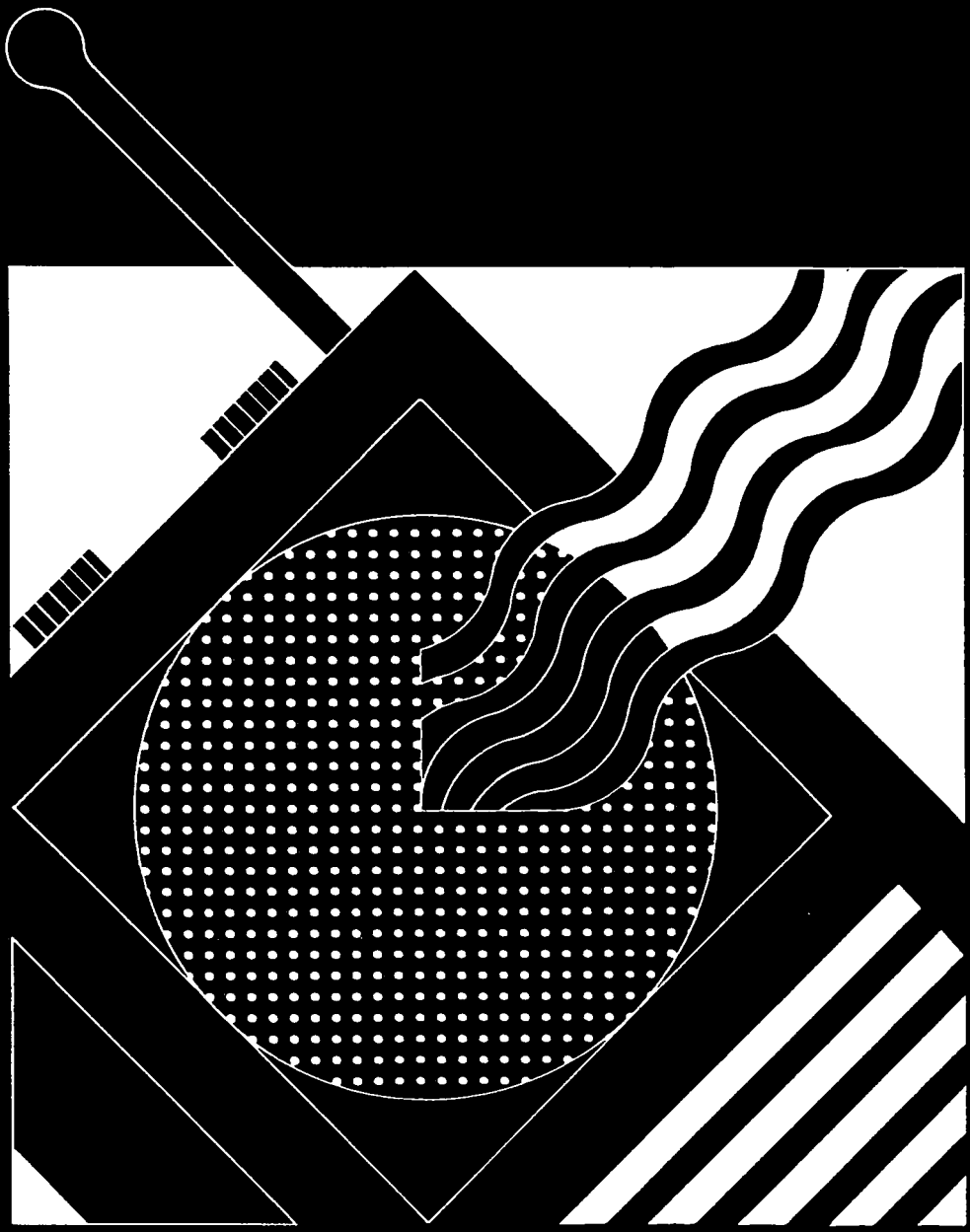
WHO IS GUARDING THE GUARDIANS?

A REPORT ON POLICE PRACTICES

October 1981



A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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Arthur S. Flemming, *Chairman*
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Letter of Transmittal

October 1981

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Sirs:

The United States Commission on Civil Rights transmits this report to you pursuant to Public Law 85–315, as amended. *Who Is Guarding the Guardians?* is a report on police practices based on a national consultation held in Washington, D.C.; hearings conducted in Philadelphia, Pennsylvania, and Houston, Texas; several State Advisory Committee reports and open meetings; and research conducted during and since the hearings.

Violations of the civil rights of minority people by some members of police departments is a serious national problem. Due, in part, to the increased in the volume of complaints alleging police misconduct received by the Commission and the number of nationally publicized cases of misconduct that have come to our attention within the past several years, the Commission determined to conduct a study of police practices. The purpose of the project was to ascertain the nature and extent of police misconduct, to identify formal and informal policies and procedures relating to police conduct and discipline, to ascertain the officials and agencies legally responsible for investigating and resolving allegations of police misconduct, and to evaluate the availability of systems of accountability, both internal and external.

Although mechanisms exist within many police departments to remedy civil rights violations by police officers, there is also frequently a reluctance on the part of departmental staff and local officials to exercise their authority in these matters vigorously and diligently. Because of this reluctance, there is a necessity for Federal involvement in many instances, and this report contains recommendations for Federal action in the areas of prosecution, funding, and legislative reform of civil and criminal statutes. We believe that the acceptance and implementation of these recommendations would make it clear that the Federal Government intends to act in an increasingly vigorous manner in this area.

The report also recommends standards to which we believe communities and their police departments should adhere in areas such as recruitment, selection, and training of police officers; the use of deadly force; receipt and processing of civilian complaints; discipline; and the exercise of oversight authority by local entities. We urge public and private leaders to consider the adoption and implementation of these standards so that, as a

nation, we can make a concerted effort to end police abuse and violations of the civil rights of our people.

Respectfully,

Arthur S. Flemming, *Chairman*
Mary F. Berry, *Vice Chairman*
Stephen Horn
Blandina Cardenas Ramirez
Jill S. Ruckelshaus
Murray Saltzman

John Hope III, *Acting Staff Director*

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*No longer with the Commission.

Preface

Police conduct requires continuous, thoughtful examination—for many reasons.

Police officers possess awesome powers. They perform their duties under hazardous conditions and with the vigilant public eye upon them. Police officers are permitted only a small margin of error in judgment under conditions that impose high degrees of physical and mental stress. Their general responsibility to preserve the peace and enforce the law carries with it the power to arrest and to use force—even deadly force. It is essential, therefore, that these sweeping powers be subject to constant scrutiny to ensure that they are not abused.

Furthermore, protection of civil rights demands close examination of the exercise of police authority. Police misconduct may result in discrimination and the denial of equal protection under the laws. Past Commission reports have cited disproportionately low levels of minority employment in municipal police departments, slower police response in ghetto areas, and selective use of force and inadequate services in minority neighborhoods. The price for police protection must not be the relinquishment of civil rights.

Scrutiny is also necessary because police officers exercise their powers with wide discretion and under minimal supervision. The decision whether to use deadly force, for instance, must often be made without the opportunity for cool reflection, in dangerous and stressful circumstances. The use of deadly force should be examined and guidelines for its use developed and continuously reevaluated—for the benefit both of the public and of the officers themselves.

Yet another consideration is the fact that the consequences of police misconduct can be very farreaching. A single occurrence or a perceived pattern of discriminatory and unjustified use of force can have a powerful, deleterious effect on the life of the community. In Miami, for example, the acquittal of white police officers charged with killing a black civilian, who was pursued in a high-speed chase for a minor traffic violation, sparked

tragic and destructive violence in which 18 people died. It is vital, therefore, that ways be examined to enhance police-community relations and to minimize the kind of police conduct that gives rise to civil disorders.

Thus, there is ample reason for studying police conduct even without further justification. However, the volume of complaints of police abuse received by the Commission has increased each year, and the nature of the alleged abuse has become more serious. Patterns of complaints appear to indicate institutional rather than individual problems. Available remedies appear to be either inadequate or poorly applied, so that no effective protection from police misconduct seems to exist for the individual citizen.

It was in response to these specific developments, as well as to the general need for review of police conduct, that the Commission undertook this study. The Commission acted in accordance with its legal mandate "to study and collect information and to. . .appraise the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws. . .in the administration of justice."[1]

The Commission has addressed the issue of police misconduct often in the past. As early as 1961, 4 years after its chartering legislation, the Commission reported that "police brutality in the United States is a serious and continuing problem."[2] The Commission in 1962 surveyed hiring in municipal police departments nationally and found disproportionately low minority employment figures.[3] In a 1967 report, the Commission stated that it took the police almost four times as long to respond to robbery calls from the Hough ghetto area in Cleveland than for calls from nonblack areas of the city.[4]

These studies of the 1960s formed an important part of the factual foundation for understanding the outbreak of violent urban disorders in 1967 and were cited extensively in the reports of the President's Commission on Law Enforcement and Administration of Justice[5] and of the National Advisory Commission on Civil Disorders.[6] Police conduct was identified by the latter as a catalyst in sparking the riots of that period:

> Almost invariably the incident that ignites disorder arises from police action. Harlem, Watts, Newark and Detroit—all the major outbursts of recent years—were precipitated by routine arrests of Negroes for minor offenses by white police. But the police are not merely the spark. In discharge of their obligation to maintain order and insure public safety in the disruptive conditions of ghetto life, they are inevitably involved in sharper and more frequent conflicts with ghetto residents than with residents of other areas. Thus, to many Negroes police have come to symbolize white power, white racism and white repression. And the fact is that many police do reflect and express these white attitudes. The atmosphere of hostility and cynicism

[1] 42 U.S.C.A. sec. 1975c(a)(2), (3) (Supp. 1974–1979).
[2] U.S., Commission on Civil Rights, *Justice* (1961), p. 26.
[3] U.S., Commission on Civil Rights, *Law Enforcement: A Report on Equal Protection in the South* (1965), pp. 97–99.
[4] U.S., Commission on Civil Rights, *A Time to Listen. . .A Time to Act* (1967), p. 23.
[5] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967).
[6] Ibid.

is reinforced by a widespread perception among Negroes of the existence of police brutality and corruption, and of a "double standard" of justice and protection—one for Negroes and one for whites.[7]

By the end of the decade of the 1960s, police conduct had become a subject of concern not only to this Commission, but to the national government as a whole.[8]

During the 1970s the Commission continued to report on serious problems involving police misconduct in specific localities and with respect to particular minority communities.[9] State Advisory Committees to the Commission in Florida, South Dakota, North Dakota, California, Kansas, Kentucky, and Tennessee have conducted studies of police practices at the local level. The Florida Advisory Committee undertook a police-community relations study in Miami and Dade County in 1976 in response to civilian complaints of police brutality and inadequate services in minority neighborhoods. That report emphasized the importance of having a police force that reflects the racial and cultural composition of the public it serves. It also urged that police departments take steps to identify officers who are repeatedly cited in complaints and to ensure that they receive appropriate counseling or discipline.[10]

The State Advisory Committee studies in Arizona, North Dakota, and South Dakota focused on communities with large American Indian populations.[11] The California study was a 3-year monitoring effort that traced changes in community-police relations following the implementation of progressive policies by a new police chief.[12] The Kentucky Advisory Committee called for greater minority and female representation in the Bureau of State Police.[13] A Tennessee Advisory Committee investigation[14] and a subsequent Commission hearing on police practices in Memphis prompted an 18-month investigation by the U.S. Department of Justice. At the close of the investigation, the Memphis Police Department agreed to end all discriminatory practices in the provision of services and to provide officers with training in resolution of conflicts and the proper use of deadly force.

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[7] Ibid., part II, chap. 4.

[8] See also National Commission on the Causes and Prevention of Violence, *Rights in Conflict* (1968), the "Walker Report."

[9] U.S., Commission on Civil Rights, *Cairo, Illinois: A Symbol of Racial Polarization* (1973); *Mexican Americans and the Administration of Justice in the Southwest* (1970).

[10] Florida Advisory Committee to the U.S. Commission on Civil Rights, *Policed by the White Male Minority* (October 1976).

[11] Arizona Advisory Committee to the U.S. Commission on Civil Rights, *Justice in Flagstaff* (1977); South Dakota Advisory Committee, *Liberty and Justice for All* (1977); North Dakota Advisory Committee, *Native American Justice Issues in North Dakota* (1978).

[12] California Advisory Committee to the U.S. Commission on Civil Rights, *Police-Community Relations in San Jose* (April 1980).

[13] Kentucky Advisory Committee to the U.S. Commission on Civil Rights, *A Paper Commitment: EEO in the Kentucky Bureau of State Police* (1978).

[14] Tennessee Advisory Committee to the U.S. Commission on Civil Rights, *Civic Crisis-Civic Challenge* (1978).

Other national studies have already begun to address the problem of police misconduct in the 1980s. In October 1980 the National Advisory Council on Criminal Justice released a study, *The Inequality of Justice: A Report on Crime and the Administration of Justice in the Minority Community.* The Council, which was established in June 1976 by the Department of Justice's Law Enforcement Assistance Administration, conducted research, field studies, and public hearings for 4 years before releasing this report. The study views the police, courts, prisons, and education and research needs from the perspective of the Nation's four major minority groups—blacks, Hispanics, American Indians, and Asian Americans.

This study continues the process of examination of police misconduct issues. The first phase of the project consisted of extensive research and field work that culminated in December 1978 with a national consultation on police practices and civil rights.[15] This consultation brought together more than 30 experts and community representatives who explored such vital issues as the police role, community views of the police, officer selection and training, remedies for abuse, and research needs.

In the second phase of the study, the Commission in 1979 conducted field studies and public hearings on police practices in Philadelphia. This study consisted of a 3-month field investigation by Commission staff attorneys, a public hearing on February 6, 1979, to receive subpenaed material, and a second hearing on April 16 and 17, 1979, during which 30 subpenaed witnesses testified. Testimony focused on police accountability, Federal enforcement activities, State and local prosecution, local government oversight, police associations, internal disciplinary process, training and selection of police, and command control. The third phase, a field study in Houston, closely paralleled that in Philadelphia. A hearing to receive subpenaed documents was conducted in Houston June 12, 1979, and a hearing to receive testimony was held the following September.

It was necessary for the Commission to take legal action to compel production of the subpenaed documents in Philadelphia. The Commission served six city officials with subpenas to produce certain documents by February 6, 1979, all of which were turned over except for some that had been requested from the police commissioner and a chief inspector. The Commission referred the matter to the U.S. attorney, who filed a motion in U.S. district court to enforce the subpenas. After a discussion in the judge's chamber, some material was turned over, but certain vital documents, relating to investigations into reports of alleged brutality on the part of named police officers, were not surrendered. The U.S. district court denied enforcement on grounds of governmental privilege. After obtaining approval of the U.S. Solicitor General, the U.S. attorney appealed the case

[15] U.S., Commission on Civil Rights, *Police Practices and the Preservation of Civil Rights* (1978).

to the U.S. Court of Appeals for the Third Circuit, which, in March 1980, rejected the claim of privilege and found for the Commission. The court noted:

> In the absence of any evidence to the contrary, the requested material is presumptively relevant and the Commission is presumptively entitled to enforcement of the subpoenas. . . .
>
> It appears the trial court gave too little weight to the needs of the Commission, holding its need was less important than that of a private litigant. The background for the formation of the Commission and the significance of its investigation were fully considered in *Hannah v. Larche,* 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 1307 (1960), where the Court stressed the legitimacy of its function as an investigative and fact-finding body. Thus, the relevance and need for the information sought in this case were established. . . .[16]

All subpenaed materials were subsequently turned over.

This report constitutes the fourth and final phase of the present police practices study. It contains the Commission's findings and recommendations with respect to police practices that have an impact on the civil rights of individuals, and through it the Commission hopes to focus national attention on institutional aspects of the problem of police misconduct so that States and communities will be motivated to make appropriate changes.

Two basic assumptions underlie this report: first, that police officers will be careful not to abuse the rights of citizens if they believe they will be subject to administrative sanctions for violating departmental policies and to prosecution for violations of State or Federal law; and, second, that local governmental and police officials will institute and enforce policies to protect the rights of citizens if those officials are legally accountable for the actions of their subordinates.[17]

[16] U.S. v. O'Neill, 619 F.2d 222, 228 (1980).
[17] Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, statement, Sept. 29, 1978, p. 3.

Contents

Chapter 1

Introduction

Some understanding of the historical development of the modern police force is helpful as background for this report. In England and the United States, the modern municipal police organization began its development during the first three decades of the 19th century. In both countries the appearance of police departments as arms of civil authority paralleled the emergence of the city as a population center on a scale previously unknown. In England large urban disorders associated with protests over London's food shortages and the economic turmoil of the 1820s led to passage of an act in 1829 to establish a police force. The act replaced the *ad hoc* use of the military with a regular, continuous police presence in all parts of London to ward off group violence by "dangerous classes." The military had employed violent tactics to suppress riots, and it was a conscious purpose of the 1829 act to *reduce* the level of force required to deal with civil disorder.[1] To this day, police officers in Great Britain do not, as a general rule, carry guns.

The American experience differs significantly. In this rough country of frontiersmen and immigrants, the police often had to maintain order and enforce the law by applying summary justice on the spot. This practice led to early justification of the use of force by police. One student of police behavior has characterized the evolution of this principle as follows:

> So, at the outset, actual fighting was the main job of American law enforcement. There had to be rudimentary order before there could be law. And we were a disorderly people. Promptly, then, the municipal policeman lost the constabulary attitude, became something more than the arrest-making agent of the courts, and formed the habit of inflicting direct and violent punishment himself. It was a drastic departure; its importance is clearly seen today.[2]

[1] Allan Silver, "The Demand for Order in Civil Society: A Review of Some Themes in the History of Urban Crime, Police, and Riot," in *The Police: Six Sociological Essays*, ed. David J. Bordua (New York: John Wiley and Sons, 1967), pp. 7, 12.

[2] Ernest J. Hopkins, *Our Lawless Police: A Study of the Unlawful Enforcement of the Law* (New York: Da Capo, 1972), pp. 324–25.

Today there are over 15,000 duly authorized law enforcement agencies in the country, and over 500,000 men and women are involved in the law enforcement process with the power of arrest.[3] Perhaps the most valuable asset these officers can possess is credibility with the communities they serve. Effective policing depends to a large degree on the cooperation and support of residents.

Ben Holman, former Director of the Community Relations Service of the Department of Justice,[4] thinks that the root causes of civil disturbances—poor housing, education, employment opportunities, and health conditions—are factors over which the police have no control. However, he believes it essential that police departments adopt measures to cope with problems they encounter in a manner that reduces violent confrontations.[5]

One of these measures is the hiring of more minorities and upgrading them throughout the force. In its recent study, the National Minority Advisory Council on Criminal Justice found:

> Central to the problem of police brutality is the underrepresentation of minorities as police officers. Appreciable gains in minority representation in employment as police have been made in the last ten years. It has been shown that the presence of minority police officers has had a positive effect on police-community relations. Therefore, more minorities must be recruited into police employment.[6]

Mr. Holman describes good police-community relations in Washington, D.C.: "Unquestionably, the single most influential factor in the success is the fact that half of the police force in the city are black, and blacks are present throughout the command ranks. The present chief himself is black."[7] (Minority police hiring will be discussed in chapter 2.)

Police use of excessive or deadly force has also been singled out as a threat to good police-community relations. Gilbert Pompa, Director of the Community Relations Service, U.S. Department of Justice, has observed:

> Problems contributing to these poor relationships range from simple traffic disputes to harassment complaints. But by far the most common and volatile occurrence involves complaints over allegations of excessive or deadly force in carrying out the police mission. We have found that there is no single issue which further provokes both majority and minority resentment, or which has more potential for community conflict, than this one.[8]

On this issue, the National Minority Advisory Council found:

> Evidence. . .suggests that police abuse of minority citizens comes close to being an organized practice within some departments. That these facts affect minorities most is evident in the

[3] Paul Zolbe, Chief, Uniform Crime Reporting Section, FBI, telephone interview, Sept. 8, 1980.
[4] Mr. Holman is currently dean of the University of Maryland College of Journalism.
[5] Ben Holman, testimony before the Pennsylvania House of Delegates, Judiciary Committee, Harrisburg, Pa., July 17, 1978.
[6] National Minority Advisory Council on Criminal Justice, *The Inequality of Justice: A Report on Crime and the Administration of Justice in the Minority Community,* October 1980, pp. 15–16 (hereafter cited as *Inequality of Justice.)*
[7] Holman Testimony, p. 5.
[8] Gilbert Pompa, "Police Use of Excessive Force: A Community Relations Concern" (address delivered at NAACP Region III Conference, Mar. 17, 1978), p. 4.

percentages of minorities killed by policemen. For example, between 1950 and 1973, blacks represented approximately 45 percent of more than 6,000 killings by policemen.[9]

Mr. Holman suggests that the solution lies in "the adoption of, broadscale publication of, and stringent enforcement of an adequate policy on the use of deadly force within the department."[10] (The issue of deadly force will be addressed in subsequent chapters on training and internal controls and on legislative developments.)

Another recommendation for improving relations is the adoption of a "clear and firm" grievance procedure. Mr. Holman notes:

> The feeling is pervasive in minority communities that, regardless of circumstances, the police always will be exonerated when accusations of misconduct are brought by minority citizens. This perception that justice will not prevail alone militates against improvement in the relationship between law enforcers and minorities.[11]

(Grievance procedures are discussed in chapter 3.)

Another suggestion for improving relations is guaranteeing uniformity of law enforcement in all sections of a community. Mr. Holman has written:

> I have never met a police chief who did not tell me that his police officers enforced the law equally. I have never met a member of a minority group who believed that this is true. If we want to bridge this credibility gap. . .police officers are going to have to be directed to lean over backwards to be fair to minorities. . . .Hence the same instincts that lead an officer to conclude that an unruly appearing white person has probably merely had a few too many drinks and ought to be directed home, can lead to the same conclusion for an unruly black. The Puerto Rican who left his driver's license home ought to be given the same benefit of doubt given an Anglo who commits the same mistake.[12]

Various other recommendations have been made for improving police-community relations, including instituting youth programs, providing ombudsmen, and establishing a viable community service unit.[13]

One hurdle to be overcome in the effort to improve police-community relations is the attitude of business leaders. There is a commonly held perception by those economically, politically, and socially well-off that police misconduct may occur but not at any level that would affect them personally. Testimony from the president of the local chamber of commerce at the Commission's hearing in Philadelphia provides a good example of this philosophy:

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[9] *Inequality of Justice*, p. 16.

[10] Holman Testimony, p. 5.

[11] Ibid., p. 8.

[12] Ibid., p. 10.

[13] Victor G. Strecher, *Police-Community Relations, Urban Riots, and the Quality of Life in Cities* (East Lansing: Michigan State University, 1967), pp. 123–29. Dr. Strecher describes a successful community service unit in Winston-Salem, N.C., in which officers undergo a 7-week education-training-internship program focusing on behavioral sciences, delinquency and education, deviant behavior, mass communications, social class, local politics and economics, interviewing skills, and field work in all varieties of treatment and correctional facilities.

[M]ost businessmen feel that the protection which business receives in this city is so outstanding that they are willing to put up with instances which had they occurred to somebody in their own family or in their own employment they would consider unbearable.

It's not difficult to differentiate between something that happens to either you or somebody with whom you're very close where police brutality is involved, and where you have righteous indignation and you want instant action, and something that happens to somebody else, where you shrug your shoulders and say, "Well, I'm afraid that's something we just have to accept in return for adequate police protection."

I think that with the exception of some businessmen who through personal experience have had an involvement with an instance of police brutality for themselves, their families, their employees—with the exception of those, the average businessmen does feel that he is willing to put up with "a little brutality" in return for what he considers adequate protection. Now you get to the point of, What is "a little brutality?" And there, it depends on who you're talking to, his sort of identification of what "a little" is.[14]

Along the same line, the chairman of the board of the largest corporation in Pennsylvania provided his insight:

COUNSEL. There seems to be a perception. . .that, in fact, you have to have a certain amount of brutality in exchange for safe streets. Would you like to comment on that?

MR. BUNTING. I feel that within the city, and I'll limit myself to the business community, I think that most of the members of the business community that I know and speak to me candidly on this subject feel that there is a kind of trade off. Whether that's right or wrong, that's the perception. . . .

I think outside the city we have an unfortunate image as a result of this issue of police brutality. [W]ithin the city there is complete trade off, I would say, pretty much. Most business leaders within the city would make that trade off. . . .But I do recognize it, and I think most business leaders would recognize it and think that it's accurate. That is their perception.[15]

The "trade off" that those in power in this particular city are willing to make does not involve those within that structure or their families, friends, and acquaintances but rather a group of persons with whom they have little or no contact. Once political and economic leaders send a message to the police that the price exacted for their services is acceptable, those who must pay, in this context victims of brutality and abuse, can do little as individuals. The situation not only leads ultimately to a deterioration in police-community relations, but also engenders the hostility and hopelessness that can result in civil disorder.

The Commission is hopeful that responsible individuals from both the public and private sectors and agencies at the State and local levels will recognize the vital importance of fostering harmonious relations between the police and the community and will implement recommendations, both those made in this report and those suggested by other sources, toward that end.

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[14] Thacher Longstreth, testimony, *Hearing Before the U.S. Commission on Civil Rights, Philadelphia, Pa.*, Feb. 6, 1979, Apr. 16–17, 1979, pp. 104–05, 109.
[15] John Bunting, testimony, *Philadelphia Hearing*, pp. 102–03.

Chapter 2

Recruitment, Selection, and Training for Police Work

Recruitment

Abrasive relationships between police and minority groups have been cited as the cause of tension and even civil disorder.[1] It has been observed by former Assistant Attorney General Drew S. Days III that

> discriminatory employment practices are often related closely to discrimination in the provision of public services. A police department that deliberately excludes minorities from employment is often accused of failing to provide adequate police services to minority communities.[2]

The Commission and its Advisory Committees have frequently called upon law enforcement officials and municipal governments to work toward developing a work force that reflects the racial and ethnic composition of the community it serves, including persons who can speak the major languages spoken in the community.[3] It is axiomatic that a police force representative of its community will enjoy improved relations with the community and will, consequently, function more effectively.

Finding 2.1: Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence.

[1] *Report of the U.S. National Advisory Commission on Civil Disorders* (1968), p. 157. The report is more familiarly known as the Kerner Commission Report.

[2] U.S., Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice, "Affirmative Action in the Criminal Justice System," 1979, p. 1.

[3] See, for example, U.S., Commission on Civil Rights, *Law Enforcement: A Report on Equal Protection in the South* (1965), p. 93; *Cairo, Illinois: A Symbol of Racial Polarization* (1973), p. 13; *Mexican Americans and the Administration of Justice in the Southwest* (1970), p. 17; Alabama Advisory Committee, *Where Are Women and Blacks? Patterns of Employment in Alabama Government* (March 1979), p. 17; Kansas Advisory Committee, *Police-Community Relations in the City of Wichita and Sedgwick County* (July 1980), p. 69; Washington Advisory Committee, *Equal Employment Opportunity in Tacoma Area Local Government* (July 1980), p. 40; Florida Advisory Committee, *Toward Police/Community Detente in Jacksonville,* (June 1975), p. 10; Florida Advisory Committee, *Policed By The White Male Minority* (October 1976), pp. 72–73; South Dakota Advisory Committee, *Liberty and Justice For All* (October 1977), p. 37; Florida Advisory Committee, *The Administration of Justice in Pensacola and Escambia County,* (April 1981), p. 17.

As early as 1962 the Commission found a disproportionately low utilization of minority citizens in American municipal police departments.[4] In connection with the present study, the Commission in 1978 surveyed selected cities across the United States, and results indicate that this low utilization rate still exists and that it also exists with respect to female employment.[5]

Although police departments are not unique in this respect among public employers, it is clear from the survey that, despite some entry of minorities and women into police service, the departments remain largely white and male.

A report of the National Minority Advisory Council on Criminal Justice in October 1980 viewed this white-male domination with concern:

> Throughout the history of the United States the white majority has felt compelled to use economic and political power, and particularly the criminal justice system, to maintain control and authority over the racial minorities in American society. The oppression of minorities in America is supported by a system of racial beliefs and ideologies that has pervaded the nation's major political and cultural institutions, especially the criminal justice system.[6]

The report points out that the nation's first police force was developed in the South to prevent disruptions by slaves. It continues:

> The long, lingering conflict between minorities and police emerges out of a complex of forces beyond the police's primary function to control minorities while maintaining the dominant majority's values and interests. Such experiences also reflect the society's views and attitudes of minorities which the police too often share, and which is mirrored in their questionable services to minorities.[7]

The Minority Advisory Council found that the average minority population in cities such as Baltimore, Memphis, New Orleans, and Newark is around 40 percent, while minority representation in their police departments is, on the average, less than 7 percent. The Council noted, "The need for minority representation is important because it has been shown that minority police officers have a positive effect on police-community relations, particularly those with minority communities."[8]

Figures for female participation also show significant underrepresentation. Women have been in police work since 1910, but until recently were assigned almost exclusively to paperwork or juvenile details. The first woman was assigned a patrol in 1968 and by 1971 fewer than a dozen

[4] U.S., Commission on Civil Rights, *Civil Rights' 63*, p. 120.

[5] Survey results in Commission files. Cities surveyed were Cleveland, Denver, Detroit, Houston, Jackson, Miss., Los Angeles, Memphis, Philadelphia, Pittsburgh, San Jose, Seattle, Wichita.

[6] National Minority Advisory Council on Criminal Justice, *The Inequality of Justice: A Report on Crime and the Administration of Justice in the Minority Community* (September 1980 draft report), p. I. The Council was established in June 1976 by the Law Enforcement Assistance Administration of the U.S. Department of Justice.

[7] Ibid., p. 163.

[8] Ibid., p. 175.

women had joined her. By 1974, though, more than 1,000 women were patrolling the streets.[9] In pre-1976 Philadelphia, there were no women in the entry level police officer or detective categories; in 1979 as a result of a court order directing the Philadelphia department to hire qualified women in those positions, there were 108, or about 1.6 percent of the total for those two ranks.[10]

One author who has studied the intense resistance to hiring women on police forces attributes it to traditional views of the roles of men and women in society:

> Within police ranks, attitudes were similar to those that existed in male-dominated craft occupations. At work, they could get away from the social inhibitions the presence of women placed on them. . . .They did not want to be shown up by women or take orders from women. . . .What kind of society permitted its women to protect its men, to put their bodies on the line while men rested secure and safe? Patrol was no place for women, not because they could not perform the work, but because their presence on the street would be an indictment of society. Anyway there was something special about the street. It was the place where police officers were tested and proved, by attitude toward the job and superior officers and by the quality and quantity of their arrests.[11]

Several other evaluations of the performance of women as police officers have been conducted.

In a study published by the Police Foundation in 1972, Catherine Milton concluded that assigning policewomen a broader law enforcement role would result in a number of benefits:

> (1) Reduction in incidence of violence between police officers and citizens.
>
> (2) Increase in crime-fighting capability through the use of women as decoys, detectives and plainclothes patrol officers.
>
> (3) Improvement of image of the department.
>
> (4) Improvement in the quality of patrol service since many women enjoy the service role of police work.
>
> (5) Increase in responsiveness of the department to the needs of the community, since hiring more females would cause a department to be more representative of the population served.[12]

Police expert Gerald Caiden agrees that a larger role for women in police agencies might have a beneficial effect upon the performance of the entire force:

> Had the police been more representative from early on, they probably would have been less prone to violence and aggressive behavior, more effective in delivering police services, more

[9] Michael Kiernan and Judith Cusick, "Women on Patrol: The Nation's Capital Gives Them High Marks," *Police Magazine,* (Summer 1977), pp. 45–46 (hereafter cited as Kierman and Cusick, *Women on Patrol*).

[10] Figures supplied to the Commission by the Philadelphia Police Department, February 1979. See U.S. v. City of Philadelphia, 499 F. Supp. 1196, 1197 (E.D. Pennsylvania 1980).

[11] Gerald E. Caiden, *Police Revitalization* (Lexington, Mass.: Lexington Books, D.C. Heath and Co., 1977), p. 132, with some reordering of sentences.

[12] Catherine Milton, *Women in Policing* (Washington, D.C.: Police Foundation, 1972), p. 37. See also Cynthia G. Sulton and Roi D. Townsey, *Women Police Officers: A Personnel Study* (Washington, D.C.: Police Foundation, 1980).

responsive to communal needs, more humane and understanding, less discriminatory, much closer to the public they served, and much less set in their ways. Patrolwomen, for instance, would have aroused less antagonism, stimulated less fear, and provoked less violence.[13]

One of the most frequent arguments voiced against the hiring of female officers is that women will be unable to apprehend suspects in violent or dangerous circumstances or that they will react improperly in such situations. Studies consistently show, however, that policewomen react similarly to policemen under such conditions.

In 1975–1976, the National Institute of Law Enforcement and Criminal Justice sponsored an extensive study, conducted by the Vera Institute and the New York City Police Department, that compared 41 female officers with 41 male officers with similar backgrounds and made the following conclusions:

The findings add to the growing literature justifying assignment of women to patrol. In general, male and female officers performed similarly: they used the same techniques to gain and keep control and were equally unlikely to use force or to display a weapon. However, small differences in performance were observed. Female officers were judged by civilians to be more competent, pleasant and respectful than their male counterparts, but were observed to be slightly less likely to engage in control-seeking behavior, and less apt to assert themselves in patrol decisionmaking.

Compared to male officers, females were less often named as arresting officers, less likely to participate in strenuous physicial activity, and took more sick time.

Some of the performance disparities appeared rooted in morale and deployment problems resulting from departmental layoffs, social conventions, and role expectations. Situationally and socially engendered differences between the performance of male and female officers might be remedied by different deployment and training policies.[14]

The Police Foundation in 1974 published a study by Urban Institute scholars that compared 86 female officers with 86 males officers, all hired about the same time by the Metropolitan Police of the District of Columbia and given patrol assignments. The women and men were similar in education, civil service test scores, previous number of jobs held, and preemployment interview ratings.[15] After a year of performance measurement based on supervisory ratings, patrol observations by trained observers, opinions by citizens who observed the police in action, and arrest statistics, the study reached the following conclusions, based on three questions the authors posed:

1. Is it appropriate, from a performance viewpoint, to hire women for patrol assignments on the same basis as men? The men and women were found to perform patrol work similarly; to respond to similar types of calls for service; to encounter similar proportions of citizens who were dangerous,

[13] Caiden, *Police Revitalization*, p. 129 (footnote omitted).

[14] U.S., National Institute of Law Enforcement and Criminal Justice, *Women on Patrol: A Pilot Study of Police Performance in New York City*, by Joyce L. Sichel, et al. (Washington, D.C.: Government Printing Office, 1978), p. iii (hereafter cited as Sichel, *Women on Patrol*).

[15] Peter Bloch and Deborah Anderson, *Policewomen on Patrol: Final Report* (Washington, D.C.: Police Foundation, 1974), p. 1.

angry, upset, drunk or violent; and to obtain similar results in handling angry or violent citizens. Women were found to make fewer arrests than men. However, the women were given assignments other than patrol more often than their male counterparts, thereby having fewer opportunities to make arrests and give citations. Departmental performance ratings indicated equal overall satification with officers of both sexes. Sex was found not to be a bona fide occupational qualification for doing police patrol work.[16]

2. What advantages or disadvantages arise from hiring women on an equal basis for partol work? "The hiring of women enlarges the supply of personnel resources, may reduce the cost of recruiting and may assure that police personnel will be more representative of both the racial and sexual composition of the city."[17] Women are less likely than men to engage in serious unbecoming conduct that can damage community relations. The fact that women as a group made fewer arrests and gave fewer traffic citations than men was found not necessarily to be a disadvantage arising from the hiring of women. The availale data on arrests was insufficient to determine the quality of arrests. Therefore, it is possible that instead of women making too few arrests, men may be making too many.[18]

3. What effect would the use of a substantial number of policewomen have on the nature of police operations? The study found that the presence of women might stimulate increased attention to ways of avoiding violence and cooling violent situations without resort to the use of force.[19] This does not mean that women are less able to handle violent occurrences, however: "Reports by observers indicated that men and women are equally capable of handling angry or violent citizens. . . .Violence against police officers is an infrequent occurrence in police work, and in the course of this study, it was not possible to observe enough incidents to be sure that men and women are equally capable in all such situations. It is clear from the incidents which were described that women performed well in the few violent situations which did arise."[20]

In Newton, Massachusetts, an "Evaluation of Women in Policing Program"[21] found:

> . . . .in reviewing the entire array of data from the Newton Study, the most striking finding is the discrepancy between the male officers' predominantly negative view regarding the performance of female officers and the showing, in the actual performance data, that there is relatively little difference between the kinds and amounts of activity accomplished by male and by female officers. At the same time, in every dimension of performance measured—from

[16] Ibid., pp. 2–3.
[17] Ibid., p. 3.
[18] Ibid., pp.3–4.
[19] Ibid., p. 4.
[20] Ibid., p. 61.
[21] Carol Kizziah and Dr. Mark Morris, *Evaluation of Women in Policing Program: Newton, Mass.* (Oakland, Calif.: Approach Associates, 1977).

supervisor's ratings to community reactions to actual incident statistics—the female officers were close to or above the levels achieved by the male officers.[22]

Studies of officers in St. Louis County, Missouri,[23] in the California Highway Patrol,[24] and in Denver[25] and Philadelphia[26] also found that women performed as ably and effectively as males in most aspects of police work.

Minorities and women have not been the only groups to encounter roadblocks in their attempts to obtain employment with local police departments. Homosexuals are another group that have experienced similar problems. The hiring of openly homosexual officers by police departments is a relatively new phenomenon. In the early seventies the San Francisco sheriff's office actively recruited homosexuals and the San Francisco Police Department followed suit several years later. Most of the nation's other police departments, however, have drawn the line on homosexuality in the ranks.[27] In 1979 the International Association of Chiefs of Police passed a resolution endorsing that policy:

WHEREAS, Society has delegated the power to enforce these rules, laws, and sense of right and wrong to the criminal justice system and commissioned police officers specifically as enforcement agents; and. . . .

WHEREAS, The life-style of homosexuals is abhorrent to most members of the society we serve, identification with this life-style destroys the trust, confidence and esteem so necessary in both fellow workers and the general public for a police agency to operate efficiently and effectively; now, therefore, be it

RESOLVED, That the International Association of Chiefs of Police reaffirms its position established in 1958 during the sixty-fourth session as stated in Article VI of the Canons of Police Ethics and thereby endorses a no hire policy for homosexuals in law enforcement.[28]

In Houston the president of the Gay Political Caucus called for the police department to hire "qualified openly gay citizens" as a step toward improved police service and better community relations with that city's estimated 250,000 homosexual residents.[29] Although homosexuals presently do not enjoy the protections of Federal civil rights laws accorded to racial minorities and to women, this does not prevent cities and police

[22] Ibid., p. 65.

[23] Lewis J. Sherman, "Evaluation of Policewomen on Patrol in a Suburban Police Department," *Journal of Police Science Administration,* vol. 3, no. 4 (December 1975).

[24] State of California, Highway Patrol, *Women Traffic Officer Project: Final Report* (1976).

[25] Harold Bartlett and Arthur Rosenblum, *Policewoman Effectiveness* (Denver, Colo.: Civil Service Commission and the Denver Police Department, 1977).

[26] *The Study of Police Women Competency in the Performance of Sector Police Work in the City of Philadelphia* (State College, Pa.: Bartell Associates, Inc., 1978).

[27] Richard Hongisto, "Why Are There No Gay Choir Boys? Ask Your Friendly Chief of Police," *Perspectives: The Civil Rights Quarterly* (Summer 1980), pp. 39–42. *Perspectives* is a publication of the U.S. Commission on Civil Rights.

[28] Resolution passed by majority vote of IACP membership at 1978 Annual Conference. Article 6 of the Canons of Police Ethics provides in part that the law enforcement officer "will so conduct his private life that the public will regard him as an example of stability, fidelity and morality."

[29] Steve Schiflett, president, Houston Gay Political Caucus, testimony, Hearing Before the U.S. Commission on Civil Rights, Houston, Tex. Sept. 11–12, 1979, p. 69 (hereafter cited as *Houston Hearing).*

departments from taking steps to remove hiring barriers and to ensure that police services are provided in a fair and unbiased way and that all members of the community are treated with respect regardless of actual or perceived sexual orientation. One step that could be taken to minimize the confrontations that commonly take place between the police and the homosexual community is the hiring of homosexual police officers.

Finding 2.2: Efforts to recruit minority police officers may be hampered by a community perception of racism in the police department, a perception reinforced by a low level of minority hiring, a high level of minority attrition during the training process, and an apparent lack of opportunity for advancement.

At the time the Commission held its hearing in Houston, that police department was understaffed by 2,000 positions due to rapid population growth and geographic expansion of the metropolitan area.[30] Chief Harry Caldwell testified about the difficulties he faced in recruiting minority applicants:

[W]e work very hard to try to get more black and Hispanic youngsters in this department.

The fact of the matter is we are not succeeding. I have taken it upon myself to do personal recruiting in this area. I met as recently as 2 weeks ago with a large convocation of prominent black citizens in this community and I asked them not to recommend anybody out of their community to join the police department, not to recommend anybody until they had come to the police department themselves, sat down with me, satisfied every question they had, and then go back and make up their mind. But the fact of the matter is that we hear things like, "If your image improved, you wouldn't have any trouble recruiting."[31]

Despite the chief's expressed commitment to establishing a constructive dialogue with leaders of the minority community, the director of recruitment suggested that the difficulties stemmed from the lack of community support and assistance in efforts of the department to recruit more minorities:

Q. Are there any ways that you can suggest or that you would like to see that recruitment or selection process could be changed which would attract more qualified applicants?

A. You bet.

Q. Would you share those suggestions with us?

A. I'd like to see some of these communities' leaders and political leaders of minority communities that have been throwing rocks at us help us instead of throwing rocks; instead of criticizing, do something constructive. Anyone can sit back and criticize. They criticize my division; they criticize Chief Caldwell; they criticize the department. Not one of these alleged community leaders, political leaders, has sat in my office and spoke with me about recruiting

[30] Harry Caldwell, chief, Houston Police Department, testimony, *Houston Hearing*, p. 279. Chief Caldwell resigned from the Houston Police Department in early 1980 to take a position as director of a private security organization, as had his immediate predecessor, B.G. Bond.
[31] Harry Caldwell, testimony, *Houston Hearing*, p. 292.

efforts, what he could do to help, not one. I'd like to see the community support, in other words.

Q. Are there any suggestions that you yourself have about changes in procedures that you think would be helpful?

A. You mean, recruiting procedures?

Q. Yes, sir, and selection procedures.

A. No, ma'am.[32]

Police expert Herman Goldstein has expressed the view that recruitment procedures and campaigns may be effective only after the department has laid the proper groundwork:

> The single most important step a police administrator can take toward recruiting more members of minority groups is to demonstrate in unequivocal terms that he is working vigorously to ensure that the personnel of his agency do not, in their daily contacts with members of the minority community, discriminate against them. He must further provide clear evidence that members of minority groups employed by the agency will have equal opportunities regarding assignments and promotion. Once credibility is established in this fashion, a straightforward recruitment drive that communicates to potential applicants that they are really wanted will have a much greater chance of succeeding.[33]

Prospective recruits learn through a variety of means what the receptivity of a given institution is. They learn from others who have sought employment and been turned away, from some who have become employees and experienced discrimination on the job, and from newspaper accounts of misconduct by police against members of the public.

It is certainly possible that community knowledge of high rejection rates and low employment figures would deter minority applicants. In Philadelphia in 1976–77, 5 percent of white males who took the police examination were hired, and 1.2 percent of blacks, 0.7 percent of Hispanics, 4.5 percent of white females, and 0.2 percent of black females were hired. Of 54 female Hispanic applicants who took the examination, none were hired.[34] In 1977 the Houston department accepted 12.2 percent of white male applicants, 3.4 percent of white female applicants, 5 percent of black male applicants, 7 percent of black female applicants, 11 percent of male Hispanic applicants, and none of the female Hispanic applicants (very few had applied).[35] At the Houston Police Academy, more than 86 percent of those who started were able to finish and proceed to field training as probationary officers. Of the approximately 14 percent who did not finish, the highest attrition rate was among Hispanic males, more than 29 percent

[32] Capt. B.R. White, Houston Police Department, testimony, *Houston Hearing*, p. 201.
[33] Herman Goldstein, *Policing a Free Society* (Cambridge: Ballinger, 1977), p. 270.
[34] City of Philadelphia, Police Department, *Equal Employment Opportunities Report Fiscal Year 1978*, "Exhibit C: Applicants for Employment 7-1-76 to 6-30-77."
[35] Houston Police Department. *Equal Employment Opportunity Program* (March 1978), "Class No.77" (chart on applicants investigated and accepted) (hereafter cited as *Houston Equal Employment Program).*

of whom did not finish; more than one-fourth of the black males were also unable to complete the training.[36]

A black community leader in Houston said that minority disinterest in police careers resulted from the community's past experience with the police department and a tough, hard-line, former chief, and that experience still deters individuals from applying. He also stated that in the past police salaries were so low that the department had to hire officers from small, poor, rural communities in east Texas and Louisiana who brought with them "red-neck" attitudes; these officers are now in command positions in the force, he noted.[37]

During 1978 the recruitment division of the Houston Police Department made contact with 25,000 potential recruits in an eight-State area; special efforts in Houston included opening several neighborhood storefront centers and spending $100,000 on advertising. In the preceding year, the recruitment team visited 78 college campuses in 5 States, including 25 predominantly black and 16 predominantly Hispanic colleges.[38] Whether these efforts will have an effect on the image of the department in the minority community—and consequently on the number of minority recruits—remains to be seen.

Another area of concern to minority applicants is that of promotions. The figures indicate that command positions are filled disproportionately by whites. In Philadelphia, of the 1,339 black males on the police force as of 1979, 171, or 11.6 percent, had attained a rank above that of "police officer," the entry position. By contrast, of 6,502 white male officers, 1,298, or 20 percent, had been promoted above the entry level.[39] In Houston in 1978, 9 of 160 black officers (5.6 percent) had attained rank above the entry level, as had 23 of the 161 Hispanic officers (14.3 percent); by contrast, 651 of 2,492 white males (26.1 percent) had been promoted above the entry level.[40]

Selection

Once a sufficiently diverse pool of applicants has been assembled through a police agency's recruitment program, attention may be turned to selecting those men and women who are most likely to render good professional services and to enhance the police force's ability to protect the public.

The selection process in most police departments encompasses some or all of the following procedures and requirements: application forms

[36] *Houston Equal Employment Program,* "Houston Police Academy Race/Sex Breakdown, Classes Nos. 76–78."

[37] Rev. Bill Lawson, pastor, Wheeler Ave. Baptist Church, interview in Houston, Tex., Apr. 5, 1979.

[38] Harry D. Caldwell, chief, Houston Police Department, statement at the monthly meeting of the U.S. Commission on Civil Rights, Nov. 13, 1975.

[39] Figures supplied to the Commission by the Philadelphia Police Department, February 1979.

[40] *Houston Equal Employment Program,* "Houston Police Department Classification Chart, Dec. 31, 1977."

soliciting biographical and other personal data; medical examinations; written tests; oral interviews; psychiatric or psychological evaluations; polygraph tests; background investigations of character and credit patterns; physical agility tests; height, weight, and vision requirements; veterans preference; possession of a driver's license; and requirements on voter registration, residence, citizenship, age, sex, and education.[41] Both Houston and Philadelphia utilize most of these requirements.[42]

The application of these requirements in the selection process in Philadelphia and Houston, however, is unclear. Commission staff reviewed files of Philadelphia officers who had been charged with police misconduct[43] and found that in hiring some of the officers, the department had occasionally waived otherwise rigid rules and overlooked some questionable backgrounds.

Several officers whose files were reviewed had records of arrests for major offenses, including robbery, larceny, receiving stolen goods, conspiracy, aggravated assault and battery, and hunting inside city limits. One Philadelphia officer had received two special court-martials. A neuropsychiatric report on one applicant diagnosed a "passive-aggressive personality with dyssocial trends,"[44] and a background investigation showed that he had been convicted for falsifying information on his application for a driver's license and was fined $100, with his license suspended for 6 months. His license was also suspended for 16 months after an accident causing considerable property damage.

One man who, as a Philadelphia officer, was involved in several shootings, one of them fatal, and who also had been the subject of numerous complaints of false arrest and physical brutality, had originally been rejected by the department. No explanation appears in his file, either for the rejection or for the subsequent acceptance, which occurred less

[41] Glenn Stahl and Richard A. Staufenberger, eds., *Police Personnel Administration* (Washington, D.C.: Police Foundation, 1974), p. 83.

[42] Capt. B.R. White, interview in Houston, Tex., May 7, 1979; Richard F. Bridgeford, testimony, *Philadelphia Hearing*, pp. 188–89.

[43] In Houston, Commission staff reviewed a sample of internal police files that amounted to 10 percent of "Class I" internally and externally generated complaints, an approximate total of 133 cases. By contrast, the cases reviewed in Philadelphia were investigations of all civilian complaints and all shooting incidents involving each of 31 previously selected officers, amounting to an approximate total of 124 cases. Personnel files of the officers studied in each city were also reviewed.

The purpose of reviewing and reporting facts from individual officers' files was to detect and illustrate significant patterns of police practice that may be inconsistent with stated policies and procedures. Disclosure of the identity and contents of individual files is exempt under 5 U.S.C. sec. 552(b)(6) and (7) covering personnel and investigatory records, the disclosure of which would constitute an unwarranted invasion of personal privacy. Further, such disclosure may be prohibited by 5 U.S.C. sec. 552a(b) and (k) and by Commission regulations 45 C.F.R. secs. 704.1(f), 704.4(b), 705.13(a)(1) and (b)(3).

[44] According to a psychiatrist at the National Institute of Mental Health, "passive-aggressive" is a life-long personality pattern in which anger or aggression is expressed passively rather than openly. Such a personality often exhibits pervasive occupational ineffectiveness through intentional inefficiency, forgetfulness, dawdling, and stubbornness. "Dyssocial" behavior is antisocial in a passive way, ranging from lying and not paying traffic tickets to taking bribes, participating in thefts, and driving recklessly. Dr. Steven Scharfstein, telephone interview, Jan. 28, 1981.

than 6 months after a memorandum stating that he could not be considered for appointment.

In Houston, one officer was accepted by the department despite knowledge that he had lied about having no arrest record. This officer had been rejected previously because of immaturity, falsifying his application, and having an unstable marriage.

Another Houston officer was accepted on the force even though he had been court-martialed, reduced in grade, sentenced to hard labor, and fined while in the army.

Still another Houston officer, who had seven complaints against him in the 2-year period reviewed by Commission staff, had admitted racial prejudice at the time of his initial application to the department. His listed employment references made derogatory comments about him, and he also admitted thefts and that he had lied on his application to the police department. He was not recommended for employment, but just 6 months later he was appointed to the police force.

Finding 2.3: Many current police selection standards do not accurately measure qualities actually required for adequate performance as a police officer, and they contribute to the perpetuation of a nonrepresentative police force by disproportionately disqualifying minority and women applicants.

Many police departments continue to use criteria with little or no relation to the qualities required in a police officer. A quotation from a Detroit police recruiting brochure illustrates the point: "When I first applied, they told me I didn't have enough teeth. . .man, I'm not coming on this job to bite anybody."[45]

Irrelevant requirements have often been found to disqualify proportionately more female and minority candidates, thus contributing to the perpetuation of a police force that does not reflect the diversity of the community to be served.[46] The most creative and diligently administered recruitment program will fail to affect the makeup of the police force if minority and female candidates are disqualified by failure to pass arbitrary and irrelevant tests during the selection process. Federal law prohibits the use of tests or standards that disproportionally disadvantage minority or female job applicants and that are not shown to be job-related.[47] Many traditional police selection standards have been found to disadvantage

[45] Stahl and Staufenberger, *Police Personnel Administration*, p. 74.

[46] Public Hearings of the Subcommittee on Crime and Corrections of the Pennsylvania House Judiciary Committee (July 17–18, 1978) (testimony of Ben Holman, former Director, Community Relations Service, U.S. Department of Justice), transcript of proceedings, pp. 210–11.

[47] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Dothard v. Rawlinson, 433 U.S. 321 (1977).

minority applicants, including minimum height requirements, biased written examinations and psychological tests,[48] and rules that disqualify applicants on the basis of prior arrest records regardless of the nature of the charge or subsequent acquittal.[49] Typical standards that have presented obstacles to female applicants include veterans' preference, height requirements, and non-job-related physical strength tests such as number of situps or pushups.[50]

A New York study of selection standards and police performance repudiates some current requirements. It found:

> Those officers who had been arrested for a petty crime prior to appointment on the NYPD were less likely to be charged subsequently with harassment of citizens.
>
> Those officers who were better educated at the time of appointment tended to perform better. No differences in field performance were found between military veteran and non-veteran.[51]

The Police Foundation in 1974 published recommendations for police selection criteria,[52] which included keeping the common requirement for high school education, U.S. citizenship, medical examination, good vision, a motor vehicle license, and weight in proportion to height.[53] With respect to lowering specified minimum height requirements, it observed:

> [T]he lowering or otherwise changing of this selection performance standard. . .could very well result in general improvement in the quality of performance. . .because the application population would be expanded, setting the occasion for a more effective and discriminating selection to operate.[54]

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[48] *See,* for example, Guardians Association of New York City Police Department v. Civil Service Commission, 431 F. Supp. 526, 550–51 (E.D.N.Y. 1977); cases collected at 29 A.L.R. Fed. 792.

[49] Several Federal courts have held that racial minorities are statistically more likely to be subject to arrest. In the leading case, Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (N.D. Cal. 1970), *mod. on other grounds,* 472 F.2d 631 (9th Cir. 1972), the plaintiffs presented statistical evidence to show that blacks, while making up 11 percent of the population, were 27 percent of all persons arrested and 45 percent of all arrests "on suspicion of crime." The court held that an arrest record, as such, cannot serve as lawful grounds for disqualification of an applicant.

Prior *convictions* of serious crime, however, are an appropriate concern of police agencies and other employers, and may serve as valid grounds for disqualifying an applicant from police work despite disparate racial impact. United States v. City of Chicago, 411 F. Supp. 218 (D. Ill. 1976). *See also* cases collected at 33 A.L.R. Fed. 263.

[50] *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 228–31 (1977) (upholding lower court's finding that penal institution's minimum height and weight requirements disproportionately disqualify female applicants). See cases collected at 29 A.L.R. Fed. 792.

A publication of the Police Foundation has suggested that while physical agility appears to be vital to successful performance as a police officer, the test should "take the form of a job-related 'obstacle course' rather than the more traditional test composed of a pre-determined minimum number of push-ups, sit-ups, knee-bends, and other exercises." Stahl and Staufenberger, *Police Personnel Administration* (Washington, D.C.: Police Foundation 1974), p. 89.

[51] Bernard Cohen and Jan M. Chaiken, *Police Background Characteristics and Performance,* New York City Rand Institute, 1972, pp. 73, 59, 67.

[52] Stahl and Staufenberger, *Police Personnel Administration,* pp. 87–89.

[53] Ibid., p. 87.

[54] Ibid., pp. 75–76.

Although the foundation-sponsored study suggested an age requirement of 18–40 for entrance on a police force, it specified that recruits under 21 should be employed only in nonhazardous, service activities.[55] It also stressed that the background investigation should be very thorough, since it has been found to be one of the three best predictors of field performance (the other two being recruit training and probationary performance).[56] Other criteria that the Police Foundation recommended for serious consideration include a polygraph examination, a psychiatric or psychological appraisal, and an oral interview.[57]

The Police Foundation suggested abandoning requirements for registered voter status or preemployment residency; it concluded that postemployment residency requirements should specify only reasonable commuting distance.[58] The Police Foundation also rejected veterans' preference, since service experience has been found to be irrelevant in predicting police performance, although it favored a policy of actively informing veterans of job opportunities on police forces.[59] If veterans receive preferential treatment with respect to the dissemination of employment information, however, sex discrimination could result.

The Police Foundation found that physical agility requirements appear to reflect a bona fide occupational qualification and recommended that such requirements be included among selection criteria. However, "it is suggested that the elements of the physical agility test take the form of a job-related 'obstacle course' rather than the more traditional test composed of a pre-determined minimum number of push-ups, sit-ups, knee-bends, and other exercises."[60]

Written tests have often been examined to determine whether they have a demonstrable relationship to subsequent measures of field performance. Ideally, tests are used to help ensure that applicants with equal probability of success on the job have an equal chance of being hired. The advantages in having written tests are: they are quickly and easily administered and scored, they are relatively inexpensive, and they have the appearance of being objective and free from political interference. However, their "deficiencies should be understood along with those advantages. . . . For

[55] The age of recruits has been mentioned as a problem in Houston, where the police department has grown fast and is terribly "young" and "inexperienced." Field training officer E. B. Houghton, in an interview with Commission staff, said that the new recruits are young, "a bunch of scared little kids" who overreact and "don't know when to back off and smile" and "keep things quiet and leave." He cited the need for mature judgment and experience in making decisions. Interview in Houston, Tex., May 14, 1979 (hereafter cited as Houghton Interview).

[56] Stahl and Staufenberger, *Police Personnel Administration,* pp. 86, 87.

[57] Ibid., p. 88.

[58] Ibid.,

[59] Ibid.,

[60] Ibid., p. 89.

one thing, many written tests are not valid and possess cultural bias characteristics on the one hand and an absence of validity on the other."[61] Experts claim that tests presently being used are not appropriate:

[P]erformance on written entry tests has measured or predicted neither the quality of field performance nor the desirable characteristics of general intelligence, common sense, and good judgment. Furthermore, it is evident that testing and validity issues are not simply a question of race, in that validity is frequently absent for whites as well as blacks.[62]

The Police Foundation recommended a reexamination of the role that present tests should play in the selection process. One alternative it suggested is not to use a test at all, but instead to rely on recruits' test scores on police academy coursework. A second suggested alternative is to exclude from current tests items that are blatantly and unfairly discriminatory; the Police Foundation suggested consulting with minority representatives and test experts to accomplish this. A third alternative is to reduce established minimum cutoff scores; the Police Foundation said that this would not significantly influence the quality of candidates.[63]

Finding 2.4: Despite the apparent need for psychological screening in order to ensure stability under stress and the refinement of this tool, the effective use of psychological screening in police selection remains limited in the cities studied.

The role of psychological evaluation as part of the selection process deserves special attention. One scholar has found that "police integrity is at least partly determined by personality characteristics that are present when the recruit is hired. There is also convincing evidence that the problem of police impropriety is in part a function of the personality type that is attracted to police work."[64] This expert concluded:

One implication for reducing the incidence of improper behavior is that we should attempt to screen out the most "predisposed" applicants while attempting to remedy the organizational dynamics which encourage such behavior.[65]

As early as 1967 the President's Commission on Law Enforcement and the Administration of Justice recognized the need for psychological testing and interviews of applicants for police jobs.[66] The 1973 National Advisory Commission on Criminal Justice Standards and Goals adopted as one of its recommendations that "a competent body of police professionals and

[61] Ibid., pp. 76–77.
[62] Ibid., p. 79.
[63] Ibid., p. 88.
[64] Allen E. Shealy, *Policy Integrity: The Role of Psychological Screening of Applicants*, (New York: John Jay Press, 1977) p. 14. This publication is Monograph Number 4 of the Criminal Justice Center of the John Jay College of Criminal Justice in New York.
[65] Ibid.
[66] President's Commission on Law Enforcement and Administration of Justice, Task Force on the Police, *Task Force Report: The Police* (1967), p. 129.

behavioral scientists conduct research to develop job-related mental ability and aptitude tests."[67] It also recommended that every police agency require all applicants to undergo thorough entry-level physical and psychological examinations to insure detection of conditions that might prevent maximum performance under rigorous physical or mental stress. That national advisory group commented:

> Perhaps no professional group other than police is subjected so continually to the range of physical and mental stress under hazardous conditions common in police work. The police are allowed small margin for error in judgment or action and are constantly open to public scrutiny. No other profession is so readily and vehemently criticized when one of its members fails to perform his duties properly. Most police officers daily encounter hazardous situations requiring immediate action. An officer's physical or mental inability to react appropriately can be fatal to himself or others.
>
> While an applicant's capability to respond properly under continual stress cannot be predicted with complete reliability, it is possible to identify with some accuracy through a thorough entry-level physical and psychological examination those individuals who are unsuited for the demands of police service.[68]

One of the experts working to identify such individuals is Stuart Shaffer, a psychologist who specializes in screening police applicants for the city of Los Angeles. Dr. Shaffer has concluded that since police work varies from city to city and town to town, there can be no ideal selection process that will apply to all police agencies; as a consultant on police selection procedures he has observed how transfer officers perform well in one agency, but not in another.[69]

To determine selection criteria appropriate for a given jurisdiction, Dr. Shaffer rides with officers, speaks with arrestees, interviews citizens who have called the police, asks citizens groups what kind of police department they want for the community, and interviews police management, new recruits, and academy personnel. His Los Angeles field work yielded a list of 400 selection criteria, which he ultimately narrowed down to 9 variables that he feels are correlated with job performance. He stressed that these variables are appropriate for Los Angeles, but are not necessarily applicable to other areas. The nine variables he identified were:

(1) Logical reasoning—How does the applicant take in, integrate, assemble, and use information in a meaningful way? Rather than rely on tests, which he finds are culturally biased, Dr. Shaffer looks at the major decisions the applicant has made over the past 2 years and examines the candidate's own logic for making these decisions.

(2) Decisiveness—Can the applicant make decisions in a meaningful time span and separate personal biases from the decision?

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[67] National Advisory Commission on Criminal Justice Standards and Goals. Task Force on Police, *Police* (1973), p. 348 (hereafter cited as *National Advisory Commission Report*.

[68] Ibid.,p. 498.

[69] Stuart Shaffer, telephone interview, Nov. 20, 1980.

(3) Organizational compatibility—Can the applicant take orders? "We are a large, militaristic organization; we are not looking for individuality and creativity in our Field Officers."

(4) Self-confidence—Can the applicant function independently when and if necessary and does he have enough confidence to ask for help when that is appropriate?

(5) Sensitivity—Does the applicant feel empathy for the wants and needs of other people, especially people of cultures not familiar to the appplicant?

(6) Stress tolerance—Under conditions of stress, are the applicant's logical reasoning skills impaired?

(7) Impact (nonverbal communication)—What kind of signals does the applicant send? How do people respond to this person?

(8) Positive motivation—Does the applicant really want this job as a profession, or "is he looking for a way to beat on people?"

(9) Behavioral flexibility—Can the applicant respond under conditions of low police activity as well as high police activity? "People expecting to find excitement tend to create it when it is not there."

In evaluating applicants for the Los Angeles Police Department, Dr. Shaffer disqualifies any candidate who is weak in four of the nine areas, or in whom there is evidence of psychopathology. He also disqualifies anyone with an "abrasive" personality, since policing is so closely involved with public relations and working with partners.[70]

In determining an applicant's strengths and weaknesses in the nine variables, Dr. Shaffer uses the following sources of data:

(A) *Background investigations.* Investigators look for information, both positive and negative, relevant to the nine areas. Dr. Shaffer states that the investigators screen *in* good people, whereas old systems tended to screen *out* people with gross clinical pathology, and select in everyone else.

(B) *A battery of tests.* While tests are sufficient to test hypotheses, Dr. Shaffer indicates that since they are not bias-free, they are not reliable enough to depend on alone.

(C) *A clinical stress interview.* "The interviewer deliberately throws off negative vibes. Every candidate walks out disliking the psychologist; we must know what this person will do when he or she is stressed and forced to interact with someone strongly disliked."

If two of these measurement areas agree on a finding, Dr. Shaffer treats the information as valid.[71] Los Angeles Assistant Chief of Police Robert Vernon notes that Dr. Shaffer's system screens out 20 to 60 percent of all applicants. Dr. Shaffer is working with the department to develop a

[70] Ibid.,
[71] Ibid.,

feedback system for measuring the field performance of the new selectees.[72]

Five years ago the city of Miami, as the result of a Federal consent order, contracted with the University of Chicago to design a psychological screening examination for its police department to measure the ability to perform the job and to safeguard against racial, cultural, or ethnic bias.[73] At recent Commission hearings in Miami, that city's assistant police chief testified that the examination does not have a disparate impact upon the hiring or promotion of minorities.[74]

In contrast, in Dade County, Florida, which has a separate police department, psychological testing has had an adverse impact on minorities. The county's police department compiled a list of behavior characteristics to be screened out, including psychoses, character disorders, neuroses, mute disorders, poor impulse control, the need for very high levels of excitement, the tendency to be abrasive or aggressive in the face of conflict, and strong racial, religious, or ethnic prejudices.[75] The tests then developed were discovered to exclude 20 percent of Anglo and Hispanic candidates, and 28 percent of black candidates. According to Dr. Larry Capp, a black clinical psychologist practicing in the Dade County area, the figures for male applicants are even more significant; 17 percent of white males were screened out on the basis of the test, while 33 percent of black males were screened out.[76] The cause of the adverse effect may have been that the tests were developed by two local psychologists highly regarded for their work in stress management, but without experience in developing psychological fitness tests.[77]

The two Florida experiences do not demonstrate that psychological testing is discriminatory, but that tests must be carefully developed by experts to avoid such an outcome. A recently awarded grant from the Law Enforcement Assistance Administration of the U.S. Department of Justice will allow the Southeast Florida Institute of Criminal Justice to establish a model assessment center in Dade County. The $220,000 project will include extensive task analysis of the police function, development of role-playing simulation exercises, and the training and supervision of assessors.[78]

The psychologist's role in police selection was examined at the Commission's Houston and Philadelphia hearings. In 1973 in Texas, the Governor's Executive Committee on Criminal Justice Standards and Goals

[72] Robert Vernon, telephone interview, Nov. 26, 1980.
[73] Michael M. Cosgrove, assistant chief, Miami Police Department, testimony before the U.S. Commission on Civil Rights, hearing, Miami, Fla., Dec. 8–11, 1980, p. 1258 (hereafter cited as Miami Transcript).
[74] Ibid.
[75] Fred Taylor, chief, administrative division, Department of Public Safety, testimony, ibid., p. 1298.
[76] Dr. Larry Capp, director, Center for Child and Family Enrichment, testimony, ibid., p. 1302.
[77] John A. Sample, director, Professional Development Specialists, Inc., interview in Miami, Fla., Oct. 17, 1980.
[78] Howard M. Rasmussen, testimony, Miami Transcript, p. 1318.

recommended that every police agency in the State should, by 1975, "retain the services of a qualified psychiatrist or psychologist to conduct psychological testing of police applicants in order to screen out those who have mental disorders or are emotionally unfit for work."[79]

The Houston Police Department did not retain a psychologist until 1979. The new director of psychological services administers the Minnesota Multiphasic Personality Inventory, "a standard test that's been used for 20 to 30 years for identifying mentally disordered people."[80] The psychologist testified that the test must be administered and evaluated with special care since parts of it have been found to be discriminatory against minorities, particularly blacks:

There are two primary scales on the instrument that are really—I guess you'd say unfair to minorities, primarily blacks. One is scale 4. . .which happens to be a scale relating to crime, really to behavior. It was originally developed to identify people who were criminal types. The criterion group were people in prisons, and if you answered a test and got high scores on that scale you were a criminal type person was the rationale behind it. Unfortunately that scale tends to be elevated for all police personnel, whether they're white or black, because most folks in police work are interested in crime, as you might well expect.

In addition to that, it is additionally unfair to minorities because of cultural background. Influenced minorities tend to get additional elevation on that particular scale, so it is not of great value with minority groups.

Scale 9 is similar to that. Scale 9 is not related specifically to crime as much as energy level or impulse behavior, and we find that minority groups tend to get almost twice the raw score on that scale as nonminority groups and, therefore, you have to not rely very much on raw scores on those two areas in making decisions about people from minority groups. It would be unfair.[81]

Philadelphia has employed a full-time educational psychologist on its police training bureau staff since 1975. He administers a written 16-factor personality test to applicants. According to the psychologist, one of the 16 factors has to do with emotional stability:

If we found that person was very much affected by feeling—and we're talking about extreme scores now. If a person was affected by feelings, if he was extremely tense, extremely suspicious, if he was undisciplined as opposed to having social control—these are the types of things that we look for.[82]

The psychologist analyzes the test results and forwards them to one of several private psychiatrists who, working under retainer with the city of Philadelphia personnel department, conduct the psychiatric examination of applicants for all city jobs, including police jobs. Questions regarding the applicant's background are asked, but the police department's background investigation is not made available to the psychiatrist. The test is brief—

[79] Governor's Executive Committee on Criminal Justice Standards and Goals, *Texas Criminal Justice Standards and Goals* (undated), p. 54, Standard 13.5(2).
[80] Gregory Riede, testimony, *Houston Hearing* p. 228.
[81] Ibid., p. 229.
[82] John Fraunces, testimony, *Philadelphia Hearing*, p. 185.

only about 30 minutes—and thus does not allow time for identifying subtle personality problems. One doctor estimated that he recommends that only 2–10 percent not be hired.[83]

The police staff psychologist plays a relatively weak role in the selection process in Philadelphia. His data is only advisory and is seen only by the private psychiatrist; it does not play a part in the police department's background investigation. The department can veto a candidate only if he or she is disqualified on the basis of the personal data questionnaire, the oral interview, or the polygraph. The psychologist's findings are not considered part of the personal data. The staff psychologist also spends considerable time on duties unrelated to selection, such as conducting research.[84]

The fact that the psychiatrist processes applicants for all city jobs—and does not focus specifically on suitability for police work—is also evidence that the behavioral evaluation of police applicants is not well-integrated into the selection process.

Although it is encouraging that both Houston and Philadelphia now have professional psychologists on staff, neither jurisdiction appears to be making effective use of the psychological screening of applicants to screen out those with a propensity toward violence or toward racism.

Training

Once a police department's recruitment and selection programs have produced a class of qualified, eligible men and women, attention can be turned to the nature and extent of the training needed to make a recruit an effective police officer. The importance of the training process and its interrelationship with other segments of the selection process cannot be overlooked. The Police Foundation has noted:

> [R]ecruit training should be considered as part of the selection process, not separate and apart from it as it generally is today. A poor recruit-training program can compromise a high quality selection program; and conversely, a good recruit-training program can partially offset a low quality selection program. People, in this case police recruits, can and do change; and the recruit-training process can influence the nature of the changes.[85]

Finding 2.5: Police training programs examined do not give sufficient priority to on-the-job field training, programs in human relations, and preparation for the social service function of police officers, including intervention in family-related disturbances.

[83] Dr. Milton Adams, telephone interview, Feb. 16, 1979.
[84] Fraunces Testimony, *Philadelphia Hearing*, p. 185.
[85] Stahl and Staufenberger, *Police Personnel Administration*, p. 72.

The Training Program

A police officer's training normally involves three phases: initial cadet academy classroom training, probationary field work, and inservice training offered by or through the department for experienced officers.

In Philadelphia, formal training consists of 779 hours of instruction spread over 20 weeks. Fifteen weeks are spent at the police academy, 2 weeks at Temple University, and 3 weeks in the field on actual patrol duty. The police academy curriculum is divided as follows:

Orientation and Administration	52 hours
Firearms	47 hours
Driver Training	16 hours
Criminal Law and Related Subjects	76 hours
Traffic	37 hours
Arrest Procedures	40 hours
Physical Training	46 hours
Patrol Operations	81 hours
Miscellaneous Subjects (public relations, first aid, vice enforcement, crime prevention)	49 hours
Tours (Court, Agencies)	14 hours
Human Behavioral Sciences	71 hours
Philadelphia Police Specialists	42 hours
City Agencies	22 hours
State Agencies	4 hours
Federal Agencies	12 hours
Miscellaneous Agencies (Public Defenders Office, Bell Telephone, Press Relations, Philadelphia Electric)	18 hours
Fire Department Training	7 hours[86]

Houston training consists of 604 hours of classroom work and 116 hours of field work, although the minimum State requirement is only 240 hours of training. There are approximately 105 course titles covering a wide range of areas, including the following:

Basic Police Functions (communications, counterfeiting, fingerprinting, and 24 other courses)	139 hours
Investigation (arson, auto theft, burglary, accident, forgery, homicide, juvenile, narcotics, et al.)	68 hours
Firearms courses	51 hours
Behavioral Studies (crisis intervention, human relations, psychology, et al.)	54 hours
Traffic and Driving	54 hours
Administration and Testing	53 hours

[86] Philadelphia Police Department Training Bureau—Police Academy: Training Program for Recruit Police Officers, Feb. 1, 1978.

Government Agencies..... 13 hours
Law courses ..... 83 hours
Gym..... 53 hours[87]

A special counseling assistance team in Houston works to prevent cadets from failing or dropping out. Nonacademic reasons cited for attrition include antipolice attitudes of family and friends, too many pressures at home, and lack of sufficient funds.[88]

Under standards recommended by the National Advisory Commission on Criminal Justice Standards and Goals, a minimum of 4 months field training away from the police academy, working with a certified field training officer (FTO), and rotating districts and assignments should be a mandatory element of the recruit training program.[89] Though not meeting the 4-month minimum suggested by the Advisory Commission, both Philadelphia and Houston have field training programs that furnish the probationary officers with on-the-job experience.

In Houston the field training program lasts 14 weeks, during which time the field training officers demonstrate the correct performance of a number of police duties and then evaluate the probationary officer in his or her performance. The program attempts to expose recruits to several different supervisors and field training officers and to all three shifts. The probationary officer spends 4 weeks in each shift, working under a different field training officer and supervisor on each shift. The probationary officer is evaluated daily by the field training officer and weekly by the supervisor. Finally, after this 12-week experience, the trainee is again assigned to his or her original field training officer for a 2-week "evaluation only" phase in which he or she is expected to work independently under observation.[90] According to one Houston field training officer, "field training is probably the finest idea anyone has come up with."[91]

In Houston, about 1–2 percent of the probationary officers are terminated during field training and about 5 percent must go through "recycling," or repeat certain phases of field work. The two most common reasons for termination during field training have been cited as lack of ability to read and write and "attitude."[92]

Field training in Philadelphia lasts 18 days (144 hours), and the recruit spends the entire time in the same district, although he or she does work all shifts and under different supervisors. Supervision is provided by a

[87] *Houston Equal Employment Program,* "Houston Police Academy Class No. 85 Distribution of Hours."
[88] I.L. Stewart, lieutenant, Houston Police Department, interview in Houston, Tex., May 8, 1979 (hereafter cited as Stewart Interview).
[89] *National Advisory Commission Report,* p. 392.
[90] John Wilson, testimony, *Houston Hearing,* p. 227.
[91] Houghton Interview.
[92] Wilson Testimony, *Houston Hearing,* p. 221.

supervising officer on the beat, not a field training officer specialized in teaching probationary officers.[93]

Police training does not end with academy and field training for new officers. Inservice training is given to officers after graduation, and may be either voluntary or mandatory. In Houston this comprises rollcall training, supervisors school, special driving courses, and special substantive courses on such subjects as juveniles and narcotics. At times officers are sent to training classes elsewhere.[94]

The Philadelphia Police Department also offers numerous inservice training opportunities, many which are required courses for officers promoted to new positions or assigned specialized duties such as narcotics or stakeout. Rollcall training often includes closed-circuit television education, and training pamphlets (called "assist officers") are also utilized. Some training occurs at outside institutions such as Northwestern University or the FBI training facility at Quantico, Virginia.[95]

The Philadelphia Police Department's inservice training program appears to deemphasize training in areas related to police misconduct and community relations. Not all officers receive mandatory firearms refresher courses on a regular basis, and the voluntary firearms courses do not include discussion of legal standards governing the use of deadly force.[96]

In contrast, the State of Minnesota has been particularly mindful of the importance of training programs. A Minnesota Peace Officers Standards and Training Board was established in 1977 to set training standards and to license local police officers. The 11-member board consists of a chairman, 2 sheriffs, 2 peace officers, 2 police chiefs, 2 persons (not police officers) experienced in law enforcement, 2 members of the public, and the superintendent of the Minnesota Bureau of Criminal Apprehension.[97] The board has the responsibility of educating and training peace officers, both preservice and inservice, and regulations have been enacted describing the academic and skills requirements of police officers.[98] Licensed officers are required to complete 48 hours of continuing education and training every 3 years.[99]

Training in Human Relations

In a recently published report, the Minnesota State Advisory Committee to this Commission points out that in addition to field procedure training,

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[93] Memorandum, Detail of Recruit Police Officers to Patrol Districts re: Field Training Program—Class 244, 12-27-77, obtained under Commission subpena.

[94] Capt. Leroy Michna, Houston Police Department, interview in Houston, Tex. May 8, 1979 (hereafter cited as Michna Interview).

[95] Richard F. Bridgeford, chief inspector, Philadelphia Police Department, testimony, *Philadelphia Hearing*, pp. 179–80.

[96] Chief Inspector Richard F. Bridgeford, letter, Mar. 13, 1979 (Commission files).

[97] Minnesota Advisory Committee, open meeting, Minneapolis, Minn., Sept. 27, 28, 1979, transcript, pp. 163–73.

[98] 4 Minn. Code Adm. Regs sec. 13.008 (eff. August 1978).

[99] 4 Minn. Code Adm. Regs sec. 13.008 (eff. July 1979).

police training also involves "attitude-change training which tries to mold the attitudes of police officers in terms of making them more accepting of cultural differences" as well as "environmental training which provides the officer with an understanding of the social system."[100] The report stresses the importance of integrating such training into the total curriculum:

During the 1960s, the Minneapolis Police Department was very much aware of the need for community relations training and for a time did provide some training which involved academics and other representatives of the broader community. But as in many other police departments, human relations or community relations was not a part of the total training process. It was and still is considered only as a special class, one which most officers consider a bore. Experts agree that this approach has not worked and will not work. The most effective training for good community relations is one that recognizes community relations as an integral part of the total operations and not a special program that is done periodically to appease certain alienated segments of the community.[101]

With respect to training that prepares new officers for work in minority neighborhoods, one community representative testifying at the Houston hearing made the following suggestions:

There are a couple of measures that I would suggest at this time: One would be better training of the police officers who are working in high violence, high crime, and thus in the usual minority neighborhoods, to be aware of the total population, not just the criminal population. . . .I don't know of any. . .extensive or indepth preparation for an officer to work in a neighborhood like that. And one of the things I've observed is that most officers who come into neighborhoods like that are tense, are frightened, and also they almost have to consider everybody to be a criminal or potential criminal, and that's not the truth.

. . .I think more extensive and indepth training in preparation of police officers to work in those neighborhoods is absolutely necessary.[102]

Houston has taken some positive steps in this area. That department incorporates into its cadets' curriculum a 2-hour course given by a retired school administrator, who "comes in to talk to them [about] what it is like to be black," and a 2-hour course on Latin American culture. A sociology professor also talks "about race relations and human relations." Other coursework deals with cultural awareness, relating both to blacks and to Hispanics. In addition, two experienced police officers teach a course on police-citizen interaction.[103] Followup in field training in Houston occurs as follows:

We use in our evaluations what we call relationships. Here we cover relationships with citizens in general, with minorities, with officers, and with supervisors. What we actually get

[100] Minnesota Advisory Committee to the U.S. Commission on Civil Rights, *Police Practices in the Twin Cities* (1981), pp.49–50, (footnotes omitted).
[101] Ibid., p.50, (footnotes omitted).
[102] Jack McGinnis, board member, Public Interest Advocacy Center, testimony, *Houston Hearing*, pp. 49–50.
[103] Capt. Leroy Michna and Lt. I. L. Stewart, Houston Police Department, testimony, *Houston Hearing*, pp. 215–16.

at here, we want these people to treat everyone the same. It's as simple as that, regardless of race.[104]

The Philadelphia Police Academy presently requires that all cadets take 72 hours of coursework in "Human Behavioral Sciences," including 8 hours on recognition and handling of disturbed persons, 52 hours on interpersonal and intergroup relations, cultural awareness, and crisis intervention, and 12 hours of conversational Spanish. These courses are taught at nearby Temple University. Short segments (from 45 to 90 minutes) treat such topics as urban family life, juvenile delinquency, crime and deviance, child abuse, and the physiology of stress. Lectures on the culture and history of nine racial and ethnic groups are given, each ranging in length from 45 minutes (for German, Greek, Polish, and Ukrainian history) to 2½ hours (for black and Puerto Rican history). Officers who graduated from the academy before this course was offered may take a similar course through the inservice training program.

Training for Service Functions

It is obvious that police training should prepare current and prospective officers to undertake their duties and responsibilities in police work. Despite the image that the police have as enforcers of the law, "[e]mpirical studies of police behavior show that the average police officer spends more time performing a wide variety of social services than he spends in the pursuit of criminals."[105] In 1978 a considerable number of the three million contacts Philadelphia police made with citizens were service-oriented and did not involve law enforcement.[106] Police scholar Herman Goldstein describes how officers spend their time:

> What do police do with their time if they are not working on matters related to crime? The studies report the large number of hours devoted to handling accidents and illnesses, stray and injured animals, and intoxicated persons; dealing with family disturbances, fights among teenage gangs, and noisy gatherings; taking reports on damage to property, traffic accidents, missing persons, and lost and found property. They cite the amount of time devoted to administering systems of registration and licensing; to directing traffic; to dealing with complaints of improper parking; to controlling crowds at public events; and to dealing with numerous hazards and municipal service defects that require attention.[107]

The academy courses listed above indicate that very little is taught in Philadelphia and Houston on the police service function. Some of the training in Houston does address crisis intervention, halfway houses, and traveler's assistance.[108] The Philadelphia academy curriculum covers crisis

[104] John Wilson, coordinator, Field Officer Training Program, Houston Police Department, testimony, *Houston Hearing*, p. 228.
[105] Project STAR, *The Impact of Social Trends on Crime and Criminal Justice* (Cincinnati: Anderson Pub. Co. and Santa Cruz: Davis Pub. Co., Inc., 1976), p. 43.
[106] Committee on Public Safety, Council of the City of Philadelphia, Hearings on Council Bills 590 and 1063, Dec. 17–18, 1978, pp. 724–28.
[107] Goldstein, *Policing a Free Society*, pp. 24–25.
[108] Michna Interview.

intervention (10 hours), courtesy and interpersonal relations (4 hours), and sources of referrals, including city, State, and private social service agencies. However, training in service areas does not bear the same proportion to training in law enforcement that service on the job bears to the law enforcement function on the job.

One human service area deserving of special mention is crisis intervention and conflict management, since police can make a unique contribution here. The police are particularly suited for this function because of their immediate response capability and their authority. The National Institute of Law Enforcement and Criminal Justice has long taken an interest in this police role and has developed a program for police in crisis intervention and conflict management. In the foreword to its training guide, the following reasons are given for the development of that program:

> In 1973, one in every four homicides grew out of family disputes. A substantial number of serious assaults also occur within families. Another dreadful result—one which has been largely overlooked—is child abuse. Many parental attacks on children occur in the course of a general family quarrel.
>
> Police are aware of how frequent, time consuming and dangerous the family quarrel can be for their officers. They know it can often end in death or serious injury to the participants or the police.
>
> Given the proper training, police officers have a unique potential to defuse family fights before violence reaches its peak. The police are usually the first summoned in such situations, for people know that they can respond quickly and have the power to do something. But the "something" the citizen wants done may not be an arrest. We all know that many calls arise from personal crises in which an arrest is neither necessary nor appropriate.[109]

In two New York City experiments, the institute found that using crisis intervention techniques significantly reduced injuries to both the police and the families involved.[110] In addition, it has found that crisis intervention can give the police a more positive image:

> Success is measured in terms of the officer's ability to solve disputes rather than the number of felony arrests he makes. As officers begin to view themselves as skilled conflict managers, capable of defusing potentially explosive situations, beneficial effects are felt throughout the department. If the department recognizes and rewards the officers for using these new skills, both practice and its benefits can be institutionalized.[111]

Finding 2.6: Training in the use of deadly force is essential but usually insufficient and subject to the ambiguities found in statutes and departmental policies.

State statutes governing the use of deadly force, which are set forth in chapter 3, are complex and ambiguous. It is difficult for new recruits, and

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[109] Morton Bard, et al., *The Function of the Police in Crisis Intervention and Conflict Management—A Training Guide,* U.S. Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice, 1975, p. vii.

[110] Ibid.

[111] Ibid., p. viii.

even seasoned officers, to determine when deadly force may be applied. Each individual must use his or her own discretion in each set of circumstances when making this decision, a decision that must usually be made in a fleeting moment. It is, of course, vital that training prepare the recruit as much as possible for this responsibility.

In Philadelphia, an assistant district attorney recognized the need for greater training for Philadelphia police officers in the use of deadly force. He noted that "the police department apparently feels satisfied to deal with that complex legislation with that one 30- to 40-minute lecture on the law."[112] He also criticized the city's training in relation to that in other cities:

> I would say that uniformly [other police departments] have all had better training and better preparation in [the use of deadly force] than that which is available to the average Philadelphia police office. I think if you go, say, to the Police Foundation or the International Association of Chiefs of Police, they will all tell you how important it is for departments to have a clear policy directive on when deadly force can be used, not only from the standpoint of protecting the citizenry, but just letting the officers know what they can do and what they can't do. It's just out of fundamental fairness to the police involved. You should have such a policy, especially where you have a criminal statute like we have in Pennsylvania, which is so ambiguous.
>
> So. . .I can say from my survey of other police departments that we're far behind the, I would say, average enlightened or well-run police department in that regard.[113]

The chief inspector of training of Philadelphia's police department disagreed with the assessment of the assistant district attorney. He indicated that, although training on the use of deadly force is technically only a 1-hour block in the criminal law section, the topic is treated throughout the curriculum:

> You don't deal with it as a topic per se, but rather we talk courtesy, we talk and teach conflict management and the handling of people. And this is always geared to be done with the least amount of force. . . .So it's a thread of this throughout the entire curriculum.[114]

However, subsequent testimony in Philadelphia by the chief inspector of training revealed that a training pamphlet entitled "Illegal Use of Deadly Force" had been under revision for 6 years—since Pennsylvania law was changed in 1973—and during that period of time no training pamphlet on this critical subject had been available to trainees.[115]

In Houston, training on the use of deadly force was extensively reviewed, modified, and expanded when Harry Caldwell became police chief in 1977. Among other things, Chief Caldwell initiated the use of "crime-scene" scenarios in academy training. These scenes employ role-playing by field training officers to demonstrate to cadets when and how to

[112] L. George Parry, testimony, *Philadelphia Hearing*, p. 85.
[113] Ibid., p. 92.
[114] Bridgeford Testimony, *Philadelphia Hearing*, pp. 180–81.
[115] Ibid., pp. 181–82.

use deadly force, in addition to other difficult areas such as approaching a suspect, investigation, understanding of the law, making arrests, and search and seizure.[116] Supervisors critique cadets on their readiness to fire too quickly or their reluctance to fire at all.[117] Cadets are dismissed for failing crime scenes; a trainee fails a crime scene, it was explained, by improper use of deadly force in the simulated drama.[118] Special care is taken to make the scenarios as realistic as possible:

COUNSEL. But your attempt is to simulate as much as possible the stress that would occur in real life on the street?

CAPTAIN MICHNA. Yes ma'am, and if you see some of those soaking wet uniforms with sweat from fear and notice perspiration, I think we come very close. It takes a few minutes to calm them down as if they have been in real life situations, but as close as possible we try to make them.[119]

A Police Foundation publication cites other new role-playing programs, including some training films and tapes, either commercially produced or locally developed. It describes a program in Oakland, California, in which recruits listen to tapes of radio transmissions on real incidents and discuss how they were handled. The publication also mentions a Detroit course called "Learn and Live" based on a collection of actual incidents in which police have lost their lives.[120]

These simulated-life programs are all the more important because field training in the use of deadly force is necessarily limited. A Houston field training officer noted, "Once you start riding with a probationary, of course, occasions that you're going to use deadly force are very slim. For probably every thousand contacts that you make with the public, you may have one occasion to pull your weapon, even though it may not be in a deadly manner."[121]

Experts also advocate more emphasis in teaching alternatives to the use of deadly force. According to a Police Foundation booklet on deadly force, "The best training programs seem to be those which are thorough and consciously job related—those which teach not only *how* and *when* to shoot but *what* to do *instead.*"[122] This has also been stated by James J. Fyfe, a former New York City police officer who is an expert on police practices:

Training in deadly force should involve far more than marksmanship. It should be based on an analysis of the agency's actual experiences, should consider the legal, administrative and moral questions centered around the use of the gun, and should emphasize that the most

[116] Stewart Interview.
[117] Michna Interview.
[118] Michna Testimony, *Houston Hearing,* pp. 203–04.
[119] Ibid., p. 205.
[120] Catherine H. Milton, et al., *Police Use of Deadly Force* (1977), pp. 109–10.
[121] Officer J. L. Sessums, patrol bureau, Houston Police Department, testimony, *Houston Hearing,* p. 221.
[122] Milton, *Police Use of Deadly Force,* p. 106 (emphasis supplied).

successful resolution to situations which involve potential violence is that which minimizes bloodshed.[123]

Even when a department develops a thorough training program on the use of deadly force, its job is not done. Care must be taken to ensure that the teachings are applied on the street by the senior officers who will influence the new recruits:

> Even among recruits in the training academy, there is peer pressure to reject official policy—particularly any policy that threatens to turn an officer into a "social worker" or a "bleeding heart." Some street-wise instructors make it clear by facial expression or tone of voice, even as they teach the elements of department policy, that recruits will learn the *real* story later. Of course, some degree of conflict is inevitable between the values of the training academy and the rules of the street. But the conflict can be reduced if, first, the academy avoids teaching unrealistic or unattainable standards of performance, and, second, if the recruit, once out on the street, is assigned to work with peers and superiors who genuinely support the policies taught in the academy.[124]

Finding 2.7. Preparation of police officers to cope with personal and job-related stress that may affect their behavior on the job is still largely unaddressed in the police training and management programs studied.

Police officers are particularly vulnerable to stress. They must make split-second, life-and-death decisions; their assignments are often dangerous; and they work under the realization that even routine assignments can unexpectedly become life threatening. The boredom of some assignments causes stress, as does the need to repress emotions so that the officer can appear calm on the job. Also contributing to stress are the irregular hours, rotating shift work, the quasi-military structure and discipline, inadequate opportunities for transfers and advancement, and the perceived need to live up to the "supercop" image portrayed by television programs and films.[125]

Increasingly, stress has come to be identified as an important underlying factor in police misconduct incidents. For example, the report of the Los Angeles Board of Police Commissioners in January 1980 following the police shooting of Eulia Love[126] identified stress as a cause of police

[123] James J. Fyfe, "Deadly Force," FBI Law Enforcement Bulletin, (December 1979), p. 9.

[124] Milton, *Police Use of Deadly Force,* pp. 112–13.

[125] J. T. Skip Duncan, et al., eds., *Police Stress—A Selected Bibliography,* National Criminal Justice Reference Service, June 1979, p. v.

[126] The case of Eulia Love involved a distraught black woman who waved a knife at two police officers who had been called to her home to assist a gas company employee in cutting off service for delinquent payments. Ms. Love was killed in a hail of shots from both officers. See Los Angeles Police Department, *The Report of the Board of Police Commissioners Concerning the Shooting of Eulia Love and the Use of Deadly Force* (1979), Part I, pp. 4–9. That report contains four sections: Part I—The Shooting of Eulia Love; Part II—Investigation and Adjudication of Use of Force Incidents; Part III—Training and Community Relations; and Part IV—Officer Involved Shootings. Parts I and II were published in 1979 and Part III was published in 1980. Although a draft version of Part IV does exist, it is not known whether that section has been published.

violence and recommended changes in police training procedures in stress management, among other areas.[127] The board noted that 2 years previously, in 1977, it had recognized the need for a stress management program:

> Stress, when untreated, can result in major financial, emotional, and physical cost to officers and the citizens they serve. The benefits of a comprehensive stress management program include improved police work resulting from better selection, improved morale among officers, reduction in costs and liabilities resulting from a decrease in potentially adverse police actions, significant reduction in costs associated with worker's compensation and disability pensions and sounder judgments by officers on when and how to apply force.[128]

In 1977 an interdepartmental task force convened by the Los Angeles Board of Police Commissioners had called for a four-part stress management program consisting in general of the following:

1. A pre-selection interview panel that would make final hire and no-hire recommendations based upon a background investigation and psychological evaluation.
2. A psychological services clinic within the police department providing counseling, treatment, probationary evaluation, early identification of officers with stress problems, stress management training, and special medical intervention.
3. A continuing psychological evaluation program during the probationary period.
4. Ongoing research related to stress, with specific focus on anxieties connected with the escalation of force, and psychological assessment of police officers and candidates.[129]

The board's report in 1980 reiterated the need for this four-point program and also called for the immediate implementation of three new programs: (1) examining police attitudes and effects of attitudes in shooting situations, (2) appraising psychological training at the academy, and (3) avoiding emotional emergencies through the hiring of psychologists to detect early warning signs of emotional distress.[130]

Most of these suggested projects are being implemented in Los Angeles. An Early Prevention of Emotional Emergencies (EPEE) program was implemented in June 1980. A stress management program is planned for the future, which will include a satellite clinic that will employ biofeedback and relaxation techniques for managing stress in officers.[131]

Neither Philadelphia nor Houston has a stress management program as comprehensive as the one recommended for Los Angeles. In Philadelphia a counseling unit exists in the training division of the police department. It was established primarily to deal with alcohol abuse. If that unit or any

[127] *Los Angeles Police Commissioners Report,* Part III, pp. 9–12.
[128] Ibid., p. 9.
[129] Ibid., pp. 9–10.
[130] Ibid., pp. 11–12.
[131] Dr. Martin Reiser, psychologist, Los Angeles Police Department, telephone interview, Dec. 1, 1980).

supervising officer in any unit so requests, a psychiatric evaluation of an individual officer will be performed. No systematic or periodic psychiatric evaluation is made of officers; they must request it voluntarily or they must be referred by the counseling unit or a commanding officer.[132] L. George Parry, assistant district attorney, police brutality unit, testified on the shortcomings of this system. Mr. Parry, formerly assistant U.S. attorney in Buffalo in charge of the Justice Department's organized strike force, observed:

I think that many police departments have recognized that problem and have attempted to deal with it by offering some kind of psychological support, some kind of periodic review of an officer's performance, how the officer is holding up on the job, that kind of thing.

You don't have that in Philadelphia. The police are put out on their own, and there is no followup of that kind, even though it is generally recognized that in police work the first 5 years on the job are probably the most difficult years that you're going to put in, when the greatest personality changes take place and greatest stress comes about.[133]

In Houston the director of psychological services offers counseling services to the officers and members of their immediate families. He also participates in academy and inservice training "where I might be able to provide psychological aid for officers in their work,"[134] and he assists in department research projects. He has taught sergeants "how to help the officers deal with the problems in their work and how to communicate more effectively with them to help them reduce difficulties in their work."[135]

Although some departments, including those in Houston and Philadelphia, are addressing the problem of stress management, both in the classroom, and in inservice counseling, the problem is not receiving high priority. Herman Goldstein notes that developing an effective stress management program is a difficult challenge, but it must be faced; the dividends to be realized are well worth the effort:

Meeting stress with calm is counter to natural inclinations; it is certainly in conflict with the stereotype of how the police are expected to function. The young person going into police work most likely believes that one should stand up to a challenge, and this attitude is often reinforced by seasoned police officers. As an officer, he must be convinced that the height of maturity and prowess is to deal with challenges to his authority in a calm, unemotional, and somewhat detached manner. He must rise above the emotions of those with whom he is dealing, even at the risk of appearing cowardly. Restrained, dispassionate conduct on the part of police in hostile confrontations has won a great deal of respect for them and has, at the same time, provided some clear and dramatic lessons for the community on the true nature of the police role in our society. My own impression is that officers who develop a reputation for being unflappable receive less resistance to their actions and to their authority.[136]

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[132] Bridgeford Testimony, *Philadelphia Hearing*, pp. 192–93.
[133] L. George Parry, assistant district attorney, Office of the Philadelphia District Attorney, testimony, *Philadelphia Hearing*, pp. 85–86.
[134] George Riede, Ph.D., director, psychological services, Houston Police Department, testimony, *Houston Hearing*, p. 226.
[135] Ibid.
[136] Herman Goldstein, *Policing a Free Society*, p. 172 (footnote omitted).

Chapter 3

Internal Regulation of Police Departments

Effective internal discipline is in the best interest of the police agency, as well as in the public interest. "No police agency could maintain internal order if employee misconduct were rampant, just as it could not maintain social order if public anarchy were rampant."[1] Discipline is essential to the efficient operation of the force and to officer morale. It is also central to the definition of the police department's public image.

Citizen support and cooperation can be attained only where the community perceives the police force as working in its behalf, not as "the enemy" to be feared and avoided. Even a model police agency can sometimes be perceived as abusing its authority, and it is therefore essential that every agency take the necessary steps to become more credible. The public must have confidence in the ability of the police to police themselves.

An effective system of internal discipline will include clear definition of proper conduct, a reliable mechanism for detecting misconduct, and appropriate sanctions, consistently imposed, when misconduct has been proven. This chapter will discuss these three needs in sections on departmental rules and regulations, citizen complaints procedures, and dispositions and sanctions.

Departmental Rules and Regulations

The underlying validity of any successful internal disciplinary process depends upon the existence of clearly-defined policies, rules, regulations, and guidelines, so that every officer knows what conduct is expected and what will not be condoned. According to police expert Herman Goldstein, "[s]tructuring discretion is perhaps the most obvious" means to meeting

[1] National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Police, *Police* (Washington, D.C.: 1973), p. 471 (hereafter cited as *National Advisory Commission Report*).

desired standards of conduct, "for there is no more logical way to avoid wrongdoing than by giving police officers clearer and more positive directions on what is expected of them."[2]

In 1967 the President's Commission on Law Enforcement and Administration of Justice called on the Nation's police departments to "develop and enunciate policies that give police personnel specific guidance for the common situations requiring the exercise of police discretion." The call was later echoed by the National Advisory Commission on Civil Disorders and by the National Advisory Commission on Criminal Justice Standards and Goals. The American Bar Association's standards relating to the urban police function urged police administrators to "give the highest priority to the formulation of administrative rules governing the exercise of discretion."[3]

The National Advisory Commission on Criminal Justice Standards and Goals suggests that to serve as an adequate foundation for internal order, clear and unequivocal departmental rules should be written and issued to each member of the force.[4] By issuing a set of current rules to each officer, the department provides notice of what constitutes punishable misconduct. Similarly, careful training in and communication of precise policies will best assure their implementation.

Both the Philadelphia and Houston police departments have rules manuals that are issued to each member of the force, and all officers are required to familiarize themselves with the rules contained in them.[5] Each department also issues written "directives" (Philadelphia) or "general orders" (Houston) which may supplement and amend previously issued rules or announce new policies and explain reasons for new rules. These have the same effect as other rules, regulations, and departmental policies. Both cities provide training on some portions of the rules manuals.[6]

While the Houston manual and orders undergo constant revision, the Philadelphia police manual has not been revised for 7 years, and serious gaps have been left in important areas regulating police conduct. The new administration in Philadelphia, however, has declared the old manual obsolete, and the department is working with the police union in the development of a new one.[7]

Patrick Murphy, president of the Police Foundation, said at the Commission's national consultation that "many police agencies still keep

[2] Herman Goldstein, *Policing a Free Society* (Cambridge, Mass.: Ballinger, 1977), p. 167 (hereafter cited as *Policing a Free Society*).

[3] Patrick Murphy, president, Police Foundation, consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Dec. 12–13, 1978, p. 66 (hereafter cited as *Police Practices and Civil Rights*).

[4] *National Advisory Commission Report*, p. 474.

[5] City of Philadelphia, *Policeman's Manual* (1973); *Manual of the Houston Police Department* (February 1978).

[6] Houston Police Department, Equal Employment Opportunity Program (March 1978), "Houston Police Academy Class No. 78, Distribution of Hours"; Philadelphia Police Department Training Bureau—Police Academy: Training Program for Recruit Police Officers, Feb. 1, 1978.

[7] Donald Gravatt, deputy commissioner, Philadelphia Police Department, telephone interview, Nov. 26, 1980.

major policies ambiguous and invisible rather than risk discussion and controversy by developing overt administrative guidelines."[8]

Policies to Reduce Incidents of Unnecessary Deadly Force

Clearly-defined policies and guidelines are vital in the sensitive area of police use of deadly force because an officer may not have even a few seconds in which to assess the situation and decide whether to fire. There is little opportunity to determine the nature of the offense committed, the identity and age of the suspect, the reason for his flight, or whether he is carrying a weapon. Snap judgments on these factors often lead to tragic, unnecessary shootings and loss of life. Moreover, since this is a fleeing *suspect,* authorizing the officer to shoot essentially makes a police officer the prosecutor, jury, sentencing judge, and executioner, all in one moment.

The most restrictive firearms policies limit an officer's use of his weapon to defense-of-life situations—where either the officer's or another's life is endangered and there is no alternative means of protection or escape. In the absence of a definitive departmental policy, the applicable State law governs the circumstances under which an officer may use deadly force to apprehend an individual suspected of committing a felony. Some list specific felonies which are applicable; some distinguish between juveniles and adults.

Most State laws allow the use of deadly force to apprehend an individual suspected of committing a felony, even though the penalty imposed after trial could be much less severe than the death penalty. Pennsylvania and Texas statutes governing the use of deadly force, like those in many other States, are overbroad or vague. The applicable statutes in both States permit the use of deadly force to prevent the escape of a suspected felon in at least some instances. The Pennsylvania statute reads, in part:

(a) Peace officer's use of force in making arrest.

(1) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:

(i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

[8] Murphy Remarks, *Police Practices and Civil Rights,* p. 66.

(2) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid.

(c) Use of force to prevent escape.

(1) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.

(2) A guard or other peace officer is justified in the use of force, including deadly force, which he believes to be necessary to prevent the escape from a correctional institution of a person whom the officer believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.[9]

The Philadelphia Police Department issued no implementing directives or interpretive guidelines for more than 7 years after the enactment of the Pennsylvania statute. During the Commission's hearings in Philadelphia, the following exchange between Commission Vice Chairman Stephen Horn and Philadelphia Police Commissioner Joseph O'Neill suggested that the department lacked a clear policy on the use of deadly force:

VICE CHAIRMAN HORN. Don't you find it strange, as the chief executive of the police department, that no interpretive guidelines have been issued on this subject in 6 years? How is an officer expected to know where he or she draws the line in the conduct in a particular situation if there aren't interpretive examples of what does this statute mean so a person can understand?

COMMISSIONER O'NEILL. Idon't think the legislators themselves have interpreted the particular statute. . . .

VICE CHAIRMAN HORN. Has the police department drafted an interpretation and sent it to the city solicitor for review in this area?

COMMISSIONER O'NEIL. I don't recall. We may have some time ago.

VICE CHAIRMAN HORN. Do you feel that the present policy which is essentially distributing the law as passed by the Pennsylvania Legislature is sufficient instruction for police to know what choices they should make under certain circumstances, or do you feel that anything else should be done?

COMMISSIONER O'NEILL. I don't think that I could sit here and say that the law is sufficiently clear that you can tell a policeman that, "You will, in this case, shoot; you will, in this other case, not shoot."

VICE CHAIRMAN HORN. I'm not sure completely what the law is in Pennsylvania. Let me give you an example: suppose a policeman sees an individual running away from a store, and the store owner says, "I've just been robbed." The policeman calls after the individual, "Halt or I'll shoot." The individual does not halt. The individual does not appear to have a gun, does not turn around and fire. Does the police, under Pennsylvania law, have a right to shoot at the fleeing suspect? There is no visible gun and the person has not turned around to fire.

COMMISSIONER O'NEILL. You've got a situation here in which the officer is apprised that there was a felony. Now, whether or not the individual has a weapon is questionable. Does the officer know whether or not he has one? I don't know. Frankly, I don't like to deal with

[9] 18 Pa. Cons. Stat. Ann. sec. 508 (Purdon 1973). See, for example, Minn. Stat. Ann. §609.066 (Supp. 1981); Ariz. Rev. Stat. Ann. §13.410 (1978; Fla. Stat. Ann. §776.05 (1975).

these suppositions. I like to have actual cases and then get all the facts together. I don't think it would be appropriate for me to say, "Yes, he should; no, he shouldn't." I just don't know.

VICE CHAIRMAN HORN. [W]hen the law is not clear, it seems to me, it is incumbent on the agency to issue regulations as best they can to interpret the law. If somebody disagrees at that point, they can take us all to court. But it seems to me that we have obligations as administrators to try to interpret the murky laws that we sometimes have to operate under. I'm just curious what the philosophy is in the Philadelphia Police Department.

COMMISSIONER O'NEILL. No, this is all very interesting, sir. You take the particular case that you were talking about, and let's assume for the moment that the man says he was robbed, but he doesn't say that his wife is laying dead inside there. Now, the policeman decides, no he's not going to shoot, and he lets the man go. He doesn't make any kind of effort.

VICE CHAIRMAN HORN. I'm not saying he should or he shouldn't. I'm just trying to figure out how the department would—My query is very simple; it is, What is the policy of the police department under that type of situation, and if the command doesn't know, how do we expect the recruit on the street to know?

COMMISSIONER O'NEILL. You're inferring that the command doesn't know. Indeed, the command does know. The policy is as clear as it can possibly be considering the law. I can't make my response any clearer than that, sir.

VICE CHAIRMAN HORN. Well, I just wondered if you'd shoot or not shoot if you were that officer.

COMMISSIONER O'NEILL. If I were there, I'd have to make a determination at that time. I don't know. But I'll tell you this, that if he did shoot, if he felt that he was doing that which is right, most certainly I'd defend him.[10]

In a general order issued February 1, 1979,[11] the Houston Police Department summarized the applicable provisions from the Texas State Penal Code[12] and then stated unequivocally the more restrictive departmental policy:

2. *Policy* —Although State law permits the use of deadly force to protect life and property in certain circumstances, the policy of the Houston Police Department is much more restrictive.

It shall be the policy of the Houston Police Department to permit an officer of this Department to use deadly force *only* when:

2.1 *The officer reasonably believes* that the officer's life is in jeopardy and that deadly force is *immediately* necessary to preserve his life; or

2.2 *The officer reasonably believes* that the life of another is in jeopardy and that deadly force is *immediately* necessary to preserve the other life; or

2.3 The officer *reasonably believes* that the conduct authorizing the arrest included the use or attempted use of deadly force.

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[10] Joseph O'Neill, police commissioner, Philadelphia Police Department, testimony, *Hearing Before the U.S. Commission on Civil Rights, Philadelphia,* April 16–17, 1979, pp. 215–18 (hereafter cited as *Philadelphia Hearing*).

[11] Houston Police Department General Order No. 500–7, "Officer Use of Deadly Force," Feb. 1, 1979. This portion of the General Order is not new. It merely repeats the policy previously in effect, located at sec. 3/18.03 of the Rules Manual. Other portions of this General Order extend the Deadly Force Policy, however.

[12] Tex. Penal Code Ann. title 2, secs. 9.51–.52 (Vernon 1974).

2.3.1 The officer must *reasonably believe* that there is a substantial risk of death or serious bodily injury at the hand of the person sought to be arrested if the arrest is delayed.

2.4 Once the immediate danger of death or serious bodily injury to an officer or another person has passed, deadly force shall not be used.[13]

The lack of a clear and restrictive deadly force policy in Philadelphia may have been responsible for the many incidents of apparent misuse of deadly force by police there. A review of 32 incidents of police officer shootings of civilians in Philadelphia,[14] showed that all victims were male, 24 (or 75 percent) were black, 2 white, 1 Hispanic, 2 American Indian, and 3 were of unknown race. Eighteen of the victims were age 21 or younger and 4 were age 15 or under. Of the 32 victims, at least 19 were fleeing and unarmed at the time police shot at them, and 1 was handcuffed. One innocent bystander lying on the ground was shot by police.

While most of the victims were classified as "fleeing felons" by the police, in only one instance had a known felony been committed prior to police pursuit of the victim. Although the victims were usually charged with "aggravated assault on a police officer" or similar charges, their greatest known offense prior to encountering the police had often been such conduct as running when police were seen approaching or driving a car with a missing taillight.

According to officers' accounts of shooting incidents, repeatedly their reasons for shooting were that their guns were taken from them and they were threatened with them. This provides cause either for them to shoot (when they regain control) or for another officer to shoot. Victims also become felons in these instances.

The following are excerpts from a Commission review of Philadelphia police files:

A 24-year-old white male was seen around 2 a.m. on a porch and he ran when an officer approached. The officer pursued and caught him. Apparently a scuffle ensued during which, the officer alleges, the victim temporarily got control of the officer's gun. The man finally broke away from the policeman and fled, but the officer had his gun back and used it to shoot and kill the fleeing "felon."

A 47-year-old black male was also shot after officers saw him on a doorstep late at night. They said they thought they should "investigate"

[13] Houston Police Department, General Order No. 500-7, Feb. 1, 1979.

[14] In Houston, Commission staff reviewed a sample of internal police files which amounted to 10 percent of "Class I" internally and externally-generated complaints, an approximate total of 133 cases. By contrast, the cases reviewed in Philadelphia were investigations of all civilian complaints and all shooting incidents involving each of 31 previously selected officers, amounting to an approximate total of 124 cases. Personnel files of the officers studied in each city were also reviewed.

The purpose of reviewing and reporting facts from the files of individual officer's is to detect and illustrate patterns of practice that may be inconsistent with stated policies and procedures. Disclosure of the identity and contents of individual files is exempt under 5 U.S.C. secs. 552(b)(6) and (7) covering personnel and investigatory records, the disclosure of which would constitute an unwarranted invasion of personal privacy. Further, such disclosure may be prohibited by 5 U.S.C. secs. 552a(b) and (k) and by Commission regulations 45 C.F.R. secs. 704.1(f), 704.4(b), 705.13(a)(1) and (b)(3).

because he "appeared to be tampering with the lock." It turned out to be his own home.

In one case, an officer tried to break up an argument among four black males. Two of the blacks left, and at least four more officers arrived. One of the remaining blacks allegedly got the first officer's gun and another officer shot and killed him. Many eyewitnesses disputed this account, describing the victim as being on the ground with hands behind him, probably handcuffed, at the time he was shot.

An officer who made 90 "gun" arrests and confiscated 92 weapons within 7 months shot two black males during that same period, killing one of them. Both males had been pursued by the officer after they ran when he approached them. He alleged that each was armed and pointed a gun at him prior to his shooting, although eyewitness' accounts did not corroborate this.

In one instance a 19-year-old black male was arrested for traffic violations (speeding, driving without a license) and taken, handcuffed, in a police van from a substation to police headquarters by two police officers. As one officer was removing the prisoner from the van, the prisoner escaped; allegedly he had knocked the officer over with his shoulder (hands were cuffed behind his back). Eyewitnesses reported seeing the officer strike the victim to the ground with his blackjack, kick and stomp on him, and then shoot him in the head, killing him. The medical examiner found new bruises on the victim in the groin area.

A 15-year-old black youth was seen by an officer climbing out of a grocery store window around midnight. The policeman threw his night stick at the boy, and when the unarmed juvenile failed to stop, the officer fired four shots at him.

Several teenagers in a car were chased by officers who had heard of a chase in progress and joined it without any knowledge of the reason for the chase (which was that the car had no lights on). The car stopped and the occupants scattered. One of them, unarmed, was pursued by two officers who fired eight shots at him, killing him.

Philadelphia's "stakeout" officers were found to be frequently represented among the deadly force cases reviewed by Commission staff. The stakeout uses officers in plain clothes who pose as careless and defenseless persons with a lot of money. The decoy officer, who displays a large roll of money, may accost those he sees on the street to ask them directions in order to let them know how much money he has and that he seems to be alone and unfamiliar with the neighborhood. If someone attempts to lure him into an alley, he goes along, actually encouraging the person in some cases. When the robbery is attempted, another plainclothes officer comes out of his hiding place and yells "police." If the person runs, he is shot at. This setup accounts for a very high proportion (14 of 32) of the shootings reviewed, with most victims being unarmed, black teenagers. Police

descriptions of the incidents sometimes charge that the victim used a "simulated" weapon, thus justifying the officer's use of deadly force in "self-defense." The "simulated" weapon in some instances was actually the victim's hand or finger.

In Houston a survey of 93 deaths resulting from police shootings between 1973 and 1977 shows that 47 of the victims were black, 8 were Spanish-surnamed, and 38 were white. One victim was Hispanic female and the other 92 were male. Fourteen of the victims were listed as unarmed, but those listed as armed included cases where it was later revealed that "throw-down" weapons had been planted on the victims by officers at the time of the shootings.

Commission review of a random sample of Houston internal police files revealed many police shootings in which the victim was charged with "attempted capital murder" and the killing justified as self-defense. The shooting of a 19-year-old black youth followed after police stopped him because he was in a "suspicious van." After the youth gave the police a false name, they arrested him, frisking him and removing most of his clothing. He fled from them and crawled beneath the porch of a small church, where he was shot by another officer who claimed he thought the victim was armed. The shooting was found to be "justifiable homicide."

An 18-year-old's theft of a tool box prompted a high-speed, 30-mile chase by 40 police cars and 2 helicopters. The chase ended when the youth was shot in the head by police. The case was ruled a justifiable homicide on the allegation that the youth was armed and had fired at police. Three years later the case was reopened with evidence that a "throw-down" weapon had been planted in the victim's car after he was killed by police. The new investigation focused on the existence of a conspiracy to hide the fact of the "throw-down" gun. There was no apparent recognition by the internal investigation unit that the "throw-down" gun removed the "self-defense" grounds upon which the shooting was ruled "justifiable." One of the officers testified at the "coverup" trial that he "felt the decision to go along with the use of a throw-down was right."[15]

A 17-year-old burglary and theft suspect also was shot in the head by police following a high-speed chase, and a "throw-down" gun was also planted beside his body. Over 2 years later, a Federal jury found the involved officers guilty of covering up the fact that the victim was unarmed when he was shot.

In another incident, police partners fired 12 shots at a victim at close range. In this case, neither officer was injured, but one officer had a bullet in his bullet-proof vest that, according to the allegations of at least one witness, was self-inflicted to support the claim of self-defense. The original

[15] *Houston Post*, , May 10, 1979, p. 24A.

reason for police contact with this victim had been "stop for investigation." No offense had been alleged as cause for the stop.

In another case, one officer fired 17 shots and a second officer fired 6 shots, critically wounding a man stopped for a "vehicle check."

Instances of police abuse of deadly force are not limited to Philadelphia and Houston. A report by the Ohio State Advisory Committee to the U.S. Commission on Civil Rights relates several instances of police use of deadly force in the Cincinnati area:

> A mentally disturbed highway maintenance employee allegedly scuffled with a policeman at a city garage and took away the officer's night stick; the officer then shot the man in the stomach.
>
> Police shot in the head a 28-year-old escaped mental patient who was fleeing from the police.
>
> An 18-year-old was accidentally shot in the back by a police officer and was paralyzed from the waist down. The officer, pursuing the youth on theft and burglary charges, allegedly slipped on the pavement and his gun discharged.
>
> A 17-year-old suspect in a car robbery was shot and killed by police while fleeing.[16]

According to a recent report of the Tennessee Advisory Committee to the Civil Rights Commission, the police in Memphis killed 11 men in 1970, 8 of whom were black; in 1971 no one was killed; in 1972, at least 2 persons were killed, both were black; in 1973, 5 persons were killed, races unknown; in 1974, 5 out of 7 persons killed were black; in 1975, 7 out of 8 killed were black; in 1976, 2 of the 4 men killed were black; and in a 5-week period in 1977, 5 persons were killed by Memphis police, all of whom were black.[17] During the Advisory Committee's open meeting on police-community relations in Memphis, a member of the board of directors of the Tennessee American Civil Liberties Union stated "that 58 percent of the persons arrested in the city of Memphis are black; but of those persons, against whom deadly force was employed—that is, who the police shot at—87 percent were black."[18]

Finding 3.1: Unnecessary police use of excessive or deadly force could be curtailed by

(1) clear and restrictive State laws, local ordinances, and department rules on the use of force;

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[16] U.S., Commission on Civil Rights, Ohio Advisory Committee, *Policing in Cincinnati, Ohio: Official Policy vs. Civilian Reality* p. 1, citing Dave Krieger and Douglas Imbrogno, "Beasley's Death Makes 9 Police-Related Shootings," *Cincinnati Enquirer,* Dec. 3, 1978.

[17] U.S., Commission on Civil Rights, Tennessee Advisory Committee, *Civic Crisis-Civic Challenge: Police-Community Relations in Memphis (Aug. 1978), pp. 80–81 (hereafter cited as* Memphis Report *), citing* Commercial Appeal, *Aug. 18, 1977, p.1 and Aug. 19, 1977, p. 25.*

[18] *Memphis Report,* p. 80.

(2) careful regulation of department-sanctioned weapons and continuing training in their use; and
(3) strict procedures for reporting firearms discharges.

It is possible for restrictive policies on use of deadly force to effectively reduce instances of shootings by officers. Lt. James Fyfe of the New York City Police Department described at the Commission's consultation the dramatic decrease in the use of deadly force following a change in New York's firearms guidelines:

In New York City the policies did reduce the use of force significantly. Prior to the guidelines, 18.4 New York City police officers were shooting their guns every week. Following promulgation of the guidelines, that declined to less than 13 per week. So that is a pretty considerable decline in the face of continued increases in other indices of violence within New York City—arrest rates, homicide rates. . . .

What's more interesting is the type of situations upon which the firearms guidelines impacted most directly, and they had to do with fleeing-felon situations. Those incidents were reduced by 75 percent. The defense-of-life shootings, shootings in which officers reported shooting to defend their own lives or the lives of someone else, remained fairly constant. They've decreased 15 or 18 percent. The most controversial shootings decreased 75 percent. So that's a pretty considerable decrease.[19]

According to Lieutenant Fyfe, the New York City guidelines "make the argument that the gun is a device primarily for defense of the officer's life and should be used as a last resort."[20] Lieutenant Fyfe's findings were the first to demonstrate a clear nexus between a change in departmental policy and an immediate effect on the practice of officers on the street.

While many other variables (e.g., general violence levels, population changes, etc.) have an impact on the frequency of police-citizen violence, it is significant that great reductions in shooting frequencies (especially among those involving minimal threat to officer or non-opponent life) followed immediately the promulgation of [the directive]. Further, these shooting decreases were also accompanied by reduced confrontation generated injuries and deaths among both police and civilians. Contrary to frequent assertions, limiting police shooting discretion apparently did not increase the danger of the police job.[21]

On April 2, 1980, the Philadelphia Police Department issued Directive Number 10, setting the department's new policy on the use of deadly force; it was modified 6 months later.[22] The policy tends to be more restrictive than the unwritten policy that preceded it. In the department's training lesson plans on the new policy, officers are cautioned to "exhaust all other reasonable means of apprehension and control before resorting to the use of deadly force," and to "never assume that a crime has actually

[19] James Fyfe, associate professor, American University College of Public Affairs, School of Justice, *Police Practices and Civil Rights*, p. 70. "Fleeing felon" statutes are discussed further in chapter 6, "Use of Deadly Force."
[20] Fyfe Remarks, *Police Practices and Civil Rights*, p. 70.
[21] James Fyfe, "Shots Fired: An Examination of New York City Police Firearms Discharges" (unpublished executive summary, undated) p. 7.
[22] Philadelphia Police Department, Directive 10, Apr. 2, 1980.

occurred," since radio information may be inaccurate. Officers are ordered to "never assume the severity of a crime," since a reported robbery in progress may be a minor theft. The lesson plan warns, "Never assume that an individual running from the scene of a crime is the offender,"[23] since the person running could be the victim, or could be chasing the offender or running for help. The directive also limits firing from, or at, moving vehicles, and prohibits firing warning shots and firing while in pursuit of a traffic violator. A summary of the new policy was issued to each police officer in the form of a wallet card, the text of which reads as follows:

USE OF DEADLY FORCE

PREAMBLE

It is the Policy of this Department that members shall exhaust all other reasonable means of apprehension and control before resorting to the use of deadly force. It is also the Policy of this Department that members shall not unnecessarily or unreasonably endanger themselves in applying the below policy to actual situations.

POLICY

I. SELF-DEFENSE OR DEFENSE OF ANOTHER

A police officer is justified in using deadly force when he believes that such force is necessary to prevent death or serious bodily injury to himself or to another person.

II. ESCAPE FROM ARREST OR FROM POLICE CUSTODY

A police officer is justified in using deadly force to prevent a person fleeing from arrest or police custody when he believes that no other alternative exists to effect the arrest *and* knows that:

1. The person fleeing possesses a deadly weapon which he has used or indicates he is about to use, or

2. The person fleeing should be arrested for committing or attempting a forcible felony.

(Until forcible felony is defined by statute, the Police Department adopts the position that forcible felony includes the crimes of Murder, Voluntary Manslaughter, Rape, Robbery, Kidnapping, Involuntary Deviate Sexual Intercourse, Arson, Burglary of a Private Residence, Aggravated Assault Causing Serious Bodily Injury.)[24]

What is the effect of having a departmental policy on deadly force that is more restrictive than State law? While it does not make the officer criminally culpable in an instance where State law finds his actions "justifiable," it can make departmental sanctions possible. In some

[23] Philadelphia Police Department, Police Academy/Training Bureau, "Use of Deadly Force Roll Call Training," Oct. 2, 1980, Lessons No. 1 and No. 2 (hereafter cited as Roll Call Training).

[24] Alan J. Davis, Philadelphia city solicitor, letter to Burton A. Rose, Peruto, Ryan & Vitullo, counsel for the Fraternal Order of Police, Oct. 15, 1980.

jurisdictions, the breach of clear departmental policy may also be considered as evidence of negligence in an action for wrongful death.[25] The restrictive policy may indeed serve as a deterrent to unnecessary use of deadly force.

Additional restrictions regarding the use of firearms can be imposed by department regulation, and not only may reduce the numbers of persons killed or injured by officers, but also can protect officers' lives.[26] These include prohibitions against warning shots, against displaying weapons in a situation that does not warrant their use, and against firing at or from a moving vehicle, as well as a policy of close regulation of weapons.[27]

Both Philadelphia[28] and Houston[29] forbid the firing of warning shots and restrict shots from or at moving vehicles. Philadelphia's lesson plan on its new Directive 10 provides, "A police officer *WILL NOT* fire at or from a moving vehicle unless it is absolutely necessary to protect the life of the officer or of another person."[30] The "unless" clause effectively renders the prohibition subject to the personal judgment of the individual officer.

Firearms regulation includes the issuance of standard regulation weapons and ammunition; required registration and control of additional weapons, if any; regular and frequent inspections of all weapons and checks against registration; requirements for frequent requalifying (and, if necessary, retraining) with duty weapons; and the mandatory reporting of all firearms discharges. Regarding the regulation of weapons, the two departments differ considerably.

The Houston Police Department does not issue regulation weapons, but rather, permits its officers to supply their own firearms.[31] Commission staff interviews with more than 50 members of the Houston force[32] revealed that officers frequently possess four or five firearms. General orders on firearm use and control permit Houston officers, with some restrictions, to carry semiautomatic pistols and rifles, shotguns, and carbines (the latter two "may not be modified in any substantial way," but "substantial way" is not defined). A sidearm must be .357 or larger caliber.[33]

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[25] Grudt v. City of Los Angeles, 2 Cal. 3d 575, 468 P.2d 825, 831 (1970).

[26] J. L. Sessums, officer, Patrol Bureau, Houston Police Department, testimony, *Hearing Before the U.S. Commission on Civil Rights*, Houston, Texas, Sept. 11–12, 1979, p. 222 (hereafter cited as *Houston Hearing*); Harry Caldwell, chief, Houston Police Department, testimony, ibid., p. 275; U.S., Commission on Civil Rights, monthly meeting, Nov. 13, 1978, transcript p. 31 (remarks of Harry Caldwell).

[27] Catherine Milton, Jeanne Halleck, James Lardner, and Gary Albrecht, *Police Use of Deadly Force* (Washington, D.C.: The Police Foundation, 1977), pp. 51–57 (hereafter cited as *Deadly Force*).

[28] City of Philadelphia, Policeman's Manual, Ch. 2, secs. XXXVII, F., H.

[29] Houston Police Department, General Order No. 500–7 secs 2.5.1, 2.5.2.

[30] Roll Call Training, Lesson #2.

[31] Harry Caldwell, chief of police, Houston Police Department, testimony, *Houston Hearing*, p. 280. Chief Caldwell's explanation for this policy: "The important thing is not what an officer carries, it's when he uses it. This is his life insurance. I feel quite comfortable with him carrying whatever he feels confortable with." Ibid.

[32] Interviews with more than 50 officers of the Houston Police Department were conducted between May 7 and May 24, 1979 (hereafter cited as Houston Police Department Interviews).

[33] Houston Police Department, General Order No. 900–11 (Feb. 1, 1979), secs. 1-.2–1.3, 2.–2.3.2.

The regulation of officer firearms often includes only primary weapons and not "second guns." As one recent police study noted, the carrying of "second guns," while useful in certain situations to protect the officer, presents difficulties for the department in other situations. These apply to officer-supplied primary weapons as well:

> The rationale for a second gun, presumably, is that it will protect officers should they be disarmed, run out of ammunition, or have mechanical difficulties with the primary weapon. But there are many possible pitfalls. First, the practice is likely to make it harder to prevent the improper carrying of "drop guns"—weapons carried for planting on a suspect in order to build a case or justify a police shooting. In a department in which no additional firearms are permitted, the sight of a second gun protruding from an officer's pocket will be cause for immediate investigation by a passing superior. In cities such as Detroit and Indianapolis, where second guns are allowed, the passing superior might reasonably assume that such an extra gun was merely an officer's backup weapon.
>
> In addition, the practice may cause an officer to be less cautious—perhaps to take unnecessary risks rather than call for assistance. It could also hamper the investigation of an incident by making it harder to trace a bullet to an officer's gun.
>
> Finally, by leaving so important a question as the carrying of a second gun to the discretion of the individual officer, a department risks reinforcing the belief of many rank-and-file officers that desk-bound command officials have no idea what it is like out on the street. If officers are allowed to decide for themselves what weapons they should carry, why not decide for themselves when to use them?[34]

Houston requires that every firearm carried by officers in the performance of their duties be registered with the department,[35] but interviews with patrolmen and line supervisors indicated that there is seldom, if ever, a check of weapons against the registration form.[36] Former Houston police chief Harry Caldwell, when asked whether an officer could fail to register all his firearms, responded that "he does so at his own peril."[37] The discharge of a firearm must be reported, and the registration is checked at that time, but an officer may reasonably believe that the discharge of an unregistered weapon need not be reported. An unregistered weapon is available, too, as a possible "throw down."

The phenomenon of throw-down guns was a much-discussed issue in Houston during the Commission's study. Two of the previously discussed cases involving the use of planted weapons illustrate graphically the need for stringent firearms requirements. Both incidents occurred following high-speed chases through the streets of Houston. In one instance, police reported being fired at by the victim and said they returned fire, killing him. When no gun was found on the victim or in his car, the officers placed one at the scene. In the other case, the police caught the suspect but during attempts to subdue him an officer's gun discharged and killed the suspect. The officers planted a gun in the victim's hand. That gun was

[34] *Deadly Force*, pp. 55, 56.
[35] Houston Police Department, General Order No. 900-12 (Feb. 1, 1979).
[36] Houston Police Department Interviews.
[37] Harry Caldwell, chief of police, Houston Police Department, interview, Houston, Tex., May 10, 1979.

eventually traced to the police property room and had purportedly been destroyed years before the incident. The Houston Police Department promulgated rules detailing an elaborate procedure for the destruction of weapons in an attempt to avoid future incidents like the second described.[38]

Of course the argument can always be made that any officer can carry unauthorized weapons, even when the department issues a regulation gun. While this is undoubtedly true, such an infraction is far more readily detected when an officer is not expected to have several weapons, different from those of other officers, and changing from day to day.

In Philadelphia, regulation .38 caliber weapons and ammunition are issued to each officer.[39] In addition, the "receipt or disposition by purchase, sale, trade or transfer of any firearm" must be reported.[40] Philadelphia officers may carry privately-owned firearms off duty.[41]

Proficiency in the use of service weapons can discourage a hasty resort to firearms in situations in which other alternatives would suffice. At the Commission's national consultation there were statements regarding the importance of weapons training in reducing the likelihood that deadly force will be used unnecessarily.

> Training can teach the officer how to handle his weapon, how to become confident in his own ability to use it, and. . .one of the end results of that kind of training would be to make him wait longer before he resorts to using it, to make him more confident that he can handle the situation without the use of fatal force.[42]

This raises an additional concern about the Houston department's practice of having officers supply their own weapons. Cadets use .22 caliber pistols for the first few days and then purchase their own weapon. There is no requirement for them to achieve or maintain proficiency with any particular weapon.[43] Several of the officers interviewed indicated that they were not inclined to have much "target practice" because they had to pay for their own ammunition, although others expressed the opinion that weapons proficiency was essential to their security and that they, therefore, practiced frequently.[44]

Philadelphia Directive 100, which addresses the subject of firearms, and the relevant sections of the police manual do not indicate whether there is any requirement for continuing proficiency qualification. The current

[38] Houston Police Department, General Order 700-12 (Feb. 1, 1979) governs the destruction of prohibited weapons. Weapons are placed in a 55 gallon steel barrel by three officers of the rank of lieutenant or above. A written inventory of the weapons is made and sworn to by each officer. The barrel is then secured with three locks, the combination of each known to only one of the officers. The locked barrel is then sent to a foundry and unlocked by the three officers and the contents destroyed.

[39] Philadelphia Police Department, Directive 100 (Oct. 23, 1972).

[40] City of Philadelphia, Policeman's Manual, ch. 2, sec. XXXVIII, C.1.

[41] Philadelphia Police Department, Memorandum 75-18 (Dec. 4, 1975).

[42] Richard Myren, dean, American University College of Public Affairs, School of Justice, remarks, *Police Practices and Civil Rights*, p. 51.

[43] Sgt. F. H. Walschburger, firearms training supervisor, Houston Police Department, interview in Houston, Tex., May 21, 1979.

[44] Houston Police Department Interviews.

administration is designing a new inservice training course on weapons use; all 7,500 members of the Philadelphia force will ultimately be certified, and will be recertified regularly.[45]

Experts from the Police Foundation and Lieutenant Fyfe agree that another critical area of firearms regulation is the mandatory reporting of all weapons discharges, whether or not they result in human injury or death:

> [W]hen we talk about deadly force, it is important to note that we shouldn't measure it in terms of body counts, because deadly force really involves a police officer's decision to pull a trigger. What happens after that is a matter of chance.[46]

> To guarantee effective enforcement of a department's firearms policy, it is essential to require that all shootings and discharges be reported.[47]

Both Philadelphia and Houston have explicit rules regarding the reporting of firearms discharges. Houston requires immediate notification to the internal affairs division of firearms discharges when injury to any person results,[48] with written notification to internal affairs within 24 hours if the weapon was fired in the line of duty.[49] A weapons discharge without injury which occurred "not in the pursuit of some lawful purpose" is to be investigated by the line supervisor and reported through the chain of command to the internal affairs division within 5 days.[50] The Houston rules also describe investigative responsibility and disciplinary procedures.[51]

Section V of Philadelphia Directive 100 requires immediate notification of the operations supervisor in cases not involving injury or death.[52] A written memorandum is not required.[53] In cases resulting in injury or death, Police Radio is to be immediately notified from the scene and Police Radio has the responsibility of notifying the following: (1) the duty commander of the detective bureau, (2) the homicide unit, (3) the detective division of the occurrence, (4) the operations room supervisor in the district of occurrence, and (5) the district or unit to which the officer involved is assigned.[54] The officer is to make no statements, except to command and homicide investigators, and as soon as a supervisor arrives, the officer is to be taken directly to the homicide unit, which has sole

[45] Donald Gravatt, deputy commissioner, Philadelphia Police Department, telephone interview, Nov. 14, 1980.
[46] Fyfe Remarks, *Police Practices and Civil Rights*, p. 70.
[47] *Deadly Force*, p. 66.
[48] Houston Police Department, General Order 300–1 (June 1, 1979), sec. 4.3.17.1.
[49] *Id.* at sec. 4.3.17.3.
[50] *Id.* at sec. 4.3.17.2.
[51] *Id.* at secs. 4.3.17.3, 4.3.20.
[52] Philadelphia Police Department, Directive 100, sec. V.A.I.a.
[53] *Id.*
[54] *Id.* at secs. V.A.2.a.–b.

responsibility for investigating all shootings by police officers resulting in injury or death.[55]

Two other policies in Houston deserve mention. These are known as the "chase"[56] and "burglar in the building"[57] policies. The former restricts the manner and number of vehicles (one primary and one backup) for conducting a chase.[58] The "burglar" policy requires calling a supervisor and requesting backup when it is suspected that a burglar is inside a building.[59] Officers do not have authority to enter the building unless supervisors and backup are available at the scene.[60] These policies, especially the latter, have had significant success in reducing shooting injuries and deaths both by and of police officers.[61] At the Houston hearing, Chief Caldwell defended the "burglar" policy by saying that he did not care how many burglars were lost "as long as we place a high priority on human life."[62]

Citizen Complaints Procedures

A system for the receipt, processing, and investigation of citizen complaints about police is a necessary component of internal regulation of police practices. It is also vital in developing community confidence in the police.[63]

As an internal regulatory tool, citizen complaints are probably the best available source of information about police performance. Since police officers are only minimally supervised while on duty, command has little opportunity to evaluate officer conduct.[64] The so-called "code of silence"—or reluctance of an officer to report a colleague—can prevent command from learning about important problems.[65] Thus, citizens' complaints can provide valuable accounts of events on the beat.

Citizen complaints are not only useful sources of information about police conduct but, whether accurate or not, they also act as important indicators of public perception of the agency. Instead of being defensive, police administrators can make positive use of this information to improve the public image and community relations of their departments and to learn ways to better serve their communities.

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[55] *Id.* at secs. V.A.2.c.–d.,3.

[56] Houston Police Department, General Order No. 500–9 (Feb. 1, 1979), "Fresh Pursuit."

[57] Houston Police Department, General Order No. 900–17 (Feb. 1, 1979) "Standard Operating Procedures for Burglar and Reported Calls."

[58] Houston Police Department, General Order No. 500–9, sec. 4.6.

[59] Houston Police Department, General Order No. 900–17, sec. 1.1.

[60] *Id.* at secs. 1.7–1.8.

[61] Caldwell testimony, *Houston Hearing,* p. 275.

[62] Ibid.

[63] International Association of Chiefs of Police, *Managing for Effective Police Discipline: A Manual of Rules, Procedures, Supportive Law and Effective Management* (2d rev. ed., 1977) (hereafter cited as *Effective Police Discipline),* p. 48.

[64] Ibid.

[65] Ibid., p .50.

Lack of an efficient procedure for intake of citizen complaints detracts from the credibility of the department's commmitment to thorough investigation and correction of misconduct. On the other hand, the existence of a formal complaint procedure provides a much needed 'safety valve" in the community.[66]

Finding 3.2: The effectiveness of a complaint system may be undermined by
(1) insufficient public education about the system,
(2) inaccessible, nonbilingual complaint forms in intimidating locations,
(3) unwillingness to investigate anonymous complaints,
(4) lack of notification to the complainant about the investigation and its results, and
(5) improper maintenance of records and statistics.

For a complaints process to work effectively, the public must be adequately informed about its procedures and encouraged to use it. The complaint process can be explained by a vigorous public education effort utilizing the media, various civic organizations, libraries, schools, community service centers, lectures, posters, and brochures. It has also been recommended that police substations, storefronts, and community relations offices have complaint forms and explanatory literature available.[67]

Experts recommend that the complaints process be as accessible as possible, and that every effort be made to reduce the intimidating features that might discourage complainants from reporting incidents of abuse. Receiving complaints at a variety of locations is likely to be less threatening to most complainants than requiring them to go to police headquarters. Training in the complaint process will enable officers to assist citizens wishing to make a complaint. Consideration of language and literacy barriers is considered another important component of instructing and helping complainants.[68]

At the inception of Houston's internal affairs division, which was instituted to investigate alleged officer misconduct, there was considerable media coverage of the new division. However, there does not appear to have been any other attempt to inform citizens of the complaint process available to them. In response to a question about how citizens learn of the procedures, Captain Thaler of internal affairs said, "If they have a complaint, they're going to find someone to complain to."[69]

[66] Ibid., p. 51.
[67] *National Advisory Commission Report,* pp. 477–478; *Policing a Free Society,* p. 173; *Effective Police Discipline,* pp. 49–54; U.S., Department of Justice, Law Enforcement Assistance Administration, National. Inst. of Law Enforcement and Criminal Justice, "Improving Police-Community Relations" (1973), p. 47.
[68] Ibid.
[69] E.R. Thaler, captain, internal affairs division, Houston Police Department, interview in Houston, Tex., May 7, 1979.

Complaint forms or informative brochures in Houston do not exist at public locations to assure the broadest public awareness of the procedures. However, police officers are instructed in the operation of internal affairs and how to assist citizens who wish to make complaints. An internal affairs detective instructs at the academy and gives inservice training on the procedures. Assistance is provided to complainants who are illiterate or who speak only Spanish. However, no Spanish language forms or brochures are available.[70]

Philadelphia Police Commissioner O'Neill, testifying at the Philadelphia hearing, rejected the suggestion that public information about the complaints process was inadequate, although the police department made no effort to inform the public or to make complaint forms available at locations other than police stations:

MR. O'NEILL. It seems to me that the public, thanks to some of our papers in this city, is well aware of the existence of the IAD. . .at least they should be if they read the papers. . . .

VICE CHAIRMAN HORN. One suggestion that has been made in other areas has been that, perhaps, if a postcard was made available for an individual when a citation is made. . .that they could mark off the type of conduct, etc., send it to the internal affairs unit. Do you have any feeling on that type of approach one way or the other?

MR. O'NEILL. No, I don't think it's incumbent upon us to give people postcards. It's kind of comparable to the Gimbel Brothers giving each and every one of the salespersons a card to give to the customer so that the customer can complain about the salesperson at the time of purchase. It seems somewhat ludicrous to me.

VICE CHAIRMAN HORN. May I say, many progressive organizations in the country do give customers an opportunity to respond on surveys or whatever. Airlines do it regularly. I'm sure you fly a lot just as I do. You occasionally get a survey—How did you like the meal? How did you like the person dealing with you from the time you set foot in the airline's territory, when you ordered your ticket, when you put the baggage, etc. They've done rather well, those organizations.

MR. O'NEILL. Yes, but they're paying for those services. The customers we have generally—they're not paying to be arrested.

VICE CHAIRMAN HORN. Well, they're paying taxes which support your department.

MR. O'NEILL. A good percentage of them aren't sir.

VICE CHAIRMAN HORN. Do you mean we've got studies on that to show who pays taxes [of those] arrested in Philadelphia?

MR. O'NEILL. No, I haven't, but I'm reasonably sure that if one were done, it would be quite interesting.

VICE CHAIRMAN HORN. They're paying taxes in the stores, usually a sales tax, whether or not they're paying income taxes, I would suggest. And even if they weren't, I would suggest there's a broader concept of responsibility to the public.[71]

[70] J.A. Gamino, lieutenant, and Earl Campa, detective, internal affairs division, Houston Police Department, interviews in Houston, Tex. May 7, 1979.
[71] O'Neill testimony, *Philadelphia Hearing*, pp. 212–13.

Philadelphia has prenumbered citizen complaint forms[72] which do not require notarized or sworn statements. The complainant is given a carbon copy as a receipt.[73] Officers are instructed to assist with completion of complaints and station houses are open 24 hours daily. Illiterate complainants are to be assisted in the preparation of complaints.[74] A new complaints procedure also provides for the availability of bilingual complaint forms in various public offices throughout the city.[75]

Experts advise that complaints be accepted initially whether made in person, in writing, or by phone, and whether made anonymously or by the victim, an eyewitness, or some other interested party.[76] Requiring sworn affidavits or notarized complaints at the initial stage of complaint reception cannot guarantee the elimination of frivolous complaints and may discourage legitimate ones. The International Association of Chiefs of Police recommends that neither anonymous nor apparently frivolous complaints be eliminated at the receipt stage, but only after investigation establishes that they are in fact unfounded.[77] The purpose of this is twofold: to avoid discouraging the making of complaints, and to determine whether the complaint has systemic or managerial information of value to the department. Both of these reasons also suggest that the department should continue to investigate certain complaints even when a citizen may choose to withdraw a complaint. Such a policy would effectively discourage the intimidation of complainants.[78]

In Houston complaints that are withdrawn are not investigated.[79] It is possible for Houston residents to make a complaint by phone, by letter, or in person at any substation or at the division headquarters, at any time of day. However, complaints, in order to be investigated, usually have to be made to a supervisor and have to be written and notarized. Anonymous or phoned complaints are categorized as "informal" and the manual of the Houston Police Department indicates that "[t]he decision as to whether informal complaints will be investigated depends on the nature and seriousness of the complaint. This decision will be made by the internal affairs division."[80] Interviews with internal affairs personnel and statistics

[72] Philadelphia Police Department, "Citizen's Complaint Report" (Form 75-561).

[73] Philadelphia Police Department, Directive 127 (Feb. 15, 1978), sec. 75-561).

[74] Joseph O'Neill, testimony, Hearing Before the Public Safety Committee of the Philadelphia City Council, transcript, p. 721;(hereafter cited as *City Council Hearing*). Philadelphia Police Department, Directive 127 (Feb. 15, 1978) sec. II A.3.

[75] City of Philadelphia, Office of the Mayor, Executive Order I-80, (May 14, 1980).

[76] President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: *The Police* (Washington, D.C.: Government Printing Office, 1967) p. 195.

[77] *Effective Police Discipline,* p. 51.

[78] *Policing A Free Society,* p. 173.

[79] Commission staff review of IAD complaints log, as of July 1979.

[80] Manual of the Houston Police Department, Sec: 3/22.02; Houston Police Department, "Record of Complaint" form. The Recommended Organization & Standard Operating Procedures for the Houston Police Department Internal Affairs Division also states at I.B.2.c.: "Informal complaints are not investigated unless directed by the commander of the Internal Affairs Division."

provided by the department indicate, however, that informal complaints are not investigated.[81] In fact, when an informal complaint is received, the supervisor receiving the complaint is required to inform the complainant that no investigation will proceed until the complaint has been formalized.[82] A form letter is also supposed to be sent from internal affairs to the complainant informing him or her that no investigation will occur unless an affidavit is received by the division within 30 days of the incident alleged in the complaint.[83]

As noted, Philadelphia's complaint forms do not require notarized or sworn statements. Under the new procedures, anonymous complaints are to be "processed in as normal a manner as possible under the circumstances."[84]

Prenumbered complaint forms prevent the possible loss or destruction of complaints and simplify the maintenance of records and statistics. Since accountability for all complaints is necessary for the integrity of the complaints process, the National Advisory Commission suggested that the complainant be furnished with a copy of the complaint and with information concerning procedures, notification, rights of appeal, and alternative remedies.[85]

In Houston the complaint form is an internal document and is not available to the complainant either before or after completion of the investigation. A form letter is mailed to each complainant after internal affairs receives and assigns a control number to the complaint, informing the complainant of the receipt of the complaint and the control number, but giving no information regarding the classification or investigation of the complaint. This form letter does not name the officer complained against or provide any explanation of the complainant's rights, the process of investigation, rights of appeal, or alternative remedies which might be pursued by the complainant.[86] By contrast, notification to the officer indicates the complainant's name, the class of the complaint, whether the complaint is formal, and which division will be investigating.[87]

The classification of complaints according to the seriousness of the allegations usually results in a determination of who shall investigate them. While it is possible to have the person who receives the complaint classify it, it is more consistent to have all complaints forwarded automatically to internal affairs for classification. It has been recommended that internal affairs be assigned responsibility for logging and classifying complaints; determining who should investigate; maintaining all records, files and

[81] Internal Affairs Division statistical data, June 1977 through March 1979.
[82] Houston Police Department Record of Complaint form.
[83] Houston Police Department, "Notification to Complainant of Informal Complaint."
[84] City of Philadelphia, Office of the Mayor, Executive Order I-80, sec. VII-A (May 14,1980).
[85] National Advisory Commission Report, pp. 477-479.
[86] Houston Police Department, "Notification to Complainant of Receipt of Formal Complaint."
[87] Houston Police Department, "Notification to Employee of Receipt of Complaint."

statistics; and supervising the investigative process, regardless of who investigates. A determination of investigative responsibility is most logically decided by answers to the following questions:

1. Who is in the best position to determine the facts honestly and without bias?
2. Who is best qualified to institute change?
3. Who has time available to investigate the allegations?[88]

The National Advisory Commission on Criminal Justice Standards and Goals advises that investigations of complaints alleging excessive or unnecessary physical or deadly force be investigated by the internal affairs division.[89] Although incidents resulting in death will be investigated by the homicide division, internal affairs should maintain a supervisory review responsibility over this and every investigation conducted by any other division.[90]

Allegations of minor rules infractions, complaints of inadequate or discourteous service, or other misconduct of a less serious nature can usually be investigated by the line supervisor of the officer's division but with internal affairs maintaining a supervisory role.[91]

In Houston the internal affairs division is responsible for classifying, investigating, reporting, and final filing of complaints. Any complaint that alleges unnecessary or excessive force used by an officer, criminal conduct by an officer, or serious misconduct or officer abuse of authority is classified as a "Class I" complaint. All Class I complaints are to be investigated by the internal affairs division.

Class II complaints consist of all other types of allegations not included in Class I. These less serious complaints are usually referred for investigation to the division to which the officer complained against is assigned.

Once complaints are classified, they are given a control number, logged in a complaint control book, and sent either to the investigative lieutenant of internal affairs or to the assistant chief in charge of the command and division to which the complaint will be assigned for investigation. A copy of all complaints sent to the divisions for investigation is kept in an internal affairs file called the "suspense file," and internal affairs has the responsibility of seeing that those investigations are expeditiously completed and reported to the chief.[92]

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[88] *Effective Police Discipline,* p. 59.

[89] The National Advisory Commission on Criminal Justice Standards and Goals recommends that all citizen complaints be investigated by the internal affairs division and that all internal allegations of criminal conduct or serious misconduct also be the responsibility of the internal affairs unit. *National Advisory Commission Report,* pp. 480–81.

[90] *Policing A Free Society,* p. 192; *Effective Police Discipline,* pp. 59–60; *National Advisory Commission Report,* p. 480.

[91] *National Advisory Commission Report,* p. 481; Glenn Stahl and Richard A. Staufenberg, ed., *Police Personnel Administration* (The Police Foundation, 1974) (hereafter cited as *Police Administration*), pp. 191–92.

[92] Information on the classification and logging of complaints and their assignment for investigation comes

The number of citizen complaints in Houston averages about 45 per month; approximately 60 percent of these are Class I complaints. The greatest number of complaints are ones alleging excessive or unnecessary force (Class I) and/or rude or verbally abusive attitude or demeanor (Class II).[93]

In addition to the handling of citizen complaints, the internal affairs division also investigates and monitors internally-generated allegations of officer misconduct and firearms discharges. (Internally-generated complaints are those in which a member of the department reports the alleged misconduct, rather than someone external to the department.) These complaints are broken into the same Class I and Class II categories as are citizen complaints. However, it is more likely that some of the Class II complaints of this type will be investigated by internal affairs if, for instance, the complainant is the officer's supervisor, who would otherwise be the likely person asked to conduct the investigation into the matter.[94]

While the internal affairs division in Houston clearly has responsibility for monitoring investigations into shootings by police officers, the division of investigative responsibilities between homicide and internal affairs generates some lack of understanding of the respective roles of these two divisions in the investigations.[95]

Under Philadelphia's new procedure, the internal affairs bureau of the police department is responsible for investigating all citizen complaints of police misconduct.[96]

According to the Police Foundation,"Standard procedure should require that citizens always be advised of the outcome of the investigation and the disposition of the complaint by the department."[97] The foundation recommends that when a complainant has taken the trouble to file a written complaint, final notification should be in writing to the complainant.[98] Since investigations will vary in length according to the complexity of the case and other variables, the time within which completion is reasonably to be expected may also vary. Notification to complainants that their complaints are being investigated is a minimum courtesy if, after a

from the Houston Police Manual, Section 3/22.02-.03; Recommended Organization and Standard Operating Procedure for Houston Police Department Internal Affairs Division, secs. I.C., II and III; Thaler and Gamino interviews, May 7, 1979; D.J. McWilliams, lieutenant, internal affairs division, Houston Police Department, interview in Houston, Tex., May 21, 1979.

[93] Internal Affairs Division Statistical Data, June 1977 through March 1979; Thaler and Gamino Interviews, May 7, 1979.

[94] Lt. J.A. Gamino, telephone interview, June 1, 1979, to clarify internal affairs statistical data, June 1977 through March 1979.

[95] B.F. Adams, captain, homicide division, Houston Police Department, interview in Houston, Tex., May 22, 1979.

[96] City of Philadelphia, Office of the Mayor, Executive Order I-80, sec. III-A. (May 14, 1980).

[97] *Police Administration,* p. 193.

[98] Ibid.

designated period, the investigation is not complete and no final notification can be given.[99]

Notification to the accused officer is also appropriate in most instances, although there may be occasions when an investigation can and should proceed without the officer's awareness. This would most likely be the case where allegations are made of corruption or criminal conduct, or there is evidence of a pattern of officer harassment or intimidation of complainants.[100]

Under Philadelphia's new system, upon completion of the investigation (required to be completed within maximum of 45 days from receipt of the complaint unless there is good cause for an extension), the complainant is to be notified of the findings and results.[101] There was no requirement for written notification under the previous system, only that the complainant be "aware of the results of our investigation."[102] Commissioner O'Neill testified before the city council in defense of the adequacy of that informal notification procedure. He stated that "nothing is gained us by putting this in writing," and that "in-person or telephone conversations saves us stamps."[103] At the Commission's hearing, the chief inspector of internal affairs made the following statement:

> I object to the repetitious requirement for notification in writing. . .at the completion of the investigation to notify and outline your reasons for the findings. I don't know of anybody in the police department who has that kind of writing ability that could clearly state why, in writing, certain conclusions have been reached.[104]

Formerly, Philadelphia did not provide for notification of the complaint to the accused officer.[105] The new procedure requires written notice to the complainant and to the officer involved. The commissioner must publicly announce the determination of every complaint involving serious charges. While the latter provision may be effective in deterring future misconduct, no effort is made to balance this benefit with the officer's right to privacy with respect to the dissemination of detailed personal information.[106] In Houston, both the complainant and the officer are informed of the final

[99] The National Advisory Commission on Criminal Justice Standards and Goals recommends that all investigations be concluded and final notification given within 30 days. *National Advisory Commission Report,* p. 483. On the other hand, Stahl and Staufenberger recommend that a 90-day maximum time limit be imposed regardless of whether a criminal case is pending. *Police Administration,* p. 192.

[100] *Police Administration,* p. 195.

[101] City of Philadelphia, Office of the Mayor, Executive Order I-80, secs. III-D, IV-D (May 14, 1980).

[102] Directive 127, "Complaints Against Police, dated Jan. 1, 1975.

[103] O'Neill testimony, *City Council Hearings,* pp. 776, 778. Commissioner O'Neill went on to recite the adage about the lover: "[T]ell her with flowers or tell her with mink, but never, never tell her in ink." Ibid., p. 778.

[104] Frank A. Scafidi, chief inspector, Internal Affairs Bureau, Philadelphia Police Department, testimony, *Philadelphia Hearing,* p. 169.

[105] Directive 127, "Complaints Against Police," dated Jan. 1, 1975, Feb. 27, 1975, and Apr. 24, 1975, makes no mention of notification to the accused officer of the complaint against him. However, in serious incidents the accused officer may actually be assigned to the unit that investigates (IAB or Homicide) for the duration of the investigation.

[106] City of Philadelphia, Office of the Mayor, Executive Order I-80, secs. IV D, E. (May 14, 1980).

disposition. The form letters sent to the complainant do not describe the investigation or discipline but report whether the allegation in the complaint was sustained. In the case of a complaint that was sustained, the letter indicates that "appropriate disciplinary action has been administered."[107]

The National Advisory Commission has suggested that complete records of complaint reception, investigation, and adjudication be maintained and statistical summaries published regularly for police personnel and the public.[108] A central location for the maintenance of all records pertaining to citizen complaints, probably in the internal affairs unit of the police department, provides the best opportunity for security of files and protection of privacy and the integrity of the complaint process. In Houston, all complaints are stored at the internal affairs division and records are maintained and statistical summaries reported on the receipt, classification, investigation, and disposition of them.[109] In Philadelphia, complaint investigation files are maintained at the internal investigation bureau, available for public view for 5 years and semiannual statistical compilations are made.[110]

Internal Investigations

Although each step in the complaint process from access to the system through notification to the parties and maintenance of records is important, the actual investigation of the complaint lies at the core of the process.

Finding 3.3: Ingredients of an effective internal investigation system include
(1) the exercise of a strong supervisory role by the internal affairs unit,
(2) a staff adequate in numbers and training,
(3) written investigative procedures, and
(4) suspension of officers under investigation for serious offenses.

Police administration experts agree on the need for a specialized unit with responsibility for the internal investigation of all serious complaints of officer misconduct, reporting directly to the chief police executive.[111] An insular unit provides for the development of expertise and consistency in the investigative techniques employed, and for the maintenance of security and integrity of the investigative process.

[107] Houston Police Department, "Notification to Complainant of Results of Investigation: Sustained Employee Misconduct" (form letter).
[108] *National Advisory Commission Report*, p. 477.
[109] Recommended Organization & Standard Operating Procedures for the Houston Police Department Internal Affairs Division; Thaler and Gamino interviews in May 7, 1979.
[110] City of Philadelphia, Office of the Mayor, Executive Order I-80, secs. II-C, VI-B, G.
[111] *Effective Police Discipline*, p. 59; *National Advisory Commission Report*, p. 480.

Experts also recommend that the internal affairs unit have a monitoring and supervisory role with respect to all other investigations of citizen complaints against police.[112] While minor misconduct may be investigated by first line supervisors, the integrity of the process will best be maintained if such investigations are reviewed by internal affairs, according to experts from the Police Foundation:[113]

> . . .there is the risk that the line supervisor, who is in daily contact with subordinates and who desires, quite naturally, to be well-liked by them, may ignore complaints or process them too leniently if the supervisor's own actions are unsupervised.
>
> To prevent this, a system for handling citizen complaints should be constructed so that the disposition of every written citizen complaint will be subject to review at the staff level by the internal affairs unit.[114]

Having an internal affairs unit with overall responsibility for complaints investigation also makes possible uniformity in the all-important decisions regarding the classification and assignment of complaints. To accomplish this goal, internal affairs would receive and process all complaints and be the final repository of all records pertaining to the investigations of them.[115]

The internal investigative unit needs ample staff to effectively meet the workload. To work efficiently, the investigators must be able to devote their time solely to investigative tasks and not be distracted by other duties.[116] Investigators need special training on the conduct of internal investigations; because of the sensitive nature of investigating fellow officers, these differ considerably from usual police investigations and require special techniques. Detailed written procedures[117] can best provide for the thoroughness and consistency of complaint investigations, respect for individual rights, and the maintenance of strict confidentiality.

There are differing views on the appropriate length of assignment to an internal affairs unit. While the National Advisory Commission recommends that rotation of internal investigative personnel be required at least every 18 months,[118] there are also reasons to favor a longer, or even a permanent assignment. Rotation may help increase understanding and acceptance of a new division by broadening the exposure and experience of more persons within the department. Rotation also limits the hardship of performing what is admittedly an unpleasant task, and it probably diminishes the likelihood of corruption within the division. On the other hand, rotation reduces the effectiveness of investigation that could be developed through experience. It may also make personnel more vulnera-

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[112] *Effective Police Discipline,* pp. 59–60; *National Advisory Commission Report,* p. 480.
[113] *National Advisory Commission Report,* p. 480.
[114] *Police Administration,* pp. 191–92.
[115] *Effective Police Discipline,* p. 61.
[116] *National Advisory Commission Report,* pp. 480–81.
[117] Ibid., pp. 483–84.
[118] Ibid., pp. 480, 482.

ble to the pressures of investigating fellow officers with whom one worked 6 months ago or with whom one may be assigned to work 6 months hence.

The responsibility of the investigative unit is to determine the facts of a case and to report them directly to the chief executive of the police agency. Internal investigations must be conducted with at least that degree of skill and effort devoted to the investigation by police of felony crimes where the suspect is known.[119] Since internal investigations have several advantages over most external criminal investigation (for instance, the accused is usually known and accessible), a high success rate in learning the facts would be expected. When great numbers of complaints are not sustained, meaning insufficient facts were found to clearly prove the allegations of the complaints, it may be an indication that investigations are not being conducted with the requisite degree of thoroughness, skill, and aggressive effort. The National Advisory Commission has said:

> The investigation and adjudication process should be swift, certain, and fair. This demands that only the most competent employees be selected and developed to conduct internal discipline investigations. The efforts expended in these investigations at least must be equal to the efforts expended in the investigation of serious crimes. Because of the reduced caseload and greater freedom in the use of investigative techniques, the potential for learning the true facts in internal discipline investigations is much greater than in most criminal matters.
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>
> The investigator of an internal discipline complaint is responsible for discovering sufficient information to support an appropriate disposition of the matter. To accomplish this, the investigator must employ all reasonable investigative tools and techniques. He is given much greater latitude than the criminal investigator, but he must be constantly guided to prevent the misuse and loss of this privilege. In keeping with the principles of investigation, the internal discipline complaint investigator must not be charged with adjudicating the matter.[120]

If it appears likely that criminal prosecution may ultimately be warranted, "the investigation must adhere to all of the restrictions of a normal criminal investigation."[121] The officer's rights must be protected as would those of any other person accused of a criminal act; evidence obtained without such protections cannot be used in a criminal prosecution.[122] Internal affairs must also consider when and to what degree prosecutors and other investigators should be involved. If the district attorney, the U.S. attorney, and the FBI are not involved in the early stages of investigation, valuable evidence can be lost or may grow stale. On the other hand, if each of these is attempting to conduct concurrent investigations the result may be sloppy handling of evidence and overwhelming of witnesses who will simply refuse to cooperate with so many different investigators. There are no clear guidelines, but it is

[119] Ibid., p. 484. See also *Effective Police Discipline*, p. 64.

[120] *National Advisory Commission*, pp. 484–85.

[121] *Effective Police Discipline*, p. 65.

[122] Even though such evidence could be used to support disciplinary action by the department, such sanctions are inadequate where criminal behavior is involved, and police agencies must use caution to preserve the criminal justice process.

important that evidence of criminal conduct be reported to the agency that will have prosecutorial responsibility, and that the internal investigation proceed with that agency's guidance, advice, and assistance where appropriate.[123]

A necessary element of the internal investigative process is the protection of the rights of an accused officer, whether or not criminal conduct is involved, but giving the officer more lenient treatment that other suspects is unwarranted. Questioning the officer is an obvious example. Good investigative technique will require questioning an accused.[124] Permitting officers to submit their written statements about an incident is insufficient. However, if questions concern possible criminal conduct, officers must be given *Miranda* warnings[125] which advise them of the right to refuse to make self-incriminating statements. If threat of dismissal compels an officer to make incriminating statements, they will not be admissible at trial because they will not be considered to have been voluntarily made.[126]

Other legal restrictions on internal investigations may be found in collective bargaining agreements or in legislated provisions such as the "police officers' bill of rights," which is also discussed in chapter 6.[127] Such bills exist in several States, and efforts are being made to enact a Federal police officers' bill of rights. The State bills usually contain the following provisions:

1. Rules to be followed any time a police officer is to be questioned or investigated in any matter which could lead to disciplinary action, demotion, transfer, suspension or dismissal.
2. A requirement that the officer be questioned only at certain hours and specified locations.
3. A requirement that any complaint for brutality be dismissed unless it is sworn and notarized.
4. A requirement that officers be given the names of any witnesses against them.
5. A prohibition of offers of immunity to officers in return for information against others, as well as a prohibition of threatened transfers, etc., for refusal to cooperate with departmental investigations.
6. A requirement that counsel be present whenever an officer is being questioned on an internal disciplinary matter.
7. A prohibition of the use of lie detector tests in internal investigations.

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[123] For a detailed discussion of prosecutorial responsibility, see sections entitled "State Prosecution" and "Federal Prosecution" in chapter 4.

[124] *Effective Police Discipline*, p. 65.

[125] Miranda v. Arizona, 384 U.S. 436, 467–73 (1966).

[126] Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

[127] See discussion of such statutes in section entitled "Law Enforcement Officers' Bill of Rights" in chapter 6. See also Md. Ann. Code art. 27, sec. 727 (Supp. 1980); Fla. Stat. Ann. sec. 112.532 (1978); and, Wash. Rev. Code Ann. sec. 41.12.090(1975).

The police officers' bill of rights was sharply criticized by Deputy Chief Robert W. Klotz of the Metropolitan Police of Washington, D.C., in his remarks at the Commission's national consultation.[128] Chief Klotz found fault with the bill for its ambiguity and broadness: "What it attacks is the ability of the chief of police to maintain the internal security of the police department through its investigative process."[129] The protections of the bill were not needed, he maintained, because of the existence of protections of due process rights where criminal matters are involved. Furthermore, he said, the overbroad provisions hamper departmental investigations by preventing the department from acting on anonymous tips or on information from other officers and third-party witnesses. They could also subject potential witnesses to intimidation and severely restrict the time-and-place flexibility that investigations of this type require. Moreover, the provisions for attorney presence during questioning on administrative matters, and for prohibiting polygraph tests are not rights afforded other accused persons, nor are they supported by court decisions.[130]

Under certain circumstances it will be desirable to relieve an officer from duty while the investigation is pending. At a minimum, the suspension of officers involved in shooting a civilian or otherwise causing civilian death is an advisable precaution that can avoid undue pressures on the officer, unnecessary risk to the community, and damaging public criticism of the department.[131] While bad publicity is not in itself a reason to suspend an officer, the fact that this may undermine public confidence in the department is. The Police Foundation in its report *Police Use of Deadly Force* noted:

> [M]any departments have a fixed set of procedures to use in the wake of fatal shootings: The officer is suspended with pay or reassigned to inside duty, and all public comment is declined. In Washington, D.C., the officer is also relieved of his or her service revolver, badge, and identification, and of the right to carry a personal off-duty revolver. This procedure is naturally resented by officers involved in shooting incidents, who feel they are being prejudged. In fact, the department's rationale for taking the officer's gun away in *all* cases is precisely to avoid having to make prejudicial decisions in those instances when the officer appears to be demonstrably unsuited for further duty.[132]

Temporary relief from duty may also be appropriate when an employee is under investigation for corruption or other major crime or serious misconduct. "A police chief executive is severely hindered in his ability to maintain control over his organization" if he is without authority to suspend an officer who is being investigated for alleged misconduct.[133]

[128] Robert Klotz, deputy chief, Metropolitan Police of Washington, D.C., remarks, *Police Practices and Civil Rights*, pp. 122–25.
[129] Ibid., p. 123.
[130] Ibid., pp. 123–25.
[131] *National Advisory Commission Report*, pp. 483, 485; *Effective Police Discipline*, pp. 62–63; *Deadly Force*, pp. 71–73.
[132] *Deadly Force*, p. 72 (emphasis in original).
[133] *National Advisory Commission Report*, p. 485.

At the conclusion of an investigation of a citizen complaint, the internal affairs unit has the responsibility of reporting the results to the chief police executive, for compiling and analyzing complaint statistics, and for publishing periodic statistical reports.

While the internal affairs unit may have similar responsibilities with respect to internally-generated complaints against officers, it may be advisable to maintain separate statistics, because many of the internal "complaints" are likely to include minor rules infractions, such as not wearing the uniform hat, which are of little concern to the general public. Mixing these complaints in the total complaint statistics can easily give an inaccurate view of the percentage of complaint allegations that are sustained and for which discipline is meted out.

Both Philadelphia and Houston police departments have special internal affairs units, and, while there are some significant differences, many of their procedures are similar.

Houston's unit, called the Internal Affairs Division (IAD), was formalized in June 1977 as one of the first official acts of the newly-appointed chief of police, Harry Caldwell.[134] Prior to its official inception, however, the division had been planned and proposed under former Chief B.G. Bond and had been in operation on an ad hoc basis to investigate the Torres incident,[135] which involved the drowning of an arrestee.

Until the IAD was instituted, any complaint of officer misconduct was investigated by the officer's division, and allegations of serious misconduct were investigated by the most appropriate division, such as homicide or burglary. However, former Chief Bond said that a more objective procedure was needed because people can't investigate themselves.[136] Many resisted the new division because it took away responsibilities they formerly had and so implied they could not perform those duties satisfactorily. Much effort was needed to gain acceptance of and credibility for the new division among both police officers and the public.[137]

There is an indication, from more than 50 interviews that Commission staff conducted with current members of the Houston Police Department, that even though the IAD met with considerable resistance at the outset, it has begun to gain wider acceptance.

In 1979 the staff of the IAD consisted of one captain, two lieutenants, eight detectives, and one police officer. Like most of the department, the IAD complains that it is understaffed. The investigative lieutenant assigns investigative responsibility to the detectives and normally only one detective will work on a given case, though the more serious cases may

[134] E.R. Thaler, captain, internal affairs division, Houston Police Department, testimony, *Houston Hearing*, p. 262.
[135] Ibid.
[136] B.G. Bond, former chief, Houston Police Department, interview in Houston, Tex., Apr. 5, 1979.
[137] Lester Wunsche, deputy chief, Houston Police Department, interview, Houston, Texas, May 10, 1979. Chief Wunsche was captain of the internal affairs division during the first 6 months of its existence.

require additional persons. The hours when investigative work must occur may also require more than one person working on a case, for instance, if interviews must be conducted when the detective assigned to the case is not on duty. At least one detective from the unit is on call 24 hours a day, 7 days a week.[138]

There is no time limit for the completion of investigations in Houston. The division attempts to complete investigations within 6 months,[139] but that it depends on the number, importance, and complexity of the cases. Serious matters such as shootings take priority. One detective stated that his current caseload was 10 cases.[140]

The IAD provides no special training for its investigators but relies on selection of the best investigators from other divisions within the department. All detectives have had training and experience in investigative techniques but not specifically to deal with internal matters. Lieutenant McWilliams acknowledged that investigations of IAD may involve different charges from those of ordinary crimes, and they have some unique elements.[141]

One detective estimated that it probably takes about a year to develop expertise in internal investigations.[142] This raises the issue of rotation of assignment. As previously discussed, the National Advisory Commission has suggested that rotation of internal investigative personnel be required at least every 18 months.[143] In Houston there is an attempt to rotate assignments even more frequently. Lieutenant McWilliams favors rotation because of the tremendous pressures of the job. All IAD personnel interviewed remarked about the emotional strain of this assignment and said the job "takes its toll" and that no one should be required to remain in that division permanently.[144]

When, during an investigation, it appears criminal conduct may have occurred, the IAD may contact the district attorney's office for advice and assistance. As far as can be determined, however, there is no requirement for reporting complaints to the district attorney routinely. The relations between IAD and the district attorney's office have been described by an IAD lieutenant as very cooperative.[145]

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[138] J. A. Gamino, lieutenant, internal affairs division, Houston Police Department, testimony, *Houston Hearing*, pp. 254–55; Thaler, Gamino, and Campa Interviews, May 7, 1979; McWilliams Interview, May 21, 1979.

[139] In a civil service hearing on an officer's appeal of an indefinite suspension, the department may not complain of acts that occurred more than 6 months prior to the date of the suspension. Tex. Rev. Civ. Stat. Ann. art. 1269m, sec. 16 (Vernon 1963)..

[140] Thaler and Campa Interviews, May 7, 1979.

[141] D. J. McWilliams, lieutenant, internal affairs division, Houston Police Department, testimony, *Houston Hearing*, p. 257; Thaler and Campa Interviews, May 7, 1979; McWilliams Interview, May 21, 1979.

[142] Campa Interview, May 7, 1979.

[143] *National Advisory Report*, pp. 480, 482.

[144] McWilliams Interview, May 21, 1979; Campa Interview, May 7, 1979.

[145] McWilliams Interview, May 21, 1979.

Due to the lack of any written procedures for internal investigations, it appears that each detective decides how he will investigate the complaints assigned to him. IAD Detective Campa described some of the steps in his investigations. He reviews the complaint to see what the allegation is and to consider the likelihood that it occurred. He then reviews documents that accompany the complaint, such as an arrest record of the complainant, or an offense report related to the occurrence. He interviews the officer involved, the complainant, and any witnesses, either police or civilian. Detective Campa described his investigation as just as thorough as an investigation of criminal activity external to the department.[146] IAD Captain Thaler said that every means is exhausted in their investigations to be sure that they have "covered everything that could be covered."[147]

Commission staff review of investigative files showed that both homicide investigations of police shootings and IAD investigations of civilian complaints of police brutality devote much attention to the victim's wrongdoing. Investigations invariably include records checks on victims and their families, and often as much time and effort in complaint investigation is devoted to pursuing the charges placed against the victim as in trying to ascertain the facts alleged in the complaint. Although such checks are important in the overall assessment of credibility, especially in "one-on-one" situations, the victim's criminality should not excuse whatever treatment he may have received from the officer. The investigation of one Houston complaint of police use of excessive force against a 15-year-old black arrestee was directed almost entirely at the complainant, who had a juvenile record. The IAD investigator determined his complaint to be "unfounded," noting, "There is definitely a pattern of criminality" and "complainant's background investigation has destroyed his credibility."

Staff review of files also indicated that Houston officers accused of wrongdoing were frequently permitted to submit written statements rather than to be questioned orally. The extent of one IAD investigation of an alleged beating consisted primarily of the written statements of two officers and an interview with the victim. The officers' statements were accepted and they were exonerated, although the complainant received severe injuries to the head and chest and multiple cuts and bruises.

In the case of a shooting by an officer, the homicide and internal affairs divisions in Houston have some dual responsibilities for the investigation. Completed IAD investigations are reviewed by the investigative lieutenant and the captain before final reporting to the chief. In every case, a report is made to the chief of police with a recommendation for findings based on the results of the investigation. The division makes no recommendation

[146] Campa Interview, May 7, 1979.
[147] Thaler Interview, May 7, 1979.

regarding possible disciplinary action to be taken; it merely reports the findings of its investigation.[148]

Philadelphia's internal investigative unit, the Internal Affairs Bureau (IAB), was formed in 1968 and is the police commissioner's principal investigative tool. Under the revisions promulgated in Directive 127 in February 1978, the IAB was to receive a copy of incoming complaint forms from any point in the department at which they were received, the district headquarters being the most common point of reception.[149] Under Directive 127, the IAB was empowered to handle any complaint regarding physical or verbal abuse.[150]

Directive 127A, promulgated on the same day as Directive 127, set the procedure for processing "complaints against police officers other than physical or verbal abuse."[151] In 1978 complaints "other than physical or verbal abuse" constituted 438 of 673 total complaints of police misconduct, or 65 percent.[152] Under the procedure of Directive 127A, "all complaints against police officers. . .shall be recorded and referred to the Commanding Officer of district/unit of occurrence for investigation."[153] Unlike Directive 127, Directive 127A left the decision on how or whether an investigation would occur to the district commanding officer. The IAB received copies of any investigation or incident reports made, but apparently did not have the power to decide who would conduct the investigation. If the complaint was serious or concerned "corruption, crimes or other serious matters," none of which were defined in the directive, the lieutenant in the district office was to evaluate all complaints and notify the district commander immediately. He was charged with the responsibility of notifying the IAB for a determination by the staff inspectors as to who would conduct the investigation.[154] In effect, the IAB's role as the "central control agency" for complaint investigations was secondary to that of the district command in all complaints other than physical or verbal abuse. Directive 127A left a high degree of uncertainty as to whether a particular complaint or incident would be classified as serious enough to warrant involvement of the IAB. This helps to explain Chief Inspector Scafidi's statement that IAB only investigated about 30 percent of allegations of police misconduct.[155]

Under Philadelphia's new complaint system, as set forth in Mayor William Green's Executive Order I–80 of May 14, 1980, "The Internal

[148] McWilliams Testimony, *Houston Hearing*, p. 259.

[149] Frank Scafidi, chief inspector, Internal Affairs Bureau, Philadelphia Police Department, oral deposition, May 10, 1978, at 14–15, Culp v. Philadelphia, No. 77–44 (E.D.Pa.)(hereafter cited as Scafidi deposition).

[150] Philadelphia Police Department, Directive 127 (Feb. 15, 1978).

[151] Philadelphia Police Department, Directive 127A (Feb. 15, 1978).

[152] Philadelphia Police Department, Commissioner's Log for 1978.

[153] Philadelphia Police Department, Directive 127A, Section I.A. (Feb. 15, 1978).

[154] *Id.* at Section V.

[155] Scafidi deposition at 17.

Affairs Bureau shall be responsible for investigating all citizen complaints of alleged police misconduct."[156] The IAB staff inspector assigned to the case is "to direct a thorough investigation of each complaint," and "he may not delegate the authority to direct the investigation."[157]

The IAB has a full-time staff of about 60 (including all ranks and several civilian employees)[158] to police a department of more than 8,000 uniformed personnel. In 1974 a study by the Pennsylvania Crime Commission considered this to be substantial understaffing of the IAB and noted that the staff was expected to attend to many tasks other than investigating police misconduct.[159] The Crime Commission pointed out that investigative personnel chosen to work in IAB had had no particular training for that work, but were drawn from the ranks of regular patrol officers.[160] The Crime Commission criticized the investigative approaches and techniques of the IAB for warning officers in advance that they were under suspicion of wrongdoing, enabling them to protect themselves against either departmental or external sanctions.[161] The IAB staff does not rotate. "[W]e have the same people until they either retire or [are] promoted out of the unit."[162]

Directives 127 and 127A were not only vague about who was to investigate which types of citizen complaints against police, they also lacked any procedures for investigating complaints, although they did explain the color of six copies of certain reports that were to go to a specified person or bureau.[163] The Pennsylvania Crime Commission also reported that techniques of investigation used by the Philadelphia Police Department were not "aggressive" or "imaginative" in rooting out police corruption.[164]

Executive Order I-80 does address investigative procedure briefly. It provides, "Investigators shall attempt to obtain interviews with all participants in and witnesses to the incident which is the subject of the

[156] City of Philadelphia, Office of the Mayor, Executive Order I-80, sec. III-A (May 14, 1980).
[157] *Id.* at sec. III-B.
[158] Scafidi deposition at 6.
[159] Pennsylvania Crime Commission, *Report on Police Corruption and the Quality of Law Enforcement in Philadelphia* (March 1974), pp. 455, 476, 477, 479 (hereafter cited as *Pennsylvania Crime Commission Report*).
[160] Ibid., pp. 474, 480.
[161] Ibid., pp. 480-81, 512.
[162] Scafidi Testimony, *Philadelphia Hearing*, p. 166.
[163] For example, subparagraph 2. of sec II F., Directive 127, as amended, indicates the distribution of investigative reports on citizen complaints of physical and verbal abuse:

Investigation Report (75-49)
a. White—Reports Control and Review (with Transmittal Register)
b. Canary—District of Occurrence
c. Pink—Commanding Officer of the District of Occurrence Staff
d. Goldenrod—Staff Inspector Notified
e. Green—Divisional Inspector of the Divison of Occurrence
f. Blue—District Reporting (when other than District of Occurrence)—otherwise to Staff Inspector notified

[164] *Pennsylvania Crime Commission Report*, pp. 474, 488.

complaint unless an exemption for good cause is granted by the Commissioner in writing."[165]

In Philadelphia, the Commission found that police investigations of alleged police wrongdoing are often not as thorough as criminal investigations. An examination of incident reports and investigative files revealed that a bias is often evident from the initiation of misconduct investigations, since forms describing the incident usually identify the officer as the "complainant" and the victim as the "defendant." Frequently the incident is labeled with the alleged crime of the victim. For example, a police shooting may be classified on an incident report as "burglary." One officer shooting was labeled "sudden death," as if the incident to be reported were someone dying of cardiac arrest.

The extent of the investigations and the type of information pursued often show the same bias that the initial categories listed on the incident report suggest. For example, in the Philadelphia investigative files that were reviewed by Commission staff, the direction and emphasis of an investigation often focused on the alleged criminal act of the victim rather than on that of the police officer.

Although rather extensive investigations were conducted by the homicide division in officer shooting cases, evidence which might disprove the officer's version of the facts sometimes seemed to be ignored, while evidence to incriminate the victim was scrupulously sought and analyzed. Victims, if they survived, were frequently subjected to polygraph examination, but officers never were.

In the summary of the complaint investigation, the complainant's description of the incident is set forth under the heading "Allegation," while the officer's version is sometimes recorded under the heading "Facts."

It is seldom clear from the file what results were found by the investigation and whether these were reported or reviewed by anyone in the department. Some IAB files have brief, cryptic notes scrawled over the initials of the chief inspector, but a formal reporting system is not evident.

Civilian complaints are often termed "cleared by arrest." This is a police terminology used when an arrest is made in a criminal investigation. However, in the IAB case it refers not to the clearance of the complaint by arrest of the accused officer; it appears to mean that the investigation of the complaint has been dropped following the arrest of the complainant on charges stemming from the incident which gave rise to the complaint. This practice seems to imply that there is no validity to a complaint against a police officer if the complainant is arrested.

An attitude that all complainants are criminals and that all criminals file false complaints pervades internal investigations. Commissioner O'Neill

[165] City of Philadelphia, Office of the Mayor, Executive Order I-80, sec. III C. (May 14, 1980)

stated that the majority of those who initiate civil suits against the department have prior criminal histories and called a sample of 10 of these "thugs and robbers and bums of the worst sort," and later said, "Very seldom do we shoot some innocent person."[166] A staff inspector wrote in one IAB report, contained in files reviewed by Commission staff, "If the officers did in fact say everything attributed to them it was not vile profanity towards the woman. . . .This complainant and her husband are active drug peddlers. . . .No further action is deemed appropriate in response to this complaint."

Investigators attach more credence to statements by police officers than they do to the word of civilians. In one case, three eyewitnesses corroborated a brutality complaint against an officer who denied the allegations. The officer's partner supported his statement. The staff inspector wrote, "It is felt that the witnesses to this arrest were not in a position to observe accurately what happened. . . .It is the belief of the undersigned that the officers acted properly and that no further action is warranted."

In the case of an alleged beating, the officer claimed the victim "stumbled and fell to the pavement." The staff inspector reported, "Since the injuries are consistent with the fall this subject took while being apprehended, it is the opinion of the undersigned that this case should be closed with the submission of this report."

Another brutality complaint against the same officer was investigated with the result that the IAB inspector found the police action "appropriate" and the complainant "somewhat unbalanced." In this case the inspector did not even write his interview with a second policeman because it "simply corroborated everything" the first officer had said.

According to an allegation in one complaint against an officer, he entered the complainant's home without a warrant, went upstairs, and dragged the complainant out of a bedroom, beating him with a blackjack. The officer admitted all of this. The complainant required four stitches in his head and received injuries to his face, legs, and shoulders. This complaint was termed "unfounded," an obviously erroneous classification, since even if the officer's conduct had been justified, the complaint would be "exonerated," not "unfounded."

Directive 127 established a 45-day time limit to complete the investigation and report of a citizen complaint of physical or verbal abuse.[167] A random sampling of 40 Philadelphia Police Department investigative files revealed that in 17, or 42.55 percent, this time limit was not met. Directive

[166] O'Neill Testimony, *City Council Hearings*, pp. 731, 766.
[167] Philadelphia Police Department, Directive 127, sec. II D. (Feb. 15, 1978).

127A, which covered a majority of complaints, carried no time requirement.[168] The new executive order also provides a 45-day limit, which can be extended for good cause by the commissioner, "who shall notify the complainant and any police officer involved in the matter in writing of any grant of additional time and the reasons."[169]

The Philadelphia Police Department kept records and compiled complaint statistics that appeared to have little meaning or use. The monthly statistics on civilian complaints listed numbers of complaints only, with no indication of dispositions or any other relevant information. The commissioner's "log" listed complainants but not officers, indicated date of the incident that led to the complaint, but no dates for either the receipt of the complaint or the completion of the investigation, making it impossible to determine whether the 45-day limit had been met. Further, there was no indication when or whether the results of the investigation were reported to the commissioner, to the complainant, or to the involved officer.

The statistics maintained were apparently not used to ascertain patterns of police misconduct or to identify systemic problems. In response to a question about this, Chief Inspector Frank A. Scafidi replied, "We make no specific studies. We make continuing evaluations and scrutiny of each case with regard to particular officers or particular areas."[170]

Executive Order I–80 requires that investigative reports and files be maintained for 5 years and that they "shall be indexed by the name of the complainant, the victim and police officer(s)."[171]

Philadelphia has an unusual practice of placing officers being investigated for wrongdoing on temporary assignment in the office conducting the investigation. For example, an officer who has committed a fatal shooting will be assigned to the homicide bureau pending the investigation by homicide into that shooting incident. Chief Inspector Joseph Golden of the Detective Bureau was questioned about this procedure:

MR. GOLDEN. You might call it policy; you might call it practice. What it really does, it makes available for additional questioning if something—certainly, the investigation is not closed in one day or one tour. And the normal practice would be to leave that man at the homicide division until we're satisfied that we've pretty much completed the investigation. In other words, he's available. If we heard from some witness some new fact, the policeman would be readily available to us to ask him what about so and so, and that's the main reason why it's done. But it is done; yes, it is.

COUNSEL. It has been suggested that that could raise certain problems with respect to the closeness and sympathy which might arise and the prejudice that it might create with respect to the investigation. Do you have any sense that that might be a problem?

[168] Philadelphia Police Department, Directive 127A. (Feb. 15, 1978). Of 673 civilian complaints recorded on the commissioner's log for 1978, approximately 65 percent were categorized as 127A-type complaints.
[169] City of Philadelphia, Office of the Mayor, Executive Order I–80, sec. III D. (May 14, 1980).
[170] Scafidi Testimony, *Philadelphia Hearing*, p. 162.
[171] City of Philadelphia, Office of the Mayor, Executive Order I–80, secs. VI, A–B. (May 14, 1980).

MR. GOLDEN. I see no problem whatsoever in that regard. I don't see any prejudice at all in these investigations. I see a thoroughly objective investigation, counselor, and I've been associated with them for a long while.[172]

Commissioner O'Neill also testified in defense of this practice.

MR. O'NEILL. We're talking about people that are put into nonsensitive assignments, police shooters, if you will, who are assigned to the homicide division for a period of time. I think it makes sense because they are readily available to the homicide investigator. . . .

VICE CHAIRMAN HORN. Well, don't you think it's reasonable for people to question that process? When you are investigating any other type of incident that is by a nonpoliceman, you don't invite them into the house and ask them to sit around the office and drink coffee with you and answer the telephone all day. Don't you think people can reasonably infer. . .that when you have an individual sitting around, answering the phone trying to be helpful, he's on a duty assignment. That pretty soon you know about Susie and the kids, or you know about all the personal problems. And isn't he really a heck of a good guy? And how tough can the investigation be? You don't do that for a civilian you're investigating. I mean, how do you explain that?

MR. O'NEILL. As I said earlier, there were two distinct differences. The civilian will probably be under arrest. . . .and/or the civilian probably wouldn't want to spend his time with us.

VICE CHAIRMAN HORN. Well, don't you think it's a good question that if you had a civilian in similar circumstance, and he would probably be under arrest, a taxpayer, a citizen in Philadelphia could reasonably ask, "Why isn't the policeman under arrest while the investigation is going on?" I mean, have we got a double standard of justice? If you're a member of the force, you get to answer the phones and serve coffee. But if you're not a member of the force, you get thrown in jail while the investigation is going on.

MR. O'NEILL. It's much deeper than that. It's not an either/or situation.

VICE CHAIRMAN HORN. Well then, educate me.

MR. O'NEILL. I sure will. We've got a —each and every case, incidentally, stands on its own merits. If you've got something that's clearly black and white, no problem; here it is. This man shot this man. He's coming out of the tavern. He's in an off-duty situation. He's not taking police action. That individual will be arrested. If you've got a situation in which the policeman was taking police action, then we put together everything that we possibly can to make a determination on whether or not he should be arrested or the assailant should be arrested. We've got two different situations. As I said earlier, the policeman is doing his duty. I don't know of any taxpayer that pays a private citizen to shoot somebody or apprehend any criminal.[173]

Dispositions and Sanctions

The most thorough mechanisms for detecting officer misconduct will be without effect unless the proven misconduct is accompanied by appropriate sanctions that are both swift and certain. The Police Foundation addressed the issue of discipline in its report on deadly force:

What happens to the officer who indefensibly disobeys a policy? If nothing happens (or nothing very dramatic), the policy is just another piece of paper among many. If such an

[172] Joseph Golden, chief inspector, Detective Bureau Headquarters, Philadelphia Police Department, testimony, *Philadelphia Hearing*, p. 162.
[173] O'Neill Testimony, *Philadelphia Hearing*, pp. 214–15.

officer is fired, suspended, demoted, or otherwise seriously disciplined, the disciplinary action is an important indication that the policy is in fact a policy.[174]

The ultimate determination of whether the facts are sufficient to prove misconduct usually rests with the chief police executive, as does the decision regarding the nature and degree of disciplinary sanctions to be applied.[175] Factfinding and disciplinary boards can offer advice and make recommendations, but the responsibility for the final determination is usually the chief's.

Finding 3.4: Once a finding sustains the allegation of wrongdoing, disciplinary sanctions commensurate with the seriousness of the offense that are imposed fairly, swiftly, and consistently will most clearly reflect the commitment of the department to oppose police misconduct.

The National Advisory Commission on Criminal Justice Standards and Goals suggests the following categories for the disposition of complaints: sustained, not sustained, exonerated, unfounded, or misconduct not based on the original complaint.[176] A finding of "sustained" means the facts support the allegation of the complaint, while a finding of "not sustained" means that insufficient facts were found to prove or disprove the allegation. A finding of "not sustained" might result when the only evidence is the officer's word versus the complainant's. "Exonerated" means the alleged conduct did in fact occur but it was excused or justified by the circumstances, or that it was not illegal or not a violation of department rules and policies. "Unfounded" means that no factual basis exists for the complaint. In the event that an investigation finds wrongdoing but not of the kind the complaint alleged, the finding of "misconduct not based on the original complaint" is used.[177] Philadelphia's Inspector Scafidi estimated that 7 to 10 percent of the internal investigations into complaints of excessive force conducted in that city each year result in "sustained" findings.[178]

The Houston Internal Affairs Division's control log for 1978 lists a total of 118 "firearms" investigations—which would include anything from complaints of unnecessary and improper display of firearms to discharges of weapons causing injury or death. None of the 118 was listed as "sustained." In the same year the same source recorded IAD investigations of 149 complaints of excessive or unnecessary physical force. Only 6 of these were sustained. During the same period, 210 investigations *did* sustain allegations of misconduct. These 210 were, except for the 6 for

[174] *Deadly Force*, p. 65.
[175] *National Advisory Commission Report*, pp. 474–75, 487–88; *Police Administration*, p. 200.
[176] *National Advisory Commission Report*, p. 487.
[177] Ibid., p. 488.
[178] Scafidi deposition at 32.

excessive force, generally for internally-generated complaints such as "accident with police vehicle," "not wearing hat," "late for roll call," "missing court date," or for minor complaints from civilians such as "slow police service," "rude manner," and other "Class II" complaints.[179]

Some departments include in their rules manuals a schedule of penalties for specific offenses, but the Police Foundation considers this to be generally undesirable, except for very minor infractions, because of the complexities of most incidents and the need to consider the prior conduct of an individual officer.[180] The Foundation advocates continuity of membership on disciplinary boards so that penalties will be equal and consistent.

> In debating which penalty to apply, police officials should bear in mind the basic philosophy behind using penalties at all. Properly administered, punishment should help eliminate both the behavior and the individuals that are the cause of criminal misconduct, serious administrative misconduct, or repeated acts of minor misconduct in the force. Stringent penalties for the guilty makes clear to the entire force and the community that serious misconduct is not tolerated.[181]

The available options include not only several degrees of penalties, but also, depending on the nature and severity of the offense and the officer's prior record, such alternatives as reassignment, psychological counseling, and retraining. Some typical sanctions employed by police agencies include oral reprimands, written letters of reprimand (usually placed in the officer's personnel file), suspension, demotion, and dismissal. Some departments may also take away vacation time, require extra duty hours, or impose monetary fines as penalties.[182]

An oral reprimand is probably only appropriate as discipline for first offenses of minor infractions of departmental rules, especially where no written record is kept of such reprimands. This makes it of questionable use in disciplining any misconduct about which a civilian complaint has been made. Because there is usually no record of such discipline, it has little deterrent effect with respect to other officers and does not serve to emphasize that breach of departmental policies will not be tolerated. A written reprimand that is placed in the personnel file, although not much of a penalty, does serve as notice "to the officer involved and others on the force that certain conduct is viewed with disapproval."[183]

Suspension is a useful disciplinary sanction because of its flexibility and because it is sure to be widely noticed and therefore have a valuable

[179] Houston Police Department, Internal Affairs Division, Complaints Log for 1978, reviewed by Commission staff in July 1979.
[180] *Police Administration*, p. 196.
[181] Ibid., p. 199.
[182] Ibid., p. 197.
[183] Ibid.

deterrent effect. Flexibility in the number of days an officer can be suspended is limited by law in some jurisdictions.[184] Loss of pay during suspension makes it an effective punishment, but the effect may be too severe, particularly when the officer's family suffers extreme economic hardship from the loss of income. Alternatives to suspension that will avoid the monetary loss of normal income include losing paid vacation time or serving extra duty hours. These "[punish] the officer in a way that does not cause dependents financial hardship, and [repay] the government for some of the direct and indirect costs of the officer's misconduct."[185]

Demotion, loss of position and its accompanying loss of income, is a severe penalty available against supervisors. "Some police administrators argue that any individual whose conduct justifies demotion should simply be dismissed from the service."[186] This is probably true in cases of serious misconduct. It must be recognized, however, that some command officers lack supervisory skill and cannot handle the stress of a supervisory position, but they may perform well at a level with less demanding responsibilities or with duties of a different type. In such cases, demotion may be preferable to dismissal as a means of discipline.

Dismissal is the ultimate administrative penalty, the most severe disciplinary sanction. It does more than punish; it removes the offender and thereby prevents any further violations and abuse of police authority by that individual.[187]

Philadelphia's Disciplinary Code, a schedule of possible penalties for given misconduct, is intended as a guide for the Police Board of Inquiry (PBI). Penalties recommended by the PBI are to be within the stated limits, but the commissioner may impose greater or lesser penalties at his discretion.[188]

The category of smallest penalty, "reprimand to five days suspension," is listed for first offenses for infractions such as "idle conversation with known gamblers while on or off duty";[189] intoxication while "off duty and out of uniform";[190] "failure to remove keys from patrol car when unattended";[191] "eating, other than at prescribed time";[192] "smoking in public when in uniform, other than between hours of 10 p.m. and 7:00 a.m.";[193] and "reading newspapers, books, or periodicals while on duty."[194]

[184] Houston is restricted by the City of Houston Civil Service Commission Rules to giving a maximum of 15 days suspension. Any number of days above 15 will be considered an "indefinite" suspension, which is, in effect, a recommendation for dismissal. Rules 1(qq) and 13 secs. 2,5; Houston Code sec.12-182(b). *See also,* City of Wichita Falls v. Harris, 532 S.W.2d.653,660(1975).

[185] *Police Administration,* pp. 197, 198.

[186] Ibid., p. 199.

[187] Ibid., p. 198.

[188] City of Philadelphia, Policeman's Manual, chap. V. (1973).

[189] *Id.* at sec. 1.20.

[190] *Id.* at sec. 2.20.

[191] *Id.* at sec. 4.60.

[192] *Id.* 5.42.

[193] Id. at sec. 5.45.

[194] *Id.* at sec. 5.69.

The lightest penalty is also prescribed for the first offense of "flagrant misuse, handling or display of firearms."[195] This is the only disciplinary category that refers to the use of firearms. By contrast, the most severe penalty, immediate dismissal for first offense, is prescribed for the following: "failure to possess and maintain a current and valid Pennsylvania motor vehicle operator's license";[196] "interference with police radio broadcasting and tampering with police radio equipment";[197] and "willfully damaging police department property and/or equipment."[198]

Upon receipt of the investigative report, Philadelphia's police commissioner may refer the case to the Police Board of Inquiry for its advisory opinion:

> The Police Board of Inquiry is a creature of the police commissioner in that it has no legal status or basis. It is a unit run by a police lieutenant [whose] title is judge advocate. It handles both internal wrongdoings or alleged wrongdoings of department violations and those cases involving civilian complaints which are put before it.
>
> The police commissioner has total responsibility for discipline under our City Charter form of government. He can take direct action against an accused officer or he can refer it to the Police Board of Inquiry.
>
> ---
>
> They have the power to hear the case. The judge advocate presents the case to them. It is a three man board composed of at least one officer of equal rank of the accused and two of successively higher ranks.
>
> ---
>
> And the board members are not permanent members. They are selected from the field. They have the power to recommend to the police commissioner their findings. He has the power to modify, overturn, accept.[199]

A complainant may have counsel present to advise him, but counsel cannot examine the officer; that is done by the "judge advocate." The accused officer is similarly entitled to counsel.[200]

Many cases never reach the PBI; either the commissioner does not choose to refer those cases to the board, or an accused officer may plead guilty when charged with a violation and waive a hearing before the board.[201] For the 8-year period 1971–1978 at least 3,600 complaints of physical or verbal abuse were received from civilians by the Philadelphia

[195] *Id.* at sec. 5.18.
[196] *Id.* at sec. 5.84.
[197] *Id.* at sec. 5.81.
[198] *Id.* at sec. 5.80.
[199] Scafidi deposition at 35–37.
[200] *Id.* at 38–39.
[201] Memorandum 71–16 (Sept. 8, 1971).

Police Department (one observer estimates the number was probably twice as great).[202] The number of such complaints that reached the PBI during the same 8-year period was 410, a maximum of 11 percent, or possibly as little as 6 percent.[203]

It has been alleged that cases sent to the PBI by the commissioner are ones in which the department wishes to discipline. The Pennsylvania Crime Commission provided the following analysis in its 1974 report:

> The Police Commissioner appears to refer to the Board only those cases in which either he has already made up his mind about guilt or in which the evidence is extremely strong. In 1971, according to a resume of the year's activities compiled by the Police Board of Inquiry, the Board disposed of 325 cases. Out of that number there were only 29 not guilty verdicts, of which 24 were a direct result of the civilian complainant not appearing before the hearing. In 1972, in a similar resume, the Police Board of Inquiry reported that it had disposed of 550 cases. Of those, 37 resulted in a not guilty verdict. Of those 37, 13 not guilty findings were the result of the civilian complainant not appearing for the hearing. Thus, where the case reached a hearing on the merits, only 29 of the 875 cases (3%) resulted in an acquittal. These statistics support the view of many police officers that the Board is not an impartial tribunal but rather an administrative rubber stamp. A United States District Court found as a fact in a recent case that "[i]t is generally believed within the Department that the Commissioner refers cases to a board of inquiry for trial only if he is already convinced that the accused officer is guilty and should be disciplined." If the Commissioner should disagree with the Board's conclusion he retains the discretion to ignore its recommendation.[204]

Commissioner O'Neill testified before the city council that the PBI had found accused officers "guilty" in about 79 percent of the physical abuse cases it heard in 1978 (i.e., in 26 out of 33 cases).[205] These 33 cases heard by the PBI did not originate from citizen complaints but apparently arose internally.[206] By contrast, only 5 of 80 civilian complaints of physical force (6 percent) were "sustained" by the IAB.[207] The high percentage of guilty findings by the PBI tends to confirm the Pennsylvania Crime Commission's analysis quoted above. In testimony before the city council these figures were stressed as evidence that the Philadelphia Police Department does an effective job of policing itself.[208] Unfortunately, these figures are very misleading because of the high number of cases that never reach the

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[202] Spencer Coxe, executive director, American Civil Liberties Union (Philadelphia), letters to Ian Lennox, executive vice president, Citizens Crime Commission (Philadelphia), Dec. 29, 1978, and Jan. 11, 1979; Ian Lennox to Spencer Coxe, Jan. 9, 1979.

[203] Coxe-Lennox correspondence of Dec. 29, 1978, Jan. 9, 1979, Jan. 11, 1979.

[204] *Pennsylvania Crime Commission Report,* p. 473 (footnote omitted). The case cited is COPPAR v. Rizzo, 357 F. Supp. 1289, 1293 (E.D. Pa., 1973). In that case, civil rights actions were brought alleging widespread violations of the legal and constitutional rights of minority citizens by police. The court ordered the mayor and police officials to formulate and submit a comprehensive program for dealing with civilian complaints alleging police misconduct.

A report by the Public Interest Law Center of Philadelphia (PILCOP) in 1975 concluded, "Hard evidence condemns the PBI and Commissioner O'Neill for their repeated failure to take disciplinary action against policemen who have misused a firearm." PILCOP, "A Study Of The Use Of Firearms By Philadelphia Policemen From 1970 Through 1974" (Apr. 1, 1975), p. 23. The report stated that in the 2-year period 1972–1974, only 6 of 170 cases of police shootings (3.5 percent) even came up to the P.B.I. for hearing; in four of these the officers were dismissed outright without a hearing. Ibid., pp. 20–21.

[205] O'Neill Testimony, *City Council Hearings,* p. 730.

[206] Ibid.

[207] Ibid.

[208] Ibid., p. 732.

PBI and in which no discipline is imposed. It seems safe to assume also that the majority of PBI cases are internally-generated matters of discipline rather than cases resulting from civilian complaints.

At the city council hearings in December 1978, there were some questions raised about the extent to which hearings before the police board of inquiry are open to the public. Commissioner O'Neill said that those involved in the proceedings know they are scheduled, although the sessions are not held regularly. He also stated that the press representatives at police headquarters also know of the hearings and could attend and that some outside organizations had attended PBI meetings.[209]

No adjudicative or factfinding board exists within the Houston Police Department for the purpose of conducting hearings into the complaints of officer wrongdoing. Once the investigation is complete, whether conducted by internal affairs or by the officer's own division, a report with recommended findings is sent to the chief of police. The chief reviews the investigative file and the report made and determines whether to adopt the recommended disposition.[210] If the chief accepts a recommendation of "Sustained" or "Misconduct Not Alleged in Complaint," he may ask the Administrative Discipline Board to review the investigation and make a recommendation for appropriate discipline.[211]

The Administrative Discipline Board, a committee consisting of the three assistant chiefs of police, was initiated after the formalization of the internal affairs division by Chief Caldwell. The primary responsibility of this committee is to assure uniformity of discipline throughout the department. When assigned a case by the chief, the board reviews the investigative file and the "cover sheet" (containing personnel data on the officer, including his discipline record) from the officer's personnel file, and makes a recommendation to the chief of what it considers appropriate discipline. It is not the responsibility of this committee to determine "guilt," as that will already have been determined before it receives a case. Only complaints that have been sustained are submitted to the board for its recommendation on disciplinary action to be taken. Neither of the assistant chiefs interviewed could estimate how often the chief accepts, rejects, or modifies the board's recommendations.[212]

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[209] Ibid., pp. 783–84.

[210] Manual of the Houston Police Department, secs. 3/22.02h–k. (Feb., 1978).

[211] *Id.* at sec. 3/22.021; Recommended Organization and Standard Operating Procedures for Houston Police Department Internal Affairs Division, sec. X.A 7 c.; B.K. Johnson and R.G. McKeehan, assistant chiefs, Houston Police Department, interviews in Houston, Tex., May 10, 1979.

[212] Johnson and McKeehan Interviews, May 10, 1979.

Between May 1977 and March 1979, 28 Houston officers were disciplined for 18 incidents of excessive or unnecessary physical or deadly force.[213] The first of these, the Torres beating and drowning[214], resulted in the "indefinite suspension" (dismissal) of 5 officers. The Webster[215] shooting resulted in the indefinite suspension of 5 other officers. Other disciplinary action and the offenses for which they were imposed included 15-day suspensions for the unnecessary display or discharge of firearms (4 instances), 10-day suspensions for mistreatment of a prisoner (2 occasions), and 5 days for discharging a firearm at a moving vehicle. Three-day suspensions were given for unnecessary display and discharge of firearms, discharge of firearm at moving vehicle, and discharge of firearm at fleeing suspect (2 officers). One-day suspensions were given for unnecessary display of force (2 officers), attack on a prisoner, unauthorized discharge of firearms, unnecessary display of firearms, improper display of firearm, and unnecessary force.

During the Philadelphia hearing, the assistant district attorney in the police brutality unit was asked whether he knew of any instances where Philadelphia police officers who had violated department policies or Pennsylvania law had not been disciplined by the department. He responded:

> Yes. Every case that we've arrested in, with the exception of one, there has been no disciplinary action taken. These cases involve everything from murder on down to aggravated assault, simple assault, reckless endangerment.
>
> In the one case where there was disciplinary action, it appears that the disciplinary action came about as a result of a mistake on the part of the police commissioner, who misunderstood what our intentions were with regard to prosecution. He was of the opinion that, if he would take disciplinary action in this one particular case, that there would be no prosecution; and he, in a sense, expressed great outrage that, once the officer was disciplined, we went ahead and arrested him.
>
> I might add parenthetically that the case I'm talking about is the case of the police officer who crashed the local hotel and throttled the assistant manager and assaulted several other people. And the punishment that was given in the case was a 30-day suspension with pay. The officer elected not to take his pay, however.[216]

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[213] "Summary of Disciplinary Actions for Excessive Use of Force" (April 1979), compiled by Dennis Gardner, senior assistant city attorney, Houston, Tex.

[214] In 1977 six Houston police officers were involved in the beating and drowning of 23-year-old Joe Campos Torres. The officers had arrested Torres in a barroom fight and had taken him to an isolated spot where they beat him severely. When the officers took Torres to police headquarters to book him, the supervisor at the jail refused to admit him because of his injuries, and ordered the officers to take Torres to a hospital. Instead, the officers took him to a 22-foot cliff from which they pushed him into a bayou. His body was found 3 days later. *The Washington Post,* May 18, 1978, p. A8.

[215] Randall Webster, 17, was killed by a police bullet in 1977 after the stolen van he was driving crashed during a high-speed chase. An officer said he shot the youth in self-defense and a .22 calibre pistol was found near Webster's body, but the pistol was later traced to the police property room, having been used as evidence in an earlier case. Two of the officers involved were ultimately convicted in Federal court of a coverup conspiracy in planting the gun to make it appear that the police shooting was in self-defense. *Houston Post,* May 10, 1979, p. 24A.

[216] George Parry, testimony, *Philadelphia Hearing,* pp. 84–85.

In testimony before this Commission in September 1980, Assistant Attorney General Drew Days III discussed a well-known instance when the Philadelphia police department failed to discipline officers convicted by the Federal courts:

> We prosecuted six homicide detectives for [systematically] forcing confessions out of people who [were] charged with killings. They were convicted; their convictions were affirmed on appeal. They engaged in the most horrendous activities in exacting and extracting confessions from people, in one instance in question a false confession. The mayor. . .kept the officers on the force, promoted one of the men who had been convicted, and asserted they were innocent until proven guilty at the Supreme Court level.[217]

In Houston the chief of police has disciplinary power to suspend an officer for up to 15 days or to indefinitely suspend. He also has apparent authority to reassign or transfer employees within the department. This is the limit of his major disciplinary power.[218] In the period from January 1977 through April 1979 a total of 26 officers were suspended for a collective sum of 221 days for misuse of firearms, 10 officers were suspended 46 days for "misconduct" (not otherwise defined), and 9 were suspended a total of 41 days for use of unnecessary force. A total of 165 officers were suspended 423 days for other reasons. During the same period, 26 officers were indefinitely suspended from the department for reasons of misconduct, violation of department rules, or criminal acts.[219]

Finding 3.4a: Less severe action such as reassignment, retraining, and psychological counseling may be appropriate in some cases.

Although reassignment may sometimes be an appropriate corrective measure, a study on police personnel cautions that transfer should be used rarely for discipline, because of the risk of labeling some assignments as punishment and because it usually means merely moving a problem around rather than trying to correct it.[220]

In specific instances alternative measures may also be preferable to imposing sanctions, or they may be useful in conjunction with some of the penalties already discussed. These include psychological evaluation and counseling and some types of retraining, especially in firearms use.

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[217] Drew Days III, Assistant Attorney General, Civil Rights Division, Department of Justice, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Sept. 16, 1980, transcript, p. 118.

[218] Tex. Rev. Stat. Ann. art. 1269m, secs. 16, 20 (Vernon 1963 & Supp. 1980); Houston Code, Ch. 12, art. II, rules 15, 16; City of Houston Civil Service Commission Rules Governing Members of the Fire and Police Departments, rule 13 (1952); David Beck, Chairman, Civil Service Commission, interview, Houston, Tex., Aug. 22, 1979; Dennis Gardner, senior assistant city attorney, interview, Houston, Apr. 3, 1979. However, the chief may "pass-by," upon written justification, names submitted to him for promotion. With the exception of immediate office assistants, the chief has no power to name ranking commanders, although he may assign or reassign them among command positions.

[219] Statistics obtained from "Houston Police Department Disciplinary Action," monthly records, January 1978—April 1979. The 1978 monthly records also contain data for the corresponding monthly periods in 1977.

[220] *Police Administration,* p. 197.

Retraining can be a useful mechanism for correcting the attitudes and behavior of officers who violate departmental policies.[221] Because misconduct that involves physical abuse or deadly force is a complex problem, the causes of which vary, one retraining program for all officers may be largely ineffective.

According to a recent police study, there is one local department, the New York City Police Department, that has implemented a retraining program which addresses the needs of individual officers:

> In New York City, the training academy receives officers on a referral basis from the personnel bureau of the department. Counselors from the academy develop individual retraining programs (averaging three weeks in length) after initial diagnostic interviews. Officers involved in excess force or questionable shooting incidents are given a review of probable cause standards, the law of search and seizure, and the department's use-of-force policies.[222]

Some officer retraining is provided by the Philadelphia Police Department. In testimony before the city council, Philadelphia Police Commissioner O'Neill stated that retraining may occur after instances of firearms discharge:

> When, as you say, the gun goes off. Then we look at the thing. And then if we believe that this individual needs additional training, he is sent up to the Police Academy to Chief Inspector Bridgeford and is given additional training, training in the use of firearms and the actual firing of them, and most specifically in the safety aspect, in when to use it and why and so forth.[223]

In other testimony, the commissioner was asked whether there "is anything we could do or suggest that might increase the sensitivity of the police officer or police officers so that we can cut down on this verbal abuse, the nonserious matters?"[224] He replied:

> What we do. . .when we run across an individual whom we believe needs a little bit of special attention, Chief Scafidi advises his commanding officer, usually through the deputy commissioner, and then we give him that additional training which he needs. Sometimes that additional training is nothing more, really, than a bit of a sitdown with the Chief Inspector and/or his designee or with someone designated by the Deputy Commissioner.[225]

With respect to psychological counseling, Philadelphia provides its officers with some assistance. While the Philadelphia Police Department has a staff psychologist, he is an educational, not a clinical, psychologist,

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[221] *Effective Police Discipline*, pp. 75–76.

[222] *Deadly Force*, p. 101.

[223] O'Neill testimony, *City Council Hearing*, pp. 765–66.

[224] Ibid., p. 756. Question by Councilman Johanson.

[225] Ibid., pp. 756–57. Chief Inspector Scafidi also testified during the Commission's hearing in Philadelphia that he sometimes recommends counseling, "less sensitive" assignments, or training. However, he indicated having no information regarding what becomes of such recommendations. Scafidi Testimony, *Philadelphia Hearing*, p. 175.

and it appears that his primary responsibilities relate to the initial testing of recruits.[226] A police counseling unit is available to officers on the force, but its function appears to be almost exclusively related to the treatment of alcoholism.[227] No inhouse assistance is routinely available for other types of psychological problems, but a department directive provides procedures for supervisors to request psychiatric care or evaluation of any member of their command under certain circumstances.[228]

Houston's psychological services provide inhouse counseling for officers and their families on a voluntary basis.[229] The director, Dr. Gregory Riede, has a policy of accepting voluntary clients only, not wishing to become a discipline agent for supervisors who might like to send their problem officers to him.[230]

While psychological evaluation and counseling or retraining may not be useful corrective techniques in the isolated misconduct case, they are more likely to be appropriate where repeated patterns are evident.[231]

Finding 3.5: "Early warning" information systems may assist the department in identifying violence-prone officers.

The careful maintenance of records is essential to making possible the recognition of officers who are frequently the subject of complaints or who demonstrate identifiable patterns of inappropriate behavior. In a survey of local police departments, one study found that several departments had developed early warning information systems "for monitoring officers' involvement in violent confrontations" and that those systems generally collected "some or most of the following items" on each officer:

1. The number of times an officer is assaulted or resisted in the course of making an arrest, as well as the number of injuries sustained by an officer or citizen in confrontations between the two. Arrest reports can,

[226] John Fraunces, psychologist, Training Bureau, Philadelphia Police Department, testimony, *Philadelphia Hearing*, pp. 184–85.

[227] Captain John Gallen, commanding officer, inservice training unit, Philadelphia Police Department, Memorandum and accompanying Report Evaluating the Police Counseling Unit, to Police Commissioner Joseph O'Neill, Nov. 1, 1977; Richard Bridgeford, chief inspector, Training Bureau, Philadelphia Police Department, testimony, *Philadelphia Hearing*, pp. 192–93.

[228] Philadelphia Police Department, Directive 109, (Feb. 20, 1974). According to Directive 109, there are three options for initiating the psychiatric evaluation of an officer. In "urgent" cases, the employee can be "transported to Philadelphia General Hospital. . .for examination and/or admission." Sec. II(A)(2)(a)(2). In "non-urgent" situations, the commanding officer can have the officer "seek psychiatric care on his own initiative" (sec. II(A)(2)(b)(1)) or, if the officer fails or refuses to seek counseling on his own, the commanding officer may "[r[equest that an appointment for a psychiatric examination be arranged through Police Personnel Officer" (sec. II(A)(2)(b)(2)). In the latter instance, the chief surgeon, after notification from the police personnel officer, will "set up an appointment for psychiatric examination for the employee." Sec. II(B)(1), (C)(1).

[229] Gregory Riede, director, psychological services, Houston Police Department, testimony, *Houston Hearing*, pp. 226, 234.

[230] Gregory Riede, director, psychological services, Houston Police department, interview in Houston, Tex., May 14, 1979.

[231] See additional discussion of psychological services in the sections that follow Findings 2.4 and 2.7 in chapter 2.

for this purpose, include a box to be checked if either party has been injured or received medical attention.

2. The number and outcome of citizen complaints lodged against an officer, alleging abusive behavior or unwarranted use of force. Many such complaints are groundless, and many that would be well-founded are never made; nevertheless, the accumulation of a large number of complaints against an officer may reveal something about that officer's style of policing.

3. The number of shootings or [firearms] discharges involving an officer.

4. The picture of the officer presented in supervisory evaluations, intradepartmental memoranda, letters, and other reports.[232]

The Police Foundation described two such systems. One is in California:

> In Oakland, copies of all arrest reports are sent daily to the conflict management unit. Personnel in the unit read these reports and isolate charges of simple resistance or delaying the actions of a police officer, battery on a police officer, or assault with a deadly weapon on a police officer. The elements of these offenses are isolated even if none was charged. Then the original reports are filed by officer (for all officers involved), and the basic information is recorded on punch cards. The conflict management unit is staffed by civilians as well as sworn officers. In addition to watching individual officers for signs of trouble, this unit also attempts, using the department's computer facilities, to correlate the occurrence of violent episodes with the facts about the officers involved—e.g., age, length of service, education, background, and physical stature.[233]

The other system is on the East Coast:

> The New York City Police Department has an early warning system that operates within its personnel division. The system was designed to identify violence-prone officers, but its jurisdiction has been broadened to include all officers judged to be in need of monitoring, support, counsel, or retraining (officers with drinking problems, for example). The early warning system contains a file on every member of the department, including such items as reports of abusive force, firearms discharge reports, citizens complaints, accusatory letters, information about civil suits pending against the officer, disciplinary actions, number and duration of sick leave reports, and information about off-duty employment.
>
> The officers who enter this information into the files daily are responsible for noting trends and for bringing an individual file to the attention of one of the sergeants in the office, who in turn decides if a profile of the officer should be developed. Such a profile includes performance evaluation reports, a complete disciplinary record, a history of assignments, an interview with the member's commanding officer, and the sergeant's recommendation for department action. The recommendation could be for no further action, close monitoring, retraining, treatment for alcoholism, or psychological counseling.[234]

Kansas City maintains a similar system but, in addition, cross indexes by supervisor's name "on the theory that particular supervisory officers may be tolerating abusive behavior."[235]

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[232] *Deadly Force*, p. 95.
[233] Ibid., pp. 95–96.
[234] Ibid., p. 96.
[235] Ibid., p. 97.

Sometimes, because of the lack of an early warning system, facts are not brought to the attention of the chief and other responsible administrators. Other times facts are known, but, because of a supervisor's poor judgment, are not heeded. For example, in police files reviewed by Commission staff it was discovered that one Houston officer resigned to avoid dismissal as a result of proven brutality. Within the space of less than a year, the following occurred: The officer asked to be reinstated; the request was denied by his former supervisor, who called him "a bad risk," as well as by the police chief and the civil service commission; he was reinstated after the former supervisor found him "repentant." After reinstatement, this officer shot a burglar and in subsequent years was repeatedly disciplined for misconduct, including a suspension for "brutality to prisoner."

Houston has a "History File" system[236] which could act as an "early warning" system. For every officer against whom a complaint is made or an investigation is conducted, a "History File," indexed by the name of the officers and complainants involved, is maintained by internal affairs. This file reflects the previous complaints against an officer, the nature of the allegations, whether they were sustained or received some other disposition, and the disciplinary action taken, if any. The file makes it possible to note when a particular officer is receiving a high number of complaints, but there appears to be no formal system for alerting anyone when this occurs.[237]

Houston also has a committee that could serve as an "early warning" tool, but Commission staff interviews with the members of this committee revealed that it is not used for that purpose. The Administrative Personnel Committee is made up of deputy chiefs appointed by the chief of police. The committee was originally created to operate on an ad hoc basis, and as of 1979 the meetings were still "at the instruction of the Chief of Police."[238]

The stated goal of the Administrative Personnel Committee is "[t]o objectively evaluate patterns of conduct by specific officers and to recommend appropriate courses of action to the Chief of Police."[239] The committee receives cases assigned to it by the chief of police, which normally have been referred to him by supervisors who feel that officers under their supervision demonstrate a pattern of behavior that may interfere with their effectiveness or ability to perform their job. The chief then refers the case to the committee, if appropriate. The committee meets

[236] The "History File" accompanies the investigative report when it goes to the Administrative Discipline Board to aid in the determination of appropriate sanctions. Recommended Organization & Standard Operating Procedure for Houston Police Department Internal Affairs Division, sections XI.B.1. and XII.F.

[237] In one case reviewed by Commission staff, the IAD lieutenant noted in his report that this was the third shooting incident in which the officer had been involved in a period of 8 months, but there was no indication in the file that any notice of that was taken by the chief or any other superior or that any action resulted.

[238] Bond interview, Apr. 5, 1979; Houston Police Department, General Order No. 300-5, (Dec. 7, 1977, as amended, Feb. 1, 1979.

[239] Houston Police Department, General Order No. 300-5 (Feb. 1, 1979).

only when a case is assigned to it by the chief—about four to five times per year.[240] The committee reviews the officer's file and then conducts an informal hearing, not open to the public, during which it questions the supervisor, fellow officers, and other persons able to supply additional information. The officer may be present but is not represented by counsel. The committee will sometimes recommend psychological evaluation prior to reaching its final decision on action, which could include counseling, transfer, demotion, or even termination.[241]

The types of problem behavior the committee has considered consist mostly of drinking problems and one or two cases that involved inability to perform satisfactorily because of domestic or other pressures.[242] Chief Lester Wunsche did not recall any instance of the committee reviewing patterns of excessive force or misuse of firearms in the 1½ years he had been a member. Chief Lem Sherman thought he might have reviewed a firearms case in his 2 years but was not sure. Chief Floyd Daigle recalled one instance of misuse of firearms but none of excessive force in his 2½ years.[243]

An officer in Houston shot and killed at least three persons and was also involved in other shooting incidents. Commission staff review of the investigative file revealed that this pattern was noted by one of the IAD lieutenants in his report to superior officers. No indication appears in the officer's IAD or personnel files that any action was ever taken by the department with respect to his shooting record. The case was not reviewed by the Administrative Personnel Review Committee.

Another officer received 12 civilian complaints in the 2-year period the IAD had operated, including 1 for a shooting death and 5 for excessive force. There was no indication that any notice was taken of this pattern.

In another Houston case, an internal affairs investigation into an allegation of excessive force, verbal abuse, and theft included a notation by the investigative lieutenant that the officer had had six other complaints against him in the space of 4 months, in addition to three letters of reprimand. The complaints consisted of three allegations of excessive force, two of false arrest, and one discharge of firearms. There is no record that this information was ever sent to the administrative personnel review committee or that the chief of police saw or acted upon this information, although the IAD lieutenant had commented in his report that this history " *could* be indicative of a problem calling for reassignment or training."

Frequent injuries incurred while making an arrest or handling a prisoner may indicate that an officer is quick to resort to physical force. An early warning system could alert superior officers to the propensity for violence

[240] Deputy Chiefs Lester Wunsche, Lem Sherman, and Floyd Daigle, Houston Police Department (current members of the Administrative Personnel Committee), interviews in Houston, Tex., May 10, 1979.
[241] Ibid.
[242] Ibid.
[243] Ibid.

and trigger closer scrutiny of the circumstances of such inquiries, with the goal of determining whether closer supervision, counseling, retraining, or transfer (or a combination of these) could promote officer restraint in the use of force.

The Philadelphia Police Department has routinely ignored these early warning signs, although the department is very safety conscious. It requires lengthy reports[244] whenever an officer is injured. These include date and nature of last injury before the one being reported, and these reports must be reviewed by supervisors, commanding officers, and, perhaps, by the Safety Review Board which frequently imposes discipline. A variation of this system could provide the opportunity for early warning of violence-prone officers.

Staff review of a select number of officers' files indicates that departmental policy has not focused on reducing violent behavior. For instance, in repeated instances of officer injury to wrists, fists, knuckles, and hands, the written comments by reviewing supervisors and commanding officers merely urge the subject officer to use his blackjack instead of his fists to avoid injury in the future. One Philadelphia officer received nine injuries while making arrests between October 1970 and August 1973, including an injured right hand on three occasions, a sprained right wrist twice, a contusion on the right hand, an injured left hand, and a fractured left hand. The latter injury was suffered while the officer was "subduing" a prisoner and "did not have time to draw blackjack."

Repeated numbers of civilian complaints against an officer may also provide early warning, especially when found in combination with a record of injuries. However, complaint files reviewed by Commission staff demonstrate the failure of the Philadelphia department to respond to this information. Instead, the department appears to have tolerated incredible records of proven misconduct. For instance, one officer was disciplined by the department on 9 different occasions and given a total of 122 days suspension, spread out over a 10-year period, before the officer was finally dismissed. His misconduct had included criminal behavior, assault and battery, attempts with intent to kill, reckless use of a firearm, and many repeated lesser offenses.

The Philadelphia department seems to have ignored increasing numbers of complaints against an officer. In files reviewed by Commission staff, it was learned that one officer received 11 complaints of physical and verbal abuse and arrest without cause, all within 3 years. In two instances no charges were ever filed against the arrestees, in one instance the citizen's complaint was withdrawn, and in another case traffic citations were canceled "for the sake of good public relations." The balance of the citizen complaints were called "unfounded," "not substantiated," and "not

[244] City of Philadelphia, "Employee Injury Report" (form 82-S-58).

sustained." No discipline resulted from the citizen complaints, although this officer was disciplined twice for internal charges involving "preventable" automobile accidents.

In another instance, where a supervisor and a commanding officer both recognized a problem early in an officer's career, it was apparently ignored by the department's administration. In 1970 the officer's immediate supervisor urged his transfer from a busy patrol unit because he was "a constant problem. . .in his relations with the public." The officer's attitude was described as "one which causes friction" and his contacts with the public were termed "extremely poor." The transfer was denied. There is no indication that the problems were attended to. The officer has been the subject of repeated complaints of excessive and abusive force.

Finding 3.6: When officers proven to have violated departmental policies are not seriously disciplined and even receive commendations, awards, or promotions for incidents of misconduct, it signals that the policies violated are not considered important by the department.

The Police Foundation notes that the messages a police agency may give in its handling of the use of deadly force are frequently confusing and conflicting. In one case cited in a police study, after two shots were fired through a closed door, an officer shot blindly through the door and killed a gunman:

> In this case, a review board (1) commended the officer for his actions, (2) arranged for his transfer to the helicopter unit because he had been involved in three fatal shootings, and (3) reprimanded him for using unauthorized ammunition. The officer's actions in this incident would not seem to reflect sound police practice. A department order describes a complicated procedure to be followed in such "barricaded gunman" situations and expressly discourages shooting blindly through doors or walls at an undefined target. Although transferring the officer to the helicopter unit probably eliminates the risk of involvement in a fourth fatality, this choice duty will inevitably be viewed by the officer and fellow officers as a "reward" for the shooting.[245]

That study further noted that this is hardly an isolated case:

> Police departments are not, as a rule, using discipline to convey the impression that firearms use is a high-priority concern. Department discipline in shooting cases seems lenient if not perfunctory in many cities. Apparent violations of both the letter and the spirit of department policies have been condoned either by outright justification or by extremely mild discipline. Officers even have been commended for shootings that appear to have gone against department policy or sound practice. The National Commission on the Causes and Prevention of Violence, in a task force report, made similar observations and noted that departments often impose far more severe sanctions on personnel who have violated minor internal regulations than on those who have been involved in questionable or unjustified shootings.[246]

[245] *Deadly Force*, p. 81.
[246] Ibid., pp. 81–82.

During the Commission's hearing in Philadelphia, it was learned that some officers convicted of criminal offenses were not dismissed or otherwise disciplined but, on the contrary, were promoted.[247] Of the 31 members of the Philadelphia police force who were investigated for using excessive or deadly force and whose files were reviewed by Commission staff, several were promoted following involvement in incidents of shootings or allegedly excessive and unnecessary use of force; nearly all of the rest were rated as having "promotional potential." One who shot five minority teenagers was promoted more than once. Significantly, at least 8 of the 31 officers investigated were promoted above the rank of patrolman, with one rising as high as inspector.

Commendations have been lavished upon many of the Philadelphia officers against whom high numbers of complaints have been brought. Occasionally these commendations refer to the same incident that gave rise to a civilian complaint. One officer shot 10 persons, 9 during 1974 and 1975, and 2 of the victims were killed. This officer received a total of 22 commendations over a 15-year period, and 15 of the 22 were given to him during 1974–1976. Performance evaluation comments referred to the officer's "excellent arrests" and noted, "It is apparent you keep busy on the street." He was also praised for his "aggressive manner" in carrying out assignments, noting that he was a leader in the squad. One comment noted that his "activity" had taken a "noticeable nose dive. . .since the two unfounded complaints" were made against him.

Another Philadelphia officer received an official letter of commendation for a fatal shooting and several years later was involved in another fatal shooting that resulted in a sizable civil judgment against the city. One officer with numerous complaints against him for unlawful arrests and brutality received 20 commendations. An officer with allegations against him of beatings and two shootings, one of them fatal, was commended 21 times, while another officer, who had shot and killed one person and received repeated complaints of severely beating others, was given a total of 30 commendations. Another officer received 23 commendations, one for a shooting. The circumstances of this shooting were almost precisely duplicated a few months later, except that the second shooting was fatal.

Allegations were repeatedly made that one officer had arrested persons without cause, taken them to an interrogation cell, and beaten them severely, often obtaining false confessions and denying basic due process rights. He received 14 commendations, most for just such incidents. Quotes from some of this officer's commendations and performance evaluations serve to illustrate:

During your expertly conducted interrogations, the defendant freely admitted his guilt

[247] John Penrose, first assistant U.S. attorney, Philadelphia, Pa., testimony, *Philadelphia Hearing*, p. 77.

As a result of your untiring investigatory efforts

. . .expertly conducted interrogation

During interrogation, both defendants admitted guilt. . .untiring investigative efforts

An intensive round-the-clock effort. . .and exceptional interrogative skills

Both admitted guilt during interrogations

Diligent and persistent investigation

Diligent and painstaking

Aggressive desire to carry out (assignments)

Requires little or no supervision

In addition to commendations, performance evaluations also show command approval, and even encouragement, for the patrol and arrest tactics used by other, allegedly brutal, subordinates. Regardless of the numbers of complaints against them or the frequency of their involvement in shootings, these officers consistently received "superior" or "outstanding ratings."[248]

Written comments frequently recognize aggressiveness and productivity as the ultimate praiseworthy goals, while emphasizing the lack of supervision required. Such comments are often coupled with an officer's record of civilian complaints of false arrests, brutal treatment of arrestees and prisoners, beatings, coerced confessions, and unjustified shootings.

A sample of written comments on performance evaluations of some of the purportedly most brutal and abusive officers demonstrates the encouragement provided for such conduct:

Your zeal has had a salutory effect

You go all out

Have very active drive and desire

aggressive interest and action in productivity

Being away from district work whetted your appetite. . . .This has resulted in a new look for the squad which had become soft and misdirected. Continue this attitude. . .and further advancement is guaranteed

You excel in making. . .arrests. . .you have the knack of being in the right place at the right time

Referring to a case where an officer was promoted following a court finding of wrongdoing, Philadelphia Commissioner O'Neill defended the

[248] From Commission staff review of files, it appears that these ratings were given prior to 1974, after which time only "satisfactory" and "unsatisfactory" ratings were given and no written comments were made.

decision to promote, stating that the court's views were not binding on the department.[249]

In Houston, too, commendatory letters, high performance ratings, and promotions sometimes appear to have rewarded officers accused of brutal behavior, or at least allegations of brutality did not prevent such rewards.

The Commission's review of police files revealed that 1 Houston officer with 17 commendations, including a Chief's Commendation, was the subject of several civilian complaints. One of these, which was sustained, was for the severe beating of a 17-year-old black youth, who suffered a concussion, fainting, blurred vision, an infected eye, and nosebleeds as a result. He required hospitalization and surgery.

One Houston officer shot four persons in 5 months, killing one. He received five commendations in the same 5 months, four of them related to shootings. This officer also had eight complaints against him, five for physical brutality. Two years after the shootings he was promoted to detective.

Civil judgments are apparently not considered proof of officer misdeeds. The Philadelphia deputy city solicitor told the city council:

> I am not so sure that because a jury comes back and says that a particular police officer is liable that that should per se require the police officer to be removed if, in fact, all other sources and parts of that investigation show that he acted properly. . . .
>
> I don't think you can make much out of the findings of a particular civil suit.[250]

On the other hand, investigators sometimes defer to the court system prior to adjudication. One IAB complaint investigation was dropped after the inspector learned that the complainant and officer had filed suits against each other, saying, "Since all parties will have their day in court, it is felt the matter should be settled there."

Finding 3.7: Police officers usually have the right to appeal disciplinary decisions although the procedures underlying that right vary significantly from department to department.

The IACP notes that "[t]he law of most states and federal due process standards require that an officer be allowed a hearing on disciplinary charges'[251] at some point before discipline is imposed:

> The hearing need not be conducted like a criminal trial, but basic due process must be afforded. At a minimum this means the right to call, confront, and cross-examine witnesses. . . .

[249] O'Neill Testimony, *Philadelphia Hearing*, pp. 202–03.
[250] Stephen Saltz, testimony, *City Council Hearing*, p. 770.
[251] *Effective Police Discipline*, p. 70.

The persons before whom the hearing is held must be neutral, impartial and detached from prior proceedings in the matter. . . .[i]t is not mandatory that there be a "board" at all; a single hearing officer is sufficient.[252]

The right to a hearing does not attach to minor forms of discipline, but rather where, as in the case of suspension, demotion, or dismissal, property interests are involved. State laws may vary and rights may be expanded by contract, such as a collective bargaining agreement. The hearing right usually does not apply to probationary officers who may be dismissed for any cause except when the discipline can injure the probationer's reputation and bar him from further employment.[253]

Philadelphia Civil Service Regulation 17 governs the right of an officer to appeal to the civil service commission a disciplinary action taken by the police department. An appeal may only be based on major sanctions such as dismissal, demotion, suspension without pay (which is limited to 30 days), or reduction in pay,[254] and appeals may be taken for any discipline over 10 days suspension.[255]

Both the officer and the department "have the right to be heard publicly and to present evidence, but technical rules of evidence. . .[do]. . .not apply."[256] The officer is entitled to legal representation if he wishes it.[257] The hearings are stenographically transcribed[258] and written findings and an opinion are issued.[259] Decisions of the civil service commission may be appealed and are subject to review by the Philadelphia Common Pleas Court.[260]

The Civil Rights Commission reviewed Philadelphia civil service appeals for 1976–1978 and found that a total of 33 appeals were brought by officers during the 3-year period. Of these, 24 were appeals from dismissals, 5 were from 30-day suspensions, 2 from 20-day suspensions, and 2 were from unknown sanctions. The 33 appeals resulted in 14 reinstatements and 1 reduction from 30 to 25 days suspension.[261] Six of these cases involved shootings or misuse of firearms. Of these, four officers were

[252] Ibid., p. 71.
[253] Ibid., pp. 70–71.
[254] City of Philadelphia Personnel Department and Civil Service Commission, Philadelphia Civil Service Regulations, (undated) secs. 17.01–17.05 (hereafter cited as Philadelphia Civil Service Regulations).
[255] *Id.* at sec. 17.061.
[256] *Id.*
[257] John D'Angelo, executive assistant, Philadelphia Civil Service Commission, interview, Jan. 24, 1979.
[258] Ibid.
[259] Philadelphia Civil Service Regulations, sec. 17.061.
[260] John D'Angelo, testimony, *City Council Hearing*, p. 37. The police department is represented at appeals hearings by the city solicitor, a potential conflict of interest, since the city solicitor is also legal counsel for the civil service commission and the city council and, in some instances, the police officer. D'Angelo interview; Sheldon Albert, testimony, *Philadelphia Hearing*, pp. 234–35.
[261] The statistics are derived from U.S., Commission on Civil Rights, "Summaries of Civil Service Commission Appeals Involving Police Officers, 1976–1978" (undated chart). The source materials for the information contained in the chart were opinions of the Philadelphia Civil Service Commission provided by John J. D'Angelo, executive assistant to the Civil Service Commission of Philadelphia.

reinstated, one appeal was denied, and one appeal was the 30-day suspension reduced to 25 days.[262]

In Houston the right of appeal for a disciplined officer is to the Firemen's and Policemen's Civil Service Commission, a legislatively created body[263] that regulates hiring, promotion, discipline, and termination of all uniformed and nonuniformed police personnel except the chief of police. Although commission regulations and State civil service law seem only to require a full-scale hearing when the discipline imposed is as severe as an indefinite suspension, the chairman indicated that the commission grants this right in almost every case if the officer requests it.[264] Unless the officer appeals to the commission, the discipline imposed by the department will stand.

The officer has 10 days to appeal an indefinite suspension (which would not defeat pension rights);[265] if the civil service commission fails to hold a hearing within 30 days of the filing of the notice of appeal, the officer is reinstated automatically.[266] After hearing the case, the civil service commission can decide to reverse the department's discipline and order reinstatement, it can affirm the suspension or dismissal, or it can reduce an indefinite suspension to a fixed period of time.[267]

Occasionally a minor disciplinary matter may be decided on submission of affidavits alone, but generally officers are accorded hearings with counsel and witnesses present. If the discipline is of the severity of an "indefinite suspension" (a euphemism for dismissal in most instances) a court reporter is present. These cases are reported and carry a written opinion, while hearings on less serious allegations become a part of commission minutes. The city attorney, on behalf of the department, has the burden of proof—a preponderance of the evidence—and must present his case first. Commission decisions are by majority vote. A decision will be explained in an opinion if it appears likely to serve as a precedent for future cases.[268]

A Houston officer may appeal an adverse decision of the civil service commission to the State district court.[269] The officer must then show that the commission acted without substantial evidence or may produce additional evidence not in existence at the time the commission heard the

[262] Ibid.

[263] Tex. Rev. Civ. Stat. Ann. art. 1269m (Vernon 1963 & Supp. 1980), known as the Firemen's and Policemen's Civil Service Act. Houston opted in 1948 for participation in the State system and established a municipal agency for that purpose. (Charter of the City of Houston, art. Va sec. 3, note).

[264] Beck Interview, Aug. 22, 1979.

[265] Tex. Rev. Civ. Stat. Ann. art. 1269m sec. 16 (Vernon 1963).

[266] City of Houston Civil Service Commission Rules Governing Members of the Fire and Police Departments, Rule 13 sec. 2(a)(Dec. 10, 1952).

[267] Tex. Rev. Civ. Stat. Ann. art. 1269mm sec. 16 (Vernon 1963).

[268] City of Houston Civil Service Commission Rules Governing Members of the Fire and Police Departments, Rule 13 secs. 2–3 (1952); Beck interview, Aug. 22, 1979; Gardner Interview, Aug. 22, 1979.

[269] Tex. Rev. Stat. Ann. art. 1269m sec. 18 (Vernon 1963 & Supp. 1980).

case. If the chief's decision is not upheld by the civil service commission, he may not appeal.[270]

A procedure that hampers a chief's efforts to bring disciplinary actions under the civil service law requires that the incident forming the basis of a violation must have occurred within 6 months of the disciplinary action taken by the chief.[271] Chief Caldwell was successful in arguing to the civil service commission that the *discovery* of the violation should initiate the operative 6 month statute of limitations for suspension.[272] However, officers who have appealed to the State district court on the basis of lapse of the statute of limitations have been reinstated on the force.[273] Chief Caldwell's argument on the 6-month rule provides a good illustration of the legal limitations on a chief's ability to deal with police misconduct as a result of the civil service law:

> [W]here one or more officers have acted in conscious concert to not only alter the evidence at the scene, but then to create and submit an untruthful and distorted version of what occurred, and finally to enter a conspiracy of silence, the Chief cannot be held to a six (6) months limitation, Under my theory, I have six (6) months from the time I learned the truth of what occurred to take appropriate disciplinary action. To interpret the Statute otherwise is to reward rather than to punish an officer who is able to cover his misconduct for a minimum of six (6) months.[274]

Another concern is that giving civil service commissions the power to overturn disciplinary actions of the police administration may weaken police discipline and the role of the chief in attempting to maintain internal order. One police study, though stating that such "arguments have proved largely unfounded," did note that:

> Chief executives responsible for operating organizations must retain the necessary authority to control their subordinates. If appeal of a disciplinary action imposed by the police chief is to be permitted, then it should be finally decided by the official to whom the chief reports—the mayor or city manager, for example. A review and recommendation by a central personnel office or a civil service commission might be beneficial as long as the final decision rests with the official who is to be held accountable for making the department function well.[275]

Conclusion

There are many internal mechanisms through which a police agency can prevent, reduce, and discipline incidents of officer misconduct. They include recruitment, selection, training, and psychological services, which were discussed in a previous chapter. But they must also include clear and precise written rules and policies, especially with respect to the use of

[270] Gardner Interview, Apr. 3, 1979.
[271] Tex. Rev. Stat. Ann. art. 1269m, sec. 16 (Vernon 1963).
[272] Although this opinion was overturned by a trial court, the Texas Court of Civil Appeals reversed, agreeing with the Civil Service Commission's application of the "six-month rule." Houston v. Dillon, 596 S.W.2d 212 (Tex. Ct. Civ. Ap. Houston 1980).
[273] *Id.*
[274] Memorandum from H.D. Caldwell, Chief of Police, to The Firemen's and Policemen's Civil Service Commission of the City of Houston Regarding Indefinite Suspension of P.D. Dillon, Apr. 28, 1978, p. 6.
[275] *Police Administration*, p. 196.

deadly force. Effective internal discipline depends as well on a thorough and open system for the processing and impartial investigation of civilian complaints of officer misconduct, and on the certainty of appropriate punishment. According to police expert Herman Goldstein, "The more effective and open a job the police do in managing their internal investigations, the less likely it is that there will be need for external review."[276]

Goldstein has addressed the complex problem of police departments' refusal to take responsibility and liability for the wrongdoing of individual officers. He argues that only when the agency is held to account for the wrongdoing will it move to prevent misconduct:

> If alleged wrongdoing is verified, police tend to defend the reputation of their agency by characterizing the wrongdoing as an isolated phenomenon not representative of their operations. This traditional response has contributed, perhaps unwittingly, to a prevalent attitude within police departments that wrongdoing is exclusively the responsibility of the wrongdoers; that the agency itself is exempt from any responsibility for the misconduct. It follows that, while sergeants, lieutenants, captains, and higher-ranking officers are held to strict account for investigating wrongdoing, they are rarely held to account for having failed to prevent the alleged misconduct in the first place or for having failed to uncover it on their own. Thus preoccupied with defending themselves in the community, police administrators in many jurisdictions have forfeited one of the oldest and potentially most effective means for achieving conformity with legislative and administrative promulgations—the simple process of creating through traditional administrative devices an agencywide sense of responsibility for the prevention of misconduct.
>
> A factor that may contribute to this lack of responsibility for the wrongdoing of others is that—aside from the negative publicity–the agency incurs no direct liability or other costs when wrongdoing is proved. This is in sharp contrast with the effects on an agency when its officers have automobile accidents. Damage to vehicles and personnel means direct costs in the form of budget expenditures for repairs and replacements; injuries may result in loss of manpower; and sizable claims may be filed against the city which are made known to the department because the funds for them are generally quite limited and closely watched. Confronted with these problems, most large police agencies and many smaller ones develop, as was previously noted, elaborate programs aimed at preventing accidents. Accidents are carefully reviewed. Drivers with a propensity for having accidents are identified, counseled, schooled, and in the most serious cases, grounded. Safedriving campaigns are launched within the agency. Refresher courses in defensive driving are offered to all personnel. The most common causes of accidents are described and analyzed in training programs and in safety campaigns. And awards are given to the department unit having the best safety record. Departments with such programs have accepted the responsibility for preventing automobile accidents. If administrators applied these same techniques to police wrongdoing, they could eliminate many current abuses.[277]

Thus, departments that are serious about preventing police misconduct can do something about it.

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[276] *Policing A Free Society,* p. 175.

[277] Ibid., pp. 168–169 (footnote omitted).

Chapter 4

External Controls

Introduction

Chapter 3 described mechanisms that exist within police departments to ensure that individual police officers are held accountable for their misdeeds. The effectiveness of these "internal controls" varies from department to department.

Review of police conduct, however, is not restricted to a police department; it is also conducted by a variety of governmental units and private groups external to the police department. Locally elected officials, State and Federal prosecutors, Federal agencies, and quasi-government or nongovernment groups all play an important role in the process of external review of police misconduct.

City Government

Finding 4.1: Local government officials possess powers to review police practices externally. Typically, the chief executive officer (mayor or city manager) or his designee is not only granted the power to appoint and dismiss the chief of police at will but sets the tone for the entire force. A city council may be authorized to enact legislation affecting the policies and procedures of the police department. There are a variety of conditions that affect these powers and, frequently, a reluctance to exercise such powers.

City officials play an important, though sometimes indirect, role in influencing and reviewing police conduct. Typically, citizens elect the mayor who is empowered to appoint the police chief. The police chief in turn is ultimately responsible to the chief executive officer for all aspects of police operations. If dissatisfied with the department's performance, the chief executive can dismiss the police chief. City councils may also play a role in reviewing police conduct by exercising their legislative and budgetary powers.

Thus, citizens wishing to influence police operations should, at least in theory, be able to do so through their vote for these local officials and by lodging with them any complaints about the police. It has been observed, however, that there are problems with this system of accountability.

Whether the police should be responsible to the mayor has been the subject of much debate. During the 19th century the police were closely aligned with partisan politics, even to the point of delivering elections. In reaction, there was a trend in the 20th century to appoint a tenured police chief who would be insulated from political influence. However, this movement drew opposition because the chief would also be insulated from appropriate citizen input.

Today most police chiefs are directly responsible to the municipal chief executive, but the municipal executive may tend to avoid direct involvement with police operations to prevent allegations that he is attempting to unduly influence or interfere with the police function. This practice, in turn, may bring about isolation of the police from the community and frustrate citizen influence.

In their shifts from one form of organization to another, jurisdictions around the country have sought the proper form of citizen input. It is appropriate for the police to be insulated from certain community pressures—for instance, pressures to thwart a family's right to move into a neighborhood. Citizen groups should provide guidance on direction and priorities, but the police need flexibility to carry out their daily functions, and it has been suggested that citizen input on the day-to-day administrative details is not appropriate.[1]

The President's Commission on Law Enforcement and Administration of Justice Task Force on Police also noted this situation:

> In more recent times there has been a continuing effort to compromise the need for popular control [of the police] with the need for a degree of operating independence in order to avoid the undesirable practices that have generally resulted from direct political control. Election and city council supervision of the police function gradually gave way to the establishment of administrative boards, variously constituted, in an effort to assure both independence and some semblance of civilian control.
>
> These organizational patterns have, in turn, often led to an obscuring of responsibilities, resulting in a swing back to more direct control in the form of a movement for the appointment of a single executive, directly answerable to the elected mayor or, more recently, to a city manager who in turn is responsible to a city council. Variations of each of these arrangements, including some attempts at State control, continue to this day, with periodic shifting from one organizational pattern to another in response to a community's conclusion that its police force has too much or too little independence.[2]

[1] See Herman Goldstein, *Policing a Free Society* (Cambridge, Mass.: Ballinger Publishing Co., 1977), pp. 131–56.

[2] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (Washington, D.C.: Government Printing Office, 1967), p. 30.

In its Philadelphia and Houston hearings, the Commission on Civil Rights learned of the roles played by officials in these cities in reviewing police conduct.

Philadelphia

In Philadelphia the mayor is an elected official. As the chief executive officer of the city, he is responsible for the conduct of the executive and administrative work of the city and for law enforcement within its boundaries.[3] The mayor appoints a managing director, who supervises all departments rendering municipal services to the city.[4] The managing director, in turn, appoints the commissioner of police, with the approval of the mayor.[5] Thus, the police chief is directly responsible to the managing director, but ultimately responsible to the mayor. Philadelphia Mayor Frank Rizzo expressed complete support for Commissioner of Police Joseph P. O'Neill, whom he had appointed, indicating that Commissioner O'Neill required no supervision by the mayor and would be around as long as he was mayor.[6]

In addition to appointing the chief, mayors, through their public statements and overall leadership postures, can set a mood or tone for the police and populace. During the hearing in Philadelphia then mayor and former police commissioner Frank Rizzo testified that not only was there no problem of police misconduct in Philadelphia but: "While I'm the mayor of Philadelphia, nobody, but nobody, will take advantage of policemen doing their job."[7]

Mayor Rizzo's unequivocal support of the Philadelphia police officers during his tenure as mayor led to exchanges throughout the hearing about the tone he had set. The following, involving a business leader, is typical:

MR. BUNTING. I have no difficulty at all in accepting the notion that the people at the top set the tone. And the tone. . .I think, especially in a situation such as this, governs. If the tone is such that no instance of police brutality will be tolerated, I think you'll have a police force that is perhaps not quite as effective as this one, but in which there are indeed very, very, very few instances of police brutality.

COMMISSIONER SALTZMAN. So you do see a connection?

MR. BUNTING. I definitely do.

COMMISSIONER SALTZMAN. Between a good, effective police force and allowing some brutality.

MR. BUNTING. I didn't say that. . .I'm saying effective. I'm not saying whether that's good or bad. I'm saying they might be somewhat less effective.

[3] Philadelphia Home Rule Charter of 1951, art. IV, sec. 4–100.
[4] *Id.*, art. III, sec. 3–204; art. V, sec. 5–100.
[5] *Id.*, art. III, sec. 3–206.
[6] Frank Rizzo, mayor, city of Philadelphia, testimony, *Hearing Before the U.S. Commission on Civil Rights, Philadelphia, Pa.*, Apr. 17, 1979, pp. 245, 254 (hereafter cited as *Philadelphia Hearing*). Mr. Rizzo is no longer mayor of Philadelphia and Mr. O'Neill is no longer commissioner of police.
[7] Rizzo Testimony, *Philadelphia Hearing*, p. 247.

COMMISSIONER SALTZMAN. Because they are harsh?

MR. BUNTING. Because the police officer feels that he is not going to be protected from above and, therefore, he does not as assiduously go about his duties. I think there could be that connection. I think, on the other hand, if the tone is set that "we'll defend anything you do," or at least that's the suggestion that the officer assumes, then I think that they may be more effective. I don't know; again, measuring effectiveness, they may be more effective. But there will be more instances of excesses, no question about it.[8]

The legislative power of the city of Philadelphia is exclusively vested in the city council.[9] The council is empowered to conduct investigations and to compel the attendance of witnesses and the production of documents in aid of its legislative functions.[10] The mayor is authorized to call special meetings of the council when required by public necessity.[11]

The council has been criticized for not vigorously exercising these powers in matters involving police practices in Philadelphia. A member of the committee on public safety, which has jurisdiction over such matters, stated that until December 1978 the committee had never met during his 3 years on the council.[12]

Critics have also alleged that the council was dilatory in acting on legislation providing for the codification of the Philadelphia Police Department's citizen complaint process.[13] Council bill 1063 was introduced in December 1977 and had widespread community support, but hearings were not held on the measure until December 1978. A former council member testified:

I often regretted the fact that city council did not see fit to act as expeditiously on some bills as it did on others. The street bill could be introduced one week and have a hearing the next week, but bill 1063, which had to do with civil rights and the infringement of those rights and safety of people, was introduced since December 1 of 1977 and did not get a hearing until well late into 1978.[14]

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[8] John Bunting, chairman of the board, First Pennsylvania Corporation, testimony, *Philadelphia Hearing*, pp. 111–12.

[9] Philadelphia Home Rule Charter of 1951, art. I, §1–101.

[10] *Id.*, art. II, secs. 2–400, 401.

[11] *Id.*, art. IV, sec. 4–103.

[12] James J. Tayoun, city councilman, testimony, *Philadelphia Hearing*, p. 132; Louis G. Johanson, Sr., councilman, District 9, interview in Philadelphia, Pa., Jan. 24, 1979.

[13] One bill, No. 590, provided for the establishment within the police department of an independent Office of Citizens Complaints. The unit would consist of an executive director, an investigative section, group of hearing examiners, review board, and appropriate support personnel. The findings of the review board would be transmitted to the police commissioner who would then be required to take disciplinary action, although the exact action to be taken would be left to the discretion of the commissioner and dependent on the language of the union contract.

The second bill, No. 1063, provided for the intake of citizen complaints at the city's Commission on Human Relations, Mayor's Office for Information and Complaints, district attorney's office, city councilmembers' offices, and police district headquarters. The police department would create a special unit as a central control agency for all citizen complaints and would be responsible for investigations. In cases where misconduct was found, the police commissioner would be responsible for referring the matter to the district attorney if a violation of the criminal law was found to have occurred. Upon completion of the investigation, the record would be made available for public review.

[14] Ethel Allen, former member, Philadelphia City Council, testimony, *Philadelphia Hearing*, pp. 132–33.

The chairman of the committee on public safety explained the reason for the delay in scheduling hearings on this bill:

In this city, as in many other urban centers, inquiries into allegations of police misconduct are heavily layered with political implications. Given the political and emotional fever existing in Philadelphia during the recent charter change campaign, it is my absolute opinion that had those hearings been held prior to the November 7 referendum, either or both sides on the principal charter change question would have misused the hearings for ends other than those contemplated by my colleagues who introduced the legislation now before this council. That misuse would have been unavoidable, but it would have made a circus of what should have been a thoughtful, probing, and thorough study of what is considered to be a serious problem in this city.

But now the decision has been made on the charter question, and there is little risk that the focus will be on the tenor of the current city administration. The focus will be where it should be: on the issues, the hard facts, rather than on personalities.[15]

The Philadelphia Police Department in 1978 issued two directives (Directives 127 and 127A) revising its citizen complaint intake and investigation procedures that incorporated some of the same provisions of bill number 1063. The commissioner of police objected to the codification of these procedures.[16] In testifying on this legislation, Commissioner O'Neill stated:

I oppose any legislation which will ultimately adversely affect efficient police performance and infringe upon the ability of the police commissioner to effectively run his department. Such restrictive measures and their long-range effect will, in the opinion of the staff and myself, adversely influence or prevent a police action which may result in injury or death to some human being. It would in time undoubtedly reduce the quality of police service presently enjoyed by the public.

Those individuals or groups who would be a party to any ordinance to limit police performance must bear the full responsibility for the end result.

In regard to bill 1063, I don't believe that there are members of this committee or city council as a whole or the people of the city who understand the nature and volume of complaints against police or the manner in which we process these complaints. We strongly feel that bill 1063 is not only unnecessary but has serious flaws.[17]

Houston

In Houston the governing body of the city is the city council. The mayor is a member of the council.[18] All administrative and executive powers are vested in the mayor who is empowered to appoint, subject to council confirmation, the heads of the city departments, including the police department, and can remove such heads at any time he sees fit without confirmation by the city council.[19] Under Texas law, the chief

[15] Hearings on Council Bill 1063 Before the Committee on Public Safety, Council of the City of Philadelphia, Dec. 11, 1978 (hereafter cited as *Council Hearings*) pp. 5-6 (Statement of Chairman James J. Tayoun).

[16] Joseph F. O'Neill, commissioner of police, Philadelphia Police Department, testimony, *Council Hearings*, pp. 739–40.

[17] *Ibid., pp. 718–20.*

[18] *Charter of the City of Houston, art. V, sec. 11 (1961).*

[19] *Charter of the City of Houston, art. VI, sec. 17a (1961).*

must have been a law enforcement officer within the State for 5 years prior to becoming chief.[20]

During the Commission's hearing in Houston, Mayor James McConn stated that although there have been egregious cases of police misconduct in the past, the Houston Police Department, in his opinion, had "done an excellent job of cleaning themselves up internally."[21]

[Police Chief] Caldwell and I meet rather frequently. The conversation or a meeting between Chief Caldwell and I is never held, or certainly very seldom held, where the subject of the responsibility and accountability of the Houston Police Department is not brought up, because it is my very candid opinion for a police department to be effective that it must be accountable to the citizens of the community. I think that, again, forgetting what might have happened in the past. . .for the last 18 months there has been accountability in the Houston Police Department because it is demanded by me as well as the chief.[22]

Louis Welch, the former mayor of Houston and the current president of the Houston Chamber of Commerce, expressed strong feelings about the role of the mayor in the operation of a police department:

The political support from city hall is absolutely essential to an efficient police department. There has to be some continuity in the operation of that police department, or there is a slippage of discipline and morale. . . .

Whenever city hall tries to run the police station, it almost always gets in trouble, because city hall has not the expertise in the criminal justice chain. It must accept the responsibility for the efficiency of it, but when it tries to get into the day-to-day operations of it and say, "Old Joe is a good old boy, and his brother is a candidate for sergeant and let's see if we can't help him a little bit," that's when you get a bad sergeant and he later becomes a bad lieutenant. This is the sort of thing that destroys police departments, or having as the head of a police department a man who is not respected by his fellow officers is destructive to the morale and the discipline.[23]

Mr. Welch was also adamant about the need for the police chief to be accountable only to the mayor:

The present system cleans itself. You got a shot at the mayor every 2 years, and if he goofs, you throw him out. . . .[i]f the mayor knows that the police chief is doing a bad job, he's going to make a change or he's going to be changed, one or the other. . . .

I think that a police chief establishes his own continuity. If he does a good job, then he becomes one of the greatest assets that administration has. If he does a bad job, he's a liability and he's cut loose. I came into office wanting to keep the man who was chief of police, wanted to keep him because I didn't want to make any change. Eight months later I called him in and asked him to sign a resignation and he said, "No, why don't you fire me?" I said, "You are fired." I accommodated him instantly.

. . .[H]is failure to enforce impartially the laws of the city was so evident to me, by that time, and to the community that I feared no political reprisal at all if I fired him, but I felt if I kept

[20] *Tex. Rev. Civ. Stat. Ann., art. 1269m, sec. 114E (Vernon) (Supp. 1979).*

[21] *James McConn, mayor, city of Houston, testimony, Hearing Before the U.S. Commission on Civil Rights, Houston, Tex.*, Sept. 11, 1979, p. 146 (hereafter cited as *Houston Hearing).*

[22] Ibid. p. 148.

[23] Louis Welch, president, Houston Chamber of Commerce, testimony, *Houston Hearing*, p. 162.

him that I would not have kept faith with the people who had elected me and I changed. The next man stayed with me for 9 years and 2 months until I left office.[24]

In 1979, after almost 2 years effort by the community, Mayor McConn and police Chief Harry Caldwell agreed to the formation of a permanent citizens advisory panel to meet regularly with them about community concerns regarding the police. The primary objective of the Police Advisory Committee for Continued Improvement (PACCI) was to foster better communications between the police and the community generally.

At the time of the Houston hearing PACCI had just been formed. It was anticipated, however, that PACCI would, among other things, "review with the chief current police programs, policies and procedures and their impact on police-community relations and crime prevention, offering advice, support, or suggestions for modification, addition, or broader dissemination."[25]

The Houston City Council is vested with all legislative powers[26] and has subpena power and the authority to conduct inquiries pursuant to its legislative powers. The council is precluded from direct involvement in those administrative responsibilities, including law enforcement, that under the city charter are in the province of the mayor.[27] In actual practice, for the purpose of requesting an investigation from the police department into acts of police brutality and misconduct, the council normally works through the mayor.[28] The city council shares with the mayor the authority to prescribe rules and regulations governing the operation of each administrative department,[29] but, again, usually allows the mayor to exercise this authority.

Although the role played by the city council in reviewing police misconduct has been at best limited, the council does set aside time each week at a public session to listen to citizen complaints against any department, including the police department. Sworn testimony is taken and then the matter is referred for investigation to the internal affairs division of the department and/or to the district attorney's office.[30] The council does not conduct an independent investigation of the complaint.[31] It is then up to the district attorney to determine whether or not a presentation will be made to the grand jury.[32] The council does not necessarily receive a report from the district attorney specifying the disposition of the referred complaint; however, Mayor McConn testified

[24] Ibid., pp. 163–64.
[25] Memorandum of the Police Advisory Committee for Continued Improvement, May 29, 1979.
[26] Charter of the City of Houston, art. VII, secs. 4, 10 (1961).
[27] *Id.*, art. IV, sec. 7a.
[28] Judson Robinson, city councilman, interview in Houston, Tex., Apr. 3, 1979.
[29] Charter of the City of Houston, art. VI, sec. 17a. Robinson Interview.
[30] McConn Testimony, *Houston Hearing*, pp. 146–47, 153.
[31] Ibid. Houston city councilmembers are part time. Each councilmember employs one secretary but no other staff.
[32] Ibid., p. 154.

that he received a report from the police department on all complaints referred to it for investigation.[33]

This Commission received testimony criticizing city officials for their relative inaction in reviewing allegations of police misconduct:

. . .In Houston, there has been a history of absolutely no action taken by the city council or the mayor against the police department. Every complaint that has ever been made before the city council has been totally ignored. We've given them the opportunity on many occasions to investigate police actions, and until it starts coming out of the city pocketbook when you got a judgment against an officer for shooting someone, for hurting someone that he shouldn't have, then you're not going to get the sort of reaction from the city fathers that will somehow filter down to the police department. The police department here is totally autonomous; they answer to no one except the chief of police.

The mayor's office, the city council simply, historically, has never reacted and won't react until the city can feel it somehow and feel it the quickest in the pocketbook.[34]

State Prosecution

Finding 4.2: The criminal law is a limited vehicle for preventing or deterring police misconduct. Nonetheless, vigorous prosecution of such cases by local prosecutors is essential.

The criminal law provides another basis for redressing unlawful police conduct. Yet, there are several factors that restrict the usefulness of criminal prosecutions as a viable tool in deterring police misconduct or serving as a catalyst for changes in police polices.

Perhaps the primary limitation of prosecution as a means of preventing or deterring police misconduct lies in the nature of the criminal charge itself. Prosecutions are designed to redress specific incidents of unlawful conduct by particular individuals only *after* the incident has occurred. As was stated in testimony before this Commission:

A prosecution for police misconduct does not address itself to the activities of a police department as such or of a city administration per se, but only to the actions of one or more officers in a given circumstance, framed by and limited to the wording of criminal indictment. Moreover, criminal prosecutions are reactive litigations involving only the calling to account of individuals who have already engaged in acts of misconduct.[35]

This Commission also received testimony in Philadelphia on this point:

I don't believe that [criminal prosecution] is the way that you prevent police brutality. The men who are predisposed to do this kind of thing are police officers; they know how well the criminal justice system works or doesn't work. They know that their chances of being caught are remote. They know that their chances of being successfully prosecuted are even more remote. Their chances of being sentenced to jail are almost miniscule. I think the overall

[33] Ibid.

[34] Dick DeGuerin, attorney, testimony, *Houston Hearing*, p. 100.

[35] Drew S. Days III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, remarks, consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Dec. 12–13, 1978, *Police Practices and the Preservation of Civil Rights* (hereafter cited as *Police Practices and Civil Rights*). In these remarks, Mr. Days was speaking of the limitations of Federal prosecutions in deterring police misconduct; however, State prosecutions suffer from the same limitations noted above.

effect of that, the deterring effect of criminal prosecution of these cases, is minimal. I think the real answer lies in other areas; it lies in an enlightened police administration.[36]

Additionally, many forms of police misconduct affecting police- community relations, such as harassment and verbal abuse, may not be violations of the criminal law. There may be egregious acts of wrongdoing, but the facts may not readily constitute a crime under the law of that particular State. On the other hand, the facts may constitute a crime, but only minimal punishment is authorized under the State statute.[37]

Even if an officer's misconduct constitutes a violation of the criminal law, the subsequent prosecution is further limited by problems of proof and credibility of testimony. Often the only witnesses to the incident are the police officer and the victim. Police are experienced witnesses and often highly esteemed citizens within the community. Local jurors, given a choice between the police officer's version of events and that of a victim (who may be a minority, have a prior criminal record, and be poorly educated and unemployed), may be predisposed to believing the officer, particularly when the incident was in connection with a criminal investigation. Moreover, in cases involving the question of whether reasonable force was used under the circumstances, jurors may be reluctant, except in the most clear and flagrant situations, to second-guess the judgment of the police officer. Finally, juries may be reluctant to find that a police officer actually violated the very law he solemnly swore to uphold.

Despite these limitations and difficulties, vigorous prosecution of police misconduct cases is absolutely essential to demonstrate that no one, including a police officer, is above the law. Prosecutors at all levels of government must be vigilant to identify and act upon all meritorious cases of misconduct to ensure that the law is applied on an equal basis.

Although prosecution of police misconduct is possible at both the State and Federal levels,[38] a basic question exists as to which level of government bears the primary prosecutive responsibility.[39]

Generally, local prosecutors have a wide range of charges that can be brought in cases involving criminal conduct by police against citizens.

[36] L. George Parry, assistant district attorney, city of Philadelphia, testimony, Philadelphia Hearing, p. 86.

[37] The so-called "Torres" case is a good example. This case involved the drowning death of Jose Campos Torres in a Houston bayou at the hands of Houston police officers. The district attorney was left with the possibility of charging the officers with murder, which could have resulted in a penalty of life imprisonment, or other offenses such as involuntary manslaughter or negligent homicide, both carrying lesser penalties. According to the district attorney's office, it was the common view that the facts, although egregious and shocking, did not constitute the crime of murder, as defined under Texas law. The officers were indicted for murder but were acquitted of this charge and convicted of negligent homicide, a misdemeanor. Terry Wilson, director, Civil Rights Division, Office of Harris County District Attorney, interview in Houston, Tex., Aug. 22, 1979.

[38] The statutory bases for prosecution of misconduct cases, of course, differ at the State and Federal levels.

[39] The determination as to which sovereign should prosecute first in a particular case must, of course, be made on an individual basis.

Depending on the jurisdiction, these may include murder, manslaughter, negligent homicide, aggravated battery, battery, aggravated assault, and assault, with each crime being assigned a different maximum penalty. In contrast, Federal prosecution of police misconduct must principally rest on two statutory bases: one, a felony, making it an offense to conspire to deprive a citizen of his or her civil rights;[40] the other, a misdemeanor (under most circumstances), making it an offense to deprive another of his or her civil rights under color of law.[41] Former Assistant Attorney General Drew Days III testified on this point:

> You have to understand, as I'm sure you do, that local prosecutors have a panoply of offenses and charges that they can bring under circumstances that we call police brutality or abuse. They have lesser included offenses, and so a skillful and professional use of those State statutes can, in contrast to what we have to confront very often, present a jury with a variety of options. It is not just up or down. There are ways in which the jury can express itself other than acquit them, which is a problem we sometimes face, expressing its view on the severity of the violation of the extent to which they believe a particular defendant ought to be punished. . . .[42]

In addition to having a greater number of statutes under which prosecutions can be brought, local prosecutors generally have more attorneys, investigators, and juries available to them than do Federal prosecutors. Thus, as a practical matter local prosecutors may be able to proceed more expeditiously with a case than can Federal prosecutors.

On the other hand, it is well recognized that on a day-to-day basis, district attorneys must work very closely with and rely heavily on the police in the prosecution of other criminal cases. It is argued that this necessary dependence makes it difficult for district attorneys to impartially investigate and prosecute police for alleged wrongdoing. The potential for such a conflict of interest at the Federal level may be less because the reliance on local police in Federal cases is not as great.

Nonetheless, the testimony received by this Commission supported the view that local prosecutors bear the primary responsibility in bringing criminal charges against police officers alleged to have engaged in wrongdoing.[43]

Both the Philadelphia and Houston field investigations revealed several factors bearing on prosecution policies, some of which may exist in other cities.

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[40] 18 U.S.C. sec. 241 (1976).

[41] 18 U.S.C. sec. 242 (1976).

[42] Drew S. Days III, Assistant Attorney General of the United States, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Sept. 16, 1980, transcript, pp. 100–01 (hereafter cited as Washington Hearing Transcript).

[43] John Holmes, Harris County district attorney, testimony, *Houston Hearing*, p. 105; Mary Sinderson, assistant U.S. attorney, testimony, ibid., p. 144; Days Testimony, Washington Hearing Transcript, pp. 90, 95, 97–98 and 100; Gilbert Pompa, Director, Community Relations Service, U.S. Department of Justice, testimony, Washington Hearing Transcript, pp. 245–47.

Philadelphia

Under Pennsylvania State law, the power to prosecute State crimes is chiefly vested in the locally elected district attorney.[44] The Pennsylvania State attorney general's role in dealing with police abuse cases is a relatively limited one, and nonprosecutorial in nature.[45]

In January 1978 the incumbent district attorney in Philadelphia established a special police brutality unit to investigate and prosecute, when appropriate, allegations of police brutality, abuse, or misconduct. From that time until April 1979, the unit investigated approximately 300 cases of alleged brutality.[46]

The prosecutive efforts of the Philadelphia district attorney in police misconduct cases were hampered by several factors. First, the head of the police brutality unit characterized the unit's relationship with the Philadelphia Police Department as "adversarial," but noted that the district attorney's office, on the whole, received relatively good cooperation from the department in other criminal cases. Thus, the department's "bad feelings" toward the district attorney's office seemed to be isolated to and directed at the work of the police brutality unit.[47]

This adversarial relationship manifested itself in different ways. Generally, the district attorney had difficulty gaining access to needed information. According to the district attorney's office, very often crucial investigatory material in the sole possession of the police was shared with the prosecutor at the sole discretion of the police department. In some cases, the department turned over all the requested material; in others, the material was withheld, or the information was given, but only after inordinate delay.[48]

Complicating the problem of access to information was the fact that until late 1978, the district attorney and the grand jury had no way to compel the production of needed information that was not turned over voluntarily. Prior to the enactment of Pennsylvania's Investigating Grand Jury Act of 1978,[49] the grand jury had no investigatory subpena power;

[44] Pa. Stat. Ann. Tit. 16, §1402 (Purdon) (Supp. 1980).

[45] Despite its limited statutory authority, the Pennsylvania attorney general's office did take steps to resolve the problems of police misconduct in Philadelphia, including: (1) filing an amicus brief in Rizzo v. Goode, 423 U.S. 362 (1976); (2) helping in the establishment of the "Coalition Against Police Abuse," whose purpose was to encourage the police department and district attorney's office to make changes in their citizen complaint procedures; and (3) securing funding for the Public Interest Law Center of Philadelphia (PILCOP). Barry Kohn, former deputy attorney general of Pennsylvania and former director of the Community Advocate Unit, testimony, *Philadelphia Hearing*, pp. 86–88.

[46] Parry Testimony, *Philadelphia Hearing*, pp. 88–89.

[47] Ibid., p. 84.

[48] Edward G. Rendell, district attorney, city of Philadelphia, testimony before the Pennsylvania House of Representatives, Judiciary Committee, Subcommittee on Organized Crime, Public Corruption and Civil Rights Violations, July 20, 1978, p. 17 (hereafter cited as Rendell Testimony); Parry Testimony, *Philadelphia Hearing*, p. 100.

[49] Pa. Stat. Ann., Tit. 19, §§265–278 (Purdon) (Supp. 1980).

rather, subpena power attached only in court cases, after an arrest had been made.[50]

The significance of the problem of access to information is illustrated by the following:

. . .[t]o give you an example, we are presently investigating a case that occurred several weeks ago in the Philadelphia area, where an individual was driving a cab. The report came to the police that that cab was stolen. In fact, that individual was a cab driver who accidentally got into another cab, leaving his cab behind in the parking lot, and was driving.

The report did come into the police that the vehicle was stopped, very properly by the police. The man was told to get out, place his hands on the car, and a frisk was undertaken.

The officer frisking the individual pulled out his service revolver; had his service revolver in his hand, and was proceeding to frisk, when something occurred which caused a discharge of that revolver.

Most of the witnesses at the scene were candid and said it was not a deliberate shooting. However, it may well have been criminal negligence involved in that case. One of the crucial things to find out is what the officer says happened. And, two, the ballistics report of that gun. There was talk in the police version they put out to the newspapers that the officer had cocked his gun. That is an important fact to nail down. Because if he was frisking with a cocked gun, that might draw you to one conclusion; where if he were frisking someone with a gun that was not cocked, and less likely to go off by accidental jarring—it makes it more likely to go off quicker if it is cocked.

That is a key investigative fact. We need to see ballistics reports; ballistics reports would indicate trigger pull, things like that. We need to see the officer's statement; we also need to independently examine the gun ourselves, have our own independent ballistics expert take a look at that gun. We have requested that from the police over the past several weeks. . . .Those requests have gone unheeded. . . .It is my belief that the police are best served by giving us that material, because very often we are sometimes forced to make a decision whether to arrest or not to arrest on incomplete facts, and sometimes the facts could be beneficial to their own officers.

The position taken by the police department has a tendency to hurt their own officers, because we are forced to make very difficult decisions, whether to arrest or not to arrest, bring criminal charges, without a complete investigative file.

On the other side of the coin, we are totally unable to make an arrest because our investigation may be blocked.[51]

Another indication of this adversarial relationship between the district attorney's office and the police department was that the principal way in which the district attorney's office learned of citizen deaths and woundings by police action was through the news media. The police department failed to notify the district attorney's office routinely of such incidents, despite repeated requests:[52]

We do not get all of the complaints that come in the area, in the city of Philadelphia. The complaints that come into the social service agencies. . .are being referred to us.

[50] Rendell Testimony, p. 16.
[51] Ibid., pp. 18–19.
[52] Parry Testimony, *Philadelphia Hearing*, p. 98.

But we do not get access to the complaints that come to the police department. We are never told [of] those complaints. A lot of our citizens still have a tendency, when they feel they are abused by the police, to make those complaints to the police themselves. Knowledge of the existence of those complaints is never given to us. That is number one.

There are a number of complaints we never even hear about. Unless the individual goes to the newspapers or comes to us, or comes to a social service agency, we may never get knowledge. I think we are investigating a high percentage—I guess 80 or 85 percent of the complaints made, but we are missing a significant segment, because there is no force of law to make the police notify us of the complaints given to them.[53]

Another factor affecting prosecutive efforts is the fact that in Pennsylvania, the police are empowered, separate and apart from the district attorney, to initiate or refrain from initiating criminal charges against an individual.[54] The police are not required to consult with the district attorney before lodging charges against citizens who file complaints. Likewise, the police are not required to consult with the district attorney before deciding *not* to file charges against a police officer alleged to have engaged in acts of misconduct.

Houston

Under Texas State law, the power to prosecute State crimes is vested in locally elected district attorneys.[55] The Texas State attorney general's role in dealing with police abuse cases is limited and nonprosecutorial in nature,[56] as in Pennsylvania.

The Harris County district attorney's office, which has jurisdiction over criminal matters in the city of Houston, is staffed by approximately 145 attorneys.[57] In July 1979 a separate civil rights division staffed by two attorneys, an investigator, and a secretary was established to investigate and handle cases arising out of shooting deaths or serious injury to citizens by police officers, and shooting deaths or serious injury to police officers by citizens. This division is also responsible for cases arising under a State law enacted in 1979 making it a felony to violate the civil rights of persons in custody.[58] The Harris County district attorney's office supported the enactment of the legislation.[59]

The chief of the civil rights division testified that efforts were made with the Houston Police Department and other police agencies under its

[53] Rendell Testimony, pp. 16–17.

[54] Harry Spaeth, assistant district attorney, city of Philadelphia, telephone interview, Jan. 12, 1981.

[55] Tex. Code Crim. Proc. Ann., art. 2.01 (Vernon) (1977).

[56] Despite its limited authority, the Texas State attorney general's office conducted investigations into at least 10 police abuse incidents that had resulted in death. All incidents occurred between 1977–1978 and in each instance a specific request to conduct such an investigation was made by a private individual or group. The results of these investigations were published. In four of the cases, the Texas attorney general contacted the U.S. Department of Justice requesting Federal action, as appropriate. See "Summary of Civil Rights Investigations by the Texas Attorney General's Office of Incidents Resulting in Death," John L. Hill, attorney general of Texas, Austin, Tex., 1978.

[57] Holmes Testimony, *Houston Hearing*, p. 109. The district attorney estimated that his office handled approximately 2,100 felonies and 30,000 misdemeanors per year.

[58] Tex. Penal Code Ann., Tit. 8, sec. 39.021 (Vernon) (Supp. 1980).

[59] Holmes Testimony, *Houston Hearing*, p. 112.

jurisdiction to ensure immediate notification of the division in the event of a police shooting incident where either the officer or civilian is injured. Upon such notification, the division decides whether or not to proceed immediately to the scene to commence an independent investigation. In most cases, the decision has been made to go to the scene. The division chief further reported that he had received "outstanding cooperation from the police departments" in this regard.[60]

The civil rights division was established just 2 months before the Commission's hearing in Houston and consequently no testimony was received assessing the division's effectiveness in handling police misconduct cases. Prior to the establishment of the civil rights division, the prosecution of police brutality cases was conducted by the more senior attorneys in the district attorney's office.

From 1977 to 1979, the district attorney's office prosecuted one police misconduct case against Houston Police officers.[61] When asked to estimate the number and disposition of cases alleging police brutality presented to the grand jury during the same period, the district attorney replied that he did not know and a review of approximately 40,000 case files would be required to so determine, because such cases had never been separated out under a category of "police brutality."[62]

With respect to the policy of the district attorney's office in prosecuting cases also being pursued at the Federal level, the district attorney stated:

MR. HOLMES. We have kind of a loose policy, nothing set in concrete. It is my understanding that neither jurisdiction engages in dual prosecution. In my opinion, it is not an efficient expenditure of the public funds. Frankly, if you have a person who violates the law, I don't care which penitentiary he goes to, whether it is U.S. or local; and I think that is. . .the position of the Federal jurisdiction takes as well. . . .

COUNSEL. Bearing in mind that the elements of the Federal offense are somewhat different from the State offense, if there should be an acquittal in Federal court after Federal prosecution, would your office then consider the possibility of bringing State charges?

MR. HOLMES. Probably not, no.

COUNSEL. Why is that?

MR. HOLMES. I think it is a little unfair, whether he is a police officer or anybody else. If you have the same circumstances that are presented to a jury on either side, and you have—just like bank robbery, the law clearly says you don't have any problem with regards to prior adjudication there, certainly between Federal and local, but it has been a policy of the U.S. attorney and our office, although. . .not an inflexible policy, that we just don't engage in that. I don't see any useful purpose to be served. . . .[63]

The Commission received testimony criticizing the district attorney's reluctance to pursue investigations and prosecutions of police brutality

[60] Wilson Testimony, *Houston Hearing*, pp. 113–14.
[61] Holmes Testimony, *Houston Hearing*, p. 118.
[62] Ibid. Subsequent communication with the district attorney's office revealed that the files are maintained in chronological order without regard to the type of offense involved.
[63] Ibid., pp. 110–11.

cases. The past president of the Harris County Criminal Lawyers Association addressed this issue:

COUNSEL. Do you have, based on your experience as an attorney, any perception of whether the district attorney's office pursues these investigations and prosecutions [of police brutality cases] as vigorously as they do other types of criminal cases?

MR. DE GUERIN. Definitely not. It has been my experience that prosecution of a police officer charged with an offense is reluctant at best. I think a perfect example of this—and I speak only of method in which the case came up and not about the merits of the case. . .but in [the Torres] case, it was a month and a half before that case was ever presented to a grand jury. It was only presented to the grand jury after the Harris County Criminal Lawyers Association called to the public's attention the amount of time that had gone past without any sort of prosecution, and an offer to become special prosecutors in that case.

Compare that with a case that arose at almost the same time in which a Mexican American killed a police officer. That man was indicted within 48 hours for capital murder of a police officer; within 12 hours of the time that incident occurred, the defendant's mugshot was in the hands of some 500 officers on duty. . . .The response of both the police department and the district attorney's office, comparing these two cases, is typical. Both of these cases were sensational cases, and it is difficult to judge the entire operation of the district attorney's office or the police department by sensational cases, but they point up that comparison that I think is very illustrating.[64]

Responding to a question regarding the possibility that in police misconduct cases a built-in conflict of interest may exist in a district attorney's office, given the normally close working relationship between prosecutors and police, the district attorney stated:

MR. HOLMES. . . .I can understand the concern of persons who are on the outside of the criminal justice system seeing prosecutors putting police officers on the stand one week and the next week having them sitting at counsel table as defendants. However, as a lawyer, I personally feel that that does not enter into consideration of either the charging or trying function. I personally have been responsible for trying—indicting police officers on numerous offenses. There are other people in the office that have. I do not believe that is a valid criticism of the system, particularly in light of the fact that it is nothing unique to Harris County, Texas. That is done throughout this country, and I think it is done properly and I think the inference that we do not discharge our duty in that regard is not well taken, by me, anyway.[65]

Federal Prosecution

Finding 4.3: At the Federal level, prosecution of police misconduct cases is conducted by the Civil Rights Division of the United States Department of Justice and by U.S. attorneys. Although Federal officials annually receive thousands of complaints alleging police misconduct, on the average fewer than 100 cases are successfully prosecuted each year. Several factors contribute to this situation, including lack of Federal jurisdiction over complaints, problems of proof and credibility of testimony, statutory limitations, and lack of sufficient staff and resources.

[64] DeGuerin Testimony, *Houston Hearing*, pp. 89–90.
[65] Holmes Testimony, *Houston Hearing*, p. 110.

The Attorney General of the United States is responsible for enforcing Federal criminal civil rights statutes. However, the authority and scope of Federal prosecution of police misconduct is substantially less than that of local prosecutors. In contrast to the range of criminal statutes available to a local prosecutor, there are just two principal statutes available under Federal law for the prosecution of criminal conduct violating the civil rights of individuals. Section 241, Title 18, of the U.S. Code makes it unlawful to conspire against a citizen to deprive him or her of rights guaranteed by the Constitution or Federal law.[66] Section 242 makes it unlawful to deprive any inhabitant of his or her civil rights under color of law.[67] These statutes were enacted during the Reconstruction era to effectuate the requirements of the 14th amendment by authorizing the Department of Justice to seek Federal criminal convictions against officers who abuse their authority. Although never intended to supplant State prosecutions of assaults and homicides, these statutes nevertheless provide a basis for a Federal response to individual instances of police misconduct.

As the investigative arm of the Department of Justice, the Federal Bureau of Investigation (FBI) investigates allegations that police officers have violated the Federal criminal civil rights statutes. Under current procedures, the FBI will conduct a "preliminary investigation"[68] whenever it receives information setting forth a *prima facie* [69] violation. Such information may come by way of a complaint by an alleged victim, by a person with knowledge of an incident, or from newspaper or media reports. If it is not clear whether a *prima facie* violation is alleged, the information or complaint will be forwarded to the Civil Rights Division of the Department[70] for review. The FBI also conducts investigations at the

[66] 18 U.S.C. sec. 241 makes it unlawful for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same." The section also makes it a crime for two or more persons to "go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured." The penalty is ordinarily up to 10 years in prison, but increases to a maximum of life imprisonment if death results.

[67] 18 U.S.C. sec. 242 makes it an offense for anyone acting under color of any law, statute, ordinance regulation, or custom willfully to subject any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens. The maximum penalty is 1 year in prison, but rises to life imprisonment if death results.

[68] A preliminary investigation of police brutality cases includes interviews of the victim and subjects; interviews of witnesses; obtaining medical records, photographs, or a description of physical injuries sustained; and collecting and processing of any physical evidence. Police reports and criminal records of the victim and police officers, if any, are obtained as is information regarding any other complaints against the subjects. Federal Bureau of Investigation Manual of Investigations and Operations Guidelines, Apr. 8, 1980.

[69] *Prima facie* means immediately plain or clear, at first appearance, and before investigation.

[70] Under the regulations of the Department of Justice, the Assistant Attorney General for Civil Rights is primarily responsible for the prosecution of violations of the Federal criminal civil rights statutes. 28 C.F.R. sec. 0.50 (1979).

request of the Civil Rights Division or a U.S. attorney; however, most investigations are initiated by the FBI.[71]

Under FBI procedures, preliminary investigations must be completed within 21 workdays of the initiation of the investigation.[72] A Federal prosecutor testifying before the Commission criticized this rule saying that the 21-day rule could work to the advantage of a local police department that was "generally uncooperative" in filling requests for information and thus could deliberately delay production of needed documents until after the 21 days had expired.[73]

The FBI furnishes a copy of its investigative report to its headquarters where it is reviewed for adequacy and completeness. It is then submitted to both the local U.S. attorney and the Civil Rights Division in Washington, D.C., for consideration as to whether further Federal action is warranted. The FBI makes no recommendation to the merits of the case but simply reports its findings. When the investigation has been completed and forwarded to the Department, the FBI's role is ended unless further action is specifically requested.

Even if State or local officials are conducting an investigation, the FBI proceeds with its own independent investigation unless and until State or local charges are actually filed against the law enforcement officials involved. Thus simultaneous, yet independent, investigations with local authorities is the rule.[74] This policy is followed so that "the Department is not confronted with a stale case in the event that local investigation does not result in prosecution."[75] However, once local authorities have initiated prosecution, the FBI is directed to suspend its investigation and "monitor" the progress of the case, reporting any developments to the local U.S. attorney and the Civil Rights Division. This policy is followed to encourage local authorities to pursue these investigations and eliminate the

[71] Days Testimony, Washington Hearing Transcript, written statement, p. 5.

[72] Francis Mullen, Executive Assistant Director for Investigations, Federal Bureau of Investigation, testimony, Washington Hearing Transcript, p. 19.

[73] John Penrose, assistant U.S. attorney, testimony, *Philadelphia Hearing*, p. 75. The remarks of Mr. Penrose referred specifically to the Philadelphia Police Department.

The Justice Department submitted the following comments to this Commission regarding the 21-day rule:

> The time limit is set because of the recognition that violations of the criminal civil rights statutes are and should be a priority item for both the Justice Department and the FBI. However, whenever an investigation is not completed within the 21-day period, an agent may file an interim report, indicating the investigation completed to date and those leads still to be pursued. Well over half of the preliminary investigations conducted by the FBI utilize one or more of these interim reports. An investigation need not be closed or terminated simply because the FBI cannot get all the relevant information within the initial 21-day period. Should a police department resort to obstruction tactics, refusing to turn over relevant information voluntarily, a federal grand jury subpena can be used to compel production of the information.

James P. Turner, Acting Assistant Attorney General for Civil Rights, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Apr. 6, 1981, p. 2 (hereafter cited as Turner Letter).

[74] An exception to this rule was made for Dade County, Fla. After the May 1980 civil disturbances in Miami, Fla., the Attorney General ordered that FBI investigations of police brutality complaints continue, even if a local prosecution was in progress.

[75] Days Testimony, Washington Hearing Transcript, written statement, p. 5.

problem of brutality on a local level. If the local authorities are unable to do this, then the Federal investigation will be pursued.[76]

If it is determined that a case has Federal prosecutive merit, it is presented to a Federal grand jury either by the U.S. attorney, the Criminal Section of the Civil Rights Division, or both offices working together.[77] While Federal law permits the government to proceed in misdemeanor cases[78] by filing a legal document known as an "information" signed by the prosecuting attorney, the policy of the Department of Justice is to prosecute all civil rights crimes, whether they be misdemeanors or felonies, only after obtaining an indictment from a Federal grand jury. This policy is followed to evaluate the strength of the case before proceeding further. As was explained by former Assistant Attorney General Days:

> We put on in many instances a full case before the grand jury to make certain that when we go to trial we have a [very] strong case. I need not remind you in terms of problems we encounter in terms of jury nullification. . . .There is a need really to pin down evidence. We are dealing, in many instances, in civil rights cases not with pillars of the community as complaining witnesses, [but with] people who have significant credibility problems. . .they are people who often have criminal records, they are people who are not steady employees, who are poorly educated and, therefore, it is very important that we go through that process and have the grand jury assist us in evaluating the strength of our cases.
>
> That is a time consuming process. We try to be very thorough. We do have the forensic support of the FBI. I think the reports that we do are extremely thorough; they are much more thorough than often is the case at the local level. We could go through some of these investigations and prosecutions more quickly and that's why we're asking for additional resources, using computers and other techniques, but I think, however, much as we increase our efficiency, we still are going to be slower on average in dealing with these cases than are local and State prosecutors.[79]

In section 242 misdemeanor cases, the Criminal Section of the Civil Rights Division and the U.S. attorney for the particular jurisdiction generally consult before seeking an indictment. Prosecution of *any* criminal civil rights violation constituting a felony, however, requires the approval of the Civil Rights Division prior to submission of an indictment to a Federal grand jury. In explaining the rationale for requiring prior approval by the Civil Rights Division, a Justice Department official stated:

> The language of both statutes—sections 241 and 242—is broad and, at the same time, not immediately clear. The Civil Rights Division frequently receives requests to prosecute crimes which United States attorneys may believe are violations of the statutes but which are not in fact violations. This is particularly true of 18 U.S.C. section 241 where some "civil rights" are protected against the action of private persons but where most rights require the participation of persons acting under color of law before a violation can be found. Authorization is also appropriate because the statutes are so broad, and because the "rights" protected are being continually defined, and redefined, by court decision and statute. There are few, if any,

[76] Mullen Testimony, Washington Hearing Transcript, pp. 5–6.
[77] Days Testimony, Washington Hearing Transcript, written statement, p. 7.
[78] 18 U.S.C. sec. 242 is a misdemeanor punishable by up to 1 year imprisonment unless death results, in which case a term of life imprisonment may be imposed.
[79] Days Testimony, Washington Hearing Transcript, pp. 98–100.

United States attorney's offices that have readily available the extensive understanding of the case law interpreting the statutes that is possessed by the Civil Rights Division.

. . .Most violations of 18 U.S.C. sections 241 and 242 involve the misconduct of police officers. As with any criminal statute, prosecutorial discretion is involved in any decision to prosecute or not to prosecute. For example, if significant and appropriate action has been taken against the subject officers by either the local law enforcement agency or State officials, Federal prosecution may not be authorized. In determining what is "appropriate" action, the Department seeks to employ uniform standards nationwide so that, for example, a police officer in Connecticut is held to no greater or lesser standard than a police officer in California. The Civil Rights Division of the Justice Department is the only place in which staff have the information available to perform this critical function.[80]

This Commission received testimony from a former U.S. attorney criticizing the policy of prior approval by Washington:

. . .[W]hile having all the power in the world to conduct an investigation, for example, into white-collar crime fraud, to investigate and prosecute bank fraud, public corruption, large cases on narcotics, I don't need anybody's approval; yet, if it is a civil rights prosecution, all of a sudden, I need to go to Washington to go talk to a staff attorney. And the staff attorney perhaps could be an experienced lawyer or perhaps he's not, but I've got to convince him. And that means I've got to give him all the records; I've got to give him all the grand jury testimony, and I've got to go lobby him. And after that lawyer looks at it, then he has to give it to his immediate supervisor; then on top of that, the branch supervisor; then on top of that, he has to get the section chief; on top of that, the Assistant Deputy Attorney General in charge of civil rights; then the Assistant Attorney General in charge of civil rights—five layers of review.

Why is it that we investigate and prosecute cases of the civil rights nature different than the traditional other type of cases?. . .I have returned and convicted some pretty significant cases and nowhere have I had to go back to somebody in Washington for these kinds of cases. . . .

I wish it could change. I've spoken to the Attorney General about this. . .I've spoken to the Assistant Attorney General in charge of civil rights about it. It doesn't take a statute; it just takes implementation of a policy. The policy has been there for 20 years and it's hard to change sometimes, and I think we're changing.[81]

It is significant to note that an increasing number of U.S. attorneys are taking an active role in the prosecution of criminal civil rights cases.[82] Additionally, several U.S. attorneys have established civil rights units within their offices.[83]

The Department of Justice receives more than 10,000 complaints of police misconduct each year; between 50 and 100 cases are prosecuted each year.[84] In fiscal year 1979 there were 57 convictions, and 43

[80] Turner Letter, pp. 3–4.

[81] J.A. Canales, U.S. attorney, testimony, *Houston Hearing*, pp. 139–40.

[82] Days Testimony, Washington Hearing Transcript p. 80.

[83] As of June 1980, according to Assistant Attorney General Days, there were 36 such units in U.S. attorneys' offices. Although they vary in size and organization, there are separate units in most of the major offices. Mr. Days testified that "in the middle-sized offices they tend to be units with a person assigned full time to work these matters, and in various small offices, several U.S. attorneys have as part of their assignment working on civil rights matters." Ibid. Houston has had such a unit since September 1977 when U.S. attorney Tony Canales assumed his duties. The U.S. attorney's office in Philadelphia also has such a unit.

[84] Days Testimony, Washington Hearing Transcript, written statement, p. 13.

convictions for fiscal year 1980.[85]

According to the testimony received, several factors account for the disparity in the numbers of complaints filed and cases successfully prosecuted. A complaint may not allege a violation of the law or it may allege a violation of some law, but not one over which there is Federal jurisdiction. The alleged violation may be impossible to prove. If proof exists, it may not be sufficient to convince a jury beyond a reasonable doubt that the crime was committed by the defendant-officer.

Beyond these factors, fundamental problems exist with the Federal statutes under which such prosecutions are brought. Testimony presented to this Commission revealed that sections 241 and 242 suffer from substantive and procedural defects that impede the prosecutive efforts of the Department of Justice.

As previously noted, section 241 makes it unlawful to conspire to deprive a citizen of his or her civil rights. The offense is a felony with a penalty of not more than 10 years imprisonment unless death results, in which case a term of life imprisonment is authorized. The testimony uniformly noted that as a conspiracy offense, section 241 does not reach acts committed by an individual not part of a conspiracy. A second problem is that the statute protects only citizens. Thus, the statute cannot be used to reach conduct, no matter how reprehensible, directed at a victim who is a resident alien or a visitor from another country.[86]

The testimony also pointed out the problems of bringing cases under section 242, which makes it a misdemeanor offense to deprive a person of his or her civil rights under color of law. In response to a constitutional challenge on grounds of vagueness, the Supreme Court of the United States upheld section 242 by reading into it a requirement of a finding of "specific intent" to deprive the victim of a constitutional right.[87] This ruling has made prosecutions for this offense more difficult because the offender is held to a higher standard: it must be proved that he intended to accomplish the precise act prohibited by the law rather than simply proving that the consequences of his act were substantially certain to occur, which is all that is required for a showing of "general intent."

[85] Mullen Testimony, Washington Hearing Transcript, p. 52. It is significant to note that the Department's conviction rate in cases where police officers are the defendants is markedly different from its normal conviction rate. "If we look at our conviction rate, we fluctuate between 45 to 70 percent in any given year in terms of our success rate when we're prosecuting police officers, but if one looks at our conviction rate in involuntary servitude or peonage cases, one sees interestingly enough the pattern that is more common in normal prosecutions, that is 95, 96, 97 percentage conviction rate, so there is still, assuming we really are applying the same standards in determining when to go forward in all of these cases, there is clearly a discrepancy in the way that the juries respond to our cases when the police officers are defendants." Days Testimony, Washington Hearing Transcript, p. 149.

[86] See, e.g., Days Remarks, *Police Practices and Civil Rights*, p. 143; Days Testimony, Washington Hearing Transcript, p. 88, and written statement, p. 17; Sinderson Testimony, *Houston Hearing*, p. 136; Penrose Testimony, *Philadelphia Hearing*, p. 71.

[87] Screws v. United States, 325 U.S. 91 (1945).

Proof of "specific intent" is difficult in any case, but is further complicated in police misconduct cases by the existence of State "fleeing felon" statutes. Generally, such laws authorize a police officer to use whatever force he believes to be reasonably necessary, including deadly force, to apprehend an individual suspected of committing a felony. Under fleeing felon statutes, police officers are given great latitude in using force; thus, it is difficult to prove that the force was used willfully and with the actual knowledge that it was unnecessary—a showing of which is essential to proving the requisite "specific intent" under section 242.

The application of the "specific intent" requirement is often confusing to juries and therefore has proved in practice to be an impediment to successful prosecution. Testimony received by this Commission in Philadelphia illustrates this difficulty:

> The intent instruction does cause juries, I believe, some difficulty. . . .The jury is required to conclude that the officer's intent was to deprive the victim of a specific constitutional right. Sometimes we can convince the judges to go on and instruct the jury that the officer does not have to be a scholar of constitutional law, and that is the fact. But it does generate confusion.[88]

Former Assistant Attorney Days has expressed similar views:

> While case law has made it clear that a defendant—that is, a police officer—need not be familiar with the 14th amendment in order to deny an individual his protection, the cases also make it clear that more than a general criminal intent is required. While this specific criminal intent, which is defined as deliberately disobeying or disregarding the law, is a constitutionally satisfactory standard of intent and may be understandable to lawyers who deal with constitutional issues routinely, I can't help thinking that many jurors become confused when asked to confirm or deny the existence of specific intent.[89]

Testimony presented to this Commission highlighted a second problem with section 242. While this section is the principal tool in the Federal criminal code for prosecuting incidents of police misconduct, its violation is, in most instances, a misdemeanor punishable by not more than 1 year in prison. Only when death results does the crime become a felony punishable by up to life in prison. In Houston, testimony was received criticizing the range of penalties available under this statute.

> Section 242. . .covers, I would estimate, 75 percent, perhaps as high as 90 percent of the complaints that we receive, if they were criminal activities. . . .That statute makes it a misdemeanor unless the victim dies, in which event it is a felony. That is an unrealistic range there. You may have injury as severe as permanent paralysis which can be prosecuted only as a misdemeanor. I feel that's totally inappropriate to that type of situation.[90]

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[88] Penrose Testimony, *Philadelphia Hearing*, p. 72.

[89] Days Remarks, *Police Practices and Civil Rights*, p. 143.

[90] Sinderson Testimony, *Houston Hearing*, p. 136. Ms. Sinderson also testified as to her belief that there should be mandatory prison sentences in connection with Federal criminal civil rights offenses:

> I feel very strongly that an officer who has taken an oath, a public trust, to preserve and protect the Constitution of the United States and has been found by a jury to have willfully violated that oath and deprived an individual of rights which are guaranteed by the Constitution, I feel that is of such severity and such seriousness to the concept of ordered liberty in our society that it is something which requires a very heavy penalty, regardless of the needs of the individual defendant officer. In other words, his

A Federal prosecutor in Philadelphia also noted this situation:

The problem that I have with that statute is that it is a misdemeanor and, unless death results, the maximum possible penalty is one year in prison. Therefore, if two policemen conspire to beat someone within an inch of life, they can get 10 years [under section 241]. If one policeman does exactly the same thing by himself, he can only get one year, [under section 242] which seems to be an inconsistency.[91]

There are other factors which help explain why few prosecutions are brought each year. These cases are complex and take a great deal of time to investigate and litigate. According to former Assistant Attorney General Days, it takes on the average approximately 1 year to bring a typical police brutality prosecution from receipt of complaint through trial.[92] Some cases take substantially longer:

But if you get a major case like the Webster case, which we investigated for some 3 months prior to initiating a grand jury. The grand jury ran from November of 1977 until indictments were returned in June of '78, and we were not fooling around. We were investigating the case. It was of huge dimension, and something like that eats up time and resources to an incredible degree. From the time that that indictment was returned until the time the case was tried in March of '79, I would say at least 70 percent of [one attorney's] time was spent on that case, that one case, investigating further leads, preparing it for trial, gathering evidence, interviewing witnesses. And then there were two other prosecutors who also participated in that case, and there's a considerable amount of man-hours on their part, too.

We were then in court 5 weeks. That's a huge drain on your manpower, so the number of cases that we have in court can be very deceiving, because we haven't had any that were quick. They were all extensive investigations like that.[93]

Sufficient staff and adequate resources are needed to litigate these cases. Currently 21 of the Civil Rights Division's 168 attorneys are assigned to the Criminal Section which, in conjunction with local U.S. attorney offices, has the responsibility of enforcing the Federal criminal civil rights statutes in the area of police misconduct.[94]

Because of the numerous obstacles to effective Federal prosecution, aggressive enforcement on the part of Federal prosecutors is absolutely essential. Effective prosecution will not deter future misconduct unless it is undertaken in conjunction with leadership on the part of prosecutors and the head of the police department. A former U. S. attorney testified:

. . .the whole key to. . .civil rights enforcement is to have a chief prosecutor somewhere down the line, the U.S. attorney or the local DA, to be committed to the program and, if that U.S. attorney is not committed to the program, a Miss Sinderson will not be able to get four

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acceptance of the public trust and subsequent betrayal of it is something which, aside from any personal considerations about him, is something which ought to be noted with a severe penalty, and I do believe that a mandatory prison sentence should not be in any instances probated. Ibid., p. 137.

[91] Penrose Testimony, *Philadelphia Hearing*, p. 71.

[92] Drew Days III, statement before the House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, Mar. 13, 1980.

[93] Sinderson Testimony, *Houston Hearing*, p. 135. The killing of Randall Webster took place on Feb. 8, 1977. Sentencing of the defendants occurred on May 14, 1979.

[94] Daniel Rinzel, Chief, Criminal Section, Civil Rights Division, U.S. Department of Justice, telephone interview, June 5, 1980.

lawyers and she will not be able to get the staff and they will not be able to go down there and talk to the FBI and tell the FBI, you know, "We want this done" and whatever unless that person is committed or unless the local district attorney is committed. So you can have all the statutes in the world, unless your heart is in the right place, you aren't going to do it. The whole key is the two people. One, I believe, is the U.S. attorney and second is the chief of police. If that chief of police is not committed to that program, I can prosecute those boys all day and all night, but unless that chief tells them, "I'm setting the standard and the standard is there ain't nobody going around and shooting or killing people," and unless he tells them and they believe him, he cracks the whip on them, we [are] never going to.

The whole key is the chief and supervisory level of the officers. If those police officers or supervisors tolerate those police officers. . . lying and covering up and everything else, we'll never get to the root of it, so it all goes back, one, the U.S. attorney willing to prosecute; second, the chief of police, getting the message that he is responsible for a lot of those boys getting prosecuted, unless he straightens them out, and it is his responsibility.[95]

In defining the Federal role vis-a-vis State and local authorities in prosecuting police abuse cases, the Department of Justice takes the position that "it is neither proper nor feasible for the federal government to become the law enforcement body of first resort."[96] Former Assistant Attorney General Days elaborated on this:

Although we see ourselves as part of the law enforcement establishment, we also think that the community of interests among the federal government, the local police and the minority communities can only be served by a collaborative effort. In addition to the goals of punishment and deterrence in federal prosecution, the Civil Rights Division, in its enforcement capacity, is also seeking to strengthen state and local systems. We want to encourage local authorities to police themselves, to develop sound administrative and state procedures to deter, to detect and to discipline police misconduct at the local level.[97]

While the Department is committed to encouraging State and local authorities to be the initiators of proceedings where appropriate, cases do arise in which such prosecutions are unsuccessful. In defining its prosecutorial role under these circumstances the Department follows its "dual prosecution" policy, which was explained to the Commission by Mr. Days:

Under the Department's dual prosecution policy, as amended by former Attorney General Griffin Bell in 1977, and further refined by Attorney General Civiletti in 1979, prosecution of a police officer on Federal civil rights charges will be neither begun nor continued following a State prosecution based on substantially the same act unless there is a "compelling Federal interest" supporting the dual prosecution. As Assistant Attorney General in charge of the Civil Rights Division, I must give my approval before a dual prosecution can be either begun or continued. Since March 1977, I have approved seven dual prosecutions. The dual prosecution policy applies whenever a prior State proceeding has resulted in an acquittal, a conviction, or other termination of the case on the merits. It does not apply where the State proceeding did not get to the point where jeopardy attached. I evaluate requests for dual prosecutions on a case-by-case basis to determine whether the State proceeding has left "substantial federal interests demonstrably unvindicated." Because civil rights cases come within priority areas of the Department, such cases are more likely to meet the "compelling federal interest" requirement. Even so, under Department guidelines a dual prosecution is not warranted unless a conviction is anticipated and, if there was a conviction at the state level, unless greater sentence in the federal prosecution is also anticipated. However, dual

[95] Canales Testimony, *Houston Hearing*, pp. 143–44.
[96] Days Testimony, Washington Hearing Transript, written statement, p. 12.
[97] Ibid.

prosecution may be warranted where the state proceeding was affected by one or more of various factors, such as ineffective prosecution, court or jury nullification in blatant disregard of the evidence, failure of the state to prove an element of the state offense which is not an element of the federal offense, or unavailability of significant evidence in the state proceeding.[98]

Community Relations Service

Finding 4.4: The Community Relations Service of the U.S. Department of Justice has made constructive efforts in some cities in mediating and conciliating disputes between minority groups and police departments.

Another government agency that has addressed the problem of police misconduct is the Community Relations Service of the U.S. Department of Justice (CRS). CRS was established by Title X of the Civil Rights Act of 1964 "to provide assistance to communities. . .in resolving disputes, disagreements or difficulties relating to discriminatory practices based on race, color, or national origin."[99] CRS provides conciliation, mediation, and technical services—services that enable troubled communities to resolve racial and ethnic problems without going through the lengthy and costly process of litigation.

Conciliation is the process of easing tensions and channeling emotions into a constructive dialogue between adversaries, with the goal of reaching a voluntary settlement of differences. Conciliation is the basic response of the Community Relations Service to racial and ethnic problems.[100]

Mediation is a more formal approach, bringing together disputing parties in face-to-face negotiations. Unlike conciliation, mediation is attempted only if both parties elect to pursue this course. One objective of mediation is to encourage the parties to work out a formal written agreement specifying the steps to be taken to address the problems identified.[101]

Technical assistance embraces those services CRS provides directly to public and private agencies and organizations to help them alleviate problems that cause friction between racial and ethnic groups. Technical assistance can range from conducting training in conflict management to providing resource material, programs tools, and models indicating how other agencies or community groups have dealt effectively with similar problems or issues.[102]

The Community Relations Service may offer its assistance on its own motion when its monitoring activities suggest that peaceful relations among community residents are threatened, or at the request of appropriate State or local officials or other interested persons.[103]

[98] Ibid., pp. 6–7.
[99] 42 U.S.C. secs. 2000g–2000g–3 (1976).
[100] U.S., Department of Justice, Community Relations Service, 1978 Annual Report, p. 2.
[101] Ibid., pp. 2–3.
[102] Ibid., p. 3.
[103] Ibid.

The mediation and conciliation efforts of CRS have several advantages over litigation, especially in cases involving police-citizen disputes: (1) the parties can agree to remedies which may not otherwise be imposed by a court (i.e., a change in the Department's deadly force policy); (2) a just and reasonable settlement of the dispute may result more quickly than in litigation; (3) the residue of anger and bitterness that often follows court orders may be less likely to occur when a mutually agreed upon settlement is reached; and (4) there are substantial financial savings to both parties.

In the area of police-community relations, CRS has mediated and conciliated disputes between minority groups and police departments in several communities, including Houston. Its activities have included training in conflict management, conducting assessment of recruitment and upgrading programs, establishing guidelines related to use of firearms, establishing and evaluating police-community relations programs, and identifying models for effective citizen-participation mechanisms.

Over the past several years, CRS has noted a steady increase in the number of complaints it receives from minorities alleging excessive force by the police. In testimony presented to this Commission, CRS Director Gilbert Pompa stated that in the first half of fiscal year 1980, "138 instances of alleged use of excessive force by police were alerted by CRS. . .a 146 percent increase over the same period of the previous year." He said that the number of cases CRS was able to resolve increased from 24 to 58 and projected resolution of a total of 110 cases by the end of fiscal year 1980.[104]

Currently, the Community Relations Service employs 111 persons (divided among the Washington, D.C., 10 regional, and 4 satellite offices) and had a budget for fiscal year 1980 of approximately $5 million.[105]

In Houston the CRS played an important and constructive role in facilitating discussions between the Houston Police Department and an alliance of broad-based, multiracial community groups called the Coalition for Responsible Law Enforcement. The formation of the coalition was precipitated by a growing community concern over a series of police brutality and shooting incidents and interest in establishing a civilian review board. The most widely publicized of these incidents was the drowning death in May 1979 of Joe Campos Torres, a Mexican American, while in the custody of six Houston police officers. In the weeks following the Torres drowning, the coalition, in concert with a representative of the Dallas regional office of CRS, sought the cooperation of the chief of the Houston Police Department in setting up a formal mediation process to discuss the department's firearms and use-of-force policies and police community relations in general. While rejecting the process of mediation, and committing the department to any written agreement as required by

[104] Gilbert G. Pompa, Director, Community Relations Service, U.S. Department of Justice, testimony, Washington Hearing Transcript, p. 191.
[105] Ibid., written statement, p. 3.

mediation, newly appointed Police Chief Harry Caldwell agreed to meet with the coalition and have a CRS representative present during these meetings.

The subsequent discussions centered on (1) the circumstances under which an officer is permitted to shoot; (2) standardization of weapons (i.e., number and type to be used by officers); (3) whether the firearms policy should be written, and, if so, to whom it should be made available; and (4) training in firearms policies.[106] As a result of these deliberations, substantive changes were made in the department's firearms policies. The department also agreed to establish a permanent citizens' advisory commission to meet regularly with the chief of police about community concerns to improve police-community relationships.

From December 1977 until May 1978 the coalition was essentially inactive. On May 9, 1978, a group of community leaders who had been associated with the coalition met with the mayor and the chief of police to request the permanent establishment of a police advisory committee under carefully drawn guidelines. The mayor and police chief appeared enthusiastic about the idea, but it was not until May 10, 1979, one year after the initial meeting, that the mayor and chief agreed to establish such a committee, to be known as the Police Advisory Committee for Continued Improvement (PACCI).[107] PACCI's initial meeting was held in June 1979.

Several Houston community, church, and civic organizations were represented on PACCI.[108] While CRS was not directly involved with the establishment of PACCI, some credit the work of CRS in laying the foundation for its ultimate establishment in 1979.[109]

At the time of the Commission's hearings in Houston, PACCI had identified several issues it might explore in future deliberations with the chief of police. These included citizen complaint procedures, establishing and maintaining communications between police and community, minority recruitment, and improving the structure of the police department to enhance the chief's ability to implement improved policies and procedures. One witness characterized PACCI's objective as follows:

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[106] Robert Greenwald, Community Relations Service, U.S. Department of Justice, Dallas Regional Office, interview in Dallas, Tex., Apr. 18, 1979.

[107] "Summary History of Houston Police Advisory Committee Proposal," Sept. 7, 1979, provided by the Houston Council on Human Relations.

[108] Some of these organizations included: Anti-Defamation League of B'nai B'rith, Antioch Baptist Church, Chicano Training Center, Community Relations Office of the Houston Galveston Diocese, Concerned Teens, IMAGE (Mexican-American Government Employees), Houston Urban League, Houston Bar Association, Houston Chamber of Commerce, Houston Council of Human Relations, Houston Metropolitan Ministries, League of United Latin American Citizens, League of Women Voters of Houston, National Conference of Christians and Jews, Jewish Federation of Houston, and the Houston Gay Political Caucus.

[109] Hector J. Garcia, director, community relations, Metropolitan Transit Authority, Houston, Tex., testimony, *Houston Hearing*, pp. 179–80.

The committee seems to be interested in finding ways of changing the whole nature of the structure so that the community attitude toward the chief, which tends to be very positive, can also be positive toward the officer on the street.[110]

Private Monitoring

Finding 4.5: Private organizations engaged in monitoring police abuse, in those cities where they exist, are providing useful assistance through the gathering and analysis of data, recordkeeping, and provision of assistance to complainants. However, the research conducted by these groups is limited by the general nonavailability from law enforcement agencies of data regarding shootings of and injuries to citizens by police.

The distinct roles played by various government units in the external review of police conduct have been discussed in this chapter. In each instance the role played is largely based on and restricted by the specific statutory authority conferred upon the unit.

In addition to government agencies, private groups that monitor police conduct also exist in some communities. Unlike government agencies, their role is not limited by statutory restrictions but rather is free to be defined by the particular needs of the community served. The activities of these groups range from gathering and analyzing statistical information on incidents of police abuse, to assisting citizens in filing complaints, to monitoring the citizen complaint process, to participating in a police department's process of administrative rulemaking.

An example of this last activity was relayed to this Commission by Amitai Schwartz of the Northern California Police Practices Project.[111] This organization advocated the adoption by police departments—with participation of the public—of specific rules to guide police conduct. It viewed this process of rulemaking as an effective means of controlling police discretion and thereby controlling police abuse. Mr. Schwartz explained the significance of rulemaking:

The benefits of rulemaking in terms of dealing with police abuses are several. First of all, at least in theory and often in practice, to assure some consistency once there is a rule or a policy or a guideline established in treating like cases alike. Second, it allows the police department to fill in some of the gaps in terms of what correct policy ought to be, in terms of the substantive policies. Third, it gives the police department an opportunity to accommodate competing public interests and not just to look to one set of the public or another, but to accommodate those interests in written policy. Fourth, it promotes efficiency because it gives the police some standard operating procedures. It improves communication because it allows the public to address serious concerns in a deliberative and calm manner without waiting for an ugly sort of incident to trigger a public response. It allows the police to really measure the

[110] Larry Spencer, executive director, Houston Council on Human Relations, testimony, *Houston Hearing*, p. 185.

[111] This project operates out of the northern California chapter of the American Civil Liberties Union. It was established in 1973 in an attempt to remedy various sorts of police abuse that were occurring in the San Francisco Bay area.

public feeling and the public views. Finally, it takes away the necessity of proving wrongdoing or assigning fault.[112]

The police practices project was successful in putting the process of rulemaking into practice. For example, it convinced the San Francisco Police Commission, the governing board of the police department, to hold public hearings routinely whenever the department was considering adopting, repealing, or amending a written policy. What began as a departmental practice in 1974, later, at the urging of the project, was written into the city charter, which now requires that public hearings take place whenever the department makes rules.[113]

In attempting the process of rulemaking, the project focused on developing rules on particular police practices and tactics of concern to the community. Mr. Schwartz gave the following example of the project's effort in this regard:

We were faced in a situation in a suburb north of San Francisco with a minority community that was very concerned about the use of police dogs in that city. They felt that on numerous occasions dogs had been used improperly and inappropriately, and they wanted to get rid of the dogs altogther. The police department was opposed to ridding itself of dogs generally, but was willing to listen to some sort of solution, given the fact that the minority community felt strongly that they were being abused.

The solution was for the department to write a regulation or a rule which spelled out in very clear terms under what circumstances dogs would be used and under what circumstances they would not be used. For example, the regulation said dogs would not be used for routine patrol in residential neighborhoods. They would only be used for commercial blocks. Dogs would only be used to investigate and sniff out drugs, guns, contraband, things of that sort. They would not be used for crowd control.

It took a while and there was some give and take between the community and the police department; but I think, in the end, the police department was satisfied because it remained with the power. . .to use their dogs in circumstances where it was appropriate to use them. On the other hand, the minority community was assured after this policy and these rules were worked out and made public that the dogs would not be used. . .as means of endangering the community.[114]

The Chicago Law Enforcement Study Group, established in 1970, is another private organization working with a police department. Among other things, the study group conducted an extensive study on shootings of and by Chicago police officers over a 5-year period (1974–1978). These data were analyzed under a grant from the National Institute of Justice.[115] Although the police department refused for almost a year to provide the

[112] Amitai Schwartz, attorney, American Civil Liberties Union Foundation of Northern California, remarks, *Police Practices and Civil Rights*, p. 64.
[113] Ibid., p. 63.
[114] Ibid., p. 158.
[115] See William A. Geller and Kevin J. Karales, *Split-Second Decisions: Shootings Of and By Chicago Police Officers* (Chicago: Chicago Law Enforcement Study Group, 1981).

study group with the data requested, the information was eventually shared.[116] Discussing the difficulty in obtaining information regarding police shootings generally, the research director of the study group observed:

> Police departments normally provide detailed data on police shootings only to other law enforcement agencies, declining the requests of private researchers on the grounds that such researchers lack "a legitimate law enforcement interest." The resulting information gap may breed public suspicion that police have something to hide about their use of deadly force. This suspicion may be especially strong among those who already distrust the police. And the suspicion is fed by accounts of tragic, apparently unjustified police shootings, which typically are the only kind to make the headlines.[117]

Monitoring groups are also at work in Philadelphia and Houston. The Philadelphia group, the Public Interest Law Center of Philadelphia (PILCOP), was established in 1970. From 1975 to 1979, PILCOP received funding from the Law Enforcement Assistance Administration (LEAA) for its police abuse program. Although the law center is still in operation, it is no longer able to concentrate its efforts in the area of police abuse because it no longer has the funds.[118]

When in operation, PILCOP provided services to individuals who alleged abuse by members of the Philadelphia Police Department. Existing legal mechanisms and extrajudicial strategies were employed in an attempt to provide redress to individual abuse victims and to bring about systematic changes in police practices.

Anthony Jackson, director of PILCOP's police project, testified that from September 1975 to April 1979, PILCOP handled over 2,500 citizen complaints of police abuse in Philadelphia. It referred approximately 200 cases to the police department, of which only 1 resulted in the disciplining of an officer.[119] While barred from providing direct legal assistance in cases having civil damages potential, it referred these cases to private attorneys, but monitored their disposition. PILCOP also conducted studies based on information contained in news clippings on the use of deadly force by Philadelphia Police Department officers against citizens.[120] Mr. Jackson also testified that the mayor and police commissioner considered PIL-

[116] *Police Use of Deadly Force,* workshop conducted by the U.S. Community Relations Service at the 1978 Conference of the National Association of Human Workers, remarks of William A. Geller, research director, Chicago Law Enforcement Study Group, pp. 42–43, 49.

[117] Ibid., p. 41.

[118] LEAA funding was terminated in 1979 because it is a policy of the agency not to extend beyond 4 years the funding of demonstration grants.

[119] Anthony E. Jackson, director of PILCOP, testimony, *Philadelphia Hearing,* pp. 37–38. Approximately 65–70 percent of all complaints came from minority persons, 65 percent of all complaints were from either students or employed persons, 80 percent of all complaints had no prior police record, 89 percent of those complaints charged with "cover charges" were not convicted of those charges. Ibid., pp. 38–39.

[120] Ibid. PILCOP had 3,500–4,000 files of police officers who had some type of complaint against them since 1969, though not all of these complaints were valid. The deadly force studies indicated that in certain years, more than 70 percent of officers involved in these incidents had a prior complaint filed against them.

COP's monitoring efforts as "anti-police" because it criticized police department actions.[121]

The Public Interest Advocacy Center (PIAC) in Houston was established in January 1979, after receiving a grant from LEAA.[122] PIAC has three purposes: to provide consumer aid to elderly and disabled individuals, to provide job assistance to individuals released from the county jail, and to assist persons alleged to have been victimized by the police. With respect to the third function, PIAC assists individuals in pursuing their complaints through the administrative processes set up within the city and within the Houston Police Department itself. The center does not engage in litigation, nor does it provide legal representation to complainants.

In testimony received in Houston, this Commission learned that approximately 60 cases were received by the center from January to September 1979, of which 37 involved contact with the internal affairs division of the Houston Police Department in some way.[123] A spokesperson for PIAC testified that the center had not "experienced a receptive attitude from the Houston police. The attitude that has been presented to our clients as they have described it to us, to ourselves personally, has been one of arrogance and absolute dislike of what we're about in the community."[124]

PIAC also conducted a survey, based on newspaper clippings, on the use of deadly force by Houston Police Department officers over a 10-year period. When the center requested statistical information regarding police shooting incidents from the police department to assist in this study, the department refused.[125]

In Houston, PIAC is not the only group monitoring police abuse. In February 1979 the Houston Gay Political Caucus initiated "Operation Documentation," a program to document incidents of police abuse, harassment, and discrimination against members of the gay community by the Houston Police Department. Operation Documentation was established in response to "the increasing reports of discrimination, entrapment, assault, brutality, failure to protect gay people, and harassment by the Houston Police Department in the form of contrived charges of driving while intoxicated, public intoxication, and assault."[126]

Studies on police abuse conducted by these and other groups provide valuable and detailed information regarding police activity in the community. Unfortunately, these studies are not "official" because the facts and figures contained therein are drawn in large measure from newspaper clippings and citizen information. Statistics on the number of persons killed

[121] Ibid., p. 38.
[122] Jenifer Schaye, Public Interest Advocacy Center (PIAC), testimony, *Houston Hearing*, p. 6.
[123] Ibid., p. 71. PIAC provided this Commission with copies of these files.
[124] Ibid.
[125] Ibid., p. 61.
[126] Houston Gay Political Caucus newsletter (Commission files).

or injured by police in particular cities are not otherwise readily accessible, since local law enforcement agencies are generally not required to include such information in official reports to the public. Moreover, the Uniform Crime Reports issued by the Federal Bureau of Investigation contain information regarding assaults on and shootings of law enforcement officers, but have no corresponding information regarding the same conduct by police against citizens.[127]

Civilian Review Boards

Finding 4.6: Over the past 30 years, several communities have established civilian review boards to ensure citizen review of complaints against police officers. These boards have met with varying degrees of success.

Civilian review boards are another mechanism by which police misconduct can be reviewed. The primary objective of citizen review of police action is to judge the propriety of conduct of an *individual* officer *after* an incident of alleged wrongdoing has occurred.[128]

Generally, the process of civilian review is assumed to include the participation of individuals representing a cross-section of the community and to be external to the investigations unit of the police departments.[129] Civilian review mechanisms vary in type, ranging from civilian-dominated or police-civilian representative boards sitting *external* to the police department to committees and offices including the representation of citizens *within* the police department.[130]

Although there is currently interest in several communities in establishing some form of citizen review of police behavior, the idea is not new. One commentator notes that interest in establishing citizen review of complaints filed against police officers reaches back over 30 years, prompted by the general belief that existing means for seeking redress against misconduct were ineffective.[131]

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[127] The FBI recently noted the lack of reliable sources of information about the level of police brutality in any given area or in the Nation as a whole. FBI Director Judge William Webster said, "In recognition of this, the FBI's Uniform Crime Reporting (UCR) program has over the last year begun tabulating data concerning the use of force resulting in death by law enforcement officers." William Webster, Director, Federal Bureau of Investigation, Washington Hearing Transcript, written statement, p. 17.
A 1977 report issued by the Police Foundation indicates that the only published national figures on the numbers of civilians injured or killed by the police are compiled from coroners' reports by the National Center for Health Statistics of the U.S. Department of Health and Human Services. Unfortunately, even this information is of limited utility because the data is not categorized by city, nor is the cause of death indicated (i.e., firearms, batons, automobile, etc.). Catherine Milton, et al., *Police Use of Deadly Force* (Washington, Police Foundation: 1977), p. 4.

[128] Civilian review boards generally differ from citizen advisory panels. The latter involves citizen participation in the formulation of departmental policy so that the future actions of the police will be guided by policies actually sanctioned by the community.

[129] "Civilian Review of the Police—The Experiences of American Cities" (Hartford, Conn.: The Hartford Institute of Criminal Justice, 1980), p. 2. (hereafter cited as Hartford Institute Study).

[130] Ibid.

[131] Goldstein, *Policing a Free Society,* pp. 157–58.

During this period, review boards were established in several communities, including Washington, D.C. (1948); Philadelphia (1958); Minneapolis, and York, Pennsylvania (1960); Rochester (1963); and New York City (1966). Although each of these boards differed in organization, authority, and procedures, all had a stormy history. The board in Washington was severely criticized for its inactivity. The Philadelphia and Rochester boards became the subject of litigation and injunctions against their operation were issued by the courts. The Minneapolis and York boards never became fully operational, and the New York City board was rejected by the citizenry in a referendum and replaced by a board composed of civilian police employees.[132]

While encountering some successes, these boards largely failed. Their basic flaw was that they were advisory only, having no power to decide cases or impose punishment. Traditionally and legally, a police chief cannot give away his authority as the ultimate decisionmaker and disciplinarian. Without the proper authority to decide cases and impose discipline, a review board cannot adequately perform its functions because it cannot demand change. Another factor attributed to the failure of review boards is the lack of sufficient investigative staff and adequate resources.[133]

Not all attempts at establishing a process of civilian review have failed. According to the U.S. Community Relations Service, some form of citizen review of police conduct is currently in operation in the following communities:

Kansas City, Missouri. Kansas City has had an Office of Civilian Complaints functioning since 1970. It works under the Board of Police Commissioners (4 civilians plus the mayor). They review complaints handled by Internal Affairs and make recommendations on those findings before sending them to the Chief of Police.

Chicago, Illinois. In 1974 the Superintendent of the Chicago Police formed an Office of Professional Standards. It screens all complaints, but anything other than excessive force charges are sent to Internal Affairs. It is within the police department, and yet it is administered by civilians who have a free hand in the conduct of investigations.

Detroit, Michigan. Detroit has had a Board of Police Commissioners since 1974. There are 5 civilian commissioners. The citizens complaint process is not its only function. This office

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[132] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (Washington, D.C.: Government Printing Office, 1967) p. 200 (hereafter cited as *The Police*). See also Goldstein, *Policing a Free Society,* pp. 139, 158.

[133] *The Police,* pp. 200–02. This report also noted, "Civilian review boards have many of the same weaknesses which exist in internal police machinery in many departments. Citizens have had difficulty obtaining complaint forms, the procedures of the board have not been widely known, and the boards have been slow in the determination of cases." At the Commission's Philadelphia hearing, Ian Lennox, executive vice president of the Citizens' Crime Commission, testified that the investigative staff and financial resources for the Philadelphia review board came from the police department, thus making the citizen review board responsible to police investigators. Ian Lennox, testimony, *Philadelphia Hearing,* p. 63. See also Gerald Caiden, *Police Revitalization* (Lexington, Mass.: Lexington Books, 1977), pp. 184–95.

screens all complaints about police brutality and excessive force. These findings are forwarded to the police chief with recommendations for disciplinary action if needed.[134]

There have also been several recent efforts to establish some form of civilian review in other areas of the country:

Oakland, California. The City Council of Oakland created a Citizens Complaint Board (CCB) in April 1980 and it became operational in July 1980. The CCB is advisory to the City Manager and exists externally to the police department. Its purpose is to review citizen complaints alleging excessive force by police officers and after investigating such complaints, reports its findings to the City Manager.[135]

Miami, Florida. The Miami City Commission approved a bill to provide the first civilian oversight of citizen complaints and police investigations of police shootings, a little over a month after the outbreak of violence in the Liberty City of Miami. The review panel will have jurisdiction only over the City of Miami Police Department; the larger and separate Dade County Police Safety Department, whose members figured in the McDuffie case which sparked the May riots, is already served by a county review panel which hears complaints about all county agencies, including police.[136]

Dallas, Texas. Recently the Dallas City Council turned down a request for a civilian review board with subpena power to investigate allegations of police abuse. The three minority members of the Council voted for creation of the review panel, and all eight white members voted against it. After the vote, the Council passed a compromise measure calling for a five-member advisory committee without subpena power that would review decisions of the police department's internal affairs division. None of the minority members were among the six Council members who voted for the compromise. After the meeting, black groups talked of seeking a public referendum on the review board proposal; the police officers' association threatened to file suit over the compromise board, and both sides said the issue had raised tension in the black community "to the point that a new series of shooting incidents could lead to violence."[137]

Washington, D.C. On March 26, 1980, two committees of the District of Columbia City Council held hearings on legislation proposing the establishment of some form of citizen review to investigate allegations of misconduct by local police. Most witnesses did not address the particular provisions of either bill; rather, statements were presented as to why some civilian forum was or was not needed to deal effectively with police misconduct in the District. The testimony opposing the establishment of such a public mechanism focused on the cost involved, lack of necessity for the creation of a new process of review when such a process already exists within the police department, failure of review boards in other cities, and the effect such review would have on police morale.

On October 28, 1980, the D.C. City Council voted to create a civilian-dominated board to review brutality and misconduct complaints against police officers.[138]

In testimony about civilian review boards at the Commission's Houston hearing, one witness opposed to such boards stated:

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[134] Howard P. Carrington, Administration of Justice, specialist, U.S. Community Relations Service, Washington, D.C., letter, Mar. 27, 1980, Washington, D.C., (hereafter cited as Carrington Letter); Hartford Institute Study, pp. 5–19.

[135] Hartford Institute Study, pp. 29–32; Carrington Letter; see also "Police Shootings Result in Oakland Review Unit," *New York Times*, Jan. 13, 1980, p. 39.

[136] "Miami Passes Police Bill; U.S. Aid Outlined," *New York Times*, June 28, 1980, p. 10.

[137] "Race Tensions in Dallas Focus on Police Shootings," *New York Times*, July 6, 1980, p. 22.

[138] Hearing Before the Committee on the Judiciary and the Committee on Public Services and Consumer Affairs of the District of Columbia City Council, Mar. 26, 1980; "Civilian Dominated Board Set on Police Misconduct," *Washington Post*, Oct. 29, 1980, p. C–4.

I believe that putting a bunch of amateurs in a position where they are subject to the pressures of politically oriented groups to do the type of investigation which is required in a case involving police brutality or any sort of violence between officer and citizen is a mistake. I don't believe that they have the training to handle it. I don't believe that they have the resources to do the kind of investigation [required], and I think that it would subject the entire issue to political pressures which are unnecessary and unwarranted and not appropriate to the seriousness of the situation.

I would suggest that [a recent] case [in Houston] is a good example of that. In effect, grand juries. . .served as civilian review boards and they simply did not have the familiarity with police techniques to understand what could have happened and how it could have happened and, given that understanding, to then pursue it and find out what really did happen, but it took a highly organized team of attorneys and FBI agents and the internal affairs investigators to ferret out the truth in that case. I don't see how any civilian review board would have that kind of resource available to them.[139]

Another witness, however, testified as to the need for an effective, impartial mechanism to handle citizen complaints in Houston and suggested that the grand jury system could be such a mechanism:

I frankly think that, from all perspectives, a grand jury system that would ensure an adequate opportunity to be heard would be better than a police civilian review board for several reasons: one is because of the obvious politics in the police department it takes on a bad connotation. There's been so much resistance on behalf of the city of Houston and its mayor and its chief of police for so long that it would be difficult to establish confidence on behalf of the officers and the department in a civilian review board for their own politics. . . .

. . .I think a special grand jury, or in the alternative, a revision of the present grand jury system would meet both the confidence of the police department in that it is an ongoing institution in which they have and should have a great deal of confidence and it would also meet the objections of the community at large with respect to the present method of selection, such that both the police officers and the citizens in a confrontation situation could feel that they had an adequate opportunity to have their cases heard before an impartial body.[140]

Conclusion

Several external controls that can affect the internal workings of police departments have been reviewed in this chapter. Each can play a part in addressing police misconduct, but each also has serious limitations. External controls, thus, are no substitute for fair and effective regulation of police conduct *within* a police agency.

[139] Sinderson Testimony, *Houston Hearing*, p. 138.
[140] Craig Washington, State representative, testimony, *Houston Hearing*, pp. 194–95.

Chapter 5

Remedies

Introduction

Chapter 3 described the process by which individuals who have been the target of police misconduct can file a complaint with the police department. If an investigation is conducted and discipline imposed, this avenue of redress offers the citizen some sense of satisfaction. On the other hand, the absence of effective and timely departmental action may increase the sense of injustice and frustration felt by the complainant.

If the citizen is dissatisfied with the result of the police investigation of his complaint and the complaint alleged the police officer violated the law, the complainant can contact the local district attorney in an attempt to have the officer prosecuted.

If the complaint alleges a violation of an individual's constitutional rights, the aggrieved person can seek prosecution of the police officers by Federal officials. However, although Federal prosecutors annually receive several thousand complaints alleging police misconduct, few cases are actually tried and even fewer result in convictions.

Chapter 4 discussed the limitations of the criminal law in preventing or deterring police misconduct. This chapter examines other remedies for victims of police misconduct. While unlawful police violence is a criminal act, it may also constitute a "tort"—a civil wrong—for which the victim may sue for damages under State law. The injured party can also bring suit under Federal civil rights laws, or similiar State statutes where they exist.

Certain remedies are also available against cities and police departments that receive Federal funds.

Civil Suits for Damages

Finding 5.1: Civil suits for damages under State or Federal law provide a remedy for compensating persons suffering injury resulting from unlawful police action, although the usefulness of such suits is limited by several weaknesses inherent in the civil remedy. Civil suits against individual police

officers may help to deter police misconduct. The effectiveness of this remedy in deterring police misconduct within a department could be strengthened by subjecting municipalities to liability for the unlawful actions of police officers. The threat of monetary judgments against governmental units could have the effect of motivating officials to design hiring, training programs, disciplinary procedures, and internal rules to control and root out misconduct.

Perhaps the most common avenue of redress available to victims of police abuse is initiating a civil action for damages under State law. Generally such suits involve allegations of false arrest, false imprisonment, malicious prosecution, assault, battery, or wrongful death.[1]

There are several major advantages of civil suits: the injured party may personally initiate the action; a case may result in direct compensation to the victim; and the need for proof, by a "preponderance of the evidence," is a less stringent standard than is required in criminal cases.

To a certain extent, the problems in bringing civil suits closely parallel those faced in prosecuting police misconduct cases. The plaintiff may be a minority, unemployed, or uneducated. He may have engaged in criminal conduct himself or possess other characteristics that make his testimony less credible in the eyes of the jury than that given by the police officer-defendant.

In civil cases, however, additional barriers exist. A plaintiff must locate and hire an attorney willing to handle the case. Litigation of this type is time-consuming and costly.[2] Even if a jury finds in favor of the plaintiff, it may consider the financial status of the police officer-defendant in awarding any judgment. Should the victim be vindicated by the award of monetary compensation, the police officer-defendant may not possess the necessary resources to satisfy the judgment, in effect rendering the verdict meaningless. When viewed together, these factors led a national commission to conclude that "[u]nless the prospect of payment is substantial, there is little incentive for the victim to incur the costs of investigation and counsel necessary to the suit or for counsel to take the case on a contingent fee basis."[3]

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[1] Herman Goldstein, *Policing a Free Society* (Cambridge, Mass.: Ballinger Publishing Co., 1977), p. 176. See also Foote, "Tort Remedies for Police Violations of Individual Rights," 39 Minn. L. Rev. 493–516 (1955); and National Commission on the Causes and Prevention of Violence, Task Force on Law and Law Enforcement, *Law and Order Reconsidered* (Washington, D.C.: Government Printing Office, 1969), pp. 370–75 (hereafter cited as *Law and Order Reconsidered).*

[2] In *Law and Order Reconsidered,* it was stated "Unfortunately, [such] litigation is most costly, and consequently least attractive in cases where redress is most needed—brutality cases in which recovery is likely to depend on the resolution of disputed factual issues necessitating a protracted trial," p. 374.

[3] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (Washington, D.C.: Government Printing Office, 1967), p. 200 (hereafter cited as *The Police).*

In addition to civil remedies under State law, a person aggrieved by police misconduct may have a cause of action for damages under the Federal civil rights laws or under similar State laws, where they exist.

The principal Federal statutory authority providing a civil right to redress unconstitutional conduct by local police officers is 42 U.S.C. section 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.[4]

Enacted as part of the Civil Rights Act of 1871, section 1983 was designed to provide a remedy for the widespread civil rights violations that characterized the Reconstruction period in the South. In 1961 the Supreme Court of the United States held this statutory language to permit civil tort suits in Federal courts against State law enforcement officers.[5] There has been no question that individual police officers could be sued for actions constituting a violation of this statute. The Supreme Court, however, has held that a "good faith defense" is available to individual police officers sued under section 1983.[6] Accordingly, if in committing allegedly unconstitutional acts, the police officer reasonably and in good faith believed that his conduct was lawful, even though it was not, it is a complete defense to the section 1983 suit. The phrasing of this defense in jury instructions can be vague and confusing, leaving the jury with little guidance as to the appropriate standard by which a police officer's conduct should be judged.

Section 1983 suits against individual police officers suffer from the same intrinsic weaknesses as do State tort cases previously discussed: the expense of maintaining a suit, problems of proof and credibility of witnesses, and limited personal assets of the defendant police officer. For all of these reasons it is the exception rather than the rule for a victim of police misconduct to prevail against an individual police officer under section 1983, lacking clearly outrageous instances of police illegality.[7]

Even if the obstacles in suing individual police officers are overcome in a given case, State and Federal civil suits for damages are very limited means of deterring police misconduct within a police department. The *President's Task Force Report: The Police* found that:

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[4] 42 U.S.C. sec. 1983 (1976).

[5] Monroe v. Pape, 365 U.S. 167 (1961). Monroe also held that municipalities were immune from suit under 42 U.S.C. Sec. 1983, a holding that was later overruled. See also Reimer v. Short, 578 F.2d 621 (5th Cir. 1978).

[6] Pierson v. Ray, 386 U.S. 547 (1967).

[7] For a discussion of the limitations of police misconduct sec. 1983 suits, see *Law and Order Reconsidered*, p. 378.

The effect of the threat of possible civil liability upon police policy is not very great. In the first place, plaintiffs are seldom able to sustain a successful lawsuit because of the expense and the fact that juries are not likely to have compassion for a guilty, even if abused, plaintiff. Insurance is also now available along with other protective methods that insulate the individual officer from financial loss.

The attitude of the police administrator is to try to protect his man or the municipality from civil liability even though he may privately be critical of the actions of the officer. Usually legal counsel will instruct the police administrator to suspend departmental disciplinary proceedings because they might prejudice the litigation.

Even in the unusual case where an individual is able successfully to gain a money judgment in an action brought against a police officer or governmental unit, this does not cause a reevaluation of departmental policy or practice.

In general, it seems apparent that civil litigation is an awkward method of stimulating proper law enforcement policy. At most, it can furnish relief for the victim of clearly improper practices. To hold the individual officer liable in damages as a way of achieving systematic reevaluation of police practices seems neither realistic nor desirable.[8]

The effectiveness of the tort remedy in deterring police misconduct can be strengthened by holding municipalities liable for the torts committed by police officers in the performance of their duties.[9] The threat of monetary judgments against government units could have the effect of motivating higher-ranking officials to design hiring practices, training programs, disciplinary procedures, and internal rules to control and root out misconduct. As one commentator noted:

To put it bluntly, it would slap the right wrists—i.e., at the level where police policy is made. The Department, under pressure from fiscal authorities, would very likely establish and enforce firmer guidelines through internal review and purge recurrent offenders.[10]

In a major ruling in 1978, the Supreme Court held that under certain circumstances municipalities are subject to liability under section 1983, thus reversing prior case law on this important question.[11] In *Monell v. New York City Department of Social Services,* the Court ruled that local governments could be sued when the action alleged to be unconstitutional "implements or executes a policy statement, ordinance, regulation, or decision officially adopted by that body's officers."[12] However, municipalities could not be held liable unless action pursuant to official policy or

[8] *The Police,* pp. 31–32

[9] See Foote, "Tort Remedies for Police Violations of Individual Rights," 39 Minn. L. Rev. 493 (1955). The American Bar Association has adopted standards for criminal justice, one of which addresses the subject of tort liability. It states, in part:

> In order to strengthen the effectiveness of the tort remedy for improper police activities, governmental immunity, where it still exists, should be eliminated, and legislation should be enacted providing that governmental subdivisions shall be fully liable for the actions of police officers who are acting within the scope of their employment.

The American Bar Association, *Standards for Criminal Justice, Second Edition,* vol. I, p. 154.

[10] *Law and Order Reconsidered,* p. 375.

[11] Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) overruled Monroe v. Pape, 365 U.S. 167 (1961), insofar as *Monroe* held that local governments were not among the "persons" to whom 42 U.S.C. sec. 1983 applies and therefore wholly immune from suit under the statute.

[12] 436 U.S. at 690.

governmental custom (even though such custom did not receive formal approval) actually *caused* the injury. Thus, a municipality

may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.[13]

While the Court held that municipalities were not absolutely immune from suit under section 1983, the Court expressly left open the question whether local governments should be afforded some form of official immunity. This question was later answered in the case of *Owen v. City of Independence* [14] in which the Supreme Court held that a municipality may not assert the good faith of its officers or agents as a defense to its own liability under section 1983.[15] The Court observed that many victims of government malfeasance would be left remediless if cities were allowed to assert the good faith defense that is presently available to most government officials.[16]

In so holding, the Court specifically noted that in addition to compensating victims for constitutional deprivations suffered in the past, section 1983 "was intended to serve as a deterrent against future constitutional deprivations, as well."[17]

The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several governmental officials, each of whom may be acting in good faith.[18]

These recent Supreme Court holdings on the existence and scope of municipal liability may help strengthen the section 1983 remedy. Former Assistant Attorney General Drew Days III has stated:

The Supreme Court, by its recent constructions of 1983 and the whole question of municipal immunity, has made it now more possible to get at the deep pocket in these cases, and, to the extent that one gets at the deep pocket, not only is the money available but there perhaps will

[13] *Id.* at 694.
[14] 445 U.S. 622, 651 (1980).
[15] *Id.* at 638, footnote omitted. The court reasoned that there was no common law tradition of immunity for municipal corporations and that neither history nor policy considerations supported a construction of section 1983 that would justify the granting of qualified immunity to municipalities under the statute.
[16] *Id.* at 651. As noted above, police officers have "qualified immunity" under section 1983 suits from actions arising out of the good faith performance of their duties. Pierson v. Ray, 386 U.S. 547 (1967); Procunier v. Navarette, 434 U.S. 555 (1978) (good faith defense extended to prison officials). See also Scheuer v. Rhodes, 416 U.S. 232 (1974) (qualified immunity available to executive branch officials under certain circumstances) and Wood v. Strickland, 420 U.S. 308 (2975) (qualified immunity available to school board members under certain circumstances).
[17] 445 U.S. 662, 651 (1980).
[18] *Id.*, 651–52, (footnotes omitted).

be greater institutional response and reform, where there are allegations of misconduct that are proven in civil proceedings. I don't think it is the total answer but it is a very important ingredient in dealing with problems of police misconduct.[19]

In Philadelphia the former commissioner of police and former city solicitor deemphasized the significance of civil suits. In testimony before the city council, the police commissioner asserted that over a 17-month period a majority of those individuals initiating civil suits against the police department had prior criminal histories:

Of those who initiate civil suits the majority, or 53 percent, have prior criminal histories. Most of those with prior histories have two or more arrests, some 66 percent of them. I have a sample of ten criminals with extensive arrest records. They are thugs and robbers and bums of the worst sort. And they have initiated suits against the Department.[20]

At this Commission's Philadelphia hearing, the former city solicitor testified that the cost to Philadelphia in civil damage awards for police misconduct suits in 1976–1979 had been $592,350.[21]He omitted from the "misconduct" totals those cases involving police negligence of certain kinds, such as instances involving injury to the police officer from mishandling of weapons or the "classic innocent bystander case, where an officer just does, in fact, shoot the wrong person but, crystal clear, by accident."[22] He also testified that as of April 1979 there were 622 lawsuits pending against Philadelphia police, compared to roughly 100 in 1972–1973.[23] The solicitor referred to the civil damages as the "cost of doing business"[24] in Philadelphia, stating:

There are many factors that result in a jury verdict, or a possibility of a jury verdict. Just when you get right to the bottom line, in economic situations, it really is not indicative of what an officer did or didn't do. On the other hand, you can have—let me give you an example. An officer gets angry at a citizen, which he shouldn't do, and he slams the car door at the citizen, which is something he shouldn't do. On the face of a little thing, it's certainly not a gross or even a violation of any sort, just something that shouldn't have been done. But because of the location of the elbow and because of the location of the door and because of the physical mechanics involved, it turns into a very, very serious injury and you have a large settlement. That is not an indication of abuse.[25]

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[19] Drew S. Days III, Assistant Attorney General for Civil Rights, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Sept. 16, 1980, transcript, p. 117 (hereafter cited as Washington Hearing Transcript).

[20] Joseph F. O'Neill, commissioner of police, city of Philadelphia, testimony before Philadelphia City Council, Dec. 18, 1978, transcript, p. 731.

[21] Sheldon Albert, city solicitor, city of Philadelphia, testimony, *Hearing Before the U.S. Commission on Civil Rights, Philadelphia,* Apr. 16–17, 1979, p. 237 (hereafter cited as *Philadelphia Hearing).* Another witness testified that the figure was substantially higher. Anthony Jackson, director of the police project of the Public Interest Law Center of Philadelphia, estimated that in fiscal year 1976–77 and 1977–78 the city of Philadelphia paid out over $2 million in awards and settlements to victims of police abuse in Philadelphia. Jackson Testimony, *Philadelphia Hearing,* p. 40.

[22] Albert Testimony, *Philadelphia Hearing,* pp. 238–39.

[23] Ibid., p. 239.

[24] Ibid., p. 238.

[25] Ibid., pp. 236–37.

The city of Philadelphia is presently attempting to resolve the host of civil lawsuits against it, including those alleging police abuse, through the process of negotiation and settlement rather than going to court.[26]

In Houston, testimony was received that in only one case alleging excessive use of force by Houston police officers had a civil judgment been awarded.[27] In October 1980 a jury in Houston awarded $1.4 million in damages to the parents of an unarmed teenager who was shot and killed by Houston police officers after a 100 m.p.h. chase in a stolen van. Although the officers testified in the criminal proceedings that the teenager was armed, subsequent investigation revealed that he had no weapon and that officers had placed a "throw down" gun by his body to justify the shooting. The jury directed two of the three defendants to pay a total of $1.2 million to the decedent's family. The city of Houston was directed to pay $200,000 of the total damage award, and the city is appealing the judgment.[28]

Federal Litigation Aimed at Institutional Misconduct

Finding 5.2: Although the United States Department of Justice recognizes the importance of bringing suit against police departments where a pattern or practice of police abuse is alleged to exist, recent court decisions have held that the Department has limited legal authority to bring suits to prohibit the continuation of such practices.

As noted in chapter 4, criminal prosecution of police misconduct cases does not reach activities of an entire police department or city administration, but only addresses itself to "the actions of one or more officers in a given circumstance, framed by and limited to the wording of the criminal indictment."[29] Likewise, civil suits for damages typically seek redress for the conduct of individual officers. Additionally, both criminal prosecution and civil litigation suffer from important restrictions limiting their effectiveness as remedies.

Cases may arise, however, in which a systematic pattern of misconduct within a police department is alleged. Recent court decisions have held that the U.S. Department of Justice has virtually no legal authority to bring suit to prohibit the continuation of those practices.

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[26] *The Philadelphia Inquirer,* Oct. 1[0], 1980, p. 1-B. This article noted that under the administration of Mayor Green a "crash settlement program" has been undertaken to dispose of the backlog of about 4,500 civil lawsuits against the city, including 500 civil rights complaints alleging police abuse.

[27] Dennis Gardner, senior assistant city attorney, testimony, *Hearing Before the U.S. Commission on Civil Rights, Houston, Tex.,* Sept. 11-12, 1979, p. 243 (hereafter cited as *Houston Hearing).*

[28] *The Miami Herald,* Oct. 17, 1980, p. 8-C. Letter from Dennis Gardner, Mar. 27, 1981.

[29] Drew S. Days III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, remarks, consultation sponsored by the U.S. Commisssion on Civil Rights, Dec. 12-13, 1978 (hereafter cited as *Police Practices and Civil Rights).*

In the case of *United States v. City of Philadelphia,* [30] filed by the Department of Justice in 1979, the Department alleged the existence of a pervasive pattern of police abuse in Philadelphia that resulted in the denial of basic Federal constitutional rights to persons of all races, colors, and national origins.[31] The complaint further alleged that police department and city officials actually facilitated the abusive practices by maintaining policies and procedures that thwarted the investigation of complaints and shielded the officers involved from any kind of scrutiny or discipline. As a remedy, the Department sought, in part, to restrain the defendant officials from engaging in the allegedly unconstitutional acts, practices, policies, and procedures and to terminate certain Federal funds to the city and the police department until effective reforms could be instituted. On October 30, 1979, the Federal district court, dismissing a major portion of the case, concluded that no statutory authority, express or implied, authorized the Attorney General to bring such a suit: "The Attorney General has no standing. . .when he seeks to advance the civil rights of third persons, absent an express grant of the necessary power by an Act of Congress."[32] On December 13, 1979, the district court, finding that the remaining allegations were not stated with sufficient specificity, dismissed the balance of the case without reaching the merits of the serious charges alleged.

The Justice Department appealed this case and a three-judge panel of the United States Court of Appeals for the Third Circuit affirmed in all respects the judgment of the district court. The Justice Department then filed a petition with the court of appeals to rehear the case. On February 19, 1981, the court denied the petition by a four-to-four vote.[33]

The importance of the Philadelphia suit was noted by former Assistant Attorney General Days in testimony before this Commission:

> . . .Attorney General Bell and I concluded when we decided to file the Philadelphia case we were dealing with something that went beyond individual acts of misconduct. We were dealing with institutional problems. . .if an officer on the beat perceives that he or she is going to be shielded and protected by the institution from an investigation and from prosecutions, that the counsel is going to be provided, and even when damages are awarded that not the officer but the city is going to pay, then I think what we have is a situation where even prosecuting individual officers is not going to change the environment.
>
> I think I have spoken to this Commission before about the Philadelphia experience. We prosecuted six homicide detectives for systematically forcing confessions out of people who

[30] United States v. City of Philadelphia, No. 80-1348 (3d Cir. Dec. 29, 1980), 482 F. Supp. 1248, 1274 (E.D. Pa. 1979).

[31] The complaint in this suit set forth alternative grounds for holding the challenged practices of the Philadelphia Police Department to be unlawful. It alleged that, without regard to racial discrimination, conduct fostered by the defendants violated the due process clause of the 14th amendment as well as 18 U.S.C. secs. 241-242. In addition the complaint alleged that the practices discriminated against blacks and Hispanics thereby violating the equal protection clause and statutory prohibitions against racial discrimination in federally assisted programs. For further discussion of this case, see "The Authority of the Attorney General to Institute Police Brutality Suits—United States v. Philadelphia," 17 Am. Crim. L. Rev. 255 (1979).

[32] 482 F. Supp. 1274 (E.D. Pa. 1979).

[33] United States v. City of Philadelphia, No. 80-1348 (3d Cir. Dec. 29, 1980, and Feb. 19, 1981).

are charged with killings. They were convicted; their convictions were affirmed on appeal. They engaged in the most horrendous activities in exacting and extracting confessions from people, in one instance in question, a false confession. The mayor at the time, of Philadelphia, kept the officers on the force, promoted one of the men who had been convicted, and asserted they were innocent until proven guilty at the Supreme Court level.

I don't want at this point to beat on, to use the vernacular, Philadelphia because I think Mayor Green and Commissioner Solomon have really taken significant steps since they came into office to deal with many officers. . . .That's the type of institutional response that I think begins to get the message across to people up and down the line, that they cannot violate citizens' rights with impunity.

I see it as a group of responses to police misconduct, criminal prosecution, civil actions that seek institutional reform of the political process, certainly, and damage actions, and there may be several others that I can't think of right now, but it would be, I think, very unfortunate for us to believe that there is any single answer to this problem.[34]

The Justice Department is, however, continuing to investigate complaints alleging police misconduct that fall within its jurisdiction. In Memphis, Tennessee, an investigation by the U.S. Department of Justice revealed a discriminatory pattern in that police department's use of excessive force, including deadly force. On April 22, 1980, the police and the Justice Department entered into a negotiated agreement imposing limits on the use of deadly force and requiring improved training for police officers. The Justice Department is conducting investigations into the use of force by police in several other cities.

Withholding Federal Funding

Finding 5.3: The Law Enforcement Assistance Administration, a Federal grantmaking agency that funds State and local programs, and the Office of Revenue Sharing, a Federal agency that funds State and local units of government, have not used their powers effectively to curb police department employment discrimination and misconduct in the delivery of police services; this has been due in part to a lack of clear policy and a lack of adequate staffing.

Cities and their police departments receive millions of Federal dollars each year. The two principal Federal enforcement agencies that channel money into local law enforcement agencies are the Law Enforcement Assistance Administration (LEAA) within the U.S. Department of Justice and the Office of Revenue Sharing (ORS) within the U.S. Department of the Treasury.

Both agencies are subject to Title VI of the Civil Rights Act of 1964[35], which provides as follows:

[34] Days Testimony, Washington Hearing Transcript, pp. 117–19.
[35] 42 U.S.C. sec. 2000d (1976).

No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Each agency is governed by its own enabling legislation. Both the Omnibus Crime Control and Safe Streets Act of 1968, as amended (administered through LEAA) and the State and Local Fiscal Assistance Act of 1972, as amended[36] (administered through ORS) contain the following provision:

No person in the United States shall on the grounds of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under [the respective program].

Each agency has also issued regulations in order to carry out these civil rights responsibilities.[37] LEAA recently issued a rule prohibiting any recipient of its funds from subjecting any individual to physical abuse or summary punishment.[38] Both LEAA and ORS are statutorily authorized to suspend or terminate the flow of Federal funds to a recipient who does not comply with the nondiscrimination provisions.

LEAA

LEAA[39] provides funds and technical assistance to State and local governments for reducing crime and juvenile delinquency and for improving the administration of the criminal justice system.[40] In its early years, the agency funded many improvements in police management and operations in such areas as communications, education and training, police community relations, investigative techniques, and crime analysis.[41]

In a 1979 report on LEAA legislation, the Senate Judiciary Committee recognized the need for funding research in the areas of police-minority relations and police misconduct and suggested that LEAA give priority to these areas in awarding grants.[42] As a result, such projects as the following have been recently funded: $361,000 to the University of California at Irvine to review data from 14 police departments to analyze the use of deadly force; $300,000 to the National Urban League and National Council of La Raza to study the use of deadly force from the minority group perspective; and $155,000 to the International Association of Chiefs of Police (IACP) to survey the 57 largest police departments in order to

[36] 42 U.S.C. 3701–3797 (Supp. 1980); 31 U.S.C.A. 1221–1265 (Supp. 1980).
[37] 28 C.F.R. Part 42, Subpart D; 31 C.F.R. Part 51, Subpart E (1975) 1977.
[38] 28 C.F.R. Part 42, sec. 42.208(b)(8).
[39] In the event that LEAA should be phased out of existence, recommendations in this report pertaining to LEAA are intended to apply to whatever agency assumes the functions of LEAA.
[40] U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. VI, To Extend Federal Financial Assistance* (1975), p. 270.
[41] Senate Report 96–142, p. 18, Senate, Committee on the Judiciary, 96th Cong., *Law Enforcement Assistance Reform Act of 1979*, S. Rept. No. 96–142, 96th Cong. 1st sess. 18 (1979).
[42] Ibid., pp. 19–20.

gather data and identify means by which police administrators can limit the use of deadly force.[43] In addition to these national studies, LEAA is funding programs to assist local jurisdictions that have special units to investigate police shootings of civilians. A 1-year grant to Los Angeles, for example, calls for the dispatchment of police personnel, a deputy district attorney, and an investigator to the scene of any police shooting on a 24-hour basis.[44]

LEAA's Office of Civil Rights Compliance in its reviews considers factors such as: response times to calls from the minority community compared with those in the majority community, the homicide clearance rate in the minority community compared to the majority community, underenforcement, citizen complaint processes, bilingualism, and background investigations that may negatively affect the hiring of minorities.[45]

Until recently, LEAA's policies on investigating alleged discriminatory police misconduct were not clear. In December 1978 Lewis H. Taylor, then Director of LEAA's Office of Civil Rights Compliance testified:

> . . .we had a meeting with the [Department of Justice] Civil Rights Division approximately a year ago to determine exactly what our responsibility would be in the issue of overenforcement and brutality. That was a very productive meeting, and we were informed, of course, that the criminal section would be handling the issue of brutality. It clarified exactly what the responsibilities of our office were at that time. I'm not quite sure where we stand now, but I'm just saying we are going to get some different instructions pretty soon.[46]

In an interview in October 1979, Paul R. Barnes, Mr. Taylor's successor, stated that LEAA had jurisdiction to investigate charges of police misconduct in the context of discrimination in the delivery of services, but noted that it was futile for his staff of six persons to secure the compliance of more than 30,000 grantees.[47]

The adoption of the recent rule explicitly prohibiting "physical abuse"[48] may clearly establish LEAA's jurisdiction over police brutality, increase support for the Office of Civil Rights Compliance, and induce fund cutoffs when appropriate. The filing of the above-mentioned suit by the Attorney General against the city of Philadelphia may also help accomplish these objectives; that suit charged in part that the city and police officials established police policies that have resulted in the widespread and severe abuse of citizens by police officers, depriving citizens of rights by subjecting them to systematic physical and verbal abuse, summary punishment, and racial and ethnic discrimination. LEAA's nondiscrimination provision formed part of the basis of this suit.[49]

[43] Criminal Justice Newsletter, p. 3, Oct. 22, 1979.
[44] Drew Days III, Testimony, Washington Hearing Transcript, Sept. 16, 1980, p. 11.
[45] Lewis W. Taylor, *Police Practices and Civil Rights*, pp. 145–46.
[46] Ibid., p. 145.
[47] Barnes Interview, Oct. 29, 1979.
[48] 28 C.F.R. Part 42. sec. 42.208(b)(8).
[49] U.S. v. Philadelphia, E.D., Penn. Civ. No. 79-2937, Complaint.

The promise that the new rule and lawsuit hold for the future is especially important in light of comments made by two witnesses at the Philadelphia hearing. The police project director of the Public Interest Law Center of Philadelphia testified:

> [I]t has been our experience in trying to trigger those mechanisms that it is a very cumbersome process. Indeed, right today, if we go outside and see the police department, if for some argument they just decided to abuse everyone who is outside this street, and we said that ought to be reason enought to cut off revenue sharing funds or LEAA funds, from my investigations that is not possible. There are so many administrative—well, so many things that can be done to push it off. I know for a fact that there has been a request made in Washington for withholding of LEAA funds and revenue sharing funds. That has not been done.[50]

The assistant distict attorney of the police brutality unit in the office of the Philadelphia district attorney stated:

> I think the area that you should be looking at is what, if any, steps can be taken by the LEAA to bring departments like Philadelphia police into compliance with the Constitution of the United States. For example, an awful lot of LEAA money comes into Philadelphia, and I think if LEAA were to say to the department, "We're not going to give you any more Federal money until you clean house," that would have a tremendous effect.[51]

ORS

The Office of Revenue Sharing (ORS) under an established formula, provides State and local governments with their share of Federal revenues, which may be used for any purpose consistent with State and local law.[52] The agency has been distributing about $6 billion annually to more than 38,000 State and local jurisdictions.[53]

Although ORS does not require that recipients specify how funds will be spent, they are required to execute forms which "assure" that they will not violate the provision prohibiting discrimination based on race, color, national origin, or sex.[54]

As was the case with LEAA, the ORS policy on investigating alleged discriminatory police misconduct is vague. In an interview in October 1979, Treadwell Phillips of the ORS Civil Rights Division said that there was no serious commitment to secure civil rights compliance at that point, largely because his staff of 32 was nowhere near adequate.[55] Thus, as a matter of policy, his office does not investigate complaints of this type but refers them to the Department of Justice[56] even though two chief counsels

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[50] *Philadelphia Hearing,* pp. 49–50.

[51] Ibid., p. 98.

[52] 31 U.S.C.A. secs. 1221–1264 (Supp. 1980).

[53] *Civil Rights Under General Revenue Sharing,* Center for National Police Review, Catholic University Law School, Washington, D.C., July 1975, p. 3.

[54] Treadwell Phillips, interview in Washington, D.C., Oct. 31, 1979.

[55] Ibid.

[56] This is in contrast to Mr. Phillips' remarks on Dec. 13, 1978, at the Commission's national consultation when he stated:

> Even though we don't have complaints, we would expect to be involved in this type of operation within the ensuing year through the use of a compliance review that would be self-initiated by our

of ORS have ruled that ORS does have jurisdiction to accept and investigate complaints of discrimination relating to police misconduct.[57]

In a subsequent interview Mr. Phillips said that ORS had submitted a request to the Department of Justice for a meeting to clarify ORS's handling of brutality complaints.[58] As of October 1980, several months after this request, no response had been received from the Department of Justice, although an official did state in April 1981, "It should be noted that the Justice Department did agree that such a meeting would be useful to clarify ORS's role in handling brutality and remains willing to meet with ORS at any convenient time or place to discuss these concerns."[59]

Mr. Phillips also noted that most complaints involved discrimination in employment and said that he could recall only about 10 complaints alleging police brutality, 9 of which had been referred to the Department of Justice.[60]

Former ORS Chief Counsel Herman Schwartz described the staff of the Civil Rights Division as "superb," but said they could not do a massive investigation. He said that it is impractical to monitor civil rights compliance by using compliance reviews, considering the volume of individual complaints received.[61] An interview with ORS Director Jose Lucero in July 1980 revealed that there were 1,200[62] active complaints to be resolved and that ORS gives priority to individual complaints over general compliance reviews.[63]

In cases when ORS and the Department of Justice have attempted to coordinate investigations, some difficulties have been cited. An ORS official complained that Justice did not keep ORS informed on late

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office.

So it is our position that we do have this responsibility. The act itself imposes this responsibility upon us and we intend to do serious and indepth reviews of selected jurisdictions to see if, in fact, there can be any documentation that would stand up and, in turn, that would allow us to effect some changes in the system so that minorities and the majority community would be treated equally insofar as the use of revenue sharing funds are concerned. (*Police Practices and Civil Rights*, p. 151)

In the interview on Oct. 31, 1979, Mr. Phillips said he had changed his mind since his remarks at the national consultation because the office had lost an experienced investigator.

[57] Phillips Interview, Oct. 31, 1979.

[58] Phillips Interview, July 23, 1980.

[59] James P. Turner, Acting Assistant Attorney General, Civil Rights Division, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Apr. 6, 1981 (hereafter cited as Turner Letter).

[60] Phillips Interview, July 23, 1980.

[61] Schwartz Interview, Nov. 6, 1979.

[62] Among the complaints received were two from Houston: a 1975 complaint from the National Organization for Women (NOW) and a 1977 complaint from the Afro-American Police Officers League, both alleging employment discrimination in police hiring. The NOW complaint was eventually dismissed; the League complaint, which is still pending, noted that out of 2,760 officers on the Houston police force, only 150 (5.4 percent) were black, while Houston's black population constituted 30 percent of the total population, Of 227 sergeants, 2 were black; of 81 lieutenants, 29 captains, and 8 deputy chiefs, 1 was black. The investigating delay was apparently caused by the departure of the investigator working on the case. The case has been reassigned, and the league has submitted a revised complaint. Kathy Idziak, equal opportunity specialist, Civil Rights Division, Office of Revenue Sharing, telephone interview, Sept. 29, 1980.

[63] Jose Lucero, interview, July 23, 1980.

developments and relied too heavily on already overworked ORS personnel to do their work.[64] Mr. Luero said recently, however:

> This office, has worked with the Department of Justice in the area of police misconduct and anticiaptes further endeavors with that agency in an attempt to establish a uniform policy for handling complaints that come to our attention. The Chief Counsel's Office participated with the Department of Justice in a police misconduct trial investigation in Memphis, Tennesse. It also assisted with the pleadings introduced by Justice in the court presentation of the police misconduct trial in Philadelphia.[65]

Current officials reveal a similar back-and-forth attitude with respect to ORS's jurisdiction and willingness to investigate police misconduct discrimination cases. The Chief of the Federal Enforcement Section of the Justice Department's Civil Rights Division has pointed out that although the Justice Department has concurrent jurisdiction with respect to some violations under the Revenue Sharing Act, the ORS is still obligated under the statute to handle police brutality discrimination complaints just as it would handle any other complaint. He stated that the ORS cannot, under the statute, refer these cases to the Justice Department.[66] However, the ORS Chief Counsel maintains that ORS is not set up to do the extensive investigation that is necessary to prove a police brutality discrimination case.[67] Mr. Lucero recently said:

> Because of the dramatic increase in the number of complaints involving discrimination in employment and municipal services, this Office's resources are being concentrated on resolving these cases. It is for this reason that we particularly look to the Department of Justice for guidance in the police misconduct area, as they appear to possess the expertise in this field.[68]

One potential remedy for the individual complainant remains unnoticed and unused. Section 124(d) of the Revenue Sharing Act provides that if the ORS has not acted on an individual complaint within 90 days, the complainant will be deemed to have exhausted the administrative remedies and may go to court to seek a fund cutoff and a temporary restraining order to halt the alleged illegal conduct. Under present procedures, ORS does not notify the complainant of this right under the law,[69] although it would be a simple matter to do so at the time it acknowledges receipt of each complaint.

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[64] Schwartz Interview, Nov. 6, 1979.
[65] Jose Lucero, letter to Louis Nunez, Apr. 1, 1981 (hereafter cited as Lucero Letter).
[66] David Rose, Chief, Federal Enforcement Section, Civil Rights Division, Department of Justice, telephone interview, Oct. 1, 1980.
[67] Richard Isen, Chief Counsel, Office of Revenue Sharing, telephone interview,Oct. 1, 1980.
[68] Lucero Letter.
[69] Isen Interview.

Chapter 6

Legislative and Legal Developments

Introduction

Legislatures at the Federal and State levels play a key role in formulating public policy in the area of police practices. At the Federal level, Congress has considered legislation addressing some of the major issues already raised in this report, including reform of the Federal criminal civil rights laws, subjecting municipalities to liability for the civil rights violations of its employees and protecting the due process rights of police officers. At the State level, legislatures have enacted laws setting legal boundaries for the use of deadly force by law enforcement officers.

Federal Criminal Civil Rights Statutes

As noted in chapter 4, sections 241 and 242 of Title 18 of the U.S. Code are the principal Federal criminal civil rights statutes under which the Department of Justice may seek criminal convictions against police officers who abuse their authority. Although these statutes provide a foundation for the Federal response to individual instances of police misconduct, the testimony received at this Commission's police practices hearings revealed that both sections suffer from important substantive and procedural defects that impede prosecution efforts by Federal officials.

Section 241, commonly known as the "conspiracy" offense, makes it unlawful for

> . . .two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the laws of the United States, or because of his having so exercised the same.

It also makes it a criminal offense for two or more persons to

. . .go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured.[1]

As originally enacted, a violation of section 241 was a felony, punishable by a maximum fine of $5,000, a 10-year prison sentence, or both. Congress amended this statute in 1968 to allow the imposition of a fine of $10,000 and a sentence of life imprisonment if death results.[2]

Prosecution of cases under section 241 requires proof of a number of factual elements. There must exist a conspiracy of two or more persons, the specific purpose of which is to injure, oppress, threaten, or intimidate one or more persons. One or more of the intended victims must be a citizen of the United States. The specific intent of the conspiracy must be to hinder the free exercise or enjoyment of a right or privilege secured by the Constitution or laws of the United States.

Although an invaluable tool for Federal prosecution of civil rights violations by police officers, the utility of section 241 is limited because it cannot be used to reach an act committed by an individual police officer not part of a conspiracy. Moreover, it cannot be used to reach conduct directed at persons who are not citizens of the United States, for example, Mexican aliens.

Section 242 is the principal tool in the Federal criminal code for prosecution of incidents of police misconduct. It subjects to Federal jurisdiction any person who

. . .under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.[3]

As originally enacted, a violation of this statute was a misdemeanor punishable by up to 1 year imprisonment. However, in 1968 Congress amended it to provide for a fine of $1,000 and imprisonment for any term of years, including life, if death results.[4]

The Supreme Court of the United States upheld the constitutionality of a section of the Federal criminal code, now codified as section 242, in *Screws v. United States.* [5] Screws, a county sheriff in Georgia, with the assistance of two others arrested a young, black male on charges of theft. When they brought him to the courthouse, they knocked him to the ground and severely beat him; he died within an hour at a hospital. Indictments were brought against the officials charging them, in part, with violating section 242 by willfully depriving the decedent of rights, privileges, and immunities secured or protected by the 14th amendment, namely, "the right not to be deprived of life without due process of law and the right to be tried,

[1] 18 U.S.C. sec. 241 (1976).
[2] *Id.*
[3] 18 U.S.C. sec. 242 (1976).
[4] *Id.*
[5] 325 U.S. 91 (1945).

upon a charge for which he was arrested, by due process of law and if found guilty, to be punished in accordance with law. . . ."[6]

The defendants were convicted; they appealed, challenging section 242 as being unconstitutionally vague with respect to the nature and extent of the rights actually protected under the sweeping language of the statute. Consequently, it was argued, the statute lacked an ascertainable standard of guilt under which the defendants could be judged. The Supreme Court attempted to resolve this problem by interpreting the word "willfully" to require the defendant to have a "specific intent" to deprive the victim of a federally or constitutionally guaranteed right.[7] The Court stated:

> We do say a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.
>
> Once the section is given that construction, we think that the claim that the section lacks an ascertainable standard of guilt must fail.[8]

Thus, by court interpretation, the elements of a section 242 offense are that a person (1) act "under color of law" (2) with the specific intent (3) to deprive an inhabitant (4) of an established right secured by Federal law or the Constitution.

There are problems in prosecuting police misconduct cases under section 242. The "specific intent" element is especially troublesome for prosecutors because it is very difficult to prove beyond a reasonable doubt that a police officer specifically intended to violate the constitutional rights of the victim. In many instances, there are only two witnesses to the incident, the police officer and the victim, and the jury may be more inclined to believe the testimony of the police officer whose sworn duty is to uphold the law. Additionally, the legal doctrine of specific intent is difficult to understand and generates confusion among jurors.

Moreover, even if the burden of proof can be met, the maximum punishment authorized is a fine of $1,000, or up to 1 year imprisonment (unless death results), or both. In light of the difficulty of proof and the generally limited resources and heavy caseloads of prosecutors, it is difficult to measure what effect, if any, the relatively light penalty imposed by section 242 has on the decision by prosecutors to bring such cases. At a minimum, it can be said that the misdemeanor penalty does not serve as a great incentive to prosecute.

While prosecutions of police misconduct cases can and should be vigorously sought under existing Federal laws, the Commission on Civil Rights believes that it is imperative for the Department of Justice to have

[6] *Id.* at 93.
[7] *Id.* at 101.
[8] *Id.* at 103.

at its disposal more effective statutory tools to prosecute unlawful police conduct.

Prosecutions of police misconduct cases under the Federal criminal civil rights laws could be made more effective in several ways if present law were amended. Section 241 could be amended to protect all persons, not just citizens, as present law provides. Focus would then be placed on the nature of the rights violated rather than on the status of the victim involved. Section 241 also could be amended to remove the existing requirement that the prohibited actions be part of a conspiracy.

Section 242 could be amended to remove the impediment to prosecution presented by the judicially imposed "specific intent" requirement. Additionally, the penalty for violation of section 242 could be made a felony under all circumstances.

Legislation proposing revisions of sections 241 and 242, consistent with these suggested changes, was considered in the 96th Congress as part of a proposed overall revision of the Federal criminal code.[9] Both the Senate and House Judiciary Committees completed action on the respective bills, but the legislation was not considered by the Senate or House.

Municipal Liability

As discussed in chapter 5, a civil suit for damages against individual police officers is a potentially useful device for compensating victims of illegal police action and for deterring police misconduct. The effectiveness of this remedy in deterring police misconduct could be strengthened by subjecting municipalities to liability for unlawful police activity.

Recent decisions by the United States Supreme Court have given new vitality to efforts to hold municipalities liable under 42 U.S.C. section 1983[10] for civil rights violations committed by police officers. In *Monell v. New York City Department of Social Services,* [11] the Court held that municipalities were not absolutely immune from liability under section 1983 and, in so holding, overruled in part its landmark decision 17 years previously, *Monroe v. Pape.* [12] While the *Monell* Court made clear that municipalities are not wholly immune from suit under section 1983, it made equally clear that such entities are not, under all circumstances, liable for

[9] The Senate bill, S. 1722, known as the Criminal Code Reform Act of 1979, was introduced by Senator Edward M. Kennedy (D–Mass.) on Sept. 7, 1979. 125 Cong. Rec. S12204 (daily ed. Sept. 7, 1979). The House bill, H.R. 6915, known as the Criminal Code Revision Act of 1980, was introduced by Representative Robert F. Drinan (D–Mass.) on Mar. 25, 1980. 126 Cong. Rec. H2190 (daily ed. Mar. 25, 1980).

[10] 42 U.S.C. sec. 1983 establishes a civil cause of action for the deprivation of an individual's civil rights. It provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[11] 436 U.S. 658 (1978).

[12] 365 U.S. 167 (1961).

the actions of their employees or agents. For liability to be imposed, the alleged unconstitutional action must be taken pursuant to some official policy or custom and must actually cause the injury.[13] In construing the legislative history of section 1983, the Court also found that Congress did not intend for liability to be imposed on municipalities solely on a theory of *respondeat superior.* [14] Thus, while a municipality is now subject to section 1983 suits, it will not be held liable "solely because it employs a tortfeasor."[15]

The Court expressly and implicitly left open for future decision several important questions, including whether States and the District of Columbia are subject to suit under section 1983, further delineation of the circumstances under which a municipality will be held liable, and whether the same immunities and defenses available to individual defendants under section 1983 will be available to municipal defendants.

In 1980 the Supreme Court addressed this last question in the case of *Owen v. City of Independence,* holding that a municipality is not entitled to "qualified immunity" from liability based on the good faith performance of duties by the city officials involved.[16]

Legislation addressing the scope of municipal liability under section 1983 was introduced in the 96th Congress. The Civil Rights Improvements Act of 1979, S. 1983, was introduced to "insure the continued vitality of Section 1983" and to clarify legislatively some of the questions left open by *Monell*.[17]

In part, S. 1983 provided that States and the District of Columbia,[18] municipalities, counties, and other forms of local government be subject to suit under section 1983. It delineated certain circumstances under which such entities would be liable for the actions of their employees and agents for violations of section 1983. These included instances where (1) the conduct was authorized by statute, ordinances, policy, or practice of the entity or was undertaken by those making such policies; (2) a supervisor encouraged or directed his subordinate to engage in the unconstitutional conduct; (3) a government employee had a history of misconduct and his supervisor failed to take the necessary remedial action to prevent its recurrence; and (4) a constitutional violation was documented but the identity of the offending officer could not be determined. The bill prevented the governmental unit from using the personal defenses that

[13] 436 U. S. at 691, 692–694

[14] Under the legal theory of *respondeat superior,* an employer is held liable for the acts of his employees when those acts are done within the course of their employment. There is no requirement for the employer to have authorized or acquiesced in the acts, or even to have had any knowledge of them.

[15] 436 U. S. at 691.

[16] 445 U.S. 622, (1980).

[17] S. 1983, 96th Cong., 1st Sess. 125 Cong. Rec. S15991 (daily ed. Nov. 9, 1979) (remarks of Sen. Mathias).

[18] The District of Columbia is included in the definition of "person" under sec. 1983 as a result of legislation enacted after the introduction of S. 1983. *See* Pub. L. 96–170, 93 Stat. 1284, signed into law Dec. 29, 1979.

might be available to the officers and agents on an individual basis. Legislation incorporating the above provisions was also introduced in the House of Representatives.[19]

On September 15, 1980, Senator Orrin Hatch introduced S. 3115, "a bill to provide a special defense to the liability of political subdivisions of states" in section 1983 cases. Under this bill, if a municipality acted in good faith with a reasonable belief that its actions were not in violation of any rights, privileges, or immunities secured by the Constitution or by laws providing equal rights of citizens or persons, the municipality would not be subject to suit under section 1983.[20]

The 96th Congress did not act on any of these bills.

Law Enforcement Officers' Bill of Rights

Several bills were introduced in the 96th and previous Congresses calling for the establishment of a "bill of rights" for law enforcement officers.[21] Under one version of this legislation the Law Enforcement Assistance Administration (LEAA) would have been required to "encourage, assist and urge states, units of general local government or public agencies" to adopt a law enforcement officers' bill of rights.[22] Other bills would have prevented any State or local government or agency from obtaining funds unless a binding law enforcement officers' bill of rights was in effect.[23]

Although the rights provided for varied according to the bill, the legislation typically included provisions protecting law enforcement officers in the following ways:

1. Law enforcement personnel could not be prohibited from engaging in political activity while off duty and acting in a nonofficial capacity.
2. Whenever a law enforcement officer was under investigation for alleged illegality or impropriety with a view toward possible disciplinary action, demotion, dismissal or criminal charges, certain minimum standards would apply, including but not limited to:

—notice of the nature of the complaint and identity of those conducting and present at the interrogation;

[19] H.R. 7384, 96th Cong., 2d Sess., 126 Cong. Rec. H3815 (daily ed. May 19, 1980). *See also* 126 Cong. Rec. E3477 (daily ed. July 21, 1980) (remarks of Rep. Parren Mitchell).

[20] S. 3115, 96th Cong., 2d Sess., 126 Cong. Rec. S12562 (daily ed. Sept. 15, 1980) (remarks of Sen. Hatch).

[21] The first police officers' bill of rights was negotiated and incorporated into the contract of the New York City Police Benevolent Association in the late 1960s. Subsequently, versions of this bill of rights have been enacted into law in California, Florida, Maryland, Virginia, and Washington. Certain cities, including Milwaukee, Miami, Seattle, and New York, have adopted ordinances providing a bill of rights for law enforcement personnel. Other cities, including Memphis and Greensboro, have included a bill of rights for law enforcement officers in the contract between the police department and the city. *See* 122 Cong. Rec. 28949 (1976); Edward J. Kiernan and Nelson DeMille, "H.R. 181 Policeman's Bill of Rights," *The Law Officer*, March-April 1977, p. 11; 126 Cong. Rec. S1506 (daily ed. Feb. 19, 1980).

[22] S. 2301, 96th Cong., 2d Sess., 126 Cong. Rec. S1506 (daily ed. Feb. 19, 1980).

[23] H.R. 101, 1226, 2443, 96th Cong., 1st Sess. (1979).

—limitations as to place and length of time a law enforcement officer could be questioned;

—prohibition of threats or harassment against any law enforcement officer to induce the answering of any question;

—right to counsel or any other one person chosen by the law enforcement officer at any interrogation in connection with the investigation.

3. Law enforcement officers were to be fairly represented on any complaint review board having the authority to investigate and take public action on charges of improper conduct by law enforcement officers.

4. Any law enforcement officer was to have the right to receive public legal assistance upon request, and to sue for pecuniary and other damages from persons violating rights established under this legislation.

The International Conference of Police Associations (ICPA) is a major proponent of the law enforcement officers' bill of rights legislation, arguing that its enactment is needed to protect the civil rights of police officers. In an article written by the president of the ICPA, the need for such legislation was explained:

> There is a multitude of judicial decisions, such as *Miranda,* to mention the most famous, that specifically protect the rights of minorities, prisoners, criminals, women, children and even non-citizen aliens. . . .in this area of policemen's rights, legislation and judicial decisions have tended to limit, rather than expand those same common rights that we share as citizens with the rest of the nation. We feel this is regressive and we feel that in some areas of the country, we are in a relatively worse position, vis-a-vis the rapidly expanding definition of civil rights for everyone else, than we were ten or twenty years ago.[24]

With respect to the specific provisions of the bill, it was stated:

> A portion of this Bill of Rights that we are discussing specifically refers to the rights of police officers who are being questioned about noncriminal matters, such as violations of rules, procedures and internal disciplinary regulations. Even departments that have been scrupulous in safeguarding the rights of policemen in criminal accusations have become very heavy-handed and dictatorial in matters of internal policy. If we are going to talk about equal protection under the law, then we must include this area as well. Police officers themselves have tended to accept many of these harassments concerning internal rules violations over the years as a necessary part of belonging to an organization that is sometimes styled as para-military. We don't accept that any longer. We intend to be treated with the same dignity and courtesy and with the same concern for the letter and spirit of the law as any civilian, accused by his employer of a breach of company regulations, would expect. No one ever heard of an IBM employee being rousted out of his bed at three in the morning and interrogated through the night about a missing typewriter. In the past, we were told that the special circumstances of the job made all of this necessary and that the job had other rewards, rights and privileges that compensated for the abridgements of our rights. Well, the only special circumstances we are aware of that make us different from civilians is that we wear guns and get shot at. Those are enough special circumstances and we don't see why our rights should be violated because of them. The rewards we get from the job are our own rewards for what we put into it. We don't get any more than any civilian who does his job well. The so-called rights and

[24] Edward J. Kiernan and Nelson DeMille, "H.R. 181 Policeman's Bill of Rights," *The Law Officer* , March-April 1977, p. 11.

privileges that policemen are supposed to enjoy are non-existent. Congressmen have rights, privileges and immunities. Policemen have second-class citizenship.[25]

Those opposed to this legislation argue that a special bill of rights for law enforcement officers is unnecessary because police officers are entitled to the very same constitutional and civil rights statutory protections as are all individuals under investigation for an alleged criminal offense and that the real purpose of this type of legislation is to secure benefits for law enforcement officers not available to other public employees.

Arguments to this effect were made in 1976 on the floor of the House of Representatives when Congressman Mario Biaggi (D–N.Y.) offered a law enforcement officers' bill of rights, similar in provision to that discussed above, as an amendment to a bill reauthorizing the Law Enforcement Assistance Administration. One Congressman, opposed to the amendment, stated:

. . .The amendment purports to grant to police officers something called a bill of rights. Let us understand what we are talking about. We are not talking about constitutional rights, of course, because police officers are entitled to the full protection of the U.S. Constitution, whether we have an LEAA bill or an amendment to it or not. And we are not talking about civil rights, as that term is generally understood, because the civil rights statutes of the United States already are of general application. They apply to every police officer in the land.

No, we are talking about something else under the rubric of a bill of rights. We are talking about employee benefits which police officers would like to obtain. They have been successful in some places and unsuccessful in others.

The amendment proposes federally mandated benefits to police officers.[26]

The amendment was defeated by a vote of 148–213.[27] The law enforcement bill of rights legislation was not acted on by the 96th Congress.

Use of Deadly Force

The police are charged with enforcing the law, pursuing violators, and providing security to the people they serve. They bear primary responsibility for protecting people's fundamental rights to life, liberty, and property. They must also assure that individuals are protected in the exercise of their rights to political participation, free speech, and free assembly. To fulfill these responsibilities, society has authorized its police to use force, even deadly force, under certain circumstances.

A majority of States have statutes governing the justified use of deadly force by police officers to make an arrest. The laws of at least 24 States have codified the common law "fleeing felon" rule under which a law enforcement officer was justified in using deadly force against any person suspected of committing any felony in order to make the arrest; however,

[25] *Id.*, 11–12.
[26] 122 Cong. Rec. 28951 (1976) (remarks of Rep. Wiggins).
[27] 122 Cong. Rec. 28953–54 (1976).

the use of such force was never justified in apprehending a fleeing misdemeanant.[28] The rationale for this rule was based on the fact that under common law, all felonies—murder, manslaughter, rape, arson, burglary, mayhem, prison break—were punishable by death, and the use of deadly force to apprehend a fleeing felon was merely a way of accelerating the penal process. "It made little difference if the suspected felon were killed in the process of capture since, in the eyes of the law, he already forfeited his life by committing the felony."[29]

One commentator has observed that this rule developed in an era when there were no accurate or reliable weapons available that could kill at lengthy distances, and there was little, if any, communication among law enforcement officers in different communities, thus permitting a successfully escaping felon to begin a new life in a different community with virtual impunity.[30]

Over time, the rationale supporting the common law deadly force doctrine was weakened by several developments. Advancements were made in the field of weaponry, and policemen began to use revolvers. As one commentator observed, "[T]he immediate effect of this change was that police could, and did, shoot fleeing suspects who were posing no immediate threat to anyone."[31] By the latter half of 19th century in America, police departments with the capacity to transmit information about criminal suspects at large were established in several communities. "The effect of the increasingly sophisticated apprehension techniques meant that it was no longer absolutely necessary to kill a suspect, if his identity were known, in order to ensure his eventual capture."[32]

The effect on police homicide of the advancements in weaponry and the rise of police agencies was compounded by the expansion in the scope of felonies. In the latter half of the 19th century, too, the number of crimes specified as felonies[33] increased and the use of the death penalty decreased. Hence, without a change in the rule permitting the arrest of any fleeing felon, deadly force was authorized in many more situations.[34]

Law enforcement officers, under certain circumstances, are statutorily authorized to use deadly force (and thus kill) a fleeing felon, even though the maximum penalty for the underlying felony is less severe than execution. Some State statutes depart from the common law rule and

[28] Comment, *Deadly Force to Arrest: Triggering Constitutional Review,* 11 Harv. Civ. Rights—Civ. Lib. Rev. 361, 364–65 (1976) (hereafter cited as Comment, *Deadly Force)*.
[29] Petrie v. Cartwright, 70 S.W. 297, 299 (1902).
[30] Sherman, *Execution Without Trial: Police Homicide and the Constitution,* 33 Vand. L.R. 71, 74–75 (1980).
[31] *Id.* at 75.
[32] *Id.* at 76.
[33] Felonies today include numerous crimes not involving force or violence, for example, property-based crimes and failure to adhere to governmental regulations (i.e., income tax evasion).
[34] Comment, *Deadly Force,* p. 366.

restrict to specified felonies the use of deadly force by police trying to arrest a fleeing felon.[35] The statutes generally permit such force only for forcible or violent felonies. Other States have adopted statutes justifying police use of deadly force based on the provisions of the Model Penal Code (MPC).[36] Under the MPC, the technical classification of a crime as a felony or misdemeanor does not determine the amount of force that is justified. Rather, the focus is placed on a balancing of interests—the need to apprehend suspects, the safety of the arresting officers, and the value of human life. The MPC provides that a police officer may use deadly force to arrest only when he believes that (1) the crime for which the arrest is made "involved conduct including the use or threatened use of deadly force" or (2) there is "substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed."[37]

That deadly force is legally justified under State law does not, of course, mean that it is wise to utilize it. Even if it is legally permissible to shoot a person who has just committed a felony, an officer may have only a few seconds to assess the situation and decide whether or not to fire. There is little opportunity to determine the nature of the offense committed, the identity and age of the suspect, the reason for the flight, or whether a weapon is being carried. Snap judgments on these factors can lead to tragic, unnecessary shootings and the loss of life.

Although State legislatures determine the legal use of deadly force, it is incumbent upon police administrators to promote its wise use by adopting a written departmental policy specifying in detail the restrictions to be placed on the use of deadly force and the circumstances under which it is to be used, and emphasizing the alternatives to the use of deadly force in resolving conflicts.

> [S]ome administrative guidelines in the form of police "policy" are required to assist the police officer. The bare skeleton of the Penal Code provisions offers no guidance as to which felonies should be regarded as sufficiently dangerous to justify resorting to deadly force to prevent their commission or to capture the perpetrator. Nor do the statutes suggest the use of non-deadly force if the felon is a juvenile or is known to be intoxicated or otherwise incapacitated. Such guidelines must come from police administrators.[38]

The legal effect to be given a police department's deadly force policy has been the subject of debate. It is argued that if a police officer is sued, the department's regulations governing the use of deadly force will be admitted in court as evidence. Moreover, if the policy is more restrictive than State law permits, it may create liability where none might otherwise exist. This, however, is not a settled question.

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[35] Ibid., pp. 368–69.
[36] Ibid., p. 369.
[37] Model Penal Code, sec. 1307(2)(b)(i), (iv) (Proposed Official Draft, 1962).
[38] Uelmen, *Varieties of Public Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County,* 6 Loyola L.A. L. Rev. 1, 6 (1973).

Cases in California and Florida have reached different results on this issue. In *Peterson v. City of Long Beach,* [39] a police officer shot and killed a fleeing felon. The shooting was justified under California State law but violated departmental regulations. The Supreme Court of California held that the departmental regulations were admissible on the ground that under California law, an employee's failure to follow a safety rule promulgated by his employer, a public entity, gave rise to a rebuttable presumption of lack of due care by the employee. The departmental policy, therefore, became "statutory" for the purpose of a civil suit and its violation indicated such a lack of due care by the officer.

In contrast, at least two Florida State district courts of appeal have reached the opposite conclusion regarding the legal effect to be given departmental regulations in court proceedings.[40] These decisions held that while departmental regulations governing the use of deadly force that are more restrictive than State law may be applicable for departmental discipline of its officers, the regulations would not affect the standard by which the officer's liability in criminal or civil proceedings would be measured; rather, State law would govern such proceedings.

[39] 594 P.2d 477 (1979).

[40] City of St. Petersburg v. Reed, 330 So. 2d 256 (Fla. 2d Dist. Ct. App. 1976); Chastain v. Civil Service Board of Orlando, 327 So. 2d 230 (Fla. 4th Dist. Ct. App. 1976).

Chapter 7

Summary of Findings and Recommendations

Chapter 2: Recruitment, Selection, and Training For Police Work

Finding 2.1: Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence.

While there has been some entry of minorities and women into police service in recent years, police departments remain largely white and male, particularly in the upper-level command positions. Utilization figures for women hardly approach tokenism, although studies have indicated that as a rule women perform at least as well as men on the force.

Recommendation 2.1: Police department officials should develop and implement affirmative action plans so that ultimately the force reflects the composition of the community it serves.

Finding 2.2: Efforts to recruit minority police officers may be hampered by a community perception of racism in the police department, a perception reinforced by a low level of minority hiring, a high level of minority attrition during the training process, and an apparent lack of opportunity for advancement.

Prospective recruits learn through a variety of means what the receptivity of a given institution is—from others who have sought employment and been turned away, from employees who have experienced discrimination on the job, and from newspaper accounts of misconduct by police against members of the public. Figures for the cities studied indicate that white applicants are accepted at a significantly higher rate than are minority applicants. Figures also indicate that command positions in police forces are filled disproportionately by whites.

Recommendation 2.2: Minorities and women, through the implementation of equal opportunity programs, should hold positions that lead to upward mobility in the ranks, allowing them to compete for command positions.

Finding 2.3: Many current police selection standards do not accurately measure qualities actually required for adequate performance as a police officer, and they contribute to the perpetuation of a nonrepresentative police force by disproportionately disqualifying minority and women applicants.

Many police departments continue to use selection criteria with little or no relation to the qualifications required of a police officer. Traditional selection standards that have been cited as disadvantaging minority applicants include minimum height requirements, biased written examinations and psychological tests, and rules that disqualify applicants with arrest records. Typical standards that have presented obstacles to female applicants include veterans' preference, height requirements, and non-job-related physical strength tests such as number of situps or pushups. It has been suggested that the physical agility test take the form of a job-related obstacle course rather than the more traditional test of pushups and situps. It also has been suggested that the use of biased written examinations be curbed by not using a written test, excluding, with the help of minority representatives and test experts, discriminatory questions from the tests, or reexamining the weight given to written tests in the selection procedure.
Recommendation 2.3: Current selection standards in departments should be reviewed to ensure that they are job-related. Those standards that tend to disqualify minorities and women disproportionately should be subjected to a high degree of scrutiny.

Finding 2.4: Despite the apparent need for psychological screening in order to ensure stability under stress and the refinement of this tool, the effective use of psychological screening in police selection remains limited in the cities studied.

Psychological screening of police applicants has potential value in screening out inappropriate candidates—those predisposed to violence and/or racism and those who may not be able to perform under the rigorous physical and mental stress that is part of police work. It has been recommended that separate screening procedures be developed to suit each jurisdiction's special needs. Psychological testing in the cities studied was not comprehensive and did not play a strong role in police selection.

Recommendation 2.4: Psychological screening of all applicants should be an integral part of any selection process and should be performed by qualified experts.

Finding 2.5: Police training programs examined do not give sufficient priority to on-the-job field training, programs in human relations, and preparation for the social service function of police officers, including intervening in family-related disturbances.

Police training normally involves three phases—cadet academy classroom training, probationary field work, and inservice training offered by or through the department for experienced officers. Programs studied were deficient in the length of on-the-beat field training programs. Experts have suggested that inservice training emphasize community relations and offer firearms refresher courses that include training on legal standards governing the use of deadly force. Courses in human relations, including cultural awareness and race relations, are to be encouraged. Although a large part of police work involves the social service function, only a small proportion of police training prepares officers for this role. Training in crisis intervention and conflict management are particularly recommended.

Recommendation 2.5: More emphasis in training programs should be placed on the social service aspect of police work so that officers both realize its importance and potentially become more qualified to perform services for the public.

Finding 2.6: Training in the use of deadly force is essential but usually insufficient and subject to the ambiguities found in statutes and departmental policies.

It is vital that training prepare the police recruit as much as is possible for the awesome responsibility in using deadly force under often ambiguous statutes and guidelines. Crime-scene scenarios and other role-playing programs in academy training help to simulate actual conditions that might call for the use of force. Experts advocate more emphasis in teaching alternatives to the use of deadly force.

Recommendation 2.6: Training in the use of deadly force must reflect an overriding concern for safeguarding the lives of officers, bystanders, and suspects.

Finding 2.7: Preparation of police officers to cope with personal and job-related stress that may affect their behavior on the job is still largely unaddressed in the police training and management programs studied.

Police officers are particularly vulnerable to stress. They must make split-second, life-and-death decisions; the boredom of some assignments can also cause stress. Increasingly, stress has been identified as an important underlying factor in police misconduct incidents. Los Angeles is cited as a city with a particularly comprehensive stress management program for police officers.

Recommendation 2.7: Police officials should institute comprehensive stress management programs that include identification of officers with stress problems, counseling, periodic screening, and training on stress management.

Chapter 3: Internal Regulation of Police Departments

Finding 3.1: Unnecessary police use of excessive or deadly force could be curtailed by

(1) clear and restrictive State laws, local ordinances, and department rules on the use of force,

(2) careful regulation of department-sanctioned weapons and continuing training in their use, and

(3) strict procedures for reporting firearms discharges.

Clearly defined policies, rules, and statutes are vital so that every officer knows what conduct is expected and what will not be condoned; rules governing the use of deadly force, however, are frequently ambiguous. The use of deadly force can be limited through prohibitions against warning shots, against displaying weapons in a situation that does not warrant their use, and against firing at, or from, a moving vehicle. The close regulation of weapons, training in their use, and mandatory reporting of all weapons discharges have also been cited by experts as measures that can contribute to less use of deadly force.

Recommendation 3.1:

(1) Police department regulations should restrict officer use of deadly force to defense of life in those circumstances where it is reasonably believed to be the only available means for protecting the officer's life or the life of another person.

(2) Officers should be issued a single regulation sidearm, and the carrying of additional sidearms should be prohibited.

(3) Officers should be required to train with their issued weapons and to requalify with that weapon periodically.

(4) Every discharge of a firearm by an officer should be reported and thoroughly investigated within 24 hours of the discharge.

Finding 3.2: The effectiveness of a complaint system may be undermined by

(1) insufficient public education about the system;
(2) inaccessible, nonbilingual complaint forms in intimidating locations;
(3) unwillingness to investigate anonymous complaints;
(4) lack of notification to the complainant about the investigation and its results; and
(5) improper maintenance of records and statistics.

A system for the receipt, processing, and investigation of citizen complaints about police is a necessary component of internal regulation of police practices. It is also vital in developing community confidence in the police. Citizen complaints are not only useful sources of information about police conduct, but, whether accurate or not, are also important indicators of public perception of the agency. If police administrators are to make positive use of this information, the public must be adequately informed about and encouraged to use the complaint system.

Recommendation 3.2: Every police department should have a clearly defined system for the receipt, processing, and investigation of civilian complaints. The system, to be effective, should include

(1) methods for informing the public about the system and how to use it,
(2) nonintimidating actions and conditions for the receipt of complaints,
(3) prenumbered bilingual complaint forms with copies provided to complainants,
(4) prompt and thorough investigation of all complaints,
(5) written notification to both complainants and officers of the results of the investigation,
(6) maintenance and reporting of records and statistics.

Finding 3.3: Ingredients of an effective internal investigation system include

(1) the exercise of a strong supervisory role by the internal affairs unit,
(2) a staff adequate in numbers and training,
(3) written investigative procedures, and
(4) suspension of officers under investigation for serious offenses.

Police administration experts agree on the need for a specialized unit with responsibility for the internal investigation of all serious complaints of officer misconduct, reporting directly to the chief police executive. The investigation may be limited by protection of the rights of an accused officer, collective bargaining agreements, or legislated provisions such as "police officers' bill of rights." In the cities studied, homicide investiga-

tions of police shootings and internal investigations of civilian complaints of police brutality often devoted more attention to an investigation of the victim's wrongdoing than to the officer's alleged misconduct.

Recommendation 3.3:

(1) A specialized internal affairs unit should be responsibile for the investigation of all complaints containing serious allegations such as the abuse of physical or deadly force; this unit should also have a supervisory and monitoring responsibility with respect to all investigations of less serious misconduct, which may be conducted by line supervisors. The internal affairs unit should report directly to the chief police executive.

(2) The internal affairs unit should be adequately staffed with specially trained investigators whose duties are confined to investigative tasks, and some members of the staff should be available for investigative duty at all times. Detailed written investigative procedures which provide for thoroughness, consistency, respect for individual rights, and the maintenance of strict confidentiality should be issued to staff conducting internal investigations.

(3) To ensure public confidence, the integrity of the internal investigative process, and the protection of the officer, an officer who has caused a civilian death should be placed on off-duty status until the completion of the investigation determines whether or how it will be appropriate for the officer to reassume his duties.

Finding 3.4: Once a finding sustains the allegation of wrongdoing, disciplinary sanctions commensurate with the seriousness of the offense that are imposed fairly, swiftly, and consistently will most clearly reflect the commitment of the department to oppose police misconduct. Less severe action such as reassignment, retraining, and psychological counseling may be appropriate in some cases.

The most thorough mechanisms for detecting officer misconduct will be ineffective unless proven misconduct is accompanied by appropriate sanctions that are both swift and certain. Very few serious complaints against police officers are sustained, and prescribed penalties are often inappropriate. The Philadelphia police department offers the lightest penalty for "flagrant misuse, handling or display of firearms," and the heaviest penalty for "failure to possess and maintain a current and valid Pennsylvania motor vehicle operator's license." Retraining can be a useful mechanism for correcting the attitudes and behavior of officers who violate departmental policies; however, if such retraining is viewed as punishment, its effect in reducing misconduct may be minimal. Capability for psychological counseling in the cities studied is limited.

Recommendation 3.4: Discipline imposed should be fair, swift, and consistent with departmental practices and procedures.

Finding 3.5: "Early warning" information systems may assist the department in identifying violence-prone officers.

The careful maintenance of records based on written complaints is essential to indicate officers who are frequently the subject of complaints or who demonstrate identifiable patterns of inappropriate behavior. Some jurisdictions have "early warning" information systems for monitoring officers' involvement in violent confrontations. The police departments studied routinely ignore early warning signs.

Recommendation 3.5: A system should be devised in each department to assist officials in early identification of violence-prone officers.

Finding 3.6: When officers proven to have violated departmental policies are not seriously disciplined and even receive commendations, awards, or promotions for incidents of misconduct, it signals that the policies violated are not considered important by the department.

In the departments studied, it was not unusual for officers involved in the use of excessive force to be commended, and even promoted, following the incident. In Philadelphia, even convicted officers were promoted rather than disciplined. The files of violent officers abound with laudatory observations such as "diligent and persistent investigation," "you go all out," "aggressive manner," and "untiring investigative effort."

Recommendation 3.6: Commendations, rewards, and promotions should be awarded fairly, but care should be taken to ensure that such recognition is given for exemplary service and that officers so recognized did not abuse the rights of others during the course of the actions that led to the award.

Finding 3.7: Police officers usually have the right to appeal disciplinary decisions although the procedures underlying that right vary significantly from department to department.

Both the officer and the department have the right to be heard publicly and to present evidence, although technical rules of evidence do not apply at department hearings. Rights of appeal to a civil service board are generally available to officers. The power of some State civil service commissions to overturn disciplinary actions of the police administration may weaken police discipline.

Recommendation 3.7: The right and means to appeal an adverse departmental decision without having to go to court is an important right of police officers, but care should be taken that such right is not construed in a way that prevents the chief from imposing discipline on officers who have violated departmental rules and regulations.

Chapter 4: External Controls

Finding 4.1: Local government officials possess powers to review police practices. Typically, the chief executive officer (mayor or city manager) or his designee is not only granted the power to appoint and dismiss the chief of police at will but sets the tone for the conduct of the entire force. A city council may be authorized to enact legislation affecting the policies and procedures of the police department. There are a variety of conditions that affect these powers and frequently a reluctance to exercise such powers.

Review of police conduct is not restricted to a police department; it is also conducted by a variety of external government units and private groups. The Philadelphia and Houston city councils have been criticized for failing to use their investigatory powers in matters involving police practices and to enact police reforms. Furthermore, in both cities studied, it was apparent that the line officers took their cues from the words and actions of the mayors in defining the perimeters of tolerated conduct.

Recommendation 4.1: Local government officials should ensure that their words and actions neither create an atmosphere in which officers feel that they may take any action with impunity nor imply a lack of confidence in the department, its officers, or leadership. Furthermore, when powers of review have been granted to local officials, they should take an active role to ensure that the department's policies, procedures, and practices are consistent with the letter and the spirit of the Federal, State, and local laws that the officials have sworn to uphold.

Finding 4.2: The criminal law is a limited vehicle for preventing or deterring police misconduct. Nonetheless, vigorous prosecution of such cases by local prosecutors is essential.

The threat of criminal prosecution is a limited deterrent to police misconduct; also, many forms of misconduct affecting police-community relations, such as harassment and verbal abuse, may not be violations of the criminal law. Given a choice between a police officer's version of events and that of a minority victim, who may have a prior criminal record and be poorly educated and unemployed, local jurors may tend to believe the officer. Despite these problems, vigorous prosecution is necessary to demonstrate that no one, including a police officer, is above the law. In Philadelphia, the district attorney had difficulty gaining access to needed

information from the police department. In Houston, the district attorney's office was criticized as being reluctant to pursue investigations and prosecutions of police brutality cases.

Recommendation 4.2: Local prosecutors should be vigorous and vigilant in identifying and prosecuting cases of police misconduct.

Finding 4.3: At the Federal level, prosecution of police misconduct cases is conducted by the Civil Rights Division of the U.S. Department of Justice and by U.S. attorneys. Although Federal officials annually receive thousands of complaints alleging police misconduct, on the average fewer than 100 cases are successfully prosecuted each year. Several factors contribute to this situation, including lack of Federal jurisdiction over complaints, problems of proof and credibility of testimony, statutory limitations, and lack of sufficient staff and resources.

There are two principal statutes available under Federal law for prosecuting police misconduct cases; one makes it unlawful to conspire against a citizen to deprive him or her of rights guaranteed by the Constitution or Federal law, and the other makes it unlawful to deprive any inhabitant of his or her civil rights under color of law. The Department of Justice receives more than 10,000 complaints of police misconduct each year; between 50 and 100 cases are prosecuted. There were only 21 convictions in fiscal year 1980, partially because the statutes suffer from substantive and procedural defects that impede prosecution efforts, and partially because of staff and resource shortages.

Recommendation 4.3:

(1) The Congress should approve the hiring of additional personnel for the Criminal Section of the Civil Rights Division of the Department of Justice to investigate and prosecute police misconduct cases.

(2) The Congress should also ensure adequate staffing for civil rights enforcement in the U.S. attorneys' offices.

(3) 18 U.S.C. section 241 should be amended to

(a) eliminate the restriction that the victim be a citizen (the Commission believes there is no reason to shield an offender solely because of the citizenship status of the victim); and

(b) remove the requirement that prohibiting actions must be proven to be a part of a conspiracy.

(4) 18 U.S.C. section 242 should be amended to

(a) remove the impediment to prosecution presented by the judicially imposed "specific intent" requirement; and

(b) treat unlawful acts of violence committed under color of law as felonies under any circumstances.

Finding 4.4: The Community Relations Service of the U.S. Department of Justice has made constructive efforts in some cities in mediating and conciliating disputes between minority groups and police departments.

The Community Relations Service was established "to provide assistance to communities. . .in resolving disputes, disagreements or difficulties relating to discriminatory practices based on race, color, or national origin. . . ." It has been successful in its mission through the provision of conciliation, mediation, and technical services to troubled communities. With a staff of only 111 and a fiscal year 1980 budget of approximately $5 million, it is not able to meet the steady increase in the number of complaints it receives from minorities alleging excessive force by the police.

Recommendation 4.4: The President and Congress should urgently address the need for the services of the Community Relations Service and provide for an expansion of its staff and resources so that the important work it is doing in mediating police-citizen conflicts can be extended.

Finding 4.5: Private organizations engaged in monitoring police abuse, in those cities where they exist, are providing useful assistance through the gathering and analysis of data, recordkeeping, and provision of assistance to complainants. However, the research conducted by these groups is limited by the general nonavailability from law enforcement agencies of data regarding shootings of and injuries to citizens by police.

Unlike governmental agencies, private groups that monitor police conduct are not limited by statutory restrictions, but rather are free to address the particular needs of the community served. Such groups may participate in rulemaking, conduct extensive studies on police shootings, and provide services to individual victims of police abuse. Such groups do not always enjoy cordial relations with the police agencies they monitor. The groups' attempts to produce studies are hampered by lack of access to official police figures.

Recommendation 4.5: The Federal Bureau of Investigation should be directed to collect, compile, and make available publicly statistics and information regarding assaults on and shootings of civilians by law enforcement officers. These data should be reported and analyzed by city, circumstances, and characteristics of the parties involved. In order that this information be useful, police departments should keep accurate internal records and use standard classifications and terminology.

Finding 4.6: Over the past 30 years, several communities have established civilian review boards to ensure citizen review of complaints against police officers. These boards have met with varying degrees of success.

Generally, the primary objective of citizen review of police action is to judge the propriety of conduct by an individual officer after an incident of alleged wrongdoing has occurred. While encountering some successes, these boards have often failed. Their basic flaws were that they were advisory only, having no power to decide cases or impose punishment, and that they lacked sufficient staffs and resources.

Recommendation 4.6: The primary responsibility for investigating citizen complaints and subsequently imposing appropriate discipline on police officers rests with the police department itself. This Commission believes, however, that it is imperative for this process to be subject to some outside review to ensure, among other things, that a citizen not agreeing with the police department's disposition of a complaint has an avenue of redress to pursue. The exact type of review mechanism employed will, of course, vary from community to community. Included among the several types of possible review mechanisms are:

(1) a special office or committee within the office of the mayor;

(2) a special committee of the city council;

(3) a review board external to the police department comprised wholly of citizens or a mixture of citizens and police personnel;

(4) a committee or office comprised wholly or in part of citizens sitting within or over the police department;

(5) a special master appointed by a court.

We believe that whatever system is adopted, a citizen should have the right to seek review of his or her complaint, following initial investigation and disposition by the police department, by the special office, committee, board or special master. At a minimum, the review mechanism should:

be readily accessible to citizens;

be given adequate staff and funds;

be granted full investigatory and subpena powers;

have access to relevant police department files and records;

be empowered to make recommendations to the chief of police regarding the disposition of the complaint and discipline, if any, to be imposed;

be able to forward its recommendations, when the body deems it appropriate, to the legally constituted authority to whom the police chief reports rather than to the chief; and

make its proceedings and recommendations a matter of public record.

Chapter 5: Remedies

Finding 5.1: Civil suits for damages under State or Federal law provide a remedy for compensating persons suffering injury resulting from unlawful

police action, although their usefulness is limited by several weaknesses inherent in the civil remedy.

Civil suits against individual police officers may help to deter police misconduct. The effectiveness of this remedy in deterring police misconduct within a department could be strengthened by subjecting municipalities to liability for the unlawful actions of police officers. The threat of monetary judgments against governmental units could have the effect of motivating officials to design hiring, training programs, disciplinary procedures, and internal rules to control and root out misconduct.

While unlawful police violence is a criminal act, it may also constitute a tort, or a civil wrong, for which the victim may sue for damages under State law. Typical tort actions against police officers allege false arrest, false imprisonment, malicious prosecution, assault, battery, or wrongful death. A plaintiff may be hampered in such suits if he himself has a criminal record or in other ways appears less credible in the eyes of the jury than the defendant police officer. Litigation may be time-consuming and costly. If the plaintiff does receive a judgment, the defendant may not possess the necessary resources to satisfy the judgment.

Individual plaintiffs may also sue for damages under Federal law if they have been deprived of their rights, although the defendant police officer is free from liability if he reasonably and in good faith believed that his conduct was lawful, even though it was not. The threat of possible civil liability is a limited deterrent to police misconduct. Subjecting municipalities to liability for the torts of its employees, including police officers, could motivate officials to stem police misconduct.

Recommendation 5.1: Congress should enact legislation holding governmental subdivisions liable under 42 U.S.C. section 1983 for the actions of police officers who deprive persons of rights protected by that section.

Finding 5.2: Although the U.S. Department of Justice recognizes the importance of bringing suit against police departments where a pattern or practice of police abuse is alleged to exist, recent court decisions have held that the Department has limited legal authority to bring suits to prohibit the continuation of such practices.

The Department of Justice filed the case of *United States v. City of Philadelphia* in 1979, alleging the existence of a pervasive pattern of police abuse in Philadelphia that resulted in the denial of basic Federal constitutional rights to persons of all races, colors, and national origins. The lower Federal court dismissed the suit and the U.S. Court of Appeals for the Third Circuit affirmed.

Recommendation 5.2: Congress should enact legislation specifically authorizing civil actions by the Attorney General of the United States against

appropriate government and police department officials to enjoin proven patterns and practices of misconduct in a given department.

Finding 5.3: The Law Enforcement Assistance Administration, a Federal grantmaking agency that funds State and local programs, and the Office of Revenue Sharing, a Federal agency that funds State and local units of government, have not used their powers effectively to curb police department employment discrimination and misconduct in the delivery of police services; this has been due in part to a lack of clear policy and a lack of adequate staffing.

Cities and their police departments receive millions of Federal dollars each year from the Law Enforcement Assistance Administration (LEAA) and the Office of Revenue Sharing (ORS). Both agencies are subject to antidiscrimination laws, but neither uses its power to suspend or terminate the flow of Federal funds to a recipient jurisdiction when there is noncompliance with the nondiscrimination provisions. One LEAA administrator noted that it was "futile" for his staff of six persons in the agency's Office of Civil Rights Compliance to secure compliance of more than 30,000 grantees. ORS officials complain of a similar lack of staff and resources needed to mount the massive investigations that are required to prove noncompliance.

Recommendation 5.3: The Department of Justice should develop uniform policy guidelines for use by funding agencies that have responsibilities under Title VI of the Civil Rights Act of 1964 governing the receipt, investigation, and referral of complaints alleging a pattern or practice of discrimination. Such guidelines should provide for early involvement of Federal program staff of the Civil Rights Division of the Department of Justice in the investigatory stage of complaints.

Federal agencies that fund, directly or indirectly, police departments should take vigorous action to ensure compliance with the nondiscrimination provisions within their statutes. Such action should include vigilant monitoring, investigation of complaints, and immediate referral to the Civil Rights Division of the Department of Justice of complaints alleging a pattern or practice of discrimination in the delivery of services.

Appendix
Houston Complaint, Complaint Investigation and Discipline Systems

During its field investigation of police practices in Houston, the U.S. Commission on Civil Rights was granted access to certain files and records of the Internal Affairs Division (IAD) of the Houston Police Department for the purpose of examining and analyzing that department's citizen and internal complaint and investigation process. The following analysis is based on data gathered from the IAD card file in which information regarding the nature and disposition of complaints against individual officers for the period of June 1977 to June 1979 was recorded.

Multiple Complaints Against Individual Officers

In the 2-year period examined, two or more complaints were filed against a total of 573 individuals of the department's almost 3,000 member force.[1] (See table 1.)

Table 1
Multiple Complaints

Number of Complaints	Number of Officers
2 complaints	298
3 complaints	136
4 complaints	70
5 complaints	33
6 complaints	18
7 complaints	8
8 complaints	6
9 complaints	1
10 complaints	0
11 complaints	2
12 complaints	1
	573 TOTAL

Nature of Complaints

The nature of the complaints filed against the Houston Department officers were varied. Records of the 2-year period examined indicated that approximately 300 different types of complaints were filed against 575 officers. The complaint allegations ranged from use of excessive force, theft, false arrest, harassment, verbal abuse, withholding medical treatment, and not being allowed to use the phone to trespassing and blocking a citizen's driveway. Other complaints, presumably generated by the department itself, ranged from allegations of the officer's failure to wear his or her hat, failure to attend court, and failure to maintain radio contact with supervisor or dispatcher to allegations of sleeping on duty and involvement in an accident with a police car. As table 2 indicates, however, the most frequent complaint filed in the records of the 2-year period studied was the use of excessive force.

Table 2
Nature of Complaints

Nature of Complaint	Percentage of Total Complaints
Use of excessive force	13.336%
Verbal abuse	8.351
Officer attitude and demeanor	8.351
Police vehicle accident	5.858
Use of unnecessary force	5.567
Theft	5.401
Discharge of firearms	4.528
Harassment	3.324
False arrest	3.241
False charged filed	2.077
Making threats	1.496
Failure to attend court	1.288
Withholding medical treatment	1.246
Discharge of firearms—citizen injury	.997
Failure to take prompt and effective police action	.997
Handcuffs too tightly fastened	.997
Unnecessary display of firearms	.914
Failure to make offense report	.872
Illegal Search	.831
Failure to give name	.665
Discharge of firearms—citizen death	.499
Damage to property	.499
Not allowed to use phone	.415
Discharge of firearms—citizen death and injury	.291
Discharge of firearms—officer injury	.208
Failure to wear hat	.208
Violation of fresh pursuit policy	.166
Failure to maintain radio contact with supervisor or dispatcher	.083
Blocking driveway	.083
Other	27.211
	100.000%

Investigation and Disposition of Complaints

After a complaint has been filed, it is investigated by the Internal Affairs Division or other division of the police department and a finding is made as to the disposition of the complaint. For the purposes of disposition, complaints are generally classified as one of the following:

Sustained—the evidence is sufficient to prove the allegation;

Not Sustained—the evidence is insufficient to either prove or disprove the allegation;

Exonerated—the incident occurred, but was lawful and proper;

Unfounded—the allegation is false or not factual.[6]

Table 3 indicates by percent the disposition of selected categories of complaints. As the table shows, complaints alleging violations of departmental rules such as failure to attend court, wear a hat, or maintain radio contact with the supervisor or dispatcher or alleging an officer's responsibility for a police vehicle accident were sustained 100 percent of the time. In contrast, complaints alleging use of excessive force, which as table 2 indicates was the most frequent complaint filed in the records studied, were sustained only 2.87 percent of the time. Similarly, complaints alleging verbal abuse, the second most frequent complaint filed, were sustained only 6.53 percent of the time.

Table 3
Disposition of Selected Complaint Categories (By Percent)

Nature of Complaint	Sustained	Not Sustained	Exonerated	Unfounded	Never Formalized	Dropped	Other
Use of excessive force	2.87	16.13	14.34	61.65	2.51	1.79	.72
Use of unnecessary force	6.11	25.95	8.40	51.91	6.11	0	1.52
Brutality	0	17.14	37.14	14.29	17.14	14.29	0
Verbal abuse	6.53	29.15	4.02	45.73	12.56	1.01	1.01
Harassment	1.27	3.80	18.99	68.35	5.06	0	2.53
False arrest	5.26	21.05	23.68	47.37	0	1.32	1.32
False charges filed	2.04	24.49	10.20	53.06	0	8.16	2.04
Making threats	14.71	26.47	11.76	38.24	5.88	2.94	0
Theft	1.57	28.35	3.15	54.33	10.24	0	2.36
Officer attitude	7.89	31.58	11.40	36.84	11.40	0	.88
Withholding medical treatment	0	10.00	3.33	83.33	3.33	0	0
Handcuffs too tightly fastened	0	60.87	8.70	30.43	0	0	0
Unnecessary display of firearms	19.05	0	19.05	47.62	14.29	0	0
Not allowed to use phone	20.00	10.00	10.00	60.00	0	0	0
Police vehicle accident	100.00	0	0	0	0	0	0
Failure to attend court	100.00	0	0	0	0	0	0
Failure to wear hat	100.00	0	0	0	0	0	0
Failure to take prompt and effective police action	37.50	12.50	12.50	33.33	4.17	0	0
Failure to make offense report	33.33	9.52	9.52	42.86	0	0	4.76
Illegal search	0	15.79	26.32	47.37	10.53	0	0
Failure to give name	6.25	37.50	0	50.00	0	0	6.25
Damage to property	0	8.33	0	91.67	0	0	0
Failure to maintain radio contact with supervisor or dispatcher	100.00	0	0	0	0	0	0
Violation of fresh pursuit policy	100.00	0	0	0	0	0	0

Table 4
Disposition of Firearms-Related Complaints (By Percent)

Nature of Complaint	Accidental	Justified	Not Justified	Other Disposition
Discharge of firearms	16.82	12.15	67.29	3.73
Discharge of firearms—citizen injury	20.83	75.00	4.17	0
Discharge of firearms—citizen death	8.33	91.67	0	0
Discharge of firearms—citizen death and injury	0	100.00	0	0
Discharge of firearms—officer injury	100.00	0	0	0

Discipline Imposed in Sustained Complaints

Table 5 analyzes the discipline imposed in complaints from the selected categories that have been sustained. As the table shows, officers who were found to have engaged in an improper discharge of a firearm, theft, the unnecessary display of a firearm, drinking on duty, and who failed to report to duty on time were suspended 100 percent of the time. In contrast, officers found by the department to have used excessive force were suspended 25 percent of the time, given a written reprimand 50 percent of the time, and given no discipline 25 percent of the time.

1. According to figures provided by the Houston Police Department as part of an addendum to its 1978 Equal Employment Opportunity Plan, as of January 1, 1979, the Houston Police Department consisted of 2,906 uniformed personnel (Class A Houston Civil Service).

2. The records upon which these figures are based did not distinguish between complaints filed by citizens and complaints internally generated by the department.

3. The data upon which this table is based was collected from the IAD card file in July 1979. The Commission examined and noted the information entered on each of the files in which two or more complaints had been made, as of July 1979, against an individual officer.

4. The Commission has grouped complaints of "brutality" in the category of "use of excessive force."

5. The Commission has grouped complaints of "rude and discourteous" in the category of "officer attitude and demeanor."

6. These terms are defined in the Manual of the Houston Police Department, Sec. 3/22.02j (February 1978). Other complaint disposition categories are used, including "accidental" and "not justified."

Table 5
Discipline Imposed in Sustained Complaints

Nature of Complaint	No Discipline Imposed	Counseling	Oral Reprimand	Written Reprimand	Written Reprimand & Counseling	Suspended
Use of excessive force	25.00	0	0	50.00	0	25.00
Use of unnecessary force	12.50	0	12.50	37.50	0	37.50
Discharge of firearms	5.56	0	5.56	27.78	0	61.11
Discharge of firearms—citizen injury	0	0	0	0	0	100.00
Verbal abuse	7.69	0	23.08	46.15	0	23.08
Harassment	0	0	0	66.67	0	33.33
False arrest	0	0	0	100.00	0	0
False charges filed	0	0	0	50.00	0	50.00
Making threats	25.00	0	0	75.00	0	0
Theft	0	0	0	0	0	100.00
Officer attitude	10.00	10.00	10.00	60.00	0	10.00
Unnecessary display of firearms	0	0	0	0	0	100.00
Not allowed to use phone	0	50.00	50.00	0	0	0
Police vehicle accident	0	0	0	76.43	0	23.57
Failure to attend court	0	0	0	61.29	0	38.71
Failure to wear hat	0	0	0	40.00	0	60.00
Failure to take prompt and effective police action	25.00	0	12.50	25.00	0	37.50
Failure to make offense report	0	0	0	57.14	0	42.86
Failure to give name	0	0	50.00	50.00	0	0
Failure to maintain radio contact with superior	0	0	0	50.00	0	50.00
Violation of fresh pursuit policy	0	0	0	0	50.00	50.00
Drinking on duty	0	0	0	0	0	100.00
Failure to report to duty on time	0	0	0	0	0	100.00

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