

Saint Louis University Public Law Review

Volume 22
Number 1 *New Approaches to Ensuring the
Legitimacy of Policy Conduct (Volume XXII, No.
1)*

Article 4

2003

The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context

Samuel Walker
University of Nebraska at Omaha

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>

 Part of the [Law Commons](#)

Recommended Citation

Walker, Samuel (2003) "The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context," *Saint Louis University Public Law Review*: Vol. 22 : No. 1 , Article 4.
Available at: <https://scholarship.law.slu.edu/plr/vol22/iss1/4>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

THE NEW PARADIGM OF POLICE ACCOUNTABILITY: THE U.S. JUSTICE DEPARTMENT “PATTERN OR PRACTICE” SUITS IN CONTEXT

SAMUEL WALKER*

I. AMERICAN POLICING TODAY: THE BEST OF TIMES/THE WORST OF TIMES

In April 2001, the city of Cincinnati experienced a riot reminiscent of the 1960s: an outburst of African American rage following the fifteenth fatal shooting of a young black man by the Cincinnati Police Department in six years.¹ At the same time, the department was sued by local civil rights and civil liberties groups over racial profiling. The police crisis led to an investigation of the police department by the Civil Rights Division of the U.S. Justice Department. In the spring of 2002, the racial profiling suit and the Justice Department investigation were jointly settled through a Memorandum of Agreement with the Justice Department and a Collaborative Agreement with the plaintiffs in the racial profiling suit.²

The two Cincinnati agreements mandate a series of reforms designed to enhance police accountability. The Memorandum of Agreement requires, among other changes, a revision of the police department’s policy on the use of force, the development of policies governing deployment of the canine unit, a risk management system to identify “problem” officers, and a court appointed

* Isaacson Professor of Criminal Justice, University of Nebraska at Omaha, Omaha, NE 68182-0149; *samwalker@unomaha.edu*. In the interest of disclosure, the author has been directly involved in some of the activities and reports cited in this article. He was a paid consultant to the Civil Rights Division of the U.S. Department of Justice in its investigation of the New Jersey State Police and the Metropolitan Police Department of Washington, D.C. He also participated in conferences and discussions that led to the Justice Department report, PRINCIPLES FOR PROMOTING POLICE ACCOUNTABILITY. See PRINCIPLES, *infra* note 18.

1. See Francis X. Clines, *Appeals for Peace in Ohio After Two Days of Protests*, N.Y. TIMES, Apr. 12, 2001, at A18.

2. MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE AND THE CITY OF CINCINNATI, OHIO AND THE CINCINNATI POLICE DEPARTMENT (April 12, 2002), <http://www.usdoj.gov/crt/split/Cincmoafinal.htm> [hereinafter CINCINNATI MEMORANDUM]; Collaborative Agreement, In re Cincinnati Policing, No. C-1-99-3170, 2002 U.S. Dist. LEXIS 15928, at *27 (S.D. Ohio Aug. 5, 2002), <http://www.cincinnati.police.org/doj/finalsettlement.pdf>, also available at http://enquirer.com/editions/2002/04/04/loc_text_of_collaborative.html.

monitor to oversee implementation of the Agreement.³ The Collaborative Agreement mandates the Cincinnati Police Department to implement Community Problem Oriented Policing, the City to consolidate the two existing citizen complaint agencies into a single agency, and for both the City and the police department to create an evaluation program including both surveys of citizens and observations of police work.⁴

Similar reforms are also contained in the consent decrees and memoranda of understanding secured by the Justice Department to settle investigations of police misconduct in other cities. The Justice Department is acting under authority of 42 U.S.C. § 14141, which authorizes the Attorney General to bring civil suits against police departments where there is a “pattern or practice” of violations of citizens’ rights.⁵ To date, there have been a total of eight such settlements, with the most highly publicized ones involving the Pittsburgh Police Bureau,⁶ the New Jersey State Police,⁷ the Los Angeles Police Department,⁸ and the Metropolitan Police Department of the District of

3. CINCINNATI MEMORANDUM, *supra* note 2.

4. In re Cincinnati Policing, *supra* note 2, at *19-20.

5. 42 U.S.C. § 14141 (2002).

§ 14141. Cause of action.

(a) Unlawful conduct.

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General.

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

Id.

6. See Consent Decree, *United States v. Pittsburgh*, No. 97-0354 (W.D. Pa. approved Apr. 16, 1997) [hereinafter Pittsburgh Decree], <http://www.usdoj.gov/crt/split/documents/pittssa.htm>.

7. See Joint Application for Entry of Consent Decree, *United States v. New Jersey*, No. 99-5970 (D. N.J. approved Dec. 30, 1999) [hereinafter N.J. Decree], <http://www.usdoj.gov/crt/split/documents/jerseysa.htm>; see also PETER VERNIERO & PAUL H. ZOUBEK, INTERIM REPORT REGARDING ALLEGATIONS OF RACIAL PROFILING (1999), http://www.state.nj.us/lps/intm_419.pdf.

8. Consent Decree, *United States v. Los Angeles*, No. 00-11769 (C.D. Cal. approved June 15, 2001) [hereinafter L.A. Decree], <http://www.usdoj.gov/crt/split/documents/laconsent.htm>; see also BOARD OF INQUIRY INTO THE RAMPART AREA CORRUPTION INCIDENT, LOS ANGELES POLICE DEPARTMENT, PUBLIC REPORT (2000), www.lapdonline.org/pdf_files/pc/boi_pub.pdf; RAMPART INDEP. REVIEW PANEL, REPORT OF THE RAMPART INDEP. REVIEW PANEL (2000), <http://www.ci.la.ca.us/oig/rirprpt.pdf>.

Columbia.⁹ At the same time, similar settlements have been reached in suits by the Attorney General of California against the City of Riverside,¹⁰ the Attorney General of New York against the Town of Wallkill,¹¹ and a private suit by the NAACP and the ACLU against the Philadelphia Police Department.¹²

The police problems in Cincinnati, Los Angeles, New Jersey, and other locales might well lead a reasonable person—that is, someone well-informed about civic events but with no special expertise in policing—to conclude that the American police have made little if any progress since the strife-torn decade of the 1960s.¹³ Racism, brutality, and corruption might appear to be as prevalent and serious today as they were then. This might also suggest that the various police reforms of the last thirty years have been for naught. These reforms include Supreme Court limits on police practices,¹⁴ community policing and problem-oriented policing,¹⁵ a significant increase in the number of African-American, Hispanic and female police officers,¹⁶ and dramatic improvements in police officer educational levels and training programs.¹⁷

Our hypothetical reasonable person, however, would be misled by the events that have dominated the news. Quietly, and with little publicity, a number of police departments have made significant progress with regard to police accountability in recent years and have taken steps to curb excessive force, unjustified shootings, and other forms of misconduct. The best

9. See MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE AND THE DISTRICT OF COLUMBIA AND THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT (June 13, 2001) [hereinafter D.C. MEMORANDUM], <http://www.usdoj.gov/crt/split/documents/dcmoa.htm>.

10. Stipulation for Entry of Judgment, *California v. City of Riverside* (Cal. Super. Ct., Riverside County, Att’y Gen. Draft of Feb. 12, 2001) (on file with author).

11. First Report of the Monitor, *New York v. Town of Wallkill*, No. 01-CIV-0364 (S.D.N.Y. Jan. 2002) (on file with author).

12. *NAACP v. City of Philadelphia*, No. 96-6045 (E.D. Pa. Sept. 4, 1996) (on file with author).

13. See generally NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). This commission is also known as the Kerner Commission.

14. See THE MIRANDA DEBATE: LAW JUSTICE, AND POLICING (Richard A. Leo and George C. Thomas eds., 1998).

15. See generally Jack R. Greene, *Community Policing in America: Changing the Nature, Structure, and Function of the Police*, in POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 299 (J. Horney ed., 2000); MICHAEL S. SCOTT, U.S. DEP’T OF JUSTICE, PROBLEM-ORIENTED POLICING: REFLECTIONS ON THE FIRST 20 YEARS (2000).

16. SAMUEL WALKER & CHARLES M. KATZ, THE POLICE IN AMERICA (4th ed. 2002).

17. See DAVID L. CARTER ET AL., THE STATE OF POLICE EDUCATION: POLICY DIRECTION FOR THE 21ST CENTURY 73 (1989); see also WALKER & KATZ, *supra* note 16, at 387, 431-38 (reviewing trends in policing).

indicators of this development are, ironically, the consent decrees and memoranda of understanding secured by the Justice Department under § 14141. The specific reforms mandated in those agreements were not developed by the Justice Department itself but were drawn from recognized “best practices” related to accountability already in place in other more progressive police departments.¹⁸ In effect, the consent decrees have ratified and given the Justice Department’s sanction to a new consensus regarding reforms designed to promote police accountability.

The purpose of this article is to place the Justice Department’s consent decrees and memoranda of understanding under § 14141 in a broader context of police reform efforts.¹⁹ Taken as a whole, these reforms represent a new paradigm of police accountability, which includes not just a specific set of “best practices” but also an overarching conceptual framework of accountability. With reference to the most important provisions of the consent decrees and memoranda of understanding related to Pittsburgh, the New Jersey State Police, Los Angeles, Washington, D.C., and Cincinnati, this article assesses the nature and significance of the new paradigm of accountability.

II. ELEMENTS OF THE NEW PARADIGM

The new paradigm of police accountability consists of five elements.

A. *A Short List of Best Practices*

The first element is an emerging consensus of opinion on a short list of best practices designed to enhance accountability. These best practices include: (a) a comprehensive use-of-force reporting system,²⁰ (b) an open and accessible citizen complaint system,²¹ (c) an early intervention (or warning)

18. See U.S. DEP’T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY 3 (2001), <http://www.ncjrs.org/pdffiles1/ojp/186189.pdf> [hereinafter PRINCIPLES], which presents the best summary of these best practices. This report was developed through a series of Justice Department sponsored conferences as workshops in the preceding years. See also U. S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S CONFERENCE: STRENGTHENING POLICE-COMMUNITY RELATIONSHIPS, SUMMARY REPORT (June 1999) (on file with author) [hereinafter ATTORNEY GENERAL’S CONFERENCE].

19. For a preliminary assessment following the first two § 14141 cases, see Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 844 (1999).

20. See generally BUREAU OF JUSTICE STATISTICS, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 21-22 (1999) (discussing use-of-force policies and presenting data).

21. See generally SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 5-7 (2001) (discussing various methods of citizen complaint procedures).

system to identify potential “problem” officers,²² and (d) the collection of data on traffic stops for the purpose of curbing racial profiling.²³ The best summary statement of these best practices is the January 2001 Justice Department report, *Principles for Promoting Police Integrity*, issued in the last days of the Clinton Administration.²⁴ In various ways, these best practices are incorporated into all of the consent decrees and memoranda of understanding currently in force.²⁵

B. Conceptual Framework

Second, the new paradigm involves an overarching conceptual framework for the best practices cited above. The new framework emphasizes changing police organizations, as opposed to pursuing individual officers guilty of misconduct, for the purpose of cultivating an organizational culture that will sustain professional conduct in the future.²⁶ In an initial assessment of the Justice Department’s efforts under § 14141, Debra Livingston argues that the “conclusion drawn by many police scholars” is that “police reform will be most effective . . . when reform involves not simply adherence to rules in the fact of punitive sanctions, but a change in the organizational values and systems to which both managers and line officers adhere.”²⁷ Section 14141 specifically authorizes the Justice Department to bring suit against police organizations rather than individual officers.²⁸ As this article argues, one of the limits of many previous police reforms is that they have been narrowly directed toward particular organizational problems or to punishing individual officers guilty of misconduct. These efforts have not achieved lasting

22. See generally Samuel Walker, et al., *Early Warning Systems for Police: Responding to the Problem Police Officer*, RESEARCH IN BRIEF (U.S. Dep’t of Justice/Nat’l Inst. Of Justice, Washington D.C.), July 2001 [hereinafter *Early Warning*], <http://www.ncjrs.org/pdffiles1/nij/188565.pdf>; SAMUEL WALKER, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES: A PLANNING AND MANAGEMENT GUIDE (2002) (unpublished report submitted to the U.S. Dep’t of Justice, Office of Community Oriented Policing Services) (on file with author) [hereinafter EARLY INTERVENTION].

23. See generally DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 175-77 (2002) [hereinafter PROFILES]; DAVID A. HARRIS, ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION’S HIGHWAYS (June 1999), <http://archive.aclu.org/profiling/report/index.html> [hereinafter DRIVING WHILE BLACK].

24. PRINCIPLES, *supra* note 18.

25. Provisions of the various consent decrees are referenced below in the context of discussions of particular issues.

26. This point is argued in WALKER, *supra* note 21, at 109.

27. Livingston, *supra* note 19, at 848.

28. 42 U.S.C. § 14141 (2002). See *supra* note 5 in which the statutory text is presented.

improvements, in large part, because dysfunctional organizational cultures limit or undermine reforms or condone misconduct by other officers.²⁹

C. *Collection and Analysis of Systematic Data*

Third, the operational strategy of the new paradigm involves the collection and analysis of systematic data on officer performance for the purpose of identifying recurring problems that merit corrective action. This strategy closely parallels developments in policing, medicine,³⁰ private enterprise, and other government agencies,³¹ which focus on the collection and analysis of systematic agency performance. One of the most celebrated recent reforms in policing, COMPSTAT, involves the collection and analysis of systematic data on crime patterns for the purpose of focusing crime reduction efforts.³² The reform strategy is illustrated by a comment from Merrick Bobb, Special Counsel to the Los Angeles Sheriff's Department (LASD), in a report on one troubled unit in the LASD. He concludes by observing: "[T]his chapter began with a discussion about numbers and ended with a discussion about management. This is how it should be."³³ The reform strategy of the new paradigm, instead of focusing on individual officers, uses comprehensive data about agency and officer performance to identify management problems that are likely to lead to misconduct by individual officers.

D. *Convergence of Internal and External Strategies*

Fourth, the new paradigm represents the convergence of two strategies for accountability that have historically been seen as competing alternatives.³⁴

29. "The [LAPD's] Board of Inquiry report fails to recognize that the central problem is the culture of the Los Angeles Police Department, which gave rise to and tolerated what occurred in the Rampart Division and elsewhere." ERWIN CHEMERINSKY, AN INDEP. ANALYSIS OF THE LOS ANGELES POLICE DEPARTMENT'S BOARD OF INQUIRY REPORT ON THE RAMPART SCANDAL (2000), reprinted in 34 LOY. L.A. L. REV. 549, 551 (2001). See also RAMPART INDEP. REVIEW PANEL, *supra* note 8, at 2.

30. See NATIONAL INSTITUTE OF MEDICINE, TO ERR IS HUMAN 77-78 (1999).

31. For example, consider Baltimore's CitiStat program, described at <http://www.ci.baltimore.md.us/news/citistat/index.html>, as a data collection and analysis tool useful for all city agencies.

32. See David Weisburd, Steven D. Mastrofski, A. M. McNally, R. Greenspan, J. J. Willis, Reforming to Preserve: Compstat and Strategic Problem Solving in American Policing (2002) (unpublished article prepared for the U.S. Dep't of Justice, Nat'l Inst. of Justice, under review with CRIMINOLOGY AND PUBLIC POLICY, and on file with author); see also JACK MAPLE, THE CRIME FIGHTER 33 (1999).

33. MERRICK J. BOBB ET AL., LOS ANGELES COUNTY SHERIFF'S DEP'T, 15TH SEMIANNUAL REP. 9-35 (2002) [hereinafter 15TH SEMIANNUAL], <http://lacounty.info/mbobb15.pdf>, also available at <http://www.co.la.ca.us/bobbreports/mbobb15.pdf>

34. See text at Part IV *infra*.

Traditionally, the police vigorously insisted that they have both the responsibility and the capacity to manage their own affairs—including matters of discipline—free of external intervention. Civil rights activists, despairing of the capacity of police departments to police themselves, have pursued a variety of external mechanisms of accountability.³⁵ These mechanisms have included the intervention of the courts, particularly with respect to constitutional standards for police work, and external citizen oversight agencies to handle citizen complaints. A bitter struggle between the claims of professional autonomy and external oversight defines much of the politics of policing over the previous four decades. In this struggle, internal and external mechanisms of accountability have been seen as competing and irreconcilable alternatives. This article argues, to the contrary, that in the new paradigm internal and external mechanisms merge to form a mutually reinforcing, “mixed” structure of accountability.³⁶

E. *Building on Past Reforms*

Fifth, the new paradigm builds upon past police reforms, taking into account both their shortcomings and accomplishments. The result is a more sophisticated awareness of the conditions necessary for achieving genuine accountability in policing. In brief, these requirements are threefold: that to be effective any reform must (a) reach deep into the police organization; (b) have some direct impact on the day-to-day behavior of police officers; and (c) ultimately change, or at least begin to change, the culture of police organizations.³⁷ The new paradigm of accountability takes these conditions into account and represents a significant advance over prior reform efforts.

III. POLICE ACCOUNTABILITY DEFINED

Police accountability consists of several different dimensions.³⁸ In a democratic society the police should be answerable to the public for both what

35. Walker, *supra* note 21, at 24.

36. OFFICE OF INDEP. REVIEW, COUNTY OF LOS ANGELES, FIRST REPORT (2002), <http://www.laoir.com/report1.pdf>; ELLEN GREEN-CEISLER, INTEGRITY AND ACCOUNTABILITY OFFICE, PHILADELPHIA POLICE DEPARTMENT, ENFORCEMENT OF NARCOTICS LAWS (2002), <http://inquirer.philly.com/specials/2002/narcotics/report.htm>.

37. See Chemerinsky, *supra* note 29, at 4; WILLAM A. WESTLEY, VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY (1970) (the classic work on the norms of secrecy in the police subculture).

38. The literature on American policing is disturbingly scant on the subject of accountability. This summary of the dimensions of accountability is taken from THE INDEP. COMM’N ON POLICING IN N. IR., A NEW BEGINNING: POLICING IN NORTHERN IRELAND 22 (1999), <http://www.belfast.org.uk/report/fullreport.pdf>. A fuller discussion will appear in NAT’L

they do—law enforcement, order maintenance, and the provision of miscellaneous public services—and how they conduct themselves. This article focuses exclusively on issues related to what has been called the integrity or legitimacy of the police in their treatment of individual citizens and demographic groups.³⁹ In brief, the police are expected to treat citizens in a lawful, respectful, and equal manner. The tragic history of American policing involves a long history of physical brutality, corruption, violations of constitutional rights, and race discrimination.⁴⁰ As the next section of this article argues, previous reform efforts have not adequately curbed these abuses. This article does not address accountability issues related to the crime-fighting effectiveness or the efficiency of police operations, although both are matters for which the police should be held accountable.⁴¹

One of the central dilemmas of policing in a democratic society is that the demands of the public and the law often conflict. The political process is the basic means of ensuring that the police reflect the will of the people. Mayors, city council members, county commissioners, governors, state legislatures, presidents, and the Congress exercise control and oversight through budgets and appointments.⁴² At the same time, the police are also accountable to the law and should conform to established standards of legality in all of their operations (including not just law enforcement activities such as arrests and searches and seizures, but also personnel procedures involving equal employment opportunity, sexual harassment, and so on). The courts are the principal mechanism for this aspect of accountability. The history of American criminal justice is replete with episodes where public demands conflict with legal standards. In policing this usually involves the majority demanding the police do things that are illegal, as in overly aggressive law enforcement tactics that violate the rights of individuals or entire classes of persons.⁴³ In a classic

ACADEMY OF SCIENCES, *THE EVIDENCE ON POLICING: FAIRNESS AND EFFECTIVENESS IN U.S. LAW ENFORCEMENT* (forthcoming 2002).

39. The term “legitimacy” is increasingly used to encompass the related issues of police compliance with the law and citizen perceptions of the police. *See* NATIONAL ACADEMY OF SCIENCES, *supra* note 38.

40. *See generally* SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM, THE EMERGENCE OF PROFESSIONALISM* (1977); ROBERT M. FOGELSON, *BIG-CITY POLICE* (1977).

41. Geoffrey P. Alpert & Mark H. Moore, *Measuring Police Performance in the New Paradigm*, in BUREAU OF JUSTICE STATISTICS, *PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM* 109 (1993).

42. *See* WALKER & KATZ, *supra* note 16, at 351-56.

43. This is the central theme in SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* (2nd ed. 1998). *See also* JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (3rd ed. 1994).

statement of the problem, Herbert Packer defined it in terms of a clash between crime control and due process perspectives on the criminal process.⁴⁴

The political dilemma involving conflicting demands on the police translates into policy dilemmas regarding alternative mechanisms for enhancing police accountability. This has generally taken the form of tensions between internal mechanisms, in the form of professional management and supervision, and external mechanisms, in the form of direct political control, the courts, and external review agencies.⁴⁵ Part IV of this article reviews the contributions and shortcomings of the various internal and external accountability mechanisms in order to establish the context for the new paradigm.

IV. TRADITIONAL POLICE REFORMS: ACCOMPLISHMENTS AND LIMITATIONS

The modern police reform movement is just over one hundred years old.⁴⁶ Traditional strategies for achieving police accountability may be divided into three categories that roughly parallel the three branches of American government: administrative, judicial, and legislative.

A. *The Administrative Strategy: Professional Police Management*

1. The Police Professionalism Movement

The principal internal mechanism of police accountability is embodied in the administrative strategy of professional police management. The professionalization movement emerged in the early years of the twentieth century.⁴⁷ The reform agenda of the professionalism movement included expert leadership, freedom from external (especially political) influence, the application of the principles of modern management to police organizations, and elevation of personnel standards, both through higher minimum recruitment standards and better training.⁴⁸ The classic statements of professional police management are found in the reports and text books by, first, August Vollmer,⁴⁹ and later his disciple, O. W. Wilson. Wilson's text,

44. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149 (1968).

45. See discussion *infra* Part IV.A-D.

46. WALKER, *supra* note 40.

47. *Id.*

48. *Id.*

49. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON POLICE: POLICE CONDITIONS IN THE UNITED STATES* (1931). August Vollmer served as the principal author of the report, which summarized ideas he had developed in previous reports on local police departments. This commission is also known as the Wickersham Commission.

Police Administration, served as the virtual “bible” for police chiefs from the 1950s through the 1970s.⁵⁰

The core principle of police professionalism is that law enforcement agencies have both a responsibility and a right to manage their own affairs, just as other professions enjoy a high degree of autonomy and control over their domains.⁵¹ To this end, generations of police managers have strenuously fought the actual or threatened intrusions into their managerial prerogatives, whether by the U.S. Supreme Court, citizen oversight agencies, or police unions.⁵²

The professionalism movement achieved many improvements in American policing. Most police departments were far better managed in the 1960s than they were in 1900.⁵³ Personnel standards, as indicated by minimum entry requirements and formal pre-service training programs, were far higher (although this author has argued that at that time there were, for all practical purposes, no “standards” in the modern sense at all).⁵⁴ Most police departments assigned more patrol officers to high crime areas, and made other efforts to allocate personnel on a rational basis. Police chiefs’ obsession with adding more patrol cars and acquiring sophisticated communications technology reflected a sincere effort to provide better service by responding as quickly as possible to all citizen calls for service.⁵⁵ Compared with the utter lack of professionalism that prevailed through the late nineteenth century,

50. O. W. WILSON AND R. C. MCLAREN, *POLICE ADMINISTRATION* (4th ed. 1977).

51. See the provocative discussion of the development of a police monopoly over their professional mandate in PETER K. MANNING, *POLICE WORK: THE SOCIAL ORGANIZATION OF POLICING* (1977). A critique of this insular professional monopoly over the delivery of public services is one of the core principles of the community policing movement. George L. Kelling and Mark H. Moore, *The Evolving Strategy of Policing*, *PERSPECTIVES ON POLICING*, Nov. 1988, at 1, 10-14.

52. For a contemporary account of the fierce reaction to the Supreme Court, see FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* (1970). On the reaction to police unions, see generally PETER FEUILLE, *POLICE UNIONISM* (1973). On citizen oversight, see WALKER, *supra* note 21. See the various contributions in the valuable collection, *POLICE LEADERSHIP IN AMERICA: CRISIS AND OPPORTUNITY* (William A. Geller ed., 1985).

53. It is possible to benchmark improvements in policing by comparing the data on police in: Leonard P. Ayres, *The Cleveland Survey of the Administration of Criminal Justice*, Address Before the City Club of Cleveland (Feb. 18, 1922), in *THE CLEVELAND SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE, 1922*, at 4-9 (the first of the modern crime commissions); NATIONAL COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON CRIMINAL STATISTICS* (1931) (the first national crime commission); THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *TASK FORCE REPORT: THE POLICE* (1967).

54. WALKER, *supra* note 40.

55. WALKER, *supra* note 43, at 165-167.

when police departments were the “adjuncts” of political machines, the achievements of the professionalism movement were substantial.⁵⁶

2. The Shortcomings of Professionalism

In the 1960s the American police were engulfed in a national crisis that exposed serious problems and called into question both the achievements and the assumptions of the professional management approach. The crisis was provoked by two developments: the intervention of the U.S. Supreme Court into police operations and the civil rights movement.

In a series of landmark cases, the U.S. Supreme Court intervened into previously unregulated aspects of routine police procedures, notably searches and seizures and in-custody interrogations, and imposed new constitutional standards for police conduct.⁵⁷ From the standpoint of accountability, the significant aspect of the Court’s activism is that it exposed the extent to which police managers had failed to govern effectively the exercise of police authority. In a disturbing commentary on traditional police professionalism, the Kerner Commission noted that “many of the serious disturbances took place in cities whose police departments are among the best led, best organized, best trained, and most professional in the country.”⁵⁸ In the Los Angeles Police Department, for example, professionalism involved an aggressive crime-fighting style that included such tactics as frequent stops and frisks that aggravated community relations. The Court’s intervention not only forced departments to revise their policies and procedures to conform to new constitutional standards but, in the process, also stimulated a larger process of reform.⁵⁹

At the same time, the civil rights movement challenged abuses of police power, particularly the use of both deadly and physical force, discriminatory enforcement of the laws, and race discrimination in employment.⁶⁰ Virtually all of the urban riots of the 1964-1968 period were sparked by an incident involving the police.⁶¹ The police officer in the ghetto became the symbol of the national crisis in race relations. The principal demands of civil rights

56. The characterization of the police as “adjuncts to the machine” is in ROBERT FOGELSON, *BIG-CITY POLICE* 13 (1977).

57. For a discussion of these cases see Samuel Walker, *Historical Roots of the Legal Control of Police Behavior*, in *POLICE INNOVATION AND CONTROL OF THE POLICE* (David Weisburd and Craig Uchida eds., 1993).

58. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, *supra* note 13, at 301.

59. Walker, *supra* note 57, at 32.

60. JEROME H. SKOLNICK, *THE POLITICS OF PROTEST* 241-292 (1969). WALKER, *supra* note 40, at 124-25.

61. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, *supra* note 13, at 68.

leaders became the hiring of more African-American officers and the creation of civilian review boards to handle citizen complaints.⁶²

An examination of O.W. Wilson's *Police Administration* text dramatizes what the professional management strategy failed to do with respect to accountability. Even the fourth edition published in 1977 contains no reference to police discretion and devotes a total of four pages (out of more than 600) to supervision through "written directives," or what is today recognized as administrative rulemaking.⁶³ Moreover, the discussion is couched in generic terms and makes no specific reference to the use of deadly force, physical force, high-speed pursuits, or other critical uses of police power. There is no acknowledgment of the pervasive exercise of discretion, nor recognition of the extent to which discretion can be abused and result in violations of individual citizens' rights, including unequal enforcement of the law and the use of excessive physical force and unjustified deadly force.

The principal failure of traditional professional police management was that it represented organizational formalism. It assumed that accountability would be achieved by means of a correctly designed organizational structure with clear lines of authority and reporting, together with the rational allocation of personnel according to workload. Missing from this approach was any explicit discussion of what police officers actually do on the street (the subject that has been at the core of sociological studies of policing since the late 1950s),⁶⁴ the situations they routinely encounter, the fact that they exercise broad discretion in choosing among alternative responses, and that without specific guidance they might make bad decisions that could violate citizens' rights.⁶⁵ Wilson's administrative formalism, in short, assumed that the arrangement he recommended would reach down into the organization and shape officer behavior, but in fact it failed to do so.

3. Administrative Rulemaking

Detailed rules designed to control officer behavior began to emerge in the 1960s through the technique of administrative rulemaking. The basic tool of police management today, the departmental standard operating procedure manual, is typically a large loose-leaf notebook consolidating all current rules and regulations. Administrative rulemaking also lies at the core of the new paradigm of police accountability.⁶⁶ The history of the development of

62. WALKER, *supra* note 43, at 180-183, 193-201.

63. WILSON AND MCLAREN, *supra* note 50, at 136-141.

64. Samuel Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953-1969*, 9 JUST.Q. 47, 50 (1992).

65. NAT'L ACADEMY OF SCIENCES, *supra* note 38.

66. See text at Part V *infra*.

administrative rulemaking in policing is extremely complex and uneven. Police departments always had some rules governing police officer behavior. But as the discussion of the limits of professional management in the previous section indicated, as late as the early 1960s existing rules generally ignored the critical issues of police use of authority and/or were couched in such general terms that they provided no meaningful guidance.

Several general themes in the history of police rulemaking should be noted. First, rulemaking in policing emerged rather late compared with developments in the field of administrative law in general. Herman Goldstein was the first authority to propose rulemaking as a management response to the problem of police discretion.⁶⁷ The first full discussion of the subject did not appear until 1975, with Kenneth C. Davis's 1975 book *Police Discretion*.⁶⁸ This was almost thirty years after enactment of the federal Administrative Procedure Act, which established basic principles and process of rulemaking.⁶⁹ Second, rulemaking developed late because it was not a part of the tradition of O.W. Wilson-style of police management, and this constitutes one of the great failures of that reform tradition. Third, rulemaking was, for all practical purposes, forced on the police by external forces. As already suggested, the Supreme Court initiated the process in its rulings on searches and seizures and in-custody interrogations. In the 1970s, as the Court began to withdraw from oversight of the police, rulemaking continued to develop in response to social protest and litigation in the areas of deadly force, domestic violence, and high speed pursuits.⁷⁰

The essential features of administrative rulemaking are well-known. In brief, it is designed to fill in the gap between law and practice. Statutes define the general responsibilities of public agencies but are not sufficiently detailed

67. Herman Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 160 (1967) [hereinafter *Administrative Problems*]; Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967). Goldstein played a pivotal role in the development of rulemaking. He was a field researcher for the American Bar Foundation Survey in the late 1950s, which essentially discovered the problem of police discretion. See WAYNE LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 157-58 (Frank J. Remington ed., 1965). Goldstein and Frank Remington of the University of Wisconsin Law School were the principal authors of the first two chapters of THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967), which initiated the discussion of police rulemaking.

68. KENNETH CULP DAVIS, *POLICE DISCRETION* (1975). Davis was a leading authority on administrative law, and author of the first treatise on the subject, KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* (1951).

69. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 65 (1969).

70. *Id.*; DAVIS, *supra* note 68; SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN AMERICAN CRIMINAL JUSTICE, 1950-1990*, 33 (1993).

to cover all of the contingencies that arise. Through rulemaking, agencies promulgate their own internal rules to fill this gap and to provide guidance to front-line workers who make the critical decisions in implementing official policy.

Police rulemaking has two core elements. Substantively, rules confine discretion by specifying what officers may and may not do in certain situations. Current deadly force policies, for example, limit shootings to situations where there is a threat to the life of the officer or some other person.⁷¹ Domestic violence policies typically specify that an arrest is either the required or preferred response to a situation where there is evidence that a felonious assault has occurred.⁷² Rules also structure discretion by specifying the factors that an officer should consider in the proper exercise of discretion. High speed pursuit policies, for example, instruct officers to consider road conditions and the potential risk to pedestrians or other vehicles before initiating a pursuit.⁷³

Procedurally, rules check discretion by requiring officers to file official reports on particular incidents. These reports are then automatically reviewed by supervisors. This report and review process forces officers, in a very literal sense, “to account” for their actions. In the context of police history, the rules on deadly force, domestic violence, and pursuits are significant because officers had not previously been required to account for their actions or to face an automatic review of critical incidents.⁷⁴ In discussing the “long march” toward the current defense of life standard for use of deadly force, Geller and Scott observe: “During the 1950s and 1960s, some police policy manuals still

71. WILLIAM A. GELLER & MICHAEL S. SCOTT, *DEADLY FORCE: WHAT WE KNOW* (1992) (presenting a history of police deadly force policies). Arguably, the watershed event in police rulemaking was the promulgation of Policy #237 by New York City Police Commissioner Patrick V. Murphy in 1972. The policy abolished the old fleeing felon rule and substituted the far more restrictive defense of life standard. The policy also required NYPD officers to file a report after each firearms discharge and created a procedure for reviewing each and every report. James J. Fyfe, *Administrative Interventions on Police Shooting Discretion: An Empirical Examination*, 7 J. CRIM. JUST. 309, 311-12 (1979). Curiously, Murphy does not mention this, perhaps his most important and lasting accomplishment, in his autobiography. PATRICK V. MURPHY & THOMAS PLATE, *COMMISSIONER: A VIEW FROM THE TOP OF AMERICAN LAW ENFORCEMENT* (1977).

72. *See generally* DONALD BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 85-86 (1980) (providing research that indicates that officers based arrest decisions on non-legal factors such as the complainant’s preference or the social relationship between the complainant and the suspect).

73. GEOFFREY P. ALPERT & ROGER G. DUNHAM, *POLICE PURSUIT DRIVING: CONTROLLING RESPONSES TO EMERGENCY SITUATIONS* 7 (1990).

74. *See* PAUL JACOBS, *PRELUDE TO RIOT 18-62* (1966) (discussing the lack of accountability in the Los Angeles Police Department in the mid-1960s).

made no mention whatsoever of the criteria governing when officers could properly use deadly force.”⁷⁵

There is evidence in at least some areas of policing that rulemaking does achieve its intended goals. The most persuasive evidence relates to police use of deadly force. The number of citizens shot and killed by the police dropped significantly between the late 1960s and late 1970s (but have remained stable since then).⁷⁶ Perhaps even more important, the racial disparity between white and African-American citizens shot and killed has been cut in half between the 1970s and 1990s.⁷⁷ Research has also found that restrictive high-speed pursuit policies effectively reduce the number of pursuits, the number of accidents, and the number of both citizens and officers injured.⁷⁸ At present, however, there is no clear evidence that domestic violence, arrest-preferred policies result in more arrests of spouse assailants. Nor is there any clear evidence that policies controlling the use of non-lethal force reduce such usage.⁷⁹

While a major step forward, administrative rulemaking in policing has serious limits. Its development has been haphazard and inconsistent. Many critical areas of police work remain ungoverned by rules (e.g., the use of informants, other undercover tactics, deployment of the canine unit, etc.). Many departments, meanwhile, have rules on the use of force that are not as comprehensive as they could be (e.g., limiting use of force reporting to incidents where there is injury). Finally, and most importantly, the existence of a written rule hardly guarantees that it is implemented as intended. The implementation of rules and other elements of the new paradigm is discussed below.

Administrative rulemaking is a central part of the consent decrees and memoranda of understanding secured by the Justice Department in its litigation under § 14141. The specific applications are discussed later in this article.

B. The Judicial Strategy: The Courts as an Instrument of Police Reform

The void left by the professional management strategy gave rise to two major reform efforts seeking to impose external mechanisms of accountability. The most important of these involved using the courts as an instrument of police accountability. (The second, external citizen oversight is considered in the next section.) The courts offer several different opportunities for pursuing

75. GELLER & SCOTT, *supra* note 71 at 251; *see* LAFAVE, *supra* note 67, at 209-10.

76. JODI M. BROWN & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, POLICING AND HOMICIDE, 1976-98: JUSTIFIABLE HOMICIDE BY POLICE, POLICE OFFICERS MURDERED BY FELONS 3 (March, 2001).

77. *Id.*

78. GEOFFREY P. ALPERT, U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, POLICE PURSUIT: POLICIES AND TRAINING 4 (May, 1997).

79. BUREAU OF JUSTICE STATISTICS, *supra* note 20.

police accountability: constitutional standards for police work, tort litigation, and criminal prosecution.

1. The Constitution as a Code of Criminal Procedure

One of the most significant events in American policing over the past half century was the intervention of the U.S. Supreme Court into matters of routine police work. The “due process revolution” in criminal justice was only one chapter of the momentous role of the Warren Court in imposing constitutional standards on many, if not most, areas of American life, and asserting itself as a major maker of social policy. In policing, the Court intervened into previously neglected areas of police procedure and fashioned a new set of rules based on constitutional law. Civil rights and civil liberties advocates hailed the Court’s activism and invested in it great hopes for police reform. Some experts argue that by establishing constitutional principles as a minimum standard for police work, the Court reshaped the debate over police reform and stimulated lasting reforms.⁸⁰ The controversies surrounding the famous *Mapp* and *Miranda* decisions remain live issues into the present day.⁸¹

Despite the enormous importance of the Supreme Court rulings on police procedure, even many police experts who fully support an activist Court role recognize the limits of the Court as an instrument of police reform.⁸² While the Court can enunciate grand principles of constitutional law, it lacks the institutional capacity to ensure compliance on a day-to-day basis. The Court rules only on those issues that are brought before it, and most police activities remain uncovered by any Court decision. If an illegal search does not result in prosecution and conviction, for example, there is no grounds for an appeal under *Mapp*. Compliance with Court decisions is uneven at best. Police officers have available numerous strategies for evading the intent of both *Mapp* and *Miranda*, to cite the two most important cases. There is a substantial literature on police compliance with (and evasion of) Court rulings.⁸³ Finally, federal courts have no ability to ensure that all officers are even informed of important new decisions.⁸⁴

80. WALKER, *supra* note 70, at 11.

81. THE MIRANDA DEBATE, *supra* note 14.

82. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 414-15 (1974); Livingston, *supra* note 19, at 819.

83. See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda (1996)*, in THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 222, 230-231 (Richard A. Leo & George C. Thomas III eds., 1998); See Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh—A statistical study*, in THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES 150, 152 (Theodore L. Becker & Malcolm M. Feeley eds., 2d. ed. 1973).

84. See STEPHEN L. WASBY, SMALL TOWN POLICE AND THE SUPREME COURT 217 (1976).

2. Tort Litigation

Civil rights and civil liberties activists have also employed tort litigation, under federal or state law, as a strategy for enhancing police accountability. Apart from compensation for individual plaintiffs, the reform strategy assumes that if the dollar cost of police misconduct is raised to a critical level, local elected officials will respond by adopting the techniques of risk management and, thereby, impose meaningful police reforms.⁸⁵ The strategy assumes that financial pressure might succeed where appeals to law and human rights fail.

There is little evidence that the tort litigation strategy has succeeded. Academic studies of the strategy have generally found little direct impact on police reform.⁸⁶ The flaw in the strategy appears to be the assumption that public officials will act in a rational and coordinated manner in response to rising litigation costs. Instead, there appears to be a general pattern of disconnection and indifference rather than coordination and rationality in local governments. The general pattern appears to be that one unit (the police) engages in misconduct, another unit defends it in court, and another writes the check for damages. There is little evidence that mayors, city council members, or county officials have adopted the techniques of risk management to curb costs arising from police misconduct litigation, even when those costs are publicized in the local news media. Human Rights Watch, for example, quoted one police internal affairs officer as saying “civil cases are not our problem.”⁸⁷ A recent survey of police risk management programs found that even those programs that claim to have reduced litigation costs do not collect and publish data that would verify these claims.⁸⁸

The one documented case of a jurisdiction responding effectively to rising litigation costs is Los Angeles County, which created the Special Counsel to the Los Angeles County Sheriffs Department (LASD) in 1993. Because the office of the Special Counsel is properly considered a form of citizen oversight it is discussed below.⁸⁹

85. See CAROL A. ARCHBOLD, *INNOVATIONS IN POLICE ACCOUNTABILITY: AN EXPLORATORY STUDY OF RISK MANAGEMENT AND POLICE LEGAL ADVISING 9-10* (2002), at <http://www.policeaccountability.org>.

86. See Lant B. Davis et al., *Project: Suing the Police in Federal Court*, 88 YALE L.J. 781, 812-14 (1979); Candace McCoy, *Enforcement Workshop: Lawsuits Against Police—What Impact Do They Really Have?*, 20 CRIM. L. BULL. 49, 54 (1983); HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES* at 85 (1998) (concluding that civil litigation “must always be available, but cannot be a substitute for police department mechanisms of accountability or prosecutorial action”).

87. HUMAN RIGHTS WATCH, *supra* note 86, at 81.

88. See Archbold, *supra* note 85, at 19; JAMES J. FYFE ET AL., *POLICE ADMINISTRATION* (5th ed. 1997).

89. See text at Part IV.C.2 *infra*.

3. Criminal Prosecution

Community activists have also sought to curb police misconduct by encouraging criminal prosecution of officers guilty of criminal acts related to excessive force or unjustified shootings. The reform strategy is based on the expectation that successful conviction will both remove bad officers from the police department and deter future misconduct by other officers.

Criminal prosecution has proven to be a notably weak instrument of reform.⁹⁰ Convictions of police officers are extremely difficult to obtain. Local prosecutors, by the very nature of their role, have very close working relationships with local police. On the federal level, the resources of the U.S. Department of Justice are extremely limited, particularly in light of its general mandate and the existence of over 16,000 local law enforcement agencies in the United States.⁹¹ The legal standard, proof beyond a reasonable doubt that the officer had criminal intent, is very difficult to meet. Officers can always claim that they faced a threat to their own lives and were, therefore, justified in using force. Also, judges, grand juries and petit juries are extremely deferential to the claims of police officers that they were justified in taking the action they did under the circumstances that prevailed. Even when successful, criminal prosecution does not appear to deter future misconduct. Many officers have been prosecuted and convicted in both New York City and Philadelphia over the past three decades, and yet both departments are beset by continuing controversies.

4. Summary

The judicial strategy has had very mixed success in terms of enhancing police accountability. The Supreme Court has played a major role in establishing the principle that the police will be held accountable to standards of constitutional law and in stimulating a wide range of reforms. But even the most enthusiastic supporters of an activist Court role concede that the federal courts have, at best, a limited role as monitors of day-to-day police work. Both tort litigation and criminal prosecution, meanwhile, have very poor records in terms of achieving lasting improvements in policing.

C. The Legislative Strategy: External Oversight of the Police

90. See ALEXIS AGATHOCLEOUS, PROSECUTING POLICE MISCONDUCT 9 (1998); Monrad G. Paulsen & Richard Bonnie, *Securing Police Compliance with Constitutional Limitations*, in THE RULE OF LAW, at 405-407, (James F. Short, Jr. & Marvin E. Wolfgang eds., 1970); HUMAN RIGHTS WATCH, *supra* note 86, at 85-103.

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

Community activists have also turned to the political arena in response to police misconduct, demanding external oversight of the police. In a familiar process known as “scandal and reform,”⁹² the exposure of police abuse (corruption, excessive force, etc.) provides an opportunity to mobilize public opinion and force elected officials to take some kind of corrective action. External oversight has taken two different forms: one-time, “blue ribbon” commissions and permanent, external oversight agencies to handle citizen complaints against police officers.

1. “Blue Ribbon” Commissions

“Blue ribbon” commissions are a familiar feature of the American political landscape. In response to a perceived social problem, chief executives at the local, state, and national levels regularly appoint a panel of experts to investigate the problem and prepare a report with a set of policy recommendations. There is a long history of “riot commissions” appointed in response to episodes of urban racial violence.⁹³ There is also a long history of blue ribbon commissions appointed in response to exposures of police corruption or incidents of excessive force. The Christopher Commission (1991), appointed in the wake of the Rodney King beating in Los Angeles, is the most well-known, recent example, although police history is replete with other examples.⁹⁴

National-level, blue ribbon commissions have made important contributions to American policing. The Wickersham Commission (1931),⁹⁵ the President’s Crime Commission (1967),⁹⁶ and the American Bar Association *Standards Relating to the Urban Police Function* (1974)⁹⁷ documented existing problems, defined minimum standards, and helped to set reform agendas. Commissions at both the national and local levels, however, suffer from one inherent weakness: they lack the capacity to implement their

92. LAWRENCE W. SHERMAN, *SCANDAL AND REFORM* xvi-xvii (1978) (adopting phrase “scandal and reform” to describe the process of exposing police abuse and the following community reform efforts).

93. See *THE POLITICS OF RIOT COMMISSIONS 1917-1970* 3, 4-9 (Anthony Platt ed., 1971).

94. INDEP. COMM’N ON THE LOS ANGELES POLICE DEP’T, *REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT* (1991); HUMAN RIGHTS WATCH, *supra* note 86, at 44-46. The Independent Commission on the Los Angeles Police Department is also known as the Christopher Commission.

95. See NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, *supra* note 49, at 138-39.

96. See *THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY* 91-123 (1967); see also *THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE*, *supra* note 53, at 245-46.

97. AMERICAN BAR ASSOCIATION, *STANDARDS RELATING TO THE URBAN POLICE FUNCTION* (1974).

own recommendations.⁹⁸ By their very nature, commissions are temporary bodies that disband once the final report is released. Reports typically lie on the shelf with their recommendations unimplemented. (At best, these reports become useful sources for academic studies of the police.) Implementation depends upon a voluntary effort by the police department itself. In some instances, the original scandal results in the appointment of a new police chief who makes a sincere effort to implement the recommended reforms. Before long, the political momentum for reform wanes, as the original crises fades into memory and public attention, particularly the attention of the news media moves on to new crises.⁹⁹

98. See Samuel Walker, *Setting the Standards: The Efforts and Impact of Blue-Ribbon Commissions on the Police*, in GELLER, *supra* note 52, at 354-70.

99. Events in Los Angeles in the decade of the 1990s offer one notable example of this process. The original 1991 beating of Rodney King led to formation of the Christopher Commission and the report that followed therefrom. See INDEP. COMM'N ON THE LAPD, *supra* note 94. These events prompted two follow-up reports assessing implementation of the recommendations. A few years later the Rampart scandal erupted, prompting three separate reports and the Justice Department investigation that resulted in the current consent decree. A notable exception to this general sequence, ironically in the Los Angeles area as well, is the series of events related to the Los Angeles Sheriff's Department, starting with the Kolts Commission, JAMES G. KOLTS, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT (1992), and leading to the creation of the permanent office of the Special Counsel, see *infra* notes 115-18 and accompanying text.

2. Citizen Oversight

a. The Citizen Oversight Movement¹⁰⁰

A second legislative strategy for curbing police misconduct involves creating a permanent external oversight agency to handle citizen complaints. In the police-community relations crisis of the 1960s, the creation of “civilian review boards” became one of the principal demands of civil rights groups.¹⁰¹ The movement for civilian review appeared to suffer a fatal blow, however, with the demise of the independent Citizen Complaint Review Board (CCRB) in New York City in 1966 and the Philadelphia Police Advisory Board (PAB) in 1967.¹⁰² Then in the early 1970s, the movement quietly revived, gaining momentum in the 1980s, and emerging as an established part of American policing in the 1990s. Today, virtually all of the 50 largest cities are subject to some form of citizen oversight, as are an increasing number of smaller cities and county sheriffs’ departments.¹⁰³

The reform strategy underlying citizen oversight assumes that police departments are inherently unable to police themselves as a result of both bureaucratic self-interest and the power of the police subculture. Citizen oversight transfers responsibility for investigating citizen complaints to an independent agency staffed by persons who are neither police officers nor subject to the self-protective norms of the police subculture.

The major contribution of citizen oversight agencies involves establishing the principle that the police should be answerable to the public through an independent agency. The creation of external agencies, moreover, appears to result in the filing of more complaints by citizens. The significance of this phenomenon is discussed below.

b. The Limits of Citizen Oversight

The relative success of the citizen oversight movement in establishing oversight agencies (albeit after a long and bitter struggle in virtually every city) has left many of its advocates with a bitter taste, however. Many external oversight agencies have been weak, ineffective, poorly led, and have not provided either satisfactory service to individual complainants or had any

100. This article uses the term citizen oversight because it is more inclusive of the variety of agencies that have developed in recent years. See WALKER, *supra* note 21, at 5.

101. *Id.* at 25-26.

102. ALGERNON D. BLACK, *THE PEOPLE AND THE POLICE* 71-93, 208-15 (1968) (explaining the brief history and quick demise of the New York City CCRB).

103. See WALKER, *supra* note 21 at 31-43 (discussing the revival and growth of citizen oversight).

scientifically measurable effect on police misconduct.¹⁰⁴ The New York Civil Liberties Union, for decades the leading advocate of citizen oversight in New York City, has also been the leading critic of its child, the Civilian Complaint Review Board (CCRB), issuing a series of reports on its shortcomings.¹⁰⁵ A recent report of a New Orleans Police-Civilian Review Task Force was highly critical of the Office of Municipal Investigations (OMI) that has been in place since 1981.¹⁰⁶ An investigation of the Detroit police department found serious accountability problems, despite the existence of a civilian-staffed office of citizen complaints since 1973.¹⁰⁷ Equally deep dissatisfaction has been expressed by community activists in other cities with long-established citizen oversight agencies, for example, in Portland, Oregon.¹⁰⁸

External oversight agencies fail for a variety of reasons unrelated to the underlying concept of citizen oversight. Some fail because they lack the authority to accomplish their stated objectives: e.g., an agency promising “independent” review of citizen complaints but not having power to conduct such investigations.¹⁰⁹ Others fail because of a lack of resources: e.g., not having sufficient number of investigators relative to the size of the police department and the complaint caseload.¹¹⁰ Some have suffered from poor

104. *See id.* at 44-45 (discussing publicized events that occurred in cities that were either resistant to citizen oversight or where oversight clearly failed). A good review of several citizen oversight agencies is found in HUMAN RIGHTS WATCH, *supra* note 86, at 123-383. There has been little academic research evaluating the effectiveness of citizen oversight agencies. WALKER, *supra* note 21 at 184-85. Only a handful of evaluations approach the accepted standards of evaluation research. *E.g.*, Wayne A. Kerstetter and Kenneth A. Rasinski, *Opening a Window into Police Internal Affairs: Impact of Procedural Justice Reform on Third-Party Attitudes*, 7 SOC. JUST. RES. 107, 107-125 (1994) (studying the community’s perception of the Internal Affairs Review Panel in Minneapolis).

105. N.Y. CIVIL LIBERTIES UNION, FIVE YEARS OF CIVILIAN REVIEW (1998), <http://www.nyclu.org/fiveyears.html>.

106. POLICE-CIVILIAN REVIEW TASK FORCE, DRAFT REPORT OF THE POLICE-CIVILIAN REVIEW TASK FORCE 16 (2002), <http://www.new-orleans.la.us/home/reports/policeCivilianTaskForce.php>.

107. Merrick Bobb & Julio A. Thompson, *The Detroit Police Department* (Jan. 1997) (unpublished report subsequently released by the Detroit Free Press). The first chapter of the report, *Introduction and Executive Summary*, is available at http://www.freep.com/news/locway/DPDReport1_29.htm.

108. *See* Portland Copwatch, 27 PEOPLE’S POLICE REPORT, August 2002, *see also* previous PEOPLE’S POLICE REPORTS.

109. *See* WALKER, *supra* note 21, at 61-63 (discussing the different models of oversight agencies and the meaning of “independence” in this context); Richard J. Terrill, *Alternative Perceptions of Independence in Civilian Oversight*, 17 J. POLICE SCI. & ADMIN. 77, 79 (1990).

110. N.Y. CIV. LIBERTIES UNION FOUND., CIVILIAN REVIEW OF POLICING (1993) (providing comparative data on staffing levels of review agencies) (on file with author). *See* in particular the low level of staffing for the Cincinnati Office of Municipal Investigations, with only one investigator for about 1,000 sworn officers.

management.¹¹¹ Others fail because of a lack of political support, disinterest by police management, or staunch opposition from the local police union.¹¹²

An increasing number of observers argue that, even with sufficient powers and resources, an oversight agency that focuses only on the investigation of complaints will have little long-term impact on the overall quality of police services in the field. First, the vast majority of citizen complaints are “swearing contests,” without independent evidence to support either side.¹¹³ As a result, oversight agencies do not sustain a significantly higher rate of complaints than internal police complaint procedures.¹¹⁴ Second, even the strongest and most independent oversight agencies still have only the power to advise police executives but not to impose discipline themselves. Third, even if a significant number of complaints were to be sustained, there is no persuasive evidence that this would have a deterrent effect on other officers. Finally, and perhaps most importantly, focusing on individual complaints tends to make rank and file officers scapegoats for police misconduct when such misconduct is the product of an organizational culture that permits it to exist. Recognizing this latter point, a number of experts on oversight argue that oversight agencies should focus on policies and procedures designed to change the underlying organizational culture.

c. The Auditor Model: An Alternative Vision and Role for Citizen Oversight

A small number of citizen oversight agencies, however, show promise for making some significant, lasting contributions to police accountability.¹¹⁵ This promise is found in the auditor model of oversight, which reflects a different vision of the role of citizen oversight. The original idea of citizen oversight saw its role narrowly focused on the investigation of individual citizen

111. HUMAN RIGHTS WATCH, *supra* note 86, at 259 (“[W]hen a Human Rights investigator visited the OMI office on a weekday afternoon in late 1995, the office was absolutely silent, no phones were ringing, and some staffers were playing computer video games.”). *But c.f.* MAYORAL TRANSITION TASK FORCE ON THE OFFICE OF INSPECTOR GENERAL, TASK FORCE REPORT 7 (2002), http://www.nagintransition.com/task_force.html (The director of OMI “appears to have developed a very professional office staff, to have the highest respect for her position, and to recognize the importance of her office in terms of instilling public confidence in the City government. There have been no complaints registered with OMI within the last two years about the quality or the manner in which OMI has conducted its investigations.”).

112. *See* POLICE ADVISORY COMM’N, PHILADELPHIA, FISCAL YEAR 1997 ANN. REP. 2-3 (1997) (reporting litigation sponsored by the Fraternal Order of Police).

113. WALTER GELLHORN, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES 191 (1966) (presenting the first serious discussion of this issue); *see also* WALKER, *supra* note 21, at 121-37.

114. WALKER, *supra* note 21, at 137-38.

115. *Id.* at 34-40.

complaints. The auditor model focuses on the police organization, seeking to change policies and procedures in ways that will prevent future misconduct.

Policy Review. The most important auditing activity is the process known as policy review. Under policy review, the investigation of complaints remains the responsibility of the police department. The oversight agency reviews complaints for the purpose of both identifying problems with the complaint review process and also of identifying the underlying causes of complaints and recommending the appropriate corrective action. Underlying causes may include the lack of a departmental policy on particular kinds of situations, an outdated or inadequate policy, or a lack of training for either the officer in question or the department as a whole. Policy recommendations are not binding. The chief may accept or reject them. The San Diego County Sheriff, for example, has rejected a number of recommendations made by the Citizens Law Enforcement Review Board.¹¹⁶

Several citizen oversight agencies maintain active policy review programs. The San Francisco Office of Citizen Complaints (OCC) made a total of 11 policy recommendations in 1999 alone.¹¹⁷ The San Jose Independent Police Auditor (IPA) made a total of 49 recommendations between 1993 and 2000, only three of which were not adopted by the San Jose Police Department (action on two others was still pending at the end of 2000). The policy recommendations included such issues as the system for classifying citizen complaints, procedures for addressing potential bias in the internal affairs unit, a standardized investigation report, a process for notifying complainants about the status of investigations, and others. These policy recommendations might be seen as a form of organizational “house cleaning.” No single recommendation is likely to result in significant improvements in policing, but over time the sum total is likely to make the department more professional. In short, the San Jose Independent Police Auditor focuses on organizational change rather than the disposition of discrete complaints.¹¹⁸

The new Office of Independent Review (OIR) in the Los Angeles Sheriff’s Department made seven policy recommendations in its first year of operation. These included the development of a written policy on surveillance of drug

116. Memorandum from Thomas A. Zoll, Assistant Sheriff (Acting), to Sue Quinn, Exec. Officer (Acting) of the Citizens Law Enforcement Review Board (Oct. 22, 1996), *included in* Citizens Law Enforcement Review Board, San Diego, Special Meeting Minutes app. (Feb. 3, 1997) (on file with author).

117. OFFICE OF CITIZEN COMPLAINTS, SAN FRANCISCO, 1999 ANN. REP. (2000), http://www.sfgov.org/occ/areport99/anr99_toc.htm.

118. OFFICE OF THE INDEP. POLICE AUDITOR, SAN JOSE, 2000 YEAR END REP. app. R at 83-86 (2000), <http://www.ci.san-jose.ca.us/ipa/reports/00/R%20-%20Recommendations.pdf>; *see also* WALKER, *supra* note 21, at 94-98.

activities and guidelines to ensure high quality responses to civil claims against the department.¹¹⁹

The OIR is the best example of the convergence of internal and external accountability mechanisms. Established voluntarily by Sheriff Lee Baca, the OIR is staffed by six attorneys and directed by a former U.S. Attorney, all of whom are full-time employees of the LASD. The office functions as an external auditor or monitor would, except that it is an internal accountability mechanism.¹²⁰ The Integrity and Accountability Office (IAO) in the Philadelphia Police Department represents a similar approach: a non-sworn investigator who is a full-time paid member of the department. An important difference, however, is that the IAO was created as part of a consent decree settling a suit alleging excessive force and race discrimination by the police department, and does not represent a voluntary action by the department.¹²¹

To the extent that policy recommendations are adopted, they contribute to the administrative rulemaking process. Policy review adds to the rulemaking process by adding an outside perspective on police operations and also by basing policy recommendations on specific complaints, which grounds them in current operations. Even where recommendations are rejected, the policy review process serves a number of important functions.¹²² First and most important, it subjects the law enforcement agency to outside scrutiny and represents an orderly process for public debate over its policies. In this respect it creates the “transparency” that many experts feel is essential for building and maintaining public trust. Second, the process has the long-term potential for transforming the culture of a police organization by establishing the principle that members of the department will be subject to regular outside scrutiny and will be expected to conduct themselves in a professional manner.¹²³

The policy review process also involves a new perspective on citizen complaints. Historically, police departments regarded them as a threat and responded with an equally hostile attitude. Police complaint procedures were decidedly not user friendly. In the policy review process, complaints are regarded as valuable “social indicators” and as a “management tool;” complaints are indicators of problems that police managers need to act on.¹²⁴ For the same reason, in the new paradigm complaints become important data

119. OFFICE OF INDEP. REVIEW, *supra* note 36, at 31-53.

120. *Id.*

121. GREEN-CEISLER, *supra* note 36.

122. CITIZENS’ LAW ENFORCEMENT REVIEW BOARD, SAN DIEGO COUNTY, 2000 ANN. REP. 6 (2000), <http://www.co.san-diego.ca.us/clerb/docs/00anl-rpt.pdf>.

123. WALKER, *supra* note 21, at 149-57.

124. Drew Hyman, *Citizen Complaints as Social Indicators: The Negative Feedback Model of Accountability*, 6 OMBUDSMAN J. 47 (1987).

for the early intervention system (see below). And in this respect, the police review process represents a merger between a traditional external reform strategy (citizen oversight of the complaint process) and an internal reform strategy (professional police management).

Arguably, the most successful auditor model of citizen oversight is the Special Counsel to the Los Angeles Sheriff's Department (LASD).¹²⁵ It is significant that the office of the Special Counsel was initially created as a means of reducing the department's costs for civil litigation.¹²⁶ In light of the previous discussion of the general failure of tort litigation as a reform strategy, the Special Counsel stands as an important exception to the rule. Subsequent reports of the Special Counsel have reported significant reductions in both the number of civil suits filed against the department and the amount paid to plaintiffs. As the semi-annual reports of the Special Counsel indicate, the Special Counsel has taken an extremely broad interpretation of his mandate and examined a wide range of departmental issues that could have some direct or indirect impact on civil litigation. These issues include recruitment and training practices, gender equity issues, gay and lesbian issues, as well as issues related to the use of force and civil litigation.¹²⁷

Perhaps the most notable example of the auditing process addressing organizational issues is the Special Counsel's investigation into the high rate of shooting incidents among officers assigned to the Century Station. The investigation found that the shooting rate was associated with a series of management problems, including very young officers being supervised by very young sergeants, a sergeant to officer ratio that violated the department's own guidelines, and a pervasive atmosphere that the station was an undesirable assignment that officers wanted to leave as soon as possible. In short, the problems in Century Station were not the result of a few "bad" officers but of basic management practices. It follows that the reform strategies directed at individual officers—tort litigation, criminal prosecution, citizen complaints—are not likely to remedy these problems, while continued attention to organizational issues through an auditing process is likely to achieve the desired results.¹²⁸

125. The Special Counsel's web site is LOS ANGELES COUNTY, SPECIAL COUNSEL TO BOARD OF SUPERVISORS, at <http://lacounty.info/bobb/htm>; see WALKER, *supra* note 21 (discussing role of the Special Counsel).

126. LOS ANGELES COUNTY, *supra* note 125; KOLTS, *supra* note 99, at 352 (report prompted creation of the Special Counsel's office).

127. LOS ANGELES COUNTY, *supra* note 125.

128. See generally MERRICK J. BOBB ET AL., THE LOS ANGELES COUNTY SHERIFF'S DEP'T, 9TH SEMI-ANNUAL REP. 7-34 (1998), <http://lacounty.info/2ndShrFRpt.pdf>; 15TH SEMI-ANNUAL, *supra* note 33, at 9-35.

Community Outreach. A second role for citizen oversight agencies involves community outreach. This includes making information about the complaint process widely available throughout the community in the form of brochures, posters, and appropriate public service announcements. Particularly important is producing informational materials in languages other than English, as appropriate to the local community. The Minneapolis Civilian Review Authority (CRA), for example, issued brochures describing the complaint process in eight languages other than English. The most recent brochure is in Sudanese, a response to immigration patterns that have brought perhaps 20,000 Sudanese to the Minneapolis community.¹²⁹ The Portland, Maine police department recently issued material about the department, including the complaint process, in ten languages.¹³⁰

An active community outreach program is designed to overcome the traditionally closed nature of citizen complaint procedures in police departments and is likely to generate a higher volume of complaints. As is explained below, citizen complaints are an important element in the new paradigm of police accountability, and their increased volume is not viewed negatively. Complaints are defined as a management tool, indicators of possible problems that supervisors should investigate. To be useful to management, complaints are entered into an early intervention (EI) system database that is used to track officer performance and identify potential problem officers. The central role of an EI in the new paradigm of accountability is discussed below.

D. Summary: Reform Strategies in Perspective

When viewed from the perspective of 100 years, past police reform efforts have accomplished much. In 1900, American police departments were utterly unprofessional, ineffective, inefficient, and corrupt. By the year 2000, police departments had generally defined a sense of professional mission, adopted at least the basics of modern management, raised personnel standards, and embraced innovations such as community policing and problem-oriented policing. Primarily through the intervention of the federal courts, constitutionally based, minimal standards of lawful behavior have permeated police work.

129. MINNEAPOLIS CIVILIAN POLICE REV. AUTHORITY, MINNEAPOLIS, IF YOU HAVE A COMPLAINT AGAINST THE MINNEAPOLIS POLICE DEPARTMENT (n.d.) (a brochure on file with author).

130. *Positive or Negative, in (Almost) Any Language, Portlanders Can Speak Their Minds About Cops*, L. ENFORCEMENT NEWS, June 15/30, 2001, <http://www.lib.jjay.cuny.edu/len/2001/06.30> (last visited Sep. 20, 2002).

Despite these achievements, American policing still falls far short of the ideal of genuine accountability. Across the country, departments are embroiled in controversies over excessive use of force, race discrimination, and corruption. While an increasing number of departments have taken significant steps in the direction of establishing meaningful standards of accountability, the majority falls far short of the ideal. In this context we can summarize the shortcomings of the major reform strategies discussed above.

The professional management strategy, until compelled to do so by external forces, failed to adopt policies and procedures that would shape the behavior of officers on the street in a positive direction. While the Supreme Court made a major contribution in terms of defining new standards of legality, it left most police work ungoverned by any decision, and more importantly, had little authority of its own to penetrate into the police organization and shape officer behavior. Neither civil litigation nor criminal prosecution have proven to be effective deterrents to police misconduct. Neither action succeeded in penetrating the police organization and changing the police subculture to the point of effective self-policing. Legislative strategies have also fallen short. One-time, blue-ribbon commissions have no power to implement their recommendations. Many citizen oversight agencies suffer from structural weaknesses, a lack of resources, or poor leadership. No research has demonstrated that oversight effectively reduces police misconduct. Some agencies, adopting a different model of oversight, do exhibit the promise of effecting long-term change.

Even in the face of significant past failure, several promising reform strategies of the past provide the basis for the new paradigm of accountability. The most important strategy is administrative rulemaking, a technique that does reach deep into police departments and shapes officer behavior on the street. The policy review process conducted by some citizen oversight agencies, meanwhile, adds a new dimension to the rulemaking process. Furthermore, improvements in the complaint process through community outreach are likely to provide additional data for a departmental management. The new paradigm takes these changes and integrates them into a comprehensive accountability strategy.

V. THE NEW PARADIGM: PUTTING THE PIECES TOGETHER

The new paradigm of police accountability builds upon the more promising reform measures discussed in the previous sections and both extends and integrates them into a whole that is greater than the parts. Several features characterize the new paradigm. First, it integrates otherwise discrete policies and procedures into a comprehensive accountability program. Thus, three elements of the new paradigm—use-of-force reports, citizen complaints, and traffic stop data—become the raw material for an early intervention system,

which is the linchpin of the new paradigm. Second, it relies on the systematic collection and analysis of data on police department performance for the purpose of identifying problems that can be addressed through official intervention. Third, the official intervention represents a proactive approach to reducing officer misconduct that is fundamentally different from the traditional reactive approach in which the department responds after an incident has occurred. The following section reviews the components of the new paradigm and examines their respective roles in the new paradigm.

A. *Early Intervention Systems*

1. The Concept of Early Intervention Systems

Early intervention (EI) systems are the linchpin of the new paradigm of police accountability, and for that reason are discussed first.¹³¹ A relatively new development in police administration, EI systems are data-driven management information systems designed to help identify potential problem officers and then to provide those officers with some official intervention—usually counseling or training—designed to improve their performance. The intervention is separate from the normal disciplinary system and is informal in the sense that no documentation appears in an officer's personnel record. This informality gives supervisors greater flexibility in addressing performance issues that do not yet warrant formal disciplinary action, which would, in turn, trigger all of the formal requirements of a department's disciplinary process and a collective bargaining agreement if one is in effect.¹³²

The concept of EI systems is based on evidence indicating that in any law enforcement agency a small number of officers are involved in a disproportionate percentage of problematic incidents, such as citizen complaints, use-of-force incidents, civil suits against the department, and other indicators of performance problems.¹³³ Traditionally, these officers have been known to most other rank and file officers as well as many supervisors, but police departments took no action to correct their behavior.¹³⁴

131. Livingston, *supra* note 19, at 846 (quoting “the concept of early warning is central to both [the Pittsburgh and Steubenville] consent decrees . . .”). This author prefers the term “early intervention” (“EI”) to the more commonly used “early warning” because the latter term has a negative, punishment-oriented tone, focused on “problem” officers. EI systems, however, are evolving in the direction of comprehensive personnel assessment systems for the purpose of assisting a wider range of officers. See EARLY INTERVENTION, *supra* note 22.

132. *Early Warning*, *supra* note 22, at 1.

133. Sean P. Murphy, *Wave of Abuse Claims Laid to a Few Officers*, BOSTON GLOBE, October 4, 1992, at Metro/Region 1; Don Terry, *Kansas City Police Go After Their Own “Bad Boys”*, N.Y. TIMES, Sept. 10, 1991, at A1.

134. HERMAN GOLDSTEIN, POLICING A FREE SOCIETY, 171 (1977).

An EI system consists of four basic components. The first involves the officer performance indicators that are entered into the data base: use-of-force reports, citizen complaints, involvement in civil suits, use of sick leave, resisting arrest charges, and so on. The second component involves the process by which the data are analyzed and certain officers selected for intervention.¹³⁵ The third component consists of the departmental intervention with those officers selected, usually in the form of counseling by supervisors, retraining, or referral to professional counseling. The fourth component consists of the follow-up monitoring to determine whether or not an officer's performance has improved.¹³⁶

The one evaluation of EI systems to date, a study of three big city police departments that was published by the National Institute for Justice, found that the EI systems were effective in reducing citizen complaints and use-of-force incidents among officers subject to intervention. The evaluation also concluded that EI systems have potentially broader impact than just on individual officers. If implemented properly, they can redefine the role of first-line supervisors (principally sergeants) by providing them with both the direction and the tools (systematic data on officer performance) to intervene at an early stage with officers whose performance indicates problems in dealing effectively with citizens. At the departmental level, meanwhile, the evaluation suggests that an EI system database provides a comprehensive overview of agency performance and has the capacity to identify units with high levels of unacceptable performance.¹³⁷

There is preliminary evidence that an EI system has the potential for transforming the organizational culture of a police department and raising standards of accountability.¹³⁸ This transformation is a product of several aspects of an EI system and its impact on supervisors. First, an EI system database gives sergeants systematic data on officers' performance, thereby strengthening their hand when dealing with an officer who is having problems on the street. A sergeant can cite the data to rebut an officer's claim that he or she is being singled out as a result of bias or personality factors. A survey of

135. The best description of this phase of an EI system is in 15TH SEMIANNUAL, *supra* note 33, at 37-70. The proper thresholds are a matter of much debate at present. EARLY INTERVENTION, *supra* note 22.

136. EARLY INTERVENTION, *supra* note 22 (lists four components of an early warning system). The earlier work, *Early Warning*, *supra* note 22, at 2, lists only three components of an early warning system.

137. See *Early Warning*, *supra* note 22, at 3-6.

138. The operative words here are "preliminary" and "potential." The author makes no claim that there is independently verified evidence that the transformation has, in fact, occurred in any one police department.

police managers experienced with EI systems reported many positive comments regarding use of the EI system in this manner.¹³⁹

Second, and perhaps even more important, an EI system has the potential for enhancing the accountability of sergeants. EI systems have the technical capacity for documenting the extent to which a sergeant utilizes the system. The more sophisticated systems literally record the number of times sergeants log on to the system. Documented failure to access the system can be grounds for an unsatisfactory performance evaluation of the sergeant. Additionally, the EI database has the capacity to document comparative levels of problematic officer performance among sergeants, thereby identifying sergeants who may be failing to utilize the system effectively, or who may be conducting inadequate supervision

Whether or not the potential of EI systems is realized is a crucial question. The NIJ evaluation of EI systems concluded that a system cannot be separated from the larger climate of accountability in a department. If there is no serious commitment to accountability on the part of the chief executive and the top command, even the best EI system is likely to be nullified by a hostile organizational culture. Conversely, where there is a commitment to accountability, an EI system is likely to reinforce other accountability mechanisms.¹⁴⁰

2. Early Intervention Systems and the New Paradigm

An EI system is the linchpin of the new paradigm because it serves as the central repository of the data contained in the use-of-force reports, citizen complaints, and traffic stop data. And for precisely this reason it is essential that a department have a comprehensive use-of-force reporting system, an open and accessible complaint system, and a traffic stop data collection program. For an EI system to work effectively, it needs to capture as broad a range of officer performance indicators as possible. A “problem” officer, for example, may not necessarily have a large number of citizen complaints, and thus would not be identified by that indicator alone. But that same officer may well have a number of incidents in a number of different indicators (complaints, use of force incidents, resisting arrest charges, etc.), a pattern that suggests a general problem of dealing effectively with the public.

EI systems are mandated by all of the consent decrees and memoranda of understanding between the United States and various local law enforcement agencies. They are referred to by different terms: an Early Warning System (EWS) in Pittsburgh;¹⁴¹ a Management Awareness Program (MAP) for the

139. See *Early Warning*, *supra* note 22.

140. *Id.* at 5-6.

141. Pittsburgh Decree, *supra* note 6, at para. 12.

New Jersey State Police;¹⁴² the Training Evaluation and Management System (or TEAMS II) in Los Angeles;¹⁴³ the Personnel Performance Management System (PPMS) in Washington, D.C.;¹⁴⁴ and the Risk Management System (RMS) in Cincinnati.¹⁴⁵ The differences in terminology are irrelevant, as all embody the basic elements of the EI system concept. There are variations with regard to the performance indicators that are to be included in each EI system. The Pittsburgh decree mandates fourteen indicators; the Cincinnati decree, ten; and the Los Angeles decree, seventeen. These variations in the number of indicators are not crucial (as long as there is not just one or even just three indicators). There is at present no consensus among experts regarding exactly how many indicators should be used, and there are differences of opinion regarding other specifics of an ideal EI system. EI systems are a relatively new concept, and professional thinking about the best design is still developing.¹⁴⁶

B. Use-of-Force Reporting

1. Use-of-Force Policies and Investigations

Use-of-force reporting is one of the core elements of the new paradigm. The Justice Department report, *Principles for Promoting Police Integrity* recommends: “Agencies should develop use of force policies that address use of firearms and other weapons and particular use of force issues such as: firing at moving vehicles, verbal warnings, positional asphyxia, bar arm restraints, and the use of chemical agents.”¹⁴⁷ The provisions of the various consent decrees address four separate issues related to police officer use of force: substantive use-of-force policy, incident reporting requirements, the investigation of force incidents, and entry of force reports into a departmental early intervention (EI) or risk management system. All police departments have some formal use-of-force policy, with a reporting requirement. The consent decrees and memoranda of understanding generally refine and extend those policies. Provisions related to the investigation of force incidents are an important innovation, and the requirements related to an early intervention system are the most important of all.

With regard to substantive use-of-force policy, the consent decrees and memoranda of understanding vary, reflecting the specific problems of each department. The Pittsburgh decree requires a complete overhaul of the

142. N.J. Decree, *supra* note 7, at para. 40.

143. L.A. Decree, *supra* note 8, at para. 39.

144. D.C. MEMORANDUM, *supra* note 9, at para. 106.

145. CINCINNATI MEMORANDUM, *supra* note 2, at § VII.A.

146. EARLY INTERVENTION, *supra* note 22.

147. PRINCIPLES, *supra* note 18, at § I.2.

department's policy, directing the City to "develop and implement a use of force policy that is in compliance with applicable law and current professional standards."¹⁴⁸ The Memorandum of Understanding with the Washington, D.C. police contains a similar requirement.¹⁴⁹ The Cincinnati Memorandum of Agreement, meanwhile, mandates clarifications of the existing use-of-force policy and has specific provisions severely limiting deployment of the canine unit, and the use of chokeholds and chemical spray.¹⁵⁰ The latter provisions are significant because they bring under the ambit of "force" policy such actions as deployment of the canine unit. The Los Angeles decree, however, does not call for changes in the substantive use-of-force policy but does require a number of procedural changes regarding enforcement of the existing policy.¹⁵¹ All of the decrees require that officers report all enumerated force incidents. The significant aspect of the use-of-force reports is that they are required to be entered into an early intervention system.

With respect to enforcement, the provisions of the Los Angeles consent decree are notable for their attention to operational details. First, use-of-force investigations are centralized in the Operations Headquarters Bureau (OHB), a change that separates investigators from the units where the officer under investigation is assigned.¹⁵² Second, the OHB is required to have the capacity to "roll out" (i.e., respond immediately to any incident) 24 hours a day.¹⁵³ Use-of-force incidents are to be immediately reported to OHB, the chief of police, the Police Commission, and the Inspector General.¹⁵⁴ The department is mandated to negotiate with the police union to secure a requirement that in the case of shootings involving more than one officer, each officer be represented by a different attorney.¹⁵⁵ All officers and witnesses are to be "separated immediately" after a shooting incident.¹⁵⁶ Finally, investigators are required to evaluate the effect of the presence or non-presence of a supervisor at each use-of-force incident and service of a search warrant.¹⁵⁷

148. Pittsburgh Decree, *supra* note 6, at para. 13.

149. D.C. MEMORANDUM, *supra* note 9, at para. 37 ("MPD shall complete development of a Use of Force Policy that complies with applicable law and current professional standards. The policy shall emphasize the goal of de-escalation and shall encourage officers to use advisements, warnings, and verbal persuasion when appropriate. The policy shall advise that the use of excessive force shall subject officers to discipline and possible criminal prosecution and/or civil liability.").

150. CINCINNATI MEMORANDUM, *supra* note 2, at § IV.A.12(b),(c),(f), B.14(b), C.20(a)-(h).

151. L.A. Decree, *supra* note 8 at § at III, paras. 55-105.

152. *Id.* at § III.A, paras. 55-69.

153. *Id.* at para. 56.

154. *Id.*

155. *Id.* at para. 60.

156. *Id.* at para. 61.

157. *Id.* at para. 62.

These decree provisions are designed to correct specific problems in use-of-force investigations. Investigations have been compromised by too intimate a relationship between investigators and officers, a failure of the department to respond to force incidents in a timely fashion (which may result in the loss of witnesses or physical evidence), the failure to report incidents to the top command or other authorities, the collusion of officers for the purpose of agreeing on a common and exculpatory version of the incident, and the lack of supervisory attention to critical incidents.

The significance of these decree provisions is that, as an exercise in administrative rulemaking, they move beyond formal policy and attempt to ensure the integrity of the investigative process. Several informed commentators argue that the problem in the LAPD has been not the substantive use-of-force policy, but the failure of the department to enforce that policy. The LAPD's own Board of Inquiry Report on the Rampart Incident lists thirty-one formal policies and procedures designed to ensure integrity within the department.¹⁵⁸ A separate report written by the noted legal scholar Erwin Chemerinsky concludes that the problem within the LAPD is "the culture of the Los Angeles Police Department, which gives rise to and tolerated what occurred in the Rampart Division and elsewhere."¹⁵⁹

Failures to enforce existing use-of-force policies have been found in other police departments.¹⁶⁰ The first monitor's report in Philadelphia, for example, found that "rigidity of procedure and routine failure to follow leads or take obvious measures, and a tendency to view the case only from the officer's perspective, result in too many inadequate investigations."¹⁶¹ The 1992 Kolts report on the Los Angeles Sheriffs' Department found "explicit and implicit biases against civilian complainants at every level of the complaint process."¹⁶² These problems included investigations being conducted by the supervisor of the officer under investigation, with resulting evidence of bias, investigations being "closed before completion—at times under highly suspicious circumstances," and complaints that, although "corroborated by physical evidence and independent witnesses, are frequently not sustained."¹⁶³ The Cincinnati Memorandum of Understanding attempts to improve the integrity of investigations by requiring that officers notify their supervisors after any use of

158. BOARD OF INQUIRY INTO THE RAMPART AREA CORRUPTION INCIDENT, LOS ANGELES POLICE DEPARTMENT, PUBLIC REPORT 291-298 (2000).

159. CHEMERINSKY, *supra* note 29, at § I.

160. HUMAN RIGHTS WATCH, *supra* note 86, at 74-76 (reporting problems in Los Angeles and other cities).

161. Plaintiffs' First Monitoring Report at 15, NAACP v. City of Philadelphia, No. 96-cv-6045 (E.D. Pa. Sept. 1997) (on file with author).

162. KOLTS, *supra* note 99, at 100.

163. *Id.*

force, that supervisors respond to the scene [presumably immediately]; that the Internal Investigations Section respond to the scene of “serious” force incidents and all canine bites that cause injury or require hospitalization, that investigators neither ask “leading questions,” nor give an “automatic preference for an officer’s statement over a non-officer’s statement, nor . . . disregard a witness’s statement merely because the witness has some connection to the complainant.”¹⁶⁴

The provisions of the Cincinnati Memorandum of Agreement related to the canine unit also address operational details. They require the department to revise its policy on the deployment of canines to limit “off-leash” deployments; to require officers to gain approval from an immediate supervisor prior to any deployment; to announce “loud and clear” to the suspect that a canine deployment is imminent; to prohibit bites by canines except “where the suspect poses a risk of imminent danger” (e.g., injury), and to call off the dog “at the first possible moment.”¹⁶⁵ Additionally, written reports are required of all canine deployments and these reports are to be entered into the risk management system.¹⁶⁶

With respect to canine unit deployment, the Memorandum of Agreement with the Washington, D.C., police department requires similar reforms.¹⁶⁷ On the contrary, the Los Angeles consent decree does not address substantive policy related to the canine unit but does require that all bite incidents (but not mobilizations) be entered into the EI system.¹⁶⁸

One particularly notable aspect of the Cincinnati Memorandum of Agreement is that all revisions to use of force policies proposed by the department are to be submitted to the Community Council “for their review, comment and education.”¹⁶⁹ This requirement, which is not found in other decrees and memoranda, is designed to overcome the closed and insular organizational culture of the Cincinnati police department.

2. Use of Force Policies and the New Paradigm

The provisions of the consent decrees related to the use of force essentially adopted the established principle of administrative rulemaking, and in that respect do not represent any significant departure with respect to accountability. In two other respects, however, they represent something new and important. First, they extend the rulemaking principle into the area of force

164. CINCINNATI MEMORANDUM, *supra* note 2, at § V.B, paras. 26-29.

165. *Id.* at § IV.C, para. 20.

166. *Id.*

167. D.C. MEMORANDUM, *supra* note 9, at paras. 44-46.

168. L.A. Decree, *supra* note 8, at § II.A, para. 41(b).

169. CINCINNATI MEMORANDUM, *supra* note 2, at § IV.A, para. 13.

investigations. Previous reform efforts have generally focused their attention on substantive use-of-force policy, often merely requiring that a department have a policy, and completely neglecting the department's enforcement process. The law enforcement accreditation standards, for example, require none of the enforcement procedures found in the Los Angeles and Cincinnati decrees.¹⁷⁰ Livingston astutely comments that the Commission on Accreditation for Law Enforcement Agencies (CALEA), the national accreditation agency, "has largely refrained from specifying the content of policies required in particular areas. . . ."¹⁷¹ Second and more important, force incident reports are entered into the early intervention system. The use-of-force reports are not a discrete aspect of police accountability but are integrated into a system that relates use of force to other areas of officer performance. The result is, at least potentially, a comprehensive approach to accountability, involving many different indicia (e.g., use of force, citizen complaints, traffic stops).

C. Citizen Complaint Process

1. An Open and Accessible Complaint Procedure

The provisions of the consent decrees and memoranda of understanding related to citizen complaint procedures seek to enhance the openness and accessibility of those procedures. This goal is consistent with the recommendation provided in the Justice Department report, *Principles for Promoting Police Integrity*, which suggests police departments "should provide a readily accessible process in which community and agency members can have confidence that complaints against agency actions and procedures will be given prompt and fair attention."¹⁷²

As a first step, the decrees expand the ways in which citizens can file complaints. The Los Angeles decree, for example, requires that the department accept complaints "in writing or verbally, in person, by mail, by telephone (or TDD), facsimile transmission, or by electronic mail."¹⁷³ And in an even more significant change, the LAPD must also accept anonymous complaints.¹⁷⁴ Similar complaint filing procedures are required by the consent decree related

170. COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES §1.3.7 (4th ed., 1998).

171. Livingston, *supra* note 19, at 844.

172. PRINCIPLES, *supra* note 18, at § II(1).

173. L.A. Decree, *supra* note 8, at § III.C, para. 74(a).

174. *Id.* at para. 74(b).

to the New Jersey State Police¹⁷⁵ and the Memorandum of Agreement with the Washington, D.C., police.¹⁷⁶

To open up the complaint process, the New Jersey consent decree requires that officers carry both “fact sheets and complaint forms in their vehicles at all times while on duty.”¹⁷⁷ Moreover, officers are required to inform citizens that they “have a right to make a complaint” if they are not happy with how they have been treated. Officers are also explicitly forbidden from discouraging citizens from making complaints.¹⁷⁸ Finally, officers are required to “provide their name and identification number to any civilian who requests it.”¹⁷⁹ With respect to community outreach, the decree requires: “The State Police shall develop and implement an effective program to inform civilians that they may make complaints or provide other feedback regarding the performance of any state trooper.”¹⁸⁰ This includes the development of informational materials describing the complaint process in both English and Spanish.¹⁸¹

Equally important are detailed provisions related to the investigation of citizen complaints. These provisions closely parallel those related to use-of-force investigations and are designed to ensure that investigations are thorough and fair.¹⁸² The LAPD, for example, is required to record either by audio or video tape the interviews with all complainants, involved officers, and witnesses.¹⁸³ This is a practice that has recently emerged in the field of citizen oversight and permits quality control checks of investigations by citizen oversight auditors, for example, who review tapes to identify incomplete or biased interviews.¹⁸⁴ LAPD investigators are also directed to canvass the scene of a complaint incident to locate both physical evidence and potential witnesses.¹⁸⁵ Also, attempts should be made to interview complainants and witnesses “at sites and times convenient for them.”¹⁸⁶

175. N.J. Decree, *supra* note 7, at paras. 57-60.

176. D.C. MEMORANDUM, *supra* note 9, at paras. 92-93.

177. N.J. Decree, *supra* note 7, at para. 59.

178. *Id.*

179. *Id.* at para. 57.

180. *Id.* at Para. 58.

181. *Id.*

182. Generally, use of force investigations are internally initiated while citizen complaint investigations are generated by external complaint. See D.C. MEMORANDUM, *supra* note 9, at paras. 56-59, 61, 68, 72; L.A. Decree, *supra* note 8, at paras. 55-59, 67-68.

183. L.A. Decree, *supra* note 8, at § III.D, para. 80(a).

184. POLICE INTERNAL INVESTIGATION AUDITING COMMITTEE CITIZEN ADVISORS, PORTLAND, FOURTH QUARTER 1995 MONITORING REPORT 3, 5, 10 (1996) (on file with author); WALKER, *supra* note 21, at 169-70.

185. L.A. Decree, *supra* note 8, at § III.D, para. 80(b).

186. *Id.*

Finally, the consent decrees and memoranda of understanding contain provisions related to the disposition of complaints. The Washington, D.C., Memorandum of Agreement requires that the “MPD shall continue to make findings based on a ‘preponderance of the evidence’ standard.”¹⁸⁷ While some citizen oversight agencies have adopted formal standards for evaluating the evidence in complaints, many have not, and it is widely believed that most police departments have no formal standards. Additionally, the “MPD shall consider all relevant evidence including circumstantial, direct, and physical evidence, as appropriate, and make credibility determinations, if feasible.” And particularly important, “[t]here shall be no automatic preference for an officer’s statement over a person’s statement.”¹⁸⁸ This is a particularly important rule since one of the major problems with police department complaint investigations has been the practice of discrediting citizen testimony and giving a preference to officers’ statements.

The Collaborative Agreement in Cincinnati goes much further than any of the other agreements or decrees in restructuring citizen complaint agencies, requiring the city to consolidate the two existing citizen complaint procedures into a single Citizen Complaint Authority (CCA).¹⁸⁹ At the time of the decree, Cincinnati had both a Citizens Police Review Board, with limited power to investigate complaints, and an Office of Municipal Investigation with formal authority to investigate complaints.¹⁹⁰ The new CCA mandated by the consent decree will have a full-time executive director and five professional investigators. If nothing else, this consolidation ends the ambiguity surrounding conflicting jurisdiction over complaints.

In an important step, the decree directs: “as a condition of employment, all police officers and city employees are required to provide truthful and accurate information to the CCA.”¹⁹¹ The issue of officer cooperation with citizen oversight agencies has been a major controversy. Through their unions, rank

187. D.C. MEMORANDUM, *supra* note 9, at para. 98.

188. *Id.* at para. 99.

189. CINCINNATI MEMORANDUM, *supra* note 2, at § VI.D, para. 51.

190. See CITIZENS POLICE REVIEW PANEL, CINCINNATI, FIRST ANNUAL REPORT OF THE CITIZENS POLICE REVIEW PANEL (2001) (on file with author). A similar situation currently exists in Pittsburgh. The more recent report of the court appointed monitor primarily criticized the Office of Municipal Investigations for its deficiencies in handling complaints, as opposed to the police department. “Problems within the OMI process are deeply disturbing to the auditor, particularly in light of the fact that the City is 18 quarters into a 20-quarter process. The problems within OMI are even more disturbing because many of them have appeared despite concerns expressed by the auditor in 1998, 1999, and 2000 about OMI processes.” Auditor’s Eighteenth Quarterly Report at 74, *United States v. Pittsburgh*, No. 97-0354 (W.D. Pa. filed for quarter ending Feb. 16, 2002), http://archive.aclu.org/issues/policepractices/Pittsburgh_AQR/18AQR.pdf.

191. Collaborative Agreement, *supra* note 2, at para. 68.

and file officers have bitterly fought granting oversight agencies subpoena power. The lack of officer cooperation has been a major impediment to citizen oversight across the country since it denies the agency one of the most crucial sources of information.¹⁹² The provision of the Cincinnati Agreement requiring cooperation is a significant step toward improving citizen oversight.

2. Citizen Complaints and the New Paradigm

The changes in citizen complaint procedures mandated by the consent decrees and memoranda of understanding have three important effects with respect to the new paradigm of police accountability. First, for all practical purposes they initiate the development of a formal set of professional standards for citizen complaint procedures. At present, no such standards have been promulgated by law enforcement professional associations, the Commission on Accreditation for Law Enforcement Agencies (CALEA),¹⁹³ or the two citizen oversight professional associations: the National Association for Civilian Oversight of Law Enforcement (NACOLE)¹⁹⁴ or the International Association for Civilian Oversight of Law Enforcement (IACOLE).¹⁹⁵ A number of citizen oversight agencies have developed their own detailed rules and procedures, as have many police departments, but these are locally-initiated efforts without reference to any national standards.¹⁹⁶ As Livingston observed in an initial comment on § 14141 litigation, the law “may have the beneficial effect of further stimulating the articulations and dissemination of national standards governing core police managerial responsibilities.”¹⁹⁷

Second, changes that make a complaint procedure more accessible are likely to result in more complaints filed by citizens, either because there are more convenient ways to file complaints or because citizens are likely to have greater confidence in the process.¹⁹⁸ An increase in complaints provides additional data for the departmental EI system, thereby enhancing its capacity to identify problem officers.

192. HUMAN RIGHTS WATCH, *supra* note 86, at 68-71; INDEP. COMM’N ON THE LOS ANGELES POLICE DEP’T, *supra* note 94, at 168-71.

193. COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, *supra* note 170, at ch. 52.

194. NATIONAL ASSOCIATION FOR CIVILIAN OVERSIGHT OF LAW ENFORCEMENT, INVESTIGATION, MONITORING AND REVIEW OF COMPLAINTS, at <http://www.nacole.org/investigative%20guidelines.html>.

195. IACOLE is now a non-functioning organization. Its activities have essentially been subsumed by NACOLE.

196. See OFFICE OF THE COMMUNITY OMBUDSMAN, BOISE, POLICIES AND PROCEDURES, ch. 2 (2001), www.boiseombudsman.org/PoliciesProcedures2001.pdf; WALKER, *supra* note 21, at 188-97 (example of a model citizen complaint procedure).

197. Livingston, *supra* note 19, at 843.

198. Walker, *supra* note 21, at 121-37.

Third, the role of citizen complaints in the new paradigm represents a merger of internal and external mechanisms of accountability that historically have been seen as polar opposites. Civil rights activists have pursued the creation of external citizen oversight agencies in the belief that internal mechanisms are inherently incapable of effectively investigating complaints and disciplining guilty officers. In the new paradigm a reformed citizen complaint process that is more open and accessible provides data that, along with use-of-force reports and other performance data, are an important part of an EI system. It should be noted that the entry of citizen complaint data into an EI database occurs (or should occur) even where an independent, external citizen oversight agency has original jurisdiction over complaints; this is so because the records of complaint are such an important tool for management of the police department.

D. Traffic Stop Data Collection

1. The Racial Profiling Controversy

Collection of data on traffic stops is another element of the new paradigm. Data collection is a response to allegations of racial profiling, defined as the police practice of stopping drivers on the basis of race or ethnicity rather than bona fide traffic law violations.¹⁹⁹ The Justice Department report, *Principles for Promoting Police Integrity*, recommends: “[L]aw enforcement officers should report data to their agency on each traffic stop, including information on the race, ethnicity, and gender of the person(s) stopped.”²⁰⁰ The report observes that systematic data “can shift the debate surrounding racial profiling from anecdotal reports to a more informed discussion about the appropriate allocation of police resources.”²⁰¹ For all practical purposes, traffic stop data collection is essentially a variation on the theme of use-of-force reporting. In both cases, the department requires officers to complete reports on citizen contacts that are potentially problematic. The new paradigm, in fact, can help to resolve the major problem now facing traffic stop data collection efforts.

Traffic stop data collection has been the principal demand of civil rights groups as a remedy for racial profiling.²⁰² Despite bitter opposition from the

199. DRIVING WHILE BLACK, *supra* note 23; PROFILES, *supra* note 23; DEBORAH RAMIREZ ET AL., A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS 3 (2000), www.ncjrs.org/pdffiles1/bja/184768.pdf; POLICE EXECUTIVE RESEARCH FORUM, RACIALLY BIASED POLICING 121-122 (2001), <http://www.policeforum.org/racial.html#7>.

200. PRINCIPLES, *supra* note 18, at § 4.

201. *Id.*

202. Leland Ware, *Prohibiting Racial Profiling: The ACLU's Orchestration of the Missouri Legislation*, 22 ST. LOUIS U. PUB. L. REV. 59, 61 (2003).

police and their political allies,²⁰³ several states have enacted laws requiring some or all their agencies to collect data, and a large number of departments have undertaken voluntary data collection efforts.²⁰⁴ The San Diego, California police department is generally believed to have been the first to undertake a voluntary effort, and was soon followed by the San Jose, California police department.²⁰⁵ The first reports from these departments are currently available, as are reports from a number of other data collection efforts.²⁰⁶

2. Problems with Analyzing Traffic Stop Data

The assumption underlying the demand for traffic stop data collection is that the data will reveal whether or not an illegal pattern of discrimination based on race or ethnicity exists. This assumption has proven to be somewhat naive, and both criminologists and law enforcement professionals have found the interpretation of traffic stop data to be an extremely complicated undertaking.²⁰⁷ While virtually all of the official traffic stop data reports to date reveal racial and ethnic *disparities* in drivers stopped, they do not necessarily prove that the disparities represent *discrimination*. The controversy turns on the question of what should serve as the proper benchmark or denominator for the data on drivers stopped. In the initial lawsuits alleging racial profiling the plaintiffs presented observational data on the racial composition of all drivers and of observed traffic law violators on the highways in question.²⁰⁸ The official reports published to date, however, use official population data by race and ethnicity as the denominator. Thus, for example, the San Jose Police

203. Heather MacDonald, *The Myth of Racial Profiling*, 11 CITY JOURNAL 18-19, 26-27 (2001); See POLICE EXECUTIVE RESEARCH FORUM, *supra* note 199 (acknowledging the problem of discrimination but opposing data collection and recommending other remedies).

204. See LAWS AND POLICIES, at <http://www.profilesininjustice.com/laws.html> (current data on this area of law maintained by Professor David Harris).

205. See Paul Van Slambrouck, *Two cities tackle racial profiling*, CHRISTIAN SCIENCE MONITOR, Mar. 29, 1999, <http://www.csmonitor.com/durable/1999/03/29/fp2s1-csm.shtml>.

206. See generally SAN JOSE POLICE DEP'T, VEHICLE STOP DEMOGRAPHIC STUDY ANNUAL REPORT: ISSUED DECEMBER 1, 2000 (2000), <http://www.sjpd.org/sjpd%20vehicle%20stop%20annual%20rpt.pdf>; SAN DIEGO POLICE DEP'T, VEHICLE STOP STUDY: MID-YEAR REPORT (2000); MO. ATT'Y GEN. OFFICE, ANNUAL REP. ON 2001 MISSOURI TRAFFIC STOPS (2001), available at <http://www.ago.state.mo.us/rpexecsummary2001.htm>.

207. Samuel Walker, *Searching for the Denominator: Problems with Police Traffic Stop Data and an Early Warning System Solution*, 3 JUST. RES. & POL'Y 63, 65-67 (2001); GEN. ACCT. OFFICE, UNITED STATES, GGD-00-41, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORISTS STOPS (2000), <http://www.gao.gov/new.items/gg00041.pdf>; MVA & JOEL MILLER, PROFILING POPULATIONS AVAILABLE FOR STOPS AND SEARCHES (Home Office, Police Research Series Paper 131, Carole F. Willis ed., 2000).

208. DRIVING WHILE BLACK, *supra* note 23.

Department found that Hispanics represented forty-three percent of all traffic stops but only thirty-one percent of the population of the city.²⁰⁹

Many experts question whether population data are the proper denominator because they do not represent those drivers who are “at risk” for a traffic stop.²¹⁰ There are believed to be significant variations by race and ethnicity in the driving age population and actual driving patterns (both in terms of average miles driven and also illegal driving behavior). Also, particular areas experience a significant number of non-resident drivers not represented in the census data.²¹¹ Observational data on actual drivers, such as was submitted in the early racial profiling lawsuits in New Jersey and Maryland,²¹² solves these problems, but such data collection efforts are extremely expensive and have not been used in official reports released to date.²¹³ Consequently, these reports do not answer the question of whether a pattern of race discrimination exists.

3. Traffic Stop Data and the New Paradigm

The author of this article has argued that an early intervention system offers a practical solution to the problem of analyzing traffic stop data.²¹⁴ Officers complete reports on each traffic stop, and these reports are entered into the EI system database. The denominator then becomes the traffic stop activity of officers working comparable assignments. In theory, all patrol (or traffic unit) officers working a particular assignment should make roughly the same number of traffic stops. An analysis of the data can identify officers who stop a disproportionate number of African-American or Hispanic drivers. Further analysis can determine whether these officers’ activities warrant official intervention. At the same time, the analysis can identify officers who, contrary to departmental expectations, engage in no traffic stop enforcement, devote too much effort to traffic enforcement, or who stop a disproportionate number of female drivers.²¹⁵

Traffic stop data collection is a central component in the consent decree with the State of New Jersey for the obvious reason that racial profiling was

209. SAN JOSE POLICE DEP’T, *supra* note 206, at 5-8.

210. Walker, *supra* note 207, at 79; MILLER, *supra* note 207, at 83.

211. See the effort to develop more refined denominators in David A. Harris, *The Stories, The Statistics, and The Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 284-85 (1999).

212. See PROFILES, *supra* note 23 (discussing these cases and the data presented therein).

213. SAN JOSE POLICE DEP’T, *supra* note 206, at 14-15; MO ATT’Y GEN. OFFICE, *supra* note 206.

214. Walker, *supra* note 207, at 64.

215. SAMUEL WALKER AND DAWN IRLBECK, “DRIVING WHILE FEMALE”: A NATIONAL PROBLEM IN POLICE MISCONDUCT (2002), available at <http://www.policaccountability.org/drivingfemale.htm>.

the principal basis of the Justice Department suit. The decree requires the collection of data on nineteen separate items, including, most importantly, the name and ID number of the officer, the gender and race of drivers and passengers, frisks and searches, and ultimate disposition of the stop.²¹⁶ The Pittsburgh consent decree requires:

The City shall develop, and require all officers to complete, a written report each time a PBP officer makes a traffic stop. The record shall include the officer's name and badge number; the race and gender of the individual searched or stopped; approximate time and location; whether the stop involved a frisk or pat-down search; any weapons, evidence, or contraband found during the search; whether the individual involved was arrested or cited, and if so, the charges.²¹⁷

The Los Angeles decree requires the collection of ten items related to motor vehicle stops and nine items related to pedestrian stops.²¹⁸

It should be noted that the consent decrees and memoranda of understanding require the identification of officers making a traffic stop. This is an extremely important issue because rank and file officers have bitterly opposed officer identification and have generally succeeded in preventing that from being included in data collection statutes or voluntary department

216. N.J. Decree, *supra* note 7, at para.29 (listing as information required to be collected concerning traffic stops: "1. name and identification number of trooper(s) who initiated the stop; 2. name and identification number of trooper(s) who actively participated in the stop; 3. date, time, and location of the stop; 4. time at which the stop commenced and at which it ended; 5. license number/state of stopped vehicle; 5A. description of stopped vehicle; 6. the gender and race/ethnicity of the driver, and the driver's date of birth if known; 7. the gender and race/ethnicity of any passenger who was requested to exit the vehicle, frisked, searched, requested to consent to a vehicle search, or arrested; 8. whether the driver was issued a summons or warning and the category of violation (i.e., moving violation or non-moving violation); 8A. specific violations cited or warned; 9. the reason for the stop (i.e., moving violation or non-moving violation, other [probable cause/BOLO]); 10. whether the vehicle occupant(s) were requested to exit the vehicle; 11. whether the vehicle occupant(s) were frisked; 12. whether consent to search the vehicle was requested and whether consent was granted; 12A. the basis for requesting consent to search the vehicle; 13. whether a drug-detection canine was deployed and whether an alert occurred; 13A. a description of the circumstances that prompted the deployment of a drug-detection canine; 14. whether a non-consensual search of the vehicle was conducted; 14A. the circumstances that prompted a non-consensual search of the vehicle; 15. whether any contraband or other property was seized; 15A. a description of the type and quantity of any contraband or other property seized; 16. whether the vehicle occupant(s) were arrested, and if so, the specific charges; 17. whether the vehicle occupant(s) were subjected to deadly, physical, mechanical or chemical force; 17A. a description of the circumstances that prompted the use of force; and a description of any injuries to state troopers and vehicle occupants as a result of the use of force; 18. the trooper's race and gender; 19. the trooper's specific assignment at the time of the stop (on duty only) including squad.").

217. Pittsburgh Decree, *supra* note 6.

218. L.A. Decree, *supra* note 8, at paras. 104-05.

collection efforts.²¹⁹ As a result, many official data collection efforts are not capable of identifying individual officers whose enforcement activities are questionable.

In each of the consent decrees and memoranda of understanding, the traffic stop data are required to be entered into the departmental early intervention database. In this respect, the effort to eliminate discrimination in traffic stops becomes integrated into a comprehensive accountability program along with efforts to both control the use of force and improve the citizen complaint process.

E. Court Appointed Monitors

All of the consent decrees and memoranda of understanding require the appointment of a monitor responsible for reporting to the court about compliance with the mandated reforms. While paid by the city in each case, monitors are agents of the court and, in that respect, independent of the city and police department to be monitored.²²⁰ Monitors represent an extremely important advance over previous reform strategies. As discussed above, the fatal weakness of blue ribbon commissions is their inability to implement or even oversee the implementation of their recommendations.²²¹ The Supreme Court also has very limited power to enforce its decisions.²²² The monitors appointed under § 14141 litigation are analogous to the special masters that have been appointed to oversee settlements in prison condition and mental hospital cases. The history of these institutional reform efforts, moreover, suggests that the implementation phase is usually a long and drawn out struggle, a history that suggests mandated reforms are not readily adopted.²²³

The monitor in the Pittsburgh case, the first case settled under § 14141, developed an extremely valuable three-tiered framework for analyzing compliance with the consent decree. Primary compliance involves the development of a formal policy on a particular aspect of police operations. Secondary compliance involves evidence that the department has incorporated the policy into training and supervision. Operational compliance, the third level, involves evidence that officers comply with the policy in their routine

219. The author believes this is an extremely cynical and opportunistic position since officers routinely voluntarily identify themselves on arrest reports, incident reports, and other departmental reports.

220. L.A. Decree, *supra* note 8, at para. 161 (“The Monitor shall be an agent of the Court and shall be subject to the supervision and orders of this Court, consistent with this agreement.”).

221. POLICE LEADERSHIP IN AMERICA, *supra* note 52, at 363.

222. See *supra* notes 81-83 and accompanying text.

223. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS (1998).

activities.²²⁴ This framework for analysis represents an important step forward because previous reform strategies have generally been limited to what is here defined as primary compliance.²²⁵

The monitors' reports published to date suggest the value of a mandatory monitoring process. First, the reports are lengthy and thorough, indicating that the individual monitors take their assignments very seriously.²²⁶ Second, at least one initial monitoring report, that for Washington, D.C., found that the police department had met none of the deadlines specified in the memorandum of understanding. Although the problem appears to be a matter of pervasive organizational dysfunction rather than willful hostility, the report clearly indicates that the department is not likely to achieve the mandated reforms without sustained prodding by an external authority.²²⁷

The consent decree-monitoring process is still in its early stages, so it is not possible to render a judgment on its success at this point. The newly formed Police Assessment Resource Center (PARC) is completing an evaluation of the process in Pittsburgh. PARC was established for the specific purpose of providing technical assistance to monitors, and has held a conference bringing together monitors, plaintiffs' attorneys, and officials from monitored police departments.²²⁸

VI. AN ASSESSMENT OF THE NEW PARADIGM

A. *Achievements to Date*

224. Auditor's Eighteenth Quarterly Report, *supra* note 190, at 3 ("For the purposes of this audit, 'compliance' consists of three components: primary compliance, secondary compliance, and operational compliance. Primary compliance is viewed as the administrative piece of compliance. It entails the creation of policy, procedure, rule, regulation, directive or command to 'comply' as required by the text of the decree. Secondary compliance deals with training, supervision, audit and inspection, and discipline to ensure that a specific policy is being implemented as designed. To achieve operational compliance, both the primary—policy and directive—and secondary—training, supervision, audit and inspection, and discipline—must be achieved, and the directives must, by matter of evidence, be followed in day-to-day operations of the bureau.").

225. ROBERT C. DAVIS ET AL., VERA INSTITUTE OF JUSTICE, TURNING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE (2002), http://www.vera.org/publications/publications_5.asp?publication_id=180, also available at <http://www.cops.usdoj.gov/default.asp?Open=True&Item=563>.

226. The New Jersey Monitor's reports are available at www.nj.gov/lps/monitors.htm.

227. MICHAEL R. BROMWICH, SPECIAL REPORT OF THE INDEPENDENT MONITOR FOR THE METROPOLITAN POLICE DEPARTMENT 73 (2002), www.policemonitor.org/specialreportjune12.pdf.

228. Information on PARC, including the activities referred to here are available at <http://www.parc.info>.

The new paradigm of police accountability is cause for cautious optimism about the future of police reform. While previous reform efforts have achieved much, they have also left much undone. Controversies over excessive force, race discrimination, and corruption continue to embroil police departments across the country. The new paradigm represents a major advance over previous efforts by defining a specific set of best practices related to accountability that represent a comprehensive, integrated program of reform, with an overarching conceptual framework for accountability. The new paradigm also involves a sophisticated understanding of the requirements for lasting change in policing that builds upon the successes and failures of previous reform strategies. The new paradigm reaches deep into police organizations, shaping the on-the-street behavior of individual officers, and potentially changing the organizational culture of departments in a positive direction. With respect to use-of-force policies and practices, citizen complaint procedures, traffic stop data collection, and early intervention systems, the various consent decrees and memoranda of understanding go a long way toward defining national standards.

Some of the monitoring reports of compliance with consent decrees and memoranda of understanding provide grounds for optimism, while others do not. The eighteenth report of the court-appointed monitor in Pittsburgh found the city to be in primary and secondary compliance in seventy out of seventy-four tasks, but out of compliance in four tasks. Significantly, all of the out of compliance tasks involved the Office of Municipal Investigation (OMI), the independent citizen complaint agency, and not the Pittsburgh police department.²²⁹ The sixth report of the New Jersey monitor found that the State Police had made significant progress in many areas, although there were problems in some other areas.²³⁰ On the other hand, the monitor in Washington, D.C., found: “Despite substantial efforts in the past several months to compensate for an extraordinarily slow start, MPD has failed to accomplish virtually all of the milestones identified in the MOA within the time periods specified.”²³¹

The monitoring process itself is grounds for optimism since it creates an institutionalized mechanism for ensuring implementation of reforms mandated by consent decrees and memoranda of understanding. The idea of monitoring sets a new standard for future reform efforts that may result from some process other than federal litigation under § 14141.²³²

229. Auditor’s Eighteenth Quarterly Report, *supra* note 190, at 70.

230. Monitors’ Sixth Report, *United States v. New Jersey*, No. 99-5970 (D. N.J. July 19, 2002), http://www.nj.gov/lps/monitors_report_6.pdf.

231. BROMWICH, *supra* note 227, at 1-2.

232. Section 14141 litigation has led to the creation of the Police Assessment Resource Center (PARC), which, in addition to providing technical assistance to monitors, represents an

B. Grounds for Skepticism

There are good reasons for caution and skepticism about the potential of the new paradigm, however. The history of policing is littered with promising reforms that never fulfilled their promise and quietly faded away.²³³ Rank and file police officers are well aware of this and are highly cynical about reforms they see as passing fads.

1. From Policy to Practice

The first and most important reason for skepticism is that all of the policies and procedures that comprise the new paradigm are essentially formal administrative arrangements. To become operative they must achieve what the Pittsburgh monitor defines as the third level of compliance: verifiable impact on actual police operations.²³⁴ A use-of-force reporting system, for example, requires that officers complete the mandatory reports, that they complete them accurately, that supervisors give those reports meaningful review, and that officers be disciplined for any and all violations of departmental policy. The administration of such policies over time is one of the key components in shaping the organizational culture of a police department. Through experience, officers learn the organizational norms and the “going rate” for violations of policy.²³⁵

In this regard, the Los Angeles Police Department represents a particularly important cautionary tale. The chapter of the LAPD’s Board of Inquiry Report on the Rampart Incident devoted to “Police Integrity Systems” describes thirty-one formal policies and procedures designed to ensure integrity.²³⁶ Yet, the report conceded what critics of the LAPD have long argued: the department does not effectively investigate alleged misconduct nor discipline officers who are found guilty thereof. The independent report by the noted legal scholar Erwin Chemerinsky concurred, concluding that the LAPD had an organizational culture that condones misconduct.²³⁷

Similar concerns surround early intervention (EI) systems. The NIJ study warned that they are enormously complex administrative procedures, requiring

institutionalized center of expertise on police accountability that is useful to jurisdictions where there is no federal intervention. *See generally* PARC, at <http://www.parc.info>.

233. One of the best examples of a faded reform effort is the team policing movement of the early 1970s, which vanished almost overnight. *See* LAWRENCE W. SHERMAN ET AL., *TEAM POLICING: SEVEN CASE STUDIES* 107 (1973).

234. Auditor’s Eighteenth Quarterly Report, *supra* note 190, at 3.

235. The “compliance problem” with administrative rulemaking is discussed in WALKER, *supra* note 70.

236. *See* BOARD OF INQUIRY INTO THE RAMPART AREA CORRUPTION INCIDENT, *supra* note 8, at ch. 10.

237. CHEMERINSKY, *supra* note 29, at 551.

close and continuing administrative attention. One EI system in that study ceased functioning for at least a year as a result of the transition following the appointment of a new police chief.²³⁸ A recent evaluation of the EI system in Albuquerque, New Mexico found that it lacked much of the administrative support necessary for it to function effectively.²³⁹ The court-appointed monitor in Washington, D.C., found that the system there was not functioning at an effective level.²⁴⁰ In July 2002 the New Jersey monitor expressed “grave concern” about the lack of progress with development of the mandated MMPS system.²⁴¹ And most notoriously, the Los Angeles Police Department has not implemented its TEAMS II system,²⁴² even though it had been recommended by the 1991 Christopher Commission report,²⁴³ and the LAPD has received a \$170,000 federal grant for that purpose.²⁴⁴

2. The Experience of Monitors To Date

A second reason for skepticism surrounds the implementation of the consent decrees already in force. Although each decree includes the appointment of a monitor to oversee implementation, to date the evidence of the decrees’ effectiveness is mixed. The eighteenth, and most recent, report of the Pittsburgh monitor found that the Pittsburgh Police Bureau was generally in compliance with all mandated reforms, but the independent Office of Municipal Investigations (OMI), which has responsibility for handling citizen complaints, was not in compliance with respect to four mandated changes. The monitor overseeing the New Jersey State Police reported considerable progress by July 2002, although problems existed in certain areas of compliance.²⁴⁵ By comparison, the monitor in Washington, D.C. reported that the Metropolitan Police Department had missed virtually all of the deadlines established by the Memorandum of Understanding.²⁴⁶ Similarly, the initial stages of implementing the consent decrees in both Los Angeles and Cincinnati included significant opposition and foot dragging from either the departmental command or the police union.

238. *Early Warning*, *supra* note 22, at 4.

239. RICHARD JEROME, POLICE ASSESSMENT RESOURCE CENTER, POLICE OVERSIGHT PROJECT: CITY OF ALBUQUERQUE 79-82 (2002), <http://www.cabq.gov/council/pocstudy.pdf>.

240. BROMWICH, *supra* note 227, at 73.

241. Monitors’ Sixth Report, *supra* note 230, at vii.

242. OFFICE OF THE INDEP. MONITOR, LOS ANGELES POLICE DEPARTMENT, REPORT FOR THE QUARTER ENDING SEPTEMBER 30, 2002 2 (2002), http://www.lapdonline.org/pdf_files/boi/5th_quarterly_report_02_11_15.pdf.

243. INDEP. COMM’N ON THE LOS ANGELES POLICE DEP’T, *supra* note 94.

244. BOARD OF INQUIRY INTO THE RAMPART AREA CORRUPTION INCIDENT, *supra* note 8, at 140-41.

245. Monitors’ Sixth Report, *supra* note 230, at vii-viii.

246. BROMWICH, *supra* note 227, at 73.

In short, one should not assume that the existence of a legally enforceable consent decree ensures the effective implementation of the specific mandated reforms, much less a reduction in the use of excessive force or in racial discrimination.

3. Costs

A third reason for caution involves the cost of implementing the required dramatic short-term organizational changes. It has been estimated that implementation of the two Cincinnati agreements will cost \$13 million “just in start up costs” for the provisions related to use of force.²⁴⁷ The City of Los Angeles has appropriated \$29 million in fiscal year 2001-02 and \$38.3 million in fiscal year 2002-03 for implementing the consent decree.²⁴⁸ Given the serious financial constraints affecting all state and local governments in 2002, there is serious cause for concern about the ability of some cities to bear the costs of agreed upon police reforms.²⁴⁹

4. The Absence of Whistleblower Protection

A fourth reason for skepticism is the paradigm’s failure to address the important issue of whistleblower protections. The Justice Department’s report, *Principles for Promoting Police Integrity*, recommends that police departments “should have in place appropriate protection against retaliation for officers who report misconduct.”²⁵⁰ A critical failure of the current reforms is that this issue is barely addressed by any of the consent decrees and memoranda of understanding.

Effective whistle blower protection addresses two points that are part of the conventional wisdom among most police experts. First, it has long been recognized that one of the greatest impediments to achieving police accountability is the so-called code of silence, or “blue curtain,” under which officers do not report misconduct and refuse to testify against fellow officers.²⁵¹ It is widely recognized that the police subculture actively reinforces the values of the code of silence. Second, it has long been recognized that police departments do not have adequate procedures for rewarding good

247. Gregory Korte, *Police Reforms could top \$13M*, THE CINCINNATI ENQUIRER, June 24, 2002, at A1, http://enquirer.com/editoins/2002/06/24/loc_police_reforms_could.html.

248. LOS ANGELES POLICE DEP’T, LAPD CONSENT DECREE—STATUS REPORT TO THE COURT (2002), http://www.lapdonline.org/pdf_files/boi/status_report_080102.pdf.

249. IRIS J. LAV, CENTER ON BUDGET AND POLICY PRIORITIES, STATE FISCAL CONDITIONS CONTINUE TO DETERIORATE; FEDERAL ASSISTANCE BADLY NEEDED (2002), <http://www.cbpp.org/0-20-02sfp.htm>.

250. PRINCIPLES, *supra* note 18, at 8.

251. HUMAN RIGHTS WATCH, *supra* note 86 at 68; INDEP. COMM’N ON THE LOS ANGELES POLICE DEP’T, *supra* note 94.

officers. This includes both officers who perform exceptionally well in the routine course of work and those who report misconduct.²⁵²

Federal and state whistleblower protection laws currently exist. While a discussion of the effectiveness of these laws is beyond the scope of this article, a couple of points can be made with respect to their application in the police context. First, the burden of enforcing these laws falls heavily on the individual whistleblower, who generally faces organizational hostility, the enmity of fellow workers, substantial legal costs, a long and drawn out struggle, and a very uncertain outcome. Second, the police subculture poses particularly strong impediments to the effectiveness of such laws. Officers generally work in small groups (a partner, a precinct platoon, etc.) that operate in “low-visibility” circumstances out in the field. The folklore of policing holds that these work groups readily and easily punish fellow officers who do not conform to the occupational norms and especially those who publicly criticize the department.²⁵³

The various consent decrees and memoranda of understanding are silent on the issue of whistleblower protection. This issue is also not addressed in such blue ribbon commission reports as the Christopher Commission and the Mollen Commission. The New York City Commission to Combat Corruption has addressed this issue, but has never devoted more than four pages to it in any single report.²⁵⁴ The independent report on the Los Angeles Police Department following the Rampart scandal recommended “a system where officers may report wrong-doing by other officers to the [LAPD] Inspector General, with an assurance of confidentiality, and with protection from reprisals.”²⁵⁵ Finally, there are no scholarly articles discussing how a whistleblower protection procedure would operate in the special environment of policing.

The development of meaningful whistleblower protections should be a high priority on the agenda of police accountability reform efforts in the immediate future.

VII. CONCLUSION

Litigation by the U.S. Justice Department represents a new paradigm of police accountability. This article has argued that this new paradigm represents

252. Goldstein, *Administrative Problems*, *supra* note 67, at 167.

253. A famous case of such punishment is that of New York City police officer Frank Serpico who (not entirely accurately) was regarded as the officer who “broke” the NYCPD corruption scandal in the 1970’s. Allegedly, Serpico was “set up” by fellow officers and almost killed in retaliation. See PETER MAAS, SERPICO, 11-12 (1973).

254. COMM’N TO COMBAT POLICE CORRUPTION, NEW YORK CITY, FIFTH ANNUAL REPORT OF THE COMMISSION 63-67 (2001).

255. CHEMERINSKY, *supra* note 29, at 583.

a specific set of policies and procedures that incorporate existing “best practices” related to accountability. Of equal importance to culling the best practices, these practices are integrated into a conceptual framework of police reform that moves beyond previous reform efforts. The most important aspect of this framework is the focus on organizational change rather than individual officers or discrete police problems (e.g., use of deadly force). Finally, the new paradigm represents a model of police reform that has the potential to achieve a life of its own, independent of future § 14141 litigation by the Justice Department. The list of “best practices” and the overarching conceptual framework, particularly the focus on organizational change, is an agenda that can be pursued by various means.

The new paradigm discussed in this article represents a significant advance in the long effort to achieve higher standards of police accountability. It is the occasion for some optimism about police reform. The new paradigm builds upon past reform efforts, some of which made important contributions, but some of which failed to achieve their goals.

While there is cause for optimism, it is premature to declare the new paradigm a success. Serious police misconduct continues to plague many departments in this country. The police, moreover, have a considerable record in frustrating reform efforts. The new paradigm involves policies that reach deep down into police organizations and have the potential for reshaping the police officer subculture that has been able to frustrate so many past reforms. Whether the new paradigm will succeed in transforming that subculture and eliminating the major barriers to lasting reform remains to be seen.