

Police Misconduct

Will excessive force, racial profiling be curbed?

The U.S. Department of Justice is stepping up its oversight of local police departments, pressuring them to limit the use of force in civilian encounters and eliminate racial profiling during traffic stops and other enforcement. Over the past year, the Justice Department's civil rights division has criticized long-troubled police agencies in such places as New Orleans, Seattle and Maricopa County, Ariz., which includes Phoenix. The department's power stems from a 1994 law allowing the federal government to identify a "pattern or practice" of constitutional violations and threaten court action to force police agencies to adopt changes. Seattle officials have proposed a detailed plan to answer the government's criticisms, but negotiations are stalled in New Orleans and Maricopa County, where Sheriff Joe Arpaio is balking at the government's demand for court supervision of policy changes. Meanwhile, the racially charged shooting death of a Florida teenager by a neighborhood watch volunteer has focused attention on police handling of the case.



A protestor holds up a photo of wood carver John T. Williams, a hearing-impaired Native American killed by Seattle Police Sgt. Ian Birk in 2010. A fixture at a nearby social service center, Williams was shot after failing to respond to Birk's order to drop an open carving knife. The Feb. 16, 2011, demonstration was to protest the King County prosecutor's decision not to charge Birk, who later resigned.

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Police Misconduct

BY KENNETH JOST

THE ISSUES

Wendell Allen was wearing only pajama bottoms when New Orleans police officers on a marijuana raid broke into his house in the city's middle-class Gentilly neighborhood on the evening of March 7. Armed with a search warrant, six officers, clad in plain clothes covered by jackets identifying them as police, announced their presence and, after receiving no response, barged in.

Allen, a 20-year-old former high school basketball star with a previous marijuana-related conviction, was in the stairwell, unarmed, when Officer Joshua Colclough fired a single gunshot that hit Allen in the chest. The bullet penetrated Allen's heart, aorta and lungs. He died "almost instantly," New Orleans Parish Coroner Frank Minyard said later.¹

Allen's death, the second fatal shooting of an African-American youth by New Orleans police within a week, remains under what Superintendent Ronal Serpas promises will be "a complete and thorough" investigation. Colclough, in his fifth year with the force, gave a voluntary statement to investigators a week after the shooting. His attorney, Claude Kelly, says an "honest" investigation will show the shooting was justified.

Allen's family and leaders of the city's African-American community, however, have no doubt that the shooting was unwarranted. "There have been egregious wrongs done to the black community of New Orleans," W. C. John-



AP Photo/The Albuquerque Journal/Greg Sorber

Natalie Gomez holds a picture of her brother, 22-year-old Alan Gomez, who was killed last year by Albuquerque, N.M., police. Ms. Gomez participated in a rally on June 14, 2011, protesting the police department's use of lethal force. The department's police union was found to have been giving officers involved in fatal shootings \$500 to help them recover from stress. Critics have called the payments a bounty system for killing suspects.

son, leader of the United New Orleans Front, declared as protesters massed outside police headquarters two days after the shooting. Helen Shorty, Allen's grandmother, called for Colclough to be booked for murder.²

The shootings come as the long-troubled department is negotiating with the U.S. Department of Justice (DOJ) the terms of a possible agreement on

wide-ranging reforms to be supervised by a federal court. The negotiations follow a scathing report by the Justice Department's civil rights division in March 2011 that accused the New Orleans police of routine constitutional violations, including use of excessive force, improper searches and racial and ethnic discrimination.³

The 158-page report is one of nine published so far by the civil rights division's so-called "special litigation section" under President Obama that have held police departments around the country up to highly critical scrutiny. In three reports published within five days in mid-December, Justice Department investigators upbraided Seattle police for use of excessive force and the Maricopa County, Ariz., sheriff's office and East Haven, Conn., police department for ethnic profiling of Latinos. (See graphic, p. 304.)

Racial profiling is also at the heart of the nationwide controversy over the Feb. 26 fatal shooting of a black Florida teenager by a white neighborhood watch volunteer. (See sidebar, p. 314.) Trayvon Martin, 17, was shot as he was returning from a convenience store to the house of his father's girlfriend in Sanford, an Orlando suburb. George Zimmerman,

whose mother is Hispanic, claims he shot the unarmed Martin in self-defense after following the youth because of what he regarded as suspicious behavior. The incident has touched off nationwide debate not only over racial profiling but also over Florida's so-called Stand Your Ground law, which allows someone to use deadly force when feeling threatened, with no duty to attempt to retreat.

Justice Department Targets Police Misconduct

U.S. Department of Justice investigators have examined the policies and practices of more than two dozen law enforcement agencies over the past decade and found a range of illegal or otherwise improper practices, ranging from harsh treatment of suspects and racial profiling to failure to probe allegations of sexual assault. Here are highlights from five recent Justice Department reports.

New Orleans

(March 17, 2011) *Use of excessive force; unconstitutional stops, searches and arrests; biased policing; racial, ethnic and sexual-orientation discrimination; failure to provide effective policing services to persons with limited English proficiency; systemic failure to investigate sexual assaults and domestic violence.*

Puerto Rico

(Sept. 7, 2011) *Excessive force; unreasonable force, other misconduct designed to suppress exercise of First Amendment rights; unlawful searches and seizures; evidence of frequent failure to police sex crimes and incidents of domestic violence; evidence of discriminatory practices targeting individuals of Dominican descent; “staggering level” of crime and corruption.*

Maricopa County, Ariz. (includes Phoenix)

(Dec. 15, 2011) *Racial profiling of Latinos; unlawful stops, detentions and arrests of Latinos; unlawful retaliation against individuals who complain about or criticize the office’s policies or practices; reasonable cause to believe the office operates its jails in a manner that punishes Latino inmates with limited English proficiency for failing to understand commands given in English and denying critical services provided to other inmates.*

Seattle

(Dec. 16, 2011) *Use of unnecessary or excessive force; lack of adequate training on use of force; failure of supervisors to provide oversight on use of force; serious concerns about possible discriminatory policing, particularly relating to pedestrian encounters.*

East Haven, Conn.

(Dec. 19, 2011) *Systematic discrimination against Latinos, including targeting Latinos for discriminatory traffic enforcement, treating Latino drivers more harshly than non-Latino drivers after a traffic stop and intentionally and woefully failing to design and implement internal systems of control that would identify, track and prevent such misconduct.*

Source: U.S. Department of Justice, www.justice.gov/crt/about/spl/findsettle.php.

The most recent reports by the Justice Department’s police accountability unit exemplify its more aggressive stance after an eight-year period of dormancy under President George W. Bush. “They’ve been very assertive,” says Samuel Walker, a professor of criminal justice, emeritus, at the University of Nebraska-Omaha and the nation’s senior academic expert on police-accountability issues. In all, the unit is conducting 20 investigations of state or local law enforcement agencies.

Local police officials sometimes challenge the Justice Department’s findings. “The department is not broken,” a defiant Seattle Police Chief John Diaz declared as the DOJ’s report was being released on Dec. 16. The city’s mayor, Mike McGinn, backed him up.

Over time, however, local officials generally yield to federal authorities. In East Haven, Police Chief Leonard Gallo retired on Jan. 30 in the wake of DOJ criticism. In Seattle, McGinn rethought his initial skepticism about the report in the face of public criticism and directed Diaz to begin carrying out some of the Justice Department’s proposed changes.

In Arizona, however, the outspoken Maricopa County Sheriff Joe Arpaio is refusing the Justice Department’s insistence for court supervision of changes in police and jail policies. “None of us agreed to allow a federal monitor to come remove my authority as the elected sheriff of Maricopa County,” Arpaio declared on April 3. The government now has the option of going to federal court on its own to force changes.⁴

Holding police departments accountable to the law has been an intractable problem since the era of urban police departments began in the 1830s.⁵ The 20th century saw a succession of efforts to reduce or eliminate police misconduct, starting with a movement to professionalize policing and continuing through the mid-century criminal-law revolution under Chief Justice Earl Warren.

In the decades since, civilian review boards or other independent auditing mechanisms have advanced from objects of fierce debate to structures viewed by police organizations themselves as “best practices.” Congress in 1994 also gave the Justice Department a direct role in police reform by passing a law authorizing the federal government to sue state or local law enforcement agencies if it found a “pattern or practice” of violations of constitutional or federally protected rights.

The reforms have borne fruit in a general strengthening of policies and improved conduct by police officers in the nation’s nearly 18,000 state or local law enforcement agencies nationwide. “We’ve seen a progressive improvement in the professionalism of law enforcement over the last 30 years,” says Andrew Scott, a police consultant since his retirement as Boca Raton, Fla., police chief in 2006, after 30 years in law enforcement.

“Police departments have come a long way, both in terms of the officers and the leadership in policing,” says Hubert Williams, president of the Police Foundation, a Washington-based research organization, and a former Newark, N.J., police chief.

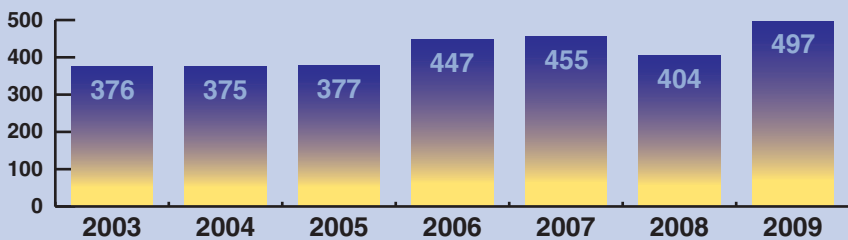
Walker, a civil liberties-minded researcher on police practices and policies since the 1970s, agrees that police behavior has generally improved over the past few decades. But he says there is a continuing gap between the country’s best and worst departments. “Some departments are taking up what I call the new accountability measures, moving forward, doing the right thing, and reducing misconduct,” Walker says. “And there are some that slip back.”

The New Orleans department, by common agreement, ranks low on those measures. “The New Orleans Police Department has never been a model of good behavior so to speak,” says Marjorie Esman, executive director of the American Civil Liberties Union of Louisiana (ACLU-La.).

Killings of Arrestees by Police on Rise

From 2003 through 2009, law-enforcement officials committed 2,931 arrest-related killings, whether criminal or justifiable, of people in their custody. Some experts caution that the upward trend over the seven-year period may reflect improvements in data reporting.

Arrest-Related Killings by Law Enforcement Personnel, 2003-2009



Source: Andrea M. Burch, “Arrest-Related Deaths, 2003-2009 — Statistical Tables,” Bureau of Justice Statistics, U.S. Department of Justice, November 2011, p. 4, bjs.ojp.usdoj.gov/content/pub/pdf/ard0309st.pdf

Walker is even blunter: New Orleans is “everybody’s candidate for the worst police department.”

Far from fighting the Justice Department’s findings, New Orleans superintendent Serpas joined the DOJ’s civil rights chief Thomas Perez in the March 17, 2011, news conference to release the report. Serpas said it contained few surprises and went on to pledge improvement. “I am convinced we will be a world-class police department,” he said. A week later, Serpas said many of the reforms were already being put into effect.⁶

The Justice Department launched its investigation in May 2010 at the request of the city’s newly inaugurated mayor, Mitch Landrieu. The investigation came on top of ongoing federal prosecutions of officers implicated in the attempted cover-up of the shooting of six unarmed black civilians on the Danziger Bridge six days after Hurricane Katrina devastated the city in September 2005.

By May 2010, four officers had already pleaded guilty to obstruction-type charges in connection with the shoot-

ing. In addition to one other guilty plea, five officers were convicted in August 2011 on federal civil rights charges after a seven-week trial. U.S. District Court Judge Kurt Engelhardt imposed sentences ranging from 38 to 65 years on four of the five defendants after an emotional sentencing hearing on April 4; a fifth defendant drew a six-year term. One other defendant is awaiting a retrial, set to begin in May, after a mistrial in January.⁷

As in previous investigations, Justice Department lawyers are negotiating with New Orleans officials on possible reforms. The changes would be included in a consent decree to be overseen by a federal court for a specified period. The department has followed the same procedure since the mid-1990s in such major cities as Pittsburgh, Cincinnati, Detroit and Los Angeles.

A one-day roundtable with police officials, experts and others convened by the Justice Department in June 2010 concluded the procedure has been effective in reforming police department practices. Experts generally agree. “Departments have come out of this much

better than they went in,” says David Harris, a professor at the University of Pittsburgh School of Law.

Some of the officials at the roundtable, however, complained that the process creates a “negative stigma” that takes time for a department to overcome.⁸

As assistant attorney general for civil rights, Perez has pushed the “pattern or practice” process more vigorously than any of his predecessors. In addition to New Orleans, Perez personally attended news conferences to announce the reports in Seattle and Maricopa County. “When police officers cross the line, they need to be held accountable,” Perez told *The Washington Post*. “Criminal prosecutions alone will not change the culture of a department.”⁹

One of the supposed deterrents to police misconduct, however, is being weakened by the Supreme Court under Chief Justice John G. Roberts Jr., according to civil liberties advocates. The Roberts Court has issued three decisions in the past six years that somewhat narrow the exclusionary rule — the court-created doctrine that prohibits the use of evidence police find during illegal searches. (See story, p. 312; “At Issue,” p. 317.)

Meanwhile, the New York City Police Department, the nation’s largest, is under a national spotlight after news reports, particularly by The Associated Press, detailing the department’s secret infiltration and surveillance of Muslim and some liberal groups as part of coun-

terterrorism investigations. The AP stories, dating from summer 2011 and continuing, show that the department investigated hundreds of mosques and Muslim student groups and infiltrated dozens. City officials are defending the practice, but some Muslim leaders are calling for the resignation of Police Commissioner Raymond Kelly.¹⁰



An opponent of a controversial New York City Police Department “stop and frisk” policy marches in the Bronx borough on Jan. 27, 2012. The NYPD says the policy helps to prevent crime, but critics accuse the police of racial profiling and civil rights abuses.

Out of 684,330 persons stopped by NYPD officers in 2011, the vast majority — 87 percent — were black or Hispanic.

The Justice Department investigations, coupled with the recurrent local controversies over police behavior, focus increased national attention on such issues as use of force, racial profiling and police accountability. Here

are some of the arguments being heard as those issues are debated:

Should police do more to control excessive force?

John Williams was carrying a board and an open wood-carving knife at an intersection near Seattle’s Pioneer Square on Aug. 30, 2010, when Police Sgt. Ian Birk spotted him, got out of his patrol car and ordered him to drop the knife. When the hearing-impaired Williams failed to respond, Birk fired four shots from about nine feet away. Williams, a fixture at the nearby social service center for Native Americans, died at the scene.

Williams’ death added to long simmering concerns about use of force by Seattle police forces. Led by the ACLU of Washington State, a coalition of 34 community groups asked the Justice Department to investigate. The department’s devastating report, released on Dec. 16, found routine violations of constitutional rights when force was used, with a small number of officers responsible for a disproportionate number of instances and with scant internal review of the incidents. “Seattle cannot control its own officers,” says Jennifer Shaw, deputy director of the ACLU affiliate.¹¹

Statistics are hard to come by, but experts appear to agree that police use force less frequently today than in the past. “Overall, it is less frequent than it was in the 1960s,” says the Police Foundation’s Williams. A study by the International Association of Chiefs of Police

Getty Images/Mario Tama

(IACP), published in 2001, found that police used force 3.6 times per 10,000 service calls during the 1990s. Citing the IACP's and a more recent study, the National Institute of Justice, the Justice Department's research arm, concluded in 2011 that use of excessive force is "rare," even while conceding the difficulty of defining "excessive."¹²

As in Seattle, a small number of officers are typically found most likely to resort to force or to use excessive force in encounters with civilians. "The vast majority of officers do not engage in excessive use of force," says former chief Scott. "It is the small minority of officers who abuse their power."

The U.S. Supreme Court has given only limited guidance on use of force by police. The court ruled in 1985 that police can use deadly force when pursuing a fleeing suspect only if the suspect poses a significant threat of death or serious physical injury to the officer or others. In a broader ruling, the court held in 1989 that any use of force by an officer must be objectively reasonable. Factors to be considered include the severity of the crime, whether the suspect poses "an immediate safety threat" and whether the suspect is "actively resisting arrest" or attempting to escape. The court added that the "calculus of reasonableness" should take into account an officer's need to make "split-second judgments."¹³

"The legal standards are pretty loose," says Robert Kane, an associate professor at the University of Baltimore's School of Criminal Justice and co-author of a forthcoming book on police accountability issues. "There's a lot of gray in terms of trying to judge the appropriateness of force."

City governments are occasionally hit with five-, six- or even seven-figure damage awards in suits by victims of police beatings or shootings. As one dramatic example, Rodney King was awarded \$3.8 million for the beating he suffered from Los Angeles police officers in 1991 after a high-speed car

Police Handle Tense Situations in Steps

Most law enforcement agencies have policies that guide their use of force. Such policies describe an escalating series of actions an officer may take to resolve a situation. Officers are instructed to respond with a level of force appropriate to the situation. An officer may move from one part of the continuum to another in a matter of seconds.

A typical use-of-force continuum:

Officer Presence — No force is used. Considered the best way to resolve a situation.

- The mere presence of a law-enforcement officer works to deter crime or defuse a situation.
- Officers' attitudes are professional and nonthreatening.

Verbalization — Force is not physical.

- Officers issue calm, nonthreatening commands, such as "Let me see your identification and registration."
- Officers may increase their volume and shorten commands in an attempt to gain compliance. Short commands might include "Stop" or "Don't move."

Empty-Hand Control — Officers use bodily force to gain control of a situation.

- *Soft technique.* Officers use grabs, holds and joint locks to restrain an individual.
- *Hard technique.* Officers use punches and kicks to restrain an individual.

Less-Lethal Methods — Officers use less-lethal technologies to gain control of a situation.

- *Blunt impact.* Officers may use a baton or projectile to immobilize a combative person.
- *Chemical.* Officers may use chemical sprays or projectiles embedded with chemicals to restrain an individual. Pepper spray is an example.
- *Conducted Energy Devices (CEDs).* Officers may use a device such as a Taser to immobilize an individual. Such devices discharge a high-voltage, low-amperage jolt of electricity at a distance.

Lethal Force — Officers use lethal weapons to gain control of a situation. These should be used if a suspect poses a serious threat to an officer or other individual.

- Officers use deadly weapons such as firearms to stop an individual's actions.

Source: www.nij.gov/nij/topics/law-enforcement/officer-safety/use-of-force/continuum.htm

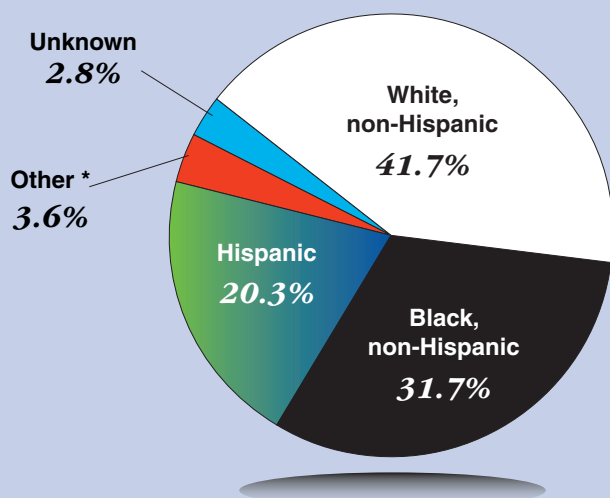
chase. Criminal prosecutions are more difficult. The King case ended in state court acquittals of four officers and a federal civil rights trial that ended with two convictions and two acquittals.

Internally, police departments appear to reject most citizen complaints of excessive force. In a recent study of eight local police departments, researchers at Michigan State University and Central

Half of Arrest-Related Killings Are of Minorities

More than half of the 2,958* people who were killed while under arrest from 2003 through 2009 were black or Hispanic. Whites comprised 42 percent of the total. All but 27 of the deaths were at the hands of law enforcement officers.

Racial Origin of Those Killed While Under Arrest, 2003-2009



* Includes American Indians, Alaska Natives, Asians, Native Hawaiians, other Pacific Islanders and persons of two or more races.

Figures do not total 100 because of rounding.

Source: Andrea M. Burch, "Arrest-Related Deaths, 2003-2009 — Statistical Tables," Bureau of Justice Statistics, U.S. Department of Justice, November 2011, p. 6, bjs.ojp.usdoj.gov/content/pub/pdf/ard0309st.pdf

Florida University found that six took no action on at least 90 percent of the complaints during the two-year period studied. Only three officers were suspended and one terminated because of use-of-force complaints during the period.¹⁴

The IACP's model policy on use of force largely restates the general guidelines from the Supreme Court, with added advisories against firing warning shots or shooting at a moving vehicle. Many departments provide more detailed guidance, including a so-called use of force continuum that correlates the level of force to be used with the suspect's level of resistance or threat to safety. (See graphic, p. 307.)

Walker says policies and training are the keys to reducing excessive force by police. "If you have a bad use-of-force incident, it's a mistake to focus on the officer because the underlying cause is some failure by the department: lack of proper training or lack of proper supervision," he says.

Should police do more to prevent racial and ethnic profiling?

Many studies over the past two decades have shown that African-American and Hispanic drivers are more likely to be stopped for traffic enforcement than white motorists. In a mammoth journalistic project, the *Hartford Courant*

took the issue one step further earlier this year by analyzing what happened in Connecticut to drivers after they were stopped by local police.

The newspaper's analysis of more than 100,000 traffic stops found that blacks and Hispanics were far more likely to get a citation than whites stopped for the same offense. As one example, blacks were twice as likely and Hispanics four times as likely to be ticketed for improper taillights as whites stopped for the same reason. "This is beyond profiling," Glenn A. Cassis, executive director of the state's African-American Affairs Commission, told the newspaper. "This goes to actually a level of discrimination, and who gets the wink and who doesn't get the wink."¹⁵

The Justice Department's recent reports found similar evidence of racial or ethnic profiling in New Orleans, Maricopa County and East Haven. In New Orleans, investigators found that police shot 27 civilians during a 16-month period, all of them African-Americans. In Maricopa County, Latino drivers were four to nine times more likely to be subjected to traffic stops than similarly situated non-Latino drivers. In East Haven, Latinos make up about 10 percent of the population, but accounted for nearly 20 percent of traffic stops.¹⁶

The tensions between police departments, historically predominantly white, and African-American and Hispanic communities are of long standing. The U.S. Supreme Court's initial decision, in 1936, limiting police conduct during interrogations came in the case of three black tenant farmers who confessed to murder only after being tortured. Los Angeles police tacitly abetted white servicemen attacking Latinos in the "Zoot Suit" riots in 1943. The Kerner Commission report on urban riots of the 1960s listed the "deep hostility between police and ghetto communities as a primary cause of the disorders."

Racial profiling advanced to the top of the national agenda in the mid- and late-1990s — as seen in the popular-

izing of the grimly ironic phrase “driving while black.” In litigation that documented the experiences of many African-Americans, ACLU affiliates in several states filed suits contesting the practice. Some states, including Connecticut, responded by passing laws requiring demographic statistics-gathering on traffic stops to try to spot signs of racial profiling.

Racial and ethnic profiling appears to be continuing despite increasing diversity on local police forces. The New Orleans police force is now majority black. In New York City, a majority of the police officers are black, Latino or Asian; whites comprise only 47 percent. Out of 684,330 persons stopped by NYPD officers in 2011, however, the vast majority — 87 percent — were either black or Hispanic.¹⁷

Harris, the Pittsburgh law professor and author of a book on racial profiling, says the practice “is a police issue, not a race issue.” Profiling, he says, “is a product of the training, culture and customs within that department. Black officers are going to be trained like all others. They’re going to want to fit in just like all officers.”

Other experts say profiling results naturally from the demographics of crime. “This is a social issue,” says the University of Baltimore’s Kane. “We know that race and class are strongly tied up with crime, perceptions of crime and urban disorder. Crime and race are not randomly distributed across America.”

“It is a problem, and it will continue to be a problem,” says police consultant Scott. “But it may not be extending from a police officer’s bigotry. If you have a particular segment of the community that is particularly involved in a particular crime, part of the profiling has to be the ethnicity of the offender.”

Identifying impermissible profiling can also be difficult, Scott adds. “It may be insidiously nontransparent as to why an officer has stopped a particular individual,” he says. In its report on

East Haven, the Justice Department accused the force of “intentionally and woefully failing to design and implement internal systems of control that would identify, track, and prevent such misconduct.” The report on Maricopa County faulted Sheriff Arpaio by name for using “unverified tips or complaints” that were “infected with bias against Latino persons.”

Police Foundation president Williams says the responsibility for stopping the practice rests with police officials. “Are chiefs dealing with the problem?” he asks rhetorically. “I think they have policies that prohibit it, and from that perspective they’re dealing with it. It’s the enforcement of those policies that’s the big question mark. In that area, there’s more of a question mark.”

Should police adopt stronger disciplinary measures for misconduct?

Jason Mucha has had a checkered career with the Milwaukee Police Department since being hired as an aide in 1996 while still a teenager. He was promoted to sergeant in 2005, but over the next few years was accused by 10 different suspects of either beating them or planting drugs or both. Although he was never disciplined, a state appeals court explicitly questioned Mucha’s credibility as a witness, and the U.S. attorney’s office dropped one case rather than put him on the stand.

The department’s disciplinary procedure has now caught up with Mucha, however, after he and fellow squad members were accused of invasive body searches in drug investigations. Mucha and seven officers in his unit were stripped of police powers and reassigned to desk duties in March because of the accusations, according to the *Journal Sentinel*. Without confirming the report, Chief Edward Flynn told a news conference on March 22 that if the allegations were true, the searches would have violated state law.¹⁸

The *Journal Sentinel* has been on the department’s case over discipline for years. A three-part series in Octo-

ber 2011 criticized the department for allowing “at least” 93 officers to remain on the force despite offenses such as drunken driving and domestic violence. A similar, nine-part series by the *Sarasota Herald Tribune* in December found that “thousands” of officers remain on the job in Florida police departments despite “arrests or evidence” implicating them in crimes punishable by prison sentences.¹⁹

Despite such newspaper investigations, some experts give police departments generally good marks for disciplining rogue cops. “Internal discipline is taken seriously by most if not all American police departments,” the University of Baltimore’s Kane says. “Police commanders and departments can often determine that a police officer is not good for the department and not good for the public.”

Police Foundation president Williams gives a mixed review. “Some police departments are very good at discipline — a lot, not just a few,” he says. “But I wouldn’t want to say that all police departments are like that.”

ACLU officials are more critical. “We have found problems with internal disciplinary procedures around the country,” says Vanita Gupta, deputy legal director for the national ACLU. “To say that they are an adequate remedy for these violations is a real problem. It’s just not how it plays out.”

The disciplinary procedures that exist today are the culmination of decades of pressure from outside groups — in particular, groups such as the ACLU and other civil rights organizations — for more effective oversight of police practices in general and in specific cases. “Some form of citizen oversight exists in almost every city,” according to the University of Nebraska’s Walker.

In contrast to civilian review boards — perhaps the most common oversight mechanism — Walker says he prefers the appointment of an independent auditor for a department. “They have authority to review the operations

of an agency and to make public reports,” Walker explains. “That’s the best solution for improving the department, not just finding guilt or innocence in a particular incident.”

Roger Goldman, a professor at St. Louis University School of Law who has specialized in police accountability issues, notes that even when an officer has been removed from a force, he or she often looks for — and sometimes finds — a job with another law enforcement agency. To remedy the problem, Goldman favors a system of “de-certifying” an officer for any police work after a finding of misconduct — akin to disbarment for lawyers, for example. “The problem can’t be left up to local municipalities and police departments to handle,” he says.

Police consultant Scott says police unions represent a big obstacle to strengthened discipline. “The unions can protect the incompetent, and the malicious, and allow them to get back on the streets,” Scott says. “The unions have lost their way as to who they’re supposed to represent in the bigger picture of law enforcement.”

Other experts, however, stress the role of leadership at the top in improving discipline. “What you’ve got to have,” says Williams, “is commitment at the highest levels of the department.” The ACLU’s Gupta agrees. “We know and police experts know how to implement best practices in this area,” she says. “There are best practices out there, but there still remains a lot of work to be done.” ■

BACKGROUND

Police Problems

Police misconduct has been a persistent problem since full-time police forces were first organized in the

United States in the mid-19th century. Political patronage and financial corruption were dominant concerns in the 1800s; use of force and other coercive tactics and racial and ethnic discrimination became major issues in the 1900s. A reform movement to professionalize policing dates from the early 20th century. The Supreme Court began to exercise oversight by the 1930s and then brought about significant changes in police practices with decisions in the 1960s establishing new limits on interrogations and searches.²⁰

The constables and night watches of the colonial and early post-independence years proved inadequate for law enforcement by the mid-19th century. The emergence of urban centers brought with it the breakdown of law and order due to interethnic clashes, economic discontent and conflict over political issues, including slavery. Philadelphia and Boston created police forces in the 1830s — not long after Sir Robert Peel in 1829 had created the first urban police force in London, England. New York City followed in 1845.

The 19th century officer was typically unarmed and untrained, inefficient and largely ineffective in preventing crime. He was likely chosen on the basis of political patronage and afforded no job security.* Corruption was “epidemic,” according to a textbook by the University of Nebraska’s Walker and Arizona State University professor of criminology Charles Katz, but reform efforts typically consisted merely of replacing supporters of one political faction with those of another. And “no attention” was given to the two issues that would dominate the 20th century: excessive force and racial discrimination.²¹

More serious reform efforts began in the early 20th century as part of Progressive Era movements to replace spoils-

system, moneyed-interest politics with popular democracy and professional government services. Walker and Katz credit August Vollmer, chief of the Berkeley, Calif., police force from 1905 to 1932, as the father of the movement to define policing as a profession. He created college-level courses in police work and, along with other reformers, favored raising standards for hiring officers, eliminating political influence and placing control in the hands of qualified administrators.

But police reform “progressed very slowly,” Walker and Katz write. And in 1931 Vollmer co-authored a critical report by the presidentially appointed National Commission on Law Observation and Enforcement, commonly called the Wickersham Commission. Among its findings: Physical brutality was “extensively practiced” by police departments around the country.

The Supreme Court first entered the field in 1936 with a unanimous decision, *Brown v. Mississippi*, declaring the use of confessions obtained by torture-like interrogation to be a violation of the Due Process Clause. Over the next three decades, the court adopted a case-by-case approach that barred confessions if induced by either physical or psychological coercion.

By the 1960s, the court saw the need to adopt a stronger, preventive safeguard. The result was the controversial but now largely accepted decision, *Miranda v. Arizona* (1966), which required police to advise a suspect of his or her rights, including the right to remain silent, before any custodial interrogation — that is, any interrogation during which the suspect is not free to leave. Five years earlier, in *Mapp v. Ohio* (1961), the court had established another landmark limitation on police conduct by requiring states to enforce the exclusionary rule, which bars the use of evidence obtained by police during an unconstitutional search or arrest.²²

* Chicago is now believed to have hired the first female officer in 1891; Portland, Ore., followed in 1905, Los Angeles in 1910.

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Chronology

1960s *Supreme Court lays down rules for police searches, interrogation.*

1961

Supreme Court says states must adopt exclusionary rule to bar use of evidence found by police during unconstitutional searches (*Mapp v. Ohio*).

1966

Supreme Court requires police to advise suspects of rights before in-custody interrogation (*Miranda v. Arizona*).

1968

National Advisory Commission on Civil Disorders (Kerner Commission) report says distrust between police and “ghetto communities” was major cause of urban riots. . . . Law Enforcement Assistance Administration is established to provide federal grants to state, local law enforcement agencies; in 14-year lifetime, agency promotes accreditation standards, provides funds for officer training.

1990s *Justice Department gains power to investigate state, local law enforcement agencies.*

1991, 1992

Videotaped beating of Rodney King by Los Angeles police officers provokes debate over use of force, leads to riots in African-American neighborhoods after officers are prosecuted but acquitted.

1994

Congress authorizes Justice Department (DOJ) to investigate state, local law enforcement agencies for “pattern or practice” of violations

of constitutional or statutory rights (42 U.S.C. § 14141).

Mid- to late '90s

Justice Department uses new law to get Pittsburgh and Steubenville, Ohio, police departments to agree to reforms; launches investigations in other cities, including Washington, D.C.

1999, 2000

Los Angeles Police Department is rocked by disclosures of corruption, excessive force by antigang unit in predominantly Latino Rampart neighborhood; Justice Department, city agree in 2000 on reforms, court supervision.

2001-Present

Bush administration pulls back on police department investigations; Obama administration takes aggressive stance.

2003

Detroit agrees to institute police reforms after investigation initiated in December 2000.

2005

Two African-American civilians killed, four others wounded by New Orleans police officers while crossing Danziger Bridge to flee post-Katrina flooding.

2006

Supreme Court allows use of evidence found in Detroit drug raid despite officers’ failure to follow knock-and-announce rule (*Hudson v. Michigan*); first of Roberts Court rulings weakening enforcement of exclusionary rule.

2009

Eric Holder is named first African-American attorney general; chooses

Thomas Perez to head Justice Department’s civil rights division.

2010

Roundtable convened by Justice Department finds police investigations “effective” in promoting reform; some police officials complain of “negative stigma.”

2011

Justice Department report sharply criticizes New Orleans Police Department for excessive force, discriminatory policing; police chief promises reforms (March 17). . . . Five New Orleans officers are convicted in federal civil rights trial in Danziger Bridge case (Aug. 5); five others had pleaded guilty earlier. . . . DOJ report lambasts Puerto Rico Police Department for excessive force, other issues (Sept. 7). . . . Three more DOJ reports fault police in Maricopa County (Phoenix), Ariz.; Seattle; East Haven, Conn. (Dec. 15, 16, 19).

2012

East Haven Police Chief Leonard Gallo retires (Jan. 30). . . . African-American teenager Trayvon Martin is shot and killed by neighborhood watch coordinator George Zimmerman in Sanford, Fla. (Feb. 26); death touches off debate over authorities’ failure to arrest Zimmerman, Florida law easing rule on self defense. . . . Seattle mayor, police chief adopt plan to revise use-of-force policies, review racial profiling (March 29). . . . Puerto Rico Police Chief Emilio Díaz Cólón resigns to avoid hurting reforms (March 29). . . . Maricopa County Sheriff Joe Arpaio rejects Justice Department demand for court-supervised consent decree (April 3). . . . Justice Department weighs requests for formal investigations of police in Albuquerque, Omaha, elsewhere.

Supreme Court Eases Rules on Police Searches

Evidence gleaned illegally allowed in criminal trials.

Detroit police officers thought they were raiding a big crack-cocaine house when they converged, seven strong, on Booker Hudson's home on the afternoon of Aug. 27, 1998. Wary of being shot, Officer Jamal Good shouted, "Police. Search warrant," and then paused only a moment before barging in.

Good's nearly instantaneous entry violated a Supreme Court decision issued three years earlier, in *Wilson v. Arkansas*, that imposed a so-called knock-and-announce rule requiring police to wait a reasonable period after the initial knock before entering a private home.

When Hudson was tried on cocaine charges, he sought to exclude the evidence that police found in their search: five individually wrapped "rocks" of crack cocaine that he had in his pants pockets. Michigan courts refused, and so did the U.S. Supreme Court — in the first of three decisions under Chief Justice John G. Roberts Jr. that critics say have seriously weakened the so-called exclusionary rule against using evidence found during an illegal police search. (See "At Issue," p. 317.)

Writing for the majority in *Hudson v. Michigan* (2006), Justice Antonin Scalia said the costs of applying the exclusionary rule to knock-and-announce violations in terms of releasing criminals would outweigh any benefits in terms of protecting privacy or deterring improper police behavior. As one reason, Scalia pointed to what he called the "substantial" existing deterrents to police violations of search rules.

David Moran, then a Wayne State University law professor who represented Hudson before the Supreme Court, sharply disagreed. "It's a joke to say that the police will comply with the knock-and-announce rule without the exclusionary rule as a sanction," he said.¹

The exclusionary rule, a distinctively U.S. legal doctrine, dates from a 1914 Supreme Court ruling applying it to federal court cases. The Supreme Court forced the same rule on state courts in 1961 in one of the first decisions under Chief Justice Earl Warren that expanded the rights of suspects and criminal defendants. The court trimmed but did not eliminate the rule under the next two chief justices, Warren E. Burger and William H. Rehnquist.

Supporters of the exclusionary rule, criminal defense attorneys and civil liberties advocates among others, echo Moran's

view that the only effective deterrent to police misconduct in conducting searches is to exclude the evidence from trial. Critics say there are other deterrents, including police disciplinary procedures and civil damage suits.

As a White House lawyer under President Ronald Reagan, Roberts helped lay the basis for a series of attacks aimed at either amending or abolishing the exclusionary rule. Now, as chief justice, Roberts leads a five-vote conservative majority that critics say is transforming those broadsides into legal precedent.²

The *Hudson* case came in Roberts' first full term as chief justice. Three years later, Roberts wrote for the same 5-4 majority in a second decision cutting back on the exclusionary rule. The decision in *Herring v. United States* (2009) allowed the use of evidence that an Alabama man was carrying when he was arrested in 2004 on the basis of what was later found to be an outdated arrest warrant. Roberts said the exclusionary rule applies only to police conduct that is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."³

In a third decision, the court in June 2011 held that the exclusionary rule does not require suppression of evidence obtained by police if they relied in good faith on an established court precedent, even if it was later overruled as violating the Fourth Amendment's protections against unreasonable searches and seizures (*Davis v. United States*). In January, however, the court gave defense lawyers and civil liberties advocates a significant victory by limiting the authority of police to attach a GPS tracking device to a vehicle for surveillance purposes. The unanimous ruling in *United States v. Jones* apparently requires police to get a search warrant unless they can show a reason for an exception.⁴

— Kenneth Jost

¹ Account taken from Kenneth Jost, *The Supreme Court Yearbook 2005-2006*.

² See Adam Liptak, "Justices Step Closer to Repeal of Evidence Ruling," *The New York Times*, Jan. 31, 2009, p. A1.

³ See Kenneth Jost, *The Supreme Court Yearbook 2008-2009*.

⁴ For coverage, see Adam Liptak, "Justices Reject GPS Tracking in a Drug Case," *The New York Times*, Jan. 24, 2012, p. A1.

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The 1960s also saw agreement between Congress and the president to increase the federal role in professionalizing state and local police agencies. Since the 1930s, the FBI had been allowing local police officers to enroll in what was originally called the FBI Train-

ing School, now the FBI National Academy, in Quantico, Va. In 1968, Congress created, as part of the Omnibus Crime Control and Safe Streets Act, a new agency to support state and local law enforcement: the Law Enforcement Assistance Administration (LEAA).

In its 14 years of existence, LEAA

funneled about \$8 billion in grants to state and local police agencies. It was abolished in 1982, unpopular in Congress and among some experts, in part because of a penchant for funding expensive gadgetry. But it also is credited with helping establish standards for police and corrections agencies

and with providing funds for training state and local police officers.

“LEAA was the catalyst that promoted the education of police officers by creating a significant amount of money for police officers to get educated,” Police Foundation president Williams says today.²³

Police Accountability

Despite widely acknowledged improvements in professionalism and accountability, major police departments around the country were beset by high-profile scandals during the final decades of the 20th century. Major controversies in New York City and Los Angeles resulted in the formation of blue-ribbon commissions that recommended significant changes, some eventually adopted. In Washington, Congress laid the foundation for increased police accountability with two legislative enactments: the 1994 provision authorizing Justice Department suits against rights-violating police departments and a 2000 provision requiring data collection on arrest-related deaths.

Financial corruption of the sort widespread in earlier eras continued as a recurrent issue. In the most dramatic episode, New York City police detective Frank Serpico blew the whistle on widespread bribery and extortion in the NYPD in a newspaper expose in 1970 and a year later as a witness before the blue-ribbon Knapp Commission.²⁴ The city’s response to the commission’s recommendations for internal reforms was criticized as timid. Two decades later, however, Mayor Rudy Giuliani established a standing independent commission to combat police corruption. Today, critics in New York continue to highlight allegations of misconduct, but the commission credits the department’s Internal Affairs Bureau generally with “thorough and diligent investigations” of accusations.²⁵

In the 1990s, the Los Angeles Police Department experienced two major scandals, each of which made national headlines. In the first, an onlooker captured on videotape the seemingly unjustified beating of an African-American suspect, Rodney King, by LAPD officers on the night of March 3, 1991, after a high-speed automobile chase. The blue-ribbon Christopher Commission created in the wake of the incident found that “a significant number” of officers repetitively used excessive force against suspects. The acquittals of the officers charged in the King beating in 1992 touched off riots in the city’s largely African-American neighborhoods and helped force the resignation of Police Chief Daryl Gates. He was succeeded by Willie Williams, the LAPD’s first African-American chief.

The King beating also led to the federal law authorizing the Justice Department to sue local police departments for rights violations. Members of Congress from California pushed the proposal unsuccessfully in 1991 and 1992; it was enacted in 1994 as a provision in the omnibus Violent Crime Control and Law Enforcement Act, thanks in part to a push from then-Senate Judiciary Committee Chairman Joseph Biden. Despite its later importance, the provision attracted little attention. A detailed Justice Department fact sheet on the law failed to mention the provision.

By 1996, however, the department’s civil rights division was beginning to use the new powers with investigations initiated in response to citizen complaints of police departments in Pittsburgh and Steubenville, Ohio. By the end of the decade, those cases had resulted in consent decrees requiring organizational changes. Nine other investigations were pending as the decade ended, including one in Washington, D.C., requested in 1999 by a new chief of police.

The department had already investigated the Los Angeles Police Department for three years when a new scandal erupted in 1999, featuring wide-ranging

excessive force, corruption and obstruction of justice accusations against members of an antigang unit assigned to one of Los Angeles’ predominantly Latino communities. The wide-ranging allegations of misconduct by Rampart Division officers included unprovoked shootings and beatings, planting of evidence, stealing and dealing in narcotics and covering up of the offenses. The scandal led to disciplinary actions against 58 officers, but an independent commission later criticized the department’s response as inadequate.

The Justice Department intensified its investigation of the LAPD after the scandal. By mid-2000, government lawyers were threatening to sue the city in federal court unless it agreed to wide-ranging internal reforms. Mayor Richard Riordan resisted any agreement, but painstaking negotiations eventually resulted in the city’s agreement to an enforceable consent decree that the city council approved by a vote of 11-2 on Nov. 2, 2000. Among other provisions, the agreement required creation of a new division to investigate all uses of force. The decree, formally entered in June 2001, was terminated in 2009.²⁶

Meanwhile, Congress gave the federal government an additional tool for police accountability by passing the Death in Custody Reporting Act to collect data on deaths of inmates in prisons and jails and of suspects in police custody. The bill was approved by voice vote in the House of Representatives in June 2000 and by the Senate in September; President Bill Clinton signed it into law on Oct. 13. After setting up procedures, the Bureau of Justice Statistics began collecting reports on police-custody deaths in fiscal 2003.

Changing Priorities

The Justice Department’s oversight of local law enforcement agencies lagged under President George W. Bush. Investigations and cases already initiated were

Florida Police Under Scrutiny in Trayvon Martin Case

Critics question handling of shooting by armed civilian.

The fatal shooting of an African-American teenager by a volunteer neighborhood watch coordinator in a gated suburban community in Florida has ignited a racially charged debate over the police department's handling of the case. The episode also puts a national spotlight on Florida's controversial Stand Your Ground law, which allows a civilian to use potentially lethal force in self-defense in public places without first trying to retreat to safety.¹

Some six weeks after the Feb. 26 death of Trayvon Martin, a special state prosecutor is set to present evidence in the case on April 10 to a Seminole County grand jury. [Update: Special prosecutor Angela Corey announced on April 9 that the case would not be presented to the grand jury on April 10, but specified that the investigation was continuing.] The U.S. Justice Department is also reviewing the case. The moves have come, however, only after local and national protests over the authorities' decision that night not to file charges against George Zimmerman, a neighborhood watch volunteer since August 2011.

Martin, 17, was returning from a convenience store to the home of his father's girlfriend in the Retreat at Twin Lakes community in Sanford, Fla., shortly after 7 p.m. when he drew Zimmerman's suspicions. Martin was unarmed; he was carrying a bag of candy and a can of iced tea and wearing a gray hoodie to protect himself from the rain. Zimmerman, 28, a resident of white and Hispanic ancestry, was carrying a 9 mm handgun — despite earlier instructions from the Sanford police department's neighborhood watch liaison that volunteers should not be armed.

Zimmerman had volunteered for the neighborhood watch in August 2011 because of several burglaries in the gated community of some 260 homes. Suspicious of Martin, he placed a 911 call to the Sanford Police Department. Zimmerman said Martin was "just walking around" and appeared to be "up to no good." The police dispatcher advised Zimmerman not to follow Martin and to wait to meet a patrol officer. Later in the record-

ed four-minute call, Zimmerman is heard saying something listed on the police transcription as "unintelligible" and interpreted by others in the subsequent debate as a racial epithet.

An altercation of some sort ensued after Zimmerman — 5-foot-10, 170 pounds — got out of his vehicle and Martin — 6-foot-1, 150 pounds — realized he was being surveilled. An unidentified girlfriend of Martin's says Martin called her to complain about being followed. Zimmerman's father says his son told police that Martin challenged him, used a racial epithet, forced him to the ground and pummeled him with his fists.

Whatever the exact course of the dispute, Zimmerman fired a single shot that hit Martin in the chest. Martin died at the scene. The police officers who arrived handcuffed Zimmerman and took him to the police station, where he was questioned and released without having been tested for drugs or alcohol. A video appears to show a gash on the back of Zimmerman's head but no serious injury to his face despite Zimmerman's claim to have suffered a broken nose during the altercation. A funeral director who examined Martin's body said it showed no scrapes, bruises or other signs of a fight other than the single gunshot wound to his chest.

Martin's death drew no news coverage for almost two weeks until his father, Tracy Martin, held a news conference on March 8 to call for Zimmerman's arrest and demand the release of the tapes of Zimmerman's 911 call. The tapes, released over the next weekend, turned the episode from an overlooked local story into a round-the-clock nationwide controversy.

In the weeks since, Martin has been described as a typical teenage boy, with good manners and good attitude, but a record of three suspensions from his high school in north Miami-Dade County, where he lived with his mother. In February, he was staying with his father in Sanford after having been hit with a 10-day suspension because of marijuana residue found in his backpack.

continued, but reports on newly opened investigations took a deferential tone toward police policies. Obama's selection of civil rights-minded officials for key posts at the Justice Department signaled a likely change in priorities. Even before Perez's confirmation to head the civil rights division, the special litigation section's report on one local department took a sharper tone than those in the Bush years. By the end of 2011, the section's activist stance was evident with a record number of investigations open

and stinging reports issued on five law enforcement bodies within four months.

As a presidential candidate in 2000, Bush said he believed police matters should be handled locally. Under Bush, the civil rights division became highly politicized, morale declined sharply and career lawyers left in droves. A later report by the Government Accountability Office found that the special litigation section suffered an attrition rate of 31 percent in 2005, 24 percent in 2006 and 18 percent in 2007.²⁷

The special litigation section had achieved important victories early in the Bush years in investigations begun by the Clinton administration of police forces in Washington, D.C.; Detroit; and Prince George's County, Md. The investigation in Washington found "a pattern . . . of excessive force" by officers in the 1990s and applauded new efforts to reduce the problem. Police officials agreed to the appointment of a monitor to oversee the department for five years. In Detroit, a consent decree agreed to in

Zimmerman is described as a former altar boy with unrealized ambitions of becoming a police officer, capable of kindness but also with a volatile temper. He was arrested in summer 2005 after pushing a Florida state alcohol agent during a raid at a college-area bar; the charge was dropped after Zimmerman agreed to a pre-trial diversion program. A month later, he and his ex-fiancée obtained reciprocal domestic violence injunctions based on mutual accusations of physical violence.

From the outset, authorities in Sanford and Seminole County explained that Zimmerman had not been charged in the shooting in part because of a law Florida enacted in 2005 making it harder to prosecute individuals in the face of a claim of self-defense. The Stand Your Ground law extends the long-established “castle doctrine” — allowing the use of deadly force in self defense inside one’s home — to any setting, private or public.

In its central provision, the 1,000-word statute provides that someone in a place where he or she has a right to be “has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.” The law specifically provides immunity from criminal or civil liability if the use of force is justified.²



AFP/Getty Images/Joe Klammar

Protesters in downtown Los Angeles mark the one-month anniversary of the Feb. 26, 2012, killing of unarmed black teenager Trayvon Martin by a neighborhood watch volunteer in Florida.

Similar laws are on the books in about half the states. Coverage of the Florida episode has led to a national debate over the laws. Prosecutors in Florida said the law had made it harder to bring charges in homicides where the suspect claimed self-defense. Police organizations have criticized the laws, but gun-rights groups have defended them.

Only after a full month had passed since the shooting was it reported that Sanford Detective Chris Serino, the lead investigator in the case, had initially recommended charging Zimmerman

with manslaughter only to be overruled by his chief and by state’s attorney Norman Wolfinger, who has declined to comment on the report. Wolfinger was removed from the case after Gov. Rick Scott and Attorney General Pamela Bondi appointed Angela Corey, the state’s attorney from the Jacksonville area, as special prosecutor.

— **Kenneth Jost**

¹ For a comprehensive overview, see Dan Barry, Serge F. Kovalski, Campbell Robertson and Lizette Alvarez, “In the Eye of a Firestorm: In Florida, an Intersection of Tragedy, Race and Outrage,” *The New York Times*, April 2, 2012, p. A1, www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html?_r=1&hp. The rapidly changing, heavily annotated Wikipedia entry on the case includes links to the 911 call made on the night of Trayvon Martin’s shooting, to other police documents and to collections of news and commentary in *The New York Times* and *Wall Street Journal*, http://en.wikipedia.org/wiki/Shooting_of_Travon_Martin. Background details drawn from both accounts.

² See Title XLVI, Chap. 0776, www.flsenate.gov/Laws/Statutes/2011/Chapter_0776/All.

June 2003 similarly provided for an outside monitor to check compliance with changes that included new steps to track officers named in excessive-force complaints. In Prince George’s County in suburban Washington, D.C., the police agreed in January 2004 to curb excessive force by officers and restrict the use of police dogs, with compliance to be tracked by an outside monitor.²⁸

In later years, however, reports on police departments appeared to steer clear of pointed criticism or threats of

litigation. Instead, reports, such as one in August 2008 suggesting the Orange County (Fla.) Sheriff’s Office adopt new policies on the use of Tasers, generally included language specifying that the “technical assistance” being provided was viewed “as recommendations and not mandates.”²⁹

Obama’s appointment of Eric Holder as the first African-American to serve as attorney general signaled a likely reinvigoration of the Justice Department’s role in civil rights enforcement, includ-

ing police-accountability investigations. As deputy attorney general in the Clinton administration, Holder had helped oversee police department investigations, including the filing of the suit against the Los Angeles Police Department in 2000. To head the civil rights division, Obama and Holder picked Perez, a former criminal prosecutor in the division from 1988 to 1995 who had gone on to hold political posts as deputy to the head of the division (1998-1999) and head of the Office of Civil Rights in the

Department of Health and Human Services (1999-2001). Perez drew Republican opposition because of his work with the immigrant rights group CASA de Maryland, but eventually won Senate confirmation on Oct. 6, 2009, by a vote of 72-22.³⁰

Even before Perez took office, a slight change of tone was seen in the section's report on the Yonkers, N.Y., police department. The June 2009 report included the same "not a mandate" language used in earlier reports, but followed with a sentence "strongly" urging the department to adopt the recommendations listed. A report on the Inglewood, Calif., department issued in December "strongly" urged adoption of the recommended changes.

Stronger reports came in quick succession in 2011, beginning with the one on New Orleans in March. A report on Puerto Rico, issued on Sept. 7, found a pattern of "unreasonable force" along with "other misconduct" aimed at limiting free speech rights as well as "troubling evidence" of "discriminatory policing practices" targeting persons of Dominican descent. In releasing the report, Perez told reporters that the section had 17 investigations under way. The investigations are "really a cornerstone of our work," Perez said. Three months later, he elevated the issue further by personally attending December news conferences releasing the Seattle and Maricopa County reports.³¹ ■

CURRENT SITUATION

Investigations Urged

With 20 investigations already under way, the Justice Department is being urged by citizen groups in several other cities to look into po-

lice departments with troubling records of fatal shootings and other uses of force against arrestees and suspects.

In the most recent request, the Omahans for Justice Alliance asked the Justice Department and U.S. Attorney Deborah Gilg on March 13 to investigate the Omaha Police Department. The 10-page letter cited an alleged pattern of excessive force, illegal arrests, disregard of state law and department policies and other misconduct.

"The kind of incidents that we've had are very, very serious and appear to get worse," University of Nebraska professor Walker, one of three co-signers of the letter, said at a news conference to announce the request. Supporting organizations include the ACLU of Nebraska, Nebraskans for Peace, Black Men United of Omaha, the NAACP's Omaha Branch and the Progressive Research Institute of Nebraska.³²

In a prepared statement, Lt. Darci Tierney, a police spokeswoman, noted that the Justice Department had previously reviewed use-of-force incidents as part of "normal business practices." She voiced no objection to scrutiny of the additional incidents noted in the letter. "We strive to be a transparent agency, and if a citizen group feels the need for the Department of Justice to review these events, we welcome the review," Tierney said.³³

Also in March, an Albuquerque citizens' group stepped up its calls for a federal investigation of the city's police department after two fatal shootings in mid-March brought the total to 18 over the past two years. Most of those killed have been young Hispanic men, according to Jewell Hall, executive director of the Martin Luther King Jr. Memorial Center. "I hope that they will do an investigation to get deep inside the Albuquerque Police Department," says Hall, a retired teacher.

The Albuquerque department drew national attention with the disclosure that the police union has had a prac-

tice for several years of giving officers involved in fatal shootings \$500 to help them take time off to recover from stress related to the incidents. Critics said the payments appeared to be a bounty for killing a suspect. Police Chief Ray Schultz said he was unaware of the practice. With the controversy raging, two top officers of the Albuquerque Peace Officers Association resigned on March 27; their successors joined Schultz and Mayor Richard Berry on March 30 in announcing an end to the practice.³⁴

Walker, who co-authored a study of the Albuquerque police department in 1997, says the number of deaths at the hands of police appeared to warrant a Justice Department investigation. "That's a lot of shootings," he told *The Associated Press*.³⁵

The Justice Department has acknowledged the preliminary inquiry into the Albuquerque department but says it has made no decision on whether to open a formal investigation. The Justice Department had no response to the Omaha request in news coverage immediately afterward. Investigations are being sought in other cities, including Las Vegas, *The Associated Press* reported. Justice Department officials did not respond to a request from *CQ Researcher* for a complete list of current investigations.

In both Omaha and Albuquerque, the groups pressing for federal investigations complained that civilians involved in police shootings or use-of-force incidents were predominantly people of color. The Omaha group also cited figures from a state commission showing that black drivers are stopped almost as often by the Omaha Police Department as white drivers are.

Both forces are predominantly white. In 2000, about 80 percent of the Omaha officers were white, and the Albuquerque department was 60 percent Anglo and 36 percent Hispanic, according to federal Bureau of Justice Statistics data.³⁶

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At Issue:

Is the exclusionary rule needed to deter illegal police searches?



NORMAN L. REIMER
EXECUTIVE DIRECTOR, NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS

WRITTEN FOR *CQ RESEARCHER*, APRIL 2012

While it is true that the Supreme Court has at times over the past decade treated the exclusionary rule with disdain, fortunately the court has not yet completely disavowed it. It is perhaps the only tool the courts have to circumscribe police behavior that violates the Fourth Amendment. Let me give you an example.

The Supreme Court in January decided a case — *U.S. v. Jones* — that is sure to be the first of many that will test the limits of government's ability to use modern technology to invade individual privacy. The court unanimously upheld the suppression of GPS tracking data, rejecting the government's sweeping claim that it can track a person's movements without spatial or temporal limitation, and without a warrant or any judicial oversight.

The idea that such surveillance could occur solely at the government's discretion prompted Chief Justice John G. Roberts Jr. to ask in astonishment whether, in the government's view, the FBI could put GPS monitors on the cars of every member of the court. The government's position was a resounding "yes." Fortunately for the future of privacy in a world in which technology now permits once unfathomable invasions of privacy, the court's decision was an equally resounding "no."

How massively was this taking place before the court's decision? During the oral argument, the deputy solicitor general acknowledged that the federal government alone has been using GPS devices "in the low thousands annually." Separate from that, state and local law enforcement authorities frequently employ GPS tracking devices — subjecting untold thousands to surveillance.

Was the court's invocation of the exclusionary rule, a venerable remedy that will soon celebrate its 100th anniversary in American jurisprudence, an effective tool to vindicate fundamental rights guaranteed by the Fourth Amendment? You bet it was. Within weeks, the FBI's general counsel, Andrew Weissmann, said the ruling in *U.S. v. Jones* caused a "sea change" in law enforcement. Following the oral argument and in anticipation of the ruling, the FBI scrambled to ensure that the government had warrants for 3,000 active GPS tracking devices.

After the decision, 250 of those tracking devices remained shut down. Many may eventually be reactivated where there is legal cause — as they should be. No doubt, states and localities are responding similarly to ensure compliance with the dictates of the Fourth Amendment. Thus, once again, the power of the exclusionary rule to rein in governmental abuse is vindicated.



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as a prosecutor for 35 years, I have never met a cop who was deterred by a judicial opinion written five years after he or she made a split-second decision. The Supreme Court-crafted exclusionary rule has morphed from its intended restraint on police misconduct into a judicially sanctioned version of roulette.

Antoine Jones, a Washington, D.C., nightclub owner, was making money the old-fashioned way, entertaining his customers with hip-hop music and running the District's largest cocaine distribution ring. Rather than spend countless hours legally following Jones, police in 2005 decided to place a GPS tracking device on his wife's car, and even though not required, they actually got a search warrant to track the location of this vehicle.

This innovative tactic resulted in Jones' arrest and conviction as well as the seizure of five kilos of cocaine and \$850,000 in ill-gotten drug proceeds.

Inexplicably, when the U.S. Attorney's office authorized the installation of the tracking device, the police did so one day beyond the sanctioned 10-day window.

In *United States v. Jones*, the Supreme Court ruled — for the first time — that the installation of a GPS device by the authorities on a suspect's car constituted a search under the Fourth Amendment. Thus the evidence obtained in the case was suppressed, despite the fact that, prior to the decision, the prevailing law was murky at best. Pardon me if I'm confused as to how this deters police misconduct. Would it not make more sense to punish the appropriate grammar school teachers who failed to properly train the future attorneys on how to read a calendar?

My colleagues have no problem with the GPS warrant requirement. What concerns us is the uncertainty and Draconian response to what may be charitably called a technical error. If we track EZ-Pass holders to locate an abducted child or trace a terrorist by using cell-tower records, do the criminals go free? While technology is changing rapidly, police who make life-and-death decisions do not have the luxury of waiting for the courts to delineate these constitutional boundaries before they take action.

Even the learned justices in *Jones* had little consensus on the grounds for the decision. Prosecutors merely want a rational approach to evidence suppression where concepts such as proportionality and good faith have some standing. You do not "deter" cops with a system that is, as Justice Lewis Powell said, "intolerably confusing." You only confuse cops and make the public less secure.

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In Omaha, the citizens' group also is urging the city to re-establish the office of Public Safety Auditor. The office was created in 2001, but Mayor Mike Fahey fired Tristan Bonn from the post in October 2006, barely a week after she delivered a report sharply critical of the department. The city fought Bonn's lawsuit to regain the position and has failed to refill the position, according to the citizens' group.³⁷

The current mayor, Jim Suttle, says there is no need for an auditor. "We have a lot of faith in our police chief," he told an Omaha television station in September 2011 in the midst of a controversy over the videotaped beating and kicking of a suspect in police custody.³⁸

In Albuquerque, an officer involved in a November 2009 shooting was fired the next year after the department's internal affairs unit and the Independent Review Officer found the shooting unjustified. Schultz said he fired Brandon Carr because the officer lied to investigators about the events.

The city paid the victim's family \$950,000 to settle a civil suit, but on March 30 the district attorney's office announced no criminal charges would be brought against Carr. Out of 29 police shootings since 2009, eight are awaiting grand jury action, but no criminal charges have been brought in the other 21, according to the *Albuquerque Journal*.³⁹

Reforms Outlined

The Seattle Police Department is preparing to adopt a 20-point reform plan aimed at answering criticisms from citizens' groups and the Justice Department and perhaps avoiding federal court supervision for several years.

The plan, released by Mayor McGinn on March 29, includes steps to revamp use-of-force policies, strengthen the role of a newly established Force Review

Board, collect data on possible racial profiling and improve diversity training. In one specific change, the plan responds to criticism of how police dealt with Occupy Seattle protesters in November by prohibiting the use of pepper spray except in self-defense or as "a last resort."

Seattle and Justice Department officials met behind closed doors the next day to discuss the plan. Seattle officials appeared to hope the department would back away from insisting that the city agree to a court order giving a federal judge supervisory authority over the plan's implementation for a specified number of years.⁴⁰

Progress on a reform plan in Seattle came after negotiations between the Justice Department and New Orleans officials had stalled because of a bizarre incident involving the federal government's point person in the talks. Sal Perricone withdrew from the talks and then resigned from the U.S. Attorney's office in New Orleans in March after he acknowledged having used a pseudonym to post hundreds of online comments about law enforcement-related stories on the *Times-Picayune's* website, *nola.com*.⁴¹

Two of the major groups involved in requesting the Justice Department investigation of the Seattle Police Department reacted approvingly to what McGinn called the 20/20 plan — 20 steps to be put into effect over 20 months. Estela Ortega, executive director of the Hispanic advocacy group El Centro de la Raza, appeared at the news conference with McGinn and Chief John Diaz and praised their willingness to work with community leaders on the plan.

In a brief statement, Kathleen Taylor, executive director of ACLU of Washington State, said the civil rights organization was "encouraged" by the plan. But she said a court-supervised consent decree "is critical to ensure that reforms are thoroughly implemented and are sustained for the long term."

The plan's use-of-force provisions call

for developing "updated, clear policies" on the use of "lethal, less-lethal and non-lethal tools available to officers." Officers would be trained annually on the policies and on "de-escalation" of "low-level encounters." Sergeants and commanders are also to be given annual training on how to investigate and document use-of-force incidents.

Seattle's Force Review Board, established after the release of the Justice Department report in December, would be given a formal role. Some form of civilian review of the board's work would be instituted.

Issues of "biased policing" are to be addressed by streamlining race-data collection related to traffic stops and initiating the collection of race data for pedestrian encounters. The University of Washington's African-American Studies Department is to be engaged to review the department's practices as related to the issue.

In New Orleans, Perricone took himself out of the federal-local negotiations on March 16 after his role as pseudonymous online commentator came to light. Mayor Landrieu said Perricone's participation had "poisoned" the negotiations, but U.S. Attorney Jim Letten insisted the removal would not cause a delay.

ACLU official Esman says the on-going talks are "very guarded," but she expects eventual agreement on a court-supervised consent decree. "Something will come of it," Esman says. "Whether it will be enough, whether it will work is anybody's guess."

Meanwhile, another of the police forces sharply criticized in Justice Department reports last year got new leadership in late March in a move that may ease the way for reforms. Puerto Rico Gov. Luis Fortuño named former FBI official Hector Pesquera as superintendent of the commonwealth's 17,000-person police department on March 29 following the resignation of Emilio Díaz Cólón from the post.

Díaz had been superintendent for only three months when the Justice

Department report was released in September. He responded by denying any constitutional violations by the force. Over the next six months, Díaz was criticized for failing to offer an anti-crime program. Fortuño quoted Díaz as saying he was resigning to avoid hurting prospective reforms.⁴² ■

OUTLOOK

Police Under Pressure

Popular trends in law enforcement push police departments in opposite directions. Police departments use high-tech tools to surveil suspects, crack down on drugs and try to spot terrorists, even as officers are being urged to get out of their cars, walk the streets and engage the public in “community policing.”⁴³

Along with these competing visions of good policing come financial pressures as fiscally strapped local governments cut back on police departments’ staffing, pay and services. In Detroit, police precincts are open only during daytime hours, and nonemergency reports have to be made through a central call center. To save \$80 million in 2011, the Los Angeles City Council cut overtime pay for cops, but the department still had to find \$41 million more in savings. And police departments around the country have been dealing with layoffs by taking reports on many property crimes over the phone instead of sending officers to investigate.⁴⁴

The financial pressures lead police consultant Scott to worry about cutbacks in the training needed to ensure that officers live up to professional standards. “Law enforcement is not training its personnel the way it should,” the former police chief says. “This is where I see many, many law-

suits that could be avoided if we as a public demanded to have better trained police officers.”

Police accountability is being enhanced, however, by new technology, such as the video cameras now installed on many police cars to record officer-suspect encounters. “The way to encourage police reform and police accountability is [with] sunlight,” says University of Baltimore professor Kane, “making these practices known to the public.”

Technology at the same time increases the potential for police abuse of individual privacy and safety. Civil liberties groups complain that local police now are using cell phone tracking routinely and aggressively, often without much judicial oversight. Tasers, once seen as a non-lethal alternative to firearms for subduing suspects, are linked by the human rights group Amnesty International to hundreds of deaths of suspects — a risk that the manufacturer acknowledges but calls exaggerated.⁴⁵

The high-power, high-tech weaponry provided to SWAT teams, especially for drug raids, is viewed disapprovingly, even by police-friendly experts. “In some cases, you’ve got this hypercoercion being used in situations that don’t require this kind of force,” Kane says. “It’s almost like a toy that needs to be played with.”

Even without high-power weaponry, the risk of unnecessary and excessive force, sometimes lethal, persists in police-civilian encounters. Review procedures in place, as in Albuquerque, often find officers’ conduct justifiable, even as outside groups and victims’ families disagree. But national police organizations appear to devote little attention to the subject. In assuming the presidency of the International Association of Chiefs of Police in November 2011, Quincy, Fla., Police Chief Walter McNeil said the group’s highest priority would be “to continue a comprehensive violence-against-police-officers reduction strategy.” McNeil did not ad-

dress the issue of excessive force against civilians, nor has he mentioned the issue in his monthly column in the association’s magazine despite the spate of critical Justice Department reports in December.⁴⁶

Walker, the veteran of police accountability issues, worries that the post-9/11 emphasis on homeland security has been a setback for best police practices. “Your primary focus is not community policing, which tells you that the major things we have to do is work with people in the community,” he says. And he worries about the impact of budget-imposed layoffs. “If the economy worsens,” Walker says, “things could be very, very worse.”

Still, Walker believes that excessive force and racial profiling are not intractable problems. “If these problems are persisting, it’s just because [police leaders] are not paying attention,” Walker says. “We have a much clearer picture of possible things we can do. It’s just finding the will to do to do them.” ■

Notes

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FOR MORE INFORMATION

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Fraternal Order of Police, Grand Lodge, 1410 Donelson Pike, A-17, Nashville, TN 37217; 615-399-0900; www.grandlodgefop.org. Largest membership organization representing rank-and-file law enforcement officers.

International Association of Chiefs of Police, 515 North Washington St., Alexandria, VA 22314; 703-836-6767; www.theiacp.org. Represents operating chief executives of international, federal, state and local law enforcement agencies of all sizes.

National Association of Civilian Oversight of Law Enforcement, 638 E. Vermont St., P.O. Box 1737, Indianapolis, IN 46206; 1-866-462-2653; www.nacole.org. Brings together individuals and agencies working to establish or improve oversight of police officers in the United States.

National Association of Criminal Defense Lawyers, 1025 Connecticut Ave., N.W., Suite 901, Washington, DC 20036; 202-872-8600; www.crimdefense.org. The largest organization exclusively representing criminal defense lawyers.

National District Attorneys Association, 44 Canal Center Plaza, Suite 110, Alexandria, VA 22314; 703-549-9222; www.ndaa.org. Represents criminal prosecutors in state, district, county and city attorneys' offices.

National Sheriffs' Association, 1450 Duke St., Alexandria, VA 22314; 1-800-424-7827; www.sheriffs.org. Represents and assists sheriffs' offices nationwide through education, training and information resources.

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Weisburd, David, Rosann Greenspan, Edwin E. Hamilton, Kellie A. Bryant and Hubert Williams, "The Abuse of Police Authority: A National Study of Police Officers' Attitudes," *Police Foundation*, 2001, www.policefoundation.org/pdf/AOANarrative.pdf.

The first-ever national survey of police officers' attitudes found that most believe extreme abuse-of-authority cases are infrequent and that the public and the media are too concerned with such incidents.

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Additional Articles from Current Periodicals

Excessive Force

McCoppin, Robert, and Dan Hinkel, "Many Complaints, Little Discipline," *Chicago Tribune*, Feb. 10, 2012, p. A1, articles.chicagotribune.com/2012-02-10/news/ct-met-north-chicago-brutality-20120210_1_excessive-force-jack-frost-police-misconduct/2.

Excessive-force cases against North Chicago police have steadily increased, but not many officers have been disciplined.

McGhee, Tom, "Spike in Cops' Lawsuit Payouts," *Denver Post*, Jan. 13, 2012, p. B1, www.denverpost.com/breaking-news/ci_19730217.

Denver paid \$1.34 million in 2011 to settle lawsuits alleging that city police officers engaged in excessive force.

Walter, Donna, "8th Circuit: Minor Injuries Can Come From Excessive Force," *Missouri Lawyers Media*, June 6, 2011.

Plaintiffs do not have to sustain major injuries in order to prove the use of excessive force by police, according to a U.S. appeals court ruling.

Discipline

Coe, Jackee, "Interim Chief Earns Praise for Tougher Policies," *Arizona Republic*, Aug. 10, 2011, p. 3, www.azcentral.com/community/swvalley/articles/2011/08/10/20110810goodyear-interim-chief-earns-praise-improving-department.html.

The interim police chief of Goodyear, Ariz., has been praised for establishing a consistent professional-standards policy outlining misconduct violations and disciplinary measures.

Furst, Randy, "Dolan Panned on Cop Discipline," *Star Tribune* (Minneapolis), Dec. 20, 2011, p. B1, www.startribune.com/local/minneapolis/135898668.html.

The Minneapolis Civilian Review Authority says it has "no confidence" that the city's police chief would discipline officers who engage in misconduct.

Grossman, Daniel J., "Atlanta Officers Escape Discipline," *Atlanta Journal-Constitution*, May 13, 2011, p. A19, www.ajc.com/opinion/atlanta-officers-escape-discipline-944221.html.

The failure of the Atlanta Police Department to discipline its officers for misconduct exposes the city to direct financial liability, says a civil rights attorney.

Klein, Robert L., "Police Must Be Accountable to the People," *Hartford* (Conn.) *Courant*, May 1, 2011, p. C1, articles.courant.com/2011-05-01/news/hc-op-klein-poice-brutality-misconduct20110501_1_police-officers-police-misconduct-police-force.

Connecticut needs an agency to hear complaints of police

misconduct and to discipline officers accordingly, says a former state assistant attorney general.

Profiling

Hanna, Bill, "Fort Worth Councilman Says Report Suggests Appearance of Racial Profiling," *Fort Worth* (Texas) *Star-Telegram*, May 25, 2011, www.star-telegram.com/2011/05/24/3101314/fort-worth-councilman-says-report.html.

A Fort Worth, Texas, council member has asked the city's police chief to provide more data justifying the arrests of alleged victims of racial profiling.

Pinkerton, James, "A Trend Not in Decline: More Blacks Pulled Over," *Houston Chronicle*, May 9, 2011, p. A1, www.chron.com/cars/article/More-black-motorists-pulled-over-according-to-1691304.php.

Houston police say race plays no part in traffic stops, but black residents continue to be pulled over more often than any other racial group.

Rubin, Joel, "Latinos Targeted in Traffic Stops By LAPD Officer," *Los Angeles Times*, March 27, 2012, p. A1, www.latimes.com/news/local/la-me-lapd-racial-profile-20120326,0,6544493.story.

An inquiry by the Los Angeles Police Department concluded that one of its officers targeted Latinos for traffic stops.

Vock, Daniel C., "Racial Profiling Data Often Unstudied," *The Washington Post*, Aug. 9, 2011, p. A13.

Illinois state police hardly ever study racial profiling information, says the state chapter of the American Civil Liberties Union.

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