

# Police Reform and The Department of Justice: An Essay on Accountability

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In 1994, Congress promulgated a significant piece of legislation that may prove to have an extremely important impact on the operation of local police departments. Section 14141 of Title 42, enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, prohibits governmental authorities or those acting on their behalf from engaging in "a pattern or practice of conduct by law enforcement officials" that deprives persons of "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."<sup>1</sup> Whenever the Attorney General has reasonable cause to believe that a violation has occurred, the Justice Department is authorized to sue for equitable and declaratory relief "to eliminate the pattern or practice."<sup>2</sup> At this writing, the Special Litigation Section of the Justice Department's Civil Rights Division has brought two civil suits pursuant to Section 14141—suits that have resulted in consent decrees with the police departments of Pittsburgh, Pennsylvania and Steubenville, Ohio.<sup>3</sup> The Department, moreover, is reported to be investigating or monitoring at least nine other police agencies—in Los Angeles, California; Orange

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1. Section 14141 provides, in relevant part:

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 . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

42 U.S.C. § 14141(a) (1994).

2. *Id.* at § 14141 (b).

3. See Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States 103-05* (1998) [hereinafter "Shielded from Justice"] (discussing consent decrees).

County, Florida; New Orleans, Louisiana; East Point, Michigan; Buffalo, New York; New York, New York; Washington, D.C.; Charleston, West Virginia; and Columbus, Ohio—in order to decide "whether to seek judicial orders on respect for governing law."<sup>4</sup>

Section 14141 was an outgrowth of the beating of Rodney King by Los Angeles police and the Christopher Commission's subsequent finding that the Los Angeles Police Department had in effect condoned brutal conduct by its officers through a pattern of lax supervision and inadequate investigation of complaints.<sup>5</sup> Prior to this legislation, police abuse experts had frequently charged that the Justice Department "plays virtually no active role in holding local police accountable for abiding by the Constitution."<sup>6</sup> Section 14141 substantially enhances the Department's authority with regard to local police affairs by affording the Civil Rights Division a statutory basis for intervening in police "patterns and practices" in ways analogous to statutes that have authorized federal government intervention in other spheres—like voting, housing, public accommodations, and access to public facilities.<sup>7</sup> To many, such legislation is long overdue.<sup>8</sup> At

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4. *Id.* at 105. Mark Posner, an attorney in the Special Litigation Section, confirmed the existence of these pending investigations. He also noted that the Justice Department has informed city officials in Columbus, Ohio of its intent to file a Section 14141 complaint; at the time this essay entered the production process, the Department was still in negotiations with Columbus officials concerning that potential litigation. Telephone Interview by Debra Livingston, Columbia Law School, with Mark Posner, Special Litigation Section, Civil Rights Div., U.S. Dep't of Justice (June 8, 1999). The Justice Department has also completed an inquiry involving the New Jersey State Police and is in the process of negotiating a consent decree with New Jersey officials. See Jerry Gray, *New Jersey Plans to Forestall Suit on Race Profiling*, N. Y. Times, Apr. 30, 1999, at A1.

5. There is no separate legislative history for the bill that was enacted and codified at 42 U.S.C. § 14141, but a committee report accompanying a predecessor bill that is identical, in pertinent part, to Section 14141 discusses the beating of Rodney King and the subsequent findings of the Christopher Commission as relevant background for the federal legislation. See H.R. Rep. No. 102-242, at 398-99 (1991) (Omnibus Crime Control Act of 1991, Title XII, Police Accountability Act)[hereinafter "Police Accountability Act"].

6. Jerome H. Skolnick & James J. Fyfe, *Above the Law* 211 (1993).

7. See Police Accountability Act, *supra* note 5, at 403-04.

the same time, concern has also been expressed that the law at least potentially threatens dangerous intrusion into local police operations by federal civil rights attorneys who lack the capability and understanding to interfere in police administration—even for the laudatory goal of ending abusive practices.<sup>9</sup>

This essay does not purport to provide an empirical account of the effects—beneficial and deleterious, anticipated and unanticipated—that Section 14141 has already had on the affairs of local police. The law is too recent for such an assessment, and its future impact will very much depend on how it is enforced. The focus of this essay, then, is limited to a close examination of key provisions of the two consent decrees already in place. This inquiry, though narrow, is important for at least three reasons.

First, by examining these consent decrees, it is possible to opine in a modest way on the measures that the Justice Department deems important to the reform of law enforcement practices believed to contribute to constitutional rights or federal law violations. Admittedly, the provisions of the Pittsburgh and Steubenville decrees were fashioned, to a considerable degree, in light of the specific problems alleged to exist in each of these police departments. The Chief of the Civil Rights Division's Special Litigation Section, however, has publicly stated that local departments seeking to avoid federal

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8. See, e.g., *Shielded from Justice*, supra note 3, at 103 (noting that police abuse experts have long recommended affording the federal government authority to bring suit against local police departments to enjoin, or to direct police departments to end, abusive practices).

9. See, e.g., *Weekend All Things Considered: Pittsburgh Police* (Nat'l Pub. Radio broadcast, June 7, 1997) (featuring Tom Murphy, Pittsburgh's mayor, noting that he only reluctantly signed a consent decree to settle a § 14141 suit involving the Pittsburgh police and that, in his opinion, Justice Department attorneys lack the expertise to intervene in local police operations). But see Johnna A. Pro, *Justice Department Consent Decree Pushes Police to Overhaul Operations*, *Pittsburgh Post-Gazette*, Mar. 1, 1998, at C1 (expressing view of Pittsburgh police lieutenant in charge of implementing consent decree provisions to effect that decree has substantially improved the operations of the Pittsburgh Bureau of Police).

intervention would be well-advised to undertake changes in their operations consistent with the provisions of the Pittsburgh and Steubenville consent decrees.<sup>10</sup> Moreover, these decrees do reflect a common approach to police reform—an approach in which the Justice Department seeks to ensure that police managers have the necessary information to minimize police illegality and that these managers, in the words of Chief Rosenbaum, "take ownership of responsibility for the conduct of their officers."<sup>11</sup>

This approach to police reform is worth close examination even apart from its adoption by the Justice Department. Scholars have long lamented that the "low visibility" of much police work is a factor that complicates—or even frustrates—the supervision of line officers. In the words of one observer, because officers are sent into far-flung neighborhoods to perform their work, "it remains hard to know precisely what they are doing and how they are doing it."<sup>12</sup> The consent decrees contain provisions incorporating traditional responses to this state of affairs: provisions for enhanced training, for instance, and the proper investigation of referrals and complaints about police misconduct. More fundamentally, however, the decrees reflect a conclusion that the constraint of unlawful police conduct is importantly tied to early warning systems within police departments—to systems "for identifying police officers who are repeatedly involved in citizen complaints or other problematic behavior" so that police managers can take prompt remedial action with regard to

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10. See Weekend All Things Considered: Cop Brutality (Nat'l Pub. Radio broadcast, March 15, 1998) (featuring Steven Rosenbaum, Chief of Special Litigation, Civil Rights Div., U.S. Dep't of Justice).

11. *Id.* (comments of Steven Rosenbaum, Chief of Special Litigation, Civil Rights Div., U.S. Dep't of Justice).

12. Stephen D. Mastrofski, *Community Policing as Reform: A Cautionary Tale*, in *Community Policing: Rhetoric or Reality* 47, 60 (Jack R. Greene & Stephen D. Mastrofski eds., 1988). See also Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *Yale L. J.* 543 (1960) (discussing "low visibility" of much police decision-making).

such officers, and often before clear violations of law or policy have occurred.<sup>13</sup> The concept of an "early warning system" has been identified as "the most important new idea in the control of police misconduct."<sup>14</sup> Discussion of the benefits and limitations of this approach to ameliorating the problems posed by diffuse police actions is thus worthwhile—and regardless of the centrality of the early warning concept to the Justice Department's consent decrees.

Finally, these decrees are a particularly apt subject for criminal procedure scholars to consider in light of conclusions that scholars have often reached about the inadequacy of the principal remedy on which most criminal procedure scholarship has focused—namely, the exclusionary remedy. The Supreme Court suggested in *Terry v. Ohio* that police actions unrelated to evidence-gathering—meaning, the majority of everyday patrol activities—are impervious to the deterrent effect of the exclusionary rule.<sup>15</sup> Legal and police scholars have tended to agree, noting that while the desire of police to prosecute offenders (and to avoid scandal) provides criminal courts employing an exclusionary sanction with a considerable degree of *influence* over police actions, this influence is at best limited: "Since the judge is not the policeman's superior there is nothing that prevents the latter from doing as he pleases while forwarding cases on a take it or leave it basis."<sup>16</sup> The consent decrees, in contrast, seek to

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13. Samuel Walker, *Achieving Police Accountability: Despite Well-Publicized Failures, Citizen Complaint Review Boards Can Be an Effective Tool* 1, 7 (Ctr. on Crime, Communities & Culture, Occasional Paper Series, Research Brief No. 3, 1998) (discussing early warning systems).

14. *Id.* at 6.

15. 392 U.S. 1, 13-14 (1968).

16. Egon Bittner, *Aspects of Police Work* 114 (1990). See also Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. Colo. L. Rev. 521, 532-33 (1992) (noting that many legal scholars have failed to address Terry's recognition that the exclusionary remedy is ineffective to address police actions "utterly unrelated to evidence-gathering" that may nevertheless be "better indicators of the pathology of the political relationship between people and police"); John Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1033 (1974) (noting that "the threat to exclude evidence leaves untouched a

ensure that police managers take control of the conduct of their officers not only in the performance of traditional criminal investigative tasks, but also in those contexts where the motive to obtain evidence for introduction in a criminal trial is often at its weakest. To the extent that scholars have disparaged the deterrent effect of the exclusionary rule, then, these decrees helpfully focus attention elsewhere: on administrative reforms and the mechanisms for ensuring that they occur.

This essay first examines the two consent decrees, outlining their major provisions and commenting on the approach to police reform that they embody. We then step back from a detailed discussion of the decrees' specific provisions to comment more broadly on the Justice Department's efforts to invigorate the role played by police management in minimizing misconduct. Here, the essay opines that Section 14141 represents an important new remedial tool that offers enhanced opportunities for the radical reform of lax police administrative practices. At the same time, however, police reform is crucially connected to ensuring that police officers "identify with the agency's mission, are proud of the agency, and believe that good performance will lead to promotions."<sup>17</sup> Part of the reform project involves reorienting police to community service in ways that place the community itself in a position to monitor police performance.<sup>18</sup> The decrees do not, and perhaps cannot, ensure the humanistic leadership within police departments that is vital to ongoing police reform. In some contexts, the entry of Section 14141 decrees may even undercut opportunities for such leadership to emerge. This essay thus explores the complicated issues raised by the Justice Department's intervention in local police affairs

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myriad of police activities such as peacekeeping, harassment of offenders, and many intelligence activities which do not and are not intended to lead to admissible evidence in a criminal case").

17. Frank Anechiarico & James B. Jacobs, *The Pursuit of Absolute Integrity* 202 (1996).

18. See *id.* at 204-07 (discussing how citizen participation in public administration can indirectly control organizational deviance).

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and suggests several avenues for further inquiry.

### I. THE CONSENT DECREES

Pittsburgh, Pennsylvania and Steubenville, Ohio, though geographically close, are quite different municipalities with different police departments. Steubenville, with a population of about 22,000, is actually a suburb of Pittsburgh and is located just thirty miles west of that city, in southeastern Ohio.<sup>19</sup> Steubenville's police department numbers fifty members and has had the same police chief, selected from within the department by internal examination, for about fourteen years.<sup>20</sup> Pittsburgh's Bureau of Police, on the other hand, has some 1,100 uniformed officers serving a population of over 358,000.<sup>21</sup> Its police chief is named by the mayor and since about 1986, most chiefs have been in office for not more than a few years.<sup>22</sup>

The Justice Department began investigating the Pittsburgh police department in April 1996 after receiving complaints from citizens and community groups.<sup>23</sup> Its

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19. See Merriam-Webster's Geographical Dictionary 1127 (Daniel J. Hopkins ed., 3d ed. 1997) (noting population of Steubenville, Ohio).

20. See Press Release, Justice Department Reaches Agreement with Steubenville, Ohio Police Dep't 1 (DOJ, Aug. 26, 1997) (noting size of Steubenville police department) [hereinafter "Steubenville Press Release"]; telephone interview by Alexandra Gelber, Columbia Law School, with Ruth Melcher, City Manager's Office, Steubenville, Ohio, (Oct. 6, 1998) (noting tenure of Steubenville's police chief).

21. See Information Please Almanac 828 (Borgna Brunner, ed. 1998) (noting Pittsburgh's population); telephone interview by Alexandra Gelber, Columbia Law School, with Bob Isacke, Police Legal Advisor, Pittsburgh, Pennsylvania, (Oct. 6, 1998) (noting size of Pittsburgh's Bureau of Police).

22. Telephone interview, *supra* note 21.

23. See Press Release, Justice Department Reaches Agreement with Pittsburgh Police Dep't 2 (DOJ, Feb. 26, 1997) [hereinafter "Pittsburgh Press Release"]. The American Civil Liberties Union (ACLU) filed a federal civil rights class action law suit against Pittsburgh and its police department in March 1996, alleging a pervasive pattern of police misconduct by Pittsburgh officers. The ACLU thereafter provided substantial assistance to the Justice Department in its investigation, giving the Department access to more than four dozen complaints about police misconduct that thereafter became in large part the basis for the Department's case. See Pro, *supra* note 9, at C1. See also Press Release, ACLU

Steubenville investigation began the same year.<sup>24</sup> The Justice Department filed complaints pursuant to Section 14141 in both cases, but in neither case were the factual claims actually litigated. Instead, the Justice Department investigations resulted in agreements with the respective municipalities and their police departments that thereafter became the basis for the consent decrees examined here. The Pittsburgh consent decree was approved by the District Court for the Western District of Pennsylvania in April 1997, one year after the Justice Department investigation began, while the Steubenville decree was approved by the Southern District of Ohio in September, 1997.<sup>25</sup> This part details the principal allegations in the two complaints before discussing the central provisions of the consent decrees.

*A. The Complaints' Allegations*

To establish a claim, Section 14141 requires the Justice Department to demonstrate that a municipality, police department, or other Section 14141 defendant has engaged in "a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."<sup>26</sup> Section 14141 has not yet been the subject of judicial interpretation. In the Title VII context, however, the Supreme Court has suggested that the term "pattern or practice" has a "usual meaning"—a meaning denoting something more "than the mere occurrence of isolated or 'accidental' or sporadic [unlawful] acts."<sup>27</sup> A "pattern or practice of conduct by law enforcement officers" depriving persons of constitutional or

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Adds Ten Plaintiffs to Pittsburgh Police Misconduct Class Action Law Suit (ACLU, Feb. 24, 1997) (noting ACLU's cooperation with Justice Department investigation).

24. See Steubenville Press Release, *supra* note 20, at 1.

25. See *Shielded from Justice*, *supra* note 3, at 104, nn.216, 218.

26. 42 U.S.C. § 14141(a) (1994).

27. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 & n.16 (1977).



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statutory rights, then, likely denotes a course of conduct that is "standard operating procedure" within a police department—in the Court's words, a course of conduct that is "the regular rather than the unusual practice."<sup>28</sup>

The Pittsburgh and Steubenville complaints allege that from at least 1990 to their filing in 1997, police officers in each complaint's respective city engaged in a pattern and practice of subjecting individuals to three categories of unlawful police action: excessive force; improper searches and seizures; false arrest and, in the case of Steubenville, false charges and reports.<sup>29</sup> In Pittsburgh, the complaint names as defendants the City, the Pittsburgh Bureau of Police, and Pittsburgh's Department of Public Safety—the governmental agency that oversees the Pittsburgh police department.<sup>30</sup> The Steubenville complaint similarly names the City of Steubenville and its Police Department, along with Steubenville's City Manager and its Civil Service Commission, which has authority for hiring and disciplining police officers.<sup>31</sup>

The complaints' excessive force allegations are easily summarized. In both Pittsburgh and Steubenville, officers are alleged to have used excessive force in making arrests and in detaining people suspected of criminal activity. The complaints also allege that improper force was used on individuals in custody—including those handcuffed or otherwise physically restrained.<sup>32</sup> The Pittsburgh complaint alleges that excessive force by Pittsburgh officers occurred even in routine encounters with citizens, and as a result of the unnecessary escalation of "ordinary encounters . . . into violent confrontations."<sup>33</sup> In Steubenville, an additional allegation charges that

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28. *Id.* at 336.

29. See Complaint, *United States v. City of Steubenville*, No. C2 97-966 (S.D. Ohio, Aug. 28, 1997) at ¶ 1 [hereinafter "Steubenville Complaint"]; Complaint, *United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa., Feb. 26, 1997) at ¶ 1 [hereinafter "Pittsburgh Complaint"].

30. See Pittsburgh Complaint, *supra* note 29, at ¶¶ 1-3.

31. See Steubenville Complaint, *supra* note 29, at ¶¶ 1-4.

32. See *id.* at ¶ 8; Pittsburgh Complaint, *supra* note 29, at ¶ 7.

33. Pittsburgh Complaint, *supra* note 29, at ¶ 7.

excessive force was used by off-duty officers involved in private disputes but acting under color of law.<sup>34</sup>

With regard to the search and seizure allegations, officers in both departments are alleged to have improperly searched homes and businesses and to have unlawfully seized the property of arrestees.<sup>35</sup> The Pittsburgh complaint further charges that Pittsburgh police engaged in a pattern of improper stops and, in addition, that Pittsburgh officers engaged in a pattern and practice of unlawfully searching cars in the course of routine traffic encounters.<sup>36</sup>

The false arrest allegations in both complaints center on the charge that police improperly arrested those who had witnessed police misconduct or who were likely to complain of it.<sup>37</sup> In Pittsburgh, the complaint alleges that Bureau of Police officers engaged in a pattern of falsely arresting persons present at the scene of police violence. People who threatened to report police misconduct or who sought to collect evidence of it were also allegedly subject to false arrest, as were those who challenged the authority of officers or attempted to prevent police misconduct from occurring.<sup>38</sup> The Steubenville complaint charges that officers engaged in a pattern of falsely arresting or charging known critics of the police and even persons disliked by individual officers. False arrests were also said to occur "against persons who behave[d] disrespectfully [sic] but noncriminally to police officers."<sup>39</sup> The Steubenville complaint further alleges that Steubenville officers falsified official reports and tampered with police recorders so as to conceal police misconduct.<sup>40</sup>

Both complaints allege a simple nexus between the patterns of unlawful conduct and the actions or omissions of the defendants. They charge that the defendants either

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34. See Steubenville Complaint, *supra* note 29, at ¶ 8.

35. See *id.* at ¶ 10; Pittsburgh Complaint, *supra* note 29, at ¶ 9.

36. See Pittsburgh Complaint, *supra* note 29, at ¶ 9.

37. See *id.* at ¶ 8; Steubenville Complaint, *supra* note 29, at ¶ 9.

38. See Pittsburgh Complaint, *supra* note 29, at ¶ 8.

39. Steubenville Complaint, *supra* note 29, at ¶ 9.

40. See *id.* at ¶ 10.

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tolerated or caused and condoned the unlawful conduct of police through the defendants' failure to supervise, train, investigate, and discipline police officers adequately. In the case of Steubenville, the defendants are also said to have failed in their duty to monitor police officers and to adopt adequate use-of-force and off-duty conduct policies.<sup>41</sup> Both Pittsburgh and Steubenville denied the Justice Department's charges related to their management systems for police training, misconduct investigations, supervision, and discipline.<sup>42</sup> They further denied the charges leveled against their officers.<sup>43</sup> In the consent decrees, however, both defendants admitted that "the manner and means of avoiding such [charges] is to achieve and maintain good practices and procedures for police management."<sup>44</sup>

*B. Principal Provisions of the Consent Decrees*

Both the Pittsburgh and Steubenville consent decrees emerged as a result of negotiations between the Justice Department and city officials, and the consent decree in each case was filed in conjunction with the filing of the Justice Department's complaint. Though both decrees mandate broad changes in the operations of their respective police departments, the Justice Department's public pronouncements about the consent decrees tend to emphasize the flexibility left to local authorities. Thus, in the words of the Department, each decree "establishes a set of *guidelines* for the training, supervision, discipline, and complaint procedures" of the relevant department.<sup>45</sup> The

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41. See *id.* at ¶ 1; Pittsburgh Complaint, *supra* note 29, at ¶ 1.

42. See Consent Decree, *United States v. City of Steubenville*, No. C2 97-966 (S.D. Ohio, Sept. 3, 1997) at ¶ 3 [hereinafter "Steubenville Consent Decree"]; Consent Decree, *United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa., Feb. 26, 1997) at ¶ 4 [hereinafter "Pittsburgh Consent Decree"].

43. See Steubenville Consent Decree, *supra* note 42, at ¶ 3; Pittsburgh Consent Decree, *supra* note 42, at ¶ 4.

44. Steubenville Consent Decree, *supra* note 42, at ¶ 3. See also Pittsburgh Consent Decree, *supra* note 42, at ¶ 4.

45. Pittsburgh Press Release, *supra* note 23, at 1 (emphasis added). See also

decrees provide "new and enhanced measures for operating and managing [each] city's police force," but leave management itself in the hands of local officials.<sup>46</sup> Each decree provides that it will remain in force for at least five years after the date of entry and that it can be vacated only after five years have elapsed and substantial compliance has been maintained for at least two years.<sup>47</sup> Compliance is subject to monitoring by an independent auditor who reports on each defendant's compliance on a quarterly basis.<sup>48</sup>

Both decrees impose requirements in three principal areas: training; the receipt and investigation of referrals and complaints concerning improper police behavior; and the development and maintenance of an early warning system. In both cases, however, the central provisions of the decrees relate to the third of these categories. The mandated training and complaint investigation procedures, however, are not incidental to the overall reform project embodied in the decrees. These procedures, then, will be summarized first, as a prelude to discussion of the early warning system.

### 1. Police Training

Police training has been said to serve three broad purposes: to prepare officers to act appropriately in a broad spectrum of situations; to enhance productivity and effectiveness; and to foster cooperation and unity of purpose within a department.<sup>49</sup> Since the mid-1970s, every state has mandated some preservice training for police; about 85 percent of departments in cities with populations

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Steubenville Press Release, *supra* note 20, at 1.

46. Pittsburgh Press Release, *supra* note 23, at 1.

47. See Steubenville Consent Decree, *supra* note 42, at ¶ 96; Pittsburgh Consent Decree, *supra* note 42, at ¶ 79.

48. See Steubenville Consent Decree, *supra* note 42, at ¶ 82; Pittsburgh Consent Decree, *supra* note 42, at ¶ 70.

49. See Comm'n on Accreditation for Law Enforcement Agencies, *Standards for Law Enforcement Agencies* 33-1 (1983).

of at least 250,000 operate their own academies.<sup>50</sup> Between the 1950s and the 1980s, "the average length of preservice training tripled, from about 300 hours to 1,000 hours."<sup>51</sup> Since at least 1986, moreover, nearly two-thirds of police departments across the country have also provided for field training in which recruits are afforded "practical experience in police work under the supervision of an experienced field training officer (FTO)."<sup>52</sup> Nationwide, police recruitment and in-service training have improved significantly over the last thirty years.<sup>53</sup> The training period "is much longer, covers more subjects than before, and is usually required by state law."<sup>54</sup> Training programs in many local departments, however, still fail to cover important subjects or to offer adequate guidance on topics within the curriculum.<sup>55</sup> And scholars are quick to point out that the effect of even exemplary training programs can still be neutralized when officers "see firsthand that the behavioral strictures in which they were schooled are routinely ignored in practice"—a situation that has been positively promoted by some police managers.<sup>56</sup>

Both the Pittsburgh and Steubenville decrees contemplate that new police officers will receive both preservice and field training and that officers will thereafter receive annual in-service training.<sup>57</sup> Generally, the decrees do not specify the content of such training. The Steubenville decree, however, goes into somewhat greater detail on aspects of its mandated training program—likely because the Steubenville Police Department provided considerably less training than the larger Pittsburgh Bureau of Police at the time their respective consent

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50. See Samuel Walker, *The Police in America* 317 (1992).

51. *Id.*

52. *Id.* at 318.

53. See *id.* at 317-18.

54. *Id.* at 317.

55. See *id.* at 318-19.

56. James J. Fyfe, *Training to Reduce Police-Civilian Violence*, in *And Justice for All* 163, 164 (William A. Geller & Hans Toch, eds., 1995).

57. See Pittsburgh Consent Decree, *supra* note 42, at ¶¶ 33-43; Steubenville Consent Decree, *supra* note 42, at ¶¶ 12-13.

decrees were negotiated. The Steubenville decree mandates the creation of a training program that includes both entry level training and at least twelve weeks of field training for probationary officers, as well as at least forty hours of annual in-service training for all officers, pre-promotion training for those advancing in rank, and annual supervisory and leadership training for all supervisors.<sup>58</sup> Both the Steubenville and Pittsburgh police must establish formal eligibility criteria for training instructors and field training officers; they must disqualify current instructors or candidates for these positions who have poor disciplinary or complaint histories.<sup>59</sup> Instructors must "maintain, and demonstrate on a regular basis, their proficiency in their areas of instruction."<sup>60</sup> In addition, both police departments must maintain records documenting the training of each individual officer and reflecting the reasons for any special training required as a result of a disciplinary infraction.<sup>61</sup>

The Steubenville consent decree further elaborates subjects that must be covered as part of the regular training program. The Steubenville Police Department is required to develop use-of-force policies that comply with applicable law and professional standards—policies that must be approved by the Justice Department—and then to provide annual training in use of force.<sup>62</sup> Annual in-service

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58. See Steubenville Consent Decree, *supra* note 42, at ¶¶ 12-20. The Pittsburgh decree generally specifies discrete additions to Pittsburgh's existing training program. See Pittsburgh Consent Decree, *supra* note 42, at ¶¶ 33-43. It requires that senior supervisors receive annual supervisory and leadership training in command accountability, integrity, and cultural diversity. See *id.* at ¶ 43. Both the Steubenville and Pittsburgh defendants are required generally to monitor complaints of police misconduct "to gauge the effectiveness of training and to detect the need for new or further training." *Id.* at ¶ 34. See also Steubenville Consent Decree, *supra* note 42, at ¶ 17 (same).

59. See Steubenville Consent Decree, *supra* note 42, at ¶ 18; Pittsburgh Consent Decree, *supra* note 42, at ¶ 39.

60. Steubenville Consent Decree, *supra* note 42, at ¶ 19. See also Pittsburgh Consent Decree, *supra* note 42, at ¶ 40.

61. See Steubenville Consent Decree, *supra* note 42, at ¶ 20; Pittsburgh Consent Decree, *supra* note 42, at ¶ 41.

62. See Steubenville Consent Decree, *supra* note 42, at ¶¶ 14, 21. The Pittsburgh defendants are also required to develop a use-of-force policy. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 13.

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training must also be provided concerning search and seizure law and response to domestic violence calls.<sup>63</sup> Hostage and barricade situations, emotionally disturbed persons, persons with mental disabilities, and vehicular pursuits must be the subjects of training at least once every two years.<sup>64</sup> The Steubenville defendants are also required to develop new policies and procedures concerning off-duty responsibilities and off-duty gun use, and then, upon their approval by the Justice Department, to train officers with respect to them.<sup>65</sup>

Both consent decrees implicitly reflect the common wisdom that police training regarding use of force should be designed to minimize not only acts of brutality, but also the incidence of unnecessary force—force that is not malicious, but "the result of ineptitude or carelessness."<sup>66</sup> Unnecessary force frequently "begins with police intervention into relatively minor conditions that escalate into violence because of police haste and/or because officers are unable to establish communication with the people involved."<sup>67</sup> The consent decrees require that officers be trained in the use of verbal de-escalation techniques as an alternative to the use of force. This training must specifically include "examples of situations that do not require the use of force but may be mishandled, resulting in force being used."<sup>68</sup> The consent decrees identify one such situation—when individuals "verbally challeng[e] an officer's authority or ask[] for an officer's identifying information."<sup>69</sup>

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63. See Steubenville Consent Decree, *supra* note 42, at ¶ 14-15.

64. See *id.*

65. See *id.* at ¶¶ 16, 21. The consent decree provides that in the first year after adoption of these new policies, as well as the others required by the decree, compliance training shall be at least 40 hours in addition to the annual training otherwise required. See *id.* at ¶ 16.

66. See Fyfe, *supra* note 56, at 163 (drawing distinction between brutality and unnecessary force).

67. *Id.* at 165.

68. Steubenville Consent Decree, *supra* note 42, at ¶ 14. See also Pittsburgh Consent Decree, *supra* note 42, at ¶ 35.

69. Steubenville Consent Decree, *supra* note 42, at ¶ 14. See also Pittsburgh Consent Decree, *supra* note 42, at ¶ 35.

There are additional provisions related to promoting among police both an appreciation for diversity in the communities they serve and an awareness of ethical standards within policing. Entry and annual in-service training in cultural diversity is required in both departments—training that must include, at a minimum, instruction "on how to relate to persons from different racial, ethnic, and religious groups, and persons of the opposite sex."<sup>70</sup> Both the Pittsburgh and Steubenville defendants must further "provide training in communications skills and avoiding improper racial, ethnic, and sexual communications."<sup>71</sup> Integrity and ethics training is further mandated both for recruits and annually for all other officers—training that "shall cover the duties of truthfulness and reporting misconduct by fellow officers, the importance of avoiding misconduct, and professionalism."<sup>72</sup> The Pittsburgh Bureau of Police is required to place integrity and ethics training, along with cultural diversity training and training in verbal de-escalation techniques, at the start of its academy curriculum. Training in these three subjects is thereafter to be used "as a foundation for all other [academy] classes."<sup>73</sup>

## 2. Receipt and Investigation of Referrals and Complaints

Police scholars have long recognized that no matter how exceptional training may be, "[c]ontinued compliance with formal policies depends on the enforcement of

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70. Pittsburgh Consent Decree, *supra* note 42, at ¶ 33. See also Steubenville Consent Decree, *supra* note 42, at ¶ 14. The Pittsburgh Bureau of Police provided such training prior to the entry of the consent decree and is simply required to continue it. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 33.

71. Steubenville Consent Decree, *supra* note 42, at ¶ 14. See also Pittsburgh Consent Decree, *supra* note 42, at ¶ 33.

72. Pittsburgh Consent Decree, *supra* note 42, at ¶¶ 36-37. See also Steubenville Consent Decree, *supra* note 42, at ¶ 14.

73. Pittsburgh Consent Decree, *supra* note 42, at ¶ 36.



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meaningful discipline by [police] department[s]."<sup>74</sup> Referrals from within a police department regarding allegations of misfeasance, malfeasance, and nonfeasance must be adequately investigated to ensure that discipline is appropriately imposed.<sup>75</sup> Civilian complaints, too, must be carefully assessed to help ensure compliance with policies and procedures.<sup>76</sup> To this end, both the Pittsburgh and Steubenville decrees contain provisions related to the receipt and investigation of referrals and complaints about improper police conduct. The Pittsburgh decree contemplates that such matters will be investigated by Pittsburgh's Office of Municipal Investigations (OMI), the city agency historically charged with this task, and staffed with both civilian and police investigators.<sup>77</sup> The Steubenville decree mandates the creation of an internal affairs unit within the Police Department to discharge this responsibility.<sup>78</sup> Though the decrees differ somewhat in their specifics, they provide similar standards for the receipt of referrals and citizen complaints, as well as their subsequent investigation and disposition.

First, several provisions in both consent decrees seek to ensure the proper referral of matters warranting investigation. Police supervisors in Pittsburgh, for instance, are required to refer to OMI all incidents in which a review of reports involving uses of force or searches and seizures reasonably indicates a possible violation of departmental policies.<sup>79</sup> OMI is required to investigate

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74. Samuel Walker, *Taming the System* 32 (1993).

75. See Comm'n on Accreditation for Law Enforcement Agencies, *Standards for Law Enforcement Agencies* (April 1994), Standard 52 at 52-1 (discussing the internal affairs function).

76. See Police Executive Research Forum, *Police Agency Handling of Officer Misconduct: A Model Policy Statement* (1981).

77. See Pittsburgh Consent Decree, *supra* note 42, at ¶¶ 44-69. In the months after Pittsburgh's consent decree was filed, the Pittsburgh City Council overwhelmingly approved the creation of an independent civilian review board to investigate complaints against police officers. The new civilian agency has concurrent jurisdiction with OMI. See John M. R. Bull & Johnna A. Pro, *Police Board Created*, *Pittsburgh Post-Gazette*, Aug. 5, 1997, at A1.

78. See Steubenville Consent Decree, *supra* note 42, at ¶¶ 28-63.

79. See Pittsburgh Consent Decree, *supra* note 42, at ¶¶ 18, 19. The

these incidents, as well as all incidents involving strip searches, body cavity searches, or specified uses of force or searches or seizures that result in serious injury.<sup>80</sup> When officers are arrested, criminally charged, or named as parties in civil suits involving allegations of untruthfulness, physical force, racial bias, or domestic violence, OMI must make findings with regard to the underlying incidents that resulted in such litigation whenever the litigation itself does not end in a finding that the officers are guilty or liable.<sup>81</sup> OMI is further required to monitor all criminal cases involving allegations that Pittsburgh officers made improper arrests or conducted unlawful searches and seizures. Officers determined by a court to have made a false arrest or to have conducted an improper search or seizure must be "disciplined, retrained, counseled, transferred, or reassigned, as the circumstances warrant."<sup>82</sup>

Numerous police observers have noted that in police departments across the country, civilian complainants are

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Steubenville decree contains similar provisions regarding referrals to the internal affairs unit. See Steubenville Consent Decree, *supra* note 42, at ¶ 23, 25, 27.

80. See Pittsburgh Consent Decree, *supra* note 42, at ¶¶ 18, 19, 60. With regard to strip searches, the Pittsburgh decree further specifies that such searches shall be conducted "in compliance with applicable law and current professional standards." *Id.* at ¶ 14. Such searches must be authorized by a supervisor and performed by officers with special training. They must be undertaken "in conformance with hygienic procedures and practices, in a room specially designated for strip searches, by the fewest number of personnel necessary all of whom must be of the same sex as the person searched, and under conditions that provide privacy from all but those authorized to conduct the search." *Id.* Field strip searches are permitted only in exigent circumstances in which lives may be at risk, and only then "in privacy with the explicit approval of a supervisor or senior supervisor." *Id.*

81. See *id.* at ¶ 26. When Pittsburgh officers are found guilty or liable by a court or jury in connection with such incidents, the consent decree requires that they be appropriately disciplined. *Id.* The Steubenville decree similarly requires an internal affairs investigation into the underlying incidents that have resulted in criminal arrests or charges against an officer, or the filing of a civil suit involving allegations that an officer has engaged in acts of untruthfulness, physical force, racial bias, domestic violence, or misconduct in the performance of his official duties. See Steubenville Consent Decree, *supra* note 42, at ¶ 65.

82. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 27. The Steubenville decree contains similar provisions. See Steubenville Consent Decree, *supra* note 42, at ¶¶ 65, 68-69.

often treated so as actively to discourage the filing of complaints.<sup>83</sup> Both the Pittsburgh and Steubenville consent decrees contain a number of provisions designed to ensure that such complaints can be easily filed. First, the decrees provide that neither Pittsburgh's OMI nor Steubenville's police can refuse to accept a complaint.<sup>84</sup> Further, civilians must be permitted to initiate and pursue a complaint against an officer either in person, by telephone, mail, or facsimile transmission—and without ever going to a police facility.<sup>85</sup> Anonymous and third-party complaints, moreover, must be accepted and investigated.<sup>86</sup> Both decrees require periodic public meetings to inform the public about the procedures for filing civilian complaints.<sup>87</sup> In Pittsburgh, OMI must use television to inform residents about OMI's function and must also locate its offices near public transportation and in a space separate from any building occupied by police personnel.<sup>88</sup> In both Pittsburgh and Steubenville, the defendants must make pamphlets describing the complaint process available at various locations around the respective cities.<sup>89</sup>

Both decrees have several provisions designed to ensure that both disciplinary referrals and civilian complaints are adequately investigated. The decrees provide that all interviews of complainants, involved officers, and witnesses must be tape-recorded and

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83. See, e.g., Walker, *supra* note 13, at 10.

84. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 53; Steubenville Consent Decree, *supra* note 42, at ¶ 33.

85. See Steubenville Consent Decree, *supra* note 42, at ¶¶ 35, 38; Pittsburgh Consent Decree, *supra* note 42, at ¶ 47, 51.

86. See Steubenville Consent Decree, *supra* note 42, at ¶ 48; Pittsburgh Consent Decree, *supra* note 42, at ¶ 36.

87. See Steubenville Consent Decree, *supra* note 42, at ¶ 38; Pittsburgh Consent Decree, *supra* note 42, at ¶ 51. The Pittsburgh decree further requires the City to hold quarterly open meetings, rotating among different geographic subdivisions, to educate the public about proper police functions and police misconduct, including excessive use of force and improper searches and seizures. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 51.

88. See Pittsburgh Consent Decree, *supra* note 42, at ¶¶ 32, 50.

89. See *id.* See also Steubenville Consent Decree, *supra* note 42, at ¶ 38 (requiring that complaint forms and pamphlets describing the complaint process be available at several non-police locations around Steubenville).

transcribed.<sup>90</sup> Investigators are required to accommodate complainants and witnesses unable or unwilling to be interviewed during normal business hours or at investigators' offices.<sup>91</sup> Investigators are further required to "aggressively collect all appropriate evidence to document each incident of potential misconduct . . . including medical records and photographs of injuries."<sup>92</sup> They must canvass the scene of an incident for witnesses as soon as possible after receiving a complaint, at least when such a canvass "could reasonably yield additional information" necessary to conduct a complete investigation.<sup>93</sup> Supervisors present at the scene of an incident that resulted in an investigation must also be interviewed and are "required to detail their handling of the situation during and after the alleged incident and their observations of the complainant (if any) and officers."<sup>94</sup> Finally, with regard to the disposition of complaints, both consent decrees specify that "[t]here shall be no automatic preference of an officer's statement over a complainant's statement."<sup>95</sup>

At the conclusion of a misconduct investigation, investigators must prepare a report describing, among other things, the alleged misconduct, any other misconduct identified during the course of the investigation, the evidence gathered during the investigation, the accused officer's history with regard to prior misconduct allegations, and the investigator's findings with respect to all potential

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90. See Steubenville Consent Decree, *supra* note 42, at ¶ 44; Pittsburgh Consent Decree, *supra* note 42, at ¶ 56. If a complainant or witness refuses to be tape-recorded, investigators must prepare a written narrative of the statement. See *id.*; Steubenville Consent Decree, *supra* note 42, at ¶ 44.

91. See Steubenville Consent Decree, *supra* note 42, at ¶ 43; Pittsburgh Consent Decree, *supra* note 42, at ¶ 55.

92. Pittsburgh Consent Decree, *supra* note 42, at ¶ 61. See also Steubenville Consent Decree, *supra* note 42, at ¶ 49.

93. Pittsburgh Consent Decree, *supra* note 42, at ¶ 59. See also Steubenville Consent Decree, *supra* note 42, at ¶ 48.

94. See Steubenville Consent Decree, *supra* note 42, at ¶ 47. See also Pittsburgh Consent Decree, *supra* note 42, at ¶ 59.

95. Steubenville Consent Decree, *supra* note 42, at ¶ 52; Pittsburgh Consent Decree, *supra* note 42, at ¶ 66.

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misconduct.<sup>96</sup> Credibility determinations must be explained in writing. Investigators must consider the officer's prior history of civilian complaints (whether or not sustained) and his disciplinary record in making credibility calls. A complainant's history for crimes involving untruthfulness must also be taken into account.<sup>97</sup>

The Steubenville consent decree specifies that the internal affairs investigator is to determine in each case whether a misconduct allegation is: "sustained," based on a preponderance of the evidence showing that inappropriate behavior occurred; "unfounded," based on a preponderance showing that the alleged misconduct did not occur; "not resolved," when there is insufficient evidence to decide what happened; or "exonerated," when the conduct referred for investigation occurred, but did not violate police department policy.<sup>98</sup> In Steubenville, the investigative file is thereafter to be provided to the Chief of Police who may require further investigation but who ultimately must report, in writing, both his agreement or disagreement with the investigator's findings and the final disposition of the allegations. Investigative files are then reviewed by the City Manager who is responsible for ensuring that the Chief of Police appropriately carries out his oversight responsibilities.<sup>99</sup> Whenever the final disposition of an internal affairs investigation is "sustained," the City of Steubenville is required to impose appropriate discipline and supervision on the officer.<sup>100</sup>

The Pittsburgh consent decree goes into somewhat less detail with regard to the findings to be made by OMI investigators because OMI already had procedures related to such findings at the time the Justice Department's complaint was filed.<sup>101</sup> The Pittsburgh consent decree does

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96. See Steubenville Consent Decree, *supra* note 42, at ¶ 54; Pittsburgh Consent Decree, *supra* note 42, at ¶ 63.

97. See Steubenville Consent Decree, *supra* note 42, at ¶ 52; Pittsburgh Consent Decree, *supra* note 42, at ¶ 66.

98. See Steubenville Consent Decree, *supra* note 42, at ¶ 51.

99. See *id.* at ¶¶ 55-57.

100. See *id.* at ¶ 69.

101. The consent decree does require OMI to change the classification of "not

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provide that when a complaint is ultimately sustained, appropriate discipline must be promptly imposed based on the nature of the infraction and the officer's prior record. "Except where the discipline is termination, remedial training or counseling shall also be imposed on each officer against whom a complaint is sustained."<sup>102</sup>

### 3. Early Warning System

The maintenance of a fair and open procedure for investigating and disciplining officers who have engaged in acts of misconduct is important. At the same time, police scholars have long agreed that it is a serious mistake to view police accountability exclusively "in terms of identifying and taking action against wrongdoing."<sup>103</sup> The aspiration of police managers should be to identify those officers who are engaged in problematic behavior before this behavior has resulted in clear violations of law or policy. Supervisors can then assist officers in changing their practices.<sup>104</sup> Simple mistakes "should routinely evoke coaching, consideration of options, training, and other such control options."<sup>105</sup> Discipline is appropriate in the face of true incompetence or irresponsibility.<sup>106</sup> The "low visibility" of much police work, however, has traditionally been viewed as a serious obstacle to realization of any scheme for such enlightened police management.<sup>107</sup>

The Pittsburgh and Steubenville decrees seek to overcome the problem posed by diffuse police action by

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sustained," when there is insufficient evidence to decide what happened in a given investigation, to "not resolved." See Pittsburgh Consent Decree, *supra* note 42, at ¶ 68.

102. *Id.* at ¶ 21.

103. Herman Goldstein, *Policing a Free Society* 159 (1977).

104. *See id.* at 171.

105. See George Kelling et. al, *Police Accountability and Community Policing*, *Persp. on Policing* (Nat'l Inst. of Justice, U.S. Dep't of Justice, Washington, D.C.), Nov. 1988, at 6.

106. *See id.*

107. See Mastrofski, *supra* note 12, at 60 (noting "fundamental structure of the supervisor-to-officer relationship" and difficulty in obtaining resources for intensive on-scene observation of police at work).

mandating a monitoring program—by requiring each police department to acquire and to retain detailed information about the activities of each of its officers, and then to use this information in supervising the rank and file. In the Pittsburgh decree, the defendants are specifically required to put in place an "early warning system"—a database in which detailed information about individual officers can be maintained and easily accessed.<sup>108</sup> The Steubenville consent decree does not require the installation of an automated early warning system, but does mandate a similar monitoring regime.<sup>109</sup> In both cases, the monitoring program requires all police officers to maintain records with regard to specified police actions. The decrees then specify how these records, along with other information about each officer, must be maintained within the police department and used in supervision.

The Pittsburgh decree is illustrative. In Pittsburgh, the consent decree requires that the Pittsburgh Bureau of Police maintain an automated early warning system that includes with regard to each Pittsburgh police officer: a textual description of all citizen complaints lodged against him; an account of any shootings involving the officer; a list of all commendations or disciplinary actions; a detailed description of all criminal investigations of possible officer misconduct; and a description of civil or administrative claims filed against the City of Pittsburgh, the Bureau of Police, or its officers arising from the officer's activities.<sup>110</sup> The database must also contain a description of any civil suits in which the officer is a named party and which involve allegations of untruthfulness, physical force, racial bias, or domestic violence.<sup>111</sup> It must detail the officer's training, any mandatory counseling afforded to him, and the status of any administrative appeals or grievances in which he might be involved.<sup>112</sup>

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108. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 12.

109. See Steubenville Consent Decree, *supra* note 42, at ¶¶ 22-27, 64-77.

110. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 12.

111. See *id.*

112. See *id.*

Next, the system must include a wealth of information about everyday police actions. It must reflect all arrests made by each individual Pittsburgh officer, including the location of the arrest, the race of each arrestee, and the relevant laws cited as the basis for arrest.<sup>113</sup> In addition, officers must prepare a report whenever they use force, conduct a warrantless search (excluding searches incident to arrest and frisks), perform strip or body cavity searches, or seize property without a warrant.<sup>114</sup> These reports, too, must be maintained in the database.<sup>115</sup> They must include, among other information, the officer's name and badge number, a description of the incident, and an account of injuries or relevant medical or hospital data. They must contain the name, race, and gender of all persons involved in a use of force or search and seizure, as well as the names and contact information for all witnesses.<sup>116</sup> Similarly, officers must record each traffic stop that they undertake—detailing the race and gender of the individual stopped and the approximate time and location.<sup>117</sup> These reports must reflect whether the stop involved a pat-down search, whether any weapons, contraband, or evidence was found during any search, and whether the individual involved was cited or arrested and, if so, for what offense.<sup>118</sup> These reports, too, must be included in the early warning

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113. See *id.*

114. See *id.* at ¶ 15. Steubenville police must prepare a written report any time force is used against an individual; an officer engages in a vehicular pursuit; a firearm is discharged, except at a firing range; a person in custody or being taken into custody receives a serious injury; or any officer is injured in the line of duty. See Steubenville Consent Decree, *supra* note 42, at ¶ 22. Written reports are also required whenever an officer performs a warrantless search (excluding searches incident to arrest and frisks), seizes property without warrant, or conducts either a traffic stop or a Terry stop. See *id.* at ¶ 24. Arrest reports must be prepared for: arrests in which officers are the only complainants; possessory arrests not stemming from a search for another offense or a warrant search, and not made pursuant to an arrest warrant; and arrests on charges of obstruction of justice, resisting arrest, assault on an officer, disorderly conduct, public intoxication, and the like. See *id.* at ¶ 27.

115. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 12.

116. See *id.* at ¶ 15.

117. See *id.* at ¶ 16.

118. See *id.*



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system.<sup>119</sup>

The system must have the capacity to retrieve information by individual officer, squad, zone, shift, or special unit.<sup>120</sup> It must also have the ability to access information about arrests in order to determine the number of times a particular officer or group of officers has filed discretionary charges of resisting arrest, disorderly conduct, public intoxication, or interfering with the administration of justice.<sup>121</sup> Data regarding an officer must be maintained in the automated early warning system during that officer's employment and for three years thereafter. It must then be archived.<sup>122</sup> The City is also required to develop a protocol specifying quality assurance checks of the information maintained in the system.<sup>123</sup>

The Pittsburgh consent decree next requires the City to develop a written protocol governing the review of this information and its use in management. This protocol must specify both the type of incident and number per officer that mandates review by supervisors. Appropriate follow-up actions must be detailed.<sup>124</sup> The consent decree specifically provides that use of force and search and seizure reports must be reviewed within an officer's chain of command within one week of the events recounted in the reports and must thereafter be referred to OMI for investigation where appropriate.<sup>125</sup> Complaints of racial bias must be reviewed within a week of the completion of their investigation by OMI.<sup>126</sup> Senior supervisors must also analyze use of force, search and seizure, and racial bias

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119. See *id.* at ¶ 12.

120. See *id.*

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.*

125. See *id.* at ¶¶ 18, 19. The Steubenville consent decree similarly provides that stop, search, and seizure reports, use-of-force reports, and specified arrest reports be reviewed by an officer's supervisors within one week of the events precipitating a report. See Steubenville Consent Decree, *supra* note 42, at ¶¶ 23, 25, 27. When the reports reasonably indicate a possible violation of departmental policies, internal affairs must be notified. See *id.*

126. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 21.

data contained in the early warning system on a quarterly, cumulative basis to detect trends and to ensure that officers are acting lawfully.<sup>127</sup>

The Pittsburgh decree specifies that certain supervisory steps must be taken when an officer accumulates a number of citizen complaints, regardless whether these complaints are substantiated. Thus, officers who have had three or more complaints containing allegations of similar types of misconduct (such as verbal abuse, excessive force, or improper search and seizure) within the last two years must be counseled, provided with appropriate remedial training, assigned to a field training officer, transferred, and/or reassigned, whether or not any of these complaints ended up being substantiated after investigation.<sup>128</sup> The same holds true for officers who have had five or more complaints of any kind within the preceding two years.<sup>129</sup>

The Pittsburgh Bureau of Police is further required to conduct annual performance evaluations of each of its officers. The complaint history of an officer and any patterns of misconduct must be taken into account in this evaluation. In addition, supervisors must be evaluated on their ability "to monitor, deter, and appropriately address misconduct by officers they supervise."<sup>130</sup> The consent decree also provides that OMI files relating to a particular officer must be made available to supervisors responsible for that officer's training, counseling, or discipline.<sup>131</sup>

Fashioned for a much smaller police department, the Steubenville consent decree does not mandate computerization of the information to be maintained as part of its early warning system. In other ways, the early warning provisions of the Steubenville decree are similar to

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127. See *id.* at ¶¶ 18, 19, 21.

128. See *id.* at ¶ 21.

129. See *id.* The Steubenville consent decree contains similar provisions. See Steubenville Consent Decree, *supra* note 42, at ¶ 66.

130. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 23. The Steubenville decree contains a similar requirement. See Steubenville Consent Decree, *supra* note 42, at ¶ 78.

131. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 45.

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those found in the Pittsburgh decree. The Steubenville defendants are required to develop an easily accessed information system to collect data about arrests, uses of force, and searches and seizures, along with information about vehicular pursuits, officer injuries, weapons discharges, complaints and commendations, training, discipline, and counseling.<sup>132</sup> Records relating to civil suits, judicial findings of misconduct, and criminal charges against Steubenville officers must also be maintained.<sup>133</sup> This information is to be used as a supervisory tool for "alerting management to potential misconduct, inappropriate behavior, and areas in which additional training or policy modification may be necessary."<sup>134</sup> As in Pittsburgh, the City of Steubenville is required to develop a protocol specifying the range of appropriate responses to various types of incidents, as well as the type and number of incidents per officer that will require supervisory intervention.<sup>135</sup> The decree also requires police supervisors to analyze the data in the information system on a quarterly, cumulative basis so as to detect trends and help minimize excessive uses of force, illegal searches and seizures, improper arrests, and actions that reflect racial bias by officers.<sup>136</sup>

## II. DISCUSSION

Enforcement of Section 14141 is still in its earliest stages. Even a brief examination of the Pittsburgh and Steubenville consent decrees, however, attests to the broad changes that Section 14141 litigation may effect in local police departments—departments that may be required to overhaul radically, under the supervision of an outside auditor, their systems for training, supervision, and discipline. Because other police departments may revise

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132. See Steubenville Consent Decree, *supra* note 42, at ¶ 71.

133. See *id.* at ¶ 72.

134. *Id.* at ¶ 65.

135. See *id.* at ¶ 66.

136. See *id.* at ¶¶ 74-77.

their administrative practices to avoid litigation, moreover, Section 14141 may well have ramifications far beyond the individual departments that find themselves the subject of a Department of Justice suit. Given the potentially far-reaching effects of the new law, it is incumbent upon scholars to pay some attention to Section 14141, even though it is too early to draw firm conclusions about the impact it will have. The Pittsburgh and Steubenville consent decrees do contain enough common elements that it is useful to speak of their overall approach to police reform—and of the benefits and limitations of this approach.

At the start, then, the new law does significantly expand the legal remedies available to address systemic police illegality. We have already alluded to a principal limitation of the exclusionary remedy in this regard: namely, that even assuming the remedy is efficacious in influencing police when they seek evidence to prosecute crime, the remedy has little effect on police practices unrelated to evidence-gathering.<sup>137</sup> Other available remedies are also limited. Thus, criminal prosecution plays some role in holding officers accountable for acts of clear illegality but it is, at best, a cumbersome tool to effectuate departmental reform.<sup>138</sup> Likewise, while exposure to money damages has undoubtedly encouraged some municipalities to revise the police policies and practices that have subjected them to liability, it remains true that major cities have only recently begun to monitor civil damages claims for the light they might shed on the need for change within

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137. See *supra* notes 15-16 and accompanying text. The exclusionary rule has other limitations, of course. For a thoughtful summary of the rule's operation, see William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 *Harv. J.L. & Pub. Pol'y* 443 (1997).

138. The reasons for this conclusion are familiar. Criminal charges must be proven beyond a reasonable doubt, and are only appropriate when the evidence of illegality is clear. They are unlikely to have any effect on police practices in cases where police managers do not agree with the decision to prosecute. Most fundamentally, criminal law standards define "the outer limits of what is permissible in society"—not the good police practices that police reformers aspire to institute in a wayward department. See Paul Chevigny, *Edge of the Knife* 101 (1995).

their police departments.<sup>139</sup> Section 14141 authorizes the Justice Department to seek injunctions *mandating* those changes in local police operations that are necessary to end a pattern and practice of unlawful conduct. Especially given the severe limitations on the ability of private parties to seek such relief, Section 14141 significantly adds to the currently available remedies.<sup>140</sup>

Beyond its impact in individual cases, moreover, the Justice Department's enforcement of Section 14141 may have the beneficial effect of further stimulating the articulation and dissemination of national standards governing core police managerial responsibilities. When the Chief of the Civil Rights Division's Special Litigation Section publicly advises police managers to undertake changes in their operations consistent with the Pittsburgh and Steubenville consent decrees, he is asserting that these decrees reflect professional standards to which all police departments should subscribe.<sup>141</sup> Police departments should have a use-of-force policy, as required by the Steubenville consent decree.<sup>142</sup> They should have a complaint procedure that is publicized within the community and that is easily accessed by community residents.<sup>143</sup> Along similar lines, several police scholars have noted that the process of accrediting police agencies and the articulation of professional standards by the Commission on Accreditation for Law Enforcement Agencies (CALEA has had some useful effect in stimulating needed administrative reforms in police departments across the country.<sup>144</sup> Section 14141 litigation may play an

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139. See *id.* at 101-05.

140. For a discussion of the limitations placed on civil injunction actions against police by cases like *Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *Rizzo v. Goode*, 423 U.S. 362 (1976), see *id.* at 108-10.

141. See *supra* note 10 and accompanying text.

142. See Steubenville Consent Decree, *supra* note 42, at ¶ 21.

143. See Pittsburgh Consent Decree, *supra* note 42, at ¶¶ 47-51; Steubenville Consent Decree, *supra* note 42, at 33-38.

144. See Skolnick & Fyfe, *supra* note 6, at 243-45. CALEA was established some twenty years ago as the outgrowth of a Justice Department grant to the International Association of Chiefs of Police, the National Organization of Black Law Enforcement Executives, the National Sheriffs' Association, and the Police

analogous role in the area of police accountability by prompting local departments first to compare their existing practices with regard to training, supervision, and discipline with those outlined in the Department's consent decrees and then to institute reforms, where needed.

Given the potential nationwide significance of these decrees, it is important to make at least some preliminary observations about their success at articulating national policing standards while preserving the opportunity for local experimentation in the area of police accountability. Here, a comparison between the consent decrees and the CALEA accreditation standards is instructive. Seeking to avoid even the appearance of trenching upon local prerogatives in an field traditionally said to invoke strong federalism concerns, CALEA has largely refrained from specifying the content of policies required in particular areas, but instead hinges the accreditation of a police agency on a showing that the agency under examination has promulgated policies in specified areas.<sup>145</sup> The consent decrees, fashioned to eliminate an ongoing pattern of unlawful conduct, are considerably more specific. They also go a great deal further than the Justice Department's characterization of them as establishing merely "a set of guidelines for . . . training, supervision, discipline and complaint procedures."<sup>146</sup> On the other hand, it would be an overstatement to charge that the decrees' authors were heedless of the need for local innovation in furthering the overall reform project that the decrees represent.

Both decrees emphasize training, for instance, and

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Executive Research Forum. Since that time, CALEA has promulgated numerous standards in about 50 police policy and operational areas. CALEA has developed a voluntary accreditation process that accredits state and local law enforcement agencies upon a demonstration that the agencies have considered and formulated policies in the relevant areas. About 455 police, sheriffs', and investigative agencies have received accreditation, while several hundred additional agencies are in the process of preparing for evaluation. See *id.* at 243-44 (detailing numbers of police agencies seeking accreditation).

145. See *id.* at 244.

146. See *supra* note 45 and accompanying text.

suggest the importance of field training.<sup>147</sup> They specify subjects that should be covered in the training program, but they do not dictate the content of training—appropriately leaving this matter to be the subject of experimentation and refinement at the local level.<sup>148</sup> Similarly, the decrees require both Pittsburgh and Steubenville to develop policies regarding certain matters—for instance, the use of force. These policies may be subject to Justice and even, in some cases, approval, but they are not authored by the Department.<sup>149</sup> Admittedly, the decrees are considerably more specific on the subject of misconduct investigations.<sup>150</sup> Even here, however, some important issues are left unresolved. Given the steady growth of civilian participation in the review of misconduct complaints over the past twenty-five years, for instance, it is interesting that neither consent decree requires—nor seeks to prohibit—such participation.<sup>151</sup> This matter, too, is left to local experimentation—wisely, given that it is yet unclear to what degree civilian review will develop into an important oversight tool.<sup>152</sup>

These examples illustrate a larger and important point. The negotiation of Section 14141 consent decrees offers the Justice Department an opportunity to push local police departments in the direction of best practices in the area of police accountability while not relinquishing the benefits of local knowledge and experimentation with regard to this subject. To realize this opportunity, however, the Justice Department will need to experiment

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147. See supra notes 57-58 and accompanying text.

148. See supra notes 57-73 and accompanying text.

149. See Steubenville Consent Decree, supra note 42, ¶ 21; Pittsburgh Consent Decree supra note 42, ¶ 13.

150. See supra notes 90-102 and accompanying text.

151. For an account of the recent growth in civilian review mechanisms, see Samuel Walker & Betsy Wright, *Citizen Review of the Police, 1994: A National Survey*, *Fresh Perspectives* 1 (Jan. 1995).

152. See Chevigny, supra note 138, at 98 (questioning whether civilian review represents "an easy answer to affecting police department policy and thus minimizing the abuse of force"); Skolnick & Fyfe, supra note 6, at 230 (supporting civilian review primarily on grounds of legitimacy, and questioning whether it can be justified otherwise).

and use the lessons of this experimentation to revise its own practices as it seeks to arrive at the appropriate degree of specification for different aspects of the reform project embodied in its consent decrees.<sup>153</sup> Indeed, this experimentation will be central to the success—or failure—of individual Section 14141 decrees, and also to realization of the law's overall goal of promoting police accountability. Neither the mindless specification of prolix rules and regulations in a consent decree nor the equally thoughtless promulgation of vague and aspirational guidelines is likely to stimulate needed reform in police departments characterized by systemic police illegalities. The aim should be to determine the appropriate degree of specificity in particular areas, taking into account local conditions and the need for local innovation.

Moving on, the concept of early warning is central to both consent decrees and is worth further elaboration here. Early warning systems, which can be found in a number of major metropolitan police departments, may offer at least a partial answer to the challenge that dispersed police action poses for police supervision.<sup>154</sup> After-the-fact review of misconduct allegations has always been an inadequate response to this challenge for the fundamental reason that most such allegations "cannot be definitively resolved one way or the other."<sup>155</sup> At the same time that these allegations may be incapable of definitive resolution, however, a relatively small percentage of the officers in any department often amass a disproportionate share of such allegations—as well as use of force reports, and other indicia of adversarial citizen encounters.<sup>156</sup> Good police

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153. For an interesting theoretical discussion of possibilities for securing the benefits of both local knowledge and national coordination in public administration, see generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267 (1988).

154. See Declaration of Lou Reiter, *United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa., Mar. 28, 1997) at ¶ 5 (noting metropolitan police departments with early warning systems and opining that such systems represent sound police practice).

155. Skolnick & Fyfe, *supra* note 6, at 229.

156. See Walker, *supra* note 13, at 7.



supervisors use information of this type to determine whether there is a need for retraining, counseling, or reassignment in a given case—and often before serious problems arise. For this reason, it has long been understood that police managers should treat citizen complaints as "a valuable source of management information."<sup>157</sup> The early warning systems mandated in the Pittsburgh and Steubenville decrees take this lesson one step further by seeking to enhance the information in the hands of supervisors—to provide them with data not only about those exceptional police-citizen encounters that generate citizen complaints and use-of-force reports, but also about more routine encounters involving searches, arrests, traffic stops, and the like.<sup>158</sup> In theory, this information should give supervisors a more accurate picture of the conduct of their supervisees and should thus enable these supervisors to better assess the risk of officer misconduct and the need for appropriate managerial response.

But this is not to say that the early warning systems required in the Steubenville and Pittsburgh consent decrees constitute a panacea for problems of police misconduct. Supervision is no doubt facilitated by the information that these decrees seek to make available. Much of this information must come from reports generated by line officers, however, and police observers have long noted variations in the degree to which these officers comply with rules requiring them to generate reports.<sup>159</sup> There are also costs to such reports, not least of which is the time that it takes to fill them out. These costs can be minimized in various ways, though not eliminated.<sup>160</sup> More fundamentally, the value of the

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157. Skolnick & Fyfe, *supra* note 6, at 231.

158. See *supra* notes 110-23 and accompanying text.

159. See David Dixon, *Law in Policing: Legal Regulation and Police Practices* 94-95 (1997).

160. In a recent speech on the subject of policing, for instance, Attorney General Janet Reno mentioned a program in San Diego, California in which officers who make stops enter information about them into computers at the scene. Attorney General Reno opined that this procedure minimized the time

information contained in an early warning system is heavily dependent on the uses to which this information is put. The Justice Department's mandated early warning system may thus *facilitate* good management by ensuring that needed information is available. Police reform in both Steubenville and Pittsburgh, however, will still be dependent upon the police supervisors "who are closest to their personnel and have the greatest day-to-day effects on their work."<sup>161</sup>

This observation is in keeping with a conclusion drawn by many police scholars—namely, that efforts at police reform will be most effective when the police organization itself is involved in the process and, ultimately, when reform involves not simply adherence to rules in the face of punitive sanctions, but a change in the organizational values and systems to which both managers and line officers adhere.<sup>162</sup> In the words of one scholar: "[E]xternal controls and accountability mechanisms (desirable as they are) cannot be expected to be effective unless police organizations are themselves involved in the process of control."<sup>163</sup> Various forms of external oversight—including the outside monitor provided for in the Pittsburgh and Steubenville decrees—will work in the long run only if "the police. . . become convinced that they will be trusted to bear most of the active responsibility for ensuring correct performance and that they have much to gain from the favourable testimony of external review agents."<sup>164</sup>

It is not always easy to enlist police managers and line personnel in reform efforts, however, and this may prove a

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involved in report preparation and was not unduly disruptive of the officer's other work. Attorney General Janet Reno, Remarks at the Nat'l Press Club Luncheon, Fed. News Serv., Apr. 15, 1999, available in LEXIS, News library, FNS File [hereinafter "Nat'l Press Club Speech"].

161. Skolnick & Fyfe, *supra* note 6 at 192.

162. See, e.g., Dixon, *supra* note 159, at 308 (regulatory strategies "must aim to foster responsibility and competence, not mere rule-following"); Skolnick & Fyfe, *supra* note 6 at 187 (for reform to last, officers must come to adhere to different systems and values).

163. Dixon, *supra* note 159 at 157.

164. David H. Bayley, *Accountability and Control of Police: Lessons for Britain*, in *Policing II*, 146, 158 (Robert Reiner ed. 1996).

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substantial challenge to the Justice Department's aspiration to use Section 14141 to spur the institution of good administrative practices in police departments across the country. Line officers, in particular, may be deeply suspicious of the early warning system, and especially of its requirement that supervisors take managerial action with regard to officers who have accumulated a certain number of citizen complaints over a given period of time, regardless of whether these complaints have been substantiated after investigation.<sup>165</sup> Proponents insist that this aspect of the early intervention program is "non-punitive."<sup>166</sup> Supervisors are merely required to take appropriate steps in the face of complaints—steps which could extend to reassignment or transfer, but which may require only supervisory counseling or remedial training.<sup>167</sup> The underlying philosophy here is simple: "[A] disproportionate number of complaints against some officers is a symptom of a problem between [the] agency and the community, and [supervisors] have an obligation to do everything reasonably possible to identify the causes of this problem and to address it."<sup>168</sup> In the adversarial context of Section 14141 litigation, however, line officers may already be resentful and defensive about the charges leveled at their departments.<sup>169</sup> They may not trust supervisors to recognize that the number of complaints filed against an officer may signal an important problem, but may also reflect something else—even the efforts of a neighborhood's serious law violators to rid themselves of a persistent law enforcement agent. Police may well perceive the early warning system's attention to unsubstantiated complaints, as well as its enhanced recordkeeping requirements, as punitive, or as evidencing a lack of trust in their

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165. See supra notes 128-29 and accompanying text.

166. See Affidavit of James J. Fyfe, Ph.D, *United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa., Apr. 2, 1997) at ¶ 10 [hereinafter "Fyfe Affidavit"].

167. See supra notes 128-29 and accompanying text.

168. Fyfe Affidavit, supra note 166, at ¶ 10.

169. See Bayley, supra note 164, at 158 (noting that the climate in which reform efforts often begin ensures that "police are likely to be resentful").

performance.<sup>170</sup> Such perceptions have their costs on officer morale and motivation. They may even frustrate the effort to minimize illegality: for if public employees perceive they are being treated as untrustworthy, "they will act accordingly, and no amount of laws or controls will remedy the situation; in some cases, they will make things worse."<sup>171</sup>

This is not to suggest that the Justice Department's intervention in local police management can produce no positive results. Far from it. In the face of systemic police illegality that is fostered by lax administrative practices, Section 14141 litigation may be an important and, indeed, necessary stimulus to reform. Litigation may focus attention on the police department so that the department is able to obtain adequate resources to institute needed administrative changes—changes like the introduction of an automated early warning system, for instance, or expanded field training.<sup>172</sup> Granted, when capable administrators have taken over a department, litigation might retard the reform process by undercutting police management's position with the rank and file. On the other hand, litigation may spur needed changes in management, where an entrenched and inadequate managerial team may be the real obstacle to reform.<sup>173</sup>

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170. In Pittsburgh, for instance, Marshall W. "Smokey" Hynes, the president of the Pittsburgh police union, has been outspoken in his criticism of the consent decree and, in particular, of its provision for supervisory response to complaints that have not been substantiated. See Michael A. Fuoco, *Ex-Cop Returns Fire*, *Pittsburgh Post-Gazette*, Apr. 20, 1997, at F1.

171. Anechiarico & Jacobs, *supra* note 17, at 202. See also Dixon, *supra* note 159, at 310 (same).

172. For instance, Pittsburgh Police Chief Robert W. McNeilly, Jr. credits the Pittsburgh consent decree with bringing hundreds of computers into his department, which had virtually no computers prior to the litigation. See David Voreacos, *Peek at N.J. Troopers' Future? Federal Cuffs Chafe Pittsburgh Police*, *Record, N.N.J.*, Mar. 8, 1999, at A1. The Pittsburgh Bureau of Police has been allocated substantial sums for training, computers, and equipment since the consent decree was negotiated, and it is generally agreed that Pittsburgh will ultimately spend millions of dollars on its overhaul of the agency. See Pro, *supra* note 9, at C1.

173. Notably, the Steubenville Consent Decree contains provisions revising the selection procedure for Steubenville's Chief of Police. See Steubenville Consent

Change in institutions, moreover, "is a complex phenomenon: people may change their behaviour without being culturally or ideologically committed to such change, but values and beliefs may then shift too."<sup>174</sup> Professor Bayley has suggested that the *symbolism* behind a reform effort like the one embodied in Section 14141 enforcement may be vitally important, perhaps even as important as the instrumental changes it effects: "[R]eform can enhance accountability through the message[ ] it sends to the police . . . that greater accountability is desired by the community."<sup>175</sup>

Nevertheless, police reform works best when the police department itself can be brought along. With regard to the early warning system, police must ultimately realize that the department benefits when more information is available about both the nature of police services being provided in a community and the community's level of satisfaction with these services. Information can help replace the arbitrary and often punitive supervision that has characterized many police departments with a new style of supervision—supervision that places emphasis on teaching, reviewing, and considering alternatives.<sup>176</sup> The information generated by a monitoring program can also correct misperceptions among community residents and the police on fundamental matters—like how often force is used.<sup>177</sup> Further, information allows a local police department to benchmark its performance against other departments that may have experimented with different styles of training or supervision—thus disrupting

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Decree, *supra* note 42, at ¶ 80.

174. Dixon, *supra* note 159, at 157.

175. Bayley, *supra* note 164, at 151.

176. See Kelling et. al., *supra* note 105, at 4 (noting that supervision in community policing framework must emphasize such techniques).

177. At least one police commander in Pittsburgh has noted that while the Pittsburgh consent decree hurt morale, its reporting requirements have had the beneficial effect of providing both the police and the Pittsburgh community with a more accurate assessment of the frequency of police uses of force. Brian Donohue & Kathy Barrett Carter, Troopers Could Face Oversight for Years, *Star-Ledger*, May 1, 1999.

established expectations about what will and will not work in promoting both police accountability and the provision of superior police services.<sup>178</sup> Police departments in fact have much to gain from the institution of early warning systems. But these systems will best achieve their designers' objectives when the police themselves buy in.

There is yet another point to be made along these lines. The Pittsburgh and Steubenville consent decrees require numerous changes in the administration of the two departments. Some of these changes simply bring the departments up to prevailing professional standards that are already widespread among American police. Other reforms go somewhat beyond what is required in similar programs found in other departments.<sup>179</sup> Even with regard to these latter reforms, however, the Justice Department is elaborating upon existing administrative practices. The Department's remedy for the patterns of police illegality alleged in the Steubenville and Pittsburgh complaints, then, may well require sweeping changes among the police of these two cities. The remedy nevertheless boils down to a simple requirement: that the two departments adopt those existing managerial practices that both reflection and experience suggest may help minimize police abuse.

It is interesting to note what this reform project omits. The consent decrees do not reflect any overall philosophy that should guide the delivery of police services. The Clinton Administration has elsewhere supported the philosophy of community policing—both rhetorically and with federal funding. There is little in these decrees, however, that would signal any commitment in this regard. Admittedly, representatives of the Pittsburgh Bureau of Police are required "to make every effort to participate in [community] meetings, including meetings organized by or

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178. For a theoretical discussion of the role of benchmarking in the provision of governmental services, see Dorf & Sabel, *supra* note 153, at 345-48.

179. Other metropolitan police departments have early warning systems, for instance, but it is likely that the Pittsburgh system, when fully operational, will be truly "state of the art." See *supra* notes 110-31 and accompanying text.

oriented towards minorities."<sup>180</sup> Both decrees require that citizens have ready access to administrative processes for filing complaints; they also require periodic public reports on the investigation and adjudication of such complaints.<sup>181</sup> To the extent the consent decrees suggest any philosophy of policing, however, they would seem to place faith in police professionalism—in the notion that adherence to professional standards for things like training, discipline, and supervision represents the best safeguard against police deviance, if not the best assurance of superior police performance.

This is not too surprising. After all, community policing is a theory about the provision of policing services, not the constraint of unlawful police conduct. It posits that working partnerships between police and communities—partnerships in which communities play a greater role in setting local police priorities and in improving the quality of life in neighborhoods—can help reduce crime and promote security. Community policing, then, is not facially about controlling police illegality. Moreover, even ardent supporters of community policing do not deny that its prescriptions for decentralized police decisionmaking and close connections between community residents and police raise legitimate concerns about corruption.<sup>182</sup>

Though perhaps superficially unrelated to debates about police integrity and accountability, however, community policing in fact has significant lessons to offer on these subjects. Most importantly, community policing implies that our very notion of police accountability—the "ambit of accountability," so to speak—must extend beyond the minimization of illegality.<sup>183</sup> Community members are legitimately concerned with the emphasis placed in a police

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180. Pittsburgh Consent Decree, *supra* note 42, at ¶ 31.

181. See *supra* notes 83-89 and accompanying text. See also Pittsburgh Consent Decree, *supra* note 42, at ¶ 69; Steubenville Consent Decree, *supra* note 42, at ¶ 63.

182. See, e.g., Mark Harrison Moore, Problem-Solving and Community Policing, in *Modern Policing*, 99, 144 (Michael Tonry & Norval Morris eds., 1992) (noting concern that community policing may reinvigorate police corruption).

183. Bayley, *supra* note 164, at 153.

department on proactive stops—however lawful—as opposed to community mobilization for crime prevention; neighborhood residents may likewise reasonably desire input into police policies regarding the response to domestic violence or to loitering youth. As Professor Bayley has said, "the need for accountability is rarely considered with respect to decisions such as these even though they profoundly affect what law-enforcement and the protection of life and property mean in practice."<sup>184</sup> Community policing, then, does not discount the importance of police adhering to law, but it does place new and needed emphasis upon police accountability to communities across a range of *lawful* police decisionmaking. Moreover, it implies ways in which community members themselves can be part of the accountability project.

It is vitally important that we develop ways to think about police accountability to communities as part of the overall task of reforming police. The Steubenville and Pittsburgh consent decrees themselves illustrate the need for this broader conception of accountability. These decrees seek to further accountability to law—to minimize those instances in which police violate constitutional and statutory norms—in part by ensuring that police managers have more information about the conduct of their officers on the street. This very move, however, also adds to the information that police maintain about citizens. The Steubenville decree, for instance, requires that easily accessible records be maintained reflecting the names of all citizens stopped by police, in traffic or otherwise, and the date, time, and location of such stops.<sup>185</sup> Similar records in Pittsburgh must also contain the names and contact information for all witnesses to specified police actions; these records must be computerized.<sup>186</sup> To be clear, these provisions are not dramatically different from record keeping requirements in some other departments;

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184. *Id.*

185. See Steubenville Consent Decree, *supra* note 42, at ¶ 24.

186. See Pittsburgh Consent Decree, *supra* note 42, at ¶ 15.



whatever civil liberties costs are attendant upon the maintenance of such records, moreover, will presumably be more than offset by the records' value in constraining police illegality. The example nevertheless points to the fact that police activities—even those directed at the control of police abuse—impact on citizens' lives in many ways that can be vitally important, but that often go unremarked and unregulated by positive law. Community policing theory, then, may not be facially directed at traditional issues of police accountability. Its premises, however, appropriately broaden the ambit of police accountability to include a more extensive set of community concerns.

Despite the vital importance of bringing to police departments many of the principles and values associated with community policing, however, these observations are not made to suggest that the Justice Department erred by not requiring the Steubenville and Pittsburgh police to adopt this policing philosophy. More significantly, the observations here point to those aspects of police reform that cannot be legislated, at least in the form of a consent decree. The changes mandated in the Steubenville and Pittsburgh decrees are directed at facilitating good police management and at providing line officers with the training and supervision necessary to minimize police illegality. As the Attorney General has recently noted, however, the project of fostering police integrity also involves developing among police officers a problem-solving, community service orientation to their work.<sup>187</sup> This project requires police departments to transcend the command and control strategies that have pervaded American policing in favor of a style of supervision better able to tap into the abilities of line officers, to reward creative performance, and to appeal to police officers' idealism and motivation for public service.<sup>188</sup> This broader project of police reform—a project that demands able and humanistic police leadership capable of rendering concrete

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187. See Nat'l Press Club Speech, *supra* note 160.

188. See Kelling et. al., *supra* note 105, at 2-3.

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many of the abstract values found in community policing theory—will no doubt benefit if the Justice Department successfully promotes among local police many of the measures outlined in the Steubenville and Pittsburgh decrees. Adoption of these measures, however, is no substitute for this broader reform effort.

### CONCLUSION

The advent of Section 14141 enforcement raises many empirical questions which must await further study and elaboration. For instance, Attorney General Reno recently noted that even as the Justice Department has pursued its Section 14141 investigations, it has worked with police agencies to "address police integrity issues without litigation, where possible."<sup>189</sup> How has the Department used informal measures to secure administrative reforms? Have such measures been effective and have they avoided some of the costs of full-blown litigation? In addition, scholars need to determine how the Department has chosen to allocate its resources for Section 14141 enforcement among the thousands of police agencies around the country. They should pay attention to the changes Section 14141 has already produced in those police departments where managers have consulted the Pittsburgh and Steubenville decrees. Finally, careful study is needed concerning the implementation of these decrees in their respective cities. What changes have these decrees produced and what unintended consequences have they brought about? Research on such subjects is important, for it can inform future enforcement efforts and enhance the Justice Department's capacity to play a positive role in stemming police abuse and promoting police integrity.

Section 14141, in sum, offers a new remedy for systemic police misconduct which legal scholars should not ignore. For many scholars, criminal procedure literature is mired in "the old doctrine-gaming"—the uninspired

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189. See Nat'l Press Club Speech, *supra* note 160.

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evaluation of Supreme Court opinions as retrenchments on, or extensions of, Warren Court precedent.<sup>190</sup> The old doctrine-gaming is particularly stale, critics say, because "the doctrine is less important in achieving its supposed goal—the proper administration of criminal justice—than might once have appeared to be the case."<sup>191</sup> Provided that critics are even partly right in asserting that it is time for criminal procedure scholarship "to look to places other than the Court for ways of addressing the larger questions about criminal justice,"<sup>192</sup> this essay, though narrow in focus, may serve to point in new directions.

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190. Weisberg, *supra* note 16, at 530.

191. Robert Weisberg, Foreword: Criminal Procedure Doctrine: Some Versions of the Skeptical, 76 *J. Crim. L. & Criminology* 832, 854 (1985)[hereinafter "Some Versions of the Skeptical"]. See also Weisberg, *supra* note 16, at 530 (noting that criminal procedure scholarship erroneously "assumes the opinions are effectual and significant in the terms in which they are written").

192. *Some Versions of the Skeptical*, *supra* note 191, at 855.