

TESTIMONY OF RICHARD JEROME BEFORE THE NEW JERSEY ADVISORY COMMITTEE ON POLICE STANDARDS

I. Introduction

I would like to thank the Committee for inviting me to testify at this hearing of the New Jersey Advisory Committee on Police Standards. Governor Corzine should be commended for establishing this Committee to address issues that are at the heart of police reform today – police accountability and bias-free policing. While there have been significant strides in many jurisdictions in improving police-community relations and enhancing police integrity, distrust of the police, particularly in minority communities, continues at unhealthy levels.

The Committee's mandate is very close to work that I do. At the Department of Justice, I was Attorney General Reno's point person on police accountability and racial profiling issues, and helped oversee the Civil Rights Division's "pattern or practice" program when the New Jersey investigation and settlement was being conducted. Since 2001, I have been in private practice working on police reform and civil rights issues. I am currently the court-appointed special master and Deputy Monitor in two settlements in Cincinnati. One of those is a Memorandum of Agreement (MOA) with the Justice Department, under the pattern or practice program. The second is a class action settlement called the Collaborative Agreement, that addresses concerns regarding racial profiling and police-community distrust.

In many ways, what the Committee is looking at in New Jersey is similar to the issues we face in Cincinnati. We are now in the fifth year of a five year agreement, and much of our energy as the Monitor Team is focused on getting

the parties to these agreements to set priorities for this final year, and to address how the reforms in these agreements can be continued and institutionalized after the agreements terminate and the Monitor team goes away. Changing organizational culture is not an easy thing, and there can be situations where the police department simply holds its breath until the agreement is over and then goes back to the old ways of business as usual.

My testimony today will address different models of police accountability, including both external civilian oversight, and ways of internally promoting accountability in a law enforcement agency. But I also want to spend a little time talking about racial profiling and bias-free policing. Let me start with that.

II. Racial Profiling

The sentiment against racial profiling is universal, but there is little consensus on its definition. Many police agencies at the start of the racial profiling debate defined racial profiling as when an officer took a police action “solely” on the basis of race. This definition, however, misses the point. No officer, even the most biased, uses race as the only basis for his or her action. At the other end of the spectrum, a definition that says that any use of race, in any context, is racial profiling is too broad. The New Jersey State Police have done an admirable job in setting out its policies on what officers can and can’t do.

The principle lesson is that officers cannot use a person’s race, ethnicity, or national origin as a shortcut for suspecting them of criminal activity. Race can be a ‘descriptor’ but not a ‘predictor.’ A person’s race or ethnicity by itself should not be a reason that officers heighten their suspicion of that person. Instead, the

officer's actions must be based on the behavior of the individual, or on reliable information that leads the officer to believe that the person he is encountering has committed, or is in the process of committing, a crime. An important question for the officer to ask is: "Would I be stopping this person, if he or she were white?" This is the "but for" test for assessing bias-free policing.

I can't speak to the specifics of the current situation in New Jersey and the Monitor's findings. I will say that in finding substantial compliance with all of the consent decree's provisions, the New Jersey State Police is in a better situation than a number of other jurisdictions under pattern or practice agreements. Also, with respect to racial profiling issues, there are significant differences between highway enforcement and policing in urban neighborhoods. However, my understanding is that while New Jersey State Police officers do a significant amount of highway policing, they have significant other responsibilities.

Police agencies must deal – harshly – with those officers who are intentionally discriminatory. Often, however, it is unconscious bias and institutional pressures that influence police actions. The police are often dealing with the dangerous offenders in high crime neighborhoods; but they cannot assume the worst when dealing with others.

Cincinnati is an interesting example. As part of the Collaborative Agreement, the City brought in the RAND Corporation to conduct a comprehensive evaluation of the impact of the agreement and assess progress towards the goals of the collaborative. In RAND's 2005 report, while RAND did not find evidence of a pattern of bias in policing, it did find that blacks and whites

in Cincinnati experience two very different styles of policing. Black residents in the City are more likely to live in neighborhoods characterized by crime and disorder. Residents in high-crime neighborhoods are more likely to see, and experience, “aggressive policing,” such as more invasive traffic stops, and individuals being stopped and patting down on the street corner. While neighborhood crime rates rather than race may be the rationale for these actions, if the message from police leadership to the street cop is simply to make more stops in high crime neighborhoods, and those neighborhoods are predominantly black or Hispanic, law abiding black and Hispanic residents will bear a heavier burden.

Concerns about racial profiling involve not only why the stop was made, but also the officer’s actions after the stop. Discretionary decisions on who gets asked for consent to search, who gets searched, who gets asked to exit the car, or whether canines are brought to the scene cannot be based on the race of the motorists. Again, however, even if the individual officer’s actions are not based on racial bias, but instead on where the stop is made (e.g., in higher crime neighborhoods), minority residents will likely be treated more intrusively.

There are a number of efforts that agencies need to take to address concerns about racial profiling. I believe the New Jersey State Police are using a number of these already. First, agencies should have a clear and widely disseminated policy prohibiting law enforcement officers from discriminating on the basis of race, ethnicity, national origin, religion, gender, disability, or sexual orientation in performing their law enforcement duties. Second, agencies need to

incorporate bias-free policing in their training efforts, for academy, in-service and management training. Third, agencies should put in place methods of monitoring and assessing the conduct of officers on traffic stops. These methods include data collection, citizen satisfaction surveys, the use of in-car video systems, an effective citizen complaint system, and supervisory oversight.

Many jurisdictions have begun the data collection process with high expectations that it will answer “bottom line” questions regarding the existence, or not, of officer bias and racial profiling. Collecting data on the race of persons stopped by the police is not a panacea, however, and these expectations are often disappointed. Communities around the country have found that the analysis of traffic stop and pedestrian stop data is more complicated and ambiguous than they anticipated. The results can be helpful, but they are never definitive. The general experience in many jurisdictions is that there have been racial disparities in stops, with blacks and Hispanics stopped at a higher percentage than whites, compared to their population percentage.¹ But at least some of this disparity can be explained by non-racial factors. For example, high crime neighborhoods are generally correlated with poverty, and correlated with minority populations. If there are more police deployed in minority neighborhoods, they will be stopping more minorities.

In addition to examining stops, data collection efforts have also reviewed what happened after the stop – which motorists get searched, or are asked for

¹ One of the difficulties in traffic stop analysis is determining what the appropriate benchmark is against which the racial percentage of traffic stops should be compared. Different studies have used Census data, traffic observation surveys, accident data and other measures, each of which has significant limitations.

consent to search, which are cited, what was the duration of stop, and what was the result of the stop (e.g., citation, arrest, or warning). Here too, many jurisdictions have identified racial disparities in police action.

A significant benefit of data collection is that it leads to a larger public discussion about how policing should be conducted in the jurisdiction. The issues of community distrust and concerns over biased policing go well beyond just traffic stops. These concerns extend to arrests, use of force, who goes to jail, and disproportion in the criminal justice system as a whole. In this light, it is necessary for us to examine what we are asking our police to do.

Police agencies are often faced with conflicting expectations. On the one hand, residents of high crime neighborhoods express concerns about the lack of police visibility and demand more police services and protections. We respond to these concerns by increasing police deployment in these neighborhoods. Emphasis on crime “hot spots” and other efforts to target criminal activity have similar effects. This can lead to even greater disproportionality in stops. Police departments need to openly discuss their deployment decisions and strategies so that their actions do not lead to increased complaints about police activity from the very same communities that are seeking greater police presence. Are traffic stops being used in the inner city as a crime suppression tool? Are pedestrian and traffic stops being done at officers’ discretion for legal, but often pretextual reasons, to dampen crime in high crime neighborhoods? If so, how well are they working? Are there modifications that should be made to an agency’s search policies or practices? Police departments cannot successfully address racial

profiling and community distrust of police unless they forthrightly engage the community and examine how their police strategies impact community members, particularly persons of color. The right police strategy is one that effectively reduces crime, makes people feel safer, and reduces perceptions of police unfairness and bias.

III. Police Oversight

Police accountability requires internal systems for holding officers accountable when they engage in misconduct, including better systems for investigating citizen complaints, and risk management systems for identifying officers who have engaged in “at risk” behavior. For accountability to take hold, these police “best practices” need to be adopted by the agency, reviewed by appropriate oversight entities, and embraced by both police leaders and the political leadership of the jurisdiction.

The goals for entities engaged in civilian oversight of law enforcement agencies include the following:

- To reduce misconduct by providing an objective review of citizen complaints and identifying improper behavior and ensuring appropriate discipline is imposed;
- To identify patterns of or trends in misconduct;
- To recommend or develop improvements in police policies, procedures, tactics, and training that will serve to increase police integrity and improve the performance of the police department;

- To help create systems that identify and address potentially problematic behavior before discipline is warranted;
- To increase public trust in the police and strengthen the relationship between the community and the police;
- To foster officer trust in the integrity and fairness of complaint investigations and the disciplinary process;
- To provide a forum for public concern and comment regarding the police department, and bring transparency and outside scrutiny to an agency often viewed as insular.

The challenges facing citizen oversight entities are great. It is difficult for them to be effective in reviewing and prompting change in a law enforcement agency, when those agencies are traditionally insular and suspicious of outsiders, jealous of their own authority to manage and discipline their members, and where those members have legitimate, but often times overwhelming, procedural rights and protections for their actions. Oversight entities have to maintain credibility with groups in the community that have widely different, and sometimes polar opposite, views of the police, and still retain the support of the agency's appointing authority.

Key factors that are critical to the success of a citizen oversight agency include: (1) ensuring sufficient authority for the agency and the organizational capacity to carry out that authority; (2) establishing the agency's credibility and impartiality; (3) managing the stakeholders' expectations of the agency; and (4) effectively conducting outreach to the public.

A. Models of Oversight

There are a variety of models of law enforcement oversight around the country, and I will address some of the principle types of entities and their pros and cons. One thing I want to note at the beginning of this discussion is that almost all of these entities function in a city or county. As far as I know, there are no civilian review boards for state police and statewide highway patrol agencies. Some states do have Inspector Generals, and many states have State Auditors, but for the most part, these entities tend to investigate and audit financial misconduct: “waste, fraud and abuse.” So I will start with what models that have been applied to local police, and then talk a little about the few examples I know of monitoring of state police agencies.

One type of civilian oversight is a **civilian review board** or commission. Generally, their members work on a voluntary basis, and their findings and recommendations are advisory. Most of these boards focus their efforts on reviewing citizen complaint investigations, or act as an appellate review of complaints where the citizen is not satisfied with the findings of the police department’s internal affairs bureau.²

A second variant of the civilian review board is where the board or commission has a professional staff, and itself undertakes the investigation of citizen complaints. Examples include the Citizen Complaint Authority in

² Many review boards were enacted with very limited powers. While some boards were given authority to consider matters of policy and to make recommendations, few boards were given the resources to meaningfully exercise that authority. Also, board members’ lack of training in police procedures, tactics, and strategy has prevented many review boards from effectively overseeing the police. Additionally, many review boards have lacked adequate staff, leading to a large backlog of unresolved cases. As a result, many review boards have had difficulty providing meaningful oversight.

Cincinnati, the CCRB in New York City, and the Office of Police Complaints in Washington, DC.

A fairly recent development in police oversight is the creation of a paid position, where the entity is responsible for assessing and evaluating the work of the police department's internal affairs bureau and reviewing the department's policies, practices and training. These entities are generally called a **monitor, auditor, Inspector General or ombudsman**. Examples of this type of oversight include the Inspector General for the LAPD, the San Jose Independent Police Auditor, Tucson's Independent Police Auditor, Boise's Ombudsman, Portland Oregon's Office of Independent Police Review, and Denver's Office of Independent Monitor. Generally, the authority and responsibilities of the agency are set out in a city ordinance, although there are two examples in Los Angeles County where the office was established through a contract. For the past nine years, the LA County Commission has hired a Special Counsel, Merrick Bobb, to monitor the LA Sheriff's Department policies and practices, and recently, the County also created through contract the Office of Independent Review, which audits the Sheriff's internal investigations. In most of these cases, the monitor or auditor reports to the city manager, the mayor or the city council, rather than to the police chief.³

³ One goal of the monitor oversight model is to look at the Department in its entirety to make judgments over time regarding how well the Department minimizes the risk of police misconduct, identifies and corrects patterns and practices of unconstitutional and illegal behavior, and finds solutions to systemic failures. This oversight model also examines how individual officers perform, how supervisors and executives respond, and how the department as a whole manages the risk that its employees engage in unconstitutional or illegal behavior.

A principal strength of monitor models is the ability to address systemic issues and to seek accountability within the police department for eliminating problems and abuses. As opposed to many civilian review boards, monitors are focused on systemic change more than on resolution of specific cases. Many do, however, also have the ability to require the police department to conduct additional investigation in specific cases, if they determine that the initial investigation was insufficient. For instance, the Denver Office of the Independent Monitor has full access to police department records, subpoena power, and the right to attend police interviews. The Monitor can conduct an independent investigation if he finds the departmental investigation insufficient. The Monitor in Austin and the Auditor's office in Portland have similar powers. The most effective monitor models have the authority to review internal investigations, such investigations of serious uses of force, as well as citizen complaint investigations. They also have the authority to review ongoing investigations in addition to closed investigations, and in that way can recommend to the police department improvements in how the investigation should proceed.

There have also been hybrid models, such as the police oversight system in Albuquerque, New Mexico. There, the Independent Review Office determines whether a citizen complaint will be investigated by its office or by the Police Department's Internal Affairs unit, and the findings of each agency are reviewed by the other before being sent to the Chief. If the citizen is dissatisfied with the Chief's decision, he or she may appeal the decision to the Police Oversight Commission, a volunteer review board.

You will be hearing at a future hearing from Professor Sam Walker on the issue of police oversight. He lists a number of core principles for oversight entities. These include:

- Independence
- Defined Scope
- Adequate Resources
- Unfettered Access
- Sanctions for Failure to Cooperate
- Public Reports
- Community Involvement
- No Censorship by the Police Department, and no Retaliation

B. State Police and Highway Patrol

As I mentioned earlier, there are no civilian review boards that I know of that deal with state police or highway patrol. There are state offices such as IG's and Auditors that sometimes have the authority to investigate state police practices beyond financial misconduct. The most recent example of that is Pennsylvania's Office of Inspector General, which in 2003 conducted an extensive investigation of sexual misconduct by state police officers, sexual harassment in the agency, and the agency's complaint processes. After issuing its report, the governor of Pennsylvania hired a private firm, Kroll Associates, as a monitor to assess whether the State IG's recommendations were being implemented. Another example of an IG office with oversight responsibility is the California Office of the Inspector General. While the California IG does not oversee the California

Highway Patrol, it is the state agency charged with independent oversight of California's correctional system. In 2004, it added a Bureau of Independent Review to ensure the integrity of internal affairs investigations of allegations of serious misconduct in California's prisons. The Bureau was established to assess the Department of Correction's implementation of reforms ordered by a federal court.

Another example of civilian oversight stemming from high-profile misconduct allegations was the Governor of Tennessee's decision to bring in Kroll Associates to review allegations of political influence in Tennessee Highway Patrol's hiring, assignment and promotional practices.

Bringing in an outside entity to audit and monitor efforts at police oversight can also be a way to assess progress in the oversight system. As part of a new system of police oversight being implemented in the City of Albuquerque, the City incorporated into its ordinance that the system would be reviewed by an outside contractor after two years of implementation. In 2003, the City Council hired myself and PARC and to review their new system and make recommendations. Many of those changes were made, and City sought a second review just this year.

C. Internal Affairs and Inspections

Let me now finish up with a short discussion of internal mechanisms to promote accountability. Clearly, law enforcement agencies such as the New Jersey State Police must have a credible internal affairs unit that conducts thorough and fair investigations of police misconduct. These investigations will

include both citizen complaints, and internal investigations that stem from uses of force, such as officer involved shootings, as well as other allegations of misconduct brought to the Department's attention, often by supervisors or an officer's colleagues.

In addition to an Internal Affairs unit, a law enforcement agency the size of the New Jersey State Police should also have a unit responsible for inspections and audits. And here, I am talking about audits and inspections that go beyond the kind of roll call and staff inspections of officer's weapons and uniforms or assessing whether police cars are properly equipped. In general, the goals of an Inspections unit are to ensure that

1. Policies and procedures of the Department are adhered to;
2. Police orders and instructions have been effectively carried out;
3. Information concerning the quality of services delivered and its effectiveness is surveyed, evaluated, and shared;
4. Resources are adequate for achieving the Department's objectives, and utilized properly; and
5. Specific needs or requirements for change are identified and police management is informed of problems of the Department on a routine basis.

The Inspections section must have access to all records, facilities, property and equipment of the agency, and must have the full backing of the leadership of the agency and report to the Chief or Superintendent.

Ideally, audits conducted by the Inspections unit would be done on a regular basis, with protocols and checklists consistent with the GAO's standards for audits, known as the "yellow book." This is a standard that to date has not been brought into most police agencies, although the California POST (Peace Officer Standards and Training) has developed standards for audits in California agencies. Examples of the kind of systems that ought to be subject to audits include: police overtime; review of sick, injured and light duty officers; off-duty employment; property room systems; crime statistics; and any crime lab and forensics work.

Again, the purpose of the Inspections unit is organizational problem solving and improvement; it is separate from internal affairs and specific investigations of the activities of individual officers.

Once again, I would like to thank the Committee for the opportunity to testify, and I would welcome any questions that Committee members may have.