

CHANGING THE CULTURE OF THE CUSTOMS AND BORDER PROTECTION AGENCY:

LESSONS FROM RECENT DEVELOPMENTS IN MUNICIPAL POLICE ACCOUNTABILITY IN THE U.S

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The Challenge – And a Path to Change

The challenge at hand is to change the culture of the Customs and Border Protection (CBP), to instill professional standards of conduct, and to develop an internal organizational culture that accepts both accountability and transparency.¹

Fortunately, there have been a number of important developments in police accountability in the U.S. in recent years, and the lessons of that experience point the way toward meaningful reform of the CBP.

The Problem of the Culture of Police Organizations

The culture of police organizations is one of those subjects that everyone talks about but about which there is precious little social science evidence.²

In brief, the police culture consists of the routine work habits of police officers, particularly with respect to their interactions with people. One way to put it simply is to see it as what officers know that they have to do to avoid getting in trouble and, conversely, what they know they can get away with.

We can illustrate this point with reference to officer use of force.³ Does an officer have a clear understanding of when he or she may use physical force? Does an officer know that a use of force report must be completed with detail about what behavior led to the use of force? Does an officer know that the immediate supervisor will critically review the report, and in some cases demand more information, and in some cases file an excessive force report with internal affairs? Does the internal affairs (or professional standards) unit conduct critical investigations of excessive force reports, looking for contradictions, interviewing other officers, looking for possible witnesses?⁴

The American Immigration Council report *No Action Taken* clearly indicates that virtually all of the points in the preceding paragraph are not present in the CBP.⁵ The culture of the agency is one where officers are reasonably certain that they will not be forced to give true and complete accounts of why they used force, and that they are very unlikely to be disciplined for uses of force that would result in discipline in more professional law enforcement agencies.

How Do We Change the Police Culture?

How then do we change the culture of a police organization? As indicated at the outset, we have precious little social science research on police culture and even less on how to change it.

The good news is that we do have a growing body of experience with accountability-related police reform that is relevant to this issue.⁶

The principal point of reference involves the various consent decrees negotiated by the U.S. Department of Justice Special Litigation Section as settlements in its “pattern or practice” litigation program. These consent decrees (or memoranda of agreement) include two key components: the substantive reforms that are mandated and the court-appointed monitor who oversees implementation of the reforms. The latter, it needs to be stressed, is as equal important as the former.⁷

The substantive reforms consist of three basic components.⁸

- (1) State of the art use of force policies, broadly defined. The force policy includes detailed protocols related to officer documentation of incidents, the investigation of incidents, and the command review of patterns and trends.
- (2) An Early Intervention System (EIS).⁹ In brief, an EIS is a computerized data base of officer performance, with anywhere from five to 25 performance indicators. Officers identified as having a high rate of problematic incidents are subject to an Intervention that directly addresses their performance problems.
- (3) An open and accessible citizen complaint process.¹⁰ Citizen complaints are increasingly recognized as valuable “management information” that provide an indication of possible officer performance problems. Citizen complaints, moreover, are one of the important performance indicators in an EIS.¹¹

The principal function of a court-appointed monitor is to oversee the progress of the implementation of the above reforms and to make periodic reports that are public documents.¹² In practice, monitors play several important roles. They not only prod the department to make continued progress toward full implementation but also serve as a resource by providing models of policies and practices from other departments.

The public reports provide a window into the department and represent an important element of transparency.¹³

The role of court-appointed monitors can by legislative action be continued after the end of a consent decree in the form of a permanent independent, external monitor (often referred to as a police

auditor), which can serve to ensure the continuity of the reforms and provide an on-going avenue of transparency.¹⁴

How Does This Process Change the Culture of a Department?

The reform process described above begins to change the culture of a law enforcement agency in several ways.

First, the state of the art use of force policy, in all of its dimensions, over time instills in officers the principle that they must account for their actions and be held accountable by supervisors for violations of department policies.¹⁵

Second, the Early Intervention System instills in officers the principle that they will be held accountable for documented patterns in their interactions with citizens, and will be subject to corrective intervention for performance problems.¹⁶

Third, as already mentioned, the court-appointed monitor introduces a new standard of transparency in the department.¹⁷

Has the DOJ Consent Decree Experience Proven Successful?

There is a growing body of evidence that DOJ consent decrees have been successful in introducing new standards of accountability within the affected departments and by implication begun to change the culture of those organizations.

In their final reports, the court-appointed monitors in Washington, DC, and Pittsburgh concluded that the departments in question had been significantly changed for the better.¹⁸

An evaluation of the Pittsburgh Police Bureau concluded that the department had been significantly changed for the better.¹⁹

An evaluation of the Los Angeles Police Department by a team from Harvard University concluded that the department was “much changed,” with significant changes in its “mainstream culture.” The reforms, moreover, did not adversely affect the department’s ability to respond to crime effectively, and crime in fact fell during the consent decree period.²⁰

At a 2012 national conference on DOJ “pattern or practice” litigation sponsored by the Police Executive Research Forum (PERF), former chiefs and current high ranking commanders with

departments that had been subject to consent decrees stated that despite the costs and pain of the consent decree experience their departments were better for as a result.²¹

Rank and file police officers regularly argue that the accountability-related reforms in consent decrees will cause them to reduce their law enforcement activities out of fear that they will be more likely to be disciplined.²² This argument is known by the name “de-policing.” Both the Pittsburgh and Los Angeles evaluations examined this argument and found no evidence to support it. In fact, there is no evidence from any source to support to “de-policing” argument.²³

Are consent decrees expensive? Yes. But the dollar costs are offset by the significant reductions in prior civil liability costs of officer misconduct.

The Relevance to the Customs and Border Protection Agency

Recent reports on the CBP document its shortcomings with respect to accountability and transparency.

The American Immigration Council *No Action Taken* Report

** The American Immigration Council report *No Action Taken* found that in 97 percent of the complaint allegation cases where a decision was reached no action was taken.²⁴

** The *No Action Taken* report concluded that the “complaint system is a rather ornamental component of the CBP”

** The *No Action Taken* report cited cases where no disciplinary action was taken in a case where a female was kicked and she subsequently miscarried; where a person in custody was “stomped on his back after he had lain on the ground,” and no action was taken; where a person in custody was threatened with death (“Don’t Move or I’ll Kill You”), and no action was taken.

The Police Executive Research Forum *Use of Force Review: Cases and Policies* Report

The Police Executive Forum *Use of Force Review: Cases and Policies* report found many policies and practices in the CBP that do not meet current best practices in the field, and in some instances have been the subject of reforms instituted decades ago.²⁵

** CPB tolerates the use of deadly force in rock throwing incidents where there is no imminent threat to the life of the officer or another person. The threat to life standard for the use of deadly force was developed by municipal police departments as far back as 1972.²⁶

** The CPB permits the firing of weapons at moving vehicles where there is no imminent threat to the life of the officer or other people. This practice began to be forbidden by municipal police departments in 1972.²⁷

The two points above indicate that the CBP is forty years behind developments in the field of municipal policing in the U.S.

** The CBP does not require officers to report all incidents where rocks are thrown at officers. The result is a lack of data that would provide a complete picture of patterns of threats to and assaults on officers.

** The report found a “lack of diligence” in the investigation of use of deadly force incidents. As argued earlier in this paper, thorough investigations of all use of force incidents, both deadly and non-deadly force, are a crucial component of establishing a culture of accountability.²⁸

** The CPB does not conduct trend analyses of use of deadly force incidents.²⁹ An EIS system can provide both a detailed data base and an efficient means of conducting pattern and trend analyses of all critical incidents.

**CBP officers do not have readily available less-lethal weapons that often can provide a better alternative to a critical incident than a firearm.

The Culture of Cruelty Report

The *Culture of Cruelty* report documented a wide variety of abuses of human rights by the CBP. They include denial of food and water, physical abuse, denial of emergency medical attention, unsanitary detention facilities, extremes in temperatures in detention facilities, failure to return personal belonging, including documents, and other abuses.³⁰

All of the abuses cited above can and should be subject to clear written policies and subject to an investigative process similar to the kind that is now standard in municipal policing with respect to the use of force.

Implementing a Strategy of Accountability-Related Reforms

Implementing accountability-related reforms that are likely to change the culture of the CBP requires a strategy involving several components. They include both external and internal reforms.

Internal Reforms

The recommendations of the 2013 PERF report are excellent and consistent with current best practices in municipal policing.³¹ These recommendations should be aggressively pursued. An independent monitor to oversee the implementation process is strongly recommended.

The PERF recommendations, however, are almost entirely limited to use of force policies, the investigation of use of force incidents, and use of force equipment. Missing from its recommendations are any related to internal and external monitoring, particularly independent external oversight of the CBP with respect to use of force and the treatment of persons in detention. This issue is discussed in the next section.

The CBP should also take immediate steps toward implementing an Early Intervention System. An EIS is now recognized as a basic accountability tool for identifying and correction individual officer problems and also for analyzing patterns and trends in department-wide performance.³²

External Reforms

The *Culture of Cruelty* report recommends a system of “independent, non-governmental oversight of the CBP.”³³ While this recommendation should be pursued, some important details of the exact form of independent oversight need further discussion.

In the judgment of this author, the oversight body should not engage in the direct investigation of complaints that are filed against the CBP or be responsible for the discipline of officers. This point may strike some people as counter-intuitive and it requires some explanation.³⁴

If the goal is to develop a culture of accountability within the CBP, that entails making the CBP itself responsible for investigating complaints against its officers and taking appropriate disciplinary action where appropriate –subject to external review and monitoring.³⁵

The principal role of the external oversight process should be to monitor the activities of internal accountability procedures of the CBP and not to supplant them. The review should involve regular reviews of force incidents to ensure that officers are complying with official policies, regular reviews of the investigation of force incidents to determine that they are thorough and unbiased, and

regular reviews of disciplinary actions to ensure that they are appropriate, proportional to the misconduct that has been identified, and free of any pattern of bias.³⁶

Given the size of the CBP, it may be necessary and appropriate to conduct the reviews through a sampling process (e.g., 25% of all force incidents in a given quarter).

The findings of the reviews described above should be made public in periodic reports –with names of officers, private persons, and other personal identifiers redacted. Thus, the public report would read, “We examined X percent of all force incidents for a total of Y incidents. We found that in Z percent of the incidents, the officers were not in compliance with official policy. And so on.

The public reports should identify problems and deficiencies and include recommendations for improvement. When making recommendations, the public reports should freely draw upon best practices in municipal law enforcement.

CBP officials should have an opportunity to review the public reports in advance and attach their comments and criticisms. Apart from identifying clear factual errors, in no case should CBP officials have the power to censor or demand changes in the draft report. The external oversight agency, after all, should be an independent body over which CBP officials have no authority.

One of the special virtues of a permanent external oversight agency is its capacity to revisit past findings and recommendations to determine if the recommendations have been adopted.³⁷

Conclusion

A number of recent reports have documented the lack of accountability and transparency in the CBP. Documented abuses include unjustified use of deadly force, other forms of force, and abuses of basic human rights.

The key problem is the culture of the CBP, which as this paper has argued is a function of the absence of meaningful accountability policies and procedures.

Recent developments in police accountability in the area of municipal policing in the U.S. provide a road map for instituting proper accountability-related reforms, introducing transparency in the CBP, and ultimately changing the culture of the agency for the better.

The road map includes two basic elements: First, introducing recognized best practices with respect to policies on all forms of use of force and other critical actions by CBP offices; Second creating a process of independent external oversight of the agency that will ensure compliance with new policies and practices, the continuity of reforms, and a culture of transparency.

¹ See, for example, the discussion of the development of “structures of critical self-analysis” in the Seattle Police Department by Merrick Bobb, the Monitor overseeing the Consent Decree over the department. Merrick Bobb, Seattle Police Monitor, *Third Semiannual Report* (June 2014), p. 20.

² The problem of the police culture and police reform is discussed in Samuel Walker, “Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure,” *St. Louis University Public Law Review*, XXXII (No. 1, 2012): 57-92. See also Steve Herbert, “Police Subculture Revisited,” *Criminology* 7 (March 2006): 343-370.

³ The pioneering work on controlling police use of deadly force, which has influenced developments with respect to other police actions, is James J. Fyfe, “Administrative Interventions of Police Shooting Discretion: An Empirical Examination,” *Journal of Criminal Justice* 7 (Winter 1979): 309-323. On police use of force, see Geoffrey P. Alpert and Roger G. Dunham, *Understanding Police Use of Force: Officers, Suspects, and Reciprocity* (New York: Cambridge University Press, 2004); Candace McCoy, ed. *Holding Police Accountable* (Washington, DC: Urban Institute Press, 2010).

⁴ James K. Stewart, et al., *Collaborative Reform Process: A Review of Officer-Involved Shootings in the Las Vegas Metropolitan Police Department* (Washington, DC: Department of Justice, 2012). Available at http://www.cops.usdoj.gov/pdf/e10129513-Collaborative-Reform-Process_FINAL.pdf.

⁵ American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse. Special Report* (Washington, DC: American Immigration Council, May 2014). Available at <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>

⁶ This author’s basic framework for police accountability and the evidence on recent developments are in Samuel Walker and Carol Archbold, *The New World of Police Accountability*, 2nd ed. (Newbury Park, CA: Sage, 2014).

⁷ The work of the Special Litigation Section of the U.S. Justice Department, including investigative reports, consent decrees and memoranda of agreement, are available at its web site: <http://www.justice.gov/crt/about/spl/>. Assessments of the federal pattern or practice litigation program include: Samuel Walker and Morgan Macdonald, “An Alternative Remedy for Police Misconduct: A

Model State Pattern or Practice Statute,” *George Mason Civil Rights Law Journal*, 19 (Summer 2009): 479-552; Joshua Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of ‘Pattern or Practice’ Police Misconduct Reform* (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf> ; Stephen Rushin, “Federal Enforcement of Police Reform,” *Fordham Law Review* 82 (2014): 3189-3247.

⁸ There are some variations in the different consent decrees and memoranda of agreement, depending on the circumstances of each department, but the three core elements are almost universal. Walker and Macdonald, “An Alternative Remedy for Police Misconduct.”

⁹ Samuel Walker, *Early Intervention Systems for Law Enforcement Agencies: A Planning and Management Guide* (Washington, DC: Department of Justice, 2003). Available at <http://www.cops.usdoj.gov/Publications/e07032003.pdf>

¹⁰ The role of police auditors and their alternative, civilian review boards, is discussed Samuel Walker, *Police Accountability: The Role of Citizen Oversight* (Belmont, CA: Wadsworth, 2001).

¹¹ See the important discussion by former police chief Darrel W. Stephens, *Police Discipline: A Case for Change* (Cambridge: Harvard Kennedy School, 2011). Available at http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/NPIP-PoliceDisciplineACaseforChange-06-11.pdf. The subject of complaints as management information is discussed in Walker and Archbold, *The New World of Police Accountability*, pp. 104-136.

¹² The first report of the monitor for the Metropolitan police department, for example, found that no progress had been made in the first months of the Memorandum of Agreement. Michael R. Bromwich, *Special Report of the Independent Monitor for the Metropolitan Police Department* (June 12, 2002), p. 1.

¹³ The various roles of a monitor is discussed in Walker and Macdonald. “An Alternative Remedy for Police Misconduct,” 510-516.

¹⁴ Walker, *Police Accountability*.

¹⁵ This point is implicit in the extremely valuable report, James K. Stewart, et al., *Collaborative Reform Process: A Review of Officer-Involved Shootings in the Las Vegas Metropolitan Police Department* (Washington, DC: Department of Justice, 2012). Available at http://www.cops.usdoj.gov/pdf/e10129513-Collaborative-Reform-Process_FINAL.pdf.

¹⁶ Walker, *Early Intervention Systems for Law Enforcement Agencies*.

¹⁷ In Washington, DC, for example, the first report of the monitor found that the department had “failed to accomplish virtually all of the milestones identified in the MOA.” Michael R. Bromwich, *Special Report of the Independent Monitor for the Metropolitan Police Department* (June 12, 2002), p. 1. This indictment of the lack of progress was extremely important information for the local community, its elected officials, and the news media.

¹⁸ Michael R. Bromwich, *Twenty-Third Quarterly Report of the Independent Monitor for the Metropolitan Police Department* (2008), p. 4. Public Management Resources, *Monitor’s Sixteenth Report* (2007), p. v.

¹⁹ “ . . . among both police officials and civil rights groups, the Pittsburgh consent decree is generally viewed as a success in terms of increasing police accountability and improving officer training.” Robert C. Davis, et al., *Turning Necessity into Virtue: Pittsburgh’s Experience with a Federal Consent Decree* (New York City: Vera Institute of Justice, 2002), Executive Summary. Available at http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/TurningNecessityintoVirtue.pdf.

²⁰ Christopher Stone, et al, *Policing Los Angeles Under a Consent Decree: The Dynamics of Change at the LAPD* (Cambridge, MA: Harvard Kennedy School of Government, 2009).

²¹ Police Executive Research Forum, *Civil Rights Investigations of Local Police Departments: Lessons Learned* (Washington, DC: Police Executive Research Forum, 2013), pp. 34-35.

²² See, for example, the complaint filed by over 100 Seattle, Washington, police officers, alleging that the new use of force policy tied their hands and put them at risk, and asking that the court invalidate the new policy. Officers Robert Mahoney, et al. v. Eric Holder, et al., Civil Action C14-0794, U.S. District Court, Western District of Washington at Seattle (May 28, 2014).

²³ The lack of evidence on “de-policing” is in Davis, et al., *Turning Necessity into a Virtue*, 41-42, 51-52, 55-57; Stone, et al, *Policing Los Angeles Under a Consent Decree*, pp. 19-32.

²⁴ American Immigration Council, *No Action Taken*.

²⁵ Police Executive Research Forum, *U.S. Customs and Border Protection: Use of Force Review: Cases and Policies* (Washington, DC: Police Executive Research Forum, 2013).

²⁶ The year 1972 marked the introduction of a new deadly force policy in the New York City Police Department by Commissioner Patrick V. Murphy, and which was evaluated by Fyfe, “Administrative Interventions on Police Shooting Discretion.” See also McCoy, ed., *Holding Police Accountable*. Walker and Archbold, *The New World of Police Accountability*.

²⁷ Fyfe, “Administrative Interventions.”

²⁸ Stewart, et al., *Collaborative Reform Process*.

²⁹ Detailed trend analyses of officer use of deadly force has been one of the principal foci of the Special Counsel to the Los Angeles Sheriff’s Department for more than twenty years. The reports are available at http://www.parc.info/los_angeles_county_sheriffs_department.shtml. See also the recommendations on this point in the Collaborative Reform report on Las Vegas: Stewart, et al., *Collaborative Reform Process*.

³⁰ *A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody* (Tucson: Unitarian Universalist Church of Tucson, 2011).

³¹ Police Executive Research Forum, *U.S. Customs and Border Protection: Use of Force Review: Cases and Policies* (Washington, DC: Police Executive Research Forum 2013). For the national context, see Walker and Archbold, *The New World of Police Accountability*.

³² Walker, *Early Intervention Systems for Law Enforcement Agencies*.

³³ *A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody*. (2011).

³⁴ Walker and Archbold, *The New World of Police Accountability*.

³⁵ Bromwich, *Twenty-Third Quarterly Report of the Independent Monitor for the Metropolitan Police Department*, p. 4.

³⁶ This author's views on the proper functions of an oversight agency are set forth in Walker, *Police Accountability: the Role of Citizen Oversight*.

³⁷ The Special Counsel to the Los Angeles Police Department engages in regular re-examinations of issues covered in previous reports. All of the reports, with a convenient index, are available at <http://www.parc.info/home.shtml>. The annual reports of the Denver, Colorado, Office of the Independent Monitor contain a special section discussing follow-up reviews of previous recommendations. Available at <http://www.denvergov.org/Default.aspx?alias=www.denvergov.org/OIM>.