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Article

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INTRODUCTION

In March of 1991, two police squad cars pursued a suspected drunk driver speeding on a Los Angeles highway.[1] At first, the incident seemed routine.[2] But only minutes later, a video

1. The pursuit started around 12:30 AM when California Highway Patrol (CHP) officers first observed King's Hyundai speeding in the northern San Fernando Valley in Los Angeles. Seth Mydans, *Seven Minutes in Los Angeles—A Special Report.; Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES (Mar. 18, 1991), http://www.nytimes.com/1991/03/18/us/seven-minutes-los-angeles-special-report-videotaped-beating-officers-puts-full.html. When the CHP officers put on their emergency lights and sirens, King slowed but did not stop. INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 4 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT]. An LAPD squad car—assigned to Officers Laurence Powell and Timothy Ward—then joined the pursuit. *Id.*

2. At around 12:50 AM, Powell and Ward radioed in a "Code 6," which signifies that a chase had come to a close. Christopher Commission Report, *supra* note 1, at 4. The LAPD Radio Transmission Operator then broadcasted

taken by a nearby onlooker showed four Los Angeles Police Department (LAPD) officers brutally beating one of the car's occupants, a man named Rodney King, without any apparent provocation.[3] The images shocked and disgusted the country.[4] Within weeks of this atrocious incident, the U.S. House Subcommittee on Civil and Constitutional Rights convened a hearing to ask two important questions[5]: Why do these abhorrent cases of misconduct continue to plague American police departments? And how can the law combat this sort of wrongdoing?

Investigations by Congress and local officials in Los Angeles concluded that the Rodney King beating was not the result of a few rogue officers. It was indicative of a diseased organizational culture within the LAPD that condoned violence, tolerated racism, and failed to respond to wrongdoing.[6] The Rodney King incident was no aberration. It was part of a pattern and practice of misconduct that had afflicted the LAPD for years.[7]

a "Code 4," a notification to all officers that no additional assistance was needed at the scene of the pursuit. *Id.* at 5. Despite these transmissions, eleven additional LAPD units with twenty-one officers and a helicopter appeared at the scene; at least twelve of the officers arrived after the Radio Transmission Operator had sent out the Code 4 broadcast. *Id.* The Christopher Commission also found that "[a] number of these officers had no convincing explanation for why they went to the scene after the Code 4 broadcast." *Id.*

3. *See id.* at 3, 5. Amateur camera work by George Holliday caught a glimpse of the LAPD ruthlessly kicking and striking King "with 56 baton strokes." *Id.* at 3. King required twenty stitches and suffered a broken cheekbone and right ankle. *Id.* at 8. Within days, video of the beating made headlines across the country, sparking public protests and outcry. *See An 'Aberration' or Police Business As Usual?*, N.Y. TIMES, Mar. 10, 1991, at E7. Chief Gates called the incident "an aberration." *Id.* In the aftermath of these events, the City of Los Angeles formed an Independent Commission to formally investigate the conditions that precipitated the Rodney King incident, headed by Warren Christopher. *Cf.* CHRISTOPHER COMMISSION REPORT, *supra* note 1, at vii–viii. The Christopher Commission Report found a wide range of systematic problems affecting the LAPD including problems with use of force, complaint procedures, training policies, and structural organization. *See id.* at 16–17.

4. President George H.W. Bush called the events "shocking" and ordered an investigation by the Department of Justice. *See* Mydans, *supra* note 1.

5. *Police Brutality: Hearing Before the H. Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong. 133 (1991) [hereinafter *Police Brutality*].

6. CHRISTOPHER COMMISSION REPORT, *supra* note 1, at 17; *see also id.* at ix–x (explaining that after the City of Los Angeles investigated the use of force post-Rodney-King, investigators discovered that in the years leading up to the King beating, "183 officers had four or more allegations [of excessive force], 44 had six or more, 16 had eight or more, and one had 16 such allegations").

7. Subsequent investigations into these incidents uncovered an organizational culture that permitted gross misconduct, patterns of excessive use of

Federal law as it existed in 1991 was incapable of dealing with this sort of systemic wrongdoing. Previous attempts by the federal government to regulate police misconduct have relied on a host of minimally invasive methods, like evidentiary exclusion[8] and private civil litigation.[9] These traditional approaches to the federal regulation of local police misconduct were largely ineffective at combating the deeply ingrained, organizational roots of police misconduct.[10] Further complicating the regulation of local police misconduct, federal courts have previously held that both private and public litigants generally lack standing to

force, a failure by the LAPD to properly discipline officers, an inability to properly process citizen complaints, and a failure to adopt an early warning system to identify problematic police officers. *See* CHRISTOPHER COMMISSION REPORT, *supra* note 1, at 17. In the investigation after the Rodney King incident, the Christopher Commission found that, among the officers that were subject to the most allegations of excessive use of force, "the performance evaluation reports for problem[atic] officers were very positive" as they "document[ed] every complimentary comment received and express[ed] optimism about the officer's progress in the Department." *Id.* at x. After the Rodney King incident, the Christopher Commission found that the LAPD's internal procedures for handling citizen complaints frequently led to public frustration. *See id.* at xix. Out of 2152 citizen allegations of excessive force, the LAPD only sustained forty-two. Once more, the commission determined that internal policies and procedures used by the LAPD's Internal Affairs Department (IAD) made it hard for citizens to file complaints. *Id.* Years later, investigators found that many of the basic problems remained. MERRICK J. BOBB ET AL., FIVE YEARS LATER: A REPORT TO THE LOS ANGELES POLICE COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT'S IMPLEMENTATION OF INDEPENDENT COMMISSION RECOMMENDATIONS 34 (1996) [hereinafter FIVE YEARS LATER REPORT ON LAPD], *available at* http://www.parc.info/client_files/Special%20Reports/2%20-%20Five%20Years%20Later%20%20Christopher%20Commission.pdf.

8. *See generally* Mapp v. Ohio, 367 U.S. 643, 655–61 (1961) (mandating the exclusion of evidence obtained in violation of the Fourth Amendment by a state law enforcement officer).

9. Civil litigants commonly bring claims against police departments under 42 U.S.C. § 1983, a statute that provides a right of action when any state agent deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2000). The U.S. Supreme Court has held that litigants can use § 1983 to hold departments and municipalities financially liable for the actions of individual officers under certain situations. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694–701 (1978) (holding that a claimant under § 1983 could recover from a police department based on the actions of an officer if the department was deliberately indifferent in failing to train or supervise the officer).

10. *See generally* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 515–25 (2004) (describing the organizational roots of police misconduct).

seek equitable relief against local police departments, absent explicit congressional authorization.[11]

By 1994, Congress attempted to fill this regulatory void by passing a little known statute—42 U.S.C. § 14141—that gives the U.S. Attorney General authority to initiate structural reform litigation (SRL) against local police departments engaged in systemic misconduct.[12] In practice, this means that the federal government can now use equitable relief to force problematic police agencies to adopt significant structural, procedural, and policy reforms aimed at curbing misconduct.[13]

Fast-forward two decades and many of the nation's largest police departments including Los Angeles, Detroit, Seattle, Albuquerque, Newark, Pittsburgh, Cincinnati, Washington, D.C., and New Orleans have undergone or are currently undergoing this sort of SRL.[14] Today, nearly one in five Americans is served

11. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105–10 (1983) (concluding that, since a § 1983 litigant was not likely to experience future harm, he did not have standing to seek injunctive relief against the Los Angeles Police Department to prevent use of a chokehold); United States v. City of Philadelphia, 644 F.2d 187, 206 (1980) (finding, in part, that the DOJ cannot seek equitable relief against a police department without statutory authorization).

12. 42 U.S.C. § 14141 (1994). Congress passed this statute as part of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA). Pub. L. No. 103–322, 108 Stat. 1796. The statute makes it unlawful for a police agency to engage in a pattern or practice of unconstitutional misconduct, § 14141(a), and gives the Attorney General the authority to seek injunctive or equitable relief to force police agencies to implement reforms aimed at curbing misconduct, § 14141(b).

13. Unlike other traditional methods of police regulation, SRL allows the courts to oversee the restructuring of policies and procedures within a police department to prevent future misconduct. In other contexts, like prisons and schools, courts have successfully used SRL to "generat[e] change in public institutions." Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 11 (2009). The statute states that "[i]t shall be unlawful for any governmental authority, or any agent thereof . . . to engage in a pattern or practice of conduct by law enforcement" and provides that "[w]henever the Attorney General has reasonable cause to believe that [such] a violation . . . has occurred, the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice." 42 U.S.C. § 14141.

14. Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3244–47 (2014) (showing a list of all cities that have undergone SRL thus far). Other major cities like Oakland and New York also have been subject to structural reform mandates at the hands of federal courts, but these were via § 1983, not § 14141. *See generally* J. David Goodman, *Bloomberg Calls Court Monitor for Police a 'Terrible Idea*,' N.Y. TIMES (June 13, 2013), http://www.nytimes.com/2013/06/14/nyregion/bloomberg-calls-court-monitor-for-police-a-terrible-idea.html (discussing New York's stop-and-frisk policy); Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES

by a law enforcement agency that has been subject to a Department of Justice (DOJ) investigation via § 14141.[15] This statute is an important development in the history of American policing law.[16] But at the time that Congress passed this measure in 1994, few noticed. The media all but ignored this law's passage.[17] Even today, very little academic research has analyzed the implementation of this statute.[18] This is particularly surprising since scholars in a wide range of disciplinary fields have long grappled with the question of how the law can prevent misconduct in local police departments. The existent literature has spent considerable time discussing the effectiveness of other regulatory mechanisms in combating police wrongdoing.[19] But across academic disciplines, legal scholars, sociolo-

(Aug. 12, 2013), http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html (providing details about the New York case regarding this policy).

15. This number was calculated by adding up the population served for each law enforcement agency listed as previously or currently under investigation by the DOJ pursuant to § 14141. *See* Rushin, *supra* note 14, at 3244–47 (listing in Appendix A all police agencies that have been subject to a formal DOJ investigation via § 14141 since 1994). Using the United States Census population estimates for 2012 as the baseline for population, this total approximates 56,017,310. U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT 1–77 (2012), http://www.census.gov/prod/2011pubs/12statab/pop.pdf. By dividing the total number of citizens living in jurisdictions served by a department subject to a § 14141 case by the total U.S. population (estimated at 313,900,000), around 18% of Americans are served by a police agency that has been subject to a § 14141 investigation. *Cf. id.*

16. *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 798–99 (2006); *see also* Armacost, *supra* note 10, at 457 (stating that § 14141 is "perhaps the most promising legal mechanism" for reducing police misconduct).

17. One way to understand just how little attention § 14141 received at the time of passage is to look at the number of media mentions about the statute in the *New York Times* in 1994 and 1995. During this period, the *New York Times* made no mention of the passage of this law, despite spending considerable time discussing other components of the VCCLEA. *See* Stephen Rushin, Structural Reform Litigation in American Police Departments 64–67 (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author) (showing the number of media mentions and words spent discussing various components of the VCCLEA). There was also virtually no mention of the measure in the congressional record. Despite this lack of mention, there is some indirect legislative history connected to a previous attempt to pass a similar measure in 1991. *Cf.* Rushin, *supra* note 14, at 3207–08.

18. *See infra* Part I.C (discussing the scope of the available literature on SRL).

19. *See infra* Part I.A (detailing some of the previous research on the traditional approach to police regulation).

gists, and criminologists have inadequately studied the DOJ's implementation of SRL pursuant to § 14141.[20]

Drawing on original interviews, court documents, statistical data, and media reports, this Article describes the SRL process and theorizes on its effectiveness. It argues that SRL can facilitate organizational change in law enforcement agencies. SRL forces local governments to prioritize investments into police reform, even if such investments are not politically popular.[21] It utilizes external monitoring to ensure that frontline officers substantively comply with top-down mandates.[22] And it provides police executives with legal cover to implement wide-ranging policy and procedural reforms aimed at curbing misconduct.[23] Evidence also suggests that SRL may help reduce a police department's civil liability, thereby potentially paying for itself long-term.[24]

But SRL in police departments is far from perfect. Successful SRL requires continual support from municipal leaders, dedication by executives within the targeted agency, and buy-in by frontline officers.[25] This suggests that SRL alone is insufficient to transform a law enforcement agency. The process is also expensive.[26] The vast majority of this financial burden falls

20. *See infra* Part I.C (showing the limited amount of existing empirical research on SRL).

21. *See infra* Part IV.A (showing the LAPD as an example of how SRL contributes to a reallocation of municipal resources towards police reform).

22. *See infra* Part IV.B.

23. As explained *infra* Part IV.C, this is particularly important since collective bargaining statutes make it difficult for police chiefs to implement significant misconduct regulations. *See* COLLEEN KADLECK & LAWRENCE F. TRAVIS, III, NAT'L INST. OF JUSTICE, POLICE DEPARTMENT AND POLICE OFFICER ASSOCIATION LEADERS' PERCEPTIONS OF COMMUNITY POLICING: DESCRIBING THE NATURE AND EXTENT OF AGREEMENT 3–4 (2004), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/226315.pdf (noting that "several researchers have described union resistance to specific policy changes," including professionalization attempts, civilian review boards, promotion procedures, organizational changes, lateral entry policies, disciplinary procedures, recruitment procedures, overtime provisions, one officer cars, and changes in departmental directives).

24. *See infra* Part IV.D (showing reduction in Los Angeles liability after SRL); Telephone Interview with City Official and External Monitor #20 (Sept. 5, 2013) [hereinafter Interview #20] (stating that in Detroit, "the amount of money that we have saved on lawsuits that we had endured for years, particularly for deaths in our holding cells, have paid for the cost of implementation of the monitoring 2 or 3 times").

25. *See infra* Part V.D.

26. *See infra* Part V.A (showing how SRL cost the LAPD over $100 million).

on local police agencies over a relatively short period of time.[27] This raises concerns about the feasibility of SRL in poorer communities.[28] Additional questions remain about whether targeted agencies will sustain reforms after federal intervention ends,[29] and whether SRL reduces officer aggressiveness, thereby contributing to higher crime rates.[30]

27. *See infra* Figure 5 (showing that the SRL process has lasted between five and approximately twelve years, depending on the affected police agency).

28. *Infra* Figure 5. This concern is particularly salient because of the extreme decentralization in American law enforcement that contributes to wide resource disparities between municipalities. *See* U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), *available at* http://www.bjs.gov/content/pub/pdf/csllea08.pdf (putting the number of state and local law enforcement agencies at 17,985); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967) [hereinafter PRESIDENT'S COMMISSION ON LAW ENFORCEMENT], *available at* https://www.ncjrs.gov/pdffiles1/nij/42.pdf (highlighting how spending for urban departments was found to be around $27.31 per resident per year, while spending in smaller departments was only $8.74 per resident per year).

29 . *See infra* Part V.B (describing sustainability concerns in municipalities like Pittsburgh).

30. *See, e.g.*, ROBERT C. DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE 16 (2005), *available at* http://www.vera.org/sites/default/files/resources/downloads/277_530.pdf (stating that after the beginning of SRL, police officers in Pittsburgh felt "hesitant to intervene in situations involving conflict because they were afraid of having a citizen file an unwarranted anonymous complaint against them"); Damien Gayle, *Shootings Up 13% in New York City After Federal Judge Rules Police 'Stop and Frisk' Tactics Unconstitutional and Racist*, DAILY MAIL (Sept. 19, 2013), http://www.dailymail.co.uk/news/article-2425055/Shootings-10-New-York-City-federal-judge-rules-stop-search-unconstitutional-racist.html (detailing how New York City officials pointed to a thirteen percent increase in shootings over twenty-eight days as evidence that the Judge's orders have contributed to higher crime); Colleen Long, *NYC Stop-and-Frisk Policy Wrongly Targeted Minorities, Judge Rules; Outside Monitor Appointed*, STAR TRIB. (Aug. 12, 2013), http://www.startribune.com/219252341.html (identifying Mayor Bloomberg as a strong critic of a federal district court decision to overhaul New York City Police Department's stop-and-frisk program, and citing Bloomberg's concern that the law will hurt crime fighting efforts); Michael Howard Saul, *Bloomberg Calls Stop-and-Frisk Ruling "Dangerous,"* WALL ST. J. (Aug. 13, 2013), http://www.wsj.com/articles/SB10001424127887323585604579009191911601838 (quoting further Mayor Bloomberg, criticizing overhauling stop-and-frisk in part because of the court's failure to understand the streets of the city); Dan Springer, *Seattle Facing Rift Between Police and Politicians Over Jump in Crime, Open Pot Smoking*, FOX NEWS (Dec. 10, 2013), http://www.foxnews.com/politics/2013/12/10/seattle-facing-rift-between-police-and-politicians-over-jump-in-crime-open-pot (stating that in Seattle, a city currently under federal monitorship as part of SRL, "police have been accused of de-policing"); Joshua M. Chanin, Negotiated Justice? The Legal, Administrative, and Policy Implications of 'Pattern or Practice' Police Misconduct Reform 185 (2011) (un-

This Article concludes by showing how the lessons from SRL can inform future legal regulations of law enforcement. The apparent success of SRL showcases the importance of specificity in police regulations and the need for external accountability.[31] It also demonstrates the need for more data collection on the behavior of frontline officers.[32] Combined, these sorts of reforms could harness the lessons from SRL to regulate local law enforcement more effectively.

I. EMERGENCE OF STRUCTURAL REFORM LITIGATION IN POLICE DEPARTMENTS

Federal policymakers did not come to view local police misconduct as a pervasive, national epidemic until the Wickersham Commission Report revealed the scope of the problem in 1931.[33] Since then, the most prominent federal regulations of

published manuscript), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf (quoting the head of Washington, D.C.'s police union that federal oversight has led to more paperwork, thereby taking away time that could be spent fighting crime).

31. *See infra* Part VI.

32. *Infra* Part VI.

33. *See, e.g.*, RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 70 (2008) ("[T]he Wickersham Commission Report revealed that police brutality in general and the third degree in particular were practiced extensively and systematically in police departments across the country."). For a full record of the Wickersham Commission Report sections involving local police misconduct, including the Report on Lawlessness, see Samuel Walker, *Records of the Committee on Official Lawlessness*, *in* RECORDS OF THE WICKERSHAM COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, at v–vi (1997), *available at* http://www.lexisnexis.com/documents/academic/upa_cis/1965_wickershamcommpt1.pdf. In 1929, President Herbert Hoover appointed the National Commission on Law Observance and Enforcement. *Id.* at v. George W. Wickersham, who served as the U.S. Attorney General under President William Howard Taft, chaired the commission. *Id.* Prominent legal scholars and policymakers also sat on the commission, including Harvard Law School Dean Roscoe Pound and former U.S. Secretary of War Newton D. Baker. *Id.* In total, the Wickersham Commission issued fourteen reports on a wide range of criminal justice issues. *See id.* These reports were unique in part because they represented objective, technocratic approaches to understanding the problems plaguing the criminal justice system. *See id.* at vi. In 1931, the Wickersham Commission published the *Report on Lawlessness in Law Enforcement*, which some policing scholars have called "one of the most important events in the history of American policing." *Id.* at v. While many of the Commission's reports had little immediate effect on public policy, the *Report on Lawlessness in Law Enforcement* did motivate major changes in policing policy. *Id.* at vii. The report claimed "in uncompromising language" that police at the time regularly used physical brutality and cruelty during interrogations to obtain involuntary confessions. *Id.* at ix. Through a combination of participant and observation evidence, the report made a strong case for major reform in

law enforcement have come via decisions handed down by the United States Supreme Court, which use the weapon of evidentiary exclusion to discourage certain police practices. Federal law also permits private litigants to bring civil suits against state actors that violate their constitutional rights. And federal law makes it a criminal offense for local law enforcement to violate a person's constitutional rights. These traditional regulations operate as "cost-raising mechanisms."[34] That is to say, these traditional approaches attempt to dissuade police wrongdoing by raising the potential costs of such behavior. They cannot force police departments to adopt proactive reforms aimed at curbing misconduct.

While these cost-raising mechanisms almost certainly have had some statistically significant effect on police wrongdoing, they are ill equipped to combat the organizational roots of police wrongdoing. The Rodney King beating brought national attention to the inadequacies of this traditional regulatory approach. In the years that followed, Congress responded by quietly passing 42 U.S.C. § 14141 to fill this regulatory void.

American police departments. While reform was not immediate, the Supreme Court did take a small step toward the judicial regulation of law enforcement the following year in *Powell v. Alabama*—the first case in which the Court reversed a conviction on the basis of a criminal procedure violation. *See* Powell v. Alabama, 287 U.S. 45 (1932). Walter Pollak, one of the consultants who authored the *Report on Lawlessness*, argued the case before the Court. Walker, *supra*, at ix–x. The justices in the *Miranda* decision cited the Wickersham Commission Report multiple times in explaining the long, documented history of police brutality and misconduct during interrogations. Miranda v. Arizona, 384 U.S. 436, 445 n.5, 447–48 (1966) (citing the Wickersham Commission Report as part of the evidence for abusive interrogation styles used at the time). It is also worth noting that American law enforcement is extremely decentralized. Virtually all police officers serve at the local level. FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 102 (2012) (explaining that the historical dedication to "localism" in law enforcement has created a "decentralization [in American policing] that often resemble[s] fragmentation").

34. *See* Rushin, *supra* note 14, at 3196. For example, imagine a city facing a major crime epidemic concludes that by encouraging officers to execute unjustified *Terry* stops, the city can reduce crime. *Id. See generally* Terry v. Ohio, 392 U.S. 1 (1968). This sort of behavior may expose the city to civil litigation and evidentiary exclusion. Rushin, *supra* note 14, at 3196. However, if the city concludes that this sort of cost is worth the potential benefit of reduced crime through deterrence, then it is free to continue the behavior under the traditional approach to federal regulation of police misconduct. *Id.* at 3197. Some might argue this is exactly what has happened in New York City. *See* Goldstein, *supra* note 14 (explaining the court decision that held that New York City acted unconstitutionally in executing racially disparate *Terry* stops).

A. HISTORICAL ATTEMPTS TO REGULATE POLICE MISCONDUCT

Historically, the federal government has never acted as "the front line troops in combating . . . police abuse."[35] Instead, the federal government has relied on a handful of less invasive measures designed to incentivize reform in police departments. First, the Court has barred the admission of some evidence obtained by police officers in violation of the Constitution.[36] The Court designed this so-called exclusionary rule to eliminate the incentive for police to engage in unconstitutional misconduct.[37] Critics, though, have pointed out that the exclusionary rule is full of exceptions that limit its usefulness.[38] The empirical evidence is split on whether or not the exclusionary rule actually results in police departments changing internal policies to prevent misconduct.[39] Critics also sharply criticize the exclusionary

35. *Police Brutality*, *supra* note 5, at 3 (statement of John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice).

36. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to cover wrongdoing by state-level law enforcement); Wolf v. Colorado, 338 U.S. 25, 26–33 (1949) (declining to extend the exclusionary rule to state police); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390–92 (1920) (expanding the exclusionary rule to cover not just illegally obtained material, but also copies of illegally obtained material—the precursor to the "fruit of the poisonous tree" doctrine); Weeks v. United States, 232 U.S. 383, 398 (1914) (establishing the exclusionary rule, but only applying the rule to actions by federal law enforcement).

37. Elkins v. United States, 364 U.S. 206, 217 (1960) (stating that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").

38. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504–27 (1996) (chronicling the Supreme Court's gradual recognition of numerous exceptions to the exclusionary rule); *see also* United States v. Leon, 468 U.S. 897, 924–25 (1984) (permitting prosecutors to submit evidence obtained illegally so long as the illegality was in good faith by law enforcement); Nix v. Williams, 467 U.S. 431, 449–50 (1984) (allowing law enforcement to use unlawfully obtained evidence so long as the police would have inevitably discovered that same evidence through another legal investigatory method); *Elkins*, 364 U.S. at 208–33 (describing the silver platter doctrine which allowed federal law enforcement to use evidence unlawfully obtained by state police); Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 183 (2012) (detailing how the exclusionary rule only applies to public law enforcement).

39. *See, e.g.*, William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 335 (1991) (arguing that the exclusionary rule may actually impact a police department's likelihood of adopting proactive reforms); Myron W. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987) (similarly finding that the Chicago Police Department did respond

rule for allowing potentially guilty suspects to go free.[40] As a result, some critics worry that the exclusionary rule may contribute to higher crime rates.[41]

Second, private litigants can bring suit under 42 U.S.C. § 1983 against state agents, like police officers, who violate their constitutional rights.[42] The Court has also carved out a narrow avenue for private litigants to hold an entire police department or municipality liable for the actions of an individual officer.[43] In theory, civil litigation ought to incentivize police departments to make proactive reforms in order to avoid costly judgments. The empirical evidence on the effectiveness of private civil litigation, though, is mixed. Professor Charles Epp has shown that when the Court opened up police departments to civil liability in the late 1970s, some insurance companies opted to no longer provide liability protections for police departments, citing the unacceptably high risk.[44] This led to some

to the exclusionary rule by making internal policy and cultural changes). *But cf.* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 322 (2d ed. 2008) (rejecting the role of courts in instigating social change in various contexts, including in the exclusionary rule).

40. *See, e.g.*, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA 10 (1982), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/87888NCJRS.pdf (finding that the use of the exclusionary rule led to prosecutors dropping complaints in 86,033 felony arrest cases); *More Criminals To Go Free? Effect of High Court's Ruling*, U.S. NEWS & WORLD REP., June 27, 1966, at 32, 33 (quoting the mayor of the city of Los Angeles as saying the *Miranda* decision would contribute to more criminals going free).

41. *See, e.g.*, LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS 248 (1983) (citing Nixon's campaign speeches criticizing *Miranda* as a decision that will increase crime); Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 159 (2003) (finding that the exclusionary rule's passage was associated with a uptick in national crime); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1127–36 (1998).

42. 42 U.S.C. § 1983 (2000) (establishing a statutory right for private litigants to bring civil suits against state agents that violate their privileges or immunities).

43. Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 700–01 (1978) (establishing that a § 1983 claimant may recover civil penalties from a department based on the actions of an officer employed at that department).

44. CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 95 (2009) (explaining that around this time "[t]he primary police liability insurance company, pointing to concerns about rising legal liability, had pulled out of the market").

departments making proactive reforms.[45] Conversely, Professor Samuel Walker argues that civil litigation is an ineffective way to incentivize police reform. This is in part because of the organization of local government—"one agency of government, the police department, commits abuses of rights, another agency, the city attorney's office, defends the conduct in court, and a third agency, the city treasurer, pays whatever financial settlement results from the litigation."[46] In addition, a recent study by Professor Joanna Schwartz claims that virtually all police departments indemnify individual police officers.[47] And in the end, civil litigation cannot force a police department to adopt costly reforms. Since it is a cost-raising mechanism, it can only raise the cost of some types of misconduct, with the hope that a rational police department will respond with proactive policy changes.

Third, federal prosecutors can also bring criminal charges against police officers when their conduct constitutes a crime.[48] Limited resources, though, prevented federal prosecutors from regularly using this authority in the years leading up to the passage of § 14141.[49] Once more, only a small subset of unconstitutional police behavior is actually criminal.[50]

Other tools against police misconduct include the development of citizen review boards[51] and accreditation.[52] These forms

45. *Id*. at 4, 95–96 (arguing that the resultant reform made by police departments were something Epp calls "legalized accountability").

46. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R. L.J. 479, 495 (2009).

47. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

48. *See* Armacost, *supra* note 10, at 464–65 (citing criminal culpability as a mechanism for holding law enforcement accountable for misconduct); Rushin, *supra* note 14, at 3202–03 (explaining the use of criminal culpability as a mechanism to prevent misconduct).

49. Rushin, *supra* note 14, at 3203 fig.1 (showing that one percent or less of all complaints of police misconduct resulted in charges being filed by federal prosecutors under § 242).

50. Debra Livingston, *Police Reform and The Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 842 n.138 (1999) ("[C]riminal 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 . . . ." (quoting PAUL CHEVIGNY, EDGE OF THE KNIFE 101 (1995))).

51. *See* James R. Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROBS 515, 518 (1971) (explaining how advocates pushing for civil review boards portrayed them as necessary since police were "not perceived as impartial, neutral enforcers of the law, particularly by the citi-

of police reform, though, are voluntary as opposed to mandatory.[53] Since these traditional approaches to the federal regulation of local police departments have relied on cost-raising mechanisms, policymakers have generally let state-level police agencies run autonomously.[54] Innovation and change within departments happened through local experimentation and voluntary coordination with other police agencies.[55] No one—not the courts, private litigants, nor the federal government—has generally forced police departments to adopt specific policies.

B. RODNEY KING AND THE NEED FOR AN EQUITABLE REMEDY

While SRL was an option in a variety of other institutional contexts, at the time of the Rodney King beating, multiple federal court rulings had barred private and public litigants from seeking equitable relief against police departments. In *Los Angeles v. Lyons*, a private citizen sued the LAPD for using a dangerous chokehold.[56] As part of the suit, the plaintiff attempted to enjoin the LAPD from using the tactic in the future.[57] In a 5-4 decision, the U.S. Supreme Court held that the private plaintiff did not have standing to enjoin any police practices because he could not show any continuing or future threat from the tactic.[58]

zens of ghetto neighborhoods."); *see generally* SAMUEL WALKER & BETSY WRIGHT, CITIZEN REVIEW OF THE POLICE, 1994: A NATIONAL SURVEY (1995), *available at* https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=155242 (describing the adoption of citizen review boards).

52. Rushin, *supra* note 14, at 3204 (discussing the rise of voluntary accreditation of municipal police departments as a way to expand the use of best practices).

53. *Id.* at 3204 n.88 (describing how only 5.6% of police agencies were subject to voluntary accreditation by 2010).

54. *See id.* at 3241 (describing a need for state and national policymakers to become more involved in police reform).

55. ZIMRING, *supra* note 33, at 103 (stating that in the past, police departments exclusively looked inward for tactical innovation and remained "hermetically sealed . . . impervious to outside influences").

56. Los Angeles v. Lyons, 461 U.S. 95, 97–98 (1983).

57. *Id*. at 95–100.

58. *Id*. at 102–05 (identifying "immediately in danger of sustaining some direct injury" as the standard and finding that this standard is not met in this case); *see also* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1386 (2000) ("In the aftermath of *Lyons*, meaningful enforcement of [civil] rights . . . —at least so far as injunctive relief is concerned—[was] left solely to the government.").

Around the same time, the federal government attempted to use equitable relief against a police department. The DOJ noticed a high number of civil rights complaints against the Philadelphia Police Department.[59] In response, the DOJ opened an eight-month investigation into this apparent pattern of unconstitutional conduct.[60] Thereafter, the DOJ brought federal suit against Philadelphia, seeking to enjoin certain unconstitutional behaviors.[61] The Third Circuit found that the DOJ had no standing to seek equitable relief against a local police department without a specific statutory mandate from Congress.[62]

After the *Lyons* and *City of Philadelphia* cases, neither private nor public litigants had an equitable remedy against a local police agency except for a few narrow cases.[63] This remained an accepted part of policing law until the early 1990s when the Rodney King beating shocked the nation and sparked a national debate on how to best address police misconduct.[64] The incident vividly illustrated the inadequacies of traditional measures to fight police misconduct and bolstered the case for an equitable remedy.[65] In 1991, in response to mounting evidence linking the Rodney King beating to organizational policies and procedures in the LAPD, several members of Congress proposed the Police Accountability Act, a measure that that would have authorized both public and private litigants to initiate SRL.[66] This measure initially failed.[67] Three years later,

59. *Police Brutality*, *supra* note 5, at 172 (statement of Drew S. Days, Professor of Law, Yale Law School) ("[W]e identified the city of Philadelphia as being very high upon the list of those communities where we had complaints of police misconduct.").

60. *Id*. at 173 (explaining that "[i]t was a very intense investigation including the use of a special squad of FBI agents, data specialists, computer experts, to look into the allegations that we had uncovered").

61. *See id*. (detailing how the DOJ filed suit for injunctive relief but failed because of the lack of an explicit grant of power from Congress).

62. *See* United States v. City of Philadelphia, 644 F.2d. 187, 206 (1980).

63. *See* Harmon, *supra* note 13, at 12 ("Prior to § 14141, no statute other than § 1983 authorized suits for equitable relief against police departments for officer misconduct, and it remains the case that no other statute authorizes private equitable suits.").

64. Rushin, *supra* note 14, at 3209–15 (describing in detail the importance of the Rodney King beating to the national debate that spurred § 14141).

65. Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 507 (2008) (discussing committee meetings in which representatives identified the "serious and outdated gap in the federal scheme for protecting constitutional rights" (quoting H.R. REP. NO. 102-242, at 138 (1991))).

66. Gilles, *supra* note 58, at 1403.

Congress finally passed § 14141, which authorizes the Attorney General, but not private litigants, to instigate SRL.[68] Although less extensive than the proposed Police Accountability Act, this new right to publicly initiated SRL was still a monumentally important development in the history of police accountability.

C. PREVIOUS RESEARCH

At the time that Congress passed § 14141, several scholars were hopeful that SRL could serve as an important tool to fight deeply rooted police misconduct.[69] Some scholars theorized that SRL would facilitate the transformation of organizational culture.[70] Others believed that SRL would empower the executive branch to craft "precisely frame[d]" policy reforms tailored to the "unique facts and situation[s] that gave rise to the problem" in a specific jurisdiction, rather than "one-size-fits-all" solutions.[71]

Nevertheless, despite these theorized benefits of SRL, there is a dearth of empirical research on the subject within the legal academy. A few legal academics have written provocative normative pieces that outline possible ways to improve the SRL process.[72] For example, Professor Rachel Harmon has theorized on how the DOJ could change its selection process to incentivize more police departments to reform proactively.[73] Professor

67. Terence Moran & Daniel Klaidman, *Police Brutality Poses Quandary for Justice Dep't*, LEGAL TIMES, May 4, 1992, at 1 (explaining how the DOJ under George H.W. Bush and police advocacy groups strongly opposed the inclusion of any such individual right of action, eventually contributing to the measure's failure).

68. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071–72.

69. *See* Stuntz, *supra* note 16, at 798 (calling SRL one of the most important developments in criminal procedure since the exclusionary rule); *see also* Armacost, *supra* note 10, at 457 (calling SRL "perhaps the most promising mechanism" for preventing police wrongdoing).

70. Armacost, *supra* note 10, at 527 (discussing how police misconduct is linked to organizational culture and then saying that "[a]ll of this suggests that injunctive relief . . . is especially suited to addressing the systemic causes of police brutality").

71. *Id*. at 525–26.

72. *See, e.g.*, Gilles, *supra* note 58, at 1403 (suggesting that Congress should permit the DOJ to deputize private citizens to bring § 14141 actions, thereby inducing more reform); Harmon, *supra* note 13, at 27–30 (arguing that the DOJ ought to develop an enforcement policy that incentivizes police departments to reform proactively); Simmons, *supra* note 65, at 518–19 (arguing for measures to increase collaboration during federal reforms).

73. *See* Harmon, *supra* note 13, at 4.

Kami Chavis Simmons has written on the importance of including community stakeholders in the negotiation and implementation of settlement agreements pursuant to § 14141.[74] Professor Samuel Walker and Morgan MacDonald have recommended that states adopt their own versions of § 14141.[75] Professor Debra Livingston has analyzed the earliest negotiated settlements in Steubenville and Pittsburgh.[76] Professor Myriam Gilles has argued that, in light of the DOJ's limited enforcement ability, Congress ought to amend § 14141 to allow the DOJ to deputize private citizens to bring public pattern or practice suits against police departments seeking injunctive relief.[77] And Professor Mary D. Fan has argued that the "off-the-books" nature of SRL "may yield smarter and farther-reaching reforms and remedies based on data-driven surveillance" of local police by the federal government.[78] Overall, the existing legal scholarship on § 14141 has provided numerous compelling normative recommendations. But the existing legal scholarship in this area has not developed a thorough account of *how* SRL works from beginning to end. By understanding how the SRL process works, legal scholars can make more effective normative recommendations to improve the implementation of the statute.

Outside of the legal academy, there have been three significant studies assessing the outcomes of SRL. All three have found SRL to be effective at reducing misconduct. In the first of these studies, the Vera Institute of Justice concluded that the use of SRL in Pittsburgh led to a long-lasting reduction in apparent misconduct.[79] The introduction of SRL in Pittsburgh cor-

74. *See* Simmons, *supra* note 65, at 494.

75. *See* Walker & Macdonald, *supra* note 46, at 481–82.

76. *See generally* Livingston, *supra* note 50, at 815.

77. *See generally* Gilles, *supra* note 58, at 1386.

78. Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 93 (2012).

79. DAVIS ET AL., *supra* note 30, at 1–2. The Vera report found that the reforms implemented as part of the consent decree remained in effect after the monitors departed. There, researchers surveyed over a hundred frontline officers, conducted focus groups, interviewed key officials, reviewed monitor reports, surveyed citizenry, and analyzed police statistics. *Id.* at 5–6. The Vera evaluation states that "the officers clearly indicated—as had the command staff—that the accountability mechanisms remained intact after the lifting of the decree." *Id*. at 17.

related with a reduction in use of force,[80] improvements in the percent of resolved complaints,[81] the development of an inspection team that identified any deficiencies in policy implementation.[82]

According to surveys, around 61% of Pittsburgh officers believed that the SRL era ushered in either minor or significant changes in the department.[83] Around 54% of officers believed that SRL increased accountability in the department.[84] The overwhelming number of community residents surveyed in Pittsburgh believed that federal intervention was necessary to improve the municipality's police agency,[85] with nearly all respondents saying that their impression of the Pittsburgh police had either stayed the same or improved during the SRL era.[86]

A second study, completed by the RAND Corporation, found that after monitoring, the Cincinnati Police Department in 2009 was "not the same as the department that policed Cincinnati in 2001" thanks to "[p]olicy changes, oversight, and a variety of reforms."[87] The RAND study analyzed vehicle stops for evidence of racial profiling, investigated trends in police aggressiveness, and conducted surveys of community and officer satisfaction.[88] It found that Cincinnati residents believed that policing improved during the consent decree.[89] External reviews

80. *Id*. at 10 fig.2 (showing the progressive reduction in use of force by the Pittsburgh Bureau of Police).

81. *Id*. at 32 figs. 12 & 13 (showing an increase in resolved and cleared complaints).

82. *Id*. at 12–15 (describing the role of this inspection team).

83. *Id.* at 20 fig.5 (showing officer responses to the survey question, "Did programs introduced under the decree change how officers interact with citizens?").

84. *Id.* at 21 fig.6 (showing officer responses to the survey question, "Did new programs introduced under the decree increase accountability of officers?").

85. ROBERT C. DAVIS ET AL., TURNING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE 35 (2002), *available at* http://www.vera.org/sites/default/files/resources/downloads/Pittsburgh_consent_decree.pdf (stating that 84% of both white and black respondents said the decree was necessary to improve the quality of policing).

86. *Id.* at 38 (showing that 86% felt that the Pittsburgh police had either improved or stayed the same during the decree years).

87. GREG RIDGEWAY ET AL., POLICE-COMMUNITY RELATIONS IN CINCINNATI, at xxx (2009), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG853.pdf.

88. *See generally id.*

89. *Id.* at 89 (explaining, for example, that black respondents reported higher satisfaction with the Cincinnati Police in 2008 than in 2005).

of videotaped interactions between Cincinnati police officers and citizens found that while some apparent racial inequalities remained, the overall body of evidence showed improvement.[90] And statistical investigations of vehicle stop data suggested that the Cincinnati Police Division substantially improved recordkeeping during the SRL era.[91]

In the third existing study, Professors Christopher Stone, Todd Foglesong, and Christine Cole determined that federal intervention contributed to a substantial decline in apparent misconduct in the LAPD.[92] SRL in Los Angeles correlated with improved community opinions of the LAPD.[93] The proportion of residents who believed that the LAPD offered "good" or "excellent" services increased from around 48% in 2005 to about 61% in 2009.[94] Similarly, the percentage of individuals who said that the LAPD treated them fairly "almost always" or "most of the time" increased from about 39% in 2005 to 51% in 2009.[95] Stone et al. also found that the LAPD reduced categorical uses of

90. *Id.* at 68 ("Thus, while we find evidence of CPD improvement over time, both in its record keeping and in the quality of its interaction with the public, there are still racial inequalities that are likely to undermine police-community relations.").

91. *Id.* at 30.

92. CHRISTOPHER STONE ET AL., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD (2009), *available at* http://www.assets.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf (showing generally how the LAPD consent decree appeared to be successful in bringing about more constitutional policing). These researchers undertook hours of participant observation, analyzed administrative data on crime, arrests, traffic or pedestrian stops, use of force, and personnel. In addition, they conducted surveys of the police officers, detainees, and residents of Los Angeles. *Id.* at i–ii.

93. *Id.* at 11, 44–51 (explaining that the survey involved 1,503 respondents via telephone and 1,636 respondents online, and also detailing the results of these surveys).

94. *Id.* at 44 fig.29.

95. *Id.* at 50 fig.33. But not all communities in Los Angeles were equally satisfied with the LAPD. Black and Latino respondents reported less satisfaction with the LAPD than White and Asian residents. *Id.* (showing that only around 40% of Black respondents and 48% of Latino respondents reported being treated fairly by the LAPD most of the time or almost all of the time). Nevertheless, even Black and Latino respondents reported an increase in perceived fairness and satisfaction during the structural reform era. *Id.* And the vast majority of Black and Latino residents were somewhat or very hopeful about the trend in effectiveness and integrity in the LAPD as of 2009. *Id.* at 46 fig.32 (showing that about 85% of Black respondents and 88% of Latino respondents claimed to be very hopeful or somewhat hopeful about the trend in the LAPD going forward). Overall, while some racial disparities continue to exist in public opinion, community satisfaction rose substantially during the SRL era, as did optimism about the future of the department.

force during SRL, defined as any serious uses of force like the use of a firearm, head strikes, dog bites, or other injuries that require hospitalization.[96] Categorical uses of force per officer decreased by 34% over the time period, and categorical uses of force per arrest fell by 33% between 2001 and 2010 in the LAPD.[97] This suggests that the LAPD was less likely to use categorical force as the SRL progressed. Of course, it is easy to imagine a set of police behaviors that do not result in a categorical use of force, but still demonstrate systemic misconduct. For instance, a pervasive pattern of *Terry* stops that target minority men, like those found in New York City involve no categorical use of force.[98] Categorical use of force statistics might not capture this type of minor, regularized misconduct. To measure this type of minor misconduct, the Stone et al. study used data on the proportion of pedestrian and traffic stops that result in an arrest. As Stone et al. argued, "[w]hen stops increase greatly without an increase in the number that lead to arrests, the pattern suggests that police suspicions are being aroused too easily

96. *Id.* at 32–35 (describing categorical use of force and showing the trend in the use of this type of force).

97. The Stone et al. study only used data from 2004 to 2009. *See* STONE ET AL., *supra* note 92. But data from additional years is available. *See* L.A. POLICE DEP'T, 2010 USE OF FORCE ANNUAL REPORT 10, *available at* http://www.assets.lapdonline.org/assets/pdf/2010YearEndReport.pdf (listing the total incidents of categorical use of force from 2007 to 2010); L.A. POLICE DEP'T, 2009 USE OF FORCE ANNUAL REPORT 15, *available at* http://www.assets.lapdonline.org/assets/pdf/2009YearEndReportFinal.pdf (listing the total incidents of categorical use of force from 2006 to 2009); OFFICE OF THE INSPECTOR GEN., 2007 ANNUAL REPORT REGARDING CATEGORICAL USES OF FORCE 2, *available at* http://www.assets.lapdonline.org/assets/pdf/010609_BPC09-0008.pdf (listing the number of categorical use of force incidents from 2003 to 2007); OFFICE OF THE INSPECTOR GEN., 2005 ANNUAL REPORT REGARDING CATEGORICAL USES OF FORCE 2, *available at* http://www.oiglapd.org/Reports/2005%20CUOF_Rept.pdf (showing the categorical uses of force from 2001 to 2005). For data on the number of officers in the LAPD, see *Uniform Crime Reports*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/ucr-publications (click on requisite year under "Crime in the United States," then click on "Police Employee Data," "Table 78," and navigate to the data for Los Angeles, California) (last visited Mar. 7, 2015). Using this additional data, categorical uses of force fell from 117 to 85 between 2001 and 2010—a drop of 27.3%. Categorical uses of force per arrest fell from 0.0008361 to 0.0005623. Categorical uses of force per officer fell from 0.01308 to 0.00862 (data on file with author).

98. *See* Terry v. Ohio, 392 U.S. 1 (1968) (holding that a police officer could perform a stop of a limited time and scope if he or she had reasonable suspicion that a person was engaged in a criminal act); *Stop and Frisk Data*, N.Y. C.L. UNION, http://www.nyclu.org/content/stop-and-frisk-data (last visited Mar. 7, 2015) (giving a detailed breakdown of the seemingly racially disparate pattern of stop-and-frisks in New York City).

and the decision to interfere with people's liberty is being made too lightly, even if the stops are constitutionally justifiable in each individual instance."[99] Conversely, when a higher percentage of stops result in arrest, this suggests that, "police officers stopped people for good reasons and were willing to have the District Attorney scrutinize those reasons."[100]

In 2002, only around 16% of pedestrian stops and 3% of vehicle stops ended in an arrest; by 2008, these numbers had increased to 34% and 6% respectively.[101] Among those arrested, the rate at which prosecutors levied charges actually increased.[102] According to Stone et al., this suggests that not only did LAPD officers arrest more individuals after stops, but that increasingly, the prosecutor agreed with these arrest decisions. This is consistent with a police department that is more judiciously using its authority to stop pedestrians and motorists.[103] There is also compelling statistical evidence that the LAPD made substantial progress in improving its management of gang units,[104] handling of persons with mental illnesses,[105] policies on confidential informants,[106] and broader training programs.[107]

99. STONE ET AL., *supra* note 92, at 24.

100. *Id.*

101. *Id.* fig.15.

102. *Id.* at 30. Stone, Foglesong, and Cole used filing rate as a measure of the "quality" of police decisions to make an arrest. In theory, if the rate at which prosecutors bring charges against those arrested by the LAPD increased, then the LAPD is likely making better arrest decisions. Conversely, if the prosecutor is choosing to bring fewer charges per arrest, then we might suspect that the LAPD is making a higher proportion of unjustified arrests. Stone et al. show that, "[f]or Part One arrests, the felony filing rate increased while both the release rate and misdemeanor filing rate fell. For Part Two arrests, the felony filing rate increased, the misdemeanor filing rate fell, and the release rate remained steady, at 14 percent." *Id.* at 31.

103. This is also not consistent with the type of potential police abuse identified in New York, where massive increases in low-level arrests did not translate into higher percentages of misdemeanor convictions. *See, e.g.*, Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 611 (2014).

104. OFFICE OF THE INDEP. MONITOR OF THE L.A. POLICE DEP'T, FINAL REPORT 76–83 (2009) [hereinafter FINAL REPORT FOR LAPD]; *see also id.* at 77 (stating that, although early on the LAPD struggled with the gang unit requirements, the "[d]epartment has made substantial strides towards a better trained and supervised gang unit").

105 . *Id.* at 89–93; *see also id.* at 93 (claiming that the LAPD has made "significant advances" in this area and now "continues to be in the national forefront of this important policing issue").

106. *Id.* at 84–88; *see also id.* at 85 ("The Department released a Confidential Informant Manual in 2002 that incorporated all of the requirements of the

While these three empirical studies provide strong evidence that SRL correlates with a reduction in misconduct, these studies also suffer from a significant limitation. The studies offer little explanation of *how* and *why* SRL achieves these impressive results. This is in part because the existing literature offers a relatively thin conception of how the SRL process works from beginning to end. This gap in the literature is understandable, given the largely extrajudicial character of SRL. In theory, § 14141 gives the DOJ the authority to file suit against any local police department engaged in a pattern or practice of misconduct. But in practice, the DOJ prefers to work with departments outside of the confines of the formal court system, in the shadow of the law.[108] The DOJ typically identifies problematic agencies, initiates investigations, and negotiates settlements largely without help from the courts. As a result, most of the SRL process happens behind closed doors. This Article attempts to fill these gaps in the literature by developing a thorough, descriptive account of this extrajudicial police reform process.

II. METHODOLOGY

This Article addresses two gaps in the existing literature on SRL in police departments. First, this Article uses empirical methods to build a descriptive account of how the SRL process works from beginning to end in American police departments. This Article focuses specifically on the most common form of SRL in police departments—SRL initiated by the DOJ pursuant to § 14141.[109] Second, this Article theorizes on the benefits and limitations of this regulatory mechanism.

Since much of the SRL process pursuant to § 14141 occurs extrajudicially, this study relies on in-depth interviews with

Consent Decree.").

107. *Id.* at 93–100; *see also id.* at 94 ("The LAPD has been tremendously successful in its effort to improve its training function.").

108. Fan, *supra* note 78, at 116–20 (discussing how the DOJ has seemingly negotiated reforms and completed substantial structural reforms in the shadow of law, without relying heavily on the formal legal system).

109. Structural reform litigation initiated by private litigants is rare, given that few litigants can show that they are likely to be affected by police misconduct in the future. This means that few litigants can overcome the *Lyons* standing barrier. While there have been a few recent examples of private structural reform litigation in police departments—namely in Oakland, New York, and Maricopa County—this study is limited to structural reform litigation initiated by the DOJ pursuant to § 14141.

stakeholders in the SRL process.[110] To identify relevant stakeholders, I used court documents, monitor reports, and other public information to identify the name and contact information for a population of seventy-four individuals that have played a substantial role in the implementation of SRL in police departments since the passage of § 14141. These stakeholders fall into three different categories: DOJ litigators, external monitors, and police officials.[111] This study did not attempt to interview frontline police officers, since past studies have already surveyed these officers about their impressions of SRL.

I sent interview requests to all seventy-four stakeholders. I received a 47% response rate, resulting in thirty-five in-depth interviews. These interview participants generally requested anonymity, given their continued work in this field. This sample of thirty-five stakeholders included at least two stakeholders from all ongoing or completed § 14141 SRL cases. To facilitate each interview, I used three interview scripts—one for monitors, one for DOJ litigators, and one for law enforcement professionals.[112] These scripts asked questions about each participant's role in § 14141 cases. These scripts also asked partic-

110. Qualitative studies commonly use semi-structured interviews. *See, e.g.*, Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 919 (2014); Keith Guzik, *The Agencies of Abuse: Intimate Abusers' Experience of Presumptive Arrest and Prosecution*, 42 LAW & SOC'Y REV. 111, 115 (2008); Helen B. Marrow, *Immigrant Bureaucratic Incorporation: The Dual Roles of Professional Missions and Government Policies*, 74 AM. SOCIOLOGICAL REV. 756, 759 (2009); David Orzechowicz, *Privileged Emotion Managers: The Case of Actors*, 71 SOC. PSYCHOL. Q. 143, 145 (2008). During semi-structured interviews, a researcher will commonly ask a participant a set of pre-planned questions. The researcher will also commonly ask unplanned follow-up questions that help the researcher gain a more detailed understanding of the participant's responses. *See* Eisenberg, *supra*, at 919. The sample size used in this study should be sufficiently large and broad to provide a representative look at the SRL process. This is because the field of individuals involved in the SRL process is surprisingly small. Few departments have undergone full-scale SRL. Only a small number of litigators have actually handled § 14141 cases at the DOJ. And only a handful of companies have served as external monitors in the existent § 14141 cases.

111. In total, eight of the interview participants had significant experience at the DOJ handling § 14141 cases, fifteen had experience as law enforcement officials in affected municipalities, and fourteen had experience as monitors in previous or ongoing SRL cases. Some participants had experience in two of these categories.

112. I developed these interview scripts by conducting a preliminary, exploratory interview with one monitor, one DOJ litigator, and one law enforcement executive. I also reviewed court documents, monitor reports, and the existing literature to develop this interview script.

ipants to describe each step in the SRL process to the best of their ability. And these scripts inquired about specific tensions that arise during this sort of SRL. I used these scripts to guide semi-structured interviews. When participants had experience in two or more of these categories—for example, when an interview participant had been both a DOJ litigator handling § 14141 cases and had worked on an external monitoring team—I asked the participant questions from both scripts. I recorded and transcribed all interviews when possible. I then coded these transcripts to identify common themes in the participants' responses. The participants gave remarkably consistent answers. I note any time that interview participants gave inconsistent responses.

These interviews were particularly useful in addressing the first research question posed by this Article—that is, in piecing together a descriptive account of each stage of SRL in police departments pursuant to § 14141. Interview participants offered consistent answers in describing how this extrajudicial police reform process worked. This Article supplements these interview responses with additional data drawn from court documents, media reports, and departmental records to provide a thorough description of the SRL process. Identifying the benefits and limitations of SRL as a regulatory mechanism is more challenging. Doing so raises tough causal questions. For example, what parts of SRL contribute to the mechanism's apparent success in reducing misconduct? And what components of SRL unnecessarily burden law enforcement? In addressing these questions, this Article does not purport to make any definitive, causal claims. Instead, this study uses interview data to engage in theory building. This Article also uses additional statistical data to provide support for these hypothesized benefits and limitations. More research will be needed, though, to fully validate the hypotheses reached in this Article.

III. THE STRUCTURAL REFORM LITIGATION PROCESS IN POLICE DEPARTMENTS

SRL in police departments is a long and complex process. It is easiest to understand the SRL process by first taking a macro-view of each step. Figure 1 demonstrates the progressive stages of SRL.

FIGURE 1. STAGES OF STRUCTURAL REFORM LITIGATION

Stage 1: Case Selection
Stage 2: Preliminary Inquiry
Stage 3: Formal Investigation
Stage 4: Settlement Negotiations
Stage 5: Appointment of Monitor
Stage 6: Monitored Reform

A. CASE SELECTION, PRELIMINARY INQUIRY, AND FORMAL INVESTIGATION

The first step in the SRL process is case selection. In this stage, the DOJ has the responsibility of identifying police agencies that may be engaged in a pattern or practice of misconduct. Of course, there are around 18,000 police agencies in the United States that potentially fall under the regulatory purview of § 14141.[113] And the federal government collects no uniform statistics on police misconduct. How, then, should a small team of lawyers in Washington, D.C. identify which of these local and state agencies is engaged in a pattern of unconstitutional misconduct?

When Congress first passed SRL in 1994,[114] the DOJ was given no guidance on how to identify which police agencies were engaged in a pattern or practice of misconduct.[115] The responses by interview participants provide some insight into this case selection process. The DOJ relies on a wide array of methods to identify problematic police departments. First, the DOJ relies on media reports to identify problematic departments.[116] As one DOJ litigator explained, "if the media brought

113. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES 2 (2011), *available at* http://www.bjs.gov/content/pub/pdf/csllea08.pdf (putting the number of state and local law enforcement agencies at 17,985).

114. *See supra* note 12 (discussing passage of SRL in 1994).

115. *See* Rushin, *supra* note 14, at 3239 (describing the ambiguous mandate given to DOJ).

116. *See, e.g.*, Telephone Interview with Dep't of Justice Participant #18, at 4 (Aug. 8, 2013) [hereinafter Interview #18] (transcript on file with author) (stating that the DOJ identified cases "through a mix of media reviews [and] newspaper reviews"). One former DOJ litigator also explained that "[o]ccasionally [inquiries] get started when there is a big expos[é] of a big problem in a department . . . ." Telephone Interview with Department of Justice Participant #14, at 4 (July 11, 2013) [hereinafter Interview #14] (transcript on

attention [to or] shed light on allegations . . . in a credible and repeated fashion" then the DOJ may give that city a closer look.[117] Second, the DOJ sometimes harnesses existing litigation as a springboard into SRL.[118] This can involve coordination with existing civil rights activists or organizations already pursing claims against police agencies.[119] Third, whistleblowers within police agencies can alert the DOJ about possible misconduct.[120] Sometimes these whistleblowers are front-line police officers, while other times these whistleblowers are top administrators within the department.[121] Fourth, academic studies

file with author). Cases that fall into this category include Los Angeles, Washington, D.C., and Cincinnati. *See* Telephone Interview with Department of Justice Participant #12, at 3–4 (July 30, 2013) [hereinafter Interview #12] (transcript on file with author); Telephone Interview with External Monitor #13, at 5 (Aug. 5, 2013) [hereinafter Interview #13] (transcript on file with author).

117. Interview #12, *supra* note 116, at 4. This participant continued by giving an example: "I think the *Washington Post* actually did an expos[é] on the shootings," which in part motivated the focus on the Metropolitan Police Department. *Id.* at 2.

118. Existing litigation appears to be a motivating factor for the DOJ's involvement in Steubenville, Pittsburgh, and Columbus. Rushin, *supra* note 14, at 3219–20. The Steubenville case is a particularly useful example of this case selection method. There, Ohio attorney James McNamara "used to litigate against Steubenville all the time." Interview #14, *supra* note 116, at 4. As a former DOJ litigator explained, McNamara "filed a *Monell* count" that "went through 50 or 60" examples of misconduct by the Steubenville Police Department. *Id.* Afterwards, McNamara sent the file to the DOJ who used this as a basis to start a formal investigation into the Steubenville Police Department. *Id*.

119. Interview #14, *supra* note 116, at 7 (explaining the role that the NAACP and the ACLU served in early investigations in cities like Pittsburgh). These sorts of organizations can bring a police department's misconduct to the attention of the DOJ through "persistent efforts by lawyers and civil rights advocates . . . flood[ing] the Justice Department with complaints" that provide the basis for a formal investigation. Nicole Marshall, *Why Investigate Us? Police Ask*, TULSA WORLD (Apr. 1, 2001), http://www.tulsaworld.com/archives/why-investigate-us-police-ask/article_519a9c8d-2e3e-5696-9aae-6147c6569141.html.

120. Interview #12, *supra* note 116, at 2 ("[S]ometimes there were internal whistle blowers."). It is worth noting that this Article cannot give too many specific examples of whistleblowers who have initiated SRL, as the DOJ "protect[s] the identity of whistleblowers [meaning litigators] aren't able to talk more about it." *Id.* at 4. But, as the litigator concluded, "in a handful of cases, we relied heavily on files and information given to us by officers inside a department." *Id*. This is in part because whistleblowers "could speak from the inside about . . . the actual policies and procedures and practices" better than outsiders. *Id.*

121. An interesting example of a front-line officer acting as a whistleblower came when a former DOJ litigator described talking "to a number of African American officers in some of the cities that I worked in who told me about

can help the DOJ identify problematic departments.[122] These studies are sometimes sufficiently rigorous to give the DOJ a running start as it builds a case against a police agency.[123] Fifth, even though § 14141 is designed to target systematic misconduct, other units within the DOJ sometimes forwards particularly egregious single incidents of misconduct that may be a symptom of broader organizational and cultural deficiencies.[124] There is no simple formula for identifying problematic police departments.[125]

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their experiences when they were out of uniform [and] [h]ow they and their sons or fathers or uncles were treated." *Id.* at 4. Other times, the whistleblower is a police executive. POLICE EXEC. RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 2 (2013) [hereinafter PERF], *available at* http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf (discussing how Chief "Charles Ramsey . . . asked the Justice Department to intervene after a series of articles . . . alleged that [his] officers shot and killed more people per capita . . . than any other large U.S. city").

122. The DOJ's investigation and eventual settlement with the New Jersey State Police typifies this selection method. Interview #12, *supra* note 116, at 1–2 (giving an overview of how the DOJ became interested in the New Jersey State police and explaining that "[t]here were maybe tens of years of problems reported by minority drivers on the Turnpike in New Jersey and lots of civil litigation and lots of allegations of abuse and D[O]J used the pattern or practice authority to bring the first racial profiling case under that statute"). As a former litigator detailed, in New Jersey's case, the DOJ "had some academic work on the subject suggesting racial profiling was happening." *Id.* at 1.

123. The rigorous study done on racial profiling by the New Jersey State Police, written by John Lamberth, is a useful example. Lamberth "systematically evaluated whether the New Jersey State Police appeared to be targeting drivers of color on state highways." Rushin, *supra* note 14, at 3222. Lamberth's work found very strong evidence that Black drivers were stopped disproportionately compared to the amount of Black drivers engaged in traffic crimes. *Id.* These "findings were central to a March 1996 ruling by Judge Robert E. Francis of the Superior Court of New Jersey that the state police were de facto targeting blacks, in violation of their rights under the U.S. and New Jersey Constitutions," and useful to the DOJ as it mounted a case against the New Jersey State Police. *Id.* at 3222–23 (quoting John Lamberth, *Driving While Black: A Statistician Proves That Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C1).

124. Interview #18, *supra* note 116, at 2 (citing the Timothy Thomas shooting as an example of a particularly egregious incident of misconduct that motivated DOJ action). This litigator went on to explain the process by which the Criminal Section may come across a particularly jarring misconduct incident and determine that it may be caused by underlying policies and cultures within the department. In such cases, they will forward the case file for possible § 14141 investigation. *Id.* at 4–5.

125. *See* Interview #14, *supra* note 116, at 4 (explaining the case identification process "varies [a] good deal" from one case to the next).

While this approach to case selection gives the DOJ wide authority, it also understandably frustrates police departments.[126]

Once a DOJ litigator has chosen a police agency for review, the department enters the preliminary inquiry stage.[127] During this period, a litigator will complete an internal and confidential review of publicly available data, examine news reports, and interview residents of the community.[128] Between January 1, 2000, and September 1, 2013, the DOJ initiated around 325 preliminary inquiries, or about 25–26 per year.[129] If there appears to be sufficient evidence that the agency is engaged in a pattern or practice of misconduct, the DOJ will officially open a formal investigation.[130] Opening a formal investigation is a major step. Only about 12% of preliminary inquiries turn into formal investigations.[131] After the DOJ opens a formal investigation, the DOJ's interest in the police department becomes public knowledge.[132] Investigations are expensive and time-

126. *See, e.g.*, Eric Lichtblau, *U.S. Low Profile in Big-City Police Probes Is Under Fire; Law: Critics Say Justice Dep't Boldly Pursues Misconduct Cases in Smaller Towns but Goes Slower on Larger Inquiries*, L.A. TIMES, Mar. 17, 2000, at A1 (quoting Gary Dufour, former City Manager of Steubenville, Ohio, who questioned why the DOJ chose Steubenville: "You see all these problems that have come up at the police departments in Los Angeles and New York and New Orleans, and you've got to wonder, why us?").

127. Rushin, *supra* note 14, at 3224–26 (explaining the preliminary inquiry process as the stage when a litigator spends a few hours researching media reports and publicly available data for evidence of misconduct); *see also Oversight of the Department of Justice—Civil Rights Division: Hearing Before the Comm. on the Judiciary*, 107th Cong. 18–20 (2002) [hereinafter *Oversight of DOJ*] (testimony of Ralph Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice) (using the same label for this phase).

128. *Oversight of DOJ*, *supra* note 127, at 18–19 (stating that during this preliminary inquiry phase, the DOJ relies on public information like witness interviews, pleadings, and testimony in court).

129. Rushin, *supra* note 14, at 3226; *see also* Telephone Interview with Department of Justice Participant #5, at 2 (Sept. 4, 2013) [hereinafter Interview #5] (on file with author) (identifying how preliminary inquiries turn into investigations if there is sufficient evidence to support the possibility of systematic misconduct).

130. *See* Interview #5, *supra* note 129 (providing this number from internal DOJ records).

131. Rushin, *supra* note 14, at 3226 (showing that between January 2000 and September 2013, the DOJ opened 325 preliminary inquiries that turned into 38 formal investigations—meaning that about 11.6% of inquiries turn to investigations).

132. Interview #14, *supra* note 116, at 4 (explaining that investigations are the point at which the inquiry becomes public and noting that "[o]pening an investigation is a huge deal. It's a very big moment. You wouldn't want to do

consuming—sometimes costing millions of dollars[133] and taking several months or even years to complete.[134] In carrying out an investigation, the DOJ takes an "inventory of departmental policies and procedures related to training, discipline, routine police activities, and uses of force, and conducts in-depth interviews to determine whether the department's practices adhere to formal policies."[135] In total, the DOJ has initiated fifty-five formal investigations, or around three per year.[136] During interviews, DOJ litigators reiterated that resource limitations prevent the Special Litigation Section from initiating as many formal investigations as they believe to be necessary.[137] Politics also play a role in the DOJ's willingness to utilize § 14141.[138] Figure 2 below shows the trend in open § 14141 cases over time.[139]

that if there turns out not to be enough there to investigate").

133. Jodi Nirode et al., *City, Justice Department Draft Pact; The Police Union Will Be Asked To OK Contract Changes To Avoid a Suit Over*, COLUMBUS DISPATCH, Aug. 17, 1999, at A1 (stating that the DOJ requested $100 million in its 2000 budget, to fund sixteen new investigators, suggesting that the cost of investigation is often high).

134. *See* Jamie Stockwell, *Rights Investigation of Police Continues; Pace of Pr. George's Inquiry Angers Some*, WASH. POST, Dec. 22, 2002, at C6 (stating that the average investigation "can take years as investigators wade through piles of internal records and personnel files").

135. INT'L ASS'N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 8 (2006), *available at* http://www.cops.usdoj.gov/files/ric/Publications/e06064100.pdf. Litigators from the DOJ do not do these investigations by themselves; instead, they outsource much of the work to police experts and professionals. *Id*.

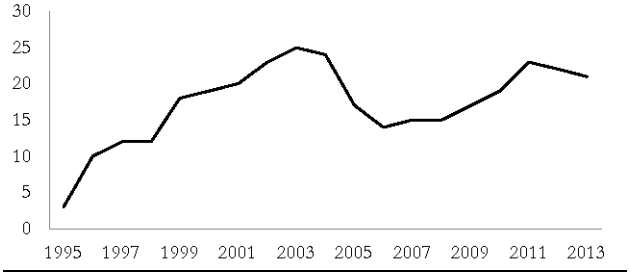
136. Rushin, *supra* note 14, at 3232 (showing that across most Administrations the total number has generally sat around three investigations per calendar year).

137. Interview #5, *supra* note 129, at 1 ("But I can tell you for starters that there are far more agencies that . . . have some sort of a problem of constitutional dimensions than we would ever get to.").

138. Rushin, *supra* note 14, at 3233 fig.4 (showing that the total number of open cases declined significantly during the second half of the Bush Administration and providing qualitative evidence tying this decline to changes in internal policies).

139. *Id*. at 3233.

FIGURE 2. OPEN § 14141 CASES OVER TIME



As the data in Figure 2 demonstrates, the volume of SRL cases fell during the second Bush Administration. Interviewees attribute this decline to a variety of changes in the internal policies of the DOJ that discouraged the use of federal oversight in reforming local state agencies.[140] Combined, this evidence suggests that public initiated rights of action like § 14141 are inevitably susceptible to political influences, potentially limiting their usefulness.

After this resource-intensive investigation, the DOJ makes a determination about whether or not the police agency is engaged in a pattern or practice of misconduct. In theory, if the DOJ finds such evidence of systematic wrongdoing, it could file suit against the local police agency and eventually bring the claim to trial. In practice, though, this has never happened. Instead, the DOJ has reached a settlement with every department identified as in violation of § 14141. These settlements happen after a period of settlement negotiations.

B. SETTLEMENT NEGOTIATIONS

After the DOJ has completed its internal investigatory phases, SRL advances to the negotiation stage. During this phase, the DOJ spends anywhere from a few months to a few years negotiating over the types of reforms that a police agency ought to make to avoid full-scale litigation under § 14141.[141]

140. *See id*. (describing the DOJ's movement away from the use of invasive structural reform because of internal directives).

141. For example, in New Orleans there was approximately a sixteen-month gap between the conclusion of the investigation and the signing of a consent decree. United States v. City of New Orleans, No. 2:12-cv-01924-SM-JCW, at 2 (E.D. La. July 24, 2013) [hereinafter New Orleans Consent Decree], *available at* http://www.clearinghouse.net/chDocs/public/PN-LA-0001-0001.pdf

The goal of every negotiation is to reach a negotiated settlement that outlines all of the necessary policy and procedural changes in a single document. As one current DOJ litigator explained, "[a] negotiated agreement is a compromise."[142] Neither the municipality nor the DOJ gets everything they want in a negotiated settlement. Remember, no § 14141 case has actually resulted in trial.[143] Both parties typically start a negotiation by making demands that they fully expect the other side to reject.[144] This anchors the negotiation and allows for an eventual

(consent decree regarding the New Orleans Police Department). There, the DOJ issued a report detailing its investigative findings on March 16, 2011, and eventually came to terms on a consent decree on July 24, 2012. *Id.*; *see also* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, at v (2011), *available at* http://www.justice.gov/crt/about/spl/nopd_report.pdf. In Detroit, that gap was approximately a year. There, the DOJ handed down technical assistance letters between March and June of 2002 before agreeing to two different consent decrees on June 12, 2003. *See* United States v. City of Detroit, No. 03-72258, at 6 (E.D. Mich. June 12, 2003) [hereinafter Detroit Consent Decree], *available at* http://www.justice.gov/crt/about/spl/documents/dpd/detroitpd_uofwdcd_613.pdf (consent decrees regarding use of force and arrest and witness detention); Letter from Steven H. Rosenbaum, Chief, Special Litigation Section, Dep't of Justice, and Jeffrey G. Collins, U.S. Attorney, Eastern Dist. of Mich., to Ruth Carter, Corporation Counsel, City of Detroit (Mar. 6, 2002), *available at* http://www.justice.gov/crt/about/spl/documents/dpd/detroit_3_6.php (referred to as the Detroit Police Department Use of Force Findings Letter); Letter from Steven H. Rosenbaum, Chief, Special Litigation Section, Dep't of Justice, and Jeffrey G. Collins, U.S. Attorney, Eastern Dist. of Mich., to Ruth Carter, Corporation Counsel, City of Detroit (Apr. 4, 2002), *available at* http://www.justice.gov/crt/about/spl/documents/dpd/detroit_4_4.php (referred to as the Detroit Police Department Holding Cell Findings Letter); Letter from Steven H. Rosenbaum, Chief Special Litigation Section, Dep't of Justice, and Jeffrey G. Collins, U.S. Attorney, Eastern Dist. of Mich., to Ruth Carter, Corporation Counsel, City of Detroit (June 5, 2002), *available at* http://www.justice.gov/crt/about/spl/documents/dpd/detroit_6_5.php (referred to as the Detroit Police Department Holding Cell Findings Letter). And in Seattle, it took a little over seven months to complete this process. In that case, the DOJ issued a findings letter on December 16, 2011 and entered into a settlement agreement on July 27, 2012. United States v. City of Seattle, No. 2:12-cv-01282-JLR, at 4 (W.D. Wa. July 27, 2012) [hereinafter Seattle Settlement Agreement] (settlement agreement and stipulated order of resolution); *see also* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT (Dec. 16, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf (explaining the DOJ's investigation of the Seattle police department).

142. Interview #5, *supra* note 129, at 4.

143. Interview #18, *supra* note 116, at 12 ("One of the challenges that the [DOJ] has is [that] there haven't been any litigated pattern or practice cases.").

144. Interview #5, *supra* note 129, at 4 (explaining that in past negotiations, the DOJ has started by asking for significantly more reforms than they

compromise somewhere in the middle.[145] The DOJ understands that it will be unable to transform every aspect of a police department's organization or culture in a way that comports with best practices. Instead, the DOJ merely attempts to negotiate a reasonably feasible set of reforms that ought to improve the likelihood that police officers will behave constitutionally.[146] The qualitative interview data from this Article provides useful insight into how the negotiation process works. From these accounts, four trends emerge.

First, there does appear to be a genuine, good faith negotiation that happens between the DOJ and the targeted police agency.[147] As a police administrator involved in the negotiation process explained, on "[t]he negotiation side, there was a lot of give and take in terms of what we thought we could do . . . and in what we thought would still make sense for [our department] as a whole."[148] DOJ litigators also recognize that negotiated settlements require compromise.[149] As one DOJ litigator acknowledged, "every city is different."[150]

Ultimately though, correcting unconstitutional practices through compromise seems counterintuitive. Why, after all, should there be any negotiating about the correction of unconstitutional practices? The answer is at the heart of the complex SRL process. There is no perfect formula that a police department can implement to prevent unconstitutional misconduct amongst its ranks. Instead, there are best practices that leading experts in the field believe encourage lawful behavior. The negotiation process, thus, invites compromise between the tar-

expect to actually get through a negotiated settlement; "you don't want to begin in your compromise position," but instead start by making lofty demands, thereby allowing each side to meet in the middle).

145. *Id*. (explaining the process of making demands and eventually reaching compromise).

146. In his study of SRL from a criminal justice and public policy perspective, Professor Joshua Chanin has called this process "negotiated justice." Chanin, *supra* note 30, at 1.

147. Interview with Independent Monitor #7, at 3–4 (July 18, 2013) [hereinafter Interview #7] (on file with author) (stating that police departments are "able to have some form of negotiation about certain things that are placed into the agreement that may just not be operationally sound because of the unique features of the Department").

148. Interview with Police Administrator #16, at 3 (July 29, 2013) [hereinafter Interview #16] (on file with author) (explaining that, "the other side had their own police experts that had that in mind as well").

149. Interview #5, *supra* note 129, at 4 ("A negotiated agreement is a compromise.").

150. *Id*.

geted police agency and the DOJ—with the DOJ demanding extensive, costly reforms and the police agency attempting to limit the scope of the federal oversight.[151]

Second, even though these settlement agreements do appear to emerge via true negotiation between various stakeholders, the DOJ typically holds an advantageous bargaining position. The DOJ has statutory authority to bring formal pattern or practice litigation in the event that a local municipality refuses to negotiate a settlement agreement. The DOJ has also demanded similar reforms across different municipalities. According to participants, the United States has attempted to leverage the contents of previous agreements to gain a bargaining endowment at various times in recent negotiations. As one former monitor and DOJ official explained, "the [DOJ] can use the threat of . . . litigation to get [police] departments to settle."[152] So far, "no pattern or practice case has come to trial . . . and resulted in a decision one way or the other," in part because "no city has wanted to risk litigation."[153]

Third, since the DOJ is a repeat litigator in the § 14141 context, the DOJ negotiates differently than a local police agency. Marc Galanter has written on the structural advantages that repeat players in the court system have over individuals who only litigate a single case.[154] In the context of § 14141 settlements, it appears that the DOJ is openly concerned with the precedent established by each agreement. While the DOJ does not demand absolute consistency across agreements, it does recognize that inconsistency in settlement terms may be harm-

151. *See, e.g.*, Interview #5, *supra* note 129, at 4 (stating that neither side wants to "begin in [their] compromise position" and also explaining how each side expects to give a little during negotiations).

152. Interview #18, *supra* note 116, at 12.

153. *Id*.

154. *See generally* Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Galanter distinguishes between repeat players (those who are engaged in multiple similar litigations over time) and one-shotters (those who litigate only on rare occasions). *Id*. at 97–104. Repeat players have advanced knowledge and expertise in the area of litigation, economics of scale, and the ability to play the odds over a long series of cases. *Id*. at 98–100. This means that repeat players have a structural advantage in our legal system. As Galanter explains, repeat players have better "information, [the] ability to surmount cost barriers, and [the] skill to navigate restrictive procedural requirements." *Id*. at 119. Since repeat players are engaged in the same type of litigation time and time again, their goals are different than a one-shotter. *Id*. at 100. One-shotters simply want to maximize their individual return in any given case. *Id*. The repeat player wants to establish valuable precedent that will be of use in future cases. *Id*.

ful in future negotiations.[155] This suggests that DOJ recognizes it is a repeat player in pattern or practice litigation. As a result, it is concerned not just about securing a satisfactory settlement, but also about how that settlement might reflect on the DOJ's bargaining position in future negotiations.[156]

Fourth, police unions commonly attempt to intervene in settlement negotiations with the intent of blocking reforms that may increase oversight or otherwise burden frontline police officers.[157] This is understandable since policies implemented as part of SRL may affect the day-to-day work of frontline officers. An organized labor unit designed to enhance working conditions for its members should rationally want to block such changes—or at minimum be a party to any negotiations. Courts have thus far rejected multiple union requests and allowed negotiation to proceed exclusively between departmental administration and the DOJ.[158] In interviews, police administrators suggested that this makes structural reform a particularly successful accountability tool.[159] Police chiefs often complain that collective bargaining restrains their ability to implement accountability measures.[160] Thus, SRL appears to provide reform-minded police chiefs with legal cover to implement wide-ranging reforms, without having to get union approval.[161] Once

155. Interview #5, *supra* note 129, at 4 (using the example of how the DOJ wants a clear and cogent answer for why they may change the ratio of supervisors to patrol officers slightly from one jurisdiction to the next, thereby ensuring consistency).

156. *Id*. (stating that "[w]e try to be consistent or at least know why we are not being consistent").

157. *See, e.g.*, United States v. City of Los Angeles, No. 2:00-cv-11769-GAF-RC, at 2 (C.D. Cal. Jan. 4, 2001) ("The [police union] sought to join the negotiations because a consent decree would 'inevitably impact the current collective bargaining agreement between the City and the [police union].'" (citation omitted)); *see also* Telephone Interview with Police Administrator #30 (Nov. 19, 2013) [hereinafter Interview #30] (on file with author) (describing the union opposition to these sorts of reforms).

158. *See, e.g.*, United States v. City of Los Angeles, 2:00-cv-11769-GAF-RC (C.D. Cal. Jan. 4, 2001) (order denying the Los Angeles Protective League's motion to intervene).

159. Telephone Interview with Police Administrator #22 (Oct. 28, 2013) (on file with author) [hereinafter Interview #22] (explaining that SRL has enabled this police chief to push potentially unpopular but necessary reforms without having to get union approval).

160. KADLECK & TRAVIS, *supra* note 23, at 1–3 (describing the various examples of accountability measures that police unions have resisted across the country).

161. For a further explanation of these concepts in organizational theory, see Peer C. Fiss & Edward J. Zajac, *The Symbolic Management of Strategic*

these accountability measures are incorporated into a negotiated settlement and enforceable in federal court, police unions have little option but to accept them. In this way, SRL reframes the implementation of accountability measures. No longer are these reforms merely annoying encumbrances on the day-to-day lives of frontline workers. Instead, SRL imbues these reforms with legal significance, increasing the probability of organizational acceptance.

From this negotiation process, the DOJ reached its first § 14141 settlement with the Pittsburgh Bureau of Police on April 4, 1997.[162] Since then, the DOJ has agreed to a total of 24 different settlements in 22 jurisdictions.[163] Of these, 12 have resulted full-scale SRL, supervised by the DOJ through the appointment of an external monitor.[164] Figure 3 maps out all of the formal investigations and settlements.

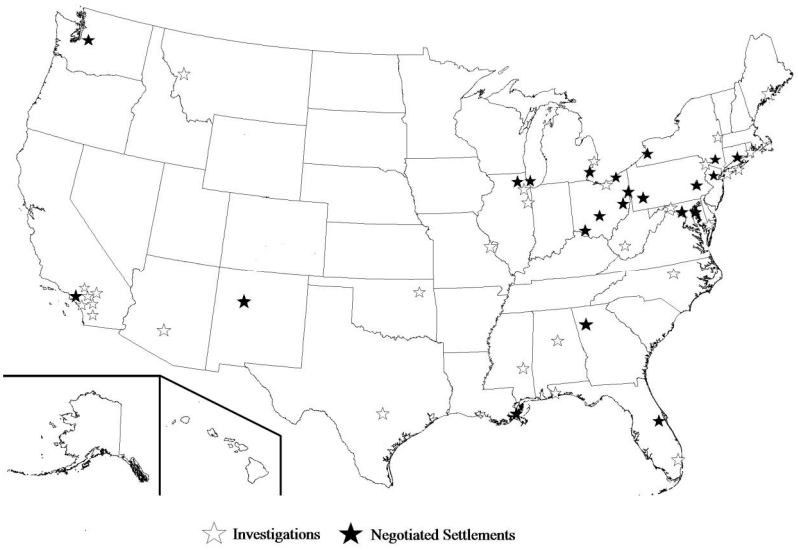
Change: Sensegiving via Framing and Decoupling, 49 ACAD. OF MGMT. J. 1173 (2006). Fiss and Zajac explain that "the success of strategic change will depend not only on an organization's ability to implement new structures and processes, but also on the organization's ability to convey the new mission and priorities to its many stakeholders . . . [and] ensuring both understanding and acceptance of new strategies among key constituents." *Id*. at 1173.

162. Rushin, *supra* note 14, at 3247.

163. *Id*.

164. *Id*. These cities include Pittsburgh, Steubenville, New Jersey, Washington, D.C., Los Angeles, Cincinnati, Detroit, Prince George's County, the Virgin Islands, Seattle, East Haven, and New Orleans. *Id.*

FIGURE 3. MAP OF FORMAL INVESTIGATIONS AND NEGOTIATED SETTLEMENTS



C. CONTENT OF NEGOTIATED SETTLEMENTS

While each negotiated settlement should be specifically tailored to the unique needs of the individual municipality, the settlements have proven to be remarkably similar over time. There are several common issues addressed in negotiated settlements. Most agreements have included sections regulating the use of force by police officers. Virtually all agreements require some change in officer training and the implementation of an early warning system to identify officers engaged in a pattern of misconduct. Agreements also frequently regulate the handling of citizen complaints and the internal investigation of officer wrongdoing. About half of the agreements require external auditing or monitoring to ensure compliance. In recent years, though, the DOJ under President Barack Obama has expanded the scope of SRL to cover a wide range of topics, including gender bias, interrogations, lineup procedures, recruitment, crisis intervention, and promotion standards.

1. Use of Force

Almost every single negotiated settlement signed by the DOJ pursuant to § 14141 addresses the policing agency's use of

force. Some of these use of force stipulations regulated many different possible issues related to force.[165] Others more narrowly targeted a particular type of force at issue in the case.[166] In total, all twelve of the negotiated settlements that involved monitors included a section regulating the use of force.[167] This seems to be consistent with the legislative roots of § 14141, as the law originated in part out of a reaction to the brutal violence against Rodney King.[168] Remember that the *Lyons* and *City of Philadelphia* cases also involved allegedly repetitive police brutality that private litigants and the DOJ were unable to stop through traditional remedies.[169] As a report by the Police Executive Research Forum (PERF) concluded, "[p]olice use of force is one of the primary issues that the Civil Rights Division investigates . . . . Use of force has been a component in almost all of DOJ's civil rights investigations to date, including consent decrees/settlement agreements . . . ."[170] It should be no surprise, then, that even the very earliest agreements, like those in Pittsburgh and Steubenville, included a substantial portion dedicated to the regulation of use of force.[171] The use of force stipulations in negotiated settlements fall into three categories.

165. *See, e.g.*, New Orleans Consent Decree, *supra* note 141, at 19–39 (detailing the expansive requirements regarding the use of force, regulating nearly every possible force usage, including oleoresin capsicum spray, canines, firearms, and electronic control weapons); United States v. City of Seattle, No. 2:12-cv-01282-JLR, at 16–40 (W.D. Wa. July 27, 2013) [hereinafter Seattle Agreement], *available at* http://www.justice.gov/crt/about/spl/documents/spd_consentdecree_7-27-12.pdf (detailing regulations on use of firearms, conductive energy devices, oleoresin capsicum spray, and impact weapons).

166. Memorandum of Agreement Between the U.S. Dep't of Justice and Prince George's County Police Department at 6–10 (Jan. 22, 2004) [hereinafter Prince George's County MOA], *available at* http://www.clearinghouse.net/chDocs/public/PN-MD-0001-0002.pdf (specifically regulating only the use of force involving oleoresin capsicum spray).

167. *See* Rushin, *supra* note 14, at 3247; *see, e.g.*, New Orleans Consent Decree, *supra* note 141, at 108–09 (describing the role of the monitor); Detroit Consent Decree, *supra* note 141, at 37–38 (describing the selection of the monitor).

168. *See supra* Part I.B.

169. *See supra* Part I.B.

170. PERF, *supra* note 121, at 12.

171. Consent Decree at 7, 9–11, United States v. City of Steubenville, No. 2:97-cv-00966 (S.D. Ohio Aug. 28, 1997) [hereinafter Steubenville Consent Decree], *available at* http://www.clearinghouse.net/chDocs/public/PN-OH-0002-0005.pdf (requiring written reports on all use of force, the implementation of new policies, training in de-escalation, and more); Consent Decree at 10–12, United States v. City of Pittsburgh, No. 2:97-cv-00354-RJC (W.D. Pa. Feb. 26, 1997) [hereinafter Pittsburgh Consent Decree], *available at* http://www

First, most regulate "[s]ubstantive policy on when officers may or may not use force."[172] Use of force sections commonly require departments to clearly delineate between different levels of force and to install policies on when certain levels of force are permissible.[173] Second, virtually every agreement establishes strict reporting requirements for use of force incidents.[174] Officers are required to notify their supervisors after any use of force or upon hearing any allegation of excessive use of force.[175] This type of requirement is evident in the Steubenville,[176] Cincinnati,[177] Prince George's County,[178] New Orleans,[179] Washington, D.C.,[180] and Pittsburgh[181] agreements. Third, most agree-

.clearinghouse.net/chDocs/public/PN-PA-0003-0002.pdf (requiring documentation and regular oversight of use of force).

172. PERF, *supra* note 121, at 12.

173. *Id.* at 13 (stating that agreements often require departments to "[c]learly identif[y] categorical types and levels of force"). These agreements also normally establish requirements for various types of weapons. *Id.* at 13 ("Policies, procedures, and training that are specific to certain weapons or types of force (such as firearms, Electronic Control Weapons, OC spray, canine use, and vehicle pursuits)."); *see, e.g.*, New Orleans Consent Decree, *supra* note 141, at 14–22 (including stipulations on the use of firearms, canines, electronic control weapons, and oleoresin capsicum spray); Seattle Agreement, *supra* note 165, at 12–20 (regulating various types of weapons and laying out detailed rules on use of force reporting, training, use of force investigations, and supervisory oversight).

174. PERF, *supra* note 121, at 13 (stating that "[r]eporting, documentation and investigation" requirements are common in negotiated settlements that provide for a supervisor response and periodic auditing or review). For an example, see Consent Decree at 6, United States v. The Territory of the Virgin Islands, No. 3:08-cv-00158-CVG-RM (D.V.I. Mar. 24, 2009) [hereinafter Virgin Islands Consent Decree], *available at* http://www.clearinghouse.net/chDocs/public/PN-VI-0001-0003.pdf (requiring the police department to document all uses of force in writing).

175. *See, e.g.*, Virgin Islands Consent Decree, *supra* note 174, at 6.

176. Steubenville Consent Decree, *supra* note 171, at 9 ("The City shall develop, and require all officers to complete, a written report each time . . . any type of force is used against an individual . . . .").

177. Memorandum of Agreement Between the U.S. Dep't of Justice & the City of Cincinnati, Ohio and the Cincinnati Police Dep't para. 24 (April 12, 2002) [hereinafter Cincinnati MOA], *available at* http://www.clearinghouse.net/chDocs/public/PN-OH-0006-0002.pdf ("The use of force report form will indicate each and every type of force that was used, and require the evaluation of each use of force.").

178. Consent Decree at 15, United States v. Prince George's County, Md., No. 8:04-cv-00185 (D. Md. Jan 22, 2004) [hereinafter Canine Consent Decree] (explaining the reporting requirements for canine use of force in particular).

179. New Orleans Consent Decree, *supra* note 141, at 24 (establishing the use of force policy and laying out requirements for use of force investigations).

180. Memorandum of Agreement Between the U.S. Dep't of Justice & the District of Columbia & the D.C. Metro. Police Dep't paras. 53–55 (June 13,

ments establish detailed procedures for how departments ought to investigate use of force incidents.[182] In sum, the negotiated settlements consistently demonstrate a concern for the reporting, regulation, and investigation of use of force incidents.

2. Early Intervention and Risk Management Systems

A large number of settlements, including the vast majority of settlements resulting in monitoring, require the development of an early intervention system (EIS) to manage risk.[183] The DOJ has required the development of these systems in the Los Angeles,[184] Pittsburgh,[185] Cincinnati,[186] Steubenville,[187] Washington, D.C.,[188] New Jersey,[189] New Orleans,[190] and the Virgin Is-

2001) [hereinafter Washington, D.C. MOA], *available at* http://www.clearinghouse.net/chDocs/public/PN-DC-0001-0001.pdf (explaining the reporting requirements for use of force).

181. Pittsburgh Consent Decree, *supra* note 171, at 10–11 (requiring officers to complete written reports on uses of force).

182. PERF, *supra* note 121, at 13. For examples of these sorts of stipulations, see Consent Decree at 23–27, United States v. City of L.A. , No. 2:00-cv-11769-GAF-RC (C.D. Cal. June 15, 2001) [hereinafter Los Angeles Consent Decree], *available at* http://www.clearinghouse.net/chDocs/public/PN-CA-0002-0006.pdf (laying out the terms of the use of force investigations). The Los Angeles agreement typifies this trend as it mandates the creation of a unit dedicated to the investigation of use of force incidents housed in the Operations Headquarters Bureau. *Id.* at 23. The Los Angeles agreement also establishes a chain of command when an officer uses specified force. *Id.* at 23–27. For other examples of this trend, see Canine Consent Decree, *supra* note 178, at 15–17 (applying specifically to use of canine force).

183. PERF, *supra* note 121, at 16 (concluding that a large number of negotiated settlements have inevitably required the development of some type of early intervention system).

184. Los Angeles Consent Decree, *supra* note 182, at 9–22 (describing the development of the TEAMS II system, the management and coordination of risk assessment responsibilities, and the performance evaluation system).

185. Pittsburgh Consent Decree, *supra* note 171, at 6–9 (stating that the city should implement an early warning system within twelve months).

186. Cincinnati MOA, *supra* note 177, paras. 57–66.

187. Steubenville Consent Decree, *supra* note 171, 28–29 (describing the information system meant to supervise officer behavior).

188. Washington, D.C. MOA, *supra* note 180, paras. 106–17 (describing the personnel performance management system (PPMS)).

189. United States v. New Jersey State Police, No. 99-5970(MLC) paras. 40–56 (D.N.J. Dec. 30, 1999) [hereinafter New Jersey Consent Decree], *available at* http://www.clearinghouse.net/chDocs/public/PN-NJ-0002-0001.pdf (describing the development of the management awareness program).

190. New Orleans Consent Decree, *supra* note 141, at 80–83 (outlining the terms of the new early warning system to be implemented as part of the consent decree).

lands[191] cases. Research suggests that in any given police department, a small number of officers typically use force more often than the rest of the department.[192] One way to limit unlawful uses of force is to identify and monitor these officers with a high proclivity to use force. EIS does just this, "flagg[ing] officers for closer review" by "collect[ing] data and analyz[ing] patterns of activity."[193] These systems go by different names, but their central goal is to "identify opportunities to reduce risky behavior, department liability, and citizen complaints."[194]

The system articulated in the Washington, D.C., negotiated settlement is reasonably representative of those required by most settlements.[195] There, the DOJ required the police department to collect numerous data points on officer behavior and catalog this information into a computerized database.[196] Supervisors were then ordered to use this database to identify "any pattern or series of incidents" that indicate that an officer may be engaged in systematic misconduct.[197] If such a pattern existed, the settlement required the supervisor to take a more intensive review of the behavior.[198]

Law enforcement departments have used these types of early intervention and risk management systems for decades,[199] and have increased in popularity because of the belief that "10

191. Virgin Islands Consent Decree, *supra* note 174, at 12–16 (describing the planned implementation of a management and risk supervision system).

192. PERF, *supra* note 121, at 16 ("Research has long suggested that a small percentage of police officers account for a high percentage of use-of-force incidents.").

193. *Id.*

194. *Id.*

195. Washington, D.C. MOA, *supra* note 180, para. 106.

196. *Id.* at para. 106 (explaining the definition and requirements of the PPMS computer database). The settlement required the PPMS to include information on use of force incidents, canine deployment, officer-involved firearm discharges, vehicle pursuits, complaints, commendations, criminal arrests and investigations, training history, educational background, and more. *Id.* para. 107.

197. *Id.* para. 112(a).

198. *Id.* para. 112(b).

199. SAMUEL WALKER ET AL., POLICE EXEC. RESEARCH FORUM, SUPERVISION AND INTERVENTION WITHIN EARLY INTERVENTION SYSTEMS: A GUIDE FOR LAW ENFORCEMENT CHIEF EXECUTIVES 2 (2005) [hereinafter PERF EARLY INTERVENTION SYSTEMS], *available at* http://www.policeforum.org/assets/docs/Free_Online_Documents/Early_Intervention_Systems/supervsion%20and%20intervention%20within%20early%20intervention%20systems%202005.pdf ("EIS have been used in the law enforcement community for more than 25 years . . . .").

percent of . . . officers cause 90 percent of the problems."[200] Initial research demonstrates that these measures also have a positive impact on police agencies as they give supervisors additional information about their officers, foster a climate of accountability, decrease complaints, and help facilitate organizational management.[201]

3. Complaint Procedures and Investigations

Nearly every single monitored settlement provides some stipulations on how the agency ought to collect and process citizen complaints about officer conduct.[202] Settlements that include stipulations on complaints address the same three basic issues—the intake of complaints, the investigation of complaints, and the complaint evaluation process.[203] The process of handling citizen complaints required under these negotiated settlements roughly mirrors those recommended by the International Association of Chiefs of Police (IACP), in coordination with the Office of Community Oriented Police Services (COPS).[204] They also match those required by the Commission

200. Samuel Walker et al., *Early Warning Systems: Responding to the Problem Police Officer*, NAT'L INST. JUST. RES. BRIEF, July 2001, at 1, *available at* http://www.ncjrs.gov/pdffiles1/nij/188565.pdf; *see also id.* at 2 (explaining that in 1999 around twenty-seven percent of departments servicing a metropolitan area of at least 50,000 people had an EIS in place and twelve percent of agencies in 1999 claimed that they would soon implement such a system).

201. *Id.* at 4, 6–7 (stating that "the qualitative component of the research found that these systems have potentially significant effects . . ." and identifying multiple potential benefits).

202. Seattle represents the rare settlement that did not establish detailed parameters on complaint procedures. *See* Seattle Agreement, *supra* note 165, at 46 (stating that the DOJ found that the existing complaint processesing system through the Office of Professional Accountability was sufficient). For examples of settlments that lay out detailed citizen complaint procedures, see Los Angeles Consent Decree, *supra* note 182, at 29–35 (detailing rules on the initiation, investigation, and adjudication of complaints); Washington, D.C. MOA, *supra* note 180, paras. 92–104 (including sections on the receipt of citizen complaints, the investigation of complaints, and the evaluation of these allegations).

203. *See, e.g.*, Steubenville Consent Decree, *supra* note 171, at 15–22 (setting requirements for starting an investigation pursuant to a complaint, conducting an investigation, and evaluating a complaint's validity); Pittsburgh Consent Decree, *supra* note 171, at 23–32 (laying out standards for each of these three different phases of the complaint process); Prince George's County MOA, *supra* note 166, at 14–18 (including components about the receipt, tracking, investigation, and adjudication of complaints against officers).

204. *See* INT'L ASS'N OF CHIEFS OF POLICE, BUILDING TRUST BETWEEN THE POLICE AND THE CITIZENS THEY SERVE: AN INTERNAL AFFAIRS PROMISING

on Accreditation for Law Enforcement (CALEA).[205] These organizations argue that improved complaint procedures provide three separate benefits.[206] First, these procedures give administrators a more accurate understanding of the scope and depth of misconduct problems within police agencies.[207] Second, the presence of these procedures may incentivize officers to be accountable for misconduct.[208] And third, these procedures may increase public trust in police agencies.[209]

4. Training Overhaul

Negotiated settlements commonly require departments to adopt major overhauls of their training procedures. This includes both training for new officers and in-service training for existing officers.[210]

The settlements generally require the departments to document the training history of each officer.[211] The DOJ normally makes some stipulation as to the subjects of these trainings.[212] The DOJ has not gone to the extent of stipulating the content of

PRACTICES GUIDE FOR LOCAL LAW ENFORCEMENT 20–26 (2008), *available at* http://www.cops.usdoj.gov/Publications/e080917232-BuildingTrust.pdf.

205. *Id.* at 22 (discussing the CALEA standards for law enforcement agencies).

206. *Id.* at 17 (discussing complaint procedures as an important part of internal affairs).

207. *Id.* at 17 (arguing that these improved complaint procedures provide a more "fair, thorough, accurate, and impartial" view of misconduct present in a department).

208. *Id.* (emphasizing the possible improvement in officer morale and behavior).

209. *Id.* (explaining how these measures will "increase trust within the community").

210. *See, e.g.*, Steubenville Consent Decree, *supra* note 171, at 6–7 (identifying the need for both entry and annual in-service training); Cincinnati MOA, *supra* note 177, para. 82 (noting the need for training for "all new recruits and as part of annual in-service training").

211. *See, e.g.*, Virgin Islands Consent Decree, *supra* note 174, para. 77 ("The VIPD shall continue to maintain training records regarding every VIPD officer that reliably indicate the training each officer has received. The training records shall, at a minimum, include the course description and duration, curriculum, and instructor for each officer."); New Jersey Consent Decree, *supra* note 189, paras. 108–09 ("[T]he State Police will track all training information, including name of the course, date started, date completed, and training location for each member receiving training.").

212. *See, e.g.*, New Jersey Consent Decree, *supra* note 189, para. 100 (identifying some of the areas that New Jersey must broadly address in trainings); Prince George's County MOA, *supra* note 166, paras. 54–55 (ordering the department to appoint a training committee to develop curriculum and stipulating the subjects that ought to be covered).

the trainings in much specificity.[213] That is to say, the DOJ gives the agency broad discretion to create their own training materials addressing each relevant subject, so long as that training is "consistent with . . . [the law] and proper police practices."[214] In some cases, though, the DOJ has gone as far as specifying the length of time that each officer must be trained.[215] The topics covered by the training section of each settlement appear to be uniquely tailored to the apparent problem in the jurisdiction.

Empirical evidence suggests that departments that rigorously train their officers suffer from lower rates of misconduct.[216] And perhaps equally important to the department administrators, enhanced training lowers the likelihood of a department suffering stiff penalties in private litigation.[217] Although there is some academic disagreement about the exact type of training necessary to reduce police wrongdoing, police professionals have increasingly recognized the absolute necessity of continual law enforcement training.[218]

5. Bias-Free Policing

A handful of the agreements demonstrate some concern for the prevention of biased policing practices by requiring departments to regularly review and audit officer records to un-

213. *See, e.g.*, New Jersey Consent Decree, *supra* note 189, para. 100 (stating that New Jersey needs to develop policies to train recruits and troopers on various issues related to diversity, complaint procedures, professionalism, and many more topics, but not specifically articulating the exact content of these trainings); Prince George's County MOA, *supra* note 166, para. 55 (listing the areas to be addressed in training, but leaving it up to the department to develop policies that address these topics in accordance with the law).

214. Virgin Islands Consent Decree, *supra* note 174, para. 75.

215. *See, e.g.*, Steubenville Consent Decree, *supra* note 171, para. 13(a)–(b) (identifying field training that must last at least twelve weeks and stating that existing officers must partake in in-service training "for at least 40 hours each year").

216. *See* James J. Fyfe, *Training To Reduce Police-Civilian Violence*, *in* POLICE VIOLENCE 165, 174 (William A. Geller & Hans Toch eds., 1996) (describing one training program that led to a substantial reduction in complaints of abuse).

217. The Court has allowed litigants to hold police departments liable for the actions of their officers in the event that the police department was deliberately indifferent in its failure to train or supervise. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). This case opened law enforcement departments to civil litigation under 42 U.S.C. § 1983 in the event that their failure to provide adequate training contributed to an officer's violation of an individual's constitutional right. *See supra* notes 9, 43 and accompanying text.

218. *See* Fyfe, *supra* note 216, at 176–77.

cover patterns of racial bias.[219] This concern for bias appears particularly evident in the Pittsburgh,[220] Steubenville,[221] New Jersey,[222] and New Orleans[223] consent decrees.[224] For example, in New Jersey, the DOJ required the State Police to collect and monitor the racial breakdown of occupants in motor vehicle stops, in hopes of thwarting the use of racial profiling.[225] The agreement then required the monitor to compare the racial breakdown of motor vehicle stops with the racial and ethnic percentage of drivers within the State Police's jurisdiction.[226]

6. Community and Problem-Oriented Policing

Another emerging trend in negotiated settlements is the inclusion of community and problem-oriented policing requirements. Even though this component is explicitly mentioned in only one of the negotiated settlements—the recent New Orleans agreement[227]—some monitors have openly pushed community and problem-oriented policing during the implementation of structural reform in other cities as a possible solution to aggressive policing strategies that stigmatized minority commu-

219. *See, e.g.*, Pittsburgh Consent Decree, *supra* note 171, para. 20; Steubenville Consent Decree, *supra* note 171, para. 77.

220. Pittsburgh Consent Decree, *supra* note 171, para. 20 ("The City shall conduct regular audits and reviews of potential racial bias, including use of racial epithets, by all officers.").

221. Steubenville Consent Decree, *supra* note 171, para. 77 ("The City shall conduct regular audits and reviews of potential racial bias.").

222. New Jersey Consent Decree, *supra* note 189, paras. 49–50 (discussing plans to monitor the racial breakdown of stops in an effort to thwart racial profiling).

223. New Orleans Consent Decree, *supra* note 141, paras. 177–222 (laying out terms, in great detail, for how the New Orleans Police Department could avoid racially biased and gender biased policing tactics). The recent settlement in New Orleans, though, has taken a more expansive view of biased policing, expanding bias-free policing to protect undocumented immigrants and LGBT persons. *See id*. para. 184.

224. The Los Angeles Consent Decree includes some mention of racial bias, too. *See* Los Angeles Consent Decree, *supra* note 182, para. 138. But this mention of racial bias seems somewhat less significant than other negotiated settlements that discussed the issue. The same can be said for the Washington, D.C. negotiated settlement. *See, e.g.*, Washington, D.C. MOA, *supra* note 180, para. 76.

225. New Jersey Consent Decree, *supra* note 189, para. 50.

226. *Id*. para. 54.

227. New Orleans Consent Decree, *supra* note 141, at 60–63, paras. 223–33 ("NOPD agrees to reassess its staffing allocation and personnel deployment, including its use of specialized units and deployment by geographic area, to ensure that core operations support community policing and problem-solving initiatives . . . .").

nities.[228] While there remain some concerns about the disparate benefits of community policing[229] and the general disinterest of law enforcement officers in community policing efforts,[230] criminological research suggests that these measures increase community trust and redefine law enforcement goals along the lines of community interests.[231]

The range of topics covered by negotiated settlements is admittedly broader than the list of topics above. Settlements have also touched on a range of issues related to interrogations,[232] lineup procedures,[233] gang unit management,[234] canine deployment,[235] crisis intervention,[236] and promotion evaluations.[237]

228. For example, a member of the Cincinnati monitoring team explained that part of the team's goal was to encourage the department to "chang[e] from saturation patrol and aggressive policing to community policing, problem oriented policing and problem solving." Interview #18, *supra* note 116, at 3.

229. *See generally* WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 107 (1990) (identifying how minority residents feel less of the positive influences of community policing efforts and explaining that "[t]he lack of positive effects for those at the bottom of the social ladder may be related to their more limited awareness of the programs").

230. *See generally* Antony M. Pate & Penny Shtull, *Community Policing Grows in Brooklyn: An Inside View of the New York City Police Department's Model Precinct*, 40 CRIME & DELINQ. 384 (1994) (finding some officers were generally disinterested in the community policing effort).

231. *See generally* Wesley G. Skogan, *The Promise of Community Policing*, *in* POLICE INNOVATION: CONTRASTING PERSPECTIVES 27, 31 (David Weisburd & Anthony A. Braga eds., 2006) ("[A]fter eight years of citywide community policing, Chicagoans' views of their police improved by 10–15 percentage points on measures of their effectiveness, responsiveness, and demeanor.").

232. New Orleans Consent Decree, *supra* note 141, paras. 163–70 (laying out standards for custodial interrogations).

233. *Id*. paras. 171–76 (establishing procedures for photographic lineup administrations).

234. Los Angeles Consent Decree, *supra* note 182, paras. 106–07 (requiring the development and administration of gang management policy).

235. Prince George's County MOA, *supra* note 166, paras. 40–48 (establishing thorough regulation of canine deployment).

236. Seattle Agreement, *supra* note 165, paras. 130–37 (laying out regulations on crisis intervention via the creation of the crisis intervention committee).

237. New Orleans Consent Decree, *supra* note 141, paras. 295–305 (establishing both performance evaluations and promotions and describing how these evaluations ought to be used in the promotion process).

D. APPOINTMENT OF MONITOR

If the DOJ and the targeted police agency agree to the appointment of an external monitor, the parties next enter the monitor appointment phase. During this stage, the parties must select a mutually agreeable external team of experts to oversee the upcoming structural reforms. This is a critical stage since "a city's relationship with the monitor is a critical factor in how swiftly reforms can be made and a consent decree ended."[238] No research into SRL in police departments has ever evaluated the monitor selection process. This void in the literature is understandable. Generally, this selection process happened through a confidential negotiation process behind closed doors.[239] To better understand how this monitor selection process works, this section supplements interview data with records from the monitor selection process in New Orleans. There, Federal District Judge Susie Morgan of the Eastern District of Louisiana ordered a transparent monitor selection involving public hearings, public disclosure of each monitoring team's proposal, and negotiations between a ten-member panel of officials from New Orleans and the DOJ.[240] From these court records and stakeholder interviews, a couple trends emerge about the monitor selection process.

First, monitors are expensive.[241] As a result, cost control is a critically important issue in the monitor appointment process. Remember, the local police agency has to foot the bill for any monitoring services.[242] Thus, a rational municipality will want

238. PERF, *supra* note 121, at 3.

239. Order Regarding Request for Proposal at 3, United States v. New Orleans, No. 2:12-cv-01924 (E.D. La. Sept. 6, 2012) [hereinafter New Orleans Monitor Search Order] ("The Court further observes that in other cases involving consent decrees negotiated to resolve claims brought pursuant to [§ 14141], the United States participated in selecting monitors outside of a jurisdiction's standard procurement procedure.").

240. Edmund W. Lewis, *NOPD Consent Decree Moves Forward*, LA. WKLY. (Aug. 19, 2013), http://www.louisianaweekly.com/nopd-consent-decree-moves-forward (explaining the selection process and identifying the ten-person panel entrusted with the selection of a monitor); John Simerman, *Federal Judge Picks Feds' Choice for NOPD Monitor*, ADVOC. (July 9, 2013), http://www.theadvocate.com/news/6438217-123/federal-judge-picks-feds-choice (explaining the five public hearings held to discuss the appointment of the monitor).

241. PERF, *supra* note 121, at 42 (stating that "[t]he costs of achieving compliance, and the legal costs paid to monitors, are sometimes contentious" and they are "often high").

242. *See, e.g.*, New Orleans Memorandum Regarding Monitor Candidates at 12–14, United States v. New Orleans, No. 2:12-cv-01924 (E.D. La. June 14,

to hire the cheapest monitor, so long as that monitor will help that municipality escape the negotiated settlement in an expeditious manner. But the municipality does not have unilateral power to select an external monitor.[243] Instead, the municipality must negotiate with the DOJ to select a monitoring team.[244] Costs are particularly critical for many cities targeted for federal monitoring in part because these communities have finite resources. In some of these municipalities, the high cost of monitoring exacerbates preexisting financial troubles. The annual cost of monitoring typically tops $1,000,000.[245] Figure 4 shows the average annual yearly cost of monitoring services in several of the police departments targeted for SRL thus far.[246]

FIGURE 4. APPROXIMATE AVERAGE YEARLY COST OF MONITORING SERVICES

City	Cost
Seattle	$880,000
Prince George's County	$900,000
Washington, D.C.	$1,000,000
Oakland	$1,700,000
Detroit	$1,750,000
New Orleans	$2,000,000
Los Angeles	$2,200,000

The New Orleans monitor selection process illustrates the tension over allocating costs and burdens. There, the City and the DOJ sharply disagreed on the appropriate choice of monitor, due in large part to substantial difference in cost between

2013) [hereinafter New Orleans Memorandum Recommending Hillard Heintze] (detailing New Orleans's concerns about the relatively high cost of monitoring that they would have to ultimately pay).

243. *See, e.g.*, Pittsburgh Consent Decree, *supra* note 171, para. 70 (serving as an example of a typical clause found in negotiated settlements that requires the two sides to negotiate on the selection of a monitor).

244. *See, e.g.*, *id.*

245. *See, e.g.*, PERF, *supra* note 121, at 1 ("The 2012 New Orleans consent decree is expected to . . . cost more than $11 million . . . .").

246. *Id.* (identifying cost of New Orleans monitoring); *id.* at 34 (identifying other costs based on estimates given by city officials, monitors, and media reports at a PERF conference on federal oversight of local police departments); *First Year Budget for Monitoring of Seattle Settlement Agreement*, SEATTLE CITY COUNCIL (Nov. 14, 2012), http://www.seattle.gov/council/harrell/attachments/Signed_Nov_2012-Oct_2013_Budget.pdf (stating that the first year budget for the Seattle monitoring will sit around $880,000).

the two options; New Orleans advocated for a cheaper monitor, while the DOJ supported the bid from a more expensive team.[247] Ultimately, the court sided with the DOJ.[248]

Second, there is widespread disagreement about the relative importance of a monitor's law enforcement background. Police agencies frequently push for monitors with law enforcement background.[249] When trying to bring about organizational change, one police chief explained, front line staff are more willing to accept changes if they know that "the leader bringing about the change has worn those shoes for a while."[250] The chief further clarified that monitors with law enforcement experience are also more credible because former cops "understand [that] if we put accountability measures in place, they [are going to] affect your crime fighting" abilities.[251] As a result, the chief concluded that monitoring teams in the future "should be comprised mostly of people with prior law enforcement experience," and "the top monitor should have very high level police management experience."[252] Conversely, the DOJ has indicated that while monitoring teams should include some individuals with law enforcement experience, lawyers should play an important role in the process.[253] As one DOJ litigator explained, "in all of these cases, there are complicated issues of constitutional law [and] criminal procedure involved" including "evidence gather-

247. The two finalist options were the Hillard Heintze team and Sheppard Mullin team. *See generally* New Orleans Memorandum Recommending Hillard Heintze, *supra* note 242. The Sheppard Mullin team proposed a four-year monitoring period for approximately $7.8 million with a cap set at $8.9 million. *Id.* at 13. Hillard Heintze offered to complete the same basic service for a capped price of around $7 million. *Id*. at 12–13. The United States, though, asserted that the City needs to comply with the Constitution, even if doing so costs money. United States' Memorandum Recommending Sheppard Mullin as Consent Decree Monitor at 17, United States v. New Orleans, No. 2:12-cv-01924 (E.D. La. June 14, 2013) [hereinafter U.S. Memorandum Recommending Sheppard Mullin].

248. Ramon Antonio Vargas, *NOPD Consent Decree Monitor Chosen: Sheppard Mullin Gets Contract*, TIMES-PICAYNE (July 5, 2013), http://www.nola.com/crime/index.ssf/2013/07/nopd_consent_decree_monitor_ch_1.html.

249 . *See* New Orleans Memorandum Recommending Hillard Heintze, *supra* note 242, at 2–6 (endorsing Hillard Heintze because of the team's experience in law enforcement).

250. Interview #16, supra note 148, at 10.

251. *Id*.

252. *Id*.

253. *See* Interview #12, *supra* note 116, at 7–8.

ing, data collection, [and] document review that needs to happen."[254]

As the participant concluded, "[a]ttorneys are trained to do that" kind of work.[255] The DOJ official added that "[t]o the extent that there are court processes [involved in monitoring], it's helpful to have attorneys that can interface with the court" and explain the "legal ramifications" of the reforms.[256] The court records suggest that this tension was a significant issue in the New Orleans monitor selection process. In that case, New Orleans advocated for the appointment of a monitoring team led by former law enforcement executives, while the DOJ pushed for a team led by lawyers.[257] New Orleans emphasized the "crucial insight" that former law enforcement administrators could provide to the SRL process.[258] The DOJ, though, insisted that lawyers were well suited to "make difficult calls" that are legally "accurate, objective, and credible."[259]

E. MONITORED REFORM

Once a police agency reaches a negotiated settlement with the DOJ, and the parties agree on the appointment of an external monitor, the long and arduous reform process begins. The monitored reform process can take as little as five years.[260] In

254. *Id.* at 8.

255. *Id.*

256. *Id.* ("It's also very helpful to have attorneys that can sometimes translate, sometimes explain to the legal entity at the jurisdiction, whether that's the city attorney's office or the state attorney's office or county counsel, whatever it will be; what the legal ramifications are of some of these reforms.").

257. New Orleans supported the Hillard Heintze monitoring team led by security and law enforcement experts. *See* New Orleans Memorandum Recommending Hillard Heintze, *supra* note 242, at 1. The DOJ supported the appointment of a monitoring team run by the law firm Sheppard Mullin. *See* U.S. Memorandum Recommending Sheppard Mullin, *supra* note 247, at 8–9 (explaining the choice of Sheppard Mullin).

258. New Orleans Memorandum Recommending Hillard Heintze, *supra* note 242, at 1–2 (explaining the importance of "law enforcement experience and expertise" in applying "provisions that are directed toward law enforcement rather than legal analysis").

259. U.S. Memorandum Recommending Sheppard Mullin, *supra* note 247, at 14 (elaborating further that lawyers are well-suited to be "[f]air and [i]ndependent" and "make difficult calls").

260. *See infra* Figure 5 (illustrating the length of monitored reform for each city involved in SRL thus far, and showing that Cincinnati and Prince George's County took only five years).

some cases, though, this stage can take well over a decade.[261] Figure 5 shows the length of monitoring in all police agencies that have fully completed SRL.[262]

FIGURE 5. LENGTH OF MONITORED REFORM FOR COMPLETED CASES

City	Length of Monitored Reform
Cincinnati	5.0 years[263]
Prince George's County	5.0 years[264]
Steubenville	7.5 years[265]
Pittsburgh	8.2 years[266]
New Jersey	9.8 years[267]
Washington, D.C.	10.7 years[268]
Los Angeles	11.9 years[269]

The monitored reform process is also costly. As already discussed, the affected police agency must pay the cost of monitoring, which often tops $1 million a year.[270] The municipality

261. *Id.* (showing that Los Angeles and Washington, D.C.'s monitored reforms took over a decade).

262. This study calculated these monitored reform periods as the number of days between the date that the DOJ entered into a negotiated settlement with the deficient department and the date that the DOJ released the department from the terms of the agreement. *See* Rushin, *supra* note 14, at 3244–47 (listing the closure date); *see also* Letter from U.S. Dep't of Justice to author (Apr. 24, 2013) [hereinafter Letter from DOJ] (on file with author) (listing agreement). This figure does not include cities that are still under monitoring.

263. The Cincinnati monitoring lasted from April 12, 2002, to April 12, 2007—approximately 1826 days or 5.0 years. Rushin, *supra* note 14, at 3245, 3247.

264. The Prince George's County monitoring lasted from January 22, 2004, to January 13, 2009—approximately 1,818 days or 5.0 years. *Id.*

265. The Steubenville monitoring lasted from September 3, 1997, to March 3, 2005—approximately 2,738 days or 7.5 years. *Id.* at 3244, 3247.

266. The Pittsburgh monitoring lasted from April 16, 1997, to June 16, 2005—approximately 2983 days or 8.2 years. *Id.*

267. The New Jersey monitoring lasted from December 29, 1999, to October 26, 2009—approximately 3,589 days or 9.8 years. *Id.*

268. The Washington, D.C. monitoring lasted from June 13, 2001, to February 10, 2012—approximately 3,884 days or 10.7 years. *Id.*

269. The Los Angeles monitoring lasted from June 15, 2001, to May 16, 2013—approximately 4353 days or 11.9 years. *Id.*

270. *See* PERF, *supra* note 121, at 1, 34 (putting the monitoring costs somewhere between $800,000 and $2,300,000); *see also* U.S. Memorandum Recommending Sheppard Mullin, *supra* note 247, at 18 (describing the competing proposals for monitors in New Orleans, with one offering a "four-year

must then cover the cost of all reforms required by the negotiated settlement. These costs are substantial. For example, in Los Angeles, the cost of implementing reforms likely totaled around $80–90 million.[271] When factoring in the cost of hiring the external monitor in Los Angeles, which came in at around $2 million a year,[272] the Los Angeles price tag likely surpassed $100 million.[273] This cost might sound starling at first. But considering the size of the city and the length of time it took to implement these changes, the actual cost to Los Angeles taxpayers was probably between $2 to $3 per city resident per year.[274]

During this reform process, the external monitor regularly visits the police agency to audit departmental records and meet with officers.[275] Based on these regular department visits and audits, monitors file public reports every three months evaluating the agency's progress in implementing the terms of the settlement.[276] These quarterly reports are long and detailed, and describe the department's observed progress in implementing

capped cost estimate [of] $7,007,542" and the other suggesting a four-year cost of "$7,880,786, with a cap of $8,900,000").

271. *See* Joseph Giordono & Jason Kandel, *Police Union Threatens Suit; LAPD: League President Says Officers To File Federal Case About Consent Decree*, LONG BEACH PRESS-TELEGRAM, Nov. 2, 2000, at A8 (putting the cost of the Los Angeles consent decree at around $40 million to implement in the first year, with an additional $30–50 million in expenses in the years to follow).

272. *Cf.* PERF, *supra* note 121, at 34 (putting the Los Angeles monitoring cost at $15 million).

273. This estimate was derived by calculating the cost of monitoring—roughly $2 million a year for over ten years—and adding it to the cost of the reforms. The $100 million figure likely underestimates the actual total cost. *Accord id.* at 34; Giordono & Kandel, *supra* note 271, at A8.

274. Over the 11.9 years that the City of Los Angeles was under a consent decree, the average population was 3,792,622. *See Los Angeles (City), California*, U.S. CENSUS BUREAU (Dec. 4, 2014), http://quickfacts.census.gov/qfd/states/06/0644000.html. Given that the estimated cost of the consent decree was around $100 million, the cost comes out to $26 a person for the entire time period. Spread out over 11.9 years, this comes out to about $2.19 per resident per year. *See supra* text accompanying note 273.

275. *See, e.g.*, Interview with External Monitor #3, at 15 (July 2, 2013) [hereinafter Interview #3] (on file with author) (stating that "the monitoring team goes on site" on a regular basis); *id.* ("Some, like ours, we basically go on site one week each quarter to do our on site review and data analysis, interviews, those kinds of things. We get our reports, data, that we look at.").

276. *See, e.g.*, OFFICE OF THE INDEPENDENT MONITOR OF THE L.A. POLICE DEP'T, FIRST QUARTERLY REPORT 1–2 (Nov. 15, 2001) (stating that the monitors in the Los Angeles case will issue quarterly reports covering approximately three months at a time); OFFICE OF THE INDEPENDENT MONITOR OF THE DETROIT POLICE DEP'T, FIRST QUARTERLY REPORT 3 (Jan. 20, 2004) (describing the plan to issue reports approximately every three months and describing these reports as quarterly reports).

each component of the negotiated settlement.[277] These quarterly reports also include the results of the monitor's regular audits of departmental records.[278]

The DOJ does not expect a police department to achieve 100% compliance with all components of a negotiated settlement. Instead, the DOJ generally requires that a police agency achieve "substantial compliance"—defined as the full satisfaction of around 94% of all components of a settlement agreement—before officially releasing the department from federal oversight.[279] To determine whether a department has reached this critical 94% compliance threshold, monitors break down the negotiated settlement by paragraph and examine whether the department has fully satisfied each term of that paragraph.[280] In doing so, monitors examine both whether a department has instituted the mandatory policy change required by a paragraph, and whether the policy change has had the intended effect.[281]

For example, if the monitor finds a department to be in full compliance with fifty out of the sixty paragraphs of a negotiat-

277. For reference, the first quarterly report in the New Orleans case was fifty-nine pages. OFFICE OF THE CONSENT DECREE MONITOR FOR THE NEW ORLEANS POLICE DEP'T, FIRST QUARTERLY REPORT (Nov. 29, 2013). The first quarterly report in the Washington, D.C. case was sixty-one pages. MICHAEL R. BROMWICH, OFFICE OF THE INDEPENDENT MONITOR FOR THE METROPOLITAN POLICE DEP'T, FIRST QUARTERLY REPORT (Aug. 1, 2002). And the first quarterly report in the Pittsburgh case was sixty-five pages. AUDITOR OF THE PITTSBURGH BUREAU OF POLICE, QUARTERLY REPORT ENDING DECEMBER 15, 1997 (Dec. 15, 1997) [hereinafter FIRST QUARTERLY REPORT FOR PBP].

278. *See, e.g.*, FIRST QUARTERLY REPORT FOR PBP, *supra* note 277, at 2 (stating that "[m]embers of the audit team have collected data on-site and have been provided data, pursuant to specific requests, by the Pittsburgh Bureau of Police . . . ." and included the findings in the quarterly reports).

279. Telephone Interview with External Monitor #10, at 4 (July 19, 2013) [hereinafter Interview #10] (on file with author) (stating that his team used a 94% completion rate to measure compliance because "many of these elements require examination of documents . . . . [and t]o do that, we really need to do scientific sampling so we know they're representative . . . . [S]o, what we were looking at was this sort of plus or minus 5% error range around that level."); *see also* Telephone Interview with External Monitor #6, at 6 (June 19, 2013) [hereinafter Interview #6] (on file with author) (describing compliance).

280. Telephone Interview with External Monitor #1, at 9 (July 13, 2013) [hereinafter Interview #1] (on file with author) (explaining controversy surrounding how writers break down settlements into paragraph segments).

281. Interview #6, *supra* note 279, at 6 (differentiating between phase one compliance—the measurement of "issuance of the policy"—and phase two—"actual implementation"—and stating that both are necessary for the DOJ to agree that a department is in "substantial compliance").

ed settlement, then that department has achieved 83.3% compliance—well short of the targeted 94% range needed for substantial compliance. Similarly, if a paragraph requires that a department enforce an efficient process for residents to file complaints about police misconduct, the monitor would first examine whether the department has adopted a policy consistent with this requirement. Then, the monitor may audit the complaint process to ensure that the department is actually living up to its new internal complaint policy. Only if the monitor finds a police agency has satisfied both of these requirements—that is, both instituted a policy change internally and subsequently changed organizational behavior consistent with that policy—will the monitor generally find that a department has satisfied the paragraph.

This approach to measuring compliance is logical, but also creates openings for confrontation. Police administrators complain that some paragraphs in negotiated settlements are long and complex.[282] In these cases, a department may be in full compliance with virtually all components of the paragraph.[283] Nevertheless, because of the department's failure to satisfy one minor element of the paragraph, the monitor will find that the department is not in compliance with the entire paragraph.[284] This can lead to a false appearance that the department is failing to make progress, when in fact the department is only having trouble with a relatively minor part of a large paragraph.[285] Ultimately, measuring compliance is an inexact science that puts considerable authority in the hands of external monitors. This has led to some questions among stakeholders in the SRL process about "[w]ho [m]onitors the [m]onitors?"[286]

282. Interview #1, *supra* note 280, at 9 ("[Y]ou will have one consent paragraph where you'll have eight or ten subsets to that paragraph.").

283. *Id.* at 9–10 (using an example from the Detroit monitoring to explain how a department may be in general compliance with virtually all parts of a subsection, but still found to not be substantially compliant because of the settlement organization).

284. *Id.* at 10 (recommending that the DOJ make each individual requirement a separate paragraph to avoid this problem).

285. *See, e.g.*, *id*. at 9–10 (using Detroit as an example of how the division of paragraphs in a consent decree can make measurement difficult and give off the false sense that a department is not making progress).

286. PERF, *supra* note 121, at 31 (quoting PERF Executive Director Chuck Wexler and giving various responses to this question from ACLU attorney Scott Greenwood, DOJ Deputy Section Chief Christy Lopez, Milwaukee Police Chief Ed Flynn, and Special Litigation Section Chief Jonathan Smith).

The relationship between the monitor and the police agency also seems to play an important role in the speed of reforms.[287] For example, one monitor recalled that the particularly contentious relationship between the monitoring team and the police administration in Oakland slowed down the progress of reforms.[288] Conversely, a police administrator in Los Angeles described how a monitor's good working relationship with the department helped in jointly crafting policy fixes that directly addressed concerns related to the consent decree.[289] And as discussed earlier, stakeholders often disagree on the relative importance of law enforcement experience in the appointment of monitors.[290]

IV. BENEFITS OF STRUCTURAL REFORM LITIGATION IN POLICE DEPARTMENTS

Based on interview responses and additional statistical data, this Article argues that SRL offers four potential advantages over traditional federal responses to police misconduct. SRL forces municipalities to invest into police reform measures that are necessary to reduce unconstitutional misconduct, but may lack local democratic support. The use of external monitoring ensures that officers substantively comply with stated mandates. External monitoring also generates extensive data on frontline officer behavior, thereby enhancing transparency and providing opportunities for public accountability. Once more, SRL provides leadership within police departments with a rare opportunity to enact top-down misconduct reforms without navigating the collective bargaining

287. *See id.* at 7 ("The choice of a monitor is extremely important . . . . [because] [t]hese officials do more than simply 'monitor' the progress being made; they work to achieve practical and effective outcomes expeditiously.").

288. Interview #16, *supra* note 148, at 9 (describing the link between the "deterioration of the relationship" between the monitor and the police administration and the slow progress of reforms caused by the subsequent "harsh criticism of the chief in one of the reports"); *see also* Interview #1, *supra* note 280, at 8 (describing how Detroit has made progress now that, "four years into it," the monitors have a respectful working relationship with the police department).

289. *See, e.g.*, Interview #6, *supra* note 281, at 7–8 (explaining how the solid working relationship between the LAPD and its monitor facilitated a collaborative effort to jointly write a new policy to satisfy the terms of the consent decree).

290. *See, e.g.*, Interview #16, *supra* note 148, at 10 ("I do think the majority of monitoring teams should be comprised mostly of people with prior law enforcement experience . . . . [a]nd the top monitor should have very high level police management experience.").

process. And finally, emerging evidence suggests that SRL may actually reduce a police department's civil liability. This would suggest that SRL may actually pay for itself in the long run.

A. PRIORITIZATION OF POLICE REFORM

SRL appears to be uniquely successful in part because it forces municipalities to prioritize investments into police reform over other municipal goals. That is, SRL forces municipalities to allocate scarce resources to the cause of constitutional policing, even when doing so may not be democratically popular. Policing in the United States is highly decentralized. This is because of a "conscious design [choice] rather than coincidence."[291] On one hand, decentralization may make local governments more democratically accountable and efficient. On the other hand, decentralization and permissive state policies on incorporation have facilitated the creation of racially and economically disparate jurisdictions. When evidence of misconduct arises in a local municipality, these racial and economic disparities play a critical role in the local political response. In poorer communities, political leaders may not view unconstitutional misconduct as the most pressing local concern. Such a municipality may understandably choose not to allocate scarce resources to costly police reform, when doing so may take away resources from other worthy causes like education. Similarly, in racially divided localities, police misconduct that only affects a discrete or insular minority group may not be seen as a major problem warranting significant attention. In such jurisdictions, the political process may even openly approve of police behavior that violates the rights of politically powerless groups. Thus, decentralization facilitates the existence of some local police agencies that harbor patterns of wrongdoing.

Take the Maricopa County, Arizona, as an example. Joe Arpaio has been elected sheriff of Maricopa County for six consecutive terms.[292] Sheriff Arpaio has received international notoriety for his unconventional and legally questionable tactics.[293] One of issues that Sheriff Arpaio has emphasized heavily

291. Erika K. Wilson, *Towards a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV., 1416, 1425 (2014).

292. Phil Benson, *Sheriff Joe Arpaio Sworn in for 6th Term*, KPHO NEWS (Jan. 6, 2013), http://www.kpho.com/story/20516330/sheriff-joe-arpaio-sworn-in-for-6th-term.

293. *See, e.g.*, *Justice Dep't To Question Sheriff Joe Arpaio for Civil Rights Lawsuit*, KTAR NEWS (Feb. 7, 2014), http://ktar.com/22/1698793/Justice-Dept

in recent years is the need for local law enforcement to help combat undocumented immigration into the United States. But before 2005, Sheriff Arpaio admitted that he personally did not view undocumented immigration as a "serious legal issue."[294]

It wasn't until Maricopa County Attorney Andrew Thomas won countywide election with the slogan "Stop Illegal Immigration" that Arpaio's office began emphasizing the need to crack down on undocumented immigrants.[295] By all accounts, Sheriff Arpaio responded to local community demands and altered his enforcement of the law to account for these prerogatives.[296] His efforts, though, have resulted in ongoing allegations that his agency engages in racial profiling[297] and regularly fails to investigate crimes against undocumented immigrants.[298] Maricopa County's location near the U.S. border with Mexico, no doubt, has affected the tone of the community's policing demands. And even though around 30 percent of the population in Maricopa County is Latino,[299] the majority of voters have continued to reelect Sheriff Arpaio.[300]

No doubt, Maricopa County is one of many. When police are primarily accountable to local political leaders and majoritarian preferences, investments into police misconduct reform often fall to the wayside. SRL changes that. Take the LAPD's experience with SRL, which cost an estimated $100 million or

-to-question-Sheriff-Joe-Arpaio-for-civil-rights-lawsuit (describing how the DOJ is investigating Arpaio for civil rights violations).

294. William Hermann & Edvard Pettersson, *Arizona's Arpaio Testifies Race Not Factor in Arrests*, BLOOMBERG NEWS (July 24, 2012), http://www.bloomberg.com/news/articles/2012-07-24/-america-s-toughest-sheriff-to-answer-profiling-claims.html (quoting Sheriff Arpaio).

295. E.J. Montini, *Still Doubting Thomas on Immigration*, ARIZ. REPUBLIC (June 18, 2010), http://www.azcentral.com/arizonarepublic/news/articles/2010/06/18/20100618Montini0618.html (quoting Thomas and describing his use of this slogan and issue during his campaign).

296. *See id.*

297. *See Justice Dep't To Question Sheriff Joe Arpaio for Civil Rights Lawsuit*, *supra* note 293.

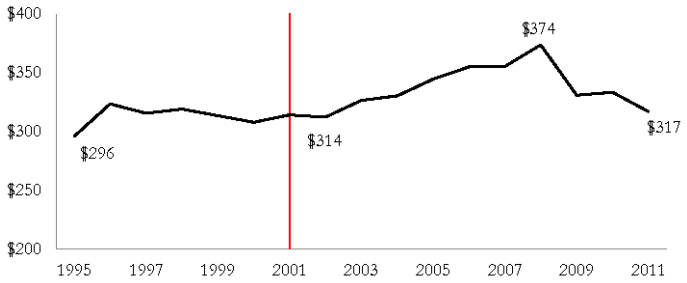
298. *See* Marc Lacey, *Arpaio Is Criticized Over Handling of Sex-Crimes Cases*, N.Y. TIMES (Dec. 9, 2011), http://www.nytimes.com/2011/12/10/us/sheriff-joe-arpaio-criticized-over-handling-of-sex-crimes-cases.html.

299. *See Census Transportation Planning Products*, AM. ASS'N OF STATE HIGHWAY AND TRANSP. OFFICIALS, http://ctpp.transportation.org/Pages/5-Year-Data.aspx (follow "take me to the data" hyperlink to access the U.S. Census Bureau American Community Survey (2006–2011)) (last visited Mar. 7, 2015).

300. *See* Elise Foley, *Joe Arpaio Defeats Paul Penzone*, HUFFINGTON POST (Nov. 7, 2012), http://www.huffingtonpost.com/2012/11/07/joe-arpaio-election_n_2086289.html.

more.[301] Gaining local political support for such a massive investment in proactive police reform over a relatively short period of time would have been extremely challenging without the impetus of SRL. But SRL transforms heightened investment in the police department from a luxury to a legal necessity. As a result, one interview participant suggested that police chiefs in cash-strapped cities would be wise to turn to the SRL as a strategic avenue to force a municipality to dedicate more money to fighting misconduct through investments in accountability measures.[302] To see how SRL can visibly shift municipal investment into a police department, Figure 6 shows the progressive increase in expenditures per resident by the LAPD, adjusted for inflation, over the SRL era.[303]

FIGURE 6. LAPD EXPENDITURES PER RESIDENT OVER TIME (ADJUSTED FOR INFLATION)[304]



This highlights an inescapable and inconvenient fact—preventing police misconduct costs money. When local political

301. *See supra* Part III.E (describing the details on the cost of the LAPD structural reform era).

302. Interview #12, *supra* note 116, at 2 (describing the decision by a municipal police chief to invite the DOJ to intervene and provide the department with "resources and the expertise" to "take a look and come up with some solutions").

303. The data for Figure 6 comes from the annual reports published by the LAPD. These annual reports include measures of total expenditures by the LAPD. *See Year in Review*, LOS ANGELES POLICE DEPARTMENT (1995–2011), http://lapdonline.org/year_in_review (last visited Mar. 7, 2015). Figure 6 adjusts the expenditures per resident for each year into 2013 dollars using the *CPI Inflation Calculator*, U.S. BUREAU LAB. STATS., http://www.bls.gov/data/inflation_calculator.htm (last visited Mar. 7, 2015) (full data, with breakdowns of expenditures per year, on file with author).

304. The vertical line signifies the beginning of the SRL era.

actors are unwilling to make the necessary investments in police reform, SRL uses the threat of equitable relief under § 14141 to force the reallocation of scarce resources in a way that no other regulatory mechanism can.

B. CHANGE IN LEADERSHIP

The introduction of SRL has also correlated with changes in leadership in targeted municipalities. In many cases, the start of SRL has ushered in the hiring of an outside, reform-minded police chief who supports the goals of the federal intervention. In a handful of cases, the municipalities have even hired former § 14141 monitors to serve as their police chief during SRL. For example, in Seattle, soon after the beginning of SRL, Mayor Ed Murray hired Kathleen O'Toole to oversee the Seattle Police Department.[305] O'Toole had previously worked as a § 14141 monitor in East Haven, Connecticut, where a DOJ investigation had found a pattern of false arrests, discriminatory policing, and excessive force.[306] Similarly, in Los Angeles, William Bratton assumed the role as police chief in soon after the LAPD came under federal monitoring.[307] Before his tenure as chief, Bratton had actually served on the monitoring team overseeing the LAPD.[308] The prospect of federal intervention via § 14141 also correlated with the appointment of new reform-minded police chiefs in New Orleans[309] and Pittsburgh.[310]

305. Gene Johnson, *Kathleen O'Toole Nominated As Seattle Police Chief*, WASH. TIMES (May 19, 2014), http://www.washingtontimes.com/news/2014/may/19/mayor-naming-new-seattle-police-chief.

306. *Id*.

307. OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, FINAL REPORT FOR LAPD APP. F: TIMELINE OF SIGNIFICANT EVENTS 5, *available at* http://www.keypoint.us.com/Content/PublicReports/LAPD_FINAL-REPORT_Appendix_f_06-11-2009.pdf (reporting, "Mayor Hahn selects William J. Bratton to be next Chief of Police" and explaining, "City Council confirms him on October 11, 2002, and he is sworn in on October 28, 2002").

308. FINAL REPORT FOR LAPD, *supra* note 104, at 5 (identifying Bratton as formerly part of the monitoring team overseeing the LAPD before his appointment as police chief).

309. In May of 2014, the same month that the DOJ opened a § 14141 investigation into the conduct of the New Orleans Police Department, Mayor Mitch Landrieu appointed Ronal Serpas to take over the top spot in the department. Ted Jackson, *Mitch Landrieu Names Nashville Police Chief Ronal Serpas As New Orleans' Top Cop*, TIMES-PICAYUNE (May 6, 2010), http://www.nola.com/crime/index.ssf/2010/05/new_orleans_native_ronal_serpa.html.

310. Robert McNeilly took over the top spot in the Pittsburgh Bureau of Police around the same time that the DOJ began a formal investigation of the agency. Chanin, *supra* note 30, at 117.

To be clear, this is not to say that SRL forces any municipality to hire reform-minded leadership. But as one interview participant observed, the beginning of a federal investigation into a police agency "can't help [a police chief's] career."[311] The initiation of SRL sends a clear message to local political leaders that their police agency is in need of significant changes. Remember, numerous interview participants emphasized the importance of supportive leadership in the expeditious completion of SRL.[312] It should come as no surprise, then, that municipalities facing the prospect of long and expensive federal oversight often respond by seeking out a reform-minded leader to oversee their police agency during this challenging time.

C. MANDATORY EXTERNAL MONITORING

Another apparent advantage of SRL is that, unlike other prior regulatory mechanisms, it uses external monitoring to ensure that police agencies substantively comply with policy changes mandated in negotiated settlements. One way to illustrate the value added of this sort of external monitoring is to look at how external monitoring has contributed to measureable improvement in the LAPD. There, the DOJ had found that the LAPD had historically failed to document and investigate citizen complaints.[313] The consent decree established detailed requirements on how the LAPD ought to handle citizen complaints, including requirements that the LAPD complete an adequate investigation, accurately describe the events on internal paperwork, forward the complaint to the proper personnel for investigation, and give timely notification of the result to the complainant.[314] SRL gave the LAPD a unique method for testing whether the LAPD had corrected some of the problems associated with its complaint procedures. The monitors worked with the LAPD to audit a sufficiently large, randomized, and

311. Interview #13, *supra* note 116, at 5.

312. *See, e.g.*, Interview #16, *supra* note 148, at 7 (describing the slow pace of reforms in Oakland and saying that "a lot of that had to do with the dysfunction of our city council and the change in leadership in City Hall, changes in direction, all that kind of stuff"); Interview #12, *supra* note 116, at 7 (saying how the most important factor to success is "leadership, stable leadership and commitment of that leadership to get it done"); Interview #5, *supra* note 129, at 6 (claiming that "a huge part of the success of these agreements is the leadership"); Interview #7, *supra* note 147, at 5 (emphasizing the overall importance of leadership).

313. *See* FINAL REPORT FOR LAPD, *supra* note 104, at 2.

314. *Id.* at 59; *see also* Los Angeles Consent Decree, *supra* note 182 (mentioning complaint procedures throughout the consent decree).

stratified sample of citizen complaints over time to determine whether the LAPD had properly handled these matters in accordance with the terms of the consent decree.[315] Through this process, the monitor helped the LAPD "review[] thousands of complaint investigations" to ensure that the LAPD was following departmental policy.[316] The consent decree also required the creation of an Audit Unit that sent undercover informants to police stations around the city; these informants attempted to file complaints and monitor their progress through the complaint system.[317] Figure 7 shows the results of these complaint process audits.[318]

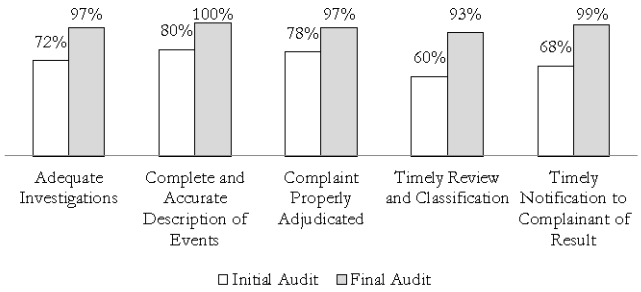
315. FINAL REPORT FOR LAPD, *supra* note 104, at 103–29 (detailing how the LAPD progressed over time in conducting internal audits to ensure that officers were engaged in constitutional policing); Los Angeles Consent Decree, *supra* note 182, at 40 (describing the requirement that the LAPD utilize audits as part of the consent decree). The consent decree also required the LAPD to create a new branch called the Audit Unit that was responsible for conducting these independent audits of LAPD behavior on a regular schedule. The monitoring team was not always primarily responsible for conducting the regular auditing of departmental records. Instead, this responsibility often fell to the Audit Unit. The monitoring team, instead, spent considerable time examining the quality of these audits to ensure that the newly-created Audit Unit was engaged in statistically valid and representative audits. Over time, the monitors found that the Audit Unit substantially improved the quality of its audits. These audits found that the LAPD made remarkable progress in fighting unconstitutional misconduct. FINAL REPORT FOR LAPD, *supra* note 104, at 109–12.

316. FINAL REPORT FOR LAPD, *supra* note 104, at 60.

317. Los Angeles Consent Decree, *supra* note 182, at 40 (stating that "the City shall develop . . . a plan for organizing and executing regular, targeted, and random integrity audit checks, or 'sting' operations . . . to identify and investigate . . . at-risk behavior, including: unlawful stops, searches, seizures . . . , uses of excessive force, . . . [and] to identify officers who discourage the filing of a complaint or fail to report misconduct").

318. This data comes from a variety of quarterly reports filed by the LAPD monitor between 2001 and 2010. The initial audit for the adequacy of investigations is from 2005, and the final audit is from 2010. *See* OFFICE OF THE INSPECTOR GENERAL, COMPLAINT INVESTIGATIONS AUDIT (FISCAL YEAR 2005–2006), at ii (Dec. 28, 2005) [hereinafter OIG COMPLAINT AUDIT 2005–2006], *available at* http://www.oiglapd.org/Reports/complt_Invsts_12-28-05.pdf (describing how in 2005 of the forty-six complaints audited, thirteen gave the Office of the Inspector General "significant concern related to the adequacy of the investigation"); NICOLE C. BERSHON, OFFICE OF THE INSPECTOR GENERAL, COMPLAINT INVESTIGATIONS AUDIT, FISCAL YEAR 2010/2011, at 2–3 (Apr. 13, 2011) [hereinafter OIG COMPLAINT AUDIT 2010–2011], *available at* http://www.oiglapd.org/Reports/Compl-A_FY10-11_4-13-11.pdf (showing that 97–100% of all complaints audited showed that officers conducted proper interviews and completed each investigatory step). The initial audit for the completeness and accuracy of the complaint description happened in 2006 and the final audit in 2009. *See* OFFICE OF THE INSPECTOR GENERAL, COMPLAINT

FIGURE 7. PERCENTAGE OF AUDITED COMPLAINTS HANDLED PROPERLY



The LAPD demonstrated remarkable and statistically significant improvement in its adherence to complaint procedures—achieving nearly perfect compliance by the end of the auditing periods in most categories. Given the rigor of the monitor's audits into the complaint process over the years of SRL, it seems likely that the LAPD mostly corrected a problem that had plagued the department for years. And it seems likely that this impressive improvement was in part because of the presence of external monitoring. As Professor Rachel Harmon has observed, the lack of data on police behavior has made regula-

INVESTIGATIONS AUDIT (FISCAL YEAR 2006–2007), at 3 (Dec. 28, 2006) [hereinafter OIG COMPLAINT AUDIT 2006–2007], *available at* http://www.oiglapd.org/Reports/06-Complaint_Audit_12-28-06.pdf (describing how "[e]leven investigations had a paraphrased statement that was either incomplete or inaccurately depicted significant information stated in the tape-recorded interview of a complainant and/or witness"); OIG COMPLAINT AUDIT 2010–2011, *supra* at 2–3 (showing that 100% of all complaints reviewed in 2010 were properly identified and framed, and 100% were also accurately summarized in writing on complaint forms). The initial audit, discussing whether issues were properly adjudicated, happened in 2005, with the final audit in 2009. OIG COMPLAINT AUDIT 2005–2006, *supra* at ii (stating that in 2005, ten out of forty-six complaints reviewed, there was some evidence of a significant allegation not properly framed or adjudicated); OIG COMPLAINT AUDIT 2010–2011, *supra* at 3 (demonstrating that in an audit completed by the Office of the Inspector General, 97% of complaints were found to have reached a reasonable adjudicatory result). The initial audit for the proper forwarding of complaints occurred in 2001 with the final audit happening in 2006. FINAL REPORT FOR LAPD, *supra* note 104, at 50–51 (showing the change over time in the complaint face sheet review). And finally, the first audit testing whether complainants were notified of the results of the complaint happened in 2002, with the final audit handed down in 2006. *Id*. at 62 (showing in figure entitled "Notification to Complainant" the progressive improvement in this category).

tion and oversight difficult throughout American history.[319] By mandating external monitoring, SRL addresses this problem by creating an extensive amount of publicly available data on police behavior, thereby increasing transparency and accountability.[320]

D. LEGAL COVER FOR TOP-DOWN REFORMS

SRL also appears to be uniquely successful because it provides police chiefs with legal cover to implement top-down reforms. The DOJ's involvement imbues these reforms with legal and constitutional significance, which increases the probability of frontline officer buy-in. And perhaps even more importantly, SRL allows some municipalities to implement dramatic misconduct reforms without navigating the traditional collective bargaining process.[321] The majority of states require departments to bargain with police unions before imposing new policies that may affect any term or condition of employment.[322] The result is that law enforcement executives are often unable to implement radical reforms, even if they may be necessary to address serious misconduct issues within the department.[323] As Professor Harmon has argued, "[c]ollective bargaining . . . functions like an immediate tax" on misconduct reforms.[324]

SRL increases the feasibility of accountability mechanisms that might be otherwise thwarted by the collective bargaining process. In multiple occasions, courts have prevented police unions from blocking SRL efforts on collective bargaining grounds. In Los Angeles, for example, the court prevented an attempt by the local police union to intervene and block negotiated settlements reached via § 14141.[325] In Washington, D.C.,

319. *See generally* Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2013) (explaining how, throughout American history, policymakers have not had the necessary data to regulate and oversee police effectively).

320. *See supra* Part III.E (discussing how monitoring creates publicly available quarterly reports, filled with data on police behavior).

321. *See supra* Part III.B.

322. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799 (2012).

323. Other scholars have also discussed how collective bargaining affects police departments. *See, e.g.*, Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2205–17 (2014).

324. Harmon, *supra* note 322.

325. *See supra* Part III.B (describing how police unions have attempted to intervene, mostly unsuccessfully, into SRL litigation under collective bargaining grounds).

the police union filed an Unfair Labor Practice Complaint challenging the introduction of an early warning system and additional record keeping.[326] But this complaint "went nowhere."[327] This underscores an uncomfortable reality in the law of policing. Sometimes, demands by police unions via collective bargaining agreements run counter to the need for external oversight and accountability.

As Professor Clyde Summers argued, "[t]he special political structure and procedure of collective bargaining is particularly appropriate for decisions where [public] employees' interests in increased wages and reduced work load run counter to the combined interests of taxpayers and users of public services."[328] As examples, Professor Summers identified "wages, insurance, pensions, sick leave, length of work week, overtime pay, vacations, and holidays" as topics that were "proper subjects for bargaining."[329] But "[d]emands by policemen for disciplinary procedures which effectively foreclose use of a public review board further illustrate the need to examine each subject to determine whether it should be decided [by] collective bargaining."[330]

This is not to say that SRL works best when police unions are excluded entirely from the negotiation process. In other cases like Cincinnati, the terms of the negotiated settlement reflected an unprecedented collaboration between the local police union, police leadership, the DOJ, and community stakeholders.[331] Scholars like Professor Kami Chavis Simmons have persuasively argued that this sort of collaborative approach can improve SRL and increase the probability of political and organizational buy in.[332] Instead, what seems to make SRL effective is its apparent ability to elevate the importance of oversight and accountability relative to other considerations.

326. Chanin, *supra* note 30, at 50.

327. *Id*.

328. Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1194 (1974).

329. *Id*.

330. *Id*. at 1196.

331. Chanin, *supra* note 30, at 56 ("With the help of a special master and a Magistrate Judge, [U.S. District Court Judge Susan] Dlott used an unprecedented form of Alternative Dispute Resolution (ADR) to bring together the plaintiff class, the police department, and the local chapter of the [Fraternal Order of Police, Fort Pitt Lodge 1].").

332. Simmons, *supra* note 65, at 518–19 (advocating for measures to increase collaboration during federal reforms).

E. REDUCED CIVIL LIABILITY

Finally, interview participants suggested that SRL helps departments reduce their civil liability. As one participant with inside knowledge about the Detroit Police Department remarked, "the amount of money that we have saved on lawsuits that we had endured for years . . . have paid for the cost of implementation of the monitoring two or three times" over.[333] Measuring the extent to which SRL can reduce civil liability is difficult. Interviewees suggested that many municipalities do not keep thorough records on civil rights payouts.[334] But at least one department, the LAPD, did disclose a complete dataset of all civil liability related to police conduct during the SRL era.[335] Figure 8 shows the trend in the number of lawsuits levied against the LAPD for civil rights violations from 2002 to 2006.[336]

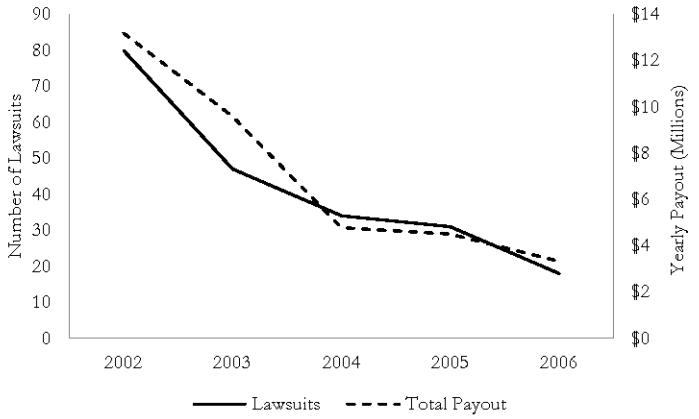
333. Interview #20, *supra* note 24, at 7.

334. *See generally* Interviews #1–30 (on file with author).

335. This data comes from a comprehensive list of all lawsuits and payouts made by the LAPD and released to the Los Angeles Times. *See Legal Payouts in LAPD Lawsuits*, L.A. TIMES (Jan. 22, 2012), http://spreadsheets.latimes.com/lapd-settlements. This data shows all suits settled between January 1, 2002, and October 5, 2011. When reporting the information to the Los Angeles Times, the LAPD categorized each case based on the type of lawsuit. Thus, many of these suits involved employment litigation, including claims of wrongful termination, sexual harassment, and the like. This figure only uses lawsuit data from this spreadsheet in cases where the LAPD categorized it as either a civil rights violation case or a use of force related case. These are the kinds of misconduct that the consent decree should have reduced. This resulted in a set of 353 civil rights lawsuits against the LAPD between 2002 and 2011. These civil rights or use of force cases took an average of 486 days to settle, or about 1.33 years. And twenty-four of these cases took over three years to settle. Of course, litigation can take years to complete. A claim filed in 2001 may not be resolved until 2002 or 2003. Thus, while the dataset runs through 2011, the figure ends at the year 2006. This is to ensure that the data takes into account the length of time it takes to settle civil rights lawsuits. The final dataset may slightly underrepresent the number of civil rights suits filed in 2006 and the expected payoff. Some suits filed in 2006 may still be unsettled as of October 5, 2011—approximately 1,749 days later. But based on the full dataset provided by the LAPD, 346 out of 353 suits (or about 98%) were settled in less than 1,749 days (data on file with author).

336. *Id.* (listing all lawsuits and payouts by LAPD over this time period). *See supra* note 335 for methodology used to create this figure.

FIGURE 8. NUMBER OF CIVIL RIGHTS AND USE OF FORCE LAWSUITS AGAINST LAPD RESULTING PAYOUTS AND ANNUAL COST



To be clear, the LAPD data is imperfect and preliminary. Data from before 2002 was unavailable at the time of this publication. Such data would have been particularly useful in determining whether this apparent decline in civil rights suits is merely a continuation of a trend that existed before SRL, or whether it was uniquely associated with the introduction of SRL. In the future, more analysis will be needed over a longer period of time and in more cities to verify this hypothesis. But the limited data is encouraging. It suggests the total number of civil rights claims filed against the LAPD that resulted in payouts declined over the SRL era. The total payouts for civil rights suits based on the date of filing also decreased from $13,187,100 in 2002 to $3,325,054 in 2006.[337] This suggests that, even though SRL is expensive,[338] it may ultimately pay for itself through decreased litigation costs.[339]

While this trend is consistent with a conclusion that SRL contributes to lower civil liability, it could also be consistent

337. *See supra* note 335 for methodology used to create this figure.

338. The total cost of the SRL in Los Angeles was approximately $100 million. *See supra* notes 271–74.

339. The LAPD spent around $17,477,740 to settle civil rights suits filed in 2001, and $13,187,100 to settle civil rights suits in 2002. By 2008 and 2009, these numbers fell to $2,194,729 and $626,599. It is not difficult to imagine these types of yearly savings quickly adding up to pay for the high initial cost of SRL. *See supra* note 335 (full dataset on file with author).

with a change in litigation strategy, independent of the introduction of SRL. If a change in litigation strategy was driving the decline in civil rights lawsuits resulting in financial payouts, this change in strategy should presumably have similar effects on other types of lawsuits against the LAPD. For example, if a change in litigation strategy was driving this decline, we might expect to see a similar decline in LAPD suits resulting in payouts for other matters, like traffic accidents. Nevertheless, the number of successful lawsuits against the LAPD for other matters, like traffic accidents, has remained relatively constant during the SRL era.[340] This is consistent with the conclusion that SRL exerted a unique and significant influence on the volume of civil rights abuses by the LAPD, which may have resulted in a reduction in civil liability.

V. LIMITATIONS OF STRUCTURAL REFORM LITIGATION

Although SRL offers several advantages over other traditional regulatory methods, it also comes with some possible drawbacks. Since local municipalities must bear the brunt of the high cost of SRL, there remain questions about the feasibility of this regulatory approach in poorer communities. Questions have also recently emerged about the sustainability of these costly reforms. Some critics have alleged that SRL causes officers to become less aggressive, thereby contributing to higher crime. Additionally, the federal government only has the resources to pursue SRL in a small fraction of the municipalities where there appears to be a pattern or practice of misconduct. Finally, and perhaps most importantly, there are significant questions about whether SRL can forcefully transform a police agency where local political leaders and police executives oppose the intervention.

A. HIGH COST AND MUNICIPAL INEQUALITY

Decentralization in American policing leads to wide resource disparities between municipalities.[341] The result is that

340. In 2003, private litigants filed thirty-seven civil suits related to traffic accidents against the LAPD that eventually resulted in a monetary payout. In the years that followed, the number of traffic-related civil suits filed against the LAPD that resulted in financial compensation remained stable—always between thirty-three and fifty-nine cases. *See Legal Payouts in LAPD Lawsuits*, *supra* note 335.

341. Several decades ago, estimates put the number of policing agencies at around 40,000. PRESIDENT'S COMM'N ON LAW ENFORCEMENT, *supra* note 28, at 91. Subsequent studies have reduced this number substantially. Modern esti-

some jurisdictions lack the necessary resources to invest in policies in procedures to reduce misconduct.[342] While the forced allocation of scarce resources may be an advantage of SRL, it also represents a potential limitation. What happens, after all, when a particularly poor community chooses not to invest in costly, proactive police reforms out of necessity because of a lack of overall resources? Take a community like Camden, New Jersey. Over a third of all Camden residents are living below the poverty line.[343] The entire City of Camden took in only around $24 million in tax revenue in 2011, despite the fact that the Camden police force alone cost around $65 million that year.[344] Camden has historically lacked the resources to hire enough police forces to man the streets, let alone to invest in proactive misconduct regulation mechanisms. When faced with the prospect of SRL, other financially strapped communities like New Orleans have been forced to increase municipal taxes substantially.[345] As a result, the DOJ may understandably face significant backlash in using SRL in cash-strapped communities.

mates place the number at around 17,985 state and local law enforcement agencies in the United States. *See* U.S. DEP'T OF JUSTICE, *supra* note 28, at 2.

342. PRESIDENT'S COMM'N ON LAW ENFORCEMENT, *supra* note 28, at 91 (highlighting how spending for urban departments was found to be around $27.31 per resident per year, while spending in smaller departments was only $8.74 per resident per year).

343. *See* U.S. CENSUS BUREAU, *supra* note 15.

344. Matt Taibbi, *Apocalypse, New Jersey: A Dispatch from America's Most Desperate Town*, ROLLING STONE (Dec. 11, 2013), http://www.rollingstone.com/culture/news/apocalypse-new-jersey-a-dispatch-from-americas-most-desperate-town-20131211. Camden has responded to this budgetary crisis by consolidating its police department with the county-level agency to lower costs and avoid duplicative expenditures. *See* Heather Haddon & Ricardo Kaulessar, *Crime Dips in Camden as New County Police Force Replaces City Officers*, WALL ST. J. (Aug. 5, 2013), *available at* http://www.wsj.com/articles/SB10001424127887323968704578650171849946106 (detailing the so-called "experiment" whereby Camden has closed its city-wide police department and instead relied on the newly expanded county department).

345. Richard Rainey, *Mitch Landrieu Requests a Doubling of Tax Rates for New Orleans Police and Fire*, TIMES-PICAYUNE (May 1, 2014), http://www.nola.com/politics/index.ssf/2014/05/mitch_landrieus_tax_hike_plan.html; Tyler Bridges, *Legislature Approves Property Tax Hike for New Orleans Police and Fire; Now Heads to Voters*, LENS (May 29, 2014), http://thelensnola.org/2014/05/29/legislature-approves-property-tax-hike-for-new-orleans-police-now-heads-to-voters.

B. SUSTAINABILITY OF REFORMS

Serious questions also remain about the ability of a police department to sustain reforms made during federal intervention after the monitoring ends. The Pittsburgh case provides a cautionary tale about what can happen after external monitoring ends. The Pittsburgh Bureau of Police was the nation's first police agency to reach a § 14141 settlement with the DOJ on April 16, 1997.[346] Both external monitoring and independent evaluation by the Vera Institute for Justice demonstrated that the Bureau made substantial progress in reducing apparent unconstitutional misconduct during SRL.[347] The DOJ ended oversight of Pittsburgh around June 16, 2005.[348] During this entire period, Police Chief Robert McNeilly oversaw the Bureau.[349] Throughout his time as Chief, McNeilly was an ardent supporter of the DOJ intervention, claiming that the changes mandated by the consent decree all "mirrored his own plans" for the agency.[350] This resulted in fierce backlash by frontline officers. When McNeilly received voter approval to create a Citizens Police Review Board, "which holds hearings on police misconduct and can recommend disciplinary action," the police union issued a vote of no confidence in McNeilly's leadership.[351] Despite this sort of opposition, McNeilly pressed ahead with implementing each requirement of the negotiated § 14141 settlement, including a computerized early warning system.[352] Throughout this time, Mayor Thomas Murphy, Jr. generally

346. Rushin, *supra* note 14, at 3247.

347. *See generally* DAVIS ET AL., *supra* note 30.

348. Rushin, *supra* note 14, at 3247.

349. Michael A. Fuoco, *The Mayoral Transition: Police Chief Out*, PITTSBURGH POST-GAZETTE (Dec. 29, 2005), http://www.post-gazette.com/local/city/2005/12/29/The-mayoral-transition-Police-chief-out/stories/200512290284 (stating how Chief McNeilly was sworn in on April 2, 1996 and was removed around December 29, 2005).

350. *See* Michael A. Fuoco, *Police Chief McNeilly's Tenure Saw Wrenching Changes*, PITTSBURGH POST-GAZETTE (Jan. 9, 2006), http://www.post-gazette.com/local/city/2006/01/09/Police-chief-McNeilly-s-tenure-saw-wrenching-changes/stories/200601090107.

351. *Id.* (explaining how the Fraternal Order of Police, the local police union that represents the Pittsburgh Police Bureau, issued this order during the consent decree time period).

352. *Id.* (describing a "computerized early-warning system that analyzes all aspects of an officer's job performance so that hints of trouble can be detected and dealt with quickly").

supported Chief McNeilly and the ongoing federal intervention.[353]

In 2006, when Pittsburgh elected Robert O'Connor, Jr. to replace Mayor Murphy, things changed.[354] Mayor O'Connor fired Chief McNeilly and sided with local police union leaders, who claimed that McNeilly's use of excessive disciplinary action hurt officer morale.[355] In the years since this change in leadership, civil rights advocates have worried that the Bureau "is now sliding back toward where it was" before federal intervention.[356] During federal oversight, for example, the number of civil rights complaints against the Pittsburgh police brought to the ALCU fell dramatically.[357] In the years after McNeilly's removal, the volume of these complaints has increased.[358]

Perhaps most troubling of all, current Pittsburgh Mayor Bill Peduto recently acknowledged that the Bureau had regressed so much that it may be "on the verge of another consent decree."[359] This latest problem has emerged after Pittsburgh Police Chief Nathan Harper was indicted in March of 2013 on corruption charges, which spurred another federal investigation of the agency.[360] The entire Pittsburgh story demonstrates how quickly reforms can unravel without institutional support. More research, though, is needed to understand the extent to which § 14141 reforms are sustained after federal intervention ends.

353. *Id.*

354. Fuoco, *supra* note 349.

355. Fuoco, *supra* note 350 (describing the change in philosophies under the new mayoral administration).

356. Laura Maggi, *Pittsburgh Bureau of Police Was First in Nation With Official Federal Intervention*, TIMES-PICAYUNE (Oct. 16, 2011), http://www.nola.com/crime/index.ssf/2011/10/pittsburgh_bureau_of_police_wa.html.

357. *Id.*

358. *Id.*

359. Jeffrey Benzing, *Pittsburgh Police Could Face Second Federal Consent Decree, Peduto Says*, PUBLICSOURCE (July 1, 2014), http://publicsource.org/from-the-source/pittsburgh-police-could-face-second-federal-consent-decree-peduto-says.

360. Jonathan D. Silver, Liz Navratil, & Rich Lord, *Attorney: Ex-Pittsburgh Police Chief Nate Harper To Plead Guilty*, PITTSBURGH POST-GAZETTE (Mar. 23, 2013), http://www.post-gazette.com/local/region/2013/03/22/Attorney-Ex-Pittsburgh-police-chief-Nate-Harper-to-plead-guilty/stories/201303220153.

C. DE-POLICING EFFECT

Various critics have claimed that federal intervention into the affairs of local police agencies contributes to de-policing—that is, SRL decreases police efficiency or aggressiveness, thereby increasing crime.[361] Perhaps the most common argument made by de-policing advocates is that SRL will decrease police aggressiveness.[362] According to this view, SRL reduces the amount of encounters between police and citizenry, either because SRL makes officers hesitant, or because it forces officers to spend valuable time completing procedural hurdles.[363] Some officers suggest that de-policing is most likely to affect the number of police contacts and arrests for minor street crimes.[364] This is because arrests for serious crimes normally happen after lengthy investigations, while arrests for minor crimes happen via police officers proactively monitoring the streets and responding to visible wrongdoing. The de-policing hypothesis suggests that policies and procedures mandated by SRL inhibit an officer's abilities to engage in this type of proactive, order maintenance policing. As a result, some worry that SRL will lead to higher crime rates.[365] As one officer in a police

361. *See, e.g.*, Colleen Long, *NYC Stop-and-Frisk Policy Wrongfully Targeted Minorities, Judge Rules; Outside Monitor Appointed*, STAR TRIB. (Aug. 12, 2013), http://www.startribune.com/219252341.html (identifying Mayor Bloomberg as a strong critic of a federal district court decision to overhaul the New York City Police Department's stop-and-frisk program, and citing Bloomberg's concern that the law will hurt crime-fighting efforts); Saul, *supra* note 30 (also quoting Mayor Bloomberg criticizing the court decision overhauling stop-and-frisk in part because of the court's failure to understand the streets of the city).

362. *See, e.g.*, DAVIS ET AL., *supra* note 30, at 16 (explaining how officers in Pittsburgh felt "hesitant to intervene in situations involving conflict because they were afraid of having a citizen file an unwarranted anonymous complaint against them").

363 *See, e.g.*, Chanin, *supra* note 30, at 185 (quoting a leader from the Washington, D.C. Police Union saying that SRL leads to more time-consuming paperwork).

364. STONE ET AL., *supra* note 92, at 19–20 (showing in Figure 10 that a high proportion of LAPD officers believed that the threat of community complaints would hurt proactive street policing; also stating that "concerns have been raised that the consent decree would lead to de-policing or what one law enforcement official describe[d] to us as the 'drive-and-wave syndrome'").

365. Perhaps the most prominent recent example of this de-policing hypothesis was the response by Mayor Michael Bloomberg to the New York City stop-and-frisk litigation. On August 12, 2013, U.S. District Judge Shira Scheindlin ruled that the New York City stop-and-frisk program constituted a "policy of indirect racial profiling." Goldstein, *supra* note 14. As part of her decision, Judge Scheindlin ordered the appointment of an external monitor to oversee the reform of the stop-and-frisk policy. Daniel Beekman, *Ivy League*

agency undergoing SRL explained, "I think the decree limited officers' ability to perform their jobs. And criminals know this and take advantage."[366] Two other officers backed up this claim, arguing that because of the introduction of federal intervention, some "officers quit pulling over cars" while others became less "aggressive with people who are breaking the law" because of fear that "people will complain of their civil rights being violated."[367]

Despite these consistent concerns about de-policing, evidence for the hypothesis is limited. Property crime rates in communities undergoing SRL, like Washington, D.C.,[368] Los Angeles,[369] Cincinnati,[370] and Prince George's County,[371] all dropped more than the national average. Only in Pittsburgh

Law Professors To Help Implement Stop-and-Frisk Reforms, N.Y. DAILY NEWS (Sept. 19, 2013), http://www.nydailynews.com/news/crime/ivy-league-law-professors-implement-stop-and-frisk-reforms-article-1.1459589. Mayor Michael Bloomberg strongly objected to this decision, calling it a "terrible idea" and arguing that it would be "disruptive." Goodman, *supra* note 14; *see also* Yoav Gonen, *De Blasio Calls NYPD's Federal Monitor a "Temporary Reality,"* N.Y. POST (Sept. 20, 2013), http://nypost.com/2013/09/20/de-blasio-calls-nypds-federal-monitor-a-temporary-reality (referring to Bloomberg's conclusion that the appointment of a monitor would be "terrible"). Citing Philadelphia's experience with a police department monitor, Bloomberg claimed that the decision could contribute to higher crime, thereby putting the safety of all New Yorkers at risk. Goodman, *supra* note 14. New York City officials are pointing to a thirteen percent increase in shootings over twenty-eight days as evidence that the Judge's orders contributed to higher crime. Damien Gayle, *Shootings Up 13% in New York City After Federal Judge Rules Police "Stop and Frisk" Tactics Unconstitutional and Racist*, DAILY MAIL (Sept. 19, 2013), http://www.dailymail.co.uk/news/article-2425055/Shootings-10-New-York-City-federal-judge-rules-stop-search-unconstitutional-racist.html.

366. DAVIS ET AL., *supra* note 30, at 22.

367. *Id*. at 19–20.

368. SRL started in Washington, D.C., on June 13, 2001, and it ended on February 10, 2008. Rushin, *supra* note 14, at 3247 (showing in Appendix B the dates for all negotiated settlements pursuant to § 14141). During that time, property crime rates fell by 22.42% in Washington, D.C., and 21.84% nationwide. *See Uniform Crime Reports*, *supra* note 97.

369. SRL started in Los Angeles on June 15, 2001, and concluded on May 16, 2013. Rushin, *supra* note 14, at 3247. During that time, property crime rates fell by 37.68% in Los Angeles and 21.84% nationwide. *See Uniform Crime Reports*, *supra* note 97.

370. SRL started in Cincinnati on April 12, 2002, and concluded on April 12, 2007. Rushin, *supra* note 14, at 3247. During that time, property crime rates fell by 14.31% in Cincinnati and 9.76% nationwide. *See Uniform Crime Reports*, *supra* note 97.

371. SRL started in Prince George's County on January 22, 2004, and ended on March 5, 2005. Rushin, *supra* note 14, at 3247. During that time, property crime rates fell by 36.62% in Prince George's County and 13.45% nationwide. *See Uniform Crime Reports*, *supra* note 97.

did property crime rates decrease less than the national average during SRL.[372] Overall, property crime rates fell by an average of 12.9% more than the national average in municipalities targeted for SRL.[373] The same pattern holds true for violent crime rates. Rates of violent crimes in targeted agencies fell by an average of 36.29% more than the national average.[374]

The available evidence also suggests that arrest and non-violent arrest, when controlling for the number of officers and the number of arrest opportunities, actually increased by an average of 22.1% and 40.12% respectively across municipalities facing SRL.[375] Evidence on traffic stop data and citizen contact data also cuts against the de-policing hypothesis. In Pittsburgh, the introduction of SRL did not correlate with any apparent reductions in traffic citations or DUI arrests.[376] In Los Angeles, the number of pedestrian and car stops per officer increased by 35.2% during SRL.[377]

372. SRL started in Pittsburgh on April 16, 1997, and ended on June 16, 2005. Rushin, *supra* note 14, at 3247. During that time, property crime rates fell by 6.10% in Pittsburgh and 20.50% nationwide. *See Uniform Crime Reports*, *supra* note 97.

373. This calculation is a weighted average. Since each municipality differs substantially in size, larger municipalities like Los Angeles were weighted more heavily in calculating this average. Each municipality was weighted relative to its population in the 2000 census.

374. Using the same basic methodology used above, *supra* notes 368–73, these five departments saw violent crime rates decrease by a weighted average of 36.29%, relative to the national average. *See* Rushin, *supra* note 14, at 3247; *Uniform Crime Reports*, *supra* note 97.

375. To calculate changes in arrest rates, this study first calculated the change in total arrest and non-violent arrest per officer in each municipality during its SRL era. This was then compared to the change in arrest opportunities, defined as the percentage change in the number of reported crimes in each jurisdiction. The difference between these two numbers represents the change in arrests, controlling for the number of officers and arrest opportunities. To calculate the weighted average of this change across the five municipalities, this study used the same basic methodology used above, *supra* notes 368–373, to weight each department by population.

376. DAVIS ET AL., *supra* note 85, at 56 fig.12 (showing the progression of these two trends during the SRL era).

377. *See* L.A. POLICE DEP'T, STATISTICAL DIGEST (2001–2011), *available at* http://www.lapdonline.org/crime_mapping_and_compstat/content_basic_view/9098 (click on "Statistical Digest" hyperlink under the requisite year) (providing the number of serious, or type I arrests, and the number of minor, or type II, arrests for 2001 and 2011 in Los Angeles); *Uniform Crime Reports*, *supra* note 97 (click on requisite year under "Crime in the United States" hyperlink; then click "Go to Police Employee Data Tables" hyperlink; then click "Table 78" hyperlink; then click "California" hyperlink and navigate to the data for Los Angeles). For pedestrian and vehicle stops, I used 2002 to represent the start of SRL, since it was the first date that there was good data available. I

This is not to say that SRL may not contribute to some type of de-policing. It is fully possible that § 14141 intervention leads to more complex externalities that are not readily apparent from these statistics.[378] This short discussion only scratches the surface of potential causal mechanisms at work across these various municipalities. But ultimately, given the limited evidence presented here, the de-policing hypothesis remains just that—a hypothesis in need of more nuanced empirical evaluation.

D. LIMITED FEDERAL ENFORCEMENT

Another potential drawback of § 14141 is that the federal government simply lacks the resources necessary for aggressive enforcement. Remember that the DOJ has only investigated around three police agencies each year pursuant to § 14141.[379] To compensate for this limitation, the DOJ has seemingly prioritized the investigation of major police agencies that serve large swaths of the American population—the New York City Police Department, the Los Angeles Police Department, the New Jersey State Police, the Illinois State Police, Maricopa County Sheriff's Department, Prince George's County Police Department, the Seattle Police Department, and the Albuquerque Police Department, just to name a few.[380] While this is an understandable enforcement approach, various interviewees with experience working § 14141 cases expressed frustration that the DOJ lacked the resources to push forward with SRL in many cases that they felt warranted DOJ intervention.[381]

used 2008 as the end date for motor vehicle and pedestrian stops since it was the most recent date when the LAPD released thorough data.

378. For instance, it remains possible that SRL reduces total police contacts via *Terry* stops or traffic stops. Measuring this sort of a reduction is challenging. In many cases, municipalities do not, or have not, kept good records on the number of these minor interactions with law enforcement. Thus, making accurate determinations regarding changes in the rate of these minor contacts over time is often impossible. It is also possible that additional causal factors have independently influenced the apparent aggressiveness of police and crime rates in these municipalities, which is hiding the potential de-policing effect of these reforms.

379. *See* supra Part III.A.

380. Rushin, *supra* note 14, at 3244–46 (showing in Appendix A the list of all cities that have been subject to a DOJ investigation pursuant to § 14141).

381. *See, e.g.*, Interview #12, *supra* note 116, at 3 ("I think it was a combination of factors, political, pragmatic and evidentiary. Because there are limited resources, the department didn't have, when I was there and certainly doesn't have now, resources to investigate every place where there might be a factual predicate that would merit it."); Telephone Interview with DOJ Partic-

As one former DOJ litigator complained, "I can tell you . . . that there are far more agencies that . . . have some sort of a problem of constitutional dimensions than we would ever get to."[382] Of course, less than optimal enforcement is common in virtually any regulatory arena. Nevertheless, given that there are around 18,000 local and state police agencies in the United States, the likelihood that any one agency will be subject to federal intervention in a given year appears to be relatively low. Or as a DOJ litigator bluntly put it, "even if 0.1% of [law enforcement agencies] have an issue, that's more than we've ever done in the entire history of the statute."[383]

E. NEED FOR LOCAL SUPPORT

Finally, and perhaps most importantly, nearly every single interview participant suggested that the supportiveness of the police executives and local political leaders in the targeted departments was the single greatest predictor of the overall success of the reforms.[384] Participants pointed to Oakland as an example of a case where departmental leadership has not always supported the ongoing SRL efforts.[385] Perhaps not coincidentally, SRL has dragged on at a painfully slow rate in Oakland.[386] Police chiefs that have embraced the structural reform efforts have had an easier time implementing the changes ex-

ipant #15, at 5 (July 31, 2013) [hereinafter Interview #15] (on file with author) (stating that "the leadership of the section and the leadership of the division have to make judgments about how to allocate resources and what things to pursue").

382. Interview #5, *supra* note 129, at 1.

383. *Id*.

384. *See, e.g.*, Interview #16, *supra* note 148, at 7 (describing the slow pace of reforms in Oakland and saying that "a lot of that had to do with the dysfunction of our city council and the change in leadership in City Hall . . . [c]hanges in direction . . . [a]ll that kind of stuff"); Interview #12, *supra* note 116, at 7 (noting the importance of "leadership, stable leadership and commitment of that leadership to get it done"); Interview #5, *supra* note 129, at 6 (claiming that "a huge part of the success of these agreements is the leadership"); Interview #7, *supra* note 147, at 5 (emphasizing the overall importance of leadership).

385. Interview #12, *supra* note 116, at 6 (explaining how Oakland leadership within the department and within the broader city government has ebbed and flowed and how this likely had some effect on the consent decree implementation).

386. Henry K. Lee, *Oakland Police Slammed for Slow Pace of Reform*, S.F. GATE (Jan. 18, 2012), http://www.sfgate.com/crime/article/Oakland-police-slammed-for-slow-pace-of-reform-2594489.php (describing the complaints about the slow speed of reform in the Oakland Police Department).

peditiously.[387] Interviewees emphasized that supportive leadership was necessary if a department was to change its organizational culture.[388] This is particularly relevant since scholars have increasingly tied misconduct within a police department to underlying trends in organizational culture.[389]

While not surprising, this realization has significant implications for the usefulness of SRL as a regulatory mechanism. It suggests that SRL is not a silver bullet. SRL ultimately requires local cooperation and dedication to succeed. The DOJ cannot use SRL to instantly transform a police agency with defiant, obstinate leadership. At the start of the Obama Administration, Assistant Attorney General Thomas Perez "told a conference of police chiefs . . . that the Justice Department would be pursuing 'pattern or practice' takeovers of police departments much more aggressively than it did under the Bush Administration, eschewing negotiation in favor of hardball tactics seeking immediate federal control."[390] During the second half of the George W. Bush Administration, the DOJ took a more cautious approach to enforcing § 14141, opting for cooperative arrangements as opposed to hostile takeovers of local police agencies.[391] Policing scholars criticized this Bush Administration approach, saying that it demonstrated a lack of political commitment to the issue of police misconduct.[392] The evidence gathered in this study raises questions about whether the DOJ can effectively use § 14141 in a manner that the Obama Administration has advocated.

Can the DOJ force reform on a municipality that adamantly opposes it? This represents that most important question fac-

387. Interview #13, *supra* note 116, at 9 (giving advice to any chief whose department was under SRL that he or she ought to "welcome it with open arms and make it a positive experience because if you become perceived as part of the solution instead of part of the problem, you'll survive . . . . And if you're not part of the solution, you'll definitely be a casualty").

388. Telephone Interview with External Monitor #11, at 9 (July 1, 2013) (transcript on file with author) (stating that organizational leaders and commanders play a pivotal role in transforming organizational culture within a police department).

389. *See, e.g.*, Armacost, *supra* note 10 (generally tying organizational culture of a police department to police misconduct).

390. Heather Mac Donald, *Targeting the Police*, WKLY. STANDARD, Jan. 31, 2011, at 26.

391. Rushin, *supra* note 14, at 3228–35.

392. Harmon, *supra* note 13, at 21 (explaining the "absence of political commitment to § 14141 suits, especially on the part of the Bush Administration").

ing SRL in the future. The answer will define the future usefulness of this regulatory mechanism. Thus far, the DOJ has not fully pursued SRL against municipalities that ardently oppose federal oversight. In fact, on occasion, municipalities have requested DOJ intervention via § 14141.[393] At least one pending § 14141 case in Alamance County, North Carolina may test the limits of SRL. There, a DOJ investigation found that the Alamance County Sheriff Department, headed by Sheriff Terry Johnson, was engaged in a pattern or practice of racial profiling and discrimination.[394] But unlike other municipalities that quickly initiated negotiations with the DOJ behind closed doors to settle the potential § 14141 suit, Sheriff Johnson called the DOJ report an "embarrassment" and vowed to fight the issue in court.[395] Alamance County could represent two firsts—the first time a municipality brings a § 14141 case to trial and the first time that the DOJ attempts to force reform on a department with openly intransigent leadership. The results from the case may speak volumes about SRL's future usefulness.

VI. AVENUES FOR FUTURE REFORM

While potentially useful in accelerating organizational change, SRL will never be the primary mechanisms for deterring police wrongdoing. The process is long and expensive,[396] and the federal government only has the resources to initiate a small number of cases each year.[397] Nevertheless, the findings from this study suggest several possible avenues for future police reform.

First, given the empirical evidence that SRL can effectively reduce patterns and practices of misconduct, there is a strong argument for increasing the number of SRL cases each year. To be clear, SRL is not perfect. As discussed, it suffers from sever-

393. Rushin, *supra* note 14, at 3223–24 (describing how whistleblowers within a department can spur DOJ action, including when a police executive encourages federal intervention).

394. Brennan McGovern, *DOJ Files Civil Rights Suit Against Alamance County Sheriff*, ELON LOC. NEWS (Dec. 21, 2012), http://www.elonlocalnews.com/2012/12/doj-files-civil-rights-suit-against-alamance-county-sheriff.

395. *Id*.

396. *See supra* Part III.D–E (showing in Figures 7 and 8 the approximate cost of monitoring and the potentially long monitoring period associated with SRL).

397. *See supra* Part II.A (explaining how the DOJ only has the resources to investigate an average of about three local police agencies each year, and push forward with SRL against around one agency annually).

al limitations. Despite these limitations, though, SRL appears to have several advantages over other legal arrangements at bringing about organizational change in a police department. Outside of increasing federal funding for § 14141 enforcement, one way to increase the number of SRL cases would be for state legislatures to pass statutes that authorize state attorneys general to initiate SRL. Any state statute could roughly mirror § 14141 and give state attorneys general the ability to bring suit against police departments within their state that are engaged in a pattern and practice of unconstitutional misconduct. At least one state, New York, already has a statute that gives the state attorney general the ability to initiate this sort of pattern or practice litigation against police departments.[398] And Professor Samuel Walker and Morgan Macdonald have previously offered a template for such a state-level SRL measure.[399]

Second, policymakers could use the lessons from SRL to craft more effective legal regulations of law enforcement. One lesson from the success of SRL is police reform efforts are costly to implement. One of the benefits of SRL is that it forces municipalities to prioritize police reform.[400] Police reform, after all, is often expensive. Given the considerable decentralization of American law enforcement, though, questions remain about whether poorer municipalities could afford the high upfront costs of SRL.[401] This presents a strong argument for state and federal subsidization of police reforms aimed at curbing misconduct. Such an approach would potentially address resource inequality created by decentralization. For example, a state government could subsidize the implementation of proactive accountability measures like early information systems in local police agencies. The federal government could also play a more substantial role in directly subsidizing many of the important misconduct reforms included in a typical § 14141 settlement.[402]

398. The New York Attorney General has already previously utilized New York Executive Law § 63(12) to justify state-level SRL. *See* New York v. Town of Wallkill, 01-Civ-0364 (S.D.N.Y. Feb. 28, 2006) (final judgment).

399 . *See generally* Walker & Macdonald, *supra* note 46, at 549 (going on to explain that "the democratic process ensures that the public interest weighs heavily on the actions of each state attorney general").

400. *See supra* Part IV.A.

401. *See supra* Part V.A.

402. Currently, dozens of federal statutes permit federal agencies to give resources to local police departments. Most of this funding is allocated to help enlarge municipal police forces, assist local police in addressing specific public safety threats, and facilitate inter-jurisdictional coordination. *See generally* Rachel Harmon, Federal Public Safety Programs and the Real Cost of Policing

But simply throwing money at the problem of police misconduct is not enough.

Another lesson from structural police reform is that, in addition to subsidizing the cost of police reform, the law needs to provide mechanisms for external accountability of frontline officers. SRL works in part because it uses external monitoring, which ensures that frontline officers substantively, rather than symbolically, comply with stated requirements.[403] These monitors come from outside the department, preventing them from being influenced by local political forces. External monitoring during SRL also results in the accumulation of copious amounts of data on frontline officer behavior.[404] This data allows outsiders to make more accurate judgments about the police department's compliance with constitutional norms. Previous legal regulations of police agencies have been criticized in part because they provide broad mandates, but do little to ensure that police officers actually comply with stated guidelines.[405] Local police behavior is also notoriously difficult to judge because most agencies collect little data on officer behavior.[406] This is a testament to the importance of external accountability and accurate data collection in the legal regulation of law enforcement. It would be impractical for every police agency in the country to hire an external, court appointed monitor to oversee police behavior and collect data on officer behavior. But there are other ways that the law can force external accountability on police agencies. States and the federal government could mandate more data collection on frontline officer behavior.[407] Technology could also be a valuable tool to increase

(July 14, 2014) (unpublished manuscript) (on file with author). Generally, these federal grants come with few conditions. *Id*. at 16. While inter-jurisdictional coordination and crime control are valuable goals, the evidence from this study suggests that the top-down subsidization of misconduct regulations may also be helpful.

403. *See supra* Part III.E (describing the value of monitoring).

404. *See supra* Part III (chronicling all of the data collected by the LAPD monitor).

405. *See supra* Part I.A (showing how previous attempts to regulate law enforcement were often ineffective because they could not force police departments to adopt substantive policies to address misconduct).

406. Harmon, *supra* note 323, at 797 n.139 ("Unfortunately, data about police misconduct and its remedies are presently too limited to say how well constitutional remedies deter.").

407. For an example of this, see the recent federal mandate that police departments collect additional data on race and police behavior. Emily Badger, *Why It's So Hard To Study Racial Profiling by Police*, WASH. POST (Apr. 30, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/30/it-is

oversight in an efficient and cost-effective manner. One way is through the mandated use of video surveillance, like body cameras, to monitor frontline officer behavior. Some municipalities have already integrated such technological oversight.[408]

A final lesson from SRL relates to the occasional tension between collective bargaining agreements and the ongoing need for officer accountability. Interview participants suggested that one of the benefits of SRL is that it elevates the importance of misconduct reforms relative to other legal considerations.[409] In practice, this allowed SRL to push forward the implementation of accountability mechanisms like early information systems, over the objection of organized labor.[410] The efforts by collective bargaining units to block these accountability measures highlights an important way that collective bargaining laws can sometimes unintentionally impede necessary police misconduct reform.[411] No doubt, collective bargaining can serve an important purpose in ensuring fair work conditions and compensation for police officers.[412] Even so, the lessons from SRL reinforce the need for states to make careful determinations about which topics are appropriate for collective bargaining.

CONCLUSION

SRL provides the federal government with a unique opportunity to force local police agencies to adopt invasive and costly reforms aimed at curbing misconduct. Because of this, legal scholars have long been optimistic that SRL could become one

-exceptionally-hard-to-get-good-data-on-racial-bias-in-policing (explaining how the Justice Department announced plans to collect data on race and police stops, searches, arrests, and case outcomes).

408. *See, e.g.*, Jim Mustian, *Body Cameras To Record All NOPD Public Interactions,* NEW ORLEANS ADVOC. (Apr. 7, 2014), http://www.theneworleansadvocate.com/home/8799320-172/body-cameras-to-record-all; Briana Bierschbach, *Police Departments in Minnesota Focus in on Body Cameras*, MINNPOST (Jan. 2, 2014), http://www.minnpost.com/politics-policy/2014/01/police-departments-minnesota-focus-body-cameras; Jay Kolls, *Minneapolis Police To Use Body Cameras as Early as September*, KSTP 5 EYE WITNESS NEWS (July 8, 2014), http://kstp.com/article/stories/s3496391.shtml.

409. *See supra* Part IV.C (describing how SRL gives police chiefs legal cover to implement unpopular reform over union objections without navigating the collective bargaining process).

410. *See supra* Part IV.D (discussing how SRL has successfully overcome challenges by collective bargaining groups to the implementation of EIS systems and other similar procedures).

411. *See, e.g.*, Stoughton, *supra* note 323, at 2216–17 (discussing how collective bargaining laws incidentally impact misconduct regulations).

412. Summers, *supra* note 328, at 1194.

of the most important tools for addressing police misconduct. The available empirical evidence suggests that SRL has been an effective tool for reducing misconduct in several police agencies. This is in part because SRL uses external monitoring to ensure organizational compliance. SRL can also force municipalities to allocate scarce resources to the cause of police reform. In doing so, this regulatory mechanism appears to give police leadership in targeted agencies the necessary legal cover to implement potentially unpopular reforms. The available evidence also suggests that SRL has even reduced some agencies' civil liability. Even so, SRL is not perfect. The process is long and costly. Questions remain about the sustainability of reforms after monitoring ends. Critics also allege that SRL contributes to de-policing. Ultimately, SRL requires institutional and political support within a municipality to succeed. This raises unanswered questions about whether this regulatory mechanism can force reform on a municipality that adamantly opposes it. In the end, SRL will never be the primary mechanism for addressing police wrongdoing. Even so, policymakers can use the lessons from SRL to craft more effective legal regulations of law enforcement in the future.