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UNENDING REFORM: POLICE RESISTANCE TO CONSENT DECREES AND FEDERAL MONITORS

Finn Mayock[*]

The murder of George Floyd and the subsequent protests that engulfed the United States in 2020 reignited public attention towards the violent and discriminatory practices of police departments across the country. While methods of reforming these institutions were debated with new vigor, the federal courts have been quietly overseeing efforts to obtain constitutionally compliant policing in numerous cities for decades. Using legal tools such as consent decrees and monitors, the Department of Justice has enlisted the assistance of federal courts to ensure that police practices are in congruence with the Constitution. As pervasive police violence against black and brown people continues unabated—and these lengthy consent decrees show no resolution in sight—it appears that these court-overseen efforts have not been successful. This Note explores the Department of Justice's practice of entering consent decrees with aberrant police institutions and the work of the federal monitors appointed as overseers of such reform efforts. In reviewing the near-decade long consent decrees governing police departments in Seattle and New York City, this Note utilizes monitor reports to identify why these institutions have eluded constitutional compliance. Ultimately, this Note argues that the Department of Justice, or the governing court, must take a

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proactive role in the enforcement of these consent decrees and must coerce constitutional compliance with the use of civil contempt sanctions against the respective municipalities. Such contempt creates a downward pressure upon police departments and will spur the municipal legislatures to take greater interest into reaching compliance with these reform efforts.

INTRODUCTION

In the summer of 2020, demonstrators across the United States took to the streets to protest discriminatory police brutality following the murder of George Floyd in Minneapolis, Minnesota in March of that year.[1] Movements across the country aiming to end police misconduct surged.[2] At the same time, calls to defund the police grew louder, bringing the "defund" movement to the forefront of the national political conversation.[3] It seemed as though the entire country was reckoning with the patterns of unconstitutional misconduct that have long permeated policing institutions.[4] Police reactions to these demonstrations only reaffirmed the existence of a systemic problem, as protestors were violently arrested following the use of batons and pepper-spray.[5]

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[1] *See* Brakkton Booker et al., *Violence Erupts as Outrage Over George Floyd's Death Spills Into a New Week*, NPR (June 1, 2020, 1:30 AM), https://www.npr.org/2020/06/01/866472832/violence-escalates-as-protests-over-george-floyd-death-continue [https://perma.cc/SMJ6-RRXP].

[2] *Id.*

[3] *See* Matt Sepic, *A Year After George Floyd's Death, Plans for Minneapolis Police Reform Have Softened*, NPR (May 25, 2021, 5:20 PM), https://www.npr.org/2021/05/25/1000298293/a-year-after-george-floyds-death-plans-for-minneapolis-police-reform-have-soften [https://perma.cc/7RF9-AFT7].

[4] *See* Booker et al., *supra* note 1.

[5] *See* John Bolger & Alice Speri, *NYPD "Goon Squad" Manual Teaches Officers to Violate Protestors Rights*, THE INTERCEPT (Apr. 7, 2021, 5:00 AM), https://theintercept.com/2021/04/07/nypd-strategic-response-unit-george-floyd-protests/ [https://perma.cc/79F4-G4GY]; *see also* Liz Brazile, *Seattle Police Officers Used Excessive Force in Punching and Pushing Protestors, Accountability Office Finds*, KUOW (Oct. 23, 2020, 1:04 PM), https://www.kuow.org/stories/seattle-police-officers-used-excessive-force-in-punching-and-pushing-protesters-accountability-office-finds [https://perma.cc/4JMD-B6LR].

While the public display of police misconduct in March of 2020 may have fomented national action by calling wide attention to a systemic problem, efforts to reform individual police departments across the country have existed for decades.[6] Both the Department of Justice ("DOJ") and public interest groups over the past two decades have attempted to reform unconstitutional practices of countless police departments across the country through the power of federal courts.[7]

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[6] *See* Adam Walinsky, *The Knapp Connection*, VILLAGE VOICE (Jan. 25, 2020), https://www.villagevoice.com/2020/01/25/the-knapp-connection/ [https://perma.cc/86ZF-ZXJG] (discussing the Knapp Commission, a 1970s police reform commission); *see e.g.*, Joel Rubin, *U.S. Ends Oversight of L.A. Police*, L.A. TIMES (July 18, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-jul-18-me-consent-decree18-story.html [https://perma.cc/T8PT-ZAW9].

[7] The Attorney General and Department of Justice have the authority to take civil action, such as the entering of a consent decree, against governmental entities accused of being engaged in a "[p]attern or practice of conduct by law enforcement . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" through 34 U.S.C. § 12601 (2017). Numerous police departments across the country have been and currently are under the constraint of consent decrees, including New Orleans, Detroit, Baltimore, Philadelphia, Chicago, and others. *See* CHICAGO POLICE CONSENT DECREE, http://chicagopoliceconsentdecree.org/about/ [https://perma.cc/3GJQ-AS9H] (last visited Sept. 9, 2022); ACLU PENNSYLVANIA, *Bailey Et Al. v. City of Philadelphia, Et Al.*, https://www.aclupa.org/en/cases/bailey-et-al-v-city-philadelphia-et-al [https://perma.cc/EBW2-4E4Q] (last visited Sept. 9, 2022); CONSENT DECREE MONITOR, NEW ORLEANS LOUISIANA, *The Consent Decree* http://consentdecreemonitor.com/the-consent-decree [https://perma.cc/NN2M-Y58M] (last visited Sept. 9, 2022); CITY OF BALTIMORE, *City of Baltimore Consent Decree*, https://consentdecree.baltimorecity.gov/ [https://perma.cc/FR95-LC6L] (last visited Sept. 9, 2022); George Hunter & Christine Ferretti, *Federal oversight forced reforms on Detroit's often violent police department*, THE DETROIT NEWS (June 9, 2020, 10:51 PM), https://www.detroitnews.com/story/news/local/detroit-city/2020/06/09/detroit-police-violence-prompted-federal- oversight-reforms/5320917002/ [https://perma.cc/22LU-XFBN]; Joseph Goldstein, *Judge Rejects New York's Stop and Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), https://www.nytimes.com/2013/08/13/nyregion/stop-and- frisk-practice-violated-rights-judge-rules.html [https://perma.cc/PQV7-R99R]; Kim Murphy, *Seattle Agrees to Independent Monitor to Oversee Police,* L.A. TIMES (July 27, 2012, 12:00 AM), https://www.latimes.com/nation/la- xpm-2012-jul-27-la-na-

There are various ways to pursue court-enforced reform. For example, a party, like the DOJ or a public interest group, may sue an institution and bring the issue to trial, hoping that the court will issue a final determination of liability and wrongdoing.[8] If an institution is found liable, the court can enjoin it from acting unconstitutionally and appoint a federal monitor to act as an independent watchdog, overseeing large-scale reform efforts.[9] Alternatively, to avoid exhaustive litigation, the DOJ may merely threaten to sue a violative institution before proposing a settlement agreement with that institution, subject to court approval.[10] These agreements, referred to as consent decrees, typically allow the institution to avoid admitting wrongdoing or liability as both parties negotiate consensual terms towards a substantive reform.[11]

Because such reform efforts are too detailed and lengthy for a court to manage alone, consent decrees often require the appointment of a federal monitor to oversee the agreed-upon reforms.[12] Monitors act as intermediaries between the court and the institution, organizing the reform effort and making periodic progress reports to the court.[13] Once compliance with the consent

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nn-seattle-police-reforms-justice-20120727-story.html [https://perma.cc/67XU-BSCK].

[8] *See generally* NAACP Legal Defense Fund, *Stop and Frisk on Trial in NYC*, LEGAL DEFENSE FUND (Mar. 21, 2013), https://www.naacpldf.org/press/stop-and-frisk-on-trial-in-nyc/ [https://perma.cc/856Y-X7T3].

[9] *See* Goldstein, *supra* note 7.

[10] *See* Shima Baradaran-Robison, *Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees After the Prison Litigation Reform Act and Freeman-Dowell*, 2003 B.Y.U. L. REV. 1333, 1337 (2003) (explaining the relationship of the court as the third party to the consent decree); *see e.g.,* Stipulation and Joint Findings of Fact and Conclusions of Law, United States v. City of Seattle, 12-CV-1282-JLR, at 2. (W.D. Wash. Sept. 21, 2012), https://casetext.com/case/united-states-v-city-of-seattle-1 [https://perma.cc/46W9-TS7X].

[11] *See e.g.,* Stipulation and Joint Findings of Fact and Conclusions of Law, *supra* note 10, at 2.

[12] *See* *Monitors*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/ [https://perma.cc/X7U8-H6LX] (last visited on Sept. 9, 2022).

[13] *Id.*

decree is met, the parties may petition the court to remove the monitor and terminate the consent decree.[14]

Although the 2020 uprisings against police misconduct and the calls to defund the police may indicate growing public disapproval of policing standards, current court-enforced reforms of police departments have not sufficiently attacked the problem.[15] Criticisms of these reform efforts, including the federal monitoring process, can be heard from every direction, including police departments, citizen-stakeholders, municipalities, and judges.[16] In 2021, even the DOJ formally acknowledged that past use of federal monitors in enforcing consent decrees has been significantly flawed and recently implemented new internal guidelines to promote greater efficiency.[17]

This Note argues that the existing legal vehicles used to enforce constitutional compliance in policing institutions—namely court-directed reform through the federal monitoring process—are currently insufficient as a means of ensuring our police abide by the same constitution they claim to uphold. For court-ordered reform efforts to create and maintain compliance, the process must involve stronger enforcement mechanisms to coerce police departments to comply with constitutional policing standards.

Part I of this Note explicates consent decrees and federal monitors as tools of institutional reform and identifies their facial shortcomings. Part II compares two court-reform efforts: one in New York after a court's ruling of liability and wrongdoing, and the other in Seattle that arose from a consent decree between the DOJ and the City of Seattle. Part III offers a wider critique of existing

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[14] *Id.*

[15] *See* David Nakamura, *Federal Monitors Cost Millions, with Disputed Results. Seattle's Police Watchdog was a Case in Point*, THE WASH. POST (Aug. 2, 2021, 6:00 AM), https://www.washingtonpost.com/national-security/police-monitor-seattle-biden/2021/08/01/c3d9ebe2-e976-11eb-97a0-a09d10181e36_story.html [https://perma.cc/WY5L-D7JK] (discussing the general shortcomings of the federal monitor of the Seattle Police Department).

[16] *See id.*

[17] Press Release, Dep't of Just. Off. of Public Aff's., Attorney General Merrick Garland Announces Results of Monitor Review (Sept. 13, 2021) (on file with Dep't of Just.), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-results-monitor-review [https://perma.cc/XR4L-VVAT].

court-ordered reform efforts. Part IV proposes that to accomplish longstanding and legitimate institutional reform, courts should utilize punitive methods, such as civil contempt charges, to add teeth to such efforts and to ensure compliance with the imposed reforms. To enable the success of civil contempt charges, the DOJ should include written admissions of liability and wrongdoing on behalf of the aberrant institution when entering consent decrees. In the absence of a settlement, the DOJ should litigate each case to conclusion.

I. DEFINING AND CRITIQUING CONSENT DECREES AND FEDERAL MONITOR PROGRAMS

A. Consent Decrees

The DOJ's internal guidelines state that "[w]hen the Department identifies a violation of federal law by a state or local governmental entity, the Department generally seeks to reach a resolution that avoids litigation. A resolution can take the form of a settlement agreement or a consent decree."[18] Black's Law Dictionary defines a consent decree as "[a] court decree that all parties agree to."[19] Further, a consent decree is a legal instrument that can be described as a "'tension-ridden' cross between private contracts and court-ordered adjudication," bearing characteristics and features of both.[20]

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[18] To clarify, a consent decree *is* a settlement agreement. The difference is that a consent decree is a settlement agreement that is subjected to final approval by the court, whereas a settlement agreement would normally result in the dismissal of a court action and private resolution between parties. *See* Memorandum from Attorney General Merrick Garland to United States Attorneys, Civil Settlement Agreements and Consent Decrees with State and Local Governmental Entities (Apr. 16, 2021) (on file with the Dep't of Justice), https://www.justice.gov/ag/page/file/1387481/download [https://perma.cc/7XWT-2HLP].

[19] *Consent Decree*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[20] Hon. Harold Baer, Jr. & Arminda Bepko, *A Necessary and Proper Role for Federal Courts in Prison Reform: The Benjamin V. Malcolm Consent Decrees*, 52 N.Y.L. SCH. L. REV. 3, 8–9 (2007–2008). Professor Shima Baradaran-Baughman, a criminal legal scholar, defines a traditional consent decree as a "hybrid between a judicial order and a settlement agreement or contract." *See* Baradaran-Robison, *supra* note 10, at 1337. To exemplify this confusing nature,

Because the court is tasked with approving and enforcing its content, consent decrees resemble judicial orders.[21] However, unlike judicial orders, consent decrees are not products of adjudication; rather, they are pretrial agreements signed by both parties.[22] As such, the terms of the agreement are obligations that the parties have agreed the court will enforce under general principles of contract law.[23]

For decades, the DOJ has used consent decrees to effect various types of institutional reform.[24] The DOJ's Civil Rights Division used them to desegregate school systems in the wake of the Civil Rights Act.[25] The Antitrust Division has been entering into consent decrees with commercial entities since the 1950s.[26] Additionally, consent decrees play a major role in the DOJ's police reform efforts: the Obama Administration alone entered into fourteen policing-related consent decrees spanning the United States, including in New Orleans, Newark, Ferguson, and many other cities.[27]

Unlike a normal settlement in which one party might agree to dismiss a pending complaint in return for monetary payment or other private resolution, parties to a consent decree remain engaged with the court so that it may oversee the implementation of the contractual obligations.[28] In fact, despite interpreting a consent

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the Seattle consent decree at issue in this Note explicitly notes that the Memorandum of Understanding contained within the settlement would function as a contract between Seattle and the United States. *See* Settlement Agreement and Stipulated [Proposed] Order of Resolution at 1, United States v. City of Seattle, 12-CV-1282-JLR, at 1 (W.D. Wash. July 27, 2012).

[21] Baradaran-Robison, *supra* note 10, at 1337.

[22] 18A EDWARD H. COOPER, FED. PRAC. & PROC. JURIS. § 4443 (3d ed. 2022).

[23] *See id.*

[24] *See* Randolph D. Moss, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1830–31 (1986).

[25] *Id.*

[26] Charles F. Phillips, *The Consent Decree in Antitrust Enforcement*, 18 WASH. & LEE L. REV. 39, 39–41 (1961).

[27] *See* Matt Vasilogambros, *The Feds Are Investigating Local Police Departments Again. Here's What to Expect.*, PEW TRUSTS: STATELINE (May 3, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/05/03/the-feds-are-investigating-local-police-departments-again-heres-what-to-expect [https://perma.cc/VBC5-UAXX].

[28] *See* Baradaran-Robison, *supra* note 10, at 1337–39.

decree by the written intentions of the contractors, courts retain "broad, and flexible equitable powers to modify the decree" and can potentially terminate it without the consent of the parties.[29] Additionally, the DOJ has published new internal guidelines for consent decrees with each turn of the past few administrations.[30] Unsurprisingly, the use of consent decrees to resolve disputes or aberrant institutional behavior is subject to the whims of each presidency.[31] For example, during the Trump Administration, then Attorney General Jeff Sessions controversially *ended* the DOJ's practice of using consent decrees to resolve civil rights disputes.[32] That practice was quickly reversed with the arrival of the Biden Administration.[33] The most recent internal guidelines, published on April 16, 2021, note that "[a] consent decree ensures independent judicial review and approval of the resolution and, if necessary,

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[29] *Id.* at 1337–38, 1343–45.

[30] *Compare* Memorandum from Attorney General Jefferson Sessions to United States Attorneys, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities, at 2–3 (Nov. 7, 2018) (on file with the Dep't of Justice), https://www.justice.gov/opa/press-release/file/1109621/download [https://perma.cc/U2HA-QCXK] (requiring that the DOJ "should exercise special caution before entering into a consent decree with a state or local government entity"); *with* Memorandum from Attorney General Merrick Garland to United States Attorneys, *Civil Settlement Agreements and Consent Decrees with State and Local Governmental Entities*, at 2–4 (Apr. 16, 2021) (on file with the Dep't of Justice), https://www.justice.gov/ag/page/file/1387481/download [https://perma.cc/7XWT-2HLP] (rescinding the 2018 memorandum and providing guidance about when entering into a consent decree would be "lawful, reasonable, and serve the public interest").

[31] *See* Ian Millhiser, *Trump's Justice Department has a Powerful Tool to Fight Police Abuse. It Refuses to Use It,* VOX (June 30, 2020), https://www.vox.com/2020/6/30/21281041/trump-justice-department-consent-decrees-jeff-sessions-police-violence-abuse [https://perma.cc/Q9A4-GVC6] (noting that the Clinton, Obama, and Trump administrations have all used consent decrees differently).

[32] *Id.*

[33] "By this memorandum, I am rescinding the November 2018 Memorandum." Memorandum from Attorney General Merrick Garland to United States Attorneys, *Civil Settlement Agreements and Consent Decrees with State and Local Governmental Entities*, at 2 (Apr. 16, 2021) (on file with the Dep't of Justice), https://www.justice.gov/ag/page/file/1387481/download [https://perma.cc/7XWT-2HLP].

allows for prompt and effective enforcement if its terms are breached."[34] These guidelines outline factors for United States Attorneys to consider when determining whether a consent decree is an appropriate method of remedying a particular issue.[35] They must consider "[t]he nature of the underlying violation(s) . . . ; [t]he nature and scope of the proposed remedies . . . ; [t]he Government's interest in the form of resolution . . . ; and [t]he nature of the public interest in the violation(s) and remedies."[36] While the absence of one factor is not dispositive of the use of a consent decree, a single factor alone is not determinative.[37]

These guidelines reflect a subtle deference to principles of federalism.[38] The use of consent decrees in disputes with state or local governmental institutions implicates the separation of powers between federal and state governance.[39] While the Judiciary has a prominent interest in ensuring that state institutions comply with the Constitution, consent decrees must be carefully crafted and enforced so that they do not raise concerns of judicial policymaking. In effectively ending the practice of entering civil rights-focused consent decrees, former Attorney General Jeff Sessions remarked that "federal-court decrees that impose wide-ranging or long-term obligations on . . . state or local governments . . . 'raise sensitive federalism concerns.'"[40] Those concerns are heightened when "a federal court decree has the effect of dictating state or local budget priorities."[41]

B. Federal Monitors

The role of the monitors appointed to institute consent decrees is a relatively intuitive concept. In essence, monitors, installed by an

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[34] *Id.* at 1.

[35] *See id.* at 3.

[36] *Id.* at 3–4.

[37] *See id.*

[38] "Attorneys should also consider whether . . . implementation of the remedies requires preemption of state or local law." *See id.*

[39] *See generally*, Hon. Baer, Jr. & Bepko, *supra* note 20, at 8–10.

[40] *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities*, *supra* note 30, at 2.

[41] Horne v. Flores, 557 U.S. 433, 434, 448 (2009).

agreement between an entity and the federal government, are external compliance officers charged with overseeing certain reforms of the "host organization."[42] Monitors can, and frequently are, appointed through the terms of a consent decree.[43]

i. The Monitor Selection Process

All parties to the consent agreement are typically involved in monitor selection.[44] The parties will meet and negotiate extensively as they select a candidate for the role.[45] The American Bar Association notes that parties may often notify the public that the parties are looking for a monitor so that appropriate candidates will come forward.[46] Candidates may be chosen from a pre-existing pool of individuals selected by the DOJ or the court; alternatively, they may apply for the position.[47] The parties evaluate candidates based on their professionalism, experience and expertise in the industry or field, and other factors.[48] The selection process also considers the proposed team structure and the associated costs.[49] While financing necessarily varies depending on the agreement, the municipal government of the hosting institution is responsible for funding the monitors.[50] The monitor must also be literally and figuratively

[42] *See Monitors*, *supra* note 12.

[43] *See* Settlement Agreement and Stipulated [Proposed] Order of Resolution, *supra* note 20, at 5. While this Note will focus on the appointment of monitors for the reform of police departments, it is important to recognize that monitors are used in a variety of other areas, such as the corporate or commercial sphere. Monitors have also been utilized consistently in antitrust cases. *See Monitors*, *supra* note 12.

[44] *See Monitors*, *supra* note 12.

[45] *See* Stipulated Motion and Order for Approval of Merrick Bobb as The Monitor at 1–2, United States v. City of Seattle, No. C12-1282JLR, 2020 WL 4207379 (W.D. Wash. July 22, 2020).

[46] *See Monitors*, *supra* note 12.

[47] *Id.*

[48] *Id.* As the American Bar Association notes, the parties will also consider the prospective cost of the monitorship.

[49] *Id.*

[50] *See e.g.,* Settlement Agreement and Stipulated [Proposed] Order of Resolution, *supra* note 20, at 68.

independent of both the hosting organization and the government.[51] "The monitor should be impartial and objective in all of its activities" and must refrain from any conduct that would bias or appear to bias their decisions.[52] After selecting the monitor, the parties submit a written agreement to the court confirming their choice.[53]

ii. The Monitor's Duties

The specific duties of a monitor similarly depend on the terms of each consent decree or court order under which the monitor is appointed. A typical consent decree will both broadly and specifically lay out the monitor's obligations.[54] Monitors overseeing police institutions often perform compliance reviews, which include issuing periodic assessment reports to the court on the reform progress and lending technical assistance to the police department upon request.[55] For example, the Seattle consent decree later discussed in this Note states that "[t]he monitor will verify that all of the substantive reform measures" are implemented by "conduct[ing] compliance and progress reviews."[56] These reviews, coupled with reports detailing the monitor's findings every six months, make up most of the monitor's obligations.[57] While the Seattle consent decree explicitly defined compliance, it also gave the monitor flexibility in developing an assessment plan.[58]

II. COMPARING REFORM EFFORTS IN SEATTLE AND NEW YORK CITY

Two representative examples illustrate the successes and shortcomings of consent decrees and monitorships in large

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51 *See Monitors*, *supra* note 12.

52 *Id.*

53 *See e.g.,* Stipulated Motion and Order for Approval of Merrick Bobb as The Monitor, *supra* note 45.

54 *See e.g.,* Settlement Agreement and Stipulated [Proposed] Order of Resolution, *supra* note 20, at 53.

55 *See id.* at 53–54.

56 *See id.*

57 *Id.* at 54.

58 *Id.* at 56–58.

municipalities: 1) a court-ordered monitorship of the New York City Police Department ("NYPD") following litigation,[59] and 2) a monitorship of the Seattle Police Department ("SPD") arising from the terms of a consent decree between the City of Seattle and the DOJ.[60] Because these two consent decrees are currently ongoing, a brief analysis of a concluded monitorship and consent decree which governed the Los Angeles Police Department ("LAPD") provides further context.[61]

A. Seattle: Monitorship through Consent Decree

In 2011, the DOJ investigated the SPD, finding that the department had continuously committed use of force violations, which suggested a pattern of discriminatory policing.[62] Following this investigation, the City of Seattle and the DOJ entered into a consent decree which appointed Merrick Bobb, a former member of the monitoring team overseeing the Los Angeles Sheriff's Department, as federal monitor and ordered a number of reforms to

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[59] Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

[60] *See* Stipulated Motion and Order for Approval of Merrick Bobb as The Monitor, *supra* note 45.

[61] *See* Rubin, *supra* note 6. The scope of this inquiry is limited to just these three cities, thus presenting a challenge in extracting a representative and illustrative sample of data to draw conclusions from. These examples were chosen due to their significant similarities: both the Seattle and New York monitorships stem from allegations of racially discriminatory policing and use of force violations, among other things, and both have been in place for over five years and have not yet achieved the compliance necessary to terminate their appointment. *See infra* Part I. Furthermore, this Note topic originally sprung from the George Floyd protests of 2020. Both cities, whose large police departments were already under lengthy consent decrees, were widely publicized flashpoints of police violence against demonstrators during that period of upheaval. *See infra* Part I. Because of the similar scale of the reform efforts, the geographical distance between cities, and most pertinently, the frustrations in reaching compliance, these cities proved ideal candidates for investigation.

[62] U.S. DEP'T OF JUST. CIVIL RIGHTS DIV., U.S. ATT'Y'S OFF. W. DIST. OF WASH., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT, at 1–2 (Dec. 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf [https://perma.cc/UG2Y-PYLV].

ensure the constitutionality of policing in Seattle.[63] Despite the gravity of the allegations brought forth by the DOJ and the resulting consent decree, the City of Seattle did not "admit or agree with [the] DOJ's findings and conclusions."[64] The monitor's first semiannual report, delivered to the court in April of 2013, described the beginning of the long—and currently ongoing—process of implementing fundamental changes to the operational methods and culture of the SPD.[65] The twenty-two page report detailed the reform effort's underwhelming results in its early stages.[66] Notably, the monitor identified a significant number of challenges.[67] The first report remarked that early into the effort, significant disagreement existed between police personnel and City officials regarding the "limits, scope, and sweep of the Settlement Agreement; [t]he degree to which negotiation and collaboration between the parties themselves and with the Monitor is possible; [t]he intentions of Judge Robart regarding enforcement of the [Settlement Agreement] [and]; [w]ho in the City of Seattle is empowered to act in the City's name."[68] In addition to the apparent tension between the parties, the report found that SPD officers—particularly the Department's personnel represented by police unions—were resistant to the monitoring effort.[69]

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[63] Kim Murphy, *L.A. Sheriff Watchdog Merrick Bobb Hired as Seattle Police Monitor*, L.A. TIMES (Oct. 30, 2012, 12:00 AM), https://www.latimes.com/nation/la-xpm-2012-oct-30-la-na-nn-merrick-bobb-seattle-police-20121030-story.html [https://perma.cc/2JRK-Y3Z4]; *see e.g.*, Settlement Agreement and Stipulated [Proposed] Order of Resolution, *supra* note 20, at 5.

[64] *See, e.g.,* Settlement Agreement and Stipulated [Proposed] Order of Resolution, *supra* note 20, at 9.

[65] *See id.* at 3.

[66] *See* MERRICK J. BOBB, SEATTLE POLICE MONITOR, FIRST SEMIANNUAL REPORT, 1 (2013), https://www.justice.gov/sites/default/files/crt/legacy/2014/10/10/spd_mtrrpt1_2013.pdf [https://perma.cc/EHU8-TB7M]. The report marked several items as milestones, such as the appointment of the monitor, the monitor's distribution of a statement of priorities to the SPD, and that the monitor's team had been granted access to the SPD's data and facilities. *See id.* at 4.

[67] *See id.* at 5.

[68] *Id.*

[69] *See id.* at 5–6.

Despite the challenges indicated by the monitor's first report, the seventh semiannual report, filed in September 2016, indicated significant improvement and the apparent close proximity of reaching full compliance with the consent decree.[70] The report notes that "[w]ith diligence and hard work, and in the absence of unforeseen impediments, and if there comes about greater community cooperation and trust, the SPD could well reach full and effective compliance in as little as a year from now . . . in many, if not all areas."[71] The seventh report further detailed "systemic assessments" that the monitor devised to evaluate "whether the Department has the systems, policies, structures, and culture in place that the Consent Decree requires both across time and incidents."[72] Finally, the seventh report concluded with a lengthy section about what "full and effective compliance" would look like, detailing the procedures leading to the dissolution of the consent decree and removal of the monitorship.[73] When the monitor determines that the City and SPD have maintained compliance with "all or nearly all of the areas addressed by the Consent Decree," it will make a recommendation to the court that the City and the SPD have achieved such "full and effective compliance."[74] Upon a determination of full compliance, the City and SPD would have a two year period in which the to retain this compliance.[75] At the end of those two years, the consent decree would dissolve and the monitor would be removed.[76]

Two years after the seventh semi-annual report, the City successfully moved the court to find them in substantial compliance with the consent decree.[77] Although the monitor neither made a

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[70] MERRICK J. BOBB, SEATTLE POLICE MONITOR, SEVENTH SEMIANNUAL REPORT, 2 (2016), https://www.documentcloud.org/documents/3114203-Monitor-s-7th-Semiannual-Report [https://perma.cc/EP3P- NBUV].

[71] *Id.* at 2.

[72] *Id.* at 4.

[73] *Id.* at 7–8.

[74] *See id.* at 8.

[75] *See id.*

[76] *See id.*

[77] Steve Miletich & Mike Carter, *Seattle Police Found in 'Full and Effective Compliance' With Court-Ordered Reforms*, SEATTLE TIMES (Jan. 10, 2018, 10:11 PM), https://www.seattletimes.com/seattle-news/crime/seattle-police-found-in-

determination of full and effective compliance, nor recommended the court enter the sustainment period,[78] the court granted Seattle's motion to find the city in full and effective compliance, beginning the two year "sustainment period."[79] In its ruling, the court noted that the monitor still had numerous concerns regarding the progress of the SPD in "nearly every assessment area," such as higher-ranking officers' failure to address subordinate deficiencies, departmental relationships with "isolated communities," and the "disproportionate number of Blacks and Latinos that are stopped and frisked."[80] Despite these deficiencies, the court nevertheless initiated the sustainment period.[81] This period seemed to indicate largely stable results, excluding a notable event in 2019, where the court deemed the City partially out of compliance following an incident where an officer assaulted a handcuffed woman.[82] Regardless, the judge did not explicitly suspend the sustainment phase or halt the clock on the two year period.[83] In May 2020, after two years of sustained compliance, the City of Seattle and the DOJ petitioned to have the Consent Decree dissolved, paving the way for the monitorship to be terminated.[84]

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full-and-effective-compliance-with-court-ordered-reforms/ [https://perma.cc/EG88-9YVY].

[78] United States v. City of Seattle, No. C12-1282, 2018 WL 348372, at *2 (W.D. Wash. Jan. 10, 2018).

[79] *See id.* at *7.

[80] *Id.* at *3.

[81] *Id.* at *7.

[82] Mike Carter & Steve Miletich, *Federal Judge Finds Seattle Partly Out of Compliance with Police-Reform Deal – A Major Blow to The City*, SEATTLE TIMES (May 16, 2019, 12:51 PM), https://www.seattletimes.com/seattle-news/federal-judge-finds-seattle-partially-out-of-compliance-with-police-reform-agreement-dealing-major-blow-to-the-city/ [https://perma.cc/P5CX-CAD6].

[83] United States v. City of Seattle, No. C12-1282, 2019 WL 2191871, at *1 (W.D. Wash. May 21, 2019).

[84] SEATTLE POLICE DEP'T: SEATTLE POLICE BLOTTER, *City of Seattle Files Motion to Terminate Seattle Police Department Consent Decree Sustainment Plan with Judge Robart* (May 8, 2020, 8:52 AM), https://spdblotter.seattle.gov/2020/05/08/city-of-seattle-files-motion-to-terminate-seattle-police-department-consent-decree-sustainment-plan-with-judge-robart/ [https://perma.cc/7W64-CGBB]; Steve Miletich, *Seattle, Department of Justice Ask Judge to Release Police from Remaining Consent*

What was purported to be a largely successful reform with a rapid turnaround quickly fell apart. One month after moving to terminate the consent decree and monitorship, the City of Seattle sharply withdrew the motion in response to public outcry over the police treatment of protestors rallying in the wake of George Floyd's murder.[85] Demonstrators protesting police brutality in June of 2020 were met with excessively violent force by the Seattle Police Department.[86] In announcing the withdrawal of the motion to terminate the Consent Decree, the Seattle City Attorney remarked,

> [h]ere in Seattle, I've been closely monitoring the response to demonstrations, and *14,000 complaints to our Office of Police Accountability* (OPA) in recent days signal that we are about to witness the most vigorous testing ever of our City's accountability systems. As OPA undertakes its independent investigation of misconduct allegations, it's become clear to me that we need to pause before asking U.S. District Judge James Robart to terminate the sustainment plan elements of the federal consent decree . . . [87]

Decree Oversight, SEATTLE TIMES (Aug. 12, 2020, 11:41 AM), https://www.seattletimes.com/seattle-news/politics/seattle-department-of-justice-ask-judge-to-release-police-from-remaining-consent-decree-oversight/ [https://perma.cc/B4LZ-MYWL]; Steve Miletich et al., *As Complaints Pour in About Police at Seattle Protests, City Will Withdraw Request That Could Lift Federal Oversight*, SEATTLE TIMES (Aug. 12, 2020, 11:41 AM), https://www.seattletimes.com/seattle-news/law-justice/after-days-of-seattle-protests-city-will-withdraw-request-to-remove-police-force-from-federal-oversight/ [https://perma.cc/6RFC-K2RR].

[85] Miletich et al., *supra* note 84.

[86] *See* Brazile, *supra* note 5; *see also* Martha Bellisle, *Report: Seattle Officers Used Excessive Force at Protests*, AP NEWS (Oct. 23, 2020), https://apnews.com/article/us-news-seattle-police-racial-injustice-police-reform-3f6aa490073ed9305a157e4aebd7eea9 [https://perma.cc/9C87-KJUH].

[87] Michael Goldberg, *In Wake of Protests, Seattle City Attorney Announces Withdrawal of Consent Decree Motion*, WASH. STATE WIRE (June 3, 2020) https://washingtonstatewire.com/in-wake-of-protests-seattle-city-attorney-to-withdraw-consent-decree-motion/ [https://perma.cc/8EFJ-BPR6] (emphasis added).

Two months following the City's withdrawal of the termination motion, Seattle's policing problems compounded as the monitor of the Seattle Police Department resigned at what he called the police department's "nadir."[88] Seattle Police Chief Carmen Best resigned in August 2020 in protest against budget cuts to the Department; additionally, the controversy and outcry surrounding the Department's response to the George Floyd protests led the monitor to feel as if the Seattle reform effort "fell apart in a very big way."[89]

After the City withdrew their motion to terminate the consent decree and Bobb resigned, a new monitor with a background in public policy, Dr. Antonio Oftelie, was appointed.[90] Oftelie resumed the role of the monitor where Bobb left off, facing new challenges from the police department, activist groups, and city councilmembers.[91] Responding to the City Council's proposed budget cuts to the SPD, Oftelie told the court that the budget cuts threatened the goal of compliance, claiming that "[t]he actions and investments of the city will either tip the department into a deepening crisis, or will lead the department into a future in which it can sustain compliance and build trust in constitutional policing."[92] Today, Oftelie continues to work towards reforming the SPD; however, after nine years under the monitorship, no clear resolution to the consent decree is apparent.[93]

B. New York: Monitorship through Court-Order

In New York, a monitor has watched over the NYPD since 2013.[94] In 2013, a group of class-action plaintiffs sued the NYPD

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[88] *Id.*; Nakamura, *supra* note 15.

[89] Nakamura, *supra* note 15.

[90] *Id.*

[91] Michael Carter, *Federal Judge to Seattle Officials: 'Too Much Knee-Jerk, Not Enough Forethought' on Police Reform,* SEATTLE TIMES (Aug. 10, 2021, 10:16 PM), https://www.seattletimes.com/seattle-news/federal-judge-to-seattle-officials-too-much-knee-jerk-not-enough-forethought-on-police-reform/ [https://perma.cc/9MYJ-UEBU].

[92] *Id.*

[93] *Id.*

[94] *See* Goldstein, *supra* note 7. Peter Zimroth, the former federal monitor of the NYPD, died while this Note was being written. Following his death, Mylan

for the department's use of racially discriminatory and unconstitutional stop and frisk policies in the case *Floyd v. City of New York*.[95] *Floyd* was eventually joined with several other lawsuits against the NYPD alleging an unlawful policy of racially discriminatory trespass arrests for public and private housing residents and their guests.[96] After a full bench trial, the court found the NYPD liable, concluding that the Department violated the constitutional rights of minorities through its stop and frisk program.[97] In a remedial order, Judge Shira A. Scheindlin appointed Peter Zimroth, a partner at Arnold & Porter, LLP and former Chief Assistant District Attorney of New York County, as monitor to oversee the reforms.[98] Although New York initially appealed the ruling, the City withdrew its appellate effort after the parties settled several additional claims.[99] The parties then agreed to the terms set forth in the initial court order, adding a provision regarding the removal of the monitor after compliance was determined.[100]

Denerstein, an attorney and partner at Gibson Dunn & Crutcher LLP, was appointed to continue the monitoring efforts. *See* Rocco Parascandola, *Peter Zimroth, Federal Monitor Overseeing Reform of NYPD's Stop-and-frisk, Dead at 78*, N.Y. DAILY NEWS (Nov. 8, 2021, 2:21 PM), https://www.nydailynews.com/new-york/nyc-crime/ny-peter-zimroth-dead-cancer-nypd-stop-and-frisk-federal-monitor-20211108-3rayrx34r5fxtgagx6olue4amu-story.html [https://perma.cc/GJX8-B5BM]; Graham Rayman, *Mylan Denerstein Named as New Federal Monitor Overseeing NYPD Stop and Frisk Case*, N.Y. DAILY NEWS (Jan. 14, 2022, 12:14 PM), https://www.nydailynews.com/new-york/nyc-crime/ny-new-federal-monitor-nypd-appointed-20220114-drmpywlrkvblzfhzyuoxk7abwa-story.html [permalink missing].

[95] Floyd v. City of New York, 959 F. Supp. 2d 540, 540 (S.D.N.Y. 2013); NAACP Legal Defense Fund, *supra* note 8.

[96] Floyd v. City of New York, 959 F. Supp. 2d 540, 540 (S.D.N.Y. 2013); NAACP Legal Defense Fund, *supra* note 8.

[97] *See* Goldstein, *supra* note 7; Floyd v. City of New York, 959 F.Supp.2d 540, 557–58 (S.D.N.Y. 2013).

[98] Remedial Order, *Floyd*, 959 F. Supp. 2d at 676.

[99] PETER L. ZIMROTH, NYPD MONITOR, FIRST REPORT OF THE INDEPENDENT MONITOR, 12 (July 9, 2015), https://www1.nyc.gov/assets/nypd/downloads/pdf/monitor-reports/MonitorsFirstReport-AsFiledInFloydDocket.pdf (hereinafter NYPD MONITOR, First Report).

[100] *Id.*

Because of the numerous pending appeals, the monitor could not initiate reforms until November 2014, over one year after the remedial order was handed down.[101] In July 2015, the monitor's team delivered their first report to Judge Torres,[102] the then-presiding judge, which indicated the early stages of the remedial process and the massive scope of the effort to come.[103] Similar to the effort in Seattle, most of the New York monitor's first report identified the large-scale reforms still required and noted the work accomplished thus far.[104] The report devoted significant space to a discussion of retraining officers and redrafting NYPD materials to educate and guide officers towards constitutionally compliant policing.[105] Though the first report came at an early stage in the monitor's tenure, it identified numerous deficiencies. Among the numerous reforms of the NYPD that were ordered by the *Floyd* court was an overhauled auditing system for stops and frisks that ensured compliance with actual legal standards, rather than the NYPD's internal requirements.[106] Notably, the report found that the Quality Assurance Division ("QAD"), an NYPD division that was in part designed to conduct internal audits of NYPD activity, including street stops, and to identify officers in need of "enhanced training," continued to "conduct audits of stops and oversee self-inspections mostly as it did *before* the court-orders, without the changes the NYPD understands need to be made . . . ."[107]

One of the goals of the reform effort was to use the QAD to audit the reported stops and frisks so that NYPD supervisors could obtain reliable data to increase early identification and reporting of

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[101] *Id.* at 1.

[102] *Id.* Judge Shira A. Scheindlin was removed as the judge presiding over the *Floyd* litigation following a decision by the Second Circuit Court of Appeals. *See* Daniel Beekman, *Stop-And-Frisk Judge Removed from Case, Reforms Put on Hold After Federal Appeals Court Ruling*, N.Y. DAILY NEWS (Nov. 1, 2013, 1:50 AM), https://www.nydailynews.com/new-york/breaking-stop-frisk-blocked-judge-removed-article-1.1503092 [https://perma.cc/Q9VK-BCYE].

[103] NYPD MONITOR, First Report, *supra* note 101, at 6.

[104] *Id.* at 11–20.

[105] *Id.* at 40–55.

[106] *See id.* at 56.

[107] *Id.*

problematic stops.[108] Alarmingly, the first report noted that the NYPD was still struggling to "identify and then address stops and frisks that are made by police officers but not documented," and that "[w]ithout accurate reporting, it will be impossible for the Department's supervisors to make informed judgements about what is actually happening on the street."[109] This concern is particularly relevant to this police reform effort, as nearly six years later, the issue of officers underreporting of stops by the NYPD remains the largest obstacle towards the Department reaching compliance.[110]

The monitor's fifth report, released in 2017, further illuminated the successes and shortcomings of the NYPD's reform.[111] It included a qualitative, albeit introductory,[112] analysis of NYPD stops across 2013 to 2015.[113] Although the report did *not* find increased compliance with constitutional restraints, it did note that "[m]ost measures showed a diminution of racial disparities, although some did not."[114] In 2013, the NYPD reported 191,851 stops; 54.4% were of Black individuals and 28.6% were of Hispanic individuals.[115] In 2014, the number of stops decreased dramatically to 45,787; 53.1% were of Black individuals and 27.2% were of

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[108] *Id.* at 57.

[109] NYPD MONITOR, First Report, *supra* note 99, at 58.

[110] PETER L. ZIMROTH ET AL., NYPD MONITOR, THIRTEENTH REPORT OF THE INDEPENDENT MONITOR, 4, 7 (2021), https://www1.nyc.gov/assets/nypd/downloads/pdf/monitor-reports/federal-monitor-13th-report.pdf [https://perma.cc/CCT9-XLHM] (hereinafter NYPD MONITOR, Thirteenth Report).

[111] *See* PETER L. ZIMROTH ET AL., NYPD MONITOR, FIFTH REPORT OF THE INDEPENDENT MONITOR, 2–3 (May 30, 2017), https://www1.nyc.gov/assets/nypd/downloads/pdf/monitor-reports/2017-05-30-MonitorsFifthReport-AnalysisofNYPDStopsReported2013-2015-Asfiled.pdf [https://perma.cc/5NSD-CUT3] (hereinafter NYPD MONITOR, Fifth Report).

[112] The fifth report qualified the monitor's delivery of such statistical analysis, noting that a determination on the NYPD's constitutional compliance would require the availability of "statistical data over a more extensive period." *See id.* at 1.

[113] *Id.*

[114] Peter L. Zimroth et al., Letter from Arnold Porter Kaye Scholer LLP to Hon. Judge Torres of the U.S. Southern Dis. Of N.Y. (Sept. 1, 2021), *in* NYPD MONITOR, Fifth Report *supra* note 111.

[115] NYPD MONITOR, Fifth Report *supra* note 111, at 7.

Hispanic individuals.[116] In 2015, the stops further decreased to 22,563; 52.9% were of Black individuals and 28.8% were of Hispanic individuals.[117] While the monitor's report remarks that these results are a "diminution in racial disparities," these statistics paint an alarming picture both of the treatment of Black and Hispanic communities by the NYPD and of the department's willingness to comply meaningfully with the court order.[118]

The eleventh report, issued in 2020, delivered a brief overview of major changes that occurred since the first report, analyzing officer training on stop and frisk policies.[119] Further, it marked the first instance in which the monitor published an exhaustive list of required reform areas outlined by the court order and assessed the NYPD's progress on those efforts.[120] However, there were still several significant areas in which the NYPD had not reached compliance.[121] The monitor found that the NYPD remained noncompliant in numerous areas crucial to the thrust of the reform effort.[122] The NYPD's documentation of stops and frisks and its adherence to the newly developed policies governing such stops had still not met the requirements of the court order.[123] Similarly, the NYPD had failed to improve their supervisory officer's assessments as to the constitutionality of a subordinate officer's stops.[124] Further, the monitor found that the NYPD continued to be noncompliant with federal and state racial profiling standards in several areas, and that

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[116] *Id.*

[117] *Id.*

[118] Peter L. Zimroth et al., Letter from Arnold Porter LLP to Hon. Judge Torres of the U.S. Southern Dis. Of N.Y. (Sep. 1, 2021), *in* NYPD MONITOR, Fifth Report *supra* note 111.

[119] *See* PETER L. ZIMROTH ET AL., NYPD MONITOR, ELEVENTH REPORT OF THE INDEPENDENT MONITOR, at 5 (2020), https://www1.nyc.gov/assets/nypd/downloads/pdf/monitor-reports/11th-Report-Submission-2.pdf [https://perma.cc/82N4-5ZWS] (hereinafter NYPD MONITOR, Eleventh Report).

[120] *Id.* at 106.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

investigator and plainclothes officers' re-trainings were still deficient.[125]

The thirteenth report, issued in August 2021, aggregated methodological research that was gathered from 2013 to 2019 by the monitoring team regarding the NYPD's compliance with the 2013 court order.[126] This report "use[d] the statistical analyses applied in the Monitor's Fifth Report to see whether racial disparities continue[d], after controlling for other potentially confounding factors."[127] First, the report reaffirmed that stop rates had significantly declined since 2013.[128] Summarizing the key findings, the report stated that disparities in frisks of minority Black and Hispanic subjects diminished relative to white individuals after the implementation of the court's remedial order and that frisk rates no longer differed significantly across racial grouping.[129] However, the report qualified this finding, noting that "when adjustments were made to account for *undocumented* stops, it appears that Black subjects were more likely to be frisked relative to White/Other subjects between 2016 and 2019."[130] The reliability of the monitor's statistical analyses are unavoidably called into question by the team's inability to obtain a complete data set—presumably because NYPD officers choose not to report all of the stops they are actually making.[131] While the statistics derived from *reported* results indicated seemingly positive progress towards compliance with the court order, estimates accounting for *unreported* stops suggest a pattern of noncompliance, a trend that seems consistent with the previous reports.[132] The report also noted that, when including undocumented stops, black people were generally more likely to be searched than their white counterparts and more likely to be arrested when compared to white counterparts; and that NYPD officers were

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[125] *Id.*

[126] NYPD MONITOR, Thirteenth Report, *supra* note 110, at 1.

[127] *Id.* at 2.

[128] *Id.*

[129] *Id.* at 4.

[130] *Id.* at 4–5 (emphasis added).

[131] *Id.* at 7–8.

[132] *Id.*

more likely to "use force during stops of Black subjects relative to the stops of White/Other subjects . . . ."[133]

The report emphasized that according to the present statistics, racial disparities between Black and Hispanic people in a number of areas such as frisks, arrests, and uses of force declined as a result of the *Floyd* order.[134] However, it also noted a separate finding[135] that sole reliance on reported stops is ultimately insufficient to establish conclusions about the NYPD's constitutional compliance while significant numbers of stops remain unreported.[136] Solidifying concerns about prevailing racial discrimination, the report further noted that "[e]stimated [racial] disparities in stop outcomes increase if one uses a larger estimate of undocumented stops."[137]

The monitor's own reporting indicates that despite modest progress, the NYPD is not yet compliant with the court order.[138] A recurring trend and consistent concern throughout the reports is that officers are simply underreporting instances of stops altogether.[139] As the final words of the introduction to the thirteenth report elucidate, "[w]ithout complete data on stops, the NYPD will not be able to demonstrate, and [the federal monitor] will not be able to inform the court, that the NYPD is in substantial compliance with the court's remedial order."[140]

C. Los Angeles: Concluded Monitorship

One challenge in extracting a representative sample from federal monitorships beyond their relative novelty in reforming police

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[133] NYPD MONITOR, Thirteenth Report, *supra* note 110, at 6.

[134] Peter L. Zimroth et al., Letter from Arnold & Porter Kaye Scholer LLP to Hon. Judge Torres in U.S. Southern Dis. Of N.Y. (Sept. 1, 2021), *in* NYPD MONITOR, Thirteenth Report, *supra* note 110.

[135] *Id.*

[136] *Id.*

[137] *Id.* (emphasis added). The term "stop outcomes" in the monitor's reports describe the arrests and use of force that are the "outcomes" of "stops."

[138] *Id.*

[139] *Id.*

[140] Peter L. Zimroth et al., Letter from Arnold & Porter Kaye Scholer LLP to Hon. Judge Torres in U.S. Southern Dis. Of N.Y. (Sept. 1, 2021), *in* NYPD MONITOR, Thirteenth Report, *supra* note 110.

institutions is that few in this field have concluded.[141] The consent decree governing the reforms of the LAPD is one example of a completed effort on a comparatively sized scale. The consent decree, which came to a full conclusion in 2013,[142] was hailed by the court as a success; however, the passage of time has raised questions as to the longevity of such impacts.[143]

A DOJ investigation into the LAPD in 2001 alleged widespread corruption and misconduct in the wake of the Rodney King beating and the Rampart corruption scandal.[144] In addition to corroborating the misconduct alleged in those two widely publicized incidents, the DOJ also found evidence of a "pattern of excessive force, false arrests and unreasonable searches, especially of members of minorities . . . ."[145] Following this investigation, the DOJ and the

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[141] *See generally* James D. Walsh, *The Most Powerful Weapon for Police Reform is Back*, N.Y. MAGAZINE (Apr. 21, 2021), https://nymag.com/intelligencer/2021/04/what-do-justice-department-consent-decrees-do.html [https://perma.cc/3FRS-SJDX] (noting that some police departments take a few years to reach compliance with federal monitor programs, while others like the Oakland Police Department have been ongoing for nearly twenty years).

[142] Tami Abdollah, *Federal Oversight of LAPD Officially Ends,* POLICE1 (May 17, 2013), https://www.police1.com/police-administration/articles/federal-oversight-of-lapd-officially-ends-nY4fN7kQjqTzDNAI/ [https://perma.cc/E3ZS-WJ4D].

[143] *See* Rubin, *supra* note 6.

[144] Solomon Moore, *Monitor Cites Reform, Though Incomplete, By Los Angeles Police*, N.Y. TIMES (June 15, 2009), https://www.nytimes.com/2009/06/16/us/16lapd.html [https://perma.cc/DZ5L-CX7K]. On March 3, 1991, the vicious beating of Rodney King by four LAPD officers was captured on video. The display of police brutality, and the later acquittal of the four officers attracted significant public attention towards the misconduct of the LAPD. The public inquiry into LAPD misconduct continued following the Rampart corruption scandal, where a whistleblower assigned to an anti-gang unit alleged that officers in the unit had framed, beaten, and robbed suspects. *See* Anjali Sastry Krbchek & Karen Grigsby Gates, *When LA Erupted in Anger: A Look Back at The Rodney King Riots,* NPR (Apr. 26, 2017, 1:21 PM), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots [https://perma.cc/WVQ6-DBLY]; John M. Broder, *Los Angeles Paying $70 Million for Police Graft*, N.Y. TIMES (Apr. 1, 2005), https://www.nytimes.com/2005/04/01/us/los-angeles-paying-victims-70-million-for-police-graft.html [https://perma.cc/NWE9-FWRD].

[145] Moore, *supra* note 144.

LAPD entered into a consent decree to reform the LAPD and to abide by constitutional constraints on policing.[146] Like the SPD, the LAPD and the City of Los Angeles refused to admit liability or wrongdoing in their consent decree.[147]

In 2009, eight years after the DOJ and the LAPD entered the consent decree, the court released the LAPD from their federal monitor's oversight.[148] Finding that the LAPD had sufficiently complied with the decree, United States District Judge Gary A. Feess remarked that the police department had "[b]ecome the national and international policing standard for activities that range from audits to handling of the mentally ill . . . ."[149] While the federal monitor's role ended, a transitional plan allowed certain provisions of the consent decree to remain intact.[150] This unceremonious end to the reform effort was highlighted by former Los Angeles police commissioner, William Bratton, who felt that the LAPD had come to view the consent decree as irrelevant and outdated, and remarked, "[i]n the mind of the department, it has been over for a long time."[151]

While federal oversight of the LAPD ended, questions about whether the department had truly achieved lasting constitutional compliance still loom large over the LAPD. Following the monitorship's conclusion, the legal director of the American Civil Liberties Union ("ACLU") in Southern California expressed his disappointment, saying there was "[s]till too much evidence that skin color makes a difference in who is stopped, questioned, and arrested by the LAPD."[152] An ongoing study finds that the LAPD have killed nearly 1,000 thousand people between 2001 and

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[146] *See generally* Consent Decree at 1, United States v. City of Los Angeles, No. 00-11769 (C.D. Cal. 2001), https://www.justice.gov/crt/file/826956/download. [https://perma.cc/2FMS-9RF6]

[147] The language and obligations espoused by the LAPD consent decree is significantly more ambiguous and open-ended than that of the language governing the reform of the NYPD or SPD but contains substantially similar obligations. *See id.* at 4.

[148] Rubin, *supra* note 6.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

September of 2022, 80% of whom were Black or Latino.[153] Like in New York and Seattle, the LAPD also reacted with excessive violence towards demonstrators protesting police brutality in the wake of George Floyd's murder.[154] A damning 2021 report found that the LAPD "severely mishandled protests" by "illegally detaining protestors" and "striking people who had committed no crimes with rubber bullets, bean bags and batons."[155] As countrywide police reactions to the George Floyd protests have evidenced, constitutional policing is a continuing challenge for police departments, even after the conclusion of prolonged court-supervised reform efforts.

III. Interpreting the Data and Drawing Conclusions

These examples represent some of the most extensive efforts at court-ordered reform of major police institutions. Despite notable progress and tangible benefits, such as the decrease in overall stops, and the implementation of body-worn cameras by officers,[156] these reform efforts fail to create permanent change and to ensure that police departments are compliant with the United States Constitution. One glaring issue, based on monitor reports in both Seattle and New York, is a profound and documented resistance to the thrust of the ordered reforms by rank-and-file police officers.[157] In Seattle, Merrick Bobb noted in his own resignation letter the SPD's resistance to the consent decree and oversight of the federal

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[153] Los Angeles Times Staff, *Police Have Killed 983 People in L.A. County Since 2000,* L.A. TIMES, https://www.latimes.com/projects/los-angeles-police-killings-database/ [https://perma.cc/ED98-8WM2] (last updated Sept. 27, 2022).

[154] *See* Nicholas Bogel-Burroughs et al., *L.A.P.D. Severely Mishandled George Floyd Protests, Report Finds*, N.Y. TIMES (Mar. 29, 2021), https://www.nytimes.com/2021/03/11/us/lapd-george-floyd-protests.html [https://perma.cc/DTQ4-VGXM].

[155] *Id.*

[156] *See* NYPD MONITOR, First Report, *supra* note 99, at 5–7.

[157] *See* Mike Carter, *Seattle Police Monitor Resigns, Says Use of Force During Protests Has Cost Goodwill*, SEATTLE TIMES (Sept. 8, 2020, 9:21 AM), https://www.seattletimes.com/seattle-news/federal-judge-appoints-new-monitor-for-seattle-police-harvard-professor-replaces-merrick-bobb-who-resigned/ [https://perma.cc/TJ7H-VWE6]; NYPD MONITOR, Thirteenth Report, *supra* note 110, at 10–11.

monitor.[158] In New York, departmental resistance was evidenced by officers' persistent failure to report stops, impeding the monitor's ability to collect meaningful data to determine actual compliance with the remedial order.[159] Even in Los Angeles, the police commissioner remarked that LAPD officers had decided themselves that the consent decree was concluded.[160]

One way to approach the shortcomings of court-ordered reform is to conclude that it is simply a lengthy process that needs more time to see its lasting change. Prior history does not offer much comparative value, as the court terminated the monitorship in Los Angeles despite significant issues regarding discriminatory policing remaining.[161] It is clear, however, that as monitorships drag on, frustrations foment from both department personnel weary of oversight and citizen-stakeholder groups displeased with the pace of reform.[162]

Another conclusion could be that the chosen mechanism for instituting reform is merely inconsequential when rank-and-file officers resist such efforts. The results in Seattle and New York are relatively similar despite significantly different legal mechanisms guiding the reform. Where one was ordered following the full litigation process,[163] and another was crafted through a settlement,[164] they have both failed to produce signs of permanent compliance with the Constitution and the terms of the agreed-upon reforms. This comparative analysis between the reporting of the New York monitor and the Seattle monitor does not indicate any significant deficiencies in work-product or results specifically arising from the nature of the legal method used to appoint them. However, both examples have rendered similar results that are costly and currently unsuccessful. Given the likeness of results, this may indicate that settlement-based consent decrees should be a

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[158] *See* Carter, *supra* note 157.

[159] *See* NYPD MONITOR, Thirteenth Report, *supra* note 110, at 10–11.

[160] *See* Rubin, *supra* note 6.

[161] *Id.*

[162] *See* Nakamura, *supra* note 15.

[163] *See* NAACP Legal Defense Fund, *supra* note 8, at 3; Floyd v. City of New York, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013).

[164] *See* Settlement Agreement and Stipulated [Proposed] Order of Resolution, *supra* note 20, at 6.

preferential method of instituting such efforts, as they avoid the time and costs of full-scale litigation.

A third conclusion is that the court simply lacks the ability to invoke reform upon these institutions. The court's inability to transform its reform orders into tangible results is not a new phenomenon.[165] If—as appears to be the case here—rank-and-file police officers simply refuse to obey the court's injunction on discriminatory policing, a court is left with limited enforcement mechanisms beyond appointing a federal monitor. The court's inability to produce institutional change could suggest that these reforms should solely be relegated to local legislatures. However, this would raise a collateral concern regarding the ability of the judiciary to maintain enforcement of the federal Constitution. It would be inappropriate for the judiciary simply to abdicate the authority to permit or prohibit constitutionally violative policing to individual state governments, since the judiciary is self-described as the "guardian and interpreter of the Constitution."[166] The inverse argument presents a similar challenge. If the court is to take on a more domineering role in enforcing the reform of state and local institutions, it may approach judicial arrogation of power—where

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[165] Failure to comply with the substantive orders of the court was a significant issue in the 1960s with school desegregation following the Brown v. Board of Education decision. Constitutional scholar David M. O'Brien wrote of the Judiciary, remarking that "the power of the Court lies in the persuasiveness of its rulings and ultimately rests with other political institutions and public opinion. As an independent force, the Court has no chance to resolve great issues of public policy." DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 325 (2d ed. 1990). This quote implies a sour possibility: a court's ruling may only be effectuated if those subject to it respect its inherent authority. If police officers can simply choose not to abide by a court order they disagree with, perhaps the power, or legitimacy, of the court is retracting. *See* Martin Luther King Jr., *How Much Had Schools Really Been Desegregated by 1964?* THE ATLANTIC, https://www.theatlantic.com/magazine/archive/2018/02/mlk-school-desegregation-report-card/552524/ [https://perma.cc/2PJV-FGAC] (last visited Sept. 9, 2022) (originally published as *Statement by Dr. King re: School Desegregation 10 Years After*, and explaining the shortcomings of court-ordered desegregation 10 years following the court order in Brown).

[166] *See The Court and Constitutional Interpretation*, SUPREME COURT OF THE UNITED STATES https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/62EJ-P4WU] (last visited Sept. 9, 2022).

the court encroaches upon issues that should be left for the state legislature.[167] Thus, such concerns require careful attention when envisioning how to rethink such reform efforts.

Given these conclusions, what becomes clear is that the existing mechanisms the court uses to enforce and oversee institutional reform must be revised. Although the federal monitoring process is imperfect, it remains the preferred instrument for reforming aberrant police departments, even if that reform appears negligible at times. Thus, there must be ways in which court ordered reform can be productively enforced to ensure that our police institutions are abiding by the Constitution they swear to uphold.

IV. PERMANENT REFORM THROUGH ENFORCEMENT

While our courts may lack the legitimacy—or merely the will—to enforce their orders upon defiant subjects, they are not absolved of their duties both to protect the Constitution and to ensure that the Constitution is protecting American citizens. This Note's analysis of monitorships suggests that the primary failure of these reform efforts is their actual enforcement. The status of the reforms in Seattle and New York indicates that courts lack the will either to punish departments for their persistent failure to abide by the reforms or to coerce them into compliance. The most clear-cut enforcement mechanism is for the DOJ to request, or the court to issue sua sponte, a finding of civil contempt if a monitor identifies a police department's continuing resistance to the implementation of a consent decree or remedial order.

A. Civil Contempt Charges

As a fundamental feature in American jurisprudence, "[i]t is firmly established that the power to punish for contempts is inherent in all courts."[168] Civil contempt differs from criminal contempt in that it is a "sanction to enforce compliance with an order of the court

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[167] *See Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities*, *supra* note 30, at 7; *see also* Horne v. Flores, 557 U.S. 433, 448 (2009).

[168] Casale v. Kelly, 710 F. Supp. 2d 347, 359 (S.D.N.Y. 2010) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)).

or to compensate for losses or damage sustained by reason of noncompliance."[169] While the elements to prove an allegation of civil contempt are narrow, there are publicized instances in which courts have found municipalities in contempt of court.[170]

In *Casale v. Kelly*, District Court Judge Shira A. Scheindlin found New York City in civil contempt following the NYPD's persistent enforcement of a loitering statute which the court had previously struck down as unconstitutional.[171] In holding New York City in contempt, Judge Scheindlin ordered the City to pay a prospective contempt fine "that begin[s] at $500 per incident of enforcement," with the fine increasing by $500 every three months, allowing for a maximum fine of $5,000 per incident.[172] Explaining her reasoning, the Judge wrote that "[a] monetary fine per future incident of enforcement is the only remedy that will bring about true, long-term compliance with the Orders."[173]

B. Using Contempt to Coerce Reform

The use of civil contempt sanctions and monetary fines may provide an appropriate enforcement mechanism to promote compliance for municipalities whose police departments have continuously failed to comply with the stated terms of the reform. While the punitive measure of the fine may come out of the city vaults rather than the direct funding of the police budget, this could create significant downward pressure from city officials to take a greater interest in constitutional compliance with remedial orders or consent decrees. This downward pressure could result in city governance considering more drastic measures to alleviate the contempt charges, such as the termination of police department

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[169] *Id.* at 359 (quoting McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949)).

[170] *Id.*

[171] *See id.* at 366–67. Notably, Judge Shira Scheindlin is the same Judge who found the NYPD liable in Floyd v. City of New York and wrote the remedial order in that case appointing Peter Zimroth as the federal monitor of the NYPD. *See* Floyd v. City of New York, 959 F. Supp. 2d 668, 676 (S.D.N.Y. 2013).

[172] *Casale*, 710 F. Supp. 2d at 364.

[173] *Id.*

executives, which would otherwise be inappropriate and inaccessible for a court to order.[174]

The language of the legal vehicle for reform may also play a significant role in determining whether a contempt charge and financial sanctions are viable enforcement mechanisms here. Where an issue, like the NYPD's stop and frisk policy in *Floyd*,[175] was litigated to a liability determination, a contempt finding for persistent violation of the judge's order would be plainly viable—the judge has dictated clear terms to which a party should be on notice of violating. Where an issue is resolved through a consent decree and a judge is tasked with enforcing such agreement within the terms of the "contractual language" negotiated by both parties, a knowing violation of such terms—and thus the chance of a contempt finding—becomes less clear.[176]

Such an issue is salient in areas of the law where the use of consent decrees is more common, like in antitrust disputes. Antitrust scholar Scott Serazin notes the difficulties that arise from a consent decree's contractual language because there are neither robust factual findings nor substantial court records.[177] Furthermore, Serazin notes that "to find violations by looking beyond the express terms of the decree to a sketchy factual record would add uncertainty" and would be difficult to appropriately adjudicate.[178] Because there is no full factual record and the defendant party does not typically admit liability, "it is difficult for a court to penalize noncompliance unless it is flagrant."[179] Where a factual record is developed through the full litigation process, as in *Floyd v. Ligon*,

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[174] One potential solution in tackling the broad issue of this Note is to give the monitor the ability to recommend the termination of individual police officers or executives. As evidenced by the monitor reports, the obstructive presence of collective bargaining agreements and the unions representing police officers would greatly impede this strategy. *See e.g.,* NYPD MONITOR, First Report, *supra* note 99, at 65.

[175] *See generally Floyd,* 959 F. Supp. 2d. at 668.

[176] *See* Scott F. Serazin, *Enforcement of Antitrust Consent Decrees by Contempt Proceedings and Civil Action*, 28 CASE W. RSRV. L. REV. 202, 206 (1977).

[177] *Id.* at 206.

[178] *Id.*

[179] *Id.* at 229–30.

parties, like the DOJ, can more easily assert a contempt charge and courts can more comfortably find such contempt.

Enforcing a contempt sanction in the context of an institutional reform consent decree presents a similar legal challenge to those outlined in antitrust, because the terms of the consent decree may have been drafted months or even years prior with vague language designed to protect the institution.[180] To overcome the difficulty of enforcing them through contempt charges, future consent decrees should be drafted with aggressive terms aimed at outlining what will constitute a clear violation of the decree and explicate the consequences for a continuing failure to comply after a certain threshold of time or training has been met. Ideally, the DOJ would put forth pre-litigation evidence presenting a case demonstrating a high likelihood of success on the merits, thus coercing an aberrant institution to admit a limited form of liability in a subsequent consent agreement. This would remove a significant hurdle standing in the way of adequately enforcing the constitutional reforms required by consent decrees.

CONCLUSION

Our country's policing institutions require significant reform to ensure that our systems of public safety are serving and protecting our communities in accordance with the United States Constitution. Affirming this fact, the DOJ and public interest organizations have found recurring unconstitutional conduct in police departments across the country and have initiated reforms through both litigation and consent agreements. Ultimately, these measures have fallen short. This Note suggests that to increase the efficacy of existing consent decrees and court orders aimed at reforming such law enforcement institutions, courts should impose financial sanctions through contempt charges. By placing a financial burden, as well as a public shame, upon a police department's municipal government, police leadership will be pressured to dispose of persistently

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[180] The Seattle Consent Decree's Findings of Fact explicitly denied any admission that the Department had committed wrongdoing or accepted liability. *See* Settlement Agreement and Stipulated [Proposed] Order of Resolution, *supra* note 20.

offending officers and sustain meaningful compliance with the Constitution. If such necessary change is not enacted, police leadership will be forced to explain such shortcomings to the municipal legislatures, who bear the moral stigma and financial burden of a contempt charge. It is likely that this strategy has not been appropriately utilized in the effort to maintain amicable relations with local governments and avoid demoralizing the police departments. If accurate, these reasons are inadequate excuses that allow continued constitutional violations. In the contemporary age, where anger and distrust surrounding police misconduct and brutality is at an all-time high, constitutional policing must be established through aggressive means.