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Structural Reform Litigation in American Police Departments

By

Stephen Michael Rushin

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University of California, Berkeley

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Stephen Michael Rushin

Abstract

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Doctor of Philosophy in Jurisprudence and Social Policy

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In 1994, Congress passed 42 U.S.C. §14141, a statute authorizing the United States Attorney General to seek equitable relief against local and state police agencies that are engaged in a pattern or practice of unconstitutional misconduct. Although police departments in some of the nation's largest cities have now undergone this sort of structural reform litigation, there has been little empirical research on the topic. Drawing on original interviews, court documents, statistical data, and media reports, this dissertation describes the federal government's use of structural reform litigation in American police departments and theorizes on its effectiveness. It shows that, under the right circumstances, structural reform litigation is uniquely effective at combating misconduct in police departments. It forces local municipalities to prioritize investments into police misconduct regulations. It utilizes external monitoring to ensure that frontline officers substantively comply with top-down mandates. And it provides police executives with legal cover to implement wide-ranging reforms aimed at curbing misconduct. Although expensive, structural reform litigation may ultimately pay for itself through reducing a police department's civil liability.

But structural reform litigation is far from a perfect regulatory mechanism. Successful organizational reform requires continual support from municipal leaders, dedication by executives within the targeted agency, and buy-in by frontline officers. This suggests that structural reform litigation alone is insufficient to transform a law enforcement agency. The financial burden of structural reform litigation falls on local police agencies over a relatively short period of time. Additional questions remain about whether targeted agencies will sustain reforms after federal intervention ends and about whether this type of federal intervention makes officers less aggressive. This dissertation concludes by showing how the lessons from structural reform litigation can inform future regulations of law enforcement.

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# Introduction

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In March of 1991, two police squad cars pursued a suspected drunk driver speeding on a Los Angeles highway.<sup>1</sup> At first, the incident seemed routine.<sup>2</sup> But only minutes later, a video 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.<sup>3</sup> The images shocked and disgusted the country.<sup>4</sup> Within weeks of this atrocious incident, the U.S. House Subcommittee on Civil and Constitutional Rights convened a hearing to ask two important questions:<sup>5</sup> Why do these abhorrent cases of misconduct continue to plague American police departments? And how can the law combat this sort of wrongdoing?

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<sup>1</sup> The pursuit started around 12:30 AM when California Highway Patrol (CHP) officers first observed King's Hyundai speeding in the northeastern 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, March 18, 1991, *text available at* <http://www.nytimes.com/1991/03/18/us/seven-minutes-los-angeles-special-report-videotape-d-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.*

<sup>2</sup> 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 broadcast a “Code 4,” a notification to all officers that no additional assistance is needed at the scene of the pursuit. Christopher Commission Report, *supra* note 1, at 5. Despite these transmissions, 11 additional LAPD units with 21 officers and a helicopter appeared at the scene; at least 12 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.*

<sup>3</sup> Amateur camera work by George Holliday caught a glimpse of the LAPD ruthlessly kicking and striking King “with 56 baton strokes.” Christopher Commission Report, *supra* note 1, at 3. King required 20 stitches and suffered a broken cheekbone and right ankle. Within days, video of the beating made headlines across the country, sparking public protests and outcry. *An Aberration or Police Business as Usual?* N.Y. Times, March 10, 1994, at 47. Chief Gates called the incident as “an aberration.” David Parrish, *Police ‘Street Justice’ Called Normal Conduct*, Daily News, March 10, 1991, at N1. 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. *See generally* Christopher Commission Report, *supra* note 1. 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 generally id.*

<sup>4</sup> President George H. Bush called the events “shocking” and ordered an investigation by the Department of Justice. *See* Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1.

<sup>5</sup> *Police Brutality: Hearing Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 102d Cong. 172 (1991).

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.<sup>6</sup> The Rodney King incident was no aberration. It was part of a pattern and practice of misconduct that had afflicted the LAPD for years.<sup>7</sup> 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<sup>8</sup> and private civil litigation.<sup>9</sup> These traditional approaches to the federal regulation of local police misconduct were largely ineffective at combating the deeply ingrained, organizational roots of police misconduct.<sup>10</sup> Further complicating the regulation of local police misconduct, federal courts have previously held

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<sup>6</sup> Christopher Commission Report, *supra* note 1, 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”).

<sup>7</sup> Subsequent investigations into these incidents uncovered an organizational culture that permitted gross misconduct, patterns of excessive use of 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. 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 [these problematic officers] were very positive” as they “document[ed] every complimentary comment received and express[ed] optimism about the officer’s progress in the Department.” Christopher Commission Report, *supra* note 1, 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. Out of 2,152 citizen allegations of excessive force, the LAPD only sustained 42. Once more, the commission determined that internal policies and procedures used by IAD make it hard for citizens to file complaints. Christopher Commission Report, *supra* note 1, at xix. Years later, investigators found that many of the basic problems remained. MERRICK J. BOBB, MARK H EPSTEIN, NICOLAS H. MILLER, AND MANUEL A. ABASCAL, FIVE YEARS LATER: A REPORT TO THE LOS ANGELES POLICE COMMISSION ON THE LOS POLICE DEPARTMENT’S IMPLEMENTATION OF INDEPENDENT COMMISSION RECOMMENDATIONS 34 (May 1996) [hereinafter FIVE YEARS LATER REPORT ON LAPD], *text available at* [http://www.parc.info/client\\_files/Special%20Reports/2%20-%20Five%20Years%20Later%20-%20Christopher%20Commission.pdf](http://www.parc.info/client_files/Special%20Reports/2%20-%20Five%20Years%20Later%20-%20Christopher%20Commission.pdf)

<sup>8</sup> See generally *Mapp v. Ohio*, 367 US 643 (1961) (mandating the exclusion of evidence obtained in violation of the Fourth Amendment by a state law enforcement officer); see also *infra* notes 24-29 and accompanying text.

<sup>9</sup> 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. 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. New York City Dept. of Social Servs.*, 436 US 658, 695–701 (1978) (holding that a claimant under 42 U.S.C. §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).

<sup>10</sup> See generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2003) (describing the organizational roots of police misconduct).

that both private and public litigants generally lack standing to seek equitable relief against local police departments, absent explicit congressional authorization.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> Today, nearly one in five Americans is served by a law enforcement agency that has been subject to a DOJ investigation via §

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<sup>11</sup> 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); *City of Philadelphia*, 644 F.2d 187, 206 (finding the DOJ cannot seek equitable relief against a police department without statutory authorization).

<sup>12</sup> Congress passed 42 U.S.C. § 14141 as part of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA). Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071. The statute makes it unlawful for a police agency to engage in a pattern or practice of unconstitutional misconduct. 42 U.S.C. § 14141(a). The statute gives the U.S. Attorney General the authority to seek injunctive or equitable relief to force police agencies to implement reforms aimed at curbing misconduct. *Id.* § 14141(b).

<sup>13</sup> 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 “generate change in public institutions.” Rachel Harmon, *Promoting Civil Rights Through Proactive Policing*, 62 STAN. L. REV. 1, 11 (2009). The statute states that “It 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]henver the Attorney General has reasonable cause to believe that a violation of paragraph 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 (1994).

<sup>14</sup> Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3244-47 (2014) (showing the full list of all cities that have undergone SRL thus far). Other major cities like Oakland and New York have also been subject to structural reform mandates at the hands of federal courts, but these were via §1983, not §14141. See, e.g., J. David Goodman, *Bloomberg Calls Court Monitor for Police a “Terrible Idea,”* N.Y. TIMES, June 13, 2013, available at <http://www.nytimes.com/2013/06/14/nyregion/bloomberg-calls-court-monitor-for-police-a-terrible-idea.html> (last visited Sep 9, 2013); Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 12, 2013, available at <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> (last visited Sep 9, 2013) (providing details about New York case).

14141.<sup>15</sup> This statute is an important development in the history of American policing law.<sup>16</sup> But at the time that Congress passed this measure in 1994, few noticed. The media all but ignored this law's passage.<sup>17</sup> Even today, very little academic research has analyzed the implementation of this statute.<sup>18</sup> 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.<sup>19</sup> But across academic disciplines, legal scholars, sociologists, and criminologists have inadequately studied the DOJ's implementation of SRL pursuant to § 14141.<sup>20</sup>

Drawing on original interviews, court documents, statistical data, and media reports, this dissertation describes the SRL process and theorizes on its effectiveness. It argues that, under the right conditions, 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.<sup>21</sup> It utilizes external monitoring to ensure that frontline officers substantively comply with top-down mandates.<sup>22</sup> And it provides police executives with legal cover to implement wide-ranging

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<sup>15</sup> 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 section 14141. The exact total is 56,017,310 using the United States Census population estimates for 2012 as the baseline for population. *See* Rushin, *supra* note 14, at 3244 (listing in Appendix A all police agencies that have been subject to a formal DOJ investigation via section 14141 since 1994). This number was calculated by dividing the total number of citizens living in jurisdictions served by a department subject to a section 14141 case by the total U.S. population. The total population of the United States is estimated at 313,900,000. This means that around 18% of Americans are served by a police agency that has been subject to a section 14141 investigation.

<sup>16</sup> William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 798 (2006); *see also* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 457 (2003) (stating that section 14141 is "perhaps the most promising mechanism" for reducing police misconduct").

<sup>17</sup> One way to understand just how little attention section 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 time 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 infra* Chapter 2. There was also virtually no mention of the measure in the congressional record. Although there is no apparent mention of section 14141 in the legislative record for the VCCLEA, there is some indirect legislative history connected to a previous attempt to pass a similar measure in 1991. Rushin, *supra* note 14, at 3207-15.

<sup>18</sup> *See infra* Chapter 2 (discussing the scope of the available literature on SRL).

<sup>19</sup> *See infra* Chapters 1-2 (detailing some of the previous research on the traditional approach to police regulation).

<sup>20</sup> *See infra* Chapter 2 (showing the limited amount of existing empirical research on SRL).

<sup>21</sup> *See infra* Chapter 4 (showing the LAPD as an example of how SRL contributes to a reallocation of municipal resources towards police reform).

<sup>22</sup> *See infra* Chapter 4-5.

policy and procedural reforms aimed at curbing misconduct.<sup>23</sup> Evidence also suggests that SRL may help reduce a police department's civil liability, thereby potentially paying for itself long-term.<sup>24</sup>

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.<sup>25</sup> This suggests that SRL alone is insufficient to transform a law enforcement agency. The process is also expensive.<sup>26</sup> The vast majority of this financial burden falls on local police agencies over a relatively short period of time.<sup>27</sup> This raises concerns about the feasibility of SRL in poorer communities.<sup>28</sup> Additional questions remain about whether targeted agencies will sustain reforms after federal intervention ends,<sup>29</sup> and whether SRL reduces officer aggressiveness, thereby contributing to higher crime rates.<sup>30</sup>

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<sup>23</sup> As explained *infra* Chapter 4, this is particularly important since collective bargaining statutes make it particularly difficult for police chiefs to implement significant misconduct regulations. See COLLEEN KADLECK AND LAWRENCE F. TRAVIS, POLICE DEPARTMENT AND POLICE OFFICER ASSOCIATION LEADERS' PERCEPTIONS OF COMMUNITY POLICING AND NATURE AND EXTENT OF AGREEMENT, NATIONAL INSTITUTE OF JUSTICE 1-3 (September 2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/226315.pdf> ("Several researchers have described union resistance to specific policy changes" including professionalization attempts, civilian review boards, promotion procedures, organizational change, lateral entry policies, disciplinary procedures, recruitment procedures, overtime provisions, one officer cars, and changes in departmental directives).

<sup>24</sup> See *infra* Chapter 4-5 (showing reduction in Los Angeles liability after SRL); Telephone Interview with City Official and External Monitor #20, at 6 (September 5, 2013) (transcript on file with author) [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").

<sup>25</sup> See *infra* Chapter 4.

<sup>26</sup> See *infra* Chapter 5 (showing how SRL cost the LAPD over \$100 million).

<sup>27</sup> See *infra* Chapter 4-5 (showing that the SRL process has lasted between 5 and approximately 12 years, depending on the affected police agency).

<sup>28</sup> *Id.* This concern is particularly salient because of the extreme decentralization in American law enforcement that contributes to wide resource disparities between municipalities. See United States Department of Justice, *Census of State and Local Law Enforcement*, 2, July 2011, available at <http://www.bjs.gov/content/pub/pdf/cslea08.pdf> (putting the number of state and local law enforcement agencies at 17,985); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION 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).

<sup>29</sup> See *infra* Chapter 4 (describing sustainability concerns in municipalities like Pittsburgh).

<sup>30</sup> See, e.g., ROBERT C. DAVIS, NICOLE J. HENDERSON & CHRISTOPHER W. ORTIZ, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE 16 (2005), [http://www.vera.org/sites/default/files/resources/downloads/277\\_530.pdf](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 conflicts because they were afraid of having citizens file an unwarranted anonymous complaint against them"); Joshua M. Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of "Pattern or Practice" Police Misconduct Reform*, 2011 (quoting the head of Washington, D.C.'s police union, saying that federal oversight of the Washington, D.C. Police Department led to more paperwork, thereby taking away time that could be spend fighting crime); Colleen Long, *NYC Stop-and-Frisk Policy Wrongfully Targeted*

## METHODOLOGY

This dissertation addresses several gaps in the existing literature on SRL in police departments. In Chapters 1 and 2, this project historically situates the rise of SRL in American police departments and describes the legislative history surrounding the passage of § 14141. Chapters 3 and 4 build a descriptive account of how the SRL process works from beginning to end in American police departments. This dissertation focuses specifically on the most common form of SRL in police departments—SRL initiated by the DOJ pursuant to § 14141.<sup>31</sup> Chapter 4 also theorizes on the benefits and limitations of this regulatory mechanism. Finally, Chapter 5 concludes by showing how the DOJ used SRL to effectively reform the LAPD.

As discussed in more detail in Chapter 3, SRL initiated by the DOJ pursuant to § 14141 almost always occurs extra-judicially. As a result, this study relies heavily on in-depth interviews with stakeholders in the SRL process.<sup>32</sup> To identify relevant stakeholders, I used court documents, monitor

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*Minorities, Judge Rules; Outside Monitor Appointed*, MINNEAPOLIS STAR TRIBUNE, August 12, 2013 (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,"* THE WALL STREET JOURNAL, September 21, 2013 (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); Damien Gayle, *Shootings Up 13% in New York City After Federal Judge Rules Police "Stop and Frisk" Tactics Unconstitutional and Racist*, MAIL ONLINE, Sept. 19, 2013, available at <http://www.dailymail.co.uk/news/article-2425055/Shootings-10-New-York-City-federal-judge-rules-stop-search-unconstitutional-racist.html> (last visited Sep 23, 2013) (detailing how New York City officials are pointing to a 13% increase in shootings over 28 days as evidence that the Judge's orders have contributed to higher crime); Dan Springer, *Seattle Facing Rift Between Police and Politicians Over Jump in Crime, Open Pot Smoking*, Fox News, Dec. 10, 2013, available at <http://www.foxnews.com/politics/2013/12/10/seattle-facing-rift-between-police-and-politicians-over-ump-in-crime-open-pot/> (last accessed January 7, 2013) (stating that in Seattle, a city currently under federal monitorship as part of SRL, "police have been accused of de-policing").

<sup>31</sup> 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 *Ljoms* 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 section 14141.

<sup>32</sup> Qualitative studies commonly use semi-structured interviews. For some examples, see, e.g. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 855, 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. SOC. 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 detail 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 section 14141 cases at the DOJ. And only a handful of companies have served as external monitors in the existent section 1414 cases.

reports, and other public information to identify the name and contact information for a population of 74 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.<sup>33</sup> 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 74 stakeholders. I received a 47% response rate, resulting in 35 in-depth interviews. These interview participants generally requested anonymity, given their continued work in this field. This sample of 35 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.<sup>34</sup> These scripts asked questions about each participant's role in § 14141 cases. These scripts also asked participants 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 analyzed these transcripts to identify common themes in the participants' responses.

These interviews were particularly useful in piecing together a descriptive account of each stage of SRL in police departments pursuant to § 14141. Interview participants offered consistent answers in describing on how this extra-judicial police reform process worked. This dissertation 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 dissertation does not purport to make any definitive, causal claims. Instead, this study uses interview data and other documentation to engage in theory building. This dissertation 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 dissertation.

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<sup>33</sup> In total, eight of the interview participants had significant experience at the DOJ handling section 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.

<sup>34</sup> 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.

# Chapter 1

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## Systemic Failure to Control Misconduct in American Police Departments

### INTRODUCTION

No academic research has ever thoroughly examined the historical underpinnings of SRL in police departments. The few academics who have previously studied this subject have told a simple story—that the Rodney King incident made apparent the inadequacies of the federal approach to police regulation and motivated Congress to take action. Under this view, SRL was a response to a single, traumatizing incident of police wrongdoing that scarred the American psyche and demanded federal action. In some respects, this account is correct. The Rodney King beating instantly elevated the issue of police misconduct to the national stage and put pressure on some congressional representatives to take decisive action. You might say that § 14141 is the law that Rodney King wrote. But this traditional narrative is also incomplete. Congress did not sanction SRL in a vacuum. Rather, SRL must be understood as a continuation of a century-long effort to combat structural, political, and organizational conditions that promote systemic wrongdoing within local police departments. Although many police agencies have made impressive strides in professionalizing their forces over the last several decades, patterns of misconduct continue to thrive in a relatively small number of police agencies. In these troubled agencies, a lack of external oversight and permissive organizational cultures facilitate widespread abuse. Wrongdoing is often not only tolerated but even applauded. These agencies demonstrate a systemic unwillingness or inability to control misconduct. But, I argue that the emergence of these sorts of problematic police agencies should not come as a surprise. Given the unique American approach to law enforcement, their existence is inevitable.

The confluence of three major factors results in a systemic failure to control misconduct in a small handful of police agencies. First, despite the quasi-militaristic organization of most police agencies, the very nature of police work puts considerable authority in the hands of frontline workers. As frontline workers, police officers necessarily wield considerable discretion. Frontline officers must also interact with individuals in intimate and vulnerable situations. This opens opportunities for constitutional violations. This is an unavoidable part of policing. No matter how well regulated, some officers will misuse this discretion to engage in misconduct. Beginning with the *Wickersham Commission Report* in 1931, national policymakers came to view the evident pattern of misconduct by frontline officers as a pervasive national problem. In decades that followed, numerous federal commissions reiterated these findings. Some agencies, though, have shown a stronger proclivity for misconduct than others.

Second, policing in the United States is highly decentralized. This is because of a “conscious design choice rather than coincidence.”<sup>1</sup> States have constitutional authority to

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<sup>1</sup> Erika K. Wilson, *Towards a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1425 (2014).

control policing within their borders. States also have plenary power to control the creation of local governments. Over the last century, states have used this power to permit the incorporation of rural and suburban areas into autonomous municipalities with their own police forces. The result has been what some scholars describe as metropolitan fragmentation<sup>2</sup> and political decentralization<sup>3</sup>—that is, the existence of several independent governments within a state or metropolitan area, each controlling significant delegated authority over everything from education to policing. In the United States, this has resulted in the creation of just under 20,000 local and autonomous police agencies. 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.

And third, despite the evidence of such widespread misconduct, the federal government has historically had a minimal role in directly regulating the thousands of decentralized law enforcement agencies in the country. As one DOJ representative explained to the House Subcommittee on Civil and Constitutional Rights, federal officials have historically not been seen as “the front line troops in combating...police abuse.”<sup>4</sup> That responsibility falls to “the internal affairs bureaus of law enforcement agencies and with State and local prosecutors.”<sup>5</sup> This combination of localization, discretion, and the lack of a national regulatory mechanism facilitated widespread wrongdoing in the early-to-mid twentieth century. In response, the judicial and legislative branches of the federal government have tried to incentivize departments to adopt proactive reforms. Regulatory tools like the exclusionary rule, private civil litigation, and federal criminal culpability all increase the cost of police misconduct. Hence, I describe these regulatory attempts by the federal government as *cost-raising regulations*. While these mechanisms cannot force a local police agency to adopt ameliorative reforms, they can make individual instances of non-compliance more expensive.

After the implementation of these various federal regulations, many police departments made impressive strides in professionalization. As Professor Michael S. Scott observed, “If one were to walk into a typical American police agency [today] ... one could not help but be struck by

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<sup>2</sup> Professor Wilson uses this term to describe “the existence of several overlapping and independent local governments across metropolitan regions.” Wilson, *supra* note 1, at 9 n.34.

<sup>3</sup> Wilson further defines this term as the “delegation of political power to a subordinate unit of government. *Id.* at 10, n.35.

<sup>4</sup> *Police Brutality: Hearing Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 102d Cong. 3 (1991) (statement of John R Dunne, Assistant Attorney General, Civil Rights Division)

<sup>5</sup> *Id.*

how much things have changed from what a similar visit would have revealed” decades earlier.<sup>6</sup> But despite this encouraging progress, many departments exhibited a continuing unwillingness to adopt proactive reforms to combat misconduct. So why did these departments continue to infringe upon individual rights systemically, despite the costs associated with such violations? I argue that a number of departments continued to engage in systemic misconduct because of two fundamental flaws in the traditional regulatory approach to police misconduct. The first major flaw is that measures like the exclusionary rule and civil litigation do not actually force local police agencies to adopt any specific ameliorative policies. To borrow from the vocabulary of law and economics, the traditional federal approach to the regulation of local law enforcement permitted efficient breaches. Departments could choose not to adopt proactive reforms so long as they were prepared to pay the costs of such a breach. And historically, many departments have done just that.

A second limitation of the historical approach to federal regulation is that it implicitly viewed police wrongdoing as an officer problem, and not an organizational problem. Over the last several decades, policing scholars have come to view police misconduct as a “rotten barrel,” rather than a “bad apple” problem.<sup>7</sup> That is to say, scholars have increasingly tied misconduct back to lax internal oversight and a departmental culture that permitted misconduct. In the absence of mandatory regulations, often with the implicit support of local political leaders, misconduct in many departments became routinized. It became common. It became an accepted part of day-to-day life, often engrained into the organizational culture. Mere cost-raising reforms could not change that. This unique problem demanded a more invasive response.

By introducing SRL, Congress finally sought to address this major gap in the federal regulation of local police agencies. In SRL, Congress authorized the DOJ to work with the courts to restructure police agencies engaged in systemic misconduct. In this chapter, I give examples of departments engaged in systemic misconduct that made national news in the years leading up to the passage of § 14141. And I situate SRL as a regulatory mechanism designed to address this critical problem.

## I

### WHY SOME POLICE AGENCIES SYSTEMICALLY FAIL TO CONTROL MISCONDUCT

Why do some police departments in the United States systemically fail to control misconduct? In this part, I develop a theory about the preconditions that lead to the existence of these problematic agencies. I contend that the existence of these agencies remains the most important misconduct-related problem facing modern police agencies. A handful of these systemically corrupt agencies continue to exist, even as voluntary professionalization has swept through the profession. Several inherent characteristics of the American policing—local political accountability, decentralization, significant frontline discretion, and the general lack of federal oversight—invariably foster a handful of departments that regularly violate individual rights with virtual impunity. SRL emerged primarily as a response to this phenomenon.

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<sup>6</sup> Michael C. Scott, *Progress in American Policing? Reviewing the National Reviews*, 34 L. & SOC'Y 171, 175 (2008)

<sup>7</sup> See Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 Geo. Wash. L. Rev. 453, 457 (2004) (using the terms “bad apple” and “rotten barrel”).

A. *The Necessity of Discretion in Frontline Work and the Inevitability of Misconduct*

American police departments necessarily give frontline officers significant amount of discretion.<sup>8</sup> The academic literature has long observed that, as frontline workers, police officers need discretion to complete their jobs.<sup>9</sup> If police did not have the ability to exercise discretion, and instead had to strictly enforce every rule of law, “the criminal law would be ordered but intolerable.”<sup>10</sup> This has been well understood going back to the President’s Commission on Law Enforcement and Administration of Justice, which recognized the importance of discretion. The authors of that report noted that police “are charged with performing [their jobs] where all eyes are upon them and where the going is always roughest—on the streets.”<sup>11</sup> A police officer’s job also requires interaction with individuals at their most vulnerable and desperate.<sup>12</sup> Much of the day-to-day work that police officers complete could be more accurately described as unstructured counseling; officers must calm everyday altercations, handle public nuisances, and offer assistance to “whoever needs help whether they want it or not.”<sup>13</sup> While this kind of discretion is a necessary part of policing, a certain amount of officers granted such authority will invariably abuse it. The “supervision of subordinates with broad discretion and responsibilities” is especially tough, meaning that superiors cannot possibly “hold officers accountable for everything all the time.”<sup>14</sup> Some misconduct is an unavoidable result of empowering frontline workers with

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<sup>8</sup> Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960) (explaining the necessity of discretion in police work and defining discretion as “the power to consider all circumstances and then determine whether any legal action is to be taken...[a]nd if so taken, of what kind and degree, and to what conclusion”).

<sup>9</sup> The academic literature has generally observed two different types of discretion in police work—discretion about which laws to enforce and discretion about how to enforce those laws. For examples of discretion in how officers enforce the law, *see, e.g.*, STEVEN MAYNARD-MOODY AND MICHAEL MUSHENO, *COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE* (2003) (describing how street-level bureaucrats like police officers have to deal with competing tensions of law abidance and cultural abidance); MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980) (recognizing in this hallmark book within socio-legal studies how police, as street-level bureaucrats, have the ability to exercise significant influence over how public policy is actually carried out). For examples of how police inevitably must decide which laws to enforce, *see, e.g.*, Herman Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 POLICE ADMINISTRATION REV. 140 (1963) (describing how, as administrators of the law, police officers must invariably make decisions on which laws to rigidly enforce, and which laws to not enforce as consistently; in doing so police begin to actually influence the meaning of the law).

<sup>10</sup> Breitel, *supra* note 8, at 427.

<sup>11</sup> PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION 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>.

<sup>12</sup> *Id.* (stating that “Policemen deal with people when they are both most threatening and most vulnerable, when they are angry, when they are frightened, when they are desperate, when they are drunk, when they are violent, and when they are ashamed”).

<sup>13</sup> *Id.* at 91-92 (making this comparison to counseling and providing additional examples of the counseling-type role that police must adopt).

<sup>14</sup> Lipsky, *supra* note 9, at 164.

considerable discretion. In the last century, the academic literature has recognized countless examples of how police discretion is invariably tied to some misconduct.

One of the first national recognitions of widespread misconduct among police officers came in 1931, when the National Commission on Law Observance and Enforcement, appointed by President Herbert Hoover, released the Wickersham Commission Report.<sup>15</sup> Perhaps the most famous portion of the Report was a section entitled the *Report on Lawlessness in Law Enforcement*. Some policing scholars have called “one of the most important events in the history of American policing.”<sup>16</sup> The report claimed “in uncompromising language” that police at the time regularly used physical brutality and cruelty during interrogations to obtain involuntary confession—something the authors of the report referred to as the “third degree.”<sup>17</sup> The authors found that police agencies across the country utilized “third degree” tactics.<sup>18</sup> Police used physical brutality, threats, and illegal detentions to elicit confessions. They denied suspects the right to a lawyer during interrogations.<sup>19</sup> And they held suspect incommunicado for long periods of time in hopes

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<sup>15</sup> Dwight C. Smith Jr, *Wickersham to Sutherland to Katzenbach: Evolving an “official” definition for organized crime*, 16 CRIME LAW SOC. CHANGE 135, 135 (1991). George W. Wickersham, who served as the U.S. Attorney General under President William Howard Taft, chaired the commission. Samuel Walker, Records of the Committee on Official Lawlessness, in RECORDS OF THE WICKERSHAM COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, v (1997), [http://www.lexisnexis.com/documents/academic/upa\\_cis/1965\\_WickershamCommPt1.pdf](http://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamCommPt1.pdf) (last visited Jul 8, 2013). Prominent legal scholars and policymakers also sat on the commissions, 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 total reports on a wide range of criminal justice issues. Richard A. Leo, *From Coercion to Deception: The Changing Nature Of Police Interrogation In America*, 18 CRIME L. & SOC. CHANGE 35, 38 (1992). These reports were unique in part because they represented objective, technocratic approaches to understanding the problems plaguing the criminal justice system. Walker, *supra*, at v (explaining the detail and objective approach used by the authors of the report).

<sup>16</sup> *Id.* 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. See *Miranda v. Arizona*, 384 US 436, 446 (1966) (citing the Wickersham Report and the presence of the third degree, a term used in the Report on Lawlessness in Law Enforcement, as a partial rationale for barring interrogations absent authorized warnings). It is also worth mentioning that it remains unclear why the commission chose to investigate policing, as there was “no political constituency with any strength at the national level demanding a federal investigation” into police misconduct. Walker, *supra* note 15, at viii. The American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) were relatively small and weak interest groups at the time. *Id.* So the best historical evidence suggests that the *Report on Lawlessness* was not the result of “conventional interest group lobbying.” *Id.* at viii. The three consultants who prepared the report were civil liberty advocates, which likely framed the tone of the report. *Id.*

<sup>17</sup> *Id.* at ix; see also NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 3 (1931) (using the “third degree” terminology and explaining the commonality of this “secret” and “illegal” practice).

<sup>18</sup> *Id.* at 4 (stating that the use of these tactics is “widespread” across departments in the United States).

<sup>19</sup> *Id.* (identifying these categories).

of extorting a confession.<sup>20</sup> One of the root causes of this abuse was the fact that police officers necessarily need discretion to interrogate suspects, as it would be “impossible to lay down strict general rules covering all situations.”<sup>21</sup>

Since the *Report on Lawlessness in Law Enforcement*, “no fewer than six national commissions [have] examined various dimensions” or police misconduct in the United States.<sup>22</sup> These reports, along with other academic research, have found certain categories of misconduct to be common across different policing agencies: racial profiling, excessive uses-of-force, unlawful searches and seizures, failures to cooperate with investigations involving fellow officers, dishonesty at trial, and the planting of evidence.<sup>23</sup> But while the granting of discretion makes some amount of misconduct inevitable, empirical evidence over the last several decades has shown that certain departments had more apparent misconduct than others. Some of the first solid, empirical evidence for this proposition emerged around the end of the twentieth century when Congress asked the DOJ to compile records on the number of complaints filed at the national level against local police agencies.<sup>24</sup> The results showed that certain police agencies—like those in New Orleans and Los Angeles—were the source of significantly more federal complaints for police wrongdoing than other major metropolitan areas.<sup>25</sup> This led policymakers to ask an obvious question: why do some police departments have more misconduct than others? What was different about the Los Angeles or New Orleans that led to more apparent misconduct?

The answer, according to many policing scholars, is differences in organizational cultures and differences in internal policies to oversee and regulate the use of discretion. Policing scholars have increasingly recognized that police misconduct that “the roots of police misconduct rest within the organizational culture of policing.”<sup>26</sup> That is to say, police departments that implicitly condone wrongdoing through using “lax supervision and inadequate investigation” techniques

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<sup>20</sup> *Id.* (further explaining how there was a “practice of holding the accused incommunicado, unable to get in touch with their family or friends or counsel” that is “so frequent that in places there are cells called ‘incommunicado cells’”).

<sup>21</sup> *Id.* at 175.

<sup>22</sup> Scott, *supra* note 6, at 172.

<sup>23</sup> Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59, CATH. U. L. REV. 373, 380 (2010) (citing each of these as examples of common misconduct issues identified over the years).

<sup>24</sup> *See Federal Response to Police Misconduct: Hearing Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 103d Cong. 92-162 (1992) (showing the results from a DOJ study from 1985-1990 on the number of complaints sent to the federal government about police misconduct for each jurisdiction).

<sup>25</sup> *Id.* at 152 (showing New Orleans and Los Angeles County as the top locations for misconduct).

<sup>26</sup> Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Police Departments*, 98 J. of Crim. & Criminology 489, 505 (2008); see also ALLYSON COLLINS, HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE ACCOUNTABILITY IN THE UNITED STATES 1, 33, 45 (1998) (detailing organizational contributors to police misconduct); INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT ON THE INDEPENDENT COMMISSION OF THE L.A. POLICE DEPARTMENT (1991) [hereinafter Christopher Comm’n Report] (linking the LAPD’s organizational mismanagement to misconduct); Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 Geo. Wash. L. Rev. 453, 493-94 (2004) (explaining how organizational culture can facilitate police brutality).

are more likely to see ongoing misconduct than departments that aggressively enforce internal regulations.<sup>27</sup> And as I explain in the next two subpart, the reason that departments can have such widely disparate internal policies, procedures, and cultures is because of the decentralization of American law enforcement, combined with the lack of mandatory federal oversight.

### B. *Decentralization of American Law Enforcement*

Policing in the United States has long been among the most decentralized institutions in the criminal justice system. In most countries, the central government regulates local police through a hierarchical, top-down approach.<sup>28</sup> In these countries, a central headquarters exercises direct authority over local law enforcement agencies.<sup>29</sup> By contrast, the United States is among a small handful of countries where state, municipal, or local governments deputize their own, largely independent police forces.<sup>30</sup> Decentralization has always been an accepted part of American law enforcement. But why has the United States taken such a radically different approach to policing than its global counterparts? The answer lays in U.S. Constitution. Since the federal government only has a handful of limited, enumerated powers, most governing responsibilities fall onto state governments. One of the most important responsibilities of the state government is to decide how to allocate the burden of governmental regulation. In virtually all cases, state governments have responded to this challenge by creating hundreds or thousands of smaller, local government units such as cities or municipalities.<sup>31</sup> The state then typically grants these smaller governmental units authority to handle a host of responsibilities like local education and law enforcement.

This creation of smaller, local-level governments happens through a process known as incorporation.<sup>32</sup> For much of the twentieth century, many states were weary to grant localities the power to incorporate into their own local governments.<sup>33</sup> States instead encouraged large, existing

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<sup>27</sup> Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 816 (1999).

<sup>28</sup> LARRY E. SULLIVAN, MARIE SIMONETTI ROSEN, DORTHY MOSES SCHULZ, AND M.R. HABERFELD, *ENCYCLOPEDIA OF LAW ENFORCEMENT* (2007), available at <http://knowledge.sagepub.com/view/lawenforcement/n517.xml> (stating that decentralized structures of law enforcement are less common, and citing various examples of centralized policing structures in France, Italy, Sweden, Finland, China, Vietnam, Cuba, and various other countries).

<sup>29</sup> *Id.* (describing by contrast how such centralization does not exist in United States—and in the process describing the model for centralized police structure countries).

<sup>30</sup> *Id.* The United States Constitution only affords the federal government with a small number of specific, enumerated powers. All other powers not specifically enumerated in the Constitution are, in theory, left to the state and localities. Since policing is not among the specific enumerated powers granted to the federal government, the power to hire and deputize police officers to enforce state laws has fallen outside the legitimate purview of the federal government.

<sup>31</sup> In *Hunter v. City of Pittsburgh*, the Supreme Court held that state governments have nearly complete authority over the creation of local municipalities within their borders. 207 U.S. 161, 178-79 (1907) (holding that municipal governments exist and serve only with the blessing of the state government, which may “at its pleasure ... modify or withdraw all such powers”).

<sup>32</sup> Wilson, *supra* note 1, at 12 (using and defining the terms incorporation and annexation).

<sup>33</sup> *Id.* (CITING KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 144 (1985)).

cities to annex nearby unincorporated areas.<sup>34</sup> The prevailing belief was that, while decentralization was valuable, extensive decentralization would make government administration less efficient.<sup>35</sup> Around the mid-twentieth century, states started to implement more permissive standards for incorporation.<sup>36</sup> Historians trace back this increase in local municipality incorporation to “racial and ethnic changes in the demographics of central cities, particularly an influx of European immigrants and African American migrants from the South, [which] caused suburban residents to resist annexation.”<sup>37</sup>

Once states began loosening incorporation requirements, these newly created municipalities wasted no time enacting land use, zoning, and tax policies that effectively excluded the economically disadvantaged and racial minorities.<sup>38</sup> Each of these newly created municipalities typically had a separate police force. One of the first times that decentralization was tied to misconduct regulation was in 1967, when the President’s Commission on Law Enforcement and Administration of Justice issued a report entitled *The Challenge of Crime in a Free Society*.<sup>39</sup> In this report, the Commission initially estimated there to be around 40,000 policing agencies in the United States.<sup>40</sup> The report also highlighted how these agencies varied widely from one part of the country to another.<sup>41</sup> Modern estimates suggest that the overwhelming majority of the nation’s active law enforcement officers serve in one of nearly 18,000 local or state police agencies.<sup>42</sup> Figures 1.1 and 1.2 below visually represent the degree of this decentralization in American Law Enforcement in 2008.

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (stating that “[t]he preference for annexation during this time reflected an underlying normative belief that larger centralized governance structures were more efficient than smaller decentralized governance structures”).

<sup>36</sup> *Id.* (“As a result, states in relation to unincorporated suburbs began to shift their focus away from annexation and towards incorporation”).

<sup>37</sup> *Id.*

<sup>38</sup> As Wilson explained in more detail, suburban communities adopted minimum lot size requirements, or single family home restrictions, in addition to zoning and other requirements to keep unwanted residents out of their town in a seemingly race neutral way. *Id.* at 14.

<sup>39</sup> PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 91 (1967) [hereinafter Presidents Commission on Law Enforcement], available at <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

<sup>40</sup> *Id.*

<sup>41</sup> For example, the Commission noted that 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.

<sup>42</sup> Several decades ago, estimates wrongly put the number of policing agencies at around 40,000. PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 91 (1967) [hereinafter Presidents Commission on Law Enforcement], available at <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>. Subsequent studies have reduced this number substantially.

FIGURE 1.1, BREAKDOWN OF LOCAL AGENCIES

<b>Type of Agency</b>	<b>Number of Agencies</b>
Local Police Department	12,501
Sheriff's Office	3,063
State Law Enforcement	50
Special Jurisdiction Agencies	1,733
Constables	638
<b>Total</b>	<b>17,985</b>

FIGURE 1.2, PERCENTAGE OF POLICE OFFICERS SERVING AT THE LOCAL LEVEL

<b>All Police</b>	<b>State and Local Police</b>	<b>Percent of State and Local</b>
885,246	765,246	86.44%

These permissive state regulations on incorporation inevitably facilitated the rise of tens of thousands of autonomous police agencies, each with limited jurisdiction over a demographically distinct area. It also resulted in wide variation from one department to another, even within a single metropolitan area. As I argue, these permissive state regulations on incorporation have facilitated the creation of demographically varied municipalities, each with drastically different budgets and crime problems.

1. Decentralization Results in Demographically Unique Municipalities with Disparate Budgets and Challenges

Each of these thousands of individual police departments must navigate the problems unique to their individual jurisdiction. Take, for example, a city like Camden, New Jersey, which has the highest crime rate in the nation.<sup>43</sup> During 2012, police in Camden had to respond to a staggering 86.3 murders per 100,000 residents—over 18 times the national average.<sup>44</sup> Camden also drastically outpaced the national average in overall violent and property crimes rates.<sup>45</sup> The average Camden resident only makes around \$29,118 per year, resulting in over a third of all Camden residents living below the poverty line.<sup>46</sup> Less than an hour away in the state of New

<sup>43</sup> Camden had a violent crime rate of 2,566.1 crimes per 100,000 residents. This included an 86.3 murder rate, a 95.3 rape rate, a 1412.5 assault rate, and a 972.1 robbery rate—all among the top in the nation. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, UNIFORM CRIME REPORTS (UCR): CRIME IN THE UNITED STATES (2000-2012) [hereinafter UCR Reports], *available at* <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications> (to access requisite data, click on desired year under “Crime in the United States,” navigate to “Table 8,” and find the crime data for Camden, New Jersey).

<sup>44</sup> *Id.* (using the murder rate found above from Table 8 and comparing it to the murder rate in the United States, found in Table 1).

<sup>45</sup> *Id.* (comparing in Table 1 and Table 8 the difference between Camden, New Jersey’s crime rates and those of the United States).

<sup>46</sup> UNITED STATES CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (2006-2010).

Jersey is the Township of Brick, a community of approximately the same size as Camden.<sup>47</sup> Unlike Camden, Brick reported no murders in 2011 or 2012, and extremely low violent and property crime rates relative to the national average.<sup>48</sup> The median family income is between two and three times higher than Camden (\$81,868), and only around five percent of the township’s residents live under the poverty line.<sup>49</sup> It would be fair to say that law enforcement officers in Camden are facing a categorically different problem than officers in Brick. Demographics also suggest that Brick and Camden are entirely different worlds. Figure 1.3 compares the criminological and demographic profiles of Camden and Brick.

FIGURE 1.3, EXAMPLE OF JURISDICTIONAL VARIATION IN NEW JERSEY

Relevant Measure	Camden, New Jersey	Brick, New Jersey
Violent Crimes Rate	2,566.1	106.8
Murder Rate	86.3	0
Rape Rate	95.3	7.9
Assault Rate	1412.5	77.9
Robbery Rate	972.1	21.1
Property Crime Rate	5,159.3	1,642.3
Burglary Rate	1,402.2	349.6
Auto-theft Rate	906.5	21.2
Staffing Rate	345.1	171.5
Median Family Income	\$29,118	\$81,868
Poverty Rate	36.1%	5.2%

So it should come as no surprise that these two cities have adopted radically different approaches to policing. Camden has historically lacked the resources to hire enough police forces to man the streets. To compensate, Camden has been in the forefront in adopting highly efficient surveillance technologies.<sup>50</sup> Camden has also successfully consolidated its police department with the county-level agency to lower costs and avoid duplicative expenditures.<sup>51</sup> Brick, on the other

<sup>47</sup> *Id.* (navigating to Table 8 and finding the data for Brick, New Jersey).

<sup>48</sup> The overall violent crime rate in Brick was 106.8 crimes per 100,000 residents, including a murder rate of 0, a rape rate of 7.9, an assault rate of 77.9, a robbery rate of 21.2, and a property crime rate of 1,642.3. *Id.* (to access requisite data, click on desired year under “Crime in the United States,” navigate to “Table 8,” and find the crime data for Brick, New Jersey).

<sup>49</sup> The median income in Brick is \$81,868. *See* UNITED STATES CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (2006-2010).

<sup>50</sup> *See generally* Conor Friedersdorf, *The Surveillance City of Camden, New Jersey*, *The Atlantic*, Dec. 12, 2013, available at <http://www.theatlantic.com/national/archive/2013/12/the-surveillance-city-of-camden-new-jersey/282286/> (describing in detail how Camden has installed hundreds of surveillance cameras, license plate readers, and other devices to increase the efficiency of local law enforcement and help deter crime).

<sup>51</sup> *See generally* Heather Haddon, *Crime Dips in Camden as New County Police Force Replaces City Officers*, *The Wall Street Journal*, Aug. 5, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323968704578650171849946106> (detailing the so-called “experiment” whereby

hand, has not had to adopt such radical approaches to policing, as it has been able to maintain extremely low crime rates with relatively few officers per capita.<sup>52</sup>

The vast differences in local approaches to policing evidence in Brick and Camden are not the exception. They are the rule. Federal surveys suggest that police departments across the country vary tremendously in size,<sup>53</sup> operating budget,<sup>54</sup> officer pay,<sup>55</sup> training requirements,<sup>56</sup> patrol methods,<sup>57</sup> equipment,<sup>58</sup> and on-the-ground strategies.<sup>59</sup> Departments vary because of both jurisdictional challenges and the availability of local resources. The budgets of law enforcement agencies are almost always tied to the local municipal budget. These municipalities almost all rely on local property taxes and in some cases sales taxes. Thus, jurisdictions with a large concentration of poor residents, like Camden, often cannot afford to invest the same amount of money into their police departments as municipalities with a higher concentration of wealthy residents, like Brick. This is a particularly cruel realization, since the communities most adversely affected by resource disparities are also typically the agencies *most* in need of additional funds to fight crime. Once more, organizational research suggests that marginal or failing organizations—those failing to achieve their intended objective—are more likely to produce

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Camden has closed its city-wide police department and instead relied on the newly expanded county department).

<sup>52</sup> Brick deploys approximately 171.5 police officers per 100,000 residents, around half of what Camden deploys. *See* UCR Reports (navigate to statistics on police employee data to find the number of police officers in Brick, New Jersey).

<sup>53</sup> *Id.* at 9 (text table 1 showing that the average number of full-time police officers per 1,000 residents varies depending on the size of the population served).

<sup>54</sup> *Id.* at 10 (table 4 showing that the largest police departments spend around \$385 per city resident, while the smallest departments spend only \$209 per city resident).

<sup>55</sup> *Id.* (table 4 showing that the largest police departments spend around \$121,900 per officer, while the smallest departments spend only \$56,400 per officer).

<sup>56</sup> *See, e.g., id.* at 11-12 (table 5 showing that in larger departments, college degrees are more commonly required than in smaller departments; figure 6 showing that larger departments typically require more training hours than smaller departments).

<sup>57</sup> *See e.g., id.* at 15-16 (table 12 showing the wide variation, largely by size, in the patrol method; table 13 showing that larger departments are typically more likely to have specific policies to deal with special populations and situations).

<sup>58</sup> *See, e.g., id.* at 17-18 (table 14 illustrating the disparate use of conducted energy devices in larger departments and table 15

<sup>59</sup> *Id.* at 27 (describing in tables 30-31 the variation in strategies used by law enforcement, again varying by size of the force). A prime example of departmental variation in internal policies is the difference in how agencies respond to alleged misconduct. The LEMAS survey asks departments' about the existence of internal checks to respond to misconduct. The results suggest that a department's likelihood of using independent oversight tools vary tremendously from department to department, depending in part on the size of the agency. The vast majority of departments serving population centers of more than a million people have a citizen review board (77%) and a substantial number give this citizen review board independent subpoena power (31%). *Id.* at 18 (reproducing the data from Table 15, entitled "Use-of-force policies and procedures in local police departments, by size of population served, 2007"). Among smaller departments, these sorts of extensive oversight measures are virtually nonexistent. *Id.*

incidents of misconduct.<sup>60</sup> This theoretically suggests that departments struggling with higher crime rates and budgetary problems may have a greater proclivity towards misconduct, while also lacking the resources to fight back.

Again the comparison between Brick and Camden is useful. Property values and incomes in Brick are significantly higher than Camden. Thus, a community like Brick is able to afford cutting-edge investments into policing. One of these investments that Brick Township Police Department has been able to afford is accreditation through the Commission on Accreditation for Law Enforcement Agencies (CALEA). Departments with accreditation under CALEA are inspected every three years by a team of independent, CALEA-trained assessors to ensure that the departments are complying with procedural and operational standards.<sup>61</sup> In 1984, only four agencies were CALEA accredited.<sup>62</sup> That number has steadily risen to 47 in 1987, 161 in 1990, 279 in 1993, and 985 by 2010.<sup>63</sup> But accreditation is still voluntary and expensive. Thus, the 985 agencies claiming CALEA accreditation in 2010 represent only 5.6% of all law enforcement agencies in the country.<sup>64</sup>

Camden, by contrast, has not undergone costly CALEA accreditation. No doubt, the vast resource per capita disparity between the Camden and Brick in part explains this difference. This is an important revelation, as it demonstrates how resource disparities can directly translate into misconduct disparities. Correcting and preventing misconduct can be expensive. As I will discuss more in Chapters 5 and 6, the reforms mandated via SRL can cost upwards of \$100 million over a decade.<sup>65</sup> Many of the reforms required for voluntary accreditation via CALEA have been shown to reduce civil liability exposure, presumably by decreasing the rate of wrongdoing. Evidence has also shown that the move towards accreditation and uniformity to national standards has made departments more receptive to shifting norms in policies and procedures.<sup>66</sup> But decentralization, which causes resource disparities, means that not all departments can even afford to invest in misconduct-detering reforms like accreditation.

## 2. Decentralized Police Agencies Rely on Local Political Preferences to Guide Policies

Given that political decentralization has created tens of thousands of local police agencies, the next obvious question is how do local police agencies develop strategies to police

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<sup>60</sup> Diane Vaughan, *The Dark Sides of Organizations: Mistakes, Misconduct, and Disaster*, 25 ANN. REV. SOCIOLOGY 271, 288 (1999).

<sup>61</sup> JOHN DECARLO, AN ARGUMENT FOR LAW ENFORCEMENT ACCREDITATION AND OFFICER EDUCATION REQUIREMENTS (2010).

<sup>62</sup> The Commission on Accreditation for Law Enforcement Agencies, *Annual Report for 2010*, December 2, 2011, available at: <http://www.calea.org/content/calea-2010-annual-report>, at 3

<sup>63</sup> *Id.*

<sup>64</sup> There are approximately 17,985 state and local law enforcement agencies in the United States. See United States Department of Justice, *Census of State and Local Law Enforcement*, 2, July 2011, available at <http://www.bjs.gov/content/pub/pdf/cslla08.pdf>. Thus, to calculate this percentage I divided the 985 CALEA accredited agencies by the 17,985 total agencies in the country that could have been national accredited.

<sup>65</sup> See, *infra* Chapters 5 and 6.

<sup>66</sup> Terry Gingerich & Gregory Russell, *Accreditation and Community Policing: Are They Neutral, Hostile, or Synergistic? An Empirical Test Among Street Cops and Management Cops*, 2 JUSTICE POLICY J. 3–27 (1996).

their unique municipalities? In such a decentralized environment, most agencies take their cues from local political preferences. This has devastating effects on politically powerless minorities in some jurisdictions. Historically, the influence of local preferences on police agencies has varied over time. The community policing movement has likely increased the sensitivity of local police departments to majoritarian preferences. In the early part of the twentieth century, the “degree of localism” in policing created a “decentralization ... that often resembled fragmentation.”<sup>67</sup> The lack of central regulation in policing contributed to local police departments that were “inward-looking” for policies and procedures, and “hermetically sealed” from outside influences.<sup>68</sup> Rather than coordinating with other police departments to develop best practices, police departments were most heavily influenced by local political leaders.<sup>69</sup> This turned many early police departments into mere adjuncts to political machines rather than neutral arbiters of the law, and led to substantial variation in policing styles.<sup>70</sup>

During the mid-twentieth century, policing went through a period of professionalization that increased cooperation and coordination between local agencies.<sup>71</sup> No longer were police departments rigidly sealed from other law enforcement agencies. By the 1940s and 1950s, “it had become clear that the only way to gain the public’s trust and respect was to reduce the influence of politicians, train and educate police officers, and promote an image of professionalism in the eyes of the public.”<sup>72</sup> This movement towards police professionalism reflected many beliefs of the time period: that police ought to focus on crime suppression, that police should be free from political influence, that police should feel free to act objectively and scientifically, and that departmental authority ought to be centralized and rationalized.<sup>73</sup> During this period, many police departments around the country operated by a core set of beliefs and practices.<sup>74</sup> The ranks of

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<sup>67</sup> FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE* 103 (2011).

<sup>68</sup> *Id.*

<sup>69</sup> LEONARD A. STEVERSON, *POLICING IN AMERICA: A REFERENCE HANDBOOK* 16-18 (2008) (offering some examples about how the political patronage influence on policing led to exploitation); *see also* George L. Kelling & Mark H. Moore, *THE EVOLVING STRATEGY OF POLICING* 3 (1988), <https://ncjrs.gov/pdffiles1/nij/114213.pdf> (last visited Jul 9, 2013) (stating that political influences were important during the Patronage Policing era and explaining that police historically “lacked the powerful, central authority of their own to establish a legitimate, unifying mandate for their enterprise”).

<sup>70</sup> *See generally* ROBERT M. FOGELSON, *BIG-CITY POLICE* 37 (1977) (describing big-city police as “adjuncts of the ward organizations”).

<sup>71</sup> Kelling and Moore, *supra* note 69, at 4 (explaining how police leaders like August Vollmer “rallied police executives around the idea of reform during the 1920s and early 1930s” and galvanized a broader movement towards professionalization).

<sup>72</sup> MITCHEL P. ROTH, *CRIME AND PUNISHMENT: A HISTORY OF THE CRIMINAL JUSTICE SYSTEM: A HISTORY OF THE CRIMINAL JUSTICE SYSTEM* 259 (2010). Notable figures like William H. Parker, Orlando W. Wilson, and August Vollmer personified this gradual transformation.

<sup>73</sup> DAVID A. SKLANSKY, *THE PERSISTENT PULL OF POLICE PROFESSIONALISM* 1 (2011), *available at* [http://cms.hks.harvard.edu/var/ezp\\_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/ExecSessionPolicing/NPIP-ThePersistentPullofPoliceProfessionalism-03-11.pdf](http://cms.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/ExecSessionPolicing/NPIP-ThePersistentPullofPoliceProfessionalism-03-11.pdf).

<sup>74</sup> Police saw their primary obligations as the investigation of crime, the enforcement of a wide variety of criminal laws, and the maintenance of order. *Id.* at 1 (explaining the focus of the professional policing era on crime control, law enforcement, and maintenance of order).

police agencies were also increasingly unionized and protected by civil service laws—somewhat insulating these officers from political influences. And in some cases, executives within police departments were also protected from political influence via civil service laws.<sup>75</sup> But by the 1980s, support for this so-called professional policing style waned. Empirical evidence suggested that some of the primary crime prevention tactics advocated by the professionalization movement were largely ineffective.<sup>76</sup> And many scholars believed that the professional policing model had become “thoroughly discredited” as many blamed the policing style “for making police departments insular, arrogant, resistant to outside criticism and feckless in responding to social

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<sup>75</sup> Los Angeles is a good example of a department that afforded executives within the LAPD with protection from firing or discipline at the hands of political officials. After the Rodney King beating, the City of Los Angeles passed City Charter Amendment F to give political officials authority to remove a police chief. *See* MERRICK BOBB, MARK EPSTEIN, NICOLAS H. MILLER, AND MANUAL A. ABASCAL, FIVE YEARS LATER: A REPORT TO THE LOS ANGELES COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT’S IMPLEMENTATION OF INDEPENDENT COMMISSION RECOMMENDATIONS 67-68 (1996).

<sup>76</sup> Common wisdom of the time suggested that police presence could deter crime, “and the most popular version of police crime prevention practice by the 1960s was what was called preventative patrol, usually the patrol activities of uniformed officers in marked cars conducting routine surveillance of designated geographic zones.” ZIMRING, *supra* note 67, at 103. And despite the allegedly objective and scientific focus on professional policing, departments did virtually no research into the effectiveness of preventative patrols. *Id.* at 103-04 (describing the orthodox, albeit untested, conclusion around 1960 about how police could most effectively reduce crime and fight disorder—including through measures like preventative patrols). The first rigorous investigation of the effects of policing on crime came in 1974, when several social scientists teamed with large American police departments to empirically assess the effects of preventative patrols on criminal activity in Kansas City and Newark. *Id.* at 104-07 (summarizing the “revolutionary” uniqueness of the Kansas City study and also discussing the importance of the follow-up study in Newark). There, law enforcement purposefully altered the presence of preventative patrols in certain parts of the city to observe the effects on crime rates. *Id.* at 105 (summarizing the methodology of the Kansas City study). In both cases, the researchers found that the changes had little to no effect on crime. GEORGE KELLING L. & ANTHONY PATE, THE NEWARK FOOT PATROL EXPERIMENT (1981); GEORGE KELLING L. ET AL., THE KANSAS CITY PREVENTATIVE PATROL EXPERIMENT: A TECHNICAL REPORT (1974). Around this same time, several notable social scientists undertook the first significant empirical studies of policing behavior. *See, e.g.*, JEROME H. SKOLNICK & UNIVERSITY OF CALIFORNIA, BERKELEY CENTER FOR THE STUDY OF LAW AND SOCIETY, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966); EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY: A REVIEW OF BACKGROUND FACTORS, CURRENT PRACTICES, AND POSSIBLE ROLE MODELS (1970); ALBERT J. REISS, THE POLICE AND THE PUBLIC (1971). Many of these early explorations of policing and crime control involved a technique called embedded observation, where social scientists observed police officers in action. Zimring, *supra* note 67, at 104 (describing methodology used in many of the earliest empirical analyses of police behavior). But these studies had obvious methodological limits—while these studies could explore the everyday interactions of law enforcement with the public, they could not address bigger questions about the effectiveness of law enforcement in suppressing crime. *Id.* (concluding that while “[t]hese pioneering social scientists could impose their insights and judgments on the police behavior they observed, they could not alter the behavior...and they could not systemically test the impact of the behavior they observed on the communities being policed”).

ferment.”<sup>77</sup> This motivated departments to seek new strategies—particularly those that sought input from the community.

Thus in recent decades, there has been a growing push for police agencies to seek out community input and adopt policies that comport with local preferences. Known as community policing, this movement has sought to incorporate the community more in the decision-making process.<sup>78</sup> It was spurred in part because of the growing civil unrest and major urban riots against American law enforcement in the 1960s and 1970s.<sup>79</sup> These major riots struck cities across the country, including New York, Los Angeles, Newark, and Detroit.<sup>80</sup> The National Advisory Commission on Civil Disorders of 1970 later determined that police misconduct—including aggressive patrols and harassment in urban communities—contributed substantially to these events.<sup>81</sup> This demonstrated the apparent divide between law enforcement and the community it served.<sup>82</sup> This further emphasized the need for a policing procedure that more closely sought the input of the community. In response, law enforcement moved away from a purely professional and technocratic approach and instead turned towards the community for assistance.<sup>83</sup> This is due in part to an understanding that “[c]ommunities with different problems and varied resources to bring to bear against them should try different things.”<sup>84</sup> Thus, the community policing movement was about fundamentally changing the decision-making within departments.<sup>85</sup> The

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<sup>77</sup> Sklansky, *supra* note 73, at 5; *see also generally* HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* (1977).

<sup>78</sup> Sklansky, *supra* note 73, at 1-2 (categorizing as community policing the move towards selecting and pursuing goals in consultation with the public).

<sup>79</sup> MICHAEL PALMIOTTO, *COMMUNITY POLICING: A POLICE-CITIZEN PARTNERSHIP* 13 (2011) (stating “police actions would precipitate a riot because of exaggerated rumors”).

<sup>80</sup> *Id.* (citing riots in Harlem [New York], Watts [Los Angeles], Newark [New Jersey], and Detroit [Michigan]).

<sup>81</sup> *Id.* at 13–14 (citing aggressive patrols and harassment as major police precipitators of unrest).

<sup>82</sup> *Id.* (discussing the emergence of various segmented opposition groups).

<sup>83</sup> *Id.* at 4 (distinguishing between bureaucratic/technocratic philosophies and more collaborate approaches).

<sup>84</sup> Wesley G. Skogan, *The Promise of Community Policing*, in *POLICE INNOVATION: CONTRASTING PERSPECTIVES* 27–44, 27 (David Weisburd & Anthony A. Braga eds., 2006).

<sup>85</sup> *Id.* at 27 (stating that community policing was about “changing decisionmaking processes and increasing new cultures within police departments”). Scholars have had trouble defining this community policing movement. But Professor David Sklansky has argued that this movement reversed some of the important trends of the professionalism movement. Sklansky, *supra* note 73, at 2. During this time, police departments no longer focused narrowly on crime suppression, but instead broadened their goals. *Id.* at 1 (stating that “[p]olice departments broadened their focus on crime control to a range of other goals...”). Departments started selecting these goals in consultation with the community. *Id.* at 1-2 (writing that police departments “selected and pursued those goals in consultation and cooperation with the public”). And in order to make this process more feasible, departments decentralized authority. *Id.* at 2 (stating that “to facilitate that consultation and cooperation, authority within departments was decentralized”). Law enforcement moved away from a purely professional and technocratic approach to law enforcement and has instead turned towards the community for assistance. *Id.* at 4 (distinguishing between bureaucratic/technocratic philosophies and more collaborate approaches). This is due in part to an understanding that “[c]ommunities with different problems and varied resources to bring to bear against them should try different things.” Wesley G. Skogan, *The Promise of Community Policing*, in *POLICE INNOVATION: CONTRASTING*

incorporation of citizen involvement in the organizational decision-making process means that policing can look very different from one decentralized police agency to another. Studies have found that while the use of community policing can increase the overall trust and confidence in law enforcement within a local jurisdiction, minority groups commonly feel that their voices are not heard.<sup>86</sup> Minority residents also have reported that, despite the fact that they are often most commonly victims of crime and police brutality, they still have little say in the departmental policies or procedures; instead, community policing transfers that power to whatever group is in the majority within the political constituency of a policing agency. Regardless of these concerns, the federal government has invested significant resources in encouraging local agencies to adopt community policing approaches; and it seems to be working, as most departments claim to utilize community policing strategies to decide how to allocate their resources and interact with the community.<sup>87</sup>

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PERSPECTIVES 27–44, 27 (David Weisburd & Anthony A. Braga eds., 2006). Thus, the community policing movement was about fundamentally changing the decision-making within departments. *Id.* at 27 (stating that community policing was about changing decisionmaking processes and increasing new cultures within police departments”). According to Professor Wesley Skogan, community policing as an organizational strategy emphasizes three distinct elements: citizen involvement, decentralization, and problem solving. *Id.* at 29-31 (explaining each in turn).

<sup>86</sup> A study in Chicago found that “after 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.” Skogan, *supra* note 84, at 31. But Chicagoans felt these benefits of community policing unevenly. Communities of color were less likely to participate in community policing efforts in part because of a fear of retaliation for working with police. *Id.*; see also Wesley G. Skogan & Lynn Steiner, *Community Policing in Chicago, Year Ten.*, CRIM. JUSTICE INF. AUTH. (2004). A similar study in Houston found that white middle and upper class individuals reported satisfaction with community policing efforts. See generally WESLEY G. SKOGAN ET AL., ON THE BEAT: POLICE AND COMMUNITY PROBLEM SOLVING (1999). They also reported easy cooperation with police and, perhaps unsurprisingly, received much of the benefits. Conversely, Black, Latino, blue-collar, and poor communities remained uninvolved and reported no changes in their opinions or experiences with law enforcement. *Id.* Thus, the benefits of community policing are not evenly distributed across an entire jurisdiction. Police also report a general disinterest in community policing efforts. 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 & DELINQUENCY 384, 410 (1994) (explaining that many officers expressed resentment and could not fully understand or appreciate the reasons for community policing efforts). A survey of police officers found that 70 percent of police officers in one department were suspicious of community policing efforts because of a belief that it would burden police with unreasonable demands. See generally WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE (1997), <http://www.ncjrs.gov/App/abstractdb/AbstractDBDetail.s.aspx?id=175951> (last visited Jul 22, 2013).

<sup>87</sup> The Violent Crime and Law Enforcement Act (1994) dedicated billions of dollars to training local officers in community policing efforts. Skogan, *supra* note 84, at 40. By 1999, approximately 88 percent of all new recruits and 85 percent of currently serving officers were trained in community policing. *Id.*

### 3. Reliance on Local Majoritarian Preferences Facilitates Minority Subjugation

The structural decentralization of American law enforcement combined with the recent emphasis on satisfying local community demands has led to a remarkable variation in policies and procedures from one jurisdiction to the next. In some cases, though, the tactics that a local agency develops to deal with its own jurisdictional problems systemically violate the rights of certain segments of the population. And since decentralized law enforcement agencies take their cues from local political leaders, these systemic abuses are often not just tolerated, but encouraged.

Take the Maricopa County, Arizona, as an example. Joe Arpaio has been elected Sheriff of Maricopa County for six consecutive terms.<sup>88</sup> Sheriff Arpaio has received international notoriety for his unconventional and legally questionable tactics.<sup>89</sup> One of issues that Sheriff Arpaio has emphasized heavily 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.”<sup>90</sup> It wasn’t until Maricopa County Attorney Andrew Thomas won county-wide election with the slogan “Stop Illegal Immigration” that Arpaio’s office began emphasizing the need to crack down on undocumented immigrants.<sup>91</sup> By all accounts, Sheriff Arpaio responded to local community demands and altered his enforcement of the law to account for these prerogatives. His efforts, though, have resulted in serious and ongoing allegations of racial profiling and a systemic unwillingness to investigate crimes against undocumented immigrants.<sup>92</sup> Maricopa County’s location near the U.S. border with Mexico, no doubt, has affected the tone of community policing demands. And even though around 30 percent of the population in Maricopa County is Latino,<sup>93</sup> the majority of voters have continued to re-elect Sheriff Arpaio and thereby implicitly support his use of tactics that appear to disproportionately affect a significant minority group in the county.

No doubt, the Maricopa County is one of many. When police are primarily accountable to local political leaders and majoritarian preferences, some agencies with particular demographic characteristics or local challenges will support the use of police procedures that disproportionately burden local minorities. Of course, this problem sounds similar to constitutional dilemmas in other institutional contexts like voting, schools, and housing. In these

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<sup>88</sup> Phil Benson, *Sheriff Joe Arpaio Sworn in for 6<sup>th</sup> Term*, KPHO NEWS, Jan. 6, 2013, *available at* <http://www.kpho.com/story/20516330/sheriff-joe-arpaio-sworn-in-for-6th-term>.

<sup>89</sup> *See, e.g., Justice Department to Question Sheriff Joe Arpaio for Civil Rights Lawsuit*, KTAR NEWS, Feb 7, 2014, *available at* <http://ktar.com/22/1698793/Justice-Dept-to-question-Sheriff-Joe-Arpaio-for-civil-rights-lawsuit> (describing how the DOJ is investigating Arpaio for civil rights violations).

<sup>90</sup> William Hermann and Edvard Pettersson, *Arizona’s Arpaio Testifies Race Not Factor In Arrests*, BLOOMBERG NEWS, Jul. 24, 2012, *available at* <http://www.bloomberg.com/news/2012-07-24/-america-s-toughest-sheriff-to-answer-profiling-claims.html> (quoting Arpaio as saying that before 2005, he never viewed illegal immigration as a “serious legal issue”).

<sup>91</sup> E.J. Montini, *Still Doubting Thomas on Immigration*, ARIZONA REPUBLIC, Jul. 18, 2010, *available at* [http://www.azcentral.com/arizonarepublic/news/articles/2010/06/18/20100618\\_Montini0618.html](http://www.azcentral.com/arizonarepublic/news/articles/2010/06/18/20100618_Montini0618.html) (quoting Thomas and describing his use of this slogan and issue during his campaign).

<sup>92</sup> *See Justice Department to Question Sheriff*, *supra* note 89.

<sup>93</sup> *See UNITED STATES CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (2006-2010)*.

other contexts, the federal government has intervened to protect these minority interests. But as I discuss next, the traditional federal responses in the arena of policing have been limited.

### C. *The Lack of Mandatory Federal Regulations*

The allocation of large amounts of discretion, combined with the decentralized nature of law enforcement, mean that pockets of misconduct—often targeting politically powerless minority groups—will invariably emerge from time to time in the United States. Federal policymakers have not turned a blind eye to this problem. Instead, over the last century, there has been a growing recognition that police misconduct is a national problem demanding some type of national solution. Nevertheless, before the passage of SRL, the available federal remedies in cases of local police misconduct were minimally invasive. Prior to the passage of § 14141, there existed three major mechanisms by which the federal government regulated local police agencies: the exclusionary rule, private civil litigation, and criminal culpability. In the subsections that follow, I briefly outline the history of each mechanism. I show that, in the years after the passage of these federal regulatory mechanisms, empirical evidence suggests that many police departments professionalized and made impressive changes to internal policies. This broad trend towards reform is encouraging. But many departments have not responded to these federal oversight measures by proactively reforming. Some have remained obstinate in the face of federal action. And I explain, the very nature of the available remedies to police misconduct makes this type of intransigence possible. Each mechanism merely incentivizes police agencies to adopt reforms. None of them force an agency to adopt any policy changes. This has meant that, while many police agencies have responded to these incentives by taking serious steps to reform, a small number of departments decided that continued misconduct was worth the cost. These departments have systemically failed to regulate misconduct.

#### 1. Exclusionary Rule

The U.S. Supreme Court has attempted to remove the incentive for police to engage in misconduct by excluding from criminal court any evidence obtained by law enforcement in violation of the Constitution. It took the court several decades for the Court to develop the exclusionary rule and apply it to all American law enforcement action. In the 1914 case of *Weeks v. United States*, the Court first established a version of the exclusionary rule.<sup>94</sup> There, police entered the home of Fremont Weeks and seized papers and personal belongings without a warrant.<sup>95</sup> The federal government used this illegally seized evidence to secure a conviction for transporting lottery tickets through the mail.<sup>96</sup> In a unanimous decision, the Court held that the seizure directly violated the Week’s Fourth Amendment constitutional right.<sup>97</sup> But the Court went a step further and ruled that the government could not use the illegally obtained evidence as

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<sup>94</sup> 232 U.S. 383 (1914).

<sup>95</sup> *Id.* at 386-87 (explaining that the police had gone to the defendant’s house and entered the house unlawfully before taking “possession of various papers and articles found there...”).

<sup>96</sup> *Id.* at 389-90 (describing how the prosecutor used the papers at trial to show that the defendant had in his possession lottery tickets and statements in reference to a lottery).

<sup>97</sup> *Id.* at 398 (holding that “the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant”).

evidence against him at trial.<sup>98</sup> Thus, *Weeks* represented the first application of the so-called exclusionary rule.<sup>99</sup> The ruling was limited, though. It only applied to actions taken by federal law enforcement.<sup>100</sup> Soon thereafter in 1920, the Supreme Court further expanded the exclusionary rule in *Silverthorne Lumber Co. v. United States*.<sup>101</sup> In that case, federal agents illegally seized tax books from Frederick Silverthorne, made copies of the records, and attempted to introduce those copies at trial.<sup>102</sup> The Supreme Court held that that even the copies of the illegally obtained evidence were illegally tainted.<sup>103</sup> This precedent would be cited in the future as the “fruit of the poisonous tree” doctrine—an extension of the exclusionary rule that ruled as inadmissible that both the illegally obtained evidence as well as any future evidence obtained as a result of the illegal action.<sup>104</sup> Despite this initial judicial activism, it would be decades before the Court expanded the exclusionary rule to state law enforcement. Since almost all American law enforcement officers work at the state level,<sup>105</sup> this functionally, meant that even after *Weeks* and *Silverthorne*, virtually all law enforcement could violate the constitutional at-will without fear that their actions would inhibit a future criminal prosecution. The Court first had the opportunity to extend the exclusionary rule to the states in *Wolf v. Colorado*.<sup>106</sup> In that case, Colorado had obtained evidence illegally—evidence that would have been inadmissible under the federal exclusionary rule established in *Weeks*.<sup>107</sup> But the Court held that while the Fourth Amendment did apply to state law enforcement, the exclusionary rule did not.<sup>108</sup> It would not be until *Mapp v.*

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<sup>98</sup> *Id.* (stating that “in permitting ... use [of the evidence] upon the trial, we think prejudicial error was committed”).

<sup>99</sup> *Id.* Although the phrase “exclusionary rule” never appears in the Court’s opinion, the remedy may still be accurately described as such since it requires the trial court to not admit the illegally obtained papers into evidence.

<sup>100</sup> Again, the Court never dealt with the difference between federal and state action here. But since the case only held that this action by a federal law enforcement officer should lead to evidentiary exclusion, it was interpreted as such going forward.

<sup>101</sup> 251 U.S. 385 (1920).

<sup>102</sup> *Id.* at 390-91 (explaining the facts of the case, including how the United States marshal obtained “books, papers and documents” illegally).

<sup>103</sup> *Id.* at 391-92 (explaining the decision to bar the admission of the evidence at trial).

<sup>104</sup> *Id.* at 392 (holding that any holding to the contrary would “reduce the Fourth Amendment to a form of words”).

<sup>105</sup> See Zimring, *supra* note 67 at 102 (describing the decentralization of American law enforcement into around 20,000 smaller state police agencies); see also United States DOJ, *Census of State and Local Law Enforcement*, 2, July 2011, available at <http://www.bjs.gov/content/pub/pdf/cslla08.pdf> (putting the number of state and local law enforcement agencies at 17,985).

<sup>106</sup> 338 U.S. 25 (1949).

<sup>107</sup> The Court started the opinion by bluntly stating the question: “Does a conviction by a State court for a State offense deny the ‘due process of law’ required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States*?” *Id.* at 26.

<sup>108</sup> *Id.* at 33 (holding that “in the a prosecution in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure”).

*Ohio* that the Court changed direction.<sup>109</sup> The Court in *Mapp* finally declared that, “all evidence obtained in violation of the Constitution is...inadmissible in a state court.”<sup>110</sup> Today, violations of the Fourth (unlawful search or seizure) and Fifth Amendment (failure to Mirandize a suspect) frequently lead to evidentiary exclusion in both state and federal courts.<sup>111</sup>

Some studies show that judicial policymaking in the form of the exclusionary rule can instigate change in police departments.<sup>112</sup> These studies find that police departments faced with the increased cost of evidentiary exclusion, are more likely to punish officers engaged in wrongdoing, reward officers that obtain evidence legally, and choose not to promote officers that put cases in jeopardy by obtaining evidence illegally.<sup>113</sup> But another strong current of research suggests that court efforts to alter police department behavior through the judicial decree have been of limited use.<sup>114</sup>

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<sup>109</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidentiary exclusion is proper in cases where state law enforcement illegally obtain evidence).

<sup>110</sup> *Id.* at 655.

<sup>111</sup> See, e.g., National Institute of Justice, Criminal Justice Report—The Effects of the Exclusionary Rule: A Study in California (Washington, D.C.: DOJ, National Institute of Justice, 1982) (finding that the use of the exclusionary rule led to prosecutors dropping complaints in 86,033 felony arrest cases).

<sup>112</sup> 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 (1990); Myron W. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987).

<sup>113</sup> See, e.g., Orfield, *supra* note 112 (finding that the exclusionary rule had at least some positive effect on Chicago police by motivating reform and discouraging violations through policy changes and social norms).

<sup>114</sup> Richard A. Leo, *Inside the Interrogation room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1995) (demonstrating how police have learned to negotiate the impact of *Miranda*, lessening the usefulness of warnings and increasing the likelihood of obtaining a confession); Richard A. Leo, *The Impact of “Miranda” Revisited*, 86 J. CRIM. LAW CRIMINOL. 1973- 621–692 (1996); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* SECOND EDITION (2d ed. 2008) (rejecting the role of courts in instigating social change in various contexts). Gerald Rosenberg famously compiled evidence from numerous empirical studies demonstrating that attempts by the Court to instigate social change often fail. ROSENBERG, *supra* note 114 at 324–331 (particularly showing his skepticism about the effectiveness of *Miranda* and the exclusionary rule). By holding in *Miranda* that officers must read suspects a set of procedural rights, Chief Justice Earl Warren had two major concerns: police brutality during confessions and psychological coercion that led to innocent people confessing to crimes they did not commit. *Id.* at 324-25. But numerous studies after *Miranda* found that individuals were confessing and pleading guilty just as often as they had before the landmark decision. *Id.* at 325-26. Police might have simply gotten better at inducing confessions through less-coercive and humane methods, although Rosenberg. Further, Rosenberg argued that many departments still suffered from pervasive brutality. *Id.* at 326. Police have also mediated the impact of judicial regulations. For example, Richard Leo and Charles Weisselberg have both shown how police have found clever ways to limit the effects of *Miranda* warnings, while still avoiding evidentiary exclusion. Leo, *supra* note 114 (reporting the results of an empirical study into interrogations done via researcher observation); Charles D. Weisselberg, *Mourning Miranda*, 96 CAL REV 1521–(2008) (illustrating in impressive detail how police training material has taught law enforcement to mediate the impact of *Miranda*).

The Court has also since carved out numerous exceptions to evidentiary exclusion<sup>115</sup>—the silver platter doctrine,<sup>116</sup> the inevitable discovery doctrine,<sup>117</sup> and the good faith exception<sup>118</sup> to name a few. It is also “inevitably much narrower than the scope of illegal police misconduct.”<sup>119</sup> This exclusionary rule was “designed [specifically] to deter police misconduct...”<sup>120</sup> For example, misconduct by non-police officers generally does not trigger evidentiary exclusion.<sup>121</sup> The exclusionary rule also only deters police misconduct that actually results in the collection of evidence. This represents only a small fraction of all misconduct. It does little to deter the excessive use of force or unlawful searches and seizures that do not lead to a criminal prosecution.<sup>122</sup> And ultimately, the exclusionary rule is a cost-raising regulation of misconduct. If police officer decides that it is more advantageous to risk evidentiary exclusion, he or she is free to violate the law. The exclusionary rule also comes at a high social cost. In the minds of many conservative thinkers, “it is an absurd rule through which manifestly dangerous criminals are let out because the courts prefer technicalities to truth.”<sup>123</sup> The Court has also suggested that the need for the exclusionary rule may be waning. In *Michigan v. Hudson*, the Court noted that significant improvements in the professionalism and training in American police departments may decrease the need for the exclusionary rule in the future—particularly given the high cost associated with excluding potentially incriminating evidence at trial.<sup>124</sup> This has led many scholars to predict that the Court could someday move to overturn the core of the evidentiary exclusion principle.<sup>125</sup>

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<sup>115</sup> See generally 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)

<sup>116</sup> *Elkins v. United States*, 364 U.S. 206 (1960) (allowing federal law enforcement to use evidence unlawfully obtained by state police).

<sup>117</sup> *Nix v. Williams*, 467 U.S. 431 (1984) (permitting law enforcement to use evidence obtained unlawfully so long as the material would have been inevitably discovered through another legal route in the process of the normal investigation).

<sup>118</sup> *United States v. Leon*, 468 US 897, 916 (1984) (allowing prosecutors to admit evidence obtained illegally so long as the illegality was done in good faith).

<sup>119</sup> Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 11 (2009).

<sup>120</sup> *Leon*, 468 U.S. at 916.

<sup>121</sup> Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 183 (2012) (detailing the fact that the exclusionary rule only applies to public law enforcement); *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921) (distinguishing between constitutionality of evidence obtained unlawfully by a state actor and a private actor); *United States v. Leon*, 468 U.S. 897, 916 (1984) (noting that “the exclusionary rule is designed to [specifically] deter police misconduct,” not misconduct by other actors such as judges or magistrates).

<sup>122</sup> There is a small exception to this general rule. The exclusionary rule would only bar the admission of evidence if the use of force or brutality was a violation of the Constitution and directly contributed to the collection of the evidence.

<sup>123</sup> Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J. L. & PUBLIC POL’Y 111, 111 (2003).

<sup>124</sup> *Hudson v. Michigan*, 547 US 586, 599 (2006) (explaining that “we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously”).

<sup>125</sup> See, e.g., Chris Blair, *Hudson v. Michigan: The Supreme Court Knocks and Announces the Demise of the Exclusionary Rule*, 42 TULSA L. REV. 751 (2006); David Alan Sklansky, *Not Your Father’s Police*

## 2. Private Civil Litigation

Private civil litigation should, in theory, incentivize police agencies to adopt accountability measures. Under 42 U.S.C. §1983, individuals can bring federal suit against state law enforcement agents that violate their constitutional rights.<sup>126</sup> For most of the twentieth century, individuals hoping to bring suit for police misconduct faced an uphill battle.<sup>127</sup> Section 1983 states that any “person” who engages in a “deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.”<sup>128</sup> On its face, this seems to open up law enforcement officers and administrators to significant liability. But because of a “misapplication of tort doctrine to constitutional law,” the courts held for most of the last century that superiors were immune from liability for the actions of their employees.<sup>129</sup> This meant that, while a private person could file suit against an individual police officer in some cases, holding the police department or municipality responsible was nearly impossible. The Court reaffirmed this holding in *Monroe v. Pape*.<sup>130</sup> This default rule limited the potential for private individuals to obtain substantial financial compensation for civil rights violations, as individual officers rarely had significant resources. Finally in 1978, the Court held in *Monell v. New York City Department of Social Services* that a local municipality or department could be considered a “person” under §1983, and thus held liable.<sup>131</sup> Courts since *Monell* have articulated a two-prong standard for determining whether a municipality or department would be liable for the actions of an employee like a police officer. Litigants have to prove that the employer was deliberately indifferent in their failure to train or supervise an employee.<sup>132</sup> Only in these narrow cases can plaintiffs reach the employer in civil litigation. The *Monell* decision, no doubt, had important implications for American police departments. Since the case, aggrieved citizens can now levy claims against *both* individual police officers, and the police departments that employ them.

Various rigorous examinations of this type of individual-initiated civil litigation against departments have yielded skepticism. This method for regulating law enforcement misconduct

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*Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. LAW & CRIMINOLOGY 1209 (2006); James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819 (2007).

<sup>126</sup> 42 U.S.C. §1983 (2000).

<sup>127</sup> This was largely because individuals could not hold a department or municipality liable for much of the twentieth century because of the Court’s holding in *Monroe v. Pape*, 365 U.S. 167 (1961), which held superiors virtually immune from liability.

<sup>128</sup> The important portions of §1983 reads:

“Every person who, under color of [law] ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....”

<sup>129</sup> Candace McCoy, *Enforcement Workshop: Lawsuits Against Police-What Impact Do They Really Have?*, 20 CRIME BULLETIN 49, 49-50 (1984).

<sup>130</sup> *Monroe*, 365 US at 167.

<sup>131</sup> *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 695–701 (1978)

<sup>132</sup> *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (explaining that a state agent employer may be liable for the actions of an employee under §1983 if the city’s policy or practice was objectively deliberately indifferent to the likelihood that a constitutional violation would occur).

“appears to be a weak strategy for achieving police reform, in part because of the structure of local governments and a pervasive pattern of political and administrative irresponsibility.”<sup>133</sup> After all, civil litigation is a classic cost-raising regulation tactic. It only works if aggrieved parties regularly litigate, and departments feel the financial consequences of this litigation, thus motivating them to change behaviors and policies. At least one study has shown that civil litigation has successfully raised the potential cost of misconduct high enough to force a response by local police agencies.<sup>134</sup> Other evidence, though, suggests that decentralization in local municipality government makes legalized accountability difficult: “one agency of the 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.”<sup>135</sup> This means that while a police department may suffer from a lawsuit in response to officer misconduct, the department itself may not feel the financial ramifications of the lawsuit. Such a finding means that private civil litigation does not necessarily increase the cost of misconduct, limiting the ability for this litigation to instigate widespread reform. Further, a recent study by Professor Joanna Schwartz concluded that across virtually every major city in the United States, police departments indemnify officers facing §1983 suits.<sup>136</sup> As she concludes, 99.98% of all dollars paid via §1983 litigation are paid by cities, departments, or municipalities—not individual officers.<sup>137</sup> This means that, not only do cities keep departments from feeling the negative effects of litigation, officers themselves rarely feel the financial consequences of misconduct. In addition, individuals hoping to exercise their rights under §1983 face high entrance barriers and legal fees. The mobilization of legal protections under §1983 is costly, making them only feasible in cases of serious misconduct. So while it might make financial sense for a person to initiate a §1983 suit in the case of police misconduct that leads to a wrongful death, a rational individual may choose not to use the statute in the event they are unlawfully stopped and frisked.

### 3. Criminal Culpability

An array of statutes at the state and federal level hold law enforcement officers criminally liable for certain acts of misconduct. If a police officer commits an act of misconduct that rises to the level of a criminal offense, prosecutors can charge them with a crime like any other person. A federal statute, 18 U.S.C. §242, provides some avenue for the DOJ to seek criminal convictions

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<sup>133</sup> Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State Pattern for Practice Statute*, 19 GEO. MASON U. C.R. L.J. 479, 495 (2008).

<sup>134</sup> CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 93-114 (2010) (describing the process by which police departments have come to implement reform, due in part to the threat of possible litigation). Epp shows that in November of 1977, when the largest private insurance company that provided police liability insurance withdrew from the market because of unacceptable risk, the prospect of self-insurance motivated many police professionals to develop rules and regulations about police conduct. *Id.* at 95. According to Epp, this contributed to a growing culture of “legalized accountability” in American police departments. *Id.* at 4, 95-96 (stating that the “resulting system of legalized accountability has spread widely”).

<sup>135</sup> Walker and Macdonald, *supra* note 133 at 495.

<sup>136</sup> Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. \_\_ (2014).

<sup>137</sup> *Id.* at \*1.

against a police officers that abuse an individual’s civil rights.<sup>138</sup> In the years leading up to the passage of § 14141, though, evidence emerged that the federal government lacked the resources to pursue § 242 prosecutions regularly. Figure 1.4 below shows the number of civil rights complaints received by the DOJ between 1981 and 1990 and the proportion of these complaints that resulted in investigations or criminal charges.

FIGURE 1.4, FEDERAL ENFORCEMENT OF 18 U.S.C. §242 IN YEARS LEADING UP TO THE PASSAGE OF SRL<sup>139</sup>

Year	Complaints	Investigations	Attempted Charges
1981	11,064	30.6%	0.6%
1982	10,327	31.2%	0.8%
1983	10,457	31.2%	0.6%
1984	8,617	39.6%	0.7%
1985	9,044	32.8%	0.8%
1986	7,546	37.0%	0.8%
1987	7,348	38.5%	1.0%
1988	7,603	38.0%	0.7%
1989	8,053	39.5%	0.9%
1990	7,960	38.3%	1.0%

As the numbers clearly demonstrate, the DOJ only had the resources to investigate a fraction of civil rights claims under § 242. And the DOJ only sought criminal charges in an extremely small portion of cases—typically under 1%. And among those cases where the DOJ actually went to trial on § 242 violations, acquittals were not uncommon.<sup>140</sup> Indeed, in the years leading up to the passage of SRL, it became increasingly clear that federal prosecution was an ineffective means to punish officers engaged in wrongdoing. These results are consistent with other past criticisms of criminal prosecutions at the state level. As other authors have previously posited, juries frequently trust and sympathize with officers during criminal trials.<sup>141</sup> Prosecutors

<sup>138</sup> 18 U.S.C. §242 (2000) (making it a federal crime for a police officer to violate a person’s constitutional rights and placing heavy criminal penalties on such behavior that leads to bodily injury); BONNIE MATHEWS & GLORIA IZUMI, UNITED STATES COMMISSION ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES (1981), <http://catalog.hathitrust.org/Record/007105152> (last visited Jul 15, 2013).

<sup>139</sup> *Police Brutality Hearing*, *supra* note 4, at 10 (showing the number of civil rights prosecutions by year as compiled by the DOJ as part of a hearing on police brutality). I calculated these numbers as follows. To determine the percentage of complaints that resulted in investigations, I divided investigations by complaints received. To determine the percentage of times the DOJ attempted to file criminal charges, I added together all times the DOJ presented a case to a grand jury or filed an information. To calculate the percentage of convictions, I used the number of trial convictions and the number of guilty pleas.

<sup>140</sup> *Id.* (showing that in some years, like 1988 and 1989, there were an equal or greater number of §242 acquittals than convictions).

<sup>141</sup> Harmon, *supra* note 119, at 9 (prosecutors generally fail to prosecute police and juries fail to convict); Armacost, *supra* note 7 at 464–465 (describing methods to hold law enforcement officer

are hesitant to bring criminal charges against police officers.<sup>142</sup> And the scope of the criminal law is also invariably narrower than the scope of police wrongdoing. A law enforcement officer may engage in numerous acts that violate the constitution, but do not rise to the level of a violation of the criminal law. Although necessary and useful in some circumstances, criminal prosecutions are an extremely limited tool for fighting police wrongdoing. Other mechanisms for spreading best practices in law enforcement, like accreditation and civil review boards, deserve some recognition.<sup>143</sup>

#### 4. Weakness of Traditional Approach to Federal Regulation of Local Police

The exclusionary rule, private civil litigation, and criminal culpability combine to create a reasonably expansive set of federal regulations on local law enforcement. In fact, many law enforcement officials have lamented the invasiveness of these regulations by arguing that they may lead to de-policing. Nevertheless, I contend that these regulations simply do not go far enough. These traditional approaches suffer from two major flaws: they are not mandatory, and they fail to address the organizational nature of misconduct.

First, by their very nature each of these measures is merely a cost-raising misconduct regulation. That is to say, these regulations attempt to incentivize police reform by raising the costs of non-compliance. If a police department engages in misconduct, the agency risks higher costs—be those the costs of evidentiary exclusion, civil litigation, or criminal prosecution. These cost-raising misconduct regulations have almost certainly had some statistically significant effect on police wrongdoing, even if it is hard to accurately measure. Nevertheless, cost-raising misconduct regulations will always be of limited use. A police department can always make a determination that a violation of a cost-raising misconduct regulation is justified. To use the

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criminally liable for constitutional violations); Livingston, *supra* note 27 at 844 (stating that “criminal prosecution plays some role in holding officers accountable for acts of clear illegality”).

<sup>142</sup> *Id.* at 9 (explaining the hesitance on the part of the prosecutors to bring charges against police officers).

<sup>143</sup> The story of how voluntary accreditation has grown in popularity is worth mentioning here. Today, law enforcement agencies increasingly seek national accreditation from the Commission on Accreditation for Law Enforcement Agencies (CALEA), which has a centripetal impact on departments across the country—“While no single authority controls accredited departments, these agencies freely converge towards the broadly accepted processes included in assessment.” ADAM G. HUGHES, PROFESSIONAL POLICE AND CENTRIPETAL ACCREDITATION (2009). Accreditation permits law enforcement to constantly reassess department policies, attend national conferences, and participate in the assessment of other agencies. Further, the move towards accreditation and uniformity to national standards has made departments more receptive to shifting norms in policies and procedures. Terry Gingerich & Gregory Russell, *Accreditation and Community Policing: Are They Neutral, Hostile, or Synergistic? An Empirical Test Among Street Cops and Management Cops*, 2 JUSTICE POLICY J. 3 (1996). Departments with accreditation under CALEA are inspected every three years by a team of independent, CALEA-trained assessors to ensure that the departments are complying with procedural and operational standards. JOHN DECARLO, AN ARGUMENT FOR LAW ENFORCEMENT ACCREDITATION AND OFFICER EDUCATION REQUIREMENTS (2010). Some have argued that the centripetal impact of accreditation has incentivized departments to be responsive to judicial findings, integrate these findings into their departmental policy, and continually improve their department policy to match national CALEA guidelines.

language of law and economics, a police department is generally free to engage in an efficient breach.<sup>144</sup> That is to say, a police department may determine that the costs associated with a breach—generally monetary penalties or potential evidentiary exclusion—are worth the benefits of violating the law. Much like a contract, cost-raising misconduct regulations give police the duty to follow the law or pay damages, whichever is preferable. For example, imagine a city with a major crime epidemic. That city may conclude that by encouraging officers to execute unjustified *Terry* stops,<sup>145</sup> they can substantially reduce crime in certain high crime neighborhoods.<sup>146</sup> Such behavior would open the city up to civil litigation and evidentiary exclusion. But the city may conclude that a cost is worth the potential benefit of reduced crime through deterrence.<sup>147</sup> Cost-raising misconduct regulations, therefore, may deter some but not all police wrongdoing. This cost-raising approach to federal regulation of police misconduct has facilitated the rise police departments that systemically fail to fight misconduct—agencies that make the choice to continue to violate rights, despite the apparent costs.

Second, the traditional approach to the federal regulation of local police treats the problem, implicitly, as a “bad apple” instead of a “rotten barrel” problem.<sup>148</sup> As Professor Barbara Armacost explained, the legal system has historically viewed police misconduct as the result of “factual and moral judgments made by officers functioning merely as individuals rather than as part of a distinctive and influential organizational culture.”<sup>149</sup> This view focuses on “notorious incidents and misbehaving individuals” and “not ... on the dysfunctional aspects of

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<sup>144</sup> Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS LAW REV. 273, 284 (1969) (defining and explaining the concept of efficient breach in the context of contract law).

<sup>145</sup> *Terry v. Ohio*, 392 US 1 (1968) (holding that a police officer may engage in a limited stop-and-frisk of an individual if the officer has reasonable suspicion that a person is engaged in criminal behavior).

<sup>146</sup> New York is a possible example of a city that has institutionalized the practice of regular *Terry* stops as a possible way to reduce crime. A Federal District Judge has found that New York City does engage in such an unconstitutional practice and has appointed a federal monitor to ensure changes in departmental policy. See Adam Serwer & Jaeh Lee, CHARTS: ARE THE NYPD'S STOP-AND-FRISKS VIOLATING THE CONSTITUTION? MOTHER JONES, <http://www.motherjones.com/politics/2013/04/new-york-nypd-stop-frisk-lawsuit-trial-charts> (last visited Sep 9, 2013) (illustrating the inequality of *Terry* stops in New York City); Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, THE NEW YORK TIMES, August 12, 2013, <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> (last visited Sep 9, 2013) (detailing District Judge's opinion finding that New York City acted unconstitutionally); J. David Goodman, *Bloomberg Calls Court Monitor for Police a "Terrible Idea,"* THE NEW YORK TIMES, June 13, 2013, <http://www.nytimes.com/2013/06/14/nyregion/bloomberg-calls-court-monitor-for-police-a-terrible-idea.html> (last visited Sep 9, 2013) (quoting Mayor Michael Bloomberg's objection to judicial intervention in City's use of *Terry* stops as something that may increase crime).

<sup>147</sup> See, e.g., Goodman *supra* note 146 (quoting Mayor Bloomberg, who argues, in response to claims that these stops are unconstitutional, that *Terry* stops are an important part of crime fighting in New York City).

<sup>148</sup> Armacost, *supra* note 7, at 457.

<sup>149</sup> *Id.* at 455.

policing organizations that sustain serious misconduct.”<sup>150</sup> When trial courts hear cases of individual officer misconduct in most §1983 or §242 cases, they get “no organizational context.”<sup>151</sup> Under this traditional regulatory approach, judges have no way to know whether the incident leading to the current claim is the result of one bad officer, or the result of a “diseased organization.”<sup>152</sup> But over the last century, policing scholars have started, in earnest, to argue that individual officer misconduct is commonly a symptom of a bigger illness—a diseased organizational culture and lax internal oversight measures that make individual officer misconduct common and routine. The narrative of misconduct as the result of a single cop-gone-rogue is tempting, but has been shown consistently to be an oversimplification. Countless real-world examples demonstrate that misconduct thrives when members of the organization are “socialized into membership in a group where the norms favor violation of internal rules, laws, or administrative regulations.”<sup>153</sup> The Philadelphia Police Department is a prime example of an organization that appeared to foster and encourage misconduct during the late 1970s. In 1979, the DOJ filed a lawsuit against Philadelphia alleging a pattern of police abuse that systemically violated residents’ constitutional rights.<sup>154</sup> According to the DOJ, the Philadelphia Police Department maintained policies and procedures that actively thwarted the investigation and disciplining of officers engaged in constitutional violations.<sup>155</sup> The DOJ requested an injunction to stop the Philadelphia Police Department from engaging in this kind of misconduct going forward.<sup>156</sup> But a federal district judge dismissed the claim, arguing that the U.S. Attorney general has no standing to bring such lawsuits absent an explicit statutory grant of power from Congress.<sup>157</sup> The DOJ appealed the decision, only to have the United States Court of Appeals for the Third Circuit uphold the lower court’s dismissal.<sup>158</sup> Then the Assistant Attorney General testified to the United States Commission on Civil Rights that he and his colleagues knew they “were dealing with something that went beyond individual acts of misconduct...we were dealing

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<sup>150</sup> SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY*, 4 (2005).

<sup>151</sup> Armacost, *supra* note 7, at 455.

<sup>152</sup> *Id.*

<sup>153</sup> Vaughan, *supra* note 60, at 290.

<sup>154</sup> *City of Philadelphia*, 644 F.2d. at 190 (explaining at the appellate level that “[t]he government’s theory is that the appellees, the City of Philadelphia and numerous high-ranking officials of the City and its Police Department, have engaged in a pattern or practice of depriving persons of rights protected by the due process clause of the fourteenth amendment”).

<sup>155</sup> BONNIE MATHEWS & GLORIA IZUMI, *U.S. COMM’N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES* (1981), *available at* <http://catalog.hathitrust.org/Record/007105152>. (stating that the DOJ alleges that “appellees discourage victims of abuse from complaining, suppress evidence that inculpates police officers, accept implausible explanations of abusive conduct, harass complainants and witnesses, prematurely terminate investigations, compile reports that justify police officers’ conduct regardless of actual circumstances, refuse to discipline police officers for known violations, and protect officers from outside investigations”).

<sup>156</sup> *Id.* at 189 (identifying injunctive relief as the desired remedy).

<sup>157</sup> *United States v. City of Philadelphia*, 482 F.Supp. 1248 (1979).

<sup>158</sup> *City of Philadelphia*, 644 F.2d. at 206 (stating that “we will hold the Attorney General to the same pleading requirements we demand of a private litigant who brings an action under the Civil Rights Acts. The appellant failed to satisfy these standards, and it deliberately rejected an opportunity to amend its complain”).

with institutional problems.”<sup>159</sup> In the eyes of the DOJ, this meant that simple criminal prosecution of individual officers was an ineffective deterrent to police misconduct. After all, “...if an officer ... perceives that he or she is going to be shielded and protected by the institution from an investigation and from prosecution ... then I think what we have is a situation where prosecuting individual officers is not going to change the environment.”<sup>160</sup>

Similarly, in 1970s through 1990s in Los Angeles, evidence emerged that a rash of misconduct incidents were not caused by rogue officers, but instead by an organization that fostered and protected wrongdoing. For example, in the early 1980s, the Los Angeles Police Department (LAPD) stopped Adolph Lyons for a traffic violation. Even though Lyons did not resist the officers, the officers nonetheless seized Lyons in a chokehold without any provocation.<sup>161</sup> As part of his §1983 suit against the LAPD, Lyons found that the LAPD regularly used this potentially unconstitutional practice against criminal suspects; consequently, he asked for the federal court to enjoin the LAPD from using such chokeholds in the future.<sup>162</sup> In a 5-4 decision, the U.S. Supreme Court concluded that Lyons did not have standing to levy a claim for injunctive relief since he could not show any real or immediate threat that he would be stopped and illegally choked in the future.<sup>163</sup> While Lyons could seek individual damages against the police and the city, he could not seek injunctive relief.<sup>164</sup> Lyons argued that the use of an unconstitutional chokehold was not the result of a single officer, but of an organization that actively promoted the use of a potentially problematic policing technique. Another prominent demonstration of the organizational roots of misconduct in the LAPD is the Rodney King beating. In March of 1991, amateur cameraman George Holliday caught on tape the LAPD brutally beating King after a traffic stop.<sup>165</sup> Subsequent investigation into the incident revealed that the events were not an isolated event, but a reflection of a deeply engrained organizational problem. Professor Jerome Skolnick commented that the violent confrontation “was going to be the historical event for police in our time.”<sup>166</sup> Skolnick further predicted that the behavior was

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<sup>159</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS., MATHEWS, AND IZUMI, *supra* note 138.

<sup>160</sup> *Id.*

<sup>161</sup> *Lyons*, 461 U.S. at 97 (identifying a traffic violation as the initial cause of the interaction with plaintiff).

<sup>162</sup> *Id.* at 99-100 (stating that at the district level, an order was handed down enjoining the use of the tactic).

<sup>163</sup> *Id.* at 100, 102 (identifying “immediately in danger of sustaining some direct injury” as the standard and identifying intent by the court to reverse the granting of injunctive relief).

<sup>164</sup> *Id.* at 100 (denying injunctive relief).

<sup>165</sup> The Holliday tape showed LAPD kicking and striking King “with 56 baton strokes.” INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 3 (1991) [hereinafter Christopher Commission Report] (“Within days, television stations across the country broadcast and rebroadcast the tape, provoking a public outcry against police abuse”). Within days, video of the beating appeared on national news across the country, sparking public outcry and demands that the resignation of LAPD Chief Daryl Gates. *An Aberration or Police Business as Usual?* N.Y. Times, March 10, 1994, at 47 (“More than 1,000 callers from around the country phoned Mr. Gates's office expressing their outrage and demanding that he resign”).

<sup>166</sup> Seth Mydans, *Seven Minutes in Los Angeles - A Special Report: Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, March 18, 1991, text available at

indicative of a larger problem in the LAPD, explaining that “Two people can go crazy, but if you have 10 or 12 people watching them and not doing anything, this tells you that this is a normal thing for them.”<sup>167</sup> These events raise the obvious question—how can an organization facilitate such horrendous abuse? In the next Part, I briefly describe how the organizational response to misconduct can facilitate such patterns or practices of misconduct.

## II MAKING POLICE MISCONDUCT ROUTINE

The inherent characteristics of the American institution of policing mean that wrongdoing will occur invariably in every agency. And given the decentralization of policing in the United States and the disparities between agencies, some departments will have less incentive to fight this misconduct rigorously. This is particularly important because policing scholars believe that the organizational response to misconduct is critical. I argue that police organizations facilitate systemic misconduct by making this kind of wrongdoing routine.

Misconduct becomes routine primarily through the development of an internal organizational culture that passively permits wrongdoing. This sort of culture often develops through a lack of oversight mechanisms and is reinforced through training, punishment, and rewards. In doing so, I borrow heavily from organizational research, specifically from Professor Diane Vaughan’s work on the “dark side of organizations.”<sup>168</sup> Organizational research shows that socialization and on-the-job training can make rule violation routine.<sup>169</sup> Organizational leadership also appears to be critically important to the presence of misconduct. Leaders can apply performance pressure that affects individual action and can support internal cultures that either indirectly or directly condone misconduct.<sup>170</sup> This, the “willingness [of an organizational member] to use illegitimate means on the organization’s behalf is sealed by a reinforcing system of rewards and punishments.”<sup>171</sup> The incidents in both Philadelphia and Los Angeles illustrate how this sort of normalization or routinization can facilitate egregious misconduct. For example, in Philadelphia, the DOJ had investigated six homicide detectives for coercing confessions about of potentially innocent suspects.<sup>172</sup> But rather than punishing this behavior, the Philadelphia Police Department actually rewarded it. Amazingly, at least one of those convicted of coercing confessions out of criminal suspects actually received a promotion and received public support from City leadership.<sup>173</sup>

The events in Los Angeles, though, are perhaps the best and most thoroughly documented case of an organization normalizing and routinizing misconduct. In the aftermath of the Rodney King events, the City of Los Angeles formed an Independent Commission to

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<http://www.nytimes.com/1991/03/18/us/seven-minutes-los-angeles-special-report-videotaped-beating-officers-puts-full.html>

<sup>167</sup> *Id.*

<sup>168</sup> *See generally id.*

<sup>169</sup> *See, e.g.,* Joseph Bensman and Israel Gerver, *Crime and Punishment in the Factory: The Function of Deviancy in Maintaining the Social System*, 28 *Amer. Sociological Rev.* 588 (1963); MAURICE PUNCH, *CONDUCT UNBECOMING* (1985).

<sup>170</sup> Vaughan, *supra* note 60, at 290.

<sup>171</sup> *Id.*

<sup>172</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS., MATHEWS, AND IZUMI, *supra* note 138.

<sup>173</sup> *Id.*

formally investigate the conditions that precipitated the incident, headed by Warren Christopher.<sup>174</sup> The report filed by this commission came to be informally known as the Christopher Commission Report. The Christopher Commission Report found a wide range of systemic problems affecting the LAPD including problems with use of force, complaint procedures, training policies, and structural organization. The commission found a startling pattern of excessive use of force amongst a small portion of officers.<sup>175</sup> The Christopher Commission Report also determined the LAPD used insufficient complaint procedures and improper investigations in cases where citizens levied complaints.<sup>176</sup> Once more, the commission determined that internal policies and procedures used by the Internal Affairs Division make it hard for citizens to file complaints. For example, “[s]ome intake officers actively discourage filing by being uncooperative or requiring long waits before completing a complaint form.”<sup>177</sup> The Christopher Commission Report also concluded that the LAPD’s training programs were unsatisfactory.<sup>178</sup> The commission believed that the systemic misconduct could be traced back to training programs that emphasized the use of physical force as opposed to verbal skills.<sup>179</sup> And

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<sup>174</sup> See generally Christopher Commission Report, *supra* note 165.

<sup>175</sup> While the vast majority of LAPD officers had only 1-2 allegations of excessive force, around “183 officers had four or more allegations, 44 had six or more, 16 had eight or more, and one had 16 such allegations.” *Id.* at ix-x. Similarly, of the 6,000 police officers involved in use of force incidents between January 1987 and March 1991. *Id.* at x. Again the overwhelming majority of all officers had fewer than 5 reported uses of force. *Id.* (explaining that “...63 officers had 20 or more reports each...” and “[t]he top 5% of the officers [ranked by number of reports] accounted for more than 20% of all reports”). But a small cohort of officers accounted for a large amount of all use of force reports. *Id.* Among the officers that were subject to the most allegations of excessive use of force, “the performance evaluation reports for [these problematic 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 xi.

<sup>176</sup> The commission reviewed “83 civil lawsuits alleging excessive or improper force by LAPD officers for the period 1986 through 1990 that resulted in a settlement or judgment of more than \$15,000.” *Id.* at xi. This review showed that the majority of “cases involved clear and often egregious misconduct resulting in serious injury or death to the victim.” *Id.* Of particular note, the commission found that the LAPD’s internal investigation into the events surrounding these 83 lawsuits were regularly “light or non-existent.” *Id.* The commission also found that the LAPD’s internal procedures for handling citizen complaints frequently led to public frustration. Out of 2,152 citizen allegations of excessive force, the LAPD only sustained 42. *Id.* at xix. This means that the LAPD sustained roughly 1-2% of all citizen complaints for excessive use of force. This was in part because the part of the police department responsible for investigating these claims—the Internal Affairs Division (IAD) had limited resources *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> As the report explained, LAPD officers go through three different training phases. *Id.* at xvi. Officers get their initial training at the police academy. *Id.* After this, officers then go through a probationary period for one year when they work in the field with more experienced officers. *Id.* After this, officers received continuing in-service training. *Id.*

<sup>179</sup> De-escalation, they argued, should be an important component of training at every stage. *Id.* The commission also found that training did not emphasize culture respect and awareness enough. *Id.* Additionally, the commission found that the requirements for training officers were insufficient. *Id.* at xvii. These field training officers (FTOs) “guide new officers’ first contacts with citizens and have primary responsibility for introducing the probationers to the culture and traditions of the

the commission noted several other systemic problems, including startling cases of documented racism.<sup>180</sup> The commission cited several specific examples of racist behaviors by LAPD officers documented cases where officers referred to interactions with minority residents as “monkey slapping time,” and among other choice comments.<sup>181</sup> Shortly before the King beating, in fact, two of the officers involved were comparing a domestic dispute between two African-American individuals to “gorillas in the mist” over the radio.<sup>182</sup> More disturbingly, evidence suggests that leadership within the police department heard or knew of these kinds of statements, but did nothing to stop them or punish those involved.<sup>183</sup>

The LAPD during this time bore all of the hallmarks of a problematic police organization: a lack of internal accountability measures, supervisors that did not punish obvious misconduct, and leadership that either implicitly or explicitly approved of wrongdoing. This made misconduct normal within the organization. External punishment of individual officers—the most common federal response to police wrongdoing during the twentieth century—merely addressed isolated symptoms. Such a historical approach could not treat the underlying illness. Thus, SRL must be understood as response tailored specifically to the challenges posed by this systemic failure to control misconduct within some American police agencies.

## CONCLUSION

Make no mistake. Without the Rodney King incident, Congress may have never authorized SRL. As I describe more in Chapter 2, this single event provided a unique political opportunity for liberal members of Congress to push for an expansion SRL into a new institutional realm. But any description of SRL must not start with the Rodney King incident. Instead, as I demonstrate, SRL must be understood as a continuation of a century-long effort to combat structural, political, and organizational conditions that promote systemic wrongdoing within local police departments. In a handful of troubled agencies, a lack of external oversight and permissive organizational cultures make wrongdoing routine. These agencies have shown a systemic unwillingness to control misconduct. Given the unique American approach to law enforcement, the existence of these sorts of problematic policing agencies is inevitable. SRL represented the first, invasive federal response to police agencies that systemically fail to control misconduct within their ranks.

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Department.” *Id.* Thus, it should be no surprise that the commission felt that these officers’ conduct was critical in ensuring an adequate training program. The requirements for these FTOs were considered insufficient since “there are no formal eligibility or disqualification criteria for the FTO position based on an applicants’ disciplinary records.” *Id.*

<sup>180</sup> *Id.* at xii.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 14

<sup>183</sup> *Id.* at xii-xiii.

# Chapter 2

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## The Unnoticed Transformation

### INTRODUCTION

How did Congress come to authorize SRL in police departments? And why did Congress choose equitable relief as the regulatory mechanism to address the systemic failure to control misconduct in American police departments? In this chapter, I describe the legislative maneuvering that led to the eventual passage of § 14141. As I show, the beating of Rodney King in 1991 spurred congressional interest in the federal regulation of police misconduct and added urgency to a growing push for a public right of action.<sup>1</sup> But even after Congress expressed serious interest in SRL in police departments, it took years for the measure to become law. It wasn't until 1994 that Congress authorized SRL as part of a larger omnibus crime bill known as the Violent Crime Control and Law Enforcement Act (VCCLEA).<sup>2</sup> As discussed in Chapter 1, this was a historic moment—a dramatic shift in how the federal government responds to the systemic failure of some police agencies to control misconduct. Yet amazingly, *no one noticed*. Major media outlets all but ignored the passage of SRL, focusing their coverage instead on more controversial components of the VCCLEA like the federal assault weapons ban.<sup>3</sup> Even the legislative record from the VCCLEA includes no significant mentions of SRL.<sup>4</sup>

Fast forward two decades and many of the nation's largest police agencies have undergone or are currently undergoing SRL via § 14141, including Los Angeles, Seattle, Washington, D.C., Pittsburgh, New Orleans, Cincinnati, and Detroit.<sup>5</sup> Other major American cities, like New York, Portland, Austin, Columbus, Providence, Albuquerque, and Tulsa have been subject to formal DOJ investigation pursuant to § 14141.<sup>6</sup> Combined, the police departments that have been subject to some sort of DOJ action via § 14141 serve a combined population of over 56 million Americans.<sup>7</sup> That means that nearly *one in five Americans* lives in a jurisdiction that is served by a law enforcement agency that has been subject to a § 14141

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1 *See infra* Part I.A (describing the Rodney King beating and the congressional response).

2 *See infra* Part I.B

3 *See infra* Part I.C (describing the various parts of the VCCLEA).

4 *See infra* Part III.A and Figure 2.1 (showing the comparative importance of structural police reform as measured by media mentions in the New York Times).

5 *See infra* Appendices A and B. I obtained the information on investigations and structural reform actions directly from the DOJ. The full list of all investigatory action is available in the appendices of this dissertation.

6 *Id.*

7 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. The exact total is 56,017,310 using the United States Census population estimates for 2012 as the baseline for population. *See* Appendix A.

investigation.<sup>8</sup> Make no mistake. SRL is a critical new component of American policing law. In theory, the equitable right of action afforded by § 14141 is uniquely tailored to address the apparent causes of patterns of practices of misconduct in local police agencies. Soon after the measure's passage, a small handful of policing scholars were optimistic that § 14141 could transform the field of American policing law.<sup>9</sup> Some called the passage of SRL “more significant, in the long run, than *Mapp v. Ohio*, which mandated the exclusion of evidence obtained in violation of the Fourth Amendment.”<sup>10</sup>

As I argue in this chapter, this sort of optimism was understandable. Upon passage, § 14141 has transformative potential. It gives the federal executive branch authority to define what constitutes legitimate policing within the field of American law enforcement. In a tremendously decentralized field such as American policing,<sup>11</sup> § 14141 is a rare opportunity for one central body to define the boundaries of acceptable policing. SRL also provides the federal government with the opportunity to demand external monitoring of problematic police agencies.<sup>12</sup> These third-party compliance professionals theoretically allow § 14141 to facilitate real change in problematic police agencies.<sup>13</sup> This could potentially overcome concerns of mere symbolic compliance.<sup>14</sup> SRL

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<sup>8</sup> I calculated this number by dividing the total number of citizens living in jurisdictions served by a department subject to § 14141 action. The total population of the United States is estimated at 313,900,000. This means that around 18% of Americans are served by a police agency that has been subject to a § 14141 investigation.

<sup>9</sup> See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 457 (2003) (stating that §14141 is “perhaps the most promising mechanism” for reducing police misconduct”).

<sup>10</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 538–39 n.134 (2001).

<sup>11</sup> BRIAN A. REAVES, U.S. DEPT’ OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), available at <http://www.bjs.gov/content/pub/pdf/csllca08.pdf> (putting the number of state and local law enforcement agencies at 17,985).

<sup>12</sup> See Chapter 4 (discussing the appointment of a monitor as a critical component of structural police reform).

<sup>13</sup> In regulating organizations, the law commonly relies upon compliance professionals who act as social filters in interpreting and implementing the tenants of the regulation. These compliance professionals, as is the case in structural reform litigation, normally are individuals with extensive experience in the organizational field being regulated (i.e. former police chiefs or litigators). Compliance professionals are therefore not impartial facilitators of the law, but rather encourage regulated organizations to adopt practices common amongst other organizations in the field. In this way, many regulations of organizations develop endogenously—that is, the meaning of external regulation is “formed in part through the actions of organizations and the models of organizational action that become institutionalized in organizational fields.” Lauren B. Edelman, *The Legal Lives of Private Organizations*, BLACKWELL COMPANION LAW SOC. 231, 244–45 (2004).

<sup>14</sup> Cf. Lauren Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, in PAUL BURSTEIN, EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY 247 (1994) (describing how, in the wake of ambiguous mandates handed down by civil rights laws and weak enforcement mechanisms, companies were able to avoid true compliance by creating symbolic structures that suggested compliance—even if true compliance was never actually achieved).

introduces a new branch of the government to the field of police regulation—the federal executive branch.<sup>15</sup> Historically, the only federal branch of government that has had a significant role in regulating local police behavior has been the judiciary.<sup>16</sup> This single branch approach to federal oversight has generally been ineffective, in part because of the judiciary’s institutional limitations. Since Congress authorized SRL, the federal executive now joins the judiciary in regulating local police behavior. In SRL, the federal executive and judicial branches work cooperatively to craft and enforce constitutional protections. Congress has authorized the executive branch to identify police departments engaging in systematic misconduct. Congress has also given the executive branch the power to recommend policies necessary to reform these police agencies. Congress has tasked the judiciary with the job of overseeing the reforms crafted and negotiated by the executive branch. Thus, SRL introduces what I describe as a form of *cooperative federal oversight* of local police agencies. And in doing so, SRL attempts to take advantage of the unique institutional competencies of each branch of the federal government.<sup>17</sup>

But has SRL actually lived up to its potential? Has it significantly affected American police departments? Despite the law’s potential, there has been little empirical research on the subject.<sup>18</sup> Little is known about how the DOJ has identified police departments in violation of § 14141. No research has explored the DOJ’s internal enforcement policies. And no work has comprehensively documented how the SRL process works from beginning to end. I conclude this chapter by arguing that these voids in the literature are increasingly indefensible in light of the growing importance of SRL.

I have divided this chapter into three parts. In the first part of this chapter, I chronicle the legislative maneuvering that led to SRL. The path to SRL started soon after the Rodney King beating in 1991 when the House Subcommittee on Civil and Constitutional Rights convened a hearing on police brutality. It was in these hearings that expert witnesses, including those from the American Civil Liberties Union (ACLU) emphasized the need for an equitable response to local police agencies that systematically fail to control misconduct within their ranks. The ACLU was not the first group to recommend the use of structural reform litigation to address police misconduct. In 1981, the United States Commission on Civil Rights (USCCR) similarly recommended some sort of equitable remedy. Soon thereafter, several members of the Subcommittee drafted and submitted legislation that closely mirrored the ACLU and USCCR recommendations. This proposed legislation, known as the Police Accountability Act of 1991, received approval from the House Committee on the Judiciary and was incorporated into the

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15 The statute states that “It 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]henver the Attorney General has reasonable cause to believe that a violation of paragraph 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 (1994). Therefore, § 14141 puts the authority to initiate structural police reform in the hands of the Attorney General—a primary member of the executive branch.

16 See *supra* Chapter 1 (describing the judiciary as the primary federal regulator of local police department misconduct).

17 See *infra* Part II.C.4 (describing the unique institutional competencies of each branch of government and how this model of cooperative federal oversight can take advantage of the competencies of both the executive and judicial branches).

18 See *infra* Part III.B (giving an overview of the available literature on structural police reform).

Omnibus Crime Bill of 1991. The measure, though, was derailed via a Republican filibuster. Like dozens of criminal justice measures proposed in the early 1990s, lawmakers revived the proposal in 1993 and incorporated it into the VCCLEA.

In the second part of this chapter, I contend that the regulatory model embraced by SRL—that is equitable relief permitting court-monitored restructuring—was both historically tested and well-suited to the unique problem facing American law enforcement. In the decades leading up to the passage of § 14141, Congress gave the Attorney General authority to initiate structural reform litigation in numerous other institutional contexts, including employment, housing, prisons, education, and voter rights among others.<sup>19</sup> The Rodney King crisis provided liberal factions in Congress with a highly visible example of misconduct in a local government. In the years leading up to the King incident, civil rights groups had been quietly pushing for an expansion of structural reform litigation. The King beating legitimized Congressional interest in expanding structural reform litigation to yet another institutional context. It made sense for Congress to choose equitable relief as the mechanism to address the systematic failures by local police agencies to control misconduct. The *Los Angeles v. Lyons* and *United States v. Philadelphia* cases made private equitable suits against local police departments practically impossible. This put the impetus on Congress to affirmatively authorize structural reform litigation in the context of police departments. I also argue that SRL offered a unique remedy by which the federal government could define the boundaries of legitimate policing behavior and overcome concerns of symbolic compliance.

In the third part of this chapter, I hypothesize on the emerging importance of SRL. I use a variety of methodological approaches to demonstrate that the public has not fully appreciated the importance of SRL, despite its potential to transform the regulation of police misconduct. The DOJ has used its authority under § 14141 to investigate departments across the country serving tens of millions of Americans. Despite receiving virtually no attention during the VCCLEA debates, I contend that SRL has emerged as the most important reform made in the VCCLEA decades later. Nevertheless, few scholars have extensively researched the SRL process. Thus, I situate this broader project as an attempt to fill these critical gaps in the SRL literature.

## I. LEGISLATIVE MANEUVERING

So how did SRL end up in the VCCLEA? Although civil rights advocates had recognized the importance of SRL for decades, it wasn't until the early 1990s that the issue rose to national importance. This is in large part because of one single incident of appalling police brutality—the LAPD's beating of Rodney King.<sup>20</sup> This event almost immediately spurred Congressional investigation into the scope of police misconduct problems in the United States. Within weeks of the event, the House Subcommittee on Civil and Constitutional Rights convened to consider the

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<sup>19</sup> Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 11 (2009)

<sup>20</sup> For a detailed account of the Rodney King events, see Seth Mydans, *Seven Minutes In Los Angeles - A Special Report: Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES (March 18, 1991), <http://www.nytimes.com/1991/03/18/us/seven-minutes-los-angeles-special-report-videotaped-beating-officers-puts-full.html> (last visited Jul 15, 2013)

how the Federal Government could do more to address brutality among the ranks of local police.<sup>21</sup>

The Subcommittee members called various experts within the field of policing law, including Paul Hoffman, the legal director of the American Civil Liberties Union (ACLU) of Southern California. Hoffman and his colleagues at the ACLU used the Rodney King incident to illustrate the need for Congress to authorize SRL.<sup>22</sup> Republican subcommittee members generally opposed such a grant of power to the federal government.<sup>23</sup> Democratic representatives, though, immediately supported the idea.<sup>24</sup> Soon thereafter, a contingent of Democratic leaders—many of which served on the Subcommittee—put forward a bill authorizing both public and private SRL.<sup>25</sup> Labeled the Police Accountability Act of 1991, this measure was ultimately incorporated into the Omnibus Crime Bill of 1991.<sup>26</sup> A Republican filibuster ultimately derailed this first legislative attempt to authorize SRL.<sup>27</sup> Three years later, a similar measure found its way into the Violent Crime Control and Law Enforcement Act (VCCLEA) of 1994 and became law soon thereafter.<sup>28</sup> In addition to authorizing SRL, the VCCLEA mandated strict truth-in-sentencing requirements, implemented life sentences for repeat violent offenders, banned numerous types of assault weapons, barred juvenile ownership of handguns, added additional penalties for hate

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21 The Rodney King beating happened on March 3, 1991. On March 20, 1991, the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary called a hearing to discuss the issue of police brutality. At this hearing, discussion of the Rodney King incident clearly dominated discussions. *See Police Brutality: Hearing Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 102d Cong. (1991).

22 *Id.* at 54-118 (showing the transcripts of Hoffman’s testimony before the Subcommittee, specifically on page 61 when Mr. Hoffman states that “if there is a pattern or practice of abuse, the Justice Department ought to be able to deal with it”).

23 *See id.* at 2 (with Republican Representative Howard Coble stating that he would “like for this sort of misconduct, for want of a better word, to be resolved internally”).

24 *See, e.g., id.* at 131 (Democratic Representative Don Edwards stating that the suggestion that Congress authorize the DOJ to initiate pattern or practice litigation is a “very, very useful concrete thing” that they could do).

25 Police Accountability Act of 1991, H.R. 2972 102d Cong. (1991). The measure was sponsored by Representatives William Edwards, Howard Berman, John Conyers, Julian Dixon, Mervyn Dymally, Michael Kopetski, Meldon Levine, Craig Washington, and Maxine Waters. Four of those individuals—Edwards, Conyers, Washington, and Kopetski—served on the Subcommittee that heard the initial recommendation that Congress expand structural police reform authority to the DOJ.

26 Omnibus Crime Control Act of 1991, H.R. 3371, 102nd Cong. (1991); *see also Federal Response to Police Misconduct: Hearing Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 103d Cong. at 2 (1992) (Representative Edwards stating that structural police reform measure was incorporated into the Omnibus Crime Bill of 1991).

27 *Federal Response to Police Misconduct*, *supra* note 26, at 2 (Representative Edwards stating that after the subcommittee unanimously approved the structural police reform measure and incorporated the measure into the Omnibus Crime Bill of 1991, “there’s been a filibuster ever since on the whole bill”).

28 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §210401 (1994).

crimes, extended the death penalty, and codified the Violence Against Women Act.<sup>29</sup> The overall tone and content of the VCCLEA was remarkably conservative and punitive. Throughout the VCCLEA debates, liberal representatives pushed their peers to include some liberal reforms of criminal justice system. Virtually all of these attempts failed. SRL, though, was one of the few politically progressive measures that found its way into the final version of the VCCLEA.

It is important to recognize that SRL, as authorized in 1994, was not an innovative idea. “On three separate occasions” before the passage of §14141, Congress considered giving the Attorney General authority to seek equitable relief.<sup>30</sup> Each time Congress rejected such an expansion of federal authority into the realm of local policing.<sup>31</sup> During the same time, Congress expanded the Attorney General’s authority to initiate structural reform litigation in numerous other institutional contexts, including employment, education, housing, and voter rights, among others.<sup>32</sup> In many respects, local policing was one of the last institutional context to come to be regulated by structural reform litigation. The Rodney King crisis provided liberal factions in Congress with a jarring, highly public example of misconduct in a local government. This horrifying incident of police wrongdoing legitimized Congressional interest in expanding the use of structural reform litigation to yet another institutional context—local policing.

In the subsections that follow, I describe the road to SRL. I begin by briefly recounting the role of the Rodney King incident in elevating the issue of police accountability to the national stage. I then describe the passage of SRL. I conclude by elaborating on how SRL has reimagined the traditional approach to police regulation.

#### *A. The Rodney King Incident*

Many writers claim that the Rodney King incident ignited concerns about widespread misconduct in the LAPD and built political support for the passage of § 14141.<sup>33</sup> Thus, it seems appropriate to start the Los Angeles story by recounting the events of the Rodney King beating. The Rodney King beating would likely never have become a national story without the amateur

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<sup>29</sup> See, SHAHID M. SHAHIDULLAH, CRIME POLICY IN AMERICA: LAWS, INSTITUTIONS, AND PROGRAMS (2008); DOROTHY V. STICKLE, WOMEN’S ISSUES: ECONOMIC, SOCIETAL, AND PERSONAL 2 (2008); RITA HAMMER, FORENSIC NURSING: A HANDBOOK FOR PRACTICE xi (2011).

<sup>30</sup> *Id.* at 27 (Assistant Attorney General of the Civil Rights Division, John R. Dunne stating in his Subcommittee testimony that Congress considered such a proposal in 1957, 1959, and 1964—rejecting it each time).

<sup>31</sup> *Id.*

<sup>32</sup> Harmon, *supra* note 19, at 11 (“[i]n other civil rights arenas, such as education, voting, housing, and prisons, structural reform litigation has supplemented damages actions and criminal punishment as a tool for generating change in public institutions”).

<sup>33</sup> *Id.* at 12–13 (discussing the role of the Rodney King beating in moving Congress to act); see also DARRELL L. ROSS, CIVIL LIABILITY IN CRIMINAL JUSTICE 183–85 (2012) (identifying the King beating as a major turning point in police regulation, precipitating § 14141); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUMBIA L. REV. 1384, 1401 (2000) (stating that “[i]n 1991, however, the brutal beating of Los Angeles resident Rodney King by six LAPD officers, caught on tape and broadcast repeatedly in the days following the incident, focused national attention on the problem of police abuse and spurred Congress to action” and explaining how Congress opted to grant the Attorney General an equitable right of action).

camera work of George Holliday.<sup>34</sup> The Holliday tape showed LAPD kicking and striking King “with 56 baton strokes.”<sup>35</sup> Within days, video of the beating appeared on national news across the country, sparking public outcry and calls for the resignation of LAPD Chief Daryl Gates.<sup>36</sup> Famously, Chief Gates referred to the incident as “an aberration,” suggesting that it was not demonstrative of a broader problem with the LAPD.<sup>37</sup>

The pursuit started around 12:30 a.m.<sup>38</sup> when California Highway Patrol (CHP) officers first observed King’s Hyundai speeding in the northeastern San Fernando Valley in Los Angeles.<sup>39</sup> When the CHP officers put on their emergency lights and sirens, King slowed but did not stop.<sup>40</sup> An LAPD squad car—assigned to Officers Laurence Powell and Timothy Wind—then joined the pursuit.<sup>41</sup> At around 12:50 a.m., Powell and Ward radioed in a “Code 6,” which signifies that a chase had come to a close.<sup>42</sup> The LAPD Radio Transmission Operator then broadcast a “Code 4,” a notification to all officers that no additional assistance is needed at the scene of the pursuit.<sup>43</sup> 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.<sup>44</sup> The Christopher Commission—an independent panel assigned to investigate the events—found that “[a] number

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34 *Tape of Police Beating Causes Major Furor*, SEATTLE TIMES, Mar. 6, 1991, at A2 (“The video, shot by amateur photographer George Holliday, shows no indication that King tried to hit or charge the officers.”)

35 INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 3 (1991).

36 *Id.* at 3 (“Within days, television stations across the country broadcast and rebroadcast the tape, provoking a public outcry against police abuse.”); *An ‘Aberration’ or Police Business As Usual?*, N.Y. TIMES, Mar. 10, 1994, at E7 (“More than 1,000 callers from around the country phoned Mr. Gates’s office expressing their outrage and demanding that he resign.”).

37 David Parrish, *Activists: L.A. Police ‘Street Justice’ Brutal*, SPOKESMAN-REV., Mar. 10, 1991, at A3 (quoting Chief Gates as saying that the event was an aberration, and that “[i]t’s not the kind of conduct that we have normally from our officers”).

38 Mydans, *supra* note 20 (“Shortly before 12:30 A.M. on Sunday, March 3, Mr. King was driving fast down the Foothill Freeway near San Fernando, at the northern edge of Los Angeles.”).

39 INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 35, at 4. Notably, King was not alone in the car at the time of the incident. Two other passengers were in the car, both African-American. Details also emerged that King was traveling at approximately 110 to 115 miles per hour, according to the CHP. *Id.*

40 In addition to not stopping, King allegedly “left the freeway and continued through a stop sign at the bottom of the ramp at approximately 50 m.p.h.” *Id.* The CHP also reports that King continued to then drive at a high speed and eventually run a red light at approximately 80 miles per hour. *Id.*

41 *Id.* In addition to the squad car driven by Powell and Wind, “[a] Los Angeles Unified School District Police squad car which was in the area also joined the pursuit.” *Id.*

42 *Id.*

43 *Id.* at 5 (“[A] Code 4 notifies all units that ‘additional assistance is not needed at the scene’ and indicates that all units not at the scene ‘shall return to their assigned patrol area.’”).

44. *Id.*

of these officers had no convincing explanation for why they went to the scene after the Code 4 broadcast.”<sup>45</sup>

Initially after the stop, the CHP officers attempted to take the lead and arrest King.<sup>46</sup> But LAPD officers soon took over, with LAPD Sergeant Stacey Koon telling the CHP officer “that they [the LAPD] would handle it.”<sup>47</sup> Sergeant Koon initially perceived King as threatening, disoriented, and potentially under the influence of PCP.<sup>48</sup> Sergeant Koon ordered King to lay flat on the ground—a command that LAPD officers claim King refused to obey.<sup>49</sup> Officer Powell claimed that as he tried to force King to the ground, King “rose up and almost knocked him off his feet.”<sup>50</sup> Sergeant Koon then used an electric stun gun twice on King.<sup>51</sup> The George Holliday video begins around this time.<sup>52</sup> At the start of the tape, King is on the ground and appears to move in the direction of one of the officers.<sup>53</sup> The officer viewed this as a “lunge” in his direction, although the report notes that this move would also be consistent with King simply trying to “get away.”<sup>54</sup> At this point, Officer Powell hit King in the head with a baton, causing King to fall to the ground immediately. King then rose to his knees where officers struck King over and over. Sergeant Koon ordered the officers to use “power strokes,” telling officers to “hit his joints, hit his wrists, hit his elbows, hit his knees, [and] hit his ankles.”<sup>55</sup> In total, officers struck King with batons fifty-six times and kicked him six times.<sup>56</sup> Officers then “dragged [King] on his stomach to the side of the road to await arrival of a rescue ambulance.”<sup>57</sup> Although there were some allegations by local news teams that officers yelled racial epithets during the beating, these allegations were deemed inconclusive by the investigators.<sup>58</sup> In the video tape, it appears

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45 *Id.* For example, “one of these officers told District Attorney investigators that he proceeded to the scene after the Code 4 ‘to see what was happening.’” *Id.*

46 *Id.* (“At the termination of the pursuit, CHP Officer Timothy Singer, following ‘felony stop’ procedures, used a loudspeaker to order all occupants out of King’s car.”).

47 *Id.* at 6. This happened after CHP Officer Melanie Singer attempted to perform a “felony kneeling” procedure to take King into custody. *Id.*

48 *Id.* (adding that although he “felt threatened,” he still “felt enough confidence in his officers to take care of the situation”).

49 *Id.* (“According to Koon and Powell, King responded by getting down on all fours and slapping the ground and refusing to lie down.”).

50 *Id.*

51 *Id.* It is unclear from the reports whether or not the stun gun had a serious effect on King. The Christopher Commission reports that Sergeant Koon felt that King did not respond to the stun gun, while another officer’s report finds that the stun gun did have an effect as King shook and yelled for approximately five seconds. *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 7.

56 *Id.* (“Finally, after 56 baton blows and six kicks, five or six officers swarmed in and placed King in both handcuffs and cordcuffs restraining his arms and legs.”).

57 *Id.*

58 *Id.* at 8.

that only once “did any officer try to intervene.”<sup>59</sup> About twenty witnesses from nearby apartments gathered to watch the events from a nearby apartment complex.<sup>60</sup> Witnesses told reporters that they were yelling at the police “don’t kill him” as the officers beat King.<sup>61</sup>

King received twenty stitches and suffered a broken cheekbone and right ankle.<sup>62</sup> Amazingly, officials initially charged King with both speeding and resisting arrest.<sup>63</sup> But as the video of the incident circulated around the nation, prosecutors decided to drop the charges.<sup>64</sup> After the events, details began to emerge about the background of the officers involved in the beating. A total of twenty-three officers had appeared at the scene of the beating at some point.<sup>65</sup> Four officers were directly involved in the use of illegal force against King—Sergeant Stacey Koon, and Officers Laurence Powell, Theodore Briseno, and Timothy Wind.<sup>66</sup> One of the officers involved in the beating had previously been suspended for sixty-six days in 1987 for beating a handcuffed man.<sup>67</sup> The other three officers had been subject to various complaints for excessive use of force—most of which the LAPD found to be unsubstantiated.<sup>68</sup> Another ten

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59. Mydans, *supra* note 20.

60. *Id.*

61. *Id.* (quoting Elois Camp, a sixty-five-year-old retired school teacher who watched the events from her nearby apartment).

62. INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 35, at 8 (noting that in addition to these undeniable injuries, King alleged in his civil complaint that he “suffered ‘11 skull fractures, permanent brain damage, broken [bones and teeth], kidney damage, [and] emotional and physical trauma”). It is also worth noting that about five hours after his arrest, King had a blood-alcohol level of 0.075 percent, which suggests that he was legally drunk at the time of the events. A blood alcohol level of 0.08 percent is sufficient to prove legal intoxication. Since blood alcohol decreases every hour without alcohol at a relatively constant rate, it can be safely assumed that King’s blood alcohol level was above 0.08 percent at the time of the chase and subsequent police misconduct. *Id.*

63. *An ‘Aberration’ or Police Business As Usual?*, *supra* note 36.

64. *Id.* (“But those charges were dropped after the police chief, Darryl F. Gates, conceded that the tape showed unnecessary force being used and said that some of the police involved would face charges instead.”).

65. INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 35, at 11. The Report further clarified that these officers varied in age from 23 to 48. Of the officers at the scene, two were African American, four were Latino, and seventeen were white. *Id.*

66. *Id.*

67. Mydans, *supra* note 20, at 3. One officer even told a reporter from the *New York Times* of the “magic pencil” that police officers used to make such misconduct allegations disappear. *Id.*

68. INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 35, at 12. The full explanation of the officers past misconduct is reproduced below:

According to press reports, another officer had been suspended for five days in 1986 for failing to report his use of force against a suspect following a vehicle pursuit and a foot chase. (The suspect’s excessive force complaint against the officer was held “not sustained” by the LAPD.) A third indicted officer was the subject of a 1986 “not sustained” complaint for excessive force against a handcuffed suspect. Since the King incident, that officer has been sued by a citizen who alleges that the officer broke his arm by hitting him with a baton in 1989. *Id.*

officers were physically present, primarily as bystanders, during the incident.<sup>69</sup> Of these ten bystander officers, four were actually field training officers that were “responsible for supervising ‘probationary’ officers in their first year after graduation from the Police Academy.”<sup>70</sup>

Observers across the country immediately condemned the behavior of the officers involved in the King beating. President George H. W. Bush called the events “shocking” and called for the Justice Department to investigate the incident.<sup>71</sup> Professor Jerome Skolnick commented that the violent confrontation was “going to be the historical event for police in our time.”<sup>72</sup> Skolnick further predicted that the behavior was indicative of a larger problem in the LAPD, explaining that “[t]wo people can go crazy, but if you have 10 or 12 people watching them and not doing anything, this tells you that this is a normal thing for them.”<sup>73</sup> Although Chief Gates agreed that the events were “shocking,”<sup>74</sup> he insisted that that they were the result of a few bad officers, not any systemic problems within the department.<sup>75</sup> The Los Angeles District Attorney’s Office secured criminal indictments against Sergeant Koon and Officers Powell, Briseno, and Wind.<sup>76</sup> The District Attorney’s Office did not seek indictments against the seventeen officers at the scene who “did not attempt to prevent the beating or report it to their superiors.”<sup>77</sup> The prosecution resulted in an acquittal followed by days of chaos and rioting in Los Angeles and surrounding areas.<sup>78</sup> Although federal prosecutors successfully secured convictions against two of the officers involved, such an effort provided no deterrent for “the dozen officers present for the beating.”<sup>79</sup>

#### B. Legislative Response to Rodney King Incident

A little over two weeks after the shocking events in Los Angeles, the House Subcommittee on Civil and Constitutional Rights convened a hearing on police brutality in the United States.<sup>80</sup> While Representatives claimed that they did not intend the Subcommittee hearing to only discuss the Rodney King incident, discussions of the incident dominated conversation.<sup>81</sup>

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69 *Id.* at 11 (“Ten other LAPD officers were actually present on the ground during some portion of the beating.”).

70 *Id.* at 11–12.

71 Mydans, *supra* note 20.

72 *Id.*

73 *Id.*

74 INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 35, at 12.

75 Parrish, *supra* note 37 (explaining that the events were a mere aberration and not indicative of a broader problem).

76 INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 35, at 13.

77 *Id.* It is worth noting, though, that “[t]he District Attorney . . . referred the matter of the bystanders to the United States Attorney for an assessment of whether federal civil rights laws were violated.” *Id.*

78 Harmon, *supra* note 19, at 12.

79 *Id.* at 13.

80 See generally *Police Brutality*, *supra* note 21.

81 *Id.* at 1 (“Our purpose in this subcommittee is not to focus on that incident [the Rodney King beating] in isolation, but to examine the issues more broadly”).

Throughout the hearing, Representatives asked witnesses about the causes of the Rodney King beating and ways that Congress could use federal resources to prevent such events in the future. Democratic representatives quickly suggested the use of SRL to address systematic patterns of misconduct in local police agencies.<sup>82</sup> In his testimony before the subcommittee, the legal director of the ACLU further reiterated the importance of such a measure.<sup>83</sup> During these initial Subcommittee meetings, legislators discussed both laws that would allow the Attorney General and private litigants to initiate SRL.<sup>84</sup> Granting this power to individual litigants was particularly controversial at the time; but the drafters of the law felt that it was “necessary to experiment with new legal theories to reform the way police departments conducted themselves.”<sup>85</sup> Conservative lawmakers and police advocates claimed that the inclusion of such a measure would lead to frivolous and expensive litigation since “[a]ny individual who feels aggrieved by conduct that [he/she] perceives to be part of a pattern or practice can file a suit.”<sup>86</sup> The George H. Bush DOJ and Police Advocacy Groups strongly opposed the inclusion of any such individual right of action, eventually contributing to the measure’s failure.<sup>87</sup>

Despite this conservative criticism, liberal members of Congress soon introduced the Police Accountability Act of 1991—which would have authorized both private and publicly initiated SRL. The Act was eventually incorporated into the Omnibus Crime Control Act of 1991 (H.R. 3371) as Title XII.<sup>88</sup> To make the measure more appealing to Republicans, lawmakers in the Conference Committee for the Omnibus Crime Control Act removed the portion of Title XII that authorized individual-intimated claims for equitable relief against police departments.<sup>89</sup> The portion of the law that granted the DOJ the authority to seek injunctive relief was less controversial, likely in part because it was roughly analogous to similar powers granted to the DOJ in other similar contexts: school desegregation, employment discrimination, public housing, and prison condition cases.<sup>90</sup> But even this compromise was not enough to win over conservatives and Title XII died via filibuster.<sup>91</sup> Democratic legislators would soon revive Title XII by inserting a similar measure into the VCCLEA two years later.<sup>92</sup> The VCCLEA, which became law in 1994, was an enormous bill touching on nearly every aspect of the criminal justice

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82 Democratic Representative Washington appears to make the first reference to pattern or practice litigation as a possibility. *Id.* at 27.

83 *Id.* at 61 (Paul Hoffman suggesting the use of pattern or practice litigation).

84 The testimony of famous litigator Johnnie L. Cochran is indicative of the Subcommittee’s contemplated granting of authority to private litigants to initiate structural police reform. In his statement to the Subcommittee, Cochran explained that post *Lions*, Congress had to do more than merely grant private litigants the authority to initiate structural police reform—it needed to make clear statement about the basis for the private litigants standing. *Id.* at 75.

85 Gilles, *supra* note 33, at 1403

86 Terence Moran & Daniel Klaidman, *Police Brutality Poses Quandary for DOJ*, LEGAL TIMES, May 4, 1992, at 1.

87 *Id.*

88 Gilles, *supra* note 33, at 1402.

89 *Id.* at 1403.

90 *Id.*

91 Joan Biskupic, *Crime Measure is a Casualty of Partisan Skirmishing*, 49 CONGRESSIONAL QUARTERLY MAGAZINE 3528, 3530 (1991).

92 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §210401 (1994).

system.<sup>93</sup> The inclusion of SRL in the VCCLEA might initially seem puzzling. After all, the VCCLEA was a largely conservative measure designed to combat the nation's crime epidemic with a host of punitive measures. How did a Congress that authorized such a largely punitive criminal justice measure also come to authorize a radical expansion of federal oversight into local police affairs? In the next section I provide some background on the VCCLEA and explain why SRL was able to garner support in an otherwise conservative piece of legislation.

### C. *The Violent Crime Control and Law Enforcement Act*

In the early 1990s, Congress felt considerable authority to act in response to the multi-decade long rise in crime rates. The national concern over violent crimes rates understandable, as the rate of violent crimes had risen by 106% between 1970 and 1993.<sup>94</sup> During this same time period, murders rose by 20%, rapes by 120%, robberies by 49%, and aggravated assaults by 167%.<sup>95</sup> Around this same time, the U.S. spending on criminal adjudication and prisons “skyrocketed,” while spending on policing increased very little.<sup>96</sup> The total crime control expenditure budget increased from \$4.6 billion in 1965 to an astonishing \$100 billion in 1993.<sup>97</sup> This represents a 162% increase total spending as a percentage of gross domestic product.<sup>98</sup> As Beckett explained, “[f]or much of the past three decades [leading up to the VCCLEA], politicians have struggled to identify themselves as tougher than their competitors on crime, delinquency, and drug use.”<sup>99</sup>

Even as crime started to recede in the early 1990s, the media paid increased attention to the so-called crime epidemic. Indeed, in “a count by a reputable research organization showed that a record number of crime stories were broadcast [the year before the passage of the VCCLEA] by the three major television networks to a national audience.”<sup>100</sup> Even though crime had declined nationwide between 1992 and 1993, the media's coverage of murder stories tripled.<sup>101</sup> Stories on crime topped coverage of both the economy and the healthcare system. As Lord Windlesham theorized, significant improvements in the economy in the early 1990s “open[ed] up space for crime or some other social issue to take its place as the leading topic in

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93 For an excellent summary of these components and a detailed historical account of the VCCLEA's passage, see DAVID JAMES GEORGE HENNESSY WINDLESHAM, *POLITICS, PUNISHMENT, AND POPULISM* (1998).

94 FEDERAL BUREAU OF INVESTIGATIONS, *UNIFORM CRIME REPORTING STATISTICS (1970-2012)* (calculating crime rates using data from each year).

95 *Id.*

96 WILLIAM J STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 783–84 (2011).

97 KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 3 (1999).

98 *Id.*

99 *Id.* Noting as well that “[m]inorities have been especially affected by these developments” as “blacks now comprise over half of all prison inmates in the United States, up from one-third just twenty years ago.” *Id.*

100 DAVID JAMES GEORGE HENNESSY WINDLESHAM, *POLITICS, PUNISHMENT, AND POPULISM* (1998).

101 WINDLESHAM, *supra* note 100, at 5 (describing a study done that demonstrated that news coverage of crime increased precipitously in the time leading up the passage of the law, thereby potentially effecting the tone of the debate).

media coverage and also in the opinion polls.”<sup>102</sup> Whatever the actual reality, Windlesham explains, by the time that lawmakers introduced the VCCLEA in late 1993, “the fixed perceptions shared by lawmakers and the general public alike were of an ever-rising tide of violence that had started to engulf the United States in the late 1960s and early 1970s.”<sup>103</sup> Some scholars believe that this exaggerated portrayal of crime by the media resulted in a disproportionately punitive response in the VCCLEA.<sup>104</sup>

In the midst of perceived crime epidemic, then-candidate Bill Clinton promised that, if elected, he would push for the adoption of a crime bill during the beginning of his first term.<sup>105</sup> After his election, President Clinton kept to his promise. He turned to Chairmen of the Senate and House Judiciary Committees, Senator Joe Biden (D) of Delaware and Representative Jack Brooks (D) of Texas, to draft a crime bill that focused on “policing and prevention.”<sup>106</sup> According to Windlesham, “[o]n various occasions in the first six months of 1993, Clinton reminded Biden of his desire to see a draft without delay.”<sup>107</sup> As then-Congressman Bill McCollum, who served as the Chairman of the Subcommittee on Crime in the U.S House of Representatives’ Committee on the Judiciary, explained, Chairmen Biden and Brooks authored bills that reflected the American concern about crime.<sup>108</sup> As he explained in a law review article published contemporaneously with the Congressional debate over VCCLEA, “[o]ver the past decade, when Americans have been asked to identify the biggest problem facing the nation, crime has usually been the answer.”<sup>109</sup> According to McCollum’s recollection of the events, Congress felt pressure to pass the VCCLEA to address an array of national crime concerns—high crime rates, a perceived juvenile delinquency epidemic, and a prison system that too frequently released dangerous inmates before they substantially completed their sentence.<sup>110</sup> This mirrored comments made by the Clinton administration at a press conference in 1993, when he, Attorney General Janet Reno, Biden, Brooks, and members of Congress from both political parties announced their intent to pass a crime bill since “[t]he first duty of any government...was to try and keep its citizens safe....[and] clearly too many Americans were not safe.”<sup>111</sup> The Clinton administration initially prioritized the hiring of new police officers and gun control.

Around the same time though, Republican lawmakers announced their own proposal, which included the building of more prisons, mandatory minimum penalties for certain crimes, restrictions on habeas petitions for prisons on death row, and a new “three strikes and you’re

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102 *Id.* For other useful examples of the country’s apparent preoccupation with crime in policymaking, see JONATHAN SIMON, *GOVERNING THROUGH CRIME* (2003) (describing how the policymakers in the United States increasingly use crime and crime metaphors to guide policy).

103 *Id.* at 8.

104 See generally Sarah Eschholz, *Media and Fear of Crime: A Survey of the Research, The*, 9 UNIV. FLA. J. LAW PUBLIC POLICY 37 (1997) (detailing how media portrayals of crime have affected public fear and perceptions).

105 WINDLESHAM, *supra* note 100, at 31.

106 *Id.*

107 *Id.*

108 Bill McCollum, *Struggle for Effective Anti-Crime Legislation - An Analysis of the Violent Crime Control and Law Enforcement Act of 1994, The*, 20 UNIV. DAYT. LAW REV. 561 (1994).

109 *Id.* at 561.

110 *Id.* (explaining in a short casual article his personal views on the motivations behind the bill and why certain components were left in or left out).

111 WINDLESHAM, *supra* note 100, at 33.

out” proposal mandating life imprisonment for recidivist offenders.<sup>112</sup> In September of 1993, Biden and Brooks each introduced nearly identical bills in the House and Senate incorporating components of both the Republican and Democratic proposals.<sup>113</sup> Both of these initial versions included identical sections permitting structural reform litigation in police departments by the Justice Department. And both contained significant elements from previous crime bills that had passed one or both Houses of congress.<sup>114</sup> These initial versions failed to garner sufficient support, and both died in committee.<sup>115</sup> Republicans found the bill insufficiently punitive, while liberal Democrats demanded additional measures to counter racial discrimination.<sup>116</sup>

After these initial attempts failed, Representative Brooks took a different route. He decided to push the legislation through multiple smaller, single-issue bills. Over the next two months, the House successfully passed eleven shorter bills covering federal drug treatment, state drug treatment, youth gangs, community policing, the Brady bill, prison alternatives, bans on youth handgun ownership, violence against women, violence against minors, kidnapping by parents, and control over child care providers.<sup>117</sup> Meanwhile, the Biden in the Senate continued to push an omnibus bill. During the debates that followed, “legislators vied to out-do each other to impress their intended audiences with demonstrations of the toughness of their attitudes.”<sup>118</sup> Through these debates, the tone of the VCCLEA began to take a noticeable punitive turn—one distinctly different from the proposals initially offered by Brooks and Biden in September. While the majority of Congress was slowly building the largest and most punitive crime bill in American history, the Congressional Black Caucus (CBC) created their own alternative bill (H.R. 3315) that emphasized prevention and alternatives to incarceration, as well as various mechanisms to protect against racial inequality. Although the measure garnered 30 co-sponsors (including four of the co-sponsors from the Police Accountability Act), it ultimately received little widespread support in Congress. The CBC version of the bill would have authorized structural reform litigation against police departments initiated by both the Justice Department and by aggrieved individuals—virtually identical to the initial version of the Police Accountability Act. Even though the CBC version failed, the organization did play a pivotal role in influencing the direction of the final VCCLEA.<sup>119</sup>

Around the end of 1993, one of the single-issue bills passed by the House (H.R. 3355, authorizing federal funds for increased community policing) became the eventual “vehicle” for the final VCCLEA. Increased spending on police officers was the single issue that united both Republicans and Democrats at the time.<sup>120</sup> The measure easily passed the House on November 3, which sent the bill to the Senate. There, Senators decided to not simply pass the narrow policing bill, but replaced the contents of the bill with their own omnibus legislation (now renumbered S

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112 *Id.* at 33.

113 Violent Crime Control and Law Enforcement Act of 1993 (1993S. 1488), GOVTRACK.US, <http://www.govtrack.us/congress/bills/103/s1488> (last visited Jul 18, 2013); Violent Crime Control and Law Enforcement Act of 1993 (1993H.R. 3131), GOVTRACK.US, <http://www.govtrack.us/congress/bills/103/hr3131> (last visited Jul 18, 2013).

114 WINDLESHAM, *supra* note 100 at 35.

115 *Id.*

116 *Id.* at 34-37.

117 *Id.* at 36.

118 *Id.* at 37.

119 *Id.* at 39-40.

120 *Id.* at 49.

1607).<sup>121</sup> This began a multi-month process of debate as the two houses of Congress attempted to find a middle ground.

By February of 1994, Congress had not yet negotiated a compromise. President Clinton responded in the State of the Union Address by scolding Congress for not acting. Clinton also took the opportunity to publicly support the implementation of three strikes legislation—a policy that Biden had recently dismissed as “wacky.” Around this same time Clinton and other Congressmen had come to label crime as one of the most urgent problems in American society. This put enormous pressure on Congress to take immediate action.<sup>122</sup> Clinton’s sense of urgency was understandable, as midterm elections loomed later in the year. For several more months, Congress vehemently debated the terms of the crime bill. Most of the debate and disagreement centered on the inclusion of an assault weapon ban in the bill—an issue from which the President Clinton and Congressional democrats refused to back down.<sup>123</sup> By August of 1994, the House neared a compromise, finally voting to pass a now extensive, omnibus crime bill by a vote of 235-195, with five representatives abstaining. Four days later, under heavy pressure from the President, the Senate passed the bill by a vote of 61-38.

By the end of the long and complex negotiation process, Congress agreed to an expansive and far-reaching set of reforms in the VCCLEA.<sup>124</sup> In total, the Act cost taxpayers an estimated \$30 billion.<sup>125</sup> The Act provided funding for 100,000 more community police officers.<sup>126</sup> It also provided billions for new prison construction.<sup>127</sup> The VCCLEA also mandated strict truth-in-sentencing requirements, implemented life sentences for repeat violent offenders, banned nineteen types of assault weapons, banned juvenile ownership of handguns, added additional penalties for hate crimes, and extended the death penalty.<sup>128</sup> Additionally, the Act allocated another “\$2.6 billion for the Federal Bureau of Investigations, the Drug Enforcement Agency, Immigration and Naturalization Services, United States Attorney Offices, and other Justice Department components.”<sup>129</sup> Despite some progressive changes, the overall tone of the bill was remarkably punitive.

So it initially might seem odd that legislators chose to include §14141—a measure designed to limit local police authority in the name of civil rights—in one of the largest and most punitive crime bills ever authored. This measure seemed both out of line with the overall tone of the VCCLEA. And this measure received no attention in public debates from conservative lawmakers, who had opposed the Police Accountability Act in 1991. Once more, §14141 represented an unprecedented expansion of the federal government’s authority into a realm traditionally regulated by local and state governments—policing. This makes the inclusion of

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121 *Id.* at 49-50.

122 *Id.* at 76.

123 *Id.* at 95-99.

124 By August of 1994, the House neared a compromise, finally voting to pass a now extensive, omnibus crime bill by a vote of 235-195, with five representatives abstaining. Four days later, under heavy pressure from the President, the Senate passed the bill by a vote of 61-38. *Id.* at 95-99.

125 WINDLESHAM, *supra* note 100, at 122.

126 *Id.*

127 SHAHIDULLAH, *supra* note 29, at 17.

128 *Id.*

129 ERICA R. MEINERS, RIGHT TO BE HOSTILE: SCHOOLS, PRISONS, AND THE MAKING OF PUBLIC ENEMIES 103 (2007).

§14141 even more perplexing. After all, Republican legislators attempted to introduce “far-reaching” amendments to the VCCLA that would “restrict the power of federal courts set population caps in prison overcrowding lawsuits,” and engage in other activist regulation of unconstitutional conduct in prisons.<sup>130</sup> If Republican lawmakers initially insisted on the limitation on the power of the courts to regulate prisons, why would many of these same lawmakers eventually authorize the courts to engage in a very similar regulation of American police department? While the regulation of prisons has been instrumental in “ameliorating the total degradation in many state run prisons and local jails,” it has also increased the cost of prison operation.<sup>131</sup> How did SRL end up in the VCCLEA and why did it receive so little attention in the legislative record? There are two possible answers to these questions.

First, many of the other initiatives in the VCCLEA were tied to pricey investments. For example, the VCCLEA required additional investment in prisons at a price tag of around \$10 billion dollars.<sup>132</sup> SRL creates no clear financial beneficiaries, nor did it come with the same sort of astronomical price tag as many of the other components of the VCCLEA. This had a couple possible consequences. It meant that there were few groups with a strong financial stake to lobby and testify before the Congress about the measure. It also made the measure more palatable as a comparatively low cost add-in to the VCCLEA to gain some additional support from liberal legislators. Second, the perceived risk of passing SRL was relatively low. The measure did not put any affirmative duty on all police agencies broadly, but instead gave the DOJ a limited right of action against only agencies engaged in a pattern or practice of misconduct. Major police agencies likely viewed the perceived risk of SRL post-VCCLEA as relatively low. Combined, these two conditions allowed Congress to pass the VCCLEA with relatively little fanfare and no public debate.

## II. THE CHOICE OF EQUITABLE RELIEF

Why did Congress choose a publicly initiated, equitable right of action to address police misconduct as opposed to other potential regulatory approaches? I argue that the choice of SRL is a uniquely tailored remedy to the misconduct problem facing American police departments. In *Los Angeles v. Lyons*, the United States Supreme Court had previously held that litigants could not pursue SRL against police agencies without congressional authorization. The *Lyons* case established a de facto bar on private litigants seeking equitable relief against police agencies, even in cases where the litigant had suffered serious harm due to the existence of a blatantly unconstitutional policy or practice. Around the same time, the DOJ attempted to intervene in the Philadelphia Police Department to enjoin the municipality from engaging in an apparent pattern of civil rights violations. But the court held that, absent congressional authorization, the DOJ lacked the authority to initiate such an equitable suit against a local governmental body. Thus, by the time that Congress considered § 14141, no one—not the DOJ nor private litigants—had any

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<sup>130</sup> WINDLESHAM, *supra* note 100, at 54. There was one unifying feature that both Republicans and Democrats could agree upon, according to Windlesham: the need to increase the size of America’s police force. As he explained, around the end of 1993, one of the single-issue bills passed by the House (H.R. 3355, authorizing federal funds for increased community policing) became the eventual “vehicle” for the final VCCLEA. Increased spending on police officers was the single issue that united both Republicans and Democrats at the time. *Id.* at 49.

<sup>131</sup> *Id.* at 55.

<sup>132</sup> SHAHIDULLAH, *supra* note 127, at 17.

real authority to seek equitable relief against a police agency. For a period of time, this made policing unique. In numerous other institutional contexts, the federal government was already actively involved in structurally reforming government agencies. Thus, the congressional choice of a public equitable right of action made sense. It filled a regulatory hole left by the *Lyons* decision and the subsequent *DCity of Philadelphia* case. Congress also had a clear blueprint for how structural reform litigation had been used in other institutional contexts via a public right of action to reform governmental agencies. I conclude this part by discussing the various theoretical advantages of SRL.

#### A. *The Rise of Public Rights of Action*

No doubt, the congressional authorization of § 14141 was a dramatic shift in policing law. But while the use of a public right of action may have been revolutionary in the policing context, it was already well tested in other institutional contexts. In fact, it may be more accurate to say that policing was one of the last institutional contexts to join the public right of action party. This is in part because, over the last several decades, law scholars have observed that privately initiated structural reform litigation had fallen out of favor with the courts. For a period of time during the twentieth century, private litigants were able to successfully instigate structural reform of many major state institutions.<sup>133</sup> Many structural reform scholars in the public law field trace this movement back to the famous *Brown v. Board of Education* (“*Brown II*”) decision when the Supreme Court order the district courts to implement the right de-segregation.<sup>134</sup> Other famous cases that followed, including *Hutto v. Finney*, limiting punitive isolated confinement in prisons,<sup>135</sup> and *Swann v. Charlotte-Mecklenburg*, approving a court-order extensive desegregation plan, suggested that the courts were prepared to restructure public institutions when necessary in order to protect constitutional rights.<sup>136</sup> For several decades after, the courts acted as “affirmative, political-activist[s].”<sup>137</sup> Scholars who supported this expansive role of the courts in structural reform praised this activist structural reform as promising to be “*the* central... mode of constitutional adjudication” of the future.<sup>138</sup> But in recent decades, “a number of events signaled the demise of the structural reform revolution.”<sup>139</sup>

Professor Myriam Gilles provides an excellent summary of the gradual erosion of structural reform litigation as a viable option for remedying constitutional violations, explaining

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133 Gilles, *supra* note 33, at 1390 (explaining how the modern structural reform movement through private litigation began in the 1950s as the federal courts agreed to hear cases alleging the need for equitable relief for various public institutions like schools and prisons).

134 *Brown v. Board of Education*, 349 US 294 (1955) (holding that the problems identified in *Brown I* required multiple different, local solutions; thus Chief Justice Warren urged localities to act “with all deliberate speed” to comply with the Court’s order).

135 *Hutto v. Finney*, 437 US 678 (1978) (where the Court held that punitive isolation for longer than thirty days in an Arkansas prison constituted cruel and unusual punishment in violation of the Constitution).

136 *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 US 1 (1971) (determining that once a locality had violated a court mandate to desegregate schools, the district court had broad and flexible power to remedy the wrong through equitable relief).

137 Abram Chayes, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1–311, 4 (1982).

138 Owen M. Fiss, *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1–281, 2 (1979).

139 Gilles, *supra* note 33, at 1393.

how the Court slowly started to set aside desegregation decrees and upholding controversial prison conditions.<sup>140</sup> Changes to procedural rules also made it more difficult for litigants to initiate suits for structural reform. During this time the Court not only has “denied standing to plaintiffs who, it claimed, failed to meet the requirements of causation, redressability, and injury-in-fact,” it also substantially limited the types of litigants that have standing to pursue injunctive relief.<sup>141</sup> These major changes in recent decades have made individual-initiated structural reform litigation challenging and rare. In its place, aggrieved parties have instead relied upon a series of federal statutes that give the Attorney General authority to seek injunctive relief through public litigation to address a range of issues.<sup>142</sup> Since then, the Justice Department has brought public litigation claims for a host of different issues—schools desegregation,<sup>143</sup> public housing,<sup>144</sup> employment discrimination,<sup>145</sup> prison conditions,<sup>146</sup> and more. Thus, it is important to recognize that SRL is not a particularly revolutionary invention. Instead, it is continuation of an existing phenomenon—an extension of structural reform litigation into another institutional context.

### B. *Limited Alternatives*

On two separate occasions in the late twentieth century, both private and public litigants sought equitable relief in civil lawsuits against local police agencies. In both cases, courts found that the litigants lacked standing to pursue such non-monetary relief absent a clear statutory authorization. The first of these cases happened in 1979, when the DOJ filed a lawsuit against the Philadelphia Police Department (PPD), alleging a pattern of police abuse that systemically violated residents’ constitutional rights.<sup>147</sup> According to the DOJ, the PPD maintained policies and procedures that actively thwarted the investigation and the disciplining of officers engaged in

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140 *Id.* at 1394–1399.

141 *Id.* at 1396; *see also* *Allen v. Wright*, 468 U.S. 737, 757, 760 (1984) (holding that the courts are “not the proper forum to press general complaints about the way in which government goes about its business”) (citation omitted).

142 *Id.* at 1402 (stating that “[t]he provision granting the Attorney General standing to seek injunctive relief substantially enhances the Justice Department’s authority with regard to local police affairs by affording the Civil Rights Division a statutory basis for intervening in police ‘pattern and practices’ in a way analogous to statutes that have authorized federal government intervention into other spheres”).

143 *Id.* at 1402 n.69 (explaining that “Many school desegregation cases were brought under authorization of the Civil Rights Act of 1964, §407, 42 U.S.C. §2000c-6 (1994)...which ... authorizes the Attorney General to sue on behalf of public school or college students for the purpose of assuring their Fourteenth Amendment rights and ‘the orderly achievement of desegregation in public education.’” (citations omitted)).

144 *Id.* at 1402 n.71 (citing 42 U.S.C. §3614(a) (1994)).

145 *Id.* at 1402 n.70 (citing 42 U.S.C. §2000e-6 (1994)).

146 *Id.* at 1402 (citing prison conditions as one of the sources of public litigation).

147 *United States v. City of Phila.*, 644 F.2d 187, 190 (3rd Cir. 1980) (explaining at the appellate level that “[t]he government’s theory is that the appellees, the City of Philadelphia and numerous high-ranking officials of the City and its Police Department, have engaged in a pattern or practice of depriving persons of rights protected by the due process clause of the fourteenth amendment”).

constitutional violations.<sup>148</sup> The DOJ requested an injunction to stop the PPD from engaging in this kind of misconduct going forward.<sup>149</sup> A federal district judge dismissed the claim, however, holding that the U.S. Attorney General had no standing to bring such lawsuits absent an explicit statutory grant of power from Congress.<sup>150</sup> The DOJ appealed the decision, only to have the United States Court of Appeals for the Third Circuit uphold the lower court's dismissal.<sup>151</sup> Then the Assistant Attorney General testified to the United States Commission on Civil Rights that he and his colleagues knew they "were dealing with something that went beyond individual acts of misconduct. . . . [They] were dealing with institutional problems."<sup>152</sup>

The DOJ had previously prosecuted six homicide detectives in Philadelphia for coercing confessions out of possibly innocent suspects.<sup>153</sup> Nonetheless, at least one of those convicted of coercing confessions out of criminal suspects actually received a promotion and support from City leadership.<sup>154</sup> As one member of the DOJ elaborated: "if an officer on the beat perceives that he or she is going to be shielded and protected by the institution from an investigation and from prosecutions . . . then I think what we have is a situation where even prosecuting individual officers is not going to change the environment."<sup>155</sup> Complaints aside, *City of Philadelphia* established the precedent that, absent Congressional authorization, the DOJ did not have standing to initiate SRL via equitable relief.

This rule did not sit well with many civil rights advocates. In 1981, the United States Commission on Civil Rights identified *City of Philadelphia* as establishing a gap in the regulatory approach to police misconduct.<sup>156</sup> The Commission recommended the adoption of legislation to remedy the judicial limitations placed on the use of SRL.<sup>157</sup> The Commission observed that "the volume of complaints of police abuse received by the Commission has increased each year . . .

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148 *Id.* (stating that the DOJ alleges that "appellees discourage victims of abuse from complaining, suppress evidence that inculpates police officers, accept implausible explanations of abusive conduct, harass complainants and witnesses, prematurely terminate investigations, compile reports that justify police officers' conduct regardless of actual circumstances, refuse to discipline police officers for known violations, and protect officers from outside investigations").

149 *Id.* at 189 (identifying injunctive relief as the desired remedy).

150 *United States v. City of Phila.*, 482 F. Supp. 1248, 1252 (E.D. Pa. 1979).

151 *City of Phila.*, 644 F.2d at 206 ("We will hold the Attorney General to the same pleading requirements we demand of a private litigant who brings an action under the Civil Rights Acts. The appellant failed to satisfy these standards, and it deliberately rejected an opportunity to amend its complaint.").

152 BONNIE MATHEWS & GLORIA IZUMI, U.S. COMM'N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES 135 (1981), *available at* <http://catalog.hathitrust.org/Record/007105152>.

153 *Id.* at 135–36.

154 *Id.* at 136 ("The mayor at the time, of Philadelphia, kept the officers on the force, promoted one of the men who had been convicted, and asserted they were innocent until proven guilty at the Supreme Court level.").

155 *Id.* at 135.

156 *Id.* at 135–36 (identifying *City of Philadelphia* as the case that has limited DOJ authority to initiate structural police reform and outlining how this has potentially hampered DOJ involvement in police reform).

157 *Id.* at 134 (identifying the need for "federal litigation aimed at institutional misconduct" in cases where there is a demonstrated "pattern or practice of police abuse").

and . . . [p]atterns of complaints appear to indicate institutional rather than individual problems.”<sup>158</sup> The Commission also recognized that one of the best possible ways to address these institutional problems was through some type of structural reform litigation that would incentivize police departments to change their behavior.<sup>159</sup> The Commission reached this conclusion in part because previous attempts to file for injunctive relief against American police departments had failed.<sup>160</sup> With that in mind, the Commission recommended the enactment of pattern or practice litigation similar to § 14141, stating that “Congress should enact legislation specifically authorizing civil actions by the Attorney General of the United States against appropriate government and police department officials to enjoin proven patterns and practices of misconduct in a given department.”<sup>161</sup> Thus, the Commission saw this proposed measure as a novel way to address systemic wrongdoing in police agencies. Nonetheless, the Commission did not offer model language, nor did it thoroughly expound on the proposal. This novel proposal did not gain traction in Congress until the following decade.

The DOJ was not the only plaintiff attempting to pursue SRL. Private litigants soon attempted to initiate such reform via equitable relief. In 1976, Los Angeles Police Department (LAPD) officers stopped Adolph Lyons for a traffic violation.<sup>162</sup> Even though Lyons did not resist the officers, the officers nonetheless seized Lyons in a chokehold without any provocation.<sup>163</sup> Lyons brought suit against the LAPD, asking in part for the court to enjoin the LAPD from using such chokeholds in the future.<sup>164</sup> In a 5–4 decision, the U.S. Supreme Court ruled that plaintiffs do not have standing to levy a claim for injunctive relief unless they can show a real, immediate, or continuing threat.<sup>165</sup> Since Lyons was not in serious risk of being stopped and illegally choked by the LAPD in the future, he lacked such standing.<sup>166</sup> Lyons could seek individual damages against the police and the city, but he could not seek injunctive relief.<sup>167</sup> After the *Lyons* and *City of Philadelphia* cases, there appeared to be no judicial remedy to force local police departments to adopt proactive reforms to prevent patterns of systemic misconduct.

### C. Theoretical Advantages of Equitable Relief as a Regulatory Mechanism

As a regulatory mechanism, equitable relief offers several theoretical advantages. First, SRL gives the DOJ and the federal courts the authority to demand the hiring of an external

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158 *Id.* at vi.

159 *Id.* at 134–36 (detailing the potential usefulness of structural reform litigation).

160 *Id.* (explaining this failure and linking it to a need for reform).

161 *Id.* at 164–65.

162 *City of L.A. v. Lyons*, 461 U.S. 95, 97 (1983) (identifying a traffic violation as the initial cause of the interaction with the plaintiff).

163 *Id.* at 97 (saying that Lyons did not resist the officers in any way, nor pose any threat before being put in a chokehold).

164 *Id.* at 99–100 (stating that, at the district level, an order was handed down enjoining the use of the tactic).

165 *Id.* at 111 (“Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles”).

166 *Id.* at 102 (explaining that injunctive relief is only appropriate when a plaintiff is “immediately in danger of sustaining some direct injury”).

167 *Id.* at 111–13 (denying injunctive relief).

monitor to ensure that local police agencies actually implement major reforms.<sup>168</sup> It can use the law to force local municipalities to allocate scarce resources to the cause of police reform.<sup>169</sup> Thus, SRL can potentially induce real change as opposed to mere symbolic compliance.<sup>170</sup> Mayer Zald, Calvin Morrill, and Hayagreeva Rao have theorized that organizational capacity, organizational commitment, and environmental pressure all affect the organizational response to legal reform.<sup>171</sup> Zald et al predicted that when environmental pressure was low, organizations would have the ability to engage in mere symbolic compliance.<sup>172</sup> Similarly, when environmental pressure was low and organizational capacity was also low, Zald et al predicted that organizations would only exhibit limited compliance.<sup>173</sup> SRL can theoretically increase environmental pressure by mandating the appointment of a monitor and expand organizational capacity by allocating the necessary resources to police reform. Thus, an equitable relief approach may provide the DOJ and the courts with the necessary tools to overcome symbolic compliance.

Second, equitable relief gives the DOJ the power to instigate widespread change within the field of local law enforcement. The statute allows the DOJ to define the boundaries of legitimate policing by establishing best practices. Theoretically, each time that the DOJ litigates against an agency, the reforms it demands ought to mirror what the federal executive deems to be best practices—those needed to eradicate a pattern or practice of misconduct and ensure constitutional policing. Historically, there has never been any concerted federal effort to define these sorts of best practices. Admittedly, voluntary peer accreditation organizations have emerged in recent decades. But § 14141 represents the first real opportunity for the federal government to define the boundaries of legitimate behavior within the field of local law enforcement. This is critically important because, as Joshua Page has previously explained, “players in [a professional] field (often unwittingly) orient their behavior to other players in the field.”<sup>174</sup> Fields typically have “guiding principles and values” that orient boundaries of acceptable behavior.<sup>175</sup> Agents within the field come to “grasp the mores, expectations, and acceptable actions” of their respective fields.<sup>176</sup> Within the policing field, § 14141 gives the federal executive enormous authority to transform the definition of acceptable behavior by local law enforcement agencies. But as I will discuss more in Chapter 3, the DOJ has not seemingly harnessed this potentially transformative power.

Third, an equitable relief model can potentially harness the unique institutional competencies of the judicial and executive branches. One criticism of the courts is that the

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168 See *infra* Chapter 4-5 (describing the various stages of structural reform and monitor appointment process); see also *infra* app B (showing the structural police reform cases that resulted in the appointment of a monitor).

169 *Id.* (showing the cost of structural police reform).

170 Mayer N. Zald, Calvin Morrill, and Hayagreeva Rao, *Environment and Responses*, in GERALD F. DAVIS, DOUG MCADAM, W. RICHARD SCOTT, AND MAYER N. ZALD, *SOCIAL MOVEMENTS AND ORGANIZATION THEORY* 266 (2005) (explaining how high pressure is needed to ensure “maximum compliance” and not mere symbolic compliance, evasion, or resistance).

171 *Id.*

172 *Id.*

173 *Id.*

174 JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* (2011).

175 *Id.*

176 *Id.*

judiciary lacks the resources to engage in significant lawmaking. As Professor Orin Kerr has argued, “[l]egislative rules tend to be the product of a wide range of inputs, ranging from legislative hearings and poll results to interest group advocacy and backroom compromises.”<sup>177</sup> By contrast, “[j]udicial rules tend to follow a more formal and predictable presentation or written briefs and oral arguments by two parties.”<sup>178</sup> The result, according to Kerr, is that courts operate with an “information” or competency deficit.<sup>179</sup> SRL, in theory, could overcome this so-called judicial deficit by putting primary authority in the hands of the DOJ to identify and negotiate settlements with problematic departments. This sort of cooperative federalism allows the executive branch and judicial branch to work together to craft and enforce standards to overhaul systemically flawed police agencies.

Fourth, an equitable relief model is designed to address the organizational roots of misconduct. Remember, as discussed in Chapter 1, there is a growing recognition in the available literature that persistent problems within a police agency are often the result of deeply ingrained organizational problems. In one sense, police agencies are bureaucratic organizations. As such, police officers “are expected to make decisions by a universal application of the rules.”<sup>180</sup> Even so, police are also frontline bureaucrats who are necessarily afforded “enormous discretionary powers to apply the law.”<sup>181</sup> Bureaucratization has attempted to address some of the concerns over police corruption by insulating officers from their environment, but territorially localized and specialized units remain particularly vulnerable to corrupt influences.<sup>182</sup> Within the typical police agency today, “[o]rganizational members believe in the essential rightness of what they do.”<sup>183</sup> This is potentially problematic since “this belief can be an obstacle . . . to critically evaluat[ing] ongoing organizational practices” as many leaders within police departments therefore believe that “corruption is the result of a few bad police officers who slipped through background screening[s]” rather than a problem rooted in organizational inadequacies.<sup>184</sup> The

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177 Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 875 (2004)

178 *Id.*

179 *Id.* at 875-82.

180 Albert J. Reiss, *Police Organization in the Twentieth Century*, 15 CRIME JUSTICE 51, 73-74 (1992).

181 *Id.*

182 *Id.* at 81. Any external regulation of an organization must deal with the unique characteristics of police departments. Police forces today are larger and more specialized than a century ago, but spend less time patrolling communities by foot. Technological developments have facilitated the centralization of most law enforcement agencies. As Albert Reiss has observed, police departments today have developed into technocratic bureaucracies. *Id.* Bureaucratization has insulated law enforcement from politics and opened the ranks of police departments to women and minorities. Despite the centralization and bureaucratization of local departments, the American law enforcement community is nonetheless still comprised of thousands of different, generally small departments. The United States remains exceptional, internationally speaking, in the belief that “local control of police is an essential ingredient of local government.” *Id.* at 67. But as Reiss also observed, there are fundamental tensions in policing organizations between bureaucratization and discretionary authority.

183 John P. Crank, *Institutional Theory of Police: A Review of the State of the Art*, 26 POLIC. INT. J. POLICE STRATEGIC MANAGEMENT 186, 187 (2003)

184 *Id.*

traditional approach to regulating police misconduct—that is, the exclusionary rule, civil litigation, and criminal prosecution—is well-suited to addressing instances of individual misconduct. But the traditional approach is poorly suited to responding to organizational pathologies or practices that perpetuate misconduct. By contrast, an equitable relief model is designed to directly combat the organizational roots of systemic misconduct in police agencies. Rather than raising the cost of wrongdoing, an equitable right of action gives the DOJ and the federal courts the authority to force police agencies to implement expansive police and procedural reforms. As I will discuss more in Chapters 4 and 5, these mandated reforms via SRL have been extensive—touching on nearly every internal policy in some cases.

As I explain in the next section, despite these potential advantages, SRL was not fully appreciated at the time of its passage. And since the law's passage, academic research has not fully explored the subject.

### III. EMERGING IMPORTANCE OF SRL

At the time of passage, § 14141 appeared to be an afterthought. Fast-forward twenty years and SRL has emerged as arguably the most important component of the VCCLEA. While other parts of the VCCLEA have waned in importance, the impact of SRL continues to grow today. Despite the apparent modern importance of § 14141, few researchers have empirically analyzed SRL. This is increasingly indefensible as many of the nation's largest police departments have become subject to SRL. In this section, I start by examining the comparative importance of SRL over time. I then briefly evaluate the available literature on SRL.

#### *A. Comparative Importance Over Time*

One way to judge the perceived importance of legal measures is to analyze media coverage. Theoretically, if the public perceived a legal proposal as more important, the media would reflect this perception by affording the measure more attention. Other researchers have adopted this sort of methodology when judging the perceived importance of a criminal justice measure.<sup>185</sup> To be clear, this methodological approach cannot speak to the actual importance of a law. Rather, it merely attempts to show the perceived importance of a law, as measured by the amount of media attention at the time of passage.

To measure media attention, Figure 2.1 shows the number of articles and words spent discussing various parts of the VCCLEA in the *New York Times* over two different time periods—the time period immediate before and after the passage of the VCCLEA in 1994-1995 and a four year window fifteen years after the law's passage.

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<sup>185</sup> Franklin E. Zimring, *The Accidental Crime Commission: Its Legacies and Lessons*, 96 MARQUETTE L. REV. 995, 1001 (2013) (using this sort of syntactical count methodology to judge the perceived importance of certain parts of the Wickersham Commission Report).

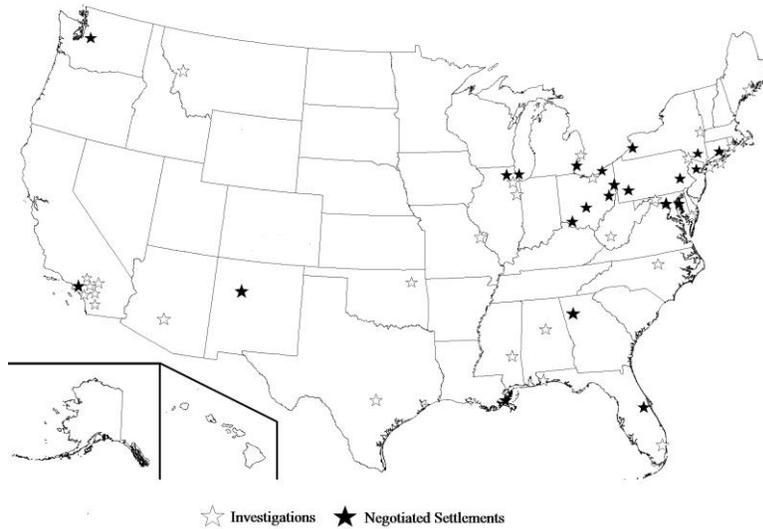
FIGURE 2.1, NEW YORK TIMES COVERAGE OF MAJOR COMPONENTS OF THE VCCLEA

	1994-1995		2009-2013	
	Articles	Words	Articles	Words
SRL	0	0	28	22,472
Truth in Sentencing	10	15,528	3	4,338
100,000 New Police Officers	74	112,912	1	1,369
Federal Assault Weapons Ban	115	169,405	21	24,088
Violence Against Women Act	8	13,667	68	68,586

As Figure 2.1 demonstrates, not a single story in the New York Times discussed the proposed authorization of SRL around the time of the VCCLEA debates. By contrast, 115 articles addressed the proposed inclusion of the Federal Assault Weapons Ban in the VCCLEA, while dozens more addressed other parts of the VCCLEA like the Violent Against Women Act, the truth in sentencing reforms, and proposed addition of 100,000 new police officers. Fifteen years later, the New York Times has written 28 different stories discussing the implementation of SRL. Coverage of most other components of the VCCLEA has decreased significantly. By 2009-2013, only two other major components of the VCCLEA have received media coverage rivaling SRL—the Violent Against Women Act and the Federal Assault Weapons Ban. But there is an important difference in the type of media coverage that these measures have received. Virtually all of the articles discussing these two other parts of the VCCLEA were discussing legislative attempts at their re-authorization. Meanwhile, the 28 articles on § 14141 all discussed the continued implementation of this statute. This provides evidence for two assertions.

First, it seems clear that SRL has increased in perceived importance today relative to the passage of the VCCLEA, as measured by news coverage. Second, this provides some evidence that, despite a lack of initial media coverage, SRL has actually had a substantial impact on American policing. But how big of an impact has SRL had on American policing? I do not intend to answer this challenging question here. I will dive into this topic in far more depth in Chapters 3-5. To begin a preliminary examination, though, I have compiled a full list of all action taken by the DOJ via §14141 in Appendices A and B. For our immediate purposes, though, it is useful to see how widely the DOJ has utilized § 14141 since the statute’s passage. Figure 2.2 maps out all of the known investigatory action taken by the DOJ pursuant to § 14141 since 1994.

FIGURE 2.2, SRL CASES OPENED BY DOJ 1994-2013



The white stars identify municipalities where the DOJ has taken some investigatory action—the beginnings of SRL. It does not show the action taken by the DOJ in Puerto Rico, where the DOJ has formally investigated the island’s central police agency. The black stars note municipalities where the DOJ has settled with the municipality on a set of necessary reforms to avoid further litigation. The figure does not show the Virgin Islands, which has also agreed to a negotiated settlement with the DOJ pursuant to § 14141. I will discuss the difference between an investigation and negotiated settlement in more depth in Chapter 4. Overall, Figure 2.2 shows the extent to which SRL has touched police agencies in states across the country. At first glance, there do appear to be some unusual patterns in the geographical distribution of investigations—for the paucity of action in southern and western United States and the high volume of cases in the mid-Atlantic, Eastern Midwest, and Northeast. I will explain some likely explanations for this geographical distribution in Chapter 3.

But these more complicated trends aside, the data shows that the DOJ has targeted 55 municipalities in 26 states. Agencies across the nation, thus, have been subject to some § 14141 action. Of course, there are around 18,000 police agencies in the United States. This means that only about 0.03% of all agencies have been subject to some § 14141 action. This might suggest that SRL has been a relatively unimportant addition to the field of policing law. But the DOJ has seemingly targeted larger municipalities via § 14141 thus far. As a result, Figure 2.3 shows the total population served by the 55 agencies targeted for § 14141 action thus far.

FIGURE 2.3, EXTENT OF SRL ACTION

Type of Action	Number of Municipalities	Total Population Served	Percentage of American Population
Documented §14141 Investigation	55	56,017,310	18%
Full Scale SRL	13	20,675,240	7%

Despite the relatively small number of agencies targeted for SRL relative to the total number of agencies, the DOJ has identified a cross-section of agencies that serve a significant percentage of the American population. The 55 municipalities identified thus far serve an estimated 56,017,310 citizens—or about 1 in 5 Americans. You could argue that roughly 1 in 5 Americans today has some had some direct stake in the outcome of a § 14141 action. This realization dramatically recasts the importance of SRL. This measure that initially received virtually no media attention has today had—at least indirectly—an effect on a substantial portion of the American population. But despite the apparent growing importance of SRL, the empirical literature on the topic is remarkably thin and outcome oriented as I explain in the next section.

### B. *Lack of Empirical Research*

Since the passage of § 14141, very little scholarship in any discipline has empirically analyzed SRL. And virtually no legal scholarship has done an empirical examination of the topic. Initially, criminal justice observers were optimistic about the potential of § 14141. The late Professor William Stuntz remarked that § 14141 may be one of the most significant historical developments in the regulation of police misconduct.<sup>186</sup> Indeed, there was reason for optimism. Section 14141 seemingly filled a significant hole in the regulatory strategy for police misconduct. As Barbara Armacost explained, “reform efforts have focused too much on notorious incidents and misbehaving individuals, and too little on an overly aggressive police culture that facilitates and rewards violent conduct.”<sup>187</sup> If a department wants to engage in “[r]eal reform,” it must “accept collective responsibility, not only for heroism, but for police brutality and corruption as well.”<sup>188</sup> Indeed, occasional misconduct is an unavoidable consequence of granting police officers the discretion to successfully carry out their jobs. Consistent patterns of misconduct are more commonly rooted in organizational culture, rather than the professional or moral failings of the individual officers. Additionally, cost-raising misconduct regulations can incentivize some reform, but have historically proven ineffective at stimulating significant broad policy changes. Thus, most commentators agreed that SRL “create[d] an unprecedented opportunity for the federal government to encourage collaborative reform of deficient police institutions.”<sup>189</sup> Since then, three empirical studies have assessed the effectiveness of § 14141 in individual cities.

First, the Vera Institute of Justice completed an empirical evaluation of the long-term effects of the negotiated settlement, sometimes called a consent decree, in Pittsburgh, Pennsylvania, years after monitors left the city.<sup>190</sup> The Vera report found that the reforms

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186 William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 798 (2006) (calling structural police reform “the most important legal initiative of the past twenty years in the sphere of police regulation”).

187 Armacost, *supra* note 9, at 455.

188 *Id.*

189 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, 528 (2008)

190 ROBERT C. DAVIS, NICOLE J. HENDERSON & CHRISTOPHER W. ORTIZ, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE (2005), *available at* [http://www.vera.org/sites/default/files/resources/downloads/277\\_530.pdf](http://www.vera.org/sites/default/files/resources/downloads/277_530.pdf). There, researchers

implemented as part of the consent decree remained in effect after the monitors departed.<sup>191</sup> Second, Professors Christopher Stone, Todd Foglesong, and Christine Cole examined the success of the Los Angeles consent decree part of the way through implementation.<sup>192</sup> The preliminary results were extremely positive.<sup>193</sup> The third study comes from a doctoral dissertation written by

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surveyed over 100 frontline officers, conducted focus groups, interviewed key officials, reviewed monitor reports, surveyed citizenry, and analyzed police statistics. *Id.* at 5–6.

191 *See id.* at 17. 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.” This suggests that the reforms were at least somewhat effective. Even so, the authors of the study noted some possible problems with the reform strategy used in Pittsburgh. The consent decree negotiation and implementation alienated some officers on the force—many of whom complained that morale sunk after the department agreed to the terms of the consent decree. *Id.* at 42. Other officers believed that the reforms discouraged them from proactively policing the streets for fear of being “disciplined for filling out forms improperly” or being burdened with “duplicative paperwork.” *Id.* Supervisors similarly grumbled that the procedures implemented by the consent decree reduced time spent on the street and increased time addressing procedural formalities. *Id.* Vera also noted that one of the primary effects of the consent decree was to centralize decisionmaking and disciplinary review. The report concluded that the “centralized approach to identifying and responding to officer misconduct makes good sense in the wake of allegations of civil rights violations” but may also run “counter to the decentralizing imperative of the other major police reforms of the past two decades: community policing.” *Id.* at 41–42. This means that officers in Pittsburgh after the implementation of the consent decree may have exercised less discretion and responsibility over their work.

192 *See* CHRISTOPHER STONE, TODD FOGLESONG & CHRISTINE M. COLE, *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD* (2009), *available at* <http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf>. There, researchers undertook participant observation, analyzed administrative data on crime, arrests, traffic/pedestrian stops, use of force, and personnel. *Id.* at i–ii.

193 Unlike the Vera study, Stone and his colleagues found no evidence for the hypothesis that the implementation of the terms of a consent decree lead to “de-policing”—or “hesitat[ion] to intervene in difficult circumstances for fear that, despite their best intentions, their actions will be criticized and they may even be disciplined.” *Id.* at 19. Like in the Vera study, officers “frequently” raised concerns about how the terms of a consent decree can hamper their abilities to exercise discretion, commonly saying that paperwork deterred them from making arrests, and arguing that compliance with the terms of the decree hurt their ability to proactively fight crime on the streets. *Id.* at 19–20. But the researchers in the Stone study rejected the claim that the terms of the consent decree uniquely burdened the LAPD’s ability to fight crime. They showed that since the start of the consent decree, motor vehicle and pedestrian stops actually increased significantly. *Id.* at 22. Once more, comparisons between similar surveys conducted in 1999 and 2003 found that the percentage of officers who reported being afraid that an honest mistake would negatively impact their careers actually decreased. *Id.* at 21. This led Stone and his colleagues to conclude that most of the concern about depolicing was likely misplaced. By all accounts, crime has decreased significantly faster in Los Angeles than other American cities since the implementation of the consent decree. Stephen Rushin, *Structural Police Reform*, 99 MINN. L. REV. (forthcoming 2015) (on file with author) (manuscript at 56–57) (showing that during the structural police reform era, violent crimes in Los Angeles fell by 65 percent and property crime rates by 36 percent—both figures far exceeding the median large American city). And the traffic and pedestrian stops today lead to arrests more often than in years past. STONE, FOGLESONG & COLE, *supra* note 192, at 24. This suggests that Los Angeles police have

Professor Joshua Chanin.<sup>194</sup> Chanin evaluated the effects of the § 14141 litigation in Washington, D.C.; Pittsburgh; Prince George’s County, Maryland; and Cincinnati, Ohio.<sup>195</sup> Unlike the Stone and the Vera case studies, Chanin’s dissertation provides analyses of multiple cities, allowing him to make at least some comparative conclusions. Chanin hypothesized that several variables affect the implementation of negotiated settlements, including the complexity of the negotiated settlement, departmental resources, and the support of police administrators as well as local political leaders for the negotiated settlement.<sup>196</sup>

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become even more proactive since the start of the consent decree and have actually become more effective at targeting proactive policing efforts towards actual wrongdoers. More to the point, though, the LAPD has also apparently decreased the use of force since the beginning of the consent decree as well. *Id.* at 32. This is a particularly striking finding since during the same time that use of force declined, the total number of arrests actually increased substantially. *Id.* at 35. The Stone examination of Los Angeles also addressed the concerns expressed in the Vera study about the effect of the consent decree on community relations. Overall, community satisfaction with the LAPD increased during the implementation of the consent decree, and this pattern continued after the conclusion of the federal intervention. *Id.* at 44. Like in Pittsburgh, the community’s satisfaction differed based on the race of the respondent, with the black community somewhat less enthusiastic about the performance of the police department. *Id.* But overall, there was less concern in Los Angeles than in Pittsburgh about the implications of federal intervention on community outreach efforts.

194 Joshua M. Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of “Pattern or Practice” Police Misconduct Reform 335* (July 6, 2011) (unpublished Ph.D dissertation, American University), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf>.

195 *Id.* at 21–22. Chanin hoped to do a retrospective on cities that had completed the terms of the negotiated settlement. *Id.* at 22. Thus, at the time that Chanin started his study, these four cities represented two-thirds of all cities that fell into this category. *Id.*

196 *Id.* at iii–iv (stating that “[s]everal factors help to explain variation between departments, including the complexity of joint action, agency and jurisdictional resources, active and capable police leadership, and support from local political leaders” and hypothesizing that “(1) the policy problem; (2) the policy solution; (3) the environmental context; and (4) the implementing agency” all define the implementation of structural police reform). It is also worth mentioning that, like the Vera study, Chanin worried that the “centralized approach at the heart of the pattern or practice reform template seems to have little in common with the [community-oriented policing] model.” *Id.* at 358. Chanin concluded his comparative study with numerous normative recommendations. He argued that the structural reform litigation process ought to include more external oversight and reporting mechanisms after the end of the reform process. *Id.* at 346–49. Chanin also suggested that the development and implementation of consent decrees should be more inclusive, using a bottom-up approach. *Id.* at 350. To this end, he recommended the inclusion of union representatives and key civil rights organizations in the settlement process, the use of community goals in formulating the settlement content, and the regular updating of community and civil rights stakeholders after the start of the implementation process. *Id.* at 351.

The legal academy has also made several worthwhile contributions to the literature on SRL.<sup>197</sup> These authors have generally offered normative recommendations on how the DOJ could improve the effectiveness of SRL. Professor Kami Chavis Simmons has targeted a different problem in § 14141 cases—the representation of the various community stakeholders in the negotiation and implementation of settlement agreements.<sup>198</sup> Simmons used Cincinnati in part as an example of how the DOJ’s implementation process could more effectively incorporate collaboration with various stakeholders.<sup>199</sup> Other legal academics have discussed SRL, including Professor Debra Livingston, who analyzed the consent decrees in Steubenville, Ohio, and Pittsburgh to identify the types of misconduct that the DOJ targeted in negotiated settlements.<sup>200</sup> Samuel Walker and Morgan Macdonald have recommended the expansion of pattern or practice litigation to the state level.<sup>201</sup>

Overall, these studies provide valuable insight into the structural reform process. But they fail to answer many important research questions. None of these studies thoroughly examine the process by which the DOJ identifies cities to target under § 14141. Although Professor Rachel Harmon has theorized on how the DOJ could change this selection process,<sup>202</sup> there remains a descriptive gap in the literature on the process by which the DOJ currently identifies cities engaged in a pattern or practice of police misconduct. This is a critical piece of missing information in the scholarship. How does the DOJ go about identifying which of the nation’s 18,000 police departments are in violation of § 14141? How does the DOJ define a pattern or practice of misconduct? And can an individual aggrieved by egregious acts of police misconduct go to the DOJ for redress? Chapter 3 will examine these important questions while situating the DOJ’s implementation of SRL within the mobilization and agency decision-making literatures. The available literature is also remarkably thin on how the SRL process works from beginning to end. Thus, chapters 4 and 5 will empirically examine the various stages of SRL. Finally, although a small number of studies have examined the apparent outcomes of SRLs, the scope of these studies have been relatively narrow. The goal of these previous studies was not to identify *why* SRL either worked or failed, but rather to examine *whether* SRL achieved its intended result. Previous studies have also not critically examined the so-called “de-policing hypothesis,” the claim by some opponents of SRL that constitutional policing inhibits the ability of law enforcement to fight crime aggressively. I address and theorize on these latter issues in Chapter 6. Thus, while a handful of studies have explored various aspects of SRL, the subject remains largely understudied and ripe for thorough, empirical examination.

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197 See, e.g., Armacost, *supra* note 9; Harmon, *supra* note 19; Simmons, *supra* note 189; 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 (2009).

198 See generally Simmons, *supra* note 189.

199 *Id.* at 531. By determining a broad range of potential stakeholders and incorporating them into the structural reform process, Simmons claims that the DOJ can restore the political legitimacy of the process, provide a check on DOJ authority, and create innovative and uniquely tailored remedies. *Id.* at 537–40.

200 See generally Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 817 (1999)

201 See generally Walker & Macdonald, *supra* note 197

202 See Harmon, *supra* note 19.

## CONCLUSION

The passage of § 14141 represents an unnoticed transformation in American policing law. Today, the federal executive branch wields considerable authority to define the boundaries of acceptable police practices in local police agencies. The regulatory model adopted by Congress in § 14141 offers considerable theoretical advantages over the traditional approach to local police regulation. But the available literature is remarkably thin how SRL works, how the DOJ identifies agencies in violation of § 14141, and how § 14141 works in practice to reform problematic agencies. The chapters to come will examine these important questions using a combination of qualitative and quantitative measures to understand how SRL operates in action.

# Chapter 3

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## Enforcement<sup>†</sup>

### INTRODUCTION

Soon after the passage of § 14141, the DOJ faced many difficult choices. Who in the DOJ would investigate local police agencies? What division of the DOJ would house this new and important responsibility? And how would the DOJ decide which of the nation's roughly 18,000 police departments were engaged in a pattern or practice of unconstitutional misconduct? This chapter chronicles the administrative implementation of § 14141. Soon after the statute's passage, the Attorney General vested the DOJ's Civil Rights Division with the authority to initiate SRL. Prior to the passage of § 14141, some litigators in the DOJ's Criminal Division had experience prosecuting individual instances of police misconduct under 18 U.S.C. § 242. And others in the DOJ had previously handled structural reform litigation cases in different institutional contexts like prisons and mental health facilities. But no one at the DOJ had any real, substantive experience regulating police. So the head of the Civil Rights Division assigned a small group of litigators to begin a crash course in police regulation. Because of this, it should come as no surprise that enforcement of § 14141 got off to a sluggish start. It took around a year to begin the first investigation of a police department, and it took around three years before the DOJ actually began restructuring a local police agency.

Once this process began, though, it quickly gained momentum. Within ten years, the DOJ had begun forcefully reforming many of the nation's largest police departments, including those in Pittsburgh, Washington, D.C., Los Angeles, Cincinnati, Detroit, and Prince George's County. At the time it looked like SRL was destined to sweep across the country and forever reshape local police practices. Then something changed. Between late 2004 and early 2009, the DOJ initiated few § 14141 investigations and did not pursue full-scale SRL against a single police agency.<sup>1</sup> The number of open § 14141 cases also declined precipitously.<sup>2</sup> During this time, public enthusiasm for § 14141 waned, in part because of a prevailing belief that the DOJ has not effectively utilized the statute.<sup>3</sup> This view "attribute[d] the weakness of § 14141 enforcement to

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<sup>†</sup> The author has previously published some of the text from Chapter 3 of this dissertation. See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014).

1. See *infra* fig.3. The second term of the Bush Administration roughly matches up with this purported timeframe.

2. See *infra* fig.4 (illustrating graphically this decline in open cases over this time period).

3. Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 100–01 (2001) (stating that "the DOJ lacks the resources" to address problems like racial profiling as demonstrated by the "[f]ew consent decrees" that have resulted from § 14141); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1407–11 (2000) (arguing that the small number of cases pushed forward by the DOJ via § 14141 are potentially the result of resource and political constraints); John C. Jeffries, Jr. & George A.

insufficient resources devoted to structural reform of police departments and the related absence of political commitment to § 14141 suits, especially on the part of the Bush Administration.”<sup>4</sup> And who could blame these pundits? During this time period, it seemed as if the DOJ had simply given up on fighting police wrongdoing.

Previously, scholars like Professor Joshua Chanin observed that during this time “the Special Litigation Section, the arm of the DOJ charged with [initiating SRL], changed considerably after the elections of George W. Bush and Barack Obama.”<sup>5</sup> With this “came subtle yet important changes in the way pattern or practice initiatives were developed and implemented.”<sup>6</sup> But there is more to this story. To examine the change in enforcement over time, this chapter utilizes a combination of quantitative and qualitative measures. Quantitatively, I acquired from the DOJ a complete listing of all formal investigations and settlements pursuant to § 14141 since the law’s passage in 1994. To my knowledge, this is the first time that any researcher has gained access to a complete list of all internal investigatory action on SRL cases by the DOJ. This data, viewable in Appendices A and B, includes the dates that the DOJ opened each investigation, agreed to a settlement, and closed each case. Qualitatively, I conducted interviews with 31 participants involved in the § 14141 reform process—including attorneys who currently or previously worked at the DOJ and have intimate knowledge of the § 14141 implementation history and process. Other interviewees include independent monitors, DOJ investigators, city officials involved in the negotiation of § 14141 settlements, police administrators, and other relevant stakeholders in the § 14141 litigation process. These interviewees requested anonymity, given their continued role in this sensitive process.

As various pundits observed, there was indeed a notable shift of enforcement during the Bush Administration. This apparent dip in enforcement was no accident. As interview data confirms, the shift in § 14141 enforcement was the result of a deliberate set of decisions made by the DOJ during the Bush Administration to deemphasize and discourage the use of SRL. Interviewees explained that leadership within the DOJ instituted various changes to internal policies and enforcement preferences that directly contributed to the lag in § 14141 enforcement between 2004 and 2009.<sup>7</sup> When President Obama took office in 2009, the DOJ adopted a drastically different enforcement strategy. At that point, 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 the Bush

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Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1419 (2007) (arguing “that the Department of Justice faces financial and political constraints on its effectiveness” in implementing § 14141); 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, 493 (2008) (“Citing the expediency and cost-effectiveness of their settlement strategy, U.S. government officials have expressly articulated a preference for avoiding litigation and negotiating with municipalities to ensure compliance with the suggested reforms.”).

4. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 21 (2009)

5. Joshua M. Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of “Pattern or Practice” Police Misconduct Reform 335* (July 6, 2011) (unpublished Ph.D dissertation, American University), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf>.

6. *Id.*

7. See *infra* notes 149–156 and accompanying text.

Administration, eschewing negotiation in favor of hardball tactics seeking immediate federal control.”<sup>8</sup> Since then, the DOJ has lived up to its word, intervening into various new police agencies and expansively reading § 14141 to authorize reforms in a wide range of policy arenas—many of which may even go beyond the text of the statutory mandate.

This chapter will also make a second important argument. It will show how resource limitations have historically prevented optimal enforcement of § 14141, even when the DOJ was committed to § 14141 reform during the Clinton and Obama Administrations.<sup>9</sup> Although the DOJ has strategically targeted many of the nation’s largest policing forces for SRL, it has not been able to initiate structural reform against many of the nation’s police agencies that appear to be engaged in systemic misconduct. The quantitative data suggests that the DOJ has initiated an average of three investigations of police departments pursuant to § 14141 per year.<sup>10</sup> And the DOJ has only pursued full-scale SRL against an average of less than one department per year.<sup>11</sup> Even if we assume that systemic misconduct is present in only a very small percentage of the nation’s roughly 18,000 police agencies,<sup>12</sup> the DOJ has only initiated § 14141 investigations against a fraction of problematic departments. Interviewees attribute this limited overall enforcement to the Civil Rights Division’s limited resources and internal political pressure to avoid litigation against certain agencies.

This chapter adds to the existing literature on agency decision-making in three ways. First, it contributes to a body of literature on how top-down political pressure can lead to “agency slack,” or the “tendency of government regulators to underenforce certain statutory requirements because of political pressure.”<sup>13</sup> Second, it provides another illustration of how resource scarcity limits virtually all agencies as they attempt to implement statutory mandates. Third, this chapter builds a new theory of how bottom-up political pressure can also influence agency-decision making. I label this sort of pressure “political spillover.”<sup>14</sup> The DOJ’s interest in New York City is a paradigmatic example of this sort of political spillover. Despite the DOJ’s desire to initiate SRL against the New York Police Department (NYPD), bottom-up pressure by the Southern District of New York prevented this action from going forward. In sum, this chapter’s illustrates the potential drawbacks of publicly-initiated rights of action. Public rights of action are almost invariably subject to resource limitations and various types of political concerns that limit their potential effectiveness.

This chapter concludes by arguing that enforcement of SRL is akin to a lottery. This enforcement lottery is messy and imprecise. For a police department to become subject to SRL

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8. Mac Donald, *supra* note 129.

9. *See infra* notes 140–141 and accompanying text.

10. *See infra* Part III.B (outlining the breakdown of investigations and describing the number of investigations and full-scale structural reform cases).

11. *Id.*

12. BRIAN A. REAVES, 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/cslla08.pdf> (putting the number of state and local law enforcement agencies at 17,985).

13 Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 110 & n.48 (describing studies that show the link between politics and “agency slack”).

14. *See infra* Part III.C.

under § 14141, numerous variables must opportunely align. The DOJ must have leadership that is supportive of federal intervention into local police departments, like that of the Clinton or Obama Administration. The misconduct of the targeted police department must stand out to the DOJ, above and beyond the nation's other 18,000 police departments. And the DOJ must have enough available resources to investigate the department. The reality is that, for virtually all police departments, these variables will never align. And thus, most agencies will never become subject to federal intervention under § 14141, even if they are engaged in an egregious pattern of misconduct. This realization underscores the need for some basic reforms in the way that the DOJ enforces § 14141—which I will discuss in more depth in Chapter 6.

This chapter starts by chronicling the early history of § 14141 enforcement and describing how the DOJ got § 14141 off the ground in the mid-1990s. The chapter then summarizes the basic enforcement model that the agency has adopted for identifying police departments in violation of § 14141. Next the chapter analyzes changes in enforcement of § 14141 over time. And the chapter concludes by situating the findings from this chapter in the available literature on agency decision-making.

## I. EARLY ENFORCEMENT OF SRL

After Congress quietly passed § 14141 in 1994, the responsibility to enforce the statute fell to the DOJ. Since the measure dealt with the federal government's response to civil rights abuses, the measure naturally fell under the purview of the Civil Rights Division.<sup>15</sup> The Civil Rights Section is the portion of the DOJ responsible for enforcing statutes that prohibit discrimination.<sup>16</sup> The division was created after the passage of the Civil Rights Act of 1957.<sup>17</sup> The Assistant Attorney General to the Civil Rights Division leads this portion of the DOJ, subject to Presidential appointment and Senate confirmation.

In 1994, Deval Patrick had assumed the role of Assistant Attorney General to the Civil Rights Division.<sup>18</sup> Better known as the current governor of Massachusetts, Patrick's background is illustrative of the type of litigators that often work in the Civil Rights Division. Patrick grew up in poverty in South Chicago.<sup>19</sup> Despite a tough childhood, Patrick graduated from Harvard Law School.<sup>20</sup> After graduation, Patrick spent his early years in legal practice working for the NAACP

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15 Brian K. Landsberg, *Enforcing Civil Rights: Race Discrimination and the Department of Justice 1* (1998) (talking about the creation and purpose of the Civil rights Division, which Landsberg describes as the “agent of social justice and change” within the DOJ by enforcing laws against various forms of discrimination and constitutional violations).

16 *Id.*

17 *Id.* at 186 n.38 (stating that “the formal order establishing the Civil Rights Division was issued by Attorney General William P. Rogers on December 9, 1957. Attorney General, Order no. 155-57, December 9, 1957”).

18 2 *Justice Department Nominees Confirmed*, CHICAGO TRIBUNE, March 23, 1994, at 8.

19 Kathy Lewis, *Clinton Defends Rights Nominee; Says Critics of Deval Patrick “Don’t Give a Rip About Civil Rights,”* SAN FRANCISCO EXAMINER, Feb. 2, 1994, at A14.

20 Lynne Duke, *Civil Rights Is Familiar Terrain for Clinton’s Justice Choice*, WASHINGTON POST, Feb. 14, 1994.

Legal Defense and Educational Fund.<sup>21</sup> Patrick had previously argued several high profile civil rights cases. Perhaps most famously, Patrick worked on the *McCleskey v. Kemp* case, which eventually reached the Supreme Court.<sup>22</sup> In that case, Patrick and the NAACP argued that the death penalty ought to be found unconstitutional because of its disparate racial impact.<sup>23</sup> Immediately before Patrick's nomination as Assistant Attorney General, President Clinton had unsuccessfully nominated Lani Guinier to head the Civil Rights Division.<sup>24</sup> A law professor from the University of Pennsylvania, Guinier had previously worked at the Civil Rights Division and had litigated cases alongside Patrick at the NAACP.<sup>25</sup> After Republicans rejected Guinier's nomination, Clinton picked Patrick for the post.<sup>26</sup>

During his confirmation hearings, Patrick promised to use his position atop the Civil Rights Division as a “bully pulpit” to “move firmly, fearlessly, and unambiguously” to enforce civil rights laws.<sup>27</sup> He promised to bring a sea change to the Civil Rights Division and ensure aggressive enforcement of existing laws.<sup>28</sup> The Senate confirmed Patrick on March 17, 1994—only months before the passage of § 14141.<sup>29</sup> Under his leadership, the Civil Rights Division appeared to ratchet up enforcement of all types of civil rights laws. This aggressive and unabashed approach caught the ire of many conservative commentators. Some publicly expressed concern that the Civil Rights Division was exceeding its statutory authority under Patrick's leadership.<sup>30</sup> But Patrick maintained his belief that the federal government ought to be vigilant in enforcing civil rights protections.

Remember, Congress quietly passed § 14141 with little fanfare and with little apparent expectation that the measure would substantially burden local law enforcement. But after passage, the mandate provided Patrick's Civil Rights Division—which was already notorious for

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21 *Id.* (explaining that Patrick was an associate director-counsel of the NAACP Legal Defense and Educational Fund, where he remained a board member at the time of his appointment atop the Civil Rights Division).

22 *Id.* (Patrick “helped prepare the defense fund's challenge to Georgia's death penalty in 1987 before the U.S. Supreme Court in *McCleskey v. Kemp*”).

23 *Id.* (“The defense fund analyzed statistics that revealed patterns showing that the death penalty was applied in a racially discriminatory way in Georgia”).

24 Timothy M. Phelps, *A ‘Sensible’ Choice: Clinton Taps Boston Lawyer for Top Civil Rights Post*, NEWSDAY, Feb. 2, 1994, at 19 (explaining how Clinton previously appointed Guinier, only to have her withdraw her nomination after controversy over her legal writings).

25 *Id.* (describing Guinier as Patrick's “former colleague”).

26 David Johnston, *Clinton Settles on 2 for Long-Vacant Posts at Justice Department*, N.Y. TIMES, Feb. 2, 1994, at N8.

27 *Nominee Pledges to Make Bully Pulpit of Civil Rights post*, ORLANDO SENTINEL, Mar. 11, 1994, at A10 (using the term “bullypulpit”); Marcy Gordon, *Civil Rights Post Nominee Speaks at Senate Hearing; Attorney Vows to Fight Bigotry, Hate Crimes*, BUFFALO NEWS, Mar. 11, 1994, at A8 (quoting Patrick as saying the department will move “firmly, fearlessly and unambiguously to enforce the anti-discrimination laws”).

28 Gordon, *supra* note 27.

29 2 *Justice Department Nominees Confirmed*, *supra* note 18.

30 *See, e.g.*, Clint Bolick, *Deval Patrick's Legal at Justice*, Wall Street Journal, May 14, 1994, at A23 (arguing that Patrick's tenure at the Civil Rights Division has been marked with “extralegal tactics aimed at coercing state and local government to adopt” unwanted practices”).

aggressively pushing the limits of civil rights litigation—with a seemingly expansive mandate to intervene into the affairs of local police departments. This only further empowered an already progressive and active wing of the DOJ. But upon passage of § 14141, the Civil Rights Division did not immediately begin intervening into local police agencies. This is because, unlike other civil rights arenas, the Civil Rights Division had no real experience with regulating police agencies. The regulation of police departments was an entirely new challenge for the Civil Rights Division. As one of the early § 14141 litigators at the DOJ explained, prior to working on police reform, DOJ litigators worked a wide variety of other legal matters.<sup>31</sup> Some worked voting rights cases.<sup>32</sup> Others worked in the Criminal Division.<sup>33</sup> And still others had handled structural reform litigation under the Civil Rights of Institutionalized Person’s Act (CRIPA), which gives the U.S. Attorney General the right to seek injunctive relief against mental health facilities, jails, prisons, nursing homes, and other similar governmental institutions that are engaged in a pattern or practice of wrongdoing.<sup>34</sup> But regardless of where these litigators came from, they all shared one common trait. They all knew “nothing ... [about] police matters at all.”<sup>35</sup>

There were also no easily accessible outside models that DOJ litigators could turn to in developing an enforcement strategy for § 14141. This made the implementation of SRL particularly challenging in comparison to other comparable statutes. For example, by the time that Congress passed CRIPA, there had already been “dozens of big decrees negotiated mostly by the ACLU” as well as “hundreds” of decrees negotiated by private parties.<sup>36</sup> The DOJ had already started “negotiating its own prison decrees.”<sup>37</sup> So when Congress finally gave the DOJ formalized authority to oversee state prison, jails, and mental health facilities via CRIPA in 1980, the agency was ready to hit the ground running. Litigators were able to use these previous cases as models of how to go about intervening and restructuring these organizations. But again, the policing context was different. As one litigator explained, “there really hadn’t been much structural reform litigation [of any kind] involving police departments” before the passage of § 14141 in 1994.<sup>38</sup> Remember back to Chapters 1 and 2. This lack of previous structural reform litigation against police departments was due in part to court decisions in the *Lyons* and *City of Philadelphia* cases, where a federal circuit court and the U.S. Supreme Court blocked attempts by private litigants and the DOJ to intervene into problematic police agencies.<sup>39</sup> Thus, the DOJ had to develop a plan to enforce § 14141 from scratch. This took time.

The first thing that the Civil Rights Division needed to do was to figure out how the agency would go about enforcing this statute. To get this process underway, Patrick handpicked two experienced litigators, Steve Rosenbaum and Richard Roberts, to head a taskforce on police

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31 Interview with DOJ Participant #15, at 1 (July 31, 2013) [hereinafter Interview #15] (on file with author).

32 *Id.*

33 *Id.*

34 Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (1980).

35 Interview #15, *supra* note 31, at 1.

36 Interview with DOJ Participant #14, at 7 (July 11, 2013) [hereinafter Interview #14] (on file with author).

37 *Id.*

38 *Id.*

39 *See supra* chapters 1-2.

misconduct.<sup>40</sup> The choice of Rosenbaum and Roberts was somewhat peculiar. The obvious choice to begin the implementation of § 14141 would have been Arthur Peabody, who headed up the Special Litigation Section at the time.<sup>41</sup> The Special Litigation Section is a smaller component of the Civil Rights Division assigned with enforcing a wide range of civil rights and structural reform litigation statutes.<sup>42</sup> The Special Litigation Section had grown out the DOJ's need to enforce CRIPA in 1980.<sup>43</sup> Since then, the section has become a sort of “potpourri section” of the DOJ, handling a wide range of specialization civil rights issues.<sup>44</sup> Patrick could have easily delegated the enforcement of § 14141 to Peabody's Special Litigation Section. But he didn't. Despite the obvious fit between § 14141 and the Special Litigation Section, Patrick decided that “he didn't want” Peabody overseeing the implementation of this new police regulation “based on certain reports he had received.”<sup>45</sup> Interviewees hinted that Patrick did not trust Peabody to actively and aggressively use SRL.<sup>46</sup> So rather than delegating § 14141 enforcement power to the Special Litigation Section, the responsibility fell to Rosenbaum, Roberts, and a small number of litigators from various other departments around the DOJ. At first, these litigators were temporarily assigned to this new taskforce.<sup>47</sup> But soon thereafter, Peabody left the Special Litigation Section. Interviewees suggested that Peabody's departure was not voluntary, but rather because he “was sort of asked to leave” by Patrick.<sup>48</sup>

With Peabody out of the picture, Patrick now had the opportunity to select his own leadership for the Special Litigation Section. Rosenbaum, one of the leaders of the new police taskforce, eventually took over for Peabody.<sup>49</sup> Section 14141 enforcement responsibility followed

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40 Interview #14, *supra* note 36, at 5 (stating that the Assistant Attorney General of the Civil Rights Division, Deval Patrick, “assigned get that statute off the ground to a former section chief whose name is Steve Rosenbaum”); Interview #15, *supra* note 31, at 3 (explaining how Steven Rosenbaum and “another guy, Richard whatever, he's now a U.S. District Judge in D.C. who was head of the criminal section sort of co-led this taskforce”). Further investigation revealed that “Richard whatever” was in fact U.S. District Judge and former DOJ litigator Richard Roberts.

41 Interview #15, *supra* note 31, at 1 (“In 1996, the person who was head of the Special Litigation Section was an individual by the name of Art Peabody ... [and] [Deval Patrick] decided that he didn't want Mr. Peabody to head” the effort to enforce § 14141).

42 *Id.* at 2 (explaining that the Special Litigation Section handles a wide range of issues, ranging from structural reform against mental health and detention facilities under CRIPA, “freedom of access to ... abortion clinics” and other responsibilities).

43 *Id.* (“out of [CRIPA] grew the Special Litigation Section”).

44 *Id.*

45 *Id.* at 3.

46 *Id.* (suggesting that it was a “complicated story” but that based on reports he had received Patrick did not want Peabody in charge of § 14141).

47 *Id.* (explaining that these litigators were “temporarily assigned from other divisions” to this taskforce”).

48 *Id.*

49 *Id.* (“Steve actually became head of the Special Litigation Section” after “Art Peabody was sort of asked to leave”).

Rosenbaum to the Special Litigation Section.<sup>50</sup> And the Special Litigation Section has enforced § 14141 ever since, even as leadership of the Civil Rights Division and the Special Litigation has shifted over time. At any given time, the Special Litigation Section has since allocated somewhere around five attorneys to the enforcement of § 14141 nationwide.<sup>51</sup> Early on in the enforcement process, though, one thing became clear to these five litigators.

Not only did the Special Litigation Section lack the experience in regulating police departments. They quickly realized that, since there are over 18,000 police departments in the United States, there was no possible way the section could address all of apparent instances of misconduct.<sup>52</sup> The Special Litigation Section can only allocate enough staff and resources to initiate a small number of § 14141 cases every year.<sup>53</sup> Thus, the Special Litigation Section would have to come up with a way to make tough choices—that is, to decide which of the nation’s police agencies were engaged in misconduct, how to investigate these agencies, and how to allocate the Special Litigation’s scarce resources. No easy task, to say the least. The next section describes in detail the enforcement model that the Special Litigation Section has adopted.

## II. SUMMARY OF THE PRESENT ENFORCEMENT MODEL

Since § 14141 gives the attorney general sole authority to initiate SRL, the DOJ has become a critical gatekeeper. This raises many important questions. How has the DOJ exercised this authority as the gatekeeper of SRL? Has the DOJ more eagerly used SRL during the Clinton and Obama Administrations than it did during the Bush Administration? Have Republican attorneys general used less invasive forms of SRL than Democratic attorneys general? And what does this mean for the future of police misconduct regulation? Despite a significant amount of speculation on these subjects,<sup>54</sup> little empirical work has sought to answer these questions. If the DOJ has shifted enforcement policies dramatically from one presidential administration to another, this would suggest that SRL is an inconsistent tool for spreading constitutional policing practices in American police departments. If the DOJ rarely exercises its statutory authority to bring pattern or practice litigation—because of either political pressure or budgetary constraints—then SRL may not serve as a general deterrent to police misconduct. And if political pressures have made the DOJ less likely to negotiate settlements and demand external

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50 *Id.* (explaining how after Rosenbaum took over at Special Litigation, the police taskforce assigned to enforce § 14141 “disappeared” and “essentially became part of the usual structural of division of special lit”).

51 Telephone Interview with DOJ Participant #14, at 5 (July 11, 2013) [hereinafter Interview #14] (on file with author) (describing how “5 lawyers plus Steve Rosenbaum began to think about how to implement that statute”).

52 Telephone Interview with DOJ Participant #5, at 2 (Sept. 4, 2013) [hereinafter Interview #5] (on file with author) (stating that since there are around 20,000 police departments, the DOJ “can’t do them all”).

53 *Id.* at 3 (stating that “we’re gonna be able to only open 2 or 3 cases in the next 1 or 2 years [so] we’re gonna be super careful about what those cases are”).

54. See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 513 (2003); Gilles, *supra* note 3, at 1419; Harmon, *supra* note 4, at 21; Simmons, *supra* note 3, at 519.

monitoring of problematic departments, SRL may not even serve as an effective tool to reform particularly problematic agencies.

This section presents the findings from an empirical examination of the SRL process. It focuses on the DOJ’s role as the gatekeeper of SRL. In doing so, it builds a descriptive account of how the DOJ has used its authority to initiate SRL under § 14141. This section also evaluates how political forces have affected the DOJ’s implementation of SRL.

SRL is a long and complex process. It is easiest to understand the SRL process by first taking a macro-view of each step. Figure 3.1 summarizes the progressive stages of SRL.

FIGURE 3.1, STAGES OF SRL

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

In this subsections that follow, I describe the first three stages of the SRL process—each of which describe a component of the DOJ’s enforcement model. I use data from interviews, court documents, media accounts, and monitor reports to supplement my descriptions with examples from various localities that have been subject to SRL over the last twenty years.

*A. Case Selection*

The first step in the SRL process is the identification of problematic police agencies. I call this the case selection process. The process by which the DOJ identifies cities for scrutiny remains somewhat of a mystery—described publicly in mere generalities by the DOJ.<sup>55</sup> This has led many agencies subject to § 14141 litigation to feel unfairly targeted. As Gary Dufour, former City Manager of Steubenville, bluntly asked a reporter after the DOJ targeted his city with pattern or practice litigation, “We’re an awfully small community. 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?”<sup>56</sup> Unfortunately for Mr. Dufour, the DOJ has not been transparent about the selection process for § 14141 investigations.<sup>57</sup> Professor Michael Selmi has echoed this sentiment, observing that “it doesn’t seem like [Justice Department officials] have a very strategic

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55. *Conduct of Law Enforcement Agencies*, U.S. DEP’T JUST., <http://www.justice.gov/crt/about/spl/police.php> (last visited April 26, 2014) (stating that the DOJ uses “information from a variety of sources” to select cases for § 14141 litigation).

56. Eric Lichtblau, *U.S. Low Profile in Big-City Police Probes Is Under Fire*, L.A. TIMES, Mar. 17, 2000, at A1.

57. *Conduct of Law Enforcement Agencies*, *supra* note 55 (providing very few details on the case selection process except to say that the DOJ considers community input while also utilizing a variety of other information sources).

approach—they simply react to cases brought to them.”<sup>58</sup> Through interviews with DOJ insiders, I found that since 1994, the agency has used five major mechanisms to identify problematic departments under this statute.

First, in some cases the DOJ has used existing civil litigation or private interest group investigations as springboards for § 14141 cases. This appears to have been the motivating factor in the DOJ’s initial selections of Steubenville, Pittsburgh, and Columbus, Ohio—“persistent efforts by lawyers and civil rights advocates . . . flood[ed] the Justice Department with complaints” that provided the basis for a formal investigation.<sup>59</sup> In the case of existing litigation, DOJ intervention in the case through § 14141 can increase the likelihood of an injunctive remedy. Participants from the DOJ also emphasized how civil rights attorneys and civil liberties groups like the NAACP and ACLU have built sufficiently persuasive cases of allegedly systemic misconduct to necessitate a DOJ inquiry.<sup>60</sup> For example, as a DOJ insider explained, both the NAACP and the ACLU took part in the initial Pittsburgh allegations; these groups “were in it from the beginning.”<sup>61</sup> These organizations have sometimes collected dozens of complaints demonstrating a common or systemic problem in one jurisdiction necessitating DOJ action. Steubenville exemplified this method, according to one former DOJ litigator. Notable Ohio civil rights attorney James McNamara “used to litigate against Steubenville all the time.”<sup>62</sup> In one particularly relevant case, McNamara “filed a *Monnell* count” which included an “affidavit that went through fifty or sixty . . . misconduct incidents.”<sup>63</sup> Although the former litigator could not remember whether “he won or lost,” the litigator did remember that “he sent the file to the Justice Department. And that’s how the case got started.”<sup>64</sup> This method of case selection saves resources, as it often provides the DOJ with a thoroughly investigated group of allegations ready for further inquiry.<sup>65</sup> Internal policies have varied over the years on whether the DOJ ought to coordinate with traditionally liberal interest groups in formulating targets for inquiries and investigations.<sup>66</sup>

Second, the DOJ regularly monitors media reports of systemic misconduct.<sup>67</sup> While any single, discrete media report of misconduct is insufficient to justify a formal investigation in most cases, a pattern of similar reports or a single report of a particularly serious case of misconduct

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58. Lichtblau, *supra* note 56 (alteration in original) (quoting Professor Michael Selmi).

59. Nicole Marshall, *Why Investigate Us? Police Ask*, TULSA WORLD, Apr. 1, 2001, at A1.

60. Interview #14, *supra* note 51, at 7 (explaining in detail the role that the NAACP and the ACLU served in early investigations in cities like Pittsburgh).

61. *Id.* at 7.

62. *Id.* at 4.

63. *Id.*

64. *Id.*

65. *Id.* (“That makes very good sense because it’s a huge amount of work to find these incidents and to know that you’re talking about something that is systemic enough that there is a point to it.”).

66. *See infra* Part III.B (explaining the changes in enforcement policy over time and the changing role of these interest groups in the process).

67. Telephone Interview with DOJ Participant #18, at 4 (Aug. 8, 2013) [hereinafter Interview #18] (on file with author) (stating that the DOJ identified cases “through a mix of . . . media reviews [and] newspaper reviews”).

can spur preliminary inquiries. As one participant explained, “Occasionally [inquiries] get started when there is a big exposé of a big problem in a department.”<sup>68</sup>

Multiple DOJ litigators identified three examples of cases where outside media attention moved the Special Litigation Section to start a preliminary inquiry—Los Angeles, Cincinnati, and Washington, D.C. In Los Angeles, the Rampart scandal made national headlines and, in part, motivated the DOJ to take a hard look at the LAPD.<sup>69</sup> The Rampart scandal refers to allegations that surfaced in the late 1990s that officers working in the Rampart station in Los Angeles were involved in numerous illegal activities including planting of drugs, making false arrests, and covering up brutality.<sup>70</sup> This massive scandal led the courts to overturn 106 criminal cases and pressured seven officers to retire or resign.<sup>71</sup> Similarly, the *Washington Post* featured a prominent news story on a string of shootings in Washington, D.C., which motivated the DOJ to make an initial inquiry into the Washington Metropolitan Police Department (MPD).<sup>72</sup> Eventually, though, the Washington, D.C., police department came proactively to the DOJ seeking help.<sup>73</sup> Additionally, in Cincinnati, the local media did an “excellent” job making “credible and repeated” showings of systemic misconduct by the police department.<sup>74</sup> There was already an active class

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68. Interview #14, *supra* note 51, at 4 (explaining further that when such a major media story breaks, the DOJ will sometimes independently open an inquiry into the matter, or leadership from the affected city may come directly to the DOJ requesting assistance).

69. *See* Interview #15, *supra* note 31, at 4 (“The LAPD of course, there had been a history of problems. And then the whole controversy broke out in 2000 or 1999, with the Rampart investigation.”); Interview #14, *supra* note 51, at 4 (identifying Rampart as an example of a prominent news story that motivated the DOJ to focus on Los Angeles); *see also id.* (describing how “a big exposé of a big problem” can spur interest in a police agency for § 14141 litigation).

70. Shawn Hubler, *In Rampart, Reaping What We Sowed*, L.A. TIMES, Feb. 17, 2000, at B1 (explaining “the sickening revelations” surrounding the Rampart scandal including “the frame-ups, the dope dealing, the tales of brutality verging on murder”). Other allegations include claims that officers arranged the deportation of witnesses to police abuse. Anne-Marie O’Connor, *Activist Says Officer Sought His Deportation*, L.A. TIMES, Feb. 17, 2000, at A1. The evidence of the Rampart scandal first started to emerge when Rafael Perez, former Rampart Division Officer, was arrested for cocaine theft charges. *See* Kathryn M. Downing et al., Editorial, *A Scandal Hits Home*, L.A. TIMES, Apr. 11, 2000, at B8.

71. David Rosenzweig, *3 Sue LAPD over Rampart Scandal*, L.A. TIMES, Aug. 7, 2005, at B3 (“More than 100 criminal cases were overturned after former Rampart Officer Rafael Perez contended that he and other officers had routinely framed gang members for crimes they did not commit.”).

72. Interview #15, *supra* note 31, at 4 (identifying the story in the *Washington Post* as a memorable event that motivated the DOJ to take a deeper look into the District of Columbia); Telephone Interview with DOJ Participant #12, at 2 (July 30, 2013) [hereinafter Interview #12] (on file with author) (noting that the interviewee “think[s] the *Washington Post* actually did an exposé on the shootings,” which in part motivated the focus on the Metropolitan Police Department).

73. Interview #12, *supra* note 72, at 1–2

74. *Id.* at 3–4. The respondent explained in detail that

if the media brought attention, shed light on allegations, various allegations in a community and did those in a credible and repeated fashion, I felt that was more powerful than an individual organization or individual complainants calling up. . . . [T]hat was certainly the case in Cincinnati. There was a lot of excellent reporting by the newspaper there. There

action suit against Cincinnati's police department.<sup>75</sup> And when the shooting of Timothy Thomas, an unarmed teenager, by Cincinnati police made national news and "resulted in about 3 days of civil unrest," it was important enough to spark DOJ interest in the police department's procedures.<sup>76</sup> Indeed, the DOJ appears to rely on media reports to initially identify problematic departments.

Third, research studies sometimes keyed the DOJ into possible instances of ongoing unconstitutional policing practices. According to one participant in the qualitative interviews, the investigation of the New Jersey State Police demonstrates this phenomenon.<sup>77</sup> The DOJ formally opened an investigation of the New Jersey State Police on April 15, 1996.<sup>78</sup> As one DOJ litigator explained, the Special Litigation Section identified the New Jersey State Police in part because of research presented in an earlier court case on racially disproportionate stop patterns associated with the jurisdiction.<sup>79</sup> Statistician John Lamberth had started studying racial profiling in traffic stops in New Jersey in 1993 after a group of attorneys asked Lamberth to investigate a suspicious and racially disparate pattern of arrests.<sup>80</sup>

Over the following years, Lamberth systematically evaluated whether the New Jersey State Police appeared to be targeting drivers of color on state highways.<sup>81</sup> He began by sampling the racial distribution of drivers on the road.<sup>82</sup> After twenty-one days of intensive observation, Lamberth concluded that roughly 13.5 percent of automobiles on the studied portions of New Jersey highway contained at least one black occupant.<sup>83</sup> He also concluded that these cars with

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was a series of shootings of unarmed African American men. A lot of civil unrest . . . happened . . . . And so, DOJ went in.

*Id.* at 4.

75. Interview #18, *supra* note 67, at 2 ("[A]t that point, there had already been an ongoing class action lawsuit on racial profiling.").

76. *Id.* ("[W]hen the Timothy Thomas shooting and the subsequent disturbances, some people called them riots, happened; then at that point, also the Justice Department began its § 14141 investigation."); *see also* POLICE EXEC. RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 3 (2013), *available at* <http://samuelwalker.net/wp-content/uploads/2013/07/PERFConsent-Decree.pdf> (stating that "[i]n Cincinnati, riots were sparked in 2001 by the police killing of Timothy Thomas, a 19-year-old African American with 14 open warrants for minor, mostly traffic-related violations," and identifying this as a major cause of the eventual DOJ investigation of the Cincinnati Police Department).

77. Interview #12, *supra* note 72, 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 DOJ used the pattern or practice authority to bring the first racial profiling case under that statute").

78. *See infra* app. A (listing the starting and ending dates for each investigation initiated by the DOJ).

79. Interview #12, *supra* note 72, at 1–2 (explaining the importance of the academic studies in making the DOJ litigators feel more confident in initiating action in New Jersey).

80. John Lamberth, *Driving While Black: A Statistician Proves That Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C1.

81. *Id.*

82. *Id.*

83. *Id.*

black occupants made up around 15 percent of all traffic law violators.<sup>84</sup> Yet, about 35 percent of the cars pulled over by police during this same time period contained a black occupant.<sup>85</sup> 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.”<sup>86</sup> The only remedy that the state judge in that particular case could provide, however, was the exclusion of evidence obtained pursuant to these unlawful stops.<sup>87</sup> The judge was not equipped to provide a more expansive, injunctive remedy. According to participants, these research findings motivated the DOJ to take action. Lamberth’s evidence was particularly jarring to some at the DOJ.<sup>88</sup> It also provided an ideal source of evidence to justify a formal investigation. Within a month of the state court judge’s ruling, the DOJ had opened an official investigation into the use of race in traffic stops by the New Jersey State Police.<sup>89</sup>

Fourth, whistleblowers within police departments sometimes provided the DOJ with sufficient evidence to bring about a lawsuit.<sup>90</sup> This often happened when officers “themselves . . . would contact the division and talk about problems they had witnessed or problems they, themselves, had experienced when they were not in uniform.”<sup>91</sup> Interview participants could not always give specific examples of this phenomenon because, as one explained, “We protect the identity of whistleblowers, so we aren’t able to talk more about it. But needless to say, in a handful of cases, we relied heavily on files and information given to us by officers inside a department.”<sup>92</sup> In other cases, though, a high-level administrator within a police department openly reached out to the DOJ to request a formal § 14141 investigation. This happened, most notably, in Washington, D.C. There,

Charles Ramsey, newly sworn in as chief in Washington’s Metropolitan Police Department after a 30-year career in the Chicago Police Department, asked the DOJ to intervene after a series of articles in the *Washington Post* alleged that MPD officers shot and killed more people per capita in the 1990s than any other large U.S. city police force.<sup>93</sup>

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Interview #12, *supra* note 72, at 1–2

89. The judge in private litigation found there to be a pattern of unconstitutional stops in March 1996. Lamberth, *supra* note 80. The next month, in April 1996, the DOJ began a formal investigation. *See infra* app. A (listing all dates of investigations).

90. Interview #12, *supra* note 72, at 2 (“[S]ometimes there were internal whistleblowers.”).

91. *Id.*

92. *Id.* at 4.

93. POLICE EXEC. RESEARCH FORUM, *supra* note 76, at 2 (discussing also how this proactive response in Washington, D.C., eventually led to a the signing of a memorandum of agreement).

Various participants confirmed this story during interviews.<sup>94</sup> Although it is rare to see a police chief so openly request that the DOJ intervene in local affairs, at least one participant remarked that this type of request happens with some frequency.<sup>95</sup> In many of these cases, the DOJ cannot find a sufficiently serious problem as to warrant intervention and instead recommends that the police agency seek alternative assistance through other federal programs or through private accreditation agencies.<sup>96</sup>

Fifth, in a small number of cases, the DOJ relied on particularly egregious individual incidents of misconduct to find possible targets. Of course, § 14141 only provides the attorney general a right of action where there is a pattern or practice of misconduct. This means that a single complaint is typically insufficient to further inquiry.<sup>97</sup> But a single complaint or heinous example of misconduct can influence the DOJ to give a police department a harder look via a preliminary inquiry.<sup>98</sup> In some cases, the Criminal Division of the DOJ sent complaints of officer involved shootings directly to the Special Litigation Section for additional investigation to determine whether they were part of a pattern or practice of misconduct.<sup>99</sup> In total, the methods by which the DOJ identifies target police departments vary widely. Similarly, while it normally took several examples of systemic misconduct to start an investigation into a police department, sometimes a single major event can catch the attention of DOJ officials.

### B. Preliminary Inquiry

The second step of the SRL process is the preliminary inquiry. If a police agency comes to the attention of the DOJ through one of the manners listed above, the agency will open a

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94. See, e.g., Interview #12, *supra* note 72, at 1–2 (stating that Chief Ramsey “very shrewdly asked DOJ to come in and do an investigation”); Interview #14, *supra* note 51, at 4 (“Or they might get started when there’s a big exposé and the department itself or, more likely, the mayor responds to that exposé by inviting the Justice Department to come in. That’s what happened in D.C.”); Interview #15, *supra* note 31, at 4 (“I think this was publicized in the *Washington Post*, there was a settlement with the D.C. police force and that resulted because D.C. actually came to the division and said, we have lots of problems. We want your help. Please investigate us.”).

95. Interview #5, *supra* note 52, at 2-3 (explaining that police departments come to the DOJ requesting assistance more often than many outsider observers may believe).

96. *Id.* (citing Community Oriented Policing Services (COPS) and CALEA as possible examples of alternative programs that the DOJ may refer a local police agency to in lieu of beginning a formal investigation).

97. Interview #14, *supra* note 51, at 4 (explaining that the evidence must show that misconduct within a department is systemic enough to justify intervention).

98. Interview #18, *supra* note 67, at 2 (citing the Timothy Thomas shooting as an example of a particularly egregious incident of misconduct that motivated DOJ action).

99. *Id.* at 4–5. This DOJ insider explained the process:

The criminal section certainly has lots of situations where they’ve had complaints about officer-involved shootings where they may have done a set of investigations in a particular jurisdiction and said, gee, the policies look pretty bad here. You might want to look at that. They got—they met with and got—feedback from civil rights and community groups.

*Id.* at 4.

preliminary inquiry into that department's conduct.<sup>100</sup> This usually happens when a litigator decides to spend more than two hours researching claims of misconduct in a particular city.<sup>101</sup> During this initial inquiry, the DOJ only relies on private complaints, news reports of misconduct, and publicly available data.<sup>102</sup> The DOJ also occasionally conducts interviews with citizens from the community.<sup>103</sup> During this initial phase, litigators at the DOJ, both past and present, are careful to describe their actions as inquiries, as opposed to investigations. This distinction matters, they say, because of the serious implications of a formal investigation. Participants consistently explained that by identifying a department as "under investigation," the DOJ would expose that department to immediate criticism in the media.<sup>104</sup> Moreover, such a decision also triggers a long and expensive investigation.<sup>105</sup> Thus, the DOJ prefers to only advance a case to the investigatory realm if the litigator finds reason to believe the agency is involved in systemic misconduct, and the leadership at the Department believes that such an investigation would be a worthwhile use of limited resources.<sup>106</sup> To illustrate the commonality of initial inquiries, the DOJ provided information on the number of preliminary inquiries registered into the DOJ database since 2000. I recreate that information below in Figure 3.2, demonstrating the progression of cases from preliminary inquiry through investigation, settlement, and monitoring.

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100. *Oversight of the Department of Justice—Civil Rights Division: Hearing Before the Comm. on the Judiciary*, 107th Cong. 18–20 (2002) [hereinafter *Oversight of the DOJ*] (testimony of Ralph Boyd, Jr., Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice).

101. Interview #5, *supra* note 95, at 2 (explaining the preliminary inquiry process and the assignment of a DOJ number for any activity that takes up at least two hours of time).

102. *Oversight of the DOJ*, *supra* note 100, at 18–19 (explaining how during this phase, the DOJ typically relies on public information like witness interviews, pleadings and testimony in court).

103. *Id.* (stating that the DOJ will conduct interviews in some cases).

104. Interview #14, *supra* note 60, at 4 (“Opening an investigation is a huge deal. It’s a very big moment. You wouldn’t want to do that if there turns out not to be enough there to investigate. It would be very detrimental to the police department. Before you open any investigation all through the Department, it doesn’t matter what the issue is, you have to figure out if there is a reason to open an investigation.”).

105. Jodi Nirode, Doug Caruso & Bob Ruth, *City, DOJ Draft Pact; The Police Union Will Be Asked To OK Contract Changes to Avoid Suit Over*, COLUMBUS DISPATCH, Aug. 17, 1999, at A1 (stating that in a request for the 2000 budget, the DOJ requested \$100 million per year to fund sixteen new investigators annually, putting the estimated cost at around \$6 million to \$7 million per investigator hired).

106. Interview #14, *supra* note 51, at 5 (calling this preliminary investigation a “sussing out exercise” used when the DOJ has a suspicion but otherwise has “nothing”).

FIGURE 3.2, TOTAL NUMBER OF INQUIRIES, INVESTIGATIONS, AND MONITOR APPOINTMENTS FROM JANUARY 1, 2000, TO SEPTEMBER 1, 2013<sup>107</sup>

Stage	Cases
Preliminary Inquiry	325 cases
Formal Investigation	38 cases
Negotiated Settlement	19 cases
Monitor Appointed	9 cases

As Figure 3.2 shows, with 325 total cases between 2000 and 2013, the DOJ has initiated an average of around twenty-five or twenty-six preliminary inquiries per year since 2000.<sup>108</sup> The vast majority of these preliminary looks fail to become a formal investigation. In fact, only 11.6 percent of preliminary inquiries resulted in a formal investigation. Only 5.8 percent ended up leading to a negotiated settlement. And in only 2.8 percent of all cases did a preliminary inquiry eventually result in a monitored settlement.

### C. Formal Investigation

If this initial inquiry uncovers the possibility of persistent misconduct in a police department, the DOJ may conduct a formal investigation. These are particularly costly endeavors. In 2000, the DOJ requested \$100 million in additional funding to expand the number of police department investigations under § 14141.<sup>109</sup> This increase in funding was supposed to hire an additional sixteen new investigators each year—suggesting that investigations are a costly endeavor.<sup>110</sup> The average investigation “can take years as investigators wade through piles of internal records and personnel files.”<sup>111</sup> Other previous reports suggested that investigations took “as long as a year.”<sup>112</sup> Such a slow pace can frustrate police agencies that complain that federal investigation contributes to a cloud of suspicion over the entire department.<sup>113</sup> Full investigations

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107. I acquired this data from an interview participant with access to DOJ records. The number of preliminary inquiries is approximate, since the Special Litigation Section does not always keep complete records of these inquiries. The participant explained that the number could be anywhere between 300 and 350. Hence, I use 325 as the best approximate estimate. Interview #5, *supra* note 95.

108. I calculated this by dividing the total number of preliminary inquiries (325) by the number of years in the sample (12.67) to arrive at an average of 25.66 preliminary inquiries per year since 2000.

109. Nirode, Caruso & Ruth, *supra* note 105.

110. *Id.*

111. Jamie Stockwell, *Rights Investigation of Police Continues*, WASH. POST, Dec. 22, 2002, at C6.

112. David Hench, *City Police To Get Federal Review*, PORTLAND PRESS HERALD, May 8, 2002, at 1A.

113. Stockwell, *supra* note 111.

are “comprehensive and far-reaching.”<sup>114</sup> In carrying out an investigation, the DOJ takes “inventory of departmental policies and procedures related to training, discipline, routine police activities, and uses of force and conduct[s] in-depth interviews to determine whether the department’s practices adhere to formal policies.”<sup>115</sup> Litigators from the DOJ do not do these investigations by themselves; instead, they outsource much of the work to police experts and professionals.<sup>116</sup> These police experts “go out and do ride alongs with the police department, to review the police policy manuals, [and] to observe police training.”<sup>117</sup> These experts also evaluate current agency procedure for investigation and commonly “look into and review investigations, both citizen complaints and use of force investigations.”<sup>118</sup> Investigations are primarily comparative—that is the DOJ seeks to compare the policies in the investigated department with “constitutional minimums.”<sup>119</sup> In theory, if an investigation reveals a pattern or practice of misconduct, and the agency refuses to cooperate, the case could go to trial.<sup>120</sup> In the vast majority of cases, departments are eager to cooperate with the investigation to avoid the expense and embarrassment of public litigation.<sup>121</sup>

A Washington, D.C., case provides a useful example of a typical investigation. When the DOJ formally investigated the Washington, D.C., MPD for allegations of excessive use of force, DOJ investigators obtained a “stratified random sample of the use of force incidents.”<sup>122</sup> They

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114. Harmon, *supra* note 4, at 15 (quoting INT’L ASS’N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 38 (2006), *available at* <http://www.cops.usdoj.gov/files/ric/Publications/e06064100.pdf>).

115. *Id.*; *see also* INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 114, at 8.

116. Interview #18, *supra* note 67, at 7 (“[T]he Civil Rights Division and the Special Litigation Section brings on police experts to assist them in the actual investigation.”). This participant further elaborated on how the DOJ selects individuals for this role:

Some individuals are—many of them are—prior chiefs or prior deputy chiefs or involved in maybe heads of internal affairs divisions, some may be academics but I don’t think so. I think they’re mostly practitioners. There’s also been some kind of going back and forth between monitors and the folks who do the investigation.

*Id.* at 8.

117. *Id.* at 7.

118. *Id.*

119. *Id.* This participant’s full explanation is worth reproduction here to give a fuller explanation of the investigatory process:

And then to look into and review investigations, both citizen complaints and use of force investigations. That’s one of the ways that they compare the police departments or it could be a sheriff or a law enforcement jurisdiction entity. They compare the practices of the investigating—the entity being investigated—with general police practices, model practices and what the expectation[s] are in the field. And review the practices for comparison to constitutional minimums. And as part of the investigation, they examine the systems, the policies, the practices, and the policy systems, compare it to what should be the norm.

*Id.*

120. Harmon, *supra* note 4, at 15.

121. *See infra* app. B (listing the disposition of each negotiated settlement).

122. WILLIAM R. YEOMANS, DEPARTMENT OF JUSTICE INVESTIGATION OF USE OF FORCE BY THE WASHINGTON METROPOLITAN POLICE DEPARTMENT 2 (2001), *available at* <http://www.clearinghouse.net/chDocs/public/PN-DC-0001-0002.pdf>.

determined that in approximately 15 percent of these cases, the officer used excessive force.<sup>123</sup> According to DOJ estimates, a “well-managed and supervised police department[]” should only expect about 1 or 2 percent of all incidents to involve excessive use of force.<sup>124</sup> The survey also found that in 22 percent of the force claims involving firearms, police used deadly force based on the suspicion that the suspect possessed a firearm.<sup>125</sup> And “[i]n each case . . . post-incident searches failed to reveal any weapon.”<sup>126</sup> Based on these findings, the DOJ provided the MPD with a set of technical assistance recommendations.<sup>127</sup> In some cases—particularly those involving a small number of problems—this investigation and technical assistance letter ends the DOJ inquiry.<sup>128</sup> If the formal investigation uncovers a more expansive pattern of misconduct, though, the DOJ could theoretically file a lawsuit under § 14141. But in practice, no § 14141 case has ever gone to trial.

This three-step process of internal, investigatory action by the DOJ sets the stage for SRL. It determines which departments are subject to long, costly litigation, and it determines which departments get a pass on federal oversight. The DOJ is the gatekeeper to the SRL process. While it remains possible that private litigants can initiate SRL in a few narrow circumstances after *Lyons*, the DOJ holds the key to virtually all SRL cases. In many respects, the current enforcement model makes sense. It attempts to use limited resources to identify and investigate a small number of police departments out of a pool of thousands of possible targets. But in doing so, it uses an imprecise and messy process. And, as I show in the next section, the agency’s enforcement model has also changed over time.

### III. CHANGES IN ENFORCEMENT POLICY OVER TIME

In the past, several writers have claimed that both internal and external pressures may affect how aggressively the DOJ pursues cases under § 14141. Professor Chanin has previously written that the DOJ’s enforcement strategy seemed to “change[] considerably after the elections of George W. Bush and Barack Obama.”<sup>129</sup> This seems to roughly align with statements made by then candidate George W. Bush as he was campaigning for his first presidential term, when he

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123. *Id.*

124. *Id.*

125. *Id.* (“22 percent of the sampled incidents involved officers firing their weapons at moving vehicles.”).

126. *Id.*

127. *Id.* at 7 (citing the need for a formal settlement outlining the terms of reform and saying that “[t]he Memorandum of Agreement provides for the development and implementation of updated use of force policies and procedures addressing the issues raised by our investigation as summarized above”).

128. Harmon, *supra* note 4, at 16 (writing that in some cases, the DOJ has “issued a technical assistance letter recommending reform, or taken no action”).

129. Chanin, *supra* note 5, at 334–35. Heather Mac Donald, arguing from the conservative standpoint, echoes the view that President Bush’s DOJ restricted the number of investigations: “During the Bush Administration, political appointees to the civil rights division reined in the staff’s eagerness to investigate police departments for racial profiling, since the profiling studies routinely served up by the ACLU and other activist organizations were based on laughably bogus methodology.” Heather Mac Donald, *Targeting the Police*, WKLY. STANDARD, Jan. 31, 2011, at 26.

stated that he did “not believe that the federal government should instruct state and local authorities on how police department operations should be conducted, becoming a separate internal affairs division.”<sup>130</sup> This stands in stark contrast to the Obama Administration, which has pledged to take on a more aggressive enforcement posture. Under President Obama, Assistant Attorney General Thomas Perez “told a conference of police chiefs in June 2010 that the Justice Department would be pursuing ‘pattern or practice’ takeovers of police departments much more aggressively than the Bush Administration, eschewing negotiation in favor of hardball tactics seeking immediate federal control.”<sup>131</sup> In many respects, there seems to be something to the notion that the politics affects the § 14141 enforcement strategy. During the Clinton Administration, the DOJ sought millions of dollars in additional funds to support § 14141 investigations.<sup>132</sup> And during the Obama Administration, the DOJ has added nine additional attorneys to facilitate § 14141 enforcement.<sup>133</sup>

But despite many researchers levying theories about changes in enforcement, no study has empirically assessed the validity of these claims. Has § 14141 enforcement changed under different political leadership?<sup>134</sup> Interviewees confirm that the DOJ lacks the necessary resources to respond to every case of apparent systemic misconduct within a police department. The quantitative data in this study confirms that, even when the DOJ actively supported § 14141 enforcement, the use of SRL has been both limited and inconsistent. These interviewees also attribute the inconsistency in the enforcement of § 14141 to change in internal policies.

First, the data shows that the DOJ has not aggressively pursued SRL against a large number of police agencies. In total, the DOJ has initiated around 55 investigations since the passage of § 14141. This means that the DOJ has only formally investigated around three departments per year.<sup>135</sup> The relatively small number of investigations appears to be a product of the high cost of each investigation. Remember, investigations are costly<sup>136</sup> and can last for several years.<sup>137</sup> As a result, the DOJ can only target a small number of cities each year. Given that there are around 17,985 state and local police agencies in the United States,<sup>138</sup> this means the DOJ can only investigate less than 0.02 percent of all departments in the country each year. If patterns or

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130. See Eric Lichtblau, *Bush Sees U.S. As Meddling in Local Police Affairs*, L.A. TIMES, June 1, 2000, at A5.

131. Mac Donald, *supra* note 129.

132. Nirode, Caruso & Ruth, *supra* note 105.

133. Mac Donald, *supra* note 129.

134. The studies that have alluded to this question have cursorily addressed it by piecing together an answer by relying on interviews, media reports, and news releases. See, e.g., Gilles, *supra* note 3, at 1404–10 (turning to publicly available information to piece together data on the DOJ’s enforcement policies); Simmons, *supra* note 3, at 516–17 (describing the lack of aggressive DOJ enforcement through reliance on media reports and publicly available information); Chanin, *supra* note 5, at 24 (describing the use of monitor reports, publicly available data, news reports, and interviews to acquire data).

135. I calculated this by taking the number of investigations reported by the DOJ in Appendix A and dividing it by the time period covered—approximately eighteen years. This results in an average of approximately three investigations per year.

136. Nirode, Caruso & Ruth, *supra* note 105.

137. Stockwell, *supra* note 111.

138. REAVES, *supra* note 12, at 2 tbl.1.

practices of misconduct exist in only one out of every 100 law enforcement departments,<sup>139</sup> then the DOJ only has the resources to investigate less than 2 percent of these departments each year. It is fair to assume that, even during the times when the DOJ has aggressively pursued pattern or practice claims, enforcement has still been less than optimal. As one litigator with the DOJ explained during an interview, “there’s no way that the [DOJ] can litigate all of the patterns and practices of police misconduct in this country. There are too many policing jurisdictions for them to do that.”<sup>140</sup> In fact, a single, complex § 14141 case alone can nearly exhaust all of the manpower and resources of the Special Litigation Section for an entire year.<sup>141</sup> It is likely that the resources given to the DOJ to investigate § 14141 abuse may never be sufficient to target every city apparently engaged in misconduct.

This is a particularly troubling realization, since only through increasing the frequency of investigations can § 14141 efficiently incentivize widespread reform and generally deter unconstitutional misconduct. As discussed in chapters 1 and 2, SRL has the potential to be the most forceful regulatory tool for overhauling American police departments when used aggressively by the DOJ. Unlike traditional cost-raising mechanisms for misconduct regulation, § 14141 can force noncompliant departments to implement radical reforms to ensure constitutional policing practices.<sup>142</sup> But § 14141 cannot achieve this objective if the DOJ chooses not to invoke the statute’s protections. In theory, the statute can only deter misconduct in one of two ways—either it can specifically reform a single problematic department through costly and invasive equitable relief, or it can serve as a general deterrent to police departments all across the country, thereby motivating departments to take proactive steps to avoid the cost and embarrassment of DOJ scrutiny.

For this general deterrent rationale to work, police agencies must perceive the possibility of DOJ investigation and oversight as reasonably possible, if not certain. If agencies view DOJ action under § 14141 to be an extremely remote possibility, then rational choice theory suggests that these departments will have no motivation for reform. Rachel Harmon has used such rational choice theory in arguing for a new DOJ enforcement model that is more transparent.<sup>143</sup> As it currently stands, a rational department engaged in systemic misconduct would likely not

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139. Unfortunately, there is no good way estimate the number of police departments that may be engaged in a pattern or practice of misconduct. There is no uniform statistic to measure misconduct—which is part of the reason why the DOJ has developed such a unique and multifaceted case selection method for § 14141 cases. *See supra* Part III.A.i.

140. Interview #14, *supra* note 51, at 11. The participant referenced the hard work required in litigating the ongoing case in Maricopa County and further elaborated that even though the Special Litigation Section now has more lawyers than in the past “it’s not plausible to think that the [DOJ] can do this by itself.” *Id.* at 12.

141. *Id.* at 11–12 (using Maricopa County as an example of a particularly complex and contentious claim that has exhausted significant resources, leaving little left to address other cities).

142. *See supra* Part I.B (explaining the comparative advantage of equitable relief compared to traditional cost-raising measures).

143. Harmon, *supra* note 4, at 23 (“According to deterrence theory, a rational actor will engage in conduct when doing so provides a positive expected return in light of the actor’s utility function . . . [meaning that] a police department will adopt remedial measures to prevent misconduct when doing so is a cost-effective means of reducing the net costs of police misconduct or increasing the net benefits of protecting civil rights.”).

view a § 14141 suit as a realistic possibility. If this law is to be an incentive for widespread reform, this must change.

Second, the data shows that the DOJ’s enforcement of § 14141 has also changed over time. Since commentators previously observed that § 14141 enforcement seemed to vary by presidential administration, Figure 3.3 organizes the total number of investigations and negotiated settlements reached during each presidential administration.

FIGURE 3.3, DOJ ACTION UNDER § 14141 BY PRESIDENTIAL ADMINISTRATION<sup>144</sup>

<b>Administration</b>	<b>Investigation</b>	<b>Negotiated Settlements</b>	<b>Monitors Appointed</b>
William Clinton Term 1 <sup>145</sup>	10	0	0
William Clinton Term 2	12	3	3
George W. Bush Term 1	13	11	5
George W. Bush Term 2	8	0	0
Barack Obama Term 1	12	8	4

The data shows a decrease in the aggressiveness of § 14141 enforcement between late 2004 and early 2009, which correlates with the second term of the Bush Administration.<sup>146</sup> This decrease in aggressiveness manifests itself in several ways. During this time period, there was a noticeable decrease in the number of investigations officially opened by the DOJ. The DOJ did not enter into a single negotiated settlement during this time period. And since the DOJ did not agree to any settlements during this time period, they also did not push for the monitoring of any

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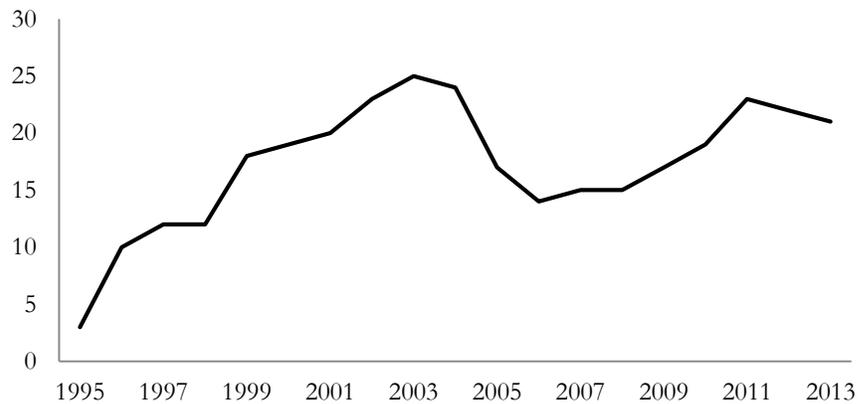
144. *See* app. A–B.

145. Section 14141 became law in 1991. The lack of negotiated settlements and monitor appointments before 1997 probably does not represent any administrative unwillingness to use these remedies. After § 14141’s passage, the DOJ needed time to develop internal implementation strategies after the passage of § 14141. Enforcement was not fully underway until about a year after Congress passed the VCCLEA. *See, e.g.*, Interview #14, *supra* note 51, at 5 (stating that “it’s hard getting a new statute implemented” and detailing the challenging process facing the DOJ in implementing the statute initially in 1994 and 1995). This likely explains the lack of negotiated settlements and monitor appointments during the first Clinton Administration.

146. It is possible that any effects of political administration on the enforcement policy of the DOJ would only be felt a year or more after a change in executive leadership. *See, e.g.*, Interview #14, *supra* note 51, at 5–6 (explaining the time it took to get policies implemented and the possibility of lagged effects of implementation); Interview #15, *supra* note 31, at 2 (explaining that while the statute was not initially enforced, it took a period of time for internal changes to lead to efforts to change enforcement policy). But even when controlling for this possibility, there still appeared to be a noticeable difference in the likelihood of the DOJ to aggressively utilize § 14141 around the second term of the Bush Administration.

police agency. Remember that part of the reason that Congress passed § 14141 in 1994 was to provide the DOJ with the ability to seek injunctive action against police departments—that is, force those police departments to make necessary policy changes aimed at curbing misconduct.<sup>147</sup> During the second term of the Bush Administration, though, the DOJ did not force a single police agency to make any policy changes via a § 14141 settlement. The noticeable shift in enforcement is also visible in Figure 3.4, which shows the number of open § 14141 cases over time.

FIGURE 3.4, OPEN § 14141 CASES OVER TIME<sup>148</sup>



So what caused this apparent shift in enforcement of § 14141? One experienced DOJ litigator, who left the DOJ around this time, attributed this sharp decline in negotiated settlements to changes in an internal policy that discouraged extensive federal involvement in local police departments.<sup>149</sup> Respondents identified two possible explanations for this change in enforcement policy. First, as one DOJ official detailed, DOJ litigators have often relied on coordination with civil rights groups like the ACLU and NAACP to determine whether there was sufficient evidence to justify a formal investigation.<sup>150</sup> Remember that, in many cases, coordination with civil rights groups formed the basis for initial inquiries and served as a vital tool for evidence during the formal investigation stage.<sup>151</sup> Litigators continued this method of preliminary inquiry in the early years of the Bush Administration.<sup>152</sup> But at some point during the Bush Administration, an internal policy change allegedly discouraged litigators from coordinating

147. *See infra* Parts I.D–II (explaining the need for equitable relief to address systemic misconduct issues).

148. This data is taken from the list of investigations. *See* app. A.

149. Interview #15, *supra* note 31, at 6 (explaining the changes that happened during the Bush Administration). One important change that this participant noted was the removal of the previous leadership within the Special Litigation Section in part because of “his police-related work and the opposition of police unions to the work. Which was very strong.” *Id.*

150. Interview #5, *supra* note 95, at 2–3 (explaining the policy that discouraged or even barred the coordination with civil rights groups).

151. *See supra* Part III.A.1 (describing the case selection process and in particular the coordination with groups like the NAACP and the ACLU).

152. *See supra* Part III.A.1.

with civil rights groups.<sup>153</sup> This hampered efforts by § 14141 litigators to acquire sufficient evidence to justify invasive federal involvement in local police affairs.

Second, multiple current and former DOJ litigators noted that internal politics around this same time favored the use of § 14141 for technical assistance as opposed to full-scale negotiated settlements and external monitoring.<sup>154</sup> The prevailing belief was that technical assistance letters could provide departments with the necessary guidance to reform departments locally, without expending additional federal resources monitoring eventual reform efforts.<sup>155</sup> Of course, these technical assistance letters are not binding.<sup>156</sup> Instead, these technical assistance letters only provide a voluntary blueprint that agencies can accept if they so choose. These apparent policy changes could explain a substantial amount of the variation in enforcement patterns evident from the data.

In recent years, the DOJ has again started to use § 14141 more aggressively to force police departments to adopt specific policy reforms.<sup>157</sup> In March 2009, less than two months after Eric Holder took over as attorney general, the DOJ approved a consent decree with the Virgin Islands Police Department.<sup>158</sup> This was the first negotiated settlement that the DOJ had approved under § 14141 in over five years.<sup>159</sup> Since then, the DOJ has reached settlement agreements with seven different police agencies in seven different states.<sup>160</sup> In three of these cases—the Virgin Islands; Seattle, Washington; and New Orleans, Louisiana—these settlements have included clauses that require the appointment of an external monitor to ensure departmental compliance with the terms of the agreement.<sup>161</sup>

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153. *See supra* Part III.A.1.

154. *See supra* Part III.A.1. Harmon also provides a useful perspective:

The technical assistance letters or investigative findings letters represent less formal attempts by the Justice Department to achieve reform. During most of the Justice Department's investigations, it has sent a letter to the investigated police department summarizing its findings at that point in the investigation. In some cases, this letter functioned as a precursor to a later settlement through a consent decree or memorandum of agreement. In other cases—although the letter suggested that the investigation was ongoing at the time—the technical assistance letter was the last public action in the case. In these cases, the letters do not make findings about whether § 14141 has been violated. Instead, they describe departmental deficiencies that may cause misconduct and recommend specific remedial measures to correct those problems.

Harmon, *supra* note 4, at 17–18.

155. Interview #5, *supra* note 95, at 3 (detailing the preference for technical assistance letters); *see also* Harmon, *supra* note 4, at 18 (“[T]he letters do not contain any mechanism for ensuring compliance or for ongoing monitoring.”).

156. Interview #5, *supra* note 95, at 3.

157. One way to measure this is to examine the number of investigations per year since President Obama's pick for attorney general—Eric Holder—has assumed office. Holder has served as attorney general for 1,687 days as of September 9, 2013. During this time, the DOJ initiated fifteen investigations. *See app. A.* This suggests that the Holder DOJ has averaged approximately 3.25 investigations per 365 days.

158. *See app. B* (detailing the dates of each negotiated settlement reached between the DOJ and local police agencies).

159. *See app. B.*

160. *See app. B.*

161. *See app. B.*

In sum, the qualitative and quantitative data suggest that the enforcement of § 14141 varied significantly during a portion of the Bush Administration, likely due in part to the adoption of internal policies that discouraged coordination with interest groups and encouraged noninvasive solutions. The Obama Administration has, meanwhile, appeared to reverse this trend, ushering in a new era of aggressive enforcement. The evidence also suggests, however, that even when internal policies favor aggressive enforcement of § 14141, the DOJ has only initiated around three new investigations per year. Interviewees argued that this number represented only a fraction of departments seemingly engaged in systemic misconduct.

#### IV. POLITICAL SPILLOVER

The qualitative evidence also suggests that the DOJ faces another potential barrier in initiating action against a municipality that may be engaged in patterns or practices of misconduct—a challenge I refer to as “political spillover.” An example best illustrates this phenomenon. Multiple interviewees described the Special Litigation Section’s interest in pursuing a possible SRL case against the New York City Police Department (NYPD).<sup>162</sup> The DOJ initiated two separate investigations in New York City—one through the U.S. Attorney’s Office (USAO) in the Eastern District of New York and one through the USAO in the Southern District of New York.<sup>163</sup> Neither investigation resulted in a settlement agreement.<sup>164</sup> When asked about this investigation into the NYPD, DOJ litigators suggested that political considerations factored into the decision to not formally pursue a settlement agreement. Before the DOJ initiates settlement negotiations under § 14141, the Special Litigation Section relies on the local USAO to facilitate the investigation and to participate in the settlement negotiation. In New York, this meant that the Special Litigation Section needed to work collaboratively with the USAO in the Southern and Eastern Districts of New York. According to interviewees, these two USAO districts are unique in their independence from the central DOJ.<sup>165</sup> Interviewees jokingly referred to the Southern District as the “Sovereign District of New York,” a tribute to the district’s informal jurisdictional independence from the central authority of the DOJ.<sup>166</sup> Although litigators in the Special Litigation Section felt that a negotiated settlement was needed to address the possible misconduct in the NYPD, multiple interviewees identified the Southern District as a barrier to § 14141 action.<sup>167</sup> Since New York City spans two different USAO districts, the DOJ

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162. Interview #14, *supra* note 51, at 11–14 (identifying, again, NYPD as an agency of interest to the Special Litigation Section for § 14141 purposes); Interview #18, *supra* note 67, at 5–7 (explaining the initiation of the New York investigation).

163. *See* app. A (listing all of the investigations pursued by the DOJ).

164. *See* app. B (showing that the NYPD is not among the list of settlement agreements).

165. Interview #18, *supra* note 67, at 6 (identifying the unique independence of the Southern District in particular); *see also* Interview #14, *supra* note 51, at 12 (“The Eastern District is sort of quasi-sovereign.”).

166. Interview #14, *supra* note 51, at 12; Interview #18, *supra* note 67, at 6 (identifying the independence of the Southern District and stating that “they do all their cases including their civil rights cases”).

167. Interview #14, *supra* note 51, at 12–13 (identifying the political concerns that likely motivated the Southern District to oppose formal action); Interview #18, *supra* note 67, at 6

needed to get the support of both the Southern and Eastern District offices.<sup>168</sup> While the Eastern District seemed somewhat willing to pursue the matter further, the Southern District resisted efforts to push further any § 14141 claims against the NYPD.<sup>169</sup> Interviewees disagreed about the extent to which politics factored into the decision by the Southern District to block further action against the NYPD. At least two participants concluded that politics played some role in the decision to not pursue a § 14141 case against the NYPD.<sup>170</sup> One former litigator believed that the DOJ made a tactical choice to not initiate action against the NYPD because of concerns about alienating the agency, thereby hampering future efforts to coordinate as part of law enforcement task forces.<sup>171</sup> As this litigator went on to speculate, federal-state coordination is an increasingly important method for addressing law enforcement issues that traverse jurisdictional borders.<sup>172</sup> And perhaps no local department engages in more federal-state coordination than the NYPD.<sup>173</sup> This suggests that internal politics can also serve as a barrier to DOJ action, in some cases.<sup>174</sup> After all, the DOJ is the ultimate “repeat player.”<sup>175</sup> And as a repeat player in the legal system, the DOJ must be cognizant of how its actions in one arena may affect its future ability to further other, future organizational goals. The result is political spillover that can hamper otherwise viable efforts to enforce § 14141.

## V. IMPLICATIONS FOR AGENCY DECISION-MAKING LITERATURE

Over the last several decades, law scholars have observed that privately initiated structural reform litigation had fallen out of favor with the courts. For a period of time during the twentieth century, private litigants were able to successfully instigate structural reform of many

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(explaining that the Southern District was the agency most opposed to further action against the NYPD).

168. Interview #18, *supra* note 67, at 6 (“[I]n order to bring a case against the city, the police department covers all of the boroughs so you’d have to get both US Attorneys on board.”).

169. *Id.* at 6 (identifying the differing opinions between the Eastern and Southern Districts).

170. Interview #14, *supra* note 51, at 12–13 (speculating that the political ambitions of the U.S. Attorney of the Southern District of New York may have contributed to the unwillingness to pursue further civil rights actions); *see also* Interview #12, *supra* note 72, at 3 (agreeing during the interview that local politics likely play an important role in the decision to pursue further action under § 14141).

171. Telephone Interview with DOJ Participant #22 (Sept. 19, 2013).

172. *Id.*

173. *Id.*

174. Several studies have found that this sort of political spillover can affect agency aggressiveness. Matthew C. Stephenson, *supra* note 13 at 110 n.48.

175. *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 98–104. 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. The repeat player wants to establish valuable precedent that will be of use in future cases. *Id.*

major state institutions.<sup>176</sup> For several decades after, the courts were “cast” in a “political” or “activist” role.<sup>177</sup> Scholars who supported this expansive role of the courts in structural reform praised this activist structural reform as promising to be “*the* central . . . mode of constitutional adjudication” of the future.<sup>178</sup> But in recent decades, “a number of events signaled the demise of the structural reform revolution.”<sup>179</sup>

The empirical evidence from this study suggests that the attorney general has not consistently and aggressively enforced § 14141. This confirms the suspicion of many earlier writers that “the frequency of § 14141 actions will likely depend upon the political ideology and commitment of the President of the United States.”<sup>180</sup> This uneven enforcement further “underscores the fact that giving the Justice Department such authority will not ensure meaningful federal enforcement.”<sup>181</sup> At least one writer has previously shown this phenomenon in the context of the Reagan Administration’s enforcement of the Civil Rights of Institutionalized Persons Act (CRIPA).<sup>182</sup> There, the Reagan Administration did not “file a single suit involving an institution” subject to potential litigation under CRIPA.<sup>183</sup> The DOJ made a policy of only initiating litigation as a last resort, opting instead to give states seemingly “unlimited time to negotiate a settlement” while the unconstitutional practices “fester[ed], destroying the purpose of the federally mandated intervention.”<sup>184</sup> The DOJ also generally avoided injunctive relief,<sup>185</sup> and

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176. Gilles, *supra* note 3, at 1390 (explaining how the modern structural reform movement through private litigation began in the 1950s as the federal courts agreed to hear cases alleging the need for equitable relief for various public institutions like schools and prisons). There are numerous prominent cases from the mid-twentieth century of the courts proactively instigating structural reform. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978) (holding that punitive isolation for longer than thirty days in an Arkansas prison constituted cruel and unusual punishment in violation of the Eighth Amendment); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (determining that once a locality had violated a court mandate to desegregate schools, the district court had broad and flexible power to remedy the wrong through equitable relief); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955) (holding that the problems identified in the Court’s original opinion, *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954), required multiple different, local solutions; thus Chief Justice Warren urged localities to act “with all deliberate speed” to comply with the Court’s order).

177. Abram Chayes, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 4 (1982).

178. Owen M. Fiss, *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 2 (1979).

179. Gilles, *supra* note 3, at 1393.

180. Marshall Miller, *Police Brutality*, 17 YALE L. & POL’Y REV. 149, 176 (1998) (hypothesizing on the future use of § 14141).

181. Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1524 n.279 (1993).

182. *Id.*; *see also* John Kip Cornwell, *CRIPA: The Failure of Federal Intervention for Mentally Retarded People*, 97 YALE L.J. 845 (1988) (finding that the Reagan Administration’s DOJ avoided litigation under CRIPA and authored inadequate settlements).

183. Cornwell, *supra* note 182, at 848.

184. *Id.* at 849 (quoting STAFF OF S. SUBCOMM. ON THE HANDICAPPED, 99TH CONG., REP. ON THE INSTITUTIONALIZED MENTALLY DISABLED 6 (1985)).

185. *Id.* at 850 (describing the lack of injunctive relief sought by the federal government and bringing up the example of Oregon’s Fairview Training Center).

also chose to not assign independent monitors to oversee the reforms.<sup>186</sup> Thus, Reagan's DOJ transformed CRIPA from a measure designed by Congress to facilitate widespread reform of facilities housing institutionalized persons into a weak measure that failed to provide for effective relief.<sup>187</sup> Other researchers have also identified how political pressure can affect agency enforcement.<sup>188</sup>

Similarly, the empirical evidence I present in this chapter adds to this body of work. It demonstrates that by giving the DOJ a broad and ambiguous mandate, Congress opened up the opportunity for the DOJ to limit the law's effectiveness. Statutes "tend to set forth broad and often ambiguous principles that give organizations wide latitude to construct the meaning of compliance in a way that responds to both environmental demands and managerial interests."<sup>189</sup> The danger in doing so is that enforcers, like the DOJ, have the opportunity to transform ambiguity into procedure that limits the law's impact on society.<sup>190</sup>

## CONCLUSION

Three lessons emerge from this chapter on the enforcement of § 14141. First, despite the transformative potential of the statute, it appears that enforcement of SRL has been hampered by resource limitations and political obstruction. Resource limitations have extended from one presidential administration to the next. It is hard to imagine that the DOJ will ever have the requisite resources to fully and rigorously enforce § 14141 against all agencies that appear to be engaged in a pattern or practice of misconduct. But the political obstruction of § 14141 during the Bush Administration is yet another reminder of how administrative actors can influence the real world consequences of law on the books.

Second, in the face of these limitations, the attorneys in the Special Litigation Section have admirably attempted to utilize their limited enforcement power in a way that maximizes the overall effect of § 14141. Yes, the process is messy. The process is also sometimes seemingly inconsistent and imprecise. But these drawbacks are an understandable consequence of an agency

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186. *Id.* at 853–54 (“The absence of provisions relating to the monitoring of placements is part of a bigger problem. . . . [T]he decrees fail to provide for any independent monitoring body to ensure compliance; instead, they leave these responsibilities to the federal government.”).

187. *Id.* at 852.

188. *See, e.g.*, Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329 (1982) (arguing that the composition of a congressional oversight committee influenced the composition of an FTC antitrust law); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 191 (showing how political considerations have lead agencies to reduce prosecution of environmental law violations).

189. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1531 (1992).

190. Organizational sociologists call this phenomenon in the private context the organizational mediation of the law. *Id.* at 1567 (explaining that in the context of equal employment opportunity and affirmative action laws, “where legal ambiguity, procedural constraints, and weak enforcement mechanisms leave the meaning of compliance open to organizational construction, organizations that are subject to normative pressure from their environment elaborate their formal structures to create visible symbols of their attention to law” that still may not honor the spirit of the law).

taxed with an impossible responsibility. To compensate, the litigators in the Special Litigation Section have strategically investigated many of the largest police agencies in the country, sending a clear message to police departments around the country about the boundaries of acceptable police behavior. But at the end of the day, these attorneys have only been able to push forward an extremely small number of cases relative to the number of police departments in the U.S.

Thus, the third lesson that emerges is that, despite the best effort of the attorneys in the Special Litigation Section, outsiders often view the enforcement of § 14141 as nothing more than an enforcement lottery. This is a particularly unfortunate development since, as I discuss more in Chapters 4 and 5, a cooperative relationship between the DOJ and a targeted municipality is often critical to the successful and expeditious implementation of mandated reforms. But since enforcement is at times so spotty and inconsistent, municipalities often view their selection for SRL as procedurally unjust. This may ultimately be the most troubling and harmful consequence of the SRL enforcement lottery.

## Chapter 4

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# The Structural Reform Litigation Process in Police Departments

### INTRODUCTION

Once the DOJ has determined that a police agency is engaged in a pattern or practice of wrongdoing, the SRL process begins. Drawing on original interviews, court documents, statistical data, and media reports, this chapter describes the negotiation, bargaining, and implementation of SRL. This chapter also theorizes on its effectiveness. The first part of this chapter explains how the vast majority of the SRL process happens outside the formal legal system, in the shadow of the law. Unlike traditional structural reform litigation, the courts play a surprisingly limited role in SRL. Every § 14141 case thus far has been resolved out of court via a negotiated settlements.<sup>1</sup> These settlements establish guidelines for how the regulated policing agency can prevent future patterns misconduct through various changes in departmental policy, supervision, and training. Judges typically sign off on these agreements. But this court approval has proven a mere formality. The result is that most of the SRL process happens out-of-court and behind closed doors. Historically, this has hidden the process from public scrutiny. Stakeholder interviews are particularly helpful in building a descriptive account of this negotiation, bargaining, and implementation process. As these stakeholder interviews demonstrate, the SRL process involves three major stages.

First, the DOJ negotiates a settlement with the targeted municipality. There does appear to be a good faith negotiation that typically happens between the DOJ and the targeted law enforcement agency. Nevertheless, the DOJ typically holds an advantageous bargaining endowment during these negotiations. Additionally, since the DOJ is a repeat litigator in the § 14141 context, the DOJ negotiates differently than a local police agency. Police unions also commonly attempt to intervene in settlement negotiations with the intent of blocking reforms that may increase oversight or otherwise burden frontline police officers.

Second, with the settlement completed, the parties must next come to an agreement on the appointment of an outside monitor. Across all existing cases, monitors are expensive. The cost of this monitoring falls entirely on the targeted police agency. As a result, the DOJ and local municipality have very different incentivizes. The DOJ often requests the appointment of a costly external monitor, while the targeted municipality often pushes for lower cost alternatives. There is widespread disagreement between the DOJ and targeted municipalities about the relative importance of a monitor's law enforcement background. During interviews, police executives expressed their strong preference for former police leaders as monitors, while the DOJ has tended to support the appointment of attorneys as external monitors.

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<sup>1</sup> See *infra* Chapter 3 (describing the periods during the Clinton and Obama Administration when the Justice Department regularly disposed of formal investigations through negotiating a settlement agreement).

Third, with an agreement in place and an outside monitor assigned, the monitored reform begins. The dominant approach used to measure compliance with a negotiated settlement is logical, but also creates openings for confrontation. The relationship between the monitor and the police agency also seems to play a critical role in the speed of reforms, as does the level of institutional and political support within the targeted municipality.

The second part of this chapter theorizes on the benefits and drawbacks of the current regulatory approach to SRL. In several ways, the DOJ's current approach to negotiating and implementing constitutional reform helps facilitate organizational change in law enforcement agencies. It forces local governments to allocate scarce municipal resources to the cause of police reform. It facilitates changes in leadership within targeted agencies. It utilizes external monitoring to ensure that frontline officers substantively comply with top-down mandates. And it provides police executives with legal cover to implement wide-ranging policy and procedural reforms aimed at curbing misconduct.

But the DOJ's current model of SRL is far from perfect. SRL, by itself, is neither necessary nor sufficient for constitutional reform in a law enforcement agency. SRL is not a silver bullet. Real, long-lasting constitutional reform requires local cooperation and dedication to succeed. The DOJ cannot use SRL to instantly transform a police agency with defiant, obstinate leadership. This raises serious questions about the viability of SRL as a regulatory mechanism. The process is also expensive. The vast majority of this financial burden falls on local police agencies over a relatively short period of time. This raises concerns about the feasibility of SRL in poorer communities. Additional questions remain about whether targeted agencies will sustain reforms after federal intervention ends, and whether intervention correlates with reductions in police aggressiveness.

## I. SETTLEMENT NEGOTIATIONS

After the DOJ has completed its internal investigatory functions, 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.<sup>2</sup> The goal of every negotiation is to reach a negotiated settlement that

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<sup>2</sup> For example, in New Orleans there was approximately a 10-month gap between the conclusion of the investigation and the signing of a consent decree. There, the DOJ issued a report detailing its investigative findings on March 16, 2011, and eventually agreed to a consent decree on January 11, 2013. *United States v. City of New Orleans*, No. 2:12-cv-01924-SM-JCW (E.D. La. July 24, 2013) (consent decree regarding the New Orleans Police Department) [hereinafter *New Orleans Consent Decree*], *text available at* <http://www.clearinghouse.net/chDocs/public/PN-LA-0001-0001.pdf>; *INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT*, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION v (March 16, 2011) [hereinafter *New Orleans Investigation*], *text available at* [http://www.justice.gov/crt/about/spl/nopd\\_report.pdf](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* *Detroit Department Use of Force Findings Letter* (March 6, 2002), *text available at* [http://www.justice.gov/crt/about/spl/documents/dpd/detroit\\_3\\_6.php](http://www.justice.gov/crt/about/spl/documents/dpd/detroit_3_6.php); *Detroit Police Department Holding Cell Findings Letter* (April 4, 2002), *text available at* [http://www.justice.gov/crt/about/spl/documents/dpd/detroit\\_4\\_4.php](http://www.justice.gov/crt/about/spl/documents/dpd/detroit_4_4.php); *Detroit Police Department Witness Detention Findings Letter* (June 5, 2002); *United States v. Detroit 03-72258* (E.D. Mich. June

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.”<sup>3</sup> Neither the municipality nor the DOJ gets everything they want in a negotiated settlement. Remember, no §14141 case has actually resulted in trial.<sup>4</sup> Both parties typically start a negotiation by making demands that they fully expect the other side to reject.<sup>5</sup> This anchors the negotiation and allows for an eventual compromise somewhere in the middle.<sup>6</sup> 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.<sup>7</sup> The qualitative interview data from this Article provides useful insight into how the negotiation process works. From these accounts, four important trends emerge.

First, there does appear to be a genuine, good faith negotiation that happens between the DOJ and the targeted police agency.<sup>8</sup> 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.”<sup>9</sup> DOJ litigators also recognize that negotiated settlements require compromise.<sup>10</sup> As one DOJ litigator acknowledged, “every city is different.”<sup>11</sup>

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12, 2003) (consent judgment use of force and arrest and witness detention) [hereinafter Detroit Consent Decree], available at [http://www.justice.gov/crt/about/spl/documents/dpd/detroitpd\\_uofwdcd\\_613.pdf](http://www.justice.gov/crt/about/spl/documents/dpd/detroitpd_uofwdcd_613.pdf). 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. *See* United States v. Seattle, no. 2:12-cv-01282-JLR (W.D. Wa. July 27, 2012) (settlement agreement and stipulated order of resolution) [hereinafter Seattle Settlement Agreement]; Investigation of Seattle Police Department, United States Department of Justice, Civil Rights Division (December 16, 2011), *text available at* [http://www.justice.gov/crt/about/spl/documents/spd\\_findletter\\_12-16-11.pdf](http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf).

<sup>3</sup> Telephone Interview with Department of Justice Participant #5, 4 (Sept. 4, 2013) [hereinafter Interview #5]

<sup>4</sup> Telephone Interview with Department of Justice Participant #18, at 12 (August 8, 2013) [hereinafter Interview #18] (transcript on file with author) (“One of the challenges that the DOJ has is they there haven't been any litigated pattern or practice cases”).

<sup>5</sup> Interview #5, *supra* note 3, at 4 (explaining that in past negotiations, the DOJ has started by asking for significantly more reforms than they 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).

<sup>6</sup> *Id.* (explaining the process of making demands and eventually reaching compromise).

<sup>7</sup> In his study of structural police reform from a criminal justice and public policy perspective, Professor Joshua Chanin has called this process “negotiated justice.” *See* Joshua M. Chanin, Negotiated Justice? The Legal, Administrative, and Policy Implications of “Pattern or Practice” Police Misconduct Reform 1 (July 6, 2011) (unpublished Ph.D dissertation, American University), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf>.

<sup>8</sup> Interview with Independent Monitor #7, at 3 (July 18, 2013) (transcript on file with author) [hereinafter Interview #7] (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 Department [unique features]”).

<sup>9</sup> Interview with Police Administrator #16, at 3 (July 29, 2013) [hereinafter Interview #16] (explaining that, “the other side had their own police experts that had that in mind as well”).

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 targeted 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.<sup>12</sup>

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 other 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.”<sup>13</sup> So far, “no pattern of 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.”<sup>14</sup>

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 extensively on the structural advantages that repeat players in the court system have over individuals who only litigate a single case.<sup>15</sup> 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 harmful in future negotiations.<sup>16</sup> This suggests that DOJ recognizes it is a repeat player in pattern or practice

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<sup>10</sup> Interview #5, *supra* note 3, at 4 (“A negotiated agreement is a compromise”).

<sup>11</sup> *Id.* at 4.

<sup>12</sup> See, e.g., Interview #5, *supra* note 3, 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).

<sup>13</sup> Interview #18, *supra* note 4, at 12.

<sup>14</sup> *Id.*

<sup>15</sup> See generally Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & 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 98-104. 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 109. 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. A one-shotter simply wants 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.*

<sup>16</sup> Interview #5, *supra* note 3, 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).

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.<sup>17</sup>

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.<sup>18</sup> This makes sense. After all, many policies implemented as part of SRL sometimes make the jobs of frontline officers more difficult. 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 these union requests and allowed negotiation to proceed exclusively between departmental administration and the DOJ.<sup>19</sup> In interviews, police administrators suggested that this makes structural reform a particularly successful accountability tool.<sup>20</sup> Police chiefs often complain that collective bargaining restrains their ability to implement accountability measures.<sup>21</sup> Thus, SRL appears to provide reform-minded police chiefs with legal cover to implement wide-ranging reforms, without having to get union approval.<sup>22</sup> Once 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.

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<sup>17</sup> *Id.* (stating that “[w]e try to be consistent, or at least know why we are not being consistent”).

<sup>18</sup> *See, e.g.*, *United States v. City of Los Angeles*, 2:00-cv-11769-GAF-RC (C.D. Cal. Nov. 8., 2000) (notice of interested parties filed by Los Angeles Police Protective League); *see also* Telephone Interview with Police Administrator #30 (Nov. 19, 2013) [hereinafter Interview #30] (describing the union opposition to these sorts of reforms).

<sup>19</sup> *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)

<sup>20</sup> Telephone Interview with Police Administrator #22 (October 28, 2013) [hereinafter Interview #22] (describing how structural police reform has enabled this police chief to push potentially unpopular, but necessary reforms without having to get union approval).

<sup>21</sup> COLLEEN KADLECK AND LAWRENCE F. TRAVIS, POLICE DEPARTMENT AND POLICE OFFICER ASSOCIATION LEADERS’ PERCEPTIONS OF COMMUNITY POLICING AND NATURE AND EXTENT OF AGREEMENT, NATIONAL INSTITUTE OF JUSTICE 1-3 (September 2004), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/226315.pdf> (describing the various examples of accountability measures that police unions have resisted across the country).

<sup>22</sup> For a further explanation of these concepts in organizational theory, *see* Peer C. Fiss and Edward J. Zajac, *The Symbolic Management of Strategic Change: Sensegiving via Framing and Decoupling*, 49 *ACADEMY OF MANAGEMENT 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.

From this negotiation process, the DOJ first reached a settlement on April 4, 1997 when it came to terms with the Pittsburgh Police Department.<sup>23</sup> Since then, the DOJ has agreed to a total of 24 different settlements in 22 jurisdictions.<sup>24</sup>

## II. CONTENT OF NEGOTIATED SETTLEMENTS

While in theory each agreement 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 systematic 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.

### A. 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.<sup>25</sup> Others more narrowly targeted a particular type of force at issue in the case.<sup>26</sup> In total, all eleven of the negotiated settlements that involved monitors included a section regulating the use-of-force.<sup>27</sup> The use of force stipulations in negotiated settlements fall into three categories.

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<sup>23</sup> Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3247 (2014) (listing all of the negotiated settlements reached between the DOJ and individual policing agencies since the passage of §14141 in 1994).

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., New Orleans Consent Decree, *supra* note 2, at 19-39 (detailing expansive requirements about the use of force, regulating nearly every possible force usage, including oleoresin capsicum spray, canines, firearms, and electronic control weapons); United States v. Seattle, No. 2:12-cv-01282-JLR, at 16-40 (W.D. Wa. July 27, 2013) (settlement agreement and stipulated [proposed] order of resolution) [hereinafter Seattle Agreement], *text available at* [http://www.justice.gov/crt/about/spl/documents/spd\\_consentdecree\\_7-27-12.pdf](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).

<sup>26</sup> Memorandum of Agreement Between the United States Department of Justice and Prince George's County Police Department, at 6-10 (Jan. 22, 2004) [hereinafter Prince George's County MOA], *text available at* <http://www.clearinghouse.net/chDocs/public/PN-MD-0001-0002.pdf> (specifically regulating only the use of force involving oleoresin capsicum spray).

<sup>27</sup> 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. See *infra* Part I.B. 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. As a report by the Police

First, most regulate substantive policy on when officers may and may not use force. These use-of-force sections commonly require a clear delineation of different levels of force.<sup>28</sup> These agreements also normally establish requirements for various types of weapons.<sup>29</sup> Second, virtually every agreement establishes strict reporting requirements for use-of-force incidents.<sup>30</sup> Officers are required to notify their supervisors after any use of force or upon hearing any allegation of excessive use of force.<sup>31</sup> The same pattern is evident in the Steubenville,<sup>32</sup> Cincinnati,<sup>33</sup> Prince George's County,<sup>34</sup> New Orleans,<sup>35</sup> Washington, D.C.,<sup>36</sup> and Pittsburgh<sup>37</sup>

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Executive Research Forum (PERF) concluded, “[p]olice use of force is one of the primary issues that the Civil Rights Division investigates...[and] [u]se of force has been a component in almost all of the DOJ’s civil rights investigations to date, including consent decrees/settlements.” POLICE EXECUTIVE RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 12 (2013), *available at* <http://policeforum.org/library/critical-issues-in-policing-series/CivilRightsInvestigationsofLocalPolice.pdf>. 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. *United States v. Pittsburgh*, No. 2:97-cv-00354-RJC, at para. 15, 18 (W.D. Pa. Feb. 26, 1997) (Consent Decree) [hereinafter Pittsburgh Consent Decree], *text available at* <http://www.clearinghouse.net/chDocs/public/PN-PA-0003-0002.pdf> (requiring documentation and regular oversight of use of force); *United States v. City of Steubenville*, No. 97-0966, at para 14.b., 21-23 (S.D. Ohio Aug. 28, 1997) (Consent Decree) [hereinafter Steubenville Consent Decree], *text 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).

<sup>28</sup> PERF, *supra* note 27, at 13 (stating that agreements often require departments to “clearly identify[ly] categorical types and levels of force”).

<sup>29</sup> *Id.* at 13 (“Policies, procedures, and training that are specific to certain weapons or types of force (such as firearms, Electrical Control Weapons, OC spray, canine use, and vehicle pursuit”); New Orleans Consent Decree, *supra* note 2, at 14-22 (including stipulations on the use of firearms, canines, electrical control weapons, and oleoresin capsicum spray); Seattle Agreement, *supra* note 25, at 14-17, 22-33 (regulating various types of weapons and lays out detailed rules on use of force reporting, training, use of force investigations, and supervisory oversight).

<sup>30</sup> PERF, *supra* note 27, at 13 (stating that “reporting, documentation and investigation” requirements are common in negotiated settlements that provide for a supervisor response and period auditing/review). For an example, *see United States v. The Virgin Islands Police Department*, no 2008-158, at 6, para 32 (D. V.I. Nov. 4, 2009) (consent decree) [hereinafter Virgin Islands Consent Decree], *text 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).

<sup>31</sup> *Id.* at 6, para 33.

<sup>32</sup> Steubenville Consent Decree, *supra* note 27, at 9, para. 22 (“The City shall develop, and require all officers to complete, a written report each time... any type of force is used against an individual”).

<sup>33</sup> Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department, at 11, para. 24 (April 12, 2012) [hereinafter Cincinnati MOA], *text available at* <http://www.clearinghouse.net/chDocs/public/PN-OH-0006-0002.pdf> (stating “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”).

<sup>34</sup> Prince George’s County MOA, *supra* note 26, at 15, para. 47 (explaining the reporting requires for canine use of force in particular).

agreements. Third, most agreements establish detailed procedures for how departments ought to investigate use-of-force incidents.<sup>38</sup> In sum, the negotiated settlements consistently demonstrate a concern for the reporting, regulation, and investigation of use of force incidents.

### B. *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.<sup>39</sup> The DOJ has required the development of these systems in the Los Angeles,<sup>40</sup> Steubenville,<sup>41</sup> Cincinnati,<sup>42</sup> Pittsburgh,<sup>43</sup> Washington, D.C.,<sup>44</sup> New Jersey,<sup>45</sup> New Orleans,<sup>46</sup> and the Virgin

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<sup>35</sup> New Orleans Consent Decree, *supra* note 2, at 14-15, 28-34 (establishing the use of force policy, and laying out requirements for use of force investigations).

<sup>36</sup> Memorandum of Agreement Between the United States Department of Justice and the District of Columbia and the District of Columbia Metropolitan Police Department, at 8-9, para. 53-55 (June 13, 2001) [hereinafter Washington, D.C. MOA] (explaining the reporting requirements for use of force), *text available at* <http://www.clearinghouse.net/chDocs/public/PN-DC-0001-0001.pdf>.

<sup>37</sup> Pittsburgh Consent Decree, *supra* note 27, at 10, para. 15 (requiring officers to complete written reports on use of force).

<sup>38</sup> PERF, *supra* note 27, at 13. For examples of these sorts of stipulations, see *United States v. City of Los Angeles*, 2:00-cv-11769-GAF-RC, at 23-27 (consent decree) (C.D. Cal. June 15, 2001) [hereinafter Los Angeles Consent Decree], *text available at* <http://www.clearinghouse.net/chDocs/public/PN-CA-0002-0006.pdf> (laying out the terms of the use of force stipulations). 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, para. 55. The Los Angeles agreement also establishes a chain of command when an officer uses categorical force, the investigation process, and the need to notify the District Attorney and details the need to interview witnesses, notify the chain of command, and more in the event of a use of force incident. *Id.* at 23-24, para. 56-68. For other examples of this trend, see *Prince George's County MOA*, *supra* note 26, at 16, para. 51 (applying specifically to canine force use).

<sup>39</sup> PERF, *supra* note 27, at 16 (concluding that a large number of negotiated settlements have inevitably required the development of some type of early intervention system).

<sup>40</sup> Los Angeles Consent Decree, *supra* note 38, at 9-21 (describing the development of the TEAMS II system, the management and coordination of risk assessment responsibilities, and the performance evaluation system).

<sup>41</sup> Steubenville Consent Decree, *supra* note 27, at 6-19, para. 12-30 (stating that the city should implement an early warning system within twelve months).

<sup>42</sup> Cincinnati MOA, *supra* note 33.

<sup>43</sup> Pittsburgh Consent Decree, *supra* note 27, at 16-17, para. 23 (describing the annual review process)

<sup>44</sup> Washington, D.C. MOA, *supra* note 36, at 17-21, para. 106-118 (describing the personnel performance management system).

<sup>45</sup> *United States v. New Jersey State Police*, 99-5970, at 15-18, para.40-56 (D. N.J. Dec. 30, 1999) (joint application for entry of consent decree) [hereinafter New Jersey Consent Decree] (describing the development of the management awareness program), *text available at* <http://www.clearinghouse.net/chDocs/public/PN-NJ-0002-0001.pdf>.

Islands<sup>47</sup> 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.<sup>48</sup> 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.”<sup>49</sup> These systems go by different names. But their central goal is to “identify opportunities to reduce risky behavior, department liability, and citizen complaints.”<sup>50</sup>

The system articulated in the Washington, D.C. negotiated settlement is reasonably representative of those required by most settlements. There, the DOJ required the police department to collect numerous data points on officer behavior and catalog this information into a computerized database.<sup>51</sup> 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.<sup>52</sup> If such a pattern existed, the settlement required the supervisor to take a more intensive review the behavior.<sup>53</sup>

Law enforcement departments have used these types of early intervention and risk management systems for decades,<sup>54</sup> and have increased in popularity because of the belief that “10 percent of...officers cause 90 percent of the problems.”<sup>55</sup> Initial research demonstrates that

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<sup>46</sup> New Orleans Consent Decree, *supra* note 2, at 80-83, para. 316-326 (outlining the terms of the new early warning system to be implemented as part of the consent decree).

<sup>47</sup> Virgin Islands Consent Decree, *supra* note 30, at 11-16, para. 59-72 (describing the planned implementation of a management and risk supervision system).

<sup>48</sup> PERF, *supra* note 27, at 16 (“Research has long suggested that a small percentage of police officers account of a high percentage of use-of-force incidents”).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Washington, D.C. MOA, *supra* note 36, at 17, para. 106 (explaining the definition and requirements of the PPMS). The settlement required the PPMS to include information on use of force incidents, canine deployment, officer-involved firearm discharges, vehicle pursuits, complaints, commendations, arrests, investigations, training history, educational background, and more. *Id.* at 17-18, para 107

<sup>52</sup> *Id.* at 19, para. 112(a)-(b).

<sup>53</sup> *Id.*

<sup>54</sup> POLICE EXECUTIVE RESEARCH FORUM, SUPERVISION AND INTERVENTION WITHIN EARLY INTERVENTION SYSTEMS: A GUIDE FOR LAW ENFORCEMENT CHIEF EXECUTIVES 2 (December 2005) [hereinafter PERF EARLY INTERVENTION SYSTEMS], *text available at* <http://www.policeforum.org/library/early-intervention-systems/Chief%27s%20Guide%20EIS.pdf> (stating “EIS have been used in the law enforcement community for more than 25 years”).

<sup>55</sup> Samuel Walker, Geoffrey P. Alpert, & Dennis J. Kenney, Early Warning Systems: Responding to the Problem Police Officer, National Institute of Justice, at 1 (July 2001), *text available at* <http://zimmer.csufresno.edu/~haralds/Linkpages/reports/earlywarn.pdf> (explaining that in 1999 around 27% of departments servicing a metropolitan area of at least 50,000 people had an EIS in place and 12% of agencies in 1999 claimed that they would soon implement such a system). Today, around 40% of agencies have EIS systems. U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS (LEMAS): 2007 SAMPLE SURVEYS OF LAW ENFORCEMENT AGENCIES (2007) [hereinafter LEMAS 2007], *available at* <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/31161>. This study calculates this number by dividing the total number of departments serving jurisdictions of over 50,000 residents who reported using an early intervention system (313) by the total number of those agencies that answered the

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.<sup>56</sup>

### C. *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.<sup>57</sup> 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.<sup>58</sup> 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).<sup>59</sup> They also match those identified as best practices by the Commission on Accreditation for Law Enforcement (CALEA).<sup>60</sup> These organizations argue that improved complaint procedures provide three separate benefits. First, these procedures give administrators a more accurate understanding of the scope and depth of misconduct problems within police agencies.<sup>61</sup> Second, the presence of these procedures may incentivize officers to be accountable for misconduct.<sup>62</sup> And third, these procedures may increase public trust in police agencies.<sup>63</sup>

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question in the LEMAS survey (774). That resulted in a calculation that approximately 40.4% of departments serving jurisdictions with over 50,000 residents have early intervention systems.

<sup>56</sup> Walker, Alpert, and Kenney, *supra* note 55, at 4-7 (stating that “[T]he qualitative component of the research found that these systems have potentially significant effects...,” identifying multiple potential benefits).

<sup>57</sup> Ten of the eleven monitored negotiated settlements establish some detailed parameters on complaint procedures—with Seattle being the only settlement not requiring such a measure. *See, e.g.*, Washington, D.C. MOA, *supra* note 36, at 15, para. 92-104 (including sections on the receipt of citizen complaints, the investigation of complaints, and the evaluation of these allegations); Los Angeles Consent Decree, *supra* note 38, at 32-38 (detailing rules on the initiation, investigation, and adjudication of complaints).

<sup>58</sup> *See, e.g.*, Pittsburgh Consent Decree, *supra* note 27, at 23-32, para. 44-69 (laying out standards for each of these three different phases of the complaint process); Steubenville Consent Decree, *supra* note 27, at 17-22, para 40-58 (setting requirements for starting an investigation pursuant to a complaint, conducting an investigation, and evaluating a complaint’s validity); Prince George’s County MOA, *supra* note 26, at 14-18, para. 60-74 (again, including components about the receipt, tracking, investigation, and adjudication of complaints against officers).

<sup>59</sup> *See generally* INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, BUILDING TRUST BETWEEN THE POLICE AND THE CITIZENS THEY SERVE (2008), *text available at* <http://www.theiacp.org/LinkClick.aspx?fileticket=pjRkKQNvkPs%3d&tabid=514>.

<sup>60</sup> *Id.* at 52 (discussing the CALEA standards for law enforcement agencies).

<sup>61</sup> *Id.* at 17-20 (arguing that these improved complaint procedures provide a more “fair, thorough, accurate, and impartial” view of misconduct present in a department).

<sup>62</sup> *Id.* (emphasizing the possible improvement in officer morale and behavior).

<sup>63</sup> *Id.* (explaining how these measures will “increase trust within the community”).

#### D. Training Overhaul

Negotiated settlements also 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.<sup>64</sup> The settlements generally require the departments to document the training history of each officer.<sup>65</sup> The DOJ normally makes some stipulation as to the subjects of these trainings.<sup>66</sup> The DOJ has not gone to the extent of stipulating the content of the trainings in much specificity.<sup>67</sup> 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.”<sup>68</sup> In some cases, though, the DOJ has gone as far as specifying the length of time that each officer must be trained.<sup>69</sup> 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.<sup>70</sup> And perhaps equally important to the department administrators, enhanced training lowers the likelihood of a department suffering stiff penalties in private litigation.<sup>71</sup> Although there is some academic disagreement about the exact type of

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<sup>64</sup> See, e.g., Steubenville Consent Decree, *supra* note 27, at 6, para. 14 (identifying the need for both entry and annual in-service training); Cincinnati MOA, *supra* note 33, at 21, para. 82 (noting the need for training for “all new recruits and as part of annual in-service training”).

<sup>65</sup> See, e.g., New Jersey Consent Decree, *supra* note 45, at 25, para. 108-109 (“[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”); Virgin Islands Consent Decree, *supra* note 30, at 18, para. 77 (“The VIPD shall continue to maintain training records regarding every VIPD officer that reliably indicate the training each officer has received... [including] the course description and duration, curriculum, and instructor for each officer”).

<sup>66</sup> See, e.g., Prince George’s County MOA, *supra* note 26, at 12-13, para. 54-55 (ordering the department to appoint a Training Committee to develop curriculum and stipulating the subjects that ought to be covered); New Jersey Consent Decree, *supra* note 45, at 24, para. 100 (identifying some of the areas that New Jersey must broadly address in trainings).

<sup>67</sup> See, e.g., Prince George’s County MOA, *supra* note 26, at 13, 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); New Jersey Consent Decree, *supra* note 45, at 24, 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).

<sup>68</sup> Virgin Islands Consent Decree, *supra* note 30, at 18, para. 75.

<sup>69</sup> See, e.g., Steubenville Consent Decree, *supra* note 27, at 6, para 13(a)-(b) (Identifying field training that must last at least 12 weeks and stating that existing officers must partake in in-service training “for at least 40 hours each year”).

<sup>70</sup> James J Fyfe, *Training to Reduce Police-Civilian Violence*, in AND JUSTICE FOR ALL 163 (William A. Geller & Hans Toch, eds., 1995).

<sup>71</sup> 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. City of New York Dept. Social 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 they failed to

training necessary to reduce police wrongdoing, police professionals have increasingly recognized the absolute necessity of continual law enforcement training.<sup>72</sup>

#### *E. 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 uncover patterns of racial bias.<sup>73</sup> This concern for bias appears particularly evident in the Pittsburgh,<sup>74</sup> Steubenville,<sup>75</sup> New Jersey,<sup>76</sup> and New Orleans<sup>77</sup> consent decrees.<sup>78</sup> For example, in New Jersey, the DOJ required the State Police to collect and monitor the racial breakdown occupants in motor vehicle stops, in hopes of thwarting the use of racial profiling.<sup>79</sup> 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.<sup>80</sup>

#### *F. 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<sup>81</sup>—some monitors

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provide adequate training that contributed to an officer's violation of an individual's constitutional right.

<sup>72</sup> James J. Fyfe, *Training to Reduce Police-Civilian Violence*, in *AND JUSTICE FOR ALL* 163 (William A. Geller & Hans Toch, eds., 1995).

<sup>73</sup> See Pittsburgh Consent Decree, *supra* note 27, at 13-14, para. 20; Steubenville Consent Decree, *supra* note 27, at 31, para. 77.

<sup>74</sup> Pittsburgh Consent Decree, *supra* note 27, at 13-14, para. 20 (“The City shall conduct regular audits and reviews of potential racial bias, including use of racial epithets, by all officers”).

<sup>75</sup> Steubenville Consent Decree, *supra* note 27, at 31, para. 77 (“The City shall conduct regular audits and reviews of potential racial bias”).

<sup>76</sup> New Jersey Consent Decree, *supra* note 45, at 16-17, para. 49-50 (discussing plans to monitor the racial breakdown of stops in an effort to thwart racial profiling).

<sup>77</sup> New Orleans Consent Decree, *supra* note 2, at 48-60, para. 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. *Id.* at 50, para. 184.

<sup>78</sup> The Los Angeles Consent Decree includes some mention of racial bias, too. See Los Angeles Consent Decree, *supra* note 38, at 69, 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 36, at 12, para. 76.

<sup>79</sup> New Jersey Consent Decree, *supra* note 45, at 17, para. 50.

<sup>80</sup> *Id.* at para. 54.

<sup>81</sup> New Orleans Consent Decree, *supra* note 2, at 60-63, para. 223-233 (“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-oriented initiatives...”).

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 communities.<sup>82</sup> While there remain some concerns about the disparate benefits of community policing,<sup>83</sup> and the general disinterest of law enforcement officers in community policing efforts,<sup>84</sup> criminological research suggests that these measures increase community trust and redefine law enforcement goals along the lines of community interests.<sup>85</sup>

The range of topics covered by negotiated settlements is admittedly broader than the list of topics above. Settlements have also touched in a range of issues related to interrogations,<sup>86</sup> lineup procedures,<sup>87</sup> gang unit management,<sup>88</sup> canine deployment,<sup>89</sup> crisis intervention,<sup>90</sup> and promotion evaluations.<sup>91</sup> One of the most contentious parts of the SRL process, though, is the appointment of an external monitor.

### III. 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.”<sup>92</sup> No research into SRL has ever

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<sup>82</sup> 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 4, at 3.

<sup>83</sup> 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 “the lack of positive effects for those at the bottom of the social ladder may be related to their more limited awareness of programs”).

<sup>84</sup> See generally Anthony M. Pate & Penny Shtull, *Community Policing Grows in Brooklyn: An Inside View of the New York City Police Department’s Model Precinct*, 40 *CRIME & DELINQUENCY* 384 (1994) (finding some officers were generally disinterested in the community policing effort).

<sup>85</sup> See generally Wesley G. Skogan, *The Promise of Community Policing*, in *POLICE INNOVATION: CONTRASTING PERSPECTIVES* 31 (eds. David Weisburd, Anthony A. Braga) (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”).

<sup>86</sup> New Orleans Consent Decree, *supra* note 2 at 46-47, para. 163-170 (laying out standards for custodial interrogations).

<sup>87</sup> *Id.* at 47-48, para 171-176 (establishing procedures for photographic lineup administrations).

<sup>88</sup> Los Angeles Consent Decree, *supra* note 38, at 47-50, para. 106-107 (requiring the development and administration of gang management policy).

<sup>89</sup> Prince George’s MOA, *supra* note 26, at 8-14, para. 29-46 (establishing thorough regulation of canine deployment).

<sup>90</sup> Seattle Agreement, *supra* note 25, at 7-9, para 23-25 (laying out regulations on crisis intervention via the creation of the crisis intervention committee).

<sup>91</sup> New Orleans Consent Decree, *supra* note 2, at 75-76 (establishing both performance evaluations and describing how these evaluations ought to be used in the promotion process).

<sup>92</sup> PERF, *supra* note 27, at 3.

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.<sup>93</sup> 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.<sup>94</sup> From these court records and stakeholder interviews, a couple trends emerge about the monitor selection process.

First, monitors are expensive. As a result, cost control is a critically important issue in the monitor appointment process.<sup>95</sup> Remember, the local police agency has to foot the bill for any monitoring services.<sup>96</sup> Thus, a rational municipality will want 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. Instead, the municipality must negotiate with the DOJ to select a monitoring team.<sup>97</sup> 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. Figure 4.1 shows the average annual yearly cost of monitoring services in several of the cities targeted for SRL thus far.<sup>98</sup>

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<sup>93</sup> United States v. New Orleans, No. 2:21-cv-01924, at 3 (E.D. La. September 6, 2012) (order granting motion for leave to request proposals) [hereinafter New Orleans Monitor Search Order] (stating “[t]he 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”).

<sup>94</sup> Edmund W. Lewis, *NOPD Consent Decree Moves Forward*, The Louisiana Weekly (Aug. 19, 2013) (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*, The Advocate (July 9, 2013) (explaining the five public hearings held to discuss the appointment of the monitor).

<sup>95</sup> PERF, *supra* note 27, 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”).

<sup>96</sup> See, e.g., United States v. New Orleans, 2:12-cv-01924-SM-JCW, at 12-15 (New Orleans Memorandum Regarding Monitor Candidates) (E.D. La. June 14, 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).

<sup>97</sup> See, e.g., Pittsburgh Consent Decree, *supra* note 27, at 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).

<sup>98</sup> PERF, *supra* note 27, at 1, 34 (identifying cost of New Orleans monitoring at 1, and the other costs on 34). These estimates come accounts given by city officials, monitors, and media reports discussed at a PERF conference on federal oversight of local police departments. See also FIRST YEAR BUDGET FOR MONITORING OF SEATTLE AGREEMENT (Nov. 14, 2012), available at [http://www.seattlemonitor.com/uploads/Signed\\_Nov\\_2012-Oct\\_2013\\_Budget.pdf](http://www.seattlemonitor.com/uploads/Signed_Nov_2012-Oct_2013_Budget.pdf) (stating that the first year budget for the Seattle monitoring will sit around \$880,000).

FIGURE 4.1, 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 the two options; New Orleans advocated for a cheaper monitor, while the DOJ supported the bid from a more expensive team.<sup>99</sup> Ultimately, the Court sided with the DOJ.<sup>100</sup>

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. 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."<sup>101</sup> 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] effect your crime fighting" abilities.<sup>102</sup> 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."<sup>103</sup> 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. As one DOJ litigator explained, "in all of these cases there are complicated issues of constitutional law [and] criminal procedure involved" including "evidence gathering, data collection, [and] document review that needs to happen."<sup>104</sup> As the participant concluded, "[a]ttorneys are trained to do that" kind of work.<sup>105</sup> The Justice Department official

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<sup>99</sup> The two finalist options were the Hillard Heintze team and Sheppard Mullin team. The Sheppard Mullin team proposed a four-year monitoring period for approximately \$7.8 million with a cap set at \$8.9 million. New Orleans Memorandum Recommending Hillard Heintze, *supra* note 96, at 13. Hillard Heintze offered to complete the same basic service for a capped price of around \$7 million. *Id.* The United States, though, asserted that the City needs to comply with the Constitution, even if doing so costs money. *United States v. New Orleans*, 2:12-cv-01924-SM-JCW, at 17 (United States Memorandum Recommending Sheppard Mullin as Consent Decree Monitor) (E.D. La. June 14, 2013) [hereinafter US Memorandum Recommending Sheppard Mullin in New Orleans]

<sup>100</sup> US Memorandum Recommending Sheppard Mullin in New Orleans, *supra* note 99, at 1-2.

<sup>101</sup> Interview #16, *supra* note 9, at 10.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Telephone Interview with Department of Justice Participant #12, at 8 (July 30, 2013) [hereinafter Interview #12].

<sup>105</sup> *Id.*

added that “to 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.<sup>106</sup> 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 lead former law enforcement executives, while the DOJ pushed for a team led by lawyers.<sup>107</sup> New Orleans emphasized the “crucial insight” that former law enforcement administrators could provide to the SRL process.<sup>108</sup> The DOJ, though, insisted that lawyers were well suited to “make difficult calls” that are legally “accurate, objective, and credible.”<sup>109</sup>

#### IV. 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 5 years.<sup>110</sup> In some cases, though, this stage can take well over a decade.<sup>111</sup> Figure 4.2 shows the length of monitoring in all police agencies that have fully completed SRL.<sup>112</sup>

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<sup>106</sup> *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”).

<sup>107</sup> New Orleans supported the Hillard Heintze monitoring team led by security and law enforcement experts. New Orleans Memorandum Recommending Hillard Heintze, *supra* note 96, at 1. The DOJ supported the appointment of a monitoring team run by the law firm Sheppard Mullin. US Memorandum Recommending Sheppard Mullin in New Orleans, *supra* note 99, at 8-9 (explaining the choice of Sheppard Mullin).

<sup>108</sup> New Orleans Memorandum Recommending Hillard Heintze, *supra* note 96, 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”).

<sup>109</sup> US Memorandum Recommending Sheppard Mullin in New Orleans, *supra* note 99, at 14 (elaborating further that lawyers are well-suited to be “fair and independent” and “make difficult calls”).

<sup>110</sup> *See infra* Figure 4.2 (illustrating the length of monitored reform for each city involved in structural police reform thus far, and showing that Cincinnati and Prince George's county took only 5 years).

<sup>111</sup> *Id.* (showing that Los Angeles and Washington, D.C.'s monitored reforms took over a decade).

<sup>112</sup> 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 23, at Appendix (listing the closure date); *see also* Letter from United States Department of Justice Responding to Freedom of Information Request (April 24, 2013) [hereinafter Letter from DOJ] (on file with author) (listing agreement). This figure does not include cities that are still under monitoring.

FIGURE 4.2, LENGTH OF MONITORED REFORM FOR COMPLETED CASES

City	Length of Monitored Reform
Cincinnati	5.0 years <sup>113</sup>
Prince George's County	5.0 years <sup>114</sup>
Steubenville	7.5 years <sup>115</sup>
Pittsburgh	8.2 years <sup>116</sup>
New Jersey	9.8 years <sup>117</sup>
Washington, D.C.	10.7 years <sup>118</sup>
Los Angeles	11.9 years <sup>119</sup>

The monitored reform process is also costly. The affected police agency must pay the cost of monitoring, which typically runs around \$1-2 million a year.<sup>120</sup> The municipality must then cover the cost of all of the 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.<sup>121</sup> When factoring in the cost of hiring the external monitor in Los Angeles, which came in at around \$2 million a year,<sup>122</sup> the Los Angeles price tag likely surpassed \$100 million.<sup>123</sup> This cost might sound startling at first. But considering the size of the city and the length of time

<sup>113</sup> The Cincinnati monitoring lasted from April 12, 2002 to April 12, 2007—approximately 1826 day or 5 years. *Id.*

<sup>114</sup> The Prince George's County monitoring lasted from January 22, 2004 until January 13, 2009—approximately 1818 days or 5.0 years. *Id.*

<sup>115</sup> The Steubenville monitoring lasted from September 3, 1997 to March 3, 2005—approximately 2738 days or about 7.5 years. *Id.*

<sup>116</sup> The Pittsburgh monitoring lasted from April 16, 1997 to June 16, 2005—approximately 2983 days or 8.2 years. *Id.*

<sup>117</sup> The New Jersey monitoring lasted from December 29, 1999 to October 26, 2009—approximately 3589 days or 9.8 years. *Id.*

<sup>118</sup> The Washington, D.C. monitoring lasted from June 13, 2001 to February 20, 2012—approximately 3894 days or 10.7 years. *Id.*

<sup>119</sup> The Los Angeles monitoring lasted from June 15, 2001 to May 16, 2013—approximately 4353 days, or 11.9 years. *Id.*

<sup>120</sup> PERF, *supra* note 27, at 1, 34 (putting the monitoring costs somewhere between \$900,000 and \$2,200,000); *see also* US Memorandum Recommending Sheppard Mullin in New Orleans, *supra* note 99, at 8 (describing the competing proposals for monitors in New Orleans, with one offering a “four-year 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”).

<sup>121</sup> Joseph Giordono and 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).

<sup>122</sup> PERF, *supra* note 27, at 34 (putting the Los Angeles monitoring cost at just north of \$2 million a year).

<sup>123</sup> 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.

it took to implement these changes, the actual cost to Los Angeles taxpayers was probably between \$2 to \$3 per city resident per year.<sup>124</sup>

During this reform process, the external monitor regularly visits the police agency to audit departmental records and meet with officers.<sup>125</sup> 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.<sup>126</sup> These quarterly reports are long and detailed, and they describe the departments observed progress in implementing each component of the negotiated settlement.<sup>127</sup> These quarterly reports also include the results of the monitor's regular audits of departmental records.<sup>128</sup>

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.<sup>129</sup> To determine whether a department has reached this critical 94% compliance threshold, monitors break down the negotiated settlement by paragraph and examine whether the

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<sup>124</sup> Over the 11.9 years that the City of Los Angeles was under a consent decree, the average population was 3,841,881. Given that the estimated cost of the consent decree was around \$100 million, then that 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

<sup>125</sup> Interview with External Monitor #3, at 16 (July 2, 2013) [hereinafter Interview #3] (transcript on file with author) (stating that "Fundamentally, the monitoring team goes on site on whatever regular basis is. 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").

<sup>126</sup> See, e.g., OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, FIRST QUARTERLY REPORT 1 (Nov. 15, 2001) [hereinafter FIRST QUARTERLY REPORT FOR LAPD] (stating that the monitors in the Los Angeles case will issue quarterly reports covering approximately 3 months at a time); OFFICE OF THE INDEPENDENT MONITOR OF THE DETROIT POLICE DEPARTMENT, FIRST QUARTERLY REPORT i [hereinafter FIRST QUARTERLY REPORT FOR DPD] (also describing the plan to issue reports every approximately three months and describing these reports as quarterly reports).

<sup>127</sup> For reference, the first quarterly report in the New Orleans case was 59 pages. OFFICE OF THE CONSENT DECREE MONITOR FOR THE NEW ORLEANS POLICE DEPARTMENT, FIRST QUARTERLY REPORT (Nov. 29, 2013) [hereinafter FIRST QUARTERLY REPORT FOR NOPD]. The first quarterly report in the Washington, D.C. case was 61 pages. OFFICE OF THE INDEPENDENT MONITOR OF THE METROPOLITAN POLICE DEPARTMENT, FIRST QUARTERLY REPORT (Aug. 1, 2002) [hereinafter FIRST QUARTERLY REPORT FOR MPD]. And the first quarterly report in the Pittsburgh case was 65 pages. OFFICE OF THE AUDITOR OF THE PITTSBURGH BUREAU OF POLICE, FIRST QUARTERLY REPORT (Dec. 15, 1997) [hereinafter FIRST QUARTERLY REPORT FOR PBP].

<sup>128</sup> See, e.g., FIRST QUARTERLY REPORT FOR PBP, *supra* note 127, at 2 (stating that "Members 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).

<sup>129</sup> Telephone Interview with External Monitor #10, at 4 (July 19, 2013) [hereinafter Interview #10] (transcript 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....so, what we were looking at was this sort of plus or minus 5% error range around that level").

department has fully satisfied each term of that paragraph.<sup>130</sup> 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.<sup>131</sup>

For example, if the monitor finds a department to be in full compliance with 50 out of the 60 paragraphs of a negotiated 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 institute 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 via an undercover agent 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 find that a department has fully 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.<sup>132</sup> In these cases, a department may be in full compliance with virtually all components of the paragraph.<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup> 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 “who monitors the monitors?”<sup>136</sup>

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<sup>130</sup> Telephone Interview with External Monitor #1, at 9 (July 13, 2013) [hereinafter Interview #1] (transcript on file with author) (explaining controversy surrounding how writers break down settlements into paragraph segments).

<sup>131</sup> Telephone Interview with External Monitor #6, at 9 (July 19, 2013) [hereinafter Interview #6] (transcript on file with author) (differentiating between phase one compliance—the measurement of “issuance of policy”—and phase two—“actual implementation”—and stating that both are necessary for the DOJ to agree that a department is in “substantial compliance”).

<sup>132</sup> Interview #1, *supra* note 130, at 9 (“you will have one consent paragraph where you’ll have eight or ten subsets to that paragraph”).

<sup>133</sup> *Id.* at 9 (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).

<sup>134</sup> *Id.* at 10 (also recommending that the DOJ should attempt to make every individual requirement a separate paragraph).

<sup>135</sup> *Id.* at 9-10 (again 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).

<sup>136</sup> PERF, *supra* note 27, at 31 (quoting PERF Executive Director Chuck Wexler asking “who monitors the monitor” and showing 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.<sup>137</sup> 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.<sup>138</sup> 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 the concerns of the consent decree.<sup>139</sup> And as discussed earlier, stakeholders often disagree on the relative importance of law enforcement experience in the appointment of monitors.<sup>140</sup>

## V. BENEFITS OF SRL

Based on interview responses and additional statistical data, this Article argues that SRL offers four potential advantages over traditional federal regulatory mechanisms. SRL can force municipalities to allocate scarce resources to the cause of police reform. The use of external monitoring, a regulatory approach unique to SRL, ensures that officers substantively comply with stated mandates. SRL also provides leadership within police departments with a rare opportunity work enact needed top-down misconduct reforms without always having to make the proposals subject to collective bargaining negotiations. And finally, emerging evidence suggests that SRL may actually reduce a police department's civil liability.

### A. *Forced Allocation of Scarce Resources*

SRL appears to be uniquely successful in part because it forces municipalities to allocate scarce resources to the cause of constitutional policing. Take the LAPD's experience with SRL, which cost an estimated \$100 million or more.<sup>141</sup> Gaining local political support for such a massive investment in proactive police reform over a relatively short period of time would be extremely challenging without the impetus of SRL. But structural reform litigation transforms heightened investment in the police department from a luxury to a legal necessity. As a result, various interview participants suggested that police chiefs in cash strapped cities would be wise to turn to the structural reform litigation as a strategic avenue to force a municipality to dedicate

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<sup>137</sup> PERF, *supra* note 27, 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”).

<sup>138</sup> Interview #16, *supra* note 9, 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 130, at 7 (describing how Detroit has made progress now that, “four years into it we [monitors] have a respectful working relationship” with the police department).

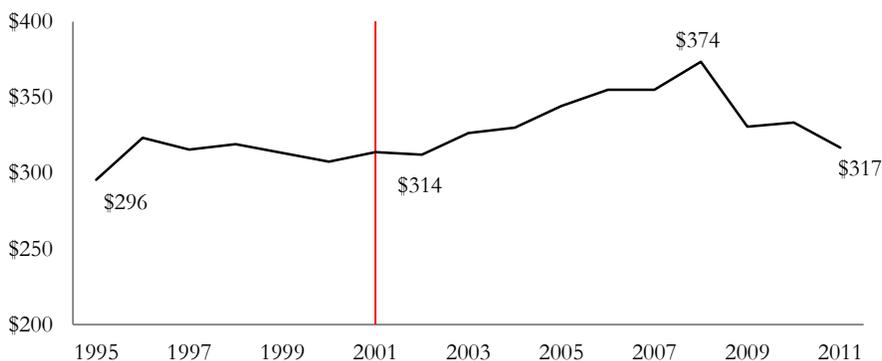
<sup>139</sup> Telephone Interview with Police Administrator #22 (October 29, 2013) [hereinafter Interview #22] (explaining how in Los Angeles, one of the monitors had a solid working relationship with the LAPD, which facilitated a collaborative effort to jointly write a new policy to satisfy the terms of the consent decree).

<sup>140</sup> *See, e.g.*, Interview #16, *supra* note 9, at 10 (“I do think the majority of monitoring teams should be comprised mostly of people with prior law enforcement experience... and the top monitor should have very high level police management experience”).

<sup>141</sup> *See supra* Part V.A (describing the details on the cost of the LAPD structural reform era).

more money to fighting misconduct through investments in accountability measures.<sup>142</sup> To see how SRL can visibly shift municipal investment into a police department, Figure 4.3 shows the progressive increase in expenditures per resident by the LAPD, adjusted for inflation, over the SRL era.<sup>143</sup>

FIGURE 4.3, LAPD EXPENDITURES PER RESIDENT OVER TIME (ADJUSTED FOR INFLATION)<sup>144</sup>



This highlights an inescapable and inconvenient fact—preventing police misconduct costs money. When local political 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 section 14141 monitors to serve as their police chief during SRL.

In Seattle, soon after the beginning of SRL, Mayor Ed Murray hired Kathleen O’Toole to oversee the Seattle Police Department.<sup>145</sup> O’Toole had previously worked as a section 14141

<sup>142</sup> Interview #12, *supra* note 104, at 2 (positively 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”).

<sup>143</sup> The data for Figure 4.3 comes from the annual reports published annually by the LAPD. These annual reports include measures of total expenditures by the LAPD. See *Annual Report*, Los Angeles Police Department (1995-2011) available at [http://lapdonline.org/search\\_results/content\\_basic\\_view/32918](http://lapdonline.org/search_results/content_basic_view/32918). Figure 4.3 adjusts the expenditures per resident for each year into 2013 dollars using the United States Bureau and Labor Statistics Inflation Calculator, available at [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm). The full data, with breakdowns of expenditures per year on file with author.

<sup>144</sup> The red vertical line signifies the beginning of the structural police reform era.

monitor in East Haven, Connecticut, where a DOJ investigation had found a pattern of false arrests, discriminatory policing, and excessive force.<sup>146</sup> Similarly, in Los Angeles, William Bratton assumed the role as police chief in soon after the LAPD came under federal monitoring.<sup>147</sup> Before his tenure as chief, Bratton had actually served on the monitoring team overseeing the LAPD.<sup>148</sup> The prospect of federal intervention via section 14141 also correlated with the appointment of new reform-minded police chiefs in New Orleans<sup>149</sup> and Pittsburgh.<sup>150</sup>

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.”<sup>151</sup> 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. 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 and undeniable improvement in some affected police departments. Again, the LAPD case provides a particularly poignant example. There, the DOJ had found that the LAPD had historically failed to document and investigate citizen complaints. 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

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<sup>145</sup> Gene Johnson, *Kathleen O’Toole Nominated as Seattle Police Chief*, WASHINGTON TIMES, May 19, 2014, available at <http://www.washingtontimes.com/news/2014/may/19/mayor-naming-new-seattle-police-chief>

<sup>146</sup> *Id.*

<sup>147</sup> OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, FINAL QUARTERLY REPORT 5 (June 11, 2009) (“Mayor Hahn selects William J. Bratton to be next Chief of Police” and explaining that “City Council confirms him on October 11, 2002, and he is sworn in on October 28, 2002”).

<sup>148</sup> *Id.* (identifying Bratton as formerly part of the monitoring team overseeing the LAPD before his appointment as police chief).

<sup>149</sup> In May of 2014, the same month that the DOJ opened a section 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. *Mitch Landrieu Names Nashville Police Chief Ronal Serpas as New Orleans’ Top Cop*, THE TIMES-PICAYUNE, May 6, 2010, available at [http://www.nola.com/crime/index.ssf/2010/05/new\\_orleans\\_native\\_ronal\\_serpa.html](http://www.nola.com/crime/index.ssf/2010/05/new_orleans_native_ronal_serpa.html)

<sup>150</sup> 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 7, at 117.

<sup>151</sup> Telephone Interview with External Monitor #13, at 5 (August 5, 2013) [hereinafter Interview #13] (transcript on file with author).

the complainant.<sup>152</sup> Structural reform litigation gave the LAPD a unique method for testing whether the LAPD had corrected some of the problems associated with its complaint procedures. The monitors in coordination with the Office of the Inspector General for the LAPD regularly audited a random sample of citizen complaints to determine whether the LAPD had properly handled these complaints in accordance with the terms of the consent decree.<sup>153</sup> Through this process, the monitor “reviewed thousands of complaint investigations and the related manager review and letters to complainants” to ensure they were following departmental policy.<sup>154</sup> The monitors also worked with the LAPD to send undercover informants to police stations around the city; these informants attempted to file complaints and monitor their progress.<sup>155</sup> Figure 4.4 shows the results of these random and undercover audits of the complaint process.<sup>156</sup>

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<sup>152</sup> OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, FINAL QUARTERLY REPORT 59 (June 11, 2009) [hereinafter FINAL QUARTERLY REPORT FOR LAPD] *see also* Los Angeles Consent Decree, *supra* note 38 (mentioning complaint procedures throughout the consent decree).

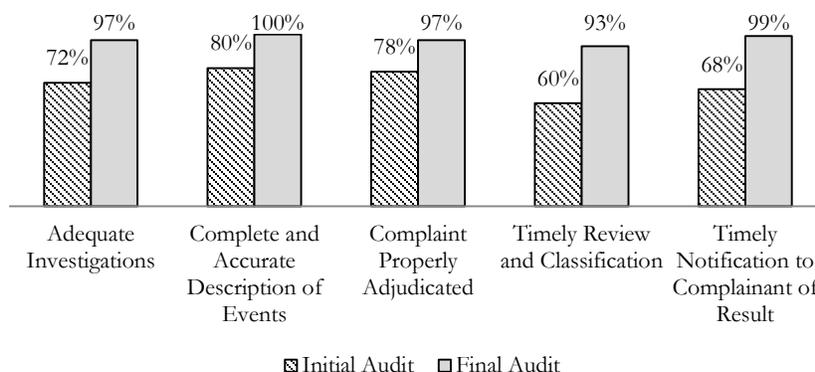
<sup>153</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 152, at 103-128 (detailing how the LAPD progressed over time in conducting internal audits to ensure that officers were engaged in constitutional policing); Los Angeles Consent Decree, *supra* note 38, at 40 (describing the requirement that the LAPD utilize audits as part of the consent decree).

<sup>154</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 152, at 59.

<sup>155</sup> Los Angeles Consent Decree, *supra* note 38, 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”).

<sup>156</sup> 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* ANDRE BIROTTE, JR., OFFICE OF THE LOS ANGELES INSPECTOR GENERAL, COMPLAINT INVESTIGATIONS AUDIT FOR FISCAL YEAR 2005-2006 ii (DECEMBER 28, 2005) [hereinafter OIG COMPLAINT AUDIT 2005-2006], *available at* [http://www.oiglapd.org/Reports/complt\\_Invsts\\_12-28-05.pdf](http://www.oiglapd.org/Reports/complt_Invsts_12-28-05.pdf) (describing how in 2005 of the 46 complaints audited, 13 gave the Office of the Inspector General “significant concern related to the adequacy of the investigation”); NICOLE C. BERSHON, OFFICE OF THE LOS ANGELES INSPECTOR GENERAL, COMPLAINT INVESTIGATIONS AUDIT FOR FISCAL YEAR 2010-2011 2-3 (April 13, 2011), [hereinafter OIG COMPLAINT AUDIT 2010-2011] *available at* [http://www.oiglapd.org/Reports/Compl-A\\_FY10-11\\_4-13-11.pdf](http://www.oiglapd.org/Reports/Compl-A_FY10-11_4-13-11.pdf) (showing that between 97-100% of all complaints audited showed that officers conducted proper interviews, 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* ANDRE BIROTTE, JR., OFFICE OF THE LOS ANGELES INSPECTOR GENERAL, COMPLAINT INVESTIGATION AUDIT FOR 2006-2007 (DEC. 28, 2006) [hereinafter OIG COMPLAINT AUDIT 2006-2007], *available at* [http://www.oiglapd.org/Reports/06-Complaint\\_Audit\\_12-28-06.pdf](http://www.oiglapd.org/Reports/06-Complaint_Audit_12-28-06.pdf) (describing how “eleven 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* note 156, 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* note 156, at ii (stating that in 2005, 10 out of 46 complaints reviewed, there was some evidence of a

FIGURE 4.4, PERCENTAGE OF AUDITED COMPLAINTS HANDLED PROPERLY



The LAPD demonstrated remarkable improvement in the adherence to all citizen 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 apparent that the LAPD mostly corrected an endemic problem that plagued the department for years. And it seems highly likely that this impressive improvement was in part because of the presence of external monitoring.

An additional requirement of the consent decree was that the LAPD ought to develop an EIS system<sup>157</sup> to keep track of “risk-oriented data (uses of force, complaints, etc.), [and] operational data (arrests, traffic stops, citations, etc.)” and “automatically notify supervisory personnel when officers in their command deviate significantly from the norms of their sworn peers.”<sup>158</sup> The monitoring team found that the LAPD not only developed a satisfactory EIS system, but that the department “incorporated [it] into the LAPD manual and in the daily business practices...including promotions, pay-grade advancement, selections to specialized units, annual performance evaluations, transfers to new commands, ... and complaint investigations.”<sup>159</sup> The monitoring team audited dozens of monthly reports created by this new data system, and

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significant allegation not properly framed or adjudicated); OIG COMPLAINT AUDIT 2010-2011, *supra* note 156, at 2-3 (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 QUARTERLY REPORT FOR LAPD, *supra* note 152, 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).

<sup>157</sup> This EIS involved five separate systems that were integrated together: “the Complaint Management System (CMS), the Use of Force System (UOFS), the STOP database, the Risk Management Information System (RMIS) and the Deployment Planning System (DPS).” FINAL QUARTERLY REPORT FOR LAPD, *supra* note 152, at 10.

<sup>158</sup> *Id.* at 9.

<sup>159</sup> *Id.*

found the department was generally using this new data system properly.<sup>160</sup> An event in 2008 illustrates just how useful these kinds of data-driven warning systems can be in improving the constitutionality of local policing. The LAPD in coordination with the monitoring team conducted an assessment of data collected by the new data system and found that the Central Area Narcotics unit appeared to engage in statistically unusual behavior.<sup>161</sup> The unit was disproportionately taking advantage of a narrow exception in LAPD policy that permitted officers to avoid completing a field data report after stopping a suspect.<sup>162</sup> Thanks to the data-driven system enforced by external monitoring, the LAPD was able to notice this potentially unconstitutional pattern of behavior and take actions to correct it preemptively.

Professor Rachel Harmon has observed, the lack of data on police behavior has made regulation and oversight tough throughout American history.<sup>163</sup> 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.

#### *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 collective bargaining process.<sup>164</sup> The majority of states require departments to bargain with police unions before imposing new policies that may affect any term or condition of employment.<sup>165</sup> 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.<sup>166</sup> As Professor Harmon has argued, “[c]ollective bargaining ... functions like an immediate tax” on misconduct reforms.<sup>167</sup> But in previous SRL cases, a curious thing has happened. Courts have rejected union attempts to intervene and block

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<sup>160</sup> *Id.* at 11-12 (“the Monitor reviewed 34 different monthly reports produced by RMIS, including four individual summary and comparison reports, 15 different summary and comparison reports for units and/or workgroups and 15 different incident reports...[and] determined that these reports met the Consent Decree requirement”)

<sup>161</sup> *Id.* at 13 (explaining how, after a staff review of “total Department-wide action items for the second quarter of 2008,” they determined that the Central Area Narcotics division “appeared to be statistically higher than the average of other specialized units for RMIS threshold”).

<sup>162</sup> *Id.* The monitors also observed that supervisors appeared to be engaged directly in use of force incidents rather than serving in a merely supervisory capacity. *Id.*

<sup>163</sup> See generally Rachel Harmon, *Why Do We (Still) Lack Data on Policing*, 96 *Marquette L. Rev.* 1119 (2014) (explaining how, throughout American history, policymakers have not had the necessary data to regulate and oversee police effectively).

<sup>164</sup> *Id.*

<sup>165</sup> Rachel Harmon, *The Problem of Policing*, 761 *MICH. L. REV.* 797, 799 (2012)

<sup>166</sup> Other scholars have also discussed how collective bargaining affects police departments. See, e.g., Seth Stoughton, *The Incidental Regulation of Policing*, 98 *MINN. L. REV.* 2205-2217 (2014).

<sup>167</sup> *Id.*

negotiated settlements reached via § 14141.<sup>168</sup> By doing so, SRL provides a narrow way that police departments can implement significant misconduct reforms without navigating the cumbersome collective bargaining process.

As the late 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.”<sup>169</sup> 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.”<sup>170</sup> 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.”<sup>171</sup>

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.<sup>172</sup> 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.<sup>173</sup> Instead, what seems to make SRL effective is its apparent ability to elevate the importance of oversight and accountability relative to other considerations.

#### 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.<sup>174</sup> 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. But at least one department, the LAPD, did disclose a complete dataset of all civil liability related to police conduct during the

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<sup>168</sup> See *supra* Part I (describing how police unions have attempted to intervene, mostly unsuccessfully, into structural police reform litigation under collective bargaining grounds).

<sup>169</sup> Clyde Summers, *Public Employees Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1194 (1974).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1196.

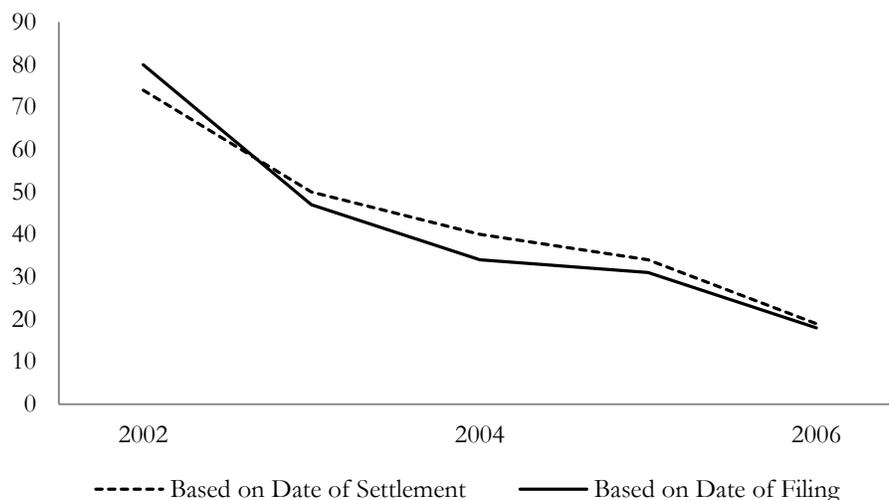
<sup>172</sup> Chanin, *supra* note 7, at 56 (“With the help of a special master and a Magistrate Judge, Dlott used an unprecedented form of Alternative Dispute Resolution (ADR) to bring together the plaintiff class, the police department, and the local chapter of the FOP”).

<sup>173</sup> Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 1973- 489–546, 518–19 (2008) (advocating for measures to increase collaboration during federal reforms).

<sup>174</sup> Telephone Interview with City Official and External Monitor #20, at 6 (September 5, 2013) (transcript on file with author) [hereinafter Interview #20].

SRL era.<sup>175</sup> Figure 4.5 shows the trend in the number of lawsuits levied against the LAPD for civil rights violations from 2002 to 2006.<sup>176</sup>

FIGURE 4.5, NUMBER OF CIVIL RIGHTS AND USE OF FORCE LAWSUITS AGAINST LAPD RESULTING IN FINANCIAL PAYOUTS



As the figure demonstrates, 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.<sup>177</sup> This also

<sup>175</sup> 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, available at <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 LA Times, the LAPD categorized each case into a category 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 kind of misconduct that the consent decree should have reduced. This resulted in a set of 353 civil rights lawsuits against the LAPD settled between 2002 and 2011. The average of these civil rights or use of force cases took 486 days to settle, or about 1.33 years. And 24 of these cases took over 3 years to settle. Of course, litigation can take years to complete. A claim filed in 2001 may not be resolved until 2002 or 2003. To correct for this, the figure includes data on the number of cases resulting in payoffs organized by both the date of settlement and the date of filing. If the LAPD is engaging in less misconduct, the total number of misconduct cases should decrease by year and the total amount paid by the LAPD for misconduct cases also decrease. Although the dataset runs through 2011, the figure ends at the year 2009. 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 15, 2011—approximately 1749 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 1749 days. Data on file with author.

<sup>176</sup> *Legal Payouts in LAPD Lawsuits*, *supra* note 175 (listing all lawsuit and payouts by LAPD over this time period). See *supra* note 175 for methodology used to create this figure.

<sup>177</sup> See *supra* note 175 for methodology used to create this figure.

suggests that, even though SRL is expensive,<sup>178</sup> it may ultimately pay for itself through decreased litigation costs.<sup>179</sup>

While this trend is consistent with a conclusion that SRL contributes to lower civil liability, it is not necessarily dispositive. For example, a change in the number of civil rights police cases that resulted in a payout might be indicative of a change in litigation strategies, 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 have similar effects on other types of lawsuits against the LAPD. Nevertheless, the number of successful lawsuits against the LAPD for other matters, like traffic accidents, has remained relatively constant during the SRL era.<sup>180</sup> This is consistent with the conclusion that SRL exerted a unique and significant influence on the volume of civil rights abuses by the LAPD. Combined with the comments made by interview participants, this provides compelling evidence that SRL may, indeed, reduce a police department's civil liability.

## VI. LIMITATIONS OF SRL

Although SRL offers several distinct 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. Finally, and perhaps most importantly, there remain significant questions about whether SRL can forcefully transform a police agency where local political leaders and police executives oppose the intervention.

### A. High Cost

Decentralization in American policing leads to wide resource disparities between municipalities.<sup>181</sup> The result is that some jurisdictions lack the necessary resources to invest in

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<sup>178</sup> The total cost of the structural police reform in Los Angeles was approximately \$100 million. *See supra* notes 121-124.

<sup>179</sup> Using the data from Figure 4.5, 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 structural police reform. *See supra* Figure 4.5; note 175 (full dataset on file with author).

<sup>180</sup> In 2003, private litigants filed 36 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 32 and 42 cases. *Legal Payouts in LAPD Lawsuits*, *supra* note 175.

<sup>181</sup> Several decades ago, estimates wrongly put the number of policing agencies at around 40,000. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967) [hereinafter Presidents Commission on Law Enforcement], *available at* <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>. Subsequent studies have reduced this number substantially. Modern estimates place the number at around 17,985 state and local law enforcement agencies in the United States. *See* United States Department of Justice, *Census of*

policies in procedures to reduce misconduct.<sup>182</sup> While the forced allocation of scarce resources may be an advantage of SRL, it also represents a potential limitation as well. 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 the example of Camden, New Jersey, discussed in Chapter 1. Remember, the average Camden resident only makes around \$29,118 per year, resulting in over a third of all Camden residents living below the poverty line.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> As a result, the DOJ may understandably face significant backlash in using SRL in poor communities.

### B. Sustainability

Serious questions also remain about the ability 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 local police agency to reach a § 14141 settlement with the DOJ on April 16, 1997.<sup>186</sup> Both external monitoring and independent evaluation by the Vera Institute for Justice demonstrated that the Bureau made substantial progress in reducing apparent

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*State and Local Law Enforcement*, 2, July 2011, available at <http://www.bjs.gov/content/pub/pdf/cslea08.pdf>.

<sup>182</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967) [hereinafter Presidents 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).

<sup>183</sup> UNITED STATES CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (2006-2010).

<sup>184</sup> Matt Taibbi, *Apocalypse, New Jersey: A Dispatch From America's Most Desperate Town*, Rolling Stone, Dec. 11, 2013, available at <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 generally Heather Haddon, *Crime Dips in Camden as New County Police Force Replaces City Officers*, The Wall Street Journal, Aug. 5, 2013, available at <http://online.wsj.com/news/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).

<sup>185</sup> Richard Rainey, *Mitch Landrieu Requests a Doubling of Tax Rates for New Orleans Police and Fire*, THE TIMES-PICAYUNE, May 1, 2014, available at [http://www.nola.com/politics/index.ssf/2014/05/mitch\\_landrieu\\_tax\\_hike\\_plan.html](http://www.nola.com/politics/index.ssf/2014/05/mitch_landrieu_tax_hike_plan.html); Tyler Bridges, *Legislature Approves Property Tax Hike for New Orleans Police and Fire; Now Heads to Voters*, THE LENS, May 29, 2014, available at <http://thelensnola.org/2014/05/29/legislature-approves-property-tax-hike-for-new-orleans-police-now-heads-to-voters>.

<sup>186</sup> Rushin, *supra* note 23, at 3247.

unconstitutional misconduct during SRL.<sup>187</sup> The DOJ ended oversight of Pittsburgh around June 16, 2005.<sup>188</sup> During this entire period, Police Chief Robert McNeilly oversaw the Bureau.<sup>189</sup> 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.<sup>190</sup> 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.<sup>191</sup> Despite this sort of opposition, McNeilly pressed ahead with implementing each requirement of the negotiated § 14141 settlement, including a computerized early warning system.<sup>192</sup> Throughout this time, Mayor Thomas Murphy, Jr. generally supported Chief McNeilly and ongoing federal intervention.

In 2006, when Pittsburgh elected Robert O’Connor, Jr. to replace Mayor Murphy, things changed.<sup>193</sup> Mayor O’Connor immediately fired Chief McNeilly and sided with local police union leaders, who claimed that McNeilly’s use of excessive disciplinary action hurt officer morale.<sup>194</sup> In the years since this change in leadership, civil rights advocates have worried that the Bureau “is now sliding back towards where it was” before federal intervention.<sup>195</sup> During federal oversight, for example, the number of civil rights complaints against the Pittsburgh police brought to the ALCU fell dramatically.<sup>196</sup> In the years after McNeilly’s removal, the volume of these complaints has increased.<sup>197</sup>

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

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<sup>187</sup> See generally ROBERT C. DAVIS, NICOLE J. HENDERSON & CHRISTOPHER W. ORTIZ, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE (2005), [http://www.vera.org/sites/default/files/resources/downloads/277\\_530.pdf](http://www.vera.org/sites/default/files/resources/downloads/277_530.pdf).

<sup>188</sup> Rushin, *supra* note 23, at 3247.

<sup>189</sup> Michael A. Fuoco, *The Mayoral Transition: Police Chief Out*, Pittsburgh Post-Gazette, Dec. 29, 2005, available at <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).

<sup>190</sup> Michael A. Fuoco, *Police Chief McNeilly’s Tenure Saw Wrenching Changes*, Pittsburgh Post-Gazette, Jan. 9, 2006, available at <http://www.post-gazette.com/local/city/2006/01/09/Police-chief-McNeilly-s-tenure-saw-wrenching-changes/stories/200601090107>.

<sup>191</sup> *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).

<sup>192</sup> *Id.* (this “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”).

<sup>193</sup> Fuoco, *supra* note 189.

<sup>194</sup> Fuoco, *supra* note 190 (describing the change in philosophies under the new mayoral administration).

<sup>195</sup> Laura Maggi, *Pittsburgh Bureau of Police was First in Nation With Official Federal Intervention*, The Times Picayune, Oct. 16, 2011, available at [http://www.nola.com/crime/index.ssf/2011/10/pittsburgh\\_bureau\\_of\\_police\\_wa.html](http://www.nola.com/crime/index.ssf/2011/10/pittsburgh_bureau_of_police_wa.html).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

consent decree.”<sup>198</sup> This latest problem has emerged after Pittsburgh Police Chief Nathan Harper was indicted in March of 2013 on corruption charges,<sup>199</sup> which spurred another federal investigation of the agency. 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.

### C. *De-Policing*

Various critics have claimed that federal intervention into the affairs of local police agencies decrease police efficiency, thereby increasing crime.<sup>200</sup> One of the most common arguments made by de-policing advocates is that SRL will decrease police aggressiveness.<sup>201</sup> According to this view, SRL reduces the amount of encounters between police and citizenry, either because structural reform makes officers hesitant, or because it forces officers to spend valuable time completing procedural hurdles.<sup>202</sup> Some officers suggest that de-policing is most likely to affect the number of police contacts and arrests for minor street crimes.<sup>203</sup> This is because arrests for serious crimes normally happen after lengthy investigations, while arrests for minor crimes happens via police officers proactively monitoring the streets and responding to visible wrongdoing. The de-policing hypothesis suggests that policies and procedures mandated

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<sup>198</sup> Jeffrey Benzing, *Pittsburgh Police Could Face Second Federal Consent Decree, Peduto Says*, Public Source, July 1, 2014, available at <http://publicsource.org/from-the-source/pittsburgh-police-could-face-second-federal-consent-decree-peduto-says>.

<sup>199</sup> Jonathan D. Silver, Liv Narvatil, and Richard Lord, *Attorney: Ex-Pittsburgh Police Chief Nate Harper To Plead Guilty*, Mar. 23, 2013, available at <http://www.post-gazette.com/local/region/2013/03/22/Attorney-Ex-Pittsburgh-police-chief-Nate-Harper-to-plead-guilty/stories/201303220153>.

<sup>200</sup> See, e.g. Colleen Long, *NYC Stop-and-Frisk Policy Wrongfully Targeted Minorities, Judge Rules; Outside Monitor Appointed*, MINNEAPOLIS STAR TRIBUNE, August 12, 2013 (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,”* THE WALL STREET JOURNAL, September 21, 2013 (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).

<sup>201</sup> See, e.g., DAVIS, HENDERSON & ORTIZ, *supra* note 187, at 16 (explaining how officers in Pittsburgh felt “hesitant to intervene in situations involving conflicts because they were afraid of having citizens file an unwarranted anonymous complaint against them”).

<sup>202</sup> See, e.g., Chanin, *supra* note 7 (quoting a leader from the Washington, D.C. Police Union as saying that structural police reform leads to more time-consuming paperwork).

<sup>203</sup> CHRISTOPHER STONE, TODD FOGLESONG & CHRISTINE M COLE, *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 19-20* (2009), <http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf> (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 to us as the ‘drive-and-wave syndrome’”).

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.<sup>204</sup>

Despite these consistent concerns about de-policing, evidence for the hypothesis is limited. Property crime rates in communities undergoing SRL, like Washington, D.C.,<sup>205</sup> Los Angeles,<sup>206</sup> Cincinnati,<sup>207</sup> and Prince George's County,<sup>208</sup> all dropped more than the national average. Only in Pittsburgh did property crime rates decrease less than the national average

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<sup>204</sup> 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." Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 12, 2013, available at <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> (last visited Sep 9, 2013). 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 Law Professors to Help Implement Stop-and-Frisk Reforms*, N.Y. DAILY NEWS, Sept. 19, 2013, available at <http://www.nydailynews.com/news/crime/ivy-league-law-professors-implement-stop-and-frisk-reforms-article-1.1459589> (last visited Sep 23, 2013). Mayor Michael Bloomberg strongly objected to this decision, calling it a "terrible idea" and arguing that it would be "disruptive." J. David Goodman, *Bloomberg Calls Court Monitor for Police a "Terrible Idea,"* N.Y. TIMES, June 13, 2013, available at <http://www.nytimes.com/2013/06/14/nyregion/bloomberg-calls-court-monitor-for-police-a-terrible-idea.html> (last visited Sep 9, 2013); see also Yoav Gonen, DE BLASIO CALLS NYPD'S FEDERAL MONITOR A "TEMPORARY REALITY" NEW YORK POST, <http://nypost.com/2013/09/20/de-blasio-calls-nypds-federal-monitor-a-temporary-reality/> (last visited Sep 23, 2013) (referring to Bloomberg's conclusion that the appointment of a monitor would be "terrible"). According to Bloomberg, any court appointed monitor would not understand "the streets of New York City." Goodman, *supra*. 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*; Damien Gayle, *Shootings up 13% in New York City after federal judge rules police "stop and frisk" tactics unconstitutional and racist*, MAIL ONLINE, Sept. 19, 2013, available at <http://www.dailymail.co.uk/news/article-2425055/Shootings-10-New-York-City-federal-judge-rules-stop-search-unconstitutional-racist.html> (last visited Sep 23, 2013) (detailing how New York City officials are pointing to a 13% increase in shootings over the last 28 days as evidence that the Judge's orders have contributed to higher crime).

<sup>205</sup> Structural police reform started in Washington, D.C. on June 6, 2001. It ended on February 20, 2012. During that time, property crime rates fell by 22.42% in Washington, D.C., and 21.84% nationwide. Rushin, *supra* note 23, at 3247 (showing in Appendix B the dates for all negotiated settlements pursuant to § 14141); FEDERAL BUREAU OF INVESTIGATIONS, UNIFORM CRIME REPORTING STATISTICS (1970-2013) [hereinafter FBI UCR], available at <http://www.fbi.gov/about-us/cjis/ucr/ucr>.

<sup>206</sup> Structural police reform started in Los Angeles on June 15, 2001 and concluded on May 16, 2013. During that time, property crime rates fell by 37.68% in Los Angeles and 21.84% nationwide. Rushin, *supra* note 23, at 3247; FBI UCR, *supra* note 205.

<sup>207</sup> Structural police reform started in Cincinnati on April 12, 2002 and concluded on April 12, 2007. During that time, property crime rates fell by 14.31% in Cincinnati and 9.76% nationwide. Rushin, *supra* note 23, at 3247; FBI UCR, *supra* note 205.

<sup>208</sup> Structural police reform started in Prince George's County on January 22, 2004 and ended on January 13, 2009. During that time, property crime rates fell by 36.62% in Prince George's County and 13.45% nationwide. Rushin, *supra* note 23, at 3247; FBI UCR, *supra* note 205.

during SRL.<sup>209</sup> Overall, property crime rates fell by an average of 12.9% more than the national average in municipalities targeted for SRL.<sup>210</sup> 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.<sup>211</sup> 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.<sup>212</sup> 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.<sup>213</sup> In Los Angeles, the number of pedestrian and car stops per officer by increased by 35.2% during SRL.<sup>214</sup> This is not to say that SRL is without negative side-effects. It is fully possible that § 14141 intervention leads to more complex externalities that are not readily apparent from these statistics.<sup>215</sup> But ultimately, given the limited evidence, the de-policing hypothesis remains just that—a hypothesis.

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<sup>209</sup> Structural police reform started in Pittsburgh on April 16, 1997 and ended on June 16, 2005. During that time, property crime rates fell by 6.10% in Pittsburgh and 20.50% nationwide. Rushin, *supra* note 23, at 3247; FBI UCR, *supra* note 205.

<sup>210</sup> 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.

<sup>211</sup> Using the same basic methodology identified *supra* notes 205-210, these five departments saw a violent crime rates decrease by a weighted average of 36.29%, relative to the national average. Rushin, *supra* note 23, at 3247; FBI UCR, *supra* note 205.

<sup>212</sup> 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 structural police reform era. This was then compared to the change in arrest opportunities, defined as the number of 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 identified *supra* notes 205-210 to weight each department by population.

<sup>213</sup> ROBERT C. DAVIS, CHRISTOPHER W. ORTIZ, NICOLE J. HENDERSON, JOEL MILLER, & MICHELLE K. MASSIE, TURNING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE, 56 (2002), available at [http://www.vera.org/sites/default/files/resources/downloads/Pittsburgh\\_consent\\_decree.pdf](http://www.vera.org/sites/default/files/resources/downloads/Pittsburgh_consent_decree.pdf) (showing in figure 12 the progression of these two trends during structural police reform era).

<sup>214</sup> Los Angeles Police Department, Statistical Digest (2001-2011), available at [http://www.lapdonline.org/crime\\_mapping\\_and\\_compstat/content\\_basic\\_view/9098](http://www.lapdonline.org/crime_mapping_and_compstat/content_basic_view/9098) (click on “statistical digest” 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); FBI UCR, *supra* note 205 (to access, click on requisite year under “Crime in the United States,” the click “Police Employee Data,” “Table 78,” and navigate to the data for Los Angeles, California). For pedestrian and vehicle stops, I use 2002 to represent the state of structural police reform, since it was the first date that there was good data available. I 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.

<sup>215</sup> For instance, it remains possible that structural police reform reduces total police contacts via *Terry* stops or traffic stops. Measuring this sort of a reduction statistically is challenging. In many cases, municipalities do not, or have not, kept good records on the number of these minor

#### D. Need for Local Support

Finally, and perhaps most importantly, interview participants strongly suggested that local support for the negotiated settlement appears to be critical to the speed at which the police agency can implement the mandated reforms.<sup>216</sup> According to nearly every single interview participant, the supportiveness of the police executives in the targeted departments was the single greatest predictor of the overall success of the reforms.<sup>217</sup> Participants pointed to Oakland as an example of a case where departmental leadership has not always supported of the ongoing structural reform efforts.<sup>218</sup> Perhaps not coincidentally, structural reform litigation has dragged on at a painfully slow rate in Oakland.<sup>219</sup> Police chiefs that have embraced the structural reform efforts normally have had an easier time implementing the changes expeditiously.<sup>220</sup> Interviewees emphasized that supportive leadership was necessary if a department was to change its organizational culture.<sup>221</sup> This is particularly relevant since scholars have increasingly tied misconduct within a department to underlying trends in organizational culture.<sup>222</sup>

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. Structural reform 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 the Bush Administration, eschewing negotiation in

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interactions with law enforcement. Thus, making accurate determinations changes in the rate of these minor contacts over time is often impossible.

<sup>216</sup> See, e.g., Interview #16, *supra* note 9, 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”).

<sup>217</sup> *Id.* at 7 (stating that, “leadership, stable leadership and commitment of that leadership to get it done”); Interview #5, *supra* note 3, at 6 (claiming that “a huge part of the success of these agreements is the leadership”); Interview #7, *supra* note 8, at 5 (emphasizing the overall importance of leadership).

<sup>218</sup> Interview #12, *supra* note 104, 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).

<sup>219</sup> Henry K. Lee, *Oakland Police Slammed for Slow Pace of Reform*, San Francisco Gate, Jan. 18, 2012, available at <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 PD).

<sup>220</sup> Telephone Interview with External Monitor #13, at 9 (August 5, 2013) [hereinafter Interview #13] (transcript on file with author) (giving advice to any chief whose department was under structural police reform 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”).

<sup>221</sup> Telephone Interview with External Monitor #11, at 9 (July 1, 2013) [hereinafter Interview #11] (transcript on file with author) (stating that organizational leaders and commanders play a pivotal role in transforming organizational culture within a police department).

<sup>222</sup> See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2003) (generally tying organizational culture of a police department to police misconduct).

favor of hardball tactics seeking immediate federal control.”<sup>223</sup> During the second half of the George W. Bush Administration, the DOJ had taken more cautious approach to enforcing § 14141, opting for cooperative arrangements as opposed to hostile takeovers of local police agencies.<sup>224</sup> Policing scholars criticized this Bush Administration approach, saying that it demonstrated a lack of political commitment to the issue of police misconduct.<sup>225</sup> 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 facing 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, in the past, it has been common for a municipality to request DOJ intervention via § 14141.<sup>226</sup> 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.<sup>227</sup> 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.<sup>228</sup> Alamance County, thus, 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.

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<sup>223</sup> Heather Mac Donald, *Targeting the Police*, WKLY. STANDARD, Jan. 31, 2011, at 26.

<sup>224</sup> Rushin, *supra* note 23, at 3228-3235.

<sup>225</sup> Rachel Harmon, *Promoting Civil Rights Through Proactive Policing*, 62 STAN. L. REV. 1, 21 (2009). (explaining the “absence of political commitment to § 14141 suits, especially on the part of the Bush Administration”).

<sup>226</sup> Rushin, *supra* note 23, at 3223-24 (describing how whistleblowers within a department can spur DOJ action, including when a police executive encourages federal intervention).

<sup>227</sup> Brennan McGovern, *DOJ Files Civil Rights Suit Against Alamance County Sheriff*, Elon Local News, Dec. 21, 2012.

<sup>228</sup> *Id.*

## Chapter 5

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### Los Angeles: How Does a Best Case Happen?

#### INTRODUCTION

While the DOJ has used § 14141 to reform numerous police departments across the country, no agency presented a bigger challenge than the Los Angeles Police Department (LAPD). Remember, misconduct by the LAPD was the catalyst for Congress to pass § 14141 back in 1994. The images of four LAPD officers savagely beating Rodney King shocked the nation. And the Rodney King event was no aberration. Subsequent investigation found that the King incident was part of a pattern of misconduct that had plagued the LAPD for years. While Los Angeles officials made some changes to the LAPD after the King incident, misconduct continued to afflict the agency.

Less than a decade later, the LAPD was again embroiled in a major misconduct scandal—the Rampart Scandal—that implicated over a dozen officers in egregious wrongdoing. Credible evidence emerged that dozens of officers had physically abuse of suspects, committed violent crimes, and planted evidence to frame innocent people. Scholars like Erwin Chemerinsky described the LAPD’s behavior as more characteristic of a “repressive dictator[ship]” or a “police state[]” than a democratic society.<sup>1</sup> The LAPD was one of police departments most in need of DOJ intervention. But reforming the LAPD seemed like an extraordinary challenge. The LAPD was (and remains) the nation’s second largest police department with over 9,000 sworn officers and over 12,000 employees. The scope of misconduct appeared to be significant. And the LAPD had been largely resistant to previous reform efforts instigated by local officials. The DOJ had its work cut out for it.

Over the decade that followed, federal intervention ushered in a new era in the LAPD. By almost any measure, the LAPD made a dramatic turnaround during the structural reform litigation era. First, SRL forced Los Angeles to invest in costly police misconduct reforms, including additional training, oversight, and a computerized early warning system. Despite mounting local support for police reform after the Rodney King and Rampart Scandals, it wasn’t until the federal government initiated structural reform litigation that the city finally dedicated the necessary resources to combat police misconduct. Second, federal intervention contributed to a change in leadership in the LAPD. This importance of this change in leadership can hardly be overstated. Soon after the initiation of federal intervention, Los Angeles named William Bratton as the new chief of the LAPD. Bratton, who was serving as a member of the monitoring team overseeing LAPD at the time, played a pivotal role in implementing the elements of the consent decree. Various interviewees identified Bratton’s appointment as a turning point in the LAPD’s transformation. This demonstrates the importance of internal governance in generating compliance with external legal mandates. Third, the consent decree required the appointment of an external monitor to oversee the LAPD for over a decade. This external monitor used

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<sup>1</sup> Erwin Chemerinsky, *The Rampart Scandal and the Criminal Justice System in Los Angeles County*, 57 GUILD PRACTITIONER 121, 121 (2000).

innovative methods to measure whether officers were complying with stated mandates. This external monitoring also created an extensive database of publicly available information on frontline officer behavior, thereby increasing transparency and accountability. Fourth, the presence of the federal consent decree also allowed leadership in the LAPD to institute potentially unpopular, but necessary policies over the objection of organized labor. This exemplifies how SRL is effective, in part, because of its apparent ability to elevate the importance of oversight and accountability relative to other considerations.

At the end of SRL, the LAPD was a dramatically different department. Virtually all empirical measures suggest that the LAPD is engaged in less misconduct today than it was before federal intervention. The LAPD has also seen a dramatic reduction in payouts for civil rights violations. And there is no evidence that federal intervention made the LAPD less aggressive or effective in fighting crime. During the consent decree period, officer aggressiveness increased and crime fell substantially more than the national average. The Los Angeles crime decline is particularly fascinating because there have not been any significant socio-economic, legal, or demographic changes in Los Angeles that should explain the unusually dramatic decline in crime over the structural reform era. This suggests that the LAPD may have played a role in the declining crime rates.

Of course Los Angeles is not the only city where the police department may have contributed to a historic crime decline. Since 1990, New York City has seen the most dramatic crime decline in American history. Professor Franklin Zimring has shown how the NYPD—also under the leadership of William Bratton for some time—played an important role in this historic crime decline. But remember that the NYPD has been subject to serious criticism for its potentially unconstitutional policing tactics. In Los Angeles, however, William Bratton oversaw a crime drop of comparable magnitude to NYPD that also coincided with reductions in apparent police misconduct. Combined, this suggests that the LAPD has been able to achieve something truly remarkable over the last decade. The agency has been able to institute changes that may have both reduced crime *and* unconstitutional misconduct. The LAPD case study suggests that, it may be possible for a police department to achieve these two important goals simultaneously. No doubt, this chapter only scratches the surface of the events that took place in Los Angeles. Los Angeles's experience with structural reform litigation could fill a book by itself. Nevertheless, this case study suggests that it may be possible to have constitutional policing without significant compromise. This hypothesis deserves additional research to determine whether the LAPD experience is exportable to other municipalities.

This chapter starts by detailing the troubled past that led to DOJ to intervention. It then examines the scope and depth of the consent decree implemented in Los Angeles. Finally, this chapter uses a variety of quantitative measures to demonstrate that the LAPD showed dramatic improvement during the SRL era.

## I. THE BAD OLD DAYS IN LOS ANGELES POLICING

Two major events precipitated the eventual federal oversight of the LAPD: the beating of Rodney King and the revelations surrounding the Ramparts Scandal. The national media heavily scrutinized both incidents. The DOJ initiated a formal §14141 investigation into the LAPD after the Rodney King beating. But the DOJ did not formally determine that the LAPD was engaged in a pattern or practice of misconduct until the Ramparts Scandal made national news. This

section summarizes each of these events and the evidence of systemic misconduct that emerged thereafter.

A. *Rodney King Beating: The First Evidence of Systematic Misconduct*

Chapter 2 has already detailed the specifics of Rodney King incident. Remember, it was the Rodney King incident that galvanized Congressional interest in passing § 14141.<sup>2</sup> Without the George Holliday video,<sup>3</sup> § 14141 may have never become law. In Los Angeles, the King incident sparked community demands for action,<sup>4</sup> after LAPD Chief Darryl Gates referred to the incident as a mere “aberration.”<sup>5</sup> Soon after the King incident, local leaders in Los Angeles convened an independent commission, later referred to as the Christopher Commission, to investigate the event.<sup>6</sup>

While the King beating itself served as a startling example of misconduct, the events that followed also demonstrated the depth of problems facing the LAPD. For instance, immediately after the incident, one of King’s passengers alerted Paul King, Rodney King’s brother, about the incident.<sup>7</sup> Paul King then went to the Foothill Police Station to file a formal complain about his brother’s treatment.<sup>8</sup> The sergeant who helped King’s brother brought him to an interview room where he had King’s brother wait for 30 minutes at one point.<sup>9</sup> During the interaction, the sergeant allegedly questioned the brother about whether he had been in any trouble—a question that understandably bothered King’s brother, who was there to merely report his brother’s mistreatment.<sup>10</sup> The sergeant eventually told King’s brother that the LAPD was actively investigating Rodney King.<sup>11</sup> The sergeant then remarked that Rodney King was in “big trouble”

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<sup>2</sup> DARRELL L. ROSS, CIVIL LIABILITY IN CRIMINAL JUSTICE 185 (2012) (identifying the King beating as a major turning point in police regulation, precipitating §14141); JACK R. GREENE, THE ENCYCLOPEDIA OF POLICE SCIENCE: A-I, INDEX 415 (2007) (also pointing to the King incident as a precipitator to §14141 passage).

<sup>3</sup> *Tape of Police Beating Causes Major Furor*, SEATTLE TIMES, March 6, 1991, at A2.

<sup>4</sup> *An Aberration or Police Business as Usual?* N.Y. Times, March 10, 1994, at 47 (“More than 1,000 callers from around the country phoned Mr. Gates's office expressing their outrage and demanding that he resign”); INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 3 (1991) [hereinafter Christopher Commission Report]

(“Within days, television stations across the country broadcast and rebroadcast the tape, provoking a public outcry against police abuse”).

<sup>5</sup> David Parrish, *Police ‘Street Justice’ Called Normal Conduct*, Daily News, March 10, 1991, at N1 (quoting Chief Gates as saying that the event was an aberration, and that “It’s not the kind of conduct that we have normally from our officers”).

<sup>6</sup> Christopher Commission Report, *supra* note 4.

<sup>7</sup> *Id.* at 9 (explaining how Bryant Allen awakened Paul King around 4:00 AM to tell him that his brother had been beaten and arrested by the police).

<sup>8</sup> *Id.* 9-10 (“Paul King said he wanted to make a complaint about his brother”).

<sup>9</sup> *Id.* at 10 (describing how the sergeant was in and out of the room during the entire 40 minute interaction, with the sergeant once leaving for about 30 minutes).

<sup>10</sup> *Id.* In response to this line of questioning, “Paul King responded that he was there to talk about Rodney King, not himself.” *Id.*

<sup>11</sup> *Id.*

for “put[ting] someone’s life in dangerous, possibly a police officer.”<sup>12</sup> The sergeant told King’s brother that if he could find the video, that such evidence may be helpful with any complaint.<sup>13</sup> King’s brother then left the precinct without having the opportunity to formally fill out any complaint form.<sup>14</sup> George Holliday also made an attempt to contact the same Foothill Police Station the following day.<sup>15</sup> Holliday inquired into Rodney King’s condition and notified the LAPD that he had witnessed the event.<sup>16</sup> The desk officer he spoke with, though, told him that he could not release information on Rodney King’s condition and made no effort learn any of the details that Holliday had witnessed at the scene.<sup>17</sup> “Confronted with what he viewed as disinterest on the part of the LAPD, Holliday made arrangements with the Los Angeles television station KTLA to broadcast the videotape.”<sup>18</sup>

After the events, details began to emerge about the background of the officers involved in the beating. A total of 23 officers had appeared at the scene of the beating at some point.<sup>19</sup> Four officers were directly involved in the use of illegal force against King—Sergeant Koon, and Officers Powell, Briseno, and Wind.<sup>20</sup> One of the officers involved in the beating had previously been suspended for 66 days in 1987 for beating a handcuffed man.<sup>21</sup> The other three officers had been subject to various complaints for excessive use of force—most of which had been found to be unsubstantiated by the LAPD.<sup>22</sup> Another 10 officers were physically present, primarily as bystanders, during the incident.<sup>23</sup> Of these 10 bystander officers, 4 were actually field training officers that were “responsible for supervising ‘probationary’ officers in their first year after graduation from the Police Academy.”<sup>24</sup>

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<sup>12</sup> *Id.* The officer also told Paul King that his brother “had been caught in a high-speed chase going over 100 m.p.h. or so....” *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* As Paul King later remarked, “I knew I hadn’t made a complaint.” *Id.*

<sup>15</sup> *Id.* at 9, 11 (stating that Paul King went into the station on March 3 and George Holliday on March 4).

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* The Report further clarified that these officers varied in age from 23-48. Of the officers at the scene, 2 were African American, 4 were Latino, and 17 were white. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1. One officer ever told a reporter from the New York Times of the “magic pencil” that police officers used to make such misconduct allegations disappear. *Id.*

<sup>22</sup> Christopher Commission Report, *supra* note 4, at 12. The full explanation of the officers past misconduct is reproduced below:

“According to press reports, another officer has been suspended for five days in 1986 for failing to report his use of force against a suspect following a vehicle pursuit and a foot chase. (The suspect’s excessive force complaint against the office was held ‘not sustained’ by the LAPD.) A third indicted officer was the subject of a 1986 ‘not sustained’ complaint for excessive force against a handcuffed suspect. Since the King incident, that officer has been sued by a citizen who alleges that the officer broke his arm by hitting him with a baton in 1989.” *Id.*

<sup>23</sup> *Id.* at 11 (“Ten other LAPD officers were actually present on the ground during some portion of the beating”).

<sup>24</sup> *Id.* at 11-12.

The Rodney King events reminded many observers of the Dalton Avenue Case that had happened three years earlier.<sup>25</sup> In that case, 77 LAPD officers “invaded the homes of two black families and engaged in what one lawyer called ‘an orgy of violence,’ ripping out sinks and toilets and smashing windows and television sets, apparently in retaliation for a telephoned threat to a police station.”<sup>26</sup> Notably, officers also allegedly wrote the words “LAPD Rules” on the outside wall of the building.<sup>27</sup> The LAPD eventually settled lawsuits by the residents in 1990 for a settlement of approximately \$3 million.<sup>28</sup>

Observers across the country immediately condemned the behavior of the officers involved in the King beating. President George H. Bush called the events “shocking” and called for the DOJ to investigate the incident.<sup>29</sup> Professor Jerome Skolnick commented that the violent confrontation “was going to be the historical event for police in our time.”<sup>30</sup> Skolnick further predicted that the behavior was indicative of a larger problem in the LAPD, explaining that, “[t]wo people can go crazy, but if you have 10 or 12 people watching them and not doing anything, this tells you that this is a normal thing for them.”<sup>31</sup> Chief Gates of the LAPD disagreed with this categorization; although Gates agreed that the events were “shocking,”<sup>32</sup> he insisted that that they were the result of a few bad officers, not any systemic problems within the department.<sup>33</sup> Later that month, though, Gates announced a “10-Point Plan” intended to understand why the officers involved in the King beating “engaged in such lawlessness.”<sup>34</sup> Gates also made various personnel changes,<sup>35</sup> including firing some of the officers involved in the beating.<sup>36</sup> The Los Angeles District Attorney’s Office secured criminal indictments against Sergeant Koon, and Officers Powell, Briseno, and Wind.<sup>37</sup> The District Attorney’s Office did not seek indictments against the 17 officers that were at the scene and “did not attempt to prevent the beating or report it to their superiors.”<sup>38</sup> And prosecution resulted in an acquittal followed by days of chaos and rioting in Los Angeles and surrounding areas.<sup>39</sup> Although federal prosecutors

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<sup>25</sup> Myrdans, *supra* note 21.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Myrdans, *supra* note 21.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Christopher Commission Report, *supra* note 4, at 12.

<sup>33</sup> Parrish, *supra* note 5 (explaining that the events were a mere aberration and not indicative of a broader problem).

<sup>34</sup> Christopher Commission Report, *supra* note 4, at 13 (referencing the entirety of the 10-Point Plan, which is included as an appendix in the report).

<sup>35</sup> *Id.* (“The Valley Bureau commander was reassigned to the LAPD headquarters and an African American officer was made commander of patrol officers at the Foothill Division”).

<sup>36</sup> *Id.* (explaining that one of the officers had been fired and the other three directly involved in the beating were set to face administrative hearings as the Department sought their dismissal).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* It is worth noting, though, that “the District Attorney, however, referred the matter of the bystander officers to the United States Attorney for an assessment of whether federal civil rights laws were violated.” *Id.*

<sup>39</sup> *Id.*

successfully secured convictions against two of the officers involved, such an effort provided no deterrent for “the dozen officers present for the beating...”<sup>40</sup>

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.<sup>41</sup> The report filed by this commission came to be informally known as the Christopher Commission Report. 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. First, the commission found a startling pattern of excessive use of force amongst a small portion of officers. While the vast majority of LAPD officers had only 1-2 allegations of excessive force, around “183 officers had four or more allegations, 44 had six or more, 16 had eight or more, and one had 16 such allegations.”<sup>42</sup> Similarly, of the 6,000 police officers involved in use of force incidents between January 1987 and March 1991.<sup>43</sup> Again, the overwhelming majority of all officers had fewer than 5 reported uses of force.<sup>44</sup> Even so, a small cohort of officers accounted for a large amount of all use of force reports.<sup>45</sup> Among the officers that were subject to the most allegations of excessive use of force, “the performance evaluation reports for [these problematic officers] were very positive” as they “document[ed] every complimentary comment received and express[ed] optimism about the officer’s progress in the Department.”<sup>46</sup>

Second, the Christopher Commission Report determined the LAPD used insufficient complaint procedures and improper investigations in cases where citizens levied complaints. The commission reviewed “83 civil lawsuits alleging excessive or improper force by LAPD officers for the period 1986 through 1990 that resulted in a settlement or judgment of more than \$15,000.”<sup>47</sup> This review showed that the majority of “cases involved clear and often egregious misconduct resulting in serious injury or death to the victim.”<sup>48</sup> Of particular note, the commission found that the LAPD’s internal investigation into the events surrounding these 83 lawsuits were regularly “light or non-existent.”<sup>49</sup> The commission also found that the LAPD’s internal procedures for handling citizen complaints frequently led to public frustration. Out of 2,152 citizen allegations of excessive force, the LAPD only sustained 42.<sup>50</sup> This means that the LAPD sustained roughly 1-2% of all citizen complaints for excessive use of force. This was in part because the part of the police department responsible for investigating these claims—the Internal Affairs Division (IAD) had limited resources.<sup>51</sup> Once more, the commission determined that internal policies and procedures used by IAD make it difficult for citizens to file complaints.

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<sup>40</sup> *Id.* at 13.

<sup>41</sup> *See generally* Christopher Commission Report, *supra* note 4.

<sup>42</sup> *Id.* at ix.-x.

<sup>43</sup> *Id.* at x.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (explaining that “...63 officers had 20 or more reports each...” and “[t]he top 5% of the officers [ranked by number of reports] accounted for more than 20% of all reports”).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at xi.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at xix.

<sup>51</sup> *Id.* (explaining that “[g]enerally IAD investigates only a few cases because of limited resources”).

For example, “[s]ome intake officers actively discourage filing by being uncooperative or requiring long waits before completing a complaint form.”<sup>52</sup> The Rodney King incident provides a possible example of this sort of tactic. Recall that King’s brother attempted to file a complaint with the Foothill Police Station—only to be forced to wait for 30-40 minutes without explanation.<sup>53</sup> The officer in that case appeared to discourage and prevent King’s brother from filing a complaint by reminding King’s brother of the accusations against King, and by inquiring into the brother’s own possible involvement in criminal conduct.<sup>54</sup> The commission’s review of 700 cases found that complaint files regularly included no explanation about whether the investigators had sought to identify or locate witnesses.<sup>55</sup> The files also demonstrated that the LAPD used a “flawed” adjudication process.<sup>56</sup> This, in part, explained the relatively low rate at which the department held officers accountable for accused misconduct.

Third, the Christopher Commission Report concluded that the LAPD’s training programs were unsatisfactory. As the report explained, LAPD officers go through three different training phases.<sup>57</sup> Officers get their initial training at the police academy.<sup>58</sup> After this, officers then go through a probationary period for one year when they work in the field with more experienced officers.<sup>59</sup> After this, officers received continuing in-service training.<sup>60</sup> The commission believed that the systematic misconduct could be traced back to training programs that emphasized the use of physical force as opposed to verbal skills. De-escalation, they argued, should be an important component of training at every stage.<sup>61</sup> Additionally, the commission found that the requirements for training officers were insufficient.<sup>62</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 10 (describing how the sergeant was in and out of the room during the entire 40 minute interaction, with the sergeant once leaving for about 30 minutes).

<sup>54</sup> *Id.* at 9-10 (describing the seemingly odd interaction between the brother and the officer, including the mention of the officer directly asking King’s brother if he had any trouble with law enforcement).

<sup>55</sup> *Id.* at xix. It is worth noting that the commission found that “on the whole...[the complaint investigations] were of a higher quality than the division investigations,” even if they did have many serious problems. *Id.*

<sup>56</sup> *Id.* at xx. The commission reached this conclusion because they found that there was no uniform method for categorizing witnesses as involved or not involved in the incident. They also found that when evaluating the reliability of witness testimony, commanding officers appear to make inconsistent decisions. They also noted that the punishment was typically lenient in cases where a complaint was sustained. Punishment appeared to be more tailored to how embarrassing the punishment was to the department’s reputation rather than how the conduct put a citizen’s wellbeing in jeopardy. And they found that excessive force was generally treated more leniently than other forms of misconduct. *Id.*

<sup>57</sup> *Id.* at xvi.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* The commission also found that training did not emphasize culture respect and awareness enough. *Id.*

<sup>62</sup> *Id.* at xvii. These field training officers (FTOs) “guide new officers’ first contacts with citizens and have primary responsibility for introducing the probationers to the culture and traditions of the Department.” *Id.* Thus, it should be no surprise that the commission felt that these officers’ conduct was critical in ensuring an adequate training program. The requirements for these FTOs were

Fourth, the Christopher Commission Report found that the LAPD's structural organization made it difficult for outsiders to hold the police chief responsible for organizational deficiencies. At the time of the King incident, Los Angeles had a unique organizational structure for regulating and monitoring police behavior. The city utilized a "five-member Board of Police Commissioners, which [was] designated the 'head' of the Department and given the express authority to 'supervise, control, regulate, and manage' the Department."<sup>63</sup> The Police Commission also had the authority to appoint, remove, and discipline the police chief.<sup>64</sup> The Mayor appointed individuals to the Police Commission and also had the authority to remove individuals, as well.<sup>65</sup> Thus, it became practice for incoming mayors to replace the entire Police Commission upon election.<sup>66</sup> Los Angeles was also unique in that its police chief was insulated from removal or serious disciplinary action absent a showing of "good and sufficient cause."<sup>67</sup> This unique level of job protection came from a 1937 initiative, when voters in the City of Los Angeles "gave the chief the strong civil service job protection previously held only by lower level police officers—a decision that has made Los Angeles one of the few major cities in the country in which the Chief of Police has the prospect of life tenure."<sup>68</sup> This type of civil service protection for the police chief was intended to "provide independence from improper political pressure."<sup>69</sup> But in practice, it made it nearly impossible to hold a police chief accountable for problems within his or her department.<sup>70</sup> Thus, it should not be a surprise that Chief Gates served over 14 years as the top executive of the LAPD before his eventual resignation. This was in part because the Police Commission had generally adopted a "passive role" acting primarily as a "rubber stamp" for the police department.<sup>71</sup> Despite the fact that the Police Commission was supposed to be a check on the LAPD, the Christopher Commission Report found that the head

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considered insufficient since "there are no formal eligibility or disqualification criteria for the FTO position based on an applicants' disciplinary records." *Id.*

<sup>63</sup> *Id.* at 184.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* ("Police Commissioners are ostensibly appointed for five-year, staggered terms, but in practice, they have served at the pleasure of the Mayor and are usually replaced when a new administration comes in").

<sup>67</sup> *Id.* at 185.

<sup>68</sup> *Id.* at 186.

<sup>69</sup> *Id.*

<sup>70</sup> The Christopher Commission Report offers a very thorough explanation of the type of procedural hurdles that would face the City of Los Angeles in the event that the Police Commission wanted to remove the Chief of Police. City law required that, in order to remove the police chief, the Police Commission needed to go through "protracted and cumbersome procedures." The City Charter provides that the Chief's job is a "substantial property right" which cannot be removed without "good and sufficient cause shown upon a finding of 'guilty' of the specific charge or charges assigned as cause or causes therefore after a full, fair and impartial hearing." This hearing was required to occur before a Civil Service Board. The Chief is also given the opportunity to appeal his removal via a writ of mandamus in the superior court. The Chief may also challenge his removal, since it is a substantial property right, in state or federal court, as a violation of his procedural due process rights. Combined, these procedural hurdles mean that the cost of removing a police chief is particularly high. *Id.* at 200.

<sup>71</sup> *Id.* at 187.

of the Police Commission, known as the Commanding Officer, often felt that disagreeing with the Police Chief could put his or her job in jeopardy.<sup>72</sup>

The commission noted several other systematic problems, including startling cases of documented racism.<sup>73</sup> In total, the commission found there to be a pattern of misconduct present within the LAPD that was caused by departmental policy, organizational structure, and agency culture. The Christopher Commission Report made several specific recommendations for how the LAPD could correct some of these problems—including the use of more community oriented forms of policing,<sup>74</sup> the recruitment of more minority officers,<sup>75</sup> changes in complaint processing procedures,<sup>76</sup> improvements in training policies,<sup>77</sup> and some significant structural changes.<sup>78</sup> And Los Angeles adopted many of these recommended reforms. Los Angeles voters passed an amendment giving the City Council the authority to review and override the Police Commission.<sup>79</sup> City voters also passed City Charter Amendment F, which “reformed the City’s procedures for selection and retention of the Chief of Police.”<sup>80</sup> This measure provided that police chiefs were to serve 5 year terms and served at the pleasure of the City—effectively ending the civil service protection for chiefs.<sup>81</sup> And the measure barred any individual from serving more than 10 years as chief in total.<sup>82</sup> The thoroughness of the Christopher Commission Report itself demonstrated the willingness of the City of Los Angeles to critically explore the problems

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<sup>72</sup> *Id.* The Commission reports that the Commanding Officer often finds himself in the middle of a battle between the Police Commission and the Police Chief:

“The Commanding Officer’s future transfer and promotion are to a substantial extent at the discretion of the Chief of Police, and he or she is part of the Chief’s command structure as well as being answerable to the Police Commission. If there is a conflict between the Police Commission and the Chief, the Commanding Officer can be caught in the middle.... [As a result,] [i]n recent years the Police Commission has gone as far as to require that all commanders apply for the Commission Operations position, out of fear that given a choice, none would apply.” *Id.*

<sup>73</sup> *Id.* at xii. The commission cited several specific examples of racist behaviors by LAPD officers documented cases where officers referred to interactions with minority residents as “monkey slapping time,” and among other choice comments. *Id.* Shortly before the King beating, in fact, two of the officers involved were comparing a domestic dispute between two African-American individuals to “gorillas in the Mist” over the radio. *Id.* at 14. More disturbingly, evidence suggests that leadership within the police department heard or knew of these kinds of statements, but did nothing to stop them or punish those involved. *Id.* at xii-xiii.

<sup>74</sup> *Id.* at xiv-xv.

<sup>75</sup> *Id.* at xvi-xviii.

<sup>76</sup> *Id.* at xix-xx.

<sup>77</sup> *Id.* at xvi-xviii.

<sup>78</sup> *Id.* at xxi-xxii.

<sup>79</sup> *Id.*

<sup>80</sup> MERRICK J. BOBB, MARK H EPSTEIN, NICOLAS H. MILLER, AND MANUEL A. ABASCAL, FIVE YEARS LATER: A REPORT TO THE LOS ANGELES POLICE COMMISSION ON THE LOS POLICE DEPARTMENT’S IMPLEMENTATION OF INDEPENDENT COMMISSION RECOMMENDATIONS (May 1996) [hereinafter FIVE YEARS LATER REPORT ON LAPD], *text available at* [http://www.parc.info/client\\_files/Special%20Reports/2%20-%20Five%20Years%20Later%20-%20Christopher%20Commission.pdf](http://www.parc.info/client_files/Special%20Reports/2%20-%20Five%20Years%20Later%20-%20Christopher%20Commission.pdf).

<sup>81</sup> *Id.* at 68.

<sup>82</sup> *Id.*

plaguing the police department. It demonstrated that the city was prepared to take many significant steps to reform departmental policies in a way that would prevent misconduct in the future. Years later, though, the circumstances surrounding the Rampart Division scandal again put the LAPD at the center of a national controversy linked to systemic problems with departmental policies and procedures.

B. *Five Years After King Beating: Reform Efforts Begin in Earnest*

Five years after the Rodney King Incident, the Independent Commission on the Los Angeles Police Department requested a follow-up report on whether the LAPD implemented the reforms recommended in the Christopher Commission Report.<sup>83</sup> Overall, this report found that the LAPD had many substantial changes five years after the Rodney King incident—including the decreasing of use-of-force incidents, virtually eliminating the use of the baton, improving diversity, and increasing the quality of internal affairs investigations.<sup>84</sup> This follow-up report, though, worried that the LAPD was still spending too much money on civil lawsuits.<sup>85</sup> Perhaps most worrisome, though, is the fact that five years after the Rodney King beating, “there [was] still no comprehensive system in place to collect, analyze, and disseminate data on the risk of excessive force.”<sup>86</sup> Consequently, the LAPD could not demonstrate that it had established sufficiently rigorous standards for holding managers and supervisors accountable for their “management of liability risk.”<sup>87</sup>

First, after the King incident, the LAPD implemented various reforms that successfully reduced the use of unlawful force—particularly the frequent and unlawful use of the baton.<sup>88</sup> It is challenging to make any definitive conclusions in this regard because of a “lack of an adequate database” on use of force claims.<sup>89</sup> But limitations aside, it appears that the amount of use-of-force incidents decreased substantially in the years following the King beating.<sup>90</sup> Of course, this decline is to be expected, as crime in Los Angeles declined substantially during this time period. The amount of injuries to officers per use of force incident remained relatively stable throughout

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<sup>83</sup> *Id.* at ii (“This Commission has asked for an investigation and a report on the status of the Christopher Commission reforms”).

<sup>84</sup> *Id.* at v. The report also mentions that these reforms have been successfully achieved without a subsequent increase in crime that many residents “feared” would be an inevitable result of such reforms. The report also suggests, though, that demographic decrease in the relative number of young adults may explain the subsequent reduction in crime in Los Angeles—further obscuring the actual effect of these reforms on crime rates. *Id.*

<sup>85</sup> *Id.* (stating that the LAPD spend around \$67.5 million on litigation costs between 1991-1995, an average of about \$13.5 per year).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1 (explaining the central three findings that: first, officers appear no less likely to use reasonable force since the King reforms; second, the officers are using batons less frequently—a particular concern raised after the King incident; and third, officers have not replaced baton use with other, more deadly forms of force).

<sup>89</sup> *Id.* at 3.

<sup>90</sup> *Id.* at 4 (“Thus, the number of both use of force incidents and officer-involved shootings declined dramatically between 1990 and 1995”).

the time period,<sup>91</sup> while the rate of injuries to suspects decreased somewhat.<sup>92</sup> The raw percentage of suspects injured in use of force incidents also declined a bit.<sup>93</sup> Overall, this data suggests that the LAPD might have been in the process of improving use-of-force procedures after the King incident, although progress was tough to measure because of poor data recording practices.

Second, the LAPD attempted to address concerns about racism and bias after the King incident by increasing the hiring of minority officers. In June of 1990, minorities constituted around 37% of the total sworn officer force—with African-American officers representing 13% of the force and Latinos 21%.<sup>94</sup> By March of 1996, minority officers made up around 46% of the sworn force—with African-Americans sitting at around 14% and Latinos around 28%.<sup>95</sup> Thus, there was measureable improvement in this regard. But Bobb et al. still concluded that there was substantial room for improvement if the LAPD was to roughly match the composition of the community.<sup>96</sup> Unfortunately, the report did note that the department had made “insufficient” progress in training officers in “cultural awareness.”<sup>97</sup>

Third, while the LAPD made progress in improving its complaint policies and procedures, many of the basic problems identified by the Christopher Commission remained.<sup>98</sup> Complaint processing in Los Angeles goes through 4 steps—intake, investigation, classification, and punishment.<sup>99</sup> The Christopher Commission had found that at the intake stage, LAPD officers discouraged residents from filing complaints, and at the investigation and classification stage, LAPD officers laxly adjudicated complaints in favor of the officers.<sup>100</sup> The Christopher Commission also found that the penalties for excessive use of force were often lenient.<sup>101</sup> While there are ways to measure the appropriateness of internal adjudication of complaints, there is virtually no way to determinate how often the LAPD discouraged complaints at the intake stage. If officers were making efforts to discourage complaints at the intake stage, we should expect there to be no formal record of these complaints. Thus, while complaints for excessive use of force appear to have declined significantly after the King incident, it is difficult to conclude whether this is the result of an improvement in policy, or the continuation of informal policies to

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<sup>91</sup> FIVE YEARS LATER REPORT ON LAPD, *supra* note 80, at 13 (showing in Figure 6 that the injuries per incident fluctuated over this time period between as low as once per 6.2 incidents to once to 4.3 incidents—with no clear pattern evident).

<sup>92</sup> *Id.* at 12 (showing in Figure 5 that the rate of injuries per shooting and deaths per shooting decreased somewhat in the time period after the King incident).

<sup>93</sup> *Id.* at 9 (showing in Table 4 that the percentage of suspects injured in use of force incidents declined from 54% in 1990 to 42% in 1995).

<sup>94</sup> *Id.* at 20-22 (mentioning these exact statistics and offering a more detailed breakdown of the numbers in Table 1).

<sup>95</sup> *Id.* at 23.

<sup>96</sup> *Id.* (“[I]t appears that with the exception of African-Americans, the LAPD still has a way to go before its composition reflects the diversity either of the City’s population or the County’s labor pool, although progress continues to be made”).

<sup>97</sup> *Id.* at 27-28 (“It is insufficient that so few members of the Department have been exposed to cultural awareness training in the five years since the Christopher Report”).

<sup>98</sup> *Id.* at 34 (explaining that while many trends suggest improvement in the complaint policies and procedures, “some problems identified by the Christopher Commission persist”).

<sup>99</sup> *Id.* at 35.

<sup>100</sup> *Id.* at 36.

<sup>101</sup> *Id.*

discourage residents from filing complaints at the intake stage.<sup>102</sup> A quick reading of the complaint files from the time period suggests a continued pattern of “egregious and disturbing” behavior.<sup>103</sup> Various problems also appeared to continue in the investigation,<sup>104</sup> classification,<sup>105</sup> and punishment.<sup>106</sup> Thus, while there may have been some progress in the complaint process, many of the same concerns identified in the Christopher Commission Report appeared to remain in place years later.

Fourth, years after the King incident, the LAPD had still not adopted a sufficiently thorough early warning and risk management system.<sup>107</sup> The City of Los Angeles paid a substantial amount of money to settle litigation in the years following the Rodney King beating.<sup>108</sup> “[B]ecause the LAPD lacks a comprehensive system to manage at-risk individuals and situations, the City of Los Angeles has not experienced the shrinkages in its police misconduct caseload and exposed achieved in the County of Los Angeles, and City taxpayers are not yet realizing the substantial cost savings that County taxpayers are beginning to see.”<sup>109</sup> By attempting to identify and control “at-risk officers and at-risk situations,” the LAPD could have saved Los Angeles taxpayers significant amounts of money.<sup>110</sup> At the time of this report, the LAPD utilized a computerized system called TEAMS to monitor at-risk officers.<sup>111</sup> But this system was “weak and inadequate,” as it only provided limited data to supervising officers.<sup>112</sup> The system did not provide supervisors with the ability to do “automated trend analysis” and the LAPD sometimes took years to upload data into the system.<sup>113</sup> The LAPD had also not clearly articulated standards by which officers would be held accountable for data loaded into the TEAMS system.<sup>114</sup> Without a formalized policy on how to use the data in the TEAMS system, the report found that the system did little to formally identify problematic officers.

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<sup>102</sup> *Id.* at 38 (stating that “we cannot determine from these statistics whether this decline is a result of changed behavior by LAPD officers, a reduction in the public’s willingness to pursue formal complaints back to pre-Rodney King levels, or a combination of both”).

<sup>103</sup> *Id.* at 39 (giving as an example an incident where an officer drove up to an African-American pedestrian and sprayed the individual with pepper spray and called him a racial slur).

<sup>104</sup> *Id.* at 40-41 (explaining a host of concerns, including the fact that officers were often not questioned as seriously or rigorously as witnesses or complainants).

<sup>105</sup> *Id.* at 41-43 (identifying any of the persistent concerns about classification identified in the Christopher Commission Report).

<sup>106</sup> *Id.* at 44-47 (showing that punishment for force-related misconduct actually decreased after the King incident, as seen in Table 1).

<sup>107</sup> *Id.* at 55-56 (explaining that the implementation of such a system is necessary to identify and neutralize officers that pose a high risk of litigation expenses to the city).

<sup>108</sup> *Id.* at 55 (putting this number at \$67.5 million between 1991 and 1995, and \$13.6 million in 1995 alone).

<sup>109</sup> *Id.* at 56.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 59.

<sup>112</sup> *Id.* (“At best, TEAMS will provide only limited data—principally raw numbers—on citizen complaints and Internal Affairs investigations, officer-involved shootings, use of force, and some court judgments, . . . among other categories of information”).

<sup>113</sup> *Id.* at 59-60.

<sup>114</sup> *Id.* at 60 (explaining that the LAPD “had not issued standards for use of statistical information that adequately address” officers concerns).

But with all this said, it is worth noting that the LAPD had made many of the structural reforms recommended in the Christopher Commission. The City of Los Angeles removed the civil service protection that prevented city officials from seriously disciplining or discharging the police chief.<sup>115</sup> The new standards established in City Charter Amendment F established that a police chief was to serve at the pleasure of city officials.<sup>116</sup> The chief was to serve one five year term, renewable only once by the authority of the Police Commission.<sup>117</sup> No chief was permitted to serve more than 10 years in total.<sup>118</sup> The City also adopted some of the Christopher Commission recommendations regarding the composition of the Los Angeles Police Commission.<sup>119</sup> One of the notable recommendations not implemented after the Christopher Commission was the hiring of additional staff to assist the Police Commission in investigations and oversight.<sup>120</sup> One very critical recommendation from the Christopher Commission had been implemented 5 years after the King beating—the appointment of an Inspector General responsible for overseeing “receipt of citizen complaints, monitoring the progress of complaints through the Internal Affairs investigation process, and auditing the results of those investigations.”<sup>121</sup>

In summary, in the years after the King incident, it appeared that the LAPD made some progress in addressing the systematic problems identified in the Christopher Commission Report. But many of the most egregious issues remained. The LAPD still lacked an early warning and risk management system to ensure accountability and limit civil liability. There remained serious questions about the procedures and policies for dealing with citizen complaints. While the force appeared to be increasingly diverse, training on cultural awareness and sensitivity did not appear to be prioritized. While the LAPD had made progress, there remained significant work to be done. And it is worth pointing out, though, that in the years after the King incident, it seemed clear that there significant local support for police reform. The external pressure on the LAPD to reform would expand significantly in the coming years as details emerged about the so-called Rampart Scandal.

### C. *The Rampart Scandal: Evidence Emerges of Continued, Systematic Problems*

Less than a decade after the Rodney King incident, the LAPD found itself embroiled in another, perhaps even more egregious scandal—the Rampart Scandal. Scholars like Erwin Chemerinsky have called the Rampart Scandal the “worst...in the history of Los Angeles.”<sup>122</sup> The scandal involved police physically abusing suspects, committing violent and serious crimes,

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<sup>115</sup> *Id.* at 67.

<sup>116</sup> *Id.* at 68.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (explaining that after the Christopher Commission recommendations, the Police Commission remains a five-person body, but now only includes individuals who can serve a maximum of two five year terms).

<sup>120</sup> *Id.* 68-69 (in particular, the Christopher Commission recommended the hiring of auditors, accountants, investigators, and more attorneys—a recommendation that appears to have gone largely unheeded).

<sup>121</sup> *Id.* at 69.

<sup>122</sup> Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 549 (2000).

planting evidence, and ultimately framing innocent people. As Chemerinsky argued, the misconduct by officers involved in the Rampart Scandal is more characteristic of a “repressive dictator[ship]” or a “police state[]” than a democratic society. Because of officer misconduct, a number of innocent men and women pled guilty to crimes they didn’t commit and were successfully convicted by judges and juries based on “fabricated cases against them.”<sup>123</sup> The scandal eventually implicated dozens of officers in the LAPD for various types of misconduct, resulted in the overturning of approximately 100 cases and the review of around 3,000 more.<sup>124</sup>

The extent of the Rampart Substation Scandal first came to light in late 1997. Most accounts of the Rampart Scandal start with the events of November 6, when three suspects robbed a Bank of America in Los Angeles.<sup>125</sup> Detectives soon identified Officer David Mack as one of the men who robbed the bank.<sup>126</sup> Officer Mack had previously been assigned to the Rampart Division before he engaged in the robbery.<sup>127</sup> While in Rampart Division, Officer Mack worked with one of his “best friends,” fellow officer Rafael Perez.<sup>128</sup> Investigations revealed that two days after the bank robbery, Officer Mack went to Las Vegas with Officer Perez and another officer from the Rampart Division.<sup>129</sup> Eventually, Officer Mack resigned from the LAPD before federal prosecutors successfully prosecuted him for bank robbery.<sup>130</sup> Officer Mack received a federal prison sentence of over 14 years.<sup>131</sup>

Only months after the bank robbery, Rampart Division Officers Brian Hewitt and Daniel Lujan detained two members of the 18<sup>th</sup> Street Gang for allegedly violating their parole conditions.<sup>132</sup> The officers brought the men back to Rampart Substation and put each man in a separate interview room.<sup>133</sup> Moments later, Hewitt demanded that one of the suspects provide him with information about gang activity.<sup>134</sup> After the suspect declined to cooperate, Officer Hewitt “choked and beat him until he vomited blood.”<sup>135</sup> Officer Lujan and another officer “were aware of the beating, but released the man from the Substation without reporting it or providing him with medical treatment.”<sup>136</sup> While the LAPD attempted to punish each of the officers involved, procedural difficulties made it impossible for the Chief of Police to fire one of

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<sup>123</sup> *Id.* at 121.

<sup>124</sup> Beth Shuster & Vincent J. Schodolski, *Poor Morale Rife in LAPD, Survey Finds*, L.A. TIMES, Sept. 8, 2000, at A22.

<sup>125</sup> BD. OF INQUIRY, L.A. POLICE DEP’T, RAMPART AREA CORRUPTION INCIDENT: PUBLIC REPORT (2000) [hereinafter RAMPART REPORT].

<sup>126</sup> *Id.* at 1-2 (explaining how Officer Mack’s girlfriend Errolyn Romero worked at the bank and helped Mack set up the robbery by ordering \$772,000 in unusual denominations the day before the crime).

<sup>127</sup> *Id.* at 1 (stating that “David Mack...had previously been assigned to Rampart and was a close friend of [another officer implicated in the Rampart Scandal] Rafael Perez”).

<sup>128</sup> *Id.* at 2.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* The report continued by noting that, “[t]he man subsequently checked into a hospital and the Department was notified of his allegations.” *Id.*

the officers involved.<sup>137</sup> Prosecutors also decided to not file criminal charges against the officers because of insufficient evidence.<sup>138</sup>

Only a few weeks after the beating, personnel in the Property Division of the Rampart Division Substation reported that three kilograms of cocaine was missing.<sup>139</sup> The property records stated that an officer in the Rampart Division had checked out the drugs for court on March 2, 1998.<sup>140</sup> When the narcotics were still missing on March 27, the Property Division sent a notice to the officer's supervisor.<sup>141</sup> The officer claimed to have not checked out the drugs; the Property Division Officer confirmed that a different person had actually checked out the contraband.<sup>142</sup> An internal investigation identified Rafael Perez as the person who checked out the drugs.<sup>143</sup> The District Attorney's Office then charged Officer Perez with three separate crimes: (1) possession of cocaine for sale, (2) grand theft, and (3) forgery.<sup>144</sup> In the first trial against Officer Perez, the jury deadlocked and could not reach a verdict.<sup>145</sup> As prosecutors prepared for a second trial, further investigation revealed that Officer Perez had been involved in additional cocaine thefts from the Property Division.<sup>146</sup> Even more disturbingly, evidence emerged that Perez had an ongoing relationship with known drug dealers. One of these drug dealers even identified Perez "as having gone to Las Vegas with Perez, Mack, and a third officer immediately after Mack's bank robbery."<sup>147</sup> As the evidence mounted, Perez decided to accept a plea bargain. In exchange for his cooperation in exposing the extent of corruption in the Rampart Division, prosecutors recommended a reduced sentence.<sup>148</sup>

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<sup>137</sup> The report explained this procedural complexity as follows:

"Administrative charges were brought against all three officers for the beating and cover-up of the incident. Officers Hewitt and Cohan were eventually terminated at separate Boards of Rights; but, a third Board found the other officer not guilty. (In Los Angeles, a three-member Board of Rights, composed of two staff or command officers and one community member, hears allegations of major misconduct. Each accused officer may select a separate Board and the Chief of Police may impose no greater penalty than the Board recommends.)" *Id.*

<sup>138</sup> The report further clarified that:

"On two occasions, a criminal filing has been sought against Hewitt, but the case was rejected both times by the District Attorney's Special Investigations Section due to insufficient evidence to convict. The District Attorney's Office is now considering the case for a third time. Criminal filing was also sought from the State Attorney General, but rejected there as well." *Id.*

<sup>139</sup> *Id.* at 3 (stating that it had been reported as checked out for court by an officer who had not actually checked out the large amount of narcotics). This amounts to approximately eight pounds of cocaine. Matt Lait, *A 2nd Rampart Officer Tells of Corruption*, L.A. TIMES, Jan. 28, 2000, at 1.

<sup>140</sup> RAMPART REPORT, *supra* note 125, at 3.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* Further investigation also revealed that the cocaine was not needed for any court hearing.

<sup>143</sup> *Id.* at 3.

<sup>144</sup> *Id.*

<sup>145</sup> The jury was hung 8-4, in favor of conviction. *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* At the time of the Rampart Report, "Perez's sentencing [was] being held in abeyance and [was] contingent upon his truthful cooperation." *Id.*

As part of his plea, Officer Perez then shared “a flood of secrets about his own misconduct and that of others in the Rampart Division, particularly its brutal anti-gang unit.”<sup>149</sup> Perez claimed that he and others in the Rampart Division “routinely framed innocent people, falsified documents, and committed perjury in court to send [their] victims to jail.”<sup>150</sup> The case of Javier Francisco Ovando perhaps best demonstrates the seriousness of the misconduct present in the Rampart Division.<sup>151</sup> Police shot Ovando in 1996 after an alleged gang raid by Officer Perez and his partner Nino Durden.<sup>152</sup> Perez and Durden then planted a gun on Ovando and accused Ovando of trying to attack them.<sup>153</sup> Ovando was left paralyzed from the waist down as a result of the shooting.<sup>154</sup> Perez later admitted to making up the story and planting a firearm with an obliterated serial number on Ovando.<sup>155</sup> Prosecutors then charged Ovando and the trial court handed down a 23 year prison sentence as a result of Perez and Durden’s testimony.<sup>156</sup> Ovando served 2 years and 6 months in prison before he was exonerated by Perez’s admissions.<sup>157</sup>

By the February of 2000, media reports predicted that the Rampart Division Scandal would eventually cost the LAPD, conservatively, around \$125 million dollars in civil liability.<sup>158</sup> The LAPD and county prosecutors quickly identified around 100 “defendants whose rights were violated by former Officer Rafael Perez.”<sup>159</sup> In total, around 70 officers were the subject of formal disciplinary investigation.<sup>160</sup> And by that point, 20 LAPD officers had been suspended without pay or fired for their role in misconduct, connected to Perez’s admissions.<sup>161</sup> As the case unraveled, other officers came forward to tell the press of abhorrent incidents of misconduct. One officer, speaking on a condition of anonymity to a Los Angeles Times Reporter, described an incident where officers shot and wounded two suspects on New Year’s Eve of 1995.<sup>162</sup> While the use of force in that case was deemed “in policy” by the Police Commission in 1996, the officer claimed that the incident was more equivalent to “hunting,” as the officer suggested that

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<sup>149</sup> John M. Broder, *Los Angeles Paying Victims \$70 Million for Police Graft*, N.Y. TIMES, April 1, 2005.

<sup>150</sup> Greg Gittrich and Beth Barrett, *LAPD Apocalypse? Cop Scandal Cost May be Colossal, Threatening City Services*, DAILY NEWS, Feb. 7, 2000, at N1.

<sup>151</sup> Alexa Haussler, *Rampart Victim to Receive \$15M*, DAILY NEWS, Nov. 22, 2000, at N1 (stating that the Ovando case “has come to symbolize the Rampart police corruption scandal”).

<sup>152</sup> *Victim of Police Framing Gets \$15 Million: Los Angeles Police Shot a Former Gang Member and Planted a Gun on Him*, VANCOUVER SUN, Nov. 22, 2000, at A14.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Erica Werner, *Perez Gets 2 Years in Prison; LAPD: Federal Sentence Ends Notorious Rampart Figure’s Corruption Case*, LONG BEACH PRESS-TELEGRAM, May 7, 2002, at A9.

<sup>156</sup> *Victim of Police Framing Gets \$15 million*, *supra* note 152, at A14.

<sup>157</sup> *Id.*

<sup>158</sup> Gittrich and Barrett, *supra* note 150, at N1.

<sup>159</sup> *Id.*

<sup>160</sup> Werner, *supra* note 155, at A9.

<sup>161</sup> Lait, *supra* note 139, at 1.

<sup>162</sup> *Id.*

the suspects may not have even been shooting at the officers.<sup>163</sup> Three of the officers involved in this questionable shooting were later relieved of duty after Perez's admissions.<sup>164</sup>

Experts and public officials quickly weighed in on the sheer extent of the Rampart Scandal. Los Angeles County District Attorney Gil Garcetti openly told the press that the scandal was "the most important case [he had] seen [his] office handle in [his] 31 years .... It goes to the heart of the criminal justice system."<sup>165</sup> Los Angeles Supervisor Zev Yaroslavsky argued that the Rampart Scandal's importance goes beyond mere concerns about policing, arguing instead that it "is a dagger aimed at the heart of constitutional democracy."<sup>166</sup> Professor Chemerinsky explained that "[n]othing is more inimical to the rule of law than police officers, sworn to uphold the law, flouting it and using their authority to convict innocent people."<sup>167</sup> Chemerinsky bluntly asserted that, "Rampart is the worst scandal in the history of Los Angeles."<sup>168</sup> Professor Jody David Amour commented that the "scale of [this scandal] is unprecedented."<sup>169</sup>

The immediate investigation and public report by the LAPD revealed the seriousness of the scandal. But, according to Chemerinsky, the report treats the Rampart Scandal as a mere incident, rather than symptoms of a broader, systematic problem in the LAPD.<sup>170</sup> Chemerinsky's independent evaluation of the Rampart Scandal found there to be a broader pattern of misconduct. According to his report, the LAPD culture "gave rise to and tolerated what occurred in the Rampart Division."<sup>171</sup> The report written by the Independent Board of Inquiry also "fail[ed] to consider the need for structural reform in the department."<sup>172</sup> And the Board of Inquiry minimized the problems with the department's disciplinary system.<sup>173</sup> Other commentators cited the prevalence of an LAPD "code of silence" described as "a misplaced loyalty system whereby cops who swore to uphold the law standby as their fellow officers maliciously break the law and shame the city."<sup>174</sup> Indeed, the emerging consensus after the Rampart Scandal was that the events were not merely the result of a handful of bad officers. Instead, the events happened in large part because of a pattern and practice of unconstitutional misconduct—tolerated by management, sustained by a dangerous culture of misconduct, and perpetuated by permissive policies that failed to properly oversee officer behavior. Given the significant amount of national attention that the Rampart Scandal received, it appeared that the

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* The newspaper article states, though, that it was unclear whether this incident was among a handful of incidents that the LAPD Corruption Task Force was actively investigating after the Rampart Division corruption became clear.

<sup>165</sup> *Judge Dismisses 10 More Cases in Corruption Scandal*, LODI NEWS-SENTINEL, Jan. 26, 2000, at 2.

<sup>166</sup> Chemerinsky, *supra* note 122, at 550.

<sup>167</sup> *Id.* 549.

<sup>168</sup> *Id.*

<sup>169</sup> Gittrich and Barrett, *supra* note 150, at N1.

<sup>170</sup> Chemerinsky, *supra* note 122, at 550 (explaining that the report refers to the events as an "incident," which "fails to convey the unconscionability of what occurred").

<sup>171</sup> *Id.* at 559.

<sup>172</sup> *Id.* at 589. Namely, the LAPD assessment of the events fail to consider the need for reform in the police commission, the need for independence in the inspector general position, and the need for permanent oversight measures.

<sup>173</sup> *Id.* at 597.

<sup>174</sup> Gittrich and Barrett, *supra* note 150, at N1.

table was set for federal intervention pursuant to §14141. Figure 5.1 below chronologically details the major events leading up to federal intervention in the LAPD.

FIGURE 5.1, CHRONOLOGY OF IMPORTANT EVENTS LEADING UP TO SRL

Date	Event
March 1991	LAPD officers caught on camera beating Rodney King following police pursuit
April 1991	Mayor Tom Bradley creates the Independent Commission on the Los Angeles Police Department (later known as the Christopher Commission) to study the circumstances that led to the King beating.
July 1991	Christopher Commission Report released
June 1992	Los Angeles voters pass City Charter Amendment F to remove the civil service protection afforded the Chief of Police
May 1996	Merrick Bobb et al release report showing that LAPD has failed to make necessary reforms recommended in the Christopher Commission Report
July 1996	DOJ officially opens investigation into LAPD
February – August 1998	Details begin to emerge about Rampart officers engaged in serious misconduct
March 2000	Board of Inquiry releases report analyzing the Rampart Scandal
May 2000	DOJ completes investigation into LAPD and finds there to be a pattern or practice of excessive force, false arrests, and unreasonable searches and seizures
September 2000	Professor Erwin Chemerinsky releases review of LAPD’s handling of Rampart Scandal
November 2000	Los Angeles City Council approves consent decree with the DOJ
May 2001	Los Angeles City Council approves Kroll as the Independent Monitor

#### D. DOJ Intervention

The DOJ first opened an investigation into the LAPD soon after the passage of § 14141. In fact, the LAPD was among first departments officially investigated by the DOJ during the Clinton Administration.<sup>175</sup> It took nearly four years for the DOJ to conclude (officially, at least) that the LAPD was engaged in a pattern or practice of misconduct in violation of § 14141.<sup>176</sup> As part of this investigation, the DOJ reviewed LAPD policy statements, examined both reports of officer-involved shootings and non-lethal force incidents, evaluated citizen complaints, and

<sup>175</sup> See *infra* Appendix, Chapter 3. In total, the LAPD was the ninth investigation initiated by the Justice Department after the passage of §14141 in 1994. The Justice Department officially opened its investigation of the LAPD on July 31, 1996 according to records I obtained from the Justice Department. Among the investigations of large police departments, only the Pittsburgh and New Orleans investigations predated the Los Angeles investigation. The LAPD investigation was started around the same time as the Montgomery County Maryland Police Department and Beverly Hills Police Department investigations.

<sup>176</sup> The investigation started on July 31, 1996. *Id.* The Justice Department found there to be an official pattern or practice of misconduct on May 8, 2000. OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, FINAL QUARTERLY REPORT, Appendix F, at 3 (June 11, 2009) [hereinafter FINAL QUARTERLY REPORT FOR LAPD]

collected data on criminal charges brought against LAPD officers.<sup>177</sup> Investigators also coordinated with the Police Commission and the Inspector General in Los Angeles to discuss and analyze possible reforms.<sup>178</sup> And investigators met with representatives from the LAPD.<sup>179</sup> This form of investigation is fairly common in most § 14141 cases, as discussed in Chapter 3. The timing of the investigation strongly suggests that the Rampart Division Scandal played a pivotal role in initiating DOJ action.<sup>180</sup> Qualitative data from interviews with DOJ officials confirms this suspicion. For example, one former DOJ litigator used the Rampart Scandal as an example of a situation where a single, “big expose of a big problem” motivated the DOJ to take action.<sup>181</sup> Another former DOJ litigator agreed, explaining that while the LAPD had “a history of problems,” it took the media attention surrounding the Rampart Scandal to finally bring the DOJ to act.<sup>182</sup> While the aftermath of the Rodney King incident appears to have caused the DOJ to initially investigate the LAPD, the national exposure of the Rampart Scandal presented an ideal opportunity for federal intervention.

In a letter to the City of Los Angeles, the DOJ alleged that the LAPD engaged in (1) excessive force, including improper officer-involved shootings, (2) improper arrests and *Terry* stops, (3) improper searches of property without adequate probable cause, and (4) improper seizures of property without probable cause.<sup>183</sup> The DOJ investigation concluded that this pattern of misconduct was the result of the LAPD’s failure to properly train and supervise officers, as well as the LAPD’s failure to investigate and discipline officers after alleged wrongdoing.<sup>184</sup> This failure to properly supervise officers “created an environment where officers may engage in misconduct without detection and intervention by LAPD supervisors.”<sup>185</sup> Even from the earliest investigatory stages, the DOJ noted that the LAPD’s failure to develop a “comprehensive risk management system to identify patterns of at-risk conduct by individual officers and groups of officers” was a primary culprit.<sup>186</sup> The computerized risk management system that the LAPD

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<sup>177</sup> Letter from United States Department of Justice, Civil Rights Division Acting Assistant Attorney General Bill Hahn Lee to Los Angeles City Attorney James K. Hahn (May 8, 2000), at 1-2 [hereinafter *Investigations Finding Letter to LAPD*], *text available at* <http://www.clearinghouse.net/chDocs/public/PN-CA-0002-0001.pdf>.

<sup>178</sup> *Id.* 2.

<sup>179</sup> *Id.*

<sup>180</sup> The Rampart Scandal made national news in 1998. In early 2000, the Board of Inquiry released its official report detailing the misconduct identified as part of the Rampart Scandal. Within a few months of this report, the Justice Department officially concluded that there was a pattern or practice of misconduct present in the LAPD. *See* Table 1.

<sup>181</sup> Telephone Interview #14, at 4 (July 11, 2013) (transcript on file with author) [hereinafter *Interview #14*] (stating that “Occasionally they get started when there is a big expose of a big problem in a department....Ramparts, for example”).

<sup>182</sup> Telephone Interview with DOJ Participant #15, at 4 (July 31, 2013) [hereinafter *Interview #15*] (on file with author) (“The LAPD of course, there had been a history of problems.... And then the whole controversy broke out in 2000 or 1999, with the Rampart investigation”).

<sup>183</sup> Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division of the United States Department of Justice, to James K. Hahn, City Attorney, City of Los Angeles 1-2 (May 8, 2000) (on file with author) [hereinafter *Letter from DOJ to LA*]

<sup>184</sup> *Id.* at 2.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

implemented in the years after the Rodney King beating was found to be inadequate by the DOJ investigation at identifying patterns of wrongdoing.<sup>187</sup>

The DOJ investigation also found that the LAPD failed to properly respond to citizen complaints.<sup>188</sup> The internal review mechanisms in the LAPD were also deemed inadequate to provide meaningful oversight of frontline officer behavior.<sup>189</sup> While the LAPD had already established an Office of the Inspector General and a citizen Police Commission to oversee police behavior, the DOJ found these two oversight branches to have inadequate authority and resources to provide meaningful oversight.<sup>190</sup>

The DOJ's choice to intervene in the LAPD was met with some skepticism. As one DOJ official recalled, "the city and the police department [had] plenty of complaints."<sup>191</sup> Within days of the DOJ announcement, Los Angeles City officials seemed resigned to the fact that the LAPD needed some sort of outside assistance in combatting misconduct. City Councilman Mark Ridley-Thomas candidly opined that the LAPD had "blown it and that's why the DOJ has come in...."<sup>192</sup> This sentiment mirrored comments made by many on the Los Angeles City Council.<sup>193</sup> But not all members of the City Council were supportive of the DOJ intervention. Councilman Nate Holden accused the DOJ of engaging in a "smear tactic," explaining that, "[t]his letter...is a boilerplate accusation that could be used against any police department in the country."<sup>194</sup>

Mayor Richard Riordan staked out a moderate position on the reforms from the outset. He argued that while reform was necessary, it should happen through the leadership of local officials—not through a full-scale federal takeover.<sup>195</sup> Mayor Riordan also stood behind then-Police Chief Bernard Parks and the LAPD leadership more broadly. As Riordan argued, "there's no one better to make reforms than the chief, the command staff, the Police Commission, the inspector general, the independent task force, the council and myself."<sup>196</sup> He concluded that the

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<sup>187</sup> *Id.* ("As the Police Commission acknowledged several years ago, the LAPD's current 'early warning' system, the Training, Evaluation, and Management System ("TEAMS"), is inadequate").

<sup>188</sup> *Id.* at 3. The investigative findings went on to state that "because they are unlikely to be discovered and disciplined, officers are not deterred from engaging in misconduct. Similarly, poorly trained officers are not identified for retraining or counseling. Together with the training and supervision deficiencies identified above, inadequate complaint investigations create an environment that allows police misconduct to occur."

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Telephone Interview with Department of Justice Participant #18, at 12 (August 8, 2013) [hereinafter Interview #18] (transcript on file with author)

<sup>192</sup> Greg Gittrich, Beth Barrett, and Alexa Haussler, *L.A. Admits P.D. Problem; LAPD: But, Says Riordan: My Preference is Local Control*, LONG BEACH PRESS-TELEGRAM, May 10, 2000, at A10. The councilman continued by stating that "We have to acknowledge that we have failed. We have failed to push forward an agenda of reform of this city that the citizens said in clear terms was a mandate." *Id.*

<sup>193</sup> For example, Councilwoman Laura Chick commented that the Justice Department made it clear it was not happy with the "laissez faire" approach taken by the LAPD. *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* It is also worth noting that Mayor Riordan walked a careful line after the announcement of the impending federal action in Los Angeles. He both acknowledged the presence of a problem, while also not necessarily agreeing with the Justice Department findings that the LAPD was engaged in a pattern or practice of misconduct.

<sup>196</sup> *Id.*

current leadership in the City of Los Angeles “can solve [its] own problems.”<sup>197</sup> For the city, one particularly frustrating part of the DOJ’s investigative findings letter was the complete absence of specific examples.<sup>198</sup> While some city officials complained about the lack of supporting evidence in the findings letter, city leaders seemed resigned to the inevitability of significant federal intervention.

*E. Response by the Police Union*

While city officials came to accept federal intervention, frontline officers were skeptical. As the DOJ began negotiations with the City of Los Angeles, officials made a decision that is relatively common in SRL cases—they generally excluded the police union from negotiations. This move did not sit well with frontline officers. In November of 2000, only a few months after the DOJ had officially determined that the LAPD was in violation of §14141, the union representing rank-and-file police officers, the Police Protective League, attempted to intervene and block a proposed negotiated settlement between the city and the federal government.<sup>199</sup> Union President Ted Hunt claimed that the City of Los Angeles “deliberately excluded” union members from consent decree negotiations.<sup>200</sup> Although objectionable, the exclusion of union leaders from §14141 settlement negotiations is commonplace.<sup>201</sup> The Police Protective League filed the motion to intervene in December of 2000, claiming a right to dispute the underlying allegations against the LAPD, a need to protect the terms of the collective bargaining agreement, and a need to prevent violations of police officers’ constitutional rights.<sup>202</sup> The District Court denied the motion to intervene in January of 2001.<sup>203</sup> The crux of the Police Protective League’s argument was that the implementation of some terms of the proposed settlement between the DOJ and the LAPD could speculatively influence the City of Los Angeles to unilaterally change the terms of the collective bargaining agreement reached between the union representatives and the City. This closely mirrors other actions taken by police unions in other cities affected by federal intervention pursuant to §14141.<sup>204</sup>

## II. TERMS OF NEGOTIATED SETTLEMENT

The terms of the negotiated settlement in Los Angeles roughly mirrored those commonly found in other cities. The LAPD agreement required that the agency adopt new procedures in

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (explaining that “There were no specific examples of abuse or evidence of corruption cited by Lee in his correspondence”).

<sup>199</sup> Joseph Giordano and 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.

<sup>200</sup> *Id.*

<sup>201</sup> For another example, the police union was also excluded from intervening into other §14141 cases in New Orleans. Interview with Police Administrator #27, *supra* note \_\_\_\_.

<sup>202</sup> See, e.g., *United States v. City of Los Angeles*, 2:00-cv-11769-GAF-RC (C.D. Cal. Nov. 8., 2000) (notice of interested parties filed by Los Angeles Police Protective League).

<sup>203</sup> *Id.*

<sup>204</sup> See Telephone Interview with Police Administrator #30 (Nov. 19, 2013) [hereinafter Interview #30] (describing the union opposition to these sorts of reforms).

investigating use of force incidents,<sup>205</sup> search and arrest procedures,<sup>206</sup> citizen complaint procedures,<sup>207</sup> investigation conduct,<sup>208</sup> and officer disciplinary action.<sup>209</sup> For example, it mandated the creation of a unit dedicated to the investigation of use of force incidents housed in the Operations Headquarters Bureau.<sup>210</sup> It mandated a specific investigative procedure for use of force incidents.<sup>211</sup> And it required the LAPD to adopt specific mechanisms for the intake, investigation, and adjudication of citizen complaints—a reform designed to address the kind of problems that Paul King faced when he attempted to file a complaint on his brother’s behalf.<sup>212</sup>

Like many consent decrees, the Los Angeles agreement also required the agency to implement an early intervention and risk management system.<sup>213</sup> This new system, described as TEAMS II in the consent decree, was designed as an improvement of the existing TEAMS system that the LAPD already used.<sup>214</sup> One important requirement of the consent decree was that the Police Commission, the Inspector General, and the Chief of Police were all required to have equal and complete access to the new TEAMS II system. This was designed to ensure that all oversight bodies in the LAPD would have the chance to engage in meaningful oversight.<sup>215</sup> The consent decree clearly labeled all of the types of information that were to be included in the TEAMS II system, including documentation on every time an officer uses force, engages in vehicle pursuits, receives a commendation, conducts an arrest, receives mandated training, is the subject of a civil lawsuit, is the subject of disciplinary action, or is the subject of a complaint.<sup>216</sup> The decree also laid out specifics on how the department ought to review and audit data from the TEAMS II system on a regular basis.<sup>217</sup>

In addition, the consent decree established important changes to the way that the LAPD trained officers.<sup>218</sup> The consent decree added components to the existing training program that

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<sup>205</sup> United States v. City of Los Angeles, 2:00-cv-11769-GAF-RC, at 23-27 (consent decree) (C.D. Cal. June 15, 2001) [hereinafter Los Angeles Consent Decree], *text available at* <http://www.clearinghouse.net/chDocs/public/PN-CA-0002-0006.pdf> (laying out the terms of the use of force stipulations).

<sup>206</sup> *Id.* at 27-28.

<sup>207</sup> *Id.* at 29-32.

<sup>208</sup> *Id.* at 32-34.

<sup>209</sup> *Id.* at 35-37.

<sup>210</sup> *Id.* at 23, para. 55.

<sup>211</sup> *Id.* at 23-24, para. 56-68.

<sup>212</sup> *Id.* at 32-38 (detailing rules on the initiation, investigation, and adjudication of complaints).

<sup>213</sup> *Id.* at 9-21 (describing the development of the TEAMS II system, the management and coordination of risk assessment responsibilities, and the performance evaluation system)

<sup>214</sup> *Id.* at 9 (stating that “The City has taken steps to develop, and shall establish a databased containing relevant information about its officers, supervisors, and managers to promote professionalism and best policing practices and to identify and modify at-risk behavior... This system shall be a success to, and not simply a modification of, the existing computerized information processing system known as the Training Evaluation and Management System, (“TEAMS”).”)

<sup>215</sup> *Id.* at 9.

<sup>216</sup> It is worth noting that this is not an exhaustive list of all information required to be included in the new TEAMS II system. For a complete list, *see id.* at 9-11.

<sup>217</sup> *See, e.g., id.* at 14-16.

<sup>218</sup> *Id.* at 54-56.

notified officers of their ability to report misconduct.<sup>219</sup> Once more, it mandated additional training in cultural diversity, Fourth Amendment law, ethics, and protections available to officers that fear retaliation for reporting misconduct.<sup>220</sup>

One of the most significant components of the LAPD consent decree was the creation of additional oversight mechanisms. Perhaps the most significant of these oversight components was the Audit Unit.<sup>221</sup> The purpose of this new Audit Unit was to regularly audit LAPD records to ensure that officers were substantively complying with written mandates. The consent decree specifically required the use of stratified random samples of departmental records to ensure compliance with policy requirements, as well as sting audits, where undercover agents investigate agency compliance covertly.<sup>222</sup> Specifically, the consent decree required the LAPD to audit arrests records, motor vehicle stop records, use of force investigations, community complaint investigation records, warrant applications, confidential informant files, and other LAPD work product.<sup>223</sup> To specifically address the problems that emerged in the Rampart scandal, the consent decree also required audits of financial disclosures made by all LAPD officers who routinely handle valuable contraband or cash.<sup>224</sup> While the Audit Unit was tasked with the responsibility of conducting these audits, the consent decree also required the Audit Unit to turn over their audit records to the Office of the Inspector General (OIG) for evaluation.<sup>225</sup> The results of these OIG investigations of Audit Division results must be forwarded to the Police Commission for further review.<sup>226</sup> This decentralization of responsibility ensures that no one group has complete control over LAPD accountability; responsibility is diffused throughout the organization.

The consent decree also included portions regulating the management of gang units,<sup>227</sup> the development of programs to respond to persons with disabilities,<sup>228</sup> and community outreach.<sup>229</sup> Finally, the consent decree required the DOJ and the LAPD to negotiate in good faith on the selection of an external monitoring team to oversee the implementation of settlement

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<sup>219</sup> *Id.* at 54.

<sup>220</sup> *Id.* at 54-55.

<sup>221</sup> *Id.* at 57 (“The Department shall create and continue to have an audit unit within the officer of the Chief of Police (the ‘Audit Unit’) with centralized responsibility for developing the Annual Audit Plan, coordinating and scheduling audits contemplated by the Annual Audit Plan and ensuring timely completion of audits, and conducting audits as directed by the Chief of Police”).

<sup>222</sup> *Id.* at 58 (describing the need for these two types of audits, each under somewhat different conditions).

<sup>223</sup> *Id.* at 58-59 (listing these and other audit requirements).

<sup>224</sup> *Id.* at 61.

<sup>225</sup> *Id.* at 62.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 47-51.

<sup>228</sup> *Id.* at 54-56.

<sup>229</sup> *Id.* at 72-74.

terms.<sup>230</sup> Like all SRL, the consent decree made it clear that the City of Los Angeles was responsible for the cost of this monitor and the cost of all necessary reform measures.<sup>231</sup>

### III. IMPLEMENTATION

By May of 2001, the Los Angeles City Council and the DOJ agreed on the appointment of an outside monitoring company—Kroll Associates, Inc.—to serve as the court mandated independent monitor.<sup>232</sup> While officially U.S. District Judge Gary A. Feess had the final say in approving the appointment of the monitoring team,<sup>233</sup> such approval has proven in most SRL cases to be a mere formality. The DOJ and City of Los Angeles selected Kroll out of an initial pool of 20 applicants.<sup>234</sup> The list of applicants included a wide range of talented and experienced lawyers and law enforcement professionals.<sup>235</sup> After a lengthy investigation and negotiation process, the monitor selection process proceeded relatively quickly. In fact, some on the Los Angeles City Council complained that the monitor selection process proceeded too quickly.<sup>236</sup> By May 17, news reports emerged that the city council had narrowed their options from 20 down to 2 finalists.<sup>237</sup> And by May 19, news came that the city council had finalized the selection of Kroll as the official monitoring team.<sup>238</sup> The Kroll team was led by Michael Cherkasky, who had previously worked as a prosecutor in New York.<sup>239</sup> Cherkasky brought with him a number of highly experienced law enforcement experts, including former New York Police Commission William Bratton.<sup>240</sup> Some in the media portrayed the selection of Cherkasky positively, describing him as “fair but tough.”<sup>241</sup>

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<sup>230</sup> *Id.* at 71 (further explaining that the monitor was to be selected by March 1, 2001 and ought to meet certain specified requirements). The monitor was supposed to cost no more than \$10 million over the first 5 years in total fees, not counting the cost of “out-of-pocket costs for travel and incidentals.” *Id.*

<sup>231</sup> *Id.* at 72 (“The City shall bear all reasonable fees and costs of the Monitor”).

<sup>232</sup> Patrick McGreevy, *N.Y. Firm Chosen to Monitor Reforms*, L.A. TIMES, May 19, 2001, at 1.

<sup>233</sup> *Id.*

<sup>234</sup> Tina Daunt, *Job of Overseeing Reforms at LAPD Attracts Nearly 20*, L.A. TIMES, Jan. 17, 2001, at 3.

<sup>235</sup> For example, the list of applicants included attorney Robert C. Bonner (a former federal prosecutor who served as the head of the Drug Enforcement Administration), attorney Stephen Yagman (local attorney who battled with LAPD on previous police cases).

<sup>236</sup> Rick Orlov, *Council Agrees on Monitor in LAPD Probe Consent Decree Nearly Final*, DAILY NEWS, May 19, 2001, at N3 (stating that Councilman Mike Hernandez, Nate Holden, and Nick Pacheco all protested the speed at which the council acted to appoint Kroll).

<sup>237</sup> Patrick McGreevy, *City Narrows Choices for Firm to Monitor Police Reforms to 2*, L.A. TIMES, May 17, 2001, at 4.

<sup>238</sup> Orlov, *supra* note 236, at N3

<sup>239</sup> Tina Daunt, *N.Y. Mob Prosecutor to Take on the LAPD*, L.A. TIMES, July 24, 2001, at 1.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*; see also McGreevy, *supra* note 237 (Deputy Mayor Kelly martin calling Cherkasky an “aggressive prosecutor” who was “tough-minded” but “also fair-minded”).

Other observers, like Professor Chemerinsky worried that the entire monitor selection process failed to consider community input.<sup>242</sup> As Chemerinsky put it, the process was largely “secret.”<sup>243</sup> Chemerinsky also expressed skepticism about how the DOJ and City of Los Angeles went about making their selection. As he explained, “several applicants told me that they thought some of the city’s representatives expressed hostility to aggressive enforcement of the consent decree [during interview questioning].”<sup>244</sup> Chemerinsky also worried that Judge Feess would merely rubber stamp the choice made by the selection of Kroll, a New York based firm, without ever seeking public comments.<sup>245</sup> Objections aside, the Los Angeles City Council eventually approved Kroll’s proposed monitoring team by a 9-3 vote.<sup>246</sup> And eventually, even Chemerinsky came to view Cherkasky as a fair monitor, up to the job of overseeing the LAPD.<sup>247</sup> Cherkasky appeared to have something to satisfy all stakeholders. As an outsider from New York who had previously worked as a monitor in other contexts, he brought the kind of impartiality and experience desired by the DOJ.<sup>248</sup> And Los Angeles officials felt that during interviews, Cherkasky “did not prejudge the Police Department” and appeared to be willing to approach the monitoring position “in an objective way.”<sup>249</sup>

In addition to Kroll, the City of Los Angeles also hired an outside Texas firm to develop criteria for implementing the actual terms of the consent decree.<sup>250</sup> This firm was given the responsibility of translating the terms of the consent decree (essentially a legal contract) into useable standards for a law enforcement agency.

Although some city council members held out hope until the very end that “Los Angeles [could] get out of the federal consent decree,” it appears that the city generally accepted the need for reform from the beginning.<sup>251</sup> From the outset, the monitor found that the LAPD “took its responsibilities under the consent decree seriously.”<sup>252</sup> The LAPD quickly established the Consent Decree Bureau that oversaw the implementation of the consent decree.<sup>253</sup>

In the early years of the consent decree, Cherkasky expressed concern over some failures by the LAPD to meet the standards of the consent decree. For example, only months after Judge Feess officially named Cherkasky as the monitor, his monitoring team found that the LAPD had an unacceptable backlog of misconduct cases and citizen complaints in violation of the consent

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<sup>242</sup> Erwin Chemerinsky, *Secretly Naming Police Monitor Ignores Public*, L.A. TIMES, May 22, 2001, at 13.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> Chemerinsky also expressed serious skepticism about fact that Kroll was from outside California. As he asked, “Is this desirable?” *Id.*

<sup>246</sup> McGreevy, *supra* note 232, at 1.

<sup>247</sup> Daunt, *supra* note 239, at 1.

<sup>248</sup> McGreevy, *supra* note 232, at 1

<sup>249</sup> *Id.*

<sup>250</sup> Orlov, *supra* note 236, at N3 (explaining how this outside team would be headed by Dr. James Ginger of Public Management Resources, “the only firm in the country that has experience with police department consent decrees”).

<sup>251</sup> Daunt, *supra* note 234, at 3 (quoting such an objection from Rudy Svorinich Jr. who tried to rescind the council’s approval of the decree until the very end).

<sup>252</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 5.

<sup>253</sup> *Id.*

decree.<sup>254</sup> This sort of problem was typical of the problems facing the LAPD in the earliest days of the consent decree. But early on in the SRL process, the LAPD made a change in leadership by appointing William Bratton as police chief.<sup>255</sup> Remember, before becoming chief, Bratton was serving as a policing expert on the Kroll monitoring team overseeing the LAPD.<sup>256</sup> According to the monitor reports, the appointment of Chief Bratton marked the true beginning of institutional reform in the LAPD, in part because “Chief Bratton raised the level of visibility and dedication to the consent decree.”<sup>257</sup>

One of Bratton’s most visible moves that demonstrated his dedication to the consent decree was his appointment of Gerald Chaleff as head of the Consent Decree Bureau. Bratton gave Chaleff, a criminal defense attorney and former member of the Board of Police Commissioners, a position within the LAPD roughly equivalent to a Deputy Chief.<sup>258</sup> Elevating such a figure like Chaleff—someone from outside the LAPD who had spent much of his professional career critical of police behavior—sent a signal that the LAPD under Bratton was prepared to undergo significant changes if necessary to meet the terms of the decree.<sup>259</sup> When Chief Bratton faced opposition from his own officers over the terms of the consent decree—and there was plenty—he adamantly stood his ground. Bratton continually referred to the decree’s provisions as mere best practices.<sup>260</sup>

Despite the existence of supportive leadership atop the LAPD, though, the entire implementation process took nearly 12 years to complete.<sup>261</sup> The federal government spent more time overseeing the LAPD than any other agency in history. This is not surprising, though, given the complexity of the agreement, the size of the department, and depth of the problems facing the agency before intervention. But once the reforms had concluded, the LAPD was a remarkably different agency by virtually any metric. The subsections that follow walk through many of these important measures, showing the progress that the LAPD made under federal monitorship. The purpose of the following sections is to examine the progress that the LAPD made during structural reform litigation.

Before doing so, it is important to fully acknowledge the limitations of the available data. Ideally, any test of the Los Angeles consent decree would examine the effects of the decree on rates of police misconduct. Unfortunately, there is no universally accepted way to measure the prevalence of police misconduct. Police misconduct is varied. Additionally, a plethora of policies

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<sup>254</sup> Rick Orlov, *LAPD Reforms Stymied by Backlog Jam*, DAILY NEWS, Nov. 20, 2001, at N4.

<sup>255</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 5.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* It is worth noting that as is typical in these sort of cases, the federal district court had very little role in the implementation. Perhaps nothing better represents how relatively small role played by the federal district court than the monitoring team’s final report. In this report, the monitors described the role played by each party in the process. The sections describing the role of the monitoring team, DOJ, and LAPD included details descriptions of the ways that each party advanced the reform process. The section on the role of the federal district court included a mere single sentence reading, “The Honorable Gary Feess of the United States Court for the Central District of California has presided over this matter for the entire time it has been pending.” *Id.* at 6.

<sup>261</sup> The Los Angeles monitoring lasted from June 15, 2001 to May 16, 2013—approximately 4353 days, or 11.9 years. See Stephen Rushin, *Structural Police Reform*, 99 Minn. L. Rev. \_\_\_, \*38 (2015).

and procedures facilitate misconduct. In a perfect world, the number of civil rights complaints filed against a police department would roughly approximate the amount of misconduct present in that agency. Unfortunately, in departments like Los Angeles, one of the key reasons that the DOJ intervened is because internal complaint procedures were inherently flawed. Remember, Paul King's experience attempting to file a complaint when his brother Rodney was brutally beaten by several members of the LAPD. Paul King went to the Foothill Police Station to file a formal complaint. But the sergeant handling the intake made King wait 30 minutes<sup>262</sup> before questioning Paul about his possible involvement in criminal activities.<sup>263</sup> The sergeant concluded that there was nothing he could do, absent more conclusive video evidence,<sup>264</sup> since Rodney was in "big trouble" for "put[ting] someone's life in danger, possibly a police officer."<sup>265</sup> These types of barriers to citizen complaints were found to be common in the LAPD and other departments at the start of structural reform litigation. As a result, when departments reform their complaint procedures, they often see complaints actually increase. This is not necessarily because police are engaged in more misconduct. Instead this is likely because citizens finally have an easy avenue to air their grievances against police officers. Thus, in the case of the LAPD, it is not possible to make any definitive conclusions about the amount of misconduct present by simply comparing the number of complaints before and after the consent decree. Instead, the subsections that follow will walk through a range of alternative methods to test the effectiveness of structural reform litigation.

#### A. Complaint Management

The LAPD substantially improved the complaint intake, review, and investigation process. Remember, complaint procedures were a problem identified after the King incident and in the subsequent consent decree. Before the DOJ intervened, the LAPD made preemptive efforts to improve the complaint intake, documentation, and review process.<sup>266</sup> Nevertheless, despite having various procedures in place to ensure supervisor review of complaint intake and review, "the LAPD struggled to comply with the requirements" of the consent decree, particularly "complaint notification requirements."<sup>267</sup> The consent decree required the LAPD to make several changes to the complaint procedures. The consent decree required that, after a complaint investigation finished, a supervisor was to evaluate the quality and completeness of the report.<sup>268</sup> The supervisor was then to identify the underlying deficiency or training problem that

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<sup>262</sup> Christopher Commission Report, *supra* note 4, at 10 (describing how the sergeant was in and out of the room during the entire 40 minute interaction, with the sergeant once leaving for about 30 minutes).

<sup>263</sup> *Id.* In response to this line of questioning, "Paul King responded that he was there to talk about Rodney King, not himself." *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* The officer also told Paul King that his brother "had been caught in a high-speed chase going over 100 m.p.h. or so...." *Id.*

<sup>266</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 59 ("Prior to the Consent Decree, the LAPD had established a practice of having managers review complaint investigations for quality and completeness and to identify training needs").

<sup>267</sup> *Id.* at 59.

<sup>268</sup> *Id.* at 58.

may have led to the issue.<sup>269</sup> And the supervisor was responsible for implementing non-disciplinary changes, or recommending an officer for formal disciplinary action.<sup>270</sup> The LAPD was also required to notify any complainant of the resolution, including a full explanation of the general allegations and disposition.<sup>271</sup>

Structural reform litigation gave the LAPD a unique method for testing whether the LAPD had corrected some of the problems associated with its complaint procedures. The monitors in coordination with the Office of the Inspector General for the LAPD regularly audited a random sample of citizen complaints to determine whether the LAPD had properly handled these complaints in accordance with the terms of the consent decree.<sup>272</sup> Through this process, the monitor “reviewed thousands of complaint investigations and the related manager review and letters to complainants” to ensure they were following departmental policy.<sup>273</sup> The monitors also worked with the LAPD to send undercover informants to police stations around the city; these informants attempted to file complaints and monitor their progress.<sup>274</sup> Figure 5.2 shows the results of these random and undercover audits of the complaint process.<sup>275</sup>

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<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

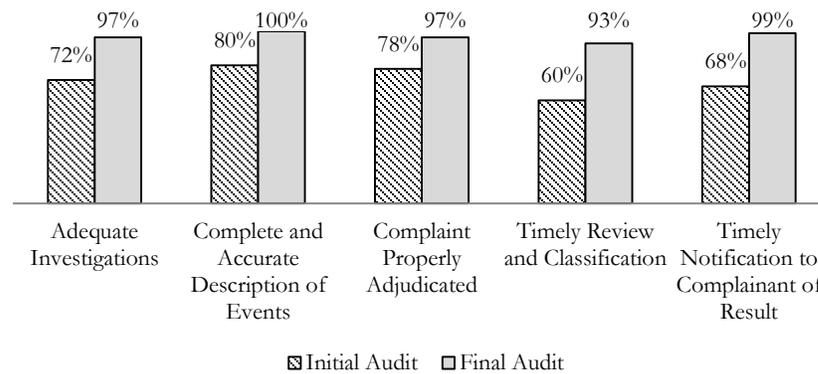
<sup>272</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 103-128 (detailing how the LAPD progressed over time in conducting internal audits to ensure that officers were engaged in constitutional policing); Los Angeles Consent Decree, *supra* note 205, at 40 (describing the requirement that the LAPD utilize audits as part of the consent decree).

<sup>273</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 59.

<sup>274</sup> Los Angeles Consent Decree, *supra* note 205, 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”).

<sup>275</sup> 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* ANDRE BIROTTE, JR., OFFICE OF THE LOS ANGELES INSPECTOR GENERAL, COMPLAINT INVESTIGATIONS AUDIT FOR FISCAL YEAR 2005-2006 ii (DECEMBER 28, 2005) [hereinafter OIG COMPLAINT AUDIT 2005-2006], *available at* [http://www.oiglapd.org/Reports/complt\\_Invsts\\_12-28-05.pdf](http://www.oiglapd.org/Reports/complt_Invsts_12-28-05.pdf) (describing how in 2005 of the 46 complaints audited, 13 gave the Office of the Inspector General “significant concern related to the adequacy of the investigation”); NICOLE C. BERSHON, OFFICE OF THE LOS ANGELES INSPECTOR GENERAL, COMPLAINT INVESTIGATIONS AUDIT FOR FISCAL YEAR 2010-2011 2-3 (April 13, 2011), [hereinafter OIG COMPLAINT AUDIT 2010-2011] *available at* [http://www.oiglapd.org/Reports/Compl-A\\_FY10-11\\_4-13-11.pdf](http://www.oiglapd.org/Reports/Compl-A_FY10-11_4-13-11.pdf) (showing that between 97-100% of all complaints audited showed that officers conducted proper interviews, 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* ANDRE BIROTTE, JR., OFFICE OF THE LOS ANGELES INSPECTOR GENERAL, COMPLAINT INVESTIGATION AUDIT FOR 2006-2007 (DEC. 28, 2006) [hereinafter OIG COMPLAINT AUDIT 2006-2007], *available at* [http://www.oiglapd.org/Reports/06-Complaint\\_Audit\\_12-28-06.pdf](http://www.oiglapd.org/Reports/06-Complaint_Audit_12-28-06.pdf) (describing how “eleven 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* note 275, at 2-3 (showing that 100% of all

FIGURE 5.2, PERCENTAGE OF AUDITED COMPLAINTS HANDLED PROPERLY<sup>276</sup>



The LAPD demonstrated remarkable improvement in the adherence to all citizen complaint procedures—achieving nearly perfect compliance by the end of the auditing periods in most categories. These improvements were statistically significant. Given the rigor of the monitor’s audits into the complaint process over the years of SRL, it seems apparent that the LAPD has now mostly corrected an endemic problem that plagued the department for years.

B. TEAMS II

Remember that an additional requirement of the consent decree was that the LAPD ought to develop a new EIS system<sup>277</sup> called TEAMS II to keep track of “risk-oriented data (uses of force, complaints, etc.), [and] operational data (arrests, traffic stops, citations, etc.)” and “automatically notify supervisory personnel when officers in their command deviate significantly

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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* note 275, at ii (stating that in 2005, 10 out of 46 complaints reviewed, there was some evidence of a significant allegation not properly framed or adjudicated); OIG COMPLAINT AUDIT 2010-2011, *supra* note 275, at 2-3 (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 QUARTERLY REPORT FOR LAPD, *supra* note 176, 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).

<sup>276</sup> The LAPD’s audit division completed these audits on a staggered schedule. Thus, the dates of the initial audits varied by a year or more in some cases. And the dates of the final audits also varied by a year or more.

<sup>277</sup> This EIS involved five separate systems that were integrated together: “the Complaint Management System (CMS), the Use of Force System (UOFS), the STOP database, the Risk Management Information System (RMIS) and the Deployment Planning System (DPS).” FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 10.

from the norms of their sworn peers.”<sup>278</sup> The monitoring team found that the LAPD not only developed a satisfactory EIS system in TEAMS II, but that the department “incorporated [it] into the LAPD manual and in the daily business practices...including promotions, pay-grade advancement, selections to specialized units, annual performance evaluations, transfers to new commands, ... and complaint investigations.”<sup>279</sup> The monitoring team audited dozens of monthly reports created by this new data system, and found the department was generally using this new data system properly.<sup>280</sup> An event in 2008 illustrates just how useful these kinds of data-driven warning systems can be in improving the constitutionality of local policing. The LAPD in coordination with the monitoring team conducted an assessment of data collected by the new data system and found that the Central Area Narcotics unit appeared to engage in statistically unusual behavior.<sup>281</sup> The unit was disproportionately taking advantage of a narrow exception in LAPD policy that permitted officers to avoid completing a field data report after stopping a suspect.<sup>282</sup> Thanks to the data-driven system mandated via SRL, the LAPD was able to notice this potentially unconstitutional pattern of behavior and take actions to correct it preemptively.

### C. Use of Force

The LAPD’s improved use of force policies and procedures were “the single most encouraging aspect” of the structural reform litigation era.<sup>283</sup> Recall, the consent decree identified a pervasive pattern of unlawful use of force present in the LAPD at the time of the federal investigation. Starting in August of 2002, the monitoring team began documenting various measures to test whether the LAPD was using force in a constitutional manner. First, the LAPD made dramatic improvements in properly reporting use of force incidents to superiors.<sup>284</sup> Second, the consent decree mandated that all so-called categorical use of force incidents be reviewed by a

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<sup>278</sup> *Id.* at 9.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 11-12 (“the Monitor reviewed 34 different monthly reports produced by RMIS, including four individual summary and comparison reports, 15 different summary and comparison reports for units and/or workgroups and 15 different incident reports...[and] determined that these reports met the Consent Decree requirement”)

<sup>281</sup> *Id.* at 13 (explaining how, after a staff review of “total Department-wide action items for the second quarter of 2008,” they determined that the Central Area Narcotics division “appeared to be statistically higher than the average of other specialized units for RMIS threshold”).

<sup>282</sup> *Id.* The monitors also observed that supervisors appeared to be engaged directly in use of force incidents rather than serving in a merely supervisory capacity. *Id.*

<sup>283</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 20.

<sup>284</sup> OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, FOURTH QUARTERLY REPORT 6-7 (August 15, 2002) [hereinafter FOURTH QUARTERLY REPORT FOR LAPD] (stating “[n]otification and a prompt response by CIID is critical to preserve evidence and maintain integrity”). The Fourth Quarterly Report stated that, “The CIID’s overall response time ranged from approximately 25 to 106 minutes, with an average mean arrival time of 69 minutes. This response time is judged to be within acceptable limits and not an impairment to the investigation.” *Id.* at 6. The report also stated that the police chief was properly notified in 22 out of 23 cases, or 95.7% of the time. *Id.* at 7. FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at Appendix D, p. 2 (showing that paragraph 58 in compliance throughout the period of the consent decree).

use of force review board.<sup>285</sup> Categorical use of force refers to any lethal force used by law enforcement or any force resulting in injury requiring hospitalization, all head strikes, and deaths in custody.<sup>286</sup> The monitors observed the process by which the Use of Force Review Board hears cases of categorical use of force and found them to be in line with the requirements in the consent decree.<sup>287</sup> The LAPD continued these full board reviews for categorical use of force throughout the period of the consent decree.<sup>288</sup> Similarly, the consent decree required the LAPD to review non-categorical use of force incidents within 14 calendar days.<sup>289</sup> The LAPD initially had a tougher time abiding by this requirement. When the monitoring team first audited use of force files in December of 2002 to determine whether non-categorical use of force incidents were being properly investigated within the requisite 14 days, the team found that only 75% of cases were evaluated in the proper time frame.<sup>290</sup> This was deemed insufficient.<sup>291</sup> By June of 2003, the LAPD had dramatically improved this figure. By then, the LAPD processed approximately 94% of non-categorical use of force cases within 14 days.<sup>292</sup> This figure increased to 95.6% in December of 2003 and remained above 95% thereafter.<sup>293</sup>

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<sup>285</sup> OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, FIFTH QUARTERLY REPORT FOR LAPD, at 20 (“Paragraph 69 requires the LAPD to continue its practice of presenting every Categorical Use of Force investigation before the Use of Force Review Board”).

<sup>286</sup> LOS ANGELES POLICE DEPARTMENT, USE OF FORCE ANNUAL REPORT FOR 2009, 4 (2009) [hereinafter USE OF FORCE REPORT FOR LAPD 2009], available at <http://www.lapdonline.org/assets/pdf/2009YearEndReportFinal.pdf>. The LAPD’s full definition of categorical use of force is as follows:

“All incidents involving the use of lethal force such as intentional Officer Involved Shootings; Unintended Discharges of a firearm; all uses of Carotid Restraint Control Holds; all uses of force resulting in an injury requiring hospitalization, commonly referred to as Law Enforcement Related Injuries; all Head strikes with an impact weapon; all other uses of force resulting in death; all deaths while the arrestee or detainee is in the custodial care of the LAPD referred to as an In-Custody Death; or a K-9 Contact which result in hospitalization.”

*Id.*

<sup>287</sup> FIFTH QUARTERLY REPORT FOR LAPD, *supra* note 285, at 20-21

<sup>288</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at Appendix D, p. 2 (showing under paragraph 69(a) that the LAPD was in compliance with this portion in the fifth quarterly report and remained in compliance over the duration of the consent decree).

<sup>289</sup> OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, SIXTH QUARTERLY REPORT 19 (February 15, 2003) [hereinafter SIXTH QUARTERLY REPORT FOR LAPD] (explaining that the consent decree requires “LAPD Division ... to review each use of force within 14 calendar days of the incident, unless a deficiency in the investigation is detected, in which case the review shall be completed within a reasonable time period”).

<sup>290</sup> *Id.* (“The Monitor found that 21 of the 85 investigations selected for review were not reviewed within 14 calendar days of their submission” and “[f]or all 21 incident investigations the Monitor noted no extenuating circumstances and the LAPD did not document any extenuating circumstances that would have precluded the investigation from reasonably being reviewed as required”).

<sup>291</sup> *Id.*

<sup>292</sup> OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, EIGHTH QUARTERLY REPORT 18 (August 15, 2003) [hereinafter EIGHTH QUARTERLY REPORT FOR LAPD] (“During the current quarter, the Monitor reviewed the merits of 87 NCUOF incident

Third, another part of the consent decree required the LAPD to utilize specific procedures in investigating both categorical and non-categorical use of force claims. For example, the consent decree required the audio and video recording of interviews conducted after categorical use of force incidents.<sup>294</sup> It barred the use of group interviews after both categorical and non-categorical use of force events.<sup>295</sup> It also established requirements for the collection and preservation of evidence and mandated officer interviews with all supervisors after use of force incidents, among other requirements.<sup>296</sup> The monitoring team first measured compliance with these requirements in September of 2002. In this initial examination, the monitors examined 37 categorical force investigations.<sup>297</sup> While this initial assessment found the LAPD in compliance with most of the categorical force investigation requirements, it did find that the LAPD had failed to adequately tape or video record interviews,<sup>298</sup> and failed to collect and preserve adequate evidence.<sup>299</sup> The monitors similarly found the non-categorical investigations to be insufficient in multiple ways during the first examination.<sup>300</sup> Soon, though, the LAPD corrected these problems and generally maintained compliant use-of-force investigation procedures from that point forward.<sup>301</sup>

Combined, these various measures suggest that the LAPD's reporting and investigation of use-of-force improved substantially during the consent decree period. What is surprisingly absent, though, from the monitoring report is some measure of how these changes impacted the LAPD's proclivity towards using force against criminal suspects. The OIG, though, does provide some consistent measure of use of force over time. During the time that the monitors were regularly overseeing the categorical use of force report procedures, the total number of categorical use of force incidents declined noticeably. Figure 5.3 below shows the decline in categorical use of force incidents during the monitoring period.

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investigations...[and in] all but five investigations, LAPD Division Management reviewed the incident within 14 days and the investigations were completed within a reasonable time period thereafter”).

<sup>293</sup> OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, TENTH QUARTERLY REPORT 23-24 (August 15, 2003) [hereinafter TENTH QUARTERLY REPORT FOR LAPD] (stating that 87 out of 91 cases of non-categorical use of force were properly handled within 14 days).

<sup>294</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at Appendix D, at 3 (describing the conduct of investigation requirements in paragraphs 80i for categorical and non-categorical use of force incidents).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> FIFTH QUARTERLY REPORT FOR LAPD, *supra* note 285, at 36-39.

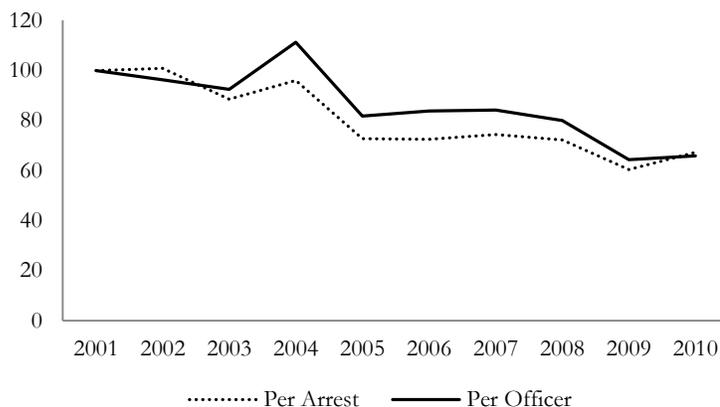
<sup>298</sup> *Id.* at 38 (“For the 37 incidents reviewed, two contained witness statements that were not captured on tape and one contained a suspect’s statement that was not captured on tape”).

<sup>299</sup> *Id.* (“In two separate Categorical Use of Force incidents the Monitor identified a key witness to the incident who was not interviewed by the investigating officers”).

<sup>300</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at Appendix D, at 3 (noting that the LAPD was not in compliance in the first audit of the non-categorical investigation procedures in the sixth quarterly report for paragraph 80i).

<sup>301</sup> *Id.* (showing a move from non-compliance to compliance for various categories listed under 80i for categorical and non-categorical use of force investigations).

FIGURE 5.3, CATEGORICAL USES OF FORCE PER OFFICER BY LAPD



The notable decrease in categorical use of force incidents during the monitoring time period may be a mere coincidence. It may be a side effect of decreased crime. Or it may represent a genuine change in officer behavior to use categorical force less often, since officers are aware that the OIG and the external monitor are observing their behavior. It is tough to make any definitive conclusions from the data, although the general trend is encouraging.

It is important to note that two years after the external monitoring team stopped monitoring categorical uses of force, the total number of categorical use of force incidents increased by about 37%.<sup>302</sup> Most of this uptick was tied back to an increase in officer-involved shootings, which increased by 58% in just one year.<sup>303</sup> The LAPD has not publicly provided any explanation for this sudden jump in officer-involved shootings. And in the last year, since the monitoring has ended, the LAPD has not released numbers public numbers on use of force incidents for 2013. This is a potentially discouraging development.

#### D. Bias-Free Policing

One controversial subject during the SRL era was the LAPD's adherence to the consent decree's mandated non-discrimination policy for automobile and pedestrian stops. The Christopher Commission report found significant evidence of racial bias in the LAPD's ranks, and investigations after the Rampart Scandal revealed similar problems.<sup>304</sup> To measure the presence of possible racial profiling, the LAPD began collecting demographic statistics on vehicle and pedestrian stops starting in November of 2001.<sup>305</sup> The Audit Unit then began auditing this

<sup>302</sup> ALEXANDER A. BUSTAMANTE, OFFICE OF THE INSPECTOR GENERAL, QUARTERLY USE OF FORCE REPORT: FIRST QUARTER 2012, 3 (June 27, 2012), [hereinafter 2012 USE OF FORCE REPORT] available at [http://www.oiglapd.org/Reports/6-27-12\\_UOF-Rprt1stQ-2012.pdf](http://www.oiglapd.org/Reports/6-27-12_UOF-Rprt1stQ-2012.pdf). I reached the 37% statistic by comparing the 2009 number of categorical use of force incidents with the 2011 number (84 and 115 respectively).

<sup>303</sup> *Id.* at 3 (explaining the rise in officer involved shootings and giving the 58% statistic).

<sup>304</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 69.

<sup>305</sup> *Id.* at 70 ("The Decree also mandated that the Department require LAPD officers to complete a written or electronic report each time an officer conducted a motor vehicle or pedestrian stop by November 1, 2001").

data in August of 2003.<sup>306</sup> By 2005, Los Angeles released a major public report detailing the results of these audits.<sup>307</sup> It found that, even when controlling for several variables, racial disparities remained.<sup>308</sup> A few years later, Professor Ian Ayres worked with the ACLU of Southern California to conduct an additional study of this same data set.<sup>309</sup> Ayres found apparent racial bias in how LAPD officers exercised authority post-stop.<sup>310</sup> In response to these reports, the LAPD leadership instituted additional protocols that require officers to fully articulate detailed reasons for conducting traffic and pedestrian stops.<sup>311</sup> Complaints against officers for racial profiling were not closed unless the officer had provided such a full explanation.<sup>312</sup>

The LAPD also made several other attempts to correct this problem. First, the LAPD put in place an automated reporting system that automatically recorded stop data into the TEAMS II system.<sup>313</sup> This way, even if it was difficult to reach conclusions on the presence of racial bias via aggregate statistics, the LAPD hoped to identify individual officers that may be engaged in a more visible pattern of race-based stops. Second, the LAPD began installing cameras in squad cars.<sup>314</sup> The LAPD has also agreed to conduct regularized audits of audio and video from these cameras.<sup>315</sup> Thus, while some claims of racial bias remain in the LAPD, it appears that the department has taken substantial steps to correct these problems.

#### E. Auditing

Perhaps the single most important change made in the LAPD was the structural change in monitoring police behavior via auditing. Remember that before the initiation of federal intervention, the LAPD had some mechanisms in place to monitor police behavior—namely the Police Commission and the Office of the Inspector General. The federal investigation of the LAPD found that these two oversight mechanisms lacked the authority and skills to properly oversee LAPD behavior. Thus, as part of the consent decree, the federal government demanded that the LAPD create a new Audit Unit, which served under the Chief of Police. This new Audit Unit was given the responsibility of conducting stratified, randomized audits of various police

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<sup>306</sup> *Id.* at 71 (the Audit Unit “completed its first *Motor Vehicle and Pedestrian Stop Data Collection Audit* in August 2003”).

<sup>307</sup> *Id.* at 72 (“The City, working with the Analysis Group, Inc. prepared and released the ‘Final Pedestrian and Motor Vehicle Stop Data Analyses Methodology Report,’ dated December 8, 2005”).

<sup>308</sup> *Id.*

<sup>309</sup> INA AYRES AND JONATHAN BOROWSKY, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT, (October 2008), *available at* <http://islandia.law.yale.edu/ayers/Ayres%20LAPD%20Report.pdf>.

<sup>310</sup> *Id.* at i.

<sup>311</sup> *Id.* at 73.

<sup>312</sup> *Id.* at 73-74.

<sup>313</sup> *Id.* at 74 (“This system incorporates the collection of stop data as approved by DOJ and provides for its storage in TEAMS II”).

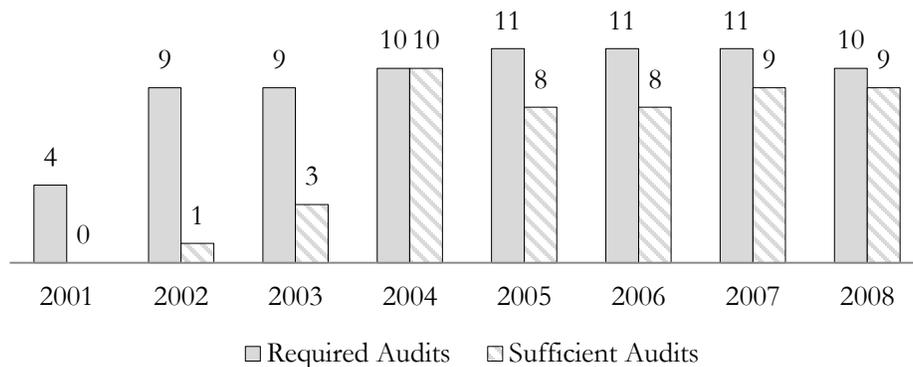
<sup>314</sup> *Id.* (explaining that “...the City and Department have continued to move towards Department-wide implementation of cameras in cars (DICVS), which the Monitor has strongly endorsed and recommended as a best practice in monitoring potential bias in stops”).

<sup>315</sup> *Id.* at 75 (stating that the LAPD planned to “conduct regular audits of the audio and video, in addition to periodic inspections by supervisors”).

practices. Under the consent decree, the Chief of Police was to submit to the Police Commission and the OIG a list of planned audit targets. The Audit Unit was then responsible for conducting these regular audits, and submitting the results to the Police Commission and OIG for review. The consent decree mandated several required subjects of these regular audits—warrants, arrests, use of force, stops, complaints, financial disclosures, and police training.

During the SRL era, the external monitoring team examined the quality of the audits conducted by the Audit Unit. At first these audits were deeply flawed. For example, the monitoring team found that many of these early audits “used inadequate samples and included questions that yielded improper results.”<sup>316</sup> Over time, and with the help of both the external monitors and additional newly hired personnel, the LAPD dramatically improved the quality of these regular audits. After only a few years, the Audit Unit began submitting timely audits that met quantitative and qualitative expectations. Figure 5.4 shows the progress that the Audit Unit made in just four short years.

FIGURE 5.4, NUMBER OF REQUIRED AND SUFFICIENT AUDITS CONDUCTED BY AUDIT UNIT



This is not to say that the Audit Unit has been perfect. In fact, in the later years of monitoring, the Audit Unit still had some issues with timeliness, as seen by the slight dip in compliance between 2005 and 2007. The LAPD, an agency that once suffered from serious deficiencies in monitoring their own officers, has made tremendous improvement in this regard over the SRL era—so much improvement that the agency “participat[ed] as founding members of the International Law Enforcement Audit’s Association (ILEAA) and coordinat[ed] the first ILEAA conference in August 2007.”<sup>317</sup> The LAPD Audit Unit has even participated in peer reviews of other similar systems that have been installed in cities like Phoenix, Dallas, and Richmond.<sup>318</sup>

<sup>316</sup> *Id.* at 109.

<sup>317</sup> *Id.* at 112.

<sup>318</sup> *Id.*

## F. *Additional Measures*

The monitoring team also found that the LAPD made substantial progress in improving its management of gang units,<sup>319</sup> handling of persons with mental illnesses,<sup>320</sup> policies on confidential informants,<sup>321</sup> and broader training programs.<sup>322</sup> Monitors also audited warrant applications and arrest records to verify legal sufficiency and authenticity of officer behavior.<sup>323</sup> The monitors found that the LAPD made substantial progress in both areas.<sup>324</sup>

## IV. COSTS OF SRL IN LOS ANGELES

By virtually any measure, SRL appears to have been a success in reducing misconduct in Los Angeles—but at what cost? What did the City of Los Angeles have to sacrifice to make this apparent improvement in its police force? Surprisingly, it appears that Los Angeles made very little sacrifice to achieve these improvements in constitutional policing. Although the City of Los Angeles spent a considerable amount of money to pay for initial investments into misconduct reforms (like the TEAMS II system), there is reason to believe that the city has been able to recoup many of these costs through reductions in police misconduct. Police officers also worried that the consent decree may result in de-policing as discussed in Chapter 4. In actuality, though, no statistical evidence exists to verify this so-called de-policing hypothesis in Los Angeles. If anything, the LAPD has become more aggressive and more effective at combatting crime, relative to other municipalities, during the SRL era. Combined, these two observations suggest that the real cost of SRL was quite low. This realization makes the Los Angeles case study a true success story—a case where the law helped to facilitate meaningful improvement in police conduct without significant cost.

### A. *Financial Costs*

The consent decree appears to have directly affected the overall budget of the LAPD. As discussed in more depth in Chapter 4, around the time that the LAPD entered into a consent decree with the DOJ, the City of Los Angeles spent around \$314 (adjusted for inflation) per resident on policing services. By 2008, that number ballooned to around \$374. Most of this cost appears to be tied to a temporary investment in equipment and administrative tools necessary to satisfy the terms of the consent decree. By the end of the consent decree period, average expenditures per resident had receded somewhat—in part because of the waning implementation

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<sup>319</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 76-83 (stating that, although early on the LAPD struggled with the gang unit requirements, the “Department has made substantial strides towards a better trained and supervised gang unit...”).

<sup>320</sup> *Id.* at 89-93 (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”).

<sup>321</sup> *Id.* at 84-88 (“The Department released a Confidential Informant Manual in 2002 that incorporated all of the requirements of the Consent Decree”).

<sup>322</sup> *Id.* at 93-99 (“The LAPD has been tremendously successful in its effort to improve its training function”).

<sup>323</sup> *Id.* at 34-38 (stating that initially audits only found 55.5% of arrest packages to be in line with policy, but 88% were in line with policy after the monitoring; also noting that compliance rates significantly increased for warrants as well).

<sup>324</sup> *Id.*

costs of the consent decree and the nationwide recession that strapped city budgets across the nation. Initial estimates suggested that the consent decree would cost around \$40 million to implement in the first year, with an additional \$30-50 million in expenses in the years to follow.<sup>325</sup> In total, this would suggest that the LAPD ought to have spent somewhere between \$80 and \$90 million dollars in equipment and administrative costs to fully implement the terms of the consent decree. Further investigation into the details of the LAPD budget suggests that these estimates were approximately correct. Between 2001 and 2011, the LAPD expenses on equipment and administrative investments related to the consent decree totaled between \$83 and 84 million.<sup>326</sup> When combined with the cost of monitoring, which amounted to an average of around \$2 million per year,<sup>327</sup> the total cost of federal intervention was north of \$100 million. While this total is jarring, in a city as large as Los Angeles, it only amounts to between \$2 and \$3 per resident per year.<sup>328</sup>

As is the case in many communities facing structural reform litigation, the cost of the monitor was particularly controversial. Towards the end of the consent decree monitoring, the then-President of the Police Protective League Tim Sands argued publicly that the Kroll was “wast[ing] taxpayer dollars [with] incessant, meaningless auditing that does nothing to enhance public safety or ‘reform’ the LAPD.”<sup>329</sup> Political critics of the consent decree also focused their attacks on the high cost of monitoring services. Council Dennis Zine publicly criticized the cost of things like airfare and food paid to monitors who needed to travel from out of state to perform their duties.<sup>330</sup>

But such short-term complaints about visible and immediate costs likely fail to account for the cost savings achieved through improving the constitutionality of the LAPD’s behavior. Admittedly, the initial cost of SRL was high. Other metrics, though, suggest that the City of Los Angeles was likely able to recoup much of this cost. One way Los Angeles may have recouped these costs is through reductions in civil liability. During interviews, subjects claimed that the LAPD saw a substantial reduction in civil liability during the SRL era. The monitor reports also stressed the importance of civil liability as a measure of whether the LAPD had actually made necessary improvements. Recall from Chapter 4 that the LAPD saw a dramatic reduction in civil rights and use of force lawsuits resulting in financial payouts during the SRL era. During this time period, the number of these types of suits against the LAPD fell by nearly 75 percent. And the total payouts for civil rights suits based on the date of filing also decreased from over \$13 million a year at the beginning of the structural reform litigation era to around \$3 million a year towards the end of the process. It is easy to imagine other ways that a substantial reduction in police misconduct may result in cost savings. For example, fewer invalid warrant applications and

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<sup>325</sup> Giordano and Kandel, *supra* note 199, at A8.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* (citing the cost of monitoring and auditing services as around \$10 million for a five year period). The monitoring period actually continued for several years more than initially predicted.

<sup>328</sup> Over the 12 years that the City of Los Angeles was under a consent decree, the average population was 3,841,881. Given that the estimated cost of the consent decree was around \$100 million—which is a conservative estimate—then that comes out to around \$26 a person for the entire time period. Spread out over 12 years, this comes out to about \$2.17 per resident per year.

<sup>329</sup> Rick Orlov, *Police Want End to Consent Decree, LAPD: Union Protests Cost of Using New York Monitoring Team*, DAILY NEWS, Feb. 1, 2008, at A3.

<sup>330</sup> *Id.* Mr. Zine explained that “I don’t know why we had to hire a New York firm to do this work. And I don’t know why they couldn’t hire someone in Los Angeles to serve as monitor.” *Id.*

more sufficient supporting affidavits could lead to less city resources spent on suppression hearings.

Of course, it may take many years for the LAPD to fully recoup the enormous upfront costs of SRL via reduced litigation costs or other consequences of improved police conduct. Time will tell whether Los Angeles will be able to sustain the improvements it has made over the last decade plus. It remains theoretically plausible, though, that SRL may be a reform that ultimately pays for itself financially.

### B. *Did Reform Hurt Police Effectiveness?*

Remember from Chapter 4 that some critics of SRL allege that this regulatory mechanism causes police departments to become less aggressive.<sup>331</sup> These critics allege that, as a result, SRL can cause crime to increase relative to unaffected municipalities. According to this view, SRL reduces the amount of encounters between police and citizenry, either because structural reform makes officers hesitant, or because it forces officers to spend valuable time completing procedural hurdles.<sup>332</sup> Some officers suggest that de-policing is most likely to affect the number of police contacts and arrests for minor street crimes.<sup>333</sup> This is because arrests for serious crimes normally happen after lengthy investigations, while arrests for minor crimes happens 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. If this de-policing hypothesis were true, the total number of arrests for minor offenses ought to decrease over the structural reform era in Los Angeles. In order to measure whether SRL impacted the aggressiveness of LAPD officers, this part starts by using data on the number of arrests towards the start and end of the structural reform era. Figure 5.5 shows the change in arrests and stops over the course of SRL in Los Angeles.<sup>334</sup>

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<sup>331</sup> See, e.g., DAVIS, HENDERSON & ORTIZ, *supra* note 17, at 16 (explaining how officers in Pittsburgh felt “hesitant to intervene in situations involving conflicts because they were afraid of having citizens file an unwarranted anonymous complaint against them”).

<sup>332</sup> See, e.g. Joshua M. Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of “Pattern or Practice” Police Misconduct Reform*, 2011 (quoting a leader from the Washington, D.C. Police Union as saying that structural police reform leads to more time-consuming paperwork).

<sup>333</sup> CHRISTOPHER STONE, TODD FOGLESONG & CHRISTINE M COLE, *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 19-20* (2009), <http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf> (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 to us as the ‘drive-and-wave syndrome’”).

<sup>334</sup> Los Angeles Police Department, *Statistical Digest (2001-2011)*, available at [http://www.lapdonline.org/crime\\_mapping\\_and\\_compstat/content\\_basic\\_view/9098](http://www.lapdonline.org/crime_mapping_and_compstat/content_basic_view/9098) (click on “statistical digest” 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); U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *UNIFORM CRIME REPORTS (UCR): CRIME IN THE UNITED STATES (2000-2012)* [hereinafter *FBI UCR STATISTICS*], available at <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications> (to access, click on requisite year under “Crime in the United States,”

FIGURE 5.5, ANNUAL ARRESTS AND STOPS BY LAPD

Stage of Structural Reform	Total Arrests	Minor Arrests	Minor Arrests per Officer	Pedestrian and Car Stops	Pedestrian and Car Stops per Officer
Start	139,928	108,005	12.1	587,200	65.7
End	146,065	123,226	12.5	875,204	88.8

The LAPD executed more arrests towards the end of the structural reform than it did at the beginning of the process. And even when controlling for the size of the police force, the number of minor arrests per officer actually increased by about 3.3% over the time period.<sup>335</sup> Additionally, the number of vehicle and pedestrian stops per officer increased from around 65.7 near the start of SRL to 88.8 near the end—an increase of 35.2%.<sup>336</sup> No matter how you break it down, LAPD officers appear to be more aggressive after SRL than before. These statistics are even more impressive, considering the fact that LAPD officers likely had fewer opportunities to execute arrests at the end of SRL than at the start. This is because the total number of reported crimes in Los Angeles declined over this time period by 43.8%.<sup>337</sup> This makes the increase in total arrests and minor arrests even more impressive. If officers do feel more reluctant to engage in proactive street policing, the arrest and stop numbers show no evidence of such hesitation.

The next obvious question is whether SRL has correlated with any changes in crime outcomes. Figure 5.6 compares the change in violent crime rates in Los Angeles to the change in violent crime rates the other largest cities over the time period in the United States.<sup>338</sup>

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the click “Police Employee Data,” “Table 78,” and navigate to the data for Los Angeles, California). For Arrests, I used data from 2001 to represent the start of structural police reform and 2011 to represent the end of structural police reform—the most recent date when the LAPD has made thorough data publicly available. For pedestrian and vehicle stops, I use 2002 to represent the state of structural police reform, since it was the first date that there was good data available. I 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.

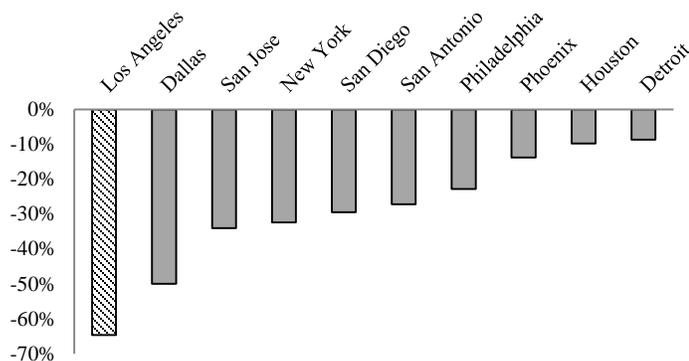
<sup>335</sup> The LAPD had approximately 8,943 sworn police officers in 2001 and 9,860 sworn officers in 2011. *Id.*

<sup>336</sup> The LAPD had approximately 9,056 sworn police officers in 2002 and 9,743 sworn officers in 2008. *Id.*

<sup>337</sup> During 2001, the LAPD reported 189,278 total crimes violent and property crimes via UCR. By 2011, this number fell to 106,375. *Id.*

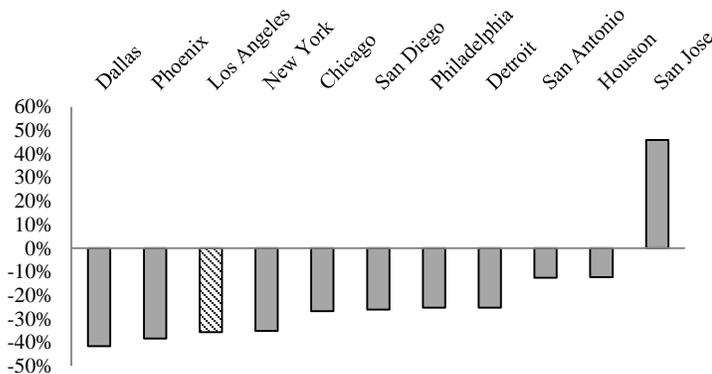
<sup>338</sup> FBI UCR STATISTICS, *supra* note 334 (to access, click on requisite year under “Crime in the United States,” click on “Violent Crime,” select “Table 8,” and navigate to the requisite police agency”). Chicago is not included in this sample because it has not collected data on rape offenses in a manner that is consistent with the rest of the country.

FIGURE 5.6, CHANGES IN VIOLENT CRIME RATES FROM 2000 TO 2012



During the same time that Los Angeles was undergoing SRL, the city saw a tremendous decrease in violent crime relative to other major American cities. In total, violent crime rates in Los Angeles dipped by 65% between 2000 and 2012.<sup>339</sup> By comparison, violent crime in the United States fell by around 24% during this time period,<sup>340</sup> and the median large American city in Figure 5.6 saw violent crime fall by about 28%.<sup>341</sup> Figure 5.7 similarly compares changes in property crime in Los Angeles and other large American cities.<sup>342</sup>

FIGURE 5.7, CHANGES IN PROPERTY CRIME RATES FROM 2000 TO 2012



Although not as impressive as the violent crime numbers, Los Angeles still outperforms the typical large American city during the structural reform era in property crime prevention.<sup>343</sup>

<sup>339</sup> *Id.* (as Los Angeles’s violent crime rate dropped from 1359.8 crimes per 100,000 residents to 481.1 crimes per 100,000 residents).

<sup>340</sup> The violent crime rates in the United States over the time period started at 506.5 per 100,000 residents and fell to 386.9 by 2012. *Id.* (to access, click on requisite year under “Crime in the United States,” click on “Violent Crime,” and select “Table 1”).

<sup>341</sup> Using the data from Figure 5.6, San Diego and San Antonio are jointly the median cities. San Diego’s violent crimes fell by 29% and San Antonio’s by 27%, resulting in a median of 28%.

<sup>342</sup> *Id.* (to access, click on requisite year under “Crime in the United States,” click on “Property Crime,” select “Table 8,” and navigate to the requisite police agency”)

<sup>343</sup> The median city—San Diego—saw a decline of 26% in property crimes. Los Angeles saw a decline of 36% in property crime. *Id.*

Los Angeles also outperformed the United States as a whole.<sup>344</sup> Combined, these statistics demonstrate that, at minimum, after the start of SRL in Los Angeles, *the sky is not falling*. Of course, it is not immediately clear whether the LAPD had an effect on these changes in crime outcomes. Criminologists have theorized that a number of demographic, legal, and socio-economic factors may affect crime rates.<sup>345</sup> Since 2000, the demographic profile of Los Angeles remains virtually unchanged,<sup>346</sup> as has the median income.<sup>347</sup> Poverty has increased.<sup>348</sup> Incarceration has actually decreased.<sup>349</sup> Overall, there have not been any significant socio-

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<sup>344</sup> The United States saw property crime decline from a rate of 3618.3 in 2000 to a rate of 2859.2 in 2012, an overall drop of about 21%—significantly lower than Los Angeles at 36%. *Id.* (to access, click on requisite year under “Crime in the United States,” click on “Property Crime,” and select “Table 1”).

<sup>345</sup> Historically, criminologists explained the causes of crime in four ways. Classical criminologists generally argued that individuals are rational actors; thus, in order to deter crime policymakers ought to raise the costs of crime through increasing the length or certainty of criminal penalties. *See generally* CESARE BECCARIA, ON CRIMES AND PUNISHMENT (1764); James Q. Wilson, *On Deterrence*, in THINKING ABOUT CRIME (1975). Sociological criminologists contend that society defines and creates crime through poverty, income inequality and culture. Adolphe Quetelet, *Of the Development of the Propensity to Crime*, in A TREATISE OF MAN (1842); John Lea and Jock Young, *Relative Deprivation*, in WHAT IS TO BE DONE ABOUT LAW AND ORDER (1984). And situational criminologists have argued that society can deter criminal deviance by adjusting situational incentives for illegal behavior. Ronald V.G. Clarke, ‘Situational’ Crime Prevention: Theory and Practice, 20 BRITISH J. CRIMINOLOGY 136 (1980); Marcus Felson, *The Routine Activity Approach as a General Crime Theory*, in S.S. SIMPSON, OF CRIME AND CRIMINALITY (2000).

<sup>346</sup> Criminologists commonly associate trends in crime with trends in the relative size of the adolescent population. *See, e.g.*, FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 92-93 (2005) (showing that the most common age for an offender to commit various crimes is around late adolescence). The adolescent population in Los Angeles represented 21.8% of the total city population in 2000, and 21.8% in 2010. Thus, any changes in crime cannot be attributed to changes in the size of the adolescent population. By contrast, the relative size of the adolescent population in the United States has declined over the same time period by 5.8%. *See* UNITED STATES CENSUS BUREAU, STATE AND COUNTY QUICK FACTS (2010), available at <http://quickfacts.census.gov/qfd/index.html> (select “California” and browse to “Los Angeles” to find 2010 statistics); UNITED STATES CENSUS BUREAU, LOS ANGELES CITY, CALIFORNIA QUICKLINKS (2000), available at <http://quickfacts.census.gov/qfd/states/06/0644000lk.html> (select “economic characteristics” under the “Census 2000 population, demographic, and housing information” subsection to find 2000 statistics).

<sup>347</sup> Adjusting for inflation, median income in Los Angeles has gone from \$47,934 in 2000 to \$50,028 in 2010—a relatively small increase of 4.3%. *Id.*

<sup>348</sup> In 2000, the poverty rate in Los Angeles was 18.3%. In 2010, that number ballooned to 20.2%, an increase of just under 2%. *Id.*

<sup>349</sup> In 2000, approximately 54,180 of the California inmates in state prison came from Los Angeles county. State of California Department of Corrections, California Prisoners and Parolees, Table 10 (2001), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/CalPris/CALPRISd2001.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2001.pdf). By contrast, in the most recent survey of California prisoners in 2013, that number had actually dropped to 46,341. Prison Census Data, California Department of Corrections and Rehabilitation, Table 7 (August 26, 2013), available at

economic, legal, or demographic changes in Los Angeles that should explain the unusually dramatic decline in crime over the structural reform era.<sup>350</sup>

This chapter does not offer a definitive, affirmative explanation for the dramatic crime decline in Los Angeles during the structural reform era. Instead this chapter offers a narrower, but nonetheless powerful claim. The LAPD case study demonstrates that constitutional policing need not come at the price of crime control. In fact, Los Angeles was able to introduce significant constitutional reforms that curbed apparent police misconduct while also undergoing one of the largest crime drops in American history. A cursory examination of other agencies that have also undergone SRL suggests that this pattern may not be unique to the LAPD.<sup>351</sup> These municipalities also saw police aggressiveness increase, when controlling for arrests opportunities and staffing rate.<sup>352</sup> This data challenges the de-policing hypothesis.

## V. A TALE OF TWO CITIES: OAKLAND AND LOS ANGELES

Overall, the LAPD appears to have made significant and meaningful changes during structural reform litigation. This sharply contrasts with another large California police department that underwent similar structural reform litigation around the same time period—Oakland. What made structural reform litigation so successful in the LAPD? And what has slowed down Oakland’s ongoing reforms? According to the monitors and other stakeholders involved in the process, the turning point in the LAPD case was the appointment of William Bratton as police chief. As Monitor Cherkasky explained, “[i]t was ... under the leadership of a new Chief, William J. Bratton, who had served as a policing expert on the Monitoring team prior to his appointment in October 2002, that reform truly began its institutionalization throughout the Department.”<sup>353</sup> After his appointment on October 28, 2002, the monitoring team immediately applauded the City’s decision.<sup>354</sup> According to Cherkasky, Bratton’s appointment was a signal that the City of Los Angeles, including “the Police Commission, the Mayor and the City Council” were dedicated the success of the consent decree.<sup>355</sup> And almost immediately after his appointment, Bratton began making significant changes. Only months after his appointment, Bratton proposed a

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[http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/Census/CENSUSd1306.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENSUSd1306.pdf).

<sup>350</sup> Los Angeles saw a substantially larger decrease in crime between 2000 and 2012 than the United States. Thus, if demographic or sociological explanation could explain the uniquely large crime drop in Los Angeles, then Los Angeles should see substantially better outcomes in these categories than the United States. As seen below, there is not a significant difference between the two locales. Given that most traditional method for explaining crime do not seem to explain the Los Angeles decline, we are left with policing and situational criminology as the most likely remaining theoretical explanation. For an example of this sort of methodology in work, see generally FRANKLIN ZIMRING, *THE CITY THAT BECAME SAFE* (2011).

<sup>351</sup> On average, the municipalities that underwent structural police reform saw violent and property crimes decrease 36.29% and 12.9% more, respectively, than the national average. See Stephen Rushin, *Constitutional Policing Without Compromise* (manuscript on file with author).

<sup>352</sup> These affected municipalities saw arrests per office increase by 21.73% when controlling for arrest opportunity. *Id.*

<sup>353</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 5.

<sup>354</sup> SIXTH QUARTERLY REPORT FOR LAPD, *supra* note 289, at 4.

<sup>355</sup> *Id.*

fundamental reorganization of the LAPD's management structure.<sup>356</sup> "Among other things, the plan elevate[d] day-to-day responsibility for the Consent Decree to the Bureau level, headed by the equivalent of a two-star chief reporting directly to Chief Bratton."<sup>357</sup> Once this plan was approved, remember that Bratton assigned Gerald Chaleff, a criminal defense attorney and former member of the Board of Police Commissioners, to this important position. Elevating some like Chaleff—a longtime, external critic of the LAPD—to a position of power sent a clear signal. It made it clear the LAPD was prepared to undergo significant changes to meet the terms of the decree.<sup>358</sup> Chief Bratton was also vigilant in ordering random audits to ensure that his department was abiding by the terms of the consent decree.<sup>359</sup> And Bratton pushed the LAPD to install "state of the art video cameras in patrol cars," a move that received enthusiastic support from the monitoring team.<sup>360</sup> Because of these moves, among others, the monitoring team believed that "Chief Bratton raised the visibility and dedication to the [d]ecree."<sup>361</sup>

We may never know whether the consent decree in Los Angeles would have been successful without Bratton's leadership. But stakeholders involved in the LAPD case all agreed that departmental and city leadership are the most important elements to the successful implementation of a consent decree in a police department. As one interviewee commented, leadership is "a huge part of the success of these agreements."<sup>362</sup> Another explained how the successful implementation of a consent decree requires "leadership, stable leadership, and commitment of that leadership to get it done."<sup>363</sup> And leadership must be supportive not just in the police department, but also within the broader city government. As another respondent remarked, "you have to have leadership at the highest level of a city in order to get success."<sup>364</sup>

There is no evidence so far that the DOJ can use § 14141 to overhaul a police department with intransigent leadership. It seems that in each successful case of structural reform litigation in American police departments, supportive leadership has played a critical role in the measure's success. And perhaps nothing better illustrates this point than the slow and painful process of structural reform litigation currently underway in the Oakland Police Department (OPD).

On December 2000, a plaintiff filed a § 1983 suit against the OPD alleging that a group of officers known as "the Riders" engaged in an pattern of misconduct.<sup>365</sup> Among the allegations,

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<sup>356</sup> OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, SEVENTH QUARTERLY REPORT 4 (May 15, 2003) [hereinafter SEVENTH QUARTERLY REPORT FOR LAPD] (stating that this plan was proposed on February 25, 2003).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> OFFICE OF THE INDEPENDENT MONITOR OF THE LOS ANGELES POLICE DEPARTMENT, FIFTEENTH QUARTERLY REPORT 4 (May 16, 2005) [hereinafter FIFTEENTH QUARTERLY REPORT FOR LAPD].

<sup>361</sup> FINAL QUARTERLY REPORT FOR LAPD, *supra* note 176, at 5.

<sup>362</sup> Telephone Interview with Department of Justice Participant #5, 6 (Sept. 4, 2013) (transcript on file with author) [hereinafter Interview #5].

<sup>363</sup> Telephone Interview with Department of Justice Participant #12, at 7 (July 30, 2013) [hereinafter Interview #12] (transcript on file with author) [hereinafter Interview #12].

<sup>364</sup> Telephone Interview with City Official and External Monitor #20, at 6 (September 5, 2013) (transcript on file with author) [hereinafter Interview #20].

<sup>365</sup> *See, e.g.,* Allen, et al v. City of Oakland, et al, 3:00-cv-04599-TEH (N.D. Cal. Dec. 7, 2000) (complaint filed)

the plaintiff alleged that these officers kidnapped him, beat him, and planted drugs on him.<sup>366</sup> A few months later, the federal district court consolidated this case with a number of other pending OPD misconduct cases.<sup>367</sup> These consolidated cases came to be known as the “Riders” cases and involved a total of 119 plaintiffs.<sup>368</sup> As part of the consolidated suit, these plaintiffs sought equitable relief against the OPD.<sup>369</sup>

Soon after consolidation, Judge Thelton Henderson took over the cases.<sup>370</sup> Judge Henderson ordered the OPD and the plaintiffs to try to negotiate a settlement.<sup>371</sup> The negotiation process was prolonged, lasting “about 2 and half years start to finish” during which time the two sides exchanged dozens of settlement drafts.<sup>372</sup> Eventually, in March of 2003, the parties agreed to a \$10.9 million settlement.<sup>373</sup> The parties also agreed that the OPD would implement an extensive package of reforms with the oversight of a monitoring team appointed by the court.<sup>374</sup> Like many consent decrees before it, this agreement required the OPD make changes to internal affairs investigations, discipline procedures, field supervision, management oversight, use of force investigations, training, and the auditing of officer performance records.<sup>375</sup>

While the DOJ was not officially involved in the OPD case, it is worth noting that the monitoring team appointed by the court included two former DOJ litigators—Kelli Evans and Christy Lopez—who had handled § 14141 cases in the past.<sup>376</sup> The lack of official DOJ involvement in the OPD case seemed to make the process somewhat different than the LAPD. The court took on a much more prominent role in this process. And the process appeared to be far more adversarial than other § 14141 cases. According to some respondents, the process was also slowed down the City of Oakland’s “dysfunctional” leadership.<sup>377</sup> This dysfunctional leadership, according to stakeholders involved in the case, came from both instability in the police department and volatility in the city government. As one knowledgeable insider remarked during an interview, the OPD case has moved slowly, and “[a] big chunk of it has to do with dysfunction and the inability to get things processed through quickly” by city management.<sup>378</sup>

The OPD also had a number of different police chiefs during the structural reform litigation era—some of which had “a decent relationship with the monitors” and others that did not.<sup>379</sup> As the interviewee explained, “we’ve had so many ... changes in leadership.”<sup>380</sup> These

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<sup>366</sup> David Postel, The Civil Rights Litigation Clearinghouse, *Allen v. City of Oakland* (2/10/2014), available at <http://www.clearinghouse.net/detail.php?id=5541>.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> Interview with Police Administrator #16, at 3-4 (July 29, 2013) [hereinafter Interview #16]

<sup>373</sup> Postel, *supra* note 366.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> Other members of this monitoring team included Charles Gruber and Rachel Burgess.

<sup>377</sup> Interview #16, *supra* note 372, at 8; Interview #18, *supra* note 191, at 5.

<sup>378</sup> Interview #16, *supra* note 372, at 8.

<sup>379</sup> *Id.* at 9 (explaining how the relationship between one chief and the monitoring team deteriorated, “[w]hich ultimately resulted in the monitor levying some very harsh criticism of the chief in one of the reports”).

<sup>380</sup> Interview #16, *supra* note 372, at 7.

sorts of “changes in direction” have made it hard for the OPD to deliver a consistent and message to frontline officers.<sup>381</sup> The OPD went through six different police chiefs in the last twelve years. By contrast, William Bratton and eventually Charlie Beck provided stable leadership for the LAPD throughout the structural reform litigation era. This unstable leadership, both within the OPD and in city hall, made implementing some parts of the OPD consent decree challenging. For example, according to one respondent, the OPD does not handle its own “technology stuff.”<sup>382</sup> These sorts of technological upgrades come directly from the city. At times, the city’s failure to provide necessary technological upgrades has brought the reform process “to a grinding halt.”<sup>383</sup>

On multiple occasions, the court has extended the negotiated settlement in the OPD case. What was supposed to be a five-year oversight period has grown to over a decade. Recently, the court announced that it would consider the possibility of receivership.<sup>384</sup> Judge Henderson even ordered the parties to prepare briefs on the issue.<sup>385</sup> Eventually, Judge Henderson opted for to appoint a Compliance Director. This Compliance Director is “appointed by and answerable to the Court” and has “‘directive authority’ over Oakland PD, relevant to the existing consent decree.”<sup>386</sup> This Compliance Director can direct individual expenditures up to \$250,000 and can directly discipline, demote, or remove the Chief of Police and Assistant/Deputy Chiefs.<sup>387</sup> Today, the Compliance Director continues to work with the monitor to reform the OPD. The OPD consent decree has now been in place for approximately 12 years. And there is still considerable work to be done.

Indeed, Oakland and Los Angeles are two cities that have taken dramatically different paths. The LAPD made steady progress under stable, supportive leadership during structural reform litigation. City officials generally supported federal intervention. The city allocated the necessary resources to get the job done. And LAPD leadership showed genuine commitment to making substantive reforms. Oakland, by contrast, suffered from death by delay under inconsistent and unsupportive leadership. The OPD seemed so opposed to external change that the first court-appointed monitoring team actually “walked away,” because they believed they could not bring about substantive change.<sup>388</sup> That monitoring team just “didn't feel as a team that [they] could get it done with the leadership that was in place there.”<sup>389</sup> Even after the new monitoring team took over, they quickly realized that the OPD would “not [be] an easy department to deal with.”<sup>390</sup> Consistently, all the monitors involved in OPD case report that the city has been more “contentious” and “resistant” than any other department in the past, making

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<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at 8.

<sup>383</sup> *Id.*

<sup>384</sup> Postel, *supra* note 366.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> Telephone Interview with External Monitor #2, at 6 (July 21, 2013) [hereinafter Interview #2] (transcript on file with author)

<sup>389</sup> *Id.*

<sup>390</sup> Telephone Interview with External Monitor #6, at 9 (July 11, 2013) [hereinafter Interview #6] (transcript on file with author).

progress challenging.<sup>391</sup> All of this suggests that the key to successful structural reform litigation in a police department may be the department's receptivity to outside reform. Put a different way, structural reform litigation can bring about change—that is, if a police department *wants* to change.

## CONCLUSION

Two lessons emerge from the Los Angeles case study. The first lesson is that, under the right conditions, structural reform litigation can be a remarkably effective tool in facilitating organizational reform in a police reforms. Many of the theorized benefits of SRL discussed in Chapter 4 appear to have played a role in the LAPD transformation. Even after the Rodney King and Rampart Scandal, the LAPD seemed unwilling to dedicate significant amounts of money to the cause of police misconduct reform.<sup>392</sup> Federal intervention forced Los Angeles to make a concerted investment in police reform measures. The use of external monitoring led to extensive data on frontline officer behavior in the LAPD. It also led to substantial improvements in how the LAPD internally audited and responded to officer behavior. The initiation of federal intervention also correlated with a change in leadership atop the LAPD. Interviewees and monitor reports suggest that Bratton's support for SRL contributed to the measure's success in Los Angeles. But perhaps the most important revelation from Los Angeles is that the city was able to make substantial improvements in the quality of its police force without significant overall cost. Admittedly, the upfront financial costs of SRL appear to be steep. Over the long haul, though, interviewees suggest that the LAPD has been able to recoup some of this cost through reductions in civil liability for civil rights violations. There is also virtually no evidence to suggest that SRL correlated with any reductions in police efficiency or effectiveness. The evidence suggests that Los Angeles improved the constitutionality of its police force with little compromise. More research is needed to determine whether this pattern is isolated to Los Angeles or more broadly applicable to other SRL cases. This hypothesis—that SRL may contribute to constitutional policing without compromise—is a promising finding that deserves substantially more investigation in the future.

The second lesson from the LAPD case study is less encouraging. The LAPD case study, especially when viewed in light of the Oakland experience, suggests that structural reform litigation is most effective in agencies that are supportive of external intervention. Of course, the police agencies most in need of the DOJ's assistance may be the least supportive of federal intervention. This is a particularly dispiriting realization. Structural reform litigation is a powerful tool for facilitating organizational change in some cases. But it remains unclear whether the DOJ can use this mechanism to reform a police department that strongly opposes federal intervention.

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<sup>391</sup> Telephone Interview with External Monitor #8, at 3 (July 14, 2013) [hereinafter Interview #8] (transcript on file with author); Telephone Interview with External Monitor #11, at 4 (July 1, 2013) [hereinafter Interview #11] (transcript on file with author) (stating “Oakland is a little more resistant to change and resistant to reform”); Telephone Interview with External Monitor #9, at 4 (July 26, 2013) [hereinafter Interview #9] (transcript on file with author) (stating that the “relationship between the city administration and the monitoring team ... has been much more strife-laden” than other cases).

<sup>392</sup> *The Lame Duck Truth Mayor Riordan's Final Budget Speaks to the Sad State of the LAPD*, DAILY NEWS, April 23, 2001, at N12.

APPENDIX A, FORMAL STRUCTURAL POLICE REFORM INVESTIGATIONS INITIATED BY THE DOJ

<b>Agency Name</b>	<b>Opened</b>	<b>Closed</b>	<b>Re-Opened</b>	<b>City</b>	<b>State</b>
<b>Torrance Police Department</b>	5/1/1995	9/14/1998		Torrance	CA
<b>Adelanto Police Department</b>	6/16/1995	9/14/1998		Adelanto	CA
<b>Steubenville Police Department</b>	7/31/1995	3/3/2005		Steubenville	OH
<b>Pittsburgh Police Department</b>	4/11/1996	6/16/2005		Pittsburgh	PA
<b>New Orleans Police Department</b>	4/15/1996	3/23/2004	5/14/2010	New Orleans	LA
<b>New Jersey State Police</b>	4/15/1996	10/26/2009		Newark	NJ
<b>Illinois State Police</b>	4/15/1996	9/27/2002		Chicago	IL
<b>Montgomery County Police Department</b>	6/1/1996	2/1/2005		Montgomery County	MD
<b>Los Angeles Police Department</b>	7/31/1996	5/16/2013		Los Angeles	CA
<b>Beverly Hills Police Department</b>	8/12/1996	11/14/2000		Beverly Hills	CA
<b>New York City Police Department (Eastern District)</b>	8/21/1997	12/23/2004		Brooklyn	NY
<b>Buffalo Police Department</b>	12/9/1997	7/9/2008		Buffalo	NY

<b>Agency Name</b>	<b>Opened</b>	<b>Closed</b>	<b>Re-Opened</b>	<b>City</b>	<b>State</b>
<b>Columbus Police Department</b>	3/13/1998	5/14/2004		Columbus	OH
<b>Eastpointe Police Department</b>	3/20/1998	1/12/2005		Eastpointe	MI
<b>District of Columbia Metropolitan Police Department</b>	1/31/1999	2/10/2012		Washington, D.C.	
<b>New York City Police Department (Southern District)</b>	3/17/1999	3/31/2005		Bronx	NY
<b>Charleston Police Department</b>	3/31/1999	11/12/2003		Charleston	WV
<b>Riverside Police Department</b>	6/29/1999	3/26/2007		Riverside	CA
<b>Prince George's County Sheriff's Office</b>	7/1/1999	1/13/2009		Upper Marlboro	MD
<b>Cleveland Division of Police</b>	10/1/1999	3/15/2005	3/14/2013	Cleveland	OH
<b>Mount Prospect Police Department</b>	4/5/2000	12/28/2006		Mount Prospect	IL
<b>Highland Park Police Department</b>	5/18/2000	12/7/2004		Highland Park	IL
<b>Tulsa Police Department</b>	2/8/2001	7/21/2008		Tulsa	OK
<b>Cincinnati Police Department</b>	5/7/2001	4/12/2007		Cincinnati	OH

<b>Agency Name</b>	<b>Opened</b>	<b>Closed</b>	<b>Re-Opened</b>	<b>City</b>	<b>State</b>
<b>Detroit Police Department</b>	5/29/2001			Detroit	MI
<b>Schenectady Police Department</b>	4/4/2002	1/9/2013		Schenectady	NY
<b>Portland Police Department</b>	5/6/2002	6/27/2005		Portland	ME
<b>Miami Police Department</b>	5/31/2002	5/19/2006	10/11/2011	Miami	FL
<b>Providence Police Department</b>	12/11/2002	3/26/2008		Providence	RI
<b>Villa Rica Police Department</b>	1/27/2003	12/23/2006		Villa Rica	GA
<b>Alabaster Police Department</b>	3/4/2003	9/7/2005		Alabaster	AL
<b>Bakersfield Police Department</b>	6/24/2003	1/25/2008		Bakersfield	CA
<b>Virgin Islands Police Department</b>	2/13/2004			Charlotte Amalie	VI
<b>Beacon Police Department</b>	8/3/2004			Beacon	NY
<b>Warren Police Department</b>	11/29/2004			Warren	OH
<b>Easton Police Department</b>	10/14/2005			Easton	PA
<b>Orange County Sheriff's Office</b>	1/10/2007	4/4/2013		Orlando	FL

<b>Agency Name</b>	<b>Opened</b>	<b>Closed</b>	<b>Re-Opened</b>	<b>City</b>	<b>State</b>
<b>Austin Police Department</b>	5/25/2007	5/27/2011		Austin	TX
<b>Yonkers Police Department</b>	7/24/2007			Yonkers	NY
<b>Puerto Rico Police Department</b>	4/30/2008			San Juan	PR
<b>Harvey Police Department</b>	9/5/2008	1/24/2012		Harvey	IL
<b>Lorain Police Department</b>	11/20/2008	5/22/2012		Lorain	OH
<b>Escambia County Sheriff's Office</b>	12/30/2008	10/14/2012		Pensacola	FL
<b>Maricopa County Sheriff's Department</b>	3/10/2009			Phoenix	AZ
<b>Inglewood Police Department</b>	3/11/2009			Inglewood	CA
<b>Suffolk County Police Department</b>	9/9/2009			Yaphank	NY
<b>East Haven Police Department</b>	9/30/2009			East Haven	CT
<b>Alamance County Sheriff's Department</b>	6/2/2010			Graham	NC
<b>Seattle Police Department</b>	3/31/2011			Seattle	WA

<b>Agency Name</b>	<b>Opened</b>	<b>Closed</b>	<b>Re-Opened</b>	<b>City</b>	<b>State</b>
<b>Newark Police Department</b>	5/9/2011			Newark	NJ
<b>Portland Police Department</b>	6/7/2011			Portland	OR
<b>Meridian Police Department</b>	11/29/2011			Meridian	MS
<b>Missoula Police Department</b>	4/25/2012			Missoula	MT
<b>University of Montana Office of Public Safety</b>	4/25/2012			Missoula	MT
<b>Albuquerque Police Department</b>	11/27/2012			Albuquerque	NM

APPENDIX B, NEGOTIATED SETTLEMENTS BETWEEN DOJ AND POLICE AGENCIES

<b>Agency</b>	<b>Agreement Date</b>	<b>Close Date</b>	<b>Monitor</b>
<b>Pittsburgh Police Department</b>	4/16/1997	6/16/2005	Yes
<b>Steubenville Police Department</b>	9/3/1997	3/3/2005	Yes
<b>New Jersey State Police</b>	12/29/1999	10/26/2009	Yes
<b>District of Columbia Metropolitan Police Department</b>	6/13/2001	2/10/2008	Yes
<b>Los Angeles Police Department</b>	6/15/2001	5/16/2013	Yes
<b>Highland Park Police Department</b>	7/11/2001	12/7/2004	No
<b>Cincinnati Police Department</b>	4/12/2002	4/12/2007	Yes
<b>Columbus Police Department</b>	9/4/2002	5/14/2004	No

<b>Agency</b>	<b>Agreement Date</b>	<b>Close Date</b>	<b>Monitor</b>
<b>Buffalo Police Department</b>	9/19/2002	7/8/2008	No
<b>Mount Prospect Police Department</b>	1/22/0203	12/28/2006	No
<b>Detroit Police Department (1)</b>	6/12/2003		Yes
<b>Detroit Police Department (2)</b>	7/18/2003	12/23/2006	Yes
<b>Villa Rica Police Department</b>	12/23/2003	12/23/2006	No
<b>Prince George's County Police Department (1)</b>	1/22/2004	3/15/2005	Yes
<b>Cleveland Division of Police</b>	2/11/2004	3/15/2005	No
<b>Prince George's County Police Department (2)</b>	3/11/2004	3/12/2007	Yes
<b>Virgin Islands Police Department</b>	3/23/2009		Yes
<b>Easton Police Department</b>	9/8/2010		No
<b>Orange County Sheriff's Office</b>	9/16/2010	4/4/2013	No
<b>Beacon Police Department</b>	12/23/2010		No
<b>Warren Police Department</b>	1/26/2012		No
<b>Seattle Police Department</b>	9/21/2012		Yes
<b>East Haven Police Department</b>	12/21/2012		Yes
<b>New Orleans Police Department</b>	1/11/2013		Yes