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**Publication Date**

2011-02-14

## WHAT POLICE LEARN FROM LAWSUITS

Joanna C. Schwartz\*

*In most departments, police learn little from damage action lawsuits. Suits are defended and resolved with no effort to gather and analyze litigation data in ways that could inform personnel and policy decisions. Given what we know about our legal system, departments' inattention to lawsuits makes some sense. As many have observed, lawsuits are highly imperfect sources of information. Suits are underrepresentative of harms generally and plaintiffs win and lose for reasons – and are compensated at amounts – often divorced from the merits of their claims. Cases drag on for years, and are often brought against individual bad actors instead of the institutional players best suited to address systemic harms.*

*This Article reveals that lawsuits can play an important role in performance improvement efforts, despite these imperfections, by revealing information about the incidence and causes of misconduct. This view is grounded in a study, the first of its kind, which examines the practices of a small handful of law enforcement agencies that systematically pay attention to suits. These departments gather lawsuit data at every stage of the litigation process and use that information to identify personnel and policy weaknesses. Lawsuits have proven valuable sources of information: Suits have alerted departments to incidents of misconduct, and the information developed during the course of discovery and trial has been found to be more comprehensive than that generated through internal channels. The practices in these departments additionally mitigate lawsuits' undeniable flaws. Department practices take advantage of the strengths – while minimizing the weaknesses – of lawsuit data and therefore suggest a promising way to learn from litigation.*

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\* Acting Professor of Law, UCLA School of Law. For helpful conversations and comments I thank Merrick Bobb, Devon W. Carbado, Ann E. Carlson, Sharon Dolovich, Gerald López, Hiroshi Motomura, Stephen C. Yeazell, Noah Zatz, participants in the October 2010 Southern California Junior Faculty Workshop and participants in the Lewis & Clark School of Law workshop in December 2010. Thanks also to those law enforcement officials and auditors who shared their insights and experiences. This Article benefitted from excellent research assistance from Daniel Matusov and CT Turney.

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## INTRODUCTION

On September 17, 2006, two Portland Transit Division officers called out to James Chasse, a schizophrenic man, who was hunched over on the sidewalk in what the officers considered to be a “suspicious” manner.<sup>1</sup> Chase turned, saw the officers, and fled. The officers ran after Chasse and forced him to the ground.

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<sup>1</sup> The facts of Chasse’s arrest are hotly disputed. For the purposes of this description, I rely upon the findings of an outside auditor that studied the events of that evening. See OIR Group, Michael Gennaco, Robert Miller & Julie Ruhlin, *Report to the City of Portland Regarding the In-Custody Death of James Chasse* 8 (2010) [hereinafter Chasse Report] (The officers thought Chasse was “either urinating or possibly injecting drugs into his hand.”)

Chasse died two hours later of blunt force chest trauma; fractured ribs had penetrated his lungs and caused severe hemorrhaging.<sup>2</sup> Chasse's family brought suit against the involved officers.<sup>3</sup>

What do police departments learn from lawsuits like the one brought by Chasse's family? In most departments, the answer is, to put it simply: Not much. To be sure, almost all departments would internally investigate the circumstances of Chasse's in-custody death as a matter of policy.<sup>4</sup> And officials – motivated by the threat of a large judgment, negative publicity, political blowback, or an interest in preventing future similar tragedies<sup>5</sup> – may try to learn all they can about what happened and the personnel and policy implications of the event. But, in most departments, the lawsuit itself will play little role in these efforts. The city attorney will defend the suit, any settlement or judgment will be paid out of the city's coffer, and the department will not keep track of which officers were named, what claims were alleged, what evidence was amassed, what resolution was reached, or what amount was paid.<sup>6</sup>

In this Article, I examine the practices of a small handful of departments that *do* pay close attention to litigation data. This study, the first of its kind,<sup>7</sup>

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<sup>2</sup> See *id.* at 12.

<sup>3</sup> See *id.*; see also Chasse v. Humphries, available at: [http://images.bimedia.net/documents/070208\\_chasse\\_lawsuit.pdf](http://images.bimedia.net/documents/070208_chasse_lawsuit.pdf). The complaint additionally seeks changes in policy, although plaintiffs would be highly unlikely to secure this type of injunctive relief. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

<sup>4</sup> A national survey found that almost all departments require officers to report in-custody deaths. See Anthony M. Pate & Lorie A. Fridell, *Toward the Uniform Reporting of Police Use of Force: Results of a National Survey*, 20 CRIM. JUST. REV. 123 (1995). And standard policy is to conduct some form of investigation into the circumstances of these deaths. See, e.g., POLICE ASSESSMENT RESOURCE CENTER, THE PORTLAND POLICE BUREAU: OFFICER INVOLVED SHOOTINGS AND IN-CUSTODY DEATHS 44 (2003) (describing Portland police department policy).

<sup>5</sup> Scholars have argued that each of these incentives guide law enforcement decisionmaking. See, e.g., Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (arguing that government officials respond to financial incentives); Peter H. Schuck, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983) (arguing that government officials respond to political, bureaucratic, and administrative incentives); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that government officials respond to political incentives); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (arguing that government officials respond to negative publicity).

<sup>6</sup> For a description of these findings, see Joanna C. Schwartz, *Myths and Mechanics of Deterrence*, 57 UCLA L. REV. 1023 (2010).

<sup>7</sup> There has been no empirical examination of organizations that pay attention to lawsuit data. Only two studies to my knowledge have examined the ways complex organizations gather and analyze information from lawsuits, and both studies focused on

focuses on five departments – the Los Angeles Sheriff’s Department and police departments in Seattle, Portland, Denver, and Chicago – that systematically gather and analyze information from lawsuits filed against the department and their officers. I have reviewed voluminous reports that describe these departments’ policies and practices, and have interviewed department officials, police auditors, and their employees.<sup>8</sup>

I find that these five departments gather information from lawsuits at each stage of the litigation process and use that information to identify and correct personnel and policy failures.<sup>9</sup> Lawsuit allegations are investigated to determine whether officer discipline is appropriate, and are considered with other data for possible trends. The evidence developed in discovery and trial is used to identify personnel and policy weaknesses. Trends in settlements and judgments are used to identify units or procedures that should be more carefully monitored. And closed case files, compared with internal investigations, reveal inadequacies in internal investigation processes.

The practices in these five departments suggest an alternative, compelling, and previously overlooked way in which lawsuits can improve organizational performance; by offering insights about the incidence and causes of misconduct. This view of litigation – as a source of information – is distinct from prevailing theories about the relationship between lawsuits and organizational decisionmaking. Lawsuits’ influence on behavior is generally viewed through the lens of deterrence theory; threatened or actual economic penalties are expected to discourage future misbehavior.<sup>10</sup> Yet, the departments in my study focus primarily on the initial allegations of misconduct and the information developed during discovery and trial, not the money paid.<sup>11</sup> Deterrence theory expects that officials deciding which course of action to take weigh the costs of litigation against the benefits of the underlying conduct.<sup>12</sup> But the policies in place in these

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organizations that ignore litigation data. *See* Schwartz, *supra* note 6; GEORGE EADS & PETER REUTER, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* 105-06 (1983).

<sup>8</sup> *See infra* Part I.A for a description of the data and methodology of this study.

<sup>9</sup> For further description of these findings, *see infra* Part I.D.

<sup>10</sup> For foundational descriptions of this theory, *see infra* note 113 and accompanying text.

<sup>11</sup> For a description of department practices, *see infra* Part I.D.

<sup>12</sup> Although deterrence theory traditionally expects that this weighing is conducted to maximize financial interests, some scholars argue that government officials are most interested in maximizing political capital, bureaucratic and administrative needs, or crime control. *See* SCHUCK, *supra* note 5 at 125 (arguing that government officials may tolerate officer misconduct to further “goals such as crime control, intelligence-gathering, or preservation of neighborhood schools,” “[b]ureaucratic needs,” and “[a]dministrative imperatives”); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 475 (2004) (arguing that officials may tolerate police misconduct that reduces crime); Levinson, *supra* note 5 (arguing that “[g]overnment actors respond to political incentives, not *financial* ones”).

departments do not facilitate this sort of weighing. Instead, lawsuits are treated as an indication of an underlying problem to be investigated and analyzed. I do not mean to suggest that these five departments are immune to lawsuits' deterrent effects; large payouts and other negative byproducts of litigation may well inspire officials to take action. But the policies in place in these five departments focus attention on the lessons that can be learned from these lawsuits regardless of individual suits' financial and political ramifications.

Department practices are more akin to those encouraged by theorists and practitioners focused on the identification and reduction of error. Cognitive psychologists, organizational theorists, and systems engineers who study the systemic causes of error emphasize the importance of gathering data about past performance as a way of identifying the types of problems that lead to future harms.<sup>13</sup> This systems analysis approach has been used to improve safety in a number of fields including aviation, nuclear power, and medical care.<sup>14</sup> Notably, lawsuits are not generally recognized as a source of information valuable to these efforts. Lawsuits have, instead, been characterized as a counterproductive distraction; a punitive threat that inhibits the disclosure of error and the kind of open dialogue that leads to performance improvements.<sup>15</sup> My prior research of

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<sup>13</sup> For seminal work in this area see, e.g., James Reason, *Human Error: Models and Management*, 320 BRITISH MEDICAL JOURNAL 768 (2000); James Reason, *MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS* (1997); James Reason, *HUMAN ERROR* (1990).

<sup>14</sup> For descriptions of human error theory applied in the aviation industry, nuclear power industry, and medicine, see Bryan A. Liang, *Error in Medicine: Legal Impediments to U.S. Reform*, 24 J. HEALTH POLITICS, POL'Y & L. 27, 29-31 (1999); Tom Kontogiannis & Strathis Malkis, *A Proactive Approach to Human Error Detection and Identification in Aviation and Air Traffic Control*, 47 SAFETY SCIENCE 693 (2009); J. Bryan Sezton, Eric J. Thomas & Robert L. Helmreich, *Error, Stress, and Teamwork in Medicine and Aviation: Cross Sectional Surveys*, 320 BMJ 745 (2000); Paul Barach & Stephen D. Small, *Reporting and Preventing Medical Mishaps: Lessons from Non-Medical Near Miss Reporting Systems*, 320 BRITISH MEDICAL JOURNAL 759 (2000) (describing "near-miss" reporting systems in aviation, petrochemical processing, steel production, and nuclear power).

<sup>15</sup> This concern has most frequently been articulated in the medical care context. See, e.g., Randall R. Bovbjerg, Robert H. Miller & David W. Shapiro, *Paths to Reducing Medical Injury: Professional Liability and Discipline v. Patient Safety – and the Need for a Third Way*, 29 J.L. MED. & ETHICS 369, 374 (2001) ("To work, patient safety approaches must create an organizational culture of openness to discovery and discussion of problems within clinical settings, but it is doubtful that this culture can coexist with the negative and blaming culture of professional discipline and liability . . . [I]n practice, individually oriented discipline and liability greatly inhibit providers' cooperation with systems managers, particularly the reporting of information about errors and injuries."); William M. Sage, *How Litigation Relates to Health Care Regulation*, 28 J. HEALTH POLITICS, POL'Y & L. 387, 407 (2003) ("Patient safety advocates believe that fear of litigation discourages voluntary reporting of near-misses by physicians and compromises efforts to ascertain root causes of medical errors."); Bryan A. Liang, *Error in Medicine:*

police department practices supports the conclusion that the threat of litigation can have these negative effects.<sup>16</sup>

Yet this Article reveals that lawsuits can, nonetheless, be a source of information valuable to error detection and prevention efforts. Lawsuits have notified officials about misconduct allegations that have not been identified through civilian complaints or other means.<sup>17</sup> And even when incidents have previously come to the department's attention, the information developed during discovery and trial has been found to be richer than that available through internal channels.<sup>18</sup> Department practices also mitigate the undeniable imperfections and limitations of litigation data.<sup>19</sup> Viewed in isolation or in conjunction with other information, lawsuits offer insights about the incidence and causes of individual and organizational failings. And, armed with these insights, departments can – and do – identify ways to improve.

This Article proceeds in four parts. In Part I, I describe my study and findings. In Part II, I offer a theoretical framework for thinking about how these five departments learn from litigation and distinguish their practices from theories of deterrence and error. In Part III, I offer evidence of the value of lawsuit data to police department performance improvement efforts. In Part IV, I describe the ways these five departments mitigate the weaknesses of litigation data. I end with a conclusion outlining areas for additional research in the police context, as well as a consideration of these same questions in other organizational settings.

This Article reveals lawsuits to be a valuable source of information relevant to efforts to improve organizational performance. In illuminating police department practices and recognizing lawsuits' role in and value to performance improvement efforts, this Article ventures into largely uncharted territory. There are, by necessity, relevant and pressing questions that this Article does not attempt to answer. First, I do not enter the already robust debate about what incentives or combination of incentives – financial, political, organizational, or otherwise – guide police department decisionmaking.<sup>20</sup> For those thinking about mechanics of organizational change, optimal liability rules, insurance effects, and the relative importance of legal sanctions, this is an important question to ask. It is, however, a very difficult question to answer; priorities are likely to be highly contextual, dependent on the organizational culture of the department, characteristics of department and city leadership, and contingencies of current events. My

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*Legal Impediments to U.S. Reform*, 24 J. HEALTH POLITICS, POL'Y & L. 27, 39 (1999) (“physicians with tort liability concerns may be hesitant to report adverse events and medical errors for fear that plaintiffs’ attorneys will have access to this information, thus exposing physicians to liability”).

<sup>16</sup> See Schwartz, *supra* note 6 at Part II.D.

<sup>17</sup> For a description of these findings, see *infra* Part III.A.

<sup>18</sup> For a description of these findings, see *infra* Part III.B.

<sup>19</sup> For a discussion of these imperfections and the ways that department policies mitigate these imperfections, see *infra* Part IV.

<sup>20</sup> See *supra* note 5 for scholarship that engages with this question.

guess is that various norms and sanctions play a role that shifts in degree depending on time and circumstance. This Article does not seek to pinpoint the influences guiding the five departments in my study, much less to generalize about law enforcement incentives more generally. Instead, it identifies lawsuits as a source of information that can be relied upon when making decisions to further any one or combination of these priorities.

This Article also does not enter the broader debate about the best ways to improve police accountability and reduce police misconduct. The general consensus is that departments should gather and analyze data about police error and allow some form of oversight.<sup>21</sup> Police departments – including the five departments in my study – are experimenting with a variety of policies and oversight models to achieve these goals. In this Article, I do not assess the relative merits of these five departments’ policies. I do not contend that that these departments have found the best ways to use litigation data, much less that they have found the best ways to regulate police behavior.<sup>22</sup> My aim, instead, is to show that these five departments take advantage of the strengths – while minimizing the weaknesses – of lawsuit data and therefore suggest a promising, and previously unrecognized, way to learn from litigation.

## I. STUDY

### A. Overview

There has been very limited study of the ways that complex organizations process information from lawsuits. A few scholars, including Lauren Edelman and Charles Weisselberg, have studied how legal rules are disseminated in

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<sup>21</sup> See, e.g., Samuel Walker, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (2005) [hereinafter *THE NEW WORLD OF POLICE ACCOUNTABILITY*]; NATIONAL INSTITUTE OF JUSTICE, *CITIZEN REVIEW OF POLICE: APPROACHES AND IMPLEMENTATION* (2001); Douglas W. Perez & William Ker Muir, *Administrative Review of Alleged Police Brutality*, in *POLICE VIOLENCE* (William A. Geller & Hans Toch, eds. 1996).

<sup>22</sup> Despite their policies and oversight, departments in this study continue to have high-profile incidents of apparent police misconduct. See, e.g., Mike Carter, *Justice Department Begins Preliminary Review of Seattle Police*, *SEATTLE TIMES* (Jan. 24, 2011) (reporting that the Department of Justice is investigating a possible pattern of civil rights violations after “highly publicized incidents in which officers have resorted to force, often against people of color”); Chasse Report, *supra* note 1. Auditors in these departments have been criticized for insufficiently rigorous review. See, e.g., P.J. Huffstutter, *This Police Watchdog is Walking a Tough Beat*, *L.A. TIMES* (Feb. 11, 2008) (describing criticism of Chicago’s police auditor); Maxine Bernstein, *Portland Officials Call for Overhaul of Police Oversight*, *The Oregonian* (Mar. 10, 2010) (describing efforts to give Portland auditor subpoena and disciplinary authority).



complex organizations.<sup>23</sup> Margo Schlanger recently studied the ways that claims management systems, developed in response to the threat of litigation, can be used to improve organizational behavior.<sup>24</sup> But the field is barren regarding my focus of inquiry: the ways that complex organizations gather and analyze information from lawsuits that have been filed against them and their employees.<sup>25</sup>

In a previous study, I found that few law enforcement agencies systematically review lawsuits with an eye toward improving officer behavior.<sup>26</sup> In most departments, the city's attorney defends the lawsuits, settlements and judgments are paid out of the city's coffer, and the police department does not keep track of which officers are named in the suits, what claims are alleged, the disposition of the cases, or the amount paid to resolve particular claims.

My research also revealed that, since the mid-1990s, a small but growing number of departments have adopted policies that integrate litigation data into personnel and policy decisionmaking practices.<sup>27</sup> Even departments with such policies falter: Technological problems, human error, and intentional efforts to obfuscate combine to frustrate or prevent data collection and analysis.<sup>28</sup> Yet, I also found, when departments with policies to gather information from lawsuits overcome these implementation problems, lawsuits assist efforts to improve performance. Here, I take a closer look at these relatively rare efforts to gather and analyze litigation data.

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<sup>23</sup> For representative work by Lauren Edelman and her colleagues regarding the dissemination of legal rules through personnel offices, see, e.g., Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 Am. J. Soc. 1589 (2001); Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941 (1999). For work regarding the dissemination of legal rules in police stations, see Charles Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121 (2001).

<sup>24</sup> See Margo Schlanger, *Operationalizing Deterrence: Claims Management (In Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L. 1 (2008). See also Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (studying the effects of threat of litigation in several contexts).

<sup>25</sup> One notable exception is a RAND study of products liability litigation. See Eads & Reuter, *supra* note 7. Another is my prior research regarding police department practices. See Schwartz, *supra* note 6.

<sup>26</sup> See Schwartz, *supra* note 6.

<sup>27</sup> Some have done so as the result of lawsuits brought by the Department of Justice, state government officials, and individuals. Some cities have hired independent personnel who analyze litigation data as part of their efforts to improve police accountability. See *id.* at 1057-58.

<sup>28</sup> See *id.* at 1060-64 for a discussion of these implementation problems.

## B. Data and Methodology

I focus on five departments – in Los Angeles County, Portland, Denver, Seattle, and Chicago – that systematically integrate information from lawsuits into decisions aimed at improving officer and department performance. These departments are in no way typical; I make no claims that their practices are representative of departments more generally.<sup>29</sup> Indeed, I contend that these departments are outliers. They review litigation data most extensively as a matter of policy and most consistently as a matter of practice.

Each of these five departments has an independent auditor who reviews and periodically reports on department practices.<sup>30</sup> I reviewed thousands of pages of reports authored by these auditors about the inner-workings of these five departments.<sup>31</sup> I then used those reports as a backdrop for extensive unstructured interviews with past and current auditors, their staff members, and department officials.<sup>32</sup> I additionally draw on my prior research about law enforcement

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<sup>29</sup> There are, however, some other departments that do share these policies. For a discussion of the prevalence of these policies, *see id.* at 1058-59.

<sup>30</sup> The presence of an outsider also makes these departments unique; few departments have such oversight. *See id.* at 1042 n.104 for data about the prevalence of police auditors.

<sup>31</sup> Twenty-nine semi-annual reports have been written about the Los Angeles Sheriff's Department by Merrick Bobb, the Special Counsel to the Board of Supervisors, and eight annual reports have been written about the LASD by the Office of Independent Review, available at [www.parc.info](http://www.parc.info) and [www.laoir.com](http://www.laoir.com), respectively. The Seattle Office of Professional Accountability has published twelve semi-annual reports, available at <http://www.seattle.gov/police/OPA/publications.htm>. Chicago's Independent Police Review Authority publishes annual and semi-annual reports, available at <http://www.iprchicago.org/resources.html>. The Denver Office of the Independent Monitor publishes quarterly and annual reports available at <http://www.denvergov.org>. And Portland's Independent Police Review Division publishes annual and quarterly reports in addition to reports dedicated to particular issues, available at <http://www.portlandonline.com/auditor/index.cfm?c=27068>.

<sup>32</sup> *See* Telephone Interview With Mary-Beth Baptista, Director, Portland Independent Police Review (December 3, 2010); Telephone Interview With Merrick Bobb, Founding Director, PARC, and Special Counsel, L.A. Sheriff's Dep't, and Oren Root, Deputy Dir., PARC (Oct. 24, 2007); Telephone Interview With John Fowler, Associate Director, Seattle Office of Prof'l Accountability (Oct. 16, 2008); Telephone Interview with Craig Futterman, Univ. of Chi. Law Sch. (Sept. 15, 2008); In-Person Interview with Michael Gennaco, Director, L.A. Sheriff's Dept Office of Independent Review (Sept. 18, 2010); Telephone Interview with Captain Shaun Mathers, Director, L.A. Sheriff's Dep't Risk Management Unit (Sept. 27, 2010); Telephone Interview with Kathryn Olson, Director, Seattle Office of Prof'l Accountability (Aug. 30, 2010); Telephone Interview With Richard Rosenthal, Indep. Monitor, City and County of Denver & former Police Auditor, City of Portland (Sept. 18, 2008); Telephone Interview With Ilana Rosensweig, Chief Admin'r, Chi. Indep. Police Review Auth. (Sept. 15, 2008).

practices across the country.<sup>33</sup>

### C. Departments

Following are brief descriptions of the five departments in my study, focusing on the creation and administration of policies to gather and analyze litigation data. The departments are listed in the order in which such policies were instituted.

*Los Angeles Sheriff's Department.* The Los Angeles Sheriff's Department is the largest sheriff's department and the fourth largest law enforcement agency in the country. Its almost 8300 sworn officers patrol over 3,000 square miles of Los Angeles County and run the country's largest jail system. Although the LASD has among the most extensive systems of accountability, and pays the most attention to the lessons that lawsuits might offer, it did not establish these policies on its own initiative. Instead, in 1991, following a series of high profile events and costly legal settlements and judgments, the Los Angeles County Board of Supervisors called for an independent investigation of the department under the leadership of retired Superior Court Judge James Kolts ("Kolts Commission").<sup>34</sup>

In July 1992, the Kolts Commission issued a "damning" report with recommendations aimed at improving reporting and review of lawsuits and other misconduct allegations, and making more effective policy, training, and discipline decisions.<sup>35</sup> Following the Kolts Commission's recommendations, three new entities were created to identify and manage information and to audit internal practices. First, the Board of Supervisors appointed Merrick Bobb to succeed Judge Kolts as Special Counsel to the Board, and charged him with overseeing the implementation of the Kolts Commission's recommendations.<sup>36</sup> Bobb reviews department policies, procedures, and practices, considers "best practices" from other jurisdictions, reviews the department's litigation trends and costs, reviews closed litigation files for policy implications, and provides semi-annual reports to

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<sup>33</sup> See Schwartz, *supra* note 6, Part II.A, for a description of sources and methodology.

<sup>34</sup> See JAMES G. KOLTS ET AL., LOS ANGELES COUNTY SHERIFF'S DEPARTMENT 1 (1992) [hereinafter KOLTS COMMISSION REPORT] (asserting that the Kolts Commission inquiry was prompted by "an increase over the past years in the number of officer-involved shootings," "four controversial shootings of minorities by LASD deputies in August 1991," and the fact that "Los Angeles County ("the County") had paid \$32 million in claims arising from the operation of the LASD over the last four years"). Merrick Bobb served as General Counsel to the Kolts Commission. *Id.*

<sup>35</sup> MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FIRST SEMI-ANNUAL REPORT 35 (1993) [hereinafter LASD FIRST SEMI-ANNUAL REPORT].

<sup>36</sup> MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FOURTEENTH SEMI-ANNUAL REPORT 55 (2001) [hereinafter LASD FOURTEENTH SEMI-ANNUAL REPORT].

the Board about the LASD.<sup>37</sup> Bobb's original contract was for three years, but the contract has been successively renewed and he has been reporting to the Board of Supervisors ever since. His reports, each of which regularly is more than 100 pages, may be the most extensive and detailed analysis available of a police department's efforts at creating systems of accountability.

Second, following the Kolts Commission's recommendations, the LASD created a risk management bureau, the first law enforcement bureau in the country dedicated to evaluating and reducing risk.<sup>38</sup> The bureau directs administrative investigations of claims when they are filed, identifies trends across claims, and reviews closed case files for possible lessons. The bureau also maintains an early intervention system that tracks information, including lawsuits, in an effort to identify problem officers.

Third, at the recommendation of the Sheriff's Department, the Board of Supervisors created the Office of Independent Review (OIR);<sup>39</sup> a civilian body separate from the department's internal affairs division that is charged with overseeing and participating in the LASD's internal investigations.<sup>40</sup> OIR is the first civilian oversight organization of its kind.<sup>41</sup>

*Seattle Police Department.* Seattle has a population of 560,000 with 1,240 sworn officers.<sup>42</sup> In 1999, after a high-profile scandal,<sup>43</sup> a civilian panel was appointed to study the police department's internal investigation processes. Based on the panel's recommendations, the department appointed a civilian director of

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<sup>37</sup> *Id.* at 55-56.

<sup>38</sup> See MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, THIRD SEMI-ANNUAL REPORT 12, 14 (1994).

<sup>39</sup> See OFFICE OF INDEP. REVIEW, COUNTY OF L.A., FIRST REPORT ii (2002) [hereinafter OIR FIRST REPORT]. A group of civil rights advocacy groups had approached Baca to complain about an incident in which members of the department harassed an Asian-American deputy. Baca suggested civilian oversight of the internal affairs bureau and the advocacy groups lobbied the Los Angeles Board of Supervisors to support the proposal. See LASD FOURTEENTH SEMI-ANNUAL REPORT, *supra* note 36 at 57-58.

<sup>40</sup> See OIR FIRST REPORT, *supra* note 39 at ii.

<sup>41</sup> See LASD FOURTEENTH SEMI-ANNUAL REPORT, *supra* note 36 at 56. Other forms of civilian oversight predate OIR, including civilian complaint review boards. OIR argues that it is better suited to fulfill its responsibilities because, in contrast to models with volunteer or part-time overseers, OIR attorneys' "full-time status. . . ensures complete dedication to the tasks of oversight, without conflicting demands." OIR FIRST REPORT, *supra* note 39 at 1.

<sup>42</sup> SAMUEL WALKER, REVIEW OF NATIONAL POLICE OVERSIGHT MODELS 19 (2005)

<sup>43</sup> See Jim Brunner, *New System in Place for Policing the Police*, SEATTLE TIMES (May 7, 2002) (describing the scandal, in which a homicide detective stole \$10,000 from the home of a dead man, and at least eighteen police officials knew of the incident but no internal investigation ever took place).

the internal affairs unit, called the Office of Professional Accountability (OPA).<sup>44</sup> The OPA director reviews civilian complaints and lawsuits and investigates the most serious claims.<sup>45</sup> The OPA director additionally tracks lawsuit data in an early intervention system, reviews suits for trends across cases, and reviews closed case files.<sup>46</sup> The department has two additional forms of oversight; an auditor who reviews complaints and OPA investigations and a three-member citizen panel that reviews closed OPA investigations.<sup>47</sup>

*Portland Police Department.* Portland has a population of approximately 537,000, and a police force of 1,050. In 2001, the Portland City Council approved the creation of an independent auditor, the Independent Police Review Division (IPR), to receive and copies of civilian complaints, refer complaints to internal affairs for investigation, review internal affairs' investigations, and conduct independent and joint investigations.<sup>48</sup> A civilian review committee was simultaneously formed to review investigation appeals, hold community meetings, and review department policies.

In 2004, the IPR director, Richard Rosenthal, recommended that the IPR begin reviewing and investigating lawsuits in the same manner that it reviewed civilian complaints.<sup>49</sup> The mayor opposed the proposal, arguing that internal investigations would be "a violation of . . . fiduciary responsibility" to the city's taxpayers because the findings of these investigations might result in higher settlements.<sup>50</sup> The chief of police argued it was the job of the city attorney, not the police auditor, to review lawsuits.<sup>51</sup> Ultimately, the Portland City Council agreed with Rosenthal and amended the local ordinance preventing investigations of claims made in litigation.<sup>52</sup> Portland's auditor currently reviews legal claims

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<sup>44</sup> *See id.*

<sup>45</sup> *See Walker, supra* note 42 at 19.

<sup>46</sup> *See Telephone Interview with John Fowler, supra* note 32.

<sup>47</sup> Brunner, *supra* note 43 (noting that formation of the civilian panel was delayed because of disputes with the union); Walker, *supra* note 42 at 19.

<sup>48</sup> INDEP. POLICE REVIEW DIV., OFFICE OF THE CITY AUDITOR, THE CITY OF PORTLAND'S HANDLING OF TORT CLAIMS ALLEGING POLICE MISCONDUCT: A NEED FOR CONSISTENT REFERRALS TO THE INTERNAL AFFAIRS DIVISION 7 (2004) [hereinafter PORTLAND TORT CLAIMS REPORT].

<sup>49</sup> Prior to 2004, the Portland Police Bureau "generally did not review or investigate tort and civil rights claims for disciplinary action unless the complaining party also filed a citizen complaint." Portland actually had a city ordinance preventing internal investigations while a lawsuit was pending. *See id.* at 3.

<sup>50</sup> Letter From Vera Katz, Mayor, Portland, Or. to Gary Blackmer, City Auditor, Portland, Or. (Aug. 26, 2004) (on file with author).

<sup>51</sup> *See* Letter From Chief Derrick Foxworth, Portland Bureau of Police to Gary Blackmer, City Auditor, Portland, Or. (Aug. 27, 2004) (on file with author).

<sup>52</sup> *See Telephone Interview With Richard Rosenthal, supra* note 32; Portland, Or. City Code ch.3.21 § 110(B) (codification of the new ordinance).

when filed, identifies those claims that have not previously been brought as civilian complaints, and internally investigates the most serious claims.<sup>53</sup> The auditor looks for trends across claims and reviews closed case files after the litigation is complete.<sup>54</sup>

*Denver.* Denver has a population of 566,000, and a police force of 1,405. Denver's Office of the Independent Monitor (OIM) was approved by their city council in 2004, and, in 2005, Richard Rosenthal left his post as Portland's auditor to become Denver's OIM Director.<sup>55</sup> The OIM, an entity independent of internal affairs, is responsible for overseeing internal affairs investigations and making personnel recommendations to the chief of police.<sup>56</sup> When Richard Rosenthal joined Denver's OIM, the department agreed to begin reviewing all tort claims and to internally investigate the underlying allegations when appropriate. Rosenthal additionally reviews claims for trends.<sup>57</sup>

*Chicago.* Chicago has a population of 2.8 million, and employs over 13,000 uniformed officers. In 2007, after a series of scandals, Chicago's internal affairs division was replaced with an independent investigative agency, the Independent Police Review Authority (IPRA).<sup>58</sup> The civilian appointed to head the division, Ilana Rosensweig, was previously an attorney at LASD's OIR.<sup>59</sup> Rosensweig has authority to investigate claims made in litigation for disciplinary and policy concerns, and reviews closed litigation files to determine whether an internal investigation should be reopened.<sup>60</sup>

#### D. Policies

The Los Angeles Sheriff's Department and the departments in Seattle, Portland, Denver, and Chicago gather and analyze information from lawsuits

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<sup>53</sup> See Telephone Interview with Mary-Beth Baptista, *supra* note 32.

<sup>54</sup> See, e.g., Eileen Luna-Firebaugh, *Performance Review of the Independent Police Review Division* 86 (2008).

<sup>55</sup> DENVER OFFICE OF THE INDEPENDENT MONITOR, FIRST ANNUAL REPORT (2005).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; Telephone Interview with Richard Rosenthal, *supra* note 32.

<sup>58</sup> Libby Sander, *Chicago Revamps Investigation of Police Abuse, but Privacy Fight Continues*, N.Y. TIMES (July 20, 2007) (describing the "string of scandals" as follows: "An off-duty officer was caught on videotape beating a female bartender. In another incident, also captured on videotape, a group of off-duty officers was seen beating four businessmen at a downtown bar. In addition, several officers in an elite unit are awaiting trial on charges that include home invasion, theft and armed violence, as county prosecutors continue to investigate the unit.")

<sup>59</sup> See Telephone Interview With Ilana Rosensweig, *supra* note 32.

<sup>60</sup> See *id.*

brought against them and their officers at each stage of the litigation process.

## 1. Review of Claims and Suits

Each of the five departments in my study review lawsuits and claims (a prerequisite to suits filed in state court) when they are first filed. Departments may make litigation decisions based on this initial review: officials identify those claims they wish to settle early or mediate, and may begin considering litigation strategies for the claims they plan to contest.<sup>61</sup> The departments in my study (and their auditors) additionally incorporate the allegation of misconduct articulated in the legal claim into various systems aimed at identifying incidents and trends of misconduct.

### a. *Early Intervention Systems*

Two of the departments in my study – the LASD and the Seattle police department<sup>62</sup> – incorporate lawsuit claims information into their early intervention systems; computerized<sup>63</sup> systems that track various pieces of information in an

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<sup>61</sup> See LASD FIRST SEMI-ANNUAL REPORT, *supra* note 35 (noting LASD efforts to reduce litigation costs through “participation in the management of litigation to shape strategy and control costs, active involvement by the LASD in decisions to settle or try individual cases, and deployment of LASD investigatory resources so that the Department and counsel are better able to defend the LASD in litigation against it and win meritorious cases”). Departments also attempt to mediate or quickly settle cases for reduced sums. For an overview of police department mediation efforts, see Samuel Walker, Carol Archbold & Leigh Herbst, *MEDIATING CITIZEN COMPLAINTS AGAINST POLICE OFFICERS: A GUIDE FOR POLICE AND COMMUNITY LEADERS* (2002).

<sup>62</sup> Of the five departments in my study, the Los Angeles Sheriff’s Department and the Seattle Police Department track litigation data in their early intervention system. Portland and Denver have early intervention systems, though litigation data is not included. And the Chicago Police Department’s system is still being developed. Yet national data suggests that early intervention systems are the most frequently used system to track and analyze data about officer performance. See Schwartz, *supra* note 6 at 1058-59.

<sup>63</sup> Early intervention systems are not always computerized; some departments, particularly smaller departments, may engage in this analysis without computerized assistance. See, e.g., International Association of Chiefs of Police, *Protecting Civil Rights: A Leadership Guide for State, Local, and Tribal Law Enforcement* 52 (2006) [hereinafter *Protecting Civil Rights*], available at: <http://www.cops.usdoj.gov/files/ric/Publications/e06064100.pdf>; Memoranda of Agreement between the United States and the City of Villa Rica, Georgia at ¶ (Dec. 23, 2003) (allowing that the early intervention system “need not be computerized”).

effort to identify at-risk officers and improve their performance before they engage in significant misconduct.<sup>64</sup>

Nationally, departments vary widely in the number of performance indicators they track,<sup>65</sup> but the most commonly relied upon performance indicators are citizen complaints, use-of-force reports, and firearm discharges.<sup>66</sup> Departments also track a variety of other indicators, including lawsuits,<sup>67</sup> administrative investigations, and officer commendations. Some systems also include information about arrests, sick days, and secondary employment; these are not, in themselves, indicators of misconduct, but can be used to contextualize other information in the system.<sup>68</sup>

Police department officials review early intervention system data to determine when an officer should be more closely evaluated. Many early intervention systems send out an alert when an officer's behavior passes a pre-set

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<sup>64</sup> For helpful descriptions of early intervention systems, see THE NEW WORLD OF POLICE ACCOUNTABILITY, *supra* note 21; *Protecting Civil Rights*, *supra* note 63 at 49-77; Samuel Walker, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES: A PLANNING AND MANAGEMENT GUIDE 27 (2003) available at <http://www.cops.usdoj.gov/files/RIC/Publications/e07032003.pdf>.

<sup>65</sup> The settlement agreement entered into between the Department of Justice and the City of Detroit has twenty-six variables. See Consent Judgment, Use of Force and Arrest and Witness Detention ¶ 80, *United States v. City of Detroit*, No. 03-72258 (E.D. Mich. June 12, 2003) [hereinafter *Detroit Consent Judgment*]. In contrast, the settlement agreement entered into between the Department of Justice and the Buffalo police department requires that the department develop an early intervention system that tracks only four types of data. See Memorandum of Agreement Between the United States Department of Justice and the City of Buffalo at ¶ 20A (Sept. 19, 2002).

<sup>66</sup> *Protecting Civil Rights*, *supra* note 63 at 56.

<sup>67</sup> Information about lawsuits is usually entered into the early intervention system at the time the case is filed, although some departments update the early intervention system to note the progress and disposition of the suits. See *Detroit Consent Judgment* at ¶ 80 (requiring that the early intervention system be updated to note the disposition of the case); LASD FIRST SEMI-ANNUAL REPORT, *supra* note 35 (noting that the Los Angeles Sheriff's Department's early intervention system tracks multiple pieces of data about the lawsuit, including "(1) the parties to the lawsuit and their respective counsel; (2) the causes of action and damages sought; (3) a synopsis of the allegations giving rise to the lawsuit; (4) important dates in the litigation; and (5) the ultimate fate of the lawsuit, such as trial verdict or settlement amount.")

<sup>68</sup> For example, the frequency with which an officer uses force can be considered in connection with the officer's number of arrests. Sick days, on their own, may not be indicators of misconduct but can suggest substance abuse problems, particularly when regularly taken after holidays or weekends. See *Protecting Civil Rights*, *supra* note 63 at 56; THE NEW WORLD OF POLICE ACCOUNTABILITY, *supra* note 21 at 108; Telephone Interview With Keith Shaddix, Police Captain, City of Villa Rica (Oct. 9, 2008) (describing the ways in which data such as sick days are used to identify problem officers).



threshold.<sup>69</sup> Some departments also review the data periodically and/or when considering an officer for promotion or transfer.<sup>70</sup>

Once an officer is triggered by the system, a supervisor determines whether some sort of intervention is necessary based on the totality of the circumstances.<sup>71</sup> Supervisors are instructed not only to think of the officer's job performance but also his personal situation and family circumstances when deciding whether to intervene.<sup>72</sup> Supervisors then craft interventions to best address the issues facing the particular officer. Two case studies described by police practices expert Samuel Walker illustrate the personalized nature of these interventions.

In one large police department, a police officer was flagged by the EI system because of a high number of use of force incidents. The counseling session with the officer revealed that she had a great fear of being struck in the face, and as a consequence was not properly taking control of encounters with citizens. After losing control with the person or persons, she would then have to use

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<sup>69</sup> Some early intervention systems have “fixed threshold alerts,” requiring reviews whenever an officer accumulates a certain number of indicators over a set period. *Protecting Civil Rights, supra* note 63 at 59. A 2001 study found that, of the early intervention systems that track civilian complaints, “most (67 percent) require three complaints in given timeframe (76 percent specify a 12-month period) to identify an officer.” Samuel Walker, Geoffrey P. Albert, and Dennis J Kenney, *Early Warning Systems: Responding to the Problem Police Officer 2* (July 2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188565.pdf>. Others have “point system threshold alerts,” requiring review whenever an officer accumulates a certain number of points, and indicators have different point values depending on their severity. And other departments have “peer-based threshold alerts,” requiring review when an officer's indicators deviate substantially from her peers in the department. *See Protecting Civil Rights, supra* note 63 at 59-60 for further description of these thresholds by departments across the country.

<sup>70</sup> *See* Schwartz, *supra* note 6 at 1053 n.185.

<sup>71</sup> Interventions generally involve counseling or retraining of selected officers. *See THE NEW WORLD OF POLICE ACCOUNTABILITY, supra* note 21 at 115. Counseling can range “from the very informal, such as a discussion of the indicating event with a supervisor, to the more formal, such as a referral to psychological counseling, stress management, or substance abuse programs through a department's employee assistance program.” *See Protecting Civil Rights, supra* note 63 at 65. Interventions are not, however, generally disciplinary in nature. The goal is to intervene before discipline is necessary. For a description of the Los Angeles Sheriff's Department's Personnel Review Committee meetings and decisionmaking process, see MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FIFTEENTH SEMI-ANNUAL REPORT 45-48 (2002) [hereinafter LASD FIFTEENTH SEMI-ANNUAL REPORT].

<sup>72</sup> “Understanding the critical factors, both on and off the job, will help supervisors decide when to intervene and to tailor needed interventions to individual officers' needs.” *Protecting Civil Rights, supra* note 63 at 62.

force to reassert control. Her supervisor referred her to the training unit, where she was instructed in tactics that would allow her to protect herself while maintaining control of encounters with the potential for conflict. As a result, her use of force incidents declined dramatically.

In another large department, a patrol officer was identified by the EI system because of a series of use of force incidents. During the intervention session the officer's supervisor discovered that he was having severe personal financial problems. The supervisors recommended professional financial consulting, the officer followed this advice, and his performance improved significantly.<sup>73</sup>

Following intervention, the department monitors the officer's performance. "Precise protocols for post-intervention monitoring are as uncommon as they are for intervention itself,"<sup>74</sup> but departments generally track officers for a period of time, paying particular attention to the types of incidents that initially triggered intervention.

To be sure, early intervention systems can fail or stall at each stage of development and implementation. My research has revealed that departments can take years to design their early intervention systems, and then, once designed, software and hardware malfunctions can further delay systems' operationalization.<sup>75</sup> Even when an early intervention system is in place, auditors and monitors have found that officials input inaccurate and incomplete information into the systems, underuse and misuse their systems when extracting information from the systems, and make seemingly biased decisions about the need for intervention and the type of intervention required.<sup>76</sup>

Yet, early intervention systems, when properly used, do appear to reduce officer misconduct. A study of the Los Angeles Sheriff's Department found that when officers were identified for intervention, their shootings, uses of force, and civilian complaints declined.<sup>77</sup> After their two-year monitoring period ended, their performance improvements continued.<sup>78</sup> A National Institute of Justice study of three departments found significant drops in civilian complaints after officers were placed on intervention.<sup>79</sup> Anecdotal evidence from other departments

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<sup>73</sup> THE NEW WORLD OF POLICE ACCOUNTABILITY, *supra* note 21 at 102.

<sup>74</sup> *Protecting Civil Rights*, *supra* note 63 at 65.

<sup>75</sup> See Schwartz, *supra* note 6 at notes 224-28 and accompanying text.

<sup>76</sup> See Schwartz, *supra* note 6 at notes 229-30 and accompanying text.

<sup>77</sup> See LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 71 at 3.

<sup>78</sup> See *id.*

<sup>79</sup> "In Minneapolis, the average number of citizen complaints received by officers subject to early intervention dropped by 67 percent 1 year after the intervention. In New Orleans, that number dropped by 62 percent 1 year after intervention. In Miami-Dade,

supports the notion that early intervention systems are helpful tools for improving officer behavior.<sup>80</sup>

*b. Trend Analysis*

All five departments in my study use initial claims and lawsuit allegations to identify problem units and types of behavior.<sup>81</sup> The Portland auditor, for example, once identified a pattern in lawsuits suggesting that officers did not understand their authority to enter a home without a warrant.<sup>82</sup> In response, the City Attorney's office made a training video on this issue, and it "nearly disappeared as a problem."<sup>83</sup>

When a claim is filed against the Los Angeles Sheriff's Department, the risk management bureau has the involved station investigate the allegations. The risk management bureau then reviews the completed claim file in conjunction with other claims to determine whether the incident is part of a trend. The centralized nature of risk management's review can reveal patterns that would not have been apparent to individual stations or officers. As the director of the bureau explained:

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only 4 percent of the early warning cohort had zero use-of-force prior to intervention; following intervention, 50 percent had zero use-of-force reports." Samuel Walker, Geoffrey P. Alpert, and Dennis J. Kenney, *Early Warning Systems: Responding to the Problem Police Officer* (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188565.pdf>. It is worth noting, however, that none of these three departments track information from lawsuits in their early intervention systems.

<sup>80</sup> See EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES, *supra* note 64 at 69.

<sup>81</sup> There is no national data about the prevalence of this type of trend analysis. The statistics about the prevalence of early intervention systems can offer some guidance, given that trends are sometimes identified through early intervention systems. See Schwartz, *supra* note 6 at 1059. Yet, statistics about national use of early intervention systems should not be relied heavily upon. Departments may not use their early intervention systems for this purpose. And other departments – including Chicago, Seattle, Denver, and Portland – conduct some manner of trend analysis without a computerized system. See Telephone Interview With Ilana Rosensweig, *supra* note 32; Telephone Interview With John Fowler, *supra* note 32; Telephone Interview With Richard Rosenthal, *supra* note 32. Finally, departments with policies to review lawsuits for trends may not do so in practice. Those departments reliant upon early intervention systems for their trend analyses will suffer from the same technological problems, errors, and incomplete information described *infra* notes 75-76 and accompanying text. And department officials that look for trends without computerized assistance may experience difficulties identifying trends, see Schwartz, *supra* note 6 at 1063.

<sup>82</sup> Luna-Firebaugh, *supra* note 54 at 86.

<sup>83</sup> *Id.*

There's times when [the station] thinks it's a single incident but when we get it we know that we've had two or three or whatever number there are. . . . An example of that is one that we have from our jails where inmates would go to the doctor and for some medical reason the doctors would hand them a note to have a bottom bunk in the jail. They would then go to an outlying custody facility and . . . [t]he outlying custody facility had no access to those records and so when the inmate got there they would say "get on the top bunk," you know, "that's where you're assigned," and you know something would happen, they would fall and get hurt. Well, each unit, from two or three units we got claims individually. They couldn't see the problem but by having it centralized in our operation we were able to say "we're seeing a pattern here, a problem across all the units and it's a communication issue," and had our custody division work on that. . . . [Y]ou know a station sees a tree . . . I get the benefit of the forest.<sup>84</sup>

OIR, Merrick Bobb, and LASD division officials have identified several trends by reviewing legal claims in this manner.<sup>85</sup>

*c. Investigations of Claims*

Each of the departments in my study evaluates the allegations in legal claims to determine whether an internal investigation should be conducted.<sup>86</sup>

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<sup>84</sup> Telephone Interview with Captain Mathers, *supra* note 32.

<sup>85</sup> In one report, the auditor identified several pending cases against the Court Services Division of the LASD relating to the transporting and searching of inmates, and vehicle pursuits. See MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, SEVENTH SEMI-ANNUAL REPORT 55-56 (1997) [hereinafter LASD SEVENTH SEMI-ANNUAL REPORT]. The auditor recommended that the department reexamine policies and procedures in both arenas. See *id.* When the auditor noticed that one station had several claims alleging that deputies had gone to the wrong address in response to a call, the OIR "raised with the unit commander the need for his staff to be alerted to this problem and ensure supervisors explain to the affected individuals what occurred, how the mistake was made, and why the officers did what they did." OFFICE OF INDEP. REVIEW, COUNTY OF L.A., SECOND ANNUAL REPORT 40-41 (Oct. 2003) [hereinafter OIR SECOND ANNUAL REPORT]. In another report, the auditor observed that the LASD Field Operations Region I undertook its own study of claims and lawsuits filed during 2000 and 2001. Region I "correlated claims and lawsuits with in-service training needs and considered the possible effectiveness of comprehensive force review panels and station traffic review committees." LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 71 at 110-111.

<sup>86</sup> There has been no study of the number of departments that internally investigate litigation claims, but police practices experts recently described this type of policy as rare.

Departments compare the allegations in claims and lawsuits with misconduct allegations and investigate those claims that had not previously been reported to the department.<sup>87</sup> Depending on the severity of the allegations, the investigation may either be conducted by the unit's supervisor or by internal affairs. If the allegations are substantiated, the officers involved may be disciplined, retrained, or terminated.

## 2. Reviews of Closed Case Files

Three of the departments in my study – Chicago, Seattle, and the Los Angeles Sheriff's Department – review the closed litigation file at the conclusion of the case. These departments consider whether the information developed during discovery and trial has personnel and policy implications.

The Chicago police auditor compares the information in the closed litigation files with the internal investigation of the same claim. If the internal investigation was closed without a finding of wrongdoing, and the litigation file identifies new witnesses or previously unavailable testimony or evidence, the auditor can reopen the internal investigation.<sup>88</sup>

The LASD and the Seattle Police Department review closed litigation files for policy and training implications. The LASD's auditor conducts "biopsies" of closed lawsuits "to assess how new training plays out on the street, or to determine whether new training is needed."<sup>89</sup> The director of LASD's risk management bureau estimates that lawsuits reveal policy weaknesses approximately ten times per year, and deputy performance problems 25-30 times per year.<sup>90</sup> The Seattle Police Department similarly evaluates closed claims for personnel and policy implications.<sup>91</sup>

The LASD is separately required to provide the Board of Supervisors – responsible for paying settlements and judgments on behalf of the department – with a corrective action plan outlining the policy implications of each case ending in a settlement or judgment for more than \$20,000 and the actions that will be

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*See* Schwartz, *supra* note 6 at 1059. In most departments, legal claims are investigated and defended with no effort to incorporate findings into personnel and policy decisions.

<sup>87</sup> *See, e.g.*, Interview with Michael Gennaco, *supra* note 32 (noting that the Office of Independent Review will "ensure that when claims come in we get them, we review them, and if there are issues that suggest that an internal affairs investigation or an administrative investigation is needed, we will push to have that happen.")

<sup>88</sup> *See* Telephone Interview with Ilana Rosensweig, *supra* note 32.

<sup>89</sup> MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, THIRD SEMI-ANNUAL REPORT 12 (Dec. 1994).

<sup>90</sup> *See* Interview with Captain Mathers, *supra* note 32.

<sup>91</sup> *See* Telephone Interview with John Fowler, *supra* note 32.

taken to reduce the likelihood of similar incidents in the future.<sup>92</sup>

Large settlements and judgments can prompt closer review of cases.<sup>93</sup> Auditors will look even closer at cases where there was a large payout in the court case, but the officer was exonerated after an internal investigation.<sup>94</sup> Lessons have also, however, been learned from cases when significant money was not paid. In one instance, a deputy from the K9 unit of the Los Angeles Sheriff's Department took his dog to a park for a walk and the dog bit a man. The department paid the man's medical costs and an additional small settlement. Even though the bite was accidental and the settlement was minimal, the K9 unit reviewed and changed its policies to prevent future similar events.<sup>95</sup>

### 3. Reviews of Payout Trends

Just as initial filings are used to suggest troublesome units and practices, settlement and judgment trends have been used to identify those areas of the department that may be underperforming. The Los Angeles Sheriff Department's Special Counsel conducts a semi-annual review of trends in the department's

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<sup>92</sup> For a description of one such corrective action report, see MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, ELEVENTH SEMI-ANNUAL REPORT 64 (Dec. 1999) [hereinafter LASD ELEVENTH SEMI-ANNUAL REPORT].

<sup>93</sup> For example, a large court verdict following an off-duty shooting prompted an analysis all of the incidents involving off-duty officers that internal affairs responded to over a three-year period. Based on that review, the auditor recommended stricter policies regarding off-duty officers and alcohol. See LASD SEVENTH SEMI-ANNUAL REPORT, *supra* note 85 at 61. For other discussions of large settlements against the LASD, see LASD ELEVENTH SEMI-ANNUAL REPORT, *supra* note 92 at 58-59.

<sup>94</sup> Telephone Interview with John Fowler, *supra* note 32 (describing the Seattle auditor's review of such cases to determine whether the officers' conduct was "lawful but awful," justifying the findings of the internal investigation, or whether there is an unwarranted disconnect between the results of the lawsuit and the internal investigation). When the LASD auditor reviewed 29 cases of police misconduct that settled for over \$100,000 and found that only eight involved any disciplinary action, the auditor questioned the strength of the department's internal investigatory procedures. MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, NINETEENTH SEMI-ANNUAL REPORT 30 (2005) [hereinafter LASD NINETEENTH SEMI-ANNUAL REPORT]. In another instance, the LASD auditor found it "ironic and somewhat puzzling that the County's lawyers and the Board of Supervisors can judge the risk of loss to be sufficiently great to believe it to be in the best interest of the County to settle for \$500,000 and incur \$200,000 in attorney's fees but the LASD, on the other hand, is paralyzed from taking any disciplinary action against the deputy because it cannot figure out who to believe, the deputy or" the plaintiff. LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 71 at 72.

<sup>95</sup> OFFICE OF INDEP. REVIEW, COUNTY OF L.A., SEVENTH ANNUAL REPORT 17 (2009), available at <http://www.laoir.com/reports/SeventhAnnualRept.pdf>.

settlements and judgments.<sup>96</sup> The trend review has been used to suggest, in general terms, the effectiveness of the accountability practices in the department.

In one review, the LASD's auditor reviewed settlements across the department and found that two stations – Century and Lenox – were responsible for 70% of the police misconduct litigation and 60% of the settlement dollars paid over a six-month period.<sup>97</sup> The auditor then conducted an in-depth investigation of Century station, what the auditor considered to be “LASD's most troubled station.”<sup>98</sup> The auditing team

spent several weeks stretched over five months at the station, reviewing documents, interviewing station management, speaking with deputies, learning about the community, and gathering facts. We also rode along with deputies on patrol and “flew along” with a helicopter crew that provides air support to LASD patrol operations. We engaged a police officer, who had worked in the two south Los Angeles Police Department stations adjoining Century, to work with three of our team members and help us interpret what we saw.<sup>99</sup>

The auditor found that the station – one of the most active in the department – had too many rookies, was using inexperienced deputies as trainers, had too few senior administrators, and had too few African-American and Spanish-

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<sup>96</sup> Richard Rosenthal, Denver's auditor, recently requested that the department begin to collect “how much money has been paid out by the Police and Sheriff's Departments, based on allegations of misconduct, over the course of the past few years,” and despaired of the fact that “the Department of Safety has no data information in this regard and has no tools to identify trends in litigation which could be used to identify, on a systemic basis, where training resources or policy reviews would be best used.” DENVER OFFICE OF THE INDEPENDENT MONITOR, ANNUAL REPORT 2009 at 5-8 (2009).

<sup>97</sup> LASD SEVENTH SEMI-ANNUAL REPORT, *supra* note 85 at 52-53. The auditor also observed that these stations were responsible for a disproportionate number of “significant force events,” shootings, and civilian complaints, and that “stations in equally tough neighborhoods have a much better record on controlling shootings, force, and litigation.” *Id.* at 53.

<sup>98</sup> See MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, THIRTEENTH SEMI-ANNUAL REPORT 9 (2000) [hereinafter LASD THIRTEENTH SEMI-ANNUAL REPORT]. Bobb also considered Century Station to be “a microcosm of American policing in inner city, crime-ridden, minority neighborhoods.” LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 71 at 1. This investigation was presented not only as an audit of the department, but also a means of examining LASD policies implemented as a result of the Kolts Commission report. See MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, NINTH SEMI-ANNUAL REPORT 7-8 (1998) [hereinafter LASD NINTH SEMI-ANNUAL REPORT].

<sup>99</sup> LASD NINTH SEMI-ANNUAL REPORT, *supra* note 98 at 9.

speaking deputies.<sup>100</sup> The auditor recommended that the station have fewer rookies at any given time, encourage training officers to stay in their positions so that they could become more experienced, encourage senior personnel to remain at Century station, decrease the sergeant-to-patrol deputy ratio, and increase staff diversity.<sup>101</sup> The auditor also identified training and policy changes to address trends in the shootings by Century station deputies.<sup>102</sup> When the auditor reviewed Century Station two years later, he found that the number of shootings at the station had dropped dramatically, even as the crime statistics and arrests remained stable.<sup>103</sup>

#### *E. The Effect of Lawsuit Data on Behavior*

My study does not attempt to quantify the effects of litigation data on these five departments. Others who have attempted to measure the effects of litigation on behavior have struggled to identify the proper metric to measure future events and control for all the unrelated variables that might affect outcomes.<sup>104</sup> The practices of the departments in my study make it especially difficult to measure the effect of the information in lawsuits on behavior. Departments are engaged in a variety of efforts aimed at reducing misconduct, only some of which involve litigation data. And when departments do use litigation data, they view that data in connection with multiple other pieces of information.<sup>105</sup> Moreover, a variety of implementation problems mean that departments are not always weighing complete information, and are not always evaluating the information in sound ways.<sup>106</sup>

The LASD's special counsel's research does reflect, however, that its efforts more generally have reduced the costs of lawsuits against the department. The first five years of the special counsel's services – costing \$1 million dollars in

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<sup>100</sup> *Id.* at 8.

<sup>101</sup> *Id.* at 9.

<sup>102</sup> *Id.* at 17-26.

<sup>103</sup> While Century Station was, in 1997, responsible for 60% of the shootings by deputies, two years later it was responsible for only 10% of the shootings. *See* LASD THIRTEENTH SEMI-ANNUAL REPORT, *supra* note 98 at 11. Two years later, Bobb found that these downward trends had reversed themselves as the Department was less committed to its risk management efforts: uses of force and shootings increased throughout the Department, but particularly at Century Station. LASD FOURTEENTH SEMI-ANNUAL REPORT, *supra* note 46 at 89-90.

<sup>104</sup> *See, e.g.,* Michelle Mello & Troyen Brennan, *Deterrence of Medical Errors*, 80 TEX. L. REV. 1595, 1613 (2001) (recognizing that there is a wide choice of measures for deterrence and that each would affect the outcome of the study).

<sup>105</sup> *See supra* Part I.D for descriptions of this contextual analysis.

<sup>106</sup> *See* Schwartz, *supra* note 6 at Part II.D (describing common implementation problems).



total – decreased the county’s litigation costs by \$30 million.<sup>107</sup> And there is no evidence that these accountability efforts have chilled officer conduct. When the special counsel measured a drop in lawsuits against the department’s crime control activities, he found that “the progress of the Department in limiting its exposure has not come at the expense of police activity in the LASD’s patrol operations.”<sup>108</sup>

My study has also revealed several instances in which departments have used lawsuit data to inform personnel and policy decisions that appear to have improved behavior in a variety of ways. Lawsuits have been included in early intervention systems that have reduced reviewed officers’ civilian complaints and uses of force.<sup>109</sup> Trends in lawsuits have caused department officials to realize that officers did not understand the scope of their legal authority, and resulting trainings have ended the problem.<sup>110</sup> Trends in lawsuits have also caused departments to identify a troubled station for further investigation and review; the subsequent recommendations dramatically improved the station’s performance.<sup>111</sup> Although I cannot quantify the power of the information gathered from those suits on behavior, my focus on decisionmaking practices allows me to be reasonably certain that lawsuit data has played a role in these decisions and resulting improvements.<sup>112</sup>

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<sup>107</sup> See LASD SEVENTH SEMI-ANNUAL REPORT, *supra* note 85 at 51 (describing drop in litigation costs); Correspondence with Merrick Bobb (June 14, 2009) (reporting that the LASD auditor charges the County of Los Angeles \$200,000 per year for his services). It is difficult to assess how much of this \$1 million was spent analyzing litigation data; the officials engaged in data analysis do not charge piecemeal for their litigation review services. The amount of time and money it takes to gather and analyze litigation data is also likely dependent on the precise stage of the analysis. An early intervention system is costly and time consuming to create, but inputting case information into the system appears more straightforward. On the other hand, closed case review does not require the development of a computerized system, but it is, presumably, time consuming to read and analyze individual files.

<sup>108</sup> See LASD NINTH SEMI-ANNUAL REPORT, *supra* note 98 at 83; *see also supra* Part I.D.3 (describing the LASD’s auditor’s intervention at Century station and the subsequent decrease in civilian complaints while other department activities remained stable).

<sup>109</sup> See *supra* notes 77-78 and accompanying text.

<sup>110</sup> See *supra* notes 81-83 and accompanying text.

<sup>111</sup> See *supra* notes 97-103 and accompanying text.

<sup>112</sup> A focus on decisionmaking practices can, in fact, better control for unrelated factors. Imagine a police department that experiences a precipitous jump in the number of lawsuits alleging chokeholds by its officers. If there is a subsequent decline in these chokehold cases, but the department does not keep track of lawsuits brought against it, those suits did not likely play a role in the decline. On the other hand, if there is no marked decline in the number of chokehold cases filed against the department but there is good evidence that the department gathered and evaluated lawsuit data, identified

## II. LEARNING FROM LAWSUITS: A DESCRIPTIVE THEORY

My findings illustrate a previously overlooked vision of lawsuits' role in performance improvement: as a source of information. Lawsuits identify allegations of misconduct that are investigated to determine whether officer discipline is appropriate, and are considered with other data for possible trends. The evidence developed in discovery and trial can offer a detailed picture of underlying events that is used to identify personnel and policy failures. Closed case files, compared with internal investigations, can identify weaknesses in internal procedures. And trends in settlements and judgments, like initial claim trends, can identify units or procedures that should be more carefully reviewed. Viewed in isolation or in conjunction with other data, lawsuits can offer insights about the incidence and causes of individual and organizational failings. And with these insights, departments can – and do – identify ways to improve.

This view of litigation – as a source of information that can be used to identify and reduce harm and error – is distinct from prevailing understandings of the effect of lawsuits on decisionmaking. Lawsuits are generally believed to influence behavior through the incentivizing effects of deterrence.<sup>113</sup> In oversimplified terms, the expectation is that threatened or actual penalties will discourage future misbehavior so long as the costs of harm avoidance are lower than the costs of liability. And, generally speaking – though not always – the costs of liability are viewed in terms of the dollars spent to satisfy settlements and judgments.<sup>114</sup> So, the – again, oversimplified – logic goes, the higher the expected or exacted damages, the greater the care that will be taken to prevent those sorts of injuries in the future. The lower the damages, the lower the care.

The practices of the departments in my study are distinct in two significant ways from expectations about the uses of litigation data underlying theories

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chokeholds as a potential problem, and trained officers in new techniques, then there is reason to believe that the suits may have had a deterrent effect that was counteracted by other events.

<sup>113</sup> For foundational descriptions of this theory, see GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: AN ECONOMIC ANALYSIS*; WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *THE ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW & ECONOMICS* (2003). For a description of the history of the economic theory of tort law – at least until 1980 – see William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 852-57 (1980-1981).

<sup>114</sup> See *supra* notes 5 and 12 (describing possible non-financial “costs” of civil rights lawsuits, including time, stress, negative publicity, and political ramifications associated with litigation).

of deterrence. Deterrence theorists generally expect that settlements and judgments – financial penalties – inspire performance improvement efforts. Yet the police departments in my study that gather and analyze litigation data do not focus solely – or even primarily – on settlements and judgments. Instead, they pay particular attention to the allegations of misconduct in claims and lawsuits when they are first filed, and the information developed during the course of litigation.

To be sure, departments in my study also pay attention to the resolution of suits in various ways. The Los Angeles Sheriff’s Department tracks trends in settlements and judgments and has reviewed practices and units responsible for large payouts.<sup>115</sup> And large settlements and judgments may focus attention on particular cases, particularly if they attract press or political attention.<sup>116</sup> But the five departments in my study pay attention to lawsuits at the beginning and middle – as well as the end – of the litigation process.

Second, deterrence theory expects that officials deciding which course of action to take weigh the costs of litigation against the benefits of the underlying conduct.<sup>117</sup> Yet, the policies in place in the departments in my study do not facilitate this sort of weighing. Departments would not, for example, track lawsuits alleging chokeholds and then decide whether to retrain their officers about the impropriety of chokeholds based on the costs of these suits.<sup>118</sup> Instead, departments in my study would use lawsuits, with other data, to identify chokeholds as behavior that triggered a concentration of suits, civilian complaints, and/or use of force reports. The department then would conduct an investigation and identify ways to address the underlying policy, training, or personnel problems.<sup>119</sup> And when a department looks for trends in payouts, officials do not weigh those judgments and settlements against the costs of potential policy

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<sup>115</sup> See *supra* notes 97-103 and accompanying text (describing the LASD’s review of settlements and judgments against Century and Lenox stations).

<sup>116</sup> See, e.g. Telephone Interview with Kathryn Olson, *supra* note 32 (noting that large amounts awarded in a settlement suggest the difference between “nuisance value” and a “significant settlement”); In-Person Interview with Michael Gennaco, *supra* note 32 (noting that large settlements “prompts the Board’s attention, and certainly prompts our as well”).

<sup>117</sup> See *supra* note 113 for representative scholarship in this area.

<sup>118</sup> This is the type of weighing assumed in many accounts of law enforcement decisionmaking, even as scholars differ about the precise incentives that guide those decisions. See, e.g., Levinson, *supra* note 5.

<sup>119</sup> It is possible that discussions of the costs of lawsuits alleging foot pursuits and the benefits of the foot pursuits are being analyzed and discussed *sub rosa*. It is also true that there may be cost-benefit calculations occurring at the edges of the analysis. For example, the LASD might decide not to prohibit foot pursuits – even though such a policy would greatly reduce lawsuits alleging foot pursuits – because foot pursuits have a law enforcement value. This is a weighing of some sort, but it is not the kind of weighing imagined by deterrence theory.

changes. Instead, the concentration of settlements and judgments is treated as an indication of an underlying problem that is then investigated and analyzed.

By differentiating department practices from prevailing understandings of deterrence, I do not mean to suggest that these departments are immune to lawsuits' deterrent effects. Indeed, the LASD's elaborate efforts to track and reduce misconduct can be understood as a kind of end-product of deterrence. When the Board of Supervisors appointed the Kolts Commission to review LASD practices, they were motivated in part by a *Los Angeles Times* story that reported \$32 million paid in settlements and judgments against the LASD over a five-year period.<sup>120</sup> The Kolts Commission was instructed to find ways to reduce the costs of litigation against the department<sup>121</sup> and a significant aim of Merrick Bobb's reviews of the department remains to monitor the costs of lawsuits brought against the LASD.<sup>122</sup> But the policies put in place by the Kolts Commission and Merrick Bobb reduce the costs of liability by understanding and addressing the underlying causes of police error and misconduct. And to achieve this understanding, the LASD and Bobb focus attention on the lessons that can be learned from lawsuits, regardless of an individual suit's financial or political ramifications.

The practices of departments in my study are more akin to those encouraged by those focused on the identification and reduction of error. Cognitive psychologists, organizational theorists, and systems engineers who study human error emphasize the importance of gathering and analyzing data about past performance at a systems level as a way of identifying the types of problems that lead to harm.<sup>123</sup> A systems analysis approach has been used to improve safety in a number of fields including aviation safety, nuclear power, and medical care.<sup>124</sup> In

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<sup>120</sup> See Tor Merina, *Lawsuits Against Deputies Cost \$32 Million Since '88*, LA Times, Dec. 10, 1991; KOLTS COMMISSION REPORT, *supra* note 34 at 1 (asserting that the Kolts Commission inquiry was prompted by "an increase over the past years in the number of officer-involved shootings," "four controversial shootings of minorities by LASD deputies in August 1991," and the fact that "Los Angeles County ("the County") had paid \$32 million in claims arising from the operation of the LASD over the last four years").

<sup>121</sup> See *id.* High profile events – though, notably, not lawsuits – caused the departments in Chicago and Seattle to hire auditors who, in turn, began looking at litigation data. See *supra* notes 43 and 58 and accompanying text.

<sup>122</sup> Bobb considers reduced litigation exposure to be a sign of improved police performance. See MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FOURTH SEMI-ANNUAL REPORT 7 (1995) [hereinafter LASD FOURTH SEMI-ANNUAL REPORT] (noting that "the efficacy and success of the Kolts recommendations can be most clearly seen in the consistent drop in the number of new lawsuits, the continuing shrinkage of the County caseload of excessive force lawsuits against the LASD, and the declines in judgments, settlements, attorneys' fees and costs to the County from these cases").

<sup>123</sup> For seminal work in this area see *supra* note 13.

<sup>124</sup> For a description of human error theory applied in the aviation industry, nuclear power industry, and medicine, see *supra* note 14.

each industry, information about accidents and “near misses” is collected and analyzed for safety implications. As with efforts to improve safety in aviation, hospitals, and other industries, the departments in my study review information about past behavior from a variety of sources to identify personnel and policy failings and possible ways to improve.

Lawsuits have not, however, generally been viewed as contributing positively to efforts to reduce error. Instead, lawsuits have been considered a counterproductive distraction; a punitive threat that inhibits the disclosure of error and the kind of open dialogue that leads to performance improvements.<sup>125</sup> I do not challenge this critique. Indeed, my research supports the view that the threat of litigation and discipline may cause government personnel to hide, misrepresent, or ignore the kinds of information crucial to performance improvement efforts.<sup>126</sup>

Nonetheless, a key insight offered by my study is that lawsuits themselves produce information that can play a role in the identification and analysis of past harms with the aim of preventing future similar events. Just as aviation experts study near misses for possible lessons, lawsuits are examined for lessons even when settled for paltry sums or dismissed early in the litigation process. And just as aviation experts study catastrophic crashes, cases that result in large settlements and judgments are studied for personnel and policy failures that can be addressed.

### III. CONSIDERING THE VALUE OF LAWSUIT DATA TO PERFORMANCE IMPROVEMENT EFFORTS

I have, thus far, shown that the five departments in my study view lawsuits as sources of information about police department practices, and do so in ways that differ in significant respects from prevailing theories of the effects of lawsuits on behavior. In this section, I offer reason to believe that lawsuits offer valuable information to law enforcement agencies seeking to reduce misconduct. My research reveals that allegations asserted in lawsuits often have not been brought to the department through the civilian complaint process or other internal reporting protocols. And the evidence developed during discovery and trial has been found to be more comprehensive than that produced in internal investigations.

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<sup>125</sup> For scholarship making these critiques, see *supra* note 15. *But see* David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?* 90 CORNELL L. REV. 893 (2005) (finding that “there is no foundation for the widely held belief that fear of malpractice liability impedes efforts to improve the reliability of health care delivery systems”).

<sup>126</sup> See Schwartz, *supra* note 6 at Part II.D for a description of these types of implementation problems.

### A. *The Information in Complaints and Claims*

Although government officials have hunches about the extent to which lawsuit claims are duplicative of civilian complaints and other internal reports, few appear to have tested their hypotheses.<sup>127</sup> The two departments in my study that have examined this issue – the Los Angeles Sheriff’s Department and the Portland Police Department – concluded that claims in lawsuits often have not been previously alleged in civilian complaints.

In 2004, Portland’s police auditor found that between two-thirds and ninety percent of claims in lawsuits brought against the Portland police department and its officers were not separately brought as civilian complaints.<sup>128</sup> And claims alleged in lawsuits against the department were found to be more serious than those alleged in civilian complaints: 50 percent of lawsuits alleged excessive force compared to just fifteen percent of civilian complaints filed during the same period.<sup>129</sup> Similarly, when the Kolts Commission examining the LASD reviewed 124 excessive force lawsuits that had resulted in judgments or settlements in the plaintiff’s favor, it found that the allegations in fewer than half of the cases had

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<sup>127</sup> The ombudsman in Boise, charged with investigating alleged misconduct, believes that lawsuits are almost always redundant; that the allegations in the suit will almost already have been investigated by his office as a civilian complaint or an officer-initiated complaint. *See* Telephone Interview with Pierce Murphy, Boise Ombudsman (Oct. 14, 2008). The head of the Tort Division in Philadelphia estimated that half of the claims in lawsuits are not separately alleged in civilian complaints. *See* Telephone Interview with Craig Straw, Chief Deputy City Solicitor, Civil Rights Div., Phila. Law Dep’t (Oct. 14, 2008). When the New York City Council recently considered legislation that would require the Law Department (that defends the New York Police Department and its officers against civil rights suits) to provide the City Council with information about pending lawsuits and settlements, the Mayor’s office opposed the legislation in part because, they argued, more timely information about alleged misconduct is available through the civilian complaints filed with the city’s Civilian Complaint Review Board. *See* Statement of William Heinzen, Deputy Counselor to the Mayor, New York City Council Committee on Governmental Operations (Dec. 11, 2009), on file with author. Heinzen’s statement reflects, however, that New York City government has not analyzed lawsuits to determine the extent to which suits and civilian complaints are duplicative. *See also* *Hudson v. Michigan*, 547 U.S. 586 (2006) (arguing that suppression was unnecessary, in part, because of the “increasing professionalism of police forces, including a new emphasis on internal police discipline”). None of these conclusions are corroborated by empirical study, however.

<sup>128</sup> *See* PORTLAND TORT CLAIMS REPORT, *supra* note 48 (finding that two-thirds of people who filed lawsuits did not file separate civilian complaints).

<sup>129</sup> *See id.* at 21.

been brought as civilian complaints investigated by Internal Affairs.<sup>130</sup> Even as their civilian complaint collection and review processes have improved, the Portland police department and the LASD continue to learn about misconduct allegations through lawsuits.<sup>131</sup>

There are good reasons to be skeptical of the extent to which civilian complaints capture allegations of police misconduct in other departments, as well. A Department of Justice survey found that nine out of ten people who believed they had been victims of excessive force never complained to the police department.<sup>132</sup>

One explanation for this low filing rate is that plaintiffs' attorneys may discourage their clients from filing civilian complaints. Human Rights Watch found that "[l]awyers bringing civil lawsuits against police officers [in New York] told Human Rights Watch that they often do not recommend that their clients file a complaint with [Internal Affairs] because the information provided is often used

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<sup>130</sup> KOLTS COMMISSION REPORT, *supra* note 34 at 60 (noting that just 57 of the 124 lawsuits reviewed had been internally investigated). The Kolts Commission study of excessive force cases does not answer whether similar disparities exist for lawsuits alleging other types of claims.

<sup>131</sup> *See, e.g.*, Interview with Michael Gennaco, *supra* note 32 (estimating that the LASD learns of misconduct allegations through lawsuits "a significant number" though "not a majority" of the time). The Portland Auditor has continued to find that many lawsuits concern claims not previously submitted as civilian complaints. *See* LAVONNE GRIFFIN-VALADE & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2009, at 19 (2009) (finding that of 165 civil claims filed, only 29 had been previously submitted as civilian complaints); GARY BLACKNER & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2008, at 23 (2008) (finding that of 163 civil claims reviewed in 2008, only 30 had been previously submitted as civilian complaints); GARY BLACKNER & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2007, at 23 (2007) (finding that, of 184 claims reviewed by the Portland auditor in 2007, only 42 had already been alleged in civilian complaints); GARY BLACKNER & LESLIE STEVENS, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2005–2006, at 22 (2006) (finding that only 10 percent of civil claimants filed separate civilian complaints). Portland's auditor does not open internal investigations for many of these lawsuit claims. For example, in 2009, the auditor opened only seven internal investigations from the 136 lawsuits alleging new claims. *See* LAVONNE GRIFFIN-VALADE & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2009, at 19 (2009).

<sup>132</sup> Mathew J. Hickman, Bureau of Justice Statistics Special Report, U.S. Dept. of Justice, NCJ 210296, *Complaints About Police Use of Force* 1 (June 2006) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf>.

against the client.”<sup>133</sup>

Another possible reason for the low filing rate of civilian complaints is the widespread inadequacy of police department civilian complaint receipt processes. Human Rights Watch investigated practices in fourteen law enforcement agencies and found “serious flaws in the way complaints from the public are initially received or forwarded” in all fourteen cities.<sup>134</sup> All of the consent judgments and memoranda of agreement entered into between the Department of Justice and law enforcement agencies have required departments to make it easier to file civilian complaints.<sup>135</sup> The DOJ has investigated civilian complaint policies and practices in thirteen additional departments,<sup>136</sup> and found fault with each of the departments’ systems for receiving complaints of officer misconduct.<sup>137</sup>

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<sup>133</sup> See HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES* 306 (1998). The police auditor in Chicago has asserted that plaintiffs’ attorneys regularly prevent plaintiffs and witnesses from cooperating with investigators, “effectively shutting off the IPRA’s access to information.” See ILANA B.R. ROSENZWEIG, INDEP. POLICE REVIEW AUTH., *ANNUAL REPORT 2007–08*, at 8 (2008). See also Maxine Bernstine, *Claims Against Portland Police Officers Cost City Millions*, THE OREGONIAN (Dec. 10, 2009) (“If the lawyer doesn’t respond [to the Portland police auditor’s request for information], ‘that pretty much stymies us, unless the police reports themselves raise serious issues of misconduct’”).

<sup>134</sup> Human Rights Watch, *supra* note 133 at 49. The fourteen cities investigated by Human Rights Watch were: Atlanta; Boston; Chicago; Detroit; Indianapolis; Los Angeles; Minneapolis; New Orleans; New York; Philadelphia; Portland; Providence; San Francisco; and Washington, DC. See *id.* Three of these departments – Detroit, Los Angeles, and Washington, D.C. – were also investigated by the Department of Justice.

<sup>135</sup> See *Protecting Civil Rights*, *supra* note 63 at 85 (noting that, “[w]ithout exception, all the federal pattern or practice agreements [entered into by the Department of Justice] related to law enforcement agencies address the complaint process”). For the precise provisions in these settlement agreements and consent judgments, see [www.usdoj.gov](http://www.usdoj.gov).

<sup>136</sup> These departments are in: Inglewood, California; Yonkers, New York; Austin, Texas; Easton, Pennsylvania; Warren, Ohio; Virgin Islands; Beacon, New York; Bakersfield, California; Cleveland, Ohio; Portland, Maine; Schenectady, New York; Miami, Florida; and Columbus, Ohio. The DOJ also investigated the policies and practices in the Orange County Sheriff’s office, but limited its investigation to the department’s use of “conducted energy devices” (also known as Tasers). For the technical assistance letters provided to these departments, see [www.usdoj.gov](http://www.usdoj.gov).

<sup>137</sup> See, e.g., Technical Assistance Letter to the Inglewood Police Department at 18-19 (recommending that “[t]he IPD should change elements of its citizen complaint process that have the potential to discourage the filing of complaints, and to impair effective tracking of complaints”); Technical Assistance Letter to Yonkers Police Department at 18-19 (recommending that the Yonkers police department “increase public awareness of how to use the citizen complaint process” and increase access to civilian complaint forms by distributing them at public facilities and printing forms in Spanish); Technical Assistance to the Austin Police Department at 28 (recommending that the department “better



Audits of several departments have found that officers discourage the filing of civilian complaints. The DOJ investigations revealed multiple instances in which officials hassled civilians attempting to file complaints or refused to accept a complaint altogether.<sup>138</sup> The Christopher Commission, convened to investigate the Los Angeles Police Department following Rodney King's beating, found that one-third of people who filed civilian complaints were harassed or intimidated in the process.<sup>139</sup> Twelve years later – after the LAPD had again been reviewed by an independent commission, had been investigated by the Department of Justice for civil rights violations, had entered into a Memorandum of Agreement with the DOJ, and had been placed under the supervision of a court-appointed monitor – the monitor found that department officials continued to harass and intimidate people who tried to file civilian complaints.<sup>140</sup>

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disseminate information to the public about its complaint process” by making complaint forms available online and in public offices, and in multiple languages); Technical Assistance Letter to Virgin Islands Police Department at 15 (finding that the department's civilian complaint forms “are inadequate and inconsistent with generally accepted police practices”); Technical Assistance Letter to the Beacon Police Department at 15 (finding that the department has no “formalized system for the intake and tracking of complaints,” and only allows a civilian to file a complaint if he has first discussed the matter with the Sergeant); Technical Assistance Letter to the Schenectady Police Department at 16-17 (recommending that it be made easier for citizens to file complaints).

<sup>138</sup> See Technical Assistance Letter to the Austin Police Department at 28 (reporting that “communications personnel, i.e., 911 operators, on many occasions may have discouraged complainants from filing complaints, failed to contact supervisors regarding complaints, and failed to document the calls and the complaints”); Technical Assistance Letter to the Warren Police Department at 10 (reporting that some citizens “have not been permitted to submit a Complaint Form to anyone other than” one single Lieutenant appointed to handle internal investigations, and only during “limited working hours”); Technical Assistance Letter to Portland Police Department at 10 (recommending that the department “change aspects of its complaint process that have the potential to discourage the filing of complaints”); Technical Assistance Letter to the Schenectady Police Department at 16 (observing that the internal affairs division “receives approximately 5 to 10 complaints each year from citizens reporting that a SPD supervisor refused to accept their complaints”); Technical Assistance Letter to the Miami Police Department at 17 (identifying several policies and practices “that appear to discourage the filing of complaints”); Technical Assistance Letter to the Columbus Police Department (finding “a complaint process that discourages complainants at intake”).

<sup>139</sup> See, e.g., INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 158 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT] (finding that one-third of the people who filed complaints against the LAPD reported that officers discouraged complaint filing by not providing Spanish-speaking officers in heavily Latino divisions, requiring complainants to wait for a long time before filing the complaint, and threatening the complainant with defamation suits or immigration consequences).

<sup>140</sup> “In one sting operation, an undercover police officer, posing as a juvenile, complained of misconduct. The Sergeant then took an inordinate amount of time to take the

Even when a person successfully submits a civilian complaint, the allegations may not be improperly recorded. Some department audits have found that officers at the stationhouses improperly classify the incident in order to avoid an internal investigation of the claim.<sup>141</sup> Other departments administratively close a significant percentage of civilian complaints for various reasons without ever completing their investigations.<sup>142</sup>

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details of the complaint, stretching the process beyond 10:00 p.m., at which point the sergeant **detained** the ostensible juvenile for curfew violation.” REPORT OF THE INDEPENDENT MONITOR FOR THE LOS ANGELES POLICE DEPARTMENT FOR THE QUARTER ENDING JUNE 30, 2003, at 3 (2003), available at: [http://www.kroll.com/library/lapd/lapd\\_report\\_081503.pdf](http://www.kroll.com/library/lapd/lapd_report_081503.pdf) (emphasis in original). At that time, officers were found to follow department procedures only 43% of the time. *See id.* In a later audit, the monitor found that officers were complying with procedures 78% of the time. *See* REPORT OF THE INDEPENDENT MONITOR FOR THE LOS ANGELES POLICE DEPARTMENT FOR THE QUARTER ENDING DECEMBER 31, 2003, at 26 (2003), available at [http://www.kroll.com/library/lapd/LAPD\\_Q10\\_Report.pdf](http://www.kroll.com/library/lapd/LAPD_Q10_Report.pdf). A subsequent audit found 84% compliance. *See* REPORT OF THE INDEPENDENT MONITOR FOR THE LOS ANGELES POLICE DEPARTMENT FOR THE QUARTER ENDING DECEMBER 30, 2004, at 19 (2004).

<sup>141</sup> The Christopher Commission, convened to investigate the Los Angeles Police Department, found that “complaints of officer misconduct made by the public were often noted in daily activity logs rather than recorded in the official Personnel Complaint Form 1.81 that triggers a formal complaint investigation and IAD review.” CHRISTOPHER COMMISSION REPORT, *supra* note 139 at 159. The San Jose police department monitor found, following an audit of internal investigations, that civilian complaints were often improperly classified. *See* SAN JOSE INDEPENDENT POLICE AUDITOR, YEAR END REPORT, 1993-1994 (1995). The Los Angeles Sheriff’s Department’s auditor reviewed service comment forms of citizens who complained of excessive force at three station houses and found that, in 42% of the cases, commanders and internal affairs personnel who filled out the forms did not identify excessive force as the reason for the complaint. *See* LASD THIRD SEMI-ANNUAL REPORT, *supra* note 38 at 51. Even in cases where complainants alleged that they had been “struck twice in the mouth” or “beaten,” LASD personnel recorded the allegations as “discourtesy” instead of “excessive force.” *Id.* at 52. When people made their complaints during their arrest or booking, the allegations of excessive force were especially unlikely to be treated as civilian complaints. *See* LASD FOURTH SEMI-ANNUAL REPORT, *supra* note 122 at 15. *See also* Technical Assistance Letter to Inglewood Police Department at 20 (finding that some excessive force complaints were routed to division level reviews – instead of internal investigations – and were routed to “supervisors who were on the scene and completed the original use of force report . . . present[ing] an apparent conflict of interest”); Technical Assistance Letter to Austin Police Department (finding that the department’s “process of complaint classification raises concerns because the classification categories are broad, subject to different interpretations, lack uniformity, and lack consistency,” amounting to “‘escape valves’ that can minimize officers’ misconduct”); Technical Assistance Letter to the Columbus Police Department (finding that the complaint process “transforms about half of the complaints that were filed into ‘inquiries’ that are not properly investigated”).

<sup>142</sup> *See* THE NEW WORLD OF POLICE ACCOUNTABILITY, *supra* note 21 at 81 (describing an audit of the New York City Civilian Complaint Review Board that found that over

Law enforcement agencies may also learn about possible misconduct through officer use of force reports. Yet, in its investigations of law enforcement agencies, the DOJ has repeatedly found that officers inadequately document uses of force.<sup>143</sup> A 1995 survey found that department policies may also be to blame:

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50% of complaints were administratively closed); ILANA B.R. ROSENSWEIG, INDEP. POLICE REVIEW AUTH., ANNUAL REPORT 2007-03 (2008) (reporting that 40% of civilian complaints are administratively closed); *see also* Schwartz *supra* note 6 at 1066 n.250 for a description of the reasons for these administrative decisions.

<sup>143</sup> *See, e.g.*, Detroit Consent Judgment, *supra* note 65 (finding that Detroit police officers “are not required to report uses of force other than uses of firearms and chemical spray, unless the use of force results in visible injury or complaint or injury”); Inglewood Technical Assistance Letter at 16-17 (finding that the Inglewood Police Department “current practices of documenting uses of force within arrest or incident reports and policy have been under-inclusive in what the IPD has considered force, and, in turn, it appears that the reporting of force by officers has been underinclusive”); Yonkers Technical Assistance Letter at 17-18 (finding that use of force forms were required when an officer uses a firearm, but not when she uses a baton or deploys a K-9 unit, and recommending that a form be filled out whenever force is used); Technical Assistance Letter to the Austin Police Department at 18-22 (describing inadequacies with department use of force reporting protocols); Technical Assistance Letter to the Easton Police Department at 6 (finding that the department does not have a form dedicated to use of force reporting, “making it extremely difficult to extract information to adequately track and analyze uses of force”); Technical Assistance Letter to the Warren Police Department at 6 (finding that the department requires officers to fill out a use of force form “any time their actions alleged result in injury or death, any time they utilize a non-lethal weapon, and any time they discharge their firearm” and recommending, instead, that the department require a form be completed “for all uses of force beyond unresisted handcuffing”); Technical Assistance Letter to Virgin Islands Police Department at 11 (noting that a use of force report is required “only when there is an injury, medical treatment is required or requested, or the force used related to a criminal charge (i.e., resisting arrest, assault, endangering or harassment)”); Technical Assistance Letter to the Beacon Police Department (finding that the department’s policies “do not clearly indicate the manner in which uses of force are to be reported”); Technical Assistance Letter to the Bakersfield Police Department at 5 (finding the department’s requirement that a use of force form be filled out “when an officer uses a level of force higher than ‘standard searching and handcuffing techniques’” to be overly ambiguous); Technical Assistance Letter to Portland Police Department at 5-6 (finding that “officers are not required to report ‘restraining force’ or certain other types of physical contacts with citizens,” and that use of force forms are unclear); Technical Assistance Letter to the Schenectady Police Department at 9 (finding, despite a “very broad reporting requirement, command level and line officers acknowledge that officers rarely document uses of force and that supervisors do not enforce the reporting policy”); Technical Assistance Letter to the Miami Police Department (finding that the department’s use of force reporting requirements “are likely to lead to an under-reporting of the use of force”); Technical Assistance Letter to the Columbus Police Department (finding an “overly restrictive definition of what constitutes a use of force”).

Departments do not always require officers to report even serious uses of force.<sup>144</sup> And, again, even in departments with comprehensive use of force reporting policies, those policies may not be followed.<sup>145</sup>

For all of these reasons, civilian complaints and internal use of force reports likely underrepresent the universe of police misconduct allegations. And lawsuits have been found (by those departments that have studied the issue) to include allegations that have not been previously brought to the department's attention. Accordingly, there is good reason to believe that lawsuits regularly concern misconduct allegations unavailable through other avenues.

Even in departments with functioning civilian complaint and use of force reporting systems, lawsuits may still be a valuable source of information. In the Los Angeles Sheriff's Department, which has rigorous internal use of force reporting systems, there are several types of allegations that tend to be reported only through legal claims, including "Fourth Amendment allegations, allegations of inappropriate entry, bad warrant or things that happen in the warrant, allegations that money was taken . . . discourtesy, [and] cases in which there may be constitutional violations or violations of policy but they don't result in injury."<sup>146</sup> The LASD's risk management bureau examines lawsuit claims, even when the same allegations have been asserted in a civilian complaint or use of force report, because the allegations in civil suits are more comprehensively and clearly articulated.<sup>147</sup> In addition, the bureau receives fewer lawsuits than civilian

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<sup>144</sup> Five percent of the departments surveyed did not require their officers to submit a report even after *shooting and killing* a civilian. See Pate & Fridell, *supra* note 4. Almost twenty percent of the departments did not require officers to submit a report after striking a civilian with a flashlight, approximately forty percent of the departments did not require an officer to submit a report after their police dog attacks or bites a civilian, and over seventy percent of the police departments did not require an officer to submit a report after using handcuffs. See *id.*

<sup>145</sup> The Kolts Commission, appointed to examine the Los Angeles Sheriff's Department, found that uses of force reported through deputies' arrest reports "almost always [were] at wide variance with the allegations made by the plaintiff in a lawsuit" such that "a deputy's report alone could not have alerted a supervisor to a problem." KOLTS COMMISSION REPORT, *supra* note 34 at 56. Several years later, the auditor for the LASD again reviewed use of force files and found widespread underreporting. LASD THIRD SEMI-ANNUAL REPORT, *supra* note 38 at 42-43. For problems with the reports, see *id.* at 42-49.

<sup>146</sup> See Interview with Michael Gennaco, *supra* note 32.

<sup>147</sup> See Telephone Interview with Captain Mathers, *supra* note 32 (noting that "by the time it gets actually to be a government claim, it's at least pretty well defined into what areas it captures, and I think we're able to sort through those a little better."); Telephone Interview with Kathryn Olson, *supra* note 32 (observing that civilian complaints can get "pigeon holed." "someone comes in and says this happened to me – and it gets treated as a use of force [uof] complaint. But when a lawsuit is filed, a number of allegations may be raised that might be different from a simple uof. People will talk in terms of being a

complaints, and lawsuits tend to concern more serious allegations. The bureau therefore considers lawsuit claims to offer more manageable and more critical data for performance improvement efforts.<sup>148</sup>

### *B. Information Developed During Discovery and Trial*

Few departments have studied the extent to which evidence produced through litigation is duplicative of internal law enforcement investigations. Those departments that have studied the issue, however, have found that litigation files are more comprehensive. Richard Rosenthal — the police auditor in Denver and former auditor in Portland — has compared files of unsubstantiated internal investigations with closed litigation files for the same case and found that the outcome of the internal investigations might well have been different had the claims gone through the extensive factual development that occurred in litigation.<sup>149</sup>

When the Kolts Commission compared closed litigation files with departmental investigations of the same claims, the Commission identified weaknesses in the department's handling of excessive force incidents.<sup>150</sup> When officers reported they had used force, “the arrest report almost always was at wide variance with the allegations made by the plaintiff in a lawsuit” such that “a deputy's report alone could not have alerted a supervisor to a problem.”<sup>151</sup> Unsurprisingly, then, supervisors generally found the force used to be appropriate even in those cases that garnered large verdicts and settlements.<sup>152</sup>

Special Counsel for the Los Angeles Sheriff's Department continues to compare closed litigation files with closed internal investigation files, and continues to find that litigation files offer “the fullest record” of claims of police misconduct.<sup>153</sup> When misconduct allegations are investigated internally, he has found, “inertia weighs heavily on the side of disposing of a matter quickly and moving on; otherwise, time and resources and effort will have to be expended.”<sup>154</sup> Even after a lawsuit is filed, those representing government defendants have little reason to identify or explore evidence of policy and personnel failures, particularly given that such evidence would likely be discoverable.<sup>155</sup> In contrast,

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victim of biased policing. But unless they are able to articulate it expressly – I'm African American, he's white – it's not going to come into the civilian complaint”).

<sup>148</sup> See Telephone Interview with Captain Mathers, *supra* note 32.

<sup>149</sup> See Telephone Interview with Richard Rosenthal, *supra* note 32.

<sup>150</sup> KOLTS COMMISSION REPORT, *supra* note 34 at 25.

<sup>151</sup> *Id.* at 56.

<sup>152</sup> *Id.* at 55-5.

<sup>153</sup> LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 71 at 85.

<sup>154</sup> *Id.*

<sup>155</sup> As Merrick Bobb, the Los Angeles Sheriff's Department's auditor, has observed, “[i]t is difficult to play that dual role of defending to the hilt the plaintiff's claims in a

plaintiffs have a “strong incentive . . . to dig deeply and generate more detailed and critical information” supporting their cases.<sup>156</sup> “If information exists, litigation is the likeliest vehicle to ferret it out.”<sup>157</sup> Seattle’s auditor similarly agrees that litigation produces valuable information.<sup>158</sup>

There is another good reason to believe that lawsuit case files are often more comprehensive than internal investigations files: civilian complaint investigations have long been found to be inadequate and incomplete.<sup>159</sup> The Department of Justice has found fault with civilian complaint investigation procedures in every department it has investigated.<sup>160</sup> Similarly, Human Rights

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lawsuit, including the need to cast ambiguous facts in a favorable light and, at the same time, report the same facts internally in a cold and objective [sic] way for purposes of discipline.” *Id.* at 78. For this reason, he recommends that police officials investigate claims made in lawsuits apart from the investigation necessary to defend against the suit. *Id.* But see Schlanger, *supra* note 24 at 8 (arguing that information gathered for claim management efforts “may end up being used . . . to design interventions for harm prevention or reduction”).

<sup>156</sup> LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 71 at 85.

<sup>157</sup> *Id.*

<sup>158</sup> See Telephone Interview with Kathryn Olson, *supra* note 32 (“just by function of depositions and someone else taking a new look at it, chances of getting new information [through the litigation process] are likely. Private counsel for the city might also uncover things. . . The litigation process itself not always but often will uncover new information that will help us understand both sides of the picture more clearly”).

<sup>159</sup> For an overview of the problems with civilian complaint processes, see THE NEW WORLD OF POLICE ACCOUNTABILITY, *supra* note 21 at 71-99.

<sup>160</sup> For descriptions of the inadequacies of the civilian complaint investigation procedures in the departments that have been investigated but not sued by the DOJ see, e.g., Technical Assistance Letter to the Inglewood Police Department at 22-23 (describing the “lack of a formal, structured, and consistent investigative process” in the department); Technical Assistance Letter to the Yonkers Police Department at 22-23 (recommending that the department “develop and implement a centralized, formal, structured, and consistent system for resolving complaints without discouraging the filing of complaints”); Technical Assistance Letter to the Austin Police Department (finding evidence that the department’s internal investigatory process is “erratic and irregular” and that “IA did not always investigate their complaints”); Technical Assistance Letter to the Easton Police Department at 9-10 (finding that the department did not keep civilian complaints and investigations organized in a single file or office, making personnel and trend review impossible, and that the department “has no formal policies governing investigative training, evidence collection and storage, victim and witness interviews, or case file documentation and retention”); Technical Assistance Letter to Warren Police Department at 17-18 (expressing concern that department policy does not “require basic investigative techniques, including questioning WPD personnel through personal interviews or gathering extrinsic evidence – e.g., third party witness accounts, or photographs of alleged injuries”); Technical Assistance Letter to the Bakersfield Police Department at 14 (finding that internal investigations are inconsistent and incomplete); Technical Assistance Letter to the Cleveland Division of Police at 9 (finding that internal investigators “inject opinions

Watch found that,

[i]n each city we examined, internal affairs units conducted sub-standard investigations, sustained few allegations of excessive force, and failed to identify, or deal appropriately with, problem officers against whom repeated complaints had been filed. In many cases, sloppy procedures and an apparent bias in favor of fellow officers combine to guarantee that even the most brutal police avoid punishment for serious violations until committing an abuse that is so flagrant, so unavoidably embarrassing, that it cannot be ignored.<sup>161</sup>

Indeed, no outside reviewer has “found the operations of internal affairs divisions in any of the major U.S. cities satisfactory.”<sup>162</sup>

Several outside reviewers have found that internal investigators do not follow basic investigative practices: Investigators do not look for witnesses, collect evidence, require police personnel to be interviewed, or reconcile inconsistent statements.<sup>163</sup> A study of internal investigations completed by the Chicago Police Department (before the IPRA was created) found that the

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and speculation that may call into question the objectivity of the investigation” and raising concerns about the thoroughness of internal investigations); Technical Assistance Letter to Portland Police Department (finding investigators to be inadequately trained); Technical Assistance Letter to the Schenectady Police Department at 20-21 (recommending that investigators be trained in standard investigative policies and practices); Technical Assistance Letter to the Columbus Police Department (finding “a process for investigating complaints, uses of force (lethal and non-lethal), and injuries to prisoners that is biased in favor of the involved officers”).

<sup>161</sup> Human Rights Watch, *supra* note 133 at 63.

<sup>162</sup> *Id.*

<sup>163</sup> REPORT OF THE INDEPENDENT MONITOR FOR THE LOS ANGELES POLICE DEPARTMENT FOR THE QUARTER ENDING SEPTEMBER 30, 2003 at 25 (2003), available at <http://www.kroll.com/library/lapd/LAPD.Q9.%20Final%20Report.11-17-03.pdf> (finding that the internal affairs division for the LAPD failed to tape review witness interviews, did not canvas the area for witnesses, allowed group interviews, failed to collect or preserve evidence, and failed to identify inconsistent statements); Technical Assistance Letter to Warren Police Department at 17-18 (expressing concern that department policy does not “require basic investigative techniques, including questioning WPD personnel through personal interviews or gathering extrinsic evidence – e.g., third party witness accounts, or photographs of alleged injuries”); Technical Assistance Letter to the Cleveland Division of Police at 9 (finding that internal investigators “inject opinions and speculation that may call into question the objectivity of the investigation” and raising concerns about the thoroughness of internal investigations); Technical Assistance Letter to Portland Police Department (finding investigators to be inadequately trained); Technical Assistance Letter to the Schenectady Police Department at 20-21 (recommending that investigators be trained in standard investigative policies and practices).

investigations were consistently shoddy and incomplete, “violat[ing] virtually every canon of professional investigation.”<sup>164</sup> The officer accused of misconduct was interviewed in less than 15% of the cases. When the officer was interviewed, often months after the incident, the “questioning” was in the form of a brief questionnaire that the officer had seven to ten days to complete in writing. It was “not uncommon” to find a complaint unsubstantiated even though several officers submitted virtually verbatim questionnaire responses.<sup>165</sup> Investigators rarely interviewed civilians and witnesses in person. And while the investigators ran background checks on the complainants and witnesses who corroborated allegations of police misconduct, the investigators did not review complaint histories of the police officers involved.

Approximately twenty percent of large police departments have some form of civilian review, and a quarter of these departments’ civilian review boards have independent investigatory authority.<sup>166</sup> There has been little examination of the quality of these investigations. Because the investigators are independent, there should be less concern about bias and capture. These boards can, however, suffer from a lack of funding, leadership, and political will.<sup>167</sup>

Given evidence of law enforcement agencies’ historic and continuing struggles to implement effective civilian complaint receipt and investigation processes and comprehensive use of force reporting protocols, there is good reason to believe that lawsuits and litigation files can offer departments insight into misconduct allegations. And those few departments that have studied the issue have confirmed that lawsuits offer unique information about the details of police misconduct allegations.

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<sup>164</sup> Craig B. Futterman, H. Melissa Mather & Melanie Miles, *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department’s Broken System*, 1 DEPAUL J. SOC. J. 251, 274 (2008).

<sup>165</sup> *Id.* at 275.

<sup>166</sup> There are several forms of civilian review, including police auditors, independent commissions, and police auditors. A 2003 study found that some form of civilian review is in place in approximately nineteen percent of municipal law enforcement agencies with more than 100 sworn officers, 25 percent of county police departments, six percent of sheriffs’ departments, and none of the 49 state agencies surveyed. *See Protecting Civil Rights*, *supra* note 63 at 94. One in four of the civilian review boards had independent investigatory authority. *See id.*

<sup>167</sup> *See* THE NEW WORLD OF POLICE ACCOUNTABILITY, *supra* note 21 at 165-67 (discussing failed police auditors); Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study*, 43 COLUMBIA J. OF LAW AND SOCIAL PROBLEMS 1 (2009) (studying different models of civilian oversight, and finding underfunding).



#### IV. MITIGATING THE WEAKNESSES OF LAWSUITS

I have, thus far, described the practices of a handful of police departments that pay close attention to lawsuit data and argued that suits offer information unavailable through internal sources. I do not, however, mean to idealize damages actions as vehicles of performance improvement. Indeed, they are, in many ways, poorly suited for this task. There is abundant evidence that lawsuits offer inaccurate information about real-world harms; many wrongfully injured people never sue and lawsuit payouts can distort the extent of a defendant's responsibility. Lawsuits are resolved long after the underlying incident occurred, further diminishing the signal's power. Lawsuits are generally focused on individual bad actors instead of the policy makers that could affect organizational change. And the threat of legal sanctions may frustrate data collection and analysis critical to performance improvement efforts. Indeed, departments have relied on the imperfections of litigation data to justify their disregard of lawsuits altogether.<sup>168</sup> Although my research offers no reason to contest these criticisms of lawsuits, the departments in my study take several steps to mitigate these concerns.

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<sup>168</sup> Mayor Bloomberg recently opposed the New York city council's efforts to gather information about pending lawsuits and settlements against the New York Police Department because, his spokesman testified, "the mere fact of a settlement in any litigation is not an acknowledgement of wrongdoing, or of the truth of the facts alleged. . . . While some settlements seem unfair or even outrageous to us, and to the public, the Law Department's decision to settle a matter is largely separate from the merits of the litigation." Statement of William Heinzen, Deputy Counselor to the Mayor, New York City Council Committee on Governmental Operations (Dec. 11, 2009), on file with author. Police department officials in other jurisdictions have similarly argued that settlements are often strategic decisions – not admissions of wrongdoing – and so should not be viewed as evidence of misconduct. *See, e.g.*, Lee Baca, Nicholas Riccardi, *Lawsuits Question Actions of Sheriff's Deputies in 3 Cases*, L.A. Times, Jan. 23, 2002 at B1; Rachel Gordon, *The Use of Force San Francisco: Tracking Makes Police Accountable, Panel Told*, S.F. CHRON., Feb. 5, 2006 at A10 (citing the San Francisco Police Department's risk manager as stating that legal settlements can be granted by City Attorney for various reasons and are not proof of officer misconduct); Robert Becker and Todd Lightly, *Deputies' abuse cases cost county*, CHICAGO TRIBUNE, Feb. 10, 2002 at C1 (same); HUMAN RIGHTS WATCH, *supra* note 133 at 81 (noting that internal affairs staff interviewed by Human Rights Watch in fourteen police departments "made statements such as 'civil cases are not our problem,' or asserted that the settled suits do not indicate the 'guilt' of an officer, disregarding the important information that citizen-initiated lawsuits could provide").

### A. *The Inaccuracies of Litigation Data*

Damages awards are widely considered to be deeply flawed reflections of the real world, although the nature of the system's imperfections is in the eye of the beholder.<sup>169</sup> Some see too little access to the civil justice system and others perceive a "lawsuit lottery" that allows undeserving plaintiffs to win astronomical settlements and judgments.<sup>170</sup>

Extensive empirical data confirms that people who have been harmed rarely sue and, when they do, the amount they recover can have little to do with the degree of defendants' misconduct. Studies of medical malpractice and other types of tort cases have found that only a very small percentage of people who have been wrongly injured – between two and ten percent – ever sue.<sup>171</sup> Once a claim

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<sup>169</sup> See, e.g., Stephen Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985); David A. Hyman, *Medical Malpractice and the Tort System: What Do We Know and What (If Anything) Should We Do About It?*, 80 TEX. L. REV. 1639, 1640 (2001) ("Mainly from a defense perspective, the tort system is seen as too large and intrusive. Claims are said to be too frequent, jury awards and private settlements too erratic, and the entire system too costly, not only in the high costs of administration relative to payouts but also in encouragement of expensive and wasteful 'defensive medicine.' On the other hand, very different complaints are heard that the system is too small, covering only a tiny fraction of injury, even clearly negligent injury, and that it is not only costly, but also slow, unpleasant, and insufficiently protects those with serious and permanent injuries"); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447 (2005) (comparing the generally accepted belief that there is too much access to the civil justice system with evidence that litigation is inefficient, inconsistent, and inequitable).

<sup>170</sup> Compare, e.g., Jeffrey O'Connell, *THE LAWSUIT LOTTERY* (1979) with Rhode, *supra* note 169 (comparing the generally accepted belief that there is too much access to the civil justice system with evidence that litigation is inefficient, inconsistent, and inequitable).

<sup>171</sup> For studies of medical malpractice claims, see, e.g., Leon S. Pocincki et al., *THE INCIDENCE OF IATROGENIC INJURIES* 101 (1973) (finding that 6% of negligently injured people filed lawsuits); Patricia M. Danzon, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 23-24 (1985) (finding that about 10% of victims of medical malpractice filed claims); Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients: Result of the Harvard Medical Practice Study I*, 324 NEW ENG. J. MED. 370, 370 (1991) (finding approximately 2% of those negligently injured ultimately sued); David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250 (2000); (finding 2.5% of those injured brought claims); Eric J. Thomas et al., *Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado*, 38 MED. CARE 261-71 (2000) (same). For other studies of civil litigation, see, e.g., Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544 (1980-81) (finding that five percent of grievances became filed lawsuits); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996)

is filed, the “right” result is reached most of the time.<sup>172</sup> But the amount of damages a plaintiff receives can have little to do with the defendants’ conduct. Instead, damages are awarded based on the severity of the plaintiff’s injury<sup>173</sup> and characteristics of the plaintiff including how much she earns, where she lives, and whether she has dependents.<sup>174</sup> Jury verdicts may be further skewed by negative

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(describing common disputes pyramids for tort claims, discrimination claims, and claims post-divorce); Deborah R. Hensler et al., RAND Inst. for Civil Justice, *Compensation for Accidental Injuries in the United States: Executive Summary* 19 (1991) (finding that lawsuits were filed for 44 percent of vehicle injuries, 7 percent of work injuries, and 3 percent of other injuries).

<sup>172</sup> See, e.g., David M. Studdert et al., *Claims, Errors and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024 (2006) (study of closed claim files found that the “right” result was reached about 73% of the time and finding that false negatives were 1.6 times more likely than false positives); Frank A. Sloan et al., *SUING FOR MEDICAL MALPRACTICE* 166-68 (1993) (finding correlation between actual outcomes of cases and independent evaluations of medical liability); Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780 (1992) (finding that payments in unmeritorious medical malpractice cases are rare); Henry S. Farber & Michelle White, *Medical Malpractice: An Empirical Examination of the Litigation Process*, 22 RAND. J. ECON. 199 (1991) (finding that negligence is an “extremely important determinant of defendants’ medical malpractice liability”). The Harvard Medical Practice Study found the outcome of the case was consistent with expert reviewers’ assessment of liability only half of the time. See Troyen A. Brenna et al., *Relation Between Negligent Adverse Events and the Outcomes of Medical-Malpractice Litigation*, 335 NEW ENG. J. MED. 1963, 1965 (1996). The methodology of this study has, however, been criticized. See Tom Baker, *Reconsidering the Harvard Medical Practice Study Conclusions about the Validity of Medical Malpractice Claims*, 33 J.L. MED. & ETHICS 502 (2005).

<sup>173</sup> See, e.g., Hyman, *supra* note 125 at 1642 (2002) (describing studies in multiple contexts that have found that “the best predictor of the size of an award is the severity of disability, not whether there was negligence, or an adverse event”); TA Brennan, CM Soc, HR Burstin, *Relation between negligent adverse events and the outcomes of medical-malpractice litigation*, 335 N.E. J. MED. 1963 (1999); Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal*, 54 LAW & CONTEMP. PROBS., Winter 1991 at 5 (showing that malpractice damage awards correlate to severity and duration of injury). Similar findings have been found regarding securities litigation. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

<sup>174</sup> It is, for example, more expensive for a defendant to harm an executive than it is to harm a factory worker. See Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1292 (1980). It is more expensive for a defendant to harm a parent than it is to harm a child or person without dependents. *Id.* at 1293. It is more expensive to harm a person who lives in a city than it is to harm a person who lives in the country. Paula Danzon, *The Frequency and Severity of Medical Malpractice Claims*, 27 J. L. & ECON. 115, 143 (1984).

public sentiment about a party to the litigation,<sup>175</sup> the depth of the defendants' pockets,<sup>176</sup> and trial participants' courtroom demeanor.<sup>177</sup> And settlement awards may be reached for amounts below the cost of the anticipated verdict following trial.<sup>178</sup> Insurance, limited liability, and bankruptcy protections further cloud the deterrent signal.<sup>179</sup> Although there are inaccuracies at each stage of the process, studies reflect that the most pressing problem is too little litigation, rather than too much.<sup>180</sup>

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<sup>175</sup> Possible explanations for increased damages awards include "greater public awareness of medical errors; lower levels of confidence and trust in the health care system among patients as a result of negative experiences with managed care; advances in medical innovation, particularly diagnostic technology, and increases in the intensity of medical services; rising public expectations about medical care; and finally, a greater reluctance among plaintiffs' attorneys to accept offers that in the past would have closed cases." Studdert et al., *Medical Malpractice*, 350 N.E. J. MED. at 286.

<sup>176</sup> A study of Chicago jury verdicts from 1960-1980 found that plaintiffs who had fallen in a corporate owned building recovered higher damages than those who had fallen in government owned and privately owned buildings. Audrey Chin & Mark Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials?* (RAND 1985).

<sup>177</sup> Stephen D. Sugarman, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* 38 (1989).

<sup>178</sup> For discounts in settlements, see J. Chelius, *WORKPLACE SAFETY AND HEALTH: THE ROLE OF WORKERS' COMPENSATION* 61 (1977); D. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Corfield & Y. Brittan, *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* 318-19 (1984); Patricia M. Danzon, *The Medical Malpractice System: Facts and Reforms, in THE EFFECTS OF LITIGATION ON HEALTH CARE COSTS* 28, 30 (1985) (noting that, "[o]n average, claims settle for 74 percent of their potential verdict"). Discounted settlement rates are attributed to a variety of factors, including "the victim's desperate and immediate need for money, the uncertainty of success in pursuing a tort remedy, the cost of processing a tort claim, and, above all, the amount of time required to obtain any compensation through judicial resolution of a contested claim." Pierce, *supra* note 174 at 1296. *But see* James K. Hammit, *AUTOMOBILE ACCIDENT COMPENSATION: PAYMENTS BY AUTO INSURERS* 74 (1985) (automobile cases settled for approximately the same amounts that were recovered after trial, without a discount); Elizabeth M. King & James P. Smith, *ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS* 75 (1988) (finding that air crash cases that settled after a lawsuit was filed recovered 50% of actual losses, but cases that went to trial recovered only 44% of actual losses).

<sup>179</sup> See, e.g., Mello & Brennan, *supra* note 104 at 1616 (describing effects of insurance); John Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1821 (1986) (describing effects of limited liability and bankruptcy).

<sup>180</sup> See, e.g., Rhode, *supra* note 169; Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DE PAUL L. REV. 253 (2005); PAUL C. WEILER, *A MEASURE OF MALPRACTICE* 76 (1993) ("[T]he malpractice system is too inaccessible, rather than too accessible, to the victims of negligent medical treatment."); Michael J. Saks, *Medical Malpractice: Facing Real Problems and Finding Real Solutions*, 35 WM. & MARY L. REV. 693, 703 (1994) ("[F]or every doctor or hospital against whom an invalid claim is filed, there are seven valid

While the accuracy of medical malpractice claims and other tort cases have been closely scrutinized, there has been limited empirical testing of the extent to which civil rights damages actions filed and won reflect the universe of civil rights violations.<sup>181</sup> Yet, the same arguments about the inaccuracy of litigation are made in the civil rights context. Plaintiffs who have been harmed may not sue,<sup>182</sup> legitimate claims may fail in court,<sup>183</sup> and plaintiffs may be under-compensated even if they prevail for any number of reasons.<sup>184</sup> Even if a damages award is accurate, officers are almost certain to be indemnified and therefore pay nothing when settlements and judgments are entered against them.<sup>185</sup> Moreover, police departments rarely pay settlements and judgments from their own budgets, further muting the impact of payouts.<sup>186</sup> For all of these reasons, we can assume that lawsuits are an imperfect source of information about police practices.

The departments in my study mitigate concerns about the imperfections of

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claims that go unfiled.”); Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 n.7 (1998) (noting that the realities of litigation undermine lawsuits’ potentially deterrent effects because of “the difficulty of detecting harm, the inability to identify the injurer, problems in proving that the injurer is liable even if he can be identified, and the plaintiff’s failure to sue because of the costs of litigation.”).

<sup>181</sup> See *infra* note 234 and accompanying text for unexplored research questions in this area.

<sup>182</sup> See Daniel M. Meltzer, *Deterring Constitutional Violations*, *supra* note 5 at 284 (arguing that people who have been harmed by the police do not sue, whether out of “ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration”); Richard Abel, *The Real Tort Crisis: Too Few Claims*, 48 OHIO STATE L. J. 443, 448-51 (1987).

<sup>183</sup> See Carl B. Klockars, *A Theory of Excessive Force and Its Control*, in POLICE VIOLENCE (William A. Geller & Hans Toch) (1996) at 6-7 (describing legal requirements in civil rights actions and observing that “police can engage in all sorts of objectionable behavior without transgressing criminal or civil definitions of excessive force”). See also Schwartz, *supra* note 6 at 1032 n.42 for arguments in this vein.

<sup>184</sup> Because compensation is generally dependent on status, and many who bring lawsuits against the police are poor and disempowered, they are likely to be undercompensated. See, e.g. Abel, *supra* note 180 at 256 (noting that “[p]ecuniary damages reproduce inequality. Medical expenses vary with income, wealth, health insurance (despite the collateral source rule), and sophistication in consuming medical care. . . . Damages for lost wages obviously reproduce income inequality (which now varies by magnitudes of 500:1 between CEO and worker in large corporations).” Moreover, plaintiffs cannot be awarded damages for the violation of their constitutional rights absent injury, distorting the deterrent signal. See Levinson, *supra* note 5 at 372-73 (observing that a “complication, which presents a serious difficulty for any analysis of the deterrent effects of constitutional tort damages, is that these damages are not calibrated to the social costs of constitutional violations. In practice, damages are available only for tort-like harms, such as property damage, medical expenses, pain and suffering, and emotional distress.”)

<sup>185</sup> See Schwartz, *supra* note 6 at 1032 n. 43 and accompanying text.

<sup>186</sup> See *id.* at 1032 n.44 and accompanying text.

litigation data in two significant ways. First, the departments do not focus solely – or even primarily – on settlements and judgments. Instead, they pay particular attention to the allegations of misconduct in claims and lawsuits when they are first filed, and the information developed during the course of litigation. Lawsuit allegations are entered into early intervention systems to track problem officers.<sup>187</sup> Trend analysis is similarly based on the initial allegations.<sup>188</sup> Internal investigations of lawsuit claims are based on the initial lawsuit filing.<sup>189</sup> And departments review the evidence developed during the course of litigation for personnel, policy, and training implications.<sup>190</sup>

Because departments review lawsuits at the time they are filed, claims that are dismissed on qualified immunity or other procedural grounds can still be the basis for personnel action. And because these departments are not guided solely by the size of payouts, a case settled for a small amount can still be the basis for policy change. A lawsuit will be included in a department’s analysis of problem officers and trends whether the case was dismissed or went to trial, whether it settled for \$5,000, or \$500,000. Departments have, in fact, made policy changes even when the underlying claim settled for an insignificant amount.<sup>191</sup>

Second, departments mitigate the imperfections of litigation data by viewing that data in context with other information. Departments input multiple pieces of information – not only lawsuits – into the early intervention systems they use to identify problem officers.<sup>192</sup> When an officer’s behavior triggers the system, officials consider the full context in which these events occurred – on and off the job – and identify underlying issues that may have caused the events to occur.<sup>193</sup> Only then does the supervisor decide whether some form of intervention might help prevent future problems.<sup>194</sup> As the International Association of Chiefs of Police recently made clear in its discussion of early intervention systems, “supervisors play *the* critical role in the decision process. The computerized alert is simply a tool.”<sup>195</sup>

Departments demonstrate similar circumspection when reviewing trends across cases. When the LASD auditor found one station was responsible for a

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<sup>187</sup> See *supra* notes 62-80 and accompanying text for a description of early intervention systems.

<sup>188</sup> See *supra* notes 81-85 and accompanying text.

<sup>189</sup> See *infra* notes 86-87.

<sup>190</sup> Some discussions of deterrence have suggested that department officials engage in this type of review of information developed during litigation, see Gilles, *supra* note 5; Carlson v. Green, 446 U.S. 14, 21 (1980).

<sup>191</sup> See *supra* note 95.

<sup>192</sup> See *supra* notes 66-68 and accompanying text.

<sup>193</sup> See *supra* notes 69-74 and accompanying text for a description of the triggering process and the review during the intervention period.

<sup>194</sup> *Id.*

<sup>195</sup> *Protecting Civil Rights*, *supra* note 21 at 61.

disproportionate number of shootings and lawsuits, the auditor spent several weeks at the station reviewing records, speaking with personnel, riding along with officers, and considering several possible reasons for the concentration of payouts.<sup>196</sup> Ultimately, many of the auditor's recommendations did not address the particular behaviors that prompted the lawsuits, but instead addressed hiring, management and training decisions at the station.<sup>197</sup>

When claims made in lawsuits are internally investigated, departments' investigations are independent of the ongoing litigation.<sup>198</sup> Only after the litigation is completed does the department review the litigation file to determine whether any additional information was uncovered in the discovery process.<sup>199</sup> And when a department reviews a behavior or unit with a concentration of payouts, the costs of the lawsuits are viewed as an initial indication of misconduct that is then considered in connection with other available data.<sup>200</sup> Lawsuits are viewed as a symptom but not the ultimate diagnosis of departmental problems.

### *B. The Slow Pace of Litigation*

Some contend that lawsuits should play no role in performance improvement efforts because litigation travels at such a slow pace. Given generous statute of limitations periods and extensive pretrial litigation practices, a settlement or judgment may not be entered until several years after the alleged incident. For those who assume that a lawsuit's regulatory power lies in its disposition, this time delay would seem to have several negative effects. Potential defendants may discount the negative effects of suit if the outcome of the case is so far in the

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<sup>196</sup> See *infra* notes 97-100 and accompanying text for a description of the investigation of the Century City Unit by the LASD auditor.

<sup>197</sup> See *supra* notes 101-03 and accompanying text for a description of the auditor's recommendations.

<sup>198</sup> See Telephone Interview with Ilana Rosensweig, *supra* note 32 (Chicago auditor reviews but does not blindly rely on information developed during the course of litigation in her independent reviews).

<sup>199</sup> See *supra* notes 86-87 and accompanying text (describing the internal investigation process).

<sup>200</sup> See *supra* notes 97-103 and accompanying text.

future.<sup>201</sup> And payouts may not change actors' behavior if they are no longer engaging in the offending conduct.<sup>202</sup>

Officials in the departments in my study recognize that lawsuits are a "trailing" rather than a leading indicator" that "may not be concluded until several years after the conduct that gave rise to the lawsuit."<sup>203</sup> However, departments do not wait until the cases are resolved to evaluate the claims for possible lessons. Instead, departments track and analyze lawsuits from the time that the suits are filed.<sup>204</sup> As the Portland police departments' safety and risk officer reported, "We're watching these claims from Day One. We don't want to wait until after a large settlement."<sup>205</sup> By paying attention to lawsuits when they are first filed, the departments in my study mitigate the effects of the inevitable delays of litigation.

Moreover, closed litigation files can be a source of valuable information even though the underlying events have occurred years before. Lawsuits have revealed information about misconduct allegations that did not arise during the internal investigation of the same incident. By comparing closed litigation files with internal investigations, auditors have identified weaknesses, flaws, biases, and gaps in internal investigation processes and ways that those internal processes can be improved. Given the documented inadequacies of internal investigations, and the vigorous discovery processes accompanying litigation, it should be no surprise that litigation files – when reviewed – have supplemented departments' knowledge and understanding of incidents and department practices despite the passage of time.

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<sup>201</sup> See, e.g., WEILER, *supra* note 180 at 81 ("Consider, for example, an anesthetist who is momentarily distracted from indicators of oxygen deprivation to the patient and omits the necessary emergency response. The prospect of a tort suit arising years later as a result of a problem the doctor is too distracted even to be thinking about during the treatment in question will not likely provide him with motivation to adopt the proper precautions.")

<sup>202</sup> See, e.g., Siliciano, *supra* note 179 at 1830-31 ("In the products liability context, "some risks from a product may not be discovered until long after it has entered the marketplace. These 'remote' risks pose a particularly difficult dilemma for the manufacturer. The manufacturer could engage in an extensive research and testing program aimed at uncovering all such risks, but at some point the costs and delay involved in such a program become prohibitive").

<sup>203</sup> MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FIFTH SEMI-ANNUAL REPORT 29 (1996).

<sup>204</sup> See *supra* notes 62-85 and accompanying text (describing early intervention systems and trend analyses).

<sup>205</sup> Bernstine, *supra* note 133.



### C. *The Individualistic Focus of Litigation*

A third critique of lawsuits' regulatory power is that damages actions are generally focused on individual bad actors instead of the organization-level causes of harm.<sup>206</sup> Organizational theory literature posits that organizational culture influences the behavior of individuals in that organization.<sup>207</sup> And those who study the police have long observed that police organizational culture influences the actions of individual officers.<sup>208</sup> Scholars, including Barbara Armacost, David Rudovsky, and Peter Schuck argue that lawsuits brought against individual officers focus too narrowly on officer error instead of the organizational causes of police misconduct.<sup>209</sup> They recommend bringing suits against the department to incentivize change at the organizational level.<sup>210</sup>

Departments in my study address concerns about the overly individualistic nature of damages actions by reviewing individual cases for large-scale lessons. As a result, a single case settled for a modest sum can nonetheless result in institution-wide policy reforms.<sup>211</sup> These departments also consolidate information from individual suits.<sup>212</sup> Because the LASD's risk management bureau

<sup>206</sup> This is not true, of course, for claims brought directly against the institution seeking injunctive relief. My focus here, instead, is on the deterrent power of damages actions brought against individuals.

<sup>207</sup> For scholarship describing the effects of organization on behavior *see, e.g.*, V. Lee Hamilton & Joseph Sanders, *Responsibility and Risk in Organizational Crimes of Obedience*, 14 RES. ORG. BEHAV. 49 (1992); David Luban, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348 (1992).

<sup>208</sup> *See, e.g.*, James Q. Wilson, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES (1978); Michael K. Brown, Working the Street: Police Discretion and the Dilemmas of Reform (1981); Jerome H. Skolnick & James J. Fyfe, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993); Robert W. Worden, *The Causes of Police Brutality*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE USES OF FORCE (William A. Geller & Hans Toch eds., 1996).

<sup>209</sup> *See, e.g.*, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004); David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465 (1992); Peter H. Schuck, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983).

<sup>210</sup> Similar arguments have made in the medical malpractice context. *See* WEILER, *supra* note 180 (recommending suing hospitals directly; by "focus[ing] tort liability and incentives on the institution . . . we will in turn induce the institution to train its organizational pressures on the physician to adhere to the highest practice standards"); Mello & Brennan, *supra* note 184 at 1623-24 (2001) (recommending enterprise liability against hospitals to promote system-wide improvements).

<sup>211</sup> *See, e.g.*, note 95 and accompanying text (describing a single case and minimal settlement that inspired changes in the LASD's K-9 policies).

<sup>212</sup> This is not to suggest that officials in these departments do not learn from individual cases. As described above, officials internally investigate initial claims and review

reviews claims in the aggregate, its director could see that what initially appeared to be a few isolated incidents of inmates falling off bunks was actually a pattern reflecting inadequate internal transfer of medical records information.<sup>213</sup> By aggregating data about lawsuits, these departments can identify systemic problems - even when the suits are focused on individual bad actors and events.

#### *D. The Blaming Culture Created by Litigation*

Some level criticism not at lawsuits themselves, but instead at the defensive culture created by the threat of being sued. Critics contend that the “blaming culture” of litigation inhibits the disclosure of error and the kind of open dialogue that leads to performance improvements.<sup>214</sup>

My research validates this concern. In my previous study of twenty-six law enforcement agencies, I found that the threat of litigation and discipline caused government personnel – including, at times, personnel in the five departments in this study – to hide or misrepresent the kinds of information crucial to performance improvement efforts.<sup>215</sup> Department officials have written reports that omit information harmful to their officers.<sup>216</sup> City attorneys have refused to produce information about pending claims.<sup>217</sup> Internal affairs bureaus

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closed case files at the end of litigation. They also, however, review cases in the aggregate.

<sup>213</sup> See *infra* note 84 and accompanying text.

<sup>214</sup> This concern has most frequently been articulated in the medical care context. See, e.g., Randall R. Bovbjerg, Robert H. Miller & David W. Shapiro, *Paths to Reducing Medical Injury: Professional Liability and Discipline v. Patient Safety – and the Need for a Third Way*, 29 J.L. MED. & ETHICS 369, 374 (2001) (“To work, patient safety approaches must create an organizational culture of openness to discovery and discussion of problems within clinical settings, but it is doubtful that this culture can coexist with the negative and blaming culture of professional discipline and liability . . . [I]n practice, individually oriented discipline and liability greatly inhibit providers’ cooperation with systems managers, particularly the reporting of information about errors and injuries.”); William M. Sage, *How Litigation Relates to Health Care Regulation*, 28 J. HEALTH POLITICS, POL’Y & L. 387, 407 (2003) (“Patient safety advocates believe that fear of litigation discourages voluntary reporting of near-misses by physicians and compromises efforts to ascertain root causes of medical errors.”); Bryan A. Liang, *Error in Medicine: Legal Impediments to U.S. Reform*, 24 J. HEALTH POLITICS, POL’Y & L. 27, 39 (1999) (“physicians with tort liability concerns may be hesitant to report adverse events and medical errors for fear that plaintiffs’ attorneys will have access to this information, thus exposing physicians to liability”). Similar concerns have also been raised in the police context. See Douglas W. Perez & William Ker Muir, *Administrative Review of Alleged Brutality*, in POLICE VIOLENCE (William A. Geller & Hans Toch, eds.) at 231-32.

<sup>215</sup> See Schwartz, *supra* note 6 at Part II.D for a description of these types of implementation problems.

<sup>216</sup> See LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 71 at 53.

<sup>217</sup> See Schwartz, *supra* note 6 at 1065-66.

have suspended investigations while lawsuits are pending for fear that internal findings will compromise the defense of the case.<sup>218</sup>

Yet, the five departments in my study have, nonetheless, managed to gather relevant information from lawsuits and other data. Key to their success appears to be the presence of independent advisors who review the departments' practices.<sup>219</sup> Court-appointed monitors and police auditors have access to information about the inner workings of their departments. And monitors and auditors have used this access to uncover inadequacies in civilian complaint receipt and investigation practices, early intervention systems, trend analyses, and internal investigations.<sup>220</sup> Monitors and auditors are also able to evaluate, in subsequent reports, whether those problems have been remedied. I do not mean to suggest that the presence of a monitor or auditor will, on its own, transform an insular police culture into a culture of transparency.<sup>221</sup> But external auditors have been able to point out and assist in the correction of data collection problems that would have been unidentifiable but for the auditor's review.

Most police departments learn little from lawsuits. But what *can* departments learn from suits like the one filed by James Chasse's family? As the conclusion of Chasse's story reflects, despite litigation's complex relationship to performance improvement efforts, there are valuable lessons to be learned from lawsuits. In 2009, the city of Portland hired outside experts to evaluate the circumstances of James Chasse's death and lengthy delays in the internal investigation.<sup>222</sup> The expert's report concluded that the pending lawsuit brought by Chasse's family was the main cause of a 22-month delay in the internal investigation. The lawyer representing the county deputy had not allowed the

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<sup>218</sup> See Schwartz, *supra* note 6 at 1064.

<sup>219</sup> In other contexts, auditing and analysis has been recognized as critical to data-driven decisionmaking. See, e.g., Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 122 (1997) (recognizing the benefits of auditing and review in corporate data-gathering and analysis); Ronal W. Serpas & Matthew Morley, *The Next Step in Accountability Driven Leadership: "CompStating" the CompStat Data*, POLICE CHIEF, May 2008, available at: <http://www.policechiefmagazine.org>.

<sup>220</sup> See generally Schwartz *supra* note 6 at Part II.D.

<sup>221</sup> Police practices expert Samuel Walker recognizes that changing police culture is "an extremely difficult task," but the "virtue of [the auditor model] approach is that it involves a permanent external oversight agency with the capacity not only to recommend changes in police department policies and procedures, but to conduct follow-up investigations on the implementation of prior recommendations." THE NEW WORLD OF POLICE ACCOUNTABILITY, *supra* note 21 at 162-63.

<sup>222</sup> See Letter to Mayor Sam Adams et al., from City Auditor La Vone Griffin-Valade & Mary-Beth Baptista, *Re: OIR Group – Report Concerning the In-Custody Death of James Chasse* (July 22, 2010), appended to *Chasse Report*, *supra* note 1.

deputy or others involved to be interviewed by department investigators until they had been deposed in the lawsuit.<sup>223</sup> The attorney's fear – shared by many in other departments in my research – was that statements made in the internal investigation could compromise the defense of the civil case.<sup>224</sup>

Although the specter of civil liability delayed the internal investigation, the expert additionally found that the litigation process uncovered critical information about the incident. The night of Chasse's death, the involved officer and deputy were videotaped at the Portland jail describing their confrontation with Chasse.<sup>225</sup> Although the audio portion of the recording was "mostly unintelligible," Portland's internal affairs investigators did nothing to enhance the sound.<sup>226</sup> Only during litigation did plaintiff's counsel enhance the audio, at which point the involved officer's statements were found to contradict his statement to internal affairs. As the expert's report concludes, "plaintiffs' attorney was the driving force behind [the Portland Police Bureau's] ultimate recognition of the importance of the video as evidence."<sup>227</sup> Although the Chasse family's civil case delayed Portland's internal investigation, the suit additionally uncovered evidence critical to a complete understanding of the events of that evening.

## CONCLUSION

This Article shows that, despite widespread reluctance to pay attention to litigation data, law enforcement agencies in fact can – and do – learn from lawsuits. Although lawsuit data is imperfect, practices in these departments minimize decisionmakers' reliance on those aspects of the data most prone to error. And department practices take advantage of unique features of litigation data. More study could refine thoughts about how best to learn from litigation and the ideal role of litigation data in performance improvement efforts. So I end with the familiar call for more research.

First, we need to know more about the relationship between the merits of civil rights lawsuits and their dispositions. Scholars have studied the volume of civil rights cases, and the frequency with which plaintiffs prevail in court and cases settle.<sup>228</sup> Some scholars have also reviewed civil rights case descriptions

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<sup>223</sup> *Chasse Report*, *supra* note 1 at 27-28.

<sup>224</sup> *See* Schwartz, *supra* note 6 at notes 244-47 and accompanying text.

<sup>225</sup> *Chasse Report*, *supra* note 1 at 27.

<sup>226</sup> *Id.* at 27.

<sup>227</sup> *Id.* at 27-28.

<sup>228</sup> *See, e.g.*, Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982) [hereinafter Eisenberg, *Section 1983*] (studying filing rates and outcomes of Section 1983 cases in the Central District of California); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort*

and files, concluding that assertions of widespread frivolous claims are overblown.<sup>229</sup> But there have been no studies of the frequency with which victims of civil rights violations bring lawsuits,<sup>230</sup> the merits of civil rights cases that are brought,<sup>231</sup> or the correlation between findings of liability, damages awarded, and actual harms suffered by plaintiffs.<sup>232</sup> Medical malpractice cases and other types

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*Litigation*, 72 CORNELL L. REV. 641 (1987) (studying a larger sample of Section 1983 cases filed in the Central District of California). Several of the studies focus only on civil rights claims filed by inmates. See, e.g., Darrell L. Ross, *Emerging Trends in Correctional Civil Liability Cases: A Content Analysis of Federal Court Decisions of Title 42 United States Code Section 1983: 1970-1994*, 25 J. CRIM. JUST. 501 (1997); William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979). These studies are generally focused on examining the extent to which civil rights actions have imposed a burden on the courts, as opposed to the underlying merits of the claims.

<sup>229</sup> See, e.g., Eisenberg, *Section 1983*, *supra* note 228 at 538 (concluding, following a review of cases brought in Los Angeles, that “section 1983 cases usually involve important constitutional claims” and, “[a]s is true of nonprisoner cases, most prisoner section 1983 complaints were not plainly trivial assertions implicating little or no federal interest,” but observing that “[t]he ultimate truth or falsity of allegations in section 1983 cases . . . is not yet a debated issue”); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1572 (2003) (concluding that the ten most often litigated issues “mostly concern real hardships inherent in prison life, not peanut butter”); Henry F. Fradella, *In Search of Meritorious Claims: A Study of the Processing of Prisoner Cases in a Federal District Court*, 21 JUST. SYS. J. 23 (1999) (finding that only 6 of 290 claims in 200 randomly selected cases were “factually absurd”).

<sup>230</sup> A significant impediment to this sort of study is the lack of information about the frequency with which law enforcement officers use excessive force. Studies have found that police officers use force or threaten to use force against approximately one percent of individuals with whom they have face-to-face interactions. See, e.g., LASD FOURTEENTH SEMI-ANNUAL REPORT, *supra* note 36 at 88, 90 n.17. Yet, there is no reliable data about the incidence of excessive force that could be compared to the number of lawsuits filed. For a description of the many gaps in our information about police uses of force, see Michael R. Smith, *Toward a National Use-Of-Force Data Collection System: One Small (and Focused) Step Is Better Than a Giant Leap*, 7 CRIMINOLOGY & PUB. POL’Y 619 (2008).

<sup>231</sup> Although the studies cited *supra* note 228-29 examine the frequency with which civil rights cases are dismissed, these studies do not evaluate whether the “right” outcome was reached – as do the medical malpractice claims studies described *supra* notes 172-78 and accompanying text.

<sup>232</sup> See, e.g., Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1613-14 (2003) (observing that inmates with attorneys have a higher success rate than *pro se* inmates, but concluding that “without data there is really no way to know which effect dominates – the depression of success rates because lawyers are not available, or the absence of lawyers because the cases are not very good cases”). See also Victor E. Kappeler, Stephen F. Kappeler & Rolando V. del Carmen, *A Content Analysis of Police Civil Liability Cases: Decisions of the Federal District Courts, 1978-1990*, 21 J. CRIM. JUST. 325, 333 (1993) (finding that procedural safeguards cause defendants to win Section

of tort claims have been scrutinized to determine the frequency with which injured people sue, the frequency with which meritorious and frivolous claims succeed, and the amount of damages awarded.<sup>233</sup> This same research can and should be conducted regarding civil rights claims.

Just as researchers have compared medical malpractice claim files against medical records to estimate the percentage of injured people who sue,<sup>234</sup> researchers could compare lawsuits filed against the police against arrest records and civilian complaints to estimate filing rates. Just as objective reviewers have read closed litigation files to evaluate the frequency with which the “correct” result is reached in medical malpractice trials and the plaintiff is awarded the “right” amount in damages,<sup>235</sup> police practices experts could review closed litigation files and reach their own conclusions about the frequency with which trial verdicts and settlements reflect the merits of the underlying claims, and the extent to which the payouts awarded reflect the quantum of compensable injuries.

More study should also be conducted to determine the extent to which lawsuit data is duplicative of internal law enforcement fact-gathering mechanisms. It would be exceedingly easy to compare civilian complaints with lawsuit claims in multiple jurisdictions – so long as the underlying data could be procured from departments. And blue ribbon commissions and police auditors have demonstrated that civilian complaint investigations can be compared with closed litigation files to test their relative comprehensiveness. Further information about the redundancy of lawsuit data would inject a much-needed dose of reality into the rhetoric about litigation data, and assist those thinking seriously about the role that lawsuits should play in decisionmaking.

Studying the accuracy of civil rights lawsuits could further inform the ways that police departments can and should use litigation data. Currently, law enforcement agencies’ evaluations of litigation data accommodate critiques that lawsuits both over-estimate and under-estimate the universe of harms. If, however, studies showed that defense counsel’s decisions to settle police misconduct cases and the amount of those settlements closely tracked objective evaluations of liability and harm, settlements could be considered more conclusive evidence of wrongdoing. And, of course, the opposite conclusion could be reached if study revealed little correlation between settlements and the merits of the underlying claims.

This research could also inform discussion of alternative means of regulating behavior. For example, some suggest that more attention should be paid to improving internal systems of gathering relevant information. Instead of proliferating the policies adopted by the handful of departments in my study,

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1983 cases more often than they would if plaintiffs and defendants were on “equal footing” procedurally).

<sup>233</sup> See *supra* notes 171-78 and accompanying text.

<sup>234</sup> See *supra* notes 171 and accompanying text.

<sup>235</sup> See *supra* notes 172-78 and accompanying text.

should we focus instead on improving police departments' internal complaint gathering and investigation processes? Another alternative – recommended in other areas of tort law – is wholly to separate deterrence goals from litigation.<sup>236</sup> No-fault claims for compensation would be processed through one agency, and another agency would investigate and remedy problems of institutional performance.<sup>237</sup> In order to accomplish this second goal, the agency would gather and analyze data about claims and the costs of resolving the claims.<sup>238</sup> No one has, to my knowledge, suggested the use of no-fault claims and a safety agency in the civil rights context. Yet, it is worth thinking about how these proposals compare with practices already in place in Chicago, Portland, Denver, Seattle, and the LASD.

If internal investigations functioned as intended, they would likely capture more allegations of misconduct and would result in more comprehensive investigations that might lessen the value of litigation data to performance improvement efforts.<sup>239</sup> Improving internal investigatory practices and no-fault systems paired with information gathering agencies would presumably be less expensive than litigating individual claims. Vigorous internal investigations and no-fault systems might also increase the number of claims processed.

Yet, when considering the promise of these alternative approaches, they should be compared with the practices of the departments in my study that extract information from lawsuits. Will agencies or internal systems gather data as comprehensive as what is gathered by plaintiffs' attorneys? Can a centralized agency evaluate information in light of the particularities of a single department?

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<sup>236</sup> Underlying these recommendations is the notion that, even if lawsuits do deter to some extent, the administrative costs of litigation outweigh any benefits. For seminal arguments in this area, see Richard A. Epstein, *The Risks of Risk/Utility*, 48 Ohio St. L.J. 469 (1987); George L. Priest, *Modern Tort Law and Its Reform*, 22 Val. U. L. Rev. 1 (1987). Others argue that damages actions hamper other safety-improvement efforts.

<sup>237</sup> Sugarman, *Doing Away with Tort Law*, 73 Cal. L. Rev. 557, 558 (1985); Weiler, *MEDICAL MALPRACTICE ON TRIAL* 134-50 (1991); Pierce, *supra* note 174 at 1322-23;. For one such example of practices in Japan, see Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 135-38 (2001).

<sup>238</sup> Many recommendations about how this type of safety agency would evaluate litigation data are reminiscent of police departments' actual practices. See Pierce, *supra* note 174 at 1322-23 (recommending that suits would be evaluated independent of the damages awarded to the plaintiff); *id.* at 1323 (noting that the agency would better be able to identify wrongdoing by reviewing claims in the aggregate). See also Weiler, *supra* note 237 at 76 (arguing that trends in lawsuits and other behavior could be reviewed parallel to the litigation system).

<sup>239</sup> These improvements might – or might not – make plaintiffs more likely to file civilian complaints: Some might decide to file a civilian complaint because it would more likely affect department practices, but others interested in preserving their strongest legal claim might continue to abstain. Either way, improvements to the civilian complaint review process would improve the quality of information gathered internally.

Even if the answers to these questions are no, policy makers may conclude economic or other benefits outweigh whatever is lost by using these alternative approaches. Either way, alternatives should be considered in light of current practices and the unique characteristics of lawsuit data.

We could also consider ways to make the data produced by litigation less burdensome to gather and analyze. The Federal Rules of Civil Procedure are structured optimally to resolve disputes between parties. What if, instead, the Rules were structured to facilitate the generation of information relevant to organizational performance improvement efforts? Prioritizing the generation of information would likely affect judicial decisions about the propriety of protective orders, confidentiality provisions in settlement agreements, and evidentiary rulings.

We should also consider ways to encourage more police departments to pay attention to the information available in lawsuits. Departments appear to ignore lawsuit data on the uninformed assumption that the data is fatally flawed.<sup>240</sup> This Article – and the additional research I have proposed – may convince some departments that lawsuits contain information worth examining. Other departments might only implement these policies if they are required to do so.<sup>241</sup> Whether instituted by choice or demand, policies to gather and analyze information from lawsuits should be periodically reviewed by an outsider who can review information-gathering protocols and offer feedback to the department. Although it is premature to contend that an outside auditor is *necessary*, their independent eye does appear to improve information-gathering and decisionmaking by the departments in my study.

Finally, research can tackle these same questions as they apply to other types of organizations. Lawsuits should now be understood as potential sources of information, but how useful is that information to other complex organizations? One might assume that litigation data would be less useful in more highly regulated areas, such as medicine, where state and federal law require extensive collection and analysis of data about adverse events. Interestingly, studies have found that initial claims<sup>242</sup> and the discovery process<sup>243</sup> reveal information about

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<sup>240</sup> See *supra* note 168.

<sup>241</sup> The five departments in this study began looking at litigation data only after significant political pressure to do so. See Part I.C.

<sup>242</sup> Studies have found that many adverse events occurring in hospitals are never entered into hospital records. L.B. Andrews, C. Stocking, T. Krizek, L. Gottlieb, C. Krizek, T. Vargish & M. Siegler, *An Alternative Strategy for Studying Adverse Events in Medical Care*, 349 LANCET 309 (1997) (identifying adverse events through ethnographic research and comparing observations to hospital records). Although medical personnel may openly discuss patient errors in morbidity and mortality conferences, one study found that that information “was rarely transmitted to the entities charged with patient safety or risk management.” Lori Andrews, *Studying Medical Error In Situ: Implications for Malpractice Law and Policy*, 54 DEPAUL L. REV. 357, 387 (2004). Although incident



medical error unavailable through internal sources, as well.<sup>244</sup> Research can reveal the ways that other types of organizations actually gather and analyze information from lawsuits and the effects of these practices on our understanding of the relationship between litigation and performance improvement.

This Article is one important step toward a better understanding the relationship between lawsuits and organizational behavior. The policies used by the five departments in my study are promising and provocative ways to learn from lawsuits. And we, in turn, should learn more from and about them.

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reporting systems have been used by hospitals to identify systematic risks and areas for additional training, studies have shown that incident reports do not reflect the scope, or severity of errors and are not, therefore, an “effective early warning system about claims.” *Id.* at 368. *See also* Lindgren et al., *Medical Malpractice Risk Management Early Warning Systems*, 54 LAW & CONTEMP. PROBS. at 25 (“Because physicians seldom participate [in the reporting process] and because many fear subsequent discovery of the information through the legal process, more serious occurrences typically go unreported.”)

<sup>243</sup> Medical malpractice claims are considered a more complete source of information about the claim than charts and medical reports. *See* Lindgren et al., *supra* note 241 at 25 (discussing the problems with relying on charts and medical reports); Rogers et al., 140 SURGERY at 26 (same). Accordingly, despite the availability of other sources of information about adverse events, closed claims files appear to be the data of choice for liability insurers, hospitals, and researchers seeking to identify trends. *See, e.g.*, Lindgren et al., *supra* note 241 at 28 (studying medical early warning systems with a database that included 50,000 reports and 8,000 malpractice claims files, but focusing on the claims data). Medical malpractice claims files are viewed as superior sources of information because, “by drawing together documentation from both formal legal documents, such as depositions and interrogatories, and confidential internal investigations, claim files present a substantially richer body of information about the antecedents of medical injury than the medical record alone.” Selwyn O. Rogers, Jr., Atul A. Gawande, Mary Kwaan, Ann Louise Puopolo, Catherine Yoon, Troyen A. Brennan & David M. Studdert, *Analysis of Surgical Errors in Closed Malpractice Claims at 4 Liability Insurers*, 140 SURGERY 25 (2006). Physician reviewers have reported that the information in claims files – including expert reports, litigation documents, and hospital committee reviews – is more helpful in assessing claims than the medical records alone.

<sup>244</sup> The ways that hospital risk managers and medical malpractice insurers gather and analyze litigation data is the subject of my current research.