
“NOT DEAD YET”: THE NATIONAL POLICE CRISIS, A NEW CONVERSATION ABOUT POLICING, AND THE PROSPECTS FOR ACCOUNTABILITY-RELATED POLICE REFORM

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This Article argues that, despite the actions of the Trump Administration in cancelling two Justice Department accountability-related police reform programs, the prospects for continued police reform efforts in the immediate future remain alive. This argument is based on several factors, both in the broader social and political environment and within the law enforcement profession. First, the events in Ferguson, Missouri, in August 2014, and the related events that followed, created a National Police Crisis. The crisis created a high level of public awareness and concern about policing and police reform that has already served as a necessary predicate to police reform efforts. Second, the crisis stimulated police debates over American policing and police reform that have coalesced into what this Article terms a New Conversation, involving a rough national consensus about needed police reforms. The New Conversation has already guided a broad series of police reform efforts at the national, state, and local levels. Three principal sources contribute to the New Conversation, which are reviewed in detail in this Article. The three sources include principles articulated by the President’s Task Force on 21st Century Policing; policies recommended by the Police Executive Research Forum, a professional association of police chiefs; and administrative practices embodied in court-enforced settlements negotiated by the Civil Rights Division of the U.S. Department of Justice. These three elements constitute a “roadmap” for future police reform.

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I. INTRODUCTION

A. *The Trump Administration's Withdrawal from Police Reform*

In a March 17, 2017 memorandum to all “Heads of Department Components and United States Attorneys,” Attorney General Jeff Sessions ordered a “review [of] all Department activities—including . . . existing or contemplated consent decrees”¹ Virtually all observers understood the order to mean that the administration of President Donald J. Trump was terminating the Justice Department’s program of pattern or practice investigations of constitutional violations by local and state law enforcement agencies.² The announcement was no surprise. During the 2016 presidential election campaign, and in the presidential transition period following Trump’s election in November 2016, both Trump and Sessions publicly expressed their opposition to Justice Department investigations of local and state police agencies, while also expressing strong support for the country’s police officers.³ President Trump’s plan to end

1. Attorney General Jeff Sessions, Memorandum for Heads of Department Components and United States Attorneys: Supporting Federal, State, Local and Tribal Law Enforcement (Mar. 31, 2017), <https://www.justice.gov/opa/press-release/file/954916/download>.

2. Mark Berman, *Sessions Wants a Review of Consent Decrees, Which Have Been Used for Decades to Force Reforms*, WASH. POST (Apr. 4, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/04/04/sessions-wants-a-review-of-consent-decrees-which-have-been-used-for-decades-to-force-reforms/?noredirect=on&utm_term=.cedf5e64e651.

3. REUTERS, *Donald Trump Addresses Role of Police*, N.Y. TIMES (July 13, 2016), <https://www.nytimes.com/video/us/10000004527060/donald-trump-addresses-role-of-police.html> (quoting Donald Trump as saying “[t]he hostility against our police has to end”).

the pursuit of consent decrees, for example, was “hailed” by police unions⁴ and caused alarm among many advocates of accountability-related police reform.⁵

The Trump administration’s effort to roll back federal police accountability-related reform efforts did not stop with the pattern or practice program.⁶ In September 2017, Attorney General Sessions also ended the existing Justice Department’s Collaborative Reform Initiative.⁷ Housed in the Office of Community Oriented Policing Services (generally referred to as the “COPS Office”), the collaborative reform program was a voluntary effort in which local police departments would request Justice Department assistance in addressing specific problems.⁸ A team of professional law enforcement experts would investigate the department and then develop a mutually agreed upon plan for corrective action.⁹ The investigations and recommended reforms were generally similar to those of the pattern or practice program, with the crucial exception that final agreements between the Justice Department and cities did not involve a judicially enforced settlement, a fact that made them palatable to local officials.¹⁰ In December 2017, the Justice Department announced the creation of a revised Collaborative Reform Initiative, supported by a \$7 million budget and involving a coalition of law enforcement organizations.¹¹ The focus of the new pro-

4. Richard Pérez-Peña & Sheryl Gay Stolberg, *Police Unions Hail Trump’s Easing of Scrutiny. Local Officials Worry*, N.Y. TIMES (Apr. 4, 2017), <https://www.nytimes.com/2017/04/04/us/trump-police-unions-obama-justice-department-doj.html>.

5. This Article focuses on accountability-related reforms, defined as policies and practices designed to hold police officers accountable for their actions in encounters with members of the public. It does not cover accountability issues related to the performance of police organizations as organizations with respect to their efforts to address crime and disorder and to serve the public, including for example, community policing and problem-oriented policing.

6. The Trump Administration is not the first presidential administration to back away from Justice Department efforts to investigate civil rights violations by local police departments and seek judicially enforced settlements. The administration of President George W. Bush, following its conservative agenda on civil rights issues, substantially reduced the Justice Department pattern or practice program between 2001 and 2009, reducing the number of investigations and reaching no new settlement agreements between 2004 and 2008. The evidence of the Civil Rights Division’s lack of effort under President Bush is in U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., *THE CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT* 19, 36 (2017) [hereinafter DOJ, PATTERN AND PRACTICE]. In short, Democratic Party presidents (Bill Clinton and Barack Obama) have pursued accountability-related police reforms, while Republican Party presidents (George W. Bush and Donald J. Trump) have not.

7. Press Release, U.S. Dep’t of Justice, Department of Justice Announces Changes to the Collaborative Reform Initiative (Sept. 15, 2017), <https://www.justice.gov/opa/pr/departement-justice-announces-changes-collaborative-reform-initiative> [hereinafter DOJ Announces Changes]; Sadie Gurman, *Justice Department Refocuses Police Reform on Fighting Crime*, USA TODAY (Sept. 15, 2017, 4:46 PM), <https://www.usatoday.com/story/news/politics/2017/09/15/justice-department-refocuses-police-reform-fighting-crime/671703001/>.

8. DOJ Announces Changes, *supra* note 7.

9. See, e.g., JAMES K. STEWART ET AL., *COLLABORATIVE REFORM MODEL: A REVIEW OF OFFICER-INVOLVED SHOOTINGS IN THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT* 9 (2012), <https://ric-zainc.com/Publications/cops-p273-pub.pdf>.

10. Press Release, U.S. Dep’t of Justice, The Department of Justice Announces Unprecedented Award to Police Executives and Unions to Create a Technical Assistance Center (Dec. 20, 2017), <https://www.justice.gov/opa/pr/departement-justice-announces-unprecedented-award-police-executives-and-unions-create> [hereinafter Unprecedented Award].

11. *Id.*

gram is not clear as this Article is written, but the rhetoric of President Trump and Attorney General Sessions on policing, combined with the termination of the two existing police reform programs, clearly indicate that it will not focus on constitutional violations by local police.¹² The fact that one coalition member is the Fraternal Order of Police, the largest national federation of local police unions and a consistent opponent of accountability-related police reforms, would seem to confirm this point.¹³

The Trump Administration's actions on the two police reform programs alarmed many police reform experts and community activists engaged in police problems.¹⁴ The pattern or practice program, authorized by Section 14141 of the 1994 Violent Crime Control and Law Enforcement Act,¹⁵ and housed in the Special Litigation Section ("SLS") of the Civil Rights Division, was an unprecedented event in the history of American policing. Never had the federal government intervened so directly in so many local police departments for the purpose of ending unconstitutional practices by the police and implementing sweeping reforms backed by judicial enforcement.¹⁶ The SLS program had been an innovative force for police reform for its twenty years of existence. The statute had been hailed by many civil rights activists and police reformers.¹⁷ Law professor William J. Stuntz in 2006 called it "the most important legal initiative of the past twenty years in the sphere of police regulation."¹⁸ Between 1997 and January 2018, the SLS conducted sixty-nine formal investigations of law enforcement agencies and reached judicially enforced settlements with for-

12. *See id.*; *see also* DOJ Announces Changes, *supra* note 7.

13. Unprecedented Award, *supra* note 10. On the role of the Fraternal Order of Police in opposing accountability-related reforms in Chicago, see CHICAGO POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM 70–73 (2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf (documenting the specific adverse impacts of the existing collective bargaining agreement on accountability for rank-and-file officers). On the Fraternal Order of Police, see FRATERNAL ORDER OF POLICE, <https://www.fop.net/> (last visited Oct. 9, 2018).

14. Yamiche Alcindor, *Minorities Worry What a 'Law and Order' Donald Trump Presidency Will Mean*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/us/politics/minorities-worry-what-a-law-and-order-donald-trump-presidency-will-mean.html>; Joe Domanick, *Cops, Trump and the Threat to Police Reform*, THE CRIME REPORT (Nov. 21, 2016), <http://thecrimereport.org/2016/11/21/cops-trump-and-the-threat-to-police-reform/>.

15. "Cause of Action (a) Unlawful conduct. It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. (b) Civil action by Attorney General. Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice." 34 U.S.C. § 12601 (2012).

16. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347–48 (2015) (reviewing the origins of Section 14141, the process of investigations conducted by the Civil Rights Division, and the reforms initiated).

17. *See, e.g.*, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 798 (2006).

18. *Id.* A crucial and distinctive feature of the pattern or practice program was its emphasis on organizational reform, as opposed to reforms addressing only one aspect of policing (*e.g.*, use of force, stop and frisk). *See infra* note 6.

ty agencies.¹⁹ The settlements, in the form of consent decrees or memoranda of agreement (“MOA”), required sweeping reforms designed to end unconstitutional practices related to controlling police officer uses of force, stops and frisks, and racial profiling, along with a set of other accountability-related reforms designed to ensure constitutional policing.²⁰ While the program was criticized for, among other reasons, intruding into local police governance, imposing extreme financial costs on local governments, polarizing rather than resolving local police-community relations, and (in the view of its critics) failing to demonstrate its effectiveness,²¹ evaluations of several settlement experiences have generally found the program to be effective in achieving its goals.²²

B. *The Goal of This Article*

This Article argues that, despite the alarm felt by many police reform experts because of the Trump Administration’s withdrawal from judicially enforced police reform, the prospects for future police reform remain viable in both the immediate and long-term future.²³ The Article argues that the political climate surrounding American policing changed dramatically following the tragic events in Ferguson, Missouri in August 2014, creating what this Article labels a “National Police Crisis.”²⁴ The crisis stimulated wide-ranging discussions of policing and police reform, which this Article labels the “New Conversation” about policing and police reform. Drawing on three principal sources, which are examined in detail here, the New Conversation developed an integrated set of *principles*, *policies*, and *practices* that represent a “roadmap” for future police reform. As is argued at appropriate points in the Article, however, many of the reforms discussed herein face uncertainties, challenges, and obstacles. Thus, while the possibility of continued reform exists, achievement of continued reform is far from certain.

Part II of this Article examines the National Police Crisis that erupted in 2014 and the various responses that it generated. Intense media coverage of police shootings and the consequent protests had a significant impact on public

19. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 3.

20. *Id.* at 20–21.

21. Shaila Dewan & Richard A. Oppel Jr., *Efforts to Curb Police Abuses Have Mixed Record, and Uncertain Future*, N.Y. TIMES (Jan. 14, 2017), <https://www.nytimes.com/2017/01/14/us/chicago-police-consent-decree.html>; Kimbriell Kelly, Sarah Childress & Steven Rich, *Forced Reforms, Mixed Results*, WASH. POST (Nov. 13, 2015), <http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/>.

22. *See infra* Section IV.B.

23. Samuel Walker, *Why Police Reform Won’t Die Under Trump*, CRIME REPORT (Nov. 28, 2016), <https://thecrimereport.org/2016/11/28/why-police-reform-wont-end-with-the-trump-administration/> (an initial statement of the argument is in this Article).

24. Events occurring as this Article was being written through mid-2018, notably a controversial police shooting in Sacramento, California, suggest that the National Police Crisis is continuing. *Video Shows Sacramento Police Shooting Unarmed Black Man in Grandparents’ Backyard*, NPR (Mar. 22, 2018), <https://www.npr.org/sections/thetwo-way/2018/03/22/596051907/video-shows-sacramento-police-shoot-unarmed-black-man-in-grandparents-backyard> [hereinafter *Sacramento Police Shooting*].

opinion, creating support for police reform efforts.²⁵ President Barack Obama created the President's Task Force on 21st Century Policing, the first-ever national commission or task force devoted exclusively to the police.²⁶ The spate of fatal shootings by police officers spurred national media coverage of the police crisis, which one analyst argues created greater public support for police reform.²⁷ Police leaders, acting through the Police Executive Research Forum ("PERF"), issued a series of reports on officer use of force, police training, and related matters that challenged existing police practices.²⁸ At the same time, by one estimate, thirty-four state legislatures and the District of Columbia enacted seventy-nine pieces of police accountability-related legislation in 2015 and 2016.²⁹ At the municipal level, new accountability-related measures were adopted in Oakland, Chicago, and Seattle.³⁰ Special investigations of the local police departments were also initiated by local authorities in Chicago³¹ and San Francisco.³² Finally, in 2017–2018, two state attorneys general, in Illinois³³ and California,³⁴ undertook major initiatives to effect accountability-related reforms in large cities in their states. The broad-based wave of action by a diverse group of actors signaled increased public support for accountability-related police reforms.

Part III of this Article examines the New Conversation about policing and police reform that has emerged as a result of the National Police Crisis. Two of the three voices contributing to the New Conversation are examined in this Part, while the third is examined in Part IV. The President's Task Force and reports by PERF articulated a set of basic principles, including the importance of legitimacy, public trust, and confidence in the police; procedural justice in po-

25. Angela S. Lee, Ronald Weitzer & Daniel E. Martínez, *Recent Police Killings in the United States: A Three-City, Comparison*, 21 POLICE Q. 196, 217 (2017); Sandhya Somashekhar & Steven Rich, *Final Tally: Police Shot and Killed 986 People in 2015*, WASH. POST (Jan. 6, 2016), https://www.washingtonpost.com/national/final-tally-police-shot-and-killed-984-people-in-2015/2016/01/05/3ec7a404-b3c5-11e5-a76a-0b5145e8679a_story.html?noredirect=on&utm_term=.5eab5e570823.

26. THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (2015) [hereinafter FINAL REPORT].

27. John Sullivan et al., *Police Fatally Shot Nearly 1,000 People, and 46 Officers Were Killed Nationwide in 2017*, CHI. TRIB. (Jan. 6, 2018, 4:49 PM), <http://www.chicagotribune.com/news/nationworld/ct-nationwide-police-fatal-shootings-2017-20180106-story.html>.

28. FINAL REPORT, *supra* note 26, at 32.

29. RAM SUBRAMANIAN & LEAH SKRZYPIEC, TO PROTECT AND SERVE: NEW TRENDS IN STATE-LEVEL POLICING REFORM, 2015–2016 (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/protect-and-serve-policing-trends-2015-2016/legacy_downloads/041417-PolicingTrendsReport-web.pdf.

30. *Id.* at 10.

31. CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 13, at 1.

32. SAN FRANCISCO DISTRICT ATTORNEY, REPORT OF THE BLUE RIBBON PANEL ON TRANSPARENCY, ACCOUNTABILITY, AND FAIRNESS IN LAW ENFORCEMENT 1 (2016).

33. Mitch Smith, *Illinois Attorney General Sues Chicago over Police Practices*, N.Y. TIMES (Aug. 29, 2017), <https://www.nytimes.com/2017/08/29/us/chicago-police-consent-decree.html>.

34. Memorandum of Understanding Between the California Department of Justice and The City and County of San Francisco, Acting Through the Mayor's Office and Francisco Police Department (Feb. 5, 2018), https://oag.ca.gov/system/files/attachments/press_releases/DOJ%20MOU1.pdf [hereinafter Memorandum of Understanding, San Francisco].

lice work; greater openness and transparency on the part of police departments; and a variety of reforms including de-escalation.³⁵ PERF contributed a set of policies related to the control of police officer use of force, including improved training, de-escalation, and tactical decision-making.³⁶ Finally, the settlements in the Justice Department's pattern or practice program embody a set of police practices that are designed to achieve constitutional policing and translate the principles and policies in the New Conversation into day-to-day policing.³⁷

Part IV of this Article examines in detail the efforts and impacts of the SLS pattern or practice program. It argues that the specific reforms contained in its settlements embody specific practices, which translate the principles articulated by the President's Task Force and the policies advanced in the PERF reports. The SLS required reforms represent a set of "best practices" that are an important element in the New Conversation about police reform.³⁸ Finally, the consent decrees also had several collateral consequences, which have not been fully recognized but which have had important implications for police accountability.³⁹

Part V concludes the Article by arguing that the developments discussed herein provide the basis for optimism about the prospects for future police reform. It also summarizes the various obstacles to continued police reform, which are discussed at different points in the Article.

II. THE NATIONAL POLICE CRISIS, 2014 AND BEYOND

A. *The Events of 2014 and After*

The fatal shooting of Michael Brown, an eighteen-year-old African American, by white police officer Darren Wilson on August 9, 2014 sparked weeks of public protest in Ferguson, Missouri, and around the country, and launched the National Police Crisis.⁴⁰ The Ferguson shooting was preceded by the July death of Eric Garner, an African American, on Staten Island, New York, by a chokehold applied by a New York City police officer.⁴¹ Other high-profile deaths at the hands of the police soon followed in other cities and continued through mid-2018.⁴² Virtually all of the deaths at the hands of the police were followed by community protests, including two that resulted in serious violence and property destruction.⁴³ Public outrage heightened in several cases by the circumstances of the deaths, including for example, the heavy use of military

35. FINAL REPORT, *supra* note 26, at 111.

36. *Id.* at 22.

37. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 20.

38. *Id.* at 27–28.

39. *Id.* at 30.

40. WESLEY LOWERY, THEY CAN'T KILL US ALL: FERGUSON, BALTIMORE, AND A NEW ERA IN AMERICA'S RACIAL JUSTICE MOVEMENT 33–39 (2016).

41. MATT TAIBBI, I CAN'T BREATHE: A KILLING ON BAY STREET 94 (2017).

42. *See, e.g., Sacramento Police Shooting, supra* note 24.

43. LOWERY, *supra* note 40, at 3–72, 155–57 (Ferguson), 133–36, 141–47 (Baltimore).

equipment against protesters in Ferguson.⁴⁴ In most, but not all cases, the police officers were either not indicted or not convicted for the shootings.⁴⁵ The relative lack of convictions heightened public cynicism, particularly among African Americans, about the failure of local criminal justice systems to provide justice for the families, friends, and neighbors of the victims of police-related deaths.

The series of fatal police shootings and the protests that followed received intense media coverage. A study of the media coverage of three deaths at the hands of the police (in Ferguson, Missouri; North Charleston, South Carolina; and Baltimore, Maryland) found a “clear departure” from media coverage in previous years with respect to explanatory factors included in the coverage.⁴⁶ The study found greater discussion of “structural factors,” defined as “institutional or societal factors.”⁴⁷ In the quantitative analysis of local newspapers, the authors of the study employed a category of “Accountability Deficiency,” meaning the failure of police departments to hold their officers accountable.⁴⁸ The authors conclude that “mainstream news reporting may be contributing to a ‘new visibility’ and critique of police wrongdoing.”⁴⁹

The intense media coverage of police shootings and the resulting protests had a significant impact on public attitudes about race and policing. A 2016 PEW Research Center survey of public attitudes on race in the U.S. found “profound differences” in the attitudes of whites and blacks, with 84% of blacks feeling blacks were “treated less fairly” than whites, compared with 50% of whites.⁵⁰ Almost half (47%) of blacks reported they had been “treated like they were suspicious” (and not just by the police), compared with only 10% of whites.⁵¹

B. Responses at the National, State, and Local Levels

1. National Level Responses

The National Police Crisis prompted a number of important responses at the national level. Most important, in December 2014, President Barack Obama

44. *Id.*

45. An increase in criminal prosecutions did occur in 2015 (from a previous average of five per year to twelve in 2015), undoubtedly in response to the sustained media coverage of police shootings. Ian Simpson, *Prosecution of U.S. Police for Killings Surges to Highest in Decade*, REUTERS (Oct. 26, 2015), <https://www.reuters.com/article/us-usa-police/prosecution-of-u-s-police-for-killings-surges-to-highest-in-decade-idUSKCN0SK17L20151026>.

46. Lee, Weitzer & Martinez, *supra* note 25, at 208.

47. *Id.*

48. *Id.* at 210 (“accountability deficiency”).

49. *Id.* at 217.

50. PEW RESEARCH CTR., ON VIEWS OF RACE AND INEQUALITY, BLACKS AND WHITES ARE WORLDS APART 4–5 (2016), <http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/>.

51. *Id.* at 5. See also the deep racial divide found in a study of traffic enforcement in the Kansas City metropolitan area. CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014).

established the President's Task Force on 21st Century Policing, the first-ever presidential commission or task force devoted exclusively to the police.⁵² By comparison, the National Advisory Commission on Civil Disorders (the "Kerner Commission"), created to study the riots of the 1964–1967 years, devoted only two full chapters to an examination of American policing and its problems.⁵³

The series of fatal shootings of young African American men focused national attention on the issue of police use of deadly force. Journalists discovered that the generally accepted national estimate of the number of people shot and killed by the police every year was not reliable.⁵⁴ The FBI's Supplemental Homicide Reports data on Law Enforcement Officers Assaulted and Killed is a voluntary system, and many departments do not submit their data.⁵⁵ Nor is the data that is submitted audited by the FBI.⁵⁶ In response, two news media outlets, the *Washington Post*⁵⁷ and the *Guardian*,⁵⁸ undertook their own surveys of fatal police shootings in 2015, using all possible sources, including social media. Both surveys found that the actual number of people shot and killed by police is about twice the official FBI figure.⁵⁹ The *Washington Post* found that 986 people were fatally shot by the police in 2015, compared with 459 in the FBI data.⁶⁰ Law professor Franklin Zimring, meanwhile, examined all three federal sources of data on persons shot and killed by the police, and found that the other two reached estimates roughly similar to the FBI count, while a "crowdsourcing" estimate was close to the *Washington Post* estimate.⁶¹

The National Police Crisis also brought unprecedented attention to the role of police unions as a factor in police governance and particularly to provisions of collective bargaining agreements that serve to impede holding police officers accountable.⁶² The new activist group Black Lives Matter published a

52. U.S. DEP'T OF JUSTICE, THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING IMPLEMENTATION GUIDE 1 (2015), <http://noblenational.org/wp-content/uploads/2017/02/President-Barack-Obama-Task-Force-on-21st-Century-Policing-Implementation-Guide.pdf>.

53. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE ADVISORY COMMISSION ON CIVIL DISORDERS 157–80 (1968) (Chapter 11, "The Police and The Community," and Chapter 12, "Control of Disorder").

54. Somashekhar & Rich, *supra* note 25.

55. See U.S. DEP'T OF JUSTICE, THE NATION'S TWO MEASURES OF HOMICIDE 2 (2014), <https://www.bjs.gov/content/pub/pdf/ntmh.pdf>; FBI, *Expanded Homicide Data Table 5*, FBI: UNIFORM CRIME REPORTS, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/expanded-homicide-data-table-5.xls> (last visited Oct. 9, 2018); Ken Schwencke & A.C. Thompson, *More Than 100 Federal Agencies Fail to Report Hate Crimes to the FBI's National Database*, PROPUBLICA (June 22, 2017, 1:39 PM), <https://www.propublica.org/article/more-100-federal-agencies-fail-report-hate-crimes-fbi-national-database>.

56. Jon Swaine et al., *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, GUARDIAN (Dec. 31, 2015), <https://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men>.

57. Somashekhar & Rich, *supra* note 25.

58. Swaine et al., *supra* note 56.

59. Somashekhar & Rich, *supra* note 25; Swaine et al., *supra* note 56.

60. Somashekhar & Rich, *supra* note 25.

61. See generally FRANKLIN E. ZIMRING, WHEN POLICE KILL (2017).

62. SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 199–210 (2d ed. 1994) ("The Cops Fight Back: Police Unionism"); Kevin M. Keenan & Samuel Walker, *An Impediment to Po-*

pioneering examination of collective bargaining agreements.⁶³ It identified several contract provisions impeding accountability-related policies, including waiting periods before an officer can be questioned by supervisors about an incident (most commonly involving a forty-eight-hour waiting period);⁶⁴ provisions allowing officers to purge disciplinary actions from their personnel files; and discipline appeal procedures that often result in the serious mitigation of punishment or, in the case of arbitration, procedures that often result in terminations being overturned.⁶⁵

2. *State and Local Legislation and Investigations*

Heightened public awareness of police misconduct led to a wave of accountability-related state legislation in 2015 and 2016.⁶⁶ Thirty-four states and the District of Columbia, passed seventy-nine bills, resolutions, or executive orders related to police policies and practices.⁶⁷ The total was four times that of the 2012–2014 period.⁶⁸ Colorado, for example, enacted ten bills, in what was labelled the “Building Trust Package.”⁶⁹

The new legislation covered a broad range of police issues, which a Vera Institute report divided into three general categories: (1) “Improving Police Operations” with laws related to police use of force, chokeholds, racial or “identity” profiling (with laws in eleven states); (2) “Documenting Police Operations” with laws on police body-worn cameras (the most popular issue, with laws in twenty-eight states), legal protections for recording police actions, and public information on all officer-involved shootings; and (3) “Increasing Accountability” with laws providing for more independent investigation and prosecution of police shooting cases, requiring written policies on the investigation of officer-involved deaths.⁷⁰ The Vera report concluded that the “proliferation” of statutes enacted in this period “represent a change in the course of policing reform.”⁷¹

Also reflecting heightened concern about police misconduct, a number of police accountability-related measures were created at the municipal level, either by city councils or by referenda. The voters in Oakland, California, in

lice Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights, 14 B.U. PUB. INT. L.J. 185, 185 (2005); Katherine J. Bies, Note, *Let the Sunshine in: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 149 (2017) (“Police unions continue to challenge and deter progressive reform efforts that would foster accountability and transparency.”).

63. *Police Union Contract Project*, CHECK THE POLICE, <http://www.checkthepolice.org/> (last updated June 10, 2016).

64. SAMUEL WALKER, POLICE UNION CONTRACT “WAITING PERIODS” FOR MISCONDUCT INVESTIGATIONS NOT SUPPORTED BY SCIENTIFIC EVIDENCE 1 (July 1, 2015), <http://samuelwalker.net/wp-content/uploads/0201/05/48HourSciencepdf.pdf>.

65. Bies, *supra* note 62, at 112.

66. SUBRAMANIAN & SKRZYPIEC, *supra* note 29, at 2.

67. *Id.*

68. *Id.*

69. *Id.* at 42.

70. *Id.* at 3.

71. *Id.* at 41.

2016, passed a referendum creating an elected Police Commission to oversee the Oakland Police Department's policies and procedures and also to investigate police misconduct incidents and recommend discipline.⁷² Chicago, in late 2016, created a new inspector general for the police department, as a unit in the Chicago Inspector General's office dedicated to the police department.⁷³ Also, in Chicago, the Grassroots Action for Police Accountability ("GAPA") began an organizing effort to propose an ordinance to create an elected citizens police commission with the power to adopt policies for the Chicago Police Department and also to have a role in the hiring and termination of the Chicago police superintendent.⁷⁴ In June 2017, Seattle, Washington completed the process of creating three separate agencies providing greater citizen oversight of the police: a revised Office of Professional Accountability, a new Inspector General, and a permanent Community Police Commission, putting the city in a unique category in terms of the number and authority of external oversight agencies for the police.⁷⁵

3. *Actions by State Attorneys General*

In another significant development in 2017–2018, the attorneys general in Illinois and California took important steps on behalf of greater police accountability. In August 2017, the Attorney General of Illinois sued the Chicago Police Department and then initiated negotiations to secure a consent decree to require a set of reforms; a draft consent decree was issued in late July 2018.⁷⁶ The U.S. Justice Department under the Obama Administration had investigated the Chicago police and delivered a report of its findings in early 2017, days be-

72. *Police Commission*, CITY OF OAKLAND, <http://www2.oaklandnet.com/government/o/CityAdministration/d/police-commission/index.htm> (last visited Oct. 9, 2018).

73. *History*, OFF. OF INSPECTOR GEN.—CITY OF CHICAGO, <https://igchicago.org/about-the-office/our-office/public-safety-section/public-safety-section-history/> (last visited Oct. 9, 2018).

74. GRASSROOTS ALLIANCE FOR POLICE ACCOUNTABILITY, <http://chicagogapa.org/> (last visited Oct. 9, 2018); Annie Sweeney, *Give a Civilian Oversight Board the Power to Remove Police Superintendent, Set Policy, Community Groups Propose*, CHI. TRIB. (Mar. 10, 2018, 4:00 PM), <http://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-oversight-commission-20180306-story.html>.

75. SEATTLE, WASH., CITY COUNCIL BILL 118969 (June 1, 2017), <http://seattle.legistar.com/LegislationDetail.aspx?ID=3041612&GUID=189886AB-6C46-438A-AB56-DA45AE4FCD7B&Options=Advanced&Search=>. On the Seattle Community Police Commission, see Samuel Walker, *The Community Voice in Policing: Old Issues, New Evidence*, 27 CRIM. JUST. POL'Y REV. 537, 544–48 (2016) [hereinafter Walker, *Community Voice*].

76. Mitch Smith, *Illinois Attorney General Sues Chicago over Police Practices*, N.Y. TIMES (Aug. 29, 2017), <https://www.nytimes.com/2017/08/29/us/chicago-police-consent-decree.html>. In late July 2018 the Illinois Attorney General issued a draft consent decree covering the Chicago Police Department. Consent Decree, *State of Illinois v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. July 27, 2018), http://www.illinoisattorneygeneral.gov/rights/Illinois_v_Chicago_Consent_Decree-DraftforPublicReview2018-7-27.pdf (draft for public review).

fore the administration left office.⁷⁷ The Chicago report closely resembled the SLS reports that preceded settlements in other pattern or practice investigations.⁷⁸ Public expectations for reform were also enhanced by the April 2016 report of the Chicago Police Accountability Task Force, which provided a scathing analysis of Chicago police abuses and the failure of the existing accountability systems.⁷⁹ In seeking its own consent decree with the Chicago Police Department, the Illinois Attorney General stepped into the void created by the termination of the pattern or practice program by the Trump Administration.

In early 2018, meanwhile, the Attorney General of California agreed to serve as the Monitor of a settlement agreement involving the San Francisco Police Department.⁸⁰ The settlement agreement was the result of a Justice Department Collaborative Reform investigation of the police department that could not be implemented when the Trump Administration cancelled the Collaborative Reform program.⁸¹ The San Francisco Police Department had previously been the subject of a highly critical Blue Ribbon Panel, organized by the San Francisco District Attorney.⁸² The Mayor of San Francisco and the Chief of Police were determined to pursue reform of the department and, consequently, requested that the State Attorney General serve as the Monitor of the implementation process.⁸³ The San Francisco case was not an exception for the Attorney General with regard to police reform. The Attorney General's office maintains a program on 21st Century Policing, which involves supporting accountability-related legislation and investigating law enforcement agencies for civil rights violations.⁸⁴

The actions by the two state attorneys general in this regard not only fill the void left by the withdrawal of the Justice Department but also serve as potential models for similar reform efforts by other state attorneys general. Should they choose to follow this model, it would greatly enhance the number of agencies active in pursuing police reform.

77. *See generally* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (Jan. 13, 2017), <https://www.justice.gov/crt/case-document/file/925771/download> [hereinafter DOJ, INVESTIGATION OF CHICAGO].

78. *See* Section IV.A.

79. CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 13, at 6.

80. Memorandum of Understanding, San Francisco, *supra* note 34, at 1.

81. *See generally* U.S. DEP'T OF JUSTICE, COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF THE SAN FRANCISCO POLICE DEPARTMENT (2016), <https://ric-zai-inc.com/Publications/cops-w0817-pub.pdf> [hereinafter U.S. DEP'T OF JUSTICE, COLLABORATIVE REFORM INITIATIVE].

82. SAN FRANCISCO DISTRICT ATTORNEY, *supra* note 32, at 1.

83. U.S. DEP'T OF JUSTICE, COLLABORATIVE REFORM INITIATIVE, *supra* note 81, at 19.

84. *21st Century Policing*, CAL. DEP'T OF JUST., <https://oag.ca.gov/21st-century-policing> (last visited Oct. 9, 2018). On December 22, 2016 the Attorney General opened investigations of the Kern County Sheriff's Department and the Bakersfield Police Department. The Attorney General had previously sued local police departments in 1999 and 2009.

4. *Summary*

The actions by state legislatures, attorneys general, and local officials described above are particularly significant with respect to the future of accountability-related police reform. The state and municipal legislative actions indicate a broad base of public support for police reform and the readiness of elected officials to respond to public demands on that issue. It is entirely possible, of course, that unforeseen events (*e.g.*, a major international crisis or severe economic recession) could divert public attention away from police reform. But it is equally possible that no such crisis will occur and that public support for police reform will continue in the foreseeable future. The actions of the two state attorneys general, meanwhile, mark the entry of an important legal force into the field of police reform, the combined resources of which far exceeds that of the U.S. Justice Department.

III. THE NEW CONVERSATION ABOUT POLICING AND POLICE REFORM

A. *The Development of the New Conversation*

The National Police Crisis provoked much public protest, investigative research, and debate that eventually led to a New Conversation about the state of policing and police reform. The New Conversation involves a rough consensus on principles, policies, and practices to guide future accountability-related police reform efforts. This Part examines two of the three major voices that contributed in different ways to the rough consensus. The President's Task Force on 21st Century Policing in 2015 articulated a set of basic principles for policing and police reform.⁸⁵ PERF, representing larger city police chiefs, meanwhile, published a series of reports, which advanced an interrelated set of policy recommendations on police use of force; de-escalation; and tactical decision-making, police training, and related issues.⁸⁶ The reforms embodied in the DOJ settlements are examined in Part IV. Although these sources acted independently of each other and had different points of emphases, they shared the same currents of thinking about police reform and reached a rough consensus of opinion regarding the needed reforms.⁸⁷

B. *The President's Task Force on 21st Century Policing*

The President's Task Force on 21st Century Policing issued its *Final Report* in May 2015, declaring that a national crisis of trust and confidence in local police departments existed across the country and articulating a set of prin-

85. FINAL REPORT, *supra* note 26, at 1.

86. *Free Online Documents*, POLICE EXECUTIVE RES. F., <http://www.policeforum.org/free-online-documents> (last visited Oct. 9, 2018) [hereinafter *Free Online Documents*, PERF].

87. With varying degrees of emphasis, the common elements in the three sources contributing to the New Conversation include legitimacy, procedural justice, de-escalation, openness, and transparency on the part of police departments, officer wellness, and engagement with the community.

principles and fifty-four recommendations (with accompanying recommended “Action Items”) designed to address that crisis.⁸⁸ In developing its report, the Task Force cast a wide net, conducting seven “listening sessions” in three cities, which included testimony from a broad range of law enforcement managers, police union officials, academics, social service providers, community activists, and representatives of professional associations.⁸⁹ Through this process the Task Force’s *Final Report* captured the most important new thinking about policing and police reform that had been emerging among police experts for several years. While none of the ideas promulgated by the Task Force were new, the Task Force brought them to fore, presented them as a coherent package, and gave them the imprimatur of a presidential task force.

The Task Force’s *Final Report* opened with a declaration that “recent events . . . have exposed rifts in the relationship between local police and the communities they protect and serve.”⁹⁰ Interestingly, despite the fact that the events that created the National Police Crisis involved the deaths of African Americans at the hands of the police, the report handled the issue of race very gingerly. The introduction contains only one passing reference to “young people of color [who] do not feel as they are being treated fairly.”⁹¹

The most notable contribution of the Task Force report was to emphatically place the concept of legitimacy at the center of the discussion of American policing. Concern about legitimacy had been developing among police experts for some years,⁹² but the Task Force catapulted it to the forefront of what developed as the New Conversation in policing. To achieve legitimacy, the Task Force argued that police departments had to practice procedural justice in their interactions with members of the public.⁹³ In brief, procedural justice involves officers treating people they encounter with respect, including introducing themselves, explaining the reason for the encounter, listening to the person’s questions or concerns, answering any questions, and ending the encounter with an explanation of the result of the encounter.⁹⁴ Notably, the Task Force also extended the principles of legitimacy and procedural justice to police internal op-

88. FINAL REPORT, *supra* note 26, at 1–4.

89. *Id.* at 73–82 (describing the listening sessions and their respective participants).

90. *Id.* at 1.

91. *Id.* at 5. The delicate handling of the issue of race by the President’s Task Force contrasts sharply with the blunt opening declaration by the 1968 Kerner Commission that “[o]ur nation is moving toward two societies, one black, one white—separate and unequal.” NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, *supra* note 53, at 1. In truth, however, the Kerner Commission itself downplayed the depth of the race crisis by arguing that the nation is “moving toward” great racial division, since most informed observers of American society at the time would undoubtedly have argued that it was already deeply divided into two societies divided by race.

92. Lorraine Mazerolle et al., *Legitimacy in Policing: A Systematic Review*, 9 CAMPBELL SYSTEMATIC REVIEWS 1, 10 (2013), <https://campbellcollaboration.org/library/legitimacy-in-policing-a-systematic-review.html> (“[T]he effects of legitimacy policing interventions on each direct outcome measure are in a positive direction.”).

93. E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 253 (2004).

94. Tyler & Wakslak, *supra* note 93, at 278.

erations, as a means of reducing the polarization between management and rank-and-file officers.⁹⁵ The Task Force also made recommendations on subjects that have become integral parts of the New Conversation about policing and police reform: conducting independent investigations of police shooting incidents; making public police department data on stops and arrests; making police department policies and procedures public; involving the public in police policy-making; adopting de-escalation as a tactic for avoiding use of force in officer encounters with members of the public; and providing officers with training on unconscious bias (the idea that police officers, as with virtually all Americans, hold unconscious stereotypes and biases related to race, ethnicity, gender, and other demographic categories), along with many other recommendations (many of which are not directly relevant to the issues of accountability-related reforms).⁹⁶

Apart from one Action Item recommending de-escalation, the President's Task Force did not make any specific recommendations related to strategies to reduce police officer uses of force or, crucially, the reporting and review of force incidents.⁹⁷ That void was filled by the two other main contributors to the New Conversation, which are discussed below: the reports of the PERF and the settlements negotiated in the Justice Department's pattern or practice program.

C. *Police Chiefs and Commanders Speak: The PERF Reports*

An important voice in the New Conversation involves a series of reports published by the PERF, a professional association of police chief executives.⁹⁸ PERF was created in 1976 as an effort to provide more progressive leadership for the law enforcement profession than was being provided by the International Association of Chiefs of Police ("IACP").⁹⁹ Membership in the IACP is open to chiefs in all of the 18,000 law enforcement agencies in the U.S. and, as a result, is heavily influenced by its members from the smaller agencies.¹⁰⁰ PERF members must be a chief executive at an agency with a minimum of 100 full-

95. FINAL REPORT, *supra* note 26, at 14 (Recommendation 1.4, "Law enforcement agencies should promote legitimacy internally within the organization by applying the principles of procedural justice."). It is important to note that in its later investigations of local police departments, the Justice Department's pattern or practice program also began addressing perspectives of rank-and-file officers. *See infra* Subsection IV.C.1.e.

96. FINAL REPORT, *supra* note 26, at 16 (Recommendation 1.8). The Fair and Impartial Policing project has conducted training on unconscious bias with many local law enforcement agencies. *Home*, FAIR & IMPARTIAL POLICING, <https://fipolicing.com> (last visited Oct. 27, 2018). *See generally* LORIE A. FRIDELL, PRODUCING BIAS-FREE POLICING: A SCIENCE-BASED APPROACH (2017). Fridell is the founder and director of the Fair and Impartial Policing Project.

97. FINAL REPORT, *supra* note 26, at 20–21 (Action Item 2.2.1. "Law enforcement agency policies for training on the use of force should emphasize de-escalation and alternatives to arrest or summons in situations where appropriate.").

98. The reports are available online at the Police Executive Research Forum web site. *Free Online Documents*, PERF, *supra* note 86.

99. *About PERF*, POLICE EXECUTIVE RES. F., <http://www.policeforum.org/about> (last visited Oct. 9, 2018).

100. *Member Benefits*, INT'L ASS'N OF CHIEFS OF POLICE, <http://www.theiacp.org/Membership> (last visited Oct. 9, 2018).

time employees or serve a community of 50,000 or more people.¹⁰¹ Compared with the IACP, PERF has always been more responsive to the issues affecting policing in the larger cities and, as a result, has been more progressive in its outlook on controversial issues. On several points, the themes in the PERF reports considered here predated the National Police Crisis, and in some important respects the crisis reinforced ideas that were already developing among some police chiefs and commanders before August 2014.

The PERF reports are a voice to be reckoned with in American policing. Each report is based on a working conference (or is a research report) involving police chiefs, command-level officers, academic police experts, representatives from relevant social service agencies, and representatives from the Civil Rights Division of the U.S. Justice Department.¹⁰² The resulting reports contain statements by chiefs about what they are already doing in their departments on the issue at hand and, therefore, provide evidence of changing police practices.¹⁰³ The PERF reports contributed to the New Conversation by advancing police policies and training practices that translate the principles articulated by the President's Task Force into steps that police departments can take.¹⁰⁴

Thirteen PERF reports published between 2012 and early 2018 are relevant to the discussion in this Article.¹⁰⁵ Several directly challenge conventional thinking and practices in American policing. PERF Executive Director Charles Wexler acknowledged advanced thinking in the introduction to one report when he advised PERF members that some of the ideas “may be difficult to accept.”¹⁰⁶

The most notable PERF report, *Guiding Principles on Use of Force*, broke new ground with a sharp criticism of the Supreme Court's decision in *Graham v. Connor* (1989), arguing that the court did not provide meaningful guidance to the police in controlling officer use of force.¹⁰⁷ The *Graham* decision established the prevailing constitutional standard of “objective reasonableness” on the use of force. In brief, use of force is reasonable when related to the seriousness of the incident, whether there is an immediate threat to the officer or another person, and whether the subject is resisting arrest.¹⁰⁸ The *Graham*

101. BRIAN REAVES, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 2 tbl.1 (2015), <https://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf>.

102. See *Free Online Documents*, PERF, *supra* note 86.

103. *Id.*

104. *Id.*

105. *Id.*

106. POLICE EXECUTIVE RESEARCH FORUM, RE-ENGINEERING TRAINING ON POLICE USE OF FORCE 3 (2015), <http://www.policeforum.org/assets/reengineeringtraining1.pdf> [hereinafter PERF, RE-ENGINEERING TRAINING]. A brief chronology of the various PERF reports, which provides considerable insight into the evolution of the organization's thinking, is in POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 8–13 (2016), <http://www.policeforum.org/assets/30%20guiding%20principles.pdf> [hereinafter PERF, GUIDING PRINCIPLES].

107. PERF, GUIDING PRINCIPLES, *supra* note 106, at 15.

108. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

decision is today cited in many police department use of force policies.¹⁰⁹ The PERF report complains that the decision “outlines broad principles regarding what police officers *can legally do* in possible use-of-force situations, but it does not provide specific guidance on what officers *should do*.”¹¹⁰ The result is use of force incidents that are “lawful but awful.”¹¹¹ That is, they met the Supreme Court’s test of objective reasonableness but were unnecessary because other nonlethal responses were available, and the results had very adverse consequences in terms of community relations. The PERF report then responded to its complaint that the decision “offers little guidance . . . on *how* police agencies should devise their policies, strategies, tactics, and training regarding the wide range of use-of-force issues” with its own recommendations to fill that void.¹¹²

The PERF response involved interrelated ideas and policies the organization had been developing in earlier reports,¹¹³ which have become key parts of the New Conversation. The starting point for its recommendations is the recognition that in many encounters with people, particularly those with the possibility of conflict, police officers have considerable capacity to shape the outcome through their tactical decisions. The choice of one tactic can significantly reduce the likelihood that the officer will use force, while a different tactic can significantly increase the likelihood. Research on police encounters has established that few police encounters involve the proverbial “split second decision,” in which an officer must react immediately, but are typically scenarios that play out over time (perhaps for as short a time as one minute) and offer opportuni-

109. See, e.g., Seattle Police Dep’t, *Seattle Police Department Manual: 8.000 Use of Force Core Principles*, SEATTLE POLICE DEP’T, <https://www.seattle.gov/police-manual/title-8---use-of-force/8000---use-of-force-core-principles> (last visited Oct. 9, 2018) (“An Officer Shall Use Only the Degree of Force That Is Objectively Reasonable, Necessary Under the Circumstances, and Proportional to the Threat or Resistance of a Subject”).

110. PERF, GUIDING PRINCIPLES, *supra* note 106, at 15. It is likely that most legal scholars would object to the idea that the Supreme Court should prescribe detailed guidelines on police officer use of force in all of its innumerable manifestations. The PERF response discussed in this Article follows the well-established tradition of administrative rulemaking in policing, in which police departments develop their own rules for the many different police enforcement activities. The foundational works on administrative rulemaking include the recommendations of KENNETH C. DAVIS, *POLICE DISCRETION* (1977); HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 157–86 (1977); NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, *supra* note 53, at 21–27 (“Develop and enunciate policy guidelines for exercises of law enforcement discretion”); PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *TASK FORCE REPORT: THE POLICE* 21–30 [hereinafter *TASK FORCE REPORT: THE POLICE*] (“Current Police Practices in Need of Administrative Policy Formulation”). See also SAMUEL WALKER & CAROL A. ARCHBOLD, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 66–103 (3d ed. 2020) (forthcoming January 2019).

111. POLICE EXECUTIVE RESEARCH FORUM, AN INTEGRATED APPROACH TO DE-ESCALATION AND MINIMIZING USE OF FORCE 3 (2012), http://www.policeforum.org/assets/docs/Critical_Issues_Series/an%20integrated%20approach%20to%20de-escalation%20and%20minimizing%20use%20of%20force%202012.pdf [hereinafter PERF, AN INTEGRATED APPROACH].

112. PERF, GUIDING PRINCIPLES, *supra* note 106, at 16.

113. See POLICE EXEC. RESEARCH FORUM, *CONSTITUTIONAL POLICING AS A CORNERSTONE OF COMMUNITY POLICING* 18–19, 22 (2015), <https://ric-zai-inc.com/Publications/cops-p324-pub.pdf>; PERF, *RE-ENGINEERING TRAINING*, *supra* note 106, at 4–5, 17–19, 22, 25–26 (using the general term “decision-making model,” and the discussions of “tactical disengagement” and “tactical retreat,” “throttle back,” and “slow situations down”).

ties for officers to reassess and adjust their responses.¹¹⁴ Thus, the concept of tactical decision-making, which includes de-escalation as only one alternative, emerges as a guiding principle for police department policies, training, and supervision to fill in the void left by *Graham*.

Discussions of the different tactics available under the tactical decision-making framework appear in several different PERF reports. As already mentioned, de-escalation is only one available option.¹¹⁵ A basic tactic involves “slowing down” an encounter in order to buy time to better assess the situation, consider different options, and possibly to call in back-up officers if appropriate.¹¹⁶ Keeping a safe distance from the person who is the subject of the call to the police is one tactic for slowing down an encounter.¹¹⁷ A commander for the Los Angeles Police Department at one PERF conference reduced the new line of thinking to a short formula: “distance = time = options = resources.”¹¹⁸ Keeping a safe distance from a person reduces chances of that person physically attacking the officer and having the officer use force to assert control of the encounter. Gaining time to call in additional resources, for example, facilitates the use of crisis intervention teams, which have become a major element in the New Conversation as a response to the nation’s mental health crisis and the consequent increase in mental health-related calls to the police.¹¹⁹ Another tactic involves “positioning” (also known as “cover and concealment”), in which an officer takes a position *vis-à-vis* the subject that does not expose him or her to attack by the subject.¹²⁰

The various PERF reports devote considerable time to discussions of improving police training related to the use of force and tactical decision-making as a way of reducing force incidents. The 2015 PERF report on *Re-Engineering Training on Police Use of Force* is a stinging critique of current police training curricula, and the resulting discussions dovetail with the PERF recommenda-

114. GEOFFREY P. ALPERT & ROGER G. DUNHAM, UNDERSTANDING POLICE USE OF FORCE: OFFICERS, SUSPECTS, AND RECIPROCITY (2004) (identifying ten stages); PETER SCHARF & ARNOLD BINDER, THE BADGE AND THE BULLET: POLICE USE OF DEADLY FORCE 117 (1983) (identifying four different stages of officer behavior in armed encounters). See the application of the scenario analysis in police shootings and the consequent identification of various failures that are capable of being corrected. STEWART ET AL., *supra* note 9, at 44–59 (identifying the most common tactical errors, with recommendations for corrective action).

115. PERF, RE-ENGINEERING TRAINING, *supra* note 106, at 30, 59.

116. *Id.* at 5.

117. *Id.*

118. *Id.* at 52–53 (“Time gives you the ability to community with the suspect; Time gives you the ability to make a tactical plan. And time gives you the ability to get resources to the scene.”).

119. The Special Litigation Section’s investigation of the Portland, Oregon, police department focused primarily on the department’s response to people experiencing mental health crises. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE PORTLAND POLICE BUREAU 6–7 (2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/09/17/ppb_findings_9-12-12.pdf [hereinafter DOJ, INVESTIGATION OF PORTLAND] (quoting a senior command officer that “over his career, encounters with people in crisis have gone from a couple of times a month to a couple of times a day”). The depth of the nation’s crisis regarding mental health care and treatment is indicated by the fact that the Justice Department’s Special Litigation Section had a unit that investigated mental health facilities, and between 2001 and 2010, it investigated seventeen institutions in eight states and the District of Columbia. See *Special Litigation Section—Archives*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/special-litigation-section-archives-0> (last visited Oct. 9, 2018).

120. PERF, RE-ENGINEERING TRAINING, *supra* note 106, at 56 (“repositioning”).

tions related to the *Graham* decision.¹²¹ A survey of recruit training practices conducted for the report found that the 280 law enforcement agencies surveyed devoted an average of fifty-eight hours of recruit training to “Firearms,” along with forty-nine hours to “Defensive Tactics” and forty hours to “Con law/legal issues.”¹²² By comparison, agencies devoted an average of ten hours to “communication skills,” and eight hours each to “UoF [use of force] Policy,” de-escalation, and “crisis intervention.”¹²³ Use of a “Baton” and “ECW” [electro conducted weapon or Taser] also received eight hours of training.¹²⁴ The amount of time spent in favor of the various aspects of use of force compared with alternative means of resolving encounters was startling and effectively made a basic point: if the police concentrate training time on the use of force, officers will understand that force is their primary tool for resolving encounters. The bulk of the *Re-Engineering Training* report is taken up with discussions among conference participants regarding criticisms of the standard justifications of use of force¹²⁵ and of the new alternatives, including crisis intervention,¹²⁶ the need for a “guardian” as opposed to a “warrior” mindset within the police subculture,¹²⁷ and scenario-based rather than lecture-based police officer training.¹²⁸

A significant aspect of the conference discussions in the *Re-Engineering Training* report is that they did not consider the principal issues in the abstract but instead provided testimony by police chiefs and command-level officers of how they had implemented or were implementing the new approaches in their departments. The participants, moreover, represented the nation’s largest departments (*e.g.*, New York City, Los Angeles) and medium-sized and small departments (*e.g.*, Woburn, Massachusetts; Camden, New Jersey; Leesburg, Virginia).¹²⁹ This testimony is perhaps the best evidence that the new approaches to controlling officer use of force have begun to take root in police departments around the country.

The PERF recommendations regarding tactical decision-making directly confront one of the major obstacles to police reforms: the norms of the traditional police culture, particularly the “warrior” mentality that has dominated American policing for decades. The “warrior” mentality emphasizes toughness,

121. *Id.*

122. *Id.* at 3–10.

123. *Id.* at 11.

124. *Id.*

125. *Id.* at 9–10 (critiquing the “use of force continuum,” a once-popular formula for guiding use of force that is now considered to be too inflexible); *id.* at 13–19 (critiquing the “21-foot rule,” an informal standard that PERF argues was perverted from defining a danger zone for officers to a free to a virtual shoot zone); *see also* PERF, GUIDING PRINCIPLES, *supra* note 106, at 19–20, 20, 54 (explaining the use of force continuum and the “21-foot rule”).

126. PERF, RE-ENGINEERING TRAINING, *supra* note 106, at 24–27.

127. *Id.* at 28–38. The discussion reflected the argument in the highly influential paper SUE RAHR & STEPHEN K. RICE, FROM WARRIORS TO GUARDIANS: RECOMMITTING AMERICAN CULTURE TO DEMOCRATIC IDEALS (2015), <https://www.ncjrs.gov/pdffiles1/nij/248654.pdf>.

128. PERF, RE-ENGINEERING TRAINING, *supra* note 106, at 39–67.

129. *Id.* at 19, 29.

a preoccupation with always “winning” in an encounter and never showing signs of weakness or appearing to retreat.¹³⁰ In one of the most influential contributions to the New Conversation, Sue Rahr and Stephen K. Rice argue that the traditional “warrior” mentality is contrary to the values of American democracy and call for replacing it with a “guardian” mindset, in which an officer “operates as part of the community, demonstrating empathy and employing procedural justice principles during interactions.”¹³¹ Changing that deeply ingrained mentality is a major hurdle. Chief Scott Thomson of the Camden, New Jersey Police Department pointed out that traditionally in policing “culture will trump policy every time.”¹³² At the PERF conference on re-engineering police training, the Chief of the Leesberg, Virginia Police Department described the traditional officer view as “I can’t back down; I need to win at all costs,” pointing out that it often leads to many inappropriate incidents.¹³³ The chief of the Woburn, Massachusetts Police Department argued that it is necessary to convince officers that “there is no shame in tactically retreating and calling for backup.”¹³⁴ In the traditional police subculture the word “retreat” is unthinkable, and PERF conference participants preferred such terms of “tactical disengagement” or re-positioning.¹³⁵

In a final comment of the *Guiding Principles* report, it should be noted that the PERF criticism of *Graham* in the report is an unprecedented event in the history of American policing. Never before has a leading police professional association argued for a higher standard on controlling a critical police activity than the one set by the Supreme Court. Beginning in the mid-1950s, and reaching its peak in the 1960s, the law enforcement profession (joined by political conservatives) sharply criticized the court for intruding into matters best left to law enforcement professionals and imposing rules that restrict (“handcuff,” in the more extreme rhetoric of the day) police crime-fighting efforts.¹³⁶

The PERF critique of *Graham*, in fact, provoked a response by other law enforcement professional associations, led by the IACP, who issued their own alternative statement on police use of force.¹³⁷ Most notably in a rebuke to PERF, the report reaffirmed its support of the Supreme Court’s *Graham* decision.¹³⁸ Suggesting some ambivalence among the constituent groups, however, the published document was explicitly designed as a “Discussion Paper” and “not intended to be a national standard by which all agencies are held ac-

130. *Id.* at 36.

131. RAHR & RICE, *supra* note 127, at 3.

132. PERF, RE-ENGINEERING TRAINING, *supra* note 106, at 22.

133. *Id.* at 29 (Leesberg).

134. *Id.* at 19 (Woburn).

135. *Id.* at 5 (tactical disengagement); *id.* at 56 (repositioning).

136. WALKER, *supra* note 62, at 180–83.

137. NATIONAL CONSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE 3 (2017), http://www.theiacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf (endorsing without criticism the *Graham* standard: “An officer is authorized to use deadly force when it is objectively reasonable under the totality of the circumstances.”). The National Consensus Policy was endorsed by eleven law enforcement and police labor organizations. *Id.* at 16.

138. *Id.* at 2, 7–8.

*countable.*¹³⁹ Two national-level sheriffs' associations represented the strongest opposition to the PERF position and refused to endorse the coalition statement, going to far as to argue against the very idea of a generally applicable national standard on use of force.¹⁴⁰

Two other PERF reports indicate that the thinking among its leading members has moved a long way away from the ritualistic anti-civil libertarian posture of years past.¹⁴¹ The 2015 report on *Constitutional Policing as a Cornerstone of Community Policing*¹⁴² would undoubtedly surprise most civil libertarians, with its theme that "The Constitution is Our Boss."¹⁴³ This once unthinkable concept for the police is made palatable by some astute framing strategies. Labeling the Constitution "our boss" frames the issue in terms of the traditional hierarchical organizational structure and command and control culture of American policing. The report also frames constitutional principles in terms of established police commitments: first as a "cornerstone" of community policing and second as a necessary companion of legitimacy.¹⁴⁴

The 2013 PERF report on the Justice Department's pattern or practice program is notable for its lack of hostility to the program¹⁴⁵ and the number of favorable statements about the program from chiefs or former chiefs or current commanders who experienced consent decrees.¹⁴⁶ In past decades, one would have expected to hear a stream of criticisms of federal intervention and expensive court-enforced requirements. Instead, as discussed below, chiefs and former chiefs with consent decree experience from Cincinnati, Washington, D.C., and Los Angeles testified that, despite much pain at the outset, their departments were much improved as a result of the consent decrees.¹⁴⁷

139. *Id.* at 5 (emphasis in original).

140. The two sheriffs' group's position, in effect, rejects the fundamental idea of professional standards, which presumably would extend to accreditation and any attempt to establish "best practices" in policing. Tom Jackson, *National Police Groups Add 'De-Escalation' to New Model Policy on Use of Force*, WASH. POST (Jan. 17, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/01/17/national-police-groups-add-de-escalation-to-new-model-policy-on-use-of-force/?noredirect=on&utm_term=.7707574aadfa. Sandra Hutchens, a sheriff affiliated with the Major County Sheriffs' Associations, argued that "a one-size fits-all policy is impractical; what is proper and accepted in one city or county may be contrary to law and/or community tolerances in another." *Id.*

141. WALKER, *supra* note 62, at 180–83 (discussing the conflicts over the police-related Supreme Court decisions that flared in the 1960s).

142. POLICE EXEC. RESEARCH FORUM, *CONSTITUTIONAL POLICING AS A CORNERSTONE OF COMMUNITY POLICING*, *supra* note 113.

143. *Id.* at 2 (quoting New Haven, Connecticut, Police Chief Dean Esserman, that "[t]he Constitution is our boss").

144. *Id.* at 3–4.

145. POLICE EXEC. RESEARCH FORUM, *CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED* (2013), http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf [hereinafter POLICE EXEC. RESEARCH FORUM, *CIVIL RIGHTS INVESTIGATIONS*]. Representatives from two cities made belligerent comments about some aspects of the program, but their strongest remarks were not included in the published report of the conference. (Personal observation of this author).

146. *Id.* at 34–35.

147. *Id.*; see also *supra* Section IV.B.

It is important to conclude this Part of the Article with a major caveat. The ideas and policies expressed in the various PERF reports are indeed promising and provide important direction for future police reform. Nonetheless, we cannot ignore the well-known fact that organizational change in American policing has always been slow and halting. (The organizational changes discussed in Part IV of the Article, below, had the power of judicial enforcement behind them). Another inescapable fact is that the U.S. has 18,000 separate law enforcement agencies,¹⁴⁸ with (apart from the Supreme Court) no central governing authority. Even state governments have exercised relatively little control over the operational details of local policing.¹⁴⁹ The challenge is compounded by the long and sad history of important police reforms in the past that simply faded away with time.¹⁵⁰ In short, the possibility of continued police reform in the near future is strong, but nothing in the world of American policing is certain.

IV. THE JUSTICE DEPARTMENT'S "PATTERN OR PRACTICE" PROGRAM: DIRECT AND COLLATERAL IMPACTS

This Part examines the twenty-year history of the Justice Department's pattern or practice program of investigating local and state law enforcement agencies for violations of people's civil rights, and where the evidence finds a pattern or practice of violations, in forty cases suing the department in question and negotiating a judicially enforced settlement.¹⁵¹ As argued earlier, the pattern or practice program was an unprecedented event in the history of American policing. Never before had the federal government intervened so directly into local police departments for the purpose of ending unconstitutional police practices and reaching settlements requiring sweeping reforms backed by judicial enforcement. As already indicated, the substantive reforms in the various DOJ settlements involve practices that implement and enforce the principles articulated by the President's Task Force and the policies recommended by the PERF reports discussed in this Article.¹⁵² This Part also discusses some of the collateral consequences of the DOJ program that have had important implications for police accountability.

A. *The Nature and Scope of the Justice Department's Program*

The January 2017 report by the Civil Rights Division on the Special Litigation Section's pattern or practice program reported that the program under-

148. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 1.

149. Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 656–59 (2016) [hereinafter Walker, *Governing the American Police*].

150. Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS. U. PUB. L. REV. 57, 57 (2012) [hereinafter Walker, *Institutionalizing Police Accountability Reforms*].

151. DOJ, PATTERN AND PRACTICE, *supra* note 6.

152. See *supra* Part III.

took sixty-nine formal investigations of local and some state agencies, which resulted in forty formal settlements in the form of consent decrees or memoranda of agreements.¹⁵³ The report explains that because the SLS received hundreds of inquiries and requests for investigations, and given the Section's limited resources, it used three principles to guide its decisions in selecting which cases merited investigation:¹⁵⁴ (1) whether the violations in a jurisdiction "represent an issue common to many law enforcement agencies" around the country; (2) whether the violations "represent an emerging or developing issue, such that reforms could have an impact" beyond the agency immediately in question; and (3) whether the violations represent, beyond certain "core issues," special issues affecting law enforcement agencies, such that any resulting reforms "might help set a standard for reform" for other agencies.¹⁵⁵

When a formal investigation found a pattern or practice of violations of constitutional rights, the SLS negotiated with local authorities to reach a judicially enforced settlement agreement.¹⁵⁶ The term "settlement" has been used somewhat loosely in the existing literature and requires some clarification. The term has been used to include consent decrees,¹⁵⁷ memoranda of agreement ("MOA"), and technical assistance letters.¹⁵⁸ Unlike the other settlements, technical assistance letters are not court-enforceable.¹⁵⁹ It should be noted that

153. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 8. Special litigation inquiries begin with a "preliminary investigation," which results in a "formal investigation" where there appears to be evidence of a pattern or practice of violations of constitutional rights. At that point, local officials are officially notified that a formal investigation will occur. Formal investigations in all but a few cases have resulted in a formal settlement. The process is described in Stephen D. Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 726–28 (2017).

154. The case selection process is described in Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3219–28 (2014).

155. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 6.

156. It is noteworthy that only two jurisdictions refused to settle and forced the Justice Department to take them to court. The two are the Alamance, North Carolina, Sheriff's Department (the history of the case is in <https://www.justice.gov/crt/file/886406/download>) and the Maricopa County, Arizona, Sheriff's Department (the history of the complex and multi-faceted case, which involved the nationally famous Sheriff Joe Arpaio, is in <https://www.justice.gov/crt/file/785481/download>). It should be noted that in both cases, the chief law enforcement officer was motivated in large part by conservative ideological considerations. *See generally* Stephen Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, 14 OHIO ST. J. CRIM. L. 113 (2016) (discussing the Alamance County case). The question of why most jurisdictions settled has not been researched, but in many instances, it is very likely that mayoral administrations concluded that a protracted trial would only aggravate already tense community relations regarding police misconduct.

157. The term "Settlement Agreement" has been used in some cases to refer to what is essentially a consent decree. *See supra* note 156 and accompanying text.

158. Letter from U.S. Dep't of Justice, Civil Rights Div., to Mr. Alejandro Vilarello, City Attorney, Miami, Florida, Investigation of the Miami Police Department (Mar. 13, 2003), https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/miamipd_techletter.pdf.

159. Among critics of the Justice Department's pattern or practice program, judicial enforcement of settlements has been a major issue. Space in this Article does not permit a full discussion of this issue. Nonetheless, it is important to note that with respect to two law enforcement agencies, Cleveland, Ohio, and Miami, Florida, the SLS initially investigated and resolved the investigations with non-enforceable Findings Letters. In both cases, police abuses continued, and the Section returned several years later to investigate again and reached judicially enforced consent decrees. *See* Letter from U.S. Dep't of Justice, Civil Rights Div., to Subodh Chandra, Director of Law, City of Cleveland, Agreement to Conclude DOJ'S Investigation of the Cleveland

the MOAs for the Washington, D.C. Police Department (2001)¹⁶⁰ and the Cincinnati Police Department (2002)¹⁶¹ include provisions that explicitly provide for court enforcement should the Justice Department deem that necessary. This Article focuses on only those settlements that involve a *judicially enforced court order*.

The various SLS settlements contain a roughly similar set of requirements.¹⁶² They include: administrative controls over police use of force and/or traffic and pedestrian stops; requirements related to police officers completing reports on all use of force or stop incidents; requirements that officers' supervisors critically review all officer incident reports; administrative procedures for systematically reviewing use of force and stop reports for the purpose of identifying organizational problems that need to be corrected; early intervention systems designed to identify officers with performance problems and to apply an appropriate intervention to correct identified performance problems; improvements in the citizen complaint processes for the purpose of making them more open and accessible and also for improving the investigation of complaints; and improved training related to the previously noted requirements.¹⁶³ As is argued below, the content of settlements changed in significant ways between the "first generation" and the "second generation" of settlements.¹⁶⁴

Division of Police's Use of Deadly Force (Feb. 9, 2004); Letter from U.S. Dep't of Justice, Civil Rights Div., to Mr. Alejandro Vilarello, *supra* note 158.

160. Memorandum of Agreement Between the United States Department of Justice and the District of Columbia and the District of Columbia Metropolitan Police Department ¶ 189, 190 (2001), <https://www.justice.gov/crt/memorandum-agreement-united-states-department-justice-and-district-columbia-and-dc-metropolitan>.

161. Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department ¶ 113, 114 (2002), <https://www.justice.gov/crt/memorandum-agreement-between-united-states-department-justice-and-city-cincinnati-ohio-and>; *In re Cincinnati Policing* [The "Collaborative Agreement"], 209 F.R.D. 395 (S.D. Ohio 2003), available at <https://www.cincinnati-oh.gov/police/linkservid/27A205F1-69E9-4446-BC18BD146CB73DF2/showMeta/0/>.

162. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 25–34 ("B) The Substance of the Division's Police Reform Agreements").

163. The Justice Department pattern or practice approach to police reform embraces the concept of "Accountability-Based Policing" that relies primarily on internal police department procedures rather than judicially enforced standards of constitutional law as the principal tool for holding police officers accountable for their conduct. See generally David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149 (2009). The most important early advocate of the accountability-based approach was GOLDSTEIN, *supra* note 110, at 157–86 (drawing upon his various article in the 1960s); see also WALKER & ARCHBOLD, *supra* note 110.

164. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 23 (referring to the two "generations" of settlements). The two "generations" essentially coincide with the presidential administrations of Bill Clinton and Barack Obama, respectively. See *infra* Part V.

B. Evaluations of the Effectiveness of the “Pattern or Practice” Program

1. Formal Evaluations

Several SLS settlements have been the subject of formal evaluations. Some evaluations confine themselves to a few issues, or even just one, while others assess a broader range of issues and use multiple methods to investigate them.¹⁶⁵ There is, however, no evaluation that attempts a comprehensive assessment of all the reforms and goals of a single DOJ settlement. Because settlements involve a broad range of required reforms, with multiple impacts, a comprehensive assessment would be an extremely daunting challenge in terms of work effort and cost.¹⁶⁶

The various evaluations generally found SLS settlements to have been successful in achieving their stated goals.¹⁶⁷ There is no case where a settlement has been found to have been a failure.¹⁶⁸ The evaluations of the SLS settlements are important to the argument in this Article. If the existing evaluations were generally unfavorable, it would undermine the argument advanced herein that the settlements contribute to the New Conversation and the roadmap for future police reform.

The first evaluation of an SLS settlement was a two-part Vera Institute study of the Pittsburgh consent decree experience.¹⁶⁹ The second report (completed fairly soon after the end of the consent decree) concluded that the decree had “dramatically changed the culture” of the police department.¹⁷⁰ Accountability-related reforms “remained in full force” following the end of judicial oversight.¹⁷¹ The early intervention system continued to be “a functional sys-

165. DOJ, *PATTERN AND PRACTICE*, *supra* note 6, at 38.

166. As a result, we may never have a comprehensive assessment of the impact of a consent decree, taking into account all the requirements related to use of force and stops of citizens, department-wide accountability mechanisms, impact on racial disparities in basic police activities, changes in training, changes in the citizen complaint process, impact on the police officer culture, and impact on public attitudes, particularly among communities of color.

167. Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 16, at 1422. See also Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. C.R. L.J. 479, 535 (2009), <https://www.nlg-npap.org/sites/default/files/WalkerandMacdonaldAlternativeRemedy.pdf> (arguing that the SLS program “can be an effective instrument for police reform”).

168. The notable exception to this rule is the settlement in Oakland, California. Although arising from a private law suit, it is essentially identical to the SLS settlements in terms of content. The police department has not achieved compliance after fifteen years. There is no independent assessment of this failure however. Negotiated Settlement Agreement, *Allen v. City of Oakland*, No. C00-4599 (N.D. Ca. 2003).

169. ROBERT C. DAVIS, NICOLE J. HENDERSON & CHRISTOPHER ORTIZ, VERA INST. OF JUSTICE, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE (2005), <https://ric-zai-inc.com/Publications/cops-w0023-pub.pdf> [hereinafter DAVIS ET AL., FEDERAL INTERVENTION]. See also the earlier evaluation, ROBERT C. DAVIS ET AL., TURNING NECESSITY INTO VIRTUE: PITTSBURGH’S EXPERIENCE WITH A FEDERAL CONSENT DECREE 7–8 (2002), <http://samuelwalker.net/wp-content/uploads/2010/09/PittsburghCD-VeraTurningNecessity.pdf> [hereinafter DAVIS ET AL., TURNING NECESSITY INTO VIRTUE].

170. DAVIS ET AL., FEDERAL INTERVENTION, *supra* note 169, at 40.

171. *Id.*

tem that helped to create broad accountability” within the department.¹⁷² Although officers complained about fears of being unfairly disciplined, and about excessive paperwork, the evaluation found no statistical evidence of reduced law enforcement effort as a result of the required reforms (a phenomenon generally referred to as “de-policing”).¹⁷³ Focus groups and a written survey of officers revealed greater sensitivity to “the appearance of unequal enforcement,” and that “[a]s time passed, officers got used to the new” accountability-related procedures.¹⁷⁴

A subsequent but more limited evaluation by Chanin covered Pittsburgh, in part, and found that because of changes in the mayor’s office and city budget problems, there was considerable “backsliding” in the vitality of the consent decree’s reforms.¹⁷⁵ The backsliding finding raises the important issue of the sustainability of reforms, an issue that has been relevant to many other police reforms over the past several decades.¹⁷⁶

The most thorough evaluation of a settlement is a study of the Los Angeles Police Department consent decree by a team from Harvard University (although it too was completed fairly soon after most of the decree had been implemented).¹⁷⁷ The evaluation reached the very positive conclusion that the LAPD was “much changed” as a result of the consent decree, with both the “quantity and the quality of [law] enforcement activity hav[ing] risen substantially.”¹⁷⁸ Stops of citizens and arrests had risen and serious crime had fallen. Twice as many local residents surveyed reported improvement in department practices as saw deterioration.¹⁷⁹ Although officers complained about the burden of the new reporting requirements and there was talk of “de-policing,” the data on officer enforcement activities indicated that they had actually increased under the consent decree.¹⁸⁰ The implications of this finding are discussed below.¹⁸¹

172. *Id.* at 8.

173. RICHARD ROSENFELD, NAT’L INST. JUSTICE, DOCUMENTING AND EXPLAINING THE 2015 HOMICIDE RISE: RESEARCH DIRECTIONS 4, 18–23 (2016), <https://www.ncjrs.gov/pdffiles1/nij/249895.pdf> (examining one dimension of the “de-policing” phenomenon known as the “Ferguson Effect,” referring to the police response to the protests over the fatal shooting of Michael Brown on August 9, 2014 and the resulting protests).

174. DAVIS ET AL., FEDERAL INTERVENTION, *supra* note 169, at 8, 19, 40.

175. Joshua M. Chanin, *Examining the Sustainability of Pattern or Practice Police Misconduct Reform*, 18 POLICE Q. 163, 170–75 (2015).

176. *Id.* at 175. On the problem of sustaining police reforms, see Walker, *Institutionalizing Police Accountability Reforms*, *supra* note 150. See also Walker, *Governing the American Police*, *supra* note 149, at 616.

177. CHRISTOPHER STONE, TODD FOGELSONG & CHRISTINE M. COLE, POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD i (2009) (“Executive Summary”), <http://assets.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf>.

178. *Id.* at ii (“Executive Summary”).

179. *Id.*

180. *Id.* at i.

181. See *infra* Subsection IV.C.5.c.

Notably, the LAPD evaluation found significant improvements in race relations, one of the longest-standing problems with the department.¹⁸² In a survey of public opinion “the vast majority of [residents in] each racial and ethnic group” were hopeful that LAPD enforcement practices would, in the next three years, continue “respecting their rights and complying with the law.”¹⁸³ Teenagers and young adults in focus groups, however, were less positive than older participants. Particularly surprising, over half of persons arrested (thirty-nine of seventy-one) and interviewed within three hours after their arrest, reported that the LAPD was doing a “good” or “excellent” job.¹⁸⁴ Presumptively, persons just arrested would be the group most critical of police conduct. With respect to the key issues of organizational change and police-race relations, the LAPD evaluation presents the most positive findings among all the evaluations.

Stephen Rushin also examined the impact of the Los Angeles consent decree in a comparative evaluation involving another jurisdiction, and concluded that the overall result was “encouraging.”¹⁸⁵ The LAPD had improved with respect to “the constitutionality of its police force with little compromise” to its efficiency or effectiveness on crime control.¹⁸⁶ Rushin also found that civil litigation payouts for police misconduct dropped from over \$13 million in 2002 to only a little more than \$3 million in 2006.¹⁸⁷

The 2002 Collaborative Agreement with regard to the Cincinnati Police Department, which settled a set of private lawsuits alleging race discrimination in police stops and was signed as a parallel agreement to a MOA settling a Justice Department investigation of the department, included a provision for “periodic surveys” of the impact of the court-ordered reforms.¹⁸⁸ The RAND Corporation contracted to conduct surveys for five years and produced seven reports covering field stops, arrests, searches, uses of force, traffic stops, public attitudes, and officer perceptions of the reform process.¹⁸⁹ The final RAND report in 2009 found that “[p]olice-community relations have improved in a number of ways.”¹⁹⁰ African American residents perceived an improvement in “police professionalism” and that racial profiling had declined between 2003 and 2008.¹⁹¹ The adoption of electronic control devices appeared to help reduce the incidence of serious uses of force. A significant decline in the crime rate re-

182. See generally LOU CANNON, OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD (1992); JOE DOMANICK, BLUE: THE LAPD AND THE BATTLE TO REDEEM AMERICAN POLICING (2015); PAUL JACOBS, PRELUDE TO RIOT (1968).

183. STONE, FOGELSONG & COLE, *supra* note 177, at ii, 46.

184. *Id.* at 48–49.

185. Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, *supra* note 156, at 140.

186. *Id.* at 116–36, 140.

187. See generally *id.* Positive outcomes were also reported in POLICE EXEC. RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS, *supra* note 145, at 35.

188. *In re Cincinnati Policing*, *supra* note 161, at 11 (“Periodic Surveys”).

189. The reports are available at GREG RIDGEWAY ET AL., RAND CORP., POLICE-COMMUNITY RELATIONS IN CINCINNATI (2009), <https://www.rand.org/pubs/monographs/MG853.html>.

190. *Id.* at xvii.

191. *Id.* at xvii, 29, 89–107.

duced the number of arrests, which undoubtedly reduced the number of police-citizen encounters likely to result in the use of force by officers.¹⁹² Particularly notable with respect to traffic stops, video recordings of stops revealed an improvement in the “communication quality” of officer behavior, with officers exhibiting “better listening” skills and greater patience and helpfulness.¹⁹³

The RAND survey did find racial disparities in some but not all post-stop procedures. African American drivers were subject to stops of longer duration and were more likely to be searched (although searches yielded contraband at equal rates for white and black drivers).¹⁹⁴ African American drivers were more likely to be subject to “proactive” policing such as being asked for identification.¹⁹⁵ The RAND report speculated that the intrusive nature of these proactive police actions, independent of stops *per se*, help to explain why African American residents perceive racial profiling even though the statistical evidence on stops finds no disparities in stops.¹⁹⁶

Joshua Chanin examined three police departments that experienced a consent decree (Pittsburgh, Washington, D.C., and Cincinnati), finding evidence of the successful impact of the consent decrees during the time of judicial oversight in all three cases, followed by subsequent backsliding in two.¹⁹⁷ Because the study covered the periods of during judicial oversight (which, importantly, includes the presence of the court-appointed Monitor),¹⁹⁸ and after judicial oversight was ended, it provides some evidence on the question of whether the reforms were sustained once judicial oversight was removed. In Pittsburgh, a series of political changes, combined with a budget crisis, caused standards of officer accountability to “erode[] considerably.”¹⁹⁹ Washington, D.C. offered a complex pattern of trends following the end of the MOA, with uses of force following a “volatile” pattern, while civil litigation payouts declined and stayed low.²⁰⁰ In Cincinnati, there were substantial improvements in key areas of police performance. Officer uses of force declined by 46% between 2002 and 2012, and public complaints about excessive force declined by 36% between 2006 and 2012. Additionally, there was “little or no backsliding” six years after

192. *Id.* at xviii–xix.

193. *Id.* at xvii, xxvii, 7–28, 67–88 (“The Context of Policing in Cincinnati: Crime, Arrests, and Use of Force” and “Analysis of Videotaped Police-Motorist Interactions”).

194. *Id.* at xxiii–xxvii; *see also* GREG RIDGEWAY, RAND CORP., CINCINNATI POLICE DEPARTMENT TRAFFIC STOPS: APPLYING RAND’S FRAMEWORK TO ANALYZE RACIAL DISPARITIES xiii (2009), <https://www.rand.org/pubs/monographs/MG914.html>. The findings in the RAND study are not inconsistent with the study of traffic stops in the Kansas City metropolitan area, in which African Americans experienced more “investigatory” stops, which the authors regard as more intrusive than traffic enforcement stops, and which African Americans deeply resented because of their intrusiveness. EPP ET AL., *supra* note 51.

195. RIDGEWAY ET AL., *supra* note 189, at xxvi.

196. *Id.*

197. Chanin, *supra* note 175, at 163–64.

198. The multiple roles of Monitors in court-enforced settlements are discussed in Walker & Macdonald, *supra* note 167, at 510–16.

199. Chanin, *supra* note 175, at 170.

200. *Id.* at 177.

the end of the consent decree.²⁰¹ Chanin's study provides the most important evidence to date on the issue of post-settlement "backsliding" and the sustainability of court-enforced reforms.

Powell et al. examined the impact of consent decrees on the filing of law suits alleging Section 1983 violations by police departments subject to consent decrees in twenty-three jurisdictions.²⁰² In theory, consent decree-required reforms, particularly with regard to officer use of force, will reduce police misconduct that might give rise to Section 1983 litigation. The study found that consent decrees were associated with "modest reductions" in the filing of civil rights cases.²⁰³

The most thorough post-consent decree assessment of a department is a 2016 report on the Washington, D.C. Police Department, completed seven years after the MOA was lifted (and was authorized as part of the lifting of judicial oversight).²⁰⁴ While acknowledging that the assessment did not cover all aspects of the required reforms, the report found "much that is positive," including a continuing commitment on the part of top management and reductions in the "use of the most serious types of force, including firearms."²⁰⁵ Nonetheless, some "significant shortcomings" remained.²⁰⁶ Some changes in the use of force reporting system inhibited effective management of uses of force and created problems in resolving the investigation of fatal shootings by officers. The department's early intervention system, described as "a star-crossed project," remained a serious problem.²⁰⁷ In the end, the overall picture of the department was decidedly mixed: better than it had been before federal intervention but still with a number of problems.

2. *The Testimony of Police Chiefs with SLS Settlement Experience*

Important testimony on the impact of SLS settlements comes from several police chiefs, former chiefs, and other police commanders from departments subject to settlements. At a 2012 PERF conference on federal civil rights investigations of local police departments, Charles Ramsey, former Chief of Police in Washington, D.C. during its MOA experience, stated that "[t]he end result was very positive. Shootings dropped by 80 percent and have remained low. And it gave us credibility with the public."²⁰⁸ Tom Streicher, Chief of the Cincinnati Police Department during its MOA experience, explained that "[p]rior to the consent decree in Cincinnati, we paid out \$10 to \$11 million to settle a

201. *Id.* at 170–75 (Pittsburgh), 175–79 (Washington, D.C.), 179–82 (Cincinnati).

202. Zachary A. Powell, Michele Bisaccia Meitl & John L. Worrall, *Police Consent Decrees and Section 1983 Civil Rights Litigation*, 16 CRIM. & PUB. POL'Y 575, 575 (2017).

203. *Id.*

204. THE BROMWICH GRP. LLC, *THE DURABILITY OF POLICE REFORM: THE METROPOLITAN POLICE DEPARTMENT AND USE OF FORCE: 2008–2015* i (2016), http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf.

205. *Id.* at i.

206. *Id.*

207. *Id.* at x.

208. POLICE EXEC. RESEARCH FORUM, *CIVIL RIGHTS INVESTIGATIONS*, *supra* note 145, at 34 (Ramsey).

number of lawsuits. But since the consent decree, the ACLU has not sued the Police Department. That is a tremendous savings.”²⁰⁹ A Los Angeles police commander, citing the \$15 million cost of the consent decree, argued that “I think the money was well spent in terms of preventing future litigation and gaining credibility with the community.”²¹⁰ Other police officials at the PERF conference expressed similarly positive views of the consent decree experience.²¹¹ To be sure, the comments from these officials are anecdotal. Nonetheless, given their positions and first-hand experiences, they are voices to be taken seriously. Notably, they did not use the opportunity to express serious criticisms of the pattern or practice program.²¹²

Reviewing the available evaluations, Rushin concluded that “[t]he available empirical evidence suggests that [systemic court-enforced police reform] has been an effective tool for reducing misconduct in several police agencies.”²¹³ The most serious problem, because of its implications for all police reforms, involved the evidence of “backsliding” from reforms in three departments once judicial oversight was lifted.

C. *Intended and Unintended Effects of the Special Litigation Section’s Program*

The following Section examines important intended and unintended aspects of the Special Litigation Section’s pattern or practice program that contribute to the New Conversation and to the future of police reform. As already noted, these issues have not received sufficient attention from police experts.

1. *A Work in Progress: The Special Litigation Section’s Learning Curve*

The Civil Rights Division’s 2017 report on the pattern or practice program explains that its investigations and settlements changed significantly over

209. *Id.* at 35 (Streicher).

210. *Id.* at 34 (Los Angeles). The question of the true cost of consent decrees is a highly controversial matter and wildly different estimates have been offered. *See* Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 16, at 1399 (citing a \$100 million estimate for the cost of the LAPD consent decree). Many of the cost estimates for pattern or practice settlements are, in the view of the author of this Article, inappropriately inflated. Many of the costs are for reforms (*e.g.*, an early intervention system, or the cost of installing a computerized record-keeping system) that were long overdue and would have been incurred had the departments in question been properly managed to begin with.

211. POLICE EXEC. RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS, *supra* note 145, at 34–35. Charles Ramsey subsequently served as Co-Chair of the President’s Task Force on 21st Century Policing in 2015. He also served as Commissioner of the Philadelphia Police Department (2007–2015) where he initiated a number of reforms by engaging the Justice Department’s Collaborative Reform Process. *See generally* *Open and Accountable*, PHILADELPHIA POLICE DEP’T, <https://www.phillypolice.com/accountability/> (last visited Oct. 9, 2018).

212. Some strong criticisms of the pattern or practice program were expressed by representatives from two communities, however the strongest remarks did not appear in the final report of the conference. (Personal observations of the author of this Article). POLICE EXEC. RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS, *supra* note 145.

213. Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 16, at 1422. *See also* Walker & Macdonald, *supra* note 167, at 535.

the course of twenty years.²¹⁴ The changes occurred as a result of lessons “learned from its own experience,” feedback from various stakeholders, and “developments in the social science of police reform.”²¹⁵ This Article characterizes the process as a “learning curve” for the SLS attorneys and expert consultants. The driving force behind these changes was a continually evolving sense of what additional reforms are necessary in order to successfully achieve the original goal of securing constitutional policing. This changing view of the requirements of effective accountability-related reforms has important implications for future police reform. The extent of the changes in settlements over time was such that the Civil Rights Division’s report refers to “first generation” and “second generation” settlements.²¹⁶

a. Greater Length, Detail, and Content of Settlements

A cursory review of all the settlements reached by the SLS since 1997 reveals that they grew enormously in terms of length, detail, and substantive content. An Investigative Findings Letter regarding the Pittsburgh Police Department, the first issued by the SLS, contained only 4 paragraphs describing the problems it had found in the department.²¹⁷ The resulting 1997 Pittsburgh Consent Decree was extremely short in comparison with later settlements, containing only 83 paragraphs; the 2013 New Orleans Consent Decree contains 492 paragraphs;²¹⁸ and the 2017 Baltimore consent decree contains 511 paragraphs.²¹⁹ The most important aspect of the growing length of settlements was the addition of more detail related to such issues as the control of officer use of force and also the addition of entirely new subjects and requirements.²²⁰ These issues are discussed in detail in the following subsections.

b. Enhancing Public Understanding of Police Problems and the Need for Reform

Compared with the first generation of settlements, the second generation ones include narratives on the nature of the police problems in the police department in question and the consequent need for federal intervention.²²¹ The

214. DOJ, PATTERN AND PRACTICE, *supra* note 6.

215. *Id.* at 20.

216. The “generations” framework originated in *id.* at 23. See also the report’s observations that “[m]uch has changed since the Division’s first initiatives under Section 14141,” and that the early settlements represent a “different era” compared with more recent settlements. *Id.* at 4.

217. Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Div., U.S. Dep’t of Justice, to Jacquelyn Morrow, Esq., City Solicitor, City of Pittsburgh (undated), <https://www.justice.gov/crt/city-pittsburgh-investigative-findings-letter>.

218. Consent Decree, *United States v. City of New Orleans*, 35 F.Supp.3d 788 (E.D. La. 2013) (No. 12-1924), https://www.justice.gov/sites/default/files/crt/legacy/2013/01/11/nopd_agreement_1-11-13.pdf.

219. Consent Decree, *United States v. Baltimore Police Dep’t*, 249 F.Supp.3d 816 (D. Md. 2017) (No. 17-99), <https://www.justice.gov/crt/case-document/file/925036/download>.

220. *See id.* § VII.

221. The problem of not involving community groups was identified in the PITTSBURGH GROUP, REPORT TO THE U.S. ATTORNEY GENERAL OF THE WORKING GROUP ON POLICE PATTERN OR PRACTICE LITIGATION 5

effort to provide the public with a better understanding of police problems reflects one of the most important developments in thinking about policing in America in recent years. The central theme of the 2015 President's Task Force report is the importance of public trust and confidence in local police agencies as a necessary predicate to enhancing legitimacy of and public cooperation with those agencies.²²² The first generation of consent decrees are barebones documents, devoted entirely to the required reforms, with little discussion of the context of those reforms, including the police problems they address. The 2001 Los Angeles consent decree, for example, is limited to language covering the required reforms, such as "[t]he Department shall prepare and implement . . ." and "the Department shall develop and initiate implementation . . ." and so on.²²³ The New Jersey State Police consent decree is couched in similar language.²²⁴ Neither document explains the nature of the underlying law enforcement problems or how federal intervention would correct them.

Second generation settlements, by contrast, typically provide introductory narratives describing the social, political, and historical context of the police department in question as a way of explaining the pattern of misconduct that has been found. The Ferguson, Missouri investigation report, for example, describes the critical point that the city was using the police department as a source of revenue, which was the principal source of the police misconduct: "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs," with the result that "[p]atrol [officer] assignments and schedules are geared toward aggressive enforcement of Ferguson's municipal code" for the purpose of generating revenue.²²⁵ The 2017 Baltimore investigation report, meanwhile, discusses the history of race relations in the Baltimore community, including discriminatory policing and the city's history of racial segregation in housing that was supported by government policies, with the result that a condition of deep racial division —"two Baltimores"—exists today.²²⁶

(2009) ("The Department of Justice should make the involvement of community groups in pattern or practice investigations, negotiations, and litigation standard operating procedure from the beginning of the process."). Pittsburgh Group involved an *ad hoc* meeting of police accountability experts, with a variety of experiences related to the Justice Department pattern or practice program. It met at the University of Pittsburgh Law School in the early months of the Obama administration in 2009, discussed a variety of issues related to Section 14141 litigation, and then submitted a report with recommendations to the Civil Rights Division. The author of this Article was a convening member, along with Professor David Harris of the University of Pittsburgh School of Law. The report is unpublished, but copies are available from the author of this Article.

222. FINAL REPORT, *supra* note 26, at 1.

223. Consent Decree ¶ 42, 54, *United States v. City of Los Angeles*, 288 F.3d 391 (2002) (No. 00-11769), <https://www.justice.gov/crt/file/826956/download>.

224. Consent Decree, *United States v. State of New Jersey*, 194 F.3d 426 (3d Cir. 1999) (No. 99-5970), <https://www.justice.gov/crt/us-v-new-jersey-joint-application-entry-consent-decree-and-consent-decree>.

225. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson_findings_3-4-15.pdf.

226. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 16, 70-73 (2016), <https://www.justice.gov/crt/file/883296/download> [hereinafter DOJ, INVESTIGATION OF BALTIMORE]. The Justice Department did not invent the idea of a deeply racially polarized

Providing explanatory contextual material represents an effort by the SLS to help members of the local community (including the media and elected officials) understand the dynamics of police misconduct, including organizational failures on the part of the police department and a community's history of race relations. Explaining these factors is designed to help build public trust and confidence in the police reform effort, in accord with the President's Task Force recommendation on this issue.²²⁷

c. Engaging Police Departments with the Community

The 2017 Civil Rights Division's report on its pattern or practice program stated that "[c]ommunity input and engagement is a core part of every pattern-or-practice investigation."²²⁸ That goal was not a part of the first generation of SLS settlements but increasingly became a significant part of later settlements.²²⁹

The idea of greater engagement of police departments with the community reflected several trends in thinking about policing. The turning point was the development of both community policing and problem-oriented policing in the early 1980s.²³⁰ Both movements reflected a growing awareness among police experts that police departments cannot by themselves effectively control crime and disorder and depend on community cooperation and engagement. In this respect, community policing explicitly rejected the then-established norms of police professionalism, in which the police presented themselves as the experts in their professional domain (crime control) and rejected community input (particularly criticisms of excessive force and discrimination in arrests) as non-expert opinion.²³¹ Police scholars increasingly recognized that, even in terms of a narrowly defined mission of crime control, the police depend on citizens to report crime; to provide information about neighborhood problems; to provide information about specific criminal events and criminal suspects; and to testify as witnesses in the prosecution of crimes.²³² This process has been character-

city of Baltimore. See *Divided Baltimore: How Did We Get Here, Where Do We Go*, UNIV. OF BALT., <https://blogs.ubalt.edu/dividedbaltimore/> (last visited Oct. 9, 2018).

227. FINAL REPORT, *supra* note 26, at 1; see also PITTSBURGH GROUP, *supra* note 221.

228. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 13.

229. On the absence of these concerns, see Consent Decree ¶ 42, 54, *United States v. City of Los Angeles*, 288 F.3d 391 (2002) (No. 00-11769), <https://www.justice.gov/crt/file/826956/download>; Consent Decree, *United States v. State of New Jersey*, 194 F.3d 426 (3rd Cir. 1999) (No. 99-5970), <https://www.justice.gov/crt/us-v-new-jersey-joint-application-entry-consent-decree-and-consent-decree>.

230. Jack R. Greene, *Community Policing in America: Changing the Nature, Structure, and Function of the Police*, in POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 299 (2000), https://www.ncjrs.gov/criminal_justice2000/vol_3/03g.pdf; MICHAEL S. SCOTT, PROBLEM-ORIENTED POLICING: REFLECTIONS ON THE FIRST 20 YEARS (2000), <http://www.popcenter.org/library/reading/pdfs/reflectionsfull.pdf>.

231. George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, PERSP. ON POLICING (Nov. 1988), <https://pdfs.semanticscholar.org/a614/21a27a6c4fa0e25962ef30e95a22371c1b9c.pdf> (conceptualizing police history in terms of three eras: "The Political Era," "The Reform Era," and "The Community Problem-Solving Era").

232. *Id.* at 12.

ized as the “co-production” of police services, and it was specifically endorsed by the President’s Task Force in 2015.²³³ Greene, in a review of the community policing movement, explained that “[c]ommunity policing has sought from its beginning to engage the community in matters of public safety,” giving it a “coproduction” role.²³⁴

The second generation of SLS settlements simply extended the principle of community engagement to accountability-related police reform. The nexus between accountability and community engagement was the assumption that community input into policing strategies would challenge, and hopefully eliminate, traditional crime-fighting strategies that involved aggressive tactics that too often involved abusive tactics, including frequent traffic and pedestrian stops and uses of force.²³⁵ This assumption guided the Collaborative Agreement in Cincinnati, where a structured community input process served to reduce uses of force and improve police-community relations.²³⁶

The pursuit of greater community engagement took several forms in second generation SLS settlements. Several required police departments to engage in community policing and/or problem-oriented policing. The Baltimore Findings Letter concluded that “our investigation revealed a significant divide between the police and members of the Baltimore community,” resulting in a wide-spread perception of “two Baltimores” which receive “dissimilar policing services.”²³⁷ The dissimilarity included the apparent paradox of low-income and African American neighborhoods simultaneously receiving both overly aggressive policing and too little policing (in the form of police failing to respond to calls for service).²³⁸ Requirements to adopt community policing or problem-oriented policing strategies are included in consent decrees with the Albuquerque²³⁹ and Cleveland²⁴⁰ Police Departments, among others. Both community policing and problem-oriented policing typically involve formal procedures for community input into the development of policing strategies. In Chicago, for example, a core element of the community policing effort had involved regular neighborhood “beat meetings” between residents and police officers.²⁴¹

233. FINAL REPORT, *supra* note 26, at 46 (Recommendation 4.5); Wesley G. Skogan & George E. Antunes, *Information, Apprehension, and Deterrence: Exploring the Limits of Police Productivity*, 7 J. CRIM. JUST. 217, 232 (1979).

234. GREENE, *supra* note 230, at 323.

235. See *infra* Subsection IV.C.1.c.

236. Collaborative Agreement at 5, *In re Cincinnati Policing*, 209 F.R.D. 395 (S.D. Ohio 2002) (“Community problem-oriented policing is an information intensive strategy that places a premium on data, intelligence, community input, and analysis.”).

237. DOJ, INVESTIGATION OF BALTIMORE, *supra* note 226, at 156, 371.

238. DAVID SKLANSKY, *DEMOCRACY AND THE POLICE* 122 (2008) (arguing that what are commonly referred to as “communities” are “not monolithic,” with different experiences with crime and the police).

239. Settlement Agreement at 79–80, *United States v. City of Albuquerque*, No. 1:14-CV-1025 (D.N.M. Nov. 14, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/12/19/apd_settlement_11-14-14.pdf.

240. Settlement Agreement at 8–10, *United States v. City of Cleveland*, No 1:15CV1046 (N.D. Ohio June 12, 2015), <https://www.justice.gov/crt/case-document/file/908536/download> (“Community and Problem-Oriented Policing”).

241. WESLEY G. SKOGAN & SUSAN M. HARTNETT, *COMMUNITY POLICING, CHICAGO STYLE* 113–37 (1997). The ambitious Chicago community policing program, however, was effectively disbanded. See DOJ,

The model for greater community input into the implementation of court-enforced settlements was the Collaborative Agreement (“CA”) in Cincinnati, a settlement of private law suits alleging race discrimination against the Cincinnati Police Department, which paralleled and was linked to the SLS settlement of its investigation of the department.²⁴² The CA stipulated that as a “First Goal: Police Officers and Community Members Will Become Proactive Partners in Community Problem Solving” and as a “Second Goal: Build Relationships of Respect, Cooperation and Trust Within and Between Police and Communities.”²⁴³ To fulfill these goals, the agreement directed the police department to change its policing strategy: “The City of Cincinnati . . . shall adopt problem solving as the principal strategy for addressing crime and disorder problems.”²⁴⁴

The Cincinnati Collaborative Agreement proved to be extremely influential. It provided a model for the community police commissions in the more recent SLS settlements and also for the Joint Remedial Process in the settlement of the New York City “stop and frisk” case in 2013. The Opinion and Order in *Floyd v. City of New York* held that “community input is perhaps an even more vital part of a sustainable remedy in this case,” in large part because the communities affected by the police department’s stop and frisk practices “have a distinct perspective that is highly relevant to crafting effective reforms.”²⁴⁵ The Joint Remedial Process involved participation by relevant community stakeholders, supplemented by “academic and other experts” as deemed necessary, in a series of “town hall” meetings in each of the five boroughs of New York City, for the purpose of developing “remedial measures” that would supplement those ordered by the court.²⁴⁶

The Seattle settlement went further than any previous ones with regard to community input by requiring the creation of a Community Police Commission, a broadly representative body that would have a formal role in the development of police department policies.²⁴⁷ The settlement held that “[e]ffective and constitutional policing requires a partnership between the Police Depart-

INVESTIGATION OF CHICAGO, *supra* note 77, at 14 (finding that the community policing program and been “institutionally neglected,” “poorly funded,” “relegated” “to a small group of officers and civilians in each district,” with officers receiving “little training on how to accomplish their mandate”).

242. The linkage between the *Collaborative Agreement* and the Justice Department *Memorandum of Agreement* is in *In re Cincinnati Policing*, *supra* note 161, ¶ 48, 162.

243. *Id.* at 3.

244. *Id.* at 4 (“The City of Cincinnati, the plaintiffs and the FOP, shall adopt problem solving as the principal strategy for addressing crime and disorder problems.”); Chanin, *supra* note 175, at 179 (finding the reforms in Cincinnati “broader and deeper” than in other consent decree jurisdictions).

245. 959 F. Supp. 2d 668, 686 (S.D.N.Y. 2013).

246. *Id.* at 686–88 (“4. Joint Remedial Process for Developing Supplemental Reforms”); see also PETER L. ZIMROTH, MONITOR, SECOND REPORT OF THE INDEPENDENT MONITOR 1–6 (2016), <http://nypdmonitor.org/wp-content/uploads/2016/02/2016-02-16FloydvCityofNY-MonitorsSecondStatusReport.pdf>.

247. Settlement Agreement and Stipulated [Proposed] Order of Resolution at 2, *United States v. City of Seattle*, No. 12-CV-1282 (W.D. Wash. July 7, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentedecree_7-27-12.pdf.

ment, its officers, community members, and public officials,” and directed the City to create a Community Police Commission (“CPC”) by executive order within ninety days.²⁴⁸ The Consent Decree defined the purpose of the CPC as, providing “ongoing community input” into “reforms,” “police priorities,” and “mechanisms to promote community confidence in” the Seattle Police Department.²⁴⁹ A subsequent Memorandum of Understanding (“MOU”) spelled out the composition of the CPC and its roles and responsibilities, which included reviewing reports of the court-appointed Monitor, and the authority to issue its own reports and recommendations.²⁵⁰ The MOU did not, however, give the CPC the authority to review police department policies, an issue that became a matter of conflict in the early history of the CPC. CPC members demanded to have a voice in the development of the new police department use of force policy.²⁵¹ The result was a stand-off between the CPC and the Monitor, the U.S. Attorney, and city officials.²⁵² The CPC members stood their ground and, at one point, threatened to resign *en masse*, with some arguing that if they were denied a voice in the critical issue of use of force it would reduce the CPC to “window dressing.”²⁵³ The other side then relented, not willing to risk a mass resignation, which could have jeopardized the entire consent decree implementation.²⁵⁴ As a result, the CPC participated in the development of the new use of force policy.²⁵⁵ The role of the two police union representatives on the CPC, itself an important experiment on the part of the SLS, is discussed below.²⁵⁶

In the end, the Seattle government immediately became an active voice in police reform efforts in the city. In 2017, the Seattle City Council passed an ordinance making the CPC a permanent city agency.²⁵⁷ The Seattle events may prove to be an anomaly, or they may prove to have established a viable model for giving representatives of the public a meaningful voice in police policy-making. Only time and careful analysis will tell.

248. *Id.* The settlement with the Cleveland Division of Police contained a similar requirement. Settlement Agreement at 4–7, *United States v. City of Cleveland*, No. 15-CV-01046 (N.D. Ohio June 12, 2015), <https://www.justice.gov/crt/case-document/file/908536/download>.

249. Settlement Agreement and Stipulated [Proposed] Order of Resolution at 2, *United States v. City of Seattle*, No. 12-CV-1282 (W.D. Wash. July 7, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentedecree_7-27-12.pdf.

250. Memorandum of Understanding Between the United States and the City of Seattle (July 27, 2012), at 4–6, https://www.justice.gov/sites/default/files/crt/legacy/2012/07/27/spd_mou_7-27-12.pdf; Walker, *Community Voice*, *supra* note 76, at 544–48. See also the related discussion in Walker, *Governing the American Police*, *supra* note 149, at 656–59.

251. Walker, *Community Voice*, *supra* note 75, at 546.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 544 (interviews with key stakeholders); Walker, *Governing the American Police*, *supra* note 149, at 656–59.

256. See *infra* Subsection IV.C.1.e.

257. SEATTLE, WASH., CITY COUNCIL BILL 118969 (June 1, 2017), <http://seattle.legistar.com/LegislationDetail.aspx?ID=3041612&GUID=189886AB-6C46-438A-AB56-DA45AE4FCD7B&Options=Advanced&Search=>.

It is important to note that the requirement that the City of Seattle create a Community Police Commission was a bold and unprecedented effort on the part of the Justice Department with respect to restructuring the governance of local police departments.²⁵⁸ The President's Task Force on 21st Century Policing made several recommendations regarding citizen input into police policy-making but none went so far as to involve a formal restructuring of police governance.²⁵⁹ In the first generation of SLS settlements, community groups had been largely excluded from the reform implementation process. Some experts argued that this exclusion undermined the legitimacy of settlements among a crucial local constituency.²⁶⁰

The experiment in requiring a restructuring of the governance of local police departments is fraught with uncertainties and potential pitfalls, running head long into unresolved issues related to the governance of local police. As law professor David Sklansky has argued, it is not certain that there is "an identifiable 'public' or 'community' position on controversial policy questions," and policing certainly involves a host of policy questions.²⁶¹ Police reform activists, when speaking of "the community," too often assume that it refers to people with *their* analysis of police problems and the needed reforms. In fact, however, African American communities and Latino communities, like their white counterparts, are quite diverse. As Sklansky puts it, "communities are not monolithic."²⁶² In particular, there are working individuals, with stable families and children, who are deeply concerned about crime and drugs and not only want "tough" law enforcement but are also willing to tolerate aggressive police practices they believe will effectively reduce crime. In this respect, they are no different than their white counterparts. Thus, in creating a "community" police commission, the question becomes, who speaks for that community? And even within the bounds of a predominantly African American geographic area, which parts of that "community" will be represented? It is not at all far-fetched to imagine a "community" police commission dominated by the advocates of aggressive crime-fighting.

d. Engaging Social Service Agencies

The second generation of SLS settlements included several with provisions requiring the development of working relationships with social service agencies related to particular social and legal problems. The goal, according to

258. Whether the U.S. Justice Department should order the restructuring of local governance of police departments (as opposed to ordering administrative procedures deemed necessary to end unconstitutional police practices) is a matter that needs extended discussion.

259. FINAL REPORT, *supra* note 26, at 15 (Action Item 1.5.1), 20 (Recommendation 2.0), 46 (Recommendation 4.5), 47 (Action Item 4.5.3).

260. PITTSBURGH GROUP, *supra* note 221, at 5.

261. SKLANSKY, *supra* note 238, at 87–88.

262. *Id.* at 122. See also SCOTT, *supra* note 230, at 121 ("[N]ew collaborations between police and community present significant challenges in a constitutional democracy. At times, the 'majority rules' philosophy of the community and the conservative traits of the police combine to support police practices that the courts find threatening to the constitutional order.").

the Civil Rights Division, was to focus on the “links between [police] misconduct and institutional failures outside of police departments.”²⁶³ The Findings Letter and the settlement agreement for the New Orleans Police Department, for example, addressed gender discrimination, with respect to the police department’s response to sexual assaults and domestic violence incidents.²⁶⁴ Regarding sexual assault cases, the Findings Letter found “[i]nadequate policies and procedures, deficiencies in training, and extraordinary lapses in supervision have contributed to a systemic breakdown in NOPD handling of sexual assault investigations.”²⁶⁵ The subsequent consent decree required the NOPD “to work with the [District Attorney], community service providers, and other stakeholders to develop and implement” a collaborative agreement “to provide a coordinated and victim-centered approach to sexual violence.”²⁶⁶ In addition, the NOPD was required to develop a formal process for “representatives from the community” to review and provide feedback on the NOPD’s performance regarding its response to sexual assaults.²⁶⁷ With respect to domestic violence, meanwhile, the Findings Letter found that “[n]either NOPD’s Operations Manual nor the Domestic Violence Unit’s manual contains specific guidance regarding . . . important functions,” including taking domestic violence calls, preliminary investigations, documenting victim injuries, and so on.²⁶⁸ The Consent Decree required the NOPD to “support a centralized, multi-agency Family Justice Center model in the handling of domestic and sexual assault cases” in the city.²⁶⁹

In a similar fashion, the Findings Letter for the Portland, Oregon Police Department concluded that Portland police officers too often used force inappropriately against persons experiencing mental health crises because “the lack of a comprehensive state-wide crisis system,” which resulted in “an overreliance on local law enforcement, jails, and emergency rooms.”²⁷⁰ It should be noted that the SLS findings letter was as critical of the failures of state and local mental health programs as it was of the police department’s shortcomings.

263. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 33.

264. Consent Decree at 54, *United States v. City of New Orleans*, No. 12-CV-01924 (E.D. La. 2012), [https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/2018-03-15-Amended-and-Restated-NOPD-Consent-Decree-CLEAN-\(1\).pdf/](https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/2018-03-15-Amended-and-Restated-NOPD-Consent-Decree-CLEAN-(1).pdf/).

265. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 43 (Mar. 16, 2011) [hereinafter DOJ, INVESTIGATION OF NEW ORLEANS], https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

266. Consent Decree at 57, *United States v. City of New Orleans*, 35 F.Supp.3d 788 (E.D. La. 2013) (No. 12-1924), [https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/2018-03-15-Amended-and-Restated-NOPD-Consent-Decree-CLEAN-\(1\).pdf/](https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/2018-03-15-Amended-and-Restated-NOPD-Consent-Decree-CLEAN-(1).pdf/).

267. *Id.*

268. DOJ, INVESTIGATION OF NEW ORLEANS, *supra* note 265, at 49.

269. Consent Decree at 58, *United States v. City of New Orleans*, 35 F.Supp.3d 788 (E.D. La. 2013) (No. 12-1924), https://www.justice.gov/sites/default/files/crt/legacy/2013/01/11/nopd_agreement_1-11-13.pdf.

270. DOJ, INVESTIGATION OF PORTLAND, *supra* note 119, at 7; Settlement Agreement at 32–35, *United States v. City of Portland*, No. 12-CV-02265, 2013 U.S. Dist. LEXIS 188465 (D. Or. Feb. 19, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentdecree_7-27-12.pdf.

To correct this problem, the resulting consent decree ordered the development of closer working relationships with various mental health related groups.²⁷¹

The idea of police departments engaging relevant social service agencies was hardly new with the Justice Department pattern or practice program. Such involvements developed in the 1960s and have been a long-standing part of more recent problem-oriented policing and community policing programs.²⁷² The unique contribution of several SLS settlements has been to link engagement with social service agencies in the effort to curb officer use of force and other unconstitutional practices.

e. Involving Rank-and-File Officers and Police Unions

The second generation of SLS settlements also gave greater attention to rank-and-file officers than had been the case in previous settlements. This new approach had two dimensions. First, the investigations gave more attention to the perspectives of rank-and-file officers on problems within police departments. The Seattle Consent Decree stated that: “Police officers also bring an important voice to the reform process. Their views, whether presented through their labor organizations or through other channels, should inform the development of the reform effort and its implementation.”²⁷³ The Findings Letter on the Cleveland Division of Police, for example, concluded that “[o]fficers are [i]nadequately [s]upported and [t]rained.”²⁷⁴ Because of inadequate training, officers “do not know how to safely and effectively control subjects,” with the result that in “many instances” officers lost control of subjects and as a result had to apply “significant force.”²⁷⁵ Officers in some instances deployed tasers or drew their firearms because of a “lack of confidence that they will be able to control a situation.”²⁷⁶ Additionally, the department did not provide its officers with “the basic equipment, the physical structures, and the technology required to perform their jobs safely.”²⁷⁷ Outdated technology meant that officers could not effectively communicate with command officers or other patrol officers, thereby creating dangerous situations for them and “drain[ing]” their morale.²⁷⁸ Similarly, the SLS investigation of the Baltimore City Police Department found

271. Settlement Agreement at 50–59, *United States v. City of Portland*, No. 12-CV-02265 (D. Or. Feb. 19, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentedecree_7-27-12.pdf.

272. See the various guides published by the Center for Problem-Oriented Policing, at *Problem Specific Guides*, CTR. FOR PROBLEM-ORIENTED POLICING, <http://www.popcenter.org/guides/> (last visited Oct. 9, 2018). See, for example, the discussion of “Stakeholders” in the POP Guide on *Chronic Public Intoxication*. *Id.* On 1960s-era programs, see TASK FORCE REPORT: THE POLICE, *supra* note 110, at 161–63.

273. Settlement Agreement and Stipulated [Proposed] Order of Resolution at 2, *United States v. City of Seattle*, No. 12-CV-1282 (W.D. Wash. July 27, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentedecree_7-27-12.pdf.

274. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 42 (Dec. 4, 2014) [hereinafter DOJ, INVESTIGATION OF CLEVELAND], https://www.justice.gov/sites/default/files/crt/legacy/2014/12/04/cleveland_findings_12-4-14.pdf.

275. *Id.*

276. *Id.*

277. *Id.* at 54–55.

278. *Id.*

that it “[f]ails to [a]dequately [s]upport its [o]fficers,” through, among many problems, inadequate technology, a recruitment and retention strategy that would address chronic inadequate staffing, and “psychological counseling for officers following a traumatic incident.”²⁷⁹ As with greater engagement with social service agencies, the unique contribution of the SLS pattern or practice program has been to link police officer involvement in policy-making and up-to-date technology with improved officer performance and the reduction in unconstitutional policing.

In a second development, two second generation SLS settlements required that unions representing police officers have a formal place in the newly created governance structure. Representatives of both the rank-and-file officers’ union and the command officers’ union were given seats in the Seattle Community Police Commission²⁸⁰ and on the Cleveland Community Police Commission.²⁸¹

Including rank-and-file officers and/or their union representatives in policy-making is another bold experiment by the SLS that is fraught with both considerable possibilities for improving policing and reducing unconstitutional policing and also with uncertainties and potential pitfalls. Since they emerged as a powerful factor in policing in the late 1960s, police unions have been a largely negative force with regard to police accountability.²⁸² Unions have almost consistently opposed all measures designed to improve police-community relations, particularly the creation of citizen review boards.²⁸³ For this reason, David Sklansky points out that today many police scholars have “little affinity” for a vision of democratic governance of the police that includes “participation by, or deliberation among, police officers themselves.”²⁸⁴ In the first real challenge facing the Seattle Community Police Commission, the two union representatives joined forces with other members who were long-standing critics of the police department to secure a CPC voice in the adoption of a new use of force policy, which was a positive development for police accountability.²⁸⁵

The question remains, however, whether including representatives in similar community police commissions will also serve to advance accountability-related reforms or produce only conflict and dysfunction.

279. DOJ, INVESTIGATION OF BALTIMORE, *supra* note 226, at 137.

280. Memorandum of Understanding Between the United States and the City of Seattle, *supra* note 250, at 8.

281. Settlement Agreement at 4–7, *United States v. City of Cleveland*, No. 15-CV-01046 (N.D. Ohio June 12, 2015), <https://www.justice.gov/crt/case-document/file/908536/download>.

282. SKLANSKY, *supra* note 238, at 76 (“The police themselves entered the political fray [in the 1960s], vocally and visibly”).

283. *Id.* at 77.

284. *Id.* at 97. Sklansky has performed the admirable service of recovering a lost piece of American police history, which involved serious discussions of participation by rank-and-file police officers in police governance, which flourished briefly in the 1960s and early 1970s. *Id.* at 168–73.

285. See generally Walker, *Community Voice*, *supra* note 75.

f. Summary

The learning curve of the SLS discussed in sub-paragraphs (a) through (e) above ended with an entirely different vision of accountability-related police reform than the one that the Section began with in 1997 with the Pittsburgh consent decree. As already noted, that decree was strictly limited to matters related to a then-conventional view of reform: the management and control of officer conduct, particularly with regard to use of force, searches, traffic stops, racial bias, citizen complaints, officer performance evaluations, and “community relations.”²⁸⁶ The second generation of SLS settlements, as described in the above Subsection, by contrast, sweep broadly into a host of new issues: far greater detail regarding the reporting and review of uses of force, the need to build greater public understanding of police problems and the reform process, the need to develop formal arrangements for formal community input into police policy-making, the need for engagement with community social service agencies on relevant social problems, and the need for greater involvement of rank-and-file officers and their unions in police policy-making.

The SLS did not set out to consciously expand its reform agenda. As already argued, the new requirements in settlements emerged slowly out of a learning process that involved a continuing reassessment of what is needed to effect meaningful accountability-related reforms and achieve constitutional policing. And as also noted, two of the new requirements, involving formal procedures for greater community engagement and for involvement of rank-and-file officers and their union in the reform process, are bold experiments, fraught with risks and uncertain outcomes. The learning curve process itself and several of the resulting initiatives have received almost no comment among the various evaluations of the pattern or practice program. Yet the changes sweep so broadly and have such profound implication that they cry out for extended comment, which exceeds the bounds of this Article.

2. *The Goal of Organizational Transformation*

From the outset, the SLS adopted an ambitious goal of transforming police organizations.²⁸⁷ This goal embraced a line of thinking among police experts that had been developing for some years, spurred by several lines of thinking about the nature of police misconduct.²⁸⁸

286. PITTSBURGH GROUP, *supra* note 221.

287. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 2 (“The Division’s reform agreements emphasize institutional reforms.”). The terms “organizational transformation,” “systemic reform,” and “structural reform” have also been used by various commentators. See Rushin, *supra* note 16 (using the term “structural reform”).

288. The most creative and provocative discussion by a criminologist of the control of police shootings borrows from the sociology of organizations, particularly the work of Charles Perrow on airline crashes, arguing that the problem “is not inherently criminological but organizational.” Lawrence W. Sherman, *Reducing Fatal Police Shootings as System Crashes: Research, Theory, and Practice*, 2018 ANN. REV. CRIMINOLOGY 421, 432 (2018); see CHALRES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES (1984).

a. The Dimensions of Organizational Transformation in Policing

Organizational transformation in policing involves three distinct dimensions. The first dimension involved a rejection of the idea that police misconduct is caused by just a few bad officers (the proverbial “rotten apples”).²⁸⁹ Rachel Harmon, for example, argued that “[m]uch police misconduct is not accidental . . . or inevitable,” and therefore systemic reform “requires structurally changing police departments . . . in order to create accountability for officers and supervisors and foster norms of professional integrity.”²⁹⁰ The SLS findings letter on the Albuquerque Police Department embraced this view, concluding that “[t]he use of excessive force by [Albuquerque police] officers is not isolated or sporadic;” rather, it “stems from systemic deficiencies in oversight, training, and policy.”²⁹¹ Similarly, the New Orleans findings letter concluded that “[t]he deficiencies in the way NOPD polices the City are not simply individual, but structural as well,” and “the deficiencies that lead to constitutional violations span the operation of the entire Department.”²⁹²

A second dimension of organizational transformation involved a rejection of the piecemeal approach to police reform in which specific police actions—searches, interrogations, uses of deadly force, and so on—are addressed separately. The Supreme Court decisions on the constitutionality of particular police practices inherently address only the specific issues before the court. The SLS approach to systemic police reform takes the view that addressing only one form of misconduct (*e.g.*, stops and frisks) leaves much other misconduct untouched and fails to address the inadequacies of a police department’s accountability mechanisms that are a major contributor to all forms of officer misconduct. The Baltimore Findings Letter, for example, concluded that “[t]he fault for officers’ systemic use of these heavy-handed tactics lies with BPD as an agency,” through its lack of proper policies to guide officer conduct, inadequate supervision, and improper or inadequate training.²⁹³ Correcting systemic deficiencies related to policies, training, and accountability procedures (such as an early intervention system) will necessarily affect a broad range of police activities.

A third dimension of organizational transformation involved recognition that much police misconduct is rooted in specific crime-fighting policies. This

289. Lee, Weitzer & Martinez, *supra* note 25, at 206 (finding that the “rotten apple” interpretation persisted in media coverage of three recent highly-publicized fatal police shootings, being mentioned as often as “racism” as a causal factor); Sherman, *supra* note 288, at 434 (drawing on the work of Perrow in organizational sociology, arguing that “the urge to blame individuals often obstructs the search for organizational solutions”).

290. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 1 (2009). On the application of the organizational approach to reform to the stops and frisks, see MICHAEL D. WHITE & HENRY F. FRADELLA, STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC 117–45 (2016) (Ch. 5, “Beyond a Few Bad Apples”).

291. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., RE: ALBUQUERQUE POLICE DEPARTMENT 9–10 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf.

292. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT v (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

293. DOJ, INVESTIGATION OF BALTIMORE, *supra* note 226, at 79.

view was first articulated by the Kerner Commission, created to investigate the riots of the 1960s, which concluded in 1968 that “many of the serious disturbances took place in cities whose police are among the best led, best organized, best trained, and most professional in the country.”²⁹⁴ The commission noted that police “professionalism” at that time was generally associated with aggressive crime fighting tactics that were focused on African American communities. The 2015 President’s Task Force reiterated the argument, calling on police departments to “consider the potential damage to public trust when implementing crime fighting strategies.”²⁹⁵ The New York City Police Department’s “stop and frisk” policy, in which the number of stops rose from 97,296 in 2002 to 685,724 in 2011 and was declared unconstitutional as practiced in 2013, is a classic illustration of how an allegedly “tough” anti-crime policy leads directly to systematic officer misconduct.²⁹⁶ A recent study of traffic stops in the Kansas City Metropolitan area, meanwhile, found an important distinction between stops involving driving behavior and suspicion-based stops in which stops are based on suspicion about the driver or other persons in the vehicle.²⁹⁷ The study found that racial disparities were higher in *suspicion-based* stops, as opposed to traffic enforcement stops, where the stop is based on driving behavior.²⁹⁸ Suspicion-based stops, moreover, were deeply resented by African Americans.²⁹⁹ In short, changing “the organization,” in many cases, involves changing its crime-fighting strategies.

b. The Challenge of Organizational Transformation: A Conundrum

Transforming police organizations is a daunting challenge, however, and encounters the same problems faced in efforts to bring about comprehensive change in all public and private bureaucracies. The fact that most consent decrees have not reached compliance by the end of five years (the standard target date in all settlements) is only one indicator of the difficulties in implementing the many required reforms and achieving compliance with the terms of the settlement.³⁰⁰ Private corporations in the 1980s, in response to the challenge of foreign competition and widespread criticism that they had become stagnant and resistant to innovation, wrestled with how to transform themselves.³⁰¹ The

294. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, *supra* note 53, at 301. Most observers believed that the commission’s comment involved the Los Angeles Police Department, but the point has broader application, even today.

295. FINAL REPORT, *supra* note 26, at 86 (Recommendation 1.6).

296. *Stop-and-Frisk 2011: NYCLU Briefing*, N.Y. CIVIL LIBERTIES UNION (May 9, 2012), http://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf; WHITE & FRADELLA, *supra* note 290, at 139.

297. EPP ET AL., *supra* note 51.

298. *Id.*

299. *Id.*

300. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 35 (noting that some settlements “have been in place for over a decade” and that “institutional change presents different challenges to different institutions”).

301. See, e.g., STEVEN PEARLSTEIN, SOCIAL CAPITAL, CORPORATE PURPOSE AND THE REVIVAL OF AMERICAN CAPITALISM (2014), https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsPearlstein_v5_Revised-Feb-2014.pdf. The paper is a contribution to the Brookings Institution’s Initiative on 21st Century

prisoners' rights movement in the U.S. that began in the 1970s, meanwhile, ultimately involved broad institutional reforms.³⁰²

The SLS explained the challenges of organizational transformation in its New Orleans Findings Letter. "Organizational transformation," it explained, "requires that a police department integrate and embed community-and problem-oriented policing principles into each aspect of its management, structure, and use of resources."³⁰³ That includes "leadership, policies, climate and culture, systems of accountability, and training and deployment of personnel."³⁰⁴

In short, it involves changing virtually all aspects of the department and making those changes simultaneously without disrupting normal activities. The challenge is complicated by the fact that many of the different elements being changed are dependent on each other. A department cannot begin training on a new use of force policy until that policy has been written and approved. In Albuquerque, the court-appointed Monitor's Fourth Report noted that the complexity of developing an acceptable new use of force policy delayed "the start of required department-wide training related to the appropriate use of force," leaving little time for "revisions to training processes" as implementation of the new policy progresses, and delayed the "training of supervisors in how to assess, evaluate and review officers' use of force."³⁰⁵

The goal of organizational transformation, particularly in the most troubled police departments, involves a conundrum. All of the required reforms in consent decrees are complex administrative procedures: data collection on all uses of force; systematic analysis of use of force patterns; an early intervention system, and so on. Yet, the evidence from the SLS findings letters clearly indicates that troubled police departments are poorly managed, lack up-to-date accountability procedures, such as record systems on use of force and other critical police actions, do not have the technological infrastructure to support those procedures, are highly affected by deeply ingrained traditions of officer conduct that are hostile to accountability, and in general lack an overall mindset committed to accountability. The court-appointed Monitor for the Baltimore City Police Department, in a 2018 report, bluntly questioned "whether BPD [the Baltimore Police Department] has the *capacity* to implement the linchpin requirements of the Consent Decree" because of its utterly inadequate technological infrastructure.³⁰⁶ The Justice Department's Cleveland Findings Letter,

Capitalism. *The Initiative on 21st Century Capitalism*, BROOKINGS, <https://www.brookings.edu/series/the-initiative-on-21st-century-capitalism/> (last visited Oct. 9, 2018).

302. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* (1998).

303. DOJ, *INVESTIGATION OF NEW ORLEANS*, *supra* note 265, at 103.

304. *Id.* at 103.

305. JAMES D. GINGER, *MONITOR'S FOURTH REPORT 4-5* (2016) https://www.abqmonitor.org/docs/Abq_Monitor_Special_Report_2016-11-01.pdf.

306. BALT. POLICE DEP'T MONITORING TEAM, *FIRST SEMIANNUAL REPORT* (July 18, 2018), <https://static1.squarespace.com/static/59db8644e45a7c08738ca2f1/t/5b4f83b070a6ad75b5b8adb9/1531937719069/BPD+-+First+Semiannual+Report+7-18-18.pdf>. The SLS, however, cited a few departments with whom it reached settlements as having many sound procedures related to accountability. See, for example, the Findings Letter related to the Antelope Valley Division of the Los Angeles Sheriff's Department: U.S. DEP'T OF JUSTICE, CIVIL

meanwhile, found the department unable “to produce key documents,” which “are necessary to assess whether officers are using force appropriately.”³⁰⁷ Additionally, departments subject to settlements lack command officers with experience in professional departments, and they consequently lack an accountability-related mindset that understands the value of modern accountability systems. The problem of the lack of experience and appropriate mindset appears to be particularly acute with respect to early intervention systems, one of the basic components of SLS settlements from the very beginning but which are extremely complex administrative tools and appear to have a problem-prone record in police departments.³⁰⁸ In short, judicially enforced settlements ask a police department to do things it has never before done and for which its leadership and rank-and-file are ill-equipped to do.

The 2016 First and Second Quarterly Report by the New Orleans Monitor illustrates the challenge of effecting change on just one seemingly straight forward aspect of policing. The settlement was entered in 2012 and the first Monitor’s report is dated 2013.³⁰⁹ Yet, three years later, in an assessment of the “Duties of Supervisors,” the Monitor found that in eight districts or units only one was “compliant” with the settlement’s requirement that “Supervisors Respond to and Investigate Uses of Force.”³¹⁰ One district was in “Partial Compliance,” one was “Not Compliant,” and three were “Unable to Demonstrate” compliance, which typically means a lack of proper documentation, which is itself a major form of noncompliance.³¹¹

Given the conundrum just described, an obvious question arises: if a police department lacks the necessary experience, skills, and technological infrastructure to achieve the complex set of reforms required by a consent decree, how then can we expect it to transform itself? The best answer would appear to lie in the combined impact of both the compulsory element of judicial oversight and the role of the court-appointed Monitors. The monitoring process involves an independent team observing on a regular basis the various reforms. Monitors report the degree of progress made to the district court and to the public through regular reports. Monitors have played a variety of roles in this process: monitor, goad, counsellor, tough-grading school teacher, and resource per-

RIGHTS DIV., INVESTIGATION OF LOS ANGELES COUNTY SHERIFF’S DEPARTMENT STATIONS IN ANTELOPE VALLEY 1 (2013), http://www.justice.gov/sites/default/files/crt/legacy/2013/06/28/antelope_findings_6-28-13.pdf.

307. DOJ, INVESTIGATION OF CLEVELAND, *supra* note 274, at 11.

308. See the discussion *supra* Subsection IV.C.2. See particularly the findings of BROMWICH, *supra* at 204.

309. REPORT OF THE CONSENT DECREE MONITOR FOR THE NEW ORLEANS POLICE DEPARTMENT CONSENT DECREE COVERING THE FIRST AND SECOND QUARTERS OF 2016 62–63, [http://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/1st-and-2nd-Quarterly-Report-of-2016-\(1\).pdf/](http://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/1st-and-2nd-Quarterly-Report-of-2016-(1).pdf/).

310. *Id.* at 62–64.

311. *Id.* at 62–63.

son.³¹² In short, a police department is not attempting to implement the required reforms entirely on its own.

That said, however, the question becomes whether meaningful police reforms, particularly in very troubled police departments, can be achieved without the compulsory element of judicial enforcement possessed by the Justice Department's Civil Rights Division. Will there be sufficient strong leadership by police chiefs, the requisite political and financial support from local governments, and continuing activism by community groups to achieve broad, organizationally focused reforms efforts? It is impossible to answer that question at present, but it stands as one of the major questions facing the future of police reform.

The goal of organizational transformation in policing has received little serious attention from police scholars (apart from some discussion with regard to community policing). As the discussion in the previous section makes clear, organizational transformation with respect to accountability-related policies and procedures is particularly complex and challenging. The existing literature on police organizations provides little perspective and guidance. More attention from police scholars is definitely needed.

3. *Defining a Set of "Best Practices" in Police Accountability*

A major contribution of the SLS program has been the development of a relatively short list of "best practices" related to constitutional policing, which have become a part of the New Conversation and the roadmap for police reform.³¹³ The 2017 Civil Rights Division report explains that the settlements "often reflect a common set of substantive reforms,"³¹⁴ and that some investigations have been undertaken "to set a standard for reform," which would help other agencies address similar problems they are facing.³¹⁵ A similar process emerged out of the prisoners' rights movement. Feeley and Rubin concluded that the introduction of constitutional standards—in effect a set of best practic-

312. The role of the monitors in SLS settlements is discussed in Walker & Macdonald, *supra* note 167, at 510–16. The subject, however, has not been fully researched. See the discussion of monitors in PERF, AN INTEGRATED APPROACH, *supra* note 111, at 29–32.

313. The term "best practices" is widely used in the world of policing today. There is a near-absence of discussion, however, of what that term means, including what practices should be on any list, what process should be used to develop any such list, or what authority of agency should develop any such list. To date, the term is an informal, colloquial one, with no consensus regarding its substantive meaning. See the discussion in WALKER & ARCHBOLD, *supra* note 110, at 28, 305–07. The closest thing to an official list of "best practices" are in COMM'N ON ACCREDITATION FOR LAW ENF'T AGENCIES, STANDARDS FOR ACCREDITATION FOR LAW ENFORCEMENT AGENCIES (6th ed. 2017) [hereinafter CALEA, STANDARDS]. See also *CALEA: The Gold Standard in Public Safety*, CALEA, www.calea.org (last visited Oct. 9, 2018). The accreditation process, however, has been widely criticized on a number of grounds.

314. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 25; see also *id.* at 27 ("core principles").

315. *Id.* at 6 (describing the goal of helping to "set a standard for reform" in specialized areas of police problems, but the goal applies generally to the entire work of the Special Litigation Section).

es—into prisons was one of the major contributions of the prisoners' rights litigation movement.³¹⁶

The list of best practices embodied in the first generation of SLS settlements includes: (1) a state of the art use of force policy, including requirements related to officers filing reports that are complete and accurate and that supervisors critically review such reports; (2) accountability procedures for command-level review of use of force incidents, including primarily a use of force review board ("UFRB") dedicated to identifying problems in a department's use of force policies, training, and supervision; (3) an early intervention system ("EIS") to identify officers with patterns of problematic conduct, and to provide interventions to correct those performance problems;³¹⁷ (4) a citizen complaint process that is open and readily accessible to potential complainants and the thorough and unbiased investigation of complaints; and (5) all training necessary to achieve standards of professionalism in the aforementioned areas. As already discussed, the list of best practices increased in the second generation of settlements as part of the SLS learning curve, and now includes, as discussed above: (1) the development of community policing or problem-oriented policing; (2) the establishment of working relationships with social service agencies; (3) provisions that give community representatives a voice in police policy-making; and (4) policies and practices to address the needs of rank-and-file officers and also to give the rank-and-file and their union representatives a voice in police policy-making.³¹⁸

The best practices discussed here do not involve a formal list and have no official or legal status apart from the settlements where they are court-enforced. Rather, it is an informal and fluid list that has emerged in recent years as part of an on-going process of discussions, recommendations, and experimentation among law enforcement agencies, professional associations, and police experts. Walker and Archbold argue that a fluid and continuously evolving list of best practices, rather than a single, formal list is the best approach, as it allows for new perspectives, new ideas, and new policies and practices to come to the fore.³¹⁹

Prior to the pattern or practice program there was no equivalent set of accountability-related best practices. The only set of formal standards for police agencies has been the Standards for Law Enforcement Agencies promulgated and implemented by the Commission on Accreditation for Law Enforcement Agencies ("CALEA").³²⁰ The CALEA accreditation process, however, has

316. FEELEY & RUBIN, *supra* note 302, at 366 ("The first and most obvious [contribution] was the extension of well-recognized constitutional rights to prisoners.").

317. SAMUEL WALKER, U.S. DEP'T OF JUSTICE, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES 62-70 (2003), https://www.nccpsafety.org/assets/files/library/Early_Intervention_Systems_for_Law_Enforcement_Guide.pdf. See Harris, *supra* note 163, at 166-75 (arguing that an early intervention system can reinforce the exclusionary rule as a means of ensuring police officer compliance with the Fourth Amendment).

318. See *infra* Subsection IV.C.1.

319. WALKER & ARCHBOLD, *supra* note 110, at 28, 305-07.

320. See generally CALEA, STANDARDS, *supra* note 313.

been criticized on several grounds. The program is entirely voluntary on the part of local agencies; there is no penalty for not being accredited and fewer than 1,000 agencies are currently accredited.³²¹ Particularly relevant for this Article, with only a few exceptions, the standards focus on formal process (as in “A written directive governs”) without substantive requirements as to what the policy should involve.³²² Thus, they provide no meaningful guidance on how to achieve a particular standard’s goal, much less constitutional policing.³²³

The best practices embodied in the SLS settlements became important elements of the New Conversation and an important part of the new roadmap for future police reform. While the President’s Task Force defined the principle of legitimacy as a necessary element of professional policing and the various PERF reports advanced policies that would control police uses of force and help to build community trust and legitimacy, the SLS settlements developed the specific requirements necessary to control officer uses of force.

4. *Controlling Police Use of Force: A Systematic Approach*

The Civil Rights Division’s report on its pattern or practice program asserted that “[a]ddressing systemic excessive force is one of the core functions of the Division’s pattern-or-practice cases.”³²⁴ This Subsection examines the requirements in the various SLS settlements related to the control of officer use of force and their impacts on policing. While the discussion here focuses only on force, the reforms and their impacts are relevant to all critical incidents in which police actions affect the lives, liberties, and well-being of people who experience police encounters.³²⁵

The SLS approach to controlling police officer use of force involves the application of administrative rulemaking to policing. Following the pioneering work of Kenneth C. Davis on the control of police discretion, use of force policies today follow the administrative rulemaking model of seeking to confine, structure, and check discretion.³²⁶ These three elements represent a systematic approach to the control of use of force, which includes a policy on when to use and not use force, requirements for officer reporting of use of force incidents, requirements for immediate supervisors to critically review officer force reports, a new approach to the investigation of force incidents, and new procedures for command level review of force incidents.

321. *See generally id.*

322. *See generally id.*

323. *Id.* at 1–3 (Standard 1.2.7. “A Written directive governs the use of discretion by sworn officers.”). Yet, only a few routine police activities are governed by a specific CALEA Standard. On accreditation, *see* SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA: AN INTRODUCTION* 512–13 (9th ed. 2018).

324. DOJ, *PATTERN AND PRACTICE*, *supra* note 6, at 27.

325. The “critical incident” framework is covered in WALKER & ARCHBOLD, *supra* note 110, at 13, 105–40.

326. DAVIS, *POLICE DISCRETION*, *supra* note 110; WALKER & ARCHBOLD, *supra* note 110, at 69–104 (applying administrative rulemaking to the control of police use of force); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1861–62 (2015).

a. Confining and Structuring Officer Discretion: Use of Force Policies

Use of force policies today seek to *confine* all forms of officer use of force, including deadly force, nonlethal force, the use of chemical agents or electronic devices, and the deployment of canines.³²⁷ Confinement is achieved first by clearly spelling out the circumstances when force may be used and when it is prohibited.³²⁸ With respect to deadly force, current best practice policies now generally open with a statement that the department has a commitment to preserving the sanctity of human life.³²⁹ Policies then limit the use of deadly force to situations where there is an *imminent threat* to the life or physical safety of the officer or other persons, while also allowing the use of deadly force against a fleeing person who has committed a violent felony and who the officer believes is armed and is likely to commit another violent crime.³³⁰ Deadly force policies also generally contain a number of specific prohibitions, include forbidding shots to wound, to signal for help, or at or from moving vehicles.³³¹

Policies on the use of physical force, meanwhile, generally specify that it can only be used to accomplish a lawful police purpose (to effect an arrest, overcome resistance by a suspect, or to bring a dangerous situation under control) and must be *proportional* to the level of resistance or force used by the person against whom force is used.³³²

Deadly force and physical force policies then *structure* the exercise of officer discretion through language specifying that it should be used as a last resort, that alternative means of resolving the incident have been exhausted, and that the officer has engaged in de-escalation³³³ or other tactical decisions designed to avoid the use of force. Additional language may prohibit use of force against persons who do not pose a danger to anyone, are engaged in passive resistance, or who are already handcuffed.

327. See PERF, GUIDING PRINCIPLES, *supra* note 106.

328. *Id.*

329. *Id.* at 34–35 (Guiding Principle No. 1: “The *sanctity of human life* should be at the heart of everything an agency does.”).

330. NEW ORLEANS POLICE DEP’T, POLICY MANUAL § 300.5 <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569adafed82d5e0d876a81b2/1452989185205/NOLA+use+of+force+policy> (“Deadly Force Applications: An officer may use deadly force to protect him/herself or others from what he/she reasonably believes would be an imminent threat of death or serious bodily injury.”).

331. See, e.g., *id.* § 300.6.1 (“Warning and Other Shots: Warning shots or shots fired for the purpose of summoning aid are prohibited.”).

332. SEATTLE POLICE DEP’T, POLICY MANUAL, *supra* note 109, at POLICY 8.000, <https://www.seattle.gov/police-manual/title-8---use-of-force/8000---use-of-force-core-principles> (“Use of Force Core Principles: An Officer Shall Use Only the Degree of Force That Is Objectively Reasonable, Necessary Under the Circumstances, and Proportional to the Threat or Resistance of a Subject”). See also PERF, GUIDING PRINCIPLES, *supra* note 106, at 38–40.

333. SEATTLE POLICE DEP’T, POLICY MANUAL, *supra* note 109, at POLICY 8.100, <https://www.seattle.gov/police-manual/title-8---use-of-force/8100---de-escalation> (“De-Escalation”).

b. Requirements on Officer Reporting Uses of Force

SLS investigations of local police departments have found a consistent pattern of officers failing to report uses of force or filing incomplete or dishonest reports.³³⁴ From the perspective of administrative rulemaking, use of force reports are intended to check officer discretion. The failure of officers to file complete and accurate reports, however, undermines a department's use of force policy.

In some cases, officers did not file reports at all; in others, only one officer filed a report even though more than one officer used force.³³⁵ Force reports are often vague and lacking in sufficient detail about the conduct of the person against whom force was used that justified the use of force. The SLS Findings Letter on the Cleveland Division of Police, for example, found strong evidence of officer failures to report or accurately report force incidents.³³⁶ "Until recently," it found, "when a use of force incident occurred, each officer at the scene was not required to write a report documenting the incident."³³⁷ Additionally, "Officers' reports repeatedly do not adequately convey the [level of] force they have used or why."³³⁸ The investigation of the Chicago Police Department, for example, found the Chicago Police Department's use of force reporting form deficient because "officers are not required to provide detail[s] of the incident]" but instead the form provides boxes that officers can check.³³⁹ Boxes offer only general categories rather than specific detail about an incident. The space on the force report form for "additional information" was "too small to provide an actual narrative" of the incident, and "officers rarely use it at all."³⁴⁰ Additionally and alarmingly, officers were apparently "instructed on the language they should use to justify force" (for example that the person "flailed" his or her arms, a statement that fails to describe any serious resistance or threat).³⁴¹ A recurring problem involved the use of "canned" or "boilerplate" language by officers regarding the behavior of the person involved.³⁴² In the lawsuit challenging the New York City Police Department's stop and frisk practices, evidence was presented that officers frequently claimed that force was used because of "furtive movement" by the suspect.³⁴³

334. See *Special Litigation Section Case Summaries*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/special-litigation-section-case-summaries> (last visited Oct. 9, 2018).

335. *Id.*

336. DOJ, INVESTIGATION OF CLEVELAND, *supra* note 274, at 28.

337. *Id.* at 29.

338. *Id.*

339. DOJ, INVESTIGATION OF CHICAGO, *supra* note 77, at 6.

340. *Id.* at 42.

341. *Id.* at 43. A check box system was used by the New York City Police Department with respect to stops and frisks and was found to be a contributing factor in the failure of appropriate accountability. The resulting information was not sufficient for an "adequate review" by immediate supervisors or higher-ranking command officers. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 569–70 (2013) (a blank "UF-250" form is included in the opinion, *id.* at 668 app. A).

342. DOJ, INVESTIGATION OF CHICAGO, *supra* note 77, at 32.

343. *Floyd*, 959 F. Supp. at 559.

SLS findings letters emphasize that the lack of detail in officer use of force reports, and possible outright lying in some cases, makes it difficult if not impossible for the sergeant or internal affairs investigators to determine whether the force used was justified, thereby thwarting effective accountability. The SLS investigation of the Newark, New Jersey, Police Department, for example, found “an unacceptable tolerance within the NPD for Force Reports that are insufficient to permit meaningful review.”³⁴⁴ As argued in greater detail below, the more stringent reporting requirements on officer uses of force directly challenge the norms of the traditional police subculture, under which officers assume that they should not be held accountable for uses of force and other actions that may be unlawful or not consistent with department policy.³⁴⁵

To address the problem of inadequate use of force reporting, SLS settlements required that officers report each and every use of force and that reports be detailed and truthful accounts of such incidents and that reports be completed in a timely fashion.³⁴⁶ The settlement agreement in Cleveland, for example, required that “[a]ll officers using or observing force will report in writing, before the end of their shift, the use of force in a Use of Force Report.”³⁴⁷ Force reports were to be “detailed account[s] of the incident” with a “specific description of the acts that led to the use of force,” the “level of resistance encountered,” and a “description of every type of force used or observed.”³⁴⁸

The requirement that officers file detailed and truthful use of force reports and do so by the end of the officer’s shift directly challenges the prevailing norms of the traditional police subculture in unprofessional police departments, that officers do not account for their conduct, with the principle that they are required to do so.³⁴⁹ The “by the end of the shift” requirement, in particular, challenges the practice of officers being granted forty-eight hours before they can be interviewed by supervisors about force incidents, which exists in a number of police departments.³⁵⁰

344. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 24 (July 24, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf.

345. See *infra* notes 388–91 and accompanying text.

346. More recent SLS settlements require that officers complete use of force reports before the end of the shift. Settlement Agreement ¶ 88, *United States v. City of Cleveland*, No 1:15CV1046 (N.D. Ohio June 12, 2015), <https://www.justice.gov/crt/case-document/file/908536/download> (“All officers using or observing force will report in writing, before the end of their shift, the use of force in a Use of Force Report.”). This requirement directly challenges police union contract provisions that officers do not have to report uses of force for forty-eight hours. WALKER, *supra* note 64; see also PERF, GUIDING PRINCIPLES, *supra* note 106, at 48 (“Agencies should document all uses of force . . .”).

347. Settlement Agreement ¶ 88, *United States v. City of Cleveland*, No 1:15CV1046 (N.D. Ohio June 12, 2015), <https://www.justice.gov/crt/case-document/file/908536/download>.

348. *Id.*

349. See *infra* notes 357–58 and accompanying text.

350. SEATTLE POLICE DEP’T, POLICE MANUAL, *supra* note 109, at POLICY 8.400 (“Use of Force Reporting and Investigation: TSK-1 Use of Force – Involved Officer’s responsibilities During a Type I Investigation . . . Completes a Type-I Use-of-Force Report in Blue Team by the conclusion of the current shift, unless the sergeant approves an extension”).

c. Requirements on Supervisors' Review of Officer Use of Force Reports

Officer discretion in the use of force is also *checked* by requirements that officers' immediate supervisors (typically the sergeant) critically review officer use of force reports. Critical review involves examining reports for lack of detail, missing information, use of "canned" language, inconsistencies, contradictions, and a failure to specify the person's conduct that justified the use of force.³⁵¹ Where reports are inadequate, supervisors are required to ask officers for additional detail and clarifying language. If a report remains inadequate, supervisors are to forward it to internal affairs with the shortcomings noted.

The SLS investigation of the Seattle Police Department, for example, found that the department failed to require proper review of force incidents and officer reports by officers' immediate supervisors.³⁵² The department's policy did not "require supervisory investigation following all uses of reportable force" incidents, but only that they "respond" to the scene of incidents.³⁵³ Consequently, supervisors generally relied "only on the involved officer statements" about an incident and why force was used.³⁵⁴ Existing policy provided no "guidance about how to investigate" whether a use of force was proper.³⁵⁵ Supervisors "consistently" failed to search for witnesses to incidents or to obtain statements from citizen or officer witnesses, and failed to take photographs of individuals' injuries.³⁵⁶

In Cleveland, meanwhile, the SLS investigation found that sergeants' reviews of force incidents were " cursory and too often appear to be designed from the outset to justify officers' actions."³⁵⁷ Sergeants failed to "identify necessary information that is missing in the initial officers' reports," and often simply repeat the language in an officer's report, even when it is "facially insufficient."³⁵⁸

The Cleveland settlement required immediate supervisors to respond to the scene of force incidents, render aid to anyone injured, "identify and collect all evidence relevant to the use of force," canvass the immediate area for potential witnesses and interview any who are located, ensure that all officers who witnessed the incident file a use of force report, interview all officers separately

351. DOJ, INVESTIGATION OF CLEVELAND, *supra* note 274, at 33 ("[I]nadequate reports and investigations were approved all the way up the chain of command with no comment.").

352. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 17 (Dec. 16, 2011) [hereinafter DOJ, INVESTIGATION OF SEATTLE], https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* at 18.

357. DOJ, INVESTIGATION OF CLEVELAND, *supra* note 274, at 31.

358. *Id.*

(including the officer who used force), and “provide a brief written synopsis” to his or her immediate supervisor.³⁵⁹

The requirement that immediate supervisors critically review officer use of force reports challenges the norms of the traditional police officer subculture in the same way that the officer reporting requirement does. In this instance, a formal requirement exists to ensure that officers account for their conduct in a complete and truthful report. In addition, the review requirement for sergeants challenges the prevailing norms for immediate supervisors in unprofessional and abusive police departments.

d. Independent Investigations of Force Incidents: The FIT Approach

A relatively new procedure for checking officer uses of force and improving the quality of use of force investigations involves the creation of a special unit, often called a Force Investigation Team (“FIT”), to investigate officer involved shootings and serious physical force cases.³⁶⁰ The Newark consent decree, for example, required the creation of a Serious Force Investigation Team (“SFIT”) with its own specialized “training curriculum and procedural manual,” whose function is “to ensure that uses of force that are contrary to law or policy are identified and appropriately resolved,” and also whose reports are sufficiently detailed to allow the Use of Force Review Board (see discussion below) to “identify trends or patterns of policy, training, equipment, or tactical deficiencies.”³⁶¹

A FIT is designed to improve the quality of investigations, and thereby enhance officer accountability, in two ways. First, investigations are conducted by officers who have training, experience, and expertise related to the task.³⁶² Second, because none of the FIT investigators are the immediate supervisor of the officer being investigated for use of force, it is unlikely that there is a close working relationship that results in a biased investigation.³⁶³

e. Command-Level Review of Use of Force Incidents

The final component of a systematic policy on officer use of force includes two procedures for the review of use of force incidents for the purpose of identifying problems related to department policies, training, and supervision that need to be corrected.

359. Settlement Agreement ¶ 97, *United States v. City of Cleveland*, No 1:15CV1046 (N.D. Ohio June 12, 2015), <https://www.justice.gov/crt/case-document/file/908536/download>.

360. *Id.* ¶ 111.

361. Consent Decree at 33–34, *United States v. City of Newark*, No 2:16-cv-01731-MCA-MAH, <https://www.justice.gov/crt/file/868131/download>. See also PERF, GUIDING PRINCIPLES, *supra* note 106, at 50–51 (describing the New York Police Department practice). On use of force review boards, see *infra* note 364.

362. ROBIN SHEPPARD ENGEL, HOW POLICE SUPERVISORY STYLES INFLUENCE PATROL OFFICER BEHAVIOR (2003), <https://www.ncjrs.gov/pdffiles1/nij/194078.pdf>.

363. *Id.* (finding four different “styles” of supervision, “traditional,” “innovative,” “active,” and “supportive;” finding that “supportive supervisors” protect their officers “from discipline or punishment perceived as ‘unfair’”).

(1) Use of Force Review Boards

The first innovation regarding the systematic review of force incidents is a Use of Force Review Board, which reviews patterns in force incidents, seeks to identify policy, training, or supervision issues that need correcting, and develops recommendations for change where needed.³⁶⁴ The Seattle settlement agreement, for example, requires that the Use of Force Committee (“UFC”)

will review each use of force packet to determine whether the findings from the chain of command regarding whether the force used is consistent with law and policy and supported by a preponderance of the evidence, whether the investigation is thorough and complete, and whether there are tactical, equipment, or policy considerations that need to be addressed.³⁶⁵

As one indication of the importance of the UFC, it is chaired by an Assistant Chief and includes supervisors from the Training Section and representatives from each precinct.³⁶⁶ Each committee member, moreover, receives eight hours of annual in-service training, which includes legal updates on officer use of force and also the department’s current training curriculum on use of force.³⁶⁷

A properly functioning UFRB embodies what William A. Geller years ago envisioned as making police departments self-monitoring “learning organizations” in which formal procedures exist for a department to learn from its own practices and take corrective action where necessary.³⁶⁸ There is no reason, of course, why a UFRB and an external inspector general-type agency cannot function simultaneously. The UFRB concept can and should be extended to other critical incidents where police actions pose risks to the lives, liberty, and well-being of members of the community.

(2) Early Intervention Systems

The second administrative tool for identifying force-related problems is an early intervention system.³⁶⁹ From the outset, all SLS settlements have in-

364. The idea of a use of force review board originated with the pioneering 1972 New York City Police Department deadly force policy. See James J. Fyfe, *Administrative Interventions on Police Shooting Discretion: An Empirical Examination*, 7 J. CRIM JUST. 309, 309 (1979).

365. Settlement Agreement and Stipulated [Proposed] Order of Resolution ¶ 123, *United States v. City of Seattle*, No. 12-CV-1282 (W.D. Wash. July 27, 2012) https://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentedecree_7-27-12.pdf.

366. *Id.* ¶ 120.

367. *Id.* ¶ 121.

368. William A. Geller, *Suppose We Were Really Serious About Police Departments Becoming ‘Learning Organizations’*, 234 NAT’L INST. J. 2, 3 (1997).

369. WALKER, *supra* note 317, at 3. See the proposal to utilize early intervention systems to reinforce (or if necessary take the place of) the exclusionary rule as a means of holding officers accountable. Harris, *supra* note 163, at 166–71.

cluded the requirement of an early intervention system.³⁷⁰ EIS emerged in the early 1990s and, by including them in virtually every settlement agreement, SLS settlements gave the idea an enormous boost as a best practice for achieving constitutional policing.³⁷¹ Whereas a UFRB focuses on organizational issues, an EIS focuses on individual officers whose performance may include problematic patterns in the use of force (or other issues).

An EIS is a computerized data base of officer performance, with anywhere between five and over fifteen specific indicators (uses of force, citizen complaints, officer discipline history, use of overtime and sick leave, and other indicators).³⁷² Analysis of the data can identify officers with a higher than average number of problematic performance indicators (typically compared to peer officers working similar assignments).³⁷³ Officers identified by the system are then screened, with some selected for a formal intervention designed to correct the performance problems that have been identified.³⁷⁴ Interventions may involve counseling by supervisors, retraining on specific policies and tactics, or referral to professional counseling on substance abuse, family problems, or other issues.³⁷⁵

An EIS is an extremely complex system to administer, however, and many departments have had difficulty maintaining an effective system.³⁷⁶ Illustrating the reform conundrum discussed earlier, an EIS poses a major challenge for departments with major accountability-related deficiencies, asking them, for example, to develop detailed data systems they do not have and to employ an accountability mindset that does not yet exist in the department.³⁷⁷ As a consequence, a number of departments subject to SLS investigations have been found to have had poorly functioning or nonfunctioning systems.³⁷⁸ The SLS Findings Letter on Seattle, for example, found the department's EIS to be "broken," as a result of "systemic deficiencies."³⁷⁹ The system's thresholds for identifying officers for possible intervention were too high, meaning that an officer could accumulate a number of uses of force indicators before being identified. Additionally, interventions occurred "far too long after the triggering incident," thereby diminishing the potential impact of the remedial action provided.³⁸⁰ Similarly, the SLS Findings Letter on Cleveland found its EIS "ineffective and poorly utilized."³⁸¹

370. DOJ, PATTERN AND PRACTICE, *supra* note 6, at 31 (describing early intervention systems as "a consistent feature the Division's policing reform agreements since the beginning . . .").

371. *Id.* at 42, 41–47.

372. WALKER, *supra* note 317, at 26–30.

373. *Id.* at 30–33 (discussing peer group analyses and other approaches).

374. *Id.*

375. *Id.* at 5, 35.

376. *Id.* at 88, 112.

377. *Id.* at 109–10.

378. DOJ, INVESTIGATION OF CLEVELAND, *supra* note 274, at 47 (finding the Cleveland Division of Police's EIS "ineffective and poorly utilized").

379. DOJ, INVESTIGATION OF SEATTLE, *supra* note 352, at 22.

380. *Id.* at 22–23.

381. DOJ, INVESTIGATION OF CLEVELAND, *supra* note 274, at 47.

(3) Summary

The combined impact of the reforms discussed above directly address the fundamental issue in police accountability and the pursuit of constitutional policing. Requiring officers to file complete and honest force reports, requiring sergeants to critically review force reports, maintaining a use of force review board, and also maintaining an early intervention system are all strategies to first, require that officers account for their own conduct, and second, to have in place department procedures for reviewing those officer reports. Two unanswered questions remain. First, will the reforms discussed in this Section be sustained by police departments over the long term? And second, if they are sustained, will they fully achieve their intended goals over that long term?

The following Subsection examines how these requirements challenge, and hopefully begin to transform, the traditional police officer subculture.

5. *Collateral Consequences: Challenging the Traditional Police Subculture*

a. Reporting Review Requirements and the Traditional Police Subculture

The systematic approach to controlling police officer use of force embodied in the requirements of SLS settlements, as already suggested, directly challenges the phenomenon known as the police officer subculture. The evidence for this is derived from evaluations of SLS settlements. This goal was not an intended part of the DOJ pattern or practice program, but it nonetheless developed in the process of implementing the relevant requirements of the program's settlements.

b. The Traditional Police Subculture

As with subcultures in other occupations, the traditional police subculture involves the informal norms and behaviors that shape employees' day-to-day work.³⁸² It is the consensus of virtually all experts in policing that today's police subculture is and has been for several decades hostile to accountability-related reforms.³⁸³ Informally, the traditional norms reinforce the "warrior" mentality of policing, with its emphasis on "physical control tactics and weapons," which are associated with the probability of officers using force, including in many cases where it is not warranted.³⁸⁴ Additionally, as the Chicago Police Accountability Task Force concluded, important parts of the traditional police officer subculture have become deeply embedded in local police union contracts with provisions that impede officer accountability.³⁸⁵ The most well-known aspect of the police officer subculture is the so-called "blue curtain" or

382. EDGAR H. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* 57–68 (4th ed. 2010) (identifying "Three Generic Subcultures" in organizations, with "The Operator Subculture" as the functional equivalent of the police officer rank-and-file). The terms "police officer subculture" and "organizational culture" are often used interchangeably. While the two overlap and interact with each other in important ways, there are also important distinctions. The organizational culture of a law enforcement agency refers to officer behavior that is directly related to the policies and practices of the department itself (e.g., an aggressive stop and frisk program). The police officer subculture refers to officer norms and behavior that arise from the rank-and-file, which in most cases are in violation of official department policies.

383. The negative impact of police unions on accountability is documented in *SAN FRANCISCO DISTRICT ATTORNEY*, *supra* note 32, at 137–49 (Chapter 7, "Culture") and *CHICAGO POLICE ACCOUNTABILITY TASK FORCE*, *supra* note 13, at 69–77. The pioneering work on the police officer subculture was WILLIAM A. WESTLEY, *VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY* (1970) (emphasizing the norms of solidarity, hostility to the public, and secrecy). See also Steve Herbert, *Police Subculture Reconsidered*, 36 *CRIMINOLOGY* 343 (1998).

384. RAHR & RICE, *supra* note 127, at 4–5.

385. *CHICAGO POLICE ACCOUNTABILITY TASK FORCE*, *supra* note 13, at 70–73. On the police unions and accountability, see Bies, *supra* note 62, at 126. Keenan & Walker, *supra* note 62, at 198–99. The group Check the Police, an offshoot of Black Lives Matter, maintains a very valuable data base of police union contracts, with an analysis of provisions that impede accountability. *Police Union Contract Project*, *supra* note 63. LEONARD RUCHELMAN, *POLICE POLITICS: A COMPARATIVE STUDY OF THREE CITIES* (1974) (comparing conflicts between the local police unions, department chiefs and mayors in New York City, Philadelphia, and Chicago in the 1960s and early 1970s).

“code of silence” by which officers do not report or testify about other officers’ misconduct.³⁸⁶ The Code directly impedes the key reforms, discussed above, regarding holding officers accountable for their uses of force. Under the Code, officers do not accurately report the circumstances of their uses of force; witness officers do not contradict the accounts given by officers who do use force; and sergeants, imbued with the culture of the Code since they joined the department, do not seek to probe into either an officer’s use of force or the dishonest report the officer filed.³⁸⁷ As a result, inaccurate reports are entered into departmental accountability measures, mainly the UFRB and the EIS.

c. Evidence of the Impact of Reforms on the Traditional Police Subculture

The evaluations of the SLS settlements over the Pittsburgh and Los Angeles Police Departments provide extremely important insights into the impact of settlement reforms on rank-and-file officers and the police officer subculture. The Pittsburgh evaluation involved both focus groups with officers and a written survey of officer opinions.³⁸⁸ Officers expressed “largely negative” attitudes about the consent decree, feeling “betrayed” by the city and believing it should have fought the Justice Department more vigorously.³⁸⁹ Officers felt the consent decree had “lowered officer morale and productivity,” had made officers “hesitant to intervene” in situations of possible conflict, and had imposed burdensome and “time-consuming” reporting requirements.³⁹⁰ The language used by officers clearly reflected the norms of the traditional police officer subculture, particularly with respect to valuing aggressive enforcement tactics. Officers reported that enforcement efforts had declined as a result of the consent decree, with officers having “less interaction with citizens,” being “not aggressive with people who are breaking the law,” and also being “more guarded in their interactions.”³⁹¹ In short, they claimed they were “de-policing.”

Other evidence, however, indicated that Pittsburgh officers had begun accommodating their work habits, however grudgingly, to the new consent-decree requirements.³⁹² Notably, a number of officers reported being “more sensitive to the appearance of unequal enforcement.”³⁹³ One officer, moreover, pointed out that “[e]very incident now has a paper trail.”³⁹⁴ These statements

386. SAN FRANCISCO DISTRICT ATTORNEY, *supra* note 32, at 137 (“Confidential [police officer] witnesses informed the Panel that current officers were afraid of retaliation by the [Police Officers Association] and/or their fellow officers if they spoke with the Panel.”). CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 13, at 69–77. Jamie Kalven, *Code of Silence*, INTERCEPT (Oct. 6, 2016), <https://theintercept.com/series/code-of-silence/>.

387. CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 13, at 70.

388. DAVIS ET AL, FEDERAL INTERVENTION, *supra* note 169, at 16–27.

389. *Id.* at 16.

390. *Id.*

391. *Id.* at 20.

392. *Id.*

393. *Id.* at 19.

394. *Id.* at 20–21.

by officers indicate that the consent decree was at least beginning to achieve its intended goals. Officers were becoming less aggressive and more aware of how their actions were perceived and understood that the allegedly “burdensome” paperwork had the the purpose of holding them accountable for their conduct.

The Pittsburgh study also found evidence of change, and the grudging acceptance of major changes in their routine police work practices. The report found that “the accountability mechanisms remained intact after the lifting of the decree,” suggesting that there was no immediate backsliding.³⁹⁵ There was also “some indication” among supervisors that the new mechanisms “were becoming accepted as part of the job” by rank-and-file officers.³⁹⁶ No officers in the focus groups openly said anything to that effect, but in the anonymous written survey “a majority of officers agreed that the reforms had increased accountability.”³⁹⁷ Finally, the data on enforcement efforts found no evidence of “de-policing” in response to the constraints of the consent decree.³⁹⁸

Interestingly, the focus groups with African American officers, who in recent police history have been alienated from norms of the majority white officers, found them both “more sympathetic to the concerns of the black community” and “far more positive about the [consent] decree.”³⁹⁹ They perceived the new disciplinary process to be more impartial than before, where “[t]here was no discipline for white officers.”⁴⁰⁰

The Harvard evaluation of the Los Angeles consent decree found a similar pattern of officer responses to the requirements of the decree.⁴⁰¹ In interviews and focus groups, officers “frequently” claimed that they would “hesitate to intervene in difficult circumstances” out of fear of discipline.⁴⁰² Officers claimed they would “look the other way” when they observed criminal activity (that is, “de-police”).⁴⁰³ They also claimed to be “timid” and used “kid gloves” when

395. *Id.* at 17.

396. *Id.*

397. *Id.* at 18.

398. The first evaluation of the Pittsburgh consent decree attempted to determine if there was any evidence of a reduction of officer law enforcement work effort as a result of the consent decree. The city experienced a 40% decline in serious crime during the period studied, resulting in a parallel decline in arrests. No decline in officer activity attributable to the consent decree was identified, however. DAVIS ET AL., TURNING NECESSITY INTO VIRTUE, *supra* note 169, at 54–57. A significant decline in traffic summonses was found, but was attributed to a change in court procedures that reduced police overtime. *Id.* at 56 (Figure 12).

399. DAVIS ET AL., FEDERAL INTERVENTION, *supra* note 169, at 26.

400. *Id.* at 26–27 (“The Perspectives of African-American Officers”). On the attitudinal divisions between white and African American officers see DAVID WEISBURD, ROSANN GREENSPAN ET AL., THE ABUSE OF POLICE AUTHORITY: A NATIONAL STUDY OF POLICE OFFICERS’ ATTITUDES 39 (2001) (finding “striking differences” in attitudes toward use of force by racial subgroups of officers).

401. STONE, FOGELSONG & COLE, *supra* note 177, at 19–38.

402. *Id.* at 19.

403. “De-policing,” the idea that police officers reduce their law enforcement efforts in response to consent decree requirements and/or public criticisms of the police because of fatal shootings of members of the community, has been a controversy in recent years. No research has confirmed the existence of this phenomenon, however. In addition to the evidence cited in this Article, one study examined the impact of judicially enforced reforms in thirty-one jurisdictions, finding a statistically significant “uptick” in crime rates immediately following the entry of a consent decree, followed by a decline over time. Rushin & Edwards, *supra* note 153, at 730 (studying 31 police departments where a court-enforced settlement existed, and finding a slight “uptick” in

handling suspects.⁴⁰⁴ The data on enforcement activities by LAPD officers, however, did not support these assertions. Both pedestrian and motor vehicle stops increased 39% between 2002 (the first year of the consent decree) and 2008; arrests also increased.⁴⁰⁵ Additionally, the rate at which arrests resulted in felony charges increased, “suggesting indirectly at least that the quality of those arrests has improved,” according to the evaluation (presumably by greatly reducing the number of “weak” cases, where there was no reasonable suspicion for a stop or probable cause for an arrest).⁴⁰⁶ Finally, the total number of use of force incidents declined by 30% between 2004 and 2008.⁴⁰⁷

In short, the data suggests that while officers complained about the consent decree and its requirements, they adjusted to the new rules on stops, arrests, and use of force and actually increased their enforcement efforts. That is to say, it is a picture of a changing police subculture. More research, involving other departments experiencing major accountability-related reforms, is needed to determine whether the picture that emerges from these two evaluations is unique to the two departments involved or is representative of the general impact of court-mandated reforms on officer conduct.⁴⁰⁸ It is premature to conclude that the challenges to the police subculture prompted by the SLS’s efforts will be successful in the long run. Nonetheless, the possibility of a significant change to the traditional police officer subculture exists and that represents an important achievement of the SLS program.

6. Summary

When the Justice Department’s pattern or practice program was terminated in early 2017, its vision of police reform was radically transformed from what it had been twenty years earlier, at the time of the 1997 consent decree with the Pittsburgh Police Department. The earliest settlements had been confined to reforms that addressed specific police actions (use of force, racial pro-

crime rates immediately following the entry of settlements, followed by a decline over time). *See also* ROSENFELD, *supra* note 173, at 18; Danielle Wallace, Michael D. White, Janne E. Gaub, & Natalie Todak, *Body-Worn Cameras as a Potential Source of Depolicing: Testing for Camera-Induced Passivity*, CRIMINOLOGY, May 2018, at 22 (finding that officer-initiated activity increased among officers with body-worn cameras).

404. STONE, FOGELSONG & COLE, *supra* note 177, at 19–27 (“Claims of ‘De-Policing’”).

405. *Id.* at 19–22.

406. *Id.* at 30. The discussion of the quality of arrests in the report is not completely satisfactory. It notes that the filing of charges is not controlled by the LAPD and argues that a higher rate of felony filings by prosecutors reflects “the quality of arrests.” *Id.* at 31.

407. *Id.* at 33.

408. Arguably, one of the best documented cases of officers accommodating themselves to new rules involves the use of deadly force by New York City police officers, from the 1970s to the present, where the data indicate dramatic long-term declines in the number of persons shot and killed by NYPD officers. NEW YORK CITY POLICE DEPARTMENT, ANNUAL FIREARMS DISCHARGE REPORT app. B, fig. 44 (2015), http://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/firearms-discharge/annual-firearms-discharge-2015.pdf. *See also* Fyfe, *supra* note 364, at 322.

filing in traffic stops⁴⁰⁹); accountability measures related to those actions (force reports by officers, early intervention systems); and citizen complaint procedures. Twenty years later, the reform agenda had expanded enormously to embrace issues that extended outside police organizations *per se*. As discussed in this Subsection, they include efforts to inform the public about local police problems and the need for federal intervention; formal arrangements to engage police departments with the community and local social service agencies, often through community policing or problem-oriented policing programs; and attention to the perspectives of rank-and-file officers about their respective departments' problems, concerns with officer wellness, and procedures for involving officers and their union representatives in police department policy-making.

The expansion of the SLS's reform agenda was driven in large part by the growing recognition on the part of its attorneys and consultants of what was needed to achieve effective control of police officer conduct and to end unconstitutional police practices. The implicit assumption underlying the change was that the new requirements were *necessary* to achieve constitutional policing. It needs to be said, however, that while logic and common sense certainly support this proposition, it has never been truly tested. The question can be stated as follows: Is it possible to effectively bring officer conduct under control and to achieve constitutional policing *without* a community policing or problem-oriented policing component? Or, is it possible to achieve the desired goals without a formal mechanism for community input into police policy-making? These questions raise fundamental issues about not just accountability-related police reform efforts but American policing generally. We do not have evidence at this point that would answer these questions.⁴¹⁰ But it can be said that the Justice Department's twenty-year pattern or practice program raised these questions, which now cannot be ignored by anyone concerned about achieving professional and constitutional policing in this country.

V. CONCLUSION

The fatal shooting of Michael Brown in Ferguson, Missouri on August 9, 2014 set in motion a series of events that this Article has labeled a National Police Crisis. Events in the spring of 2018 suggest that the crisis continues as this Article is being written. This Article has argued that, despite the withdrawal of the U.S. Justice Department from accountability-related police reform, there are grounds for optimism about the future of police reform. At the same time, however, there are factors that pose challenges and potential obstacles to future accountability-related police reform.

409. See generally Consent Decree, *United States v. State of New Jersey*, 194 F.3d 426 (3rd Cir. 1999) (No. 99-5970), <https://www.justice.gov/crt/us-v-new-jersey-joint-application-entry-consent-decree-and-consent-decree>.

410. See *supra* note 166 and the discussion on the challenges to undertaking a comprehensive assessment of the impact of a single court-enforced pattern or practice settlement. The issues posed in this Section simply compound the challenges.

The National Police Crisis that began in 2014 prompted intense media coverage of police misconduct issues and, as a consequence, heightened public awareness of police problems and the need for accountability-related reforms. The resulting change in public attitudes has created fertile political soil for action on police accountability issues. As explained in this Article, several developments have given intellectual and policy direction to police reform efforts. The President's Task Force on 21st Century Policing endorsed the principles of legitimacy, procedural justice, and the need for greater openness and transparency on the part of police departments. The Police Executive Research Forum issued a series of reports recommending police policies designed to reduce officer uses of force and improve police relations with the communities they serve. The judicially enforced reforms mandated by the Justice Department's pattern or practice programs embodies a set of police practices designed to achieve constitutional policing.

In response to the new political mood, a remarkable burst of accountability-related reform efforts has occurred since 2014. Leaders of the law enforcement profession have been active in implementing reforms in their respective departments. State legislatures have enacted a wide range of accountability-related statutes. Two state attorneys general have acted to continue work that was initiated by the U.S. Justice Department but ended by the change in presidential administrations in 2017. Mayors and city councils and voters acting through referenda, meanwhile, have initiated a variety of reforms. In short, as the title of the Article suggests, despite the withdrawal of the U.S. Justice Department in 2017 from two major police reform efforts, accountability-related police reform is Not Dead Yet.

The prospects for accountability-related police reform nonetheless face a number of uncertainties, challenges, and obstacles. The new public mood that supports police reform might not be sustained. Some unforeseen event, such as an international crisis involving even more military conflict than already exists, could easily divert public attention away from domestic issues and police reform in particular. Alternatively, the current support for accountability-related reform could simply lose momentum as a result of public fatigue or disappointment over a perceived failure to achieve immediate improvements in policing.

The specific reforms discussed in this Article face enormous challenges. The goal of organizational transformation of law enforcement is a daunting challenge. Moreover, it is not certain how it would be achieved without the compulsory power of judicial enforcement. The broad agenda of police reform that developed in the Justice Department's second generation of settlements may simply be too ambitious and visionary for local authorities to achieve. Reforms on specific issues, such as uses of force and pedestrian stops, may well continue, but only on a piecemeal basis as in the past. The bold experiments in some Justice Department settlements regarding restructuring the governance of police departments and providing rank-and-file officers and union representa-

tives with a formal voice in police policy-making, as this Article has explained, are fraught with uncertainties and potential problems.

The ideas articulated by the President's Task Force and other voices with respect to legitimacy and procedural justice may prove to be too ambitious. As theoretical constructs, these ideas are certain to survive. Whether they will be translated into police operations in more than a few police departments, however, is uncertain. By the same token, the policies recommended by the Police Executive Research Forum are also likely to survive and to become embedded in many police departments. Whether they will become embedded in the majority of departments, large and small, is also uncertain.

Finally, the long-standing problem of sustaining major police reforms casts a worrisome shadow over all the current accountability-related reform efforts. Some of the departments subject to Justice Department consent decrees have experienced degrees of "backsliding." The history of the American police over the last half century is littered with the bones of once-celebrated reforms that simply withered away with time. Police experts have given very little attention to this problem, and we have no real understanding of the conditions necessary for major reforms to be sustained over the long haul. Strong leadership in police departments is an obviously important condition. The history of turnover among American police chiefs, however, is cause for concern about the continuity of major reforms. Additionally, policing is an extremely complex operation, with many moving parts. The major reforms discussed in this Article—use of force reporting, early intervention systems—require continuous attention, and there may be a natural tendency for complex programs to slowly erode and lose their focus.

Some police reform experts, nostalgic for the work of the Justice Department under presidents Bill Clinton and Barack Obama, may hope for a new president in 2020 or 2024 committed to accountability-related police reform. That could certainly happen, but it is a hope that ignores today's pressing demands. It puts the quest for accountability-related police reform on hold for years. Additionally, it fails to take into account the fact that, at best, the resources of the U.S. Justice Department are very limited and can only address a very small portion of the 18,000 law enforcement agencies in this country. In the end, the best hope for establishing accountable and constitutional policing across the country involves a continued public and political commitment to work for the principles, policies, and practices discussed in this Article.

