ARTICLES

AN ALTERNATIVE REMEDY FOR POLICE MISCONDUCT: A MODEL STATE "PATTERN OR PRACTICE" STATUTE

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INTRODUCTION

Section 14141 of the 1994 Violent Crime Control Act empowers the Attorney General of the United States to bring civil suits against law enforcement agencies where there is a "pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[1] As implemented, the purpose of such suits has been to effect organizational reforms designed to establish standards of accountability that will prevent such abuses from occurring in the future. The Special Litigation Section of the United States Department of Justice Civil Rights Division has reached formal outcomes with about 21 state or local law enforcement agencies under Section 14141.[2] Experts on police reform, including court-appointed Monitors, argue that, despite some limitations, litigation under Sec-

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[1] 42 U.S.C. § 14141 (2006) ("(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.").

[2] Once consent decrees have been terminated, however, materials from the case are removed from the web site. Civil Rights Division, U.S. Dep't of Justice, Special Litigation Section, http://www.usdoj.gov/crt/split/findsettle.php#Settlements.

tion 14141 has brought about significant reforms in the affected law enforcement agencies.[3] For example, the Independent Monitor for the Washington, D.C. Police Department reported in January 2008 that the department "has substantially transformed itself for the better since the late 1990s."[4] Similarly, the Monitor for the New Jersey State Police concluded that as a result of the reforms implemented because of a consent decree "the agency appears to have become self-monitoring and self-adaptive."[5]

Equally important, in terms of the long term process of police reform, the various outcomes under Section 14141 embody a set of "best practices" that serves as a model for other police reform efforts. Law Professor Debra Livingston, a frequent commentator on police accountability, argues that "enforcement of Section 14141 may have the beneficial effect of further stimulating the articulation and dissemination of national standards governing core police managerial responsibilities."[6] Additionally, it is believed that a number of law enforcement agencies have initiated reforms on their own in an effort to avoid possible intervention by the Department of Justice.[7]

A Vera Institute independent evaluation of the consent decree experience in Pittsburgh, Pennsylvania rhetorically asked, "Can Federal Intervention Bring Lasting Improvement in Local Policing?"[8]

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[3] *See generally* SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY (Sage Publications 2005) [hereinafter WALKER, THE NEW WORLD].

[4] MICHAEL BROMWICH, TWENTY-THIRD QUARTERLY REPORT OF THE INDEPENDENT MONITOR 4 (2008), *available at* http://www.policemonitor.org/080131report.pdf.

[5] PUBLIC MANAGEMENT RESOURCES, MONITORS' SIXTEENTH REPORT iv (2007), *available at* http://www.state.nj.us/lps/monitors-report-16.pdf.

[6] Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 845 (1999), *available at* http://wings.buffalo.edu/law/bclc/bclrarticles/2(2)/livingston.pdf. The argument is not that pattern or practice litigation is the sole means of achieving police accountability, or even that it is necessarily the most effective in all cases, but simply that it is one important tool that is particularly relevant in the case of law enforcement agencies with systemic management failures related to supervision and discipline. This argument is the central thesis of WALKER, THE NEW WORLD, *supra* note 3. As is explained below, the Cincinnati settlement was unique in that it involved two separate settlements, one of which covered issues of policing strategy not addressed by other consent decrees or MOAs.

[7] RICHARD JEROME, POLICE REFORM: A JOB HALF DONE 5 (2006), *available at* http://www.acslaw.org/files/RJ%20Community%20Policing%204-26-06.pdf. This point was anticipated at the very outset of Section 14141 litigation: "Other departments may revise their administrative practices to avoid litigation." Livingston, *supra* note 6, at 841-42.

[8] ROBERT C. DAVIS, NICOLE J. HENDERSON & CHRISTOPHER ORTIZ, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE (2004) [hereinafter DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT]. *See also* ROBERT C. DAVIS ET AL., TURNING NECESSITY INTO VIRTUE: PITTS-

The report answered its own question by concluding that the consent decree did in fact "dramatically change the culture" of the department, brought about "sweeping management changes" that introduced new standards of accountability, and helped the department "regain the trust of the community."[9] This conclusion indicates an enormous achievement in reforming a police department and suggests that pattern or practice litigation under Section 14141 can be an effective instrument of police reform.

Despite the positive conclusion of the Pittsburgh evaluation and similar positive reports by court-appointed monitors in other cases, a number of questions remain regarding the nature and impact of pattern or practice litigation. The evidence from several cases also indicates that the pattern or practice litigation strategy has encountered some difficulties. As explained in this Article, the implementation of reforms mandated by consent decrees and memoranda of agreement ("MOAs") in some agencies has encountered organizational obstacles and delays. Serious questions remain about whether reforms effected through litigation will be sustained once the consent decree or MOA is terminated. Some civil libertarians have expressed concern that the Department of Justice under President George W. Bush had substantially scaled back use of Section 14141. In an overview of these developments, Richard Jerome characterized the federal police reform effort as "a job half done."[10] In an early essay on Section 14141, meanwhile, Debra Livingston argued that the statute "raises many empirical questions which must await further study and elaboration."[11] This Article addresses some of Livingston's principal questions.[12]

This Article will propose a model state statute, similar to the federal Section 14141, which would authorize state Attorneys General to

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BURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE (2003) [hereinafter DAVIS ET AL., TURNING NECESSITY INTO VIRTUE], *available at* http://www.vera.org/publication/pdf_180_326.pdf.

9 DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8.

10 JEROME, *supra* note 7, at 6.

11 Livingston, *supra* note 6, at 858.

12 *Id.* The other questions needing investigation, according to Livingston, are how the U.S. Justice Department has allocated its resources in enforcing the law, whether it has used "informal measures" to effect change, whether changes have occurred in other departments that consulted the initial Pittsburgh and Steubenville decrees, and whether there have been "unintended consequences" of Section 14141 litigation. *Id.*

bring civil suits to effect police reform designed to curb civil rights abuses and enhance police accountability.[13] The language and intent of such state laws would be essentially identical to Section 14141. Their practical effect would be to vastly increase the number of officials authorized to pursue police reform through litigation. Barbara Armacost, while lauding Section 14141's potential to effect needed organizational change in policing, noted that "the Justice Department lacks the resources to monitor all police departments nationwide."[14] It is conceded that not all state legislatures would enact a model pattern or practice law. It is also conceded that where such laws would exist, not all state attorneys general would use the statute. Nonetheless, even if *some* states adopted such a statute and *some* attorneys general used it, there would be a significant increase in police reform efforts directed at patterns or practices of police abuse of rights.

This Article commences with an explanation of the use of pattern or practice litigation in police accountability cases. Part II of this Article places pattern or practice litigation in context by providing a brief review of the various remedies that have been employed to reduce police misconduct over the years, the strengths and limitations of each of those remedies, and the potential for overcoming those remedies in Section 14141-style pattern or practice litigation. Part III reviews the implementation of Section 14141 since 1994, with attention to both the positive achievements and the limitations of that effort.[15] Part IV reviews the evidence on the impact of pattern or practice litigation under Section 14141. Finally, Part V offers a model state pattern or practice law. Part V also discusses the potential impact of state pattern or practice laws, with attention to both the positive contributions

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[13] California has already enacted such a statute. CAL. CIV. CODE § 52.3 (2007).

[14] Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 531 (2004).

[15] In two instances, state attorneys general have sued local police departments for patterns of abuse of citizens' rights and reached settlements that closely parallel the settlements in the federal cases. Because of these parallels, those cases will also be referred to in this article even though they are not technically federal actions under Section 14141. *See* New York v. Town of Wallkill, 01-CIV-0364, 2001 U.S. Dist. LEXIS 13364 (S.D.N.Y. Mar. 16, 2001); California v. City of Riverside, No. 355410 (Cal. Sup. Ct. Mar. 5, 2001), http://www.riversideca.gov/rpd/AGTF/stipjdg.pdf. *See also* DEAN ESSERMAN, FIRST REPORT OF THE MONITOR (2002), *available at* http://www.parc.info/client_files/Wallkill/1st%20Wallkill%20Monitor%20Report.pdf (first report of the court-selected monitor to audit the Town of Wallkill Police Department's compliance with the Consent Decree). Private suits resulted in settlements in Oakland, CA, and Philadelphia. Allen v. City of Oakland, Settlement Agreement, 3:00-cv-04599-TEH (N.D. Cal. Mar. 13, 2003); NAACP v. City of Philadelphia, Settlement Agreement, 96-CV-6045 (E.D. Pa. 1996).

to police accountability and the potential limitations on this strategy for police reform.

I. PATTERN OR PRACTICE LITIGATION AND POLICE ACCOUNTABILITY

Pattern or practice litigation is designed to effect organizational changes in law enforcement agencies to enhance police accountability. In this respect it parallels prisoners' rights and mental health patient litigation, which is used to effect changes in institutional policies and practices, instead of to provide redress for individual plaintiffs. Police accountability has two basic dimensions. On one level, it refers to holding law enforcement agencies accountable for the basic services they deliver: crime control, order maintenance, and miscellaneous services to people and communities.[16] That dimension of police accountability is not discussed here. The focus of this Article is the dimension of police accountability relating to individual officers' conduct toward individual citizens, particularly with regard to the use of force, equal treatment of all people, and respect for individual dignity.[17] In certain important respects, however, the two dimensions of police accountability are interrelated. For instance, effective crime control and order maintenance depends in part on citizen perceptions of officer conduct on the street.[18] The community policing movement, which has reshaped policing strategies over the past quarter century, rests on the premise that police depend on citizen cooperation to accomplish their goals. Citizen cooperation, in turn, is diminished by patterns of abusive police conduct that undermines public trust.[19] An emerging consensus among police experts holds that misconduct by

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[16] The community policing movement stimulated a reconsideration of the police role and a search for new measures of police accountability in these areas. *See* NATIONAL RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 104-05 (2004); Geoffrey Alpert & Mark H. Moore, *Measuring Police Performance in the New Paradigm of Policing*, *in* U.S. DEP'T OF JUSTICE, PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 109-42 (1993), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pmcjs.pdf; *see generally* DAVID BAYLEY, POLICE FOR THE FUTURE (1994).

[17] NATIONAL RESEARCH COUNCIL, *supra* note 16, at 252-326; SAMUEL WALKER, POLICE ACCOUNTABILITY: CURRENT ISSUES AND RESEARCH NEEDS 1-2 (2006) [hereinafter WALKER, POLICE ACCOUNTABILITY], *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/218583.pdf.

[18] "If citizens trust the police, they will call them when they need help and help them identify offenders; crimes that are investigated as a result are more likely to be solved than if citizens are reluctant to call." NATIONAL RESEARCH COUNCIL, *supra* note 16, at 291.

[19] Jack R. Greene, *Community Policing in America: Changing the Nature, Structure, and Function of the Police*, 3 J. CRIM. JUST. 299, 319-20 (2001), *available at* http://www.ncjrs.gov/

individual officers is not primarily the result of bad officers; that is, officers who lack the personal integrity or intelligence to perform properly as law enforcement officers. The so-called "rotten apple" theory of police misconduct has long been discredited. The new consensus of opinion holds that patterns of misconduct are ultimately the result of inadequate management policies and practices, which include written policies to govern officer conduct, adequate procedures for investigating alleged misconduct, meaningful discipline where such allegations are sustained, and procedures for identifying and correcting patterns of misconduct. The new consensus has been colloquially called the "rotten barrel" theory, as opposed to the discredited "rotten apple" theory.[20]

The structure of American law enforcement poses a major obstacle for achieving police accountability. Unlike most other countries in the world, where policing is highly centralized and subject to national control, responsibility for law enforcement in the United States is divided among a bewildering array of federal, state, local, and special district agencies. Experts on policing have had difficulty even determining the total number of law enforcement agencies in the United States, but the Bureau of Justice Statistics estimates that in 2000 there were 17,784 local, state, and special jurisdiction agencies and 2,867 additional federal agencies.[21]

In this organizationally fragmented system, there is no single controlling authority that could presumably establish required minimal standards for personnel, operations, and accountability procedures. In the American legal system, the United States Supreme Court represents one of only two national-level controlling authorities, to the extent that Court rulings on police procedures are binding on all agencies in the country. Police experts, however, have generally agreed that while the Court has had a very significant impact on policing in certain areas, it is an extremely limited instrument for a comprehensive approach to police accountability. The Court has ruled on only a small fraction of all the issues related to policing. The only other national-level controlling authority is the United States Congress,

criminal_justice2000/vol_3/03g.pdf (discussing the concern that the "normative legitimacy of the police . . . will be undermined when the police are seen primarily as a punitive force in society").

[20] WALKER, THE NEW WORLD, *supra* note 3, at 14.

[21] BUREAU OF JUSTICE STATISTICS, FEDERAL LAW ENFORCEMENT OFFICERS, 2004 (2006), *available at* http://ojp.usdoj.gov/bjs/pub/pdf/fleo04.pdf; BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS 2000 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/lpd00.pdf.

which has enacted various federal laws related to employment discrimination that apply to every employer, including law enforcement agencies. The strategy of pattern or practice litigation was designed to fill the void left by the limited scope of Congress's and the federal courts' actions.

In addition to limited federal controls, there is a patchwork of state-level controls that covers only a small range of issues. Every state has established some procedure for licensing sworn peace officers, with minimum entry-level training requirements and some in-service training requirements.[22] State legislatures have enacted various statutes governing police activities such as the use of deadly force and handling domestic violence incidents.[23] Such statutes are not universal in all 50 states, nor are existing statutes identical.[24]

In the absence of controlling authorities at either the federal or state levels, the numerous local law enforcement agencies have been free to operate more or less autonomously. The result is considerable variation in the quality of police services and standards of police accountability in the United States.[25] This conclusion is, however, based largely on anecdotal evidence. No common measures of the quality of police services or accountability exist to permit meaningful, evidence-based comparisons among departments.[26] Some police departments have reputations for high levels of efficiency and accountability, while others have reputations for inefficiency, corruption, and brutality.[27] However, these reputations are not based on any objective measures.[28]

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22 *See* RAYMOND A. FRANKLIN, 2005 SURVEY OF POST AGENCIES REGARDING CERTIFICATION PRACTICES 6-8 (2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/213048.pdf.

23 *See, e.g.*, American Bar Association, Commission on Domestic Violence, Domestic Violence Arrest Statutes by State (Nov. 2007), http://www.abanet.org/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.pdf.

24 *See* NATIONAL RESEARCH COUNCIL, *supra* note 16, at 54-55.

25 *Id.* at 52.

26 Surveys of public attitudes toward the police, including trust and willingness to cooperate with the police, are conducted episodically in local jurisdictions. *See* SAMUEL WALKER & CHARLES M. KATZ, THE POLICE IN AMERICA: AN INTRODUCTION 382-400 (6th ed., McGraw-Hill 2007).

27 *See id.* at 454.

28 *See* BAYLEY, *supra* note 16, at 116-17. *See generally* David Bayley, *Law Enforcement and the Rule of Law: Is There a Tradeoff?*, 2 CRIMINOLOGY & PUB. POL'Y 133 (2002). The argument that there are wide differences among police departments with regard to accountability is widely shared among police experts, but, admittedly, it is based entirely on anecdotal evidence. Justice Department investigations under Section 14141 represent one approach to this

With respect to the pursuit of police accountability, the major consequence of the fragmentation of American law enforcement is that accountability advocates—be they local community activists, academics, or activist lawyers—are forced to address problems on a city by city, county by county, and state by state basis.[29] A significant achievement in one law enforcement agency—for example, a new policy restricting the use of tasers or the deployment of the canine unit—has no direct impact on the other agencies. In most other countries, by contrast, reform can be pursued through the controlling national authority.

The fragmented structure of law enforcement parallels the fragmentation of the American political system. Each of the three branches of government has some responsibility for law enforcement and, by extension, police accountability.[30] The mayors, governors, and president of each executive branch are responsible for directing law enforcement agencies. Direction is achieved primarily through the development of public policy and the appointment of law enforcement executives. The city councils, country commissions, state legislatures, and federal legislature direct law enforcement agencies through the budget process and legislation that sets public policy. Finally, the judicial branch has various responsibilities for overseeing the conduct of law enforcement officers and agencies. The U.S. Supreme Court and state supreme courts oversee law enforcement activities by establishing constitutional standards that prohibit certain police actions. Trial court judges, meanwhile, influence police activity through their power to admit or exclude evidence and dismiss criminal charges. This Article focuses specifically on the responsibilities of law enforcement agencies and chief executives of the executive branches.

Since 1997, investigations by the Department of Justice Special Litigation Section have resulted in outcomes with regard to 21 law enforcement agencies that take the form of consent decrees, memoranda of agreement ("MOAs"), or Investigative Findings Letters.[31] The reforms mandated by those consent decrees and MOAs represent a set of policies and procedures designed to enhance management

problem, although it is based largely on the absence of certain policies and practices in the agencies the Department has chosen to sue.

[29] NATIONAL RESEARCH COUNCIL, *supra* note 16, at 52-53.

[30] *Id.* at 47-108.

[31] Civil Rights Division, U.S. Dep't of Justice, Special Litigation Section, http://www.usdoj.gov/crt/split/findsettle.php#Settlements.

control over officer conduct.[32] As this Article describes, the settlements involve a common set of mandated reforms: improved use of force policies, early intervention systems, improved citizen complaint systems, and better officer training.

Some policing experts regard Section 14141, both the statute itself and the resulting litigation, as an important new development in police reform.[33] Unlike previous reform efforts, Section 14141 is directed toward organizational reform.[34] This reflects an emerging consensus of opinion among police experts that lasting improvements in police conduct are not achieved by addressing particular symptoms of misconduct.[35] For example, the exclusionary rule focuses on only a small part of all police activity, and it does not address the issue of aggressive law enforcement practices that typically underlie questionable search and seizure incidents. Similarly, an independent citizen review board addresses complaints that are the symptoms of unprofessional police conduct. Debra Livingston, in an early discussion of Section 14141 litigation, argued that effective police reform requires "a change in the organizational values and systems to which both managers and line officers adhere."[36] Barbara Armacost argued that it is necessary to change not just the formal procedures of a law enforcement organization but also the informal aspects of the organizational culture that play a powerful role in shaping officer conduct on the streets.[37] She framed the distinction between a focus on the organization over individual incidents in terms of "rotten barrels" versus "rotten apples."[38] A number of citizen oversight agencies, using the police auditor model of oversight, also define their mission in terms of effect-

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[32] WALKER, THE NEW WORLD, *supra* note 3, at 5.

[33] *Id.* *See also* JEROME, *supra* note 7, at 2; Saul A. Green, Monitoring the Cincinnati Collaborative, Remarks Delivered at the Vera Institute of Justice (May 6, 2004) *available at* http://www.vera.org/publication_pdf/saul_green_remarks.pdf.

[34] The Special Litigation Section of the U.S. Justice Department explains that departments that have "designed, implemented and enforced an effective program to prevent, detect, and ensure accountability for incidents of misconduct and other civil rights violations are unlikely to violate the pattern or practice statutes." Civil Rights Division, U.S. Dep't of Justice, Special Litigation Section Frequently Asked Questions, http://www.usdoj.gov/crt/split/faq.php (last visited Apr. 22, 2009).

[35] WALKER, THE NEW WORLD, *supra* note 3, at 11.

[36] Livingston, *supra* note 6, at 848.

[37] Armacost, *supra* note 14, at 509.

[38] *Id.* at 457-58.

ing fundamental organizational change.[39] The Office of Independent Review for the Los Angeles Sheriff's Department, for example, defines its role as going "beyond the facts and parties of any particular case and identify[ing] [b]roader issues implicating LASD policies, practices, or training" that affect accountability.[40]

II. THE HISTORIC PROBLEM OF POLICE MISCONDUCT

Pattern or practice litigation is designed to address long-standing problems related to police accountability. This Part briefly reviews the history of police misconduct, the major reforms that have been attempted to correct that problem, and the achievements and limitations of each of those reforms.

A. Misconduct in American Police History

Police misconduct is as old as policing in the United States itself. Beginning with the very first police departments in the 19th century, there were significant patterns of police misconduct, including: the use of excessive force, illegal detention and arrests, coercive tactics to gain confessions, illegal searches and seizures, race discrimination (with respect to both arrests and the use of force), and corruption.[41] In the early 20th century, reform efforts focused on what has been called the "third degree," or the use of coercive tactics to gain confessions.[42] With the rise of the civil rights movement in the 1940s and 1950s, public attention focused on race discrimination in the use of force and in arrests and the resulting problem of civil disorders.[43] The Supreme Court in the late 1950s and 1960s, led by Chief Justice Earl Warren, focused attention on unconstitutional practices related to confessions and searches and seizures.[44]

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[39] LOS ANGELES OFFICE OF INDEPENDENT REVIEW, SECOND ANNUAL REPORT i-iii (2003), *available at* http://www.laoir.com/reports/2nd-annualrpt-2003.pdf.

[40] LOS ANGELES OFFICE OF INDEPENDENT REVIEW, FIRST REPORT 32 (2002), *available at* http://www.laoir.com/report1.pdf.

[41] *See generally* WILBUR MILLER, COPS AND BOBBIES 150-51 (2d ed. 1999); ROBERT FOGELSON, BIG CITY POLICE 3 (1977); SAMUEL WALKER, A CRITICAL HISTORY OF POLICY REFORM: THE EMERGENCE OF PROFESSIONALISM (1977) [hereinafter WALKER, A CRITICAL HISTORY].

[42] *See generally* NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, THE THIRD DEGREE ix (1931).

[43] NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 158, 172, 176 (1968).

[44] MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 243 (2001).

B. Remedies for Police Misconduct

This Section reviews, in brief, the major strategies for police reform that have been attempted over the years. The discussion highlights the positive achievements of each strategy and the limitations to effecting organizational change that is likely to establish standards of accountability and prevent future police misconduct.[45]

1. Professional Self-Regulation

Among members of the law enforcement profession, the principal strategy for achieving police accountability is self-regulation, or professionalization.[46] This strategy is modeled after other occupations such as law, medicine, and education. In these occupations, for example, members of the profession act collectively to define standards for proper credentials (*e.g.*, a J.D., M.D., or Ph.D. degree), accredit educational institutions to award those credentials, and control the process for admission to profession and for disciplining misconduct. The police professionalization movement emerged in the early years of the 20th century and continues today.[47] The basic assumption of professionalism is that law enforcement agencies have a right and a responsibility to manage their own affairs, as do other professions.[48] The basic agenda of police professionalization has changed little since the early 20th century. The principal reforms include: hiring strong chief executives, developing high standards of recruitment and training for rank and file officers, managing personnel efficiently (particularly with

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[45] The earliest and still valuable assessment of the various remedies is Monrad G. Paulsen, Charles Whitebread & Richard Bonnie, *Securing Police Compliance with Constitutional Limitations: The Exclusionary Rule and Other Devices*, *in* NAT'L COMM'N ON THE CAUSES & PREVENTION OF VIOLENCE, LAW AND ORDER RECONSIDERED 365 (1970), *available at* http://ia331343.us.archive.org/1/items/laworderreconsid00camprich/laworderreconsid00camprich.pdf;. *see also* WALKER, THE NEW WORLD, *supra* note 3, at 20-40; Livingston, *supra* note 6, at 626 (giving a brief review of other remedies, in the context of Section 14141).

[46] The history of professionalization is covered in WALKER, A CRITICAL HISTORY, *supra* note 41.

[47] *Id.*

[48] *See generally* PETER K. MANNING, POLICE WORK: THE SOCIAL ORGANIZATION OF POLICING (1977) (discussing the development of a police monopoly over their professional mandate). Overcoming of the insular professional monopoly of the police on the delivery of public services is one of the cornerstones of community policing. *See generally* GEORGE L. KELLING & MARK H. MOORE, NAT'L INST. OF JUSTICE ET AL., PERSPECTIVES ON POLICING: THE EVOLVING STRATEGY OF POLICING (1998), *available at* http://www.ncjrs.gov/pdffiles1/nij/114213.pdf.

regard to patrol operations), and supervising and disciplining officers effectively.[49]

Professional associations are the principal instrument of professionalization in law enforcement, as in other professions. The most important associations are the International Association of Chiefs of Police ("IACP"),[50] the National Sheriff's Association ("NSA"),[51] and the Police Executive Research Forum ("PERF").[52] These associations periodically issue official statements on recommended best practices or model policies of specific issues.[53] They also engage in consulting with state and local agencies. The major limitation of this approach to police reform is that it is an entirely voluntary process. No law enforcement agency is required to adopt any of the recommended best practices or model policies, and there is no penalty for failure to do so.

In 1979, the professionalization movement adopted accreditation as a means of self-regulation. The accreditation process is administered by the Commission on Accreditation for Law Enforcement Agencies ("CALEA"), which promulgates the formal Standards for Accreditation and accredits individual agencies.[54] The first set of accreditation standards were promulgated in 1982.[55]

Many police experts, including Jerome Skolnick and James J. Fyfe among others, question the efficacy of the accreditation process, and the CALEA Standards in particular, in bringing about meaningful accountability and reducing officer misconduct.[56] Accreditation is a voluntary process and there is no penalty for not becoming accredited. As a result, only about 750 of the estimated 17,000 state and local law

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[49] For several decades the standard police management text incorporating these principles was O.W. WILSON & ROY C. MCLAREN, POLICE ADMINISTRATION (4th ed. 1977). Wilson was Professor of Criminology at the University of California-Berkeley and also the Superintendent of the Chicago Police Department from 1960-1967.

[50] International Association of Chiefs of Police, http://www.theiacp.org (last visited Feb. 7, 2009).

[51] National Sheriffs' Association, http://www.sheriffs.org (last visited Feb. 7, 2009).

[52] Police Executive Research Forum, http://www.policeforum.org (last visited Feb. 7, 2009).

[53] The official policy statements of each organization may be found at their respective websites. *See supra* notes 50-52.

[54] *See* COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES (4th ed. 1999).

[55] JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 243-45 (1994).

[56] *Id.* at 244-45 (discussing the limits of accreditation as a reform strategy).

enforcement agencies in the United States were CALEA accredited.[57] James Fyfe in particular argues that all but a few of the CALEA Standards lack substantive content.[58] Typically, they require an agency to have a written policy or procedure on a particular issue, but do not specify what the content of that policy should be. The major exception to this rule is Standard 1.3.2 regarding police use of force, which specifies the "defense of human life" principle.[59] By contrast, however, Standard 52.1.1 requires that "A written directive requires all complaints against the agency or its employees be investigated . . ." but does not specify the procedures for investigating complaints or the criteria to be used in evaluating testimony or other evidence.[60] The CALEA Standards also fail to specify the proper number of investigators, requirements for appointment to the unit, adequate training for investigators, or proper procedures for receiving, investigating, and adjudicating complaints, among other things.[61]

2. Constitutional Standards for Police Conduct

The Supreme Court became a significant force for police reform during the 1960s, and its impact continues today, although attenuated by subsequent decisions. In a series of highly publicized decisions, which are among the Warren Court's most famous, the Court intervened in previously hidden matters of routine police work and imposed new standards of conduct based on principles of constitutional law. The two most controversial of these decisions were *Mapp v. Ohio*[62] and *Miranda v. Arizona*.[63] As part of the Warren Court's due process revolution, they were significant in policing because the Court imposed constitutional standards on crime-fighting activities of

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57 CALEA reported that 746 U.S. and Canadian agencies were accredited as of October 15, 2008. *See* COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, CALEA AWARDS (2008), *available at* http://www.calea.org/Online/Clients/CALEAAWARDS.pdf.

58 *See* SKOLNICK & FYFE, *supra* note 55, at 244-45 (arguing that the focus of CALEA accreditation "is on documents, facilities, and general policies and practices rather than upon the actual quality of work or the reasonableness of specific police actions").

59 *See* COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT, *supra* note 54, at Standard 1.3.2.

60 *Id.* at Standard 52.1.1.

61 *See* WALKER, THE NEW WORLD, *supra* note 3, at 28-29. *See also* AMERICAN CORRECTIONAL ASSOCIATION, PERFORMANCE-BASED STANDARDS FOR COMMUNITY RESIDENTIAL SERVICES (4th ed. 2000) (evidencing that the accreditation standards for correctional institutions are far more substantive in that they define specific standards of care).

62 367 U.S. 643 (1961).

63 384 U.S. 436 (1966).

state and local police.[64] Conservative critics, notably the late Northwestern University law professor Fred Inbau and more recently Paul G. Cassell, have argued that judicial activism improperly intruded on the professional autonomy of the police and "handcuffed" their capacity to effectively fight crime.[65] Yale Kamisar, a member of the University of Michigan Law School faculty at the time, and other supporters of the Court's judicial activism on policing argued that the imposition of constitutional standards on police work forced police departments to upgrade standards related to recruitment, training, supervision, and discipline.[66] Police experts continue to debate the full, long-term impact of the Supreme Court's activism on police crime-fighting practices. Richard Leo argued that in the case of the Miranda warning, the police have devised ways of effectively undermining the spirit of the original Miranda decision.[67] Samuel Walker, on the other hand, argued that the Court's intervention spurred reforms in recruitment, training, and supervision that continue today, even after the Court has turned in a more conservative direction, and these reforms have contributed to the professionalization of the police.[68]

The Warren Court's activism created the expectation among many liberals and civil libertarians that the Court could and should serve as a leading instrument of police reform.[69] Two factors have undermined those hopes, however. First, the Court began to withdraw from judicial activism on policing in the 1970s, as well as on prison conditions by the 1980s, as part of a general backing away from Warren Court activism on many issues.[70] Second, police experts, including many supporters of the Court's activist role, have concluded that the Court has, at best, limited institutional capacity to ensure street-level compliance with its own decisions.[71] Studies have con-

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[64] *Id.*

[65] Fred Inbau, *More About Public Safety v. Individual Civil Liberties*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 329 (1962); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1986). *See also* THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 1-7 (Richard A. Leo & George C. Thomas III eds., 1999) (summarizing the debate over the impact of *Miranda*).

[66] WALKER, THE NEW WORLD, *supra* note 3, at 29-31.

[67] THE MIRANDA DEBATE, *supra* note 65, at 1-7.

[68] *Id.*

[69] SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 183 (2d ed. 1997).

[70] *Id.* at 214.

[71] HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 174 (1977) (arguing that "[n]o court or specially constituted civilian body, based outside the agency, can possibly provide the kind of

cluded that the police have considerable capacity to evade or undermine both the *Mapp* decision's exclusionary rule and the *Miranda* decision's exclusion of improper interrogations.[72] Responsibility for translating a Court decision into operational policy in a law enforcement agency ultimately falls on department officials. There is no guarantee that local officials will faithfully carry out either the letter or the spirit of a major decision. Additionally, many critical aspects of routine policing fall outside the purview of constitutional standards.[73] Issues such as the structure and management of a citizen complaint procedure or the nature of day-to-day supervision of patrol officers by sergeants, both of which are recognized as crucial elements of an effective system of accountability, do not raise constitutional concerns.[74]

More fundamentally, constitutional litigation over police practices necessarily involves discrete aspects of policing (for example, search and seizure or interrogations), which ignores the impact of the larger organizational culture on police behavior. A department may have a state of the art policy on reporting use of force incidents, for example, but the informal culture might tolerate or even encourage officers not to comply fully with the policy.[75] Reflecting an emerging consensus of opinion among police reformers, Armacost argued that "no legal strategy that ignores the power of the police organization will have any lasting success in addressing police brutality" (and we might add, other forms of police misconduct).[76] The organizational

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day-to-day direction that is essential if the behavior of police officers at the operating level is to be effectively controlled").

72 *See id.* at 93-130, 157-86. *See also* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE: THE URBAN POLICE FUNCTION 1-139 (2d ed. 1980) (concluding that "[t]hose rulings to exclude evidence which are made rarely have an impact on departmental policies").

73 GOLDSTEIN, *supra* note 71, at 157-86.

74 *See* MERRICK J. BOBB, THE LOS ANGELES COUNTY SHERRIFF'S DEP'T, 9TH SEMIANNUAL REPORT 22-23 (June 1998) [hereinafter BOBB, 9TH SEMIANNUAL REPORT], *available at* http://www.parc.info/client_files/LASD/9th%20Semiannual%20Report.pdf (discussing the impact on the failure to meet this standard).

75 The reports of the Independent Monitor for the Washington, DC Police Department provide a valuable picture of this process. The reports initially found that officers were not completing the required reports for low level uses of force, and compliance rose as a result of the monitoring team's efforts. The reports of the Monitor, Michael Bromwich, are available online. Office of the Independent Monitor for the Metropolitan District of Columbia Police Department, http://www.policemonitor.org/reports.html (last visited Feb. 7, 2009).

76 Armacost, *supra* note 14, at 521.

reforms that are the central thrust of Section 14141 are designed to overcome this limitation.

3. Tort Litigation

Civil rights activists have also employed tort litigation under federal or state law as a strategy for enhancing police accountability[77] on the assumption that local officials will effect significant police reforms to avoid the costs of damage awards to plaintiffs.[78]

The available evidence is mixed regarding civil litigation as an instrument of police reform. Academic studies have found generally that civil suits against the police have little direct impact on police reform.[79] The city of Detroit, for example, paid out over $100 million a year in police-related damages between 1986 and 1997.[80] This litigation apparently did little to improve the quality of policing there, and in 2003, the Department of Justice settled a pattern or practice case against the department on issues related to the use of force, arrest practices, and the detention of witnesses.[81] Los Angeles, New York City, and other municipalities have also paid out large sums for police misconduct over the course of many years, and yet the police departments in these cities have been the subject of continued complaints about officer misconduct.[82] An important exception to this rule is Los Angeles Country, where the Board of Supervisors authorized an investigation of the Sheriff's Department in 1991, and following publication of the resulting Kolts Report created the Special Counsel to the

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77 The goal of reducing the costs of litigation prompted the Kolts Report on the Los Angeles Sheriff's Department and the consequent establishment of the Special Counsel as a form of permanent oversight for the Department. JAMES G. KOLTS, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, REPORT (1992), *available at* http://www.parc.info/client_files/Special%20Reports/3%20-%20Kolts%20Report%20-%20LASD.pdf.

78 GOLDSTEIN, *supra* note 71, at 177; Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, *in* UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE: POLICE VIOLENCE 256-58 (William A. Geller & Hans Toch eds., 1995).

79 NATIONAL RESEARCH COUNCIL, *supra* note 16, at 278-80; *see also* HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 85 (1998) (concluding that civil litigation must always be available, but cannot be a substitute for police departmental mechanisms of accountability or prosecutorial action).

80 HUMAN RIGHTS WATCH, *supra* note 79, at 183.

81 United States v. City of Detroit, No. 03-72258 (E.D. Mich. 2003) (consent judgment), *available at* http://www.docstoc.com/docs/420320/city-of-detroit-judgement.

82 KOLTS, *supra* note 77, at 25-73.

Los Angeles Sheriff's Department as a permanent watchdog agency that has given special attention to reducing litigation costs.[83]

Civil litigation appears to be a weak strategy for achieving police reform, in part because of the structure of local governments and a pervasive pattern of political and administrative irresponsibility. Essentially, one agency of government, the police department, commits abuses of rights, another agency, the city attorney's office, defends the conduct in court, and a third agency, the city treasurer, pays whatever financial settlement results from the litigation. Missing from this scenario is an overarching sense of responsibility on the part of any agent or agency of local government, presumably the mayor or city council, which would pursue improvements in the police department as a means of reducing the costs of litigation. With rare exception, mayors or legislative bodies have not undertaken this role.[84]

Charles R. Epp, however, argues that *fear* of tort litigation (as opposed to actual suits) has since the mid-1970s been a major stimulus to reform. The pivotal event occurred in November, 1977, when the largest private insurance company providing police liability insurance withdrew from the market, citing unacceptable risks. The prospect of relying on self-insurance spurred police professional organizations to begin a more concerted effort to develop rules and regulations governing police conduct (particularly with regard to deadly force and excessive use of physical force) to reduce potential liability costs. This development intensified efforts that had already begun in the 1960s in response to Supreme Court rulings and an increase in private litigation. The long-term result, Epp argues, has been the development of a pervasive culture of "legalized accountability" in the police profession that involves a broad commitment to reducing officer misconduct through formal rules and regulations.[85]

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[83] KOLTS, *supra* note 77. THE LOS ANGELES COUNTY SHERRIFF'S DEP'T, TWENTY-SIXTH SEMI-ANNUAL REPORT (Feb. 2009), *available at* http://www.parc.info/client_files/LASD/26th%20Semiannual%20Report.pdf.

[84] The problems with relying on the political system to direct police agencies have not received thorough attention from social scientists. *See* GOLDSTEIN, *supra* note 71, at 131-56.

[85] CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE (forthcoming 2009).

4. Criminal Prosecution of Police Officers

Community activists advocate criminal prosecution of officers guilty of excessive force or unjustified shootings as another remedy.[86] As a strategy of police reform, criminal prosecution is designed to secure justice, remove bad officers from the police force, and deter misconduct by other officers.[87]

Criminal prosecution has proven to be a very weak instrument of reform.[88] Proving criminal intent involves an extremely high burden of proof. Local prosecutors, moreover, have close working relationships with police departments though routine criminal cases. Additionally, judges and juries have an inherent predisposition to believe the testimony of police officers rather than citizens (a phenomenon that is compounded when the victim has a criminal record independent of the incident in question).[89] There also is no evidence that criminal prosecution deters illegal behavior by other officers.[90] Finally, much police misconduct, including use of force without injury, racial, ethnic or sexual slurs, does not rise to the level of criminal conduct.[91]

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[86] In AMERICAN CIVIL LIBERTIES UNION, FIGHTING POLICE ABUSE: A COMMUNITY ACTION MANUAL 40 (1992), *available at* http://www.aclu.org/police/gen/14614pub19971201.html, "Strategy #6" would establish an "Office of the Special Prosecutor" to prosecute cases of police abuse.

[87] WALKER, THE NEW WORLD, *supra* note 3, at 34.

[88] *See* ALEXIS AGATHOCLEOUS & HEATHER WARD, VERA INSTITUTE OF JUSTICE, PROSECUTING POLICE MISCONDUCT: REFLECTIONS ON THE ROLE OF THE U.S. CIVIL RIGHTS DIVISION (1998), *available at* http://www.vera.org/publication_pdf/misconduct.pdf.

[89] HUMAN RIGHTS WATCH, *supra* note 79, at 85-89.

[90] There is no empirical investigation of the deterrent effect of prosecuting police officers. *See, e.g.*, AGATHOCLEOUS & WARD, *supra* note 88. Nonetheless, there have been a number of successful criminal prosecutions of police officers in New York City and Philadelphia over the years, and there is no evidence that the prosecutions in the 1970s or early 1980s deterred criminal conduct in subsequent years. *See id.*

[91] *Id.* at 4-5, 8, 10. The report also concluded that prosecuting individual officers for criminal acts did not bring about needed "systemic" reforms in police departments. *See* Paulsen et al., *supra* note 45, at 405-07; HUMAN RIGHTS WATCH, *supra* note 79, at 85, 103; Cheh, *supra* note 78, at 247 (concluding that "[c]riminal prosecutions and other kinds of lawsuits have not played a major role in addressing the problem of excessive force by the police").

5. Reform Through Exhortation: "Blue Ribbon Commissions"

A long tradition of police reform efforts involves the creation of "Blue Ribbon Commissions."[92] Blue Ribbon Commissions are ad hoc, short-term investigations of law enforcement, usually in response to an immediate crisis, that typically produce a report with recommendations for reform.[93] Some Blue Ribbon Commissions have been national in scope, focusing on the law enforcement profession, while others have been local, focusing on particular law enforcement agencies. There is a long history of Blue Ribbon Commissions specifically related to the issue of police and race relations.[94] Other commissions have been created to address problems of police corruption or the use of excessive force.[95] The 1991 Christopher Commission, appointed in the wake of the Rodney King beating by Los Angeles police officers, is one of the most well known recent examples of this approach.[96] National-level examples of Blue Ribbon Commissions include the President's Commission on Law Enforcement and Administration of Justice (1965-1967),[97] the American Bar Association's *Standards Relating to the Urban Police Function*,[98] and the National Advisory Commission on Criminal Justice Standards and Goals (1973).[99]

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92 Samuel Walker, *Setting the Standards: The Efforts and Effects of Blue Ribbon Commissions on the Police*, *in* POLICE LEADERSHIP IN AMERICA: CRISIS AND OPPORTUNITY 354-70 (William A. Geller ed., 1985) [hereinafter Walker, *Setting the Standards*].

93 *Id.* For a valuable and critical interpretation of the role of special commissions, *see generally* MICHAEL LIPSKY & DAVID J. OLSON, COMMISSION POLITICS: THE PROCESSING OF RACIAL CRISIS IN AMERICA (1977). A useful collection of Blue Ribbon Commission reports is at Police Assessment Resource Center, Special Independent Commission/Blue Ribbon Reports, http://www.parc.info/special_independent_commissionsblue_ribbon_reports.chtml.

94 CHICAGO COMM'N ON RACE RELATIONS, THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT (1922); NATIONAL ADVISORY COMM'N, *supra* note 43, at 299-336. A useful collection of original reports and commentary is available in THE POLITICS OF RIOT COMMISSIONS, 1917-1970: A COLLECTION OF OFFICIAL REPORTS AND CRITICAL ESSAYS (Anthony M. Platt ed. 1971).

95 Walker, *Setting the Standards*, *supra* note 92.

96 INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT (1991), *available at* http://www.parc.info/client_files/Special%20Reports/1%20-%20Chistopher%20Commision.pdf [hereinafter CHRISTOPHER COMMISSION]; HUMAN RIGHTS WATCH, *supra* note 79, at 44-46. On the Los Angeles Police Department and the background of the case, see LOU CANNON, OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD (1997).

97 PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE POLICE (1967).

98 AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE URBAN POLICE FUNCTION (1973).

99 NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, POLICE (1973).

Blue Ribbon Commissions have played an important role in identifying existing problems, defining national standards, and providing guidance for state and local reform efforts.[100] The recommendations of both the President's Commission on Law Enforcement and Administration of Justice and the American Bar Association Standards were particularly influential in the development of administrative rulemaking as a procedure for guiding the exercise of discretion by police officers, especially in such critical situations as the use of force.[101] Administrative rulemaking has since become the dominant method for guiding officer discretion and directing police officers in the field.[102]

The basic limitation of Blue Ribbon Commissions is their advisory function: they have no power to ensure implementation of their recommended reforms.[103] Commissions typically disband upon publication of the final report. Without an implementation mechanism, however, local agencies are free to adopt or ignore its recommendations at their discretion. At best, this voluntary process has been slow and haphazard. The 1991 Christopher Commission, for example, made a comprehensive set of recommendations for reforming the Los Angeles Police Department, but the department failed to make meaningful progress and the Department of Justice filed suit under Section 14141 ten years later.[104]

6. Citizen Oversight of the Police

Since the 1950s, community activists, particularly in the African American community, have demanded the creation of agencies independent of the police department, commonly referred to as "civilian review boards," to investigate citizen complaints against police

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100 Walker, *Setting the Standards*, *supra* note 92; WALKER, THE NEW WORLD, *supra* note 3, at 36.

101 Walker, *Setting the Standards*, *supra* note 92; WALKER, THE NEW WORLD, *supra* note 3, at 36.

102 AMERICAN BAR ASSOCIATION, *supra* note 72, at 1-4.3. *See also* KENNETH C. DAVIS, POLICE DISCRETION (1975) (setting forth a pioneering discussion of administrative rulemaking). On the spread and impact of administrative rulemaking, see SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN AMERICAN CRIMINAL JUSTICE, 1950-1990 21-54 (1993).

103 Walker, *Setting the Standards*, *supra* note 92.

104 CHRISTOPHER COMMISSION, *supra* note 96.

officers.[105] In recent years, the police auditor model of accountability has emerged as an alternative to civilian review boards. Instead of investigating individual complaints, a police auditor reviews the policies and practices of the departments for which it is responsible and makes recommendations for change. Additionally, as a permanent agency, a police auditor office has the power to revisit an issue and determine whether previous recommendations have been implemented.[106] The role of police auditors in this respect closely parallels the strategy of organizational change embodied in Section 14141.[107] Because of the different models of external oversight, the term "citizen oversight" has replaced "civilian review" of the police.[108]

There is mixed evidence about the effectiveness of citizen oversight of the police.[109] No study has found persuasive evidence that civilian review boards deter police misconduct or enhance public trust in the police.[110] In many instances, the performance of the civilian review board itself has become a matter of public controversy. The New York Civilian Complaint Review Board, for example, has been sharply criticized by the New York Civil Liberties Union, an entity that played a major role in the Review Board's creation.[111]

Walker argued that the principal flaw with civilian review boards is that they reflect an adversarial model that focuses on the punishment of past misconduct.[112] On the one hand, it is difficult to prove

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105 A history of the movement for civilian review boards may be found in SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 19-49 (2001) [hereinafter WALKER, POLICE ACCOUNTABILITY].

106 The revisiting of previous issues and recommendations is notably evident in the reports of Merrick Bobb, the Special Counsel to the Los Angeles Sheriff's Department from 1993 to the present. One excellent example involves the initial investigation of the problems in the Century Station and subsequent follow up investigations. *See* BOBB, 9TH SEMIANNUAL REPORT, *supra* note 74, at 7-34 (Feb. 1998); MERRICK J. BOBB, LOS ANGELES COUNTY SHERIFF'S DEP'T, 15TH SEMIANNUAL REPORT 9-35 (2002), *available at* http://parc.info/client_files/LASD/15th%20Semiannual%20Report.pdf.

107 *See* WALKER, THE NEW WORLD, *supra* note 3, at 135-70.

108 *See* National Association for Civilian Oversight of the Police, http://www.nacole.org (last visited Feb. 7, 2009) (setting forth a roster of citizen oversight agencies).

109 WALKER, POLICE ACCOUNTABILITY, *supra* note 105, at 117-78.

110 *Id.*

111 NEW YORK CIVIL LIBERTIES UNION, MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY (2007), *available at* http://www.nyclu.org/files/ccrb_failing_report_090507.pdf.

112 SAMUEL WALKER, CAROL ARCHBOLD & LEIGH HERBST, MEDIATING CITIZEN COMPLAINTS AGAINST POLICE OFFICERS: A GUIDE FOR POLICE AND COMMUNITY LEADERS (2002), *available at* http://www.cops.usdoj.gov/files/RIC/Publications/e04021486.pdf (arguing for media-

officer misconduct in situations that typically lack independent witnesses or other corroborating evidence.[113] At the same time, as Debra Livingston argues, review boards are "retrospective," or backward-looking, whereas the real opportunities for achieving police reform are prospective, focusing on organizational reform.[114] Walker and other experts agree that achieving lasting police reform requires a focus on changing the policies and procedures of police organizations.[115] Organizational change is one of the main roles of the auditor model of citizen oversight, and the principal focus of police pattern or practice litigation.[116]

7. The Achievements and Limitations of Reform Strategies

The impact of the various reform strategies has been mixed. On the one hand, each strategy has made some positive contribution within the limits of its purview. Epp argues that the combined effect of tort litigation and other reform efforts has been a broader culture of "legalized accountability," a pervasive effort by the law enforcement profession to reduce liability risks through written rules and regulations.[117] Walker, focusing on a broader range of reform strategies, labels the same development "the new world of police accountability."[118] Nonetheless, patterns of police abuse remain a major problem in American society, and policing continues to fall short of meeting the highest standards of professional conduct.[119] Inappropriate use of force[120] and race discrimination[121] remain persistent problems within policing, and, as a result, often create serious conflict in local commu-

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tion as a more efficient and effective approach than the adversarial model inherent in the civilian review board approach).

113 WALKER, POLICE ACCOUNTABILITY, *supra* note 105, at 117-45.

114 Debra Livingston, *The Unfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 654 (2003).

115 LOS ANGELES OFFICE OF INDEPENDENT REVIEW, *supra* note 40, at 32; *see generally* WALKER, THE NEW WORLD, *supra* note 3.

116 WALKER, THE NEW WORLD, *supra* note 3, at 135-70; WALKER, POLICE ACCOUNTABILITY, *supra* note 105, at 86-109.

117 EPP, *supra* note 85.

118 WALKER, THE NEW WORLD, *supra* note 3.

119 SKOLNICK & FYFE, *supra* note 55.

120 On use of force issues, see U.S. DEP'T OF JUSTICE ET AL., USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/176330.pdf. On accountability issues generally, see WALKER, THE NEW WORLD, *supra* note 3.

121 On the question of racial discrimination in traffic enforcement or "racial profiling," see DAVID HARRIS, PROFILES IN INJUSTICE (2002). On a broader range of issues related to race and

nities.[122] Experts generally agree that no single reform strategy has been completely effective, or is likely to be effective, in establishing consistently high standards of professional conduct.[123] They also generally agree that, taken as a combined effort, the various reforms have not effectively reduced unacceptable patterns of police misconduct.[124]

Recognition of the limits of the various reform strategies has directed the attention of police accountability experts to the need for comprehensive organizational change in law enforcement. Armacost, answering her own question about the reasons for the relative "lack of success in achieving lasting police reform," argued that "reform efforts have focused too much on notorious incidents and misbehaving individuals" and have ignored the need for organizational change that would alter the prevailing "police culture" that tolerates misconduct.[125] In the organizational change model of police reform, the basic goal is to establish the policies and procedures that are likely to become self-sustaining instruments of accountability within law enforcement agencies.[126] As noted above, even observers sympathetic to Supreme Court oversight of policing concede that ultimately responsibility for enforcing Court decisions lies with individual law enforcement agencies.[127] By the same token, civilian review agencies have only the power to make findings regarding citizen complaints, but not the power to impose discipline on officers.[128] Pattern or practice litigation under Section 14141 seeks to overcome the limitations of the reform efforts reviewed above by effecting comprehensive organizational reform. The following Part examines the nature and impact of that litigation and the extent to which it has achieved this goal.

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the police, see NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE RODNEY KING STORY (1995).

122 *See* CANNON, *supra* note 96, at 51-75 (discussing the Rodney King incident); SKOLNICK & FYFE, *supra* note 55 (discussing national police accountability problems with reference to the Rodney King incident).

123 SKOLNICK & FYFE, *supra* note 55, at 237-66 (discussing possible police reforms).

124 WALKER, THE NEW WORLD, *supra* note 3, at 38-40.

125 Armacost, *supra* note 14, at 455.

126 PUBLIC MANAGEMENT RESOURCES, *supra* note 5, at 5 (concluding that the New Jersey State Police has become "self-monitoring and self adaptive").

127 WALKER, POLICE ACCOUNTABILITY, *supra* note 105, at 75-77.

128 *Id.*

III. IMPLEMENTATION OF SECTION 14141

This section examines the implementation of Section 14141 litigation settlements. It reviews the different types of settlements, the substantive reforms that consent decrees and MOAs require, and the role of court-appointed Monitors.

A. Investigations and Outcomes

Responsibility for enforcing Section 14141 lies with the Special Litigation Section of the Civil Rights Division of the Department of Justice. Since 1994, the Special Litigation Section has investigated a number of state and local law enforcement agencies. The exact number of investigations is not known. As a matter of policy, the Section does not disclose whether or not it is investigating a particular department, has undertaken one in the past, or is considering an investigation.[129] Some investigations may involve only a cursory review of allegations, with no detailed on-site review of a department's practices.[130]

As of December 31, 2007, 21 investigations have reached some kind of formal outcome.[131] No investigation to date has resulted in a trial.[132] Outcomes fall into three categories: consent decrees, Memoranda of Agreement ("MOA"), and Investigative Findings Letters.[133]

The settlements in Washington, D.C. and Cincinnati, Ohio were both unique in certain respects and require some elaboration. The Washington, D.C. police department investigation was unique because the then-new Chief of Police, recognizing very serious problems related to use of force, invited the Department of Justice to review the department.[134] The Cincinnati settlement was unique in that it involved two separate settlements that are linked by a clause in one of

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129 *See* Civil Rights Division, U.S. Dep't of Justice, Special Litigation Section, http://www.usdoj.gov/crt/split/findsettle.php#Settlements (last visited Apr. 22, 2009).

130 *Id.*

131 *Id.*

132 *Id.*

133 *See* Civil Rights Division, U.S. Dep't of Justice, Conduct of Law Enforcement Agencies, http://www.usdoj.gov/crt/split/police.php (last visited Apr. 22, 2009).

134 MICHAEL BROMWICH, SPECIAL REPORT OF THE INDEPENDENT MONITOR FOR THE METROPOLITAN POLICE DEPARTMENT 2 (2002) [hereinafter BROMWICH, SPECIAL REPORT OF THE INDEPENDENT MONITOR], *available at* http://clearinghouse.wustl.edu/chDocs/public/PN-DC-0001-0003.pdf.

them.[135] The Department of Justice suit was settled with an MOA covering the accountability-related management reforms discussed in this Article. A separate settlement resulted from the consolidation of several racial profiling suits brought by the ACLU and other plaintiffs. The settlement, officially called the Collaborative Agreement (although in fact it was a consent decree), addressed issues of police policy and specifically required the police department to adopt the police strategy known as Problem Oriented Policing and to take other steps designed to improve relations with racial and ethnic minority communities.[136] One section of the consent decree incorporates the MOA with the Department of Justice.[137]

The content of the various consent decrees and MOAs are very similar, and they include common reforms and the appointment of an Independent Monitor to ensure implementation.[138] Conversely, Investigative Findings Letters are far more limited in scope, typically focusing on one issue or a narrow range of issues; they are advisory only, and no Independent Monitor is appointed to oversee implementation.[139] Implementation of the recommendations contained in an Investigatory Finding Letter is entirely voluntary. Under the Bush Administration, the Special Litigation Section made greater use of Letters rather than consent decrees or MOAs, and to a large extent the investigation of law enforcement agencies virtually ceased.[140]

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135 In re Cincinnati Policing, C-1-99-317, 2002 U.S. Dist. LEXIS 15928 (S.D. Ohio 2002); Memorandum of Agreement between the U.S Dep't of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Dep't (Apr. 12, 2002), *available at* http://www.usdoj.gov/crt/split/Cincmoafinal.php. The linkage between the two settlements is in Paragraphs 47 and 113 of the Collaborative Agreement. This provision proved to be important when the Cincinnati Police Department was found to be in material breach of the MOA in 2005.

136 *Id.* The case for including relevant "stakeholders" (*e.g.*, community groups) in pattern or practice litigation settlements is argued in Kami Chavis Simmons, *"The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Police Agencies*, 98 CRIM. L. & CRIMINOLOGY 489 (2008).

137 *See* Green, *supra* note 33.

138 WALKER, THE NEW WORLD, *supra* note 3.

139 *See* Letter from Steven H. Rosenbaum, Chief, Special Litigation Section, Civil Rights Section, U.S. Dep't of Justice, to Alejandro Vilarello, City Attorney, Miami, Florida, (Mar. 13, 2003), *available at* http://www.usdoj.gov/crt/split/documents/miamipd_techletter.pdf.

140 The Special Litigation Section reached one settlement in 2006 and another in 2007 that involved Investigative Findings Letters and relatively small police departments. *See* Letter from Shanetta Y. Cutlar, Chief, Special Litigation Section, Civil Rights Section, U.S. Dep't of Justice, to Michael O'Brien, Mayor, et al. (Mar. 2, 2006), *available at* http://www.usdoj.gov/crt/split/documents/wpd_talet_3-2-06.pdf; Letter from Shanetta Y. Cutlar, Chief, Special Litigation Section, Civil Rights Section, U.S. Dep't of Justice, to Stu Gallaher, Chief of Staff, Office of the

B. Substantive Requirements of Consent Decrees and MOAs

The contents of the consent decrees and MOAs negotiated by the Special Litigation Section under Section 14141 involve a common set of required reforms. The four common elements include: (1) improvement in the department's use of force policy; (2) improvements in the citizen complaint process;[141] (3) the creation of an Early Intervention System ("EIS") to monitor officer performance and to identify officers repeatedly involved in inappropriate conduct in dealing with citizens;[142] and (4) improvements in officer training related to the other reforms.

The similarity of the Section 14141 settlements represents the emergence of a consensus of opinion within the law enforcement profession regarding the best practices of police accountability.[143] This consensus of opinion developed slowly over the past 20 years as a result of several forces. In response to continued protests over police misconduct, local agencies experimented with a variety of reforms. Some of these reforms were adopted by other agencies facing similar problems, and a consensus regarding best practices began to emerge.[144] Federal agencies, notably the United States Commission on Civil Rights, investigated police misconduct and recommended reforms.[145] Most importantly, the Department of Justice under Attor-

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Mayor, City of Easton (Nov. 26, 2007), *available at* http://www.usdoj.gov/crt/split/documents/easton_talet_11-26-07.pdf.

141 The Cincinnati MOA was also unique in that it required a complete reorganization of the citizen complaint process, as opposed to requiring changes in the existing process. *See* In re Cincinnati Policing, C-1-99-317, 2002 U.S. Dist. LEXIS 15928 (S.D. Ohio 2002); Memorandum of Agreement, *supra* note 135.

142 S*ee generally* SAMUEL WALKER, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES: A PLANNING AND MANAGEMENT GUIDE (2003) (discussing the nature and purpose of early intervention systems) [hereinafter WALKER, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT], *available at* http://www.cops.usdoj.gov/files/ric/Publications/e07032003.pdf.

143 *See e.g.*, U.S. DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY: EXAMPLES OF PROMISING POLICE PRACTICES AND POLICIES (Jan. 2001), *available at* http://www.ncjrs.gov/pdffiles1/ojp/186189.pdf (providing procedures and policies for promoting police integrity); WALKER, THE NEW WORLD, *supra* note 3.

144 The Special Litigation Section's pattern or practice investigations include retaining consultants "in the areas [of] police practices, police training, police management and statistical analysis." Civil Rights Division, U.S. Dep't of Justice, Special Litigation Section Frequently Asked Questions, http://www.usdoj.gov/crt/split/faq.php#primsource. The Special Litigation Section seeks "consultants who have expertise based upon their experience, education, and research or writings, as well as reputation for fair analysis." *Id.*

145 Particularly influential was a recommendation by the U.S. Commission on Civil Rights that police departments develop "early warning systems" to identify officers who use force at a

ney General Janet Reno sponsored a number of events designed to promote police accountability and encouraged departments to adopt the emerging best practices.[146] The most concise statement of the consensus on the emerging best practices is the Department of Justice report, *Principles for Promoting Police Integrity*, issued in the last days of the Clinton administration in January 2001.[147]

1. Use of Force Policies

The abuse of citizens' rights through the use of excessive force has been the central issue in all but one of the Department of Justice settlements.[148] Consequently, all have required changes in policies and procedures related to officers' use of force.[149] The specific issues related to force fall into three distinct categories: (1) the substantive policy on when officers may and may not use force; (2) the requirements for officers reporting use of force incidents; and (3) the procedures for departmental investigation of use of force incidents.

The Cincinnati MOA, for example, requires the department to "revise and augment its use of force policies to: (a) clearly define terms; (b) define force as that term is defined in this Agreement; (c) incorporate a use of force model that relates the force options available to officers to the types of conduct by individuals that would justify the use of such force and teaches that disengagement, area containment, surveillance, waiting out a subject, summoning reinforcements or calling in specialized units may be an appropriate response to a situation[.]"[150]

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particularly high rate. U.S. COMM'N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS? 81-86 (1981). That recommendation is incorporated in all of the Justice Department's consent decrees and MOAs. *See* WALKER, THE NEW WORLD, *supra* note 3, at 100-34.

146 *See generally* U.S. DEP'T OF JUSTICE ET AL., POLICE INTEGRITY: PUBLIC SERVICE WITH HONOR (Jan. 1997), *available at* http://www.ncjrs.gov/pdffiles/163811.pdf; U.S. DEP'T OF JUSTICE, ENHANCING POLICE INTEGRITY (2005), *available at* http:// www.ncjrs.gov/pdffiles1/nij/209629.pdf.

147 U.S. DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY, *supra* note 143. *See generally* WALKER, THE NEW WORLD, *supra* note 3 (elaborating the relevant social science research on each of the relevant policing issues).

148 The exception is the consent decree involving the New Jersey State Police which involved racial disparities in traffic enforcement ("racial profiling"). *See* United States v. New Jersey, No. 99-5970, at ¶¶ 57-69 (D.N.J. Dec. 30, 1999) (Consent Decree), *available at* http://www.usdoj.gov/crt/split/documents/jerseysa.php.

149 U.S. DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY, *supra* note 139.

150 Memorandum of Agreement, *supra* note 135, at Part IV.A.

The Los Angeles Police Department ("LAPD") consent decree, by contrast, requires no changes in the department's substantive use of force policy, but it does require significant changes in both the requirements for officers reporting use of force incidents and the investigation of use of force incidents.[151] The consent decree, for example, requires the LAPD to modify its use of force reporting form to include greater information about the "forced use for the physical force category, to record the body area impacted by such physical use of force, to identify fractures and dislocations as a type of injury, and to include bean bag shot gun as a type of force category."[152] The decree requires even more extensive changes in procedures for investigating use of force incidents, including the unit responsible for all Categorical Uses of Force,[153] training for investigators, immediate "roll outs" to incidents involving Categorical Uses of Force by investigators, and immediate separation of all officers and witnesses involved in an Officer Involved Shooting incident.[154]

The LAPD consent decree's silence on the substantive use of force policy and its focus on reporting and investigation requirements reflect a heightened sophistication regarding the problem of controlling officer use of force. Reform efforts have typically focused on an agency's formal use of force policy, ignoring issues related to the implementation of that policy.[155] Walker and other experts increasingly recognize the formal policy as only the starting point for controlling officer use of force.[156] An exemplary policy can be undermined if officers fail to report force incidents, do not report them accurately, or the department fails to investigate force incidents thoroughly and fairly.[157]

Consent decrees and MOAs have also expanded the definition of force beyond the conventional definition of officer use of deadly force

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151 *See* United States v. City of L.A., No. 00-11769 GAF, at Part III.A (C.D. Cal. June 15, 2001) (Consent Decree).

152 *Id.* at Part III.A.66.

153 The consent decree defines Categorical Use of Force to include a list of uses of force that involve high risk or potential high risk to citizens, including deadly force, choke holds, uses of force resulting in injury, strikes to the head with an impact weapon, and any in-custody death. *See id.* at Part I.B.13.

154 *Id.* at Part I.B.13.

155 WALKER, THE NEW WORLD, *supra* note 3, at 62-70.

156 *Id.*

157 *Id.* at 69 (arguing that the Philadelphia Police Department had "a deeply ingrained resistance to implementing" its formal use of force policies).

or physical force with a baton or hands. The MOA for the Washington, D.C. police department treats the deployment of the canine unit as a use of force.[158] That MOA was also subsequently modified to treat the pointing of a weapon at a person as a form of use of force that should be covered by the use of force reporting policy.[159]

2. Citizen Complaint Procedures

Consent decrees and MOAs have required improvements in procedures for receiving and investigating citizen complaints. The consent decree involving the New Jersey State Police requires the agency to "develop and implement an effective program to inform civilians that they may make complaints or provide other feedback regarding the performance of any state trooper."[160] To this end, the decree requires the State Police to develop informational materials on the complaint process in English and Spanish, make the materials available at various locations around the state, create a toll-free 800 telephone number for filing complaints, and accept complaints over the telephone or by fax.[161] State troopers are also directed to inform citizens about the complaint process and not to discourage any citizen from filing a complaint.[162] The assumption underlying these changes is that they will result in more citizen complaints being filed and that this will enhance accountability.[163]

The Cincinnati Police Department MOA is unique in that it requires the City to completely restructure the agency responsible for citizen complaints.[164] Because of inadequacies with the existing Office of Municipal Investigations ("OMI"), the City was required to create an entirely new agency to handle citizen complaints, the Citizen Complaint Authority ("CCA").[165] The MOA also included changes related

158 *See* Memorandum of Agreement between the U.S. Dep't of Justice and the District of Columbia and the D.C. Metropolitan Police Dep't, at Part II.C. (June 13, 2001), *available at* http://www.usdoj.gov/crt/split/documents/dcmoa.php.

159 BROMWICH, *supra* note 4, at 31-32.

160 United States v. New Jersey, No. 99-5970, at ¶ 58 (Consent Decree), *available at* http://www.usdoj.gov/crt/split/documents/jerseysa.php.

161 *Id.* at ¶¶ 58-59.

162 *Id.* at ¶ 59.

163 *Id.* at ¶¶ 57-69.

164 *See* In re Cincinnati Policing, C-1-99-317, 2002 U.S. Dist. LEXIS 15928, at ¶¶ 55-89 (S.D. Ohio 2002).

165 *See id.*

to public information about the complaint process, complaint forms, and the investigation and tracking of citizen complaints.[166]

Citizen complaint procedures that receive and investigate citizen complaints in an efficient and professional manner are essential for enhancing accountability for two reasons. First, as a matter of principle, in a democratic society citizens are entitled to a process by which they can register their comments or complaints about the performance of a governmental agency. Second, with respect to reducing misconduct, citizen complaints form one of the basic inputs in early intervention systems ("EIS"), which are a central component to Section 14141 consent decrees and MOAs.[167] In this approach, citizen complaints, instead of being a rebuke to the organization, become a particularly valuable source of management information that can be used to correct on-going officer performance problems.[168]

3. Early Intervention Systems

All of the consent decrees and MOAs require the department in question to develop an EIS, also known as an "early warning" system, for the purpose of tracking officer performance on selected performance indicators, identifying those officers who appear to exhibit a pattern of repeated problematic behavior such as a higher than average rate of citizen complaints or uses of force, and providing some form of intervention designed to correct the identified performance problems.[169] EIS have emerged in recent years as one of the most important new management tools for monitoring officer performance. Developing a habit of proactive intervention, meanwhile, is central to the goal of changing the organizational culture of a police department to effect long-term, sustainable police reform.[170] Livingston sees EIS as central to Section 14141 consent decrees because of their capacity to monitor routine encounters between police and citizens and identify the "need for retraining, counseling[,] or reassignment" of

166 *See* Memorandum of Agreement, *supra* note 135, at Part VI.

167 SKOLNICK & FYFE, *supra* note 55, at 231-35. On the importance of citizen complaint data for EIS, *see* WALKER, THE NEW WORLD, *supra* note 3, at 13, 75.

168 Livingston, *supra* note 114, at 659 (elaborating on SKOLNICK & FYFE, *supra* note 55, at 231).

169 *See, e.g.*, Memorandum of Agreement, *supra* note 135, at Part VII.

170 WALKER, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT, *supra* note 142. On the relationship of EIS to other reforms designed to promote police accountability, *see* WALKER, THE NEW WORLD, *supra* note 3.

officers.[171] Most important, EIS provide the basis for administrative intervention "before serious problems arise."[172]

An EIS system involves a computerized database of officer performance data including indicators for individual officers on use of force, citizen complaints, high speed vehicle pursuits, involvement in civil litigation against the department, prior disciplinary history, use of sick leave time, and citizen commendations.[173] Some EIS use as few as five indicators, while others use more than 20. Analysis of the performance data permits supervisors to identify those officers who are involved in a higher number of problematic indicators than their peers. The emerging standard for officer peer group analysis matches officers with roughly similar assignments, particularly with regard to geography and shift.[174]

Officers who are identified by the EIS are subjected to some form of administrative intervention designed to correct the identified performance problems. Interventions typically consist of counseling by supervisors, training, or referral to professional counselors for problems such as substance abuse. The one evaluation of EIS to date indicates that they are effective in reducing problematic officer performance.[175]

The EIS required in the various consent decrees and MOAs differ in certain details. At present, there is no commonly agreed upon standard form for EIS within the law enforcement profession. They have different names and incorporate both different performance indicators and the total number of indicators. Nonetheless, the basic form and purpose of all the consent decrees and MOAs and the EIS are essentially identical.[176] The EIS in the various departments are known by different names: TEAMS II in Los Angeles; Risk Management System ("RMS") in Cincinnati; and Management Awareness Program

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171 Livingston, *supra* note 6, at 846-48.

172 *Id.*

173 *See generally* WALKER, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT, *supra* note 142.

174 LORIE A. FRIDELL, BY THE NUMBERS: A GUIDE FOR ANALYZING RACE DATA FROM VEHICLE STOPS 143-59 (2004), *available at* http://www.cops.usdoj.gov/html/cd_rom/mayors72nd/pubs/ExecutiveSummaryBytheNumber.pdf.

175 *See generally* SAMUEL WALKER, GEOFFREY P. ALPERT & DENNIS J. KENNEY, EARLY WARNING SYSTEMS: RESPONDING TO THE PROBLEM POLICE OFFICER (2001), *available at* http://www.ncjrs.gov/pdffiles1/nij/188565.pdf.

176 The New Jersey State Police EIS is known as the MAPPS system, while the Los Angeles Police Department EIS is known as TEAMS II. In Cincinnati, it is the Risk Management System (RMS).

("MAP") in the New Jersey State Police.[177] Nonetheless, despite relatively minor technical variations, these systems are identical with respect to purpose, structure, and procedures.

In a broad sense, EIS represent a "problem-oriented" approach to police reform, as Livingston recommended.[178] Problem-oriented policing is now a widely practiced variant of community-oriented policing. In essence, it involves police departments identifying discrete crime and disorder problems (*e.g.*, open drug markets, public drunkenness, and graffiti) and developing carefully tailored responses based on strategic intelligence.[179] In the case of EIS, the "problem" to be addressed involves patterns of inappropriate behavior by police officers.

4. Improvements in Officer Training

Consent decrees and MOAs require the departments in question to improve procedures for officer training. The Los Angeles consent decree, for example, specifies certain qualifications for Field Training Officers (FTOs), specific content for the training curriculum, including the duty to report misconduct, cultural diversity, and how to resolve ethical dilemmas that arise in police work.[180] The Cincinnati consent decree contains similar provisions related to FTOs and the content of recruit training, along with management procedures to ensure both the quality and consistency of training.[181]

C. Consent Decree and MOA Monitoring

A critical aspect of consent decrees and MOAs (but not Investigative Findings Letters) is the appointment of an independent monitor as an officer of the Court to oversee implementation of the

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177 *See* United States v. City of L.A., No. 00-11769 GAF, at Part II.A (Consent Decree); United States v. New Jersey, No. 99-5970, at ¶¶ 40-56 (Consent Decree), *available at* http://www.usdoj.gov/crt/split/documents/jerseysa.php; Memorandum of Agreement, *supra* note 135, at Part VII.A-B.

178 Livingston, *supra* note 114, at 655.

179 Problem-oriented policing represents a specific approach to implementing the general philosophy of community policing. *See, e.g.*, MICHAEL S. SCOTT, PROBLEM-ORIENTED POLICING: REFLECTIONS ON TWENTY YEARS (2000), *available at* http://www.popcenter.org/library/reading/pdfs/reflectionsfull.pdf; RANA SAMPSON & MICHAEL S. SCOTT, TACKLING CRIME AND OTHER PUBLIC-SAFETY PROBLEMS: CASE STUDIES IN PROBLEM-SOLVING (2000), *available at* http://www.popcenter.org/library/reading/. *See also* University of Wisconsin, Center of Problem-Oriented Policing, *available at* http://www.popcenter.org (providing other resource materials).

180 *See* Consent Decree, at VII.A. 114-15, United States v. City of L.A., *supra* note 151.

181 *See* Memorandum of Agreement, *supra* note 135, at VII.A-C.

mandated reforms.[182] As noted in Part II.B, *infra*, one of the major shortcomings of many past reform efforts has been the lack of any mechanism to ensure implementation. The following section reviews the nature of the monitoring process under Section 14141 litigation.

The Monitor typically involves a team of professional consultants with prior law enforcement management experience, involvement in pattern or practice litigation, or involvement in overseeing management reforms in other areas of business or professional life.[183]

Monitors are required to regularly review compliance with the terms of the consent decree or MOA in question and deliver public reports on the status of compliance to the court and the public.[184] In all but a few cases, the Monitor's reports have been placed on the police department's web site, and thus made available to the public.[185] Monitors function for the duration of the consent decree or the MOA, so they do not represent permanent external oversight of the agency in question.[186] Finally, their authority is limited to the specific terms of the decree and does not extend to other problems that might arise, such as corruption or employment discrimination, unless they directly impact one or more provisions of the consent decree or MOA.[187]

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182 As argued above, the historic limitation of Blue Ribbon Commissions has been the absence of any mechanism to ensure implementation of the recommended reforms. See discussion, *supra* Part II.B.5.

183 The Monitor for the Los Angeles consent decree, for example, is Kroll Inc., a large management consulting firm. *See* Kroll, Inc., http://www.kroll.com/about/library/lapd/ (last visited Feb. 8, 2009).

184 *See, e.g.*, Memorandum of Agreement, *supra* note 135, at ¶ 107 ("The Monitor will issue quarterly public reports detailing the City's compliance with and implementation of this Agreement.").

185 *See, e.g.*, Los Angeles Independent Monitor, Reports, *available at* http://www.lapdonline.org/consent_decree.

186 As the end of the consent decree over the New Jersey State Police approached, the Governor of New Jersey appointed an Advisory Committee to consider what kind of post-consent decree oversight, if any, should be established. *See* N.J. ADVISORY COMM. ON POLICE STANDARDS, REPORT AND RECOMMENDATIONS TO GOVERNOR JON S. CORZINE (Dec. 7, 2007), *available at* http://www.state.nj.us/acps/njacps_final_report.pdf. Disclosure: One of the co-authors of this Article served as an Expert Witness to the Advisory Committee and provided both a written report and public testimony on the need for permanent oversight.

187 "Within 90 days after the entry of the Decree, the City shall appoint an independent auditor who shall report on a quarterly basis the City's compliance with each provisions of this Consent Decree . . . . The auditor shall not issue statements or make findings with regard to any act or omission of PBP, OMI, or the City, except as required by the terms of this Decree." United States v. City of Pittsburgh, No. 97-0354, at ¶ 70 (W.D. Pa. Feb. 26, 1997) (Consent Decree), *available at* http://clearinghouse.wustl.edu/chDocs/public/PN-PA-0003-0002.pdf. In these two respects, the role of Monitors is far more limited than the role of police auditors. A relatively new form of citizen oversight of the police, police auditors are permanent agencies and

Consent decrees and MOAs typically have a specified term of five years, and they are terminated when the Monitor reports that the department has successfully met the terms of the decree or MOA and the district court accepts that judgment. For example, when the federal court terminated the Collaborative Agreement regarding the Cincinnati, Ohio Police Department in December 2008, the Monitor ceased to function.[188] The consent decree over the New Jersey State Police was recommended for termination in late 2007, but it has been delayed because of various political and budgetary issues.[189] The district court managing the consent decree over the LAPD extended that decree for an additional three years because of the department's failure to meet specified deadlines.[190]

Monitors serve a number of different functions. First and most importantly, Monitors serve as an independent review of compliance with the requirements of the consent decrees or MOAs.[191] In Pittsburgh, for example, all parties to the consent decree agreed in 2002 that "the City has maintained compliance" with the provisions applying to the police department, and the district court accepted this finding and terminated the relevant sections of the decree.[192] In Cincinnati, the police department actively resisted cooperating with the monitoring team, and the district court in that case found it in "material breach" of the MOA, which it then converted into an Order of the Court.[193] The conflicts were eventually resolved, implementa-

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in almost all cases have the authority to investigate on their own initiative any problem that may arise. The role of police auditors is discussed in WALKER, THE NEW WORLD, *supra* note 3, at 135-70, and WALKER, POLICE ACCOUNTABILITY, *supra* note 105, at 135-70.

188 Terry Kinney, *Cincinnati Closes the Book on 2001 Race Riots*, ASSOCIATED PRESS, Dec. 30, 2008, *available at* http://www.foxnews.com/wires/2008Dec30/0,4670,CincinnatiPolice,00.html.

189 N.J. ADVISORY COMM. ON POLICE STANDARDS, *supra* note 186, at 1.

190 Patrick McGreevy, *LAPD Faces 3 More Years of Scrutiny*, L.A. TIMES, May 16, 2006; KROLL & ASSOCS., REPORT OF THE INDEPENDENT MONITOR FOR THE QUARTER ENDING JUNE 30, 2006, at 4 (2006).

191 *See, e.g.*, Memorandum of Agreement, *supra* note 135, at ¶¶ 98-109.

192 United States v. City of Pittsburgh, "Stipulated Order" (September 30, 2002). Regarding termination of the Cincinnati Consent Decree and MOA, see SAUL A. GREEN, CITY OF CINCINNATI INDEPENDENT MONITOR'S FINAL REPORT (2008) [hereinafter GREEN, INDEPENDENT MONITOR'S FINAL REPORT], *available at* http://www.gabsnet.com/cincinnatimonitor/Final%20Report%2012-29-08.pdf.

193 In re Cincinnati Policing, No. 1:99-CV-3170, at 7 (S.D. Ohio Jan. 26, 2005) (Decision and Recommendation), *available at* http://clearinghouse.wustl.edu/chDocs/public/PN-OH-0005-0012.pdf.

tion proceeded, and federal oversight finally terminated in December 2008.[194]

As noted previously, Investigative Findings Letters do not involve the appointment of a Monitor. An important issue worthy of empirical investigation is the extent to which the recommendations in Investigative Findings Letters have actually been implemented in the absence of an Independent Monitor with the power to investigate and issue public reports.

Monitors do more than simply report on the progress of consent decree and MOA implementation. Because of their capacity to investigate and to report both to the district court and to the public any implementation shortcomings, they are active agents of implementation. Their role in this regard encompasses assistance, encouragement, warnings, and threats of exposure, in varying degrees. A Vera Institute study of the implementation process in Pittsburgh concluded that the Monitor was one of "two key factors [that] enabled the city quickly to comply with the terms of the decree."[195] The case of the Washington, D.C. MOA suggests that the Monitor played a major role in helping the department overcome an almost complete failure to implement the MOA at the outset, and to approach successful implementation after seven years.[196] Similarly, after the district court in Cincinnati found the police department in material breach of the Collaborative Agreement and converted it into an Order of the Court, the federal magistrate played a regular role in facilitating meetings between the parties that enhanced implementation.[197] This effort proved successful. In the summer of 2008, the Monitor recommended that the Collaborative Agreement be terminated.[198]

The role of the Monitors in overseeing implementation of consent decrees and MOAs is extremely important because police experts generally agree that one of the historic problems with police reform

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194 GREEN, INDEPENDENT MONITOR'S FINAL REPORT, *supra* note 192, at 1, 25-26.

195 DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8, at Executive Summary. *See also* DAVIS ET AL., TURNING NECESSITY INTO VIRTUE, *supra* note 8, at 11.

196 MICHAEL BROMWICH, FINAL REPORT OF THE INDEPENDENT MONITOR FOR THE METROPOLITAN POLICE DEPARTMENT, EXECUTIVE SUMMARY (2008).

197 GREEN, INDEPENDENT MONITOR'S FINAL REPORT, *supra* note 192, at 26.

198 SAUL GREEN, CITY OF CINCINNATI INDEPENDENT MONITOR'S TWENTY-FIRST REPORT 1 (July 11, 2008) [hereinafter GREEN, INDEPENDENT MONITOR'S TWENTY-FIRST REPORT], *available at* http://www.gabsnet.com/cincinnatimonitor/21stReport.pdf; *see also* Letter from Richard B. Jerome, Deputy Monitor for Cincinnati, to author (May 30, 2008) (on file with author).

efforts has been departments' failure either to implement recommended reforms or to ensure the continuity of promising reforms already implemented.[199] As discussed earlier, there is a long history of "Blue Ribbon Commissions," whose various reform recommendations are generally ignored.

In addition to their primary role of ensuring compliance with the terms of the consent decree or MOA, court-appointed Monitors serve a number of collateral functions related to police accountability. Monitors' reports become extremely valuable sources of information about the agencies they monitor. For example, they provide information about the progress of reform, developments related to use of force policy, and the citizen complaint process. In this respect, Monitors' reports help to reduce or end the historic problem of the closed nature of police bureaucracies.[200] Early studies of American policing found that police agencies were insular and resistant to external inquiries about policies and procedures.[201] This insularity aggravated police-community relations, as community leaders with grievances against an agency were unable to get information about the outcomes of citizen complaints.[202] Many American police departments have become more open in recent years, in part because the community policing movement emphasizes developing working partnerships with community groups.[203] Most departments today maintain public websites with access to departmental policy and procedure manuals, documents that were historically not available to the public.[204] Monitors' reports and their ready availability on web sites have

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199 Ensuring the continuity of successful reforms is a major problem in American policing that has not received sufficient attention from police scholars. *But see* Trent E. Ikerd, Examining the Institutionalization of Problem-Oriented Policing: The Charlotte-Mecklenburg Police Department as a Case Study (2007) (unpublished Ph.D. dissertation, University of Nebraska at Omaha) (on file with author).

200 SKOLNICK & FYFE, *supra* note 55, at 266 ("If there is an overriding theme to our suggestions for police reform . . . it is the theme of *openness*.").

201 The first academic study of the American police, which shaped much of the subsequent research and informed opinion about the police, is WILLIAM A. WESTLEY, VIOLENCE AND THE POLICE (1970) (study completed in 1950 but not published in book form until 1970).

202 NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 43, at 163 (recommending that citizen complainants "be promptly and fully informed of the outcome [of the complaint]. The results of the investigation should be made public.").

203 *See* BAYLEY, *supra* note 16, at 111.

204 *See, e.g.*, Kansas City Police Department, Policies and Procedures, http://www.kcpd.org/masterindex/masterindex.html (last visited Feb. 8, 2009); Los Angeles Police Department, 2008 3rd Quarter Manual, http://www.lapdonline.org/lapd_manual/ (last visited Feb. 8, 2009); Minne-

contributed to the broader trend toward greater openness and transparency.

Monitors' reports also facilitate the work of journalists and social scientists studying the police. Monitoring teams have full access to department information that journalists and academics do not have. Monitors' reports are a particularly rich source of data on organizational change in policing. Many people, including police reformers, mistakenly assume that if a court orders a police department to, for example, implement a new use of force policy, the new policy will be promptly implemented.[205] The first report of the Washington, D.C., police Monitor, for example, found that the department "has failed to accomplish virtually all of the milestones identified in the MOA within the time periods specified."[206] The Monitor's Twenty-Third Quarterly Report provides an illuminating picture of the role of the Monitor in identifying problems that inhibit full compliance with an MOA mandate. At one point officers were not completing the required Use of Force Incident Reports ("UFIR"s) for most of the less serious incidents.[207] Efforts of the Monitor helped raise compliance levels from 24 percent to 89 percent.[208] Meanwhile, many UFIRs lacked required information. In the period from October 2004 to January 2005, the Monitor found that virtually all of the UFIRs returned by officers contained relevant data fields that were incomplete or contained no entries at all.[209] Taken as a whole, the reports of all the court-appointed monitors provide a revealing picture of the difficulties involved in bringing about change in a law enforcement organization.

Police Auditors, one form of citizen oversight of the police, also perform similar implementation and transparency reforms that Monitors do.[210] Auditors are permanent government agencies with

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apolis Police Department, MPD Policy Manual, http://www.ci.minneapolis.mn.us/mpdpolicy/ (last visited Feb. 8, 2009).

[205] This point is argued as a rationale for permanent external oversight, with supporting evidence, in WALKER, THE NEW WORLD, *supra* note 3, at 135-70, and in Expert Opinion Memorandum from Samuel Walker, Department of Criminal Justice, University of Nebraska at Omaha, to Attorney General, State of New Jersey (June 19, 2006), *available at* http://www.state.nj.us/acps/home/hearings/pdf/061121_swalker.pdf.

[206] BROMWICH, SPECIAL REPORT OF THE INDEPENDENT MONITOR, *supra* note 134, at 1-2.

[207] BROMWICH, TWENTY-THIRD QUARTERLY REPORT OF THE INDEPENDENT MONITOR, *supra* note 4, at 27-30.

[208] *Id.*

[209] *Id.* at 30.

[210] WALKER, THE NEW WORLD, *supra* note 3, at 135-70.

responsibility for auditing or monitoring the activities of law enforcement agencies.[211]

IV. THE IMPACT OF PATTERN OR PRACTICE LITIGATION

The activities of the Special Litigation Section under Section 14141 have evolved over time. First, implementing Section 14141 has involved a learning process for the attorneys in the Section. As discussed earlier, they developed a more sophisticated understanding of the nature of the problem of police misconduct and the nature of the reforms needed to correct the problem. A comparison of the consent decrees involving the Pittsburgh and Los Angeles Police Departments illustrates this learning process. The 1997 Pittsburgh consent decree, the first settlement reached by the Section, is relatively short and lacking in detail compared with later consent decrees and MOAs. The section regarding the development of a new use of force policy, for example, consists of exactly one sentence, requiring only that the Department "develop and implement a use of force policy that is in compliance with applicable law and current professional standards."[212] The 2001 Los Angeles consent decree, by comparison, is far longer and more detailed. It includes, for example, a number of specific requirements regarding the investigation of use of force incidents: an automatic "roll out" (*i.e.*, immediate in-person response) to incidents and a requirement that when more than one officer is involved they be immediately separated.[213] None of these issues is addressed in the earlier Pittsburgh consent decree.

The situation in Cincinnati is unique in that it involves two separate settlements. The Collaborative Agreement/consent decree addresses issues of policing strategy and relations with racial minority communities.[214] In that respect, the Cincinnati situation is unique among the cases discussed in this Article. Saul Green, the Independent Monitor for Cincinnati, has argued that the two agreements com-

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211 *Id.* (describing the role of police auditors); WALKER, POLICE ACCOUNTABILITY, *supra* note 105, at 86-116.

212 United States v. City of Pittsburgh, No. 97-0354, at ¶ 13 (W.D. Pa. Feb. 26, 1997) (Consent Decree), *available at* http://clearinghouse.wustl.edu/chDocs/public/PN-PA-0003-0002.pdf.

213 United States v. City of L.A., No. 00-11769 GAF, at ¶¶ 56, 61 (Consent Decree).

214 *See* In re Cincinnati Policing, C-1-99-317 at ¶ 10 (Collaborative Agreement); GREEN, INDEPENDENT MONITOR'S FINAL REPORT, *supra* note 192, at 6 ("The Cincinnati police-community reform effort is significantly different from other settlements and consent decrees that have been put in place following a DOJ pattern or practice investigations.") (footnote omitted).

plement each other in important ways.[215] His argument raises the broader question of whether reforms in internal police accountability mechanism can be successful without at the same time changing how a police department conducts its business, and in particular eliminating crime fighting tactics that are likely to encourage excessive use of force or race discrimination (*e.g.*, aggressive traffic stop practices or high rates of stops and frisks of citizens).[216] Green makes the provocative argument that the accountability-related reforms in the MOA "would have resulted in a more professional, more accountable police department, but it would not have addressed the breakdown in community trust," which the parallel Collaborative Agreement addresses.[217]

Second, the activities of the Special Litigation Section have shifted in three important respects. In 2003, the Section began settling virtually all of its investigations with Investigative Findings Letters rather than the more comprehensive and enforceable consent decrees or MOAs. In addition, after 2005, as noted above, the investigation of law enforcement agencies virtually ceased, with only one settlement each in 2006 and 2007, and two in 2008.[218] Finally, the relatively few settlements that have been reached since 2004 involve very small law enforcement agencies.[219] The Section has not reached a settlement with a large law enforcement agency (*e.g.*, the size of Pittsburgh or Cincinnati) since Cleveland, Ohio's settlement in 2003. The neglect of large police departments is particularly significant. Large depart-

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215 GREEN, INDEPENDENT MONITOR'S FINAL REPORT, *supra* note 192, at 6-8.

216 Green, *supra* note 33, at 5.

217 *Id. See also* Bayley, *Law Enforcement and the Rule of Law: Is There a Tradeoff?*, *supra* note 28 (arguing that accountability related reforms that restrict officer conduct do not, contrary to much popular belief, inhibit effective crime fighting); DAVID HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING (2005).

218 *See* Civil Rights Division, U.S. Dep't of Justice, Special Litigation Section Documents and Publications, http://www.usdoj.gov/crt/split/findsettle.php#LEletters (last visited Feb. 8, 2009) (the Special Litigation Section removes cases from its web site once a consent decree is lifted). In the final month of the Bush Administration, the Special Litigation Section issued an Investigative Finding Letter to the Austin, Texas, Police Department. The letter represented the first letter to a large police department in several years. Letter from Shanetta Y. Cutlar, Chief, Special Litigation Section, Civil Rights Division, U.S. Dep't of Justice, to Hon. Marc A. Ott, City Manager, and Chief Arturo Acevedo, Police Chief, Austin, TX (Dec. 23, 2008), *available at* http://www.usdoj.gov/crt/split/documents/AustinPD_taletter_12-23-08.pdf.

219 Civil Rights Division, U.S. Dep't of Justice, *supra* note 218 (the most recent settlements involve the Easton [PA] Police Department (November 26, 2007); Warren [OH] Police Department (March 2, 2006); Virgin Islands Police Department (October 5, 2005); Beacon [NY] Police Department (June 21, 2005)).

ments employ the majority of law enforcement officers in the United States, provide police services to the majority of the American people, and are the focus of the most frequent complaints regarding the violation of rights of racial and ethnic minorities.[220]

A. Public Policy Questions

The impact of pattern or practice litigation is a major question for all stakeholders in the area of police accountability: litigators, civic activists, social scientists, and police executives. Do the reforms mandated by consent decrees and MOAs achieve the goal of improving policing and reducing violations of citizens rights? Put another way, does Section 14141 litigation represent an effective strategy for police reform? These general questions can be divided into two more specific questions. First, a process evaluation asks whether the reforms mandated by consent decrees and MOAs are actually implemented. Second, an impact evaluation asks whether the reforms, assuming successful implementation, lead to improvements in the quality of policing and a reduction of citizens' rights abuses.[221]

The question of the effectiveness of pattern or practice litigation is part of a larger one related to the impact of rights-oriented litigation, in such areas as prisoners' rights, employment discrimination, and school desegregation. There is a substantial literature on the question of the impact of Supreme Court decisions and lower court intervention in a variety of areas of American life.[222]

Investigating the impact of pattern or practice litigation involves a number of complex issues related to what is to be measured and the research methodology to be used. With one notable exception, the consent decrees and MOAs negotiated by the Department of Justice address internal police management issues related to accountability, such as use of force policies, EIS, citizen complaint procedures, and training.[223] The important exception is Cincinnati where there are two separate settlements, a MOA with the Department of Justice and a separate consent decree, known as the Collaborative Agreement,

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220 U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS 2003, at 2-3 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/lpd03.pdf; WALKER & KATZ, *supra* note 26, at 64.

221 *See* WALKER, POLICE ACCOUNTABILITY, *supra* note 17, at 10-23.

222 *See, e.g.*, MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

223 *See* In re Cincinnati Policing, C-1-99-317 (Collaborative Agreement).

which addresses policing strategies.[224] The CA requires the Cincinnati Police Department to adopt problem-oriented policing and take other steps to improve police-community relations.[225] The Collaborative Agreement is also unique in that the monitoring effort has involved regular evaluations by an independent consulting firm, the RAND Corporation, on the impact of the mandated reforms on citizens' and police officers' attitudes and perceptions and police practices such as traffic stops.[226] This is the only case where a settlement involves an impact evaluation.[227]

B. Evidence on the Impact of Consent Decrees and MOAs

The primary source of information on the implementation of consent decrees and MOAs are the reports of the court appointed Monitors. To date, Monitors' reports provide a complex picture of both implementation difficulties and successes.[228] The most successful implementations occurred with the consent decrees over the Pittsburgh, Pennsylvania and Steubenville, Ohio police departments. In both cases, implementation proceeded fairly smoothly, both departments met the terms of their respective consent decrees within the five-year time frame, and both decrees were lifted by the respective federal district courts.[229]

In several other jurisdictions, however, the implementation of consent decrees and MOAs has encountered significant delays and resulting extensions. The LAPD failed to meet the deadlines imposed by the consent decree.[230] On May 16, 2006, at the end of the five-year period established in the consent decree, the federal district court

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[224] *Id.*

[225] *Id.*; Green, *supra* note 33.

[226] RAND CORP., YEAR THREE EVALUATION REPORT (2007), *available at* http://www.rand.org/pubs/technical_reports/TR535/; RAND CORP., POLICE-COMMUNITY RELATIONS IN CINCINNATI: YEAR TWO EVALUATION REPORT (2006), *available at* http://www.rand.org/pubs/technical_reports/TR445/; RAND CORP., POLICE-COMMUNITY RELATIONS IN CINCINNATI (2005), *available at* http://www.rand.org/pubs/monographs/MG853/.

[227] RAND CORP., YEAR THREE EVALUATION REPORT, *supra* note 226; RAND CORP., POLICE-COMMUNITY RELATIONS IN CINCINNATI: YEAR TWO EVALUATION REPORT, *supra* note 226; RAND CORP., POLICE-COMMUNITY RELATIONS IN CINCINNATI, *supra* note 226.

[228] Expert Opinion Memorandum from Samuel Walker, *supra* note 205, at 2-6.

[229] Interview with Charles Reynolds, Independent Monitor, Steubenville Police Department (Sept. 26, 2007).

[230] McGreevy, *supra* note 190; KROLL & ASSOCS., REPORT OF THE INDEPENDENT MONITOR FOR THE QUARTER ENDING DECEMBER 31, 2005, at 2-3 (2006).

extended the consent decree for an additional three years.[231] The Monitor reported that "there remained substantial work to be done" in implementing the decree.[232] The department had complied with 27 tasks, failed to comply with 11, and the Monitor "withheld determination" on two tasks.[233] The most important unresolved issue involved TEAMS II, the LAPD's early intervention system.[234] This failure was particularly notable since the Christopher Commission Report recommended developing an EIS 15 years earlier.[235]

The consent decree with the New Jersey State Police was also extended when the Monitor found a lack of full compliance on certain issues.[236] Those problems were resolved, and the Monitor recommended in 2007 that the consent decree be terminated.[237] The Sixteenth Monitor's Report in August 2007 reported that "[t]he New Jersey State Police appear to have reached a watershed moment during the last two reporting periods."[238] The Monitor concluded that the agency had "become self-monitoring and self-correcting to a degree not often observed in American law enforcement."[239] Consequently, the Monitor recommended that the consent decree be terminated.[240]

In Cincinnati, Ohio, the Independent Monitor concluded in early 2005 that the Police Department was in "material breach" of the 2002 MOA, citing several instances of willful non-cooperation.[241] The underlying conflicts between the Department and the Monitor were eventually resolved, implementation proceeded, and in 2008 the Mon-

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231 McGreevy, *supra* note 190.

232 McGreevy, *supra* note 190; KROLL & ASSOCS., *supra* note 230, at 2-3.

233 McGreevy, *supra* note 190; KROLL & ASSOCS., *supra* note 230, at 2-3.

234 McGreevy, *supra* note 190; KROLL & ASSOCS., *supra* note 230, at 2-3.

235 KROLL & ASSOCS., *supra* note 190, at 4. *See also* WALKER, THE NEW WORLD, *supra* note 3, at 130-31. Full Disclosure: In 2007, one of the co-authors of this Article began serving as a Consultant to the Los Angeles Police Department regarding TEAMS II. The TEAMS II system became fully operational in early 2007.

236 PUBLIC MANAGEMENT RESOURCES, MONITOR'S THIRTEENTH REPORT iii-iv (2005), *available at* http://www.nj.gov/lps/monitors-report-13.pdf.

237 PUBLIC MANAGEMENT RESOURCES, MONITORS' SIXTEENTH REPORT, *supra* note 5, at vi ("Compliance requirements in all areas are now at 100 percent levels.").

238 *Id.* at 4.

239 *Id.*

240 *Id.*

241 SAUL GREEN, CITY OF CINCINNATI INDEPENDENT MONITOR'S EIGHTH QUARTERLY REPORT 7-9 (2005), *available at* http://www.gabsnet.com/cincinnatimonitor/Eighth_Quarterly_Report.pdf.

itor recommended that the consent decree be terminated.[242] The district court accepted that recommendation.[243]

The Washington, D.C. MOA encountered its most serious implementation problems in its initial phases, where the Monitor's initial reports found virtually no progress toward implementation.[244] A 2002 Monitor's report concluded that the department had not met any of the timetables established in the MOA.[245] Over the next few years, the underlying management problems that inhibited successful implementation were apparently resolved and implementation proceeded, albeit behind schedule.[246] The MOA was extended beyond its original five years.[247] By early 2008, after six and a half years, the Monitor concluded that the department "has substantially transformed itself for the better since the late 1990s," and recommended that the MOA be terminated.[248]

Evaluations of the implementation of consent decrees and MOAs, independent of the work of court-appointed Monitors, are important for two reasons. First, they may identify issues related to the work of the Monitors themselves. Second, they have the capacity to address issues that are beyond the scope of Monitors's responsibilities such as effect on officer morale and productivity, community attitudes, and crime rates.

To date, two Section 14141 settlements have been subject to an independent evaluation separate from the work of the court-appointed Monitor. The first involves Department of Justice funded

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242 SAUL GREEN, INDEPENDENT MONITOR'S TWENTY-FIRST REPORT, *supra* note 198, at 1("We believe that it is time for outside monitoring to end.").

243 SAUL GREEN, CITY OF CINCINNATI INDEPENDENT MONITOR'S NINTH QUARTERLY REPORT 1, 4-5 (2005), *available at* http://www.gabsnet.com/cincinnatimonitor/9th%20Report.pdf.; GREEN, INDEPENDENT MONITOR'S TWENTY-FIRST REPORT, *supra* note 198, at 1.

244 BROMWICH, SPECIAL REPORT OF THE INDEPENDENT MONITOR, *supra* note 134, at 1.

245 MICHAEL BROMWICH, QUARTERLY REPORT OF THE INDEPENDENT MONITOR FOR THE METROPOLITAN POLICE DEPARTMENT 3 (2002), *available at* http://www.policemonitor.org/020801.pdf.

246 BROMWICH, TWENTY-THIRD QUARTERLY REPORT OF THE INDEPENDENT MONITOR, *supra* note 4.

247 BROMWICH, TWENTIETH REPORT OF THE INDEPENDENT MONITOR 6 (2007), *available at* http://www.policemonitor.org/070510report.pdf (concluding that the City and the Police Department "continues to fall short in certain important areas of MOA compliance").

248 BROMWICH, TWENTY-THIRD QUARTERLY REPORT OF THE INDEPENDENT MONITOR, *supra* note 4, at 4.

evaluations of the implementation of the consent decree in Pittsburgh by the Vera Institute of Justice.[249]

The two evaluations of the Pittsburgh consent decree implementation drew favorable conclusions, finding that the police department had implemented the required reforms within the time frame established by the consent decree and that, despite some adverse consequences, the reforms had had a generally positive impact on the department.[250] The 2005 evaluation found that the Pittsburgh's EIS (known as PARS) was functioning and had "helped to create broad accountability within the Bureau."[251] The report cited, for example, the new COPSTAR system, which involves quarterly meetings of command officers where data on officer use of force and other performance indicators are reviewed and the performance of individual officers are "discussed in detail."[252] It should be noted that both the data systems used in this process and the underlying principle of reviewing officer conduct were products of the consent decree.[253] Among officers, the new accountability measures were "becoming accepted as part of the job."[254] This finding suggests that the consent decree has helped to change the organizational culture of the department. The report also found improved training of officers, particularly with regard to "relating to different groups" and "relating to persons of the opposite gender."[255]

The 2005 evaluation also found that the consent decree had some adverse effect on the attitudes of rank and file officers.[256] In an initial round of focus groups, the "overwhelming reaction" of officers was "negative" toward the consent decree reforms.[257] (An anonymous survey of officers and interviews with African American officers yielded a more nuanced picture, however.)[258] Officers resented the

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[249] DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8.

[250] *Id.* at 1 ("The Pittsburgh Bureau of Police succeeded at implementing the required reforms.").

[251] *Id.* at 8.

[252] *Id.*

[253] *Id.* at 6.

[254] *Id.*

[255] DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8, at 17.

[256] *Id.* at 16-27.

[257] *Id.* at 23.

[258] *Id.* at 26-27.

consent decree and felt they did not understand it.[259] Sixty-one percent of the officers reported that the consent decree had resulted in "major changes" in how they do their jobs, and twenty-four percent reported "minor changes."[260] Officers had mixed opinions about the nature of those changes, however. An overwhelming majority of officers, seventy-nine percent, reported that they were "less proactive" in doing police work than in the past.[261]

Officers also had a negative reaction to the greater paperwork required by the reforms, thinking supervision had become less efficient.[262] Sergeants complained that they had to spend more time at their desks performing administrative tasks and less time in the field.[263] These findings are difficult to assess. There are no professional standards regarding the optimum balance between office and administrative tasks and field tasks for sergeants. Many police accountability experts argue that having sergeants spend more time on office and administrative tasks such as reviewing use of force reports, investigating citizen complaints, and coaching officers about proper tactics is precisely the kind of change that enhances police accountability.[264]

There is no question that the principal consent decree reforms involve more paperwork. The new reporting requirements related to use of force incidents and reviewing use of force reports by supervisors are necessarily time consuming. Utilizing the EIS, which involves the analysis of officer performance data and the review of individual officers' performance, is also extremely complex and time consuming. Police accountability experts argue that these administrative demands are precisely what are required of an effective system of holding police officers accountable for their conduct.[265] From this perspective,

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[259] *Id.* at 17.

[260] *Id.* at 18.

[261] DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8, at 22.

[262] *Id.* at 19.

[263] Social scientists studying the police have, with one notable exception, seriously neglected the role of sergeants in American policing, despite the fact that virtually all experts on policing argue that sergeants are the most critical actors in day-to-day policing. *See* NATIONAL RESEARCH COUNCIL, *supra* note 16 (reviewing police research). The exception to this neglect is Robin Shepard Engel, *Supervisory Styles of Patrol Sergeants and Lieutenants*, 29 J. CRIM. JUST. 341 (2001); Robin Shepard Engel, *The Effects of Supervisory Styles on Patrol Officer Behavior*, 3 POLICE Q. 262 (2000).

[264] WALKER, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT, *supra* note 142.

[265] *Id.*

the complaints about excessive paperwork can be interpreted as a sign of a consent decree's success and not of its failure.

At the same time, officers reported they were "more sensitive to the appearance of unequal enforcement."[266] To the extent that this finding suggests that officers are now less likely to engage in conduct that is or at least appears to be racially offensive, one can conclude that the consent decree has effected a major improvement in the department.[267]

African American officers were far more receptive than white officers to the changes brought about by the consent decree.[268] In particular, they appreciated the "impersonality" of the new centralized disciplinary system, suggesting that in their view it reduced bias in disciplinary actions.[269]

The officer complaints about the consent decree causing them to be less proactive in their police work relates to a controversy surrounding consent decrees that has been labeled "de-policing."[270] Critics of consent decrees have argued that officers will reduce their level of arrests, traffic stops, or field stops of pedestrians in the belief that fewer contacts with citizens will reduce the likelihood that they will have to use force or receive a citizen complaint, and consequently, their risk of being disciplined.[271] A reduction in citizen contacts, the argument continues, reduces the crime fighting effectiveness of the

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266 DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8, at 19.

267 In 1968, the Kerner Commission studying the riots of the 1960s concluded that aggressive law enforcement tactics had an adverse effect on police-community relations. *See* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 43, at 304. The most recent empirical study of citizen experiences and attitudes toward the police concluded that citizens "who have vicariously experienced [police] misconduct express disfavor with intensified policing." RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 160 (2006).

268 DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8, at 19 ("Overall, the focus group of black officers was far more positive about the decree than the groups dominated by white officers.").

269 *Id.* at 27.

270 *Id.* at 19. There is much anecdotal discussion of the alleged phenomenon of "depolicing," but there is currently no social science research on the subject. A search of CRIMINAL JUSTICE ABSTRACTS yielded no items under this term. *See* Criminal Justice Abstracts, http://www.sagepub.com/journalsProdDesc.nav?prodId=journal201368 (last visited January 3, 2009).

271 Heather MacDonald, *Profiling Myths Smashed*, N.Y. POST, March 27, 2002, *available at* http://www.manhattan-institute.org/html/_nypost-profiling_myth.htm (arguing that, as a result of the Consent Decree, New Jersey State Troopers "started shunning discretionary law enforcement activity").

police.[272] Criminologists have not investigated this "de-policing" argument, so it remains an unsubstantiated allegation.

The first evaluation of the Pittsburgh consent decree investigated the issue of reduced productivity and determined that officers did reduce the number of traffic tickets they wrote, but that the consent decree was not the likely cause.[273] The reduction was a result of departmental rule changes regarding overtime pay that reduced the financial incentive for officers to write traffic tickets.[274] However, the evaluation did not independently investigate other aspects of police-citizen contacts, particularly street stops and frisks.

In sum, the independent evaluations of the Pittsburgh consent decree found that despite some negative reaction among police officers, the mandated reforms were successfully implemented and had a generally positive effect on the department. Subsequent events in Pittsburgh, however, raise questions about whether the reforms mandated by the consent decree continue or are likely to continue. A new mayor was elected in late 2004, and one of his first actions was to fire the police chief who was instrumental in implementing the consent decree.[275] Additionally, in the election campaign, the new mayor was supported by the police union, which had aggressively opposed the consent decree.[276] Consequently, it remains unclear that the reforms effected by the consent decree are still being fully implemented.

As noted above, the resolution of the police problems in Cincinnati resulted in two separate settlements. The MOA with the Department of Justice was virtually identical in content to the other consent decrees and MOAs discussed in this Article. The Collaborative Agreement was unique in two respects, requiring the Cincinnati Police Department to alter its policing strategies and also to contract with an

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[272] Whether aggressive "proactive" policing is in fact an effective crime fighting technique is an empirical question beyond the scope of this Article. Much depends on the manner in which the contacts are conducted. Some research indicates that citizens are able to distinguish between active crime-fighting tactics, on the one hand, and disrespectful policing, on the other. *See generally* Sara E. Stoutland, *The Multiple Dimensions of Trust in Residents/Police Relations in Boston*, 38 J. RES. CRIME & DELINQUENCY 226 (2001).

[273] DAVIS ET AL., TURNING NECESSITY INTO VIRTUE, *supra* note 8, at 41, 51, 55-58.

[274] *Id.* at 56.

[275] Robert McNeilly, Remarks at Conference on Police Pattern or Practice Litigation, Washington, D.C. (Feb. 10, 2005).

[276] Expert Opinion Memorandum from Samuel Walker, *supra* note 205, at 8-9.

independent research firm to conduct an impact evaluation of the required reforms.[277]

As of the writing of this Article, the RAND Corporation had completed three evaluations of police-community relations in Cincinnati.[278] Overall, the evaluations have been generally positive. The Third Year Evaluation in 2007 found no pattern of racial bias in officer use of force and no department-wide pattern of racial bias in traffic stops.[279] However, the evaluation noted a possible pattern of racially biased policing among a small group of officers.[280] An analysis of videotaped traffic stops found patterns of behavior that do not necessarily prove a pattern of racially biased policing but, in the words of the report, "do help explain why black Cincinnati residents perceive that it does."[281] With respect to officer satisfaction, the Second Year Evaluation found a high level of commitment to their jobs among Cincinnati police officers, but at the same time the officers reported feeling that the black community and the media unfairly criticized them.[282] Perhaps even more significant, officers were knowledgeable about community policing and generally agreed that cooperating with citizens was essential to the task of fighting crime.[283]

The three RAND evaluations, in short, were fairly positive to the extent that they did not find systematic patterns of racially biased policing or overwhelmingly negative attitudes on the part of officers and citizens. On all of these points, the state of police-community relations in Cincinnati appears to be improved over the conditions that prevailed in 2001-2002 when violent disturbances erupted in response to a series of police shootings of citizens.[284] Given the absence of pre-Collaborative Agreement data that can serve as a

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277 *See* In re Cincinnati Policing, C-1-99-317 (Collaborative Agreement).

278 Interview with Charles Reynolds, *supra* note 229.

279 RAND CORP., POLICE-COMMUNITY RELATIONS IN CINCINNATI: YEAR THREE EVALUATION REPORT 21-48 (2007), *available at* http://www.rand.org/pubs/technical_reports/2007/RAND_TR535.sum.pdf.

280 *Id.* at 33-34 (reporting that five officers had patterns of traffic stops that "differ sufficiently from the internal benchmark [*e.g.*, comparison with peer officers] to warrant further investigation").

281 *Id.* at xiv.

282 RAND CORP., POLICE-COMMUNITY RELATIONS IN CINCINNATI: YEAR TWO EVALUATION REPORT, *supra* note 226, at 69-76.

283 *Id.* at 77-85.

284 GREEN, INDEPENDENT MONITOR'S FINAL REPORT, *supra* note 192, at 55 (concluding that the Collaborative Agreement had been "one of the most successful police reform efforts ever undertaken in this Country").

meaningful base line for the RAND data, the conclusion that the improvements are a direct result of the court-imposed reforms cannot be investigated and confirmed by procedures meeting the highest standards of social science research. Nonetheless, the evidence strongly suggests that the reforms within the police department and changes in police strategy have reduced inappropriate officer behavior and introduced police tactics that are both effective and do not generate citizen discontent.

To date, there has been only one attempt to conduct an overall assessment of the impact of pattern or practice litigation. The Conference on Pattern or Practice Litigation, held in Washington, D.C. in February 2005, involved discussions among individuals directly involved in several consent decree experiences and scholars with expertise in police accountability.[285] The Report of the Conference concluded that, in general, "a pattern or practice suit can be an effective instrument for enhancing police accountability."[286] This conclusion was based heavily on the evidence from Pittsburgh, which at the time of the Conference was the only consent decree to be lifted by a federal district court.[287] The Conference heard commentary from the former Police Chief of Pittsburgh, who had supervised implementation of the consent decree, the Legal Director of the ACLU in Pittsburgh, who brought the initial suit that led to the intervention of the Department of Justice,[288] the Director of the Citizens Police Review Board, and the principal author of the two independent evaluations of the Pittsburgh consent decree experience.[289] These commentators generally agreed that the terms of the consent decree had been successfully implemented, the management of the Department had improved substantially, and citizens' rights violations had declined significantly.[290] There was a broad consensus of opinion at the Confer-

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[285] SAMUEL WALKER, REPORT ON THE CONFERENCE ON POLICE PATTERN OR PRACTICE LITIGATION: A TEN YEAR ASSESSMENT (2005) (emphasis in original), *available at* http://www.aele.org/ppl-summary.pdf.

[286] *Id.* at 2.

[287] *Id.*

[288] DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8, at 8-9. *See also* Interview with Vic Walczak, Legal Director, ACLU of Pennsylvania (Feb. 10, 2005).

[289] Robert McNeilly (former police chief), Vic Walczak (ACLU Director), Robert Davis (principal author of Pittsburgh evaluations), and Elizabeth Pittinger (Director, Citizens Police Review Board), Remarks at Conference on Police Pattern or Practice Litigation, Washington, D.C. (Feb. 10-11, 2005).

[290] McNeilly, *supra* note 275.

ence that the leadership of the then-police chief was the most important factor contributing to the success in Pittsburgh, despite his recent termination.[291] The two evaluations of the Pittsburgh experience reached a similar conclusion about the role of the chief.[292] At the Conference, the former police chief stated that many if not most of the consent decree reforms had been part of his agenda when he first became chief, and that he enjoyed the full support of the then-mayor and other city agencies in implementing the decree.[293] He added that he had faced determined opposition from the local police union, which at one point gave him a formal vote of "no confidence."[294]

The critical importance of leadership in implementing a consent decree or MOA is supported by the experiences in New Jersey and Los Angeles. When the New Jersey State Police neared the successful implementation of its consent decree in 2006, there was widespread agreement among leaders in the agency that it had dragged its feet for the first two years and that progress toward implementation only began with the arrival of a new superintendent.[295] Some observers, meanwhile, argued that the LAPD began making significant progress toward implementation of the 2002 consent decree after the arrival of Chief William Bratton in 2002.[296]

A second factor related to successful implementation identified at the Conference involves the existence of a meaningful implementation plan. Consent decrees and MOAs all involve a large number of significant reforms that must be implemented simultaneously, many of which are major challenges in and of themselves. Police experts are generally agreed that implementing any single major reform poses a significant management challenge. This has proven to be the case with EIS, use of force policies, and corruption control programs. Conference participant Joshua Ederheimer, who was responsible for implementing the MOA in Washington, D.C., stressed the need for a

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291 WALKER, REPORT ON THE CONFERENCE ON POLICE PATTERN OR PRACTICE LITIGATION, *supra* note 285.

292 DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8, at Executive Summary.

293 McNeilly, *supra* note 275.

294 *Id.*

295 Expert Opinion Memorandum from Samuel Walker, *supra* note 205.

296 The LADP's EIS, known as TEAMS II, was not implemented for a full ten years prior to Bratton's arrival as Chief. *See* WALKER, THE NEW WORLD, *supra* note 3, at 130-31. The system finally became operational in early 2007. Walker, site visit to the Los Angeles Police Department, Mar. 28, 2008.

comprehensive and detailed implementation plan that includes timetables for the completion of specific tasks and identifying individuals responsible for each task.[297] The same presenter also emphasized the importance of constant communication among all the stakeholders.[298] Particularly important in that process, he emphasized, is notifying stakeholders of problems that arise, discussing the acceptability of particular approaches to various tasks, and alerting others to the possibility that a deadline might be missed.[299]

A third important issue identified at the Conference involves the challenge of changing the culture of a law enforcement organization. Conference participants stressed the point that a culture of accountability requires more than simply the introduction of formal policies and procedures such as a new policy on officer use of force or an EIS.[300] If formal policies and procedures are to be effective, the argument continues, there must be a shift away from the attitudes and practices that tolerate officer misconduct and the development of a new culture that recognizes the need to reduce it and understands how strict use of force policies, EIS, and other reforms are necessary tools for achieving that result.[301] The independent evaluations of the Pittsburgh consent decree highlighted the importance of the rank and file officer culture.[302] The evaluations noted the officers' resentment of the consent decree and their strong feelings that it had caused them to reduce their level of proactive police work and increase the amount of required paperwork.[303]

There is some evidence to suggest that consent decree and MOA reforms can have a positive impact on changing the culture of a law enforcement agency. The Vera evaluation of the Pittsburgh experience concluded that the EIS had "helped to create broad accountability within the Bureau," and that the new accountability measures were "becoming accepted as part of the job."[304] Additionally, officers

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297 Joshua Ederheimer, Comments at the Conference on Pattern or Practice Litigation, Washington, D.C. (Feb. 10, 2005).

298 *Id.*

299 *Id.*

300 Robert Davis & Jack Greene, Comments at the Conference on Pattern or Practice Litigation, Washington, D.C. (Feb. 10, 2005).

301 *Id.*

302 DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8, at Executive Summary.

303 *Id.* at 19.

304 *Id.* at 8.

reported that they were more sensitive to the "appearance of unequal enforcement" in doing police work, especially traffic stops.[305] This heightened sensitivity is presumably a result of the improved training of officers that the consent decree mandated, particularly with regard to "relating to different groups" and "relating to persons of the opposite gender."[306] In New Jersey, meanwhile, the final report of the Monitor reached an even more positive conclusion, arguing that "[t]he New Jersey State Police appear to have reached a watershed moment during the last two reporting periods. Ample evidence exists to suggest that the agency has become self-monitoring and self-correcting to a degree not often observed in American law enforcement."[307] In short, the reports of various monitors suggest that Section 14141 settlements can have a significant and positive effect in changing the organizational culture of law enforcement agencies.[308]

C. Measuring the Impact of Court-Ordered Reforms

Measuring the impact of consent decrees and MOAs on routine policing poses a number of very difficult methodological problems. In theory, the research questions are fairly straightforward. Are there fewer incidents of use of excessive force following the reforms compared with beforehand? Are there fewer incidents of race discrimination in arrests and traffic stops (racial profiling)? Are there fewer citizen complaints? Do citizens have a more positive opinion of the police department? Are there any unintended adverse consequences arising from aspects of the consent decree or MOA? These might include lower police officer morale, less proactive police work ("depolicing"), and reduced crime-fighting effectiveness. It is also entirely possible that consent decrees and MOAs have no measurable impact on policing whatsoever.

Investigating these questions, however, encounters a number of serious obstacles. The central problem, as noted above, is the absence of valid and reliable data for the time period before implementation of the consent decree and MOA reforms. On many of the important questions, there are no data whatsoever (*e.g.*, public attitudes about the police). On others, the available data are not usable for purposes

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305 *Id.* at 19.

306 *Id.* at 11.

307 PUBLIC MANAGEMENT RESOURCES, *supra* note 5, at iv.

308 *Id.* at v.

of research. Data on use of force incidents, for example, are often non-existent, incomplete, or erroneous. The absence of good data is, of course, one symptom of the management failures that brought about Section 14141 litigation in the first place. The evaluation of the Pittsburgh consent decree noted that "[b]ecause record-keeping was so bad in Pittsburgh before the decree, it is difficult to assess the effectiveness of reducing misconduct through changing training programs and accountability systems."[309] For all practical purposes, the Pittsburgh police department had no meaningful records on officer use of force prior to the consent decree.[310] In Washington, D.C., the Monitor found that even after the MOA had been in effect for a few years, use of force reports were not being filed by officers in all low-level force incidents and in many cases lacked information in many data fields. In short, the data would not be adequate for social science evaluation.[311]

Similarly, in most jurisdictions there are no surveys of citizen attitudes toward the police for the pre-consent decree period, and there are usually no surveys of officer morale. Citizen complaint data are problematic because unprofessional departments often have a practice of discouraging complaints.[312] The court-ordered reforms of the complaint process are designed to make the process more customer-friendly. They result in greater publicity, requiring officers to carry information about the process and provide it to citizens upon request, and policies forbidding officers from discouraging complaints.[313] The intended effect, and very likely the actual effect, is to increase the number of complaints filed.[314] Thus the pre-consent decree and post-consent decree data are not comparable.[315]

The net result may be that it is impossible to measure the impact of consent decrees and MOAs on policing in a manner that meets the minimum standards of social science research. Consequently, it is impossible to fully answer the important policy questions about

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309 DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8, at 48.

310 *Id.*

311 BROMWICH, TWENTY-THIRD QUARTERLY REPORT OF THE INDEPENDENT MONITOR, *supra* note 4, at 27-30.

312 WALKER, POLICE ACCOUNTABILITY, *supra* note 105, at 121-37.

313 *See, e.g.*, United States v. New Jersey, No. 99-5970 at ¶¶ 58-60 (Consent Decree).

314 WALKER, POLICE ACCOUNTABILITY, *supra* note 103, at 122-23.

315 *Id.* at 119-45.

whether there has been a reduction in police use of force and increase in citizen satisfaction.

To date, the three RAND evaluations in Cincinnati represent the only case of independent (that is, independent of the work of the Independent Monitor) assessment of the impact of a consent decree or MOA on police work and its impact on both citizens and officers.[316] As discussed above, the RAND evaluations have been generally positive, finding no clear patterns of racial bias in policing, and citizen and officer attitudes that exhibit some conflicts but are at least not at the crisis stage.[317]

D. The Problem of Sustaining Reform

The second evaluation of the Pittsburgh consent decree experience posed the question: "Can Federal Litigation Bring Lasting Improvement in Local Policing?"[318] The evaluation itself answered the question affirmatively.[319] Nonetheless, important questions remain about the continuity of court-ordered reforms once a consent decree or MOA is terminated. The Pittsburgh evaluation came very soon after termination of the consent decree and did not therefore address possible long-term changes. Any substantial evidence that mandated reforms erode or possibly disappear after termination would require redesigning the pattern or practice litigation strategy to include mechanisms for ensuring continuity. As discussed below, the state of New Jersey is considering some form of permanent oversight of the New Jersey State Police based on the auditor model of citizen oversight following the proposed termination of the consent decree.[320]

The problem of sustaining reform has been a general problem in the history of policing and is not limited to pattern or practice litigation. There are many notable examples of highly publicized reforms that either eroded or collapsed with time. Following a major corruption scandal in the late 1960s, the New York City Police Department instituted a set of major corruption control procedures.[321] Yet, when a

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316 RAND CORP., YEAR THREE EVALUATION REPORT, *supra* note 226.

317 *Id.*

318 DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8.

319 *Id.*

320 N.J. ADVISORY COMM. ON POLICE STANDARDS, *supra* note 186.

321 *See* THE KNAPP COMM'N, THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION (1970). The scandal is generally referred to as the "Serpico" scandal, which is a popular literary

subsequent corruption scandal erupted in the early 1980s, an investigation found that the previous reforms had collapsed and were inoperable.[322] The 1984 Mollen Commission report concluded that accountability mechanisms established in the 1970s collapsed because "no institutional mechanism was ever put in place to enforce it."[323]

Questions have been raised about the continuity of many community policing reforms over the past 25 years, and whether promising innovations continue beyond the life of grant funding or the tenure of the police chief or mayor who sponsored them.[324] In his study of problem-oriented policing in one department, Trent Ikerd found that the issue of sustaining reform has received almost no attention from police scholars.[325]

The second evaluation of the Pittsburgh consent decree addressed this issue, posing it as the question: "Can local officials maintain these reforms after the federal government and its monitor withdraw?"[326] The evaluation answered the question affirmatively, finding that the reforms were still in place a year after the end of the consent decree.[327] This conclusion must be regarded with some caution, however; the evaluation was done in 2003, only one year after the end of the consent decree.[328] Common sense suggests that the decay of organizational policies and procedures are not likely to occur overnight, but slowly over a period of time.[329] Thus, a follow up evaluation is necessary at perhaps a five-year interval.

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subject. *See, e.g.*, LAWRENCE W. SHERMAN, SCANDAL AND REFORM: CONTROLLING POLICE CORRUPTION (1978).

322 MILTON MOLLEN, THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT (1984) [hereinafter MOLLEN COMMISSION], *available at* http://parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf.

323 *Id.* at 175.

324 *See generally id.*

325 Ikerd, *supra* note 199. Ikerd developed a three-part typology for assessing whether a significant innovation had become institutionalized in a police department. Members throughout a department have to understand the nature of the innovation ("knowledge"), incorporate into their day-to-day work ("behavior"), and have a positive attitude toward it ("attitudes").

326 DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT, *supra* note 8, at 1.

327 *Id.* at 28.

328 *See* MOLLEN COMMISSION, *supra* note 320.

329 *See id.* and accompanying text (discussing an example of the collapse of the corruption control mechanisms in the New York City Police Department).

The Pittsburgh evaluation also did not take into account subsequent events that threatened the continuity of the consent decree reforms.[330] First, the City of Pittsburgh experienced a serious budget crisis that, among other things, caused a reduction in the number of officers in the department from 1,175 to 915, and the impact of this change is unknown.[331] Even more significantly, the new mayor of Pittsburgh immediately fired the police chief who has been credited with successfully implementing the consent decree.[332] Moreover, the police union, which had opposed the consent decree, supported that mayor in his election campaign.[333]

The State of New Jersey has given serious consideration to the question of what formal arrangements, if any, should be made following the termination of a consent decree or MOA to ensure continuity of the court-ordered reforms.[334] To that end, the Governor established the New Jersey Advisory Committee on Police Standards.[335] The Advisory Committee solicited stakeholders' and other experts' views, held public hearings, and issued a report on December 7, 2007.[336] The Advisory Committee concluded that continued oversight of the New Jersey State Police was "The Critical Component of Sustainability."[337] The Advisory Committee Report recommended a number of activities by the State Police itself, the Attorney General, the Office of State Police Affairs, and the State Comptroller to ensure continuity of the court-ordered reforms.[338] It also recommended that the Attorney General of New Jersey maintain the existing Office of State Police Affairs, located in the Office of the Attorney General's, for the purpose of auditing the New Jersey State Police ("NJSP").[339] Auditing activities should cover a number of NJSP operations, including training programs, Office of Professional Standards ("OPS") investigations, complaints against NJSP personnel, and standardiza-

330 *See id.*

331 McNeilly, *supra* note 275.

332 McNeilly, *supra* note 275.

333 *Id.*

334 N.J. ADVISORY COMM. ON POLICE STANDARDS, *supra* note 186.

335 *Id.* at 89-105.

336 *Id.* One of the co-authors of this article, Samuel Walker, was retained as an expert by the Advisory Committee and delivered an Expert Opinion. *See* Expert Opinion Memorandum from Samuel Walker, *supra* note 205.

337 N.J. ADVISORY COMM. ON POLICE STANDARDS, *supra* note 186, at 89.

338 *Id.* at 1-5.

339 *Id.* at 2.

tion of disciplinary actions. The Office of the State Comptroller should "designate an auditor" to audit traffic stops, post-stop enforcement activities, internal affairs and discipline, and other activities reviewed by the Monitor.[340] At the time this Article was written, the Governor of New Jersey had not acted on the recommendations of the Advisory Committee.

The NJSP proposed that it monitor its own consent decree reforms, and it offered a plan under which the agency would contract with a local university to perform many of the functions performed by the Monitor.[341] The question of the continuity of police reforms mandated under Section 14141 settlements remains an important unresolved issue. There are no independent evaluations of the long-term effect of the reforms in question, extending into the post-termination period, to permit an evidence-based judgment.

E. Summary: The Impact of Consent Decrees and MOAs

The available evidence indicates that, despite some problems with implementation in several cases, pattern or practice litigation under Section 14141 of the Violent Crime Control Act can be an effective instrument for police reform. The reforms required by consent decrees and MOAs under Section 14141 litigation appear to enhance police accountability and reduce the violations of citizens' rights, thereby fulfilling the intent of the pattern or practice statute. Required reforms have actually been implemented, and several independent court-appointed monitors believe that the reforms have changed the organizational culture of the agencies involved. The Monitor for the Washington, D.C. police department, for example, concluded that after six and a half years the department "has substantially transformed itself for the better since the late 1990s."[342] As discussed in the previous sections, similar achievements have been reported in Cincinnati and with the New Jersey State Police. Given the long history of police misconduct, such organizational transformations represent a development of major importance.

The success of pattern or practice litigation in the examples reviewed here leads to consideration of means of expanding this strat-

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[340] *Id.* at 4.

[341] *Id.* at 99-102.

[342] BROMWICH, TWENTY-THIRD QUARTERLY REPORT OF THE INDEPENDENT MONITOR, *supra* note 4, at 4 (internal footnotes omitted).

egy for police reform. To that end, the following section proposes a model state pattern or practice statute that would authorize state attorneys general to bring such suits against law enforcement agencies in their respective jurisdictions.

V. A MODEL STATE PATTERN OR PRACTICE STATUTE

Given the evidence showing the effectiveness of pattern or practice litigation, police accountability experts have considered different strategies for extending and strengthening this approach to police accountability. This Part offers a concrete proposal to that end: state pattern or practice statutes modeled after Section 14141. This Part discusses the legal, institutional, and practical implications of this approach. Section B discusses the historical origins and powers of the office of the state attorney general, as well as the modern role of state attorneys general in America. It will show that the proposed pattern or practice statute is an extension of the current trend towards more expansive state attorney general power. Section C considers the rationale for the proposed statute and discusses the structures of the federal and state executive branch offices, the resources available to state attorneys general, and the responsiveness of state attorneys general to the problems of state citizens. Finally, potential counterarguments to the proposed statute, based on federalism and separation of powers, are addressed.

A. The Model State Pattern or Practice Statute

The proposed model state pattern or practice statute is similar to its federal counterpart, Section 14141. The proposed statute reads:

> (a) No state governmental authority, or agent of a state governmental authority, or person acting on behalf of a state governmental authority, shall engage in a pattern or practice of conduct by state law enforcement officers that deprives any person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or by the Constitution or laws of state.
>
> (b) The Attorney General may bring a civil action in the name of the people to obtain appropriate equitable and declaratory relief to eliminate the pattern or practice of conduct specified in subdivision (a),

> whenever the Attorney General has reasonable cause to believe that a violation of subdivision (a) has occurred.[343]

For the reasons discussed below, each state legislature should adopt this statute through its regular legislative process, thereby empowering their respective attorneys general to bring pattern or practice lawsuits against state law enforcement agencies.

The proposed statute gives state attorneys general broad power to initiate civil actions against state law enforcement agencies to stop a pattern or practice of civil rights violations against state citizens. The statute allows state attorneys general to bring actions against state agencies for violations of state or federal law. State attorneys general cannot, however, bring actions against federal law enforcement agencies under the proposed statute. This limitation helps to alleviate the federalism and separation of powers concerns discussed at the end of this section. Overall, the model statute gives broad power to state attorneys general to take legal action to remedy a pattern or practice of civil rights violations by state law enforcement agencies, increasing the number of such lawsuits that may be brought throughout the country.

B. The Authority of State Attorneys General

1. Sources of Authority

The model statute proposed in this Article gives state attorneys general a new source of power to bring civil rights enforcement lawsuits. This new authority is an extension of the modern trend towards increased state attorney general authority and independence. To understand this development, it is necessary to consider the history of the office of the state attorney general, as well as the common law powers of state attorneys general.

The historical origins of the office of the state attorney general precede the founding of the United States.[344] The office originated in England and was subsequently instituted in each of the thirteen origi-

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[343] This is a slightly modified version of the state of California's pattern or practice statute. *See* CAL. CIV. CODE § 52.3 (2008).

[344] *See, e.g.*, Shevin v. Exxon Corp., 526 F.2d 266, 268 (5th Cir. 1976) ("The office of attorney general is older than the United States and older than the State of Florida.") (internal footnotes omitted).

nal American colonies.[345] Thus, state attorneys general's offices existed well before the federal Attorney General. These state offices continue to play a significantly different role from their federal counterpart,[346] making the state attorney general an anomalous position in American government.[347]

The Office of the United States Attorney General, as a component of the executive branch of the federal government, is subject to the appointment and control of the President of the United States.[348] State attorneys general, however, were originally part of the judicial branch of government.[349] This distinction originates from the role of local government attorneys in England, who were designated to represent the Crown in local courts.[350] Although most state constitutions eventually shifted the office of the attorney general to the executive branch,[351] important differences between the federal and state attorneys general's offices remained.

For example, most states rejected the "unitary executive" structure of the federal government. Rather than giving the state's highest executive officer, the governor, the power to control the state attorney general, states divided the executive branch. As a result of this divided executive structure, the vast majority of states provide for the office of the attorney general in their state constitution as an independent executive officer.[352] The implications of the states' divided executive structure are discussed in the second part of this Section.

Similarly, another important difference between the federal and state attorneys general's offices is that most state attorneys general

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345 William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2450 (2006) (internal footnotes omitted).

346 Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. OF POL. 525, 527 (1994).

347 *Id.* at 528.

348 Marshall, *supra* note 345, at 2451.

349 Clayton, *supra* note 346, at 529.

350 *Id.* at 526-27.

351 *Id.* at 529.

352 Justin Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 371 (2005) (internal footnotes omitted). Today, 44 states provide for the state attorney general in the state constitution, and the remaining six states do so by state statute. *See* Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495, 508 (2006) (internal footnotes omitted).

are elected by the people, rather than appointed by the governor.[353] Public elections give state attorneys general greater independence than their federal counterparts who are appointed by the President.[354] Indeed, at the state level, "[t]he office's election and tenure provides the attorney general autonomy to represent whatever positions he or she believes are in the public interest or are required by law, regardless of the preferences of the state's governor or legislature."[355] Thus, state attorneys general are held accountable by the ballot box, and not by another elected official. Despite their independence, however, the traditional role of state attorneys general is to act as the state's chief legal officer and to defend state entities and officers.[356]

Most state attorneys general's legal authority comes from state constitutions or statutes. In addition to these primary sources of authority, state attorneys general also have common law powers.[357] State attorneys general's common law powers are firmly established[358] and can serve as legal authority to bring lawsuits even when doing so is not explicitly granted by statute.[359] Moreover, because common law powers are based on the responsibility of the attorney general to protect the public, common law powers give a state attorney general "wide discretion in making the determination as to the public interest."[360]

There is considerable overlap among the sources of state attorneys general's power.[361] For example, many states that provide for attorneys general through their constitutions state that the office has

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353 Clayton, *supra* note 346, at 530.

354 *Id.*

355 *Id.*

356 PEGGY A. LAUTENSCHLAGER & DANIEL P. BACH, THE CITIZEN'S ADVOCATE: A PERSPECTIVE ON THE HISTORICAL AND CONTINUING ROLE OF STATE ATTORNEYS GENERAL 2-3 (2007), *available at* http://www.acslaw.org/files/Attorney%20General%20Powers.pdf.

357 *See id. See also* NAT'L ASS'N OF ATTORNEYS GENERAL, COMMON LAW POWERS OF STATE ATTORNEYS GENERAL 19-21(1980) [hereinafter NAAG].

358 Shevin v. Exxon Corp., 526 F.2d 266, 268 (5th Cir. 1976) ("[Attorneys generals] duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires.") (internal citations omitted).

359 NAT'L ASS'N OF ATTORNEYS GENERAL, THE OFFICE OF ATTORNEY GENERAL 32 (1971).

360 *Shevin*, 526 F.2d at 268-69.

361 STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 29-35 (Lynne M. Ross, ed. 1990) [hereinafter POWERS AND RESPONSIBILITIES].

powers as "prescribed by law."[362] Generally, this means that state attorneys general have the full breadth of common law powers.[363] The state legislature may, however, restrict state attorney general power[364] or withdraw common law authority vested in the attorney general.[365] Thus, most state attorneys general have a combination of common law and statutory powers.[366]

The common law powers of the state attorney general derive from the duty of the attorney general to represent the people of the states.[367] Common law authority includes the power to institute civil suits, challenge the constitutionality of legislative or administrative actions, intervene in rate cases, proceed against public officers, revoke corporate charters, and more.[368] State attorneys general have also been increasingly active in civil rights enforcement cases.[369] Accordingly, states often give attorneys general the power to bring civil lawsuits and suits "to remedy a pattern or practice of discriminatory conduct often are authorized."[370]

The role of the state attorney general as defender of the public interest is particularly clear in the case of civil rights lawsuits.[371] Indeed, the duty to represent the interests of the public often outweighs an attorney general's obligation to defend a state agency or officer.[372] Pattern or practice suits against state law enforcement agencies can be viewed as an extension of the common law authority to bring actions in the public interest. The statute proposed here gives that power the imprimatur of the legislature and, accordingly, serves to strengthen attorneys general's authority to bring such actions.

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362 *Id.* at 31.

363 *Id.*

364 *Id.* at 32.

365 Scott Matheson, *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 4 (1993).

366 NAAG, *supra* note 357, at 24.

367 *Id.* at 21.

368 *See* NAAG, *supra* note 359, at 43-57.

369 POWERS AND RESPONSIBILITIES, *supra* note 361, at 178-82.

370 *Id.* at 179.

371 *See id.* at 182.

372 *See* NAAG, *supra* note 359, at 21-22.

2. The Modern Trend of Expansive State Attorney General Authority

Enabling attorneys general to bring pattern or practice lawsuits against state law enforcement agencies is also in accord with the modern trend of increased authority for state attorneys general. Today, state attorneys general "more and more frequently employ common-law and statutory powers, both state and federal, to achieve public policy ends they deem desirable."[373] Through these powers, state attorneys general have been able to influence policy changes at the national level.[374]

For example, in response to former New York Attorney General Eliot Spitzer's work, much has been written about the ability of state attorneys general to regulate financial institutions.[375] Scholars have also noted the increasingly important role of state attorneys general in areas such as enforcement of state wage and hour laws,[376] protecting immigrant communities,[377] bringing antitrust actions,[378] and protecting the environment.[379] This expansion of state attorney general power illustrates that attorneys general have moved beyond their "traditional" roles of leading state litigation, acting as the state's chief legal officer, and giving advisory legal opinions.[380]

In some cases, state attorneys general have collaborated with each other to have a stronger national influence.[381] For example, state attorneys general played a major role in obtaining a national settlement against tobacco companies, which provided substantial funds for the states.[382] The 1998 tobacco litigation settlement, known as the "Master Settlement Agreement," resulted from a series of consent decrees in state courts where state attorneys general had waged a

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373 Robert J. Gaglione, *The Modern Role of State Attorneys General: A Renewed Activism* 1 (2007), *available at* http://www.fed-soc.org/doclib/20070322_ModernRoleofStateAGs.pdf.

374 LAUTENSCHLAGER & BACH, *supra* note 356, at 3.

375 *Id.* at 8.

376 *See generally* Romer-Friedman, *supra* note 352.

377 *See generally* Addison Thompson, *The Office of the State Attorney General and the Protection of Immigrant Communities: Exploring an Expanded Role*, 38 COLUM. HUM. RTS. L. REV. 387 (2007).

378 *See generally* Michael Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99 (2005).

379 LAUTENSCHLAGER & BACH, *supra* note 356, at 6.

380 *Id.* at 2-3.

381 Gaglione, *supra* note 373, at 6.

382 Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CAL. L. REV. 885, 898-904 (2007).

coordinated legal battle against the tobacco companies.[383] The actions of attorneys general in each of their respective states forced a national settlement that did not require the involvement of the federal law enforcement agencies. The tobacco litigation case is an example of state attorneys general's ability to "coordinate their litigation positions,"[384] making the collective group of state attorneys general an influential national body.

State attorneys general have also contributed to reform at the national level by working alongside federal officials. Environmental protection, for example, is an area in which the federal government has worked alongside state attorneys general to implement federal mandates. For example, the U.S. Environmental Protection Agency ("EPA") provides indirect funding to state attorneys general's offices and oversees their enforcement of federal programs.[385] The EPA also oversees environmental suits by state attorneys general and files additional suits when it feels necessary to accomplish the federal government's mandate.[386] Thus, state attorneys general can play a meaningful role in national legal enforcement programs.

These examples show that state attorneys general can have a significant national influence by acting collectively to achieve results that are important for a large group of states, as in the tobacco litigation cases, and also when they serve to complement federal enforcement efforts, as in the environmental protection cases. Accordingly, allowing state attorneys general to enforce pattern or practice laws would provide a strong additional enforcement mechanism to complement the federal government's Section 14141 enforcement efforts.

C. Rationale for the State Pattern or Practice Statute

As discussed above, providing state attorneys general the power to bring pattern or practice suits on state attorneys general is an extension of currently recognized statutory and common law attorney general power. However, there are additional reasons that make the state attorney general an appropriate officer to bring such actions. This Section explores those additional arguments, focusing primarily on the distinction between the unitary and divided executive govern-

383 *Id.* at 900.

384 *Id.* at 903.

385 *See* POWERS AND RESPONSIBILITIES, *supra* note 361, at 123.

386 *Id.* at 124 (discussing state attorneys generals' role in bringing environmental enforcement actions).

ment structures, but also discussing the resources available for such actions at the local level. This section also considers some of the counterarguments against providing state attorneys general pattern or practice enforcement authority.

One of the primary arguments to adopt a state pattern or practice statute is the difference in structure between the federal and state executive branches of the government. As discussed above, the structure of the federal government is different than the structure of most state governments with respect to the independence of the attorney general. Accordingly, state attorneys general have a greater degree of independence from the state's highest executive officer, the governor, than the federal attorney general has from the President.

As a result of the federal government's unitary executive model,[387] the President is "politically accountable for the executive branch," and all executive branch officials must answer to him and act to fulfill his policy mandates.[388] There are some important advantages to the federal structure. For instance, government is more efficient under the unitary executive model.[389] At the state level, where the attorney general is often independent of the governor, "deadlock" can occur if the attorney general and the governor do not agree on a course of action.[390] Deadlock is less likely to occur at the national level, however, because the President controls the agenda of the executive branch, including the actions of the Attorney General.

An additional benefit to the federal structure is that elected attorneys general (as is the case in many states) are more susceptible to political influences than appointed attorneys general.[391] Thus, "the risk that an attorney general will compromise professionalism and bend to political pressure in rendering opinions and carrying out law enforcement responsibilities is greater with a popularly elected and politically ambitious attorney general who has gubernatorial aspirations."[392] The U.S. Attorney General does not have a similar conflict of interest because he is not an elected official, although he still must consider the political implications of his actions for the President.

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387 Matheson, *supra* note 365, at 5.

388 *Id.*

389 *Id.* at 7.

390 *Id.*

391 *Id.* at 23.

392 *Id.*

Unlike the federal government, the structure of the state government executive branch is based on a divided executive structure.[393] This means that a state attorney general is politically independent from the state's highest executive officer and, therefore, has more autonomy in his actions. This means that state attorneys general can bring pattern or practice suits against state executive law enforcement agencies with less fear of reprisal from the executive officer. Such lawsuits, however, present complex "client" conflict of interest issues even within states' divided executive structure.

In general, a state attorney general has the obligation to defend state entities when they are sued for unconstitutional actions.[394] A conflict of interest arises, therefore, when an attorney general brings a pattern or practice suit against an agency that he is required to defend. In such circumstances, the attorney general has the obligation to serve and protect the public from police abuse, but also has the obligation to defend the state and its agencies. In the case of pattern or practice prosecutions, therefore, state attorneys general confront a conflict between their duty to represent state agencies and their obligation to represent the public interest.

Courts have frequently allowed attorney general suits against state agencies to go forward if the policy of the agency is illegal.[395] The primary reason for allowing such suits is that "[t]he Attorney General represents the state as his or her client, not simply the view of one agency or officer of the larger state entity."[396] Not all courts agree on the rationale for allowing attorneys general to sue state agencies, however. The cases discussed below explore the various issues raised by allowing state attorneys general to bring lawsuits against state agencies. Although some of these cases involve state officers, the conflicts faced by state attorneys general in those cases present similar issues to those created by lawsuits against state agencies.

In *People ex rel. Salazar v. Davidson*, the Supreme Court of Colorado considered whether it was permissible for the Colorado Attorney General to sue the Colorado Secretary of State concerning a congressional redistricting dispute.[397] The Colorado Secretary of State and

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393 Davids, *supra* note 352, at 369.

394 POWERS AND RESPONSIBILITIES, *supra* note 361, at 45.

395 *See* Matheson, *supra* note 365, at 24 (noting, however, that there is some difficulty in determining whether an agency decision is "legal").

396 POWERS AND RESPONSIBILITIES, *supra* note 361, at 47.

397 *See* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003).

the Colorado General Assembly took the position that the state constitution gave unlimited power to the people to redraw congressional voting districts.[398] By contrast, the Attorney General said that the timeframe and frequency with which districts could be changed was much more limited.[399] The Attorney General filed suit against the Colorado Secretary of State, asking the court to issue injunctive relief to prohibit the Secretary of State from implementing the redistricting plan and to issue a mandamus to order the Secretary of State to reinstate the prior redistricting plan.[400]

The Colorado Supreme Court in *Salazar* found that the Attorney General had the authority to sue the Secretary of State.[401] The court emphasized the role of the Attorney General in bringing suits to "protect the rights of the public," and held that the suit was proper pursuant to the common law powers of the Attorney General.[402] The court also noted that there was no ethical conflict concerning client loyalty.[403] In reaching this conclusion, the court emphasized the fact that the Secretary of State was sued in her official capacity and that "the Attorney General must consider the broader institutional concerns of the state even though these concerns are not shared by an individual agency or officer."[404]

Similarly, the Supreme Court of South Carolina determined that the state attorney general could sue the South Carolina Governor in *Condon v. Hodges*.[405] The case involved a state appropriations issue concerning college and university funding.[406] The Attorney General sued the Governor because the Governor had reduced state educational funds as a means of balancing the budget.[407] In upholding the the Attorney General's suit against the Governor, the court noted that the Attorney General has a "dual role" in the state.[408] Specifically, the Attorney General is "an attorney for the Governor and he is an attorney for vindicating wrongs against the collective citizens of the

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398 *Id.* at 1225.
399 *Id.*
400 *Id.* at 1227.
401 *Id.* at 1231.
402 *Id.* at 1229-30 (internal citation omitted).
403 Salazar v. Davidson, 79 P.3d 1221, 1230-31 (Colo. 2003).
404 *Id.*
405 562 S.E.2d 623, 628 (S.C. 2002).
406 *Id.* at 626.
407 *Id.* at 629.
408 *Id.* at 627.

state."[409] Thus, the court found that "[a]llowing the Attorney General to bring an action against the Governor when there is the possibility the Governor is acting illegally is consistent with the duties of this dual role."[410]

The decisions in *Condon*, *Salazar*, and other state cases[411] show that suits by state attorneys general against state entities are permissible and do not necessarily conflict with state attorneys general's duty to represent the government and its officials. The courts in these cases placed particular emphasis on the attorneys general's role in protecting the public interest,[412] noting that this trumps conflict of interest problems that would otherwise cause concern. Some cases, however, have reached the opposite conclusion.

For example, the court in *Hill v. Texas Water Quality Board*, found that the Texas Attorney General did not have the authority to bring an action against the State Water Quality Board.[413] In *Hill*, the court rejected the Attorney General's contention that, in addition to his statutory and constitutional powers, he had the power to bring other actions pursuant to his common law powers when the public interest required.[414] Instead, the court found that allowing such an action against a state agency would "give rise to an intolerable situation" because the Attorney General or one of his inferior officers is the only attorney who can represent state agencies, and, thus, suing a state agency would create a conflict of interest.[415]

Professor William Marshall examined the cases discussed above, as well as other relevant cases, and concluded that they illustrate important principals about the ethical and structural limitations of state attorneys general's conduct.[416] First, preventing a state attorney general from bringing suit against another executive branch entity would undermine the purpose of the divided executive structure, which is meant to provide the attorney general with independence so that the attorney general can play an effective role in checking the

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409 *Id.*

410 *Id.*

411 *See, e.g.*, Hancock v. Paxton, 516 S.W.2d 865 (Ky. Ct. App. 1974).

412 *See* Salazar v. Davidson, 79 P.3d 1221, 1230-31 (Colo. 2003); Condon v. Hodges, 562 S.E.2d 623, 627 (S.C. 2002).

413 568 S.W.2d 738 (Tex. Civ. App. 1978).

414 *Id.* at 740.

415 *See id.* at 741.

416 *See* Marshall, *supra* note 345, at 2461-67.

power of the governor.[417] Second, Marshall notes that, from a structural perspective, "there is no better mechanism to achieve [intrabranch checks and balances] than dividing executive power between a chief executive and a chief legal officer."[418] Marshall's conclusion indicates that allowing pattern or practice suits, which essentially force attorneys general to bring a lawsuit against their government "clients," does not create an impermissible ethical conflict.[419] Rather, allowing such suits furthers the goal of the divided executive structure.

The practical result of these conflicts of interest is that sometimes the state attorney general defends a state agency at the same time he is bringing suit against that agency. For example, the Supreme Court of Connecticut, in *Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission*, found that the role of the state attorney general is unique because "[t]he Attorney General's responsibility is not limited to serving or representing the particular interests of State agencies, including opposing State agencies, but embraces serving or representing the broader interests of the State."[420] Accordingly, regular conflict of interest problems, which arise when a lawyer is defending parties on both sides of a dispute, apply to a lesser extent to state attorneys general.[421]

However, not all courts take such a flexible approach to the attorney general's simultaneous representation of state entities and officials. For instance, the Supreme Court of California in *Deukmejian v. Brown* found that the state attorney general's authority to act in the public interest did not allow him to withdraw from representing a state agency and then to assume a position adverse to that same agency.[422] The court also found that, should a conflict develop as to what is in the public interest between the governor and the attorney general, the governor's opinion outweighs that of the attorney general.[423] In these states, courts may find the proposed pattern or prac-

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417 *Id.*

418 *Id.* at 2466.

419 *Id.* at 2467-68.

420 Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n, 387 A.2d 533, 537 (Conn. 1978).

421 *Cf. id.* (explaining that the Attorney General's dual role as a representative of the people and as an executive officer cannot be overlooked in considering professional responsibility obligations).

422 172 Cal. Rptr. 478, 481 (1981).

423 *Id.* at 481-82.

tice statute in this Article problematic because it forces a conflict of interest between the attorney general and executive agencies. In such circumstances, the attorney general may be prevented from bringing a pattern or practice suit.

The case law discussed above shows that, in many cases, state attorneys general have the ability to bring civil rights actions against state agencies without violating conflict of interest rules. This is due to the state attorneys general's broad common law power to defend the public interest and his authority to simultaneously defend the public interest and take action against a state agency at the same time.

In addition to the advantage that state attorneys general have over the federal attorney general in bringing pattern or practice suits because of the divided executive structure of state governments, state attorneys general offices also provide more resources and a greater degree of accountability for such suits. The resources available to state attorneys general have increased dramatically over recent decades.[424] Attorneys general have been effective in extending these resources by practices such as hiring outside counsel to take certain cases.[425]

The resources available to state attorneys general not only make them responsive to the people in each state, but also allow their work to have a national impact.[426] A pattern or practice suit in one state can help to highlight the need for resolution of civil rights abuse problems by state agencies on a national scale. Such a result would not be the first time that the actions of state attorneys general helped to pressure federal government reform. For example, as a result of aggressive attorneys general's actions against tobacco companies and Wall Street, the Department of Justice and the Securities and Exchange Commission also increased their own enforcement efforts.[427] A similar result can be expected from state attorneys general bringing pattern or practice suits.

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424 Meyer, *supra* note 382, at 897; Clayton, *supra* note 346, at 538 ("During the 1980s the rate of growth in budget of the attorney general's office or state department of law outpaced increases in general government spending in every single state, in some states many times over.").

425 Meyer, *supra* note 382, at 897.

426 Gaglione, *supra* note 373, at 10-11 (discussing the work of the California Attorney General suing the world's largest automakers and New York's Attorney General suing internet spyware distributors).

427 Meyer, *supra* note 382, at 908.

State attorneys general are also more responsive to the public than the federal attorney general. This is due in large part to the fact that state attorneys general hold elected positions.[428] Indeed, at the state level, the primary "check" on attorney general power is an election by the people.[429] Thus, the democratic process ensures that the public interest weighs heavily on the actions of each state attorney general.[430]

The responsiveness of state attorneys general to the needs of the public is illustrated by the many divisions of the California Attorney General's office. In California, the Attorney General has divisions for criminal law, civil law, public rights, law enforcement, gambling control, firearms, and many others.[431] These divisions indicate the level of resources available to the office, but also show that the office is responsive to a wide-ranging group of concerns from the state's citizens. The Division of Public Rights, in particular, "focuses on where the Attorney General may be more proactive in prosecuting the rights of the public" and provides a direct avenue for the Attorney General to do more than the traditional job of representing state agencies or officers of the executive branch.[432]

D. Counterarguments

Although the reasons to adopt a state pattern or practice state are compelling, opponents of increased state attorneys general's powers may raise federalism and separation of powers concerns in opposition to the proposal set forth in this Article. Expansive interpretations of state attorneys general's power are frequently met with such criticisms.[433] The federalism argument derives from the separate spheres of power given to the federal and state governments and is frequently presented in the form of a federal preemption objection to attorneys general's actions.[434] The basis for this preemption argument is that

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428 Clayton, *supra* note 346, at 530.

429 Meyer, *supra* note 382, at 892.

430 *See id.*

431 Gaglione, *supra* note 373, at 4-5.

432 *Id.* at 5.

433 *See, e.g.*, LAUTENSCHLAGER & BACH, *supra* note 356, at 4 (discussing the substance of such criticism).

434 This objection is particularly strong when state attorneys general coordinate with one another to influence national public policy. *See* Clayton, *supra* note 346, at 539-40. Such "integrated policymaking by state attorneys general can seriously threaten federal control over important areas of regulation." *Id.* at 540.

"federalism prohibits states from usurping power bestowed upon the federal government, and vice-versa."[435] Preemption concerns arise, therefore, when state law prohibits the federal government from achieving its objectives.[436]

The preemption argument against state attorneys general enforcing a pattern or practice law is that such enforcement conflicts directly with the federal government's strategy and efforts to enforce Section 14141. This would be an example of "conflict preemption," "where the particular state law conflicts directly with federal law, or otherwise stands as an obstacle to the accomplishment of federal statutory objectives."[437] Such a challenge would most likely fail.

The enforcement of civil rights actions, as discussed above, has long been an area where state attorneys general have retained common law authority. Indeed, many laws that are challenged on federalism grounds fall into this category, thereby undermining the federalism challenges.[438] Moreover, the statute proposed in this Article does not allow state attorneys general to bring actions against federal officials, avoiding a potential conflict with the federal executive's desire to have full control over federal law enforcement agencies. For these reasons, the federalism argument against a state pattern or practice statute is not compelling.

The doctrine of separation of powers "arises as an inference from the structure of the federal government created by the Constitution and the value placed by the Framers on the division of power among the branches."[439] The separation of powers argument against a state pattern or practice statute is based on the notion that state attorneys general have become a new, powerful, and unchecked force in American government and are usurping power from the executive and legislative branch. The separation of powers critique is not persuasive, however, because "the doctrine of separation of powers pertains to

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435 LAUTENSCHLAGER & BACH, *supra* note 356, at 4.

436 *See* Thompson, *supra* note 377, at 393.

437 Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2022 (2001) (citing 1 LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1176-77 (Foundation 3d ed. 2000)).

438 *See* LAUTENSCHLAGER & BACH, *supra* note 356, at 4 ("State attorneys general are, individually and in partnership, exercising powers in areas long recognized as matters legitimately within state control, or in areas such as antitrust, where federal and state authority is concurrent."). *See also* Lynch, *supra* note 437, at 2024 (noting that preemption attacks on state consumer protection laws and antitrust laws failed).

439 Lynch, *supra* note 437, at 2025.

the division of authority among the three federal branches; it does not apply to the states."[440]

The argument that attorneys general could act together to create national policy reform through pattern or practice lawsuits is simply not a separation of powers problem. Separation of powers concerns normally arise when one branch of government interferes with or usurps the power of another branch of government.[441] Thus, the doctrine of separation of powers does not apply to state attorneys general, acting on their own initiative, to enforce federal and state law against state agencies that violate the civil rights of citizens.[442]

CONCLUSION

This Article has proposed a model state pattern or practice statute, similar to Section 14141 of the 1994 Violent Crime Control Act addressing police misconduct, which each state should adopt. Adoption of the model statute would help to advance police accountability and reduce misconduct by police officers for the following reasons. First, the evidence indicates that federal litigation under Section 14141, despite some problems with implementation, has effected substantial improvements in the state and local law enforcement agencies where it has been applied. Not only have the mandated reforms been implements, but in several cases the court-appointed monitor has concluded that mandated reforms have transformed the culture of the agencies involved. Questions remain, nonetheless, about whether the reforms in question will be sustained following termination of the consent decree or MOA. This issue should be addressed in two ways. Empirical research is needed on whether or not the reforms in question are in fact sustained. Additionally, police reformers need to rethink the pattern or practice litigation strategy to incorporate post-consent decree or post-MOA mechanisms to ensure sustained reform.

Second, Section 14141 embodies a new strategy of police reform, focusing on changing law enforcement organizations. As noted, the organizational reform strategy overcomes the limitation of other police reform strategies that have been attempted over the years.

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440 LAUTENSCHLAGER & BACH, *supra* note 356, at 4.

441 Lynch, *supra* note 437, at 2026.

442 *See id.* at 2027-32 (noting that voluntary action by state officers is considerably less of a concern in terms of separation of powers than a direct grant of authority by Congress to enforce state law).

Third, the adoption of the proposed model statute would greatly expand the available remedies for police misconduct. The Department of Justice has limited resources and, even in the best of circumstances, could address only a fraction of the police problems that exist around the country.

Fourth, state level pattern or practice litigation efforts would have the virtue of being closer to problems of police misconduct, both geographically and politically. Policing in the United States is primarily the responsibility of local municipal and county governments. State attorneys general's offices would be more accessible to complainants requesting investigations of police misconduct, and in many instances they would be more responsive politically to community groups alleging patterns of police misconduct.

Fifth, there are no institutional or legal constraints on state attorneys general assuming an active role in addressing police misconduct. Indeed, as this Article has argued, assuming such a role would be consistent with expanded efforts of state attorneys general in protecting citizen rights in other areas.

Police misconduct has a long and tragic history in the United States. The poor and people of color have historically been the principal victims of such misconduct. The history of policing also suggests that misconduct continues despite many decades of effort and many different strategies to end it. The organizational change focus of pattern or practice litigation represents a promising new approach to the problem, and enacting state pattern or practice statutes could expand that approach.