Reforming Police Use-of-Force Practices: A Case Study of the Cincinnati Police Department

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When Congress enacted the Violent Crime Control & Law Enforcement Act of 1994, it gave the Department of Justice (DOJ) a powerful tool for correcting unconstitutional practices in state and local police agencies. Over the last twenty years, the DOJ has used this power to investigate, sue, and enter into contractual agreements with police agencies as a means of reforming unconstitutional police practices, such as excessive use of force, racial profiling, and unconstitutional stop-and-frisk practices. These agreements often fail to achieve their stated goals, however, because they lack effective enforcement mechanisms. Additionally, the DOJ has repeatedly failed to combat problems in the implementation process such as officer circumvention, fleeting political support, and intractable command management. In contrast to these failures, the Cincinnati Police Department achieved measurable progress in reducing use-of-force incidents, officer injuries, and improving citizen satisfaction while under an agreement with the DOJ and various private parties. This Note argues that Cincinnati Police Department's success can be explained by the innovative design of its agreement, which stresses the principles of democratic experimentalism — including a flexible and goal-oriented approach, stakeholder deliberation, regulatory transparency, and enforcement mechanisms governing the implementation of the argeement's terms. It then identifies some methods implemented in Cincinnati that may prove useful in reforming police agencies in other cities.

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I. INTRODUCTION

The use of force by law enforcement is an integral, and problematic, part of policing.[1] While police officers must at times use or threaten to use force to restrain and detain those that violate the law and such force is rare — roughly 1.5% of all contacts with civilians result in the use of force — in those encounters, seventy-five percent of those subjected to such force or threats felt that the police officer's actions were excessive.[2] Studies suggests, moreover, that police often "use force more than required, [and] improper force is more often directed at certain kinds of people."[3] Even police chiefs from law enforcement agencies in major U.S. cities have expressed the concern that excessive force in policing is "significant."[4] Most importantly, the application of excessive or lethal force by a police officer may violate the Constitution,[5] as is the failure of a law enforcement agency to adequately train its police officers to use the appropriate levels of force.[6]

Until the mid-nineties, however, the federal government played almost no role in regulating police brutality at the state and local level.[7] In response to various investigations of police brutality after the beating of Rodney King, however, Congress enacted 42 U.S.C. § 14141 to correct systemic unlawful use-of-

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1. *See, e.g.*, EGON BITTNER, *The Capacity to Use Force as the Core of the Police Role*, *in* THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY 36, 36–47 (1972) (explaining that in a society where only a few individuals are deputized and authorized to use force, ironically the use of force by these few individuals is a necessary condition to reducing overall citizen violence).

2. *See, e.g.*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 12 CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp08.pdf.

3. Christopher J. Harris, *Police Use of Improper Force: A Systematic Review of the Evidence*, 4 VICTIMS OF OFFENDERS 25, 38 (2009) (suggesting that those people are low-income minorities).

4. H.R. REP. NO. 102-242 at 135 (1991) (quoting a former police chief stating that "[p]olice use of excessive force is a significant problem in this country, particularly in our inner cities").

5. *See* Graham v. Connor, 490 U.S. 386, 394 (1989) (explaining that excessive use-of-force claims under 42 U.S.C. § 1983 should be analyzed using specific constitutional rights). *See also* Tennessee v. Garner, 471 U.S. 1 (1985).

6. Canton v. Harris, 489 U.S. 378, 388 (1989).

7. Prior to the mid-nineties, the federal government only exercised the statutory power to prosecute individual officers for constitutional violations on a criminal basis. 18 U.S.C. §§ 241–42 (2006).

force practices in police departments across the country.[8] Section 14141 empowers the Attorney General to commence a civil action against a police department that exhibits a "pattern or practice" of violating citizens' constitutional rights to obtain equitable or declaratory relief that will eliminate the practice.[9] Within ten years of its passage, the Civil Rights Division of the Department of Justice (DOJ) had either sued or entered into settlement agreements with eleven law-enforcement agencies.[10] Due to a variety of internal constraints and the slow pace at which it was creating changes,[11] however, the DOJ has recently abandoned its litigation approach, instead providing technical support to police departments.[12]

Although the DOJ's litigation efforts have not consistently achieved sustainable reform, an analysis of the department's successful intervention in Cincinnati to remedy various problems in the City's police department demonstrates that this approach can bring about meaningful change. Under a pair of agreements between the DOJ, the City, Cincinnati's police union, and various private plaintiffs, the Cincinnati Police Department (CPD) achieved drastic improvement. Officers began using force — i.e., the amount of effort required by police to compel compliance from an unwilling subject — less frequently and when they did use force, used safer forms of it.[13] Civilian complaints throughout the City dropped and civilian attitudes about the CPD improved as

8. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 1111(a), 108 Stat. 1796 (1994) (codified in part at 42 U.S.C. § 14141 (2006)). While twenty-one officers watched, three officers 'restrained' Rodney King by administering fifty-six baton blows, six kicks to his head and body, and two shocks from a Taser gun, all of which was caught on videotape. *See* H.R. REP. NO. 102-242 at 135–39 (1991) (detailing the background of the incident as well as the purpose of an identical provision in the Omnibus Crime Control Act of 1991 years earlier).

9. 42 U.S.C. § 14141 (2006). Commonly referred to as the "Pattern or Practice Statute."

10. Affected police departments include agencies found in Pittsburgh, PA, Steubenville, OH, New Jersey, Washington, DC, Los Angeles, CA, Detroit, MI, Cincinnati, OH, Buffalo, NY, Village of Mt. Prospect, IL, Villa Rica, GA, and Prince Georges County, MD. *See* RICHARD JEROME, POLICE REFORM: A JOB HALF DONE 4–6 (2006), *available at* http://www.acslaw.org/sites/default/files/Jerome_issue_brief.pdf.

11. Reasons include lack of agency resources, leadership, and poor initial results. *See id.* *See also* Expert Opinion Memorandum from Samuel Walker, Ph.D., Dep't of Crim. Just., Univ. of Neb. at Omaha, to the Att'y Gen. of N.J. (Jun. 19, 2006) (*available at* http://samuelwalker.net/wp-content/uploads/2010/06/NJExpertOpinion.pdf).

12. JEROME, *supra* note 10, at 5.

13. *See infra* Part III.

crime rates dropped and as the CPD implemented community-oriented and problem-solving policing techniques.[14] The parties rapidly transformed the CPD's practices by adopting a decentralized, goal-oriented approach to institutional reform and by applying pressure through various enforcement mechanisms.[15] No DOJ pattern or practice intervention before or since Cincinnati has taken this approach, and consequently, no law enforcement agency involved in a pattern or practice intervention in comparably sized metropolitan area has achieved similar success.[16]

This Note argues that the DOJ will not achieve consistent results from its pattern or practice interventions unless it replicates a reform model for eliminating institutional misconduct like Cincinnati's.[17] Part II explains how the DOJ uses section 14141 to investigate and litigate police misconduct, how the DOJ's approach compares to other public law litigation, and how common obstacles stunt institutional reforms. Part III then describes the two agreements in Cincinnati and analyzes the declines in CPD use-of-force practices. Part IV argues that the agreements achieved their stated goals because (1) they were uniquely designed using an experimentalist model; (2) the parties utilized effective enforcement provisions; and (3) abrupt leadership changes came to bear on police compliance. Finally, Part V ties the CPD reform efforts to an institutional reform model known as democratic experimentalism, and provides recommendations for future DOJ interventions, some of which follow the experimentalist model, and others that are more salient after Cincinnati.

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14. *Id.*

15. *Id.*

16. The closest successful analogues to Cincinnati have been reforms in Pittsburgh, PA, Los Angeles, CA, and Washington, DC. *See generally* ROBERT C. DAVIS ET AL., VERA INST. OF JUSTICE, TURNING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE (2002), *available at* http://www.vera.org/sites/default/files/resources/downloads/Pittsburgh_consent_decree.pdf (detailing Pittsburgh's success); MICHAEL R. BROMWICH, OFFICE OF THE INDEP. MONITOR, FINAL REPORT 1–4 (2008), *available at* http://www.policemonitor.org/MPD/reports/080613reportv2.pdf.

17. *See* Michael C. Dorf & Charles F Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 327–32 (1998) (explaining how the Chicago Police Department achieved reforms by adopting a more decentralized approach to policing that focused on community input, local contacts, and problem-oriented policing).

II. PATTERN OR PRACTICE SUITS AND PUBLIC LAW LITIGATION

This Part provides an overview of how the DOJ enforces the Pattern and Practice Statute, how such enforcement fits into a larger model of public law litigation to reform government agencies, and common institutional barriers to achieving change via public law litigation in the context of law enforcement agencies.

A. THE CURRENT IMPLEMENTATION OF 42 U.S.C. § 14141

In 1994, Congress enacted 42 U.S.C. § 14141, which makes it:

> 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 . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.[18]

Section 14141 authorizes the Attorney General to bring a civil action to obtain equitable and declaratory relief when reasonable cause exists to believe a violation has occurred.[19] Since 1994, the Attorney General has directed the DOJ to launch over forty-one pattern or practice investigations, each of which has focused in large part on correcting excessive use of force; the prevalence of unlawful searches, seizures, or arrests; and discriminatory policing.[20]

Because the Attorney General may only sue when there is "reasonable cause to believe" that a government agency has engaged in a pattern or practice of unconstitutional behavior, an investigation must show that police misconduct is "standard operating procedure — the regular, rather than the unusual prac-

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18. 42 U.S.C. § 14141(a) (2006).

19. 42 U.S.C. § 14141(b). A House Report in the bill's legislative history indicates that Congress empowered the Attorney General to sue government agencies because it is often difficult for private citizens to do so. *See* H.R. REP. NO. 102-242 at 137–39 (1991). This bill responds directly to the Supreme Court's limitations on private citizens seeking injunctive relief using 42 U.S.C. § 1983. *Id.* (citing City of Los Angeles v. Lyons, 461 U.S. 95 (1983)).

20. *Conduct of Law Enforcement Agencies* U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/spl/police.php (last visited Nov. 17, 2012).

tice."[21] Section 14141 litigation progresses in three stages: a preliminary inquiry, a formal investigation, and finally litigation and settlement with the parties.[22] The initial inquiry focuses on fact development to determine if a pattern or practice truly exists by examining citizen complaints; court documents from recent cases; or testimony of a politically charged event, such as a citizen's death, alleging excessive use of force.[23] The DOJ often conducts these investigations privately to determine whether there is a "formal policy or some unspoken practice that is leading to some level of repetitive unconstitutional uses of authority by police officers."[24] Once the DOJ is satisfied that a pattern or practice exists, it launches a public, formal investigation of the agency.[25]

At this point, the DOJ conducts interviews with police command staff, the police union, officers, and community leaders; it also attends and reviews police training sessions, assesses the agency's disciplinary practices, and reviews its records and procedures for civilian complaints.[26] During an investigation, the DOJ will often release a Technical Assistance Letter providing its preliminary findings of misconduct and recommendations for correcting such misconduct, but at the end of the investigation it will always issue a Findings Letter concluding whether there are grounds for filing a civil suit.[27]

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21. *See Special Litigation Section Frequently Asked Questions*, DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, SPECIAL LITIG. (last updated Jan. 23, 2003) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1997)) [hereinafter *Frequently Asked Questions*], http://www.justice.gov/crt/about/spl/faq.php.

22. *Oversight of the Department of Justice – Civil Rights Division: Hearing Before the S. Comm. on the Judiciary* 107th Cong. 18-19 (2002) (statement of Ralph J. Boyd Jr., Assistant Att'y Gen., Civil Rights Div.) (explaining how the DOJ decides to initiate pattern or practice litigation). It is worth noting, however, that this description does not account for the fact that there is probably a fourth stage that one could call settlement negotiation or implementation of a settlement agreement.

23. *Id.* at 18-19; see also Holly James McMickle, *Letting DOJ Lead the Way: Why DOJ's Pattern or Practice Authority is the Most Effective Tool to Control Racial Profiling*, 13 GEO. MASON U. C.R. L.J. 311, 324 (2003) ("The Special Litigation Section receives thousands of complaints and referrals regarding alleged police misconduct every year.").

24. Hearing Before the S. Comm. on the Judiciary, *supra* note 22, at 19 (statement of Assistant Att'y Gen. Ralph J. Boyd Jr.) (analogizing the preliminary inquiry as one of municipal liability under 42 U.S.C. § 1983 (2006)).

25. *Id.*

26. *Frequently Asked Questions*, *supra* note 21.

27. Technical Assistance Letters function like a progress report if the department institutes changes. *See, e.g.* Technical Assistance Letter from Michael Goldberger, Chief of Civil Rights, U.S. Attorney's Office, to Steve Levy, Suffolk County Cnty. Exec. (Sept. 13, 2011) (*available at* http://www.justice.gov/crt/about/spl/documents/suffolkPD_TA_9-13-

Once a section 14141 investigation becomes public, a police department has a strong incentive to cooperate with the investigation and an even greater incentive to adopt the DOJ's proposed reforms in an out-of-court settlement. By signing a settlement agreement, a police chief can avoid the reputational costs associated with ongoing federal supervision and "a reduced ability to enact his preferences and serve his personal interests."[28] The police chief is likely to sign an agreement with federal officials cooperatively because, unlike other actors in the municipality such as the city council or the mayor, equitable relief reduces her control over the police department.[29] By committing to an agreement, a police chief may also receive funding and legislative support at a local level to upgrade infrastructure; rebuild the police department's image; install systems to prevent future lawsuits; and most importantly, avoid cost-intensive, lengthy litigation against the DOJ.[30] These incentives are so strong, in fact, that the DOJ has only resorted to filing a civil complaint four times since Congress enacted section 14141 compared to the dozens of times where the department has not done so.[31] Even litigation under section 14141, however, invariably ends in a settlement agreement.[32]

The eventual agreement, referred to as a memorandum of agreement (MOA), directs the regulated agency to implement the

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11.pdf); Technical Assistance Letter from Shanetta Y. Cutlar, Chief, Special Litig. Section, U.S. Dep't of Justice, to Roosevelt Dorn, Mayor of Inglewood, CA (Dec. 28, 2009) (*available at* http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf).

28. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 47 (2009).

29. *Id.* at 46-47.

30. *See* Interview by Police Assessment Resource Ctr. with William A. McCafferty, Police Chief, Steubenville, OH, (Apr. 2005), *available at* http://www.parc.info/monitoring-related_police_practices_review_interviews.chtml; *Subject to Debate: PERF Chiefs Tell the Inside Story on Consent Decrees*, 22 POLICE EXEC. RES. F. 4 (2008), *available at* http://www.policeforum.org/library/subject-to-debate/2008/STD_April2008_web.pdf.

31. *See, e.g.*, Complaint, United States v. Maricopa County, 2:12-cv-00981 (D. Ariz. May 12, 2012), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_complaint_5-10-12.pdf. The DOJ has filed civil complaints against police agencies in Columbus, OH, Colorado City, AZ, and the U.S. Virgin Islands. *See Special Litigation Section Cases and Matters*, DEP'T OF JUSTICE, http://www.justice.gov/crt/about/spl/findsettle.php (last visited Apr. 14, 2013) (listing complaints against law enforcement agencies).

32. To date, no pattern or practice suit has gone to trial. *See generally Special Litigation Section Cases and Matters*, DEP'T OF JUSTICE, http://www.justice.gov/crt/about/spl/findsettle.php#police (last visited Mar. 4, 2013).

DOJ's best practices to alleviate or prevent excessive-force violations.[33] While there is some negotiation of a MOA terms, they are ultimately based on the DOJ's assessment of solutions for constitutional violations elaborated in its findings letter.[34] Despite this, the terms of a MOA are largely uniform. The agency must draft substantive and procedural use-of-force policies and retrain its officers accordingly.[35] It must also institute use-of-force reporting and review, internal investigations, and civilian-empowered review of police misconduct.[36] Finally, it must purchase and implement an early-warning tracking system for discovering and monitoring officers that do not follow the police department's newly proscribed guidelines.[37] To ensure compliance, the terms of a MOA require review by an independent monitor and frequent data audits.[38]

Notably, the DOJ does not normally include the local police union or community interest groups as parties to a MOA, and it has even sought to prevent their joinder from litigation in some cases.[39] This might seem puzzling, given both the union's usual rights under a collective bargaining agreement and the community groups' interest in rigorous enforcement of the MOA.[40] One plausible explanation for the DOJ's exclusion policy is that it simply lacks the resources to conduct lengthy negotiations and litigation against multiple and varied defendants.[41] Whatever the justifications, the result has been exclusion of police unions

33. Some are also called Memoranda of Understanding. In contrast to a consent decree, which may address substantive change to police practices, the DOJ drafts MOA to address internal policies and procedures, citizen complaints, and data collection. DARRELL L. ROSS, CIVIL LIABILITY IN CRIMINAL JUSTICE, 186 (5th ed. 2009).

34. McMickle, *supra* note 23, at 329.

35. U.S. DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY 3–6 (2001), *available at* https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf.

36. *Id.* at 5–13.

37. *Id.* at_11. *See also* U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN CITIZENS & POLICE 29–35 (2003), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/105895NCJRS.pdf.

38. *See, e.g.*, Consent Judgment: Use of Force and Arrest Witness Detention at 35–42, United States v. City of Detroit, No. 03-72258 (E.D. Mich. Jun. 12, 2003); PROMOTING POLICE INTEGRITY, *supra* note 35, at 13 (explaining auditing systems).

39. *See, e.g.*, United States. v. City of Los Angeles, 288 F.3d 391, 396–97 (9th Cir. 2002) (discussing the degree to which a police union and private plaintiffs can intervene as parties to a § 14141 after the DOJ's decision to exclude those parties).

40. *Id.* at 400–03.

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

and community groups from the negotiation process, and in most cases, the implementation process.[42]

B. SECTION 14141 ACTIONS AND PUBLIC LAW LITIGATION

Section 14141 represents a relatively new approach to police reform that may be compared to a more common type of action, often called public law litigation.[43] In contrast to the traditional model of litigation involving a legal dispute between private parties, public law litigation involves a suit against the government agency for injunctive relief, alleging that the agency has carried out a legal policy harmful to them.[44] Examples include litigation brought by private plaintiffs to correct practices in police departments that violate the statutory and constitutional rights of citizens.[45] Section 14141 litigation bears a similar form: the DOJ, as plaintiff, seeks equitable relief for a police department's alleged constitutional violations.[46]

But MOAs differ from equitable relief in public law litigation. If the plaintiff in a public law litigation case successfully establishes liability, a judge, with the help of experts and the parties, will approve a consent decree enumerating a list of changes the police department must make.[47] The court then oversees and as-

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42. The notable exceptions to this general bar on police unions is the reform effort in Cincinnati, discussed in Part II & III, *infra*. *See also* Memorandum of Agreement between the U.S. Dep't of Justice and the City of Buffalo et al. (Sept. 19, 2002), *available at* http://www.clearinghouse.net/chDocs/public/PN-NY-0004-0001.pdf.

43. Professor Abram Chayes gives one of the earliest and fullest descriptions of public law litigation in seminal work in the field. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1302 (1976) (describing the public law litigation as (1) shaped by the court and the parties rather than a legal dispute, (2) having parties with more than a bilateral relationship, (3) involving prospective factual inquiries, (4) having relief that is ad hoc and broad, (5) a negotiated remedy, (6) having a remedy that require constant judicial supervision, (7) active judicial role in shaping the litigation, and (8) a grievance about public policy rather than the interpretation of a law).

44. *See generally id*.

45. In this situation, a citizen would file a lawsuit under 42 U.S.C. § 1983 with the hope of obtaining injunctive relief against the municipality. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976); City of Los Angeles v. Lyons, 461 U.S. 95, 101–10 (1983).

46. Notably, the DOJ has more investigatory power and can therefore more easily detect violations than discovery mechanisms used by private plaintiffs. *See, e.g.*, Findings Letter from Thomas Perez, Assistant Att'y Gen., Civil Rights Div., to Bill Montgomery, Maricopa Cnty. Att'y, at 5 (Dec. 15, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

47. Chayes, *supra* note 43, at 1298 (describing the role of a consent decree in the public law model).

sesses compliance with the consent decree.[48] The first section 14141 actions resulted in the DOJ obtaining a consent decree from a federal court, which, save for the public character of the plaintiff, is indistinguishable from public law litigation model.[49] By contrast, more recently the DOJ has entered into MOAs, which are privately-negotiated contracts between the DOJ and the regulated agency that are not enforceable by a court's contempt power.[50] A likely reason the DOJ has elected to proceed by private contract is because a MOA does not need to be approved by a federal court as "fair, adequate and reasonable," but is still enforceable via breach of contract.[51] Because the slow pace of litigation severely delays the fashioning of consent decrees, the DOJ can enforce section 14141 more efficiently with MOAs, and may avoid the court system altogether.

Despite the efficiencies gained by the DOJ's shift from consent decrees to MOAs, MOAs share common political problems with consent decrees, and present new ones. First, some have argued that consent decrees in public law litigation are politically illegitimate because they empower judges to grant broad prospective relief over politically thorny issues best left to other branches.[52] The DOJ's role in negotiating a MOA arguably resolves this problem — the executive branch commonly compels local agencies to improve services via settlement[53] — but it creates a larger feder-

48. *Id.* at 1284.

49. The DOJ has entered into consent decrees with police agencies in Los Angeles, CA, Stuebenville, OH, Pittsburgh, PA, Maryland, Detroit, MI, and New Jersey. Kami Chavis Simmons, *The Politics of Policing: Enforcing Stakeholder Collaboration in Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. & CRIMINOLOGY 489, 509 (2008).

50. Without the entry of an order by the Judiciary, a court lacks the power to hold a regulated agency in contempt for violating the terms of a privately-negotiated contract. *See* Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S.787, 798 (1987).

51. Order and Reasons Approving Consent Between U.S. and City of New Orleans at *6–9, United States v. New Orleans, 12-cv-01924-SM-JCW (E.D. La. Jan. 11, 2013). Every MOA also contains a provision reserving the DOJ's right to re-initiate suit if the other party is found in material breach of the agreement. Memorandum of Understanding Between the United States and the City of Seattle 9 ¶ 27 (entered July 27, 2012), *available at* http://www.justice.gov/crt/about/spl/documents/spd_mou_7-27-12.pdf (indicating that the U.S. may initiate suit for breach of contract).

52. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 16 (1991). In fact, a judge's power to grant broad prospective relief is limited when the remedy is not closely linked to the original harm. *See* Lewis v. Casey, 518 U.S. 343, 347 (1996) (limiting broad relief in the prison context).

53. *See, e.g.*, Press Release, Office of the N.Y. Att'y Gen., A.G. Schneiderman Announces Landmark Agreement With Nassau County Police Department To Strengthen

alism problem: the intrusiveness of a MOA, which does not have robust checks created by the court system, can more easily create resentment with local agency officials.[54] A second criticism of consent decrees is that court-fashioned remedies are inefficient because judges lack sufficient expertise to provide competent answers to the large social problems the consent decrees seek to resolve.[55] Relatedly, the relief a judge can approve may be too narrow because reform requires coordination from stakeholders that are not parties to the litigation.[56] The DOJ's active and ongoing role in the implementation of a MOA is a significant improvement, but the DOJ excludes citizen and union input throughout the process, relief in a MOA may still be poorly tailored. Many of the barriers to successful implementation of consent decrees continue to plague the DOJ's implementation of MOAs. The next section will address these barriers.

C. OBSTACLES TO IMPLEMENTING SUCCESSFUL USE-OF-FORCE POLICES

Reforming police use of force practices under a MOA is a monumental task, and one the DOJ has shied away from since 2003.[57] This reticence stems in part from the myriad barriers to successful MOA implementation. Part II.C describes some of the institu-

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Language Access Services, Jan. 11, 2013, *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-landmark-agreement-nassau-county-police-department.

54. See Jason Ryan, *DOJ Breaks Off Negotiations with Defiant Sheriff Joe Arpaio*, ABC News (Apr. 3, 2012, 7:24PM), http://abcnews.go.com/blogs/politics/2012/04/doj-breaks-off-negotiations-with-defiant-sheriff-joe-arpaio/; *see also* Joshua M. Chanin, Negotiated Justice: The Legal, Administrative, and Policy Implications of 'Pattern or Practice' Police Misconduct Reform 50 (Jul. 6, 2011) (dissertation), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf.

55. *See* Donald L. Horowitz, *Decreeing Organization Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1303–05 (1983) (explaining that judges, unfamiliar and unsuited to deal with such complex social problems, become inappropriately invested in outcomes and stray from the idea that the court should link a remedy to a specific right closely).

56. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1018 nn.5–7 (2004).

57. Samuel Walker & Morgan Mcdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R. L.J. 479, 517–18 (2009) (noting that the DOJ had not sued a large metropolitan police force since 2003 even though the DOJ received many more complaints from metropolitan areas than from more rural jurisdictions with much smaller police forces).

tional obstacles that prevent the DOJ and police departments from implementing reforms agreed to in MOAs.

1. *Resistance from Police Officers and Police Unions*

A MOA is often drafted in the wake of a politically-charged event or series of events, often involving the death or severe beating of an African American at the hands of a city's police department,[58] that pressures a city and its police department to acquiesce to the DOJ's demands for reform.[59] Entering into a MOA, however, conveys to the public that officers are involved in at least some wrongdoing. Consequently, rank-and-file officers are often hostile to MOAs because they see the terms as an implied challenge to their professionalism, unnecessary and ineffective oversight, and penalty for honest police work.[60] This perception may drive officers to undermine reforms. For instance, there is evidence that officers falsify use-of-force incident records to subvert reporting requirements[61] and intimidate those who report misconduct to superiors.[62] An equally common reaction for many young officers faced with new training, additional scrutiny from superiors and the public, and diminishing support from their superiors is to quit or transfer to neighboring jurisdictions.[63]

Hostility toward a MOA can also affect how officers police. Some officers under Pittsburgh's agreement indicated that they avoided patrols and traffic stops to reduce the chance that a civil-

58. Chanin, *supra* note 54, at 38, 47–48, 66–67 (documenting the proverbial 'straws' in Pittsburgh, Washington, D.C., and Prince George County that led to DOJ interventions).

59. *See supra* note 29 and accompanying text (describing a police chief's incentive to enter into a MOA).

60. *See* DAVIS ET AL., VERA INSTITUTE, TURING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE, 48–49 (2002) (officer reactions to Pittsburgh's MOA), *available at* http://www.vera.org/download?file=239/Pittsburgh%2Bconsent%2Bdecree.pdf; U.S. DEP'T OF JUSTICE, TAKING STOCK: REPORT FROM THE 2010 ROUNDTABLE ON THE STATE AND LOCAL LAW ENFORCEMENT POLICE PATTERN OR PRACTICE PROGRAM 4–6 (2011), *available at* http://clerk.seattle.gov/public/meetingrecords/2012/pscrt20120118_1b.pdf.

61. *See, e.g.*, DAVIS ET AL., *supra* note 60, at 52.

62. *See* RACHEL BURGESS ET. AL., SEVENTH STATUS REPORT OF THE INDEPENDENT MONITOR, DELPHINE ALLEN ET AL. V. CITY OF OAKLAND ET AL. ix–x (2005), *available at* http://www2.oaklandnet.com/oakca1/groups/police/documents/webcontent/dowd005041.pdf (Oakland Monitor detailing retaliation concerns uncovered in an independent audit).

63. Some Police Chiefs, however, report that separations can also create positive effects by removing obstacles in the Department. *See* McCafferty Interview, *supra* note 30.

ian might issue a complaint.[64] While the underlying data is conflicted, perceptions that a MOA prevents good police work can delay reforms significantly.[65]

Police unions may also mount significant legal and political challenges to a MOA. Roughly two-thirds of active officers are members of a police union.[66] Although there is little research in this area, studies suggest that police unions generally do not trust police management as decision makers often attempt to reduce management discretion or obtain a louder voice in departmental affairs.[67] Police unions disfavor consent decrees because, in their view, they complicate patrol work, increase paperwork, increase oversight, reduce officer discretion and autonomy, and increase punishment for practices that the union considers "good police work."[68]

Institutionalizing reform is often more difficult in organizations whose labor force is organized, especially when reforms are subject to political pressure.[69] In the context of police reform, a union can pressure elected officials to appoint a union-friendly police chief. In at least one case, a powerful police union financially supported a successful pro-union mayoral candidate, who then fired the city's highly effective police chief for implementing

64. The evidence supporting this proposition is conflicted. *Compare* Davis et al., *supra* note 60, at 55–56 (suggesting police officers remained active after Pittsburgh signed a MOA), *with* Lan Shi, *Does Oversight Reduce Policing? Evidence from the Cincinnati Police Department After the April 2001 Riot*, 93 J. PUB. ECON. 99 (2009) (suggesting the opposite after the CPD signed a MOA). In Pittsburgh, clearance rates for minor felonies and misdemeanors after the department signed the MOA dropped from their pre-MOA level, a possible sign that police stopped proactively policing, but quickly returned, suggesting any effect was short lived. Davis et al., *supra* note 60, at 56. Citations for moving violations also dropped, but the drop does not coincide with the signing of the MOA. Rather, the drop appears to have coincided with the entry of a new court procedure reducing overtime compensation for documenting such violations. *See id.* Driving under the influence ("DUI") arrests were not affected by this new procedure and did not experience such a drop. *Id.*

65. *See* Davis et al., *supra* note 60, at 65.

66. *See* COLLEEN KADLECK & LAWRENCE F. TRAVIS III, POLICE DEPARTMENT AND POLICE OFFICER ASSOCIATION LEADERS' PERCEPTIONS OF COMMUNITY POLICING: DESCRIBING THE NATURE AND EXTENT OF THE AGREEMENT 23 (2004).

67. *See* Colleen Kadleck, *Police Unions: An Empirical Examination*, 147 (2001) (dissertation), *available at* http://www.cech.uc.edu/criminaljustice/files/2010/08/kadleck.pdf.

68. Chanin, *supra* note 54, at 310; *see also* Dep't of Justice, Civil Rights Division, East Haven Findings Letter 19–20 (Dec. 19, 2011), http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf (noting union bulletins calling cooperators 'rats' and threatening union comments during the investigation).

69. THOMAS G. CUMMINGS & CHRISTOPHER G. WORLEY, ORGANIZATIONAL DEVELOPMENT AND CHANGE 193 (8th ed. 2005).

the terms of a MOA that the union disfavored.[70] By and large, however, local police unions undermine reforms by voicing their criticisms publicly in the press,[71] and through public "no confidence" votes to oust command staff who support reforms.[72]

Legal challenges to the proposed reforms brought by organized labor can be equally damaging to implementation. The Fraternal Order of Police (FOP) and other powerful police unions have lobbied for the enactment of officer-bill-of-rights statutes expanding administrative procedures in disciplinary investigations.[73] Collective bargaining agreements and state civil-service laws can also prevent departments from firing problem officers.[74] State civil-service laws restrict how a police department can recruit, promote, fire, and discipline officers, and they result in legal battles over disciplinary measures — effectively taxing the department for controlling use-of-force violations by disciplining officers.[75] State collective bargaining laws burden departments in the same way — if the department enters into an agreement with the DOJ without consulting the police union, the union will file an unfair labor practice complaint.[76]

Given this array of tactics, police officers and their unions can significantly sap the extent and effect of reform under MOAs by

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70. *See* Walker, *supra* note 11, at 8 n.22.

71. *See* HARVEY JURIS & PETER FEUILLE, THE IMPACT OF POLICE UNIONS: SUMMARY REPORT, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE 18 (1973) (noting that tactics may spur more racial tensions).

72. Chanin, *supra* note 54, at 50–51 (compiling union actions and remarks against reforms); Robert McNeilly, Former Police Chief of Pittsburgh, PA, Remarks at Conference on Police Pattern or Practice Litigation, Washington D.C. (Feb. 10, 2005) (explaining that the local police union exhibited determined opposition to his reforms in Pittsburgh).

73. Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bill of Rights*, 14 PUB. INT. L.J. 185, 241–42 (2005).

74. *See* MICHAEL R. BROMWICH, SIXTEENTH QUARTERLY REPORT OF THE INDEPENDENT MONITOR FOR THE METROPOLITAN POLICE DEPARTMENT 87–91 (2006), *available at* http://www.clearinghouse.net/chDocs/public/PN-DC-0001-0020.pdf (detailing delays caused the fact the MPD (Washington, D.C.'s Police Department) needed to negotiate an approve any changes with its police union); DOJ 2010 Roundtable, *supra* note 60, at 5.

75. *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799–801 (2012). For example, the fact that a police union funds all appeals from discipline determinations creates a perverse incentive for police management. On the one hand, union representation ensures no officer is unfairly disciplined by a superior. Representation also, however, creates a perverse disincentive to discipline problem officers because the transaction cost for the department of defending its disciplinary action before a politically appointed, officer-friendly appeals board is more definite than the possible cost of liability should a victim sue the department for violating her constitutional rights. *Id.*

76. Chanin, *supra* note 54, at 42.

placing external and internal constraints on the command staff and the police chief.

2. *Poor Leadership of Police Chiefs and City Representatives*

Hostile or stubborn leadership can also prevent reforms from taking root.[77] Some police chiefs oppose MOAs because of their belief that independent monitoring undermines leadership, and because implementing use-of-force policies expends resources that would otherwise be allocated to reducing crime.[78] Reforms also open up police departments to greater public scrutiny.[79] Some police chiefs, due to pride or willful blindness, resist compliance because they do not know the extent of officer misconduct, and refuse to address it.[80]

A recalcitrant chief can slow compliance to a crawl for years by neglecting deadlines, protesting implementation efforts, and understaffing investigations and data analysis.[81] A Court-appointed monitor must be attentive because a police chief, while he may change the department's use-of-force policies, may not retrain or discipline officers once those policies take effect.[82] Because a police chief's tenure often outlives the life of a MOA, even a diligent monitor cannot prevent the discontinuation of reforms once a MOA has lapsed.[83] More commonly, reforms lag because the police command staff's efforts to train officers are poorly coordinated and executed.[84] In contrast, a reform-minded chief, with like-

77. *See* McCafferty Interview, *supra* note 30, at 2; Interview by Police Assessment Resource Ctr. with Robert W. McNeilly Jr., Police Chief, Pittsburgh, PA (May 2004), *available at* http://www.parc.info/monitoring-related_police_practices_review_interviews.chtml.

78. *See Los Angeles will not accept consent decree on police reform, mayor says*, CNN.com (Jun. 7, 2000), http://articles.cnn.com/2000-06-07/us/lapd_1_decree-on-police-reform-consent-decree-justice-department?_s=PM:US.

79. CHRISTOPHER STONE ET AL., POLICING IN LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 6 (2009).

80. *See* Ryan, *supra* note 54.

81. *See, e.g.*, EIGHTH STATUS REPORT OF THE INDEPENDENT MONITOR 5–9 (2006) (Oakland monitor citing understaffing for review boards, investigations, and data collection in management).

82. Doug Gutherie, *Detroit Police Fail to Meet Terms of Consent Decree*, Detroit News (Jul. 7, 2009), http://www.detroitnews.com/article/20090707/METRO01/907070363.

83. STONE ET AL., *supra* note 79, at 58–59.

84. MICHAEL R. BROMWICH, THIRD QUARTERLY REPORT OF THE INDEPENDENT MONITOR FOR THE METROPOLITAN POLICE DEPARTMENT 5 (2003), *available at* http://www.policemonitor.org/MPD/reports/030130.pdf (detailing such poor coordination in Washington, D.C.).

minded sergeants and lieutenants, can greatly influence officer behavior and reduce use-of-force abuses immediately.[85]

Like the police chief, the mayor, the city manager,[86] and the city's attorneys may resist reform when it is politically advantageous to do so. Although city officials are often the ones to seek DOJ investigations to address community outrage,[87] these efforts can be aimed at providing the city with political cover during charged events.[88] Once public pressure has subsided, city officials often later contest proposed DOJ reforms to escape the financial and political burdens they entail.[89] As one commentator has noted, "public officials heavily discount future costs and benefits because they may be out of office when these costs and benefits are felt, whereas the near-term costs and benefits will often dictate their political futures."[90] Further, a mayor with a tough-on-crime approach may also resist reforms because she does not believe that civil-rights abuses in the police department are widespread.[91] An unsupportive mayor can stall reform through appointment[92] and support of elected officials, or by turning a blind

85. *See* McCafferty Interview, *supra* note 30, at 2; McNeilly Interview, *supra* note 77, at 2.

86. Police chiefs are often appointed by either the mayor, city manager, or by the city council after a rigorous search by a selection committee. *See* POLICE EXECUTIVE RESEARCH FORUM, SELECTING A POLICE CHIEF: A HANDBOOK FOR LOCAL GOVERNMENT 1–15 (1999), *available at* http://bookstore.icma.org/freedocs/99-199%20Selecting%20A%20Police%20Chief%20Excerpt.pdf.

87. John Ashcroft, U.S. Att'y Gen., News Conference with Washington, D.C., Mayor Anthony Williams and Police Chief Charles Ramsey (Jun. 13, 2001), *available at* http://www.justice.gov/crt/about/spl/mpdpressconf.php.

88. Members of the D.C. city council believed that Police Chief Ramsey called for the DOJ investigation to shift blame after the Washington Post published a Pulitzer Prize-winning series highly critical of the department's use of deadly force in 1998. *Chief Ramsey Writes Letter Requesting Review of Use of Force Policies and Practices*, THE DISTRICT OF COLUMBIA (Jan. 6, 1999), http://mpdc.dc.gov/release/chief-ramsey-writes-letter-requesting-review-use-force-policies-and-practices.

89. *See* ROSS, *supra* note 33, at 202–03; Walker, *supra* note 11, at 49–50 (citing costs from $20 million to $250 million for civilian review and early warning systems infrastructure over the life of the agreement). *See also* Part IV.D.

90. Harmon, *supra* note 28, at 47.

91. DAVIS ET AL., *supra* note 60, at 5–8.

92. *See, e.g.*, N.Y. CITY CHARTER CH. 18 § 431(a) ("There shall be a police department the head of which shall be the police commissioner who shall be appointed by the mayor . . . .") (2004).

eye to institutional opposition within the police department by a police chief or the police union.[93]

3. *Lax Enforcement by Court-Appointed Monitors*

Because parties within police departments invariably challenge DOJ reforms, a monitor must be independent, experienced, and diligent. A conflicted monitor that expresses loyalty to an interested party can undermine compliance or stifle reforms.[94] Because the monitor regularly deals with parties opposed to the DOJ, a monitor is susceptible to the effects of regulatory capture.[95] A monitor with prior history in police practices, such as an ex-police chief, may be especially receptive to excuses made by the police department that compliance is impossible within a certain time frame.[96]

Likewise, a monitoring team that lacks expertise in use-of-force practices may incorrectly find compliance when the underlying data suggest that policy changes are not having their intended effect.[97] Because it is difficult to monitor the monitor, the monitor and her team must be familiar with industry standards for reporting, auditing, and performance evaluation.[98] Additionally, the monitor's focus must be qualitative as well as quantitative to ensure that the data is credible and the parties are in compliance.[99]

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93. *See, e.g.*, Mike Carter, *Seattle Panel to fix police is fractured, sources say*, SEATTLE TIMES (Mar. 28, 2012), http://seattletimes.nwsource.com/html/localnews/2017861913_dojmeeting29m.html.

94. Jeff T. Wattrick, *Disgraced ex-Detroit Police Monitor Sheryl Robinson Wood Likely to Keep Law License*, MLIVE.COM (Sept. 23, 2011 8:29AM), http://www.mlive.com/news/detroit/index.ssf/2011/09/disgraced_ex-detroit_police_mo.html.

95. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998) (defining agency capture as a phenomenon whereby the regulator ends up, for a variety of reasons, catering to the regulatory needs of well-organized interest groups).

96. *See* Chanin, *supra* note 54, at 138–39 (suggesting the Prince George County Police Department captured the monitor on various compliance implementation issues).

97. *Cf.* Noah Kupferberg, Note, *Transparency: A New Role For Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 152–55 (2008) (citing monitor inexperience for failure of racial profiling reforms).

98. *See id.* at 146.

99. *See, e.g.*, INDEP. MONITOR TASKFORCE, PRINCE GEORGE COUNTY MONITOR TWELFTH QUARTERLY REPORT 16 (2007) (on file with author) (finding that officer performance reviews lacked sufficient detail to be trustworthy).

As the DOJ enforces the pattern or practice statute, it faces potential roadblocks from almost every actor involved in implementing a MOA. Further, the DOJ's tactical decision to avoid the courts raises political and enforcement problems that may outweigh any efficiency gained in doing so. Fortunately, the DOJ's successful intervention in Cincinnati highlights how the department might pursue enforcement of the pattern and practice statute that will more produce more consistent results.

III. INTERVENTION AND REFORM IN THE CINCINNATI POLICE DEPARTMENT

Despite the many obstacles that face police-department overhauls, the 2002 settlement agreement between the DOJ, the City of Cincinnati, and the Cincinnati Police Department (CPD) created meaningful reform. Under the agreement, the CPD reduced the number of incidents where officers unnecessarily used chemical irritants, physical force, canines, and firearms; reduced civilian complaints; and reduced the number of suspect injuries in the course of an arrest.[100] Part III charts this success. First, Part III.A–B will briefly describe the racially charged events that led to the DOJ's investigation of the CPD, followed by a summary of the terms contained in the agreements the parties were tasked with implementing. Part III.C will then present of data evidencing the MOA's success.

A. RACIAL TENSIONS AND THE CINCINNATI POLICE FORCE

Cincinnati is heavily segregated[101] and has a long history of racial tension.[102] Residents in high-crime, predominantly black

100. *See* SAUL GREEN ET. AL., CITY OF CINCINNATI INDEPENDENT MONITOR'S FINAL REPORT 36–51 (2008), *available at* http://www.cincinnati-oh.gov/police/linkservid/97D9709F-F1C1-4A75-804C07D9873DC70F/showMeta/0/ (summarizing major use-of-force changes during the term of the MOA).

101. *See Cincinnati Population: Race, Age by Statistical Neighborhoods Census 2000*, CITY OF CINCINNATI, http://www.cincinnati-oh.gov/planning/linkservid/B6986A16-90FD-0DDE-CE3F0F7DE86023CB/showMeta/0/ (last visited Mar. 5, 2013) (detailing the population disparities in each neighborhood by race and age). *See also* Daniel Denvir, *The Ten Most Segregated Cities in America,* SALON MAGAZINE, http://www.salon.com/2011/03/29/most_segregated_cities/slide_show/ (last visited Apr. 19, 2012).

102. *See, e.g.*, OTTO KERNER, JR. ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 302 (1968), *available at* http://

neighborhoods experience much more aggressive policing than low-crime, predominantly white neighborhoods.[103] For instance, in the seven years preceding the agreement, thirteen African-American males — but no whites — were killed in police shootings.[104] Racial tension reached a tipping point in 2001 when a CPD officer chased an unarmed black teenager, Timothy Thomas, down an alley, drew his service weapon and fired, killing Thomas.[105] Within forty-eight hours, riots broke out, the City issued a mandatory curfew, and the mayor requested that federal authorities investigate the CPD.[106] The DOJ quickly announced a formal investigation, which ultimately revealed problems with CPD's use-of-force policies, reporting, and data management, and found a lack of accountability both inside and outside the department in a formal findings letter.[107] These findings became the basis for a MOA, which the parties signed in April 2002.

B. THE MOA AND THE COLLABORATIVE AGREEMENT

On April 12, 2002, the CPD entered into two agreements: (1) a MOA with the City and DOJ as co-parties,[108] and (2) collaborative agreement ("CA") between the City, the FOP, and the American Civil Liberties Union (ACLU) and Cincinnati Black United Front (CBUF) as class representatives on behalf of Cincinnati's

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www.eisenhowerfoundation.org/docs/kerner.pdf (summarizing racial animosity toward the police in Cincinnati).

103. *See* SAUL GREEN ET. AL., CITY OF CINCINNATI'S INDEPENDENT MONITOR'S RESPONSE TO RAND'S SECOND ANNUAL REPORT: POLICE-COMMUNITY RELATIONS IN CINCINNATI 2 (2006), *available at* http://www.clearinghouse.net/chDocs/public/PN-OH-0005-0023.pdf (describing the disparity in policing practices as "A Tale of Two Cities").

104. In 1999, the ACLU filed a class action suit against the city and the police department on behalf of some of the victims. *See* Tyehimba v. City of Cincinnati, No. C-1-99-317, 2001 WL 1842470, *1–4 (S.D. Ohio May 3, 2001). This class action led to mediation proceedings between the parties, the result of which became the Cincinnati Collaborative Agreement. *See infra* note 109 and accompanying text.

105. *Race Riot Timeline*, CINCINNATI ENQUIRER, http://www.enquirer.com/editions/2001/04/13/timeline.gif (last visited Apr. 19, 2012).

106. *Id.*

107. Letter from Steven H Rosebaum, Chief, Special Litig. Section on Investigation of the Cincinnati Police Dep't, to William R. Martin, Special Counsel for the City of Cincinnati 1–14 (2001) [hereinafter Cincinnati Technical Assistance Letter].

108. Memorandum of Agreement between the U.S. Dep't of Justice and the City of Cincinnati, OH, and the Cincinnati Police Dep't [hereinafter Cincinnati MOA].

black residents.[109] Prior to the DOJ's investigation in 2001, private plaintiffs sued the CPD under 42 U.S.C. § 1983 for its excessive use-of-force practices.[110] Once the DOJ began investigating the CPD, the parties to this lawsuit expressed interest resolving the dispute via alternative dispute resolution, most likely to complement any DOJ agreement.[111] The presiding federal judge issued an order staying proceedings and establishing a collaborative procedure between the parties.[112] The DOJ joined these talks and designed the MOA with the CA in mind because the suit paralleled their own action against the City and the CPD.[113] The agreements were separate but complementary: the MOA corrected CPD's use-of-force practices and procedures and the CA mandated problem-oriented policing regime, a large substantive change in how the CPD was to interact with the community.[114] A comparison of traditional policing tactics to problem-oriented policing is beyond the scope of this Note, but suffice it to say that unlike traditional policing tactics, problem-oriented policing focuses on avoiding arrests — which does not deter certain persistent social problems — by collaborating with public agencies, the community, and the private sector to prevent crime and disorder.[115]

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109. *See* Collaborative Agreement, Tyehimba v. Cincinnati, 2001 WL 1842470 (S.D. Ohio, May 3, 2001) (No. C-1-99-317) [hereinafter Cincinnati CA], *available at* http://www.enquirer.com/editions/2002/04/04/loc_text_of_collaborative.html.

110. Complaint at ¶¶ 3, 26–27, 33, *Tyehimba*, 2001 WL 1842470 (S.D. Ohio, May 3, 2001) (No. C-1-99-317), 1999 WL 34013216.

111. *Tyehimba*, 2001 WL 1842470, at *1.

112. *Id.*

113. *See* Alan S. Kalmanoff, *Monitoring Police Reform in Cincinnati*, INST. FOR L. & POL'Y PLAN, http://ilpp.org/clients/cincinnati.php#dispute (last visited May 3, 2012).

114. *See Deal Signed, Changes Begin,* WLWT.COM, http://www.wlwt.com/news/1394770/detail.html (last visited Apr. 19, 2012). The CA contains provisions for implementing problem-oriented policing, a civilian complaint authority, and enforcement procedures for the MOA and the CA. Cincinnati CA, *supra* note 109, at ¶¶ 16–89. For more information about problem-oriented policing, *see infra* notes 225–233 and accompanying text.

115. CTR. FOR PROBLEM-ORIENTED POLICING, *What is POP?*, COPS, http://www.popcenter.org/about/?p=whatiscpop (last visited Mar. 5, 2013). *See also* CTR. FOR PROBLEM-ORIENTED POLICING, *Responses to the Problem of Street Prostitution*, COPS, http://www.popcenter.org/problems/street_prostitution/3 (last visited Mar. 5, 2013) (explaining possible responses the problem of street prostitution that avoid arrest, which apparently does not deter prostitution).

The MOA required compliance with the DOJ's best practices for policing.[116] The CPD agreed to draft use-of-force guidelines based on a continuum that provided both techniques to avoid force and limitations on certain types of force.[117] All CPD officers were to report use-of-force incidents, which would be subject to civilian and internal review in certain cases, and to enter into an early-warning system to monitor problem officers.[118] The CPD had responsibility for implementing these reforms, but a court-appointed monitor was to assess compliance with both agreements by meeting with the parties, reviewing city and CPD documents, attending training sessions, reviewing investigations, and analyzing use-of-force reporting data.[119]

C. CINCINNATI ACHIEVES REFORMS UNDER THE AGREEMENTS

The CPD successfully reduced the number of incidents where officers used force and the severity of force used.[120] Once CPD drafted new use-of-force policies and trained its officers, use-of-force incidents began to drop dramatically.[121] The CPD's simultaneous shift from physical force and chemical irritants to Tasers also successfully lowered suspect and officer injuries over the same period.[122] Unlawful use-of-force complaints also declined and African-American residents reported higher levels of satisfaction with CPD officers.[123] The following discussion provides some context to these trends.

Before this discussion, however, it is relevant to note that the data have some limitations. Before the MOA — signed in August 2002 — CPD's reporting procedures significantly underreported use-of-force incidents.[124] For instance, under the previous sys-

116. Many of the provisions in the MOA are taken from DOJ literature. *See generally* U.S. DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING FOR POLICE INTEGRITY (2001), *available at* https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf.

117. Cincinnati MOA, *supra* note 108, at ¶¶ 12–23, 77–91.

118. *Id.* at 24–76.

119. SAUL A. GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR'S FIRST QUARTERLY REPORT 114–15 (2003).

120. *See infra* Figures 1–2.

121. *See infra* Figure 1 (detailing the drop after 2004, when the procedures went into place).

122. *See infra* Figure 2.

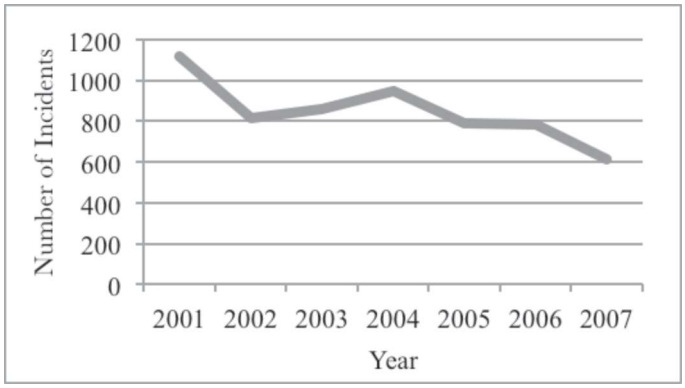
123. *See infra* note 129.

124. These problems are documented in Cincinnati's Technical Assistance Letter. *See supra* note 107, at 4–5.

tem, an officer did not need to report using force on restrained subjects unless she injured the suspect.[125] CPD officers also carried different forms for different types of force used (chemical irritant, canines, etc.), but only filed one form per incident, thereby allowing an officer to report only one use of force where the officer had actually used multiple types.[126] The MOA solved these reporting problems, but only data from 2004 onward — the first year officers received appropriate training in how and when to report use-of-force incidents according to the DOJ's policies — accurately reflects the total number of incidents where officers used force.[127] Further, public data exists only in monitor and auditor reports from 2002 to 2007.[128]

Figure 1 indicates that the overall use-of-force incidents declined significantly over the MOA's term, which spanned from August 2002 through January 2007.[129] The downward trend, however, reflects complex change within the CPD.

Figure 1 — Use of Force Incidents



125. *Id.*

126. For example, an officer that used chemical spray and 'hard hands' could omit the use of chemical spray by simply filling out the 'hard hands' form. GREEN ET AL., *supra* note 119, at 33.

127. *See* Cincinnati MOA, *supra* note 108, at ¶¶ 24–34

128. *See* Cincinnati MOA, *supra* note 108, at ¶¶ 101–106; Cincinnati CA, *supra* note 109, at ¶ 37–46.

129. Data is located in various documents. *See* GREEN ET AL., *supra* note 119, at 116 (2001 and 2002 data); SAUL A. GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR'S THIRTEENTH REPORT 14 (2006) (2003, 2004, and 2005 data); COL. THOMAS H. STREICHER, JR., CINCINNATI POLICE CHIEF ET AL., EIGHTEENTH STATUS REPORT TO THE INDEPENDENT MONITOR 5 (2007) (2006 data); GREG RIDGEWAY ET AL., RAND CORP., POLICE-COMMUNITY RELATIONS IN CINCINNATI 27 (2009) (2007 data).

The high-water mark for use-of-force incidents, 2001, includes altercations during the riots after Timothy Thomas's death — the event that led to DOJ involvement.[130] The subsequent rise between 2002 and 2004 is more puzzling. One hypothesis is that officers underreported using force until 2003, after which improved reporting increased the total number of incidents recorded.[131] Another theory suggests that CPD officers, similar to officers in Pittsburgh following that city's 1998 MOA, under-policed after the riots and during the first years of the MOA out of fear that citizens would issue complaints and the CPD's command staff would respond with disciplinary actions.[132]

Arrest statistics support the latter explanation. While the number of felony arrests did not change from 1999 to 2002, misdemeanor arrests, especially discretionary arrests like disorderly conduct, drug possession, and liquor-law violations, dropped substantially in 2001 and 2002.[133] The drop was more dramatic for young officers in minority neighborhoods, where citizen complaints were more common.[134] Because use-of-force incidents are more common in these neighborhoods, the drop in arrests could explain why use-of-force incidents also declined. Officers have since reported that the department pulled back initially in response to increased regulation under the agreement, but that it slowly returned to more active policing after the first few years.[135]

Whatever the cause for the rise in use-of-force incidents from 2002 to 2004, the data indicates that police officers used force in fewer situations after 2004 than they did before the agreement. In 2001, there were approximately twenty-seven use-of-force in-

130. *See* GREEN ET AL., *supra* note 119, at 116.

131. *See* SAUL A. GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR'S THIRD QUARTERLY REPORT 2–3 (2003) (offering such a hypothesis).

132. *See* DAVIS ET AL., *supra* note 60, at 57. Another study of the LAPD suggests the same effect occurred in 1998, after it became subject to external oversight. Canice Prendergast, *Selection and Oversight in the Public Sector, with the Los Angeles Police Department as an Example* 20–28 (Nat'l Bureau of Econ. Research, Working Paper No. 8664, 2001), *available at* http://www.nber.org/papers/w8664.pdf.

133. *See* Shi, *supra* note 64, at 102–04 (2009) (comparing felony and misdemeanor arrests in from 1999 to 2001).

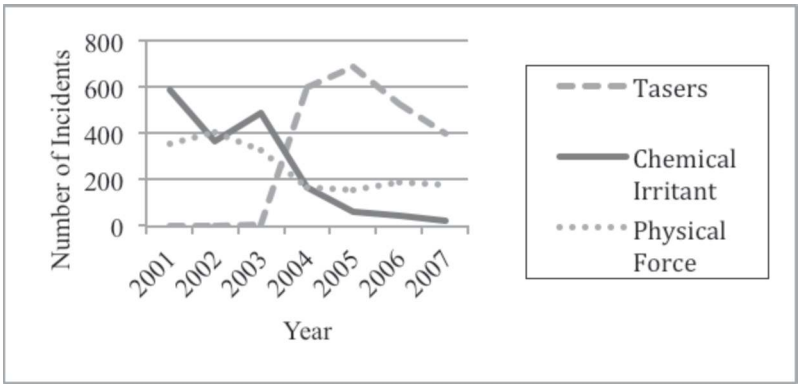
134. *See id.* at 108–09 (explaining away other alternative explanations for the data).

135. Linda Byron, *DOJ Reform: What Seattle Can Learn from Cincinnati*, KING 5 NEWS (May 18, 2012, 11:20 PM), http://www.king5.com/news/investigators/DOJ-police-reform-Seattle-Cincinnati-151925915.html.

cidents for every 1000 arrests.[136] By 2004, that number had fallen to twenty-three incidents for every 1000 arrests, and from 2005 onward it declined further to fourteen incidents for every 1000 arrests.[137] The monitor reports suggest that the full implementation of reforms brought about this change.[138]

Figure 2 indicates that after 2002, CPD officers also chose to use less harmful methods of force to make arrests. At the outset of the MOA, police most commonly used physical force (via batons, takedowns, heavy hands, etc.),[139] but beginning in 2004, they largely shifted to Tasers.[140]

Figure 2 — Use of Tasers, Chemical Irritant, and Physical Force



While Tasers are not risk-free, they pose fewer risks than the application of physical force or chemical spray because Tasers may be used up to twenty-one feet away and cause few side effects when used.[141] Once the CPD fully implemented its use of

136. *See* GREEN ET AL., *supra* note 119, at 116.
137. *See* GREG RIDGEWAY ET AL., *supra* note 129, at 21.
138. GREEN ET AL., *supra* note 129, at 13–15.
139. SAUL A. GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR'S EIGHTH QUARTERLY REPORT 2 (2004).
140. SAUL A. GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR'S ELEVENTH QUARTERLY REPORT 1 (2005).
141. GREEN ET AL., *supra* note 139, at 16 & n.2 (explaining that Tasers are more effective than other means of force than use of a baton or hard hands when the officer is at least one arm's length away from the subject).

Tasers, the department lowered officer injuries by 56% and suspect injuries by 35%.[142]

Citizen satisfaction with the CPD also improved. The data shows that unlawful force complaints spiked at 782 in 2003 — the first year of the new civilian complaint authority — but dropped to 193 in 2004 and steadily declined to sixty-four complaints in 2007.[143] Though the 2003 spike can be explained by a backlog in officer complaints from 2000 onward, the downward trend in complaints cannot be.[144] Moreover, recent surveys indicate that Cincinnati residents perceive CPD officers to be more professional, and are satisfied with the complaint process.[145] Changes are also more dramatic in black communities,[146] which suggests the agreement reached its intended beneficiaries.

IV. CRUCIAL FACTORS FOR THE SUCCESS OF THE CINCINNATI MOA

As with other pattern or practice litigation, DOJ had to overcome institutional obstacles to reform the CPD. Part IV explores in greater detail why these efforts succeeded in Cincinnati, while litigation in other cities has failed. Part IV.A argues that the DOJ overcame officer dissatisfaction by and union opposition by improving transparency in use-of-force reporting, review, and auditing, as well as utilizing the federal court when the parties reached an impasse. Part IV.B suggests that these enforcement mechanisms also kept the police chief from undermining the CPD's compliance, but that the real driver of reform came from aggressive city leadership. Finally, Parts IV.C–D argue that the Collaborative Agreement supplemented design deficiencies in the

142. Julie O'Neil, *Cincinnati Police Chief Weighs in on Tasers*, WCPO.COM, Nov. 18, 2011, http://www.wcpo.com/dpp/news/local_news/cincinnati-police-chief-weighs-in-on-tasers; U.S. DEP'T OF JUSTICE, POLICE USE OF FORCE, TASERS AND OTHER LESS-LETHAL WEAPONS 7–10 (2011) (surveying Tasers); *see* GREEN ET AL. *supra* note 140, at 12–13.

143. *See* GREEN ET AL., *supra* note 119, at 116 (citing total civilian complaints in 2001 and 2002); *see also* CITIZEN COMPLAINT AUTHORITY, CITY OF CINCINNATI, ANNUAL REPORT 11 (2004) (on file with the *Journal*). Subsequent audits are located on the city's website. *See Citizen Complaint Annual Reports*, CINCINNATI CITIZEN COMPLAINT & INTERNAL AUDIT, http://www.cincinnati-oh.gov/ccia/citizen-complaint-authority/citizen-complaint-annual-reports/ (last visited Apr. 14, 2013).

144. CITIZEN COMPLAINT AUTHORITY, *supra* note 143, at 11.

145. *See* GREG RIDGEWAY ET AL., *supra* note 129, at 89–90, 125–26.

146. *Id.*

MOA — namely its lack of enforcement provisions, its failure to address needed reform in the way police interact with citizens, and its lack of transparency to the public — and that the monitoring team's expertise and management strategy avoided pitfalls that other monitors have faced.

A. OVERCOMING OFFICER AND UNION RESISTANCE

Cincinnati police officers and their union, the FOP, opposed the agreement but did not prevent the CPD from implementing reforms. Like the police force in Pittsburgh under the 1998 MOA there, officers in Cincinnati initially reduced proactive policing, at least in part, because they feared disciplinary measures stemming from civilian complaints.[147] Young officers made fewer arrests and separated from the department in large numbers.[148] By 2005, fear of disciplinary measures had subsided, but officers still felt that reforms did not improve their police work.[149] In fact, at that time, 46% of officers described CPD's primary mission as compliance with the agreements and avoiding civilian complaints as opposed to reducing crime.[150] When asked what hypothetical changes they would make to the Department, officers surveyed said they would cancel implemented reforms; 85.2% of respondents felt that the agreements would not make the CPD more professional or effective.[151] In a separate 2007 survey, officers expressed similar pessimism.[152] In sum, the reforms created a

147. *See supra* notes 130–135 and accompanying text.

148. The CPD, which had roughly 1040 sworn officers during the period of the agreement, experienced separations higher than the national average from 2001 to 2003. *Compare* Letter from Valerie A. Lemmie, City Manager, to Mayor and Members of City Council, Oct. 13, 2004 (detailing CPD attrition rates), *with* ATLANTA POLICE FOUND., PUBLIC SAFETY FIRST: AN ATTRITION STUDY OF THE ATLANTA POLICE DEPARTMENT 1 (2009) (noting the average attrition rate at 5.7% over the same period); *see also* K. JACK RILEY ET AL., RAND CORP., TECHNICAL REPORT: POLICE-COMMUNITY RELATIONS IN CINCINNATI 30–32 (2005).

149. *See* JOHN LINDER, CINCINNATI POLICE DEPARTMENT POLICE OFFICER OPINION SURVEY #1 2 (2005) (on file with the *Journal*) (noting CPD officers' attitudes). The survey does not distinguish between changes stemming from the CA and those resulting from the MOA.

150. *Id.*

151. *Id.*

152. *See* RIDGEWAY ET AL., *supra* note 129, at 109–11, 118 (noting that while officers derived great personal satisfaction from their jobs, they did not feel protected by the command staff, felt disrespected, and did not believe that community cooperation with policing would be likely).

measurable difference in policing in the minds of the citizenry, but CPD officers did not perceive or appreciate its positive effects of reform.

But while rank-and-file officers resented reforms mandated by the agreements, they did not subvert the CPD's compliance with the agreements. Early monitoring reports suggest that officers and their supervisors routinely omitted information in their use-of-force reporting, but there is no indication that they did so consciously rather than inadvertently.[153] One reason why CPD officers did not falsify reports is that there has never been a culture of corruption within the department, as there has been in other jurisdictions under consent decrees.[154] An equally plausible explanation is that the MOA instituted more rigorous and transparent review of use-of-force incidents. For every instance where an officer applies chemical spray, deploys a Taser, or uses physical force, the shift supervisor must conduct taped interviews with all witnesses and issue a report to the CPD's use-of-force review board.[155] Technology-based oversight — for example, tape-recorded interviews, automated car cameras, and inventory checks — made it difficult for officers to hide troublesome incidents from supervisors, the command staff, and the monitoring team, which may have deterred malfeasance.[156] Alternatively, CPD officers may have avoided subverting the agreements because they had voted to make the FOP a party to them, and the FOP had been advocating for their interests before the monitoring team.[157] The agreement required the FOP to negotiate in good faith, and even though it criticized the agreement publicly

153. *See, e.g.*, SAUL GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR'S SECOND QUARTERLY REPORT 89–118 (2003) (detailing often incomplete investigations by supervisors in response to use-of-force incidents).

154. *See*, *e.g.*, ROBERT S. WARSHAW, ELEVENTH QUARTERLY REPORT OF THE INDEPENDENT MONITOR FOR THE OAKLAND POLICE DEPARTMENT 37–39 (2012) (Even after years under a MOA, the Oakland monitor's independent review reveals that supervisory review deems many use-of-force forms adequate even when such forms are illegible. Further, where supervisors have incorrectly finds appropriate officer use-of-force when pointing a firearm, 94% of the time the subject is black).

155. CINCINNATI POLICE DEP'T PROCEDURE 12.545 19 (2013), *available at* http://www.cincinnati-oh.gov/police/assets/File/Procedures/12545.pdf.

156. *See, e.g.*, *id.* at 27 (explaining how supervisors may track Taser deployment by reviewing data provided on a chip within the device).

157. *Cincinnati police union backs suit's settlement*, CNN (Apr. 8, 2002), http://articles.cnn.com/2002-04-08/justice/cincinnati.police_1_police-union-police-officers-tentative-settlement?_s=PM:LAW.

and sought to withdraw,[158] internally it likely encouraged officers to cooperate with the reform efforts.[159]

B. OVERCOMING THE FAILURE OF POLICE DEPARTMENT AND CITY LEADERSHIP

The CPD command staff's opinion of the reforms proceeded through three stages: initial optimism at the signing of the agreement, active opposition after from the monitor's initial report in 2003 criticizing the CPD's progress toward compliance until 2005, and finally, acceptance and reformation from 2005 to the end of the agreement in 2008.[160] Then-CPD Police Chief Thomas Streicher described his relationship with the monitor as not being "a very good marriage" and the early years under the MOA as "extremely contentious."[161] The CPD command staff, like that of many departments under MOAs, denied any wrongdoing and became adversarial when the monitoring team publically disclosed the lack of progress toward compliance.[162] CPD Captain David Baily described the command staff's reaction as defiant: "Wait a minute; they're going to tell me what to do? We know policing here in Cincinnati."[163]

Chief Streicher, and Mayor Charlie Luken, the new elected mayor, embraced some reforms but opposed many others.[164] For instance, Mayor Luken attempted to withdraw the City as a party to the MOA almost immediately after he signed it, claiming that the monitor had overbilled the City to retain his services.[165] The City and the Chief Streicher also delayed substantive chang-

158. Letter from Valerie A Lemmie, City Manager, to Mayor and Members of City Council on Collaborative Agreement, Oct. 27, 2003 (summarizing the court's denial). Notably, however, the FOP's rhetoric of opposition did not match its cooperation at the bargaining table, which is a credit to the union's fair-minded lawyer during the term of the MOA. Telephone Interview with Saul Green, Court-Appointed Indep. Monitor, Cincinnati, OH, Sept. 18, 2012, 11:00 AM (notes from the interview on file with *Journal*).

159. In fact, the representative for the union in ongoing negotiations was cordial and took reasonable positions, opting to compromise when appropriate. Interview with Saul Green, *supra* note 158.

160. *See* Telephone interview with Saul Green, *supra* note 158.

161. *See* Subject to Debate, *supra* note 30, at 5.

162. *See* Telephone interview with Saul Green, *supra* note 158.

163. Linda Byron, *supra* note 137 (quoting Captain David Bailey).

164. *See* GREEN ET AL., *supra* note 119, at 13.

165. *See* Kalmanoff, *supra* note 113 (detailing how the mayor attacked expenditures made by Kalmanoff despite their routine nature).

es to the CPD's use-of-force policies by two years, only acceding to the DOJ's demanded revisions to the policy under threat of litigation.[166] In 2004, Chief Streicher completely cut off the monitoring team's access to CPD staff, facilities, and documents.[167] The monitoring team eventually obtained a court order stating that the City and CPD had materially breached the terms of the agreement in denying the monitoring team access to documents, facilities, and police personnel, but only after a prolonged court battle and members of Cincinnati's City Council publicly chastised then-City Manager Valerie Lemmie to reprimand Chief Streicher.[168]

After court-ordered mediation sessions between the parties, the CPD began to remedy its non-compliance with certain MOA provisions. For instance, when the monitoring team discovered that the department's Internal Investigations Section ("IIS") did not assign an investigator to review civilian complaints against officers, the CPD conducted a formal review and transferred the IIS commander to a different command.[169] Had enforcement proceedings be brought earlier, use-of-force policy changes that took years may have taken a matter of months.[170]

A crucial factor in the CPD's compliance in the latter years of the agreement was the 2006 appointment of a new City Manager, Milton R. Dohoney Jr., who played an active role in ongoing negotiations regarding the implementation of various terms still found to be in non-compliance by the monitor. Once appointed by the newly elected mayor, Mike L. Mallory, he made a commit-

166. *See* GREEN ET AL., *supra* note 119, at 21–23.

167. *See* Report to the Conciliator from Special Master/Independent Monitor, *In re* Cincinnati Policing, Case No. C-1-99-3170 (S.D. Ohio 2004) [hereinafter Report to the Conciliator].

168. *See* Nathanial Livingston Jr., *Lemmie Holding Streicher's Hand, Again*, CINCINNATI BLACK BLOG (Feb. 9, 2005), http://blackcincinnati.blogspot.com/2005/02/lemmie-holding-streichers-hand-again.html.

169. GREEN ET AL., *supra* note 140 at 26.

170. For example, the CPD and the City delayed the promulgation of use-of-force policies by almost two years. GREEN ET AL., *supra* note 119, at 21–23. In contrast, Pittsburgh's reformed-minded chief drafted and implemented use-of-force polices within five months. *Compare* AUDITOR'S QUARTERLY REPORT 8–9 (1997), *available at* http://www.parc.info/client_files/CityofPittsburghAuditorQuarterlyReport1.pdf, *with* AUDITOR'S THIRD QUARTERLY REPORT 10–11 (1998), *available at* http://www.parc.info/client_files/CityofPittsburghAuditorQuarterlyReport3.pdf (noting that the Pittsburgh Police Department developed its use-of-force policies within five months).

ment that the CPD and the City would come into compliance with the agreements.[171] Following through on this promise, he participated in ongoing negotiation sessions (something his predecessor did not do regularly), met with the monitor, and took steps to understand the qualitative change the City and the CPD needed to take to comply with the agreement.[172] As a result of Mr. Dohoney Jr.'s "hands on" approach, a lion's share of the provisions in both agreements came into compliance after 2006.[173] Reform efforts in Cincinnati illustrate that reform can happen quickly with the right leadership, but also that an aggressive monitor and court sanctions are needed to overcome recalcitrance.

C. PRESSURE FROM PUBLIC INTEREST GROUPS AND THE COLLABORATIVE AGREEMENT

In light of the strong institutional opposition, use-of-force reform would not have occurred without civil litigants who negotiated the terms of the Collaborative Agreement (CA).[174] The CA aided the MOA's use-of-force reform process in three principal ways. First, the CA eased trust issues between the CPD and the community. Unlike the MOA, which focused on reforming the CPD's internal procedures, the CA created a more community-oriented policing regime that gave the CPD more legitimacy with the public.[175] Studies conducted by the RAND Corporation in 2005 and 2008 show a dramatic change in citizen satisfaction levels during the implementation of the CA, which occurred principally after 2005, but no corresponding increase in satisfaction levels during the MOA's implementation, which primarily reached its completion in 2005.[176]

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171. Telephone Interview with Saul Green, *supra* note 158.

172. *Id.*

173. GREEN ET AL., *supra* note 100, at 32–36.

174. *See* Tyehimba v. Cincinnati, 2001 WL 1842470, at *1–4 (S.D. Ohio, May 3, 2001) (order establishing procedure for a collaborative agreement); *In re* Cincinnati Policing, 209 F.R.D. 395, 298–404 (S.D. Ohio 2002) (finding the CA to be better than an fight for injunctive relief).

175. Interview by Police Assessment Resource Ctr. with Saul Green, Court-Appointed Indep. Monitor, Cincinnati, OH 3 (Jun. 28, 2004) [hereinafter Green Interview].

176. *Compare* GREEN ET AL., *supra* note 131, at 2–3, *with* GREG RIDGEWAY, *supra* note 129, at 89–90. It is quite possible that citizens finally felt the intended benefits of the terms in a much-delayed MOA. Even if this were so, the upward change in citizen trust and satisfaction would suggest that the CA continued the momentum created by the MOA.

Crucially, the CA established the Cincinnati Problem-oriented Policing Program ("CPOP"), which increased the frequency of positive interactions between police officers and the public, made inroads with community leaders, and a created a dialogue between the CPD and city residents in each precinct.[177] As part of CPOP, trained CPD officers "identif[ied] and analyze[d] community problems and . . . develop[ed] effective responses through partnerships with city employees and Cincinnati residents by utilizing the SARA problem solving method,"[178] solving crime problems, but also addressing issues dear to residents regarding city planning, public health, and youth safety.[179] While an evaluation of this drastic shift from traditional forms of policing is beyond the scope of this Note, such changes affected how Cincinnati's residents perceived its police force, likely legitimizing the DOJ's use-of-force reforms with the public and the police.

Second, the CA's enforcement provisions allowed the monitor and the parties to address noncompliance more easily than under the MOA.[180] Under the MOA, if the City or the CPD failed to fulfill any obligation, the DOJ could initiate a court proceeding for breach of contract to seek specific performance, and in the event it could not obtain such performance, simply restart its pattern or practice cause of action.[181] Under the CA, however, Magistrate Judge Michael R. Merz,[182] pursuant to Federal Rule of Civil Procedure 53 and after reading recommendations from the monitor, could enter the MOA and CA as court orders, demand that the City or the CPD come into compliance with the agreements, and if they have not within sixty days, issue a finding that sanctions

177. GREEN ET AL., *supra* note 100, at 43–51. The most successful example is the CIRV initiative, which utilizes a statistical analysis to identify and map criminal networks. The program reduced homicide rate by 18% and use-of-force incidents by 30%. *Id.* at 31–32.

178. 2004 COMMUNITY PROBLEM ORIENTED POLICING REPORT § 1 (2004), *available at* http://www.cincinnati-oh.gov/police/linkservid/2771A190-C413-4EE7-A8F337926F17DAC6/showMeta/0/. The SARA Model is an acronym for a process, which involves scanning for problems, analyzing the contours of the problem, responding the problem by brainstorming solutions and exploring solutions in other jurisdictions, and assessing the solution that has been implemented. CTR. FOR PROBLEM-ORIENTED POLICING, *SARA Model*, COPS, http://www.popcenter.org/about/?p=sara (last visited Mar. 5, 2013).

179. *See generally* CTR. FOR PROBLEM-ORIENTED POLICING, *supra* note 115.

180. Green Interview, *supra* note 175, at 3.

181. Cincinnati MOA, *supra* note 108, at ¶¶ 114–17. Starting a suit at this late stage, however, significantly stalls reform while the litigation is pending.

182. Magistrate Judge Michael R. Merz sits on the U.S. District Court for the Southern District of Ohio.

apply or that the noncompliance constitutes contempt.[183] The monitor made such a recommendation[184] and Judge Merz made such a demand in 2005, which he remedied with mediation sessions to prevent further breaches.[185] Defendants did not breach the agreement again, and became substantially more cooperative with the monitor and DOJ after this point.[186]

Third, the CA made the MOA more transparent to the public. Traditionally, a court-appointed monitor provides reports to a judge and the parties in an adversary proceeding where the public is simply an observer.[187] In contrast, the CA provided funds for a professional third-party auditor — RAND — and academics at the University of Cincinnati to evaluate the effectiveness of reforms under the CA.[188] The studies and annual reports published by the third parties were distributed to libraries, schools, and other community institutions.[189] Additionally, the CPD was responsible for disseminated all CPOP reports, detailing community participation in policing initiatives and new crime-solving tactics in each neighborhood, to the public in a similar fashion.[190] These public evaluations sought to increase legitimacy through transparency, and the citizen satisfaction surveys cited above suggest that they had that effect.[191] In sum, the CA generated good will, accountability, and legitimacy that the DOJ's efforts lacked, proving to be a crucial component of the MOA's success.

D.COURT-APPOINTED MONITORING TEAM

The MOA also benefited from an autonomous, experienced, and aggressive monitoring team that held the parties accountable. The monitoring team avoided compliance "backsliding" by

183. Cincinnati CA, *supra* note 111, at ¶¶ 97, 110–13; *see also* FED. R. CIV. P. 53.

184. Report to the Conciliator, *supra* note 167, at 1–6 (alleging material breach of the CA, and by implication the MOA); Plaintiffs' Motion to Compel, *In re* Cincinnati Policing, DE 165 (on file with author).

185. Report & Recommendation, *In re* Cincinnati Policing, DE 200, at * 5–6.

186. *See* Subject to Debate, *supra* note 30, at 5 (remarks by Police Chief Tomas Streicher noting improvement with DOJ and the monitor during that year).

187. *See* SEATTLE OPA REV. BD., A COMMUNITY COLLABORATIVE PROCESS FOR THE CITY OF SEATTLE 7 (2011) (comments by Police Chief Streicher).

188. Cincinnati CA, *supra* note 111, ¶ 31–32.

189. Cincinnati CA, *supra* note 111, at ¶ 45.

190. SAUL GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR'S NINTH QUARTERLY REPORT 50 (2005).

191. *See supra* notes 145–46 and accompanying text.

measuring compliance in stages, sending experts to ride-alongs with police officers and training sessions, and conducting audits of use-of-force investigations.[192] The monitor, Saul Green, also assigned a CPD officer to oversee every provision in the agreement in order to hold specific actors accountable to the monitoring team and the court for non-compliance.[193]

Equally important, the monitoring team remained independent from the parties, enabling it to freely challenge CPD and the City. The parties initially selected a monitoring team with ties to the FOP and Judge Dlott (the federal judge with jurisdiction over both agreements), which created serious conflicts of interest and would have hampered negotiation.[194] The Green team, in contrast, maintained its neutrality by opening up most meetings to multiple parties, and frequently soliciting advice from the named plaintiffs as well as the defendants before making decisions.[195] The team criticized the CPD and the City openly when they dragged their feet[196] and met the FOP's and the CPD's challenges to the agreements, which monitors in other jurisdictions have sometimes failed to do.[197] Not all monitoring teams successfully compel department reforms,[198] but a monitor who can manage compliance and aggressively prod the relevant stakeholders is necessary to implement lasting institutional reforms.

192. *See* GREEN ET AL., *supra* note 129, at 11–13; GREEN ET AL., *supra* note 190, at 11 (withholding compliance until data from full implementation is available); GREEN ET AL., *supra* note 100, at 8–9. As a result of these measures, once the monitoring team found an MOA provision to be met, that provision rarely fell out of compliance in subsequent reports. Telephone Interview with Saul Green, *supra* note 158.

193. *See* GREEN ET AL., *supra* note 129, at App. 2; *see also* Cincinnati CA, *supra* note 109, at ¶¶ 30–36.

194. Kalmanoff, *supra* note 113 (suggesting that Justice Douglas, a member of the Ohio Supreme Court, would have favored certain parties above others due to his political and social ties to them).

195. Telephone interview with Saul Green, *supra* note 158.

196. *See, e.g.*, GREEN ET AL., *supra* note 100, at 13–16; Report to the Conciliator at *3–8, *In re* Cincinnati Policing, Case No. C-1-99-3170 (S.D. Ohio Dec. 27, 2004), *available at* http://www.clearinghouse.net/chDocs/public/PN-OH-0005-0016.pdf.

197. *See generally* Report to the Conciliator, *supra* note 167. The fact that RAND confirmed the monitoring team's use-of-force data suggests that the team accurately analyzed it and appropriately held CPD to task for failing to achieve compliance. *See, e.g.*, K. JACK RILEY ET AL., *supra* note 148, at xxxi (acknowledging the monitoring team's use of data).

198. Kupferberg, *supra* note 97, at 152–55.

V. LEARNING FROM CINCINNATI

The CPD's reform of its use-of-force practices is one of the few bright spots in pattern-or-practice reform, and public law litigation more generally, but it has been largely neglected as a model to improve the DOJ's future interventions.[199] Part V.A argues that the Cincinnati's MOA and CA succeeded, in part, because the design and implementation of the agreements embody certain principles of democratic experimentalism: flexibility, experimentation, transparency, and shareholder deliberation. Recognizing some limitations in the theory of democratic experimentalism, Part V.B also recommends that the DOJ implement a variety of changes to its current MOA scheme, some of which go beyond experimentalist solutions, in order to make such success more common. First, the DOJ should recognize the positive impact the CA had on the reform effort in Cincinnati and aim to incorporate various design features in future agreement. Second, it should implement a more effective leadership model that improves accountability, transparency, and stakeholder input. Lastly, the DOJ should amend future MOAs to more easily deploy industry experts to train officers in new policies and implement new strategies.

A. REFORM IN CINCINNATI AS AN EXAMPLE OF DEMOCRATIC EXPERIMENTALISM

The design and implementation of the Cincinnati agreements is one example in a broader movement in public law litigation away from top-down, command-and-control regulation toward what is often referred to as democratic experimentalism.[200] In a command-and-control regulatory regime, a presiding body (usually a judge or an agency) determines whether or not the regulated entity must comply with a particular rule and issues orders to the entity to that effect.[201] This is problematic in the public law context, however, because the ad hoc formulation and rigidity of a

199. Only a few academic papers provide in-depth information about Cincinnati. *See, e.g.*, Harmon, *supra* note 28; Simmons, *supra* note 49.

200. *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345–47 (2004). This new approach to reform, however, has various names. *Id.*

201. *See* Dorf & Sabel, *supra* note 17, at 357–59.

consent decree prevents the parties from adapting to changing circumstances once they begin to carry out the reforms. Too often, courts equate compliance with a consent decree with success when the appropriate comparison is whether compliance achieves the underlying goal of the remedy.[202]

In an experimentalist regime, an agency or judge sets measurable benchmarks and establishes methods for assessing progress, but then delegates the responsibility of creating (and later revising) the method by which the regulated agency plans to reach each benchmark to the parties.[203] Experimentalist regulation is often called "soft law" because the parties will experiment with one set of rules, but may change them if they prove to be ineffective.[204] Experimentalist regulation welcomes ongoing input from stakeholders, whether they are parties or not, and publicizes the resulting goals and methods of assessment.[205]

In general, the DOJ's implementation of the pattern-or-practice statute resembles a command-and-control regime similar to consent decrees in public law litigation.[206] It designs a MOA and success — termination of the agreement — is achieved only when there is compliance. Consequently, the DOJ's rigid approach faces barriers common to consent decrees in public law litigation.[207] In contrast, the DOJ overcame these implementation issues because the CA's design — a model of experimentalist regulation — supplemented deficiencies in the MOA. The following sections outline how the CA tracks this model.

1. *Goal-Oriented and Experimental Regulation*

In experimentalist regulation, the parties set benchmarks and develop plans for achieving them in lieu of the regulator deciding which approach the regulated agency must follow.[208] Some have described this approach as measuring "outputs" instead of "inputs" because ultimately the parties care about the end result

202. *See supra* Part I.C.3; Sabel & Simon, *supra* note 56, at 1019.
203. Sabel & Simon, *supra* note 56, at 1019.
204. *Id.*
205. Lobel, *supra*, note 200, at 373.
206. *See supra* Part I.C.
207. *See supra* Parts I.C–D.
208. *See* Dorf & Sabel, *supra* note 17, at 430–31.

and may not know at the outset how to achieve them.[209] Experimentalist regulation avoids a common problem in top-down models, which occurs when the parties implement a rule but the rule fails to solve the problem and burdens the regulated agency because it cannot be easily changed.[210] Goal-oriented agreements also avoid party conflict when outcomes are unsatisfactory because the parties can easily refashion the rules.[211]

A goal-oriented approach succeeds when regulations are open to revision after carful data collection, analysis, and assessment.[212] For example, the parties to a MOA might issue new restrictions on the use of batons by officers in order to limit their use. If the data fail to show a reduction in baton use after such regulations have been implemented, the parties are free to pursue other methods for reducing their use, such as behavioral training.[213] Experimentation and reformulation is crucial to success because changes to existing processes often have unintended side effects.[214]

Cincinnati operated under two completely different agreements.[215] Like all MOAs, the Cincinnati MOA mandated specific and detailed procedural amendments to the CPD's internal regulations and the establishment of certain infrastructure developments from the DOJ's best-practices template.[216] These provi-

209. Sabel & Simon, *supra* note 56, at 1028.

210. *See id.* at 1028 (suggesting that the complexity of a consent decree hampered its execution).

211. This is usually with the help of a monitoring team. *See* Shane J. Ralston, *Dewey and Hayek on Democractic Experimentalism,* CONTEMP. PRAGMATISM (forthcoming) (manuscript at 9) (noting that the monitor or agency facilitates the search and discovery of the best policies and programs by evaluating a broad spectrum of possible alternatives).

212. CHARLES SABEL ET AL., BEYOND BACKYARD ENVIRONMENTALISM 7 (2000).

213. In education, the parties initially agreed to assess teachers by implementing a testing regime. Once teachers began teaching to the test, the parties amended the testing regime to focus on abstract conceptual ideas they wanted kids to learn, instead of testing algebraic or mechanical skills. Sabel & Simon, *supra* note 56, at 1070–71.

214. Regulations must be subject to re-evaluation because the changes parties make have unintended side effects and will create unintended feedback to the new regulations. *See* PETER M. SENGE, THE FIFTH DISCIPLINE 72–88 (1990) (explaining systems thinking and types of feedback responses).

215. *Compare* Cincinnati MOA, *supra* note 117, at ¶¶ 12–23, *with* Cincinnati CA, *supra* note 109, at ¶¶ 10–15, 30–46. Notably, the MOA focuses on internal police procedure, which lends itself more to strict rules while the CA aims to change the style of policing.

216. Cincinnati MOA, *supra* note 117, at ¶¶ 12–76.

sions set aggressive deadlines for compliance and are non-negotiable.[217]

The rigidity of the Cincinnati MOA created unnecessary tensions between the parties because it placed unanticipated burdens on officers and their supervisors. For example, officers were required to record narrative accounts for all use-of-force incidents and their supervisors were required to come to the scene and conduct an investigation, "including taking taped statements from the subject . . . the officer(s) who used force, witness officers, and other witnesses" as well as create their own reports for relevant command personnel.[218] This produced an unwarranted amount of paperwork with little discernible benefit when such an investigation would be conducted in case of any injury to the subject.[219] After months of arguing with the CPD, the DOJ finally limited in-person supervisory review to incidents where injuries occurred, so long as in other cases the officer produced a narrative account of the incident and the supervisor issued detailed comments on the appropriateness of the officer's tactics and forwarded such evaluations to the internal investigations division.[220] This amendment did not lead to falsification of records to avoid review or significantly diminish review of incidents where force was not warranted[221] — a fact that highlights how the rigidity of the agreement stalled the implementation of logical use-of-force policies.

By contrast, the CA set five primary goals regarding police-community relations, which the parties arrived at by surveying community members.[222] The CA attempts to fulfill these goals by establishing, inter alia, a problem-oriented policing program and

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217. Chief Streicher describes the DOJ's position as "the basic idea was that everything was the Police Department's fault. And we needed to fall into this cookie-cutter approach." Subject to Debate, *supra* note 30, at 4.

218. Cincinnati MOA, *supra* note 117, at ¶ 24; SAUL GREEN ET AL., *supra* note 153, at 25.

219. SAUL GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR'S FOURTH QUARTERLY REPORT 21–22 (2004).

220. *Id.*

221. *Id.*

222. Cincinnati CA, *supra* note 109, at ¶ 10. Those five goals are (1) that police officers and community members become "proactive partners in the community policing problem"; (2) building respect between police and communities; (3) "improve education, oversight, monitoring, hiring practices and accountability of CPD"; (4) "ensure fair, equitable, and courteous treatment for all"; (5) create methods to establish the public's recognition of the CPD's exceptional service. *Id.*

a civilian complaint authority, measures for ensuring compliance, and methods of evaluation.[223] However, it reserves promulgation of regulations until the CPD provides input on which problems the department should tackle.[224]

The CA's open-ended design enabled the City to create an effective problem-oriented policing regime (CPOP) that improved police-community relations.[225] CPOP is designed as a program where members in each precinct and community members would jointly define and brainstorm solutions to a problem unique to a neighborhood.[226] The absence of initial regulations allows the program flexibility. Within three years in Cincinnati, five districts identified problems and worked with the community to develop a joint response.[227] The flexibility led to innovative solutions, including implementing a project called the Cincinnati Initiative to Reduce Violence,[228] which reduced homicide rates and police use-of-force incidents;[229] creating repeat databases for identifying crime hotspots,[230] and making property improvements as a crime-fighting mechanism.[231] The CPD learned to fight crime successfully in new ways under the CA because the agreement gave officers a discretionary framework for solving problems.

2. *Shareholder Deliberation*

Experimentalist regulation also emphasizes broad shareholder negotiation. These negotiations are made face-to-face, arbitrated

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223. Cincinnati CA, *supra* note 109, at parts V.A, D, E (also establishing that the CPD incorporate bias-free policing).

224. *Id.* at ¶¶ 10–15 (enumerating the goals of the agreement).

225. *Id.* at ¶ 10.

226. ANTHONY A. BRAGA, PROBLEM-ORIENTED POLICING AND CRIME PREVENTION 13–14 (2d ed. 2008) (describing problem-oriented policing and the community).

227. Sometimes, different districts devised different responses to the same problem. CITY OF CINCINNATI ET AL., COLLABORATIVE AGREEMENT PROBLEM SOLVING ANNUAL REPORT 11–20 (2005), *available at* http://www.cincinnati-oh.gov/police/linkservid/0CB37197-2386-459A-B7E48E53804C53C4/showMeta/0/ (detailing the plans implemented in the five districts).

228. CIRV is a multi-agency effort to reduce gang-related gun violence by communicating with street gangs through a variety of channels: street advocates, police, probation, parole officers, community outreach, and media outlets. *About CIRV*, City of Cincinnati, http://www.cincinnati-oh.gov/police/community-involvement/cincinnati-initiative-to-reduce-violence/ (last visited Mar. 5, 2013).

229. GREEN ET AL., *supra* note 100, at 46.

230. *Id.* at 43–45.

231. *Id.* at 47–48.

by a monitor, and seek some minimum level of consensus before pressing forward.[232] Participation in these negotiations by representatives from all the groups substantially affected pattern or practice reforms, e.g., police officers, police management, the DOJ, the City, and various city interest groups; improves upon command and control regulation because broad participation legitimizes the decisions made by the representatives with the parties they represent and the general public.[233] This, in turn, promotes compliance during and after the agreement, because agencies are more likely to buy into reforms that help them. Deliberation between interested shareholders may also produce better results.[234]

In Cincinnati, shareholder deliberation came to bear on the agreements in two ways. First, the terms of the CA were drafted in response to recommendations made by police experts, eight interest key community interest groups,[235] and over 700 citizen questionnaires.[236] The unique structure of the CA alone demonstrates the value of a broad deliberative process at the outset. Second, the CA's inclusion of the ACLU and the FOP as parties made the reforms legitimate and more effective. As indicated above, the plaintiffs took an active role in the MOA reforms and sought enforcement proceedings in 2004 to prevent future breaches of the MOA and CA,[237] and both the ACLU and the FOP provided helpful amendments to proposed solutions by the monitoring team.[238] The inclusion of the FOP may have slowed pace of reform, but giving the union a voice in the deliberative process helped soothe tensions with rank-and-file officers, lowering the risk of non-compliance with the reporting and the complaint process, and bound the union to the terms of the agreement.[239]

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232. Sabel & Simon, *supra* note 56, at 1068.

233. *See* Simmons, *supra* note 49, at 519–26 (criticizing the DOJ's exclusion community and police union representatives in the implementation process because doing so ignores both groups' interest in the reforms).

234. *Id.* at 540–41(noting that officers have knowledge to bring regarding the creation of civilian review boards because they refute assumptions about officers who have received civilian complaints).

235. A special master identified those groups as African Americans, city employees, policemen and their families, white citizens, business/foundation/education leaders, religious and social service leaders, youth, and other minorities. *Id.* at 532.

236. *Id.*

237. *See* Part III.C *supra*.

238. Telephone interview with Saul Green, *supra* note 158.

239. *See* Part III.A *supra*.

3. *Regulatory Transparency*

Experimentalist regulation also improves on the command-and-control model by making the terms of the agreement and compliance measures explicit and open to the public. In aggressive experimentalist regimes, defendants' progress is posted publicly and compared to similarly situated jurisdictions so the parties and the public can make institutional comparisons.[240] In this sense, transparency functions as a learning device for other jurisdictions and justifies penalizing the worst performing agencies and awarding the best performing ones.[241]

There is great resistance within police departments to making use-of-force statistics open to the public.[242] A MOA generally grants the monitoring team full access to police records and CPD quarterly progress reports, but does not provide a mechanism for the public to view internal use-of-force data.[243] In contrast, the Cincinnati CA provides for district-by-district publication of various CPD initiatives, including problem-oriented policing practices, police statistics (for example, use-of-force numbers and information about the race of suspects), and summary reports regarding citizen complaints.[244] In addition, RAND used raw data collected from the CPD and other sources to publish an independent analysis of the reforms.[245] The disclosure provisions in the CA confirmed the progress that City and CPD officials claimed under the MOA, and evidence suggests the CPD learned more about the communities they served by receiving information as part of their problem-oriented policing efforts.[246] The initiatives also had a

240. In education, the No Child Left Behind Act incorporates these provisions. *See* 20 U.S.C. § 9622(c)(1)(A) (2012) (granting the public access to all assessment data, questions, and complete and current assessment instruments).

241. *See* Harmon, *supra* note 28, at 64–66.

242. *See, e.g.*, sources cited *infra* note 129 (highlighting the fact that use-of-force data is only available during the terms of a MOA, and even then, only in summary form). In spite of the number of pattern or practice investigations settlements, no agreement provides for the publication of use-of-force data beyond summary statistics.

243. Cincinnati MOA, *supra* note 117, at ¶¶ 106–07.

244. Cincinnati CA, *supra* note 109, at ¶¶ 29(k), 38–40, 86.

245. *See supra* footnotes 187–97 and accompanying text.

246. *See, e.g.*, CITY OF CINCINNATI ET AL., COLLABORATIVE AGREEMENT PROBLEM SOLVING ANNUAL REPORT: COMMUNITY PROBLEM ORIENTED POLICING 4 (2003) (describing how an ex-felon pastor helped coordinate an initiative with the CPD to reach as-risk youth in the Evanston district in Cincinnati).

discernible impact on community involvement in policing efforts to solve crime and disorder problems.[247]

4. *Beyond Experimentalist Solutions*

Mapping the successes in Cincinnati to principles of democratic experimentalism suggests that the DOJ should incorporate these principles in future pattern or practice reforms. Doing so would be a good starting point, but would be insufficient on its own to ensure consistent success. The experimentalist theory relies on building new lines of communication and collaborative effort. It does not formulate principles, however, for who the collaborators should be or on how to avoid obstructionists.[248] For example, a theory of experimentalist regulation does not adequately explain how reformers can overcome the denial of wrongdoing or blame by agency administrators that often underlie resistance to reforms. The experimentalist theory rightly suggests that, once the reformers reach agreement and are in a position to make radical changes, administrators will be uncertain of how change will affect their place in the new institution.[249] The theory does not explain, however, how these leaders can be persuaded to commit to reforms.

Democratic experimentalism theory also fails to account for the expected regression of agency administrators back toward the status quo in the policing context. The experimentalist model assumes that agency officials become amenable to the prospect of reform once there has been a finding of liability, because such a finding of liability implies that the status quo is morally wrong.[250] In policing this may occur for certain officials for a brief period of time, however, the command staff and police officers will revert to

247. A more detailed look at civilian satisfaction with the CA is located in Part IV.C, *supra*.

248. Dorf & Sabel, *supra* note 17, at 348–54.

249. This phenomenon is referred to as the "veil effect" because administrators are often blinded to what change will look like. *See* Sable & Simon, *supra* note 56, at 1074–75 ("The struggle for selfish advantage is impeded at the outset of remedial negotiations by the fact that the parties find themselves partially veiled in ignorance. They cannot count on their prior positions, and it may be hard for them to anticipate what their positions will be like in the alternative future regimes under consideration.").

250. *See* Sabel & Simon, *supra* note 56, at 1075–76 (explaining that agency officials are risk-averse, and will naturally value the status quo more than changes, even if those that are in their self interest, but are more willing to do so when the status quo becomes devalued or morally disfavored).

the status quo when they perceive regulations to be unhelpful to crime prevention or that they can return to business as usual by simply rejecting administrative changes without repercussions.[251] Cincinnati did not prevent regression to the status quo through better communication channels, as experimentalist theory would suggest, but rather through effective enforcement mechanisms and city leadership.[252] Even still, the CPD failed to meet almost every relevant deadline set out by the MOA and obtained compliance with most of the CA's terms in one year. In light of this framework, how then should the DOJ pursue future pattern-or-practice interventions?

B. RECOMMENDATIONS FOR FUTURE PATTERN-OR-PRACTICE LITIGATION

Given the lack of success in pattern or practice litigation and settlements thus far, there remains much to improve in the DOJ's current approach to police reform. Part V.B.1 recommends that the DOJ amend the structure of future MOAs to more closely reflect the positive design features of Cincinnati's CA associated with democratic experimentalism. Even the CPD's path to successful compliance, however, suggests there is room for improvement. Part V.B.2–3 suggest that the DOJ should change leadership incentives by increasing the visibility of management failures and successes to superiors and to the public. Additionally the DOJ must do more to help floundering departments implement reforms and more adequately address their concerns in order to obtain buy in from those they regulate.

1. *Using Principles from the Collaborative Agreement*

The DOJ's current approach — using a MOA to institute procedural mechanisms in police departments to reduce use-of-force incidents — must be redesigned to avoid the implementation problems that plagued Cincinnati and continue to do so in other jurisdictions.

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251. *See* Linder, *supra* note 149 (detailing officer responses policing tactics brought on by the CA).

252. *See* analysis *infra* Part III.B–C.

First, a MOA must focus on outputs and retain some flexibility in its implementation. The lesson from Cincinnati is that detailed provisions do not guarantee ease of implementation, and can place undue burdens on a police department.[253] Focusing on outcomes prevents the department from wedding itself to certain procedures ill suited to a particular jurisdiction. For example, implementing behavior training may be a more effective way to reform officer interactions with citizens than simply forcing those officers read the training manual more often (a common prescription when there is a lack of training). While the DOJ carries a certain level of expertise, a goal-oriented approach will help resolve the major question of reform — given the wide array of policy choices, and the unique advantages and problems present in a particular jurisdiction, what new policies and procedures will produce the intended outcome.

Second, the DOJ should change its reform strategy by inviting key shareholders to join as part of a collaborative process to design the structure of the MOA. Once the drafting process is completed, the DOJ should invite a smaller group of these stakeholders as parties to the MOA in order to solicit their advice regarding potential solutions, including citizen groups, the police union, and policing experts. Any cost in time spent during the initial negotiation will pay dividends in implementation. After becoming parties, these groups will be bound to the agreement's terms, prevented from holding up implementation by using political pressure as a weapon, and more receptive to changes as a result of having had a hand in shaping them.[254] Additionally, adding a plaintiff organization can prevent the phenomenon of agency capture by providing a voice in opposition to the resistance that can be expected from the police department and possibly elected officials and the police union.[255] Lastly, policing experts can bring interdisciplinary experience to bear on proposed solutions. For example, economics studies argue that officer and victim input is necessary to assess officer errors more efficiently because the current monitoring process, which focuses on civilian complaints,

253. *See* Chanin, *supra* note 54, at 146–47, 163.

254. *See, e.g.*, Cincinnati MOA, *supra* note 117, at ¶ 113; Chanin, *supra* note 54, at 178–180.

255. *See* Croley, *supra* note 95, at 5.

undervalues the good created by aggressive policing.[256] Cincinnati employed independent experts to measure — succeeding to some degree — officer and citizen satisfaction with CA initiatives as feedback for the monitor's efforts. The DOJ should employ experts to do like work in other jurisdictions.

Third, the MOA should employ a more robust enforcement mechanism when parties are found in breach of the agreement. Breaches will inevitably occur and the DOJ must have some response other than initiating a new lawsuit. In Cincinnati, entering the agreements as a court order ensured that any breach was coupled with contempt of court sanctions. The DOJ should consider returning to its early days of pattern or practice litigation when it regularly obtained consent decrees enforceable by court order. Alternatively, parties themselves could devise an incentive scheme whereby noncompliance would have disastrous consequences, such as receivership,[257] fines,[258] or heightened scrutiny, alongside accompanying incentives for compliance. Such powerful incentives might be more effective than the DOJ's currently unsuccessful practice of threatening to recommence litigation for breach of contract.

2. *Changing Attitudes Through Leadership and Benchmarking*

Shifting from a top-down regulatory approach to one more in harmony with the principles of democratic experimentalism would only partially resolve problems in the current DOJ approach. Any regulatory scheme must also focus on mitigating denial that problems exist and management's conviction that reform is unwarranted.

MOAs should provide for an independent committee tasked with evaluating compliance with policy and procedural changes at the officer, supervisor, precinct, and command staff level, com-

256. Canice Prendergast, *The Limits of Bureaucratic Efficiency*, 111 J. POL. ECON. 951–53 (2003) (suggesting that despite the beneficiaries to the LAPD's less-aggressive policing style, others suffered due to increased gang activity).

257. *See* Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC'Y 73, 74 (2001). The Oakland Police Department recently struck a deal with federal officials to avoid receivership, a natural outgrowth of the Police Department's noncompliance. *Oakland Police Avoids Receivership*, NBC BAY AREA (Dec. 5, 2012, 9:05 pm), http://www.nbcbayarea.com/news/local/Oakland-Police-Avoids-Receivership-182290621.html.

258. *See* Harmon, *supra* note 28, at 62–63.

prised of retired police officers, members of the monitoring team, and DOJ officials. This committee would issue public reports to the city council and mayor, and make public recommendations to the police chief stating whether members of management are rigorously enforcing reporting guidelines. This added check would not only ensure a level of transparency, but also prevent middle management from shirking its duty to review of officer malfeasance. In instances where supervisors fail to intervene when problem officers are identified or where reporting discrepancies exist,[259] the officer would be held accountable to the supervisor, the supervisor to the committee and the chief, and the chief to the city council or mayor. Systems monitoring like this has succeeded in other disciplines,[260] and would better diagnose multifaceted and multidimensional problems within the department and identify recalcitrant employees. Further, past experience suggests that officers will comply with public commands made high-level agency officials that the status quo is unacceptable.[261]

The independent committee should provide periodic auditing in addition to the document audits provided for in current MOAs. The potential of technology to improve the auditing process should be harnessed, including by using audio recording devices or video cameras in police vehicles to record citizen interactions, and by instituting inventory checks to track when devices like Tasers are deployed. Moreover, tape-recording field investigations by supervisors can help the command staff keep better tabs on supervisors in a way that an early-warning system might not accomplish alone, and prevent false reporting by line officers.

The DOJ should also require that the monitoring team place at least one member of management in charge of achieving compliance with each provision in the MOA. The Cincinnati monitor used this process as a way to facilitate communication and progress toward compliance.[262] This had the added benefit of holding

259. *See* Chanin, *supra* note 54, at 121, 127–129.

260. *See generally Patient Monitoring Guidelines for HIV Care and Antiretroviral Therapy (ART),* WORLD HEALTH ORG. (2006) (explaining that a systemic approach that evaluates care at the patient, facility, district, national, and global level is necessary to prevent the spread of sexually transmitted diseases).

261. *Id.* at 171.

262. Telephone Interview with Saul Green, *supra* note 158 (describing the implementation of the compliance by holding a particular member of the command staff accountable for each provision in the agreements).

that officer accountable for failing to get the department in compliance. Formalizing this process will help to weed out problem officers.

Transparency should function as an accountability mechanism, though it was not used as one in Cincinnati. Future MOAs should require that each district publish crime, use-of-force, and reporting statistics to command staff and the public so that districts' successes and failures can be identified.[263] In addition, the DOJ should use its experience overseeing MOAs to catalogue, measure and publish its efforts in other jurisdictions. Such a catalogue would define the stated goals of each pattern and practice litigation, measure whether the jurisdiction obtained the stated goal, the time it took to do so, problems, and attempted solutions; and compare completed reform initiatives with pending investigations and settlements. Such comparative data would be persuasive to officers and management during the implementation process and may also apply political pressure for change. A police department unwilling to alter certain procedures or practices would have a harder time justifying its obstinacy to the public and elected officials when faced with public data suggesting it should do otherwise. As an added benefit, the DOJ could use this information to assess progress by highlighting how similarly situated jurisdictions have performed under MOAs.

3. *Reframing DOJ's Role as Facilitator*

A common problem with the imposition of MOAs is that the lines of communication between the DOJ and the regulated bodies work in one direction.[264] This is detrimental to the reform process, because it is crucial that those with diverse opinions, namely rank-and-file officers and certain management players, express conflicting ideas and to harmonize their views before moving forward because silencing those voices creates a polarization that prevents buy-in, and ultimately leads to disparagement

263. Benchmarking is not a new phenomenon, but one sorely needed by administrative agencies. *See* Dorf & Sabel, *supra* note 17, at 345–48 (explaining that the goal of benchmarking is to create institutional knowledge across jurisdictions, which "allows the parties to learn enough to do modestly better the next time.").

264. Chanin, *supra* note 54, at 177.

of reforms.[265] The DOJ should amend how it interacts with regulated agencies so that it can get more out of them.

The DOJ should create realistic compliance deadlines emphasizing phases of compliance in order to generate good faith with the regulated agency. Discouragement stemming from the perceived gap between goals and reality can prevent an agency from reaching those goals.[266] In the MOA process, police officials feel overwhelmed with the nature and number of changes they must make and respond by ignoring compliance deadlines and resent charges they are dragging their feet,[267] leading to mutual blame between the parties.[268] Instead of simply lengthening compliance deadlines, the DOJ should stagger compliance goals, emphasizing low-hanging fruit over complex reforms, and set deadlines for 50%, 75% and full compliance so deadlines become meaningful.[269]

Lastly, the reform in Cincinnati illustrates that the DOJ would improve the speed and quality of reform by acting as a facilitator in officer and civilian training. Far too often, the there is significant delay in the implementation of a civilian complaint board because investigators have not been trained to conduct investigations and parties lack the expertise to train them in a timely fashion.[270] The DOJ must recognize that police departments have limited resources and need help to establish wholly new institutions.

The DOJ should also include provisions in the MOA mandating the deployment of agency experts to train officials in local jurisdictions. Although such a provision may tax the DOJ's limited resources in the short term, it will accelerate reform, and may ultimately conserve resources over the life of the agreement. For instance, when the parties in Cincinnati determined that a shift to Tasers would reduce suspect and officer injuries, but would require extensive training and amendments to the terms of the MOA, the DOJ provided technical assistance for its implementa-

265. SENGE, *supra* note 214, at 228.

266. *Id.*

267. *See* Chanin, *supra* note 54, at 163 (describing the surmounted pressure on the regulated agency to comply with regulation after regulation).

268. SENGE, *supra* note 214, at 228.

269. Cincinnati took a staggered approach by design. The more quantitative provisions were tackled first, followed by more complex reforms. Telephone Interview with Saul Green, *supra* note 158.

270. *See, e.g.,* PITTSBURGH AUDIT TEAM, AUDITOR'S SIXTEENTH QUARTERLY REPORT, US V. CITY OF PITTSBURGH 50 (2001) (describing the backlog in citizen complaints).

tion.[271] In fact, Tasers were successfully implemented over the course of only three months because the DOJ was flexible in altering the terms of the MOA and provided expertise for officer training.[272] The DOJ should send experts to train departments in all facets of its use-of-force best practices.

VI. CONCLUSION

The DOJ's intervention in Cincinnati provides many lessons for reform of police departments in other cities. The CPD successfully reduced use-of-force violations, increased citizen satisfaction with the police department, and changed the culture of Cincinnati's policing from a militaristic model to one emphasizing problem-solving and community interaction. It accomplished this feat by overcoming a recalcitrant police force and command staff, initial pushback from city officials, and a hostile police union. Since intervening in Cincinnati, the DOJ has opted to avoid pattern-or-practice litigation and settlements where possible. This Note has argued that this decision is misguided.

The DOJ should recognize that credit for its success in Cincinnati is due to the design of the agreements, powerful leadership, party communication, and appropriate enforcement mechanisms. Until the DOJ improves upon the current structure of its MOA, and changes the style and scope of its implementation efforts, similar successes are unlikely.

271. *See* SAUL GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR FIFTH QUARTERLY REPORT (2004).
272. *See id.*