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# Early Stages of Pattern or Practice Police Misconduct Reform: An Examination of the Department of Justice's Investigation and Negotiation Processes

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Police Quarterly

0(0) 1–25

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DOI: 10.1177/1098611117709268

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## Abstract

This essay focuses on two significant blind spots in knowledge of the Justice Department's (DOJ) pattern or practice police misconduct initiative: (a) DOJ investigation of alleged systemic police misconduct and (b) the negotiation that defines the terms of the settlement agreements between the DOJ and jurisdictions found to have engaged in a pattern or practice of unlawful activity. This article will discuss each stage in some detail, beginning with a description of the relevant federal and state or local stakeholders involved and the key decisions they face throughout the investigation and negotiation processes. The article goes on to address several points of criticism, including the ambiguous legal and evidentiary standards underlying the DOJ's investigation process and the insularity and opaqueness that characterize settlement negotiation, while considering how each affects the process of implementation and the sustainability of the organizational change at issue and the broad goals of the initiative.

## Keywords

police reform, department of justice, consent decree, investigation, negotiation

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## **Introduction**

Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 charges the U.S. Department of Justice (DOJ) with identifying and eliminating “conduct by law enforcement officers... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States” (42 U.S.C. Sec. 14141).

The “pattern or practice initiative,” as it is known, has been positioned as a means of transforming the most troubled departments in the country into models of accountable, lawful policing (United States Department of Justice [U.S. DOJ], 2017a; Walker & Archbold, 2014). Under this authority, the DOJ has engaged with police departments in Cincinnati (Vela, 2001), Pittsburgh (Fuocco, 1995), Cleveland (Dewan & Oppel, 2015), and Ferguson, Missouri (Berman, Horwitz, & Lowrey, 2016), among others facing the aftermath of controversial police-involved shootings. This process was used to drive reform of the Los Angeles Police Department in the wake of the Rampart scandal (U.S. DOJ, 2000) and in Missoula, Montana, as allegations of gender bias in the investigation of sexual assault cases spread through the city’s police department, county prosecutor’s office, and the University of Montana (U.S. DOJ, 2013, 2017b), to name a few.

Yet, as Professor Alpert et al. note in their introduction to this issue, despite the vast authority granted to the DOJ and the sizable impact on affected departments and their constituencies, academic experts have largely overlooked the matter. Scholars have developed some insight into the challenges departments face in implementing pattern or practice reforms (Chanin, 2014; Davis, Ortiz, Henderson, Miller, & Massie, 2002; Walker, 2012) and are beginning to learn about the extent to which this process generates lasting organizational change (Bromwich Group, 2016; Chanin, 2015; Davis, Henderson, & Ortiz, 2005; Stone, Foglesong, & Cole, 2009; Walker, 2012) but want for richer empirical and theoretical understanding of the initiative and its enforcement.

With that in mind, this essay focuses on two of the field’s most conspicuous blind spots: (a) DOJ investigation of alleged systemic police misconduct and (b) the negotiation that defines the terms of the settlement agreements between the DOJ and jurisdictions found to have engaged in a pattern or practice of unlawful activity. This article will discuss each stage in some detail, beginning with a description of the relevant federal and state or local stakeholders involved and the key decisions they face throughout the investigation and negotiation processes. The article goes on to address several points of criticism, including the ambiguous legal and evidentiary standards underlying the DOJ’s investigation process and the insularity and opaqueness that characterize settlement negotiation, while considering how each affects the process of implementation and the sustainability of the organizational change at issue and the broad goals of the initiative.

## Investigation

Enforcement of the law to correct pattern or practice police misconduct is led by the Special Litigation Section (SPL), a small office within the DOJ's Civil Rights Division. SPL attorneys oversee the investigation process, which involves a series of steps to uncover evidence of systemic misconduct.

### *Preliminary Inquiry*

Investigations initiated under Section 14141 authority typically begin with a *preliminary inquiry*, an informal step used to identify those allegations worthy of a more thorough review. According to Former SPL Chief Jonathon Smith (Police Executive Research Forum [PERF], 2013, p. 10), the preliminary inquiry begins with the assignment of an “attorney or investigator to collect information” about the department to determine whether a violation exists (U.S. DOJ, 2010, p. 2). SPL reviews hundreds of leads per year, generated by complaints of misconduct submitted by individuals and advocacy groups, law enforcement officials, prosecutors, and elected representatives, as well as media reports and records produced in civil or criminal litigation (U.S. DOJ, 2017a).

The case of Pittsburgh illustrates the importance of data generated by civil society groups and other organized interests. In March of 1996, the American Civil Liberties Union (ACLU) filed a class action suit against the City of Pittsburgh alleging that the Pittsburgh Bureau of Police (PBP) had engaged in widespread use of excessive force (Pitz, 1997). In addition, the ACLU reached out to the Justice Department with the hope that federal attention to the matter would strengthen their position vis-à-vis the city. The DOJ's SPL used the ACLU's case to support its own pattern or practice reform of the PBP. According to ACLU attorney Witold Walczak, the DOJ was “in town before we hung up the phone” (Interview, April 19, 2010).

Preliminary inquiries do not involve affected departments and are not made public, as the DOJ considers this stage of the process *confidential* and “deliberative agency decision-making” (U.S. DOJ, 2017a, p. 5).<sup>1</sup> Although there is some evidence to suggest that SPL does not maintain a reliable historical record of this initial step (Rushin, 2014), the Justice Department notes that they have initiated *hundreds* of preliminary investigations since 1994 (U.S. DOJ, 2017a, p. 5). Another more precise estimate suggests that between 2000 and 2013, SPL reviewed somewhere between 300 and 350 agencies (Rushin, 2014).

A 2003 DOJ memo establishes that preliminary inquiries are initiated against the backdrop of several factors, “including the seriousness of the alleged misconduct, the type of misconduct alleged, the size and type of law enforcement agency, the amount of detailed, credible information available and the potential precedential impact” of the decision (U.S. DOJ, 2003, p. 3).

If this preliminary step yields “reasonable cause” to believe that a pattern or practice of unlawful activity exists, the case is sent to the Assistant Attorney General for the Civil Rights Division for review and approval to initiate a formal investigation into the department (U.S. DOJ, 2010, p. 2).

### ***Formal Investigation***

Since 1994, 69 preliminary inquiries have yielded evidence sufficient to justify a more formal investigation (U.S. DOJ, 2017a). Most have involved allegations of excessive force (48% or 69.6%), discriminatory policing (38% or 55.1%), or unlawful stop, search, or seizure practices (28% or 42.0%; Frontline, 2016). Neither department size, type, nor location seems determinative; SPL has investigated departments in large coastal cities (e.g., New York, Los Angeles), small Midwestern towns (e.g., Mt. Prospect, IL; Steubenville, OH), southern counties (e.g., Alamance County, NC), and even Caribbean islands (Puerto Rico, U.S. Virgin Islands; Frontline, 2016).

Several factors shape the nature of an investigation, including the size and complexity of the affected department and the content and context of the allegation(s) underlying it, among others (U.S. DOJ, 2017a). In general, however, with the help of private consultants and other substantive experts, including current and former police chiefs, SPL staff gather data and analyze information drawn from several sources, including (a) interviews with department executives and front-line officers, union representatives, political officials and other agency staff, civil society leaders, and community members; (b) relevant documents, including department policies and procedures, administrative records, and other pertinent data; and (c) first-hand observations made during on-site inspections of facilities, department briefings and other meetings, staff training, and ride-alongs (U.S. DOJ, 2010, 2017a).

This process has identified a pattern or practice of misconduct in some 42 law enforcement agencies, a rate of 60.8% (U.S. DOJ, 2017b, 2017c). In such cases, SPL typically relies on a public report, commonly referred to as a *Findings Letter*, to describe the investigation process and detail the outcomes of its review (U.S. DOJ, 2017a). In cases where insufficient evidence exists to support a pattern or practice finding, SPL will close the case and take no further action (U.S. DOJ, 2017a). As of April 2017, 26 investigations have concluded without a pattern or practice finding; one is ongoing (Frontline, 2016; U.S. DOJ, 2017b).

### ***Litigation or Settlement***

Upon receipt of the DOJ’s Findings Letter, the affected jurisdiction is immediately faced with a critical choice: to fight the allegations in court or negotiate the terms of a settlement agreement.

From the city or county's perspective, this decision is characterized by a complex arrangement of financial, political, and organizational costs and benefits, as is clearly illustrated by City of Pittsburgh's experience.

In April 1997, after nearly a yearlong investigation, the DOJ determined that the PBP had engaged in a pattern or practice of use of excessive force, false arrests, failure to properly investigate misconduct complaints, failure to discipline officers adequately, and a failure to supervise officers (U.S. DOJ, n.d.).

Pittsburgh officials, angry over being singled out as the first subject of Section 14141 enforcement and skeptical of the DOJ's ability to demonstrate a pattern or practice of misconduct, initially considered fighting the allegations (McNeilly, 2008). But for several reasons, they opted instead to settle the case. First, owing to severe inadequacies with PBP's record-keeping system, the logistics behind gathering and presenting evidence to combat the Justice Department's claims would be very difficult. The City of Pittsburgh also saw the process as an opportunity to make necessary capital improvements that were otherwise unlikely to receive funding (Davis et al., 2002, p. 7). Litigation carried with it the risk of the unknown. As former Chief Robert McNeilly noted at the time, "There was no guarantee with the outcome of a court case, and the stakes were high. At least with the consent decree we get to determine how we go down that path to making changes" (Pro, 1998, para. 25). And with McNeilly, the city felt confident that it had the right person to lead PBP's reform efforts.<sup>2</sup>

That other jurisdictions likely face a similar set of challenges helps explain the fact that the DOJ has reached settlement with 36 of the 42 jurisdictions (85.8%) facing a pattern or practice finding (U.S. DOJ, 2017a, p. 19). These data also highlight not only the DOJ's strong preference for avoiding litigation but also the considerable power it wields at this stage of the process.

Successful defense against DOJ allegations is an uncertain and potential costly proposition for affected jurisdictions, particularly in light of the federal government's deep resources and litigation experience. Yet, six jurisdictions have opted to challenge the DOJ's claims in federal court. Tellingly, all six either lost at trial or chose to pursue settlement at some point during the litigation process (U.S. DOJ, 2017a). Based on these data, it would appear that departments subject to a DOJ pattern or practice finding will ultimately face a structured reform, whether they choose at the outset to settle or attempt to challenge the claim in court.

Even in the face of this inevitability, there are perhaps some benefits in the decision to fight the allegations in court. First, there may be some symbolic political value in being seen as standing up to or challenging the DOJ, who many critics believe has used the pattern or practice initiative in violation of the principles of federalism and local control over public safety (Dewan & Williams, 2017; Speri, 2017).

Such opposition would likely also engender political support among police union groups, many of which have vehemently opposed federal intervention (e.g., Connelly, 2013; MacDonald, 2015). To date, the most aggressive

opposition to DOJ intervention has come from two political opponents of Obama (U.S. DOJ, 2017a): Joe Arpaio, the ultra-conservative former Maricopa County, Arizona sheriff and Sheriff Terry Johnson, who represents heavily Republican Alamance County, North Carolina, and like Arpaio, has built his career on an aggressive anti-immigration stance (Gorman, 2009). While the DOJ prevailed in their suit against the Maricopa County Sheriff's Office and Arpaio, the federal district court in North Carolina ruled in Johnson's favor. In an interview following the dismissal of the DOJ's claim, Johnson expressed gleeful defiance in his victory: "My people in this department had not done any profiling or anything else wrong. I would have never bowed to the Department of Justice" (Weichselbaum, 2015, para. 16).

For Johnson, the calculus seems to have extended beyond politics. Per one report, the legal fight cost Alamance County taxpayers an estimated \$650,000 (Johnson, 2016), far less than the cost of reform efforts in other jurisdictions (Kelly, Childress, & Rich, 2015).<sup>3</sup> There may also be instrumental value in choosing to litigate. After all, discovery rules require the DOJ to uncover all evidence against the jurisdiction and force SPL attorneys to articulate the merits of their case publicly. Having a complete understanding of the facts in place would likely result in a stronger negotiating position, should the jurisdiction choose to settle the case in the future.

What is more, affected departments may be able to use the lengthy litigation process (both the Maricopa County and Alamance County cases went on for years) to address the allegations internally. For example, in a September 2002 letter addressed to the Mayor of Columbus, Ohio, the DOJ made clear that it was willing to drop an ongoing pattern or practice suit against the city *in exchange* for significant efforts made by the Columbus Police Department to address policies and procedures at issue in the litigation, and the promise to implement additional reforms (U.S. DOJ, 2002). Largely because of the reforms already made, far less was expected of Columbus Police Department than other pattern or practice jurisdictions. The DOJ letter did not outline specific mandates or assign an independent monitor to oversee implementation, which likely reduced the costs incurred, both in terms of time and resources needed.

On the other hand, Sheriff Arpaio's decision to challenge the DOJ demonstrates the downside of opting for litigation. As of 2016, Maricopa County has either spent or allocated an estimated \$72 million dollars on the case, including approximately \$10 million dollars a year in legal fees (Roberts, 2016). Maricopa lost the suit and in the process forfeited the opportunity to participate in crafting the remedial measures used to reform the department (Melendres v. Arpaio, 2015).

## Settlement Negotiation

Once an affected jurisdiction has agreed to settle the case against it, the process of negotiating the content of the settlement begins. The negotiation process

typically involves SPL attorneys and a select group of jurisdiction representatives. In Ferguson, the city negotiating team was limited to the mayor and two members of the city council (Deere, 2016a). According to the DOJ, formal participation is limited and the substance of the discussion is kept confidential “to best facilitate reaching an agreement” (U.S. DOJ, 2017a, p. 18).

Although recently SPL has begun to solicit a diversity of views and enters negotiations “equipped with the information gathered from community representatives, rank-and-file officers, police union leadership, and other stakeholders, and with a commitment to ensuring that the input of those stakeholders remains a part of the process” (U.S. DOJ, 2017a, p. 18), some have expressed frustration at being excluded from the discussion. Police unions in Seattle (Miletich, Sullivan, & Carter, 2014) and Portland (Bernstein, 2012) filed formal motions to intervene in the process, as have other third-party groups in cities like New Orleans (Maldonado, 2012); none have been successful. Other groups are more sanguine. Peter Simonson, Executive Director of the ACLU in New Mexico, characterized his group’s position thusly:

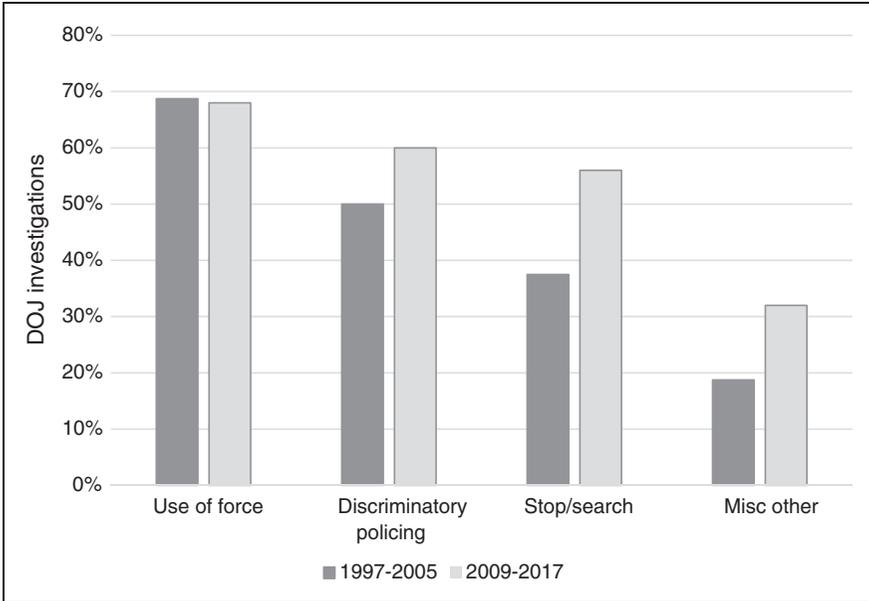
We, like a lot of people, would love to be at the negotiating table, but we also understand that too many cooks in the kitchen could cause the whole process to break down. The DOJ has assured us that they will press for the strongest consent decree possible and we look forward to reviewing what they come up with. (Boetel & McKay, 2014)

These negotiations are designed to produce a legally binding document that structures changes in order to remedy what the DOJ frames as *institutional failures* by mandating changes to the department’s “policies, practices, and culture” (U.S. DOJ, 2017a, p. 20).

At issue in the negotiation process are the specific contents of the reform initiative and its implementation schedule and process, as well as the terms of compliance management. Finally, the parties must agree on whether the terms of the agreement will be memorialized by consent decree (CD) and be enforceable in federal court and actively overseen by a federal judge, or take the form of a less restrictive contract between the parties, often referred to as a memorandum of agreement.

### **Settlement Contents**

In an effort to bring offending agencies within the bounds of federal law, the content of pattern or practice settlement agreements require that departments implement a series of comprehensive organizational and programmatic changes designed not only to correct existing patterns of unlawful behavior but also to prevent such problems from reoccurring in the future. SPL notes that the agreements reflect social science research and “best practices for preventing police



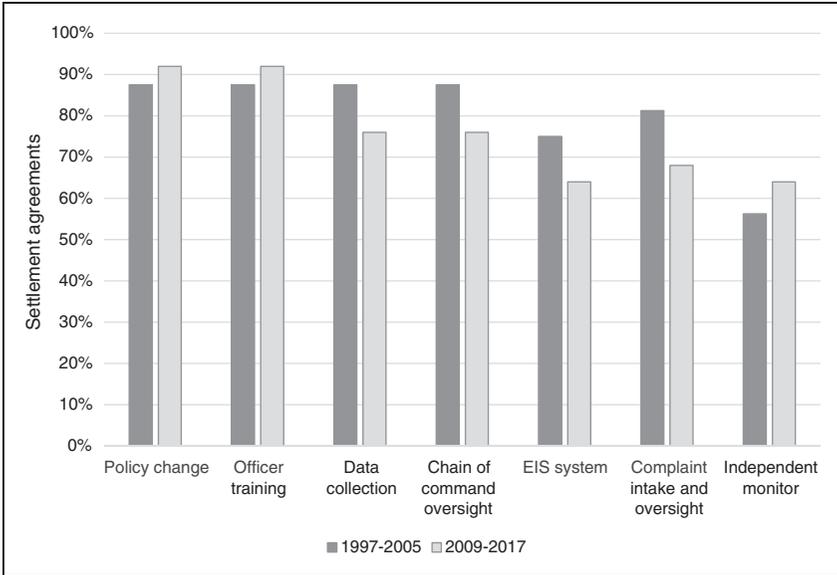
**Figure 1.** Misconduct driving pattern or practice reform, 1994–2017.

Source: United States Department of Justice (2017b).

misconduct,” while incorporating the views of national policing experts as well as officers, community members, and other governmental stakeholders from affected jurisdictions (U.S. DOJ, 2017a, p. 20).

The DOJ has finalized pattern or practice agreements in 41 jurisdictions: 16 were initiated between 1997 and 2004, while 25 took shape after 2008.<sup>4</sup> A majority of pattern or practice agreements are designed to address at least one of three substantive violations: police use of excessive force, discriminatory policing, or unlawful stop and search protocols.<sup>5</sup> As Figure 1 shows, though SPL’s focus on use of force remained fairly consistent over time, its Obama-era agreements were more likely to include provisions designed to address other violations.

Although the content of each agreement is tailored to the specific violation at issue, SPL has relied on a core set of mechanisms to drive department-wide change. In most cases, agreements have been structured around changes to police department organizational structures, policy and oversight mechanisms, training protocols, and officer accountability systems, with most pinned to aggressive implementation timelines and the oversight of an independent monitor. The goal of this template is to promote lasting change by emphasizing physical accountability structures, data-driven technology, and self-repeating operational procedures. SPL emphasizes the fact that the substance has evolved with experience and shifted to reflect changes in best practices and feedback from



**Figure 2.** The inclusion of key pattern or practice settlement components over time. Source: United States Department of Justice (2017b).

law enforcement and community stakeholders (U.S. DOJ, 2017a). The data in Figure 2 suggest that the focus and shape of reform agreements have remained relatively stable over time.

There have been some developments since 2009 worth noting, beginning with SPL’s concerted effort to adopt a more publicly minded approach. Per the DOJ (2017a, 2017b), 50% Obama era policing-related agreements require affected departments to adopt a community-oriented policing strategies, compared with just 33% before 2009. Similarly, some 60% of 2009 to 2017 settlements include community outreach provisions, like the District Policing Committees mandated by the Cleveland settlement (Cleveland Consent Decree, 2015, paras. 23–26), nearly double the rate (31.3%) of pre-2009 agreements; 12 of 25 (48%) of the Obama DOJ’s agreements mandate the creation of community-based committees to participate in and provide input during the implementation process, compared with just one agreement developed before 2009. Seattle’s Community Police Commission, whose creation was mandated by that city’s 2012 agreement (Seattle Consent Decree, 2015, paras. 3–12), has been particularly influential (Herz, 2015). Finally, nine of the Obama-era agreements require the jurisdiction to survey members of the public as part of the reform process;<sup>6</sup> no such requirements were included in any of the 16 settlements signed during the Clinton or Bush years.

Several Obama-era agreements, including those in Seattle, Ferguson, Baltimore, and Albuquerque, include provisions requiring independent monitor teams to conduct outcome assessments as a part of the oversight process (U.S. DOJ, 2017b). For example, the 2016 Newark, New Jersey agreement requires the monitor team to review department data on officer pedestrian and traffic stops, poststop searches and arrests, and use of force, in an effort to assess the effectiveness of each policy change (Newark Consent Decree, 2016, para. 174). This development is an attempt to address the criticism that early pattern or practice agreements overlooked the importance of substantive evaluation (Chanin, 2011; PERF, 2013; U.S. DOJ, 2010).

Of late SPL has been more likely to include provisions to address departments' approaches to handling interactions involving people experiencing mental health crises. The 2015 CD signed with the City of Cleveland requires the development of policy designed to regulate mental health encounters (para. 131) as well as the creation of officer teams specifically charged with responding to mental health calls (paras. 145–152). Further, all Cleveland Police Department (CPD) officers must receive crisis intervention training (paras. 143–144), while the CPD is tasked with developing collaborative partnerships with community mental health service providers (paras. 153–159). Although a handful of pre-2009 agreements include mental health provisions (e.g., Cincinnati's Memorandum of Agreement [2002, para. 10] requires mental health training for officers), most do not; those that do exist appear as isolated mandates and not as part of a coherent and focused strategy.

In addition to these substantive differences, the Obama DOJ appears to have been significantly more aggressive than previous administrations in interpreting evidence to support a pattern or practice finding. Of the 24 investigations initiated during the 8-year Obama presidency, 20 led to a pattern or practice finding; one is in litigation (Colorado City, AZ), one remains open (Orange County, CA), and one uncovered insufficient evidence (Inglewood, CA). This 87.0% *finding* rate is nearly double the combined Clinton or Bush rate of 48.9 (45 investigations led to 22 findings). If one accounts for the fact that 7 of the 22 findings to derive from Clinton or Bush investigations were settled by the Obama DOJ,<sup>7</sup> the difference is even more apparent.

## Discussion

The two earliest stages in the pattern or practice enforcement process—investigation and negotiation—are perhaps the most consequential and the least studied, with implications not only for the process associated with the pattern or practice initiative but also the viability and sustainability of the attendant organizational reforms. Several issues merit further discussion here and further attention from both practitioners and scholars alike, beginning with the DOJ's preference for limited advanced notification of an impending investigation.

### *Notice of Investigation*

According to former SPL Chief Jonathan Smith, once the DOJ opens a formal investigation, they provide “a small amount of advance notice to the jurisdiction and then make a public announcement of the investigation” (PERF, 2013, p. 10). This decision no doubt carries with it some benefit for the DOJ. Perhaps in limiting notice, they are able to reduce the amount of time available for the affected jurisdiction to prepare a legal challenge or organize a rhetorical campaign designed to undermine the investigation through the media. Similarly, this strategy may help to preserve the quality and availability of relevant administrative and interview data.

Whatever the possible gains, this approach seems to have generated animosity among some department executives (U.S. DOJ, 2010). For example, Missoula, Montana Police Chief Mark Muir noted that a last-minute DOJ announcement to investigate allegations that his department had engaged in biased practices toward female sexual assault victims undermined internal reform efforts and harmed the “agency’s reputation and its credibility with the community” (PERF, 2013, p. 23).

Complaints over short notice are consistent with the DOJ’s early reputation for heavy-handedness and an unnecessarily adversarial approach to the investigation process. According to former SPL Chief Shanetta Cutlar (2008), this reputation was *well deserved*:

We had an approach where we basically came to your department with, you know, the biggest truck we could find, asked for all of your documents, rolled away, went back to Washington, and came back maybe two or three years later with an agreement and said, ‘Sign here, or we will sue you.’ And departments either signed or they didn’t.

Perhaps a function of more recent efforts toward a more collaborative orientation, there has not been much tangible opposition or recalcitrance on the part of affected jurisdictions, as the DOJ has received full cooperation from all but a handful of departments (U.S. DOJ, 2017a).

In fact, several jurisdictions have used the investigation process to their strategic benefit. In January 1999, less than 2 months after the publication of a series of *Washington Post* stories characterizing the D.C. Metropolitan Police Department (MPD) and its officers as extremely violent, undisciplined, and unaccountable (Leen, Craven, Jackson, & Horwitz, 1998), Charles Ramsey, MPD’s new police chief, called on the federal government to investigate all aspects of the Department’s use of force policy (MPD, 1999). The request was driven by Ramsey’s belief that the Department’s problems were so entrenched, its credibility with the community so damaged, that external intervention was the only path to reform (PERF, 2013). This assumption, along with the view that

“a federal investigation can force otherwise-reluctant local elected officials to provide funding that is needed to implement reforms” and help to “overrule labor union opposition to certain changes in policies or practices” (PERF, 2013, p. 42), contributed to requests for investigation by officials in Cincinnati (Semuels, 2015), Baltimore (Bui & Hedgpeth, 2015), Cleveland (U.S. DOJ, 2014), and Albuquerque (McKay, 2014), among others.

### *Ambiguous Standard of Evidence*

Neither the text of Section 14141 nor the statute’s legislative history defines the term *pattern or practice* or establishes meaningful legal standards against which such claims are to be measured (*United States v. Johnson*, 2015). The absence of such statutory guidance is compounded by the DOJ’s decision not to make public the internal regulations that guide the investigative process, adding to the existing controversy that attaches to the investigation process.

The phrase *pattern or practice* has seldom been litigated in the context of Section 14141, though it has been the subject of private civil rights lawsuits against law enforcement agencies. The courts have repeatedly held that government bodies may be held liable if they are found by a preponderance of the evidence to have maintained an official policy that is responsible for a deprivation of rights protected by the Constitution. A municipality may also be sued for “constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decision-making channels” (*Monell v. Department of Social Services*, 1978, p. 2,036).

DOJ’s interpretation of existing case law lends some insight into the standards used to evaluate allegations of systemic misconduct. For its part, the DOJ has been clear that “sporadic bad incidents or the actions of the occasional bad officer” do not establish a pattern or practice of unlawful behavior (DOJ, 2003, p. 3). Rather, investigators must find evidence that the department in question either maintains an unlawful policy or that its officers have engaged in unlawful activity of a “repeated, routine, or of a generalized nature” (U.S. DOJ, 2010, note 3; see also U.S. DOJ, 2017a). To that end, both “statistical evidence and anecdotal evidence” may be used to establish the presence of a pattern or practice (U.S. DOJ, 2011, note 3).

Yet these standards remain underdeveloped in practice. In August 2011, the DOJ initiated a formal investigation into allegations that the Alamance County, North Carolina, Sheriff’s Office unlawfully targeted Hispanics in violation of their Fourth and Fourteenth Amendment rights (*United States v. Johnson*, 2015). ASCO refused to settle, and the suit proceeded to trial. The court ultimately denied the DOJ’s claims, noting that SPL built its case not on “evidence that any individual was unconstitutionally deprived of his or her rights,” but on “vague, isolated statements” and statistical analysis that “failed to constitute

reliable and persuasive proof of the claims under applicable legal standards” (*United States v. Johnson*, 2015, p. 251). The government failed to compare properly Alamance County Sheriff’s Office’s treatment of Hispanics to other similarly situated persons.

Despite this litigation, ambiguity surrounding the definition of *pattern or practice* in the context of Section 14141 remains, contributing to a few lines of acute, substantive criticism. The first, which echoes the court’s findings in the Alamance County case, is that certain DOJ claims were made without the necessary empirical support. Although a recent DOJ report notes that many SPL investigations have drawn on the expertise of statisticians and criminologists, the quality of the analysis has come under question (U.S. DOJ, 2017a). Mathew Hickman, an academic and former statistician in the DOJ’s COPS office, examined the raw data compiled during the DOJ’s investigation of allegations that the Seattle Police Department had engaged in a pattern or practice of excessive force. In concluding that the DOJ’s case was based on skewed data and bad science, Hickman (2012, para. 2) uncovered what he termed “factual errors as well as errors of omission, gross misrepresentations, apparent statistical errors, and other substantive flaws.” Hickman’s criticism of the Seattle investigation implicates a more fundamental question: How much of what kind of evidence is needed to support a pattern or practice finding?<sup>8</sup>

Second, and very much related, is the claim that DOJ attorneys and in particular the experts hired to support the investigation are not fully qualified to manage and inform the process. SPL notes that it relies on former chiefs and deputy chiefs with “backgrounds tailored to the issues raised in a particular investigation” in order to provide knowledge of and experience with the *specific challenges* facing affected departments (U.S. DOJ, 2017a, p. 10). Charles Ramsey, former chief in Washington, DC and Philadelphia, pointedly disagreed, implying that personnel may be at least partly responsible for issues with past investigations:

These so-called experts are often former chiefs from very small jurisdictions who come into very large departments and don’t really understand how large departments operate, or vice versa—a police executive who comes from a very large department to investigate a small department may think the small department has resources that it simply does not have.<sup>9</sup> (PERF, 2013, p. 31)

It is worth noting that the DOJ’s investigative findings letters have become progressively more nuanced, well-sourced, and analytically sophisticated, evidence of what Walker (2017) calls the DOJ’s *learning curve* (e.g., compare the three-page letter issued to the City of Pittsburgh in 1997 with the 150-page document detailing the results of the 2015 investigation of the Ferguson Police Department).

Yet, despite this progress, criticism from the likes of Chief Ramsey, Professor Hickman, and others raise questions about the legitimacy of the DOJ

investigation process and opens the door for other, less substantive attacks. Indeed, current U.S. Attorney General Jeff Sessions was quoted as saying that the DOJ's review of the Chicago Police Department "pretty anecdotal and not so scientifically based" (Ainsley, 2017), despite admitting that he had not read the full SPL report (Reilly, 2017). Shortly after Sessions took office, the DOJ filed a motion to delay implementation of the Baltimore Police Department CD and directed the DOJ to reexamine the enforcement of Section 14141 more broadly (Horwitz, Berman, & Lowrey, 2017).

Whatever the actual merits of these critical views, the notion that pattern or practice investigations lack legitimacy serves to undermine the very procedural justice that is sought through the DOJ's intervention and feeds a negative discourse that is counter to the evidence on positive dialog increasing legitimacy (Mazerolle, Bennett, Davis, Sargeant, & Manning, 2013; Tyler, 2006). An investigation seen as unsubstantiated, overly political or otherwise biased, may also further complicate a department's effort to galvanize support for the reform process among the rank and file.

### *Disproportionate Power Structures*

For jurisdictions involved in pattern or practice negotiations with the DOJ, the stakes are exceedingly high. These negotiations determine the conditions by which their police department will be managed for the next several years, the group of people who will oversee the reform process, the standards against which their progress will be judged, and the costs they will incur along the way. Yet, despite the critical importance of this process, the affected jurisdiction maintains perilously little if any leverage to shape its outcomes.

Should a city exercise their only recourse—refusing to negotiate—the DOJ has shown a willingness to file suit in order to impel reform. When the Ferguson City Council balked at the cost of implementing the proposed CD, for example, the city immediately confronted the risks and financial burdens associated with challenging the DOJ in court. The cost of litigation was estimated to fall somewhere between \$4 and \$8 million, significantly less than what it cost Maricopa County, Arizona to defend against allegations that it engaged in systemic racial discrimination (Apuzzo, 2016).

The choice by Ferguson to forego a settlement was met with bafflement by those familiar with the DOJ's Section 14141 enforcement process. Scott Greenwood, a key member of the team that negotiated the CD in Albuquerque, argued that "[t]here is no chance, zero, that the city of Ferguson will prevail in this Kamikaze mission... They are not ever likely to get the deal that they had... It will never be that good again" (Deere, 2016b).

Although the DOJ has tried move beyond its early reputation for unilateralism, the rhetoric of openness and collaboration does little to shift the reality that the federal government maintains the vast majority of the power throughout the

negotiation process. That the DOJ's settlement template has remained relatively unchanged over time and across substantive issues suggests that variance, and thus the possibility of negotiation, occurs only at the margins. Jurisdictions may be able to shape certain nonessential elements of the settlement to fit their preferences, but it seems plausible that such movement is less a function of quid pro quo, and more a symbolic gesture used to promote goodwill in furtherance of the DOJ's own preferred instrumental outcomes.

### *Insular and One-Sided Negotiation Process*

As noted earlier, a municipality is typically represented in negotiations by three or four elected officials; no third-party organizations or other stakeholders may participate (PERF, 2013; U.S. DOJ, 2017a).

There are several valid reasons for keeping the negotiation process closed to third-party stakeholders. Making space for union representatives at the negotiating table, for example, runs the risk of delaying the process considerably or derailing it altogether. Labor and management rarely see eye to eye, particularly on issues that involve the potential for increased officer discipline, the loss of autonomy and discretion, and the assignment of public blame for an ongoing pattern of police misconduct. Including civil liberties organizations and other community groups would likely present a similar set of challenges for DOJ negotiators.

Multilateral negotiations would indeed be more difficult, and given the DOJ's emphasis on recent efforts to represent the views of third-party organizations in negotiations, it is likely that the federal government sees these costs as unnecessary. And yet, there are several medium- to long-term benefits that are worth considering.

There is some evidence to suggest that pattern or practice jurisdictions are susceptible to backsliding after a settlement agreement has been terminated (Chanin, 2015; Kelly et al., 2015). Opposition to the reform effort from officer unions has played a part in this regression, as has apathy on the part of community groups and other stakeholders (Chanin, 2011). For example, Kristopher Baumann, former head of the Washington, DC officer's union, made clear that his organization remained intent on undoing the DOJ's reforms:

And if you don't respect . . . the ability of the union to have input, whatever you do is going to be undone . . . And eventually, even the good things that may have been done by [the reform] process could be undone because it wasn't done the right way. And if you don't respect the process from the beginning, you're building a house of cards. (Interview, March 1, 2010)

And while few community groups are intent on destabilizing established reforms, organizations that are less invested in the process may find it easier

to remain apathetic to the substance of the agreement, while overlooking regression (Simmons, 2009). And while such groups may appreciate the opportunity to meet with and express their preferences to DOJ staff, proxy access cannot replace formal participation in the negotiation process.

The case of Cincinnati demonstrates clearly the power of inclusivity. Unlike Washington, DC, Pittsburgh, and other jurisdictions that have struggled to maintain progress, Cincinnati is widely lauded as a model for effective, durable reform (e.g., Faraj, 2016; Maggi, 2011; Semuels, 2015).

The DOJ settlement agreement in Cincinnati was negotiated alongside a private settlement of police-related litigation brought against the City by several community groups, known as the Cincinnati Collaborative Agreement (2002). Cincinnati's police union and other private parties were involved from the earliest stages in negotiating both the agreements. Rather than excluding their voices, the Collaborative Agreement lawyers and CPD leadership agreed to work to incorporate labor's perspective into the content of each agreement. Doing so may have exacted some early costs, particularly in terms of the length and tone of the negotiation. But by most accounts, the benefits of inclusion far outweigh delays to the process. Al Gerhardstein, a Cincinnati-area civil rights attorney who brought one of the original suits that led to the Collaborative Agreement, argued that providing union representatives a seat at the bargaining table paid dividends in terms of implementation, and set a tone of collaboration and cooperation that continues today: "That turned out to be a very, very helpful move," he said "I think it was a major aid in getting us off to a good start" (McKee, 2011).

The effects of union participation go beyond the symbolic. In addition to promoting a more civil working relationship between labor and management, Fraternal Order of Police involvement in the reform effort helped to generate support for police accountability among the rank and file. According to Kenneth Glenn, head of Cincinnati's Citizen Complaint Authority (CCA), broad support for the values driving reform contributed to a trust between the police union and the CCA. This trust has resulted in high levels of compliance with CCA investigations, and a general level of respect for the CCA process among Cincinnati officers: "[I]t's something that developed over the years. So there's not that much resistance from the FOP... They don't like anyone looking over their shoulders, but they have accepted it over time" (Kenneth Glenn, Interview, April 15, 2010).

What is more, having participated in the negotiation, union leadership in Cincinnati had a much less legitimate case to make for criticizing the settlement in the press or actively working to dismantle the reform effort, either in court or through legislation. In effect, bringing third-party groups into the process gave their members ownership over both the content of the settlement and the process of reform, in the process reducing the level of opposition from members of the rank and file and other potential critics.

The experience in Cincinnati makes clear that efforts to incorporate the views of the police union, relevant civil rights organizations, and members of the public more broadly, created minimal delays and only led to a small number of setbacks during either negotiation or implementation. Further, the inclusive approach continues to pay dividends in terms of the depth of reform and the sustainability of change. Cincinnati City Manager Milton Dohoney (Interview, March 24, 2010) summarizes the costs and benefits of a more inclusive approach:

[Y]ou've got to have all the stakeholders represented. So if you had the Department of Justice sort of all over the police department and the community's not there, you're creating a set of standards or expectations that the community has no reason to buy into, because they weren't a part of making it. What we did, as painful as it was, was to have the community present . . . [to lay out], either directly or through their counsel in the ACLU, here's what we're asking you to consider. And so when we got to the end, they were a part of the process, part of the solution, and they saw ideas that they had reflected in the agreement that was in writing.

By formally including union and civil rights groups in the negotiation process, police management and jurisdictional political leaders would be forced to acknowledge and address opposition to the process before an agreement is in place, rather than during or after implementation. This makes much less likely the occurrence of two problems that have undermined efforts to reach sustainable change in places like Washington DC, where union groups continue to litigate in an effort to repeal parts of the settlement, and Pittsburgh, where members of the civil rights community lost sight of the reform effort to the detriment of lasting reform. What is more, the ability to participate in the implementation process, facilitated, for example, by an invitation to participate in regular status meetings, would provide these groups continued access to the reform effort while giving them a voice and the ability to shape the terms of compliance.

Participating in negotiations can increase the legitimacy of the settlement in the eyes of potential opponents and would-be critics (Tyler, 2006; Tyler & De Cremer, 2005). It can also give key stakeholders a sense of ownership over both the process and the content of the agreement. To that end, the DOJ should be lauded for its recent efforts to solicit and incorporate the voices of affected communities (U.S. DOJ, 2017a). This has the potential to galvanize support for reform efforts and may facilitate development of the kind of broad commitment needed to sustain changes after the formal agreement and its attendant oversight has terminated.

## **Conclusion**

In March 2016, nearly 20 months after Michael Brown's death, the Ferguson City Council agreed to settle the DOJ's pattern or practice suit against the city. Several of the key stakeholders struck a hopeful tone. Brown's father called the

settlement his son's *legacy*, while Council member Wesley Bell articulated hope that the agreement would help to "repair a tear in the fabric of our city. . . . The fact that the world is watching us, gives us an opportunity to show what change can look like" (Deere, 2016c, paras. 32–33). Then Attorney General Loretta Lynch announced the settlement, noting that it "marks the beginning of a process that the citizens of Ferguson have long awaited – the process of ensuring that they receive the rights and protections guaranteed to every American under the law."

There was—and continues to be—reason for optimism. Ferguson residents, like those in many cities across the country, will benefit from a set of reforms organized around policing best practices and designed to "ensure protection of the constitutional and other legal rights of all members of the community, improve Ferguson's ability to effectively prevent crime, enhance both officer and public safety, and increase public confidence" in the Ferguson Police Department (Ferguson Consent Decree, 2016, p. 1). There is evidence to suggest that the process in place, which, critically, includes an independent monitor team to oversee implementation, can be very effective in bringing the reforms to pass (Chanin, 2014; Davis et al., 2002; PERF, 2013; Stone et al., 2009).

The Ferguson CD, like many others developed after 2009, evidences positive developments in the DOJ's approach to enforcing Section 14141. For example, the agreement is oriented toward the community and includes several provisions designed "to promote and strengthen community partnerships and positive interactions between officers and Ferguson residents" (Lippmann, 2016, p. 4). Critically, it also establishes clear mandates for measurement and impact evaluation, which allows the monitor team to manage not just the implementation of these policy changes, but to evaluate whether the reforms are in fact working to promote more effective police-community relations and other desirable outcomes (p. 4, para. 35). Indeed, the most recent independent monitor report finds the Ferguson PD "moving in the right direction" toward reform (Lippmann, 2016), no small accomplishment considering the circumstances surrounding the effort.

Despite this progress, the City of Ferguson faces a long and challenging path toward institutionalized change. And as other jurisdictions have shown, such progress toward the goal of lawful and accountability policing is fragile, at risk of erosion in even the most conducive political, economic, and organizational environments (Stolberg, 2017). Scholars and police practitioners would benefit from further attention to and evaluation of the DOJ's enforcement of Section 14141, with an eye toward investigation and negotiation and the relationship between these stages and the viability of the pattern or practice initiative as a means of driving meaningful, lasting reform.

### **Acknowledgement**

The author would like to thank Geoff Alpert, Stuart Henry, Steve Parker, Mike White, and the other anonymous reviewers for their time and expertise in considering earlier versions of this article.

## Declaration of Conflicting Interests

The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

## Funding

The authors received no financial support for the research, authorship, and/or publication of this article.

## Notes

1. It seems likely that this policy is designed to protect affected departments from being publicly named by the DOJ simply because of unsubstantiated complaints, while also guarding against accusations that department has been the subject of an unsubstantiated federal investigation for political purposes.
2. Consider as an example McNeilly's reaction to the terms of the consent decree: "I think most of what's in there will help us, just on the things we should have been doing a long time ago. We should have been using use-of-force forms, we should have been doing performance evaluations. I believe in an early warning system, I believe in tracking an officer's history" (Fuocco, 1997, para. 21).
3. Note that shortly after its initial legal victory, Alamance County opted to avoid further litigation by settling the DOJ's claims and agreeing to a series of reforms (U.S. DOJ, 2016a).
4. No agreements were signed between 2005 and 2008 (U.S. DOJ, 2017b).
5. Five of the 41 (12.2%) agreements address other violations, including holding cell conditions (Cleveland Police Department, 2004), biased sexual assault investigation (2013: Missoula, Montana Police Department; University of Montana; and Missoula County Attorney's Office), and juvenile justice practices (2015: Meridian, Mississippi; U.S. DOJ, 2017b).
6. For example, para. 100 of the Yonkers Consent Decree (2016b) states:

YPD shall continue to support community groups and shall continue to meet regularly with the communities they serve. Within 180 days of the Effective Date, YPD shall develop a survey to measure officer outreach to a cross section of community members in each precinct, with an emphasis on community partnerships and problem-solving strategies that build mutual respect and trusting relationships with community stakeholders.

7. Per Frontline (2016), investigation into Orange County, Florida was initiated in 1997 and settled in 2010; Beacon, New York: opened 2004, settled 2010; Warren, Ohio: opened 2004, settled 2012; U.S. Virgin Islands: opened 2004, settled 2009; Easton, Pennsylvania: opened 2005, settled 2010; Yonkers, New York: opened 2007, settled 2016; Puerto Rico: opened 2008, settled 2013.
8. This point was first made by Professor Sam Walker.
9. According to one former DOJ attorney, Ramsey has it wrong: "Most experts are not from small departments. Most have been Chiefs and Deputy Chiefs with large

departments. In fact, many of the DOJ experts are police managers that helped reform departments under consent decrees. [Former Pittsburgh Bureau of Police chief] Bob McNeilly is used often by DOJ” (Parker, personal communication, April 2017).

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