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Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance

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PANOPTICISM FOR POLICE: STRUCTURAL REFORM BARGAINING AND POLICE REGULATION BY DATA-DRIVEN SURVEILLANCE

Mary D. Fan*

Abstract: Spurred by civil rights investigations, police departments across the nation, including in Washington State, are engaging in structural reform bargaining and collaborative design of institutional reforms. Often before any complaint is filed in court or a judge makes any findings of unconstitutionality, police—and the groups threatening to sue the police—are cooperating to fashion remedies for the biggest concerns that have shadowed the law of criminal procedure, such as excessive force and the disproportionate targeting of people of color. Prominent scholars have expressed concern over settlement of civil rights suits outside the arena of the courtroom and without legal clarification. This Article argues, however, that bargaining in the shadow of law and outside the courthouse may yield smarter and farther-reaching reforms and remedies based on data-driven surveillance than could be achieved through litigation and judicial decision.

This Article argues that the remedies being fashioned “off the books”—that is, outside the doctrine in the case law reporters—offer important insights for the future of police governance and reform. The primary engine of police regulation—the exclusionary rule, which deters rights violations through the remedy of exclusion of improperly obtained evidence—is increasingly eroding and becoming the last resort rather than first instinct. The question becomes: what regulatory and remedial model should arise to fill the vacuum? The Article contends that a promising paradigm being refined by structural reform bargaining is regulation by data-driven surveillance—what this Article dubs “panopticism for police.” Panopticism is efficient internalized regulation by surveillance. The term comes from the metaphor of Jeremy Bentham’s Panopticon, in which prisoners in a state of perfect visibility positioned around an opaque watch tower self-regulate because at any time the guard may be watching. The goal of police panopticism is leveraging data-driven surveillance from multiple institutional vantages. The state of “conscious and permanent visibility” reduces monitoring and remedial costs and triggers self-regulation and institutional culture change.

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INTRODUCTION

New Jersey police supervisors review on a random-selection basis videos of traffic stops and require officers to report the race of people stopped and searched pursuant to a consent decree.¹ Los Angeles police are required by consent decree to complete a written or electronic report for each incident where force was used and for each investigative stop documenting the subject's "apparent race, ethnicity, or national origin," the reason for the stop, and whether a search was conducted.² Stratified random samples of the reports are regularly audited through a procedure that includes "an examination for 'canned' language, inconsistent information, lack of articulation of the legal basis for the applicable action" or other reporting problems.³ Wallkill, New York, police are now obliged by consent decree to "document their activities while on duty and in a form that will allow monitoring of such activities to take place" through methods such as a daily log and documentation of stops.⁴ Detroit police are overseen by a monitor to ensure implementation of a consent judgment that, among other things, establishes a risk management database to track officer conduct and requires setting thresholds for red flags that trigger supervisory review to detect

1. Consent Decree at paras. 29, 32, 36–37, *United States v. New Jersey*, No. Civil 99-5970 (MLC) (D.N.J. Dec. 30, 1999).

2. Consent Decree at paras. 55–69, 104–05, *United States v. City of Los Angeles*, No. Civil 00-11769 (C.D. Cal. June 15, 2001).

3. *Id.* at para. 128.

4. Consent Decree at paras. 10–13, *New York v. Wallkill*, No. 01-Civ-0364 (S.D.N.Y. Feb. 21, 2001).

potentially problematic officers.⁵

These are just a few examples of institutional reform of police practices in recent decades.⁶ Before instituting reforms, these jurisdictions and others in similar straits struggled with allegations such as excessive force, harassment, and disproportionate targeting of minorities by the police.⁷ Civil rights investigations and, in some cases, lawsuits followed.⁸ Changes ultimately were not wrought by judicial mandate.⁹ Constitutional criminal procedure doctrine—customarily

5. Consent Judgment, Use of Force and Arrest and Witness Detention at paras. 78–90, 124–30, *United States v. City of Detroit*, No. 03-72258 (E.D. Mich. June 12, 2003).

6. There are many other similar examples. For example, New York City police report the race of people targeted for investigative stops and promulgate written policies forbidding profiling pursuant to a stipulation to settle a civil rights suit. Stipulation of Settlement at 5, 8–9, ex. B, *Daniels v. City of New York*, No. 99 Civ. 1695 (SAS) (S.D.N.Y. Sept. 24, 2003). Montgomery County, Maryland, police have agreed to implement a computer system recording traffic stop data, including race of people stopped and searched, to conduct regular data analyses, and to release the results in semi-annual public reports. Memorandum of Agreement Between the U.S. Dep’t of Justice, Montgomery County, Md., the Montgomery Cnty. Dep’t of Police and the Fraternal Order of Policy, Montgomery Cnty. Lodge, Montgomery County Lodge 35, Inc., 11–12 (Jan. 14, 2000). Pittsburgh police must file a written report after each traffic stop that records the race of people stopped, whether the stop escalated to a search, and whether searches yielded any contraband or other evidence pursuant to a consent decree. Consent Decree at para. 16, *United States v. Pittsburgh*, No. Civil 97-0354 (W.D. Pa. Sept. 30, 2002). Virgin Islands police must document all uses of force in writing and develop a computerized risk management system that enables audits of such factors as each officer’s uses of force and decisions to charge subjects with “resisting arrest,” “assault on a police officer,” “disorderly conduct,” or “obstruction of official business” in use-of-force cases. Consent Decree at paras. 32, 59–60, *United States v. Territory of the Virgin Islands*, No. 03-23-09 (D.V.I. Mar. 23, 2009), available at http://www.justice.gov/crt/about/spl/documents/VIPD_CD_03-23-09.pdf.

7. See, e.g., Bob Herbert, *Police Predators*, N.Y. TIMES, Jan. 25, 2001, at A23 (describing numerous reports of police abuse of power in Wallkill, New York); Letter from Loretta King, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., to Sheriff Joseph Arpaio, Maricopa Cnty. Sheriff’s Office (Mar. 10, 2009) (conveying allegations and notifying regarding investigation); Letter from Bill Lann Lee, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., to James K. Hahn, City Attorney, City of L.A. (May 8, 2000) (detailing allegations and findings); Letter from Deval L. Patrick, Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., to Jacquelyn Morrow, City Solicitor, City of Pittsburgh, City of Pittsburgh Investigative Findings Letter (date not specified), available at <http://www.justice.gov/crt/about/spl/documents/pittspfind.php> (detailing civil rights violations).

8. See, e.g., *Daniels v. City of New York*, 198 F.R.D. 409, 422 (S.D.N.Y. 2001) (certifying class action in civil rights suit); Complaint at 1–7, *United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa. Feb. 26, 1997) (launching civil rights suit).

9. See, e.g., Joint Motion to Remove Case to the Inactive Docket and Stay Proceedings, *United States v. Maricopa County, Ariz.*, No. 2:10-cv-01878-GMS (D. Ariz. June 2, 2011) (staying civil rights suit because of agreement to settle suit); Decision and Order Dismissing Defendant’s Challenge to Subject Matter Jurisdiction, *New York v. Wallkill*, No. 01-civ-0364 (S.D.N.Y. Mar. 16, 2001), available at <http://www.clearinghouse.net/chDocs/public/PN-NY-0003-0006.pdf> (finding subject-matter jurisdiction to enter proposed consent decree).

perceived as the main code of conduct regulating police¹⁰—did not grow new branches to prescribe reform. Claims concerning the need to check the police were not filtered through the distorting lens of a criminal case with a defendant seeking to exclude evidence from the jury. Rather, the reforms stemmed from structural reform bargaining between litigants outside the courthouse that produced consent decrees—negotiated agreements between parties in the form of a court order stipulated between the parties¹¹—or memoranda of agreement—less formal agreements that typically provide for judicial enforcement in the event of a breach.¹²

These negotiated reforms typically came *in advance of any judicial involvement* or finding of unconstitutionality.¹³ This distinction is important because some of the most famous and controversial forms of negotiated reforms—consent decrees—have frequently come *after* judicial findings of constitutional violations or probable violations, forcing the adoption of reforms.¹⁴ Such controversial consent decrees, familiar from contexts such as school desegregation, social services provision, and prison reform litigation, are sometimes decried as undemocratic because they embroil courts in dictating change and setting policies in areas that courts are ill-equipped to investigate and supervise.¹⁵ In contrast, this Article is focused on cooperative bargaining that leads to reform forged by police departments and civil rights

10. See, e.g., Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996) (explaining that constitutional criminal procedure doctrine is akin to criminal law for cops, prescribing police conduct rules).

11. A consent decree is akin to a contract in that it binds the parties, but it is “more than a mere contract” because it is in form an order of the court and requires court action for consummation. Recent Cases, 41 HARV. L. REV. 538, 539 (1928).

12. See, e.g., Memorandum of Agreement Between the United States & the City of Villa Rica, Ga. 7 para. 4 (Dec. 23, 2003) (“This Agreement is enforceable through specific performance in Federal Court.”); Memorandum of Agreement Between the United States & the Village of Mt. Prospect, Ill. para. 43 (Jan. 22, 2003) (“This Agreement is enforceable through an action for specific performance in federal court.”).

13. See, e.g., Consent Decree paras. 1, 4–8, *United States v. New Jersey*, Civil No. 99-5970 (MLC) (D.N.J. Dec. 30, 1999) (stating that the City denies the Justice Department’s allegations of unconstitutional practices but has agreed to the reforms specified in the consent decree to avoid “the risks and burdens of litigation”); Consent Decree paras. 1, 4, *United States v. Pittsburgh*, Civil No. 97-0354 (W.D. Pa. Apr. 16, 1997) (similar).

14. See, e.g., ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 9–12, 153–61 (2003) (accusing courts of becoming embroiled in problems they are ill-equipped to solve, offering examples where courts found violations or issued preliminary injunctions based on probable violations, leading to judicially enforceable consent decrees to remedy the violations).

15. See *id.*

organizations *in advance* of any judicial findings of unconstitutionality, without the prodding and intervention of judicial legal interpretation. Such structural reform bargaining typically results in memoranda of agreement prefaced with the sweetener of praise for the police department's cooperation in seeking solutions to alleged problems, though more formal consent decrees also occur.¹⁶

This Article begins with the insight that the real engine of police reform increasingly is not found in the formal criminal procedure doctrine. The exclusionary rule—oft-described as the principal remedy and basis for deterring police misconduct¹⁷—is slipping as the main lever of police deterrence despite its starring role in criminal procedure jurisprudence.¹⁸ Civil rights suits against the police are no longer the chimerical alternative for redressing undesirable police practices.¹⁹ The most important actor for prescribing rules regulating police practices is shifting from the judiciary, clumsily wielding constitutional doctrine to manage the police, to politically attuned agencies and civil society.²⁰

16. See, e.g., Agreement Between the United States & Jerry L. Demings, Orange County Sheriff paras. 5, 9 (Sept. 16, 2010) (praising Sheriff for his cooperation); Memorandum of Agreement Between the U.S. Dep't of Justice & the City of Buffalo, N.Y. & the Buffalo Police Dep't, the Police Benevolent Ass'n, Inc., & the Am. Fed'n of State, Cnty., and Mun. Emps. Local 264, at paras. 2, 4 (Sept. 19, 2002) (thanking the city and police department for cooperation with the aim of providing the "best police service" and providing a "model for the best police practices" in the use of chemical spray); cf. Consent Decree Between the U.S. Dep't of Justice and Prince George's County, Md. & the Prince George's Cnty. Police Dep't paras. 3, 6 (Jan. 24, 2004) (stating that the department denied allegations of unconstitutionality but entered into the agreement to avoid the burdens of litigation and "to partner in support of vigorous and constitutional law enforcement" using "the best available policing practices and procedures").

17. See, e.g., *Herring v. United States*, 555 U.S. ___, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting) (describing the exclusionary rule as "often the only remedy effective to redress a Fourth Amendment violation"); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974) (explaining that the exclusionary rule is the "primary instrument for enforcing the fourth amendment"); Susan A. Bandes, *And All the Pieces Matter: Thoughts on The Wire and the Criminal Justice System*, 8 OHIO ST. J. CRIM. L. 435, 441 (2011) (describing the exclusionary rule as the "main remedy for police illegality").

18. See, e.g., *Herring*, 129 S. Ct. at 698, 704 (holding that costs of exclusion are too high to remedy negligent police error causing erroneous arrest and search); David B. Owens, Comment, *Fourth Amendment Remedial Equilibrium: A Comment on Herring v. United States and Pearson v. Callahan*, 62 STAN. L. REV. 563, 565–70 (2010) (discussing cutbacks on exclusionary remedy).

19. See, e.g., Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1388 (1983) (explaining "the most 'powerful' remedies, criminal prosecutions for willful violation of the fourth amendment and actions for injunctions against large-scale violations, are rarely brought and rarely succeed" and "damage actions are also expensive, time-consuming, not readily available, and rarely successful").

20. See David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1737–41 (2005) (analyzing the turn to judicial regulation to check police discretion); cf. Eric Miller, *Putting the Practice into Theory*, OHIO ST. J. CRIM. L. 31, 31 (2009) (arguing that criminal justice "law and

Nonjudicial actors, including prominently the United States Department of Justice and civil rights organizations, are collaboratively crafting remedial and governance regimes in the shadow of law and police department investigations.²¹

Police departments across the nation are coming under scrutiny and participating in collaboratively calibrated and institutionally tailored reform.²² Close to home in Washington State, for example, the Justice Department recently launched an investigation to determine whether the Seattle Police Department has engaged in a pattern or practice of excessive force and racially biased policing after controversial incidents surfaced involving uses of force against people of color.²³ The revelation of a Justice Department investigation spurred the Seattle Police Department to announce “a complete revamp of how the department develops professional standards and expectations” before any findings from the investigation and in advance of any litigation.²⁴ Scrutiny was sufficient to spur self-regulation and reform without resort to cumbersome litigation and judicial micro-management. These shifts are instructive for the future of how American police will be regulated and the nature of remedies available for civil rights concerns.

Formal criminal procedure jurisprudence has well-known roadblocks to scrutiny of the most controversial collateral consequences of policing such as disproportionate targeting of minorities and the use of police power to intimidate or harass. Landmarks of non-inquiry include *Whren v. United States*,²⁵ which refused to invalidate pretextual stops of young minority men,²⁶ and *Atwater v. City of Lago Vista*,²⁷ which refused to intervene in a case of “merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment” in

legal scholarship have failed to keep up with real-world transformations that have seen law-based (and, in particular, court-centered) regulation become an increasingly marginal aspect of police regulation”).

21. See discussion *infra* Part II.

22. See, e.g., U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (Mar. 16, 2011) [hereinafter NEW ORLEANS INVESTIGATION] (reporting findings); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT (Sept. 5, 2011) [hereinafter PUERTO RICO INVESTIGATION] (reporting findings).

23. Mike Carter, *Justice Department to Investigate Seattle Police Civil Rights Practices*, SEATTLE TIMES, Mar. 31, 2011, at A1.

24. Letter from Mike McGinn, Mayor, City of Seattle, to Jonathan M. Smith, Chief, Special Litigation Section, U.S. Dep’t of Justice, and Jenny Durkan, U.S. Attorney, U.S. Attorney’s Office, (Dec. 6, 2011).

25. 517 U.S. 806 (1996).

26. See *id.* at 813.

27. 532 U.S. 318 (2001).

arresting a mother he had erroneously stopped before for a minor traffic violation in front of her frightened crying children.²⁸ These cases are firmly entrenched in constitutional criminal procedure's shifting and sometimes unstable terrain of rules, though vigorously decried in the literature.²⁹ Courts decline to peer into the Pandora's box of motives for police stratagems and exercises of power so long as an objective basis can be conceived for a particular police action.³⁰

The doctrine informs defendants who argue racial targeting or other problematic exercises of discretion that criminal cases are not the proper context to press such claims.³¹ Rather, the claimants must clear the hurdles of bringing an equal protection claim.³² The barriers to bringing a successful equal protection claim are prohibitively high, however.³³

28. *Id.* at 323–24, 346–47, 355.

29. See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE CRIMINAL JUSTICE SYSTEM 38 (1999) (describing *Whren* as “formal sanction” permitting the practice of courts to “look the other way” when it comes to pretextual stops that disproportionately burden people of color); I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 862 (2008) (explaining that *Whren* “essentially green-lighted the police practice of singling out minorities for pretextual traffic stops in the hope of discovering contraband . . . [a] practice that minorities know as being penalized for driving while black, driving while brown . . . often fraught with intimidation, harassment, and disrespect”); Devon W. Carbado & Rachel F. Moran, *The Story of Law and American Racial Consciousness: Building a Canon One Case at a Time*, 76 UMKC L. REV. 851, 873–74 (2008) (critiquing *Whren* as a “license to make racial distinctions”); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 FORDHAM L. REV. 329, 331–32, 331 n.4 (2002) (collecting critiques of *Atwater* and noting that criticism comes from conservatives as well as liberals because of the substantial shield for abuse); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 465–66 (2002); Timothy P. O’Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 729 (1998) (explaining that “messy details of discrimination are irrelevant under a regime of supposed objectivity”).

30. See, e.g., *Brendlin v. California*, 551 U.S. 249, 260 (2007) (explaining that the Court repeatedly rejected attempts to introduce subjectivity into Fourth Amendment analysis); *Devenpeck v. Alford*, 543 U.S. 146, 153–55 (2004) (holding that objective circumstances, rather than subjective police motives or knowledge, control analysis of reasonableness of arrest); *Whren*, 517 U.S. at 813 (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”); *Scott v. United States*, 436 U.S. 128, 136–37 (1978) (endorsing government’s argument that “[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional”); *United States v. Robinson*, 414 U.S. 218, 221 n.1, 235 (1973) (holding that traffic-violation arrest is not invalid even if was “a mere pretext for a narcotics search”).

31. See, e.g., *Whren*, 517 U.S. at 813 (“[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

32. *Id.*

33. See Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1860–61 (2004) (discussing barriers).

The U.S. Supreme Court has clamped down on the availability of discovery for selective prosecution cases, requiring the claimant to “produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not.”³⁴ Plaintiffs thus must produce evidence of discrimination to have access to discovery, the main mechanism for finding evidence of discrimination. Moreover, courts are not hospitable to claimants making a case through statistical analysis, requiring proof of purposeful discrimination in the defendant’s case.³⁵ The phalanx of rules together produces a non-inquiry stance of courts in claims of misuse or harmful use of police discretion.

This eschewal of inquiry is part of a larger judicial reluctance to second-guess police.³⁶ Judges, particularly appellate judges reviewing constitutional claims, are far-removed from the streets where police must patrol.³⁷ Courts are profoundly wary of hamstringing police in dealing with the stresses and dangers of criminal law enforcement.³⁸ More fundamentally, courts are cautious because persistent problems, such as disproportionate minority impact, are in part a result of structural societal inequities and legislative choices regarding what to penalize, which are daunting to redress at the case and court level.³⁹ To peer into

34. *United States v. Armstrong*, 517 U.S. 456, 468–71 (1996).

35. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 292–96, 293 n.12 (1987) (requiring proof of purposeful discrimination in the claimant’s case and explaining that statistics failed to establish such proof in the defendant’s particular case); *United States v. Avery*, 137 F.3d 343, 356 (6th Cir. 1997) (construing *McCleskey* to signify that “[o]nly in rare cases will a statistical pattern of discriminatory impact conclusively demonstrate a constitutional violation”).

36. *See, e.g., United States v. Robinson*, 414 U.S. 218, 235 (1973) (reasoning that officers’ “quick ad hoc judgments” on matters such as arrests should not be impeded by requirements of step-by-step justification to be second-guessed by courts); *Terry v. Ohio*, 392 U.S. 1, 17 n.15 (1968) (reasoning that officers “in the heat of an unfolding encounter on the street” and its dangers need intelligible and not overly constraining rules).

37. As the *Atwater* Court put it:

Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government’s side with an essential interest in readily administrable rules.

Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001).

38. *See, e.g., New York v. Quarles*, 467 U.S. 649, 656 (1984) (“In a kaleidoscopic situation such as the one confronting these officers . . . spontaneity rather than adherence to a police manual is necessarily the order of the day” and in such situation officers may “act out of a host of different, instinctive, and largely unverifiable motives . . .”).

39. *See, e.g., MARC MAUER, RACE TO INCARCERATE 43*, 137–40 (1999) (analyzing larger social, economic, and structural factors as well as implicit biases behind disproportionality in incarceration); Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathetic Divide*, 53 DEPAUL L. REV. 1557, 1557 (2004)

differences in the experience of justice would risk—as Justice Powell put it for the U.S. Supreme Court—“throw[ing] into serious question the principles that underlie our entire criminal justice system.”⁴⁰

There is formal law and then there is practice, forged by experts, advocates, and officials charged with vindicating the promise of law. A more hopeful portrait of the prospects for improvement of the quality and equality of justice emerges when one examines practice. Successes and progress by Department of Justice investigators and by civil society actors such as the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) illuminate promising modes of redress and reform.⁴¹

Courts are clumsy police overseers, and constitutional criminal procedure is awkwardly suited for the task of police regulation.⁴² This is not a reason, however, to abdicate the important task of providing a check and ameliorating deleterious consequences. Because of the nature of the constituencies most at odds with police power—marginalized communities—the political process often does not provide an effective check—at least not without a jump-start.⁴³ What kind of remedies would experts fashion in cooperation with police? Recent decades have begun to offer an answer to this question that can inform the deliberation of courts, litigators, and policy makers.

This Article analyzes the virtues of collaborative reform and remedial design and argues that a promising product of such collaboration is data-

(discussing “biographical racism,” defined as “the accumulation of race-related obstacles, indignities and criminogenic influences that characterizes the life histories of so many African-American capital defendants”); Research Working Grp., Task Force on Race and the Criminal Justice Sys., *Preliminary Report on Race and Washington’s Criminal Justice System*, 87 WASH. L. REV. 1, 9–10 (2012) (discussing “structural racism”).

40. *McCleskey*, 481 U.S. at 315–18.

41. For a discussion of examples, see *supra* text and sources at notes 1–9 and *infra* Part II.B.

42. For a discussion of reasons why courts are awkwardly suited to the task, see, for example, Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 786–90 (1970) (exploring the challenges surrounding the judiciary taking an effective supervisory or disciplinary role over police); Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 29–31 (2006) (analyzing the limitations of courts in supervising police practices and the particular challenge posed by evolving techniques of investigation and collecting literature); compare Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 19 (1988) (“In our constitutional mythology, the job of courts, after all, is to find law, to ascertain the rights of the individual, not to balance costs and benefits like a legislature, or even a construction engineer.”).

43. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1088–93 (1993) (applying public choice theory to explain the barriers to legislatures protecting the interests of suspects).

driven surveillance of police to better steer discretion. This Article dubs such data-driven surveillance “panopticism for police.” The Panopticon was envisioned by Jeremy Bentham, oft-described as one of the founding fathers of utilitarianism and modern deterrence theory.⁴⁴ Bentham’s original conception envisioned facilitating more efficient and effective governance of prison inmates by creating a structure that permitted the perfect visibility of prisoners arrayed around an opaque watchtower.⁴⁵ The genius of the idea has transcended the original context of prison management to become a metaphor for the management of modern society.⁴⁶ Creating a sense of “conscious and permanent visibility” leads to self-regulation by the populace in conformance with expectations because at any time one may be surveilled.⁴⁷

This Article explores the promising potential of panopticism for governing the governors—policing the police and other actors vested with power. While the focus of this Article is on police, the insights may have resonance for other criminal justice actors vested with strong discretion that may yield disparate distributions and experiences of justice. “Criminal law for cops,”⁴⁸—criminal procedure’s body of conduct rules for police—can benefit from panoptic insights to ensure less costly, more internalized enforcement of civil liberties. This Article explores the promising potential of police panopticism as a remedy and governance strategy. The goal of police panopticism is to minimize the severe costs of managing the police by leveraging data-driven surveillance from multiple institutional points and actors. The state of

44. See, e.g., Alice Ristroph, *Proportionality As a Principle of Limited Government*, 55 DUKE L.J. 263, 272 (2005) (“father of utilitarianism”); Michael L. Siegel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1569 n.46 (“father of deterrence theory”).

45. Miran Božovič, *Introduction to JEREMY BENTHAM, THE PANOPTICON WRITINGS* 13–17 (Miran Božovič ed., 1995).

46. See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 200–01 (Alan Sheridan trans., 1977) (extending Panopticon metaphor to one of management of modern society); *THEORIZING SURVEILLANCE: THE PANOPTICON AND BEYOND* 4–8, 14–17 (David Lyon ed., 2006) (extending metaphor to management of modern society); Larry Catá Backer, *Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes*, 15 IND. J. GLOBAL LEGAL STUD. 101, 112 (2008) (tracing modern decentralized and globalized surveillance state); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1415–16 (2001) (tracing influence in modern governance and discourse).

47. See, e.g., FOUCAULT, *supra* note 46, at 200–09 (analyzing influence of idea on governance of modern society in diverse contexts).

48. See Steiker, *supra* note 10, at 2470 (calling criminal procedure “a species of substantive criminal law for cops”).

“conscious and permanent visibility” should reduce monitoring and remedial costs by triggering self-regulation.

This Article proceeds in three parts. Part I discusses the dilemma surrounding how much police opacity to permit in light of countervailing crime control and power misuse concerns and statutory routes opened to penetrate that opacity. This Part discusses three of the most important statutory routes for penetrating police opacity today: (1) 42 U.S.C. § 14141, which authorizes the U.S. Department of Justice to launch investigations and sue police departments that have a pattern or practice of violating civil rights; (2) the Omnibus Crime Control and Safe Streets Act of 1968 and Title VI of the 1964 Civil Rights Act, which deploy the power of the purse to require police departments receiving federal funds to refrain from discriminating on the basis of race, color, sex, or national origin; and (3) 42 U.S.C. § 1983, which through doctrinal twists and turns, today better enables private parties to bring suit for violations of civil rights.

Part II explores how these three key litigation routes ultimately constitute avenues toward collaboration and bargaining rather than court-ordered reform and distinguishes between institutional and law reform. Part II argues that the virtues of cooperation in law’s shadow outweigh the cost of legal stasis. This Part argues that a primary virtue is expert input in fashioning practicable and institutionally tailored reform rather than a clumsy one-size-fits-all judicial rule. Moreover, cooperation rather than judicial interpretation and decision-making may yield greater reform because courts forced to decide the merits of litigation and whether to impose the high costs of clumsy judicial remedies may end up narrowing the scope of the right rather than recognizing a violation.

Part III explores the future of police regulation and reform in light of the insights emerging from collaborative reform and governance. This Article argues that police panopticism can supplement the much-eroded exclusionary rule by better detecting and preventing undesirable practices through data-driven surveillance. This Part examines emerging strategies for regulation by surveillance of police, including warning-flag databases, recording of day-to-day police–citizen encounters, and other modes of monitoring that have emerged in consent decrees and memoranda of agreement.

I. MAIN ROUTES FOR PENETRATING POLICE OPACITY

The question of whether and how to limit law enforcement discretion and penetrate the opacity of police practices has long vexed criminal justice experts.⁴⁹ Opacity and the dangers of discretion are related because problematic exercises of discretion, such as the use of excessive force or targeting racial minorities, flourish more widely in the dark, when shielded from scrutiny.⁵⁰ In the interest of effective crime prevention, the U.S. Supreme Court has been very sympathetic to the need to give police room to maneuver and act on educated intuition.⁵¹ The Court tries to avoid mandating a step-by-step breakdown and reporting of reasons out of concern that such a requirement would overly hamstring effective law enforcement.⁵² The Court also has repeatedly underscored the need to avoid impairing law enforcement effectiveness through vigor-chilling scrutiny, which also may disclose enforcement policy to would-be criminals.⁵³

Countervailing concerns regarding the need to prevent misuses of power, however, have led to the development of statutory routes for penetrating police opacity. Congress over the years, and the courts

49. See generally, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); KENNETH CULP DAVIS, *POLICE DISCRETION* (1975); WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (Frank J. Remington ed., 1965); SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990*, at 21–50 (1993); James J. Fyfe, *Structuring Police Discretion*, in *HANDLED WITH DISCRETION: ETHICAL ISSUES IN POLICE DECISION MAKING* 183–201 (John Kleinig ed., 1996).

50. See, e.g., David Packman, *How Lack of Transparency Enables Police Brutality*, *THE GUARDIAN* (Oct. 25, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/oct/25/lack-transparency-enables-police-brutality> (reporting that inaccessibility of data renders redress of police brutality difficult); cf. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 *N.Y.U. L. REV.* 911, 914–16, 955–59 (2006) (arguing that information deficits between “insiders”—judges, police, and prosecutors—and “outsiders”—crime victims and the general public—could be ameliorated through better statistical information, particularly at the local level); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 *AM. CRIM. L. REV.* 1071, 1119–22 (1997) (underscoring import of statistical information in providing a “a rough but valuable check” against selective prosecution and urging Congress to mandate the assembly of records so patterns may be detected).

51. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979) (noting police officers “have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront”); Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 *ST. JOHN’S L. REV.* 911, 952–53 (1998) (analyzing important crime prevention interests in giving police discretion in the *Terry* stop context).

52. See, e.g., *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“A police officer’s determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.”).

53. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

through statutory rather than constitutional interpretation, have forged three main bases for penetrating police opacity and curbing discretion, including discretionary decisions with racial impact. One of the most promising developments is the enactment of 42 U.S.C. § 14141(b),⁵⁴ which authorizes the U.S. Attorney General to sue for equitable and declaratory relief when there is a reasonable basis to believe that law enforcement officials have engaged in a pattern or practice of deprivation of constitutional or federal statutory rights.⁵⁵

Section 14141 complements earlier restrictions against law enforcement agencies receiving federal funds for discriminating on the basis of race, color, sex, or national origin under the 1968 Crime Control and Safe Streets Act, codified at 42 U.S.C. § 3789d,⁵⁶ and Title VI of the 1964 Civil Rights Act, codified at 42 U.S.C. § 2000d.⁵⁷ Section 14141 provides a procedural vehicle by which the Justice Department can sue agencies receiving federal funds for violations of constitutional or federal statutory rights, including the right against discrimination on the basis of race, color, sex, or national origin conferred by § 3789d and Title VI.⁵⁸ The primary cause of action for private citizens and civil rights entities suing law enforcement, 42 U.S.C. § 1983, also has proved to have some teeth, despite the teething difficulties posed by doctrinal twists and turns.⁵⁹ As demonstrated by important reforms won by private organizations suing under the provision, § 1983 is an important and complementary vehicle for extending the reach of structural reform.⁶⁰

Innovative institutional reforms secured by structural reform litigation include the data reporting and monitoring mandates detailed at the outset of this Article and further explored in Part III.⁶¹ Some scholars, however,

54. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified at 42 U.S.C. § 14141(b) (2006)).

55. 42 U.S.C. § 14141(b).

56. Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified at 42 U.S.C. § 3789d (2006)).

57. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (2006)).

58. *See infra* Part I.A–B.

59. *See infra* Part I.C.

60. For example, New York City police report the race of people targeted for investigative stops and promulgate written policies forbidding profiling pursuant to a stipulation won by the Center for Constitutional Rights to settle a civil rights suit. Stipulation of Settlement at 5, 8–9, ex. B, Daniels v. City of New York, No. 99 Civ. 1695 (SAS) (S.D.N.Y. Sept. 24, 2003); *see also* Al Baker, *New York Minorities More Likely To Be Frisked*, N.Y. TIMES, May 13, 2010, at A1 (reporting findings revealed from the data collection and release that Blacks and Latinos were nine times more likely than Whites to be stopped by New York police in 2009).

61. *See supra* notes 1–9 and accompanying text; *infra* Part III.B.

have expressed dissatisfaction with the quantity of cases brought and dismay over the persistence of police misconduct in many jurisdictions.⁶² The focus of this piece is not on the quantity debate, but rather on lessons for how to design regulatory strategies and remedies that emerge from the expert collaboration incentivized by these causes of action. Determining *how to design* more effective, finer-grained mechanisms of police regulation and reform is an important issue distinct from the general question of *how to reach more departments*. Regulatory and remedial design can inform the practices not just of structural reforms stemming from litigation under provisions such as § 14141, § 3789d, Title VI, or § 1983, but also other avenues of police regulation. This Part offers an overview of the three main legal avenues for contemporary police department reform. The next Parts explore the insights that emerge from cooperative reform and offer a theory and practical illustrations of police panopticism as regulatory strategy and remedy.

A. Path-Opening: 42 U.S.C. § 14141

Congress launched a paradigm shift in police regulation when it authorized the Justice Department to investigate and sue police departments rather than relying just on the hope that the exclusionary rule and damages actions would deter rights violations.⁶³ The legislation that would become 42 U.S.C. § 14141 was forged in the embers of fury over the videotaped beating of Black motorist Rodney King by Los Angeles Police Department (LAPD) officers.⁶⁴ The provision authorizing Justice Department suits was originally proposed in the 1991 Police Accountability Act, but did not muster enough votes to pass.⁶⁵ The potent remedy regulating the police was repackaged in the police-palatable wrapper of a bill that gave money to the police, the Violent

62. See, e.g., Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 365, 365 n.257 (2001) (arguing, six years after the enactment of § 14141, that the strategy has been ineffective in part because of filing of few suits); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 20 n.72, 21 n. 73 (2009) (collecting critiques); cf. Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 100–01 (2001) (noting that high-profile cases in high-profile cities may draw Justice Department attention but in a world of limited resources, smaller communities may remain relegated to private lawsuits).

63. See, e.g., Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 506 (2008) (discussing paradigm shift).

64. H.R. REP. NO. 102-242, pt. 1, at 135–36 (1991).

65. *Id.* at 138.

Crime Control and Law Enforcement Act of 1994.⁶⁶ The Violent Crime Control and Law Enforcement Act was mainly pitched as a bill to fight “ever-increasing violence” by giving police departments federal money to “hire new officers for community policing and to implement community policing programs.”⁶⁷ Congress pitched the bill to the powerful law and order lobby as legislation aimed at giving police money to support their “pioneer[ing] . . . return to preventative community policing techniques” aimed at “working with the community” to “tailor[] solutions . . . to unique neighborhood crime and disorder problems.”⁶⁸

But buried deep in Title 21, § 210401 of the bill was the law that would be codified at 42 U.S.C. § 14141.⁶⁹ To understand the history of the provision, one must examine its origins in the earlier criminal justice reform bill: the Police Accountability Act of 1991.⁷⁰ The highly publicized Rodney King beating prompted the legislation conferring “standing to the United States Attorney General” to seek civil injunctive relief against police departments exhibiting a pattern or practice of violating federal civil rights.⁷¹ The House Report describing the impetus for the legislation recounted the controversial beating replayed on television screens across the nation:

While twenty-one other officers stood by, three LAPD officers and a sergeant administered 56 baton blows, six kicks to the head and body, and two shocks from a Taser electric stun gun. The incident was captured on videotape by a citizen. . . .

Unfortunately, the Rodney King incident is not an aberration. The Independent Commission on the Los Angeles Police Department, created to examine the incident . . . concluded in its July 1991 report that “there is a significant number of officers in the LAPD who repetitively use excessive force against the public.” . . .

. . . .

. . . It is apparent, moreover, that the problem is not limited to Los Angeles. Police chiefs from 10 major cities convened soon after the King incident and emphasized that “the problem of

66. Pub. L. 103-322, § 210401, 108 Stat. 1796, 2071 (1994).

67. H.R. REP. NO. 103-324, at 7–8 (1993).

68. *Id.* at 7.

69. § 210401, 108 Stat. at 2071.

70. *See* H.R. REP. NO. 102-242, pt.1, at 135–39.

71. *Id.* at 135.

excessive force in American policing is real.”⁷²

The Report proffered accounts from police officials and cases from across the country, in places such as New Jersey, Ohio, Boston, Michigan, and D.C.—several of which would later be locales for structural reform litigation⁷³—regarding excessive force and abuse, particularly of minorities.⁷⁴

The conferral of investigative authority was important because prior to the legislation, the Justice Department lacked authority to address “systemic patterns or practices of police misconduct.”⁷⁵ While the Justice Department could prosecute individual police officers, juries often were reluctant to convict.⁷⁶ If the officer was acting pursuant to an official policy or was poorly trained, the Justice Department could not sue the police department to correct the larger problem.⁷⁷ The report explaining the 1991 precursor legislation proffered two examples, including one from Washington State.⁷⁸ In a nine-month period, four people in separate incidents were badly beaten by Mason County, Washington, officers in vulnerable, pain-susceptible spots such as the head, testicles, and kidneys after investigative stops.⁷⁹ Some of the beaten individuals were falsely charged to induce them into signing a release of liability form.⁸⁰ The legislative report observed that though the Ninth Circuit had found the training for the officers to be “woefully inadequate, if it can be said to have existed at all” courts were “powerless to correct” the larger institutional inadequacy.⁸¹

72. *Id.*

73. *See generally, e.g.*, Complaint, United States v. New Jersey, No. 99-5970 (MLC) (D.N.J. Dec. 22, 1999), *available at* <http://www.justice.gov/crt/about/spl/documents/jerseycomp.php>; Complaint, United States v. City of Steubenville (S.D. Ohio Aug. 28, 1997), *available at* <http://www.justice.gov/crt/about/spl/documents/steubencomp.php>; Letter from Steven H. Rosenbaum, Chief, Special Litig. Section, U.S. Dep’t of Justice, to Subodh Chandra, Dir., Law Dep’t, Cleveland City Hall (July 23, 2002), *available at* http://www.justice.gov/crt/about/spl/documents/cleveland_cover.php (investigation letter); Letter from William R. Yeomans, Acting Assistant Attorney General, Civil Rights Div., U.S. Dep’t of Justice, to The Honorable Anthony Williams, Mayor of D.C. & Charles H. Ramsey, Chief of Police, Metro. Police Dep’t (June 13, 2001), *available at* <http://www.justice.gov/crt/about/spl/documents/defindings.php>.

74. H.R. REP. NO. 102-242, pt. 1, at 135–39.

75. *Id.* at 137.

76. *Id.*

77. *Id.*

78. *Id.* at 138–39.

79. *See Davis v. Mason County*, 927 F.2d 1473, 1478–79 (9th Cir. 1991) (describing incidents).

80. *Id.* at 1478.

81. H.R. REP. NO. 102-242, pt. 1, at 138–39 (quoting *Davis*, 927 F.2d at 1482); *see also supra*

The U.S. Supreme Court's decision in *Los Angeles v. Lyons*⁸² constricted the ability of private individuals to sue for injunctive relief by imposing a high hurdle for establishing standing to sue for violations of civil rights.⁸³ The plaintiff Adolph Lyons, a Black man, had been choked unconscious by the Los Angeles police during a routine traffic stop though he offered no resistance.⁸⁴ Between 1975 and 1983, at least sixteen people had died during chokehold use by the Los Angeles police—twelve of them Black men like Lyons.⁸⁵ The Court nonetheless held that Lyons lacked standing to sue because he could not show sufficient likelihood that he would again experience a chokehold by the Los Angeles police.⁸⁶

While the 1991 legislation's provisions attempting to afford greater access to private individuals to sue for injunctive relief did not make it into the 1994 law, the authorization for the Department of Justice to sue for institutional reform did.⁸⁷ The investigations or announced investigations across diverse jurisdictions have had "influence [that] greatly exceeds their number."⁸⁸ The Justice Department has authorized more than forty-one investigations, with additional investigations inaugurated this year, including an investigation into the Seattle Police Department.⁸⁹ In fidelity with the concerns that impelled passage of § 14141, the vast majority of the investigations are into allegations of use of excessive force.⁹⁰

notes 75–76 and accompanying text.

82. 461 U.S. 95 (1983).

83. *Id.* at 105–06.

84. *Id.* at 97–98.

85. *Id.* at 115–16 (Marshall, J., dissenting).

86. *Id.* at 111 (majority opinion). For an analysis of the virtual certitude standard imposed by the *Lyons* Court, see Mary D. Fan, Comment, *Risk Magnified: Standing Under the Statist Lens*, 112 YALE L.J. 1633, 1635–36 (2003).

87. See 42 U.S.C. § 14141 (2006) (authorizing suits by the Justice Department).

88. John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1420–21 (2007).

89. See 2 BERNARD D. REAMS JR. & MICHAEL P. FORREST, USA PATRIOT ACT: A LEGISLATIVE HISTORY OF THE UNITING AND STRENGTHENING OF AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT, PUBLIC LAW NO. 107-56 (2001) (Ser. 2, 2006), Doc. 58, at 144–45 (reporting to Congress that as of 2006, the Justice Department had received authorization to launch forty-one investigations); *Special Litigation Section Cases and Matters*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/spl/findsettle.php#FindingsLetters> (last visited Feb. 15, 2012) (collecting twenty-seven Conduct of Law Enforcement Agency Investigations but omitting several others).

90. REAMS JR. & FORREST, *supra* note 89, Doc. 58, at 145.

B. Purse Power: Crime Control and Safe Streets Act and Title VI

The Justice Department's authority to pursue structural reform litigation reinforces the rights and causes of action arising from statutory restrictions on agencies receiving federal funds from discriminating based on race, color, sex or national origin.⁹¹ Title VI of the Civil Rights Act of 1964 prohibits "any program or activity receiving Federal financial assistance"—including federal law enforcement and the numerous state and local agencies receiving federal grants—from such discrimination.⁹² Adopted four years later, the Omnibus Crime Control and Safe Streets Act of 1968 reiterates the prohibition and also provides a process of warnings, funds suspension, and suit for enforcement.⁹³ These two prohibitions, tied to the federal power of the purse, offer substantive rights and procedural avenues that are bases for limiting what is colloquially called racial profiling.⁹⁴

Under both statutes, the most obvious remedy for violations is suspension or termination of federal funding.⁹⁵ The Omnibus Crime Control and Safe Streets Act of 1968, for example, provides for a civil suit for injunctive relief, including suspension, termination, or repayment of funds based on a pattern or practice of violations of the antidiscrimination provisions.⁹⁶ A very fractured U.S. Supreme Court in *Guardians Ass'n v. Civil Service Commission of New York*⁹⁷ also implied a private right of action to sue for injunctive relief to enforce the antidiscrimination protections of Title VI.⁹⁸

The fractures in *Guardians Ass'n* have resulted in the dichotomy that proof of discriminatory intent is required to make out a damages claim for violation of Title VI, but discriminatory impact suffices if plaintiffs are seeking equitable relief to enforce Title VI's implementing

91. See 42 U.S.C. § 2000d (2006) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); *id.* § 3789d(c)(1) (similar).

92. *Id.* § 2000d.

93. See, e.g., *id.* § 3789d(c)(2)(A), (C) (providing for warning process and suspension of funds on further noncompliance).

94. For an exposition, see, for example, Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Law: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 732–38 (2004).

95. See, e.g., 42 U.S.C. § 3789d(c)(2)(A), (C) (providing mechanism for suspension of funds).

96. *Id.* § 3789d(c)(3).

97. 463 U.S. 582 (1983).

98. See *id.* at 608 n.1 (Powell, J., concurring) (counting votes).

regulations.⁹⁹ Similar to Title VI, the implementing regulation provides that no program receiving federal funds may:

[U]tilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.¹⁰⁰

The distinction matters greatly. The “smoking gun” proof of discriminatory intent is hard to obtain.¹⁰¹ The most practicable way to make a case is through statistical evidence regarding the department’s practices.¹⁰² Structural reform litigants seeking to enjoin discriminatory practices thus have a lower hurdle of proof if they couch their suit as seeking to enforce the regulations implementing Title VI’s antidiscrimination protections.

Private litigants have made some headway in anti-racial-profiling structural reform litigation brought under Title VI’s regulations.¹⁰³ For instance, in *Rodriguez v. California Department of Highway Patrol*,¹⁰⁴ the NAACP, the League of United Latin American Citizens (LULAC), and the ACLU joined forces to sue for alleged racial profiling under a federally funded drug interdiction program called “Operation Pipeline.”¹⁰⁵ In support of their Title VI claim, the plaintiffs presented

99. *Id.*; see also Larry P. v. Riles, 793 F.2d 969, 981–82 (9th Cir. 1984) (explaining dichotomy); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 330 (2001) (“Since *Guardians* and *Choate*, federal courts of appeals have consistently found that Title VI implementing regulations prohibiting practices that cause an unjustified disparate impact provide a basis for private plaintiffs to sue recipients of federal funds on a discriminatory effects theory, without a showing of discriminatory intent.”).

100. 28 C.F.R. § 42.104(b)(2) (2010).

101. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combatting Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 44–45 (2004).

102. *Id.*

103. See, e.g., *Wilson v. Dep’t of Pub. Safety*, 66 Fed. App’x 791, 796 (10th Cir. 2003) (reversing motion to dismiss on defendant’s racial profiling claim involving traffic stop and reinstating suit, including Title VI claim); *Rodriguez v. Cal. Dep’t of Highway Patrol*, 89 F. Supp. 2d 1131, 1139 (N.D. Cal. 2000) (rejecting defendant’s motion to dismiss the complaint and allowing suit, including Title VI claim, to proceed).

104. 89 F. Supp. 2d 1131.

105. *Id.* at 1134; see also Press Release, ACLU, California Highway Patrol Bans Consent Searches Following Review of Data Collection Showing Discriminatory Pattern (Apr. 22, 2001) [hereinafter ACLU, California Press Release], available at http://www.aclunc.org/news/press_releases/california_highway_patrol_bans_consent_searches_following_review_of_data_collection_showing_discriminatory_pattern.shtml (noting ACLU

data that Black motorists were 1.5 times as likely and Latino motorists were three times as likely to be stopped by California Highway Patrol officers than White motorists.¹⁰⁶ District Judge Fogel ruled this disparity was sufficient to make a claim and survive a motion to dismiss.¹⁰⁷ After clearing the procedural hurdle, the ACLU and LULAC successfully settled the case and levied data-generating reforms, including collection of data on race and traffic stops and limits on searches, as well as more than \$800,000 in legal fees and damages.¹⁰⁸

Section 14141 is complementary to these prior provisions and clears up some of the murk in the scope of relief and reform that the Justice Department may seek to enforce the substantive antidiscrimination prohibitions of the 1964 and 1968 laws. Section 14141 authorizes the Justice Department to sue for a pattern or practice of violating the federal rights created by federal laws forbidding discrimination by a recipient of federal funding.¹⁰⁹ The scope of injunctive relief authorized under § 14141 is more broadly worded as “appropriate equitable and declaratory relief to eliminate the pattern or practice.”¹¹⁰ Justice Department investigations into allegations of racially discriminatory impact have thus leveraged § 14141 as well as Title VI of the 1964 Civil Rights Act and the Omnibus Crime Control and Safe Streets Act of 1968.¹¹¹

C. *A Winding and Widening Path: 42 U.S.C. § 1983*

For private citizens and entities, the main vehicle for damages and injunctive-relief suits remains 42 U.S.C. § 1983, enacted as part of the

involvement).

106. Maura Dolan & John M. Glionna, *CHP Settles Lawsuit over Claims of Racial Profiling*, L.A. TIMES, Feb. 28, 2003, at A1.

107. *Rodriguez*, 89 F. Supp. 2d at 1137; ACLU, California Press Release, *supra* note 105.

108. Weatherspoon, *supra* note 94, at 737 n.91; Dolan & Glionna, *supra* note 106, at A1.

109. 42 U.S.C. § 14141 (2006).

110. *Id.*

111. *See, e.g.*, Memorandum of Agreement Between the United States & the City of Highland Park, Ill. para. 3 (2000) *available at*

http://www.justice.gov/crt/about/spl/documents/Highland_MA.php (leveraging § 14141, Title VI and 42 U.S.C. § 3789d); Memorandum of Agreement Between the United States & the Village of Mt. Prospect, Ill. para. 1 (Jan. 22, 2003) *available at*

http://www.justice.gov/crt/about/spl/documents/mtprospect_moa.pdf (leveraging § 14141 and 42 U.S.C. § 3789d(c)); Memorandum of Agreement Between the United States & the City of Villa Rica, Ga. 1 (Dec. 23, 2003) *available at*

http://www.justice.gov/crt/about/spl/documents/villa_rica_moa.pdf (similar).

Civil Rights Act of 1871¹¹² to vindicate the promise of the Fourteenth Amendment.¹¹³ Reconstructionist Republican legislators passed the legislation because of outrage and alarm over violence against Blacks in the South, including lynching, whippings, and other atrocities.¹¹⁴ While the legislation is also called the Ku Klux Klan Act because of its genesis amid rampant Klan violence, the provision was shaped by deep concern over the inaction and potential complicity of local law enforcement officials.¹¹⁵ The remedy of § 1983 thus was not against the Ku Klux Klan but rather state actors who refused to enforce state laws or enforced them in a discriminatory manner.¹¹⁶ Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress¹¹⁷

Despite its genesis in a sense of urgent need for reform, the provision was interpretively disarmed by the U.S. Supreme Court and remained dormant for nearly a century after its passage.¹¹⁸ In *Barney v. City of New York*,¹¹⁹ Chief Justice Fuller of the U.S. Supreme Court held that official actions contrary to state law or policy are not under color of state law.¹²⁰ “Lawless police brutality” thus was outside the scope of the statute’s tort remedy against government officials.¹²¹ Official actions in derogation of state law were left to the vagaries (and potential

112. Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended in scattered sections of 42 U.S.C.).

113. For a history, see generally David Achtenberg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. § 1983 and the Meaning of “Under Color of” Law*, 1999 UTAH L. REV. 1.

114. *Id.* at 7–10.

115. See Eric Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 229 (1979) (detailing history).

116. *Monroe v. Pape*, 365 U.S. 167, 180 (1971), *overruled by* *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

117. 42 U.S.C. § 1983 (2006).

118. See, e.g., Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 23–24 (2000) (providing history).

119. 193 U.S. 430 (1904).

120. *Id.* at 437–39 (citing *Virginia v. Rives*, 100 U.S. 13 (1879)).

121. See *Monroe*, 365 U.S. at 213–14 (Frankfurter, J. dissenting) (so arguing based on past precedent).

recalcitrance) of state courts for redress.¹²²

The subsequent jurisprudence interpreting § 1983 has churned on whether to offer an avenue for suit and how narrow a route to provide.¹²³ The Court also has wavered and shifted on the liability of political subunits. In *Monroe v. Pape*,¹²⁴ the Court ruled that municipalities such as the City of Chicago are not a “person” under § 1983 and thus are not subject to suit.¹²⁵ In *Moor v. Alameda County*,¹²⁶ the Court extended the exclusion from the interpretation of “person” to other political subdivisions of states, including counties.¹²⁷

The constriction by this interpretation of § 1983 meant that the potential remedy was ineffectual when the Warren Court began searching for a way to check state police misconduct. The U.S. Supreme Court had initially eschewed extending the controversial exclusionary rule to the states even though it incorporated the Fourth Amendment’s guarantee against unreasonable searches and seizures to regulate state and local actors.¹²⁸ Without a remedy, however, it became egregiously apparent that state and local police were not observing the Fourth Amendment’s protections despite incorporation.¹²⁹ State officers blatantly illegally seized evidence in contravention of the Fourth Amendment and then handed it over to federal authorities on a silver platter for prosecution.¹³⁰ In 1961, the Court ultimately closed the gaping enforcement hole by extending the exclusionary remedy to the states in *Mapp v. Ohio*¹³¹ to deter state police misconduct.¹³² Showing how dormant § 1983 had become, the *Mapp* opinion did not even explicitly

122. *Barney*, 193 U.S. at 438 (“[I]t is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law.”).

123. *See, e.g., Monroe*, 365 U.S. at 188–91.

124. 365 U.S. 167.

125. *Id.*

126. 411 U.S. 693 (1973).

127. *Id.* at 709–10.

128. *Wolf v. Colorado*, 338 U.S. 25, 28–29, 32–33 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

129. *See Mapp*, 367 U.S. at 652–53 (describing “the obvious futility of relegating the Fourth Amendment” to toothless remedies in the states absent incorporation of the exclusionary rule).

130. For articles regarding the rampant violations, see, for example, J.A.C. Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 UCLA L. REV. 1, 4–13 (1962) (discussing cases involving searches in violation of constitutional protections without remedy); Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1101–08 (1959) (similar); Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 321–22 (1962) (similar).

131. 367 U.S. 643.

132. *Mapp*, 367 U.S. at 659–60.

analyze § 1983 as a remedy and mode of police regulation and deterrence. Writing for the Court, Justice Clark cursorily adverted to “the obvious futility of relegating the Fourth Amendment [to] the protection of other remedies”¹³³

The jurisprudence interpreting § 1983 would soon shift, however, to give force and effect to the vehicle for seeking civil remedies for official misconduct. The same term as *Mapp*, the Warren Court began breathing life into § 1983 in *Monroe v. Pape*, which held that state police officers acting in *contravention* of state law by illegally entering and ransacking the plaintiff’s home while he and his family were made to stand naked were nonetheless acting *under color of* state law.¹³⁴ By 1971, the Court construed a right to sue federal law enforcement officers in *Bivens v. Six Unknown Named Agents*.¹³⁵ To make bringing civil suits more feasible, Congress enacted the Civil Rights Attorney’s Fees Award Act of 1976,¹³⁶ which confers on courts the discretion to award attorney’s fees to prevailing parties in civil rights litigation.¹³⁷ In 1978, the U.S. Supreme Court reconstrued the term “persons” subject to suit to include municipalities.¹³⁸

Today, § 1983 is an important avenue for private impact litigators to seek reform of police practices. For example, the Center for Constitutional Rights sued the New York City police under 42 U.S.C. § 1983 and Title VI, and was able to extract a settlement stipulation that required police to, among other things, record data regarding the races of people stopped.¹³⁹ In Maryland, the NAACP and ACLU extracted a settlement that mandated, among other reforms, collection and dissemination of traffic stop and race data after suing under Title VI and 42 U.S.C. § 1983.¹⁴⁰ The NAACP also successfully sued New Jersey

133. *Id.* at 652.

134. *Monroe v. Pape*, 365 U.S. 167, 184–87 (1971), *overruled by* *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

135. 403 U.S. 388, 395–97 (1971).

136. Civil Rights Attorney’s Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988(b) (2006)).

137. 42 U.S.C. § 1988(b).

138. *Monell*, 436 U.S. at 679–82.

139. Stipulation of Settlement at 5, 8–9, ex. B, *Daniels v. City of New York*, No. 99CIV1695 (SAS) (S.D.N.Y. Sept. 24, 2003).

140. *See, e.g.*, Settlement Agreement at 2–4, *Md. State Conference of NAACP Branches v. Md. State Police*, No. 98-1098 (D. Md. Mar. 28, 2008), *available at* http://www.aclu.org/files/pdfs/racialjustice/mdnaacp_v_mdstatepolice.pdf (providing for payment of \$300,000 to plaintiffs, hiring of consultant to ensure effective implementation of 2003 consent decree, and progress on disclosure of records); *Md. State Conference of NAACP Branches v. Md. Dep’t of State Police*, 72 F. Supp. 2d 560, 569 (D. Md. 1999) (clearing initial standing, motion to

police for racial profiling of Black motorists on the New Jersey Turnpike under § 1983, among other causes of action.¹⁴¹

Emboldened by past successes in racial profiling litigation, the ACLU and the Mexican American Legal Defense Fund (MALDEF) have filed suit against Sheriff Joe Arpaio of Arizona for alleged discriminatory profiling of Latinos in attempts to interject the state in the enforcement of federal immigration law.¹⁴² Private litigation under § 1983 thus can extend the reach and spread of structural reform. Justice Department suits under § 14141 and private-entity suits under § 1983 are complementary. As discussed in Parts II and III, these statutes have spurred structural reform bargaining, yielding reforms that demonstrate the power and potential of data-driven surveillance.¹⁴³

II. COOPERATIVE REFORM IN LAW'S SHADOW

While § 14141, § 3789d, Title VI, and § 1983 are formal avenues of litigation, in practice their greatest utility is bringing expert parties together to bargain for reform. The causes of action induce cooperation through the prospect of litigation. The real action and progress, however, is achieved outside the courthouse. Indeed, most of the resolutions that have emerged from Justice Department investigations under § 14141, for example, were reached by negotiation before launch of a lawsuit.¹⁴⁴

In reality, structural reform litigation is a bit of a misnomer. In practice, what is occurring is structural reform bargaining that leads to institutional change through settlement while the law and judiciary remain in stasis. A distinguished cadre of writers has argued against settlement, particularly of civil rights litigation.¹⁴⁵ Some of the most oft-

dismiss, and summary judgment hurdles in earlier suit).

141. *White v. Williams*, 179 F. Supp. 2d 405, 409, 413–19 (D.N.J. 2002).

142. First Amended Complaint at 26–27, *Ortega-Melendres v. Arpaio*, No. CV 07-025 13-PHX-MHM (D. Ariz. July 16, 2008), available at <http://www.aclu.org/files/pdfs/immigrants/firstamdc071608%282%29.pdf>.

143. See *infra* Parts II–III.

144. Harmon, *supra* note 62, at 3–4, n.7.

145. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076, 1083 (1984) (arguing settlement is distorted by imbalances in power and coerced consent akin to plea bargaining and short-circuits the articulation of law and public values); Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 238–39 (1992) (arguing that consent decrees in public litigation “are inherently troublesome” because they come at the expense of legal clarification, “permit private parties to invoke the judiciary’s enforcement authority to define rights that are consistent with what the parties believe would be the litigated outcome,” and “avoid the mediating lens of the court and the accompanying public scrutiny”); Marshall Miller, *Police Brutality*, 17 YALE L. & POL’Y REV. 149, 176–80 (1998) (expressing concern that “repeated consent decrees will subvert

expressed concerns include short-circuiting the process of articulating law and public values,¹⁴⁶ lack of transparency and process in decision-making,¹⁴⁷ and power imbalances between parties that infect the bargaining process and outcomes.¹⁴⁸ These concerns are important and should be taken into account in crafting settlement procedures and protections.¹⁴⁹ This Part contends, however, that in the contemporary context of institutional and governmental litigants for reform, and in the shadow of increasingly police-solicitous and scrutiny-averting legal standards, the virtues of settlement exceed the concerns in a manner distinct from the past.

A. *An Invitation to Bargain*

Owen Fiss began his classic article in the anti-settlement canon *Against Settlement* with concern over how imbalance of power will infect the bargaining process.¹⁵⁰ He offered as an example “a struggle between a member of a racial minority and a municipal police department over alleged brutality.”¹⁵¹ An assumption in the argument, shaped by the lingering romance of the Warren Court era, is that in the judicially moderated and law-governed arena of litigation, power distortions are ameliorated. Fiss acknowledged that power imbalances between party representatives persist in litigation but argued that the distortions are lessened “because the judge tests those statements and

judicial opportunities to interpret § 14141 and preempt the potential benefits of publicizing . . . unconstitutional police patterns and practices” and that “a high settlement rate . . . will largely shift the role of structuring remedial change from federal judges to the Attorney General and the lawyers for the defendant police departments and municipalities”); Randolph D. Moss, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1811–12 (1986) (expressing concern over “negotiated compromises” effacing “legal ideals and procedural protections”); Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 203–04 (1987) (expressing concern over “the risk that major policy decisions will be fixed in secret negotiations with small groups of private plaintiffs rather than through the more open and accountable procedures of ordinary executive decisionmaking”).

146. *E.g.*, Fiss, *supra* note 145, at 1076, 1083; Issacharoff, *supra* note 145, at 238–39; Miller, *supra* note 145, at 178; Moss, *supra* note 145, at 1811–12.

147. *E.g.*, Issacharoff, *supra* note 145, at 238–39; Miller, *supra* note 145, at 178; Rabkin & Devins, *supra* note 145, at 204.

148. *E.g.*, Fiss, *supra* note 145, at 1076.

149. *See, e.g.*, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620–21 (1995) (analyzing how the settlement process can be improved to better serve and address concerns regarding openness, legal justice, and the creation of public good).

150. Fiss, *supra* note 145, at 1076.

151. *Id.*

actions against independent procedural and substantive standards.”¹⁵²

The stance of courts, particularly in the criminal procedure context, has dramatically changed from the days when Fiss envisioned judicial decision-making and legal standards as protecting the less powerful minority litigant. The legal doctrine and the posture of courts has been of mounting deference to the police and reluctance to peer into police stratagems that may cause disproportionate harm to the less powerful who are policed.¹⁵³ The strong judicial reluctance to intervene is reflected in the crystallization of non-inquiry rules of various types over the decades.¹⁵⁴ For example, when claimants argue police have played foul rather than fair in various stratagems, the U.S. Supreme Court has taken a strong stance of non-inquiry into the subjective motivations of officers.¹⁵⁵

A landmark—and unanimously decided—example is *Whren v. United States*. The case arose from police spotting two young Black men driving in a disadvantaged community, or “high drug area” in police parlance.¹⁵⁶ The officers executed a U-turn to tail the young Black motorists.¹⁵⁷ Followed in such a pronounced manner by police, Whren and his companion turned right without signaling at what the officers deemed an “unreasonable speed.”¹⁵⁸ Stopping the car, the officers walked up, and contended they saw two large plastic bags of crack cocaine in plain view in defendant Whren’s hands.¹⁵⁹

Whren argued that because driving is so extensively regulated by myriad open-textured provisions, such as the requirement that driving must be at a speed “reasonable and prudent under the conditions” or that the driver must give “full time and attention” to vehicle operation, police have wide cover to pursue a pretextual stop.¹⁶⁰ In effect, police are able to target individuals for little more than being young, Black, and male.¹⁶¹

152. *Id.* at 1080.

153. *See* discussion and sources cited *supra* notes 36–40 and *infra* notes 162–165.

154. *Id.*

155. This stance is oft-reiterated. *E.g.*, *Brendlin v. California*, 551 U.S. 249, 260 (2007); *Devenpeck v. Alford*, 543 U.S. 146, 153–54 (2004); *Whren v. United States*, 517 U.S. 806, 813 (1996); *see also* *Scott v. United States*, 436 U.S. 128, 136 (1978) (endorsing government argument that “[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional”).

156. *Whren*, 517 U.S. at 808.

157. *Id.*

158. *Id.* at 808–09.

159. *Id.*

160. *Id.* at 809–10.

161. *See id.*

The *Whren* Court refused to intervene to mitigate the risk of racial targeting. The Court first reiterated that constitutional criminal procedure—particularly Fourth Amendment jurisprudence—generally eschews case-specific inquiry into the subjective motivations of officers.¹⁶² One of the main reasons for this non-inquiry stance is deference to police needs and the notion that the quick ad hoc judgment calls officers make on the street are not susceptible to a step-by-step analysis.¹⁶³ *Whren* tried to get around the rule of non-inquiry into subjective intent by arguing that a reasonable officer would not have made the stop in light of customary police practices.¹⁶⁴ Justice Scalia, writing for the unanimous Court, dismissed the approach based on what a reasonable officer in the jurisdiction would do as even more unworkable than inquiry into subjective intent.¹⁶⁵ The *Whren* Court concluded that in “the run-of-the-mine case,” there was “no realistic alternative” to the customary rule of deeming a search justified without further inquiry if officers could point to probable cause.¹⁶⁶ Thus claimants who believe they were racially targeted have scant recourse because of the non-inquiry stance of courts in the criminal procedure context. Because courts are reluctant to second-guess the police, as *Whren* illustrates, it is far from clear that litigation in the judicial arena will ameliorate rather than aggravate imbalances in power.¹⁶⁷

Not only can out-of-court settlements secure potentially greater reform than the doctrine interpreted by courts provides, but the balance of power has also shifted in contemporary settlement bargaining. The advent of § 14141 means that the government brings its power, prestige, resources, and publicity to bear in representing the less powerful. The balance of power also has shifted, albeit in a less dramatic way, in the private impact litigation context, where the interests of the less powerful

162. *Id.* at 813 (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”); see also *Brendlin v. California*, 551 U.S. 249, 260 (2007) (explaining that the Court repeatedly rejected attempts to introduce subjectivity into Fourth Amendment analysis); *Devenpeck v. Alford*, 543 U.S. 146, 153–54 (2004) (holding that objective circumstances, rather than subjective police motives or knowledge, control analysis of reasonableness of arrest); *Scott v. United States*, 436 U.S. 128, 136 (1978) (“Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.”); *United States v. Robinson*, 414 U.S. 218, 221 n.1, 235 (1973) (holding that a traffic-violation arrest is not invalid even if it was “a mere pretext for a narcotics search”).

163. *E.g., Robinson*, 414 U.S. at 235.

164. *Whren*, 517 U.S. at 813–14.

165. *Id.* at 814–15.

166. *Id.* at 819.

167. See Fiss, *supra* note 145, at 1076 (giving example of a racial minority’s struggle against a police department’s use of excessive force).

are represented by prestigious, press-savvy impact litigation groups such as the ACLU, NAACP, and MALDEF. Leveraging the threat of negative spotlight, government investigators or impact litigating institutions may be able to exact more concessions in settlement than police-solicitous law would provide.

B. On Institutional Reform Rather than Law Reform

What about the oft-expressed concern that settlement subverts the clarification of law through litigation and judicial decision? Here again, the realities of contemporary constitutional criminal procedure doctrine complicate the case. When it comes to suits against the police, the Court's highly deferential qualified immunity standard may lead to dismissal of a case without ever clarifying the law—or securing any institutional reform.

The Court's recent decision in *Pearson v. Callahan*¹⁶⁸ amplifies the risk of dismissal without legal clarity. *Pearson* is a sharp shift from the Court's concern for legal clarification demonstrated in *Saucier v. Katz*.¹⁶⁹ *Saucier* required courts to decide if the facts alleged amount to a constitutional violation, even if not of “clearly established law,” because law would otherwise stagnate without clarification.¹⁷⁰ *Pearson* suspended the requirement of *Saucier* that courts first determine whether the facts as pled make out a constitutional violation.¹⁷¹ Under *Pearson*, courts may dismiss suits on the grounds that the challenged police conduct did not violate clearly established pre-existing law without ever explaining whether the conduct was permissible.¹⁷² The elimination of the *Saucier* requirement that courts must first explain what the Constitution requires thus leaves both police and the public in the dark and prevents the crystallization of clearly established law for future suits.

Moreover, when defendants try to push the law of police regulation these days, the law may push back. The law of criminal justice is retrenching sharply from its Warren Court-era hospitableness to criminal defendants.¹⁷³ Obvious signs include the erosion and cutbacks to

168. 555 U.S. ___, 129 S. Ct. 808 (2009).

169. 533 U.S. 194, 201 (2001), *abrogated by Pearson*, 129 S. Ct. 808.

170. *Id.*

171. *Pearson*, 129 S. Ct. at 816–21.

172. *Id.* at 816–20.

173. For accounts of cutbacks, see, for example, Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1525–93 (2008); Owens, *supra* note 18, at 565–71 (2010).

landmarks of the earlier era, such as the exclusionary rule or *Miranda* protections.¹⁷⁴ From a pragmatic perspective, clear-eyed about doctrinal realities and the need to achieve on-the-ground progress, pursuing institutional reform outside the risky judicial and doctrinal arena may net greater progress than aiming for legal reform.

C. *The Virtues of Collaborative Reform (Despite Legal Stasis)*

The virtue of structural reform bargaining, from a reform perspective, is that the resulting remedies are tailored by experts with input from insider police and impacted civil rights claimants. Both sides have incentives to bargain toward reform rather than risk judicial decision. The risks for civil rights claimants of generating even less hospitable law and the risks for police subjected to bad publicity and potentially clumsy judicial oversight create mutual incentive to collaborate in designing reforms. Judicial intervention acts as a penalty default that both parties have interest in avoiding. This undesirable default applies if the parties do not cooperate.¹⁷⁵ The penalty default thus incentivizes cooperation.¹⁷⁶ In the structural reform bargaining context, the undesirable aspect of the penalty default from the police perspective is the risk of clumsy and costly court-ordered remedies in the absence of cooperation and settlement. The undesirable aspect of the penalty default from the civil-rights claimant's perspective is the danger of judicial dismissal or refusal to decide if a settlement is not attained.

Transforming civil rights litigation into opening bids to bargain towards party-designed reforms shifts the actors designing reforms from the judiciary to the litigants. Rather than cause for concern, this change in approach may be salutary. As discussed, *supra*, in Part II.A, the litigants in police department structural reform suits are increasingly sophisticated actors with complementary expertise in community concerns and police needs. In contrast, courts are ill-suited and lack expertise to micro-manage police departments, particularly on the granular, department-tailored level needed to enhance the prospects of real and sustainable change.

Federal judges are generalists. Some may have criminal law experience. Many, however, do not have the level of insider knowledge

174. See, e.g., Weisselberg, *supra* note 173, at 1525–93; Owens, *supra* note 18, at 565–71.

175. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 90, 95, 97–100 (1989).

176. See *id.* at 97–98 (explaining how penalty defaults give incentive to at least one party to contract around the default).

that investigators, police, and advocacy organizations on the ground possess. Not only can parties afford to be more creative than courts in crafting reforms, they also have the know-how to develop more effective modes of regulation and remedial regimes. Indeed, the incentive to avoid inept and crude judicially imposed reforms is a reason for police to collaborate in designing reforms by agreement, stipulation, or consent decree.

Moreover, federal court decisions based on federal or constitutional law bind across diverse jurisdictions. In contrast, department-specific negotiations concerning reform can help push reforms toward best practices while still recognizing the need for local variation suited to context.¹⁷⁷ Non-judicial actors outside the arena of one-size-fits-all federal and constitutional law can engage in better-adapted reforms without costly overbreadth or ill-fit to local context.

Party-negotiated reforms also offer the virtues of greater flexibility and adaptability and room for experimentation and change if early solutions prove insufficient. Negotiating parties can apply the lessons of past agreements to explore new innovations and adaptations. Parties crafting agreements that need not bind other entities can afford to be creative in a way that courts cannot. Contrast, for example, settlement agreements that require implementation of an automated early-warning system and a statistical model to identify potentially problematic officers with the typical stakes of criminal procedure cases—exclusion of evidence obtained in violation of constitutional rights *if* the prosecutor seeks to introduce the evidence in a criminal case.¹⁷⁸ Such settlement agreements often have a detailed code of reforms tailored to problems identified after an investigation of departmental practices. This is quite a contrast to the simple stakes in a criminal procedure case of whether evidence is excluded or not.¹⁷⁹ Courts interpreting constitutional criminal procedure's minimum floor for police conduct necessarily must be minimalist because constitutional protections apply across cases and

177. Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 818, 847 (1999).

178. *Compare, e.g.*, Consent Decree at para. 12, *United States v. Pittsburgh*, Civ. No. 97-0354 (W.D. Pa. April 16, 1997) (requiring implementation of an early-warning system and statistical model for identifying problematic officers), *and* Consent Decree at paras. 71-77, *United States v. Steubenville*, Civ. No. 97-0966 (S.D. Ohio Aug. 28, 1997) (requiring implementation of an information system that allows for regular audits with the goal of supervising officer behavior and preventing constitutional violations), *with* sources cited, *supra* note 17 (explaining the exclusionary rule is the principal remedy of constitutional criminal procedure doctrine).

179. *See supra* note 178 (contrasting detailed agreements with constitutional criminal procedure's remedies).

jurisdictions. Moreover, in a system that strongly values precedent, the rigid artillery of law that courts must wield to impose reform is hard to tweak and tailor when experience counsels change.¹⁸⁰

Incentivized police cooperation in designing institutional reforms and data production measures is desirable, in turn, because it is cheaper to change a cooperating entity than it is to impose clumsy top-down measures from a distance on a recalcitrant organization. The lessons of judicial intervention in famous historical contexts such as school and residential desegregation and prison reforms demonstrate the difficulty of forcing change upon recalcitrant institutions.¹⁸¹ Ultimately, sustainable change requires buy-in and transformation in the police organizational culture.¹⁸² As Debra Livingston, Kami Chavis Simmons, and others have argued, “[p]olice reform efforts are doomed to fail without significant cooperation of the police officers themselves.”¹⁸³ This insight has led Simmons to argue that “rank-and-file officers should be allowed a place at the negotiating table and should be afforded an opportunity to have their perspective considered during the reform process” because “[a]s active participants in the negotiation process . . . rank-and-file police officers could add value by asserting their interests and participating in a dialogue about creating a solution.”¹⁸⁴

Moreover, police are best-situated to access information and well-positioned to know what reforms are needed and which strategies might produce the most change because of insider information gained from

180. Cf. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 840–70 (2004) (examining the comparative disadvantages of courts in regulating in areas in rapid flux, in part because of difficulties in updating and changing judicial interpretation of constitutional doctrine and the lag time in changes).

181. See, e.g., *Spallone v. United States*, 493 U.S. 265, 267–73 (1990) (detailing saga of recalcitrant city board members opposing judicial desegregation mandate and judicial coercion against city and legislators to implement reforms through the imposition of penalties for contempt); *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2009 WL 2430820, at *12–13 (E.D. Cal. & N.D. Cal. Aug. 4, 2009) (chronicling long history of state noncompliance with judicial orders mandating improving provision of healthcare for prisoners to remedy unconstitutionality of inadequate services).

182. Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 106–09 (2011).

183. Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 524 (2008); see also Livingston, *supra* note 177, at 848–52 (noting “a conclusion drawn by many police scholars—namely, that efforts at police reform will be most effective when the police organization itself is involved in the process and, ultimately, when reform involves not simply adherence to rules in the face of punitive sanctions, but a change in the organizational values and systems to which both managers and line officers adhere”).

184. Simmons, *supra* note 183, at 524.

day-to-day experience. For example, officers are better situated to know what goes on behind the scenes, such as whether public complaints get buried or are investigated and how the departmental culture might aggravate aggressive uses of force.¹⁸⁵ In contrast, judges are not insiders within police departments and typically lack experience with the daily workings and culture within a department.

Though best situated to produce and share information, law enforcement officials have strategic incentives to withhold information that would better inform doctrine and judicial and public deliberation. The perverse incentive arises because law enforcement officials have a strong self-interest in withholding information regarding potentially problematic practices to avoid scrutiny and retain the power to engage in such practices even though release of the information would better serve collective interests in redressing problems.¹⁸⁶ Incentivizing collaborative reform to avoid the penalty default of clumsy court-ordered solutions has the benefit of giving the police a push to cooperate in self-reform and deploy insider knowledge to better design regulatory and remedial regimes. Of course, police have self-interest—and potential law enforcement interests—in avoiding changes to the status quo and the release of internal information. Bargaining with parties representing civil rights concerns to avoid the costs and embarrassment of litigation, however, gives police better incentives to collaborate in reform and produce information.

III. LESSONS FOR THE FUTURE OF POLICE GOVERNANCE AND REFORM

In a time when the exclusionary rule as the primary mode of police regulation is increasingly embattled,¹⁸⁷ and the prospect of its demise debated,¹⁸⁸ we particularly need expertise in fashioning alternative

185. See, e.g., NEW ORLEANS INVESTIGATION, *supra* note 22 (detailing, based on interviews with officers, how excessive use of force is aggravated by a departmental culture that condones and even encourages retaliation and internal practices that avoid investigating officer uses of force).

186. See Ayres & Gertner, *supra* note 175, at 97–100 (arguing that penalty defaults should be set against parties who strategically withhold information that, if shared, would increase the size of pie because they want bigger slice of pie).

187. See, e.g., *Herring v. United States*, 555 U.S. ___, 129 S. Ct. 695, 700–02 (2009) (holding that costs of exclusion are too high to offer remedy for negligent police error leading to wrongful arrest and search); *Hudson v. Michigan*, 547 U.S. 586, 591–94 (2006) (refusing to apply exclusionary remedy for knock-and-announce violation prior to entry into home). For recent commentary on the cutback, see, for example, Owens, *supra* note 18, at 565–69.

188. See generally, e.g., Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191 (2010) (predicting demise of, or at least substantial limits

models of police regulation and remedial regimes. Concern that the exclusionary rule makes society pay by distorting the truth-finding process when the constable blunders has led to cutbacks on the remedy.¹⁸⁹ A majority of the contemporary U.S. Supreme Court has held that because of the “substantial social costs” exacted by exclusion, it should be the “last resort” rather than the “first impulse.”¹⁹⁰ As the primary engine of police regulation and remedies for violations is relegated to the “last resort,” the question becomes—what should be the new model for police regulation and remedies for violations?

A. *The Search for Alternatives and the Potential of Regulation by Information*

In recent jurisprudence, the growing distaste for exclusion as a remedy has resulted in decisions to offer no remedy at all.¹⁹¹ In *Herring v. United States*,¹⁹² for example, the U.S. Supreme Court concluded that the costs of exclusion were too high to offer the remedy for negligent police error that lead to an unlawful arrest and search incident to the arrest.¹⁹³ Currently the Court is split as to whether the exclusionary rule remains necessary to effectuate the protections of the Fourth Amendment in light of the wider availability of § 1983 relief.¹⁹⁴ In *Herring v. United States*, Justice Ginsburg in dissent, joined by Justices Breyer, Stevens, and Souter, underscored that she adhered to the view in *Mapp v. Ohio* that the exclusionary rule “is often the only remedy effective to redress a Fourth Amendment violation.”¹⁹⁵ The makeup of

on, exclusionary rule); Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI-KENT L. REV. 209 (2010) (predicting retention of exclusionary rule or revival if discarded).

189. Justice Cardozo framed the iconic refrain in *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). The concern has steered recent cases. See David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 190 (2009) (analyzing critique).

190. *Hudson*, 547 U.S. at 591.

191. *Herring*, 129 S. Ct. at 702 (no remedy for wrongful arrest and search incident to arrest); *Hudson*, 547 U.S. at 594 (no remedy for knock-and-announce violation prior to entry into home).

192. 129 S. Ct. 695.

193. *Id.* at 702.

194. Compare *Hudson*, 547 U.S. at 597–98 (writing that § 1983 suits are now a more potent remedy than in the days when the Court extended the exclusionary rule to the states for lack of a viable alternative remedy to effectuate Fourth Amendment protections), with *id.* at 609 (Breyer, J., dissenting) (arguing that § 1983 suits remain inadequate as an alternative remedy to deter rights violations).

195. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting).

the Court has changed since the days of *Mapp*, however, so that the more “majestic conception” of the purpose of the exclusionary rule,¹⁹⁶ which launched turning-point cases for police regulation such as *Mapp*, is now relegated to dissents protesting erosion of past commitments.¹⁹⁷

As the exclusionary rule falls out of favor with the contemporary Court, criminal procedure doctrine and practice has been in search of an alternate remedial and regulatory approach.¹⁹⁸ The main alternatives are damages schemes of varying degrees of refinement.¹⁹⁹ Constitutional criminal procedure doctrine, however, has shown great concern over the potential for damages to overdeter and chill vigorous policing because officers will ease up on the job rather than face individual liability.²⁰⁰ Indeed, compared to the numerous criminal cases where law has been clarified by defendants seeking exclusion of evidence, civil cases presenting criminal procedure questions remain rare. Professor Donald Dripps has observed that only four damage actions against police have led to substantive Fourth Amendment decisions by the Court, laying aside a small cluster of cases on the execution of search warrants.²⁰¹

Moreover, the U.S. Supreme Court’s decision in *Pearson v. Callahan* does not suggest a Court hospitable to rendering damages more readily available any time soon. As discussed, *Pearson* makes it easier to dismiss civil rights suits against officers and harder for clearly established law to crystallize because courts no longer have to first indicate whether there has been a constitutional violation.²⁰² In practice, therefore, damages will probably remain a rarely viable remedy for

196. *Id.* (quoting *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

197. *See, e.g., id.* (recalling “a more majestic conception” of the Fourth Amendment and its adjunct, the exclusionary rule” and expressing concern about its erosion (quoting *Evans*, 514 U.S. at 18 (Stevens, J., dissenting))); *United States v. Caceres*, 440 U.S. 741, 763, 769–70 (1979) (Marshall, J., dissenting) (lamenting the majority’s decision declining to apply the exclusionary rule and neglect of the larger values served by the rule); *United States v. Calandra*, 414 U.S. 338, 356 (1974) (Brennan, J., dissenting) (deploring “downgrading” of the exclusionary rule).

198. *See, e.g.,* Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations As Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241, 241–42 (2010) (observing that now that a majority of justices have expressed dissatisfaction with the exclusionary rule and interest in alternative means of deterrence of violations, the question is what remedial regime should be adopted).

199. *See, e.g.,* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 364–68 (proposing a smarter monetary penalties regime).

200. *See, e.g.,* Jeffries, Jr. & Rutherglen, *supra* note 88, at 1408 (discussing judicial reluctance to award money damages, particularly for borderline errors, because of fears of “overdeterrence—more precisely, unintended deterrence of legitimate acts”).

201. Dripps, *supra* note 188, at 209, 235.

202. *See supra* notes 168–172 and accompanying text.

defendants, and thus insufficient as a supplement to the eroded exclusionary rule.

The search for alternatives can draw fresh insights from innovations outside the judicial arena. Opening up our gaze to examine approaches taken by experts engaging in collaborative institutional reform bargaining expands the model from the usual forced choice of exclusion or damages. This choice is forced by the constriction in the scope of vision of the standard palette of remedies. Analyzing the denouement following consent decrees can expand the field of vision to include panoptic data-driven surveillance approaches, such as automated early-warning systems and audits, to prevent constitutional violations.²⁰³

What is striking is that many of the key reforms forged by settlement stipulations, agreements, and consent decrees generate data to penetrate the opacity of police discretion through information-reporting, collection, and dissemination.²⁰⁴ Many of the reforms in cases involving recurrent problems such as excessive force or racial targeting call for police to report uses of force, demographic information, and bases for investigative stops and searches.²⁰⁵ The methods of regulation and remedies are shifting to information and data-driven surveillance of police practices.

The benefits of data collection and dissemination for public deliberation and oversight concerning police tactics are demonstrated by the New York City Police Department's collection of data on *Terry* stops and frisks. After mass protests erupted in New York over the fatal shooting of Amadou Diallo, an unarmed West African immigrant in the Bronx, by four police officers in 1999,²⁰⁶ the Center for Constitutional Rights sued the city for data.²⁰⁷ The resulting data-gathering measures have documented the disparate impact of *Terry* stops, showing, for example, that Black and Latino people were nine times more likely to be stopped than Whites in 2009.²⁰⁸

Another success story crystallized in the years following the 2001 consent decree entered into between the Justice Department and the LAPD.²⁰⁹ The reforms included such data-driven requirements as (1) the

203. *See supra* notes 1–5; *infra* notes 206–242.

204. *See supra* notes 1–9 and accompanying text.

205. *See supra* notes 1–9 and accompanying text.

206. Baker, *supra* note 60; Jane Fritsch, *Four Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1.

207. Baker, *supra* note 60.

208. *Id.*

209. Consent Decree, *United States v. City of Los Angeles*, No. Civil 00-11769 (C.D. Cal. June

completion of a written or electronic report for each incident where officers use force; (2) performance tracking with automated alerts for every officer; and (3) data-collection regarding investigative stops, including a suspect's "apparent race, ethnicity, or national origin," the reason for the stop, and whether a search was conducted.²¹⁰ To avoid circumvention of data-collection efforts using "canned" or vague language, the reports are regularly audited.²¹¹ The LAPD case tackling a controversial and deeply troubled department involved heavier judicial intervention, including appointment of a federal monitor to ensure implementation.²¹² The reforms have paid off. A recent study found that since 2004 nearly every category of use of force by the LAPD dropped, collectively falling nearly thirty percent.²¹³ Uses of force against Black and Hispanic suspects declined the most.²¹⁴ The decrease in uses of force such as chokeholds and shootings by police is all the more striking because the annual number of arrests and percentage of stops resulting in arrest rose vigorously, suggesting that the vitality of law enforcement did not drain because of the reforms.²¹⁵ Moreover, focus groups and surveys indicate increased public confidence in the police and cautious optimism for improved community relations that extended across racial and ethnic groups.²¹⁶

Settlement agreements have pried information from police to penetrate the opacity that shields potential abuse, which has begun an information cascade when it comes to persistent flashpoints such as racial profiling. Successfully securing reform through investigation in one jurisdiction may lead to reforms in other jurisdictions without even need for suit—leading by example and general deterrence. Many states have introduced racial profiling legislation, often requiring data

15, 2001).

210. *Id.* at paras. 55–69, 104–05.

211. *Id.* at para. 128.

212. *See, e.g.*, CHRISTOPHER STONE ET AL., HARVARD KENNEDY SCH., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 2–5 (May 2009), available at

http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/Harvard_LAPD_Report.pdf.

213. *Id.* at 33.

214. *Id.* at 34.

215. *Id.* at 25, 33, 35; *id.* at 19 (Officers interviewed expressed worries about de-policing and policing being less proactive in tasks like investigation and arrests because of paperwork burdens and fear of disciplinary action). While subjective accounts are worth considering, the objective measurement of arrests and percentage of stops resulting in arrests suggests caution may not be a bad thing for accuracy.

216. *Id.* at 2, 44–53.

collection.²¹⁷ Some police departments even have begun voluntarily collecting data on the issue after successful suits in other jurisdictions—showing the power of cascades of reform.²¹⁸ Data-generation remedies also can help illuminate the impact of implicit biases that can lead to persistent problems such as disproportionate impact in criminal justice policies and racial targeting because of subconscious perceptual distortions, which would otherwise be obscured by opacity.²¹⁹

Monitoring through data generation exerts its own control function. The greater transparency produced by data generation is a technique of police panopticism.²²⁰ When police are subject to the watchful gaze of courts, the public, and self-surveillance, they behave in better conformity with expectations.²²¹ Data-driven surveillance also can spur self-examination and change. Minneapolis–St. Paul police, for example, adopted a policy of advising motorists of their right to decline consent to a search and set up complaint collection centers after data gathering revealed the disparate impact of stops and searches on minority motorists.²²² In the St. Paul case, the legislature was the entity creatively providing incentive to undertake data-driven surveillance by offering

217. Michael E. Buerger & Amy Farrell, *The Evidence of Racial Profiling: Interpreting Documented and Unofficial Sources*, 5 POLICE Q. 272, 273–74 (2002).

218. *Id.* at 273.

219. For some of the abundant and rich literature on implicit biases, see generally, for example, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241; Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004); Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (2003); Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083 (2004); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008); Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591 (2004); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811 (1998); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 235 (2011); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127 (2003).

220. See FOUCAULT, *supra* note 46, at 201–02 (developing, as a metaphor for control, the notion of panoptic prison in which prisoners arrayed in transparent cells self-police).

221. See *supra* notes 44–48 and accompanying text for applying panoptic insights to policing.

222. Heron Marquez Estrada, *Focus of Profiling Shifts from St. Paul: Minneapolis Officials Say They'll Soon Reveal New Plans for Traffic Stops and Searches*, MINNEAPOLIS STAR TRIB., June 22, 2001, at A1; David Shaffer & Heron Marquez Estrada, *St. Paul Police Search Black, Hispanic Drivers at Higher Rate*, MINNEAPOLIS STAR TRIB., Jan. 10, 2001, at A1.

money for video cameras in police cars if agencies agreed to gather data.²²³ Thus, legislatures as well as civil rights litigators can be catalysts for creatively and cooperatively triggering data-driven methods to prevent undesirable conduct.

B. *Optimizing Police Panopticism*

The lessons of experience from implementing consent decrees can inform better design to optimize the strategy of police panopticism. An important lesson of experience is that generalized data-gathering regarding problems such as racial disparities is not enough to steer behavior without finer-grained surveillance. There is a difference between data-driven surveillance of police conduct and amassing more data of disparities. We have ample data and recurrent reports of disparities in criminal justice at the national, state, and local levels.²²⁴ What we need is smarter surveillance of the conduct that can lead to problems such as disparities in who is targeted for investigative stops and seizures or the use of excessive force.

Effective data-driven surveillance calls for finer-grained information regarding specific actor conduct. Finer-grained data-generation surveillance better responds to the frequent lament that the “low visibility” of line-level law enforcement officers renders effective oversight difficult.²²⁵ Indeed, the lessons of implementing effective reform following earlier consent decrees show the need for such finer-grained data. An example is the NAACP and ACLU’s pioneering litigation over racial profiling in Maryland in the 1990s, which resulted in an earlier form of consent decree.²²⁶ The consent decree involved an agreement that police collect data on the race of people stopped and

223. Shaffer & Estrada, *supra* note 222, at A1.

224. *See generally, e.g.*, MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY (2007) (presenting disparity data across jurisdictions); Research Working Grp., Task Force on Race and the Criminal Justice Sys., *supra* note 39 (summarizing data on racial disparities in Washington state); ROBERT D. CRUTCHFIELD ET AL., WASH. STATE MINORITY & JUSTICE COMM’N, A STUDY ON RACIAL AND ETHNIC DISPARITIES IN THE PROSECUTION OF CRIMINAL CASES IN KING COUNTY WASHINGTON: FINAL REPORT (1995) (presenting findings on disparities in Washington State).

225. Livingston, *supra* note 177, at 820; *cf.* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 552 (1960) (discussing low-visibility police decisions not to invoke criminal process).

226. *See* Press Release, ACLU, Maryland Court Orders State Police to Turn Over Racial Profiling Records (Feb. 10, 2011) [hereinafter ACLU, Maryland Press Release], available at <http://www.aclu.org/racial-justice/maryland-court-orders-state-police-turn-over-racial-profiling-records> (describing settlement).

searched in traffic incidents, make the process of filing complaints more user-friendly, and implement better measures to investigate complaints.²²⁷ The measures were adopted to redress “an alleged pattern of racially discriminatory stops, detentions and searches of minority motorists traveling on I-95 in the state of Maryland.”²²⁸

Five years after these reforms, data in 2008 showed similar disparities in searches of minority motorists compared to White motorists as in 2002, the year immediately preceding entry into the consent decree and implementation of its reforms.²²⁹ By 2008, litigators had the insights of experience to draw upon in seeking more effective information-based regulation and remedies. NAACP and ACLU litigators went back to court and sued for finer-grained information to effectuate enforcement of the agreement.²³⁰ In 2010, the organizations successfully secured a court order requiring release of approximately ten thousand documents pertaining to racial profiling complaints against officers that the Maryland Department of Police had tried to shield against release as personnel records.²³¹

Of course, in the information age, we have smarter ways of data-based surveillance than sorting through boxes of ten thousand documents. The evolution in the nature of collaboratively designed reform over the years of experience with structural reform bargaining have yielded examples of how to better regulate police through smarter data-driven surveillance. Examples of reform by surveillance range from important low-technology changes, such as collecting information on people stopped, to sophisticated computerized systems for analyzing complaints data and potential red-flag patterns.²³²

Perhaps unsurprisingly, the greatest advances in the nature of reforms designed have occurred in settlements extracted by leveraging the power, authority, and prestige of the Justice Department under § 14141.²³³ John C. Jeffries, Jr., and Scott Rutherglen have aptly argued

227. *See id.*

228. *See, e.g.,* Md. State Conference of NAACP Branches v. Md. Dep’t of State Police, 72 F. Supp. 2d 560, 563–64 (D. Md. 1999) (describing what the suit is based on).

229. ACLU, Maryland Press Release, *supra* note 226.

230. Md. Dep’t of State Police v. Md. State Conference of NAACP Branches, 988 A.2d 1075, 1078 (Md. Ct. Spec. App. 2010).

231. *Id.*

232. *See infra* notes 238–242 and accompanying text.

233. For example, Pittsburgh police must file a written report after each traffic stop that records the race of people stopped, whether the stop escalated to a search, and whether searches yielded any contraband or other evidence pursuant to a consent decree. Consent Decree at paras. 16-17, *United States v. Pittsburgh*, Case No. Civil 97-0354 (W.D. Pa. Sept. 30, 2002).

that one of the great virtues of Justice Department-initiated structural reform is the “political endorsement of the need for structural relief” and the accountability of government officials.²³⁴

Another important virtue of Justice Department structural reform bargaining is the greater equalization in bargaining power when the Justice Department represents the community. Smarter and farther-reaching reforms are more readily exacted by the Justice Department than by private litigants, including even well-organized groups such as the ACLU and NAACP. Contrast, for example, the lengths of litigation the NAACP and ACLU had to pursue to obtain racial profiling complaints from the Maryland State Police with the readiness and ease with which the Justice Department recently extracted sensitive records from the Maricopa County, Arizona, Sheriff’s Department.²³⁵

In September 2010, the Justice Department filed a complaint against the Maricopa County Sheriff’s Office concerning allegations of a pattern or practice of national origin discrimination and unconstitutional searches and seizures.²³⁶ Maricopa County opted to settle soon after the filing of the complaint to remove the case to the inactive docket and to stay the proceedings.²³⁷ As the price for staying the civil rights lawsuit pursuant to the 2011 consent decree, the Justice Department exacted from Maricopa County agreements to:

- Release all use of force forms completed and submitted by sheriff’s deputies between September 2008 and March 2009;
- Release all documents related to internal affairs investigations concerning allegations of excessive use of force and/or discriminatory policing from 2008 onwards; and
- Disclose all current or former personnel recommended for

234. Jeffries, Jr. & Rutherglen, *supra* note 88, at 1421. They argue:

An action brought by federal officials represents a political endorsement of the need for structural relief, usually to remedy pervasive constitutional violations. Furthermore, when the litigation is settled, it serves as an acceptable form of bargaining between governments, outside the ordinary political processes of revenue sharing and legislation but still under political control. . . . Unlike court orders obtained by private plaintiffs, those obtained by federal officials involve some degree of political accountability in the decision to sue and to seek structural relief. The democratic deficit is rapidly resolved when the real attorney general, not a private attorney general, decides to sue.

Id.

235. *See supra* notes 227–231.

236. Complaint at 6, 9, *United States v. Maricopa County, Ariz.*, No. 2:10-cv-01878-GMS (D. Ariz. Sept. 2, 2010); *see also* Letter from Loretta King to Sheriff Joseph Arpaio, *supra* note 7 (conveying allegations).

237. *See* Joint Motion to Remove Case to the Inactive Docket and Stay Proceedings, *United States v. Maricopa Cnty., Ariz.*, No. 2:10-cv-01878-GMS (D. Ariz. June 2, 2011), *available at* <http://www.justice.gov/crt/about/spl/findsettle.php#FindingsLetters>.

correction, discipline, suspension, or termination because of excessive use of force and/or discriminatory policing from January 1, 2007 onwards.²³⁸

Examining Justice Department consent decrees yields other examples of innovations in refined data-driven surveillance that afford finer-grained and more effective monitoring than mere data collection. For example, the Justice Department's 2009 consent decree with the U.S. Virgin Islands Police Department (VIPD) requires the development and implementation of a risk management system to collect and record:

- a. all uses of force;
- b. canine bite ratios;
- c. the number of canisters of chemical spray used by officers;
- d. all injuries to prisoners;
- e. all instances in which force is used and a subject is charged with "resisting arrest," "assault on a police officer," "disorderly conduct," or "obstruction of official business;"
- f. all critical firearm discharges, both on-duty and off-duty;
- g. all complaints (and their dispositions);
- h. all criminal proceedings initiated, as well as all civil or administrative claims filed with, and all civil lawsuits served upon, the Territory and its officers, or agents, resulting from VIPD operations or the actions of VIPD personnel;
- i. all vehicle pursuits;
- j. all incidents involving the pointing of a firearm (if any such reporting is required); and
- k. all disciplinary actions taken against officers.²³⁹

The database permits individualized surveillance, requiring the name, badge number, shift, and supervisor of each involved officer.²⁴⁰ The VIPD is required to design a protocol for the automated system permitting data analysis according to the:

- i) number of incidents for each data category by individual officer and by all officers in a unit; ii) average level of activity for each data category by individual officer and by all officers in a unit; and iii) identification of patterns of activity for each data category by individual officer and by all officers in a unit.²⁴¹

238. Agreement at 6, *United States v. Maricopa County, Ariz.*, No. 2:10-cv-01878-GMS (D. Ariz. June 2, 2011).

239. Consent Decree at para. 60, *United States v. Virgin Islands*, No. 03-23-09 (D.V.I. Mar. 23, 2009), available at http://www.justice.gov/crt/about/spl/documents/VIPD_CD_03-23-09.pdf.

240. *Id.* at para. 61.

241. *Id.* at para. 64.

The consent decree also requires quarterly review of information generated by the automated risk management system.²⁴²

Developments in data-driven surveillance thus have moved us beyond the aphorism that mere information is power. Today, the automation of information and data-driven surveillance is power. Some of the most promising reforms to emerge from collaborative structural reform bargaining harness this insight. The examples detailed above demonstrate how reforms from structural reform bargaining do not only generate information, but also use the information to steer behavior and change organizational culture through, for example, early warning systems and intervention protocols.

The reforms framed in consent decrees and memoranda of agreement are not just empty promises—they are leading to changes in practices and spurring cascades of reform.²⁴³ Consent decrees are not merely promissory—they are entered as court orders and provide for judicial enforcement in the event of nonperformance by the police department.²⁴⁴ While memoranda of agreement are less formal than consent decrees and do not take the form of a court order, these agreements typically also provide for enforcement in federal court.²⁴⁵ Moreover, a Justice Department announcement regarding the commencement of investigation against a police department can spur voluntary reform even in advance of any findings, as recently demonstrated in Seattle.²⁴⁶

Eight months after the Justice Department announced an investigation into allegations of excessive force and racially biased policing by the Seattle Police Department, Seattle Mayor Mike McGinn announced “a complete revamp of how the department develops professional standards and expectations.”²⁴⁷ Contemplated reforms include such measures as in-

242. *Id.* at para. 64.

243. *See, e.g.*, Buerger & Farrell, *supra* note 217, at 273–74 (summarizing reforms).

244. *See, e.g.*, Consent Decree at paras. 104–05, *United States v. Los Angeles*, No. Civil 00-11769 (C.D. Cal. June 15, 2001); Consent Decree at paras. 29, 32, 36–37, *United States v. New Jersey*, Case No. Civil 99-5970 (MLC) (D.N.J. Dec. 30, 1999).

245. *See, e.g.*, Memorandum of Agreement Between the United States & the City of Villa Rica, Ga. 7 para. 4 (Dec. 23, 2003) (“This Agreement is enforceable through specific performance in Federal Court.”); Memorandum of Agreement Between the United States & the Village of Mt. Prospect, Ill. 9 para. 43 (Jan. 22, 2003) (“This Agreement is enforceable through an action for specific performance in federal court.”).

246. Steve Miletich, *Seattle Police Plan Major Changes in Oversight of Use of Force*, SEATTLE TIMES (Dec. 6, 2011), http://seattletimes.nwsourc.com/html/localnews/2016950243_doj07m.html (discussing reforms Seattle Police Department is pursuing after announcement of Justice Department investigation into a potential pattern and practice of excessive force).

247. *Id.*; Letter from Mike McGinn, Mayor of Seattle, to Jonathan M. Smith, Chief, Special Litig. Section, U.S. Dep’t of Justice, and Jenny Durkan, U.S. Attorney for the Western District of Wash.,

car video review in use-of-force investigations; creation of a Force Review Board and Force Investigative Team; a “top-to-bottom review and rewrite” of the Department’s policies and procedures; and creation of a new Professional Standards Section responsible for internal audits, inspections, and researching best practices.²⁴⁸ Reform spurred by structural reform bargaining in one jurisdiction also can lead other police departments to voluntarily undertake improvements to avert the scrutiny and expense of litigation—extending the power and sweep of self-regulation.²⁴⁹ Thus, the panoptic power is so efficient that even the threat of scrutiny can spur police department self-regulation.

There are different ways to define and measure impact and success when it comes to institutional reform of police practices. One way to measure impact is progress in the perception, documentation, and revelation of problems previously misunderstood or discounted. For example, reforms requiring reporting of the race of people stopped and searched have revealed that not only are minorities disproportionately stopped and searched, but also that stops and searches of minorities yield lower “hit rates” of evidence or arrests.²⁵⁰ Because of this data, disproportionate targeting can no longer be dismissed as vague unsubstantiated allegations or justified because of supposed greater probability of criminality. Data collection has revealed that searches of minorities are *less* efficient and yet police suspicion leads to grossly disproportionate targeting of minorities for stops and searches.²⁵¹ Thus, data-driven surveillance may detect patterns revealing potential implicit bias because of subconscious inaccurate stereotyping.²⁵²

Of course, the ultimate goal and standard of success is reduction of practices of persistent concern, such as reduction of the disproportionate targeting of minorities yielding lower hit rates or excessive force. More studies must be done about the impact of data-driven surveillance on reducing such problems. The focus should be on the newer generation of

Re: United States’ Investigation of the Seattle Police Department – *Garrity* Protections (Dec. 6, 2011) [hereinafter Letter from Mayor McGinn].

248. *Id.* at 1–2.

249. Buerger & Farrell, *supra* note 217, at 273.

250. See, e.g., Andrew Gelman et al., *An Analysis of the New York City Police Department’s “Stop and Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS’N 813, 815–17, 820–21 (2007) (collecting and analyzing data).

251. *Id.*; see also Baker, *supra* note 60 (reporting findings revealed from the data collection and release that Blacks and Latinos are nine times more likely than Whites to be stopped by police in 2009).

252. See *supra* note 219 for some of the abundant and rich literature on implicit bias in policing and other legal contexts involving judgment and decision making.

smarter reforms that involve not just *collection of data* in the aggregate, but also methods of monitoring and red-flag systems that create greater incentive for individual officers to self-regulate and internalize the external gaze facilitated by data-driven transparency.

CONCLUSION

Structural reform bargaining arising from police practice reform suits is offering a micro-laboratory for experimentation with smarter methods of police regulation and remedial regimes. The insights that are emerging from collaborative agreements demonstrate the power of a third alternative to the traditional exclusionary rule–damages dichotomy for deterring police misconduct. The potential third approach to preventing undesirable police conduct is information-based regulation that leverages data-driven surveillance of police practices. Such data-driven surveillance increasingly entails more than mere data collection and reporting. Rather, the most powerful reforms harness data to detect potentially problematic actors who harm the reputation of the whole department and to prevent future abuses.

A minority of officers can account for a substantial amount of problematic conduct, tarring trust in a majority of hard-working officers. For example, one of the most recently released investigative findings, focusing on excessive force by the Seattle Police Department, noted that:

In any given year, a minority of officers account for a disproportionate amount of use of force incidences. Over the more than two-year period reviewed, 11 officers used force 15 or more times, and 31 officers used force 10 or more times. In 2010, just 20 officers accounted for 18% of all force incidents. Yet, [the Seattle Police Department] has no effective supervisory techniques to better analyze why these officers use force more than other officers, whether their uses of force are necessary, or whether any of these officers would benefit from additional use of force training.²⁵³

If not caught and corrected, problematic practices may become structurally entrenched, infecting a department's institutional culture and undermining community trust.²⁵⁴

253. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFFICE, W. DIST. OF WASH., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 4 (Dec. 16, 2011) [hereinafter INVESTIGATION OF THE SEATTLE POLICE].

254. See, e.g., NEW ORLEANS INVESTIGATION, *supra* note 22, at v (finding that "too many officers of every rank either do not understand or choose to ignore the boundaries of constitutional

The finding that the Seattle Police Department has engaged in excessive force is a sobering reminder that even police agencies such as the Seattle police, hailed as innovative and responsive to community concerns,²⁵⁵ must wrestle with problematic conduct. Moreover, the Seattle Police Department's case illustrates the import of collaborative design and definition of desirable conduct with input from a powerful, expert entity representing countervailing civil rights concerns, such as the Justice Department. Indeed, even before the Justice Department investigation, the Seattle Police Department already had an Early Intervention System—admirable self-monitoring in principle.²⁵⁶ As the Justice Department found, however, the Seattle police thresholds for triggering red flags are far too high, interventions come far too late, and supervisory review “is superficial at best.”²⁵⁷ Effective reform and design of data-driven police surveillance is better produced in the crucible of adversarial collaboration—that is, bargaining between entities representing countervailing interests.

Data-driven surveillance measures such as implementing automated early detection systems and requiring audits and supervisory review also changes the structural context of neglect that often is identified as a contributing factor to abuses.²⁵⁸ Sophisticated systems for preventing abuses by discerning red-flag patterns of behavior have the potential for greater impact in penetrating the opacity of police practices where potential abuses may flourish. The monitoring for problematic patterns of behavior also incentivizes internalization of expectations of proper behavior because deviation is subject to detection through data-driven surveillance. Such surveillance is more effective if designed and conducted from multiple vantages with input from groups representing

policing” and structurally and culturally entrenched problems with the department that “undermine trust within the very communities whose cooperation the Department most needs”).

255. See, e.g., ACLU, *Innovative LEAD Project Sends Drug Offenders to Services Instead of Jail* (Oct. 13, 2011), available at <http://www.aclu-wa.org/news/innovative-lead-project-sends-drug-offenders-services-instead-jail> (detailing leadership of Seattle Police in responding to community input and implementing innovative program).

256. INVESTIGATION OF THE SEATTLE POLICE, *supra* note 253, at 22.

257. *Id.* at 23. For example, a red flag is not triggered and departmental intervention does not occur unless there are seven uses of force in a period of six months or fourteen uses of force in a year. *Id.* at 22.

258. See, e.g., *id.* at 5, 15, 18 (finding that lack of supervisory analysis of uses of force, “appalling[ly]” low-quality investigations of citizen complaints, and nonreporting of uses of force by officers contributes to the problem of excessive force); PUERTO RICO INVESTIGATION, *supra* note 22, at 32 (finding that “[l]ack of reporting requirements and objective supervisory review” and “[i]nadequate systems to review critical incidents” as well as “[c]ondoned fear and violence by tactical units” contribute to longstanding problems with excessive force).

countervailing civil liberties concerns as well as expert insider police. Statutory avenues such as § 14141, Title VI, § 3789d, and § 1983 have become more viable avenues to penetrate police opacity and introduce data-driven surveillance. Designing a panopticon for police is an ambitious project with important implications that call for collaboration across institutions—including formal adversaries. Nonjudicial institutions outside the constraints of formal constitutional criminal procedure doctrine have important expertise to offer in the design of the future of police regulation and remedies for social harms.