

# MYTHS AND MECHANICS OF DETERRENCE: THE ROLE OF LAWSUITS IN LAW ENFORCEMENT DECISIONMAKING

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*Judicial and scholarly descriptions of the deterrent power of civil rights damages actions rely heavily on the assumption that government officials have enough information about lawsuits alleging police officer misconduct that they can weigh the costs and benefits of maintaining the status quo. But no one has looked to see if that assumption is true.*

*Drawing on extensive documentary evidence and interviews, this Article finds that officials rarely have much useful information about suits alleging officer misconduct. Some departments intentionally ignore information from suits. Technological kinks, employee error, and deliberate efforts to sabotage data collection combine to undermine other departments' limited efforts to gather information. Yet those law enforcement agencies with functioning systems to gather and analyze data about lawsuits have used that information to reduce the likelihood of misconduct. Just as informational regulation has been used to improve corporate, medical, and financial behavior, more robust and effective information policies and practices may improve law enforcement behavior. Until these policies and practices become commonplace, however, descriptions of deterrence—and the prescriptions that follow—must be recalibrated to reflect the current relationship between litigation, information, and decisionmaking.*

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## INTRODUCTION

The United States Supreme Court considers it “almost axiomatic”<sup>1</sup> that civil rights damages actions<sup>2</sup> deter government employees and policymakers. Being sued and even the threat of suit are expected to cause government officials

1. *Carlson v. Green*, 446 U.S. 14, 21 (1980).

2. By “civil rights damages actions,” I mean to refer to actions for monetary damages brought against individual state and federal actors under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and claims against municipalities. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

to conform their conduct to the law.<sup>3</sup> Courts believe the deterrent power of lawsuits is so strong that it can “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties” and cause other “able citizens” to avoid public office altogether.<sup>4</sup>

A host of distinguished scholars have offered multiple theories about why civil rights damages actions—and the millions of dollars paid out each year in these cases—will not effectively deter police department officials from engaging in future unconstitutional behavior.<sup>5</sup> An equally accomplished group has defended the deterrent power of civil rights damages actions.<sup>6</sup>

More than descriptive accuracy is at stake in this debate. Courts use the expectation of deterrence as a basis to limit remedies: Decisional law immunizes defendants from liability for fear that civil rights damages actions will overly chill government activities.<sup>7</sup> In constitutional criminal procedure, courts have confined the reach of the exclusionary rule on the ground that damages actions adequately deter the police.<sup>8</sup>

Scholars, like courts, link practical conclusions to their respective accounts of the deterrent effect of lawsuits. They recommend imposing more direct penalties on government officials,<sup>9</sup> changing liability rules to give Section 1983

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3. See, e.g., *Wyatt v. Cole*, 504 U.S. 158, 161 (1992); *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986). See *infra* notes 32–35 and accompanying text for a description of judicial expectations of deterrence.

4. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)) (describing the need for qualified immunity).

5. See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). See *infra* notes 41–51 and accompanying text for a description of these arguments.

6. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913 (2007). See *infra* notes 52–59 and accompanying text for a description of these arguments.

7. See, e.g., *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (absolute immunity); *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity); *Harlow*, 457 U.S. at 806 (qualified immunity). For further description of this doctrine, see *infra* notes 60–66 and accompanying text.

8. See *Hudson v. Michigan*, 547 U.S. 586, 598 (2006). For further description of this doctrine, see *infra* notes 67–72 and accompanying text.

9. See, e.g., Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 596–600 (2000); Levinson, *supra* note 5. See *infra* note 74 for a description of these recommendations.

greater effect,<sup>10</sup> or using injunctive claims instead of damages actions to influence government behavior.<sup>11</sup>

Courts' and scholars' deep convictions about the deterrent effect of civil rights damages actions—and, by implication, the prescriptions that follow—rely heavily on the assumption<sup>12</sup> that when a plaintiff prevails<sup>13</sup> against a government entity and/or its employee(s), a government policymaker<sup>14</sup> will gather information about the lawsuit and weigh the costs and benefits of the alleged activity. The policymaker will then decide whether to maintain the status quo and risk being sued again, or make changes that would reduce the likelihood of future suit.

There are good reasons, however, to doubt expectations of (1) rational decisionmaking and (2) access to relevant information underlying this assumption of what I call “informed deterrence.” Modern cognitive social science challenges rational choice theory and, in its place, substitutes “bounded rationality.”<sup>15</sup> This “bounded” rival to “rational man” cannot engage in the

10. See, e.g., SCHUCK, *supra* note 5, at 184; Gilles, *supra* note 6, at 867–75; Jonathan Papik, *Don't Knock Them Until We Try Them: Civil Suits as a Remedy for Knock-and-Announce Violations After Hudson v. Michigan*, 126 S. Ct. 2159 (2006), 30 HARV. J.L. & PUB. POL'Y 417, 425 (2006); Gloria Jean Rottell, Note, *Paying the Price: It's Time to Hold Municipalities Liable for Punitive Damages Under 42 U.S.C. § 1983*, 10 J.L. & POL'Y 189 (2001). See *infra* notes 75–76 for a description of these recommendations.

11. See, e.g., Gilles, *supra* note 6, at 875–76; John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387 (2007); Levinson, *supra* note 5, at 416–17. See *infra* note 77 for a description of these recommendations.

12. Although courts and scholars do not explicitly state this assumption, their arguments rely on an expectation of this type of rational decisionmaking. For a further description of this assumption, see *infra* Part I.C.

13. Courts and scholars do not generally pinpoint the triggering event in a lawsuit that will cause government officials to engage in this weighing process, though a financial payout—whether through settlement or judgment—appears often to represent the expected “costs” of the activity. See, e.g., Armacost, *supra* note 5, at 474–75; Levinson, *supra* note 5, at 371. *But see* Gilles, *supra* note 6 (noting the deterrent power of information developed during litigation).

14. By “policymaker,” I mean to refer to those who might make personnel and policy decisions on behalf of a police department, including decisions based on lawsuits filed against the department and its officers. A “policymaker” will often, though not always, be a police chief. See *infra* notes 96–97 and accompanying text (describing the difficulties of identifying the police official in the best position to make and enforce policies aimed at reducing misconduct).

15. Bounded rationality aims to be more psychologically plausible than classical and neoclassical accounts without abandoning the idea that reason plays a central role in decisionmaking. This theory was proposed by Herbert Simon, see HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS* (1947) [hereinafter SIMON, *ADMINISTRATIVE BEHAVIOR*]; Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955), and has been explored by many in multiple areas, including psychology, economics, and behavioral organizational theory. For illustrative works in the field of psychology, see, for example, Daniel G. Goldstein & Gerd Gigerenzer, *Models of Ecological Rationality: The Recognition Heuristic*, 109 PSYCHOL. REV. 75 (2002); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974), and in economics, see, for example, Richard H.

stylized weighing assumed in current accounts of lawsuits' deterrent effects.<sup>16</sup> Theories of the deterrent power of civil rights damages actions would benefit from a more nuanced view of human cognition and decisionmaking.<sup>17</sup>

This Article, however, focuses on the second assumption underlying accounts of deterrence: that government officials have access to enough useful information about suits that they can make informed decisions about whether and how to act in response. The impact of imperfect information on decisionmaking has received significant scholarly attention.<sup>18</sup> Yet judicial and scholarly discussions of the deterrent effect of civil rights damages actions overwhelmingly assume that governments gather copious amounts of information about suits and analyze that information in sophisticated ways.<sup>19</sup>

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Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980), and in organizational theory, see, for example, RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (1963). Scholars have also examined the various ways in which bounded rationality impacts legal theory. See, e.g., Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111 (2006) (relaxing the theory of rationality to accommodate boundedly rational man); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CAL. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998) (providing an overview of legal scholarship that employs behavioral theories). Behavioral realism also identifies biases that may impact decisionmaking. See, e.g., Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006) (exploring the impact of system justification motive on decisionmaking); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (describing effects of implicit bias); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063 (2006) (describing "behavioral realism").

16. Some attention has been paid to the effects of bounded rationality on other theories of deterrence. See, e.g., Howard A. Latin, *Problem Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677 (1985) (examining the deterrent effect of tort law on individual behavior); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (examining the deterrent effect of the exclusionary rule); Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 LAW & SOC'Y REV. 23 (1998) (examining the deterrence of organizational misconduct). The effects of bounded rationality have been largely ignored in discussions of the deterrent effects of civil rights damages actions on government officials, although some have considered this issue briefly. See, e.g., SCHUCK, *supra* note 5, at 129–30; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 283 (1988).

17. See *infra* notes 275–278 and accompanying text for further discussion of the divergences between bounded rationality and theories of the deterrent power of civil rights damages actions.

18. For foundational works in this area, see, for example, JAMES G. MARCH, *A PRIMER ON DECISION MAKING* 8–23 (1994); SIMON, *ADMINISTRATIVE BEHAVIOR*, *supra* note 15, at 218–49; Kenneth J. Arrow, *Limited Knowledge and Economic Analysis*, 64 AM. ECON. REV. 1 (1974); Jacob Marschak, *Economics of Inquiring, Communicating, Deciding*, 58 AM. ECON. REV. PAPERS & PROC. 1 (1968); Roy Radner, *Costly and Bounded Rationality in Individual and Team Decision-Making*, 9 INDUS. & CORP. CHANGE 623 (2000); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

19. There are, however, a few notable exceptions. Some have recognized that information costs play a role in the proper functioning of deterrence. See, e.g., Margo Schlanger, *Operationalizing Deterrence: Claims Management (In Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L. 1, 3–4

This Article challenges the assumption of informed decisionmaking by exploring the ways in which information from lawsuits is gathered and analyzed by twenty-six law enforcement agencies across the United States. Drawing on documentary evidence and interviews, I demonstrate that law enforcement officials only rarely have information about suits brought against their departments and officers.<sup>20</sup> Over two-thirds of police departments and over 80 percent of sheriffs' departments with more than one thousand sworn officers have no computerized system to track lawsuits brought against them.<sup>21</sup> Even less frequently do law enforcement agencies investigate claims made in lawsuits, review closed litigation files, or consider the dispositions of cases.<sup>22</sup> Finally, the small number of departments with formal policies to gather data from lawsuits characteristically falter in the implementation phase. Technological kinks, employee error, and deliberate efforts to sabotage data collection combine to undermine departments' limited efforts to gather this information.<sup>23</sup>

If policymakers do not gather and analyze information from lawsuits, they cannot possibly make informed decisions intended to avoid future

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(2008) (explaining that information costs affect deterrence). Some studies have found that information barriers hamper government and corporate responses to litigation. See, e.g., HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 9 (1998) (noting the failure of several police departments to track information about litigation against officers). In addition, two articles have cited evidence from HUMAN RIGHTS WATCH, *supra*, in the context of other organizational barriers to police reform. See Armacost, *supra* note 5, at 474; Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 783–85 (1993). Similar observations have also been made regarding corporate decisionmaking. See, e.g., Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMPLE L. REV. 451, 481–82 (2003) (noting that theories of deterrence rely on expectations of rational decisionmaking but “give[] scant attention to the impact of information flow”); GEORGE EADS & PETER REUTER, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* 105–06 (1983) (noting that corporate-level products safety officers were found to play a minimal role in the legal defense of products liability litigation).

20. As a technical matter, a suit alleging unconstitutional policies and practices would generally be brought against the municipality, not the police department. See, e.g., *Hervey v. Estes*, 65 F.3d 784 (9th Cir. 1995) (holding that the Tahoma Narcotics Enforcement Team is not a proper defendant); *Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992) (holding that the county sheriff's department is not a proper defendant); *Darby v. Pasadena Police Dep't*, 939 F.2d 311 (5th Cir. 1991) (stating that the police department may not be a proper defendant). *But see* *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir. 2001) (holding that the sheriff's department can be named as a defendant). For the sake of simplicity, I refer periodically to cases brought against the department as shorthand for a municipal claim.

21. See INT'L ASS'N OF CHIEFS OF POLICE, *PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT* 52 (2006), available at <http://www.cops.usdoj.gov/files/RIC/Publications/e06064100.pdf>.

22. See *infra* notes 216–218 and accompanying text.

23. See *infra* Part II.D.

misconduct.<sup>24</sup> Yet, my research—and the use of information from lawsuits and other data in different contexts—offers reason to believe that the inverse is also true: When officials actually consider information from lawsuits, they use that information to reduce the likelihood of future misbehavior.<sup>25</sup>

In other complex and challenging realms, government entities and private corporations have changed behavior after gathering and analyzing relevant information. CompStat—a system to track and analyze data relevant to criminal behavior—is used by police departments throughout the country to diagnose trends and reduce crime.<sup>26</sup> Rates of litigation against anesthesiologists have declined following trend analyses of closed malpractice claim files.<sup>27</sup> Corporate behavior has improved over the past half century as regulations increasingly require companies to disclose information about the use of chemicals, workplace injuries, and the nutritional value of foods.<sup>28</sup> Across the public and private spheres, organizations have demonstrated the capacity to change behavior after confronting previously ignored data. This Article suggests that more robust and effective information policies and practices may have a similar effect on law enforcement behavior.

Even if we embrace the potential impact of information from suits on law enforcement behavior, however, there remains a gap between where we are now and where we might one day be. Until that gap closes, the information failures revealed in my study should lead us to reconsider certain assumptions in judicial opinions and scholarship. No longer should we facilely—and inaccurately—consider it “almost axiomatic” that lawsuits deter.<sup>29</sup> Nor can local governments that ignore information from suits insist

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24. This is not to say that officials will not be deterred unless systems exist to gather and analyze information from suits. Officials may act based on a generalized fear of suit or fragmented information about suits against their officers. See *infra* note 91 (describing possible sources of fragmented information) and note 100 (noting studies of officers' representations about the deterrent effects of the threat of being sued). For individual officers who have been named as defendants, the experience of being sued might impact behavior. For a brief description of data regarding the effects of the threat of suit on law enforcement behavior, see *infra* note 308. These distinct types of deterrence, reliant upon different types of information and systems to process that information, will be explored in a future project.

25. See *infra* Part III.A.

26. See, e.g., DAVID WEISBURD, STEPHEN D. MASTROFSKI, ROSANN GREENSPAN, & JAMES J. WILLIS, *THE GROWTH OF COMPSTAT IN AMERICAN POLICING* (2004). For a discussion of the effects and limitations of CompStat, see *infra* notes 279–284 and 297 and accompanying text.

27. See, e.g., Frederick W. Cheney, *The American Society of Anesthesiologists Closed Claims Project: What Have We Learned, How Has It Affected Practice, and How Will It Affect Practice in the Future*, 91 *ANESTHESIOLOGY* 552, 553 (1999). See also *infra* notes 286–289 and accompanying text for a description of these and other closed claims studies.

28. See *infra* notes 289–294 and accompanying text for a discussion of the effects of informational regulation on corporate behavior.

29. *Carlson v. Green*, 446 U.S. 14, 21 (1980).

that the threat of excessive deterrence ought to compel courts to expand immunities or eliminate the exclusionary rule.

The potential deterrent power of lawsuits should also temper scholars' prescriptions. Those who recommend that we look to alternative ways of influencing government behavior are burying deterrence alive. When the failure of deterrence is viewed as an information failure, instead of an intractable problem related to the way government officials analyze information once it is in their hands, commentators' fatalism seems neither necessary nor compelling.

Arguments that would make it easier for plaintiffs to sue and prevail against government officials miss the mark as well. Those departments that ignore information from lawsuits will not notice the additional plaintiff victories (unless those victories create outside pressures to increase accountability). Even when departments do gather information about lawsuits, they rarely take note of who wins, or how much they win. Accordingly, these recommended changes would not alter the data entered into systems currently in place to gather and analyze information from suits.

Instead of the dramatic suggestions offered by scholars—doing away with damages actions as a vehicle of reform, or recreating rules of liability and relief—I suggest that those interested in strengthening the impact of lawsuits on law enforcement behavior first seek to increase the extent to which information from lawsuits is gathered and analyzed as a matter of formal policy and then minimize barriers to the effective implementation of these policies. My research suggests that these comparatively small steps may significantly expand the role of lawsuits in decisionmaking.

The remainder of this Article is organized as follows. In Part I, I describe courts' and scholars' theories of deterrence and the implications of these theories. I then explore the shared, deeply ingrained assumption that officials gather and analyze information about lawsuits such that they can weigh this information in light of their preferences. In Part II, I describe my study and the bases for my conclusion that law enforcement officials only rarely weigh information from suits alleging misconduct by their officers. In Part III, I offer evidence of informed decisionmaking in law enforcement and other contexts. Finally, I argue in Part IV that current theories of deterrence, and the prescriptions that follow, must be recalibrated to reflect both current police practices as well as the potential role of information from lawsuits in decisionmaking. I also suggest ways to increase the extent to which lawsuit data are reviewed by law enforcement.



## I. CURRENT THEORIES

### A. Descriptions of Deterrence

Since *Monroe v. Pape*<sup>30</sup> resurrected Section 1983,<sup>31</sup> courts have confidently declared that civil rights damages actions will deter constitutional violations in a number of different ways. Being named in a suit will discourage officers from engaging in future misconduct.<sup>32</sup> Judgments against municipalities will cause policymakers to “discharge . . . offending officials” and make policy changes.<sup>33</sup> Even the threat of suit will make officers and policymakers conform their conduct to the law.<sup>34</sup> The deterrent power of suits is so strong, the Supreme Court contends, that “the threat of litigation and liability” will deter misconduct “no matter that [officers] may enjoy qualified immunity, are indemnified by the employing agency or entity, or are acting pursuant to an entity’s policy.”<sup>35</sup>

Despite this confidence, courts have not settled on a coherent explanation for why lawsuits deter. Most cases describing deterrence focus on the financial burden of settlements and judgments.<sup>36</sup> Some decisions even suggest

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30. 365 U.S. 167 (1961), *overruled in part in* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (holding that local governments are not immune from suit under Section 1983).

31. Although Section 1983 was enacted in 1871, it “remained in relative obscurity” until *Monroe* was decided in 1961. Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1981). See *id.* for a description of the history of Section 1983 suits from 1871 until the 1970s.

32. See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (“[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future . . . particularly . . . in the area of individual police misconduct, where injunctive relief generally is unavailable.” (citation omitted)).

33. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981).

34. See, e.g., *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (“The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.” (citation omitted)); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 495 (1986) (Powell, J., dissenting) (“The primary reason for imposing § 1983 liability on local government units is deterrence, so that if there is any doubt about the constitutionality of their actions, officials will ‘err on the side of protecting citizens’ rights.” (quoting *Owen v. City of Independence*, 445 U.S. 622, 652 (1980))); *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (“Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate . . .”).

35. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (citations omitted) (regarding the deterrent effect of *Bivens* actions on federal officials).

36. See, e.g., *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring) (writing that Section 1983 “is designed to provide compensation for injuries arising from the violation of legal duties, and thereby, of course, to deter future violations” (citation omitted)); *Rivera*, 477 U.S. at 575 (“[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations . . .”); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“[D]eterrence . . . operates through the mechanism of damages that are compensatory.”).

that suits deter *only* when the defendant will suffer a direct financial penalty.<sup>37</sup> Others find that the hassle of defending oneself,<sup>38</sup> the information revealed during litigation,<sup>39</sup> and the symbolic power of a judgment<sup>40</sup> will influence behavior.

Skeptics offer a whole host of reasons why lawsuits might underdeter government misconduct. Daniel Meltzer describes reasons potential plaintiffs might not bring a case in the first place: “ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration.”<sup>41</sup> Others focus on the difficulties of bringing and winning a case, given qualified immunity and other legal barriers.<sup>42</sup> Even when plaintiffs win, some believe that judgments and settlements will not reliably deter because officers are regularly indemnified<sup>43</sup> and litigation costs are not paid out of police department budgets.<sup>44</sup>

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37. See, e.g., *F.D.I.C. v. Meyer*, 510 U.S. 471, 485 (1994) (explaining that if federal agencies could be sued for damages, “there would be no reason for aggrieved parties to bring damages actions against individual officers . . . [and] the deterrent effects of the *Bivens* remedy would be lost”); *Fact Concerts, Inc.*, 453 U.S. at 268 (“[I]t is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality.”).

38. See *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998).

39. See *Carlson v. Green*, 446 U.S. 14, 21 (1980).

40. See *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317–18 (2d Cir. 1999).

41. Meltzer, *supra* note 16, at 284.

42. See, e.g., Jeffries & Rutherglen, *supra* note 11, at 1417 (noting that damages actions against the police “founder on qualified immunity,” which “covers a . . . broad range of borderline misconduct”); Meltzer, *supra* note 16, at 284 (“Even when individual officers are sued, the risk that they will be held liable (and hence the deterrent effect of potential tort liability) is slight. Even if the particular official who engaged in the illegal practice can be identified, he will be shielded by a broad official immunity.”); Brian J. Serr, *Turning Section 1983’s Protection of Civil Rights Into an Attractive Nuisance: Extra-Textual Barriers to Municipal Liability Under Monell*, 35 GA. L. REV. 881 (2001) (“[T]he Supreme Court has erected so many non-textual barriers to recovery . . . that § 1983 is increasingly being turned into an ‘attractive nuisance’ for citizens injured by police officers.”); Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers’ Power*, 117 YALE L.J. 1549, 1554 (2008) (“Such suits are prohibitively expensive . . . frequently result in nominal damages . . . [and] face significant evidentiary hurdles.”). This argument also appears in discussions of the exclusionary rule. See, e.g., Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 114–15 (2003) (“The reason that tort suits—that great American pastime—work the way they do in most civil cases is because juries identify with the plaintiff. . . . [J]urors tend not to identify with the people searched. . . . The result is that plaintiffs bringing tort actions against the police often fail to get jury verdicts.”); 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) (“[Lawsuits are] expensive, time-consuming, not readily available, and rarely successful.”).

43. See, e.g., Lant B. Davis, John H. Small & David J. Wohlberg, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 812–14 (1979) (asserting that municipalities indemnify officers for any settlement or judgment); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987) (noting that a study of Section 1983 cases in one federal district found no case in which an officer was not indemnified); Emery & Maazel, *supra* note 9 (describing indemnification practices in New York City); Meltzer, *supra* note 16, at 284 (“[I]ndividual defendants virtually never pay damages to plaintiffs.”); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 812 (2007) (“Public

Others argue that civil rights damages actions underdeter government officials because those officials do not reliably respond to financial incentives. Peter Schuck argues that the costs of liability may be outweighed by “countervailing pressures to tolerate low-level misconduct.”<sup>45</sup>

The political environment may countenance or even reward lawbreaking that appears to advance important programmatic or ideological goals such as crime control, intelligence-gathering, or preservation of neighborhood schools. Bureaucratic needs—for example, to preserve employee morale or to maintain order within a custodial institution—may induce agencies to wink at illegal behavior. Administrative imperatives, such as the duty to process massive case loads, may encourage dubious procedures or shortcuts in the interests of “efficiency.”<sup>46</sup>

Daryl Levinson argues that damages actions do not deter in the manner assumed by courts because governments do not have the financial incentives of for-profit firms.<sup>47</sup> Levinson writes that “[g]overnment actors respond to political incentives, not *financial* ones,” and so will make post-litigation personnel and policy changes only if those changes protect or further their political interests.<sup>48</sup>

A related—but more pointed—observation has been made in the law enforcement context: the costs of litigation are outweighed by “perceived gains” from aggressive policing.<sup>49</sup> Following lawsuits, local government officials may actually “reward police with larger budgets, since the political returns for higher police funding and appearing tough on crime may be worth the budgetary cost.”<sup>50</sup> For those law enforcement officials who believe that the threat of police brutality

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employers are usually required by statute to indemnify their employees or otherwise pay judgments against those employees arising from torts committed within the scope of their employment.”)

44. See, e.g., HUMAN RIGHTS WATCH, *supra* note 19, at 80 (“[I]n most cities . . . civil settlements paid by the city on behavior of an officer usually are not taken from the police budget but are paid from general city funds.”); SCHUCK, *supra* note 5, at 107 (explaining that it is difficult to enforce municipal liability because “a decision to charge a public program’s budget with the costs of defending claims and satisfying adverse judgments arising out of employees’ misconduct is probably easier to evade and more difficult to enforce”); Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 781–82 (2004) (“[T]he monetary cost of judgments against police are not always fully or directly born by police departments or by individual officers. Civil judgments come out of city or county funds, or perhaps from insurance policies that the local government purchases—i.e., from taxpayers.”).

45. SCHUCK, *supra* note 5, at 125.

46. *Id.*

47. See Levinson, *supra* note 5, at 345.

48. *Id.*

49. Armacost, *supra* note 5, at 475.

50. Miller & Wright, *supra* note 44, at 782.

will discourage criminals, payouts are “a reasonable price for the presumed deterrent effect of the department’s most violent responses to lawbreaking.”<sup>51</sup>

Although scholars more often come to bury deterrence than to praise it, some defend lawsuits’ deterrent power. Payouts can pressure policymakers to amend policies or retrain officers.<sup>52</sup> The threat of suit can also “induce the government to change its policies.”<sup>53</sup> In a response to Daryl Levinson, Myriam Gilles identifies several noneconomic effects of lawsuits that can deter officials.<sup>54</sup> “[V]aluable information is unearthed and exposed” during litigation that can inspire change, Gilles writes, either because officials “respond to previously unknown information” or because they are pressured by “publicity that attends the exposure of the information.”<sup>55</sup> Findings of municipal liability also serve a “fault-fixing function,” Gilles argues, that will “forc[e] municipal policymakers to consider reformative measures.”<sup>56</sup>

Some also believe that damages awards can influence individual officer behavior. Although officers can expect to be indemnified unless they were acting in “extreme bad faith,”<sup>57</sup> judgments may, nonetheless, harm officers’ career prospects or have “immense political costs (in the sense of everyday workplace politics).”<sup>58</sup> The stress and anxiety of defending oneself in a lawsuit may also discourage future officer misconduct.<sup>59</sup>

51. JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 205 (1993).

52. See, e.g., Fallon & Meltzer, *supra* note 6, at 1788 (arguing that a damages award against a city police force “does not require discontinuation of [unconstitutional] practices,” but “exerts significant pressure on government and its officials to respect constitutional bounds”); Papik, *supra* note 10, at 424 (“[B]y forcing state and local governments to pay for officers’ wrongdoing, tort suits will also provide greater incentive [than the exclusionary rule] for police departments to train their officers properly.”).

53. Karlan, *supra* note 6, at 1918.

54. See Gilles, *supra* note 6, at 860–61.

55. *Id.* at 859, 861.

56. *Id.* at 861.

57. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 (1998). See also *supra* note 43 for evidence of widespread indemnification of officers. But see SCHUCK, *supra* note 5, at 85 (arguing that indemnification is “neither certain nor universal”); Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 583, 588 n.17 (1998) (noting that indemnification is generally not automatic and defendants may not know the extent of the indemnification or their legal defense until after the case is resolved); Gilles, *supra* note 6, at 854 (citing SCHUCK, *supra* note 5); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1675 n.389 (2003) (explaining that it was difficult for an officer to get a home loan while named in pending litigation, despite indemnification).

58. Gilles, *supra* note 6, at 854–55; see also Davis et al., *supra* note 43, at 809 n.154 (explaining that police misconduct suits may deter future misconduct because they result in “emotional stress, adverse publicity, and detrimental effects on the officer’s career”).

59. See Gilles, *supra* note 6, at 854–55 (suggesting that even if officers suffer no direct financial consequences, they will suffer “anxiety,” “embarrassment,” or “emotional stress” as a result of being sued); Jeffries, *supra* note 57, at 50–51 (“State officers named as defendants may feel more anxiety and embarrassment than if their employers were sued for their conduct.”); James C. Wrenn, Jr., Note,

## B. Implications

More than descriptive accuracy is implicated in judicial assumptions and scholarly theories of deterrence. Courts consider the threat of civil rights damages actions so “disabling” that government officials need immunity from suit.<sup>60</sup> Courts fear that police officers will be incapacitated by the threat of suit unless claims are dismissed against “all but the plainly incompetent or those who knowingly violate the law.”<sup>61</sup> Legislators,<sup>62</sup> prosecutors,<sup>63</sup> and judges<sup>64</sup> are even more vulnerable and need absolute immunity from suit. Without these protections, the fear of liability “will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official’s decisiveness and distorting his judgment on matters of public policy.”<sup>65</sup> Other “able citizens” will so fear suit that they will avoid public office altogether.<sup>66</sup> The dismissal of claims brought by people whose rights have been violated is considered a necessary price to pay to ensure that government officials will vigorously perform their duties.

In constitutional criminal procedure, the Supreme Court has confined the reach of the exclusionary rule on the ground that damages actions are an adequate alternative deterrent. In *Wilson v. Arkansas*,<sup>67</sup> the Supreme Court held

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*Passing the Buck: The Supreme Court’s Failure to Clarify Qualified Immunity Doctrine to Protect Public Officials From Frivolous Lawsuits*, Crawford-El v. Britton, 118 S. Ct. 1584 (1998), 22 HARV. J.L. & PUB. POL’Y 1031, 1047 (1999) (“There is still a social stigma attached to being named a defendant in a lawsuit, especially if one is accused of violating someone’s constitutional rights. Discovery may well bring out embarrassing facts unrelated to the lawsuit. Furthermore, the disruption, prying, and other aggravation makes the job more stressful.”).

60. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

61. Malley v. Briggs, 475 U.S. 335, 341 (1986).

62. See Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998) (Legislators need absolute immunity from suit, so that their “legislative discretion is not . . . distorted by the fear of personal liability,” so that they do not spend “time and energy” defending suits, and so people are not discouraged from legislative office, “where prestige and pecuniary rewards may pale in comparison to the threat of civil liability.”).

63. See Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976) (“The public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.”).

64. See Pierson v. Ray, 386 U.S. 547, 554 (1967) (“[A judge’s] errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.”).

65. Owen v. City of Independence, 445 U.S. 622, 655–56 (1980); see also Scheuer v. Rhodes, 416 U.S. 232, 240 (1974), abrogated in part by Harlow v. Fitzgerald, 457 U.S. 800 (1982) (The threat of liability should not deter an official’s “willingness to execute his office with the decisiveness and the judgment required by the public good.”).

66. Harlow, 457 U.S. at 814 (describing the need for qualified immunity); see *supra* notes 62–65 for similar justifications of absolute immunity.

67. 514 U.S. 927 (1995).

that the failure of police to knock and announce their presence before entering a home violated the Fourth Amendment.<sup>68</sup> Yet, in *Hudson v. Michigan*,<sup>69</sup> a case in which the police failed to knock and announce, the Court held that suppression was not a necessary remedy.<sup>70</sup> A significant basis for this conclusion, the Court explained, was that, “[a]s far as we know, civil liability is an effective deterrent.”<sup>71</sup> The Court assumed that officers will be deterred by the money awarded in damages and attorneys’ fees, as well as the prospect of internal discipline related to the suit.<sup>72</sup>

Scholars, like courts, link prescriptions to their respective accounts of the deterrent effect of lawsuits.<sup>73</sup> Scholarly recommendations generally fall into three camps: One is to impose more direct financial penalties on government officials and agencies following settlement or judgment.<sup>74</sup> Another is to change rules of liability<sup>75</sup> and relief<sup>76</sup> in ways that will strengthen the deterrent effect of Section 1983 damages actions. And the third is to rely on claims for injunctive relief, instead of damages actions, to influence government behavior.<sup>77</sup>

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68. *Id.*

69. 547 U.S. 586 (2006).

70. *Id.* at 598.

71. *Id.* Many have, however, disagreed with this reasoning, including the dissent in *Hudson*. See *id.* at 605 (Breyer, J., dissenting). For other arguments that civil suits are inadequate substitutes for suppression, see, for example, Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 119, 126–29 (2003); Stewart, *supra* note 42, at 1388.

72. See *Hudson*, 547 U.S. at 598 (“Another development over the past half-century that deters civil rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.”).

73. In Part IV.B, *infra*, I consider the effect of my study on these prescriptions.

74. See, e.g., Emery & Maazel, *supra* note 9, at 596–600 (arguing that the costs of settlements and judgments should be allocated between police departments and officers); Levinson, *supra* note 5, at 419–20 (recommending that money be taken out of government officials’ campaign budgets).

75. See, e.g., SCHUCK, *supra* note 5, at 184 (recommending greater municipal liability and strengthened immunities for street-level officials); Gilles, *supra* note 6, at 867–75 (recommending increased municipal liability with reinvigorated use of “policy and custom” language and less frequent bifurcation of *Monell* claims).

76. See, e.g., Papik, *supra* note 10, at 425 (arguing that punitive damages should be awarded more frequently against officers); Rottell, *supra* note 10, at 224 (arguing that punitive damages should be allowed against municipalities).

77. For arguments in favor of structural reform injunctions, see, for example, Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000); Gilles, *supra* note 6, at 875–79; Jeffries & Rutherglen, *supra* note 11; Levinson, *supra* note 5, at 416–17.

### C. Shared Assumptions

#### 1. Types of Information Required

Judicial and scholarly descriptions of deterrence—and the prescriptions that follow—appear to rely on the assumptions that government officials are both rational and informed. Although there are good reasons to doubt both assumptions,<sup>78</sup> I focus here on the expectation that officials have enough useful information about past suits that they can make informed decisions about whether to make changes to reduce the likelihood of future suit.

Take, for example, Daryl Levinson's theory that government policymakers are motivated by political, not financial, concerns, and so are not reliably deterred by lawsuits.<sup>79</sup> Levinson hypothesizes that a police chief will allow his officers to engage in constitutional violations—chokeholds, for example—despite lawsuits against them, until “the costs of permitting chokeholds, quantified in constitutional tort damages paid to people severely injured or killed by the police, would exceed the crime-reduction benefits.”<sup>80</sup> According to Levinson, this same calculation will likely occur regarding any rights that are frequently litigated in civil rights damages actions.<sup>81</sup>

Levinson's account of deterrence does not make any explicit claims about what information is relied upon by police chiefs when deciding whether to maintain the status quo. But consider the information that would be needed to engage in this stylized cost-benefit analysis.<sup>82</sup> A police chief would need to know the amount of money paid in settlements or judgments for cases alleging improper chokeholds. The chief would then need to assess the “crime-reduction benefits” of the chokeholds applied in these cases, although it is not clear how he might accomplish this task. Perhaps the chief would evaluate the crimes for which the plaintiffs were arrested or the crimes that were attempted when the chokeholds were applied. The chief might also consider the costs

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78. See *supra* notes 15–16 and accompanying text for a brief discussion of the need for further consideration of the impact of bounded rationality on theories of deterrence. See *infra* notes 275–278 and accompanying text for a description of the effects of bounded rationality on limited law enforcement information-gathering efforts.

79. See Levinson, *supra* note 5.

80. *Id.* at 371.

81. *Id.* at 369–70. In support of this argument, Levinson cites studies by Theodore Eisenberg and Stewart Schwab about “the frequency of various types of constitutional tort litigation.” *Id.* at 369 n.74. These studies assess civil rights cases in three federal district courts, but include no data or analysis concerning government decisionmaking in anticipation of or in response to litigation.

82. Levinson self-consciously assumes a “highly stylized form of majority rule under which fully informed citizens vote their self-interest, each citizen gets one vote, and government accurately records and acts upon the preferences of a majority of citizens.” *Id.* at 363–64.

and crime-reduction benefits of lawsuits alleging other types of infringements—cases regarding the improper use of batons, pepper spray, or Tasers, for example—in order to assess the relative cost and benefit of chokeholds. Only with all of this information could a chief weigh the political benefits of the chokeholds against the costs of related lawsuits.

Levinson is not the only scholar whose theory of deterrence rests on the expectation that government officials gather and analyze significant amounts of information about past suits. Barbara Armacost contends that, “[t]o the extent that chiefs of police view a little bit of brutality as an effective law enforcement tool, they will balance the costs of liability against the perceived gains of aggressive policing.”<sup>83</sup> Armacost, like Levinson, does not explicitly consider what information chiefs would need about past lawsuits to assess the costs and benefits of misconduct. But in order to balance the costs of liability against perceived gains, Armacost’s chief would need to know the amount paid in cases alleging different types of police misconduct and the law enforcement benefits of the misconduct.

Courts and scholars who argue that the financial impact of suits will motivate chiefs to “respect constitutional bounds”<sup>84</sup> or take disciplinary action against the officers involved<sup>85</sup> also appear to expect that chiefs gather information about the claims alleged in lawsuits and the costs associated with these cases. Only with this information could a chief calculate the damages associated with various kinds of misconduct and identify personnel and policy changes that could reduce future payouts. Those who argue that government officials may make personnel or policy decisions based on information unearthed during litigation expect that these officials actually know the substance of the evidence that changes hands during discovery.<sup>86</sup>

Theories that damages actions deter individual officers also appear to rely on the assumption that policymakers gather and analyze information about these suits. Given the prevalence of indemnification, a damages award is highly unlikely to be paid out of the officer’s pocket.<sup>87</sup> A damages action is, therefore, more likely to influence an officer’s behavior if the suit has ramifications at work. Yet a lawsuit can only have “detrimental effects on the officer’s career” if his supervisors know about the suit.<sup>88</sup> And a judgment can only have “immense political costs (in the sense of everyday workplace politics)” if peers

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83. Armacost, *supra* note 5, at 475.

84. Fallon & Meltzer, *supra* note 6, at 1788.

85. See Gilles, *supra* note 6, at 854–55.

86. See *id.*; Karlan, *supra* note 6.

87. See sources cited *supra* note 43.

88. Davis et al., *supra* note 43, at 809 n.154.



and supervisors within the police department know that a lawsuit was filed and something about the result of the case.<sup>89</sup>

## 2. Information Systems

It might seem uncontroversial—indeed, “almost axiomatic”<sup>90</sup>—to assume that a policymaker would have useful information about suits alleging misconduct by his own officers. But how, other than through media reports or office gossip,<sup>91</sup> might a policymaker find relevant information about these cases?

If an individual officer is sued, the attorney representing the defendant will likely possess the most information about the claims, evidence developed during litigation, and disposition of the case. In most instances, these lawyers are not police department employees, and thus do not report to the department.<sup>92</sup> Assuming the officer has been indemnified,<sup>93</sup> the city agencies that approve settlements and distribute payments will know the amount paid. But again, these agencies will often be outside the department and may not report their actions to police department leaders.<sup>94</sup> Even the named defendant may not have relevant information about his case.<sup>95</sup> In any event, the policymaker will need to look to the officer or government employees outside the department for relevant information.

Even if the chief or another senior official is named as a defendant—and therefore, presumably, knows something about the case—she may not be the person best suited to decide what action to take. Peter Schuck identifies “[t]he

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89. Gilles, *supra* note 6, at 864.

90. Carlson v. Green, 446 U.S. 14, 21 (1980).

91. Information about lawsuits may travel through multiple informal communication networks. An officer may be served with a lawsuit at work, in front of peers and supervisors. An officer may tell his coworkers that he has been named in a suit. A supervisor may learn about a suit when the officer requests a shift change, so that he can be deposed or attend a court proceeding. And a police chief may well keep informal track of those suits about which she learns. This type of fragmented, piecemeal information about lawsuits may play some role in decisionmaking, but could not be used in the comprehensive cost-benefit calculations underlying descriptions of informed deterrence.

92. See SCHUCK, *supra* note 5, at 83–85 (noting that government lawyers will usually defend officers in court); Dina Mishra, Note, *When the Interests of Municipalities and Their Officials Diverge: Municipal Dual Representation and Conflicts of Interest in § 1983 Litigation*, 119 YALE L.J. 86 (2009) (noting that city attorneys may represent both municipalities and individual government defendants, leading to conflicts of interest).

93. For studies and discussions of the frequency of officer indemnification, see *supra* note 43.

94. For sources observing that settlements and judgments against police officers often do not come out of police department budgets, see *supra* note 44.

95. See Emery & Maazel, *supra* note 9, at 590 (“Police officers are so removed from the process of settling cases and paying money damages that they often have no idea how much their cases settle for, or even whether they settle at all. We have deposed many officers who have been sued one, two, three times before, yet had no idea how any of those cases were resolved.”).

ideal locus of liability, the Archimedean point of maximum leverage over deterrence,” as the government official who possesses

a comprehension of the full range of social values affected by the misconduct and by efforts to control it; an understanding of the technology of how particular misconduct can be deterred; the incentive to optimize not only deterrence but also competing values, notably vigorous decisionmaking; and the resources to ensure that this knowledge and incentive is used at street level.<sup>96</sup>

As Schuck recognizes, this is a tall order.<sup>97</sup> There may in fact be no one department official best equipped to weigh the costs and benefits of conduct, identify appropriate policy changes, and implement those changes. Information will therefore need to be exchanged between the officials who share these responsibilities. And for information to be exchanged, it has to exist in a form that allows for its transfer.

Even assuming that the relevant officials manage to gather information about cases, this information must be stored and analyzed in a manner that allows for sophisticated calculations over time.<sup>98</sup> To comport with prevailing theories of deterrence, a chief considering the costs and benefits of chokeholds would need to weigh the benefits of chokeholds against the costs of resolving cases alleging chokeholds over a period of months or years—regardless of whether he aimed to maximize political capital, dollars, or the benefits of aggressive policing.

Although theories of deterrence rest on the assumption that government officials make informed decisions, courts and scholars have not explicitly considered what information about past suits would be relevant to officials' decisions or how officials might come to possess that information. Instead, courts and scholars appear to expect that relevant information about lawsuits travels, without incident, through complex bureaucratic institutions and lands on the desks of government officials best situated to make personnel and policy decisions aimed at reducing misconduct and, consequently, future litigation. Theories of deterrence focus on how officials evaluate information from lawsuits once it is in their hands. I contend, however, that this focus is premature until we know whether, or to what extent, officials actually know about past suits.

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96. SCHUCK, *supra* note 5, at 104.

97. *Id.*

98. It might seem that a chief in a small department with few lawsuits to analyze could do these calculations in his head and would not need a sophisticated system. However, even in small departments, it would be difficult to determine the costs and benefits of behavior alleged over several years without some mechanism for systematic review. See *infra* note 299 (chief of police department with only thirty-three officers describes how his department's computerized data system improved officer supervision).

## II. A STUDY OF POLICE DEPARTMENTS' USES OF INFORMATION FROM LAWSUITS

### A. Sources

Despite judicial and scholarly assumptions that government officials gather large amounts of data about suits and analyze that data in sophisticated ways, we actually know very little about what information officials have about suits and what systems, if any, are in place to assist in the review of this information. Studies have evaluated what happens to civil rights cases in the courts, including the number and types of cases brought and their dispositions,<sup>99</sup> and have also examined how police officers report responding to the threat of suit.<sup>100</sup> However, almost no attention has been paid to how—or whether—police departments track and analyze data about lawsuits filed against their own officers.<sup>101</sup>

In an effort to understand the relationship between litigation, information, and decisionmaking, I have gathered data about policies and practices in

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99. See, e.g., David K. Chiabi, *Police Civil Liability: An Analysis of Section 1983 Actions in the Eastern and Southern Districts of New York*, 21 AM. J. CRIM. JUST. 83 (1996) (discussing a study of Section 1983 actions filed in the Southern and Eastern Districts of New York over four years); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982) (discussing the results of a study of all Section 1983 litigation filed in the Central District of California over a two-year period); Eisenberg & Schwab, *supra* note 43 (discussing the results of a second study of lawsuits filed in the Central District of California); Stewart J. Schwab and Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988) (replicating the Central District of California study with a study of Section 1983 cases in the Eastern District of Pennsylvania and the Northern District of Georgia).

100. These studies generally focus on officers' representations about the deterrent power of the threat of suit. See, e.g., Daniel E. Hall, Lois A. Ventura, Yung H. Hee & Eric Lambert, *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 POLICING: INT'L J. POLICE STRAT. & MGMT. 529, 543 (2003); Kenneth J. Novak, Brad W. Smith & James Frank, *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 POLICING: INT'L J. POLICE STRAT. & MGMT. 352, 357 (2003); Dennis J. Stevens, *Civil Liabilities and Arrest Decisions*, 73 POLICE J. 119 (2000); Michael S. Vaughn, Tab W. Cooper & Rolando V. del Carmen, *Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views*, 47 CRIME AND DELINQ. 3 (2001). See also *infra* note 308 for a description of some studies' findings that, although officers assert that they fear being sued, the threat of suit does not have an appreciable effect on officer conduct.

101. One significant exception is Human Rights Watch's study of fourteen police departments across the country. See HUMAN RIGHTS WATCH, *supra* note 19. For each of these fourteen jurisdictions, Human Rights Watch addressed issues related to civil litigation against officers. Many of the civil litigation entries focus on the amount spent on litigation and not the degree to which department officials use information from the lawsuits. However, the report does have relevant information about practices in seven of the fourteen police departments they studied, including: Chicago, Detroit, Los Angeles, New Orleans, New York, Portland, and Washington, D.C. These seven departments are included in my study.

twenty-six law enforcement agencies across the country.<sup>102</sup> I chose these twenty-six departments because each has been subject to some form of external review. Twelve were sued and subsequently entered into consent decrees or memoranda of agreement requiring court-appointed monitoring.<sup>103</sup> Ten are monitored by “police auditors”—government employees who focus on accountability issues in police departments.<sup>104</sup> The final four were evaluated by outside organizations: two departments voluntarily agreed to a one-time review by an outside agency,<sup>105</sup> and the other two were involuntarily investigated.<sup>106</sup>

102. Included are the Los Angeles Sheriff's Department (LASD), the New Jersey State Troopers, and police departments in: Albuquerque; Boise; Buffalo; Chicago; Cincinnati; Denver; Detroit; the District of Columbia; Farmington, New Mexico; Los Angeles; Metropolitan Nashville; New Orleans; New York; Oakland; Philadelphia; Pittsburgh; Portland, Oregon; Prince George's County, Maryland; Sacramento; San Jose; Seattle; Steubenville, Ohio; Villa Rica, Georgia; and Wallkill, New York.

103. The New York state attorney general brought one suit. See DEAN ESSERMAN, FIRST REPORT OF THE MONITOR, *NEW YORK V. TOWN OF WALLKILL* (2002), available at [http://www.parc.info/client\\_files/Wallkill/1st%20Wallkill%20Monitor%20Report.pdf](http://www.parc.info/client_files/Wallkill/1st%20Wallkill%20Monitor%20Report.pdf). Private plaintiffs brought one suit. See Settlement Agreement Re: Pattern and Practice Claims, *Allen v. City of Oakland*, No. C00-4599 TEH(JL) (N.D. Cal. Feb. 4, 2004) [hereinafter *Oakland Settlement*], available at <http://www.clearinghouse.net/chDocs/public/PN-CA-0010-0001.pdf>. The remaining ten suits—against Buffalo, Cincinnati, Detroit, the District of Columbia, Los Angeles, Pittsburgh, Prince George's County, Steubenville, Villa Rica, and the New Jersey State Troopers—were brought by the U.S. Department of Justice pursuant to the attorney general's authority to investigate and sue law enforcement agencies where there is a pattern of unconstitutional conduct. See Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (2006). The texts of these consent decrees and associated monitoring reports are available at the website for the Police Assessment Resource Center, <http://www.parc.info>, the Department of Justice's website, <http://www.doj.gov>, and the website for the Civil Rights Litigation Clearinghouse, <http://www.clearinghouse.net>. The Department of Justice has investigated and issued formal letters with recommended policy changes to eleven additional police departments. See Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. CIV. RTS. L.J. 479 (2009). The eleven jurisdictions that received letters from the Department of Justice are not included in this study.

104. These jurisdictions are: Boise, Chicago, Denver, the Los Angeles Sheriff's Department, Nashville, Philadelphia, Portland, Sacramento, San Jose, and Seattle. Within the general category of “police auditor,” there is some variation. Some police auditors are appointed to review and comment on police policies and performance and report to members of the local government, while others are appointed to “oversee and direct police internal affairs organizations” within the department. See Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151, 162 (2003). There are two additional police auditors, in Austin and Tucson, but they did not respond to my requests for an interview.

105. These two police departments—in Farmington, New Mexico, and Albuquerque—were evaluated by the Police Assessment Resource Center (PARC). See RICHARD JEROME, POLICE ASSESSMENT RES. CTR., PROMOTING POLICE ACCOUNTABILITY AND COMMUNITY RELATIONS IN FARMINGTON: STRENGTHENING THE CITIZEN POLICE ADVISORY COMMITTEE (2007) [hereinafter *JEROME, FARMINGTON REPORT*]; RICHARD JEROME, POLICE ASSESSMENT RES. CTR., POLICE OVERSIGHT PROJECT, CITY OF ALBUQUERQUE (2002) [hereinafter *JEROME, ALBUQUERQUE REPORT*]. Both reports are available at <http://www.parc.info>.

106. New Orleans was investigated by Human Rights Watch, see HUMAN RIGHTS WATCH, *supra* note 19, at 250–67. New York was investigated both by Human Rights Watch, see *id.* at 268–313, and by the New York City Bar Association, see COMM. ON N.Y. CITY AFFAIRS, ASS'N OF THE BAR OF

The fact that all of the departments in my study have been subject to some sort of external review makes them atypical, as most departments do not have comparable oversight.<sup>107</sup> I will address the impact of this selection bias on my findings.<sup>108</sup>

My study nonetheless focuses on jurisdictions that have been subject to external review because much more information is available about their policies and practices. As others have observed, it can be difficult to get any information directly from law enforcement officials.<sup>109</sup> In contrast, the complaints and settlement agreements, police auditors' reports, and reports from independent investigations offer detailed information about policies and their implementation in these departments.<sup>110</sup>

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THE CITY OF N.Y., THE FAILURE OF CIVIL DAMAGES CLAIMS TO MODIFY POLICE PRACTICES, AND RECOMMENDATIONS FOR CHANGE (2000) [hereinafter N.Y. CITY BAR ASS'N REPORT], available at [http://www.abcnyc.org/Publications/reports/show\\_html.php?rid=32](http://www.abcnyc.org/Publications/reports/show_html.php?rid=32).

107. See *supra* note 103 (noting that only ten Department of Justice suits have resulted in external oversight); *supra* note 104 (noting that only twelve cities have police auditors); see also Gilles, *supra* note 77, at 1407–08 (describing the difficulties of prevailing in plaintiff-driven structural reform efforts).

108. See *infra* Part II.C.

109. Human Rights Watch repeatedly—and sometimes unsuccessfully—struggled to get information from police department officials, as is evidenced throughout its report. For example, the authors noted that they obtained information from the city attorney's office in New Orleans “[a]fter a dozen telephone calls, repeated written requests, and finally threats to sue under the state's public records act.” HUMAN RIGHTS WATCH, *supra* note 19, at 264. My efforts to research the New York Police Department (NYPD) are consistent with Human Rights Watch's experience. When I called the NYPD for an interview, the person I spoke to in its Legal Affairs Division would not give me any information, including his name, but suggested that I approach Police Commissioner Raymond Kelly for an interview. My request for an interview with Police Commissioner Kelly or his staff went unanswered for several months and then was denied “[o]wing to the volume of requests for information that the New York City Police Department receives.” Letter From John K. Donohue, Deputy Chief, Commanding Officer, Office of Mgmt. Analysis & Planning to Author (undated) (on file with author). The author of the letter assured me, however, that “[a]t all times, members of this Department strive to adhere to our Department values, which prioritize fighting crime and rendering service with courtesy and civility.” *Id.* The deputy chief of the Torts Division at the New York City Law Department would not review an independent report about the NYPD written by the city bar association to confirm or deny its accuracy. See Telephone Interview With Steven Levi, Deputy Chief, Tort Div., N.Y. Law Dep't (Sept. 22, 2008). He offered only the following statement: “We give our clients, all our clients, lots of advice with what we learn from our relationship of representing them, and we keep that confidential. We try to be good lawyers, and good lawyers counsel their clients.” *Id.*

110. For departments that have been sued, complaints, settlement agreements, and periodic reports by monitors provide an in-depth view of departments' policies and practices. Police auditors also regularly issue reports about their departments. I additionally reviewed press reports and reports written by the commissions appointed to investigate the Los Angeles Police Department (LAPD) following the Rodney King and Rampart scandals, and the commission appointed to evaluate the Los Angeles Sheriff's Department in 1991. See INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) [hereinafter CHRISTOPHER COMMISSION REPORT]; JAMES G. KOLTS ET AL., THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT (1992) [hereinafter KOLTS COMMISSION REPORT]; RAMPART INDEP. REVIEW PANEL, A REPORT TO THE LOS ANGELES BOARD OF POLICE COMMISSIONERS CONCERNING THE

I gained additional insights about these departments by interviewing and corresponding with over two dozen knowledgeable practitioners and experts, including court-appointed monitors of settlement agreements,<sup>111</sup> police auditors,<sup>112</sup> former and current police officials,<sup>113</sup> attorneys who defend the city and its officers in civil suits,<sup>114</sup> other city officials,<sup>115</sup> and plaintiffs' attorneys and advocates.<sup>116</sup>

Although the twenty-six departments in my study represent a small fraction of the over 18,000 law enforcement agencies across the country,<sup>117</sup> their

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OPERATIONS, POLICIES, AND PROCEDURES OF THE LOS ANGELES POLICE DEPARTMENT IN THE WAKE OF THE RAMPART SCANDAL (2000) [hereinafter RAMPART COMMISSION REPORT].

111. See Telephone Interview With Joe Buzeck, Kroll & Associates, Monitor, L.A. Police Dep't Consent Decree (Oct. 30, 2008); Telephone Interview With Kelli Evans and Christy Lopez, Court-Appointed Monitors, Oakland Settlement (Oct. 6, 2008); Telephone Interview With Richard Jerome, P.C., Deputy Monitor & Court-Appointed Special Master for Two Police Reform Settlements in Cincinnati, Ohio (Oct. 14, 2008).

112. See Telephone Interview With Calvin Anderson, Deputy Director, Phila. Police Advisory Comm'n (Oct. 28, 2008); Telephone Interview With Merrick Bobb, Founding Director, PARC, and Special Counsel, L.A. Sheriff's Dep't, and Oren Root, Deputy Dir., PARC (Oct. 24, 2007); Telephone Interview With John Fowler, Assistant Dir., Seattle Office of Prof'l Accountability (Oct. 16, 2008); Telephone Interview With Pierce Murphy, Boise Ombudsman (Oct. 14, 2008); Telephone Interview With Richard Rosenthal, Indep. Monitor, City and County of Denver & former Police Auditor, City of Portland (Sept. 18, 2008); Telephone Interview With Ilana Rosensweig, Chief Admin'r, Chi. Indep. Police Review Auth. (Sept. 15, 2008); Telephone Interview With Kennetha Sawyers, Dir. of the Office of Prof'l Accountability, Nashville Police Dep't (Oct. 12, 2008); Telephone Interview With Susan Stauffer, Complaint Examiner, San Jose Office of the Indep. Police Auditor (Dec. 17, 2008); see also Correspondence With Francine Tournour, Office of Pub. Safety & Accountability, Sacramento Police Dep't (Jan. 5, 2009) (on file with author); Correspondence With Oren Root, Deputy Dir., PARC (Dec. 17, 2008) (on file with author).

113. See Telephone Interview With Greg Baker, Executive Dir. of Police Relations, Cincinnati Police Dep't (Oct. 28, 2008); Telephone Interview With William McCafferty, Police Chief, Steubenville (Sept. 11, 2008); Telephone Interview With Ray Schultz, Police Chief, Albuquerque (Sept. 25, 2008); Telephone Interview With Keith Shaddix, Police Captain, City of Villa Rica (Oct. 9, 2008); see also Correspondence With Sara Kashing, Admin. Officer & Legal Liaison, Office of the Chief, Sacramento Police Dep't (Jan. 23, 2009) (on file with author).

114. See Telephone Interview With Steven Levi, Deputy Chief, Tort Div., N.Y. Law Dep't (Sept. 22, 2008); Telephone Interview With Craig Straw, Chief Deputy City Solicitor, Civil Rights Div., Phila. Law Dep't (Oct. 14, 2008).

115. See Telephone Interview With Frederika Miller, N.Y. City Comptroller's Office (Sept. 22, 2008); Telephone Interview With Earl Ward, Former Member of the N.Y. Civilian Complaint Rev. Bd. (June 18, 2008).

116. See Telephone Interview With Professor Michael Avery, Suffolk Univ. Law Sch. (Sept. 25, 2008); Telephone Interview With Professor Craig Futterman, Univ. of Chi. Law Sch. (Sept. 15, 2008); Telephone Interview With Rashidah Grinage, Dir., People United for a Better Oakland (PUEBLO) (Oct. 7, 2008); Telephone Interview With Sarah Netburn, Partner, Emery Celli Brinckerhoff & Abady PC (Sept. 22, 2008); Telephone Interview With David Rudovsky, Civil Rights Attorney and Senior Fellow, Univ. of Pa. Law Sch. (Sept. 25, 2008).

117. See BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE & LOCAL LAW ENFORCEMENT AGENCIES, 2004, at 1 (2007) [hereinafter BJS LAW ENFORCEMENT CENSUS], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslea04.pdf>.

policies and practices have a disproportionately large impact. The departments employ over 13 percent of the nation's sworn officers<sup>118</sup> and police over 12 percent of the population.<sup>119</sup> Included are:

- the country's four largest law enforcement agencies;
- six of the ten largest local police departments;
- almost 18 percent of the police departments with more than one thousand sworn officers; and
- almost 54 percent of the officers in departments with more than one thousand sworn officers.<sup>120</sup>

Also included are midsize and small municipal police departments, sheriffs' departments, and state police agencies in seventeen states from across the country.<sup>121</sup> Appendix A reflects the range in size of these agencies, measured by sworn personnel and population policed.

#### B. Police Departments That Ignore Information From Lawsuits

Six of the police departments in my study—New York, Philadelphia, Nashville, San Jose, Sacramento, and New Orleans—do not gather or analyze information from lawsuits filed against them and their officers in any comprehensive or systematic way. When the forces of these departments are combined, they employ more than 47,000 officers, which amounts to more than 32 percent of the officers in the largest police departments across the country.<sup>122</sup>

##### 1. New York

The New York Police Department (NYPD) is a prime example of a department that has long paid little attention to lawsuits and their outcome. The NYPD is the largest police department in the United States, with over

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118. See *id.* at 2 tbl.1, 9 app. tbl.2.

119. See U.S. Census Bureau, State and County QuickFacts, <http://quickfacts.census.gov/qfd/index.html> (last visited Mar. 25, 2010). I arrived at this figure by selecting the states in which the law enforcement agencies in my study are located and then selecting the appropriate city or county from the drop-down menu. I added these figures and divided them by the national population estimate provided under the "USA QuickFacts" tab. This method has likely led to a slight underestimation, as the census bureau data for the national population is based on a 2008 estimate, while the data for the cities and counties is based on a 2006 estimate. For a review of the populations of the jurisdictions in my study, see *infra* Appendix A.

120. See BJS LAW ENFORCEMENT CENSUS, *supra* note 117.

121. As a native of Washington, D.C., I am compelled to include it in my tally of the represented states.

122. Sacramento is not included in this tally because it has fewer than one thousand sworn officers.

36,000 sworn officers.<sup>123</sup> Each year, thousands of lawsuits are filed against NYPD officers, and the city pays millions of dollars in settlements and judgments.<sup>124</sup> Yet the NYPD rarely uses claims alleged in lawsuits, the evidence developed during litigation, or the results of cases in its supervision and discipline of officers.<sup>125</sup>

The fact that a lawsuit is filed is not placed in the officer's personnel file<sup>126</sup> or entered into any system to identify problem officers.<sup>127</sup> Allegations made in lawsuits are not investigated—except as necessary to determine whether the officer should be indemnified or provided with counsel—unless those claims are separately brought to the department's Internal Affairs Division or the independent Civilian Complaint Review Board.<sup>128</sup>

The New York City Law Department—the attorneys who represent the city and its officers—does not inform Internal Affairs or the Civilian Complaint Review Board when a lawsuit has been filed.<sup>129</sup> And although the Law Department tracks lawsuits when they are served on the city, it does not keep track of the type of claims made nor the outcomes of the cases.<sup>130</sup>

The NYPD also learns little about the evidence developed during litigation and the merits of the claims. The Law Department regularly provides the NYPD with a data printout of cases filed against the department and its officers, but only offers detailed memoranda about the 1–2 percent of cases anticipated to result in a payment of \$250,000 or more.<sup>131</sup>

123. See BJS LAW ENFORCEMENT CENSUS, *supra* note 117, at 9 app. tbl.2.

124. In fiscal year 2009, the city of New York paid more than \$117 million to resolve claims against the police. Jim Dwyer, *Fewer Officers, Attracting More Lawsuits*, N.Y. TIMES, Dec. 1, 2009, at A28. Since 1998, lawsuits alleging police misconduct have cost the city of New York over half a billion dollars. See James Fanelli, *'Bad Cop' Suit\$ Cost the City a Half Billion*, N.Y. POST, Apr. 26, 2009.

125. See N.Y. CITY BAR ASS'N REPORT, *supra* note 106.

126. See Kevin McCoy, *Police Misconduct Mess: City Doles Out Big Bucks—But Cops Get Off Easy*, N.Y. DAILY NEWS, July 16, 2000, at 6.

127. See HUMAN RIGHTS WATCH, *supra* note 19, at 298–99. Although the NYPD does have a system to track problem officers, the system does not track civil suits. See *Testimony of New York City Policing Roundtable (NYCPR): J. Oversight Hearing Before the Comm. on Public Safety and Civil Rights, N.Y. City Council 4* (2007), available at <http://www.nycpr.org/documents/342431testimony%203.9.07.pdf> (statement of Amanda Masters, Founder, NYCPR).

128. See HUMAN RIGHTS WATCH, *supra* note 19, at 281. The Civilian Complaint Review Board does not have the authority to investigate claims made in lawsuits unless they are separately brought to the board. See Telephone Interview With Earl Ward, *supra* note 115.

129. See HUMAN RIGHTS WATCH, *supra* note 19, at 281, 298; City Council Report of the Governmental Affairs Division Committee on Governmental Operations Regarding Int. No. 1025 (Dec. 11, 2009) (on file with author) (revealing that the Law Department and CCRB do not coordinate their complaint records).

130. See Statement of William Heinzen, Deputy Counselor to the Mayor, New York City Council Committee on Governmental Operations (Dec. 11, 2009) (on file with author).

131. See HUMAN RIGHTS WATCH, *supra* note 19, at 281, 298.



The resolutions of lawsuits brought against the NYPD and its officers are not recorded or analyzed by the department. Judgments and settlements against an officer are not placed in the officer's personnel file.<sup>132</sup> The department rarely—if ever—analyzes the evidence developed in closed cases for personnel and policy implications.<sup>133</sup> Although the New York City Comptroller—who disburses settlements and judgments out of the general fund—tracks the amount of money spent on legal claims against the department,<sup>134</sup> the NYPD does not analyze how much is spent on lawsuits against particular officers, nor does it track the cost of suits alleging particular types of claims.<sup>135</sup>

The NYPD has long resisted calls to use information developed during litigation when making policy and personnel decisions. In 1992, then-comptroller Elizabeth Holtzman issued a report recommending that the NYPD monitor claims made in lawsuits as it would civilian complaints, and use the information developed during litigation to identify personnel and policy problems.<sup>136</sup> In 1999, her successor, Alan Hevesi, wrote to the police commissioner again to recommend that the department analyze information developed during litigation. Even when cases are settled, Hevesi asserted, “there is enough evidence collected to convince the City that the plaintiff has a serious case. The police department should analyze these settled claims, and take steps to review the officers’ performance and propensity to commit acts of excessive force.”<sup>137</sup>

New York City’s most recent former comptroller, William Thompson, made limited, independent efforts to identify patterns of misconduct in lawsuits.

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132. See McCoy, *supra* note 126.

133. See N.Y. CITY BAR ASS’N REPORT, *supra* note 106. In November 2009, it was reported that the New York Police Department had formed a committee to review the files of cases that had cost the city more than \$250,000, but it is unclear whether this limited review has begun. See Rocco Parascandola, *Chasing Cops’ Paper Trail: NYPD Panel to Scour Lawsuits for Police Misconduct*, N.Y. DAILY NEWS, Nov. 5, 2009. And this review, when and if conducted, will be of a very small universe of cases. In 2008, for example, the city of New York paid to resolve 2433 claims of police misconduct, but only sixty-seven of those claims—less than 3 percent of the total cases—resulted in payments of more than \$250,000. See Letter From Allen Fitzer, Records Access Officer, City of N.Y. Office of the Comptroller (July 22, 2009) (on file with author) (responding to Freedom of Information Law Request by Amanda Masters Ehrenberg, NYCPR, that requested “documents concerning the amount the City has paid in response to NYPD misconduct for the years 2008, 1998, and 1988”).

134. See WILLIAM C. THOMPSON, JR., CITY OF N.Y. OFFICE OF THE COMPTROLLER, CLAIMS REPORT: FISCAL YEARS 2005–2006, at 2–3 (2007), available at [http://www.comptroller.nyc.gov/bureaus/bla/pdf/2006\\_Claims\\_Report.pdf](http://www.comptroller.nyc.gov/bureaus/bla/pdf/2006_Claims_Report.pdf) (compiling the number of civil claims brought against NYPD officers and the costs of settling those claims and satisfying judgments).

135. See N.Y. CITY BAR ASS’N REPORT, *supra* note 106.

136. See *id.*

137. *Id.*

In 2006, Thompson created an Early Settlement Unit made up of comptroller and Law Department staff.<sup>138</sup> The unit reviews ten to twelve cases per week for early settlement. At this rate, the unit can review only between 24 and 28 percent of lawsuits filed each year that allege police misconduct.<sup>139</sup> The attorney at the comptroller's office reports to the Law Department about any patterns apparent in the cases she reviews. However, the Law Department does not have any policy to communicate this information to the NYPD.<sup>140</sup> In fact, the deputy chief of the Torts Division at the Law Department could not identify any protocols in place to communicate information from Early Settlement Unit meetings—or lawsuits more generally—to the NYPD.<sup>141</sup> The NYPD may be seen as extraordinary given its size—it is approximately three times as big as the next largest police department—and its many high profile incidents of police abuse.<sup>142</sup> Nevertheless, the NYPD's failure to use information from lawsuits is not idiosyncratic. New Orleans and four of the jurisdictions in my study with police auditors—Philadelphia, Nashville, San Jose, and Sacramento—also ignore information from lawsuits.

## 2. Philadelphia

Philadelphia, the fourth largest police department in the country, spends millions of dollars annually to settle and satisfy judgments against its approximately 6800 officers.<sup>143</sup> Yet, as with the NYPD, there appears to be only limited, if any, connection between lawsuits filed and the discipline, supervision, and training of its officers.

The Philadelphia Police Department does not internally investigate claims made in lawsuits unless a separate civilian complaint has been made, or the claim involves a shooting or death. If the claim is a “middle of the road use of force,” there will be no spontaneous investigation of the claim by the department's Internal Affairs Division.<sup>144</sup> The chief deputy city solicitor for

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138. See THOMPSON, *supra* note 134, at 8.

139. Generously assuming that the Early Settlement Unit conducts this review fifty-two weeks per year, the unit would review somewhere between 520 and 624 cases per year. In fiscal year 2006, 2211 lawsuits were filed alleging improper police action. See *id.* at 26.

140. See Telephone Interview With Frederika Miller, *supra* note 115.

141. See Telephone Interview With Steven Levi, *supra* note 114.

142. See, e.g., HUMAN RIGHTS WATCH, *supra* note 19, at 271–75 (describing recent high profile incidents involving NYPD officers). See also Marilyn S. Johnson, STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY (2003) (tracing the history of police violence in New York City from the late nineteenth century to the present).

143. During 1996, Philadelphia paid approximately \$13 million in settlements and judgments. See HUMAN RIGHTS WATCH, *supra* note 19, at 332.

144. Telephone Interview With Craig Straw, *supra* note 114.

the Civil Rights Unit in the Philadelphia Law Department estimated that roughly half of the approximately 220 lawsuits filed against the Philadelphia Police Department each year are not separately investigated by Internal Affairs.<sup>145</sup>

Moreover, when a civilian complaint and lawsuit are filed regarding the same incident, the civilian complaint will not be investigated while the lawsuit is pending. If either Internal Affairs or the department's auditor, the Police Advisory Commission, is investigating an allegation of misconduct and learns that a lawsuit has been filed regarding that same claim, the investigation will be suspended and remain inactive until the lawsuit is resolved.<sup>146</sup> When I asked what the rationale was for this practice, I was told that that is "just part of the way it works in Philly."<sup>147</sup>

The Philadelphia Police Department has a system to track problem officers, but the system only includes information about claims that Internal Affairs has investigated. The approximately 110 lawsuits filed per year that are not investigated by Internal Affairs are not included in the system.<sup>148</sup> Lawsuits also appear to play no role in the evaluation of officers' performance, unless Internal Affairs has separately investigated the claims. As the chief deputy of the Law Department's Civil Rights Unit stated, "if there is no Internal Affairs complaint, I can guarantee for the most part that there will be no discipline of the officer."<sup>149</sup>

The Police Advisory Commission does keep track of lawsuits filed against each officer but does not get that information from the police department or the Law Department; instead, the commission pulls information about suits from a subscriber-based internet service.<sup>150</sup> Moreover, the commission uses this information for very limited purposes. The commission reviews the information it has about lawsuits—along with newspaper accounts and other information about the officer—only if a civilian complaint has been sustained and the commission is considering what punishment to recommend.<sup>151</sup>

The Law Department does make limited efforts to inform the police department of notable cases and trends. At the end of litigation, in "a very small percentage" of cases, the Law Department will recommend that Internal Affairs open an investigation of a claim made in a lawsuit.<sup>152</sup> The Law

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145. See *id.*

146. See Telephone Interview With Calvin Anderson, *supra* note 112.

147. *Id.*

148. See Telephone Interview With Craig Straw, *supra* note 114.

149. *Id.*

150. See Telephone Interview With Calvin Anderson, *supra* note 112.

151. See *id.*

152. Telephone Interview With Craig Straw, *supra* note 114.

Department also represents that it tells the police department about trends that it identifies across cases.<sup>153</sup> But there is no way to know what the Law Department actually tells the police department, given the attorney-client privilege that protects these communications.

### 3. Nashville

Policies are similar in the Metropolitan Nashville Police Department, a smaller department with approximately 1200 sworn officers.<sup>154</sup> Before 2000, the department never internally investigated claims against officers if the same claims were alleged in pending litigation. When a civilian filed both a lawsuit and a civilian complaint, the claims would be investigated only to defend the case—not for personnel and policy implications.<sup>155</sup> In 2000, the department established an auditor, the Office of Professional Accountability (OPA), that is independent of the police department and headed by a civilian.<sup>156</sup> OPA has the authority to direct internal investigations, make recommendations regarding the disposition of investigations, and review and make policy recommendations regarding complaint-gathering and investigative processes.<sup>157</sup>

Despite these changes, OPA still does not consistently investigate claims made in lawsuits. The director of OPA told me that “it would be helpful to have some sort of official response with regard to allegations of misconduct that come to our attention through lawsuits” but acknowledged that they “don’t have a structured response” to those types of cases.<sup>158</sup> While OPA has the discretion to investigate claims made in lawsuits, the auditor is not notified when lawsuits are filed and will not know of the claims made in litigation unless a separate civilian complaint is filed with her office or she has seen press or other information about the claim.<sup>159</sup> Neither OPA nor the Nashville Police Department use information from lawsuits in any systematic way to identify problem officers.<sup>160</sup>

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153. See *id.*

154. See BJS LAW ENFORCEMENT CENSUS, *supra* note 117, at 10.

155. See Telephone Interview With Kennetha Sawyers, *supra* note 112.

156. See SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 138 (2005).

157. See Nashville Police Department Office of Professional Accountability, [http://www.police.nashville.org/bureaus/chief/professional\\_accountability.asp](http://www.police.nashville.org/bureaus/chief/professional_accountability.asp) (last visited Mar. 27, 2010).

158. Telephone Interview With Kennetha Sawyers, *supra* note 112.

159. See *id.*

160. See Telephone Interview With Representative, Behavioral Health Servs. Div., Nashville Police Dep’t (Oct. 14, 2008); Telephone Interview With Kennetha Sawyers, *supra* note 112.

#### 4. San Jose

Practices are much the same in San Jose, a department of similar size to the Nashville Police Department.<sup>161</sup> The San Jose Police Department does not track lawsuits as a way of identifying problem officers. The department does not internally investigate claims made in lawsuits unless the claim was separately alleged in a civilian complaint.<sup>162</sup> The department's auditor, called the Office of the Independent Auditor, oversees investigations conducted by Internal Affairs and analyzes trends in those claims. However, because lawsuits are not investigated by Internal Affairs, trends in lawsuits are not analyzed.<sup>163</sup> The auditor does receive copies of all lawsuits brought against the city and its officers.<sup>164</sup> If the auditor has an open investigation regarding the same claim, the complaint is placed in that file. But, if there is no open investigation, the complaint is just "filed in a drawer," and is not made a part of the office's analysis.<sup>165</sup>

#### 5. Sacramento

Similar policies exist in Sacramento, a department with nearly 700 officers.<sup>166</sup> The Sacramento Police Department does not track lawsuits as a way of identifying problem officers, and their Internal Affairs Division does not investigate allegations made in lawsuits as they would civilian complaints.<sup>167</sup> Closed litigation files are not reviewed for personnel or policy implications.<sup>168</sup> In response to my request for an interview, the office of the chief for the Sacramento Police Department offered this statement:

SPD is continually evaluating and revising our policies in light of events that occur to better serve the community. I would not say, however, that lawsuits are treated like other [Internal Affairs] complaints nor would I say that revisions to our policies are the result of lawsuits that have been brought against us.<sup>169</sup>

Sacramento's police auditor informed me that she "does not view or even become aware [of] the findings of civil suits or complaints."<sup>170</sup> The auditor

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161. See BJS LAW ENFORCEMENT CENSUS, *supra* note 117, at 10.

162. See Telephone Interview With Susan Stauffer, *supra* note 112.

163. See *id.*

164. See *id.*

165. *Id.*

166. See SACRAMENTO POLICE DEP'T, 2006 ANNUAL REPORT 5 (2006), available at <http://www.sacpd.org/pdf/publications/ar/ar06/pdf>.

167. See Correspondence With Sara Kashing, *supra* note 113.

168. See *id.*

169. *Id.*

170. Correspondence With Francine Tournour, *supra* note 112.

explained that “[t]he only way we would know about a pending lawsuit is if the complainant mentions it during the course of our questioning.”<sup>171</sup>

## 6. New Orleans

The New Orleans Police Department, with over 1600 sworn officers,<sup>172</sup> displays similar inattention to information from civil lawsuits. The department created a computerized system to track problem officers in 1995, but does not include information about lawsuits in the system.<sup>173</sup> Although the City Attorney’s Office does notify the department when lawsuits are filed, the department does not investigate claims made in lawsuits as they would civilian complaints.<sup>174</sup> In June 2008, the New Orleans City Council passed an ordinance to create an independent police auditor who will have the authority to review patterns related to civil claims and lawsuits, and review the internal investigations of these claims.<sup>175</sup> An auditor was hired in 2009, but quit after a month in office.<sup>176</sup> To date, the position has not been re-filled.<sup>177</sup>

## C. Policies to Incorporate Information From Lawsuits Into Decisionmaking

### 1. Types of Policies

Twenty of the jurisdictions in my study have recognized—or been forced to accept—lawsuits as a source of information relevant to personnel and policy decisions. These departments gather and analyze information from lawsuits in one or more of five ways.

*Early Intervention Systems.* Seventeen of the jurisdictions in my study use information from lawsuits,<sup>178</sup> along with other information, to identify

171. *Id.*

172. See BJS LAW ENFORCEMENT CENSUS, *supra* note 117, at 9 app. tbl.2.

173. See HUMAN RIGHTS WATCH, *supra* note 19, at 262 n.68.

174. See *id.* at 263.

175. The text of the ordinance passed by the New Orleans City Council is available at <http://archive.nolacitycouncil.com/newsletter/2008Jul/7.10.08%20Ordinance%2027032%20Independent%20Monitor.pdf> (last visited Mar. 27, 2010).

176. See *NOPD Monitor Resigns, Accuses Former IG of Overspending*, WDSU.COM, <http://www.wdsu.com/news/20951474/detail.html>.

177. See Bruce Egger, *OIG Has Big Plans for Audits*, TIMES-PICAYUNE, Feb. 9, 2010 (describing one of the Inspector General’s priorities as hiring a new police monitor).

178. Of the seventeen early intervention systems in my study that include information about lawsuits, there is variation in the type of information that is tracked. Some jurisdictions track notices of claim—prerequisites to state law claims in many jurisdictions. See, e.g., Memorandum of Agreement Between the U.S. Dep’t of Justice and the City of Cincinnati, Ohio ¶ 58(h) (Apr. 12, 2002) [hereinafter Cincinnati MOA], available at <http://www.usdoj.gov/crt/split/Cincmoafinal.htm> (requiring

problematic behavior by police officers before significant misconduct occurs.<sup>179</sup> These systems, called early intervention systems or early warning systems, record various pieces of information about each officer's performance, including, for example, civilian complaints, arrests, shootings, and lawsuits.<sup>180</sup> Then, the systems typically flag those officers who reach a department-prescribed threshold.<sup>181</sup> The triggering incidents are then reviewed to assess whether intervention is necessary.<sup>182</sup> Possible interventions include retraining, counseling, reassignment, or, occasionally, discipline.<sup>183</sup> The department then typically monitors the officer's conduct for a period of time.<sup>184</sup> Departments may also review the information in early intervention systems periodically or at the time of an officer's promotion or transfer.<sup>185</sup>

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that both "civil and administrative claims" and lawsuits be recorded in the early intervention system). Some jurisdictions track lawsuits that are filed. See, e.g., Joint Application for Entry of Consent Decree and Consent Decree ¶ 41(b), *United States v. New Jersey*, No. 99-5970 (D.N.J. Dec. 30, 1999) [hereinafter *New Jersey Consent Decree*] (requiring that the early intervention system track "[i]nformation on . . . civil suits involving alleged misconduct by state troopers while on duty"). And some jurisdictions update the early intervention system to note the progress and dispositions of the lawsuits. See, e.g., Consent Judgment, Use of Force and Arrest and Witness Detention ¶ 80(1), *United States v. City of Detroit*, No. 03-72258 (E.D. Mich. June 12, 2003) [hereinafter *Detroit Consent Decree*] (requiring that the early intervention system be updated to note the dispositions of lawsuits); MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FIRST SEMI-ANNUAL REPORT 19 (1993) [hereinafter *LASD FIRST SEMI-ANNUAL REPORT*] (noting that LASD early intervention system is updated to note the dispositions of lawsuits).

179. See *infra* Appendix B for those jurisdictions with Early Intervention Systems. For a comprehensive discussion of these types of systems, see WALKER, *supra* note 156, at 100–34.

180. Some early intervention systems also record information suggesting exemplary behavior by officers, including commendations, awards, or letters of appreciation. See INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 21, at 57. Pittsburgh's system records commendations. See *id.* at 56. More extensive systems may also include neutral data that can be used to evaluate other information in the system. For instance, some systems track arrests, not because the arrests themselves are indicative of problematic conduct, but to contextualize the number of times an officer reported using force. See *id.*

181. Some departments have fixed thresholds, reached whenever an officer accumulates a certain number of indicators over a specified period of time. In other departments, indicators carry different point values, and officers are flagged when they accrue more than a certain number of points in a specified period of time. Other systems identify officers for evaluation when they accrue a disproportionately large number of incidents compared to their peers. Finally, some systems automatically flag an officer for review of more serious incidents. For an in-depth description of these systems, see INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 21, at 59–60. See WALKER, *supra* note 156, at 110–15 for a description of a variety of ways officers are identified for intervention.

182. This review is meant to occur in the broader context of the officers' obligations, the circumstances of the events, and the officers' conduct. See INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 21, at 61–64.

183. See *id.* at 65–66.

184. See *id.* at 65.

185. Some consent decrees require that supervisors review early intervention system data when considering an officer for a promotion or transfer and periodically to identify officers' risky behavior. See, e.g., *Detroit Consent Decree*, *supra* note 178, ¶¶ 84c (at-risk behavior), 84h (promotion or transfer); *Final Consent Decree, United States v. City of Los Angeles*, No. 00-11769 ¶ 47(g) (C.D. Cal. June

*Trend Analysis.* Sixteen departments in my study have policies to use information from lawsuits to identify problematic trends.<sup>186</sup> Some departments look for spikes of allegations of misconduct in particular divisions or units.<sup>187</sup> Departments may also look for trends in types of behavior—allegations of excessive use of pepper spray, or racially motivated stops, for example—that have policy or training implications.<sup>188</sup> Departments may identify trends with their early intervention systems<sup>189</sup> or through separate analysis.<sup>190</sup>

*Investigations of Claims.* Fourteen departments in my study have policies to investigate claims made in lawsuits—apart from the defense of the suit—as they would a civilian complaint.<sup>191</sup> These investigations, if founded, can result in

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15, 2001) [hereinafter LAPD Consent Decree], available at <http://www.usdoj.gov/crt/split/documents/laconsent.php> (requiring supervisors to access system data for annual review and when selecting officers for “pay grade enhancement, promotion,” or assignment to Internal Affairs); Consent Decree, *United States v. City of Pittsburgh*, No. 97-0354 ¶ 24 (W.D. Pa. Apr. 16, 1997) [hereinafter Pittsburgh Consent Decree], available at <http://www.usdoj.gov/crt/split/documents/pittssa.php> (requiring review before promotions); Consent Decree, *United States v. City of Steubenville*, No. C2 97-966 ¶ 78 (S.D. Ohio Sept. 3, 1997) [hereinafter Steubenville Consent Decree], available at <http://www.usdoj.gov/crt/split/documents/steubensa.php> (requiring review before promotion); Oakland Settlement, *supra* note 103, ¶ VII.B-11 (requiring review before promotion or transfer). Some departments only require that supervisors review an officer’s early intervention system data after being transferred. See Cincinnati MOA, *supra* note 178, ¶ 62(h); Telephone Interview With Greg Baker, *supra* note 113 (indicating that the Cincinnati Police Department reviews data quarterly but does not review the data before an officer is promoted or transferred).

186. See *infra* Appendix B for those jurisdictions that conduct trend analysis.

187. See, e.g., Cincinnati MOA, *supra* note 178, ¶ 62(b), (k).

188. See, e.g., Memorandum of Agreement Between the U.S. Dep’t of Justice and the City of Buffalo, NY et al. ¶ 20B (Sept. 19, 2002) [hereinafter Buffalo MOA], available at [http://www.usdoj.gov/crt/split/documents/buffalo\\_police\\_agreement.php](http://www.usdoj.gov/crt/split/documents/buffalo_police_agreement.php).

189. For departments that conduct trend analysis through their early intervention systems, see, for example, LAPD Consent Decree, *supra* note 185, ¶¶ 47(c), (f), (k); New Jersey Consent Decree, *supra* note 178, ¶¶ 47–51; Pittsburgh Consent Decree, *supra* note 185, ¶ 18(b); Steubenville Consent Decree, *supra* note 185, ¶¶ 73–74.

190. The police auditors in Chicago, Portland, and Denver review lawsuits and civilian complaints for trends without computerized assistance. See Telephone Interview With Ilana Rosensweig, *supra* note 112; Telephone Interview With Richard Rosenthal, *supra* note 112. For further description of their methods, see *infra* notes 235–236 and accompanying text.

191. See *infra* Appendix B for those jurisdictions that investigate claims made in suits. Some departments automatically investigate every claim made in a lawsuit if it is not already being investigated by Internal Affairs. See LAPD Consent Decree, *supra* note 185, ¶ 93(a). Others review every lawsuit but only investigate the claims in a small portion of the suits. See INDEP. POLICE REVIEW DIV., OFFICE OF THE CITY AUDITOR, PORTLAND, OR., ANNUAL REPORT 2007, at 22–23 (2007) (noting that the Portland auditor reviews lawsuits and has the discretion to open investigations but initiated investigations of less than 10 percent of civil claims brought in 2007). Some departments have Internal Affairs conduct these investigations. See LAPD Consent Decree, *supra* note 185, ¶ 93(a). In other departments, investigations of claims made in lawsuits are conducted by independent agencies that report back to the police department with recommendations. See, e.g., Telephone Interview With Ilana Rosensweig, *supra* note 112 (explaining that the Chicago auditor conducts independent investigations).



disciplinary action against the officer.<sup>192</sup> Some consent decrees and memoranda of agreement specifically require that the city attorney<sup>193</sup> or the defendant officer<sup>194</sup> notify the police department when a lawsuit has been filed so that this investigation (and other analyses described above) can occur.

*Review of Closed Case Files.* Three departments in my study have policies to review information developed during the course of litigation. Chicago's Independent Police Review Authority (IPRA) reviews all closed police litigation files to determine whether further internal investigation is necessary.<sup>195</sup> An auditor for the Los Angeles Sheriff's Department (LASD) reviews closed litigation files to evaluate the strength of the department's internal investigatory and disciplinary processes, and to identify personnel and policy implications of the claims.<sup>196</sup> And the Seattle Police Department's auditor reviews closed litigation files to evaluate the reason for payout and possible policy implications.<sup>197</sup>

*Finding of Liability as Basis for Discipline.* Two departments in my study take action based on a finding of liability after trial. Settlements in Buffalo and Pittsburgh provide that, when an officer is found guilty by a court or jury of acts that constitute "misconduct or incompetence," the department "shall" discipline or terminate the officer.<sup>198</sup>

Of all the departments in my study employing some combination of the above five policies, the Los Angeles Sheriff's Department may make the most comprehensive use of information from lawsuits. The LASD has an early intervention system that records allegations of deputy misconduct, including

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192. See, e.g., LAPD Consent Decree, *supra* note 185, ¶ 88; Telephone Interview With Richard Rosenthal, *supra* note 112; Telephone Interview With Ilana Rosensweig, *supra* note 112.

193. See, e.g., Memorandum of Agreement Between the U.S. Dep't of Justice and the D.C. Metro. Police Dep't ¶ 75 (June 13, 2001) [hereinafter D.C. MOA] (requiring corporation counsel to notify Internal Affairs when a civil claim is filed against the city alleging misconduct by an officer); LAPD Consent Decree, *supra* note 185, ¶ 76 (same); New Jersey Consent Decree, *supra* note 178, ¶ 66 (same).

194. See, e.g., D.C. MOA, *supra* note 193, ¶ 76 (requiring that officers notify Internal Affairs when they are named in a suit); LAPD Consent Decree, *supra* note 185, ¶ 77 (same); Pittsburgh Consent Decree, *supra* note 185, ¶ 26 (same); Oakland Settlement, *supra* note 103, at 26 (same).

195. If the Independent Police Review Authority (IPRA) investigation is pending at the time of settlement, the investigator reviews the file to determine whether there is additional information in the litigation file. If the investigation has been closed with a finding, the IPRA will review the closed case to see whether there is any basis to reopen the investigation. If the investigation was closed because of no affidavit or other cooperation, the IPRA will reopen the investigation if the complainant was deposed in the litigation or is now willing to cooperate. See ILANA B.R. ROSENZWEIG, INDEP. POLICE REVIEW AUTH., ANNUAL REPORT 2007-08, at 13 (2008).

196. MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FIFTEENTH SEMI-ANNUAL REPORT 31, 71 (2002) [hereinafter LASD FIFTEENTH SEMI-ANNUAL REPORT].

197. See Telephone Interview With John Fowler, *supra* note 112.

198. Buffalo MOA, *supra* note 188, ¶ 24A; Pittsburgh Consent Decree, *supra* note 185, ¶ 26A.

lawsuits, and updates the system to note the disposition of the suits.<sup>199</sup> In addition, the LASD has a separate database to track trends of problematic behavior across department units, stations, and divisions.<sup>200</sup> The LASD also internally investigates claims made in lawsuits for possible discipline of the officer<sup>201</sup> and reviews closed civil litigation files, regardless of “whether [the case was] ultimately won, lost or settled by the County,” for policy and training implications.<sup>202</sup> Two separate police auditors evaluate lawsuits as part of their review of department practices.<sup>203</sup>

The other jurisdictions in my study use information from lawsuits in a variety of more limited ways. Appendix B shows the range of policies adopted by these departments.

Apart from these five policies, some police departments are also making efforts to reduce the costs of litigation through mediation and early settlements.<sup>204</sup> Although valuable in their own right, these efforts to reduce the costs of lawsuits do not further the goal of deterrence: They are not intended to reduce the likelihood that future unconstitutional acts will occur, but instead seek to make those suits less costly.<sup>205</sup> Accordingly, these efforts are not considered here.

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199. LASD FIRST SEMI-ANNUAL REPORT, *supra* note 178, at 19.

200. MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, SEVENTH SEMI-ANNUAL REPORT 93–94 (1997) [hereinafter LASD SEVENTH SEMI-ANNUAL REPORT].

201. See, e.g., MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, SECOND SEMI-ANNUAL REPORT 39–40 (1994).

202. LASD FIRST SEMI-ANNUAL REPORT, *supra* note 178, at 34.

203. Merrick Bobb was appointed in 1993 to oversee the implementation of the Kolts Commission's recommendations. Bobb's twenty-five semiannual reports about the LASD can be found at <http://www.parc.info> (last visited Mar. 27, 2010). A second police auditor, the Office of Independent Review, evaluates investigations by LASD Internal Affairs, and separately reviews allegations of misconduct. For a description of the activities of the Office of Independent Review, see OFFICE OF INDEP. REVIEW, COUNTY OF L.A., FIRST REPORT 1–4 (2002), available at <http://www.laoir.com/report1.pdf>.

204. For a comprehensive study of the risk managers who engage in these and other activities to reduce the costs of litigation, see CAROL A. ARCHBOLD, POLICE ACCOUNTABILITY, RISK MANAGEMENT, AND LEGAL ADVISING (2004). Archbold's study suggests that these risk managers primarily review policies in light of legal developments that are unrelated to cases filed against the department and its officers. See *id.* at 89–96. To the extent that these advisors are reactive—that is, to the extent that they respond to suits filed against the department or its officers—this study suggests that these advisors may focus more on reducing the amounts paid in settlements and judgments than on reducing the frequency of the underlying violations. See *id.* at 99–101; see also *id.* at 98 (pointing to the need for more research regarding the proactive and reactive responsibilities of police risk managers).

205. Indeed, efforts to reduce the costs of litigation can conflict with interests in preventing future misconduct: “The desire to prevail—or at least minimize loss—in the context of litigation must compete with the Department's need to deal with the public fairly and to address deficiencies responsibly and thoughtfully.” OFFICE OF INDEP. REVIEW, COUNTY OF L.A., SEVENTH ANNUAL REPORT 16 (2009), available at <http://www.laoir.com/reports/SeventhAnnualRept.pdf>.

## 2. Prevalence

No study has explored how many police departments nationwide gather information from lawsuits against them, much less what types of information they use or how they use that information.<sup>206</sup> There are, however, two reasons to believe that relatively few departments have these types of policies.

### a. Jurisdictions in Study

Most of the twenty jurisdictions in my study that gather information from suits do so involuntarily. The Los Angeles Police Department (LAPD) resisted gathering and analyzing information from lawsuits for over a decade, contravening the recommendations of two blue ribbon commissions.<sup>207</sup> Only after the U.S. Department of Justice sued the LAPD and the parties entered into a consent decree did the department begin to change its practices in this area.<sup>208</sup> The Portland police chief and mayor also resisted their police auditor's recommendation to investigate allegations made in lawsuits.<sup>209</sup>

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206. In the Conclusion, *infra*, these and related questions are identified as subjects for future research.

207. When the Christopher Commission investigated the workings of the Los Angeles Police Department in 1991, in the wake of the beating of Rodney King, the commission found that the problem of excessive force was, in part, attributable to the department's failure to "analyze and act upon" information in lawsuits. CHRISTOPHER COMMISSION REPORT, *supra* note 110, at iv. The commission recommended that the LAPD "establish procedures to monitor the results of civil litigation and make use of the information obtained." *See id.* at 60. Almost ten years later, following the Rampart scandal, the Rampart Commission criticized the LAPD for its continued "disengagement" from civil suits and for failing to implement the Christopher Commission's recommendations. RAMPART COMMISSION REPORT, *supra* note 110, at 14–15.

208. *See* LAPD Consent Decree, *supra* note 185; *see generally* L.A. POLICE DEP'T, REPORTS OF THE INDEPENDENT MONITOR, <http://www.kroll.com/about/library/lapd> (last visited Mar. 24, 2010) (chronicling policy and practice changes in the LAPD following the LAPD Consent Decree).

209. Prior to 2004, the Portland Police Bureau "generally did not review or investigate tort and civil rights claims for disciplinary action unless the complaining party also filed a citizen complaint." INDEP. POLICE REVIEW DIV., OFFICE OF THE CITY AUDITOR, THE CITY OF PORTLAND'S HANDLING OF TORT CLAIMS ALLEGING POLICE MISCONDUCT: A NEED FOR CONSISTENT REFERRALS TO THE INTERNAL AFFAIRS DIVISION 3 (2004). Portland actually had a city ordinance preventing internal investigations while a lawsuit was pending. *Id.* In 2004, the police auditor, called the Independent Police Review Division (IPR), recommended that the IPR begin to review and investigate lawsuits in the same manner that it reviewed civilian complaints. *Id.* The mayor argued that internal investigations would be "a violation of . . . fiduciary responsibility" to the city's taxpayers because the findings of these investigations might result in higher settlements. Letter From Vera Katz, Mayor, Portland, Or. to Gary Blackmer, City Auditor, Portland, Or. (Aug. 26, 2004) (on file with author). The chief of police argued it was the job of the city attorney, not the police auditor, to review lawsuits. *See* Letter From Chief Derrick Foxworth, Portland Bureau of Police to Gary Blackmer, City Auditor, Portland, Or. (Aug. 27, 2004) (on file with author). Ultimately, the Portland City Council did amend the local ordinance preventing investigations of claims made in litigation. *See* Telephone Interview With

Other jurisdictions in my study may not have actively avoided information from lawsuits, but did not gather this information until they were required to do so. The twelve departments that were successfully sued implemented relevant policies as conditions of their settlements.<sup>210</sup> Auditors who review information from lawsuits were often appointed after high-profile incidents or calls for increased police accountability.<sup>211</sup>

That policies to gather and analyze information from lawsuits have been adopted involuntarily by the jurisdictions in my study does not prove that the failure to use this information is widespread. It does, however, support this conclusion. One can imagine that in jurisdictions without legal or political pressures to increase accountability, these types of policies would be less frequently adopted.

#### b. National Data

Limited available information about national practices supports the conclusion that only a small number of jurisdictions try to gather and analyze information from suits. Of all of the policies, early intervention systems appear to be the most popular. Early intervention systems have been used by law enforcement agencies since the early 1970s to identify problem officers and trends,<sup>212</sup> and are widely recognized by police experts and administrators as the

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Richard Rosenthal, *supra* note 112; Portland, Or. City Code ch.3.21 § 110(B) (codification of the new ordinance).

210. For references to these twelve consent decrees and memoranda of agreement, see *supra* note 103.

211. Chicago appointed a police auditor—who has authority to investigate claims made in litigation for disciplinary and policy concerns—only after a high-profile incident in which a police officer was videotaped assaulting a customer at a bar. See Telephone Interview With Ilana Rosensweig, *supra* note 112. Boise created an ombudsman's office to investigate complaints about the police in 1999 after the Boise police were involved in six shootings that killed eight people in less than a year and a half. Patrick Orr, *10 Years After Pierce Murphy Was Hired to Investigate Complaints About Boise Police, Case Numbers Have Dropped by Half*, IDAHO STATESMAN, Mar. 25, 2009; see also Telephone Interview With Pierce Murphy, *supra* note 112 (describing creation of the ombudsman's office). The Seattle auditor, the Office of Professional Responsibility, was created by the Seattle City Council in 1997 "in response to concerns by various segments of the community." Seattle City Council Office of Professional Accountability, <http://www.seattle.gov/council/oparb> (last visited Mar. 27, 2010). The Los Angeles Sheriff's Department appointed a police auditor only after the Los Angeles County Board of Supervisors convened the Kolts Commission to review the department following several controversial police shootings and over \$38 million dollars spent in settlements, judgments, and legal fees on excessive force cases in the prior five years. See MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, TENTH SEMI-ANNUAL REPORT 12–13 (1999) [hereinafter LASD TENTH SEMI-ANNUAL REPORT].

212. See WALKER, *supra* note 156, at 106. Some police auditors conduct trend analysis without an early intervention system. See *supra* note 190 and accompanying text.

“centerpiece” or “linchpin” of recent police accountability efforts.<sup>213</sup> A recent study, however, found that 68 percent of municipal departments and 88 percent of sheriffs’ departments with more than one hundred employees do not have early intervention systems.<sup>214</sup> And even when departments have early intervention systems, the systems do not necessarily track information from lawsuits.<sup>215</sup>

There have been no studies of the number of police departments that investigate claims made in lawsuits. However, experts estimate that the number is quite small. In 2007, the Police Assessment Resource Center, which regularly evaluates police departments’ practices, commended a small department for “being among the vanguard of departments nationwide that routinely conduct an Internal Affairs investigation when the municipality receives a claim or lawsuit that alleges wrongdoing by a member of its police department.”<sup>216</sup> Beyond those departments that have been subject to consent decrees, or have a police auditor, most departments do not seem to engage in this analysis.<sup>217</sup> And only a very small number of jurisdictions—a subset of the two dozen or so departments with police auditors or under court supervision—appear to review closed litigation files or the results of cases for any purpose.<sup>218</sup>

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213. See ROBERT C. DAVIS, CHRISTOPHER W. ORTIZ, NICOLE J. HENDERSON, JOEL MILLER & MICHELLE K. MASSIE, TURNING NECESSITY INTO VIRTUE: PITTSBURGH’S EXPERIENCE WITH A FEDERAL CONSENT DECREE 37 (2002), available at <http://www.cops.usdoj.gov/ric/ResourceDetail.aspx?RID=217>; WALKER, *supra* note 156, at 101. The Department of Justice and the U.S. Commission on Civil Rights have recommended that departments develop early intervention systems. U.S. DEPT’ OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY: EXAMPLES OF PROMISING POLICE PRACTICES AND POLICIES 10 (2001); U.S. COMM’N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES 81 (1981). The Commission on Accreditation for Law Enforcement Agencies (CALEA) now requires that all large law enforcement agencies have early intervention systems in order to be accredited. See CALEA, Accreditation and Civil Liability, <http://www.calea.org/Online/newsletter/No89/AccdCivilLiability.htm> (last visited Mar. 27, 2010).

214. See INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 21, at 52; see also SAMUEL WALKER, GEOFFREY P. ALPERT & DENNIS J. KENNEY, NAT’L INST. OF JUSTICE, EARLY WARNING SYSTEMS: RESPONDING TO THE PROBLEM OFFICER 2 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188565.pdf> (noting that 27 percent of law enforcement agencies serving populations of 50,000 or more had early intervention systems, but those systems did not necessarily track information about litigation). The largest departments, with over one thousand sworn officers, are more likely to have early intervention systems. Eighty-two percent of sheriffs’ departments and 53 percent of municipal departments with over one thousand sworn officers had early intervention systems as of 2003. See INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 21, at 52.

215. See WALKER, *supra* note 156, at 108. There has been no study of the percentage of early intervention systems that track civil claims. Anecdotal evidence suggests that at least some of these systems do not track lawsuits. The Phoenix Police Department’s early intervention system, regarded as one of the most sophisticated systems in the country, tracks thirty-seven indicators but does not track civil suits filed. See INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 21, at 57.

216. JEROME, FARMINGTON REPORT, *supra* note 105, at 76.

217. See Correspondence With Oren Root, *supra* note 112.

218. See *id.* See also *infra* Appendix B for those jurisdictions in my study that analyze closed claims.

#### D. Implementation of Policies

Up to this point, the discussion has focused on the nature and prevalence of policies that incorporate information from lawsuits into decisionmaking. But the fact that a department has a policy does not mean that the policy is followed. Reports by court-appointed monitors and police auditors—and my conversations with some of these monitors and auditors—reveal several recurring impediments that have delayed, compromised, and defeated efforts to gather, analyze, store, and communicate information from lawsuits.<sup>219</sup> As the following descriptions reveal, some policies appear to be stymied by technological glitches<sup>220</sup> or human error,<sup>221</sup> despite officials' good faith efforts to gather and analyze relevant information. And other policies appear to be sabotaged by those hiding harmful information<sup>222</sup> or maintaining the law enforcement "code of silence."<sup>223</sup>

219. I have only included evidence about the three policies used most often by departments in this study—early intervention systems, trend analysis, and internal investigations. There is insufficient information to offer any coherent description of efforts to implement the policies to review closed litigation files or discipline officers following findings of liability in civil cases.

220. Technological error is increasingly likely as systems become more complicated. See, e.g., Radner, *supra* note 18, at 640 ("[A]s the size of the information processing task increases, the minimum delay must also increase unboundedly, even for efficient networks and even if the number of available processors is unlimited.").

221. Human error is another well-recognized barrier to information processing. See, e.g., Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 120–21 (1997) ("As the children's game of telephone inevitably illustrates, the mere act of retransmission makes it increasingly probable that the final message will not be the same as the one first sent.").

222. The potential for people to conceal information adverse to their interests has been a subject of concern and consideration by information and organizational theorists. See, e.g., KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 75 (1974) (identifying "the tendency . . . to filter information in accordance with one's preconceptions"); CYERT & MARCH, *supra* note 15, at 81–82, 109–10 (considering the effects of "both conscious and unconscious bias in expectations" on information); Jane E. Dutton et al., *Reading the Wind: How Middle Managers Assess the Context for Selling Issues to Top Managers*, 18 STRATEGIC MGMT. J. 407, 409 (1997) ("[P]eople tend to control . . . information about themselves that will affect others' perceptions of them."); Martha S. Feldman & James G. March, *Information in Organizations as Signal and Symbol*, 26 ADMIN. SCI. Q. 171, 176 (1981) ("Information is gathered and communicated in a context of conflict of interest and with consciousness of potential decision consequences."); Langevoort, *supra* note 221, at 119–26 (describing how line staff may hide damaging information from their supervisors, and supervisors may hide damaging information from higher-level managers); Malloy, *supra* note 19, at 486 (describing the cultural barriers to lateral information flows); R. Joseph Monsen Jr. & Anthony Downs, *A Theory of Large Managerial Firms*, 73 J. POL. ECON. 221, 236 (1965) (observing that firms develop structures that "tend to . . . provide biased information to top management").

223. For illuminating discussions of the organizational culture of policing and, particularly, its "code of silence," see SKOLNICK & FYFE, *supra* note 51, at 112 (positing that the police code of silence is "an extreme version of a phenomenon that exists in all human groups" but "is exaggerated in some police departments and some police units"); Armacost, *supra* note 5, at 456 (identifying the code of silence as one aspect of police organizational culture that "permit[s], sanction[s], or even encourage[s]"

## 1. Early Intervention Systems

The development and design of early intervention systems can be delayed for a variety of reasons. Some delays have been attributed to interactions with vendors creating the software and hardware.<sup>224</sup> Other delays are the result of negotiations between the police department, the court-appointed monitor, and the Department of Justice about the specifications of the system.<sup>225</sup> In Chicago, where there is no pressure of a court order, responsibility for the early intervention system has been passed back and forth between the department, an outside developer, and other government agencies for several years.<sup>226</sup>

Once an early intervention system has been developed and designed, the department must have the infrastructure to support the system. In Detroit, officials complained that they needed more computers with “adequate memory” and a “regular power supply” to use their early intervention system—over six years after they were ordered to create the system.<sup>227</sup> Although Albuquerque boasted of its early intervention system, an auditor found that it was created and

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police misconduct); David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 486–88 (1992) (noting that the code of silence frustrates internal investigations of misconduct claims).

224. See ROBIN BUSCH-WHEATON ET AL., NINTH STATUS REPORT OF THE INDEPENDENT MONITOR, DELPHINE ALLEN ET AL. V. CITY OF OAKLAND ET AL. 70 (2007), available at <http://opdimt.net/uploads/Ninth%20IMT%20Status%20Report%20FINAL.pdf> (noting delays from the vendor creating the early intervention system in Oakland).

225. The Detroit Police Department, which was required by court order to create an early intervention system, developed a data plan and report protocol quickly, but the police department apparently failed to include some of the data fields that were required by the consent judgment. The monitor’s reports reflect that the Department of Justice, monitor, and Detroit Police Department negotiated about and modified the system multiple times over a period of years. See SHERYL L. ROBINSON, KROLL, INC., REPORT OF THE INDEPENDENT MONITOR FOR THE DETROIT POLICE DEPARTMENT, REPORT FOR THE QUARTER ENDING MAY 31, 2004 (2004), available at [http://www.kroll.com/library/detroit/DPD\\_Q3\\_Report\\_07-15-2004.pdf](http://www.kroll.com/library/detroit/DPD_Q3_Report_07-15-2004.pdf).

226. Although Chicago’s initial system development progressed quickly, “changes in management seemed to stymie progress for a while as new managers became familiar with their new roles.” JILL DUBOIS, WESLEY G. SKOGAN, & SUSAN M. HARTNETT, CLEAR AND I-CLEAR: AN INTERIM STATUS REPORT ON NEW INFORMATION TECHNOLOGY IN CHICAGO AND ILLINOIS 4 (2006), available at <http://www.northwestern.edu/ipr/publications/papers/iclearinterim.pdf>. Then, when the project ran low on money, policymakers decided to remove the outside system designer, Oracle, from the project and let Chicago Police Department employees develop the early intervention system. Then the employee in charge of developing the system left the department and managed the system from another city agency. When responsibility for the early intervention system returned to the department, staff had changed, “leaving the project with virtually no institutional memory or expertise.” *Id.* at 14. Once the early intervention system was tested, fundamental flaws were discovered. The Oracle consultant was then brought back and “work began anew.” *Id.*

227. See SHERYL ROBINSON WOOD, KROLL, INC., REPORT OF THE INDEPENDENT MONITOR FOR THE DETROIT POLICE DEPARTMENT, REPORT FOR THE QUARTER ENDING FEBRUARY 28, 2009, at 45 (2009), available at [http://www.kroll.com/library/detroit/DPD\\_Q22\\_Report\\_04-20-2009.pdf](http://www.kroll.com/library/detroit/DPD_Q22_Report_04-20-2009.pdf).

run by one part-time volunteer on a single computer in Internal Affairs that police department commanders could not access.<sup>228</sup>

And, once in place, the systems may be improperly used. Monitors and auditors have found that officials both enter inaccurate and incomplete information,<sup>229</sup> and misunderstand what information they can get out of the systems. A station commander in the Los Angeles Sheriff's Department had a civilian programmer spend one thousand hours to create a database that generated reports about uses of force and civilian complaints—a report that could have been generated by the LASD's early intervention system. Twenty-four other LASD stations and field operations adopted this alternative database before learning that it was redundant.<sup>230</sup>

As the above examples suggest, developing and implementing an early intervention system can be a lengthy process. Even departments under court order have spent several years developing their systems.<sup>231</sup> For those departments without the pressures of a court order, it may take even longer.<sup>232</sup>

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228. See JEROME, ALBUQUERQUE REPORT, *supra* note 105, at 79–80.

229. The police department in Farmington, New Mexico, has an early intervention system that can track information about civil suits against officers, as well as civilian complaints and nine other factors. However, when the department was audited, it was discovered that the department only used the system to track civilian complaints. See JEROME, FARMINGTON REPORT, *supra* note 105, at 97–98. In Pittsburgh, the city audited information in their early intervention system and found some of it to be inaccurate. Even after the city cleaned the data, the auditor found that some of the data remained “questionable.” PUB. MGMT. RES., AUDITOR'S SIXTH QUARTERLY REPORT, QUARTER ENDING FEBRUARY 16, 1999, at 5–6, available at [http://parc.info/client\\_files/CityofPittsburghAuditorQuarterlyReport6.pdf](http://parc.info/client_files/CityofPittsburghAuditorQuarterlyReport6.pdf). In Washington, D.C., the court-appointed monitor found that there was so little historical data in the early intervention system that it could not be used to identify officers with a history of misconduct. See MICHAEL R. BROMWICH, TWENTY-THIRD QUARTERLY REPORT OF THE INDEPENDENT MONITOR FOR THE METROPOLITAN POLICE DEPARTMENT 86 (2008), available at <http://www.policemonitor.org/080131report.pdf>. An audit of the early intervention system used by the Los Angeles Sheriff's Department found that the data was “often sloppy and error-ridden”: 50–73 percent of citizen complaint packages were rejected for errors, and it often took six months for data to be entered into the system. MERRICK L. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T SIXTEENTH SEMI-ANNUAL REPORT 43–44 (2003) [hereinafter LASD SIXTEENTH SEMI-ANNUAL REPORT]; see also WOOD, *supra* note 227, at 45 (finding that Detroit police officers may intentionally input inaccurate information).

230. LASD SIXTEENTH SEMI-ANNUAL REPORT, *supra* note 229, at 58; see also *id.* at 57–58 (describing several LASD supervisors' incorrect beliefs that their early intervention system could not perform certain basic functions).

231. The early intervention system in Washington, D.C. has been in development since 2001 but was still not fully operational when the court terminated the memorandum of agreement on April 1, 2008. See BROMWICH, *supra* note 229, at 83–90. The Detroit Police Department's early intervention system, which was mandated by its memorandum of agreement with the Department of Justice in 2003, was still not operational as of March 2010. See David Ashenfelter, *City Officials Cop to Mistake: Police Monitor System a Dud*, DETROIT FREE PRESS (Mar. 2, 2010), available at <http://www.freep.com/article/20100302/NEWS01/303020001/1322/City-officials-cop-to-mistake-Police-monitor-system-a-dud>. The early intervention system mandated in the consent decree with the New Jersey State Troopers was supposed to be operational within 180 days, but it took more than five years. See PUB. MGMT. RES., MONITOR'S EIGHTH REPORT 52 (2003), available at



Finally, even with functional early intervention systems, supervisors may analyze information from the system in a biased manner. Once an early intervention system flags an officer, the supervisor must review data in the system and identify ways to reduce the likelihood of future problems. In one department, the auditor found that supervisors' reports "read as if they were written by union delegates or a lawyer for the employee," and did not include information harmful to the officer.<sup>233</sup>

## 2. Trend Analysis

To the extent that trend analysis is performed with data from early intervention systems, it will suffer the same problems of delay, bad data, and ineffective use described above.<sup>234</sup> Those jurisdictions that do not use a computerized system will analyze trends in a less systematic way. Richard Rosenthal, the police auditor in Denver, has an employee who can analyze trends, but Rosenthal must be able to spot the possible trend before the analysis can be done.<sup>235</sup> Rosenthal said that he tries to identify trends across claims in lawsuits and other Internal Affairs investigations by "trying to pay attention," but acknowledges that it is difficult to spot trends in this manner.<sup>236</sup>

Even when departments have the necessary data, their methodology and results may be faulty. For example, when the Los Angeles Sheriff's Department's auditor identified one unit with a disproportionately high number of shootings, the LASD analyzed the data and concluded that the shootings in that unit

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[http://www.state.nj.us/lps/monitors\\_report\\_8.pdf](http://www.state.nj.us/lps/monitors_report_8.pdf); PUB. MGMT. RES., MONITOR'S TENTH REPORT 48-49 (2004), available at [http://www.state.nj.us/lps/monitors\\_report\\_10.pdf](http://www.state.nj.us/lps/monitors_report_10.pdf). Other delays have been significant, but less egregious: The Oakland Police Department was scheduled to have its early intervention system functioning a year after it entered into a settlement agreement and completed the system only two years behind schedule. See ROBIN BUSCH-WHEATON ET AL., TENTH STATUS REPORT OF THE INDEPENDENT MONITOR, DELPHINE ALLEN ET AL. V. CITY OF OAKLAND ET AL. 75-76 (2007), available at <http://www2.oaklandnet.com/oakca/groups/police/documents/webcontent/dowd005041.pdf>.

232. Chicago has been developing its system since 2001, and it may still be years from completion. See Telephone Interview With Craig Futterman, *supra* note 116.

233. LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 196, at 53.

234. The Oakland Police Department can track trends through its early intervention system, but the court-appointed monitors of the consent decree believe that the system is underutilized. See Telephone Interview With Kelli Evans and Christy Lopez, *supra* note 111.

235. See Telephone Interview With Richard Rosenthal, *supra* note 112.

236. *Id.* Similarly, the Portland Independent Police Review Division and the LASD's Office of Independent Review identify trends in cases by individually reviewing pending and closed cases (including civil claims and civilian complaints). See GARY BLACKMER & LESLIE STEVENS, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2005-2006, at 21-22 (2006). Chicago's police auditor also conducts trend analysis in this manner. See Telephone Interview With Ilana Rosensweig, *supra* note 112.

were not different from the norm in any significant way.<sup>237</sup> When the LASD's independent auditor evaluated the same data, he identified numerous faults with the department's analysis and confirmed that the shooting statistics were significantly higher than in other comparable units.<sup>238</sup>

### 3. Investigations

There are also multiple barriers preventing the complete investigation of claims made in civil rights suits. Police department investigators and lawyers for both plaintiffs and defendants have all, at times, impeded the investigations of these claims.

As a matter of policy, Internal Affairs may suspend their investigation of a civilian complaint if a lawsuit is pending.<sup>239</sup> If an investigation is suspended while a case is pending—which can sometimes be a matter of years—it is very difficult to take disciplinary action against an officer once the case is resolved. By that time, “the [officer] in question may either have gotten into more trouble or the event may have receded so far into the past that discipline [is] no longer feasible or meaningful.”<sup>240</sup> Statutory time limits on administrative

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237. MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, NINTH SEMI-ANNUAL REPORT 11 (1998) [hereinafter LASD NINTH SEMI-ANNUAL REPORT].

238. *Id.* at 11–16. There has been a similar disagreement about whether available data show that the Los Angeles Police Department officers engage in racial profiling. The city of Los Angeles commissioned a study of 810,000 field data reports completed by LAPD officers whenever they conduct a vehicle stop. The analysts hired by the city found that minorities who were stopped were no more likely than whites to be frisked, searched, cited, or arrested. See GEOFFREY P. ALPERT ET AL., ANALYSIS GROUP, INC., PEDESTRIAN AND MOTOR VEHICLE POST-STOP DATA ANALYSIS REPORT (2006), available at [http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/LAPD\\_Data\\_Analysis\\_Report\\_07-5-06.pdf](http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/LAPD_Data_Analysis_Report_07-5-06.pdf). Yale Law Professor Ian Ayres reviewed the identical data and the city's report at the request of the ACLU of Southern California. Ayres criticized the city analysts' methodology on multiple grounds and found that, contrary to the city's report, African Americans and Hispanics are over-stopped, over-frisked, and over-searched relative to whites. See IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT, at i (2008), available at <http://www.aclu-sc.org/documents/view/47>. Former LAPD Chief William Bratton rejected the data and findings in Ayres's report. See Joel Rubin, *LAPD Rejects Finding of Bias*, L.A. TIMES, Jan. 14, 2009, at B4.

239. See Telephone Interview With Calvin Anderson, *supra* note 112 (Philadelphia Internal Affairs investigations are suspended when a lawsuit is filed.); Telephone Interview With Greg Baker, *supra* note 113 (Cincinnati Internal Affairs investigations are suspended when a lawsuit is filed.); Telephone Interview With Kennetha Sawyer, *supra* note 112 (Nashville Internal Affairs investigations are suspended when a lawsuit is filed.). This was also the practice in Oakland before the court-appointed monitor intervened. See RACHEL BURGESS ET AL., INDEP. MONITORING TEAM, SECOND QUARTERLY REPORT OF THE INDEPENDENT MONITOR, DELPHINE ALLEN ET AL. V. CITY OF OAKLAND ET AL. 8 (2004), available at [http://opdimt.net/uploads/Second\\_Report.pdf](http://opdimt.net/uploads/Second_Report.pdf).

240. KOLTS COMMISSION REPORT, *supra* note 110, at 193.

investigations may also prevent investigations from being reopened.<sup>241</sup> And even if there is a policy to reopen investigations, that policy may be followed inconsistently or not at all.<sup>242</sup>

Internal investigations may also be biased if they are not separate from the investigation conducted to defend the case. As auditors found when they reviewed the investigative process in Farmington, New Mexico, the police department “had not separated these two functions, leading in some files [the auditors] reviewed to investigations that read like legal briefs for denying liability rather than objective, thorough investigations of the facts to determine whether policy or other conduct violations occurred.”<sup>243</sup>

City attorneys’ offices also resist internal investigations of claims made in litigation.<sup>244</sup> Some city attorneys discretely “pocket[ ]” information developed during the lawsuit that might reflect poorly on their client.<sup>245</sup> Other city attorneys more explicitly refuse to assist internal investigations.<sup>246</sup> One auditor has had the authority to investigate claims made in lawsuits for three years, but

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241. In the Los Angeles Sheriff’s Department, information from lawsuits is not made available to Internal Affairs until after the completion of the suit; by that time, the statutory time limit for administrative investigations may have passed. See OFFICE OF INDEP. REVIEW, *supra* note 203, at 56. In other jurisdictions, the formal suspension of the internal investigation while a lawsuit is pending will toll the statute of limitations on the administrative proceedings. This is the practice in Chicago. See Telephone Interview With Ilana Rosensweig, *supra* note 112.

242. For example, the Oakland monitors found that suspended internal investigations were never reopened. See BURGESS ET AL., *supra* note 239, at 8. But see RACHEL BURGESS ET AL., INDEP. MONITORING TEAM, ELEVENTH STATUS REPORT OF THE INDEPENDENT MONITOR (2008), available at [http://opdimt.net/uploads/Eleventh\\_Report.pdf](http://opdimt.net/uploads/Eleventh_Report.pdf) (reporting that, four years later, the Oakland Internal Affairs Division has begun investigating claims made in litigation).

243. JEROME, FARMINGTON REPORT, *supra* note 105, at 78.

244. Police auditors have offered several possible ethical and strategic explanations for this reluctance to share information. The Portland auditor posited that a lawyer representing an individual officer may believe that turning over information about her client to the police department would violate her ethical obligation to represent her client’s interests. See INDEP. POLICE REVIEW DIV., *supra* note 209, at 15–16. The Kolts Commission posited that an attorney may not want to “strongly advocate terminating an officer for misconduct knowing at the same time that the fact of termination may increase the exposure of the [city or county] in litigation arising from that misconduct.” KOLTS COMMISSION REPORT, *supra* note 110, at 194. And the LASD auditor posited that lawyers might avoid disclosing damaging information about an officer if they are “concerned about their individual track record in litigation and their perceived effectiveness at minimizing judgments and settlements.” LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 196, at 80.

245. LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 196, at 88; see also Telephone Interview With Ilana Rosensweig, *supra* note 112 (noting that attorneys representing the city might not want to disclose evidence of systemic problems or problems with an individual officer that are revealed during the course of litigation).

246. County counsel for the Los Angeles Sheriff’s Department has “blocked” the LASD auditor from gathering documents generated during litigation. See OFFICE OF INDEP. REVIEW, *supra* note 203, at 55 (2002).

the city attorney's office continues to refuse to provide him with the notices of claim he needs to begin the investigations.<sup>247</sup>

Finally, plaintiffs' attorneys sometimes make it difficult for investigations to occur. Anecdotal evidence suggests that plaintiffs' attorneys may not want their clients to participate in internal investigations for fear that the clients' statements to investigators might be used against them during the lawsuit.<sup>248</sup> The police auditor in Chicago, the Independent Police Review Authority (IPRA), asserts that plaintiffs' attorneys prevent plaintiffs and witnesses from cooperating with investigators, "effectively shutting off the IPRA's access to information."<sup>249</sup> Others argue that the IPRA could continue these investigations with other evidence but chooses not to do so.<sup>250</sup>

#### E. Conclusion

Over two-thirds of police departments and almost 90 percent of sheriffs' departments with over one hundred sworn officers have no early intervention system, and those with such systems may not track information about lawsuits.

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247. See Telephone Interview With Richard Rosenthal, *supra* note 112. Rosenthal recently arranged to get notices of claim from another city agency and can only now begin investigating these claims. *Id.*

248. "Lawyers bringing civil lawsuits against police officers [in New York] told Human Rights Watch that they often do not recommend that their clients file a complaint with [Internal Affairs] because the information provided is often used against the client." HUMAN RIGHTS WATCH, *supra* note 19, at 306. PARC's audit of the Farmington Police Department's investigations of claims made in lawsuits revealed the same practice: Complainants who had also filed lawsuits did not want to speak to the investigators for fear that it would have negative consequences in their case. See JEROME, FARMINGTON REPORT, *supra* note 105, at 78.

249. See ROSENZWEIG, *supra* note 195, at 8.

250. There appears to be some merit to this argument. The first step of the IPRA's investigation is to gather detailed interviews from the victim and other witnesses and participants. *Id.* The IPRA requests that anyone making a complaint or giving a statement sign a sworn affidavit, and the IPRA closes the investigation in most cases if it does not receive an affidavit. *Id.* The IPRA asserts that, under Illinois law and Chicago police officer union contracts, it cannot interview an officer unless it obtains a sworn affidavit regarding allegations of misconduct except under rare circumstances. *Id.* at 8 n.1. Approximately 40 percent of IPRA investigations are closed because they cannot satisfy the affidavit requirement. *Id.* at 8. However, the agreement between the city of Chicago and the Chicago Fraternal Order of Police, which represents Chicago police officers, provides that an investigation can proceed without an affidavit if the head of the IPRA or Internal Affairs reviews available evidence and concludes that "it is necessary and appropriate for the investigation to continue." Fraternal Order of Police Chicago Lodge No. 67, Agreement Between Fraternal Order of Police Chicago Lodge No. 7 and the City of Chicago, 116 app. L ¶ 7, available at [http://www.chicagofop.org/Contract/Contract\\_03-07.pdf](http://www.chicagofop.org/Contract/Contract_03-07.pdf). In other words, the IPRA could continue to investigate at least some of these claims after viewing available documentary evidence, written statements, or depositions generated during the litigation, but it does not do so as a matter of practice. See Telephone Interview With Craig Futterman, *supra* note 116.

Law enforcement agencies use other methods to gather and analyze information from lawsuits even less frequently.

The minority of departments with policies to use information from lawsuits in personnel and policy decisions struggle to implement these policies. A range of problems—including hardware and software failures,<sup>251</sup> personnel limitations,<sup>252</sup> and intentional efforts to hide harmful information<sup>253</sup>—delay, compromise, and defeat efforts aimed at incorporating information from lawsuits into decisionmaking.

There is every reason to believe that other departments attempting to implement these types of policies will struggle equally if not more than the departments in my study. Court-appointed monitors and police auditors have access to information about the inner workings of their departments. And monitors and auditors have been able to find out when policies are not being followed, draw the attention of departments and the general public to these failings, and periodically evaluate whether the problems have been remedied. Yet, as my research shows, even these scrutinized departments continue to struggle. In departments without external oversight, it would be even more difficult to identify and correct similar problems.

Given the infrequency with which departments seek to gather information from lawsuits, and the barriers when they do try to gather this information, it seems fair to conclude that most law enforcement officials know little about lawsuits alleging misconduct by their officers.

### III. EVIDENCE OF INFORMED DECISIONMAKING

Thus far, I have shown that many law enforcement agencies do not gather information about past lawsuits. And without information about past suits, law enforcement can hardly make the types of informed decisions presupposed by judicial and scholarly theories of deterrence. Yet, my research suggests that the inverse may also be true: When officials review information from lawsuits, they can—and do—make informed decisions aimed at reducing misconduct. Just as governments and private corporations have long used retrospective data in a variety of contexts to identify and correct problematic

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251. See, e.g., *supra* notes 224, 227 and accompanying text (describing problems in implementing early intervention systems).

252. See, e.g., *supra* notes 229–230 and accompanying text (describing errors in inputting information and generating reports).

253. See, e.g., *supra* notes 244–249 and accompanying text (describing attorneys hiding relevant information to undermine internal investigations).

behavior, some law enforcement agencies have successfully used information from suits in their efforts to identify and correct police misbehavior.

#### A. Informed Decisionmaking in Law Enforcement

When departments have policies to gather and analyze information from lawsuits—and overcome barriers to implementation—these policies can have a tangible effect on decisionmaking. For example, the Los Angeles Sheriff's Department's early intervention system has significantly reduced officer misconduct. When LASD deputies were placed on "Performance Review"—the intervention for at-risk officers identified by the system—the deputies were involved in fewer shootings and uses of force and received fewer civilian complaints.<sup>254</sup> After their two-year Performance Review period, deputies' shootings, uses of force, and civilian complaints dropped again.<sup>255</sup> Another recent study found that police managers "overwhelmingly report that their [early intervention system] has had some positive impact on the quality of on-the-street police service" as well as a positive impact on police supervision.<sup>256</sup>

Police auditors and officials have used lawsuit data (with other data) to identify trends in types of misconduct alleged. In Portland, a number of lawsuits and other complaints suggested that officers did not understand their authority to enter homes and effect arrests without a warrant. After identifying this trend, the auditor and the city attorney's office produced a training video about officers' authority in this area.<sup>257</sup>

Lawsuit data have also been used to identify subdivisions of law enforcement agencies that get into trouble. The LASD auditor's trend analysis revealed two units with a disproportionate number of shootings and "60% of the entire bill for settlements of force cases."<sup>258</sup> The auditor then spent several weeks diagnosing the reasons for these units' problems.<sup>259</sup> Based on this research and analysis, the auditor made several policy recommendations, and the units' shooting statistics dropped during the next two years.<sup>260</sup> Internal investigations

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254. See LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 196, at 3.

255. See *id.*

256. WALKER, *supra* note 156, at 126.

257. See BLACKMER & STEVENS, *supra* note 236, at 22. The auditor also provided additional training as a result of two other legal issues arising in individual civil claims. *Id.* Later reports by the Portland Independent Police Review Division do not identify warrantless searches as a continuing problem, nor do the reports affirmatively conclude that these trainings changed officer behavior.

258. See LASD SEVENTH SEMI-ANNUAL REPORT, *supra* note 200, at 52.

259. LASD NINTH SEMI-ANNUAL REPORT, *supra* note 237, at 9.

260. See MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FOURTEENTH SEMI-ANNUAL REPORT 79–92 (2001) [hereinafter LASD FOURTEENTH SEMI-ANNUAL REPORT].

of claims made in litigation have led to officer discipline,<sup>261</sup> and the review of closed litigation files has led to policy changes.<sup>262</sup>

Limited available evidence suggests that early intervention and other accountability systems do not chill law enforcement activities.<sup>263</sup> In a recent study, 77 percent of police officials reported that their early intervention system had some positive impact on officer behavior, and none reported that their system “caused officers to back off and reduce their activity level.”<sup>264</sup> Eighty-four percent of officials surveyed reported no opposition to early intervention systems by police unions.<sup>265</sup> And only 6 percent of officials reported that early intervention systems had a negative impact on officer morale.<sup>266</sup>

Of the jurisdictions in my study, the LASD has most extensively analyzed the impact of its accountability efforts on officer performance. The LASD auditor studied litigation trends over five years and found a steady decrease in the number of cases filed.<sup>267</sup> When the auditor measured a drop in lawsuits against the department’s crime control activities, he found that “the progress of the Department in limiting its exposure has not come at the expense of police activity in the LASD’s patrol operations.”<sup>268</sup>

Although these law enforcement agencies appear to have successfully integrated information from lawsuits into personnel and policy decisions,

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261. See OFFICE OF INDEP. REVIEW, COUNTY OF L.A., FOURTH ANNUAL REPORT 55–56 (2005), available at <http://www.laoir.com/reports/OIRFall05.pdf> (describing claims in two lawsuits against the LASD that were investigated internally; one was pending when the report was written and the other resulted in discipline of the officer).

262. For a comprehensive review of two investigations undertaken by the LASD’s Office of Independent Review and subsequent recommendations and policy changes, see OFFICE OF INDEP. REVIEW, *supra* note 203, at 31–53. The Christopher Commission and the Kolts Commission, which reviewed practices of the LAPD and the LASD respectively, also used closed litigation files to identify inadequacies in internal investigation procedures. See CHRISTOPHER COMMISSION REPORT, *supra* note 110; KOLTS COMMISSION REPORT, *supra* note 110.

263. It might, admittedly, be difficult to uncover evidence of over-deterrence. If officers were over-deterred by the threat of suit, they might decide not to venture into dangerous neighborhoods or take decisive action to apprehend suspects. It would be difficult to uncover evidence of this sort of timidity. See SCHUCK, *supra* note 5, at 71–73. On the other hand, studies have concluded that early intervention systems have a positive effect on officer behavior and do not result in decreased crime control activities. See *infra* notes 264–268 and accompanying text.

264. For a description of the study’s methodology and results, see SAMUEL WALKER, OFFICE OF CMTY. ORIENTED POLICING SERVS., EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES: A PLANNING AND MANAGEMENT GUIDE 73–91 (2003).

265. *Id.* at 79.

266. *Id.* at 80.

267. See MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF’S DEP’T, TWENTY-FIFTH SEMI-ANNUAL REPORT 117 (2008) [hereinafter LASD TWENTY-FIFTH SEMI-ANNUAL REPORT]. The number of suits increased, however, during two years in which the auditor observed “dwindling commitment to risk management,” suggesting that these trends are tied to conduct by the department. See MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF’S DEP’T, THIRTEENTH SEMI-ANNUAL REPORT 31, 91 (2000).

268. LASD NINTH SEMI-ANNUAL REPORT, *supra* note 237, at 83.

decisionmaking even in these departments diverges in several critical respects from assumptions about decisionmaking underlying traditional theories of deterrence.<sup>269</sup> First, while many theories of deterrence appear to expect that the financial payout carries the deterrent signal,<sup>270</sup> the departments in my study that have integrated information from lawsuits into decisionmaking focus on the fact that a lawsuit has been filed, and occasionally pay attention to information developed during the course of litigation, but rarely note the outcome of the case.<sup>271</sup>

Second, while theories of deterrence appear to expect that lawsuit data are analyzed in isolation, police departments actually gather information about police conduct from multiple sources. Early intervention systems, trend analyses, internal investigations, and closed claim reviews rely upon many kinds of data about officers, not only the fact that a lawsuit has been filed.<sup>272</sup> Departments have also implemented various other systems to improve accountability that do not rely on information from lawsuits.<sup>273</sup> Further study would be necessary to identify the incremental impact of information from lawsuits on law enforcement officials' decisions aimed at improving behavior.<sup>274</sup>

Third, "boundedly rational" officials in these departments will not evaluate information from lawsuits in the stylized manner assumed by current theories.<sup>275</sup> Research in the cognitive social sciences suggests that officials will take shortcuts in decisionmaking to accommodate cognitive limitations and other costs of information processing.<sup>276</sup> Officials' predictions about the consequences of alternative personnel and policy decisions will be colored by

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269. A future project will examine the ways in which these departments utilize information from lawsuits, and the distinctions between these practices and deterrence theory.

270. See *supra* note 13. Some, however, do suggest that information developed during the course of litigation has deterrent power as well. See *supra* notes 39 and 55.

271. See *supra* Section II.C.1 for a description of these policies.

272. Indeed, even systems that do not track information from lawsuits have been found to reduce civilian complaints by a significant margin. See WALKER ET AL., *supra* note 214, at 3 (noting that early intervention systems in Miami-Dade, Minneapolis, and New Orleans were found to reduce civilian complaints dramatically, even though none of the three departments track information from lawsuits).

273. For example, all of the settlement agreements entered into with the Department of Justice require police departments to change policies and practices regarding a wide variety of areas, including use of force policies; officer training; civilian complaint filing and processing; and internal investigation practices and standards of review. See, e.g., Buffalo MOA, *supra* note 188; D.C. MOA, *supra* note 193; Detroit Consent Decree, *supra* note 178; LAPD Consent Decree, *supra* note 185.

274. For suggested further research in this area, see *infra* Conclusion.

275. For literature in this area, see *supra* note 15.

276. See, e.g., Herbert A. Simon, *Rational Choice and the Structure of the Environment*, in MODELS OF MAN: SOCIAL AND RATIONAL 261, 270-71 (1957) (explaining that man will make "satisficing" rather than "optimal" decisions given cognitive limitations); Goldstein & Gigerenzer, *supra* note 15; Korobkin & Ulen, *supra* note 15, at 1075-76.



perceptual biases and decisionmaking heuristics.<sup>277</sup> Institutional pressures and law enforcement norms may also influence officials' evaluation of information from suits.<sup>278</sup>

When law enforcement agencies gather information from lawsuits, their decisionmaking practices diverge in multiple ways from idealized notions of deterrence. Yet, these practices nonetheless appear to have a deterrent effect. When officials have reviewed information about officer misconduct—including lawsuits—they have made decisions aimed at reducing future misconduct, and incidents of misconduct have declined.

## B. Informed Decisionmaking in Other Contexts

That law enforcement officials act to reduce the likelihood of misconduct after gathering and analyzing relevant information should not come as a surprise. In a variety of complex and challenging realms, governments and private corporations have used retrospective data to identify and correct problematic behavior.

Law enforcement regularly gathers and analyzes data to improve officer performance. A prime example is CompStat, a system used to track and analyze crime trends with the goal of preventing future crime.<sup>279</sup> Using CompStat,

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277. See generally Tversky & Kahneman, *supra* note 15; see also JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 23–100 (Daniel Kahneman et al. eds., 1982) (representativeness); *id.* at 163–210 (availability); Korobkin & Ulen, *supra* note 15, at 1091–95 (describing the “overconfidence bias” and discussing its effects on deterrence policy); *id.* at 1100–02 (describing “anchoring” and “adjustment” biases).

278. See, e.g., Korobkin & Ulen, *supra* note 15 at 1102–25 (describing the effects of framing, status quo bias, and other contextual effects on decisionmaking). A recent study of the effects of environmental disclosure requirements on behavior found that the regulations enhanced the performance of companies that were already compliant, but had limited effect on the performance of historically poor compliers. See Michael W. Toffel & Jodi L. Short, *Coming Clean and Cleaning Up: Is Voluntary Self-Reporting a Signal of Effective Self-Policing?* (Harvard Bus. Sch. Tech. & Operations Mgmt. Unit Research Paper No. 08-098; CELS 2009 4th Annual Conference on Empirical Legal Studies Paper, July 27, 2009), available at <http://ssrn.com/abstract=1440926>. Similarly, although some officials in my study appear to have embraced information from suits, other officials downplay or ignore available evidence of misconduct. See, e.g., text accompanying *supra* note 233 (noting that LASD supervisors wrote biased reports about deputies flagged by the early intervention system); *supra* note 238 (explaining that LAPD analysis of vehicle stop data found no racial profiling, but independent study found profiling); *supra* note 238 and accompanying text (asserting that LASD analysis differs from independent auditor analysis of shooting data); text accompanying *supra* note 243 (noting that Farmington police department investigative reports were found to be biased).

279. See David C. Anderson, *Crime Stoppers*, N.Y. TIMES, Feb. 9, 1997, § 6 (Magazine), at 47, 48. This is not the only example of informational regulation in law enforcement. Law enforcement agencies are increasingly implementing racial profiling data collection systems to monitor police practices. For a description of these systems, see Deborah Ramirez, Jack McDevitt & Amy Farrell, *Data Collection Systems: Promising Practices and Lessons Learned*, in RACIAL PROFILING: DATA, ISSUES, AND ANALYSES (Steven J. Muffler ed., 2006). The Prison Rape Elimination Act, passed in 2003, aims to

police officials gather crime statistics and other relevant data from each precinct.<sup>280</sup> Then, senior managers analyze this data to identify patterns in types and locations of crime. In regular meetings with top police officials, precinct commanders give presentations and respond to questions about data drawn from their jurisdictions.<sup>281</sup> Since its introduction by the New York Police Department in 1994, CompStat is now used in police departments across the country<sup>282</sup> and around the world,<sup>283</sup> and has been adapted for use by a wide variety of city agencies.<sup>284</sup> Many believe that CompStat has lowered crime rates in New York and elsewhere.<sup>285</sup>

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eliminate prison rape in significant part by collecting data about the incidence of prison rapes in facilities across the country. See 42 U.S.C. § 15603 (2006).

280. The first CompStat system, introduced in New York City, recorded only crime statistics. Over time, however, CompStat started to include information about recovered vehicles, shots fired, general complaints, and reports from taxi and bus drivers. See Tom Steinert-Threlkeld, *CompStat: From Humble Beginnings*, BASELINE MAG., Sept. 9, 2002, available at <http://www.baselinemag.com/c/a/Past-News/CompStat-From-Humble-Beginnings>.

281. *Id.* For descriptions of the CompStat meeting process, see, for example, *id.*; WEISBURD ET AL., *supra* note 26, at 2–3.

282. Shaila K. Dewan, *New York's Gospel of Policing by Data Spreads Across U.S.*, N.Y. TIMES, Apr. 28, 2004, at A1. A 2004 study found that 58 percent of police departments with over one hundred employees used CompStat or were planning to do so in the near future. WEISBURD ET AL., *supra* note 26, at 6.

283. See Elissa Gootman, *Crime Fighters From Around World Visit for Tips*, N.Y. TIMES, Oct. 24, 2000, at B1.

284. In New York, the CompStat model “has been successfully implemented in a variety of other public sector organizations, such as New York City’s Department of Correction (TEAMS), Department of Parks and Recreation (‘ParkStat’), Traffic Division (‘Trafficstat’), and Human Resources Administration (‘JobStat’). The city of Baltimore is presently using ‘CitiStat’ to monitor many of its largest departments and agencies.” Paul E. O’Connell, *Using Performance Data for Accountability: The New York City Police Department’s CompStat Model of Police Management*, in MANAGING FOR RESULTS 2002, at 179, 182 (Mark A. Abramson & John M. Kamensky eds., 2002).

285. See, e.g., VINCENT E. HENRY, *THE COMPSTAT PARADIGM: MANAGEMENT ACCOUNTABILITY IN POLICING, BUSINESS, AND THE PUBLIC SECTOR* 6 (2003) (explaining that New York City officials attributed a 30 percent drop in crime to CompStat); Lorraine Mazerolle, Sacha Rombouts, & James McBroom, *The Impact of CompStat on Reported Crime in Queensland*, 30 POLICING 237 (2007) (noting that the CompStat system significantly reduced reported crime in Queensland, Australia); Walt Schick, *CompStat in the Los Angeles Police Department*, POLICE CHIEF, Jan. 1, 2004, at 17 (noting that CompStat reduced crime in Los Angeles). Others contend that CompStat is less effective for a variety of reasons. See, e.g., Mark H. Moore, *Sizing Up CompStat: An Important Administrative Innovation in Policing*, in POLICING: KEY READINGS 548 (Tim Newburn ed., 2005) (suggesting that CompStat may stifle innovation and focus excessively on crime statistics); James J. Willis, Stephen D. Mastrofski & David Weisburd, *Compstat and Bureaucracy: A Case Study of Challenges and Opportunities for Change*, 21 JUST. Q. 463 (2004) (asserting that law enforcement bureaucratic structures limit the effectiveness of CompStat); James J. Willis, Stephen D. Mastrofski, & David Weisburd, *Making Sense of COMPSTAT: A Theory-Based Analysis of Organizational Change in Three Police Departments*, 41 LAW & SOC’Y REV. 147, 173 (2007) [hereinafter Willis et al., *Making Sense of COMPSTAT*] (CompStat data “did improve the speed and focus of each organization’s response to emerging problems,” although it did not dramatically change crime fighting strategies.).

Managing behavior with litigation data is not unique to law enforcement; malpractice insurers and medical organizations use information from closed lawsuits to identify and reduce risks in the provision of medical care. The American Society of Anesthesiologists (ASA) undertook one of the most comprehensive analyses. Their Closed Claims Project is a database of over four thousand closed malpractice files gathered from thirty-five insurance companies across the country.<sup>286</sup> Researchers used the Closed Claims Project database to identify events that lead disproportionately to injury, and the ASA then issued standards and practice guidelines aimed at addressing these troublesome trends.<sup>287</sup> The Closed Claims Project appears to have reduced some of the risks associated with anesthesiology.<sup>288</sup> Malpractice insurers and medical organizations have subsequently used closed claims data to identify risks in several other medical practice areas.<sup>289</sup>

The federal government has also long used information as a tool to regulate corporate behavior. Since the 1930s, federal securities laws have regulated financial markets by requiring disclosure of information to consumers.<sup>290</sup> And, over the past half century, informational regulation has required corporations

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286. See Frederick W. Cheney, *The American Society of Anesthesiologists Closed Claims Project: What Have We Learned, How Has It Affected Practice, and How Will It Affect Practice in the Future?*, 91 ANESTHESIOLOGY 552, 553 (1999).

287. *Id.* at 554.

288. A study found that the severity of injury in malpractice claims against anesthesiologists has declined since the Closed Claims Project began, and that the particular types of claims identified in the Closed Claims Project and addressed by ASA standards have decreased. *Id.* The same study revealed that anesthesiology claims had not declined for those types of claims that “would not be expected to be affected by improved monitoring,” and those for which “the mechanisms of . . . injuries are not well known.” *Id.* at 555.

289. See, e.g., Diane J. Angelini & Linda Greenwald, *Closed Claims Analysis of 65 Medical Malpractice Cases Involving Nurse-Midwives*, 50 J. MIDWIFERY & WOMEN'S HEALTH 454 (2005) (surveying closed claim studies and presenting original data regarding nurse-midwifery closed claims); see also David M. Benjamin & Robert F. Pendrak, *Medication Errors: An Analysis Comparing PHICO'S Closed Claims Data and PHICO'S Event Reporting Trending System (PERTS)*, 43 J. CLINICAL PHARMACOLOGY 754 (2003) (clinical pharmacology); Lorraine M. Jordan, Michael Kremer, Karen Crawforth, & Susan Shott, *Data-Driven Practice Improvement: The AANA Foundation Closed Malpractice Claims Study*, 69 AANA J. 301 (2001) (nurse anesthesiology); Barry M. Manuel & Linda M. Greenwald, *Using Medical Malpractice Closed Claims Data to Reduce Surgical Risk and Improve Patient Safety*, in BULL. OF THE AM. COLL. OF SURGEONS 27 (2007) (general surgery).

290. See, e.g., John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 723 (1984) (describing the original purpose of the federal securities laws); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1223–27 (1999) (describing the historical background of the federal securities laws).

to disclose information about the use of chemicals, workplace injuries, and the nutritional value of foods.<sup>291</sup>

Such informational regulation has been found to have a tangible effect on corporate decisionmaking. One notable example is the Emergency Planning and Community Right-to-Know Act (EPCRA).<sup>292</sup> EPCRA, which requires covered companies to disclose to the Environmental Protection Agency the amounts of toxic chemicals they release,<sup>293</sup> is widely believed to have changed corporate environmental behavior and caused large annual declines in chemical usage and emissions.<sup>294</sup> Similarly, securities disclosure requirements have been understood to produce information necessary for managers to improve their performance.<sup>295</sup>

By offering these examples in varied bureaucratic contexts, I do not mean to suggest that they are functionally equivalent. CompStat, the ASA's Closed Claims Project, government regulations like EPCRA, and early intervention systems gather and analyze different types of data, and use the data for different purposes. Information is analyzed at the behest of different institutional and extrainstitutional players. Different types of pressures are expected to

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291. See Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618–24 (1999) (describing increasing use of informational regulation in a variety of contexts).

292. 42 U.S.C. §§ 11001–11050 (2006).

293. The EPA maintains the information on a publicly accessible database. See Toxics Release Inventory (TRI) Program, <http://www.epa.gov/tri> (last visited Mar. 24, 2010).

294. See, e.g., David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 385–86 (2005) (arguing that there is consensus that the Toxic Release Inventory required by EPCRA “has induced significant voluntary reductions in covered releases well below levels otherwise required by existing command-and-control regulation” (citing Sidney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act*, 11 J. LAND USE & ENVTL. L. 217 (1996))); Mark Cohen, *Information as a Policy Instrument in Protecting the Environment: What Have We Learned?*, 31 ENVTL. L. REP. 10425, 10425–27 (2001) (describing effects of environmental regulations on corporate behavior).

295. See Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1345–52 (1996) (discussing several examples where corporate financial reporting requirements have changed behavior).

encourage behavioral change.<sup>296</sup> And different implementation problems may inhibit their success.<sup>297</sup>

Yet these diverse policies do share one fundamental, underlying insight: When organizations gather and analyze retrospective information, they are better able to make informed decisions aimed at improving future behavior. When CompStat reveals trends in criminal activity, police officials can deploy additional resources to prevent future similar crimes. When closed malpractice-claims studies reveal trends of risky behavior, medical organizations can promulgate standards intended to reduce those risks. Even regulations like EPCRA, understood to work primarily through public disclosures that affect consumer behavior, are believed to improve conduct in part because they “help, or perhaps force,” organizations to confront performance problems.<sup>298</sup> Similarly, early intervention systems, trend analyses, and the other policies used by law

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296. CompStat aims to make information available to middle managers and top brass at law enforcement agencies. See *supra* note 280. The Closed Claims Project aims to make information publicly available to medical practitioners who are likely to follow recommendations that reduce their chance of litigation and, potentially, reduce insurance premiums. See *supra* notes 286–288. Federal regulations like EPCRA aim to reduce information asymmetries primarily by providing consumers with information. See Case, *supra* note 294, at 383; Lowenstein, *supra* note 295. Finally, early intervention systems make information available to law enforcement supervisors and policymakers for the purpose of avoiding future misconduct. See *supra* notes 181–185.

297. Corporations have been known to obfuscate data or to refuse to provide it altogether. See, e.g., Lowenstein, *supra* note 295, at 1347. Police officials have been accused of manipulating data in CompStat. See, e.g., William K. Rashbaum, *Retired Officers Raise Questions on Crime Data*, N.Y. TIMES, Feb. 6, 2010, at A1 (reporting that a recent study found that some NYPD captains and high-ranked officers manipulated crime statistics entered into CompStat); Dewan, *supra* note 282 (noting that pressure on statistics causes officers to input incorrect numbers or arrest people without cause). But even the authors of the study cited in Rashbaum, *supra*, who found evidence of data manipulation in CompStat, believe that “there has been a significant drop in crime and that the fundamentals of CompStat are sound.” Eli B. Silverman & John A. Eterno, Letter, *New York Crime Statistics: What the Researchers Say*, N.Y. TIMES, Feb. 24, 2010, at A26. For a detailed description of implementation problems of policies used to gather and analyze information from lawsuits, see *supra* Part II.D.

298. William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1771 (1999). See also Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 297–300 (2001) (The Toxic Release Inventory disclosure requirements mandated by EPCRA influence corporate decisionmaking by “compelling managers to examine environmental outcomes.”). Disclosure requirements on Wall Street have similarly been found to “forc[e] managers to confront disagreeable realities in detail and early on, even when those disclosures may have no immediate market consequences.” Lowenstein, *supra* note 295, at 1342. Disclosure requirements in the Sarbanes-Oxley Act give “directors more information by which they can evaluate the strength of the company and the performance of the officers.” Robert B. Thompson, *Corporate Governance After Enron*, 40 Hous. L. REV. 99, 111 (2003). And in the healthcare arena, mandated disclosures “stimulat[e] information generation and overcom[e] barriers to information sharing.” Sage, *supra*, at 1771.

enforcement to analyze data from lawsuits have forced departments to confront information that they had previously ignored.<sup>299</sup>

#### IV. REFORMING DESCRIPTIONS AND PRESCRIPTIONS

Although I have shown that increased information flows may strengthen the impact of lawsuits on decisionmaking,<sup>300</sup> it nonetheless remains that many law enforcement officials currently know little about lawsuits filed against them and their officers. The widespread failure to take account of information from lawsuits should lead us to reconsider the rhetoric of judicial opinions and scholarship reliant on the assumption of a well-informed policymaker. At the same time, the potential impact of information from lawsuits on behavior should temper scholars' normative prescriptions.

##### A. Descriptions

Judicial and scholarly expectations of informed deterrence cannot withstand evidence that law enforcement agencies only rarely gather and analyze probative information about suits. Unless allegations in a suit are separately brought to the attention of policymakers, the conduct will not be investigated, and the involved officers will not be disciplined, counseled, or retrained following the incident.<sup>301</sup> The claims alleged in the suit, the strength of the allegations,

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299. Law enforcement officials have stated that early intervention systems and other information policies improve decisionmaking. In response to a survey about the effectiveness of early intervention systems, one police official reported that their system "assisted us in identifying officers or non-sworn personnel . . . who began to demonstrate behavior not consistent with our policies and standards." WALKER, *supra* note 264, at 76. The chief of Wallkill Police Department, a department with only thirty-three sworn officers, reported that his early intervention system has been helpful, even in his small department, because "[t]he process takes the participant from viewing problems case by case and gives perspective on both trends and cumulative records." DEAN ESSERMAN, THIRD REPORT OF THE MONITOR, NEW YORK V. TOWN OF WALKILL 47 (2004), available at <http://clearinghouse.net>.

300. In Part IV.C, I offer preliminary recommendations about ways that law enforcement might come to rely more heavily on information from suits.

301. Some might argue that even without information from lawsuits, policymakers will learn of officer misconduct through other means, such as civilian complaints. However, plaintiffs in lawsuits might not file separate civilian complaints: Studies of practices in Portland found that between two-thirds and 90 percent of claims in lawsuits were not separately brought as civilian complaints. See INDEP. POLICE REVIEW DIV., *supra* note 209, at 19 (finding that two-thirds of people who filed lawsuits did not file separate civilian complaints); BLACKMER & STEVENS, *supra* note 236, at 22 (finding that only 10 percent of civil claimants filed separate civilian complaints). A Portland study also found that claims alleged in lawsuits were more serious than those alleged in civilian complaints: 50 percent of lawsuits alleged excessive force compared to just 15 percent of civilian complaints filed during the same period. See INDEP. POLICE REVIEW DIV., *supra* note 209, at 21. Accordingly, if a police department does not review information from lawsuits, many serious allegations of misconduct may never be investigated, tracked, or otherwise used in managing the department.

and the manner in which the case was resolved will likely play no role in the officer's performance reviews or promotions, or the policymakers' assessment of the department.

Even scholars skeptical of the deterrent effect of suits on government behavior incorrectly assume that officials are making informed decisions to maintain the status quo. For example, Levinson assumes that a police chief would make a cost-benefit analysis when deciding whether to allow his officers to continue using chokeholds.<sup>302</sup> My research suggests, however, that very few police departments even attempt to identify trends in the types of claims alleged in lawsuits. For the significant majority of law enforcement agencies without early intervention systems,<sup>303</sup> it would be exceedingly difficult to conduct the type of trend analysis Levinson assumes.<sup>304</sup> Moreover, even the jurisdictions with early intervention systems may not track trends as a matter of policy, or may not produce sound information about these trends in practice; the systems may not be operational, may have inaccurate or incomplete data, or may not be used competently by staff and supervisors.

Given these information failures, individual officers should have little reason to fear workplace ramifications of being sued. A lawsuit will not prevent an officer from being promoted—or cause him to be shunned at work—if no one knows he has been named as a defendant.<sup>305</sup> And given the prevalence of indemnification, most officers have little reason to believe they will be financially stung by a judgment.<sup>306</sup> Some might argue that the fear of suit will, nonetheless, chill officer behavior.<sup>307</sup> Yet, studies have shown otherwise: While

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302. For a description of this argument, see *supra* notes 79–82 and accompanying text.

303. See *supra* notes 214–215 and accompanying text.

304. Levinson—or his defenders—might counter that, even if police officials do not weigh litigation costs against the political benefits of particular types of misconduct, they are, at least, concluding that the aggregate costs of lawsuits are outweighed by their political benefits *en masse*. Yet, this shift is significant both as a descriptive matter and in terms of its implications for the deterrent potential of information from suits. Levinson suggests that chiefs make informed decisions to allow certain types of misconduct because the costs of the misconduct are outweighed by their benefits. If, however, a chief knows only about the aggregate costs of lawsuits, he cannot evaluate whether certain types of behaviors are worth their costs. Moreover, my research suggests that when officials *do* have particularized information about the types of behaviors that are getting officers in trouble, officials act to reduce these harms even when there is no direct financial or political benefit associated with the change. See *supra* Part III.A (describing the effects of informed decisionmaking in law enforcement); *infra* note 323 (noting that officials make personnel and policy changes even when the changes do not have a direct financial or political benefit).

305. See *supra* notes 58–59 for a description of these theories of deterrence.

306. See *supra* note 57.

307. Many have written about the chilling effects of the threat of suit. See, e.g., PHILLIP K. HOWARD, *LIFE WITHOUT LAWYERS* (2009). For a critique of these depictions, and advocates of tort reform more generally, see, e.g., Stephen Daniels & Joanne Martin, "The Impact That It Has Had Is Between People's Ears": *Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 *DEPAUL L. REV.* 453

officers consistently report that the threat of liability deters misconduct, the threat of liability does not actually change most officers' behavior on the job.<sup>308</sup>

## B. Prescriptions

### 1. Courts

My findings impact not only judicial descriptions of deterrence, but also some significant doctrinal byproducts of those descriptions. We now know enough to reject the notion that there will be no one to police us without vigorous qualified immunity protections. Given that lawsuits generally carry no financial or workplace ramifications, fears that lawsuits will “paralyz[e] . . . [an] official’s decisiveness and distort[] his judgment” seem overwrought.<sup>309</sup> Even in those law enforcement agencies that do gather and analyze information from lawsuits, suits do not appear to wield the extraordinary power imagined by the Court.<sup>310</sup>

And no longer can the Supreme Court limit the exclusionary rule on the grounds that lawsuits deter “[a]s far as we know.”<sup>311</sup> We now know that police

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(2000) (describing mass culture depictions of civil litigation); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447 (2004) (comparing depictions of civil litigation with actual litigation outcomes).

308. See VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 7 (2001) (finding that “it would seem that the prospect of civil liability has a deterrent effect in the abstract survey environment, but that it does not have a major impact on field practices”); Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 POLICE STUD. INT’L REV. POLICE DEV. 19, 19–37 (1995) (finding that 62 percent of officers reported that civil suits deter police officers, but most do not consider the threat of a lawsuit when they stop a vehicle or engage in a personal interaction); Kenneth J. Novak, Brad W. Smith & James Frank, *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 POLICING INT’L J. POLICE STRAT. & MGMT. 352, 360 (2003) (concluding, following a study that involved both surveys and the observation of thousands of encounters between officers and members of the public, that “[o]fficer initiated aggressive behaviors . . . do not seem to be deterred to any substantial extent by concerns about liability”); see also *id.* (finding that officers who had previously been sued were more aggressive than officers who had not). Similar findings have been reached in studies of the impact of lawsuits on medical behavior: Despite strong rhetoric about the rise of defensive medicine, rising malpractice premiums have had limited impact on medical practice. See U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE 50–67 (1994) (providing a survey of physicians finding limited defensive practices resulting from malpractice concerns); Randall R. Bovbjerg et al., *Defensive Medicine and Tort Reform: New Evidence in an Old Bottle*, 21 J. HEALTH POL. POL’Y & L. 267, 269–80 (1996) (surveying defensive medicine studies); Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1610 (2002) (arguing that studies of defensive medicine have been inconclusive).

309. *Owen v. City of Independence*, 445 U.S. 622, 655 (1980).

310. See *supra* notes 263–268 and accompanying text (describing evidence that officers are not overly deterred by accountability policies).

311. *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).



department policies make it exceedingly difficult for information from lawsuits to play any role in department decisionmaking. The Court's assertion in *Hudson*<sup>312</sup> that the police can effectively regulate themselves also relies on a false premise.<sup>313</sup> Even if Justice Scalia is right that "police forces across the United States take the constitutional rights of citizens seriously" in the abstract, these departments can hardly discipline officers for constitutional violations that officials know nothing about.<sup>314</sup>

My criticism of the Court's assumptions about the deterrent power of lawsuits in *Hudson* should not be understood as a defense of the exclusionary rule.<sup>315</sup> Information failures may well hamper the exclusionary rule's effectiveness, as well. There may be no feedback from prosecutors to the police when evidence is suppressed,<sup>316</sup> and available evidence suggests limited tracking of suppression rulings by police departments.<sup>317</sup> Moreover, exclusion may not be

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312. *Id.*

313. *See id.* at 598–99.

314. *See id.* at 599.

315. There has long been a vigorous positive and normative debate on this subject. For data and arguments supporting the conclusion that the exclusionary rule has a deterrent effect, see, for example, Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992); Stewart, *supra* note 42; Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COL. J.L. & SOC. PROBS. 87 (1968); Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) [hereinafter Comment, *Exclusionary Rule*]. For opposing data and arguments, see Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 11 (1964).

316. The commission that investigated the Los Angeles Police Department following the Rampart Scandal found that "there was no formalized system for prosecutors to report suspicions regarding an officer's integrity or conduct to the LAPD" and "management at the District Attorney's Office has stated that there is no record of, nor could they recall, any incident in which the Office made a referral to the LAPD regarding suspicions about an officer committing perjury, filing a false report, or committing other improper acts." RAMPART COMMISSION REPORT, *supra* note 110, at 153; *see also* Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 953 (1983) ("Even those few officers who actually participate in a suppression hearing may not be made sufficiently aware of how they erred to enable them to modify their future conduct. Officers who testify in suppression hearings may not be present in court when the judge gives his ruling and even if they are informed of the outcome, they may not be told of the judge's rationale. When a case is reversed by an appellate court because of the trial judge's failure to suppress evidence, offending officers are even less likely to be told of their responsibility for the reversal, unless the case goes to trial after remand."); Burger, *supra* note 315, at 11 ("I am informed by experts that a policeman is rarely disciplined for action declared illegal by a court as a basis for suppression . . . . In most cases a policeman does not hear or learn about the ultimate disposition of the case that fails because of his acts, or if he does, it may be years later."). *But see* Comment, *Exclusionary Rule*, *supra* note 315, at 1033, 1046 (finding that Chicago police officers "virtually always find out when their evidence has been suppressed because they are almost always in court when a judge rules on the suppression motion," and are transferred or demoted after two suppressions "in other than minor cases").

317. Some departments include information about suppressed evidence in early intervention systems, *see* WALKER, *supra* note 156, at 109 (noting that the Oakland system tracks "[c]riminal cases dropped due to concerns with member veracity, improper searches, false arrests, etc."), but many

particularly well-tailored to remedy those harms against which the Fourth Amendment was aimed to protect.<sup>318</sup> Courts may conclude that the harms of the exclusionary rule outweigh its benefits for any number of reasons. Given widespread information failures, the presumptive deterrent effect of lawsuits should not, however, be used as the basis for the conclusion that suppression is unnecessary.

## 2. Scholars

The potential deterrent power of lawsuits should also temper scholars' normative prescriptions. Some suggest that damages actions have limited deterrent power and instead focus on structural reform injunctions and alternative pressures to change government behavior.<sup>319</sup> Yet, my study suggests that damages actions can influence decisionmaking if police departments actually have information about suits.<sup>320</sup> Granted, twelve of the departments in my study gather and analyze information from lawsuits only because they were ordered to do so as a condition of settlement in a case seeking injunctive relief. Yet, once these policies are enacted—whether through lawsuits, police auditors, or other avenues—my study suggests that damages actions can impact law enforcement behavior.

The potential deterrent power of lawsuits also throws into question scholars' theories about the incentives that animate government officials' decisions. If Levinson is right that police officials review information from lawsuits with an eye toward maximizing their political interests,<sup>321</sup> or if Armacost is right that officials consider lawsuits a worthwhile price to pay to deter crime,<sup>322</sup> police officials will rarely if ever act on information in damages actions. Yet, evidence suggests that officials may act on information when it is

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departments do not have these systems, see *supra* notes 214–215 and accompanying text. Even departments with early intervention systems may not track criminal cases dropped based on officer conduct. The Phoenix and Pittsburgh early intervention systems, which have been offered as exemplary systems, do not track evidence suppressed or criminal cases dropped as a result of improper searches. See INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 21, at 57.

318. See, e.g., Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 27–29 (1997); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994); Barnett, *supra* note 316, at 984; Calabresi, *supra* note 42, at 112.

319. See *supra* note 77.

320. See *supra* Part III.A.

321. See Levinson, *supra* note 5.

322. See Armacost, *supra* note 5.

available—even when acting on the information does not result in any obvious financial, political, or crime-control benefits.<sup>323</sup>

If abandoning damages actions as a vehicle of deterrence seems premature, so do efforts to strengthen them. Some have recommended making it easier both to win and to recover damages from Section 1983 actions against individual officers and municipalities.<sup>324</sup> Consistent with current theories, these recommendations expect that a damages action will have greater deterrent power if the plaintiff wins the case and is awarded significant damages. My study suggests, however, that many departments do not gather any information about lawsuits. Even those that do gather information from lawsuits generally ignore information about the results of the cases and the damages awarded. Accordingly, more victories and larger awards will not likely change police department behavior—except to the extent that they create external pressures to review incidents or policies.<sup>325</sup>

Finally, suggestions to place the financial burdens of litigation more directly on officers and police officials may be ineffective. Some argue that lawsuits will have greater deterrent power if officials must satisfy legal settlements and judgments out of their general operating budgets or campaign coffers.<sup>326</sup> Unfortunately, these well-meant prescriptions might not cure the disease. Instead of trying to reduce officer misconduct, police officials may instead reduce litigation costs with early settlements and mediation programs.<sup>327</sup> These efforts may reduce the litigation costs associated with individual cases, but they are not aimed at examining or curtailing the incidence of misconduct.

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323. One intriguing example is the success of early intervention systems at reducing officer misconduct, even though interventions do not come with disciplinary or financial consequences for the officer. See, e.g., *supra* notes 254–256, 272 and accompanying text (describing the successes of early intervention systems).

324. See *supra* notes 75–76 and accompanying text.

325. See, e.g., *supra* note 211 (describing the convening of the Kolts Commission after several high profile incidents and damages awards against the Los Angeles Sheriff's Department).

326. See *supra* note 74 and accompanying text.

327. For an example of early settlement efforts, see, e.g., MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, NINETEENTH SEMI-ANNUAL REPORT 33 (2005) (describing the LASD's "Critical Incident Analysis" program, which aims to identify and quickly resolve lawsuits with a "significant liability risk"). The Seattle Police Department has a successful mediation program. See Telephone Interview With John Fowler, *supra* note 112. But see U.S. DEP'T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., MEDIATING CITIZEN COMPLAINTS AGAINST POLICE OFFICERS: A GUIDE FOR POLICE AND COMMUNITY LEADERS 41 (2002) (noting that only sixteen law enforcement agencies across the country have mediation programs).

### C. Preliminary Recommendations

Given evidence of widespread information failures, and evidence suggesting that improved information flows may increase the deterrent power of suits, it is worth exploring ways to (1) increase the extent to which information from lawsuits is gathered and analyzed as a matter of official policy; and (2) minimize anticipated barriers to the effective implementation of these policies. Following are some broad, preliminary recommendations to accomplish these two goals.

First, increased efforts must be made to gather and analyze information from lawsuits. Municipal liability insurers, following the example of the Closed Claims Project, could use closed case files to identify trends within and across departments.<sup>328</sup> Congress could pass a statute akin to EPCRA, requiring<sup>329</sup> that police departments disseminate information about lawsuits and other evidence of misconduct.<sup>330</sup> Local governments could require that police departments gather and analyze information as a condition of funding or indemnification from suit.<sup>331</sup> Or, the press, scholars, and other interested parties could simply go to

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328. Limited evidence suggests that municipal liability insurers can have a profound impact on government behavior. For example, in Oak Grove, Kentucky, a town of 8000 people, payouts in six excessive force lawsuits against the police department had a significant financial impact on the city, causing it to delay purchases of necessities, including police cars. The insurance premium and deductible also jumped dramatically. As a result, the city insurer did a risk analysis and made several policy recommendations that the Oak Grove Police Department followed. See Malone James, *Excessive-Force Suits Hurt Oak Grove Coffers, Confidence; Insurer Notes Police Mostly Ex-soldiers*, COURIER-J., May 9, 2005, at A1.

329. To be successful, such a regulation would need to require—not request—relevant information. In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act, which required the attorney general to gather data on police use of excessive force and publish annual reports based on that data. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14142 (2006). However, police departments are not mandated to provide the Department of Justice with this information and have been reluctant to do so. As a result, the Department of Justice has never complied with the requirement that it publish the annual summary. See Michael R. Smith, *Toward a National Use-of-Force Data Collection System: One Small (and Focused) Step Is Better than a Giant Leap*, 7 CRIMINOLOGY & PUB. POL'Y 619, 621 n.1 (2008).

330. Others have made a similar recommendation, though for reasons different than my own. Levinson has suggested informational regulation as a way of politically pressuring government actors. See Levinson, *supra* note 5, at 417–20. Armacost has suggested informational regulation as a way to provide information to courts and executives that can help identify “an unhealthy organizational culture,” and prompt “further investigation and possible intervention.” Armacost, *supra* note 5, at 532. I focus here on the potential of disclosure requirements to inform officials about department practices and trends that they previously ignored.

331. For a similar recommendation aimed at increasing transparency about suits against the police, see Miller & Wright, *supra* note 44, at 785–90. Some local governments do use the settlement approval process as an opportunity to encourage police officials to be self-reflective and find ways to avoid similar conduct in the future. For example, the Board of Supervisors for the County of Los Angeles has instructed the sheriff's department to submit “Corrective Action Plans” when recommending a case

records offices in federal and state courthouses, gather and analyze publicly available case files, and make their findings known.<sup>332</sup>

Consent decrees and police auditors have required police departments to gather information from lawsuits, and efforts in these areas can and should be continued. Yet, my preliminary recommendations have some qualities that make them particularly appealing. First, information-producing regulations and claims studies could capture information about police practices without first having to prove widespread and severe misconduct.<sup>333</sup> At the same time, information-producing regulations and claims studies would allow police departments to retain a great deal of authority to manage themselves.<sup>334</sup> Information would be gathered and analyzed, but police department decisionmaking would not be constrained. In this way, regulating through information may be considered less disruptive than structural reform injunctions.<sup>335</sup>

Second, once systems are in place to gather and analyze relevant information, implementation problems should be identified and minimized

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for settlement. The Corrective Action Plan describes any training or policy implications of the lawsuit and identifies action the department will take to minimize the likelihood of future similar misconduct. At the time of settlement, the board of supervisors has also asked the LASD's auditor to investigate claims alleged in lawsuits and make policy recommendations. See OFFICE OF INDEP. REVIEW, *supra* note 203, at 33, 45.

332. For one such scholarly study, see Chiabi, *supra* note 99 (study of Section 1983 actions filed in the Southern and Eastern Districts of New York over four years).

333. In contrast, a consent decree is available only when the plaintiff shows widespread constitutional violations. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). And police auditors are generally appointed only after egregious incidents and calls for increased accountability. See *supra* note 211.

334. See James Q. Wilson, *Criminal Justice*, in UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION 475, 475–76 (Peter H. Schuck & James Q. Wilson eds., 2008) (describing highly localized practices of police departments).

335. Informational regulation has been seen as less interventionist and more efficient than command and control. See Katherine Renshaw, *Sounding Alarms: Does Informational Regulation Help or Hinder Environmentalism?*, 14 N.Y.U. ENVTL. L.J. 654, 664 (2006) (“Because . . . informational regulatory strategies do not directly regulate production they are perceived to be more ‘benign,’ and therefore are often preferred over traditional command and control regulation.”); Sunstein, *supra* note 291, at 625 (“It is increasingly recognized that information is often a far less expensive and more efficient strategy than command-and-control . . . A chief advantage of informational regulation is its comparative flexibility.”). This flexibility may address the concerns of those who argue that injunctive relief can result in excessive intervention in local government policymaking. See, e.g., SCHUCK, *supra* note 5, at 190 (advocating remedies that “allow defendants latitude to employ as many possible implementation strategies as may, in the light of operating realities, seem prudent”); Jack M. Beermann, *A Critical Approach to Section 1983 With Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 79–80 (1989) (describing the Court's reluctance to intrude on state functions through injunctive relief). Cf. Jeffries & Rutherglen, *supra* note 11, at 1411–12 (Current structural reform injunctions have avoided the “command and control,” and “kitchen sink” approaches, and have instead set goals that are “more fine-grained, more process-oriented, and in important ways less intrusive.”).

whenever possible.<sup>336</sup> My research revealed a number of recurring problems when officials attempt to gather and analyze information about cases alleging their own department's misconduct. But my research also suggested a number of possible ways to address these problems.

First, and perhaps most importantly, departments attempting to gather information from lawsuits should engage external monitors.<sup>337</sup> Auditing has been critical to the success of CompStat<sup>338</sup> and informational regulation in private corporations.<sup>339</sup> Court-appointed monitors and auditors have been equally crucial to the limited success of policies to incorporate information from lawsuits into police decisionmaking.<sup>340</sup> Auditors can identify and help correct implementation problems, whether willful, unintentional, or somewhere in between.

Second, departments should find ways to minimize unintentional obstructions to data gathering and analysis. Funds to support infrastructure and additional trainings might reduce the frequency of technological glitches and human error.

Third, departments should find ways to minimize willful obstructions to the disclosure of complete and accurate information. The best antidotes will likely be context dependent. For example, my study shows that city attorneys' offices sometimes impede efforts to investigate claims, possibly because they believe that turning over information to the police department would violate their ethical obligations to their clients. Any number of interventions could lessen the impact of this perceived conflict. Investigators could avoid requesting information about pending cases from city attorneys' offices and instead

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336. There would likely be implementation problems no matter what type of system was used to gather information; my aim is not to identify and address each type of problem that might arise from these systems, but to point out that these limitations can be minimized through appropriate, targeted interventions.

337. I am agnostic about the precise mechanism used to encourage police departments to engage a monitor. Departments could be required to hire a monitor, provided with funds only to be used for the purpose of hiring a monitor, or a department could receive some sort of benefit upon hiring a monitor.

338. See Ronal W. Serpas & Matthew Morley, *The Next Step in Accountability Driven Leadership: "CompStatting" the CompStat Data*, POLICE CHIEF, May 2008.

339. See Langevoort, *supra* note 221, at 122 (describing the benefits of accounting and auditing in corporations).

340. See, e.g., DAVIS ET AL., *supra* note 213, at 64 (recognizing the critical role of the court-appointed monitor in overseeing the implementation of the Pittsburgh Consent Decree). Although external monitors may seem an unnecessary extravagance to cash-strapped municipalities, external monitoring can be less expensive than one might imagine. The Los Angeles Sheriff's Department's auditor charged with overseeing the implementation of the Kolts Commission's recommendations—who is among the most vigorous and meticulous auditors represented in this study—is paid approximately \$200,000 per year for his services. See Correspondence With Merrick Bobb, *supra* note 112. To put this figure in context, the LASD's budget is \$2.4 billion. See Los Angeles County Sheriff's Department, <http://www.lasd.org/aboutlasd/execs.html#baca> (last visited Mar. 24, 2010).

retrieve the information directly from the courthouse or from other government agencies with access to relevant documents.<sup>341</sup> Police departments could request only closed-case information from city attorneys. Those closed files could then be used to identify trends or investigate officers without potentially compromising the defense of a suit.<sup>342</sup> Departments could ask city attorneys to produce case files with officer names redacted, which could still be used to identify trends of misconduct. Or plaintiffs' attorneys and the city attorneys' offices could agree that internal investigations of pending claims be kept confidential, encouraging cooperation by both sides.<sup>343</sup>

This is not meant to be an exhaustive list of all the steps that could be taken to make city attorneys more willing to produce information from their cases, or an endorsement of any particular set of strategies. Instead, it is meant to suggest the types of relatively minor changes that might have a significant impact on behavior. Solutions could be developed to minimize other types of intentional obstructions as well.

Instead of pursuing the dramatic steps offered by scholars—reformulating liability rules and punitive damages standards, or doing away with civil rights damages actions as a vehicle of deterrence altogether—we should explore ways to increase the amount of information that is gathered and analyzed about lawsuits against the police. My study suggests that enhanced information policies and practices may well lead to significant, positive changes in the deterrent effect of civil rights damages actions.

## CONCLUSION

The current debate about deterrence glosses over what governments know and focuses instead on how they evaluate what they know. Yet, as this Article has shown, that focus is misplaced. Most police departments lack sufficient information about past suits to draw any sensible lessons. Some police departments completely ignore information from lawsuits. Other departments try to gather information from suits, but their efforts are frustrated by technological problems, human error, and efforts to obfuscate relevant information.

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341. This is, in fact, what some auditors have done to avoid obstreperous city attorneys. See *supra* note 247.

342. Chicago, the Los Angeles Sheriff's Department, and Seattle use closed case files to review the thoroughness of Internal Affairs investigations and identify trends of misconduct. See *supra* notes 195–197 and accompanying text. Medical groups use closed claims to identify trends of risky behavior. See *supra* notes 286–289 and accompanying text.

343. Current evidentiary rules do not clearly protect investigative reports from admissibility in Section 1983 litigation. See Martin A. Schwartz, *Admissibility of Investigatory Reports in § 1983 Civil Rights Actions—A User's Manual*, 79 MARQ. L. REV. 453 (1996).

Lawsuits will not deter misconduct in the ways courts and scholars expect if law enforcement officials know nothing about the suits. But the inverse also appears to be true: When officials gather and analyze information about suits, they may take action to reduce the likelihood of future misconduct. Just as informational regulation has been used to improve medical and corporate behavior, more robust and effective information policies and practices can increase the impact of lawsuits on law enforcement behavior.

These critical observations, previously overlooked by theories of deterrence, prompt many additional questions about the relationship between litigation, information, and decisionmaking. More study is necessary to learn the extent to which other police departments across the country are using information from lawsuits alleging police misconduct. Additional study could reveal whether information about different types of lawsuits is processed in different ways—whether, for example, suits brought by police officers against their departments for sexual harassment or violation of civil service rules are recorded and analyzed in ways different from those alleging constitutional violations. There is also much to learn about the ways other public and private bureaucracies use information from suits in decisionmaking. Further study is also necessary to understand the impact of information from lawsuits on behavior. Few have examined the role of existing efforts to gather information from suits in law enforcement decisionmaking, and no one has attempted to isolate the effects of information from lawsuits.<sup>344</sup> Finally, more study is necessary to identify the best uses of information from lawsuits in accountability efforts. Of the departments I studied, the Los Angeles Sheriff's Department gathers and analyzes information from lawsuits in the most complete manner. But, at this point, I cannot advocate that all departments use a certain set of information from lawsuits, or that they use that information for a certain set of purposes. We need to analyze policies in light of the strengths and weaknesses of information from lawsuits, the costs of these policies,<sup>345</sup> their effects on litigation expenses,<sup>346</sup> and their effects on law enforcement

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344. See *supra* Part III.A for limited available studies in this area.

345. See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 430–44 (1994) (describing the complex methodology necessary to weigh the costs and benefits of torts).

346. Such a study would need to additionally control for other possible influences on cost, and recognize that the long lifespan of litigation may mean that effects of policies are significantly delayed. Other influences could include changing crime rates or arrest rates, unusual cases brought against the department, and efforts to reduce the costs of litigation through early settlement or mediation efforts. The LASD's auditor recognizes that all these influences may be at play, which limits his ability to understand the impact of policies on litigation trends. See LASD TWENTY-FIFTH SEMI-ANNUAL REPORT, *supra* note 267, at 129; LASD NINTH SEMI-ANNUAL REPORT, *supra* note 237, at 82–83.



behavior.<sup>347</sup> The twenty departments in this study with policies to gather and analyze information from lawsuits would be excellent subjects for further exploration of these issues.

Although there is much that we still do not know about the relationship between litigation, information, and decisionmaking, this Article shows that the failure to collect information from lawsuits is both an overlooked impediment to deterrence and a key to strengthening the deterrent effect of suits. Given the significant assumptions about government behavior in current theories of deterrence, and the prescriptions that follow, this is an important first step.

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347. Relevant considerations would include the ways that boundedly rational officials analyze information from suits, and the preferences officials are exercising when they make personnel and policy decisions.

## APPENDIX A—DEPARTMENTS INCLUDED IN STUDY

City	Sworn Officers <sup>348</sup>	Population
New York P.D.	36,118	8,214,426 <sup>349</sup>
Chicago P.D.	13,129	2,833,321
Los Angeles P.D.	9099	3,849,378
Los Angeles Sheriff's Dep't	8239	2,900,000 <sup>350</sup>
Philadelphia P.D.	6832	1,448,394
District of Columbia P.D.	3800	591,833
Detroit P.D.	3512	871,121
New Jersey State Police	2768	8,682,661 <sup>351</sup>
New Orleans P.D.	1646	223,388
Denver P.D.	1405	566,974
Prince George's County P.D.	1344	820,852
San Jose P.D.	1342	929,936
Seattle P.D.	1248	582,454
Nashville P.D.	1212	552,120
Portland P.D.	1050	537,081
Cincinnati P.D.	1048	332,252
Albuquerque P.D.	951	504,949
Pittsburgh P.D.	892	312,819
Oakland P.D.	803	397,067
Buffalo P.D.	750	276,059
Sacramento P.D.	677	453,781
Boise P.D.	330	198,638
Farmington P.D.	125 <sup>352</sup>	42,637 <sup>353</sup>
Steubenville P.D.	50 <sup>354</sup>	18,820 <sup>355</sup>
Villa Rica P.D.	35 <sup>356</sup>	12,838 <sup>357</sup>
Wallkill P.D.	33	2190 <sup>358</sup>
Total	98,418	36,155,408

348. Unless otherwise noted, numbers of sworn officers are from BJS LAW ENFORCEMENT CENSUS, *supra* note 117.

349. Unless otherwise noted, populations of cities are taken from U.S. Census Bureau 2006 figures, <http://quickfacts.census.gov/qfd/index.html> (last visited Mar. 27, 2010).

350. See Los Angeles County Sheriff's Department Contract Law Enforcement Services, [http://www.lasd.org/lasd\\_services/contract\\_law/municipalsrv1.html](http://www.lasd.org/lasd_services/contract_law/municipalsrv1.html) (last visited Mar. 27, 2010).

351. Because the New Jersey State Troopers are responsible for patrolling the New Jersey state highways, this figure represents the population of the entire state of New Jersey.

352. JEROME, FARMINGTON REPORT, *supra* note 105, at 47.

353. See City-Data.com, Farmington, New Mexico Detailed Profile, <http://www.city-data.com/city/Farmington-New-Mexico.html> (last visited Mar. 27, 2010).

354. Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 821 (1999).

355. See City-Data.com, Steubenville, Ohio Detailed Profile, <http://www.city-data.com/city/Steubenville-Ohio.html> (last visited Mar. 27, 2010).

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356. See Livingston, *supra* note 354.

357. See City-Data.com, Villa Rica, Georgia Detailed Profile, <http://www.city-data.com/city/Villa-Rica-Georgia.html> (last visited Mar. 27, 2010).

358. See City-Data.com, Wallkill, New York Detailed Profile, <http://www.city-data.com/city/Wallkill-New-York.html> (last visited Mar. 27, 2010).

## APPENDIX B—DEPARTMENT POLICIES

Appendix B reflects the extent to which departments in my study have adopted the policies described in Part II.C.1. “EIS with Suits” refers to early intervention systems that track data from lawsuits, as well as other indicia of problematic behavior. “Investigate Claims” refers to policies to investigate allegations made in lawsuits, apart from the defense of the case, for possible discipline of the officer. “ID Trends” refers to policies to identify trends of misconduct across cases. These trends may be trends in types of claims, or spikes of misbehavior in particular subdivisions of the department. “Review Closed Files” refers to policies to review closed litigation files for personnel or policy implications. And “Discipline After Verdicts” refers to policies to retrain, discipline, or terminate officers following a jury verdict against the officer. Departments receive a “√” if they have a formal policy in that category. The implementation problems described in Part II.D are reflected in the endnotes.

City	Monitor	EIS with suits	Investigate claims	ID trends	Review Closed Files	Discipline after Verdicts
Albuquerque	One-time audit	√ <sup>359</sup>		√ <sup>360</sup>		
Boise	Police Auditor	√ <sup>361</sup>				
Buffalo	Court Monitor	√ <sup>362</sup>	√ <sup>363</sup>	√ <sup>364</sup>		√ <sup>365</sup>
Chicago	Police Auditor		√ <sup>366</sup>		√ <sup>367</sup>	
Cincinnati	Court Monitor	√ <sup>368</sup>		√ <sup>369</sup>		
Denver	Police Auditor		√ <sup>370</sup>	√ <sup>371</sup>		
Detroit	Court Monitor	√ <sup>372</sup>		√ <sup>373</sup>		
D.C.	Court Monitor	√ <sup>374</sup>	√ <sup>375</sup>	√ <sup>376</sup>		
Farmington	One-time audit	√ <sup>377</sup>	√ <sup>378</sup>			
LAPD	Court Monitor	√ <sup>379</sup>	√ <sup>380</sup>	√ <sup>381</sup>		
LASD	Police Auditor	√ <sup>382</sup>	√ <sup>383</sup>	√ <sup>384</sup>	√ <sup>385</sup>	
Nashville	Police Auditor					
NJ State Troopers	Court Monitor	√ <sup>386</sup>	√ <sup>387</sup>	√ <sup>388</sup>		
New Orleans	HRW Report <sup>389</sup>					
New York	HRW Report					
Oakland	Court Monitor	√ <sup>390</sup>	√ <sup>391</sup>	√ <sup>392</sup>		
Philadelphia	Police Auditor					
Pittsburgh	Court Monitor	√ <sup>393</sup>	√ <sup>394</sup>	√ <sup>395</sup>		√ <sup>396</sup>
Portland	Police Auditor		√ <sup>397</sup>	√ <sup>398</sup>		
Prince George's County	Court Monitor	√ <sup>399</sup>		√ <sup>400</sup>		
Sacramento	Police Auditor					
San Jose	Police Auditor					
Seattle	Police Auditor	√ <sup>401</sup>	√ <sup>402</sup>	√ <sup>403</sup>	√ <sup>404</sup>	
Steubenville	Court Monitor	√ <sup>405</sup>	√ <sup>406</sup>	√ <sup>407</sup>		
Villa Rica	Court Monitor	√ <sup>408</sup>				
Wallkill	Court Monitor	√ <sup>409</sup>	√ <sup>410</sup>	√ <sup>411</sup>		

359. Albuquerque has an early intervention system, but a 2002 audit found that it was run by a part-time volunteer on a single computer that others could not access. See JEROME, ALBUQUERQUE REPORT, *supra* note 105, at 80.

360. The risk management officer issues quarterly and annual reports about the types of claims filed and the named officers' unit. See *id.*

361. See Telephone Interview With Pierce Murphy, *supra* note 112.

362. See Buffalo MOA, *supra* note 188, ¶ 20.

363. See *id.* ¶ 24B (Internal Affairs “shall independently investigate, and BPD shall make findings, and take any appropriate disciplinary or non-disciplinary action on all incidents giving rise to . . . civil litigation, which arises from officers’ actions within the scope of their employment . . . regardless of whether the complaint is withdrawn or settled.”).

364. See *id.* ¶ 20B (System must be searchable by officer, unit, or type of incidents “(e.g., all CAP spray incidents).”).

365. See *id.* ¶ 20A.

366. All claims in litigation are logged as misconduct. Although some claims are sent to Internal Affairs, most end up at the IPRA. See Telephone Interview With Ilana Rosensweig, *supra* note 112.

367. See *id.*

368. See Cincinnati MOA, *supra* note 178, ¶ 58(h) (ordering that the risk management system track “all civil or administrative claims filed with, and all civil lawsuits served upon, the City, or its officers, or agents, resulting from CPD operations or the actions of CPD personnel”).

369. See *id.* ¶ 62(d) (“CPD commanders, managers, and supervisors will review, on a regular basis but not less than quarterly, system reports, and will evaluate individual officer, supervisor, and unit activity.”).

370. See Telephone Interview With Richard Rosenthal, *supra* note 112.

371. See *id.* Rosenthal has no formal process to identify trends but tries to “pay attention” to any trends he identifies in the course of his work.

372. See Detroit Consent Decree, *supra* note 178, ¶ 80(1) (requiring that Detroit develop a “risk management database” including information about civil lawsuits filed against officers and the police department). However, Kroll’s final memorandum suggests that the system is still not operational. See Memorandum From Joseph S. Buczek, Kroll & Assocs., to Deputy Chief Tammie Gregg, U.S. Dep’t of Justice, and Deputy Chief Jamie Fields, Detroit Police Dep’t 4 (Sept. 8, 2009), available at [http://www.kroll.com/library/detroit/DPD\\_Final\\_Memorandum\\_09-08-2009.pdf](http://www.kroll.com/library/detroit/DPD_Final_Memorandum_09-08-2009.pdf). See also SHERYL ROBINSON WOOD, KROLL, INC., REPORT OF THE INDEPENDENT MONITOR FOR THE DETROIT POLICE DEPARTMENT, REPORT FOR THE QUARTER ENDING MAY 31, 2009, at 7–9 (2009), available at [http://www.kroll.com/library/detroit/DPD\\_Q23\\_Report\\_07-16-2009.pdf](http://www.kroll.com/library/detroit/DPD_Q23_Report_07-16-2009.pdf) (discussing the shortcomings of the early intervention system).

373. See Detroit Consent Decree, *supra* note 178, ¶ 83a (stating that the early intervention system must analyze “number of incidents for each data category by individual officer and by all officers in a unit”; “average level of activity for each data category by individual officer and by all officers in a unit”; and “identification of patterns of activity for each data category by individual officer and by all officers in a unit”). However, the early intervention system is still not operational. See *supra* note 231.

374. See D.C. MOA, *supra* note 193, ¶ 107(k). However, the system still was not fully operational when the court terminated oversight in 2008. See *supra* notes 231 and 372.

375. See D.C. MOA, *supra* note 193, ¶ 68.

376. See *id.* ¶ 112(a) (requiring that supervisors “review and analyze all relevant information in [the early intervention system] about officers under their supervision to detect any pattern or series of incidents that indicate that an officer, group of officers, or an MPD unit under his or her supervision may be engaging in at-risk behavior”). The system was not operational, however, when the court terminated oversight in 2008. See *supra* note 231.

377. Although civil litigation is one of the fields in the early intervention system, a 2002 audit found that litigation information was never added into the system. See JEROME, FARMINGTON REPORT, *supra* note 105, at 99–100.

378. The 2002 audit found that Farmington’s Internal Affairs Division investigated claims in lawsuits but did not separate this investigation from their defense of the case, “leading in some files [they] reviewed to investigations that read like legal briefs for denying liability rather than objective, thorough investigations of the facts to determine whether policy or other conduct violations occurred.” See *id.* at 78.

379. See LAPD Consent Decree, *supra* note 185, ¶ 41(1).

380. See *id.* ¶ 93(a).

381. See LAPD Consent Decree, *supra* note 185, ¶ 47a (“The protocol [for the early intervention system] shall require that, on a regular basis, supervisors review and analyze all relevant information in [the system] about officers under their supervision to detect any pattern or series of incidents that indicate that an officer, group of officers, or an LAPD unit under his or her supervision may be engaging in at-risk behavior.”).

382. The LASD developed the Personnel Performance Index (PPI), which tracks information about litigation and other complaints, investigations, and uses of force. See LASD FIRST SEMI-ANNUAL REPORT, *supra* note 178, at 19.

383. The LASD has a policy of investigating these claims, although this policy has not always been followed. See *supra* notes 241, 244–246 and accompanying text.

384. See LASD SEVENTH SEMI-ANNUAL REPORT, *supra* note 200, at 94.

385. The auditor for the LASD reviews closed litigation files to evaluate the strength of the department's internal investigatory and disciplinary processes, and to identify personnel and policy implications. See LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 196, at 31, 71.

386. See New Jersey Consent Decree, *supra* note 178, ¶ 41b (requiring that the early warning system track “information on . . . civil suits involving alleged misconduct by state troopers while on duty”).

387. See *id.* ¶ 73(c).

388. See *id.* ¶ 48 (requiring that supervisors conduct quarterly reviews “to ensure that individual troopers and State Police units and subunits are performing their duties in accord with the provisions of the Decree”).

389. See HUMAN RIGHTS WATCH, *supra* note 19, at 262–63.

390. See Oakland Settlement, *supra* note 103, at 28.

391. See *id.* at 14.

392. See *id.* at VII.B.5 (requiring that managers review system information quarterly “to detect any pattern or series of incidents which may indicate that a member/employee, supervisor, or group of members/employees under his/her supervision may be engaging in at-risk behavior”). The Oakland court monitors do not believe that department officials are conducting this trend analysis. See Telephone Interview With Kelli Evans and Christy Lopez, *supra* note 111.

393. See Pittsburgh Consent Decree, *supra* note 185, ¶ 12a.

394. See *id.* ¶¶ 26, 26(b) (stating that the city and police department will monitor all lawsuits “involving allegations of untruthfulness, physical force, racial bias, or domestic violence” and will independently investigate the claim “where the court or jury does not find the officer guilty or liable, even when the complaint is withdrawn or settled”).

395. See *id.* ¶ 12b (requiring that the system be capable of retrieving information regarding “individual officer; squad, zone, shift, or special unit; arrests by officer(s) and types of arrests to determine the number of times a particular officer or groups of officers have filed discretionary charges of resisting arrest, disorderly conduct, public intoxication, or interfering with the administration of justice”).

396. See *id.* ¶ 26.

397. See Telephone Interview With Richard Rosenthal, *supra* note 112.

398. The independent monitor is doing some informal tallying of this information. See OFFICE OF THE CITY AUDITOR OF PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION COMBINED ANNUAL REPORT 22 (2006) (showing a pattern through the review of litigation challenging entries into residences).

399. See Memorandum of Agreement Between the U.S. Dep't of Justice and Prince George's County, Md. and Prince George's County Police Dep't ¶ 76(g) (Jan. 22, 2004), available at [http://www.justice.gov/crt/split/documents/pgpd/pg\\_memo\\_agree.pdf](http://www.justice.gov/crt/split/documents/pgpd/pg_memo_agree.pdf).

400. See *id.* ¶¶ 80b, 80c (requiring that the early intervention system produce information about “individual and unit patterns”).

401. See Telephone Interview With John Fowler, *supra* note 112.

402. *Id.*

403. *Id.*

404. *Id.*

405. Steubenville Consent Decree, *supra* note 185, ¶¶ 65, 71, 72.

406. *Id.* ¶ 33.

407. *Id.* ¶ 74 (requiring analysis of data, including “use of force incidents by officer, by injury, and by types of force used”).

408. Memorandum of Agreement Between the U.S. and the City of Villa Rica, Ga. ¶ F5 (Dec. 23, 2003), *available at* [http://www.justice.gov/crt/split/documents/villa\\_rica\\_moa.pdf](http://www.justice.gov/crt/split/documents/villa_rica_moa.pdf).

409. ESSERMAN, *supra* note 103, at 30–31.

410. See ESSERMAN, *supra* note 299, at 18–19.

411. See *id.* at 37 (“The Chief and the Governing Body shall look for and detect any trends in members’ conduct requiring intervention, in areas including but not limited to: (1) traffic stops, (2) searches and seizures, (3) arrest and charging practices, and (4) evidence handling.”).