

## WHAT POLICE LEARN FROM LAWSUITS

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### ABSTRACT

*This Article asks what can be learned from the vast amount of information generated by modern civil litigation. One answer lies in the practices of a small but growing number of law enforcement agencies that pay careful attention to suits brought against them and their officers. These departments gather information from initial complaints, discovery, and case resolutions and use that information to identify personnel and policy weaknesses. Lawsuit data has proven valuable to these departments' performance improvement efforts: Suits have alerted departments to incidents of misconduct, and the information developed during the course of discovery and trial has been found to be more comprehensive than that generated through internal channels. Although information generated by litigation has filled gaps in internal reporting systems, it is also, undeniably, flawed. The adversarial process produces biased and sometimes irrelevant information about a relatively small number of misconduct allegations, and the slow pace of litigation means that a case may not be resolved until several years after the underlying event. Departments in my study mitigate these flaws by gathering information from each stage of the litigation process, reviewing data in context with other available information, and using independent auditors to consider what the data may show. Department practices take advantage of the strengths—while minimizing the weaknesses—of lawsuit data and thereby suggest a promising way to learn from litigation.*

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## INTRODUCTION

Contemporary civil litigation produces massive amounts of highly imperfect information. The complaint that initiates each lawsuit<sup>1</sup> describes why the plaintiff believes she has been wronged and the people and events that caused those legal violations.<sup>2</sup> Assuming the plaintiff

<sup>1</sup> Although each lawsuit produces a large amount of information, most aggrieved people never sue. For a discussion of low filing rates' impact on the usefulness of lawsuit data to performance improvement efforts, see *infra* note 185 and accompanying text.

<sup>2</sup> Although Rule 8 requires only a "short and plain" statement of facts and claims, the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), which require plaintiffs to present a "plausible" claim for relief in the complaint, lead prudent plaintiffs' attorneys to submit detailed initial plead-

prevails against any motion to dismiss, the pretrial litigation process is dominated by the production and exchange of information.<sup>3</sup> In federal court and the majority of states that follow the federal rules of civil procedure,<sup>4</sup> parties must disclose witnesses and documents that support their claims and defenses.<sup>5</sup> Each side can demand any document from the opposing party—emails, bills, memos, medical records, diaries, personnel manuals, and the like—that “appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>6</sup> Each side can demand written answers to interrogatories and requests for admission.<sup>7</sup> Each side can depose witnesses, subject to minimal objections or limitations on the scope of questioning.<sup>8</sup> And attorneys, if they are zealously representing their clients, use these discovery tools to squeeze all the plausibly relevant information they can from the opposing side’s file cabinets, computer hard drives, and witnesses’ memories. Although the vast majority of cases are resolved through settlement or motion practice,<sup>9</sup> trial can produce yet more information, as attorneys introduce evidence and question witnesses about the merits of legal claims.

We know little about the ways that complex organizations process

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ings. For a description of pleading’s evolving standards, see Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010), and Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010). For a discussion of the effects of *Twombly* and *Iqbal* on pleading practice, see Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527-37 (2010).

<sup>3</sup> Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 543-44 (1998) (finding that 85% of attorneys surveyed reported engaging in some form of discovery in a recent closed case). For a discussion of the changing focus in civil litigation from trial to pretrial litigation over the past century, see Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919 (2009), and Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (1994).

<sup>4</sup> See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 30 NEV. L.J. 354, 356-58 (2003) (finding that thirty-three states have adopted the federal rules or very similar rules). Over the past fifteen years, states have increasingly experimented with their own procedural rules, particularly those governing discovery. See Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167 (2005).

<sup>5</sup> FED. R. CIV. P. 26(a). State procedural rules generally require each side to disclose additional information. For a description of mandatory disclosure provisions across the country, see Koppel, *supra* note 4, at 1226-34, and Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 640-41 (2002) (describing state mandatory disclosure provisions).

<sup>6</sup> FED. R. CIV. P. 26(b)(1), 34.

<sup>7</sup> FED. R. CIV. P. 33, 36. For a survey of various state procedural requirements for interrogatories and requests for admission, see Koppel, *supra* note 4, at 1216-21.

<sup>8</sup> FED. R. CIV. P. 30.

<sup>9</sup> See Clermont, *supra* note 3, at 1955-56 (finding that, of the federal cases terminated in 2005, 67.7% were settled, 20.7% were adjudicated by motion, and just 1.3% were adjudicated at trial—the remaining 10.3% were generally transferred or remanded).

the dizzying amount of data generated by litigation. Lauren Edelman and Charles Weisselberg have studied how legal rules are disseminated in companies' personnel offices and police department station houses, respectively.<sup>10</sup> Margo Schlanger recently studied the ways that claims management systems, developed in response to the threat of litigation, can be used to improve organizational behavior in hospitals, retailers, and prisons.<sup>11</sup> But we know almost nothing about how complex organizations gather and analyze information from lawsuits that have been filed against them and their employees.<sup>12</sup>

My research of law enforcement uses of litigation data aims to fill this gap. In a previous study, I found that few police departments learn from lawsuits brought against them.<sup>13</sup> Officials may pay attention to lawsuits that lead to large judgments or political repercussions. But most departments ignore lawsuits that do not inspire front-page newspaper stories, candlelight vigils, or angry meetings with the mayor. The city attorney will defend these suits, any settlement or judgment will be paid out of the city's coffer, and the department will not keep track of which officers were named, what claims were alleged, what evidence was amassed, what resolution was reached, or what amount was paid.<sup>14</sup>

This Article examines the practices of a small group of police departments that *do* consistently gather and analyze information from lawsuits filed against them and their officers.<sup>15</sup> I have studied five departments—the Los Angeles Sheriff's Department and police departments in Seattle, Portland, Denver, and Chicago—that gather and analyze legal claims, information generated during discovery, and litigation outcomes.<sup>16</sup> These departments use lawsuit data—with other information—to identify problem officers, units, and practices. They explore personnel, training, and policy issues that may have led to the claims. And they craft interventions aimed at remedying those underlying problems.

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<sup>10</sup> For representative work by Lauren Edelman and her colleagues regarding the dissemination of legal rules through personnel offices, see, for example, Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001), and Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941 (1999). For work regarding the dissemination of legal rules in police departments, see Charles Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121 (2001).

<sup>11</sup> See Margo Schlanger, *Operationalizing Deterrence: Claims Management (In Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L. 1 (2008); see also Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (studying the effects of threat of litigation in several contexts).

<sup>12</sup> Apart from my research, see GEORGE EADS & PETER REUTER, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* 105-06 (1983).

<sup>13</sup> See Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1037-40 (2010).

<sup>14</sup> *Id.* (describing these findings).

<sup>15</sup> See *infra* Part I.A for a description of the data and methodology of this study.

<sup>16</sup> For further description of department practices, see *infra* Part I.C.

For these departments, lawsuits are a valuable source of information about police misconduct allegations. Departments that do not gather lawsuit data rely on civilian complaints and use-of-force reports to alert them to possible misconduct. In the litigation-attentive departments in my study, lawsuits have notified officials of misconduct allegations that did not surface through these other reporting systems. For example, the Los Angeles Sheriff's Department's review of lawsuit claims revealed clusters of improper vehicle pursuits, illegal searches, and warrantless home entries.<sup>17</sup> These vehicle pursuits, searches, and home entries did not appear in officers' use-of-force reports because the events—while potentially serious constitutional violations—did not involve the application of force as defined by department policies and so did not trigger reporting requirements.<sup>18</sup> The civilians involved in these lawsuits could have chosen to file civilian complaints but did not; people rarely file civilian complaints and may be particularly unlikely to do so if they are planning to sue.<sup>19</sup>

Even when a civilian complaint or use-of-force report is filed, the litigation process can unearth details that did not surface during the internal investigation. When, for example, a man died of blunt force chest trauma two hours after being taken into Portland police custody, a critical question was how much force the involved deputies had used to bring him to the ground.<sup>20</sup> The night of the man's death, the involved officer and deputy were videotaped at the Portland jail describing their confrontation.<sup>21</sup> The audio portion of the tape was very scratchy, but Portland's internal affairs investigators did nothing to improve the sound.<sup>22</sup> Only during litigation did plaintiff's counsel enhance the audio, at which point the involved officer's statements were found to contradict his statement to internal affairs.<sup>23</sup>

Although lawsuits have filled critical gaps in police department internal reporting systems, lawsuits are themselves flawed sources of information. Aggrieved parties rarely file lawsuits and, when they do, plaintiffs win and lose for reasons—and are compensated at amounts—divorced from the merits of their claims. Cases drag on for years and are often brought against individual bad actors instead of the institutional players best positioned to address systemic harms. This Article does not contest these critiques. Instead, it shows that departments mitigate law-

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<sup>17</sup> See *infra* note 156 and accompanying text.

<sup>18</sup> See *infra* note 157 and accompanying text.

<sup>19</sup> See *infra* notes 136-141 and accompanying text.

<sup>20</sup> See MICHAEL GENNACO ET AL., OIR GROUP, REPORT TO THE CITY OF PORTLAND CONCERNING THE IN-CUSTODY DEATH OF JAMES CHASSE 1, 9 (2010) [hereinafter CHASSE REPORT], available at [www.portlandonline.com/auditor/index.cfm?a=310291&c=54263](http://www.portlandonline.com/auditor/index.cfm?a=310291&c=54263).

<sup>21</sup> See *id.* at 27.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at 27-28.

suits' flaws by gathering information from each stage of the litigation process, reviewing data in context with other available information, and using independent investigators and auditors to consider what the data may show.

This Article not only describes how a group of police departments processes information from lawsuits; it also enriches our understanding of the relationship between lawsuits and performance improvement. Courts and scholars expect that negative litigation outcomes deter misbehavior.<sup>24</sup> Scholars who think about the deterrent effects of lawsuits against the police disagree about whether police officials will be deterred by lawsuits' financial, political, administrative, or emotional effects.<sup>25</sup> But all expect that it is lawsuits' punitive nature that inspires performance improvement.

Although high-profile cases and large damages awards may inspire behavior change, my research reveals that deterrence does not function as expected when it comes to run-of-the-mill damages actions. My prior study showed that most departments collect so little information about lawsuits brought against them that they cannot weigh the costs and benefits of future misconduct as deterrence theory assumes.<sup>26</sup> This Article shows that when departments pay attention to lawsuits they do so in ways also distinct from prevailing theories of deterrence. Departments mine lawsuits for data about misconduct allegations and the details of those allegations. Lawsuits promote performance improvement not because they have political or financial ramifications, but because the information generated by litigation offers valuable insights about police practices. These five departments have found original, productive, and promising ways to learn from litigation.

The remainder of the Article proceeds as follows. In Part I, I describe my study and findings. In Part II, I show that lawsuits offer departments otherwise unavailable information about the occurrence of

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<sup>24</sup> For foundational descriptions of this theory, see GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970), WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987), A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (2d ed. 1989), and STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987). For a description of the history of the economic theory of tort law, see William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 852-57 (1981).

<sup>25</sup> See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983) (arguing that government officials respond to political, bureaucratic, and administrative incentives); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (arguing that government officials respond to financial incentives); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (arguing that government officials respond to negative publicity); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that government officials respond to political incentives).

<sup>26</sup> See Schwartz, *supra* note 13.

alleged misconduct and details of those events. In Part III, I examine the weaknesses of lawsuit data and show how departments mitigate these flaws. And, in Part IV, I show how department practices complicate and enrich our understanding of the role of lawsuits in performance improvement efforts.

## I. STUDY

### A. Overview

Most police departments ignore lawsuits, but a small but growing number of departments have begun to review lawsuit claims and evidence for possible lessons.<sup>27</sup> Some began doing so as conditions of settlement in cases alleging department-wide failures brought by the Department of Justice, state attorneys general, and individuals.<sup>28</sup> Other cities have hired independent investigators or auditors who analyze litigation data as part of their efforts to improve police accountability.<sup>29</sup> Technological problems, human error, and intentional efforts to obfuscate can frustrate data collection and analysis.<sup>30</sup> But when departments with policies to gather information from lawsuits overcome these implementation problems, lawsuits inform training and policy decisions that, in turn, appear to improve performance and decrease misconduct.<sup>31</sup>

In this study, I focus on five departments—in Los Angeles County, Portland, Denver, Seattle, and Chicago—that systematically integrate information from lawsuits into decisions aimed at improving officer and department performance. These departments are in no way typical; I make no claims that their practices are representative of departments more generally. Indeed, I contend that these departments are outliers. These five departments review litigation data most extensively as a matter of policy<sup>32</sup> and most consistently as a matter of practice.<sup>33</sup>

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<sup>27</sup> See generally *id.* (describing these findings).

<sup>28</sup> See *id.* at 1057-58.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* at 1060-64.

<sup>31</sup> See *id.* at 1068-71.

<sup>32</sup> Although there has been no national study of the extent to which police departments use litigation data, experts estimate that the number is quite small. Two-thirds of large police departments do not have early intervention systems that track information about officers. See *id.* at 1059. And even departments with early intervention systems may not necessarily track civil claims. See *id.* Even fewer departments appear to use lawsuit data for other purposes. 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." RICHARD JEROME, POLICE ASSESSMENT RES. CTR., PROMOTING POLICE ACCOUNTABILITY AND COMMUNITY RELA-

Each of these five departments has an independent investigator or auditor that evaluates department policies and practices, and reviews lawsuit data for possible lessons. I read reports by these reviewers about the inner workings of their departments.<sup>34</sup> I then used those reports as a backdrop for semi-structured interviews with past and current auditors and investigators, their staff members, and department officials.<sup>35</sup>

## B. Departments

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TIONS IN FARMINGTON: STRENGTHENING THE CITIZEN POLICE ADVISORY COMMITTEE 76 (2007). 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. *See* Correspondence from Oren Root, Deputy Dir., Police Assessment Res. Ctr., to author (Dec. 17, 2008) (on file with author). 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. *See id.*

<sup>33</sup> Twenty of the twenty-six departments in my prior study had policies to integrate information from lawsuits into their personnel and policy decisions. *See* Schwartz, *supra* note 13, at 1052-56; *see also id.* at 1057-58 (explaining why a disproportionately large number of departments in my study had these types of policies). Reports about these twenty departments revealed several recurring impediments that have delayed, compromised, and defeated efforts to gather, analyze, store, and communicate information from lawsuits. For descriptions of these implementation problems, *see id.* at 1060-66. The five departments in this study have also struggled to follow their own policies. *See id.* Yet, I also found evidence that these five departments' policies are, relatively speaking, in working order: These departments input information into relevant systems, analyze that information, and craft interventions based on their analysis. *See id.*

<sup>34</sup> Merrick Bobb, the Special Counsel to the Board of Supervisors, has written twenty-nine semiannual reports about the Los Angeles Sheriff's Department (LASD), which are available at [www.parc.info](http://www.parc.info); additionally, nine annual reports have been written about the LASD by the Office of Independent Review and are available at [www.laoir.com](http://www.laoir.com). The Seattle Office of Professional Accountability has published twelve semi-annual reports, available at <http://www.seattle.gov/police/OPA/publications.htm>. Chicago's Independent Police Review Authority publishes annual and quarterly reports, available at <http://www.iprachicago.org/resources.html>. The Denver Office of the Independent Monitor publishes quarterly and annual reports available at <http://www.denvergov.org>. And Portland's Independent Police Review Division publishes annual and quarterly reports in addition to reports dedicated to particular issues, available at <http://www.portlandonline.com/auditor/index.cfm?c=27068>.

<sup>35</sup> *See* Telephone Interview with Mary-Beth Baptista, Dir., Portland Indep. Police Review (Dec. 3, 2010); Telephone Interview with Merrick Bobb, Founding Dir., Police Assessment Res. Ctr., and Special Counsel, L.A. Sheriff's Dep't, and Oren Root, Deputy Dir., Police Assessment Res. Ctr. (Oct. 24, 2007); Telephone Interview with John Fowler, Assoc. Dir., Seattle Office of Prof'l Accountability (Oct. 16, 2008); Telephone Interview with Craig Futterman, Univ. of Chi. Law Sch. (Sept. 15, 2008); Interview with Michael Gennaco, Chief Attorney, L.A. Sheriff's Dep't Office of Indep. Review, in L.A., Cal. (Sept. 18, 2010); Telephone Interview with Captain Shaun Mathers, Captain, L.A. Sheriff's Dep't Risk Mgmt. Unit (Sept. 27, 2010); Telephone Interview with Kathryn Olson, Dir., Seattle Office of Prof'l Accountability (Aug. 30, 2010); Telephone Interview with Richard Rosenthal, Indep. Monitor, City & Cnty. of Denver & former Police Auditor, City of Portland (Sept. 18, 2008); Telephone Interview with Ilana Rosenzweig, Chief Admin'r, Chi. Indep. Police Review Auth. (Sept. 15, 2008); Telephone Interview with David Woboril, Senior Deputy City Attorney, Portland City Attorney's Office (Sept. 12, 2011).

*Following are descriptions of the five departments in this study, listed in the order in which they instituted policies to gather and analyze litigation data.*

*Los Angeles County.* The Los Angeles Sheriff's Department (LASD) is the largest sheriff's department and the fourth largest law enforcement agency in the country. Its nearly 8,300 sworn personnel patrol over 3,000 square miles of Los Angeles County and run the country's largest jail system.<sup>36</sup> Although the LASD has among the most extensive systems of accountability, and pays the most attention to the lessons that lawsuits might offer, it did not establish these policies on its own initiative. Instead, in 1991, following a series of high profile events and costly legal settlements and judgments, the Los Angeles County Board of Supervisors ordered an independent investigation of the department under the leadership of retired Superior Court Judge James Kolts (the Kolts Commission).<sup>37</sup>

In July 1992, the Kolts Commission issued a report with recommendations aimed at improving reporting and review of lawsuits and other misconduct allegations, and making more effective policy, training, and disciplinary decisions.<sup>38</sup> Following the Kolts Commission's recommendations, the LASD created three new entities to identify and manage information and to audit internal practices. First, the Board of Supervisors appointed Merrick Bobb to succeed Judge Kolts as Special Counsel to the Board, and charged him with overseeing the implementation of the Kolts Commission's recommendations.<sup>39</sup> Bobb reviews department policies and practices, reviews the department's litigation trends and costs, reviews closed litigation files for policy implications, and provides semiannual reports to the Board about the LASD.<sup>40</sup> Bobb's original contract was for three years, but the contract has been successively renewed and he has been reporting to the Board ever since. His reports, which are regularly more than a hundred pages long, may be the

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<sup>36</sup> See Brian A. Reaves, Bureau of Justice Statistics, U.S. Dep't of Justice, Census of State and Local Law Enforcement Agencies, 2004 5 (2007) [hereinafter BJS Law Enforcement Census].

<sup>37</sup> See JAMES G. KOLTS ET AL., THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT 1 (1992) [hereinafter KOLTS COMMISSION REPORT] (asserting that the Kolts Commission inquiry was prompted by "[a]n increase over the past years in the number of officer-involved shootings," "[f]our controversial shootings of minorities by LASD deputies in August 1991," and the fact that "Los Angeles County . . . paid \$32 million in claims arising from the operation of the LASD over the last four years"). Merrick Bobb served as General Counsel to the Kolts Commission. *Id.*

<sup>38</sup> MERRICK J. BOBB ET AL., L.A. CNTY. SHERIFF'S DEP'T, 1ST SEMIANNUAL REPORT 35 (1993) [hereinafter LASD 1ST SEMIANNUAL REPORT].

<sup>39</sup> MERRICK J. BOBB ET AL., L.A. CNTY. SHERIFF'S DEP'T, 14TH SEMIANNUAL REPORT 55-56 (2001) [hereinafter LASD 14TH SEMIANNUAL REPORT].

<sup>40</sup> *Id.*

most extensive and detailed analysis available of a police department's efforts at creating systems of accountability.

Second, following the Kolts Commission's recommendations, the LASD created a risk management bureau, the first law enforcement bureau in the country dedicated to reducing preventable accidents and liability costs.<sup>41</sup> The bureau directs administrative investigations of claims when they are filed, identifies trends across claims, and reviews closed case files for possible lessons. The bureau also maintains an early intervention system that tracks information, including lawsuits, in an effort to identify problem officers. Third, at the recommendation of the Sheriff's Department, the Board of Supervisors created the Office of Independent Review (OIR), a civilian body separate from the department's internal affairs division that is charged with overseeing and participating in the LASD's internal investigations.<sup>42</sup>

*Seattle.* Seattle has a population of 560,000 with 1,240 sworn officers.<sup>43</sup> In 1999, after a high-profile scandal,<sup>44</sup> a civilian panel was appointed to study the police department's internal investigation processes. Based on the panel's recommendations, the department appointed a civilian director of the internal affairs unit, called the Office of Professional Accountability (OPA).<sup>45</sup> The OPA director reviews civilian complaints and lawsuits and investigates the most serious claims.<sup>46</sup> The OPA director additionally tracks lawsuit data in an early intervention system, reviews suits for trends across cases, and reviews closed case files.<sup>47</sup> The department has two additional forms of oversight: an auditor who reviews complaints and OPA investigations and a citizen panel that reviews closed OPA investigations.<sup>48</sup>

*Portland.* Portland has a population of approximately 537,000, and a police force of 1,050.<sup>49</sup> In 2001, the Portland City Council approved the creation of an independent auditor, the Independent Police Review

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<sup>41</sup> See MERRICK J. BOBB ET AL., L.A. CNTY. SHERIFF'S DEP'T, 3RD SEMIANNUAL REPORT 12, 14 (1994).

<sup>42</sup> See OFFICE OF INDEP. REVIEW, CNTY. OF L.A., FIRST REPORT i-ii (2002) [hereinafter OIR FIRST REPORT].

<sup>43</sup> POLICE ASSESSMENT RES. CTR., REVIEW OF NATIONAL POLICE OVERSIGHT MODELS FOR THE EUGENE POLICE COMMISSION 19 (2005) [hereinafter NATIONAL POLICE OVERSIGHT MODELS].

<sup>44</sup> See Jim Brunner, *New System in Place for Policing the Police*, SEATTLE TIMES, May 7, 2002, at A1 (describing the scandal, in which a homicide detective stole \$10,000 from the home of a dead man, and at least eighteen police officials knew of the incident but no internal investigation ever took place).

<sup>45</sup> See *id.*

<sup>46</sup> See NATIONAL POLICE OVERSIGHT MODELS, *supra* note 43, at 19.

<sup>47</sup> See Telephone Interview with John Fowler, *supra* note 35.

<sup>48</sup> See Brunner, *supra* note 44; NATIONAL POLICE OVERSIGHT MODELS, *supra* note 43, at 19.

<sup>49</sup> See BJS LAW ENFORCEMENT CENSUS, *supra* note 36, at 10.

Division (IPR), to receive civilian complaints, refer complaints to internal affairs for investigation, review internal affairs' investigations, and conduct independent and joint investigations.<sup>50</sup>

In 2004, IPR director Richard Rosenthal recommended that IPR begin reviewing and investigating lawsuits in the same manner that it reviewed civilian complaints.<sup>51</sup> The mayor opposed the proposal, arguing that internal investigations would be "a violation of . . . fiduciary responsibility" to the city's taxpayers because the findings of the investigations might lead to higher payouts.<sup>52</sup> The chief of police argued it was the job of the city attorney, not the police auditor, to investigate lawsuits.<sup>53</sup> The Portland City Council agreed with Rosenthal and allowed him to investigate lawsuit claims.<sup>54</sup> Portland's auditor reviews legal claims when filed, identifies those claims that have not previously been brought as civilian complaints, and internally investigates the most serious claims.<sup>55</sup> The auditor looks for trends across claims and reviews closed case files after the litigation is complete.<sup>56</sup> Portland additionally has a tort review board—comprised of officials from the city attorney's office, the police department, and the police commissioner's office—that reviews claims when they are first filed and receives updates about pending claims.<sup>57</sup>

*Denver.* Denver has a population of 566,000, and a police force of 1,405.<sup>58</sup> Denver's City Council created the Office of the Independent Monitor (OIM) in 2004 and, in 2005, Richard Rosenthal left his post as Portland's auditor to become Denver's OIM Director.<sup>59</sup> The OIM, an entity independent of internal affairs, oversees internal affairs investigations and makes personnel recommendations to the chief of police.<sup>60</sup>

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<sup>50</sup> See 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 7 (2004) [hereinafter PORTLAND TORT CLAIMS REPORT].

<sup>51</sup> 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." *Id.* at 3. Portland actually had a city ordinance preventing internal investigations while a lawsuit was pending. *See id.*

<sup>52</sup> Letter from Vera Katz, Mayor, Portland, Or., to Gary Blackmer, City Auditor, Portland, Or. (Aug. 26, 2004) (on file with author).

<sup>53</sup> See Letter from Chief Derrick Foxworth, Portland Bureau of Police, Portland, Or., to Gary Blackmer, City Auditor, Portland, Or. (Aug. 27, 2004) (on file with author).

<sup>54</sup> See Portland, Or., City Code ch. 3.21 § 110(B) (2005) (codifying ordinance allowing the IPR to investigate tort claims); Telephone Interview with Richard Rosenthal, *supra* note 35.

<sup>55</sup> See Telephone Interview with Mary-Beth Baptista, *supra* note 35.

<sup>56</sup> See, e.g., EILEEN LUNA-FIREBAUGH, PERFORMANCE REVIEW OF THE INDEPENDENT POLICE REVIEW DIVISION 86 (2008).

<sup>57</sup> See Telephone Interview with David Woboril, *supra* note 35.

<sup>58</sup> See BJS LAW ENFORCEMENT CENSUS, *supra* note 36, at 10.

<sup>59</sup> RICHARD ROSENTHAL, OFFICE OF THE INDEP. MONITOR, ANNUAL REPORT 2005 (2005).

<sup>60</sup> *Id.*

When Richard Rosenthal joined Denver's OIM, he began reviewing all tort claims and investigating the underlying allegations when appropriate. Rosenthal additionally reviews claims for trends.<sup>61</sup>

*Chicago.* Chicago has a population of 2.8 million, and employs over 13,000 uniformed officers.<sup>62</sup> In 2007, after a series of scandals,<sup>63</sup> Chicago created an independent investigative agency, the Independent Police Review Authority (IPRA), to investigate police misconduct allegations.<sup>64</sup> The civilian appointed to head the division, Ilana Rosenzweig, was previously an attorney at LASD's OIR.<sup>65</sup> Rosenzweig investigates claims of misconduct asserted in lawsuits and reviews closed litigation files to determine whether internal investigations should be reopened.<sup>66</sup>

### C. Policies

The LASD and the police departments in Seattle, Portland, Denver, and Chicago gather information from lawsuits brought against them and their officers at each stage of the litigation process. Departments use this data to understand individual incidents of alleged misconduct and to identify trends across cases that suggest widespread personnel and policy failings. I describe those policies here. In Part II I will consider the extent to which lawsuit data adds value to department performance improvement efforts and in Part III I will describe how these departments minimize the data's flaws.

#### 1. Trend Analysis

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<sup>61</sup> *Id.*; Telephone Interview with Richard Rosenthal, *supra* note 35.

<sup>62</sup> See BJS LAW ENFORCEMENT CENSUS, *supra* note 36, at 10.

<sup>63</sup> Libby Sander, *Chicago Revamps Investigation of Police Abuse, but Privacy Fight Continues*, N.Y. TIMES, July 20, 2007, at A14 (describing the "string of recent scandals" as follows: "An off-duty officer was caught on videotape beating a female bartender. In another incident, also captured on videotape, a group of off-duty officers was seen beating four businessmen at a downtown bar. In addition, several officers in an elite unit are awaiting trial on charges that include home invasion, theft and armed violence, as county prosecutors continue to investigate the unit.")

<sup>64</sup> IPRA investigates "allegations of the use of excessive force, police shootings where the officer discharges his/her weapon and strikes someone, deaths in custody, domestic violence, verbal abuse including bias and coercion." See *About IPRA*, CITY OF CHI., INDEP. POLICE REVIEW AUTH., <http://www.iprachicago.org/about.html> (last visited Oct. 31, 2011). Other misconduct claims are investigated by Chicago's internal affairs division.

<sup>65</sup> See Telephone Interview with Ilana Rosenzweig, *supra* note 35.

<sup>66</sup> See *id.*

All five departments review legal claims in the aggregate to identify trends that suggest problem units and types of behavior.<sup>67</sup> Departments' trend analyses vary in their depth and rigor. Some departments maintain a computerized database of lawsuits and perform sophisticated analyses of the data;<sup>68</sup> others identify trends by "trying to pay attention."<sup>69</sup> In each department, officials periodically review the legal claims pending against the department and its officers and consider whether a cluster of similar cases merit closer scrutiny and, possibly, intervention.<sup>70</sup>

By reviewing lawsuits as a group, departments can identify problems that would not have been apparent had they reviewed each case individually. As the director of the LASD's risk management bureau explained:

There's times when [the station] thinks it's a single incident but when we get it we know that we've had two or three or whatever number there are. . . . An example of that is one that we have from our jails where inmates would go to the doctor and for some medical reason the doctors would hand them a note to have a bottom bunk in the jail. They would then go to an outlying custody facility and . . . [t]he outlying custody facility had no access to those records and so when the inmate got there they would say "get on the top bunk," you know, "that's where you're assigned," and you know something

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<sup>67</sup> There is no national data about the prevalence of this type of trend analysis. The statistics about the prevalence of early intervention systems can offer some guidance, given that trends are sometimes identified through early intervention systems. See Schwartz, *supra* note 13, at 1058-59. Yet, statistics about national use of early intervention systems should not be relied upon heavily. Departments may not use their early intervention systems for this purpose. And other departments—including Chicago, Seattle, Denver, and Portland—conduct some manner of trend analysis without a computerized system. See Telephone Interview with John Fowler, *supra* note 35; Telephone Interview with Richard Rosenthal, *supra* note 35; Telephone Interview with Ilana Rosenzweig, *supra* note 35. Finally, departments with policies to review lawsuits for trends may not do so in practice. Those departments reliant upon early intervention systems for their trend analyses will suffer from the same technological problems, errors, and incomplete information described *infra* at notes 95-105 and accompanying text. And department officials that look for trends without computerized assistance may experience difficulties identifying trends. See Schwartz, *supra* note 13, at 1063.

<sup>68</sup> See MERRICK J. BOBB ET AL., L.A. CNTY. SHERIFF'S DEP'T, 7TH SEMIANNUAL REPORT 56 (1997) [hereinafter LASD 7TH SEMIANNUAL REPORT].

<sup>69</sup> See Telephone Interview with Richard Rosenthal, *supra* note 35.

<sup>70</sup> See Maxine Bernstein, *Portland Officials Call for Overhaul of Police Oversight*, THE OREGONIAN, Mar. 10, 2010, available at [http://www.oregonlive.com/portland/index.ssf/2009/12/portland\\_payouts\\_on\\_police\\_use.html](http://www.oregonlive.com/portland/index.ssf/2009/12/portland_payouts_on_police_use.html) (describing Portland's Tort Claim Review Board, a group of city risk managers, police personnel, and city attorneys who meet monthly to review tort claims against the city); Telephone Interview with John Fowler, *supra* note 35; Telephone Interview with Shaun Mathers, *supra* note 35 (explaining that, when a claim is filed against the LASD, the risk management bureau has the involved station investigate the allegations, after which the risk management bureau reviews the completed claim file in conjunction with other claims to determine whether the incident is part of a trend); Telephone Interview with Richard Rosenthal, *supra* note 35; Telephone Interview with Ilana Rosenzweig, *supra* note 35.

would happen, they would fall and get hurt. Well, each unit, from two or three units we got claims individually. They couldn't see the problem but by having it centralized in our operation we were able to say "we're seeing a pattern here, a problem across all the units and it's a communication issue," and had our custody division work on that. . . . [Y]ou know a station sees a tree . . . . I get the benefit of the forest.<sup>71</sup>

In addition to the claims brought by inmates who had fallen off their top bunks, the LASD has found clusters of claims relating to the transporting and searching of inmates,<sup>72</sup> vehicle pursuits,<sup>73</sup> and deputies' failure to go to the correct address in response to a call.<sup>74</sup>

Once the LASD has identified a trend, officials can diagnose and correct the underlying problem. LASD's auditor recommended policy changes to address the problems transporting and searching inmates,<sup>75</sup> and enhanced supervision to improve vehicle pursuits and accuracy when responding to calls.<sup>76</sup>

The Portland police department has also found troubling trends in their claims review and successfully identified and corrected the underlying problems. For example, Portland's tort review board came across several claims of excessive force that involved blows to the head.<sup>77</sup> Closer review of the cases revealed that the allegations were primarily made regarding officers on the night shift at one Portland police station. Following retraining and closer supervision, allegations of head strikes in that station declined. When the Portland auditor observed a cluster of claims suggesting that officers did not understand their authority to enter a home without a warrant, the City Attorney's office made a training video on this issue, and it "nearly disappeared as a problem."<sup>78</sup>

Just as clusters of initial filings suggest troublesome practices, settlement and judgment trends can identify underperforming stations in the department. The LASD's special counsel semiannually reviews trends in department settlements and judgments.<sup>79</sup> In one review, the

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<sup>71</sup> Telephone Interview with Captain Mathers, *supra* note 35.

<sup>72</sup> See LASD 7TH SEMIANNUAL REPORT, *supra* note 68, at 54-56.

<sup>73</sup> See *id.* at 56.

<sup>74</sup> OFFICE OF INDEP. REVIEW, CNTY. OF L.A., SECOND ANNUAL REPORT 40-41 (2003) [hereinafter OIR SECOND ANNUAL REPORT].

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See Telephone Interview with David Woboril, *supra* note 35.

<sup>78</sup> LUNA-FIREBAUGH, *supra* note 56, at 86.

<sup>79</sup> Other departments in this study do not conduct this type of analysis. Richard Rosenthal, Denver's auditor, recently requested that the department begin to collect "how much money has been paid out by the Police and Sheriff's Departments, based on allegations of misconduct, over the course of the past few years," and despaired of the fact that "the Department of Safety has no data information in this regard and has no tools to identify trends in litigation which could be used to identify, on a systemic basis, where training resources or policy reviews would be best used." RICHARD ROSENTHAL, OFFICE OF THE INDEP. MONITOR, ANNUAL REPORT 2009 5-8

special counsel found that two of the department's twenty-three stations<sup>80</sup>—Century and Lenox—were responsible for approximately 70% of the police misconduct litigation and 60% of the settlement dollars paid over a six-month period.<sup>81</sup> He then investigated Century station, which the special counsel considered to be “LASD's most troubled station.”<sup>82</sup> Special counsel's team

spent several weeks stretched over five months at the station, reviewing documents, interviewing station management, speaking with deputies, learning about the community, and gathering facts. We also rode along with deputies on patrol and “flew along” with a helicopter crew that provides air support to LASD patrol operations. We engaged a police officer, who had worked in the two south Los Angeles Police Department stations adjoining Century, to work with three of our team members and help us interpret what we saw.<sup>83</sup>

Special counsel found that the station—one of the most active in the department—had too many rookies, used inexperienced deputies as trainers, had too few senior administrators, and had too few African-American and Spanish-speaking deputies.<sup>84</sup> The special counsel recommended that the station employ fewer rookies at any given time, encourage training officers to stay in their positions so that they could become more experienced, encourage senior personnel to remain at Century station, decrease the sergeant-to-patrol-deputy ratio, and increase staff diversity.<sup>85</sup> Special counsel also recommended additional training and policy changes to reduce shootings by Century station deputies.<sup>86</sup> When special counsel reviewed Century station two years later, he found that the number of shootings at the station had dropped dramatically, even as the crime statistics and arrests remained stable.<sup>87</sup>

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(2009).

<sup>80</sup> See *General Phone Numbers*, L.A. Cnty. Sheriff's Dep't, [http://www.lasdhq.org/lasd\\_services/lasd\\_gnrphone\\_no.html](http://www.lasdhq.org/lasd_services/lasd_gnrphone_no.html) (last visited Oct. 31, 2011) (listing LASD's twenty-three stations).

<sup>81</sup> LASD 7TH SEMIANNUAL REPORT, *supra* note 68, at 52-53. The auditor also observed that these stations were responsible for a disproportionate number of “significant force incidents,” shootings, and civilian complaints, and that “stations in equally tough neighborhoods have a much better record on controlling shootings, force, and litigation.” *Id.* at 53.

<sup>82</sup> See MERRICK J. BOBB ET AL., L.A. CNTY. SHERIFF'S DEP'T, 13TH SEMIANNUAL REPORT 9 (2000) [hereinafter LASD 13TH SEMIANNUAL REPORT]. Bobb also considered Century station to be “a microcosm of American policing in inner city, crime-ridden, minority neighborhoods.” MERRICK J. BOBB ET AL., L.A. CNTY. SHERIFF'S DEP'T, 15TH SEMIANNUAL REPORT 1 (2002) [hereinafter LASD 15TH SEMIANNUAL REPORT]. This investigation was presented not only as an audit of the department, but also a means of examining LASD policies implemented as a result of the Kolts Commission report. See MERRICK J. BOBB ET AL., L.A. CNTY. SHERIFF'S DEP'T, 9TH SEMIANNUAL REPORT 7-8 (1998) [hereinafter LASD 9TH SEMIANNUAL REPORT].

<sup>83</sup> LASD 9TH SEMIANNUAL REPORT, *supra* note 82, at 9.

<sup>84</sup> *Id.* at 8.

<sup>85</sup> *Id.* at 21-25.

<sup>86</sup> *Id.* at 17-26.

<sup>87</sup> While Century station was, in 1997, responsible for 60% of the shootings by deputies, two

## 2. Investigations of Claims

The five departments in this study view each lawsuit as a “civilian complaint plus a demand for money.”<sup>88</sup> In other words, departments review and investigate misconduct claims in a lawsuit the same way they would if the claims were alleged in a civilian complaint. Parties sometimes refuse to participate in an internal investigation while a lawsuit is pending.<sup>89</sup> As a matter of policy, however, the internal investigation is meant to proceed simultaneously with, but independent of, the litigation.<sup>90</sup>

When a lawsuit is filed, department officials compare the allegations in the complaint with incidents reported through civilian complaints, use of force reports, and other reporting systems.<sup>91</sup> If the incident was not previously brought to the attention of department officials,<sup>92</sup> officials will decide what type of review should be conducted.<sup>93</sup> As with civilian complaints, internal affairs investigates the most serious allegations and department supervisors review the less serious claims.<sup>94</sup> If an internal investigation substantiates the allegations in the lawsuit, the departments discipline, retrain, or terminate the involved officers.

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years later it was responsible for only 10% of the shootings. See LASD 13TH SEMIANNUAL REPORT, *supra* note 82, at 11. Two years later, during a period in which the Department was less committed to risk management efforts, Bobb found that these downward trends reversed themselves: Uses of force and shootings had increased throughout the LASD, but particularly at Century station. LASD 14TH SEMIANNUAL REPORT, *supra* note 39, at 89-90.

<sup>88</sup> Interview with Michael Gennaco, *supra* note 35; Telephone Interview With Ilana Rosenzweig, *supra* note 35.

<sup>89</sup> See Schwartz, *supra* note 13, at 1065-66.

<sup>90</sup> See PORTLAND TORT CLAIMS REPORT, *supra* note 50; Interview with Michael Gennaco, *supra* note 35; Telephone Interview with Kathryn Olson, *supra* note 35; Telephone Interview with Richard Rosenthal, *supra* note 35; Telephone Interview with Ilana Rosenzweig, *supra* note 35.

<sup>91</sup> See, e.g., Telephone Interview with Michael Gennaco, *supra* note 35; Telephone Interview with Kathryn Olson, *supra* note 35; Telephone Interview with Richard Rosenthal, *supra* note 35; Telephone Interview with Ilana Rosenzweig, *supra* note 35. There has been no study of the number of departments that internally investigate litigation claims, but police practices experts recently described this type of policy as rare. In most departments, legal claims are investigated and defended with no effort to incorporate findings into personnel and policy decisions. See Schwartz, *supra* note 13, at 1059.

<sup>92</sup> For a discussion of the likelihood that departments will be notified of misconduct allegations through lawsuits, see *infra* Part II.A.

<sup>93</sup> See, e.g., Interview with Michael Gennaco, *supra* note 35 (noting that the Office of Independent Review will “ensure that when claims come in we get them, we review them, and if there are issues that suggest that an internal affairs investigation or an administrative investigation is needed, we will push to have that happen”).

<sup>94</sup> See SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 62-63 (2005) [hereinafter POLICE ACCOUNTABILITY].

### 3. Early Intervention Systems

Two of the departments in this study—the LASD and the Seattle police department<sup>95</sup>—enter lawsuit claims information into their early intervention systems, which are computerized<sup>96</sup> systems that track various pieces of information in an effort to identify at-risk officers and improve their performance before officers engage in significant misconduct.<sup>97</sup> Once an officer accumulates a certain number of incidents, a supervisor decides whether some sort of intervention is necessary based on the totality of the circumstances.<sup>98</sup> Following intervention, the department monitors the officer's performance, paying particular attention to the types of incidents that initially triggered intervention.<sup>99</sup>

Early intervention systems can fail or stall at each stage of development and implementation. Departments can take years to design their early intervention systems, and then, once designed, software and hardware malfunctions can further delay systems' operability.<sup>100</sup> Even when an early intervention system is in place, officials may input inaccurate and incomplete information into the systems, misuse their systems when extracting information, and make biased decisions about the need for intervention and the type of intervention required.<sup>101</sup>

Although we do not know the incremental value of lawsuit data to early intervention systems, there is evidence that functioning early in-

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<sup>95</sup> National data suggests that early intervention systems are the most frequently used systems to track and analyze data about officer performance. See Schwartz, *supra* note 13, at 1058-59. Of the five departments in my study, the LASD and the Seattle Police Department track litigation data in their early intervention system. Portland and Denver have early intervention systems, though litigation data is not included. And the Chicago Police Department's early intervention system is still being developed. See *id.*

<sup>96</sup> Early intervention systems are not always computerized; some departments, particularly smaller departments, may engage in this analysis without computerized assistance. See, e.g., INT'L ASS'N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL AND TRIBAL LAW ENFORCEMENT 52 (2006) [hereinafter PROTECTING CIVIL RIGHTS], available at <http://www.cops.usdoj.gov/files/ric/Publications/e06064100.pdf>.

<sup>97</sup> See generally PROTECTING CIVIL RIGHTS, *supra* note 96, at 49-77; POLICE ACCOUNTABILITY, *supra* note 94; SAMUEL WALKER, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES: A PLANNING AND MANAGEMENT GUIDE 27 (2003), available at <http://www.cops.usdoj.gov/files/RIC/Publications/e07032003.pdf>.

<sup>98</sup> Interventions generally involve counseling or retraining of selected officers. See POLICE ACCOUNTABILITY, *supra* note 94, at 115. Counseling can range "from the very informal, such as a discussion of the indicating event with a supervisor, to the more formal, such as a referral to psychological counseling, stress management, or substance abuse programs through a department's employee assistance program." See PROTECTING CIVIL RIGHTS, *supra* note 96, at 65. Interventions are not, however, generally disciplinary in nature. The goal is to intervene before discipline is necessary. For a description of the LASD's Personnel Review Committee meetings and decisionmaking process, see LASD 15TH SEMI-ANNUAL REPORT, *supra* note 82, at 45-48.

<sup>99</sup> PROTECTING CIVIL RIGHTS, *supra* note 96, at 65.

<sup>100</sup> See Schwartz, *supra* note 13, at 1061-62.

<sup>101</sup> *Id.* at 1062-63.

tervention systems can reduce misconduct.<sup>102</sup> A study of the LASD's system found officers' shootings, uses of force, and civilian complaints declined after intervention.<sup>103</sup> After their two-year monitoring period ended, their performance improvements continued.<sup>104</sup> Anecdotal evidence from other departments supports the notion that early intervention systems help identify problem behaviors and improve officer performance.<sup>105</sup>

#### 4. Reviews of Closed Case Files

Four of the departments in this study—Chicago, Seattle, Portland, and the LASD—compare information in closed litigation files with information in closed internal affairs investigation files. Through this comparison, departments double-check the accuracy and completeness of their internal investigations. In Chicago, an investigator can reopen an internal investigation closed without a finding of wrongdoing if the litigation file identifies new witnesses or previously unavailable testimony or evidence.<sup>106</sup>

Kathryn Olson, the director of Seattle's OPA, uses closed litigation files to reveal inadequacies in internal investigations. By comparing closed litigation files and internal investigation files, Olson has identified weaknesses in interviewing techniques and evidence-gathering efforts.<sup>107</sup> Olson looks particularly closely at cases where there was a large payout in the court case but an internal investigation exonerated the officer. In some cases, OPA will conclude that the officers' conduct was "lawful but awful": The officer harmed the plaintiff, justifying the litigation payout, but he did not violate department policy, justifying internal affairs' decision to exonerate the officer.<sup>108</sup> OPA may, instead, find an unwarranted disconnect between the results of the lawsuit and the internal investigation, suggesting that the exoneration was improper.

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<sup>102</sup> Available evidence does not measure the effect of lawsuits on these performance improvements; some departments with successful early intervention systems do not track lawsuit data. See SAMUEL WALKER ET AL., EARLY WARNING SYSTEMS: RESPONDING TO THE PROBLEM POLICE OFFICER (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188565.pdf> (finding officers were named in one-half or one-third as many civilian complaints after intervention, but none of the departments studied track legal claims in their early intervention systems). For the difficulty of measuring the effects of lawsuits on behavior, see *infra* Part I.D.

<sup>103</sup> See LASD 15TH SEMIANNUAL REPORT, *supra* note 82, at 3.

<sup>104</sup> See *id.*

<sup>105</sup> See *infra* note 195 and accompanying text (describing positive effects of early interventions in two large police departments).

<sup>106</sup> See Telephone Interview with Ilana Rosenzweig, *supra* note 35.

<sup>107</sup> See Telephone Interview with Kathryn Olson, *supra* note 35.

<sup>108</sup> See Telephone Interview with John Fowler, *supra* note 35.

Similarly, Portland reviews closed cases to see “whether the bureau or the independent review board missed anything.”<sup>109</sup>

The LASD reviews closed litigation files not only to audit internal investigations,<sup>110</sup> but also to evaluate department training and policies. The LASD’s special counsel conducts “biopsies” of closed lawsuits “to assess how new training plays out on the street, or to determine whether new training is needed.”<sup>111</sup> The L.A. County Board of Supervisors—responsible for paying settlements and judgments on behalf of the department—separately requires the LASD to submit a corrective action plan for each case ending in a settlement or judgment of more than \$20,000. The plan must set out any policy or training issues raised by the case and steps the department will take to reduce the likelihood of future similar incidents.<sup>112</sup>

## 5. The Effect of Lawsuit Data on Behavior

It is difficult to measure the effects of litigation data on behavior in these departments. Departments are engaged in a variety of efforts aimed at reducing misconduct, only some of which involve lawsuits.<sup>113</sup> And when departments do use litigation data, they view that data in connection with multiple other pieces of information.<sup>114</sup> Moreover, departments cannot always weigh complete information, and cannot always evaluate the information in sound ways.<sup>115</sup> Although independent outsiders identify and help correct these implementation problems, they too have been criticized for insufficiently rigorous review.<sup>116</sup> And the

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<sup>109</sup> Bernstein, *supra* note 70.

<sup>110</sup> When the LASD auditor reviewed twenty-nine cases of police misconduct that settled for over \$100,000 and found that only eight involved any disciplinary action, the auditor questioned the strength of the department’s internal investigatory procedures. MERRICK J. BOBB ET AL., L.A. CNTY. SHERIFF’S DEP’T, 19TH SEMIANNUAL REPORT 30 (2005) [hereinafter LASD 19TH SEMIANNUAL REPORT]. And the LASD auditor found it “ironic and somewhat puzzling that the County’s lawyers and the Board of Supervisors can judge the risk of loss to be sufficiently great to believe it to be in the best interests of the County to settle for \$500,000 and incur \$200,000 in attorney’s fees but the LASD, on the other hand, is paralyzed from taking any disciplinary action against the deputy because it cannot figure out who to believe, the deputy or” the plaintiff. LASD 15TH SEMIANNUAL REPORT, *supra* note 82, at 72.

<sup>111</sup> LASD 3RD SEMIANNUAL REPORT, *supra* note 41, at 14.

<sup>112</sup> For a description of one such corrective action report, see MERRICK J. BOBB ET AL., L.A. CNTY. SHERIFF’S DEP’T, 11TH SEMIANNUAL REPORT 64 (1999) [hereinafter LASD 11TH SEMIANNUAL REPORT].

<sup>113</sup> Departments may attempt to reduce misconduct through any number of strategies, including mediating complaints, improving use of force policies and reporting requirements, improving civilian complaint policies, improving internal investigations, and reviewing of shootings and other incidents.

<sup>114</sup> See *supra* Part I.C (describing this contextual analysis).

<sup>115</sup> See Schwartz, *supra* note 13, at Part II.D (describing common implementation problems).

<sup>116</sup> See, e.g., Bernstein, *supra* note 70 (describing efforts to give Portland auditor subpoena

officials I interviewed may have offered inflated assessments of the merits of their own review. For all of these reasons, it is difficult to pinpoint the role of lawsuits in department decisions.

It is also difficult to measure the effect of department decisions on line officer behavior. There is no national data about how much misconduct exists in individual police departments, and no agreed upon metric to compare the quality of departments.<sup>117</sup> Departments in this study continue to employ officers that engage in high-profile incidents of apparent police misconduct.<sup>118</sup> One could conclude, based on these continuing instances of misconduct, that department policies are having little effect. On the other hand, departments might be even more dysfunctional without policies to review lawsuits and other data and outsiders to oversee department practices.

One way to evaluate the impact of department policies would be to compare the costs of suits against the department before and after implementation of relevant policies. By this metric, the LASD's efforts appear to be having a positive effect. During the first five years of the LASD's special counsel's tenure, the county's litigation costs decreased by \$30 million.<sup>119</sup> And there is no evidence that officers' crime fighting efforts were chilled during this period.<sup>120</sup> But an auditor might be having a positive effect even if litigation costs did not drop so precipitously. As Denver's auditor explained, even if his work led to higher payouts in the short run, "it would be part of an overall risk-management strategy

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and disciplinary authority); P.J. Huffstutter, *This Police Watchdog is Walking a Tough Beat*, L.A. TIMES, Feb. 11, 2008, at A8 (describing criticism of Chicago's police auditor).

<sup>117</sup> See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 28-32 (2009) (describing the lack of comparative data about police misconduct).

<sup>118</sup> See, e.g., CHASSE REPORT, *supra* note 20; Sara Burnett, *2 Cops on Tape in Beating Fired*, DENVER POST, Mar. 26, 2011, at A1; Mike Carter, *Justice Department Begins Preliminary Review of Seattle Police*, SEATTLE TIMES, Jan. 24, 2011, available at [http://seattletimes.nwsourc.com/html/localnews/2014026946\\_justice25m.html](http://seattletimes.nwsourc.com/html/localnews/2014026946_justice25m.html) (reporting that the Department of Justice is investigating a possible pattern of civil rights violations after "highly publicized incidents in which officers have resorted to force, often against people of color"); Robert Faturechi & Andrew Blankstein, *Deputies Sue After Alleged Attack at Party, Two Say L.A. County Sheriff's Department Fosters Lawlessness Among Jail Employees*, L.A. TIMES, May 5, 2011, at AA3.

<sup>119</sup> See LASD 7TH SEMIANNUAL REPORT, *supra* note 68, at 51 (describing drop in litigation costs); Correspondence from Merrick Bobb, Founding Dir., Police Assessment Res. Ctr., and Special Counsel, L.A. Sheriff's Dep't, to author (June 14, 2009) (on file with author) (reporting that the LASD auditor charges the County of Los Angeles \$200,000 per year for his services). This \$30 million reduction in legal fees is not solely attributable to the LASD's review of litigation data, but rather to the LASD's policies as a whole. See LASD 1ST SEMIANNUAL REPORT, *supra* note 38, at 4 (noting LASD reduces litigation costs through "participation in the management of litigation to shape strategy and control costs, active involvement by the LASD in decisions to settle or try individual cases, and deployment of LASD investigatory resources so that the Department and counsel are better able to defend the LASD in litigation against it and win meritorious cases"). Moreover, any argument about the financial benefits of litigation review should account for the costs of the review and the administrative costs associated with litigation.

<sup>120</sup> See LASD 9TH SEMIANNUAL REPORT, *supra* note 82, at 83.

that would reduce liability in the long run.”<sup>121</sup> More study would be necessary to understand the effects of litigation review on lawsuit filings and costs.

Another way to evaluate the impact of lawsuits on department practices is to examine the role of lawsuits in individual decisions. This study has revealed several instances in which departments have used lawsuit data to inform personnel and policy decisions, and those decisions improved behavior in a variety of ways. The litigation process revealed evidence proving an officer had lied during his interview with internal affairs.<sup>122</sup> Trends in claims have caused department officials to realize that officers did not understand the scope of their legal authority, and resulting interventions have ended the problem.<sup>123</sup> Trends in payouts have also caused a department to identify a troubled station for further investigation and review; the subsequent recommendations improved the station’s performance.<sup>124</sup> Although I cannot quantify the power of the information gathered from lawsuits on behavior, my close examination of these decisions allows me to be reasonably certain that lawsuit data has helped identify problems and craft interventions in these instances.<sup>125</sup>

## II. CONSIDERING THE VALUE OF LAWSUIT DATA TO PERFORMANCE IMPROVEMENT EFFORTS

I have, thus far, shown that these five departments view lawsuits as sources of information about police department practices. I now offer reason to believe that these suits offer valuable and otherwise unavailable information to law enforcement agencies seeking to improve performance. Police departments primarily learn of possible misconduct

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<sup>121</sup> Joel Warner, *Independent Monitor Richard Rosenthal Keeps a Close Eye on the Denver Police*, DENVER WESTWORD NEWS, May 19, 2011, available at <http://www.westword.com/2011-05-19/news/richard-rosenthal-independent-monitor-denver-police/>.

<sup>122</sup> See *infra* notes 177-183 and accompanying text.

<sup>123</sup> See *supra* notes 71-74 and accompanying text.

<sup>124</sup> See *supra* notes 79-87 and accompanying text.

<sup>125</sup> A focus on lawsuits’ role in individual decisions is particularly well-suited to control for the effects of unrelated factors. Imagine a police department that experiences a precipitous jump in the number of lawsuits alleging chokeholds by its officers. If there is a subsequent decline in these chokehold cases, but the department does not keep track of lawsuits brought against it and has not otherwise been informed of the chokehold cases, those suits did not likely play a role in the decline. On the other hand, if there is no marked decline in the number of chokehold cases filed against the department but there is good evidence that the department gathered and evaluated lawsuit data, identified chokeholds as a potential problem, and trained officers in new techniques, then there is reason to believe that the suits may have influenced department decisionmaking, but department efforts to reduce the incidence of chokeholds were thwarted by intervening causes.

through civilian complaints and use-of-force reports.<sup>126</sup> Yet, for a variety of reasons, misconduct incidents may not appear in these reports. And, even when incidents do surface, internal investigations may be incomplete or biased. Lawsuits are flawed sources of information, as well.<sup>127</sup> But in departments that pay attention to lawsuits, suits have filled some gaps in internal information systems. Lawsuits have alerted police officials to misconduct allegations unreported through internal systems, and the evidence developed during litigation has been found to be more detailed than that generated in internal investigations.

### A. *Identifying Misconduct Allegations*

#### 1. Civilian Complaints v. Lawsuits

Although almost every police department has a policy to accept and investigate civilian complaints against police personnel,<sup>128</sup> there are four reasons to believe that misconduct allegations fall through the cracks of police department civilian complaint processes. First, a very small percentage of aggrieved people file civilian complaints. A Bureau of Justice Statistics (BJS) survey estimated that police used or threatened force against 664,500 people nationwide in 2002.<sup>129</sup> Of the people surveyed who had been involved in a police use of force, approximately 75.4% believed the force was excessive and approximately 87.3% believed officers had acted improperly.<sup>130</sup> Yet fewer than 13% of the

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<sup>126</sup> See generally POLICE ACCOUNTABILITY, *supra* note 94 (describing use of force and civilian complaint policies).

<sup>127</sup> In Part III, I describe the imperfections of litigation data and the ways department analyses mitigate these imperfections.

<sup>128</sup> See PROTECTING CIVIL RIGHTS, *supra* note 96, at 85.

<sup>129</sup> MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY v (2005) [hereinafter BJS 2002 STUDY]. The Bureau of Justice Statistics (BJS) surveyed over 75,000 people about their contacts with the police, and estimated national numbers based on their survey results. BJS has conducted several similar surveys, and has reached findings with some variation in each. See MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005 7 (2007) [hereinafter BJS 2005 STUDY] (finding that police used or threatened force against an estimated 707,520 people in 2005); PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 1999 NATIONAL SURVEY 24 (2001) [hereinafter BJS 1999 STUDY] (finding that police used or threatened force against approximately 422,000 people); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE (1996) [hereinafter BJS NATIONAL DATA COLLECTION STUDY]. I rely on the 2002 study – instead of the more recent 2005 study – because the 2005 study did not measure the frequency with which people sued and/or filed civilian complaints regarding perceived misconduct by the police. See *infra* note 131 and accompanying text.

<sup>130</sup> BJS 2002 STUDY, *supra* note 129, at 19-20. The other BJS studies found a similar percentage of those surveyed believed that the force used against them was improper. See BJS 2005

people who believed they were mistreated filed a civilian complaint.<sup>131</sup> Accordingly, the civilian complaint process did not capture approximately 508,421 allegations of improper force and related misbehavior in a single year. Another approximately 3.95 million people believed that police acted improperly in contacts that did not involve the use of force.<sup>132</sup> Given the low filing rates for civilian complaints alleging excessive force, it seems likely that a significant percentage of these 3.95 million people did not file civilian complaints, either.

Lawsuits also under-represent the universe of misconduct allegations. The same 2002 BJS survey found that people who believed the police mistreated them sued infrequently—approximately one percent of the time.<sup>133</sup> People harmed by the police may choose not to sue for any number of reasons, including “ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration.”<sup>134</sup> But the same people who decide not to file civilian complaints may choose instead to file lawsuits. Plaintiffs’ attorneys have been known to discourage their clients from filing civilian complaints for fear that information in the internal investigation will be used against them in litigation.<sup>135</sup>

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STUDY, *supra* note 129, at 8 (finding that nearly 83% of those who had force used against them believed the force was excessive); BJS 1999 STUDY, *supra* note 129, at 25 (finding that 76.1% of those who had force used against them believed the force was excessive); BJS NATIONAL DATA COLLECTION STUDY, *supra* note 129.

<sup>131</sup> BJS 2002 STUDY, *supra* note 129, at 20 (finding that, of the estimated 580,108 individuals who were involved in a police use of force and believed officers had acted improperly, just 63,699 filed a complaint with the law enforcement agency and 7,988 filed a complaint with a civilian complaint review board).

<sup>132</sup> The BJS’s 2005 survey reported that nearly 10% of the people who had contact with the police in 2005 believed the police had acted improperly. *See* BJS 2005 STUDY, *supra* note 129, at 3. There is no comparable number in the BJS’s 2002 study, but given the consistency in other aspects of the two reports, one can assume that a similar percentage of respondents would have said that the police acted improperly had this question been asked in 2002. The 2002 study estimated that 45.3 million people had contact with police. If 10% of those people – 4.53 million – believed the police acted improperly, and approximately 580,108 of those people believed that the police had acted improperly during a use of force, BJS 2002 Study, *supra* note 129, the remaining approximately 3.95 million would have concluded the police acted improperly for reasons other than officers’ use of force. *Id.*

<sup>133</sup> *See* BJS 2002 STUDY, *supra* note 129, at 16-20 (finding that the police had used force against 664,500 people, 87.3% of whom (580,108) believed that the police acted improperly, and just 1.3% of whom (7,416) filed a lawsuit regarding the alleged misconduct).

<sup>134</sup> Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988) (footnotes omitted); *see also* Richard L. Abel, *The Real Tort Crisis: Too Few Claims*, 48 OHIO STATE L.J. 443, 448-51 (1987).

<sup>135</sup> *See* HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 306 (1998) (“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.”) The police auditor in Chicago has found that plaintiffs’ attorneys regularly prevent plaintiffs and witnesses from cooperating with investigators, “effectively shutting off IPRA’s access to information.” *See* ILANA B.R. ROSENZWEIG, INDEP. POLICE REVIEW AUTH., ANNUAL REPORT 2007–2008 8 (2008); *see also* Maxine Bernstein, *Claims Against Portland*

Portland and the LASD have compared lawsuit and civilian complaint filings, and both found that many lawsuit claims had not previously been filed as civilian complaints. In 2004, Portland's police auditor found that two-thirds of claims in lawsuits brought against the department and its officers were not separately brought as civilian complaints.<sup>136</sup> When the Kolts Commission reviewed 124 excessive force lawsuits that had resulted in judgments or settlements against the LASD, it found that plaintiffs in fewer than half of the cases had filed civilian complaints.<sup>137</sup> Even as Portland and the LASD have improved their civilian complaint collection and review processes, both departments continue to learn about misconduct allegations through lawsuits.<sup>138</sup>

Second, civilian complaints capture misconduct allegations only when complainants describe their claims completely and clearly. People registering a civilian complaint generally do so orally (over the phone or in person at the station) or by filling out a form.<sup>139</sup> The informality of

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*Police Officers Cost City Millions*, THE OREGONIAN, Dec. 11, 2009, available at [http://www.oregonlive.com/portland/index.ssf/2009/12/portland\\_payouts\\_on\\_police\\_use.html](http://www.oregonlive.com/portland/index.ssf/2009/12/portland_payouts_on_police_use.html) ("If the lawyer doesn't respond [to the Portland police auditor's request for information], 'that pretty much stymies us, unless the police reports themselves raise serious issues of misconduct.'").

<sup>136</sup> See PORTLAND TORT CLAIMS REPORT, *supra* note 50, at 19. Moreover, claims in lawsuits against the department involved more serious allegations than those in civilian complaints: Fifty percent of lawsuits alleged excessive force compared to just fifteen percent of civilian complaints filed during the same period. See *id.* at 21.

<sup>137</sup> KOLTS COMMISSION REPORT, *supra* note 37, at 60 (noting that just fifty-seven of the 124 lawsuits reviewed had been internally investigated). The Kolts Commission study of excessive force cases does not answer whether similar disparities exist for lawsuits alleging other types of claims.

<sup>138</sup> See, e.g., Interview with Michael Gennaco, *supra* note 35 (estimating that the LASD learns of misconduct allegations through lawsuits "a significant number" though "not a majority" of the time). The Portland Auditor has continued to find that many lawsuits concern claims not previously submitted as civilian complaints. See LAVONNE GRIFFIN-VALADE & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, INDEPENDENT POLICE REVIEW DIVISION: ANNUAL REPORT 2009 19 (2009) (finding that of 165 civil claims filed, only twenty-nine had been previously submitted as civilian complaints); GARY BLACKMER & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, INDEPENDENT POLICE REVIEW DIVISION: ANNUAL REPORT 2008 23 (2008) (finding that of 163 civil claims reviewed in 2008, only thirty had been previously submitted as civilian complaints); GARY BLACKMER & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, INDEPENDENT POLICE REVIEW DIVISION: ANNUAL REPORT 2007 22-23 (2007) (finding that of 184 claims reviewed by the Portland auditor in 2007, only forty-two had already been alleged in civilian complaints); GARY BLACKMER & LESLIE STEVENS, OFFICE OF THE CITY AUDITOR, INDEPENDENT POLICE REVIEW DIVISION: ANNUAL REPORT 2005-2006 22 (2006) (finding that only ten percent of civil claimants filed separate civilian complaints). Portland's auditor does not open internal investigations for many of these lawsuit claims. For example, in 2009, the auditor opened only seven internal investigations from the 136 lawsuits making allegations not previously submitted as civilian complaints. See ANNUAL REPORT 2009, *supra*, at 19.

<sup>139</sup> U.S. DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY: EXAMPLES OF PROMISING POLICE PRACTICES AND POLICIES 7 (2001) (recommending that police departments should allow civilians to "file complaints in-person, by mail, by telephone, by facsimile transmission, or, where possible, by email").

these methods of communication may dilute complainants' allegations. Lawyers, not always known for the clarity of their prose, may nevertheless better articulate all dimensions of the alleged violations. As the director of Seattle's OPA explained:

[S]omeone comes in and says "this happened to me"—and it gets treated as a use of force [uof] complaint. But when a lawsuit is filed, a number of allegations may be raised that might be different from a simple uof. People will talk in terms of being a victim of biased policing. But unless they are able to articulate it expressly—I'm African American, he's white—it's not going to come into the civilian complaint.<sup>140</sup>

Well-drafted legal complaints will include every involved party, every relevant fact, and each plausible cause of action. This level of detail can help police officials understand the full scope of the allegations. As the LASD's risk manager explained, "by the time it gets actually to be a government claim, it's at least pretty well defined into what areas it captures, and I think we're able to sort through those a little better."<sup>141</sup>

Third, departments may discourage people from filing complaints. The Department of Justice (DOJ) has investigated civilian complaint processes in over two dozen law enforcement agencies, and found fault with each of the departments' systems for receiving complaints of officer misconduct.<sup>142</sup> The DOJ found some departments were not doing enough to solicit complaints: their forms were unclear or written only in English, or the department did not disseminate information about the complaint process.<sup>143</sup> In other departments, officers discouraged or has-

<sup>140</sup> Telephone Interview with Kathryn Olson, *supra* note 35.

<sup>141</sup> See Telephone Interview with Captain Mathers, *supra* note 35.

<sup>142</sup> For the precise provisions in the settlement agreements and consent judgments entered into between the Department of Justice and law enforcement agencies, and for the technical assistance letters provided to over a dozen additional law enforcement agencies, see <http://www.justice.gov/crt/about/spl/police.php>.

<sup>143</sup> See, e.g., CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE AUSTIN POLICE DEPARTMENT 28 (2008), available at [www.justice.gov/crt/about/spl/documents/AustinPD\\_talletter\\_12-23-08.pdf](http://www.justice.gov/crt/about/spl/documents/AustinPD_talletter_12-23-08.pdf) (recommending that the department "better disseminate information to the public about its complaint process" by making complaint forms available online and in public offices, and in multiple languages); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE BEACON POLICE DEPARTMENT 15 (2005), available at [http://www.justice.gov/crt/about/spl/documents/split\\_beacon\\_ta\\_letter\\_6-21-05.pdf](http://www.justice.gov/crt/about/spl/documents/split_beacon_ta_letter_6-21-05.pdf) (finding that the department has no "formalized system for the intake and tracking of complaints," and only allows a civilian to file a complaint if he has first discussed the matter with the Sergeant); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE INGLEWOOD POLICE DEPARTMENT 18-19 (2009), available at [www.justice.gov/crt/about/spl/documents/inglewood\\_pd\\_Jail\\_findlet\\_12-28-09.pdf](http://www.justice.gov/crt/about/spl/documents/inglewood_pd_Jail_findlet_12-28-09.pdf) (recommending that "[t]he IPD should change elements of its citizen complaint process that have the potential to discourage the filing of complaints, and to impair effective tracking of complaints"); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE SCHENECTADY POLICE DEPARTMENT 16-17 (2003), available at

sled civilians attempting to file complaints, or refused to accept complaints altogether.<sup>144</sup>

The Christopher Commission, convened to investigate the Los Angeles Police Department (LAPD) in 1991, found that one-third of people who filed civilian complaints were harassed or intimidated in the process.<sup>145</sup> Twelve years later—after the LAPD had again been reviewed by an independent commission, had been investigated by the DOJ for civil rights violations, had entered into a Memorandum of Agreement with the DOJ, and had been placed under the supervision of a court-appointed monitor—the monitor found that department officials continued to harass and intimidate people who tried to file civilian complaints.<sup>146</sup>

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[www.justice.gov/crt/about/spl/documents/schenectady\\_ta.pdf](http://www.justice.gov/crt/about/spl/documents/schenectady_ta.pdf) (recommending that it be made easier for citizens to file complaints); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO VIRGIN ISLANDS POLICE DEPARTMENT 15 (2005), *available at* [www.justice.gov/crt/about/spl/documents/virgin\\_island\\_pd\\_talet\\_10-5-05.pdf](http://www.justice.gov/crt/about/spl/documents/virgin_island_pd_talet_10-5-05.pdf) (finding that the department's civilian complaint forms "are inadequate and inconsistent with generally accepted police practices"); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE YONKERS POLICE DEPARTMENT 18-21 (2009), *available at* [www.justice.gov/crt/about/spl/documents/YonkersPD\\_talet\\_06-09-09.pdf](http://www.justice.gov/crt/about/spl/documents/YonkersPD_talet_06-09-09.pdf) (recommending that the Yonkers police department "increase public awareness of how to use the citizen complaint process" and increase access to civilian complaint forms by distributing them at public facilities and printing forms in Spanish).

<sup>144</sup> See TECHNICAL ASSISTANCE LETTER TO THE AUSTIN POLICE DEPARTMENT, *supra* note 143, at 28 (reporting that "communications personnel, i.e., 911 operators, on many occasions may have discouraged complainants from filing complaints, failed to contact supervisors regarding complaints, and failed to document the calls and the complaints"); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE COLUMBUS POLICE DEPARTMENT (1998), *available at* <http://www.justice.gov/crt/about/spl/documents/columbus.php> (finding "a complaint process that discourages complainants at intake"); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE MIAMI POLICE DEPARTMENT 17 (2003), *available at* [www.justice.gov/crt/about/spl/documents/miamipd\\_techletter.pdf](http://www.justice.gov/crt/about/spl/documents/miamipd_techletter.pdf) (identifying several policies and practices "that appear to discourage the filing of complaints"); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE PORTLAND POLICE DEPARTMENT 10 (2003), *available at* [www.justice.gov/crt/about/spl/documents/portland\\_ta\\_itr.pdf](http://www.justice.gov/crt/about/spl/documents/portland_ta_itr.pdf) (recommending that the department "change aspects of its complaint process that have the potential to discourage the filing of complaints"); TECHNICAL ASSISTANCE LETTER TO THE SCHENECTADY POLICE DEPARTMENT, *supra* note 143, at 16 (observing that the internal affairs division "receives approximately 5 to 10 complaints each year from citizens reporting that a SPD supervisor refused to accept their complaints"); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE WARREN POLICE DEPARTMENT 10 (2006), *available at* [www.justice.gov/crt/about/spl/documents/wpd\\_talet\\_3-2-06.pdf](http://www.justice.gov/crt/about/spl/documents/wpd_talet_3-2-06.pdf) (reporting that some citizens "have not been permitted to submit a Complaint Form to anyone other than" one single Lieutenant appointed to handle internal investigations, and only during "limited working hours").

<sup>145</sup> See INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 158-59 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT] (finding that one-third of the people who filed complaints against the LAPD reported that officers discouraged complaint filing by not providing Spanish-speaking officers in heavily Latino divisions, requiring complainants to wait for a long time before filing the complaint, and threatening the complainant with defamation suits or immigration consequences).

<sup>146</sup> "In one sting operation, an undercover police officer, posing as a juvenile, complained of misconduct. The Sergeant then took an inordinate amount of time to take the details of the com-

Fourth, officials may mislabel or misfile civilian complaints so they are not investigated. Police departments generally have two levels of review; higher-ranked officers within the precinct review less serious allegations and the internal affairs division investigates more serious allegations.<sup>147</sup> The Christopher Commission that investigated the LAPD found that “complaints of officer misconduct made by the public were often noted in daily activity logs rather than recorded in the official Personnel Complaint Form 1.81 that triggers a formal complaint investigation and IAD review.”<sup>148</sup> Department of Justice investigations have revealed the same tactics used in other departments: Officers improperly classify misconduct claims so that they will not be investigated by internal affairs.<sup>149</sup>

A plaintiff filing a lawsuit against the police does not face the same hurdles as a person trying to file a civilian complaint. To be sure, suing the police has its own challenges. Plaintiffs’ attorneys in civil rights cases are generally paid on contingency, out of the proceeds won by the plaintiff.<sup>150</sup> As a result, a plaintiff may have trouble finding an attorney to take her case if the recoverable damages are low or there is a small likelihood of prevailing.<sup>151</sup> Once a case is filed, it may be dismissed for

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plaint, stretching the process beyond 10:00 p.m., at which point the sergeant **detained** the ostensible juvenile for curfew violation.” INDEP. MONITOR FOR THE L.A. POLICE DEP’T, REPORT FOR THE QUARTER ENDING JUNE 30, 2003 3 (2003) (emphasis in original). At that time, officers were found to follow department procedures only 43% of the time. *See id.* In a later audit, the monitor found that officers were complying with procedures 78% of the time. *See* INDEP. MONITOR FOR THE L.A. POLICE DEP’T, REPORT FOR THE QUARTER ENDING DECEMBER 31, 2003 26 (2004). A subsequent audit found approximately 94% compliance. *See* INDEP. MONITOR FOR THE L.A. POLICE DEP’T, REPORT FOR THE QUARTER ENDING DECEMBER 30, 2004 19 (2005).

<sup>147</sup> *See* POLICE ACCOUNTABILITY, *supra* note 94, at 62-63 (describing administrative and internal affairs investigations).

<sup>148</sup> CHRISTOPHER COMMISSION REPORT, *supra* note 145, at 159.

<sup>149</sup> *See* TECHNICAL ASSISTANCE LETTER TO THE AUSTIN POLICE DEPARTMENT, *supra* note 143, at 30-31 (finding that the department’s “process of complaint classification raises concerns because the classification categories are broad, subject to different interpretations, lack uniformity, and lack consistency,” amounting to “‘escape valves’ that can minimize officers’ misconduct”); TECHNICAL ASSISTANCE LETTER TO THE COLUMBUS POLICE DEPARTMENT, *supra* note 144 (finding that the complaint process “transforms about half of the complaints that are filed into ‘inquiries’ that are not properly investigated”); TECHNICAL ASSISTANCE LETTER TO THE INGLEWOOD POLICE DEPARTMENT, *supra* note 143, at 20 (finding that some excessive force complaints were routed to division level reviews—instead of internal investigations—and were routed to “supervisors who were on the scene and completed the original use of force report . . . present[ing] an apparent conflict of interest”); *see also* SAN JOSE INDEP. POLICE AUDITOR, YEAR END REPORT, 1993-1994 (1995);

<sup>150</sup> *See* Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 756 (1993) (noting that “few plaintiffs can afford counsel and most suits are taken on a contingency basis”); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 490 (1992) (describing the difficulty of hiring a lawyer on contingency to litigate a case against the police); *see also infra* note 186 (discussing the frequency with which attorneys’ fees are awarded under Section 1988).

<sup>151</sup> *See* Patton, *supra* note 150, at 756-57 (noting that, because most attorneys take police

failure to state a plausible claim in the complaint or on qualified immunity grounds.<sup>152</sup> But there is very little chance that a court clerk will harass or discourage a person attempting to file a lawsuit. And a lawsuit alleging police misconduct will not be mislabeled as a securities matter or improperly sent to probate.

## 2. Use of Force Reports v. Lawsuits

Incidents of possible misconduct can also come to a department's attention through officers' use-of-force reports.<sup>153</sup> Yet there are three reasons to believe that these reports will not capture all instances of alleged police misconduct. First, despite their name, use-of-force reporting policies do not require officers to document many types of uses of force. A national survey of use-of-force reporting requirements found that almost twenty percent of the departments did not require officers to submit a report after striking a civilian with a flashlight, approximately forty percent of the departments did not require an officer to submit a report after their police dog attacked a civilian, and over seventy percent of the departments did not require an officer to submit a report after using handcuffs.<sup>154</sup> In its investigations of law enforcement agencies, the Department of Justice similarly found that departments had ambiguous reporting requirements or required officers only to document the most serious uses of force.<sup>155</sup>

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misconduct cases on contingency, "an attorney undertakes enormous financial risk when filing a section 1983 suit" and "will therefore be hesitant to accept a weak case or a case without significant damages").

<sup>152</sup> See Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757 (2004) (describing difficulties of prevailing in lawsuits against the police).

<sup>153</sup> PROTECTING CIVIL RIGHTS, *supra* note 96, at 136.

<sup>154</sup> See Anthony M. Pate & Lorie A. Fridell, *Toward the Uniform Reporting of Police Use of Force: Results of a National Survey*, 20 CRIM. JUST. REV. 123, 135-36 (1995).

<sup>155</sup> See, e.g., CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE DETROIT POLICE DEPARTMENT (2002), available at [http://www.justice.gov/crt/about/spl/documents/dpd/detroit\\_3\\_6.php](http://www.justice.gov/crt/about/spl/documents/dpd/detroit_3_6.php) (finding that Detroit police officers "are not required to report uses of force other than uses of firearms and chemical spray, unless the use of force results in a visible injury or complaint of injury"); TECHNICAL ASSISTANCE LETTER TO THE AUSTIN POLICE DEPARTMENT, *supra* note 143, at 18-22 (describing inadequacies with department use of force reporting protocols); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE BAKERSFIELD POLICE DEPARTMENT 5 (2004), available at [www.justice.gov/crt/about/spl/documents/bakersfield\\_ta\\_letter.pdf](http://www.justice.gov/crt/about/spl/documents/bakersfield_ta_letter.pdf) (finding the department's requirement that a use of force form be filled out "when an officer uses a level of force higher than 'standard searching and handcuffing techniques'" to be overly ambiguous); TECHNICAL ASSISTANCE LETTER TO THE BEACON POLICE DEPARTMENT, *supra* note 143, at 12 (finding that the department's policies "do not clearly indicate the manner in which uses of force are to be reported"); TECHNICAL ASSISTANCE LETTER TO THE COLUMBUS POLICE DEPARTMENT, *supra* note 144 (finding an "overly restrictive definition of what constitutes a use of force"); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE EASTON

Second, use-of-force reporting systems do not capture claims related to verbal abuse, sexual harassment, improper searches, and other incidents that do not involve force. In the LASD, which has rigorous internal use-of-force reporting systems, the auditor noted that several types of allegations tend to be identified only through legal claims, including “Fourth Amendment allegations, allegations of inappropriate entry, bad warrant or things that happen in the warrant, allegations that money was taken, . . . discourtesy, [and] cases in which there may be constitutional violations or violations of policy but they don’t result in injury.”<sup>156</sup> If a lawsuit does not involve a use of force, department officials likely will not learn about the incident through internal reporting channels. Fittingly, many of the trends identified through lawsuits by the departments in this study concern incidents that would not prompt use of force reports: falls from upper bunks; vehicle pursuits; improper searches of inmates; responses to the wrong address; and warrantless home entries.<sup>157</sup>

Third, officers do not always follow use-of-force reporting policies. An investigation of use of force reports in Philadelphia found that descriptions of incidents “were routinely sparse, vague, inaccurate, or

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POLICE DEPARTMENT 6 (2007), available at [www.justice.gov/crt/about/spl/documents/easton\\_talet\\_11-26-07.pdf](http://www.justice.gov/crt/about/spl/documents/easton_talet_11-26-07.pdf) (finding that the department does not have a form dedicated to use of force reporting, “making it extremely difficult to extract information to adequately track and analyze uses of force”); TECHNICAL ASSISTANCE LETTER TO THE INGLEWOOD POLICE DEPARTMENT, *supra* note 143, at 16-17 (finding that the Inglewood Police Department’s “current practice of documenting uses of force within arrest or incident reports and policy have been under-inclusive in what the IPD has considered force, and, in turn, it appears that the reporting of force by officers has been under-inclusive”); TECHNICAL ASSISTANCE LETTER TO THE MIAMI POLICE DEPARTMENT, *supra* note 144, at 12 (finding that the department’s use of force reporting requirements “are likely to lead to an under-reporting of the use of force”); TECHNICAL ASSISTANCE LETTER TO THE PORTLAND POLICE DEPARTMENT, *supra* note 144, at 5-6 (finding that “officers are not required to report ‘restraining force’ or certain other types of physical contacts with citizens,” and that use-of-force forms are unclear); TECHNICAL ASSISTANCE LETTER TO THE SCHENECTADY POLICE DEPARTMENT, *supra* note 143, at 9 (finding, despite a “very broad reporting requirement, command level and line officers acknowledge that officers rarely document uses of force and that supervisors do not enforce the reporting policy”); TECHNICAL ASSISTANCE LETTER TO THE VIRGIN ISLANDS POLICE DEPARTMENT, *supra* note 143, at 11 (noting that a use of force report is required “only when there is an injury, medical treatment is required or requested, or the force used related to a criminal charge (i.e., resisting arrest, assault, endangering or harassment)”); TECHNICAL ASSISTANCE LETTER TO THE WARREN POLICE DEPARTMENT, *supra* note 144, at 6 (finding that the department requires officers to fill out a use of force form “anytime their actions allegedly result in injury or death, anytime they utilize a non-lethal weapon, and anytime they discharge their firearms” and recommending, instead, that the department require a form be completed “for all uses of force beyond unresisted handcuffing”); TECHNICAL ASSISTANCE LETTER TO THE YONKERS POLICE DEPARTMENT, *supra* note 143, at 17-18 (finding that use of force forms were required when an officer uses a firearm, but not when she uses a baton or deploys a K-9 unit, and recommending that a form be filled out whenever force is used).

<sup>156</sup> See Interview with Michael Gennaco, *supra* note 35.

<sup>157</sup> See *supra* notes 71-74 and accompanying text.

incomprehensible.”<sup>158</sup> Descriptions of injuries similarly lacked detail: “A ‘head injury’ could refer to a scratch, sutures, a concussion, or a broken skull.”<sup>159</sup> The Kolts Commission, which examined the LASD, found that uses of force described in deputies’ arrest reports “almost always [were] at wide variance with the allegations made by the plaintiff in a lawsuit” such that “a deputy’s report alone could not have alerted a supervisor to a problem.”<sup>160</sup> Even after several years of oversight, the auditor for the LASD continued to find widespread underreporting.<sup>161</sup> A well-crafted complaint is unlikely to suffer from similar vagueness or lack of detail.

### B. *Details of the Incidents*

Even when a police department already knows about a misconduct allegation, lawsuits can reveal critical details about the event. Police department internal affairs divisions investigate serious uses of force and allegations of misconduct. Yet internal affairs investigations have long been found to be inadequate and incomplete.<sup>162</sup> Indeed, no outside reviewer has “found the operations of internal affairs divisions in any of the major U.S. cities satisfactory.”<sup>163</sup>

The Department of Justice found fault with internal investigation procedures in each of the over two dozen departments it investigated. The DOJ found that many departments had no standard procedures for documenting or investigating complaints.<sup>164</sup> When departments did in-

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<sup>158</sup> ELLEN H. CEISLER & JAMES B. JORDAN, PHILA. POLICE DEP’T INTEGRITY & ACCOUNTABILITY OFFICE, THIRD REPORT 28 (1999).

<sup>159</sup> *Id.*

<sup>160</sup> KOLTS COMMISSION REPORT, *supra* note 37, at 56.

<sup>161</sup> LASD 3RD SEMI-ANNUAL REPORT, *supra* note 41, at 42-43. For problems with the reports, see *id.* at 42-49.

<sup>162</sup> For an overview of the problems with civilian complaint processes, see POLICE ACCOUNTABILITY, *supra* note 94, at 71-99.

<sup>163</sup> HUMAN RIGHTS WATCH, *supra* note 135, at 63.

<sup>164</sup> For descriptions of the inadequacies of the civilian complaint investigation procedures in the departments that have been investigated but not sued by the DOJ see, for example, TECHNICAL ASSISTANCE LETTER TO THE AUSTIN POLICE DEPARTMENT, *supra* note 143, at 36 (finding evidence that the department’s internal investigatory process is “erratic and irregular” and that “IA did not always investigate their complaints”); TECHNICAL ASSISTANCE LETTER TO THE BAKERSFIELD POLICE DEPARTMENT, *supra* note 155, at 14 (finding that internal investigations are inconsistent and incomplete); TECHNICAL ASSISTANCE LETTER TO THE EASTON POLICE DEPARTMENT, *supra* note 155, at 9-10 (finding that the department did not keep civilian complaints and investigations organized in a single file or office, making personnel and trend review impossible, and that the department “has no formal policies governing investigative training, evidence collection and storage, victim and witness interviews, or case file documentation and retention”); TECHNICAL ASSISTANCE LETTER TO THE INGLEWOOD POLICE DEPARTMENT, *supra* note 143, at 22-23 (describing the “lack of a formal, structured, and consistent investigative process” in the department); TECHNICAL ASSISTANCE LETTER TO THE YONKERS POLICE DE-

investigate misconduct allegations, many did not follow the types of standard investigative procedures they would use to solve crimes: Investigators did not look for witnesses, collect evidence, interview police personnel, or reconcile inconsistent statements.<sup>165</sup>

A study of the Chicago Police Department's internal affairs division found that the investigations were consistently shoddy and incomplete, "violat[ing] virtually every canon of professional investigation."<sup>166</sup> The officer accused of misconduct was interviewed in less than 15% of the cases. When the officer was interviewed, often months after the incident, the "questioning" was in the form of a brief questionnaire that the officer had seven to ten days to complete in writing. It was "not uncommon" to find a complaint unsubstantiated even though several officers submitted virtually verbatim questionnaire responses.<sup>167</sup> Investigators rarely interviewed civilians and witnesses in person. And while the investigators ran background checks on the complainants and witnesses who corroborated allegations of misconduct, the investigators did not review complaint histories of the police officers involved.

Approximately twenty percent of large police departments have some form of civilian review, and a quarter of these departments' civilian review boards have independent investigatory authority.<sup>168</sup> There

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PARTMENT, *supra* note 143, at 22-23 (recommending that the department "develop and implement a centralized, formal, structured, and consistent system for resolving complaints without discouraging the filing of complaints").

<sup>165</sup> INDEP. MONITOR FOR THE L.A. POLICE DEP'T, REPORT FOR THE QUARTER ENDING SEPTEMBER 30, 2003 25 (2003) (finding that the internal affairs division for the LAPD failed to tape review witness interviews, did not canvas the area for witnesses, allowed group interviews, failed to collect or preserve evidence, and failed to identify inconsistent statements); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TECHNICAL ASSISTANCE LETTER TO THE CLEVELAND DIVISION OF POLICE 9-10 (2002), *available at* [http://www.justice.gov/crt/about/spl/documents/cleveland\\_uof.pdf](http://www.justice.gov/crt/about/spl/documents/cleveland_uof.pdf) (finding that internal investigators "inject opinions and speculation that may call into question the objectivity of the investigation" and raising concerns about the thoroughness of internal investigations); TECHNICAL ASSISTANCE LETTER TO THE COLUMBUS POLICE DEPARTMENT, *supra* note 144 (finding "a process for investigating complaints, uses of force (lethal and non-lethal), and injuries to prisoners that is biased in favor of the involved officers"); TECHNICAL ASSISTANCE LETTER TO THE PORTLAND POLICE DEPARTMENT, *supra* note 144, at 14-17 (finding investigators to be inadequately trained); TECHNICAL ASSISTANCE LETTER TO THE SCHENECTADY POLICE DEPARTMENT, *supra* note 143, at 20-21 (recommending that investigators be trained in standard investigative policies and practices); TECHNICAL ASSISTANCE LETTER TO THE WARREN POLICE DEPARTMENT, *supra* note 144, at 17-18 (expressing concern that department policy does not "require basic investigative techniques, including questioning WPD personnel through personal interviews or gathering extrinsic evidence—e.g., third party witness accounts, or photographs of alleged injuries").

<sup>166</sup> Craig B. Futterman et al., *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System*, 1 DEPAUL J. SOC. JUST. 251, 274 (2008).

<sup>167</sup> *Id.* at 275.

<sup>168</sup> There are several forms of civilian review, including police auditors, independent commissions, and civilian review boards. A 2003 study found that some form of civilian review is in place in approximately nineteen percent of municipal law enforcement agencies with more than 100 sworn officers, twenty-five percent of county police departments, six percent of sheriffs'

has been little examination of the quality of these investigations. Because the investigators are independent, there should be less bias and capture. These boards can, however, suffer from a lack of funding, leadership, and political will.<sup>169</sup>

Attorneys engaged in police misconduct litigation will rarely be accused of foot-dragging when investigating their cases. Whether motivated by their ethical obligations or the promise of a percentage of any recovery, plaintiffs' civil rights attorneys have strong incentives to uncover all evidence that might support their client's claims. They will depose the involved officers under oath, seek out additional witnesses, and request documents about the incident and the officers. Attorneys representing the defendants will protect their client's interests by digging for evidence that rebuts plaintiffs' claims and supports their clients.

Those who have examined evidence developed during litigation and internal investigations have found litigation files to be far more comprehensive. The director of Seattle's OPA has found that litigation produces valuable information: "Just by function of depositions and someone else taking a new look at it, chances of getting new information [through the litigation process] are likely."<sup>170</sup> Special counsel for the LASD, Merrick Bobb, regularly compares closed litigation files with closed internal investigation files and finds that litigation files offer "the fullest record" of claims of police misconduct.<sup>171</sup> When misconduct allegations are investigated internally, he has found, "inertia weighs heavily on the side of disposing of a matter quickly and moving on; otherwise, time and resources and effort will have to be expended."<sup>172</sup> Even after a lawsuit is filed, those representing government defendants have little reason to identify or explore evidence of policy and personnel failures, particularly given that such evidence would likely be discoverable.<sup>173</sup> In contrast, plaintiffs have a "strong incentive . . . to dig deeply and generate more detailed and critical information" supporting their

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departments, and none of the forty-nine state agencies surveyed. See PROTECTING CIVIL RIGHTS, *supra* note 96, at 93-94. One in four of the civilian review boards had independent investigatory authority. See *id.* at 94.

<sup>169</sup> See POLICE ACCOUNTABILITY, *supra* note 94, at 165-67 (discussing failed police auditors); Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study*, 43 COLUM. J. OF LAW & SOC. PROBS. 1 (2009) (studying different models of civilian oversight, and finding underfunding).

<sup>170</sup> See Telephone Interview with Kathryn Olson, *supra* note 35.

<sup>171</sup> LASD 15TH SEMI-ANNUAL REPORT, *supra* note 82, at 85.

<sup>172</sup> *Id.*

<sup>173</sup> As Merrick Bobb has observed, "[i]t is difficult to play that dual role of defending to the hilt the plaintiff's claims in a lawsuit, including the need to cast ambiguous facts in a favorable light and, at the same time, report the same facts internally in a cold and objective [sic] way for purposes of discipline." *Id.* at 78.

cases.<sup>174</sup> “If information exists, litigation is the likeliest vehicle to ferret it out.”<sup>175</sup>

Richard Rosenthal—the police auditor in Denver and former auditor in Portland—has compared files of unsubstantiated internal investigations with closed litigation files for the same case and found that the outcome of the internal investigations might well have been different had investigators accessed the information uncovered during litigation.<sup>176</sup>

In one notable Portland case, a man named James Chasse died of blunt force chest trauma after two transit division officers forced him to the ground.<sup>177</sup> His family brought suit against the involved officers.<sup>178</sup> An outside expert reviewed the internal investigation of the incident and found that internal affairs’ investigation had neglected several critical leads. Internal affairs did not interview all of the officers who had reported to the scene, did not interview nurses who had observed Chasse at the jail, and did little to investigate allegations that officers had been “laughing and joking at the scene.”<sup>179</sup>

The “most glaring deficiency” of the internal investigation was the failure to enhance a video taken the night of Chasse’s death in which the involved officer and deputy were describing and reenacting their confrontation with Chasse.<sup>180</sup> Although the audio portion of the recording was “mostly unintelligible,” Portland’s internal affairs investigators did nothing to improve the sound.<sup>181</sup> Only during litigation did plaintiff’s counsel improve the audio, at which point it became clear that the officer said he “tackled” Chasse, contradicting his statement to internal affairs that he had pushed Chasse to the ground.<sup>182</sup> As the expert’s report concluded, “plaintiffs’ attorney was the driving force behind [the Portland Police Bureau’s] ultimate recognition of the importance of the video as evidence.”<sup>183</sup>

Given what we know about law enforcement agencies’ civilian complaint and use-of-force reporting protocols and internal investigations, it should be no surprise that information about police misconduct

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<sup>174</sup> *Id.* at 85.

<sup>175</sup> *Id.* at 86.

<sup>176</sup> See Telephone Interview with Richard Rosenthal, *supra* note 35.

<sup>177</sup> The facts of Chasse’s arrest are hotly disputed. For the purposes of this description, I rely upon the findings of an outside expert that studied the events of that evening. See CHASSE REPORT, *supra* note 20, at 8 (stating that the officers thought Chasse was “either urinating or possibly injecting drugs into his hand”).

<sup>178</sup> See *id.*; Chasse v. Humphreys, No. CV-07-189-HU, 2009 U.S. Dist. LEXIS 100626 (D. Or. Oct. 13, 2009).

<sup>179</sup> CHASSE REPORT, *supra* note 20, at 25-26.

<sup>180</sup> *Id.* at 27.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 28.

falls through the cracks. Although lawsuit data also has its flaws, suits have revealed valuable information about the incidence and details of police misconduct allegations. The gaps in civilian complaints, use-of-force reports, and internal investigations appear to be filled, at least in part, by information revealed during litigation.

### III. MITIGATING THE WEAKNESSES OF LAWSUITS

I have, thus far, described the practices of a group of police departments that pay close attention to lawsuit data and shown that suits offer information unavailable through other sources. I do not, however, intend to idealize the information generated by damages actions. Many people never sue and lawsuit payouts can distort the extent of a defendant's responsibility. Lawsuits are resolved long after the underlying incident occurred and are generally focused on individual bad actors instead of the policy makers that could affect organizational change. And litigation may inhibit the type of information exchange necessary to understand and correct problem behavior.

Some departments have used these imperfections in litigation data to justify their decision to ignore lawsuits.<sup>184</sup> Yet these information flaws are not fatal. Departments in this study compensate for the imper-

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<sup>184</sup> Mayor Bloomberg recently opposed the New York City Council's efforts to gather information about pending lawsuits and settlements against the New York Police Department because, his spokesman testified, "the mere fact of a settlement in any litigation is not an acknowledgment of wrongdoing, or of the truth of the facts alleged. . . . While some settlements seem unfair or even outrageous to us, and to the public, the Law Department's decision to settle a matter is largely separate from the merits of the litigation." William Heinzen, Deputy Counselor to the Mayor, Statement Before the N.Y.C. Council Comm. on Governmental Operations (Dec. 11, 2009) (on file with author). Police department officials in other jurisdictions have similarly argued that settlements are often strategic decisions—not admissions of wrongdoing—and so should not be probative of misconduct. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 135, at 81 (noting that internal affairs staff interviewed by Human Rights Watch in fourteen police departments "made statements such as 'civil cases are not our problem,' or asserted that the settled suits do not indicate the 'guilt' of an officer, disregarding the important information that citizen-initiated lawsuits could provide"); Robert Becker & Todd Lightly, *Deputies' Abuse Cases Cost County: 32 Complaints Settled in 4 Years for \$1.5 Million*, CHI. TRIBUNE, Feb. 10, 2002, at C1 (citing director of operations for Cook County Sheriff as stating that legal settlements are often business decisions and not proof of officer misconduct); Nicholas Riccardi, *Lawsuits Question Actions of Sheriff's Deputies in 3 Cases*, L.A. TIMES, Jan. 23, 2002, at B1; Susan Sward, Bill Wallace & Elizabeth Fernandez, *The Use of Force: When SFPD Officers Resort to Violence*, S.F. CHRON., Feb. 5, 2006, at A1 (citing the San Francisco Police Department's risk manager as stating that legal settlements can be granted by City Attorney for various reasons and are not proof of officer misconduct). Police officials also contend that delays in the filing and adjudication of lawsuits make lawsuits arguably inferior to internal information sources. *See* Statement of William Heinzen, *supra* (opposing legislation to gather lawsuit data because more timely information about alleged misconduct is available through the civilian complaints filed with the city's Civilian Complaint Review Board); Telephone Interview with Richard Rosenthal, *supra* note 35 (referring to lawsuits as "late warning systems").

fections in lawsuits—and the imperfections in civilian complaints and use-of-force reports—by reviewing data from each source in context with other available information and using independent auditors to consider what the data may show.

### A. *The Inaccuracies of Claims and Evidence*

The adversarial nature of litigation may produce biased and skewed information. Most people who believe their rights have been violated never sue.<sup>185</sup> And those cases that plaintiffs' attorneys choose to take are not necessarily the strongest on the merits. Lawyers retained on contingency receive a portion of plaintiff's award and, therefore, will be attracted to high damages cases—even when there is middling evidence of liability.<sup>186</sup> Lawyers may also decline to take a case with strong evidence of liability but low recoverable damages; the plaintiff may be unemployed, incarcerated, or unsympathetic, or the claims may be too difficult to prove.<sup>187</sup>

Once a plaintiff retains a lawyer or decides to proceed pro se, she will present her very strongest case in her complaint.<sup>188</sup> A savvy defense

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<sup>185</sup> There are low filing rates for police misconduct claims. See *supra* note 133 and accompanying text (noting that 1% of people sue who believe they have been mistreated by the police). For other studies of civil litigation filing rates, see, for example, DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES: EXECUTIVE SUMMARY 19 (1991) (finding that lawsuits were filed for 44 percent of vehicle injuries, 7 percent of work injuries, and 3 percent of other injuries), Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996) (describing common disputes pyramids for tort claims, discrimination claims, and claims post-divorce), Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544 (1980-81) (finding that five percent of grievances became filed lawsuits), and David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250, 254-55 (2000) (finding less than 3% of those injured by medical error brought legal claims).

<sup>186</sup> Plaintiff's attorneys in civil rights cases will also be entitled to attorneys' fees if they prevail. See 42 U.S.C. § 1988(b) (2006). Many cases are resolved through settlement agreements, however, which do not necessarily include a provision for attorneys' fees. See, e.g., *Evans v. Jeff D.*, 475 U.S. 717 (1986). In those cases, the attorney will take a portion of the plaintiff's recovery.

<sup>187</sup> See Meltzer, *supra* note 134 (observing that people mistreated by the police often do not bring claims because of "ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration"); Miller, *supra* note 2, at 68 (noting that, given heightened pleading standards in *Twombly* and *Iqbal*, meritorious but hard to prove cases may not be brought "because prospective litigants or their counsel may not have—or be willing to risk—the resources needed to investigate sufficiently prior to institution to survive a motion to dismiss"); Rudovsky, *supra* note 150, at 467 ("Because police abuse is most often directed against those without political power or social status, their complaints are often dismissed or ignored.").

<sup>188</sup> This is not to suggest that plaintiffs regularly lie in their complaints. Although some complaints will overstate the plaintiffs' case, there are strong incentives for a plaintiff to be judicious but thorough in her complaint. An attorney will not recover attorneys' fees for time spent on frivolous claims. In fact, a defendant can recover fees for time spent defending against frivolous claims. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Harris v. Maricopa*

attorney will deny her contentions to the hilt. During discovery, both sides will use interrogatories, requests for admission, document requests, and depositions to generate a great deal of information. The nature of discovery practice means that at least some of the information generated will be irrelevant, prejudicial, and inadmissible.<sup>189</sup> Not every discovery request or deposition question, even when asked in good faith, will uncover valuable evidence. And each witness may tell a version of the facts influenced by faulty memory or a preference for one side.<sup>190</sup>

The information generated by litigation will be further distorted if the parties do not have comparably resourced and capable counsel. Scholars have recognized that unequally matched counsel make it more difficult for neutral fact-finders to reach a just verdict.<sup>191</sup> Unequal litigators also affect the quality of the information generated by litigation. The lion's share of evidence may support plaintiff's claim not because

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County Superior Court, 631 F.3d 963, 971-72 (9th Cir. 2011). The threat of Rule 11 sanctions also discourages a plaintiff and her attorney from including unsupportable facts and claims. On the other hand, the plausibility pleading requirements in *Twombly* and *Iqbal* require plaintiffs to file detailed pleadings. See Miller, *supra* note 2.

<sup>189</sup> Although some evidence generated during discovery will be prejudicial and irrelevant, the general consensus among attorneys is that discovery produces the correct amount of information needed properly to litigate the case. Willging et al., *supra* note 3, at 531. Contingency-fee plaintiff's attorneys are particularly unlikely to engage in frivolous discovery practice: "To avoid expenditures that may never be reimbursed and to prevent the loss of potentially more attractive professional opportunities," contingent-fee lawyers are unlikely to "conduct unnecessary depositions or be inundated with documents or e-discovery to hunt for the proverbial 'smoking gun.'" Miller, *supra* note 2, at 67.

<sup>190</sup> See, e.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 86 (1949) ("[The witness] often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed."); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 304 (1989) (observing that "[w]itnesses may differ in what they think they saw; or there may be no witnesses on a significant issue so that the past must be reconstructed from circumstantial evidence; or, in some cases, witnesses may deliberately lie" (footnotes omitted)).

<sup>191</sup> See John H. Langbein, *The German Advantage in Civil Procedure*, 52 *U. CHI. L. REV.* 823, 843 (1985) ("It is a rare litigator in the United States who has not witnessed the spectacle of a bumbling adversary whose poor discovery work or inability to present evidence at trial caused his client to lose a case that should have been won."); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 *VA. L. REV.* 79, 91 (2008) ("Because the adversarial system relies upon the parties to produce the facts, examine and cross-examine witnesses, and present legal arguments on their own behalf, the parties must be at least somewhat equally capable of making their cases . . . If, due to a lack of resources, one party is unable to uncover evidence or is less skilled in developing legal arguments, the outcome might be skewed in favor of her better-equipped adversary."); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *CARDOZO L. REV.* 1865, 1873-74 (2002) ("If one side in adversarial adjudication is ill-equipped—it cannot afford access to the system, or has less time and money to pursue evidence, or less skill in developing legal claims—then what emerges as the stronger case might not necessarily be the better case.").

the claim is meritorious, but because defense counsel overlooked critical areas of inquiry in his document requests and deposition questions.

Departments that pay attention to litigation data do not assume the data to be accurate or complete. Instead, they view the data skeptically, supporting or rebutting allegations with other available information. When departments investigate lawsuit claims, their investigations are parallel to and independent of the litigation discovery process.<sup>192</sup> Only after the internal investigation is complete do investigators review the litigation file to determine whether any additional information was uncovered in discovery. In this way, departments cross-check the quality and thoroughness of the internal investigation and litigation discovery process. Similarly, when a department is looking for problem officers, units, and practices, a single meritless legal claim or an isolated civilian complaint will have little impact; the department will intervene only if it sees a cluster of incidents within a limited period of time.<sup>193</sup>

Departments also look beyond lawsuit data when crafting solutions to the problems they identify. When a cluster of incidents trigger early intervention, officials consider not only the officer's job performance but also his personal situation and family circumstances before deciding what course of action might prevent future problems.<sup>194</sup> Two case studies described by police practices expert Samuel Walker illustrate the personalized nature of these interventions.

In one large police department, a police officer was flagged by the EI system because of a high number of use of force incidents. The counseling session with the officer revealed that she had a great fear of being struck in the face, and as a consequence was not properly taking control of encounters with citizens. After losing control over the person or persons, she would then have to use force to reassert control. Her supervisor referred her to the training unit, where she was instructed in tactics that would allow her to protect herself while maintaining control of encounters with the potential for conflict. As a result, her use of force incidents declined dramatically.

In another large department, a patrol officer was identified by the EI system because of a series of use of force incidents. During the intervention session the officer's supervisor discovered that he was having severe personal financial problems. The supervisors recommended professional financial consulting, the officer followed this advice, and his performance improved significantly.<sup>195</sup>

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<sup>192</sup> See Telephone Interview with Ilana Rosenzweig, *supra* note 35 (stating that she considers but does not blindly rely on information developed during the course of litigation in her independent reviews).

<sup>193</sup> See *supra* Parts I.C.1 and I.C.3 (describing trend analysis and early intervention systems).

<sup>194</sup> See PROTECTING CIVIL RIGHTS, *supra* note 96, at 62 ("Understanding the critical factors, both on and off the job, will help supervisors decide when to intervene and to tailor needed interventions to individual officers' needs.")

<sup>195</sup> POLICE ACCOUNTABILITY, *supra* note 94, at 102.

As these descriptions show, a supervisor's expansive view of officers' problems may lead him to conclude that an officer needs training in self-defense tactics or financial counseling instead of discipline to reduce his uses of force.

Departments demonstrate similar circumspection when reviewing trends across cases. When the LASD's special counsel found one station was responsible for a disproportionate number of shootings and lawsuits, he spent several weeks at the station reviewing records, speaking with personnel, riding along with officers, and considering several possible reasons for the concentration of payouts.<sup>196</sup> Ultimately, many of his recommendations did not address the particular behaviors that prompted the lawsuits, but instead addressed hiring, management and training decisions at the station.<sup>197</sup>

Although departments' holistic review of information from multiple data sources mitigates the flaws of available data, it raises the costs of information gathering and analysis.<sup>198</sup> Reviewers bear the responsibility of separating the wheat from the chaff, the "good" from the "bad" information. Given cognitive limitations and heuristics, and the effects of information overload, we should expect analytical errors.<sup>199</sup> Officials may have trouble deciding what information is relevant.<sup>200</sup> Although the astute supervisor described by Samuel Walker thought to ask the officer with multiple uses of force about his financial situation,<sup>201</sup> finances might seem irrelevant to another competent supervisor trying to understand an officer's use of force statistics.

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<sup>196</sup> See *supra* notes 80-83 and accompanying text (describing the investigation of the Century City station by the LASD auditor).

<sup>197</sup> See *supra* notes 84-86 and accompanying text (describing the auditor's recommendations).

<sup>198</sup> There are not only information costs but also financial costs associated with departments' contextual analyses. Auditors charge cities and counties hundreds of thousands of dollars each year. See Warner, *supra* note 121 (reporting that Denver's auditor's budget is \$636,000); Correspondence from Merrick Bobb, *supra* note 119 (reporting that the LASD auditor charges the County of Los Angeles \$200,000 per year for his services). Of course, not all of this money is spent reviewing lawsuit data. Police auditors are involved in multiple different efforts to improve police accountability, and do not charge piecemeal for their litigation review services.

<sup>199</sup> See, e.g., HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS (1947); 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 SCI. 1124 (1974).

<sup>200</sup> As James March observed, decisionmakers "often have relevant information but fail to see its relevance. They make unwarranted inferences from information, or fail to connect different parts of the information available to them to form a coherent interpretation." JAMES G. MARCH, A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN 10 (1994); see also Diane Vaughn, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 LAW & SOC'Y REV. 23, 29 (1998) (noting that "[d]ecisionmakers do not weigh all possible outcomes but instead rely on a few key values; the magnitude of possible bad outcomes is more salient, so that there is less risk taking when greater stakes are involved; in practice, quantifying costs and benefits of a line of action is not easy").

<sup>201</sup> See *supra* note 195 and accompanying text.

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Officials may also assess available information in a biased manner.<sup>202</sup> When supervisors use early intervention systems to design appropriate interventions, for example, they are instructed to look to the particular characteristics of the officer and the problems he faces.<sup>203</sup> Supervisors have broad authority to decide whether an officer should be counseled informally in the supervisor's office or reassigned to another station. The supervisor's personal dislike of that officer, or, conversely, his desire to protect one of his own may impact his decision about what course to take.

Departments attempt to limit error and bias by having both department personnel and external auditors evaluate available information.<sup>204</sup> Department personnel may run the early intervention system, for example, but the department's auditor will periodically review the department's collection and analysis of early intervention system data and the effectiveness of intervention decisions. With this dual review, departments reap the benefits of internal and external perspectives. Departments preserve the input of police officials, who have a deep understanding of the department and staff but may be biased by their relationship with the involved officers and stations.<sup>205</sup> Departments also benefit from the insights of external auditors, who know less about the inner-workings of the department but may be more objective.<sup>206</sup>

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<sup>202</sup> As sociologist Diane Vaughn has observed, "[A]n extensive body of research and theory on decisionmaking in organizations shows that the weighing of costs and benefits does occur, but individual choice is constrained by institutional and organizational forces: Decision practices and outcomes are products of external contingencies, political battles, unacknowledged cultural beliefs, and formal and informal internal pathologies that undercut both the determination of goals and their achievement." Vaughn, *supra* note 200, at 29.

<sup>203</sup> See generally PROTECTING CIVIL RIGHTS, *supra* note 96, at 44-78.

<sup>204</sup> The benefits of auditing and review have been recognized in multiple organizational contexts. 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, 122 (1997) (recognizing the benefits of auditing and review in corporate data-gathering and analysis); Ronal W. Serpas & Matthew Morley, *The Next Step in Accountability Driven Leadership: "CompStating" the CompStat Data*, POLICE CHIEF, May 2008, available at <http://www.policchiefmagazine.org>.

<sup>205</sup> For the potential for biased information in a variety of institutional contexts see, for example, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004), 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 (1997), and R. Joseph Monsen, Jr. & Anthony Downs, *A Theory of Large Managerial Firms*, 73 J. POL. ECON. 221 (1965).

<sup>206</sup> Although auditors may be more objective than department personnel, they are still human; auditors' decisions will be impacted by errors and biases, including possible biases toward their department employers. See generally Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133 (2000).

### B. *The Inaccuracies of Litigation Outcomes*

Like claims and facts developed during litigation, litigation outcomes can be inaccurate. Plaintiffs with strong claims may lose at trial or have their case dismissed by the court.<sup>207</sup> Plaintiffs with weak claims may prevail. The amount awarded to a prevailing plaintiff can have little to do with the merits of the claim or the severity of the defendant's misconduct. Juries may award damages based on the severity of the plaintiff's injury<sup>208</sup> and characteristics of the plaintiff including how much she earns, where she lives, and whether she has dependents.<sup>209</sup> Jury verdicts may be skewed by negative public sentiment about a party to the litigation,<sup>210</sup> the depth of the defendants' pockets,<sup>211</sup> and trial participants' courtroom demeanor.<sup>212</sup> Settlement awards may also be inaccurate reflections of defendants' misconduct. Even if a defendant is not at fault, he may nonetheless settle the claim for nuisance value to avoid

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<sup>207</sup> See Carl B. Klockars, *A Theory of Excessive Force and Its Control*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 1, 6-7 (William A. Geller & Hans Toch eds., 1996) (describing legal requirements in civil rights actions and observing that "police can engage in all sorts of objectionable behavior without transgressing criminal or civil definitions of excessive force"); see also Levinson, *supra* note 25, at 372-73 (noting that, even if a plaintiff's constitutional rights have been violated, they cannot be awarded damages absent injury).

<sup>208</sup> See, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (finding that awards are based more on the extent of plaintiff's injury than defendants' wrongdoing); Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 LAW & CONTEMP. PROBS. 5 (1991) (showing that malpractice damage awards correlate to severity and duration of injury); Troyen A. Brennan et al., *Relation Between Negligent Adverse Events and the Outcomes of Medical-Malpractice Litigation*, 335 NEW ENG. J. MED. 1963 (1999); David A. Hyman, *Medical Malpractice and the Tort System: What Do We Know and What (If Anything) Should We Do About It?*, 80 TEX. L. REV. 1639, 1642-44 (2002) (describing studies in multiple contexts that have found that "the best predictor of the size of an award is the severity of disability, not whether there was negligence, or an adverse event").

<sup>209</sup> It is, for example, more expensive for a defendant to harm an executive than it is to harm a factory worker. See Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1292 (1980). It is more expensive for a defendant to harm a parent than it is to harm a child or a person without dependents. *Id.* at 1293. It is more expensive to harm a person who lives in a city than it is to harm a person who lives in the country. Patricia Danzon, *The Frequency and Severity of Medical Malpractice Claims*, 27 J.L. & ECON. 115, 143 (1984).

<sup>210</sup> See, e.g., David M. Studdert, Michelle M. Mello & Troyen A. Brennan, *Medical Malpractice*, 350 NEW ENG. J. MED. 283, 286 (2004).

<sup>211</sup> See, e.g., AUDREY CHIN & MARK A. PETERSON, *THE RAND CORP., DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* (1985) (studying Chicago jury verdicts from 1960-1980 and finding that plaintiffs who had fallen in a corporate owned building recovered higher damages than those who had fallen in government owned and privately owned buildings).

<sup>212</sup> See, e.g., Stephen D. Sugarman, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* 38 (1989).

the costs and risks of trial.<sup>213</sup> In other cases, settlement awards may be reached for amounts below the cost of the anticipated verdict.<sup>214</sup>

A department interested in reducing the costs of litigation should collect and assess litigation data regardless of the accuracy of the outcomes. After all, to reduce the costs of suits, one must understand what types of cases are brought and how all payouts—not just payouts in meritorious cases—can be reduced.

The imperfections of lawsuit outcomes do, however, warp the deterrent signal of damages actions.<sup>215</sup> Deterrence theory imagines that threatened or actual penalties will discourage future misbehavior so long as the costs of harm avoidance are lower than the costs of liability. And, generally speaking—though not always—the costs of liability are viewed in terms of the dollars spent to satisfy settlements and judgments.<sup>216</sup> So, the logic goes, the higher the expected or exacted damages, the greater the care that will be taken to prevent those sorts of injuries in the future. The lower the damages, the lower the care.

In order for tort law appropriately to incentivize actors, defendants' liability exposure must be equivalent to the value of the harms they cause. Only with this type of equity can lawsuits carry the properly calibrated deterrent signal:

If injurers pay less than for the harm they cause, underdeterrence may result—that is, precautions may be inadequate, product prices may be too low, and risk-producing activities may be excessive. Conversely, if injurers are made to pay more than for the harm they cause, wasteful precautions may be taken, product prices may be inappropriately high, and risky but socially beneficial activities may be undesirably curtailed.<sup>217</sup>

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<sup>213</sup> For descriptions and discussions of so-called “nuisance value” suits see, for example, Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PENN. L. REV. 519 (1997), Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004), and David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3 (1985).

<sup>214</sup> For discounts in settlements, see JAMES CHELIUS, *WORKPLACE SAFETY AND HEALTH: THE ROLE OF WORKERS' COMPENSATION* 61 (1977), DONALD HARRIS, *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* 318-19 (1984), and Patricia M. Danzon, *The Medical Malpractice System: Facts and Reforms*, in *THE EFFECTS OF LITIGATION ON HEALTH CARE COSTS* 28, 30 (Mary Ann Baily & Warren I. Cikins eds., 1985). *But see* JAMES K. HAMMITT, *THE RAND CORP., AUTOMOBILE ACCIDENT COMPENSATION: PAYMENTS BY AUTO INSURERS* 74 (1985) (automobile cases settled for approximately the same amounts that were recovered after trial, without a discount); ELIZABETH M. KING & JAMES P. SMITH, *THE RAND CORP., ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS* 75 (1988) (finding that air crash cases that settled after a lawsuit was filed recovered approximately 50% of actual losses, but cases that went to trial recovered only approximately 44% of actual losses).

<sup>215</sup> For other critiques of lawsuits' deterrent effects, see Schwartz, *supra* note 13, at 1026-27.

<sup>216</sup> *But see supra* note 25 (describing possible non-financial “costs” of civil rights lawsuits).

<sup>217</sup> A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998); *see also* *Ciraolo v. City of New York*, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring) (“[U]nless approximately all the costs of the activity are

Given what we know about litigation outcomes, litigation payouts are highly unlikely to equal the nature and severity of underlying harms. And the deterrent signal is further skewed in police misconduct cases, where officers are almost certain to be indemnified and judgments against departments come from city budgets, not police coffers.<sup>218</sup>

The departments in this study minimize concerns about the imperfections of litigation outcomes by not focusing exclusively—or primarily—on payouts. Departments do track litigation payouts, and may pay particular attention to cases with high settlements and judgments.<sup>219</sup> But departments also pay attention to allegations of misconduct in claims and lawsuits when they are first filed, and the information developed during the course of litigation. Departments enter lawsuit allegations into early intervention systems used to track problem officers.<sup>220</sup> Departments identify trends by looking at clusters of legal claims.<sup>221</sup> Departments investigate lawsuit claims when they are filed.<sup>222</sup> And departments review the evidence developed during the course of litigation for personnel, policy, and training implications.<sup>223</sup>

Because departments review lawsuits at the time they are filed, claims that are dismissed can still be the basis for personnel action. And because these departments are not guided solely by the size of payouts, a case settled for a small amount can still inspire policy change. A lawsuit will be included in a department's early intervention system and trend analysis whether the case was dismissed or went to trial, whether it settled for \$5,000 or \$500,000. Departments have, in fact, made policy changes even when the underlying claim settled for an insignificant amount. In one instance, a deputy from the K9 unit of the LASD took his dog to a park for a walk and the dog bit a man. The department paid the man's medical costs and an additional small settlement. Even though the bite was accidental and the settlement was small, the K9 unit reviewed and changed its policies department-wide to prevent future similar events.<sup>224</sup> Conversely, lawsuits resulting in large judgments or

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borne by the actor . . . the actor will not be adequately deterred from undesirable activities.”); Margo Schlanger, *Second Best Damage Action Deterrence*, 55 DEPAUL L. REV. 517, 520 (2006) (referring to this equity as the “identity principle”); Schwartz, *supra* note 11, at 423 (noting that torts-and-economics scholarship “assume[s], at least implicitly, a one-to-one relationship between the incentives afforded by tort liability rules and the resulting conduct of real-world actors”).

<sup>218</sup> See Schwartz, *supra* note 13, at 1032-33.

<sup>219</sup> See *supra* notes 81 and 110 and accompanying text.

<sup>220</sup> See *supra* Part I.C.3 for a description of early intervention systems.

<sup>221</sup> See *supra* Part I.C.1 for a description of trend analysis.

<sup>222</sup> See *supra* Part I.C.2 for a description of investigations of legal claims.

<sup>223</sup> See *supra* Part I.C.4 for a description of closed case reviews.

<sup>224</sup> MICHAEL J. GENNACO, OFFICE OF INDEP. REVIEW, CNTY. OF L.A., SEVENTH ANNUAL REPORT 17 (2009), available at <http://www.laoir.com/reports/SeventhAnnualRept.pdf>.

settlements will not necessarily lead to personnel or policy changes if the department concludes that none are merited.<sup>225</sup>

### C. *The Slow Pace of Litigation*

Some contend that lawsuits should play no role in performance improvement efforts because litigation travels at such a slow pace.<sup>226</sup> Given generous statute of limitations periods and extensive pretrial litigation practices, a settlement or judgment may not be entered until several years after the underlying incident.

Officials in the departments in this study recognize that lawsuits are a “‘trailing’ rather than a leading indicator” that “‘may not be concluded until several years after the conduct that gave rise to the lawsuit.’”<sup>227</sup> However, departments do not wait until cases are resolved to evaluate the claims for possible lessons. Instead, departments track and analyze lawsuits from the time that the suits are filed.<sup>228</sup> As the Portland police department’s safety and risk officer reported: “We’re watching these claims from Day One. We don’t want to wait until after a large settlement.”<sup>229</sup> By paying attention to lawsuits when they are first filed, departments lessen the inevitable delays of litigation, although they of course cannot eliminate some of the delay, including delays in filing.

Moreover, closed litigation files can be a source of valuable information even though the underlying events have occurred years before.

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<sup>225</sup> See, e.g., L.A. CNTY. BD. OF SUPERVISORS, INFORMATION ON PROPOSED SETTLEMENT OF LITIGATION: MONTROYA V. COUNTY OF LOS ANGELES (Nov. 28, 2005), available at <http://file.lacounty.gov/bos/supdocs/36736.pdf> (finding no personnel or policy failures in lawsuit, settled for \$150,000, in which plaintiff was shot in the abdomen after a struggle with sheriff’s deputy); L.A. CNTY. BD. OF SUPERVISORS, INFORMATION ON PROPOSED SETTLEMENT OF LITIGATION: EICHENLAUB V. COUNTY OF LOS ANGELES (Jan. 21, 2009), available at [lacounty.info/bos/sop/supdocs/47196.pdf](http://lacounty.info/bos/sop/supdocs/47196.pdf) (finding no personnel or policy failures in lawsuit, settled for \$450,000, claiming excessive force and wrongful death).

<sup>226</sup> See *supra* note 184. The effects of the delay on the impact of litigation have been recognized in other contexts as well. See, e.g., PAUL C. WEILER, A MEASURE OF MALPRACTICE 81 (1993) (“Consider, for example, an anesthetist who is momentarily distracted from indicators of oxygen deprivation to the patient and omits the necessary emergency response. The prospect of a tort suit arising years later as a result of a problem the doctor is too distracted even to be thinking about during the treatment in question will not likely provide him with motivation to adopt the proper precautions.”); JOHN A. SILICIANO, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1821, 1830-31 (1987) (“[In the products liability context,] some risks from a product may not be discovered until long after it has entered the marketplace. These ‘remote’ risks pose a particularly difficult dilemma for the manufacturer. The manufacturer could engage in an extensive research and testing program aimed at uncovering all such risks, but at some point the costs and delay involved in such a program become prohibitive.”).

<sup>227</sup> MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF’S DEP’T, 5TH SEMIANNUAL REPORT 29 (1996) [hereinafter 5TH SEMIANNUAL REPORT].

<sup>228</sup> See *supra* Part I.C (describing early intervention systems and trend analyses).

<sup>229</sup> Bernstein, *supra* note 70.

Lawsuits have revealed information about misconduct allegations that did not arise during the internal investigation of the same incident. It was the plaintiff's attorney—not internal investigators—who enhanced the audio portion of a videotape taken of the involved Portland transit division officers on the night of James Chasse's death.<sup>230</sup> By comparing closed litigation files with internal investigations, reviewers have identified weaknesses, flaws, biases, and gaps in internal investigation processes and ways that those internal processes can be improved.<sup>231</sup> Given the documented inadequacies of internal investigations and the vigorous nature of discovery, it should be no surprise that litigation files—when reviewed—have supplemented departments' knowledge and understanding of incidents and department practices despite the passage of time.

#### D. *The Individualistic Focus of Litigation*

A fourth critique of lawsuits' role in performance improvement—raised by scholars, not police executives—is that damages actions are generally focused on individual bad actors instead of systemic causes of harm. Organizational theory literature posits that organizational culture influences the behavior of individuals in that organization.<sup>232</sup> And those who study the police have long observed that police organizational culture influences the actions of individual officers.<sup>233</sup> Scholars including Barbara Armacost, David Rudovsky, and Peter Schuck argue that lawsuits brought against individual officers focus too narrowly on officer error.<sup>234</sup> They recommend bringing suits against the department to incentivize change at the organizational level.<sup>235</sup>

Although these scholars correctly suggest that lawsuits are overly focused on individual behavior, litigation analysis nevertheless can un-

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<sup>230</sup> See *supra* notes 177-183 and accompanying text (describing Chasse case and investigation).

<sup>231</sup> See *supra* Part I.C.4 (describing benefits of closed claim reviews).

<sup>232</sup> For scholarship describing the effects of organization on behavior, see V. Lee Hamilton & Joseph Sanders, *Responsibility and Risk in Organizational Crimes of Obedience*, 14 RES. ORG. BEHAV. 49 (1992), and David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348 (1992).

<sup>233</sup> See, e.g., MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* (1981); JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993); JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* (1978); Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force*, in *POLICE VIOLENCE*, *supra* note 207, at 23.

<sup>234</sup> See, e.g., SCHUCK, *supra* note 25; Armacost, *supra* note 205; Rudovsky, *supra* note 150.

<sup>235</sup> See SCHUCK, *supra* note 25; Armacost, *supra* note 205; Rudovsky, *supra* note 150. For similar arguments in the medical malpractice context, see WEILER, *supra* note 226; Mello & Brennan, *supra* note 210, at 1623-24.

cover organizational problems. Departments address concerns about the individualistic nature of damages actions by reviewing individual cases for large-scale lessons. As a result, a single case brought against the LASD's K9 unit and settled for a modest sum can nonetheless lead to institution-wide policy reforms.<sup>236</sup> Departments also mitigate the individualistic focus of litigation by consolidating information from individual suits. Take, for example, the cluster of claims against the LASD by inmates who fell off their top bunks.<sup>237</sup> A supervisor reviewing a single claim might see a simple fall. By reviewing claims in the aggregate, LASD's risk manager could see that the department was improperly maintaining and communicating medical information—an organization-wide problem—even though the suits were focused on individual officers and events.

#### E. *The Blaming Culture Created by Litigation*

Some level criticism not at lawsuits themselves, but instead at the defensive culture created by the threat of being sued. In multiple industries, including aviation, manufacturing, nuclear power, and medical care, information about past performance is gathered and analyzed as a way of identifying the types of problems that lead to accidents.<sup>238</sup> Reporting systems collect information about accidents and near misses, and officials analyze the data to identify system-wide problems that could cause future harms. And when accidents do occur, in-depth reviews are conducted to understand the root causes of error. The departments in this study—much like airlines, hospitals, and nuclear power plants—review information from a variety of sources to identify weaknesses and possible ways to improve. Police department early intervention systems—like near-miss reporting systems—gather information from multiple sources as a way of identifying problem officers, units, and practices. Police department closed claims reviews—like root cause analyses—sift through all available information about an incident as a way of diagnosing what went wrong.

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<sup>236</sup> See *supra* note 224 and accompanying text.

<sup>237</sup> See *supra* note 71 and accompanying text.

<sup>238</sup> See, e.g., Paul Barach & Stephen D. Small, *Reporting and Preventing Medical Mishaps: Lessons from Non-Medical Near Miss Reporting Systems*, 320 BRITISH MED. J. 759 (2000) (describing “near-miss” reporting systems in aviation, petrochemical processing, steel production, and nuclear power); Tom Kontogiannis & Stathis Malakis, *A Proactive Approach to Human Error Detection and Identification in Aviation and Air Traffic Control*, 47 SAFETY SCI. 693 (2009); Bryan A. Liang, *Error in Medicine: Legal Impediments to U.S. Reform*, 24 J. HEALTH POL., POL'Y & L. 27, 29-31 (1999); J. Bryan Sexton et al., *Error, Stress, and Teamwork in Medicine and Aviation: Cross Sectional Surveys*, 320 BRITISH MED. J. 745 (2000).

Although lawsuits play an important role in police department policies, scholars generally view suits to be counter-productive to error reducing efforts. The concern, most frequently articulated in the health care context, is that safety improvements require “an organizational culture of openness to discovery and discussion of problems” that will be stifled by the threat of discipline and liability.<sup>239</sup> Some police experts similarly fear that the threat of lawsuits and internal discipline will hamper law enforcement self-review.<sup>240</sup>

My research supports the concern that litigation can undermine efforts to understand error. The threat of litigation and discipline may have caused government personnel—including, at times, personnel in the five departments in this study—to hide or misrepresent the kinds of information crucial to performance improvement efforts.<sup>241</sup> Department officials have written reports that omit information harmful to their officers.<sup>242</sup> City attorneys have refused to disclose information about pending claims.<sup>243</sup> And internal affairs bureaus have suspended investigations while lawsuits are pending for fear that internal findings will compromise the defense of the case.<sup>244</sup> Indeed, the internal investigation of James Chasse’s death was delayed by twenty-two months because the lawyer representing the county deputy did not allow department investigators to interview the deputy or others involved until they were deposed in the lawsuit.<sup>245</sup> The attorney was afraid that statements made in the internal investigation could compromise the defense of the civil case.<sup>246</sup>

Although the fear of litigation can inhibit data collection, the departments in this study show that lawsuits are also an important source of information about error. Suits have revealed incidents of misconduct,

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<sup>239</sup> Randall R. Bovbjerg et al., *Paths to Reducing Medical Injury: Professional Liability and Discipline vs. Patient Safety—and the Need for a Third Way*, 29 J. L., MED. & ETHICS 369, 374 (2001); see also Liang, *supra* note 238, at 39 (“physicians with tort liability concerns may be hesitant to report adverse events and medical errors for fear that plaintiffs’ attorneys will have access to this information, thus exposing physicians to liability”); William M. Sage, *Unfinished Business: How Litigation Relates to Health Care Regulation*, 28 J. HEALTH POL., POL’Y & L. 387, 407 (2003) (“Patient safety advocates believe that fear of litigation discourages voluntary reporting of near-misses by physicians and compromises efforts to ascertain root causes of medical errors.”). But see David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893, 894 (2005) (finding that “there is no foundation for the widely held belief that fear of malpractice liability impedes efforts to improve the reliability of health care delivery systems”).

<sup>240</sup> See Douglas W. Perez & William Ker Muir, *Administrative Review of Alleged Police Brutality*, in POLICE VIOLENCE, *supra* note 207, at 213, 231-32.

<sup>241</sup> See Schwartz, *supra* note 13, at Part II.D (describing these types of implementation problems).

<sup>242</sup> See LASD 15TH SEMI-ANNUAL REPORT, *supra* note 82, at 53.

<sup>243</sup> See Schwartz, *supra* note 13, at 1065-66.

<sup>244</sup> See *id.* at 1064.

<sup>245</sup> CHASSE REPORT, *supra* note 20, at 22-24.

<sup>246</sup> See *id.* at 23.

and evidence generated during litigation has offered critical details about those misconduct allegations. How have departments learned from lawsuits even as lawsuits inhibit disclosure of error and open dialogue? Key to these departments' success appears to be the independent personnel who review department practices.<sup>247</sup> In each of these departments, auditors or investigators have unfettered access to department documents and personnel. This access has allowed them to learn that officials were not complying with their obligations to disclose or investigate.<sup>248</sup> Reviewers are also able to evaluate, in subsequent reports, whether those problems have been remedied. Although auditors and investigators do not eliminate problems in the collection and analysis of data, they have been able to point out and assist in the correction of data collection problems that would have gone unidentified but for the outside review.<sup>249</sup>

#### IV. RECONSIDERING LAWSUITS' ROLE IN ORGANIZATIONAL PERFORMANCE IMPROVEMENT

Lawsuits are widely expected to compensate and deter; this Article shows lawsuits can also inform. In the departments in this study, lawsuits reveal allegations of misconduct that officials investigate and consider with other data for possible trends. The evidence developed in discovery and trial offers a detailed picture of underlying events that can help identify personnel and policy failures. Closed case files, compared with internal investigations, reveal weaknesses in internal procedures. And trends in settlements and judgments, like initial claim trends, highlight units that officials should more carefully review. Viewed in isolation or in conjunction with other data, lawsuits offer insights about the incidence and causes of individual and organizational failings. And armed with these insights, departments find ways to improve.

This view of litigation—as a source of information that can be used to identify and reduce harm and error—parts company with prevailing understandings of lawsuits' roles in organizational performance improvement.

In the standard story, lawsuits' financial costs are expected to deter misbehavior.<sup>250</sup> Others contend that police officials will be deterred by

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<sup>247</sup> See *supra* note 204.

<sup>248</sup> See generally Schwartz, *supra* note 13, at Part II.D.

<sup>249</sup> See *id.* at 1063-64 (citing examples).

<sup>250</sup> 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)); *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.”); *Memphis Cmty.*

lawsuits only when the suits jeopardize political capital, bureaucratic and administrative needs, or crime control efforts.<sup>251</sup> But all expect that it is lawsuits' punitive effects that inspire performance improvement.

High profile and costly cases can, most certainly, affect change in law enforcement. Indeed, several of the departments in this study began reviewing lawsuit data as a response to significant political and financial pressures.<sup>252</sup> But these departments do not limit their attention to cases that garner high payouts or press attention. Instead, they gather information about legal claims, evidence, and dispositions of all cases, even those without financial and political ramifications.

Deterrence theory also imagines that officials deciding which course of action to take weigh the costs of litigation against the benefits of the underlying conduct.<sup>253</sup> But the policies in place in the departments in this study do not facilitate this sort of weighing. Departments would not, for example, track lawsuits alleging chokeholds and then decide whether to retrain their officers about the impropriety of chokeholds based on the costs of these suits.<sup>254</sup> Instead, departments in this study would use lawsuits, with other data, to identify chokeholds as behavior that triggered a concentration of suits, civilian complaints, and/or use-of-force reports. The department then would conduct an investigation and identify ways to address the underlying policy, training, or personnel problems. And when a department looks for trends in payouts, officials do not weigh those judgments and settlements against the costs of potential policy changes. Instead, the concentration of set-

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Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) (“[D]eterrence . . . operates through the mechanism of damages that are compensatory.” (emphasis omitted)). For scholarly discussions of lawsuits as a financial deterrent, see, for example, Fallon & Meltzer, *supra* note 25. Some have, however, noted that other types of pressures associated with lawsuits can influence behavior. Myriam Gilles has pointed out that information revealed during litigation, press attention, and the symbolic power of judgment can have a deterrent effect. See Gilles, *supra* note 25. Several have also pointed out that individual officers may be deterred by the stresses of defending oneself. See, e.g., Bogan v. Scott-Harris, 523 U.S. 44, 50-54 (1998); Gilles, *supra* note 25, at 854-55; John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50-51 (1998).

<sup>251</sup> See SCHUCK, *supra* note 25, at 125 (arguing that government officials may tolerate officer misconduct to further “goals such as crime control, intelligence-gathering, or preservation of neighborhood schools,” “[b]ureaucratic needs,” and “[a]dministrative imperatives”); Armacost, *supra* note 205, at 475 (arguing that officials may tolerate police misconduct that reduces crime); Levinson, *supra* note 25, at 345 (arguing that “[g]overnment actors respond to political incentives, not *financial* ones” (emphasis added)).

<sup>252</sup> See *supra* notes 37, 44 and 64 for descriptions of the scandals that led to independent oversight of the LASD, the Seattle police department, and the Chicago police department, respectively.

<sup>253</sup> See *supra* notes 24-25 for representative scholarship in this area.

<sup>254</sup> This is the type of weighing assumed in many accounts of law enforcement decisionmaking, even as scholars differ about the precise incentives that guide those decisions. See, e.g., Levinson, *supra* note 25.

tlements and judgments is treated as an indication of an underlying problem that is then investigated and analyzed.

In differentiating department practices from deterrence models, I do not mean to suggest that these departments never engage in cost-benefit analyses. Indeed, department officials likely weigh the costs and benefits of their actions at multiple points during information gathering, analysis, and decisionmaking. When LASD's Century station was identified as having a high concentration of payouts, department officials likely considered the bureaucratic and administrative costs of focusing public attention on that station when deciding what course of action to pursue.<sup>255</sup> When Portland's auditor identified a number of incidents suggesting that officers did not understand their authority to enter a home without a warrant, department officials likely weighed the financial costs of various interventions before deciding to make a training video that clarified officers' legal obligations.<sup>256</sup> This type of cost-benefit analysis is far more nuanced and complex than is suggested by formal models of deterrence. And lawsuits' role in this cost-benefit analysis is not just as a "cost," but also as one of many sources of information.

Others have recognized that information generated during litigation can – when publicly disclosed – serve a regulatory function. Scholars, including Wendy Wagner and Timothy Lytton, argue that lawsuits can unearth what Wagner calls "stubborn information" – damaging information closely held by wrongdoers that regulators do not have the resources, motivation, or authority to uncover.<sup>257</sup> Wagner's and Lytton's careful studies of lawsuits challenging the gun industry, clergy sexual abuse, tobacco, and breast implant manufacturers confirm that lawsuits can unearth valuable information that supplements incomplete regulatory efforts.<sup>258</sup> Similarly, scholars have observed that when police misconduct lawsuits publicly reveal damaging information, negative publicity and political pressure can cause police departments to change their behavior.<sup>259</sup> In each organizational setting, public disclosure of litigation data has produced external pressures to improve.

This Article shows that litigation can also generate valuable information previously unavailable to the very entity that is sued. Police department officials in this study rely on lawsuits to surface allegations

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<sup>255</sup> See *supra* note 81 and accompanying text.

<sup>256</sup> See *supra* note 78 and accompanying text.

<sup>257</sup> Wendy Wagner, *Stubborn Information Problems & the Regulatory Benefits of Gun Litigation* 271 (in *Suing the Gun Industry*) (Lytton, ed.)

<sup>258</sup> See, e.g., Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837 (2008); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693 (2007).

<sup>259</sup> See, e.g., Gilles, *supra* note 25.

of misconduct that fall through the cracks of internal data collection efforts. And even when department officials already know about an incident that is the subject of a lawsuit, they review the closed litigation file because the adversarial process may have revealed information that did not surface during the department's internal investigation. Lawsuits have notified departments about incidents of misconduct and their root causes, helped officials design effective interventions to prevent future similar incidents, and highlighted weaknesses in civilian complaint, use of force reporting, and internal investigation protocols.

Current conceptions of the relationship between lawsuits and organizational change overlook the possibility that lawsuits can inform defendants about their own behavior. Yet, for the departments in my study, lawsuits play just this role; suits have revealed valuable information about department employees, units and practices. Departments' attention to the lessons they can learn about their own conduct from lawsuits – what could be called *introspection through litigation* – is an under-explored yet promising avenue by which lawsuits can lead to organizational performance improvements.

Although lawsuits have proven to be a valuable source of information about organizational performance, departments that gather and analyze lawsuit data recognize that the information is flawed.<sup>260</sup> Information produced internally—through civilian complaints and use of force reports—is flawed as well.<sup>261</sup> The approach of the departments in this study is not to ignore information because of its imperfections, but instead to review data from multiple sources with the hopes that imperfections will be minimized by a holistic approach. The LASD's policies “consciously were fashioned to create multiple, new, and even redundant sources of information.”<sup>262</sup>

The same force incident that gave rise to a citizen's complaint might also give rise to a claim, a lawsuit, an IA rollout, a determination by a Commander's Panel on use of force, an administrative inquiry, and possibly even a criminal investigation. Each of the foregoing would give the Department an independent opportunity to bring facts about a particular incident to light, albeit at different times and at different stages of various proceedings and from different perspectives.<sup>263</sup>

By collecting information generated through multiple avenues, at different times, and from different perspectives, officials can account for imperfections in the data and thereby better understand department practices. As Kathryn Olson, the director of Seattle's OPA, described, lawsuits—like civilian complaints, use-of-force reports, and other inter-

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<sup>260</sup> See *supra* Part III.

<sup>261</sup> See *supra* Part II.

<sup>262</sup> LASD 15TH SEMIANNUAL REPORT, *supra* note 82, at 81.

<sup>263</sup> LASD 5TH SEMIANNUAL REPORT, *supra* note 227, at 84.

nally generated data—are a “foggy lens through which to view agency improvement.”<sup>264</sup> The departments in this study have shown that several foggy lenses, viewed together, can reveal a clearer picture of institutional performance.

### CONCLUSION

Despite widespread reluctance to pay attention to litigation data, law enforcement agencies can—and do—learn from lawsuits. Department practices take advantage of information in lawsuits that is unavailable through other sources. And although lawsuit data has significant flaws, practices in these departments minimize decisionmakers’ reliance on those aspects of the data most prone to error. In illuminating police department practices and recognizing lawsuits’ role in and value to performance improvement efforts, this Article ventures into largely uncharted territory. More study could refine thoughts about how organizations can best learn from litigation and the ideal role of litigation data in organizational decisionmaking. So I end with a familiar call for further research.

First, more can be done to understand the value of lawsuit data to police departments. I have shown that lawsuits—despite their flaws—may fill gaps in civilian complaint and use-of-force reporting systems. Further research could quantify the degree of overlap between these information sources by evaluating the types of information departments receive through civilian complaints, use-of-force reports, notices of claim, and lawsuits. Research could also compare the comprehensiveness of internal investigations and lawsuit files. Further information about the uniqueness (or redundancy) of lawsuit data would assist those thinking seriously about the role that lawsuits should play in early intervention systems, trend analyses, internal investigations, and policy reviews.

More can also be learned about the relationship between the merits of civil rights lawsuits and their dispositions. Scholars have studied the volume of civil rights cases and the frequency with which plaintiffs prevail in court and cases settle.<sup>265</sup> Some scholars have also reviewed

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<sup>264</sup> See Telephone Interview with Kathryn Olson, *supra* note 35 (referencing a paper given by an official in the Eugene, Oregon, police department).

<sup>265</sup> See, e.g., Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982) [hereinafter Eisenberg, *Section 1983*] (studying filing rates and outcomes of Section 1983 cases in the Central District of California); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (studying a larger sample of Section 1983 cases filed in the Central District of California). Several of the studies focus only on civil rights claims filed by inmates. See, e.g., Darrell L. Ross, *Emerging Trends in Correctional Civil Liability Cases: A Content Analysis of Federal Court*

civil rights case descriptions and files, concluding that assertions of widespread frivolous claims are overblown.<sup>266</sup> But there have been no studies of the frequency with which victims of civil rights violations bring lawsuits,<sup>267</sup> the merits of civil rights cases that are brought,<sup>268</sup> or any correlation among findings of liability, damages awarded, and actual harms suffered by plaintiffs.<sup>269</sup> Medical malpractice cases and other types of tort claims have been scrutinized to determine the frequency with which wrongfully injured people sue, the frequency with which meritorious and frivolous claims succeed, and the amount of damages awarded.<sup>270</sup> This same research can be conducted regarding civil rights claims.

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*Decisions of Title 42 United States Code Section 1983: 1970-1994*, 25 J. CRIM. JUST. 501 (1997); William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979). These studies are generally focused on examining the extent to which civil rights actions have imposed a burden on the courts, as opposed to the underlying merits of the claims.

<sup>266</sup> See, e.g., Eisenberg, *Section 1983*, *supra* note 265, at 537-38 (concluding, following a review of cases brought in Los Angeles, that “section 1983 cases usually involve important constitutional claims” and, “[a]s is true of nonprisoner cases, most prisoner section 1983 complaints were not plainly trivial assertions implicating little or no federal interest,” but observing that “[t]he ultimate truth or falsity of allegations in section 1983 cases . . . is not yet a debated issue”); Henry F. Fradella, *In Search of Meritorious Claims: A Study of the Processing of Prisoner Cases in a Federal District Court*, 21 JUST. SYS. J. 23, 46-47 (1999) (finding that only 6 of 290 claims in 200 randomly selected cases were “factually absurd”); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1572 (2003) (concluding that the ten most often litigated issues “mostly concern real hardships inherent in prison life, not peanut butter”).

<sup>267</sup> Although one study reports that less than one percent of people who *believe* police mistreated them sue, BJS 2002 STUDY, *supra* note 129, we do not know how frequently people whose rights have actually been violated by the police decide to sue. Similar analyses have successfully been conducted to determine, for example, the frequency with which victims of medical error sue. See Studdert et al., *supra* note 186. For a description of the many gaps in our information about police uses of force, 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 (2008).

<sup>268</sup> Although the studies cited *supra* in note 265 examine the frequency with which civil rights cases are dismissed, these studies do not evaluate whether the “right” outcome was reached.

<sup>269</sup> See, e.g., Schlanger, *supra* note 266, at 1613-14 (2003) (observing that inmates with attorneys have a higher success rate than pro se inmates, but concluding that “without data there is really no way to know which effect dominates—the depression of success rates because lawyers are not available, or the absence of lawyers because the cases are not very good cases” (footnote omitted)); see also Victor E. Kappeler et al., *A Content Analysis of Police Civil Liability Cases: Decisions of the Federal District Courts, 1978-1990*, 21 J. CRIM. JUST. 325, 333 (1993) (finding that procedural safeguards cause defendants to win Section 1983 cases more often than they would if plaintiffs and defendants were on “equal footing” procedurally).

<sup>270</sup> For the frequency with which wrongfully injured people sue, see *supra* note 185. For the correlation between damages awarded and underlying harms, see *supra* note 208. For the frequency with which the “right” result occurs in medical malpractice cases, see, for example, FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 166-68 (1993) (finding correlation between actual outcomes of cases and independent evaluations of medical liability); Henry S. Farber & Michelle J. White, *Medical Malpractice: An Empirical Examination of the Litigation Process*, 22 RAND J. ECON. 199, 199 (1991) (finding that negligence is an “extremely important determinant of defendants’ medical malpractice liability”); David M. Studdert et al., *Claims, Errors and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED.

Studying the accuracy of civil rights lawsuits could further inform the ways that police departments should use litigation data. Currently, law enforcement agencies' evaluations of litigation data accommodate critiques that lawsuits both over-estimate and under-estimate the universe of harms. If, however, studies showed that outcomes in these cases closely tracked objective evaluations of liability and harm, settlements could be considered more conclusive evidence of wrongdoing. And, of course, the opposite conclusion could be reached if study revealed little correlation between outcomes and the merits of the underlying claims.

Research can also tackle these same questions as they apply to other types of organizations. Although lawsuit data appear to fill significant gaps in the information available to police departments, the value of lawsuit data in other institutional settings will likely depend on the visibility of the error, the organizational structure, and the quality and availability of alternative sources of information. Further study can reveal the ways that other types of organizations actually gather and analyze information from lawsuits and the influence of their practices on our understanding of the relationship between litigation and performance improvement.

Finally, research could explore how substantive, procedural and evidentiary rules could be structured to encourage organizations to pay attention to lawsuits. Some reforms would ease the punitive effects of litigation and encourage freer discussion of error. For example, steps have been taken to protect quality improvement efforts from disclosure in health care and aviation.<sup>271</sup> Perhaps similar efforts should be made to protect law enforcement quality improvement efforts, as well. Other possible reforms might make proactive accountability efforts a defense to liability. Employers can successfully defend against hostile work environment claims if they can show they have "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."<sup>272</sup> The federal sentencing guidelines allow courts to reduce fines on corporations with effective compliance and ethics programs.<sup>273</sup> Evi-

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2024 (2006) (presenting a study of closed claim files that found that the "right" result was reached about 73% of the time and finding that false negatives were 1.6 times more likely than false positives); Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780 (1992) (finding that payments in unmeritorious medical malpractice cases are rare).

<sup>271</sup> See Steven Suydam et al., *Patient Safety Data Sharing and Protection from Legal Discovery*, in ADVANCES IN PATIENT SAFETY: FROM RESEARCH TO IMPLEMENTATION 361 (Kern Henriksen et al. eds., 2005) (describing existing discovery protections for patient safety efforts); Alan Levin, *FAA Error-Reporting Program Reveals Hazards, Yields Fixes*, USA TODAY, Apr. 5, 2010, at A1 (describing new FAA reporting program that provides immunity to reporters for all but the most serious lapses).

<sup>272</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

<sup>273</sup> U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2006).

dence of systems to gather and analyze lawsuits and other data for lessons could similarly be a defense to law enforcement liability.<sup>274</sup> Reimagining existing rules to prioritize the generation of information will likely result in perceived gains and losses for all sides. If re-imagined correctly, however, such changes could lead to overall reductions in claims and improvements in care.

This Article is one important step toward a better understanding of the relationship between lawsuits and organizational behavior. The policies used by the five law enforcement agencies in my study are promising and provocative ways to learn from lawsuits. And we, in turn, should learn more from and about them.

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<sup>274</sup> A more aggressive approach would impose an affirmative obligation on police departments to gather and analyze litigation data. *See, e.g.*, Hazel Glenn Beh, *Municipal Liability for Failure to Investigate Citizen Complaints Against Police*, 25 FORDHAM URB. L.J. 209, 229 (1998); *see also* *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (creating an affirmative obligation for boards of directors to create compliance mechanisms).