

Examining the Effectiveness of Consent Decrees in Relation to Police Accountability

Introduction

The widespread outcry against police brutality, triggered by the extrajudicial killing of George Floyd in 2020, has made police oppression a prominent concern in the public consciousness. In this developing landscape, a comparatively unexamined aspect of police accountability is the use of the consent decree. A police municipality charged by the federal government with violating the constitutional rights of its civilians may choose to agree to a consent decree, a legally binding document governing its future behavior, instead of going through litigation. The goal of the consent decree is to change the police culture of a municipality through close oversight by a court-appointed monitor until the period or the terms of the decree are complete. The consent decree, though controversial, is seen as a viable alternative to spending taxpayer money on what might be futile litigation. This paper seeks to answer the following question: Is the consent decree effective in increasing police accountability? My preliminary argument, based on an analysis of the Pittsburgh and Ferguson consent decrees, is that the consent decree is ineffective for police accountability due to municipalities' continued lack of transparency and failure to emphasize public participation.

Historical Context: The Rodney King Trial

Consent decrees were created by Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994¹. The Act itself was an omnibus bill (a bill which is a collection of bills with the same theme) that prioritized crime reduction, not police accountability. The bill heavily

¹ "Violent Crime Control and Law Enforcement Act of 1994," p. 294.

prioritized spending on police officers and agencies, prison systems, and other forms of punitive justice². This is important because the political inspiration of the consent decree (largely an afterthought in the context of punitive justice) and the social inspiration are significantly different. Furthermore, the police beating of Rodney King and the subsequent acquittal of the officers involved is essential to contextualize the social inspiration for the creation of the consent decree. The circumstances of the case were subject to scrutiny from the beginning, as out of the 15 police officers charged by the prosecutor, only four were chosen to be indicted by a grand jury. The case was then transferred from racially diverse Los Angeles County to Simi Valley, which resulted in a predominantly white jury that had no African American representation³. At the time, almost 92% of people who were polled believed that the officers used excessive force on Rodney King.⁴ The verdict, an acquittal, was a stark contrast to the polled public opinion, and the highest offices in the nation could no longer ignore public discontent. The response from President George Bush did not inspire a multitude of confidence among the people protesting for racial justice, considering he honored the police officers as underpaid, humble servants of the community. These statements are in direct opposition to the fact that the police officers were the orchestrators of the violence. In addition, President Bush (in a strange attempt at racial unity) decided to share an anecdote of people helping the injured, saying, "The injured [white] driver was able to get behind the wheel of his truck and tried to drive away. But his eyes were swollen shut. The [black] woman asked him if he could see. He answered, 'No.' She said, 'Well, then I will be your eyes.'"⁵ Safe to say, this story did not quell the protests.

² Ibid.

³ Linder, "An Account of the Los Angeles Police Officers' Trials (The Rodney King Beating Case)."

⁴ Ibid.

⁵ "Public Papers of the Presidents of the United States: George H. W. Bush (1992, Book I) - Address to the Nation on the Civil Disturbances in Los Angeles, California."

Consent Decree Creation Process

The process to create a consent decree is largely focused in the office of the President of the United States (POTUS). The Executive Branch (typically the Civil Rights Division of the Department of Justice) writes a report on a police municipality. While this can be directly ordered by the POTUS at any time, it is typically done after a public event has occurred, such as a nationwide protest. These reports highlight the abuses of that municipality in its policing patterns and practices. In recent times, this report has been created in conjunction with the federal government, community organizers, and police officers. It is important to articulate that this is the only part of the process that has any form of public participation. In response to the federal government report (and the subsequent legal suit), police municipalities will typically choose the path of entering a consent decree as a way to save face and forgo a reputation-damaging public trial⁶. Jiao articulates that the consent decree can be determined as a "memo of understanding" by paying the monetary requirements but not necessarily outwardly admitting guilt to the public.⁷ When entering this decree, the federal government and the police agency work behind closed doors to create an agreement that is signed by a federal judge and kept on track by a federal court monitor. Although the consent decree is typically based on a particular event, the decree could cover a depth of topics specific to that municipality. Alpert et al., describes the common themes among consent decrees (in no particular order):

- The use of force
- Search and arrest procedures

⁶ Jiao, "Federal Consent Decrees: A Review of Policies, Processes, and Outcomes."

⁷ Ibid.

- Initiation, receipt, and processing of citizen complaints
- Investigations and adjudications of complaints regarding the use of force, including disciplinary actions
- Assignment of the responsibility for investigations to internal affairs
- Nondiscrimination policy, and data on motor vehicle and pedestrian stops
- Design of a program that responds to people with mental illness
- Officer training
- Audits by the inspector general and the police commission
- Community outreach and public information⁸

There are little to no measurables concerning the success of the decree, or accountability on the part of the federal government or police agency; as long as the consent decree terms are fulfilled, then the decree is considered complete.⁹ The judge and court monitor track the progress of the tangible milestones of the decree but generally do not comment on the effectiveness or validity of what the decree contains. For example, the consent decree implemented in Pittsburgh introduced the concept of a "probationary" period, in which after the judge has determined that a satisfactory amount of measurables of the decree have been completed, there would be a two-year period to hold the parties accountable¹⁰.

Purpose of the Paper

Very few studies have investigated the effectiveness of consent decrees on police accountability in terms of individual officers and, more broadly, the police municipalities facing public scrutiny. This paper will examine the 1997 Pittsburgh consent decree in response to the

⁸ Alpert, et al., "Consent Decrees: An Approach to Police Accountability and Reform."

⁹ Ibid.

¹⁰ "Pittsburgh Consent Decree."

death of Johnny Gammage, a Black businessman who died of asphyxiation by police officers. The second decree that will be examined is the Ferguson decree of 2016, written in response to the widely known killing of Michael Brown. Additionally, the Ferguson decree was formulated with the perspective of a predominantly non-white population, as the majority of residents in Ferguson, Missouri identify as Black. The literature surrounding consent decrees can be broken into three parts: their historical usage, their constitutionality, and their municipal strain in order to determine their effectiveness. Most scholarship describes the data on consent decrees as inconclusive regarding short-term effects, citing a wide range of positives and negatives such as municipal strain, police officer satisfaction, and rates of police violence.¹¹ The debate of the Constitutionality of the decree largely follows the same vein. The legal scholarly discourse surrounding the Constitutional validity of consent decrees are centered around its unconstitutional properties.¹² The deliberation of the effectiveness of the consent decree is ongoing and heavily influenced by how its critics define success.

Literature Review: Historical Usage

Historically speaking, there are no explicit criteria for determining what constitutes enough constitutional violations to warrant a consent decree. As previously stated, the consent decree is at the behest of the Department of Justice (DOJ) and the Executive Branch as a whole. While the process is occurring within the DOJ, POTUS has a significant impact on the implementation and continuation of the decree. Any President has the unilateral authority to

¹¹ Alpert, McLean, and Wolfe, "Consent Decrees;" Jiao, "Federal Consent Decrees;" and Darrell L. Ross and Patricia A. Parke, "Policing by Consent Decree: An Analysis of 42 U.S.C. § 14141 and the New Model for Police Accountability."

¹² Ross and Parke, "Policing by Consent Decree;" Morley, "Consent of the Governed or Consent of the Government; The Problems with Consent Decrees in Government-Defendant Cases;" and David L. Douglass, "Department of Justice Consent Decrees as the Foundation for Community-Initiated Collaborative Police Reform."

cancel any ongoing report creation or deliberation, or issue the report to be written¹³. Evidence has shown that the usage of the consent decree is heavily based on party lines. The Obama Administration created 15 consent decrees by the end of his term, and Trump's Administration ended all of them.¹⁴ In both consent decrees studied, it was not merely the act of violence that led to the creation of the decree—it was the lack of accountability that followed.

Literature Review: Constitutionality

The constitutionality of the decree, while not significantly questioned in practice, is still an important part of the discourse. Prominent legal scholars have exercised an Originalist view of the Constitution (that the Constitution should be taken at its face value) and by extension determine that the consent decree is overstepping the bounds of federalism.¹⁵ In *Printz vs United States*, Justice Antonin Scalia (who is also an Originalist), suggested the consent decree could be in violation of the 10th Amendment (that any powers not given to the federal government belong to the states), and are thus unconstitutional¹⁶. However, this has been countered by the legal philosophy that the consent decree is simply an expansion of the laws already created, taking it from an individualistic litigation perspective to a municipal litigation perspective.¹⁷ By that argument, since the federal government does have the authority to prosecute individual officers, it would then have the authority to litigate over a group of individuals, such as the police municipality.

¹³ Faturechi, "The Obama Justice Department Had a Plan to Hold Police Accountable for Abuses. The Trump DOJ Has Undermined It."

¹⁴ Ibid.

¹⁵ Ross and Parke, "Policing by Consent Decree."

¹⁶ "Printz v. United States, 521 U.S. 898 (1997)."

¹⁷ Douglass, "Department of Justice Consent Decrees as the Foundation for Community-Initiated Collaborative Police Reform."

There are other legal scholars who argue the procedural resolution of the consent decree means that it cannot be properly adjudicated in a court of law, as both sides cannot at the same time agree and litigate against each other.¹⁸ Another tenant of Morley's argument is the finality of the consent decree itself. Legally speaking, the consent decree counts as the termination of the suit between the two parties, but the judge is not the deliberator of the consent decree, just the overseer of the consent decree process. Termination of the suit itself is illegal under Article III Section 2 of the Constitution (that the judges on the court are the ones to decide when a case is closed). Morley suggests that to rectify this problem, the legal parties should "do so through a settlement agreement accompanied by voluntary dismissal, rather than a consent decree."¹⁹

Literature Review: Language and Policies of the Pittsburgh and Ferguson Consent Decrees

The Pittsburgh and Ferguson consent decrees are parallel in their ideas of how police relate to their sense of community. It is important to articulate that both police agencies denied liability for the circumstances that created the consent decree. The Pittsburgh decree articulates that it "denies any and all allegations advanced by the United States,"²⁰ and the Ferguson decree articulates that it "does not agree with every finding or opinion referenced in the Report."²¹ The wording and language of these statements heavily dispute the genuineness of the advertised allegations. While this denial is for legal purposes, and it is assumed that the party being forced to pay is morally in the wrong, denying liability for an agreement reliant on mutual accountability is, at best, dishonest. The party paying for the consent decree is not the police

¹⁸ Morley, "Consent of the Governed or Consent of the Government; The Problems with Consent Decrees in Government-Defendant Cases."

¹⁹ *Ibid.*, p. 664.

²⁰ "Pittsburgh Consent Decree," p. 2.

²¹ "Ferguson Consent Decree," p. 2.

agency directly; the cost is pushed onto the public for actions that the municipality does not claim liability to. While it is not particular on how the funding is allocated, it is precedent for local municipalities to reallocate funds in order to fund the consent decree.²² The denial also goes deeper than simple legalese; police officers resisting accountability (like the colloquial blue code of silence) is also common, so this denial is more than simply legal jargon—it is the thesis for how police agencies are run.

One significant commonality between both consent decrees is their change in language over the last 30 years. The language itself changed from "denies" to "disagrees." We see the softening of language continue within the introduction. The Pittsburgh consent decree emphasizes they want to improve "practices and procedures for police management," while the Ferguson consent decree wants to implement a "better community oriented policing model." This softening of language can be attributed to changing sentiments at the time of the consent decrees' creation. Regardless of the legal or policing lexicon, the effect of the two sentiments (denying accountability) are exactly the same.

The policy comparisons of the consent decrees are intertwined with the aforementioned placation. Officer mental health is a prominent example. Studies have been done on how police officers are seeking out mental health services, provided they are guaranteed confidentiality²³. Police officer mental health has also been used as a prominent argument to justify why police violence occurs, as the implied jadedness of the job is seen as leeway for their immoral actions. While this paper recognizes that police officers' mental health is an important factor, the judgment of these services only serves to placate the general population. The emphasis on police officer mental health, including their confidentiality, has been in place since the Pittsburgh

²² Vera Institute of Justice, "Everything You Need to Know about Consent Decrees."

²³ Jetelina et al., "Prevalence of Mental Illness and Mental Health Care Use Among Police Officers."

consent decree over thirty years ago. And yet, police misconduct from racial bias to corruption is so bad in Pittsburgh that they may enter another consent decree in the near future.²⁴ The problems surrounding police accountability are tied to their accountability to the public, not to themselves (as the paper will later elaborate). When those frameworks have been established, then substantial police accountability can be achieved.

Literature Review: Municipal Strain

The municipal strain imposed by consent decrees varies heavily based on the duration, contents, and location of the decree. The publicized costs are estimated to be expensive. Taking Ferguson as an example, the range of cost could be anywhere from \$3 to \$10 million dollars a year, an immense burden for a city that is already in debt by several million dollars (City of Ferguson). According to the *New York Times (NYT)*, the decree would cost "\$3.7 million in the first year and \$3 million in subsequent years."²⁵ While most consent decrees are funded entirely by the city municipality, Eligon articulates that the Justice Department will help with some of the costs (the exact number was not mentioned). In order to develop a more intricate understanding of how the consent decree is funded, the paper issued a public records request. According to the City of Ferguson Public Records, monies allocated to the decree terms are being taken from the general city fund, which is also used to fund schools, roads, and all other public works/properties. As stated by The City of Ferguson, Missouri Comprehensive Annual Financial Report For The Year Ended June 30, 2021, the decree would cost anywhere between \$400 thousand and \$600 thousand a year.²⁶ This means, if taking the most conservative estimate, the

²⁴ Benzling, "Pittsburgh Police Could Face Second Federal Consent Decree, Peduto Says."

²⁵ John Eligon, "Ferguson Approves a Federal Plan to Overhaul Police and Courts."

²⁶ "Ferguson Municipal Balance Sheet," p. 50.

city has spent \$2 million dollars over the last 5 years not including changes in funds due to the COVID-19 pandemic (there is no information on the fiscal changes during/after the pandemic or inflation). This paper does not explore how the money allocated to the consent decree affects other forms of programs in the specific consent decree affected locations because that information is not available. The paper also does not analyze the specific cost effectiveness of specific consent decree implementations because neither the itemized list nor a cost breakdown of said list are available.

Literature Review: Empirical Evidence of Consent Decrees

One prominent article suggests that consent decrees *are* an effective tool in relation to 42 U.S.C. Section 1983 (Section 1983) filings²⁷. This law enables individual people to sue officers for violations of federal rights, the same law that was argued in defense of the Constitutionality of consent decree. This law was an amendment created in the Civil Rights Act of 1871 to protect African Americans from Ku Klux Klan members due to the lack of police prosecution.²⁸ They theorize that if consent decrees were effective, they would see less Section 1983 filings. From a sample of 23 police municipalities that had both Section 1983 filings and were under consent decrees, they found that there was a significant decrease in fillings for smaller police municipalities and a significant increase in Section 1983 filings. This indicates that the consent decree could be more effective in smaller municipalities than larger ones. The increase in filings in larger populations could be the sign of police officers' well-chronicled resistance to police reform (which could lead to more abuse by police), or it could be that the public feels they can

²⁷ Powell, Meitl, and Worrall, "Police Consent Decrees and Section 1983 Civil Rights Litigation Police Consent Decrees."

²⁸ Zachary A. Powell, Michele Bisaccia Meitl, and John L. Worrall, "Police Consent Decrees and Section 1983 Civil Rights Litigation Police Consent Decrees."

hold police officers more accountable due to the implementation of the decree. While this study is highly theoretical, it is a promising sign that consent decrees could be an effective litigation tool among smaller municipalities.

There is very little empirical data on how citizens feel about the effectiveness of these decrees. The most prominent study on this topic was conducted by the Vera Institute of Justice, where researchers surveyed an ethnographic representative sample of Pittsburgh citizens when the city's consent decree expired in 2002. Researchers chose that specific district because it was predominantly white and black in equal percentages, which made the survey more socially significant. In this survey, they asked a variety of questions surrounding changes in policing over the last five years. These included questions such as, "In dealing with citizens in a fair and courteous manner, police department has..." and "In dealing with citizens in a fair and courteous manner, are Pittsburgh police doing a..." with the answers ranging from "very good job" to "very bad job." These responses were categorized into themes of police accountability, such as "Perceptions of Police Community Relations" and "Perceptions of Change." The results showed that white people in the community saw police more favorably at higher rates than African American people in that same community.²⁹ This shows the discrepancy for the lived experiences of those communities, even with the consent decree being enacted.

Preliminary Conclusions

The preliminary conclusion is that that the consent decree is an ineffective tool in order to achieve police accountability, due to the lack of measurables and public

²⁹ Robert C. Davis, Christopher W. Ortiz, Nicole J. Henderson, Joel Miller, and Michelle K. Massie, "Turning Necessity into Virtue: Pittsburgh's Experience with a Federal Consent Decree."

insight. While the public is involved with the initial investigation writing for the decree, that is largely where their input ends.³⁰ The public, specifically community leaders and organizers, do not have the ability to actually edit the decree in question. The findings of this paper clearly show that more work is needed to establish how the public relates to the consent decrees in their own community. There has yet to come a point to determine if the public being present makes the consent decree a more or less viable legal solution to police accountability. After twenty years since the first established consent decree, the people of the United States are not reaping significant or tangible change when it comes to police-civilian relationships. This is largely due to the lack of clear accountability that officers and police municipalities have. Future studies should examine decrees with more specific and measurable goals that involve the community it serves.

There are very few suggestions from academia about how the consent decree could be changed as most focus on how inconclusive the results of the decree are. However, Douglass is one of the few exceptions. Douglass's paper has a strong analysis on reforming the consent decree to a non-governmental organization (NGO) based program. While it is not the position of this paper to advocate for community-based policing as the answer to police accountability, switching from a police-based model to a community-based model would be significant. The main criticism that Douglass brings up against the community policing-based model is the public's lack of knowledge as to what "good policing" is and that education is required in order to provide that foundation in order for reformation. While this is true to a certain extent, I largely disagree. The ideas behind petitioning the federal government is not because they do not understand what "good policing" is, rather it is because they have no means of egress. The public

³⁰ Douglass, "Department of Justice Consent Decrees as the Foundation for Community-Initiated Collaborative Police Reform."

are victims of economic and political disenfranchisement, especially in larger cities. In this way, I believe that the public is not misinformed, they are misheard. Public input is critical when it comes to the creation of the reports and their findings. There is little literature disagreeing with the public input into the creation of the decree, and much more agreement on the negative effects of the public not being involved with the decree. This would imply that more public participation is needed to bolster the effectiveness of the consent decree.

In closing, my evaluation of the validity of the consent decree is based on the ideas of accountability; since we the people have no meaningful input on the creation of the decree, any reforms made during the decree are at best temporary and at worst obsolete. Any reforms (however "progressive" they may be) are created with police officers and police municipalities in mind—without proper public oversight they will inevitably fall short. I believe that the goal of changing a police municipality is a flawed goal and the discussion of the abolition of the police as a whole would serve a much better purpose.

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