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## Federal Enforcement of Police Reform

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## FEDERAL ENFORCEMENT OF POLICE REFORM

*Stephen Rushin\**

*Congress passed 42 U.S.C. § 14141 in an effort to combat police misconduct and incentivize proactive reform in local law enforcement agencies. The statute gives the U.S. Attorney General the power to initiate structural reform litigation against local police departments engaged in a pattern or practice of unconstitutional behavior. While academics initially praised the law's passage, many have since worried that the Department of Justice (DOJ) has not effectively administered the measure. Little research has analyzed how the DOJ has used its authority to initiate structural police reform. Using a combination of qualitative and quantitative methods, I fill this gap in the available literature by detailing the DOJ's use of structural police reform over time. I conclude that the DOJ has historically underenforced § 14141, due in part to resource limitations that prevent the agency from aggressively pursuing all reported cases of systemic misconduct. I also show that the DOJ has unevenly enforced § 14141 over time. Changes in leadership and internal policies have influenced the DOJ's use of structural police reform. These changes affected both the breadth and depth of enforcement. In some cases where systemic police misconduct did appear to exist, a phenomenon I refer to as "political spillover" deterred the DOJ from turning to structural police reform. Based on these findings, I argue that the DOJ must adopt a more transparent internal case selection process that incentivizes proactive reform in local police agencies. And given the resource limitations facing the DOJ in enforcing § 14141, I contend that state and national policymakers should seek alternative routes to increase the number of structural police reform cases. Combined, these changes could ensure that structural police reform lives up to its potential as a transformative tool for combating police wrongdoing.*

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## INTRODUCTION

For much of American history, courts and legislative bodies have fought against police misconduct by using minimally invasive regulatory tools, like evidentiary exclusion,<sup>1</sup> criminal prosecution,<sup>2</sup> and civil litigation.<sup>3</sup>

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1. See generally *Mapp v. Ohio*, 367 U.S. 643 (1961) (mandating the exclusion of evidence obtained in violation of the Fourth Amendment by a state law enforcement officer).

2. 18 U.S.C. § 242 (2012) (making it a federal crime for a law enforcement officer to violate a person's constitutional rights and providing stiff penalties for violations that result in bodily injury or death); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 464–65 (2003) (describing methods to hold law enforcement officers criminally liable for constitutional violations); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 817, 844 (1999) (“[C]riminal prosecution plays some role in holding officers accountable for acts of clear illegality.”).

3. See 42 U.S.C. § 1983 (2006); *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (establishing that a § 1983 claimant could sometimes recover from a government agency based on the actions of an employee from that department); see also *City of Canton*

Around the end of the twentieth century, a growing number of legal academics agreed that these existing regulatory mechanisms were insufficient.<sup>4</sup> These measures cannot force local police departments to adopt reforms aimed at curbing misconduct. Instead, these traditional regulatory tools only incentivize reform by raising the cost of unconstitutional behavior.<sup>5</sup> By the early 1990s, a series of highly publicized incidents of police brutality showcased the inadequacy of these traditional misconduct regulations and spurred renewed calls for federal action.<sup>6</sup>

In 1994, in an effort to address the need for mandatory reform in American police departments, Congress passed 42 U.S.C. § 14141 as part of the Violent Crime Control and Law Enforcement Act of 1994<sup>7</sup> (VCCLEA). The statute makes it unlawful for a police agency to engage in a pattern or practice of unconstitutional misconduct.<sup>8</sup> The statute gives the U.S. Attorney General the authority to seek injunctive or equitable relief to force police agencies to accept reforms aimed at curbing misconduct.<sup>9</sup> The law seeks to reduce police misconduct in local police agencies in two distinct ways. First, the statute aims to forcefully transform organizational

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v. Harris, 489 U.S. 378, 385–88 (1989) (extending *Monell* and explaining that a state agent employer may be liable for the actions of an employee if the municipality's policy or practice was deliberately indifferent to the likelihood that a constitutional violation would happen).

4. Although discussed in more detail later in the Article, I will mention two noteworthy examples here. Over the years, the courts have gradually chipped away at the exclusionary rule. See Carol S. Steiker, *Counter-revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504–27 (1996) (explaining in detail the U.S. Supreme Court's gradual recognition of various exceptions to the exclusionary rule). Prosecutors have shown hesitance in prosecuting police officers. See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 9 (2009) (“As a result, prosecutions against police officers are too rare to deter misconduct.”); see also Livingston, *supra* note 2, at 844 n.138 (arguing that criminal prosecution only represents condemnation for the most egregious behavior and mentioning the high standard of proof and cumbersome procedural requirements for criminal prosecution).

5. See *infra* Part I.B (explaining how traditional mechanisms are cost raising—that is they incentivize reform by increasing the cost of noncompliance).

6. Perhaps the most prominent instance of police brutality that spurred congressional action was the beating of Rodney King. Soon after the King beating, the House Subcommittee on Civil and Constitutional Rights held hearings on police brutality—specifically on the root causes of the King incident. The individuals who testified at this hearing made various recommendations on how structural police reform may be an effective way to deter systemic misconduct. See generally *Police Brutality: Hearing Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong. (1991) [hereinafter *Police Brutality Hearing*].

7. Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071.

8. 42 U.S.C. § 14141(a) (“It shall be unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution . . .”).

9. *Id.* § 14141(b) (“Whenever the Attorney General has reasonable cause to believe [that there is a pattern or practice of misconduct] . . . the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.”).

policies and procedures to ensure compliance with constitutional norms.<sup>10</sup> Second, the law encourages the widespread adoption of national standards through the mere threat of costly litigation and restructuring.<sup>11</sup>

Academics have praised this sort of structural police reform as a vital new tool to prevent police wrongdoing. Professor Barbara Armacost called it “perhaps the most promising legal mechanism” for reducing police misconduct.<sup>12</sup> Professor William Stuntz suggested that this might be “more significant, in the long run, than *Mapp v. Ohio*, which mandated the exclusion of evidence obtained in violation of the Fourth Amendment.”<sup>13</sup> But in recent years, enthusiasm for the legislation has waned, in part because of a prevailing belief that the DOJ has not effectively used structural police reform.<sup>14</sup> This emerging view “attribute[s] the weakness of § 14141 enforcement to insufficient resources devoted to structural reform of police departments and the related absence of political commitment to § 14141 suits, especially on the part of the Bush Administration.”<sup>15</sup> Professor Joshua Chanin has observed that “the Special Litigation Section, the arm of the DOJ charged with [initiating structural police reform], changed considerably after the elections of George W. Bush and Barack Obama.”<sup>16</sup> With this “came subtle yet important changes in the way pattern or practice initiatives were developed and implemented.”<sup>17</sup>

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10. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. C.R. L.J. 479, 479 (2009) (“[T]he purpose of such suits has been to effect organizational reforms designed to establish standards of accountability that will prevent such abuses from occurring in the future.”).

11. Livingston, *supra* note 2, at 845 (“[E]nforcement of Section 14141 may have the beneficial effect of further stimulating the articulation and dissemination of national standards governing core police managerial responsibilities.”).

12. Armacost, *supra* note 2, at 457.

13. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 538–39 n.134 (2001).

14. Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 100–01 (2001) (stating that “the DOJ lacks the resources” to address problems like racial profiling as demonstrated by the “[f]ew consent decrees” that have resulted from § 14141); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1407–11 (2000) (arguing that the small number of cases pushed forward by the DOJ via § 14141 are potentially the result of resource and political constraints); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1419 (2007) (arguing “that the Department of Justice faces financial and political constraints on its effectiveness” in implementing § 14141); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 493 (2008) (“Citing the expediency and cost-effectiveness of their settlement strategy, U.S. government officials have expressly articulated a preference for avoiding litigation and negotiating with municipalities to ensure compliance with the suggested reforms.”).

15. Harmon, *supra* note 4, at 21.

16. Joshua M. Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of “Pattern or Practice” Police Misconduct Reform 335* (July 6, 2011) (unpublished Ph.D dissertation, American University), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf>.

17. *Id.*

Since § 14141 gives the attorney general sole authority to initiate structural police reform, the DOJ has become a critical gatekeeper. This raises many important questions. How has the DOJ exercised this authority as the gatekeeper of structural police reform? Has the DOJ more eagerly used structural police reform during the Clinton and Obama Administrations than it did during the Bush Administration? Have Republican attorneys general used less invasive forms of structural police reform than Democratic attorneys general? And what does this mean for the future of police misconduct regulation? Despite a significant amount of speculation on these subjects,<sup>18</sup> little empirical work has sought to answer these questions. If the DOJ has shifted enforcement policies dramatically from one presidential administration to another, this would suggest that structural police reform is an inconsistent tool for spreading constitutional policing practices in American police departments. If the DOJ rarely exercises its statutory authority to bring pattern or practice litigation—because of either political pressure or budgetary constraints—then structural police reform may not serve as a general deterrent to police misconduct. And if political pressures have made the DOJ less likely to negotiate settlements and demand external monitoring of problematic departments, structural police reform may not even serve as an effective tool to reform particularly problematic agencies.

This Article presents the findings from an empirical examination of the structural police reform process. It focuses on the DOJ's role as the gatekeeper of structural police reform. In doing so, it builds a descriptive account of how the DOJ has used its authority to initiate structural police reform under § 14141. To do this, I obtained internal records detailing the various types of internal investigatory action that the DOJ has initiated since the law was passed in 1994. This quantitative data offers insight into two important statistical trends in enforcement over the last twenty years. First, the DOJ has seemingly underenforced § 14141. The quantitative data suggests that the DOJ has initiated an average of three investigations of police departments pursuant to § 14141 per year.<sup>19</sup> And the DOJ has only pursued full-scale structural police reform against an average of less than one department per year.<sup>20</sup> Even if we assume that systemic misconduct is present in only a very small percentage of the nation's roughly 18,000 police agencies,<sup>21</sup> the DOJ has only initiated § 14141 investigations against a fraction of problematic departments. Second, the DOJ has enforced § 14141 differently over time. Between late 2004 and early 2009, the DOJ initiated few § 14141 investigations and did not pursue full-scale structural

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18. See Armacost, *supra* note 2, at 513; Gilles, *supra* note 14, at 1419; Harmon, *supra* note 4, at 21; Simmons, *supra* note 14, at 519.

19. See *infra* Part III.B (outlining the breakdown of investigations and describing the number of investigations and full-scale structural reform cases).

20. *Id.*

21. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), available at <http://www.bjs.gov/content/pub/pdf/cs1lea08.pdf> (putting the number of state and local law enforcement agencies at 17,985).

police reform against a single police agency.<sup>22</sup> The number of open § 14141 cases also declined over this time period.<sup>23</sup>

To better understand the causes of these quantitative trends in enforcement, I completed thirty semistructured interviews with knowledgeable stakeholders in the structural police reform process.<sup>24</sup> Interviewees suggested that resource limitations prevented more aggressive and comprehensive enforcement of § 14141.<sup>25</sup> Interviewees also attributed the variation in enforcement policies to changes in internal policies and enforcement preferences.<sup>26</sup> Further, interviewees suggested that where systemic police misconduct did exist, a phenomenon I refer to as “political spillover” sometimes prevented the DOJ from turning to structural police reform.<sup>27</sup> These realizations are further reminders that public rights of action are commonly subject to political cooptation and resource restraints, thereby limiting their potential effectiveness over time.

Based on these descriptive observations, I make several normative recommendations to improve the effectiveness of structural police reform as a regulatory mechanism. First, I argue that the DOJ should adopt a more transparent case selection process that incentivizes police agencies to reform proactively. The qualitative data from this study suggests that the DOJ uses a wide range of methodologies to select a local police agency for § 14141 litigation.<sup>28</sup> No doubt, the DOJ has an enormous responsibility in identifying which of the nation’s 18,000 police agencies are engaged in a pattern or practice of unconstitutional misconduct. And given the agency’s limited resources, the case selection process requires the DOJ to make tough choices. The case selection process is messy, imprecise, and generally hidden from outsiders. This makes it hard for police agencies to reform proactively. From the perspective of local municipalities, getting selected for structural police reform today is akin to winning a terrible lottery.<sup>29</sup> Thus, I suggest that the DOJ develop a more publicly transparent case selection process that provides departments with incentives and opportunities to address patterns of misconduct.

Second, given the apparent underenforcement of structural police reform in the United States, I contend that state and national policymakers should look for alternative ways to increase the number of structural police reform

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22. See *infra* Figure 3. The second term of the Bush Administration roughly matches up with this purported timeframe.

23. See *infra* Figure 4 (illustrating graphically this decline in open cases over this time period).

24. By and large, these interviewees requested anonymity given their continued role in this sensitive process. As a result, this Article will refer to the interviews by an assigned number for identification purposes.

25. See *infra* notes 289–90 and accompanying text.

26. See *infra* notes 298–305 and accompanying text.

27. See *infra* Part III.C.

28. See *infra* Part III.A.1.

29. Eric Lichtblau, *U.S. Low Profile in Big-City Police Probes Is Under Fire*, L.A. TIMES, Mar. 17, 2000, at A1 (quoting Gary Durfour, former City Manager of Steubenville, Ohio, who wondered why the DOJ chose to investigate Steubenville when other departments appeared to have more significant problems).

cases. One way to increase the number of structural police reform cases would be for Congress to reformulate § 14141 to grant private parties a limited equitable right of action to initiate structural police reform. To prevent a private structural police reform claim from interfering with an active public claim, such a provision could also give the attorney general limited statutory authority to intervene and block a private claim if the DOJ has already initiated a public investigation pursuant to § 14141. While such a reform would almost certainly increase the number of structural police reform cases and avoid issues of political spillover, it would be constitutionally tenuous and potentially lead to less rigorous reforms.<sup>30</sup> Conversely, another way to increase the number of structural reform cases would be for state legislatures to pass statutes that mirror § 14141 and give state attorneys general the authority to initiate structural police reform. Both of these normative proposals would permit the DOJ to continue the important job of structurally reforming a small number of problematic police departments, while empowering a new group of litigants to fill the gaps left by the DOJ's limited enforcement.

I have divided this Article into four Parts. Part I details the history of police regulation, highlighting the inadequacies of these earlier methods of fighting misconduct. Part II situates the emergence of § 14141 historically and summarizes the available research on the statute's enforcement and effectiveness. Part III builds a descriptive account of how the DOJ has interpreted and enforced § 14141. This Part also describes the change in the use of structural police reform over time. Based on these descriptive findings, I make several normative recommendations in Part IV.

#### I. HISTORICAL RESPONSES TO POLICE MISCONDUCT

Policymakers did not come to view police misconduct as a widespread, national problem until the Wickersham Commission Report shed light on the pervasiveness of police wrongdoing.<sup>31</sup> In the decades since, courts and

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30. Harmon, *supra* note 4, at 60–62.

31. See, e.g., RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 70 (2008) (“[T]he Wickersham Commission Report revealed that police brutality in general and the third degree in particular were practiced extensively and systematically in police departments across the country.”). For a full record of the Wickersham Commission Report sections involving local police misconduct, including the Report on Lawlessness, see Samuel Walker, *Records of the Committee on Official Lawlessness*, in RECORDS OF THE WICKERSHAM COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, at v (1997), available at [http://www.lexisnexis.com/documents/academic/upa\\_cis/1965\\_WickershamCommPt1.pdf](http://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamCommPt1.pdf). In 1929, President Herbert Hoover appointed the National Commission on Law Observance and Enforcement. George W. Wickersham, who served as the U.S. Attorney General under President William Howard Taft, chaired the commission. *Id.* Prominent legal scholars and policymakers also sat on the commissions, including Harvard Law School Dean Roscoe Pound and former U.S. Secretary of War Newton D. Baker. In total, the Wickersham Commission issued fourteen reports on a wide range of criminal justice issues. These reports were unique in part because they represented objective, technocratic approaches to understanding the problems plaguing the criminal justice system. In 1931, the Wickersham Commission published the *Report on Lawlessness in Law Enforcement*, which some policing scholars have called “one of the most important events in the history of



legislatures have taken various steps to prevent police misconduct. These actors have generally attempted to dissuade police wrongdoing by raising the potential costs of such behavior. I call these previous efforts to limit misconduct “cost-raising misconduct regulations.” These cost-raising misconduct regulations have almost certainly had some statistically significant effect on police wrongdoing, even if it is hard to accurately measure.<sup>32</sup> Nevertheless, cost-raising misconduct regulations will always be of limited use. To use the language of law and economics, a police department is generally free to engage in an efficient breach.<sup>33</sup> That is to say, a police department may determine that the costs associated with a breach—generally monetary penalties or potential evidentiary exclusion—are worth the benefits of violating the law. Much like a contract, cost-raising misconduct regulations give police the duty to follow the law or pay damages, whichever is preferable. For example, imagine a city with a major crime epidemic. That city may conclude that by encouraging officers to execute unjustified *Terry* stops,<sup>34</sup> they can substantially reduce crime in certain high-crime neighborhoods.<sup>35</sup> Such behavior would expose the city

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American policing.” *Id.* at v. While many of the Commission’s reports had little immediate effect on public policy, the *Report on Lawlessness in Law Enforcement* did motivate major changes in policing policy. The report claimed “in uncompromising language” that police at the time regularly used physical brutality and cruelty during interrogations to obtain involuntary confessions. *Id.* at ix. Through a combination of participant and observation evidence, the report made an extremely strong case for major reform in American police departments. While reform was not immediate, the Supreme Court did take a small step towards the judicial regulation of law enforcement the following year in *Powell v. Alabama*—the first case in which the Court reversed a conviction on the basis of a criminal procedure violation. *See Powell v. Alabama*, 287 U.S. 45 (1932). Walter Pollak, one of the consultants who authored the *Report on Lawlessness*, argued the case before the Court. Walker, *supra*, at ix. The justices in the *Miranda* decision cited the Wickersham Commission Report multiple times in explaining the long, documented history of police brutality and misconduct during interrogations. *Miranda v. Arizona*, 384 U.S. 436, 445 n.5, 447–48 (1966) (citing the Wickersham Commission Report as part of the evidence for abusive interrogation styles used at the time).

32. *See infra* notes 55–56, 77 and accompanying text (describing studies that show that some cost-raising misconduct regulations like the exclusionary rule and private civil litigation appear to incentivize departmental reform, thereby possibly reducing misconduct).

33. Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970) (defining and explaining the concept of efficient breach in the context of contract law).

34. *See Terry v. Ohio*, 392 U.S. 1 (1968) (holding that a police officer may engage in a limited stop-and-frisk of an individual if the officer has a reasonable suspicion that a person is engaged in criminal behavior).

35. New York is a possible example of a city that has institutionalized the practice of regular *Terry* stops as a possible way to reduce crime. A federal district judge held that the New York City Police Department was engaged in such an unconstitutional practice and has appointed a federal monitor to ensure changes in departmental policy. *See* Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 13, 2013, at A1 (detailing Judge Shira Scheindlin’s opinion finding that New York City acted unconstitutionally); J. David Goodman, *Mayor Calls Court Monitor for Police a “Terrible Idea,”* N.Y. TIMES, June 14, 2013, at A22 (quoting Mayor Michael Bloomberg’s objection to judicial intervention in the city’s use of *Terry* stops as something that may increase crime); Adam Serwer & Jaeah Lee, *Charts: Are the NYPD’s Stop-and-Frisks Violating the Constitution?*, MOTHER JONES (Apr. 29, 2013, 03:00 AM), <http://www.motherjones.com/>

to civil litigation and evidentiary exclusion. But the city may conclude that a cost is worth the potential benefit of reduced crime through deterrence.<sup>36</sup> Cost-raising misconduct regulations, therefore, may deter some but not all police wrongdoing. In this Part, I examine the various legal remedies previously available in response to misconduct. As I show, each previous regulatory method has serious limitations.

### A. Exclusionary Rule

The U.S. Supreme Court has attempted to remove the incentive for police to engage in misconduct by excluding from criminal court any evidence obtained by law enforcement in violation of the Constitution. It took several decades for the Court to develop a robust exclusionary rule that extended to various types of law enforcement wrongdoing. In the 1914 case of *Weeks v. United States*,<sup>37</sup> the Court first established a version of the exclusionary rule. There, police entered the home of Fremont Weeks and seized papers and personal belongings without a warrant.<sup>38</sup> The federal government used this illegally seized evidence to secure a conviction for transporting lottery tickets through the mail.<sup>39</sup> In a unanimous decision, the Court held that the seizure directly violated Weeks's Fourth Amendment right.<sup>40</sup> But the Court went a step further and ruled that the government could not use the illegally obtained evidence as evidence against him at trial.<sup>41</sup> Thus, *Weeks* represented the first application of the so-called exclusionary rule.<sup>42</sup> The ruling was limited, though. It only applied to the actions of federal law enforcement.<sup>43</sup> Soon thereafter, in 1920, the Supreme Court further expanded the exclusionary rule in *Silverthorne Lumber Co. v. United States*.<sup>44</sup> In that case, federal agents illegally seized tax books from Frederick Silverthorne, made copies of the records, and

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politics/2013/04/new-york-nypd-stop-frisk-lawsuit-trial-charts (illustrating the inequality of *Terry* stops in New York City).

36. See, e.g., Goodman, *supra* note 35 (quoting Mayor Bloomberg, who argues, in response to claims that these stops are unconstitutional, that *Terry* stops are an important part of crime fighting in New York City).

37. 232 U.S. 383 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

38. *Id.* at 386–87 (explaining that the police had gone to the defendant's house and entered the house unlawfully before taking "possession of various papers and articles found there").

39. *Id.* at 389–90 (describing how the prosecutor used the papers at trial to show that the defendant had in his possession lottery tickets and statements in reference to a lottery).

40. *Id.* at 398 ("[T]he letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant . . .").

41. *Id.* ("[I]n permitting . . . use [of the evidence] upon the trial, we think prejudicial error was committed.")

42. See *id.* Although the phrase "exclusionary rule" never appears in the Court's opinion, the remedy may still be accurately described as such because it requires the trial court to decline to admit the illegally obtained papers into evidence.

43. *Id.* (stating that the Fourth Amendment can "reach the Federal Government and its agencies" but making no such claims about state government officials).

44. 251 U.S. 385 (1920).

attempted to introduce those copies at trial.<sup>45</sup> The Supreme Court held that that even the copies of the illegally obtained evidence were illegally tainted.<sup>46</sup> This precedent would be cited in the future as the “fruit of the poisonous tree” doctrine—an extension of the exclusionary rule that ruled as inadmissible both the illegally obtained evidence as well as any future evidence obtained as a result of the illegal action.<sup>47</sup> Despite this initial judicial activism, it would be decades before the Court expanded the exclusionary rule to state law enforcement. Since almost all American law enforcement work at the state level,<sup>48</sup> this functionally meant that even after *Weeks* and *Silverthorne*, virtually all law enforcement could violate the rule without fear that their actions would inhibit a future criminal prosecution. The Court first had the opportunity to extend the exclusionary rule to the states in *Wolf v. Colorado*.<sup>49</sup> In that case, Colorado had obtained evidence illegally—evidence that would have been inadmissible under the federal exclusionary rule established in *Weeks*.<sup>50</sup> But the Court held that while the Fourth Amendment did apply to state law enforcement, the exclusionary rule did not.<sup>51</sup> It would not be until *Mapp v. Ohio* that the Court changed direction.<sup>52</sup> The Court in *Mapp* finally declared that “all evidence obtained . . . in violation of the Constitution is . . . inadmissible in a state court.”<sup>53</sup> Today, violations of the Fourth (unlawful search or seizure) and Fifth (failure to Mirandize a suspect) Amendments frequently lead to evidentiary exclusion in both state and federal courts.<sup>54</sup>

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45. *Id.* at 390–91 (explaining the facts of the case, including how the United States marshal obtained books, papers, and documents illegally).

46. *Id.* at 391–92 (explaining the decision to bar the admission of the evidence at trial).

47. *Id.* at 392 (observing that any holding to the contrary would “reduce[] the Fourth Amendment to a form of words”).

48. See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE* 102 (2012) (describing the decentralization of American law enforcement into around 20,000 smaller state police agencies); see also REAVES, *supra* note 21, at 2 tbl.1.

49. 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

50. The Court started the opinion by bluntly stating the question:

Does a conviction by a State court for a State offense deny the ‘due process of law’ required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States*?

*Id.* at 25–26.

51. *Id.* at 33 (“[I]n a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.”).

52. *Mapp*, 367 U.S. 643 (holding that evidentiary exclusion is proper in cases where state law enforcement illegally obtain evidence).

53. *Id.* at 655.

54. See, e.g., NAT’L INST. OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA* (1982) (finding that the use of the exclusionary rule led to prosecutors dropping complaints in 86,033 felony arrest cases).

Some studies show that judicial policymaking in the form of the exclusionary rule can instigate change in police departments.<sup>55</sup> These studies find that police departments faced with the increased cost of evidentiary exclusion are sometimes more likely to punish officers engaged in wrongdoing, reward officers that obtain evidence legally, and choose not to promote officers that put cases in jeopardy by obtaining evidence illegally.<sup>56</sup> But another strong current of research suggests that court efforts to alter police department behavior through the judicial decree have been of limited use.<sup>57</sup>

The Court has also since carved out numerous exceptions to evidentiary exclusion<sup>58</sup>—the silver platter doctrine,<sup>59</sup> the inevitable discovery doctrine,<sup>60</sup> and the good faith exception,<sup>61</sup> to name a few. The exclusionary

55. See generally William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311 (1991); Myron W. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987).

56. See, e.g., Orfield, *supra* note 55, at 1018 (finding that the exclusionary rule had at least some positive effect on Chicago police by motivating reform and discouraging violations through policy changes and social norms).

57. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 302 (1995) (demonstrating how police have learned to negotiate the impact of *Miranda*, lessening the usefulness of warnings and increasing the likelihood of obtaining a confession); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. LAW & CRIMINOLOGY 621, 621–92 (1996); see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) (rejecting the role of courts in instigating social change in various contexts). Gerald Rosenberg famously compiled evidence from numerous empirical studies demonstrating that attempts by the Court to instigate social change often fail. *Id.* at 324–31 (showing his skepticism particularly about the effectiveness of *Miranda* and the exclusionary rule). By holding in *Miranda* that officers must read suspects a set of procedural rights, Chief Justice Earl Warren had two major concerns: (1) police brutality during confessions and (2) psychological coercion that led to innocent people confessing to crimes they did not commit. *Id.* at 324. But numerous studies after *Miranda* found that individuals were confessing and pleading guilty just as often as they had before the landmark decision. *Id.* at 325–26. Further, Rosenberg argued that many departments still suffered from pervasive brutality. *Id.* at 326. Police have also mediated the impact of judicial regulations. For example, Charles Weisselberg has shown how police have found clever ways to limit the effects of *Miranda* warnings, while still avoiding evidentiary exclusion. Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1521, 1523 (2008) (illustrating in impressive detail how police training material has taught law enforcement to mediate the impact of *Miranda*).

58. See Steiker, *supra* note 4, at 2504–27 (chronicling the Supreme Court’s gradual recognition of numerous exceptions to the exclusionary rule).

59. The Court rejected the so-called silver platter doctrine in 1960. *Elkins v. United States*, 364 U.S. 206 (1960) (holding that evidence is inadmissible in a federal criminal trial if it was obtained by state officers during a search that, if conducted by federal officers, would have violated the defendant’s protection from unreasonable searches and seizures). But since then, the Court has recognized a “collateral use exception” that seemingly “reconstitutes a version of what was once known as the ‘silver platter doctrine.’” David Gray, Meagan Cooper & David McAloon, *The Supreme Court’s Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 10 (2012).

60. *Nix v. Williams*, 467 U.S. 431 (1984) (holding that law enforcement may use evidence obtained unlawfully so long as the material would have been inevitably discovered through another legal route in the process of the normal investigation).

61. *United States v. Leon*, 468 U.S. 897, 919–20 (1984) (allowing prosecutors to admit evidence obtained illegally so long as the illegality was done in good faith).

rule is also “inevitably much narrower than the scope of illegal police misconduct.”<sup>62</sup> This exclusionary rule was “designed [specifically] to deter police misconduct.”<sup>63</sup> For example, misconduct by nonpolice officers generally does not trigger evidentiary exclusion.<sup>64</sup> The exclusionary rule also only deters police misconduct that actually results in the collection of evidence. This represents a small fraction of all misconduct.<sup>65</sup> And ultimately, the exclusionary rule is merely a cost-raising regulation of misconduct. If a police officer decides that it is more advantageous to risk evidentiary exclusion, he or she may rationally decide to violate the law. The exclusionary rule also comes at a high social cost. As one commentator argued, the exclusionary rule “is an absurd rule through which manifestly dangerous criminals are let out because the courts prefer technicalities to truth.”<sup>66</sup> The Court has also suggested that the need for the exclusionary rule may be waning. In *Hudson v. Michigan*, the Court noted that significant improvements in the professionalism and training in American police departments may decrease the need for the exclusionary rule in the future—particularly given the high cost associated with excluding potentially incriminating evidence at trial.<sup>67</sup> This has led many scholars to predict that the Court could someday move to overturn the core of the evidentiary exclusion principle.<sup>68</sup>

### B. Private Civil Litigation

Private civil litigation should, in theory, incentivize police agencies to adopt accountability measures. Under 42 U.S.C. § 1983, individuals can bring federal suit against state law enforcement agents that violate their constitutional rights.<sup>69</sup> For most of the twentieth century, individuals

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62. Harmon, *supra* note 4, at 11.

63. *Leon*, 468 U.S. at 916.

64. See Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 183 (2013) (detailing the fact that the exclusionary rule only applies to public law enforcement); see also *Leon*, 468 U.S. at 916 (noting that “the exclusionary rule is designed [specifically] to deter police misconduct,” not misconduct by other actors such as judges or magistrates); *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921) (distinguishing between the constitutionality of evidence obtained unlawfully by a state actor and a private actor).

65. Harmon, *supra* note 4, at 11 (stating that “the scope of the exclusionary rule is inevitably much narrower than the scope of illegal police misconduct” and arguing that “many kinds of misconduct” fall out of the scope of the exclusionary rule).

66. Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 111 (2003).

67. *Hudson v. Michigan*, 547 U.S. 586, 599 (2006) (“[W]e now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously.”).

68. See generally Chris Blair, *Hudson v. Michigan: The Supreme Court Knocks and Announces the Demise of the Exclusionary Rule*, 42 TULSA L. REV. 751 (2007); David Alan Sklansky, *Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209 (2006); James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819 (2008).

69. 42 U.S.C. § 1983 (2006).

hoping to bring suit for police misconduct faced an uphill battle.<sup>70</sup> Section 1983 states that “[e]very person” who engages in a “deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.”<sup>71</sup> On its face, this seems to open up law enforcement officers and administrators to significant liability. But because of a “misapplication of tort doctrine to constitutional adjudication,” the courts held for most of the last century that superiors were immune from liability for the actions of their employees.<sup>72</sup> This meant that while a private person could file suit against an individual police officer in some cases, holding the police department or municipality responsible was nearly impossible. The Court reaffirmed this holding in *Monroe v. Pape*.<sup>73</sup> This default rule limited the potential for private individuals to obtain substantial financial compensation for civil rights violations, as individual officers rarely had significant resources. Finally in 1978, the Court held in *Monell v. New York City Department of Social Services* that a local municipality or department could be considered a “person” under § 1983 and thus held liable for the actions of their employees in some cases.<sup>74</sup> Courts since *Monell* have held that in order to hold a municipality or department liable for the actions of an employee, the employer must have been deliberately indifferent in its failure to train or supervise an employee.<sup>75</sup> Only in these narrow cases could plaintiffs reach the employer in civil litigation. The *Monell* decision, no doubt, had important implications for American police departments. After the case, aggrieved citizens could levy claims against *both* individual police officers and the police departments that employ them.

Various rigorous examinations of this type of individual-initiated civil litigation against departments have yielded skepticism. This method for regulating law enforcement misconduct “appears to be a weak strategy for achieving police reform, in part because of the structure of local governments and a pervasive pattern of political and administrative irresponsibility.”<sup>76</sup> After all, civil litigation is a cost-raising regulation

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70. This was largely because under *Monroe v. Pape*, 365 U.S. 167 (1961), individuals could not hold a department or municipality liable for much of the twentieth century. The Court in *Monroe* deemed superiors virtually immune from liability. *Id.*

71. The relevant portion of § 1983 reads:

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

42 U.S.C. § 1983.

72. Candace McCoy, *Enforcement Workshop: Lawsuits Against Police—What Impact Do They Really Have?*, 20 CRIM. L. BULL. 49, 51–52 (1984).

73. *Monroe*, 365 U.S. at 191–92.

74. *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 695–701 (1978).

75. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (explaining that a state agent employer may be liable for the actions of an employee under § 1983 if the employer’s policy or practice was deliberately indifferent to the likelihood that a constitutional violation would occur).

76. Walker & Macdonald, *supra* note 10, at 495.

tactic. It only works if aggrieved parties regularly litigate and departments feel the financial consequences of this litigation, thus motivating them to change behaviors and policies. At least one study has shown that civil litigation has raised the potential cost of misconduct high enough to force a response by local police agencies.<sup>77</sup> Other evidence, though, suggests that decentralization in local municipality government makes legalized accountability difficult: “[O]ne agency of the government, the police department, commits abuses of rights, another agency, the city attorney’s office, defends the conduct in court, and a third agency, the city treasurer, pays whatever financial settlement results from the litigation.”<sup>78</sup> This means that while a police department may suffer from a lawsuit in response to officer misconduct, the department itself may not feel the financial ramifications of the lawsuit. Such a finding suggests that private civil litigation does not necessarily increase the cost of misconduct, limiting the ability for this litigation to instigate widespread reform. Further, a recent study by Professor Joanna Schwartz concluded that across virtually every major city in the United States, police departments indemnify officers facing § 1983 suits.<sup>79</sup> As she concludes, 99.98 percent of all dollars paid via § 1983 litigation are paid by cities, departments, or municipalities—not individual officers.<sup>80</sup> This means that, not only do cities keep departments from feeling the negative effects of litigation, but officers themselves rarely feel the financial consequences of misconduct. In addition, individuals hoping to exercise their rights under § 1983 face high entrance barriers and legal fees. The mobilization of legal protections under § 1983 is costly, making them only feasible in cases of serious misconduct. So while it might make financial sense for a person to initiate a § 1983 suit where police misconduct leads to a wrongful death, a rational individual may choose not to use the statute in the event they are unlawfully stopped and frisked.

### C. Criminal Culpability

State and federal laws hold police officers criminally liable for certain acts of misconduct. If a police officer commits an act of misconduct that rises to the level of a criminal offense, prosecutors can charge them with a crime like any other person. A federal statute, 18 U.S.C. § 242, provides some avenue for the DOJ to seek criminal convictions against police

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77. CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 93–114 (2009) (describing the process by which police departments have come to implement reform, due in part to the threat of possible litigation). Epp shows that in November 1977, when the largest private insurance company that provided police liability insurance withdrew from the market because of unacceptable risk, the prospect of self-insurance motivated many police professionals to develop rules and regulations about police conduct. *Id.* at 95. According to Epp, this contributed to a growing culture of “legalized accountability” in American police departments. *Id.* at 4.

78. Walker & Macdonald, *supra* note 10, at 495.

79. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. (forthcoming 2014).

80. *Id.* (manuscript at 1).

officers that abuse an individual’s civil rights.<sup>81</sup> In the years leading up to the passage of § 14141, though, evidence emerged that the federal government lacked the resources to pursue § 242 prosecutions regularly. Figure 1 below shows the number of civil rights complaints received by the DOJ between 1981 and 1990 and the proportion of these complaints that resulted in investigations or criminal charges.

FIGURE 1. FEDERAL ENFORCEMENT OF 18 U.S.C. § 242 IN YEARS LEADING UP TO THE PASSAGE OF STRUCTURAL POLICE REFORM<sup>82</sup>

Year	Complaints	Investigations	Attempted Charges
1981	11,064	30.6%	0.6%
1982	10,327	31.2%	0.8%
1983	10,457	31.2%	0.6%
1984	8,617	39.6%	0.7%
1985	9,044	32.8%	0.8%
1986	7,546	37.0%	0.8%
1987	7,348	38.5%	1.0%
1988	7,603	38.0%	0.7%
1989	8,053	39.5%	0.9%
1990	7,960	38.3%	1.0%

As the numbers demonstrate, the DOJ only had the resources to investigate a fraction of civil rights claims under § 242. Moreover, the DOJ only sought criminal charges in less than 1 percent of the cases. Among those cases where the DOJ actually went to trial on § 242 violations, acquittals were not uncommon.<sup>83</sup> Indeed, in the years leading up to the passage of structural police reform, it became increasingly clear that federal

81. 18 U.S.C. § 242 (2012) (making it a federal crime for a police officer to violate a person’s constitutional rights and placing heavy criminal penalties on such behavior that leads to bodily injury); BONNIE MATHEWS & GLORIA IZUMI, U.S. COMM’N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES (1981), available at <http://catalog.hathitrust.org/Record/007105152>.

82. *Police Brutality Hearing*, supra note 6, at 10 (showing the number of civil rights prosecutions by year as compiled by the DOJ as part of a hearing on police brutality). I calculated these numbers as follows. To determine the percentage of complaints that resulted in investigations, I divided investigations by complaints received. To determine the percentage of times the DOJ attempted to file criminal charges, I added together all times the DOJ presented a case to a grand jury or filed an information. To calculate the percentage of convictions, I used the number of trial convictions and the number of guilty pleas.

83. *Id.* (showing that in some years, like 1988 and 1989, there were an equal or greater number of 18 U.S.C. § 242 acquittals than convictions).



prosecution was an ineffective means to punish officers engaged in wrongdoing. These results are consistent with other past criticisms of criminal prosecutions at the state level. As other authors have previously posited, juries frequently trust and sympathize with officers during criminal trials.<sup>84</sup> Prosecutors are hesitant to bring criminal charges against police officers.<sup>85</sup> And the scope of the criminal law is also invariably narrower than the scope of police wrongdoing. A law enforcement officer may engage in numerous acts that violate the constitution, but do not rise to the level of a violation of the criminal law. Although necessary and useful in some circumstances, criminal prosecution is an extremely limited tool for fighting police wrongdoing.<sup>86</sup>

Other mechanisms for spreading best practices in law enforcement, like accreditation, also deserve some recognition,<sup>87</sup> although accreditation's usefulness is limited by the fact that it is voluntary and intermittently used by local police agencies across the country.<sup>88</sup> Given the clear inadequacies of traditional approaches to regulating police misconduct, the next section chronicles historical attempts by litigants to initiate structural police reform via equitable remedies.

#### D. Previous Pushes for Structural Police Reform

On two separate occasions in the late twentieth century, both private and public litigants sought equitable relief in civil lawsuits against local police agencies. In both cases, courts found that the litigants lacked standing to pursue such nonmonetary relief absent a clear statutory authorization. The first of these cases happened in 1979, when the DOJ filed a lawsuit against

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84. See Armacost, *supra* note 2, at 464–65 (describing methods to hold law enforcement officers criminally liable for constitutional violations); Harmon, *supra* note 4, at 9 (noting that prosecutors generally fail to prosecute police and juries fail to convict); Livingston, *supra* note 2, at 844 (“[C]riminal prosecution plays some role in holding officers accountable for acts of clear illegality . . .”).

85. Harmon, *supra* note 4, at 9 (explaining the hesitance on the part of the prosecutors to bring charges against police officers).

86. For another example of how criminal prosecution has been a limited tool for combating police misconduct, see John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 806–11 (discussing the limitations of federal criminal prosecution as a tool to fight misconduct).

87. Some have argued that the move towards accreditation and uniformity to national standards has made departments more receptive to shifting norms in policies and procedures. See Terry Gingerich & Gregory Russell, *Accreditation and Community Policing: Are They Neutral, Hostile, or Synergistic? An Empirical Test Among Street Cops and Management Cops*, 2 JUST. POL'Y J. 3, 7 (1996).

88. *Id.* In 2010, there were 985 local police agencies accredited by the Commission on Accreditation for Law Enforcement Agencies (CALEA). COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, ANNUAL REPORT FOR 2010, at 3 (2011), available at <http://www.calea.org/content/calea-2010-annual-report>. But accreditation is still voluntary and expensive. Thus, it should come as no surprise that the 985 agencies claiming CALEA accreditation in 2010 represent only 5.6 percent of all law enforcement agencies in the country. See REAVES, *supra* note 21, at 2 (showing that there are approximately 17,985 local law enforcement agencies in the United States). The vast majority of all departments have not taken the step to receive CALEA accreditation, making it a weak method for instilling widespread adoption of best practices as currently constructed.

the Philadelphia Police Department (PPD), alleging a pattern of police abuse that systemically violated residents' constitutional rights.<sup>89</sup> According to the DOJ, the PPD maintained policies and procedures that actively thwarted the investigation and the disciplining of officers engaged in constitutional violations.<sup>90</sup> The DOJ requested an injunction to stop the PPD from engaging in this kind of misconduct going forward.<sup>91</sup> A federal district judge dismissed the claim, however, holding that the U.S. Attorney General had no standing to bring such lawsuits absent an explicit statutory grant of power from Congress.<sup>92</sup> The DOJ appealed the decision, only to have the Third Circuit uphold the lower court's dismissal.<sup>93</sup> The assistant attorney general testified to the U.S. Commission on Civil Rights that he and his colleagues knew they "were dealing with something that went beyond individual acts of misconduct. . . . [They] were dealing with institutional problems."<sup>94</sup>

The DOJ had previously prosecuted six homicide detectives in Philadelphia for coercing confessions out of possibly innocent suspects.<sup>95</sup> Nonetheless, at least one of those convicted of coercing confessions out of criminal suspects actually received a promotion and support from City leadership.<sup>96</sup> As one member of the DOJ elaborated: "if an officer on the beat perceives that he or she is going to be shielded and protected by the institution from an investigation and from prosecutions . . . then I think what we have is a situation where even prosecuting individual officers is not going to change the environment."<sup>97</sup> Complaints aside, *United States v. City of Philadelphia* established the precedent that, absent Congressional

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89. *United States v. City of Phila.*, 644 F.2d 187, 190 (3rd Cir. 1980) (explaining at the appellate level that "[t]he government's theory is that the appellees, the City of Philadelphia and numerous high-ranking officials of the City and its Police Department, have engaged in a pattern or practice of depriving persons of rights protected by the due process clause of the fourteenth amendment").

90. *Id.* (stating that the DOJ alleges that "appellees discourage victims of abuse from complaining, suppress evidence that inculpates police officers, accept implausible explanations of abusive conduct, harass complainants and witnesses, prematurely terminate investigations, compile reports that justify police officers' conduct regardless of actual circumstances, refuse to discipline police officers for known violations, and protect officers from outside investigations").

91. *Id.* at 189 (identifying injunctive relief as the desired remedy).

92. *United States v. City of Phila.*, 482 F. Supp. 1248, 1252 (E.D. Pa. 1979), *aff'd*, 644 F.2d 187.

93. *City of Phila.*, 644 F.2d at 206 ("We will hold the Attorney General to the same pleading requirements we demand of a private litigant who brings an action under the Civil Rights Acts. The appellant failed to satisfy these standards, and it deliberately rejected an opportunity to amend its complaint.").

94. MATHEWS & IZUMI, *supra* note 81, at 135.

95. *Id.* at 135–36.

96. *Id.* at 136 ("The mayor at the time, of Philadelphia, kept the officers on the force, promoted one of the men who had been convicted, and asserted they were innocent until proven guilty at the Supreme Court level." (quoting *The Federal Role in the Administration of Justice: Hearing Before the U.S. Comm'n on Civil Rights*, 96th Cong. 117–19 (statement of Drew S. Days III, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice)).

97. *Id.* at 135.

authorization, the DOJ did not have standing to initiate structural police reform via equitable relief.

This rule did not sit well with many civil rights advocates. In 1981, the U.S. Commission on Civil Rights identified *City of Philadelphia* as establishing a gap in the regulatory approach to police misconduct.<sup>98</sup> The Commission recommended the adoption of legislation to remedy the judicial limitations placed on the use of structural police reform.<sup>99</sup> The Commission observed that “the volume of complaints of police abuse received by the Commission has increased each year . . . and . . . [p]atterns of complaints appear to indicate institutional rather than individual problems.”<sup>100</sup> The Commission also recognized that one of the best possible ways to address these institutional problems was through some type of structural reform litigation that would incentivize police departments to change their behavior.<sup>101</sup> The Commission reached this conclusion in part because previous attempts to file for injunctive relief against American police departments had failed.<sup>102</sup> With that in mind, the Commission recommended the enactment of pattern or practice litigation similar to § 14141, stating that “Congress should enact legislation specifically authorizing civil actions by the Attorney General of the United States against appropriate government and police department officials to enjoin proven patterns and practices of misconduct in a given department.”<sup>103</sup> Thus, the Commission saw this proposed measure as a novel way to address systemic wrongdoing in police agencies. Nonetheless, the Commission did not offer model language, nor did it thoroughly expound on the proposal. This novel proposal did not gain traction in Congress until the following decade.

The DOJ was not the only plaintiff attempting to pursue structural police reform. Private litigants also attempted to initiate such reform via equitable relief. In 1976, Los Angeles Police Department (LAPD) officers stopped Adolph Lyons for a traffic violation.<sup>104</sup> Even though Lyons did not resist the officers, the officers nonetheless seized Lyons in a chokehold without any provocation.<sup>105</sup> Lyons brought suit against the LAPD, asking in part for the court to enjoin the LAPD from using such chokeholds in the future.<sup>106</sup> In a five-to-four decision, the U.S. Supreme Court ruled that

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98. *Id.* at 135–36 (identifying *City of Philadelphia* as the case that has limited DOJ authority to initiate structural police reform and outlining how this has potentially hampered DOJ involvement in police reform).

99. *Id.* at 134 (identifying the need for “federal litigation aimed at institutional misconduct” in cases where there is a demonstrated “pattern or practice of police abuse”).

100. *Id.* at vi.

101. *Id.* at 134–36 (detailing the potential usefulness of structural reform litigation).

102. *Id.* (explaining this failure and linking it to a need for reform).

103. *Id.* at 164–65.

104. *City of L.A. v. Lyons*, 461 U.S. 95, 97 (1983) (identifying a traffic violation as the initial cause of the interaction with the plaintiff).

105. *Id.* at 97 (saying that Lyons did not resist the officers in any way, nor pose any threat before being put in a chokehold).

106. *Id.* at 99–100 (stating that, at the district level, an order was handed down enjoining the use of the tactic).

plaintiffs do not have standing to levy a claim for injunctive relief unless they can show a real, immediate, or continuing threat.<sup>107</sup> Since Lyons was not in serious risk of being stopped and illegally choked by the LAPD in the future, he lacked such standing.<sup>108</sup> Lyons could seek individual damages against the police and the city, but he could not seek injunctive relief.<sup>109</sup>

After the *Lyons* and *City of Philadelphia* cases, there appeared to be no judicial remedy to force local police departments to adopt proactive reforms to prevent patterns of systemic misconduct. This left a significant gap in the regulatory approach to local police departments. As I detail in the next Part, by the early 1990s, several prominent examples of police misconduct—including the Rodney King incident in Los Angeles<sup>110</sup>—drew national attention to the inadequacies of the available misconduct regulations. And by 1994, the stage was set for the introduction of a new regulatory approach.

## II. THE ROAD TO STRUCTURAL POLICE REFORM

Although civil rights advocates had recognized the importance of structural police reform for decades, it was not until the early 1990s that the issue rose to national importance. This is in large part because of one single incident of appalling police brutality—the LAPD’s beating of Rodney King.<sup>111</sup> This event almost immediately spurred congressional investigation into the scope of police misconduct problems in the United States. Within weeks of the event, the House Subcommittee on Civil and Constitutional Rights convened to consider the how the federal government could do more to address brutality among the ranks of local police.<sup>112</sup>

The subcommittee members called various experts within the field of policing law, including Paul Hoffman, the legal director of the American Civil Liberties Union (ACLU) of Southern California. Hoffman and his colleagues at the ACLU used the Rodney King incident to illustrate the

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107. *Id.* at 111 (“Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles.”).

108. *Id.* at 102 (explaining that injunctive relief is only appropriate when a plaintiff is “immediately in danger of sustaining some direct injury”).

109. *Id.* at 111–13 (denying injunctive relief).

110. Harmon, *supra* note 4, at 12 n.31 (“On March 2, 1991, Los Angeles Police Department officers attempted to subdue Rodney King, an African-American man, after a high-speed chase. King initially resisted arrest, and officers fired a taser at him and struck him with batons in order to subdue him. As a videotape of the incident famously portrayed, officers continued to stomp on King, kick him, and strike him with baton blows even after he lay prone on the ground.”).

111. For a detailed account of the Rodney King events, see Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1.

112. The Rodney King beating happened on March 3, 1991. On March 20, 1991, the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary called a hearing to discuss the issue of police brutality. At this hearing, discussion of the Rodney King incident clearly dominated discussions. See *Police Brutality Hearing*, *supra* note 6.

need for Congress to authorize structural police reform.<sup>113</sup> Republican subcommittee members generally opposed such a grant of power to the federal government.<sup>114</sup> Democratic representatives, though, immediately supported the idea.<sup>115</sup> Soon thereafter, a contingent of Democratic leaders—many of whom served on the subcommittee—put forward a bill authorizing both public and private structural police reform.<sup>116</sup> Labeled the Police Accountability Act of 1991, this measure was ultimately incorporated into the Omnibus Crime Control Act of 1991.<sup>117</sup> A Republican filibuster derailed this first legislative attempt to authorize structural police reform.<sup>118</sup> Three years later, a similar measure found its way into the VCCLEA of 1994 and became law soon thereafter.<sup>119</sup>

It is important to recognize that structural police reform, as authorized in 1994, was not an innovative idea. “On three separate occasions” before the passage of § 14141, Congress considered giving the attorney general authority to seek equitable relief.<sup>120</sup> Each time Congress rejected such an expansion of federal authority into the realm of local policing.<sup>121</sup> During the same time, Congress expanded the attorney general’s authority to initiate structural reform litigation in numerous other institutional contexts, including employment, education, housing, and voter rights, among others.<sup>122</sup> In many respects, local policing was the last institutional context

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113. *Id.* at 54–118 (showing the transcripts of Hoffman’s testimony before the Subcommittee, specifically on page 61 when Hoffman states that “[i]f there is a pattern or practice of abuse, the Justice Department ought to be able to deal with it”).

114. *See id.* at 2 (reporting Republican Representative Howard Coble’s statement that he would “like for this sort of misconduct, for want of a better word, to be resolved internally”).

115. *See, e.g., id.* at 131 (reporting Democratic Representative Don Edwards’s statement that the suggestion that Congress authorize the DOJ to initiate pattern or practice litigation is a “very, very useful concrete thing[]” that they could do).

116. Police Accountability Act of 1991, H.R. 2972, 102d Cong. The measure was sponsored by Representatives William Edwards, Howard Berman, John Conyers, Julian Dixon, Mervyn Dymally, Michael Kopetski, Meldon Levine, Craig Washington, and Maxine Waters. Four of those individuals—Edwards, Conyers, Washington, and Kopetski—served on the Subcommittee that heard the initial recommendation that Congress expand structural police reform authority to the DOJ.

117. H.R. 3371, 102d Cong.; *see also Federal Response to Police Misconduct: Hearing Before the H. Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 103rd Cong. 2 (1992) [hereinafter *Federal Response to Police Misconduct*] (statement of Rep. William Edwards, Member, H. Comm. on the Judiciary) (noting that a structural police reform measure was incorporated into the Omnibus Crime Bill of 1991).

118. *Federal Response to Police Misconduct*, *supra* note 117, at 2 (reporting Representative Edwards’s statement that, after the subcommittee unanimously approved the structural police reform measure and incorporated the measure into the Omnibus Crime Bill of 1991, “there’s been a filibuster ever since on the whole crime bill”).

119. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071.

120. *Police Brutality Hearing*, *supra* note 6, at 27 (reporting Assistant Attorney General of the Civil Rights Division John R. Dunne’s statement in his Subcommittee testimony that Congress considered such a proposal in 1957, 1959, and 1964—rejecting it each time).

121. *Id.*

122. Harmon, *supra* note 4, at 11 (“In other civil rights arenas, such as education, voting, housing, and prisons, structural reform litigation has supplemented damages actions and criminal punishment as a tool for generating change in public institutions.”).

to join the structural reform litigation party. The Rodney King crisis provided liberal factions in Congress with a jarring, highly public example of misconduct in a local government. This horrifying incident of police wrongdoing legitimized congressional interest in expanding the use of structural reform litigation to yet another institutional context—local policing.

In the sections that follow, I describe the road to structural police reform. I begin by briefly recounting the role of the Rodney King incident in elevating the issue of police accountability to the national stage. I then describe the passage of structural police reform. I conclude by elaborating on how structural police reform has reimagined the traditional approach to police regulation.

#### *A. The Rodney King Incident and Renewed Interest in Structural Police Reform*

Many writers claim that the Rodney King incident ignited concerns about widespread misconduct in the LAPD and built political support for the passage of § 14141.<sup>123</sup> Thus, it seems appropriate to start the Los Angeles story by recounting the events of the Rodney King beating. The Rodney King beating would likely never have become a national story without the amateur camera work of George Holliday.<sup>124</sup> The Holliday tape showed LAPD kicking and striking King “with 56 baton strokes.”<sup>125</sup> Within days, video of the beating appeared on national news across the country, sparking public outcry and calls for the resignation of LAPD Chief Daryl Gates.<sup>126</sup> Famously, Chief Gates referred to the incident as “an aberration,” suggesting that it was not demonstrative of a broader problem with the LAPD.<sup>127</sup>

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123. *Id.* at 12–13 (discussing the role of the Rodney King beating in moving Congress to act); see also DARRELL L. ROSS, CIVIL LIABILITY IN CRIMINAL JUSTICE 183–85 (2012) (identifying the King beating as a major turning point in police regulation, precipitating § 14141); Gilles, *supra* note 14, at 1401 (stating that “[i]n 1991, however, the brutal beating of Los Angeles resident Rodney King by six LAPD officers, caught on tape and broadcast repeatedly in the days following the incident, focused national attention on the problem of police abuse and spurred Congress to action” and explaining how Congress opted to grant the Attorney General an equitable right of action).

124. *Tape of Police Beating Causes Major Furor*, SEATTLE TIMES, Mar. 6, 1991, at A2 (“The video, shot by amateur photographer George Holliday, shows no indication that King tried to hit or charge the officers.”).

125. INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 3 (1991).

126. *Id.* at 3 (“Within days, television stations across the country broadcast and rebroadcast the tape, provoking a public outcry against police abuse.”); *An ‘Aberration’ or Police Business As Usual?*, N.Y. TIMES, Mar. 10, 1994, at E7 (“More than 1,000 callers from around the country phoned Mr. Gates’s office expressing their outrage and demanding that he resign.”).

127. David Parrish, *Activists: L.A. Police ‘Street Justice’ Brutal*, SPOKESMAN-REV., Mar. 10, 1991, at A3 (quoting Chief Gates as saying that the event was an aberration, and that “[i]t’s not the kind of conduct that we have normally from our officers”).

The pursuit started around 12:30 a.m.<sup>128</sup> when California Highway Patrol (CHP) officers first observed King's Hyundai speeding in the northeastern San Fernando Valley in Los Angeles.<sup>129</sup> When the CHP officers put on their emergency lights and sirens, King slowed but did not stop.<sup>130</sup> An LAPD squad car—assigned to Officers Laurence Powell and Timothy Wind—then joined the pursuit.<sup>131</sup> At around 12:50 a.m., Powell and Ward radioed in a “Code 6,” which signifies that a chase had come to a close.<sup>132</sup> The LAPD Radio Transmission Operator then broadcast a “Code 4,” a notification to all officers that no additional assistance is needed at the scene of the pursuit.<sup>133</sup> Despite these transmissions, eleven additional LAPD units with twenty-one officers and a helicopter appeared at the scene; at least twelve of the officers arrived after the Radio Transmission Operator had sent out the Code 4 broadcast.<sup>134</sup> The Christopher Commission—an independent panel assigned to investigate the events—found that “[a] number of these officers had no convincing explanation for why they went to the scene after the Code 4 broadcast.”<sup>135</sup>

Initially after the stop, the CHP officers attempted to take the lead and arrest King.<sup>136</sup> But LAPD officers soon took over, with LAPD Sergeant Stacey Koon telling the CHP officer “that they [the LAPD] would handle it.”<sup>137</sup> Sergeant Koon initially perceived King as threatening, disoriented, and potentially under the influence of PCP.<sup>138</sup> Sergeant Koon ordered King to lay flat on the ground—a command that LAPD officers claim King refused to obey.<sup>139</sup> Officer Powell claimed that as he tried to force King to

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128. Mydans, *supra* note 111 (“Shortly before 12:30 A.M. on Sunday, March 3, Mr. King was driving fast down the Foothill Freeway near San Fernando, at the northern edge of Los Angeles.”).

129. INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 125, at 4. Notably, King was not alone in the car at the time of the incident. Two other passengers were in the car, both African-American. Details also emerged that King was traveling at approximately 110 to 115 miles per hour, according to the CHP. *Id.*

130. In addition to not stopping, King allegedly “left the freeway and continued through a stop sign at the bottom of the ramp at approximately 50 m.p.h.” *Id.* The CHP also reports that King continued to then drive at a high speed and eventually run a red light at approximately 80 miles per hour. *Id.*

131. *Id.* In addition to the squad car driven by Powell and Wind, “[a] Los Angeles Unified School District Police squad car which was in the area also joined the pursuit.” *Id.*

132. *Id.*

133. *Id.* at 5 (“[A] Code 4 notifies all units that ‘additional assistance is not needed at the scene’ and indicates that all units not at the scene ‘shall return to their assigned patrol area.’”).

134. *Id.*

135. *Id.* For example, “one of these officers told District Attorney investigators that he proceeded to the scene after the Code 4 ‘to see what was happening.’” *Id.*

136. *Id.* (“At the termination of the pursuit, CHP Officer Timothy Singer, following ‘felony stop’ procedures, used a loudspeaker to order all occupants out of King’s car.”).

137. *Id.* at 6. This happened after CHP Officer Melanie Singer attempted to perform a “felony kneeling” procedure to take King into custody. *Id.*

138. *Id.* (adding that although he “felt threatened,” he still “felt enough confidence in his officers to take care of the situation”).

139. *Id.* (“According to Koon and Powell, King responded by getting down on all fours and slapping the ground and refusing to lie down.”).

the ground, King “rose up and almost knocked him off his feet.”<sup>140</sup> Sergeant Koon then used an electric stun gun twice on King.<sup>141</sup> The George Holliday video begins around this time.<sup>142</sup> At the start of the tape, King is on the ground and appears to move in the direction of one of the officers.<sup>143</sup> The officer viewed this as a “lunge” in his direction, although the report notes that this move would also be consistent with King simply trying to “get away.”<sup>144</sup> At this point, Officer Powell hit King in the head with a baton, causing King to fall to the ground immediately. King then rose to his knees where officers struck King over and over. Sergeant Koon ordered the officers to use “power strokes,” telling officers to “hit his joints, hit his wrists, hit his elbows, hit his knees, [and] hit his ankles.”<sup>145</sup> In total, officers struck King with batons fifty-six times and kicked him six times.<sup>146</sup> Officers then “dragged [King] on his stomach to the side of the road to await arrival of a rescue ambulance.”<sup>147</sup> Although there were some allegations by local news teams that officers yelled racial epithets during the beating, these allegations were deemed inconclusive by the investigators.<sup>148</sup> In the video tape, it appears that only once “did any officer try to intervene.”<sup>149</sup> About twenty witnesses from nearby apartments gathered to watch the events from a nearby apartment complex.<sup>150</sup> Witnesses told reporters that they were yelling at the police “don’t kill him” as the officers beat King.<sup>151</sup>

King received twenty stitches and suffered a broken cheekbone and right ankle.<sup>152</sup> Amazingly, officials initially charged King with both speeding and resisting arrest.<sup>153</sup> But as the video of the incident circulated around

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140. *Id.*

141. *Id.* It is unclear from the reports whether or not the stun gun had a serious effect on King. The Christopher Commission reports that Sergeant Koon felt that King did not respond to the stun gun, while another officer’s report finds that the stun gun did have an effect as King shook and yelled for approximately five seconds. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 7.

146. *Id.* (“Finally, after 56 baton blows and six kicks, five or six officers swarmed in and placed King in both handcuffs and cordcuffs restraining his arms and legs.”).

147. *Id.*

148. *Id.* at 8.

149. Mydans, *supra* note 111.

150. *Id.*

151. *Id.* (quoting Elois Camp, a sixty-five-year-old retired school teacher who watched the events from her nearby apartment).

152. INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 125, at 8 (noting that in addition to these undeniable injuries, King alleged in his civil complaint that he “suffered ‘11 skull fractures, permanent brain damage, broken [bones and teeth], kidney damage, [and] emotional and physical trauma’”). It is also worth noting that about five hours after his arrest, King had a blood-alcohol level of 0.075 percent, which suggests that he was legally drunk at the time of the events. A blood alcohol level of 0.08 percent is sufficient to prove legal intoxication. Since blood alcohol decreases every hour without alcohol at a relatively constant rate, it can be safely assumed that King’s blood alcohol level was above 0.08 percent at the time of the chase and subsequent police misconduct. *Id.*

153. *An ‘Aberration’ or Police Business As Usual?*, *supra* note 126.



the nation, prosecutors decided to drop the charges.<sup>154</sup> After the events, details began to emerge about the background of the officers involved in the beating. A total of twenty-three officers had appeared at the scene of the beating at some point.<sup>155</sup> Four officers were directly involved in the use of illegal force against King—Sergeant Stacey Koon, and Officers Laurence Powell, Theodore Briseno, and Timothy Wind.<sup>156</sup> One of the officers involved in the beating had previously been suspended for sixty-six days in 1987 for beating a handcuffed man.<sup>157</sup> The other three officers had been subject to various complaints for excessive use of force—most of which the LAPD found to be unsubstantiated.<sup>158</sup> Another ten officers were physically present, primarily as bystanders, during the incident.<sup>159</sup> Of these ten bystander officers, four were actually field training officers that were “responsible for supervising ‘probationary’ officers in their first year after graduation from the Police Academy.”<sup>160</sup>

Observers across the country immediately condemned the behavior of the officers involved in the King beating. President George H. W. Bush called the events “shocking” and called for the Justice Department to investigate the incident.<sup>161</sup> Professor Jerome Skolnick commented that the violent confrontation was “going to be the historical event for police in our time.”<sup>162</sup> Skolnick further predicted that the behavior was indicative of a larger problem in the LAPD, explaining that “[t]wo people can go crazy, but if you have 10 or 12 people watching them and not doing anything, this tells you that this is a normal thing for them.”<sup>163</sup> Although Chief Gates

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154. *Id.* (“But those charges were dropped after the police chief, Darryl F. Gates, conceded that the tape showed unnecessary force being used and said that some of the police involved would face charges instead.”).

155. INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 125, at 11. The report further clarified that these officers varied in age from 23 to 48. Of the officers at the scene, two were African American, four were Latino, and seventeen were white. *Id.*

156. *Id.*

157. Mydans, *supra* note 111, at 3. One officer even told a reporter from the *New York Times* of the “magic pencil” that police officers used to make such misconduct allegations disappear. *Id.*

158. INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 125, at 12. The full explanation of the officers past misconduct is reproduced below:

According to press reports, another officer had been suspended for five days in 1986 for failing to report his use of force against a suspect following a vehicle pursuit and a foot chase. (The suspect’s excessive force complaint against the officer was held “not sustained” by the LAPD.) A third indicted officer was the subject of a 1986 “not sustained” complaint for excessive force against a handcuffed suspect. Since the King incident, that officer has been sued by a citizen who alleges that the officer broke his arm by hitting him with a baton in 1989.

*Id.*

159. *Id.* at 11 (“Ten other LAPD officers were actually present on the ground during some portion of the beating.”).

160. *Id.* at 11–12.

161. Mydans, *supra* note 111.

162. *Id.*

163. *Id.*

agreed that the events were “shocking,”<sup>164</sup> he insisted that that they were the result of a few bad officers, not any systemic problems within the department.<sup>165</sup> The Los Angeles District Attorney’s Office secured criminal indictments against Sergeant Koon and Officers Powell, Briseno, and Wind.<sup>166</sup> The District Attorney’s Office did not seek indictments against the seventeen officers at the scene who “did not attempt to prevent the beating or report it to their superiors.”<sup>167</sup> The prosecution resulted in an acquittal followed by days of chaos and rioting in Los Angeles and surrounding areas.<sup>168</sup> Although federal prosecutors successfully secured convictions against two of the officers involved, such an effort provided no deterrent for “the dozen officers present for the beating.”<sup>169</sup>

A little over two weeks after the shocking events in Los Angeles, the House Subcommittee on Civil and Constitutional Rights convened a hearing on police brutality in the United States.<sup>170</sup> While Representatives claimed that they did not intend the subcommittee hearing to only discuss the Rodney King incident, discussions of the incident dominated conversation.<sup>171</sup> Throughout the hearing, Representatives asked witnesses about the causes of the Rodney King beating and ways that Congress could use federal resources to prevent such events in the future. Democratic representatives quickly suggested the use of structural police reform to address systemic patterns of misconduct in local police agencies.<sup>172</sup> In his testimony before the subcommittee, the legal director of the ACLU of Southern California further reiterated the importance of such a measure.<sup>173</sup> During these initial subcommittee meetings, legislators discussed laws that would allow both the attorney general and private litigants to initiate structural police reform.<sup>174</sup> Granting this power to individual litigants was particularly controversial at the time, but the drafters of the law felt that it was “necessary to experiment with new legal theories to reform the way

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164. INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 125, at 12.

165. Parrish, *supra* note 127 (explaining that the events were a mere aberration and not indicative of a broader problem).

166. INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 125, at 13.

167. *Id.* It is worth noting, though, that “[t]he District Attorney . . . referred the matter of the bystanders to the United States Attorney for an assessment of whether federal civil rights laws were violated.” *Id.*

168. Harmon, *supra* note 4, at 12.

169. *Id.* at 13.

170. *See generally Police Brutality Hearing, supra* note 6.

171. *Id.* at 1 (“Our purpose in this subcommittee is not to focus on [the Rodney King beating] in isolation, but to examine the issues more broadly.”).

172. Democratic Representative Craig Washington appears to make the first reference to pattern or practice litigation as a possibility. *Id.* at 27.

173. *Id.* at 61 (reporting Paul Hoffman’s suggestion of the use of pattern or practice litigation).

174. The testimony of famous litigator Johnnie Cochran is indicative of the subcommittee’s contemplated granting of authority to private litigants to initiate structural police reform. In his statement to the subcommittee, Cochran explained that after *Lyons*, Congress had to do more than merely grant private litigants the authority to initiate structural police reform—it needed to make a clear statement about the basis for the private litigants’ standing. *Federal Response to Police Misconduct, supra* note 117, at 76.

police departments conducted themselves.”<sup>175</sup> Conservative lawmakers and police advocates claimed that the inclusion of such a measure would lead to frivolous and expensive litigation since “[a]ny individual who feels aggrieved by conduct that [he or she] perceives to be part of a pattern or practice can file a suit.”<sup>176</sup> The George H. W. Bush DOJ and police advocacy groups strongly opposed the inclusion of any such individual right of action, eventually contributing to the measure’s failure.<sup>177</sup>

Despite this conservative criticism, liberal members of Congress soon introduced the Police Accountability Act of 1991—which would have authorized both private and publicly initiated structural police reform. The Act was eventually incorporated into the Omnibus Crime Control Act of 1991 as Title XII.<sup>178</sup> To make the measure more appealing to Republicans, lawmakers in the Conference Committee for the Omnibus Crime Control Act removed the portion of Title XII that authorized private claims for equitable relief against police departments.<sup>179</sup> The portion of the law that granted the DOJ the authority to seek injunctive relief was less controversial, likely in part because it was roughly analogous to powers granted to the DOJ in other similar contexts: school desegregation, employment discrimination, public housing, and prison condition cases.<sup>180</sup> But even this compromise was not enough to win over conservatives, and Title XII died via filibuster.<sup>181</sup> Democratic legislators would soon revive Title XII by inserting a similar measure into the VCCLEA two years later.<sup>182</sup> The VCCLEA, which became law in 1994, was an enormous bill touching on nearly every aspect of the criminal justice system.<sup>183</sup> The national news media paid virtually no attention to the passage of structural police reform in 1994.

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175. Gilles, *supra* note 14, at 1403.

176. Terence Moran & Daniel Klaidman, *Police Brutality Poses Quandary for Justice Dept.*, LEGAL TIMES, May 4, 1992, at 24.

177. *Id.*

178. Gilles, *supra* note 14, at 1402.

179. *Id.* at 1403.

180. *Id.* at 1402–03.

181. Joan Biskupic, *Crime Measure Is a Casualty of Partisan Skirmishing*, 49 CQ WEEKLY 3528, 3530 (1991).

182. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071.

183. For an excellent summary of these components and a detailed historical account of the VCCLEA’s passage, see LORD WINDLESHAM, POLITICS, PUNISHMENT, AND POPULISM (1998). In total, the Act cost taxpayers an estimated \$30 billion. *Id.* at 122. The Act provided funding for 100,000 more community police officers. *Id.* It also provided \$9.9 billion for new prison construction. SHAHID M. SHAHIDULLAH, CRIME POLICY IN AMERICA: LAWS, INSTITUTIONS, AND PROGRAMS 17 (2008). The VCCLEA also mandated strict truth-in-sentencing requirements, implemented life sentences for repeat violent offenders, banned nineteen types of assault weapons, banned juvenile ownership of handguns, added additional penalties for hate crimes, and extended the death penalty. *Id.* Additionally, the Act allocated another “\$2.6 billion for the Federal Bureau of Investigations, the Drug Enforcement Agency, Immigration and Naturalization Services, United States Attorney Offices, and other Justice Department components.” ERICA R. MEINERS, RIGHT TO BE HOSTILE: SCHOOLS, PRISONS, AND THE MAKING OF PUBLIC ENEMIES 103 (2007).

Regardless of the lack of attention, the introduction of structural police reform was a dramatic departure from the traditional approach to regulation of local policing behavior. Structural police reform has fundamentally reimaged the role of the federal government in regulating local law enforcement wrongdoing. It introduces a new branch of government to the field of police regulation—the federal executive branch. It also transforms our understanding of police misconduct. Structural police reform implicitly assumes that systemic police misconduct is an organizational, rather than an individual officer, problem. And perhaps most importantly, structural police reform makes police accountability measures mandatory. It uses the courts to do whatever is necessary to implement radical policy and procedural changes. Although potentially underappreciated within mass media, structural police reform had the potential to transform the regulation of local police.

### B. Previous Research on Structural Police Reform

Since the passage of § 14141, very little scholarship in any discipline has empirically analyzed structural police reform. And virtually no legal scholarship has done an empirical examination of the topic. Initially, criminal justice observers were optimistic about the potential of § 14141. The late Professor William Stuntz remarked that § 14141 may be one of the most significant historical developments in the regulation of police misconduct.<sup>184</sup> Indeed, there was reason for optimism. Section 14141 seemingly filled a significant hole in the regulatory strategy for police misconduct. As Barbara Armacost explained, “reform efforts have focused too much on notorious incidents and misbehaving individuals, and too little on an overly aggressive police culture that facilitates and rewards violent conduct.”<sup>185</sup> If a department wants to engage in “[r]eal reform,” it must “accept collective responsibility, not only for heroism, but for police brutality and corruption as well.”<sup>186</sup> Indeed, occasional misconduct is an unavoidable consequence of granting police officers the discretion to successfully carry out their jobs. Consistent patterns of misconduct are more commonly rooted in organizational culture, rather than the professional or moral failings of the individual officers. Additionally, cost-raising misconduct regulations can incentivize some reform, but have historically proven ineffective at stimulating significant broad policy changes. Thus, most commentators agreed that structural police reform “create[d] an unprecedented opportunity for the federal government to encourage collaborative reform of deficient police institutions.”<sup>187</sup> Since then, three empirical studies have assessed the effectiveness of § 14141 in individual cities.

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184. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 798 (2006) (calling structural police reform “the most important legal initiative of the past twenty years in the sphere of police regulation”).

185. Armacost, *supra* note 2, at 455.

186. *Id.*

187. Simmons, *supra* note 14, at 528.

First, the Vera Institute of Justice completed an empirical evaluation of the long-term effects of the negotiated settlement, sometimes called a consent decree, in Pittsburgh, Pennsylvania, years after monitors left the city.<sup>188</sup> The Vera report found that the reforms implemented as part of the consent decree remained in effect after the monitors departed.<sup>189</sup> Second, Professors Christopher Stone, Todd Foglesong, and Christine Cole examined the success of the Los Angeles consent decree.<sup>190</sup> The results were extremely positive.<sup>191</sup> The third study comes from a doctoral

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188. ROBERT C. DAVIS, NICOLE J. HENDERSON & CHRISTOPHER W. ORTIZ, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE (2005), available at <http://www.calea.org/content/calea-2010-annual-report>. There, researchers surveyed over 100 frontline officers, conducted focus groups, interviewed key officials, reviewed monitor reports, surveyed citizenry, and analyzed police statistics. *Id.* at 5–6.

189. *See id.* at 17. The Vera evaluation states that “the officers clearly indicated—as had the command staff—that the accountability mechanisms remained intact after the lifting of the decree.” This suggests that the reforms were at least somewhat effective. Even so, the authors of the study noted some possible problems with the reform strategy used in Pittsburgh. The consent decree negotiation and implementation alienated some officers on the force—many of whom complained that morale sunk after the department agreed to the terms of the consent decree. *Id.* at 42. Other officers believed that the reforms discouraged them from proactively policing the streets for fear of being “disciplined for filling out forms improperly” or being burdened with “duplicative paperwork.” *Id.* Supervisors similarly grumbled that the procedures implemented by the consent decree reduced time spent on the street and increased time addressing procedural formalities. *Id.* Vera also noted that one of the primary effects of the consent decree was to centralize decisionmaking and disciplinary review. The report concluded that the “centralized approach to identifying and responding to officer misconduct makes good sense in the wake of allegations of civil rights violations” but may also run “counter to the decentralizing imperative of the other major police reforms of the past two decades: community policing.” *Id.* at 41–42. This means that officers in Pittsburgh after the implementation of the consent decree may have exercised less discretion and responsibility over their work.

190. *See* CHRISTOPHER STONE, TODD FOGLESONG & CHRISTINE M. COLE, POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD (2009), available at <http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf>. There, researchers undertook hundreds of hours of participant observation, analyzed administrative data on crime, arrests, traffic/pedestrian stops, use of force, and personnel. They also conducted surveys of the police officers, detainees, and residents of Los Angeles. *Id.* at i–ii.

191. Unlike the Vera study, Stone and his colleagues found no evidence for the hypothesis that the implementation of the terms of a consent decree lead to “de-policing”—or “hesitat[ion] to intervene in difficult circumstances for fear that, despite their best intentions, their actions will be criticized and they may even be disciplined.” *Id.* at 19. Like in the Vera study, officers “frequently” raised concerns about how the terms of a consent decree can hamper their abilities to exercise discretion, commonly saying that paperwork deterred them from making arrests, and arguing that compliance with the terms of the decree hurt their ability to proactively fight crime on the streets. *Id.* at 19–20. But the researchers in the Stone study rejected the claim that the terms of the consent decree uniquely burdened the LAPD’s ability to fight crime. They showed that since the start of the consent decree, motor vehicle and pedestrian stops actually increased significantly. *Id.* at 22. Once more, comparisons between similar surveys conducted in 1999 and 2003 found that the percentage of officers who reported being afraid that an honest mistake would negatively impact their careers actually decreased. *Id.* at 21. This led Stone and his colleagues to conclude that most of the concern about depolicing was likely misplaced. By all accounts, crime has decreased significantly faster in Los Angeles than other American cities since the implementation of the consent decree. Stephen Rushin, *Structural Police Reform*, 99 MINN. L. REV. (forthcoming 2015) (on file with author) (manuscript at 56–57) (showing that during the

dissertation written by Professor Joshua Chanin.<sup>192</sup> Chanin evaluated the effects of the § 14141 litigation in Washington, D.C.; Pittsburgh; Prince George’s County, Maryland; and Cincinnati, Ohio.<sup>193</sup> Chanin hoped to do a retrospective on cities that had completed the terms of the negotiated settlement.<sup>194</sup> Thus, at the time that Chanin started his study, these four cities represented two-thirds of all cities that fell into this category.<sup>195</sup> Unlike the Stone and the Vera case studies, Chanin’s dissertation provides multiple intensive analyses of individual cities, allowing him to make comparative conclusions. Chanin hypothesized that several variables affect the implementation of negotiated settlements, including the complexity of the negotiated settlement, departmental resources, and the support of police administrators as well as local political leaders for the negotiated settlement.<sup>196</sup>

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structural police reform era, violent crimes in Los Angeles fell by 65 percent and property crime rates by 36 percent—both figures far exceeding the median large American city). And the traffic and pedestrian stops today lead to arrests more often than in years past. STONE, FOGLESONG & COLE, *supra* note 190, at 24. This suggests that Los Angeles police have become even more proactive since the start of the consent decree and have actually become more effective at targeting proactive policing efforts towards actual wrongdoers. More to the point, though, the LAPD has also apparently decreased the use of force since the beginning of the consent decree as well. *Id.* at 32. This is a particularly striking finding since during the same time that use of force declined, the total number of arrests actually increased substantially. *Id.* at 35. The Stone examination of Los Angeles also addressed the concerns expressed in the Vera study about the effect of the consent decree on community relations. Overall, community satisfaction with the LAPD increased during the implementation of the consent decree, and this pattern continued after the conclusion of the federal intervention. *Id.* at 44. Like in Pittsburgh, the community’s satisfaction differed based on the race of the respondent, with the black community somewhat less enthusiastic about the performance of the police department. *Id.* But overall, there was less concern in Los Angeles than in Pittsburgh about the implications of federal intervention on community outreach efforts.

192. Chanin, *supra* note 16.

193. *Id.* at 21–22.

194. *Id.* at 22.

195. *Id.*

196. *Id.* at iii–iv (stating that “[s]everal factors help to explain variation between departments, including the complexity of joint action, agency and jurisdictional resources, active and capable police leadership, and support from local political leaders” and hypothesizing that “(1) the policy problem; (2) the policy solution; (3) the environmental context; and (4) the implementing agency” all define the implementation of structural police reform). It is also worth mentioning that, like the Vera study, Chanin worried that the “centralized approach at the heart of the pattern or practice reform template seems to have little in common with the [community-oriented policing] model.” *Id.* at 358. Chanin concluded his comparative study with numerous normative recommendations. He argued that the structural reform litigation process ought to include more external oversight and reporting mechanisms after the end of the reform process. *Id.* at 346–49. Chanin also suggested that the development and implementation of consent decrees should be more inclusive, using a bottom-up approach. *Id.* at 350. To this end, he recommended the inclusion of union representatives and key civil rights organizations in the settlement process, the use of community goals in formulating the settlement content, and the regular updating of community and civil rights stakeholders after the start of the implementation process. *Id.* at 351.

The legal academy has also made several worthwhile contributions to the literature on structural police reform.<sup>197</sup> These authors have generally offered normative recommendations on how the DOJ could improve the effectiveness of structural police reform. Professor Kami Chavis Simmons has targeted a different problem in § 14141 cases—the representation of the various community stakeholders in the negotiation and implementation of settlement agreements.<sup>198</sup> Simmons used Cincinnati in part as an example of how the DOJ's implementation process could more effectively incorporate collaboration with various stakeholders.<sup>199</sup> Other legal academics have discussed structural police reform, including Professor Debra Livingston, who analyzed the consent decrees in Steubenville, Ohio, and Pittsburgh to identify the types of misconduct that the DOJ targeted in negotiated settlements.<sup>200</sup> Samuel Walker and Morgan Macdonald have recommended the expansion of pattern or practice litigation to the state level.<sup>201</sup>

Overall, these studies provide valuable insight into the structural reform process. But they fail to answer many important research questions. None of the three studies thoroughly examine the process by which the DOJ identifies cities to target under § 14141. This is a critical piece of missing information in the scholarship. Although Professor Rachel Harmon has theorized on how the DOJ could change this selection process,<sup>202</sup> there remains a descriptive gap in the literature on the process by which the DOJ currently identifies cities engaged in a pattern or practice of police misconduct.

### III. THE ENFORCEMENT OF STRUCTURAL POLICE REFORM

The available literature on structural police reform lacks a thorough empirical study of the enforcement policies used by the DOJ. In order to fill this gap, I use a multimethod analysis that includes both quantitative and qualitative measures. I combined these methods to build an empirical understanding of how the DOJ enforced § 14141 and how this enforcement has changed over time. I start by summarizing the basic structure of the current enforcement model. I then examine how enforcement has changed over time.

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197. See, e.g., Armacost, *supra* note 2; Gilles, *supra* note 14; Harmon, *supra* note 4; Simmons, *supra* note 14; Walker & Macdonald, *supra* note 10.

198. See generally Simmons, *supra* note 14.

199. *Id.* at 531. By determining a broad range of potential stakeholders and incorporating them into the structural reform process, Simmons claims that the DOJ can restore the political legitimacy of the process, provide a check on DOJ authority, and create innovative and uniquely tailored remedies. *Id.* at 537–40.

200. See generally Livingston, *supra* note 2.

201. See generally Walker & Macdonald, *supra* note 10.

202. See Harmon, *supra* note 4. I discuss Rachel Harmon's arguments in significant detail later in this Article. See *infra* Part IV.B.

### A. A Summary of the Present Enforcement Model

This Article focuses on the three stages of review that the DOJ uses to identify police departments engaged in a pattern or practice of unconstitutional misconduct—(1) case selection, (2) preliminary inquiry, and (3) formal investigation. These steps represent only part of the structural police reform process. I will more thoroughly discuss the later stages of the structural police reform process in another forthcoming article.<sup>203</sup> In the subsections that follow, I use empirical data to describe these three preliminary stages of structural police reform.

#### 1. Case Selection

The first step in the structural police reform process is the identification of problematic police agencies. I call this the case selection process. While past literature has identified the basic steps of structural police reform, the process by which the DOJ identifies cities for scrutiny remains somewhat of a mystery—described publicly in mere generalities by the DOJ.<sup>204</sup> This has led many agencies subject to § 14141 litigation to feel unfairly targeted. As Gary Dufour, former City Manager of Steubenville, bluntly asked a reporter after the DOJ targeted his city with pattern or practice litigation, “We’re an awfully small community. You see all these problems that have come up at the police departments in Los Angeles and New York and New Orleans, and you’ve got to wonder, why us?”<sup>205</sup> Unfortunately for Mr. Dufour, the DOJ has not been transparent about the selection process for § 14141 investigations.<sup>206</sup> Professor Michael Selmi has echoed this sentiment, observing that “it doesn’t seem like [Justice Department officials] have a very strategic approach—they simply react to cases brought to them.”<sup>207</sup> Through interviews with DOJ insiders, I found that since 1994, the agency has used five major mechanisms to identify problematic departments under this statute.

First, in some cases the DOJ has used existing civil litigation or private interest group investigations as springboards for § 14141 cases. This appears to have been the motivating factor in the DOJ’s initial selections of Steubenville, Pittsburgh, and Columbus, Ohio—“persistent efforts by lawyers and civil rights advocates . . . flood[ed] the Justice Department with complaints” that provided the basis for a formal investigation.<sup>208</sup> In the case of existing litigation, DOJ intervention in the case through § 14141 can

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203. Rushin, *supra* note 191.

204. *Conduct of Law Enforcement Agencies*, U.S. DEP’T JUST., <http://www.justice.gov/crt/about/spl/police.php> (last visited April 26, 2014) (stating that the DOJ uses “information from a variety of sources” to select cases for § 14141 litigation).

205. Lichtblau, *supra* note 29.

206. *Conduct of Law Enforcement Agencies*, *supra* note 204 (providing very few details on the case selection process except to say that the DOJ considers community input while also utilizing a variety of other information sources).

207. Lichtblau, *supra* note 29 (alteration in original) (quoting Professor Michael Selmi).

208. Nicole Marshall, *Why Investigate Us? Police Ask*, TULSA WORLD, Apr. 1, 2001, at A1.



increase the likelihood of an injunctive remedy. Participants from the DOJ also emphasized how civil rights attorneys and civil liberties groups like the NAACP and ACLU have built sufficiently persuasive cases of allegedly systemic misconduct to necessitate a DOJ inquiry.<sup>209</sup> For example, as a DOJ insider explained, both the NAACP and the ACLU took part in the initial Pittsburgh allegations; these groups “were in it from the beginning.”<sup>210</sup> These organizations have sometimes collected dozens of complaints demonstrating a common or systemic problem in one jurisdiction necessitating DOJ action. Steubenville exemplified this method, according to one former DOJ litigator. Notable Ohio civil rights attorney James McNamara “used to litigate against Steubenville all the time.”<sup>211</sup> In one particularly relevant case, McNamara “filed a *Monnell* count” which included an “affidavit that went through fifty or sixty . . . misconduct incidents.”<sup>212</sup> Although the former litigator could not remember whether “he won or lost,” the litigator did remember that “he sent the file to the Justice Department. And that’s how the case got started.”<sup>213</sup> This method of case selection saves resources, as it often provides the DOJ with a thoroughly investigated group of allegations ready for further inquiry.<sup>214</sup> Internal policies have varied over the years on whether the DOJ ought to coordinate with traditionally liberal interest groups in formulating targets for inquiries and investigations.<sup>215</sup>

Second, the DOJ regularly monitors media reports of systemic misconduct.<sup>216</sup> While any single, discrete media report of misconduct is insufficient to justify a formal investigation in most cases, a pattern of similar reports or a single report of a particularly serious case of misconduct can spur preliminary inquiries. As one participant explained, “Occasionally [inquiries] get started when there is a big exposé of a big problem in a department.”<sup>217</sup>

Multiple DOJ litigators identified three examples of cases where outside media attention moved the Special Litigation Section to start a preliminary inquiry—Los Angeles, Cincinnati, and Washington, D.C. In Los Angeles,

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209. Telephone Interview with DOJ Participant #14, at 7 (July 11, 2013) [hereinafter Interview #14] (on file with *Fordham Law Review*) (explaining in detail the role that the NAACP and the ACLU served in early investigations in cities like Pittsburgh).

210. *Id.* at 7.

211. *Id.* at 4.

212. *Id.*

213. *Id.*

214. *Id.* (“That makes very good sense because it’s a huge amount of work to find these incidents and to know that you’re talking about something that is systemic enough that there is a point to it.”).

215. See *infra* Part III.B (explaining the changes in enforcement policy over time and the changing role of these interest groups in the process).

216. Telephone Interview with DOJ Participant #18, at 4 (Aug. 8, 2013) [hereinafter Interview #18] (on file with *Fordham Law Review*) (stating that the DOJ identified cases “through a mix of . . . media reviews [and] newspaper reviews”).

217. Interview #14, *supra* note 209, at 4 (explaining further that when such a major media story breaks, the DOJ will sometimes independently open an inquiry into the matter, or leadership from the affected city may come directly to the DOJ requesting assistance).

the Rampart scandal made national headlines and, in part, motivated the DOJ to take a hard look at the LAPD.<sup>218</sup> The Rampart scandal refers to allegations that surfaced in the late 1990s that officers working in the Rampart station in Los Angeles were involved in numerous illegal activities including planting of drugs, making false arrests, and covering up brutality.<sup>219</sup> This massive scandal led the courts to overturn 106 criminal cases and pressured seven officers to retire or resign.<sup>220</sup> Similarly, the *Washington Post* featured a prominent news story on a string of shootings in Washington, D.C., which motivated the DOJ to make an initial inquiry into the Washington Metropolitan Police Department (MPD).<sup>221</sup> Eventually, though, the Washington, D.C., police department came proactively to the DOJ seeking help.<sup>222</sup> Additionally, in Cincinnati, the local media did an “excellent” job making “credible and repeated” showings of systemic misconduct by the police department.<sup>223</sup> There was already an active class action suit against Cincinnati’s police department.<sup>224</sup> And when the shooting of Timothy Thomas, an unarmed teenager, by Cincinnati police made national news and “resulted in about 3 days of civil

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218. See Telephone Interview with DOJ Participant #15, at 4 (July 31, 2013) [hereinafter Interview #15] (on file with *Fordham Law Review*) (“The LAPD of course, there had been a history of problems. And then the whole controversy broke out in 2000 or 1999, with the Rampart investigation.”); Interview #14, *supra* note 209, at 4 (identifying Rampart as an example of a prominent news story that motivated the DOJ to focus on Los Angeles); see also *id.* (describing how “a big exposé of a big problem” can spur interest in a police agency for § 14141 litigation).

219. Shawn Hubler, *In Rampart, Reaping What We Sowed*, L.A. TIMES, Feb. 17, 2000, at B1 (explaining “the sickening revelations” surrounding the Rampart scandal including “the frame-ups, the dope dealing, the tales of brutality verging on murder”). Other allegations include claims that officers arranged the deportation of witnesses to police abuse. Anne-Marie O’Connor, *Activist Says Officer Sought His Deportation*, L.A. TIMES, Feb. 17, 2000, at A1. The evidence of the Rampart scandal first started to emerge when Rafael Perez, former Rampart Division Officer, was arrested for cocaine theft charges. See Kathryn M. Downing et al., Editorial, *A Scandal Hits Home*, L.A. TIMES, Apr. 11, 2000, at B8.

220. David Rosenzweig, *3 Sue LAPD over Rampart Scandal*, L.A. TIMES, Aug. 7, 2005, at B3 (“More than 100 criminal cases were overturned after former Rampart Officer Rafael Perez contended that he and other officers had routinely framed gang members for crimes they did not commit.”).

221. Interview #15, *supra* note 218, at 4 (identifying the story in the *Washington Post* as a memorable event that motivated the DOJ to take a deeper look into the District of Columbia); Telephone Interview with DOJ Participant #12, at 2 (July 30, 2013) [hereinafter Interview #12] (on file with *Fordham Law Review*) (noting that the interviewee “think[s] the *Washington Post* actually did an exposé on the shootings,” which in part motivated the focus on the Metropolitan Police Department).

222. Interview #12, *supra* note 221, at 1–2.

223. *Id.* at 3–4. The respondent explained in detail that

if the media brought attention, shed light on allegations, various allegations in a community and did those in a credible and repeated fashion, I felt that was more powerful than an individual organization or individual complainants calling up . . . [T]hat was certainly the case in Cincinnati. There was a lot of excellent reporting by the newspaper there. There was a series of shootings of unarmed African American men. A lot of civil unrest . . . happened . . . . And so, DOJ went in.

*Id.* at 4.

224. Interview #18, *supra* note 216, at 2 (“[A]t that point, there had already been an ongoing class action lawsuit on racial profiling.”).

unrest,” it was important enough to spark DOJ interest in the police department’s procedures.<sup>225</sup> Indeed, the DOJ appears to rely on media reports to initially identify problematic departments.

Third, research studies sometimes keyed the DOJ into possible instances of ongoing unconstitutional policing practices. According to one participant in the qualitative interviews, the investigation of the New Jersey State Police demonstrates this phenomenon.<sup>226</sup> The DOJ formally opened an investigation of the New Jersey State Police on April 15, 1996.<sup>227</sup> As one DOJ litigator explained, the Special Litigation Section identified the New Jersey State Police in part because of research presented in an earlier court case on racially disproportionate stop patterns associated with the jurisdiction.<sup>228</sup> Statistician John Lamberth had started studying racial profiling in traffic stops in New Jersey in 1993 after a group of attorneys asked Lamberth to investigate a suspicious and racially disparate pattern of arrests.<sup>229</sup>

Over the following years, Lamberth systematically evaluated whether the New Jersey State Police appeared to be targeting drivers of color on state highways.<sup>230</sup> He began by sampling the racial distribution of drivers on the road.<sup>231</sup> After twenty-one days of intensive observation, Lamberth concluded that roughly 13.5 percent of automobiles on the studied portions of New Jersey highway contained at least one black occupant.<sup>232</sup> He also concluded that these cars with black occupants made up around 15 percent of all traffic law violators.<sup>233</sup> Yet, about 35 percent of the cars pulled over by police during this same time period contained a black occupant.<sup>234</sup> These “findings were central to a March 1996 ruling by Judge Robert E. Francis of the Superior Court of New Jersey that the state police were de

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225. *Id.* (“[W]hen the Timothy Thomas shooting and the subsequent disturbances, some people called them riots, happened; then at that point, also the Justice Department began its § 14141 investigation.”); *see also* POLICE EXEC. RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 3 (2013), *available at* <http://samuelwalker.net/wp-content/uploads/2013/07/PERFConsent-Decree.pdf> (stating that “[i]n Cincinnati, riots were sparked in 2001 by the police killing of Timothy Thomas, a 19-year-old African American with 14 open warrants for minor, mostly traffic-related violations,” and identifying this as a major cause of the eventual DOJ investigation of the Cincinnati Police Department).

226. Interview #12, *supra* note 221, at 1–2 (giving an overview of how the DOJ became interested in the New Jersey State Police and explaining that “[t]here were maybe tens of years of problems reported by minority drivers on the Turnpike in New Jersey and lots of civil litigation and lots of allegations of abuse and DOJ used the pattern or practice authority to bring the first racial profiling case under that statute”).

227. *See infra* Appendix A (listing the starting and ending dates for each investigation initiated by the DOJ).

228. Interview #12, *supra* note 221, at 1–2 (explaining the importance of the academic studies in making the DOJ litigators feel more confident in initiating action in New Jersey).

229. John Lamberth, *Driving While Black: A Statistician Proves That Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C1.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

facto targeting blacks, in violation of their rights under the U.S. and New Jersey constitutions.”<sup>235</sup> The only remedy that the state judge in that particular case could provide, however, was the exclusion of evidence obtained pursuant to these unlawful stops.<sup>236</sup> The judge was not equipped to provide a more expansive, injunctive remedy. According to participants, these research findings motivated the DOJ to take action. Lamberth’s evidence was particularly jarring to some at the DOJ.<sup>237</sup> It also provided an ideal source of evidence to justify a formal investigation. Within a month of the state court judge’s ruling, the DOJ had opened an official investigation into the use of race in traffic stops by the New Jersey State Police.<sup>238</sup>

Fourth, whistleblowers within police departments sometimes provided the DOJ with sufficient evidence to bring about a lawsuit.<sup>239</sup> This often happened when officers “themselves . . . would contact the division and talk about problems they had witnessed or problems they, themselves, had experienced when they were not in uniform.”<sup>240</sup> Interview participants could not always give specific examples of this phenomenon because, as one explained, “We protect the identity of whistleblowers, so we aren’t able to talk more about it. But needless to say, in a handful of cases, we relied heavily on files and information given to us by officers inside a department.”<sup>241</sup> In other cases, though, a high-level administrator within a police department openly reached out to the DOJ to request a formal § 14141 investigation. This happened, most notably, in Washington, D.C. There,

Charles Ramsey, newly sworn in as chief in Washington’s Metropolitan Police Department after a 30-year career in the Chicago Police Department, asked the DOJ to intervene after a series of articles in the *Washington Post* alleged that MPD officers shot and killed more people per capita in the 1990s than any other large U.S. city police force.<sup>242</sup>

Various participants confirmed this story during interviews.<sup>243</sup> Although it is rare to see a police chief so openly request that the DOJ intervene in local

235. *Id.*

236. *Id.*

237. Interview #12, *supra* note 221, at 1–2.

238. The judge in private litigation found there to be a pattern of unconstitutional stops in March 1996. Lamberth, *supra* note 229. The next month, in April 1996, the DOJ began a formal investigation. *See infra* Appendix A (listing all dates of investigations).

239. Interview #12, *supra* note 221, at 2 (“[S]ometimes there were internal whistleblowers.”).

240. *Id.*

241. *Id.* at 4.

242. POLICE EXEC. RESEARCH FORUM, *supra* note 225, at 2 (discussing also how this proactive response in Washington, D.C., eventually led to a the signing of a memorandum of agreement).

243. *See, e.g.*, Interview #12, *supra* note 221, at 1–2 (stating that Chief Ramsey “very shrewdly asked DOJ to come in and do an investigation”); Interview #14, *supra* note 209, at 4 (“Or they might get started when there’s a big exposé and the department itself or, more likely, the mayor responds to that exposé by inviting the Justice Department to come in. That’s what happened in D.C.”); Interview #15, *supra* note 218, at 4 (“I think this was

affairs, at least one participant remarked that this type of request happens with some frequency.<sup>244</sup> In many of these cases, the DOJ cannot find a sufficiently serious problem as to warrant intervention and instead recommends that the police agency seek alternative assistance through other federal programs or through private accreditation agencies.<sup>245</sup>

Fifth, in a small number of cases, the DOJ relied on particularly egregious individual incidents of misconduct to find possible targets. Of course, § 14141 only provides the attorney general a right of action where there is a pattern or practice of misconduct. This means that a single complaint is typically insufficient to further inquiry.<sup>246</sup> But a single complaint or heinous example of misconduct can influence the DOJ to give a police department a harder look via a preliminary inquiry.<sup>247</sup> In some cases, the Criminal Division of the DOJ sent complaints of officer involved shootings directly to the Special Litigation Section for additional investigation to determine whether they were part of a pattern or practice of misconduct.<sup>248</sup> In total, the methods by which the DOJ identifies target police departments vary widely. Similarly, while it normally took several examples of systemic misconduct to start an investigation into a police department, sometimes a single major event can catch the attention of DOJ officials.

## 2. Preliminary Inquiry

The second step of the structural police reform process is the preliminary inquiry. If a police agency comes to the attention of the DOJ through one of the manners listed above, the agency will open a preliminary inquiry into that department's conduct.<sup>249</sup> This usually happens when a litigator decides

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publicized in the *Washington Post*, there was a settlement with the D.C. police force and that resulted because D.C. actually came to the division and said, we have lots of problems. We want your help. Please investigate us.”)

244. Telephone Interview with DOJ Participant #5, at 2–3 (Sept. 4, 2013) [hereinafter Interview #5] (on file with *Fordham Law Review*) (explaining that police departments come to the DOJ requesting assistance more often than many outsider observers may believe).

245. *Id.* (citing Community Oriented Policing Services (COPS) and CALEA as possible examples of alternative programs that the DOJ may refer a local police agency to in lieu of beginning a formal investigation).

246. Interview #14, *supra* note 209, at 4 (explaining that the evidence must show that misconduct within a department is systemic enough to justify intervention).

247. Interview #18, *supra* note 216, at 2 (citing the Timothy Thomas shooting as an example of a particularly egregious incident of misconduct that motivated DOJ action).

248. *Id.* at 4–5. This DOJ insider explained the process:

The criminal section certainly has lots of situations where they've had complaints about officer-involved shootings where they may have done a set of investigations in a particular jurisdiction and said, gee, the policies look pretty bad here. You might want to look at that. They got—they met with and got—feedback from civil rights and community groups.

*Id.* at 4.

249. *Oversight of the Department of Justice—Civil Rights Division: Hearing Before the Comm. on the Judiciary*, 107th Cong. 18–20 (2002) [hereinafter *Oversight of the DOJ*] (testimony of Ralph Boyd, Jr., Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice).

to spend more than two hours researching claims of misconduct in a particular city.<sup>250</sup> During this initial inquiry, the DOJ only relies on private complaints, news reports of misconduct, and publicly available data.<sup>251</sup> The DOJ also occasionally conducts interviews with citizens from the community.<sup>252</sup> During this initial phase, litigators at the DOJ, both past and present, are careful to describe their actions as inquiries, as opposed to investigations. This distinction matters, they say, because of the serious implications of a formal investigation. Participants consistently explained that by identifying a department as “under investigation,” the DOJ would expose that department to immediate criticism in the media.<sup>253</sup> Moreover, such a decision also triggers a long and expensive investigation.<sup>254</sup> Thus, the DOJ prefers to only advance a case to the investigatory realm if the litigator finds reason to believe the agency is involved in systemic misconduct, and the leadership at the Department believes that such an investigation would be a worthwhile use of limited resources.<sup>255</sup> To illustrate the commonality of initial inquiries, the DOJ provided information on the number of preliminary inquiries registered into the DOJ database since 2000. I recreate that information below in figure 2, demonstrating the progression of cases from preliminary inquiry through investigation, settlement, and monitoring.

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250. Interview #5, *supra* note 244, at 2 (explaining the preliminary inquiry process and the assignment of a DOJ number for any activity that takes up at least two hours of time).

251. *Oversight of the DOJ*, *supra* note 249, at 18–19 (explaining how during this phase, the DOJ typically relies on public information like witness interviews, pleadings and testimony in court).

252. *Id.* (stating that the DOJ will conduct interviews in some cases).

253. Interview #14, *supra* note 209, at 4 (“Opening an investigation is a huge deal. It’s a very big moment. You wouldn’t want to do that if there turns out not to be enough there to investigate. It would be very detrimental to the police department. Before you open any investigation all through the Department, it doesn’t matter what the issue is, you have to figure out if there is a reason to open an investigation.”).

254. Jodi Nirode, Doug Caruso & Bob Ruth, *City, DOJ Draft Pact; The Police Union Will Be Asked To OK Contract Changes To Avoid Suit Over*, COLUMBUS DISPATCH, Aug. 17, 1999, at A1 (stating that in a request for the 2000 budget, the DOJ requested \$100 million per year to fund sixteen new investigators annually, putting the estimated cost at around \$6 million to \$7 million per investigator hired).

255. Interview #14, *supra* note 209, at 5 (calling this preliminary investigation a “sussing out exercise” used when the DOJ has a suspicion but otherwise has “nothing”).

FIGURE 2. TOTAL NUMBER OF INQUIRIES, INVESTIGATIONS, AND MONITOR APPOINTMENTS FROM JANUARY 1, 2000, TO SEPTEMBER 1, 2013<sup>256</sup>

Stage	Cases
<b>Preliminary Inquiry</b>	325 cases
<b>Formal Investigation</b>	38 cases
<b>Negotiated Settlement</b>	19 cases
<b>Monitor Appointed</b>	9 cases

As figure 2 shows, with 325 total cases between 2000 and 2013, the DOJ has initiated an average of around twenty-five or twenty-six preliminary inquiries per year since 2000.<sup>257</sup> The vast majority of these preliminary looks fail to become a formal investigation. In fact, only 11.6 percent of preliminary inquiries resulted in a formal investigation. Only 5.8 percent ended up leading to a negotiated settlement. And in only 2.8 percent of all cases did a preliminary inquiry eventually result in a monitored settlement.

### 3. Formal Investigation

If this initial inquiry uncovers the possibility of persistent misconduct in a police department, the DOJ may conduct a formal investigation. These are particularly costly endeavors. In 2000, the DOJ requested \$100 million in additional funding to expand the number of police department investigations under § 14141.<sup>258</sup> This increase in funding was supposed to hire an additional sixteen new investigators each year—suggesting that investigations are a costly endeavor.<sup>259</sup> The average investigation “can take years as investigators wade through piles of internal records and personnel files.”<sup>260</sup> Other previous reports suggested that investigations took “as long as a year.”<sup>261</sup> Such a slow pace can frustrate police agencies that complain that federal investigation contributes to a cloud of suspicion over the entire department.<sup>262</sup> Full investigations are “comprehensive and far-

256. I acquired this data from an interview participant with access to DOJ records. The number of preliminary inquiries is approximate, since the Special Litigation Section does not always keep complete records of these inquiries. The participant explained that the number could be anywhere between 300 and 350. Hence, I use 325 as the best approximate estimate. Interview #5, *supra* note 244.

257. I calculated this by dividing the total number of preliminary inquiries (325) by the number of years in the sample (12.67) to arrive at an average of 25.66 preliminary inquiries per year since 2000.

258. Nirode, Caruso & Ruth, *supra* note 254.

259. *Id.*

260. Jamie Stockwell, *Rights Investigation of Police Continues*, WASH. POST, Dec. 22, 2002, at C6.

261. David Hench, *City Police To Get Federal Review*, PORTLAND PRESS HERALD, May 8, 2002, at 1A.

262. Stockwell, *supra* note 260.

reaching.”<sup>263</sup> In carrying out an investigation, the DOJ takes “inventory of departmental policies and procedures related to training, discipline, routine police activities, and uses of force and conduct[s] in-depth interviews to determine whether the department’s practices adhere to formal policies.”<sup>264</sup> Litigators from the DOJ do not do these investigations by themselves; instead, they outsource much of the work to police experts and professionals.<sup>265</sup> These police experts “go out and do ride alongs with the police department, to review the police policy manuals, [and] to observe police training.”<sup>266</sup> These experts also evaluate current agency procedure for investigation and commonly “look into and review investigations, both citizen complaints and use of force investigations.”<sup>267</sup> Investigations are primarily comparative—that is the DOJ seeks to compare the policies in the investigated department with “constitutional minimums.”<sup>268</sup> In theory, if an investigation reveals a pattern or practice of misconduct, and the agency refuses to cooperate, the case could go to trial.<sup>269</sup> In the vast majority of cases, departments are eager to cooperate with the investigation to avoid the expense and embarrassment of public litigation.<sup>270</sup>

A Washington, D.C., case provides a useful example of a typical investigation. When the DOJ formally investigated the Washington, D.C., MPD for allegations of excessive use of force, DOJ investigators obtained a “stratified random sample of the use of force incidents.”<sup>271</sup> They determined that in approximately 15 percent of these cases, the officer used

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263. Harmon, *supra* note 4, at 15 (quoting INT’L ASS’N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 38 (2006), available at <http://www.cops.usdoj.gov/files/ric/Publications/e06064100.pdf>).

264. *Id.*; see also INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 263, at 8.

265. Interview #18, *supra* note 216, at 7 (“[T]he Civil Rights Division and the Special Litigation Section brings on police experts to assist them in the actual investigation.”). This participant further elaborated on how the DOJ selects individuals for this role:

Some individuals are—many of them are—prior chiefs or prior deputy chiefs or involved in maybe heads of internal affairs divisions, some may be academics but I don’t think so. I think they’re mostly practitioners. There’s also been some kind of going back and forth between monitors and the folks who do the investigation.

*Id.* at 8.

266. *Id.* at 7.

267. *Id.*

268. *Id.* This participant’s full explanation is worth reproduction here to give a fuller explanation of the investigatory process:

And then to look into and review investigations, both citizen complaints and use of force investigations. That’s one of the ways that they compare the police departments or it could be a sheriff or a law enforcement jurisdiction entity. They compare the practices of the investigating—the entity being investigated—with general police practices, model practices and what the expectation[s] are in the field. And review the practices for comparison to constitutional minimums. And as part of the investigation, they examine the systems, the policies, the practices, and the policy systems, compare it to what should be the norm.

*Id.*

269. Harmon, *supra* note 4, at 15.

270. See *infra* Appendix B (listing the disposition of each negotiated settlement).

271. WILLIAM R. YEOMANS, DEPARTMENT OF JUSTICE INVESTIGATION OF USE OF FORCE BY THE WASHINGTON METROPOLITAN POLICE DEPARTMENT 2 (2001), available at <http://www.clearinghouse.net/chDocs/public/PN-DC-0001-0002.pdf>.



excessive force.<sup>272</sup> According to DOJ estimates, a “well-managed and supervised police department[]” should only expect about 1 or 2 percent of all incidents to involve excessive use of force.<sup>273</sup> The survey also found that in 22 percent of the force claims involving firearms, police used deadly force based on the suspicion that the suspect possessed a firearm.<sup>274</sup> And “[i]n each case . . . post-incident searches failed to reveal any weapon.”<sup>275</sup> Based on these findings, the DOJ provided the MPD with a set of technical assistance recommendations.<sup>276</sup> In some cases—particularly those involving a small number of problems—this investigation and technical assistance letter ends the DOJ inquiry.<sup>277</sup> If the formal investigation uncovers a more expansive pattern of misconduct, though, the DOJ could theoretically file a lawsuit under § 14141. But in practice, no § 14141 case has ever gone to trial.

This three-step process of internal, investigatory action by the DOJ sets the stage for structural police reform. It determines which departments are subject to long, costly litigation, and it determines which departments get a pass on federal oversight. The DOJ is the gatekeeper to the structural police reform process. While it remains possible that private litigants can initiate structural police reform in a few narrow circumstances after *Lyons*, the DOJ holds the key to virtually all structural police reform cases. In many respects, the current enforcement model makes sense. It attempts to use limited resources to identify and investigate a small number of police departments out of a pool of thousands of possible targets. But in doing so, it uses an imprecise and messy process. And, as I show in the next section, the agency’s enforcement model has also changed over time.

### B. Changes in Enforcement Policy over Time

In the past, several writers have claimed that both internal and external pressures may affect how aggressively the DOJ pursues cases under § 14141. Professor Chanin has previously written that the DOJ’s enforcement strategy seemed to “change[] considerably after the elections of George W. Bush and Barack Obama.”<sup>278</sup> This seems to roughly align

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272. *Id.*

273. *Id.*

274. *Id.* (“22 percent of the sampled incidents involved officers firing their weapons at moving vehicles.”).

275. *Id.*

276. *Id.* at 7 (citing the need for a formal settlement outlining the terms of reform and saying that “[t]he Memorandum of Agreement provides for the development and implementation of updated use of force policies and procedures addressing the issues raised by our investigation as summarized above”).

277. Harmon, *supra* note 4, at 16 (writing that in some cases, the DOJ has “issued a technical assistance letter recommending reform, or taken no action”).

278. Chanin, *supra* note 16, at 334–35. Heather Mac Donald, arguing from the conservative standpoint, echoes the view that President Bush’s DOJ restricted the number of investigations: “During the Bush Administration, political appointees to the civil rights division reined in the staff’s eagerness to investigate police departments for racial profiling, since the profiling studies routinely served up by the ACLU and other activist organizations

with statements made by then candidate George W. Bush as he was campaigning for his first presidential term, when he stated that he did “not believe that the federal government should instruct state and local authorities on how police department operations should be conducted, becoming a separate internal affairs division.”<sup>279</sup> This stands in stark contrast to the Obama Administration, which has pledged to take on a more aggressive enforcement posture. Under President Obama, Assistant Attorney General Thomas Perez “told a conference of police chiefs in June 2010 that the Justice Department would be pursuing ‘pattern or practice’ takeovers of police departments much more aggressively than the Bush Administration, eschewing negotiation in favor of hardball tactics seeking immediate federal control.”<sup>280</sup> In many respects, there seems to be something to the notion that the politics affects the § 14141 enforcement strategy. During the Clinton Administration, the DOJ sought millions of dollars in additional funds to support § 14141 investigations.<sup>281</sup> And during the Obama Administration, the DOJ has added nine additional attorneys to facilitate § 14141 enforcement.<sup>282</sup>

But despite many researchers levying theories about changes in enforcement, no study has empirically assessed the validity of these claims. Has § 14141 enforcement changed under different political leadership?<sup>283</sup> To examine the change in enforcement over time, I utilize a combination of quantitative and qualitative measures. Quantitatively, I acquired from the DOJ a complete listing of all formal investigations and settlements pursuant to § 14141 since the law’s passage in 1994. To my knowledge, this is the first time that any researcher has gained access to a complete list of all internal investigatory action on structural police reform cases by the DOJ. This data, viewable in Appendices A and B, includes the dates that the DOJ opened each investigation, agreed to a settlement, and closed each case. Based on this data, I show that the DOJ’s enforcement of § 14141 is both limited and inconsistent. Qualitatively, I conducted semistructured interviews with thirty participants involved in the § 14141 reform process—including attorneys who currently or previously worked at the DOJ and have intimate knowledge about the internal workings of the Special Litigation Section. Other interviewees include independent monitors, DOJ investigators, city officials involved in the negotiation of § 14141

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were based on laughably bogus methodology.” Heather Mac Donald, *Targeting the Police*, WKLY. STANDARD, Jan. 31, 2011, at 26.

279. See Eric Lichtblau, *Bush Sees U.S. As Meddling in Local Police Affairs*, L.A. TIMES, June 1, 2000, at A5.

280. Mac Donald, *supra* note 278.

281. Nirode, Caruso & Ruth, *supra* note 254.

282. Mac Donald, *supra* note 278.

283. The studies that have alluded to this question have cursorily addressed it by piecing together an answer by relying on interviews, media reports, and news releases. See, e.g., Gilles, *supra* note 14, at 1404–10 (turning to publicly available information to piece together data on the DOJ’s enforcement policies); Simmons, *supra* note 14, at 516–17 (describing the lack of aggressive DOJ enforcement through reliance on media reports and publicly available information); Chanin, *supra* note 16, at 24 (describing the use of monitor reports, publicly available data, news reports, and interviews to acquire data).

settlements, police administrators, and other relevant stakeholders in the § 14141 litigation process. These interviewees, by and large, requested anonymity, given their continued role in this sensitive process. These interviewees confirm that the DOJ lacks the necessary resources to respond to every case of apparent systemic misconduct within a police department. These interviewees also attribute the inconsistency in the enforcement of § 14141 to change in internal policies.

First, the data clearly shows that the DOJ has not aggressively pursued structural police reform against a large number of police agencies. In total, the DOJ has initiated around fifty-five investigations since the passage of § 14141. This means that the DOJ has only formally investigated around three departments per year.<sup>284</sup> The relatively small number of investigations appears to be a product of the high cost of each investigation. Remember, investigations are costly<sup>285</sup> and can last for several years.<sup>286</sup> As a result, the DOJ can only target a small number of cities each year. Given that there are around 17,985 state and local police agencies in the United States,<sup>287</sup> this means the DOJ can only investigate less than 0.02 percent of all departments in the country each year. If patterns or practices of misconduct exist in only one out of every 100 law enforcement departments,<sup>288</sup> then the DOJ only has the resources to investigate less than 2 percent of these departments each year. It is fair to assume that, even during the times when the DOJ has aggressively pursued pattern or practice claims, enforcement has still been less than optimal. As one litigator with the DOJ explained during an interview, “there’s no way that the [DOJ] can litigate all of the patterns and practices of police misconduct in this country. There are too many policing jurisdictions for them to do that.”<sup>289</sup> In fact, a single, complex § 14141 case alone can nearly exhaust all of the manpower and resources of the Special Litigation Section for an entire year.<sup>290</sup> It is likely that the resources given to the DOJ to investigate § 14141 abuse may never be sufficient to target every city apparently engaged in misconduct.

This is a particularly troubling realization, since only through increasing the frequency of investigations can § 14141 efficiently incentivize

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284. I calculated this by taking the number of investigations reported by the DOJ in Appendix A and dividing it by the time period covered—approximately eighteen years. This results in an average of approximately three investigations per year.

285. Nirode, Caruso & Ruth, *supra* note 254.

286. Stockwell, *supra* note 260.

287. REAVES, *supra* note 21, at 2 tbl.1.

288. Unfortunately, there is no good way estimate the number of police departments that may be engaged in a pattern or practice of misconduct. There is no uniform statistic to measure misconduct—which is part of the reason why the DOJ has developed such a unique and multifaceted case selection method for § 14141 cases. *See supra* Part III.A.i.

289. Interview #14, *supra* note 209, at 11. The participant referenced the hard work required in litigating the ongoing case in Maricopa County and further elaborated that even though the Special Litigation Section now has more lawyers than in the past “it’s not plausible to think that the [DOJ] can do this by itself.” *Id.* at 12.

290. *Id.* at 11–12 (using Maricopa County as an example of a particularly complex and contentious claim that has exhausted significant resources, leaving little left to address other cities).

widespread reform and generally deter unconstitutional misconduct. Structural police reform has the potential to be the most forceful regulatory tool for overhauling American police departments when used aggressively by the DOJ. Unlike traditional cost-raising mechanisms for misconduct regulation, § 14141 can force noncompliant departments to implement radical reforms to ensure constitutional policing practices.<sup>291</sup> But § 14141 cannot achieve this objective if the DOJ chooses not to invoke the statute's protections. In theory, the statute can only deter misconduct in one of two ways—either it can specifically reform a single problematic department through costly and invasive equitable relief, or it can serve as a general deterrent to police departments all across the country, thereby motivating departments to take proactive steps to avoid the cost and embarrassment of DOJ scrutiny.

For this general deterrent rationale to work, police agencies must perceive the possibility of DOJ investigation and oversight as reasonably possible, if not certain. If agencies view DOJ action under § 14141 to be an extremely remote possibility, then rational choice theory suggests that these departments will have no motivation for reform. Rachel Harmon has used such rational choice theory in arguing for a new DOJ enforcement model that is more transparent.<sup>292</sup> As it currently stands, a rational department engaged in systemic misconduct would likely not view a § 14141 suit as a realistic possibility. If this law is to be an incentive for widespread reform, this must change.

Second, the data shows that the DOJ's enforcement of § 14141 has also changed over time. Since commentators previously observed that § 14141 enforcement seemed to vary by presidential administration, figure 3 organizes the total number of investigations and negotiated settlements reached during each presidential administration.

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291. *See supra* Part I.B (explaining the comparative advantage of equitable relief compared to traditional cost-raising measures).

292. Harmon, *supra* note 4, at 23 (“According to deterrence theory, a rational actor will engage in conduct when doing so provides a positive expected return in light of the actor’s utility function . . . [meaning that] a police department will adopt remedial measures to prevent misconduct when doing so is a cost-effective means of reducing the net costs of police misconduct or increasing the net benefits of protecting civil rights.”).

FIGURE 3. DOJ ACTION UNDER § 14141 BY PRESIDENTIAL ADMINISTRATION<sup>293</sup>

Administration	Investigation	Negotiated Settlements	Monitors Appointed
William Clinton Term 1 <sup>294</sup>	10	0	0
William Clinton Term 2	12	3	3
George W. Bush Term 1	13	11	5
George W. Bush Term 2	8	0	0
Barack Obama Term 1	12	8	4

The data shows a decrease in the aggressiveness of § 14141 enforcement between late 2004 and early 2009, which correlates with the second term of the Bush Administration.<sup>295</sup> This decrease in aggressiveness manifests itself in several ways. During this time period, there was a noticeable decrease in the number of investigations officially opened by the DOJ. The DOJ did not enter into a single negotiated settlement during this time period. And since the DOJ did not agree to any settlements during this time period, they also did not push for the monitoring of any police agency. Remember that part of the reason that Congress passed § 14141 in 1994 was to provide the DOJ with the ability to seek injunctive action against police departments—that is, force those police departments to make necessary policy changes aimed at curbing misconduct.<sup>296</sup> During the

293. See Appendices A–B.

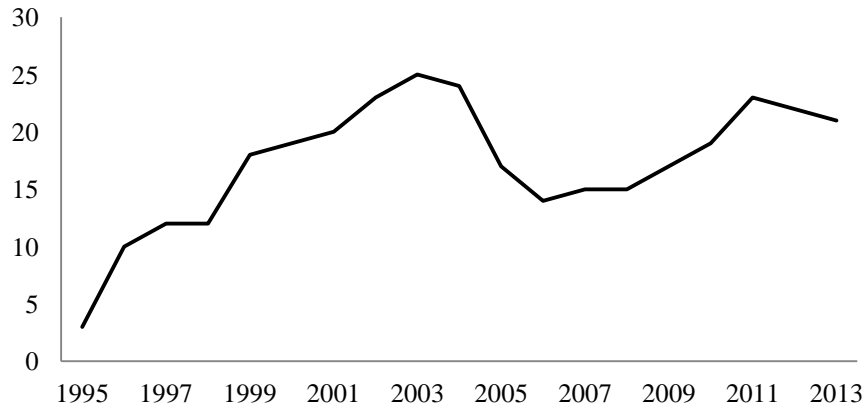
294. Section 14141 became law in 1991. The lack of negotiated settlements and monitor appointments before 1997 probably does not represent any administrative unwillingness to use these remedies. After § 14141's passage, the DOJ needed time to develop internal implementation strategies after the passage of § 14141. Enforcement was not fully underway until about a year after Congress passed the VCCLEA. See, e.g., Interview #14, *supra* note 209, at 5 (stating that “it’s hard getting a new statute implemented” and detailing the challenging process facing the DOJ in implementing the statute initially in 1994 and 1995). This likely explains the lack of negotiated settlements and monitor appointments during the first Clinton Administration.

295. It is possible that any effects of political administration on the enforcement policy of the DOJ would only be felt a year or more after a change in executive leadership. See, e.g., Interview #14, *supra* note 209, at 5–6 (explaining the time it took to get policies implemented and the possibility of lagged effects of implementation); Interview #15, *supra* note 218, at 2 (explaining that while the statute was not initially enforced, it took a period of time for internal changes to lead to efforts to change enforcement policy). But even when controlling for this possibility, there still appeared to be a noticeable difference in the likelihood of the DOJ to aggressively utilize § 14141 around the second term of the Bush Administration.

296. See *infra* Parts I.D–II (explaining the need for equitable relief to address systemic misconduct issues).

second term of the Bush Administration, though, the DOJ did not force a single police agency to make any policy changes via a § 14141 settlement. The noticeable shift in enforcement is also visible in Figure 4, which shows the number of open § 14141 cases over time.

FIGURE 4. OPEN § 14141 CASES OVER TIME<sup>297</sup>



So what caused this apparent shift in enforcement of § 14141? One experienced DOJ litigator, who left the DOJ around this time, attributed this sharp decline in negotiated settlements to changes in an internal policy that discouraged extensive federal involvement in local police departments.<sup>298</sup> Respondents identified two possible explanations for this change in enforcement policy. First, as one DOJ official detailed, DOJ litigators have often relied on coordination with civil rights groups like the ACLU and NAACP to determine whether there was sufficient evidence to justify a formal investigation.<sup>299</sup> Remember that, in many cases, coordination with civil rights groups formed the basis for initial inquiries and served as a vital tool for evidence during the formal investigation stage.<sup>300</sup> Litigators continued this method of preliminary inquiry in the early years of the Bush Administration.<sup>301</sup> But at some point during the Bush Administration, an internal policy change allegedly discouraged litigators from coordinating with civil rights groups.<sup>302</sup> This hampered efforts by § 14141 litigators to acquire sufficient evidence to justify invasive federal involvement in local police affairs.

297. This data is taken from the list of investigations. See Appendix A.

298. Interview #15, *supra* note 218, at 6 (explaining the changes that happened during the Bush Administration). One important change that this participant noted was the removal of the previous leadership within the Special Litigation Section in part because of “his police-related work and the opposition of police unions to the work. Which was very strong.” *Id.*

299. Interview #5, *supra* note 244, at 2–3 (explaining the policy that discouraged or even barred the coordination with civil rights groups).

300. See *supra* Part III.A.1 (describing the case selection process and in particular the coordination with groups like the NAACP and the ACLU).

301. See *supra* Part III.A.1.

302. See *supra* Part III.A.1.

Second, multiple current and former DOJ litigators noted that internal politics around this same time favored the use of § 14141 for technical assistance as opposed to full-scale negotiated settlements and external monitoring.<sup>303</sup> The prevailing belief was that technical assistance letters could provide departments with the necessary guidance to reform departments locally, without expending additional federal resources monitoring eventual reform efforts.<sup>304</sup> Of course, these technical assistance letters are not binding.<sup>305</sup> Instead, these technical assistance letters only provide a voluntary blueprint that agencies can accept if they so choose. These apparent policy changes could explain a substantial amount of the variation in enforcement patterns evident from the data.

In recent years, the DOJ has again started to use § 14141 more aggressively to force police departments to adopt specific policy reforms.<sup>306</sup> In March 2009, less than two months after Eric Holder took over as attorney general, the DOJ approved a consent decree with the Virgin Islands Police Department.<sup>307</sup> This was the first negotiated settlement that the DOJ had approved under § 14141 in over five years.<sup>308</sup> Since then, the DOJ has reached settlement agreements with seven different police agencies in seven different states.<sup>309</sup> In three of these cases—the Virgin Islands; Seattle, Washington; and New Orleans, Louisiana—these settlements have included clauses that require the appointment of an external monitor to ensure departmental compliance with the terms of the agreement.<sup>310</sup>

In sum, the qualitative and quantitative data suggest that the enforcement of § 14141 varied significantly during a portion of the Bush Administration,

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303. See *supra* Part III.A.1. Harmon also provides a useful perspective:

The technical assistance letters or investigative findings letters represent less formal attempts by the Justice Department to achieve reform. During most of the Justice Department's investigations, it has sent a letter to the investigated police department summarizing its findings at that point in the investigation. In some cases, this letter functioned as a precursor to a later settlement through a consent decree or memorandum of agreement. In other cases—although the letter suggested that the investigation was ongoing at the time—the technical assistance letter was the last public action in the case. In these cases, the letters do not make findings about whether § 14141 has been violated. Instead, they describe departmental deficiencies that may cause misconduct and recommend specific remedial measures to correct those problems.

Harmon, *supra* note 4, at 17–18.

304. Interview #5, *supra* note 244, at 3 (detailing the preference for technical assistance letters); see also Harmon, *supra* note 4, at 18 (“[T]he letters do not contain any mechanism for ensuring compliance or for ongoing monitoring.”).

305. Interview #5, *supra* note 244, at 3.

306. One way to measure this is to examine the number of investigations per year since President Obama's pick for attorney general—Eric Holder—has assumed office. Holder has served as attorney general for 1,687 days as of September 9, 2013. During this time, the DOJ initiated fifteen investigations. See Appendix A. This suggests that the Holder DOJ has averaged approximately 3.25 investigations per 365 days.

307. See Appendix B (detailing the dates of each negotiated settlement reached between the DOJ and local police agencies).

308. See Appendix B.

309. See Appendix B.

310. See Appendix B.

likely due in part to the adoption of internal policies that discouraged coordination with interest groups and encouraged noninvasive solutions. The Obama Administration has, meanwhile, appeared to reverse this trend, ushering in a new era of aggressive enforcement. The evidence also suggests, however, that even when internal policies favor aggressive enforcement of § 14141, the DOJ has only initiated around three new investigations per year. Interviewees argued that this number represented only a fraction of departments seemingly engaged in systemic misconduct.

### C. Political Spillover

The qualitative evidence also suggests that the DOJ faces another potential barrier in initiating action against a municipality that may be engaged in patterns or practices of misconduct—a challenge I refer to as “political spillover.” An example best illustrates this phenomenon. Multiple interviewees described the Special Litigation Section’s interest in pursuing a possible structural police reform case against the New York City Police Department (NYPD).<sup>311</sup> The DOJ initiated two separate investigations in New York City—one through the U.S. Attorney’s Office (USAO) in the Eastern District of New York and one through the USAO in the Southern District of New York.<sup>312</sup> Neither investigation resulted in a settlement agreement.<sup>313</sup> When asked about this investigation into the NYPD, DOJ litigators suggested that political considerations factored into the decision to not formally pursue a settlement agreement. Before the DOJ initiates settlement negotiations under § 14141, the Special Litigation Section relies on the local USAO to facilitate the investigation and to participate in the settlement negotiation. In New York, this meant that the Special Litigation Section needed to work collaboratively with the USAO in the Southern and Eastern Districts of New York. According to interviewees, these two USAO districts are unique in their independence from the central DOJ.<sup>314</sup> Interviewees jokingly referred to the Southern District as the “Sovereign District of New York,” a tribute to the district’s informal jurisdictional independence from the central authority of the DOJ.<sup>315</sup> Although litigators in the Special Litigation Section felt that a negotiated settlement was needed to address the possible misconduct in the NYPD, multiple interviewees identified the Southern District as a barrier to

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311. Interview #14, *supra* note 209, at 11–14 (identifying, again, NYPD as an agency of interest to the Special Litigation Section for § 14141 purposes); Interview #18, *supra* note 216, at 5–7 (explaining the initiation of the New York investigation).

312. See Appendix A (listing all of the investigations pursued by the DOJ).

313. See Appendix B (showing that the NYPD is not among the list of settlement agreements).

314. Interview #18, *supra* note 216, at 6 (identifying the unique independence of the Southern District in particular); see also Interview #14, *supra* note 209, at 12 (“The Eastern District is sort of quasi-sovereign.”).

315. Interview #14, *supra* note 209, at 12; Interview #18, *supra* note 216, at 6 (identifying the independence of the Southern District and stating that “they do all their cases including their civil rights cases”).



§ 14141 action.<sup>316</sup> Since New York City spans two different USAO districts, the DOJ needed to get the support of both the Southern and Eastern District offices.<sup>317</sup> While the Eastern District seemed somewhat willing to pursue the matter further, the Southern District resisted efforts to push further any § 14141 claims against the NYPD.<sup>318</sup> Interviewees disagreed about the extent to which politics factored into the decision by the Southern District to block further action against the NYPD. At least two participants concluded that politics played some role in the decision to not pursue a § 14141 case against the NYPD.<sup>319</sup> One former litigator believed that the DOJ made a tactical choice to not initiate action against the NYPD because of concerns about alienating the agency, thereby hampering future efforts to coordinate as part of law enforcement task forces.<sup>320</sup> As this litigator went on to speculate, federal-state coordination is an increasingly important method for addressing law enforcement issues that traverse jurisdictional borders.<sup>321</sup> And perhaps no local department engages in more federal-state coordination than the NYPD.<sup>322</sup> This suggests that internal politics can also serve as a barrier to DOJ action, in some cases.<sup>323</sup> After all, the DOJ is the ultimate “repeat player.”<sup>324</sup> And as a repeat player in the legal system, the DOJ must be cognizant of how its actions in one arena may affect its future ability to further other, future organizational goals. The result is political spillover that can hamper otherwise viable efforts to enforce § 14141.

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316. Interview #14, *supra* note 209, at 12–13 (identifying the political concerns that likely motivated the Southern District to oppose formal action); Interview #18, *supra* note 216, at 6 (explaining that the Southern District was the agency most opposed to further action against the NYPD).

317. Interview #18, *supra* note 216, at 6 (“[I]n order to bring a case against the city, the police department covers all of the boroughs so you’d have to get both US Attorneys on board.”).

318. *Id.* at 6 (identifying the differing opinions between the Eastern and Southern Districts).

319. Interview #14, *supra* note 209, at 12–13 (speculating that the political ambitions of the U.S. Attorney of the Southern District of New York may have contributed to the unwillingness to pursue further civil rights actions); *see also* Interview #12, *supra* note 221, at 3 (agreeing during the interview that local politics likely play an important role in the decision to pursue further action under § 14141).

320. Telephone Interview with DOJ Participant #22 (Sept. 19, 2013).

321. *Id.*

322. *Id.*

323. Several studies have found that this sort of political spillover can affect agency aggressiveness. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 110 & n.48 (describing studies that show the link between politics and “agency slack”).

324. *See generally* Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974). Galanter distinguishes between “repeat players” (those who are engaged in multiple similar litigations over time) and “one shotters” (those who litigate only on rare occasions). *Id.* at 98–104. Since repeat players are engaged in the same type of litigation time and time again, their goals are different than a one shotter. *Id.* at 100. The repeat player wants to establish valuable precedent that will be of use in future cases. *Id.*

## IV. IMPLICATIONS AND AVENUES FOR FUTURE REFORM

The results of this study have implications for the study of public rights of action and for the viability of § 14141 as an effective means of combating police misconduct. Structural reform litigation relies on statutory language authorizing public rights of action to be initiated by the executive branch. These findings suggest that, in such cases, the executive branch can easily mediate the impact of ambiguous statutory authorizations. In Part IV.A, I situate this study in the broader literature on importance of public rights of action.

In Part. IV.B, I evaluate possible ways to ameliorate some of the problems with § 14141 uncovered in this study. To help improve the federal enforcement of § 14141, I make two normative recommendations. First, I argue that the DOJ should adopt a more transparent case selection process that incentivizes local law enforcement agencies to reform proactively. Second, I argue that state and national policymakers should take steps to increase the number of structural police reform cases. I outline and evaluate two possible ways that policymakers could do this. Congress could expand § 14141 to include a limited private right of action. In theory, such an effort could ensure a more expansive enforcement of injunctive measures against policing agencies engaged in systemic misconduct. Such a grant of power to private litigants could also be reasonably limited so as to prevent private parties from interfering with legitimate DOJ investigations under § 14141. But ultimately such an expansion of § 14141 would be constitutionally questionable after *Lyons*. Thus, an alternative method for increasing the number of structural police reform cases would be for state legislators to pass legislation permitting state attorneys general to initiate structural police reform in state court.

A. *Implications for the Utility of a Public Right of Action*

Over the last several decades, law scholars have observed that privately initiated structural reform litigation had fallen out of favor with the courts. For a period of time during the twentieth century, private litigants were able to successfully instigate structural reform of many major state institutions.<sup>325</sup> For several decades after, the courts were “cast” in a

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325. Gilles, *supra* note 14, at 1390 (explaining how the modern structural reform movement through private litigation began in the 1950s as the federal courts agreed to hear cases alleging the need for equitable relief for various public institutions like schools and prisons). There are numerous prominent cases from the mid-twentieth century of the courts proactively instigating structural reform. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978) (holding that punitive isolation for longer than thirty days in an Arkansas prison constituted cruel and unusual punishment in violation of the Eighth Amendment); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (determining that once a locality had violated a court mandate to desegregate schools, the district court had broad and flexible power to remedy the wrong through equitable relief); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955) (holding that the problems identified in the Court’s original opinion, *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954), required multiple different, local solutions; thus Chief Justice Warren urged localities to act “with all deliberate speed” to comply with the Court’s order).

“political” or “activist” role.<sup>326</sup> Scholars who supported this expansive role of the courts in structural reform praised this activist structural reform as promising to be “*the* central . . . mode of constitutional adjudication” of the future.<sup>327</sup> But in recent decades, “a number of events signaled the demise of the structural reform revolution.”<sup>328</sup>

Professor Myriam Gilles provides an excellent summary of the gradual erosion of structural reform litigation as a viable option for remedying constitutional violations, explaining how the Court slowly started to set aside desegregation decrees and uphold controversial prison conditions.<sup>329</sup> Changes to procedural rules also made it more difficult for litigants to initiate suits for structural reform. During this time, the Court not only has “denied standing to plaintiffs who, it claimed, failed to meet the requirements of causation, redressability, and injury-in-fact,” it also substantially limited the types of litigants that have standing to pursue injunctive relief.<sup>330</sup> These major changes in recent decades have made individual-initiated structural reform litigation challenging and rare. In its place, aggrieved parties have relied on a series of federal statutes that give the attorney general authority to seek injunctive relief through public litigation to address a range of issues.<sup>331</sup> Since then, the DOJ has brought public litigation claims for a host of different issues—school desegregation,<sup>332</sup> public housing,<sup>333</sup> employment discrimination,<sup>334</sup> prison conditions,<sup>335</sup> and more. But the executive branch—most often the attorney general—must first initiate this type of public structural reform litigation.

The empirical evidence from this study suggests that the attorney general has not consistently and aggressively enforced § 14141. This confirms the suspicion of many earlier writers that “the frequency of § 14141 actions will likely depend upon the political ideology and commitment of the

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326. Abram Chayes, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 4 (1982).

327. Owen M. Fiss, *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 2 (1979).

328. Gilles, *supra* note 14, at 1393.

329. *Id.* at 1394–99.

330. *Id.* at 1396; *see also* *Allen v. Wright*, 468 U.S. 737, 757, 760 (1984) (holding that the courts are “‘not the proper forum to press’ general complaints about the way in which government goes about its business” (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 112 (1983))).

331. Gilles, *supra* note 14, at 1402 (“The provision granting the Attorney General standing to seek injunctive relief substantially enhances the Justice Department’s authority with regard to local police affairs by affording the Civil Rights Division a statutory basis for intervening in police ‘pattern or practices’ in ways analogous to statutes that have authorized federal government intervention in other spheres.”).

332. *Id.* at 1402 n.69 (“Many school desegregation cases were brought under authorization of the Civil Rights Act of 1964, § 407, 42 U.S.C. § 2000c-6 (1994). . . . [And this] authorizes the Attorney General to sue on behalf of public school or college students for the purpose of assuring their Fourteenth Amendment rights and ‘the orderly achievement of desegregation in public education.’” (quoting 42 U.S.C. § 2000c-6 (1994))).

333. *Id.* at 1402 n.71 (citing 42 U.S.C. § 3614(a)).

334. *Id.* at 1402 n.70 (citing 42 U.S.C. § 2000e-6(c)).

335. *Id.* at 1402 (citing prison conditions as one of the sources of public litigation).

President of the United States.”<sup>336</sup> This uneven enforcement further “underscores the fact that giving the Justice Department such authority will not ensure meaningful federal enforcement.”<sup>337</sup> At least one writer has previously shown this phenomenon in the context of the Reagan Administration’s enforcement of the Civil Rights of Institutionalized Persons Act (CRIPA).<sup>338</sup> There, the Reagan Administration did not “file a single suit involving an institution” subject to potential litigation under CRIPA.<sup>339</sup> The DOJ made a policy of only initiating litigation as a last resort, opting instead to give states seemingly “unlimited time to negotiate a settlement” while the unconstitutional practices “fester[ed], destroying the purpose of the federally mandated intervention.”<sup>340</sup> The DOJ also generally avoided injunctive relief,<sup>341</sup> and also chose to not assign independent monitors to oversee the reforms.<sup>342</sup> Thus, Reagan’s DOJ transformed CRIPA from a measure designed by Congress to facilitate widespread reform of facilities housing institutionalized persons into a weak measure that failed to provide for effective relief.<sup>343</sup> Other researchers have also identified how political pressure can affect agency enforcement.<sup>344</sup>

Similarly, the empirical evidence I present in this Article adds to this body of work. It demonstrates that by giving the DOJ a broad and ambiguous mandate, Congress opened up the opportunity for the DOJ to limit the law’s effectiveness. Statutes “tend to set forth broad and often ambiguous principles that give organizations wide latitude to construct the meaning of compliance in a way that responds to both environmental demands and managerial interests.”<sup>345</sup> The danger in doing so is that

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336. Marshall Miller, *Police Brutality*, 17 YALE L. & POL’Y REV. 149, 176 (1998) (hypothesizing on the future use of § 14141).

337. Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1524 n.279 (1993).

338. *Id.*; see also John Kip Cornwell, *CRIPA: The Failure of Federal Intervention for Mentally Retarded People*, 97 YALE L.J. 845 (1988) (finding that the Reagan Administration’s DOJ avoided litigation under CRIPA and authored inadequate settlements).

339. Cornwell, *supra* note 338, at 848.

340. *Id.* at 849 (quoting STAFF OF S. SUBCOMM. ON THE HANDICAPPED, 99TH CONG., REP. ON THE INSTITUTIONALIZED MENTALLY DISABLED 6 (1985)).

341. *Id.* at 850 (describing the lack of injunctive relief sought by the federal government and bringing up the example of Oregon’s Fairview Training Center).

342. *Id.* at 853–54 (“The absence of provisions relating to the monitoring of placements is part of a bigger problem. . . . [T]he decrees fail to provide for any independent monitoring body to ensure compliance; instead, they leave these responsibilities to the federal government.”).

343. *Id.* at 852.

344. See, e.g., Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329 (1982) (arguing that the composition of a congressional oversight committee influenced the composition of an FTC antitrust law); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 191 (showing how political considerations have lead agencies to reduce prosecution of environmental law violations).

345. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1531 (1992).

enforcers like the DOJ, have the opportunity to transform ambiguity into procedure that limits the law's impact on society.<sup>346</sup>

*B. Improving the Response to Patterns or Practices of Police Misconduct*

This Article identified numerous possible problems with the DOJ's enforcement of § 14141. The DOJ's case selection process appears messy and imprecise. The case selection process also lacks transparency. Additionally, the DOJ has unevenly enforced § 14141 over the years based in part on changes in internal policies. Enforcement of the statute appears limited, as the DOJ only has the resources for a small number of investigations per year. And political spillover prevents the DOJ from aggressively pursuing structural police reform in all cases. To overcome these problems, I make two normative recommendations.

First, the DOJ should develop a more transparent case selection process that effectively puts police agencies on notice about the types of reforms that they ought to implement to avoid § 14141 action. Other scholars like Professor Harmon have made similar calls for improvements in the § 14141 case selection process.<sup>347</sup> One way that the DOJ could do this is by creating a national list of best practices each year, and prioritizing suits against departments that fail to implement these recommended policies. This solution would not only require the DOJ to develop a core set of best practices each year, it would also require the DOJ to collect data from all of the nation's police agencies on whether the department currently employs certain best practices. This would be a challenging, but hardly impossible feat. The federal government already collects annual and semiannual data from the vast majority of local police agencies.<sup>348</sup> This potential method for prioritizing litigation, though, would offer numerous advantages. It could incentivize rational police departments to implement proactive reforms.<sup>349</sup> Police executives that want to avoid potentially public and embarrassing structural police reform would have a clear blueprint of the

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346. Organizational sociologists call this phenomenon in the private context the organizational mediation of the law. *Id.* at 1567 (explaining that in the context of equal employment opportunity and affirmative action laws, "where legal ambiguity, procedural constraints, and weak enforcement mechanisms leave the meaning of compliance open to organizational construction, organizations that are subject to normative pressure from their environment elaborate their formal structures to create visible symbols of their attention to law" that still may not honor the spirit of the law).

347. Professor Harmon persuasively suggested that the DOJ should announce an ordered list of problematic police agencies each year that could potentially be subject to litigation. Harmon, *supra* note 4, at 27. She then recommended that the DOJ investigate these departments in order, prioritizing the DOJ's limited resources on departments at the top of the list. *Id.*

348. The DOJ is currently authorized to "collect and analyze statistical information about the operation of the justice system." *Id.* at 30.

349. *Id.* at 23 ("According to deterrence theory, a rational actor will engage in conduct when doing so provides a positive expected return in light of the actor's utility function . . . [meaning that] a police department will adopt remedial measures to prevent misconduct when doing so is a cost-effective means of reducing the net costs of police misconduct . . .").

kind of proactive policies they can implement to avoid federal intervention. Additionally, this approach would allow the DOJ to exert a continued and evolving influence over local police agencies as best practices change over time. It could also increase the perceived legitimacy of future DOJ interventions into police agencies that lack these best practices. To develop this annual list of best practices, the DOJ could coordinate with recognized law enforcement organizations. This would be consistent with a growing movement within the DOJ to focus on collaborative police reform.<sup>350</sup>

Second, given the apparent inability of the DOJ to consistently or aggressively utilize § 14141, policymakers should take steps to increase the number of structural police reform cases. One way that Congress could achieve this is by granting private litigants a limited equitable right of action against police departments engaged in a pattern or practice of unconstitutional misconduct.<sup>351</sup> Some scholars have argued that granting such a private right of action would interfere with active public claims.<sup>352</sup> This is a reasonable concern. In order to alleviate this concern, though, Congress could provide the attorney general with narrow authority to intervene and block private § 14141 claims against agencies where the DOJ has already initiated a public § 14141 investigation. In theory, this statutory change would permit the DOJ to continue the important job of structurally reforming problematic police departments, while empowering a new group of plaintiffs to fill the gaps left by the DOJ's historically uneven enforcement policies. Congress considered this possibility in the original Police Accountability Act of 1991 and considered another bill that would do just this in 1999 and again in 2000.<sup>353</sup> Such a private right of action would be “especially valuable when the reigning presidential administration's financial and political commitment to § 14141

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350. See, e.g., Sam Wood, *The Federal Agent Scrutinizing the Philadelphia P.D.*, PHILLY.COM (Dec. 30, 2013, 4:34 PM), [http://www.philly.com/philly/news/breaking/The\\_fed\\_scrutinizing\\_the\\_Philadelphia\\_PD.html](http://www.philly.com/philly/news/breaking/The_fed_scrutinizing_the_Philadelphia_PD.html) (discussing how Philadelphia, Las Vegas, and other cities are part of a collaborative police reform model with the DOJ that will potentially avoid the use of § 14141 and external monitoring).

351. At least one scholar has recommended a similar proposal in the past. Professor Myriam Gilles has argued that, in light of the DOJ's limited enforcement ability, Congress ought to amend § 14141 to allow the DOJ to deputize private citizens to bring public pattern or practice suits seeking injunctive relief. Gilles, *supra* note 14. Gilles tempers her recommendation that the DOJ must formally deputize any private individual seeking § 14141 relief. *Id.* at 1417. She says that this deputation model thrives in other similar litigation contexts. *Id.* at 1418. Scholars have also recognized that agencies often “lack the capacity to enforce the law adequately,” making private enforcement valuable in some contexts. Stephenson, *supra* note 323, at 107–09.

352. Harmon, *supra* note 4, at 63 (“[P]rivate suits would not only likely result in weaker reforms than government suits, but would effectively inhibit the [DOJ] from pursuing more effective reforms in the same departments in the future.”).

353. *Id.* at 58 (“[S]everal members of Congress introduced in 1999 and then again in 2000 the Law Enforcement Trust and Integrity Act (LETIA) to amend § 14141 to allow any aggrieved person to bring a civil action for declaratory and injunctive relief for violations of the statute.”); see Law Enforcement Trust and Integrity Act of 2000, H.R. 3927, 106th Cong. § 502; Law Enforcement Trust and Integrity Act of 1999, H.R. 2656, 106th Cong. § 501.

enforcement is low.”<sup>354</sup> The evidence presented in this Article demonstrates that during a period of the Bush Administration, there appeared to be little commitment to § 14141. In the absence of DOJ action, this statutory change would permit private individuals to fill the gaps during times of underenforcement. Further, this would likely increase the number of total § 14141 claims brought against American police departments,<sup>355</sup> as DOJ officials openly acknowledge that they cannot possibly litigate in most agencies where there may be a pattern or practice of misconduct.<sup>356</sup> This change would empower civil rights groups to bring pattern or practice claims independently, rather than having to convince the DOJ that action is warranted. One litigator commented that adding a private right of action to § 14141 would “obviously be transformative.”<sup>357</sup> This proposed change would also potentially overcome concerns about political cooptation of public rights of action and political spillover, as the power would be directly in the hands of private litigants to seek equitable action against local law enforcement agencies.<sup>358</sup> But this approach would suffer from several drawbacks. To begin with, private parties may “pursue a resolution to the § 14141 suit that maximizes their expected financial gain rather than a resolution that maximizes effective reform.”<sup>359</sup> As Professor Harmon has argued, § 14141 claims could be used by private parties as leverage in § 1983 cases.<sup>360</sup> And such a grant of power to private litigants is

354. Harmon, *supra* note 4, at 59.

355. *Cf.* Interview #14, *supra* note 209, at 11. The participant explained in depth:

I think that a private cause of action would obviously be transformative. And I think if Congress was nervous about creating a private cause of action and thought that it's too radical, that there would be ways to have some kind of gatekeeping function around the private cause of action. I think that would be—there's no way that the Justice Department can litigate all of the patterns and practices of police misconduct in this country. There are too many policing jurisdictions for them to do that.

*Id.*

356. *Id.* at 12 (stating that “[i]t's just, it's not plausible to think that the Justice Department can do this by itself” in arguing that the Special Litigation Section cannot possibly litigate all pattern or practice claims.)

357. *Id.* at 11.

358. Stephenson, *supra* note 323, at 110–12 (stating that “private enforcement is most associated with legislative distrust of the executive branch” and can potentially correct “agency slack”).

359. Harmon, *supra* note 4, at 60.

360. *Id.* at 59. Harmon concludes that the availability of § 14141 remedies will make local municipalities

more receptive partners for private actors seeking to maximize § 1983 awards: some public officials will seek to avoid intrusive reforms, even at the expense of financial payouts by the city, while some private actors will seek to maximize financial awards from the city, even at the expense of less reform. In such cases, both parties would have reason to reach a settlement that avoids many best practice reforms. Even private plaintiffs with good motives may be influenced by local agents intent on avoiding intrusion. These incentives for collusion suggest that private suits are unlikely to produce results consistent with the public interest.

*Id.* at 60.

constitutionally suspect after *Lyons*.<sup>361</sup> In light of the potential shortcomings of a private right of action, policymakers may understandably look for other ways to increase the number of structural police reform cases. For instance, states legislatures could permit state attorneys general to initiate structural police reform in state court. Professor Samuel Walker and Morgan Macdonald have recommended the addition of such a state-level structural police reform measure.<sup>362</sup> Any state statute could roughly mirror § 14141 and give state attorneys general the ability to bring suit against police departments within their state that are engaged in a pattern or practice of unconstitutional misconduct. This could dramatically increase the number of structural police reform cases. While state attorneys general may be susceptible to the same resource limitations, political cooptation, and political spillover effects evident in the federal government's enforcement of § 14141, structural police reform initiated by state attorneys general may be more rigorous than reforms requested by private litigants.

#### CONCLUSION

Pattern or practice litigation represents a dramatically different avenue for police reform. The initial enthusiasm for this potentially invasive form of federal regulation was understandable. After all, § 14141 did not simply increase the cost of misconduct, but instead gave the attorney general the authority to forcefully bring about reform in problematic police departments. At the time of passage, § 14141 represented perhaps the only legal mechanism capable of forcefully reorganizing and improving otherwise decentralized American policing agencies. But the enthusiasm for this regulatory mechanism has justifiably waned, as enforcement has been weak and inconsistent. The empirical results from this study are discouraging. They remind us that, despite all of the optimism originally surrounding this measure, the only way that § 14141 can instigate proactive police reform is if the DOJ routinely enforces the measure. The normative recommendations in this Article could potentially increase the number of § 14141 claims and improve the transparency of the case selection process. These changes could ensure that § 14141 finally fulfills its potential as “the most promising legal mechanism” available to incentivize constitutional policing.<sup>363</sup>

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361. Gilles, *supra* note 14, at 1414 (arguing that any attempt to grant a private right of action under § 14141 would face “insurmountable constitutional problems under the equitable standing rule of *Lyons*”).

362. See generally Walker & Macdonald, *supra* note 10, at 549 (“[T]he democratic process ensures that the public interest weighs heavily on the actions of each state attorney general.”).

363. Armacost, *supra* note 2, at 457.



APPENDIX A. FORMAL STRUCTURAL POLICE REFORM INVESTIGATIONS  
INITIATED BY THE DOJ

Agency Name	Opened	Closed	Re-Opened	City	State
<b>Torrance Police Department</b>	5/1/1995	9/14/1998		Torrance	CA
<b>Adelanto Police Department</b>	6/16/1995	9/14/1998		Adelanto	CA
<b>Steubenville Police Department</b>	7/31/1995	3/3/2005		Steubenville	OH
<b>Pittsburgh Police Department</b>	4/11/1996	6/16/2005		Pittsburgh	PA
<b>New Orleans Police Department</b>	4/15/1996	3/23/2004	5/14/2010	New Orleans	LA
<b>New Jersey State Police</b>	4/15/1996	10/26/2009		Newark	NJ
<b>Illinois State Police</b>	4/15/1996	9/27/2002		Chicago	IL
<b>Montgomery County Police Department</b>	6/1/1996	2/1/2005		Montgomery County	MD
<b>Los Angeles Police Department</b>	7/31/1996	5/16/2013		Los Angeles	CA
<b>Beverly Hills Police Department</b>	8/12/1996	11/14/2000		Beverly Hills	CA
<b>New York City Police Department (Eastern District)</b>	8/21/1997	12/23/2004		Brooklyn	NY
<b>Buffalo Police Department</b>	12/9/1997	7/9/2008		Buffalo	NY
<b>Columbus Police Department</b>	3/13/1998	5/14/2004		Columbus	OH
<b>Eastpointe Police Department</b>	3/20/1998	1/12/2005		Eastpointe	MI
<b>District of Columbia Metropolitan Police Department</b>	1/31/1999	2/10/2012		Washington, D.C.	
<b>New York City Police Department (Southern District)</b>	3/17/1999	3/31/2005		Bronx	NY

Agency Name	Opened	Closed	Re-Opened	City	State
<b>Charleston Police Department</b>	3/31/1999	11/12/2003		Charleston	WV
<b>Riverside Police Department</b>	6/29/1999	3/26/2007		Riverside	CA
<b>Prince George's County Sheriff's Office</b>	7/1/1999	1/13/2009		Upper Marlboro	MD
<b>Cleveland Division of Police</b>	10/1/1999	3/15/2005	3/14/2013	Cleveland	OH
<b>Mount Prospect Police Department</b>	4/5/2000	12/28/2006		Mount Prospect	IL
<b>Highland Park Police Department</b>	5/18/2000	12/7/2004		Highland Park	IL
<b>Tulsa Police Department</b>	2/8/2001	7/21/2008		Tulsa	OK
<b>Cincinnati Police Department</b>	5/7/2001	4/12/2007		Cincinnati	OH
<b>Detroit Police Department</b>	5/29/2001			Detroit	MI
<b>Schenectady Police Department</b>	4/4/2002	1/9/2013		Schenectady	NY
<b>Portland Police Department</b>	5/6/2002	6/27/2005		Portland	ME
<b>Miami Police Department</b>	5/31/2002	5/19/2006	10/11/2011	Miami	FL
<b>Providence Police Department</b>	12/11/2002	3/26/2008		Providence	RI
<b>Villa Rica Police Department</b>	1/27/2003	12/23/2006		Villa Rica	GA
<b>Alabaster Police Department</b>	3/4/2003	9/7/2005		Alabaster	AL
<b>Bakersfield Police Department</b>	6/24/2003	1/25/2008		Bakersfield	CA
<b>Virgin Islands Police Department</b>	2/13/2004			Charlotte Amalie	VI
<b>Beacon Police Department</b>	8/3/2004			Beacon	NY
<b>Warren Police Department</b>	11/29/2004			Warren	OH
<b>Easton Police Department</b>	10/14/2005			Easton	PA
<b>Orange County Sheriff's Office</b>	1/10/2007	4/4/2013		Orlando	FL

Agency Name	Opened	Closed	Re-Opened	City	State
<b>Austin Police Department</b>	5/25/2007	5/27/2011		Austin	TX
<b>Yonkers Police Department</b>	7/24/2007			Yonkers	NY
<b>Puerto Rico Police Department</b>	4/30/2008			San Juan	PR
<b>Harvey Police Department</b>	9/5/2008	1/24/2012		Harvey	IL
<b>Lorain Police Department</b>	11/20/2008	5/22/2012		Lorain	OH
<b>Escambia County Sheriff's Office</b>	12/30/2008	10/14/2012		Pensacola	FL
<b>Maricopa County Sheriff's Department</b>	3/10/2009			Phoenix	AZ
<b>Inglewood Police Department</b>	3/11/2009			Inglewood	CA
<b>Suffolk County Police Department</b>	9/9/2009			Yaphank	NY
<b>East Haven Police Department</b>	9/30/2009			East Haven	CT
<b>Alamance County Sheriff's Department</b>	6/2/2010			Graham	NC
<b>Seattle Police Department</b>	3/31/2011			Seattle	WA
<b>Newark Police Department</b>	5/9/2011			Newark	NJ
<b>Portland Police Department</b>	6/7/2011			Portland	OR
<b>Meridian Police Department</b>	11/29/2011			Meridian	MS
<b>Missoula Police Department</b>	4/25/2012			Missoula	MT
<b>University of Montana Office of Public Safety</b>	4/25/2012			Missoula	MT
<b>Albuquerque Police Department</b>	11/27/2012			Albuquerque	NM

## APPENDIX B. NEGOTIATED SETTLEMENTS BETWEEN DOJ AND POLICE AGENCIES

<b>Agency</b>	<b>Agreement Date</b>	<b>Close Date</b>	<b>Monitor</b>
<b>Pittsburgh Police Department</b>	4/16/1997	6/16/2005	Yes
<b>Steubenville Police Department</b>	9/3/1997	3/3/2005	Yes
<b>New Jersey State Police</b>	12/29/1999	10/26/2009	Yes
<b>District of Columbia Metropolitan Police Department</b>	6/13/2001	2/10/2008	Yes
<b>Los Angeles Police Department</b>	6/15/2001	5/16/2013	Yes
<b>Highland Park Police Department</b>	7/11/2001	12/7/2004	No
<b>Cincinnati Police Department</b>	4/12/2002	4/12/2007	Yes
<b>Columbus Police Department</b>	9/4/2002	5/14/2004	No
<b>Buffalo Police Department</b>	9/19/2002	7/8/2008	No
<b>Mount Prospect Police Department</b>	1/22/0203	12/28/2006	No
<b>Detroit Police Department (1)</b>	6/12/2003		Yes
<b>Detroit Police Department (2)</b>	7/18/2003	12/23/2006	Yes
<b>Villa Rica Police Department</b>	12/23/2003	12/23/2006	No
<b>Prince George's County Police Department (1)</b>	1/22/2004	3/15/2005	Yes
<b>Cleveland Division of Police</b>	2/11/2004	3/15/2005	No
<b>Prince George's County Police Department (2)</b>	3/11/2004	3/12/2007	Yes
<b>Virgin Islands Police Department</b>	3/23/2009		Yes
<b>Easton Police Department</b>	9/8/2010		No
<b>Orange County Sheriff's Office</b>	9/16/2010	4/4/2013	No
<b>Beacon Police Department</b>	12/23/2010		No
<b>Warren Police Department</b>	1/26/2012		No
<b>Seattle Police Department</b>	9/21/2012		Yes
<b>East Haven Police Department</b>	12/21/2012		Yes
<b>New Orleans Police Department</b>	1/11/2013		Yes