A NECESSARY EXPANSION OF STATE POWER: A "PATTERN OR PRACTICE" OF FAILED ACCOUNTABILITY

BRIANNA HATHAWAY[∞]

ABSTRACT

Too often do we hear of a person of color, frequently a Black man, dying at the hands of the police. Too often do we dismiss the tragedy as an isolated event. And too often do we learn that our criminal justice system has failed to provide meaningful redress. Local prosecutors work closely and develop strong ties with the police, leading to a governmental structure that denies justice to those most subjected to police misconduct. This Article proposes that the process of oversight and reform of police departments should be conducted by state attorneys general and their offices, as they are more likely than local prosecutors to function independently and impartially. Part I provides a snapshot of police misconduct, its inordinate impact on Black and Latinx communities, and the lack of oversight on police officers. Part II expands upon the different mechanisms at the local, state, and federal levels that are available to facilitate reform but are currently underutilized or ineffective. It focuses on 42 U.S.C. § 14141 (Section 14141), which enables the Department of Justice to conduct a pattern-or-practice investigation into law enforcement agencies with the potentiality of a lawsuit. Part III proposes the expansion of the Section 14141 power to the states, to ensure greater police accountability.

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INTRODUCTION

"I can't breathe."[1] Our nation is suffocating, as was Eric Garner, an *unarmed* 43 year-old Black father, who strained to speak these last words while being brutally choked and murdered by NYPD officers.[2] This story—of an unarmed Black man dying at the hands of law enforcement agents tasked with protecting citizens—has become all too familiar. Alarmingly, in this case and in many others, law enforcement was not held accountable for its actions. In fact, "not one single police officer was convicted for an on-duty death in 2015,"[3] even though they killed *at least* 1,146 civilians.[4] Even more worrisome, not only are police officers

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1. Josh Sanburn, *Behind the Video of Eric Garner's Deadly Confrontation with New York Police*, TIME (July 23, 2014), http://time.com/3016326/eric-garner-video-police-chokehold-death/ [https://perma.cc/D8NY-S4F6].

2. *See id.*

3. Shaun King, *King: Record Number of Police Officers Were Charged with Murder or Manslaughter in 2015 — Not a Single One Convicted*, N.Y. DAILY NEWS (Jan. 5, 2016), http://www.nydailynews.com/news/national/king-no-convictions-cops-charged-murder-2015-article-1.2486371 [https://perma.cc/VT4H-9CQL].

4. *The Counted: People Killed by Police in the US*, THE GUARDIAN (June 1, 2015), https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-kill-

not being convicted, but they are also rarely charged: research has shown that between 2007 and 2017, over 99% of officers involved in civilian killings were never charged with a crime.[5]

Our justice system is constructed to shield law enforcement from prosecution. One contributing factor is that the people tasked with prosecuting law enforcement—namely, local prosecutors—are the same people who work with the police every day. The relationship between local prosecutors and police officers is heavily intertwined, as police cooperation—especially police testimony—is vital for the success of local prosecutors' cases.[6] Yet local prosecutors are the ones who decide whether to bring charges against those same officers if and when law enforcement agents engage in misconduct.[7] Given their close-knit working relationship, prosecutors cannot "honestly be expected to be impartial and aggressive" towards law enforcement.[8] This structure denies proper justice.

This Article addresses two basic questions: (1) what is being done to hold law enforcement officers accountable for their misconduct, and (2) what is being done to reform those police departments that engage in systemic constitutional violations. It argues that to combat police brutality and the structurally defective system that enables it, a party more independent than local prosecutors—namely, state attorneys general—must be charged with reforming and overseeing police departments.

Part I of this Article reviews the current state of police misconduct and the lack of oversight thereof. It discusses policing statistics, highlighting interactions between law enforcement and communities of color. It underscores the problem of accountability, concluding that not enough is being done to oversee and hold police departments responsible for their actions. It analyzes different mechanisms at the local, state, and federal levels that are available to serve the public and facilitate reform, but which are currently underutilized or ineffective.

Part II of this Article expands upon one of the current mechanisms described in Part I, 42 U.S.C. § 14141 (Section 14141). Section 14141 gives the U.S. Department of Justice (DOJ)—specifically, the Attorney General—the ability to conduct a pattern-or-practice investigation into law enforcement agencies with the potentiality of a lawsuit. This Part examines Section 14141's history and development, discusses the process of conducting a pattern-or-practice investigation, and expounds on why this power is more effective than other methods of reform. It

ings-us-database [https://perma.cc/NK44-4SSL]. The modifier "at least" is used because new research (that will be mentioned later in this Article) finds that media sources still miss about 7% of police killing cases.

5. Michael Harriot, *White Men Can't Murder: Why White Cops Are Immune to the Law*, THE ROOT (June 22, 2017), https://www.theroot.com/white-men-cant-murder-why-white-cops-are-immune-to-the-1796309966 [https://perma.cc/2A75-WTTY].

6. *See* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1147, 1465–68 (2016).

7. *Id.* at 1470.

8. *Id.* at 1450.

explains that despite Section 14141's effectiveness, it still suffers from structural limitations—particularly its reliance on limited government resources.

Part III discusses the need for an expansion of the Section 14141 power. It argues that states should adopt their own versions of Section 14141, giving a similar power to their attorneys general. This Part begins by discussing the history of state attorneys general, evaluating how their powers have expanded over time. It emphasizes why this expansion is necessary to combat current police accountability problems and explains how it makes up for Section 14141's limitations. Finally, it demonstrates how this expansion of power would work in practice by examining the California Department of Justice, the only state DOJ that already uses this method of police oversight, as established by California Civil Code § 52.3.[9]

This Article concludes that pattern-or-practice investigations are an effective means of achieving greater police accountability. Given its potential to advance change, this investigative power must not be limited to the federal government. Empowering states to take advantage of this remedy can drive much-needed reform.

I. CURRENT PROBLEM

A. Communities of Color: Trapped in a Steady State of Police Misconduct

Being Black in America is a crime. Even eating vanilla ice cream on one's own couch is a capital offense if you are Black.[10] People of color in the United States, especially Black men, are burdened with a presumption of guilt and dangerousness.[11] This "mythology of black criminality" is perpetuated by the narrative of racial inferiority—a narrative intertwined with the justification for slavery[12] that has seeped its way into our criminal legal system and manifested in the actions of countless law enforcement officers. Racial disparities exist at all levels in the United States criminal legal system.[13] Police stop Black males at twice the

9. Candice Norwood, *Why California Is a Case Study for Monitoring Police Misconduct*, THE ATLANTIC (May 24, 2017), https://www.theatlantic.com/politics/archive/2017/05/police-misconduct-sessions/527664/ [https://perma.cc/XY8C-DCAX].

10. *See* Dan Frosch & Elizabeth Findell, *Dallas Officer Found Guilty in Shooting of Black Neighbor*, WALL ST. J. (Oct. 1, 2019), https://www.wsj.com/articles/dallas-officer-found-guilty-in-shooting-of-black-neighbor-11569946054 [https://perma.cc/V6U3-A7SM].

11. *See* Bryan Stevenson, *A Presumption of Guilt*, *in* POLICING THE BLACK MAN 3, 4 (Angela J. Davis ed., 2017).

12. *Id.* at 12.

13. For an outline of quantitative research on racial disparities in the criminal legal system, see Radley Balko, Opinion, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/ [https://perma.cc/XTJ9-7W73].

rate of white males.[14] The leading factor in investigatory stops is being Black.[15] During traffic stops, police search Black and Hispanic drivers at nearly three times the rate of white drivers.[16] According to the most recent statistics, up to one out of every three Black men born in 2001 will go to prison at some point in his life.[17]

Even more fundamentally, race impacts individual interactions with the police. According to the Center for Policing Equity, police use of force against Black people "is 3.6 times as high as the rate for White [people]."[18] Scientists at the University of Colorado Boulder and California State University Northridge found that police officers "were faster to shoot armed targets when they were black (rather than white), and they were faster to choose a don't-shoot response if an unarmed target was white (rather than black)."[19] These reactions are particularly worrisome given the alarming number of civilian deaths by officers' hands. In 2017, the police killed 1,147 people;[20] that year, only fourteen days passed without a police killing.[21] That number has only increased: in 2018, the police killed 1,164 people.[22] Tellingly, police killings disproportionally impact communities of color, particularly the Black community.[23]

14. *Id.*

15. *See* Charles Epp & Steven Maynard-Moody, *Driving While Black*, WASH. MONTHLY (Feb. 2014), https://washingtonmonthly.com/magazine/janfeb-2014/driving-while-black [https://perma.cc/85KN-JSGS].

16. Bill Quigley, *18 Examples of Racism in the Criminal Legal System*, HUFFINGTON POST (Oct. 3, 2016), https://www.huffingtonpost.com/entry/18-examples-of-racism-in-criminal-legal-system_us_57f26bf0e4b095bd896a1476 [https://perma.cc/W2QP-Q66Z].

17. Angela J. Davis, POLICING THE BLACK MAN, *supra* note 11, at xi, xvi.

18. Phillip Atiba Goff, Tracey Lloyd, Amanda Geller, Steven Raphael, & Jack Glaser, CTR. FOR POLICING EQUITY, THE SCIENCE OF JUSTICE RACE, ARRESTS, AND POLICE USE OF FORCE 15 (2016), https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf [https://perma.cc/7J8J-GH45]; *see also* Jacqueline Howard, *Black Men Nearly 3 Times as Likely to Die from Police Use of Force, Study Says*, CNN (Dec. 20, 2016), https://www.cnn.com/2016/12/20/health/black-men-killed-by-police/index.html [https://perma.cc/M8HW-228K].

19. Laurie Vazquez, *The Science Behind Why Cops Kill Black Men - and How to Fix It*, BIGTHINK (July 9, 2016), http://bigthink.com/laurie-vazquez/the-science-behind-why-cops-kill-black-men-and-how-to-fix-it [https://perma.cc/JJM7-SY9Q].

20. *2017 Police Violence Report*, https://policeviolencereport.org [https://perma.cc/L3MR-3Q9A] (last visited June 16, 2019).

21. Kaitlyn D'Onofrio, *The Data Is In: Police Disproportionately Killed Black People in 2017*, DIVERSITYINC (Jan. 3, 2018), https://www.diversityinc.com/data-police-disproportionately-killed-black-people-2017 [https://perma.cc/ZJZ5-3DNY].

22. MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org [https://perma.cc/74BH-DU9Y] (last updated May 15, 2019).

23. DAVIS, *supra* note 11, at xv ("While more whites are killed by law enforcement than people of color, African Americans are killed at a disproportionate rate. In fact, black men are 21 times more likely to be killed by police than white men.").

Police violence targeting the Black community is far from new. Our current system of policing stems from historically racist policing structures, like slave patrols.[24] In the post-Civil Rights Era, law enforcement officers enforced Jim Crow and segregation with ruthless methods, like deploying dogs and fire hoses against unarmed Black individuals.[25] Police still use these methods of oppression today: for instance, police dogs were used to control people of color in Ferguson, Missouri, in 2015[26] and Bakersfield, California, in 2017.[27] Our nation's history of policing is drenched in Black blood,[28] a sentiment acknowledged even by former FBI Director James Comey.[29]

Given the deep entrenchment of this racist legacy, how might the U.S. change its conduct? First, it must acknowledge that a problem exists. In December 2015, *The Washington Post* and ABC asked people whether they thought recent police killings of unarmed Black men were isolated events or patterns. The majority stated that they believed the deaths were isolated incidents.[30] Five months later, a separate survey posing a similar question showed some progress, with only 39% of people believing the killings were isolated.[31]

Although skeptics may claim that there is no underlying racial component to police violence,[32] the fact remains that Black individuals make up 30% of all those killed by police while accounting for only 13% of the nation's population.[33] The disparity between rates of Black people being killed by officers compared to other races is stark. Black people are three times more likely to be killed by police than

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24. *See* Corinthia Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 528 (2017).

25. *See* TEDx Talks, *David Harris, After Ferguson: What Policing in America Is Missing*, YOUTUBE (June 4, 2015), https://www.youtube.com/watch?v=VRP5JK5CebI [https:// perma.cc/AYB2-65AA].

26. *See id*.

27. *See* Rosalina Nieves, *Police Allegedly Beat Teenage Girl They Mistook for Adult Male Suspect*, CNN (July 15, 2017), https://edition.cnn.com/2017/07/14/us/teen-police-assault-claim-california-trnd/index.html [https://perma.cc/EMG6-3EH3].

28. *See* TEDx Talks, *supra* note 25.

29. James B. Comey, Georgetown University Speech on Race and Law Enforcement (Feb. 12, 2015), https://www.americanrhetoric.com/speeches/jamescomeygeorgetownraceandlaw.htm [https: // perma.cc/4LA3-YFX6] ("First, all of us in law enforcement must be honest enough to acknowledge that much of our history is not pretty. At many points in American history, law enforcement enforced . . . a status quo that was often brutally unfair to disfavored groups . . . . [W]e cannot forget our law enforcement legacy . . . [because] the people we serve and protect cannot forget it either.").

30. David A. Graham, *Systemic Racism or Isolated Abuses? Americans Disagree*, THE ATLANTIC (May 7, 2015), https://www.theatlantic.com/politics/archive/2015/05/systemic-racism-or-isolated-abuse-americans-disagree/392570/ [https://perma.cc/A7VX-UDJ9].

31. *Id*.

32. *Id*.

33. Carl Bialik, *The Police Are Killing People as Often as They Were Before Ferguson*, FIVETHIRTYEIGHT (July 7, 2016), https://fivethirtyeight.com/features/the-police-are-killing-people-as-often-as-they-were-before-ferguson/ [https://perma.cc/3AA8-7Y55].

white people,[34] and "black males aged 15-34 were 9 times more likely than other Americans to be killed by law enforcement . . . [and] killed at 4 times the rate of young white men."[35] Alarmingly, in thirteen of the one hundred largest U.S. cities—where 27% of policing killings occurred from January 2013 to December 2016[36]—the police killed Black individuals at higher rates than the national murder rate.[37]

The rhetoric used to excuse these killings is that the suspects were dangerous, probably armed, and involved in violent crime.[38] As one troubling illustration of this, "in all of the cases where Black men were shot and killed [since Trayvon Martin's death in 2012], the officers claimed that they felt threatened, even though the men were unarmed and often running away or retreating."[39] Indeed, facts show that the portrayal of dangerousness is heavily biased and misguided. In 2014, 69% of Black people killed by police were not involved in violent crime and were unarmed.[40] Furthermore, the level of violent crime in an area does not make it any more or less likely the police will kill.[41] Race, as highlighted above, is a much stronger indicator.

B: An Institutionalized Failure of Police Accountability

"[U]nderreported, underinvestigated, underprosecuted and underconvicted."[42] This is the current norm for how our system handles police misconduct. Although not every police officer engages in misconduct, a nationwide system of institutionalized failure—a rotten barrel problem—exists.[43] This Article posits that two important factors exacerbate this systemic institutional failure: (1) a lack

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34. *Id*.

35. Jon Swaine & Ciara McCarthy, *Young Black Men Again Faced Highest Rates of US Police Killings in 2016*, THE GUARDIAN (Jan. 8, 2017), https://www.theguardian.com/us-news/2017/jan/08/the-counted-police-killings-2016-young-black-men [https://perma.cc/MAU6-BJUC].

36. *Police Accountability Tool (January 2013-December 2016)*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/compare-police-departments/ [https://perma.cc/B9YG-DYGS] (last visited June 2, 2019).

37. MAPPING POLICE VIOLENCE, *supra* note 22.

38. Ron Hosko, *Ron Hosko: The Truth About Fatal Shootings by Police*, FOX NEWS (Jan. 14, 2018), https://www.foxnews.com/opinion/ron-hosko-the-truth-about-fatal-shootings-by-police [htt ps: //perma.cc/674R-6364].

39. DAVIS, *supra* note 11, at xiii.

40. MAPPING POLICE VIOLENCE, *supra* note 22.

41. *See* MAPPING POLICE VIOLENCE, *supra* note 22.

42. Carter, *supra* note 24, at 526.

43. *See* 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, 483–84 (2009) (discussing the rotten barrel theory, which posits that patterns of police misconduct stem from "inadequate management policies and practices, which include written policies to govern officer conduct, adequate procedures for investigating alleged misconduct, meaningful discipline where such allegations are sustained, and procedures for identifying and correcting patterns of misconduct").

of data on police violence and (2) a failure of our current oversight methods to hold police departments accountable for their actions.

It is difficult to hold an institution accountable for its failure when there is not sufficient data to demonstrate a problem. The federal government keeps records on everything from shark attacks to pig populations, yet it lacks reliable data on how many people are shot by police officers each year.[44] Although the federal government has substantial power to hold police departments accountable for their actions, its reliance on *voluntarily* reported data from police departments[45] and from databases such as the National Vital Statistics System (NVSS) leads to severely inaccurate statistics on the number of civilian deaths caused by police killings.[46] For example, the NVSS uses death certificates to count police killings, and it only classifies as police-related deaths those whose certificates "explicitly state that the deceased passed away due to injuries from an altercation with law enforcement."[47] This methodology results in a drastic understatement of the actual number of civilian deaths caused by police violence.[48] NVSS counted 523 deaths in 2015, but *The Guardian* calculated 1,086.[49] Stated another way, the federal government identified *less than half* of the actual deaths that resulted from police violence. It could be argued that news outlets are not reliable sources for counting deaths, but in 2016, after its own methodology had been discredited, the DOJ adopted a new method of counting deaths modeled after *The Guardian*'s system.[50] Yet even though news outlets such as *The Guardian* and *The Washington Post* have historically done a better job at tracking these deaths than the DOJ, they still undercount police killings.[51] A 2017 study published by PLoS Medicine using wildlife ecology techniques determined that media sources are still missing about 7% of cases.[52] For an issue as important as this one, it is concerning how poorly our nation has monitored this epidemic.

In addition to failing to collect accurate data, our policing system has not adequately been held accountable for its misconduct. Although mechanisms at the local, state, and federal levels are in place to oversee police department misconduct, many of them lack the ability to initiate reform and some act as a barrier to achieving it.

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44. Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 118 (2016).

45. Carter, *supra* note 24, at 555.

46. *See* Kate Wheeling, *How Many People Are Really Killed by Police in the United States?*, PAC. STANDARD (Oct. 10, 2017), https://psmag.com/social-justice/how-many-people-are-killed-by-police-in-the-united-states [https://perma.cc/5CNU-KTE8].

47. *Id*.

48. *See id*.

49. *Id*.

50. *Id*.; *see also* Jon Swaine, *Police Will Be Required to Report Officer-Involved Deaths Under New US System*, THE GUARDIAN (Aug. 8, 2016), https://www.theguardian.com/us-news/2016/aug/08/police-officer-related-deaths-department-of-justice [https://perma.cc/T6YZ-G8K4].

51. *See* Wheeling, *supra* note 46.

52. *Id*.

At the local and state levels, various measures of accountability exist. For example, citizens can help monitor police departments through the use of Civilian Review Boards.[53] Although responsibilities differ between boards, they usually investigate complaints, oversee internal affairs investigations and make recommendations, or do a combination of both, with a primary focus on analyzing broad patterns of police misconduct.[54] In reality, however, this method of oversight has very little disciplinary impact on police departments, as they often refuse to cooperate with the boards or else reject their findings or recommendations. Often, citizens are unaware of the process to begin with.[55] Additionally, police departments can initiate internal investigations of their officers through their Internal Affairs offices. Unfortunately, even for serious infractions, officers usually face nominal punishment, such as desk duty or *paid* leave.[56] Finally, police officers could be charged with violating a range of state and local criminal laws.[57] In practice, however, these types of prosecutions are rarely undertaken, and when they are, the officers are frequently acquitted.[58]

At the federal level, constitutional oversight and statutory oversight are the main means of reform. The U.S. Supreme Court can dictate the floor for what is deemed a constitutional violation of civilian rights by law enforcement.[59] However, the Supreme Court's foundational rulings on use of force, in *Graham v. Connor*[60] and *Tennessee v. Garner*,[61] shield police from accountability.[62] *Garner* allows an officer to use deadly force if it is reasonable and based on probable cause of a threat of serious physical harm,[63] and *Graham* holds that "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[64] These standards are vague and indefinite, and often are interpreted leniently in favor of law enforcement, instead of providing justice for civilians. As one example of how *Graham* obfuscates jury instructions, jurors are provided with such statements as, "officers are often forced to make split-second decisions, and . . . those decisions

53. Carter, *supra* note 24, at 538–39.

54. Olugbenga Ajilore, *How Civilian Review Boards Can Further Police Accountability and Improve Community Relations*, SCHOLARS STRATEGY NETWORK (June 25, 2018), https://scholars.org/brief/how-civilian-review-boards-can-further-police-accountability-and-improve-community-relations [https://perma.cc/46TH-8J4B].

55. *See* Carter, *supra* note 24, at 539.

56. *Id.* at 540.

57. *Id.* at 537.

58. *Id.*

59. *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1889–90 (2015).

60. 490 U.S. 386 (1989).

61. 471 U.S. 1 (1985).

62. Celisa Calacal, *These Two Supreme Court Cases Protect Police Who Use Excessive Force*, SALON (Aug. 12, 2017), https://www.salon.com/2017/08/12/these-two-supreme-court-cases-protect-police-who-use-excessive-force_partner/ [https://perma.cc/29M3-4YZ8].

63. 471 U.S. at 11–12.

64. 490 U.S. at 396.

should be evaluated based only on what the cop knew at that moment."[65] Such loose standards can produce worrisome consequences by "excusing unacceptable fears" of Black people derived from both explicit and implicit biases.[66] Ngozi Ndulue, Senior Director of criminal justice programs at the NAACP, reiterates that "[t]here is more fear of [Black people], and in particular [Black] men, that is not justified, that's just based on who they are. So in these cases, [an officer's] fear and an unreasonable fear can end up being someone's death sentence."[67] Justice Sotomayor highlighted our nation's willingness to let police brutality go unchecked in her passionate dissent in *Kisela v. Hughes*.[68] She wrote that the current legal regime of accountability for police violence "sends an alarming signal to law enforcement officers and the public . . . It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[69]

From a statutory standpoint, some federal laws permit citizens to seek remedies, both criminal and civil, when their rights are violated.[70] For example, 18 U.S.C. § 242 ("Section 242") criminalizes police conduct that is racially motivated.[71] In theory, this statute is better situated than criminal prosecutions to effectuate reform. Federal prosecutors handle Section 242 cases, thereby benefiting from distance that limits local prosecutors' ability to hold police officers accountable.[72] Discouragingly, this statute is rarely used for reform. It acts more often as an obstacle to justice, given the immense difficulty of successfully prosecuting an officer under the required standard.[73] To find an officer guilty requires the government to prove that the officer "willfully" deprived a citizen of her federal or constitutional rights.[74] In *Screws v. United States*, Robert Hall, a Black man ar-

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65. Martin Kaste, *Prosecutors Face Challenges Convicting Police Officers Involved in Shootings*, NPR (June 29, 2017), https://www.npr.org/2017/06/29/534916038/prosecutors-face-challenges-convicting-police-officers-involved-in-shootings [https://perma.cc/28F2-U98G].

66. *Id*.

67. *Id*.

68. *See* Adam Liptak, *Supreme Court Rules for Police Officer in Excessive Force Case*, N.Y. TIMES (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/us/politics/supreme-court-rules-for-police-officer-in-excessive-force-case.html [https://perma.cc/EA4U-5ZK2].

69. 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

70. Carter, *supra* note 24, at 528.

71. 18 U.S.C. § 242 (2017) ("Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both . . . .").

72. *See* Judith A.M. Scully, *Rotten Apple or Rotten Barrel?: The Role of Civil Rights Lawyers in Ending the Culture of Police Violence*, 21 NAT'L BLACK L.J. 137, 144 (2009) ("Since a federal prosecutor does not have to rely on local police officers to 'make their cases,' theoretically it would be more likely for such a criminal action to be successfully prosecuted.").

73. *See id*.

74. 18 U.S.C. § 242.

rested for a stolen tire, was beaten unconscious and brutally murdered by officers.[75] Yet when the federal government sued pursuant to Section 242, the Supreme Court stated that a violation of local law does not necessarily equate to a violation of federal rights.[76] Specifically, the Court held that "[t]he fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States."[77] This case demonstrates a grave limitation of Section 242: the difficulty of clearing the "evidentiary hurdle" required for finding that law enforcement acted willfully under the statute.[78]

A federal civil cause of action, 42 U.S.C. § 1983 (Section 1983),[79] authorizes citizens to sue persons who, "acting under color of any statute ordinance, regulation, custom, or usage, of any State or Territory," violate their civil rights.[80] In theory, this statute should produce a high level of accountability, as any civilian can initiate a claim. Like Section 242, this statute allows for distance in the adversarial process, as private attorneys—not local prosecutors—file these cases.[81] However, for a number of reasons, these suits are rarely successful.[82] First, the victims of police violence often start with a severe disadvantage: they are usually persons from low-income backgrounds who have been charged with criminal violations, weakening their perceived credibility.[83] Their only witnesses tend to be friends or family, who are viewed as interested parties also lacking credibility.[84] Accordingly, juries are more likely to believe the police than the plaintiffs.[85] Second, the high cost of bringing these suits presents a stark obstacle, as the typical

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75. *See* 325 U.S. 91, 92 (1945) (stating that after Hall stepped out of the police car at the courthouse, and while he was still handcuffed, officers "began beating [Hall] with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds . . . [and after Hall] had been knocked to the ground, they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the courthouse yard into the jail and thrown upon the floor, dying. An ambulance was called, and Hall was removed to a hospital, where he died within the hour and without regaining consciousness.").

76. *Id.* at 108; *see also* Carter, *supra* note 24, at 531.

77. Screws v. United States, 325 U.S. at 108–09.

78. Scully, *supra* note 72.

79. Carter, *supra* note 24, at 529–30.

80. 42 U.S.C. § 1983 (2017) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 . . . .").

81. *See* Scully, *supra* note 72, at 147.

82. Lynda Dodd, *Civil Rights Suits Against the Police Are an Essential Tool for Enforcing the Constitution. But Cops Rarely Pay and Settlements Don't Lead to Change*, USCENTRE (Nov. 18, 2015), http://blogs.lse.ac.uk/usappblog/2015/11/18/civil-rights-suits-against-the-police-are-an-essential-tool-for-enforcing-the-constitution-but-cops-rarely-pay-and-settlements-dont-lead-to-change/ [https://perma.cc/2Q9Q-JMFP].

83. *See* Scully, *supra* note 72, at 148.

84. *See id*.

85. *See* Carter, *supra* note 24, at 534.

victim has limited financial means.[86] Finally, a limitation of Section 1983's utility is qualified immunity, a statutory protection for law enforcement that shields them from prosecution under many circumstances. If officers "are acting within the scope of their employment and their behavior does not demonstrate a clear disregard for constitutional rights[,]" then the doctrine of qualified immunity shields them from civil suit.[87] To make matters worse, if an officer's conduct does not afford him protection under this doctrine, he generally can "still benefit from departmental indemnification policies."[88]

Ultimately, even though Section 1983 is by far the most utilized tool for enforcing constitutional rights against officers—"[i]n 2013, private litigants filed over 15,000 cases . . . and prisoners filed well over 30,000"[89]—in the rare case that a settlement or judgment results, academic studies show that civil suits do not result in effective reform.[90] This is because Section 1983 fails to address the institutional problem associated with police violence. These suits instead focus solely on the conduct of the individual defendant police officer at the time of the alleged misconduct. In fact, "evidentiary rules prohibit judges and juries in Section 1983 cases of being advised of the police officer's history of misconduct . . . [and they] are not informed about how one police officer's record compares to that of his colleagues."[91] The structure of these cases problematically does not allow for an understanding and evaluation of the potential pattern of misconduct in an officer's department, thereby shifting focus away from systemic issues to individual ones.[92] As a result, Section 1983 creates "the worst of both worlds"—providing neither justice for plaintiffs nor reform for police departments.[93] Both Sections 242 and 1983 are therefore ineffective tools to promote justice.

The failures in the above police accountability mechanisms signal a need for a more effective remedy to effectuate reform. This Article proposes that another federal statute is better equipped to facilitate change: 42 U.S.C. § 14141 ("Section 14141"), recently re-codified as 34 U.S.C. § 12601.

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86. *See id*.

87. Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CAL. L. REV. 263, 275–276 (2017).

88. *Id*.

89. Dodd, *supra* note 82.

90. Walker & MacDonald, *supra* note 43, at 494.

91. Scully, *supra* note 72, at 149.

92. *See* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 237 (2017).

93. Dodd, *supra* note 82.

II.
OVERVIEW OF SECTION 14141

A. The History of Section 14141

For fifteen minutes on March 3, 1991, four white police officers savagely beat Rodney King, a Black man, in the streets of Los Angeles.[94] This beating was filmed, and in "one of the first police brutality videos of its kind," four officers were seen tasing, kicking, and hitting King with their batons upwards of fifty-three times.[95] Rodney King, who witnesses stated did not resist, ended up with a broken leg, bruises, and a scar from the stun gun.[96] The officers, by contrast, ended up with an acquittal.[97] This unjust beating and verdict left Los Angeles in a state of unrest. For days afterward, rioting, looting, violence, and arson ravaged the city, ending with 55 people dead—including ten individuals shot by police officers and National Guardsmen—and over 2,000 injured.[98]

The beating of a Black man by officers was nothing new. What was significant was that it was caught on video. The media coverage of the beating catalyzed national conversations on police brutality, including a series of Congressional hearings on police misconduct.[99] What the hearings ultimately unveiled was the difficulty of seeking relief for police civil rights violations, even when the federal government was the litigant.[100] For example, in *United States v. City of Philadelphia*,[101] the DOJ sued the Philadelphia Police Department under 42 U.S.C. § 1985

94. Karen Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots [https://perma.cc/M49P-RC8H].

95. Cydney Adams, *March 3, 1991: Rodney King Beating Caught on Video*, CBS NEWS (Mar. 3, 2016), https://www.cbsnews.com/news/march-3rd-1991-rodney-king-lapd-beating-caught-on-video [https://perma.cc/BC3W-BH5V]; *see also* Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (Apr. 30, 1992), https://archive.nytimes.com/www.nytimes.com/books/98/02/08/home/rodney-verdict.html [https://perma.cc/R9DF-BTKA] (stating that Rodney King was actually beaten 56 times).

96. Adams, *supra* note 95.

97. *Id.* (discussing how a majority white jury found the four officers not guilty of the main charges after only one day of deliberation).

98. *Id.*; Bates, *supra* note 94.

99. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., ROUNDTABLE ON STATE AND LOCAL LAW ENFORCEMENT POLICE PATTERN OR PRACTICE PROGRAM 42 USC § 14141 (June 3, 2010), http://web.law.columbia.edu/sites/default/files/microsites/contract-economic-organization/files/1-Pattern%20or%20Practice%20Background%20Paper.pdf [https://perma.cc/9L2A-6T29] [hereinafter DOJ ROUNDTABLE]; Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3230 (2014) ("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.").

100. *See* DOJ ROUNDTABLE, *supra* note 99 ("Following the 1991 Rodney King incident . . . [and] a series of Congressional hearings . . . [i]t became apparent that the federal government had limited capability to address civil rights violations by police agencies.").

101. 482 F. Supp. 1248 (E.D. Pa. 1979).

for engaging in a pattern of abuse that systemically violated citizens' constitutional rights. However, a federal judge dismissed the claim, stating that the DOJ lacked standing to bring such a lawsuit "absent an express grant of the necessary power by an Act of Congress."[102] In *City of Los Angeles v. Lyons*,[103] police officers choked Adolph Lyons, a Black man, until he lost consciousness after they pulled him over for a mere traffic violation.[104] When Lyons sought an injunction to prevent the LAPD from further use of chokeholds, the Supreme Court ruled that he did not have standing because he could not guarantee that he would interact with those officers again and that they would use a chokehold.[105] Responding to this lack of federal governmental oversight, Congress enacted the Violent Crime Control and Law Enforcement Act in 1994 and within it, 42 U.S.C. § 14141.[106]

B. The Operation of Section 14141

Under the authority of Section 14141, the U.S. Attorney General has the power to conduct investigations and initiate civil litigation for cases that involve a "pattern or practice of conduct by law enforcement officers" that violates constitutional or federal rights.[107] The Special Litigation Section of the Civil Rights Division of the Department of Justice mainly oversees the usage of this provision.[108] During the twenty-four years that this statute has been in effect, the DOJ has only conducted seventy investigations on law enforcement conduct around the nation.[109]

In a pattern-or-practice case, the Civil Rights Division considers two threshold questions when deciding whether to conduct a preliminary inquiry into a law enforcement agency. The first is, "would the allegations, if proven, establish a violation of the Constitution or federal laws?"[110] If the answer to this is yes, then the second question is, "would the allegations, if proven, constitute a pattern or

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102. City of Philadelphia, 482 F. Supp. at 1252–53 (explaining that Section 1985 establishes individual liability for persons who interfere with another's constitutional rights).

103. 461 U.S. 95, 109 (1983).

104. *Id.* at 97–98.

105. *Id.* at 110.

106. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT (2017), https://www.justice.gov/crt/file/922421/download [https://perma.cc/JFJ2-6K9K] [hereinafter DOJ POLICE REFORM].

107. 42 U.S.C. § 14141 (1994) (re-codified at 34 U.S.C. § 12601 (2019)).

108. DOJ POLICE REFORM, *supra* note 106, at 3.

109. Brandon Patterson, *Rodney King and the LA Riots Changed Policing. Now Jeff Sessions Wants to Turn Back the Clock*, MOTHER JONES (Apr. 27, 2017), https://www.motherjones.com/politics/2017/04/rodney-king-jeff-sessions-consent-decrees-policing/ [https://perma.cc/H4BP-RUC6]. Though the 2017 DOJ report Patterson cites states that the department has conducted only sixty-nine investigations, Trump's DOJ has since opened one investigation, bringing the total to seventy. *See* Ryan J. Reilly, *5 Years After Ferguson, The Justice Department Has All But Ended Federal Police Reform*, HUFFPOST (Aug. 9, 2019), https://www.huffpost.com/entry/ferguson-justice-department-police-reform-trump-pattern-or-practice_n_5d4b18b3e4b0066eb70bad87 [https://perma.cc/75JY-74KY].

110. DOJ POLICE REFORM, *supra* note 106, at 5.

practice, as opposed to sporadic or isolated violations of the Constitution or federal laws?"[111] The department then examines the complaints received from organizations focused on police and civil rights issues; attorneys and parties in civil suits with police departments; police officers, their representatives, or the department itself; prosecutors and criminal defense attorneys; judges; investigative reports from the academic community; and referrals from the FBI, other parts of the Civil Rights Division, or other federal government branches.[112]

The Division has opened hundreds of initial preliminary inquiries, and it has identified substantially more jurisdictions that meet the basic criteria to warrant opening an investigation than it is able to actually investigate.[113] Given its limited resources, it prioritizes among the complaints it receives. The Division prefers allegations that are common across jurisdictions, such as unlawful use of force, unlawful stops and seizures, and racial discrimination.[114] It also considers other factors, including the size and type of the department; the amount of credible information available; the potential precedent the investigation could set;[115] and whether other forms of federal intervention would better handle the case.[116] If after evaluating these conditions the Division believes an investigation is warranted, it makes a recommendation to the Assistant Attorney General for Civil Rights, who decides whether to open an investigation.[117]

Once the pattern-or-practice investigation has commenced, the Division examines two main issues: (1) whether a pattern or practice of police misconduct exists, and (2) if so, why the pattern or practice exists.[118] To address these questions, the Division must take a comprehensive look at the law enforcement agency. It does this by examining its policies, procedures, practices, training systems, methods of accountability, incident-related data, and data collection mechanisms.[119] To better understand any existing issues, the Division engages with community members, policing experts, outreach specialists, law enforcement leadership, and other affiliated groups.[120] Additionally, the Division often receives significant help from the local United States Attorney General's Office, especially with negotiating and implementing the proposed reform.[121] The DOJ's stated goal is that full pattern-or-practice investigations should take at most a year

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111. *Id.*

112. U.S. DEP'T OF JUSTICE, POLICE MISCONDUCT PATTERN OR PRACTICE PROGRAM 2 (2001), http://web.law.columbia.edu/sites/default/files/microsites/contract-economic-organization/files/10-SPL-Pattern%20or%20Practice%20Program%20FAQ.pdf [https://perma.cc/CX23-T7YZ] [hereinafter DOJ POLICE MISCONDUCT].

113. DOJ POLICE REFORM, *supra* note 106, at 5–6.

114. *Id.* at 6.

115. DOJ POLICE MISCONDUCT, *supra* note 112, at 3.

116. DOJ POLICE REFORM, *supra* note 106, at 7.

117. *Id.* at 8.

118. *Id.* at 9.

119. *Id*.

120. *Id.* at 9–10.

121. *Id.* at 14.

and a half from start to finish.[122] Due to the complexity of these investigations, many take at least a year.[123]

Since the statute's enactment and not counting ongoing investigations, 63% of investigations have found a pattern-or-practice violation, have resulted in the law enforcement agency entering a reform agreement, or both.[124] *Around three-quarters* of the investigations conducted during President Obama's tenure resulted in a pattern-or-practice violation, a reform agreement, or both.[125] If it finds a violation, the Division issues a "Findings Letter" to the DOJ and to the public.[126] The Findings Letter is an important catalyst for negotiation and reform. After it is published, the DOJ usually meets with police and community leaders to discuss the way forward.[127] The preferred path is the issuance of a joint statement by the Department and the jurisdiction outlining a framework for the implementation of needed reforms,[128] usually in the form of a court-enforceable consent decree.[129] Sometimes the reform agreement takes the form of a memorandum of agreement (MOA), "enforceable in federal court as a contract between the United States and the local jurisdiction, rather than as a consent decree actively overseen by a federal court."[130] MOAs avoid the delay and costs of adversarial litigation, but the DOJ can pursue litigation if necessary.[131] Once it is finalized, a reform agreement sets out a timeline for the jurisdiction to meet its reform goals. These timelines vary from a few years to over a decade.[132]

C. The Advantages and Disadvantages of Section 14141

1. Section 14141's Mechanisms of Reform

This Article argues that three critical components of Section 14141 demonstrate its effectiveness. First, it allows the DOJ to pursue reform both implicitly through means such as political pressure, and explicitly through investigations

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122. DOJ POLICE MISCONDUCT, *supra* note 112, at 5.

123. *Id.* at 5–6.

124. DOJ POLICE REFORM, *supra* note 106, at 3, 15. The report did not include the subsequent finding of a pattern-or-practice violation from the 2015 investigation into the Chicago Police Department, as it had not been determined at the time of the report's publication. The Chicago investigation ended in 2017 with a finding of a pattern-or-practice violation. *See* Debra Weiss, *Justice Department Will Oppose Consent Decree to Reform Chicago Police Department*, ABA JOURNAL (Oct. 10, 2018), http://www.abajournal.com/news/article/justice_department_will_oppose_consent_decree_to_reform_chicago_police_depa [https://perma.cc/2P5P-VDPK].

125. DOJ POLICE REFORM, *supra* note 106, at 15.

126. *Id.* at 15–16.

127. *Id.*

128. *Id.* at 17–18.

129. *Id.* at 20.

130. DOJ POLICE REFORM, *supra* note 106, at 21.

131. *Id.* at 18–19.

132. *Id.* at 35.

and/or lawsuits.[133] Second, it encourages law enforcement agencies to change their behavior to avoid the costs of litigation under the statute.[134] Third, it reduces the information cost for law enforcement agencies to understand what is required to address misconduct.[135]

According to scholar Joanna Schwartz, certain factors are determinative of any such structure's ability to influence police behavior.[136] To successfully facilitate reform, it is necessary to have (1) leverage to enable the reformer to place pressure on law enforcement agencies to change their behavior; (2) motivation to ensure that the reformer stays committed to her goals; and (3) resources, such as time, money and personnel, to implement institutionalized reform.[137] These factors come into play on all levels of government. Combined, they influence the ability to effectively police the police.

The first factor, leverage, is key to a prosecuting agency's ability to reform police conduct.[138] Section 14141 provides leverage to the DOJ to investigate and to sue law enforcement agencies.[139] The Division's initial investigation into a law enforcement agency shines an enormous spotlight on the police department.[140] This spotlight puts political pressure on that department to initiate preliminary reforms and incentivizes other departments to reform preemptively so as not to attract that same attention.[141] The investigation process also promotes reform once the Division releases its Findings Letter to the public. As previously mentioned, this letter prompts departments to collaborate with the Division on reform methods to avoid litigation.[142] Moreover, it informs the public of police misconduct and provides ammunition for private civil lawsuits,[143] thereby encouraging the department to implement measures of reform to avoid additional costly litigation. Finally, the DOJ uses its investigation to strongly suggest that a consent decree will follow if the police department chooses not to implement reforms.[144]

Should the law enforcement agency refuse to cooperate, the Division can utilize its other means of leverage: the ability to sue.[145] "When the DOJ has sued law

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133. *See* Rachel Harmon, *Evaluating and Improving Structural Reform in Police Departments*, 16 CRIMINOLOGY & PUB. POL'Y 617, 617 (2017) ("If Section 14141 litigation forces reform that reduces constitutional violations, increases accountability, and strengthens public confidence in a department, it might considerably improve policing.").

134. *Id.* at 623.

135. *Id.*

136. Joanna Schwartz, *Who Can Police the Police?*, 11 U. CHI. LEGAL F. 437, 439 (2016).

137. *Id*.

138. *Id.* at 440.

139. *Id.* at 447.

140. Harmon, *supra* note 133, at 621.

141. *Id*.

142. *See supra* notes 126–27 and accompanying text.

143. Harmon, *supra* note 133, at 619.

144. Zachary Powell, Michele Bisaccia Meitl, & John L. Worrall, *Police Consent Decrees and Section 1983 Civil Rights Litigation*, 16 CRIMINOLOGY & PUB. POL'Y 575, 579–80 (2017).

145. Schwartz, *supra* note 136, at 447.

enforcement agencies, it has only lost once—all other cases have resulted in a consent decree."[146] Significantly, even in the one case the DOJ lost, the police department ultimately consented to a settlement agreement to implement reform.[147] Given the odds, "departments tend to settle with the DOJ to avoid embarrassment" instead of waiting to be sued.[148] When departments settle, what usually follows is the DOJ's most common method of reform: a consent decree.[149]

Consent decrees are "court-ordered and court-enforceable settlements" overseen by a federal judge.[150] Consent decrees give federal courts substantial leverage over law enforcement agencies to facilitate real change. For this reason, the consent decree is the DOJ's most effective tool.[151] Consent decrees, and Section 14141 reform in general, target institutional rather than individual change by focusing on what Samuel Walker, one of the nation's leading police experts, calls PTSR—policy, training, supervision, and review.[152] Additionally, nearly all consent decrees require improving civilian police misconduct complaint mechanisms, and some consent decrees require the implementation of body cameras, thereby dissuading misconduct and aiding plaintiffs in private litigation.[153] Another crucial element of consent decrees is the installation of an independent monitor, an officer of the court tasked with overseeing the reform process.[154] A study by the Vera Institute of Justice found that the independent monitor was one of the key factors that led to Pittsburgh's compliance with its police department's consent decree.[155] A Harvard Kennedy School study examining the effectiveness of a consent decree on reforming the Los Angeles Police Department (LAPD) found that the decree resulted in notably different policing practices.[156] For example, serious use of force incidents decreased by 15%.[157] While the system of consent decrees

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146. Schwartz, *supra* note 136, at 447.

147. *See* Anna Johnson, *What the DOJ Settlement Means for Alamance County*, TIMES NEWS (Aug. 8, 2016), http://www.thetimesnews.com/news/20160818/what-doj-settlement-means-for-alamance-county [https://perma.cc/KKH9-UGPN]. The DOJ began appealing this decision at trial, but the Alamance police department agreed to reform if the appeal was dropped. *Id.*

148. Carter, *supra* note 24, at 535.

149. Powell, Meitl & Worrall, *supra* note 144, at 578.

150. Darrell L. Ross, CIVIL LIABILITY IN CRIMINAL JUSTICE 212 (7th ed. 2006).

151. DOJ POLICE REFORM, *supra* note 106, at 20.

152. Dodd, *supra* note 82; Samuel Walker, A FRAMEWORK FOR ACCOUNTABILITY: PTSR, BOARD CONNECTION (Can. Ass'n of Police Governance), Winter 2014, at 16.

153. Harmon, *supra* note 133, at 619.

154. Walker & MacDonald, *supra* note 43, at 502–03 (describing the independent monitoring role of the Special Litigation Section of the Civil Rights Division of the DOJ).

155. ROBERT DAVIS, CHRISTOPHER ORTIZ, NICOLE HENDERSON, JOEL MILLER, & MICHELLE MASSIE, VERA INSTITUTE OF JUSTICE, TURNING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE 64 (2002).

156. CHRISTOPHER STONE, TODD FOGLESONG, & CHRISTINE M. COLE, HARVARD KENNEDY SCHOOL, POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 2 (2009), http://assets.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf [https:// perma.cc/5KQS-S6DM].

157. *Id.* at 1.

is not perfect, there are "no cases where a consent decree is believed to have completely failed."[158]

Section 14141 also has a deterrent effect on police departments. The theory is that law enforcement agencies will adopt preemptive reformative measures to avoid the costs of the legal remedies for police misconduct such as civil lawsuits or the exclusionary rule.[159] There is a common conception that litigation produces no real financial deterrent effect because settlement payments come from government general funds, not law enforcement budgets.[160] However, Joanna Schwartz's 2016 study of the financial aspects of police misconduct lawsuits shows that this is not always the case. Some law enforcement agencies do pay for the settlements, with large agencies more likely to pay than small ones and state agencies more likely to pay than city agencies.[161] Schwartz also argued that "the notion that law enforcement agencies will have financial incentives to reduce claim costs *if and only if* lawsuits are paid from their budgets is incorrect," meaning there are many other financial factors that can deter a department from engaging in misconduct.[162]

Finally, Section 14141 reduces information costs for other police departments by showcasing what the Division does and does not deem a constitutional violation. The DOJ has defined what constitutes both "best practices" and "worst practices" in police accountability.[163] The elements of "best practices" are found in almost all consent decrees and include (1) a "state of the art" use of force policy, (2) a supervised system for recording accurate use of force data that is critically reviewed, (3) an early intervention system designed to track officer performance, and (4) a revamped and more accessible citizen complaint process.[164] These four requirements set a floor for constitutional policing. On the other hand, the DOJ's Finding Letters lay out the "worst practices."[165] These include violations related to (1) "the nature and underlying causes of officer use of excessive force," (2) "the failure of officers to complete [accurate] use of force reports," (3) the lack of substantial oversight for use of force reports, (4) and the departmental failure to evaluate and rectify patterns of improper uses of force.[166]

158. Samuel Walker, Twenty Years of DOJ "Pattern or Practice" Investigations of Local Police: Achievements, Limitations, and Questions 4 (Feb. 2017) (unpublished manuscript) (*available at* http://samuelwalker.net/wp-content/uploads/2017/02/DOJ-PP-Program-Feb24.pdf [https:// perma.cc/AS7Q-ENDQ]).

159. Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 36 (2013).

160. *See* Joanna Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1147 (2016).

161. *Id.* at 1172–73.

162. *Id*. at 1173 (emphasis added).

163. *See* Walker, *supra* note 158, at 7–9.

164. *Id*. at 7–8.

165. *Id*. at 8.

166. *Id*. at 8–9.

2. *Common Critiques of Section 14141*

Despite the many advantages of Section 14141, there are arguments against its use. To begin with, commentators argue that its effectiveness is difficult to measure, as there is little empirical research on whether it reduces police misconduct.[167] Much of the existing research concerning Section 14141's effectiveness focuses mainly on whether specific departments complied with their agreements, not whether DOJ intervention decreased constitutional violations.[168] Regardless, these studies showed that police departments were motivated to meet their reform goals.[169] Research is hampered by the lack of reliable data on police activities—like searches and stop and frisks—that lie at the heart of misconduct allegations.[170] In recent years, however, researchers have produced new studies to measure Section 14141's effectiveness. For example, one study compared the rate of Section 1983 lawsuits before and after DOJ intervention and used this as a measure of the interventions' effectiveness.[171] This study found that the "likelihood of a civil rights filing occurring may be reduced as much as 43% after DOJ intervention begins."[172] Although various factors may contribute to the reduction, "a reduction in filings would imply that . . . Section 14141 [has] some use in . . . ending practices and patterns of police misconduct."[173] Furthermore, Professor Rushin recently surveyed the impacts of Section 14141 reform—which he calls "structural reform litigation" (SRL)—conducting "in-depth interviews with various stakeholders in the SRL process."[174] His study suggests numerous advantages accompanying SRL, reinforcing that it is an effective tool for reducing police misconduct and achieving organizational reform.[175] His study also analyzed data from the Vera Institute of Justice, the Harvard Kennedy School, and the RAND Corporation—which conducted the three major studies that have evaluated the effects of SRL on DOJ-targeted law enforcement agencies—finding that "these three empirical studies provide strong evidence that SRL correlates with a reduction in misconduct."[176]

Additionally, critics argue that Section 14141 negatively affects the attitudes and behaviors of police officers. The 2005 Vera Institute evaluation of the Pitts-

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167. *See* Harmon, *supra* note 133, at 625 (concluding that "[s]ignificant questions remain about whether and how Section 14141 enforcement works").

168. Powell, Meitl & Worrall, *supra* note 144, at 577.

169. *Id*.

170. *See* Harmon, *supra* note 133, at 620 ("If there are little data about how often police use force or coercion, it is hardly a surprise that it is difficult to estimate how often they do so illegally.").

171. Powell, Meitl & Worrall, *supra* note 144, at 577.

172. *Id*. at 596.

173. Powell, Meitl & Worrall, *supra* note 144, at 597.

174. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1364–65 (2015).

175. *Id*. at 1418–19.

176. *Id*. at 1364.

burgh Police Department and its consent decree found that many of its law enforcement officers held negative attitudes towards consent decrees.[177] Perhaps unsurprisingly, Black officers were far more receptive to the reforms enacted by the consent decrees.[178] Although this effect on morale may be worrisome, it appears as though this initial reaction may be short-lived.[179] Additionally, many officers' negative attitudes towards the consent decrees relate to their belief that it will result in de-policing, a notion both the Vera and Harvard studies heavily refuted.[180] De-policing is the idea that reporting requirements take time away from crime fighting and that officers' fears of increased scrutiny and discipline result in a reduction in crime fighting.[181] However, the Vera and Harvard studies found no evidence of de-policing in departments with consent decrees.[182] On the contrary, the Harvard study of the LAPD found "a positive effect on both the quantity and quality of police activity."[183] In the wake of the LAPD consent decree, police use of force declined, crime declined, police-community relations improved (even in the poorest neighborhoods), and public safety improved.[184] A 2017 study by Professor Rushin partially filled the current gap in literature on the theory of de-policing. Although it found that a Section 14141 settlement agreement "was associated with a statistically significant increase in the frequency of several crime categories—particularly property crimes[,]" this increase "was concentrated in the years immediately after the initiation of external regulation and diminished into statistical insignificance over time."[185] Notably, the temporary nature of the increase in some crimes leads Rushin to believe that the increase is not because of the inherently cumbersome nature of the regulations.[186] Officers' jobs are not hindered due to increased paperwork or their fear of heightened disciplinary action.

Finally, some claim that consent decrees produce too high a financial burden to justify their positive results.[187] For example, the cost of hiring an external monitor and implementing the reforms associated with the LAPD settlement was likely around $100 million.[188] However, when considering factors such as the population size of Los Angeles and time period for implementing the changes, the cost to each individual taxpayer was probably about two to three dollars per year.[189]

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177. *See* Walker & MacDonald, *supra* note 43, at 522–23.

178. *Id*. at 524.

179. STONE, FOGLESONG & COLE, *supra* note 156, at 19–22.

180. *Id*.; DAVIS ET AL., *supra* note 155, at 48.

181. *See* Walker & MacDonald, *supra* note 43, at 524.

182. DOJ POLICE REFORM, supra note 106, at 39.

183. *Id*.

184. STONE, FOGLESONG & COLE, *supra* note 156, at 2.

185. Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 758–59 (2017) (citations omitted).

186. *Id*. at 768–69.

187. *See*, e.g., Walker, *supra* note 158, at 23–24.

188. Rushin, *supra* note 174, at 1393.

189. *Id*. at 1393 n.274.

From this perspective, the cost of protecting constitutional rights seems less daunting. Additionally, while reforms may present upfront expenses, they produce long-term savings. Research shows that "the risk of litigation in consent decree jurisdictions was reduced between 22 and 36 percent."[190] Data from the LAPD back this claim. The number of civil rights suits against the LAPD during its SRL era declined, suggesting that while the reform may be expensive, it pays for itself by reducing the costs of civil liability.[191] This sentiment is echoed by one of Rushin's interviewees affiliated with the Detroit Police Department: "'the amount of money that we have saved on lawsuits that we had endured for years . . . [has] paid for the cost of implementation of the monitoring two or three times' over."[192] Lastly, proponents of this critique typically only consider direct costs and fail to take into account the human and social costs of police misconduct.[193]

While over twenty years have passed since the enactment of Section 14141, there is limited empirical research examining this statute and its effects on policing practice.[194] What research exists, however, indicates that Section 14141 is a vital resource for propelling institutional change. Limitations may hamper the utility of Section 14141, but these limitations appear to be short-lived or inconclusive. Consequently, Section 14141 offers an essential avenue for ensuring constitutional policing.

3. A Lack of Resources and Changes in Motivation Hinder Section 14141 from Continually Implementing Police Reform

Reforming law enforcement agencies requires resources—including time, money, and personnel.[195] Viewing Section 14141 at a micro, case-by-case level, the DOJ has more resources to oversee reform than do private plaintiffs. But the converse is true at the macro, nationwide level.[196] Civil suits are costly to individual plaintiffs, and as such the DOJ is better situated to facilitate reform at the micro level. However, at the macro level, individual plaintiffs can initiate more civil suits than the DOJ can sustain at any given time. The DOJ has limited funding for investigations, with the ability to investigate less than 0.02% of the country's nearly 18,000 state and local law enforcement agencies each year.[197] The Civil Rights

190. John Worrall, *Data Show Consent Decrees Worth Their Costs*, BALT. SUN (June 17, 2017), http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0613-consent-decree-20170612-story.html [https://perma.cc/RJ5Y-4VFD].

191. Rushin, *supra* note 174, at 1407.

192. *Id*. at 1406.

193. For an in-depth analysis of the indirect costs of police misconduct, see Eleanor Lumsden, *How Much is Police Brutality Costing America?*, 40 U. HAW. L. REV. 141 (2017).

194. Rushin, *supra* note 174, at 1358–60.

195. *See* Schwartz, *supra* note 136, at 443.

196. *Cf. Id*. at 443–44 (discussing how at the micro level, the DOJ has more resources to affect a single agency compared to a criminal defendant filing a suppression motion, which requires the time of overworked public defenders, but at the macro level, all defendants nationwide are better suited to file motions than the DOJ is to investigate all agencies).

197. Rushin, *supra* note 99, at 3230.

Division only has eighteen full time lawyers, yet a single investigation of a relatively small department requires extensive resources.[198] For example, the 2014 investigation into Ferguson "involved a relatively tiny police force of 54 officers and a town population of barely 20,000. But it required hundreds of Justice Department interviews, the review of 35,000 pages of police records, and an extensive statistical analysis of police and court data, among other steps."[199] All this work came before the negotiation of the reform agreement.

Lastly, the efficacy of Section 14141 depends on the motivations of those using it and, in particular, the level of the DOJ's commitment to enforcing the statute.[200] The motivation to use Section 14141 to pursue police reform is intertwined with partisan politics, as the DOJ changes hands with each new president.[201] Reforming law enforcement agencies was a top priority for President Obama's DOJ, as evinced not only by the number of pattern-or-practice investigations conducted during his administration,[202] but also by the expansion of issues investigated to include, for instance, gender bias, and the push for legally binding consent decrees as the main mechanism of reform.[203] The Trump administration, by contrast, has made it clear that it will not be utilizing its Section 14141 power.[204] The decision to investigate law enforcement agencies is highly partisan, and the federal government is often fickle in protecting citizens' constitutional rights.[205]

III. EXPANDING SECTION 14141 POWER TO THE STATES

Even with its limitations, Section 14141 is an effective method of mandating institutional change. Scholars suggest that the DOJ's pattern-or-practice investigations are largely successful, as following implementation, police departments "will likely possess a stronger, more capable accountability infrastructure, more

198. Schwartz, *supra* note 136, at 448. The Special Litigation Unit has about 50 full- and part-time lawyers combined, but "some of [them] concentrate on issues other than police accountability." Simone Weichselbaum, *Policing the Police*, THE MARSHALL PROJECT (May 26, 2015), https://www.themarshallproject.org/2015/04/23/policing-the-police [https://perma.cc/CQB3-NJMJ].

199. Weichselbaum, *supra* note 198.

200. Schwartz, *supra* note 136, at 447.

201. Schwartz, *supra* note 136, at 447.

202. *See supra* note 124. President Obama's administration conducted 25 investigations, or 36% of total investigations since the statute's enactment.

203. Rob Arthur, *Will Trump Reverse Obama's Push For Greater Police Oversight?*, FIVETHIRTYEIGHT (May 23, 2017), https://fivethirtyeight.com/features/will-trump-reverse-obamas-push-for-greater-police-oversight/ [https://perma.cc/L3M9-PU25].

204. Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html [https://perma.cc/2WHD-FYV4].

205. *See* Joshua Chanin, *Evaluating Section 14141: An Empirical Review of Pattern or Practice Police Misconduct Reform*, 14 OHIO ST. J. CRIM. L. 67, 70 (2016).

robust training, and a set of policies that reflect national best practices."[206] To produce the benefits associated with Section 14141 reform while compensating for its limitations, the power should be expanded to the states, specifically to state attorneys general. Before discussing this avenue, however, it is necessary to understand the history and power of state attorneys general.

A. The Authority of State Attorneys General

The state attorney general position existed before the genesis of the federal Attorney General, and its role is distinct from its federal counterpart.[207] Many of the differences between the two offices are political. The U.S. Attorney General, as part of the executive branch, is subject to appointment by and the control of the President of the United States (POTUS).[208] Most states do not follow this "unitary executive" structure. Instead of allowing the governor to control the attorney general, most state constitutions establish the attorney general as an independent executive officer.[209] This separation of political control is bolstered by the means by which a state attorney general rises to power: unlike the U.S. Attorney General, who is appointed by POTUS, most state attorneys general are elected by the people.[210]

Most state attorneys general receive their legal authority from a combination of many sources, including state constitutions, statutes, and common law.[211] At the heart of a state attorney general's common law authority is the responsibility to protect the public.[212] To effectively carry out this job, common law power gives the state attorney general the authority "to institute civil suits, challenge the constitutionality of legislative or administrative actions, intervene in rate cases, proceed against public officers, revoke corporate charters, and more."[213] Given this vast range of authority, state attorneys general have also increasingly used their power to engage in civil rights enforcement and to initiate lawsuits aimed at remedying discriminatory police conduct.[214]

B. A Necessary Expansion of Existing Power

1. Codifying Already-Existing Powers

If states explicitly enact laws mirroring Section 14141 to allow their attorneys general to investigate and sue law enforcement agencies for pattern-or-practice

206. *Id*. at 111.
207. *See* Walker & MacDonald, *supra* note 43, at 537–38.
208. *Id*. at 538.
209. *Id*.
210. *Id*. at 538–39.
211. *Id*. at 539.
212. *Id*.
213. *Id*. at 540.
214. *Id*.

violations, this would only codify currently recognized powers. As mentioned, the common law power of state attorneys general is firmly established.[215] Their common law power is the "fountainhead" of their authority "to represent, defend, and enforce the legal interests of . . . the public."[216] Courts have recognized this broad common law power as stemming from a need to preserve and protect the public interest.[217] The Fifth Circuit advanced this theme of broad common law powers in *State of Florida ex rel. Shevin v. Exxon Corp.*, where it held that the Florida Attorney General had the power to initiate an antitrust enforcement action against major oil companies on behalf of state agencies without their consent.[218] That court acknowledged that the legislature can restrict the power of a state attorney general, but in the absence of such a restriction, the attorney general "may exercise all such authority as the public interest requires. And [she] has wide discretion in making the determination as to the public interest."[219] This decision exemplifies the majority rule in state jurisdictions.[220]

In evaluating state attorneys general, the National Association of Attorneys General (NAAG) has identified consistent common law powers. Three of these powers imply that state attorneys general already have the power to conduct pattern-or-practice investigations. The first recognized power is the investigative authority of state attorneys general.[221] This power gives state attorneys general the ability to investigate government misconduct and other issues of substantial public interest. It also allows them to issue reports with recommendations regarding potential solutions.[222] Investigation into a law enforcement agency would fall within this already recognized power, and the ability to issue recommendations allows state attorneys general to propose mechanisms of police reform, like consent decrees. Another recognized power of state attorneys general is the common law power of public advocacy,[223] which places them "in the position of initiator or plaintiff, a role reversal that provides an opportunity for major public policy initiatives."[224] In recent years, state attorneys general have used this power to order major outreach and public advocacy programs.[225] For example, some have already

215. *See* LYNNE ROSS, STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 38 (1990). There are very few states whose attorneys general lack common law power. These include Arizona, Colorado, Indiana, Iowa, Louisiana, Maryland, New Mexico, South Dakota, West Virginia, and Wisconsin.

216. *Id*. at 27.

217. *See* Angelita Plemmer, *National Association of Attorneys General: State Attorneys General Powers and Responsibilities, in* THE BOOK OF THE STATES 229 (The Council of State Governments ed., 2008), http://knowledgecenter.csg.org/kc/system/files/NAG_2008.pdf [https://perma.cc/XF9M-ZPL3].

218. 526 F.2d 266 (5th Cir. 1976).

219. *Id*. at 268–69 (citations omitted).

220. *See* Ross, *supra* note 215, at 29.

221. Plemmer, *supra* note 217, at 231.

222. *Id*.

223. *Id*. at 230.

224. Ross, *supra* note 215, at 13.

225. *Id*.

shown a commitment to criminal legal reform in the area of officer-involved shootings by implementing body camera programs.[226] The ability of state attorneys general to advocate for a public policy position is a necessary component of instituting police reform. Lastly, the common law (as well as state constitutions and statutes) grants state attorneys general the power to litigate.[227] As with Section 14141, suing a law enforcement agency would serve as a last resort if the state and the law enforcement agency could not reach a reform agreement. State attorneys' general's existing powers to investigate government agencies, initiate litigation, and advocate for policy reform demonstrate that they currently have authority to conduct pattern-or-practice investigations similar to Section 14141.

Pursuant to their broad common law powers, state attorneys general have expanded their roles into non-traditional areas to address new issues.[228] For example, state attorneys general have enforced consumer protection laws when the federal government has failed to or been unable to act.[229] "To change industry practices or build support for legislation[,]" state attorneys general collaboratively "brought 'impact cases'" utilizing multi-state investigations and litigation.[230] Although this strategy may not be effective in every case, it provides an example for state attorneys general to follow in pattern-or-practice cases. By coordinating their efforts, states have more resources, information, and leverage. "Strength in numbers" could also alleviate the political pressures associated with controversial investigations.[231]

Yet even with their recognized common law powers, states must explicitly adopt language granting pattern-or-practice power to state attorneys general. Currently, many of the constitutional and statutory provisions granting state attorneys general their authority merely declare their common law powers.[232] Presumably this lessens the risk of legal challenge when state attorneys general use their common law powers. A formalization of pattern-or-practice power would strengthen the leverage of state attorneys general when implementing reform. Even if implicit common law powers exist, having an explicit statute to rely on undoubtedly sends a stronger message to law enforcement agencies.

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226. *See* Emily Myers & Ayeisha Cox, *The Authority of State Attorneys General and Their Efforts on 21st Century Policing*, in THE BOOK OF THE STATES 202 (The Council of State Governments ed., 2016), http://knowledgecenter.csg.org/kc/system/files/Myers%20Cox%202016.pdf [https: //perma.cc/9YU9-DHDX].

227. *Id*. ("Although common law powers are defined differently in the states, they generally include the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the State, preservation of order and the protection of public rights.").

228. *See* Plemmer, *supra* note 217, at 229.

229. *See* JULIE AOKI, NAT'L POL'Y & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY, STATE AGS: WHO THEY ARE AND WHAT THEY DO 1 (2010), http://www.publichealthlawcenter.org/sites/default/files/resources/phlc-fs-agwhowhat-2010.pdf [https://perma.cc/CZ5W-L7E 3].

230. *Id*. at 2–3.

231. *Id*. at 3 ("[T]he 'strength in numbers' approach can serve to bring in states that might not be able or willing to take action by themselves.").

232. *See* Ross, *supra* note 215, at 31.

2. Expansion and Its Consequences

i. Expansion Counteracts the Limitations of Section 14141

As previously mentioned, one of the benefits of Section 14141 is its deterrent effect. It encourages departments across the nation to implement preemptive reform to avoid the costs associated with DOJ investigations or lawsuits.[233] Yet as scholar Rachel Harmon argues, this deterrent effect is relatively fixed, as the existing remedial cost imposed on departments for violations cannot be substantially increased.[234] Another constraint on Section 14141's deterrent effect is the DOJ's inability to oversee all of the nation's 18,000 police departments. As mentioned, the DOJ's resources are strapped on a macro level. Harmon notes, however, that one way to overcome this constraint is to increase the probability of imposing costs on departments.[235] Similarly, Joanna Schwartz proposes collaboration with private plaintiffs as a method to overcome this resource limitation.[236] Correspondingly, if state attorneys general had a similar power to Section 14141, then a greater possibility for investigations and lawsuits could ultimately increase the current fixed level of deterrence. Adding the resources of state attorneys general could alleviate some of the constraints on the DOJ. Fortunately, over recent decades, the amount of resources available to state attorneys general has dramatically increased.[237]

Motivation is another underlying limitation of Section 14141 that can be alleviated by expanding state power. Because the U.S. Attorney General serves POTUS, the frequency with which Section 14141 is used fluctuates depending on who is in office.[238] During the Clinton administration, the DOJ conducted twenty-five investigations, with more than half resulting in consent decrees or memorandums of agreement.[239] Under President Obama, the DOJ conducted 25 investigations.[240] Democratic administrations conducted nearly 72% of all investigations;[241] meanwhile, the Trump administration has made it clear that it will not be

233. *See* Harmon, *supra* note 159, at 45.

234. *Id*. at 34.

235. *Id*. at 39.

236. Schwartz, *supra* note 136, at 481–82.

237. *See* Walker & MacDonald, *supra* note 43, at 548.

238. *See supra* notes 200–05 and accompanying text.

239. Weichselbaum, *supra* note 198.

240. *See* Press Release, U.S. Dep't of Justice, Justice Department Releases Report on Civil Rights Division's Pattern and Practice Police Reform Work (Jan. 4, 2017), https://www.justice.gov/opa/pr/justice-department-releases-report-civil-rights-division-s-pattern-and-practice-police-reform [https://perma.cc/E7YK-WZAJ].

241. Presidents Obama and Clinton conducted 50 of the 69 investigations. *See* DOJ POLICE REFORM, *supra* note 106, at 3 (stating that since the enactment of Section 14141, the DOJ has opened 69 investigations). *See also* Press Release, *supra* note 240 ("Since 2009, the Civil Rights Division has opened 25 investigations"); Weichselbaum, *supra* note 198 (noting the Clinton administration launched 25 investigations).

utilizing Section 14141 at all.[242] Although this partisan divide is not surprising, it is worrisome, as it indicates that federal leaders perceive constitutional violations from a partisan rather than a human rights standpoint. Even though partisan influences also impact local politics, the accountability structure of state attorneys general provides a little more distance between their decisions and partisan sway. As mentioned, the vast majority are not appointed by their local governors, which gives them more leeway to make their own decisions.[243] Because they are elected, they are more readily able to pursue initiatives that represent the public interest. This level of autonomy is crucial, as the traditional role of state attorneys general is "to act as the state's chief legal officer and to defend state entities and officers."[244] This "duty to defend the state" is balanced with and often outweighed by a duty to the public, especially concerning civil rights lawsuits.[245]

A common criticism of Section 14141 is that its top-down approach creates a "democratic deficit," as unelected federal officials create the rules. This democratic deficit leads to less effective reform because it stifles local participation.[246] State investigations could shrink this deficit and allow for more bottom-up reform and accountability. State investigations could be a model of "democratic experimentalism," which seeks to improve governmental effectiveness by encouraging the participation of and information-sharing with local stakeholders.[247] State power could restore the political legitimacy of a reform process that is often mistrusted by both law enforcement and the public.[248] Furthermore, this system not only allows states to learn from the federal government's past pattern-or-practice cases, but it also promotes interstate collaboration to create institutional change. As previously mentioned, state attorneys general have used their powers before to work with each other to drive national reform. Structurally, the NAAG often facilitates multistate investigations and litigation to promote policy reform.[249] The ability of state attorneys general to pool resources and information could be leveraged to investigate police misconduct and attain national police reform.

Police oversight may seem to be a realistic objective only in traditional liberal states. However, it is important to note that "the political climate surrounding American policing [has] changed dramatically following the tragic events in Ferguson, Missouri, in August 2014," sparking what policing expert, Samuel Walker,

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242. *See, e.g.*, Lichtblau, *supra* note 204.

243. *See* Paul Cassell, *Who Prosecutes the Police? Perceptions of Bias in Police Misconduct Investigations and A Possible Remedy*, WASH. POST: VOLOKH CONSPIRACY (Dec. 5, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy/?utm_term=.d5959720c3cd [https://perma.cc/A4DN-3Y7P].

244. Walker & MacDonald, *supra* note 43, at 539.

245. Walker & MacDonald, *supra* note 43, at 540.

246. *See* Kami Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 403 (2010).

247. *Id*. at 379.

248. *See id*. at 404–05.

249. Aoki, *supra* note 229.

calls a "National Police Crisis."[250] For example, there has been a recent surge in state legislation addressing police accountability. Thirty-four state legislatures and the District of Columbia "enacted seventy-nine bills, resolutions, or executive orders related to police policies and practices" in 2015 and 2016.[251] This trend offers some hope for the future of police reform, even in traditional conservative states.

This trend toward protecting the public interest offsets another limitation of Section 14141: Even if DOJ intervention produces some permanent changes, law enforcement agencies often backslide after a consent decree is lifted.[252] Once a department reaches the necessary level of compliance, the federal government often ceases to oversee the department to ensure it continues to uphold its new reform measures.[253] As Samuel Walker noted, once the consent decree finishes and the judge and monitor leave, "cities are on their own, and then it's dependent on the local community and local politics" to hold departments accountable.[254] If state statutes were to grant state attorneys general the power to pursue pattern-or-practice investigations, local governments would be better equipped to oversee local police departments and prevent backsliding. As such, states should provide their local governments with the power, tools, and leverage needed to oversee accountability efforts.

ii. Potential Concerns to Expanding Powers

Critics draw on federalism and separation of powers arguments to appraise the expansion of the power of state attorneys general.[255] The federalism argument suggests that granting states Section 14141 powers violates the preemption doctrine, as a conflict arises if this new power permits states to impede federal investigations.[256] However, state attorneys general have already been active in civil rights cases,[257] and extending their power could help the federal government by expanding the amount of agencies that could be targeted. Additionally, California has already utilized Section 14141 power, as will be discussed later, and to the best of this author's knowledge, the federal government has not objected on federalism grounds. The separation of powers argument is also immaterial, as that

250. Samuel Walker, *Symposium Federal Responses to Police Misconduct: Possibilities and Limits: "Not Dead Yet": The National Police Crisis, A New Conversation About Policing, and the Prospects for Accountability-Related Police Reform*, 18 U. ILL. L. REV. 1779, 1782 (2018).

251. *Id*. at 1787.

252. *See* Shaila Dewan & Richard Oppel Jr., *Efforts to Curb Police Abuses Have Mixed Record, and Uncertain Future*, N.Y. TIMES (Jan. 14, 2017), https://www.nytimes. com/2017/01/14/us /chicago-police-consent-decree.html [https://perma.cc/8QMQ-FQ6S].

253. *See* Chanin, *supra* note 205, at 72.

254. Sheryl Stolberg, *'It Did Not Stick': The First Federal Effort to Curb Police Abuse*, N.Y. TIMES (Apr. 9, 2017), https://www.nytimes.com/2017/04/09/us/first-consent-decree-police-abuse-pittsburgh.html [https://perma.cc/9548-HKAZ].

255. For a more developed discussion of these arguments, see Walker & MacDonald, *supra* note 43.

256. *See* Walker & MacDonald, *supra* note 43, at 549–50.

257. *Id*. at 540.

doctrine applies to the division of authority among the three federal branches and does not concern the states.[258] Further, law enforcement has historically been the prerogative of the states. While federal intervention can help states address systemic failures, states should also have the power to address these issues.[259] And while the DOJ often does a good job of gathering local community input in pattern-or-practice cases, this process could benefit from greater local control.[260]

Others may advocate for different federal avenues of reform, such as deploying special prosecutors,[261] or argue that it is unnecessary to extend formal investigatory power to state attorneys general. The fate of recent consent decrees, however, highlights the urgency of promoting the power of state attorneys general. For example, President Obama's DOJ began a pattern-or-practice investigation of the Chicago Police Department (CPD).[262] This investigation concluded with a scathing report about the CPD's blatant misconduct and a negotiated consent decree that included a court-appointed monitor.[263] After Trump took office, Chicago backed out of the deal and sought an out-of-court negotiation with Trump's DOJ.[264] The City and CPD did not want federal judicial oversight in case they fail to comply with the terms of the consent decree.[265] In a city plagued by police misconduct, the consent decree was a much-needed reform. Following the out-of-court negotiation, six community groups and Illinois Attorney General Lisa Madigan sued the city for backing out of the deal.[266] In September 2018, "Madigan, Chicago Mayor Rahm Emanuel, and CPD Superintendent Eddie Johnson filed a 236-page proposed reform agreement in federal court . . . [that] is now pending approval."[267] Although the reformers' ultimate success may imply that there is no need to explicitly grant state attorneys general the power to sue for pattern-or-practice violations, this Article proposes that Attorney General Madigan's success crucially turned on her ability to leverage the initial consent decree. By the time

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258. *Id*. at 550–51.

259. *See* Kami Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 379–80 (2011).

260. *See generally* Walker & MacDonald, *supra* note 43.

261. Cassell, *supra* note 243.

262. *See* Connor Maxwell & Danyelle Solomon, *Expanding the Authority of State Attorneys General to Combat Police Misconduct*, CTR. FOR AM. PROGRESS (Dec. 12, 2018), https://www.americanprogress.org/issues/race/reports/2018/12/12/464147/expanding-authority-state-attorneys-general-combat-police-misconduct/ [https://perma.cc/C5PN-CYP2].

263. *See* Bill Ruthhart, Annie Sweeney, & John Byrne, *AG Madigan Sues to Enforce Chicago Police Reform; Emanuel Pledges Cooperation*, CHI. TRIB. (Aug. 30, 2017), http://www.chicagotribune.com/news/local/politics/ct-emanuel-madigan-consent-decree-met-0830-20170829-story.html [https://perma.cc/MP9P-UBSX].

264. *See id*.

265. *See* Brandon Patterson, *As Feds Back Away from Police Oversight, Black Lives Matter Sues Chicago*, MOTHER JONES (June 16, 2017), https://www.motherjones.com/crime-justice/2017/06/as-feds-back-away-from-police-oversight-black-lives-matter-sues-chicago/ [https://perma.cc/E5YN-G3T6].

266. *Id*.; *see also* Ruthhart, Sweeney & Byrne, *supra* note 263.

267. Maxwell & Solomon, *supra* note 262.

she initiated the lawsuit, the DOJ had finished its investigation, issued a findings report, and negotiated a consent decree.[268] The DOJ only had leverage to do these things because it retained the power to file suit if the city refused to cooperate. Additionally, Madigan sued[269] under pattern-or-practice authority granted to her office by the Illinois Human Rights Act of 2004.[270] Unlike Section 14141 or California Civil Code § 52.3, the Act does not specifically target police misconduct; nonetheless, it armed Madigan with necessary leverage to effectuate change. The preliminary DOJ investigation and explicit statutory powers were not just sufficient components to drive police reform, but necessary ones. It is essential to equip state attorneys general not only with the power to investigate law enforcement but also with the power to sue if necessary. Even if ideas vary on how to hold law enforcement agents accountable for their actions, there is a consensus that some reform is necessary.[271]

To safeguard the public interest, states must bolster the power of their attorneys general by giving them the explicit authority to initiate pattern-or-practice cases. While this idea may seem novel, there is established precedent for it. Since 2001, this power has been expanded in one state: California.[272]

C. California: The Model State

California Civil Code § 52.3, closely mirroring the language of Section 14141, grants its state attorney general the authority to bring a civil lawsuit against law enforcement agencies that engage in a pattern or practice of conduct that violates people's constitutional or other legal rights.[273] California enacted its state statute after a police killing attracted national scrutiny.[274] In 1998, four white Riverside Police Department officers shot and killed Tyisha Miller, a 19-year-old

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268. Patterson, *supra* note 265.

269. Maxwell & Solomon, *supra* note 262.

270. Illinois Human Rights Act of 2004, 775 ILL. COMP. STAT. ANN. 5/10-104 (2004).

271. *See* Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, CATO INST. (Dec. 7, 2016), https://www.cato.org/survey-reports/policing-america [https://perma.cc/3SLN-XRUH] ("Majorities across racial and ethnic groups agree on path toward reform . . . .").

272. *See* Norwood, *supra* note 9.

273. CAL. CIV. CODE § 52.3 (West 2019) ("(a) No governmental authority, or agent of a governmental authority, or person acting on behalf of a governmental authority, shall engage in a pattern or practice of conduct by law enforcement officers that deprives any person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or by the Constitution or laws of California. (b) The Attorney General may bring a civil action in the name of the people to obtain appropriate equitable and declaratory relief to eliminate the pattern or practice of conduct specified in subdivision (a), whenever the Attorney General has reasonable cause to believe that a violation of subdivision (a) has occurred.").

274. *See* Simone Weichselbaum, *Sessions May Resist Federal Oversight of Police, But There's Another Option*, THE MARSHALL PROJECT (Feb. 5, 2017), https://www.themarshallproject.org/2017/02/05/sessions-may-resist-federal-oversight-of-police-but-there-s-another-option [https://perma.cc/D6L9-QPLD].

Black girl "who was passed out in her car with a gun in her lap."[275] The officers, who broke into the window of her car while she was sleeping, causing her to jolt awake, immediately fired at her—not once, but 24 times—ultimately "striking her with 12 bullets."[276] The officers were not prosecuted for this murder.[277] During this same time period, the infamous Rampart scandal, "the worst police scandal in the history of Los Angeles," was exposed.[278] The Rampart scandal involved a series of systemic police abuses, including unjustified shootings, beatings, perjury, and evidence tampering, and resulted in the review of 3,000 cases, the overturning of thirty-six related convictions, and the payout of $125 million in settlements.[279] Tyisha Miller's murder and the Rampart Scandal became catalysts for change. In 2001, California Civil Code § 52.3 became law.[280] As the bill's author, General Assembly Member Romero, powerfully asserted, "the cost[s] of the Ramparts scandal [were] incalculable with respect to the systematic violations of civil and human rights, as well as the loss in public trust not only in the police, but in the entire criminal justice system."[281]

This law gave the state the power to rectify the wrongs committed against Tyisha Miller and many others. It was first used in 2001 by California State Attorney General Bill Lockyer against the Riverside Police Department.[282] In 2006, the Riverside Police Department and City of Riverside achieved full compliance with the terms of the judgment and were released from their state-mandated reform.[283] The reform efforts included improved training, data collection, management accountability, and tracking of misconduct. According to the current police chief, Sergio Diaz, most of the reforms remain in place.[284] The department's commitment to maintaining reform mechanisms after the end of state oversight demonstrates the lasting influence that pattern-or-practice power can have on a department and its community. Additionally, while costs to the city and department increased initially, over time the reforms saved money by reducing litigation

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275. David Rosenzweig, *No Charges in Killing of Tyisha Miller*, L.A. TIMES (Dec. 13, 2002), http://articles.latimes.com/2002/dec/13/local/me-tyisha13 [https://perma.cc/6Z9U-M34K].

276. *Id.*

277. *See id.*

278. ASSEMB. COMM. ON JUDICIARY, 1999-2000 REG. SESS., BILL ANALYSIS ON A.B. 2484, at 3 (Apr. 25, 2000), http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2451-2500/ab_2484_cfa_20000424_154159_asm_comm.html [https://perma.cc/3C4A-HA2U] [hereinafter BILL ANALYSIS].

279. Peter Boyer, *Bad Cops*, THE NEW YORKER (May 21, 2001), https:// www. newyorker.com/magazine/2001/05/21/bad-cops [https://perma.cc/C9XY-BGVD].

280. CAL. CIV. CODE § 52.3 (West 2019).

281. BILL ANALYSIS, *supra* note 278.

282. Times Editorial Board, Editorial, *As Sessions Fails to Curb Police Misconduct and Draconian Prosecution, States Step Up*, L.A. TIMES (Aug. 31, 2017), http://www.latimes.com/opinion/editorials/la-ed-chicago-police-reform-20170831-story.html [https://perma.cc/QR43-4PF9].

283. *See* Memorandum from Joseph Brann to Bill Lockyer (Feb. 12, 2006), https://oag.ca.gov/system/files/attachments/press_releases/06-017_0c.pdf? [https://perma.cc/BG4T-HN2A].

284. Weichselbaum, *supra* note 274.

and settlement costs, especially those associated with police civil liability cases.[285] In 2009, State Attorney General Jerry Brown, Lockyer's successor, employed the statute once more against the Maywood Police Department after *The Los Angeles Times* reported that it employed police officers who had been fired from other departments.[286] After an investigation and a year of state-ordered reform, the sixty-officer police department disbanded.[287] Finally, California Attorney General Kamala Harris employed the statute in 2016, announcing a California DOJ investigation into the Kern County Sheriff's Office and the Bakersfield Police Department.[288] Topics covered by complaints included the use of excessive force, concerns over officer-involved shootings, deaths in custody, and civil rights violations.[289] A 2015 report by *The Guardian* naming Kern County, where Bakersfield is located, America's deadliest county in terms of police violence also spurred the investigation.[290]

The California law has not been employed often, as the State Attorney General still faces political and resource constraints. In addition, when California enacted the statute in 2001, the federal DOJ was already investigating the LAPD for pattern-or-practice violations. In 2011, the DOJ opened another investigation into the Los Angeles County Sheriff's Department.[291] The visibility of DOJ investigations may have contributed to the state's reticence to start its own investigations.

Even though California has not used its law extensively, former State Attorneys General Lockyer and Verdugo believe that the law is beneficial and that other states should adopt similar statutes.[292] The law's very existence may have served as needed leverage for other reforms. For example, *Allen v. City of Oakland* in-

285. Memorandum from Joseph Brann to Bill Lockyer, *supra* note 283 (noting that police civil liability cases averaged twelve per year before the judgment but fell to four per year after the judgment).

286. Weichselbaum, *supra* note 274.

287. *Id*.

288. Robert Jablon, *California Attorney General to Investigate Kern County, Bakersfield Policing*, KPCC (Dec. 22, 2016), https://www.scpr.org/news/2016/12/22/67499/california-attorney-general-to-investigate-kern-co/ [https://perma.cc/6EEP-NE5A].

289. Jon Swaine & Oliver Laughland, *Two 'Deadliest' Police Departments in US to be Investigated in California*, THE GUARDIAN (Dec. 22, 2016), https://www.theguardian.com/us-news/2016/dec/22/california-police-kern-county-investigation-kamala-harris [https://perma.cc/5T6B-ZPBA]; *see* also *Attorney General Kamala Harris Opens Investigation into KCSO and Bakersfield Police Department*, 23ABC NEWS BAKERSFIELD (May 4, 2017), http://www.turnto23.com/news/local-news/attorney-general-kamala-harris-opens-investigation-into-kcso-and-bakersfield-police-department [https://perma.cc/HUX6-3MYQ].

290. *See* Jon Swaine & Oliver Laughland, *The County: The Story of America's Deadliest Police*, THE COUNTED (Dec. 1, 2015), https://www.theguardian.com/us-news/2015/dec/01/the-county-kern-county-deadliest-police-killings [https://perma.cc/3EWE-T27W].

291. *An Interactive Guide to the Civil Rights Division's Police Reforms*, DEP'T OF JUSTICE (Jan. 18, 2017), https://www.justice.gov/crt/page/file/922456/download [https://perma.cc/4HHP-4P9R] [hereinafter *Interactive Guide*].

292. *See* Weichselbaum, *supra* note 274.

volved an individual's § 1983 suit alleging civil rights violations against the Oakland Police Department.[293] The case turned into a 119-plaintiff class action that was resolved in 2003 with a settlement agreement that included monetary compensation and a consent decree ordering the implementation of numerous reforms of the police department.[294] This reform program, including court monitoring, is ongoing as of November 2018.[295] While *Allen* was pending, both the LAPD and the Riverside police departments were under investigation by the federal and California DOJs, respectively.[296] The spotlight on other California police departments and the possibility of federal or local DOJ involvement may have influenced the Oakland department's decision to settle.

The California law has arguably enabled the state to uphold Obama-era reforms that were eviscerated by the Trump administration. In February 2018, California State Attorney General Xavier Becerra and the San Francisco Police Department (SFPD) signed a Memorandum of Understanding (MOU) after U.S. Attorney General Jeff Sessions decided to stop using the DOJ's Office of Community Oriented Policing Services (COPS) to investigate police departments.[297] Under President Obama, COPS conducted a six-month investigation into SFPD and released a 432-page report documenting "disparities in traffic stops, post-stop searches and use of deadly force against [Black individuals], as well as implicit and institutionalized bias against minority groups."[298] The report detailed COPS's intent to oversee the close to three hundred recommendations it made to the SFPD. However, after Sessions pulled the plug on COPS, the SFPD and thirteen other police departments who received reports from COPS were "left dangling in the wind."[299] The California DOJ helped fill the gap and signed the MOU with SFPD instead of exercising its Section 52.3 power.[300] Presumably, the state's ability to file suit and the existence of the COPS report provided the leverage Becerra needed to get the SFPD to cooperate.

The importance of the pattern-or-practice power in the state has not gone unnoticed. Civil rights advocacy groups are calling on the California DOJ to use its

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293. Complaint, Allen v. City of Oakland, No. 00-cv-04599-TEH (N.D. Cal. Dec. 17, 2000).

294. *See Oakland Police Department and Court-Ordered Reform*, CITY OF OAKLAND 1 (2012), http://www2.oaklandnet.com/oakca1/groups/ceda/documents/marketingmaterial/oak038511.pdf [https://perma.cc/29GW-GMQM].

295. *Case Profile: Allen v. City of Oakland*, C.R. LITIG. CLEARINGHOUSE (Nov. 22, 2018), https://www.clearinghouse.net/detail.php?id=5541 [https://perma.cc/VX38-5ZTP].

296. *See Interactive Guide*, *supra* note 291; Times Editorial Board, *supra* note 282.

297. *See* Alex Emslie, *State Stepping in to Oversee San Francisco's Police Reforms*, KQED (Feb. 5, 2018), https://www.kqed.org/news/11648011/state-stepping-in-to-oversee-san-franciscos-police-reforms [https://perma.cc/LT6Y-GCYA]; Monique Judge, *Jeff Sessions Won't Hold Bad Police Departments Accountable, so California Is Doing It on Its Own*, THE ROOT (Feb. 7, 2018), https://www.theroot.com/jeff-sessions-won-t-hold-bad-police-departments-account-1822821486 [https://perma.cc/Z4JX-R6GK].

298. Judge, *supra* note 297.

299. *Id.*

300. Emslie, *supra* note 297.

powers to pursue reform in other departments besides the two for which it has active investigations. For example, a 2017 report by the American Civil Liberties Union of California (ACLU-CA) uncovered that the Fresno Police Department's shootings disproportionately impacted Fresno's low-income communities of color.[301] From 2011 to 2016, 80% of Fresno police shootings involved Black or Latinx people, though they account for only 52% of the population.[302] Highlighting the evidence unearthed by the report, ACLU-CA asked the California DOJ to conduct a pattern-or-practice investigation of the Fresno Police Department's use of force.[303] California may not use its § 52.3 power often, but these examples demonstrate that explicit state pattern-or-practice authority can lead to lasting police reform and can provide an avenue for public advocacy.

CONCLUSION

There is an institutional "rotten barrel" problem with policing in our nation. With the rise in coverage of police misconduct comes a wave of social movements pressing all levels of government to take a more active role in holding the police accountable when they violate the rights of those they are employed to protect. To date, the U.S. has failed to collect accurate data on police violence and provide adequate access and justice for those who have been wronged by agents of the law. To combat this institutionalized failure, we need more readily available tools for true reform. One such tool is Section 14141, but it is inherently limited by the DOJ's lack of resources and partisan structure. Section 14141 has nonetheless been a formidable force for much-needed change. If state attorneys general are explicitly granted a similar power, they will be better able to protect the public interest.

California, the only state to enact a law that parallels Section 14141, serves as a model for the type of state activism needed to adequately oversee the nation's law enforcement agencies. Its model law—California Civil Code § 52.3—has proven to be an effective means for state attorneys general to initiate reform. Other states can and should follow suit. This is not a perfect solution, but if one more state attorney general had the explicit authority to conduct pattern-or-practice investigations, there may be one less corrupt police department, one less reason for divisiveness in our nation, and most importantly, one less dead, Black or Latinx body in our streets.

301. Jacob Denney, Celia Guo, Ellen Lawther, & Britney Wise, *Reducing Officer-Involved Shootings in Fresno*, ACLU CAL. (Nov. 2017), https://www.aclunc.org/docs/ReducingOIS-Fresno2017.11.29.pdf [https://perma.cc/BK7W-SHLR].

302. Brady Hirsch, *Fifty Years After MLK's Death, We're Still Fighting for Civil Rights*, ACLU N. CAL. (Jan. 12, 2018), https://www.aclunc.org/blog/fifty-years-after-mlk-s-death-we-re-still-fighting-civil-rights [https://perma.cc/9FDC-VHQU].

303. *Id.*