

Police Brutality

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“It is as much the duty of Government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals.” Abraham Lincoln.¹

In early August 1997, reports surfaced of a police brutality scandal in New York City. Newspapers across the country reported that Abner Louima, a Haitian immigrant to the United States, was arrested on August 9, 1997, and brought to the stationhouse of the 70th Precinct where New York City Police Department (NYPD) officers took Louima into the bathroom, beat him severely, and sodomized him with the handle of a plunger.² Though a recent study by Amnesty International had reported an alarming pattern of excessive force by NYPD officers,³ local authorities predictably refused to recognize that the Louima incident might represent something more than an isolated occurrence.⁴

While the Louima case is unique in its brutal detail, similar incidents involving excessive force occur with disturbing frequency across the nation.⁵ Yet despite the seemingly pervasive nature of the problem, the le-

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1. CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* at vii (1972).

2. See David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody*, N.Y. TIMES, Aug. 13, 1997, at B1.

3. See Richard Pyle, *Human Rights Group Criticizes NYPD*, ASSOCIATED PRESS, June 26, 1996, available in 1996 WL 4429173. New York City Police Commissioner Howard Safir dismissed the report as “short on facts and long on hype.” Clyde Haberman, *Crossing into a Circle of the Brutal*, N.Y. TIMES, Aug. 15, 1997, at B1.

4. According to Commissioner Safir, the Louima incident was “not a case of police brutality. It was a criminal act.” Nat Hentoff, *The Politics of Police Brutality*, WASH. POST, Aug. 26, 1997, at A15. Accordingly, the NYPD treated the case as an isolated event.

5. A nationwide survey of residents of U.S. cities in 1982 found that 13.6% of respondents believed they personally had been the victims of police misconduct in the preceding year. See 1 ANTHONY M. PATE & LORIE A. FRIDELL, *POLICE USE OF FORCE: OFFICIAL REPORTS, CITIZEN COMPLAINTS, AND LEGAL CONSEQUENCES* 23-24 (1993). For additional statistics on the prevalence of police brutality, see DOUGLAS W. PEREZ, *COMMON SENSE ABOUT POLICE REVIEW* 24 (1994); Thomas Barker & David L. Carter, *A Typology of Police Deviance*, in *POLICE DEVIANCE* 3-12 (Thomas Barker & David L. Carter eds., 1991).

gal response to police brutality incidents across the nation has been uniformly limited to retrospective relief. The incidents have almost invariably failed to trigger any response aimed at investigating or reforming the way the local police department does business.

But in the Louima case, something new happened. On August 18, 1997, the U.S. Attorney for the Eastern District of New York, Zachary Carter, announced the launch of a federal investigation into whether the Louima case was more than an isolated incident—whether instead it was a symptom of a pattern in the NYPD “of failing to take effective action against officers who are guilty of civil rights violations or otherwise permitting an atmosphere of tolerance for police abuse of authority.”⁶ If the investigation were to reveal such a pattern, Carter promised to pursue appropriate relief under 42 U.S.C. § 14141, a little-known, recently enacted civil rights law.⁷

In launching an investigation of NYPD practices under § 14141, U.S. Attorney Carter focused national attention for the first time on a law passed quietly some three years before. When the U.S. Congress passed the Violent Crime Control and Law Enforcement Act of 1994,⁸ most of the law’s provisions—from its Assault Weapons Ban to its promise of 100,000 new beat officers—had been the subject of national headlines. But passing uncommented upon by the press and undebated by Congress was Title XXI,⁹ a provision that greatly augmented the power of the federal government to fight systematic misconduct within local police departments.

Responding to judicial decisions that had effectively denied victims of police misconduct standing to pursue proactive relief, Title XXI specifically authorized the U.S. Attorney General to bring civil actions for equitable and declaratory relief against any police department engaged in a pattern or practice of depriving people of constitutional or statutory rights.¹⁰ For the first time, Congress invested the Justice Department with explicit statutory authority to work proactively to change policies and practices in police departments with records of misconduct.

But if passage of Title XXI, codified as 42 U.S.C. § 14141, clearly added a potentially potent weapon to the arsenal available to the Justice Department, whether that weapon will have a significant effect on the national problem of police brutality is less clear. The effectiveness of the

6. Blaine Harden, *Civil Rights Investigation Targets N.Y. Police*, WASH. POST, Aug. 19, 1997, at A1 (quoting Zachary Carter).

7. *See id.*

8. Pub. L. No. 103-322, 108 Stat. 2071 (1994) (codified at 42 U.S.C. § 14141 (1994 & Supp. 1997)).

9. 42 U.S.C. § 210401.

10. *See id.*

law will depend on the answer to a host of questions. How difficult a task will the Attorney General face in proving a pattern or practice of rights deprivations under § 14141? Will the Department of Justice obtain and employ the resources necessary to vigorously enforce the law? Will federal courts prove willing and able to invest the energy, time, and ingenuity needed to fashion effective equitable relief? If implementation of the law results in extensive intervention into the administration of local police departments, would Congress accept such a result?

This Note closely analyzes 42 U.S.C. § 14141 in order to address these questions. Part I of the Note briefly depicts the legal and social background which led to the passage of the bill by describing the failure of traditional legal remedies to deter police brutality and the historic unavailability of injunctive relief as a remedy in the field. Part I closes by analyzing the legislative history of § 14141 to gain insight into Congress's intentions in granting the Attorney General this new authority to pursue injunctive relief. Part II addresses the text of the law itself, analyzing what the Attorney General must prove to demonstrate that a police department has engaged in a pattern or practice of violating rights and what forms of relief the Attorney General can pursue. Part III turns to the current strategy that the Department of Justice has chosen to employ in implementing § 14141, focusing on its resource commitment and legal strategies. Part IV examines whether federal courts are likely to respond favorably to structural litigation under § 14141. In conclusion, this Note offers an assessment of the potential impact of the law on the national problem of police brutality and an analysis of what steps might be taken to improve the law's operation.

I. THE PROBLEM OF POLICE BRUTALITY AND THE BIRTH OF 42 U.S.C. § 14141

A. *The Failure of Traditional Legal Remedies*

Studies of the two groups most aware of police practices—residents of high-crime neighborhoods and police officers themselves—have demonstrated that the violation of individual rights is a common feature of contemporary American policing.¹¹ Indeed, in 1992, ten urban police chiefs issued a joint public assessment that “the problem of excessive force in

11. See DAVID H. BAYLEY & HAROLD MENDELSON, MINORITIES AND THE POLICE 128-29 (1969); PATE & FRIDELL, *supra* note 5, at 24 (noting that officers in a small southern city reported that “40 percent of their fellow officers have used excessive force on a prisoner”); James R. Davis, *A Comparison of Attitudes Toward the New York City Police*, 17 J. POLICE SCI. & ADMIN. 233 (1990) (publishing a study in which 25% of a cross-section of Bronx residents reported witnessing police brutality or harassment during arrest).

American policing is real."¹² Yet despite the relative frequency of police violations of individual rights, the legal mechanisms that traditionally control individual behavior harmful to others—criminal and civil law—have proven conspicuously ineffective at policing the police.

1. *The Failure of Criminal Prosecution*

Police misconduct will often constitute a violation of common criminal statutes.¹³ In addition, the U.S. Congress and many state legislatures have passed criminal statutes that prohibit a police officer from willfully interfering with another person's civil rights.¹⁴ Yet criminal prosecutions of police officers for misconduct in the line of duty are exceedingly rare.

Analysts point to a number of reasons to account for the paucity of prosecutions. First, evidentiary factors substantially reduce the probability of obtaining a conviction. Victims of police misconduct—frequently convicted felons, criminal suspects, or other marginalized members of society—often lack credibility before a jury.¹⁵ If the complainant has corroborating witnesses, they often suffer from the same credibility problems as the complainant.¹⁶ In many cases, the only witnesses to the incident are other police officers; the phenomenon of police officers covering for their colleagues through silence or prevarication is well documented and apparently widespread.¹⁷ Coupled with the heavy burden of proof in a criminal case and likely juror identification with the law enforcement officer,¹⁸ these evidentiary problems render prosecutions of police officers difficult to win and thus infrequently brought.

12. INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, REPORT at i (1991) [hereinafter CHRISTOPHER COMMISSION].

13. For example, a policeman's use of excessive force would constitute assault and battery, or, in its most egregious form, manslaughter or murder.

14. See, e.g., 18 U.S.C. §§ 241, 242 (1994); CAL. PENAL CODE § 422.6 (West 1998).

15. See PEREZ, *supra* note 5, at 24 (arguing that "[e]xcessive force is used quite often on the most disenfranchised members of society *precisely because of their position in the social order*"). Research has revealed that victims of police misconduct are predominantly members of minority groups, see Edward J. Littlejohn, *Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct*, 58 U. DET. J. URB. L. 365, 369 (1981); Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 756 n.13 (1993), and are often gays and lesbians, see CHRISTOPHER COMMISSION, *supra* note 12, at 168-71; Patton, *supra* at 756 n.14, or homeless people, see Patton, *supra* at 756 n.14. Citing the views of § 1983 practitioners and academics, Patton argues that juries generally resolve credibility questions in favor of police officers rather than members of groups traditionally subjected to discrimination. See Patton, *supra*, at 755-56.

16. See *id.* at 757.

17. See *id.* at 763-64; PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 51 (1995).

18. See *Police Brutality: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102nd Cong. 5 (1992) (statement of John R. Dunne, Assistant Attorney General, Civil Rights Division) [hereinafter *Police Brutality Hearings*].

Second, institutional pressures work against local criminal prosecutions. Because of their close working relationship, "prosecutors tend to be . . . reluctant to bring charges against police officers, on whom they so heavily depend as a group."¹⁹ Perhaps as a result, local prosecutors' offices traditionally dedicate limited resources to police prosecutions.²⁰ Finally, in an era in which fear of crime represents a potent political force, supervisory elected and appointed officials—mayors, district attorneys, and police commissioners—are unlikely to support criminal prosecution of police officers in any but the most egregious cases.

While federal prosecutors face less potent political and institutional pressures, statutory limitations have reduced their ability to step into the void. Both federal criminal civil rights laws—18 U.S.C. §§ 241 and 242²¹—require proof not only that a police officer's actions had the effect of depriving a victim of civil rights, but also that the officer intended the deprivation.²² In effect, the prosecutor must demonstrate that the officer specifically intended to use force that the officer knew to be unreasonable.²³ This specific intent requirement presents "a significant obstacle" to federal criminal civil rights prosecutions.²⁴

The role of federal prosecutors has also been limited by policy decisions.²⁵ The Department of Justice has rejected the notion that its lawyers are "front line troops in combating instances of police abuses," viewing its role as "more of a backstop."²⁶ This policy decision is reflected in the number of lawyers assigned to civil rights prosecution and the number of

19. HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 176 (1977).

20. See Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 537 (1994).

21. Section 241 prohibits conspiracies to deprive any person of civil rights secured by the Constitution or U.S. law. See 18 U.S.C. § 241 (1994). Section 242 prohibits those acting under color of law from depriving persons of civil rights secured by the Constitution or U.S. law. See 18 U.S.C. § 242 (1994).

22. See *United States v. Guest*, 383 U.S. 745, 753-54 (1966) (adopting specific intent requirement under 18 U.S.C. § 241); *Screws v. United States*, 325 U.S. 91, 101 (1945) (adopting specific intent requirement under 18 U.S.C. § 242).

23. See Levenson, *supra* note 20, at 556-57. Though there has been some confusion about what the specific intent requirement actually entails, see Edward F. Malone, *Legacy of the Reconstruction: The Vagueness of the Criminal Civil Rights Statutes*, 38 UCLA L. REV. 163, 192 (1990), the Supreme Court has ruled that "specific intent" can be inferred when an objective police officer would find the defendant's acts unreasonable, see *Graham v. Connor*, 490 U.S. 386, 397 (1989). For a critique of the specific intent requirement, see Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113 (1993).

24. Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1455, 1491 (1993); see also Levenson, *supra* note 20, at 556.

25. See David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 499 (1992).

26. *Police Brutality Hearings*, *supra* note 18, at 3 (statement of John R. Dunne, Assistant Attorney General, Civil Rights Division).

cases brought. Of the 80,747 positions at the Department of Justice in 1991, only forty-four were slated for civil rights prosecution.²⁷ And though the Department received more than 8000 and investigated more than 3000 complaints of police misconduct per year in the late 1980s and early 1990s, federal prosecutors annually pursued indictments in only about fifty to sixty cases.²⁸

Finally, legal commentators question whether criminal sanctions could ever "have significance as a deterrent."²⁹ Our societal desire to grant police officers the discretion to exercise force, coupled with our inability to define bright-line standards for this practice, diminishes our willingness to pursue convictions of erring police officers.³⁰ Put another way, juries are "understandably reluctan[t] . . . to brand as criminal those who, however misguidedly, are seeking to enforce the law."³¹

As a result of these barriers, prosecutions of police officers occur remarkably infrequently. Between 1981 and 1991 in Los Angeles, the District Attorney brought excessive force prosecutions in forty-three cases—less than one-quarter of one percent of alleged acts of excessive force.³² Federal prosecutors were even less active. The Department of Justice initiated only three prosecutions against police officers in Los Angeles during the same ten-year period.³³ The import of these statistics is clear: the criminal justice system punishes officers engaging in misconduct so rarely that it could not be expected to deter potential future offenders.

27. See *id.* at 321 (supplemental materials submitted by John R. Dunne, Assistant Attorney General, Civil Rights Division). Since 1985, while the staffing levels at the Department of Justice have grown by 55 percent, the number of civil rights prosecution positions has declined by 2 percent. See *id.*

28. See *id.* at 89; see also JEROME SKOLNICK & JAMES FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 209 (1993). These statistics became available in 1992 after the Rodney King incident pursuant to an agreement between the Attorney General and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee. No updated statistics are available.

29. Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 450 (1978); see also PETER SCHUCK, *SUING GOVERNMENT* at xix (1983).

30. See EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 38 (1980) ("Our expectation that policemen will use force, coupled by our refusal to state clearly what we mean by it . . . smacks of more than a bit of perversity.").

31. Newman, *supra* note 29, at 450.

32. See Levenson, *supra* note 20, at 535. The organization Police Watch documented some of the cases that the L.A. District Attorney's office declined to prosecute; these cases included alleged assaults "with fists, clubs, flashlights, leather-covered saps, pistol barrels, scalding water and electric stun gun." Patton, *supra* note 15, at 796 n.236 (quoting POLICE WATCH, *LAW ENFORCEMENT DATA* 3-4 (1991)).

33. See Levenson, *supra* note 20, at 538 (citing David Freed, *Federal Prosecutors Usually Keep Hands Off*, L.A. TIMES, July 7, 1991, at A12).

2. *The Failure of Civil Damages*

Because civil law holds plaintiffs to a lesser burden of proof and asks juries to impose less onerous penalties, individual complainants have had somewhat more success at winning civil suits for damages against police officers. The majority of civil suits against police officers are filed in federal court under § 1983.³⁴ However, despite hopes that 42 U.S.C. § 1983 damage awards might provide “an effective deterrent and compensatory remedy,”³⁵ successes in individual damage claims have yet to translate into an effective system for controlling police misconduct.

Winning a § 1983 suit against a police officer remains a difficult proposition. Those on the receiving end of police brutality typically “do not make sympathetic plaintiffs.”³⁶ This problem is exacerbated by the requirement that 42 U.S.C. § 1983 plaintiffs sue the offending police officer, rather than the officer’s municipal employer;³⁷ juries are often reluctant “to impose heavy damage remedies on a hard-working police officer.”³⁸ Moreover, even if a § 1983 plaintiff proves the commission of a constitutional violation, the defendant officer may still avoid liability if he establishes a reasonable good faith belief in the lawfulness of his actions.³⁹ Many juries interpret this good faith defense as license to reject liability if the officer “was doing what he thought was best.”⁴⁰

Section 1983 plaintiffs are also hampered by evidentiary and procedural difficulties, such as corroboration problems, the police “code of silence,” and discovery battles to access confidential police documents.⁴¹ Agreements under which prosecutors drop criminal charges in exchange for promises not to sue the police or the city preempt a potentially large

34. Section 1983 provides a right of action to plaintiffs whose constitutional or statutory rights are violated by persons acting under color of law. *See* 42 U.S.C. § 1983 (1994). While tort claims against police officers can also be brought in state court, “the largest number of police misconduct cases are still brought in federal court [under § 1983].” MICHAEL AVERY & DAVID RUDOVSKY, *POLICE MISCONDUCT: LAW AND LITIGATION* 1-5 (1995).

35. Newman, *supra* note 29, at 453.

36. Patton, *supra* note 15, at 756; *cf. supra* note 15 and accompanying text.

37. *See* *Monroe v. Pape*, 365 U.S. 167, 187-92 (1961).

38. *Federal Response to Police Misconduct: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102nd Cong. 17 (1992) (statement of Judge Jon Newman) [hereinafter *Police Misconduct Hearings*]. In most cases, municipalities indemnify police officers, but courts refuse to allow plaintiffs to publish this fact to the jury. The result is the worst of both worlds: juries likely reduce awards based upon ability of officer to pay, but indemnification reduces the deterrent effect of personal awards. *See* Newman, *supra* note 29, at 455-58.

39. *See id.* at 459-62. To be more precise, police officers are shielded from liability by qualified immunity unless “a reasonable jury could conclude that the [constitutional violation] is so apparent that no reasonable officer could have believed in the lawfulness of his actions.” *DeGraff v. District of Columbia*, 120 F.3d 298, 302 (D.C. Cir. 1997) (quoting *Wardlaw v. Pickett*, 1 F.3d 1297 (D.C. Cir. 1993)).

40. *Police Misconduct Hearings*, *supra* note 38, at 18 (statement of Judge Jon Newman).

41. *See* Patton, *supra* note 15, at 761.

number of prospective suits.⁴² Add to the mix that § 1983 cases are costly⁴³ and that the typical complainant will usually lack the financial resources to retain an attorney,⁴⁴ and the result is that civil actions against police officers are rarely successful.⁴⁵

Moreover, even sizable plaintiff victories in police misconduct cases may neither deter police officers from subsequent abusive behavior nor prompt police departments to alter policies or tactics. Laws across the country protect individual police officers from paying legal fees or damages in misconduct cases, transferring liability to the municipality so long as the officer acted in good faith.⁴⁶ In practice, municipalities virtually always determine that an officer acted in good faith, even if the trial court explicitly rules that the officer acted with malice.⁴⁷ As a result, commentators may not be exaggerating when they argue that “[o]fficers have no economic incentive to change their behavior since a civil suit has no financial impact upon them.”⁴⁸

Studies show that the outcomes of civil suits have a similarly minimal impact on many police departments.⁴⁹ From 1986 to 1990, the years leading up to the Rodney King incident, the city of Los Angeles paid damage awards totaling 20 million dollars in excessive force cases alone.⁵⁰ Similarly, New York City paid out 50 million dollars in damages in cases of “police misconduct” from 1987 to 1992.⁵¹ Yet, in each city, the police department made no institutional or policy changes to respond to these

42. See R. Samuel Paz, *Civil Rights Laws: The Need for a New Look at an Old BandAid*, 14 CHICANO-LATINO L. REV. 20, 24 (1994); see also *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (holding agreements to release § 1983 claims in exchange for dismissal of criminal charges enforceable).

43. See Paz, *supra* note 42, at 24 (drawing on experience to argue that § 1983 suits require at least one expert witness).

44. See Patton, *supra* note 15, at 756 n.18. Because such cases are difficult to win, few attorneys are willing to work on a contingent basis except in the most egregious and/or provable cases of police misconduct. See *id.* at 756-57.

45. See Alfredo Garcia, *The Scope of Police Immunity from Civil Suit Under Title 42 Section 1983 and Bivens: A Realistic Appraisal*, 11 WHITTIER L. REV. 511, 532 (1989) (opining that “the likelihood of a successful civil action against a police officer is miniscule”); Patton, *supra* note 15, at 753-54 (discussing the weakness of § 1983 as a deterrent because of the difficulty of filing and winning a suit against a police officer).

46. See, e.g., CAL. GOV'T CODE § 825 (West 1993).

47. See Patton, *supra* note 15, at 771-72.

48. *Id.* at 771.

49. According to the Police Foundation, “many departments [do] not keep information concerning civil suits.” PATE & FRIDELL, *supra* note 5, at 146.

50. See CHEVIGNY, *supra* note 17, at 52-53. In addition, between January 1989 and May 1992, L.A. County paid over \$15 million for excessive force judgments against the Sheriff's Department. See *id.* at 53.

51. See *id.* at 101-02. For the purposes of this statistic, “police misconduct” is defined as all cases against police officers excluding ordinary negligence such as auto accidents. See *id.*

suits. In fact, despite the substantial sums of money involved, neither city even bothered to monitor civil suits.⁵²

Legal commentators have suggested a host of reforms to endow § 1983 with a more powerful punch.⁵³ But recent history in L.A. and New York suggests that reforming § 1983 to increase the size and power of damage awards will likely not provide the necessary deterrence to control police misconduct. In cases involving hot-button issues like crime control, general deterrence in the form of damages simply may not do the trick. As one analyst has pointed out, “the political environment may countenance or even reward lawbreaking that appears to advance important programmatic or ideological goals such as crime control.”⁵⁴ In pursuing crime control at the expense of police misconduct, cities may prove willing to “pay as they go for the violation of the rights of their people.”⁵⁵

B. The Historical Unavailability of Injunctive Relief for the Remediation of Police Misconduct: The Problem of Standing

Traditionally, when confronted with cases in which legal relief is inadequate or insufficient to prevent a recurring legal harm, courts have resorted to the equitable remedies of injunction and declaratory judgment. As discussed above, the history of police misconduct litigation under § 1983 presents a case study in the inadequacy of legal remedies. Yet, courts have not filled the void by issuing injunctions against repeated police misconduct or by declaring particular police procedures unconstitutional. This absence of injunctive and declaratory relief is no puzzle: it stems directly from a body of standing jurisprudence that dramatically limits the availability of such relief in police misconduct cases. The following section will trace the development of this standing doctrine—a doctrine which § 14141 was designed to circumvent.

52. *See id.* at 102. After public reports were issued criticizing the ignoring of civil suits, both the LAPD and the NYPD instituted policies aimed at monitoring civil claims. *See id.* at 105. It is telling, however, that these reforms came about not as a result of the economic pressure of civil damage awards but because of the publicity of high-profile incidents of excessive force.

53. Proposals have included: authorizing the Attorney General to initiate § 1983 suits on behalf of victims, imposing liability on municipalities rather than individual officers, eliminating the qualified immunity defense, authorizing unindemnifiable punitive damages against officers for egregious violations, and authorizing punitive damages against municipalities for ineffective training and/or complaint management. *See Hoffman, supra* note 24, at 1518-26; Newman, *supra* note 29, at 453-65.

54. SCHUCK, *supra* note 29, at 125.

55. Rudovsky, *supra* note 25, at 500; *see also Police Brutality Hearings, supra* note 18, at 60 (statement of Paul Hoffman, Legal Director, ACLU of Southern California).

1. *The Unavailability of Equitable Relief to Private Litigants*

On its face, § 1983 appears to provide "sweeping remed[ies] for official misconduct," ranging from damages to equitable relief.⁵⁶ For a brief period in the 1970s, § 1983 plaintiffs successfully pursued injunctive relief to eliminate unconstitutional police practices and transform police policy.⁵⁷ However, a line of Supreme Court cases subsequently erected nearly insurmountable standing requirements for plaintiffs pursuing equitable relief against police departments. As a result, today it is "virtually impossible for private § 1983 litigants to obtain equitable relief against patterns or practices of police abuse."⁵⁸

The Supreme Court's first foray into the field in *Rizzo v. Goode* involved the reversal of an injunctive order requiring the city of Philadelphia to overhaul its procedure for handling civilian complaints of police misconduct.⁵⁹ Though the district court found constitutional violations by police officers "unacceptably high" in number and too frequent to be "dismissed as rare, isolated instances,"⁶⁰ the Supreme Court ruled that the plaintiffs lacked "the requisite personal stake in the outcome" to pursue injunctive relief because past exposure to illegal conduct does not demonstrate a likelihood of future harm.⁶¹ In effect, the *Rizzo* Court deemed patterns or practices of constitutional violations insufficient to invest victims of such violations with standing to sue for injunctive relief,⁶² instead, the Court apparently required plaintiffs to allege a "deliberate polic[y]" or an "intentional, concerted, and . . . conspiratorial effort."⁶³

56. SCHUCK, *supra* note 29, at 16.

57. See *Police Brutality Hearings*, *supra* note 18, at 171 (statement of Drew Days, Professor, Yale Law School).

58. Hoffman, *supra* note 24, at 1513.

59. *Rizzo v. Goode*, 423 U.S. 362 (1976).

60. *COPPAR v. Rizzo*, 357 F. Supp. 1289, 1319 (E.D. Pa. 1973), *aff'd sub nom. Goode v. Rizzo*, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976).

61. *Rizzo*, 423 U.S. at 372-73 (internal quotation omitted). The widespread nature of police misconduct may have worked against the plaintiffs: in pointing out that "there was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere," *id.* at 375, the majority is hinting at its concern that allowing injunctive actions under § 1983 could precipitate a shift in control of police departments from local governments to federal courts.

62. Analysts initially questioned whether *Rizzo* merely resulted from insufficient proof of a pattern or practice of misconduct. See, e.g., Archibald Cox, *The Effect of the Search for Equality upon Judicial Institutions*, 1979 WASH. U. L.Q. 795, 803 (1979); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 974 (1978). More recently, as dismissals of suits for injunctive relief against patterns or practices of police misconduct have piled up, commentators have viewed *Rizzo* as systematically limiting private plaintiffs in police abuse suits to damage remedies. See *Police Brutality Hearings*, *supra* note 18, at 171 (statement of Drew Days, Professor, Yale Law School).

63. *Rizzo*, 423 U.S. at 374-75.

In *City of Los Angeles v. Lyons*,⁶⁴ the Supreme Court extended its restrictive standing rationale to cases involving unconstitutional police policies. In overturning a preliminary injunction enjoining the L.A. Police Department from employing a chokehold that carried a high risk of injury or death,⁶⁵ the *Lyons* Court held that neither the plaintiff's previous exposure to the chokehold nor the continued existence of a department policy authorizing its use constituted sufficient threat of future harm to confer equitable standing on the plaintiff.⁶⁶ In the process, *Lyons* effectively rendered the admittedly unconstitutional policy immune from injunction.⁶⁷ As Justice Marshall pointed out in dissent, the decision left the city "free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result."⁶⁸

With precious few exceptions, plaintiffs have been unable to devise innovative pleading strategies to circumvent *Lyons* and *Rizzo* and establish standing.⁶⁹ As a result, *Rizzo* and *Lyons* have effectively rendered injunctive relief against police misconduct virtually unobtainable, even

64. 461 U.S. 95 (1983).

65. The preliminary injunction enjoined use of the hold except when an officer was threatened with death or serious injury. It also mandated an improved training program and regular reporting and record keeping. *See id.* at 99-100.

66. *See id.* at 105.

67. *See* CHEVIGNY, *supra* note 17, at 109.

68. *Lyons*, 461 U.S. at 113 (Marshall, J., dissenting).

69. The few exceptions to this generalization are worth noting. First, Ninth Circuit courts have allowed plaintiffs who establish standing to seek § 1983 damage remedies against police officers to pursue injunctive relief. *See, e.g.,* Nava v. City of Dublin, 121 F.3d 453, 456 (9th Cir. 1997). No other circuit has adopted this minority interpretation of *Lyons*, and even Ninth Circuit courts have questioned its validity. *See id.* at 457. Second, in at least two cases, plaintiffs seeking injunctions to remedy discriminatory police practices have successfully avoided dismissal by bringing claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* (1994) (proscribing discrimination under programs receiving financial assistance from the federal government), rather than under § 1983. *See* Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012 (6th Cir. 1989) (reversing the dismissal of a § 2000d action seeking injunctive relief to force a police department to provide equal police protection to a minority neighborhood); Chavez v. Illinois State Police, No. 94CV5307, 1996 WL 66136 (N.D. Ill. Feb. 13, 1996) (rejecting motion to dismiss § 2000d action seeking injunctive relief against police practice of detaining, stopping, and searching individuals on the basis of race). Third, in a number of cases, plaintiffs pursuing preliminary injunctions under § 1983 against patterns or practices of police misconduct have satisfied *Lyons* by successfully pleading a "real and immediate threat of injury" from police. In *Thomas v. County of Los Angeles*, 978 F.2d 504 (9th Cir. 1993), the plaintiffs were successful in obtaining standing because of the huge number of incidents and the localized nature of the alleged misconduct. *See id.* at 507-08 (involving 75 alleged incidents within six-by-seven block area). In at least three other cases, plaintiffs have satisfied *Lyons* by bringing a class action to enjoin mandatory law enforcement policies. *See* DeShawn E. v. Safir, 156 F.3d 340 (2d Cir. 1998); LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985); Franklin v. City of Chicago, 102 F.R.D. 944 (N.D. Ill. 1984). For example, in *DeShawn E.*, a certified class of children arrested on delinquency charges convinced the Second Circuit that the likelihood that the class would suffer harm from the NYPD's mandatory interrogation policy was sufficient to satisfy the *Lyons* requirement. *See DeShawn E.*, 156 F.3d at 345.

where the misconduct involves patterns of abuse or unconstitutional official policies.⁷⁰

2. *The Unavailability of Injunctive Relief to the Attorney General*

Partly in response to the outcome of *Rizzo*, the Department of Justice entered into an extensive investigation of the Philadelphia Police Department that revealed widespread officer misconduct and institutional mismanagement.⁷¹ As a result, the Department of Justice filed suit against the city of Philadelphia, its police department, and high-ranking municipal officials, alleging both a systematic pattern of constitutional rights violations by officers and the deliberate encouragement of such violations through the police department's adoption and retention of inadequate disciplinary, complaint review, and training procedures.⁷² As a remedy, the Justice Department sought an injunction both against the rights violations themselves and against the city's failure to correct the effects and to ensure against recurrence of such violations.⁷³

Arguing that the Attorney General had standing to pursue injunctive relief against patterns or practices of rights violations under implied rights of action in the Fourteenth Amendment and the criminal civil rights statutes,⁷⁴ the Department of Justice hoped to fill the gap left by *Rizzo*'s denial of standing to individuals in similar cases.⁷⁵ However, willing neither to read an implied civil right of action into expressly criminal statutes nor to grant the executive branch the power to sue local governments to enforce the Fourteenth Amendment without Congressional authorization, the Third Circuit rejected the Attorney General's claim of standing and dismissed the case.⁷⁶

70. See Hoffman, *supra* note 24, at 1513; *Police Brutality Hearings*, *supra* note 18, at 174 (statement of Drew Days, Professor, Yale Law School). Lower courts have applied *Lyons* to deny standing to plaintiffs seeking declaratory as well as injunctive relief against allegedly unconstitutional police policies. See Laura E. Little, *It's About Time: Unraveling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933, 942 & n.51 (1993) (citing cases from four circuits).

71. See *Police Brutality Hearings*, *supra* note 18, at 173 (statement of Drew Days, Professor, Yale Law School).

72. See *United States v. City of Philadelphia*, 644 F.2d 187, 190 (3d Cir. 1980).

73. See *id.* The Department of Justice also sought declaratory relief.

74. See *id.*

75. See *Police Brutality Hearings*, *supra* note 18, at 173 (statement of Drew Days, Professor, Yale Law School).

76. See *City of Philadelphia*, 644 F.2d at 190-202. Similar holdings by federal circuit courts undermined the Justice Department's pursuit of injunctive relief to vindicate the constitutional rights of institutionalized persons. See, e.g., *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). In *United States v. Mattson*, for example, the Justice Department sought to enjoin a state-managed mental health institution from continuing to house mentally retarded individuals in an environment so unsafe and unhealthy that it violated their constitutional rights. See *Mattson*, 600 F.2d at 1297. Although the Ninth Circuit termed the Justice Department's efforts "laudable," *id.* at 1297, the court held

Though the Supreme Court never ruled on the issue, subsequent attorneys general apparently viewed the rulings in *City of Philadelphia* as determinative;⁷⁷ the Department of Justice never again attempted to enjoin patterns or practices of rights violations by police or institutional officials. Like individual victims, the federal government lacked standing to enjoin police officers' violations of individual rights. As a result, by 1983, the triumvirate of *Rizzo*, *Lyons*, and *City of Philadelphia* had effectively removed injunctive relief from the tools available to deter police misconduct. Prior to legislative action,⁷⁸ legal solutions to the problem of police brutality consisted merely of a dysfunctional system of criminal liability and civil damages. It would take a videotape and a riot to spur congressional action.

C. Legislative Background of 42 U.S.C. § 14141

The power of Congress to grant individuals or the Attorney General standing to pursue injunctive relief in cases involving patterns or practices of violations of individuals' rights has never been much in doubt.⁷⁹ Settled case law confirms Congress's plenary authority to grant standing to the Attorney General whenever it deems such standing to be in the national interest.⁸⁰ Whether Congress has the authority to confer standing upon individuals presents a more complicated question. In its first analysis of the issue, the Supreme Court appeared to acknowledge that Congress held broad authority to confer standing upon individuals.⁸¹ Subsequent cases, however, have drawn a distinction between prudential standing rules, which Congress can waive through legislation, and constitutional standing requirements, which are inviolable.⁸² In *Lujan v. De-*

that the Department had neither explicit nor implicit statutory authority to bring the case and thus lacked standing, *See id.* at 1298-1300.

77. *See, e.g., Police Brutality Hearings, supra* note 18, at 173 (statement of John R. Dunne, Assistant Attorney General, Civil Rights Division) (informing the congressional committee that D.O.J. lacked authority to pursue injunctive relief against police departments because of *City of Philadelphia*).

78. In 1980, Congress overturned *Mattson* by passing the Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247 (codified at 42 U.S.C. §§ 1997-1997j (1994)), which granted the Attorney General standing to bring suits for injunctive relief to remedy patterns or practices of unconstitutional treatment of institutionalized persons.

79. For an extensive discussion of the ability of Congress to grant standing in this area, see Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 48-56 (1984). While Professor Fallon suggests that *Lyons* could be interpreted to imply that "Congress could not authorize injunctive relief based solely on past injuries," he rejects this interpretation as "unwise if not untenable." *Id.* at 30.

80. *See id.* at 54.

81. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (allowing Congress to authorize suits by individuals by passing "statutes creating legal rights, the invasion of which creates standing" (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973))).

82. *See, e.g., Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

fenders of Wildlife,⁸³ the Court attempted to clarify this distinction. Writing for a plurality, Justice Scalia rejected the idea that Congress could invent injuries in order to satisfy standing requirements but allowed that Congress could "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."⁸⁴ Meanwhile, in a concurrence that provided the deciding votes for the majority, Justice Kennedy argued that congressional power includes the definition of injuries to create standing, so long as Congress "at the very least identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit."⁸⁵ Under either framework, a statute that authorized victims of rights deprivations to enjoin the pattern or practice of police misconduct that led to those deprivations would create standing by identifying a concrete, *de facto* injury, relating that injury to a class of victims entitled to bring suit, and elevating the status of that injury to provide standing for equitable relief.

Prior to *City of Philadelphia*, Congress had repeatedly considered and rejected the possibility of employing these powers to authorize the Attorney General to pursue injunctive relief in *any* case involving a civil rights violation.⁸⁶ Instead of a general authorization, Congress repeatedly elected to grant the Attorney General and individuals standing to pursue injunctive relief to remedy violations of specific civil rights, such as voting rights, prisoners' rights, and rights to public accommodations.⁸⁷

Though *City of Philadelphia* and *Lyons* had rendered injunctive relief virtually unavailable in police misconduct cases in the early 1980s, Congress was slow to respond to the challenge. Perhaps due to rising national concerns over crime, the expansion of police power to fight the war on drugs, a conservative Republican White House, and the growing antipa-

83. 504 U.S. 555 (1992). At issue in *Lujan* was the Endangered Species Act's authorization for "any person" to bring suit to enjoin a violation of the Act. See 16 U.S.C. § 1540(g)(1)(A) (1994).

84. *Lujan*, 504 U.S. at 578; see also *Raines v. Byrd*, 117 S. Ct. 2312, 2322 (1997) (rejecting as unconstitutional Congress's declaration that individual members of Congress had standing to challenge the Line-Item Veto Act, because they could allege "no injury to themselves as individuals").

85. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

86. This proposal was included in the original versions of the Civil Rights Acts of 1957 and 1964 and offered as an amendment to the Civil Rights Act of 1960. In each case, however, Congress rejected granting the Attorney General such broad, wide-ranging authority. See *United States v. City of Philadelphia*, 644 F.2d 187, 194-197 (3d Cir. 1980) (chronicling the legislative history of attempts to grant the Attorney General the authority to pursue injunctive relief under the Fourteenth Amendment).

87. See, e.g., 42 U.S.C. § 1971(c) (1994) (authorizing the Attorney General to pursue injunctive relief in cases involving voting rights); 42 U.S.C. § 1997(a) (1994) (authorizing Attorney General to pursue injunctive relief in cases involving civil rights of prisoners); 42 U.S.C. §§ 2000a-3, 2000a-5 (1994) (authorizing Attorney General and individuals to pursue injunctive relief in cases involving discrimination in public accommodations).

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thy of the Supreme Court towards federal intervention in local governmental administration, the largely Democratic Congress of the 1980s mounted no serious attempt to pass legislation to counteract *Lyons*, *Rizzo*, and *City of Philadelphia* by authorizing the pursuit of injunctive relief to remedy police abuse. But the Rodney King incident and the national outcry that followed rejuvenated congressional interest in new approaches to the problem of police brutality.

Within months of the King incident, Representative Don Edwards of California introduced the Police Accountability Act, which authorized actions for injunctive relief to remedy police abuse.⁸⁸ More specifically, Edwards's bill prohibited police officers from engaging in a pattern or practice of conduct that deprived individuals of civil rights; the bill also authorized both the Attorney General and the victims of such conduct to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice."⁸⁹ Responding to popular outrage over the King incident and renewed national interest in controlling police practices, the Democratic House leadership of the 102d Congress incorporated the Police Accountability Act into the House Omnibus Crime Bill of 1991 ("Crime Bill") as Title XII.⁹⁰

However, opposition from the Bush Justice Department, potent political pressure from police groups, and the prospect of a veto by President Bush forced Senate leadership to water down Title XII.⁹¹ By the time the Conference Committee reconciling House and Senate versions of the bill had completed its work, Title XII authorized only the Attorney General to sue for injunctive relief.⁹² Though the House Judiciary Committee had termed private standing "necessary, especially in situations where the Department of Justice does not act,"⁹³ the Conference Committee dropped the private cause of action. The deletion of individual standing represented a critical policy decision that will greatly affect the legislation's implementation.⁹⁴

88. See H.R. 2972, 102d Cong. (1991); Don Edwards, *Making a Federal Case*, THE RECORDER, Sept. 25, 1991, at 4. The bill also originally included a section increasing criminal liability for police officers; that section was stricken by the Judiciary Committee. See H.R. REP. NO. 102-242, at 405 (1991).

89. H.R. 2972, 102d Cong. (1991).

90. See H.R. 3371, 102d Cong. (1991); see also H.R. REP. NO. 102-1085, at 149-50 (1992) (describing the incorporation of H.R. 2972 into H.R. 3371).

91. See Terence Moran & Daniel Klaidman, *Police Brutality Poses Quandary for Justice Department*, LEGAL TIMES, May 4, 1992, at 1.

92. See H.R. CONF. REP. NO. 102-405, at 223-24 (1991).

93. H.R. REP. NO. 102-242, at 402 (1991).

94. See *infra* notes 148-176 and accompanying text.

On November 27, 1991, the House passed the Conference Committee's compromise bill.⁹⁵ Yet on account of a veto threat and an ultimately successful filibuster by Senate Republicans, the Crime Bill never reached President Bush's desk.⁹⁶

Defeat of the 1991 Crime Bill merely postponed congressional action to authorize the pursuit of injunctive relief against police abuses. The ill-fated 1991 bill provided the starting point for the drafting of the 103rd Congress's own crime legislation. When Senator Joseph Biden introduced the Violent Crime Control and Law Enforcement Act of 1993, the legislation included the 1991 Conference Committee's compromise provision authorizing the Attorney General to pursue injunctive relief for patterns of police abuse.⁹⁷ Though partisan wrangling over other issues held up passage of the bill until late 1994, the final enacted version of the Crime Act included this provision, codified at 42 U.S.C. § 14141.⁹⁸

Thus, in response to the unavailability of equitable relief to prevent police misconduct, Congress expressly authorized the Attorney General to use civil suits to prevent patterns or practices of civil rights violations by law enforcement officials. But would the new law prove an effective tool in preventing police brutality? Because of the law's recent enactment, answers in the form of statistical data and interpretive case law are unavailable. As a result, this paper will attempt to predict the significance of 42 U.S.C. § 14141 through textual analysis and examination of the law's preliminary application.

II. 42 U.S.C. § 14141: A TEXTUAL ANALYSIS

Section 14141 consists of two parts: Subsection (a) which defines and proscribes the "[u]nlawful conduct," and subsection (b) which assigns the sole method of enforcing subsection (a). Section 14141(a) declares:

It shall be unlawful for any governmental authority, or any agent thereof . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.⁹⁹

95. See 137 CONG. REC. H8173 (daily ed. Nov. 27, 1991).

96. See Joan Biskupic, *Crime Measure Is a Casualty of Partisan Skirmishing*, CONG. Q. WKLY. REP., Nov. 30, 1991, available in 1991 WL 5333376.

97. See S.1488, 103d Cong. (1993).

98. See Pub. L. No. 103-322, tit. XXI 108 Stat. 2071 (1994). Title XXI also included a provision, codified at 42 U.S.C. § 14142, that requires the Attorney General to gather and publish "data about the use of excessive force by law enforcement officers." *Id.*

99. 42 U.S.C. § 14141(a). Section 14141(a)'s prohibition also extends to a pattern or practice of conduct by "officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles" as well as by "law enforcement officers." *Id.*

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In order to enforce this prohibition, § 14141(b) provides that “[w]henever the Attorney General has reasonable cause to believe that a violation of paragraph (1) [sic] has occurred, the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.”

This Note will analyze each subsection individually.

A. *Section 14141(a): “Pattern or Practice”*

In passing 42 U.S.C. § 14141, Congress’s general intent was clear: to overrule *City of Philadelphia* and provide the Attorney General with the authority to “sue a local government or its officials to enjoin violations of citizens’ constitutional rights by police officers.”¹⁰⁰ But the procedural and evidentiary burden that the Attorney General must shoulder in order to obtain injunctive relief under § 14141 is less obvious. That burden will depend almost entirely on judicial construction of the phrase “pattern or practice of conduct by law enforcement officers.” Depending upon the term’s construction, proving a “pattern or practice” of police misconduct could entail anything from extensive evidence of systematic unconstitutional police activities, to evidence of a pernicious police department policy, to evidence of a handful of similar police actions that violate citizens’ rights. To date, no federal court has interpreted the phrase “pattern or practice” under the two acts that utilize this phrase in the context of rights deprivations: the Civil Rights of Institutionalized Persons Act (CRIPA) and § 14141.

Because § 14141 does not define its terms, the legislative text provides little guidance as to what Congress meant by a “pattern or practice.” In interpreting an undefined statutory term, the Supreme Court has examined two sources to determine congressional intent: the statute’s legislative history and previous judicial constructions of similar language in other statutes.¹⁰¹ Analysis of these two sources provides a number of insights—though no definitive answer—regarding the term’s likely definitional scope. The legislative history of § 14141 reveals that a “pattern or practice” may be inferred from a few individual rights violations, coupled with an overt institutional police policy of condoning misconduct. And judicial acceptance of statistical evidence and disparate impact theories to prove a “pattern or practice” under other statutes strongly suggests that evidence of repeated, similar rights deprivations will be sufficient proof of a § 14141. But before launching into an extended examination of these

100. H.R. REP. NO. 102-242, at 400 (1991).

101. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977).

two sources, it is important to pause and note the traditional judicial reluctance to find patterns of police misconduct.

1. *The Backdrop to Section 14141: Judicial Reluctance To Find Patterns of Police Misconduct*

Prior to the passage of § 14141, federal courts had proved reluctant to find patterns of police misconduct. Whether federal courts adopt a less onerous standard of proof in “pattern or practice” cases brought under § 14141 may in large part determine its efficacy at limiting police misconduct.

In order to obtain supervisory or municipal liability under 42 U.S.C. § 1983, plaintiffs must prove the existence either of an institutional “policy” authorizing misconduct or of a police “custom” of misconduct, defined as a “continuing, widespread, persistent pattern of unconstitutional misconduct by the government entity’s employees” that policy-making officials ignored.¹⁰² Not surprisingly given this onerous standard of proof, few plaintiffs have successfully demonstrated a police “custom” of constitutional deprivations.¹⁰³ As a result, “the only defendant realistically subject to suit is the subordinate state official directly responsible for violating the plaintiff’s rights.”¹⁰⁴ However, § 1983 case law will not bind courts interpreting § 14141. To the contrary, the congressional decision to use the term “pattern or practice” in § 14141 rather than to adopt the term “custom” from § 1983 case law—as well as the absence of the limiting adjectives “continuing,” “widespread,” and “persistent”—suggests that proving a “pattern or practice” of police misconduct will be easier under § 14141 than under § 1983.

In *Rizzo v. Goode*, the only Supreme Court case involving an alleged pattern of police misconduct, the Court acknowledged that at least 16 incidents in which officers violated citizens’ constitutional rights occurred in Philadelphia in the space of a year.¹⁰⁵ And the *Rizzo* Court did not dispute the lower court’s finding that departmental procedures “discourage[d] the filing of civilian complaints and . . . minimize[d] the consequences of police misconduct.”¹⁰⁶ In reversing the lower court findings of a judicially cognizable pattern of police misconduct, the *Rizzo* Court downplayed the number of incidents as only “some 20 in all occur-

102. *Thelma D. v. Board of Educ.*, 934 F.2d 929, 932-33 (8th Cir. 1991).

103. *See* Kit Kinports, *The Buck Does Not Stop Here*, 1997 U. ILL. L. REV. 147, 150 (arguing that courts have “been fairly consistent in allowing supervisors to escape liability for their subordinates’ constitutional wrongs”).

104. *Id.* at 185.

105. *See Rizzo v. Goode*, 423 U.S. 362, 367-68 (1976).

106. *Id.* at 368-69.

ring at large in a city of some three million inhabitants, with 7,500 policemen.”¹⁰⁷ Moreover, the Court rejected “invocation of the word ‘pattern’ in a case where . . . the defendants are not causally linked to it.”¹⁰⁸

While its discussion of the word “pattern” demonstrates the *Rizzo* Court’s reluctance to question police practices, it carries little precedential weight over § 14141 cases. The *Rizzo* Court was interpreting § 1983 rather than “pattern or practice” legislation like § 14141. Moreover, § 14141 provides the link between incidents of police misconduct and governmental defendants that the Court found missing in *Rizzo*. Section 14141 prohibits not only law enforcement officers but also “any governmental authority” from engaging in a pattern of conduct that violates constitutional rights. However, despite these distinctions, if the general tenor of the *Rizzo* decision—particularly its rather cavalier dismissal of twenty similar constitutional violations within one year—carries over, the current Supreme Court may not interpret § 14141 as broadly as its proponents hope.

2. *Legislative History*

A better sense of what level of evidence will be required emerges from § 14141’s legislative history. While the direct legislative history of § 14141 is virtually non-existent,¹⁰⁹ the House Judiciary Committee Report on the 1991 Crime Bill discusses § 14141’s predecessor bill extensively.¹¹⁰ Though the previous bill included a more expansive enforcement section that authorized private parties, as well as the Attorney General, to seek injunctive relief, its prohibition section contained language identical to § 14141, declaring unlawful a pattern or practice of rights-depriving conduct by law enforcement officials.¹¹¹ As a result, the 1991 committee reports analyzing § 14141’s predecessor bill are compelling evidence of congressional intent regarding the meaning of “pattern or practice” in § 14141.¹¹²

107. *Id.* at 373.

108. *Id.* at 375. It is unclear what bearing the Court’s interpretation of whether there existed a “pattern” of misconduct had upon the case.

109. The committee reports and congressional record assessing the 1993 Crime Act never substantively discuss § 14141.

110. See H.R. REP. NO. 102-242 (1991).

111. Compare *id.* at 76-77 with 42 U.S.C. § 14141(a) (1994).

112. The Department of Justice has relied upon this exact argument. See Memorandum of Law in Support of Joint Motion for Entry of Consent Decree at 3, *United States v. City of Steubenville*, No. C2 97-966 (S.D. Ohio filed Aug. 28, 1997) (“There is no separate legislative history for . . . 42 U.S.C. § 14141, but the legislative history of the predecessor bill is relevant because the language of that bill was identical, in pertinent part . . .”).

The 1991 Judiciary Committee Report emphasized that § 14141's virtually identical predecessor does not "impose any new standards of conduct on police officers," but rather enables a court to identify "a pattern of abuse . . . [and] bring it to an end with a single legal action."¹¹³ While the report never explicitly defined the term "pattern or practice," it posited that "pattern or practice authority is needed . . . to address patterns or practices such as the lack of training, or the routine use of deadly chokeholds, or the absence of a monitoring and disciplinary system."¹¹⁴ Moreover, it provided examples of a "pattern or practice" in the form of "[t]wo cases [that] illustrate both the need for the authority and how it will work."¹¹⁵

The first case cited by the Committee Report, *Davis v. Mason County*, was a § 1983 case arising from four incidents involving excessive use of force by police officers during routine traffic stops within a nine-month period in Mason County, Washington.¹¹⁶ In addition to finding that the individual sheriffs violated the plaintiffs' constitutional rights, the trial court held Mason County liable as a result of its failure to adequately train its officers in the constitutional use of force.¹¹⁷ In affirming the trial court's findings, the Ninth Circuit described Mason County's training program as "woefully inadequate, if it can be said to have existed at all," and in direct violation of Washington state law on police training.¹¹⁸ Though the *Davis* court was powerless to award relief other than damages, the Committee Report clarified that § 14141 would authorize the court to force Mason County to correct its deficient training procedures.¹¹⁹

In *Swann v. Goldsboro*, the second case described by the Committee Report, police officers in Goldsboro, North Carolina strangled a young black man to death.¹²⁰ Evidence at trial apparently demonstrated that the defendant officers had been involved in numerous previous incidents involving excessive force without incurring disciplinary action and that the city of Goldsboro had an official policy against investigating incidents of excessive force. Once again, though the *Swann* court lacked the authority to provide remedies other than the \$220,000 damage award, the report

113. H.R. REP. NO. 102-242, at 402-03 (1991).

114. *Id.* at 403.

115. *Id.*

116. *See id.* at 404 (discussing *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991)).

117. *See Davis*, 927 F.2d at 1479-82.

118. *Id.* at 1482.

119. *See* H.R. REP. NO. 102-242, at 404 (1991).

120. *See id.* at 404-05 (discussing *Swann v. Goldsboro*, No. 90-59-CIV-5-D (E.D.N.C.) (1990)).

indicated that under § 14141 the court could have acted to “order remedies for the glaring deficiencies the case highlighted.”¹²¹

The report’s discussion of these two cases indicates that the Attorney General could prove a “pattern or practice” under § 14141 without providing extensive evidence of systematically repeated instances of misconduct. Apparently, evidence of a few individual rights violations, coupled with evidence of an institutional police practice or policy condoning or contributing to police misconduct—in *Davis* a practice of insufficient training, in *Swann* a policy against investigating misconduct—is enough to constitute a “pattern or practice.”

But while the Committee report includes examples providing guidance regarding the level of evidence necessary to constitute a “pattern or practice” in cases involving an egregious police policy, a plain language reading of “pattern or practice” suggests that the Attorney General can satisfy § 14141 without offering any evidence as to an *institutional* practice or policy at all.¹²² By providing evidence of enough related individual instances of rights violations, the Attorney General surely could demonstrate a “pattern . . . of conduct” that would violate § 14141. Indeed, in recounting the impetus for the legislation, the Committee report described testimony regarding egregious patterns of misconduct that arose without identified contributory institutional policies: routine “unconstitutional, harassing stops and searches of minority individuals” in Boston and repeated arrests of “bystanders who complain about police actions” in New York City.¹²³

Unfortunately, the report sheds no light on the question of how numerous, frequent, or similar such rights deprivations must be to constitute a pattern under § 14141 without a contributory institutional policy or supervisory practice. Bereft of guidance from either the statutory text or the legislative history of § 14141, courts will likely look to interpretations of similar language in other statutes for guidance on this question.

3. *Judicial Construction of “Pattern or Practice”*

As a legislative phrase, “pattern or practice” has been employed repeatedly in civil rights statutes authorizing the Attorney General to bring suits to remedy discrimination.¹²⁴ In each of these civil rights statutes,

121. *Id.*

122. This point can be looked at in one of two ways: (1) evidence of enough repeated, similar instances of rights deprivations itself constitutes a “pattern of conduct,” or (2) evidence of enough repeated, similar instances of rights violations gives rise to an inference of an institutional policy or practice of condoning such violations through inaction.

123. H.R. REP. NO. 102-242, at 398 (1991).

124. *See, e.g.*, 42 U.S.C. § 1971(e) (1994); 42 U.S.C. § 2000a-5 (1994); 42 U.S.C. § 2000e-6(a) (1994); 42 U.S.C. § 3613 (1994).

Congress neglected to provide a statutory definition of the phrase. As a result, courts have looked for guidance to the legislative history of the earliest civil rights laws that employed the phrase. Moreover, courts have assumed that Congress intended the phrase to bear the same meaning in each of the statutes in which it appears.

In its seminal "pattern or practice" case, *International Brotherhood of Teamsters v. United States*, the Supreme Court held that "the 'pattern or practice' language . . . of Title VII was not intended as a term of art, and the words reflect only their usual meaning."¹²⁵ Citing Title VII's legislative history,¹²⁶ the *Teamsters* Court held that to establish a "pattern or practice" of employment discrimination, the Government must "prove more than mere occurrence of isolated . . . or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice."¹²⁷ Lower federal courts have consistently adopted the same interpretation of "pattern or practice" language when employed in other statutes outlawing discrimination.¹²⁸

While the doctrinal definition of "pattern or practice" identified by the *Teamsters* court has been clear and consistent, its application to particular fact patterns has proven less so. Though the *Teamsters* Court found that "pattern or practice" cases involved "controlling principles that are relatively clear,"¹²⁹ lower courts have struggled to maintain a coherent and consistent approach to what set of facts constitutes a "pattern or practice."¹³⁰

Courts have refused to adopt any exact formula for proving a "pattern or practice" of discrimination. For example, in explaining seemingly conflicting decisions regarding the number of incidents necessary to constitute a pattern or practice,¹³¹ the Seventh Circuit explicitly

125. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977).

126. In particular, the Court relied on Senator Humphrey's explanation of the term: [A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. . . . [S]ingle, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice.

Id. (quoting 110 CONG. REC. 14,270 (1964)).

127. *Id.* at 336.

128. See, e.g., *United States v. DiMucci*, 879 F.2d 1488, 1497 n.11 (7th Cir. 1989) (interpreting the Fair Housing Act); *United States v. Mayton*, 335 F.2d 153, 159 (5th Cir. 1964) (interpreting voting rights legislation).

129. *Teamsters*, 431 U.S. at 335.

130. See Paul E. Starkman, *Alleging a "Pattern or Practice" Under ADEA: An Analysis of the Impact and Problems of Proof*, 8 LAB. L.J. 91, 92 (1992) ("[T]he legal principles to be applied in a pattern or practice case often have been difficult to discern and apply.").

131. Compare *United States v. Balistrieri*, 981 F.2d 916, 929-30 (7th Cir. 1992) (holding six incidents of discrimination at a housing complex in two months sufficient to constitute a pattern

recognized the near impossibility of fashioning a consistent threshold of discrimination that constitutes a pattern or practice. As a result, the court emphasized that “each [pattern or practice] case must stand on its own facts.”¹³² The Fifth Circuit has agreed: “The number of blacks actually turned away or discriminated against is not determinative [of the existence of a pattern or practice] [N]o mathematical formula is workable, nor was any intended. Each case must turn on its own facts.”¹³³

In determining the existence of a “pattern or practice” of discrimination, courts have accepted and considered a wide array of evidence, including anecdotal evidence of specific instances of discrimination, direct evidence of general discriminatory policies, and statistical studies suggesting discriminatory policies.¹³⁴ *United States v. Lansdowne Swim Club* provides a classic example: in successfully proving that an institution of public accommodation engaged in a pattern or practice of discrimination, the Department of Justice offered both statistical evidence regarding the racial composition of the club’s membership and direct, anecdotal evidence regarding specific instances of discrimination.¹³⁵ Most likely, courts will prove equally flexible regarding the forms of evidence with which the Attorney General can demonstrate a “pattern or practice” of rights violations under § 14141.

In general, federal courts have interpreted the term “pattern or practice” of discrimination broadly.¹³⁶ Under the Fourteenth Amendment and many civil rights statutes, a plaintiff must prove disparate treatment in order to prove discrimination, but in pattern or practice cases, the plaintiff may rely solely on disparate impact.¹³⁷ And the Supreme Court has held that plaintiffs can make out a *prima facie* case of a “pattern or practice” of discrimination simply through the introduction of statistical evidence.¹³⁸ By accepting statistical evidence as sufficient proof of a “pattern or practice” of discrimination, the Court made clear that plaintiffs need not prove any overt institutional policy to satisfy the *Teamsters* definition

or practice of discrimination), with *King v. General Elec. Co.*, 960 F.2d 617, 619, 627 (7th Cir. 1992) (holding seventeen instances of age discrimination at a company plant in three years insufficient to constitute a pattern or practice of discrimination).

132. *Balistreri*, 981 F.2d at 930.

133. *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 227 (5th Cir. 1971) (citations omitted).

134. See *EEOC v. American Nat’l Bank*, 652 F.2d 1176, 1188 (4th Cir. 1981); Starkman, *supra* note 130, at 115.

135. See *United States v. Lansdowne Swim Club*, 894 F.2d 83, 88-89 (3d Cir. 1990).

136. See Karen E. Rubin, Note, *Judicial Remedies in “Pattern and Practice” Suits Under the Fair Housing Act of 1968: United States v. City of Parma*, 33 CLEV. ST. L. REV. 109, 129 (1984-85).

137. See Rubin, *supra* note 136, at 129; Starkman, *supra* note 130, at 102 (citing *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984)).

138. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308-09 (1977).

of "pattern or practice." To the contrary, an institutional policy will be inferred from disparate impact.

Applying the *Teamsters* definition of a "pattern or practice" to § 14141, the Attorney General must prove that rights deprivations are a police department's "regular rather than unusual practice."¹³⁹ In meeting that burden of proof, the Attorney General will be free to introduce a wide variety of evidence, from statistical to anecdotal. Evidence of repeated, similar rights violations should enable the Attorney General to make a *prima facie* case without proving any institutional policy.¹⁴⁰ And federal courts will likely adopt a case-specific, micro-analytical approach to § 14141 cases, rendering it impossible to generate a formulaic answer to what constitutes a "pattern or practice of conduct by law enforcement officers."

In sum, federal courts will likely rely upon the legislative history of § 14141 to find a "pattern or practice" whenever evidence establishes a few related rights violations accompanied by an institutional police practice or policy. But examination of previous judicial constructions of the term "pattern or practice" suggests that federal courts will not stop there. In cases involving repeated, similar rights violations absent an institutional practice or policy, courts will apply the *Teamsters* definition and infer a "pattern or practice" from statistical evidence. In the process, federal judges will not only follow precedent, but will also further the remedial goals of the statute—to bring police conduct into conformity with the Constitution and laws of the United States

139. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

140. In interpreting the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(a)-(d) (1994), the U.S. Supreme Court has held that, under its ordinary meaning, a "pattern" is determined not by "the number of predicates" but by "the relationship that they bear to each other or to some external organizing principle." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238 (1989). The two organizing principles generating a RICO pattern are "that the racketeering [acts] are related, and that they amount to or pose a threat of continued activity." *Id.* at 239. Because this "continuity plus relationship" framework was derived from RICO's legislative history, the framework has no automatic weight in interpreting what constitutes a § 14141 "pattern or practice." But these concepts—relatedness and continuity—could inform an application of § 14141 to repeated instances of rights deprivations by law enforcement officers absent an institutional policy. Requiring that the instances of rights deprivations be related—i.e., that they have "similar purposes, results, participants, victims, or methods of commission," *id.* at 240—could inform the *Teamsters* requirement that incidents be more than "isolated or sporadic" to constitute a "pattern or practice." Likewise, mandating continuity—i.e., that the rights deprivations extend over a substantial period of time—could inform the *Teamsters* requirement that the objectionable conduct be "standard operating procedure." However, given the intense criticism that the RICO pattern framework has received, *see, e.g., id.* at 252-56 (Scalia, J., concurring), the Court may prove reluctant to extend the "continuity plus relationship" framework beyond the RICO context. Still, the RICO case law suggests that the Court will be willing to infer a "pattern or practice" from strong statistical evidence of related violations continuing over a substantial period of time.

B. Section 14141(b): Enforcement

The enforcement portion of § 14141, codified as subsection (b), contains three provisions that will affect the law's implementation. First, the congressional decision to authorize only the U.S. Attorney General, and not aggrieved individuals, to bring § 14141 actions will greatly reduce the frequency of such suits and largely condition the law's success at curbing police misconduct on effective and proactive implementation by the executive branch. Second, as a result of decades-old case law, the provision that allows the Attorney General to file suit whenever she has "reasonable cause" to believe a violation has occurred will effectively render the decision of when and whether to bring a § 14141 action unreviewable. Finally, the simplicity and clarity of the language that authorizes the Attorney General to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice" masks complex and controversial questions of how to remedy systematic police misconduct. The following section will examine each of these three provisions in detail, with an emphasis on their likely impact on the nature of § 14141 litigation and the influence of the various § 14141 actors—the Attorney General, municipal defendants, the federal judiciary, and the communities and individuals affected by systematic police misconduct.

1. Governmental Standing: A Narrow Focus

Section 14141(a) consists of a sweeping declaratory statement that repeated unconstitutional conduct by law enforcement officers "shall be unlawful." Yet the breadth of the law's declaratory portion is limited by the narrow focus of its enforcement provision: only one person, the U.S. Attorney General, is authorized to remedy a "pattern or practice" of constitutional violations by police officers. Not authorized to initiate actions for relief, nor even to intervene in the Attorney General's suits, are the victims of the constitutional deprivations resulting from the pattern or practice.

As discussed above, original versions of § 14141 authorized victims of the unlawful "pattern or practice" conduct, as well as the Attorney General, to pursue injunctive and declaratory relief.¹⁴¹ However, as a result of threats of filibusters by Republican Senators and of a veto by President Bush, private enforcement provisions were stripped from the precursor

141. See H.R. REP. NO. 102-242, at 77 (1991) ("Any person injured by a violation of paragraph (1) may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.").

bill to § 14141 during conference committee negotiations on the 1991 Crime Bill.¹⁴² The provisions would never resurface.

Congress's rejection of private enforcement represented a shift in thinking about the objectives behind § 14141. Reacting to the Rodney King videotape and the failure of traditional legal sanctions to curtail police abuses, the drafters of § 14141's precursor, the Police Accountability Act, were searching for new legal regimes to force police departments to adhere to constitutional principles.¹⁴³ To the drafters, apparently, the overriding objective was to force police compliance; not surprisingly, then, these legislators proposed extending the authority to initiate pattern or practice suits to individuals as well as to the federal government, thus increasing the reach and significance of the legislation. The result was a bill that contained two checks upon local police: both the federal government and aggrieved individuals were to be empowered to supervise the local exercise of police power.

The existence of two checks was no accident. The deterrent and remedial effects of granting the Attorney General standing depend entirely on the Attorney General's commitment to enforcing the bill's prohibitions.¹⁴⁴ After twelve years of Republican control of the executive branch, the drafters—liberal Democratic Members of Congress—were obviously reluctant to entrust enforcement solely to the Department of Justice. As a result, the original bill shifted power vertically from local governments to individuals, as well as horizontally from local to federal governmental entities. In reporting the bill, the House Committee on the Judiciary underscored the importance of individual empowerment, describing individual standing as “necessary, especially in situations where the Department of Justice does not act.”¹⁴⁵

While police groups and conservative lawmakers predictably opposed the bill in its entirety, they focused their ire principally upon the bill's individual standing provision. In the words of Bush Administration Assistant Attorney General W. Lee Rawls, their principal, articulated concern was that “[w]hile the Attorney General might be expected to exercise restraint . . . [a]ny individual who feels aggrieved by conduct that [she] perceives to be part of a pattern or practice can file a suit that will be expen-

142. See *supra* notes 93-96 and accompanying text.

143. In addition to “pattern or practice” legislation, members of Congress suggested a host of other bills with this end. See, e.g., *Police Brutality Hearings*, *supra* note 18, at 26 (statement of Rep. Washington) (suggesting the addition of a specific reference to the protection of civil liberties of citizens in the police officer oath); *id.* at 131 (statement of Rep. Edwards) (discussing the amendment of 18 U.S.C. §§ 241, 242 to increase its effectiveness); *id.* at 133-34 (statement of Rep. Washington) (proposing an increase in penalties for criminal civil rights violations by police and withholding of federal funds to states who do not pass similar penalty increases).

144. See *infra* notes 149, 172-174 and accompanying text.

145. H.R. REP. NO. 102-242, at 402 (1991).

sive and time-consuming to defend against.”¹⁴⁶ But police groups and conservative lawmakers surely must also have been concerned about meritorious suits brought by individuals; individual standing to bring “pattern or practice” suits presented a much greater danger of shifting control over police practices from legislators, mayors, and police chiefs to federal judges than granting the Attorney General such standing. With public opinion firmly entrenched in the corner of law and order, the Attorney General—who remains, even if indirectly, responsive to public opinion—likely seemed far less dangerous than aggrieved individual victims. Riding the force of public opinion in favor of crime control, conservative voices prevailed and eliminated the individual standing provisions.¹⁴⁷

As a result, in the process of winding its way through Congress, § 14141 developed into a measured shift in the law governing police misconduct rather than the wholesale change proposed by the bill’s drafters. The elimination of the populist, counter-majoritarian check on the local police power inherent in individual standing left only the intergovernmental, bureaucratic check represented by the Attorney General.

What will be the practical effects of the decision to delete individual standing and to rely solely upon suits by the Attorney General? First and foremost, the decision will greatly reduce the frequency of § 14141 actions. Since the law passed in 1994, the Attorney General has filed only two § 14141 complaints against police departments.¹⁴⁸ Were § 14141 available to private plaintiffs, many more “pattern or practice” complaints would certainly have been filed.

146. Terence Moran & Daniel Klaidman, *Justice’s Study of Police Violence on Back Burner*, THE RECORDER, May 4, 1992, at 1 (quoting a letter from Assistant Attorney General W. Lee Rawls to Rep. Henry Hyde).

147. Apparently, no thought was given to a compromise, giving individuals a qualified right of action. One potential compromise—inspired by *qui tam* litigation—might have been to authorize individual victims of § 14141 violations to bring suits for injunctive relief but require that they first give notice to the Attorney General, who would have the authority to either (1) intervene and litigate, (2) decline to intervene but allow the individual to go forward, or (3) move to dismiss the case. See Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869 (1997) (outlining of the history and current status of *qui tam* litigation). It should be noted that, like all *qui tam* litigation, this compromise example faces constitutional questions regarding the standing of the non-governmental plaintiffs.

148. See *infra* notes 206-207 and accompanying text. This paucity of § 14141 cases may have resulted in part from the difficulties of implementing new legislation, for example, a desire “to make sure the first cases are sure, solid cases that help establish good law.” Mark Curriden, *When Good Cops Go Bad*, 82 A.B.A. J. 62, 63 (May 1996) (quoting Deval Patrick, Assistant Attorney General, Civil Rights Division). The Department of Justice has recently threatened to bring a third action against the city of Columbus, Ohio and its Division of Police. See Editorial, *Police Chief Needs to Accept Necessary Scrutiny*, COLUMBUS DISPATCH, Aug. 2, 1998, at C2. Attorneys for the city of Columbus are apparently negotiating with the Justice Department regarding a possible consent decree. See Connie A. Higgins, *Rice to Jackson: Provide Details of Meeting*, COLUMBUS DISPATCH, Oct. 9, 1998, at C3.

Moreover, the frequency of § 14141 actions will likely depend upon the political ideology and commitment of the President of the United States and, to a lesser extent, of Congress. As a number of legal analysts have pointed out, the failure of the Reagan Administration to proactively enforce the Civil Rights of Institutionalized Persons Act (CRIPA)—a law authorizing the Attorney General to pursue injunctive relief to remedy patterns or practices of constitutional deprivations against institutionalized persons—demonstrates that providing the executive branch with statutory authority to enjoin abuses does not necessarily translate into enforcement.¹⁴⁹ Not only can an Administration choose not to enforce § 14141, but Congress could deny the Department of Justice sufficient funding to support its implementation.¹⁵⁰ Because of the absence of individual standing, governmental decisions by either political branch could undermine the efficacy of the legislation.¹⁵¹

Second, the decision to limit standing to the Attorney General will alter the nature of § 14141 litigation. Due to the investigative resources of the federal government, each § 14141 case that is brought is likely to be buttressed by substantial evidence, forcing the defendant municipality to take the case seriously. As a result, defendants may prove interested in settling through a consent decree rather than incurring the litigation and publicity costs of defending a § 14141 action.¹⁵² Early returns suggest that this will lead to a high settlement rate for individual cases: to date, both of the § 14141 suits against police departments have culminated in comprehensive consent decrees altering police practices.¹⁵³

The virtues of a high settlement rate are likely to be mixed. On the one hand, not having to prove a “pattern or practice” in court will free up Department of Justice resources to pursue additional § 14141 cases. On

149. See Hoffman, *supra* note 24, at 1524 n.279 (“The failure of the Civil Rights Division to enforce the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, during the Reagan/Bush years underscores the fact that giving the Justice Department such authority will not ensure meaningful federal enforcement.”).

150. Separation of powers principles prevent Congress from directing the Attorney General not to enforce the statute. See, e.g., *INS v. Chadha*, 462 U.S. 919, 955 (1983) (“Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”). However, Congress can use its spending power to control the level of funds available to the Justice Department in general and to the Civil Rights Division in particular. See Steven A. Holmes, *Federal Anti-Bias Spending Is Inadequate, Groups Say*, N.Y. TIMES, Oct. 8, 1998 (detailing Congress’s rejection of Clinton Administration requests for large increases in funding for anti-discrimination efforts including the Civil Rights Division). By controlling the level of funds available to the Civil Rights Division, Congress can exercise indirect control over § 14141 enforcement.

151. It does not appear that aggrieved victims of patterns or practices of police brutality will have any legal means to compel suits by the Attorney General. See *infra* notes 180-182 and accompanying text.

152. For discussion of the litigation and publicity costs, see *infra* notes 210-211 and accompanying text.

153. See *infra* notes 206-207 and accompanying text.

the other hand, repeated consent decrees will subvert judicial opportunities to interpret § 14141 and preempt the potential benefits of publicizing governmental action against unconstitutional police patterns and practices.¹⁵⁴

Moreover, though federal courts clearly have the authority to accept or reject a proposed consent decree before entering it as a judicial order, courts have generally exercised only limited review of consent decrees,¹⁵⁵ granting particular deference to decrees approved by the Attorney General.¹⁵⁶ As a result of this limited and deferential posture towards consent decree review,¹⁵⁷ a high settlement rate of § 14141 claims will largely shift the role of structuring remedial change from federal judges to the Attorney General and the lawyers for the defendant police departments and municipalities.¹⁵⁸ Whether private parties or federal judges are better able to design remedial injunctive relief is the subject of some dispute.¹⁵⁹

Finally, as a result of the deletion of individual standing, communities victimized by patterns or practices of police misconduct prohibited by § 14141 will have to rely on the federal government to pursue effective injunctive remedies. The result is a classic agency problem due to the po-

154. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1084 (1984).

155. See *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (requiring reviewing courts merely to ensure that consent decrees are within the subject matter jurisdiction of the court, within the scope of the pleadings, and in furtherance of the goals of the statute on which the action was based); *United States v. South Bend Community Sch. Corp.*, 692 F.2d 623, 628 (7th Cir. 1982) (quoting *United States v. City of Miami*, 614 F.2d 1322, 1333 (5th Cir. 1980)) (requiring reviewing courts merely to determine that the proposed consent decree is not "unconstitutional, unlawful, . . . contrary to public policy, or unreasonable"); see also Randolph D. Moss, Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1820-21 (1986).

156. See *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981); *Kelley v. Thomas Solvent Co.*, 717 F. Supp. 507, 515-16 (W.D. Mich. 1989); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 918 (discussing courts' willingness to grant "what amounts to automatic approval" to government-negotiated consent decrees).

157. In contrast to their *general* authority to review consent decrees, federal courts have enjoyed greatly increased authority in antitrust cases and class actions. In class actions, Federal Rule of Criminal Procedure 23(e) has been interpreted to require federal courts to hold fairness hearings at which the proponents of a settlement must prove it to be fair, reasonable, and adequate. See Moss, *supra* note 155, at 1831. Under the Tunney Act, federal judges must subject antitrust consent decrees to a far-ranging inquiry to determine "that the entry of such [a consent decree] is in the public interest." 15 U.S.C. § 16(e) (1994).

158. It should be noted that the trial courts retain some discretion over the nature of consent decree review. See Schwarzschild, *supra* note 156, at 911, 913 (pointing out that a few courts have held fairness hearings, though rarely in cases involving the government as plaintiff). In considering one of the two § 14141 consent decrees entered to date, U.S. District Judge Robert Cindrich held a public hearing on the proposed consent decree. See Michael A. Fuoco, *Police Accord Hearing Set*, PITTSBURGH POST-GAZETTE, Mar. 8, 1997, at C2.

159. Compare Fiss, *supra* note 154, at 1083-84, with Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11 (1984).

tentially different goals of the Department of Justice and of victimized communities.¹⁶⁰ This agency problem could surface in two different forms.

First, because victimized communities and individuals cannot compel a § 14141 suit,¹⁶¹ they must rely upon the Justice Department to actively enforce § 14141 through adequate funding and prioritization.¹⁶² And even if the Department does engage in active § 14141 enforcement, individual communities will have to abide by the Department's system of case selection and resource commitment.¹⁶³

Second, past experience in related institutional reform suits suggests that advocacy groups, affected communities, and individual victims will have little opportunity to influence the negotiation, design, or implementation of a § 14141 consent decree. Because consent decrees in institutional reform cases are often filed on the same day as the initial complaints,¹⁶⁴ affected individuals and groups will need to be vigilant indeed or consent decrees will be entered before they are aware of the case. Even if aware of the suit, affected individuals and groups will likely be legally incapable of intervening in § 14141 cases.¹⁶⁵ In similar civil rights cases initiated by the government, courts have generally assumed adequate representation of all citizens' interests and consequently not permitted intervention as of right by victims or advocacy groups.¹⁶⁶ Courts

160. The views of the Justice Department regarding what policies and procedures will eradicate the "pattern or practice" of rights violations will not always match the views of victims, who may have more radical views of the needed changes. As a repeat player in § 14141 cases, the Justice Department may have an interest in developing a consent decree blueprint, *see infra* note 204 and accompanying text, rather than focusing solely on the particular pattern or practice as victims would. For a discussion of agency problems in civil rights suits brought by the Justice Department, *see* Schwarzschild, *supra* note 156, at 918 (Title VII suits), and Moss, *supra* note 155, at 1825-29 (school desegregation suits).

161. *See infra* notes 180-182 and accompanying text.

162. *See infra* note 181 and accompanying text.

163. The Civil Rights Division of the Justice Department clearly does not have adequate funding to perform comprehensive oversight of each of the nation's police forces. *See infra* notes 196-205 and accompanying text.

164. *See* Schwarzschild, *supra* note 156, at 913. In both § 14141 cases to date, the Justice Department filed the consent decree and the underlying complaint simultaneously. Telephone Interview with Robert Moosy, Staff Attorney, Department of Justice, Civil Rights Division, Special Litigation Section (Jan. 12, 1998) [hereinafter Moosy Interview].

165. Both intervention as of right and permissive intervention are governed by Federal Rule of Civil Procedure 24. In order to qualify for intervention as of right, the moving party must (1) file a timely motion, (2) assert an interest relating to the subject of the action, (3) demonstrate that the action's disposition may impair the protection of that interest, and (4) show that the interest will not be adequately represented by existing parties. *See* *United States v. Oregon*, 839 F.2d 635, 637 (9th Cir. 1988); *United States v. Michigan*, 680 F. Supp. 928, 950-51 (W.D. Mich. 1987); JAMES W. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 24.07[1] (1993). In order to qualify for permissive intervention, the moving party must (1) file a timely motion, (2) make a claim or defense involving a common question of law or fact with the main action, and (3) show an independent grounds for jurisdiction to support the intervention. *See* *Cook v. Pan Amer. World Airways, Inc.*, 636 F. Supp. 693, 698-99 (S.D.N.Y. 1986).

166. *See* Moss, *supra* note 155, at 1821 n.52 (listing school desegregation cases brought by the government in which intervention was denied); Schwarzschild, *supra* note 156, at 914-23 &

also have an additional reason to reject intervention as of right in § 14141 cases: because prospective intervenors lack independent standing to pursue injunctive relief,¹⁶⁷ the government's § 14141 action will not jeopardize intervenors' ability to protect any legal interest.¹⁶⁸ Moreover, because affected individuals and groups in § 14141 cases cannot establish independent grounds for jurisdiction to pursue injunctive relief, they will likely also fail the test for permissive intervention.¹⁶⁹ Finally, while non-litigating parties on whose behalf a court order is entered may petition the court to enforce the order,¹⁷⁰ parties who would lack standing to bring the original action may not.¹⁷¹

Affected individuals, communities, and advocacy groups have had more success entering institutional reform suits as *amici curiae*,¹⁷² but as such they are precluded from initiating legal proceedings, filing pleadings, pursuing enforcement or modification of any equitable judgment or consent decree, or exercising any judicially cognizable power to endorse or veto any consent decree.¹⁷³ As a result, absent judicial solicitude for their opinions and interests, such individuals or groups must depend largely upon the Justice Department to pursue effective structural changes to remedy the particular pattern of abuse.¹⁷⁴

In order to ensure that the views and interests of victims and affected communities are reflected in § 14141 consent decrees, federal judges would be wise to employ a less limited and deferential policy in reviewing consent decrees. Not only should judges carefully consider the submissions of *amici curiae*, but they should ponder conducting public hearings in order to ensure that victims and communities are aware and generally

nn.166-67 (listing Title VII cases brought by government in which intervention was denied); John Kip Cornwell, Note, *CRIPA: The Failure of Federal Intervention for Mentally Retarded People*, 97 YALE L.J. 845, 854-56 (1988) (listing CRIPA cases in which intervention was denied). But see *United States v. Oregon*, 839 F.2d 635 (9th Cir. 1988) (overturning the lower court's denial of an affected inmates' motion to intervene in a CRIPA case).

167. See *supra* notes 56-70 and accompanying text.

168. See FED. R. CIV. P. 24(a)(2).

169. See *Mopaz Diamonds, Inc. v. Institute of London Underwriters*, 822 F. Supp. 1053, 1056 (S.D.N.Y. 1993); MOORE, *supra* note 165, ¶ 24.18[4]. Affected individuals and groups cannot establish independent grounds for jurisdiction because they lack independent standing.

170. See FED. R. CIV. P. 71; *Berger v. Heckler*, 771 F.2d 1556, 1566-67 (2d Cir. 1985).

171. See MOORE, *supra* note 165, ¶ 71.03 ("Rule 71 does nothing to disturb the requirement of a standing to sue."); *Moore v. Tangipahoa*, 625 F.2d 33 (5th Cir. 1980).

172. See Schwarzschild, *supra* note 156, at 923-26.

173. See, e.g., *United States v. Michigan*, 940 F.2d 143, 163-67 (6th Cir. 1991).

174. See Schwarzschild, *supra* note 156, at 889. This dependence upon DOJ may be exacerbated by a high settlement rate, which reduces the role of the federal judge—a neutral third-party who may be more attuned to the community's interests—in designing injunctive relief. See *supra* notes 158-159 and accompanying text; cf. Moss, *supra* note 155, at 1818-19, 1821 (arguing that participation of affected parties is particularly important in school desegregation consent decrees because of the limited role of the federal judge).

supportive of § 14141 consent decrees.¹⁷⁵ Such hearings could go a long way towards assuring victims a stake in the § 14141 process and repairing relationships between communities and police departments. If courts should fail to seek out proactively the views and interests of victims and affected communities, Congress should amend § 14141 to require courts to do so—possibly through the requirement of fairness hearings analogous to those applicable to class actions.¹⁷⁶

2. *Reasonable Cause*

Section 14141 only authorizes the Attorney General to pursue injunctive relief when she “has reasonable cause to believe that a violation . . . has occurred.” This clause suggests that § 14141 might require some preliminary showing of reasonable cause by the Attorney General. However, in addressing similar statutory language in other civil rights laws, federal courts have repeatedly held the Attorney General’s determination of “reasonable cause” to be beyond judicial review.¹⁷⁷ Courts have generally assumed that “[a] sufficient complaint, by its substantial allegations with respect to the existence of a ‘pattern or practice’ . . . , will clearly demonstrate the basis of the Attorney General’s ‘reasonable cause to believe.’”¹⁷⁸ In enacting the similarly drafted CRIPA, Congress clearly expressed its intent that “the decision of the Attorney General to file suit be . . . unreviewable.”¹⁷⁹ Though the legislative history of § 14141 is not as explicit as that of CRIPA, it is a safe assumption that federal courts will continue to interpret the “reasonable cause” determination as an unreviewable guideline rather than a threshold requirement.

175. See *supra* note 158.

176. See FED. R. CIV. P. Rule 23; *supra* note 157.

177. See *United States v. Northside Realty Assoc., Inc.*, 518 F.2d 884, 889-90 (5th Cir. 1975) (declining to review the Attorney General’s “reasonable cause” determination under the Fair Housing Act); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973) (declining to review the Attorney General’s “reasonable cause” determination under Fair Housing Act); *United States v. International Assoc. of Bridge, Structural & Ornamental Iron Workers Local No. 1*, 438 F.2d 679, 680-81 (7th Cir. 1971) (declining to review the Attorney General’s “reasonable cause” determination under 42 U.S.C. § 2000e-6); *United States v. Greenwood Mun. Separate Sch. Dist.*, 406 F.2d 1086, 1089 (5th Cir. 1969) (declining to review the Attorney General’s “reasonable cause” determination under 42 U.S.C. § 2000c-6); *United States v. City of Philadelphia*, 838 F. Supp. 223, 227 (E.D. Pa. 1993) (“It is well settled that the reasonableness of the Attorney General’s belief [of cause to bring Fair Housing action] is not subject to judicial review.”), *aff’d*, 30 F.3d 1488 (3d Cir. 1994); *cf. United States v. Pennsylvania*, 863 F. Supp. 217, 220 (E.D. Pa. 1994) (holding “that the Attorney General is vested with the discretion to bring suit [under CRIPA] whenever she is satisfied that a case is serious enough to warrant federal involvement”). But see *United States v. Pelzer Realty Co., Inc.*, 484 F.2d 438, 444-45 (5th Cir. 1973) (subjecting the Attorney General’s “reasonable cause” determination under Fair Housing Act to very deferential judicial review).

178. *Bridge, Structural & Ornamental Iron Workers*, 438 F.2d at 681; see also *United States v. Gustin-Bacon Div. Certain-Teed Prod. Corp.*, 426 F.2d 539, 543 (10th Cir. 1970).

179. S. REP. NO. 96-416, at 29 (1980), *reprinted in* 1980 U.S.C.C.A.N. 787, 811.

The unreviewability of the Attorney General's reasonable cause determination will extend even more powerfully to any decision *not* to file a § 14141 action. The deletion of individual standing during the legislative history of § 14141 will clearly undercut any argument that the statute implied a private right of action to compel enforcement.¹⁸⁰ Moreover, in *Heckler v. Chaney*, the Supreme Court recognized that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."¹⁸¹ In deciding whether to file a § 14141 action, the Department of Justice must not only decide whether a violation has occurred but also whether the particular case is winnable, worthy of resource commitment, and amenable to effective injunctive relief. According to *Chaney*, such policy decisions are better made by the Attorney General than the federal courts.¹⁸² As a result, private parties will lack authority to compel § 14141 enforcement.

The unreviewability of the reasonable cause determination will also have important procedural effects. In order to survive a motion to dismiss, the Attorney General need not plead facts supporting the reasonable cause determination, but rather need only plead allegations that, viewed in the light most favorable to the Attorney General, could support a "pattern or practice" claim.¹⁸³ Thus, in bringing § 14141 actions, the Attorney General will have virtually automatic access to court-governed discovery through the filing of a complaint detailing repeated incidents of police abuse.¹⁸⁴

3. *Designing Equitable Relief*

After successfully proving a violation of § 14141(a), § 14141(b) authorizes the Attorney General to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice." This statutory language clearly and concisely grants federal courts the power to force police departments and municipalities to take necessary steps to ensure

180. Plaintiffs alleging an implied right of action must "demonstrate that Congress intended to make a private right of action available." *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (citing *Cort v. Ash*, 422 U.S. 66 (1975)). The original inclusion and subsequent deletion of individual standing in § 14141 will make such an allegation untenable.

181. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citations omitted).

182. *See id.* at 831-32.

183. Given the liberal pleading standards of Federal R Civil Procedure 8(a), such allegations will not require much factual accompaniment. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

184. The virtually automatic access to court-governed discovery and thus subpoena power may at least partially offset the following objection. Critics have argued that the lack of grand jury power to "force information from witnesses," particularly recalcitrant police officer witnesses, will undermine the efficacy of § 14141. Curriden, *supra* note 148, at 64.

future compliance with § 14141. But how federal courts or, in the case of a consent decree, the parties themselves should exercise this power is far less clear.

While police policy analysts generally agree that the problems of excessive force and other misconduct are ubiquitous in contemporary American policing, there is little consensus concerning how to remedy these problems. Police analysts disagree vehemently over the virtues of such potential remedial steps as civilian review boards¹⁸⁵ and early warning systems to detect patterns of complaints against particular officers.¹⁸⁶ No doubt these disagreements stem in part from the lack of empirical data concerning police abuses and remedial policies.¹⁸⁷ But whatever the cause, this lack of consensus leaves the Attorney General and federal courts in a difficult position in designing "appropriate equitable and declaratory relief."

As supporters of proactive implementation of "pattern or practice" legislation have pointed out, fashioning remedial relief will not always be complicated.¹⁸⁸ For example, in cases involving a pattern or practice of mistreatment resulting directly from an unconstitutional police policy, a federal court may only need to enjoin implementation of the policy to eliminate the pattern or practice.¹⁸⁹ In cases where courts are able to attribute patterns or practices of misconduct to a particular cause, such as a lack of training,¹⁹⁰ courts should not find it difficult to take steps to remedy the particular cause. Finally, in "pattern or practice" cases involving more complicated causes, supporters of proactive implementation argue that even a modest order requiring a police department to follow its own policies and report allegations of misconduct to the court would be of great utility in curbing police abuse.¹⁹¹ However, the history of injunctive

185. Compare Andrew Bayley, *Preface to COMPLAINTS AGAINST THE POLICE: THE TREND TO EXTERNAL REVIEW* at ix (Andrew J. Goldsmith ed., 1991) ("[P]olice cannot be trusted to police themselves. . . . [C]ivilian review is critical to the legitimacy of the police."), with SKOLNICK & FYFE, *supra* note 28, at 227 (citing arguments that civilian review is ineffective and antagonistic to police).

186. Compare SKOLNICK & FYFE, *supra* note 28, at 232 (arguing that early detection systems can be effective in identifying problem officers), with PEREZ, *supra* note 5, at 29-30 (arguing that very few officers receive large numbers of complaints).

187. See SKOLNICK & FYFE, *supra* note 28, at 227. As mentioned above, the 1994 Crime Bill included a provision that requires the Attorney General to gather data on the use of excessive force by police officers. See *supra* note 98.

188. See, e.g., Hoffman, *supra* note 24, at 1526-27.

189. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 99-100 (1983) (describing the district court's preliminary injunction against the use of a potentially lethal chokehold except when the officer threatened with death or serious bodily injury).

190. See, e.g., *Davis v. Mason County*, 927 F.2d 1473, 1482-83 (9th Cir. 1991) (identifying unconstitutional police actions as resulting from the absence of training).

191. See Hoffman, *supra* note 24, at 1527 (arguing that even modest orders can be effective by publicizing both patterns of abuse and ineffective municipal responses); see also *Thomas v. County of Los Angeles*, 978 F.2d 504, 507 (9th Cir. 1993) (granting a preliminary injunction

relief in civil rights cases suggests that remedial injunctions are more difficult to design, expensive to administer, and challenging to control than supporters of proactive implementation recognize.¹⁹² Courts are more experienced and adept at the art of identifying rights than fashioning institutional injunctions.¹⁹³ The negotiation of consent decrees removes the burden of designing remedial relief to the litigating parties, avoiding the pitfalls of judicial action. However, the settlement of structural litigation provokes its own concerns in the potential for coercion, displacement of costs onto uninvolved third parties, and a lack of judicial information to judge the equity of the settlement.¹⁹⁴

As is obvious from the historic inability of municipalities to successfully balance effective crime control with constitutional police practices, designing an organizational structure that will police the police promises to be a complicated task. As one commentator on structural injunctions has pointed out, courts must struggle with the “sheer difficulty of devising an intellectually coherent solution to certain social problems. Causes may be poorly understood; a technology for effectively dealing with them may not exist; progress may be inherently difficult to measure.”¹⁹⁵ The intractability of a problem like police misconduct makes it a continual candidate for constitutional suits, but a difficult subject for comprehensive injunctive relief. Whether § 14141 proves a potent weapon against police misconduct may rest in large part on the capability of federal judges and the Department of Justice at designing effective equitable relief.

III. IMPLEMENTATION OF 42 U.S.C. § 14141

Due to the Attorney General’s exclusive authority to bring suit under § 14141, the statute’s success at curbing police misconduct will be determined largely by the effectiveness of its implementation by the Department of Justice. As with any governmental program, this will depend upon the resources available, the efficiency of resource allocation, and the accuracy of the policy prescription. Because, as discussed below, funding will not prove sufficient to enable comprehensive oversight of the nation’s police forces, the Civil Rights Division of the Justice Department will need to capitalize on and exploit all of its available resources to implement § 14141. The following section will discuss the level

with these terms in a § 1983 case).

192. According to Professor Schuck, “[c]ommentators willing to hazard a judgment usually conclude that in general, structural orders have been largely, though not wholly, ineffective.” SCHUCK, *supra* note 29, at 154.

193. See John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1123 (1996).

194. See SCHUCK, *supra* note 29, at 160-61.

195. *Id.* at 155.

of resources available to the Justice Department and make recommendations regarding methods of conserving resources. It will examine the Department's current legal strategies, particularly its emphasis on negotiating consent decrees. The section will discuss, in general fashion, the first two consent decrees under § 14141 in order to determine the Department's current prescriptive strategies. And finally, the section will examine the degree to which community and interest groups can indirectly use § 14141 to pursue police reform, despite their lack of direct standing to bring a § 14141 action.

A. Resource Allocation: Staffing and Funding Levels

In recent years, the responsibilities of the Justice Department's Civil Rights Division have increased dramatically. Since 1993, Congress has expanded the Division's duties to include the prosecution of church arson crimes, the enforcement of the Freedom of Access to Clinic Entrances Act (FACE) and § 14141.¹⁹⁶ During that time, however, Congress has not increased the Division's budget commensurately. According to Isabelle Katz Pinzler, Acting Assistant Attorney General for Civil Rights, during this period "the Division's funding has remained essentially flat."¹⁹⁷ The Clinton Administration has requested and received a modest increase in the Division's funding for Fiscal Year 1998.¹⁹⁸ However, the Administration's request for a sizable increase in the Division's budget for FY 1999 has apparently encountered opposition in Congress.¹⁹⁹ If the Division is to proactively enforce § 14141, it will need continued increased funding for implementation.

The Special Litigation Section of the Civil Rights Division has borne the lion's share of the Division's increased responsibilities. Since 1993, the Section has assumed civil enforcement responsibility for § 14141 and FACE to augment its existing responsibility for the CRIPA.²⁰⁰ The Sec-

196. *Oversight of the Civil Rights Division: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. (1997), 1997 WL 10571840, at *1 (statement of Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Division) [hereinafter *Oversight Hearings*].

197. *Id.* In FY 1994, the Civil Rights Division spent \$59.85 million; in FY 1997, the Division's estimated budget was \$62 million—an increase of only 3.6%. Compare BUDGET OF THE UNITED STATES GOVERNMENT, FY 1996, at 627 App. (1995), with BUDGET OF THE UNITED STATES GOVERNMENT, FY 1998, at 662 App. (1997).

198. In FY 1998, the Civil Rights Division will receive an estimated \$68 million, \$6 million more than in FY 1997. See *id.*; see also *Oversight Hearings*, *supra* note 196, at *1 (statement of Isabelle Katz Pinzler).

199. See Steven A. Holmes, *Federal Anti-Bias Spending Is Inadequate, Groups Say*, N.Y. TIMES, Oct. 8, 1998 (detailing Congressional rejection of sizable increases in budgets of the EEOC, HUD's fair housing program, the Civil Rights Division of DOJ, and other agencies that investigate complaints of bias).

200. See *Oversight Hearings*, *supra* note 196, at *8 (statement of Isabelle Katz Pinzler). It

tion consists of one Section Chief, two Deputy Chiefs, and 22 full-time and two part-time attorneys.²⁰¹ According to a Special Litigation Section staff attorney, there are no investigators assigned full-time to the Section.²⁰²

The absence of full-time investigators means that the Justice Department will depend heavily on external sources of information regarding § 14141 violations. Not surprisingly, in Pittsburgh—the only large city yet targeted for a § 14141 case—the Department apparently relied heavily on investigations and information developed by the ACLU.²⁰³

Implementing legislation designed to enforce constitutional principles in our nation's police forces, prisons, and abortion clinics is a Herculean task. Clearly, twenty-seven attorneys, who bear the additional responsibility of investigating and reforming prison conditions and monitoring and assuring clinic access, cannot perform comprehensive oversight of our nation's police forces. The Department of Justice simply does not have the resources to bring suit against every police force that engages in a pattern or practice of rights violations. As a result, there is a danger that § 14141 will devolve into a last-resort tool to remedy egregious police policies and reform the worst police departments, rather than a proactive tool to improve American policing nationwide.

In order to avoid this devolution, the Department of Justice should take two steps: first, use the § 14141 cases it does bring to fashion a blueprint for a model police institutional structure. If the Department's blueprint is widely understood and recognized as effective in curtailing misconduct, municipalities can learn what steps to take both to improve their police departments and to avoid § 14141 litigation.²⁰⁴ Second, the Department should design a comprehensive strategy to control police behavior that strategically employs all of its resources including both criminal prosecutions of individual officers and § 14141 enforcement suits. Criminal prosecutions of police officers can double as investigative techniques to determine the existence of patterns or practices of misconduct. Moreover, prosecutions can alert municipalities of the need to revise de-

should be noted that U.S. Attorney's Offices can engage in investigation and enforcement of § 14141; indeed, the U.S. Attorney's Office in the Eastern District of New York appears to be leading the investigation of the New York City Police Department triggered by the Louima incident. *See supra* note 6.

201. *See* Moosy Interview, *supra* note 164.

202. *See id.* According to Moosy, federal agents do from time to time assist the Special Litigation attorneys with investigative tasks. *See id.*

203. *See* Jeff Gammage, *Pittsburgh Consents to Federal Reforms of Police Department*, PITTSBURGH POST-GAZETTE, Mar. 5, 1997, at A3.

204. It should be noted that a Justice Department blueprint for police reform might become a ceiling above which no municipality would venture. This ceiling could slow potential reforms or discourage experimentation, particularly if the Department does not continually update the blueprint with the latest strategies.

partment policies and procedures to conform with a Justice Department blueprint. As one commentator has pointed out, "the possibility of [§ 14141] action will make all the other tools the Justice Department has at its disposal more effective."²⁰⁵

B. Legal Strategy: The Pursuit of Consent Decrees

Since 1994, the Attorney General has launched a number of § 14141 investigations of police departments²⁰⁶ and has taken legal action against two police departments, in Pittsburgh, Pennsylvania, and Steubenville, Ohio.²⁰⁷ In both cases, the Department of Justice and the defendants negotiated settlements prior to the official commencement of litigation. As a result, in each case the Department filed its complaint and the negotiated consent decree simultaneously, resolving the cases in a manner that ensures a federal district court's involvement in oversight of the decree's implementation.²⁰⁸

While a handful of investigations and two police department cases constitute very little empirical evidence from which to draw inferences, the Justice Department appears to have adopted an initial § 14141 strategy of investigation and negotiation, opting to pursue consent decrees rather than litigated judgments. Such a conciliatory strategy comes as no surprise. In implementing CRIPA—similarly crafted legislation which authorizes the Attorney General to bring pattern or practice cases to protect the rights of institutionalized persons—the Department has chosen

205. Hoffman, *supra* note 24, at 1526.

206. The Department is currently officially investigating police departments in Columbus, New Orleans, Los Angeles, New York City, Buffalo, and Orange County, as well as juvenile detention facilities in Louisiana. Moosy Interview, *supra* note 164; see also Mark Curriden, *Police Rank 7 in Abuse Reports*, CHATTANOOGA TIMES, Apr. 1, 1996, at A1 (quoting Assistant Attorney General Deval Patrick as confirming investigations in L.A., New Orleans, and Philadelphia, as well as "a number of major investigations [of] police and sheriffs departments"). The Department has reportedly determined that the Police Division of Columbus, Ohio, has violated § 14141 and is currently negotiating a consent decree with the city. See Connie A. Higgins, *Rice to Jackson: Provide Details of Meeting*, COLUMBUS DISPATCH, Oct. 9, 1998, at C3.

207. See Complaint, United States v. City of Steubenville, No. C2 97-966 (S.D. Ohio filed Aug. 28, 1997); Complaint, United States v. City of Pittsburgh, No. 97-0354 (W.D. Pa. filed Feb. 26, 1997). The Department is reportedly in the process of negotiating a third consent decree with the city of Columbus, Ohio, and its Division of Police. See *supra* note 206. Complaints were also filed and consent decrees reached with a sheriff's office in Iberia Parish, Louisiana, and the juvenile detention system of the Commonwealth of Kentucky, but both actions focused on detention policies and conditions rather than police practices. Moosy Interview, *supra* note 164.

208. Consent Decree ¶ 96, *City of Steubenville*, No. C2 97-966 ("The Court shall retain jurisdiction of this action for all purposes during the term of this Decree."); Consent Decree ¶ 79, *City of Pittsburgh*, No. 97-0354 (same). The same Department appears to be applying the same strategy in its investigation of Columbus, Ohio, where the Department has reportedly determined that the city's Division of Police has violated § 14141 but has delayed filing suit pending negotiations over a potential consent decree. See Higgins, *supra* note 206.

to pursue litigation only if a negotiated consent decree could not be achieved.²⁰⁹

In pursuing a strategy of negotiating consent decrees, the Department of Justice operates from a position of strength. No municipality could relish the prospect of a § 14141 trial. The publicity surrounding a trial pitting the municipality against the federal government over incidents of police misconduct would be enormous and largely injurious.²¹⁰ The monetary costs of litigating a protracted § 14141 trial would be exorbitant.²¹¹ A judgment that the municipality violated § 14141 would not only subject the local police department to a structural injunction designed by a federal judge, but also could provide existing police misconduct suits with additional evidence and spark new individuals to sue for damages. As a result, municipalities will likely respond favorably to Justice Department overtures regarding the possibilities of settlement.

The strategy of pursuing settlement rather than litigation will have profound consequences on the effectiveness of § 14141. On the positive side, pursuing settlement and avoiding litigation will allow the Special Litigation Section to conserve resources—an important goal considering the Section's limited manpower. Proving a pattern or practice case in court would require extensive discovery and trial preparation, as well as courtroom advocacy. Negotiating settlements frees-up Department resources to take on new investigations and expand oversight of the nation's police forces.

Successful settlement negotiations could also encourage the defendant municipality to support rather than oppose the structural changes. Since the municipal and police officials will be managing the system on a day-to-day basis, acrimonious litigation can jeopardize the viability of structural relief before it has even been entered.²¹² Conversely, if munici-

209. See *Oversight Hearings*, *supra* note 196, at *8 (statement of Assistant Attorney General Isabelle Katz Pinzler) (“[W]here cooperative efforts fail [in CRIPA cases], we have been obliged to file suit . . .”) (emphasis added); *cf.* Cornwell, *supra* note 166, at 849. Unlike § 14141, the text of CRIPA itself provides evidence of Congressional preference for settlement, requiring that the Attorney General notify the offending state of the alleged CRIPA violation “at least forty-nine days before suit is filed to allow adequate time for consultation and possible resolution of problems without the need for further legal action.” Cornwell, *supra* note 166, at 847 (footnotes omitted); *see also* 42 U.S.C. § 1997b (1994).

210. How injurious the publicity would be, of course, depends upon the local community's views of the Department of Justice and the federal government.

211. During discovery alone in *City of Philadelphia*, the Department of Justice provided over 800 pages of interrogatory answers, including detailed allegations of 810 prisoners injured and 290 shootings by Philadelphia police officers. See *Police Brutality Hearings*, *supra* note 18, at 174 (statement of Drew Days, Professor, Yale Law School); Stephanie L. Franklin, Comment, *United States v. City of Philadelphia: A Continued Quest for an Effective Remedy for Police Misconduct*, 7 BLACK L.J. 180, 183 n.16 (1981). The costs of preparing for trial and actually litigating a case of this scope would be immense.

212. See SCHUCK, *supra* note 29, at 170 (noting the opportunities for defendants to under-

pal and police officials agree with the changes being implemented, the prospects for a decree's success improve dramatically. The probability of support for the decree among local officials is greatly enhanced by the negotiation of settlements.²¹³ Indeed, one academic analyst of structural decrees has posited that, in institutional reform cases, negotiated settlement provides the only possible route to success: "Litigated structural remedies break down; only negotiated structural remedies work."²¹⁴

On the other hand, consent decrees in institutional reform litigation could undermine a court's understanding of the underlying problem²¹⁵ and thus merely delay costs and acrimony. In many institutional reform cases, trial judges have no opportunity to supervise discovery or to oversee trial proceedings because the consent decree is filed the same day as the underlying complaint.²¹⁶ Because of the limited, deferential standard of review of consent decrees, few courts will analyze a decree in great detail before entry.²¹⁷ As a result, if one party returns to the court to ask for modification of the decree, "the judge is at a loss: He has no basis for assessing the request."²¹⁸ While the judge can, of course, hold lengthy hearings to reconstruct the underlying problem, such an inquiry could eliminate the resources conserved by the original settlement.²¹⁹ Moreover, if the plaintiff returns to the court with a request for judicial enforcement of the decree's terms, judges are generally reluctant to impose contempt sanctions for violations of a "mere bargain between the parties."²²⁰

Analyses of the implementation of CRIPA have focused some criticism of the Justice Department's emphasis on negotiating settlements. In particular, CRIPA critics have argued that the Department's negotiation strategy proved ineffective because consent decrees were long delayed, poorly drafted, weakly administered, and failed to adequately address the

mine structural injunctions through outright refusal to obey or "foot-dragging and minimalism"); Schwartzschild, *supra* note 156, at 899; Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1026-27 (1986).

213. For example, in Pittsburgh, both Mayor Murphy and Police Chief Robert W. McNeilly expressed their support for the consent decree. See Marylynne Pitz & John M.R. Bull, *Court OKs City Police Reform Agreement: Settles U.S. Suit Charging Patterns of Abuse*, PITTSBURGH POST-GAZETTE, Apr. 17, 1997, at C1; Michael A. Fuoco, *Police Recoil, Union Chief Says No 'Extra Steps' If Court Approves City-Justice Pact*, PITTSBURGH POST-GAZETTE, Mar. 5, 1997, at A1. It should be noted, however, that the police union vigorously opposed the consent decree, even threatening that officers will no longer "take that extra step" to stop crime. Fuoco, *supra*, at A1.

214. Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011, 1012 (1993).

215. See Schwartzschild, *supra* note 156, at 913.

216. See *supra* notes 164 & 208.

217. See *supra* notes 155-157 and accompanying text.

218. Fiss, *supra* note 154, at 1083.

219. See *id.* at 1084.

220. *Id.*

needs of the institutionalized.²²¹ Because private interest groups have generally been unable to intervene in CRIPA actions, these groups could not remedy perceived deficiencies in the Department's strategy.²²² Section 14141 could pose similar problems, as victims and advocacy groups will face similar difficulties in influencing § 14141 actions.

To date, these criticisms do not seem to attach to § 14141 enforcement.²²³ As discussed above, there is every reason to believe that the Justice Department's conciliatory § 14141 strategy will prove more expeditious than a litigation strategy; similarly, as will be discussed in the next section, the two § 14141 decrees already entered appear comprehensive and well administered. In order to assuage the concerns of affected communities and advocacy groups, the Justice Department should conduct outreach to gather the opinions and interests of affected groups and tailor consent decrees to reflect these opinions and interests where possible.

C. *Equitable Relief: Current Department Strategy*

Designing equitable relief that is appropriate and ameliorative may be the Department's biggest challenge under § 14141. Structural injunctions usually arise from problems for which our society has struggled for decades to find answers. As a result, these problems' "[c]auses may be poorly understood; a technology for effectively dealing with them may not exist; progress may be inherently difficult to measure."²²⁴ Such is clearly the case with the problem of police misconduct.²²⁵ Designing institutional rules and procedures that deter and punish police misconduct, but allow police the necessary discretion to control crime effectively has proven an arduous task. The Steubenville and Pittsburgh cases represent the Attorney General's first efforts at designing such institutional rules

221. See Cornwell, *supra* note 166, at 852-54. It should be noted that this criticism was leveled at the Justice Department's strategy during the Reagan and Bush Administrations. There is some reason to believe that the Department has expanded enforcement of CRIPA under the Clinton Administration. See 3 No. 16 DOJ Alert 13, Dec. 6, 1993 ("[T]he division is expanding enforcement under the Civil Rights of Institutionalized Persons Act . . .").

222. See *supra* notes 165-171 and accompanying text.

223. In fact, Witold Walczak, Executive Director of the ACLU of Pittsburgh, whose class action suit against the Pittsburgh Police Department included many of the victims of the pattern of misconduct remedied by the Pittsburgh Consent Decree, described the Decree in glowing terms: "I think it's a great day. This is the most far-reaching order governing any police department in the United States." Pitz & Bull, *supra* note 213, at C1. Walczak also noted, "The Justice Department took our case and used their clout to get what we both wanted, which is meaningful reform." *Id.*

224. SCHUCK, *supra* note 29, at 155.

225. Part of the difficulty stems from our society's sometimes conflicting desires that police control and prevent crime quickly and effectively—using force when necessary—but that they do so while adhering to rules and standards governing police conduct.

and procedures. Though the decrees differ somewhat in their specifics, their general approach and their framework are strikingly similar in nature.

1. *General Approach*

The Justice Department's general approach appears to focus remedial relief upon the implementation of particular policies rather than the attainment of statistical goals. While the consent decrees each include one paragraph enjoining the cities and police forces from further violations of § 14141,²²⁶ the entire remainder of each decree mandates the installation of elaborate new police procedures—from new 'use of force' policies to new complaint review procedures. Nothing in either decree specifically requires the defendants to reduce the frequency of rights violations by their police officers. Thus, in order to terminate the decrees, the defendants must demonstrate not that they have reduced the number or frequency of rights violations, but that they have in good faith installed and implemented the required procedures.²²⁷

This focus on implementation of procedure, rather than elimination of the underlying problem, represents a marked shift from the form of prior structural injunctions. When compared to structural decrees and injunctions in school desegregation cases—under which school districts interested in terminating decrees must not only demonstrate implementation of integrative policies but also "that the purposes of the desegregation litigation ha[ve] been fully achieved,"²²⁸ the shift in remedial focus is patent.

In part, this shift results from the difficulty of measuring levels of police misconduct. In school desegregation cases, it is relatively easy to ascertain the extent of the problem—comparisons of the number of minority students with the number of non-minority students in particular schools will often suffice.²²⁹ Gathering and evaluating data regarding police misconduct is much more difficult. Available statistics, such as the number of civil suits or citizen complaints, are poor predictors of the level of police misconduct because of the numerous other variables that de-

226. Consent Decree ¶ 10, *United States v. City of Steubenville*, No. C2 97-966 (S.D. Ohio filed Aug. 28, 1997); Consent Decree ¶ 10, *United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa. filed Feb. 26, 1997).

227. Consent Decree ¶ 96, *City of Steubenville*, No. C2 97-966; Consent Decree ¶ 79, *City of Pittsburgh*, No. 97-0354.

228. *Board of Educ. v. Dowell*, 498 U.S. 237, 247 (1991).

229. This point is not intended to minimize the complicated nature of structural reform of segregated school systems, but merely to point out that the problem in those cases is rarely in measuring whether or not segregation exists.

termine these figures.²³⁰ As a result, mandating procedural changes rather than decreased misconduct enables courts and the plaintiff Department of Justice to better measure compliance.

The shift also appears to represent a policy decision that pursuing enhanced procedures can increase the influence of each § 14141 suit. First, in the individual case, obtaining improved procedures may prove more effective over the long haul. The institutional nature of the changes wrought by the consent decrees in Pittsburgh and Steubenville signifies that, absent active steps to the contrary, the changed policies will remain in effect after the consent decree has expired. Second, pursuing procedural changes enables the Justice Department to develop a remedial blueprint that, in principle, will apply equally to other police departments. Thus, while remedying a pattern of misconduct in Pittsburgh, the Justice Department can also notify other municipalities interested in reducing police misconduct and/or in avoiding § 14141 litigation as to what policies the Department endorses. Through this strategy, the Department can work to minimize misconduct in other police departments in addition to those against which it brings § 14141 actions.

2. Framework

The Pittsburgh and Steubenville consent decrees contain enough identical provisions to exhibit the framework of a reform model. The decrees provide for a replacement of each police department's use of force,²³¹ training,²³² complaint review,²³³ and officer supervision policies²³⁴ with a new Justice Department model. In order to secure compliance, the decrees each mandate the retention of an auditor to oversee the agreement's implementation and report to the court regarding progress.²³⁵ And

230. The number of civil suits is affected by the resources of victims, the types of police misconduct, and the availability of legal representation. The number of civilian complaints is determined by the type of complaint review procedure, community awareness of the review procedure, the mechanism of complaint receipt, and community opinion regarding complaint review effectiveness. The consent decrees' requirements that Pittsburgh and Steubenville establish more flexible complaint receipt policies and accept third party and anonymous complaints will likely substantially increase the number of complaints. See Consent Decree ¶¶ 35-36, 38, *City of Steubenville*, No. C2 97-96; Consent Decree ¶¶ 48, 50-51, *City of Pittsburgh*, No. 97-0354.

231. See Consent Decree ¶¶ 21-23, *City of Steubenville*, No. C2 97-966; Consent Decree ¶¶ 13, 15, & 18, *City of Pittsburgh*, No. 97-0354.

232. See Consent Decree ¶¶ 12-20, *City of Steubenville*, No. C2 97-966; Consent Decree ¶¶ 33-43, *City of Pittsburgh*, No. 97-0354.

233. See Consent Decree ¶¶ 28-63, *City of Steubenville*, No. C2 97-966; Consent Decree ¶¶ 44-69, *City of Pittsburgh*, No. 97-0354.

234. See Consent Decree ¶¶ 64-78, *City of Steubenville*, No. C2 97-966; Consent Decree ¶¶ 12-30, *City of Pittsburgh*, No. 97-0354.

235. See Consent Decree ¶¶ 82-90, *City of Steubenville*, at C2 97-966; Consent Decree ¶¶ 70-76, *City of Pittsburgh*, at 97-0354.

both decrees will remain in force for at least 5 years, at which time the municipalities can move to terminate by demonstrating full and faithful implementation of all provisions and substantial compliance for two years.²³⁶

While the two consent decrees share a common framework, they differ in important respects. These differences may result from a number of factors. Different approaches are necessitated by the differences between the two police departments in size and structure.²³⁷ The specifics of the alleged pattern of rights violations may have triggered a particular focus within the consent decree. In addition, the negotiated nature of consent decrees and the differing objectives of each § 14141 defendant affected the final product.²³⁸

The Department of Justice will no doubt continue to develop its approach to reforming police departments under § 14141. With the assistance of academic experts in the field of police policy,²³⁹ the Department of Justice developed the Pittsburgh and Steubenville consent decrees through extensive analysis of the successes and failures of policies in different cities across America.²⁴⁰ As experience and academic studies provide additional data regarding police policies, the Department will, no doubt, adapt its framework to utilize successful new strategies.

D. A Potential Role for Community Groups?

Despite the law's limitation of standing to the Department of Justice, the passage and implementation of § 14141 may present a new opportunity for community and interest groups to pursue institutional police reform. As discussed above, the ACLU of Pittsburgh provided the Department of Justice with evidence of 66 alleged incidents of police misconduct compiled for the ACLU's own class action suit. Though the city of Pittsburgh apparently rejected a Department of Justice suggestion to include the ACLU in settlement negotiations of the § 14141 action,²⁴¹

236. See Consent Decree ¶ 96, *City of Steubenville*, No. C2 97-966; Consent Decree at ¶ 79, *City of Pittsburgh*, No. 97-0354.

237. For example, on account of the Pittsburgh Police Department's relatively large size and budget, the Pittsburgh consent decree requires the installation of an "automated" early warning system and a computerized database providing information on officers' behavioral histories. See Consent Decree ¶ 12, *City of Pittsburgh*, No. 97-0354. On the other hand, because of the relatively small size and budget of the Steubenville Police Department, the Justice Department settled for a non-computerized information system. See Consent Decree ¶ 71, *City of Steubenville*, No. C2 97-966.

238. Moosy Interview, *supra* note 164.

239. See, e.g., Consent Decree at App. 1, *City of Pittsburgh*, No. 97-0354 (affidavits of James J. Fyfe, Ph.D, and Lou Reiter).

240. See Moosy Interview, *supra* note 164.

241. See Marylynne Pitz, *City Sued To Pay Lawyer Fees in Police Suit*, PITTSBURGH POST-GAZETTE, Aug. 30, 1997, at B2.

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the ACLU clearly felt that the resulting consent decree satisfied their objectives.²⁴² Indeed, the ACLU subsequently claimed to be a prevailing party and filed a petition for lawyers' fees for time spent compiling evidence that led to the settlement.²⁴³ Whether other community and interest groups can afford to imitate the ACLU's role in the Pittsburgh case may depend largely on the disposition of this fee petition and others like it.

In addition, community and interest groups may be able to use the prospects of a § 14141 enforcement suit as a bargaining chip to increase leverage regarding their own suits. For example, in Philadelphia, the local ACLU and NAACP chapters and the Police-Barrio Project, a local Latino group favoring police reform, filed a class action suit on behalf of victims of police misconduct seeking injunctive relief to establish effective training, supervision, and discipline policies.²⁴⁴ As discussed above, Supreme Court precedent has virtually ruled out the possibility of the suit actually obtaining injunctive relief.²⁴⁵ However, the city of Philadelphia chose to settle the case with a consent decree that alters the police department's complaint review process, installs an anti-corruption task force, and reforms its Internal Affairs Division.²⁴⁶ The city's willingness to settle a lawsuit in which it appeared to have a very strong case was surely increased by the possibility of a subsequent § 14141 suit by the Justice Department arising from the same facts.²⁴⁷

Because of the absence of private standing, any leverage gained by community and interest groups from § 14141 will depend entirely upon active enforcement of the statute by the Department of Justice. If the threat of a § 14141 suit by the Justice Department is not a real one, municipalities will return to their practice of litigating, and almost invariably winning, private suits for injunctive relief against police misconduct. As a result, the potential role for community and interest groups in § 14141 litigation is a tenuous one. However, if a proactive approach from the Justice Department renders § 14141 litigation a common municipal concern, community and interest groups could exert substantial new influence over police institutions. A symbiotic relationship between an active

242. See Pitz & Bull, *supra* note 213, at C1.

243. See Pitz, *supra* note 241, at B2.

244. See Mark Fazlollah & Richard Jones, *Suit Will Ask U.S. Court to Take Over City Police Reform*, PHILA. INQUIRER, Dec. 7, 1995, at A1.

245. See *supra* notes 56-70 and accompanying text.

246. See Mark Fazlollah, *Major Police Reforms Announced*, PHILADELPHIA INQUIRER, Sept. 5, 1996, at A1.

247. At the time, Philadelphia was reported as being on a short list of cities being considered by the Department of Justice for a full § 14141 investigation. See Curriden, *supra* note 148, at 64.

Justice Department and community groups with trickle-down leverage could markedly increase the nationwide impact of § 14141.

IV. JUDICIAL AND POLITICAL AMBIVALENCE REGARDING STRUCTURAL LITIGATION: WHAT RECEPTION FOR § 14141?

The structural injunction—under which the judiciary reorganizes bureaucratic structures to bring them into compliance with constitutional or statutory requirements—is a relatively recent phenomenon. However, within its short life span, the structural injunction has spawned substantial academic criticism and, more recently, legislative and judicial curtailment. As a result of this curtailment, both the Justice Department and federal district court judges will have to tread carefully. As will be discussed below, structural injunctions and consent decrees will need to be carefully tailored in order to satisfy recent Supreme Court precedent and to avoid congressional backlash.

A. *Civil Rights Structural Litigation*

In 1955, in an effort to overcome the intractable opposition of state bureaucracies to desegregating public school systems, the U.S. Supreme Court authorized federal district courts to implement its decision in *Brown v. Board of Education* by retaining jurisdiction over desegregation cases and fashioning appropriate equitable remedies to ensure compliance with constitutional principles.²⁴⁸ In order to achieve school desegregation, the *Brown II* Court granted district courts the authority not only to overhaul every aspect of educational administration, but also to revise “local laws and regulations which may be necessary in solving the foregoing problems.”²⁴⁹ Thus was born what analysts termed the “structural injunction”—defined by Professor Owen Fiss as a decree “through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution.”²⁵⁰

The structural injunction quickly became an important tool in the arsenal of remedies employed by district courts in civil rights cases of all types.²⁵¹ Indeed, structural injunctions were soon entered in cases involving issues as diverse as electoral reapportionment, trade practices, and

248. See *Brown v. Board of Educ.*, 349 U.S. 294, 300-01 (1955) [hereinafter *Brown II*].

249. *Id.* at 301. The power of federal district courts to force local and state governments to revise laws and even raise taxes was recently upheld. See *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) [hereinafter *Jenkins II*] (overturning the district court's tax increase order as violating the principles of comity, but holding that the district court could have ordered the school district to raise taxes itself).

250. Owen Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 965 (1993).

251. For a discussion of the historical antecedents of the structural injunction, see OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* 1-6 (1978).

environmental degradation.²⁵² At one point during the 1970s, Chief Judge Johnson of the Middle District of Alabama took control of the state's school, prison, and mental health systems through structural injunctions aimed at guaranteeing students and inmates constitutional treatment.²⁵³

If courts in the 1960s and early '70s considered *Brown II* a decision of "unquestioned correctness"²⁵⁴ and structural injunctions a commonplace remedy,²⁵⁵ widespread use of the structural injunction spawned substantial academic criticism in the late 1970s and early 1980s.²⁵⁶ Arguing that unelected federal judges with little administrative experience are poor managers of political and bureaucratic institutions,²⁵⁷ these academics advocated a return to a traditional remedial hierarchy with equitable relief available only in the extraordinary circumstance that no other remedy will do the job.²⁵⁸

Perhaps in a nod to this conservative criticism, the Supreme Court established guiding principles for district court injunctions, requiring that "the nature of the violation determine[] the scope of the remedy"²⁵⁹ and that district courts "take into account the interests of state and local authorities in managing their own affairs."²⁶⁰ But the Court's general attitude remained one of deference to district court decision-making: "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad."²⁶¹ As a result, structural civil rights injunctions proceeded apace. By 1994, for example, federal injunctions governed the confinement conditions of 244 prisons in thirty-four jurisdictions and the administration of hundreds of school districts.²⁶² In some cases, these injunctions have remained in force for decades.²⁶³

252. *See id.* at 4.

253. *See id.*; Yoo, *supra* note 193, at 1124.

254. FISS, *supra* note 251, at 5.

255. *See* Yoo, *supra* note 193, at 1132.

256. *See* SCHUCK, *supra* note 29, at 150-81; RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); LINO GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976).

257. *See* Yoo, *supra* note 193, at 1123.

258. *See* Fiss, *supra* note 250, at 968-969.

259. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

260. *Milliken v. Bradley*, 433 U.S. 267, 281 (1977).

261. *Swann*, 402 U.S. at 15.

262. *See* Yoo, *supra* note 193, at 1124. In a particularly compelling example of the widespread employment of structural injunctions, federal court orders played a role in the administration of the Corrections, Fire, Human Services, Education, Public Works, and Public Housing departments of the government of the District of Columbia. *See id.*

263. *See, e.g., Missouri v. Jenkins*, 115 S. Ct. 2038, 2042 (1995) [hereinafter *Jenkins III*]; *Board of Educ. v. Dowell*, 498 U.S. 237, 240 (1991) ("This school desegregation litigation began almost 30 years ago."); Fiss, *supra* note 154, at 1083 (acknowledging that because "our knowledge of how to restructure on-going bureaucratic organizations is limited . . . courts must over-

However, recent years have witnessed a backlash against the structural injunction not only in academic circles,²⁶⁴ but, more importantly, in Congress and the Supreme Court. On the judicial level, the Supreme Court has repeatedly upheld district court decisions to terminate structural injunctions that plaintiffs and many analysts felt had not yet achieved their objectives.²⁶⁵ More recently in *Jenkins III*, the Court put real teeth into previously nebulous limitations on structural injunctions, overruling a seemingly typical desegregation order on the grounds that the remedy was not sufficiently tailored to the constitutional violation.²⁶⁶ Finally, in overturning a recent prison reform decree in *Lewis v. Casey*, the Court questioned the very basis of structural injunctions, arguing that "it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."²⁶⁷

Meanwhile, less than two years after the passage of § 14141, Congress enacted the Prison Litigation Reform Act of 1995, limiting the authority of federal district courts to issue broad injunctive relief to remedy prison conditions.²⁶⁸ Recently, bills have been introduced in the House and Senate to limit the authority of federal courts to enjoin the enforcement of state laws and to raise taxes in order to comply with structural injunctions.²⁶⁹ Given the anti-judicial philosophy of the current Republican majority in Congress and the increase in the interaction of Congress and the judiciary, further legislation limiting federal injunctive power is a distinct possibility.²⁷⁰ As Professor Fiss put it, in an article that preceded many of these legal and political developments, the structural injunction

see and manage the remedial process for a long time—maybe forever").

264. See, e.g., Yoo, *supra* note 193 (arguing that structural injunctions are beyond the power granted to federal courts by the Constitution).

265. See *Freeman v. Pitts*, 503 U.S. 467, 471 (1992) (holding that the district court has the authority to partially relinquish control of a school district before full compliance with constitutional principles is achieved); *Dowell*, 498 U.S. 237 (1991).

266. See *Jenkins III*, 115 S. Ct. at 2047-56 (overturning injunction aimed at desegregating Kansas City schools by improving educational standards in order to attract non-minority students from other school districts).

267. *Lewis v. Casey*, 116 S. Ct. 2174, 2179 (1996). Without relying on the Prison Litigation Reform Act's limitations on structural injunctions in the prison context, *Lewis* overturned an injunction mandating a detailed legal library policy for Arizona prisons, in large part because the district court "failed to give adequate consideration to the views of state prison authorities." *Id.* at 2185.

268. Pub. L. No. 104-134, tit. VIII (1996). In granting prospective relief in suits over prison conditions, district courts must satisfy a three-prong test: the remedy must be "narrowly drawn," "extend[] no further than necessary to correct the violation," and be "the least intrusive means necessary to correct the violation." *Id.* § 802(a) (amending 18 U.S.C. § 3626(a) (1994)).

269. See H.R. 1252, 105th Cong. (1997); S. 32, 105th Cong. (1997); S. 1817, 104th Cong. (1996).

270. See Yoo, *supra* note 193, at 1176.

is in the process of being “confined and enfeebled by a plethora of devices.”²⁷¹

B. Likely Effects of Ambivalence Toward Structural Litigation on § 14141

The development of these legal and political movements to curtail the structural injunction raises interesting questions regarding the viability of 42 U.S.C. § 14141. Will courts prove reluctant to enter broad structural injunctions aimed at reforming police bureaucracies for fear of reversal by the Supreme Court? Or will courts not go the extra mile to implement injunctions or consent decrees knowing that the Supreme Court will not criticize inaction? Finally, if consent decrees or injunctions are enforced proactively by federal courts, will active federal involvement in police management offend the current conservative Congress enough to prompt legislative curtailment of § 14141?

Whether courts will actively enforce injunctive relief under § 14141 will likely continue to depend on the individual district court. Though the Supreme Court has begun to enforce limitations on structural injunctions²⁷² and individual members of the Supreme Court have expressed distaste for broad structural injunctions,²⁷³ district courts continue to exercise considerable discretion in fashioning institutional remedies to counter institutional violations of constitutional rights.²⁷⁴ So long as district judges satisfy *Jenkins III* and *Lewis* by involving the local government in designing equitable remedies and explaining the connection between violation and remedy, their ability to enforce injunctive relief will likely remain broad.

Early returns suggest that the Department of Justice has already incorporated the limitations on structural injunctions in *Jenkins III* and *Lewis* into its § 14141 enforcement strategy. On a strategic level, the decision to secure consent decrees rather than pursue litigation necessarily involves state and local authorities in the drafting of equitable relief, addressing the *Lewis* Court’s concerns regarding the involvement of local governments. Moreover, a consent decree co-opts the municipality as a remedial co-author, thus ensuring the decree itself against municipal challenge.²⁷⁵

271. Fiss, *supra* note 250, at 965.

272. See *supra* notes 259-260 & 265-267 and accompanying text.

273. See, e.g., *Jenkins III*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring).

274. See Yoo, *supra* note 193, at 1134-35 (acknowledging that limits on federal equitable authority remain weak); *Jenkins II*, 495 U.S. 33, 38-39 (1990) (authorizing district courts to enjoin state laws barring local officials from raising taxes).

275. The greatest danger to the consent decree is probably a challenge from police officers. In the Pittsburgh case, the Fraternal Order of Police vehemently opposed the agreement and

On a substantive level, the complaints and consent decrees in the Pittsburgh and Steubenville cases appear to be drafted with the Courts' limitations on injunctive relief in mind. No doubt aware of the *Jenkins III* requirement that the remedy be carefully tailored to the constitutional violation, the Department's complaints allege an underlying unconstitutional action for almost every consent decree requirement.²⁷⁶ And, most likely in an effort to meet the *Lewis* requirement that injunctions allow "administrators to exercise wide discretion within the bounds of constitutional requirements,"²⁷⁷ the consent decrees leave substantial discretion in the hands of local police administrators to operate within the decrees' mandatory framework.²⁷⁸ As a result, even if the substance of the decrees had been entered as injunctions and challenged by reluctant municipalities, it seems likely that appellate courts would uphold such an order as within the discretion of the district court.

Politically, it is clear that the current Republican Congress would not pass a statute like § 14141, due to the ideological commitment of Congress to the devolution of power from the federal government to states and localities and its distrust for the federal judiciary.²⁷⁹ It is less clear what it would take for Congress to change the status quo by repealing or limiting federal authority to pursue injunctive relief under § 14141. The force of inertia—a powerful force in current politics—favors the retention of § 14141. Most likely, it would take a substantial overreach by the Department of Justice or by a federal judge to provide momentum for a repeal or a limiting amendment. Given the current Department strategy of pursuing consent decrees and preserving administrative flexibility, such an overreach seems unlikely.

filed a motion to intervene. While U.S. District Judge Robert Cindrich denied the motion, he held that the union could request hearings if it believed the decree had violated its contract with the city or an officer's rights. See Pitz & Bull, *supra* note 213, at C1. Judge Cindrich has held at least one such hearing to determine whether the city's new police contract conflicted with the decree. See Marylynne Pitz, *Settle Conflict, City and Police Told*, PITTSBURGH POST-GAZETTE, Feb. 20, 1998, at B1.

276. Compare, e.g., Complaint at ¶ 11(a), *United States v. City of Pittsburgh*, 97-0354 (W.D. Pa. filed Feb. 26, 1997) (alleging failure to train officers adequately), with Consent Decree ¶¶ 33-43, *City of Pittsburgh*, No. 97-0354 (instituting new training procedures); Complaint at ¶ 7, *City of Pittsburgh*, No. 97-0354 (alleging pattern or practice of excessive force), with Consent Decree ¶¶ 13, 15, & 18, *City of Pittsburgh*, No. 97-0354 (instituting new use of force policy and oversight procedures); Complaint at ¶ 11(d), *City of Pittsburgh*, No. 97-0354 (alleging failure to investigate citizen complaints adequately), with Consent Decree ¶¶ 44-69, *City of Pittsburgh*, No. 97-0354 (instituting new complaint review procedure).

277. *Lewis v. Casey*, 518 U.S. 343, 363 (1996) (quoting *Bounds v. Smith*, 430 U.S. 817, 833 (1977)).

278. See Moosy Interview, *supra* note 164.

279. See NEWT GINGRICH ET. AL., *CONTRACT WITH AMERICA* 49-51, 73 (Ed Gillespie & Bob Schellhas eds., 1994) (arguing for block grants and state and local flexibility in spending federal dollars on crime prevention and welfare reform); John Aloysius Farrell, *Republicans Take Aim at the Federal Judiciary*, BOSTON GLOBE, Sept. 24, 1997, at A1.

V. CONCLUSION

Congressional passage of 42 U.S.C. § 14141 represents an important step towards filling the vacuum left by the failure of criminal and civil law regimes to control police misconduct. By authorizing the pursuit of injunctive relief, § 14141 provides the Justice Department with a new tool to address systemic problems rather than scapegoating individual officers. Few analysts of police practices would argue with the proposition that such a tool is badly needed. However, it remains an open question whether § 14141 will develop into an effective weapon in the fight to reform police practices across the country, or simply become a last-resort tool to clean up the worst American police departments.

The preceding analyses allow for a number of conclusions and policy suggestions. First, on a judicial level, despite critics' concerns that the difficulties of proving a pattern or practice case will limit the statute's effectiveness,²⁸⁰ § 14141 represents a workable and powerful tool. Though no § 14141 case has yet gone to trial, the statute's legislative history and judicial precedent in other "pattern or practice" cases suggest that proving a § 14141 case would not represent an overly difficult task.²⁸¹ By adopting a broad, encompassing interpretation of "pattern or practice," federal courts can advance the statute's overriding objective—to bring police departments across America into compliance with federal law. Moreover, by employing stricter review of § 14141 consent decrees and granting fee petitions of community and advocacy groups that aid the Justice Department, federal judges can ensure greater community involvement in and increased effectiveness of § 14141.

Second, as a result of the deletion of individual standing, whether § 14141 will have a profound impact upon police practices across the nation will depend upon its implementation by the Department of Justice. The pursuit of negotiated consent decrees will likely enable the Justice Department to avoid expensive courtroom litigation and to retain addi-

280. See *Police Misconduct Hearings*, *supra* note 38, at 64-65 (statement of Judge Newman).

[T]he pattern or practice remedy . . . I think is a useful remedy, although I suspect it will have limited success. It will always be difficult to prove a pattern and practice case. There are, I think, some 7 or 8 statutes on the books now that authorize the U.S. to sue to try to establish a pattern and practice of civil rights violations . . . , but my impression is very few cases have been brought and very few successes have been achieved.
Id.

281. To the contrary, § 14141's legislative history indicates that the Attorney General could satisfy her burden of proof through evidence of a few individual rights violations and an institutionalized police practice or policy condoning or contributing to police misconduct. See *supra* notes 115-121 and accompanying text. Moreover, case law interpreting the phrase "pattern or practice" in other civil rights statutes suggests that evidence of a large number of similar incidents could prove sufficient to meet the burden of proving rights violations to be a regular practice of the defendant police department. See *supra* notes 124-140 and accompanying text.

tional control over remedial solutions. Tactics such as employing consent decree blueprints and integrating § 14141 actions with other Department tools to fight police misconduct will help the Department make the most of its resources.²⁸² However, such tactics may prove ineffective unless Congress provides the Civil Rights Division with increased funding to perform its increased responsibilities. Furthermore, the Department of Justice must continue to make § 14141 enforcement a priority, regardless of which political party controls the White House.

Effective implementation of § 14141 will require heightened awareness of the current political and judicial climates regarding structural injunctions. The Justice Department and federal judges must craft injunctive relief that satisfies the Supreme Court's limitations in *Jenkins III* and *Lewis*. In order to avoid incurring the anger of the current Congress, the Justice Department and federal courts should be sure to leave local institutions some flexibility in implementing equitable relief. The Department's current strategy of pursuing consent decrees should go a long way towards satisfying both of these objectives.

Finally, the potency of § 14141 as a solution to nationwide problems of police misconduct will depend greatly upon the efficacy of the procedural framework developed by the Justice Department and employed in the Steubenville and Pittsburgh consent decrees.²⁸³ If the procedural reforms pursued by the Justice Department do not translate into improved policing, then § 14141 may represent nothing more than a tool to alter unconstitutional police policies and rein in the most offensive police departments.

In the field of police misconduct, our society has yet to live up to President Lincoln's admonition that it is "the duty of the Government to render prompt justice against itself in favor of its citizens."²⁸⁴ Traditional criminal and civil damages regimes have failed to secure prompt justice. By presenting a different legal paradigm in the form of civil equitable relief, § 14141 represents a step in the right direction. How big a step remains to be seen.

282. See *supra* notes 204-205 & 210-214 and accompanying text.

283. Engaging in policy analysis as to the effectiveness of the procedural reforms mandated by the Steubenville and Pittsburgh consent decrees is beyond the scope of this paper. However, the importance of policy success to the future of § 14141 cannot be ignored.

284. JACOBS, *supra* note 1, at vii.