

## Strengthening Section 14141: Using Pattern or Practice Investigations to End Violence Between Police and Communities

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STRENGTHENING SECTION 14141: USING PATTERN OR  
PRACTICE INVESTIGATIONS TO END VIOLENCE  
BETWEEN POLICE AND COMMUNITIES

***“Why is it that officers are not responsible for their acts  
when other citizens are?”<sup>1</sup>***

By: Sigourney Norman

INTRODUCTION

Imagine you are on your way home from work and driving your usual route. You hear police sirens getting louder and louder. You realize you are the subject of their chase, but you cannot imagine why. You slow down and pull over, not wanting to cause confrontation. The officer beats on your car door. You roll down your window and ask why you have been pulled over. The officer informs you that your tail light is broken. Next, the officer orders you out of the car. Your heart races ***as the officer pats you down***. You wonder if the officer knows you are in arrears for child support, a punishable offense in South Carolina.<sup>2</sup> You hope for a chance to explain your situation.

You ask the officer why you needed to leave the vehicle. Rather than offer a verbal explanation, the officer draws a weapon. Gripping his weapon, the officer tries to pin you down and handcuff you. You know you haven't done anything worth going to jail over, so you resist! You feel like you have fought him off, but suddenly you feel a sharp burn of a taser shot. Unsure of what the officer will do next, you grab the device that injured you and throw it to the ground. ***Now*** is your chance to break away! You run, unarmed. Dashing for your life, you get about fifteen feet

<sup>1</sup> Associated Press, *Cincinnati Officer is Acquitted in Killing That Ignited Unrest*, N.Y. TIMES (Sept. 27, 2001), <http://www.nytimes.com/2001/09/27/us/cincinnati-officer-is-acquitted-in-killing-that-ignited-unrest.html> (quoting the mother of Timothy Thomas, an unarmed black teenager shot and killed by a Cleveland police officer).

<sup>2</sup> See *Child Support*, S.C. BAR, <https://www.sccbar.org/public/get-legal-help/common-legal-topics/child-support/> (last visited Sept. 20, 2019).

away. Suddenly, you feel indescribably painful blows to your spine. The officer fires repeated gun shots when you were seventeen feet ahead, unarmed and back turned away. You swiftly fall to the ground, only this time never to wake up again. The officer places the taser near your lifeless body, and walks away.

These are Walter Scott's last moments on earth. Scott, an unarmed black man, died by eight consecutive gunshots fired at his back by a white police officer.<sup>3</sup> This violent arrest would not have receive attention but for a home video taken by a bystander.<sup>4</sup> When questioned, the police officer explained that his gunfire was a reaction of "total fear."<sup>5</sup> Conversely, video footage shows Scott did not pose a deadly threat.<sup>6</sup> The footage also reveals the officer placing the taser next to Scott's lifeless body, perhaps attempting to skew the evidence.<sup>7</sup>

Scott's death echoes the loss of Michael Brown, an unarmed black teenager who died by lethal excessive use of force in 2014, in Ferguson, Missouri.<sup>8</sup> Although some evidence suggests Mr. Brown put his hands up offering a truce as the officer closed in on him, the officer proceeded to fire twelve rounds at the teenager.<sup>9</sup> That same year, Mr. Garner, an unarmed black man, was approached by a group of policemen for the petty violation of selling loose cigarettes.<sup>10</sup> A "swarm" of police officers surrounded him while one put him in a choke hold.<sup>11</sup> Garner died gasping for air and

<sup>3</sup> Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer is Charged With Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>.

<sup>4</sup> See Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence*, N.Y. TIMES (Dec. 7, 2017), [https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html?\\_r=0](https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html?_r=0).

<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (last updated Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

<sup>9</sup> *See id.*

<sup>10</sup> See Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

<sup>11</sup> See Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <https://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html?smid=pl-share>.

crying, “I can’t breathe.”<sup>12</sup> In 2016, Philando Castile, a father and husband, died by five police gunshots as he peacefully reached for his license and registration, his girlfriend and daughter in the vehicle witnessing the violence.<sup>13</sup> Then, on March 18, 2018, two officers who did not identify themselves as law enforcement approached Stephon Clark in his grandmother’s backyard and shouted for Clark to come forth.<sup>14</sup> Suspecting his involvement in a recent crime, the officers asked Clark to reveal his hands.<sup>15</sup> The officers shot Clark repeatedly before he could show himself to be unarmed.<sup>16</sup> When officers approached Clark’s body, they found that he was in fact unarmed.<sup>17</sup> Again, on June 19, 2018, seventeen-year-old honors student Antwon Rose was shot three times as he ran away from a traffic stop.<sup>18</sup> These accounts capture a glimpse of the staggering amount of annual police homicides of civilians.<sup>19</sup>

Communities of color and their allies are responding to these incidents of violence through activist organizations including, but not limited to, the Black Lives Matter (“BLM”) movement.<sup>20</sup> Vocalizing citizen support for heightened accountability of American police forces through groups like BLM is critical because the movement brings national awareness to persistent, systemic racialized violence against people of color.<sup>21</sup> However, awareness

<sup>12</sup> Baker et al., *supra* note 10.

<sup>13</sup> See Matt Furber & Richard Pérez-Peña, *After Philando Castile’s Killing, Obama Calls Police Shootings ‘an American Issue’*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html>.

<sup>14</sup> See Jamiles Lartey, *Stephon Clark family joins hundreds in Sacramento for fifth day of protest*, THE GUARDIAN (Apr. 1, 2018), <https://www.theguardian.com/us-news/2018/mar/31/stephon-clark-hundreds-condemn-police-killing-in-fourth-night-of-protest>.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> Melissa Gomez, *Antwon Rose, Killed by a Police Officer, Is Remembered at Funeral as a ‘Bright Light’*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/antwon-rose-funeral-pittsburgh-police.html>.

<sup>19</sup> See Jon Swaine & Ciara McCarthy, *Killings by US police logged at twice the previous rate under new federal program*, THE GUARDIAN (Dec. 15, 2016), <https://www.theguardian.com/us-news/2016/dec/15/us-police-killings-department-of-justice-program> (explaining that a *Guardian* study documented 1,146 civilian homicides perpetrated by police in 2015).

<sup>20</sup> See *What We Believe*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/what-we-believe/>.

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

does not change the system without a corresponding change in our laws.<sup>22</sup> Using 42 U.S.C. § 14141, we can ground activism in a change in our legal structure. Through § 14141's uniquely legal response to police brutality, we can enforce peaceable arrest practices across our Nation's cities. Section 14141's power to create change is grounded in its basis on evidence, strong judicial processes, and power to enjoin police departments to specific terms and particularized outcomes designed on a city by city basis.

This note argues that 42 U.S.C. § 14141 is a critical pillar of civil rights legislation because it creates specific accountability for police institutions which cannot be provided through advocacy groups alone. Likewise, § 14141 requires municipal adherence to reforms, thereby addressing unconstitutional policing at a local level—a task which is impossible under the framework of other existing civil rights laws.<sup>23</sup>

Although § 14141 fills a critical gap in civil rights legislation, it is not without flaws.<sup>24</sup> For example, § 14141 is a strong change-maker when the federal government is actively surveilling local police departments.<sup>25</sup> Cities under active surveillance see police-to-civilian violence decrease and community-to-police communication increase.<sup>26</sup> However, we find inconsistent outcomes in reform for the years and decades following § 14141 when, after cities prove their adherence to reform, leading the federal government to cease its oversight as the federal government is convinced of the reform's soundness.<sup>27</sup> This note responds to § 14141's inconsistent long-term effectiveness by first evaluating causes of discrepancies in enduring reform adherence between different police departments formerly under federal review. Second, this note will demonstrate that grounding reform on specific political leaders undermines long-term reform. Conversely, grounding reform in local groups representing *both*

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

<sup>23</sup> See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 3, 4, 7, 20 (2009).

<sup>24</sup> See A 'Pattern or Practice' of Violence in America, BLOOMBERG (May 27, 2015), <https://www.bloomberg.com/graphics/2015-doj-and-police-violence/>.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See Kimbriell Kelly et al., *What Happens When Police Are Forced to Reform?*, FRONTLINE (Nov. 13, 2015), <https://www.pbs.org/wgbh/frontline/article/what-happens-when-police-are-forced-to-reform/>.

police and city residents strengthens the capacity for enduring change. Thus, ultimately this note proposes that the most effective mechanism to ensure long-term reform under 42 U.S.C. § 14141 is amending the statute to legally empower local citizen groups within the reform process.

Section I explores the history of civil rights actions against police and police institutions before 42 U.S.C. § 14141 by highlighting the problematic reliance on Reconstruction Era statutes. It then explores how the expansion of citizen causes of action allowed for recovery against individual police officers, but still indemnified police departments. Section II discusses the impetus behind the creation of 42 U.S.C. § 14141. It then explains the legal steps necessary to bring about federal oversight under 42 U.S.C. § 14141 and the practical application of changes proposed by the Department of Justice (“DOJ”) to departments under federal review.

Section III evaluates the varying results of § 14141 and studies in detail the best practices from major cities, such as Pittsburgh, Los Angeles, and Cincinnati. This note seeks to understand why these practices created lasting, improved relations between police and their communities and relies on DOJ filings, regional crime data, and scholarly case studies.

Section IV proposes amending 42 U.S.C. § 14141, such that its legal mechanism incorporates the strategies which have had the most success since the Act’s enactment in 1994. Section IV proposes Congress create a legal mechanism empowering community groups to act as oversight bodies during federal oversight. Building the legal role of these institutions creates a system of accountability that can outlast the length of a federal oversight period. Moreover, by involving the community in designing local reforms, the process will be driven by long-standing groups whose investment in the process will support change lasting longer than shifts in local political leadership. Most importantly, legally empowering community groups in partnership with the DOJ will overcome police department resistance to changes more effectively than the threat of further DOJ action alone.

## I. HISTORY OF CIVIL RIGHTS ACTIONS AGAINST POLICE AND POLICE INSTITUTIONS

Before 42 U.S.C. § 14141, 42 U.S.C § 1983 and the Fourteenth Amendment created a civil cause of action for citizens that providing monetary damages in instances of police brutality.<sup>28</sup> This legal framework for protecting citizens against excessive use of force by police is the same framework enacted one hundred twenty-three years earlier to protect newly freed slaves from violent pro-confederate groups.<sup>29</sup> During the southern reconstruction from 1863-1877, the Ku Klux Klan whipped and murdered blacks who tried to exercise their newly granted right to vote.<sup>30</sup> The Antebellum Republican Congress drafted the Ku Klux Klan Act to provide immediate relief from the violent, discriminatory attacks.<sup>31</sup> One section of this legislation became the current text for 42 U.S.C. § 1983,<sup>32</sup> which reads:

Every person who, under *color of any statute*, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>33</sup>

Though originally created for the unique setting of the post-Civil War south, this legislation later provided a civil cause of action for individual citizens whose constitutional rights were deprived by police.<sup>34</sup>

<sup>28</sup> See Matthew J. Silveira, *An Unexpected Application of 42 U.S.C. § 14141: Using Investigative Findings for § 1983 Litigation*, 52 UCLA L. REV. 601, 606, 608 (2004).

<sup>29</sup> See *id.* at 607, n. 20. "Congress passed § 1983 as part of the Ku Klux Klan Act of 1871 at the tail-end of '[a] wave of federal civil rights legislation.'" *Id.*

<sup>30</sup> See BERNARD SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS – PART I* 443 (Chelsea House Publishers, 1970).

<sup>31</sup> See David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1, 7 (1999).

<sup>32</sup> *Id.* at 2.

<sup>33</sup> 42 U.S.C. § 1983 (2018) (emphasis added).

<sup>34</sup> See *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961).

*A. Limitations Under 42 U.S.C. § 1983*

For almost a century, from the Antebellum Era of the late 1860s to the civil rights movement of the 1960s, a private citizen succeeding on a § 1983 claim under the Fourteenth Amendment against police departments proved practically impossible.<sup>35</sup> Instead, plaintiffs relied on the Equal Protection Clause of the Fourteenth Amendment to seek relief for police misconduct, which proclaims no state shall “deny to any person within its jurisdiction equal protection of the laws.”<sup>36</sup> This language means states must apply the laws to each of its citizens in the same manner.<sup>37</sup> When bringing a Fourteenth Amendment claim against a state actor, which includes a police department, victims’ claims are required to fall under one of two complaints: (1) the department used an explicit race-based classification policy<sup>38</sup>; or (2) the department used a policy that is “impartial in appearance” but applied discriminatorily against a group.<sup>39</sup>

Applying the first cause of action to police misconduct was rarely successful because *explicit* race-based policies became almost unheard of in policy-making.<sup>40</sup> Likewise, proving that a police department acted in a consciously discriminatory manner is an evidentiary barrier for private litigants.<sup>41</sup> Thus, the second approach is only marginally easier to succeed on in court.

*Monroe v. Pape* changed the landscape for claims against police departments by changing the interpretation of the phrase “color

<sup>35</sup> See Michael S. Vaughn & Lisa F. Coomes, *Police Civil Liability Under Section 1983: When Do Police Officers Act Under Color of Law?*, 23 J. CRIM. JUST. 395, 396-97 (1995).

<sup>36</sup> U.S. CONST. amend. XIV, § 1.

<sup>37</sup> See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

<sup>38</sup> See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (explaining that “[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct [which includes police officers] discriminating on the basis of race . . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional Solely because it has a racially disproportionate impact.”).

<sup>39</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”).

<sup>40</sup> See *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

<sup>41</sup> See Harmon, *supra* note 23, at 9.



of' law in the text of 42 U.S. C. § 1983 from being limited to strictly private actors, such as Ku Klux Klan members, to including institutional actors such as police officers and their supervising departments.<sup>42</sup> The Supreme Court found that the Antebellum Congress created the initial Ku Klux Klan Act to properly enforce the Fourteenth Amendment.<sup>43</sup> Thus, this same language in the descendant statute, namely 42 U.S.C. § 1983, is intended to enforce the Fourteenth Amendment.<sup>44</sup> Furthermore, this statute reaches the conduct of institutional state actors.<sup>45</sup> In effect, the Court held that the statute grants a federal cause of action to "parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position" against state actors, such as police officers.<sup>46</sup> The Court found that Congress may override state police power, even when "[i]mmunity is given to crime," as is the case when a police department shields officers who engage in misconduct from legal recourse.<sup>47</sup> In fact, the Court highlighted legislative history wherein the Antebellum Congress sought to remedy violations of civil rights where state officials, serving as sheriffs, upheld practices denying civil rights to a certain class of people and remained at their posts with no reproach from other citizens or the state.<sup>48</sup> The Court then described that present-day police officers and departments who also functionally deprive citizens of their civil rights will be federally liable under this statute.<sup>49</sup>

*B. Private Citizens Attempt § 1983 Claims Against Police and Police Departments*

Following *Monroe v. Pape*, a critical element in a private citizen § 1983 claim against a specific police officer is the causation analysis showing the officer was personally involved in the

<sup>42</sup> See Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1778; see also 42 U.S.C. § 1983 (2010).

<sup>43</sup> See *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

<sup>44</sup> See *id.*

<sup>45</sup> See *id.* at 171-72.

<sup>46</sup> *Id.* at 172.

<sup>47</sup> See *id.* at 175.

<sup>48</sup> See *id.* at 177.

<sup>49</sup> See *id.* at 180.

unconstitutional conduct.<sup>50</sup> An officer personally conducting an arrest almost certainly satisfies this requirement; however, officers who are on the scene and viewing the arrest process may or may not be jointly liable.<sup>51</sup> Plaintiffs' arguments against participating officers hinged on those officers' awareness of the wrong committed.<sup>52</sup> When an officer was unaware of the civil rights deprivation, a plaintiff could not recover against the bystander-officer.<sup>53</sup> If, on the other hand, the bystander-officer was aware of the unconstitutional conduct, and failed to prevent unlawful behavior, the plaintiff could recover against the bystander-officer.<sup>54</sup> For instance, when two officers guarded a room while a plaintiff screamed in pain as he was beaten with nightsticks by a third officer, the court found that the two guarding officers heard and understood a beating was going on, and therefore were liable for failing to protect the plaintiff because, "a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge."<sup>55</sup>

Arguably, § 1983 claims against supervisors of delinquent officers involved in unlawful conduct are more effective than claims against individual officer because they may incentivize internal reforms.<sup>56</sup> Furthermore, society receives the message that such conduct is a system-wide issue and not a dismissible, isolated incident when claims are brought against supervisors.<sup>57</sup> However, supervisor claims are significantly more nuanced than claims against individual officers and are thus harder to prove under § 1983.<sup>58</sup> In *Ashcroft v. Iqbal*, the plaintiffs allegedly experienced unlawful force while detained because of discrimination on the basis of national origin, Muslim religion and

<sup>50</sup> See MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* 340 (3d ed. 2017).

<sup>51</sup> See *id.*

<sup>52</sup> See *Byrd v. Brishke*, 466 F.2d 6, 10-11 (7th Cir. 1972).

<sup>53</sup> See Michael Avery et al., *Police Misconduct: Law and Litigation Highlights* § 4:2 (2018).

<sup>54</sup> See *Byrd*, 466 F.2d at 10-11.

<sup>55</sup> See *id.* at 9-11.

<sup>56</sup> See AVERY ET AL., *supra* note 53, at 346.

<sup>57</sup> See *id.* at 346-47.

<sup>58</sup> See *id.* at 347-48.

race.<sup>59</sup> In this case, the Supreme Court effectively indemnified high level supervisors from personal liability because “mere knowledge of [a] subordinate’s discriminatory purpose” does not meet the burden of proof.<sup>60</sup> The supervisors’ mental state of “knowledge” or “acquiescence” to discrimination carried out by subordinates was not enough to be the discriminatory purpose element necessary to succeed on a claim.<sup>61</sup>

Moreover, in *Wellington v. Daniels*, a witness testified that the plaintiff ran away from an officer, posing no threat to the officer’s life; but, in order to apprehend and arrest him, the officer battered the plaintiff with a flashlight, causing permanent physical paralysis.<sup>62</sup> The offending officer’s supervisor knew that the use of flashlights as a weapon causing serious injury or death was a national policing issue, but did not ban these flashlights or retrain his police to refrain from using them as a weapon, as other police forces around the nation had done.<sup>63</sup> Still, the court found for the supervisor, indemnifying him of any liability for the subordinate’s overuse of force because the plaintiff “failed to establish a pattern of excessive use of force” necessary to support his claim.<sup>64</sup>

Private plaintiffs sometimes bolstered their claims of supervisor liability using expert testimony.<sup>65</sup> While this tactic assisted plaintiffs seeking recovery from an isolated incident, a private plaintiff who seeks accountability from a supervisor for patterns of discrimination may face procedural barriers that undermine the claim.<sup>66</sup> For example, if a plaintiff seeks a remedy for patterns of discrimination under § 1983 using the injuries of other arrestees

<sup>59</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009).

<sup>60</sup> *Id.* at 677.

<sup>61</sup> *See id.*

<sup>62</sup> *See Wellington v. Daniels*, 717 F.2d 932, 934 (4th Cir. 1983).

<sup>63</sup> *See id.* at 936-37.

<sup>64</sup> *See id.* at 937-38.

<sup>65</sup> *See AVERY ET AL.*, *supra* note 53, at 366. For example, in *Gutierrez-Rodriguez v. Cartagena*, officers approached a private citizen in an unmarked car with plain clothes and guns drawn and fired at the car when the citizen attempted to drive away, thereby injuring the plaintiff. *See Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 557 (1st Cir. 1989). The officer perpetrating misconduct had forty complaints against him for overuse of force and department records revealed no disciplinary action had been taken to investigate the officer. *See id.* at 565-66. Expert testimony established that this number of complaints going without investigation deviated from the acceptable norm in police departments. *Id.* Due to this deviation from standard practice, the court found the supervisor’s gross negligence akin to discriminatory intent. *Id.*

<sup>66</sup> *See AVERY ET AL.*, *supra* note 53, at 366.

to corroborate the plaintiff's argument, the overall effect may be to lessen the effectiveness of the claim.<sup>67</sup> Each witness called to testify on a similar deprivation of rights creates small trials within the larger trial.<sup>68</sup> Judges and juries often find this process confusing and unnecessary.<sup>69</sup> Moreover, the plaintiff may have difficulty finding numerous credible and cooperative witnesses to assist in the case.<sup>70</sup> Thus, even after *Monroe v. Pape*, § 1983 claims against individual police officers and their supervisors often failed or were inadequate.<sup>71</sup>

### *C. Limits on Police Department Liability Under § 1983*

Plaintiffs rarely succeed on claims against a municipality as an alternative remedy under § 1983 when their claims against individual officers failed.<sup>72</sup> As with claims against an individual police officer, plaintiffs bringing claims against a municipality are required to satisfy Fourteenth Amendment requirements for discriminatory intent in addition to proving causation and culpability on the part of the municipality.<sup>73</sup> Consequently, a plaintiff has to prove a local government should have known or knew about a discriminatory act *and* that the local government failed to rectify it.<sup>74</sup> This cause of action requires evidence a plaintiff rarely can assemble because it requires time and resources to investigate thousands of police records.<sup>75</sup> Moreover, a plaintiff may struggle to meet the evidentiary standard of “widespread practice” resulting in “constitutional violations” that are part of “policies or customs” held by the municipality.<sup>76</sup>

For example, in *Hicks-Field v. Harris County*, a correctional officer responded to an inmate suffering from a schizophrenic

<sup>67</sup> *See id.*

<sup>68</sup> *Id.*

<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See* Harmon, *supra* note 23, at 11-12.

<sup>72</sup> *See* AVERY ET AL., *supra* note 53, at 368.

<sup>73</sup> *See id.* at 372.

<sup>74</sup> *See id.* n 2, at 389

<sup>75</sup> *See id.* at 365, 367.

<sup>76</sup> *See id.* at 379 (explaining that a plaintiff alleging a constitutional violation by a police department must show that those unconstitutional policies and procedures were in widespread use throughout the department).

attack by fatally punching him in the face and leaving the inmate unconscious.<sup>77</sup> The officer violated protocol by leaving the inmate unattended rather than seeking medical attention for the inmate following the use of force.<sup>78</sup> Another officer found the inmate, and took him to the hospital, where the inmate died.<sup>79</sup> An autopsy confirmed homicide as the cause of death.<sup>80</sup> Although the correctional officer directly inflicted violence on the inmate and personally avoided calling for medical help, under the applicable evidentiary standards, the municipality could not be held liable for this unconstitutional behavior.<sup>81</sup> Here, the facts of this incident, the officer's record, and a DOJ report on the conditions of the jail—which was excluded from evidence—cumulatively failed to prove liability.<sup>82</sup> Due to the report being excluded from trial, the plaintiff lost its strongest means of proving a pervasive occurrence of constitutional violations by the municipality, thus losing its § 1983 claim against the city.<sup>83</sup>

When private citizens attempted to use § 1983 claims to remedy patterns of police misconduct, the Supreme Court has resisted federal discipline of state police. For example, in 1976, plaintiffs in *Rizzo v. Goode* demanded federal oversight of the Philadelphia Police Department, alleging a pervasive pattern of depriving constitutional rights of African Americans and city residents at large.<sup>84</sup> Though this request would become the purpose and power of 42 U.S.C. § 14141, here, the Supreme Court struck down plaintiffs' request because principles of federalism required that any discipline of police remain in the hands of the state.<sup>85</sup> Indeed,

<sup>77</sup> See *Hicks-Fields v. Harris Cty.*, 860 F.3d 803, 806-07 (5th Cir. 2017), *aff'g* *Hicks-Fields v. Harris Cty.*, No. H-12-3650, 2015 WL 9581844 (S.D. Tex. Dec. 30, 2015).

<sup>78</sup> *Id.* at 807.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *id.* at 808.

<sup>82</sup> See *id.* at 809-10.

<sup>83</sup> *Id.* at 811 (holding that plaintiff's evidence was not "sufficient to establish an official policy of Harris County" because there was no proof of persistent, widespread practices within Harris County). *But see* *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985) (holding that courts may however infer "policy or custom" when a city neglects extremely inappropriate officer conduct; for example, when the city of Borger, Texas did not investigate the officers who recklessly shot an innocent man in the back, fatally wounding and killing him, the court reasoned the police department sanctioned reckless use of force as a general policy).

<sup>84</sup> See *Rizzo v. Goode*, 423 U.S. 362, 362 (1976).

<sup>85</sup> See *id.* at 366.

the Court found the plaintiffs' goal of preventing future abuses by the department at large irrational because the abuses were only committed by a small, unnamed minority of the force.<sup>86</sup> Furthermore, the Supreme Court reasoned an entire department may not be held liable for the actions of those engaging in unlawful police procedures where a small level of police misconduct inheres in urban environments.<sup>87</sup> Thus, the plaintiffs could not build a case for systemic police reform.<sup>88</sup>

In 1980, the U.S. government sued the City of Philadelphia, alleging systemic police misconduct.<sup>89</sup> The DOJ pleaded the city's civil rights abuses included, but were not limited to, unwarranted searches and seizures, excessive force, denial of legal counsel and racial slurs committed by a large number of the force.<sup>90</sup> The DOJ argued the department had a system to suppress public reporting of these abuses and to extricate officers from liability.<sup>91</sup> Nevertheless, the court held the even these specific allegations did not satisfy a case holding the City of Philadelphia accountable.<sup>92</sup> Furthermore, the court adamantly found the DOJ's case dangerous to federalism because police power is specifically delegated to the states.<sup>93</sup> In effect, the court indemnified police departments from federal redress.

In *U.S. v. City of Philadelphia*, the dissent argued that federal intrusion upon state governments is the exact purpose of the Fourteenth Amendment and the Civil Rights Act (42 U.S.C. § 1983).<sup>94</sup> Dismissing the majority's federalism argument that estopped the United States from holding the Philadelphia Police Department accountable, Circuit Judge Gibbons explained that: "[T]he [F]ourteenth [A]mendment and the Civil Rights Acts are what intervene in the workings of local government. They were intended to intervene. The relief which the federal Executive

<sup>86</sup> See *id.* at 372.

<sup>87</sup> See *id.* at 375.

<sup>88</sup> See *id.* at 366.

<sup>89</sup> See *United States v. City of Phila.*, 644 F.2d 187, 189-90 (3d Cir. 1980).

<sup>90</sup> *Id.* at 190; cf. *Rizzo*, 423 U.S. at 372-73 (noting fear of a "small, unnamed minority" of police officers' future conduct was insufficient to give plaintiffs a personal stake in the outcome).

<sup>91</sup> *City of Phila.*, 644 F.2d at 190.

<sup>92</sup> See *id.* at 205-06.

<sup>93</sup> See *id.* at 206.

<sup>94</sup> *Id.* at 227 (Gibbons, J., dissenting).

seeks is nothing more than [what] the [F]ourteenth [A]mendment and the Civil Rights Acts require . . . .”<sup>95</sup> Nearly a decade and a half later, this argument would be embodied in the enactment of 42 U.S.C. § 14141.

## II. IMPETUS FOR 42 U.S.C. § 14141

Unrelenting racial tension in the 1990s called congressional attention to the lack of legal framework to hold police institutions accountable.<sup>96</sup> In particular, the public documentation of the Rodney King beating in 1991 in Los Angeles brought the inadequacy of legal remedies for police brutality to the American consciousness.<sup>97</sup> The at-home videotape recorded by a neighbor captured shocking images of excessive use of violence by police, thereby bringing the systemic abuse experienced by inner-city communities to the national stage.<sup>98</sup> Local judicial action was insufficient to address the wrongs against the community because, even after the clear record of violence, the police personnel involved were acquitted.<sup>99</sup> Public outcry ensued.<sup>100</sup> Already tense relations between the community and police deteriorated completely as residents of King’s neighborhood expressed their frustration through historic riots, costing the city of South Los Angeles one billion dollars in damage.<sup>101</sup> Congress responded to the crisis with the passage of 42 U.S.C. § 14141.<sup>102</sup>

<sup>95</sup> *Id.* at 228.

<sup>96</sup> See Brandon E. Patterson, *Rodney King and the LA Riots Changed Policing. Now Jeff Sessions Wants to Turn Back the Clock.*, MOTHER JONES (Apr. 27, 2017), <https://www.motherjones.com/politics/2017/04/rodney-king-jeff-sessions-consent-decrees-policing/>.

<sup>97</sup> See *Fighting Police Abuse: A Community Action Manual*, ACLU, <https://www.aclu.org/other/fighting-police-abuse-community-action-manual> (last visited Sept. 23, 2019).

<sup>98</sup> See *id.*

<sup>99</sup> *Rodney King beating reverberated for years*, L.A. TIMES (Mar. 1, 2016, 3:15 PM), <http://timelines.latimes.com/rodney-king/>.

<sup>100</sup> *Id.*

<sup>101</sup> Jennifer Medina, *The L.A. Riots 25 Years Later: A Return to the Epicenter*, N.Y. TIMES (April 28, 2017), [https://www.nytimes.com/2017/04/28/us/la-riots-rodney-king-south-central-201992.html?rref=collection%2Ftimestopic%2FKing%2C%20Rodney%20Glen&action=click&contentCollection=tim%20estopics&region=stream&module=stream\\_unit&version=latest&contentPlacement=2&pgtype=collection](https://www.nytimes.com/2017/04/28/us/la-riots-rodney-king-south-central-201992.html?rref=collection%2Ftimestopic%2FKing%2C%20Rodney%20Glen&action=click&contentCollection=tim%20estopics&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection).

<sup>102</sup> See U.S. DEPT OF JUSTICE, THE CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 3 (2017),

*A. Legal Framework for 42 U.S.C. § 14141*

Under 42 U.S.C. § 14141, the federal government may sue a municipality when the U.S. Attorney General has reasonable cause to believe that:

[A] governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, [has] engage[d] in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.<sup>103</sup>

Suits brought under this statute are meant to eliminate “patterns or practices” and provide equitable relief.<sup>104</sup> First, the DOJ conducts a preliminary investigation.<sup>105</sup> The DOJ may call for an investigation on its own accord,<sup>106</sup> or at the demand of city residents.<sup>107</sup> There are even instances of state governments asking for a federal investigation to help them properly address civil rights violations in certain police departments.<sup>108</sup> Thus, the punitive association with federal investigations is misconstrued. Rather, federal investigations seek to help local departments meet their policing goals by eliminating systemic misconduct.

If the initial review suggests systemic issues within a police department, the DOJ proceeds to the second step of conducting a formal investigation to determine whether legal action against a

<https://www.justice.gov/crt/file/922421/download> [hereinafter PATTERN AND PRACTICE POLICE REFORM WORK].

<sup>103</sup> See 34 U.S.C. § 12601 (2018) (formerly cited as 42 U.S.C. § 14141).

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

<sup>105</sup> See U.S. Dep’t of Justice, *How Department of Justice Civil Rights Division Conducts Pattern-or-Practice Investigations*, <https://www.justice.gov/opa/file/797676/download> [hereinafter *DOJ Investigations Paper*] (last visited Sept. 15, 2019).

<sup>106</sup> See *id.*

<sup>107</sup> See Sari Horwitz et al., *Justice Department will investigate practices of Chicago police*, WASH. POST (Dec. 6, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/12/06/justice-department-will-launch-investigation-into-practices-of-chicago-police/>.

<sup>108</sup> See Debo P. Adebile, *Policing Through an American Prism*, 126 YALE L. J. 2222, 2256 (2017).



municipality is appropriate.<sup>109</sup> Although formal cases against police departments followed high profile incidents like the 2001 shooting of Timothy Thomas in Cleveland, Ohio<sup>110</sup> and the 2014 shooting of Mike Brown in Ferguson, Missouri,<sup>111</sup> one incident is not enough to bring about a case.<sup>112</sup> Instead, a cause of action is only substantiated when investigations reveal repeated, systematic unlawful behavior including, but not limited to, patterns of excessive use of force, promotion systems rewarding those who engage in excessive force, and systems suppressing citizen complaints against officers.<sup>113</sup>

Third, the DOJ initiates litigation against a police department.<sup>114</sup> Not all matters end up in trial. Some departments agree to pre-trial settlements called “memorandums of agreement,” whereas departments who take cases to trial are bound by court ordered agreements called “consent decrees.”<sup>115</sup> Both memorandums of agreement and consent decrees are enforceable in court.<sup>116</sup> Finally, the fourth step is implementation of the memorandum of agreement or the consent decree.<sup>117</sup>

There have been sixty-nine pattern or practice investigations since 1994.<sup>118</sup> These actions include one-hundred thirty-two different allegations, forty-eight attributable to excessive use of force, thirty-eight for discriminatory policing, twenty-nine for unlawful stops, searches and/or seizures, five for unlawful arrests, four for poor jail conditions, and the remainder for gender bias in handling sexual assault reports, improper detentions, sexual misconduct, retaliation, improper treatment of the mentally ill

<sup>109</sup> See *DOJ Investigations Paper*, *supra* note 109.

<sup>110</sup> See The Associated Press, *Cincinnati Officer Is Acquitted in Killing That Ignited Unrest*, N.Y. TIMES (Sept. 27, 2001), <http://www.nytimes.com/2001/09/27/us/cincinnati-officer-is-acquitted-in-killing-that-ignited-unrest.html>.

<sup>111</sup> See Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> (last updated Aug. 10, 2015).

<sup>112</sup> See *DOJ Investigations Paper*, *supra* note 109.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 106, at 20.

<sup>116</sup> *Id.* at 20-21.

<sup>117</sup> See *id.* at 21.

<sup>118</sup> *Fixing the Force, Allegations*, FRONTLINE, <http://apps.frontline.org/fixingtheforce/#allegations> (last visited Aug. 31, 2019).

and violation of due process.<sup>119</sup> Eighteen of these actions reached a so-called “closed” agreement because the police department met DOJ standards and maintained those standards for two consecutive years.<sup>120</sup> A third of the departments reforming excessive use of force took nine years or more to eliminate unlawful policing practices.<sup>121</sup> Twenty-one actions are ongoing.<sup>122</sup>

Though some ongoing agreements are recent and fall within a five to seven year time frame to make reforms, other cities where there are layered charges of unconstitutional policing—such as excessive force paired with unlawful searches and seizures—have been under federal review for over a decade.<sup>123</sup> These extreme examples include the Detroit, Michigan Police Department, which was under a consent decree for eleven years to reform excessive force, unlawful searches, and seizures, as well as poor jail conditions.<sup>124</sup> At present, Detroit is no longer under a formal decree but must still adhere to a “transitional agreement” permitting continued federal surveillance.<sup>125</sup> Likewise, the Warren, Ohio Police Department has been in and out of federal surveillance under short-term agreements since 2004 and has been under a consent decree since 2012.<sup>126</sup> Presently, officials report that the Warren Police Department still has significant changes to make regarding excessive use of force.<sup>127</sup>

### *B. Common Changes Proposed by the Department of Justice*

The implementation of a settlement agreement involves police departments fulfilling recommendations from the DOJ.<sup>128</sup> These standards often involve changing the mode of policing from that which emphasizes use of racial profiling and violence to that which involves the community as a partner, most commonly called

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See id.*

<sup>124</sup> *Fixing the Force, Allegations, supra* note 121.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See id.*

<sup>128</sup> *See* United States v. East Haven, No. 3:12-CV-1652(AWT), 2012 WL 5860787 (D. Conn. Nov. 20, 2012) (Settlement Agreement and Order).

“community policing.”<sup>129</sup> Tactics in policing vary widely across the country because every police department varies in size, funding, and socio-economic community.<sup>130</sup> Nevertheless, there are certain practices which epitomize the mission of community policing.<sup>131</sup> For example, the New Orleans Police Department executed the tenets of community partnership and problem-solving by innovating a Community-Police Mediation Program to address police misconduct complaints.<sup>132</sup> In New Orleans, a city resident alleging excessive force, excessive violence, or deprivation of due process rights will meet with the officer and two specially trained community-police mediators.<sup>133</sup> One mediator is of the same socio-economic and racial background as the officer and one is of the same background as the civilian.<sup>134</sup> The mediation location communicates partnership rather than punitive action because it is held in community-valued spaces like libraries, recreation centers, and public schools.<sup>135</sup> Thus, the mediation process is structured to rectify any violations of law by police and create a collaborative relationship between civilians and police. This reparative function further supports the community policing goal of crime prevention by increasing the likelihood civilians will feel safe reporting crime and tipping police off to persons driving crime.

Another popular community policing policy is de-escalation training.<sup>136</sup> Those police departments with reported excessive use of force reframe their problem-solving methods from those which rely on deadly force to secure a suspect to those which slow the arrest process down to reduce tension between the civilian and the

<sup>129</sup> See U.S. Dep’t of Just., *Community Policing Defined*, 1, 3, <https://cops.usdoj.gov/pdf/vets-to-cops/e030917193-CP-Defined.pdf> [hereinafter *Community Policing Defined*] (last visited Aug. 31, 2019).

<sup>130</sup> U.S. Dep’t of Justice, *Principles for Promoting Police Integrity: Examples of Promising Police Practices and Policies*, 1, 1, <https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf> (2001).

<sup>131</sup> *Community Policing Defined*, *supra* note 134, at 3-4.

<sup>132</sup> See Lou Furman & Alison R. McCrary, *Feature: Building Trust in Law Enforcement: Community-Police Mediation in New Orleans*, 63 L.A. B. J. 192, 192 (2015).

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*

<sup>135</sup> *Id.*

<sup>136</sup> See Tom Jackman, *De-escalation training to reduce police shootings facing mixed reviews at launch*, WASH. POST (Oct. 15, 2016), [https://www.washingtonpost.com/local/public-safety/de-escalation-training-to-reduce-police-shootings-facing-mixed-reviews-at-launch/2016/10/14/d6d96c74-9159-11e6-9c85-ac42097b8cc0\\_story.html](https://www.washingtonpost.com/local/public-safety/de-escalation-training-to-reduce-police-shootings-facing-mixed-reviews-at-launch/2016/10/14/d6d96c74-9159-11e6-9c85-ac42097b8cc0_story.html).

officer.<sup>137</sup> For example, when Camden, New Jersey officers encountered a potentially mentally ill civilian brandishing a knife in the street, the officers followed the civilian on foot until the optimal moment to disarm him.<sup>138</sup> The officers achieved a community policing goal by resisting the traditional “shoot first” training and instead finding a way to complete the arrest without deadly force.<sup>139</sup> The police commissioner in Cambridge, Massachusetts, Robert Haas, expressed the importance of de-escalation by saying, “If I back away and the person calms down and the situation resolves itself, then I’ve done what I came to do.”<sup>140</sup>

However, a proper community policing program is comprised of four more components.<sup>141</sup> First, police departments should institutionalize frequent, positive officer and community member communications outside of the arrest context.<sup>142</sup> The DOJ recommends departments create police athletic leagues that engage local families to participate as well.<sup>143</sup> This tactic is particularly useful when it engages disconnected residents in large housing projects because it creates a sense of trust residents are willing to rely on when crimes do occur.<sup>144</sup> Thus, project residents are more likely to provide police information needed to solve crimes than without a previously established relationship.<sup>145</sup>

Second, the DOJ asks departments to move from twelve-hour rotating shifts to keeping the same officers consistently patrolling the same sections of their precinct.<sup>146</sup> This seemingly particular recommendation serves the broader purpose of personalizing the

<sup>137</sup> See Matt Apuzzo, *Police Rethink Long Tradition on Using Force*, N.Y. TIMES (May 4, 2015), <https://www.nytimes.com/2015/05/05/us/police-start-to-reconsider-longstanding-rules-on-using-force.html>.

<sup>138</sup> See Jackman, *supra* note 140.

<sup>139</sup> See *id.*

<sup>140</sup> Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-escalate*, N.Y. TIMES (June 27, 2015), <https://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html>.

<sup>141</sup> See U.S. Dep’t Just. Civ. Rts. Div., *Investigation of the Ferguson Police Department 1*, 90 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [hereinafter *Investigation of the Ferguson Police Department*].

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> *Id.* at 80.

<sup>146</sup> *Id.* at 90.

civilians being policed so they are less likely to be seen as the stereotype of a criminal.<sup>147</sup> This reassignment of police is paired with anti-discrimination and anti-bias training to re-train police away from basing investigative work on racial profiling.<sup>148</sup> Furthermore, where racial tensions are particularly high, the DOJ recommends police construct cultural awareness programs with community leaders, wherein the leaders create programs needed to reduce bias against their ethnic group.<sup>149</sup>

The next critical component is organizational transformation. The Office of Community Oriented Policing (COPS) describes organizational transformation as “[t]he alignment of organizational management, structure, personnel, and information systems to support community partnerships and proactive problem-solving.”<sup>150</sup> This broad definition provides little guidance. More telling are specific DOJ recommendations for transforming police departments who repeatedly deprive citizens’ constitutional rights. For instance, in New Orleans, the organizational transformation was geared toward creating a process to identify excessive use of force, investigate unconstitutional conduct and properly reprimand officers violating civilians’ civil rights.<sup>151</sup> Particularly, the DOJ sought changes in promotion systems because the conduct of officers who receive leadership positions dictates the policing culture.<sup>152</sup> Promotion systems that elevate officers who repeatedly use excessive force incentivize civil rights violations.<sup>153</sup> Conversely, promotion systems that reward officers who achieve arrests and investigations without repeated complaints of violence and racial

<sup>147</sup> See U.S. Dep’t Just. Civ. Rts. Div., *supra* note 145 at 87.

<sup>148</sup> *Id.* at 94.

<sup>149</sup> See U.S. Dep’t Just. Civ. Rts. Div. & U.S. Atty’s Off. N. Dist. Ill., *Investigation of the Chicago Police Dep’t* 1, 161 (2017), <https://www.justice.gov/opa/file/925846/download> [hereinafter *Investigation of the Chicago Police Dep’t*].

<sup>150</sup> Community Oriented Policing Services, *Measure Community Policing for Free*, U.S. DEP’T JUST. (Apr. 2015), [http://cops.usdoj.gov/html/dispatch/04-2015/measure\\_cp\\_for\\_free.asp](http://cops.usdoj.gov/html/dispatch/04-2015/measure_cp_for_free.asp).

<sup>151</sup> See U.S. Dep’t Just. Civ. Rts. Div., *Investigation of the New Orleans Police Dep’t* 2, 75-76 (2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd\\_report.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf).

<sup>152</sup> See *id.* at xvi-xvii.

<sup>153</sup> See *id.* at 66 (explaining that “problematic performance evaluations” lead to officers being “promoted to supervisory positions when they are not ready or are unqualified to supervise”).

profiling incentivize ethical policing.<sup>154</sup> Changing criteria, such as changing point allocations on promotion evaluations, is a practical application of organizational change.<sup>155</sup>

Notably, organizational change can also mean changing the allocation of police resources.<sup>156</sup> For example, Baltimore is known for having “two cities:” a white Baltimore and a black Baltimore.<sup>157</sup> In white neighborhoods, the Baltimore Police Department (BPD) were more responsive to complaints.<sup>158</sup> The BPD even conducted a number of community policing style programs like meetings with community leaders and the like in white neighborhoods.<sup>159</sup> Conversely, the BPD repeatedly neglected resident calls from minority neighborhoods for police assistance.<sup>160</sup> When the BPD did work in black precincts the response consistently included physical force or verbal threats.<sup>161</sup> In fact, when a female resident’s home was being searched and she asked for the reason for the search, BPD officers replied, “shut the fuck up bitch and sit the fuck down because [we are] the fucking law.”<sup>162</sup> The DOJ decided the diametrically different treatment of the white and black communities can only be changed with organizational change through equitable allocation of police officers and requiring that department leaders engage in the community engagement programs used in white neighborhoods in black precincts as well.<sup>163</sup> Thus, departments may use certain aspects of community

<sup>154</sup> See *id.* at 11.

<sup>155</sup> See *id.* at 78.

<sup>156</sup> See U.S. Dep’t Just. Civ. Rts. Div., *Investigation of the Baltimore City Police Dep’t* 1, 5 (2016), <https://www.justice.gov/crt/file/883296/download> [hereinafter *Investigation of the Baltimore City Police Dep’t*].

<sup>157</sup> *Id.* at 4-5.

<sup>158</sup> See *id.* at 5.

<sup>159</sup> See *id.* at 156, 160 (explaining, separately, that police are perceived as more attentive in white neighborhoods, and have only focused community policing efforts on a select few neighborhoods; it follows that the white neighborhoods have received better community policing efforts).

<sup>160</sup> See *id.* at 156.

<sup>161</sup> See *id.* at 157.

<sup>162</sup> *Investigation of the Baltimore City Police Dep’t*, *supra* 160, at 157.

<sup>163</sup> See *id.* at 160 (explaining that community policing must be more widespread and fully integrated equally into all communities regardless of demographic).

policing and still need organizational change through equitable allocation of police resources.<sup>164</sup>

Organizational change is not only important for implementing positive changes; it is also integral to ending unconstitutional police conduct. For example, in Ferguson, Missouri, the DOJ pinpointed processes that curtail excessive use of force.<sup>165</sup> First, the DOJ recommended eliminating informal and formal arrest quotas to eliminate perceptions that those who make the most arrests are the best officers.<sup>166</sup> Second, all stops, searches, and arrests must include reports of the facts giving rise to legal authority for that arrest.<sup>167</sup> Third, supervisors must review officer reports for adequate reasoning for the arrest.<sup>168</sup> Notably, these reports are analyzed for racial trends to identify any disparate treatment in arrests.<sup>169</sup> These procedural checkpoints self-monitor internal department culture around the use of force, thereby positioning police and civilian interactions in-line with community policing values.

Lastly, a final prong common under the organizational change objective of community policing is aligning police training to support the partnership goals with which they are tasked.<sup>170</sup> For example, many community policing reports emphasize working with “diverse” community leaders.<sup>171</sup> In practice, this means working with leaders of not only racial minority groups, but religious minorities like Muslims, communities for whom English is a second language, and the LGBTQ community.<sup>172</sup> Accordingly, departments must provide anti-bias training that prepares officers to communicate with the particular set of socio-economic groups their precincts protect.<sup>173</sup> Yet, as the DOJ notes, departments cannot satisfy training objectives by “sitting in a classroom” for

<sup>164</sup> *See id.* at 156 (stressing that community policing applied only in wealthier white neighborhoods is inadequate; instead, more community policing needs to occur in minority neighborhoods).

<sup>165</sup> *See Investigation of the Ferguson Police Department*, *supra* note 145, at 92.

<sup>166</sup> *See id.* at 91.

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

<sup>168</sup> *Id.* at 92.

<sup>169</sup> *See id.* at 91–92.

<sup>170</sup> *See Investigation of the Chicago Police Dep’t*, *supra* note 153, at 160.

<sup>171</sup> *See id.*

<sup>172</sup> *See id.*

<sup>173</sup> *See id.* at 160–61.

hours but, rather, must satisfy such objectives with “meaningful content.”<sup>174</sup> Thus, training on the constitutional procedure of arrests should not simply be a thirty-five-year-old video that is inaccurate to current constitutional standards for police, accompanied by a check-the-box worksheet quiz.<sup>175</sup> Instead, training must teach police the lawful boundaries for use of force and incorporate simulation training so that de-escalation tactics are more likely to be used in the fast-paced arrest setting.<sup>176</sup> Through proper training, police are not simply confident to patrol streets, but competent to fulfill their duties in a lawful manner.

*C. Best Practices Under § 14141 for Lasting Reform*

Some advocates, including Former Attorney General Jeff Sessions, argue against the relative value of consent decrees, questioning the long-term value of federal oversight.<sup>177</sup> First, this section responds to skepticism of § 14141 federal oversight by identifying how the consent decrees in Pittsburgh, Pennsylvania; Cincinnati, Ohio; and Los Angeles, California created institutional reform. Moreover, this section differentiates the tactics used in these case study cities that undermined long-term reform, from those that supported long-term reform. Finally, this section identifies local leadership, community-driven reform objectives and community oversight of police departments as keystones to lasting reform under § 14141.

In Pittsburgh, which was the first city bound to federal oversight under § 14141 legislation, the short-term results markedly shifted police culture.<sup>178</sup> However political shifts in leadership resulted

<sup>174</sup> *Id.* at 94.

<sup>175</sup> *Id.* at 95. Investigation of Chicago Police Academy training revealed a course on the use of deadly force based on a video series created thirty-five years ago. *Id.* Since this video had been produced, the Supreme Court has heightened the standards for the reasonable use of force. *Id.*

<sup>176</sup> *Id.* at 151.

<sup>177</sup> See Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, N.Y. TIMES (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html>.

<sup>178</sup> See Robert C. Davis, Nicole J. Henderson, & Christopher W. Ortiz, *Can Federal Intervention Bring Lasting Improvement in Local Policing: The Pittsburgh Consent Decree*, VERA INST. JUST. ii, 40 (2005).



in severe backsliding.<sup>179</sup> For instance, in the first year following the end of federal oversight in Pittsburgh, the community viewed police as “helpers of victims of crime” because the police department maintained reform initiatives such as officer training and use of force oversight.<sup>180</sup> These changes continued for a decade under the former Police Chief Robert McNeilly Jr., who felt an obligation to his city to maintain terms of the consent decree.<sup>181</sup> McNeilly created cutting-edge systems including a modern use-of-force policy and a computerized early warning system to identify officer misconduct.<sup>182</sup> These innovations were so effective, police departments around the country studied the Pittsburgh model and implemented similar systems.<sup>183</sup>

However, when the mayor fired McNeilly in 2006 and replaced him with Nathan Harper in the hopes of moving the police department in a different direction, the commitment to the systems setup by McNeilly eroded.<sup>184</sup> First, empirically, the yearly number of use-of-force incidents rose by 38% and the number of assaults committed against officers rose by 49% under Harper, all while both property and violent crime trended down, indicating a breakdown in the policing system.<sup>185</sup> Second, former Police Chief Harper was indicted in 2013 on conspiracy charges because he used state funds for personal use.<sup>186</sup> Then, in 2014, three undercover police officers brutally beat Jordan Miles, a young African-American high school student who was initially running from the officers because he thought the plain-clothes

<sup>179</sup> See Joshua Chanin, *Evaluating Section 14141: An Empirical Review of Pattern or Practice Police Misconduct Reform*, 14 OHIO ST. J. CRIM. L. 67, 78 (2016) (implying that mayoral changes has negatively impacted police accountability and the relationship between police and the communities they serve).

<sup>180</sup> *Id.* at 77–78.

<sup>181</sup> See Michael A. Fuoco, *Police chief McNeilly's tenure saw wrenching changes*, PITT. POST-GAZETTE (Jan. 9, 2006), <https://www.post-gazette.com/local/city/2006/01/09/Police-chief-McNeilly-s-tenure-saw-wrenching-changes/stories/200601090107>.

<sup>182</sup> *See id.*

<sup>183</sup> *See id.*

<sup>184</sup> *See* Chanin, *supra* note 183, at 81–83.

<sup>185</sup> *Id.* at 82.

<sup>186</sup> *See* Press Release, W. Dist. Pa. U.S. Atty's Off., *Former Pittsburgh Police Chief Charged with Conspiracy, Failure To File Federal Tax Returns* (Mar. 22, 2013), <https://www.justice.gov/usao-wdpa/pr/former-pittsburgh-police-chief-charged-conspiracy-failure-file-federal-tax-returns>.

men were following him to rob him.<sup>187</sup> Thus, under new leadership, the reform in Pittsburg regressed to the same violent arrest procedure which sparked the initial call for reform. Pittsburg's reliance on the leadership of the former mayor and former Police Chief McNeilly illustrates the danger resting an entire movement of change in one administration. Indeed, departments who follow this path will lack the institutional strength to withstand changes in leadership. Instead, reform efforts must remain vigilant against depending predominantly on leaders and political timing to enact change. It follows that if, on the contrary, the § 14141 reform process includes interest groups outside of city leadership, then reform can withstand fluctuating political priorities.

For example, in Cincinnati, the city fell under federal oversight for five years following the unarmed shooting of a black teenager, Timothy Thomas, in 2001.<sup>188</sup> The Cincinnati Police Department ("CPD") achieved full reforms of their consent agreement within five years.<sup>189</sup> Moreover, six years following federal oversight, researchers found no reform erosion.<sup>190</sup> Relationships between the community and police remained strong even following a 2014 incident of the police shooting of Donyale Rowe because the CPD immediately published the video footage of the incident to the public and disciplined the officer involved.<sup>191</sup> Scholars attribute Cincinnati's lasting commitment to transparency and lawful policing to the two-pronged legal mechanism binding the city to reform.<sup>192</sup> The CPD signed a memorandum of agreement with the DOJ and signed a concurrent collaborative agreement with both the American Civil Liberties Union ("ACLU") and the Fraternal

<sup>187</sup> See Rich Lord & Liz Navratil, *Jordan Miles jury reaches split verdict*, PITT. POST-GAZETTE (Mar. 31, 2014), <https://www.post-gazette.com/local/city/2014/03/31/Jury-reaches-verdict-in-Jordan-Miles-civil-trial/stories/201403310142>.

<sup>188</sup> See Chanin, *supra* note 183 at 91; see also The Associated Press, *Cincinnati Officer Is Acquitted in Killing That Ignited Unrest*, N.Y. TIMES (Sept. 27, 2001), <https://www.nytimes.com/2001/09/27/us/cincinnati-officer-is-acquitted-in-killing-that-ignited-unrest.html>.

<sup>189</sup> See Chanin, *supra* note 183 at 91, 94.

<sup>190</sup> *Id.* at 91.

<sup>191</sup> See *id.* at 94.

<sup>192</sup> See *id.* at 91; Elliot H. Schatmeier, *Reforming Police Use-of-Force Practices: A Case Study of The Cincinnati Police Department*, 46 COLUM. J. L. & SOC. PROBS. 540, 557, 562 (2013).

Order of Police (“FOP”).<sup>193</sup> Each stage of the reform process involved feedback from the community in which people’s rights were deprived under previous policies and the police who would be carrying out new policies.<sup>194</sup> More to the point, by incorporating stakeholder interests in policy creation the city made a durable agreement between the community and police.

Cincinnati’s second feature enabling long-term reform is the legal enforceability of the collaborative agreement which empowered the ACLU and FOP to seek judicial remedies against the Cincinnati Police Department when met with resistance against their requested reforms.<sup>195</sup> Specifically, the collaborative agreement permitted court sanctions against the CPD for non-compliance and court-ordered mediation to prevent further breaches of the agreement.<sup>196</sup> In fact, the ACLU and FOP sought court remedies against the CPD in 2004 because the police department refused to meet policing standards under § 14141 reform.<sup>197</sup> The court responded by placing the parties in court-ordered mediation where the ACLU, FOP, and CPD came to an agreement on local solutions for meeting the federal standards.<sup>198</sup> Strikingly, the CPD began substantive reforms following the court-ordered mediation that continued through the term of federal supervision and beyond.<sup>199</sup>

In Los Angeles, the DOJ placed the police department under federal oversight through a consent decree for twelve years, from 2001 to 2013.<sup>200</sup> The decree focused reforms around issues of

<sup>193</sup> Schatmeier, *supra* note 196, at 557; see *Memorandum of Agreement Between The U.S. Dep’t Of Justice And The City of Cincinnati, Ohio and the Cincinnati Police Dep’t*, U.S. DEPT JUST. (Aug. 6, 2015), <https://www.justice.gov/crt/memorandum-agreement-between-united-states-department-justice-and-city-cincinnati-ohio-and> (Aug. 6, 2015).

<sup>194</sup> See Schatmeier, *supra* note 196, at 558.

<sup>195</sup> See *id.* at 567, 577 (stating that “the CA’s inclusion of the ACLU and the FOP as parties made the reforms more legitimate and more effective”).

<sup>196</sup> *Id.* at 567.

<sup>197</sup> *Id.* at 577 (stating that plaintiff’s taking an active role in the MOA reforms helped prevent future breaches of the MOA and CA).

<sup>198</sup> See *id.*

<sup>199</sup> See *id.* at 586 (emphasizing that substantive reforms included a reduction in use-of-force violations, increased citizen satisfaction with the police department, and a change in the culture of Cincinnati’s policing from a materialistic model to one emphasizing problem-solving and community interaction).

<sup>200</sup> Chanin, *supra* note 183, at 102.

excessive use of force and unlawful searches and seizures.<sup>201</sup> Los Angeles achieved improvement in these areas by mimicking tactics of former Pittsburgh Police Chief McNeilly, such as computerized early misconduct identification systems, officer retraining, and strengthening its own oversight bodies to enforce accountability even after federal oversight lifted.<sup>202</sup> Los Angeles Police Chief Charlie Beck described the consent decree as the “catalyst” to making the department “transparent and . . . more effective than we’ve ever been.”<sup>203</sup> Scholars attribute the shift in transparency to the consent decree strengthening the oversight role of the Police Commission and community civil rights organizations.<sup>204</sup> Notably, real change occurred only after a decade of oversight suggesting that adequate time increases effectiveness of § 14141 reforms.

### III. RECOMMENDATIONS: AMENDING § 14141 FOR LONG TERM TRANSFORMATION

Congress should amend 42 U.S.C. § 14141 to create an additional legal mechanism compelling police departments to set a concurrent agreement with stakeholder groups when they reach a memorandum of agreement or a consent decree with the DOJ.<sup>205</sup> This would ensure that the reform process represents both police stakeholder interests and community socio-economic group interests, thereby creating durable change.<sup>206</sup> The stakeholder

<sup>201</sup> *Id.*; see *U.S. v. City of L.A. – Consent Decree – Introduction*, U.S. DEP’T JUST., <https://www.justice.gov/crt/us-v-city-los-angeles-consent-decree-introduction> (last visited Sept. 15, 2019).

<sup>202</sup> See Chanin, *supra* note 183, at 102; see also Fuoco, *supra* note 185 (“One frequently cited example of the [Pittsburgh Police] [D]epartment’s ‘best practices’ is a computerized early-warning system that analyzes all aspects of an officer’s job performance so that hints of trouble can be detected and dealt with quickly.”).

<sup>203</sup> Joel Rubin, *Federal judge lifts LAPD consent decree*, L.A. TIMES (May 16, 2013, 12:00 AM), <http://articles.latimes.com/2013/may/16/local/la-me-lapd-consent-decree-20130517>.

<sup>204</sup> Chanin, *supra* note 183, at 107.

<sup>205</sup> See Schatmeier, *supra* note 196, at 572 (emphasizing how implementing a more effective leadership model that improves accountability, transparency, and stakeholder input will lead to positive change).

<sup>206</sup> See *id.* at 576 (describing how the Cincinnati Police Department designed programs where community members worked with the police department on solutions to community problems, which has led to innovative solutions, including programs to reduce violence and police use-of-force incidents).

concurrent agreement would likewise be valid in a court of law and will conclude simultaneously with the close of the settlement agreement.

The reasoning for this amendment is two-pronged. First, as with the CPD, reform will no longer exist as a top-down process that departments struggle to implement. Instead, the stakeholder groups will help shape the mandated reform to policies uniquely appropriate to the city and police department.<sup>207</sup> Second, the community groups will have a legal mechanism to act as an oversight body. For instance, in Cincinnati, the legal enforcement of community oversight has had a more lasting effect than in Los Angeles where the community role is variable with political changes.<sup>208</sup> Furthermore, statutorily empowering groups like police unions and civil rights organizations adds these groups to the institutional framework to avoid drastic reform erosion. Through this new mechanism we prevent the Pittsburgh phenomenon, where the only institution with decision-making power after federal oversight ended was the police department itself. Consequently, adding legal mechanisms empowering stakeholders creates a local oversight body who can hold police departments accountable after the federal government leaves.

The amendment to § 14141 would read:

Any department entering a memorandum of agreement or consent decree with the United States government will enter a concurrent agreement with stakeholder groups from its jurisdiction. The stakeholder agreement shall include as plaintiffs both groups representing police and groups representing community civil rights advocates. The stakeholder agreement will remain in effect until the settlement agreement or consent decree closes.

Under this statute stakeholders are defined as local groups representing the city residents and the local police union. Similarly, the statute specifies that *both* the police and citizen

<sup>207</sup> *Id.* at 577 (“Participation in [] negotiations by representatives from all the groups substantially affected pattern or practice reforms [in Cincinnati], e.g., police officers, police management, the DOJ, the City, and various city interest groups; improves upon command and control regulation because broad participation legitimizes the decisions made by the representatives with the parties they represent and the general public.”).

<sup>208</sup> See Chanin, *supra* note 183, at 108 (emphasizing how this process has sustained positive effects where numbers of post-reform citizen complaints have continued to decline, as did the use of force incidence, and the number of injuries sustained by CPD officers).

groups must be represented for the collaborative agreement to be valid because involvement of these groups was central to the success in Cincinnati.<sup>209</sup> Through this dual representation, voices from all interested parties will be invested in creating and maintaining reform under § 14141.

While the DOJ promulgates many recommendations surrounding community policing, at present it falls short of using the law to strengthen this ideal. By adding this amendment, community groups can utilize the same tools as the DOJ such as injunctive relief to compel changes while the department is under review. Likewise, by creating these coalitions as legally recognized institutions, the DOJ sets the standard that the consensus from the community is as valid as the consensus from those within the police department. Through this improved legal mechanism, a new foundation for policing is created in jurisdictions where collaboration and accountability is necessary.

#### CONCLUSION

This country was founded on a set of unalienable rights. Since the Civil War, activists and legislators made changes to our statutory framework mandating that those human rights be accessible to all citizens. The policing context should be no different. Respect for police and police institutions is too often conflated with indemnity for all unlawful behavior ranging from deprivation of due process procedures to homicide.

Innovations in civil rights law under 42 U.S.C. § 14141 created a framework for a new style of policing, one that is a “another kind of law enforcement altogether, one that understands people and just doesn’t put a uniform in our face.”<sup>210</sup> In fact, federal investigations, oversight, and implementation of community policing has made marked changes in our communities. Notwithstanding these advances, there are still barriers to these changes having a lasting effect.

<sup>209</sup> See *id.* at 579.

<sup>210</sup> Lynh Bui & Peter Hermann, *Baltimore mayor, police commissioner pledge to move forward on reform efforts*, WASH. POST (Apr. 4, 2017), [https://www.washingtonpost.com/local/public-safety/baltimore-police-commissioner-pledges-reform-despite-justice-dept-action/2017/04/04/5b745ce8-b88b-4b5e-a14b-4f9f84376168\\_story.html?utm\\_term=.775b2ca3bb81](https://www.washingtonpost.com/local/public-safety/baltimore-police-commissioner-pledges-reform-despite-justice-dept-action/2017/04/04/5b745ce8-b88b-4b5e-a14b-4f9f84376168_story.html?utm_term=.775b2ca3bb81).

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By amending § 14141 to create a binding agreement with community stakeholder groups, the government can do more than create temporary improvements. Instead, it can change the status quo from one where civilians may be murdered while exiting a car and police persons on duty may commit crimes against humanity, to one where police can serve in peace and citizens feel protected.