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PROMOTING CIVIL RIGHTS THROUGH PROACTIVE POLICING REFORM

Rachel A. Harmon

ARTICLES

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Reducing police misconduct requires substantial institutional reform in our nation's police departments. Yet traditional legal means for deterring misconduct, such as civil suits under § 1983 and the exclusionary rule, have proved inadequate to force departmental change. 42 U.S.C. § 14141 was passed in 1994 to allow the Justice Department to sue police departments to force institutional reform. Scholars initially hailed § 14141 as a powerful tool for reducing unconstitutional police abuse. The Justice Department, however, has sued few police departments. This Article contends that § 14141's greatest potential has been overlooked. Limited resources will always mean that § 14141 can be used to force reform on only a limited number of police departments. But § 14141 could also be used to induce reform in many more. This goal requires a § 14141 litigation strategy designed to motivate proactive reform in more departments than the Justice Department can sue. The key components of this strategy are a "worst-first" litigation policy that prioritizes suits against police departments with the worst indicia of misconduct, and a policy that grants a "safe harbor" from suit for police departments that voluntarily adopt best practice reforms. This Article also explains why this proactive § 14141 enforcement strategy would be more efficient at reducing police misconduct than current enforcement policies, proposals to reform § 14141 by adding private plaintiffs, and alternative mechanisms by which the federal government could regulate police department reform.

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INTRODUCTION

Much police misconduct is not accidental, incidental, or inevitable. Instead, it is systemic, arising out of departmental deficiencies that undermine officer adherence to legal rules. When a police department resists public feedback, provides inadequate training and policy guidance to officers, or disciplines laxly those who violate legal rules, it facilitates—even encourages—law breaking. Countering the systemic causes of police misconduct requires doing more than punishing individual officers. It requires structurally changing police departments that permit misconduct in order to create accountability for officers and supervisors and foster norms of professional integrity.¹

Federal law has long prohibited some kinds of police misconduct and has

1. See, e.g., U.S. DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY 2, 10-13 (2001), available at <http://www.ncjrs.gov/pdffiles1/ojp/186189.pdf>; SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 14-17 (2005). Although scholars discussing police misconduct sometimes use a broader definition, I mean “misconduct” to refer to conduct that violates the Constitution or federal civil rights law.

empowered governmental and private actors to enforce those prohibitions. Yet, unfortunately, the traditional federal legal means of regulating police officer conduct—federal criminal prosecutions, civil suits for damages under 42 U.S.C. § 1983, and the exclusionary rule—promote departmental reform only weakly.² One alternative to these remedies, structural reform litigation, has been a primary legal tool for inducing public institutional change in other civil rights contexts—such as changing segregated schools or improving unconstitutional prison conditions. But litigation seeking equitable relief against police departments has frequently foundered on standing requirements and similar legal obstacles.³ As a result, structural reform litigation has played a marginal role in promoting reform in law enforcement agencies.⁴ In sum, traditional legal tools do not spur widespread change in pathological police departments.

In the mid-1990s, Congress passed 42 U.S.C. § 14141 in an effort to remove some of the barriers to structural reform of police departments.⁵ Section 14141 authorizes the Justice Department to bring suits for equitable remedies against police departments that engage in a pattern or practice of unconstitutional police misconduct. Initially, legal scholars hailed § 14141 as a significant achievement in the battle against police misconduct because it expressly authorizes lawsuits that could force institutional changes on police departments. Since then, however, enthusiasm has waned. A consensus has emerged that, hampered by limited resources and inadequate political commitment, the Justice Department has brought too few cases.⁶

The Obama Administration represents new hope for those interested in widespread policing reform. Political commitment to enforce § 14141 is likely to increase, and that commitment may produce a concomitant devotion of resources. Although this is exactly what prior scholarship implies is necessary to improve § 14141 enforcement, these changes alone are unlikely to make more than marginal improvements in the effectiveness of § 14141 at reducing police misconduct. Even with new interest, funding for § 14141 actions will unquestionably remain limited. If any significant number of the nation's large police departments are structurally deficient, the Justice Department is unlikely—under the Obama Administration or any other—to have sufficient resources to investigate and sue every problematic police department. Instead, additional resources will allow only a few more suits each year.⁷ Thus, using

2. *See infra* text accompanying notes 16-25.

3. *See infra* notes 26-29 and accompanying text.

4. *See infra* note 30.

5. *See infra* note 39 and accompanying text.

6. *See infra* notes 71-74 and accompanying text.

7. Although here and elsewhere I refer to the effect of § 14141 “suits,” or the Justice Department’s ability to “sue,” it would be more accurate to talk about the effect of § 14141

§ 14141 to achieve direct reform is inevitably a limited enterprise. To achieve more significant reform, the Obama Administration must improve as well as enlarge the government's efforts to reduce systemic misconduct.

This Article proposes a new approach to § 14141 enforcement, one that overcomes the limits of direct reform by *inducing* departmental reform as well as *compelling* it. The Justice Department can induce reform in police departments that are engaged in substantial misconduct, even if it does not sue them, by making the proactive adoption of reforms a less costly alternative for these departments than risking suit. This strategy seeks to leverage whatever Justice Department litigation resources exist to motivate problematic departments to adopt recommended reforms without incurring the costs to the Justice Department of additional suits. Since the Justice Department can induce and monitor reform in more departments than it could otherwise sue, incentivizing reform in this way—rather than solely by coercing it department-by-department through § 14141 litigation—is a more efficient means of attacking systemic police misconduct. Thus, this Article argues that the Justice Department can best use § 14141 to reduce police misconduct by implementing a regulatory and litigation strategy that maximizes the rate at which police departments *proactively* adopt cost effective reforms. Even if the Justice Department has resources sufficient to sue only a few departments each year, it can use those resources to create a § 14141 policy that provides sufficient incentives for many more departments to reform.

In order to induce police departments to reform prior to being sued under § 14141, the Justice Department must make the net expected cost of reform less than the net expected cost of misconduct for those departments. The Justice Department can change the calculus of police departments in three ways: (1) it can raise the expected cost of a § 14141 suit for a department by raising the probability that the department will be sued; (2) it can increase the benefits of proactive reform for a department; and (3) it can lower the costs of adopting proactive reform. To achieve these ends for departments that most need reform, the Justice Department should adopt a three-pronged § 14141 enforcement policy.

The first prong requires the Justice Department to adopt a “worst-first” policy that prioritizes suing the worst large departments. Such a policy raises the expected costs of a § 14141 suit for the worst departments in the nation by

“investigations and suits” and the Justice Department’s capacity to “investigate and sue.” Investigations themselves are costly for the Justice Department and impose significant costs on police departments. Moreover, most § 14141 resolutions that mandate reform are reached by negotiation before suit. For the sake of exposition, however, except when I am specifically considering the effect of an investigation apart from a suit, I will use “suit” or “sue” to include the full course of the investigation and resolution, even if the matter is never litigated or the negotiated outcome is never filed in court.

raising the probability of suit for those departments. This requires a radical change in how the Justice Department approaches enforcing § 14141. Instead of deciding which departments to target under § 14141 simply by reacting to complaints, the Justice Department itself must be proactive: it must identify the worst departments and pursue them. Doing so requires a vision of § 14141 that is more like regulation than traditional public civil rights enforcement. It also presupposes the creation of a new national database on police misconduct through which the Justice Department can identify the worst departments.

Collecting national data is no less essential for assessing and improving the efficacy of the Justice Department's current § 14141 enforcement policy than it is for implementing the proposal advanced here. Any effective effort to reduce systemic police misconduct nationwide requires data sufficient to estimate where misconduct exists, how departments compare in their levels of misconduct, and what the effects are of different departmental reforms on misconduct over time. No such data currently exist.⁸ As a result, existing § 14141 enforcement is reactive and haphazard rather than proactive and systematic. Without the most basic empirical tools, the Justice Department cannot set priorities intelligently. Rather, it necessarily chooses its targets without regard to how the misconduct in those departments compares to that of similar departments, and it therefore uses its limited resources inefficiently. For this reason, whether or not the Justice Department adopts the proactive approach this Article recommends, Congress should grant the Justice Department authority to issue regulations requiring large police departments to collect and report essential data in a uniform manner. But once such data are collected, the Justice Department can do better than merely to improve existing enforcement choices; it can use the data to make § 14141 enforcement significantly more effective.

The second prong requires the Justice Department to announce a "safe harbor" policy. Such a policy would shield from investigation or suit any department that officially commits itself to adopting proactively a preset array of reforms and then makes substantial, verifiable progress toward their implementation. A police department that receives the safe harbor would avoid the litigation costs associated with a § 14141 suit. In addition, the set of reforms that a department would be required to adopt in order to receive the safe harbor,

8. Many police departments maintain records about officer conduct determined to be violations of law or policy. Even if departments were to share these data voluntarily, however, the content, format, and accuracy of these records vary enormously across departments and do not provide an adequate basis for comparing departments. *See, e.g.*, NAT'L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 258-62 (Wesley G. Skogan & Kathleen Frydl eds., 2003) (discussing problems with data on excessive and lethal force). While some studies have attempted to assess rates for some kinds of misconduct, these efforts have also largely been restricted to a small number of departments and are of little comparative use. *See, e.g., id.*

though still beneficial, would be less extensive and costly than the reforms imposed as a result of a suit. The safe harbor policy would therefore raise the net expected benefit of proactively adopting reforms.

The safe harbor mechanism is critical to this three-pronged proposal because it would ensure that departments can move quickly off the worst list. However, the safe harbor mechanism cannot work to reduce misconduct unless there exists a standardized set of reforms that is both effective and cost-effective for departments that should adopt them. Presently, such a set of reforms exists only for large departments.⁹ Thus, the three-pronged proactive approach to § 14141 advanced in this Article is intended to apply to and to incentivize only large police departments, that is, those with fifty or more sworn law enforcement officers.¹⁰

9. Many of the reforms that experts commonly recommend for reducing misconduct address informational, supervisory, and administrative problems that arise principally in large departments. For example, early intervention systems that collect data on officer conduct to allow departments to identify problems, or improved internal affairs procedures for investigating and adjudicating complaints of misconduct, are most clearly and uniformly appropriate for the departments that have at least 100 police officers, though they will also usually be appropriate in the additional departments that have between fifty and 100 full-time officers. See SAMUEL WALKER, U.S. DEP'T OF JUSTICE, EARLY INTERVENTION FOR LAW ENFORCEMENT AGENCIES 21 (2003), available at www.cops.usdoj.gov/files/RIC/Publications/e07032003.pdf. By contrast, these reforms will often be of little value and will rarely be cost-effective in smaller departments, of which there are more than 15,000. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2004, at 2 tbl.2 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cslea04.pdf>. These departments will typically require different reforms and more individualized tailoring of common reforms to their particular circumstances. See, e.g., JEFFREY J. NOBLE & GEOFFREY P. ALPERT, MANAGING ACCOUNTABILITY SYSTEMS FOR POLICE CONDUCT 3 (2009) (describing size as a central factor in determining whether a police department could realistically staff an independent internal affairs unit for investigating officer misconduct). Large organizations also enjoy economies of scale that permit them to implement more costly measures for preventing misconduct. This proposal therefore does not address the problem of reducing misconduct by small departments. Rather, it seeks to increase the rate of reform only at the worst of the nation's large police departments. This limitation is consistent with the Justice Department's use of § 14141 so far: only two of its investigations have occurred in a department of fewer than fifty officers. See *infra* note 155. This focus is also consistent with scholarly commentary on § 14141: no scholar has suggested that § 14141 enforcement should reach beyond large departments. If anything, the academic response has been to push the Justice Department to focus on larger departments more than it has in the past. See, e.g., Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1407 (2000); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 516 (2008); see also Eric Lichtblau, *U.S. Low Profile in Big-City Police Probes Is Under Fire*, L.A. TIMES, Mar. 17, 2000, at A1 (reporting complaints that the Justice Department inappropriately used § 14141 in small towns and cities while abuses in much larger departments went unaddressed).

10. This amounts to 2358 law enforcement agencies in the Justice Department's most

To work, a safe harbor mechanism must also have an effective monitoring scheme. Otherwise, police departments may attempt to use superficial reform to secure a safe harbor at low cost. The case for a proactive reform policy, therefore, rests on a key claim: that the costs of suing a department are substantially higher than the costs of inducing and monitoring proactive genuine reform in that department. As discussed later in this Article, there is good reason to believe this is true.¹¹

The third prong requires using Justice Department resources to refine and disseminate information about institutional deficiencies that breed police misconduct, remedial measures that will reduce misconduct, and means for effectively implementing those measures. This technical assistance effort would make reform more cost-effective for police departments by lowering the information costs of adopting reform. Together, the worst-first, safe harbor, and technical assistance policies would raise the probability of suit while lowering the costs and increasing the benefits of reform for the worst of the nation's police departments. Because it is more efficient at promoting reform, the § 14141 enforcement strategy advanced here would be superior to existing enforcement efforts, which have failed to maximize the expected costs of a § 14141 suit for police departments.

This proposal responds to existing deficiencies in § 14141 enforcement. Others have responded to such deficiencies by urging legislation to modify § 14141 to allow private citizens as well as the federal government to sue police departments. These critics assume that allowing private suits will result in more suits and that more suits will produce more effective § 14141 enforcement, regardless of the Justice Department's efforts. While private suits might add resources, they would also likely promote less effective departmental changes than federal efforts and may interfere with the most efficient governmental enforcement of § 14141. In fact, this Article contends that the three-pronged § 14141 enforcement strategy advocated here is likely to be more effective and efficient and less likely to intrude in local affairs or inhibit innovation than adding private plaintiffs to § 14141 or replacing § 14141 with a regulatory scheme.

Part I of this Article describes some problems with the primary federal legal tools that address police misconduct and explains why Congress created § 14141. It also describes how the Justice Department presently enforces § 14141. Part II argues that § 14141 cannot bring about widespread police department reform if it is used according to current thinking and that proactive reform would be more cost effective at reducing misconduct. To maximize the combined effect of coercive and proactive reform, this Part proposes the three-

recent law enforcement agency census. *See* REAVES, *supra* note 9, at 2 tbl.2.

11. *See infra* II.D.

pronged strategy for enforcing § 14141. Part III returns to the Justice Department's enforcement efforts since § 14141 was passed and shows how they diverge from the proactive reform policy proposed here. It also considers this proactive reform policy in relation to alternative means of increasing reform among police departments, such as adding private plaintiffs to § 14141, adding fines to § 14141, or replacing § 14141 with other means of mandating or incentivizing reform. The Article concludes by noting that this view of § 14141 places it at the core of a national strategy to use a regulatory approach rather than litigation to effectively reduce police misconduct nationwide.

I. ORIGINS AND ENFORCEMENT OF SECTION 14141

A. *The Origins of Section 14141*

Section 14141 was passed because police departments will not reduce misconduct without a legal incentive to do so, and yet, traditional legal tools have proved inadequate to create that incentive. Preventing police misconduct requires institutional change, but police departments have many reasons to avoid engaging in substantial reform. Police departments do not exist to promote civil rights. Instead, they exist to prevent crime, protect life, enforce law, and maintain order.¹² Promoting civil rights can sometimes interfere with these primary objectives because assessing misconduct and identifying, implementing, and monitoring appropriate reforms is difficult and consumes resources. Determining whether officers are engaged in misconduct frequently requires new systems for accurate self-reporting by officers about their conduct and considerable data entry and analysis.¹³ Designing and developing reforms such as early intervention systems and field training programs can be complicated and expensive.¹⁴ Moreover, some reforms may compete with preventing and solving crime. For example, requiring officers to document every stop, frisk, or search consumes officer time without necessarily improving law enforcement outcomes; and policies prohibiting chokeholds or restricting high-speed chases deny officers discretion to use particular means to

12. See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1150-55 (2008).

13. See, e.g., INT'L ASS'N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 6-9 (2006), available at <http://www.cops.usdoj.gov/files/ric/Publications/e06064100.pdf>; WALKER, *supra* note 9; SAMUEL WALKER ET AL., SUPERVISION AND INTERVENTION WITHIN EARLY INTERVENTION SYSTEMS: A GUIDE FOR LAW ENFORCEMENT CHIEF EXECUTIVES (2005), available at http://www.cops.usdoj.gov/files/RIC/Publications/supervisionintereis_lechiefs.pdf.

14. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 13, at 55-66; WALKER, *supra* note 9, at 109-10; WALKER ET AL., *supra* note 13, at 31.

pursue legitimate law enforcement aims. For these and other reasons, not all police departments embrace practices that promote civil rights without additional incentives and assistance.¹⁵

In many cases, local political pressure will not counteract such bureaucratic obstacles to promoting civil rights. When aggressive law enforcement reduces crime, for example, the benefits and therefore the political rewards are widespread. When the same aggressiveness deprives some citizens of their civil rights, the burdens are concentrated on subgroups that frequently have limited political capital.

Federal law has played an important role in regulating police misconduct. In particular, federal criminal prosecutions, civil suits for damages under § 1983, and the exclusionary rule are all legal tools that attempt to reduce police misconduct by punishing specific incidents of it and by deterring it in the future. Unfortunately, each is inadequate to promote wholesale institutional change. Federal criminal civil rights prosecutions face significant legal and practical obstacles, including that federal law imposes an onerous intent requirement on civil rights crimes; that victims of police misconduct often make problematic witnesses; and that juries frequently believe and sympathize with defendant officers.¹⁶ As a result, prosecutions against police officers are too rare to deter misconduct. Even if criminal prosecutions were more common, however, it is not clear that charges against individual officers would encourage departmental change. Almost inevitably, when some officers in a department are prosecuted, others are not. Criminal prosecution may therefore enable cities to characterize egregious misconduct as resulting from individual pathology rather than systemic problems and to deny the need for departmental improvement.¹⁷

Successful § 1983 suits for damages encourage some departmental reform, but they too are limited. Suits against individual officers are difficult to win, both because they suffer some of the same trial challenges as criminal cases against officers, and because officers often have qualified immunity for their actions, even when the conduct is unconstitutional.¹⁸ Suing supervisors or

15. See, e.g., WALKER, *supra* note 1, at 20-40 (describing advances in and limits of police professionalism during the twentieth century).

16. See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 465-67 (2004); Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, in POLICE VIOLENCE 247, 253, 258-59, 266 (William A. Geller & Hans Toch eds., 1996); John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 806-11; David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 488, 490-92 (1992).

17. See, e.g., Armacost, *supra* note 16, at 457-58.

18. See, e.g., *id.* at 467-69; Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1320-27 (1999); Cheh, *supra* note 16, at 264, 266. Since individual officers are often indemnified by their departments or municipalities as a matter

chiefs often requires establishing deliberate indifference or reckless action rather than negligence, and suing a city requires a plaintiff to show that misconduct was not only unconstitutional, but reflected municipal “policy” or “custom.”¹⁹ Some civil actions succeed despite these obstacles, but many incidents of serious misconduct result in an unsuccessful § 1983 suit or an inexpensive settlement, and therefore provide little incentive for reform.²⁰ Moreover, some scholars have argued that even when plaintiffs win civil suits, damages actions against government actors are an ineffectual—even perverse—means of encouraging local officials to reduce misconduct.²¹ Daryl Levinson, for example, contends that government officers, police chiefs, and mayors respond to political incentives, and may never be forced to internalize the economic costs of damages paid by municipalities.²² Although Levinson may overstate the case against civil suits,²³ he persuasively argues that even when they are successful, civil suits are at best an inefficient and limited means of encouraging institutional reform.²⁴

The exclusionary rule generally prohibits evidence resulting from pre-trial Fourth Amendment and Fifth Amendment violations from being used against criminal defendants at trial. It is by far the most commonly used means of discouraging police misconduct and perhaps the most successful. Nevertheless, it too is limited as a means for promoting institutional change. First, the rule is riddled with exceptions and limitations, many of which are inconsistent with

of contract or state or local law, *Armocost*, *supra* note 16, at 473, institutional changes may theoretically result even from damages awarded against individual officers.

19. *See, e.g.*, MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* §§ 4:5, 4:15 (3d ed. 2006); *Armocost*, *supra* note 16, at 471, 489-90; *Cheh*, *supra* note 16, at 265.

20. *See, e.g.*, *Armocost*, *supra* note 16, at 472-73.

21. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 965 (2005) [hereinafter Levinson, *Empire-Building Government*] (“[T]here is no reason to expect that . . . compensation payments will change [the government’s] behavior in any predictable way.”); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 367-68 (2000) [hereinafter Levinson, *Making Government Pay*] (arguing that because government agencies do not internalize costs, “awarding compensation to the victims of constitutional violations would not seem to have any deterrent effect on government”); *see also* NAT’L RESEARCH COUNCIL, *supra* note 8, at 278-80 (noting evidence that suggests that departments do not institute changes in response to successful civil suits).

22. Levinson, *Making Government Pay*, *supra* note 21, at 357.

23. For example, Levinson does not address issues of scale. Civil judgments are likely to have a much more significant impact on political actors in small cities and towns than the large cities he seems to envision. *See* NAT’L RESEARCH COUNCIL, *supra* note 8, at 278-280.

24. Even if § 1983 is a weak tool for deterring police misconduct, it may remain an important tool for compensating victims of misconduct. *But see* Levinson, *Making Government Pay*, *supra* note 21, at 402-14.

using the exclusionary rule as an effective deterrent of police misconduct.²⁵ Because of these exceptions and limitations, evidence produced by misconduct often retains much of its value for the government, and that weakens the incentive cities face to rein in officers who violate the law. Second, and more importantly, the scope of the exclusionary rule is inevitably much narrower than the scope of illegal police misconduct. The exclusionary rule provides a remedy only when police seek to use evidence that results from misconduct at a criminal trial. It therefore discourages officer misconduct only when the misconduct may produce evidence and when the government would value using that evidence at trial. Many kinds of misconduct do not have these characteristics. For example, *Terry* stops might be done primarily to harass or intimidate, and police uses of excessive force rarely produce evidence of a crime. Thus, the exclusionary rule, like § 1983 and federal criminal prosecution, cannot effectively encourage departments to prevent these kinds of misconduct. Each of these traditional means of deterring misconduct is too weak or too narrow to motivate robust agency reform.

In other civil rights arenas, such as education, voting, housing, and prisons, structural reform litigation has supplemented damages actions and criminal punishment as a tool for generating change in public institutions. Structural reform litigation begins with suits against public institutions alleging that its officials have violated the rights of those the agency serves.²⁶ When plaintiffs win or settle these suits, the remedy includes restructuring the bureaucracy to prevent future rights violations.²⁷ Structural reform suits pursuant to § 1983 and other statutes have provided systemic solutions to systemic problems by enabling courts to mandate specific institutional changes and to monitor ongoing agency conduct in a wide variety of public institutions.²⁸ However, a series of U.S. Supreme Court cases declared that most potential plaintiffs lack

25. See, e.g., *United States v. Payner*, 447 U.S. 727, 733-35 (1980) (refusing to require exclusion of evidence produced by flagrant and intentional Fourth Amendment violations of third-party's rights unless the suspect's rights were violated, despite the interest in deterring illegal searches); *Rakas v. Illinois*, 439 U.S. 128, 138 (1978) (refusing to require exclusion of evidence produced by Fourth Amendment violations by the police unless the suspect's rights were violated).

26. See, e.g., Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2000-05 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998)).

27. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292 (1976); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1412-13 (2007).

28. 42 U.S.C. § 1983 expressly provides for both damages and equitable relief. See Jeffries & Rutherglen, *supra* note 27, at 1408-21 (describing the history of structural litigation reform and implementation of equitable remedies on public institutions).

standing to sue police departments for equitable relief under § 1983.²⁹ As a result, § 1983 is a weaker tool for seeking institutional reform in police departments than it has been in other civil rights contexts.³⁰ Prior to § 14141, no statute other than § 1983 authorized suits for equitable relief against police departments for officer misconduct, and it remains the case that no other statute authorizes private equitable suits. As a result, although many consider structural reform litigation to be a critical tool for changing public institutions to promote civil rights, structural reform suits against police departments have had only modest success.

Although the limits of traditional legal tools are long-standing, in the early 1990s, the videotaped beating of Rodney King by three Los Angeles police officers vividly illustrated and drew public attention to the problem of misconduct. Moreover, the aftermath of the King incident highlighted the inadequacy of existing solutions for achieving reform.³¹ Initial local prosecution of the officers resulted in an acquittal.³² Many saw the verdict as racist and riots resulted, leaving Los Angeles in chaos for days.³³ A subsequent

29. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-10 (1983) (finding that plaintiff lacked standing to sue police department for declaratory and equitable relief); *Rizzo v. Goode*, 423 U.S. 362, 371-73 (1976) (holding that plaintiffs had insufficient personal stake in major reform of police department to satisfy case or controversy requirement); *O'Shea v. Littleton*, 414 U.S. 488, 493-99 (1974) (dismissing the plaintiffs' case for lack of actual case or controversy); *United States v. City of Philadelphia*, 644 F.2d 187, 199 (3d Cir. 1980) (concluding that the United States had no standing to sue police department for pattern of civil rights violations against individuals without specific statutory authority); Gilles, *supra* note 9, at 1396-99 (2000). Not all such suits have been barred, however. See, e.g., *Allee v. Medrano*, 416 U.S. 802 (1974); *Thomas v. County of Los Angeles*, 978 F.2d 504 (9th Cir. 1992).

30. See, e.g., Gilles, *supra* note 9, at 1384, 1399 ("The equitable standing doctrine articulated in *Lyons* effectively relegates private individuals aggrieved by police misconduct to damages suits under 42 U.S.C. § 1983."); Jeffries & Rutherglen, *supra* note 27, at 1418 ("The inhibitions imposed by *Rizzo* and *Lyons* are . . . highly consequential. They obscure the benefits of epidemiological assessments of police violence and preclude the use of systemic remedies for what are, at bottom, institutional and systemic problems.")

31. On March 2, 1991, Los Angeles Police Department officers attempted to subdue Rodney King, an African-American man, after a high-speed chase. King initially resisted arrest, and officers fired a taser at him and struck him with batons in order to subdue him. As a videotape of the incident famously portrayed, officers continued to stomp on King, kick him, and strike him with baton blows even after he lay prone on the ground. See, e.g., *Koon v. United States*, 518 U.S. 81, 85-87 (1996).

32. *Id.* at 87-88.

33. See, e.g., *id.* at 88 ("More than 40 people were killed in the riots, more than 2,000 were injured, and nearly \$1 billion in property was destroyed."); Seth Mydans, *Verdicts Set Off a Wave of Shock and Anger*, N.Y. TIMES, Apr. 30, 1992, at D22 (describing beginning of riots in Los Angeles following the Rodney King verdict); President George Bush, Address to the Nation on the Civil Disturbances in Los Angeles, California (May 1, 1992), available at http://bushlibrary.tamu.edu/research/public_papers.php?id=4252&year=1992&month=5 (describing riots in Los Angeles and speaking of outrage about Rodney King beating).

federal criminal prosecution resulted in convictions, but only for two of the dozen officers present at the beating, and even those two received light sentences.³⁴ A civil verdict for King was slow in arriving and did not appear to inspire significant reform.³⁵ The Christopher Commission, an independent commission established after the beating to review the Los Angeles Police Department's practices, concluded that misconduct in the department resulted from significant management failures, including a pervasive failure to hold officers accountable for repeated acts of excessive force.³⁶ Thus, the Commission made it clear that substantial changes to the department were necessary to address police misconduct in Los Angeles.³⁷ Yet, despite this report and public concern, neither the legal maneuvering nor the political process seemed capable of achieving adequate reform in the department.³⁸ Congress responded to the situation in 1994 by creating a new legal mechanism to permit structural reform litigation against police departments.³⁹

B. How Section 14141 Works

In 42 U.S.C. § 14141, Congress declared police departments responsible for patterns or practices of constitutional violations by their officers and authorized the Justice Department to sue departments to demand reforms intended to stop such conduct.⁴⁰ This authority has been assigned to the Special

34. *Koon*, 518 U.S. at 88-90 (stating that each convicted defendant was sentenced to thirty months' imprisonment). The Supreme Court remanded the case for further proceedings. *Id.* at 114. The defendants were later resentenced to thirty months' imprisonment each. Jim Newton, *Judge Refuses to Return Koon, Powell to Prison*, L.A. TIMES, Sept. 27, 1996, at A1.

35. See John L. Mitchell, *Punitive Damages From Police In King Beating Rejected*, L.A. TIMES, June 2, 1994, at A1 (describing \$3.8 million verdict in compensatory damages for King three years after the beating).

36. See INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, at iii-iv (1991).

37. *Id.* at iv.

38. See MERRICK J. BOBB ET AL., FIVE YEARS LATER: A REPORT TO THE LOS ANGELES POLICE COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT'S IMPLEMENTATION OF THE INDEPENDENT COMMISSION RECOMMENDATIONS, at vi (1996), available at http://www.parc.info/client_files/Special%20Reports/2%20-%20Five%20Years%20Later%20-%20Christopher%20Commission.pdf ("Given the five years that have elapsed since the Christopher Report was published, we conclude that the Department has not undergone reform to the extent that was possible or required."). Subsequent scandals again highlighted the inadequacy of reform following the King incident. See, e.g., RAMPART INDEP. REVIEW PANEL, REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL 3, 16-38 (2000), available at <http://www.lacity.org/oig/rirprpt.pdf> (describing the ongoing inadequacy of civilian and political control of the police department).

39. See Armacost, *supra* note 16, at 527-28; Gilles, *supra* note 9 at 1401-04.

40. The statute reads in full:

Litigation Section of the Civil Rights Division, which investigates departments and brings suits pursuant to the statute with permission of the Assistant Attorney General for Civil Rights.⁴¹

To prove a police department liable under § 14141, the government must show that officers in the department have committed acts that constitute violations of the Constitution or federal law, and that those acts constitute a “pattern or practice” of such conduct.⁴² The Justice Department’s existing

§ 14141. Cause of action

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage 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.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) [*sic*] has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

42 U.S.C. § 14141 (2006) (footnote omitted). The statute applies not only to law enforcement, but also to the treatment of incarcerated persons. This Article concerns exclusively § 14141 suits against law enforcement departments for law *enforcement* and order-maintenance activities, like enforcing traffic laws, investigating crimes, and conducting arrests, rather than running a jail or juvenile justice facility. The Justice Department makes the same distinction and treats the two types of § 14141 suits separately. *See* U.S. Dep’t of Justice, Civil Rights Division, Special Litigation Section Frequently Asked Questions, <http://www.usdoj.gov/crt/split/faq.php> (last visited Aug. 29, 2009) [hereinafter U.S. Dep’t of Justice, Special Litigation FAQs]. While I refer to police departments as local and tied to a particular municipality, § 14141 applies as well to state law enforcement agencies, county police departments, and sheriffs’ offices. Since all of these engage in traditional law enforcement functions, for my purposes, the differences among them do not matter. *See, e.g.*, REAVES, *supra* note 9, at 4-5.

41. U.S. DEP’T OF JUSTICE, UNITED STATES’ ATTORNEYS’ MANUAL 8-2.241, 8-2.260 (1999) [hereinafter UNITED STATES’ ATTORNEYS’ MANUAL], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/2mcvr.htm; U.S. DEP’T OF JUSTICE, UNITED STATES’ ATTORNEYS’ MANUAL: CIVIL RIGHTS RESOURCE MANUAL § 5 (1998) [hereinafter CIVIL RIGHTS RESOURCE MANUAL], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr0005.htm.

42. There has been no litigation yet over the meaning of “pattern or practice” in § 14141. The Justice Department and scholars have assumed that the term “pattern or practice” in the statute shares the meaning attributed to these words in employment discrimination law. *See* Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 822-23 (1999) (citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977)); Simmons, *supra* note 9, at 517 n.147 (citing Livingston, *supra*); *see also* CIVIL RIGHTS RESOURCE MANUAL, *supra* note 41, § 5 (citing *Int’l Bhd. of Teamsters*, 431 U.S. at 324); U.S. Dep’t of Justice, Special Litigation FAQs, *supra* note 40. To establish a “pattern or practice” of violations in that context, the Supreme Court has said that “the Government ultimately [must] prove more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts.” *Int’l Bhd. of Teamsters*, 431 U.S. at 336. Instead, the government must demonstrate that violations are

practice is to open preliminary § 14141 investigations when citizen complaints, private suits against a department, high-profile incidents of misconduct, self-referrals by police departments, or other indicators suggest a pattern or practice of constitutional violations by the police department.⁴³ Once it opens a matter, the Justice Department conducts an initial investigation using public sources. If there is “evidence tending to support the existence of a pattern or practice violation,” the Special Litigation Section may conduct a full investigation at its discretion.⁴⁴

A full investigation seeks to determine whether the department is engaged in a pattern or practice of misconduct, to discover the institutional causes of any pattern that exists, and to identify promising areas for departmental reform.⁴⁵ A full investigation is “comprehensive and far-reaching.”⁴⁶ It includes taking inventory of departmental policies and procedures related to training, discipline, routine police activities, and uses of force and conducting in-depth interviews to determine whether the department’s practices adhere to formal policies.⁴⁷ These tasks are labor-intensive and costly, even with departmental cooperation, and departmental cooperation is not always forthcoming.⁴⁸ Although public information available about the Justice Department’s § 14141 enforcement practice so far is incomplete,⁴⁹ there have been at least thirty-three § 14141 full investigations of police departments⁵⁰: seven of these

“standard operating procedure—the regular rather than the unusual practice.” *Id.*

43. See, e.g., INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 13, at 8; U.S. Dep’t of Justice, Special Litigation FAQs, *supra* note 40.

44. See INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 13, at 7; U.S. Dep’t of Justice, Special Litigation FAQs, *supra* note 40.

45. See INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 13, at 7; U.S. Dep’t of Justice, Special Litigation FAQs, *supra* note 40.

46. See, e.g., INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 13, at 8.

47. See *id.*

48. Letter from Shanetta Y. Cutlar, Chief of Special Litig. Section of Civil Rights Div., to Kerry Drue, Attorney Gen. for V.I. (Oct. 5, 2005) [hereinafter V.I. Letter], available at http://www.usdoj.gov/crt/split/documents/virgin_island_pd_talet_10-5-05.pdf.

49. For example, the website states that the Justice Department has conducted more than seventy preliminary assessments, but this portion of the website does not appear to have been updated since July 2008. U.S. Dep’t of Justice, Special Litigation FAQs, *supra* note 40.

50. See U.S. Dep’t of Justice, Civil Rights Div., Special Litigation Section Documents and Publications, <http://www.usdoj.gov/crt/split/findsettle.php> (last visited Oct. 12, 2009) [hereinafter U.S. Dep’t of Justice, Documents and Publications] (providing documents relating to twenty-five investigations in Pittsburgh, Pa.; Steubenville, Ohio; Columbus, Ohio; the State of New Jersey; Los Angeles, Cal.; Washington, D.C.; Detroit, Mich.; Cincinnati, Ohio; Cleveland, Ohio; Mt. Prospect, Ill.; Buffalo, N.Y.; Miami, Fla.; Schenectady, N.Y.; Portland, Me.; Villa Rica, Ga.; Prince George’s County, Md.; Bakersfield, Cal.; Alabaster, Ala.; Beacon, N.Y.; Virgin Islands; Warren, Ohio; Easton, Pa.; Austin, Tex.; Yonkers, N.Y.; and Orange County, Fla.); U.S. Dep’t of Justice, Special Litigation FAQs, *supra* note 40 (mentioning 8 more full investigations or settlements in Highland Park, Ill.; Charleston, W. Va.; Eastpointe, Mich.; New Orleans, La.; New York, N.Y.; Providence, R.I.; Riverside,

investigations resulted in a consent decree filed in federal court,⁵¹ seven more resulted in a memorandum of agreement between the United States and the police department,⁵² and twelve investigated departments received only a technical assistance or investigative findings letter from the Justice Department.⁵³ The other seven did not result in any public action.⁵⁴ If the Justice Department detects a pattern or practice of unconstitutional conduct during its investigation, it may file a complaint charging a violation of the statute, and, in principle, the matter could go to trial.⁵⁵ As these outcomes suggest, however, in practice, § 14141 investigations are resolved without litigation. Instead, the Justice Department has in each case negotiated a decree or an agreement mandating reform in the police department, issued a technical assistance letter recommending reform, or taken no action.

Consent decrees and memoranda of agreement are negotiated settlements in which a city does not admit liability, but nevertheless agrees to adopt specific remedial measures to end the matter and avoid litigation. Consent decrees are more formal and are contained in a court order.⁵⁶ Thus, a district

Cal.; Tulsa, Okla.).

51. *See, e.g.*, U.S. Dep't of Justice, Documents and Publications, *supra* note 50 (providing consent decrees in Pittsburgh, Steubenville, New Jersey, Los Angeles, Detroit, Prince George's County, and the Virgin Islands).

52. *See id.* (providing memoranda of agreement in Cincinnati, Mt. Prospect, Buffalo, Villa Rica, Prince George's County, and Washington, D.C.). In Prince George's County, the investigation resulted in both a consent decree and a memorandum of agreement. Although not provided as a link from its documents website, the Justice Department has also entered into a memorandum of agreement with Highland Park, Illinois. *See* Memorandum of Agreement Between the United States and the City of Highland Park, Ill. (July 11, 2001), available at http://www.usdoj.gov/crt/split/documents/Highland_MA.php.

53. *See* U.S. Dep't of Justice, Documents and Publications, *supra* note 50 (providing letters in Columbus, Miami, Schenectady, Portland, Bakersfield, Alabaster, Beacon, Warren, Easton, Austin, Yonkers, and Orange County). In Pittsburgh, Los Angeles, Washington, D.C., Detroit, Cleveland, Cincinnati, and the Virgin Islands, the government sent a technical assistance letter and later reached a settlement with the department resulting in a consent decree or memorandum of agreement. In Columbus, Ohio, the government sent a letter recommending reforms and later ended the investigation when the department agreed to engage in specific reforms. That agreement was never formalized in a memorandum of agreement. *See* U.S. Dep't of Justice, Special Litigation FAQs, *supra* note 40 (characterizing Columbus, Ohio settlement as a conditional dismissal).

54. *See supra* notes 50-53. Some of the seven departments without public resolutions may have received technical assistance letters recommending specific reforms that never became public.

55. *See* U.S. Dep't of Justice, Special Litigation FAQs, *supra* note 40.

56. *See* Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Cont'l Banking Co.*, 420 U.S. 223, 235-37 & n.10 (1975)) (describing consent decrees as containing aspects of both contracts and judicial decrees).

court must agree to terminate a consent decree.⁵⁷ The memoranda, by contrast, are drafted as private contracts between the city at issue and the United States. Parties can enforce them only by suing for breach of contract.⁵⁸ Both the Justice Department's memoranda of agreement and consent decrees have provided for independent auditors to monitor and report on the police department's compliance with the agreement.⁵⁹

The technical assistance letters or investigative findings letters represent less formal attempts by the Justice Department to achieve reform. During most of the Justice Department's investigations, it has sent a letter to the investigated police department summarizing its findings at that point in the investigation. In some cases, this letter functioned as a precursor to a later settlement through a consent decree or memorandum of agreement.⁶⁰ In other cases—although the letter suggested that the investigation was ongoing at the time—the technical assistance letter was the last public action in the case.⁶¹ In these cases, the

57. See, e.g., *United States v. City of Detroit*, No. 03-72258, para. 148 (E.D. Mich. July 18, 2003) (order entering consent decree), *text available at* http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_uofwdcd_613.pdf (stating that the court will have jurisdiction for a minimum of five years and that the city may not move to terminate the decree until substantial compliance has been maintained for a minimum of two years); *United States v. City of Los Angeles*, No. 00-11769 GAF, para. 179 (C.D. Cal. June 15, 2001) (order entering consent decree), *text available at* <http://www.usdoj.gov/crt/split/documents/laconsent.htm> (same); *United States v. City of Pittsburgh*, No. 2:97-cv-00354-RJC, para. 79 (W.D. Pa. Apr. 16, 1997) (order entering consent decree), *text available at* <http://www.usdoj.gov/crt/split/documents/pittssa.htm> (same); Memorandum of Agreement Between the United States and the Village of Mt. Prospect, Ill., para. 44 (Jan. 22, 2003) [hereinafter Mt. Prospect MOA], *available at* http://www.justice.gov/crt/split/documents/mtprospect_moa.pdf (same).

58. See, e.g., Mt. Prospect MOA, *supra* note 57, para 43; see also Memorandum of Agreement Between the United States Dep't of Justice and the City of Buffalo, N.Y., paras. 65-67 (Sept. 19, 2002) [hereinafter Buffalo MOA], *available at* http://www.usdoj.gov/crt/split/documents/buffalo_police_agreement.htm; Memorandum of Agreement Between the United States Dep't of Justice and the City of Cincinnati, Ohio, paras. 113-117 (Apr. 12, 2002) [hereinafter Cincinnati MOA], *available at* <http://www.usdoj.gov/crt/split/Cincmoafinal.htm>.

59. See, e.g., *United States v. City of Detroit*, No. 03-72258, paras. 131-137 (E.D. Mich. July 18, 2003) (order entering consent decree), *text available at* http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_uofwdcd_613.pdf (providing for and describing duties of an independent monitor); Memorandum of Agreement Between the United States and the City of Villa Rica, Ga., paras. H. 1-8 (Dec. 23, 2003), *available at* http://www.usdoj.gov/crt/split/documents/villa_rica_moa.pdf (same).

60. See *supra* note 53; see also, e.g., *United States v. City of Detroit*, No. 03-72258, para. 7 (E.D. Mich. July 18, 2003) (order entering consent decree), *text available at* http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_uofwdcd_613.pdf (noting the sending of three technical assistance letters prior to the consent decree); Cincinnati MOA, *supra* note 58, para. 4 (noting the sending of a technical assistance letter prior to the agreement).

61. See *supra* note 53; see also, e.g., V.I. Letter, *supra* note 48 (providing

letters do not make findings about whether § 14141 has been violated. Instead, they describe departmental deficiencies that may cause misconduct and recommend specific remedial measures to correct those problems.⁶² Although these letters may be understood as stating the expectations of the Justice Department with respect to a police department, the letters do not contain any mechanism for ensuring compliance or for ongoing monitoring. Additionally, there is no indication that the Justice Department continued to monitor the departments to which it issued such letters to determine whether those departments adopted the recommended reforms.

All of the Justice Department's § 14141 investigations have focused on a few key kinds of misconduct, including racial profiling and other forms of discriminatory harassment, the use of excessive force, false arrests, and illegal stops and searches.⁶³ The Justice Department has also identified in its decrees,

recommendations and characterizing the investigation as ongoing); Letter from Shanetta Y. Cutlar, Chief of Special Litig. Section of Civil Rights Div., to Frank James, Counsel for Alabaster, Ala. Police Dep't (Nov. 9, 2004) [hereinafter Alabaster Letter], *available at* http://www.usdoj.gov/crt/split/documents/split_alabaster_talet_11_09_04.pdf (same); Letter from David N. Kelley, United States Attorney for S. Dist. of N.Y., to Gerard J. Pisanelli, Counsel for Beacon Police Dep't (June 21, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_beacon_ta_letter_6-21-05.pdf (same).

62. Letter from Shanetta Y. Cutlar, Chief of Special Litig. Section of Civil Rights Div., to Stu Gallaher, Chief of Staff for the Mayor of Easton, Pa., at 1 (Nov. 26, 2007), *available at* http://www.usdoj.gov/crt/split/documents/easton_talet_11-26-07.pdf (providing "recommendations . . . not previously memorialized in our earlier communications" but with no mention of whether a § 14141 violation had been determined); Letter from Steven H. Rosenbaum, Chief of Special Litig. Section of Civil Rights Div., to Alejandro Vilarello, City Attorney for Miami, Fla., at 2 (Mar. 13, 2003) [hereinafter Miami Letter], *available at* http://www.usdoj.gov/crt/split/documents/miamipd_techletter.pdf ("This letter is therefore preliminary in nature and does not reach any conclusion about whether there is a violation of Section 14141."); Letter from Steven H. Rosenbaum, Chief of Special Litig. Section of Civil Rights Div., to William R. Martin, Counsel for Cincinnati Police Div., at 1 (Oct. 23, 2001), *available at* <http://www.usdoj.gov/crt/split/cincita.php> (commenting that the letter's purpose is to provide "significant recommendations . . . at this preliminary stage of the investigation under 42 U.S.C. § 14141").

63. *See* United States v. City of Steubenville, Ohio, No. C2-97-966 (S.D. Ohio Sept. 4, 1997) (order entering consent decree), *text available at* <http://www.usdoj.gov/crt/split/documents/steubensa.htm>; Cincinnati MOA, *supra* note 58; Letter from Shanetta Y. Brown Cutlar, Acting Chief of Special Litig. Section of Civil Rights Div., to Gary Wood, Corp. Counsel for Portland, Me., at 2 (Mar. 21, 2003), *available at* http://www.justice.gov/crt/split/documents/portland_ta_ltr.pdf; Letter from Shanetta Y. Brown Cutlar, Acting Chief of Special Litig. Section of Civil Rights Div., to Michael T. Brockbank, Schenectady Corp. Counsel (Mar. 19, 2003), *available at* http://www.usdoj.gov/crt/split/documents/schenectady_ta.pdf; U.S. Dep't of Justice, Special Litigation FAQs, *supra* note 40 ("Our police misconduct investigations focus on a number of different types of law enforcement violations of citizens' civil rights, including excessive force (such as excessive use of deadly force, pepper spray, or improper use of canines), racially discriminatory behavior (such as racial discrimination in traffic stops), and false arrest.").

memoranda, and letters, a core set of remedial measures to improve officer performance and ensure accountability in problem departments.⁶⁴ For example, the Justice Department has encouraged or required every investigated department to develop or improve an early intervention system, a system which includes means for collecting performance indicators on officers, for regularly analyzing the data in order to identify officers who may be prone to misconduct, and for intervening before serious misconduct occurs. Although early intervention systems vary in complexity and expense, they almost always require a computerized database and significant information technology infrastructure.⁶⁵ Other core reforms demanded by the Justice Department include refining formal policies, especially on the use of force; strengthening citizen complaint procedures, internal investigations, and mechanisms for officer discipline; and improving training.⁶⁶ The Justice Department's

64. The memoranda and decrees also contain additional recommendations for reform that are particular to the misconduct and deficiencies of the department at issue. *See, e.g.*, *United States v. Prince George's County, Md.*, No. RWT 04 cv 185 (D. Md. Mar. 11, 2004) (order entering consent decree), *text available at* http://www.usdoj.gov/crt/split/documents/pgpd/pg_consent_decree.pdf (providing recommendations regarding canine section policy, procedures, and deployments); *United States v. City of Los Angeles*, No. 00-11769 GAF, paras. 106-107 (C.D. Cal. June 15, 2001) (order entering consent decree), *text available at* <http://www.usdoj.gov/crt/split/documents/laconsent.php> (detailing particular recommendations regarding management of gang units); Memorandum of Agreement Between the United States Dep't of Justice and the Dist. of Columbia, paras. 149-159 (June 13, 2001) [hereinafter *Dist. of Columbia MOA*], *available at* <http://www.usdoj.gov/crt/split/documents/dcmoa.htm> (providing recommendations for specialized mission units).

65. The number and kinds of performance indicators that are collected pursuant to an early intervention system vary from department to department, but the Justice Department has usually required or recommended two types of data: data on primary officer conduct, like uses of force, officer or suspect injuries, vehicular pursuits, weapons discharges, arrests (and their statutory basis), stops, and searches; and data on performance measures, like commendations, complaints, civil suits, criminal charges, and disciplinary actions. The Justice Department also usually requires that the data be searchable by officer, supervisor, squad, and shift, to allow the police department to identify the source of a pattern of misconduct. These systems are usually focused on retraining or counseling officers rather than disciplining them. *See* WALKER, *supra* note 1, at 103-05; *see also* INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 13, at 49-50.

66. *See, e.g.*, *United States v. New Jersey*, No. 99-5970 (MLC), paras. 73-74 (D. N.J. Dec. 30, 1999) (order entering consent decree), *text available at* <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (detailing procedures for initiating potential misconduct allegations, conducting such an investigation, and evaluating such claims); *United States v. City of Steubenville, Ohio*, No. C2-97-966, paras. 33-63 (S.D. Ohio Sept. 4, 1997) (order entering consent decree), *text available at* <http://www.usdoj.gov/crt/split/documents/steubensa.htm> (same); *id.* paras. 17, 21 (requiring measures to evaluate the effectiveness of training particularly in regard to police misconduct and new policies regarding use of force); *United States v. City of Pittsburgh*, No. 2:97-cv-00354-RJC, para. 44 (W.D. Pa. Apr. 16, 1997) (order entering consent decree), *text available*

recommendations have remained largely consistent since the early § 14141 settlements,⁶⁷ and together the reforms the Justice Department has advocated are intended to bring about increased accountability in the police department.⁶⁸

II. PROMOTING PROACTIVE REFORM USING SECTION 14141

A. *The Possibility and Benefits of Proactive Reform*

The reforms recommended and mandated by the Justice Department through § 14141 hold significant promise. Unfortunately, the Justice Department's current enforcement strategy limits the effectiveness of § 14141 in achieving widespread reform. Only through a new approach to enforcement can the statute fulfill its potential to reduce significantly police misconduct nationwide.

Scholarly response to § 14141's passage was strongly positive.⁶⁹ Professor

at <http://www.usdoj.gov/crt/split/documents/pittssa.htm> (requiring the city to maintain records documenting all the complaints and investigations of misconduct since 1986); *id.* para. 36 ("The [police department] shall train all officers in integrity and ethics, cultural diversity, and verbal de-escalation . . ."); Dist. of Columbia MOA, *supra* note 64, paras. 36-40 (requiring further development of use of force training); Letter from Shanetta Y. Cutlar, Chief of Special Litig. Section of Civil Rights Div., to Michael O'Brien, Mayor of Warren, Ohio, at 3-5 (Mar. 2, 2006), *available at* http://www.usdoj.gov/crt/split/documents/wpd_talet_3-2-06.pdf (recommending updated policies on the use of force to provide greater guidance to police officers).

67. *Compare* United States v. City of Pittsburgh, No. 2:97-cv-00354-RJC, para. 77 (W.D. Pa. Apr. 16, 1997) (order entering consent decree), *text available at* <http://www.usdoj.gov/crt/split/documents/pittssa.htm> (requiring Pittsburgh to communicate standards and educate officers on the requirements of the consent decree), *with* Letter from Shanetta Y. Cutlar, Chief of Special Litig. Section of Civil Rights Div., to Marc A. Ott, City Manager of Austin, Tex. (Dec. 23, 2008) (proposing similar recommendations in encouraging revision of use of force policies and trainings).

68. *See* Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3 (2003) (describing new paradigm of accountability as conceptual framework behind § 14141 reforms).

69. *See, e.g.,* Armacost, *supra* note 16, at 457 ("[P]erhaps the most promising legal mechanism [for addressing misconduct] is the newly created equitable remedy made available through 42 U.S.C. § 14141."); Jeffries & Rutherglen, *supra* note 27, at 1418-21; Livingston, *supra* note 42, at 820 ("Section 14141 represents an important new remedial tool that offers enhanced opportunities for the radical reform of lax police administrative practices."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 538 n.134 (2001) ("The best legal tool for regulation at the department level is neither the exclusionary rule nor damages—the two remedies whose merits are so extensively debated in the law reviews—but injunctions. That is why the passage of 42 U.S.C. § 14141 (1994) . . . may be more significant, in the long run, than *Mapp v. Ohio*, which mandated the exclusion of evidence obtained in violation of the Fourth Amendment." (citation omitted)).

Bill Stuntz, for example, called it “the most important legal initiative of the past twenty years in the sphere of police regulation.”⁷⁰ This is not surprising. Section 14141 overcomes some of the key obstacles to using the law to induce systemic change in American police departments. Unlike criminal prosecution, § 14141 specifically targets departments and cities rather than individual officers only. Unlike § 1983 law, § 14141 contains few legal barriers to liability. Unlike the exclusionary rule, § 14141 is not limited in scope to conduct that produces evidence. Instead, it may be used to reach any pattern of unconstitutional conduct. And, of course, § 14141 achieves its intended purpose: it authorizes structural reform litigation.

Over time, however, this enthusiasm has faded. Critics have argued that despite its promise to reform American policing, § 14141 enforcement has failed:⁷¹ the Justice Department has sued few departments,⁷² and serious misconduct continues in many cities.⁷³ Scholars critical of the Justice Department’s efforts uniformly attribute the weakness of § 14141 enforcement to insufficient resources devoted to structural reform of police departments and the related absence of political commitment to § 14141 suits, especially on the part of the Bush Administration.⁷⁴

The Obama Administration is likely to devote new attention and perhaps new resources to § 14141. Much of the prior scholarship implies that this new commitment and any new funds should be devoted to bringing more investigations and suits, and that such an agenda will help eliminate the obstacles to § 14141’s success. As the above description suggests, however, investigating and suing or reaching a settlement with a police department is time-consuming and resource-intensive. The Special Litigation Section has

70. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 798 (2006).

71. See, e.g., Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 100-01 (2001); Gilles, *supra* note 9, at 1386-87; Jeffries & Rutherglen, *supra* note 27, at 1416; Simmons, *supra* note 9, at 493-94.

72. Garrett, *supra* note 71, at 100; Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 876 (2001) [hereinafter Gilles, *In Defense*]; Myriam E. Gilles, *Representational Standing: U.S. ex. rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 365 n.257 (2001) [hereinafter Gilles, *Representational Standing*]; David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 118-19 (2007); Simmons, *supra* note 9, at 493.

73. See Gilles, *supra* note 9, at 1408, 1410; Walker, *supra* note 68, at 52.

74. See Armacost, *supra* note 16, at 531; Garrett, *supra* note 71, at 100; Gilles, *In Defense*, *supra* note 72, at 876-77, 879; Gilles, *Representational Standing*, *supra* note 72, at 365; Jeffries & Rutherglen, *supra* note 27, at 1419; Eugene Kim, *Vindicating Civil Rights Under 42 U.S.C. § 14141: Guidance from Procedures in Complex Litigation*, 29 HASTINGS CONST. L.Q. 767, 780 (2002); Rudovsky, *supra* note 72, at 118; Simmons, *supra* note 9, at 518-19.

fewer than forty attorneys to detect potential targets, investigate and sue departments, and monitor compliance in past cases, and many of these attorneys work on other civil rights programs.⁷⁵ With existing resources, it is impossible to imagine that § 14141 could be used to force change in more than a handful of departments each year. Even if the Special Litigation Section's budget were doubled or tripled, the Section still could not be expected to examine more than a tiny fraction of large police departments. Assuming that a significant number of large American police departments need reform,⁷⁶ no plausible allocation of resources will allow the Justice Department to sue many of those departments.⁷⁷ The problem of police misconduct simply cannot be solved by using federal resources to change departments one by one. If the Obama Administration adopts a § 14141 enforcement strategy by which it devotes its resources to investigating and suing as many departments as it can, its efforts will be only marginally more successful at reducing misconduct than those of its predecessors.

Because the Justice Department has and will always have insufficient resources to force reform by suing each department with a pattern of misconduct, the Obama Administration should consider how to use its limited resources to best effect. The answer is that § 14141 enforcement can not only *compel* police departments to reform by suing them, but can *induce* police departments to reform by creating incentives for the departments to adopt proactive measures to reduce misconduct without being sued. By adopting a § 14141 enforcement strategy that maximizes § 14141's potential to induce police departments to reform, the Obama Administration can leverage whatever resources are devoted to § 14141 to motivate reforms in more departments than

75. See OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION 8 tbl.1 (2008), available at <http://www.usdoj.gov/opr/oig-opr-iaph-crd.pdf>; UNITED STATES ATTORNEYS' MANUAL, *supra* note 41 (describing the many activities of the Special Litigation Section); U.S. Dep't of Justice, Civil Rights Div., Special Litigation Section Overview, <http://www.usdoj.gov/crt/split/overview.php> (last visited Oct. 13, 2009) (describing the Section's extensive activities in its multiple other litigation programs).

76. It is a premise of this paper that significantly more police departments have engaged in a pattern or practice of misconduct than the Justice Department has yet investigated or reformed. Were this not true, there would be no reason to expand § 14141 either directly or by inducing additional departments to reform. This premise reflects a widespread, if sometimes implicit, scholarly consensus that systemic misconduct is common in large police departments. See, e.g., Armacost, *supra* note 16, at 454; Gilles, *supra* note 9, at 1408; Walker, *supra* note 68, at 52. Unfortunately, insufficient data exist to evaluate this assumption.

77. See Gilles, *supra* note 9, at 1410 ("In the absence of a massive (and politically improbable) infusion of capital resources into the detection and investigation of unconstitutional police patterns and practices, the current § 14141 regime appears doomed from the outset." (footnote omitted)).

it can sue. Even if the Justice Department has resources sufficient to investigate and sue only a few departments each year, it can—and should—create a § 14141 policy that provides sufficient incentives for many more departments each year to reform proactively, that is, without Justice Department intervention. Existing scholarship focuses exclusively on the direct effects of § 14141. None of it considers its further potential to induce proactive reform.

The claim made here then is that § 14141's promise depends on using it strategically to sue some departments in order to shape the conduct of many more. To defend this claim, this Article outlines a strategy by which the Justice Department can induce reforms in departments without suing them. It also argues that the Justice Department can use the same resources to reform more departments by devoting those resources to both suing departments and inducing proactive reform than by devoting them exclusively to suing departments.

Inducing proactive reform is a matter of providing sufficient incentives to police departments. According to deterrence theory, a rational actor will engage in conduct when doing so provides a positive expected return in light of the actor's utility function.⁷⁸ Thus, a police department will adopt remedial measures to prevent misconduct when doing so is a cost-effective means of reducing the net costs of police misconduct or increasing the net benefits of protecting civil rights.⁷⁹ To induce reform in departments that are not sued, the Justice Department must change the calculation for departments that currently find preventing systemic misconduct insufficiently worthwhile.⁸⁰ This goal should motivate the Justice Department's § 14141 enforcement efforts.

There are three primary ways in which the Justice Department can promote reform by changing the cost/benefit calculus of misconduct and reform for departments. It can: (1) raise the expected costs of engaging in misconduct; (2) lower the costs of preventing misconduct; and (3) raise the benefits of

78. See A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 47 & n.7 (2000).

79. Throughout much of the Article, I treat "police departments" as the entities that decide to reform and engage in reform. Of course, police departments are part of municipal governments, and other actors play a significant role in these activities. I consider some of the issues this complexity raises in Part II.E., *infra*.

80. The particular costs and benefits for any given municipality will vary tremendously based on their circumstances and utility functions, and those costs and benefits are difficult to assess. As a result, a municipality may overestimate the expected benefits of police misconduct, such as the value of illegal searches for efficient law enforcement, or underestimate its costs, such as the law enforcement effect of community mistrust. Deterrence theory predicts municipalities will act on their estimations, accurate or not, and legal regulation intended to deter must be directed at those perceptions. See Polinsky & Shavell, *supra* note 78, at 68. This is usually done by shaping the reality on which those assessments are based.

preventing misconduct.⁸¹ Section 14141 is capable of promoting each of these goals, and each is considered in detail in this Part.

B. Raising the Expected Cost of Misconduct

1. Obstacles to raising the expected cost of misconduct

Given § 14141 enforcement, one of the costs of continuing misconduct for a police department is the possibility that the police department will be investigated and sued for equitable relief by the Department of Justice. The expected cost of § 14141, E , to any municipality is at least p , the probability perceived by the municipality that its police department will be subject to a full investigation⁸² under § 14141 (regardless of the outcome) multiplied by c , the cost a municipality expects to incur as a result of that investigation.⁸³ By increasing the expected costs of § 14141 for cities, the Justice Department can

81. While the federal government may educate cities to prevent them from overestimating the benefits of misconduct or make law enforcement strategies that reduce misconduct comparatively more attractive, it cannot easily lower the real benefits of engaging in misconduct.

82. A full investigation is intrusive and costly for a police department no matter how it is resolved. Police departments will therefore assess their expected costs under § 14141 by considering the probability that the Justice Department will conduct a full investigation using § 14141, not just the probability that the Justice Department will file suit against the department. By contrast, a preliminary assessment's costs are insignificant for the department. The cost and probability of a preliminary assessment can therefore largely be ignored.

83. In calculating the likely costs of being investigated and sued, municipalities consider the likelihood that if they are investigated, they may not be charged with a § 14141 violation, and that if they are charged, they may negotiate an outcome with the Justice Department that avoids litigation over liability or remedies. Any alternative to a fully litigated suit will substantially lower the transaction, reputational, and uncertainty costs for a municipality and may result in less costly remedial measures and monitoring as well. No municipality has yet litigated liability and remedies in a § 14141 case.

Additionally, it is likely that the expected impact of § 14141 is actually greater than the product of the expected cost of an investigation and its perceived probability, $c \times p$. The Justice Department will not investigate cities at random. Instead, to use resources efficiently, it will use preliminary assessments and other informal indicia of misconduct to choose cities with more misconduct to investigate. Assuming it is at all successful in selecting cities with misconduct for full investigation, then the probability that a department will be investigated rises with, and is therefore an increasing function of, its level of misconduct ($p = p[m]$). Moreover, if departments with more systemic misconduct also face additional costs during the Justice Department's investigation or are more costly to fix than departments with less misconduct, then c , the cost that a department will face if it is targeted, is also likely an increasing function of its misconduct ($c = c[m]$). If c and p are correlated with each other in this way, the expected impact of § 14141 on a municipality will be the expected product of cost and probability, $E = c[m] \times p[m]$, which will be greater than $E[c] \times E[p]$, since both cost and probability are strictly increasing with respect to the degree of misconduct.

induce more police department reform without suing them.

Deterrence theorists frequently highlight raising c , the legally-imposed costs of engaging in undesirable conduct, as the most efficient means of raising E , and thereby disincentivizing that conduct.⁸⁴ Raising the penalties associated with a crime is attractive because doing so can often be near costless or subject to reasonable marginal costs.⁸⁵ By contrast, the alternative, raising p , is often more difficult, because increasing the detection and prosecution of crime can be very expensive.⁸⁶ Section 14141 is different because the Justice Department cannot substantially increase the costs imposed on a police department subject to a § 14141 investigation or suit. The statute permits only the imposition of equitable remedies to correct patterns of misconduct on liable defendants, not fines in order to deter future misconduct.⁸⁷ Courts therefore will impose remedial measures and monitoring that are no more costly than necessary to remedy the illegality. That limitation establishes a ceiling on the costs a city can be forced to incur pursuant to § 14141.⁸⁸

Nor can the Justice Department raise transaction costs to achieve the same result, higher expected costs for violating § 14141. There are strong ethical and legal barriers to imposing unnecessary investigative, trial, or settlement costs on police departments,⁸⁹ and, in any case, increasing those transaction costs would almost inevitably impose proportional additional costs on the Justice Department itself, making raising c an inefficient as well as unprofessional way of raising expected costs of misconduct for police departments. Finally, the Justice Department cannot easily use § 14141 to impose significant publicity and reputational costs on police departments engaged in misconduct, because

84. See Polinsky & Shavell, *supra* note 78, at 53; Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195, 1209 (1985).

85. Fines are a low-cost means of imposing costs on victims; imprisonment is a higher-cost means of doing so, but each unit of imprisonment imposes a fixed marginal cost.

86. Polinsky & Shavell, *supra* note 78, at 71-72. Thus, it is easier to deter additional drunk driving by increasing the fine one pays if caught than it is to do so by putting more police officers on the road.

87. 42 U.S.C. § 14141(b) (2006). In Part III.B.2, *infra*, I consider whether it makes sense to amend § 14141 to add fines in order to provide the Justice Department with means for increasing c .

88. Presumably, a city might agree to more costly measures in settling a § 14141 investigation or suit, but only if the total cost of the suit to the city, including the savings in transactional and reputational costs achieved by settling, were lower than the total cost the department would expect to face if the suit were litigated.

89. See, e.g., 28 U.S.C. § 1927 (2006) (stating that an attorney in a federal case may be liable for the excessive costs and attorneys fees of the other party if he or she “multiplies the proceedings in any case unreasonably and vexatiously”); FED. R. CIV. P. 11 (making it impermissible to enter a pleading or make a motion in federal court for “any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation”); MODEL RULES OF PROF’L CONDUCT R. 3.2 (2007) (“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”).

those departments will often already have incurred a significant portion of the reputational price for the incidents of misconduct as a result of media or community attention to those incidents. Because the present structure of § 14141 limits the Justice Department's ability to raise c , changing c should not be a central focus of its efforts to reduce police misconduct using § 14141.

The Justice Department is also severely constrained in its ability to induce proactive reform by raising p , the probability that a city will be investigated or sued under § 14141. The resource constraints that limit the direct impact of § 14141 also limit its indirect effect. If only a handful of investigations or suits are conducted each year, an average city faces only a remote risk of being investigated and sued. As a result, within existing resources, raising p substantially, even solely for large departments, is too costly to be practical.

2. *Concentrating resources on the worst departments*

This discussion suggests that § 14141 cannot be used to raise either p or c sufficiently to induce widespread adoption of remedial measures among all large police departments. Nevertheless, § 14141 can still be used to reduce misconduct in many departments. The Justice Department can concentrate resources on fewer police departments and can raise p sufficiently among those departments to incentivize reform. Moreover, if the Justice Department focuses on departments with the most misconduct, the Justice Department can induce reform where it is most needed. This can be achieved by pursuing a “worst-first” litigation policy.

Concentrating resources on a subset of departments represents a trade-off: the Justice Department would create significantly higher p for that subset of departments at the price of lowering p for the remainder of departments to a level below what it is under current enforcement practices. This price seems worth paying. As the above discussion suggests, under any reasonable resource conditions, p under current enforcement practices cannot rise to a level that will motivate significant reform among many large police departments. Focusing resources on a subset of possible offenders is worthwhile when resources are otherwise insufficient to deter wrongdoers—even when those resources are concentrated randomly—because it is better that fewer departments are incentivized significantly than that more departments are induced at a level that makes no difference in how they behave.⁹⁰ Suing the worst departments first

90. See Henrik Lando & Steven Shavell, *The Advantage of Focusing Law Enforcement Effort*, 24 INT'L REV. L. & ECON. 209 (2004) (demonstrating that when resources are below the threshold necessary to create an expected cost sufficient to deter wrongdoers, it will be more efficient to focus law enforcement efforts on a subgroup of possible violators of the law, even if the frequency of violations is no higher in that subgroup). In the context of policing reform, there is no obvious threshold below which no deterrence would take place.

does better: it not only concentrates resources in order to generate a p sufficient to induce some departments to reform, but also spends those resources only on departments in which reform is most needed. That is, this strategy both concentrates resources to incentivize departments and saves resources that are currently wasted by including those large departments that are not engaged in significant patterns of misconduct as targets of p .

To sue the worst first, the Justice Department should generate and publish a list of departments it has reason to believe are engaged in the worst wrongdoing. Then it should investigate the departments on that list in order, and sue those departments in which investigation confirms serious systemic misconduct. Police departments would know they were on the worst list and that they might be sued soon, but they would not know how many departments the Justice Department would sue in a given year. This threat of suit would raise the expected costs of § 14141 for these problematic departments. In addition, departments labeled “worst” would incur secondary costs, such as increased media attention, reputational costs, political scrutiny, and perhaps more lawsuits under § 1983. Because placing departments on the worst list would increase their expected costs, it will also increase their incentive to adopt reforms that will prevent misconduct and lead to the department’s removal from the list.

While suing the worst first would heighten the incentive to reform for all departments on the worst list, the distribution of that heightened incentive among departments on the list would depend on whether the Justice Department makes public the ordinal ranking of departments on the list. Releasing a ranked worst list would achieve transparency and increase the incentive to reform for departments at the top of the list relative to those departments further down. The incentive for police departments would be progressive: the worse the department, the higher on the list; the higher on the list, the higher p would be; the higher p would be, the higher the expected costs of § 14141. Measures to remedy misconduct range enormously in expense.⁹¹ Assuming that the effectiveness of reforms is a function of their costs, departments with more misconduct will find more extensive and effective reforms cost-effective as way of lowering the expected cost of § 14141. But even departments further down the list should engage in inexpensive reforms,

Thus, arguably, even marginal deterrence could encourage some marginal reform. However, since most of the low-cost reforms—like implementing new use-of-force policies—are unlikely to make much difference without some high-cost investment, such as improved training and accountability, it is likely that there is a resource threshold for incentivizing *effective* reforms and that p cannot rise above that threshold as § 14141 is presently used given how few suits can be brought.

91. Changing use of force policies, for example, imposes trivial costs; training officers to comply with a new policy imposes greater ones; and creating an early warning system to detect officers who may be using excessive force imposes very substantial costs.

such as refining complaint intake procedures as a cost-effective means of lowering *p*.⁹² Thus, a ranked list would concentrate resources on shaping the incentives of departments whose reform would be most valuable, and it would still provide some incentive to reform for departments lower on the list. Refraining from publishing a ranking of departments would lower the incentive for the very worst departments, but it would have the benefit of distributing more evenly the incentive to reform among problematic departments. In either case, the worst list and litigation strategy would use the *threat* of a § 14141 suit to raise the expected costs for misconduct significantly for departments on the list.⁹³

3. *Determining which departments are worst*

The greatest challenge in pursuing a worst-first litigation strategy for § 14141 is formulating the list. There are presently no national comparative data available about how much misconduct exists in various large police departments.⁹⁴ As a result, developing a list of “worst” departments requires identifying measures for relative levels and kinds of misconduct, acquiring department-specific data with respect to those measures, and generating an ordinal ranking of departments.

Misconduct in a police department cannot be easily measured directly. Most kinds of misconduct are difficult to identify, and lack easy, objective metrics.⁹⁵ When an officer stops and frisks a suspect, for example, the intrusion is often brief, unrecorded, and without third-party witnesses. Whether the stop and frisk was legitimate or a form of misconduct depends on whether the officer had reasonable suspicion of criminal conduct and dangerousness that justified the intrusion, a contextual, fact-specific question that cannot easily be answered, even by a well-meaning department. Similarly, police departments may often have difficulty distinguishing lawful uses of non-deadly force from

92. Below some threshold of expense, however, these reforms are likely to be ineffectual at significantly reducing misconduct. *See supra* note 90.

93. Law enforcement leaders have considered using techniques very similar to the worst list proposed here to concentrate law enforcement resources and deter crime. *See* David M. Kennedy, *Old Wine in New Bottles: Policing and the Lessons of Pulling Levers*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 155, 165 (David Weisburd & Anthony A. Braga eds., 2006) (describing “pulling levers” strategic policing as a way around the problem of inadequate deterrence created by inadequate resources); *id.* (“It may be possible to make sure that the worst 100 domestic abusers in a jurisdiction get very special attention, and then let the next 1000 know that behavior on their part will win them a place in the top group. It may be possible to warn a dozen street drug markets that there will be a crackdown in a week, and that they can protect themselves by shutting down before it comes.”).

94. *See supra* note 8 and accompanying text.

95. Of course, much more data are available about some kinds of misconduct than others.

those that are unreasonable.⁹⁶

As a result, the Justice Department cannot simply demand that police departments report misconduct and use those reports to rank departments. Instead, the Justice Department must choose its misconduct priorities⁹⁷ and develop—and refine over time—indirect evidence-based proxies for those kinds of misconduct. For example, research might support using contextual data about a department, such as crime rates and average household income in the community, along with some combination of the total number of uses of any force by department officers, the number of suspects injured or killed during arrest, the number of civil lawsuits against a department, and the number of citizen complaints for excessive force, to identify departments with the most severe patterns of using unconstitutional levels of force.⁹⁸

By developing various proxies for different types of misconduct, the Justice Department could create a basis for comparing departments and generating a worst list. While these proxies should be robust and based on advanced social science research,⁹⁹ they need not be perfect measures of misconduct to be useful. In each case, when the Justice Department targets a department, it would also conduct a full investigation before bringing suit. Nevertheless, the proxies could provide a meaningful basis for allocating resources, something absent from the Department's present, purely responsive litigation strategy.

Generating a worst list using proxies for misconduct is possible only with

96. See Harmon, *supra* note 12, at 1127-44 (describing the difficulty of assessing the reasonableness of a use of force under current doctrine).

97. Prioritizing some types of misconduct focuses the Justice Department's resources. In choosing which types of misconduct to prioritize, the Justice Department should consider that suing departments is an expensive and intrusive way to promote reform. It is best used against misconduct that has institutionalized causes, but is difficult to reach by other legal means. The excessive use of non-deadly force would meet these criteria. So would abusive high-volume, low-yield investigative techniques, like unreasonable *Terry* frisks.

98. See Kenneth Adams, *A Research Agenda on Police Use of Force*, in NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA* 61, 65 (1999) [hereinafter Adams, *Research*] (discussing the need for multiple measures of police misconduct to provide a complete picture of the extent of the problem); *id.* ("Sometimes it is possible to combine a variety of measures into an index that is robust because the combined errors of the individual measures tend to cancel each other out."); Kenneth Adams, *Measuring the Prevalence of Police Abuse of Force*, in POLICE VIOLENCE, *supra* note 16, at 52, 79-80 [hereinafter Adams, *Measuring*]; Kenneth Adams, *What We Know About Police Use of Force*, in *USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA*, *supra*, at 1, 10 (discussing some of the various data sources available to estimate police use of excessive force). Such combined data may over time also contribute to the research on whether reducing misconduct improves or reduces effective crime control by a department.

99. In order to strengthen the measures of misconduct, the Justice Department should also fund further research on useful proxies for misconduct.

mandatory data collection and reporting. To create a list that will raise p for the right departments, the Justice Department must be able to identify, before even a preliminary assessment, departments that have the worst indicia of misconduct as defined by its proxies. The Justice Department can accomplish this only if it can require all large departments to collect and report data about relevant conduct and can enforce that mandate. Under current law, the Justice Department is authorized to recommend national standards for data collection, and to collect and analyze statistical information about the operation of the justice system, and it does so through the Census of State and Local Law Enforcement Agencies, the Law Enforcement Management and Statistics survey (LEMAS), and the Police-Public Contact Survey (PPCS).¹⁰⁰ However, the census occurs only every four years, and the LEMAS and PPCS survey every three. The census and LEMAS both collect data directly from departments, but participation is voluntary, and neither asks questions sufficient to assess misconduct in each department or to compare departments to each other.¹⁰¹ Moreover, departments are not required to collect data they otherwise do not maintain or to gather information in a standardized format in order to complete the survey. Improving the Justice Department's misconduct reduction efforts requires more. In order to facilitate intra- and inter-department

100. See 42 U.S.C. § 3732(c) (2006) (describing the duties and functions of the Bureau of Justice Statistics). Pursuant to this authority, the Bureau of Justice Statistics collects and analyzes some department-specific data about police operations through the Law Enforcement Management and Statistics (LEMAS) survey. See, e.g., BRIAN A. REAVES & MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 2000: DATA FOR INDIVIDUAL STATE AND LOCAL AGENCIES WITH 100 OR MORE OFFICERS (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/lemas00.pdf>. Other data about police conduct are derived from citizen complaint surveys. See, e.g., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbl.1.0004.2002 (2002), <http://www.albany.edu/sourcebook/pdf/t100042002.pdf> (tracking citizen complaints about police use of force in large law enforcement agencies); *id.* at tbl.1.0005.2002 (tracking dispositions of citizen complaints in large agencies). Data about police conduct are also available from the International Association of Chiefs of Police database project. See Mark A. Henriquez, *IACP National Database Project on Police Use of Force*, in USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA, *supra* note 98, at 19 (1999).

101. See REAVES, *supra* note 9; REAVES & HICKMAN, *supra* note 100; U.S. DEP'T OF JUSTICE, 2003 SAMPLE SURVEY OF LAW ENFORCEMENT AGENCIES (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/lem03q.pdf>. In addition, the survey is given only to a representative sample of departments smaller than 100 officers. See Robert H. Langworthy, *LEMAS: A Comparative Organizational Research Platform*, JUST. RES. & POL'Y, Fall 2002, at 21 (2002) (describing LEMAS origins, dimensions, and limitations). The Justice Department, for example, is required to collect and publicly report data about the use of force in police departments, see 42 U.S.C. § 14142 (2006), but departments are not required to provide this information, see 145 CONG. REC. 20,139 (1999). Police departments are presently effectively required to report to the Justice Department information regarding the death of individuals in custody, but this provision represents an exception to the general rule. See *infra* note 109.

comparisons, policing experts have advocated more standardized collection of data by police departments on various police activities, including arrests, uses of force, and citizen complaints.¹⁰² Congress should heed these calls and authorize the Justice Department to require that all large police departments collect and report data on police activities and provide information on departmental policies and procedures.¹⁰³ Such data and information would facilitate creating a worst list, and would enable continuing research on the causes of and cures for police misconduct.

Collecting and reporting standardized data about indicia of misconduct should not be unreasonably onerous or costly for police departments. Many departments already collect much of the data on arrests, uses of force, internal administrative sanctions, and complaints, though not in a standardized format.¹⁰⁴ Departments that do not currently collect these data should be required to do so. Without these data the departments themselves cannot know whether misconduct is a serious departmental problem or ensure accountability for preventing misconduct. Other kinds of information used in developing the worst list might include a straightforward accounting of particular departmental policies and procedures—e.g., how many hours of handgun training officers receive each year, whether citizen complaints may be submitted over the

102. See, e.g., Stuntz, *supra* note 70, at 834 (“Data collection is the key. If adequate records of police stops and uses of force are kept, it should be possible to identify large-scale deviations from industry norms, and to target the offending police departments with injunctions like the ones the Justice Department has employed in § 14141 cases.”); *id.* at 834 n.264 (describing the proposition that data collection is essential as long-held conventional wisdom among police violence experts); see also NAT’L RES. COUNCIL, *supra* note 8 (advocating legislation requiring police departments to report shootings by officers); Adams, *Research*, *supra* note 98, at 63; Adams, *Measuring*, *supra* note 98, at 77-83; Armacost, *supra* note 16, at 531-32; William A. Geller & Hans Toch, *Understanding and Controlling Police Abuse of Force*, in *POLICE VIOLENCE*, *supra* note 16, at 292, 297-302 (describing the need for national data on the use of force, advocating improvements to the current national data collection system, and recommending improving and standardizing arrest reports, use of force reports, service calls, field contacts, and citizen complaint procedures to permit useful national data for comparing departments). There have been some voluntary efforts to create national databases on some aspects of misconduct, but the results have been limited. See, e.g., Henriquez, *supra* note 100, at 19-20 (describing development of voluntary and anonymous national use of force database by International Association of Chiefs of Police for quantifying types and uses of force by police).

103. Congress has considered similar proposals before. See 145 CONG. REC. 20,139-40 (1999) (amendment offered and withdrawn by Rep. Davis of Illinois that would make federal funding conditional on providing data to the Justice Department).

104. Presently, police departments use a variety of computer software programs to maintain internal data and these databases would make it difficult to export data to the Justice Department in compatible formats. The Justice Department could considerably ease the technical difficulties of collecting and reporting data by facilitating the development of flexible, low-cost software for collecting and reporting data and by providing technical assistance on the use of such software.

Internet, or whether a specific policy exists governing the use of canines during arrests. This information is easily available and reportable. While the Justice Department may also seek some types of data that police departments do not commonly collect to generate the worst list, such as reports on all pedestrian stops and frisks, the additional costs of collecting such information would not be overwhelming.¹⁰⁵

Clearly, the costs of collecting data for a worst list would fall on departments without significant patterns of misconduct as well as departments that are liable under § 14141. One might wonder whether the problem of police misconduct justifies imposing these costs on all police departments. However, without comparative data, we cannot know which departments are relatively “innocent” and we cannot evaluate the extent of the problem of misconduct nationwide. It is inconsistent to devote significant funds to § 14141 enforcement yet refuse to spend the resources on data collection necessary to make that enforcement rational and effective. Moreover, over time, the Justice Department may require more data from departments on the worst list than those that are not, lowering the costs for departments without substantial indicators of misconduct.

Relying on self-reported data creates the risk that the worst police departments will also fail to report data adequately.¹⁰⁶ This risk is certainly

105. Such information would also have secondary benefits to large departments interested in effective internal management and accountability. Notably, although the Justice Department has often advocated additional data collection as part of its recommended remedial measures, usually as part of an early intervention system, collecting and reporting for the worst list would be much less costly than creating such a system. The data required for an early intervention system is more extensive and must be searchable by a wider variety of fields. It must provide a way of flagging problems within the department, such as a squad that appears to use force too often, or a supervisor who fails to discipline the officers beneath him. This kind of data analysis requires a significant information technology infrastructure. *See supra* note 65 and accompanying text. The same is unlikely to be true for the data required by the Justice Department in a national reporting system. Such data need not be officer-specific and largely would involve disclosing policies and aggregating reports of events that satisfy particular criteria.

106. This risk may not be as great as it initially seems. Police departments may distort data in two separate ways: individual officers may fail to collect relevant data adequately, or administrative and supervisory officials may underreport the data. Much of the data a national reporting system would likely require, however, would be as useful to the department as it is to the federal government, making under-collection of the data self-defeating. *See Geller & Toch, supra* note 102, at 299. In addition, some forms of misconduct stem from institutional deficiencies that should not be correlated with weak data reporting. The use of excessive force, for example, may arise from poor supervision and tactical decision-making in crisis situations, from weak training on conflict avoidance, or from inadequate policies governing the use of force, but there is no reason to believe that a department with those deficiencies also permits officers not to report using force. If that correlation is absent, departments with those deficiencies may be no more likely to under-collect data negligently than departments without them. Once data are collected, police

familiar from other forms of regulation, where self-reporting is common.¹⁰⁷ As in other regulatory contexts, this risk is manageable, through consequences for intentionally false or negligent reporting and through mechanisms for verifying the data provided.¹⁰⁸ Thus, the Justice Department should monitor the submission of data and punish departments that fail to comply with mandatory data collection and reporting.

The problem of bad data, however, presents fewer challenges for regulators of police departments than it does for regulators of other entities because some false data reporting by police departments would be detectable at low cost. Much of the information the Justice Department would likely require of a police department is objective, verifiable, and sometimes already public. The number of civil suits, for example, can be checked against public records. Similarly, the number of suspects killed by officers is difficult to hide, and is already subject to reporting to the Justice Department.¹⁰⁹ The Justice Department could develop other means of verifying data as well: hospitals might be required to file reports when there is reason to believe that a patient's injuries were caused by law enforcement;¹¹⁰ and mechanisms might encourage

administrative officials and supervisors may be reluctant to risk individual liability to under-report data.

107. Many statutes go beyond this reporting scheme to require that actors report not only primary conduct, but violations of the law. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2064(b) (2006); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9603(b) (2006) (penalizing failure to report hazardous releases). *See generally* Louis Kaplow & Steven Shavell, *Optimal Law Enforcement with Self-Reporting of Behavior*, 102 J. POL. ECON. 583 (1994) (discussing the theoretical advantages of requiring self-reporting of violations and describing enforcement of self-reporting as manageable by lesser penalties for self-reported violations).

108. *See, e.g.*, 18 U.S.C. § 1001 (2006) (making it a crime punishable by up to eight years of imprisonment to willfully make a materially false representation in any matter within the jurisdiction of a federal agency).

109. *See* 42 U.S.C. § 13704 (2006), which conditions certain grant money on providing the Justice Department with information regarding the death of any person who is killed during the process of arrest or while incarcerated. This Act was implemented by the Justice Department's Death in Custody Reporting Program, which collects detailed quarterly information from prisons and jails around the country on arrest-related deaths. While the initial legislation expired, the Justice Department has continued the data collection as part of an ongoing statistical series of the Bureau of Justice Statistics. *See* U.S. Dep't of Justice, Office of Justice Programs, 2009-2011 Deaths in Custody Reporting Program: State Prisons and Local Jails Solicitation, <http://www.ojp.usdoj.gov/bjs/pub/html/dcrp09sol.htm> (last visited Oct. 10, 2009) (description of reporting program by the Office of Justice Programs). U.S. Representative Bobby Scott has introduced the Death in Custody Reporting Act of 2009 to reauthorize the 2000 Act, extend it to subjects of federal custody, and require the Attorney General to study how future deaths may be reduced. Death in Custody Reporting Act of 2009, H.R. 738, 111th Cong. (2009).

110. *See, e.g.*, 42 U.S.C. § 13031 (2006) (requiring professionals in federally operated facilities to report suspected child abuse).

citizens to file complaints with the FBI at the same time they file with police departments.¹¹¹ The Justice Department could use court arrest disposition records to check departmental reporting on officer arrests. The Justice Department may also find ways to enlist and empower local citizens to provide a check on departmental data. Finally, false reporting can be risky for police departments. Police departments providing bad data take the chance that they will misjudge the appropriate parameters of the data they submit. If they underreport by too much, they may well stand out against peer institutions, suggesting a problem rather than hiding one. Thus, the Justice Department can and should find many of the bad reporters and sanction them in order to induce good reporting.

Although I have argued that data are needed to use § 14141 to induce reform in the worst departments, data on existing misconduct are equally essential to ensure other approaches to § 14141 are effective. The Justice Department's current practice is reactive in much the same way as criminal prosecution. The Justice Department waits for allegations of a pattern of misconduct before it acts. It then determines whether the department is likely to be liable under the statute, and it makes its resource allocation decisions only among those likely-liable departments.¹¹² There is no reason to believe, however, that a complaint or referral to the Justice Department is a good indicator of the severity, frequency, or extent of misconduct in a police department. It seems more probable that complaints and referrals reflect the political salience of particular incidents of misconduct. Nor is there good reason to believe that the Justice Department's existing method of screening complaints—looking at public information for evidence to support allegations of a pattern of misconduct¹¹³—is effective at identifying the departments with the most serious patterns of misconduct. As a result, without additional data, there is little reason to believe that when the Justice Department allocates

111. The Justice Department already carries out a Police-Public Contact Survey. The survey questions a nationally representative sample of more than 60,000 individuals in order to obtain detailed information about direct contacts between police officers and the public, including whether force was used by the officer. Especially if expanded, it is a potentially useful source of data for verifying self-reporting by police departments. For a sample report of results from the survey, see MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC 2005, at 2 tbl.1, 7 & tbl.9 (2007) (indicating that, in 2005, 19% of Americans had direct contact with a police officer, force was used or threatened against 1.6% of them, and 83% of those felt the force was excessive).

112. U.S. Dep't of Justice, Special Litigation FAQs, *supra* note 40. According to the website, the Justice Department selects among departments with credible allegations of a pattern or practice of unconstitutional conduct by "consider[ing] a variety of factors, including the seriousness of the alleged misconduct, the type of misconduct alleged, the size and type of law enforcement agency, the amount of detailed, credible information available and the potential precedential impact." *Id.*

113. *See id.*

resources among the departments after preliminary assessment, it is choosing among the worst actors, those most easily fixed, or by any other principled criteria.¹¹⁴

Even once the Justice Department chooses to investigate a particular department, the absence of data on police departments nationwide currently undermines its efforts. Many departments are going to have some misconduct. Comparative data would enable the Justice Department to tell whether the level is disproportionate for the type of department and city.¹¹⁵ Police departments cannot easily eliminate all misconduct, and resources spent on remedial measures will not be spent on other programs. The Justice Department's credibility in mandating such expenditures depends in part on its capacity to distinguish comparatively severe patterns of misconduct from comparatively low-level misconduct, which might be addressable without substantial institutional change or may not be worth costly reform to address. Data are also essential to determine which reform efforts work, which are most cost effective, and which reforms promote—rather than undermine—crime control efforts. Thus, even *direct* reform requires national comparative data to be effective and efficient.¹¹⁶ We must incur the additional costs of expanding departmental reporting to the Justice Department in order to ensure that public resources employed to reduce misconduct are well spent, whether that effort maximizes compelled or induced reform.¹¹⁷

In addition to prioritizing types of misconduct, developing proxies for misconduct, and collecting data with respect to those proxies, formulating a

114. See Armacost, *supra* note 16, at 532 (“[M]andatory reporting is the only way to ensure that interventions like § 14141 suits are deployed against cases ‘other than the headline grabbers’” (footnote omitted)).

115. See *id.* at 531-32.

116. Of course, criticisms of the Justice Department's current practice are equally plagued by bad data. We do not know how many police departments have significant indicia of misconduct, so we do not know what percentage of those departments the Justice Department has sued. We do not know which police departments are engaged in the worst misconduct, so we cannot know if those suits are misdirected. It seems plausible that a number of dysfunctional departments remain, but we cannot know for sure. Without data, criticism of the Justice Department's § 14141 enforcement—like the enforcement itself—lacks a sound social science basis.

117. Presumably, if Congress does not authorize the Justice Department to require data collection and reporting or fund management of a national database, the Justice Department could nevertheless implement a kind of “worst-first” strategy based on the much more limited information now available. It could gather data on some indicia of misconduct during its preliminary assessments following complaints and then choose the apparently worst departments from among those about which it receives credible complaints. Some police departments do not collect the appropriate data, but the Justice Department could provide some incentive to do so by assuming that unreported information would indicate misconduct. This strategy would not identify the worst departments, but it would concentrate resources on what are likely to be the worst of those that come to the Justice Department's attention.

worst list requires fixing criteria for aggregating those measures into an ordinal ranking of departments. The Justice Department must make policy choices, including prioritizing some kinds of misconduct over others, deciding how to balance the pervasiveness of misconduct against its frequency and severity, and determining how to weigh the size of a department.¹¹⁸ So far, it appears that these concerns have been balanced largely based on intuition. By necessitating that these policy choices be self-conscious and explicit, the worst list would facilitate § 14141 enforcement that better serves the public interest.

Since a city placed on the worst list would face additional reputational costs and an increased expected cost of § 14141, cities would have a strong incentive to avoid the list. Although that incentive should motivate reform, there is a risk that some municipal actors will instead seek to decrease expected costs by lobbying to influence the Justice Department to keep it off the list. Were these actors successful, the worst list would not accurately indicate the large departments with the strongest indicia of misconduct.

Scholars have not generally argued that such lobbying has shaped the Justice Department's selection of § 14141 targets so far,¹¹⁹ and notably, the existing Justice Department practice for selecting departments for investigation or suit is much more vulnerable to politicization than the worst list. At present, there are no objective criteria for determining that suing one department will reduce misconduct or deter other departments more than suing another. Under political pressure, Civil Rights Division attorneys could choose one department rather than another, and no one either inside or outside the Justice Department could easily scrutinize that decision. Developing fixed criteria for a worst list based on data provides a basis for reviewing the decisions of the Special Litigation Section attorneys and should help insulate the worst list from political manipulation, even if the criteria and data are not fully public.

Of course, this advantage over existing practice does not mean that the worst list would never be subject to political influence. For one thing, the criteria on which the worst list is based may be manipulated to the benefit of some departments over others. But considerations of fairness simply do not apply to any department whose level of misconduct justifies its inclusion on the

118. For example, one might approach worseness by evaluating the severity and frequency of misconduct either per officer or for the whole department or by weighing both numbers. The first method would likely lead to a worst list heavily populated by small departments and the second by big departments. Suing a large department consumes more resources than suing a smaller one, but it often reaps the most rewards in direct misconduct reduction. On the other hand, the fewer departments the Justice Department sues, the slower the turnover on the worst list and the weaker the incentive for reform for departments below the top.

119. While Myriam Gilles has suggested that politics may have influenced the enforcement of the statute, she has not attributed this influence to this type of lobbying. *See* Gilles, *supra* note 9, at 1409-11.

worst list. Even if other worse departments avoid the list, the public benefits by incentivizing the departments with substantial indicia of misconduct to reform, and those departments have no grounds for complaint. Moreover, even if the worst list is imperfectly insulated from politics, it will still incentivize reform. If a few departments that might otherwise appear on a list of the fifty worst large departments manage to use political influence to avoid appearing on the list, those departments will presumably have less incentive to reform. But the fifty next worst departments will appear on the list, and they will have that incentive. As some of those departments move off the list through effective reform, other departments will take their places. Thus, even if the § 14141 is concentrated on the “almost worst” instead of the “worst,” it will do much to prevent significant misconduct nationwide. For these reasons, suing departments according to a worst list can make § 14141 enforcement more effective despite the risk of politicization.

Given a world of limited resources, § 14141 enforcement can generate only a limited incentive for police departments to reform proactively. Current enforcement practices dissipate that incentive, so much so that it is unlikely to influence departments to reform. A worst list, based on national mandatory reporting, along with a worst-first § 14141 litigation strategy, would concentrate the incentive on departments most in need of reform and shift that incentive to newly worst departments over time. Thus, this strategy will make reform more cost-effective for departments engaged in significant misconduct.

C. Increasing the Benefits of Reform

1. Why a safe harbor mechanism is useful

The second prong of the three-pronged § 14141 enforcement strategy proposed in this Article is a “safe harbor” mechanism that increases the benefits of proactive reform for police departments and by that means intensifies the incentive for meaningful reform in departments presently engaged in significant misconduct.

By placing the worst departments on a public list and announcing a policy of investigating these departments before any others, the Justice Department can raise the expected cost of liability for the worst departments and thereby induce them to adopt reforms to avoid the costs of § 14141. By themselves, however, the worst list and worst-first litigation policy are unlikely to be sufficient to induce widespread policing reform in most departments that are placed on the list. First, even with the added incentives of the worst list, some problematic departments will not find reform worthwhile. Reducing police misconduct is difficult, costly, and time consuming. As a result, even departments that aggressively pursue reform will take time—even years—to

reap the rewards of a lower p , especially when misconduct has its origins in long-standing structural conditions in a department. Yet, as § 14141 is presently structured, the expected costs of being sued pursuant to § 14141 are capped at the sum of the costs of the remedies that would be imposed as a result of litigation, the transaction costs, and the reputational costs of a § 14141 investigation. If engaging in reform only slowly lowers the probability of being sued over a period of years, the expected costs of being sued are limited, and yet reform requires significant expenditures, then police departments with the most serious and resilient misconduct problems might find it cost-effective to wait to be sued under § 14141 rather than to engage in proactive reform.

Second, even when police departments pursue reforms, they may do so ineffectively. Often, police departments cannot easily determine the most cost-effective means of reducing the risk of misconduct. They have superior local knowledge regarding, for example, which officers commit the most misconduct and what kinds of misconduct are prevalent, but they frequently do not have the expertise necessary to identify the most probable institutional causes of misconduct, or to develop reforms that successfully address those causes. Unfortunately, experience in policing does not necessarily produce expertise on reducing misconduct. Reducing misconduct requires specialized knowledge about departmental reforms, and that knowledge is constantly evolving. As a result, even if the threat of § 14141 litigation spurs departments to undertake reform, left to their own devices, these departments may not choose the best reforms or implement their chosen reforms effectively.

For these reasons, the worst-first strategy for raising the expected costs of § 14141 to induce reform should be paired with a means of specifying appropriate reforms for police departments and rewarding departments immediately for making those changes.¹²⁰ Specifically, the Justice Department should develop a “safe harbor” policy. The Justice Department should design a set of standardized remedial measures and publicly adopt the policy of refraining from investigating or suing any department that adopts those measures proactively, even if that department would otherwise appear on the worst list because of its indicia of misconduct. Because the Justice Department has exclusive authority to bring § 14141 suits, when it grants a “safe harbor” to a department, it eliminates the possibility that the department will be sued under § 14141 and thereby lowers the expected costs of § 14141 for that

120. Cf. STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 281-82 (1987) (noting that while injurers often have the natural advantage in knowledge, “in certain contexts information about risk will not be an obvious by-product of engaging in activities but rather will require effort to develop or special expertise to evaluate. . . . A social authority may learn about such risks by committing resources to the task . . . whereas injurers may have an insufficient motive to obtain information . . .” and suggesting that in those cases *ex ante* regulation will be superior to *ex post* liability in reducing harm).

department.¹²¹ By providing an early and dramatic reward for genuine reform efforts, a safe harbor mechanism would make preferred reforms more appealing for departments with serious misconduct. In addition, by providing and rewarding the adoption of a set of remedial measures that reflects the Justice Department's considerable expertise in reducing misconduct, a safe harbor mechanism would promote effective reform.

A safe harbor mechanism also would amplify the positive effects of the worst-first strategy by creating a cascade of reform. A worst-first enforcement strategy incentivizes police departments slowly because departments move off the worst list only when they are sued or successfully eliminate indicia of misconduct. A safe harbor provision changes that. The Justice Department would remove a department from the worst list as soon as it satisfies the requirements of the safe harbor. Assuming the safe harbor requirements are substantial, as they should be, this process would not be instantaneous. But a police department should be able to earn safe harbor status more quickly than the department could eliminate indicia of misconduct or than the Justice Department could investigate and sue. Thus, there would be additional movement off the worst list (bringing other departments onto the list) as police departments near the top earn a safe harbor.

Because departments on the list cannot know how quickly a department above them may earn a safe harbor, they would have an incentive to begin minimizing misconduct or working towards a safe harbor as soon as they appear on the worst list. In this way, the safe harbor increases the incentive for departments on the list to reform. As these departments adopt reforms, the Justice Department would remove them from the list and replace them with other departments. This dynamic would result in a cascade of reform, as departments on the list adopted reforms to avail themselves of the safe harbor and new departments replaced them on the worst list. While this reform cascade would use resources more efficiently than pursuing direct reform exclusively, it would still be constrained by resources: the greater the expected

121. As suggested here, the § 14141 safe harbor would be more like a publicly-stated prosecution policy than a legally binding regulation for the Justice Department. Compare the Petite policy, a Justice Department policy limiting the circumstances in which prosecutors may bring charges against individuals already charged by the state for the same acts, *see, e.g., Rinaldi v. United States*, 434 U.S. 22, 27-28 (1977) (describing Petite policy as a form of "self-restraint" that "limits the federal prosecutor in the exercise of his discretion to initiate, or to withhold, prosecution for federal crimes" after local prosecution, despite federal legal authority to bring charges), with SEC Rule 175, which shields companies from legal liability for forward-looking statements made in good faith, *see* 17 C.F.R. § 230.175(a) (2008). The advantage of this weaker version of a safe harbor is that it likely requires no new authorization, only the Justice Department's judicious exercise of discretion in litigating under § 14141. A stronger safe harbor might create somewhat stronger incentives, but it would require additional legislation and might reduce the Justice Department's flexibility in refining the safe harbor over time.

costs of being sued under § 14141, the more incentive a department would have to spend resources to earn a safe harbor to avoid that fate. Thus, the resources the Justice Department devotes to suing departments at the top of the worst list would help determine how quickly other departments on the list reform, how quickly new departments are placed onto the worst list, and therefore how far the § 14141 incentive effect spreads beyond the worst few departments.

The safe harbor is the primary mechanism proposed here for rewarding reform, but the Justice Department should also reward proactive reform efforts that do not earn the safe harbor. Some problematic departments may find common departmental reforms, including those required to qualify for the safe harbor, to be particularly costly because, for example, they have an underdeveloped information technology capacity or because institutional deficiencies are particularly entrenched in those departments. If the safe harbor provision is the exclusive mechanism for rewarding reform efforts, such departments may refrain from adopting any reforms, even when placed on the worst list, because they will be unable to qualify for a safe harbor and any reform efforts they undertake may hold out little prospect of lowering their objective indicia of misconduct sufficiently to lead the Justice Department to remove them from the list.

To provide an incentive for such departments to adopt reforms, the Justice Department should reward proactive reform efforts or other cooperation in three circumstances that fall short of qualifying for the safe harbor: reforms that approach, but do not satisfy the safe harbor requirements;¹²² reforms that are adopted proactively by a department after the Justice Department commences an investigation of it; and cooperation by departments with the Justice Department in the form of self-reporting a substantial pattern of misconduct and voluntarily undertaking a meaningful commitment to reform.¹²³ The Justice Department could reward departments that reform or cooperate in these ways, not by lowering p , as it does in the safe harbor, but by permitting lower cost resolutions of investigations of these departments, thereby lowering c . For example, the Justice Department might agree to enter into a memorandum of agreement that imposes lower transaction and monitoring costs on a department

122. See generally Robert Innes, *Self-Policing and Optimal Law Enforcement When Violator Remediation Is Valuable*, 107 J. POL. ECON. 1305 (1999) (arguing that lowering sanctions for violators that undertake measures to reduce harm before they are caught can be an efficient means of achieving early remediation and reducing additional harm for the same governmental expenditure that monitoring resources requires).

123. See Polinsky & Shavell, *supra* note 78, at 66 (noting that “[s]elf-reporting can be induced by lowering the sanction for individuals who disclose their own infractions. Moreover, the reward for self-reporting can be made small enough that deterrence is only negligibly reduced” and “self-reporting lowers enforcement costs because, when it occurs, the enforcement authority does not have to identify and prove who the violator was”); see also Kaplow & Shavell, *supra* note 107, at 584.

that engages in some reform, rather than demanding a consent decree. Consent decrees might then be reserved for the Justice Department's more reluctant reform partners. By publicizing its policy of rewarding these other types of proactive steps, the Justice Department can incentivize additional proactive reform even outside the safe harbor structure.

2. *How a safe harbor works*

The safe harbor mechanism would offer police departments the opportunity to adopt a set of reforms as a cost-effective means of reducing the expected costs of § 14141. Such a mechanism makes sense only if three conditions are met. First, the safe harbor must sufficiently reduce the expected costs of § 14141 to attract police departments to choose reform rather than risk suit. Second, the reforms must be robust enough to achieve meaningful institutional improvement. Third, it must be possible to monitor police departments and enforce the safe harbor requirements at a reasonable cost.

The expected cost of § 14141 for a municipality is at least p —the probability that it will realize the costs of § 14141—multiplied by c —the realized cost that a department expects to face if it is investigated and sued.¹²⁴ The safe harbor effectively raises p to 1 for departments qualifying for it, because it ensures that the police department will realize the costs of § 14141. However, entering the safe harbor nevertheless lowers the expected costs of § 14141, because it eliminates all investigation, litigation, settlement, and reputational costs of being investigated and sued by the Justice Department. As a result, so long as the reforms are no more costly than those imposed when the Justice Department sues a police department, the safe harbor will be worthwhile to departments facing a high p , that is, departments high on the worst list.

The Justice Department can expand the appeal of the safe harbor to additional departments, those with a lower p , by lowering the costs of the reforms it requires in the safe harbor below the costs of reforms it might demand after an investigation and suit. This is possible because there are a variety of appropriate remedial measures that reduce systemic misconduct, and they vary in cost.¹²⁵ The Justice Department should be attentive to both cost and effectiveness in developing its safe harbor requirements. For example, early intervention systems vary in the number and kind of data fields they require, even within the Justice Department's own § 14141 practice.¹²⁶ Even if

124. *See supra* note 83.

125. *See supra* note 91 and accompanying text.

126. *Compare* United States v. City of Detroit, No. 03-72258, para. 80 (E.D. Mich. July 18, 2003) (order entering consent decree), *text available at* http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_uofwdcd_613.pdf (requiring

the Justice Department often demands many data fields in early intervention systems developed pursuant to a consent decree or a memorandum of understanding, including some that address department-specific issues, the mandated reforms for a safe harbor should require only those data fields calculated to be most helpful in most departments.¹²⁷ By demanding reforms, the Justice Department can achieve meaningful change in police departments that seek the safe harbor. By minimizing the cost of those reforms, the Justice Department can maximize the benefit and therefore the appeal of its safe harbor.

Promoting proactive reform by granting a safe harbor to departments that adopt favored reforms inevitably puts substantial weight on the quality of the Justice Department's set of favored reforms. If the Justice Department chose its remedial measures carelessly, a safe harbor policy would encourage municipalities to expend resources but would not significantly reduce misconduct. Fortunately, the Justice Department is institutionally well situated to be an excellent source of information on effective remedial measures. In most cases, the Justice Department is better positioned than police departments to identify cures for misconduct in a manner that is cost-effective and consistent with law enforcement goals. Section 14141 enforcement itself presents an opportunity to develop and refine this expertise. More broadly, the Justice Department is the primary enforcer of both civil and criminal federal civil rights laws governing law enforcement.¹²⁸ It has also long engaged in research, training, and technical assistance to local law enforcement on best policing practices, including those that affect civil rights. These activities give the Justice Department a firm foundation for understanding and refining over time the institutional causes of systemic misconduct and developing reforms that both protect civil rights and promote effective law enforcement.

Not only is the Justice Department well prepared to identify best practice reforms, but in developing effective remedial measures for a safe harbor, the Justice Department need not rely exclusively on its own expertise. The Justice Department should welcome input about remedial measures from a broad range of experts and stakeholders, as it has in the past. Moreover, a safe harbor mechanism may itself provide a means for generating innovative reform approaches. The safe harbor could be structured to allow a police department to

twenty-six data fields), *with* Mt. Prospect MOA, *supra* note 57, para. 22 (requiring fourteen data fields), *and* Miami Letter, *supra* note 62, at 19 (suggesting four data fields).

127. Having more data fields does not necessarily improve an early intervention system. Additional fields can be costly to collect and be more technologically complex to maintain and use. To the degree this complexity overwhelms the capacity of the department, additional fields may have the effect of making an early intervention system too costly, cumbersome, or complicated to work at all.

128. *See, e.g.*, 18 U.S.C. §§ 241-242 (2006); 42 U.S.C. §§ 2000d, 3789d (2006).

propose an alteration to the set of favored reforms based on a new remedial idea. If the reform looked promising, the Justice Department could grant the safe harbor, conditional perhaps on some additional monitoring. While allowing generous alterations to the standard reforms would increase monitoring costs, those additional costs might be worth paying in order to achieve innovation in reform. In this way, the Justice Department can also use § 14141 to improve its own expertise in reducing misconduct and make future § 14141 enforcement more effective.¹²⁹

Finally, in order for a safe harbor mechanism to ensure meaningful reform, the Justice Department must put in place a vigorous system for monitoring and verifying progress on proactive reforms. This monitoring scheme is essential to ensuring that police departments are not exempted from investigation and suit for superficial reform. There is a significant difference between adopting a remedial measure and implementing it in a meaningful way.¹³⁰ For example, a police department may say that it has an early intervention system, but it may collect data irregularly or fail to generate and analyze reports on officer misconduct. Monitoring will require departments to report on their safe harbor compliance to the Justice Department. The Justice Department must then review and verify information in the reports, including occasional brief site visits to departments, to ensure that departments are implementing as well as adopting safe harbor reforms.

D. The Costs of Inducing Rather than Compelling Reform

This Article argues that the Justice Department can induce proactive reform by announcing a policy of investigating the departments it places on a worst list in order to raise the expected costs of misconduct for those departments and by granting departments that adopt favored reforms a safe harbor from investigation and suit in order to raise the expected benefits of reform. Adopting worst-first and safe harbor policies would lead some problematic departments to adopt reforms in order to reduce the expected costs of § 14141. Since reform can also be achieved as it is achieved now—by simply suing some departments—the argument in favor of these policies is premised on the claim that they would be more efficient than current practice. There is good reason to believe this is the case. As explained above, using § 14141 to investigate, sue, and monitor a police department is extremely costly

129. In structural reform litigation more broadly, private plaintiffs associated with advocacy groups are often repeat players and significantly influence the reforms imposed by courts. While private suits have had some influence on the Justice Department's § 14141 practice, private actors have few of the Justice Department's distinctive advantages in developing remedial measures and improving them over time in the context of policing.

130. See Walker, *supra* note 68, at 29.

for the Justice Department.¹³¹ The strategy for inducing proactive reform proposed here is likely to be less expensive for the Justice Department to implement than its current approach of directly compelling departments to reform.

First, inducing proactive reform saves considerable resources currently spent on detecting and investigating § 14141 violations. Before the Justice Department can coerce reform in a department under § 14141, it must determine whether a pattern or practice of misconduct exists in that department. Proactive reform occurs when a police department has sufficient incentive to adopt reforms before it is investigated or sued. When a department reforms proactively, the Justice Department does not incur the expenses of initiating and executing a full investigation because it need not establish liability. Whatever expenses the Justice Department incurs in verifying and overseeing departments that claim to have adopted reforms proactively would necessarily be far lower than the expenses they would incur in launching a full-scale investigation of a department that has not initiated reform on its own.

Second, even putting aside the costs of detecting a violation, investigating and suing a department is more expensive for the Justice Department than inducing it to reform by raising its expected § 14141 costs. As suggested above, under the worst-first strategy, the Justice Department would threaten to sue departments on the worst list in order. If credible, this threat would raise the expected costs for departments on the list, thus encouraging reform. The Justice Department would sue some departments, thereby incurring investigation and litigation costs in those cases, in order to maintain the credibility of its threat. Because of the threat implied by the policy, each such suit would generate reform in the sued department and also in additional departments on the list that have not yet been sued, at little additional expense to the Justice Department. Under the current § 14141 litigation strategy, departments that have not been sued are unlikely to be motivated to reform in the face of a suit against a peer department: without a reliable means of predicting which departments will be sued in the future, each suit against a department only trivially raises the expected costs for other departments. The worst-first strategy does impose the additional costs of formulating the worst list.¹³² But the cost of generating the list would likely be substantially less than the cost of suing the departments that adopt reforms without being sued under the worst-first policy. Thus, relative to the same resource base, a worst-first litigation strategy would generate more

131. See *supra* notes 46-48 and accompanying text.

132. I do not include as an additional cost of a proactive strategy the costs to police departments of collecting data on misconduct because as described above, see text accompanying notes 8, 112-116, such data are essential to any coherent use of § 14141 to reduce misconduct.

reform than the current strategy.¹³³

Third, raising the benefits of reform through a safe harbor mechanism would increase reform further without adding significant additional expense. The safe harbor provision is intended to make the worst-first policy significantly more efficient by inexpensively raising the expected benefits of reform for departments that proactively adopt reforms. Rewarding police departments that adopt favored reforms costs very little, because it requires only that the Justice Department establish a set of reforms and refrain from suing those departments that undertake them. As noted above, the Department of Justice has already built its § 14141 practice around a core set of reforms.¹³⁴ While tailoring reforms to local conditions is resource-intensive, developing a uniform set of proactive reforms for a safe harbor program would require only that the Justice Department distill the most universally applicable and cost-effective remedial measures from the reforms it has previously imposed on departments.

While developing reforms for the safe harbor does not require significant resources, creating an effective safe harbor mechanism also requires that the Justice Department ensure that only departments that effectively implement required reforms in good faith receive the benefits of the safe harbor. Although the cost of providing monitoring adequate to ensure such implementation may be considerable, it should be significantly less on average than the monitoring costs imposed on police departments during § 14141 suits.¹³⁵ Consent decrees

133. Presumably, if resources devoted to § 14141 dropped below the level necessary to maintain a worst list and create a credible threat of suit to some departments on it, then existing § 14141 litigation strategy would be more efficient than the worst-first policy per department, though under such conditions neither strategy would achieve much reform.

134. See, e.g., *United States v. City of Steubenville, Ohio*, C2-97-966, paras. 12-81 (S.D. Ohio Sept. 4, 1997) (order entering consent decree), *text available at* <http://www.usdoj.gov/crt/split/documents/steubensa.htm> (recommending changes for improved data collection, management and supervision, training, and complaint and investigation procedure); *United States v. City of Pittsburgh*, No. 2:97-cv-00354-RJC, paras. 12-69 (W.D. Pa. Jan. 17, 1997) (order entering consent decree), *text available at* <http://www.usdoj.gov/crt/split/documents/pittssa.htm> (same); Buffalo MOA, *supra* note 58, paras. 14-52 (recommending changes for improved data collection, management and supervision, training, and complaint and investigation procedure); Cincinnati MOA, *supra* note 58, paras. 12-108 (same); Alabaster Letter, *supra* note 61, at 5-12 (encouraging the improvement of policies, training, and data collection on use of force); Letter from Steven H. Rosenbaum, Chief of Special Litig. Section of the Civil Rights Div., to Subodh Chandra, Dir. of Law Dep't of Cleveland, Ohio (July 23, 2002), *available at* http://www.usdoj.gov/crt/split/documents/cleveland_uof.pdf (same).

135. In the past, § 14141 consent decrees and memoranda of agreement have imposed the monitoring costs on the police departments. A safe harbor mechanism could equally require that such costs be borne by participants. Whether the safe harbor is an efficient way of improving social welfare, however, is driven by the total amount of these costs rather than by their distribution.

and memoranda of agreement require monitoring for compliance with case-specific reforms, usually carried out by an independent auditor hired to assess and report on the police department on an ongoing basis. A safe harbor, however, requires uniform remedial measures, which can be designed in part to promote efficient monitoring. Departments would be required to report regularly and in detail on their progress implementing the required remedial policies and procedures, but this reporting should not be very costly. The Justice Department would audit these reports, use external sources to verify their results, and conduct site visits to deter fraudulent reporting. Some areas of reform are objectively verifiable: either a department has engaged in training officers on new policies or it has not. Others, such as whether the department is consistent in its data collection efforts, would require little more than a brief site visit by a Justice Department attorney to confirm compliance with relative certainty. Thus, the monitoring of proactive departments would also be less costly than the individualized monitoring that results from compelled reform.

For all of these reasons, the Justice Department can likely employ the same resources indirectly to induce reform in more departments than it can reform by direct investigation and suit. As a result, a § 14141 policy aimed at maximizing proactive reform would make more efficient use of Justice Department resources than a policy designed exclusively to maximize reforms imposed coercively by suit.

E. *Section 14141 Enforcement and Agency Costs*

In applying deterrence theory to police misconduct, this Article has so far treated a city and its police department as a unified rational actor who decides whether to adopt police department reforms on the basis of a single utility function ranging over misconduct and reform. In reality, of course, there are several important individuals, institutions, and constituencies that constitute a municipality for these purposes, including the police chief, the city attorney, the city manager, the elected mayor, the elected council members, interest groups, and members of the public.¹³⁶ All of these actors have different utility functions and experience different costs and benefits from misconduct and reform. And all will attempt to maximize their individual utility. Thus, treating

136. The relevant actors and their relationships to one another vary with the structure of the local government. In a mayor-council government, which usually occurs in the smallest and the largest municipal governments, the mayor or the council will have authority to appoint and dismiss the police chief, and will prepare the police department's budget. *See* 2A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 9.17 (3d ed. 1979). In a council/city manager government, those responsibilities will usually rest with a professional city manager, though the budget will be approved by the council. *Id.* at § 9.21; DAVID R. MORGAN ET AL., *MANAGING URBAN AMERICA* 68-71, 81 (6th ed. 2007).

municipalities as a single actor assumes away complexity.

For the most part this complexity should not significantly affect the implementation of this proactive approach to § 14141. For example, cities have difficulty making credible threats and commitments because the city decision-makers who reap the benefits of any contracts and pay the costs of violating agreements change over time. But lawmakers and scholars nonetheless have devised and implemented numerous regulatory schemes that govern cities despite this fact. There is no reason to believe this problem would be more likely to undermine the success of the § 14141 strategy proposed here than it would be to undermine these other manifold regulatory enterprises.

The problem of agency costs is another matter. It is well understood that the interests of an agent are not perfectly aligned with the interests of its principal.¹³⁷ In a municipality, the citizens are a collective principal, and elected and appointed officials are the public's agents. Legal and political mechanisms attempt to reduce the agency costs suffered by the public by compelling these agents to internalize the costs and benefits of their official conduct: a mayor may be voted out of office if he raises taxes or cuts services to pay for a civil settlement.¹³⁸ A police chief may be fired by the mayor or city council if he fails to adopt reforms that prevent the incidents leading to such a settlement. But those mechanisms are hardly foolproof. Often the economic and social costs and benefits to a city are not translated efficiently into economic and political costs for the individual governmental actors, and in other cases, financial, reputational, and professional costs and benefits to agents do not accrue efficiently to the city.

Agency costs for a municipality may sometimes be substantial, so much so that Daryl Levinson has argued that imposing financial costs on municipalities is an ineffectual—perhaps even perverse—tool for incentivizing government actors to reduce police misconduct.¹³⁹ In this view, financial payouts by the government do not result in commensurate political costs for government actors. As a result, government actors may undervalue the costs to a city of payouts to victims of misconduct.¹⁴⁰ If this is true, it would follow that § 1983 suits are a largely useless means of attempting to achieve police reform: cities will pay settlements, but this will have little influence on the mayor, the police chief, or other actors who may shape the individual officers' incentives to engage in or avoid misconduct. Even if the problem is not as severe as

137. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-09 (1976).

138. See Robert J. Barro, *The Control of Politicians: An Economic Model*, 14 PUB. CHOICE 19 (1973) (describing political agency problem, and elections as a means of controlling political agents).

139. Levinson, *Making Government Pay*, *supra* note 21, at 356-57.

140. *Id.* at 355-56.

Levinson suggests, agency costs clearly limit the value of § 1983 as a deterrent.¹⁴¹

The effectiveness of § 14141, by contrast, is not undermined by this kind of agency problem. Unlike § 1983, § 14141 imposes direct political costs on local government agents. Even if a police chief sees liability payouts as simply “a cost of doing business,”¹⁴² a cost he need not account for or control, he is not going to be equally sanguine about a federal takeover of his department. A police chief subject to ongoing federal supervision suffers reputational costs and a reduced ability to enact his preferences and serve his personal interests. He also loses political power in relation to other local actors, including both elected officials and special interest groups. Thus, even if a chief would find reform insufficiently worthwhile absent § 14141, § 14141 can change that calculus and make civil rights a priority for such a chief. Because § 14141 is so intrusive, mayors and police chiefs will experience the costs of § 14141 more acutely than the municipality as a whole. Thus, rather than faltering on agency costs, § 14141 can be viewed as a device that ameliorates agency costs by translating the costs of unsound police department policy and the benefits of sound policy reforms into costs and benefits borne directly by the political actors responsible for making those policy decisions.

This notable advantage with respect to agency costs arises because § 14141 authorizes equitable relief. The advantage exists as much under the current enforcement strategy of compelling reform directly as under the proactive enforcement strategy advocated in this Article. However, the current direct enforcement strategy is nevertheless limited as an effective deterrent by another aspect of the agency problem for municipalities, one that the proactive enforcement strategy advanced here overcomes. Reforming a police department as a means of lowering misconduct and thereby avoiding the expected costs of § 14141 is a long-term investment. Improving a police department takes time and money. Unfortunately, public officials heavily discount future costs and benefits because they may be out of office when those costs and benefits are felt, whereas the near-term costs and benefits will often dictate their political futures.¹⁴³ For this reason, even if the Justice Department raised substantially the number of departments it sued, its present enforcement strategy would be unlikely to encourage the kind or amount of reform needed to prevent misconduct.

Enforcing § 14141 as proposed in this Article avoids this agency problem

141. See *supra* notes 21-24 and accompanying text.

142. U.S. COMM’N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES 133 (1981) (quoting Philadelphia city solicitor as describing civil damages as a “cost of doing business” (internal citation omitted)); see also Armacost, *supra* note 16, at n.117 and accompanying text.

143. See Barro, *supra* note 138.

as well as the one that appears to plague § 1983. By publicly naming bad departments, a “worst-first” litigation strategy makes police chiefs and mayors pay immediate political costs for permitting misconduct. At the same time, a safe harbor mechanism gives immediate benefits to police chiefs and mayors for spending present resources to reduce misconduct in the future. The litigation strategy advocated here therefore brings forward the costs of misconduct and the benefits of reform and increases the incentive effect of § 14141, especially for agents.¹⁴⁴ In this way, this Article’s proposal leverages a unique advantage of § 14141—its ability to impose costs directly on the agents who control systemic change—without incurring the time-related agency costs that other approaches to § 14141 may entail.

F. Lowering the Costs of Reform

This Part has proposed a § 14141 enforcement strategy that increases the expected costs for a police department of allowing misconduct and increases the benefits of engaging in reform. Through its § 14141 enforcement efforts and in its other programs, the Justice Department might also lower the costs for police departments of adopting remedial measures. Like raising the benefits of those measures, lowering their cost makes reform a more cost-effective means of reducing the expected costs of § 14141 for police departments, and therefore incentivizes that reform.

Some costs of reform are difficult to mitigate. The information technology and data collection required for an early intervention system, the costs of training officers on a use-of-force continuum or de-escalation techniques, and the costs of establishing an independent internal affairs component in a

144. In enforcing § 14141, the Justice Department could also take advantage of agency costs to further incentivize reform by providing additional rewards to police chiefs and mayors that embrace proactive reform. For example, the Justice Department could develop an accreditation program that recognized “best departments” to supplement its § 14141 policy targeting worst ones. An accreditation program would generate additional political and professional benefits for police chiefs and reputational benefits for mayors in cities that exceed federal civil rights standards for liability in reducing misconduct and meet specific measures of success. Such accreditation is now carried out by many states and the Commission on Accreditation for Law Enforcement Agencies. A similar federal program has been proposed in the past. *See* Law Enforcement Trust and Integrity Act of 2000, H.R. 3927, 106th Cong. (2000) (directing the Attorney General to develop national accreditation standards for law enforcement agencies).

Accreditation is a way of rewarding and thereby encouraging professional excellence in police departments. Most accreditation mechanisms incentivize the best departments, the ones that are nearest to meeting the credentialing standards set out by the accreditation agency, rather than the departments most in need of reform. As a result, although such a mechanism may be a useful supplement to § 14141, it would be ineffective at addressing the problem of systemic misconduct in police departments nationwide.

department are not easy to reduce. The Justice Department, however, has substantial control over one aspect of the costs of reform. Police departments must identify misconduct, determine what problematic practices contribute to the misconduct, choose reform measures, tailor those measures for the department's circumstances, and implement and monitor reforms. Each of these tasks requires expertise that police departments are unlikely to possess. Thus, the Justice Department can most easily reduce the costs of reform by reducing information costs for police departments. Lowering the information costs of reform requires two tasks: (1) developing the relevant information on what causes and cures misconduct and (2) disseminating it to police leadership in a manner that facilitates departmental reform.

Some consensus now exists about the institutional deficiencies that cause misconduct and what remedial measures cure it.¹⁴⁵ But departments need more information about which remedial measures work best in different kinds of departments and how to best implement those measures. Thus, the Justice Department should work aggressively to promote research on the causes of misconduct and the effectiveness of reforms. Already, the Justice Department works through the Office of Justice Programs (OJP) to facilitate some research on policing practices that affect civil rights.¹⁴⁶ Unfortunately, weak data presently limit these efforts.¹⁴⁷ Over time, however, the mandatory data collection and reporting system for police departments described above and data from the safe harbor mechanism will help to improve the social science evidence on institutional deficiencies and the efficacy of various remedial measures.¹⁴⁸ Thus, research on policing best practices is the foundation for lowering the information costs of reform for police departments, and that research would be improved by the § 14141 data collection advocated here.

The Justice Department can also use both its § 14141 enforcement and other non-litigation activities to communicate to departments about how to

145. See Walker, *supra* note 68, at 6.

146. See 42 U.S.C. §§ 3711-3715a (2006). The Office of Justice Programs partners with local justice communities in providing training, grants, and assistance. See U.S. Dep't of Justice, Office of Justice Programs, Mission and Vision, <http://www.ojp.usdoj.gov/about/mission.htm> (last visited Sept. 8, 2009).

147. With respect to improving data on misconduct, the Justice Department has not used even its existing resources to maximum effect. For example, the Justice Department's voluntary data collection about police practices and police-citizen interactions through the *Law Enforcement Management and Statistics Survey*, the *Census of Law Enforcement Training Academies*, and the *Census of State and Local Law Enforcement Agencies* does not presently include many areas of inquiry that would be helpful to promoting policing reform. See, e.g., DUROSE ET AL., *supra* note 111; REAVES, *supra* note 9, at 8; REAVES & HICKMAN, *supra* note 100; BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2006, at 11 (2009).

148. Of course, the research can also help to refine § 14141 enforcement by, for example, strengthening the indicia of misconduct used to formulate the worst list.

prevent misconduct; that is, to disseminate the information it develops. Because it has the exclusive authority to bring suit, the Justice Department plays a central role in drafting every consent decree and memorandum of agreement used to resolve a § 14141 investigation. By crafting decrees and agreements in an accessible form, framing remedial measures in terms that are applicable to many departments, and making them public, the Justice Department can use—and already has used—§ 14141 enforcement itself to communicate its priorities with respect to police misconduct, the kinds of institutional conditions that lead to those kinds of misconduct, and what the Justice Department sees as the most promising reforms in different types of departments.¹⁴⁹ Of course, the reforms required for a safe harbor could further reinforce that message.

The Justice Department can also reduce information costs for police departments by providing technical assistance to departments regarding how to implement best practices for reducing misconduct. The Justice Department has already produced materials for police departments outlining best practices that can assist police departments in avoiding § 14141 suits by reducing civil rights violations.¹⁵⁰ The Justice Department should engage in similar efforts in the future, continuing to use its extensive relationships with non-profit organizations that promote police professionalism to create and distribute these materials.¹⁵¹ The Justice Department should also take advantage of its interaction with local law enforcement departments to provide additional information about promoting civil rights. For example, the FBI trains many police officers, supervisors, and chiefs at its National Academy and Field Police Training Program.¹⁵² The FBI's training programs should be refined to

149. See *supra* text accompanying notes 63-68; *infra* text accompanying notes 170-174.

150. See INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 13; U.S. DEP'T OF JUSTICE, *supra* note 1 (summarizing principles for promoting police professionalism with respect to uses of force, citizen complaints, internal management and accountability, data collection, and recruitment and hiring); WALKER ET AL., *supra* note 13; U.S. Dep't of Justice, Special Litigation FAQs, *supra* note 40 ("The Civil Rights Division has found that law enforcement agencies that have designed, implemented and enforced an effective program to prevent, detect, and ensure accountability for incidents of misconduct and other civil rights violations are unlikely to violate the pattern or practice statutes. The Department of Justice has helped focus attention on these issues through the publication in January 2001 of a guide to 'Principles for Promoting Police Integrity' with examples of promising police practices and policies." (citation omitted)).

151. *Protecting Civil Rights* was produced by the International Association of Chiefs of Police through a grant by the Justice Department. OJP and the National Institute of Justice provide funding to IACP and a variety of other non-profit organizations that provide technical assistance and training to police departments in order to promote best practices in policing. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 13, at 25 n.22.

152. The Federal Bureau of Investigation provides training to local police officers through both its National Academy, which "provides college-level training to mid-level state, local, and foreign police officers" at the FBI Academy in Quantico, Virginia, and the

reinforce the Justice Department's message on police reform.

Improving and communicating the state of knowledge about the most effective means of protecting civil rights require effectively coordinating efforts within the Justice Department. In particular, the Special Litigation Section of the Civil Rights Division, which enforces § 14141, must coordinate with OJP, which conducts, funds, and facilitates the Justice Department's research efforts on police practices, and the FBI, which trains officers. Effective coordination would promote real efficiencies for the Justice Department by ensuring that the data collected would be useful for assessing departments and improving knowledge. Moreover, such coordination would ensure a unified message on policing reform from the Justice Department.¹⁵³ Even with coordination costs, however, lowering information costs for police departments should be inexpensive. Compared to the other common means of preventing misconduct, which are costly, developing and disseminating information on best practices is a relatively cost-effective and non-intrusive means of inducing reform. It should therefore be an important component of federal efforts to reduce police misconduct in the United States.

Scholarly attention to § 14141 has focused exclusively on its capacity to impose reform on police departments by suing them. As this Part demonstrates, the Justice Department can use § 14141 and its other programs to do much more. Section 14141 can be used strategically to shape the incentives of police departments to reform proactively. Specifically, the Justice Department can maximize proactive reform by raising the expected costs of engaging in

Field Police Training Program, which "provide[s] training assistance at local, county, and state law enforcement training facilities to improve the investigative, managerial, administrative, and technical skills of local officers." Federal Bureau of Investigation Frequently Asked Questions, <http://www.fbi.gov/aboutus/faqs/faqone.htm> (last visited Aug. 30, 2009). Similarly, the Federal Law Enforcement Training Center, a part of the Homeland Security Department, provides basic and advanced training for local law enforcement agencies throughout the country. It too should be part of the federal effort to reduce police misconduct by lowering the cost of reform.

153. This coordination might best be achieved through a policing czar, perhaps in the Associate Attorney General's office or the Deputy Attorney General's office. Currently, the *United States Attorneys' Manual* states that Civil Rights Division civil sections coordinate their work with the Division's Criminal Section, the Office of Justice Programs, and the Office of Community Oriented Policing Services, *see* UNITED STATES ATTORNEYS' MANUAL, *supra* note 41, at 8-2.241, but it is not clear how well that coordination works or how it is facilitated outside the Civil Rights Division. The problem of coordinating federal efforts to reform police departments has been recognized before. *See* Law Enforcement Trust and Integrity Act of 2000, H.R. 3927, 106th Cong. § 801 (2000) (proposing a "Task Force on Law Enforcement Oversight" with members from the Special Litigation, Criminal, Employment, Disability Rights, and Coordination and Review Sections of the Civil Rights Division, the Office of Justice Programs, the Office of Community Oriented Policing Services, the Corruption/Civil Rights Section of the FBI, the Community Relations Service, and the unit within the Justice Department that serves as a liaison for civilian review boards).

misconduct, raising the benefits of engaging in reform, and lowering the costs of adopting reforms. As argued above, the threat of a § 14141 suit imposes expected costs on police departments. Because there are likely hundreds of police departments that might benefit from proactive reform, but limited resources to make a § 14141 threat credible, the Justice Department should concentrate that threat on departments with the worst misconduct. It should do this by using a national data collection and reporting system to create a list of the most serious offenders and by embracing a worst-first litigation strategy. This strategy raises the expected costs of misconduct for departments on that list. In addition, the Justice Department should provide a way off the list—a safe harbor—for those departments that embrace reforms before they are investigated and sued. Doing so increases the rewards for a police department engaged in reform. It also encourages reform without imposing investigation costs on the Justice Department and allows the Justice Department to add new police departments to its worst list, expanding the scope of § 14141's incentive effect. Finally, the Justice Department should engage in a coordinated effort to lower the information costs for police departments of identifying and adopting proactive reforms to prevent misconduct. Each of these levers pulls police departments toward reform faster than the Justice Department could push them there by investigating and suing them. Together these elements constitute a more efficient means of using § 14141.

III. ASSESSING STRATEGIES FOR ENFORCING SECTION 14141

A. Evaluating Section 14141 Enforcement So Far

The above Parts argue that the most efficient use of § 14141 would seek to maximize its potential to induce rather than compel reform, and that inducing reform requires the Justice Department to raise the expected § 14141 costs of engaging in misconduct, raise the benefits of engaging in reform, and lower the costs of reforms for some set of departments. This Part evaluates the Justice Department's § 14141 enforcement efforts so far by those measures. While the Justice Department has lowered the information costs of reform for police departments, it has not maximized either the expected costs of misconduct or the expected rewards of reform.

1. The expected costs of misconduct and benefits of reform

The Justice Department's § 14141 enforcement practice has done little to maximize the expected costs of engaging in misconduct for most police departments. Since 1994, the Justice Department has conducted thirty-three

public full investigations under § 14141.¹⁵⁴ The relative frequency of investigation for large police departments is therefore 1.4% over those fifteen years.¹⁵⁵ Even though the costs imposed by an investigation on a police department are high, it is hard to imagine that the *expected* costs of an investigation, given this relative infrequency, would induce much reform in most police departments. Part II suggested that given limited resources, the Justice Department can induce reform by concentrating its enforcement efforts on raising the probability of being investigated for a subset of departments. So far, the Justice Department has not pursued this path. It has not concentrated its resources in a manner that would raise perceptions of *p* for a subset of departments. Instead, it has investigated cities of various sizes¹⁵⁶ and types,¹⁵⁷ in different geographic regions.¹⁵⁸ Additionally, it has sent only weak signals about how it selects its targets.¹⁵⁹ As a result, departments have little factual

154. See *supra* note 50.

155. This frequency represents the number of full investigations since the passage of the statute divided by the 2358 large departments. See REAVES, *supra* note 9, at 2 tbl.2 (reporting that there are 2358 departments nationwide with at least 50 officers). However, because two of the thirty-three departments, the Villa Rica Police Department in Georgia and the Beacon Police Department in New York, have fewer than fifty sworn police officers, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2008 tbl.78 (2009), <http://www.fbi.gov/ucr/cius2008/index.html>, this calculation slightly overestimates the frequency in the relevant population. It would be more precise to say either that the relative frequency of an investigation among police departments with at least fifty officers is 1.3% (thirty-one investigations in 2358 departments) or that the relative frequency of an investigation among police departments with at least twenty-five officers is .7% (thirty-three investigations in 4662 departments). See REAVES, *supra* note 9.

156. The Justice Department has investigated cities ranging in size from around 11,000 residents (Villa Rica, Georgia) to almost 4 million (Los Angeles, California) with substantial variation in between. See U.S. Census Bureau, Population Estimates: Cities and Towns 2000-2006, <http://www.census.gov/popest/cities/SUB-EST2006-4.html> (last visited Aug. 30, 2009). The police departments investigated and sued have ranged in size from approximately thirty-two officers to more than 9000. FED. BUREAU OF INVESTIGATION, *supra* note 155. For comparison, there are seventy-nine departments each with 1000 or more officers in the United States that together employ approximately 30% of all full-time sworn officers and 3563 departments each with between twenty-five and 100 officers that together employ approximately 22% of all full-time sworn officers in the United States. See REAVES, *supra* note 9, at 2 tbl.2.

157. The Justice Department has targeted state, county, and local departments in urban, suburban, and rural areas. U.S. Dep't of Justice, Special Litigation FAQs, *supra* note 40.

158. While a significant number of the investigations have been in large industrial Midwest cities, including Pittsburgh, Columbus, Detroit, Cincinnati, and Cleveland, other investigations have been distributed throughout the country. See *id.*

159. See *id.* (“We exercise our discretion to prioritize certain investigations or certain types of allegations. In general, we consider a variety of factors, including the seriousness of the alleged misconduct, the type of misconduct alleged, the size and type of [the] law enforcement agency, the amount of detailed, credible information available and the potential precedential impact.”).

basis for assessing whether their p is higher than the relative frequency of suits.¹⁶⁰

Clearly, some departments will assess their p to be considerably higher than the relative frequency of full investigations in all large departments. For example, the Justice Department is almost certainly more likely to investigate a department when it experiences an incident of misconduct with substantial media coverage. Given how little data the Justice Department has to make its choices among departments, it could hardly be otherwise. But even this signal is noisy, since the Justice Department's practice is hardly consistent in this respect.¹⁶¹ The Justice Department's diverse practice and weak signaling have diluted the incentive effect of its § 14141 enforcement.

The Justice Department has also failed to maximize the incentive effect of its enforcement efforts in another way. Part II suggested that the Justice Department has a limited ability to raise c to induce reform. The Justice Department, however, has imposed c well below its maximal levels in its § 14141 suits.¹⁶² Of the thirty-three departments publicly subject to full investigations, only fourteen have been resolved in a manner that mandates that

160. While the Justice Department has clearly focused its § 14141 enforcement on only a few kinds of misconduct, it is unlikely that this type of concentration effectively focuses the expected costs of § 14141 on a finite group of departments. The vast majority of large departments will receive some complaints concerning excessive force, illegal stops and searches, and racial profiling. As a result, few departments will be eliminated from the pool of potential targets by the Justice Department's practice of focusing almost exclusively on these types of misconduct. Moreover, because these kinds of misconduct are difficult to assess and comparative data are largely unavailable, departments will have difficulty assessing p relative to other departments.

161. Many departments with high-profile incidents of misconduct have not been subject to investigation by the Justice Department, including, for example, the Chicago Police Department, *see* Armacost, *supra* note 16, at 478-90, the Oakland Police Department, *see* Liz Garone, *Oakland's Police 'Riders' on Trial*, WASH. POST, Jan. 26, 2003, at A10, and the Dallas Police Department, *see* Jennifer Emily, *Convicted Ex-Cop to Begin Sentence*, DALLAS MORNING NEWS, May 6, 2008, at 7B.

162. The Bush Administration not only reduced the actual probability and cost of a § 14141 investigation, it did much to minimize the perception of that probability and cost. When running for office, President George W. Bush expressed doubt about the appropriate role for § 14141 in regulating local police departments. *See* Eric Lichtblau, *Politics*, L.A. TIMES, June 1, 2000, at 5. A police department might reasonably have used his comments rather than the Justice Department's practice under the Clinton Administration to assess p and would have perceived p to be low. Moreover, the Bush Administration did not publicize investigations or their results. The Special Litigation Section's website, for example, has had only minor updates since 2003, and does not announce every investigation. Finally, the Bush Administration engaged in efforts to undermine existing consent decrees, further suggesting to those watching departments that the Administration was uninterested in enforcing § 14141 aggressively. *See, e.g.*, Patrick McGreevy, *LAPD Faces 3 More Years of Scrutiny*, L.A. TIMES, May 16, 2006, at B1.

the police department adopt remedial measures.¹⁶³ In a dozen more cases, the Justice Department has done no more than send the department a technical assistance letter suggesting the existence of problems in the department and recommending reforms.¹⁶⁴ Since investigations that result in technical assistance letters impose substantially lower costs on police departments than those resulting in mandatory reforms,¹⁶⁵ using such a letter depresses the costs of § 14141 investigations for police departments. This approach thereby lessens the incentive effect such investigations have on other departments.¹⁶⁶

The Bush Administration practice of emphasizing low-cost resolutions of § 14141 suits was not accidental. Instead, the Administration expressly favored cooperative § 14141 investigations and resolutions.¹⁶⁷ A policy of settling investigations with less costly memoranda of agreement or technical assistance letters would not necessarily be inconsistent with maximizing the incentive effect of § 14141, if the lower costs were a reward for proactive reform. However, the Justice Department does not appear to have conditioned its non-adversarial approach on reform effort. Although some of the technical assistance letters refer to voluntary reforms by the departments, others suggest that the departments investigated were not cooperating fully with the investigations.¹⁶⁸ Moreover, the Justice Department has no apparent monitoring system for departments to which it has provided reform recommendations, and there is no public indication that the Justice Department has ever reinvestigated such a department. Since the Justice Department has not required that police departments engage in verifiable reform in exchange for lower expected § 14141 costs and has not monitored reforms that have occurred, it does not appear that the Justice Department used lower-cost

163. See *supra* notes 50-52 and accompanying text.

164. See *supra* note 53 and accompanying text.

165. See *supra* text accompanying note 62.

166. In a number of cases, the Justice Department took no public action. Presumably, some of these might have involved departments found not to have a pattern of misconduct and required no further action. If, however, the Justice Department sometimes failed to act in cases in which liability existed, then these non-action cases would further reduce the expected costs of an investigation for departments engaged in misconduct.

167. See *Reauthorization of the Civil Rights Division of the United States Department of Justice: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 27 (2005) (prepared statement of R. Alexander Acosta, Assistant Attorney General, Civil Rights Division) (noting new approach to § 14141 cases based on cooperative model); Dan Horn, *City Helped Tame DOJ's Fierceness*, CINCINNATI ENQUIRER, June 9, 2003, available at http://www.enquirer.com/editions/2003/06/09/loc_dojchange09.html (describing change in Justice Department strategy in § 14141 investigations from adversarial to cooperative and compromising).

168. See, e.g., V.I. Letter, *supra* note 48 (“[W]e have made repeated requests for and are still awaiting receipt of a number of documents We would greatly appreciate production of these items as soon as possible in order to complete our investigation.”).

outcomes to increase the expected benefits to police departments of engaging in proactive reform. Instead, whatever the other benefits of a cooperative approach to § 14141, the Bush Administration policy lowered the expected costs of § 14141 for police departments and failed to take advantage of the potential incentive effect of § 14141 enforcement.¹⁶⁹

2. *The information costs of reform*

Although the Justice Department has not used § 14141 to raise the expected costs of misconduct or the expected benefits of reform as much as this Article's proposal would, it has encouraged proactive reform by reducing information costs for police departments. As described above, the Justice Department has consistently pursued a few kinds of misconduct using § 14141, identified some primary institutional causes of these kinds of misconduct, and advocated a consistent and coherent set of core remedies designed to promote accountability and reduce these institutional causes.¹⁷⁰ It has also framed its consent decrees, memoranda of agreement, and technical assistance letters largely in general terms,¹⁷¹ easily applied to other large departments engaged in misconduct. The Justice Department has also kept the reforms it has

169. Despite the Justice Department's practice of not maximizing the cost of a § 14141 suit for police departments, there is evidence that some police departments perceived a § 14141 reward for voluntary reform. At least two cities, Miami and Washington, D.C., have been investigated at their own initiative, suggesting that they expected rewards for coming forward and/or committing to reform. *See* Miami Letter, *supra* note 62; John Ashcroft, U.S. Attorney Gen., News Conference with Washington, D.C. Mayor Anthony Williams and Police Chief Charles Ramsey (June 13 2001), *available at* <http://www.usdoj.gov/crt/split/mpdpressconf.php>. In each case, the city had reason to estimate a higher than average probability of being sued: both departments are in larger cities with widely publicized civil rights problems. The Washington, D.C. Metropolitan Police Department approached the Justice Department in 1999, after a series of front-page Washington Post articles revealed a pattern of apparently unjustified deadly shootings in the late 1990s. *See, e.g.*, David Jackson, *Holes in the Files: Investigations of Police Shootings Often Leave Questions Unanswered*, WASH. POST, Nov. 17, 1998, at A1; Jeff Leen, *Moving Targets: Despite Department Rules, Officers Often Have Used Gunfire to Stop Drivers*, WASH. POST, Nov. 16, 1998, at A1; Jeff Leen et al., *District Police Lead Nation in Shootings: Lack of Training, Supervision Implicated as Key Factors*, WASH. POST, Nov. 15, 1998, at A1. Miami approached the Justice Department in 2002, after a number of high-profile incidents received media and community attention. *See, e.g.*, Dana Canedy, *11 Start Trial in Shootings by Miami Police Officers*, N.Y. TIMES, Jan. 22, 2003, at A12. In both cases, cooperating with the Justice Department may have been perceived as a means to lower the costs of § 14141 enforcement. To the degree the departments accurately perceived Justice Department policy, these rewards for self-reporting may represent a limited strategy of raising the benefits of proactive reform for police departments.

170. *See supra* text accompanying notes 63-66.

171. Livingston, *supra* note 42, at 845 (observing that the decrees have certain requirements, such as training and policies on use of force, but leave the details unspecified).

recommended or required stable over the course of § 14141's enforcement.¹⁷² In these ways, the Justice Department has used § 14141 to communicate to police departments about methods to reduce systemic misconduct.

The Justice Department has also publicized these reforms effectively to police departments in other ways. The Civil Rights Division published an early paper for police departments expressly outlining recommended reforms.¹⁷³ More recently, as noted earlier, the Justice Department helped to fund a book by the International Association of Chiefs of Police highlighting potential departmental deficiencies and recommending the Justice Department's core reforms as a means of promoting civil rights.¹⁷⁴ These non-litigative efforts should have lowered the information costs of preventing misconduct for some departments. In sum, the Justice Department has not used § 14141 to raise significantly the costs of misconduct or the benefits of reform, but it has used it to make it easier for departments to engage in policing reform. While reducing information costs has likely had some benefits, the Justice Department has not yet taken nearly full advantage of § 14141's potential to encourage remedial effort.

B. *Assessing Proposals to Amend or Replace Section 14141*

1. *Adding private plaintiffs to section 14141*

While scholars have overlooked § 14141's potential—its power to incentivize rather than merely compel reform—as noted in Part I, they have not overlooked the Justice Department's failure to achieve widespread results. To solve that problem, some have suggested that private plaintiffs be authorized to supplement the Justice Department's efforts in pursuing § 14141 suits.¹⁷⁵

Proposals to add private plaintiffs take different forms. In order to facilitate private structural reform suits against police departments, several members of Congress introduced in 1999 and then again in 2000 the Law Enforcement Trust and Integrity Act (LETIA) to amend § 14141 to allow any aggrieved person to bring a civil action for declaratory and injunctive relief for violations of the statute. The bill also permitted courts to award a prevailing § 14141 plaintiff reasonable attorney's fees if he won.¹⁷⁶ The bill died in committee, but

172. See *supra* note 67 and accompanying text.

173. See U.S. DEP'T OF JUSTICE, *supra* note 1 (summarizing principles for promoting police professionalism with respect to uses of force, citizen complaints, internal management and accountability, data collection, and recruitment and hiring).

174. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 13.

175. See, e.g., Law Enforcement Trust and Integrity Act of 2000, H.R. 3927, 106th Cong. § 502 (2000); Gilles, *supra* note 9, at 1417-18.

176. It also permitted a prevailing defendant reasonable attorney's fees if the action

some civil rights groups continue to urge its adoption, and recently, there has been renewed interest in the Act.¹⁷⁷

Some academics have doubted the constitutionality of permitting private plaintiffs to bring § 14141 suits as proposed in LETIA on the ground that the bill runs afoul of constitutional prohibitions against granting citizens standing to challenge future police practices.¹⁷⁸ They have therefore suggested alternative means of using private plaintiffs to supplement the Justice Department's efforts. Myriam Gilles, for example, has proposed amending § 14141 to permit private actors who have been injured by an unconstitutional pattern or practice to prosecute § 14141 claims only with authorization from the Department of Justice.¹⁷⁹

The argument for adding private plaintiffs to § 14141 rests on two empirical premises: first, that suits by private actors would be effective in reducing misconduct, and second, that private and government suits together would achieve more reform than government suits alone.¹⁸⁰ Both premises are doubtful. Private suits may add resources to § 14141 litigation. This benefit could be especially valuable when the reigning presidential administration's financial and political commitment to § 14141 enforcement is low. Unfortunately, private suits are ill-suited as a means for achieving high-quality departmental reform, and when there is a government commitment to pursuing § 14141 suits, adding private plaintiffs risks interfering with the Justice Department's best use of the statute to induce proactive remedial efforts by police departments.

Under any proposal, private plaintiffs will likely vary in their motivation.

was frivolous, unreasonable, or without foundation. Law Enforcement Trust and Integrity Act of 2000, H.R. 3927, 106th Cong. § 502 (2000); Law Enforcement Trust and Integrity Act of 1999, H.R. 2656, 106th Cong. § 501 (1999).

177. See, e.g., Hazel Trice Edney, *On 100th Anniversary, NAACP Challenges First Black President*, WILMINGTON J., Feb. 11, 2009, available at <http://www.wilmingtonjournal.com/News/article/article.asp?NewsID=17812&sID=3>; Press Release, NAACP, NAACP National Board Member Testifies at Congressional Forum on Law Enforcement Accountability (May 12, 2008), available at <http://www.naacp.org/news/press/2008-05-12/index.htm>; Human Rights Watch, Statement in Support of the Law Enforcement Trust and Integrity Act of 2000 (Mar. 13, 2000), <http://www.hrw.org/en/news/2000/03/13/statement-support-law-enforcement-trust-and-integrity-act-2000> (last visited Oct. 15, 2009).

178. See, e.g., Gilles, *supra* note 9, at 1414 (“[A]uthorizing . . . ‘all aggrieved persons’ to sue to enjoin unconstitutional ‘patterns or practices[]’ . . . would raise insurmountable constitutional problems under the equitable standing rule of *Lyons* . . .” (footnote omitted)).

179. Gilles, *supra* note 9, at 1417-18; Gilles, *Representational Standing*, *supra* note 72, at 365-66. As an alternative, George Rutherglen and John Jeffries have encouraged private plaintiffs to tailor § 1983 cases narrowly to escape the *Lyons* equitable standing bar. See Jeffries & Rutherglen, *supra* note 27, at 1419-20.

180. See, e.g., Gilles, *supra* note 9, at 1386-87; Jeffries & Rutherglen, *supra* note 27, at 1421.

While some may pursue § 14141 as a means to spread policing reform and reduce civil rights violations in their city, many would pursue more personal goals. Most notably, those with § 1983 claims against police officers or departments might reasonably expect that a § 14141 suit against a department for equitable relief would improve the expected outcome in their related § 1983 suit.¹⁸¹ Rational private plaintiffs with such an interest will often pursue a resolution to the § 14141 suit that maximizes their expected financial gain rather than a resolution that maximizes effective reform. As a result, these suits are unlikely to achieve optimal reforms.

As discussed above, local public officials are imperfect agents of the public interest. In particular, mayors and police chiefs may not fully internalize the economic costs to the city of their official decisions, but may experience higher costs than the city as a result of intrusive police department reforms.¹⁸² This will often make them more receptive partners for private actors seeking to maximize § 1983 awards: some public officials will seek to avoid intrusive reforms, even at the expense of financial payouts by the city, while some private actors will seek to maximize financial awards from the city, even at the expense of less reform. In such cases, both parties would have reason to reach a settlement that avoids many best practice reforms. Even private plaintiffs with good motives may be influenced by local agents intent on avoiding intrusion. These incentives for collusion suggest that private suits are unlikely to produce results consistent with the public interest.¹⁸³ Because the Justice Department and its agents cannot benefit from financial payouts, its suits for equitable relief offer a better chance to cost effectively reduce misconduct than those by private actors.

Gilles's more modest proposal to permit private plaintiffs to sue police departments under § 14141 only with the Justice Department's acquiescence

181. Gilles, *supra* note 9, at 1451-52 (“[T]here exist meaningful financial incentives for petitioners to initiate § 14141 claims. Most often, private § 14141 petitioners will have parallel damages actions based upon the same facts under federal civil rights laws or state law. A ruling on a § 14141 claim would be entitled to preclusive effect in those damages suits, providing a powerful incentive, in many cases, for the filing of a § 14141 petition.” (footnote omitted)); *see also* Matthew J. Silveira, *An Unexpected Application of 42 U.S.C. § 14141: Using Investigative Findings for § 1983 Litigation*, 52 UCLA L. REV. 601 (2004) (advocating using information discovered during § 14141 investigations to pursue § 1983 suits for damages). Information that could be used in a § 1983 claim might arise out of a § 14141 action in a variety of ways: as information obtained during discovery, as findings of policy or admission of liability, or as part of settlement with a police department.

182. *See supra* text accompanying notes 137-142.

183. Similar collusion has been the subject of concern about structural reform litigation in other contexts, and scholars have been skeptical that judicial review is sufficient to eliminate the risk. *See* ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 156-57 (2003); Neal Devins, *I Love You, Big Brother*, 87 CAL. L. REV. 1283 (1999) (reviewing FEELEY & RUBIN, *supra* note 26).

would make this problem worse. Under Gilles's proposal, the *only* private plaintiffs eligible to bring suit would be victims of unconstitutional misconduct.¹⁸⁴ But this class of plaintiffs is especially likely to bring a suit for injunctive relief in order to bolster a simultaneous suit for private damages. Such plaintiffs would have a strong financial incentive to settle for inferior reforms in return for pecuniary compensation in their damages suit.¹⁸⁵ And as discussed above, local actors have an incentive to give them what they want. Although the Justice Department could veto such suits under Gilles's proposal, uncovering collusion may be difficult and would require that the Justice Department expend considerable resources monitoring and evaluating ongoing lawsuits.¹⁸⁶ Thus, Gilles's private plaintiff scheme would not take advantage of § 14141's ability to incentivize mayors and police chiefs to bring about change. To the contrary, it risks consuming Justice Department and local resources without generating effectual reform.¹⁸⁷

Advocates of adding private plaintiffs might argue that even if private suits are imperfect vehicles for serving the public interest, so long as any private suits serve that interest at all, police reform would be improved by adding them to the statute. However, private suits would not only result in inferior reform; some proposals to add private plaintiffs would also undermine the Justice Department's capacity to incentivize reform because they would interfere with the § 14141 litigation strategy suggested above. First, the possibility of private suits would interfere with the government's ability to reward police departments engaged in proactive reform. Under the safe harbor proposed above, the Justice Department would refrain from suing police departments that proactively adopt favored reforms. This safe harbor provides a critical means for increasing the benefits of reform for departments and is essential to leveraging Justice Department resources beyond the few departments at the top of the list of worst departments. But in order to provide a safe harbor, the Justice Department must be able to ensure that departments that proactively comply with its recommended reforms will not be subject to the risk of suit

184. Gilles, *supra* note 9, at 1432 ("The model proposed here would deputize only those individuals who have been injured by an unconstitutional police pattern or practice.").

185. *See id.* at 1451-52.

186. *See id.* at 1417-18.

187. Gilles assumes that reviewing initial proposals by private parties to sue police departments and assessing those suits on an ongoing basis would take little effort for the Justice Department. This seems unlikely. The Justice Department would need to engage in significant investigation before it permitted a suit to determine whether liability was likely, whether existing reform efforts were adequate, and whether the complaint would undermine incentives for proactive reform. The Justice Department would need to spend even more resources monitoring suits on an ongoing basis to determine whether they continued to serve the public interest. As a result, Gilles's proposal would permit private actors to commandeer precious Justice Department § 14141 resources.

under § 14141. If private suits under § 14141 are possible as proposed in LETIA, for example, the Justice Department would lack the power to provide that assurance. Police departments that proactively reform would be insulated from § 14141 suits brought by the Justice Department, but not immune from those brought by private plaintiffs. Thus, some proposals for private plaintiffs would inhibit the Justice Department from using this important tool to reduce misconduct.¹⁸⁸

Section 14141's strict liability standard has a similar effect. As currently enacted, § 14141 makes a department liable so long as a pattern or practice of misconduct exists in the department. This standard facilitates efficient enforcement of the statute because it allows the Justice Department to determine quickly whether liability likely exists and discourages litigation over liability. However, this standard also means that liability continues for departments after they have begun reform but before they have eliminated patterns of misconduct. With the Justice Department as the sole plaintiff for § 14141 and the proactive strategy proposed here in place, the ongoing § 14141 liability during a department's efforts to reform would play little role in the department's decision to reform. The department would know the probability of a § 14141 suit and the nature of the reforms likely to be sought in the suit. It could therefore adopt only reforms that would decrease subsequent remedial costs in a suit, and because it would earn a safe harbor or be rewarded for its proactive effort, it could expect to benefit from its attempts to reform despite potential ongoing liability. However, if private plaintiffs could sue a police department after it starts reform, then a police department might rationally refrain from reform even though reform would decrease the expected costs of a suit against the department by the government. The department would not know when it might be sued by a private actor or what remedial measures would be demanded in that suit, and it would not necessarily expect the costs of a suit to be lowered by its reform efforts. In this way, private suits could be counterproductive, undermining proactive reform that would reduce police misconduct.

Not all proposals for private plaintiffs need interfere with the Justice Department's safe harbor mechanism or undermine the incentives for proactive reform. A private plaintiff mechanism could be crafted to avoid these disadvantages. For example, private plaintiffs could be required to face a higher burden of proof to limit suits that inhibit reform. In addition, the Justice Department safe harbor mechanism could grant immunity from private as well as public suit. Such limitations on private plaintiffs would reduce the

188. Gilles's proposal would not have this effect, since under her proposal the Justice Department could quash any suits against safe harbored departments before they arose. See Gilles, *supra* note 9, at 1418.

interference between private plaintiffs and public proactive enforcement. Nevertheless, private suits have another disadvantage that would be more difficult to mitigate: namely, that private suits would not only likely result in weaker reforms than government suits, but would effectively inhibit the Justice Department from pursuing more effective reforms in the same departments in the future.

For all practical purposes, once a police department enters a court-approved consent decree with private plaintiffs, the Justice Department would be unable to sue that department under § 14141 for a considerable period of time, because the department would already be subject to remedial effort under the supervision of a federal court. Thus, private suits could create a perverse de facto safe harbor. Police departments with misconduct could settle with plaintiffs for less costly and ineffectual reforms in order to insulate themselves from the threat of future suits by the Justice Department that might impose more meaningful, and more expensive, reforms. In fact, the possibility of preventing a future Justice Department suit would make municipality collusion with private plaintiffs even more likely, especially for the worst police departments: even public-minded local officials might find it worthwhile for the city to pay off private plaintiffs and agree to adopt superficial reforms in order to avoid for some years the more costly remedial measures and additional reputational costs that could result from a Justice Department suit.¹⁸⁹ For this reason, paradoxically, increasing the number of § 14141 suits by adding private plaintiffs may not reduce police misconduct. More suits may occur, but they may not produce effective reform and, in addition, they may bar the future suits by the government that would. Although § 14141 suits under a particular administration may be inadequate, it might nevertheless be better to live with those inadequate efforts until a new administration funds and prosecutes § 14141 suits zealously, rather than attempt to supplement those efforts in a way that would interfere with effective future reform.

Private actors would add resources to § 14141 litigation, but at significant cost. If the law authorizing them is not carefully tailored, private suits would interfere with federal efforts to induce reform by granting a safe harbor. Even if carefully tailored, private suits would likely bring about less effectual reform, because the incentives of private actors and local agents diverge from the public's interest, and private suits would likely interfere with future efforts by the Justice Department to sue or incentivize the same departments. Private suits may be more appealing when there are sophisticated and public-minded plaintiffs to bring them and when the Justice Department's § 14141 efforts are weak, but the tradeoff remains unavoidable. In assuming that more litigation is

189. Nor would the supervision of the federal courts likely provide an effective check on this collusion.

better, scholars have failed to consider significant problems with adding private plaintiffs to § 14141 suits.¹⁹⁰

2. *Adding fines to section 14141*

If private plaintiffs are unlikely to improve § 14141 enforcement, it may be worth considering other ways of making the statute more effective. One possibility is to amend § 14141 to permit financial penalties for severe patterns of unconstitutional conduct. Fines have some advantages not apparent when one focuses exclusively on the direct impact of § 14141 suits. Most notably, they could mitigate the problem of too few suits without requiring substantial additional enforcement resources or introducing the disadvantages of permitting private suits.

The Justice Department's ability to increase the expected costs of misconduct for police departments by threatening suit under § 14141 is severely constrained because there are both resource limits on raising p and substantial practical and legal limits on raising c .¹⁹¹ While a worst-first policy would help raise p for the departments the Justice Department is most interested in reforming, there is no cost-effective and appropriate way to raise c for departments that are investigated and sued. Allowing fines to be imposed on departments that violate § 14141 would solve this problem.¹⁹² Fines would allow the Justice Department to raise substantially the expected costs of misconduct without committing any additional resources. By raising the expected costs of being investigated and sued under § 14141, the threat of a fine would incentivize departments that otherwise might take their chances. Fines are particularly useful in the context of § 14141 because the costs to a police department of engaging in proactive reform are significant relative to the costs of being sued. A fine provision would increase the difference between the costs to a department of adopting proactive reform and the transactional and remedial costs to a department of being targeted under § 14141.

190. Advocates of private plaintiffs may also contend that private actors would add information as well as resources to police department reform. *See* Gilles, *supra* note 9, at 1388 (stating that private actors “have the information, means, and incentives required to challenge” police misconduct); Polinsky & Shavell, *supra* note 78, at 46 (contending that private enforcement makes sense when private actors have exclusive information about the identity of law breakers). It is notable, however, that potential private plaintiffs are unlikely to have much exclusive information about patterns of conduct in a police department, because patterns of misconduct may be more difficult for private actors to identify, and to the degree they do identify such patterns, that information can be conveyed easily to the Justice Department.

191. *See supra* notes 84-89 and accompanying text.

192. *See* Polinsky & Shavell, *supra* note 78, at 72 (noting that sanctions can be made more efficient by raising fines because raising fines increases deterrence more cheaply than raising enforcement expenditures).

Fines have another advantage as well. The threat of a fine would give the Justice Department additional flexibility to reward departments, such as those that cooperate with a § 14141 investigation or suit and begin reform prior to the resolution of the investigation. As previously stated, the Justice Department could manipulate remedial and monitoring costs to reward a demonstrated commitment to reform, even short of a safe harbor. However, that strategy could lessen the effectiveness of reform. A fine gives the Justice Department an alternative incentive scheme. Non-cooperating departments could be subject to a significant fine when sued, whereas cooperating ones could be rewarded for their efforts by an investigation resolution that imposes only the costs of the remedial measures and any necessary monitoring. Because fines would allow the Justice Department to increase the benefits of reform as well as the expected costs of misconduct, they could be a powerful tool for promoting civil rights through § 14141.

On the other hand, fines as a means of regulating government actors have distinct disadvantages. As Daryl Levinson points out, they may not sufficiently motivate the relevant actors to adopt remedial measures.¹⁹³ It is impossible to ensure that a fine will reach its target: the police department. The political economy of crime control may well ensure that the cost of the fine is distributed much more diffusely. In addition, fines against government actors perversely deprive cities of the resources that remedial measures require. For these reasons, adding fines to § 14141 may not make the statute more effective despite the potential advantages of financial penalties.

Whatever the ultimate value of adding a fine provision to § 14141, this discussion of private plaintiffs and fines demonstrates that focusing on the incentive potential of § 14141 has significant consequences for how one views proposals to amend the statute. Because inducing reform is a more efficient use of the statute than compelling it, any amendment must be evaluated in light of this use. This requires both considering the effect of the proposed amendment on the Justice Department's ability to induce reform effectively, and determining whether the amended statute or the litigation strategy proposed here has a greater capacity to reduce misconduct effectively.

3. *Replacing section 14141 with alternative means of inducing reform*

Even assuming that using § 14141 to incentivize proactive reform is a more efficient means of reducing misconduct than using § 14141 merely to impose reforms coercively on departments by suit, one might ask whether § 14141 is the best mechanism for inducing reform among departments that are not sued. The safe harbor proposed above provides a means of encouraging departments

193. See Levinson, *Making Governments Pay*, *supra* note 21, at 386-87.

to engage in particular reforms. In other contexts, Congress and federal agencies encourage conduct more directly by passing laws or regulations mandating particular remedial measures;¹⁹⁴ conditioning federal funding on adopting particular measures;¹⁹⁵ or granting funds for entities adopting particular reforms or engaging in favored conduct.¹⁹⁶ The strategy of using § 14141 with a safe harbor opportunity, however, is preferable to these other forms of ex ante regulation. Most obviously, § 14141 has the advantage of political economy, since it is the regulatory mechanism we already have and policing is an area that Congress is reluctant to subject to regulation.

Even putting aside this practical obstacle to direct federal regulation of police departments, a safe harbor mechanism is likely to be less costly and more effective than alternative means of encouraging police departments to adopt favored remedial measures. A direct regulation could, for example, require all police departments to adopt remedial measures designed to reduce misconduct. However, such a regulation would deter departments from looking for innovative or lower cost means to reduce misconduct, since it would mandate a particular way of achieving reform, even if more cost-effective alternatives were available. In addition, such a regulation would impose costs on many departments that are relatively free of misconduct problems. By contrast, using § 14141 and a safe harbor policy offers departments the opportunity to reduce the expected costs of § 14141 by adopting particular reforms, but also permits departments to adopt alternative means of reducing misconduct and therefore expected costs. Moreover, it encourages no action, except data reporting, among departments that have no significant misconduct problems.

A less intrusive form of direct regulation might combine traditional direct regulation with the worst list. It could require favored reforms only of departments declared to be among the worst. Such a regulation would be less broad, but it would still reduce innovation and increase intrusion by prohibiting departments from implementing alternative means of reducing misconduct. A regulation even more carefully tailored to avoid that effect might regulate

194. *See, e.g.*, 16 C.F.R. pt. 1303 (2009) (banning of lead paint by the Consumer Product Safety Commission); 28 C.F.R. pt. 36 (2007) (implementing Title III of the Americans with Disabilities Act).

195. *See, e.g.*, National Minimum Drinking Age Act, 23 U.S.C. § 158 (2006); Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16925 (2006); Emergency Highway Energy Conservation Act, Pub. L. No. 93-239, § 2, 87 Stat. 1046, 1046 (1974).

196. *See, e.g.*, No Child Left Behind Act of 2001, 20 U.S.C. § 6311 (2004); Justice for All Act of 2004, 42 U.S.C. § 3797k (2006) (expanding Paul Coverdell Forensic Sciences Grant Program); Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. § 8621-8630 (2006); U.S. Dep't of Justice, Nat'l Inst. of Justice, Coverdell Forensic Science Improvement Grants Program, <http://www.ojp.usdoj.gov/nij/topics/forensics/nfsia/> (last visited Oct. 14, 2009).

departments on the worst list *and* permit generous variances at the Justice Department's discretion. Under such a scheme, police departments with substantial misconduct could either adopt reforms specified by the Justice Department or develop an alternative set of remedial measures approved by the Justice Department. Such a regulation would inevitably require an enforcement mechanism that either fined municipalities—difficult for the reasons described above—or permitted suits for equitable relief. As this description suggests, however, a direct regulation that achieved widespread reform without limiting innovation or imposing excessive costs on departments free of substantial misconduct would amount to an alternative substantially similar in result to the § 14141 enforcement strategy described above, except that it would not take advantage of the existing legal mechanism for achieving this end.

A scheme that conditioned unrelated federal funding to police departments on adopting remedial measures might also induce additional reform. Unfortunately, it would incentivize the departments that most need funding rather than the departments that most need reform. Even if such a regulation were targeted only at the worst departments, it might be politically difficult to implement if it denied law enforcement resources to police departments that need such funding to ensure effective law enforcement work as well as effective reform.

Finally, the Justice Department might offer new funding to police departments in a grant program to facilitate adoption of particular remedial measures. This sounds like a way to induce reform without intrusion, but it may not effectively reduce misconduct. Federal money is not free. It must be used in particular ways and usually requires concomitant expenditures of resources from the local police departments.¹⁹⁷ Of course, such funding supplements local resources and thereby would make reform more cost-effective for local police departments. However, even if reform is *more* cost-effective, municipalities would be unwilling to spend local resources unless the benefits of reform outweigh the costs to the municipality. Federal grants would therefore incentivize marginal departments, departments for which the benefits of reform already come close to outweighing the costs. The greater the grants,

197. See, e.g., CMTY. CAPACITY DEV. OFFICE, U.S. DEP'T OF JUSTICE, CCDO FY 10 WEED AND SEED COMMUNITIES COMPETITIVE PROGRAM GUIDE AND APPLICATION KIT 10 (2009), *available at* http://www.ojp.usdoj.gov/ccdo/funding/CCDO_FY2010_WSC_Competitive_Solicitation.pdf (requiring that federal "Weed and Seed" funding to local law enforcement agencies for attacking and preventing violent crime be used in concert with local resources redeployed for the same purposes); SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING OFFICE, U.S. DEP'T OF JUSTICE, SMART OFFICE FISCAL YEAR 2008 SUPPORT FOR ADAM WALSH ACT IMPLEMENTATION GRANT PROGRAM COMPETITIVE GRANT ANNOUNCEMENT 6-7 (2008), *available at* http://www.ojp.usdoj.gov/smart/funding/fy08awa_implementation.pdf (describing grant for improving sex offender registry that requires 25% match from non-federal funds).

the more departments would find them worth seeking. But departments for which adopting the reforms would be most expensive—perhaps because they are most structurally deficient or institutionally resistant to change—would be the least likely to reform as a result of such a funding program. Rather than incentivizing the worst departments to adopt reform, such funding may instead result in strengthening the best departments further.¹⁹⁸ The safe harbor provision combined with a worst-first litigation strategy does not have this disadvantage: instead, it incentivizes reform progressively, giving the strongest incentive to departments with the worst misconduct problems by making remedial measures the most cost-effective for them. For these reasons, using § 14141 as suggested above is not only a better means of reducing misconduct than existing enforcement strategies, but also has significant advantages over other possible means of encouraging police departments to engage in systemic reform.

CONCLUSION

To the degree that police misconduct is caused by institutional dysfunction in a police department, § 14141 provides a singular means of attacking it. Section 14141 suits impose professional and political costs directly on those who have the most power to reshape a department: police chiefs and mayors. Despite its promise, the Justice Department has not yet used the statute to achieve widespread policing reform, and even with the strongest will and greater resources, the mission of forcing reform via *seriatim* suits will inevitably fail on any large scale. It is time to rethink our approach. Towards that end, this Article has proposed that the Justice Department's efforts to prevent police misconduct through § 14141 focus on inducing reform by

198. This problem might be mitigated by making grants available only to departments with substantial indicia of misconduct, but such an effort may create perverse incentives for departments. Grants also have two further problems. First, there is a question of timing. The grants themselves cover a limited period of time. If the reform requirement is similarly temporary, it is unlikely to have much lasting effect. Some grants solve this problem by requiring that activities continue beyond the life of the funding. Such a requirement, however, discourages the participation of problematic departments. Second, just like other kinds of regulation, grants that condition money on particular activities require monitoring and enforcement to be effective. In the past, the Justice Department has not always enforced the conditions of grant programs effectively. *See, e.g.,* THE INNOCENCE PROJECT, INVESTIGATING FORENSIC PROBLEMS IN THE UNITED STATES: HOW THE FEDERAL GOVERNMENT CAN STRENGTHEN OVERSIGHT THROUGH THE COVERDELL GRANT PROGRAM (2009), available at <http://www.innocenceproject.org/docs/CoverdellReport.pdf> (describing the Justice Department's failure to enforce the conditions of the Paul Coverdell Forensic Science Improvement Grant Program, which provides federal funds to reform state and local crime labs).

threatening to investigate and sue departments that show substantial signs of misconduct and that do not adopt reforms proactively. In order to concentrate its resources on the departments engaged in the most misconduct, the Justice Department should threaten to sue the worst departments first. Because identifying the worst departments requires collecting data on what police officers are doing and on how police departments work, Congress should permit the Justice Department to mandate data reporting on indicia of misconduct.

A worst list and worst-first policy would focus and leverage the Justice Department's resources. Without this strategy, no department would have much incentive to reform; with it, some of the worst departments would. But that reform will take time to lower misconduct. To strengthen the incentive for departments to engage in proactive reform and to spread that incentive to more departments, this Article has argued that the Justice Department should also grant a safe harbor to departments that engage in reforms approved by the Justice Department, self report on their progress, and accept effective monitoring. A safe harbor would provide a significant incentive for departments that appear on the list to adopt reforms, which should result in a cascade of reform beginning with the worst police departments in the country.

Although inducing proactive reform is more efficient than coercing reform through suit, it too requires public resources. With those resources inevitably limited, some might continue to propose adding private suits to § 14141 to increase reform. Paradoxically, however, private § 14141 suits may not result in reducing misconduct. Many private suits would likely be ineffective at achieving reform, because private motivations to sue often diverge from the public interest in promoting the adoption of cost-effective remedial measures. In addition, private suits could inhibit the efficient use of public resources devoted to § 14141. While fines provide another way of increasing the effect of limited public resources, they too have disadvantages.

Regulating police misconduct by deploying § 14141 to induce proactive reform runs counter to a tradition of rhetorical absolutism in reaction to incidents of police abuse. Misconduct is often discussed solely as a wrong that can never be accepted, as a crime that needs to be punished. Even if eliminating unconstitutional conduct is our goal, this rhetoric has negative substantive consequences: it leads to a court-centered, reactive approach to civil rights violations, even with respect to forward looking remedies, like equitable relief. Perhaps because of this mindset, both scholars and the Justice Department have treated § 14141 as a means to reform police departments one at a time as misconduct comes to light. This approach is reactive in two ways: the Justice Department reacts to complaints and referrals before it looks for a pattern of misconduct, and police departments react to Justice Department suits by engaging in reform. Instead, this Article treats police misconduct as a

regulatory problem. Police departments play a crucial role in our society. Given that resources to promote police department reforms are limited, we should use them to minimize bad outcomes as efficiently as possible. Section 14141 is a critical tool for the federal regulation of police misconduct. Using § 14141 this way requires that the government take a doubly proactive approach: the Justice Department must assess misconduct nationally and choose its § 14141 targets to cost effectively reduce it; the Justice Department must then use the statute to maximize the incentives for police departments to engage in reform before they are sued. By regulating rather than litigating to reduce misconduct, the federal government can better promote policing reform and civil rights nationwide.