

# IMPROVING PROSECUTION OF SEXUAL ASSAULT CASES: CAN THE JUSTICE DEPARTMENT USE 42 U.S.C. § 14141 TO INVESTIGATE PROSECUTORS' OFFICES?

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In December 2013, an editorial appeared in the *Missoulian*, a Montana-based newspaper, criticizing Missoula County Attorney Fred Van Valkenburg for a statement about his office's handling of rape prosecutions: that attorneys in his office could review and work on those cases "whenever 'they have spare time.'"<sup>1</sup> Van Valkenburg published a defiant response.<sup>2</sup> This exchange was part of an ongoing dialogue between the editors of the paper and Van Valkenburg concerning Van Valkenburg's refusal to cooperate with a Department of Justice investigation into his office's allegedly inadequate handling of sexual assault cases, an investigation that was undertaken in tandem with investigations of the University of Montana's Office of Public Safety and the Missoula Police Department.<sup>3</sup>

The investigation of law enforcement agencies by the Department of Justice for civil rights violations is not new. What *does* appear to be relatively new is the investigation of responses to sexual assault. Only a handful of investigations have addressed such responses, and those few investigations share several features. First, they have asserted jurisdiction under two particular statutes, 42

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1. Editorial, '*Spare Time*' Is Wrong Priority for Rape Investigations, *MISSOULIAN* (Dec. 11, 2013, 7:03 AM), [http://missoulian.com/news/opinion/editorial/missoulian-editorial-spare-time-is-wrong-priority-for-rape-investigations/article\\_1372d4c8-626d-11e3-adfd-001a4bcf887a.html](http://missoulian.com/news/opinion/editorial/missoulian-editorial-spare-time-is-wrong-priority-for-rape-investigations/article_1372d4c8-626d-11e3-adfd-001a4bcf887a.html).

2. Fred Van Valkenburg, Op-Ed., *Words Twisted on DOJ Compliance*, *MISSOULIAN* (Dec. 16, 2013, 7:10 AM), [http://missoulian.com/news/opinion/columnists/van-valkenburg-words-twisted-on-doj-compliance/article\\_c20e6b18-665b-11e3-8b10-0019bb2963f4.html](http://missoulian.com/news/opinion/columnists/van-valkenburg-words-twisted-on-doj-compliance/article_c20e6b18-665b-11e3-8b10-0019bb2963f4.html).

3. See, e.g., Editorial, *County Attorney Should Follow Example*, *MISSOULIAN* (May 19, 2013, 8:00 AM), [http://missoulian.com/news/opinion/editorial/county-attorney-should-follow-example/article\\_6f660de2-bf0a-11e2-8ff5-001a4bcf887a.html](http://missoulian.com/news/opinion/editorial/county-attorney-should-follow-example/article_6f660de2-bf0a-11e2-8ff5-001a4bcf887a.html); Fred Van Valkenburg, Op-Ed., *DOJ Has No Authority over Office of County Attorney*, *MISSOULIAN* (May 22, 2013, 8:15 AM), [http://missoulian.com/news/opinion/columnists/doj-has-no-authority-over-office-of-county-attorney/article\\_3c74200c-c2ea-11e2-95e9-0019bb2963f4.html](http://missoulian.com/news/opinion/columnists/doj-has-no-authority-over-office-of-county-attorney/article_3c74200c-c2ea-11e2-95e9-0019bb2963f4.html).

U.S.C. §§ 14141 and 3789d.<sup>4</sup> Second, they have focused on failings in other areas, such as excessive force, with problems in sexual assault investigations identified as a secondary concern. And finally, they have targeted police or sheriff's departments.<sup>5</sup>

The Missoula investigation resembles the handful of investigations that have gone on before, but it also stands out in two distinct ways. First, this was the first time a public Justice Department investigation was *centered* on sexual assault response. Second, in addition to the Missoula Police Department, the investigation examined the University of Montana's Office of Public Safety and the Missoula County Attorney's Office. A review of the Department of Justice's publicly available information on its investigations reveals that this was the first time that a prosecutor's office was the target of this type of investigation.<sup>6</sup>

The Justice Department has not stated its reasons for this new use of § 14141. Perhaps the rising profile of mishandled rape cases spurred it to action, and the relative success of the inclusion of these concerns in previous investigations emboldened the office. Or perhaps the Justice Department perceived that the problem in Missoula could not be addressed effectively without involving all three agencies. In any event, the police department and university investigations proceeded as usual, with the agencies cooperating and reaching

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4. Although there are two statutes under which the Department of Justice has asserted jurisdiction, the focus in this Essay is on the first (and newer) of the two, 42 U.S.C. § 14141. The second statute, 42 U.S.C. § 3789d, turns on the use of federal funding, a more fact-bound question.

5. The New Orleans Police Department agreed to a consent decree in 2012 addressing, among other issues, the use of excessive force, with the investigation of sexual assault cases identified as another area of concern. See *United States v. City of New Orleans*, No. 12-1924 (E.D. La. Jan. 11, 2013), available at [http://www.justice.gov/crt/about/spl/documents/nopd\\_opinion\\_1-11-13.pdf](http://www.justice.gov/crt/about/spl/documents/nopd_opinion_1-11-13.pdf). The Puerto Rico Police Department entered into a settlement in 2013 addressing the use of force and searches and seizures, in addition to concerns about sexual assault. See *United States v. Puerto Rico*, No. 3:12-cv-2039 (GAG) (D.P.R. July 17, 2013), available at [http://www.justice.gov/crt/about/spl/documents/prpd\\_agreement\\_7-17-13.pdf](http://www.justice.gov/crt/about/spl/documents/prpd_agreement_7-17-13.pdf). A similar investigation in Maricopa County, Arizona, has led to ongoing litigation. See *United States v. Cnty. of Maricopa*, No. CV-12-00981-PHX-ROS (D. Ariz. Dec. 12, 2012), available at [http://www.justice.gov/crt/about/cor/cases/121212\\_US\\_v\\_MCSO\\_MTD\\_Decision.pdf](http://www.justice.gov/crt/about/cor/cases/121212_US_v_MCSO_MTD_Decision.pdf).

6. See *Special Litigation Section—Archives*, U.S. DEP'T JUST., [http://www.justice.gov/crt/about/spl/split\\_archive\\_findsettle\\_2004.php](http://www.justice.gov/crt/about/spl/split_archive_findsettle_2004.php) (last visited June 16, 2014); *Special Litigation Section Cases and Matters*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/spl/findsettle.php> (last visited June 16, 2014) (listing recent and active cases). The academic commentary has also focused on police departments. See, e.g., Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009); Matthew J. Silveira, *An Unexpected Application of 42 U.S.C. § 14141: Using Investigative Findings for § 1983 Litigation*, 52 UCLA L. REV. 601 (2004). Universities are regularly investigated for similar problems, but almost always by the Department of Education, not the Department of Justice. See *About OCR*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified May 29, 2012).

agreements to improve their practices.<sup>7</sup> But the county attorney has refused to cooperate.<sup>8</sup> This past February, he filed a declaratory judgment action in federal court seeking a ruling that the Justice Department has no right to investigate his office.<sup>9</sup> The Department then issued, and posted on its website, a detailed letter outlining its concerns and its position on the legal bases for its investigation.<sup>10</sup> One thing appears certain: this is the first time the Justice Department has publicly invoked these statutes to investigate a prosecutor's office. As the county attorney's complaint indicates, the practice raises significant questions.

## I. THE STATUTE

Section 14141 provides that “[i]t shall be unlawful for any government authority, or any agent thereof, . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”<sup>11</sup> It further provides that “[w]henver the Attorney General has reasonable cause to believe” that this prohibition has been violated, “the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.”<sup>12</sup> The statute does not provide for a private right of action or for damages.

The provision is enforced by the Special Litigation Section of the Department of Justice's Civil Rights Division.<sup>13</sup> Since the law's passage in the mid-1990s, the Section has investigated more than thirty agencies, issuing findings letters and technical assistance, entering into settlement agreements, and, in some cases, filing complaints and litigating.<sup>14</sup>

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7. Memorandum of Agreement Between the United States Department of Justice and the University of Montana Regarding the University of Montana Office of Public Safety's Response to Sexual Assault (May 9, 2013), *available at* [http://www.justice.gov/crt/about/spl/documents/missoulasettle\\_5-9-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulasettle_5-9-13.pdf); Memorandum of Understanding Between the United States Department of Justice and the City of Missoula Regarding the Missoula Police Department's Response to Sexual Assault (May 15, 2013), *available at* [http://www.justice.gov/crt/about/spl/documents/missoulapdsettle\\_5-15-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulapdsettle_5-15-13.pdf).

8. *See* Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., Civil Rights Div., and Michael W. Cotter, U.S. Att'y, Dist. of Mont., to Fred Van Valkenburg, Missoula Cnty. Att'y 16 n.22 (Feb. 14, 2014) [hereinafter Findings Letter], *available at* [http://www.justice.gov/crt/about/spl/documents/missoula\\_ltr\\_2-14-14.pdf](http://www.justice.gov/crt/about/spl/documents/missoula_ltr_2-14-14.pdf) (“[T]he County Attorney has refused to cooperate with this investigation.”).

9. Complaint for Declaratory Judgment, *Van Valkenburg v. U.S. Dep't of Justice*, No. 9:14CV00038 (D. Mont. Feb. 11, 2014), 2014 WL 631036.

10. *See* Findings Letter, *supra* note 8.

11. 42 U.S.C. § 14141(a) (2012).

12. *Id.* § 14141(b).

13. *Conduct of Law Enforcement Agencies*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/spl/police.php> (last visited June 16, 2014).

14. *See Special Litigation Section Cases and Matters*, *supra* note 6. The investigations generally also invoke the authority of the Safe Streets Act, 42 U.S.C. § 3789d, and, in some

## II. ARE PROSECUTORS “LAW ENFORCEMENT OFFICERS”?

Section 14141 contains no definition of the term “law enforcement officers.” Whether this term is generally used to include prosecutors may shed some light on the likelihood that Congress intended to include them here. It is common for courts to lump prosecutors in as part of the law enforcement process.<sup>15</sup> Of course, this kind of casual usage is no substitute for legal analysis. Courts have considered the question of what it means to be a law enforcement officer extensively in the context of qualified immunity inquiries for § 1983 suits: police officers may be entitled to qualified immunity, while prosecutors are generally entitled to more absolute prosecutorial immunity.<sup>16</sup> Job title, however, does not end the inquiry; courts have developed a functional inquiry, looking to the role an individual performs at a particular time to determine whether the individual should be entitled to absolute, or only to qualified, immunity.<sup>17</sup> In considering the reach of § 14141, courts should draw on this well-developed area of law to make the distinction between prosecutorial activities, which may fall outside of the statute’s reach, and investigative activities, which should be subject to Justice Department investigation.

### A. *Investigation Versus Prosecution*

A series of cases has developed the distinction. First, in *Imbler v. Pachtman*, the Supreme Court recognized a distinction between conduct “intimately associated with the judicial phase of the criminal process,” which consisted of “initiating a prosecution and . . . presenting the State’s case,” and acts of investigation or administration.<sup>18</sup> The Court did not specify where or how the line could be drawn, and it reserved judgment on “immunity for those aspects of the

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cases, Title VI of the Civil Rights Act of 1964. *See Conduct of Law Enforcement Agencies*, *supra* note 13. This Essay focuses on § 14141.

15. *See, e.g.*, *Villasana v. Wilhoit*, 368 F.3d 976, 979 (8th Cir. 2004) (“The Supreme Court has never imposed this absolute [*Brady*] duty on law enforcement officials other than the prosecutor.”); *Bernard v. Cnty. of Suffolk*, 356 F.3d 495, 502 (2d Cir. 2004) (“By contrast, only qualified immunity applies to law enforcement officials, including prosecutors, when they perform investigative functions.”); *Houston v. Partee*, 978 F.2d 362, 367 (7th Cir. 1992) (“Rather, the defendant prosecutors are in the same position as the defendant Chicago police officers: state law enforcement officials . . .”).

16. *See, e.g.*, *Milstein v. Cooley*, 257 F.3d 1004, 1007 (9th Cir. 2001). Van Valkenburg has attempted to assert prosecutorial immunity as a separate defense here, but because that doctrine is focused on immunity from suits *for damages*—*see, e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-69 (1993) (noting that some officials “deserve absolute protection from damages liability”)—it appears to be inapplicable here, as § 14141 is explicitly limited to injunctive or declaratory relief.

17. *See Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976).

18. *Id.*

prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate."<sup>19</sup>

In *Burns v. Reed*, the Court held that a prosecutor's appearance at a probable cause hearing for a search warrant was a function for which absolute immunity was appropriate: it was "connected with the initiation and conduct of a prosecution, particularly where the hearing occurs after arrest," and was thus a core prosecutorial function.<sup>20</sup> The Court further held that a prosecutor's giving of legal advice to the police did not constitute "acting in a prosecutorial capacity" and that this distinction was especially compelling when concerning suspects who were not eventually prosecuted and thus had no existing judicial proceeding in which to address any potential violations of their rights.<sup>21</sup>

In *Buckley v. Fitzsimmons*, the Court held that prosecutors did not have absolute immunity from a claim that they fabricated evidence, noting that

[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.<sup>22</sup>

The Court added that the latter functions are "normally performed by a detective or police officer" and that it was inappropriate to allow different treatment for a police officer or a prosecutor engaged in exactly the same behavior.<sup>23</sup> The Court explained that a prosecutor could not properly be considered an advocate until there was probable cause to make an arrest.<sup>24</sup>

In *Van de Kamp v. Goldstein*, the Court held that the training of subordinate attorneys on how to deal with information obtained from jailhouse informants was "directly connected with the conduct of a trial" and was thus a prosecutorial function entitled to absolute immunity.<sup>25</sup>

These cases reveal that courts are reluctant to shield prosecutors until they enter a phase of their work that is unambiguously prosecutorial—after probable cause has been determined and a specific prosecution contemplated.

### B. *The Function of the Missoula County Attorney in Rape Cases*

The situation here is complicated because the Missoula County Attorney's Office engages in both investigative and prosecutorial activities, and the con-

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19. *Id.*

20. 500 U.S. 478, 492 (1991).

21. *Id.* at 496 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985)) (internal quotation mark omitted).

22. 509 U.S. 259, 273 (1993).

23. *Id.*

24. *Id.* at 274; *see also* *Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997) (refusing to extend absolute immunity to a prosecutor who, acting as a witness, submitted an affidavit).

25. 555 U.S. 335, 344 (2009).

cerns identified by the Justice Department straddle both functions. The Findings Letter identified five areas of concern:

- “The County Attorney’s Office’s Treatment of Female Victims of Sexual Assault”;
- “Public Comments by the County Attorney”;
- “The County Attorney’s Office’s Handling of Non-Stranger Sexual Assault Cases and Its Failure to Explain or Document Its Decisions Not to File Charges in Those Cases”;
- “The County Attorney’s Office[’s] Fail[ure] to Adequately Investigate Sexual Assault Crimes or Communicate with Law Enforcement Partners to Aid in Their Development of Sexual Assault Cases”;
- “The County Attorney’s Office[’s] Fail[ure] to Offer Prosecutors Training that Would Facilitate Their Proper Handling of Sexual Assault Cases.”<sup>26</sup>

Two of these five areas—the “handling” of the cases and inadequate training—are arguably prosecutorial functions. Under the heading of “handling” of cases, the Findings Letter focuses on two problems: the lack of prosecution where there seemed to be a strong case in nonstranger assaults of adult women, and the failure of the Missoula County Attorney’s Office to document these decisions.<sup>27</sup> The charging decisions themselves are undeniably prosecutorial functions under *Imbler*, and the Office and its staff are entitled to exercise discretion in that area. It is unlikely that under the functional analysis applied in the immunity inquiry, § 14141 could properly be applied to investigate or reform the grounds on which charging decisions are made. The documentation of those decisions not to prosecute, however, lacks an obvious connection to prosecutorial functions. Indeed, it seems much more reasonable to categorize the documentation of decisions as an administrative function of the office, which is not prosecutorial under *Imbler*. Concern about documentation thus might be properly addressed under this statute, even if concern about charging decisions would not. (And perhaps a requirement for increased documentation would bring about some change in the decisions themselves.)

Regarding training, under *Van de Kamp*, the training of lawyers in a prosecutor’s office may be considered a prosecutorial function; however, the deficient training identified in Missoula included lack of training in broader areas such as understanding “rape myths” and “the various physical and psychological responses that a woman may have following sexual assault.”<sup>28</sup> The Findings Letter noted that the “inadequate training impacts *both* charging decisions and the ability to successfully prosecute sexual assault.”<sup>29</sup> Thus, unlike the missing training in *Van de Kamp*, which concerned only a very specific evidentiary is-

26. See Findings Letter, *supra* note 8, at 10, 13-14, 17-18.

27. *Id.* at 15-16.

28. *Id.* at 19.

29. *Id.* (emphasis added).

sue, this training would broadly affect the activities of the Missoula County Attorney's Office. Although the impacted functions fall within areas that are traditionally considered prosecutorial, the line cannot be so neatly drawn when the claim is that a better understanding of the requirements for presenting the case might affect investigation and communication with victims as well as the actual charging decisions and conduct of trial. *Van de Kamp* should not be read to create a blanket rule under which all training of prosecutors is "prosecutorial."

In both of these areas, there appears to be a mixture of proper and improper applications of § 14141. In such situations, courts should do what they have done in their immunity inquiries and take the question issue by issue. There is no need to take an all-or-nothing approach, where the involvement of prosecutorial activities might "taint" an investigation that otherwise concerns law enforcement. In *Burns*, for example, the Court granted absolute immunity for one type of activity and only qualified immunity for another activity in the same case.<sup>30</sup> There is no reason a court could not do the same with § 14141, allowing oversight for investigative, but not prosecutorial, functions in the same office.

The other three areas of concern identified in the Findings Letter—communication with victims, public comments, and investigations—fall squarely on the nonprosecutorial side of the *Imbler* line. The level of communication with victims or the tone of those conversations is not tied to the in-court and advocacy functions the courts have deemed to be prosecutorial. Indeed, the prosecution can proceed (or not) in exactly the same way, regardless of how often, or how sensitively, the prosecutors communicate with the victims. A failure to "provide status updates or notices of scheduling changes for court dates" or "convey important information about charging decisions"<sup>31</sup> is obviously a separate issue from charging decisions themselves or the conduct of proceedings at those court dates of which victims were not properly informed. Indeed, the Findings Letter notes that "the burden of identifying and communicating with complaining witnesses falls entirely to the Crime Victim Advocate Office."<sup>32</sup> The fact that an office other than the Missoula County Attorney's Office *can* perform this function establishes that it is not prosecutorial.

Regarding public comments, *Buckley* clearly held that statements to the press have "no functional tie to the judicial process just because they are made by a prosecutor."<sup>33</sup> The concerns with public comments by the Missoula County Attorney's Office raised by the Justice Department were not made directly to the press but rather were reported to an independent reviewer evaluating the Justice Department's settlement agreements reached with two other local Missoula offices.<sup>34</sup> The letter does, however, cite to a newspaper editorial authored

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30. *Burns v. Reed*, 500 U.S. 478, 487, 494-96 (1991).

31. Findings Letter, *supra* note 8, at 11.

32. *Id.* at 12.

33. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993).

34. Findings Letter, *supra* note 8, at 13.

by Van Valkenburg.<sup>35</sup> Neither making statements to the reviewer nor publicly commenting in newspaper editorials involved “the initiation of a prosecution, the presentation of the State’s case in court, or actions preparatory for these functions” any more than did the press conference in *Buckley*.<sup>36</sup>

Finally, investigation is the quintessential nonprosecutorial function, and courts treat prosecutors engaging in investigation exactly as they treat police officers. The Findings Letter specifically addresses the prosecutor’s “affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies”<sup>37</sup> and takes issue with the failure of the prosecutors “to develop, or work with Missoula Police detectives to develop, the evidence necessary to make non-stranger sexual assault cases into viable prosecutions.”<sup>38</sup> There is no question that this type of developing of evidence, in conjunction with the police, falls on the law enforcement side of the line.

Under the well-developed analysis of qualified immunity, it is beyond question that at least some of the challenged practices of the Missoula County Attorney’s Office concern functions that are properly considered law enforcement functions. Thus, the county attorney overseeing those functions is properly considered a law enforcement officer.

### III. IMPLICATIONS

It is not now known whether the Justice Department will continue to use § 14141 in this way. It has obviously touched a nerve in Missoula, and the county attorney’s concerns are not entirely without basis. For instance, there is a danger in allowing an outside agency to dictate how a local agency must allocate its resources without having the full picture of what resources are available and what the local agency needs. Because the Justice Department generally does not provide funds for compliance with its § 14141 demands, compliance could do injury to the local agency’s ability to perform its duties in other areas. While this is a concern no matter what agency and violations are being investigated, it seems more pressing when the focus is on *insufficient* services in a specific area (here, sexual assault) rather than poor practices (for example, use of excessive force) that need to be *altered*. The Justice Department is not in a position to weigh the costs to the community that such compliance might impose in other areas. It is worth noting, however, that similar concerns arise in police departments, which are unquestionably subject to § 14141 actions; one can only assume that Congress was aware of this tradeoff in passing the statute.

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35. *Id.* at 13 & n.14.

36. *Buckley*, 509 U.S. at 278.

37. Findings Letter, *supra* note 8, at 17 (quoting AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.1(a) (3d ed. 1993)) (internal quotation mark omitted).

38. *Id.*



There are also significant reasons to allow this type of oversight. As is apparent from a review of the qualified immunity cases, prosecutors generally receive significant immunity for their choices and are subject to little supervision, especially in cases in which there is no prosecution undertaken and thus no forum available to review the prosecutors' actions. Of course, prosecutorial immunity for charging decisions is an important doctrine that facilitates the functioning of the justice system, but it leaves little recourse, especially, as noted by the *Burns* Court, where there is no prosecution initiated. For instance, any particular victim whose case a county attorney declines to prosecute is unlikely to have a remedy under statutes such as § 1983, because even if a victim could prove discrimination in her particular case, charging decisions are insulated by the absolute immunity afforded under the cases cited above. The concerns being raised here are constitutional—the Justice Department has framed it in terms of gender discrimination—and if indeed there are violations occurring, it is important to have *some* mechanism, somewhere in our government, by which courts can consider such concerns. The Missoula County Attorney, like many others, is an elected official. If he is not required to answer to any investigation concerning his failure to protect constitutional rights of a large group of constituents, a slim majority, or even a plurality, of voters could continue to support an unconstitutional regime that deprives a large number of citizens of rights to which they are entitled under the United States Constitution, without the federal government being able to offer any protection.

Moreover, § 14141 provides a mechanism for examining systemic problems that cannot be addressed on the level of individual cases, either because there is no cause of action or because discrimination might be nearly impossible to prove in any individual case. This difference between systemic problems and failings in individual cases also presents perhaps the strongest argument *against* using the immunity cases to determine the reach of § 14141: absolute immunity insulates individual prosecutors from liability for particular decisions to prevent every unsuccessful prosecution from giving rise to a follow-on civil suit. There is no such risk here, as § 14141 has no private right of action and thus does not present the same risk as § 1983. It thus could be unnecessarily limiting to exempt prosecutorial functions from its reach if a broader definition of law enforcement—one that includes both investigation *and* prosecution—is available. Still, a line will need to be drawn somewhere, and the considerable thought that has gone into the immunity analysis provides a ready starting place.

#### CONCLUSION

The Justice Department has just dipped its toes in the water of using § 14141 to address this country's rape problem. Although the application of § 14141 to prosecutors' offices is not straightforward, there does appear to be some basis for this novel application. It is apparent from the prevalent media reports that rape investigations and prosecutions are a problem in this coun-

try,<sup>39</sup> and the Justice Department and the courts should continue to use every tool available to address it. Although the outcome of the Missoula County Attorney's Office's lawsuit remains to be seen, § 14141 could prove a powerful tool in that quest.

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39. See, e.g., Lynn Ardit, *Brown Student Accused of 'Sexual Misconduct' Says He Won't Return to Campus in the Fall*, PROVIDENCE J. (Apr. 26, 2014, 7:29 PM), <http://www.providencejournal.com/news/police-fire/20140426-brown-student-accused-of-rape-says-he-wont-return-to-campus-in-the-fall.ece>; Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>; Tyler Kingkade, *Yale Student Says Man Who Attempted Sexual Assault Punished with 1-Day Suspension*, HUFFINGTON POST (Jan. 23, 2014, 6:58 PM EST), [http://www.huffingtonpost.com/2013/08/23/yale-sexual-assault-punishment\\_n\\_3786885.html](http://www.huffingtonpost.com/2013/08/23/yale-sexual-assault-punishment_n_3786885.html).