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## Using Data to Reduce Police Violence

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# USING DATA TO REDUCE POLICE VIOLENCE

STEPHEN RUSHIN\*

**Abstract:** Congress passed the Death in Custody Reporting Act in 2014, which created a national database on civilian deaths caused by law enforcement. The Federal Bureau of Investigations and the Bureau of Justice Statistics have subsequently also announced new efforts to collect data on the frequency of deadly encounters between law enforcement and civilians. This Article explores how the federal government could use these newly amassed datasets to reduce police violence. This Article makes two contributions. The first Part of the Article argues that data alone will be insufficient to bring about widespread reform in local police departments. By making these datasets publicly available, the federal government could incentivize some police departments to prioritize reductions in police violence. But even when faced with troubling statistical trends, there is no guarantee that some of the nation's most problematic law enforcement agencies will voluntarily make expensive policy and procedural reforms. Thus, the second Part of the Article considers some ways that the U.S. Attorney General could harness these new datasets to improve the use of federal civil rights litigation against local police departments. Under 42 U.S.C. § 14141, the Attorney General has the power to seek equitable relief against police departments engaged in a pattern or practice of unconstitutional misconduct, including excessive uses of force. By using this data, the Attorney General can incrementally improve the enforcement of § 14141 in a way that incentivizes local police departments to implement reforms aimed at reducing officer violence.

## INTRODUCTION

Several recent, high profile police killings of civilians have ignited a national debate about the regulation of law enforcement.<sup>1</sup> Many advocates have

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\* Assistant Professor, University of Alabama School of Law. I received helpful comments from Ronald Krotoszynski, Heather Elliott, Avlana Eisenberg, Sharon Rush, Erika Wilson, Jason Cade, Debbie Dinner, Shawn Bayern, Wilson Parker, Rebecca Hollander-Blumoff, Jonathan Nash, Abigail Perdue, Ann Lipton, Usha Rodrigues, Mark Weidemaier, Stephanie Bornstein, Shu-Yi Oei, and Andrew Tuch.

<sup>1</sup> Most notably, the killings of Michael Brown in Ferguson, Missouri, Eric Garner of New York, New York, and Tamir Rice of Cleveland, Ohio have sparked national outrage. See, e.g., Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), [http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html?\\_r=0](http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html?_r=0) [<http://perma.cc/7UUN-GSL8>] (providing an early account of Michael Brown's death at the hands of the Ferguson Police Department); J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island->

argued that in order to reduce civilian deaths at the hands of law enforcement, the United States must better document police behavior through national statistics.<sup>2</sup> Although the federal government keeps records on everything from “how many people were victims of unprovoked shark attacks . . . to the number of hogs and pigs living on farms in the [United States], there is no reliable data on how many people are shot by police officers each year.”<sup>3</sup> In response, Congress passed the Death in Custody Reporting Act (“DCRA”), which requires police departments to document the death of any person “who is detained, under arrest, or is in the process of being arrested.”<sup>4</sup> Under the law, police de-

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chokehold-death-of-eric-garner.html [http://perma.cc/QT7M-5MMU] (providing a detailed account of Eric Garner’s death after being choked by police); Richard A. Oppel Jr., *Police Gave Boy No Aid After Shooting in Cleveland*, N.Y. TIMES (Jan. 8, 2015), <http://www.nytimes.com/2015/01/09/us/police-in-cleveland-boys-fatal-shooting-did-not-give-medical-aid.html> [http://perma.cc/J2GQ-EQZM] (explaining how Cleveland officers shot and failed to offer any medical assistance to a twelve-year-old named Tamir Rice, who was shot while holding a toy gun, after a 911 call reported “a guy” holding a “probably fake” pistol).

<sup>2</sup> Blake Fleetwood, *Congress Finally Acts to Prevent Police Killings, but Will It Make a Difference?*, WASH. MONTHLY (Dec. 17, 2014), [http://www.washingtonmonthly.com/ten-miles-square/2014/12/congress\\_finally\\_acts\\_to\\_preve053348.php#](http://www.washingtonmonthly.com/ten-miles-square/2014/12/congress_finally_acts_to_preve053348.php#) [http://perma.cc/U5WZ-L7SW] (describing how Rand Paul was a prominent supporter of the Death in Custody Reporting Act, which calls on local law enforcement agencies to report all people killed during arrests or while in their custody); Jon Swaine, *Eric Holder Calls Failure to Collect Reliable Data on Police Killings Unacceptable*, THE GUARDIAN (Jan. 15, 2015), <http://www.theguardian.com/us-news/2015/jan/15/eric-holder-no-reliable-fbi-data-police-related-killings> [http://perma.cc/3YUB-CFFP] (stating “[t]he troubling reality is that we lack the ability right now to comprehensively track the number of incidents of either uses of force directed at police officers or uses of force by police,” and saying “[t]his strikes many—including me—as unacceptable”).

<sup>3</sup> Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows> [http://perma.cc/3GCA-GV7M]; see also Rob Barry & Coulter Jones, *Hundreds of Police Killings Are Uncounted in Federal Statistics*, WALL STREET J. (Dec. 3, 2014), <http://www.wsj.com/articles/hundreds-of-police-killings-are-uncounted-in-federal-statistics-1417577504> [http://perma.cc/8GQD-7GAK]; Eugene Robinson, *What America’s Police Departments Don’t Want You to Know*, WASH. POST (Dec. 1, 2014), [http://www.washingtonpost.com/opinions/eugene-robinson-its-a-crime-that-we-dont-know-how-many-people-police-shoot-to-death/2014/12/01/adedcb00-7998-11e4-b821-503cc7efed9e\\_story.html](http://www.washingtonpost.com/opinions/eugene-robinson-its-a-crime-that-we-dont-know-how-many-people-police-shoot-to-death/2014/12/01/adedcb00-7998-11e4-b821-503cc7efed9e_story.html) [http://perma.cc/FH36-9AN3] (stating “no one can say for sure” how many people police officers kill every year). This sentiment was perhaps best summed up by FBI Director James B. Comey, who remarked that, “It’s ridiculous that I can’t tell you how many people were shot by the police last week, last month, last year.” Michael S. Schmidt, *F.B.I. Director Speaks Out on Race and Police Bias*, N.Y. TIMES (Feb. 12, 2015), <http://www.nytimes.com/2015/02/13/us/politics/fbi-director-comey-speaks-frankly-about-police-view-of-blacks.html> [http://perma.cc/2LND-VN9J].

<sup>4</sup> Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (2014) (to be codified at 42 U.S.C. § 13727). Technically, this law is simply a reauthorization of an earlier measure passed in 2000. It took several years for law enforcement agencies to report data via the original version of this law. And the original version expired shortly thereafter, in 2006. As a result, the Department of Justice (“DOJ”) did not release any comprehensive statistics from the first attempt at this sort of database. Allie Gross, *Congress Is Finally Going to Make Local Law Enforcement Report How Many People They Kill*, MOTHER JONES (Dec. 17, 2014), <http://www.motherjones.com/politics/2014/12/death-custody-reporting-act-police-shootings-ferguson-garner> [http://perma.cc/NY9F-XD5B].

partments must report the manner and circumstances of these deaths.<sup>5</sup> States that fail to report these statistics to the Department of Justice (“DOJ”) “could be stripped of up to 10 percent of the federal money they receive for local law enforcement purposes.”<sup>6</sup> The DCRA also requires the U.S. Attorney General to study the resulting data and make recommendations to Congress on how the federal government can reduce the number of deaths in custody.<sup>7</sup>

In addition, the Federal Bureau of Investigations (“FBI”) has announced that it will “sharply expand” its system of tracking fatal police shootings.<sup>8</sup> As part of this push, the FBI will attempt to track not just civilian deaths, but “any incident in which an officer causes serious injury or death to civilians, including through the use of stun guns, pepper spray and even fists and feet.”<sup>9</sup> The new FBI data may be available as early as 2017.<sup>10</sup>

Whereas the FBI database relies on police departments to self-report information on police behavior, the Bureau of Justice Statistics (“BJS”) has recently unveiled a pilot program that relies on open-source data to document the frequency of police use of deadly force.<sup>11</sup> The BJS is currently dedicating two

<sup>5</sup> Eli Hager, *The Ferguson Bill*, MARSHALL PROJECT (Dec. 12, 2014), <https://www.themarshallproject.org/2014/12/12/the-ferguson-bill> [<https://perma.cc/22R9-FR7Q>] (“Each report must include ‘the name, gender, race, ethnicity, and age of the deceased; the date, time, and location of the death; the law enforcement agency’ involved and a description of how the death occurred.”).

<sup>6</sup> *Id.* (elaborating that the funds local law enforcement would lose would be through “so-called Byrne grants, which account for about \$500 million a year”). For more information on how Byrne grants are awarded and distributed, see *How Byrne JAG Grants Are Awarded and Distributed*, NAT’L CRIMINAL JUSTICE ASS’N, <http://www.ncja.org/how-byrne-jag-grants-are-awarded-and-distributed> [<http://perma.cc/ZP54-CPPJ>] (explaining how these grants are “awarded to states and territories by a formula based on population and Part 1 violent crimes”).

<sup>7</sup> 42 U.S.C.A. § 13727(f) (West 2014) (stating “[t]he Attorney General shall carry out a study of the information reported under subsection (b) and section 3(a) to . . . determine means by which such information can be used to reduce the number of such deaths”).

<sup>8</sup> Kimberly Kindy, *FBI to Sharply Expand System for Tracking Fatal Police Shootings*, WASH. POST (Dec. 8, 2015), [https://www.washingtonpost.com/national/fbi-to-sharply-expand-system-for-tracking-fatal-police-shootings/2015/12/08/a60fbc16-9dd4-11e5-bce4-708fe33e3288\\_story.html](https://www.washingtonpost.com/national/fbi-to-sharply-expand-system-for-tracking-fatal-police-shootings/2015/12/08/a60fbc16-9dd4-11e5-bce4-708fe33e3288_story.html) [<https://perma.cc/72V3-RZNY>].

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (explaining that “[t]he FBI’s system for tracking fatal police shootings is a ‘travesty,’ and the agency will replace it by 2017”).

<sup>11</sup> Tom McCarthy, *US Government Database Hopes to Tell ‘Whole Story’ of Police Killings After Year of Guardian Count*, THE GUARDIAN (Dec. 13, 2015), <http://www.theguardian.com/us-news/2015/dec/13/justice-department-database-police-killings-counted-statistics> [<https://perma.cc/UGC7-NDA3>]. Several media outlets have already explored this sort of an open-source approach to documenting police killings. See, e.g., *How to Help*, FATAL ENCOUNTERS, <http://www.fatalencounters.org/how-to-help/> [<http://perma.cc/UJ2N-QZ37>] (describing the methodology for documenting police killings and offering the public a submission form option to submit information about police killings); *The Counted: People Killed by Police in the US*, THE GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [<http://perma.cc/8ZDM-L52U>] (documenting the number of individuals killed by police in the United States and including a tab at the top requesting the public to “send a tip” about a police killing that may not be reflected in the database).

computer servers to “combing the internet 24 hours a day for reports of anything that looks like someone dying in an interaction with a police officer.”<sup>12</sup> As part of this BJS initiative, analysts have begun contacting “police, medical examiners and other local officials to check the accuracy of the information and gather additional facts.”<sup>13</sup> The BJS hopes to “convert [this] pilot into a full-fledged program” that will produce annual data “by the end of 2016.”<sup>14</sup>

Admittedly, each of these planned databases may have problems. The financial penalty for failing to report DCRA data is relatively small.<sup>15</sup> The FBI database will rely on police departments to self-report data voluntarily.<sup>16</sup> And the BJS database may only identify police killings that result in a news story.<sup>17</sup> Despite their individual shortcomings, these three databases combined provide the best available information on the frequency of civilian deaths at the hands of law enforcement. Thus, in the coming years policymakers must wrestle with a challenging question: Once we have more thorough data on killings by law enforcement, how can we use this information to reduce police violence?<sup>18</sup>

In addressing this question, this Article makes two contributions. The first Part of the Article argues that **data alone will be insufficient to bring about widespread reductions in police use of deadly force**. It is possible that by making these datasets publicly available, the federal government could incentivize some local police departments to prioritize reductions in officer use of deadly force. Currently, the public has access to very few national statistics on local police behavior.<sup>19</sup> By making more data on police killings publicly available, the federal government could empower the public, the press, and interest groups to identify potentially problematic patterns of police violence. This

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<sup>12</sup> McCarthy, *supra* note 11.

<sup>13</sup> Kindy, *supra* note 8.

<sup>14</sup> *Id.*

<sup>15</sup> Editorial, *Data on Officer-Involved Shootings Will Finally Get Compiled Under State and Federal Laws*, L.A. TIMES (Jan. 3, 2016), <http://www.latimes.com/opinion/editorials/la-ed-police-shooting-data-20160103-story.html> [<https://perma.cc/55ZD-2HCA>] (“The latest version of the law is superior to its predecessor in that it has teeth, albeit not terribly sharp ones.”).

<sup>16</sup> Kindy, *supra* note 8 (“The new database will continue to rely on the voluntary reports of local police departments; FBI officials said they lack the legal authority to mandate reporting.”). It is worth noting, though, that the FBI has expressed an intention to offer federal grants to local police departments that need additional resources to comply with this data request. And the FBI has received support from “the nation’s largest police organizations,” which “have agreed for the first time to lobby local departments to produce the data.” *Id.*

<sup>17</sup> See McCarthy, *supra* note 11 (explaining that the dataset will be based on information available online).

<sup>18</sup> This question is timely and particularly important because the text of the DCRA requires the Attorney General to study the DCRA data and make recommendations to Congress on how the federal government can reduce the number of deaths in custody. 42 U.S.C.A. § 13727(f) (stating “[t]he Attorney General shall carry out a study of the information reported under subsection (b) and section 3(a) to . . . determine means by which such information can be used to reduce the number of such deaths”).

<sup>19</sup> See *infra* note 43 and accompanying text (discussing some of the data that are currently publicly available).

could, in turn, motivate some local police departments to institute proactive reforms aimed at reducing the frequency of police violence. But this Article argues that even when faced with troubling statistical trends, there is no guarantee that many of the nation's most problematic police departments will voluntarily make expensive policy and procedural reforms. In making this argument, this Article provides a detailed account of the structural, political, and organizational barriers to bottom-up police reform. This Part concludes that in order to bring about meaningful reform in local law enforcement agencies, the federal government will have to do more than merely provide public access to data on police killings.

The second Part of the Article considers some possible ways that the Attorney General could use these new datasets to bring about reform in local police practices. Specifically, this Article demonstrates how the Attorney General could use this newly amassed data on police violence to facilitate federal civil rights litigation against local police departments. Under 42 U.S.C. § 14141, the Attorney General has the power to seek equitable relief against police departments engaged in a pattern or practice of unconstitutional misconduct, including excessive use of force.<sup>20</sup> Essentially, § 14141 gives the DOJ the power to force local police departments to make costly reforms aimed at curbing future wrongdoing—provided the DOJ can prove the police department is engaged in

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<sup>20</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401(a), 108 Stat. 1796, 2071 (codified at 42 U.S.C. § 14141 (2012)) (“It shall be unlawful for any governmental authority . . . 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 . . .”); 42 U.S.C. § 14141(b) (“Whenever the Attorney General has reasonable cause to believe [that there is a pattern or practice of misconduct] . . . the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.”); see also Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3207–15 (2014) [hereinafter Rushin, *Federal Enforcement of Police Reform*] (explaining the rise of § 14141). Congress passed § 14141 in response to the Rodney King incident in Los Angeles. See David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1159–60 (2014) (describing legislative action following the Rodney King beating). The Rodney King incident happened in March of 1991 when two police cars pursued a possible drunk driver speeding on a highway in Los Angeles. Seth Mydans, *Seven Minutes in Los Angeles—A Special Report; Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES (Mar. 18, 1991), <http://www.nytimes.com/1991/03/18/us/seven-minutes-los-angeles-special-report-videotaped-beating-officers-puts-full.html> [<http://perma.cc/8ZDM-L52U>]. Minutes later, “a video taken by a nearby onlooker showed four Los Angeles Police Department . . . officers brutally beating one of the car’s occupants, a man named Rodney King, without any apparent provocation.” Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1344–85 (2015) [hereinafter Rushin, *Structural Reform Litigation*]. Investigations revealed that the Rodney King beating was not the result of a few bad officers. For more information about the congressional investigation into the Rodney King incident, see generally *Police Brutality: Hearing Before the H. Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 133 (1991). Instead, it was indicative of a “diseased organizational culture within the LAPD that condoned violence, tolerated racism, and failed to respond to wrongdoing.” Rushin, *Structural Reform Litigation*, *supra*, at 1345. Federal law at the time was simply incapable of dealing with this sort of “systemic wrongdoing.” *Id.* So in 1994, Congress passed § 14141.

systemic misconduct. Soon after Congress passed § 14141, many scholars praised it as one of the most important regulations of police misconduct in American history.<sup>21</sup> But this optimism soon turned into disappointment as critics observed that the DOJ lacked the necessary tools to enforce § 14141.<sup>22</sup> Previous empirical work has attributed this lack of aggressive enforcement of § 14141 to a combination of resource scarcity and the lack of national statistics on police behavior.<sup>23</sup> Thus, the DOJ could use data on police violence to improve the enforcement of § 14141 in three ways.

First, the DOJ could use these datasets as tools to identify police departments engaged in a pattern or practice of misconduct.<sup>24</sup> Previous empirical research has shown that, in the absence of national statistics on police behavior, the DOJ has been forced to use a range of highly imperfect methods to identify police agencies in violation of § 14141.<sup>25</sup> Admittedly, these new datasets will

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<sup>21</sup> Around the time of the law's passage, one scholar theorized that § 14141 might end up being "more significant, in the long run, than *Mapp v. Ohio* . . . which mandated the exclusion of evidence obtained in violation of the Fourth Amendment." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 539 n.134 (2001). Others at the time suggested that § 14141 would become the "most promising legal mechanism" for combatting police misconduct. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 457 (2003).

<sup>22</sup> See Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3219–23 (describing the challenges the DOJ faces in case selection). It is also worth noting here that many critics have observed that the DOJ appears to under-enforce § 14141. See, e.g., Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 100–01 (2001) (noting "the DOJ lacks the resources" to address problems like racial profiling as demonstrated by the "[f]ew consent decrees" used thus far); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1407–11 (2000) (linking the lack of DOJ enforcement to resource and political constraints); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1419 (2007) ("[T]he Department of Justice faces financial and political constraints on its effectiveness [in enforcing § 14141]."); 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, 493 (2008) ("Citing the expediency and cost-effectiveness of their settlement strategy, U.S. government officials have expressly articulated a preference for avoiding litigation and negotiating with municipalities to ensure compliance with the suggested reforms."). As a result, critics have complained that the DOJ lacks a strategy for selecting police departments for § 14141 litigation. Eric Lichtblau, *U.S. Low Profile in Big-City Police Probes Is Under Fire*, L.A. TIMES (Mar. 17, 2000), <http://articles.latimes.com/2000/mar/17/news/mn-9869> [<http://perma.cc/Y4VN-CC8E>]. The process by which the DOJ selects cases for § 14141 litigation currently appears "messy, imprecise, and generally hidden from outsiders." Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3194. Today, the DOJ uses a collection of highly imperfect methods to identify which local police agencies are in need of federally mandated reform. The DOJ relies on media coverage, existing civil litigation, internal whistleblowers, and academic studies to identify problematic police departments. Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3220–24.

<sup>23</sup> See *infra* notes 217–248 and accompanying text (describing the challenges of § 14141 enforcement including lack of resources, spillover, and case selection troubles).

<sup>24</sup> *Infra* notes 253–261 and accompanying text.

<sup>25</sup> Until recently, little was known about how the DOJ identified agencies in violation of § 14141. This author's recent empirical study based on interviews with DOJ personnel and other stakeholders suggests that the DOJ uses a range of proxies in the absence of hard statistics on police misconduct.

not be perfect.<sup>26</sup> But they will be useful in judging the comparative presence of police violence across different police departments. Although a police department may be able to manipulate some data, it seems unlikely that departments will be able to hide patterns of police killings from all three.<sup>27</sup> And although the DOJ has already sought this sort of information on police killings through previous § 14141 investigations, the DOJ has often only been able to acquire this information *after* initiating an investigation of a police department.<sup>28</sup> By making this information publicly available for all police departments across the country, these datasets will give the DOJ important tools to make cross-departmental comparisons that may reveal patterns of police behavior it would have otherwise missed.

Second, the DOJ could publicize DCRA, FBI and BJS data on police violence in a manner that stimulates some proactive reform in local police departments. Because of its resource limitations, the DOJ has only been able to investigate around three law enforcement agencies each year under § 14141—or less than 0.02% of the nation’s police departments.<sup>29</sup> Section 14141 action

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The DOJ relies on media coverage. Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3220–21 (citing Los Angeles, Cincinnati, and Washington, D.C. as communities where media coverage of police misconduct inspired DOJ action via § 14141). The DOJ also has turned to existing civil litigation. *Id.* at 3219–20 (explaining how the American Civil Liberties Union (“ACLU”) and National Association for the Advancement of Colored People (“NAACP”) were instrumental in investigating police misconduct or bringing their own civil suits against some police departments before DOJ intervention). Whistleblowers have also helped the DOJ in identifying problematic agencies. *Id.* at 3223–24 (detailing how officers “would contact the division and talk about problems they had witnessed or problems they, themselves, had experienced when they were not in uniform”). And even academic studies have been useful. *Id.* at 3222–23 (citing a study by John Lamberth).

<sup>26</sup> See *supra* notes 15–17 and accompanying text (describing some of the likely limitations of the DCRA, FBI, and BJS datasets).

<sup>27</sup> To be clear, a police department is not necessarily engaged in a pattern of unconstitutional misconduct just because its officers are involved in more civilian deaths than other agencies. Police sometimes need to use deadly force to defend themselves and others. Additionally, some municipalities are simply more dangerous than others and may require police to use deadly force more often. Nonetheless, an unusually large number of civilian deaths at the hands of a particular law enforcement agency raise questions about the adequacy of that agency’s training and oversight mechanisms, as excessive use of force is the most common allegation made by the DOJ in § 14141 cases. The DOJ has relied on a pattern of excessive use of force as a legal basis for federal intervention in 71% of prior § 14141 cases. See Sarah Childress, *Fixing the Force*, PBS FRONTLINE, <http://apps.frontline.org/fixingtheforce> [<https://perma.cc/MC75-VQA8>] (showing that forty-eight of sixty-eight allegations as of January 2015 involved claims of excessive use of force).

<sup>28</sup> Albuquerque, New Mexico provides an example of a case where the DOJ sought this information. There, the DOJ received information on the circumstances surrounding police shootings resulting in deaths as part of its investigation of the Albuquerque Police Department (“APD”). This evaluation revealed a troubling pattern of apparently unjustified killings by the APD dating back several years. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE ALBUQUERQUE POLICE DEPARTMENT 1 (2014), [http://www.justice.gov/crt/about/spl/documents/apd\\_findings\\_4-10-14.pdf](http://www.justice.gov/crt/about/spl/documents/apd_findings_4-10-14.pdf) [<http://perma.cc/PDX7-4GY5>] [hereinafter Albuquerque Investigative Finds Letter from DOJ].

<sup>29</sup> This is not meant to criticize the DOJ’s current enforcement approach. This approach makes sense, given the lack of hard data available to justify § 14141 intervention into one police department



has been so rare that a police department's selection for federal oversight often seems procedurally unjust.<sup>30</sup> These conditions raise a set of classical enforcement dilemmas. How can the DOJ ensure widespread statutory compliance with limited § 14141 enforcement? And under these sorts of resource constraints, how can the DOJ ensure that enforcement is procedurally just? To address these problems, the DOJ could use the DCRA, FBI, and BJS datasets to create an annual, public list of "Police Departments Responsible for the Most Civilian Deaths."<sup>31</sup> The DOJ could then issue an ultimatum to these police departments—either (1) explain the unusually large number of civilian deaths per capita in your community, or (2) provide evidence of meaningful reforms taken to reduce the number of police killings. To enforce this ultimatum, the DOJ could prioritize § 14141 enforcement against police departments that fail to provide evidence of proactive reforms.<sup>32</sup> By transparently announcing selection criteria for § 14141 based in part on DCRA, FBI, and BJS statistics, the DOJ can both improve the perceived fairness of § 14141 enforcement and motivate some police department to adopt measures aimed at reducing police use of deadly force.<sup>33</sup>

Third, the DOJ could use this newly amassed data to monitor police departments that have already undergone § 14141 reform. This would address another significant problem facing the DOJ's enforcement of § 14141. Although the DOJ has successfully used the statute to overhaul a number of police

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over another. But because the DOJ has only had the resources to investigate around three police departments in the United States each year, getting selected has felt akin to "winning a horrible lottery." Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3194.

<sup>30</sup> For an example of this feeling of procedural unfairness, see Lichtblau, *supra* note 22 (recalling comments made by Gary Durfour, former City Manager of Steubenville, Ohio, who openly questioned why the DOJ chose to investigate Steubenville, Ohio when other departments appeared to have more significant problems).

<sup>31</sup> See *infra* notes 262–272 and accompanying text (discussing creation of such a list).

<sup>32</sup> This recommendation is somewhat similar to one made by Professor Rachel A. Harmon. See generally Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009) (focusing on (1) the justification for the DOJ creating a list of problematic police departments and (2) the need to prioritize litigation against police departments on this list). This Article argues that the newly developed DCRA, FBI, and BJS data on police violence will provide one of the few statistical databases the DOJ could use in developing an enforcement strategy similar to that recommended by Professor Harmon. Thus, this Article hopes to both support and extend Professor Harmon's creative and innovative proposal based on these new databases.

<sup>33</sup> Professor Harmon has previously observed how this sort of an enforcement approach could incentivize proactive reform in local police departments. See Harmon, *supra* note 32, at 1 (describing how her proposal could "induce reform in many more" police departments than the current enforcement regime). But no previous research has identified how this sort of an enforcement approach could correct another significant problem facing § 14141 interventions—the perceived lack of procedural justice in the case selection process. This is an ongoing problem. Rushin, *Structural Reform Litigation*, *supra* note 20, at 1370 (explaining that while the DOJ's current "approach to case selection gives the DOJ wide authority, it also understandably frustrates police departments"). The enforcement proposal made in this Article could help alleviate this concern.

departments,<sup>34</sup> questions remain about the sustainability of these reforms.<sup>35</sup> The DOJ has not yet established a mechanism to keep track of police departments that have previously undergone § 14141 reforms. The creation of these new datasets provides a unique and cost-effective opportunity for the DOJ to conduct some limited monitoring of police departments after § 14141 intervention ends.

To be clear, the DCRA, FBI, and BJS datasets are not a solution to all of the problems with § 14141. As this Article concludes, these databases should be just the beginning of a broader federal effort to collect more data on local police conduct. Congress passed § 14141 in order to give the Attorney General the power to enjoin all types of systemic misconduct within police departments, not just excessive uses of deadly force. If Congress were to require local police departments to report other valuable information on local police behavior—like the frequency of citizen complaints, the demographic profiles of individuals stopped by law enforcement, the number of civil rights suits stemming from police misconduct, or the number of use of force incidents—the DOJ should similarly incorporate this data into its enforcement of § 14141. But Congress has yet to take such bold action to document local police behavior. In the absence of other useful data, this Article argues that consideration of the DCRA, FBI, and BJS datasets on police killings will provide the DOJ with an opportunity to at least incrementally improve the enforcement of § 14141.

As such, this Article is divided into three Parts. Part I of this Article begins by examining passage of the DCRA and the announcement of the FBI and BJS datasets. It shows that, while imperfect, these datasets may come to represent some of the best available information on local police behavior. Part II argues that the federal government ought to make data from the DCRA, FBI, and BJS databases publicly accessible. Part II ultimately argues that while transparency of data may stimulate bottom-up reform in some local police departments, others are likely to remain obstinately opposed to change. This reflects a broader problem that has plagued police departments for much of American history. Throughout history, many police departments have been unwilling or unable to respond to systemic misconduct within their ranks for a variety of structural and political reasons. This was one of the primary reasons that the federal government has felt it necessary to gradually increase its oversight of local police departments in recent decades. Thus, Part II concludes that

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<sup>34</sup> See Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, apps. A, B (showing the police departments that the DOJ has reformed with § 14141 and describing the reform process in general terms).

<sup>35</sup> There is some evidence that jurisdictions have made costly reforms under DOJ oversight, only to regress once the DOJ leaves town. Perhaps the best example of this would be Pittsburgh, Pennsylvania, where evidence suggests that some of the hard-fought reforms have been scrapped after federal oversight ended. Rushin, *Structural Reform Litigation*, *supra* note 20, at 1410–11.

the federal government should look for ways to use DCRA, FBI, and BJS data on police violence to enhance the use of federal civil rights litigation against local police departments—namely § 14141 litigation. Part III considers how the DOJ could use these new datasets to improve the application of § 14141. This Part first recounts the history of § 14141. It also describes the available empirical literature on § 14141, paying careful attention to the current challenges the DOJ faces in enforcing § 14141. Based on these observations, this Part concludes by showing how the DOJ could use DCRA, FBI, and BJS data on police violence to construct a more coherent approach to enforcing § 14141.

### I. THE EMERGING DATA ON KILLINGS BY POLICE

The last several years have brought calls for additional data on police conduct.<sup>36</sup> These calls increased significantly after the killings of Michael Brown,<sup>37</sup> Eric Garner,<sup>38</sup> and Tamir Rice.<sup>39</sup> These calls have crossed traditional political party lines.<sup>40</sup> It seems incongruent for the federal government to keep detailed records on the number of law enforcement officers killed or assaulted in the line of duty,<sup>41</sup> but not keep comparable records on citizens killed or assaulted by law enforcement. Over the last two years, the federal government has announced several new initiatives to collect data on civilian deaths at the hands of law enforcement. First, in 2014, Congress finally took a significant step towards collecting this information with the passage of the DCRA, which requires police departments to report the death of any person “who is detained, under arrest, or is in the process of being arrested,” and requires police de-

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<sup>36</sup> Editorial, *One Thing the U.S. Government Doesn't Count: How Often Police Kill Civilians*, L.A. TIMES (Dec. 16, 2014), <http://www.latimes.com/opinion/editorials/la-ed-police-statistics-20141217-story.html> [<http://perma.cc/9W9R-4LTC>] [hereinafter L.A. TIMES Editorial] (calling for a comprehensive, national database on police killings).

<sup>37</sup> See, e.g., Lowery, *supra* note 3 (bringing up the Michael Brown shooting as one of several that have inspired a national conversation on police shootings).

<sup>38</sup> See, e.g., Martin Kaste, *System for Reporting Police Killings Unreliable, Study Finds*, NPR (Mar. 26, 2015), <http://www.npr.org/2015/03/06/391269342/system-for-reporting-police-killings-unreliable-study-finds> [<http://perma.cc/M547-KQUN>] (using Eric Garner as one example of a police killing that has inspired a national conversation about police statistics).

<sup>39</sup> See, e.g., Allen G. Breed, *Police Killing Data Filled with Many Unknowns*, HUFFINGTON POST (Dec. 7, 2014), [http://www.huffingtonpost.com/2014/12/07/police-killings\\_n\\_6284358.html](http://www.huffingtonpost.com/2014/12/07/police-killings_n_6284358.html) [<http://perma.cc/BU5T-QEXP>] (describing the shooting of twelve-year-old Tamir Rice as one of many examples of police killings that have sparked calls for more detailed national statistics).

<sup>40</sup> See Fleetwood, *supra* note 2 (describing how support for such a measure has received “rare bipartisan” support).

<sup>41</sup> The FBI currently records detailed data on any assault or killing of a police officer in the line of duty as part of the Uniform Crime Reports (“UCR”). See *Uniform Crime Reports*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications> [<http://perma.cc/AZK5-LGMC>] [hereinafter *Uniform Crime Reports: Law Enforcement*] (to access data regarding police officers, click on dates under “Law Enforcement Officers Killed and Assaulted”).

partments to report the manner and circumstances of the death.<sup>42</sup> Like most police statistics, the DCRA requires police departments to self-report the number of individuals killed in their custody.<sup>43</sup> The measure requires police departments to report not just the occurrence of deaths in custody, but also a range of circumstantial and demographic information, including “the name, gender, race, ethnicity, and age of the deceased,” as well as “the date, time, and location of the death.”<sup>44</sup>

Second, the FBI has also announced a plan to expand its recordkeeping of police violence.<sup>45</sup> Like the DCRA, the FBI hopes to collect demographic information including the “age, sex, and race of the officers and subjects” as well as “the circumstances of the encounter and the relationship between the officer

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<sup>42</sup> Death in Custody Reporting Act § 2; *see also* 42 U.S.C. § 1327(a). It is worth nothing, though, that the DCRA data contain several gaps that could limit the DCRA’s effectiveness. For example, the law only requires police to report deaths that occur in police custody or while police are attempting an arrest. Seemingly unjustified killings, like that of Tamir Rice, would very possibly fall outside the scope of this act. L.A. TIMES Editorial, *supra* note 36.

<sup>43</sup> The federal government has collected information from police departments in several different databases. Perhaps most prominently, the FBI collects information on crimes reported in most jurisdictions in the United States through the UCR. *See Uniform Crime Reports*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications> [<http://perma.cc/AZK5-LGMC>] [hereinafter *Uniform Crime Reports: Crime*] (to access data on crime rates, click on the dates under “Crime in the United States”). These annual statistics report the numbers and rates of different crimes in each reporting jurisdiction. UCR data are self-reported voluntarily. Crime data is also aggregated in the National Incident Based Reporting System. *See* Lynn A. Addington, *Studying the Crime Problem with NIBRS Data: Current Uses and Future Trends*, in 23 HANDBOOK ON CRIME AND DEVIANCE 24–30 (Marvin D. Krohn et al. eds., 2009). And the federal government collects information on police department policies, procedures, and behaviors through the Law Enforcement Management and Administrative Statistics (“LEMAS”). *E.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS (LEMAS): 2007 SAMPLE SURVEYS OF LAW ENFORCEMENT AGENCIES (2007), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/31161> [<http://perma.cc/YQ37-M65X>] [hereinafter LEMAS]. This self-reporting procedure has predictably led to some problems. *See* Barry & Jones, *supra* note 3 (describing apparent discrepancies between self-reported numbers on justifiable homicides in various jurisdictions and numbers obtained by the *Wall Street Journal* during their own independent investigation). Social scientists and reporters have documented numerous cases of police departments altering or manipulating data via these self-reported metrics. *See, e.g.*, Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1206 (2014) (describing how police departments systemically underreport or manipulate rape statistics); Michael Matza et al., *U.S. Review Set for Philadelphia Crime Reports*, PHILA. INQUIRER (Nov. 14, 1998), <http://inquirer.philly.com/packages/crime/html/111498.asp> [<http://perma.cc/FJG2-MQE7>] (describing investigations into a pattern of underreporting of crime statistics in the Philadelphia Police Department); Steve Thompson & Tanya Eiserer, *Experts: Dallas Undercount of Assaults Builds ‘Artificial Image,’* DALL. MORNING NEWS (Dec. 15, 2009), <http://www.dallasnews.com/news/community-news/dallas/headlines/20091214-Experts-Dallas-undercount-of-assaults-6330.ece> [<http://perma.cc/ZD8J-EFP2>] (showing how the Dallas Police Department has allegedly underreported assault statistics).

<sup>44</sup> 42 U.S.C. § 13272(b).

<sup>45</sup> Tom McCarthy et al., *FBI to Launch New System to Count People Killed by Police Officers*, THE GUARDIAN (Dec. 8, 2015), <http://www.theguardian.com/us-news/2015/dec/09/fbi-launch-new-system-count-people-killed-police-officers-the-counted> [<https://perma.cc/SK5S-BBYW>].

and subject.”<sup>46</sup> The dataset will encompass more information than the DCRA data, as it will include not just fatalities caused by police, but any incident in which an officer causes a serious injury.<sup>47</sup> The FBI hopes to release this data almost immediately after the events occur, rather than waiting for the data to be “tallied in the aggregate at the end of each year.”<sup>48</sup> This FBI database will have one major drawback: **the FBI will rely on local police departments to self-report this information.**<sup>49</sup> **This fact is troubling, because less than three percent of police departments have voluntarily turned over data to the FBI on fatal police shootings in the past.**<sup>50</sup> Without an explicit act of Congress, such as the DCRA, the FBI lacks the legal authority to require local police departments to report this data. Instead, the FBI must rely on “leaders of the nation’s largest police organizations . . . to lobby local police departments to produce the data,” as well as other financial incentives.<sup>51</sup>

Third, the BJS has announced an ambitious plan to document police killings in a very different way. **The BJS has dedicated two computer servers to searching the internet twenty-four hours a day for apparent incidents of civilians dying in interactions with law enforcement.**<sup>52</sup> The BJS is working with a third-party research company to verify these incidents with law enforcement agencies and medical examiners’ offices.<sup>53</sup> The BJS hopes to provide this data to the DOJ in 2016.<sup>54</sup> The database should document any civilian death that happened “while the decedent’s ‘ability to leave’ was restricted by a law enforcement officer . . . but before the decedent was officially booked into jail.”<sup>55</sup> The BJS also plans to cross-reference its database with those created by major media outlets.<sup>56</sup> The BJS database may only obtain information on police killings that receive media attention; however, this methodology should capture many of the deaths that occur while in the custody of police departments that may otherwise be unwilling to self-report to the DCRA and FBI databases.

<sup>46</sup> *Id.* (quoting an FBI official speaking about these plans).

<sup>47</sup> Kindy, *supra* note 8. This should help capture many instances where officers use non-lethal force.

<sup>48</sup> *Id.* (quoting Stephen L. Morris, an assistant director of the FBI’s Criminal Justice Information Services Division, as saying that the data should be released in “near real-time”).

<sup>49</sup> *See id.* (“The new database will continue to rely on the voluntary reports of local police departments . . .”).

<sup>50</sup> *Id.* (detailing the low reporting rate under a similar FBI initiative since 2011).

<sup>51</sup> *Id.*

<sup>52</sup> McCarthy, *supra* note 11.

<sup>53</sup> These analysts contact relevant law enforcement and medical examiners and utilize a nineteen-point questionnaire to better understand the incident. *Id.*

<sup>54</sup> *Id.* (stating that “the pilot program . . . expects to deliver an initial report to the Justice Department early next year” and that the first report should be submitted “this spring”).

<sup>55</sup> *Id.*

<sup>56</sup> *See id.* (noting that “[a]nalysts [will] check these lists against The Counted [The Guardian’s list of deaths caused by police] and other databases of people killed by police”).

Combined, these efforts will likely create useful data without significantly burdening local police departments. First, to the extent that the DCRA and FBI mandates require police departments to self-report data, collecting this information should not be particularly expensive or time-consuming. And the BJS database puts virtually no burden on local law enforcement. Although some may object that because every federal reporting requirement comes at a cost to the local municipality, the added cost of reporting deaths caused by police in each jurisdiction will be minimal, given that police already provide the federal government with a range of other, more complex statistical datasets each year.<sup>57</sup> Adding an additional reporting category—the number of individuals killed by law enforcement officers—will require little additional work.<sup>58</sup> Further, the number of individuals killed in each jurisdiction by law enforcement—even in the worst of the worst police departments—will be a relatively low number.<sup>59</sup> The burden imposed by documenting the number of police killings pales in comparison to the burden currently placed on departments via other reporting measures.<sup>60</sup>

Second, it will be somewhat difficult for a police department to hide police killings from all three databases. The literature is replete with examples of law enforcement agencies manipulating self-reported data.<sup>61</sup> This manipulation is often easy to accomplish because it is difficult to independently verify most self-reported data. Take the number of robberies as an example. Particularly in a large city, the media is unlikely to give attention to a single robbery. And robberies typically do not create any additional record outside that kept by the local police department—unlike automobile thefts, which often produce insurance claims.<sup>62</sup> By contrast, as the last few years have vividly demonstrated, a police killing of a private person can make national headlines. In fact, some of these events receive so much press coverage that reporters and social scientists

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<sup>57</sup> See L.A. TIMES Editorial, *supra* note 36 (“The FBI [already] compiles statistics from 18,000 law-enforcement agencies for its annual ‘Crime in the United States’ report, but it doesn’t include ‘use of force’ data. Separately, the [B]ureau collects voluntarily supplied data on ‘justifiable homicide’ by police, defined as ‘the killing of a felon by a law enforcement officer in the line of duty.’”).

<sup>58</sup> See *id.* (describing how many police departments “already maintain ‘use of force’ reports for their own analyses and personnel reviews, so these statistics are obtainable (some agencies, including the Los Angeles Police Department, post summaries on a website)”).

<sup>59</sup> Fleetwood, *supra* note 2 (showing in an enclosed table that the number of police killings estimated in many large cities is still fairly small).

<sup>60</sup> For example, the UCR reporting requirements appear to be far more onerous than the DCRA. See *Uniform Crime Reports: Law Enforcement*, *supra* note 41 (providing a multitude of self-reported statistics); *Uniform Crime Reports: Crime*, *supra* note 43 (same).

<sup>61</sup> See *supra* note 43 and accompanying text (describing multiple examples of police departments manipulating, underreporting, or otherwise altering self-reported crime statistics).

<sup>62</sup> See, e.g., Franklin E. Zimring, *Killings by Police Are Almost a Daily Occurrence in America*, S.F. CHRON. (Feb. 27, 2015), <http://www.sfchronicle.com/opinion/article/Killings-by-police-are-almost-a-daily-occurrence-6105999.php> [<http://perma.cc/E73K-BD7E>] (using insurance claims to verify the authenticity of the New York Police Department crime statistics for auto thefts).

have attempted to estimate the frequency of police killings based on media reports alone.<sup>63</sup> Third parties can also document police killings through public records like coroner reports and vital statistics in states and localities.<sup>64</sup> Although a police department may be able to hide regularized, minor misconduct like unjustified *Terry* stops,<sup>65</sup> it seems much harder for a police department to sweep a police killing under the proverbial rug. Because of this combination of intense media coverage, third-party documentation, and the development of three methodologically varied databases, federal policymakers can feel reasonably confident that the frequency of police killings will be difficult for a police department to hide in the future.

Third, the number of killings by law enforcement can serve as a valuable, albeit highly imperfect, proxy for the presence of systemic misconduct. If a police department is involved in a disproportionately large number of police killings relative to other comparable police departments, it may be an indicator of larger problems within the agency.<sup>66</sup> Admittedly, this sort of statistic will possibly fail to identify many police departments that are engaged in less serious misconduct that falls short of a pattern of unjustified police killings. And of course not all police killings are unjustified. When encountering an imminent threat to themselves or others, police sometimes have to use deadly force. Additionally, not all jurisdictions are the same. One may expect police officers in dangerous, high-crime jurisdiction neighborhoods to use deadly force more often than officers in safe, low-crime jurisdictions. The available data on police injuries in the line-of-duty only reaffirms this conclusion.<sup>67</sup> For example, police officers in larger cities face a higher risk of injury in the line of duty than rural

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<sup>63</sup> Rueben Fischer-Baum, *Another (Much Higher) Count of Homicides by Police*, FIVETHIRTYEIGHT (Aug. 25, 2014), <http://fivethirtyeight.com/datalab/another-much-higher-count-of-police-homicides/> [<http://perma.cc/Q82Q-ZGBY>] (citing databases of police killings put together by the Gun Violence Archive, Deadspin, Fatal Encounters, and even a Facebook page—each of which tends to rely heavily on media reports to document the number of police killings of civilians); see also Kyle Wagner, *We're Compiling Every Police-Involved Shooting in America. Help Us.*, REGRESSING (Aug. 20, 2014), <http://regressing.deadspin.com/were-compiling-every-police-involved-shooting-in-america-1624180387> [<http://perma.cc/F8R2-737L>] (requesting public assistance in gathering police shooting data).

<sup>64</sup> Zimring, *supra* note 62 (using this methodology to verify the authenticity of homicide records in New York City). This is presumably why the BJS will scour media reports and third-party records to create their database of police killings.

<sup>65</sup> See generally *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that it is reasonable for officers to stop and frisk citizens).

<sup>66</sup> An apparent “pattern or practice of use of excessive force, including deadly force, in violation of the Fourth Amendment,” is one of the most common justifications for the DOJ to intervene into a local police department via § 14141. Albuquerque Investigative Finds Letter from DOJ, *supra* note 28, at 1. For example, in the DOJ investigation of Albuquerque Police Department, the DOJ found that “of the 20 officer-involved shootings resulting in fatalities from 2009 to 2012 . . . a majority of these shootings were unconstitutional.” *Id.* at 2–3.

<sup>67</sup> *Uniform Crime Reports: Law Enforcement*, *supra* note 41 (to access data, click on years 2000 through 2014 under “Law Enforcement Officers Killed and Assaulted”).

officers. In 2012, for every one hundred police officers in metropolitan counties, eight were victims of assault in the line of duty.<sup>68</sup> By contrast, only about 4.9 out of every one hundred officers in nonmetropolitan counties were victims of assaults over the same time period.<sup>69</sup>

Consequently, it would not be fair to judge a police department based solely on the number of times that department has utilized deadly force. Any analysis of these statistics ought to consider the relative dangerousness of police department's jurisdiction as well as other potentially relevant information.<sup>70</sup> But limitations aside, the DCRA, FBI, and BJS databases have the potential to do something important—provide the federal government and the public with at least some data by which to identify potentially problematic police departments that may be engaged in an unusually high amount of violence.

In addition, the DCRA also requires the U.S. Attorney General to study the resulting data on deaths in custody and make recommendations to Congress on how the federal government can reduce the number of deaths in custody.<sup>71</sup> Specifically, the Attorney General must “determine the means by which such information can be used to reduce the number of [deaths in custody]” and report the results of this study to Congress by no later than December 18, 2016.<sup>72</sup> Thus, in the coming months, the Attorney General's Office faces a challenge. It must determine the best ways to use data on police killings to reduce violence by frontline officers. Some have claimed that the mere act of keeping data on police killings may be enough to bring about reform in some law enforcement agencies.<sup>73</sup> But is that enough? Or is there something else the Attorney General can do with these newly amassed datasets to reduce police violence? The Parts

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<sup>68</sup> *Id.* at tbl.66 (under “Law Enforcement Officers Killed and Assaulted,” select “2012”; then under “Officers Assaulted,” select “Access Tables”; then select “Table 66”).

<sup>69</sup> *Id.*

<sup>70</sup> One possible way to accomplish this goal would be by weighing the frequency of police killings against the relative dangerousness of each jurisdiction. Dangerousness could be measured by using some combination of available statistics of each jurisdiction's homicide rates or the rate at which officers in each jurisdiction suffer injuries in the line of duty.

<sup>71</sup> 42 U.S.C. § 13727(f) (stating “[t]he Attorney General shall carry out a study of the information reported under subsection (b) and section 13727a(a) . . . [to] determine means by which such information can be used to reduce the number of such deaths”).

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., Mariel Garza, *Police Use of Force: More Clamor and a New Bill Seeking Public Accountability*, L.A. TIMES (June 3, 2015), <http://www.latimes.com/opinion/opinion-la/la-ed-police-use-of-force-0602-story.html> [<http://perma.cc/G44H-7BCY>] (arguing that the presence of more public statistics on police use of deadly force will lead to “public accountability”); *Urge U.S. Senate to Pass the NAACP-Supported Death in Custody Reporting Act When They Return in Sept.*, NAACP, <http://www.naacp.org/action-alerts/entry/urge-u.s.-senate-to-pass-the-naacp-supported-death-in-custody-reporting-act> [<http://perma.cc/5TXP-RZFS>] (explaining to its members that the passage of this bill will “alleviate the environment of suspicion, concern and mistrust that currently exists in many racial and ethnic minority communities across America”).



that follow consider several ways the Attorney General could harness these datasets to combat violence in local police departments.

## II. THE BENEFITS AND LIMITATIONS OF TRANSPARENCY

It is imperative that the Attorney General makes DCRA, FBI, and BJS data on police violence, including circumstantial and demographic information, publicly accessible. The FBI has made it clear that it intends to make any data it obtains publicly available as soon as possible.<sup>74</sup> However as written, the DCRA does not explicitly require the Attorney General to do so.<sup>75</sup> At least some policing advocates have worried that the recent public attention given to allegations of police misconduct has made officers tentative in proactively policing the streets.<sup>76</sup> Some, like FBI Director James B. Comey, have suggested that additional scrutiny on law enforcement may contribute to increases in crime.<sup>77</sup> But in this case, the benefits of transparency outweigh any potential objections. By making this data publicly accessible, federal policymakers can incentivize police departments to implement policies aimed at curbing police violence. Ultimately, though, this Part argues that transparency alone will be insufficient to bring about proactive reform in all police departments. A number of political, structural, and organizational barriers may discourage some municipalities from implementing reform measures aimed at curbing police violence, even if these datasets are made readily available to the public. Thus the sections below consider the benefits and limitations of transparency.

### *A. The Benefits of Transparency: Empowering Bottom-Up Reform*

By making all of this new data public, federal policymakers could improve transparency in local police conduct and incentivize some police departments to institute policies aimed at reducing police violence. Currently, the

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<sup>74</sup> Kindy, *supra* note 8 (describing how the data will be “collected and shared with the public”).

<sup>75</sup> See 42 U.S.C.A. § 13727(f) (West 2014) (only requiring the Attorney General to release the results of a study on how the federal government can use DCRA statistics to reduce police violence).

<sup>76</sup> See, e.g., Todd C. Frankel, *DEA Chief Joins FBI Chief in Giving Credence to ‘Ferguson Effect’*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/11/04/dea-chief-joins-fbi-chief-in-giving-credence-to-ferguson-effect/> [http://perma.cc/ZV87-2EXD] (describing how the head of the Drug Enforcement Agency has also suggested that the increase in scrutiny of law enforcement may make cops hesitant or less effective); Janell Ross, *The ‘Ferguson Effect’ Creates an Ill-Timed Rift Between the FBI and the White House*, WASH. POST (Oct. 27, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/10/27/the-ferguson-effect-creates-an-ill-time-d-rift-between-the-fbi-and-the-white-house/> [http://perma.cc/U9KF-32KE] (explaining existing theories about how scrutiny on police may contribute to reductions in aggressiveness or increases in crime).

<sup>77</sup> Wesley Lowery, *FBI Chief Again Says Ferguson Having Chilling Effect on Law Enforcement*, WASH. POST (Oct. 26, 2015), [https://www.washingtonpost.com/politics/fbi-chief-again-says-ferguson-having-chilling-effect-on-law-enforcement/2015/10/26/c51011d4-7c2c-11e5-afce-2afd1d3eb896\\_story.html](https://www.washingtonpost.com/politics/fbi-chief-again-says-ferguson-having-chilling-effect-on-law-enforcement/2015/10/26/c51011d4-7c2c-11e5-afce-2afd1d3eb896_story.html) [http://perma.cc/VJP8-8WKY].

public has access to very few national statistics on local police departments.<sup>78</sup> Virtually all data on local law enforcement behavior come from a handful of self-reported databases on jurisdictional crime rates and departmental characteristics. For example, the FBI maintains the Uniform Crime Reports (“UCR”), which aggregates annual crime statistics for jurisdictions across the country using uniform formulas.<sup>79</sup> The federal government also maintains the Law Enforcement Management and Administrative Statistics (“LEMAS”), a database that includes self-reported information on internal departmental budgets, expenditures, salaries, demographics, equipment, and training requirements, among other variables.<sup>80</sup> Unlike the UCR, the federal government only compiles LEMAS data periodically (every three to four years) from a smaller number of law enforcement agencies.<sup>81</sup> While databases like UCR and LEMAS provide useful information on local police departments, they provide little insight on the frequency of police violence against civilians. Currently, the best government database on deaths in custody is the Supplementary Homicide Report, compiled as part of the UCR.<sup>82</sup> Police departments “are requested—but not required—to provide information to the Supplementary Homicide Report” on civilians deaths at the hands of law enforcement.<sup>83</sup> This has led one scholar to suggest that the Supplementary Homicide Report only includes “around 80 percent of total civilian killings.”<sup>84</sup>

In addition to government databases, a number of media sources have attempted to estimate the total number of individuals killed by law enforcement each year.<sup>85</sup> For instance, the “The Counted” project by *The Guardian* encourages users to send tips about individuals killed by law enforcement. The newspaper then aggregates this information into a user-friendly interface that includes photographs, circumstantial information, and demographics.<sup>86</sup> In practice though, these crowdsourcing efforts alone produce incomplete and imperfect databases.<sup>87</sup>

By contrast, the DCRA, FBI, and BJS databases should combine to produce useful data on the frequency of deadly force across different law en-

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<sup>78</sup> See *supra* note 3 and accompanying text (discussing the lack of data on police shootings of civilians).

<sup>79</sup> *Uniform Crime Reports: Crime*, *supra* note 43.

<sup>80</sup> LEMAS, *supra* note 43.

<sup>81</sup> See *id.* (describing LEMAS surveys as occurring every three to four years and explaining how the 2007 sample included 3095 agencies).

<sup>82</sup> Zimring, *supra* note 62.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *supra* note 11 and accompanying text (describing media estimates based on crowdsourcing data).

<sup>86</sup> *The Counted: People Killed by Police in the US*, *supra* note 11.

<sup>87</sup> See, e.g., *id.* (showing that many of the entries on *The Guardian* website include virtually no information on victims’ names, ages, races, or circumstances).

forcement agencies. Remember, the DCRA requires localities to report an array of information, including a description of the circumstances leading to the killing and information about the race, gender, ethnicity, and age of the victim.<sup>88</sup> The FBI and BJS are also seeking similarly “granular” data.<sup>89</sup> This information goes far beyond what is currently available to the public via the UCR, Supplementary Homicide Reports, or media crowdsourcing efforts alone. If made publicly available, this data will allow police departments to understand in clear terms how they compare to their peers in use of deadly force. Mere access to this information may motivate some police departments to take proactive steps to implement policies that reduce police violence.

Transparency will also empower the public, the press, and interest groups to oversee local police conduct. In recent years, the United States has seen an explosion of public interest in police conduct. In many major cities, “copwatching” groups—“groups of local residents who wear uniforms, carry visible recording devices, patrol neighborhoods, and film citizen-police interactions”—have taken an active role in overseeing police behavior.<sup>90</sup> These copwatching groups have emerged in Berkeley, Los Angeles, Austin, New York, Richmond, Portland, Atlanta, Minneapolis, and other cities.<sup>91</sup> The Black Lives Matter movement has produced protests in cities and on college campuses across the country.<sup>92</sup> These groups add to the list of existing civil rights groups

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<sup>88</sup> 42 U.S.C. § 13727(b) (requiring agencies to report “the name, gender, race, ethnicity, and age of the deceased; the date, time and location of death; . . . and a brief description of the circumstances surrounding the death”).

<sup>89</sup> Kindy, *supra* note 8 (quoting Morris as stating that the data will be “‘much more granular’ than in the past and will probably include the gender and race of officers and suspects involved in these encounters, the level of the threat or danger the officer faced, and the types of weapons yielded by either party”); McCarthy, *supra* note 11 (explaining that the BJS project involves the administration of a questionnaire that asks the “decedent’s name, age, date of death and the law enforcement agency involved”).

<sup>90</sup> Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. (forthcoming 2016) (manuscript at 1) (on file with author).

<sup>91</sup> *Id.* at 60 (showing a full list of copwatching groups that Professor Simonson interviewed as part of her article). Presumably, the list provided by Professor Simonson is not inclusive of the entire field of copwatching, but rather an indication that copwatching groups exist in, at minimum, these listed communities.

<sup>92</sup> See, e.g., Charlotte Alter, *Protests Erupt in Minneapolis After Police Shoot Black Man*, TIME (Nov. 16, 2015), <http://time.com/4114447/minneapolis-black-lives-matters-protests-police-shooting/> [<http://perma.cc/FGL2-LZPY>] (describing protests in Minneapolis by Black Lives Matter activists after the shooting of unarmed twenty-four-year-old Jamar Clark); Shelby Grad, *How Black Lives Matter Became a Thorn in the Side of L.A. Leaders*, L.A. TIMES (Oct. 20, 2015), <http://www.latimes.com/local/lanow/la-me-ln-how-black-lives-matter-became-a-thorn-in-the-side-for-la-leaders-story-so-far-20151020-htm1story.html> [<http://perma.cc/G3YD-XER8>] (describing Black Lives Matter protests in Los Angeles); Sandhya Somashekhar, *How Black Lives Matter, Born on the Streets, Is Rising to Power on Campus*, WASH. POST (Nov. 17, 2015), [https://www.washingtonpost.com/national/how-black-lives-matter-born-on-the-streets-is-rising-to-power-on-campus/2015/11/17/3c113e96-8959-11e5-be8b-1ae2e4f50f76\\_story.html](https://www.washingtonpost.com/national/how-black-lives-matter-born-on-the-streets-is-rising-to-power-on-campus/2015/11/17/3c113e96-8959-11e5-be8b-1ae2e4f50f76_story.html) [<http://perma.cc/ZZYF-G9Y4>] (describing the rise of Black Lives

with a longtime interest in police violence, like the American Civil Liberties Union.<sup>93</sup>

Historically, we have seen a troubling pattern in how some police departments respond to incidents of misconduct. A video emerges of alleged misconduct by a police officer.<sup>94</sup> Community groups immediately express outrage and demand reform. In response, police leaders deflect these calls for reform by arguing that misconduct was an isolated incident.<sup>95</sup> After all, every large organization will have a few bad apples. In the absence of any national statistics on local behavior, it can be difficult for the public, the press, or interest groups to prove that an individual act of police misconduct is connected to a broader problem within a police department.

These new datasets may provide an opportunity to break this cycle. If made available to the public, the press and interest groups could use DCRA, FBI, and BJS statistics to compare the rate of police killings across different municipalities in the country. These groups could even investigate patterns of deaths in custody by race, gender, age, or other demographic characteristics to uncover potentially problematic patterns. These datasets will hardly capture the full range of police misconduct. But by giving these groups access to this information, federal policymakers may be able to empower these groups to bolster demands for reform. This could, in turn, motivate local police departments to institute preemptive reforms aimed at reducing the frequency of police violence.

### B. The Limitations of Data Transparency

Transparency may spur some bottom-up reform in some local police departments. But history suggests that transparency alone may not be enough to bring about change in all police departments engaged in excessive violence.

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Matter groups at Columbia University, Kalamazoo College, Wesleyan University, Georgetown University, and the University of Cincinnati).

<sup>93</sup> For an example of the work done by the ACLU to investigate and lobby against police misconduct, see Robinson Meyer, *Film the Police: A New App Makes It Easier*, THE ATLANTIC (May 6, 2015), <http://www.theatlantic.com/technology/archive/2015/05/film-the-police/392483/> [<http://perma.cc/84QY-FUBA>] (describing a mobile phone application that encourages people to film police conduct and have the video automatically uploaded to “servers owned by the American Civil Liberties Union” ensuring that “[e]ven if the phone is destroyed, the video will survive”). The ACLU has also been instrumental in lobbying against the use of stop-and-frisk procedures by police officers. For an example of this, see Associated Press, *Chicago Stop-and-Frisk to Be Monitored*, N.Y. TIMES (Aug. 8, 2015), <http://www.nytimes.com/2015/08/09/us/chicago-stop-and-frisk-to-be-monitored.html> [<http://perma.cc/C6LP-SMVN>].

<sup>94</sup> See, e.g., Harmon, *supra* note 32, at 12 n.31 (describing the release of the George Holliday video in Los Angeles showing the beating of Rodney King).

<sup>95</sup> See, e.g., David Parrish, *Police ‘Street Justice’ Called Normal Conduct*, DAILY NEWS, Mar. 10, 1991, at N1 (quoting Chief Gates as saying that the event was an aberration, and that “[i]t’s not the kind of conduct that we have normally from our officers”).

This inconsistency underscores, perhaps, the biggest problem facing American policing today. Misconduct does not affect all police departments equally. Instead, the United States likely suffers from a handful of problematic police departments that are engaged in a pattern of unconstitutional misconduct. This section discusses conditions that lead to the existence of a handful of problematic police departments in the United States. Several inherent characteristics of American policing—local political accountability, decentralization, significant frontline discretion, and the general lack of federal oversight—lead to wide discrepancies in American police departments. Additionally, police misconduct often affects politically marginalized or unpopular minorities.<sup>96</sup> The cost of addressing systemic misconduct is high—sometimes requiring communities to reallocate scarce resources—and local police unions sometimes resist oversight mechanisms.<sup>97</sup>

Given these barriers, it is impractical to expect all localities to address violence within their ranks without additional top-down incentives. This suggests that federal policymakers should look to combine data transparency with other mechanisms in order to bring about a meaningful reduction in police violence.

### 1. Discretion in Frontline Policing

American police departments necessarily give frontline officers a significant amount of discretion.<sup>98</sup> This discretion is an important factor to consider, as it makes the documentation of police behavior particularly challenging. The academic literature has long observed that, as frontline workers, police officers need discretion to complete their jobs.<sup>99</sup> If police did not have the ability to exercise discretion, and instead had to strictly enforce every rule of law, “the criminal law would be ordered but intolerable.”<sup>100</sup> This reality has been well

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<sup>96</sup> See *infra* notes 179–185 and accompanying text (using Maricopa County, Arizona as an example of a location where police misconduct has disproportionately affected Latinos, a minority group in the county).

<sup>97</sup> See *infra* notes 201–203 and accompanying text (using the reforms in Los Angeles, Cleveland, and New Orleans as examples of the costs associated with efforts to reduce police misconduct).

<sup>98</sup> Charles D. Breitl, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960) (explaining the necessity of discretion in police work and defining discretion as “the power to consider all circumstances and then determine whether any legal action is to be taken . . . [a]nd if so taken, of what kind and degree, and to what conclusion”).

<sup>99</sup> The academic literature has generally observed two different types of discretion in police work—discretion about which laws to enforce and discretion about how to enforce those laws. For examples of discretion in how officers enforce the law, see generally MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* (2d ed. 2010) (recognizing in this hallmark book within socio-legal studies how police, as street-level bureaucrats, have the ability to exercise significant influence over how public policy is actually carried out); STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, *COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE* (2003) (describing how street-level bureaucrats like police officers have to deal with competing tensions of law abidance and cultural abidance).

<sup>100</sup> Breitl, *supra* note 98, at 427.

understood going back to the President's Commission on Law Enforcement and Administration of Justice, which recognized the importance of discretion. The authors of that report noted that police "are charged with performing [their jobs] where all eyes are upon them and where the going is always roughest—on the streets."<sup>101</sup> A police officer's job also requires interaction with individuals at their most vulnerable and desperate.<sup>102</sup> Much of the day-to-day work that police officers complete could be more accurately described as unstructured counseling; officers must calm everyday altercations, handle public nuisances, and offer assistance to "whoever needs help whether they want it or not."<sup>103</sup> Although this kind of discretion is a necessary part of policing, certain officers granted such authority will abuse it. The "supervision of subordinates with broad discretion and responsibilities" is especially tough, meaning that superiors cannot possibly "hold officers accountable for everything all the time."<sup>104</sup> Some misconduct is an unavoidable result of empowering frontline workers with considerable discretion. In the last century, the academic literature has recognized countless examples of how police discretion is invariably tied to some misconduct.

One of the first national recognitions of widespread misconduct among police officers came in 1931, when the National Commission on Law Observance and Enforcement, appointed by President Herbert Hoover and commonly referred to as the Wickersham Commission, released a series of reports.<sup>105</sup> Perhaps the most famous one was entitled the Report on Lawlessness in Law Enforcement. Some policing scholars have called it "one of the most

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<sup>101</sup> PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967) [hereinafter PRESIDENT'S COMM'N ON LAW ENF'T].

<sup>102</sup> *Id.* (stating that "[p]olicemen deal with people when they are both most threatening and most vulnerable, when they are angry, when they are frightened, when they are desperate, when they are drunk, when they are violent, and when they are ashamed").

<sup>103</sup> *Id.* at 91–92 (making this comparison to counseling and providing additional examples of the counseling-type role that police must adopt).

<sup>104</sup> LIPSKY, *supra* note 99, at 164.

<sup>105</sup> Dwight C. Smith Jr., *Wickersham to Sutherland to Katzenbach: Evolving an "Official" Definition for Organized Crime*, 16 CRIME L. & SOC. CHANGE 135, 135 (1991). George W. Wickersham, who served as the U.S. Attorney General under President William Howard Taft, chaired the Commission. RECORDS OF THE WICKERSHAM COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, at v (Samuel Walker ed., 1997), [http://www.lexisnexis.com/documents/academic/upa\\_cis/1965\\_WickershamCommPt1.pdf](http://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamCommPt1.pdf) [<http://perma.cc/EX9E-ZXJZ>]. Prominent legal scholars and policymakers also sat on the Commission, including Harvard Law School Dean Roscoe Pound and former U.S. Secretary of War Newton D. Baker. *Id.* In total, the Wickersham Commission issued fourteen reports on a wide range of criminal justice issues. Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 38 (1992). These reports were unique in part because they represented objective, technocratic approaches to understanding the problems plaguing the criminal justice system. RECORDS OF THE WICKERSHAM COMMISSION, *supra*, at v (explaining the detailed and objective approach used by the authors of the reports).

important events in the history of American policing.”<sup>106</sup> The report claimed “in uncompromising language” that police at the time regularly used physical brutality, threats, illegal detentions, and cruelty during interrogations to obtain involuntary confession—something the authors of the report referred to as the “third degree.”<sup>107</sup> The authors found that police agencies across the country utilized third-degree tactics.<sup>108</sup> They denied suspects the right to a lawyer during interrogations.<sup>109</sup> And they held suspects incommunicado for long periods of time in hopes of extorting a confession.<sup>110</sup> One of the root causes of this abuse was the fact that police officers necessarily need discretion to interrogate suspects, as it would be “impossible to lay down strict general rules covering all situations.”<sup>111</sup>

Since the Report on Lawlessness in Law Enforcement, “no fewer than six national commissions [have] examined various dimensions” of police misconduct in the United States.<sup>112</sup> These reports, along with other academic research, have found certain categories of misconduct to be common across different policing agencies: racial profiling, excessive uses-of-force, unlawful searches and seizures, failures to cooperate with investigations involving fellow officers, dishonesty at trial, and the planting of evidence.<sup>113</sup> Although the granting of discretion makes some amount of misconduct inevitable, empirical evidence

<sup>106</sup> RECORDS OF THE WICKERSHAM COMMISSION, *supra* note 105, at v. Although many of the Commission’s reports had little immediate effect on public policy, the Report on Lawlessness in Law Enforcement (“the Wickersham Report”) did motivate major changes in policing policy. NAT’L COMM’N ON LAW OBSERVANCE & ENF’T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 3 (1931); *see* *Miranda v. Arizona*, 384 U.S. 436, 446 (1966) (citing the Wickersham Report and the presence of the third degree, a term used in the report, as a partial rationale for barring interrogations absent authorized warnings). It is also worth mentioning that it remains unclear why the Commission chose to investigate policing, as there was “no political constituency with any strength at the national level demanding a federal investigation” into police misconduct. RECORDS OF THE WICKERSHAM COMMISSION, *supra* note 105, at viii. The ACLU and the NAACP were relatively small and weak interest groups at the time. *Id.* So the best historical evidence suggests that the report was not the result of “conventional interest group lobbying.” *Id.* The three consultants who prepared the report were civil liberty advocates, which likely framed the tone of the report. *Id.*

<sup>107</sup> RECORDS OF THE WICKERSHAM COMMISSION, *supra* note 105, at ix; *see also* NAT’L COMM’N ON LAW OBSERVANCE & ENF’T, *supra* note 106, at 3 (using the “third degree” terminology and explaining the commonality of this “secret” and “illegal” practice).

<sup>108</sup> NAT’L COMM’N ON LAW OBSERVANCE & ENF’T, *supra* note 106, at 4 (stating that the use of these tactics is “widespread” across departments in the United States).

<sup>109</sup> *Id.* (identifying these categories).

<sup>110</sup> *Id.* (further explaining how there was a “practice of holding the accused incommunicado, unable to get in touch with their family or friends or counsel,” that is “so frequent that in places there are cells called ‘incommunicado cells’”).

<sup>111</sup> *Id.* at 175.

<sup>112</sup> Michael C. Scott, *Progress in American Policing? Reviewing the National Reviews*, 34 LAW & SOC’Y 171, 172 (2008).

<sup>113</sup> Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 380 (2010) (citing each of these as examples of common misconduct issues identified over the years).

from the last several decades has shown that certain departments had more apparent misconduct than others. Some of the first solid, evidence for this proposition emerged around the end of the twentieth century when Congress asked the DOJ to compile records on the number of complaints filed at the national level against local police agencies.<sup>114</sup> The results showed that certain police agencies—like those in New Orleans and Los Angeles—were the source of significantly more federal complaints for police wrongdoing than other major metropolitan areas.<sup>115</sup> This finding led policymakers to ask an obvious question: Why do some police departments have more misconduct than others? What was different about New Orleans or Los Angeles that led to more apparent misconduct?

The answer, according to many policing scholars, is differences in organizational cultures and differences in internal policies to oversee and regulate the use of discretion. Policing scholars have increasingly recognized that “the roots of police misconduct rest within the organizational culture of policing.”<sup>116</sup> Police departments that implicitly condone wrongdoing through the use of “lax supervision and inadequate investigation” techniques are more likely to see ongoing misconduct than departments that aggressively enforce internal regulations.<sup>117</sup> And the reason that departments can have such widely disparate internal policies, procedures, and cultures is because of the decentralization of American law enforcement, combined with the lack of mandatory federal oversight.

## 2. Decentralization of American Law Enforcement

Policing in the United States has long been among the most decentralized institutions in the criminal justice system. In many countries, the central government regulates local police through a hierarchical, top-down approach.<sup>118</sup> In

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<sup>114</sup> See *Federal Response to Police Misconduct: Hearing Before the H. Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. 92–162 (1992) (showing the results from a DOJ study from 1985–90 on the number of complaints sent to the federal government about police misconduct for each jurisdiction).

<sup>115</sup> *Id.* at 152 (showing New Orleans and Los Angeles County as the top locations for misconduct).

<sup>116</sup> Simmons, *supra* note 22, at 505; see INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE L.A. POLICE DEPARTMENT, at iv (1991) [hereinafter CHRISTOPHER COMM’N REPORT] (linking the LAPD’s organizational mismanagement to misconduct); see also Armacost, *supra* note 21, at 493–94 (explaining how organizational culture can facilitate police brutality); ALLYSON COLLINS, HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE ACCOUNTABILITY IN THE UNITED STATES 1, 33, 45 (1998) (detailing organizational contributors to police misconduct).

<sup>117</sup> Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 816 (1999).

<sup>118</sup> Michael Sadykiewics, *Police Structure: Centralized/Decentralized*, in LARRY E. SULLIVAN ET AL., ENCYCLOPEDIA OF LAW ENFORCEMENT 1250, 1251 (Marie Simonetti Rosen et al. eds., 2004),



these countries, central headquarters exercise direct authority over local law enforcement agencies.<sup>119</sup> By contrast, the United States is among a small handful of countries where state, municipal, or local governments deputize their own, largely independent police forces.<sup>120</sup> Decentralization has always been an accepted part of American law enforcement. But why has the United States taken such a radically different approach to policing than its global counterparts? The answer lies in the U.S. Constitution.<sup>121</sup> Since the federal government only has a handful of limited, enumerated powers, most governing responsibilities fall onto state governments. One of the most important responsibilities of the state government is to decide how to allocate the burden of governmental regulation. In virtually all cases, state governments have responded to this challenge by creating hundreds or thousands of smaller, local government units such as cities or municipalities.<sup>122</sup> The state then typically grants these smaller governmental units authority to handle a host of responsibilities, like local education and law enforcement.

This creation of smaller, local-level governments happens through a process known as incorporation.<sup>123</sup> For much of the twentieth century, many states were wary to grant localities the power to incorporate into their own local governments.<sup>124</sup> States instead encouraged large, existing cities to annex nearby unincorporated areas.<sup>125</sup> The prevailing belief was that, although decentralization was valuable, extensive decentralization would make government administration less efficient.<sup>126</sup> Around the mid-twentieth century, states started to

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<http://knowledge.sagepub.com/view/lawenforcement/n517.xml> [<http://perma.cc/W3G8-ECXX>] (stating that decentralized structures of law enforcement are less common, and citing various examples of centralized policing structures, including France, Italy, Sweden, Finland, China, Vietnam, and Cuba).

<sup>119</sup> *Id.* at 1252–54 (describing by contrast how such centralization does not exist in the United States—and in the process describing the model for centralized police structures).

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

<sup>121</sup> The U.S. Constitution only affords the federal government with a small number of specific, enumerated powers. All other powers not specifically enumerated in the Constitution are, in theory, left to the state and localities. U.S. CONST. amend. X. Because policing is not among the specific enumerated powers granted to the federal government, the power to hire and deputize police officers to enforce state laws has fallen outside the legitimate purview of the federal government.

<sup>122</sup> In 1907, in *Hunter v. City of Pittsburgh*, the U.S. Supreme Court held that state governments have nearly complete authority over the creation of local municipalities within their borders. 207 U.S. 161, 178–79 (1907) (holding that municipal governments exist and serve only with the blessing of the state government, which may “at its pleasure . . . modify or withdraw all such powers”).

<sup>123</sup> Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1426–29 (2014) (using and defining the terms incorporation and annexation).

<sup>124</sup> *Id.* (citing KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 144 (1985)).

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

<sup>126</sup> *Id.* at 1427 (stating that “[t]he preference for annexation during this time reflected an underlying normative belief that larger centralized governance structures were more efficient than smaller decentralized governance structures”).

implement more permissive standards for incorporation.<sup>127</sup> Historians trace back this increase in local municipality incorporation to “racial and ethnic changes in the demographics of central cities, particularly an influx of European immigrants and African American migrants from the South, [which] caused suburban residents to resist annexation.”<sup>128</sup>

Once states began loosening incorporation requirements, these newly created municipalities wasted no time enacting land use, zoning, and tax policies that effectively excluded the economically disadvantaged and racial minorities.<sup>129</sup> Each of these newly created municipalities typically had a separate police force. One of the first times that decentralization was tied to misconduct regulation was in 1967, when the President’s Commission on Law Enforcement and Administration of Justice issued a report entitled *The Challenge of Crime in a Free Society*.<sup>130</sup> In this report, the Commission initially estimated there to be around 40,000 policing agencies in the United States.<sup>131</sup> The report also highlighted how these agencies varied widely from one part of the country to another.<sup>132</sup> Modern estimates suggest that the overwhelming majority of the nation’s active law enforcement officers serve in one of nearly 18,000 local or state police agencies.<sup>133</sup>

*a. Decentralization Results in Demographically Unique Municipalities with Disparate Budgets and Challenges*

These permissive state regulations on incorporation inevitably facilitated the rise of tens of thousands of autonomous police agencies, each with limited jurisdiction over a demographically distinct area. It also resulted in wide variations from one department to another, even within a single metropolitan area. These permissive state regulations on incorporation have thus facilitated the creation of demographically varied municipalities, each with drastically different budgets and crime problems. Accordingly, each of these thousands of indi-

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<sup>127</sup> *Id.* (“As a result, state laws in relation to unincorporated suburbs began to shift their focus away from annexation and toward incorporation.”).

<sup>128</sup> *Id.*

<sup>129</sup> Suburban communities adopted minimum lot size requirements, or single family home restrictions, in addition to zoning and other requirements to keep unwanted residents out of their town in seemingly race-neutral ways. *Id.* at 1428.

<sup>130</sup> PRESIDENT’S COMM’N ON LAW ENF’T, *supra* note 101, at 91 (beginning the discussion of policing by highlighting decentralization and the wide resource disparities between police agencies).

<sup>131</sup> *Id.*

<sup>132</sup> For example, the Commission noted that spending for urban departments was found to be around \$27.31 per resident per year, while spending in smaller departments was only \$8.74 per resident per year. *Id.*

<sup>133</sup> BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), <http://www.bjs.gov/content/pub/pdf/cslla08.pdf> [<http://perma.cc/V55C-AMMB>] (estimating the number of state and local law enforcement agencies to be 17,985).

vidual police departments must navigate the problems unique to their individual jurisdictions.

For example, a city like Camden, New Jersey, has among the highest crime rates in the nation.<sup>134</sup> In 2012, Camden's murder rate was over eighteen times the national average.<sup>135</sup> Camden also drastically outpaced the national average in overall violent and property crimes rates.<sup>136</sup> The average Camden resident only makes around \$29,118 per year, and over a third of all Camden residents live below the poverty line.<sup>137</sup> Less than an hour away in the state of New Jersey is the Township of Brick, a community of approximately the same size as Camden.<sup>138</sup> Unlike Camden, Brick reported no murders in 2011 or 2012, and extremely low violent and property crime rates relative to the national average.<sup>139</sup> The median family income is two to three times higher than that in Camden, and only around six percent of the township's residents live under the poverty line.<sup>140</sup> It would be fair to say that law enforcement officers in Camden are facing a categorically different problem than officers in Brick, as demographics suggest that Brick and Camden are entirely different worlds.

It should come as no surprise that these two cities have adopted radically different approaches to policing. Camden has historically lacked the resources to hire enough police to patrol the streets. To compensate, Camden has been at the forefront in adopting highly efficient surveillance technologies.<sup>141</sup> Camden

<sup>134</sup> See, e.g., *Uniform Crime Reports: Crime*, *supra* note 43, tbl.8 (to access crime data for Camden, click on "2012" under "Crime in the United States"; click on "Violent Crime" under "Offenses Known to Law Enforcement"; then select "Table 8," and then "New Jersey"). In 2012, Camden, a city of 77,665, had a violent crime rate that translated to 2566.1 crimes per 100,000 residents. This included an 86.3 murder rate, a 95.3 rape rate, a 1412.5 assault rate, and a 972.1 robbery rate per 100,000 residents—all among the highest in the nation. See *id.* tbl.1 (to access crime data for the nation as a whole, click on "2012" under "Crime in the United States"; click on "Violent Crime" under "Offenses Known to Law Enforcement"; then select "Table 1").

<sup>135</sup> Compare *id.* tbl.8 (showing Camden's 2012 murder rate), with *id.* tbl.1 (showing the murder rate in the United States in 2012).

<sup>136</sup> Compare *id.* tbl.8 (showing Camden's 2012 crime rates), with *id.* tbl.1 (showing crime rates of the United States in 2012).

<sup>137</sup> *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/34/3410000.html> [<https://perma.cc/Y4VQ-3JKL>] (showing Camden's median household income is \$26,202, and 39.8% of residents live below the poverty line).

<sup>138</sup> See *Uniform Crime Reports: Crime*, *supra* note 43, tbl.8 (showing crime data for Brick Township, New Jersey). Brick had 75,809 residents in 2012.

<sup>139</sup> *Id.* (showing crime data for Brick, New Jersey). In 2012, the overall violent crime rate in Brick translated to 106.8 crimes per 100,000 residents, including a murder rate of 0, a rape rate of 7.9, an assault rate of 77.9, a robbery rate of 21.2, and a property crime rate of 1642.3.

<sup>140</sup> *QuickFacts, Brick Township, Ocean County, New Jersey*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/HSD410214/3402907420,00> [<https://perma.cc/9N6P-STF2>] (reporting the median income for Brick in 2010–14 as \$69,063, and that 6.1% of residents live in poverty).

<sup>141</sup> See generally Conor Friedersdorf, *The Surveillance City of Camden, New Jersey*, THE ATLANTIC (Dec. 12, 2013), <http://www.theatlantic.com/national/archive/2013/12/the-surveillance-city-of-camden-new-jersey/282286/> [<http://perma.cc/BS88-J7MF>] (describing in detail how Camden has

has also successfully consolidated its police department with the county-level agency to lower costs and avoid duplicative expenditures.<sup>142</sup> Brick, on the other hand, has not had to adopt such radical approaches to policing, as it has been able to maintain extremely low crime rates with relatively few officers per capita.<sup>143</sup>

The vast differences in local approaches to policing evidenced in Camden and Brick are not the exception; they appear to be the rule. Federal surveys suggest that police departments across the country vary tremendously in size,<sup>144</sup> operating budget,<sup>145</sup> officer pay,<sup>146</sup> training requirements,<sup>147</sup> patrol methods,<sup>148</sup> equipment,<sup>149</sup> and on-the-ground strategies.<sup>150</sup> Departments vary because of both jurisdictional challenges and the availability of local resources, as the budgets of law enforcement agencies are almost always tied to the local municipal budget. These municipalities almost all rely on local property taxes and in

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installed hundreds of surveillance cameras, license plate readers, and other devices to increase the efficiency of local law enforcement and help deter crime).

<sup>142</sup> See Heather Haddon, *Crime Dips in Camden as New County Police Force Replaces City Officers*, WALL STREET J. (Aug. 5, 2013), <http://online.wsj.com/news/articles/SB10001424127887323968704578650171849946106> [<http://perma.cc/9AYR-YXPL>] (detailing the so-called “experiment” whereby Camden has closed its city-wide police department and instead relied on the newly expanded county department).

<sup>143</sup> Brick deploys approximately 171.5 police officers per 100,000 residents, around half of what Camden deploys. *Uniform Crime Reports: Crime*, *supra* note 43, tbl.78 (to obtain data, select “2014” under “Crime in the United States”; then under “Police Employment Data,” select “Go to Police Employment Tables”; then select “Table 78” and then “New Jersey”).

<sup>144</sup> LEMAS, *supra* note 43, at 9 tbl.1 (showing that the average number of full-time police officers per 1000 residents varies depending on the size of the population served).

<sup>145</sup> *Id.* at 10 tbl.4 (showing that the largest police departments spend around \$385 per city resident, while the smallest departments spend only \$209 per city resident).

<sup>146</sup> *Id.* (showing that the largest police departments spend around \$121,900 per officer, while the smallest departments spend only \$56,400 per officer).

<sup>147</sup> See, e.g., *id.* at 11–12 & tbl.5 (showing that in larger departments, college degrees are more commonly required than in smaller departments); *id.* fig.6 (showing that larger departments typically require more training hours than smaller departments).

<sup>148</sup> See e.g., *id.* at 15–16 & tbl.12 (showing the wide variation, largely by size, in the patrol methods); *id.* tbl.13 (showing that larger departments are typically more likely to have specific policies to deal with special populations and situations).

<sup>149</sup> See, e.g., *id.* at 17–18 & tbl.14 (illustrating the disparate use of conducted energy devices in larger departments).

<sup>150</sup> *Id.* at 27 tbls.30, 31 (describing the variation in strategies used by law enforcement, again varying by size of the force). A prime example of departmental variation in internal policies is the difference in how agencies respond to alleged misconduct. The LEMAS survey asks departments about the existence of internal checks to respond to misconduct. The results suggest that a department’s likelihood of using independent oversight tools varies tremendously from department to department, depending in part on the size of the agency. The vast majority of departments serving population centers of more than a million people have a citizen review board (77%) and a substantial number give this citizen review board independent subpoena power (31%). *Id.* at 18 (reproducing the data from Table 15, entitled “Use-of-force policies and procedures in local police departments, by size of population served, 2007”). Among smaller departments, these sorts of extensive oversight measures are virtually nonexistent. *Id.*

some cases sales taxes. Thus, jurisdictions with a large concentration of poor residents, like Camden, often cannot afford to invest the same amount of money into their police departments as municipalities with a higher concentration of wealthy residents, like Brick. This is a particularly cruel realization, because the communities most adversely affected by resource disparities are often the agencies *most* in need of additional funds to fight crime. Once more, organizational research suggests that marginal or failing organizations—those failing to achieve their intended objectives—are more likely to produce incidents of misconduct.<sup>151</sup> This finding theoretically suggests that departments struggling with higher crime rates and budgetary problems may have a greater proclivity towards misconduct, while also lacking the resources to fight back.

Again the comparison between Brick and Camden is useful. Presumably, Brick is able to bring in more tax revenue per capita because of higher incomes and property values. Thus, we might predict that a community like Brick will be able to afford cutting-edge investments into policing. One of these investments that Brick Township Police Department has been able to afford is accreditation through the Commission on Accreditation for Law Enforcement Agencies (“CALEA”). Departments with accreditation under CALEA are inspected periodically by a team of independent, CALEA-trained assessors to ensure that the departments are complying with procedural and operational standards.<sup>152</sup> In 1984, only four agencies were CALEA accredited.<sup>153</sup> That number rose to forty-seven in 1987, 161 in 1990, 279 in 1993, and 985 by 2010.<sup>154</sup> But accreditation is still voluntary and expensive. Thus, the 985 agencies claiming CALEA accreditation in 2010 represent only 5.6% of all law enforcement agencies in the country.<sup>155</sup>

Camden, by contrast, has not undergone costly CALEA accreditation. The vast resource per capita disparity between the Camden and Brick may partially explain this difference. This revelation is important, as it demonstrates how resource disparities can directly translate into misconduct disparities. Correcting and preventing misconduct can be expensive. Many of the reforms required for voluntary accreditation via CALEA have been shown to reduce civil liability exposure, presumably by decreasing the rate of wrongdoing. Evidence has also shown that the move towards accreditation and uniformity to national

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<sup>151</sup> Diane Vaughan, *The Dark Sides of Organizations: Mistakes, Misconduct, and Disaster*, 25 ANN. REV. SOCIOLOGY 271, 288 (1999).

<sup>152</sup> *The Commission*, COMM’N ON ACCREDITATION FOR LAW ENF’T AGENCIES, <http://www.calea.org/content/commission> [http://perma.cc/Q55F-X96K].

<sup>153</sup> COMM’N ON ACCREDITATION FOR LAW ENF’T AGENCIES, ANNUAL REPORT FOR 2010, at 3 (2011), <http://www.calea.org/content/calea-2010-annual-report> [http://perma.cc/T2ZN-B7PA].

<sup>154</sup> *Id.*

<sup>155</sup> There are approximately 17,985 state and local law enforcement agencies in the United States. REAVES, *supra* note 133, at 2. Thus, to calculate this percentage, divide the 985 CALEA accredited agencies by the 17,985 total agencies in the country that could have been nationally accredited.

standards has made departments more receptive to shifting norms in policies and procedures.<sup>156</sup> But decentralization, which causes resource disparities, means that not all departments can even afford to invest in misconduct-detering reforms like accreditation.

*b. Decentralized Police Agencies Rely on Local Political Preferences to Guide Policies*

Given that political decentralization has created tens of thousands of local police agencies, the next obvious question is how local police agencies develop strategies to police their unique municipalities. In such a decentralized environment, most agencies take their cues from local political preferences. This has devastating effects on politically powerless minorities in some jurisdictions. Historically, the influence of local preferences on police agencies has varied over time. The community policing movement has likely increased the sensitivity of local police departments to majoritarian preferences. In the early part of the twentieth century, the “degree of localism” in policing created a “decentralization . . . that often resembled fragmentation.”<sup>157</sup> The lack of central regulation in policing contributed to local police departments that were “inward-looking” for policies and procedures, and “hermetically sealed” from outside influences.<sup>158</sup> Rather than coordinating with other police departments to develop best practices, police departments were most heavily influenced by local political leaders.<sup>159</sup> This turned many early police departments into mere adjuncts to political machines rather than neutral arbiters of the law, and led to substantial variation in policing styles.<sup>160</sup>

During the mid-twentieth century, policing went through a period of professionalization that increased cooperation and coordination between local agencies.<sup>161</sup> No longer were police departments rigidly sealed from other law

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<sup>156</sup> Terry Gingerich & Gregory Russell, *Accreditation and Community Policing: Are They Neutral, Hostile, or Synergistic? An Empirical Test Among Street Cops and Management Cops*, 2 JUST. POL’Y J. 3–27 (1996).

<sup>157</sup> FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE* 103 (2011).

<sup>158</sup> *Id.*

<sup>159</sup> LEONARD A. STEVERSON, *POLICING IN AMERICA: A REFERENCE HANDBOOK* 16–18 (2007) (offering some examples about how the political patronage influence on policing led to exploitation); see also George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, PERSPECTIVES ON POLICING (Nat’l Inst. of Justice, Wash., D.C.), Nov. 1988, at 1, 3, <https://www.ncjrs.gov/pdffiles1/nij/114213.pdf> [<https://perma.cc/M3TN-9QYL>] (stating that political influences were important during the patronage policing era and explaining that police historically “lacked the powerful, central authority of their own to establish a legitimate, unifying mandate for their enterprise”).

<sup>160</sup> See ROBERT M. FOGELSON, *BIG-CITY POLICE* 37 (1977) (describing big-city police as “adjuncts of the ward organizations”).

<sup>161</sup> See Kelling & Moore, *supra* note 159, at 4 (explaining how police leaders like August Vollmer “rallied police executives around the idea of reform during the 1920s and early 1930s” and galvanized a broader movement towards professionalization).

enforcement agencies. By the 1940s and 1950s, “it had become clear that the only way to gain the public’s trust and respect was to reduce the influence of politicians, train and educate police officers, and promote an image of professionalism in the eyes of the public.”<sup>162</sup> This movement towards police professionalism reflected many beliefs of the time period: that police ought to focus on crime suppression; that police should be free from political influence; that police should feel free to act objectively and scientifically; and that departmental authority ought to be centralized and rationalized.<sup>163</sup> During this period, many police departments around the country operated by a core set of beliefs and practices.<sup>164</sup> The ranks of police agencies were also increasingly unionized and protected by civil service laws—somewhat insulating these officers from political influences. And in some cases, executives within police departments were also protected from political influence via civil service laws.<sup>165</sup>

But by the 1980s, support for this so-called professional policing style waned. Empirical evidence suggested that some of the primary crime prevention tactics advocated by the professionalization movement were largely ineffective.<sup>166</sup> And many scholars believed that the professional policing model had

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<sup>162</sup> MITCHEL P. ROTH, *CRIME AND PUNISHMENT: A HISTORY OF THE CRIMINAL JUSTICE SYSTEM* 259 (2d ed. 2010). Notable figures like William H. Parker, Orlando W. Wilson, and August Vollmer personified this gradual transformation.

<sup>163</sup> David A. Sklansky, *The Persistent Pull of Police Professionalism*, NEW PERSPECTIVES ON POLICING (Nat’l Inst. of Justice, Wash., D.C.), Mar. 2011, at 1, 1, <https://www.ncjrs.gov/pdffiles1/nij/232676.pdf> [<https://perma.cc/W7BB-K7AX>].

<sup>164</sup> Police saw their primary obligations as the investigation of crime, the enforcement of a wide variety of criminal laws, and the maintenance of order. *Id.* (explaining the focus of the professional policing era on crime control, law enforcement, and maintenance of order).

<sup>165</sup> Los Angeles is a good example of a department that afforded executives within the LAPD with protection from firing or discipline at the hands of political officials. After the Rodney King beating, the City of Los Angeles passed City Charter Amendment F to give political officials authority to remove a police chief. *See* MERRICK BOBB ET AL., *FIVE YEARS LATER: A REPORT TO THE LOS ANGELES COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT’S IMPLEMENTATION OF INDEPENDENT COMMISSION RECOMMENDATIONS* 67–68 (1996).

<sup>166</sup> Common wisdom of the time suggested that police presence could deter crime, “and the most popular version of police crime prevention practice by the 1960s was what was called preventative patrol, usually the patrol activities of uniformed officers in marked cars conducting routine surveillance of designated geographic zones.” ZIMRING, *supra* note 157, at 103. And despite the allegedly objective and scientific focus on professional policing, departments did virtually no research into the effectiveness of preventative patrols. *See id.* at 103–04 (describing the orthodox, albeit untested, conclusion around 1960 about how police could most effectively reduce crime and fight disorder—including through measures like preventative patrols). The first rigorous investigation of the effects of policing on crime came in 1974, when several social scientists teamed with large American police departments to assess empirically the effects of preventative patrols on criminal activity in Kansas City and Newark. *See id.* at 104–07 (discussing the “revolutionary” uniqueness of the Kansas City study and also discussing the importance of the follow-up study in Newark). There, law enforcement purposefully altered the presence of preventative patrols in certain parts of the city to observe the effects on crime rates. *Id.* at 105 (summarizing the methodology of the Kansas City study). In both cases, the researchers found that the changes had little to no effect on crime. *See* GEORGE L. KELLING ET AL., *THE KANSAS CITY PREVENTATIVE PATROL EXPERIMENT: A TECHNICAL REPORT* 16–20

become “thoroughly discredited” as many blamed the policing style “for making police departments insular, arrogant, resistant to outside criticism and feckless in responding to social ferment.”<sup>167</sup> This drop in support motivated departments to seek new strategies—particularly those that sought input from the community.

Thus in recent decades, there has been a growing push for police agencies to seek out community input and adopt policies that comport with local preferences. Known as community policing, this movement has sought to incorporate the community more in the decision-making process.<sup>168</sup> It was spurred in part because of the growing civil unrest and major urban riots against American law enforcement in the 1960s and 1970s.<sup>169</sup> These major riots struck cities across the country, including New York, Los Angeles, Newark, and Detroit.<sup>170</sup> The National Advisory Commission on Civil Disorders of 1970 later determined that police misconduct—including aggressive patrols and harassment in urban communities—contributed substantially to these events.<sup>171</sup> This finding demonstrated the apparent divide between law enforcement and the community it served.<sup>172</sup> It also further emphasized the need for policing procedures that incorporated the input of the community. In response, law enforcement moved away from a purely professional and technocratic approach and instead turned towards the community for assistance.<sup>173</sup> This shift was due in part to an understanding that “[c]ommunities with different problems and varied resources to

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(1974) (noting that placing patrols in high crime areas had a negligible effect on crime rates); GEORGE L. KELLING & ANTHONY PATE, *THE NEWARK FOOT PATROL EXPERIMENT* 122–24 (1981) (same). Around this same time, several notable social scientists undertook the first significant empirical studies of policing behavior. *See generally* EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY: A REVIEW OF BACKGROUND FACTORS, CURRENT PRACTICES, AND POSSIBLE ROLE MODELS* (1970) (analyzing the basic character of police work); ALBERT J. REISS, *THE POLICE AND THE PUBLIC* (1971) (documenting the interaction between the police and the public); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (1966) (studying police culture, accountability, and the application of the rule of law). Many of these early explorations of policing and crime control involved a technique called embedded observation, where social scientists observed police officers in action. *See* ZIMRING, *supra* note 157, at 104 (describing methodology used in many of the earliest empirical analyses of police behavior).

<sup>167</sup> Sklansky, *supra* note 163, at 5.

<sup>168</sup> *Id.* at 1–2 (categorizing as community policing the move towards selecting and pursuing goals in consultation with the public).

<sup>169</sup> *See, e.g.*, MICHAEL PALMIOTTO, *COMMUNITY POLICING: A POLICE-CITIZEN PARTNERSHIP* 13 (2011) (stating “police actions would precipitate a riot because of exaggerated rumors”).

<sup>170</sup> *Id.* (citing riots in Harlem (New York City), Watts (Los Angeles), Newark, and Detroit).

<sup>171</sup> *Id.* at 13–14 (citing aggressive patrols and harassment as major police precipitators of unrest).

<sup>172</sup> *Id.* (discussing the emergence of various segmented opposition groups).

<sup>173</sup> *Id.* at 4 (distinguishing between bureaucratic or technocratic philosophies and more collaborative approaches).



bring to bear against them should try different things.”<sup>174</sup> Thus, the community policing movement was about fundamentally changing the decision-making within departments.<sup>175</sup>

The incorporation of citizen involvement in the organizational decision-making process means that policing can look very different from one decentralized police agency to another. Studies have found that although the use of community policing can increase the overall trust and confidence in law enforcement within a local jurisdiction, minority groups commonly feel that their voices are not heard.<sup>176</sup> Minority residents also have reported that, despite the fact that they are often most commonly victims of crime and police brutality, they still have little say in the departmental policies or procedures.<sup>177</sup> Instead, community policing transfers that power to whatever group is in the majority within the political constituency of a policing agency. Regardless of these concerns, the federal government has invested significant resources in encouraging local agencies to adopt community policing approaches; and it seems to be working, as most departments claim to utilize community policing strategies to decide how to allocate their resources and interact with the community.<sup>178</sup>

### *c. Reliance on Local Majoritarian Preferences Facilitates Minority Subjugation*

As described above, the structural decentralization of American law enforcement combined with the recent emphasis on satisfying local community

<sup>174</sup> Wesley G. Skogan, *The Promise of Community Policing*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 27 (David Weisburd & Anthony A. Braga eds., 2006), [http://www.skogan.org/files/Promise\\_of\\_Comm\\_Policing\\_2006.pdf](http://www.skogan.org/files/Promise_of_Comm_Policing_2006.pdf) [<http://perma.cc/LFM6-BUYH>].

<sup>175</sup> *Id.* (stating that community policing was about “changing decisionmaking processes and increasing new cultures within police departments”). Scholars have had trouble defining this community policing movement. But at least one scholar has argued that this movement reversed some of the important trends of the professionalism movement. Sklansky, *supra* note 163, at 2. During this time, police departments no longer focused narrowly on crime suppression, but instead broadened their goals. *Id.* at 1. Departments started selecting these goals in consultation with the community. *Id.* at 1–2. And in order to make this process more feasible, departments decentralized authority. *Id.* at 2.

<sup>176</sup> A study in Chicago found that “after eight years of citywide community policing, Chicagoans’ views of their police improved by ten to fifteen percentage points on measures of their effectiveness, responsiveness, and demeanor.” Skogan, *supra* note 174, at 31. But Chicagoans felt these benefits of community policing unevenly. Communities of color were less likely to participate in community policing efforts in part because of a fear of retaliation for working with police. *Id.*

<sup>177</sup> For example, a study in Houston found that white middle- and upper-class individuals reported satisfaction with community policing efforts. WESLEY G. SKOGAN ET AL., ON THE BEAT: POLICE AND COMMUNITY PROBLEM SOLVING 238 (1999), [http://www.skogan.org/files/On\\_The\\_Beat\\_Police\\_and\\_Community\\_Problem\\_Solving.pdf](http://www.skogan.org/files/On_The_Beat_Police_and_Community_Problem_Solving.pdf) [<http://perma.cc/G4Z8-8HMR>].

<sup>178</sup> The Violent Crime Control and Law Enforcement Act of 1994 dedicated billions of dollars to training local officers in community policing efforts. Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C. (2012)); Skogan, *supra* note 174, at 40. By 1999, approximately 88% of all new recruits and 85% of currently serving officers were trained in community policing. Skogan, *supra* note 174, at 40.

demands has led to a remarkable variation in policies and procedures from one jurisdiction to the next. In some cases, though, the tactics that a local agency develops to deal with its own jurisdictional problems systemically violate the rights of certain segments of the population. And because decentralized law enforcement agencies take their cues from local political leaders, these systemic abuses are sometimes not just tolerated, but are even encouraged.

Maricopa County, Arizona provides an example. Joe Arpaio has been elected Sheriff of Maricopa County for six consecutive terms.<sup>179</sup> Sheriff Arpaio has received international notoriety for his unconventional and legally questionable tactics.<sup>180</sup> One of the issues that Sheriff Arpaio has emphasized heavily in recent years is the need for local law enforcement to help combat undocumented immigration into the United States. But before 2005, Sheriff Arpaio admitted that he personally did not view undocumented immigration as a “serious legal issue.”<sup>181</sup> It was not until the County Attorney of Maricopa County Andrew Thomas won a countywide election with the slogan “Stop Illegal Immigration” that Sheriff Arpaio’s office began emphasizing the need to crack down on undocumented immigrants.<sup>182</sup> By all accounts, Sheriff Arpaio responded to local community demands and altered his enforcement of the law to account for these prerogatives. His efforts have resulted in serious and ongoing allegations of racial profiling and a systemic unwillingness to investigate crimes against undocumented immigrants.<sup>183</sup> And even though around thirty percent of the population in Maricopa County is Latino,<sup>184</sup> the majority of voters have continued to reelect Sheriff Arpaio, implicitly supporting his use of tactics that appear to disproportionately affect a significant minority group.

The Maricopa County Sheriff’s Department is likely one of many. When police are primarily accountable to local political leaders and majoritarian preferences, some agencies with particular demographic characteristics or local

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<sup>179</sup> Phil Benson, *Sheriff Joe Arpaio Sworn In for 6th Term*, KPHO NEWS (Jan. 6, 2013), <http://www.kpho.com/story/20516330/sheriff-joe-arpaio-sworn-in-for-6th-term> [<http://perma.cc/G4S8-8CXN>].

<sup>180</sup> See, e.g., Associated Press, *DOJ to Question Arpaio in Civil Rights Lawsuit*, CBS D.C. (Feb. 7, 2014, 7:58 AM), <http://washington.cbslocal.com/2014/02/07/doj-to-question-arpaio-in-civil-rights-lawsuit/> [<http://perma.cc/3LV8-T2LW>].

<sup>181</sup> William Hermann & Edvard Pettersson, *Arizona’s Arpaio Testifies Race Not Factor in Arrests*, BLOOMBERG NEWS (July 24, 2012), <http://www.bloomberg.com/news/2012-07-24/-america-s-toughest-sheriff-to-answer-profiling-claims.html> [<http://perma.cc/Z6GJ-VL7K>] (quoting Arpaio as saying that before 2005, he never viewed illegal immigration as a “serious legal issue”).

<sup>182</sup> E.J. Montini, *Still Doubting Thomas on Immigration?*, ARIZ. REPUBLIC (July 18, 2010), <http://archive.azcentral.com/arizonarepublic/news/articles/2010/06/18/20100618Montini0618.html> [<http://perma.cc/N42R-9J7F>] (quoting Thomas and describing his use of this slogan and issue during his campaign).

<sup>183</sup> E.g., Associated Press, *supra* note 180.

<sup>184</sup> See *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04/04013.html> [[perma.cc/BDU3-GXHH](http://perma.cc/BDU3-GXHH)] (indicating that Maricopa County is 30.3% Hispanic or Latino).

challenges will support the use of police procedures that disproportionately burden local minorities.<sup>185</sup>

### 3. Making Police Misconduct Routine

The inherent characteristics of the American institution of policing mean that some wrongdoing will occur in every department. Further, given the decentralization of policing in the United States and the disparities between agencies, some departments will have less incentive to fight this misconduct rigorously. This lack of incentive is particularly important because policing scholars believe that the organizational response to misconduct is critical. Some police organizations facilitate systemic misconduct by making this kind of wrongdoing routine.

Misconduct becomes routine primarily through the development of an internal organizational culture that passively permits wrongdoing. This sort of culture often develops through a lack of oversight mechanisms and is reinforced through training, punishment, and rewards.<sup>186</sup> Organizational research shows that socialization and on-the-job training can make rule violation routine.<sup>187</sup> Organizational leadership also appears to be critically important to the presence of misconduct. Leaders can apply performance pressure that affects individual action and can support internal cultures that either indirectly or directly condone misconduct.<sup>188</sup>

The Los Angeles Police Department ("LAPD") serves as a useful example of an agency normalizing and routinizing misconduct.<sup>189</sup> In the aftermath of the Rodney King events, the City of Los Angeles developed an independent com-

<sup>185</sup> Of course, this problem sounds similar to constitutional dilemmas in other institutional contexts like voting, schooling, and housing. In these other contexts, the federal government has intervened to protect these minority interests. In the context of policing though, the federal government has traditionally played a much less significant role in combating police wrongdoing.

<sup>186</sup> See generally Vaughan, *supra* note 151 (describing how marginal or failing organizations are more likely to experience misconduct within their ranks).

<sup>187</sup> See, e.g., MAURICE PUNCH, CONDUCT UNBECOMING 46 (1985) (explaining a corruption scandal surrounding Amsterdam's police in the late 1970s); Joseph Bensman & Israel Gerver, *Crime and Punishment in the Factory: The Function of Deviancy in Maintaining the Social System*, 28 AMER. SOCIOLOGICAL REV. 588, 595 (1963) (discussing how deviant behavior contributes and supports the system).

<sup>188</sup> Vaughan, *supra* note 151, at 290 (showing how the "willingness [of an organizational member] to use illegitimate means on the organization's behalf is sealed by a reinforcing system of rewards and punishments").

<sup>189</sup> The Philadelphia Police Department appears to provide another example of this phenomenon. There, the DOJ had investigated six homicide detectives for coercing confessions out potentially innocent suspects. But rather than punishing this behavior, the Philadelphia Police Department actually rewarded it. In fact, at least one of those convicted of coercing confessions out of criminal suspects received a promotion and public support from city leadership. BONNIE MATHEWS & GLORIA IZUMI, U. S. COMM'N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES 79 (1981), <http://catalog.hathitrust.org/Record/007105152> [<http://perma.cc/DD7G-KTCC>].

mission to investigate the conditions that precipitated the incident, headed by Warren Christopher.<sup>190</sup> The report filed by this commission came to be informally known as the Christopher Commission Report.

The Christopher Commission Report found a wide range of systemic problems affecting the LAPD, including problems with use of force, complaint procedures, training policies, and structural organization. The Commission found a startling pattern of excessive use of force amongst a small portion of officers.<sup>191</sup> The Christopher Commission Report also determined the LAPD used insufficient complaint procedures and improper investigations in cases where citizens levied complaints.<sup>192</sup> Once more, the Commission determined that internal policies and procedures used by the Internal Affairs Division make it hard for citizens to file complaints.

For example, the report noted that “[s]ome intake officers actively discourage filing by being uncooperative or requiring long waits before completing a complaint form.”<sup>193</sup> The Christopher Commission Report also concluded that the LAPD’s training programs were unsatisfactory.<sup>194</sup> The Commission believed that the agency-wide misconduct could be traced back to training pro-

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<sup>190</sup> See Rushin, *Structural Reform Litigation*, *supra* note 20, at 1345 n.3 (describing the formation of what came to be known as the Christopher Commission).

<sup>191</sup> Although the vast majority of LAPD officers had only one to two allegations of excessive force, around “183 officers had four or more allegations, 44 had six or more, 16 had eight or more, and one had 16 such allegations.” CHRISTOPHER COMM’N REPORT, *supra* note 116, at ix–x. Similarly, of the 6000 police officers involved in use of force incidents between January 1987 and March 1991, “more than 4000 had fewer than five reports each.” *Id.* at x. Again the overwhelming majority of all officers had fewer than five reported uses of force. *Id.* (explaining that “63 officers had 20 or more reports each” and “[t]he top 5% of the officers [ranked by number of reports] accounted for more than 20% of all reports”). But a small cohort of officers accounted for a large amount of all use of force reports. *Id.* Among the officers that were subject to the most allegations of excessive use of force, “the performance evaluation reports . . . were very positive,” as they “document[ed] every complimentary comment received” and were “uniformly optimistic about the officer’s progress and prospects on the force.” *Id.* at 41.

<sup>192</sup> The Commission reviewed “83 civil lawsuits alleging excessive or improper force by LAPD officers for the period 1986 through 1990 that resulted in a settlement or judgment of more than \$15,000.” *Id.* at xi. This review showed that the majority of “cases involved clear and often egregious misconduct resulting in serious injury or death to the victim.” *Id.* Of particular note, the Commission found that the LAPD’s internal investigation into the events surrounding these eighty-three lawsuits were regularly “light or non-existent.” *Id.* The Commission also found that the LAPD’s internal procedures for handling citizen complaints frequently led to public frustration. Out of 2152 citizen allegations of excessive force, the LAPD only sustained forty-two. *Id.* at xix. This means that the LAPD sustained roughly 1–2% of all citizen complaints for excessive use of force. This was in part because the division of the police department responsible for investigating these claims—the Internal Affairs Division—had limited resources. *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> As the report explained, LAPD officers went through three different training phases. *Id.* at xvi. Officers received their initial training at the police academy. *Id.* After this, officers then went through a probationary period for one year when they worked in the field with more experienced officers. *Id.* After this, officers received continuing in-service training. *Id.*

grams that emphasized the use of physical force as opposed to verbal skills.<sup>195</sup> And the Commission noted several other systemic problems, including startling cases of documented racism.<sup>196</sup> The Commission cited several specific examples of racist behaviors by LAPD officers, such as officers referring to interactions with minority residents as “monkey slapping time” and making other highly offensive comments.<sup>197</sup> Shortly before the King beating, in fact, one of the officers involved compared a domestic dispute between two African-American individuals to “gorillas in the mist” over the radio.<sup>198</sup> More disturbingly, evidence suggests that leadership within the police department heard or knew of these kinds of statements, but did nothing to stop them or punish those involved.<sup>199</sup>

The LAPD during this time bore all of the hallmarks of a problematic police organization: a lack of internal accountability measures, supervisors that did not punish obvious misconduct, and leadership that either implicitly or explicitly approved of wrongdoing. This made misconduct normal within the organization. External punishment of individual officers—the most common federal response to police wrongdoing during the twentieth century—merely addressed isolated symptoms. Such a historical approach could not treat the underlying illness.

#### 4. The Cost of Reform and Other Barriers

A couple of other barriers further discourage police departments from proactively responding to misconduct within their ranks. First, the cost of police reform is often prohibitive. When the DOJ has sought to overhaul problematic police departments, it has commonly required the agencies to pay for the implementation of early warning systems, new training procedures, new complaint management systems, use of force policies, and external monitoring.<sup>200</sup> Take the LAPD as an example again. There, the DOJ used § 14141 to investigate and eventually reform the LAPD between 2001 and 2013. During this time, the LAPD paid more than \$100 million to cover the cost of DOJ-mandated reforms.<sup>201</sup> Similar settlements in New Orleans<sup>202</sup> and Cleveland<sup>203</sup>

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<sup>195</sup> De-escalation, they argued, should be an important component of training at every stage. *Id.* at xix. The Commission also found that training did not emphasize culture respect and awareness enough. *Id.* Additionally, the Commission found that the requirements for training officers were insufficient. *Id.* at xvii.

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

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 14.

<sup>199</sup> *Id.* at xii–xiii.

<sup>200</sup> Rushin, *Structural Reform Litigation*, *supra* note 20, at 1378–87 (discussing the reforms mandated by the DOJ in previous § 14141 settlements).

<sup>201</sup> *Id.* at 1393 (“[I]n Los Angeles, the cost of implementing reforms likely totaled around \$80–90 million. When factoring in the cost of hiring the external monitor in Los Angeles, which came in at

are expected to cost anywhere between \$50–\$60 million. It is an inconvenient but undeniable fact that correcting misconduct in police departments is expensive. Additionally, municipalities are often unwilling to allocate scarce resources to the cause of police reform, when doing so means taking resources away from other local needs.

Second, collective bargaining and civil service protections inadvertently discourage police management from responding forcefully to misconduct. As one scholar observed, “thirty-four states require government employers to engage in collective bargaining with public-sector employees, and another nine states permit, but not require, public-sector collective bargaining.”<sup>204</sup> Under collective bargaining agreements, police unions have the ability to negotiate with police management on a range of topics, including the procedures that management must follow when investigating and disciplining officers that have engaged in misconduct.<sup>205</sup> “[T]he grievance procedures that are often a central part of collective bargaining agreements both discourage and frustrate attempts to discipline individual officers.”<sup>206</sup> Even in jurisdictions that do not have collective bargaining agreements, state civil service laws make it procedurally demanding to punish problematic officers.<sup>207</sup> As a result, when management wants to implement a reform mechanism designed to root out misconduct, it must often navigate the complex and challenging legal process to do so. Col-

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around \$2 million a year, the Los Angeles price tag likely surpassed \$100 million.” (footnotes omitted)).

<sup>202</sup> Jaquetta White, *City’s 2015 Budget Includes \$7.3 Million for NOPD Consent Decree*, ADVOCATE (BATON ROUGE) (Nov. 4, 2014), <http://theadvocate.com/news/neworleans/10689951-148/citys-2015-budget-includes-73> [<http://perma.cc/9S7B-JQAD>] (stating that this cost will cover more officers, new hardware, and a comprehensive early warning system).

<sup>203</sup> Rich Exner, *How Much Cleveland Will Pay to Reform Its Police Department Under Consent Decree*, CLEVELAND.COM (June 2, 2015), [http://www.cleveland.com/datacentral/index.ssf/2015/06/how\\_much\\_it\\_will\\_cost\\_cleveland.html](http://www.cleveland.com/datacentral/index.ssf/2015/06/how_much_it_will_cost_cleveland.html) [<http://perma.cc/4BSA-6679>] (attributing these costs to the added expense of external monitoring, training, hardware, additional staffing, and more).

<sup>204</sup> Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2207 (2014). Police are also “relative newcomers to the labor movement.” *Id.* at 2206. But today, police unions are common. And it is frequently the case that police departments have more than one union representing the officers of that department. *Id.* at 2208 (describing how the Dallas Police Department has both chapters of the Fraternal Order of Police and the Dallas Police Association).

<sup>205</sup> *Id.* at 2212 (using examples from Illinois, Ohio, and Florida).

<sup>206</sup> *Id.* at 2211–12 (“An officer’s ability to contest adverse employment actions makes supervisors less likely to impose disciplinary sanctions because while a supervisor faces a possible headache for not disciplining a misbehaving subordinate, they face a certain headache if they do.”).

<sup>207</sup> *Id.* at 2212. As one scholar explained,

[I]n the civil service context, an officer who is left alone after having violated a policy or procedure *may* commit a future infraction, which *may* injure someone, who *may* file a complaint or *may* find a lawyer to file a lawsuit, all of which *may* have an effect on the supervisor, but an officer who is reprimanded, transferred, suspended, or terminated is both enabled and highly motivated to challenge the disciplinary action.

*Id.* (emphasis added).

lective bargaining and civil service laws incidentally interfere with efforts to combat police reform. They serve as a sort of “tax” on efforts to protect civil rights.<sup>208</sup>

Given these barriers to locally supported police reform, we should not expect data transparency to stimulate bottom-up reform in all police departments. Top-down reform, initiated by the federal government, may be necessary to bring about reform in some police departments. There are simply too many political and structural barriers that prevent some police departments from proactively addressing corruption within their ranks without additional federal incentives. The federal government took the first step in this direction by passing § 14141 over twenty years ago. Although § 14141 has helped reform a handful of major police departments, it has ultimately failed to live up to its promise as a transformative tool for federal oversight of local police departments. By using DCRA, FBI, and BJS data on police violence, the next Part argues that the DOJ can improve enforcement of § 14141.

### III. USING DATA ON POLICE VIOLENCE TO FACILITATE FEDERAL INTERVENTION INTO LOCAL POLICE DEPARTMENTS

None of the planned DCRA, FBI, or BJS databases on police violence constitute Congress’s first attempt at establishing meaningful federal oversight of local police departments.<sup>209</sup> In 1991, the American public was reeling from the release of the Rodney King footage.<sup>210</sup> Much like today with the deaths of Michael Brown, Tamir Rice, and Eric Garner, the Rodney King video sparked a national conversation about the federal government’s role in combating police brutality.<sup>211</sup> The federal government needed a weapon to prevent problematic police departments like the LAPD from systemically violating civil rights.

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<sup>208</sup> Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 811 (2012).

<sup>209</sup> Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (2014) (to be codified at 42 U.S.C. § 13727); *see also supra* notes 8–14 and accompanying text (describing the planned FBI and BJS databases).

<sup>210</sup> Harmon, *supra* note 32, at 12 n.31. Professor Harmon described the incident:

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.

*Id.*

<sup>211</sup> Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3207 (“This event almost immediately spurred congressional investigation into the scope of police misconduct problems in the United States. Within weeks of the event, the House Subcommittee on Civil and Constitutional Rights convened to consider . . . how the federal government could do more to address brutality among the ranks of local police.”).

The obvious answer appeared to be the use of equitable relief to force police departments to make policy and procedural changes, also known as structural reform litigation. For decades, the federal government and private litigants had both successfully used structural reform litigation to bring about reform in other institutional contexts like prisons and schools.<sup>212</sup> But federal courts have held that both private litigants and the federal government generally lack standing to seek equitable relief against police departments absent explicit congressional authorization.<sup>213</sup> So in 1994 Congress addressed this problem by passing 42 U.S.C. § 14141.<sup>214</sup> Section 14141 gives the U.S. Attorney General the necessary standing to seek equitable relief against local police departments engaged in a pattern or practice of unconstitutional misconduct.<sup>215</sup> Scholars hailed § 14141 as a major victory for civil rights in the United States.<sup>216</sup> Finally, it appeared that Congress had empowered the federal government with the authority to force local police departments to make specific policy and procedural changes aimed at curbing misconduct.

### A. The Challenges Facing § 14141 Enforcement

While the DOJ has used § 14141 to improve a number of police departments across the country,<sup>217</sup> there has been a growing frustration with § 14141 as a regulatory mechanism, as detailed below.<sup>218</sup>

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<sup>212</sup> Gilles, *supra* note 22, at 1390 (explaining how federal courts have agreed to enact structural reforms via litigation in schools and prisons).

<sup>213</sup> In 1983, in *City of Los Angeles v. Lyons*, the U.S. Supreme Court considered an individual's lawsuit against the LAPD, alleging that an officer used a dangerous chokehold. 461 U.S. 95, 97–98 (1983). The individual also sought to enjoin the LAPD from using this chokehold in the future. *Id.* at 95–100. The Court held that the private litigant did not have the requisite standing to enjoin the LAPD from using this dangerous chokehold because he could not prove a continuing or future threat from the tactic. *Id.* at 102–05. Because of the *Lyons* precedent, private litigants rarely have the requisite standing to initiate structural reform litigation (“SRL”) against police departments. Gilles, *supra* note 22, at 1386 (“In the aftermath of *Lyons*, meaningful enforcement of [civil] rights . . . —at least so far as injunctive relief is concerned—[was] left solely to the government.”). Similarly in 1980, in *United States v. City of Philadelphia*, the U.S. Court of Appeals for the Third Circuit held that the DOJ did not have standing to enjoin the Philadelphia Police Department from using certain tactics, absent explicit congressional authorization. 644 F.2d 187, 206 (3d Cir. 1980).

<sup>214</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified at 42 U.S.C. § 14141 (2012)).

<sup>215</sup> 42 U.S.C. § 14141(b) (“Whenever the Attorney General has reasonable cause to believe [that there is a pattern or practice of misconduct in a local police department] . . . the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.”).

<sup>216</sup> See, e.g., Stuntz, *supra* note 21, at 539 n.134 (arguing that § 14141 may have an even greater effect than the exclusionary rule).

<sup>217</sup> See, e.g., Simmons, *supra* note 22, at 531 (citing Cincinnati as an example of a successful collaborative reform process initiated by the DOJ).

<sup>218</sup> See Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 100–01 (2001) (claiming that “the DOJ lacks the resources” to address some problem facing police depart-



## 1. Challenges in Identifying Problematic Police Departments

Since passage of § 14141, the DOJ has struggled to develop a coherent methodology to identify police departments engaged in systemic misconduct. How, after all, “should a small team of lawyers in Washington, D.C.” go about identifying which local and state police agencies are engaged in a pattern or practice of unconstitutional wrongdoing?<sup>219</sup> The text of § 14141 provides the DOJ with no guidance. DOJ officials claimed that they have used media coverage,<sup>220</sup> existing civil litigation,<sup>221</sup> internal whistleblowers,<sup>222</sup> and academic studies<sup>223</sup> to identify problematic police departments. Ultimately, as one DOJ insider explained, “There is no simple formula for identifying problematic police departments.”<sup>224</sup> These findings reinforce the suspicions of at least one scholar who has argued that “it doesn’t seem like [Justice Department officials] have a very strategic approach—they simply react to cases brought to them.”<sup>225</sup> Without the benefit of any national statistics on police brutality, the DOJ has no consistent way to compare the behavior of one police department to another. The result is that the DOJ’s case selection process appears sloppy to outsiders.<sup>226</sup>

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ments like racial profiling as demonstrated by the “[f]ew consent decrees”); Gilles, *supra* note 22, at 1407–11 (claiming that resource and political constraints prevent the DOJ from bringing about more claims under § 14141); Jeffries & Rutherglen, *supra* note 22, at 1419 (stating that “the Department of Justice faces financial and political constraints on its effectiveness” in enforcing § 14141); Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3192 (“But in recent years, enthusiasm for the legislation has waned, in part because of a prevailing belief that the DOJ has not effectively used structural police reform.”).

<sup>219</sup> Rushin, *Structural Reform Litigation*, *supra* note 20, at 1367.

<sup>220</sup> See, e.g., Telephone Interview with Department of Justice Participant No. 12, at 3–4 (July 30, 2013) [hereinafter Interview No. 12] (transcript on file with author); Telephone Interview with Department of Justice Participant No. 14, at 4 (July 11, 2013) [hereinafter Interview No. 14] (transcript on file with author) (“Occasionally [inquiries] get started when there is a big expos[é] of a big problem in a department . . . .”); Telephone Interview with Department of Justice Participant No. 18, at 4 (Aug. 8, 2013) (transcript on file with author) (stating that the DOJ identified cases “through a mix of media reviews [and] newspaper reviews”); Telephone Interview with External Monitor No. 13, at 5 (Aug. 5, 2013) (transcript on file with author).

<sup>221</sup> Interview No. 14, *supra* note 220, at 4 (talking about how the DOJ intervened in Steubenville because of a series of civil cases brought by attorney James McNamara).

<sup>222</sup> Interview No. 12, *supra* note 220, at 2 (“[S]ometimes there were internal whistle blowers.” (alteration in original)).

<sup>223</sup> Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3222 (using a study by John Lamberth as an example of such a study that directed DOJ action at the New Jersey State Police Department).

<sup>224</sup> Rushin, *Structural Reform Litigation*, *supra* note 20, at 1369 (quoting Interview No. 14, *supra* note 220, at 4).

<sup>225</sup> Lichtblau, *supra* note 22 (quoting Professor Michael Selmi).

<sup>226</sup> Rushin, *Structural Reform Litigation*, *supra* note 20, at 3194.

## 2. Lack of Resources

The DOJ also lacks the necessary resources to enforce § 14141 effectively.<sup>227</sup> Between 1994 and 2012, the DOJ investigated around fifty-five police departments in the United States pursuant to § 14141.<sup>228</sup> The DOJ has only had the resources to pursue § 14141 investigations against less than 0.02% of the nation's law enforcement agencies each year.<sup>229</sup> Further, the DOJ only reached a negotiated settlement pursuant to § 14141 with around twenty-two agencies during this time—or a little more than one per calendar year.<sup>230</sup> In explaining the relatively small number of § 14141 cases each year, a DOJ insider stated, “[T]here’s no way that the [DOJ] can litigate all of the patterns and practices of police misconduct in this country. There are too many policing jurisdictions . . . to do that.”<sup>231</sup> Even if a pattern of misconduct exists in one out of every one hundred law enforcement agencies, “[T]he DOJ [still] only has the resources to investigate less than 2 percent of these departments each year.”<sup>232</sup> This lack of regular enforcement may limit the ability of § 14141 to deter misconduct. If agencies view § 14141 action to be a remote possibility, rational choice theory suggests that they will have little reason to reform.<sup>233</sup> This reality has led some scholars to call for more resources to enforce § 14141, or for a new enforcement approach that will promote proactive reform by police departments.

## 3. Lack of Transparency

Another problem with § 14141 enforcement has been a perceived lack of transparency. This problem has led to two unfortunate results. First, many cities feel “unfairly targeted.”<sup>234</sup> This feeling is perhaps best illustrated by the response of the former City Manager of Steubenville, Ohio. After his police de-

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<sup>227</sup> Harmon, *supra* note 32, at 21 (stating this view “attribute[s] 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”).

<sup>228</sup> Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, app. A (showing the full list of all formal investigations pursued by the DOJ between 1994 and 2012).

<sup>229</sup> *Id.* at 3230.

<sup>230</sup> *Id.* app. B (showing the name of each police department to agree to a settlement with the DOJ along with the dates).

<sup>231</sup> Interview No. 14, *supra* note 220, at 11.

<sup>232</sup> Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3230.

<sup>233</sup> Harmon, *supra* note 32, at 22–23. As Professor Harmon explained,

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. 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.

*Id.*

<sup>234</sup> Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3219.

partment was selected for § 14141 reform, he remarked, “We’re an awfully small community. You see all these problems that have come up at the police departments in Los Angeles and New York and New Orleans, and you’ve got to wonder, why us?”<sup>235</sup> This perceived procedural unfairness could hinder the reform process.

This lack of transparency on the part of the DOJ also contributes to a second problem. Police departments seem less likely to reform proactively without a clear understanding of how the DOJ is identifying problematic police departments. The DOJ has thus far used § 14141 to compel merely a handful of police departments to make specific reforms.<sup>236</sup> But without a clear case selection process, the DOJ has been unable to induce other police departments to adopt reforms preemptively.<sup>237</sup> One scholar, thus, has argued that the DOJ ought to create a transparent case selection process that gives notice to police departments and also creates incentives for police departments that take proactive steps to address systemic wrongdoing within their ranks.<sup>238</sup>

#### 4. Sustainability

Concerns also exist about the sustainability of § 14141 reforms. The typical § 14141 reform process can take anywhere from five to ten years or longer to complete.<sup>239</sup> During this time, an external monitor oversees the implementation of DOJ-mandated reforms and files quarterly reports detailing the police department’s progress.<sup>240</sup> But invariably, the DOJ monitoring must end. The hope is that the DOJ reforms will stick long after the external monitoring ends. Recent evidence, though, suggests that some of the reforms implemented by the DOJ may unravel soon after the external monitoring ends.<sup>241</sup> This situation raises an important and unanswered question: How can the DOJ keep tabs on police departments that have already undergone § 14141 reform? In the ab-

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<sup>235</sup> Lichtblau, *supra* note 22 (quoting the City Manager).

<sup>236</sup> Harmon, *supra* note 32, at 4.

<sup>237</sup> *Cf. id.* (proposing “a new approach to § 14141 enforcement, one that overcomes the limits of direct reform by *inducing* departmental reform as well as *compelling* it” (emphasis added)).

<sup>238</sup> *See generally id.* (describing how the DOJ should (1) prioritize litigation against the worst large police departments, (2) develop a list of the worst police departments that is publicly displayed in order to induce reform, and (3) give departments a safe harbor if they make proactive changes after being included on this list of the worst police departments).

<sup>239</sup> Rushin, *Structural Reform Litigation*, *supra* note 20, at 1392 fig.5 (showing the length of time it has taken for each police department to complete monitored reform, ranging from five years for Cincinnati and Prince George’s County to 11.9 years in Los Angeles).

<sup>240</sup> *Id.* at 1393 (“During this reform process, the external monitor regularly visits the police agency to audit departmental records and meet with officers.”).

<sup>241</sup> *Id.* at 1410–11 (explaining how many of the reforms implemented by Robert McNeilly in Pittsburgh under the DOJ consent decree appear to have unraveled once he was fired by Mayor Robert O’Connor Jr.).

sence of useful national statistics on police behavior, the DOJ has lacked the resources to ensure the sustainability of § 14141 reforms.

All of this is not to say that § 14141 is wholly ineffective. In fact, § 14141 has often proven to be a powerful weapon for reform, in the LAPD and a number of other police departments.<sup>242</sup> The author of this Article has argued that § 14141 forces police departments to prioritize investments in police reform.<sup>243</sup> It often instigates change in departmental leadership.<sup>244</sup> The use of mandatory external monitoring ensures that police departments substantively comply with the terms of negotiated settlements.<sup>245</sup> And § 14141 settlements can provide supportive leadership in a police department with the necessary legal cover to justify necessary reforms that may be unpopular with organized labor.<sup>246</sup> Consequently, the DOJ has used § 14141 to bring about meaningful reform in not just Los Angeles, but also in Washington, D.C., Cincinnati, and Detroit.<sup>247</sup> Reforms are also currently underway in other large cities, including New Orleans and Seattle.<sup>248</sup> But the effectiveness of § 14141 has been somewhat limited by the lack of national statistics on local police departments. In this sense, while highly imperfect, the DCRA, FBI, and BJS data may incrementally improve the enforcement of § 14141.

### *B. Using DCRA, FBI, and BJS Data on Police Violence to Improve § 14141 Enforcement*

The forthcoming data on police violence represent opportunities for the DOJ to improve the enforcement of § 14141. The core problem facing § 14141 has been a lack of information on police behavior. Without adequate information, the federal government cannot use the statute to engage in widespread oversight of local police departments. This Article does not argue that these new databases will fix all of the problems facing § 14141. The DCRA, FBI, and BJS databases will only provide the DOJ with potentially useful infor-

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<sup>242</sup> *Id.* at 1421 (“SRL provides the federal government with a unique opportunity to force local police agencies to adopt invasive and costly reforms aimed at curbing misconduct.”).

<sup>243</sup> *Id.* at 1397–400 (using Los Angeles as an example of a police department that appeared unwilling to make significant investments into police reform efforts until the DOJ applied pressure via § 14141, resulting in approximately \$100 million in additional funding thereafter).

<sup>244</sup> *Id.* at 1400–01 (using changes in leadership in Seattle, New Orleans, Los Angeles, and Pittsburgh as examples of this phenomenon).

<sup>245</sup> *Id.* at 1401–04 (again using Los Angeles as an example of a police department that benefited tremendously from the use of external monitoring, including auditing to ensure compliance with constitutional norms).

<sup>246</sup> *Id.* at 1376 (“[P]olice unions commonly attempt to intervene in settlement negotiations with the intent of blocking reforms that may increase oversight or otherwise burden frontline police officers.”).

<sup>247</sup> *Id.* at 1378 fig.3 (showing a full map of the police departments that have undergone § 14141 investigations and reforms).

<sup>248</sup> *Id.* at 1347.

mation on one facet of police behavior. Congress passed § 14141 with the hopes of enjoining all sorts of police misconduct, from unlawful killings, to excessive *Terry* stops, to racial profiling.<sup>249</sup> In a perfect world, Congress would give the DOJ accurate national statistics on all local police behavior.

But we do not live in a perfect world. The DCRA, FBI, and BJS datasets will ultimately represent some of the only national sources on potentially suspect police behavior. Remember that it is impossible to have accurate national statistics on many aspects of police behavior because policing, by its very nature, is highly discretionary and unstructured.<sup>250</sup> American policing is also extraordinarily decentralized across thousands of individual, largely autonomous departments.<sup>251</sup> Given these challenges, these new datasets represent something imperfect but useful—comprehensive databases documenting the most deadly police behavior that should prove difficult for police departments to manipulate and easy for third parties to authenticate.<sup>252</sup> And perhaps most importantly, an excessive number of police killings often serves as a symptom of larger organizational deficiencies. Thus, the DOJ could use these databases to improve the enforcement of § 14141 in three ways set out below.

### 1. Identifying Police Departments Engaged in Misconduct

The DOJ could use these new databases to identify police departments that are engaged in a pattern or practice of unconstitutional misconduct. Remember that, in the absence of national statistics on police behavior, the DOJ has been forced to use a range of highly imperfect methods to identify police agencies in violation of § 14141.<sup>253</sup> The current case selection methods generally require the DOJ to operate reactively—the DOJ essentially relies on third parties like the media to collect evidence of misconduct.<sup>254</sup> The DOJ then

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<sup>249</sup> See H.R. REP. NO. 102-242, at 136–38 (1991) (discussing the congressional intent underlying § 14141).

<sup>250</sup> See *supra* notes 98–117 and accompanying text (describing the use of discretion in policing).

<sup>251</sup> See *supra* notes 118–185 and accompanying text (explaining the causes and consequences of decentralization).

<sup>252</sup> See *supra* notes 36–73 and accompanying text (discussing why the new datasets will be useful albeit imperfect).

<sup>253</sup> See *supra* notes 219–226 and accompanying text (describing the trouble the DOJ has had in identifying police departments in violation of § 14141); see also Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3220–24 (citing various examples of the different case selection methodologies that the DOJ currently uses, including media coverage, civil litigation, whistleblowers, and academic studies).

<sup>254</sup> See *supra* notes 219–238 and accompanying text (describing the DOJ's methods of identifying cases for § 14141 reforms); see also Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3219–24 (describing the manner by which the DOJ currently enforces § 14141).

surveys these third-party sources to uncover potential targets for preliminary inquiries.<sup>255</sup>

This process undoubtedly helps the DOJ identify at least some of the police departments that are engaged in systemic misconduct. But this case selection process does not allow for the DOJ to make meaningful, cross-departmental comparisons. For example, the DOJ commonly relies on media reports of misconduct to guide § 14141 enforcement.<sup>256</sup> As the last few years have demonstrated, some incidents of police misconduct receive prominent media attention, while others seem to go unnoticed. This inconsistency only adds to the seemingly arbitrary nature of the DOJ's current case selection methods. Thus, one advantage of using statistics on police killings to guide § 14141 enforcement is that they give the DOJ a uniform metric to identify potentially problematic police departments. It would also make cross-departmental comparisons more effective.

Some critics may claim that the DOJ should not base its § 14141 enforcement strategy exclusively on the number and circumstances of civilian deaths at the hands of law enforcement. No doubt, some police departments may be engaged in a pattern of racial profiling or unlawful searches that represent a clear violation of § 14141, but do not result in any civilian deaths. Thus, one possible criticism of this enforcement strategy is that it will do little to address police misconduct that does not result in a death. This concern is a fair one. This Article does *not* suggest that the DOJ should *exclusively* use DCRA, FBI, and BJS data in selecting police departments for § 14141 reform. The DOJ could use this emerging data on violence by police to ground some investigations while also leaving room for other case selection methods to identify other types of misconduct.

But using national data on civilians killed by law enforcement to guide some § 14141 enforcement actions can clearly save lives. Albuquerque, New Mexico provides an example. The DOJ did not start investigating the Albuquerque Police Department (“APD”) until November of 2012.<sup>257</sup> Without national statistics on police killings, the DOJ was forced to act responsively rather than proactively to the police killings in Albuquerque. The subsequent DOJ investigation found that the APD had shot and killed twenty individuals in the preceding three years.<sup>258</sup> Had the DOJ identified the unusually large number of police killings in the APD earlier via a national database, it could have

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<sup>255</sup> Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3219–24. Given the limitations the DOJ faces in enforcing § 14141, this sort of an enforcement approach makes sense.

<sup>256</sup> *Id.* at 3220–22 (using the cases in Los Angeles, Cincinnati, and Washington, D.C. as examples of how media attention has helped the DOJ identify problematic patterns of police misconduct).

<sup>257</sup> *Id.* app. A (showing that the investigation of the APD officially began on November 27, 2012).

<sup>258</sup> Albuquerque Investigative Finds Letter from DOJ, *supra* note 28, at 2–3.

potentially initiated an investigation earlier. Further investigation in the APD found that “a majority of these shootings were unconstitutional.”<sup>259</sup> The large number of police killings was a symptom of an even larger problem in the APD. The DOJ investigation found that APD officers also “use[d] less lethal force in an unconstitutional manner,” and that a significant amount of use of force incidents involved “persons with mental illness and in crisis.”<sup>260</sup> Thus in the APD, as in many police departments, an unusually high amount of police killings was evidence of broader misconduct within a police department.

Of course, data from the DCRA, FBI, and BJS will not be perfect. Even so, they should combine to represent a helpful tool for identifying police departments engaged in high rates of violence against civilians.<sup>261</sup> And if the federal government makes all of this data publicly available, the DOJ will have another tool to use in identifying problematic police departments.

## 2. Publicizing Problematic Police Departments to Promote Proactive Reform

The DOJ could also use the DCRA, FBI, and BJS data to stimulate widespread and proactive reform in local police departments. Recall that the DOJ has only been able to investigate an average of around three law enforcement agencies police department each year—or less than 0.02% of the nation’s police departments.<sup>262</sup> Section 14141 action is extremely rare, leading some to feel that the process lacks procedural fairness.<sup>263</sup> The goal, then, for the DOJ is to establish, with limited resources, an enforcement strategy that appears procedurally fair, while also ensuring widespread compliance. This task has been virtually impossible without some national statistics on police behavior.

To help accomplish these goals, the DOJ could use these new databases to create a national list of police departments that kill the most civilians per capita—similar to a creative proposal made by one scholar several years ago.<sup>264</sup> The DOJ could then publish this list of “Police Departments Responsible for

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 3.

<sup>261</sup> See *supra* notes 75–93 and accompanying text (discussing how DCRA, FBI, and BJS data can help identify problematic police departments).

<sup>262</sup> Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3230. Of course, this current enforcement approach makes sense, given the lack of hard data available to justify intervention into one police department over another. Historically, there has been little hard evidence to support the DOJ’s choice of using § 14141 to investigate one jurisdiction rather than another. Because the DOJ has only had the resources to investigate around three police departments in the United States each year, getting selected can seem like simple bad luck. See *id.* at 3194.

<sup>263</sup> See *supra* note 29–30 and accompanying text (discussing how § 14141 investigations can seem unfair).

<sup>264</sup> See generally Harmon, *supra* note 32 (similarly recommending that the DOJ develop a public list of the most problematic police departments as a way to stimulate widespread change).

the Most Civilian Deaths” annually. The DOJ could then issue an ultimatum that gives the highest ranking police departments two choices—either (1) explain the unusually large number of killings by your officers, or (2) provide evidence that your department has taken steps to address these problems in the next year. The DOJ could then turn to § 14141 to enforce this ultimatum by prioritizing § 14141 investigations against police departments that fail to either justify or correct their pattern of civilian deaths. Similarly, the DOJ could offer safe harbor to police departments that proactively explain or correct their pattern of police killings. The DOJ might even consider offering police departments a specific list of policies and procedures they must implement to obtain such safe harbor protection.<sup>265</sup>

This approach would have two likely benefits. First, it would improve the perceived fairness of the § 14141 selection process. Unlike the current system, this proposed case selection process methodology would be more transparent. Municipalities would also have ample, public opportunity to respond to their ranking on the DOJ’s watch list. Second, and perhaps most importantly, this enforcement approach could motivate a larger number of police departments to adopt reforms on their own, despite the DOJ’s limited investigatory resources.<sup>266</sup> As it currently stands, the DOJ is careful not to publicly suggest a police department may be engaged in any misconduct before the formal investigation stage in § 14141 cases.<sup>267</sup> The stated reasoning for this policy is that the DOJ does not want to unfairly implicate a police department that may not

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<sup>265</sup> See Rushin, *Structural Reform Litigation*, *supra* note 20, at 1378–95. For example, the DOJ could require that police departments implement at least a few of the policies or procedures typically mandated under § 14141 consent decrees—like early intervention systems, training initiatives, complaint management protocols, or use-of-force investigation procedures.

<sup>266</sup> As Professor Harmon argues:

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.

Harmon, *supra* note 32, at 4. This Article agrees with Professor Harmon’s core idea: the DOJ should rank police departments through some public, transparent list. This Article builds on and supports Professor Harmon’s argument by asserting that the DOJ should specifically use the DCRA, FBI, and BJS data on police killings in constructing this list of problematic police departments. This would provide more transparency and give police departments a clear metric by which they ought to improve.

<sup>267</sup> Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3225 (stating that “[d]uring [a preliminary look into a police department’s behavior], litigators at the DOJ, both past and present, are careful to describe their actions as inquiries, as opposed to investigations. . . . [Because by publicly] identifying a department as ‘under investigation,’ the DOJ would expose that department to immediate criticism in the media.”).



be engaged in wrongdoing.<sup>268</sup> This rationale is understandable. The DOJ does not want to unfairly suggest that a police department is engaged in systemic misconduct without first conducting a thorough investigation. But this caution also severely limits the national impact of § 14141.

By publishing a list of “Police Departments Responsible for the Most Civilian Deaths” the DOJ can substantially increase the perceived risk of § 14141 action. A hypothetical illustrates this point. Assume the City Council and Police Chief in the fictional City of Pleasantville are trying to decide whether they should fund additional police misconduct reforms to prevent DOJ intervention via § 14141. Under the current enforcement approach, Pleasantville would have little motivation to undertake reforms. As one scholar has previously argued,

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 investigation under § 14141 (regardless of the outcome) multiplied by  $c$ , the cost a municipality expects to incur as a result of that investigation.<sup>269</sup>

Given that the DOJ only has the resources to investigate around three municipalities per year, the probability ( $p$ ) that the DOJ would target Pleasantville appears to be around 0.02%.<sup>270</sup> Even if assuming that the ultimate cost ( $c$ ) of § 14141 reform in Pleasantville could run as high as \$50 million—as it has in many other communities—the risk of § 14141 reforms may still be too remote for Pleasantville to justify such any significant police reform expenditure. Under such circumstances, the expected cost ( $E$ ) of § 14141 amounts to no more than \$10,000—or the probability of § 14141 action (0.02%) multiplied by the possible cost of this DOJ action (\$50 million). And that assumes that an investigation of Pleasantville would result in full-scale § 14141 reforms.

Now assume that the DOJ were to adopt the enforcement strategy proposed in this Article. Assume the DOJ identified twenty police departments on its annual “Police Departments Responsible for the Most Civilian Deaths” us-

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<sup>268</sup> *Id.* at 3225 n.253. As a knowledgeable DOJ insider stated,

Opening an investigation is a huge deal. It’s a very big moment. You wouldn’t want to do that if there turns out not to be enough there to investigate. It would be very detrimental to the police department. Before you open any investigation all through[out] the Department, it doesn’t matter what the issue is, you have to figure out if there is a reason to open an investigation.

Interview No. 14, *supra* note 220, at 4.

<sup>269</sup> Harmon, *supra* note 32, at 23–24.

<sup>270</sup> Again, this is based on the presumption that the DOJ investigates an average of around three departments each year out of the nation’s 18,000 total law enforcement agencies. Rushin, *Federal Enforcement of Police Reform*, *supra* note 20, at 3230.

ing DCRA, FBI, and BJS data. And assume that the DOJ announced that it would formally investigate and pursue § 14141 reform in three of these departments each year. If Pleasantville were included on this list of “Police Departments Responsible for the Most Civilian Deaths,” city officials would be highly motivated to take proactive steps to avoid DOJ intervention. Rather than a 0.02% probability ( $p$ ) of DOJ intervention, Pleasantville is now facing a 15% chance of a DOJ investigation.<sup>271</sup> Given this probability of DOJ action, and the possible price tag associated with this intervention, Pleasantville may rationally conclude that it makes sense to allocate significant resources to proactive police reform. Using a deterrence theory formula, we can expect Pleasantville to invest up to \$7.5 million to implement misconduct reforms after being included on a list of “Police Departments Responsible for the Most Civilian Deaths”—that is, the probability of § 14141 action (15%) multiplied by the possible cost of this DOJ action (\$50 million).<sup>272</sup>

Under the current enforcement strategy, however, rational police departments will wait until the DOJ has publicly selected them for § 14141 investigation. The result is that the DOJ can only force a small number of departments a year to make changes. By adopting this enforcement strategy, the DOJ could induce many more police departments to make at least some proactive reforms aimed at curbing police violence. Doing so would expand the net of police departments affected by § 14141. And by also giving these police departments an opportunity to justify or explain their unusually large number of police killings, the DOJ could also avoid unfairly stigmatizing agencies without some procedurally fair process.

### 3. Monitoring Police Departments After § 14141 Reform

The DOJ could also use DCRA, FBI, and BJS data on police violence to monitor law enforcement agencies that have already undertaken § 14141 reforms. Remember that § 14141 reform typically takes anywhere from five to ten years or longer to complete.<sup>273</sup> Once a police department has demonstrated substantial compliance with the terms of the negotiated settlement, the DOJ will officially stop monitoring the department.<sup>274</sup> This raises a very serious concern: What is to keep a police department from abandoning the reforms

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<sup>271</sup> This figure is calculated by taking the actual number of police departments targeted each year for an investigation (three) and dividing it by the hypothetical number of departments identified in the annual list of “Police Departments Responsible for the Most Civilian Deaths” (twenty).

<sup>272</sup> See Harmon, *supra* note 32, at 22–23 (explaining the deterrence theory).

<sup>273</sup> Rushin, *Structural Reform Litigation*, *supra* note 20, at 1392 fig.5 (showing the length of time each settlement took to complete).

<sup>274</sup> *Id.* at 1394 (describing how a police department can demonstrate substantial compliance to end external monitoring—generally a standard that requires at least 94% compliance with the terms in the consent decree).

mandated by the DOJ immediately after § 14141 oversight ends? This concern is especially salient because, in the absence of national statistics on police behavior, the DOJ has no mechanism to oversee police departments after the end of a consent decree. And given the high cost of police reforms, municipalities may be highly incentivized to drop these procedures as soon as external oversight ends.

Again, these new databases do not fully solve this problem. But they do give the DOJ a cost-effective mechanism to keep an eye on police department violence after § 14141 reform ends. The DOJ could use each of these databases to monitor these agencies for several years thereafter. The DOJ could even mandate in future § 14141 settlements that a suspicious pattern of police killings after monitoring ends would trigger another investigation of the department. Importantly, this sort of continual oversight would not be resource intensive for the DOJ. And it could provide police agencies with additional incentives to keep § 14141 reforms in place after the terms of the settlements conclude. Thus, the emergence of the DCRA, FBI, and BJS databases presents a unique and cost-effective opportunity for the DOJ to conduct some limited monitoring of police departments after § 14141 intervention ends.

### CONCLUSION

For years, the United States has kept few statistics on local police behavior. The passage of the DCRA and the announcements of new databases on police killings by the FBI and BJS do not solve this glaring problem. But these events represent important steps in improving oversight of police conduct. By making all of this new data readily available to the public, federal policymakers may be able to encourage police departments to prioritize reductions in police violence. Transparency alone, though, will likely be insufficient to bring about widespread reductions in police violence. In order to maximize their impact, the DOJ should use these new databases to improve its use of federal civil rights litigation against local police departments. In doing so, the DOJ can incrementally improve the enforcement of § 14141 and promote proactive reform. In order to truly realize the potential of § 14141, however, Congress must begin collecting more substantial statistics on police behavior. Documenting civilian deaths caused by law enforcement is a step in the right direction. But this should be just the beginning of a broader effort to document police behavior and empower the DOJ's enforcement of § 14141.