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# THE POLITICS OF POLICING: ENSURING STAKEHOLDER COLLABORATION IN THE FEDERAL REFORM OF LOCAL LAW ENFORCEMENT AGENCIES

KAMI CHAVIS SIMMONS\*

The principle of the sovereignty of the people, which to some extent always underlies nearly all human institutions, is ordinarily wrapped in obscurity. People obey it without recognizing it; if light should chance briefly to fall on it, they are quick to relegate it to the darkness of the sanctuary.<sup>1</sup>

*Title 42 U.S.C. § 14141 authorizes the United States Department of Justice ("DOJ") to seek injunctive relief against local law enforcement agencies to eliminate a pattern or practice of unconstitutional conduct by these agencies. Rather than initiate lawsuits to reform these agencies, DOJ's current strategy is to negotiate reforms using a process that involves only DOJ representatives, municipality officials, and police management officials. While there are many benefits of negotiating the reforms, the current process excludes important stakeholders directly impacted by the reforms, including community members, who are the consumers of police services, and the rank-and-file police officers, whom the reforms may adversely impact. The exclusion of these groups is not only inconsistent with general norms of democratic inclusion, but it is also inconsistent with the paradigm of community policing that emphasizes the benefits of police-community partnerships. Ultimately, exclusion of these stakeholders undermines the legitimacy of the reforms, thereby threatening the*

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<sup>1</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 62 (Arthur Goldhammer trans., Literary Classics 2004) (1835).

*implementation and permanence of the reforms. This Article advocates that in order to ensure broader stakeholder participation in the context of DOJ's enforcement of § 14141, DOJ should formally adopt the paradigm of regulatory negotiation, a process that has been used successfully in administrative rulemaking. Applying the regulatory negotiation model to police reform has important implications such as greater cooperation among those implementing the reforms and the creation of innovative solutions to address police misconduct that are specifically tailored to the respective community.*

### I. INTRODUCTION

On November 21, 2006, after obtaining a “no knock” search warrant based on false information, several Atlanta police officers stormed into the home of ninety-two-year-old Kathryn Johnston.<sup>2</sup> Ms. Johnston, who lived alone and feared a home invasion, always locked her door and kept a gun for protection.<sup>3</sup> When the officers burst unannounced into the home, Ms. Johnston fired a single shot but struck no one.<sup>4</sup> Officers at the scene, however, returned fire, striking Ms. Johnston multiple times and fatally wounding her.<sup>5</sup> When a search of the home revealed no drugs, rather than leaving the scene, one of the officers planted in the basement three bags of marijuana seized in an unrelated case.<sup>6</sup> The officer then filed a false incident report stating that someone had purchased drugs at Ms. Johnston's home earlier in the day.<sup>7</sup> To conceal their crimes, the officers suggested to Atlanta homicide investigators that Ms. Johnston's shooting death was justifiable.<sup>8</sup> Fortunately, in later interviews with the Federal Bureau of Investigation, one of the officers admitted their wrongdoing.<sup>9</sup> With their criminal conspiracy revealed, two of the three officers involved pleaded

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<sup>2</sup> Press Release, Dep't of Justice, Three Atlanta Police Officers Charged in Fatal Shooting of Elderly Atlanta Woman (Apr. 26, 2007), available at [http://www.usdoj.gov/opa/pr/2007/April/07\\_crt\\_299.html](http://www.usdoj.gov/opa/pr/2007/April/07_crt_299.html) [hereinafter U.S. DOJ Apr. 26 Press Release].

<sup>3</sup> *Tighten Rules on “No-Knock,”* MACON TELEGRAPH (Macon, Ga.), Mar. 5, 2007, at A.

<sup>4</sup> Press Release, Dep't of Justice, Three Atlanta Police Officers Charged in Connection with the Fatal Shooting of an Elderly Atlanta Woman, at 3 (Apr. 26, 2007), available at <http://www.usdoj.gov/usao/gan/press/2007/04-26-07.pdf> [hereinafter N.D. Ga. Apr. 26 Press Release].

<sup>5</sup> Ms. Johnston sustained multiple gunshot wounds and several officers were injured by the shots fired from their fellow officers. *Id.* at 3-4.

<sup>6</sup> *Id.* at 4. Officer Jason Smith and another officer disposed of the remainder of the seized marijuana by throwing it down a sewer drain. *Id.*

<sup>7</sup> *Id.* at 3-4. Officer Smith submitted two bags containing crack cocaine that he falsely claimed had been purchased by an informant at Ms. Johnston's home. *Id.*

<sup>8</sup> *Id.* at 4.

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

guilty to state and federal charges stemming from the incident in April 2007.<sup>10</sup>

If this deplorable incident had been an isolated occurrence involving a few wayward officers, the story may have ended here. Unfortunately, this was not the first time several of the officers involved in Ms. Johnston's death had made false statements in their sworn affidavits before magistrate judges.<sup>11</sup> Perhaps what is even more disturbing is that, as the District Attorney observed, the investigation following Ms. Johnston's death demonstrated that "many of the practices that led to her death were common occurrences in this unit of the Atlanta Police Department."<sup>12</sup>

A few months after this police shooting in Atlanta, police officers three thousand miles away also engaged in a shocking display of collective force. On May 1, 2007, Los Angeles police officers clashed with citizens during a peaceful immigration rally in McArthur Park.<sup>13</sup> When a small group of people began throwing rocks and bottles at the police officers, the officers responded with a barrage of rubber bullets and used batons to disperse the protestors.<sup>14</sup> Forty-two people, including news media personnel, protestors, and police were injured in the incident.<sup>15</sup> Soon after the incident, Police Chief William Bratton acknowledged the actions of some of the officers "were inappropriate in terms of use of batons and

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<sup>10</sup> Officers Gregg Junnier and Jason Smith pleaded guilty in state court to voluntary manslaughter, violation of oath by a public officer, criminal solicitation and false statements, and in federal court to a civil rights conspiracy violation that resulted in the death of Ms. Johnston. Smith also pleaded guilty in state court to one count of perjury. *Id.* at 1. A third officer involved in the shooting, Arthur Tesler, "was indicted on state charges of false statements, violation of oath of office by a public officer, and false imprisonment." U.S. DOJ Apr. 26 Press Release, *supra* note 2. In May 2008, a jury convicted Tesler of lying to investigators about the shooting, and a judge sentenced him to four years and six months in prison, six months probation, and 450 hours of community service. Associated Press, *Georgia Cop Gets 4 1/2 Years for Lying After Raid That Killed Elderly Woman*, FOX NEWS.COM, May 22, 2008, <http://www.foxnews.com/story/0,2933,357241,00.htm>; *see also* Jeffrey Scott & S.A. Reid, *5 Years for Officer in Botched Raid*, ATLANTA J.-CONST., May 23, 2008, at E1.

<sup>11</sup> According to information presented in court, Officers Junnier and Smith, as well as other Atlanta Police Department officers, previously falsified affidavits for search warrants in order to meet the department's performance targets. N.D. Ga. Apr. 26 Press Release, *supra* note 4, at 3.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> Patrick McGreevy & Richard Winton, *Report Cites Police "Breakdown" at May Rally*, L.A. TIMES, May 30, 2007, at A1.

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

<sup>15</sup> *Id.*

possible use of non-lethal rounds fired,” and he later attributed the incident to a “breakdown in communication” among supervising officers.<sup>16</sup>

The fatal shooting of Kathryn Johnston in Atlanta and the Los Angeles “May Day Melee,” as it has become known, are only the most recently publicized representations of institutional failures plaguing police agencies. In Los Angeles, more than 100 criminal convictions were overturned and 200 people sued the Los Angeles Police Department after a police officer disclosed that members of the police department’s Rampart Division regularly tampered with evidence and tortured suspects.<sup>17</sup> Nine officers were criminally charged and twenty-three officers were fired or suspended for their roles in the Rampart scandal.<sup>18</sup>

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<sup>16</sup> Associated Press, *Los Angeles Police Chief William Bratton Says Officers Used Inappropriate Tactics During Immigration Rally*, FOX NEWS.COM, May 2, 2007, <http://www.foxnews.com/story/0,2933,269616,00.html>.

<sup>17</sup> Andrew Blankstein, *Perez Details Gang Member Framing*, L.A. TIMES, May 10, 2005, at 4. In 1998, Officer Rafael Perez, an officer with LAPD’s Rampart Division gang unit, was alleged to have used his position to procure and sell illegal narcotics. As part of a plea agreement, Perez revealed his knowledge of widespread misconduct among other LAPD officers including murder. *Frontline: LAPD Blues* (PBS television broadcast May 15, 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/etc/script.html>; see also Andrew Murr, *L.A.’s Dirty War on Gangs*, NEWSWEEK, Oct. 11, 1999, at 72 (discussing officer Rafael Perez’s disclosure of the Rampart scandal); Todd S. Purdum, *Los Angeles Police Scandal May Soil Hundreds of Cases*, N.Y. TIMES, Dec. 16, 1999, at A16 (discussing the ramifications of the Rampart scandal).

<sup>18</sup> Patrick McGreevy, *LAPD Still at Risk of Scandal Despite Reform, Panel Says*, L.A. TIMES, July 12, 2006, at 1. Of course no discussion of police reform would be complete without mentioning the infamous police beating of Rodney King by members of the Los Angeles Police Department. Memorialized on video, the King beating ignited an outcry for police reform in America and a commission studying the Los Angeles Police Department in the aftermath of the King beating found serious systemic problems that cultivated and tolerated police misconduct. See INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT ON THE INDEPENDENT COMMISSION OF THE L.A. POLICE DEPARTMENT, at vii (1991) [hereinafter CHRISTOPHER COMM’N REPORT]. The New York City Police Department also has been the focus of several high-profile allegations of police brutality. In 1997, police officers sodomized Abner Louima in a police station bathroom. John Kifner, *Doctors Rush Beating Victim to Surgery*, N.Y. TIMES, Aug. 29, 1997, at B1. In 1999, police fired forty-one shots at Amadou Diallo, an unarmed West African immigrant, striking him nineteen times. Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, N.Y. TIMES, Feb. 5, 1999, at A1. As he was standing in the vestibule of an apartment building, four officers looking for a rape suspect opened fire on Diallo, killing him. *Id.*; see also AMNESTY INT’L, RACE, RIGHTS AND POLICE BRUTALITY I (1999). Recently, the tactics of the New York Police Department again came under fire after the shooting death of unarmed Sean Bell, whom officers fatally shot as he left his bachelor party on the morning he was to be married. Robert D. McFadden, *Police Kill Man After a Bachelor Party in Queens*, N.Y. TIMES, Nov. 26, 2006, at A1. On April 25, 2008, New York State Supreme Court Judge Arthur J. Cooperman acquitted three undercover officers who had been charged in Sean Bell’s death. Michael Frazier, *Panel Tackles Excess Force by Police*, L.A. TIMES, May 13, 2008, at 14.

In 1994, recognizing the need for a national response to systemic reform of law enforcement agencies, Congress adopted 42 U.S.C. § 14141. The statute authorizes the Attorney General to conduct investigations and, if warranted, file civil litigation to eliminate a “pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”<sup>19</sup> Until the adoption of § 14141, there was no mechanism available to the federal government to force local law enforcement agencies to change their practices contributing to patterns or practice of conduct that violated a citizen’s civil rights. The Attorney General has delegated this authority to the Special Litigation Section of the Civil Rights Division of the United States Department of Justice (“DOJ”), which investigates allegations of patterns or practices of constitutional violations in order to determine whether enforcement under § 14141 is justified. In practice, DOJ has initiated what some experts consider only a “paucity” of lawsuits, all of which have been resolved via court-enforced consent decrees.<sup>20</sup> In other jurisdictions where DOJ’s investigations revealed a pattern or practice of constitutional violations, the government has refrained from initiating litigation and instead has opened formal investigations and entered into negotiated agreements with the municipalities and police departments, known as Memoranda of Agreement (“MOA”).<sup>21</sup> 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.<sup>22</sup> These agreements generally contain a package of reforms aimed at enhancing greater public accountability.<sup>23</sup> Called the “new paradigm of police accountability” by one commentator, the most common provisions of

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The acquittal sparked citywide protests, and shortly thereafter, the House Judiciary Committee held a public forum on police accountability. *Id.*

<sup>19</sup> 42 U.S.C. § 14141 (2000). Section 14141’s grant of authority to seek injunctive relief against local law enforcement agencies has been likened to the federal government’s intervention in civil rights cases involving school desegregation, employment discrimination, public housing, and prison condition cases. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1402 (2000).

<sup>20</sup> Gilles, *supra* note 19, at 1408 (offering possible explanations for the small number of suits initiated by DOJ).

<sup>21</sup> See *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 18, at 18, 50 (2002) [hereinafter *Oversight Hearing*] (testimony of Ralph Boyd, Jr., Assistant Att’y Gen., Civil Rights Div.).

<sup>22</sup> See *id.* at 50-52.

<sup>23</sup> See, e.g., Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department’s “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 6 (2003).

these agreements are aimed at implementing or changing internal policies related to developing early warning tracking systems to detect “problem officers,” creating use-of-force reporting systems, and devising an impartial civilian complaint review process.<sup>24</sup>

Notwithstanding the practical benefits of negotiating reforms for local law enforcement agencies, DOJ’s negotiation process runs contrary to the established democratic theory that those affected by governmental policies should have an opportunity to participate in the development of those policies.<sup>25</sup> The agreements resulting from DOJ’s pattern or practice legislation have far-reaching ramifications for both the police officers performing everyday policing tasks as well as for the community members that the local law enforcement agencies serve. For the most part, however, DOJ’s process of fashioning the negotiated agreements has excluded these important stakeholders. The discontent arising from such exclusion undermines the legitimacy of DOJ’s reform efforts, thereby threatening the successful implementation and permanence of the reforms.

The goal of this Article is to devise a model of collaborative problem-solving to ensure inclusion of the interested parties, such as community-based groups and rank-and-file officers, in the federal government’s efforts to reform local law enforcement agencies.<sup>26</sup> Specifically, this Article advocates that DOJ adopt the paradigm of regulatory negotiation to ensure the inclusion of stakeholders in the development of the specific DOJ-mandated reforms. The participation of various stakeholders in the reform of local police departments through the framework of negotiated rulemaking ensures the legitimacy of the reform process, thereby increasing the possibilities for expediting compliance with the reforms and ensuring long-term adherence to the improved practices.

Part II of this Article describes the inception of federal pattern or practice litigation as a response to the limitations of traditional remedies to address police misconduct. Previously, efforts to address police misconduct

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<sup>24</sup> *Id.* at 6-8 (identifying DOJ’s package of reforms as “the new paradigm of police accountability”).

<sup>25</sup> See IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 8 (2000) (“Democratic inclusion means that all members of the given polity should have effectively equal influence over debate and decision-making within that polity.”).

<sup>26</sup> It is important to note that this proposed collaborative process begins only after DOJ has found a pattern or practice of unconstitutional violations and has determined to negotiate with the respective jurisdiction regarding reforms. Several experts have criticized the statute’s lack of a private right of action, and at least one scholar has advocated deputizing private citizens to initiate actions. See, e.g., Gilles, *supra* note 19. While I do not disagree with their proposed reforms, the model I propose seeks to operate within the current statutory parameters of § 14141 and assumes the executive retains the discretion to initiate suit.

have focused on punishing individual officers for misconduct and compensating victims of police abuse. Critics have long argued that because police misconduct must be addressed at an organizational level, both the retrospective and individual-focused nature of the traditional remedies account for their inability to address systemic police misconduct.<sup>27</sup> However, there has been little evaluation of the potential for addressing police misconduct through a collaborative process involving the affected stakeholders. I argue that § 14141 complements the traditional remedies because DOJ's proclivity to negotiate agreements offers an unprecedented opportunity to include both rank-and-file-police officers and citizens in a collaborative process to address police misconduct.

Part III examines DOJ's exercise of its "pattern or practice" authority to date. Although widely hailed as a new tool in the arsenal against police misconduct, police experts have expressed many valid critiques of the legislation, including its lack of a private right of action and a perceived lack of political will to aggressively investigate and reform problem police departments.<sup>28</sup> Part III also describes the provisions commonly included in DOJ's negotiated agreements, including the implementation of early warning tracking systems, use-of-force reporting systems, civilian complaint review processes, and the appointment of an independent monitor to oversee the implementation of the reforms.

Part IV argues that a greater, yet under-examined, deficiency of DOJ's current enforcement of § 14141 is the exclusion of the community members and rank-and-file police officers from the negotiation process that DOJ uses to develop the consent decrees and MOA. The exclusion of these groups is not only inconsistent with general norms of democratic inclusion, but it is also inconsistent with the paradigm of community policing, which emphasizes police-community collaboration and has become a dominant model of policing in the United States.

Asserting that § 14141 is a potential vehicle to utilize collaborative problem-solving in efforts to address institutional reform of local police practices, Part V advocates a normative model of consensus-based negotiation for use in developing future consent decrees or MOA. Part V

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<sup>27</sup> See generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004) (discussing the organizational nature of police misconduct and the inadequacy of punishing individual police officers).

<sup>28</sup> See, e.g., *infra* text accompanying note 102. Specifically, several commentators have expressly criticized DOJ's departure from seeking court-enforceable consent decrees and question the efficacy of DOJ's conciliatory strategy to enter into negotiated agreements. *Id.* This Article does not take a position with respect to determining the superiority of either enforcement mechanism, but rather seeks to offer a workable solution to improve upon the current negotiation process.



argues that DOJ should formally adopt the paradigm of regulatory negotiations in future reform efforts under § 14141 to ensure that those impacted by the reforms are afforded the opportunity to participate in the negotiations through their respective representatives.

Finally, Part VI considers the implications of the collaborative model in the context of police reform, including increased political legitimacy, greater cooperation, and better quality reforms specifically tailored to the jurisdiction. Part VI also examines potential challenges this collaborative model may experience in the specific context of police reform.

## II. THE INADEQUACY OF “TRADITIONAL” REMEDIES IN ADDRESSING POLICE MISCONDUCT

Even when naïvely dismissed as exaggerated or aberrant instances of police wrongdoing, the Kathryn Johnston shooting, May Day Melee, the L.A. Rampart scandal, or countless other anecdotes paint a vivid picture about the contours of policing and police culture in a democratic society.<sup>29</sup> In state and local agencies with 100 or more sworn officers, citizens filed more than 26,000 complaints regarding police officer use of force in 2002 alone.<sup>30</sup> An estimated 2000 of these incidents were “sustained,” meaning that there was “sufficient evidence of the misconduct allegation to justify disciplinary action against the subject officers.”<sup>31</sup> These figures confirm that police misconduct is more than just a rare occurrence. Rather, citizen abuse at the hands of those sworn to protect the public is a complex problem without a simple cure. It is easy to identify and punish individual rogue officers for isolated incidents of misconduct once an incident has already occurred. But as the Johnston shooting and the May Day Melee make clear, these events often are symptomatic of a larger problem endemic in American law enforcement agencies.<sup>32</sup> The culture of police violence is

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<sup>29</sup> For example, the Rodney King beating involved only a few officers who actually struck King with a baton or used a taser gun, but twenty other officers stood by and watched. JEROME SKOLNICK & JAMES FYFE, *ABOVE THE LAW* 12-13 (1993). Skolnick and Fyfe observe that the acquiescence of these officers indicated a “subculture of policing” that tacitly endorsed such behavior. *Id.*

<sup>30</sup> MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, *CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE* 1-2 (2006), available at <http://www.ojp.usdoj.gov/bjs/abstract/ccpuf.htm>.

<sup>31</sup> *Id.* at 1.

<sup>32</sup> It is important to note that each of the incidents mentioned above, and many of the most publicized incidents of police misconduct over the past twenty years, have involved victims who are racial minorities, particularly African-American males. While it is plausible to conclude that police misconduct is often synonymous with racial prejudice, it is imperative to note that the phenomenon of police misconduct in the United States cannot be characterized as an entirely racial issue. As Skolnick and Fyfe make clear, this racial

tightly woven into the institutional fabric of the police organization itself. Therefore, police reform efforts should address not only the conduct of individual police officers, but should also address systemic problems within police departments that contribute to police misconduct.

When one officer is responsible for a single act of police misconduct, there are a variety of remedial responses available to address his conduct, ranging from judicial intervention, state prosecution of police officers, federal prosecution of police officers, tort suits by aggrieved citizens, internal police investigations and citizen review of police misconduct.<sup>33</sup> But when the police organization itself is responsible for a pattern of misconduct, these remedies have proven inadequate as catalysts for addressing systemic problems in police departments.

#### A. "TRADITIONAL" METHODS OF ADDRESSING POLICE MISCONDUCT

Upon analyzing the goals and structures of traditional methods previously used to address police misconduct, the distinction between these methods and § 14141 becomes immediately apparent. The traditional remedies all share one common feature—they are all centered on an adversarial, litigation-based model. Such remedies generally focus upon deterring police misconduct by making illegally obtained evidence unavailable, punishing individual wrongdoers, or imposing financial consequences upon the municipality for abuses. These remedies rarely focus on systemic changes within a law enforcement agency to reduce and monitor violations of citizens' rights. In contrast, § 14141 offers the possibility for collaborative problem-solving among stakeholders to identify problems, implement institutional reforms, and monitor progress.

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dynamic was not at play at the Democratic Convention of 1968 when police clashed with protestors, many of whom were white. SKOLNICK & FYFE, *supra* note 29, at xvii. Nor can racial animus on the part of police officers explain the violence directed at anti-war protestors or student protestors. See generally JEROME H. SKOLNICK, *POLITICS OF PROTEST* (1969) (discussing anti-war and student protests in the 1960s). It is likewise important to understand that officers from racial minority groups also are not immune from misbehavior. SKOLNICK & FYFE, *supra* note 29, at xvii.

<sup>33</sup> See generally U.S. COMM'N ON CIVIL RIGHTS, REVISITING "WHO IS GUARDING THE GUARDIANS?" 50-54, 64-69 (2000), available at <http://www.usccr.gov/pubs/guard/main.htm> [hereinafter REVISITING "WHO IS GUARDING THE GUARDIANS?"] (summarizing legal remedies for police misconduct); John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789 (2000) (discussing the limits of federal prosecution of law enforcement officers under 18 U.S.C. § 242); Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 18-25 (2001) (discussing the exclusionary rule, civil rights actions, administrative discipline, and commission reports). Samuel Walker offers a conceptualization of these remedies that divides them into three categories that "parallel the three branches of American government: administrative, judicial, and legislative." Walker, *supra* note 23, at 11-29.

### 1. Judicial Intervention

The exclusionary rule, set forth in *Mapp v. Ohio*, represents the judiciary's attempt to deter officers from producing evidence in violation of a criminal suspect's constitutional rights by excluding evidence obtained in violation of the Fourth Amendment from being used at trial.<sup>34</sup> A by-product of the Warren Court's "due process revolution," the exclusionary rule is perhaps one of the most controversial doctrines in criminal procedure because of its potential to allow "guilty" defendants to go free.<sup>35</sup> However, the numerous exceptions to the exclusionary rule have severely limited the doctrine's ability to deter police officers from engaging in misconduct and have rendered the rule virtually meaningless.<sup>36</sup> In addition to the numerous exceptions, the effectiveness of efforts to address police misconduct such as the exclusionary rule is limited because the rule can seek only to remedy or deter conduct that is adjudicated. Because many citizen-police contacts are never scrutinized by the judiciary,<sup>37</sup> courts may "lack the institutional capacity to ensure compliance on a day-to-day basis."<sup>38</sup>

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<sup>34</sup> 367 U.S. 643 (1961). The Supreme Court's decision in *Weeks v. United States*, 232 U.S. 383 (1914), had already prohibited the admission of illegally obtained evidence in federal courts. The Court subsequently extended the exclusionary rule to evidence obtained in violation of the Fifth Amendment's right against self-incrimination and to the Sixth Amendment's right to counsel. See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (extending exclusionary rule to Fifth Amendment violations); *Massiah v. United States*, 377 U.S. 201 (1964) (extending exclusionary rule to Sixth Amendment violations).

<sup>35</sup> As Justice Cardozo famously noted, "[T]here has been no blinking the consequences. The criminal is to go free because the constable has blundered." *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926), cert. denied, 270 U.S. 657 (1926); see also *Stone v. Powell*, 428 U.S. 465, 489-90 (1976) ("The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."); Walker, *supra* note 23, at 17 (discussing how the Warren Court's "due process revolution" generated lasting police reforms).

<sup>36</sup> For example, Levenson explains that pursuant to *Rawlings v. Kentucky*, 448 U.S. 98 (1980), courts may not address violations if the defendant does not have standing to assert the issue. Levenson, *supra* note 33, at 18. She further notes that the "good faith" exception recognized in *United States v. Leon*, 468 U.S. 897 (1984), along with other exceptions to the warrant requirement, and the inapplicability of the exclusionary rule to impeachment evidence, renders that exclusionary rule meaningless. Levenson, *supra* note 33, at 18. Furthermore, the effectiveness of judicially created rules is often questioned because the opportunities to circumvent judicially created protections are vast. Walker, *supra* note 23, at 18.

<sup>37</sup> For example, in 2004, federal prosecutors filed charges in district court in only 58.3% of the "criminal matters" referred to them for prosecution or investigation. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004 tbl.2.2, NJC-213476 (Dec. 2006). Of the remaining 41.7% of charges, 20.2% were referred to federal magistrates while in the other 21.5% of cases, prosecution was declined. *Id.*; see also Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of*

## 2. Civil Remedies Available Under State and Federal Law

Another traditional method of addressing police misconduct is through civil litigation under state or federal law.<sup>39</sup> Many civil actions involving police misconduct are filed under 42 U.S.C. § 1983, which allows federal suits for damages or equitable relief where state or local governments have deprived citizens of their constitutional rights or have violated federal law.<sup>40</sup>

Proponents of civil remedies cite advantages including lower burdens of proof than in a criminal case, the ability of victims to initiate the lawsuit, and the possibility of monetary compensation for the victim.<sup>41</sup> Advocates of civil suits as a strategy to address police misconduct contend the monetary compensation for victims, if significant, may pressure local elected officials to urge reform of local police departments.<sup>42</sup> However, the tort litigation strategy has not substantially impacted police reform because

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*Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 251-52 (1980) (calculating that U.S. Attorneys nationwide filed criminal cases in 20% to 23.4% of the “criminal matters received” from 1974 to 1978).

<sup>38</sup> Walker, *supra* note 23, at 18; *see also* Terry v. Ohio, 392 U.S. 1, 13-14 (1968) (noting that many routine police functions related to evidence gathering are ill-suited to the deterrent effect of the exclusionary rule). Empirical evidence also suggests that police officers themselves are rarely deterred by the prospect that evidence may be excluded, and federal courts also have no mechanism to determine whether police officers are even educated about major court decisions affecting their work. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda* (1996), in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 222, 230-31 (Richard A. Leo & George C. Thomas III eds., 1998).

<sup>39</sup> Under state law, these suits include allegations such as false arrest, false imprisonment, malicious prosecution, assault, battery, or wrongful death. REVISITING “WHO IS GUARDING THE GUARDIANS?”, *supra* note 33, at 64.

<sup>40</sup> 42 U.S.C. § 1983 (2000). Section 1983 provides that

[e]very person who, under color of any statute, ordinance, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . . .

*Id.*

<sup>41</sup> REVISITING “WHO IS GUARDING THE GUARDIANS?”, *supra* note 33, at 64.

<sup>42</sup> According to Human Rights Watch, New York City paid nearly \$70 million to plaintiffs alleging police misconduct between 1994 and 1996. ALLYSON COLLINS, HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE ACCOUNTABILITY IN THE UNITED STATES* 304 (1998). In addition, a 1998 report claimed that the City of Chicago has paid out more than \$29 million since 1992 to settle civil lawsuits alleging police misconduct, while Detroit has paid more than \$100 million since 1986. *See* Robert Suro & Cheryl W. Thompson, *Group Says Police Abuses Persist Because of Lack of Prosecution*, WASH. POST, July 8, 1998, at A6. By 2001, the City of Los Angeles had already paid \$32 million to victims of the Rampart scandal. Amanda Bronstad, *Rampart Payouts Less Than Expected*, L.A. BUS. J., Aug. 6, 2001, at 6.

police officers rarely experience adverse financial consequences associated with such suits.<sup>43</sup> For example, municipalities pay for both the individual officer's legal defense as well as for any penalties imposed.<sup>44</sup> Furthermore, civil actions against police officers face significant legal barriers such as the doctrine of qualified immunity, which prevents monetary actions against police officers acting in their official capacity.<sup>45</sup> A successful § 1983 prosecution requires the jury to find that the officer violated "clearly established" law at the time of the incident.<sup>46</sup> As one expert noted, qualified immunity improperly "focuses the jury's attention on what the officer reasonably believed about the facts justifying the force used" and juries therefore have a difficult time finding the officer liable "if the conduct is objectively unreasonable but somehow understandable."<sup>47</sup> Additionally, local municipalities or police unions often indemnify police officers when they have acted in their official capacity, and thus, the police officer may face no direct financial consequences.<sup>48</sup> In addition to these legal hurdles, just as with criminal prosecutions of police officers, juries often decide credibility determinations in favor of the police officers rather than the victim.<sup>49</sup> Thus, some critics believe "civil remedies are never a sufficient form of accountability because they almost never address flawed management, policies, or patterns of abuse, nor do they hold an individual officer financially responsible."<sup>50</sup>

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<sup>43</sup> Walker, *supra* note 23, at 18-19.

<sup>44</sup> *Id.* at 19 (noting that "there appears to be a general pattern of 'disconnection and indifference' between the police officers engaging in the misconduct and the governmental bodies that actually assume the financial burden").

<sup>45</sup> Armacost, *supra* note 27, at 469-71; Levenson, *supra* note 33, at 20. Despite the barriers that qualified immunity poses for victims of police abuse, it is a necessary limitation. The absence of such a limiting doctrine would undoubtedly create difficulties in hiring police officers committed to protecting citizens.

<sup>46</sup> *Wilson v. Layne*, 526 U.S. 603, 605-06 (1999).

<sup>47</sup> Paul Hoffman, *The Feds, Lies and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1506-07 (1993).

<sup>48</sup> REVISITING "WHO IS GUARDING THE GUARDIANS?", *supra* note 33, at 65 (citing U.S. COMM'N ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN CITIES: POVERTY INEQUALITY, AND DISCRIMINATION, VOLUME III: THE CHICAGO REPORT 139 (1995)); *see also* Hoffman, *supra* note 47, at 1507; Levenson, *supra* note 33, at 20.

<sup>49</sup> *See, e.g.*, Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. Section 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 756 n.17 (1993).

<sup>50</sup> COLLINS, *supra* note 42, at 77. For similar reasons, imposing municipal liability to reform police practices has been unsuccessful. Municipal liability for police misconduct is also plagued with legal barriers similar to § 1983 suits. In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691 (1978), the Supreme Court rejected *respondeat superior* liability, stating that a "municipality cannot be held liable *solely* because it employs a tortfeasor—or in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."

### 3. State and Federal Criminal Prosecutions of Law Enforcement Officers

State and federal criminal prosecutions are also available as a remedy for police misconduct. State prosecutions of law enforcement officers are rare.<sup>51</sup> In one study, entitled *Shielded by Justice*, Human Rights Watch reported that prosecutors in many cities such as Chicago, Detroit, Indianapolis, New Orleans, Philadelphia, Portland, and San Francisco frequently have failed to prosecute officers for police brutality.<sup>52</sup> There is little doubt that the dearth of state prosecutions may be related to the inherent conflict of interest that exists between the prosecutors' offices and the police officers upon whose work the prosecutors rely.<sup>53</sup> Prosecutors may be hesitant to prosecute police officers who work in the same police department as other officers with whom the prosecutors work closely and rely upon to seek successful convictions in other criminal cases.

Where states fail to prosecute officers for unlawful actions, 18 U.S.C. §§ 241 and 242 allow for federal intervention.<sup>54</sup> Federal intervention is also rare because DOJ officials have often asserted that state prosecution is the preferred avenue for criminal prosecutions of law enforcement officers, and therefore federal intervention should serve only as a "back-stop."<sup>55</sup> By

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<sup>51</sup> State criminal prosecutions resulting from violations of state laws against assault, aggravated assault, manslaughter, and murder are another method of holding police officers accountable. See Jacobi, *supra* note 33, at 803 (discussing the reluctance of police officers to pursue investigations of fellow officers' misconduct).

<sup>52</sup> *Id.* at 805-06 (citing COLLINS, *supra* note 42, at 2). Thus, it seems Human Rights Watch accurately concluded that "victims of police abuse correctly perceive that criminal prosecution . . . is rarely an option—except in highly publicized cases."

<sup>53</sup> Jacobi, *supra* note 33, at 804.

<sup>54</sup> Section 241 makes it unlawful for "two or more persons to conspire to injure, oppress, threaten, or intimidate any person in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having so exercised the same." 18 U.S.C. § 241 (2000). Section 242 provides that it is unlawful for a person acting "under color of any law, statute, ordinance, regulation, or custom, [to] willfully subject any inhabitant of any State, Territory, Commonwealth, possession or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States." 18 U.S.C. § 242 (2000).

<sup>55</sup> Department of Justice officials have often articulated the presumption against federal intervention, describing § 242 as only a "back-stop" for federal prosecutions. *Police Brutality: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 131, at 3 (1991) (recording testimony of John R. Dunne, then-Assistant Att'y Gen., Civ. Rights Div., U.S. Dep't of Justice). Then-Acting Assistant Attorney General for Civil Rights Bill Lann Lee has stated,

The arm of government that principally polices the police is the local district attorneys and the state attorneys general. It is important, however, for the federal government to have that back-up jurisdiction, because sometimes in our nation's history, the local authorities have not prosecuted the police when they have engaged in misconduct. That hasn't happened as a systemic matter in many years. But it is still important that the federal government have that jurisdiction.

most accounts, §§ 241 and 242 traditionally have been underutilized.<sup>56</sup> According to DOJ, in fiscal year 2001, of the 6000 complaints received, the Federal Bureau of Investigation investigated approximately 1000 complaints. Only about 100 of those complaints resulted in federal prosecution.<sup>57</sup>

The infrequency of criminal prosecutions under federal law may be attributed to a lack of resources as well as to the many challenges associated with these proceedings. Criminal trials are plagued with many of the same problems experienced in civil cases, including the police “code of silence,” where officers refuse to testify against fellow officers or, worse, hinder investigation and prosecution by tampering with evidence and witnesses to cover up the officer’s actions.<sup>58</sup> As with civil trials involving police officers as defendants, jurors in state and federal criminal cases involving police officers often make credibility determinations in favor of the police officer instead of an unsympathetic victim.<sup>59</sup>

Finally, in the rare circumstance that the federal government prosecutes a police officer, the current statutory scheme itself serves as an impediment to effectively addressing police misconduct. Prosecutions

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*Interview with Bill Lann Lee, Acting Assistant Attorney General for Civil Rights, U.S. Dept. of Justice, 4 GEO. PUB. POL’Y REV. 119, 121 (1999).*

<sup>56</sup> See Jacobi, *supra* note 33, at 810 (discussing the limited number of police abuse cases filed by DOJ when compared with the number of civil rights complaints received); see also Roger L. Goldman, *State Revocation of Law Enforcement Officers’ Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121, 126 (2003) (noting that officers who plead guilty or were convicted under federal law represented only a fraction of the total number of complaints received). Federal government “plays virtually no active role in holding local police accountable for abiding by the Constitution.” SKOLNICK & FYFE, *supra* note 29, at 211.

<sup>57</sup> Goldman, *supra* note 56, at 126 (citing U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION ACTIVITIES AND PROGRAMS (2002), available at <http://web.archive.org/web/20030207213913/www.usdoj.gov/crt/activity.html>). According to recent reports, DOJ has made modest improvements, noting that “[i]n fiscal year 2006, nearly 50 percent of the cases the Criminal Section filed involved excessive force or law enforcement misconduct.” Press Release, Dep’t of Justice, Two Former Memphis Police Officers Plead Guilty to Civil Rights Violations (May 3, 2007), available at [http://www.usdoj.gov/opa/pr/2007/May/07\\_crt\\_326.html](http://www.usdoj.gov/opa/pr/2007/May/07_crt_326.html). DOJ also reports that the Civil Rights Division “has filed 25 percent more such cases and convicted nearly 50 percent more defendants in these cases than in the preceding six years.” *Id.*

<sup>58</sup> See Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 64 (2000). Gilles defines the code of silence as referring to the “refusal of a police officer to ‘rat’ on fellow officers, even if the officer has knowledge of wrongdoing or misconduct.” *Id.* at 64. Gilles writes that the “‘code of silence’ is a well-documented phenomenon” dating back to New York’s Boss Tweed gang of the 1840s. *Id.* at 64; see also Armacost, *supra* note 27, at 468 (noting that “police officers sometimes lie about police-citizen encounters”).

<sup>59</sup> Armacost, *supra* note 27, at 467-68.

under § 242 require that police officers have the specific intent to violate the plaintiff's civil rights, as opposed to the specific intent to assault the victim, which creates a difficult evidentiary requirement for the victim to meet.<sup>60</sup>

#### 4. Internal Investigations of Police Misconduct

In order to address police misconduct, many police departments have internal affairs divisions that oversee investigations of misconduct by individual officers within the department.<sup>61</sup> Perhaps the strongest criticism of internal police investigations is that the officers investigating these reports have an inherent inability to conduct impartial investigations.<sup>62</sup> In addition, internal investigations may be less likely to result in favorable results for claimants. For example, the Bureau of Justice Statistics reported that use-of-force complaints received by agencies with an internal affairs unit were "more than twice as likely to be found not sustained than in agencies not having an internal affairs unit."<sup>63</sup> Citing "lax and incomplete investigations," low rates of substantiation of complaints, and the failure to inform the public of the reasons for the results of complaints, critics of internal review of police misconduct have advocated for a more transparent process to investigate police misconduct.<sup>64</sup>

#### 5. Citizen Oversight

Citizen oversight of police departments transfers the investigatory process of police misconduct allegations to an entity independent of the police department.<sup>65</sup> Citizen review boards, also commonly known as

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<sup>60</sup> See Jacobi, *supra* note 33, at 806 (discussing the evidentiary burdens of § 242's specific intent requirement).

<sup>61</sup> See Levenson, *supra* note 33, at 23.

<sup>62</sup> As Paul Chevigny writes in his discussion of the Internal Affairs Division of New York City's Police Department, "Superior officers did not want to root out corruption, both because it might threaten their jobs and because they wanted to maintain a good image for the department." PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 79-80 (1995); see also Gilles, *supra* note 58, at 84-85 (discussing the lack of cooperation experienced by police officers investigating their fellow officers).

<sup>63</sup> HICKMAN, *supra* note 30, at 5.

<sup>64</sup> CHEVIGNY, *supra* note 62, at 90; see also *id.* at 79-81 (discussing the failures of the New York City Police Department Internal Affairs Division). Critics of internal investigations have also noted that these investigations tend to be "shrouded in secrecy," resulting in public distrust. AMNESTY INT'L, *supra* note 18, at 6-7. This deeply held distrust of internal investigation and discipline undermines the legitimacy of the investigatory process. CHEVIGNY, *supra* note 62, at 81 (noting that police brutality investigations conducted by internal bodies are "likely to fail"); Walker, *supra* note 23, at 7.

<sup>65</sup> Samuel Walker defines citizen oversight as "a procedure for providing input into the complaint process by individuals who are not sworn officers." Walker, *supra* note 23, at 5.



*civilian* review boards, were created in many communities in the United States in the 1960s with the hope that citizen review could quell the tensions between inner-city residents and the police in those communities.<sup>66</sup> Underlying the trend to develop citizen review boards is the argument that greater transparency increases the political accountability of police, thereby deterring police misconduct.<sup>67</sup> Thus, the primary goal of these review boards is to provide an independent review of police conduct and to combat the insularity of internal investigations of police misconduct.<sup>68</sup>

Despite the value associated with increased public participation in reviewing citizen complaints against police, like other efforts at reforming police misconduct, citizen oversight has fallen short. Even proponents of citizen oversight agencies argue that they are often “weak, ineffective, poorly led,”<sup>69</sup> and have had no measurable impact on police misconduct.<sup>70</sup> In addition to the general critiques of the citizen oversight movement, the retrospective nature of reviewing citizen complaints makes it particularly ill-suited to address police misconduct *before* it actually occurs.<sup>71</sup>

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Nearly all of the fifty largest cities are subject to some form of citizen oversight, but the structure and function of these review boards vary widely throughout the United States. *Id.* at 21.

<sup>66</sup> SKOLNICK & FYFE, *supra* note 29, at 220. From the beginning, citizen review boards sparked controversy. For example, when he became Mayor of Philadelphia, Frank Rizzo dismantled the city’s citizen review board. As Skolnick and Fyfe explain, in 1966 the police commissioner of New York, Vincent Broderick, “openly opposed the idea of civilian review of police misconduct.” *Id.* at 220.

<sup>67</sup> William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 833 (2006).

<sup>68</sup> According to figures from the Bureau of Justice Statistics, the presence of a civilian complaint review board (“CCRB”) seems to have an effect on percentage of citizens who lodge complaints about police officers. For example, departments with CCRBs had a higher rate of use-of-force complaints as compared to agencies without a CCRB. The overall rate of citizen force complaints was 158 per agency in jurisdictions with CCRBs as compared to 18 complaints per agency in jurisdictions without a CCRB. See HICKMAN, *supra* note 30, at 4.

<sup>69</sup> Walker, *supra* note 23, at 22.

<sup>70</sup> *Id.* at 22-23; see also Richard S. Jones, *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission*, 77 MARQ. L. REV. 505, 505 (1994) (stating that since their inception, review boards have achieved only moderate success). Walker has stated that whether citizen review may be deemed effective “depends” upon the formal structure of the agency and the powers with which it is invested. SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 187 (2001). For example, New York City’s CCRB is invested with subpoena powers which it used to obtain information relevant to the proceedings such as medical records, accident reports, and tape recordings of police communications. Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 655 (2004).

<sup>71</sup> See Livingston, *supra* note 70, at 655 (noting this retrospective investigation of complaints is inadequate to identify and prevent police misconduct).

Despite the failures of the traditional methods to curb police misconduct, many of the remedies have intrinsic values that should not be overlooked.<sup>72</sup> The traditional methods used to address police misconduct focus on determining culpability and compensating victims; this focus is both necessary and admirable. Thus, advocates of police reform should not jettison these efforts or fail to improve their effectiveness addressing police misconduct. However, the retrospective nature of the “traditional” reforms and their focus on the misdeeds of individual officers are often blamed for the failure of these remedies to result in widespread cultural changes in police organizations.

#### B. EMPHASIZING ORGANIZATIONAL REFORM OF POLICE DEPARTMENTS

In recent years, there has been renewed evaluation and debate about the nature and causes of police misconduct, and many experts agree that the roots of police misconduct rest within the organizational culture of policing.<sup>73</sup> In the aftermath of the Rodney King beating, the Christopher Commission concluded in its July 1991 report that “there is a significant number of officers in the LAPD who repetitively use excessive force against the public.”<sup>74</sup> The Commission also found that police department management condoned this behavior through “a pattern of lax supervision and inadequate investigation of complaints.”<sup>75</sup> Recent scholarship demonstrates police officers are not “independent agents” of the police

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<sup>72</sup> Alexa Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 712-16 (1996) (discussing the inherent value of criminal prosecution of police officers).

<sup>73</sup> See, e.g., CHRISTOPHER COMM’N REPORT, *supra* note 18 (discussing the LAPD’s management culture and its relation to police misconduct); COLLINS, *supra* note 42, at 1, 33, 45 (reporting that many of the problems identified in police departments across the nation had an organizational component); Armacost, *supra* note 27, at 493-94 (detailing the organizational roots of police brutality).

<sup>74</sup> CHRISTOPHER COMM’N REPORT, *supra* note 18, at iii, 31. The Commission further elaborated that

[t]he failure to control these officers is a management issue that is at the heart of the problem. The documents and data that we have analyzed have all been available to the department; indeed, most of this information came from that source. The LAPD’s failure to analyze and act upon these revealing data evidences a significant breakdown in the management and leadership of the Department. The Police Commission, lacking investigators or other resources, failed in its duty to monitor the Department in this sensitive use of force area.

*Id.* at iv.

<sup>75</sup> See Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 816 (1999) (citing H.R. REP. NO. 102-242, at 398-99 (1991) (Omnibus Crime Control Act of 1991, Title XII, Police Accountability Act) [hereinafter Police Accountability Act]).

agencies for whom they work.<sup>76</sup> Rather, individual police officers operate within a “powerful organizational culture that significantly influences and constrains their judgment and conduct.”<sup>77</sup> Thus, efforts to address police misconduct, no matter how sincere, are doomed to fail if they consistently emphasize the behavior of individual officers rather than address the “distinctive and influential organizational culture” of police institutions.<sup>78</sup> The pivotal role of organizational culture in police reform requires institutional change of law enforcement agencies to address effectively the problem of police misconduct. Yet, as demonstrated above, the common disadvantage shared by the aforementioned “traditional” remedies of police misconduct is their focus on retrospective acts of individual instances of police officer misconduct. The retrospective nature of the “traditional” reforms and their focus on the misdeeds of individual officers are often blamed for the failure of these remedies. The narrowly focused remedial approach prompted discussion about the need for a “new paradigm of police accountability” and has refocused efforts toward the broader goal of institutional reform rather than the malfeasance of individual officers.<sup>79</sup>

### III. THE NEW PARADIGM IN POLICE ACCOUNTABILITY: THE EMERGENCE OF § 14141

#### A. THE POLICE ACCOUNTABILITY ACT OF 1991

The Police Accountability Act of 1991, a precursor to § 14141, exemplifies the shift away from legal remedies to address police abuse that are premised upon rational actor theories such as criminal prosecutions and the imposition of civil liability.<sup>80</sup> Although § 14141 has no direct legislative history, as the statute’s predecessor, the Police Accountability Act’s emphasis on institutional reform is relevant in understanding the policy concerns underlying the enactment of § 14141. In 1991, prompted by the national call for police reform precipitated by the Rodney King beating, a subcommittee of the House Judiciary Committee held hearings on the excessive use of force by police in the United States to determine the federal response. The hearings shed new light on the institutional failures

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<sup>76</sup> Armacost, *supra* note 27, at 476.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 455; *see also* SKOLNICK & FYFE, *supra* note 29, at 187 (stating that “if police reform is to be more than window dressing, it must be supported by the powerful institutions among which police organizations exist”).

<sup>79</sup> *See* Walker, *supra* note 23, at 6.

<sup>80</sup> *See* United States v. City of Columbus, No. 99CV1097, 2000 WL 1133166, at \*3 (S.D. Ohio Aug. 3, 2000) (citing H.R. REP. NO. 102-1085 (1992), 1992 WL 396419, at \*65 (Leg. Hist.)).

within law enforcement agencies that cultivated police misconduct. In its report, the committee noted that while police misconduct was endemic to police departments nationwide, the U.S. government lacked the authority to address systemic patterns or practices of police misconduct and could only prosecute individual police officers.<sup>81</sup> The report recognized that “if an officer was poorly trained, or was acting pursuant to an official policy, it is difficult to obtain a conviction, and the Department of Justice has no authority to sue the police department itself to correct the underlying policy.”<sup>82</sup> Indeed, in *United States v. City of Philadelphia*,<sup>83</sup> the court held that the federal government does not have implied statutory or constitutional authority to sue a local government or its officials to enjoin violations of citizens’ constitutional rights by police officers. Citing the Supreme Court’s decision in *Los Angeles v. Lyons*,<sup>84</sup> the House Judiciary Committee also noted that “while a private citizen injured by police misconduct can sue for money damages, he or she cannot sue for injunctive relief, absent a showing of likely future harm.”<sup>85</sup> Thus, the established case law represented a “serious and outdated gap in the federal scheme for protecting constitutional rights.”<sup>86</sup> The committee sought to remove barriers to injunctive relief in the Police Accountability Act, which authorized the Attorney General of the United States to obtain civil injunctive relief against governmental authorities for patterns or practices of unconstitutional police practices.<sup>87</sup> The Police Accountability Act was incorporated into the Omnibus Crime Control Act of 1991, but ultimately failed to win Congressional approval.<sup>88</sup> The defeated 1991 bill, however,

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<sup>81</sup> See H.R. REP. NO. 102-242 (1991), 1991 WL 206794, at \*138. The hearings specifically indicated widespread patterns of police misconduct in New York and Boston. See *id.* at \*137.

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

<sup>83</sup> 644 F.2d 187 (3d Cir. 1980).

<sup>84</sup> 461 U.S. 95 (1983).

<sup>85</sup> See H.R. REP. NO. 102-242 (1991), 1991 WL 206794, at \*138. In *Lyons*, a Los Angeles resident sued the City after police officers administered a chokehold that rendered him unconscious following a routine traffic stop. 461 U.S. at 97-98. From 1975 to 1982, sixteen people died as a result of LAPD chokeholds, while many other cities had limited the use of a chokehold to situations where the officer’s life was in peril. *Id.* at 116 (Marshall, J., dissenting). The Supreme Court held that Lyons had no standing to seek an injunction restricting the use of chokeholds because he could not demonstrate that he himself was likely to be choked again. If choked again, the Court allowed, he could sue for damages again, but no individual could sue to bring the LAPD’s chokehold policy in conformity with practices accepted in most other cities. *Id.* at 111.

<sup>86</sup> See H.R. REP. NO. 102-242 (1991), 1991 WL 206794, at \*137.

<sup>87</sup> *City of Columbus*, 2000 WL 1133166, at \*3.

<sup>88</sup> Section 1202 of the Police Accountability Act was incorporated into H.R. 3371, the Omnibus Crime Control Act of 1991. Although the bill passed the House of Representatives, after it was forwarded to the Senate it failed to achieve cloture on the

was resurrected in the Violent Crime Control and Law Enforcement Act of 1993, which included the 1991 provision authorizing the Attorney General to pursue injunctive relief for patterns of police abuse.<sup>89</sup>

Section 14141 grants DOJ the authority to seek injunctive relief to initiate reforms of law enforcement agencies where DOJ determines a “pattern or practice” of unconstitutional violations or violations of federal law.<sup>90</sup> DOJ’s enforcement of § 14141 begins when DOJ becomes aware of concerns that a local police department might be engaging in such unlawful practices.<sup>91</sup> DOJ first conducts a preliminary investigation by reviewing witness interviews and other pleadings, such as depositions or testimony, to determine whether a pattern or practice of unconstitutional violations exists.<sup>92</sup> If the preliminary investigation reveals sufficient evidence of the allegations, DOJ then launches a formal investigation.<sup>93</sup> If DOJ finds a pattern or practice of unconstitutional violations, § 14141 gives DOJ the authority to file a lawsuit against the law enforcement agency.<sup>94</sup>

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Conference Report. After failing to achieve cloture for a second time in the Senate, the Senate never approved the bill. *See id.* at \*3 (citing H.R. REP. NO. 102-1085 (1992), 1992 WL 396419, at \*65 (Leg. Hist.)).

<sup>89</sup> *See* S. 1488, 103d Cong. (1st Sess. 1993). Since its adoption, courts considering § 14141 have upheld the legality of the statute as a constitutional exercise of Congress’ power to remedy police misconduct. *City of Columbus*, 2000 WL 1133166, at \*9.

<sup>90</sup> Section 14141 provides:

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

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

42 U.S.C. § 14141 (2000).

<sup>91</sup> *Oversight Hearing*, *supra* note 21, at 18-19 (testimony of Ralph Boyd, Jr., Assistant Att’y Gen., Civ. Rights Div.).

<sup>92</sup> *Id.* In his testimony before the Senate Judiciary Committee, then-Assistant Attorney General for Civil Rights Ralph Boyd compared the process to making “[a] 1983 assessment as to whether there is some formal policy or some unspoken practice that is leading to some level of repetitive unconstitutional uses of authority by police officers.” *Id.* at 19.

<sup>93</sup> *Id.*

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

## B. DOJ'S ENFORCEMENT OF § 14141

*1. Implementing Reforms via Consent Decrees*

To date, DOJ has filed complaints against and entered into court-enforced consent decrees with the following local law enforcement agencies: Los Angeles Police Department;<sup>95</sup> Steubenville, Ohio Police Department;<sup>96</sup> Pittsburgh, Pennsylvania Police Department;<sup>97</sup> Prince George's County, Maryland Police Department (regarding the use of canines);<sup>98</sup> Detroit, Michigan Police Department;<sup>99</sup> and the New Jersey State Police.<sup>100</sup> DOJ also filed a lawsuit against the Columbus, Ohio Police Department but subsequently dropped the suit after satisfying itself that Columbus was in compliance with the Constitution.<sup>101</sup>

*2. Implementing Reforms via Negotiated Agreements*

While the Clinton administration aggressively sought the entry of court-enforced consent decrees, the Bush administration has completely abandoned the use of consent decrees, thereby circumventing judicial

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<sup>95</sup> Consent Decree, *United States v. Los Angeles*, No. 00-11769 (June 15, 2001), available at <http://www.usdoj.gov/crt/split/documents/laconsent.htm> [hereinafter *Los Angeles Consent Decree*].

<sup>96</sup> Consent Decree, *United States v. Steubenville* (Sept. 3, 1997), available at <http://www.usdoj.gov/crt/split/documents/steubensa.htm> [hereinafter *Steubenville Consent Decree*].

<sup>97</sup> Consent Decree, *United States v. Pittsburgh* (Apr. 16, 1997), available at <http://www.usdoj.gov/crt/split/documents/pittssa.htm> [hereinafter *Pittsburgh Consent Decree*].

<sup>98</sup> Prince George's County has been the subject of both a consent decree involving the use of canines and a Memorandum of Agreement involving the police department's use of force. See Consent Decree between the United States Dep't of Justice and Prince George's County, Md. and the Prince George's County Police Dep't (Jan. 22, 2004), available at [http://www.usdoj.gov/crt/split/documents/pgpd/pg\\_consent\\_decree.pdf](http://www.usdoj.gov/crt/split/documents/pgpd/pg_consent_decree.pdf) [hereinafter *Prince George's County Consent Decree*]; Memorandum of Agreement between the United States Dep't of Justice and Prince George's County, Md. and the Prince George's County Police Dep't (Jan. 22, 2004), available at [http://www.usdoj.gov/crt/split/documents/pgpd/pg\\_memo\\_agree.pdf](http://www.usdoj.gov/crt/split/documents/pgpd/pg_memo_agree.pdf) [hereinafter *Prince George's County MOA*].

<sup>99</sup> Consent Decree, *United States v. Detroit*, No. 03-72258 (June 25, 2003), available at [http://www.usdoj.gov/crt/split/documents/dpd/detroitpd\\_uofwcdcd\\_613.pdf](http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_uofwcdcd_613.pdf).

<sup>100</sup> Consent Decree, *United States v. New Jersey*, No. 99-5970 (Dec. 30, 1999), available at <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> [hereinafter *New Jersey Consent Decree*].

<sup>101</sup> See Letter from Ralph Boyd, Jr., Assistant Att'y Gen., to Michael Coleman, Mayor of Columbus (Sept. 4, 2002), available at [http://www.usdoj.gov/crt/split/documents/columbus\\_cole\\_boyd\\_letters.htm](http://www.usdoj.gov/crt/split/documents/columbus_cole_boyd_letters.htm) (stating that the DOJ accepted the City's recommendations for resolving the litigation).

review of the agreements.<sup>102</sup> DOJ officials maintain the government's decisions whether to engage in litigation, seek consent decrees, or enter into MOAs are considered on a "case-by-case basis."<sup>103</sup> However, arguing that the local agencies are more likely to "buy in" to the solution if they are included in the process,<sup>104</sup> DOJ officials articulated a preference for resolving violations through a collaborative negotiation process, rather than engaging in litigation or seeking entry of court orders.<sup>105</sup> For example, the then Assistant Attorney General of the Civil Rights Division, R. Alexander Acosta, expressly stated:

Rather than adopting a purely litigation-driven enforcement model, our experience demonstrates that a cooperative model produces much better and faster results. Accordingly, rather than husband findings of potential violations for use in court, we work hard to keep target agencies informed of our findings and progress, so that they can begin to develop and implement effective solutions.<sup>106</sup>

Illustrative of this settlement strategy are DOJ's resolutions of "pattern or practice" investigations in Buffalo, New York;<sup>107</sup> Cincinnati, Ohio;<sup>108</sup> the

<sup>102</sup> Noting the absence of substantial compliance requirements and the departure from the previous consent decree model, Representative John Conyers described DOJ's current policy as a "[r]etrenchment in the area of pattern and practice enforcement under § 14141." See *Civ. Rights Div. of the U.S. Dep't of Justice: Hearing Before the H. Subcomm. on the Constitution of the Comm. on the Judiciary*, 108th Congress, at 59 (2004), available at [http://commdocs.house.gov/committees/judiciary/hju92346.000/hju92346\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju92346.000/hju92346_0.HTM).

<sup>103</sup> *Oversight Hearing*, *supra* note 21, at 52 (written response of Ralph Boyd, Jr. to questions from Sen. Kennedy). To date, there are several investigations which appear to be ongoing, including Miami, Florida; Schenectady, New York; and Portland, Maine. During the course of these investigations, DOJ has also sent technical assistance letters identifying areas of concern and making recommendations for improvements. See, e.g., DOJ Letter to Frank James regarding Investigation of Alabaster Police Dep't (Nov. 9, 2004), available at [http://www.usdoj.gov/crt/split/documents/split\\_alabaster\\_talet\\_11\\_09\\_04.pdf](http://www.usdoj.gov/crt/split/documents/split_alabaster_talet_11_09_04.pdf); DOJ Letter to Kerry Drue, Att'y Gen., regarding U.S. DOJ Investigation of the Virgin Is. Police Dep't (Oct. 5, 2005), available at [http://www.usdoj.gov/crt/split/documents/virgin\\_island\\_pd\\_talet\\_10-5-05.pdf](http://www.usdoj.gov/crt/split/documents/virgin_island_pd_talet_10-5-05.pdf).

<sup>104</sup> *Oversight Hearing*, *supra* note 21, at 52 (written response of Ralph Boyd, Jr. to questions from Sen. Kennedy).

<sup>105</sup> For example, when Sen. Kennedy, through written questions to then-Assistant Attorney Ralph Boyd, inquired about DOJ's proclivity to enter into negotiated agreements rather than judicially monitored consent decrees, Boyd responded, "[T]o the extent we can achieve compliance with the law with contractual settlement agreements that are enforceable in court . . . and do so on an expedited basis, we hope to reach such agreements at the earliest possible date." *Id.* at 52.

<sup>106</sup> *Reauthorization of the Civ. Rights Div. of the U.S. Dep't of Justice: Hearing Before the Subcom. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 67 (2005) (testimony and prepared statement of R. Alexander Acosta, Assistant Att'y Gen., Civ. Rights Div., U.S. Dep't. of Justice), available at [http://commdocs.house.gov/committees/judiciary/hju99784.000/hju99784\\_0f.htm](http://commdocs.house.gov/committees/judiciary/hju99784.000/hju99784_0f.htm).

<sup>107</sup> Memorandum of Agreement between the U.S. Dep't of Justice and the City of Buffalo, N.Y. and the Buffalo Police Dep't, the Police Benevolent Ass'n, and the Am. Fed'n

District of Columbia;<sup>109</sup> Mount Prospect, Illinois;<sup>110</sup> Prince George's County, Maryland (regarding the use of force);<sup>111</sup> and Villa Rica, Georgia.<sup>112</sup> Rather than initiating law suits for injunctive relief, DOJ has resolved each of these investigations, some of which the agencies have themselves initiated, by entering into MOAs.<sup>113</sup> In contrast to the consent decrees, which are court-enforceable if the City fails to comply with its terms, the MOA that DOJ has entered into must rely on the threat of a future consent decree or litigation in order to encourage municipalities to comply with the reforms.<sup>114</sup> The Bush administration has also increasingly engaged in the practice of providing "technical assistance" letters to some law enforcement agencies that detail specific reforms the jurisdiction should undertake.<sup>115</sup> It is unclear, however, as to whether these technical letters are the final action DOJ will take in these jurisdictions and how (or whether) DOJ will monitor the implementation of the recommended reforms.<sup>116</sup>

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of St., County, and Mun. Employees Local 264 (Sept. 19, 2002), *available at* [http://www.usdoj.gov/crt/split/documents/buffalo\\_police\\_agreement.htm](http://www.usdoj.gov/crt/split/documents/buffalo_police_agreement.htm) [hereinafter Buffalo MOA].

<sup>108</sup> Memorandum of Agreement Between the U.S. Dep't of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Dep't (Apr. 12, 2002), *available at* <http://www.usdoj.gov/crt/split/Cincmoafinal.htm> [hereinafter Cincinnati MOA].

<sup>109</sup> Memorandum of Agreement Between the U.S. Dep't of Justice and the D.C. Metro. Police Dep't (June 13, 2001), *available at* <http://www.usdoj.gov/crt/split/documents/dcmoa.htm> [hereinafter D.C. MOA].

<sup>110</sup> Memorandum of Agreement Between the U.S. Dep't of Justice and the Village of Mt. Prospect, Ill., *available at* [http://www.usdoj.gov/crt/split/documents/mtprospect\\_moa.pdf](http://www.usdoj.gov/crt/split/documents/mtprospect_moa.pdf).

<sup>111</sup> Prince George's County MOA, *supra* note 98.

<sup>112</sup> Memorandum of Agreement Between the U.S. Dep't of Justice and the City of Villa Rica, Ga. (Dec. 23, 2003), *available at* [http://www.usdoj.gov/crt/split/documents/villa\\_rica\\_moa.pdf](http://www.usdoj.gov/crt/split/documents/villa_rica_moa.pdf).

<sup>113</sup> Several jurisdictions, including the District of Columbia, Cincinnati, and Detroit, have invited DOJ to make an assessment of their police practices.

<sup>114</sup> *See, e.g.*, D.C. MOA, *supra* note 109, ¶ 185 (noting that if DOJ determines that the failure to fulfill any obligation under the agreement has not been cured, DOJ may file an action in federal District Court against the City and the Police Department for breach of contract; the MOA provides that DOJ may then seek specific performance of the agreement).

<sup>115</sup> According to a 2006 report detailing the activities of the Civil Rights Division, DOJ had sent nineteen such technical assistance letters and provided hundreds of hours of technical assistance to law enforcement agencies in the previous five years. *See* U.S. Dep't of Justice, Civil Rights Division Activities and Programs (2006), *available at* <http://www.usdoj.gov/crt/activity.html>. DOJ's Civil Rights Division's website currently reflects that DOJ has sent technical assistance letters to jurisdictions including Bakersfield, California; Miami, Florida; Schenectady, New York; Portland, Maine; Alabaster, Alabama; Beacon, New York; Warren, Ohio; and the Virgin Islands. *See* U.S. Dep't of Justice, Civil Rights Division, Special Litigation Section, <http://www.usdoj.gov/crt/split/findsettle.htm> (last visited Mar. 10, 2008).

<sup>116</sup> The letters typically indicate that the recommendations in the letter are "not exhaustive" and that while DOJ has found no "pattern or practice" of violation as of yet, the



C. COMMON REFORMS INCLUDED IN CONSENT DECREES AND  
NEGOTIATED AGREEMENTS PURSUANT TO § 14141

DOJ's propensity to procure reforms through consent decrees, and more recently through negotiated settlement agreements, has made the resulting MOA and consent decrees the most important tools in DOJ's enforcement of § 14141. Although the provisions of the consent decrees and MOA are determined in part by the problems peculiar to the respective police department and jurisdiction, they reflect common practices designed to enhance the accountability of the local police department.<sup>117</sup> A key component of the agreements is the emphasis on administrative rulemaking as a tool to guide officers' conduct in the field, establish investigatory protocols, and implement supervisory review.<sup>118</sup> The most common provisions, which are drawn from a list of "best practices" developed by DOJ in conjunction with police practices experts, include the development of an early intervention system, collection of use-of-force reporting, and development/improvement of a civilian complaint review process.<sup>119</sup>

*1. Implementing an Early Warning Tracking System*

Identifying officers who exhibit a pattern of misconduct can have a significant impact on the occurrence of unconstitutional violations within the department as a whole. Therefore, many of the MOA and consent decrees developed pursuant to § 14141 stipulate that the particular police department must devise and implement an Early Warning Tracking System or Early Intervention System to identify "problem" officers within the department.<sup>120</sup> Essentially, the early warning tracking systems, or early intervention systems, operate as a "risk management" tool for the police departments.

The need for such a risk management tool is based upon the concept that a small number of the same police officers within a department are

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government's "fact-gathering process" is not yet complete. See, e.g., Investigation Letter from Shanetta Y. Cutlar to Virginia Gennaro (Apr. 12, 2004), available at [http://www.usdoj.gov/crt/split/documents/bakersfield\\_ta\\_letter.pdf](http://www.usdoj.gov/crt/split/documents/bakersfield_ta_letter.pdf).

<sup>117</sup> See Livingston, *supra* note 75, at 818; Walker, *supra* note 23, at 7.

<sup>118</sup> See Walker, *supra* note 23, at 14 (noting that administrative rulemaking "lies at the core of the new paradigm of police accountability").

<sup>119</sup> *Id.* at 6-7. The principles set forth in DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY: EXAMPLES OF PROMISING POLICE TACTICS AND POLICIES (2001), available at <http://www.ncjrs.gov/pdffiles1/ojp/186189.pdf> [hereinafter DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY], are focused upon promoting civil rights integrity. Many of these same principles form the basis of the reforms required in the consent decrees and MOA developed by DOJ under § 14141. See Walker, *supra* note 23, at 7.

<sup>120</sup> During initial investigations, DOJ has also recommended to several jurisdictions that they implement early warning tracking systems.

typically responsible for the majority of the department's reports of police misconduct.<sup>121</sup> Most illustrative of this phenomenon is the Christopher Commission's analysis of complaints involving 1800 Los Angeles police officers between 1986 and 1990.<sup>122</sup> According to the Commission's report, 1400 officers had only one or two allegations. However, "183 officers had four or more allegations, 44 had six or more allegations, 16 had eight or more allegations, and one had 16 allegations."<sup>123</sup> The Commission found that "[t]he top 5% of officers ranked by number of reports accounted for more than 20% of all reports, and the top 10% accounted for 33%."<sup>124</sup> Even if only a small number of officers are involved, these figures implicate a need for reform at an organizational level, because they indicate that little is being done at a departmental level to identify, discipline, or retrain these officers in an effort to improve their performance. In fact, evidence supports the assertion that, despite displaying a pattern of misconduct, many of these "problem" officers in Los Angeles avoided both negative personnel evaluations and disciplinary action; in some instances, they may even have been promoted.<sup>125</sup> To identify these patterns, the consent decrees, or MOA governing the following police departments, contain references to the development of an Early Warning Tracking System: Los Angeles, California;<sup>126</sup> New Jersey State Police;<sup>127</sup> Pittsburgh, Pennsylvania;<sup>128</sup> Prince George's County, Maryland;<sup>129</sup> Steubenville, Ohio;<sup>130</sup> Cincinnati, Ohio;<sup>131</sup> and Washington, DC.<sup>132</sup>

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<sup>121</sup> CHRISTOPHER COMM'N REPORT, *supra* note 18, at 31; SKOLNICK & FYFE, *supra* note 29.

<sup>122</sup> CHRISTOPHER COMM'N REPORT, *supra* note 18, at 36.

<sup>123</sup> *Id.* Similarly, when examining the use-of-force reports involving 6000 officers from January 1987 to March 1991, more than 4000 of the officers had fewer than five reports each, but the Commission noted sixty-three officers had two or more reports each. *See id.*

<sup>124</sup> *Id.*

<sup>125</sup> For example, the Christopher Commission noted that personnel evaluations of the forty-four officers receiving six or more complaints were generally "very positive" and "failed to give an accurate picture of the disciplinary histories of these officers." *Id.* at 41. Many of the performance evaluations did not contain any reference to sustained complaints against the officer, prompting the Commission to note that "the picture conveyed in an officer's personnel evaluation file was often incomplete and commonly at odds with contemporaneous comments appearing in the officer's . . . complaint files." *Id.* For specific examples of those inconsistencies, see *id.* at 42-47.

<sup>126</sup> Los Angeles Consent Decree, *supra* note 95, ¶¶ 39-52.

<sup>127</sup> New Jersey Consent Decree, *supra* note 100, ¶¶ 40-56.

<sup>128</sup> Pittsburgh Consent Decree, *supra* note 97, ¶ 12.

<sup>129</sup> Prince George's County MOA, *supra* note 98, ¶¶ 75-84.

<sup>130</sup> Steubenville Consent Decree, *supra* note 96, ¶¶ 71-77.

<sup>131</sup> Cincinnati MOA, *supra* note 108, ¶ 57.

<sup>132</sup> D.C. MOA, *supra* note 109, ¶ 2.

### 2. Implementing Use-of-Force Reporting Systems

In addition to the Early Intervention Systems, another important component of some of the consent decrees and settlement agreements is the requirement that the local police agencies either develop and implement use-of-force reporting systems or modify their existing use-of-force policies. The consent decrees and agreements typically address “substantive use of force policies, incident reporting requirements, the investigation of force incidents, and entry of force reports into a departmental early intervention (‘EI’) or risk management system.”<sup>133</sup> For example, the jurisdiction may be required to implement a use-of-force policy that complies with “applicable law and current professional standards.” Alternatively, the MOA, or consent decree, might require specific reforms that limit practices, such as the deployment of canines, the use of particular chemical agents, or the use of certain physical restraints.<sup>134</sup>

Beyond the substantive modifications of use-of-force policies, administrative rulemaking in the various agreements extends to the investigations surrounding these uses of force. Generally, the provisions in the agreements are designed to correct problems in the investigation process and to maintain the integrity and impartiality of the investigation. For example, Prince George’s MOA contains requirements related to critical firearm discharges.<sup>135</sup> Not only does the MOA require the police department to investigate all such discharges, but it stipulates that the department create a special board to review such firearm discharges.<sup>136</sup>

### 3. Devising a Civilian Complaint Process

Another common provision of the consent decrees and negotiated MOA involves improving upon the police department’s existing citizen complaint process or developing a new system to handle citizen complaints.<sup>137</sup> Provisions related to the civilian complaint process generally

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<sup>133</sup> Walker, *supra* note 23, at 33.

<sup>134</sup> Prince George’s County MOA, *supra* note 98, ¶¶ 35-39 (detailing revisions and augmentations to the police department’s use of the chemical agent Oleoresin Capsicum, commonly known as pepper spray).

<sup>135</sup> *Id.* ¶¶ 46-48.

<sup>136</sup> *Id.* ¶ 47.

<sup>137</sup> Precedent for many of these policies may be found in DOJ’s Principle for Promoting Police Integrity which states that law enforcement agencies have an obligation to “provide a readily accessible process in which community and agency members can have confidence that complaints against agency actions and procedures will be given prompt and fair attention.” The report details the acceptance of misconduct complaints and states that law enforcement officers should be required to report misconduct by other officers. See DEP’T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY, *supra* note 119, at 7.

focus on facilitating the methods by which citizens can lodge a complaint. A common provision might require the police department to allow citizens to make complaints in writing, verbally, by mail, by telephone, by facsimile, or by e-mail and may require the police department to provide a twenty-four-hour telephone hotline to lodge complaints against officers. Beyond delineating the methods for receiving complaints, a common reform provision may stipulate the manner in which those complaints are processed and investigated. For example, pursuant to the consent decree in Los Angeles, the department is required to make audio or video recordings of all complainants, involved officers, and witnesses, and are required to investigate the scene of complaint incidents to secure evidence.<sup>138</sup>

#### 4. Selection of an Independent Monitor

All of the MOA and consent decrees to date have included provisions for the selection of an Independent Monitor, chosen together by the city, the law enforcement agency, and DOJ. The Independent Monitor is charged with reviewing and reporting on the police department's implementation of the agreement.

#### D. CRITIQUES OF DOJ'S ENFORCEMENT OF § 14141

Because of the relatively small number of jurisdictions in which DOJ has exercised its § 14141 authority, many discussions about § 14141 begin with the caveat that the statute's effectiveness is largely untested.<sup>139</sup> To date, there has yet to be a comprehensive empirical analysis to determine whether federal intervention has actually resulted in decreased use of inappropriate force or greater accountability across all of the law enforcement agencies in which it has been enforced.<sup>140</sup> Despite the lack of empirical data, DOJ's willingness to intervene in certain jurisdictions may, however, encourage other jurisdictions to make improvements in existing policies and practices.<sup>141</sup>

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<sup>138</sup> Los Angeles Consent Decree, *supra* note 95, ¶¶ 80(a) & 80(b).

<sup>139</sup> See Gilles, *supra* note 19, at 1407-08; Jacobi, *supra* note 33, at 834; Livingston, *supra* note 75, at 817.

<sup>140</sup> There has not been any study of § 14141's effectiveness across the aggregate jurisdictions subject to federal oversight under § 14141. However, through field observations, interviews with key officials, focus groups, and surveys, the Vera Institute of Justice found that in the year following the termination of the consent decree, the Pittsburgh Police Bureau was able to sustain many of the reforms it accomplished under the decree. See ROBERT C. DAVIS, CHRISTOPHER ORTIZ & NICOLE J. HENDERSON, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING: THE PITTSBURGH CONSENT DECREE 41 (2005), available at [http://www.vera.org/publications\\_5.asp?publication\\_id=277](http://www.vera.org/publications_5.asp?publication_id=277).

<sup>141</sup> See Gilles, *supra* note 19, at 1407.

*1. Lack of "Aggressive" Enforcement*

The relatively small number of targeted police departments has prompted some concern among observers that DOJ is not exercising its enforcement authority under § 14141 aggressively enough. Critics of DOJ's enforcement strategy note that DOJ has filed only a "paucity" of actions against law enforcement agencies.<sup>142</sup> Ironically, the initial lawsuits were filed in smaller cities, while many major urban areas with a history of highly publicized police corruption and misconduct have not been targets of federal reform.<sup>143</sup> New York City, for example has had a number of high-profile incidents of police misconduct but DOJ has not yet filed suit against the New York City Police Department. Indeed, after the 1997 police beating of Abner Louima, the federal government appeared to be in "negotiations" with New York City about reforming its police department. Yet ten years later, the New York City Police Department is still not subject to a consent decree or MOA.<sup>144</sup> The failure to intervene more quickly in larger, traditionally troubled jurisdictions has prompted some critics to suggest that perhaps DOJ has focused only on smaller jurisdictions that are easily amenable to federal reform efforts.<sup>145</sup>

There are also questions regarding DOJ's ability to properly identify "problem" police departments because of difficulties in obtaining reliable information about the department. For example, as part of its initial investigation to determine whether a "pattern or practice" of unconstitutional violations exists, DOJ relies heavily on records of the law enforcement agencies themselves, which are often inaccurate and

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<sup>142</sup> *Id.* at 1408.

<sup>143</sup> For example, DOJ has tended to target its investigations on smaller localities rather than on large urban centers. The Pittsburgh Police Bureau, which was one of the first agencies against which DOJ filed suit, employs roughly 1000 officers to serve approximately 336,000 citizens, and Steubenville, the subject of another DOJ suit, has a population of about 19,000 citizens. See BUREAU OF JUSTICE STATISTICS, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS (2002), available at <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Law/Law.cfm>. In contrast, Chicago, employing 13,466 officers to serve 2,927,391 people, and New York City, employing 40,435 officers to serve a population of 8,087,000, are not, at least publicly, currently under investigation pursuant to § 14141. *Id.*; see also Eric Lichtblau, *U.S. Low Profile in Big-City Police Probes Is Under Fire: Critics Say Justice Department Boldly Pursues Misconduct Cases in Smaller Towns but Goes Slow on Larger Inquiries*, L.A. TIMES, Mar. 17, 2000, at A1 (quoting Steubenville's then-City Manager, who stated, "You see all of 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>144</sup> See Kevin Flynn, *Wild Card in Police Oversight Talks*, N.Y. TIMES, July 8, 2000, at B3 (noting that New York City balked at entering into a consent decree with the federal government to implement reforms of the police department).

<sup>145</sup> Gilles, *supra* note 19, at 1408 (describing the smaller jurisdictions as the "low hanging fruit" of DOJ's enforcement strategy).

incomplete.<sup>146</sup> Furthermore, there is a concern that § 14141 does not capture many instances of police misconduct because it reaches only allegations that the police department has engaged in a “pattern or practice” of misconduct. There are innumerable egregious instances of police misconduct that do not arise to a “pattern” or “practice” of misconduct.<sup>147</sup> Victims in these jurisdictions are therefore left with the traditional remedies because equitable and declaratory relief is unavailable under § 14141 unless a pattern or practice of misconduct can be established.

## 2. Lengthy Investigation Periods

In addition to the lack of aggressive enforcement, observers have also criticized the amount of time it takes for DOJ to initiate an investigation and the subsequent lengthy investigation period prior to settlement. For example, in a congressional hearing in 2002, Senator Diane Feinstein noted that it had taken a year for DOJ to even authorize the investigation of the Schenectady, New York Police Department. Nearly five years later, this investigation does not appear to be resolved.<sup>148</sup> In addition to the investigations settled through consent decrees or MOA, as of January 2003, DOJ was reported to be investigating several other agencies, including Charleston, West Virginia; Cleveland, Ohio; Eastpointe, Michigan; Miami, Florida; New Orleans, Louisiana; New York, New York (one investigation involving use of force and another regarding the stop and frisk practices of the street crimes unit); Portland, Maine; Providence, Rhode Island; Riverside, California; Schenectady, New York; and Tulsa, Oklahoma.<sup>149</sup> While it is unclear to what extent these particular investigations have continued, many of these investigations were initiated as early as 1999 or

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<sup>146</sup> Armacost, *supra* note 27, at 531.

<sup>147</sup> The term “pattern or practice” has yet to be defined in the context of police reform, but the Supreme Court has suggested in the Title VII context that “pattern or practice” denotes something more “than the mere occurrence of isolated or accidental or sporadic [unlawful] acts.” Livingston, *supra* note 75, at 822-23 (citing Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 & n.16 (1977)). Livingston interprets this to mean that a “pattern or practice” of conduct by law enforcement officers depriving citizens of constitutional or statutory rights “likely denotes a course of conduct ‘that is standard operating procedure’ within a police department.” *Id.* at 822-23; *see also* Jacobi, *supra* note 33, at 834.

<sup>148</sup> Letter from DOJ to Michael T. Brockbank, Schenectady Corporate Counsel, re: Investigation of Schenectady Police Department (Mar. 19, 2003), *available at* [http://www.usdoj.gov/crt/split/documents/schenectady\\_ta.pdf](http://www.usdoj.gov/crt/split/documents/schenectady_ta.pdf).

<sup>149</sup> DOJ Special Litigation Section, Frequently Asked Questions, <http://www.usdoj.gov/crt/split/faq.htm> (last visited Mar. 10, 2008).

earlier, and have yet to be either dismissed or resolved through a settlement.<sup>150</sup>

### 3. *Lack of Political Will to Intervene in Local Police Practices*

In its enactment of § 14141, Congress granted sole discretion to the executive branch to initiate suits enjoining unconstitutional practices. Noting several problems associated with this lack of a private right of action, at least one observer has advocated amending the statute to allow private citizens to sue police departments for injunctive relief.<sup>151</sup> Most notably, a problem associated with the lack of a private right of action is that this leaves enforcement of the statute subject to the political whims and priorities of the political administration in power.<sup>152</sup> Because policing and the regulation of police practices are traditionally local functions, the federal government historically has resisted intervention. Thus, rigorous federal intervention efforts may be politically unpopular in local jurisdictions that are unaccustomed to federal oversight. As a presidential candidate, President George W. Bush capitalized on the fear of federal encroachment and proponents of § 14141 understandably became concerned about the fate of the legislation. While courting the Fraternal Order of Police, then-Presidential candidate Bush vehemently stated he did not believe the “Justice Department should routinely seek to conduct oversight investigations, issue reports, or undertake other activity that is designed to function as a review of police operations in states, cities and towns.”<sup>153</sup> President Bush further stated that he “[did] not believe that the federal government should instruct state and local authorities on how police department operations should be conducted, becoming a separate internal affairs division.”<sup>154</sup> These statements signaled, at the very least, the possibility that the Bush administration might be reluctant to intervene aggressively in local police practices.

In addition, because authority to seek injunctive relief rests solely with DOJ, enforcement of the statute is completely reliant on the limited

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<sup>150</sup> See Livingston, *supra* note 75, at 816. Livingston cites to a June 8, 1999 telephone interview she had with Mark Posner, an attorney in the Special Litigation Section, who confirmed that DOJ was conducting investigations of police departments in Orange County, Florida; New Orleans, Louisiana; Eastpointe, Michigan; New York, New York; and Charleston, West Virginia. *Id.* at n.4.

<sup>151</sup> See generally Gilles, *supra* note 19, at 1388-89.

<sup>152</sup> See, e.g., Jacobi, *supra* note 33, at 835 (noting that “the intensity of interest in pursuing claims against police departments will ebb and flow to a certain extent with the changing administrations”); see also Gilles, *supra* note 58, at 1410-11 (noting the negative influence of politics on federal executive enforcement of civil rights).

<sup>153</sup> See Eric Lichtblau, *Politics*, L.A. TIMES, June 1, 2000, at 5.

<sup>154</sup> See *id.* at 1.

resources available within the Department of Justice.<sup>155</sup> Thus, even an administration with a commitment to aggressively enforce the legislation would be limited to the available departmental resources. As with any federal mandate, without adequate appropriations from Congress to fund the enforcement of DOJ pattern or practice litigation, DOJ could be forced to shift its priorities to other civil rights agendas.

#### IV. THE EXCLUSION OF AFFECTED STAKEHOLDERS IN DOJ'S REFORM OF LOCAL LAW ENFORCEMENT AGENCIES

As demonstrated above, the existing critiques of § 14141 primarily focus on quantifiable factors such as the number of departments affected or the length of time that passes between investigation and the initiation of the reform process. However, my critique argues that a more viable starting point for evaluating the efficacy of the legislation should focus on efforts to assure the legitimacy and sustainability of the proposed reforms. One early criticism of DOJ's reform efforts pursuant to § 14141 is that the statute lacked "any overall philosophy that should guide the delivery of police services."<sup>156</sup> This critique remains true today. As Debra Livingston poignantly noted of the first two consent decrees in Pittsburgh and Steubenville, many of the reforms included in those consent decrees emphasized adherence to professional standards related to training, discipline, and supervision, but the decrees included no mechanism to actively include community members as part of the accountability reform. The early consent decrees only foreshadowed what was to become commonplace in DOJ's later enforcement of § 14141. To date, none of the subsequent consent decrees or MOA enumerates a role for community members who are the recipients of the police department's services. Similarly, police union representatives are habitually absent from the negotiation process through which the reforms are developed.<sup>157</sup> While

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<sup>155</sup> See Armacost, *supra* note 27, at 531 (noting that "the Justice Department lacks the resources to monitor all police departments nationwide"); Gilles, *supra* note 19, at 1409-10 (noting that in 1999 only twenty-six attorneys worked in the Special Litigation Unit and that only fifteen FBI agents were assigned to investigate local police departments patterns and practices). Furthermore, DOJ is not a static institution and does tend to reshape its mission based on the political administration in power. See Neil A. Lewis, *Justice Dept. Reshapes Its Civil Rights Mission*, N.Y. TIMES, June 14, 2007, at A1 (noting that the Bush Administration has "recast" DOJ's role in civil rights by focusing less on race cases and aggressively pursuing religion-oriented cases).

<sup>156</sup> Livingston, *supra* note 75, at 853.

<sup>157</sup> See DAVIS ET AL., *supra* note 140, at 4 (noting in the Executive Summary that "[m]ore engagement of citizens and greater participation of front-line officers might have made a good process better").



there are a few notable exceptions,<sup>158</sup> the negotiations that have culminated with an agreement delineating the required reforms traditionally involved only representatives from DOJ, city officials from the jurisdiction, and police department executives.<sup>159</sup>

The exclusion of police officers and community members, both of whom represent the primary stakeholders in DOJ's police reform efforts, is contrary to the general principle of democratic theory that those affected by government policies should be able to participate in the decision-making process.<sup>160</sup> Scholars have long argued that participation in the development of policies enhances the political legitimacy of the resulting policy and that those affected by government decisions should have the opportunity to present their views and force policy-makers to consider their perspective.<sup>161</sup>

#### A. THE EXCLUSION IGNORES THE INTERESTS OF RANK-AND-FILE POLICE OFFICERS AND THREATENS THE IMPLEMENTATION EFFORTS

Many of the common provisions discussed earlier implicate the interests of the rank-and-file police officers. For example, the information collected and stored in the Early Warning Tracking Systems can have

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<sup>158</sup> While police unions and community groups have not been active participants in the vast majority of DOJ's investigations and settlements, the processes in Cincinnati represent major departures from this model and will be discussed *infra*. Similarly, the MOA in Buffalo lists the Fraternal Order as a Party to the Agreement, but it is unclear to what extent the union representatives participated in the reforms.

<sup>159</sup> There have been only minimal attempts on the part of DOJ to include community members or police unions in the reform process pursuant to § 14141. In Cincinnati, tensions over several high-profile incidents culminated with both a traditional MOA and a separate agreement called the Collaborative Agreement, discussed *infra*, a document between police and community members. The Collaborative Agreement required the City of Cincinnati to abide by the terms of the MOA. Collaborative Agreement, *In re Cincinnati Policing*, No. C-1-99-3170, 2002 U.S. Dist. LEXIS 15928, at \*27 (S.D. Ohio Aug. 5, 2002).

Additionally, while the Buffalo MOA lists the Fraternal Order of Police ("FOP") as a party, it is difficult to discern the level of FOP's involvement in this instance. Available documents and newspaper articles provide no details of FOP's involvement. Finally, it appears as though DOJ had invited a police union in Los Angeles, the Los Angeles Police Protective League, to participate in formulating a database of personnel information. See Brief of Intervenor-Appellant, *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002) (No. 01-55182), 2001 WL 34093539, at \*2. Despite these instances, it is clear that DOJ has not adopted a formal policy to include community members and rank-and-file officers in their negotiations.

<sup>160</sup> See YOUNG, *supra* note 25, at 5-6 ("The normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making processes and have had the opportunity to influence the outcomes.").

<sup>161</sup> Philip Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 18 (1982) (noting that "groups affected by a regulation need the opportunity to actually participate in its development if they are to have faith in it").

important implications for employment, promotion, and discipline of police officers. To illustrate how the components of an early warning tracking system might impact rank-and-file officers, it is helpful to examine, for example, the early identification provision of the MOA between the United States and Prince George's County Police Department ("PGPD"). The agreement requires PGPD to expand a computerized database that will collect and record for PGPD officers all uses of force; the number of instances in which pepper spray, foam canisters, and ammunition for pepperball launchers is used by officers; all injuries to prisoners; all instances in which force is used and a subject is charged with "resisting arrest," "assault on a police officer," "disorderly conduct," or "obstruction of justice"; all critical firearm discharges; all complaints (and their dispositions); all criminal proceedings, civil or administrative claims alleging misconduct, or civil lawsuits resulting from PGPD operations or actions of personnel; all vehicle pursuits; and all disciplinary action taken against officers.<sup>162</sup> The MOA also requires PGPD to develop a protocol that requires the automated system to generate reports on a monthly basis and identify patterns among individual officers and units.<sup>163</sup> Commanders, managers, and supervisors are required to "initiate intervention" for officers, supervisors, or units based on the assessment of the information collected in the database. This intervention includes various options such as discussion, counseling, training, and documented action plans to modify activity.<sup>164</sup> All interventions are required to be in writing and entered into the automated system.<sup>165</sup> According to the MOA, the protocol will require that the commanders, managers, and supervisors are evaluated on their ability to enhance effectiveness and reduce risk.<sup>166</sup> The agreement also requires the County to maintain all personally identifiable information about officers included in the database during the officer's employment with the PGPD and for the maximum length of time permitted by the Law Enforcement Officer's Bill of Rights.<sup>167</sup>

Similarly, the use-of-force reporting requirements in many of the agreements may implicate the interests of rank-and-file police officers. For example, the Los Angeles consent decree included a detailed protocol with respect to the investigation of use-of-force incidents. Under the Los Angeles consent decree, use-of-force investigations are to be conducted by

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<sup>162</sup> Prince George's County MOA, *supra* note 98, ¶¶ 75-76.

<sup>163</sup> *Id.* ¶ 80.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* The Law Enforcement Officer's Bill of Rights is set of procedural protections for police officers codified in Md. Code Ann., Public Safety § 3-101 to 113 (2003).

a centralized bureau, thus assuring that an officer is not investigated by other officers in his unit.<sup>168</sup> Notably, the Los Angeles Consent decree also requires the department to negotiate with the police union to ensure that if multiple officers are involved in a shooting, they are to be represented by different attorneys.<sup>169</sup>

Despite the “special obligations” of police officers,<sup>170</sup> rank-and-file police officers, like other employees, have an interest in “job security, fair pay, safe working conditions, and fair and appropriate treatment by their employers.”<sup>171</sup> Although police management officials currently participate in the reform process, many of the interests of police managers and the rank-and-file officers diverge with respect to disciplinary actions against rank-and-file officers.<sup>172</sup> Police managers have an interest in maintaining high standards of professionalism and investigating allegations of misconduct while police officers have an interest in maintaining their employment record. Thus, while police managers would prefer a greater ability to question police officers about the allegations, the officers may seek to invoke due process protections when faced with an allegation of misconduct.<sup>173</sup> Many of these protections, commonly called Law Enforcement Officers’ Bill of Rights (“LEOBORs”), have been included in collective bargaining agreements and have been codified in the laws of fourteen states. In the last few decades, police unions lobbying for these special protections have argued, among other things, that “policing is perhaps the only job in which people are forced to answer questions or be fired” and the “lack of due process rights has led to a loss of officer

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<sup>168</sup> Los Angeles Consent Decree, *supra* note 95, ¶¶ 55-69.

<sup>169</sup> *Id.* ¶ 60.

<sup>170</sup> Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officer’s Bill of Rights*, 14 B.U. PUB. INT. L.J. 185, 190-91 (2005) (discussing the dual mandate that police officers must be both fair and effective).

<sup>171</sup> *Id.* at 198. Keenan and Walker note that “local and national unions are the principal advocates for the interests of police officers.” *Id.* at 198. Keenan and Walker note that fourteen states have codified due process protections for officers facing official misconduct charges. These protections are commonly called the Law Enforcement Officers’ Bills of Rights (“LEOBORs”). Similar protections, while not codified in state law, also exist in collective bargaining agreements. *See id.* at 185-86.

<sup>172</sup> *See* SAMUEL WALKER, REPORT OF THE CONFERENCE ON POLICE PATTERN OR PRACTICE LITIGATION: A 10-YEAR ASSESSMENT 4 (2005), available at <http://www.aele.org/ppl-summary.pdf> (noting that despite the absence of police unions from reform efforts throughout the years, the unions and collective bargaining agreements “not only have a profound impact on the implementation of consent decrees and MOA but on police accountability in general”).

<sup>173</sup> Keenan & Walker, *supra* note 170, at 199-200.

confidence in the disciplinary process and a loss of morale.”<sup>174</sup> Many of the reasons offered in support of these LEOBORs support the notion that rank-and-file officers have a specific interest in efforts to address misconduct allegations levied against them, and thus a general interest in the broader context of police reform. Accordingly, police reforms ignoring the divergent interests of police managers and the rank-and-file officers may be difficult to implement if the officers do not “buy in” to the reforms or if the reforms seem inconsistent with their interests as set forth in the collective bargaining agreements of LEOBORs.<sup>175</sup>

Rank-and-file police officers have expressed displeasure with their exclusion from DOJ’s reform process pursuant to § 14141. For example, the Los Angeles Police Protective League (“LAPPL”), the union representing police officers in Los Angeles, attempted to intervene in the consent decree, arguing that intervention was necessary to protect their “substantial legal interest in the provisions of its collective bargaining agreement and defend against charges of misconduct.”<sup>176</sup> Despite the interests of these stakeholders, DOJ opposed intervention with respect to both the community members and LAPPL. Justifying its opposition, DOJ argued that inclusion of these stakeholders would “only further delay and encumber” the litigation.<sup>177</sup> The attempt of stakeholders to intervene in the Los Angeles consent decree demonstrates that the citizens recognize their

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<sup>174</sup> *Id.* at 199.

<sup>175</sup> At present, the MOA developed by DOJ and the respective jurisdictions typically contain provisions indicating that “nothing in the agreement is intended to alter the existing collective bargaining agreements” and in states that have codified LEOBORs, the typical MOA also states that nothing in the MOA is intended to alter the lawful authority of the officers under the LEOBOR. *See, e.g.,* Prince George’s County MOA, *supra* note 98, ¶ 7-8. In addition to enhancing the legitimacy of the reforms, having the interests of police officers represented at the negotiations would ensure the reforms are consistent with the collective bargaining agreements and LEOBORs and could perhaps galvanize the city to amend collective bargaining agreements where the bargaining agreements prevented instituting necessary reforms.

<sup>176</sup> *See* Brief of Intervenor-Appellant, *supra* note 159, at \*18.

<sup>177</sup> *Id.* at \*28. In response to the community members’ argument that DOJ lacked the political will to adequately enforce the consent decree, DOJ also argued that the community members’ intervention was unnecessary because DOJ could adequately represent the members’ claimed interests. *Id.* at \*26-27. Similarly, DOJ argued that LAPPL had no protectable interest in the consent decree. *See* Brief of Appellee, *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002) (No. 01-55182), 2001 WL 34094554, at \*10-15. The Ninth Circuit ultimately permitted LAPPL to intervene as of right, holding that the potential conflicts with the bargaining agreements constituted a protectable interest. *See City of Los Angeles*, 288 F.3d at 400-01. The court, however, denied intervention as of right with respect to the community members and remanded the case for determination as to whether the community members should be granted permissive intervention. *See id.* at 402-03.

interests in reforming police practices and evince a desire to become involved in that process.

Of course, efforts to protect the rights of police officers should not be allowed to invalidate important reforms designed to remedy a pattern of constitutional violations. However, ignoring these interests and failing to make allowances where appropriate may actually hinder the reform effort. Police reform efforts are doomed to fail without significant cooperation of the police officers themselves, thus providing further justification for ensuring the participation of rank-and-file officers in police reform efforts.<sup>178</sup> As Debra Livingston predicted in an early discussion of § 14141, “police reform works best when the police department itself can be brought along.”<sup>179</sup> Still, others contend police reform will be reduced to mere “window-dressing” without the support of police organizations themselves.<sup>180</sup> Thus, rank-and-file officers should be allowed a place at the negotiating table and should be afforded an opportunity to have their perspective considered during the reform process. As active participants in the negotiation process, however, representatives of rank-and-file police officers could add value by asserting their interests and participating in a dialogue about creating a solution that protects the interests of the officers.<sup>181</sup> The challenge is to implement a process that achieves this participation without sacrificing the reforms necessary to remedy the pattern or practice of constitutional violations.

Even though the common provisions in some instances may conflict with the interests of rank-and-file officers, DOJ has failed to adopt a formal process to ensure the ability of these groups to participate and influence the negotiations. To the extent the reforms do not appear to be legitimate, there is a risk that constituencies will become distrustful of federal intervention. This distrust and failure to “buy in” to the reforms may undermine the government’s efforts to protect citizens’ constitutional rights. Concerns regarding the political legitimacy of these policies are particularly heightened when the federal government intervenes in local policing, which has traditionally been the exclusive domain of state or local government.<sup>182</sup>

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<sup>178</sup> See Livingston, *supra* note 75, at 848 (noting that police reform is most effective “when the police organization itself is involved in the process, and ultimately when reform involves not simply adherence to rules in the face of punitive sanctions, but a change in the organizational values and systems to which both manager and line officers adhere”).

<sup>179</sup> *Id.* at 851.

<sup>180</sup> SKOLNICK & FYFE, *supra* note 29, at 187.

<sup>181</sup> For a general discussion on the competing interests of police officers, police managers, and the public, see Keenan & Walker, *supra* note 170, at 197-203.

<sup>182</sup> See DAVIS ET AL., *supra* note 140, at 2.

The Vera Institute of Justice's study of the Pittsburgh Police Department's experience with a consent decree pursuant to § 14141 best exemplifies the importance of "political legitimacy" in DOJ's reform of local law enforcement agencies.<sup>183</sup> Many of the officers surveyed after the Pittsburgh consent decree noted that they experienced "low morale" because they felt excluded from the reform process.<sup>184</sup> Many officers mentioned that they were "afraid" to engage in certain behavior because they feared negative employment repercussions.<sup>185</sup> Although some would deem the Pittsburgh Consent Decree a "success," some portion of the police force was clearly adversely impacted by its exclusion from the process. The experience of these officers demonstrates the potential detrimental impact of stakeholder exclusion in DOJ's current reform process.

#### B. THE REFORMS PURSUANT TO § 14141 IMPLICATE THE INTERESTS OF COMMUNITY MEMBERS

The interests of community members in efforts to reform police practices are obvious. Residents living in the affected communities are the consumers and direct beneficiaries of the police department's services. In addition, community groups often represent the interests of local residents that lobby for reform of the local police agencies. Thus, community members have an interest in ensuring that the reforms stipulated by DOJ will be timely implemented in a manner that meets their expectations.<sup>186</sup> Despite the community groups' interests, like the rank-and-file police officers, DOJ has excluded local community groups from participating directly in their negotiations pursuant to § 14141.

In several instances, however, community members have attempted to insert themselves into the dialogue between DOJ and local law enforcement agencies. For example, prior to the entry of the consent decree between DOJ and the City of Los Angeles, several community groups filed a motion to intervene as of right in the consent decree process.<sup>187</sup> The proposed intervenors were distrustful of the negotiation process and complained that

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

<sup>184</sup> *Id.* at 18.

<sup>185</sup> *Id.* at 16-17.

<sup>186</sup> To be sure, there are residents in these communities who feel their interests are not aligned with residents who advocate for increased oversight of the police. My intention is not to assume a monolithic definition of community, or to exclude the interests of this subset of community members in any way. Rather, the interests of this subset of community members are likely aligned with those of the rank-and-file officers who are better situated to know what types of policies are too impractical to effectuate public safety goals.

<sup>187</sup> The community groups included individuals who had been victims of police misconduct, as well as the ACLU, the Southern Christian Leadership Conference, the Asian Pacific American Legal Center, and Radio Sin Fronteras.

DOJ engaged in “secret” negotiations with the city officials. The proposed intervenors also criticized the length of time that had passed between the City’s approval of the consent decree and entry of the order, noting that neither the City nor DOJ attempted to accelerate the process.<sup>188</sup> Despite the desire of the community members to intervene in the consent decree, DOJ opposed that intervention, stating that it would delay the proceedings.<sup>189</sup>

Critics may assert that elected representatives should be presumed to adequately represent the interests of their constituent community members. One might argue that individuals in communities where DOJ’s investigations have revealed patterns of constitutional violations are represented in the reform process as long as their elected representatives are involved and working with DOJ to remedy the problems.<sup>190</sup> The above example from Los Angeles, however, highlights the inherent tension present in a representative democracy. Even in a representative democracy like the United States, only a small number of people are entrusted with the policy-making decisions for the greater majority.<sup>191</sup> In order to fully ensure the political legitimacy of certain policies, particularly those as divisive as police reform, citizens should be afforded the opportunity to participate in aspects of the political process that extend beyond merely electing their representatives. In order to ensure that the myriad viewpoints involving the reform of police services in a community are adequately considered, community members should have the opportunity to participate *directly* in the reform process when feasible.<sup>192</sup>

### C. EXCLUSION OF POLICE AND COMMUNITY PREVENTS COMMUNITY-POLICE COLLABORATION AND IS INCONSISTENT WITH THE COMMUNITY POLICING RATIONALE

In addition to ignoring general democratic notions of inclusion, DOJ’s enforcement of § 14141 ignores the concepts underlying the model of community policing. Community policing theories have become prevalent

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<sup>188</sup> See Appellant’s Opening Brief at 7, *United States v. Los Angeles*, No. 01-55453, (9th Cir. June 13, 2001). For the full opinion, see *United States v. Los Angeles*, 288 F.3d 391 (9th Cir. 2002).

<sup>189</sup> The Ninth Circuit eventually denied the community members’ intervention as of right but remanded the decision to determine whether they should be allowed to permissively intervene. *Los Angeles*, 288 F.3d at 404.

<sup>190</sup> Indeed, officials from the mayor’s office are present at the negotiations, and the “City” is typically a signatory to the MOA. See, e.g., Buffalo MOA, *supra* note 107; D.C. MOA, *supra* note 109 (each MOA listing the respective city as signatories).

<sup>191</sup> See Kathryn Abrams, “Raising Politics Up”: *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV 449, 479 (1988).

<sup>192</sup> See *id.* at 476-82 (discussing the rationale for direct participation in political processes).

in the discourse of policing over the last few decades. Community policing policies are characterized in part by the value they place on police-community partnerships.<sup>193</sup> Police experts have long noted the value of cooperation between police officers and citizens with respect to crime prevention, problem solving, and easing police-community tensions.<sup>194</sup> In the 1990s, the United States witnessed an evolution in policing that trended away from police professionalism and moved toward encouraging police-community partnerships to address crime prevention. Community policing promotes police-community partnerships to encourage crime prevention and reciprocity between police departments and community members.<sup>195</sup>

At the core of the community policing philosophy is the belief that there should be greater reciprocity between police and community.<sup>196</sup> Generally described under the umbrella of “community policing,” this new initiative was characterized by police who were “a visible presence in communities, oriented toward crime prevention and problem-solving, and working toward a partnership with communities.”<sup>197</sup> In articulating the concept of community-oriented policing, noted police scholar Herman

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<sup>193</sup> There is a wealth of literature discussing the various forms that community policing might take, as well as a body of scholarship detailing both the benefits and detriments of community policing. See Livingston, *supra* note 75, at 562 (reviewing the literature of community policing). The scholarship reveals a fair amount of disagreement regarding whether certain “community policing” techniques unfairly restrict the liberties of low-income communities with crime problems or whether they empower inner-city residents to address the particularized needs of those communities. Compare BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 16-17, 135 (2001) (criticizing order-maintenance policing as “grounded in these categorical distinctions” between “honest people and . . . the disorderly”), with Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998), and Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197 (1998). This Article does not seek to examine these critiques, but merely asserts that there may be value in creating police-community partnerships. Thus, DOJ’s current policy of exclusion is inconsistent with the underlying rationale of these policies and signals that DOJ is missing an opportunity to cultivate positive police-community partnerships.

<sup>194</sup> See, e.g., Mark Harrison Moore, *Problem-Solving and Community Policing*, in *MODERN POLICING* 99, 123 (1992) (arguing that community policing will result in stronger and safer communities).

<sup>195</sup> See Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, CAL. L. REV. 1513, 1514-15 (2002) (discussing reciprocity).

<sup>196</sup> Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 562 (1997).

<sup>197</sup> *Id.* (quoting Herman Goldstein, *Toward Community-Oriented Policing: Potential, Basic Requirements, and Threshold Questions*, 33 CRIME & DELINQ. 6, 6 (1987)). Commentators have been careful to note that community policing initiatives vary widely in approach, thus precluding a simplistic definition of community policing. See Livingston, *supra* note 196, at 661-62.



Goldstein advocated that police should expand their focus beyond responding to incidents once they had occurred to a more proactive practice of identifying the underlying causes of problems and developing customized solutions.<sup>198</sup> Goldstein's articulation of community-oriented policing urged a multi-faceted approach to crime prevention, which provided alternatives to simply arresting and prosecuting offenders. A basic component of any community policing model is the consultation with community groups to set priorities for policing and crime prevention in that particular neighborhood or community.<sup>199</sup> Thus, the lack of police and citizen involvement has important implications in the specific context of policing because it is antithetical to the underlying rationale for community policing and precludes the opportunity for police officers and community members to work together to ease community-police tensions in their respective jurisdictions.

#### V. ACHIEVING STAKEHOLDER PARTICIPATION IN FEDERAL OVERSIGHT OF LAW ENFORCEMENT AGENCIES THROUGH A COLLABORATIVE GOVERNANCE MODEL

Section 14141 creates an unprecedented opportunity for the federal government to encourage collaborative reform of deficient police institutions. Given the implications for rank-and-file police officers and community members in the reform process and the desire of these stakeholders to participate in the reform process, DOJ should formulate regulations adopting a formal mechanism to allow for the participation of these groups in developing and implementing reforms. The paradigm of regulatory negotiation creates a workable framework to ensure stakeholder participation in DOJ's efforts to reform local law enforcement agencies.

#### A. THE DEVELOPMENT OF REGULATORY NEGOTIATION IN ADMINISTRATIVE RULEMAKING

Negotiated rulemaking was developed in response to the expense, delay, and dissatisfaction associated with traditional adversarial rulemaking

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<sup>198</sup> This view was in tension with the prevailing norm at the time which emphasized insulating police from the community because of fears that such close contact would result in widespread corruption.

<sup>199</sup> See WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 92 (1990) ("Community Policing requires that police be responsive to citizen demands when they decide what local problems are, and set their priorities."); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006) (noting that collaborative, open decision-making, such as some community-policing methods, can reflect neighborhood priorities and accommodate outsiders' concerns).

in the development of administrative rules. Philip Harter advocated for negotiated rulemaking as an alternative to the traditional rulemaking process, arguing that adversarial rulemaking in administrative law failed to “provide a mechanism for deciding the inherently political issues in a politically legitimate way.”<sup>200</sup> Harter’s justification for negotiated rulemaking rests largely on the premise that “a participatory process would have positive merit in and of itself because a resulting regulation would be based on consensus of those who would be affected by it . . . .”<sup>201</sup>

In traditional rulemaking, the federal agency seeking to promulgate the rule drafts the text of the proposed rule. After comment within the agency, the rule is printed in the Federal Register as a proposed rule and the public is invited to comment on the rule. After reviewing the comments, the agency evaluates issues identified during the comment period and may choose to revise the rule. The final rule is then published in the Federal Register and is later incorporated into the government’s Code of Federal Regulations.<sup>202</sup> Harter argues that the traditional rulemaking process “has marched steadily toward reliance on the judiciary to settle disputes and away from direct participation of affected parties.”<sup>203</sup> Noting that the inherently political questions raised in rulemaking had “resulted in a crisis of legitimacy that is the current malaise,” Harter advocates consensus-based regulatory negotiation as a framework to ensure public participation in the rulemaking process.<sup>204</sup>

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<sup>200</sup> See Harter, *supra* note 161, at 18 (advocating the use of consensus). Regulatory negotiation is a specific illustration of collaborative governance theories.

<sup>201</sup> *Id.*

<sup>202</sup> See Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 134-35 (1985) (describing the traditional rulemaking process).

<sup>203</sup> Harter, *supra* note 161, at 113.

<sup>204</sup> *Id.* at 17. The Administrative Conference of the United States based its recommendation in favor of negotiated rulemaking upon Harter’s article. Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (1983), reprinted in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, NEGOTIATED RULEMAKING SOURCEBOOK 11 (David M. Prizker & Deborah S. Dalton eds., 1995). The term “regulatory negotiation,” or “reg-neg,” as it is often called, is sometimes referred to as “negotiated rulemaking.” There is some debate regarding the meaning of these terms. Harter views the two terms as synonymous. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 33 n.1 (2000); see also Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256 n.6 (1997) (noting that federal law defines “negotiated rulemaking” as “rulemaking through the use of a negotiated rulemaking committee[.]” and such a committee is in turn defined as “an advisory committee established by an agency . . . to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule,” while regulatory negotiation is a general term referring

In contrast to traditional administrative rulemaking, Harter's version of negotiated rulemaking begins with a negotiation process that occurs prior to the agency's issuance of the proposed regulation. The agency convenes a committee comprised of representatives of interested parties, including regulated firms, trade associations, citizen groups, other interested organizations, and the staff of the agency to negotiate the text of the proposed rule.<sup>205</sup> The goal of negotiated rulemaking is to provide an avenue for the groups to draft the text of the rule through consensus. If a consensus is not reached, then the agency will proceed with its normal rulemaking activities.<sup>206</sup> There are various benefits to negotiated rulemaking when compared with traditional rulemaking, including decreased time and expense associated with developing the regulation, improved quality of regulations issued, and fewer post-issuance legal challenges to the regulations.<sup>207</sup>

B. THE POTENTIAL OF THE "NEW PARADIGM" OF POLICE  
ACCOUNTABILITY AS A VEHICLE FOR COLLABORATIVE POLICE  
REFORM

*1. DOJ's Police Reform Process Pursuant to § 14141 Is Well Suited to a  
Collaborative Negotiation Process*

Many of the benefits associated with regulatory negotiation in the administrative rulemaking context are equally relevant in the context of police reform through DOJ's pattern or practice litigation. First, one of the major justifications for negotiated rulemaking was the acknowledgement that inherently political issues were ill suited for the adversarial process and inappropriate for courts to decide.<sup>208</sup> Advocates of regulatory negotiation therefore argue that a consensus-based model is superior in resolving certain concerns. Given the polycentric concerns involved in addressing systemic police misconduct and the wide range of acceptable solutions,

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to multiple forums in which agency officials discuss rules with the public and may not necessarily be "negotiated rulemakings").

<sup>205</sup> Harter, *supra* note 161, at 70.

<sup>206</sup> This process is summarized in the Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-570 (1994 & Supp. V. 2000), which codifies the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

<sup>207</sup> Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 196 (2005).

<sup>208</sup> See Susskind & McMahon, *supra* note 202, at 134 (noting that courts are "inappropriate arbitrators of technically complex regulatory disputes"); see also Philip Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U. L. REV. 471, 474 (1983) (discussing the inability of courts to adequately handle complex factual questions).

police reform is an inherently political exercise which makes it particularly ill suited to the adversarial process. For example, once DOJ has already found a pattern or practice of constitutional violations within a particular department, the question is not *whether* to remedy the violations; the legislation mandates injunctive relief. The more important question becomes *how* to effectuate reforms that are consistent with these goals. There may be numerous acceptable alternatives making it difficult for a neutral third party to decide one way or another.<sup>209</sup> Determining whether or not a jurisdiction should be mandated to have a complaint process might be an issue easily resolved through adversarial litigation. Fashioning a satisfactory process detailing how that complaint process should be implemented, however, involves multiple concerns and is best achieved through negotiation.<sup>210</sup> These are precisely the issues DOJ is grappling with when seeking to reform the policies and practices of local law enforcement agencies.

## *2. Cincinnati's Police Reform Efforts Exemplify Potential for Collaborative Reform of Police Practices*

Cincinnati, Ohio's efforts to implement systemic police reforms illustrate the potential for collaborative reform of police practices in the context of DOJ's enforcement of § 14141. Following the 2001 fatal shooting of an unarmed African-American man in Cincinnati, the city erupted in riots. This shooting represented the fifteenth fatal police shooting of an African-American within a six-year period. The 2001 shooting precipitated DOJ's investigation pursuant to § 14141, which found a pattern of constitutional violations within the Cincinnati Police Department.<sup>211</sup> On March 15, 2001, the Ohio chapter of the American Civil Liberties Union joined with the Cincinnati Black United Front to initiate a

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<sup>209</sup> See Harter, *supra* note 208, at 475 (stating that, because political choices have no "right" or "wrong," this leads to "contradiction in the legitimacy of regulations").

<sup>210</sup> Greater transparency in the complaint process may be necessary if the jurisdiction has a history of failing to adequately investigate citizen complaints. For example, should the focus be on drafting use-of-force guidelines? Should personnel records be kept on officers who consistently fail to strike this balance? To what extent should citizens be involved in the complaint process? To what extent should officers be disciplined for infractions and what entity should mete out their punishment? These complex questions often have no "right" or "wrong" answer and reaching a satisfactory result might take many different forms. See Harter, *supra* note 161, at 17 (noting that political decisions necessarily have no purely "right" answer).

<sup>211</sup> In April 2001, Cincinnati Mayor Charlie Luken requested that DOJ conduct a review of the Cincinnati Police Department's ("CPD") policies and procedures, specifically those that related to the use of force. See CINCINNATI POLICE DEP'T, FIFTH STATUS REPORT TO THE INDEPENDENT MONITOR 2 (Aug. 12, 2003).

suit, unrelated to DOJ's investigation, against the city on behalf of a plaintiff alleging racial profiling. The federal judge handling the racial profiling suit, Judge Susan J. Dlott, believed that the complex issues involved made an adversarial proceeding improper to dispose of the issues. Instead, the Court urged the parties to reach a settlement that culminated in a Collaborative Agreement involving citizens, the municipality, and police officers.<sup>212</sup>

The parties to the suit agreed to take part in a negotiation and they also invited the local chapter of the Fraternal Order of Police, the local police union, to take part in the negotiations.<sup>213</sup> Judge Dlott appointed a local conflict resolution specialist to direct the collaborative and appointed him as special master. An advisory group consisting of attorneys and key stakeholders was formed to work collectively to negotiate a collaborative settlement that was ultimately signed in April 2002. The collaborative settlement stipulated, among other things, that the City must adhere to the provisions set forth in its MOA with DOJ pursuant to § 14141.<sup>214</sup> Judge Dlott described the purpose of the collaborative as

an opportunity to receive the viewpoints of all persons in the Cincinnati community regarding their goals for community-police relations. . . . The collaborative will include an opportunity for dialogue about these responses in structured group sessions. . . . [T]he collaborative will also include a process for expert analysis of the current practices of the Cincinnati Police Division and [best] practices in other communities.<sup>215</sup>

The advisory group sought participation from many constituencies across the city and organized the constituents into eight stakeholder groups including: (1) African-Americans; (2) city employees; (3) police and their families; (4) white citizens; (5) business/foundation/education leaders; (6) religious and social service leaders; (7) youth; and (8) other minorities. Through the media, these groups were invited to complete questionnaires and participate in feedback groups.<sup>216</sup> The advisory groups also sought the assistance of a policing expert to research the best practices and model programs to provide recommendations to the interested parties.<sup>217</sup> In

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<sup>212</sup> Jay Rothman & Randi Land, *The Cincinnati Police-Community Relations Collaborative*, 18 CRIM. JUST. 35, 36-37 (2004).

<sup>213</sup> *Id.* at 36.

<sup>214</sup> *Id.*

<sup>215</sup> *See id.* at 37 (citing *In re Cincinnati*, Collaborative Agreement, Case No. C-1-99-317, § V n.10).

<sup>216</sup> *Id.* at 37. The questionnaires focused on determining what goals each of these groups had for police-community relations in Cincinnati, why those goals were important, and how they thought those goals could be achieved. Over 3500 people answered the questionnaires. *Id.*

<sup>217</sup> *See id.*

addition to the questionnaires, over 700 citizens participated in group meetings with members of their stakeholder groups.<sup>218</sup> Ultimately, in April 2002, the Cincinnati Collaborative Agreement was signed and included, among other things, substantive changes in recommendations on ways to engage community members through problem-oriented policing, use-of-force reporting, promotion and hiring, and citizen review processes.<sup>219</sup>

Although it has faced challenges, the Cincinnati Collaborative Agreement offers a unique model to ensure participation of stakeholders in police reform and demonstrates that police and community members can work together to reform police practices.<sup>220</sup> Future evaluation of Cincinnati's collaborative experiment will assist policymakers in determining ways to improve the process and to replicate it in other jurisdictions. Given DOJ's willingness to negotiate police reforms and the desires of the excluded stakeholders to participate in the reforms, § 14141 could provide an excellent vehicle for collaborative reform aimed at improving institutional police practices. The next section explores how the federal government could use regulatory negotiation as a model to achieve similar collaborative reforms between police and community members.

#### C. APPLYING THE REGULATORY NEGOTIATION FRAMEWORK TO DOJ'S ENFORCEMENT PURSUANT TO § 14141

Consistent with the goals of ensuring political legitimacy and police-community collaboration, the framework of regulatory negotiation serves as an excellent model to ensure stakeholder participation in the context of DOJ's pattern or practice efforts to reform local police departments.<sup>221</sup> Although the policies associated with DOJ's current reform process are akin to administrative rulemaking, at present DOJ falls woefully short of providing an adequate opportunity for participation that is generally

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<sup>218</sup> *Id.* at 38.

<sup>219</sup> *See generally id.*

<sup>220</sup> The Rand Corporation is currently assessing CPD's response to and implementation of the Cincinnati Collaborative Agreement. Reports from the Rand Corporation illustrate that the Collaborative Agreement has not been without its challenges. For example, although a 2005 report found that there was general community support for CPD, African-Americans were more dissatisfied with CPD and more likely to believe that they were the target of racial profiling. *See* JACK RILEY ET AL., POLICE-COMMUNITY RELATIONS IN CINCINNATI, at xxv (2005). Similarly, those residents living in neighborhoods with perceived high rates of crime were less likely to view CPD as favorable. *See id.* at xxv.

<sup>221</sup> *See* Walker, *supra* note 23, at 17 (comparing DOJ's current process to that of administrative rulemaking, and noting that "[a]dministrative rulemaking is a central part of the consent decrees and memoranda of understanding secured by the Justice Department" in its pattern or practice litigation).

afforded to stakeholders in this type of administrative rulemaking.<sup>222</sup> This section explores how a “consensus-based negotiation” would proceed in the context of DOJ’s § 14141 pattern or practice litigation.

*1. A Finding of a Pattern or Practice of Constitutional Violations Triggers the Negotiation Process*

First, only a finding of a “pattern or practice” of unconstitutional behavior and a decision by DOJ to exercise its authority to pursue declaratory relief pursuant to § 14141 would trigger the “regulatory negotiation” process. In administrative rulemaking, the administrative agency makes a discretionary choice to propose a regulation in a particular area after its examination of an issue.<sup>223</sup> Because DOJ’s decision to exercise its authority under § 14141 is parallel to the agency’s decision to promulgate a rule, it follows that DOJ should retain the discretion to initiate investigations and would be responsible for determining the outcome of those investigations.<sup>224</sup> For this reason, DOJ’s current investigation process pursuant to § 14141 would remain unchanged by adopting the regulatory negotiation framework.

*2. Selecting a “Convenor” and Determining the Feasibility of Negotiating the Reforms*

One of the first steps in the negotiation process involves the selection of a neutral third party, known as a “convenor,” to perform some initial, but important, tasks with respect to the negotiation.<sup>225</sup> Once DOJ decides to exercise its authority under § 14141 to seek reform of the law enforcement agency at issue, the convenor would have primary responsibility for determining the feasibility of negotiation, i.e., determining whether the issues are amenable to negotiation. This is arguably the most critical step in the process because it determines whether the negotiation will meet the goals of developing adequate reforms and the interests of the stakeholders.

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<sup>222</sup> See *id.*

<sup>223</sup> For a general discussion of the steps in the rulemaking process that take place prior to the agency’s giving notice of proposed rulemaking, see Thomas McGarity, *The Internal Structure of the EPA*, 54 LAW & CONTEMP. PROBS. 57 (1991).

<sup>224</sup> It is apparent that DOJ’s initial investigations involve a fact-finding process by which staff attorneys interview representatives from citizen groups and police officials. Indeed, many of the investigations are initiated at the behest of interested citizen groups. However, allowing stakeholder participation at the investigation and determination stage would seem inconsistent with the absence of a private right of action. It is in the final phases of fashioning reforms and the ongoing implementation of those reforms where citizens seem to be excluded.

<sup>225</sup> See Harter, *supra* note 161, at 70.

### 3. Identifying Participants in the Negotiation

The convenor would play an important role in ensuring the political legitimacy of the process, because the convenor would also have the primary responsibility of identifying the interested parties that would take part in a particular negotiation and determining the appropriate representatives of those parties.<sup>226</sup> The convenor would be charged with identifying, either through information gathered during DOJ's initial investigation or conducting its own research and interviews, the appropriate stakeholders and representatives. In addition to DOJ officials, police managers, and city officials, other logical participants would include representatives of community groups and representatives of rank-and-file police officers.

One of the most important tenets of a successful negotiation is that there should be a limited number of participants.<sup>227</sup> While the community groups and police unions represent the two obvious groups currently excluded by DOJ's process, depending upon the specifics in the jurisdiction, there is always the possibility of including additional stakeholders. In order to keep the numbers of participants manageable, some groups could form caucuses with other groups to have their interests represented.<sup>228</sup> For example, suppose a neighborhood watch group was concerned about the impact of DOJ's reforms on effective policing and therefore wanted to participate in the negotiations. The convenor would have the discretion to decide whether the rank-and-file police officers and police managers could adequately represent the interests of a neighborhood watch group. Similarly, a given jurisdiction may have several active community groups concerned about police violence and the convenor might encourage the groups to select an appropriate representative among them in order to keep the actual number of participants to a manageable level.

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<sup>226</sup> *See id.* There are important arguments that militate against having DOJ officials act as a convenor. Having a convenor other than DOJ ensures that the negotiations are not structured based on the "political will" of DOJ officials. A convenor potentially depoliticizes some of the initial choices and ensures greater neutrality in the selection of interested parties and representatives. *See id.* (describing how the use of a neutral third party allows the participants to speak with candor). In his original formulation, Harter suggested a number of possible sources for locating a convenor, including the Federal Mediation and Conciliation Service. *Id.* at 71.

<sup>227</sup> *Id.* at 46.

<sup>228</sup> *See id.* at 82 (discussing the possibility of forming caucuses in order to keep the number of participant to a manageable level).



#### 4. Formation of an Advisory Committee and Facilitated Negotiations

After determining the appropriate stakeholders and their representatives, the convenor would be responsible for contacting the interested parties and inviting them to participate in the negotiation.<sup>229</sup> The convenor would then formally invite the representatives of the various stakeholders to form an advisory committee that would negotiate a settlement.<sup>230</sup> Stakeholders who have been invited to participate, but failed to do so, would be precluded from challenging the final agreement. Much like the settlement proceedings DOJ currently undertakes with city officials and police executives, the full committee would review the information gleaned from the fact-gathering process and begin developing a package of reforms suited to the specific needs of the jurisdiction. However, in contrast to DOJ's current negotiation process, under this proposal a mediator (whose role is distinct from that of the convenor) would facilitate the negotiations.<sup>231</sup>

During the course of the negotiation, the representatives of the stakeholders would present information related to the specific problems and conduct additional research, if necessary, to determine a collaborative solution to the issues presented. Assuming the group reached a consensus with respect to the problems identified in DOJ's initial investigation, the group would assist in drafting the proposed reform provisions.<sup>232</sup> In short, if DOJ officials and representatives of affected interests meet as a group,

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<sup>229</sup> *Id.* at 70-71 (discussing the role of the convenor). In the context of police reform stakeholders other than DOJ, city officials and police executives might include representatives from citizen advisory groups, local churches, police unions, neighborhood crime prevention councils, or similar entities.

<sup>230</sup> *See id.* at 105. Participation in the negotiations might take various forms. For instance, stakeholders could choose to participate by submitting comments.

<sup>231</sup> While the roles of a convenor and mediator are distinct, it is possible that the same person could perform both functions. *See id.* at 79. The role of the mediator also must not be confused with that of an arbitrator, who actually makes determinations. *See id.* Rather, the role of a facilitator would be to facilitate discussion and propose alternatives and creative solutions without taking a position. *See id.* Harter advocates using a mediator without substantive knowledge of the subject matter because of the danger that the mediator would insert his own viewpoint, thus compromising his neutrality. *See id.* at 78.

<sup>232</sup> There are several alternative ways to determine whether the group has reached a consensus. In his description of the negotiation process, Harter notes that while unanimity is preferable, it may also be impractical. *Id.* at 96. He describes several other possibilities for determining a consensus, including "structured decisions" where the group creates a standard for determining whether it has met a consensus, substantial majority, or concurrent majorities. *Id.* Harter adds that consensus may be determined by a concurrent majority where members of the group are identified by interest and caucuses are formed. In a concurrent majority, each caucus must support the decision but each individual need not support the specific decision. *Id.* A consensus could also be defined by a substantial majority such as two-thirds or three-fourths of the group. *Id.* at 97.

they would likely “be able to identify the issues involved, rank them according to their relative priorities among the respective interests, conduct sufficient research to address those issues, and make suitable tradeoffs in working a position of consensus.”<sup>233</sup>

### *5. Review and Approval by DOJ*

DOJ, after reviewing the MOA for consistency with applicable law, would retain the ultimate authority to approve the package of reforms in the MOA developed by the group.<sup>234</sup> In the event the committee is unable to reach a consensus, DOJ could then decide to seek injunctive relief pursuant to § 14141.

## VI. ASSESSING THE IMPLICATIONS OF ADOPTING A COLLABORATIVE MODEL IN POLICE REFORM

### A. BENEFITS OF APPLYING THE REGULATORY NEGOTIATION MODEL TO POLICE REFORM

#### *1. Stakeholder Inclusion Restores Political Legitimacy of the Reform Process and May Facilitate Implementation of the Reforms*

The “overarching” benefit of the proposal to include police officers and community members in the negotiation process is the added legitimacy of the final reforms.<sup>235</sup> It is a well-established principle of democratic

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<sup>233</sup> Harter, *supra* note 208, at 476.

<sup>234</sup> Because a senior DOJ official is part of the committee, and has presumably kept other agency officials abreast of the negotiations, any consensus reached should logically be within the bounds of accepted alternative the agency is willing to consider. As Harter notes, this does not mean that the agency should prevail on every issue, but the consensus would reflect the differing viewpoints of the various parties, including DOJ officials. Harter, *supra* note 161, at 100. If any revisions were necessary, the committee could review the revisions to determine if there is still a consensus. In traditional rulemaking, the proposed rule would still be subject to notice and comment by the public. Unlike traditional administrative rulemaking, DOJ’s current practice, of course, does not involve additional opportunities for the public to comment on the reforms settled upon by DOJ and the respective police department. The agreements between DOJ and the requisite city officials do not contain provisions allowing individuals and interest groups to comment on or influence the resulting agreement. My proposal to apply negotiated rulemaking practices to DOJ’s enforcement likewise does not allow for a subsequent comment on the reforms achieved by consensus. Under my proposal, an additional comment period would be obsolete in the context of DOJ’s enforcement under § 14141 because many of the interested parties would have already been invited to the initial negotiation process.

<sup>235</sup> The political legitimacy rationale is frequently mentioned as justification underlying transparency in the administrative rulemaking context. Great efforts are made to include the interested parties in the development of the rule, including the requirement that, prior to

theory that those directly impacted by a policy should be able to participate in the development of that policy. For example, David Skalansky notes that the theme of legitimacy has become “increasingly prominent in criminal procedure jurisprudence and scholarship.”<sup>236</sup> Whether this legitimacy is perceived or actual, theories of participatory democracy stress “the value of participation in making governmental decisions more acceptable to those affected by them.”<sup>237</sup> As Professor Harter notes, if all the parties viewed the outcome as “reasonable and endorsed it without a fight,” there would be a greater likelihood that the groups charged with implementing the rules or reforms would “buy in” to those reforms.<sup>238</sup> The opportunity for stakeholders to participate in the reform process creates a feeling of “ownership” and “increases their commitment to its successful implementation.”<sup>239</sup> Thus, the parties are more likely to implement rules when they have participated in developing those rules through a consensus process.<sup>240</sup> This enhanced legitimacy could have positive implications for police reform efforts because if those responsible for implementing police services embrace the reform efforts rather than lobby against requirements they view as illegitimately imposed upon them, they are more likely to participate in the implementation process.<sup>241</sup>

Extolling the additional benefits that flow from the “enhanced legitimacy,” legal scholars have long noted the intrinsic values of citizen participation in implementing public law remedies.<sup>242</sup> First, the perceived legitimacy resulting from the ability to participate increases the participants’ willingness to cooperate with the proposed remedy.<sup>243</sup> Second, participation serves an “integrative function” of involving those responsible

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adopting a rule, the proposed rule must be published in the Federal Register. The inclusion of various viewpoints is paramount and the interested parties are given an opportunity to comment on the rule. The agency then responds to these comments before promulgating the final rule. See, e.g., Harter, *supra* note 208, at 471-76 (discussing the justification for administrative rulemaking and the requirements of the Administrative Procedure Act); see also Harter, *supra* note 161, at 23 (noting the importance of interested parties to participate in the development of regulations in order to achieve political acceptance of the regulations).

<sup>236</sup> David Skalansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1792 (2005).

<sup>237</sup> *Id.*

<sup>238</sup> Harter, *supra* note 161, at 31.

<sup>239</sup> Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1, 24 (1997) (“Parties are thought to be more likely to implement rules produced by a consensus in which they are a part.”).

<sup>240</sup> *Id.* at 23.

<sup>241</sup> As Harter notes, this “perceived lack of legitimacy may reduce voluntary compliance.” Harter, *supra* note 161, at 22.

<sup>242</sup> See, e.g., Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981 (1993) (discussing participation values implicated by the consent decree process).

<sup>243</sup> See *id.* at 997.

for implementing reform to appreciate their relationship to the problem and their role in addressing the underlying problem.<sup>244</sup> Third, participation encourages incorporation of varying perspectives, thereby resulting in superior substantive outcomes.<sup>245</sup> Finally, participation provides valuable information about the possible impediments in the reform process as well as possible solutions.<sup>246</sup> Thus, the legitimacy rationale for stakeholder participation is inextricably linked to the success of the reform effort.

### *2. Stakeholder Inclusion and the Presence of a Mediator Provides a "Check" on DOJ's Enforcement Authority*

Another benefit of the proposed model of consensus-based negotiation is its response to critics' concerns regarding the political "whims" of DOJ.<sup>247</sup> The proposed model does not, of course, address the political considerations with respect to DOJ's initial decision to exercise its § 14141 authority. However, the selection of stakeholders by a neutral third party and the presence of a neutral mediator at the negotiations make it less likely that improper political considerations will impact the nature of the substantive reforms.

For example, a political administration desiring to be perceived as "tough on crime" might fail to pursue aggressive reforms for fear of alienating constituents. This fear might result in diluted, ineffective remedial measures. Conversely, an administration that wants to be perceived as a champion of civil rights might aggressively extract reforms from police departments that are unrealistic and thus equally ineffective. The presence of a mediator ameliorates concerns about power differentials between the various stakeholders, and therefore ensures that politically powerful or better funded groups do not dominate the reform process and extract reforms solely for their benefit.

### *3. Innovation and Specifically Tailored Remedies*

Allowing stakeholder participation encourages incorporation of varying perspectives and may result in superior substantive outcomes.<sup>248</sup> Applying the negotiated rulemaking framework to DOJ's police reform efforts provides the opportunity for developing creative solutions based on the dynamics of the respective jurisdiction. The rules emerging from the

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<sup>244</sup> *See id.*

<sup>245</sup> *See id.*

<sup>246</sup> *See id.*

<sup>247</sup> *See Gilles, supra* note 19, at 1418.

<sup>248</sup> *See Sturm, supra* note 242, at 997.

negotiation process tend to reflect a “shop-floor insight and expertise.”<sup>249</sup> Therefore, negotiation “can develop considerable innovation and take account of issues that would likely escape the attention of an agency in a traditional rulemaking.”<sup>250</sup>

To illustrate how this process might work in the context of police reform, imagine that DOJ’s initial investigation of a particular jurisdiction revealed a problem with excessive uses of force. As part of the remedy, DOJ proposes instituting a use-of-force policy, detailing what types of force might be acceptable in certain situations. In this context, additional stakeholders would also have an opportunity to be heard on this matter. Participating DOJ officials might suggest implementing new use-of-force tracking procedures and might propose to model these procedures on those that have been instituted elsewhere. Citizen groups in the affected jurisdiction, however, might have specific knowledge of bothersome patterns of certain types of uses of force, such as the deployment of canines in non-threatening traffic stops. Police officers, although not willing to cease deployment of canines in certain situations, might be willing to document the use of canines in all situations and assist in crafting guidelines for when canines may be deployed. Through this participatory process, citizens might learn the value of canines in law enforcement and police officers might learn the distrust and resentment created by random deployment of dogs in the investigation of minor infractions. Together, the representatives bring more relevant information to bear on the issues and are able to craft a creative solution reflecting the interests of all involved constituents.

To illustrate further the value of stakeholder participation, take a scenario set forth by Professor Livingston. In her early discussion of § 14141 regarding the rank-and-file officer’s approach to reforming the civilian complaint review process, Professor Livingston notes, “[Police officers] may not trust supervisors to recognize that the number of complaints filed against an officer may signal an important problem, but may also reflect something else—even the efforts of a neighborhood’s serious law violators to rid themselves of a persistent law enforcement agent.”<sup>251</sup> This example not only illustrates the divergent interests of the rank-and-file officers and their employers, but also demonstrates the benefits of including various stakeholders, particularly those with intimate knowledge of an issue. Here, the first-hand knowledge of the rank-and-file

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<sup>249</sup> Philip Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389, 1403 (1997).

<sup>250</sup> *Id.*

<sup>251</sup> Livingston, *supra* note 75, at 849.

officers may provide valuable insights and provide for a more effective civilian complaint review process without compromising the safety of the residents within the community.

The development of a civilian complaint review board (“CCRB”) provides yet another example of how consensus-based negotiations could create a superior reform mechanism within a given jurisdiction. A CCRB can take many different forms and may be empowered in many different ways. Although there are some basic principles about which types of boards are most effective, there may be a range of acceptable alternatives. Stakeholder participation could be valuable in a jurisdiction where community members have been dissatisfied with the composition of a CCRB. For example, community members may argue that the CCRB should not contain police officials for fear that these officers could not be impartial. The police officers may fear that those members of a CCRB comprised only of citizens would not adequately appreciate the context of certain uses of force in the way trained officers may be able to appreciate the same use of force. In such a situation, both the community members and police officers could present their views during the negotiation process. The stakeholders may be privy to information that DOJ is not and this information could be used in establishing a CCRB and developing procedures for investigating civilian complaints that are satisfactory to all parties. Even in a failed negotiation, where the group is unable to reach a consensus, DOJ, at a minimum, has learned more information regarding the interests of the stakeholders and can suggest remedies based upon the interests.<sup>252</sup>

## B. CHALLENGES TO APPLYING A COLLABORATIVE MODEL TO DOJ’S POLICE REFORM EFFORTS

### *1. Will Consensus-Based Negotiation Subvert DOJ’s Authority, Resulting in Inferior Reforms?*

Notwithstanding the myriad benefits of applying the negotiated rulemaking model to police reform, an examination of this proposal would be incomplete if it failed to consider the potential fault lines that lurk beneath the surface of this proposed model. While much of the literature regarding negotiated rulemaking is complimentary, not all critiques are

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<sup>252</sup> See William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1366 (1997) (noting that even in failed negotiations, participants may impart valuable information to the agency for use in crafting its own proposal).

supportive of the paradigm.<sup>253</sup> By far, the most resounding criticism of the negotiated rulemaking framework is that it subverts the agency's authority, thus compromising the public interest.<sup>254</sup> Some critics argue that regulatory negotiation creates incentives for the participants that lead to "inferior outcomes."<sup>255</sup> Specifically, Professor Cary Coglianese argues that the negotiated rulemaking process's emphasis on reaching a consensus presents several important limitations.<sup>256</sup> Coglianese asserts that participants in the negotiation may be reluctant to raise important issues that would hinder the ability to attain a consensus.<sup>257</sup> Coglianese further argues that in order to secure consensus agreements, participants may adopt vague language, ultimately "constrain[ing] the effectiveness of any resulting public policy."<sup>258</sup>

One can anticipate how opponents of adopting the negotiated rulemaking framework in DOJ's pattern or practice settlements could conscript similar arguments articulated against regulatory negotiation. Opponents may argue that the reforms sought pursuant to § 14141 would be diluted and ineffective through this model. For example, if stakeholders who view the reforms as hindering effective law enforcement are allowed to participate, they may be unwilling to agree to those reforms. Such stakeholders may even suggest reforms that are less effective at satisfying the remedial goals. Conversely, others might argue that stakeholders who advocate aggressive policies will extract reforms that impede the law enforcement agency's ability to adequately police the jurisdiction.

These concerns underscore the importance of having DOJ's officials actively participate in the negotiation process. To ensure that the reforms reflect § 14141's mandate to rectify unconstitutional patterns of police misconduct, it should be made clear to the negotiating committee that DOJ

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<sup>253</sup> For detailed critiques of the problems posed by regulatory negotiation, see generally Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Phil Harter*, 9 N.Y.U. ENVTL. L.J. 386, (2001); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987); Rena Steinzor & Scott Strauss, *Building a Consensus: Agencies Stressing "Reg Neg" Approach*, LEGAL TIMES, Aug. 3, 1987, at 16.

<sup>254</sup> See Funk, *supra* note 253, at 96 (describing regulatory negotiation in the context of EPA's regulation of woodstove emissions); Steinzor & Strauss, *supra* note 253 (arguing that EPA's policy of having the agency to commit in advance to the proposal of the participants allows the agency to ignore its statutory obligation in an all-out campaign to promote consensus).

<sup>255</sup> See Morriss et al., *supra* note 207, at 198 (summarizing the arguments against regulatory negotiation).

<sup>256</sup> Coglianese, *supra* note 253, at 439-40.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 440-41. Finally, Coglianese's empirical research suggests that regulatory negotiation fails to meet its primary goals in that it neither saves time nor reduces litigation.

would adopt the proposed reforms only if they are satisfactory to DOJ. Throughout the process, DOJ officials could provide guidance to the parties on disputed areas and keep the participants informed about DOJ's position on various matters. DOJ's senior staff would determine whether the package of reforms would result in meaningful changes in the police department's conformity with constitutional norms and in line with practices used in various jurisdictions around the country.<sup>259</sup> Thus, unlike "unsuccessful" negotiated rulemakings cited by some opponents of regulatory negotiation, DOJ would make the final decision regarding the reforms.<sup>260</sup> Not only would DOJ retain its sovereignty in developing remedial measures pursuant to § 14141, but adopting a negotiated rulemaking approach would also bring the additional benefit of having the collective expertise and viewpoints of those directly impacted by the decision. Still, critics may argue that because DOJ has the final authority over whether to implement the reforms, there is no incentive for the stakeholders to participate. This view ignores the possibility that as long as DOJ officials negotiate in good faith and value the participants' ideas, groups—particularly the previously excluded stakeholders—may still be able to exert some influence over the decisions where they could have no such influence under DOJ's current settlement process.

Furthermore, determining at the outset whether or not a specific situation lends itself to negotiation will ameliorate many of the criticisms leveled against negotiated rulemaking in the context of police reform.<sup>261</sup> Proponents of regulatory negotiation have long recognized that not all issues are amenable to negotiation.<sup>262</sup> DOJ's efforts to negotiate police reforms pursuant to § 14141, however, fit the criteria for "successful negotiations" identified by Professor Harter.<sup>263</sup> First, the interests affected

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<sup>259</sup> To this end, DOJ's *Principles for Promoting Police Integrity* provides examples of certain policies and practices from police departments around the country that DOJ finds acceptable. See DEP'T OF JUSTICE, *PRINCIPLES FOR PROMOTING POLICE INTEGRITY*, *supra* note 119.

<sup>260</sup> Harter, *supra* note 161, at 65. Harter notes that while the final decision regarding a newly developed regulation may not be the exact rule the agency would have developed absent the negotiation process, any new rule would fall within the "range of reasonableness," and the agency retains its sovereignty because ultimately, it is the agency that makes the final decision). *Id.*

<sup>261</sup> See *supra* note 232 and accompanying text (discussing the role of the convenor to determine the feasibility of the negotiation).

<sup>262</sup> Harter, *supra* note 161, at 42-51 (discussing several preconditions for determining whether negotiation of a particular rule or regulation is likely to be successful); see also Harter, *supra* note 208, at 479-80 (discussing preconditions for successful negotiations).

<sup>263</sup> Harter identifies the following preconditions for successful negotiations: (1) the interests affected by the proposed policy are easily identified; (2) only a limited number of interests should be able to participate; (3) no single interest should dominate the negotiations



by the reform process are easily identified and are not so broad that they cannot be represented by a combination of community groups, police unions, municipal officials, and DOJ officials.<sup>264</sup> Adding representatives from various community groups and police unions will not increase the number of participants beyond a manageable number.<sup>265</sup> Furthermore, there is little danger that the participants will consider issues not yet ripe for discussion or fail to adequately identify the issues at hand. Prior to negotiating or initiating a lawsuit, DOJ's practice has been to send a "findings letter" to the jurisdiction detailing the specific violations. Based upon these findings, the parties will know what issues they must address to comply with DOJ's mandate and will be limited to negotiating only these "ripe" issues. The excessive delays envisioned by critics are similarly forestalled by mandating a strict deadline for reaching a consensus. If no consensus is reached within the deadline, DOJ could result to its default position and simply file suit.

Similarly, the issues involved in police reform, unlike the issues in "unsuccessful" negotiations, do not require the parties to "compromise a fundamental value."<sup>266</sup> In the context of police reform, the parties are working toward the common goal of assuring that the police services so critical to our society are administered in a manner that preserves basic civil rights. While no one would disagree that police officers should do their best to protect the public from those who violate criminal laws, everyone

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and countervailing power should be present to prevent one interest from extracting unacceptable concessions from another interest; (4) the issues should be ripe for discussion; (5) the issues involved should not require the parties to compromise a fundamental value (i.e., questions such as which religion is best are not suitable for negotiation); (6) there should be a number of diverse issues that the participants are able to prioritize; (7) a deadline should be imposed for finalizing the proposed rule or reform; and (8) the agency must be willing to use the negotiation process to develop the reforms. Harter, *supra* note 208, at 479-80.

<sup>264</sup> For example, signatories to the Cincinnati Collaborative Agreement included the Cincinnati Black United Front, the American Civil Liberties Union of Ohio Foundation, the City of Cincinnati, and the Fraternal Order of Police. Collaborative Agreement, *In re Cincinnati Policing*, No. C-1-99-3170, 2002 U.S. Dist. LEXIS 15928 (S.D. Ohio Aug. 5, 2002). This effort is representative of the ways in which interested community groups, along with police executives and union officials, might come together to adequately represent the various interests at stake.

<sup>265</sup> Harter recommends limiting the number of participants to fifteen. Harter, *supra* note 208, at 479.

<sup>266</sup> See Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1209 (1994). Rose-Ackerman's example of a consensual negotiation between the Catholic Church and a pro-choice organization aptly illustrates the point that issues of fundamental values are not appropriate for consensus. *Id.*

would also agree that police power is not without limits.<sup>267</sup> Finally, the agency must be willing to negotiate the policies at issue. As demonstrated by its current enforcement strategy of § 14141, DOJ has exhibited a willingness to use the negotiation process to develop the reforms.<sup>268</sup>

## 2. Will DOJ and Police Unions Embrace Stakeholder Inclusion?

While DOJ has evinced a willingness to negotiate the reform, it has been far less willing to include all the various stakeholders in the negotiation process. In order to be successful, the proposal to use a form of negotiated rulemaking would necessitate the full support of *all* of the affected interests, including those of community members and rank-and-file officers. DOJ's opposition to the intervention of community members and rank-and-file police officers in the Los Angeles Consent Decree suggests that there may be some hesitancy on the part of the current administration to allow local interests to participate in the reform process. The negotiations will necessarily involve a certain degree of logistical complexity, but any inconvenience will be outweighed by the increased political legitimacy, cooperation and innovative solutions resulting from the inclusion.

Similarly, police unions may be hesitant to join conversations with DOJ to reform local police practices. Historically, rank-and-file police officers have resisted various oversight efforts and, at times, police officers have reacted violently to reform efforts.<sup>269</sup> However, given the impact that the reforms may have on their interests, rank-and-file officers may be persuaded of the benefits of consensual rulemaking in the context of police reform.

An in-depth analysis of Cincinnati's experience with a collaborative approach to police reform is necessary to determine whether the potential benefits of stakeholder inclusion are realized through the collaborative

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<sup>267</sup> Thus, despite some disappointment over DOJ's decisions to negotiate settlements rather than force court-ordered injunctive relief, there are obvious merits to DOJ's unwritten policy to negotiate these reforms. From the perspective of police officers, they are charged with protecting citizens from individuals who, based upon the officer's professional experience, pose a danger to other citizens. In addition, police officers must perform this task while simultaneously taking their own physical safety into account. Citizens, from their perspective, want protection from police officers, but not at the expense of sacrificing their own personal liberties. When police officers misbehave, as public officials, they should be held accountable.

<sup>268</sup> See Harter, *supra* note 208, at 479-80.

<sup>269</sup> See SKOLNICK & FYFE, *supra* note 29, at 223. For example, in 1992, as a result of Mayor David Dinkins's proposal to staff a police review board with civilians, New York police officers blocked the Brooklyn Bridge. The officers protested violently and shouted racial epithets at the mayor and passersby. *Id.* at 223; see also CHEVIGNY, *supra* note 62, at 64-65.

process. Lessons learned from Cincinnati will be valuable to future policy makers and DOJ officials who seek to include stakeholders in police reform and in determining whether collaborative governance models can succeed in this context where many other remedies have failed.

## VII. CONCLUSION

The application of regulatory negotiation to DOJ's efforts to systemically reform local law enforcement agencies envisioned by this Article seeks to provide a practical solution to ensure stakeholder inclusion in federal reform of local police agencies. Police misconduct continues to be a troubling phenomenon in American society, and it is clear that remedial measures must engage law enforcement agencies to effectively address institutional policies that cultivate or tolerate police misconduct. Where traditional remedies have failed to engender widespread systemic reform, § 14141, with its emphasis on implementing systemic reforms, has the potential to transform local police departments throughout the nation. The success of § 14141, however, is inextricably linked to the legitimacy of the reforms, as perceived by the community members and police officers directly impacted by the reforms. Thus, DOJ's continued exclusion of these key stakeholders undermines the implementation of the reforms. Similarly, any institutional changes that occur while jurisdictions are subject to federal oversight may not outlive the terms of the agreements if community members and rank-and-file officers are precluded from taking ownership of these reforms. The federal government, police unions, and community members must learn to collaborate in order to develop lasting institutional reforms of the nation's law enforcement agencies.