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## Limited Leverage: Federal Remedies and Policing Reform

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## LIMITED LEVERAGE: FEDERAL REMEDIES AND POLICING REFORM

RACHEL HARMON\*

### INTRODUCTION

Remedies for police misconduct have multiple purposes, including punishing perpetrators, making victims whole, and forcing departments to comply with constitutional rules. For those interested in reducing police misconduct, the primary measure of federal legal remedies for police misconduct is whether they deter future bad acts. Other speakers at *Saint Louis University Public Law Review's* Fall 2012 Symposium described good news about federal remedies and future police misconduct despite Supreme Court restrictions on the application of the exclusionary rule. For example, 42 U.S.C. § 1983 suits against municipalities for officer misconduct are imposing significant costs on cities that permit officers to violate suspects' rights; federal criminal prosecutions against police officers have reached record highs this year; and the Obama Administration has reinvigorated the use of 42 U.S.C. § 14141 to secure institutional reform in departments with a pattern and practice of violating constitutional rights. These uses of federal remedies likely will deter some officers from committing misconduct and encourage some departments to prevent it. Unfortunately, this good news is overshadowed by the persistent realities of federal remedies for misconduct.

Here is the bad news: with respect to deterring police misconduct, federal remedies are almost as good as they are ever going to get. The remedies probably reduce police misconduct some now, and they can be tailored to induce somewhat more reform. However, legal, structural, and practical limits on the capacity of existing federal remedies to deter misconduct ensure that even with improvements they can be only marginally more effective.

Federal remedies for police misconduct, and most other remedies for misconduct, promote change by making misconduct costly for police departments and municipalities. Improving federal remedies would encourage some additional departments to seek the positive expected return on reform measures likely to reduce misconduct. But existing federal remedies all focus

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on either increasing the cost of misconduct or reducing its benefits. The problem is that even if existing federal remedies are altered to maximize deterrence, they cannot be employed to impose a substantially greater price for misconduct because, by their nature, the costs imposed by existing remedies are relatively fixed. As a result, federal remedies for misconduct will never prevent bad policing much more than they do now.

While existing federal remedies are constrained in their capacity to deter much more than they do, there are alternative means of inspiring reform. Strengthened state and local remedies, and new federal remedies, could supplement existing federal remedies and incentivize additional reform—at least to some degree. However, because these remedies suffer from some of the same structural limits as existing federal remedies, and because expanding them is politically unlikely, it may be time for those interested in deterring misconduct further to consider a different approach. Instead, federal actors may foster reform by lowering the costs of adopting policies that prevent misconduct and by shoring up rewards for police chiefs and departments that pursue reform. Some Justice Department programs already likely modify the expected costs of reform, but the Department of Justice's undertakings appear both piecemeal and limited. Although discouraging police misconduct by reducing the costs of reform and increasing its benefits poses some risks, the limits of existing federal remedies suggest these risks may be well worth taking.

#### I. THE CALCULUS OF POLICE REFORM

While individual police officers commit misconduct, preventing police misconduct often requires institutional change, and institutional change requires investment and commitment from departmental leadership. Federal remedies both increase the expected costs of engaging in misconduct for police officers, and perhaps more importantly, increase the expected costs of permitting misconduct for police departments. As a result, federal remedies have long been viewed as important to deter misconduct by individual officers and to incentivize departmental reforms necessary to reduce unconstitutional conduct.<sup>1</sup>

Police officers violate constitutional rights because they receive a benefit or avoid a cost by doing so. An officer might use too much force to preempt a suspect's injurious resistance, to satisfy a taste for revenge, because he has a mistaken understanding of the law governing force, or because it is quicker to

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1. See, e.g., Wayne R. LaFare & Frank J. Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 987 (1964) (describing significance of exclusionary rule in deterring police misconduct); Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 793 (1955) (discussing advantages of federal civil remedies over state remedies to deter police misconduct).

gain compliance by force than to persuade a suspect to cooperate.<sup>2</sup> A rational officer will learn and comply with the law governing force when the expected costs of doing so are less than the net expected cost of misconduct. Legal remedies are likely to reduce police misconduct when they raise the costs of misconduct relative to restraint.

Scholars and others interested in reducing police misconduct emphasize the significance of institutional change rather than simply focusing on individual restraint, because police departments strongly shape individual officer capacity and motivation to comply with constitutional norms.<sup>3</sup> With respect to capacity, police departments determine much of the preparation and guidance officers receive beyond the minimum amounts dictated by state law.<sup>4</sup> Some departments have their own police academies or provide supplemental training for officers after basic training, including supervision by field training officers.<sup>5</sup> Many departments provide annual in-service training beyond state mandates.<sup>6</sup> All departments provide direct supervision of officers by sergeants and other departmental leadership.<sup>7</sup> This training and supervision—along with formal departmental policies—gives officers the knowledge and skills necessary to comply with constitutional requirements. If officers know the law, learn to evaluate the situations they face, and are well-trained in the communication, physical, and practical skills necessary to address those situations, the costs of lawful policing for officers is lowered.

With respect to motivation, departments determine many of the professional and financial incentives of the police officer's work. If a

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2. See Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1163 (2008).

3. See, e.g., Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 456, 493–94 (2004); CAMBRIDGE REVIEW COMM., MISSED OPPORTUNITIES, SHARED RESPONSIBILITIES: FINAL REPORT OF THE CAMBRIDGE REVIEW COMMITTEE 7–9 (2010) (advocating departmental changes to reduce confrontations between citizens and police officers like the 2009 arrest of Henry Louis Gates, Jr. by an officer of the Cambridge, Massachusetts Police Department).

4. See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 806 (2012) (citing statistics from MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2002, at 10 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/slleta02.pdf>).

5. See BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 12 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd07.pdf>.

6. See HICKMAN, *supra* note 4, at iv.

7. Very small departments may provide less direct supervision of officers, but even in small departments there is a chief of police who monitors the work of other officers, sometimes as a matter of state law. See e.g., VA. CODE ANN. § 15.2–1701 (mandating that locally-organized police forces have a chief of police who serves as the chief law enforcement officer of the locality).

department rewards arrests with promotions, officers will be motivated to make more arrests, even those with a weak legal justification.<sup>8</sup> If a department disciplines illegal searches, officers will have good reason to engage in fewer of them. Less formally, departmental leadership may foster respect for officers engaged in aggressive policing even as official policies discourage unconstitutional actions:<sup>9</sup> if sergeants treat officers who disdain formal rules as successful, other officers learn to value those qualities and young officers learn to emulate them.<sup>10</sup>

Institutional police practices are in turn the product of departmental leadership and the local political process. Mayors, city managers, and council members hire and fire police chiefs, determine departmental budgets, and oversee police activities—and therefore influence departmental policies.<sup>11</sup> A mayor might pressure a chief to police more assertively when voters complain about crime, or threaten to impose external citizen review of police disciplinary determinations in light of community concerns about abuse. Moreover, peer groups, communities, and officer associations impose less tangible costs and benefits on police leadership and officers for both misconduct and reform.

While the factors that shape departmental policies and practices are complex, deterrence theory suggests that a police department will adopt remedial measures when doing so is a cost-effective means of lowering the net costs of police misconduct or increasing the net benefits of protecting civil rights.<sup>12</sup> Legal remedies imposed for misconduct are one significant way of making reform cost-effective for departments. Among those legal remedies are four significant federal remedial mechanisms that can raise the expected costs of misconduct for departments, and therefore incentivize reform and deter civil rights violations: the federal exclusionary rule, which prohibits the use of unconstitutionally obtained evidence in criminal trials; federal criminal prosecutions for willful constitutional civil rights violations; private federal civil suits under 42 U.S.C. § 1983 for constitutional violations; and civil suits by the U.S. Department of Justice under 42 U.S.C. § 14141 for equitable relief against police departments to remedy patterns and practices of constitutional violations.

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8. See *Armacost*, *supra* note 3, at 495, 498–99.

9. See *id.* at 498–499, 518–520.

10. See *id.* at 516, 519.

11. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 46 (2009).

12. *Id.* at 22–23.

By many accounts, these remedies increase the relative expected costs of unconstitutional police conduct, at least to some degree.<sup>13</sup> Despite doctrinal changes that limit the exclusionary rule, it continues to affect individual cases and it remains part of the internal culture of police departments, in which knowing and adhering to Fourth, Fifth, and Sixth Amendment law is part of what it means to be a police officer. The rule therefore encourages departments to foster compliance with constitutional norms.<sup>14</sup> Similarly, while criminal prosecutions of police officers are relatively rare, they are well publicized and have serious sanctions.<sup>15</sup> Therefore, they may deter some officers from engaging in or lying about violent misconduct.<sup>16</sup> Civil suits almost certainly influence some police chiefs to adopt reform measures.<sup>17</sup> Small municipalities, for example, where even relatively small civil judgments are likely to be well known and costly, are likely to take steps to avoid or reduce future judgments.<sup>18</sup> Finally, investigations by the U.S. Department of Justice for Section 14141 violations almost inevitably lead local police departments to agree to substantial and expensive reform rather than risk a lawsuit.<sup>19</sup> In each case, the federal remedy increases the cost or decreases the benefits of engaging in misconduct relative to adopting remedial measures and, therefore, encourages some departments to change.

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13. See, e.g., David H. Kaye, *Unraveling the Exclusionary Rule: From Leon to Herring to Robinson—And Back?*, 58 UCLA L. REV. DISCOURSE 207, 209 (2011) (on exclusionary rule); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1923 (2007) (on civil suits); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1420 (2007) (on injunctive relief).

14. See Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1372–74 (2008) (describing changes to police departments resulting from the exclusionary rule); SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 30 (2005) (describing the effects on policing of the Warren Court’s key rulings, including the exclusionary rule).

15. See, e.g., *infra* note 34.

16. *Contra* Harmon, *supra* note 11, at 9 (stating criminal prosecutions are too rare to deter police misconduct); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 20 (2003) (concluding successful criminal prosecutions do not appear to deter future police misconduct).

17. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991). It is hard to imagine how else a cottage industry could exist providing risk management consulting to police departments. See, e.g., CIRMAT, INC., <http://www.sashley.com/> (last visited Jan. 10, 2013) (describing risk management services); LAAW INTERNATIONAL, INC., <http://www.laaw.com/lerm.htm> (last visited Jan. 10, 2013). *Contra* NAT’L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 279 (Wesley Skogan & Kathleen Frydl eds., 2004) (“[I]t is well recognized that civil suits offer little deterrence to excessive police force.”).

18. See NAT’L RESEARCH COUNCIL, *supra* note 17, at 280.

19. See Harmon, *supra* note 11, at 16.

Although federal remedies seem to work to some degree, few observers believe these remedies have solved the problem of police misconduct.<sup>20</sup> While data on police conduct and misconduct is difficult to obtain,<sup>21</sup> most participants in *Saint Louis University Public Law Review's* Symposium, and elsewhere, take for granted the need for additional efforts by police departments to promote civil rights through departmental reform because civil rights violations continue to occur. In order to deter more misconduct and facilitate further reform, legal scholars and advocates have proposed innumerable ways to make federal remedies more effective. They advocate legal and policy changes designed to enable federal remedies to be used more efficiently, more often, or at greater cost to officers and departments.<sup>22</sup> Although some of these proposals might be cost-effective means of making federal remedies somewhat better at incentivizing departmental reform, efforts to improve federal remedies will face inevitable limits.

Departments have significant power over officer conduct, and many kinds of misconduct require departmental participation to prevent. But better policies, training, ongoing supervision, and disciplinary mechanisms are expensive for departments to adopt.<sup>23</sup> Reducing misconduct much further probably requires improved accountability in many departments that now do not find key reforms worth the costs. To alter the reform calculus for a large number of departments, federal remedies would have to increase the expected costs of misconduct significantly. Unfortunately for those interested in using federal remedies to affect reform, this cannot be done.

Federal legal remedies for misconduct largely change the relative costs of misconduct and reform by raising the expected costs of engaging in civil rights violations, making lawful policing and the remedial measures necessary to achieve it comparatively more attractive. In calculating the expected cost of misconduct, officers and departments with adequate information will consider both the risk that allowing misconduct will result in imposition of a federal

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20. See, e.g., WALKER, *supra* note 14, at 31–35; NAT'L RESEARCH COUNCIL, *supra* note 17, at 275–81.

21. See Harmon, *supra* note 11, at 5.

22. See, e.g., Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1082–85 (2010) (recommending polices to make civil rights damages actions a more efficient deterrent); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (advocating statutory changes to improve Section 14141); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

23. See, e.g., *Seattle Police Call DOJ's Reform Proposals Wildly Unrealistic*, SEATTLE TIMES (May 15, 2012, 7:54 PM), [http://seattletimes.nwsour.com/html/localnews/2018215185\\_doj16m.html](http://seattletimes.nwsour.com/html/localnews/2018215185_doj16m.html) (describing significant expenses associated with changing policies, adding training, improving supervision, and ensuring the implementation of such reforms through outside monitoring).

judgment and the cost of that judgment if it is imposed. Thus, to further increase the expected cost of misconduct, federal remedies must impose costs on officers and departments either more harshly or more often, or make the translation of costs into incentives for the relevant actors more effectual. Although federal remedies can be changed to marginally increase the incentives to reform, federal remedies will never inspire substantially more reform than they do now because neither legal nor policy reforms will notably change the cost of federal remedies, the probability they will be imposed, or their efficiency at driving reform.

## II. THE LIMITED COSTS OF FEDERAL REMEDIES

First, none of the federal remedies can be changed to increase notably its cost to officers and departments when it is employed. The exclusionary rule, for example, reduces the expected value of misconduct by depriving officers and departments of the evidentiary value of illegal searches and seizures.<sup>24</sup> As a deterrent, the rule suffers well-known structural limits: excluding evidence cannot influence officers or departments uninterested in using illegally obtained evidence in a criminal prosecution, and it cannot discourage unconstitutional conduct that is unlikely to produce evidence.<sup>25</sup> Nevertheless, federal courts do not presently use the exclusionary rule to its fullest possible extent. In the name of reducing the societal costs of the exclusionary rule without undermining its benefits, the Supreme Court permits courts to admit illegally obtained evidence in grand jury proceedings, preliminary hearings, and sentencing hearings, for example; as well as collateral non-criminal proceedings, such as tax proceedings, deportation hearings, and parole hearings.<sup>26</sup> As a result, even when a court finds that an officer discovered evidence in violation of the Fourth Amendment and, therefore, that the evidence must be excluded from the prosecution's case-in-chief in a criminal case, illegally obtained evidence may retain value for government actors.

Changes to the federal exclusionary rule that would further minimize the evidentiary value for officers and departments of illegally obtained evidence are extremely unlikely in light of recent judicial skepticism about whether the

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24. See *Elkins v. United States*, 364 U.S. 206, 217 (1960) (“The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”).

25. See *Terry v. Ohio*, 392 U.S. 1, 13–14 (1968).

26. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (deportation hearings); *United States v. Janis*, 428 U.S. 433, 457 (1976) (tax proceedings); *United States v. Calandra*, 414 U.S. 338, 354 (1974) (grand jury proceedings); *Penn. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 369 (1998) (parole hearings); *Giordenello v. United States*, 357 U.S. 480, 482 (1958) (preliminary hearings); *United States v. McCrory*, 930 F.2d 63, 70 (D.C. Cir. 1991) (sentencing).



rule is worth the cost of allowing guilty individuals to evade justice.<sup>27</sup> Even assuming, however, that this were not so, and that broadening the scope of the rule to further decrease the benefits of illegally obtaining evidence would be a cost-effective means of discouraging misconduct, such a project could only have a limited effect on the rule's power to deter. The primary cost of evidentiary exclusion for a police department or local municipality is fixed—it can do no more than deprive a government of the value of the excluded evidence. No change to the exclusionary rule can dramatically increase the costs of the rule for officers and departments. All adjustments can do is to reduce somewhat the residual value of illegally obtained evidence. Such changes to the exclusionary rule may encourage a few additional departments to adopt remedial measures, but they are unlikely to drive significant national reform.

In addition to depriving the government of the evidentiary benefit of misconduct, the exclusionary rule can impose secondary political and reputational costs on the government actors held responsible for the misconduct and the evidentiary exclusion that follows, increasing the rule's influence on the expected costs of misconduct. Thus, when an illegal search by the police weakens a newsworthy criminal prosecution, the district attorney, police chief, and mayor may feel the sting of critical popular sentiment.<sup>28</sup> While these political costs are not fixed in the same way as the underlying cost of the evidentiary exclusion, they are likely to be closely correlated with the consequences of evidentiary exclusion over time. It is therefore difficult to imagine that strategies to increase these intangible costs could be used to expand significantly the impact of the exclusionary rule. Thus, neither legal changes nor strategic use of the exclusionary rule can be expected to alter considerably the expected costs of misconduct—and, therefore, the behavior of departments.

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27. See, e.g., *Herring v. United States*, 555 U.S. 695, 704 (2009) (expanding the good faith exception because it neither appreciably deters constitutional violations, nor outweighs its costs in the context of isolated negligent police mistakes attenuated from the search); *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (refusing to apply the exclusionary rule in part because the costs outweigh its deterrence value for knock-and-announce violations).

28. See, e.g., Buffy Spencer, *Judge Throws Out \$2 Million Worth of Drugs, Gun as Evidence in Case Against Springfield Man*, THE REPUBLICAN NEWSROOM (Feb. 3, 2009), <http://www.freerepublic.com/focus/f-news/2177394/posts?page=60>; *Judge Upheld Law, Not Police Interests, in Barkyoub Case*, THE REPUBLICAN (Oct. 6, 2009), [http://www.masslive.com/opinion/index.ssf/2009/10/judge\\_upheld\\_law\\_not\\_police\\_in.html](http://www.masslive.com/opinion/index.ssf/2009/10/judge_upheld_law_not_police_in.html) (citing with approval statement by judge that misuse of evidence is “corrupt . . . absolutely corrupt” and suggesting that the message needed to be heard by the district attorney and police chief); Jesse McKinley, *Dozens of Cases to Be Dropped in San Francisco Police Scandal*, N.Y. TIMES, Mar. 9, 2011, at A16 (noting that San Francisco District Attorney's office dropped “dozens of drug and robbery cases” after revelations that undercover officers allegedly committed perjury and conducted illegal searches).

Federal criminal prosecutions deter misconduct by imposing costs in the form of imprisonment, fines, and the stigma of criminal conviction on officers and supervisors who willfully deprive victims of their constitutional rights.<sup>29</sup> Criminal prosecutions are likely better at deterring individual officer misconduct than encouraging departmental reform. Unlike other federal remedies, the individuals who commit the misconduct suffer most of the costs of criminal prosecutions. Moreover, federal civil rights criminal cases target willful conduct, that is, conduct that intentionally deprives the victim of a constitutional right.<sup>30</sup> As a result, although departments can do much to create a culture that encourages compliance with the law, the conduct targeted by criminal prosecutions often occurs in spite of policies or training—and officers can avoid such intentional acts without costly departmental action.

Already, defendants convicted of violating federal criminal civil rights statutes face very high penalties. An officer can receive the death penalty for civil rights violations that kill, life imprisonment for violations involving aggravated sexual abuse or kidnapping, and up to ten years imprisonment for using a dangerous weapon or causing bodily injury.<sup>31</sup> Even a defendant convicted of depriving someone of their civil rights without a weapon or causing injury faces a felony conviction and potential imprisonment.<sup>32</sup> While the United States Sentencing Guidelines do not recommend maximal sentences in most civil rights cases, the guidelines do authorize significant sentences,<sup>33</sup> and those convicted of federal civil rights crimes are frequently sentenced to substantial terms of imprisonment.<sup>34</sup>

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29. See 18 U.S.C. § 242 (2006).

30. See *Screws v. United States*, 325 U.S. 91 (1945). See also, e.g., CRIMINAL PATTERN JURY INSTRUCTION COMM. OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS § 2.17 (2011); CRIMINAL PATTERN JURY INSTRUCTION COMM. OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS § 2.18.

31. See 18 U.S.C. § 242. Although the statute authorizes death for violations including kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse or an attempt to kill, constitutional restrictions on the application of the death penalty limit to life imprisonment the legal sentence for violations that do not result in a death. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting application of the death penalty to defendant convicted of aggravated rape of a child); *Coker v. Georgia*, 433 U.S. 584 (1977) (prohibiting application of the death penalty to defendant convicted of raping an adult woman).

32. See 18 U.S.C. § 242.

33. See U.S. SENTENCING GUIDELINES MANUAL § 2H1.1 (2011) (setting base level for offenses involving individual rights).

34. See e.g., Lawrence Buser, *Memphis Ex-Cop's Drug-Robbery Convictions, Life-Plus Sentence Upheld, The Commercial Appeal*, COMMERCIAL APPEAL (Oct. 24, 2011, 1:47 PM), <http://www.commercialappeal.com/news/2011/oct/24/memphis-ex-cops-drug-robbery-convictions-life-plus/>; Laura Maggi & Brendan McCarthy, *Two Former NOPD Officers Receive Stiff Sentences in Henry Glover Case*, Times-Picayune, (Mar. 31, 2011, 1:41 PM), [http://www.nola.com/crime/index.ssf/2011/03/two\\_former\\_nopd\\_officers\\_recei.html](http://www.nola.com/crime/index.ssf/2011/03/two_former_nopd_officers_recei.html); Kristen Gosling, *Former*

Raising the costs of federal prosecution to deter more misconduct would require raising the penalties imposed when an officer is convicted under federal criminal law. There are few absolute bounds on criminal punishment beyond human mortality and Eighth Amendment limits on the application of the death penalty, and, more recently, life without parole.<sup>35</sup> To deter more officers from misconduct, Congress could raise the maximum penalty for all criminal civil rights violations to life imprisonment or impose new mandatory minimum sentences of imprisonment for violations. However, even assuming that such actions would be a cost-effective means of deterring future constitutional violations, criminal sentences are graduated for a purpose: to achieve marginal deterrence.<sup>36</sup> If maximal penalties were imposed for minor violations, officers who beat a suspect would be given incentive to kill him or nearby witnesses to lower the risk of being caught without raising the potential penalty for the crime. Raising the penalties for minor offenses also risks imposing punishments on criminal defendants far beyond their just deserts in the name of deterrence—a result many would find unjust.

This is not to say that criminal prosecutions could or should not be used to raise the costs of misconduct above present levels. One might argue that some civil rights criminal violations should be sentenced more harshly than present law permits in order to serve justice and deter future illegal conduct. A police officer who plants evidence on an innocent suspect or who—enabled by his uniform, gun, and arrest power rather than the threat of force—pressures someone to have sex against her will might reasonably receive more than the one year imprisonment now authorized. But in light of the already very high costs of federal criminal conviction, and the difficulties of raising those costs across the board, changes to federal criminal statutes to address such matters are unlikely to result in criminal punishments for constitutional violations that are considerably more serious than present law achieves.

Although much of the deterrent potential of criminal convictions comes from influencing individual officers, because police chiefs and political actors

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*Uplands Park Officer Leon Pullen Sentenced to 25 Years*, KSDK (Jan. 28, 2011, 2:46 PM), <http://www.ksdk.com/rss/article/241087/3/Former-Uplands-Park-police-officer-sentenced>.

35. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Kennedy*, 554 U.S. at 407; *Roper v. Simmons*, 543 U.S. 551 (2005).

36. One classic statement of the principle of marginal deterrence comes from Jeremy Bentham. *Of the Proportion Between Punishments and Offences*, in *COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 168 (J.H. Burns & H.L.A. Hart eds., 1996). Bentham notes that one purpose of punishment is “to induce a man to choose always the least mischievous of two offenses; therefore where two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less.” *Id.* For a more contemporary analysis, see Steven Shavell, *A Note on Marginal Deterrence*, 12 INT’L REV. L. & ECON. 345 (1992) (engaging in an economic analysis of marginal deterrence with respect to fines).

can pay reputational and political costs for serious criminal conduct that occurs under their watch, criminal prosecutions may also encourage departments to engage in remedial measures to prevent misconduct.<sup>37</sup> As in the use of the exclusionary rule, increasing the costs of criminal prosecutions for those who govern police departments and municipalities could lead to some reform. Recently, for example, the Department of Justice has coordinated some criminal prosecutions with civil investigations into widespread department misconduct, increasing publicity for the criminal convictions and highlighting for the public the systemic causes of criminal police conduct.<sup>38</sup> This strategic use of criminal prosecutions may increase the secondary costs of criminal prosecutions and therefore their power to drive reform. But such increases may be marginal, since prosecutions by the Department of Justice have long

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37. See, e.g., Tina Daunt & Henry Weinstein, *Officials Renew Call for Outside Probe of LAPD*, L.A. TIMES, Feb. 11, 2000, at A1 (“The Rampart situation—in which officers allegedly conspired to put innocent people in jail and to cover up unjustified shootings and beatings—warrants a U.S. criminal civil rights investigation because there is evidence of ‘a widespread pattern and practice of federal civil rights violations’ by Rampart officers, said lawyer Merrick J. Bobb, an expert on police misconduct who advises the Board of Supervisors and the Los Angeles Police Commission.”); John Discepolo, *Report on Officer-Involved Shootings Says SPD Culture Must Change*, KOMO NEWS (Dec. 22, 2011, 6:23 AM), <http://www.komonews.com/news/local/New-report—136052748.html> (noting a Citizens Report on police shootings in Seattle “says the culture within the police department has to change, specifically in how officers communicate with the public”); Gabriel Baird & Henry J. Gomez, *Police Get Renewed Scrutiny from Feds: Questions Raised in Other Cities Mirror Issues Here*, THE PLAIN DEALER (Cleveland, OH), June 26, 2011, at A1 (suggesting that investigations into police brutality by a handful of officers could lead to investigation of department-wide problems).

38. See *Assistant Attorney General Thomas E. Perez Speaks at the East Haven Police Department Indictment Announcement*, U.S. DEP’T OF JUSTICE (Jan. 24, 2012), <http://www.justice.gov/crt/opa/pr/speeches/2012/crt-speech-120124.html> (announcing criminal indictment of East Haven officers and noting that “[c]riminal prosecutions are not the only tool we have to combat police misconduct . . . [and] the Civil Rights Division [recently] completed a civil investigation of the East Haven Police Department using our authority under federal civil rights laws to investigate patterns or practices of police misconduct”); *Assistant Attorney General Thomas E. Perez of the Civil Rights Division Speaks at the Portland, Oregon, Police Bureau Press Conference*, U.S. DEP’T OF JUSTICE (June 8, 2011), <http://www.justice.gov/crt/opa/pr/speeches/2011/crt-speech-110608.html> (linking criminal investigation of police shooting and civil pattern or practice investigation of the Portland Police Bureau); *Assistant Attorney General Thomas E. Perez Speaks at the Miami Police Department Investigation Announcement*, U.S. DEP’T OF JUSTICE (Nov. 17, 2011), <http://www.justice.gov/crt/opa/pr/speeches/2011/crt-speech-111117.html> (making public pattern or practice investigation and noting that “most” of the matters related to the civil investigation were “being evaluated separately with regard to potential criminal liability by the state or by the Justice Department”). See also *Oversight Hearing on the U.S. Dep’t of Justice Civil Rights Div. Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 31 (2011) (statement of Thomas E. Perez, Assistant Att’y Gen., Civil Rights Div.) (“Following the spate of criminal cases involving NOPD officers, the Division launched a civil pattern or practice investigation of the New Orleans Police Department.”).

received significant media attention.<sup>39</sup> Existing potential reform efforts likely already reflect much of the potential secondary costs of criminal prosecutions.

One might respond that, more than the exclusionary rule, criminal convictions have complex and difficult to discern effects on the incentives of departmental actors who lead reform. While criminal convictions can lead to reputational costs that encourage remedial measures, federal criminal convictions of officers in a department also may sometimes *lower* the costs of misconduct for police chiefs and politicians by attributing bad acts to individuals and implicitly relieving departmental leadership of blame.<sup>40</sup> If the Department of Justice's recent efforts to connect criminal prosecutions and departmental deficiencies inhibit that phenomenon, they could raise the secondary costs of criminal convictions for department and municipal leaders. But even so, it seems unlikely that the Department of Justice's efforts can markedly change the expected value of reform for troubled departments because criminal sanctions inherently emphasize individual responsibility. As a result, neither the primary costs of criminal convictions on individual defendants nor the secondary effects of those convictions on others is likely to alter significantly the calculus governing institutional reform in American police departments.

Section 14141 permits the Department of Justice to sue police departments for injunctive relief to stop patterns and practices of constitutional violations by police officers.<sup>41</sup> Although Section 14141 enforcement compels departments to adopt remedial measures to prevent further misconduct, the statute is expensive for the Department of Justice to employ. There are more than fifteen thousand local police departments and sheriff's offices in the United States.<sup>42</sup> Assuming even a small minority of them is engaged in a pattern or practice of constitutional violations, the Department of Justice cannot achieve national reform by suing every department with a pattern of widespread constitutional violations.<sup>43</sup> Nevertheless, as I have argued elsewhere, because Section 14141 investigations and suits are costly to police departments as well as the Department of Justice, the threat of a Section 14141 investigation and subsequent suit could—like the threat of other federal remedies—raise the expected costs of misconduct and induce proactive reform

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39. See e.g., Daunt & Weinstein, *supra* note 37; Robert Reinhold, *Verdict in Los Angeles; Calm Relief Where Rage Once Ruled*, N.Y. TIMES, Apr. 17, 1993, at A1; John M. Crewdson, *Ex-Officer Indicted in Miami Racial Inquiry*, N.Y. TIMES, June 6, 1980, at A14.

40. See Harmon, *supra* note 11, at 9; Armacost, *supra* note 3, at 457–58.

41. 42 U.S.C. § 14141 (2006).

42. See BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslea08.pdf>.

43. Harmon, *supra* note 11, at 21–22.

in police departments that are not investigated, in addition to those departments that are investigated.<sup>44</sup>

Just as expanding the deterrence effect of other federal remedies requires increasing their expected costs for departments, exploiting the deterrence potential of Section 14141 requires increasing the expected costs of permitting a pattern or practice of constitutional violations for police departments. However, this goal cannot be achieved by raising the costs of Section 14141 for each department that is investigated or sued since the statute authorizes only remedial measures and monitoring necessary to eliminate the illegality—not damages or other non-remedial punishments. As a result, Section 14141 cannot incentivize additional police departments by raising the costs of each investigation or suit under the statute.<sup>45</sup> If Department of Justice suits for equitable relief are to deter misconduct more than they do now, they must do so by some other mechanism.

Civil suits for damages under 42 U.S.C. § 1983 do not face the inherent constraints of other federal remedies. Assuming that the political obstacles to changing Section 1983 could be overcome, Section 1983 could be used to impose significantly higher financial awards against officers and departments than it does now, through expanded punitive damages, for example.<sup>46</sup> Despite this difference, it is highly unlikely that Section 1983 can be used to induce significant additional institutional reform by raising the costs of misconduct for departments. Instead, the example of civil damages reveals another obstacle to using remedial costs to deter more misconduct: federal remedies do not incentivize reform efficiently. Raising the cost imposed in a civil judgment

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44. *See id.* at 22. In an earlier article, *Promoting Civil Rights Through Proactive Policing Reform*, *id.*, I contended that Section 14141 could not induce reform as it is currently enforced, even if resources devoted to enforcement increase dramatically. Instead, I argued that by concentrating Section 14141 investigations and suits on police departments with the worst indicia of misconduct and granting safe harbor for departments that adopt reform measures, Section 14141 could be used to reduce misconduct cost-effectively. This Article contends that both the limits of Section 14141 in raising the costs of misconduct and some of the alternatives I proposed earlier apply not only to Section 14141—but to all federal remedies.

45. *See id.* at 24–25.

46. For example, although the Supreme Court has held that a municipality is immune from punitive damages under Section 1983 in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), some have questioned the Court's reasoning that punitive damages would not serve the purposes of Section 1983 and public policy. *See, e.g.,* *Ciraolo v. City of New York*, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring). Such an argument could—at least in theory—provide a basis for the Supreme Court to reevaluate the breadth of that immunity, something that existing Supreme Court doctrine might make possible. *See Fact Concerts, Inc.*, 453 U.S. at 267 n. 29 (suggesting that imposing punitive damages on taxpayers might not be unjust or unreasonable in “an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights”).

often will not raise a department's incentive to adopt remedial policies by the same measure.

I argue above that criminal prosecutions provide only limited incentives to departments to reform because many of their costs accrue to individuals and many of the means of avoiding those costs are within individual control.<sup>47</sup> This point illustrates an important form of remedial inefficiency: the costs imposed for misconduct do not accrue to the actors who most control institutional reform. A different version of this problem exists for civil damages actions.

In civil rights actions, governments bear most of the costs of legal judgments. Because localities often indemnify police officers for civil damage awards by contract or statute, municipalities ultimately pay civil awards or buy insurance to pay for them.<sup>48</sup> However, the costs borne by municipalities do not translate easily into political and financial costs for police chiefs and the political actors that shape their incentives and budgets, and those actors may face countervailing incentives to permit misconduct or to avoid adopting remedial measures.<sup>49</sup> Many cities fail even to collect information about how much money is paid in civil judgments against police officers and about what practices trigger those judgments, making it much more difficult to implement measures tailored to reduce civil awards.<sup>50</sup> Because police departments and their leaders are not easily forced to internalize the costs borne by the government, it is not surprising that many departments fail to adopt institutional reforms even after successful civil judgments impose significant costs for misconduct.<sup>51</sup> Increasing civil penalties for misconduct, even substantially, may not increase costs on those who must be incentivized to adopt reforms commensurately, and therefore may not deter substantially more misconduct than existing civil judgments do.<sup>52</sup> While some have advocated methods for increasing how efficiently civil judgments drive reform,<sup>53</sup> the

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47. See *supra* text accompanying notes 29–30.

48. See NAT'L RESEARCH COUNCIL, *supra* note 17, at 279.

49. See Harmon, *supra* note 4, at 796 (arguing that government actors face countervailing pressures not to adopt many reform measures); PETER SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 125 (1983) (suggesting that “countervailing pressures” including the political environment and bureaucratic needs such as maintaining morale can compel officials to “tolerate low-level misconduct”).

50. See Schwartz, *supra* note 22, at 1028 (drawing on documentary evidence and interviews to argue that most police departments “with more than one thousand sworn officers have no computerized system to track [civil] lawsuits brought against them”); see *id.* at 1030, 1040.

51. See Levinson, *supra* note 22, at 367 (arguing that because government agencies do not internalize costs, “awarding compensation to the victims of constitutional violations would not seem to have any deterrent effect on government”).

52. See Schwartz, *supra* note 22, at 1030, 1081.

53. See, e.g., Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 *FORDHAM URB. L.J.* 587, 597 (2000) (suggesting that civil suits can change police behavior if

problem is structural rather than situational. Without significant and improbable changes in law or public policy, it is unlikely that civil suits can cost-effectively increase the costs of misconduct significantly enough to encourage much additional institutional reform.<sup>54</sup>

### III. THE LIMITED FREQUENCY OF FEDERAL REMEDIES

Federal remedies could still be used to change officer conduct on a large scale if departments and officers could be made to face significantly increased probability that they would bear the costs of acts of misconduct. However, federal remedies not only cannot be made to impose considerably higher costs for each act of misconduct they target, they also cannot practically be imposed dramatically more often than they are now.

If evidence were excluded from criminal cases in a higher proportion of illegal searches, some further unconstitutional acts could be discouraged. But reaching that end is highly improbable, because for decades the Supreme Court has moved in precisely the opposite direction. The burgeoning good-faith exception, for example, restricts application of the exclusionary rule when police officers act in objectively reasonable reliance on a warrant, statute, court decision, or clerical determination later found to be invalid, unconstitutional, or mistaken.<sup>55</sup> As a result, the Court has expanded over time the number of unconstitutional acts for which evidence may be admitted at a subsequent

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“[a]fter the jury’s verdict as to liability and damages, the judge presiding over the civil rights case . . . determine[s] what portion of the judgment the city must indemnify” with the officer, depending on the gravity of the constitutional violations, liable for the rest); Jonathan Papik, *Don’t Knock Them Until We Try Them: Civil Suits as a Remedy for Knock-and-Announce Violations After Hudson v. Michigan*, 30 HARV. J. L. & PUB. POL’Y 417, 425 (2006) (suggesting that police misconduct should be deterred by punitive damages in addition to compensatory damages in civil suits); SCHUCK, *supra* note 49, at 82, 103 (suggesting that the burden of liability be shifted from individual officers to the government in order to “strengthen general deterrence by focusing at a better location the incentives” for compliance with rules by street-level officials).

54. For example, Joanna C. Schwartz has suggested that in contrast to the “dramatic suggestions offered by [other] scholars,” civil lawsuits can be made a substantially more effective deterrent by “comparatively small steps,” including new departmental efforts to gather and analyze information from lawsuits. Schwartz, *supra* note 22, at 1030. By her own account, however, most of the departments in her study, which had adopted information gathering policies and programs had done so involuntarily. *See id.* at 1057. To accomplish information gathering, she proposes new federal legislation—a substantial suggestion by any measure; extremely laborious work by private citizens collecting and publicizing information; or local political changes, which, if there were sufficient incentive to motivate, likely would have occurred in additional jurisdictions without court order or Department of Justice suit. *See id.* at 1082–83. As this example suggests, even proposals intended to improve civil suits at modest cost face notable obstacles.

55. *See, e.g.,* Davis v. United States, 131 S. Ct. 2419 (2011) (binding appellate precedent); Herring v. United States, 555 U.S. 135 (2009) (clerical determination); Illinois v. Krull, 480 U.S. 340 (1987) (statute); United States v. Leon, 468 U.S. 897 (1984) (warrant).



criminal trial. The independent source and inevitable discovery doctrines similarly restrict the frequency with which exclusion is applied.<sup>56</sup> In total, the exclusionary rule applies to far fewer acts of misconduct than it once did, and the Supreme Court's reasoning indicates that this trend will continue, if not strengthen.

Federal criminal prosecutions for civil rights violations have increased under the Obama Administration.<sup>57</sup> Mark Kappelhoff, the Chief of the Civil Rights Division, Criminal Section, noted in *Saint Louis University Public Law Review's* Symposium that the Justice Department prosecuted a record number of police officers in 2010. Nevertheless, by his account, and by every other, federal criminal cases against police officers remain resource intensive, legally challenging, and factually difficult to prove.<sup>58</sup> As a result, the Department of Justice prosecutes fewer than one hundred officers.<sup>59</sup> To strengthen the deterrent effect of criminal prosecutions on the 644,000 sworn officers in local police departments and sheriff's offices in the United States,<sup>60</sup> that number would have to increase by orders of magnitude. Even without the evidentiary and legal obstacles such cases face, no realistic budgetary forecast could lead to that outcome.<sup>61</sup> Criminal prosecutions may deter some misconduct now, and they remain important to promoting justice in individual cases and to demonstrating federal commitment to civil rights, but they cannot be used to change the future conduct of many police officers.

Suits by the Department of Justice for injunctive relief are even more costly and difficult and, therefore, even less common. The Department of Justice's efforts in Maricopa County, Arizona illustrate the problem. The Department launched an investigation into discriminatory policing practices by

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56. See, e.g., *Hudson v. Michigan*, 547 U.S. 586 (2006) (expanding causation requirement for exclusionary rule); *Murray v. United States*, 487 U.S. 533 (1988) (expanding independent source doctrine); *Nix v. Williams*, 467 U.S. 431 (1984) (recognizing broad inevitable discovery rule).

57. Peter J. Boyer & Peter Schweizer, *Why Can't Obama Bring Wall Street to Justice?*, NEWSWEEK, May 14, 2012, at 28.

58. See Armacost, *supra* note 3, at 465–71; Mary M. Cheh, *Are Lawsuits the Answer to Police Brutality?*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 254–56 (William A. Geller & Hans Toch eds., 1996).

59. In 2011, for example, only forty-five law enforcement officers, including police officers, deputy sheriffs and state prison correctional officials, were charged by the Division. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, FISCAL YEAR 2013 PERFORMANCE BUDGET: CONGRESSIONAL SUBMISSION 19 (2012), available at <http://www.justice.gov/jmd/2013justification/pdf/fy13-crt-justification.pdf> [hereinafter PERFORMANCE BUDGET].

60. See REAVES, *supra* note 42, at 2.

61. See PERFORMANCE BUDGET, *supra* note 59, at 5 (“The current Department-wide partial hiring freeze has impeded [the Civil Rights Division's] ability to fill position vacancies and caused delays for securing exceptions.”).

the Maricopa County Sheriff's Office in 2008.<sup>62</sup> Such investigations include a far-reaching inventory of departmental policies and procedures and interviews with departmental employees.<sup>63</sup> The Maricopa County investigation stalled in 2009 because the Sheriff's Office refused to give the Department of Justice access to records necessary for the investigation.<sup>64</sup> The Department of Justice sued for that access in 2010,<sup>65</sup> and a negotiated resolution to that suit made the records available to Department of Justice lawyers, permitting the Department to continue investigating the office's practices.<sup>66</sup> Pursuant to that investigation, the Department of Justice's Civil Rights Division issued a notice of findings in 2011, which alleged widespread discrimination by the sheriff's deputies.<sup>67</sup> Sheriff Arpaio promised cooperation with the Department of Justice, and in 2012 the parties started negotiating towards a set of reform measures intended to end the pattern of constitutional violations.<sup>68</sup> However, those negotiations broke down when Sheriff Arpaio publicly refused a key point of the settlement proposed by the Department of Justice, a court-appointed monitor to ensure compliance with the agreement.<sup>69</sup> The Department of Justice filed suit in spring 2012.<sup>70</sup> The complaint begins what is likely to be a long and expensive trial to prove the Department's allegations against the Sheriff's Office, and if the Department establishes a violation, additional proceedings or negotiations

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62. Letter from Thomas E. Perez, Assistant Att'y Gen., to Bill Montgomery, Cnty. Att'y, Maricopa Cnty. 1-2 (Dec. 15, 2011), available at [http://www.justice.gov/crt/about/spl/documents/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf) [hereinafter Perez Letter].

63. Harmon, *supra* note 11, at 15.

64. Perez Letter, *supra* note 62, at 1, n.1 (explaining that the "investigation was delayed when MCSO repeatedly refused to provide the United States with access to pertinent material and personnel"); see also J.J. Hensley, *Arpaio Won't Cooperate with Federal Inquiry*, AZCENTRAL.COM (July 8, 2009, 12:00 AM), <http://www.azcentral.com/news/articles/2009/07/08/20090708mcsovdj0708.html>.

65. See generally Complaint, United States v. Maricopa County, No. 2:10-cv-01878-LOA (D. Ariz. Sept. 2, 2010); see also Marc Lacey, *Justice Department Sues Sheriff Over Bias Investigation*, N.Y. TIMES, Sept. 3, 2010, at A11; see also Press Release, U.S. Dep't of Justice, Justice Department Files Lawsuit Against Maricopa County Sheriff's Office For Refusing Full Cooperation With Title VI Investigation (Sept. 2, 2010) (on file with author).

66. See Perez Letter, *supra* note 62, at 1, n.1 ("The United States and MCSO eventually resolved this lawsuit in June 2011 after MCSO agreed to provide [the United States] with the information and access [it] had been seeking.").

67. See Perez Letter, *supra* note 62, at 2.

68. See Jason Ryan, *DOJ Breaks off Negotiations with Defiant Sheriff Joe Arpaio*, ABC NEWS: LEGAL, (Apr. 3, 2012, 7:24 PM), <http://abcnews.go.com/blogs/politics/2012/04/doj-breaks-off-negotiations-with-defiant-sheriff-joe-arpaio/>.

69. Associated Press, *Arizona: Sheriff Is Accused of Bad-Faith Negotiations*, N.Y. TIMES, Apr. 4, 2012, at A14.

70. See Complaint, United States v. Maricopa County, No. 2:12-cv-00981-LOA (D. Ariz. May 10, 2012); see also Fernando Santos & Charlie Savage, *Lawsuit Says Sheriff Discriminated Against Latinos*, N.Y. TIMES, May 11, 2012, at A18.

will be needed to specify reforms. The mandated reforms must then be implemented, and if experience provides a guide, that process could lead to years of continued litigation contesting compliance.<sup>71</sup>

Given how difficult and complicated structural reform is, it is perhaps not surprising that no more than a few dozen police departments have been investigated in the nearly twenty years since the statute was passed.<sup>72</sup> If federal efforts to enforce Section 14141 were doubled, trebled, or quadrupled, the Department of Justice could still likely investigate or sue no more than one or two dozen departments each year, a tiny fraction of the more than fifteen thousand local police departments and sheriff's offices in the United States, many more of which are likely engaged in a pattern of unconstitutional action.<sup>73</sup> Worse yet, federal efforts may well be Sisyphean; even as the Department of Justice investigates new departments for violating civil rights, some departments it previously investigated need revisiting.<sup>74</sup> Thus, while Section 14141 remains an important tool for reforming problematic departments, without dramatic revisions to the ways in which it is enforced, it is unlikely that it can be imposed with sufficient frequency to change the calculus of reform for many police departments engaged in misconduct.<sup>75</sup>

Civil suits under Section 1983 do not depend on government resources. As a result, they do not face the same limitations as criminal prosecutions or suits under Section 14141. But that also means that civil suits cannot be made more frequent by devoting more federal resources to them. Some factors routinely cited as limiting the frequency of civil suits presently—legal doctrines

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71. See, e.g., Patrick McGreevy, *Extension Sought for Police Decree*, L.A. TIMES, May 11, 2006, at B3 (describing dispute over extending consent decree beyond its initial five year term); see also *Lift the LAPD Consent Decree*, L.A. TIMES (May 24, 2009), <http://articles.latimes.com/2009/may/24/opinion/ed-consent24> (explaining that initially, the department moved slowly to embrace the consent decree, and completing its requirements took longer than expected); Joel Rubin, *U.S. Judge Ends Federal Oversight of the LAPD*, L.A. TIMES (July 18, 2009), <http://articles.latimes.com/2009/jul/18/local/me-consent-decree18> (reporting that the consent decree under which LAPD had been operating for eight years had finally been lifted, but that there were *still* outstanding issues including racial profiling and financial disclosures).

72. See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Special Litigation Section Cases and Matters*, <http://www.justice.gov/crt/about/spl/findsettle.php#police><http://www.justice.gov/crt/about/spl/findsettle.php#police> (last visited Jan. 10, 2013) (providing a list of law enforcement agencies the DOJ has investigated).

73. See Harmon, *supra* note 11, at 4.

74. See, e.g., CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011), *available at* [http://www.justice.gov/crt/about/spl/nopd\\_report.pdf](http://www.justice.gov/crt/about/spl/nopd_report.pdf). For instance, a DOJ pattern or practice investigation of the New Orleans Police Department more than a decade ago noted that "some NOPD officers could not articulate proper legal standards for stops, searches, or arrests," and the 2011 DOJ pattern or practice investigation noted that "NOPD still does not provide meaningful in-service training to officers on how to properly carry out stops, searches, and arrests." *Id.*

75. See Harmon, *supra* note 11, at 22–23.

governing qualified immunity and municipal liability, practical difficulties in obtaining legal representation, and the obstacles to proving misconduct by law enforcement officers<sup>76</sup>—are unlikely to change.

However, one trend may notably increase the frequency of civil suits and perhaps also criminal prosecutions: the spread of new technologies that increase the ability of plaintiffs and prosecutors to prove misconduct. In the last few years, privately-held video-recording devices, often in the form of cellular telephones, have become ubiquitous. At the same time, police departments have installed cameras in police cars, and as new devices become available and affordable, have provided officers with wearable video-recording devices.<sup>77</sup> This dramatic increase in videotaping of police conduct, both by citizens and police departments themselves, enables prosecutors and plaintiffs to establish liability for some incidents that lack independent or credible witnesses. Because it facilitates cases that would otherwise be extremely difficult to bring, the additional videotaping is likely to deter some additional misconduct. Nevertheless, while videotape mitigates problems of proof, it does not eliminate them, and it does not mitigate the other obstacles to suit in criminal or civil cases.<sup>78</sup>

As this discussion suggests, outside this small island of promise, none of the major remedies for police misconduct is likely to increase notably in the costs it imposes for acts of misconduct, in the frequency with which it is applied, or in the efficiency with which expected costs for misconduct translate into reform. Expanding resources and reforming federal remedies may achieve marginal improvements, but the structural, doctrinal, and practical obstacles to increasing the deterrent effect of the federal exclusionary rule, criminal civil rights prosecutions, civil suits, and suits for equitable relief are notable and likely persistent. As a result, while these remedies may be used to influence some additional departments to adopt promising remedial measures, they are unlikely to drive significant national reform.

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76. See Aramcost, *supra* note 3, at 467–71.

77. See *TASER Ships Axon Flex On-Body Cameras*, POLICE (May 24, 2012), [http://www.pollicemag.com/Channel/Technology/News/2012/05/24/TASER-Ships-Axon-Flex-On-Body-Cameras.aspx?ref=OnTarget-Thursday-20120524&utm\\_source=Email&utm\\_medium=Enewsletter](http://www.pollicemag.com/Channel/Technology/News/2012/05/24/TASER-Ships-Axon-Flex-On-Body-Cameras.aspx?ref=OnTarget-Thursday-20120524&utm_source=Email&utm_medium=Enewsletter) (noting that the new second-generation digital video recorder camera weighs only fifteen grams, can be mounted on a collar, cap, helmet, or eyeglasses, and is being adopted immediately by several major police departments).

78. Part II argues that raising monetary damages under Section 1983 might not produce commensurate reform because police chiefs will not internalize most of those additional costs. See *supra* notes 46–52 and accompanying text. The same problem extends to raising the expected costs of civil suits by increasing the frequency of suits. The resulting expected costs for municipalities are similarly difficult to translate into costs for the actors who could most easily prevent future violations.

Furthermore, even if many of these obstacles could be overcome, and federal remedies could be used to impose substantial additional costs on police departments that engage in unconstitutional conduct, federal efforts would still fail to produce the kind of officer conduct many advocates seek. All of these major federal remedies suffer the same well-known defect for those interested in shaping police conduct: they exclusively target constitutional violations. While constitutional law prohibits many kinds of serious misconduct, many avoidable, but necessary-in-the-moment uses of force; retaliatory arrests for trivial offenses; and lies told by police officers to citizens and courts do not violate the Constitution; and, therefore, cannot be deterred by federal remedies. At best, discouraging constitutional violations using federal remedies will secondarily improve police conduct more generally by improving accountability and increasing professionalism. The exclusionary rule seems to have had that effect.<sup>79</sup> But depending on constitutional remedies to fix non-constitutional misconduct seems a crooked path to important goals for American policing.

#### IV. THE LIMITS OF OTHER MEANS OF RAISING THE COSTS OF MISCONDUCT

Federal remedies remain significant in spite of these limits. They already incentivize some reform, they have purposes other than deterrence, and they can be improved somewhat to deter misconduct further. Nevertheless, those interested in broader reform must look further.

To some degree, looking further means exploring underutilized or new federal means of increasing the costs of misconduct for departments. For example, Title VI of the Civil Rights Act of 1964<sup>80</sup> and the Omnibus Crime Control and Safe Streets Act of 1968<sup>81</sup> prohibit law enforcement agencies receiving federal funds, training, or technical assistance from discriminating on the basis of race, color, national origin, sex, or religion. Since police departments receive substantial federal assistance,<sup>82</sup> these statutes could be used to induce remedial measures designed to prevent discrimination of individuals by police officers. One could also imagine new analogous statutes that condition federal funds for police departments on abstaining from forms of misconduct other than discrimination.

Presently, Title VI is not used to its full deterrent potential. Existing federal regulations limit the statute's use to induce reform because they specify

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79. See Walker, *supra* note 14, at 29–31.

80. 42 U.S.C. §§ 2000d–2000d7 (2006).

81. 42 U.S.C. § 3789d (2006).

82. See U.S. DEP'T OF JUSTICE, FISCAL YEAR 2013 PERFORMANCE BUDGET: OFFICE OF JUSTICE PROGRAMS 8 (2012), available at <http://www.justice.gov/jmd/2013justification/pdf/fy13-ojp-justification.pdf> (indicating that federal grants to state and local law enforcement total more than one billion dollars).

that the Department of Justice should enforce Title VI only to “secure prompt and full compliance so that needed [f]ederal assistance may commence or continue” and dictate enforcement strategies designed to minimize the statute’s impact on funding.<sup>83</sup> As a result, while Title VI is sometimes used in conjunction with Section 14141, it is rarely used with notable effect against police departments.<sup>84</sup> Even if there were no regulations that restricted its enforcement, Title VI, and any new federal remedies based on it, would likely suffer from some of the same obstacles that presently limit the frequency of Section 14141 suits: discrimination in violation of federal law is expensive to investigate and difficult to prove.

#### V. EXPLORING AN ALTERNATIVE MECHANISM OF REFORM: CHANGING THE EXPECTED COSTS AND BENEFITS OF REFORM

The federal government likely plays an ineliminable role in regulating the police. State and local actors face strong majoritarian interests in crime control and powerful special interests in law enforcement that may inhibit reaching a good balance between police effectiveness and civil rights.<sup>85</sup> Perhaps for this reason, state and local legal remedies for police misconduct have long been weaker than their federal counterparts. But federal remedies are close to the practical limits of their ability to raise the expected costs of misconduct for police departments. For this reason, it is worth considering whether federal efforts should target the other side of the equation for police departments: the costs and benefits of the remedial measures likely to reduce misconduct. While existing remedies induce reform by making misconduct costly, federal resources can also be used to lower the costs and increase the benefits of institutional reform. Rather than continue to look for ways to make misconduct unappealing relative to reform, it may be time to consider ways to make reform more appealing relative to misconduct.

As I have pointed out elsewhere, the Department of Justice already facilitates reform by lowering its information costs.<sup>86</sup> For example, the Department has funded reports intended to show police leadership how to

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83. See 28 C.F.R. § 50.3(a) (2011) (Guidelines for the enforcement of Title VI, Civil Rights Act of 1964).

84. For an example of a recent use of Title VI in conjunction with Section 14141, see Press Release, U.S. Dep’t of Justice: Office of Pub. Affairs, Department of Justice Files Lawsuit in Arizona Against Maricopa County Sheriff’s Office, and Sheriff Joseph Arpaio (May 10, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-crt-602.html>.

85. See Harmon, *supra* note 4, at 811–16.

86. See Harmon, *supra* note 11, at 48–49, 56–57; see also U.S. DEP’T OF JUSTICE: OFFICE OF JUSTICE PROGRAMS, *Mission and Vision*, <http://www.ojp.usdoj.gov/about/mission.htm> (last visited Jan. 10, 2013) (stating that OJP seeks to “provid[e] and coordinat[e] information, research and development, statistics, training, and support to help the justice community build the capacity it needs to meet its public safety goals”).

adopt computerized early intervention systems and how to conduct internal affairs investigations in small departments.<sup>87</sup> But those efforts have been limited.<sup>88</sup> The Department of Justice could work more aggressively and strategically to promote research on the causes of misconduct and the effectiveness of reforms, disseminate information and model policies on promising reforms, and provide technical assistance to departments seeking to adopt them. In this way, the Department of Justice could further lower the information barriers to reform.

Although some gains may be available by increasing research, training, and technical assistance by the Department of Justice, the information costs of policing reform are relatively small and bounded. Departments considering adopting and maintaining remedial measures as a means to lower the costs of misconduct likely face much greater infrastructure, personnel, and training costs than information costs. The Department of Justice already subsidizes reform, for example, by providing grants to local departments to encourage specific remedial measures. Thus, the Office of Community Oriented Policing Services has given tens of millions of dollars in grants to state and local police agencies for the purchase of in-car video cameras that can be used to improve training and accountability for officers.<sup>89</sup> But, overwhelmingly, the Department of Justice's grants to police departments serve purposes other than promoting civil rights.<sup>90</sup> One could imagine a much stronger federal grant program designed to subsidize cost-effective remedial measures for preventing key forms of misconduct.

I have also argued elsewhere that the Department of Justice could increase the benefits of reform for police departments by, for example, introducing a

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87. See, e.g., BEAU THURNAUER, INT'L ASS'N OF CHIEFS OF POLICE, *BEST PRACTICES GUIDE FOR INTERNAL AFFAIRS: A STRATEGY FOR SMALLER DEPARTMENTS* 6 (2008), available at <http://www.theiacp.org/LinkClick.aspx?fileticket=4B%2f4SDZtgV8%3d&tabid=392>; SAMUEL WALKER, OFFICE OF COMMUNITY ORIENTED POLICING SERV., *EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES: A PLANNING AND MANAGEMENT GUIDE* (2003); SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 107 (2005); INT'L ASS'N OF CHIEFS OF POLICE, *THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING* 25 (2003), available at [www.cops.usdoj.gov/Publications/video\\_evidence.pdf](http://www.cops.usdoj.gov/Publications/video_evidence.pdf) [hereinafter *IMPACT OF VIDEO EVIDENCE*] (observing that in-car camera recordings "may serve as an early warning of an officer experiencing problems that should be addressed").

88. See Harmon, *supra* note 11, at 56–57.

89. See U.S. DEP'T OF JUSTICE, *COMMUNITY ORIENTED POLICING SERVICE GRANT PROGRAMS FISCAL YEAR 1994-2009*, 1 (2012), available at [http://www.cops.usdoj.gov/pdf/grants\\_glossary.pdf](http://www.cops.usdoj.gov/pdf/grants_glossary.pdf) [hereinafter *COPS GRANT PROGRAMS*] ("In-Car Camera Program: Provided vehicle-based video camera systems to state law enforcement agencies to deter assaults on officers, provide evidence in trials and increase law enforcement accountability. (2000-2003)"); *IMPACT OF VIDEO EVIDENCE*, *supra* note 87, at 1 (COPS "provided over \$21,000,000 in grants to help state police and highway patrol agencies purchase over 5,000 cameras").

90. See *COPS GRANT PROGRAMS*, *supra* note 89.

safe harbor from suit under Section 14141 for police departments that commit themselves to adopt a preset array of reform measures specified by the Department of Justice and make verifiable progress toward their implementation.<sup>91</sup> Such a program would require a significant change in the Department of Justice's Section 14141 enforcement program and an effective monitoring scheme. But by providing immediate rewards for departments that adopt such reforms, it could also open a significant new avenue for changing the calculus of misconduct and reform for police departments, something existing federal remedies cannot offer.<sup>92</sup>

Federal resources could also be used to increase the reputational and professional benefits for chiefs who adopt reform efforts. Accreditation provides reputational benefits to departments and chiefs that satisfy specific administrative and operational standards, and it could be a mechanism for further identifying and rewarding reform efforts.<sup>93</sup> The Department of Justice could also increase professional benefits for civil rights initiatives informally, by holding prestigious invitation-only conferences for police chiefs with reputations as reformers. Since the possibilities of inducing reform by reducing its costs and increasing its benefits have not been adequately explored, there may be many other creative and cost-effective means of encouraging chiefs and municipalities to adopt reforms. These suggestions are merely the beginning.

This approach to reducing police misconduct is not without risk. In order to lower the cost of reform or raise its benefits, the federal government must be able to evaluate police department efforts. Those efforts can be measured either by their impact on misconduct outcomes or by departmental progress in implementing specific reforms. Unfortunately, both means of evaluating departmental efforts are problematic. Presently, there exist only crude outcome measures for misconduct, and little data to support them.<sup>94</sup> Without better measures, it would be hard to compare the success of police department reform efforts. If instead the Department of Justice rewards implementing particular remedial measures without reference to outcomes, the cost-effectiveness of federal efforts to incentivize reform will depend heavily on the Department's success in endorsing cost-effective remedial measures. If the Department of Justice chooses ineffectual reforms, the federal government and municipalities

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91. See Harmon, *supra* note 11, at 36–42.

92. See *id.* at 37–38.

93. Accreditation offers the greatest incentive to departments nearest to meeting the credentialing standards set out by the accreditation agency, and therefore incentivizes good departments to become better rather than encouraging departments most in need of reform to adopt remedial measures. See Harmon, *supra* note 11, at 48 n.144. Nevertheless, if the goal is to promote effective reform nationally, accreditation may provide one cost-effective means to achieve this end.

94. *Id.* at 5.



could spend valuable resources and receive little benefit or even undermine other law enforcement goals.<sup>95</sup> Yet, without additional data, the Department of Justice will also have difficulty evaluating competing reforms or the distorting effect such reforms could have on policing more broadly. Thus, collecting national data is an essential precondition for federal efforts to lower the costs and increase the rewards of reform as a means to reduce misconduct.<sup>96</sup> Even with such data, there are no guarantees that federal monies used to induce reform will be well spent.

Despite such risks, advocates, scholars, and policymakers should devote new energy to exploring federal means of lowering the costs and increasing the benefits of reform. The law, politics, and practicalities that circumscribe existing federal remedies mean that additional efforts to refine those remedies are likely to achieve only marginal gains in deterring misconduct. Against this backdrop, this untapped resource for inducing national reform promises more hope than danger.

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95. *See id.* at 41.

96. *Id.*