

# COOPERATIVE FEDERALISM AND POLICE REFORM: USING CONGRESSIONAL SPENDING POWER TO PROMOTE POLICE ACCOUNTABILITY

*Kami Chavis Simmons\**

## ABSTRACT

*Police misconduct and corruption persist in our nation's local police departments. Recognizing the organizational roots of police misconduct, Congress granted the U.S. Department of Justice (the "DOJ") the authority to seek injunctive relief to implement institutional reforms within local law enforcement agencies. While the federal government's current strategy represents a promising model for reform, the DOJ's efforts cannot reach many local police departments that require intervention. Furthermore, the local primacy of criminal-justice issues, particularly issues related to police practices, implicates important federalism concerns. Although federal intervention is appropriate to address persistent patterns of misconduct, states and local entities must play a more active role in implementing institutional reform of these agencies, and they must have the flexibility to develop locally tailored police accountability measures. This Article proposes a model that encourages federal-state cooperation to address the longstanding questions of how best to promote police accountability within local law enforcement agencies and which entities should be responsible for implementing reform. Congress, pursuant to its spending authority under the U.S. Constitution, should condition federal funding to state and local law enforcement agencies upon the state's development and implementation of regulations to reduce police misconduct and promote police accountability. Specifically, this Article proposes an amendment to the statute authorizing the Community-Oriented Policing Services ("COPS") program. This Amendment would require the federal government to withhold 5% of COPS funding from states that fail to implement measures to*

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\* Associate Professor of Law, Wake Forest University Law School. J.D., Harvard Law School. B.A., The University of North Carolina at Chapel Hill. I would like to thank Ronald Wright, Sidney Shapiro, Roger Fairfax, Michael Pinard, Andrea Dennis, Yolanda Vasquez, Kristin Henning, Renee Hutchins, Sherri Keene, Mercer Givhan and Omari Scott Simmons for their insightful comments, and Sally Irvin, David Fear, Sonya Casstevens, Russell Katz, Craig Principe, and Amanda Johnson for their invaluable research assistance. All errors or omissions are my own.

*reduce police misconduct and promote police accountability. The COPS program has distributed billions of federal dollars to states to hire police officers and implement community policing programs, but the authorizing statute includes no requirement that the agencies receiving these funds ensure the accountability of the officers they hire. Pursuant to the model proposed in this Article, states would develop their own standards to promote police accountability and reduce police misconduct, while the DOJ would determine if the measures met minimum federal guidelines. Thus, the proposed regime is consistent with “cooperative federalism,” a process in which states implement federal standards, yet retain the flexibility to develop and supplement those standards. This Article explores several justifications for implementing this scheme, examines the constitutionality of the proposed amendment, and concludes that the proposal is a viable tool to achieve sustainable reforms in the nation’s local police departments.*

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## INTRODUCTION

Police brutality and corruption have long been issues within American law enforcement agencies. Unfortunately, these problems continue to plague our nation’s local police departments. Nearly two decades have passed since the infamous beating of Rodney King at the hands of Los Angeles police officers, and yet major urban police departments including New

Orleans, Atlanta, Chicago, and New York still struggle with corruption and accusations of excessive uses of force.<sup>1</sup>

Several recent, highly-publicized instances of police misconduct and corruption illustrate that these problems are endemic within several large police departments. For example, in the days following Hurricane Katrina, New Orleans police officers opened fire upon several citizens as they were crossing Danziger Bridge to flee the hurricane's devastation.<sup>2</sup> The officers' shots wounded four citizens and killed two others.<sup>3</sup> One of the victims sustained seven gunshot wounds to the back.<sup>4</sup> Although officers claim that they were under fire from people on the bridge, none of the victims were armed.<sup>5</sup> Perhaps the most disturbing aspect of the Danziger Bridge incident is that authorities have also charged the officers assigned to investigate the shooting with covering up the shooting.<sup>6</sup> Six officers indicted in the case are currently facing trial, and five officers have pleaded guilty to charges related to the shooting or the cover up.<sup>7</sup> One officer, Lt. Michael Lohman, admitted to concealing evidence of what he thought was a "bad shoot."<sup>8</sup>

During the period from 1972 to 1991, citizens accused police officers in Chicago's Police Area 2 of brutalizing suspects to secure confessions. Former Chicago police commander, Jon Burge, was recently convicted and sentenced to fifty-four months for lying about these instances in a deposition regarding a civil lawsuit in 2003.<sup>9</sup> In a deposition, Burge denied

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1. See, e.g., Robbie Brown, *National Briefing, South - Georgia: Ex-Officers Sentenced*, N.Y. TIMES, Feb. 25, 2009, available at <http://query.nytimes.com/gst/fullpage.html?res=9807E7D7133BF936A15751C0A96F9C8B63> (reporting that three former Atlanta police officers were sentenced to prison terms for their roles in the fatal shooting of a 92 year-old Atlanta woman); David W. Chen & Al Baker, *New York to Pay \$7 Million for Sean Bell Shooting*, N.Y. TIMES, July 27, 2010, available at <http://www.nytimes.com/2010/07/28/nyregion/28bell.html> (describing New York City's seven million dollar settlement with the family and friends of Sean Bell, who was unarmed and fatally shot by the police on his wedding day in 2006); Campbell Robertson, *Police Are Charged in Post-Katrina Shootings*, N.Y. TIMES, July 14, 2010, at A1 (detailing the indictments of four current and two former New Orleans police officers in connection with the killing of unarmed civilians on the Danziger Bridge during the days after Hurricane Katrina).

2. Brendan McCarthy, *Danziger Co-Defendant's Trial Severed From Others*, NEW ORLEANS TIMES PICAYUNE, Jan. 20, 2011, available at <http://www.nola.com/news/t-p/frontpage/index.ssf?base/news-16/1295508842160020.xml&coll=1>.

3. *Id.*

4. Laura Maggi, *Testimony That Civilians had Guns on Danziger Bridge Could Be Used in Cops' Favor*, NEW ORLEANS TIMES PICAYUNE, Mar. 10, 2010, available at [http://www.nola.com/crime/index.ssf/2010/03/testimony\\_of\\_civilians\\_with\\_gu.html](http://www.nola.com/crime/index.ssf/2010/03/testimony_of_civilians_with_gu.html).

5. *Id.*

6. *Id.*

7. Campbell Robertson, *Jury Convicts 3 Officers Over a Killing in New Orleans*, N.Y. TIMES, Dec. 10, 2010, at A16.

8. *Id.* The New Orleans police department has earned a reputation as a troubled department because of other egregious acts of police misconduct. For example, a jury convicted three police officers in the shooting death of an unarmed man, Henry Glover. After shooting Glover, officers placed his body in a car and set the car on fire. See *id.*

9. Press Release, U.S. Dep't of Justice, *Former Chicago Police Officer Jon Burge Sentenced for Lying About Police Torture* (Jan. 21, 2011), available at <http://www.justice.gov/opa/pr/2011/>

abusing suspects or being aware of any abuse, yet evidence at his trial showed that he used various types of coercion and abuse such as suffocating suspects with plastic bags, holding guns to their heads, and using electrical instruments to shock them.<sup>10</sup>

These incidents represent not only some of the most flagrant abuses of individual police officers in the United States, but are unfortunate examples of how the police institution and culture cultivate misconduct. The incidents in Chicago and New Orleans could not have occurred absent the collusion and cooperation of several officers in the department who either ignored the conduct, actively assisted their fellow officers in the act, or helped them concealing the wrongdoing.

The findings of the Christopher Commission, which examined the Los Angeles Police Department in the aftermath of the Rodney King beating two decades ago, foretold the stories related above. The Christopher Commission exposed within the Los Angeles Police Department (“LAPD”) an institutional culture, imbued with a fierce group loyalty that cultivated and tolerated misconduct among its officers.<sup>11</sup> Officers who had been the subject of multiple citizen complaints were not disciplined internally for their transgressions, and many were even rewarded with promotions.<sup>12</sup> Furthermore, the Commission noted that the LAPD lacked clear procedures to ensure that citizens could lodge complaints against officers without facing negative consequences.<sup>13</sup> Racial epithets and derogatory remarks about minority citizens were commonplace among the ranks within the LAPD, demonstrating that officers viewed the behavior as acceptable and unlikely to result in adverse consequences.<sup>14</sup> Other blue-ribbon commissions, police practices scholars, and congressional testimony from experts in the area all confirmed that the institutional factors influencing police misconduct were not unique to Los Angeles but existed within many major police departments nationwide.<sup>15</sup> The federal government responded

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January/ 11-crt-909.html.

10. *Id.*

11. *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 COMMISSION].

12. *Id.* at xvii, 39.

13. *Id.* at 158–59.

14. The Christopher Commission documented numerous racially insensitive messages conveyed through the electronic messaging system in the officers’ squad cars. *Id.* at 174.

15. *See, e.g.*, H.R. REP. NO. 102-242 (1991), 1991 WL 206794, at \*136–38 (a congressional committee held hearings and determined that widespread police misconduct was persistent in some of the nation’s large urban centers, such as New York and Boston); ALLYSON COLLINS, HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 1, 33, 45 (1998) (reporting that many of the problems identified in police departments across the nation had an organizational component); COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, CITY OF NEW YORK, COMMISSION REPORT 51 (1994) [hereinafter MOLLEN COMMISSION REPORT], available at [http://www.parc.info/client\\_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf](http://www.parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf) (noting that “[p]olice culture -- the attitudes and values that shape officers’ behavior -- is a

to calls for reform by enacting legislation that grants the Attorney General of the United States the power to sue local police departments that have demonstrated a “pattern or practice” of constitutional violations for injunctive relief.<sup>16</sup> The United States Department of Justice’s (“DOJ”) “pattern or practice” authority, as it is commonly known, demonstrates a departure from the methods typically utilized to address police misconduct. There is widespread consensus among scholars that the organizational culture of police departments has a critical impact upon the level of corruption and misconduct within the department.<sup>17</sup> The DOJ’s pattern or practice investigations recognize the role of institutional culture, and the resulting recommendations from these investigations embody measures to address the institutional culture of the department. Thus, unlike other mechanisms to deter and remedy police misconduct (e.g., criminal prosecution of officers, civil suits pursuant to 42 U.S.C. § 1983, internal investigations, proceedings before citizen review boards), the DOJ’s primary focus in its pattern or practice investigations has been to implement prospective, forward-looking measures that are designed to influence the current organizational culture of the particular department.<sup>18</sup>

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critical component of the problem of police corruption today”).

16. 42 U.S.C. § 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 (2006) (footnote omitted).

17. See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004) (discussing the organizational nature of police misconduct).

18. For a full discussion of the organizational nature of police misconduct and the inadequacy of traditional remedies, see generally *id.*, detailing the organizational factors relevant to police misconduct and noting the inadequacy of punishing individual police officers. The DOJ’s enforcement of § 14141 begins when the DOJ becomes aware of concerns that a local police department might be engaging in such unlawful practices. See *Oversight of the Department of Justice—Civil Rights Division: Hearing Before the Comm. on the Judiciary*, 107th Cong. 18–20 (2002) (testimony of Ralph Boyd, Jr., Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice) [hereinafter *Oversight Hearing*]. The 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. *Id.* at 18–19. If the preliminary investigation reveals sufficient evidence of the allegations, the DOJ then launches a formal investigation. *Id.* at 19. If the DOJ finds a pattern or practice of unconstitutional violations, § 14141 gives the DOJ the authority to file a lawsuit against the law enforcement agency. *Id.* In recent years, the DOJ officials expressly articulated a preference for avoiding litigation and negotiating with municipalities to ensure compliance with the suggested reforms. *Id.* at 51–52. The most common provisions of these negotiated agreements require local police departments

Despite the many efforts to reform local police departments and to increase police accountability, police misconduct and corruption persist in the United States.<sup>19</sup> Although many state legislatures have taken some measures to ensure that individual officers who engage in misconduct are disciplined or removed from their positions, states have not adequately addressed the organizational or institutional roots of police misconduct. While the federal government can play an integral role in ensuring that the practices of local police departments comply with the U.S. Constitution, state governments can and should play a more active role in ensuring that the policies and practices of the local police departments conform to certain minimum standards. State governments need significant financial and other incentives to encourage the development and adoption of measures that increase police accountability. Accordingly, this Article argues that enhancing police accountability requires the implementation of a “Cooperative Federalism” regime—a process that promotes greater federal–state collaboration and allows states to retain flexibility in implementing federal standards related to police accountability.<sup>20</sup> To accomplish this end, this Article argues that Congress, pursuant to the Spending Clause of the U.S. Constitution, should impose a condition upon states receiving federal grant money for law enforcement initiatives that requires states to enact legislation aimed at promoting police accountability.<sup>21</sup> Specifically, states that fail to adopt either proposed regulations, or legislation modeled on the existing federal pattern or practice legislation, would be required to forfeit 5% of those federal funds.

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to implement or revise internal policies regarding the development of early warning tracking systems to detect “problem officers,” “use-of-force reporting system[s],” and procedures to establish an impartial civilian complaint review process. 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, 6–8 (2003).

19. The term “police accountability” perhaps requires a more specific definition. The focus of this Article is improving the way in which police officers treat individual citizens with respect to preserving their constitutional rights. See Samuel Walker & Morgan MacDonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice Statute,”* 19 GEO. MASON U. C.R. L.J. 479, 483–84 (2009) (discussing the various dimensions of police accountability).

20. “Cooperative federalism” is a term that describes the symbiotic relationship between the states and national governments. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 284 (2005) (offering a definition of “Cooperative Federalism”). See also Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 578 (1998) (describing cooperative federalism as a process in which “states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards”) (quoting Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534 (1995)).

21. Article I, Section 8 of the U.S. Constitution, referred to as the Spending Clause, states that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .” U.S. CONST. art. 1, § 8, cl. 1. Thus, although Congress cannot compel states to enact specific legislation, the Spending Clause of the Constitution does permit Congress indirectly to influence state regulation through the use of monetary incentives. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

Part I of this Article examines the national scope of police misconduct and demonstrates the necessity of continued federal involvement in efforts to reform the practices within local police departments. This Part briefly summarizes the traditional mechanisms for remedying police misconduct and contrasts those measures with 42 U.S.C. § 14141, a statutory scheme that represents the current federal strategy designed to eliminate constitutional violations within troubled police departments. This Part also critiques the structure and implementation of the current federal scheme. Although § 14141 gives the federal government greater authority to ensure that the practices of local police departments meet certain standards, the federal government's current efforts to alleviate police misconduct do not, alone, adequately address police misconduct on a national level. Despite the necessary involvement of the federal government in the realm of police reform, several important justifications exist for maintaining state involvement in overseeing and implementing improvements in local police practices. For example, only the most highly publicized instances of local police misconduct are likely to receive attention because federal resources are limited. Thus, the nation cannot depend entirely upon the federal government to address these issues. This Part also addresses important federalism concerns related to federal intervention in local police issues. Because states and local entities are in a position best suited to determine the frailties of their local police departments, they must play an integral part of any effort to reform those agencies.<sup>22</sup> Historically, however, state indifference to civil-rights issues involving police brutality demonstrates that state legislatures need active encouragement to enact legislation allowing them to adequately address police-accountability issues. Thus, this Part argues that innovative state-federal cooperation, characterized as the concept of cooperative federalism, will be critical to implementing sustainable police reform measures at the local level.

Part II proposes a simple, yet powerful tool to encourage states to develop and implement some of the measures that the federal government has already deemed useful in eliminating patterns and practices of unconstitutional violations in the nation's local law enforcement agencies. Pursuant to its authority under the Spending Clause of the Constitution, this Article proposes that Congress should condition the receipt of federal funds for local law enforcement agencies upon whether the state has adopted regulations aimed at ensuring police accountability. Specifically, this Part advocates that Congress should condition federal money delivered to states under the Community Oriented Policing Services ("COPS") pro-

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22. See Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 843-44 (1999) (noting the importance of "preserving the opportunity for local experimentation in the area of police accountability" while promoting national standards in the context of the DOJ's pattern or practice legislation).



gram upon the state's adoption of measures to eliminate constitutional violations by members of local police departments. Historically, the federal government has given billions of dollars to states to support their law-enforcement initiatives, which include hiring and training police officers. This funding, however, is not tied to conditions that ensure police accountability. The possibility of losing even a fraction of federal money would adversely impact local police departments, and thus would be a powerful incentive for states to implement and enforce measures to address police accountability.

Part III sets forth the policy justifications for federal-state collaboration. Although this type of federal-state collaboration is revolutionary in the context of local police reform, federal-state collaboration itself is not a novel concept. Cooperative-federalism regimes have existed in other policy contexts, and those experiments in federal-state collaboration should inform the policy debate regarding the federal government's proper role in reforming local police departments. In addition to explaining how Congress has used its spending power to induce states to enact certain policies within the criminal justice context, this Part explores the use of congressional spending power as a logical, but underutilized, tool to cultivate federal-state cooperation in the context of police accountability and demonstrates the benefits of federal-state collaboration in the police-accountability context.

Finally, Part IV discusses the possible challenges of using congressional spending power to achieve greater police accountability. Applying the criteria set forth in *South Dakota v. Dole*, this Part assesses the constitutionality of the proposal to condition COPS funds to induce states to enact legislation or implement regulations that promote police accountability. This Article concludes that the proposed amendment to COPS could be fashioned to adhere to the criteria established in *South Dakota v. Dole* and thus would be a constitutional exercise of congressional spending power.<sup>23</sup> This Article illustrates that potential challenges to the proposal can be overcome, and it concludes that the Spending Clause represents a

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23. *Dole*, 483 U.S. at 206. In *Dole*, Congress had attached a condition of a minimum state drinking age on the receipt of federal highway funds; any state failing to heed that minimum drinking age would lose 5% of the funds otherwise obtainable. *Id.* at 209. The Court noted that 5% was a relatively small percentage of the total funds available, and the Court held that the financial inducement offered by Congress was not "so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 210 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). The *Dole* court set forth several criteria which must be met in order to ensure the constitutionality of legislation that conditions the receipt of federal funds on the state's implementation of certain legislation. Pursuant to *Dole*, in order to pass constitutional muster, the legislation enacted pursuant to congressional spending power must meet the following criteria: (1) the exercise of spending power must be in pursuit of the "general welfare"; (2) Congress must state any conditions on the states' receipt of federal funds "unambiguous[ly]"; (3) conditions on federal grants must be rationally related to the federal interest in national projects or programs; (4) Congress cannot induce states to engage in activities that would themselves be unconstitutional; and (5) the financial inducement cannot be coercive. *Id.* at 207-11

viable tool to encourage states to take a more active role in local police-reform initiatives.

## I. FEDERAL INTERVENTION IN EFFORTS TO PROMOTE POLICE ACCOUNTABILITY

### A. *The Scope of Police Misconduct*

The number of complaints citizens file with the federal government illustrates the national scope of police misconduct. For example, in 2001, the federal government received 6,000 complaints against law enforcement officers.<sup>24</sup> The Christopher Commission, which investigated the Los Angeles Police Department, and the Mollen Commission, which investigated the New York City Police Department, documented widespread misconduct among police officers in those departments.<sup>25</sup> Similarly, commissions in Chicago, New Orleans, and Boston unearthed instances of individual and systemic police misconduct.<sup>26</sup>

The term “police misconduct” is broad and requires further refinement before discussing remedial measures. Typically, the concept of police misconduct conjures images of police officers physically abusing criminal suspects come to mind. Although instances of police brutality or excessive uses of force tend to receive the most media attention, such instances represent only one aspect of undesirable conduct in which some law enforcement officers engage. Excessive uses of force by police officers, alternatively referred to as police brutality, connotes physical abuse or other uses of force by police officers such as deployment of chemical agents or canines.<sup>27</sup> Police misconduct, however, includes a broader range of prac-

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24. See 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) (citing CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, ACTIVITIES AND PROGRAMS, available at <http://www.usdoj.gov/crt/activity.html> (last updated Oct. 8, 2009)). Goldman notes that the number 6000 is an approximation since the website states that approximately 12,000 criminal civil rights complaints filed annually are against “officials,” a term that includes “state and local police officers, prison superintendents and correctional officers, federal law enforcement officers and state and county judges.” *Id.* at 126 n.26. Goldman notes that it is assumed that “complaints against law enforcement officers make up the bulk of the complaints against ‘officials’ since there are many more law enforcement officers than other types of officials listed.” *Id.*

25. See CHRISTOPHER COMMISSION, *supra* note 11, at ix; MOLLEN COMMISSION REPORT, *supra* note 15.

26. See COLLINS, *supra* note 15, at 153, 253; *id.* at 140 (citing St. Clair Commission, *Report of Boston Police Department Management Review Committee* iv (Jan. 14, 1992)).

27. In general, police uses of force also include use of physical force or restraint, brandishing or firing of service weapons, deployment of canines or chemical agents, and use of nonlethal weapons such as tasers. TOM MCEWEN, U.S. DEP'T OF JUSTICE, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE, at 40 (1996), available at [http://bjs.ojp.usdoj.gov/content/pub/pdf/ndcop\\_uof.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/ndcop_uof.pdf). Depending upon the circumstances an officer encounters, use of force may be necessary to resolve the situation and for the safety of the officer or others. *Id.* at 1. It is the use of *excessive* force that is objectionable. *Id.* at 1–2. However, even the term “excessive force” is problematic because “there is

tices that also infringe on the civil rights of individual citizens such as perjury, extortion, falsifying evidence, and engaging in unconstitutional racial profiling.<sup>28</sup> Collectively, these practices constitute a broad category of behavior occurring in local police departments that the proposal in this Article seeks to address. Because of the myriad activities that police misconduct encompasses, determining the scope of the problem is difficult and necessitates considering different types of behaviors separately. This Subpart categorizes negative behaviors by dividing them into three separate areas: utilizing excessive force, offering false evidence, and engaging in unconstitutional racial profiling. There is ample empirical evidence to demonstrate that both alone and collectively, these aspects of police misconduct are significant problems persisting in local police departments nationwide.

### *1. Use of Force and Excessive Uses of Force by Police Officers*

In 2002, “[s]tate and local law enforcement agencies, representing . . . 59% of officers, received a total of 26,556 citizen complaints about police use of force.”<sup>29</sup> This translates to a rate of 6.6 complaints per 100 full-time sworn officers.<sup>30</sup> Data also indicate that “as many as 6 percent of

no single, accepted definition of ‘excessive force’ among police, researchers, and legal analysts.” *Id.* at 5. The legal standard for determining whether an officer used excessive force has been defined as “whether the officer *reasonably* believed such force to be *necessary* to accomplish a legitimate police purpose.” *Id.* at 5–6. Determinations are inherently fact specific and made on a case-by-case basis, as there are “no universally accepted definitions of what is ‘reasonable’ [or] ‘necessary . . . .’” *Id.* at 6. See also Kenneth Adams, *Measuring the Prevalence of Police Abuse of Force*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 52, 52 (William A. Gellar & Hans Toch eds., 1996) [hereinafter POLICE VIOLENCE] (discussing the inherent subjectivity and involved in making judgments regarding the appropriate use of force). Failure to separate justified from nonjustified uses of force is one of several conceptual and analytical problems inherent in studying police misconduct. See *id.* at 55. For a full discussion of these challenges, see McEWEN, *supra*, at 21, 31, 47, 54.

28. There are of course numerous other imaginable ways in which officers might abuse their authority. For a full discussion of deviant police behaviors, see David Lester, *Officer Attitudes Toward Police Use of Force*, in POLICE VIOLENCE, *supra* note 27, at 180–81, 188; see also Herbert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in POLICE VIOLENCE, *supra* note 27, at 129, 140–41. Because police misconduct manifests itself in numerous ways, definitional problems abound. Police violence/excessive force has been defined as “a type of misconduct, deviance, and police abuse and is used as a generic term for brutality, extralegal force, riots, torture, shootings, killings, and deadly force.” Jeffery Ian Ross, MAKING NEWS OF POLICE VIOLENCE: A COMPARATIVE STUDY OF TORONTO AND NEW YORK CITY 3 (2000).

29. MATTHEW J. HICKMAN, U.S. DEP’T OF JUSTICE, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 1 (June 2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ccpuf.pdf>. Just as “police misconduct” is broad and encompasses many forms of police behavior, multiple terms are used relating to police uses of force. The distinctions in terminology can be meaningful when discussing studies related to uses of force and remedial measures aimed at addressing particular types of uses of force. See Kenneth Adams, *What We Know About Police Use of Force*, in DEP’T OF JUSTICE, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 4 (1999), available at <http://ncjrs.gov/pdffiles1/nij/176330-1.pdf> (noting the various characterizations of police use of force including deadly force, police brutality, excessive force, improper force, or illegal force).

30. HICKMAN, *supra* note 29, at 2.

arrests involve the use of force by police.”<sup>31</sup> Similarly, a 1991 Gallup poll found that 5% of respondents in a telephone survey said that they had been physically mistreated or abused, while 20% of the respondents knew someone that had been physically mistreated or abused.<sup>32</sup> In the same poll, a higher percentage of nonwhites reported having experienced abuse by police officers.<sup>33</sup> That same year, the Christopher Commission determined that force was involved in 1% of arrests in Los Angeles.<sup>34</sup> Despite the relatively low percentage of uses of force reported, nearly 30% of the officers surveyed believed that “the use of excessive force is a serious problem facing the Department.”<sup>35</sup> Equally disturbing is the revelation that nearly 4.6% of officers agreed that officers were justified in using physical punishment to suspects exhibiting “a bad or uncooperative attitude.”<sup>36</sup>

Although the Christopher Commission’s report provides valuable insight into the problem of police officer uses of force in the Los Angeles Police Department, Human Rights Watch documented similar problems in several cities nationwide. Based on research conducted in fourteen U.S. cities over a two-and-a-half year period, Human Rights Watch came to the conclusion that “[p]olice brutality is one of the most serious, enduring, and divisive human rights violations in the United States.”<sup>37</sup> The study examined police departments in Atlanta, Boston, Chicago, Detroit, Indianapolis, Los Angeles, Minneapolis, New Orleans, New York, Philadelphia, Portland, Providence, San Francisco, and Washington, D.C.<sup>38</sup> Human Rights Watch found that “police brutality [was] persistent in all of these cities . . . .”<sup>39</sup>

While information available for certain metropolitan areas demonstrates a pervasive problem, several studies have found that police violence has impacted only a small percentage of citizens nationwide. For example, in 1999, a joint report by the National Institute of Justice and the

31. Adams, *supra* note 27, at 61. One difficulty in tracking police uses of force is the lack of systemic, centralized data collection in many departments. See MCEWEN, *supra* note 27, at 18. Indeed, collection of these statistics was a slow process that began only in the last thirty years. *Id.* In the 1980s and 1990s several task forces made recommendations that all law enforcement agencies begin to collect data on uses of force. *Id.* at 20. It was not until the 1994 Crime Act that the federal government was required to “‘acquire data about the use of excessive force by law enforcement officers’ and to ‘publish an annual summary of the data acquired . . . .’” *Id.* at vi (citation omitted in original).

32. Adams, *supra* note 27, at 63.

33. *Id.* at 91. While 5% of whites reported that they had experienced uses of force by police officers, 9% of nonwhites reported uses of force. *Id.*

34. *Id.* at 61.

35. CHRISTOPHER COMMISSION, *supra* note 11, at 34. Similarly, a 1994 study of police officers in Illinois (excluding Chicago), found that 21.1% of officers had seen another officer “use more force than was necessary to apprehend a suspect . . . .” MCEWEN, *supra* note 27, at 71-72. This same study revealed that 5.7% of officers had witnessed another officer “cover up excessive force . . . .” *Id.* at 72.

36. Adams, *supra* note 27, at 75 (quoting CHRISTOPHER COMMISSION, *supra* note 11, at 34).

37. COLLINS, *supra* note 15, at 1.

38. *Id.*

39. *Id.* at 26.

Bureau of Justice Statistics found that only 1% of citizens “who had face-to-face contact[] with police said that officers used or threatened force . . . .”<sup>40</sup> In 1992, Anthony Pate and Lori Fridell surveyed 1,697 law enforcement agencies nationwide regarding police-use-of-force data for 1991. The study revealed, among other things, a rate of 272 uses of bodily force per 1,000 officers.<sup>41</sup> In 1996, a National Institute of Justice study reported that 500,000 people over the age of twelve were subjected to force or the threat of force by law enforcement officers.<sup>42</sup> Thus, while some argue that statistics demonstrate that police use of force is relatively infrequent, these incidents touch a large number of citizens and can negatively impact the perception of police officers. Additionally, a common critique of those attempting to study police use of force is that there is a lack of data collected on this issue and many police departments nationwide do not collect data on uses of force, and thus, instances of improper or illegal force might be underreported.<sup>43</sup>

## 2. *Police Perjury*

In addition to excessive uses of force, it is widely accepted that some police officers frequently offer false testimony while testifying in court or otherwise falsify evidence.<sup>44</sup> The Mollen Commission noted that police perjury, also known as “testilying,” was endemic in many New York police precincts.<sup>45</sup> Other observers have found “a widespread belief that testilying is a frequent occurrence” throughout the nation.<sup>46</sup> The Mollen Commission further noted that police falsification, which included “testi-

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40. Adams, *supra* note 27, at vii. Another study by the Virginia Association of Chiefs of Police similarly reported infrequent uses of force. The study found that officers used force in only 0.15% of the total number of arrests. MCEWEN, *supra* note 27, at 36.

41. *Id.* at 34.

42. Angelyn Spaulding Flowers, *Police Misconduct*, INST. FOR PUB. SAFETY & JUSTICE: A FACT SHEET (2001), available at <http://www.ipsj.org/publications/Police%20Misconduct.pdf>.

43. See generally ANTHONY M. PATE & LORIE A. FRIDELL, *POLICE USE OF FORCE: OFFICIAL REPORTS, CITIZEN COMPLAINTS, AND LEGAL CONSEQUENCES* (1993). Recently, the NAACP has provided a mechanism on its website to help track, monitor, and document instances of police abuse by enabling citizens to file reports online. See *Please Tell Us More About Your Police Misconduct Incident*, <http://action.naacp.org/page/s/misconduct> (last visited Jan. 17, 2011). See also NAACP *Urges Cell Phone Use to Fight Police Brutality*, CNN, July 15, 2009, [http://articles.cnn.com/2009-07-15/us/naacp.police\\_1.cell-phone-police-misconduct-transit-officer?\\_s=PM:US](http://articles.cnn.com/2009-07-15/us/naacp.police_1.cell-phone-police-misconduct-transit-officer?_s=PM:US).

44. See, e.g., Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998). Police brutality and police perjury are of course related because many officers who have engaged in or witnessed police brutality may lie about the incident to protect themselves or other officers. See I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 866 (2008) (“Police brutality persists, at least in part, because officers are aware that they can misrepresent the truth with impunity. . . . [A] reduction in [perjury] might have the collateral effect of contributing to a reduction in brutality and profiling.”).

45. MOLLEN COMMISSION REPORT, *supra* note 15, at 36–43.

46. Chin & Wells, *supra* note 44, at 235–36 (quoting Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996)).

monial perjury,” “documentary perjury,” and “falsification of police records,” was “probably the most common form of police corruption facing the criminal justice system . . . .”<sup>47</sup>

Several factors explain the prevalence of police perjury.<sup>48</sup> Some officers, adhering to the “blue wall of silence” may lie to protect other officers who engaged in misconduct.<sup>49</sup> Perhaps the most common motivation for offering false testimony is to preserve evidence that might normally be suppressed under the exclusionary rule. Alan Dershowitz has stated that “[a]lmost all police lie about whether they [have] violated the Constitution in order to convict guilty defendants.”<sup>50</sup> Indeed, empirical evidence suggested that “judges, prosecutors, and defense attorneys all view police perjury at suppression hearings as relatively common.”<sup>51</sup>

Experts attribute the “closed nature” of police culture and the dangerous nature of police work to the endemic nature of the police code of silence.<sup>52</sup> For example, occupational groups like police officers enjoy a sometimes necessary “close-knit camaraderie” which may incentivize them to lie to protect fellow officers engaged in wrongdoing.<sup>53</sup> Thus, even an officer who is not directly involved in corruption may perjure herself to protect fellow officers.<sup>54</sup> For example, testimony from officers appearing before both the Mollen Commission and the Christopher Commission indicated that officers faced retaliation if they did not abide by the code of silence.<sup>55</sup>

47. MOLLEN COMMISSION REPORT, *supra* note 15, at 36.

48. *See id.* *See also* Chin & Wells, *supra* note 44, at 247 (discussing various contexts in which officers engage in some form of perjury, including meeting arrest quotas, the ability to procure overtime pay, and extortion).

49. The “blue wall of silence,” also known as the “code of silence,” has been the topic of numerous articles about police culture. *See, e.g.,* Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17 (2000). Human Rights Watch also acknowledged the existence of the code of silence and the detrimental role it plays in holding police officers accountable for their behavior. *See* COLLINS, *supra* note 15, at 16 (recommending that police officials should “provide consistent positive reinforcement for those who report human rights violations” and that those who fail to report it be stigmatized).

50. ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xxi (1983).

51. Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 933 (2009) (citing Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992)); *see also* Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596 (“Every lawyer who practices in the criminal courts knows that police perjury is commonplace.”).

52. Chin & Wells, *supra* note 44, at 251–53.

53. *Id.* at 251. *See* Sharp v. City of Houston, 960 F. Supp. 1164, 1174–75 (S.D. Tex. 1997) (noting a potential customary code of silence as indicated by evidence of training given at the police academy that officers should not report misconduct and should take measures to conceal misconduct).

54. *See* Chin & Wells, *supra* note 44, at 251.

55. *See* MOLLEN COMMISSION REPORT, *supra* note 15, at 54 (statement of officer that those who do not adhere to the code are “held away,” “pushed off to one side,” and “kept away from the rest of the group”); CHRISTOPHER COMMISSION, *supra* note 11, at 132. *See also* Chin & Wells, *supra* note 44, at 257 (citing MOLLEN COMMISSION REPORT, *supra* note 15, at 50); *id.* at 258 (detailing specific accounts of officers who faced retaliation for breaking the code of silence).

The detrimental impact of police perjury on defendants and the criminal justice system is undeniable. For example, “[i]n individual cases, not only may the guilty be wrongly acquitted, but the innocent may be wrongly convicted. Over time, average citizens may lose faith in the police department and in the law itself.”<sup>56</sup> Similarly, police perjury and the code of silence severely hamper police accountability measures. The Christopher Commission noted that “[p]erhaps the greatest single barrier to the effective investigation and adjudication of complaints is the officers’ unwritten ‘code of silence’” which “consists of one simple rule: an officer does not provide adverse information against a fellow officer.”<sup>57</sup> The dangers of the code of silence often reverberate far beyond an officer’s single act of perjury, and the implications are widespread. As one author notes, “[the code of silence] mandates that no officer report another for misconduct, that supervisors not discipline officers for abuse, that wrongdoing be covered up, and that any investigation or legal action into police misconduct be deflected and discouraged.”<sup>58</sup>

### 3. Racial Profiling

The term racial profiling can generally be defined as occurring “whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person’s racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating.”<sup>59</sup> Empirical evidence supports the view that racial profiling is a widespread practice of police officers in many communities. For example, in New Jersey, blacks and Hispanics constituted 78% of the motorists police stopped and searched.<sup>60</sup> Although officers stopped and searched whites on a less frequent basis, officers found evidence of criminal wrongdoing 25% of the time.<sup>61</sup> Yet another study found that African-American women are nine times more likely than white women to be strip searched or x-rayed

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56. Chin & Wells, *supra* note 44, at 237.

57. CHRISTOPHER COMMISSION, *supra* note 11, at 168. See also MOLLEN COMMISSION REPORT, *supra* note 15, at 51.

58. David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 487 (1992).

59. See Debra Livingston & Samuel R. Gross, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415. See also Capers, *supra* note 44, at 849 (citing Gallup Poll that found 40% of blacks who had been pulled over for traffic stops believed that police specifically targeted them based on their race).

60. Capers, *supra* note 44, at 850. Similarly, in Maryland, although African-Americans constituted only 17.5% of drivers violating traffic laws on a particular portion of Interstate 95, 72.9% of drivers that state police stopped and searched were African-American. *Id.* Myriad other studies of other jurisdictions have produced similar results. See *id.* (listing evidence of racial profiling in several American cities).

61. *Id.*

by U.S. Customs officers.<sup>62</sup> In New York City, initiatives implemented in the early 1990s, commonly referred to as “quality-of-life” policing, resulted in a disproportionate number of police stops and frisks of racial minorities.<sup>63</sup> Recent data demonstrate that police in New York City continue to stop and frisk blacks and Hispanics in numbers disproportionate to their representation in the general population. For example, in 2006, of 508,540 reported stops by police, 55% involved blacks, 30% involved Hispanics, and 11% involved whites.<sup>64</sup> As a result of litigation, several jurisdictions in the United States have been subject to consent decrees to address issues related to racial profiling, including Highland Park, IL, the State of New Jersey, and the State of Maryland.<sup>65</sup>

In isolation or collectively, the aforementioned practices exemplify the institutional nature of police misconduct. Individual officers who engage in these practices generally do so because the institutional culture within the police agency allows, tolerates, or encourages the behavior. Thus, it is the institution itself that must change.

## *B. Implications of Police Misconduct*

### *1. The Tangible Impact of Police Misconduct*

The implications of police misconduct negatively impact communities in a number of ways. Patterns of police abuse have a tangible impact upon affected municipalities and police departments due to the financial costs of litigating and settling litigation associated with police misconduct in the United States. Every year, municipalities nationwide pay millions of dollars to victims of police abuse.<sup>66</sup> For example, one group estimated that from April to June of 2009, nearly \$72 million were spent in costs related to civil litigation involving claims of police misconduct.<sup>67</sup> Between 1994

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62. *Black Women Searched More, Study Finds*, N.Y. TIMES, Apr. 10, 2000, at A17.

63. Reenah L. Kim, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 465 n.13, 467 n.20 (2001).

64. Christopher Dunn, *Civil Rights and Civil Liberties: NYPD Stops and Frisks and the Fourth Amendment*, N.Y. L.J., Feb. 27, 2007, at 3. For other statistics involving disproportionate stops and frisks, see Tim Roche & Constance Humburg, *Stops Far Too Routine for Many Blacks*, ST. PETERSBURG TIMES, Oct. 19, 1997, at 1A.

65. *See, e.g.*, *Ledford v. City of Highland Park*, No. 00C4212, 2000 WL 1053967 (D. Ill. July 31, 2000); *United States v. New Jersey*, No. 99-5970, (D.N.J. Dec. 30, 1999) (Consent Decree), available at <http://www.state.nj.us/oag/jointapp.htm>; and Peter Hermann, *Role of Race in Police Traffic Stops*, BALTIMORE SUN, Oct. 3, 2010, at 6A.

66. *See, e.g.*, Dan Christensen, *Blood Money: Victims of Police Wrongful Shootings Have Won Millions from Miami in Court*, 76 MIAMI DAILY BUS. REV. 6, 2001 WLNR 12926843, Nov. 5, 2001; Mick Dumke, *The City that Pays Out*, CHICAGO READER, Nov. 27, 2008, available at <http://www.chicagoreader.com/chicago/the-city-that-pays-out/Content?oid=1104044>.

67. *See Quarterly Q2-2009 NPMSRP Police Misconduct Statistical Report*, INJUSTICE EVERYWHERE, [http://www.injusticeeverywhere.com/?page\\_id=481](http://www.injusticeeverywhere.com/?page_id=481) (last visited Jan. 17, 2011).



and 2000, damages in New York City police misconduct cases amounted to \$180 million.<sup>68</sup> Similarly, the City of Detroit paid over \$124 million in lawsuits related to police misconduct.<sup>69</sup> Damages related to the L.A. Rampart scandals totaled \$75.5 million for the City of Los Angeles.<sup>70</sup> More recently, in February 2009, the City of Los Angeles paid \$13 million to demonstrators who were injured when the Los Angeles Police Department forcefully broke up a peaceful pro-immigration May Day rally.<sup>71</sup> Sadly, as one commentator observed, despite the large amounts of money at stake, the high amount of damages the municipalities pay to litigate and settle these claims has not had a deterrent effect on police misconduct.<sup>72</sup>

## 2. *The Intangible Impact of Police Misconduct: Undermining the Rationale of Community Policing*

In addition to the financial ramifications of police misconduct, there is also evidence of negative, intangible effects of persistent police misconduct. Police misconduct affects not only individual members of society, but there is substantial evidence that police abuse negatively impacts the perceived legitimacy of police officers and increases police–community tensions.<sup>73</sup> This is acutely the case among minority groups who are disproportionately impacted by police brutality.<sup>74</sup> Community policing, which has become the dominant model of policing in this country, is premised upon the ability of police officers and community members to forge partnerships to fight crime within the respective community.<sup>75</sup> While it is dif-

68. David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 156 (2009).

69. *Id.*

70. Tim Rutten, *LAPD Gets Reform Right*, L.A. TIMES, Feb. 7, 2009, at A19.

71. During this event, commonly referred to as the “May Day Melee,” forty-two people were injured including several journalists. Richard Winton & Andrew Blankstein, *Officers Won’t Be Charged in Melee*, L.A. TIMES, Oct. 31, 2009, at A8. *See also No New Charges in LA Melee*, GRAND RAPIDS PRESS, Oct. 31, 2009, at A6. Los Angeles, unfortunately, offers a prime example of the negative financial impact police violence has on a community. The Rodney King beating by Los Angeles police officers cost the city \$3.8 million to settle, but fifty-two people were killed in the civil unrest that followed the acquittal of the officers and \$446 million worth of property was destroyed. Rutten, *supra* note 70, at A19.

72. *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 9–11 (2009) (stating that prosecutions against police officers are still too rare to deter misconduct).

73. *See, e.g.*, Walker & MacDonald, *supra* note 19, at 483–84.

74. *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1387 (noting that police brutality and its impact on minority communities “threatens the stability of our society and the legitimacy of our justice system”).

75. There is a large body of scholarship devoted to discussing the various forms of community policing, and much of this scholarship details both the benefits and detriments of community policing. *See* Livingston, *supra* note 22, at 853 (reviewing the literature of community policing). The scholarship also elucidates the debate regarding whether certain community policing techniques unfairly restrict the liberties of low-income communities with crime problems or whether they empower inner-

difficult for scholars to formulate one definition of community policing, one common theme in community policing models is the “decentralization of command” and increased “discretion of street-level officers, especially when they deal with community-nominated problems.”<sup>76</sup> In contrast to other models of policing, community policing emphasizes problem-solving by “focusing proactively on specific neighborhood problems . . . .”<sup>77</sup> When tension between police and citizens exists, it logically becomes more difficult for police officers and community residents to forge partnerships that are aimed at addressing crime.<sup>78</sup> Thus, police misconduct undermines the rationale and the efficacy of the community policing model that has become so popular in the United States.

### C. Federal Authority to Address Police Misconduct

Despite the national scope of police misconduct, the federal government historically has demonstrated a fierce reluctance to investigate and prosecute local law enforcement officers for misconduct, and DOJ officials have often referred to the federal government’s role as a “backstop” when states fail to properly address instances of police misconduct.<sup>79</sup> Thus, state and local governments have retained primary responsibility for regulating local and state police officers. William Stuntz noted that in the criminal-justice context, “[l]ocal governments dominate, more so than in any other sphere of governance or regulation.”<sup>80</sup> States, too, have failed to aggressively prosecute police officers for misconduct or encourage wide-

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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 persons’ 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).

76. Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1600 (2002).

77. *Id.* For further descriptions of community policing see Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQ. 236 (1979).

78. See Walker & MacDonald, *supra* note 19, at 483 (noting that in the community policing context, “[c]itizen cooperation . . . is diminished by patterns of abusive police conduct that undermines public trust”) (citing Jack R. Green, *Community Policity in America: Changing the Nature, Structure, and Function of the Police*, 3 J. CRIM. JUST. 299, 319–20 (2001), available at [http://ncjrs.gov/criminal\\_justice2000/vol\\_3/03g.pdf](http://ncjrs.gov/criminal_justice2000/vol_3/03g.pdf)).

79. For example, then-Assistant Attorney General John Dunne stated in Congressional testimony that “[w]e are not the front line troops in combating instances of police abuse. That role properly lies with the internal affairs bureaus of law enforcement agencies and with state and local prosecutors. The federal government program is more of a backstop, if you will, to these other resources.” *Police Brutality: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong., 1st Sess. 3 (1992) (testimony of John R. Dunne, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice), quoted in COLLINS, *supra* note 15, at 91 [hereinafter *Police Brutality Hearings*]. Some scholars are critical of this “backstop” role. See, e.g., William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL’Y 665, 666 (2002) (noting that “[t]he federal government serves only as a backstop, and not a very important backstop at that”).

80. Stuntz, *supra* note 79, at 666.

spread reform of local agencies within their jurisdiction.<sup>81</sup> Typically, it is only when states fail to act that the federal government chooses to take advantage of some of the tools within its arsenal to combat police misconduct.<sup>82</sup>

Recognizing the need for federal authority to address police misconduct, Congress has enacted several legislative measures that allow the federal government a role in addressing police misconduct. Federal legislative efforts to address police misconduct allow for civil suits, criminal prosecutions, and injunctions to eliminate patterns and practices related to constitutional violations. Each of these measures, however, has fallen short with regard to effectuating widespread institutional reform of police departments.<sup>83</sup>

### *1. Section 1983 Civil Liability for Police Misconduct*

Federal legislation allows victims of police misconduct to file civil suits for violations of citizens' civil rights. Specifically, § 1983 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>84</sup> Critics of § 1983 argue that it is an ineffective tool to remedy police misconduct because municipalities generally indemnify individual police officers so that the officer does not pay for the defense or for penalties associated with the suit.<sup>85</sup> Furthermore, critics argue that civil

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81. Many commentators suggest that the difficulty inherent in police prosecutions and juries' failure to credit the testimony of defendants in police abuse cases account for the lack of state prosecutions of police misconduct. See John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803–05 (2000).

82. In addition to federal legislative “remedies” for police misconduct, there are other methods to address police misconduct—both external and internal to the police department. Other nongovernmental remedies for police misconduct include internal investigations, citizen review boards, and accreditation entities. For detailed discussions of the benefits and shortcomings of each of these remedies, see Gilles, *supra* note 74, at 1399–1401 (stating that traditional approaches have not addressed systemic police misconduct); Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. §1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 771–72 (1993) (stating that traditional approaches fail because the actual cost to individual officers is minimal and the expense to police departments is viewed as an acceptable cost of doing business); Walker & MacDonald, *supra* note 19, at 490–91 (noting that the accreditation process administered by the Commission on Accreditation is voluntary, lacks substantive content, and does not penalize violating departments).

83. See Jacobi, *supra* note 81, at 802–06 (discussing how state officials rarely prosecute police misconduct).

84. 42 U.S.C. § 1983 (2006). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, 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.*

85. Patton, *supra* note 82, at 759.

litigation strategies “almost never address flawed management, policies, or patterns of abuse . . . .”<sup>86</sup>

### 2. *Federal Criminal Liability for Police Misconduct*

Police officers also may face federal criminal charges for their actions related to police misconduct.<sup>87</sup> Although state criminal laws also allow state governments to prosecute police officers, such prosecutions are rare.<sup>88</sup> The failure to prosecute these officers is often attributed to the inherent conflict of interest that exists between the prosecutors’ offices and the police officers upon whose work the prosecutors rely to secure convictions.<sup>89</sup> When states fail to prosecute officers for unlawful actions, the federal government may initiate prosecutions pursuant to 18 U.S.C. §§ 241 and 242.<sup>90</sup> However, DOJ officials have often noted the preference for state prosecution and that federal intervention should serve only as a “backstop” when local authorities fail to act.<sup>91</sup> Accordingly, federal prosecutions, like state criminal prosecutions, are rare and cannot be relied upon to adequately address police misconduct and corruption.

### 3. *Federal Authority to Initiate Suit for Injunctive Relief for a Pattern or Practice of Constitutional Violations*

Finally, the federal government has statutory authority to seek injunctive relief against local law enforcement agencies where a pattern or practice of constitutional violations exists.<sup>92</sup> This legislation reflects a trend over the last two decades that focuses on the organizational roots of police misconduct rather than the misdeeds of individual officers.<sup>93</sup> The ability to affect policy level changes at an organizational level distinguishes § 14141

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86. COLLINS, *supra* note 15, at 77.

87. Section 241 of U.S.C. Title 18 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 (2006). 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 person in 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 . . . .” *Id.* § 242.

88. *See* Jacobi, *supra* note 81, at 802–06.

89. *See id.* at 803–04.

90. *See Police Brutality Hearings, supra* note 79, at 4.

91. *Id.* at 5.

92. Title 42 U.S.C. § 14141 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.” 42 U.S.C. § 14141 (2006).

93. *See* COLLINS, *supra* note 15, at 33, 45 (reporting that many of the problems identified in police departments across the nation had an organizational component); Armacost, *supra* note 17, at 493–94.

as one of the most promising tools within the federal arsenal to combat police misconduct.

*a. Investigating Troubled Police Departments*

After learning that a particular police department may be engaging in prohibited practices, the Special Litigation Section of the Civil Rights Division conducts a preliminary investigation, pursuant to § 14141, to determine whether a “pattern or practice” of unconstitutional violations exists.<sup>94</sup> If the DOJ determines that there is a pattern or practice of constitutional violations, it then conducts a formal investigation.<sup>95</sup> If the investigation reveals a pattern or practice of unconstitutional violations, § 14141 gives the DOJ the authority to file a lawsuit against the law enforcement agency.<sup>96</sup> Although § 14141 expressly gives DOJ the authority to sue police departments for injunctive relief, in practice, DOJ has rarely initiated lawsuits pursuant to the statute. In the years following the enactment of DOJ’s pattern or practice legislation, it was commonplace for the Department to enter into Memoranda of Agreement (MOA) with the targeted police departments.<sup>97</sup> The Bush administration soon dispensed with the MOA, which were court enforceable, and regularly sent technical assistance letters, which were not court-enforceable, to inform the police agency of existing problems and merely recommending possible reforms.<sup>98</sup>

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94. See *Oversight Hearing*, *supra* note 18, at 18–19. Preliminary investigation may involve reviewing witness interviews from pleadings or depositions or other testimony to determine whether a pattern or practice of unconstitutional violations exists. *Id.* In his testimony before the Senate Judiciary Committee, Ralph Boyd, the then-Assistant Attorney General for the Civil Rights Division, 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. A “pattern or practice” has not yet been defined in the context of police reform, but the Supreme Court has suggested in the Title VII context, that “‘pattern or practice’ . . . denot[es] something more ‘than the mere occurrence of isolated or “accidental” or sporadic [unlawful] acts.’” Livingston, *supra* note 22, at 822 (quoting *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 persons of constitutional or statutory rights, then, likely denotes a course of conduct that is ‘standard operating procedure’ within a police department . . . .” *Id.* at 822–83; see also Jacobi, *supra* note 81, at 834.

95. *Oversight Hearing*, *supra* note 18, at 19.

96. *Id.*

97. To date, the DOJ has filed complaints against and entered into court-enforced consent decrees with the following local law enforcement agencies: Los Angeles Police Department; Steubenville, Ohio Police Department; Pittsburgh, Pennsylvania Police Department; Prince George’s County, Maryland Police Department (regarding the use of canines); Detroit, Michigan Police Department; and the New Jersey State Police. The 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. See Press Release, U.S. Dep’t of Justice, Justice Department Files Police Misconduct Lawsuit Against the City of Columbus, Ohio (Oct. 21, 1999), available at <http://www.justice.gov/opa/pr/1999/October/494cr.htm>.

98. See, e.g., Letter from Shanetta Y. Cutlar, Chief, Special Litigation Section, U.S. Dep’t of Justice, to Frank James, Shareholder, Baker Donelson (Nov. 9, 2004), available at [http://www.justice.gov/crt/about/spl/documents/split\\_alabaster\\_talet\\_11\\_09\\_04.pdf](http://www.justice.gov/crt/about/spl/documents/split_alabaster_talet_11_09_04.pdf) (discussing inves-

*b. DOJ's Recommendations for Reform*

The reforms the DOJ has recommended for implementation in the affected police departments are all aimed at increasing transparency and public accountability. The most common provisions included in the agreements developed between the DOJ and the police departments include the development of an early intervention system, collection of use-of-force reporting, and development/improvement of a citizen-complaint review process.<sup>99</sup> Therefore, the DOJ has required many police departments subject to its pattern or practice legislation to create and implement an Early Warning Tracking System or Early Intervention System to identify officers within the police department who have been involved in multiple incidences, which might indicate a problem.<sup>100</sup> Such a requirement is logical given that a majority of the department's reports of police misconduct may be traced to a small percentage of police officers (usually the same group of officers).<sup>101</sup> In addition to early intervention systems, the consent decrees and agreements typically address "substantive use-of-force polic[ies], incident reporting requirements, the investigation of force incidents, and entry of force reports into a departmental early intervention (EI) or risk management system."<sup>102</sup> Finally, another common provision in the agreements with police departments pursuant to § 14141 involves improvements related to the complaint process such as (1) developing a citizen-complaint process; (2) improving upon the police department's existing citizen-complaint process; or (3) developing a new system to handle citizen complaints.<sup>103</sup>

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tigation of Alabaster Police Department); Letter from Shanetta Y. Cutlar, Chief, Special Litigation Section, U.S. Dep't of Justice, to Kerry Drue, Att'y Gen. for U.S. Virgin Islands, U.S. Dep't of Justice (Oct. 5, 2005), available at [http://www.justice.gov/crt/about/spl/documents/virgin\\_island\\_pd\\_talet\\_10-5-05.pdf](http://www.justice.gov/crt/about/spl/documents/virgin_island_pd_talet_10-5-05.pdf) (discussing the DOJ investigation of the Virgin Islands Police Dep't).

99. See Walker, *supra* note 18, 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 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 the DOJ under § 14141. See also Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 512 (2008) (listing common provision in MOAs). See Walker, *supra* note 18, at 6 (referring to the federal government's efforts pursuant to § 14141 as the "new paradigm of police accountability").

100. See PROMOTING POLICE INTEGRITY, *supra* note 99, at 10. During initial investigations, the DOJ has also recommended to several jurisdictions that they implement early warning tracking systems.

101. CHRISTOPHER COMMISSION, *supra* note 11, at 31, 36-37; JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND EXCESSIVE USE OF FORCE 21 (1993); Simmons, *The Politics of Policing*, *supra* note 99.

102. Walker, *supra* note 18, at 33.

103. Precedent for many of these policies may be found in the DOJ's *Principles 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." PROMOTING POLICE

#### *D. Critiquing Current Federal Efforts: Criticisms of § 14141*

##### *1. Lack of Role for Affected Community Members*

Although DOJ's pattern or practice legislation has been hailed as a novel approach to institutional reform of police agencies, there are also many critiques of this particular model of addressing police misconduct. Since its inception, one criticism of the legislation has been that it lacks an "overall philosophy that should guide the delivery of police services."<sup>104</sup> For example, in her early discussion of the legislation, Debra Livingston noted that the first two consent decrees in Pittsburgh and Steubenville lacked a mechanism to actively include community members as part of the accountability reform. This remains true of the later consent decrees and MOA, none of which "enumerates a role for community members who are the recipients of the police department's services."<sup>105</sup>

##### *2. No Private Right of Action*

Congress's failure to include a private right of action to allow citizens to initiate lawsuits pursuant to the DOJ's pattern or practice legislation is yet another shortcoming of the current federal effort to address institutional police misconduct.<sup>106</sup> Notably, many of the critiques of the current federal strategy to combat police misconduct stem from the "exclusively executive-run § 14141 regime" that the legislation sets forth.<sup>107</sup> Pursuant to the legislation, only the Attorney General can initiate an investigation and ultimately seek injunctive relief against the unconstitutional violations.<sup>108</sup> Thus, although various stakeholders may bring troubled police departments to the attention of the DOJ, only the Attorney General can decide whether to investigate or bring an action. Consequently, critics have argued that without a private right of action, which would allow individuals to file suits against the offending agencies, enforcement may be compromised by partisan politics.<sup>109</sup>

Certainly, this lack of a private right of action leaves enforcement of the statute vulnerable to the priorities of the political administration in power.<sup>110</sup> Administrations that do not view police reform as a high priori-

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INTEGRITY, *supra* note 99, at 7. The report also details the acceptance of misconduct complaints and states that law enforcement officers should be required to report misconduct by other officers. *Id.*

104. Livingston, *supra* note 22, at 852.

105. Simmons, *The Politics of Policing*, *supra* note 99, at 519.

106. *See id.* at 1288.

107. Gilles, *supra* note 74, at 1389.

108. 42 U.S.C. § 14141 (2006).

109. For an in depth discussion of the shortcomings of the DOJ pattern or practice legislation, see Gilles, *supra* note 74, at 1384.

110. *See, e.g.*, Jacobi, *supra* note 81, at 835 (noting that "the intensity of interest in pursuing claims

ty, or worse, view the idea of police reform as politically unpopular, may not vigorously enforce the legislation.<sup>111</sup> Aggressive federal intervention efforts and oversight involving local issues (particularly policing) may be unwelcome in some local jurisdictions.

Indeed, the changes in the level of enforcement of the DOJ's pattern or practice authority are evident when examining the different ways in which different political administrations have viewed the legislation and have implemented it. For example, when he campaigned for president, George W. Bush capitalized on the fear of federal encroachment and proponents of § 14141 understandably became concerned about the fate of the legislation. In a speech to the Fraternal Order of Police, Bush 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>112</sup> 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>113</sup> Ultimately, as his previous statements intimated, the Bush administration halted the practice of developing MOAs and moved to a practice of merely providing technical assistance letters.<sup>114</sup> U.S. Representative John Conyers decried the DOJ's enforcement of § 14141 under the Bush Administration, calling it a "retrenchment in the area of pattern and practice enforcement under [§] 14141 . . . ."<sup>115</sup> In contrast to the Bush Administration, the Obama Administration has promised to reinvigorate the legislation, and only two months into President Obama's first term, the DOJ launched new investigations involving the controversial Sheriff Joseph Arpaio of Maricopa County, Arizona, and has agreed, at the invitation of Mayor Mitch Landrieu, to investigate the New Orleans Police Department .<sup>116</sup>

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against police departments will ebb and flow to a certain extent with the changing administrations"); see also Gilles, *supra* note 74, at 1410–11 (noting the negative influence of politics on federal executive enforcement of civil rights).

111. See 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, 1489–90 (1993).

112. Eric Lichtblau, *Politics: Bush Sees U.S. as Meddling in Local Police Affairs*, L.A. TIMES, June 1, 2000, at A5.

113. *Id.*

114. See Harmon, *supra* note 72, at 54. See, e.g., *id.* at 9–11 (describing the technical assistance letters). These letters do not make findings about whether § 14141 has been violated but simply "describe departmental deficiencies . . . and recommend specific remedial measures to correct those problems." *Id.* at 17.

115. *Civil Rights Division of the U.S. Department of Justice: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 24 (2004) (statement of John Conyers, Member, H. Comm. on the Judiciary).

116. See Letter from Loretta King, Acting Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Sheriff Joe Arpaio, Maricopa Cnty. Sheriff's Office, regarding investigation of the Maricopa County Sheriff's Office pursuant to 42 U.S.C. § 14141 (Mar. 10, 2009), available at <http://>



Furthermore, granting the federal government the sole power to initiate lawsuits inevitably means that the number of investigations and suits will depend upon the resources of the DOJ. Thus, at least one commentator has advocated amending the legislation to include a private right of action by deputizing individual citizens in the affected communities to bring suit against troubled police departments.<sup>117</sup>

### 3. *Lax Enforcement: DOJ's Pattern or Practice Authority*

Another critique of the current federal strategy to address police accountability is that the federal government has not aggressively exercised its enforcement authority. The pattern or practice legislation has actually reached only a relatively small number of local police departments.<sup>118</sup> Since the enactment of the legislation in 1994, the DOJ has conducted thirty-three investigations, only seven of which resulted in a consent decree filed in federal court.<sup>119</sup> Many of the initial investigations that culminated in negotiated agreements were in smaller cities, while major urban areas seemed to avoid the DOJ's enforcement authority under § 14141.<sup>120</sup>

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[www.ndlon.org/images/documents/usdojletter/toarpaio.pdf](http://www.ndlon.org/images/documents/usdojletter/toarpaio.pdf). The investigation will focus on alleged unconstitutional patterns or practices such as discriminatory police practices, unconstitutional searches and seizures, as well as "allegations of national origin discrimination." *Id.* See also Paul Giblin, *Arizona: Inquiry into County Sheriff's Office*, N.Y. TIMES, Mar. 10, 2009, at A22; *Feds Answer Mayor Landrieu's Call to Overhaul NOPD*, NEW ORLEANS CITYBUSINESS (May 17, 2010 2:11 PM), available at <http://neworleans.citybusiness.com/blog/2010/05/17/feds-answer-landrieus-call-to-overhaul-nopd/>.

117. See Gilles, *supra* note 74, at 1384.

118. See *id.* at 1404 (noting that within the first two years, the government had initiated suit against 3 police departments); Jacobi, *supra* note 81, at 834; Livingston, *supra* note 22, at 817. For a detailed discussion of the critiques, see Simmons, *The Politics of Policing*, *supra* note 99, at 515–18.

119. See Special Litigation Section Documents and Publications, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., <http://www.usdoj.gov/crt/split/findsettle.php> (last updated Aug. 5, 2010) [hereinafter U.S. Dep't of Justice, Documents and Publications] (providing documents relating to twenty-five investigations in Pittsburgh, Pa.; Steubenville, Ohio; Columbus, Ohio; the State of New Jersey; Los Angeles, Cal.; Washington, D.C.; Detroit, Mich.; Cincinnati, Ohio; Cleveland, Ohio; Mt. Prospect, Ill.; Buffalo, N.Y.; Miami, Fla.; Schenectady, N.Y.; Portland, Me.; Villa Rica, Ga.; Prince George's County, Md.; Bakersfield, Cal.; Alabaster, Ala.; Beacon, N.Y.; Virgin Islands; Warren, Ohio; Easton, Pa.; Austin, Tex.; Yonkers, N.Y.; and Orange County, Fla.); Special Litigation Section, Frequently Asked Questions, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., <http://www.justice.gov/crt/about/spl/faq.php> (last visited Jan. 17, 2011) (mentioning eight more full investigations or settlements in Highland Park, Ill.; Charleston, W. Va.; Eastpointe, Mich.; New Orleans, La.; New York, N.Y.; Providence, R.I.; Riverside, Cal.; and Tulsa, Okla.).

120. To illustrate, the Pittsburgh Police Bureau, an early target of DOJ's pattern or practice authority, employs roughly 1,000 officers to serve approximately 336,000 citizens, and Steubenville, the subject of another DOJ suit, has a population of about roughly 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> (last revised Aug. 27, 2009). 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 a

#### 4. *No Mechanism to Ensure Sustainability of Reforms*

The sustainability of the existing police-accountability reforms developed under the DOJ's pattern or practice authority is yet another concern with this method of intervention. Under the DOJ's pattern or practice authority, once the negotiated agreement between the DOJ and the local jurisdiction is terminated, there is no mechanism to guarantee that the reforms implemented under the agreement will continue.<sup>121</sup> Thus, Samuel Walker notes that "[s]erious questions remain about whether reforms effected through litigation will be sustained once the consent decree or MOA is terminated."<sup>122</sup> Indeed, many of the terms of the initial MOA's and consent decrees have terminated and there is little empirical evidence available to determine whether the reforms have been successfully maintained once DOJ's oversight was complete.

#### 5. *Lack of Information Sharing and Experimentation*

Finally, the current federal model of promoting police accountability fails to encourage experimentation and information sharing among jurisdictions.<sup>123</sup> This lack of information sharing necessarily means that each jurisdiction is working without the benefit of lessons learned from other police departments that have previously implemented similar measures or have attempted to address similar issues.

As described above, the current federal scheme provides a novel approach to involving the federal government in identifying problem police departments and overseeing reforms. However, the current model is not without its shortcomings, and there is the risk that state and local governments will resist a top-down model of reform in the area of police reform, which typically has been viewed as a local issue. The next section examines how active state involvement in police reform might ameliorate the shortcomings identified in the federal scheme.

#### *E. Federalism and Police Accountability: Justifications For State Involvement*

Despite the benefits associated with federal intervention in local police practices, the shortcomings of the current federal model raise important federalism issues. There are several important justifications in favor of

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Steubenville-City Manager, who stated, "You see all these problems that have come up at the police departments in Los Angeles and New York and New Orleans, and you've got to wonder, why us?").

121. See Simmons, *The Politics of Policing*, *supra* note 99, at 519.

122. See Walker & MacDonald, *supra* note 19, at 481.

123. Kami Chavis Simmons, *New Governance and the New Paradigm of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 405 (2010).

maintaining local involvement in criminal-justice reform, especially given that these issues involve inherently political issues such as police practices.<sup>124</sup> Thus, notwithstanding the availability of the tools the federal government has at its disposal, the ensuing discussion explores why states and local governments should play an active role in the oversight and implementation of local police accountability measures.

The local primacy of criminal-justice issues is well established.<sup>125</sup> For example, even the former Chief of the Federal Bureau of Investigation, J. Edgar Hoover, publicly and frequently stated his opposition to the creation of a “national police force.”<sup>126</sup> Hoover explained that he was “unalterably opposed” to such a centralized police force because it “represent[ed] a distinct danger to democratic self-government,” and that a national police force would reduce “[t]he authority of every police officer in every community. . . in favor of a dominating figure or group on the distant state or national level.”<sup>127</sup>

The Supreme Court has also clearly articulated that “the suppression of violent crime and vindication of its victims” are “undeniably” local issues that are left to states.<sup>128</sup> Thus, law enforcement is an area where states enjoy sovereignty.<sup>129</sup> It is widely accepted that “law enforcement is and has been a local prerogative and responsibility.”<sup>130</sup> Therefore, one might argue that the manner in which local police agencies accomplish these goals and the internal policies that impact training and hiring should also be left primarily to the states.

In several contexts, the Supreme Court has articulated the local primacy of criminal-justice issues. For example, in criminal trials the Court has noted that states enjoy the primary responsibility to vindicate the constitutional rights of individuals. With respect to state criminal trials, the Court has recognized that “[f]ederal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.”<sup>131</sup> As the Supreme Court has noted, “[t]he Constitution places a number of constraints on the criminal process of the states but if none of the constraints is violated, the state is

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124. See generally William Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974–75 (2008) (arguing that generally, as state and local control of criminal justice issues shifts to federal authorities, polices become less egalitarian.).

125. See, e.g., Daniel Richman, *The Past, Present and Future of Violent Crime Federalism*, 34 CRIME & JUSTICE 377, 388 (2006) (noting that “the fact was (and continues to be) that [federal officers] could not venture far into local domains without the cooperation of the local enforcement hierarchy”).

126. *Id.* at 389 (quoting John Edgar Hoover, *The Basis of Sound Law Enforcement*, 291 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1954)).

127. *Id.*

128. *United States v. Morrison*, 529 U.S. 598, 599 (2000).

129. *United States v. Lopez*, 514 U.S. 549, 564 (1995).

130. *Jacobi*, *supra* note 81, at 826.

131. *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

free to proceed as it wishes.”<sup>132</sup> However, when local authorities fail to adequately address police misconduct, the federal government may intervene to vindicate the rights of victims.

The Supreme Court grappled with these “interjurisdictional tension[s]” that arose in the area of law enforcement in *Screws v. United States*, a case involving the federal prosecution of a local law enforcement officer for the beating to death of a suspect.<sup>133</sup> Here, the Court was faced with the decision to broaden or narrow the construction of the *mens rea* requirement of 18 U.S.C. § 242, which authorized the federal government to prosecute state law enforcement officers for violating citizens’ civil rights.<sup>134</sup> The *Screws* opinion reflects the Court’s concern to maintain the delicate balance of federal and state power with regard to law enforcement issues and the Court’s reluctance to extend the power of federal prosecution of state law enforcement officers.<sup>135</sup> Justice Douglas’s majority opinion reflects this sentiment when he notes, “the narrow construction which we have adopted more nearly preserves the traditional balance between the States and the national government in law enforcement than that which is urged upon us.”<sup>136</sup> Similarly, Justice Rutledge’s concurring opinion noted that an “important consideration[ ]” was the “fear grounded in concern for possible maladjustment of federal-state relations if this and like convictions are sustained.”<sup>137</sup> Even Justice Frankfurter, who dissented, noted that “[r]egard for maintaining the delicate balance ‘between the judicial tribunals of the Union and of the States’ in the enforcement of the criminal law has informed this Court . . . ‘in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict . . . .’”<sup>138</sup>

In addition to the federalism concerns echoed in the Court’s jurisprudence, the U.S. Department of Justice has itself been reticent to become involved in matters related to local criminal justice issues, including policing and police misconduct.<sup>139</sup> Historically, issues of law enforcement have

132. *Eaglin v. Welborn*, 57 F.3d 496, 502 (1995).

133. *Jacobi*, *supra* note 81, at 826 (citing *Screws v. United States*, 325 U.S. 91 (1945)). In *Screws*, Sheriff Screws of Baker County, Georgia, arrested a young black man, and he and two other officers beat him to death. 325 U.S. at 92, 93. There was no state investigation of the killing, and thus, no state charges. *Id.* Instead, Screws faced federal charges under 18 U.S.C. § 242. *Id.* at 93. The Supreme Court determined that the statute required the jury to find the specific “purpose to deprive the [citizen] of a constitutional right.” *Id.* at 107.

134. Section 242 provides, in part, that it is unlawful for a person acting “under color of any law, statute, ordinance, regulation, or custom, [to] willfully subject[] any person in 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 (2006).

135. *See Jacobi*, *supra* note 81, at 807–11 (generally discussing the opinion and how it exemplifies the Court’s reluctance to interfere with state law enforcement issues).

136. *Screws*, 325 U.S. at 105.

137. *Id.* at 131.

138. *Id.* at 144–145 (citation omitted).

139. *See Police Brutality Hearings*, *supra* note 79 (testimony of former Assistant Attorney General

enjoyed limited federal intrusion or oversight because “Congress is greatly restricted in the degree to which it can regulate a state’s administration of its local law enforcement agencies.”<sup>140</sup> Thus, Congress, too, has been hesitant to increase the federal government’s involvement in measures aimed at addressing police misconduct. For example, “the Justice Department opposed legislation in the 102nd Congress that would have required state and local law enforcement agencies to report data about police abuse and discipline to the federal government.”<sup>141</sup>

Despite the recognition of federalism concerns in the criminal justice context, Congress has increased the role of the federal government in the development and expansion of federal criminal law. Some scholars attribute this intervention to the need to rescue states from their own failures to enact legislation involving important issues. For example, Sara Sun Beale notes:

In 1937 a blue-ribbon congressional committee concluded that criminal activity was rampant and the states were incapable of responding to it. Responding to this alarm and fully conscious that it was extending federal law to matters previously left to the states, Congress enacted a series of federal crimes that targeted violence against private individuals . . . [their involvement] reflected a willingness . . . to assert jurisdiction over an increasingly broad range of conduct clearly within the traditional police powers of the states.<sup>142</sup>

Critics of the “overfederalization” of substantive crime point to negative consequences of increased federalization of crime including an overburdened federal court system and overcrowded federal prisons.<sup>143</sup> As one critic notes, “When Congress continues down the road to federalized crime, it assumes, perhaps wrongly, that the federal government can do a better job than the states. That assumption implicates serious concerns about federal and state comity.”<sup>144</sup>

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discussing the federal role as a “backstop”).

140. W. Paul Koenig, *Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State’s Compliance with “Megan’s Law”?*, 88 J. CRIM. L. & CRIMINOLOGY 721, 741 (1998).

141. Hoffman, *supra* note 111, at 1494 (citing *Authorization Request for the Civil Rights Division at the Department of Justice For fiscal Year 1993: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong., 2d Sess. 51–52 (1992)).

142. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 42 (1996).

143. Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 38 (1996).

144. *Id.*

Fears and criticism of federal overreaching in the enforcement of criminal laws and the development of substantive criminal law also extend to federal intervention into local police practices. Thus, where issues of constitutional significance are implicated, such as police misconduct that rises to a pattern or practice of constitutional violations, the federal government exercises its authority to remedy the situation. It is clear that minor individual instances of police misconduct do not warrant federal intervention into local internal police rules.<sup>145</sup> Yet, it is equally apparent that repeated failures of local entities to respond to systemic shortcomings justify federal intervention.<sup>146</sup> As Jonathan Jacobi asserts, "It is in the vast middle ground, where individual police officers abuse their positions and commit serious crimes that the tension between local desire to maintain hegemony in oversight of law enforcement and federal interest in bringing to justice bad cops is most pronounced."<sup>147</sup> Similarly, where a local police department has a demonstrated pattern or practice of unconstitutional violations, it is appropriate for the federal government to ascertain the nature of those violations and ensure that the department adheres to minimum standards. The continued reluctance of states to adequately address these issues involving police misconduct signals that the federal government should expand its role in ensuring that the individual rights of citizens are protected.

Expanding the federal government's role does not mean, however, that states and the federal government cannot work cooperatively to resolve important issues related to police accountability. Cooperative-federalism regimes operate in numerous contexts outside of the criminal justice system and may achieve the appropriate balance of federal and local involvement with respect to reforming local police departments.<sup>148</sup> To address this dilemma, I argue that federal funds issued to states pursuant to the COPS program should be conditioned upon the enactment and implementation of police accountability measures aimed at institutional reform. A provision such as the one proposed in the next section would allow the federal government to articulate minimum standards related to police accountability that states would have an incentive to adopt. Such an amendment, however, as discussed below, would leave to the states and localities the power to determine how best to achieve these minimum standards, thus, encouraging local experimentation and avoiding rigid uniform standards.

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145. Jacobi, *supra* note 81, at 826.

146. *Id.*

147. *Id.*

148. See Lauri DeBrie Thanheiser, *The Allure of a Lure: Proposed Federal Land Use Restriction Easements in Remediation of Contaminated Property*, 24 B.C. ENVTL. AFF. L. REV. 271, 309 (1997) (noting that cooperative federalism is the "most prominent model for environmental federalism").

## II. BRIDGING THE GAP: A PROPOSAL FOR FEDERAL-STATE COOPERATION IN THE IMPLEMENTATION OF LOCAL POLICE ACCOUNTABILITY MEASURES

Although the federal government currently has the authority to implement widespread institutional reforms within local police departments, the barriers previously discussed prevent widespread federal oversight and intervention. The majority of police departments in the United States, many of which have demonstrated a need for intervention, have eluded federal oversight. Even in areas where the federal government has intervened, the local needs of the affected police departments may have been muted in favor of a “one size fits all” approach. Because states and local entities are best suited to determine the frailties of their local police departments, they should be an integral part of federal efforts to promote police accountability. However, the failure of local entities to adequately address systemic police reform suggests that federal oversight and the implementation of higher standards are necessary. Thus, a gap exists in terms of the standards the federal government has deemed desirable with respect to organizational police reform and the ability or the willingness of states to initiate their own models of institutional police reform. One possibility for bridging this gap would be to condition federal funds awarded to states via the Community Oriented Policing Statute (COPS) on the development and implementation of police accountability measures. This proposal envisions a cooperative-federalism regime that could achieve the appropriate balance between the need for greater national standards to promote police accountability with the need for state and local experimentation within the context of police reform.

### *A. The Community Oriented Policing Services Program*

The COPS program was an important feature of the Violent Crime Control and Law Enforcement Act of 1994 and fulfilled then-President Bill Clinton’s vow to put 100,000 additional police officers on America’s streets.<sup>149</sup> Section 3796dd(a) grants the Attorney General the power to “make[ ] grants to States, units of local government, Indian tribal governments, other public and private entities, and multi-jurisdictional or regional consortia.”<sup>150</sup> In addition to establishing community-oriented policing programs, the grants may be used for numerous purposes related to law enforcement including, among other things, rehiring law enforcement officers that have been laid off; hiring and training new officers for deployment in community-oriented policing; purchasing equipment, technology,

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149. 42 U.S.C. § 3796dd (2006). *See also* 140 Cong. Rec. S43-03, at S-47 (Jan. 24, 1994) (statement of President Clinton, Address Before a Joint Session of the Congress on the State of the Union).

150. 42 U.S.C. § 3796dd(a) (2006).

and support systems to assist in community-oriented policing; providing training to police to enhance their service to communities; and purchasing service weapons.<sup>151</sup>

In October 1994, Attorney General Janet Reno announced the opening of the Department of Justice's Office of Community Oriented Policing Services, the entity that would administer the grants to hire additional police officers, and oversee the expansion of community-policing programs.<sup>152</sup> According to Tracey Meares, the initial mandate of the COPS program was to achieve four goals:

- (1) to increase the number of community-policing officers by 100,000;
- (2) to promote community policing in the United States;
- (3) to help local police agencies develop management infrastructure that could support and sustain community policing after federal funding ended; and
- (4) to demonstrate that community-policing techniques could significantly reduce violence, crime, and disorder in communities.<sup>153</sup>

Each year, the Community Oriented Policing Program (COPS) provides millions of dollars to local and state agencies for law enforcement initiatives.<sup>154</sup> Since 1994, the COPS program has distributed over \$12 billion of federal money to states.<sup>155</sup> Although the Bush Administration drastically reduced funding under COPS,<sup>156</sup> in March 2009, Attorney General Eric Holder announced an infusion of \$1 billion of funds to revitalize the program.<sup>157</sup>

Although the COPS program's priority is to increase the number of available officers in communities and to implement community policing initiatives, there are no specific measures that condition the funding on increased transparency and accountability.<sup>158</sup> Similarly, the current federal

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151. See *id.* § 3796dd(b)(1)-(17) for a full listing of the purposes for which entities may use COPS grants.

152. Meares, *supra* note 76, at 1596.

153. *Id.* at 1596-1597 (citing OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, COPS OFFICE REPORT: 100,000 OFFICERS AND COMMUNITY POLICING ACROSS THE NATION 3 (1997)).

154. COPS is the "principal federal program that supports police manning at the state and local levels." P.J. Crowley, *Homeland Security and the Upcoming Transition: What the Next Administration Should Do to Make Us Safe at Home*, 2 HARV. L. & POL'Y REV. 289, 302 (2008).

155. See U.S. DEP'T OF JUSTICE, COPS, <http://www.cops.usdoj.gov> (last visited Jan. 17, 2011).

156. Crowley, *supra* note 154, at 302. For example, in FY 2005, the Bush Administration requested \$97 million for the COPS program, which represented a 41% reduction from its previous request and was 91% below the amount that Congress appropriated in FY 2003. *Id.* at 302 n.57.

157. See Press Release, White House, U.S. Dep't of Justice Makes Available \$1 Billion in Recovery Act Funds for COPS Program (Mar. 16, 2009), available at 2009 WLNR 5062463.

158. All BJA programs, however, do contain the general requirement that "[a]s a condition for receiving funding from [the Office of Justice Programs], recipients must comply with applicable federal civil rights laws." *Office of Justice Programs, Other Requirements for OJP Applications*, U.S.



strategy to encourage institutional reforms is inadequate to address all of the potential patterns and potential for police abuse nationwide. The amendment proposed below would fill this gap and assure accountability not only for those officers hired as a result of federal funds, but would increase transparency and legitimacy for the entire local law enforcement agency.

*B. A Proposal to Amend COPS: Conditioning Federal Funds on the Implementation of Police Accountability Measures*

Notably absent from COPS is any requirement that the departments using these federal funds implement measures to promote accountability among the officers hired. Despite Congress' recognition of the organizational roots of police misconduct, as evidenced by § 14141, there is no federal legislation requiring local police departments to adhere to many of the principles that the federal government has utilized to promote police accountability in the departments subject to its pattern or practice authority. Given the strong nexus between community-oriented policing programs and the need for legitimacy and accountability, entities receiving the funds should be required to implement measures to ensure that the police departments receiving the funds adhere to principles that promote police accountability.

In order to encourage states to implement measures to promote police accountability, Congress should condition federal funds disbursed to states via the Community Oriented Policing Program ("COPS") upon the state's compliance with minimum standards for promoting police accountability.<sup>159</sup> Pursuant to its authority under the Spending Clause of the U.S. Constitution, Congress can place conditions upon federal funding to encourage states to play a greater role in implementing police accountability measures at the local level.<sup>160</sup> To achieve this end, I propose amending the statute authorizing the COPS program, which has provided billions of dollars of federal funds to states for law enforcement purposes. The proposed

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DEPT OF JUSTICE, [http://www.ojp.usdoj.gov/funding/other\\_requirements.htm](http://www.ojp.usdoj.gov/funding/other_requirements.htm) (last visited Jan. 17, 2011). Although compliance with civil rights laws is relevant to the context of policing, this requirement is distinct and apart from the specific measures the federal government has identified as promoting police accountability. See, e.g., the examples set forth in PROMOTING POLICE INTEGRITY, *supra* note 99.

159. Suggested language for the amendment might include the following:

(a) Guidelines: The Attorney General shall establish comprehensive guidelines for the States grants pursuant to § 3796dd that "[1] build trust [between communities and police officers], [2] enhance police accountability, and [3] reduce police misconduct." (quoting PROMOTING POLICE INTEGRITY, *supra* note 99, at 1).

(b) Ineligibility for Funds: A State that fails to implement a program as described in this section shall not receive 5 percent of the funds that otherwise would be allocated to the State under § 3796dd of this Title.

160. South Dakota v. Dole, 483 U.S. 203, 206 (1987).

amendment will encourage states to develop their own policy solutions to address institutional police reform in order to remain eligible for the full amount of funds designated for hiring and training officers. Pursuant to the amendment, states that fail to develop and implement police accountability measures approved by the DOJ will be ineligible to receive 5% of their federal funding under the COPS program. Risking 5% of the law enforcement funding provides states with an incentive to implement measures and experiment with policy solutions tailored to their local needs. Moreover, this condition simultaneously ensures that local police departments meet minimum standards acceptable to the federal government. The ensuing discussion examines the constitutionality of such a proposal and the benefits of federal intervention, and explores potential challenges to increased federal involvement in local police accountability.

### *1. Setting Standards*

Rather than dictating to states how they should increase police accountability, the purpose of the amendment is to set minimum standards and allow states to determine what methods they will use to achieve the goal of increasing police accountability and transparency. Under this proposal, the local entities may choose among a variety of methods to achieve the overall goal of increasing police accountability and transparency including: (1) implementing measures recommended in DOJ's Promoting Principles of Integrity; (2) adopting and enforcing a model pattern or practice statute; or (3) implementing standards developed by national police department accreditation agencies.

#### *a. Implementing DOJ's Recommendations*

In order to comply with the proposed amendment, states and local entities receiving funds could choose from several different options that would allow them the flexibility to determine their own rules within a range of practices acceptable to the federal government. An obvious first option would be to implement regulations consistent with the recommendations of the DOJ. The MOA and consent decrees developed pursuant to DOJ's pattern or practice authority represent examples of acceptable police accountability measures, and entities receiving federal funds could voluntarily choose to implement these measures.

*b. Enacting and Enforcing a Model State Statute*

Another option under the amendment would allow states to enact their own model pattern or practice statute which would give states the authority the federal government currently exercises pursuant to § 14141.<sup>161</sup> Samuel Walker has suggested that, given the limited resources of the federal government, states should enact a model statute similar to § 14141 which would authorize state attorneys general to initiate suits for injunctive relief where police departments demonstrate a pattern of unconstitutional violations.<sup>162</sup> Walker notes that such a statute would increase the number of officials responsible for investigating, thereby addressing the criticism that the federal government lacks the adequate resources to adequately enforce the legislation.<sup>163</sup> Walker, however, concedes that not all states would enact such a statute and that even some of the states enacting the statute would not enforce it.<sup>164</sup> The proposed amendment squarely addresses this concern and could encourage and incentivize states to adopt Walker's proposal. Linking federal funds to the condition that states adopt and enforce their own regulations to address police accountability would encourage state legislatures to provide statutory authority to reform local police departments that exhibit a pattern of constitutional violations. Utilizing this model of state pattern or practice authority would not require the DOJ to abandon its authority under § 14141, but consistent with cooperative-federalism regimes, would allow the DOJ to shift its resources from investigating troubled local departments and mandating reforms to monitoring the states' enforcement of this authority.

*c. Adopting Standards of Law Enforcement Accreditation Agencies and State Commissions*

To comply with the proposed amendment's requirement that states must adopt measures to address police accountability, states could consult with professional accreditation agencies or other commissions to develop measures to promote police accountability. Under the current federal scheme, the DOJ and the police departments develop and approve these measures. One criticism of this process is that it excludes rank-and-file officers and community members from the process. For example, organizations like the Commission on Accreditation for Law Enforcement Agen-

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161. To be clear, under the proposed amendment, states would not be required to adopt a model pattern or practice statute; rather, enacting the statute would be one of several ways to comply with the condition to increase transparency and police accountability at the local level.

162. See generally Walker & MacDonald, *supra* note 19 (proposing a model state statute similar to § 14141 that would authorize state attorneys general to initiate suits against local police departments).

163. *Id.* at 482.

164. *Id.*

cies (CALEA) and the state may wish to develop and adopt standards that promote accountability such as requiring accredited agencies to implement citizen-complaint procedures or early-warning tracking systems to identify officers who are the subject of multiple citizen complaints or disciplinary hearings. Over 300 major police departments nationwide are already accredited by CALEA, and therefore must meet certain standards related to the administration of police agencies.<sup>165</sup> Several important police organizations, including the International Association of Chiefs of Police, the National Organization of Black Law Enforcement Executives, the National Sheriff's Association, and the Police Executive Research Forum, came together to formulate CALEA's standards related to operations, organization, and the administration of police departments.<sup>166</sup> Under this model, the DOJ would approve the minimum standards adopted by the accrediting body and states would be free to adopt those standards and supplement them as appropriate.

Scholars have criticized several aspects of these accreditation agencies and have questioned their effectiveness because the accreditation process under CALEA is voluntary, and thus there are no penalties associated with losing or failing to obtain accreditation.<sup>167</sup> Generally, CALEA issues directives and training regarding uses of force and averting civil rights claims.<sup>168</sup> For example, "[CALEA] requires that agencies seeking national accreditation have a policy that permits the use of deadly force only when necessary to defend human life or in the defense of any person in immediate danger of serious physical injury."<sup>169</sup> Despite this directive, it does not appear that CALEA has focused on police accountability and transparency in the manner in which the Memorandum of Agreement developed pursuant to DOJ's pattern or practice authority. However, due to "strong federalism concerns, CALEA has largely refrained from specifying the content of policies required in particular areas, but instead hinges the accreditation of a police agency on a showing that the agency . . . has promulgated policies in specified areas."<sup>170</sup> The proposed amendment would

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165. See THEODORE A. BLAU, *PSYCHOLOGICAL SERVICES FOR LAW ENFORCEMENT* 69-162 (1994).

166. See Raymond E. Arthurs, *Accreditation: A Small Department's Experience*, 59 F.B.I. LAW ENFORCEMENT BULL. 1, 1 n.1 (Aug. 1990), <http://www.textfiles.com/law/fbiaug01.law> (last visited Jan. 17, 2011).

167. Walker & MacDonald, *supra* note 19, at 498. See also Livingston *supra* note 22, at 843 n.144 (noting that CALEA accreditation process is voluntary).

168. See *Steps in the Accreditation Process*, CALEA, <http://www.calea.org/content/steps-accreditation-process> (last visited Jan. 17, 2011) (providing case studies and training materials related to issues of police management).

169. Michael R. Smith, *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v. Garner*, 7 KAN. J.L. & PUB. POL'Y, no. 2, 1997-1998 at 100, 101. (citing COMMISSION ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC. STANDARDS FOR LAW ENFORCEMENT AGENCIES 1.3.2 (3d ed. 1994)).

170. Livingston, *supra* note 22, at 844.

perhaps encourage organizations such as CALEA and the Peace Officer Standards and Training (POST) commissions to expand their mandate to the area of police accountability and give police officers (as represented by these agencies) a way to participate in developing their own professional standards. Even though CALEA has been reluctant to formulate a single standard, they could be instrumental in reviewing various policies and suggesting a range of possible directive and policy solutions from which local agencies could choose. Ultimately, the federal government would determine which recommendations provide the appropriate minimum standards, but the participation of professional police organizations and state agencies would ensure that the resulting rules reflected the interests of stakeholders, including both police officers and other community members.

In addition to the ability to consult with groups such as CALEA to develop standards, many states already have POST commissions that set mandatory minimum training requirements.<sup>171</sup> State POST commissions could also serve as a resource to states who want to implement measures to ensure police accountability.

## 2. *Noncompliance*

States that fail to comply would be ineligible to receive 5% of the funding otherwise available to them under the COPS program.<sup>172</sup> The risk of losing this funding would incentivize states to comply with the proposed amendment. Amending COPS to include a provision requiring states to implement police accountability measures would allow states and local governments to fashion an appropriate local response to the problems plaguing police agencies in their own communities. Thus, this scheme would simultaneously promote local police reform initiatives and allow the federal government to intervene where states and municipalities fail to address persistent patterns of police misconduct.<sup>173</sup>

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171. See *IADLEST Model Minimum Standards*, INTERNATIONAL ASSOCIATION OF DIRECTORS OF LAW ENFORCEMENT STANDARDS & TRAINING, <http://www.iadlest.org/Projects/ModelStandards.aspx> (last visited Apr. 4, 2011).

172. A detailed discussion of the ways in which DOJ could monitor compliance with the statute are beyond the scope of this Article. Indeed, while anecdotal evidence exists regarding the efficacy of the DOJ's own pattern or practice legislation, a comprehensive study has yet to occur. However, there are various suggestions regarding ways in which DOJ could monitor states' compliance with the statute. For example, states could be required to issue reports detailing the measures they have taken to comply. Additional reporting requirements regarding reported instances of police misconduct could be helpful in determining the efficacy of the measures. Surveys of both rank-and-file officers as well as community members could also provide valuable information regarding the implementation of the suggested reforms.

173. Hoffman, *supra* note 111, at 1531 (advocating that Congress use its spending power to curb police abuse).

### III. COOPERATIVE FEDERALISM: A POLICY JUSTIFICATION FOR AMENDING COPS

#### *A. Cooperative Federalism Defined*

Cooperative federalism describes regulatory regimes that “invite state agencies to implement federal law.”<sup>174</sup> The concept that the federal government and states can cooperate is not a new one, and models of cooperative federalism exist in various regulatory contexts. Federal–state cooperation within the context of institutional police reform, however, is a novel concept. In a cooperative-federalism regime, Congress and the relevant federal agency (here the United States Department of Justice), provide the basic framework within which the local police agencies act with respect to setting standards for promoting police accountability.<sup>175</sup> Rather than adopting a set of uniform standards, these federal standards are merely minimum requirements, and the local agencies are free to supplement these minimum standards with measures specifically tailored to the local jurisdiction.<sup>176</sup>

According to Phillip J. Weiser, a key rationale for cooperative federalism is the recognition that value of “diversity in federal regulatory programs outweigh the benefits of demanding uniformity in all situations.”<sup>177</sup> Cooperative federalism rejects the development of a single federal standard, but “presumes the supplementation of a uniform minimum standard should be left to the states.”<sup>178</sup> Also underlying the concept of cooperative federalism is the notion that the federal, state, and local entities should share authority.<sup>179</sup>

Cooperative-federalism regimes exist in many regulatory contexts.<sup>180</sup> For example, many environmental programs, including the Clean Air Act,

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174. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1694 (2001).

175. *Id.* at 1697 (describing cooperative federalism statutes in general).

176. *Id.* at 1696–1697. Weiser notes that “[r]ather than preempting the authority of state agencies and supplanting them with federal branch offices, cooperative federalism programs invite state agencies to superintend federal law.” *Id.* at 1695.

177. *Id.* at 1698.

178. *Id.* at 1732.

179. *Id.* at 1733.

180. See, e.g., Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516 (1995) (discussing the Resource Conservation and Recovery Act (RCRA) as a model of cooperative federalism); Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469 (1993) (discussing certain provisions of the Occupational Safety and Health Act as models of cooperative federalism); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995) (discussing certain provisions of the Clean Air Act as a model of cooperative federalism); Lara Gelwasser Freed, *Cooperative Federalism Post-Schaffer: The Burden of Proof and Preemption in Special Education*, 2009 BYU EDUC. & L.J. 103 (discussing the Individuals with Disabilities Education Act (IDEA) as a model of cooperative federalism); Stephanie Showalter, *Will California Law Apply to Hubbs-Seaworld Research Institute’s Offshore Aquaculture Demonstration*

the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act operate under the rubric of cooperative federalism.<sup>181</sup> In this context, the states administer and implement state environmental programs after the Environmental Protection Agency has approved the program and determines that the state program meets federal minimum standards.<sup>182</sup>

Federal grant programs represent “the foremost examples of cooperative federalism.”<sup>183</sup> State and local officials are responsible for administering and implementing the conditional grant program once Congress enacts the program.<sup>184</sup> Therefore, a degree of collaboration between the federal government and state is assumed. Federal officials and state administrators must then work collaboratively to ensure that that the program goals are implemented.<sup>185</sup>

### *B. Cooperative Federalism in the Context of Police Reform*

Indeed, the rationale for cooperative federalism is highly relevant in the context of police accountability. As noted above, while policing and issues related to law enforcement have historically been viewed as local issues, there is a strong federal interest in assuring that these agencies respect the rights of citizens and that there are appropriate measures to hold local law enforcement officials accountable. States, unfortunately, have not risen to the challenge of protecting these rights and thus, the federal government necessarily retains a role in remedying institutional failures under its pattern or practice authority. It is this tension between the need for diversity among local jurisdictions and the need for minimum national standards that elucidates the need for a cooperative-federalism regime in the police-accountability context.<sup>186</sup>

There are several reasons why the federal government generally promotes diversity in the context of a federal regulatory regime, each of which is applicable to federal involvement in promoting reform of local law enforcement agencies. Diversity in federal regulatory regimes is preferable to a one-size fits all or uniform approach because diversity “(1)

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*Project? An Analysis of the Extraterritorial Application of State Aquaculture Laws*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 223 (2010) (discussing the Coastal Zone Management Act (CZMA) as a model of cooperative federalism).

181. Thanheiser, *supra* note 148, at 309.

182. *Id.*

183. See Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Law and Policy*, 39 J.L. & EDUC. 1, 11 (2010).

184. *See id.*

185. *Id.*

186. *See* Weiser, *supra* note 174, at 1698 (noting that “the cooperative federalism regulatory strategy makes sense where the benefits of allowing for diversity in federal regulatory programs outweigh the benefits of demanding uniformity in all situations.”).

allow[s] states to tailor federal regulatory programs to local conditions; (2) promote[s] competition within a federal regulatory framework; and (3) permit[s] experimentation with different approaches that may assist in determining an optimal regulatory strategy.”<sup>187</sup> With respect to local tailoring, the Department of Justice has neither the resources nor the ability to implement police-accountability measures that would be effective, let alone palatable, for every local police agency nationwide. Indeed, one of the harshest criticisms of the current federal effort is the scarcity of federal resources currently devoted to the federal government’s efforts pursuant to its pattern or practice authority.<sup>188</sup> The myriad provisions set forth in the Memoranda of Agreement that the DOJ developed in conjunction with various local jurisdictions, as well as the technical assistance letters the DOJ has sent to several police departments, contain many similar, or “boilerplate,” provisions, yet no two documents are identical.<sup>189</sup> The agreements and letters therefore reflect the various and diverse needs of the local departments and communities with respect to police reform initiatives that have developed over the past two decades.

Cooperative federalism allows for a level of interstate competition that is absent in situations where the federal government articulates a single national standard. Competition and information sharing among states is beneficial because as states and local entities experiment with different approaches to addressing an issue such as institutional police reform, creative solutions may begin to evolve.<sup>190</sup> Although a single approach ultimate-

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187. *Id.*

188. See Gilles, *supra* note 74, at 1388.

189. For example, the Los Angeles Consent Decree included provisions regarding the implementation of early warning systems, while several other jurisdictions, including Detroit and Buffalo, did not. See *United States v. Los Angeles*, No. 00-11769 (C.D. Cal. June 15, 2001) (consent decree), available at <http://www.justice.gov/crt/about/spl/documents/laconst.php> [hereinafter Los Angeles Consent Decree]; Mem. of Agreement between the U.S. Dep’t of Justice and the City of Buffalo, N.Y. (Sept. 19, 2002), available at [http://www.justice.gov/crt/about/spl/documents/buffalo\\_police\\_agreement.php](http://www.justice.gov/crt/about/spl/documents/buffalo_police_agreement.php) [hereinafter Buffalo MOA]; *United States v. Detroit*, No. 03-72258 (E.D. Mich. June 25, 2003) (consent decree), available at [http://www.justice.gov/crt/about/spl/documents/dpd/detroitpd\\_uofwcd\\_613.pdf](http://www.justice.gov/crt/about/spl/documents/dpd/detroitpd_uofwcd_613.pdf).

The inclusion of the early warning tracking provision in Los Angeles perhaps reflects the longstanding issues related to a small group of officers within that department that were responsible for the majority of complaints the LAPD received. See CHRISTOPHER COMMISSION, *supra* note 11, at 41. 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.* Therefore, it is logical that efforts to reform the LAPD might contain these provisions, while other jurisdictions may need to focus on other areas of concern.

190. See Weiser, *supra* note 174, at 1702. In the police reform context, one example of an innovative approach to police reform is evident in Cincinnati, Ohio. After several police shootings and allegations of racial profiling, victims filed a class action lawsuit against the Cincinnati Police Department. The DOJ initiated proceedings pursuant to its pattern or practice authority. The judge in the



ly may evolve, the federal government can avoid a premature selection of an inferior standard. Former Supreme Court Justice Louis Brandeis articulated the benefits of federalism when he noted that states can serve as “laboratories” for innovative social experiments.<sup>191</sup> This principle is especially sound when discussing police practices. Generally, when states are not bound by a single standard, they may, on their own, develop innovative solutions to policy questions. However, in areas such as police reform, where states and local governments may have failed to enact measures that meet federal minimum standards, the federal government can work in conjunction with states to develop creative strategies for addressing these issues.<sup>192</sup> Allowing the necessary federal intervention, while respecting the omnipresent federalism concerns inherent in the context of institutional police reform, necessitates implementing a carefully constructed regime.

*C. Using Congressional Spending Power to Encourage States to Adhere to Best Practices to Promote Police Accountability*

The failure of states to adequately address issues related to institutional police reform requires increased federal intervention, but under the current scheme, the federal government cannot adequately address the varied institutional reforms needed in local police agencies nationwide. While federalism concerns justify continued state involvement, the federal government should maintain a role in setting minimum standards for police accountability and its ability to ensure the implementation of sustainable reforms. To achieve this type of cooperation, the receipt of federal money related to training and hiring police officers should be given only with the assurance that states and local entities will enact measures that have already been recommended in other police departments to curb patterns of unconstitutional violations. These measures might include mechanisms to monitor and track complaints against officers, develop and implement citizen complaint procedures, or implement policies related to the investigation of uses of force. Not only is this a constitutional exercise of the Spending Power, but it offers opportunities to create innovative solutions to address police accountability.

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class action suit asked all of the parties to work together to develop a collaborative agreement. In addition to the DOJ attorneys and city executives that were typically involved in the federal process, the Cincinnati reform process included multiple community stakeholders and has been suggested as a model for future efforts to reform local agencies under federal pattern or practice authority. See Simmons, *New Governance and the New Paradigm*, *supra* note 123, at 423–25.

191. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Brandeis argued that federal and state governments must maintain the ability “to remould, [sic] through experimentation, our economic practices and institutions to meet changing social and economic needs.” *Id.*

192. See, e.g., Weiser, *supra* note 174, at 1702 (noting that when states enjoy discretion, they can engage in experimentation).

### 1. *The Spending Clause of the U.S. Constitution*

The Constitution of the United States specifically enumerates Congress' legislative powers. The Tenth Amendment provides those powers that are not specifically enumerated are reserved to the states.<sup>193</sup> Article I, Section 8 of the Constitution, referred to as the Spending Clause, however, states that “[t]he Congress shall have Power [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>194</sup> This power essentially enables Congress to regulate states in ways that it could not directly mandate through the expenditure of public monies.<sup>195</sup> Although Congress cannot compel states to enact specific legislation, the Spending Clause of the Constitution does permit Congress to indirectly influence state regulation through the use of monetary incentives.<sup>196</sup>

Generally, Congress has broad authority to legislate within the criminal justice sphere. In addition to the Commerce Clause and the Necessary and Proper Clause, the Spending Clause of the United States Constitution grants Congress power to influence criminal justice policies.<sup>197</sup> Given the importance and lack of national coordination of police reform efforts, Congressional spending power is a viable tool that can and should be used to promote and encourage states and local governments to develop and implement institutional police reform.<sup>198</sup>

### 2. *Spending Power: Encouraging Federal Priorities*

Congress has used its spending power to encourage state compliance with federal priorities in a variety of contexts. For example, many of the widespread policies implemented as part the Great Society reforms were enacted pursuant to Congress' spending power. Many of these reforms were aimed at eliminating poverty, racial inequality, and educational

193. U.S. CONST. amend. X.

194. U.S. CONST. art. I, §8, cl.1.

195. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citing *United States v. Butler*, 291 U.S. 1 (1936)).

196. See, e.g., *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143–44 (1947).

197. Both the Commerce Clause and the Necessary and Proper Clause empower Congress to impact criminal justice policy. See, e.g., *Perez v. United States*, 402 U.S. 146, 151–52 (1971) (noting that purely local activities that are part of a broader class of economic activity fall within the Commerce Clause). See also *United States v. Sabri*, 326 F.3d 937, 949 (8th Cir. 2003) (upholding a federal bribery statute as necessary and proper to carrying into execution the spending power.)

198. See *Hoffman*, *supra* note 111, at 1530–31 (advocating the use of “spending power to condition receipt of federal funds on effective local action to curb police abuse”). Hoffman suggests several specific ways in which the federal government could use its spending power to address police abuse, such as “condition[ing] the receipt of federal funds on the establishment and implementation of effective internal discipline and complaints procedures, . . . [and] training and counseling programs.” *Id.* at 1530.

reform.<sup>199</sup> For example, Title VI of the Civil Rights Act of 1964 linked federal funds to nondiscrimination.<sup>200</sup> Similarly, the Elementary and Secondary Education Act of 1965 (ESEA), provided federal funding for remedial education and support services for students in low-income areas.<sup>201</sup>

### 3. *Spending Power: Encouraging Criminal Justice System Reforms*

Similar to education and healthcare, criminal justice issues have traditionally been thought to be areas of local concern, but Congress has used its spending authority to effectuate changes with regard to several criminal justice issues.<sup>202</sup> Congress has used its spending power to encourage state compliance with a federal statute, known commonly as Megan's Law, which requires local law enforcement agencies to release information about convicted sex offenders. In 1996, Congress amended The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program to require the public release of information regarding registered sex offenders.<sup>203</sup> This amendment, commonly referred to as Megan's Law, required the state to release "relevant information that is necessary to protect the public."<sup>204</sup> The amendment also required states to maintain an Internet web site containing this information.<sup>205</sup> Megan's Law also provided that states that failed to implement the program as described would lose 10% of the federal funds that would otherwise be allocated to them under 42 U.S.C. § 3756, which provided funds to local governments to improve and modernize their technology as well as develop and implement antiterrorism training programs.<sup>206</sup> As a result, every state in the United States has a sexual offender registry program in compliance with Megan's Law.<sup>207</sup>

199. See Regina R. Umpstead, *The No Child Left Behind Act: Is it An Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 J.L. & EDUC. 193, 197 (summarizing different programs that condition state funds upon compliance with a congressional goal).

200. See 42 U.S.C. § 2000d(1-101)-(8-101) (2003).

201. See Act of Jan. 2, 1968, ch. 20, 20 U.S.C. § 6811, replaced by the English Language Acquisition, Language Enhancement, and Academic Achievement Act, 20 U.S.C. § 6811 (2002).

202. See Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1752 (2004) (noting that education has historically been the domain of local school districts). See also Abigail R. Moncrieff, *Federalization Snowballs: The Need for National Action in Medical Malpractice Reform*, 109 COLUM. L. REV. 844, 844-47 (2009) (noting that although medical malpractice issues have been traditionally thought to be areas of state concern, justifications exist for federalization).

203. See 42 U.S.C. § 14071(e)(2) (2006).

204. *Id.*

205. 42 U.S.C. § 14071(e)(2) further states that "[t]he release of information under this paragraph shall include the maintenance of an Internet site containing such information that is available to the public and instructions on the process for correcting information that a person alleges to be erroneous."

206. 42 U.S.C. § 14071(g)(2) (2006).

207. Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 6 (2008).

In addition to Megan's Law, Congress has also induced states to enact laws aimed at reducing prison rape pursuant to its spending authority. In the Prison Rape Elimination Act of 2003, Congress tied federal funding of prisons to requirements designed to reduce the incidence of prison rape.<sup>208</sup> The Act requires the Bureau of Justice Statistics to conduct an annual comprehensive statistical review of the incidence and effects of prison rape in federal, state, and local prisons.<sup>209</sup> The Act also creates a National Prison Rape Reduction Commission charged with conducting a comprehensive study of the impacts of prison rape and making recommendations to the Attorney General for national standards to enhance the detection, prevention, reduction, and punishment of prison rape.<sup>210</sup> If a state fails to enact a state version of the national standard, it loses 5% of its federal prison funding, and can obtain no new federal funding in the future.<sup>211</sup>

*D. The Constitutionality of the Proposed Amendment Pursuant to South Dakota v. Dole*

Conditioning federal funds upon the implementation of stronger police accountability measures is a constitutional exercise of congressional spending authority. Analyzing the proposed amendment to the COPS program using the factors the Court set forth in *South Dakota v. Dole*, the amendment passes constitutional scrutiny.<sup>212</sup> The Supreme Court, in *Dole*, examined the permissible extent to which the federal government could impose conditions on the receipt of funds to states in order to further the federal government's broader policy objectives.<sup>213</sup> In *Dole*, the state of South Dakota challenged 23 U.S.C. § 158, a federal statute that provided that the Secretary of Transportation should withhold 5% of federal highway funds from states "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful."<sup>214</sup> The federal goal was to encourage uniformity among states in raising their minimum drinking age to twenty-one.<sup>215</sup>

Under *Dole*, Congress legitimately exercises its spending power if the conditions it seeks to impose upon state behavior meet the following conditions. First, the conditions must be "in pursuit of 'the general wel-

208. 42 U.S.C. § 15603 (2006).

209. *Id.* at 15603(a).

210. *Id.* at § 15606.

211. *See* Armacost, *supra* note 17, at 530.

212. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

213. *See generally id.*; *see also* Massachusetts v. United States, 435 U.S. 444, 461 (1978) (stating that Congress may attach conditions to receipt of funds to further "the federal interest in particular national projects or programs").

214. *Dole*, 483 U.S. at 206 (quoting 23 U.S.C. § 158 (1982)).

215. *Id.*

fare.”<sup>216</sup> Second, the conditions must be unambiguous.<sup>217</sup> Third, the stated conditions placed upon federal grants must be related to the federal interest in particular national projects or programs.<sup>218</sup> Fourth, the *Dole* court noted that Congress cannot induce states to engage in activities that would themselves be unconstitutional.<sup>219</sup> Finally, in order for the spending clause legislation to be constitutionally permissible, the conditions imposed upon the states and local governments cannot “be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>220</sup>

The first four factors would be an unlikely source of fierce criticism.<sup>221</sup> First, with its focus on addressing police accountability, the proposed amendment is in the “general welfare.” Clearly, as evidenced by the federal legislation that already exists to combat police misconduct and the federal funds available for local police initiatives, Congress has identified police misconduct as an issue of federal significance, and thus the spending is directed for “the general welfare.” The conditions imposed are also clear and unambiguous.

Similarly, there is a strong nexus between the conditions aimed at promoting police accountability and the funding for community oriented policing programs. Thus, conditions are related to an important federal interest. It is well established that increased interaction with community residents, a goal of the community oriented policing programs, creates strong citizen-police partnerships that may reduce crime.<sup>222</sup> The increased transparency and accountability may encourage and legitimize community policing initiative. However, this increased interaction resulting from community oriented policing begets not only healthy citizen-police relationships, but also increases the potential for civil rights violations.<sup>223</sup>

216. *Id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 641 (1937)). The words “general welfare” are derived directly from the test of the Constitution itself. U.S. CONST. art. I., § 8, cl. 1. This is apparently a low threshold for Congress to meet, as the Court stated that “[i]n considering whether a particular expenditure is intended to serve general public purposes, [it would] defer substantially to the judgment of Congress.” *Dole*, 483 U.S. at 207 (citing *Helvering*, 301 U.S. at 640).

217. *Dole*, 483 U.S. at 207. Because legislation enacted to Congress’ spending authority is “much in the nature of a contract,” recipients of federal funds must accept them “voluntarily and knowingly.” *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). *See also* Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. REV. 441, 448 (2008) (noting that “unambiguous” has been interpreted by the courts to mean adequate or sufficiently clear notice about how federal money is to be spent).

218. *Dole*, 483 U.S. at 209.

219. *Id.*

220. *Id.* at 211 (quoting *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

221. Scholars have noted that in the first fifteen years following *Dole*, “lower courts, quite predictably, have found little use for three of the five elements of [the] test.” Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 464 (2003) (noting that the relatedness and anticoercion language receive more treatment).

222. *See, e.g.*, Kim, *supra* note 63, at 479–81 (discussing benefits of community policing, including reciprocity between citizens and police and increased accountability).

223. *See, e.g.*, Nicole Stelle Garnett, *Private Norms and Public Spaces*, 18 WM. & MARY BILL

Thus, there is a strong incentive for police departments to find ways to interact with the community and to maintain civil liberties. Thus, there is a nexus between the funding and the conditions placed upon that funding.

With respect to the fourth factor, the imposition of conditions aimed at police accountability would pass constitutional muster. Congress would not be asking states “to engage in activities that would themselves be unconstitutional.”<sup>224</sup>

One potential criticism of this proposed amendment would be that the 5% reduction in funding under COPS for noncompliance would be unduly coercive, and therefore unconstitutional under *Dole*. This argument, however, would also fail. A constitutional exercise of congressional spending power requires that the conditions the legislation imposes upon states and local governments cannot “be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>225</sup> The principle question that arises is whether states are freely exercising a choice to comply with the conditions or whether the conditions are so onerous that the state *must* comply. If the conditions are deemed coercive, the federal legislation violates the Tenth Amendment because it unconstitutionally interferes with a power reserved to the states.<sup>226</sup> Several factors might contribute to a finding that the conditions placed upon federal funding are coercive. For example, “the nature and severity of the alleged breach of duties by the state, the period of time the federal government has maintained that the provision in question is an essential component of the federal–state relationship, and the extent to which the condition treads on a state’s essential policy-making functions.”<sup>227</sup> A key indication of whether a condition is coercive is the amount of money at stake if the state fails to comply with the conditions. The condition in *Dole* itself involved a reduction in 5% of funds, just as the proposed amendment to COPS stipulates. It would be unusual for a court to determine that a 5% reduction in funding is coercive. In fact, no court that

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Rts. J. 183, 196 (2009) (“Critics worry that order-maintenance policies present opportunities for police abuse of power, by increasing the frequency and intensity of police-citizen interactions and failing to constrain the discretion that officers necessarily exercise during them.”).

224. *Dole*, 483 U.S. at 210.

225. *Id.* at 211 (quoting *Charles C. Stewart Mach. Co. v. Davis* 301 U.S. 548, 590 (1937)).

226. *See* Umpstead, *supra* note 199, at 219 (describing coercion under the Spending Clause). Amending COPS to condition receipt of funds upon implementing stronger police accountability measures also does not run afoul of the Tenth Amendment prohibition against federal encroachment upon state sovereignty. It is well established that the federal government cannot commandeer the mechanisms of state government to carry out federal programs; however, the Court has explicitly stated that conditional spending programs do not violate the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 925 (1997) (Congress did not have the authority to direct states to perform background checks of prospective firearm purchases in the Brady Handgun Violence Prevention Act); *see also* *New York v. United States*, 505 U.S. 144, 161–62 (1992) (Spending Clause power allows Congress to encourage states’ regulation of hazardous waste, but the Tenth Amendment prevents it from compelling such state regulation).

227. Umpstead, *supra* note 199, at 219 (citing *Hodges v. Shala*, 121 F. Supp. 2d 854, 876 (D.S.C. 2000)).

has considered the issue has determined that the requirements of the federal government constituted coercion.<sup>228</sup>

Despite the local nature of policing, the federal government has historically provided funding to state and local law enforcement agencies for law enforcement initiatives.<sup>229</sup> For example, from the 1960s until the 1980s, the Law Enforcement Assistance Administration, a federal agency within the DOJ, administered federal funds to state and local law enforcement agencies for programs related to education, research, and state planning agencies.<sup>230</sup> One criticism of the LEAA was that it essentially provided “blank checks” to state and local governments without attaching conditions to the funds.<sup>231</sup>

Other than LEAA and the COPS program, “there have been no significant infusions of federal cash into local police forces.”<sup>232</sup> Thus, the COPS program and the federal government’s increased role in police reform pursuant to § 14141 present a unique window of opportunity for federal–state collaboration. The proposed amendment bridges the gap currently existing between the two federal regulatory regimes.

As William Stuntz notes, “just as spending is worth more when accompanied by legislative regulation, regulation is worth more when accompanied by spending.”<sup>233</sup> Stuntz notes that “[t]he synergies may be especially large when the objects of spending and regulation . . . are local police forces.<sup>234</sup> He argues that “coupling aid to local police . . . can help both the police and victims of police misconduct.”<sup>235</sup> Put simply, more money for policing means more money for hiring, screening, and training better police officers, which may lead to reduced corruption and brutality.

In recent years, spending has focused on the adjudication and punishment of crime, rather than on policing as part of crime prevention.<sup>236</sup> However, as the examples above demonstrate, the federal government has increased its role in certain aspects of the criminal justice system. Just as the federal government has intervened in sex offender registration and prison rape, there is an emerging consensus among police practices experts that increased federal intervention is necessary to address effectively

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228. *Id.*

229. Much of this funding has been related to crime reduction. For example, one author notes that “[v]irtually all of President Clinton’s anti-crime initiatives . . . offer[ed] fiscal support to local crime prevention efforts.” Adam Hellegers, *Reforming HUD’s One Strike Public Housing Evictions Through Tenant Participation*, 90 J. CRIM. L. & CRIMINOLOGY 323, 333 n. 49 (1999).

230. See Richman, *supra* note 125, at 391.

231. *Id.* at 392.

232. William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 811 (2006).

233. *Id.* at 810.

234. *Id.*

235. *Id.*

236. *Id.* at 809.

the issues related to institutional police misconduct. For example, John Jacobi argued for broader ability to prosecute officers subject to § 242.<sup>237</sup> Additionally, Roger Goldman suggested a scheme in which the federal government might work cooperatively with states to utilize state revocation practices in investigating and prosecuting officers accused of misconduct.<sup>238</sup> Finally, many experts, though recognizing the shortcomings of DOJ's pattern or practice authority, believed that this method of federal intervention is a promising innovation to address the organizational aspects of police misconduct.

Although the federal government has been reluctant to become involved in local law enforcement, the federal government has historically funded state and local law enforcement initiatives. For example, the Law Enforcement Assistance Administration (LEAA) was a federal program that provided millions of dollars to local law enforcement agencies.<sup>239</sup> Therefore, merely asking that this money be spent or go to law enforcement agencies that value the integrity of those departments is not a stretch. One criticism of the LEAA was that it essentially provided "blank checks" to state and local government without attaching conditions to the funds.<sup>240</sup>

*E. Beneficial Consequences of Amending COPS: Ameliorating the Shortcomings of the Current Federal Strategy and Promoting the Coordination of Federal Efforts*

Amending the COPS statutes alleviates many of the problems discussed earlier with respect to § 14141.<sup>241</sup> Pursuant to the proposed amendment, the DOJ would no longer be the only entity responsible for implementing the important practices the federal government has identified as useful in alleviating patterns or practices of misconduct. States would bear some of this responsibility and the DOJ could shift more of its resources to monitoring the states' compliance with enforcing their own rules, rather than investigating individual departments and superimposing federal recommendations. Similarly, changes in the priorities of different political administrations would not have the pronounced impact that they have had in the past because states would have an active role in enforcing their own regulations. Further, the proposed amendment would encourage

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237. Jacobi, *supra* note 81, at 812.

238. See, e.g., Roger 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 (2003).

239. See generally U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, LEAA/OJP RETROSPECTIVE: 30 YEARS OF FEDERAL SUPPORT TO STATE AND LOCAL CRIMINAL JUSTICE (1996), available at <http://www.ncjrs.gov/pdffiles1/nij/164509.pdf>.

240. Richman, *supra* note 125, at 392.

241. See *supra* Part I.D.



information sharing among jurisdictions and potentially lead to greater substantive reforms.

In addition to ameliorating some of the shortcomings of the current federal strategy, the proposed amendment will promote greater coordination and standardization of police accountability nationwide. At the same time, the flexibility of states to develop their own response to police accountability under this proposal means that they will not sacrifice their ability to tailor the reforms to their own local needs. Although the federalism concerns discussed above are important, the proposed amendment to COPS will encourage minimal standards or trends toward best practices, without usurping the role of local stakeholders. The local nature of policing inherently means that national standards for police practices are lacking.<sup>242</sup> This “organizationally fragmented system” means that there is “no single controlling authority that could . . . establish required minimal standards for personnel, operations, and accountability procedures.”<sup>243</sup> Walker notes that while every state has some procedure for licensing officer and entry-level training requirements, these statutes typically cover only “a small range of issues.”<sup>244</sup> Thus, even though states have attempted to address police misconduct in various ways, these efforts are rarely aimed at achieving institutional reform of police agencies.

#### IV. RESPONDING TO POTENTIAL CHALLENGES

The proposal to require states to implement more stringent police accountability standards or risk losing a percentage of available federal funds faces several obvious criticisms. However, upon closer examination, these arguments do not survive careful scrutiny.

##### *A. State and Local Opposition*

Given the local nature of policing, it is realistic to expect some level of local opposition to federal oversight regarding this issue. Although policing is an inherently political issue, opposition to increased oversight and accountability of police may not be as vehement or widespread within state legislatures. For example, some states already have statutes in place to ensure that individual officers who commit certain acts unbecoming of a peace officer are not allowed to practice. Many states, including states with local police departments subject to DOJ’s pattern or practice authority, have taken some measures to regulate the activities of police officers

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242. For a full discussion of this fragmentation and its impact on police accountability at the local level, see Walker & MacDonald, *supra* note 19, at 484–86.

243. *Id.* at 484.

244. *Id.* at 485.

by enacting decertification statutes, and Puro and Goldman previously have identified this revocation process as an opportunity for cooperative federalism.<sup>245</sup> This decertification is analogous to license revocation that occurs in other professions. For example, when a police officer is alleged to have violated a state statute or regulation, he may come before a Peace Officers' Standards and Training Commission.<sup>246</sup> If the allegations are sustained, then the certifying agency may revoke the officer's certificate.<sup>247</sup> If the officer's certificate is revoked, then he may no longer serve as a law enforcement officer in that state.<sup>248</sup> As of 1997, one study showed that thirty states had broad revocation authority, nine had limited revocation, and eleven states had no revocation authority.<sup>249</sup> The result of the cooperative federalism regime proposed here might be to encourage more states to adopt similar measures. Additionally, linking federal money to increased police accountability may encourage states that already have revocation statutes to revisit their effectiveness and make them more stringent if needed.

A far more likely source of difficulty in implementation may come from police unions that often resist police reforms. Experts have long noted that many police unions may create institutional barriers to the revocation and decertification provisions and issues related to personnel matters implicated by the suggested regulations.<sup>250</sup> However, the incentives surrounding federal money may work to relax some of these barriers. Perhaps these unions will be encouraged to seek more creative ways to protect their members while allowing minimal oversight.

### *B. Increased Federal Oversight: Will it Threaten the Diversity that Federalism Values?*

One potential challenge to the proposal to amend COPS to require states to implement greater police accountability measures is that such an

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245. Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 571-72 (2001). Goldman and Puro note that, by late 2000, eleven of the fourteen police departments that the DOJ were investigating were located in states, including Ohio, with revocation power. *Id.*; see Goldman, *supra* note 238 (suggesting ways in which the DOJ and Assistant United States Attorneys handling criminal prosecutions against law enforcement officers could utilize state revocation practices).

246. Roger Goldman et al., *Police Decertification: Changing Patterns Among the States, 1985-1995*, 20 POLICING: INT'L J. POLICE STRAT. & MGMT., 481-84 (1997) (describing the decertification process).

247. *Id.* at 484.

248. *Id.*

249. *Id.* at 483. In 1997, according to Puro and Goldman, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Michigan, New Jersey, New York, Ohio, Rhode Island, and Washington had no revocation authority. Arkansas, Kansas, Louisiana, Maine, Nebraska, Oklahoma, Texas, West Virginia, and Wisconsin had limited authority. All other states were deemed to have broad revocation authority.

*Id.*

250. *Id.* at 482.

initiative risks diminishing the ability of states to experiment and develop, on their own, safeguards tailored to their local needs.<sup>251</sup> As discussed earlier, policing is inherently local in nature, and the federal government acts only as a backstop. Several groups, including both the National Association of Attorneys General and the National Conference of State Legislatures, for example, “have urged Congress to recognize that primary responsibility for criminal law enforcement belongs to the states.”<sup>252</sup> Such an argument could logically extend to local police practices.

Skeptics may argue that federal oversight will threaten the diversity of state approaches to police accountability. On the contrary, such an approach values state experimentation.<sup>253</sup> This proposed scheme allows states to experiment with methods to address police accountability but simultaneously preserves the ability of the federal government to set minimum standards. Instead of diluting the role of the state and local officials, the cooperative relationship envisioned under the proposed amendment “may actually strengthen those roles by assigning states and districts essential roles” in implementing nationally recognized standards.<sup>254</sup>

### *C. State Involvement: Will the Reforms Be Effective?*

On the opposite end of the spectrum, another potential criticism to allowing greater federal oversight of local police reform is that the federal government should take on a more dominant role. Critics may argue that there will be a “race to the bottom” and states will do only what is minimally necessary to protect citizens against police abuse.<sup>255</sup> Another potential drawback of having states develop their own rules regarding institutional police reform is that it would result in too many diverse rules, making it administratively difficult for the federal government to oversee while also creating more inefficiency. Although this approach will certainly increase the range of acceptable practices that DOJ would be responsible for reviewing and approving, this is in fact the purpose—to provide states an incentive to promote police accountability in any way that is acceptable to the government yet respects the needs of local communities.

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251. See, e.g., Brickey, *supra* note 143, at 38.

252. *Id.*

253. For detailed discussions regarding federalism’s promotion and facilitation of experimentation, see Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1445–48 (1992); Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB. POL’Y 1, 2–3 (1982); Richard Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 18 (2003).

254. See Pinder, *supra* note 183, at 12 (discussing federal grant programs in the context of local education policy).

255. Fried, *supra* note 253, at 4.

*D. The Risks of Reduced Funding: Will it Exacerbate Crime and Police Misconduct?*

Similarly, critics may argue that there is a possibility that states will either enact lukewarm measures to address the issues related to police misconduct, or worse, will willingly forgo the 5% in funding and simply fail to enact measures to increase police accountability. Thus, the argument is that not only will these entities lack police accountability measures that the federal government deems adequate, but the reduced funding will mean that they have fewer resources available to combat crime and police misconduct.

One response to this argument is that, in essence, all the states have failed to take their own initiative in developing adequate measures. These jurisdictions would still be subject to other tools available to the federal government, particularly its authority under § 14141 to sue for injunctive relief. Indeed, the failure to enact these policies might facilitate the DOJ's ability to identify police departments that might become subject to § 14141, and the DOJ could strategically direct its resources to providing technical assistance, or if need be, file suit against these jurisdictions if a pattern or practice of unconstitutional violations emerged.<sup>256</sup> The practices of these departments would automatically receive scrutiny because DOJ officials would be aware that they have failed to enact the minimum standards.

#### CONCLUSION

Problems related to police misconduct and corruption continue to persist throughout the nation's law enforcement agencies. The systemic nature of these problems necessitates complex institutional reforms that agencies and local government entities have been hesitant to initiate. The failure to ameliorate systemic problems has prompted the federal government to intervene in several local police departments pursuant to its pattern or practice authority. Although the reforms developed and implemented over the past fifteen years represent promising models of reform, the federal government has neither the resources nor the legitimacy to oversee the implementation of these measures in the majority of police departments across the nation. States and local entities must take an active role in developing appropriate institutional reforms for local law enforcement agencies in their jurisdictions.

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256. Of course, failing to enact the suggested measures should not automatically necessitate an investigation or further action by DOJ. The threshold standards for initiating an investigation and filing suit would still be in place, and the existence of the proposed amendment would not impact DOJ's ability to investigate police departments and seek injunctive relief pursuant to §14141.

The receipt of federal funding for law enforcement agencies distributed under the COPS program should be conditioned upon states implementing measures to address institutional reform. This exercise in cooperative federalism strikes the appropriate balance between a state's freedom to experiment while working within the boundaries of a federally mandated minimum standard.