AN UNEXPECTED APPLICATION OF 42 U.S.C. § 14141: USING INVESTIGATIVE FINDINGS FOR § 1983 LITIGATION

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Police misconduct is a sadly recurring phenomenon in the United States, frequently commented upon by mass media, legislators, the courts, and legal scholars. Incremental steps have been taken to remedy persistent police misconduct, most notably and recently by Congress' passage of 42 U.S.C. § 14141. Section 14141 grants the Department of Justice (DOJ) the authority to pursue relief against law enforcement officials engaged in a pattern or practice of conduct that deprives persons of their constitutional rights. The DOJ has utilized its § 14141 power to enter into private settlements with police departments and increasingly provides for the confidentiality of all documents discovered during its preceding investigations of those police departments. While § 14141 has made important strides in reforming law enforcement agencies and deterring pervasive police misconduct, it has been administered without regard to the underlying victims of police abuse. In this Comment, the author suggests that victims of police abuse attempt to harness the fact-finding unearthed during § 14141 investigations to pursue § 1983 actions seeking compensatory damages from their abusers. This strategy of follow-on litigation, using government fact-finding to aid private claims, would adopt techniques already utilized in such diverse areas as antitrust, corporate malfeasance, and products liability. By learning from these other notable areas of follow-on litigation, victims of police abuse could potentially increase the likelihood of damage recovery, and help to effectuate the dual remedial goals of compensation and deterrence. This Comment proposes that the DOJ alter its administration of § 14141 to increase transparency and allow broader access to the documents and findings stemming from its § 14141 investigations.

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INTRODUCTION

Most Americans react viscerally to tales of police misconduct. The Rodney King beating caused widespread rioting across Los Angeles.[1] A series of controversial police shootings in Cincinnati led to citizen riots—and to subsequent calls for reform—in that city as well.[2] The nation was stunned and disgusted by the police brutalization of Abner Louima and Amadou Diallo in New York in the late 1990s.[3] The unfolding of the LAPD Rampart scandal produced shocking newspaper headlines for weeks.[4]

1. *See* Alex Prud'Homme, *Police Brutality! Four Los Angeles Officers Are Arrested for a Vicious Beating, and the Country Plunges Into a Debate on the Rise of Complaints Against Cops*, TIME, Mar. 25, 1991, at 16.

2. *See* Associated Press, *Violent Unrest Spreads in Cincinnati; Officer Shot*, L.A. TIMES, Apr. 12, 2001, at A22. The Cincinnati unrest precipitated a § 14141 suit by the DOJ. *See infra* Part I.C.

3. *See* Josh Getlin, *Racial Tension Grips N.Y. in Wake of Feb. 4 Killing*, L.A. TIMES, Feb. 14, 1999, at A24; Eleanor Randolph, *In Police Abuse Case, Giuliani's Balance Tested*, L.A. TIMES, Aug. 16, 1997, at A1. On August 9, 1997, the police brought Louima, a Haitian immigrant, to a police station, beat him, and sodomized him with the handle of a toilet plunger. On February 4, 1999, the police fired forty-one bullets at the unarmed Diallo while he stood in his hallway.

4. *See* Matt Lait & Jim Newton, *The 'Rampart Way': Macho, Insubordinate and Cliquish*, L.A. TIMES, Mar. 1, 2000, at A16. The Rampart scandal was a direct cause of the DOJ's § 14141

Most recently, on December 1, 2003, a Cincinnati man was violently subdued by four police officers. Shortly thereafter, the victim died from his injuries. A surveillance camera in the officers' police cruiser videotaped the entire scene.[5] Americans were stunned again.

Why, despite this well-documented litany of police misconduct, does the nation still recoil at the latest tale of police abuse? The notion of individuals suffering at the hands of their alleged guardians instills citizens with a profound sense of insecurity. Although the Constitution does not guarantee absolute security, our nation's highest law does provide protection from the tyranny of government.[6] The police are obligated to carry out this mandate. Each incident of police brutality and misconduct undermines citizens' trust in the police, and in the government at large. Police abuse challenges citizens' basic understanding of justice and fairness.

The justice system must consider two important factors—compensation and deterrence—to successfully address the public's concerns about police misconduct. Police abuse may deprive a person of her privacy, her ability to pursue a livelihood, or even her life. Vindication of a person's rights requires compensation for the victim's injuries. But the justice system must also eradicate police misconduct in order to prevent injury to others and ensure the public's peace of mind. The reestablishment of trust in government demands reform of the offending police department to deter future misconduct.

Since the early 1960s, victims of police misconduct have attempted to use 42 U.S.C. § 1983 to address these goals of compensation and deterrence.[7]

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investigation of the LAPD. *See* United States v. City of Los Angeles, 288 F.3d 391, 396 (9th Cir. 2002) (noting that the § 14141 "suit was an outgrowth of a lengthy investigation of the LAPD's Rampart division").

5. *See* Stephanie Simon, *City Tense After Death in Arrest*, L.A. TIMES, Dec. 2, 2003, at A22. Cincinnati was still undergoing the reform efforts demanded by the city's settlement of a § 14141 investigation. This incident of police brutality renewed Cincinnati's fears of police misconduct.

6. The Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution specifically constrain the federal police powers to ensure that individual rights are upheld. U.S. CONST. amend. IV, V, VI, VIII. The Supreme Court has held that the Fourteenth Amendment incorporates most of these rights, making them applicable to the states. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment right to be free from unreasonable searches and seizures); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporating the Fifth Amendment right to be free from compulsory self-incrimination); Robinson v. California, 370 U.S. 660 (1962) (incorporating the Eighth Amendment right to be free from cruel and unusual punishment).

7. Professor Christina Whitman suggests that remedies in § 1983 actions should pursue four goals: compensation, deterrence, affirmation of individual rights, and punishment. Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 47 (1980). This Comment considers solely compensation and deterrence. Plaintiffs may only seek § 1983 punitive damage awards in suits against individual defendants. Municipalities are not subject to punitive damages. *See infra* Part III.A.2. Because "most serious injuries are caused by systemic malfunctions," plaintiffs rarely seek

However, a § 1983 claim is easier brought than won. The judiciary has erected a number of hurdles that § 1983 plaintiffs must overcome before successfully establishing a claim.[8] While some § 1983 actions have allowed plaintiffs to successfully recover damages in compensation for their injuries, even those § 1983 actions resulting in large damages awards have failed to provoke widespread police reform.[9] Meanwhile, the judiciary has effectively impaired the ability of § 1983 to provide equitable relief in pursuit of police reform.[10] Section 1983 has partially succeeded in its ability to provide victims of police abuse with compensatory damages, but it has failed as a tool of deterrence.

Congress recognized § 1983's inability to generate police reform and responded in 1994 by instituting 42 U.S.C. § 14141 as part of the Violent Crime Control and Law Enforcement Act.[11] Section 14141 gives the Department of Justice (DOJ) explicit authority to pursue equitable and declaratory relief against "law enforcement officials" engaged in a "pattern or practice" of conduct that deprives persons of constitutional rights.[12] Section 14141 provides a powerful new tool to initiate police reform and deter future misconduct. However, § 14141 serves a deterrent purpose alone. Congress did not grant the DOJ the ability to seek compensation for the victims of the police abuse that the DOJ is tasked with reforming. While § 14141 will play

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punitive damages against individual defendants. Whitman, *supra*, at 53. Also, punishment is more accurately served with criminal prosecutions under 18 U.S.C. §§ 241 and 242. Both monetary damages and equitable remedies affirm individual rights. *See* PETER W. LOW & JOHN CALVIN JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 49 (2d ed. 1994) ("One way of affirming the importance of federal rights (especially constitutional rights) and of demonstrating the federal commitment to protection of those rights is by an award of damages."). Equitable remedies recognize individual rights collectively by enjoining a practice or specifically declaring that a right exists. For a thorough description of § 1983, see *infra* Part I.A.

8. *See infra* Part I.A.

9. *See, e.g.*, Marshall Miller, Note, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 156–57 (1998) (noting that New York and Los Angeles have paid out millions of dollars in damages for civil suits but "the police department[s] made no institutional or policy changes to respond to these suits").

10. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983). In *Lyons*, the Supreme Court severely limited the class of plaintiffs permitted to bring a § 1983 claim for injunctive relief. Judicial rulings "have effectively rendered injunctive relief against police misconduct virtually unobtainable, even where the misconduct involves patterns of abuse or unconstitutional official policies." Miller, *supra* note 9, at 159–60.

11. The legislative history of § 14141 does not explicitly indicate that § 1983's failure was the direct cause for the passage of § 14141. However, one can argue that an analysis of § 14141's text—explicitly providing for equitable and injunctive relief to counter deprivation of rights by law enforcement officers—and historical context—proposed in the wake of the Rodney King beatings—implies that § 14141 was instituted to address the judiciary's unwillingness to allow equitable relief in police abuse cases such as *Lyons*. *See infra* Part I.B.

12. 42 U.S.C. § 14141 (2000).

an important role in deterrence, the statute, on its face, does not provide the other necessary response to police misconduct—compensation.

This Comment argues that the DOJ should administer § 14141 to facilitate deterrence, through § 14141's explicit mandate, and to facilitate compensation, by aiding private plaintiff discovery in § 1983 actions through the increase of public access to § 14141 investigative findings and underlying documents. The DOJ currently uses § 14141 in a manner that is not only unhelpful to potential § 1983 plaintiffs, but also hostile to the possibility of § 1983 plaintiffs benefiting from § 14141 suits. The DOJ's reliance on settlements with police departments denies the potential issue-preclusive effects of judgments against police departments.[13] The DOJ's recent trend of pursuing settlements without a court mandate abolishes judicial oversight.[14] Finally, the DOJ's hesitance to release detailed investigative findings and the express confidentiality of the documents underlying those findings deprives potential § 1983 litigants of the ability to use federal fact-finding to establish their claims or help them overcome the various obstacles to § 1983 litigation. This Comment argues that the DOJ should increase accessibility to the information underlying the explicit patterns and practices uncovered by § 14141 investigations.

Part I of this Comment briefly details the history of § 14141, focusing on its roots in § 1983, the legislative history of the statute, and the DOJ's practice of settlement through consent decrees and memoranda of agreement (MOA). Part II explains how § 1983 plaintiffs could benefit from detailed § 14141 findings and underlying documents. Part II then analyzes the advantages and disadvantages of generalized § 14141 investigative findings and confidential § 14141 documents. Part III proposes that the DOJ allow individual litigants access to detailed findings of future § 14141 investigations and analyzes the possible use of federal discovery rules and the Freedom of

13. If the DOJ successfully litigated a pattern or practice claim against a police department, and the court held that a particular pattern or practice had been established, the court's ruling would preclude the police department from contesting the pattern or practice in a claim brought against it by a § 1983 plaintiff. For instance, if a court in a § 14141 action concluded that a police department had failed to train its officers on the correct use of a chokehold, a § 1983 plaintiff who suffered injury under that same chokehold would be able to stop the police department from contesting the specific issue of failure to train the officers on the use of the chokehold. Essentially, the § 14141 claim will have established a major element of the § 1983 plaintiff's policy or custom claim against the municipality. Some courts have already considered the possibility of this occurrence. *See* Nat'l Cong. for Puerto Rican Rights v. City of New York, 75 F. Supp. 2d 154, 166 (S.D.N.Y. 1999) (noting the applicability of res judicata and collateral estoppel principles if the DOJ were to bring a § 14141 suit while the plaintiff's § 1983 claim was still being litigated).

14. *See infra* Part I.C.

Information Act (FOIA) to challenge the legitimacy of existing and future confidentiality provisions.

I. THE HISTORY OF § 14141

Congress enacted § 14141 just ten years ago. Prior to 1994, individuals seeking institutional change in police departments relied primarily on the § 1983 cause of action. However, courts imposed a number of barriers during the 1970s and 1980s, minimizing the civil action's usefulness. The courts virtually abolished § 1983 plaintiffs' ability to seek equitable remedies directed at police reform.[15] In the early 1990s, Congress pursued a new cause of action to enable police department outsiders to initiate reform of troubled law enforcement agencies. Congress' enactment of 42 U.S.C. § 14141 vested the DOJ with a new cause of action to pursue equitable relief against police departments.[16] In the late 1990s, police departments feared the DOJ's institution of a § 14141 investigation. Police departments targeted by such investigations raised vigorous challenges to the DOJ's actions.[17] However, the DOJ adopted friendlier tactics under the guidance of the George W. Bush Administration. By the new century, mayors and police chiefs called upon the DOJ to initiate collaborative § 14141 proceedings to facilitate police reform.[18] The DOJ currently uses § 14141 in a markedly different way than Congress had originally conceived, collaborating with offending police departments and hindering the involvement of the individuals directly affected by police abuse.

A. Motivation for § 14141: The Limited Power of § 1983

The history of § 1983 is well documented.[19] Congress enacted § 1983 during Reconstruction to provide individuals with a federal remedy for dis-

15. *See Lyons*, 461 U.S. 95.

16. 42 U.S.C. § 14141.

17. *See* United States v. City of Los Angeles, 288 F.3d 391, 396 (9th Cir. 2002) (noting the Los Angeles Police League's "action seeking to enjoin implementation of the consent decree and a declaration that 42 U.S.C. § 14141 is unconstitutional"); United States v. City of Columbus, No. CIV.A.2;99CV1097, 2000 WL 1133166 (S.D. Ohio Aug. 3, 2000).

18. *See, e.g.*, Attorney General John Ashcroft, Attorney General News Conference with DC Mayor Anthony Williams and DC Police Chief Charles Ramsey (June 13, 2001) (noting that the § 14141 investigation in Washington, D.C. was initiated at the request of the Police Chief and Mayor of D.C.), *available at* http://www.usdoj.gov/crt/split/mpdpressconf.htm.

19. Numerous casebooks, summaries of law, and law review articles have been dedicated to § 1983. *See, e.g.*, MICHAEL G. COLLINS, SECTION 1983 LITIGATION (2d ed. 2001); LOW & JEFFRIES, *supra* note 7; Symposium, *18th Annual Section 1983 Civil Rights Litigation: The Constitution and the Courts*, 77 GEO. L.J. 1437 (1989); Leon Friedman, *New Developments in Civil Rights Litigation and Trends in Section 1983 Actions*, 684 PRAC. L. INST./LIT. 231 (2002); Whitman, *supra* note 7.

criminatory treatment by state actors resisting segregation in the South.[20] The statute provides relief to any individual deprived of a federal right by a person acting under color of state law.[21] Despite the potentially broad language of § 1983, plaintiffs rarely used the action in the first ninety years of the statute's existence.[22] The 1961 Supreme Court ruling in *Monroe v. Pape*[23] ushered in the modern era of § 1983 litigation, creating an expansive class of potential plaintiffs and claims.

Monroe featured a claim of unreasonable search and seizure brought against a city police department and thirteen police officers.[24] The Court enunciated two important holdings, both of which expanded the scope of

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20. Congress passed § 1983 as part of the Ku Klux Klan Act of 1871 at the tail-end of "[a] wave of federal civil rights legislation." COLLINS, *supra* note 19, at 4. The context of the statute's passage seems to support an argument that § 1983 should be limited to protecting individuals from racial discrimination. Indeed, prior to *Monroe v. Pape*, 365 U.S. 167 (1961), most § 1983 actions involved racial discrimination and voting rights. LOW & JEFFRIES, *supra* note 7, at 12. However, nothing in the text of § 1983 limits the action to racial discrimination. In fact, during the original congressional debate, one of the bill's proponents noted that § 1983 "not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights." CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871) (statement of Sen. Shellabarger).

Section 1983 is also closely associated with the Fourteenth Amendment. Both grew out of the same legislative movement, and § 1983 protects rights established in the Fourteenth Amendment. *See Monroe*, 365 U.S. at 171. "As with all the Reconstruction civil rights legislation, Section 1983 has waxed and waned in significance with the Fourteenth Amendment." George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 952 (2003). Accordingly, as the Fourteenth Amendment saw massive expansion during the Civil Rights Era of the 1960s, § 1983's valid plaintiff class expanded. This variability in § 1983's scope also helps to account for the judiciary's subsequent contraction of § 1983 during the 1970s and 1980s.

21. 42 U.S.C. § 1983 (2000). The statute provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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.

22. *See* COLLINS, *supra* note 19, at 6–9; RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1121 (4th ed. 1996) (noting the infrequency of § 1983 litigation prior to *Monroe*); LOW & JEFFRIES, *supra* note 7, at 12 (commenting that before *Monroe*, "§ 1983 was remarkable for its insignificance").

23. 365 U.S. 167.

24. *Id.* at 169. Perhaps it is fitting that the expansion of § 1983 was initiated by a claim of police misconduct. Actions against law enforcement constitute a high percentage of modern § 1983 litigation. Yet the modern interpretation of § 1983 allows recovery against private actors and a far more diverse class of public defendants than just police departments. *See generally* COLLINS, *supra* note 19, at 29–35, 67–74. However, since § 14141 is limited to stamping out abuse in law enforcement agencies, this Comment is restricted to only those developments in § 1983 litigation that may affect plaintiffs hoping to benefit from § 14141 law enforcement actions.

§ 1983 actions. First, the Court held that a plaintiff's federal § 1983 claim was "supplementary" to any cause of action she may be able to bring under state law.[25] This greatly expanded the potential § 1983 plaintiff class by allowing a plaintiff to initiate a § 1983 action before she had attempted to recover via state claims. Second, the Court concluded that action "under color of" law did not mean that the action itself was legal, but that the actor was "clothed with the authority of state law."[26] This holding expanded the potential plaintiff class and claims by allowing recovery for actions by an actor invoking state authority, even if those actions were taken in clear violation of the law. However, the *Monroe* holding was limited to § 1983 actions against individual actors; it did not extend liability to the municipalities supporting illegal practices.[27]

Nearly twenty years later, in *Monell v. Department of Social Services*,[28] the Court overruled the limiting aspect of *Monroe*, concluding that "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies."[29] However, the Court rejected a respondeat superior theory of municipal liability.[30] Instead, the Court limited municipal liability to those circumstances where the "execution of a government's *policy or custom* . . . inflicts the injury."[31] By including local governments within the scope of suable persons, the Court set the stage for a major expansion of § 1983 litigation.

While modern § 1983 plaintiffs have typically focused on recovering monetary damages for their injuries, § 1983 has always allowed for the possibility of equitable relief.[32] With *Monell*'s extension of liability to

25. *Monroe*, 365 U.S. at 183.

26. *Id.* at 184, 187 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

27. *Id.* at 187.

28. 436 U.S. 658 (1978).

29. *Id.* at 690.

30. *Id.* at 694. Under the theory of respondeat superior, an employer may be held liable for the actions of an employee as long as the employee was acting in the scope of her employment. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (Tentative Draft No. 2, 2001).

31. *Monell*, 436 U.S. at 694 (emphasis added). The "policy or custom" language standardized by the *Monroe* court may have substantial overlap with § 14141's "pattern or practice" standard. Accordingly, a § 1983 suit against a municipality could benefit tremendously from a § 14141 investigation that has established a pattern or practice of misconduct within a municipal police department. *See* discussion *infra* Part II.A.

32. 42 U.S.C. § 1983 (2000) (noting liability "to the party injured in an action at law, suit in equity, or other proper proceeding for redress"). Commentators and courts have noted the traditional primacy of monetary damages in § 1983 damages. *See, e.g.*, Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1441 (1989) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 111–12 (1983)) (noting that "damages have gradually become the authorized remedy for § 1983 violations"); Bivens v. Six Unknown Named Agents of the Fed.

municipalities, the Court finally opened the door to enjoining the most pervasive deprivations of rights—those caused by illegal policies or customs of law enforcement agencies.[33] Injunctive relief against a particular officer is unlikely to solve the larger problem of a chronically abusive police department, but a suit calling for injunctive relief against the entire police department could open the door to department-wide reform. By allowing plaintiffs to sue municipalities, the Court gave practical effect to § 1983's provision for equitable remedies, allowing for a new era of § 1983 litigation.

Unfortunately, judicially imposed hurdles limited the effectiveness of this new power. The Court's invocation of the justiciability doctrine posed the greatest obstacle.[34] In *City of Los Angeles v. Lyons*,[35] the Supreme Court denied a plaintiff's claim for injunctive relief against the Los Angeles Police Department on the grounds that the plaintiff lacked standing. Though the plaintiff presented evidence that he had been harmed by a chokehold commonly used by the LAPD and that had resulted in the deaths of more than a dozen individuals, the court denied injunctive relief.[36] The Court concluded that without evidence "of any real or immediate threat" that he personally would be victimized again, the plaintiff did not have standing to bring a complaint for equitable relief.[37] The high barrier erected by the Court's decision in *Lyons* effectively disabled § 1983's capacity for police reform via equitable relief.[38]

Bureau of Narcotics, 403 U.S. 388, 395 (1971) ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

33. Technically, *Monell* only introduced the ability to sue municipalities for damages. Plaintiffs were able to subject municipalities to injunctive relief prior to *Monell*. Under *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), a party could sue for injunctive relief "by naming the relevant government official in her official capacity." COLLINS, *supra* note 19, at 97. However, along with opening municipalities up to monetary damages, *Monell* made it "possible to sue the local governmental entity in its own name for [injunctive] relief," allowing for wider relief. *Id.* Thus *Monell*'s holding had the potential for wide-ranging effects.

34. Justiciability refers to the court's ability to hear a claim and arises from the "case or controversy" clause of Article III of the Constitution. U.S. CONST. art. III, § 2, cl. 1. To state a justiciable claim, the plaintiff must: (1) have standing to sue and (2) present an actual case or controversy that is (3) ripe for consideration, and (4) has not been made moot prior to litigation. *See generally* COLLINS, *supra* note 19, at 366–81. Along with the problem of standing presented by *Lyons*, other cases have established justiciability concerns that apply to federal actions generally, but often present procedural difficulties for § 1983 claimants seeking equitable and declaratory relief. *Id.*

35. 461 U.S. 95. The Court relied heavily on the justiciability concerns originally raised by *O'Shea v. Littleton*, 414 U.S. 488 (1974), and *Rizzo v. Goode*, 423 U.S. 362 (1976). The Court reiterated the necessity for a current threat of personal injury in addition to the allegation of past wrongs. *Lyons*, 461 U.S. at 102–11.

36. *Lyons*, 461 U.S. at 111.

37. *Id.*

38. *See* Miller, *supra* note 9, at 159–60; Michael Rowan, Comment, *Leaving No Stone Unturned: Using RICO as a Remedy for Police Misconduct*, 31 FLA. ST. U. L. REV. 231, 246–47 (2003).

In addition to justiciability issues, the courts have placed a number of other hurdles in the path of potential § 1983 claimants. While local police departments and municipalities may be sued under § 1983, states retain sovereign immunity under the Eleventh Amendment.[39] Individuals sued under § 1983 are often absolved from liability under a qualified immunity.[40] A public official may invoke this immunity by arguing that a reasonable official would not have known that her actions violated the victim's rights.[41] A number of federal circuits still maintain heightened pleading requirements for § 1983 actions against defendants invoking qualified immunity, requiring plaintiffs to address any possible claims of personal immunity in a reply prior to discovery.[42] Finally, although *Monroe* held that a plaintiff need not exhaust state remedies before pressing a § 1983 claim, some of the Court's other rulings specifically permit federal courts to abstain from hearing § 1983 claims when underlying state issues remain unresolved.[43]

After the resurrection of § 1983 as a vehicle for civil rights vindication following its ninety-year dormancy, the statute's ability to provide for meaningful reform in police departments has been questioned. The numerous hurdles confronting potential plaintiffs have limited the ability of victims to recover for their injuries, while the capacity for equitable relief was essentially disabled by *Lyons*. It was not until eleven years after the holding in *Lyons* that Congress reintroduced the idea of reforming abusive police departments through equitable remedies.

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39. *See* Edelman v. Jordan, 415 U.S. 651, 662–63 (1974) (applying the longstanding sovereign immunity doctrine to § 1983 actions).

40. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

41. *See* COLLINS, *supra* note 19, at 137–39.

42. The Supreme Court banned heightened pleading standards for municipal liability claims. *See* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993). However, some circuits still require heightened pleading in a number of situations, such as cases that involve qualified immunity and proof of subjective intent. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1028–32 (2003).

43. Abstention refers to a federal court's ability to refrain from hearing certain claims that may implicate issues of state law or that are still subject to state action. A number of abstention doctrines still apply to § 1983 actions. *See generally* COLLINS, *supra* note 19, at 276–308. For instance, the Supreme Court recognizes the applicability of *Pullman* abstention (allowing federal courts to abstain from hearing a claim based on an unsettled issue of state law) to § 1983 actions, but has promulgated other holdings that undermine this basic principle. *See* FALLON ET AL., *supra* note 22, at 1236–37. Accordingly, abstention remains a valid, if uncertain, hurdle for § 1983 litigants.

B. Legislative History of § 14141

The legislative history of § 14141 provides valuable insight into Congress' goals for the new statute.[44] Congress initially proposed § 14141 in response to the Rodney King beating and alleged misconduct in a number of other cities.[45] Recurring abuses of police power indicated that past attempts at structural reform were ineffective and clear statutory authority for structural reform was necessary.[46] Congress drafted the underlying language of § 14141 to clear the justiciability hurdles erected by Supreme Court holdings in such cases as *Lyons* and *United States v. City of Philadelphia*.[47] In its final version, § 14141 grants the DOJ specific statutory authority to bring an action for equitable relief against law enforcement officers consistently depriving persons of their constitutional rights.[48] This language avoided the

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44. Section 14141 itself has no direct legislative history. However, it "is a successor to an earlier, nearly identical, provision of the Omnibus Crime Control Act of 1991." United States v. City of Columbus, No. CIV.A.2;99CV1097, 2000 WL 1133166, at *3 (S.D. Ohio Aug. 3, 2000). The history of the 1991 bill provides the context for all discussion of legislative history in this Comment, and can be found at H.R. REP. NO. 102-242 (1991).

45. *See City of Columbus*, 2000 WL 1133166, at *3 (noting that "the Committee on the Judiciary specifically referred to the Rodney King incident in Los Angeles, and to alleged misconduct within the Boston, New York City and Reynoldsburg, Ohio, Police Departments").

46. An important reason for creating a statutory mechanism of reform was the inability of § 1983 damages actions to successfully engender police reform. *See* Eugene Kim, Note, *Vindicating Civil Rights Under 42 U.S.C. § 14141: Guidance From Procedures in Complex Litigation*, 29 HASTINGS CONST. L.Q. 767, 771–72 (2002). If monetary damages were a more effective mechanism of reform, the inability of § 1983 to provide equitable relief against police departments would be far less important. It is the combination of these two factors, the inadequate provision for equitable relief and the lack of change stemming from damages, that led to § 14141's enactment.

47. *See City of Columbus*, 2000 WL 1133166, at *3. *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980) held that "the United States may not sue to enjoin violations of individuals' fourteenth amendment rights without specific statutory authority." *Id.* at 201. *City of Philadelphia* and *Lyons* were based on the same underlying case, *Rizzo v. Goode*, but *City of Philadelphia* applied to the federal government while *Lyons* applied to private parties. *See* discussion of *Lyons supra* notes 34–38. With § 14141, Congress granted standing to the DOJ that had been explicitly denied by *City of Philadelphia*. Miller notes that "[s]ettled case law confirms Congress's plenary authority to grant standing to the Attorney General whenever it deems such standing to be in the national interest." Miller, *supra* note 9, at 161 (citations omitted).

48. 42 U.S.C. § 14141 (2000) provides a cause of action under the following terms:

(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

justiciability hurdles posed by the Supreme Court's earlier decisions regarding § 1983.

An important debate underlying the passage of § 14141 centered on where the power to bring suit against an abusive police department would be vested. The original version of the bill allowed both the DOJ and individual plaintiffs to bring a claim.[49] Proponents of the original version argued that affected persons, the very people suffering the abuse, should be granted the ability to initiate a suit against their oppressors.[50] However, the George H. W. Bush administration and police groups raised strong opposition to the extension of the claim to private parties and proposed a modified bill limiting standing to the DOJ.[51] Though the House Judiciary Committee indicated the central importance of granting private plaintiffs standing to bring § 14141 claims, the Conference Committee reconciling House and Senate versions of the bill sided with proponents of the modified bill.[52] The final version of § 14141 rejected the expansive language of the original, strictly limiting the class of plaintiffs to the DOJ alone.[53]

This legislative limitation of § 14141 has substantial importance. First, it draws a distinction between actions that should be brought by the federal government and actions made available to private plaintiffs. The limitation of § 14141 to the DOJ arguably indicates that private plaintiffs should limit their claims to legal damages and individual equitable relief, while the federal government will initiate systemic police reform. Second, Congress' refusal to allow private individuals to initiate § 14141 suits indicates a missed opportunity to empower the victims of police abuse.[54] With its implementation

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> name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

Id.

49. H.R. REP. NO. 102-242, at 24 (1991).

50. *Id.* at 138.

51. *See* Miller, *supra* note 9, at 163.

52. *See id.*

53. Hence the statute's current text: "Whenever the Attorney General has reasonable cause to believe that a violation . . . has occurred, the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice." 42 U.S.C. § 14141(b).

54. The concept of the "private attorney general" (commonly effectuated via citizen suit provisions or qui tam actions) describes the ability of individuals to enforce the law on behalf of the government. *See generally* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983) (describing the role of private attorneys general in antitrust). Allowing private litigants to directly sue law enforcement agencies for equitable relief would empower them to take an active role in police reform. A number of articles have suggested that § 14141 be reformed to allow private litigants to invoke the DOJ's power to sue police departments for patterns or practices of police abuse. *See generally* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil*

of § 14141 in the early twenty-first century, the government continues to ignore opportunities for victim empowerment.

C. Section 14141 in Practice

Section 14141 provides the DOJ specific power to initiate police reform. The Clinton and George W. Bush Administrations have used this power in very different ways. The Clinton Administration adopted a tough stance on police misconduct, filing complaints after nearly all of its investigations and choosing enforcement mechanisms that ensured judicial oversight of police reform. The Bush Administration has pursued a far more conciliatory approach. Section 14141 investigations initiated by the Bush Administration have led to private settlements and blanket confidentiality of the information uncovered by the investigations. These distinct approaches have markedly different implications for victims' potential to utilize § 14141 investigative findings to aid the vindication of their rights.

In order to understand how the Clinton and Bush Administrations' approaches are distinct, one must understand how § 14141 actions are administered. Typically the DOJ initiates a § 14141 action when it is alerted to consistent police abuse in a community.[55] After a preliminary inquiry to "hear concerns about unconstitutional patterns and practices by police departments," the DOJ may notify the city and initiate a formal investigation.[56] A formal investigation involves the gathering of a substantial amount of information from the police department, community, and other sources.[57] After the investigation, the DOJ may release a letter of general findings to announce that it has found evidence of a pattern or practice of abuse, or it may "walk away" if there is no evidence of misconduct.[58]

Rights, 100 COLUM. L. REV. 1384 (2000); Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315 (2001).

55. A wide range of citizens have contacted the government to begin investigations, including the ACLU, the Washington, D.C. mayor, and ordinary citizens. *See, e.g.*, Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 821 n.23 (1999) (noting that the Pittsburgh § 14141 investigation stemmed from an ACLU class action); Ashcroft, *supra* note 18 (explaining that the D.C. action was initiated at the request of the D.C. Mayor and Police Chief). Alternately, the DOJ may simply make an unprovoked decision to commence an investigation while monitoring a city.

56. *Oversight of the Department of Justice-Civil Rights Division: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 19 (2002) (statement of Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, Dep't of Justice) [hereinafter *Oversight Hearing*].

57. *See id.* at 20.

58. The DOJ always releases a letter of findings to a city in which it has uncovered a pattern or practice of misconduct. *See, e.g.*, Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Division, to Jacquelyn Morrow, Esq., City Solicitor, City of Pittsburgh (Jan. 17, 1997),

If the DOJ uncovers a pattern or practice of civil rights abuse, it may choose from several options. The DOJ may immediately file a lawsuit in the expectation of protracted litigation, it may file a lawsuit in the expectation of settling with the city through a court-enforced consent decree, or it may settle the proceeding privately via an MOA.[59] Which course of action the DOJ chooses can have serious consequences for the enforceability of the agreement. Although both consent decrees and MOA are settlements, there are some important differences between the two instruments. When the DOJ uses a consent decree to settle its § 14141 investigation, it files a legal order with the federal district court to approve the consent decree.[60] A consent decree serves as a court-ordered and court-enforceable settlement. When an MOA is used to settle the DOJ's claim, there is no judicial oversight. The DOJ must hold out the threat of a future consent decree or litigation to ensure compliance.[61] Essentially, a consent decree is an MOA with teeth.

At the time of this writing, the DOJ has settled all of its completed § 14141 investigations through either consent decrees or MOA.[62] These settlements establish the guidelines for police reform and typically require

available at http://www.usdoj.gov/crt/split/documents/pittspdfind.htm. However, not all findings letters are released to the general public. If no problems are encountered, the government will not release a findings letter, but will simply close the investigation without filing an action against the city. *See* Dan Horn, *Cincinnati May Set a Precedent: Proposal to End Police Probe Unique*, CINCINNATI ENQUIRER, Apr. 4, 2002, *at* http://www.enquirer.com/editions/2002/04/04/loc_xcincinnati_may_set.html.

59. *See* Horn, *supra* note 58.

60. *See* Holly James McMickle, *Letting DOJ Lead the Way: Why DOJ's Pattern or Practice Authority is the Most Effective Tool to Control Racial Profiling*, 13 GEO. MASON U. CIV. RTS. L.J. 311, 326 (2003); Miller, *supra* note 9, at 186.

61. *See, e.g.*, Memorandum of Agreement Between the United States Department of Justice and the City of Buffalo, New York and the Buffalo Police Department ¶ 69 (Sept. 19, 2002) [hereinafter Buffalo MOA], http://www.usdoj.gov/crt/split/documents/buffalo_police_agreement.htm. The MOA explicitly notes that the agreement does not preclude the DOJ from bringing suit against the Buffalo Police Department. However, the DOJ may not bring a new § 14141 suit predicated on incidents covered by the MOA that occurred prior to the MOA's enactment. *Id.* An MOA completely settles the current claim, but allows for a future lawsuit if the police department fails to adequately enforce the agreement. *See also* Dan Horn, *City Helped Tame DOJ's Fierceness*, CINCINNATI ENQUIRER, June 9, 2003, at 1A ("[C]onsent decrees work because they allow a federal judge to force compliance if the city resists. With a settlement, the only option when things break down is to file a lawsuit . . . ."), *available at* 2003 WL 57250804.

62. *See Oversight Hearing*, *supra* note 56, at 19 (statement of Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, Dep't of Justice) ("Since 1994, the Civil Rights Division has never filed a pattern or practice lawsuit. The formal investigations that have been opened have always resulted . . . in a settlement or consent decree . . . ."); *see also* U.S. Dep't of Justice Civil Rights Div., Documents and Publications, *at* http://www.usdoj.gov/crt/split/findsettle.htm#settlements (listing all § 14141 investigations).

the appointment of an independent monitor to chart the progress of the target police department.[63]

The Clinton Administration completed its first § 14141 investigations in 1997, utilizing a consistent approach of complaints and consent decrees. The DOJ first utilized its § 14141 power with investigations of Pittsburgh, Pennsylvania and Steubenville, Ohio. In both of these actions, the DOJ filed legal complaints to initiate the proceedings, but used consent decrees to settle the matters, rather than fully litigating the complaints.[64] Because consent decrees were filed, the settlements required court approval before they could take effect. The DOJ used the same aggressive "complaint and consent decree" approach to remedy allegations of racial profiling by the New Jersey State Police in 1999.[65]

Eventually, police departments resisted the Clinton Administration's aggressive approach to police reform. The DOJ encountered its first real challenge to a § 14141 action in 1999 when the City of Columbus, Ohio raised a vigorous defense to a complaint filed against the City's police department.[66] The City filed a motion to dismiss the § 14141 claim, alleging that § 14141 constituted an abuse of the government's power to enforce the Fourteenth Amendment.[67] The district court denied the City's motion, holding that § 14141 is congruent and proportional to Congress' responsibility to prevent violations of the Fourteenth Amendment.[68] Despite the DOJ's initial legal success in Columbus, proceedings dragged on for a few

63. *See, e.g.*, Consent Decree ¶¶ 12–76, United States v. City of Pittsburgh (W.D. Pa. Feb. 26, 1997) (No. 97-0354) [hereinafter Pittsburgh Consent Decree], http://www.usdoj.gov/crt/split/documents/pittssa.htm; Buffalo MOA, *supra* note 61, ¶¶ 12–60.

64. The Pittsburgh complaint and consent decree were filed in February, 1997. *See* Complaint, United States v. City of Pittsburgh (W.D. Pa. 1997) (No. 97-0354) [hereinafter Pittsburgh Complaint], http://www.usdoj.gov/crt/split/documents/pittscomp.htm; Pittsburgh Consent Decree, *supra* note 63. The Steubenville investigation was settled in August of the same year. *See* Complaint, United States v. City of Steubenville (S.D. Ohio 1997) (No. C2 97-966) [hereinafter Steubenville Complaint], http://www.usdoj.gov/crt/split/documents/steubencomp.htm; Consent Decree, United States v. City of Steubenville (S.D. Ohio, Aug. 28, 1997) (No. C2 97-966) [hereinafter Steubenville Consent Decree], http://www.usdoj.gov/crt/split/documents/steubensa.htm.

65. *See* Complaint, United States v. New Jersey (D.N.J. 1999) (No. 99-5970 (MLC)) [hereinafter New Jersey Complaint], http://www.usdoj.gov/crt/split/documents/jerseycomp.htm; Consent Decree, United States v. New Jersey (D.N.J. Dec. 30, 1999) (No. 99-5970 (MLC)) [hereinafter New Jersey Consent Decree], http://www.usdoj.gov/crt/split/documents/jerseysa.htm.

66. United States v. City of Columbus, No. CIV.A.2;99CV1097, 2000 WL 1133166 (S.D. Ohio Aug. 3, 2000).

67. *Id.* at *7.

68. *Id.* at *9. The court did reject the DOJ's attempt to "posit liability . . . on a theory of *respondeat superior*." *Id.* In fact, the court limited § 14141 liability to those actions defined by the Supreme Court in municipal liability actions under *Monell*. *Id.* at *10. This has important implications for how § 1983 litigants may be able to benefit from § 14141 findings. *See* discussion *infra* Part II.A.

more years before the DOJ, under the Bush Administration, dropped the case.[69] The resistance in Columbus is important because it indicates the friction caused by an aggressive, adversarial approach to § 14141 enforcement. The Bush Administration's amicable approach to § 14141 enforcement may reflect its hesitance to confront the type of police resistance engendered by § 14141 actions under the Clinton Administration.

A statistical overview of the Bush Administration's § 14141 enforcement depicts an administration far more zealous than the preceding administration in its use of § 14141. The Bush Administration initiated and completed more § 14141 investigations in its first three years than the Clinton Administration had in the previous six years. First, the DOJ submitted the Los Angeles consent decree initiated by the Clinton administration's § 14141 investigation.[70] The DOJ then settled ten other § 14141 investigations from mid-2001 to mid-2004.[71] The DOJ also accelerated its utilization of § 14141 investigations, initiating five new investigations beginning in March 2003.[72]

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69. *See* Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Michael Coleman, Mayor, City of Columbus (Sept. 4, 2002), *available at* http://www.usdoj.gov/crt/split/documents/columbus_cole_boyd_letters.htm.

70. *See* Consent Decree, United States v. City of Los Angeles (C.D. Cal. June 15, 2001) (No. 00-11769 GAF) [hereinafter Los Angeles Consent Decree], http://www.usdoj.gov/crt/split/documents/laconsent.htm.

71. Memorandum of Agreement Between the United States Department of Justice and the District of Columbia and the District of Columbia Metropolitan Police (June 13, 2001) [hereinafter D.C. MOA], http://www.usdoj.gov/crt/split/documents/dcmoa.htm; Memorandum of Agreement Between the United States and the City of Highland Park, Illinois (July 11, 2001) [hereinafter Highland Park MOA], http://www.usdoj.gov/crt/split/documents/Highland_MA.htm; Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department (Apr. 12, 2002) [hereinafter Cincinnati MOA], http://www.usdoj.gov/crt/split/Cincmoafinal.htm; Buffalo MOA, *supra* note 61; Memorandum of Agreement Between the United States and the Village of Mt. Prospect, Illinois (Jan. 22, 2003) [hereinafter Mt. Prospect MOA], http://www.usdoj.gov/crt/split/documents/mtprospectmoa.pdf; Consent Judgment: Conditions of Confinement, United States v. City of Detroit (E.D. Mich. June 12, 2003) (No. 03-72258) [hereinafter Detroit Conditions of Confinement Consent Decree], http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_holdingcell-613.pdf; Consent Judgment: Use of Force and Arrest and Witness Detention, United States v. City of Detroit (E.D. Mich. June 12, 2003) (No. 03-72258) [hereinafter Detroit Use of Force Consent Decree], http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_uofwdcd_613.pdf; Memorandum of Agreement Between the United States and the City of Villa Rica, Georgia (Dec. 23, 2003), http://www.usdoj.gov/crt/split documents/villa_rica_moa.pdf; Memorandum of Agreement Between the United States Department of Justice and Prince George's County Maryland and Prince George's County Police Department (Jan. 22, 2004), http://www.usdoj.gov/crt/split/documents/pgpd/pg_memo_agree.pdf; Memorandum of Agreement Between the United States Department of Justice and the City of Cleveland Regarding Holding Cell Facilities Operated by the Cleveland Division of Police (May 12, 2004), http://www.usdoj.gov/crt/split/documents/cleveland_holdcell_agreefinal.pdf. The DOJ also settled the Columbus litigation during this time period. *See supra* note 69.

72. *See* Letter from Steven H. Rosenbaum, Chief, Special Litigation Section, to Alejandro Vilarello, City Attorney, City of Miami, Florida (Mar. 13, 2003), *available at* http://www.usdoj.gov/

The Bush Administration's flurry of § 14141 activity belies its potentially adverse effect on past victims of the police abuse underlying the § 14141 investigations. Though the DOJ increased the number of investigations, it focused almost exclusively on settling pursuant to MOA.[73] In particular, the DOJ has trumpeted its settlement with Cincinnati in early 2002 as the new approach to § 14141 actions.[74] The Cincinnati agreement implemented a new "cooperative" approach to § 14141 enforcement.[75] Unlike consent decrees, these MOA bypass the judiciary completely; the courts have no role in monitoring or enforcing the terms of the agreement.[76]

This pattern of settlements by MOA may hurt potential beneficiaries of § 14141 investigative findings for two primary reasons. First, the settlement withholds the possibility of a future consent decree. Accordingly, a plaintiff's assertion that the enforcement proceedings have closed is more tenuous than in the case of a binding settlement agreement.[77] Second, MOA are much more conciliatory to target police departments than consent decrees. The Bush Administration's settlements broke from the previous standard of settlements by explicitly including provisions protecting the confidentiality of all files uncovered during a § 14141 investigation.[78] These two implications further detach § 14141 from the victims underlying reform efforts.

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crt/split/documents/miamipd_techletter.pdf; Letter from Shanetta Y. Brown Cutlar, Acting Chief, Special Litigation Section, to Michael T. Brockbank, Schenectady Corporation Counsel, City of Schenectady, New York (Mar. 19, 2002), *available at* http://www.usdoj.gov/crt/split/documents/schenectady_ta.pdf; Letter from Shanetta Y. Brown Cutlar, Acting Chief, Special Litigation Section, to Gary Wood, Corporation Counsel, City of Portland, Maine (Mar. 21, 2003), *available at* http://www.usdoj.gov/crt/split/documents/portland_ta_ltr.pdf; Letter from Steven H. Rosenbaum, Chief, Special Litigation Section, to Subodh Chandra, Esq., Director, Law Department, City of Cleveland (July 23, 2002), *available at* http://www.usdoj.gov/crt/split/documents/cleveland_uof.pdf; Letter from Shanetta Y. Cutlar, Chief, Special Litigation Section, to Virginia Gennaro, Esq., City Atttorney, City of Bakersfield, California (Apr. 12, 2004), *available at* http://www.usdoj.gov/crt/split/documents/bakersfield_ta_letter.pdf.

73. Every § 14141 investigation closed by the Bush Administration has been pursuant to MOA except for the consent decree in Los Angeles, which had been initiated by the Clinton Administration, and the consent decrees in Detroit.

74. *See* News Release, U.S. Dep't of Justice, Fact Sheet: Civil Rights Accomplishments (July 23, 2003), *available at* 2003 WL 21715202.

75. *See id.*

76. *See* discussion *supra* note 61.

77. This may have detrimental effects on § 1983 plaintiffs attempting to access investigative findings via the Freedom of Information Act. *See infra* Part III.B.2.a for further discussion of why the status of the investigation affects plaintiffs hoping to access § 14141 findings.

78. MOA filed by the Bush administration have explicit provisions restricting access to police documents uncovered during § 14141 investigations. *See, e.g.*, Cincinnati MOA, *supra* note 71, ¶ 106 ("This Agreement does not authorize, nor will it be construed to authorize, access to any CPD documents, except as expressly provided by this Agreement, by persons or entities other than DOJ, the City, the CPD, and the Monitor."); Mt. Prospect MOA, *supra* note 71, ¶ 6 ("[T]his Agreement does not authorize, nor shall it be construed to authorize, access to any MPPD

II. A PROBLEM WITH § 14141: ENFORCEMENT PROCESS IS DETACHED FROM POLICE VICTIMS

Though the government is making important progress towards police reform through § 14141 enforcement, the process remains detached from the people harmed by the underlying police abuse. Congress denied victims of police abuse standing to sue under § 14141. Thus, police victims may only request that the DOJ investigate a police department. The DOJ has invariably used § 14141 to seek settlements with police departments, denying § 1983 plaintiffs the potential preclusive effects of successful § 14141 actions.[79] Once a § 14141 investigation is initiated or settled, individual litigants could potentially benefit from § 14141 by using DOJ findings and documents uncovered by the investigation to their advantage in § 1983 litigation.[80] However, the DOJ undermines this potential advantage with its current practice of including explicit settlement provisions sealing the documents uncovered by § 14141 investigations. Essentially, the DOJ has chosen an implementation of § 14141 that denies police victims a wealth of information that they could otherwise use to help establish their claims and clear the hurdles of § 1983 litigation.

A. The Potential Litigation Advantage of § 14141 Findings and Documents

Section 1983 plaintiffs could benefit from access to § 14141 investigation findings in two primary ways. First, the documents uncovered by the DOJ through their investigations could unveil the same pattern or practice of abuse alleged by the § 1983 plaintiffs. A § 1983 plaintiff could use this information to establish its substantive claim against a law enforcement agency under a theory of municipal liability for the recovery of compensatory damages. Second, plaintiffs could use the documents underlying investigative findings to overcome some of the hurdles of § 1983 litigation in their pursuit of individual equitable relief or damages from individual actors.

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documents by person or entities not a party to this Agreement."). Consent decrees filed by the Clinton Administration have no such provision. *See, e.g.*, Pittsburgh Consent Decree, *supra* note 63; Steubenville Consent Decree, *supra* note 64; New Jersey Consent Decree *supra* note 65, ¶ 125 (indicating that only information collected *pursuant to* the consent decree is confidential).

79. *See* discussion *supra* note 13.

80. *See* discussion *infra* Part III.A.

Section 14141 claims originate indirectly from the establishment of municipal liability under *Monell*.[81] A plaintiff who could benefit from § 14141 findings would likely be seeking to establish the same type of claim as envisioned by the original § 14141 action.[82] For example, imagine that an individual is injured by a police officer utilizing excessive force in compliance with departmental policy. A § 14141 investigation uncovering this exact pattern of abuse would prove invaluable to the victim's § 1983 claim alleging a policy or custom of abuse. The victim would have to provide evidence of the abuse leading to her personal injury, but could potentially also find evidence of that specific instance of abuse in documents recovered by an extensive § 14141 investigation. In addition to claims alleging municipal liability, a victim seeking to recover against an individual officer may come across documents supporting her contention.[83] In all of these cases, § 14141 findings could substantially enhance a § 1983 plaintiff's claim for damages.[84]

Even if § 14141 findings fail to help a plaintiff establish her substantive claim, a plaintiff may use government fact-finding to overcome some of the hurdles of § 1983 litigation.[85] For instance, plaintiffs in federal

81. Essentially, the establishment of municipal liability under *Monell* led to attempts by plaintiffs to sue municipalities for injunctive relief à la *Lyons*. The failure of the Court to allow claims for equitable relief under *Lyons* eventually led to the establishment of § 14141 to engender the reform of police departments via equitable relief. *See* discussion *supra* Part I.A.

82. In almost all § 14141 investigations, the DOJ settles only after it has made a determination, based on investigative findings, that the target law enforcement agency has established a pattern or practice of civil rights violations. A federal district court contended that the findings needed to establish municipal liability under a § 14141 pattern or practice claim are identical to the findings used to establish municipal liability under § 1983's *Monell* standard of liability. *See* United States v. City of Columbus, No. CIV.A.2;99CV1097, 2000 WL 1133166, at *10 (S.D. Ohio Aug. 3, 2000). Accordingly, a plaintiff's § 1983 claim against a municipality under *Monell*'s policy or custom language would attempt to establish a claim nearly identical to the government's allegation under § 14141.

83. However, the use of findings without a specific goal may indicate a "fishing expedition." As long as the plaintiffs are using discovery to investigate specific claims, the use of § 14141 investigation findings should pose few problems.

84. This Comment focuses on the recovery of compensatory damages. By its very aim and nature, a § 14141 investigation is more likely to uncover evidence of general patterns of police misconduct than of individual violations. Courts limit recovery of punitive damages to claims against private actors, and only when the action "is shown to be motivated by evil intent, or . . . reckless or callous indifference to the . . . rights of others." COLLINS, *supra* note 19, at 172. Accordingly, § 1983 litigants benefiting from § 14141 investigation are far more likely to find evidence leading to compensatory damages.

85. The majority of § 1983 litigation hurdles arise in the context of prayers for equitable relief. Though this Comment focuses primarily on the concept of using § 14141 findings to help plaintiffs recover compensatory damages for their injuries, the recent DOJ practice of using MOA settlements leaves open the possibility that equitable remedies may still be useful to § 1983 defendants. After all, MOA settlements are not court enforced, thus considerations of mootness

circuits with heightened pleading requirements could use prediscovery access to § 14141 documents to undermine an individual defendant's claim of qualified immunity.[86] Even outside the context of heightened pleading requirements, a plaintiff may use § 14141 fact-finding to overcome a public official's claim of qualified immunity. Finally, the extensive investigation into a police department's policy and custom may unveil exactly the type of documentation that a § 1983 plaintiff needs to overcome the justiciability hurdle created by *Lyons*.[87]

On the other hand, some common § 1983 problems may be compounded by a § 14141 action. For instance, a DOJ consent decree may have already eradicated a particular illegal practice, thus rendering the § 1983 plaintiff's claim moot. The statute of limitations for § 1983 actions may also undermine the utility of § 14141 investigative findings. Section 1983 does not specify a statute of limitations. Courts must adopt the statute of limitations of the state where the plaintiff alleges abuse.[88] Courts apply the state statute of limitations for the recovery of personal injury.[89] This statute of limitations runs for one or two years in most states.[90] Most investigations are initiated only after a number of plaintiffs have already been harmed. Section 14141 investigations also take a long time once initiated. Thus, the statute of limitations may invalidate a number of potential plaintiffs' claims before they can access § 14141 findings.[91] Plaintiffs attempting to utilize § 14141 findings in the future must pay careful attention to the statute of limitations in order to maximize the effectiveness of § 14141 findings.

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may be avoided. Regardless, some § 1983 hurdles exist when plaintiffs are seeking legal damages as well, in which case the plaintiff may use § 14141 findings for the original purpose proposed by this comment.

86. Since heightened pleading requirements require a plaintiff to prove elements of her claim prior to discovery, these heightened requirements effectively bar plaintiffs who do not have the resources or status to gather the evidence necessary to surpass the pleading requirement. Access to § 14141 findings could potentially provide a plaintiff with the information necessary to meet the heightened pleading requirement.

87. Michael Collins suggests that "the more routinized the practice the easier" it will be to "surmount the high barriers erected by cases such as *Lyons*." COLLINS, *supra* note 19, at 185. A § 14141 investigation would likely be initiated to enjoin (or nullify via settlement) the same practices that a § 1983 litigant would want to enjoin. But the DOJ's recent emphasis on settlements outside of court may leave some gaps in enforcement. A § 1983 litigant may find that a certain practice was left out of a DOJ settlement, and thus seek to enjoin that practice via a § 1983 action.

88. *See* Board of Regents v. Tomanio, 446 U.S. 478, 483 (1980).

89. *See* Owens v. Okure, 488 U.S. 235, 249–50 (1989).

90. *See, e.g.*, CAL. CIV. PROC. CODE § 340(C) (West 1982 & Supp. 2004) (one-year statute of limitations); KAN. STAT. ANN. § 60-513(a)(4) (1994) (two-year statute of limitations); OKLA. STAT. ANN. tit. 12, § 95(3) (West 2000 & Supp. 2004) (two-year statute of limitations).

91. This concern is amplified if plaintiffs are not able to access these findings until a § 14141 investigation has completed. *See* discussion regarding FOIA law enforcement privilege *infra* Part III.B.2.a.

B. Arguments for Public Access to § 14141 Investigative Findings

The injuries sustained by victims of police abuse provide powerful support for the proposal that plaintiffs be granted access to potentially beneficial government fact-finding. First, the abuse of potential § 1983 litigants underlies the commencement of a § 14141 investigation. Without victims of police abuse, a § 14141 investigation would never need to be initiated. Second, the typical § 1983 litigant cannot afford the costs of § 1983 litigation. Access to findings already retrieved by the DOJ would significantly reduce the time and money spent filing document requests and sorting through irrelevant information. Finally, the confidential relationship established between the abusive local police department and the DOJ fosters mistrust for government on both a local and federal level.

Invariably, § 14141 suits are initiated to address police misconduct, most commonly the abuse of individuals.[92] Indeed, some § 14141 investigations arise directly from plaintiff suits against law enforcement agencies.[93] Without significant findings of abuse and misconduct, the DOJ would not file its initial claims or settle with the offending agencies.[94] Ultimately, injured parties underlie the need for reform. Justice demands that parties harmed by police abuse be given every opportunity to be compensated for their injury. If the government collects a wide range of documents that could aid an individual's claim for compensation, it is only fair to release the documents to help the individual recover for her loss. The courts have long supported strong action to remedy civil rights abuses.[95] The DOJ's unwillingness to aid civil rights victims undermines this important goal. While § 14141 investigations should retain

92. *See, e.g.* Steubenville Consent Decree, *supra* note 64, ¶¶ 21–23 (requiring the Steubenville Police Department to reevaluate their use of force guidelines); Los Angeles Consent Decree, *supra* note 70, ¶¶ 55–69 (setting new guidelines for the Los Angeles Police Department's use of force policy).

93. The Pittsburgh Consent Decree originated from an ACLU claim against the city. *See* Pittsburgh Consent Decree, *supra* note 63. The Highland Park MOA incorporated a consent decree derived from an earlier private class action. *See* Highland Park MOA, *supra* note 71.

94. Indeed, all § 14141 settlements are precipitated by findings letters listing the general abuses uncovered by the DOJ investigation. *See, e.g.*, Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to James K. Hahn, Esq., City Attorney, City of Los Angeles (May 8, 2000), *available at* http://www.usdoj.gov/crt/split/documents/lapdnoti.htm. Initiation of a § 14141 investigation does not inevitably lead to an enforcement proceeding. The DOJ always reserves the right to end the investigation without action if there is no evidence of misconduct. *See* Horn, *supra* note 58.

95. *See* Bell v. Hood, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that the courts will be alert to adjust their remedies so as to grant the necessary relief."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

their explicit goal of reform, the investigations' beneficial side-effects for individual plaintiffs should not be denied.

The typical victim of police abuse is poor, a member of a minority group, and politically powerless.[96] Accordingly, the people most likely to suffer from police abuse are those least likely to have the resources to press § 1983 claims. Also, the people most likely to be affected by police misconduct live in the neighborhoods most closely monitored and regulated by law enforcement.[97] Without independent resources, convincing an attorney to take on a § 1983 claim requires either a sympathetic lawyer or strong evidence of misconduct that could lead to recovery. Access to § 14141 findings could provide a plaintiff with initial discovery to convince an attorney of the claim's merits. The release of § 14141 findings could also lead to a more efficient use of municipal resources. If the plaintiffs had access to the files the police department had already turned over to the DOJ, municipalities would not need to regenerate documents in response to discovery requests from multiple plaintiffs. The municipality would only have to undertake one effort to collect the documents most relevant to allegations of police misconduct.

Confidential § 14141 investigations engender a perception of collusion between the DOJ and local police departments.[98] Police abuse underlies § 14141 investigations. Actions to reform police abuse should emphasize honest acceptance of mistakes made in the past. When the DOJ agrees not only to settle with the offending police force without the police force claiming responsibility, but also agrees to keep the records underlying their findings confidential, the public could understandably question the ties between the two agencies. Section 14141 proceedings should promote a new environment of fairness and trust. Instead, by keeping findings confidential, the DOJ and local agency perpetuate the perception of bias towards local police departments and a relationship shrouded by a veil of secrecy. Releasing findings to the public may lessen this perception by eradicating the relationship of secrecy between the DOJ and local agency.

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96. *See* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1281 (1999); Stephen M. Ryals, *Discovery in Police Misconduct Litigation: Issues From the Plaintiff's Perspective*, 575 PRAC. L. INST./LIT. 859, 863 (1997).

97. For instance, most large § 14141 investigations have been in urban areas with high concentrations of poor minorities. *See, e.g.*, Los Angeles Consent Decree, *supra* note 70; D.C. MOA, *supra* note 71; Cincinnati MOA, *supra* note 71; Detroit Use of Force Consent Decree, *supra* note 71; Detroit Conditions of Confinement Consent Decree, *supra* note 71.

98. Some reporters have noted that there is already public skepticism about government action in § 14141 proceedings. *See* Horn, *supra* note 61 (noting that "[p]olice, civil rights activists and community leaders are . . . questioning the value of federal involvement and the future of civil rights enforcement" after the Bush Administration adopted its cooperative, compromising approach to police reform).

These arguments against confidentiality focus on promoting fairness by releasing detailed findings and the underlying documents of § 14141 investigations to victims of police abuse. The justice system may also gain important efficiency benefits by stopping the needless rediscovery of information related to police misconduct. Finally, releasing findings may encourage an atmosphere of trust between the community and the government.

C. Arguments for the Confidentiality of § 14141 Investigative Findings

Despite the potential benefits that § 1983 plaintiffs could derive from § 14141 findings, proponents of confidentiality have several valid arguments. First and foremost, the DOJ wants to elicit cooperation from hesitant local police departments. By entering into settlement negotiations with the promise of confidentiality, the DOJ can develop a relationship of trust with a local agency, and hopefully clear the path to full discovery of all necessary information. Second, by keeping the findings confidential, the government does not lower the hurdles to § 1983 actions; thus, municipalities are less likely to be confronted with financially devastating lawsuits. Ultimately, taxpayers pay damages in § 1983 claims.[99] Promoting confidentiality of findings reduces the proliferation of lawsuits and prevents taxpayers from paying double damages—first for reform efforts mandated by § 14141, and second for the defense and damages resulting from lawsuits. Finally, by refusing to release information helpful to litigants, the DOJ discourages nettlesome and time-consuming follow-on litigation. Releasing detailed investigative findings and documents uncovered by investigations could spawn lawsuits by unscrupulous opportunists in addition to the valid claims brought by real victims.

Perhaps the most compelling argument for confidentiality is to encourage the cooperation of target law enforcement agencies. The Bush Administration adopted its conciliatory approach to § 14141 enforcement in order to develop a relationship of trust with police departments and to ensure their complete disclosure and cooperation.[100] By initiating a settlement with a police department with the express understanding that the findings will

99. Even when a local police officer is sued, cities typically take up the defense, and indemnification agreements with cities ensure that the city rather than the officer will pay any award of damages to a successful claimant. *See* Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1211 (2001).

100. *See* Horn, *supra* note 61 (noting that the DOJ "ha[s] adopted a gentler approach to police misconduct investigations, emphasizing cooperation over conflict, compromises over court orders").

remain confidential, the police department is more likely to heed DOJ requests and provide all information necessary to remedy the force's inadequacies.[101] The promise of confidentiality may also enhance the efficiency of investigations. Under this theory, police departments will not engage in stalling techniques or hide information, but will forthrightly turn over all documents in order to reach a quick resolution. One could also argue that it would be unfair to punish a police department's willingness to disclose information by exposing it to greater liability.

The DOJ's insistence on privileged findings also limits community taxpayers' exposure to double damages. A community cooperating with the government under a § 14141 settlement already puts substantial resources into the formation, monitoring, and oversight of reform measures.[102] Releasing findings of § 14141 investigations to potential § 1983 plaintiffs would expose the community to liability for claims that otherwise might not have been brought. Essentially, this would amount to double damages. One could argue that it is unfair to increase a community's exposure to liability when the community has made proactive efforts to reform. Actions alleging municipal liability clearly implicate government funds. Most police departments also indemnify their officers, so even individual officer liability would be paid with public finances, which are supported by taxpayers.[103] One could argue that taxpayer dollars are better spent on proactive measures of police reform under the auspices of § 14141 than on stale claims capitalizing on § 14141 reform efforts.

Finally, proponents of confidentiality may argue that releasing § 14141 investigative findings will expose municipalities to the dangers inherent in follow-on litigation. Follow-on litigation is as simple as it sounds; plaintiffs utilize government action against a defendant to bring their own claims

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101. *Cf.* Jay M. Zitter, Annotation, *When Are Government Records Reasonably "Expected to Interfere With Enforcement Proceedings" so as to be Exempt From Disclosure Under Freedom of Information Act Provision (5 U.S.C.A. § 552(b)(7)(A)) Exempting Any Information "Compiled for Law Enforcement Purposes" Whenever It "Could Reasonably be Expected to Interfere With Enforcement Proceedings,"* 189 A.L.R. FED. 1, 51 (2003) (noting a DOJ argument in the context of antitrust that "disclosure of the documents would interfere with all consent decree negotiations, present or future, by chilling frank negotiation in subsequent cases").

102. *See, e.g.*, Letter from Michael B. Coleman, Mayor, City of Columbus, to Ralph F. Boyd, Jr., Assistant Attorney General for Civil Rights, U.S. Dep't of Justice (Sept. 4, 2002) (noting that the city had spent $2.9 million reengineering their citizen complaint procedures, $250,000 on training regarding racial profiling, and $500,000 on surveillance cameras in police cruisers), *available at* http://www.usdoj.gov/crt/split/documents/columbus_cole_boyd_letters.htm. Though Columbus did not technically settle under an MOA or Consent Decree, the DOJ's willingness to drop their § 14141 claim was based on the reforms efforts taken independently by the city.

103. *See* Schwartz, *supra* note 99, at 1211.

against the same defendant.[104] In traditional forms of follow-on litigation, a number of individual plaintiffs band together into a class action to press a massive claim against the defendant.[105] Section 1983 claims for compensatory damages are limited to actual injury and require a showing of specific harm.[106] Accordingly, § 1983 claims do not pose the same degree of risk as large class actions. However, widespread release of § 14141 findings may facilitate a large number of claims against the municipality. This would subject the municipality to time- and resource-intensive litigation. Follow-on litigation also poses the problem of opportunistic lawyers and unscrupulous clients pressing weak claims in hope of settlement. This would compound the time commitments the municipality must dedicate to litigation efforts.

These three justifications provide significant support for the proposition that § 14141 findings should remain confidential. Confidential findings, it is argued, will facilitate more efficient investigations and enforcement proceedings, promote fairness to the communities supporting police departments, and avoid the potential dangers of time-consuming follow-on litigation.

III. PROPOSAL: ALLOW INDIVIDUAL LITIGANTS ACCESS TO § 14141 FINDINGS

Despite countervailing concerns for confidentiality, the DOJ should reverse its current stance and allow individual litigants, and the public at large, access to § 14141 findings. By opening § 14141 investigation findings, the DOJ can join the trend of other beneficial areas of follow-on litigation while promoting justice for civil rights victims over the efficiency of mutual settlement agreements. The easiest way to gain access to confidential § 14141 investigation findings is to reverse the DOJ policy of confidentiality. However, if the government is intransigent, litigants may attempt to use the Freedom of Information Act (FOIA) and federal discovery techniques to access the information uncovered by the DOJ's § 14141 investigations.

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104. Follow-on litigation is sometimes also referred to as "coattail" litigation. *See generally* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000). The plaintiffs in follow-on litigation are often classes. Follow-on litigation is especially common in antitrust lawsuits. *See id.* at 6–9. This Comment uses the term to describe any litigation in which a plaintiff takes advantage of government enforcement efforts to improve the plaintiff's own chances for recovery.

105. *See id.* at 5.

106. *See* COLLINS, *supra* note 19, at 167–69.

A. Why Make Findings Available to the Public?

Taking into account the arguments made in Part II.B and II.C, three main justifications support releasing § 14141 investigation findings to the public. First, in the narrow context of civil rights abuse, the fairness inherent in releasing the investigation findings to victims of police abuse trumps the efficiency gained by confidentiality. The DOJ should not obstruct potential avenues of justice in order to promote faster and easier settlements. Second, § 1983 actions against municipal defendants are already limited to compensatory damages. In utilizing § 14141 findings to support claims deriving from departmental patterns or practices of discrimination, § 1983 plaintiffs are prohibited from seeking costly punitive damages. They may only recover compensatory damages. Finally, the notion of follow-on litigation is well established in American law and has important social benefits. In areas as diverse as antitrust, corporate malfeasance, and products liability, government lawsuits create a vital precedent for individual parties seeking to recover for injuries directly caused by the conduct underlying federal lawsuits. Together, these three justifications strongly support the release of investigative findings to potential § 1983 litigants.

1. The Importance of Civil Rights Vindication

While efficiency is a vital goal of the American legal system, it must be balanced with concerns for fairness and justice.[107] The Supreme Court has long stressed the importance of vindicating civil rights in the context of police abuse.[108] The vindication of civil rights demands that victims have

107. The tension between fairness and efficiency has long been present in debates about legal policy. Federal regulations explicitly balance the two concepts. *See* FED. R. CIV. P. 1 (noting that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action"); FED. R. EVID. 102 (stating that the "rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined"). Yet, some commentators favor fairness over efficiency. Renowned scholar Ronald Dworkin has been characterized as holding the "view that in adjudication, rights should take precedence over issues of public policy, such as administrative expedience." Joseph Raz, *Dworkin: A New Link in the Chain*, 74 CAL. L. REV. 1103, 1103 (1986) (book review).

108. Justice Brennan once stated that "[a]n agent acting . . . in the name of the [government] possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971). In his concurrence from the same case, Justice Harlan opined that litigants must have a remedy available for the most "flagrant and patently unjustified sorts of police conduct." *Id.* at 411 (Harlan, J., concurring).

access to appropriate means of justice. This important mandate trumps the DOJ's call for efficiency in § 14141 enforcement.

With the enactment of § 14141, Congress granted the DOJ broad power to investigate misconduct in law enforcement agencies. Section 14141 provides the DOJ with the capability to unearth far more information than a typical § 1983 litigant facing procedural hurdles and local police departments' hesitance to release information.[109] The DOJ would best promote justice by considering the repercussions of its § 14141 enforcement methods on interested third parties.[110] The DOJ can support a fair chance for police victim compensation by providing access to investigative documents that may implicate the abusive police departments.

Section 14141 does not explicitly consider the efficiency touted by proponents of confidential settlement agreements. Section 14141 specifically envisions litigation, thus promoting the adversarial process.[111] Litigation ensures that both parties, the DOJ and the local agency, vigorously defend their positions, revealing the full spectrum of arguments and problems at stake in the controversy.[112] Litigation also ensures judicial involvement in the underlying dispute, maximizing the potential for the provision of justice.[113] By consistently settling its cases with local law enforcement agencies instead of litigating the cases on the merits, the DOJ sacrifices these benefits of the adversarial process.

On balance, the importance of promoting justice for civil rights victims outweighs the efficiencies proposed by confidential settlement of § 14141 claims. The community's greater sympathies should lie with the victims of police abuse rather than with the agencies abusing them. Although the difficulty and importance of law enforcement's role in our society must not be trivialized, the tremendous power the police hold over our nation's citizens demands that police power be checked. The ineffectiveness of existing remedies and the minimal reform predicated on past scandals indicate the need to further provide for the victims of police misconduct. While

109. *See Oversight Hearing*, *supra* note 56, at 20 (statement of Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, Dep't of Justice) (noting that DOJ investigators "conduct interviews, they review court pleadings, they talk to as many good sources, original sources of information as they can").

110. *See* Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 113–14 (1986) (expressing concern that third party interests may be neglected by settlements).

111. "Whenever the Attorney General has reasonable cause to believe that a violation . . . has occurred, the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice." 42 U.S.C. § 14141(b) (2000).

112. *See* Coleman & Silver, *supra* note 110, at 114–15; Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

113. *See* Fiss, *supra* note 112, at 1085.

settlement of § 14141 investigation is an important and effective way to quickly attain proactive reform efforts, it must not come at the cost of losing discovery opportunities for the victims of past abuse. The overarching purpose of § 14141 is to remedy police abuse. Utilizing the investigation findings to help police victims recover compensation for their harm is an essential way of remedying abuse.

2. Municipal Damages are Limited to Compensatory Damages

The DOJ initiates a § 14141 investigation to remedy a pattern or practice of police abuse. Accordingly, § 14141 investigations are geared towards systemic failures within police departments. The majority of § 1983 lawsuits utilizing § 14141 findings would likely implicate police departments engaged in a pattern or practice of abuse.[114] Under the current law of § 1983, plaintiffs bringing suit against municipalities or agencies may not claim punitive damages.[115] Section 1983 limits these plaintiffs to compensatory damages alone.

Compensatory damages provide an injured plaintiff with monetary relief for harm suffered by the plaintiff. On the other hand, punitive damages enable a court to set an example by punishing a defendant for his or her conduct. While compensatory damages are calculated according to clearly evidenced injury, punitive damages have minimal limitations. Essentially, while a lawsuit for compensatory damages provides compensation for a plaintiff's actual injuries, a lawsuit for punitive damages can cost the defendant many times more than the damage actually sustained by the plaintiff.

The limitation of § 1983 municipal liability to compensatory damages ensures that the municipality, and thus the public at large,[116] will not be forced to pay out damages beyond the harm actually suffered by the individual plaintiff. This effectively limits the municipality's liability. Since the majority of § 1983 claims stemming from § 14141 investigations are likely to be against municipalities for a pattern or practice of abuse, most of these lawsuits would be limited to compensatory damages. Because exaggerated punitive damage awards are unlikely to follow § 14141 investigations, municipalities would only be paying for the harm they caused. They would not be taught an expensive lesson that unduly punishes municipal taxpayers.

114. See discussion *supra* note 81.
115. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).
116. See *supra* Part II.C.

3. Learning From Other Areas of Follow-on Litigation

Essentially, § 1983 lawsuits piggybacking on § 14141 investigations are a form of follow-on litigation. If not for the initial § 14141 investigation by the DOJ, many of these plaintiffs would be unable to afford the time and money needed to successfully pursue a § 1983 suit. American law has a long history of follow-on litigation. In several substantive areas, an initial government investigation or lawsuit opens the door for injured parties to use the preclusive effect, findings, or mere existence of the government action to secure an attorney and "follow-on" with an individual claim. While many of these traditional areas of follow-on litigation fundamentally differ from the paradigm of a § 1983 lawsuit following a § 14141 investigation, the underlying considerations remain the same.

Antitrust, corporate malfeasance, and products liability are perhaps the most notable areas of follow-on litigation. Successful government antitrust suits pave the way for private consumers to band together and demand compensation for the injuries inflicted upon them by a monopoly's anticompetitive behavior.[117] In recent years, corporate malfeasance has been a burgeoning area of follow-on litigation. For instance, the New York Attorney General's investigation of Enron provided a wealth of information for injured shareholders to utilize in their class actions against that corporation.[118] Similarly, investigations undertaken by the Consumer Products Safety Commission provide "an invaluable post-accident discovery source" for products liability plaintiffs.[119]

While follow-on litigation may lead to some abuses,[120] it benefits injured parties' searches for justice by utilizing the government's past efforts to attain justice. In the paradigmatic areas of follow-on litigation, private litigation follows government regulation of powerful actors that have abused the scope of their legal power. The private litigation following government action allows the individuals specifically harmed by the defendant's conduct to recover for their particular injuries. The government action is directed towards reform and compliance. Follow-on litigation to § 14141 actions would be used identically. The government uses § 14141 enforcement to

117. *See* Thomas E. Kauper & Edward A. Snyder, *Private Antitrust Cases That Follow on Government Cases*, *in* PRIVATE ANTITRUST LITIGATION 329 (Lawrence J. White ed., 1988).

118. *Cf.* Matthew J. Barrett, *New Opportunities for Obtaining and Using Litigation Reserves and Disclosures*, 64 OHIO ST. L.J. 1183, 1184 (2003).

119. John S. Martel, *The Consumer Product Safety Act and Its Relation to Private Products Litigation*, 10 FORUM 337, 342 (1974).

120. *See supra* Part II.C.

initiate reform and then monitor compliance with those reform efforts. Follow-on § 1983 claims would provide recovery for the victims of conduct underlying the § 14141 reform efforts. The paradigm of § 1983 litigation following § 14141 enforcement would directly mirror traditional follow-on litigation.

In nearly all of the traditional areas of follow-on litigation, there are three major differences from the follow-on litigation paradigm proposed by this Comment. First, the plaintiffs in traditional areas of follow-on litigation such as antitrust and products liability are nearly always class actions, while § 1983 claimants are almost exclusively individuals.[121] Second, in the traditional areas of follow-on litigation, the common defendant is a private corporation, while in § 14141 and § 1983 actions, the defendant is a public entity, typically a municipal police department. Third, the statutory schemes for the established areas of follow-on litigation explicitly release government findings to the public,[122] while § 14141 settlements have explicitly made the government findings confidential. Nonetheless, these distinctions do not undermine the applicability of the traditional follow-on litigation paradigm to § 14141 follow-on litigation.

In traditional areas of follow-on litigation, the government successfully files suit against a corporate defendant. The suit indicates the defendant's vulnerability and provides plaintiffs' lawyers with the opportunity to form class actions to take advantage of the defendant's weakness.[123] Often, opportunistic lawyers looking for large contingency fees initiate these class actions.[124] Section 1983 litigants following a § 14141 action are likely to be individual plaintiffs pursuing personal recovery. In a single-plaintiff § 1983 action for compensatory relief alone, the plaintiff's attorney is less likely to expect a large contingency fee. Thus, § 14141 follow-on claims are arguably less likely to be purely lawyer-driven than class actions following government action in the traditional areas of follow-on litigation.

It is more difficult to reconcile the second key difference between traditional areas of follow-on litigation and § 14141 follow-on litigation. Follow-on litigants in antitrust, corporate malfeasance, and products liability sue public corporations. Litigants following § 14141 actions sue agencies of

121. *See, e.g.*, Erichson, *supra* note 104, at 4–5 (commenting on the Microsoft antitrust class action and the tobacco products liability action).

122. *See, e.g.*, Martel, *supra* note 119, at 342 (noting that investigative findings by the Consumer Product Safety Commission "are to be made public"); *see* also *infra* note 126.

123. *See* Erichson, *supra* note 104, at 2.

124. *See* Donncadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431, 436 (2004) (noting that the United States system of private antitrust enforcement relies on law firms motivated by large contingency fees).

their local government. One could argue that using a government precedent to sue a faceless corporation is far more justifiable than using the same type of precedent to sue one's local government, the costs of which are ultimately absorbed by the plaintiff and his or her neighboring taxpayers. However, in both situations an injured plaintiff seeks recovery from the entity which caused her injury. Whether the guilty entity is a corporation or local government is irrelevant. Justice demands that wrongs are righted regardless of who caused the injury. Further, the nature of corporate ownership in America makes it nearly as likely that one's neighbor invests in the public corporation being sued as it is that the neighbor pays taxes.[125] In each of these instances, ownership or citizenship, the individual has both responsibilities and rights. Sharing the costs of the parent organization's improper conduct can help to promote greater accountability within the organization, whether a corporation or local government.

The statutory schemes for traditional areas of follow-on litigation demand that government discovery be made public; conversely, § 14141 settlements include specific confidentiality clauses. The actual enabling statutes in antitrust and products liability require public access to findings.[126] Section 14141 does not demand either publication or confidentiality of government findings. The mere failure of § 14141 to include a publication provision does not necessarily indicate that the findings should remain confidential. The administrative agency itself, the DOJ, has instituted the policy that makes findings confidential.[127] Section 14141 confidentiality is an ad hoc policy decision. There is no legislative mandate for the DOJ's provision of confidentiality.

Despite the basic differences between § 14141 and existing areas of follow-on litigation, the underlying purpose and overarching framework of the traditional areas of follow-on litigation provide a valuable precedent for the possibility of follow-on litigation for police misconduct. The most

125. In America, personal investment in corporations is pervasive. Pension plans, IRAs, and trusts all rely on institutional investors with greatly diversified investments. Either directly or indirectly, most Americans have some degree of ownership in some of America's largest corporations. *See* John Steele Gordon, *The 50 Biggest Changes in the Last 50 Years*, AM. HERITAGE, June–July 2004, at 22, 23 ("The percentage of people owning stocks and mutual funds has grown explosively as well, with over half the population directly holding financial securities. Many more have interests in pension funds.").

126. 15 U.S.C. § 16(b) (2000) (requiring the United States to publicly disclose "materials and documents which the United States considered determinative in formulating" a proposed consent judgment with an antitrust defendant); *id.* § 2074(c) (requiring the Consumer Product Safety Commission to make reports on research and testing available to the public).

127. Nowhere in the text of § 14141 is there a provision for either confidentiality or publication of findings. However, a review of the consent decrees and MOA issuing from § 14141 investigation show a shift in policy from early consent decrees to later MOA. *See* discussion *infra* Part III.B.1.

important difference between traditional follow-on litigation and police misconduct follow-on litigation is the lack of a publication provision in § 14141. Without clear legislative guidance, hopeful § 1983 claimants must explore other paths to access § 14141 investigative findings.

B. Methods for § 1983 Plaintiffs to Gain Access to § 14141 Investigative Findings

Assuming that § 14141 investigative findings should be made available to the public, the greater problem may be how to make them public. While a policy change on the part of the DOJ would be the easiest solution, a § 1983 plaintiff may also be able to access the confidential findings via traditional methods, notably the Freedom of Information Act (FOIA) and federal discovery rules.

1. Reverse the DOJ's Policy of Confidentiality

As established in Part III.A.3, Congress does not require the confidentiality of § 14141 findings. To the contrary, DOJ administrators have made a policy decision to include a provision in each settlement agreement indicating that the agreement does not authorize access to documents except as expressly provided by the settlement agreement itself.[128] Because this is a policy decision, the DOJ can just as easily reverse its stance on the issue and provide for publication of investigative findings. Such a policy shift would require either a successful lobbying effort by interested parties or a change of administration.

A successful lobbying effort to change administration policy is unlikely. The parties most interested in change have very little clout. Typical § 1983 plaintiffs are poor and powerless.[129] They have virtually no ability to provide the funds or prestige necessary for a successful lobbying effort. Trial lawyers are another potentially interested party. However, their clear self-interest may make them suspect to the DOJ.

The notion of a policy change accompanying a change in administration is more likely. The first two consent decrees implemented by the Clinton Administration contain nearly identical language about potential § 14141 beneficiaries. Both consent decrees include a provision indicating that the consent decree is not meant "to impair the right" of any individual

128. *See, e.g.*, Cincinnati MOA, *supra* note 71, ¶ 106 ("This Agreement does not authorize, nor will it be construed to authorize, access to any CPD documents, except as expressly provided by this Agreement, by persons or entities other than DOJ, the City, the CPD, and the Monitor.").

129. *See supra* note 96 and accompanying text.

seeking to make a claim against the defendant police departments.[130] Neither consent decree contains a provision barring information uncovered during the investigation.[131] However, starting with the Los Angeles consent decree submitted by the current Bush Administration, all consent decrees and MOA contain clauses noting that the agreement is not meant to "impair *or expand*" the right of other persons seeking relief against the defendant.[132] The inclusion of the word "expand" seems to indicate an administrative disposition against the use of § 14141 settlements for individual claims against defendant police departments. All settlements under the Bush Administration also contain a clause explicitly barring access to the defendant's documents by any party except the city and its entities, the DOJ, and the monitor.[133] Clearly, administrative priorities influence § 14141 enforcement.

2. Challenge Confidentiality With Traditional Mechanisms

Assuming that the DOJ refuses to make findings public in future § 14141 settlements, traditional information-gathering mechanisms may possibly be used to access § 14141 findings. Even if the DOJ changes its policy and removes explicit confidentiality provisions from future settlements, plaintiffs would still not be able to access the findings from existing settlements with confidentiality provisions. Though their success is unlikely, the FOIA and federal discovery devices could potentially be used to access documents and findings from § 14141 investigations.

130. Pittsburgh Consent Decree, *supra* note 63, ¶ 7; Steubenville Consent Decree, *supra* note 64, ¶ 6. Similar statements are found in the other two settlements completed by the Clinton Administration. *See* New Jersey Consent Decree, *supra* note 65, ¶ 128; Memorandum of Agreement Between the United States Department of Justice, Montgomery County, Maryland, the Montgomery County Department of Police and the Fraternal Order of Police, Montgomery Lodge 35, Inc., ¶ I.F (Jan. 14, 2000) [hereinafter Montgomery County MOA], http://www.usdoj.gov/crt/cor/Pubs/mcogrmt.htm.

131. These consent decrees do not include a provision explicitly noting that the settlements bar access to the investigation findings, nor do they contain a provision authorizing access to the documents.

132. *See, e.g.*, Los Angeles Consent Decree, *supra* note 70, ¶ 10 (emphasis added); D.C. MOA, *supra* note 71, ¶ 8 (emphasis added); Cincinnati MOA, *supra* note 71, ¶ 8 (emphasis added).

133. *See, e.g.*, Los Angeles Consent Decree, *supra* note 70, ¶ 10; D.C. MOA, *supra* note 71, ¶ 8; Cincinnati MOA, *supra* note 71, ¶ 8. The last two settlements under the Clinton Administration also used this language. *See* New Jersey Consent Decree, *supra* note 65, ¶¶ 114, 125; Montgomery County MOA, *supra* note 130, ¶ I.H. However, neither of these settlements included the "impair or expand" language, instead using the "impair" language.

a. Freedom of Information Act

The FOIA was passed in 1966 to allow the public access to government agency information.[134] Specifically, the FOIA allows the public to make specific requests for government documents. As long as the documents are not covered by specific exemptions, the government must provide the requestor with copies of the requested information.

Section 1983 litigants hoping to access documents from § 14141 investigations must confront one of the DOJ's explicit exemptions—Exemption 7, the law enforcement privilege.[135] Specifically, the law enforcement privilege exempts several categories of documents gathered in furtherance of law enforcement purposes. Exemption 7 covers the enforcement of both civil and criminal laws, and thus applies to § 14141.[136] However, the document being sought not only must have been collected in furtherance of law enforcement purposes; it must also fit within one of six explicit categories in order to be exempted from public retrieval.[137]

Of Exemption 7's six categories, only one is likely to be commonly implicated by findings collected during a § 14141 investigation. Categories B through F exempt law enforcement documents that may deprive a person of a fair trial, constitute an invasion of privacy, disclose the identity of a confidential source, disclose techniques and procedures for law enforcement investigations or prosecutions, or may endanger somebody's personal safety.

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134. 5 U.S.C. § 552 (2000). Prior to the FOIA's passage, the government did not allow the public to access information about the inner workings of governments. *See* U.S. Dep't of Justice, Freedom of Information Act, Reference Guide, *at* http://www.usdoj.gov/04foia/referenceguidemay99.htm.

135. 5 U.S.C. § 552(b)(7).

136. *See, e.g.*, Soucie v. David, 448 F.2d 1067, 1078 n.45 (D.C. Cir. 1971).

137. Exemption 7, 5 U.S.C. § 522(b)(7) provides:

> [The FOIA] does not apply to matters that are— . . .
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosures could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

Id.

While any one of these five categories may in a particular instance demand that a particular document be exempted from disclosure, none of them is adequate to provide the kind of blanket immunity that the DOJ claims in its settlements.[138] Category A, however, which exempts government records whenever they "could reasonably be expected to interfere with enforcement proceedings," may block all access via the FOIA. This depends on how a court interprets the status of a § 14141 investigation resulting in settlement.[139]

One can interpret a § 14141 settlement in two different ways. One could argue that the settlement closes the DOJ's investigation and enforces its authority under § 14141 without entering into formal litigation. One could also argue that the settlement is just a temporary measure while the government contemplates other enforcement proceedings, such as a civil suit, to ensure compliance.[140] Under the former interpretation, Category A does not cover government records compiled for a § 14141 investigation because "the exemption applies only if there is a pending or contemplated proceeding."[141] Under the latter interpretation, the chance of a lawsuit remains alive; thus, the enforcement proceedings are incomplete, and the exemption still applies.

Even if one does interpret a § 14141 settlement as keeping the enforcement proceedings alive, a court would have to decide "whether revealing . . . the documents could in fact hinder these ongoing or potential proceedings."[142] An examination of cases interpreting Category A present a fuzzy picture of when ongoing or potential proceedings could be hindered.[143] Without a clear guiding principle to determine whether ongoing or potential proceedings would be hindered, the court would likely interpret the documents requested on a case-by-case basis.

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138. Excluding Category A, the only of these categories that may be implicated in § 14141 findings even on an occasional basis is Category D, in case there were any internal investigations which disclosed police wrongdoing on the basis of confidentiality. However, this category could only be utilized on a case-by-case basis, because Exemption 7 is not to be used as a blanket exemption. *See* OKC Corp. v. Williams, 489 F. Supp. 576, 584 (N.D. Tex. 1980). *But see* Freedberg v. Dept. of the Navy, 581 F. Supp. 3, 4 (D.C. Cir. 1982) (holding that an administrative agency may claim general exemptions).

139. 5 U.S.C. § 522(b)(7)(A).

140. Given the Bush Administration's record of pursuing settlements, it would be a reach to interpret the DOJ's settlement as anything but the closing of a § 14141 investigation. If courts interpret the settlements accordingly, § 1983 plaintiffs have a stronger argument for accessing investigative documents through the FOIA.

141. Zitter, *supra* note 101, at 18.

142. *Id.*

143. *See generally* Zitter, *supra* note 101.

Ultimately, § 1983 plaintiffs would realize an important benefit by gaining access to § 14141 investigative findings under the FOIA. With the findings in hand prior to commencing a § 1983 claim, a victim of police abuse could establish her claim prior to the discovery stage and would have a much better chance of meeting the heightened pleading standards created for § 1983 claimants.[144] Since the plaintiff will have collected support for her claim prior to discovery, early access to findings would also support governmental policy discouraging plaintiffs from using federal discovery as a "fishing expedition."[145]

b. Federal Discovery Devices

If FOIA's Exemption 7 successfully seals DOJ records collected during § 14141 investigations, § 1983 litigants may be able to use federal discovery devices. Initially, a litigant could attempt to use the existence of a § 14141 investigation and settlement to help state her claim alleging the existence of a pattern or practice of police misconduct.[146] If a litigant is able to reach the discovery stage, federal discovery devices provide a claimant with broader information-gathering capacity than the FOIA alone.[147]

Police departments are protected by a number of privileges, including the "official information" privilege, the "self-critical analysis" privilege, and the "executive" privilege.[148] A § 1983 plaintiff may attempt to discover the files collected by the DOJ under a third-party discovery request.[149] However, federal common law provides that privileged matters retain their privilege upon disclosure if the disclosure is "itself a privileged communication."[150] A § 1983 plaintiff could also argue that by turning over its documents to the

144. *See supra* Part II.A for a discussion of the heightened pleading standards still in effect in some jurisdictions.

145. *See* discussion *supra* note 83.

146. However, judges may not be persuaded by this argument. In most cases the settlements explicitly state that there is no admission of any wrongdoing on the part of the police department. *See, e.g.*, Cincinnati MOA, *supra* note 71, ¶ 4. A local police department could fall back on this provision to claim that the § 14141 investigation is no evidence of wrongdoing. Again, this demonstrates how the DOJ's enforcement of § 14141 fails to provide any aid to injured parties seeking compensatory relief.

147. *See generally* Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119 (1984).

148. *See* Arlene Rosario Lindsay, *Issues Arising Before Magistrate Judges in Section 1983 Litigation*, 531 PRAC. L. INST./LIT. 729, 737 (1995).

149. FED. R. CIV. P. 26.

150. FED. R. EVID. 511.

DOJ, a local police department waives any existing privileges.[151] Yet, common law support for this proposition has so far been limited to attorney-client privilege and to the work-product doctrine.[152] It is not clear that this doctrine of waiver would extend to the law enforcement privileges, especially in the context of their cooperation with a law enforcement investigation. If the privileges asserted by police hold up, even discovery may fail as a means of retrieving § 14141 investigation findings and the underlying documents.

CONCLUSION

Police misconduct is a continuing problem across America. In remedying police misconduct, it is critically important to consider the dual goals of deterrence and compensation. While Congress' recent enactment of § 14141 has helped the DOJ to play an important role in the deterrence of police misconduct, DOJ administration of that statute ignores the potentially important role the statute could play in aiding the remedial goal of compensation. Section 14141 by itself is ill equipped to compensate victims of police abuse. But § 14141 investigations carried out under a mandate of openness and transparency could provide victims with considerable evidence of the police department pattern or practice of abuse from which the victim suffered.

Potential § 1983 plaintiffs should look to § 14141 actions as a precedent for establishing their complaints against law enforcement agencies. The initiation of a § 14141 investigation indicates the DOJ's confidence that a police department has engaged in a pattern or practice of misconduct. The victims of persistent police abuse should be given every opportunity to seek compensation for their injuries sustained at the hands of their protectors. Accordingly, the DOJ should administer its § 14141 investigations to facilitate the vindication of individual civil rights. By releasing § 14141 findings to the victims of police abuse, the DOJ may finally involve the injured parties underlying the § 14141 cause of action with wider enforcement of the federal statutes remedying police abuse.

151. *See* Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1431 (3d Cir. 1991) (holding that attorney-client and work-product privileges were waived when a company revealed information during a DOJ investigation).

152. *See id.*

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