

# Legal Remedies for Police Misconduct

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*Federal courts have limited the legal remedies for constitutional violations in policing to the point that they do not discourage police misconduct to the satisfaction of many communities. States and police departments impose additional penalties on police officers who violate the law, but only inconsistently, leading communities to distrust these solutions as well. Yet, because there are so many mechanisms for scrutinizing police conduct, officers often feel overregulated. Policymakers and legislators cannot change all of the obstacles to using litigation to improve policing. But by making it easier and less expensive for departments to adopt helpful reforms, by encouraging community input into police policymaking, and by supporting research, data collection, and transparency in policing, they can promote policing practices that protect rights and build community trust. In these ways, policymakers and legislators can improve police accountability, even as courts make it harder for private citizens and public officials to use legal remedies to do so.*

## INTRODUCTION

Police play a critical, but complicated, role in any free society. Officers promote public safety by stopping and deterring crime and disorder and by bringing criminals to justice. But the same powers we give police to achieve these goals—the powers to command, search, arrest, and use force against members of the public—can also enable officers to undermine freedom. In the name of public order and crime control, police sometimes cause individuals and communities substantial harm: they break down front doors and enter homes; they take personal property; they injure, and they kill. The law permits these harms under limited circumstances, and individuals are required to bear them. When police interfere with liberty in ways that go beyond the bounds of the law, however, they not only harm people without legal justification, but they also threaten the trust between the government and its citizens that is fundamental to a democratic society.<sup>1</sup>

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1. See generally Barry Friedman & Maria Ponomarenko, “Democratic Accountability and Policing,” in the present Volume.

Ideally, policing would promote public safety, maintain the trust and cooperation of the community, and simultaneously minimize any harm officers do to members of the public, even those suspected of crime, and even beyond the standards the law sets. But even if policing does not reach these goals, there is one touchstone on which everyone can agree: American policing must live up to the dictates of the law, and most especially, the basic law of the land, the U.S. Constitution. The Constitution is not a gold standard for policing; policing that satisfies its commands may still do too much harm overall and distribute that harm unfairly.<sup>2</sup> But the Constitution does provide minimum requirements that help ensure that the government does not focus unjustly on individuals and that there are limits to what the government may do in the name of law enforcement. Satisfying those minimum requirements is essential to the legitimacy of policing.

A variety of legal remedies for constitutional violations by police officers, including the exclusionary rule, civil suits for damages or reform, and criminal prosecution, exist to ensure that officers follow the law and to provide redress when they do not. In recent years, commentators have increasingly complained that police officers violate the law with impunity because these legal means for controlling their behavior are too weak. Over several decades, federal courts have left legal remedies for constitutional violations in place, but cut away at them so that, although they are frequently invoked, they are often not effective at remedying or deterring constitutional violations. The consequence is that policing has a lot of law and little remedy. Police officers are surrounded by potential legal review for every act, even legitimate ones, making them feel constantly scrutinized and overregulated. And yet, the law only infrequently holds officers and departments accountable for constitutional violations, leaving victims of police misconduct and their communities deeply dissatisfied. Both police and citizens feel wronged by the present system.

The problems with federal remedies are not easy to fix. Without changing long-standing federal statutes, little can be done by policymakers to reverse the limits to federal remedies imposed by courts, at least in the short run. Still, policymakers can promote lawful policing that builds community trust. First, they can encourage maximal use of existing remedies by federal officials, including legal remedies that have as yet been underutilized to deter misconduct, such as withholding federal funds from departments that discriminate on the basis of race or religion. Second, they can encourage local departments to adopt internal reforms by providing grants and technical assistance for improving departmental training, supervision, and internal accountability. Third,

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2. See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763, 776-81 (2012).

policymakers can facilitate data collection and transparency by departments. This is essential to allow communities to engage with departments to ensure policing that is legal, fair, and consistent with community values. Finally, policymakers can improve national data on policing and support research specifically directed at figuring out how departments can best promote civil rights and minimize harm while also protecting public safety.

This discussion focuses on legal remedies for Fourth Amendment violations.<sup>3</sup> The major federal remedies for Fourth Amendment violations are the exclusionary rule; private civil suits for money damages; private civil suits for equitable relief; public civil suits for equitable relief; and criminal prosecution of police officers. The exclusionary rule permits criminal defendants to seek to exclude from their criminal trials evidence that resulted from an illegal search or seizure, primarily to deter future constitutional violations by police officers.<sup>4</sup> Statutes authorizing civil litigation allow individuals to sue officers, departments, and cities for monetary damages both to compensate victims for their injuries and to discourage future misconduct. Individuals may also sue for equitable relief when money damages are insufficient to remedy a constitutional problem: Federal law permits private plaintiffs to seek both declaratory relief (a declaration by the court clarifying the legal rights of the parties) and injunctive relief (a judge's command to do or refrain from doing some act) against police departments as a means of preventing constitutional violations. Federal law also authorizes the U.S. Department of Justice to sue police departments engaged in a pattern and practice of constitutional violations for declaratory or injunctive relief. This relief often takes the form of structural reforms to the department designed to end that pattern. Finally, the Department of Justice can criminally prosecute officers who willfully violate the Constitution in order to punish them and deter future lawbreaking.

In addition to these federal remedies, states also authorize legal responses to police misconduct that violates state law. Since many states authorize police officers to search, stop, arrest, and use force up to or very near the limits on police power established in Fourth Amendment doctrine, state legal remedies that deter violations of state law will also discourage federal constitutional violations. In practice, most state remedies for police misconduct follow closely

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3. Although the Constitution also regulates the police through the First, Fifth, Sixth, and Fourteenth Amendments, Fourth Amendment protections against unreasonable searches and seizures, including the unreasonable use of force, are most central to the project of policing and are of widest public concern. With the exception of the exclusionary rule, the remedies discussed here largely operate similarly for other kinds of constitutional violations.

4. See *United States v. Davis*, 564 U.S. 229, 236 (2011); *Herring v. United States*, 555 U.S. 135, 141 (2009).

their federal counterparts. All states authorize evidentiary exclusion, civil suits for damages, and criminal prosecutions, though state remedies sometimes apply in circumstances in which federal law would not. In addition, almost all states use a mechanism for which there is no federal counterpart, known as delicensing or decertifying officers. When an officer is decertified or delicensed, he no longer has the state's permission to act as an officer. This remedy, which is called decertification here, is also discussed below.

Though recent public debate about policing has often emphasized the importance of holding individual police officers accountable for instances of lawbreaking, preventing constitutional violations critically demands involving police departments in reform. Officers will violate the law if they are insufficiently trained or equipped to follow it, a condition that is determined largely by departments and municipalities rather than officers themselves. Moreover, departments create both incentives to violate the law, for example, by instructing officers to engage in frequent stops and arrests without regard to their legality, and incentives not to do so, for example, by imposing discipline for breaking legal rules. In order to discourage future constitutional violations, legal remedies must therefore target not only the officers who commit the violations but the departments that train and guide them.

### I. THE EXCLUSIONARY RULE

In 1961, in *Mapp v. Ohio*, the U.S. Supreme Court forbade state courts from allowing evidence obtained in violation of the Fourth Amendment to be admitted in criminal cases.<sup>5</sup> In the decades since, the possibility of evidentiary exclusion has encouraged criminal defendants to challenge police behavior, making evidence suppression the most common Fourth Amendment remedy, and the litigation over motions to suppress the primary context in which Fourth Amendment rights have been refined by courts. The threat of evidentiary exclusion also gave departments good reason to train officers in constitutional law and to encourage officers to follow it, and over time, the exclusionary rule has helped the Fourth Amendment become central to how police officers and executives view good policing. Almost undoubtedly, the exclusionary rule has transformed American law enforcement for the better. In recent years, however, limits on the exclusionary rule have reduced its significance.

From the beginning, the exclusionary rule has been a subject of considerable controversy. In order to deter constitutional violations, the government is forbidden under the rule from using otherwise relevant and trustworthy criminal evidence, which oftentimes means, as then-Judge Cardozo noted,

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5. 367 U.S. 643 (1961).

“The criminal is to go free because the constable has blundered.”<sup>6</sup> Unlike in the case of civil damages for a constitutional violation, the extent of the benefit to the criminal defendant is not correlated with the extent of the constitutional violation. Instead, the guiltier a defendant is and the more serious his criminal conduct, the more he may be helped by excluding illegally-obtained evidence. Thus, the rule appears to provide too much benefit to many criminal defendants. At the same time, the exclusionary rule provides too little benefit for the innocent, since if a person is not charged or the government forgoes the evidence, the exclusionary rule provides no remedy. The exclusionary rule also does not deter unconstitutional policing that is unlikely to produce evidence—such as the use of excessive force or police activity designed to harass or to punish rather than to promote criminal adjudication.<sup>7</sup> These are considerable limitations for a constitutional remedy in policing. To these traditional complaints about the rule, the Supreme Court has added another in recent years: The concern that excluding evidence unfairly impugns and injures police officers who have stepped across complicated constitutional boundaries only by accident.<sup>8</sup>

In light of these concerns, perhaps it is little surprise that academics have long debated the exclusionary rule on legal, policy, and empirical grounds. They have criticized Supreme Court decisions on the rule; contested its legal status and policy justifications; argued about whether it deters misconduct; disagreed about its effects on criminal prosecutions and crime rates; and proposed many alternative schemes. Although the arguments have evolved over time, it is fair to say that in this vast academic literature, lively disagreement exists—and has existed for decades—about every aspect of the rule.<sup>9</sup>

Whatever the ongoing scholarly debate, since the 1970s, the Supreme Court has moved in a largely singular direction with respect to the rule. It has expanded an array of exceptions that permit the government to use illegally-obtained evidence, at least some of the time. These exceptions fall into two

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6. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

7. *See Terry v. Ohio*, 392 U.S. 1, 14-15 (1968).

8. *See, e.g., Davis*, 564 U.S. at 239 (“[I]solated, ‘nonrecurring’ police negligence . . . lacks the culpability required to justify the harsh sanction of exclusion.” (quoting and citing *Herring*, 555 U.S. at 137, 144)); *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016) (refusing to apply the exclusionary rule in large part because “[n]either the officer’s alleged purpose nor the flagrancy of the violation rise to a level of misconduct to warrant suppression”).

9. The debate has been so extensive for so long that Randy Barnett could credibly write in 1983, “The ongoing discussion of the merits of the exclusionary rule is as old as the rule itself. It would be impossible to review it here.” Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 938 (1983). The discussion has stayed voluminous and ferocious in the more than 30 years since.

basic categories. First, the Court has repeatedly limited the legal proceedings to which the rule applies. Thus, illegally-obtained evidence can be used in non-criminal proceedings, such as civil suits, tax proceedings, and deportation hearings; in post-conviction proceedings, such as habeas corpus proceedings; and in criminal non-trial proceedings, such as grand-jury proceedings and preliminary hearings.<sup>10</sup> Second, the Court has chipped away at the application of the exclusionary rule within criminal trials. It has expanded the good-faith exception, which increasingly limits exclusion to cases involving egregious police behavior; standing doctrine, which restricts the set of defendants who may invoke the rule against an illegal search; and limits on the fruit-of-the-poisonous-tree doctrine, which permit the use of evidence even though it was obtained in connection with an illegal activity.<sup>11</sup>

Because of these doctrines, exclusion is now often exceptional rather than ordinary, even when a constitutional violation occurs. Moreover, there is no indication that the Court is done tinkering with the attenuation doctrine, a component of the fruit-of-the-poisonous tree analysis, or the good-faith exception, both of which the Court has expanded in recent years.<sup>12</sup> Since the decisions that limit the exclusionary rule are largely based on judicial interpretation of the U.S. Constitution, they cannot be changed easily by policymakers. Accordingly, however influential the rule has been in policing in the last six decades, the new parameters of the rule suggest that it may not be nearly as important in influencing police conduct in the future.

Though federal policymakers have little opportunity to alter the federal exclusionary rule, state lawmakers are differently situated. All states have as part of their constitutions state equivalents to the Fourth Amendment, which can be more expansive in their protections of criminal suspects, but often follow federal law. These state constitutional provisions are enforced with state exclusionary doctrines, and those rules are sometimes broader than their federal counterpart, imposing a remedy for misconduct that violates both state and federal law, even when the federal exclusionary rule does not. For example, under federal law, if an officer illegally arrests a suspect because he

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10. See, e.g., *Stone v. Powell*, 428 U.S. 465, 489-95 (1976) (habeas proceedings); *United States v. Janis*, 428 U.S. 433, 447 (1976) (federal civil suits); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (grand jury proceedings).

11. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (good faith exception); *United States v. Payner*, 447 U.S. 727 (1980) (standing doctrine); *Hudson v. Michigan*, 547 U.S. 586 (2006) (attenuation doctrine); *Murray v. United States*, 487 U.S. 533 (1988) (independent source doctrine).

12. See, e.g., *Strieff*, 136 S. Ct. 2056 (expanding the attenuation doctrine); *Herring v. United States*, 555 U.S. 135 (2009) (expanding the good faith exception).

negligently believes an arrest warrant exists, the evidence he discovers in any search incident to that arrest is admissible under the good-faith exception to the exclusionary rule. But some states do not recognize a good-faith exception to their own exclusionary rule, and therefore exclude the same evidence from any state criminal case.<sup>13</sup> If a state excludes evidence that was obtained in violation of federal law in enforcing its own constitutional standards, it can incidentally deter future federal constitutional violations. States could go further, for example, by extending evidentiary exclusion beyond constitutional violations to violations of statutes, such as state restrictions on the power to arrest, or by supplementing evidentiary exclusion with administrative punishments against officers or payments to those against whom evidence is illegally obtained. Thus, state lawmakers have several avenues for reducing police misconduct that are not subject to the limits imposed on federal remedies by federal courts.

## II. CIVIL SUITS FOR DAMAGES

The Civil Rights Act of 1871—codified at 42 U.S.C. § 1983 and often known simply as Section 1983—provides a statutory basis for civil suits against police conduct that violates the U.S. Constitution or federal law as a means to deter unconstitutional conduct, vindicate constitutional rights, and provide compensation for victims of constitutional violations.<sup>14</sup> This long-standing statute gained new traction in the late 1970s after the Supreme Court clarified the circumstances in which the suits were available to plaintiffs and Congress passed 42 U.S.C. § 1988, which permitted prevailing parties in Section 1983 cases to recover reasonable attorney’s fees.<sup>15</sup>

Although Section 1983 suits are far less common than motions to suppress evidence under the exclusionary rule, Section 1983 authorizes a remedy in circumstances in which the exclusionary rule does not. Unlike the exclusionary rule, which is tied to the Fourth Amendment, Section 1983 permits plaintiffs to seek redress for violations of other constitutional rights, such as those protected by the Equal Protection Clause and the First Amendment. Civil damages actions also permit a remedy for kinds of Fourth Amendment violations the exclusionary rule does not address, such as constitutionally excessive force—which produces no evidence—and Fourth Amendment violations against those who are never charged with a crime.

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13. See, e.g., *Gary v. State*, 422 S.E.2d 426 (Ga. 1992) (holding that no good faith exception to the exclusionary rule exists under state law); *State v. Marsala*, 579 A.2d 58 (Conn. 1990) (same).

14. 42 U.S.C. § 1983.

15. 42 U.S.C. § 1988.

Despite the potential scope of Section 1983, plaintiffs face many practical barriers to bringing lawsuits. There may not be independent witnesses to an event, making misconduct difficult to prove. Victims of police misconduct often have criminal records or other qualities that may make them unappealing to juries, who are, in any case, reluctant to second-guess police decision-making, given the risks officers face on the street. In addition, because of uncertain outcomes and legal obstacles to recovery, potential plaintiffs cannot always find willing, effective, and experienced attorneys to represent them.

Beyond these practical hurdles, there are often overwhelming legal obstacles to Section 1983 actions. Most importantly, according to the Supreme Court's interpretation of the statute, individual officers are entitled to "qualified immunity" from civil damages for violating a person's constitutional rights unless the right at issue was "clearly established" at the time of the alleged conduct.<sup>16</sup> In recent years, the Supreme Court has required increasingly specific and robust precedent to establish a constitutional right clearly, noting that "existing precedent must have placed the statutory or constitutional question beyond debate," with the result that qualified immunity protects all but the "plainly incompetent" officer.<sup>17</sup>

At the same time, the Court has allowed lower courts additional discretion to avoid issuing decisions that constitute the precedents plaintiffs need in order to satisfy qualified immunity doctrine. In 2001, the Supreme Court required lower courts confronted with motions for summary judgment to address whether a constitutional right would have been violated *before* determining whether the right was clearly established.<sup>18</sup> This decision ensured that even if a plaintiff lost because of qualified immunity, officers would know in the future whether the challenged conduct is illegal, and plaintiffs could recover for future violations. In 2009, in *Pearson v. Callahan*, the Court reversed course, permitting lower courts discretion to decide these two questions in either order.<sup>19</sup> This discretion has the advantage of allowing courts to avoid deciding complex questions of constitutional law unnecessarily. However, it also permits courts to repeatedly avoid assessing the constitutionality of police conduct on the ground that in each case, as in the case before, the question has not yet been clearly established by prior law, and therefore there is no liability even if there

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16. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982) (establishing qualified immunity under § 1983 for government officials with discretionary functions).

17. *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 743 (2011)).

18. *Saucier v. Katz*, 533 U.S. 194 (2001).

19. 555 U.S. 223 (2009).



was a violation. When courts refrain from deciding constitutional questions in this way, plaintiffs challenging similar conduct will keep losing their lawsuits, and actions that violate the Constitution may remain undeterred.

Qualified immunity is available only to individual officers, not departments and municipalities.<sup>20</sup> However, there are other legal obstacles to suits against those defendants. A city (or its department) is only liable under Section 1983 for constitutional violations that it causes through its policies or customs. To establish liability against a city, a plaintiff must show that there was a constitutional violation, that the city caused the violation, and that the violation is attributable to a city policy, formal or informal.<sup>21</sup> Usually, proving these elements requires evidence that city actors knew of and permitted a pattern of similar constitutional violations,<sup>22</sup> as well as evidence that the constitutional violation was actually caused by and was closely related to the policy deficiency.<sup>23</sup> In many cases, proving municipal liability is therefore not only difficult, but requires extensive, expensive discovery.

Even when plaintiffs win civil suits for damages or settle them favorably against individuals or departments, damages actions may not influence police conduct going forward. Individual officers are almost always indemnified by their departments for judgments against them.<sup>24</sup> This means that judgments against individuals are paid for by departments and cities rather than by individual officers. In theory, paying out money should lead departments and cities to seek to prevent constitutional violations by officers to avoid future payments. But in practice, cities sometimes use financial arrangements to pay settlements and judgments that do not penalize police departments, and therefore do not create strong incentives to avoid additional violations.<sup>25</sup> As a consequence, though Section 1983 damages actions can result in considerable costs to cities, they often do little to deter misconduct.

### III. CIVIL SUITS FOR EQUITABLE RELIEF BY PRIVATE ACTORS

Under federal law, when compensatory damages are an inadequate remedy for a constitutional violation, especially a future harm, private plaintiffs, individually or in aggregate, may seek alternative remedies, known as “equitable relief.” This relief usually takes the form of a court’s declaration of the rights

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20. See *Owen v. City of Independence*, 445 U.S. 622, 657 (1980).

21. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690-92 (1978).

22. *Connick v. Thompson*, 563 U.S. 51, 62 (2011).

23. *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989).

24. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

25. See Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016).

of the parties or an injunction—a court order requiring or prohibiting certain actions. Equitable relief can be simple and prohibitory or can involve complex mandates for changing government behavior, and private plaintiffs sometimes sue municipalities seeking an order requiring government agencies to engage in substantial departmental reforms. These reforms do not act—like damages or the exclusionary rule—to deter constitutional violations indirectly. Instead, they are intended to cure the systemic conditions that cause constitutional violations.

Lawsuits for complex reforms, often known as structural reform litigation, developed in the 1950s and expanded through the mid-1970s. This litigation was not then and is not now limited to police departments. In fact, structural reform litigation has been more often and more famously used for other purposes, such as to desegregate schools, to improve prison conditions, and to fight housing discrimination by local and state agencies. Nevertheless, both simple and complex forms of equitable relief are often sought in suits against police departments.

Scholars and commentators have long been divided over the value and legitimacy of suits for equitable relief. By the mid-1970s, the U.S. Supreme Court sided with skeptics and imposed some significant limits on private efforts to obtain declaratory relief and injunctions. For plaintiffs challenging policing practices, the most important of these limits is the Court's application of constitutional standing requirements. In *City of Los Angeles v. Lyons*, the Court held that the plaintiff, Lyons, who had been choked to unconsciousness by police officers during a traffic stop, had not demonstrated a “real and immediate” threat of future injury sufficient to establish Article III standing for injunctive relief.<sup>26</sup> Even if the Los Angeles Police Department used illegal chokeholds, as Lyons alleged, the Court held that “it is no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.”<sup>27</sup> Therefore, he could not sue for injunctive relief. Although *Lyons* applies to all private suits for injunctions, the rule of *Lyons* has proven to be an especially high bar for plaintiffs challenging police practices, and in particular, challenges to the use of force, because of the seemingly unpredictable nature of individual police/citizen interactions. Thus, private suits for equitable relief have not played nearly as substantial a role in reforming police departments' civil rights practices as they have played in changing other public enterprises.

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26. 461 U.S. 95, 105 (1983).

27. *Id.* at 108.

While *Lyons* limited suits for equitable relief, it did not eliminate them entirely. Instead, *Lyons* shapes the litigation that does occur, permitting some kinds of cases against police departments and not others. In particular, courts are more likely to find standing and allow equitable challenges under *Lyons* when a policy targets relatively innocent or common conduct, when the department engages in the challenged conduct frequently, when some plaintiffs have suffered harm more than once, and when the department directs the challenged conduct against a visible subpopulation of which the plaintiff is part.<sup>28</sup> Each of these conditions raises the probability that a particular plaintiff will experience future constitutional injury. Some police practices are far more likely than others to meet these conditions. For example, plaintiffs challenging racial profiling, or the illegal, widespread use of enforcement strategies such as stops, frisks, and arrests against minor conduct, will more easily satisfy the requirements of *Lyons* than plaintiffs attempting to change strip-search practices at jails or uses of excessive force.<sup>29</sup> In this way, and others, court-imposed limits on suits for equitable relief have made such suits a powerful but infrequent tool for challenging and changing unconstitutional conduct by law enforcement.

#### IV. CIVIL SUITS FOR EQUITABLE RELIEF BY PUBLIC ACTORS

While Section 1983 has long provided a vehicle for private plaintiffs to seek injunctions or structural reform of police departments to prevent constitutional violations, until more recently there was no similar authority available to public actors. In 1994, Congress gave the Department of Justice the power to bring suits for equitable relief against police departments in the Violent Crime Control and Law Enforcement Act.<sup>30</sup> Using this authority, the Department of Justice has developed a program of investigating and suing police departments engaged in a “pattern or practice” of constitutional violations and negotiating settlements that impose significant changes on those departments. As of the beginning of 2017, the Department of Justice had engaged in substantial investigations of 69 departments and had entered into 40 reform agreements.<sup>31</sup>

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28. See, e.g., *Chang v. United States*, 738 F. Supp. 2d 83, 92 (D.D.C. 2010); *National Congress for Puerto Rican Rights v. City of New York*, 75 F. Supp. 2d 154, 160-62 (S.D.N.Y. 1999).

29. For discussions of some of these police practices, see Jeffrey Fagan, “Race and the New Policing,” in the present Volume; Henry F. Fradella & Michael D. White, “Stop-and-Frisk,” in the present Volume; Devon W. Carbado, “Race and the Fourth Amendment,” in the present Volume; David A. Harris, “Racial Profiling,” in the present Volume; and L. Song Richardson, “Police Use of Force,” in the present Volume.

30. 42 U.S.C. § 14141.

31. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, THE CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 3 (2017), <https://www.justice.gov/crt/file/922421/download>.

Because political disagreement exists about both the use of structural reform litigation and the need for policing reform, pattern or practice investigations and litigation by the Department of Justice has varied in volume and aggressiveness during the three presidential administrations that have had the power to enforce the law.<sup>32</sup> Despite this variation, there are some notable constants in pattern-and-practice suits brought by the Department of Justice so far. First, the investigations and suits have focused heavily on the use of excessive force; illegal stops, searches, and arrests; and discriminatory policing by departments.<sup>33</sup> Second, in most cases, when the Department of Justice has found a pattern or practice of constitutional violations by a police department, it has entered into an enforceable agreement with the municipality in which the city agrees to make substantial and specific reforms to the police department. Most of these agreements have been in the form of court-enforceable consent decrees.<sup>34</sup> Third, implementation of the consent decrees has been monitored by independent teams who report to the federal courts supervising the decrees.<sup>35</sup> Finally, although the reforms sought by the Civil Rights Division have evolved over time, they have consistently emphasized reducing discrimination, clarifying the policies that officers follow, improving training and supervision, strengthening data collection and transparency, and reforming citizen complaint and internal accountability systems within police departments.<sup>36</sup>

Legal scholars and other commentators have long viewed pattern-and-practice suits as a powerful tool for improving policing, and the program is largely considered successful in reforming departments that have substantial ongoing problems. Still, these suits raise some concerns. Pattern-and-practice suits are resource intensive for both the federal government and the cities that are sued, and they can represent a substantial federal intrusion in local government. In addition, the limited empirical research studying the effects of pattern-and-practice suits so far has found that, though reforms adopted seemed to improve internal processes and reduce unconstitutional policing,

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32. *See id.* at 19.

33. *See id.* at 6.

34. *See id.* at 20-21.

35. *Id.* at 21-22.

36. *See id.* at 25-30.

they also tended to alienate line officers.<sup>37</sup> Finally, reforms imposed by consent decree may not be self-sustaining once ongoing monitoring by the Department of Justice and the federal court ends.<sup>38</sup>

In recent years, the Department of Justice has sought to refine its pattern-and-practice program to address some of these concerns. It has also supplemented this program with an alternative: voluntary technical assistance for departments struggling to prevent constitutional violations through the COPS Collaborative Reform program. Additional research could permit the Department of Justice to use both programs where they are most needed and to encourage effective and cost-efficient types of reform. However, in light of Attorney General Jeff Sessions' skepticism about institutional causes for police misconduct and about the costs and benefits of suing departments, it is unlikely that pattern-and-practice litigation will play as significant a role in promoting reform over the next several years as it has in the recent past.<sup>39</sup>

When suing police departments for a pattern or practice of constitutional violations, the Department of Justice often also invokes Title VI of the Civil Rights Act of 1964<sup>40</sup> (Title VI) and the Omnibus Crime Control and Safe

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37. See, e.g., CHRISTOPHER STONE ET AL., HARVARD KENNEDY SCH. PROGRAM IN CRIMINAL JUSTICE POLICY AND MGMT., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD (2009), [https://www.hks.harvard.edu/content/download/67474/1242706/version/1/file/Harvard\\_LAPD\\_Report.pdf](https://www.hks.harvard.edu/content/download/67474/1242706/version/1/file/Harvard_LAPD_Report.pdf); ROBERT C. DAVIS ET AL., VERA INST. OF JUSTICE, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE (2005), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/can-federal-intervention-bring-lasting-improvement-in-local-policing-the-pittsburgh-consent-decree/legacy\\_downloads/277\\_530.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/can-federal-intervention-bring-lasting-improvement-in-local-policing-the-pittsburgh-consent-decree/legacy_downloads/277_530.pdf). But see THE BROMWICH GROUP LLC, OFFICE OF THE D.C. AUDITOR, THE DURABILITY OF POLICE REFORM: THE METROPOLITAN POLICE DEPARTMENT AND USE OF FORCE: 2008-2015 xvii-xix (2016), [http://www.dcauditor.org/sites/default/files/Full%20Report\\_2.pdf](http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf). Research on the consequences of these suits has been hampered by methodological challenges and is limited in both quantity and scope. See Rachel A. Harmon, *Evaluating and Improving Structural Reform in Police Departments*, 19 CRIMINOLOGY & PUB. POL'Y 617 (2017).

38. See Joshua M. Chanin, *Examining the Sustainability of Pattern or Practice Police Misconduct Reform*, 18 POLICE Q. 163 (2015); DAVIS ET AL., *supra* note 37.

39. See Jeff Sessions, Att'y Gen., U.S. Dep't of Just., Attorney General Jeff Sessions Delivers Remarks at National Association of Attorneys General Annual Winter Meeting (Feb. 28, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-national-association-attorneys-general>.

40. 42 U.S.C. §§ 2000d-2000d-7.

Streets Act of 1968<sup>41</sup> (Safe Streets Act).<sup>42</sup> Both laws prohibit police departments that receive federal funds, training, or technical assistance from discriminating in their programs. These statutes could discourage unconstitutional and other illegal discrimination by threatening to deny federal funds to departments that engage in it. This threat might motivate reform in some departments, especially those that receive substantial federal aid or that can easily reduce discrimination, but the Department of Justice has rarely invoked these statutes outside of the pattern-and-practice suits, and private rights of action are limited. As a result, these statutes do not seem to play a significant role in motivating reform. Presumably, federal agencies could enforce Title VI and the Safe Streets Act more often to discourage discrimination.<sup>43</sup> But given the practical, policy, and political obstacles to denying departments federal funding, along with the limited scope of the existing statutes—which do not address misconduct other than discrimination—it seems unlikely that these statutes will soon have significant influence on policing.

## V. CRIMINAL PROSECUTION

Police officers may be prosecuted for constitutional violations under both federal and state law. Under federal law, 18 U.S.C. § 242 makes it a crime to willfully deprive any person of his or her constitutional rights. This statute provides the most common tool used by federal prosecutors to charge police officers for constitutional violations. Though it is often used to punish excessive force in violation of the Fourth Amendment, this statute can also be used to punish a variety of other constitutional violations, including false arrest, sexual assault during arrest or detention, illegal seizures of property, and the use of unconstitutional restraints or conditions of confinement.

Criminally prosecuting police officers is harder than suing them civilly. As in all criminal cases, prosecutors are required to prove elements of a crime beyond a reasonable doubt, and Section 242 has elements that can be especially difficult to prove. A federal prosecutor must establish not only that the officer violated the Constitution, but also that the officer did so “willfully,” that is, that

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41. 42 U.S.C. § 3789d.

42. See, e.g., Complaint, *United States v. City of Baltimore Police Dep’t*, No. 17-cv-00099, 2017 WL 1301500 (D. Md. joint motion for entry of consent decree granted Apr. 7, 2017); Complaint para. 2, *United States v. City of Ferguson*, No. 16-cv-00180 (E.D. Mo. joint motion for entry of consent decree granted Apr. 19, 2016); Complaint para. 1, *United States v. City of New Orleans*, 35 F. Supp. 3d 788 (E.D. La. 2013) (No. 12-cv-01924).

43. Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 53 (2012).

the officer had the specific intent to do what the law forbids.<sup>44</sup> Since principles of federal prosecution prohibit prosecutors from bringing federal charges unless they believe that the government will likely prevail at trial,<sup>45</sup> even initiating a criminal case can be challenging. Not surprisingly, fewer than 100 federal prosecutions are brought against law enforcement officials for constitutional violations each year.<sup>46</sup>

Some states have criminal laws that specifically criminalize excessive force or other violations of law by the police. Most state prosecutions, however, use generally applicable statutes, such as those prohibiting criminal homicide or assault, to prosecute police officers who act outside their authority. For example, a state might prosecute an officer who uses excessive force resulting in death with murder or reckless homicide. The officer can then invoke self-defense or a public-authority defense to counter such a charge, since all states permit officers to use force to defend against threats to their safety and to conduct arrests. The details of state-law defenses available to officers vary from state to state. As a result, the potential for criminal liability also varies. For example, while police officers may be prosecuted for negligent homicide in New York,<sup>47</sup> a police officer can be held criminally liable for using deadly force in Washington state only with “malice and without a good faith belief” that the force was justified, a much more restrictive mental state.<sup>48</sup> States also differ in their processes for investigating and charging police officers. Although most leave criminal prosecutions of officers to local prosecutors, several permit state officials or specially appointed independent prosecutors to investigate and criminally charge the police.

Many commentators have criticized prosecutors, especially local prosecutors, for failing to bring criminal police-misconduct cases often enough. These criticisms grew especially loud after grand juries declined to indict officers for the highly publicized deaths of Michael Brown in Ferguson, Missouri, and Eric

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44. *Screws v. United States*, 325 U.S. 91, 105 (1945).

45. See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-27.220 B (2017), <https://www.justice.gov/usam/united-states-attorneys-manual> (indicating that “the attorney for the government should commence or recommend federal prosecution only if he/she believes that the person’s conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction”).

46. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION HIGHLIGHTS: 2009-2017 (2017), <https://www.justice.gov/crt/page/file/923096/download> (indicating that more than 580 law enforcement officers of all types were prosecuted between 2009 and 2016); Brian R. Johnson & Phillip B. Bridgmon, *Depriving Civil Rights: An Exploration of 18 U.S.C. § 242 Criminal Prosecutions, 2001-2006*, 34 CRIM. JUST. REV. 196 (2009).

47. See N.Y. PENAL LAW §§ 125.10, 35.30.

48. WASH. REV. CODE § 9A.16.040.

Garner in New York City. Although data is too limited to know how many police officers are prosecuted for misconduct in the states, the available evidence suggests that successful criminal cases are not common. In the last several years, many states have considered statutory reform proposals to strengthen criminal prosecutions of police officers. For example, in 2014, Wisconsin passed a law requiring an independent agency rather than local prosecutors to investigate and make decisions about prosecuting police officers who use deadly force.<sup>49</sup> California passed a statute in 2015 prohibiting the use of grand juries to decide whether to charge police officers for the use of force, though the statute was later found to violate the state Constitution.<sup>50</sup> Other states have passed or are considering similar legislation.<sup>51</sup> Members of Congress have also introduced bills to make it easier to prosecute officers.<sup>52</sup>

Though independent prosecutors may increase public confidence in decisions about charges against officers, some legislative efforts to increase prosecutions may not have their intended effect. Criminal charges against police officers are stymied by a complex set of factors, some of which are not easily changed. Under federal law, for example, criminal prosecutions depend on the clarity of the constitutional standards that govern police action, as well as proof of willfulness, and the standards that govern the use of force are especially indefinite. Moreover, although eliminating investigative grand juries in police

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49. WIS. STAT. § 175.47(3)(a).

50. CAL. PENAL CODE §§ 917(b), 919(c). However, the California Court of Appeal has held that § 917(b) violates the state's Constitution. *See* *People v. Sup. Ct.*, 212 Cal. Rptr. 3d 636 (Cal. Ct. App. 2017).

51. *See, e.g.*, 50 ILL. COMP. STAT. 727/1-10(b) (requiring that “[n]o investigator involved in the investigation may be employed by the law enforcement agency that employs the officer involved in the officer-involved death, unless the investigator is employed by the Department of State Police and is not assigned to the same division or unit as the officer involved in the death”); UTAH CODE ANN. § 76-2-408; WASHINGTON STATE JOINT LEGISLATIVE TASK FORCE ON THE USE OF DEADLY FORCE IN COMMUNITY POLICING, FINAL REPORT TO THE LEGISLATURE AND GOVERNOR 13 (2016), <http://leg.wa.gov/JointCommittees/DFTF/Documents/DFTF-FinalReport.pdf> (recommending removing malice from WASH. REV. CODE § 9A.16.040, and other changes to the law); S.B. 5073, 65th Leg., Reg. Sess. (Wash. 2017) (proposing removing malice from WASH. REV. CODE § 9A.16.040).

52. *See, e.g.*, Mike Allen, *Holder's Parting Shot: It's Too Hard to Bring Civil Rights Cases*, POLITICO (Feb. 27, 2015), <http://www.politico.com/story/2015/02/eric-holder-civil-rights-interview-mike-allen-115575>; Police Accountability Act of 2015, H.R. 1102, 114th Cong. (2015) (bill introduced by Georgia Congressman Hank Johnson to make murder and manslaughter committed by police officers federal crimes); Press Release, Rep. Johnson Reintroduces Police Accountability Act (Feb. 26, 2015), <https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-reintroduces-police-accountability-act>.



cases may put more political pressure on prosecutors to bring cases,<sup>53</sup> it also threatens an effective tool for securing evidence against officers: compelling and locking in testimony from reluctant law enforcement witnesses. Finally, independent prosecutors, like those from the same jurisdiction as the officer, can only bring charges against officers who have violated criminal statutes.

Criminal prosecutions against police officers are likely to be inevitably too rare to deter much misconduct. Nevertheless, they remain of substantial symbolic and normative importance. No other form of remedy so clearly expresses the government's condemnation of specific police violations of law, and none shows as much respect for the victims of police misconduct, especially with respect to police violence. Prosecutions also build public confidence in the government's commitment to lawful policing and fair application of criminal justice. Legislative efforts to pass straightforward criminal statutes governing the use of excessive force that do not turn on constitutional standards might help this effort. At the same time, no other form of remedy so clearly blames the officer rather than systemic factors for misconduct. Though policymakers should continue to seek ways to strengthen efforts to prosecute officers when they violate criminal law, criminal prosecutions should not replace other efforts to deter departmental causes of police misconduct. Moreover, criminal prosecutions must continue to be carried out with a strong commitment to fairness to police officers when they are defendants, even as prosecutors seek to vindicate the interests of victims and society as a whole.

## VI. STATE DECERTIFICATION

State and local police officers possess coercive power beyond that of civilians only by permission of the state in which they work. Accordingly, every state licenses or certifies officers. In most states, the commissions that provide for the training and certification of officers, or other state boards, also have the power to deprive an officer of his license or certification to punish serious misconduct.<sup>54</sup> While the threat of decertification may discourage bad acts, decertification also has a more direct effect: It prevents future violations of the public trust by stopping officers who have committed serious misconduct from continuing to serve as sworn officers in the state. Decertifying officers can also help reassure the public about the state's commitment to law-abiding law

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53. For a discussion of grand jury practice, see Roger A. Fairfax, Jr., "Grand Jury," in Volume 3 of the present Report.

54. See Loren T. Atherley & Matthew J. Hickman, *Officer Decertification and the National Decertification Index*, 16 POLICE Q. 420 (2013); RAYMOND A. FRANKLIN ET AL., INT'L ASS'N DIRS. OF LAW ENF'T STANDARDS AND TRAINING, 2009 SURVEY OF POST AGENCIES REGARDING CERTIFICATION PRACTICES (2009).

enforcement and demonstrate law enforcement's commitment to professional norms. Presently, decertification is inconsistently used, and police departments do not have reliable access to information about decertifications in other states. More systematic use of this tool and an improved system for communicating decertification actions between states, could improve its capacity to reduce police misconduct.

Decertification is especially important in preventing officers who have been fired for misconduct in one department from moving to another department in the same state and repeating the misconduct. Anecdotal evidence suggests that in the absence of decertification, officers who have been disciplined or fired for violating individual rights frequently find employment in smaller departments with poor candidate screening or more limited resources for hiring highly-qualified officers.<sup>55</sup> Although civil liability for improper hiring could theoretically discourage hiring of abusive officers, successful suits are rare.<sup>56</sup> Consequently, in the absence of decertification, which blocks officers from being hired elsewhere in the state, the law may play a limited role in hindering problematic officers from moving to new positions.

Although decertification may be used to punish federal constitutional violations, no state limits it to this function. Thus, decertification can also serve as a remedy for a variety of kinds of police misconduct, such as offering to drop criminal charges in exchange for sex acts, that may not violate constitutional rights. However, state decertification laws vary in breadth, and some states only decertify officers who have been convicted of crimes. Moreover, states vary in how often they apply their statutes, with some states only rarely decertifying officers.

In order for decertification to have its full effect, states should not only actively decertify officers who no longer meet state standards, but agencies should also consider prior out-of-state decertifications when hiring officers. This requires that agencies have access to an accurate and complete national database of state decertifications. While there is a National Decertification Index, states add to it only voluntarily, federal support for the database has been limited and variable, and state participation is incomplete and frequently slow. Further federal support for the National Decertification Index would improve the degree to which state decertification efforts serve the purpose of deterring and preventing future constitutional violations by the police.

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55. See Roger Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 149 (2012).

56. See MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* § 4:20, at 580 (3d ed. 2015).

## VII. DEPARTMENTAL AND MUNICIPAL REMEDIES

Some of the most effective means of preventing police misconduct are within the control of police departments and municipalities. There is wide agreement that hiring well-qualified officers, providing them with extensive and ongoing training, setting forth specific and realistic policies to guide their work, and supervising them well are all critical to ensuring that officers comply with the law. In addition to these management practices, however, departments and municipalities also respond to specific incidents of misconduct in ways that can affect future officer behavior. Most importantly, departments and cities receive citizen complaints about officer conduct, and they investigate and impose discipline for violations of law and departmental policies. This process is important both for deterring misconduct and for communicating a commitment to lawful policing. Since disciplinary mechanisms can be used for misconduct that violates departmental policies as well as law, these mechanisms have far greater potential impact on policing than legal remedies that merely enforce constitutional law.

In most cities, citizen complaints about officer misconduct are investigated and resolved by units of the police department itself, often known as internal affairs units, and discipline, if appropriate, is imposed by command staff. Like legal remedies, internal affairs units often impose scrutiny and burdens that officers resent, and yet rarely vindicate the interests of individuals who feel mistreated by the police. Scholars and other commentators widely criticize internal complaint, investigation, and disciplinary systems in police departments for their ineffectiveness, bias, and lack of transparency. The Department of Justice has leveled similar criticisms in its pattern-and-practice investigations. In many cities, communities distrust the police in part because they believe that internal disciplinary mechanisms do not work.

Departments can undermine disciplinary systems in subtle ways. Some departments make it difficult for citizens to file complaints by requiring them to file in person or by refusing to accept third-party or anonymous complaints. Even when departmental policies formally permit complaints easily, individual officers often resist complaint intake, discouraging citizens from revealing misconduct to the department. Once someone does complain, departments may fail to conduct thorough and fair investigations. They sometimes fail to interview complainants and witnesses or collect relevant documents. Or they favor officers in the process such that misconduct can almost never be proven to the requisite standard.

Because of these kinds of problems, and the underlying difficulties of proving misconduct, departments sustain misconduct complaints infrequently, even against officers who face repeated, similar, independent complaints. They rarely impose substantial disciplinary penalties when they sustain violations. And when departments do impose discipline, their findings and penalties are sometimes overturned by administrative review boards and arbitrators, who often are biased in favor of officers. Finally, in many cities, the entire process of complaint intake, investigation, and discipline is subject to delays and secrecy, leaving the public in the dark and officers in limbo. As a consequence, internal disciplinary systems frequently lack credibility and fail to promote policing that adheres to law and departmental policy.

In a minority of municipalities, complaints and investigations are conducted or reviewed outside the police department by an independent agency, often in some form of what is known as civilian review. These agencies vary enormously, but few seem to be especially effective in addressing misconduct. First, many are limited in structure, powers, and purpose. They may have no subpoena power or investigative resources. Some do not take complaints directly, receiving them only through the police department. They are often staffed either by former officers, who are viewed as biased in favor of the police, or by volunteers, who are perceived to lack appropriate skills and knowledge. And independent agencies frequently consider only individual instances of misconduct rather than deficiencies in policies or other systemic failures that might lead to patterns of misconduct. Even beyond these structural limits, instances of alleged misconduct investigated by independent agencies face the same challenges of proof and the same lack of independent witnesses as other efforts to assess misconduct. Although independent review is popular and may provide a forum for public input into policing, civilian review agencies do not seem to meaningfully prevent or remedy officer misconduct.

### **VIII. LOOKING BEYOND CONSTITUTIONAL REMEDIES**

As the above discussion suggests, legal remedies generate a loose patchwork of methods for remedying and preventing police misconduct. Criminal defendants challenge illegal searches and seizures with the exclusionary rule when they can. Victims of unconstitutional police violence sue for damages when qualified immunity does not bar them. Private plaintiffs challenge discriminatory policing through litigation for equitable litigation, when *Lyons* permits it. The federal government sues local police departments to target patterns of misconduct, at least when the administration favors doing so, and occasionally states and the federal government prosecute individual

officers, mostly for unconstitutional uses of force. But this patchwork has holes. Especially with court decisions narrowing the exclusionary rule, civil damages, and private equitable relief, some victims of unconstitutional actions by the police have no meaningful way to demand to be made whole or to spur preventative reform through the legal system.

Court-imposed limits on constitutional remedies have also made it increasingly difficult to clarify the scope of constitutional rights with respect to the police, a necessary precondition for shaping police behavior. It has long been true that federal criminal prosecutions for civil rights violations could only be brought for violations of rights previously made definite by a court decision or other rule of law.<sup>57</sup> As a result, such criminal prosecutions have not served as a forum for refining or extending such rights. Since structural reform litigation usually settles, forestalling any court ruling on the constitutional issues at stake, it similarly does not provide a mechanism for resolving disputes about legal rights. Instead, for decades, legal rights involving police action have been developed primarily through rulings on motions to exclude evidence in criminal cases and less often in private civil suits for damages under Section 1983.

Recently, however, changes in the law have made refining rights in both contexts more difficult. First, the expanded good-faith exception and other limits on the exclusionary rule make it unnecessary for judges to decide constitutional questions raised by motions to suppress evidence because, where evidence will not be excluded even if a constitutional violation exists, a judge need not address the constitutional question.<sup>58</sup> Instead, the judge can deny motions without determining whether the officer acted illegally. Two changes in qualified immunity doctrine, discussed above, have similar effect. First, though it has long been clear that civil damages are prohibited unless the government official violated “clearly established statutory or constitutional rights of which a reasonable person would have known,”<sup>59</sup> the Court has imposed substantially more restrictive interpretations on what qualifies as “clearly established” for purposes of qualified immunity in recent years.<sup>60</sup> Second, Supreme Court doctrine now permits courts to decide whether there is qualified immunity before deciding the scope of the constitutional right.<sup>61</sup> Both doctrines permit courts to avoid constitutional decisions, and as a result,

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57. *Screws v. United States*, 325 U.S. 91, 103 (1945).

58. *See supra* note 11 and accompanying text.

59. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

60. *See, e.g., supra* note 17 and accompanying text.

61. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

individuals have fewer opportunities to press courts to define constitutional rights and fewer opportunities to secure their protection.

Perhaps more importantly, even when constitutional remedies succeed in court, they often fail to generate the reforms widely thought most critical to effective and rights-respecting policing: more careful policy development, training, supervision, and internal accountability mechanisms inside police departments. The exclusionary rule has limited scope. Criminal prosecutions of officers are uncommon, and in any case, affect individuals more than departments, and therefore are unlikely to stimulate departmental reform. Civil suits for money damages against officers and municipalities do not always translate easily into political incentives for police chiefs and departments to reform. Structural reform litigation is simply too rare to induce departments to adopt expensive reforms to avoid it, and too resource-intensive to conduct against more than a handful of police departments each year. And decertification requires police chiefs and state agencies (filled with former police officers) to police their own, a practice that is as challenging in policing as it is in other professions. The common legal remedies currently used for police misconduct may simply be unable to achieve the goal of substantially increasing legal compliance by law enforcement, at least very far beyond current levels.<sup>62</sup>

Even if constitutional rights were easier to vindicate, public concerns about police action increasingly go beyond the Constitution. Although constitutional rights provide an important floor below which police action cannot go, they do a poor job of balancing competing interests when the police enforce the law and individuals are harmed. Because rights are held by individuals, they often do not limit policing practices that impose substantial aggregate harm to communities. Because they are defined categorically and in advance, they must be more permissive toward law enforcement than a careful weighing of the interests at stake would warrant in order to permit discretion in extreme cases.<sup>63</sup> And because they are defined and applied in the context of court rulings, they are formulated based on considerations, such as the ease of judicial administration, that have nothing to do with whether the police practices in question are overly harmful.<sup>64</sup> Though policing is substantially improved in recent decades, some contemporary policing practices nevertheless impose

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62. See Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33 (2012).

63. See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763, 776-81 (2012).

64. See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 328-31 (2016).

significant harm and sometimes distribute that harm unfairly. Today, more than ever, we should seek effective policing that not only abides by the law but goes beyond legal requirements to minimize harm and build community trust.

This is not to say that constitutional and other legal remedies for policing are no longer important. As the above descriptions suggest, constitutional remedies serve functions other than shaping police action. Criminal prosecutions of officers remain a principal way to declare conduct culpable and to show societal respect for victims. Civil damages compensate injured plaintiffs. And structural reform litigation mitigates systemic problems in policing. Thus, reformers may want to push to strengthen these remedies in the courts; to support pattern-and-practice suits and criminal prosecutions by the Department of Justice; and to promote stronger state tort remedies and criminal prosecutions. Nevertheless, those interested in reform would be wise to look beyond expanding constitutional and statutory remedies to consider alternative means of spurring changes in departments.

### RECOMMENDATIONS

More specifically, beyond altering legal remedies that enforce constitutional standards, policymakers can promote better policing by focusing on three critical tasks.

1. **Making it easier for departments to adopt effective reforms.** Informing police departments about conditions that lead to misconduct and encouraging reforms to avoid them can strengthen local policing. Departments, officers, communities and critics of policing can all agree that the federal government should help departments protect civil rights by giving them technical assistance, by providing them information about best practices for accountability as well as effectiveness, and by subsidizing critical reform efforts. The Department of Justice already does some of this, for instance, through its COPS Collaborative Reform Initiative, which assesses the practices in individual agencies in a non-adversarial way and makes recommendations for reforms, and through some accountability-oriented grant programs, such as those that have provided subsidies for body cameras. But these efforts are limited and far more could be done.
2. **Facilitating effective community input and local political accountability.** Getting communities involved in forming police policy and regulation is likely to help make legal remedies less necessary. At a departmental level, this can be done through strategies such as problem-oriented policing and community policing and other practices that solicit local community

input into policing priorities and practices. States and localities should also refine and clarify the limits on police power and should restrict the most intrusive and least effective policing practices. And the federal government should ensure that federal programs facilitate rather than undermine police accountability efforts by state and local governments. Thus, for instance, federal programs should not provide resources that allow departments to adopt intrusive policing techniques without ensuring local political support.<sup>65</sup>

- 3. Improving research, data collection, and transparency.** As noted at the start of this chapter, policing should seek to be both effective and lawful, and it should engender the trust and confidence of the community. Achieving these multiple goals requires that police departments collect and share with the public data about their actions and policies, especially in areas that raise community concern, such as the use of force. President Obama's Police Data Initiative took limited steps in this direction, but far more could and should be done to ensure transparency in American policing.

Data about what police departments are doing is not the only kind of information critical to governing the police. In addition, departments and communities need to be able to evaluate and compare different policing practices. This requires research not only about effectiveness in policing, but also about the institutional conditions that can reduce misconduct and community distrust. Such research requires funding, which presently is exceptionally limited. Instead, money for research in policing heavily favors studies of the effectiveness of crime-control measures, without adequate attention to legality or to reducing harm. Together, data and research can help us describe more accurately what policing looks like today, allow communities to weigh in on how it should be different, and encourage the most effective and efficient means of getting from the current state of affairs to the one we desire.

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65. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 944-53 (2015).