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# RETHINKING CRIMINAL JUSTICE CIVIL RIGHTS ENFORCEMENT: AN INDEPENDENT FEDERAL AGENCY APPROACH

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TABLE OF CONTENTS



"[Q]uis custodiet ipsos custodes?"[1]
-Roman Poet Juvenal

* J.D. Candidate, Rutgers University School of Law, May 2022. I would like to thank my mother, Susan Boncore, for sacrificing so much to ensure I attained a good education and my grandfather, Robert C. Boncore Sr., for teaching me the value of hard work and dedication. Additionally, I would like to thank my partner, Kaetlin McGee, for putting up with me while I wrote this Note in our living room "office" during a global pandemic. I would like to thank the editorial team at the *Rutgers University Law Review* for their hard work and diligence. Finally, this Note is dedicated to my grandmother, Cora Boncore, who was one of the many people we lost to COVID-19, she taught me the importance of kindness and respect for all people.

1. Roman poet Juvenal, in his sixth satire, was referring to the enforcement of moral codes on women in the late first or early second century CE, but in modern parlance the phrase refers to accountability of those in charge of regulating society. T.H.M. Gellar-Goad, *Who Will Watch the Watchers?*, WFU WRITING CTR. (Sept. 17, 2015), https://writingcenter.wfu.edu/uncategorized/who-will-watch-the-watchers.

## I. INTRODUCTION

Who is guarding the guardians?[2] In the United States, in practice, our police officers are held accountable largely by other police forces or career prosecutors.[3] Recent movements for criminal justice reform have challenged this idea by making the important suggestion that community-based civilian leadership should handle police misconduct claims at the state and local level.[4] However, where we place the power at the federal level has remained largely unchallenged. The Department of Justice ("DOJ") and, within it, the Federal Bureau of Investigation ("FBI") are responsible for handling investigations of civil rights abuses by law enforcement.[5] But should we couch the power to investigate police civil rights abuses with a federal prosecutorial body? Should the Attorney General have the sole power to bring pattern or practice investigations? These questions remain open.

Over the last four years, the DOJ has largely abdicated its role in enforcing civil rights laws against law enforcement.[6] The police killings of African American men that tore apart the United States in the spring and summer of 2020 were not unique.[7] These killings are emblematic of law enforcement's larger disdain for the civil rights of citizens around the

2. *See* U.S. COMM'N ON C.R., 97TH CONG., WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES, at ii, viii (1981) (reviewing police accountability practices in the late 1970s and early 1980s and concluding that police departments and local officials were reluctant to remedy civil rights violations and recommending increased federal action).

3. *See* 34 U.S.C. § 12601 (giving the U.S. Attorney General the ability to bring civil action to obtain "equitable and declaratory relief" in pattern or practice cases). Additionally, the FBI investigates criminal abuses of law enforcement power. *What We Investigate: Civil Rights*, FBI, https://www.fbi.gov/investigate/civil-rights (last visited Sept. 22, 2021).

4. *See Community Oversight*, CAMPAIGN ZERO, https://www.campaignzero.org/oversight (last visited Sept. 22, 2021).

5. *See What We Investigate: Civil Rights*, *supra* note 3.

6. *See* Chiraag Bains & Dana Mulhauser, *The Trump Administration Abandoned a Proven Way to Reduce Police Violence*, WASH. POST (June 9, 2020), https://www.washingtonpost.com/outlook/2020/06/09/trump-pattern-or-practice/.

7. *See* Oliver Laughland, *U.S. Police Have a History of Violence Against Black People. Will It Ever Stop?*, GUARDIAN (June 4, 2020, 9:28 AM), https://www.theguardian.com/us-news/2020/jun/04/american-police-violence-against-black-people.

country[8] and a long history of racism in policing.[9] In the very protests that followed the killings, police engaged in abhorrent behavior across the country including trapping and gassing protestors in Philadelphia,[10] running over protestors in New York City,[11] and inflicting a brain injury on a seventy-five year old protestor in Buffalo.[12] In response, the DOJ did not just fail to act, but rather itself engaged in shocking abuses of power. The DOJ deployed federal law enforcement in Washington, D.C. to gas protestors in order for President Trump to take a press photo.[13] In Portland, the federal government utilized unmarked law enforcement vehicles and officers in camouflage clothing that engaged in a series of detainments reminiscent of political purges in collapsing police states.[14]

8. *See generally* HUM. RTS. WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 25 (1998) (stating that "[p]olice abuse remains one of the most serious and divisive human rights violations in the United States"); *cf.* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996) (arguing that police perjury in Fourth Amendment suppression hearings is systematic and occurs potentially twenty to fifty percent of the time).

9. *See, e.g.*, Tera Agyepong, *In the Belly of the Beast: Black Policemen Combat Police Brutality in Chicago, 1968–1983*, 98 J. AFR. AM. HIST. (SPECIAL ISSUE) 253, 255–56 (2013) (describing Chicago police as "join[ing] forces with angry white mobs" and inflicting brutality on black residents); Leanne C. Serbulo & Karen J. Gibson, *Black and Blue: Police-Community Relations in Portland's Albina District, 1964–1985*, 114 OR. HIST. Q. 6, 32 (2013) ("The police have been critically important agents of an oppressive structure that resisted change in Portland and cities nationally."); Jeffery S. Adler, *"The Killer Behind the Badge": Race and Police Homicide in New Orleans, 1925-1945*, 30 L. & HIST. REV. 495, 530 (2012) ("In many respects, however, police homicide in early twentieth-century New Orleans eerily resembles police homicide in modern America."); SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 4 (2001) ("[T]he new American innovation in law enforcement during the eighteenth and early nineteenth centuries was the creation of racially focused law enforcement groups . . . .").

10. Christoph Koettl et al., *How the Philadelphia Police Tear-Gassed a Group of Trapped Protestors*, N.Y. TIMES (June 25, 2020), https://www.nytimes.com/video/us/100000007174941/philadelphia-tear-gas-george-floyd-protests.html?smid=em-share.

11. Li Cohen, *Video Shows NYPD Vehicles Driving into Protesters in Brooklyn*, CBS NEWS (May 31, 2020, 1:08 AM), https://www.cbsnews.com/news/video-shows-nypd-vehicles-driving-into-protesters-in-brooklyn-2020-05-31/.

12. Phil Helsel, *Man, 75, Shoved to Ground by Buffalo Police During Protest is Released from Hospital*, NBC NEWS (July 1, 2020, 2:56 AM), https://www.nbcnews.com/news/us-news/man-75-shoved-ground-buffalo-police-during-protest-released-hospital-n1232630.

13. *See* Zack Budryk, *Barr Personally Ordered Law Enforcement to Push Back Lafayette Square Protesters: Report*, HILL (June 2, 2020, 3:23 PM), https://thehill.com/homenews/administration/500736-barr-personally-ordered-law-enforcement-to-push-back-lafayette-square.

14. *See* Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OPB (July 16, 2020, 7:46 PM), https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/. It still appears unclear whether the agents involved were under the control of the DOJ or the Department of Homeland Security, but in either case federal law enforcement engaged in the practice. *See id.*

There is no justice for victims of police misconduct when the department charged with seeking justice abdicates its role and then engages in serious abuses itself.

This Note suggests that we rethink the structural paradigm of civil rights enforcement with regard to law enforcement abuses by consolidating, expanding, and moving the power to an independent agency outside of the DOJ. The power to achieve systemic change has been seen in the context of employment discrimination through the enforcement of Title VII and the creation of the Equal Employment Opportunity Commission ("EEOC"). This Note provides a historical connection between the act that created the EEOC and larger failed attempts at systemic relief in the realm of criminal justice. It suggests that segregationists thwarted this effort during the 1960s. Instead of a robust system, the country was left with a suboptimal system of enforcement that has been essentially ineffective at combating systemic police civil rights abuses. The Note then advocates for an independent federal agency to ensure stronger enforcement of citizen rights in the context of policing. It disregards what is politically palatable to suggest that the federal government no longer act as a "backstop"[15] to enforce civil rights in policing but rather take a central role.

In Part II, the Note explores the history of the Civil Rights Acts of 1957 and 1964 and their outgrowth. The Note connects § 14141 of the Violent Crime Control and Law Enforcement Act of 1994[16] to the older Civil Rights Acts, including the act that created the EEOC. By connecting these two points in history, the Note does not argue that the drafters of the Civil Rights Acts of 1957 or 1964 would have considered such a radical idea as proposed here. Instead, the history shows that racism, political will, and history foreclosed the expansion of civil rights enforcement in policing. While Congress built structures to prevent discrimination in various parts of everyday life, protections of criminal justice civil rights remain piecemeal and inadequately enforced.

In Part III, the Note explores enforcement of employment anti-discrimination law, itself a product of the Civil Rights Act of 1964 as expanded by the Equal Opportunity Act of 1972. The Note focuses on the work of the EEOC, a federal agency that administers and enforces civil

15. Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 368 (2011).

16. 34 U.S.C. § 12601 (originally codified as 42 U.S.C. § 14141 and hereinafter referred to as such) (authorizing the U.S. Attorney General to bring "pattern or practice" investigations and seek equitable and declaratory relief).

rights laws against workplace discrimination.[17] The Note then moves on to explore the enforcement of criminal justice civil rights, specifically in the realm of law enforcement. It explores both private and public enforcement of civil rights for police abuses and the limitations of those routes to relief. It surveys various federal statutes that provide relief for civil rights violations such as 42 U.S.C. § 1983 and § 14141 as well as the related case law.

In Part IV, the Note explores the structure, scope, and benefits of creating an independent federal agency with the sole purpose of enforcing civil rights in policing. This part of the Note suggests that an independent agency would mitigate problems faced by litigants in private suits, as well as problems with public enforcement by the DOJ. The Note then moves on to discuss how to structure the agency to avoid the pitfalls of the EEOC's structure, specifically by highlighting the structural benefits of the Federal Reserve, another independent federal agency.

In Part V, the Note attempts to constitutionally support the proposed independent federal agency by addressing the constitutionality of independent agencies themselves, the ability of the government to act on behalf of private parties, and the ability of the federal government to regulate in this area. However, there are, of course, critiques of expanding federal power in this area that are centered around political will, financing, and the public's appetite for another bureaucracy. These are important critiques that are outside the scope of this Note, but it is important to comment that political will is largely ambiguous,[18] government spending has generally continued to rise since 1950,[19] and that bureaucracy is a boon to the general public even if it is often viewed negatively.[20]

## II. A HISTORICAL NEXUS

The historical context provided in this part of the Note should not suggest that the rest of the Note will draw exactly from the originally proposed protections considered in 1957 and 1964. The United States is

17. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview (last visited Sept. 22, 2021).

18. Lori Ann Post et al., *Defining Political Will*, 38 POL. & POL'Y 653, 670 (2010).

19. *See United States Government Spending*, TRADING ECON., https://tradingeconomics.com/united-states/government-spending#:~:text=Government%20Spending%20in%20the%20United%20States%20averaged%202086.58%20USD%20Billion,the%20first%20quarter%20of%201950 (last visited Sept. 22, 2021).

20. *See* Bruce J. Schulman, *The United States Needs More Bureaucracy, Not Less*, WASH. POST (Aug. 9, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/08/09/america-needs-more-bureaucracy-not-less/.

in ways a far different nation than it was during the civil rights era, but in other ways it deeply resembles the same nation with the same unsolved problems. The small slice of history provided here suggests that the broadest protections failed because of the power of segregationists and those that would bow to them in the name of political compromise. Because of the political compromise and power of segregationists at the time, the country lost a chance at creating an enforcement paradigm that would allow an outgrowth of case law in the realm of criminal justice civil rights. As such, we will never know of the case law that might have produced additional rights in criminal justice, not only for people of color but for all Americans.

When Congress passed the Civil Rights Act of 1957, it debated and rejected a portion of the originally proposed Act that would have empowered the United States Attorney General to sue and seek injunctive relief on behalf of private citizens claiming violations of 42 U.S.C. § 1985.[21] Section 1985 allows private claims against two or more people conspiring to infringe on various civil rights.[22]

Proponents of the portion claimed that the expansion gave the Attorney General the right to bring a civil action to prevent or redress acts that would intimidate or injure parties, witnesses, or jurors; obstruct justice; deprive a person of the equal protection of the laws or equal privileges and immunities under the laws; or deprive persons of rights or privileges of a citizen of the United States.[23] Proponents claimed that "[i]n the field of civil rights, the Federal Government must assume the ultimate responsibility for the protection of individuals when State and local enforcement and protection of such rights fail."[24]

Opponents of the expansion claimed that the "provision gives the Attorney General blanket authority to institute civil actions for the United States . . . against any persons that the suit alleges are engaged in or about to engage in any acts which would form the basis of a cause of action under this legislation."[25] Opponents worried that state and local law enforcement would face the threat of federal injunction and, thus, "the chaos which must result from the breakdown of law and order."[26] Part III, as the expansion was called in the pending legislation, was condemned as "absolutely shocking" as it empowered the Attorney General to "devastate the principles of States rights" and "afford to

21. *Compare* H.R. REP. NO. 84-2187, pt. 3, at 3 (1956), *with* Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.

22. 42 U.S.C. § 1985(3).

23. H.R. REP. NO. 85-291, at 10 (1957).

24. *Id.* at 5.

25. *Id.* at 45.

26. *Id.* at 46.

certain groups of citizens free . . . legal representation" at the expense of an increase of costs on the states.[27] The opponents lamented the section's "indefiniteness," claiming the Attorney General could exercise a "plentitude" of powers relating to the equal protection language in § 1985.[28] Ultimately, Part III did not become part of the 1957 Act.[29]

The Civil Rights Act of 1957 eventually passed, creating significant change in civil rights law at the time.[30] Included in the Act was the creation of the "Commission on Civil Rights."[31] The Commission was created to study discrimination across the country and produced information influential to later Civil Rights Acts.[32] However, the Commission lacked any enforcement mechanism.[33]

While the proposed Part III of the Civil Rights Act of 1957 never made it through Congress at that time, it reemerged during debates in 1963.[34] Congress considered a similar provision, now called "Title III," as part of the landmark Civil Rights Act of 1964.[35] Politically, the Democratic Party's official platform included giving the Attorney General *general* authority to file civil suits in civil rights cases.[36] At the March on Washington, marchers demanded a law granting the Attorney General authority "to seek equitable relief to protect civil rights."[37] John Lewis, later a congressman himself and then-Chairman of the Student Non-Violent Coordinating Committee, stated at the March on Washington that "[u]nless title three is put in this bill, there's nothing to protect the young children and old women who must face police dogs and fire hoses in the South while they engage in peaceful demonstration."[38]

One of the intents of Title III was to secure the rights of protestors from racial violence conducted by state and local officials.[39] At one point

27. H.R. REP. NO. 84-2187, at 25 (1956).

28. *Id.* at 33.

29. *See* Margaret Burnham, *The Long Civil Rights Act and Criminal Justice*, 95 B.U. L. REV. 687, 699, 703 (2015).

30. *See* Jocelyn C. Frye et al., *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 453, 453–54 n.18 (1987) (stating that "Eisenhower signed the first piece of civil rights legislation to be adopted in more than eighty years").

31. *Id.* at 454.

32. *Id.* at 462–67.

33. *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. CONG., https://www.loc.gov/exhibits/civil-rights-act/legal-events-timeline.html (last visited Sept. 22, 2021).

34. *See* Burnham, *supra* note 29, at 704.

35. *Id.* at 704–07, 706 n.115.

36. *Id.* at 705–06.

37. *Id.*

38. *Id.* at 706–07 (alteration in original).

39. H.R. REP. NO. 88-914, pt. 2, at 15–17 (1963).

during the formation of the bill, Title III would have provided the U.S. Attorney General with a broad license to initiate civil rights litigation.[40] Title III as proposed in September 1963, just after the Birmingham bombing, "authorized the attorney general to initiate or intervene in civil suits, charging discrimination by state or local officials."[41] The bill was changed by October 1963 to only confer the authority to intervene in suits filed by others or when the DOJ received a written complaint alleging segregation existed in a public facility.[42] Proponents "sought [T]itle III to authorize the [U.S.] Attorney General to uphold the rights" of individuals where they could not protect themselves.[43] Even after the bill was narrowed, proponents believed the Attorney General would need to intervene in various areas including the administration of justice and the unequal treatment of civil rights demonstrators by police.[44]

Even the later, narrower versions of Title III received consternation in congressional debates. Senator John Sparkman, a segregationist Southern Democrat from Alabama,[45] claimed that Title III gave the Attorney General broad powers that would allow the DOJ to intervene in issues ranging from freedom of the press to state criminal proceedings.[46] Sparkman suggested that the Attorney General's staff would grow to equal that of the Pentagon and framed his issues with Title III as feigned-sympathy for the Attorney General's new burden.[47] During debates, Sparkman alluded to both the creation of an Orwellian state[48] and the specter of communism, stating that the Attorney General could become the "commissar of justice, with vast autocratic powers."[49] Senator

40. CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 58 (1985).

41. *Id.* at 34–35.

42. *Id.* at 58; *see* Burnham, *supra* note 29, at 709.

43. H.R. REP. NO. 88-914, pt. 2, at 15–16; *see also* 110 CONG. REC. 6779 (1964) (statement of Sen. Jacob Javits) ("[I]f one is rich enough . . . he may be able to come out on top in one of these cases. If he can last through jail, bail bonds, a few beatings, and the other difficulties that are involved, he may do so. . . . [T]he poor, the ignorant, the numerically weak, the friendless, and the powerless. Those are the people we are talking about. It is in the interest of those persons that we are seeking the intercession of the power and majesty of the United States. . . .").

44. H.R. REP. NO. 88-914, pt. 2, at 16.

45. *See* Brent J. Aucoin, *The Southern Manifesto and Southern Opposition to Desegregation*, 55 ARK. HIST. Q. 173, 173–74, 192 (1996) (showing Sparkman as a signee of the Southern Manifesto, which condemned the Supreme Court's *Brown v. Board* decision); *John Sparkman: A Featured Biography*, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_SparkmanJohn.htm (last visited Sept. 22, 2021).

46. 110 CONG. REC. 5835 (1964) (statement of Sen. John Sparkman).

47. *Id.*

48. 110 CONG. REC. 8638–39 (1964) (statement of Sen. John Sparkman).

49. 110 CONG. REC. 5835 (1964) (statement of Sen. John Sparkman).

John Stennis of Mississippi, another segregationist Southern Democrat,[50] stated that the potential power granted by Title III would be almost identical to that of the originally proposed Part III of the Civil Rights Act of 1957.[51] Stennis said that it would vest in the Attorney General the power to institute himself in any equal protection suit.[52] Stennis called Title III an "abomination"[53] and warned that "[n]othing [was] more repugnant to the basic principles of Anglo-Saxon justice."[54]

Ultimately, a narrow Title III passed and became part of the Civil Rights Act of 1964.[55] The section allows the Attorney General to further desegregation of public facilities, other than schools, by intervening in equal protection cases when he receives a complaint in writing and certifies that the complainant is unable "to initiate and maintain appropriate legal proceedings for relief."[56] A person is deemed unable to initiate or maintain suit when they cannot bear the expense of litigation, obtain legal representation, or whenever litigation would jeopardize the complainant's "personal safety, employment, or economic standing."[57]

Since even the narrow Title III faced opposition by Southern segregationist Democrats, the broader Title III originally imagined by the House Committee in September 1963 had little chance of making it into the final bill. In fact, a broad Title III was unlikely to even make it to a House floor vote given that Democrats relied on a seniority system to name committee chairs, and the Republicans and Southern Democrats had created a "roadblock" on the Rules Committee to prevent consideration of civil rights legislation.[58]

However, the Civil Rights Act of 1964 did expand protections against discrimination in the United States. The Act protected against discrimination in employment under Title VII,[59] created the EEOC,[60] extended the life of the Civil Rights Commission,[61] and provided various

50. *See* Aucoin, *supra* note 45, at 174–75 (showing Stennis was a drafter of the Southern Manifesto).

51. 110 CONG. REC. 8298 (1964) (statement of Sen. John Stennis).

52. *Id.*

53. 110 CONG. REC. 8637 (1964) (statement of Sen. John Stennis).

54. 110 CONG. REC. 8299 (1964) (statement of Sen. John Stennis).

55. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 301-304, 78 Stat. 241, 246.

56. *Id.* § 301(a).

57. *Id.* § 301(b).

58. *See* Eric Schickler et al., *Congressional Parties and Civil Rights Politics from 1933 to 1972*, 72 J. POL. 672, 675 (2010).

59. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 253–57.

60. *Id.* § 705(a).

61. *See* Frye, *supra* note 30, at 465.

other protections.[62] Upon creation, the EEOC was originally given the power to provide technical assistance to further compliance with Title VII, to make technical studies, to assist employers in effectuating Title VII, and to refer litigation to the Attorney General.[63] However, the legislation did not provide the EEOC with any enforcement power and the power to bring lawsuits directly against employers did not exist until 1972.[64]

In 1972, Congress passed the Equal Employment Opportunity Act.[65] The Act gave the EEOC the power to "bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge."[66] The power to bring suits itself, rather than referring litigation to the Attorney General, became necessary because the EEOC lacked power to combat "[l]ess flagrant violations" of Title VII.[67] Those violations would have to be pursued by the aggrieved individuals with their own resources[68] and, due to unequal time and financial resources, might never come to fruition.[69] Since 1972, the EEOC has had the authority to file suit enforcing employment discrimination claims for most citizens.[70] When it comes to other rights violations, such as violations of rights by police, citizens seeking civil remedies must turn to private causes of action. Congress did not provide the Attorney General with a civil cause of action to enjoin discriminatory police practices until 1994[71] and, even then, it fell short of the type of relief that was considered by the most liberal wings of Congress during debates surrounding the Civil Rights Acts of 1957 and 1964.

62. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241, 241 (strengthening certain protections for the individual right to vote); *id.* § 202 (establishing an individual right to be free from discrimination or segregation in places of public accommodation); *id.* § 403 (authorizing federal support for public-school desegregation); *id.* § 407 (authorizing the Attorney General to bring suits against school boards or college authorities for depriving students of equal protection). *See generally id.*

63. *See id.* § 705(g).

64. George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 825 (1972); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 4(a), § 706, 86 Stat. 103, 105–06.

65. Sape & Hart, *supra* note 64, at 824.

66. Equal Employment Opportunity Act of 1972 sec. 4(a), § 706(f)(1).

67. Sape & Hart, *supra* note 64, at 825.

68. *Id.*

69. *See, e.g.*, David E. Rosenbaum, *At Last a Weapon for the Commission*, N.Y. TIMES (Feb. 27, 1972), https://www.nytimes.com/1972/02/27/archives/at-last-a-weapon-for-the-commission-equal-employment.html (telling the story of Earl Johnson, a railroad porter who was unable to afford an attorney to take his claim and contacted the EEOC, but subsequently died before the case could be concluded).

70. The EEOC handles claims against private, but not public, employers.

71. *See* 34 U.S.C. § 12601.

The Violent Crime Control and Law Enforcement Act is far from popular.[72] It is both condemned on the political left[73] and used as a sword to attack liberal politicians on the right.[74] However, there are parts of the law that provide relief for police civil rights abuses. The law included a provision that provides the Attorney General the power to bring "pattern or practice" lawsuits.[75] Scholar Margaret Burnham considers § 14141 as the partial revival of the Civil Rights Act of 1957's original Part III.[76] Burnham suggested that given "the dismal state of our criminal justice systems" we might "revisit John Lewis' Part III."[77]

In his final essay, Congressman John Lewis called all of us to "answer the highest calling of your heart and stand up for what you truly believe."[78] The solution proposed in this Note is a large structural change to the enforcement of criminal justice civil rights that draws from the history of the Civil Rights Acts but seeks to improve and increase enforcement. Disregarding what is politically palatable, the Note argues that the federal government no longer act as a "backstop,"[79] but enforce what it truly believes in by taking a central role in criminal justice rights enforcement. Until people of all races are treated equally by police officers, there is no justice. Until corrected, the federal government fails to uphold its end of the social contract. As such, we must enact strong federal law to ensure that criminal justice civil rights are not violated and that all people are treated equally in the administration of justice. The rest of this Note uses Title VII and the history of civil rights law as a springboard to suggest that an independent federal agency be granted the power to enforce criminal justice civil rights.

72. *See, e.g.*, Carrie Johnson, *20 Years Later, Parts of Major Crime Bill Viewed as Terrible Mistake*, NPR (Sept. 12, 2014, 3:32 AM), https://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake.

73. *See* Ed Chung et al., *The 1994 Crime Bill Continues to Undercut Justice Reform—Here's How to Stop It*, CTR. FOR AM. PROGRESS (Mar. 26, 2019, 8:00 AM), https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/.

74. *See* Dom Calicchio, *Trump Taunts Biden on 1994 Crime Bill, Black Incarcerations*, FOX NEWS (June 5, 2020), https://www.foxnews.com/politics/trump-taunts-biden-on-1994-crime-bill-black-incarcerations.

75. 34 U.S.C. § 12601.

76. Burnham, *supra* note 29, at 710.

77. *Id.* at 711.

78. John Lewis, Opinion, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html.

79. *See* Simmons, *supra* note 15, at 368.

## III. EXPLORING TWO SYSTEMS: ENFORCING TITLE VII & CIVIL RIGHTS IN CRIMINAL JUSTICE

Part I of the Note laid out some historical context surrounding legislation in regard to both criminal justice and employment civil rights and antidiscrimination enforcement. Part II of the Note explores the current enforcement mechanisms of both Title VII and criminal justice civil rights.

### *A. Title VII Enforcement Paradigm*

The EEOC enforces Title VII of the Civil Rights Act of 1964.[80] Title VII makes it illegal "for an employer to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[81] Additionally, it makes it illegal for an employer to classify, limit, or segregate employees for employment based on "race, color, religion, sex, or national origin" in any way that would deprive or adversely affect employment opportunities or status as an employee.[82]

Since 1972, the EEOC has had the power to enforce Title VII on its own.[83] The process for doing so involves a number of steps.[84] However, once the EEOC determines that it wants to bring suit, it does so based on "the strength of evidence, issues in the case, and the wider impact the lawsuit could have on the EEOC's efforts" to address workplace discrimination.[85] The EEOC must complete an investigation, find reasonable cause to believe discrimination has occurred, and be unable to resolve the matter via conciliation.[86] Ultimately, the EEOC has discretion as to which charges to file in a lawsuit.[87] The EEOC does not just function "as a vehicle for conducting litigation on behalf of private parties"[88] but rather is "the master of its own case."[89] If the EEOC sues,

80. *What Laws Does EEOC Enforce?*, U.S. EEOC, https://www.eeoc.gov/youth/what-laws-does-eeoc-enforce (last visited Sept. 22, 2021).

81. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255.

82. *Id.* § 703(a)(2).

83. Sape & Hart, *supra* note 64, at 824–25.

84. For a detailed discussion of the EEOC's administrative process see Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 692–96 (2005).

85. *Filing a Lawsuit*, U.S. EEOC, https://www.eeoc.gov/filing-lawsuit (last visited Sept. 22, 2021).

86. *Id.*

87. *Id.*

88. Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 368 (1977).

89. EEOC v. Waffle House, Inc., 534 U.S. 279, 291 (2002).

the claimant can intervene in the EEOC's case by requesting a Notice of Right to Sue.[90] The employee may sue before the EEOC finishes its investigation.[91] However, requesting a Notice of Right to Sue before investigation will end the EEOC's investigation.[92]

The EEOC receives around 81,000 charges a year and files 335 lawsuits per year.[93] The Office of General Counsel litigates the EEOC's lawsuits.[94] The general counsel is "appointed by the President and confirmed by the Senate for a four-year term."[95] Lawyers working in the EEOC Office of General Counsel work in either the headquarters in Washington, D.C. or one of 23 regional offices.[96] The main priority is "high-impact" litigation where the outcome would affect large groups and further the EEOC's goals of ensuring justice in all states, helping local communities, and preventing continued discrimination.[97] The EEOC also files numerous amicus curiae in suits they do not bring.[98]

In addition to its role in litigation, the EEOC also makes regulations, provides policy guidance, and conducts free training and outreach to help prevent violations of employment discrimination law.[99] Furthermore, the EEOC publishes studies and reports regarding charges filed and employment trends.[100]

Scholars have criticized the EEOC for its limited resources, lack of systemic training, and attorney vacancies, which are all tied to budget shortfalls.[101] However, the same scholars have stated that "the agency continues to play an irreplaceable role in the battle to eradicate employment discrimination."[102] The EEOC makes the greatest impact when it focuses on systemic discrimination cases since those cases "are complicated, expensive, and time consuming," and the EEOC has the expertise and expenses to litigate these matters.[103] The EEOC is the only federal agency that tracks employment discrimination, which allows it to

90. Occhialino & Vail, *supra* note 84, at 698.
91. *Filing a Lawsuit*, *supra* note 85.
92. *Id.*
93. Occhialino & Vail, *supra* note 84, at 700.
94. *Id.* at 699.
95. *Id.*
96. *Id.*
97. *Id.* at 701.
98. *Id.* at 701–02.
99. *Id.* at 702.
100. *Id.*
101. *Id.* at 703; *see also* Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 104 (2001).
102. Occhialino & Vail, *supra* note 84, at 702–03; *cf.* Moss et al., *supra* note 101, at 109–10.
103. Occhialino & Vail, *supra* note 84, at 703.

analyze and track the types of employment discrimination that are common.[104] Investigations of discrimination charges allow the EEOC to uncover what would have been unreported cases of discrimination in the employment sector.[105] Additionally, the EEOC litigates in the public interest and is not constrained by issues faced by private litigants, such as rising attorney's costs, which might make an individual settle before going to trial.[106] Litigating in the public interest also means the EEOC has more incentive to obtain equitable relief in the form of consent decrees than an individual litigant.[107] Additionally, the EEOC is not subject to the gatekeeping function served by private attorneys that is present in other areas of litigation.[108] As such, the EEOC can pursue more risky, novel arguments.[109]

The EEOC is structured as an independent agency.[110] The President, with advice and consent of the Senate, appoints the individual members of the Commission, who all serve five year terms.[111] There are five commissioners.[112] The President names one of the commissioners as chairperson and one as vice chairperson.[113] Congress provides oversight by holding hearings regarding EEOC policy.[114] Policy is adopted by the members of the Commission.[115] The general counsel is appointed by the President[116] and "manages litigations on behalf of the Commission."[117] The EEOC is fairly responsive to political pressure as the President exerts control over appointments and budget.[118] However, this is a function that can be solved by adopting another bureaucratic structure.[119]

104. *Id.* at 704–05.
105. *Id.* at 705.
106. *Id.* at 706; *see also* Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 325–26 (1980).
107. Occhialino & Vail, *supra* note 84, at 706.
108. *Id.* at 706–07.
109. *See id.*; *see also* Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 220 (1995).
110. B. Dan Wood, *Does Politics Make a Difference at the EEOC?,* 34 AM. J. POL. SCI. 503, 506 (1990).
111. *Id.*
112. *The Commission and the General Counsel*, U.S. EEOC, https://www.eeoc.gov/commission (last visited Sept. 22, 2021).
113. *Id.*; *see* Wood, *supra* note 110, at 506.
114. Wood, *supra* note 110, at 506.
115. *The Commission and the General Counsel*, *supra* note 112.
116. *Id.*
117. Wood, *supra* note 110, at 506.
118. *See id.* at 508.
119. *See infra* Part IV.

### *B. Criminal Justice Civil Rights Enforcement*

There are two main ways criminal justice civil rights are enforced under civil causes of action. Rights can either be enforced by private plaintiffs or, in cases where a pattern or practice of violations can be shown, rights can be enforced by the DOJ. This section discusses case law and other barriers that prevent long term systemic relief from being realized in criminal justice reform under existing law.

One of the main enforcement mechanisms used by private parties is 42 U.S.C § 1983.[120] Section 1983 allows any United States citizen or person within the jurisdiction to file suit against any person acting under color of law that causes "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[121] Additionally, 42 U.S.C § 1988 provides discretion to the court to award attorney's fees but not expert fees for actions brought under § 1983.[122] However, the case law of § 1983 and § 1988 have limited routes to recovery and availability of attorney's fees in certain cases.[123]

For a private plaintiff bringing a § 1983 claim, the case law illuminates that there are several hurdles for attaining systemic relief. First, the cost of litigation may prevent claims from ever coming to court. Section 1988 attempts to incentivize private attorneys to take on civil rights cases by awarding fees but the case law prevents important cases and novel strategies from coming to the courts.

In addition to fiscal hurdles, plaintiffs also face significant burdens in bringing systemic relief via their cause of action due to the court's standing requirements and inability for private plaintiffs to achieve injunctions for pattern or practice violations.[124] The standing

120. 42 U.S.C § 1983 (establishing a civil cause of action for deprivation of rights). In addition to § 1983, the Fourth Amendment plays a role in enforcement via the exclusionary rule—an evidentiary rule that precludes evidence gathered in an unconstitutional search. *See* U.S. CONST. AMEND. IV; Mapp v. Ohio, 367 U.S. 643 (1961) (holding all evidence seized in violation of the Constitution is inadmissible in state and federal court). Since evidence preclusion is the major route to enforcing Fourth Amendment rights, many unwarranted searches that do not lead to criminal charges are never challenged. Even if outside the scope of this Note, the logic of the Note still applies to enforcement of Fourth Amendment rights—a federal independent agency may be better suited to bring cases where damages are nominal. For more on the problems of enforcing the Fourth Amendment, see generally Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (1999).

121. 42 U.S.C. § 1983.

122. 42 U.S.C. § 1988.

123. *See infra* Part III, sec. B.1.

124. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1398–99 (2000).

requirements for § 1983 make it nearly impossible to attain injunctive relief to stop police misconduct.[125]

Even Congress' current public enforcement mechanism, §14141, is highly contingent on the current politics of the presidential administration, resource tradeoffs, and incomplete data. All of these factors lead to inconsistent enforcement that results in cases falling through the cracks or not being fully litigated or enforced to conclusion. The public and private barriers to systemic relief stymie progress in criminal justice reform, but enforcement by a federal independent agency may alleviate existing burdens.

1. Attorney Fees Under 42 U.S.C. § 1988

Under § 1988, in order to recoup attorney's fees, the plaintiff must be a prevailing party and the fees must be reasonable.[126] In order to be a prevailing party, the plaintiff must win a judgment on the merits or a court ordered change in the legal relationship between the plaintiff and defendant, such as a consent decree.[127]Additionally, the extent of the plaintiff's victory is relevant to the attorney's fee award.[128] In *Hensley v. Eckerhart*, the Supreme Court held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount" of attorney's fees to award under § 1988.[129] In fact, the Court stated that "the most critical factor is the degree of success obtained."[130] The Court, applying this ruling to complex lawsuits, stated a fee for thousands of hours worked on various claims would not be reasonable where the attorneys only prevailed on one claim.[131] In that case, a fee for all the hours worked would be excessive.[132]

The Court ruled later, in *City of Riverside v. Rivera*, that "vindicat[ion of] important civil and constitutional rights . . . cannot be valued solely in monetary terms."[133] However, in *Farrar v. Hobby*, where the plaintiff

125. *Id.*

126. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). This ruling was partially superseded by the Prison Litigation Reform Act but only regarding prison litigation, which is outside the scope of this Note.

127. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 600, 605–06 (2001).

128. *Hensley*, 461 U.S. at 440.

129. *Id.*

130. *Id.* at 436.

131. *Id.*

132. *Id.*

133. 477 U.S. 561, 574 (1986).

won nominal damages, the Court stated that no award of attorney's fees was reasonable.[134]

The effect of limiting awards of attorney's fees to successful claims where the monetary value of the damages plays a significant—but not determinative—role surely limits the types of cases attorneys are willing to accept and prevents the development of more risky and novel legal strategies.[135] More complex civil rights litigation will require exceptional proof for an attorney to accept the case. Furthermore, not awarding fees in cases where nominal damages are awarded creates the possible scenario where a right can be violated and vindicated, but a plaintiff can still be left without the possibility of recouping attorney's fees, which could further dissuade attorney's from taking these cases. In fact, scholars have criticized § 1988 and suggested that it has had limited success in attracting lawyers to civil rights cases.[136] Thus, § 1988 does not fully deliver on Congress' intent of making private attorneys into "private attorneys general."[137]

2. Systemic Relief Under 42 U.S.C. § 1983

Under § 1983, a private plaintiff may get individual relief if they are able to win their case, but attaining systemic change is difficult. Systemic changes would require an injunction to prevent abusive practices from continuing. In theory, injunctive relief is available to private parties, but in practice, standing issues make it difficult to seek systemic change.

In *O'Shea v. Littleton*, the Supreme Court heard a case where nineteen named individuals alleged, individually and representing a class, that various members of the justice system, including judges, of a county intentionally and continuously engaged in various patterns and practices that deprived Black and poor white citizens of their constitutional rights.[138] The district court dismissed the case, holding that the judicial defendants were immune from acts done in the course of

134. 506 U.S. 103, 115 (1992).

135. *See generally* William K. Kimble, *Attorney's Fees in Civil Rights Cases: An Essay on Streamlining the Formulation to Attract General Practitioners*, 69 MARQ. L. REV. 373 (1986).

136. *See generally id.*; *see also* Jennifer L. Mercer & William C. Elwell, *Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 88 GEO. L.J. 1753, 1759 n.2881 (2000); Layne Rouse, Note, *Battling for Attorneys' Fees: The Subtle Influence of "Conservatism" in 42 U.S.C. § 1988*, 59 BAYLOR L. REV. 973, 974–75 (2007).

137. *See* David Shub, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs*, 42 DUKE L.J. 706, 708 (1992) (stating the legislative intent of the Civil Rights Attorney's Fees Act of 1976 was to allow civil rights plaintiffs to act as "private attorneys general").

138. 414 U.S. 488, 490 (1974).

their duties.[139] The court of appeals overturned the district court's decision, stating that the district court was not forbidden from issuing an injunction if the plaintiffs could prove the judges had discriminated against people based on their race.[140] The Supreme Court reversed the court of appeals' decision, holding that the complaint failed to satisfy the case or controversy requirement of Article III of the U.S. Constitution.[141] In other words, the plaintiffs lacked standing to sue. The Court ruled that because none of the plaintiffs identified themselves as having suffered any injury, they could not bring suit.[142] Even when counsel suggested that members of the class had suffered injury and could be named, the Court ruled that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy."[143] Furthermore, the Court stated that if class members were presently serving an assertedly unlawful sentence, were on or awaiting trial before the judges, the federal courts should not provide injunctive relief.[144] Additionally, the Court foreclosed using past wrongs as evidence of future wrongs because the speculative prospect of future injury rested on the fact that individuals would have to again be arrested and charged with violations of the law.[145] Basically, the Court's standard suggests that neither past, present, nor future injury will allow for injunctive relief in these types of cases.

The inability to use past injury for injunctive relief was further illuminated in *City of Los Angeles v. Lyons*. In *City of Los Angeles v. Lyons*, a driver was stopped by police officers for a traffic violation.[146] During the stop, even though the driver did not provoke the officers or provide any justification, the police grabbed him and applied a chokehold.[147] The chokehold left the driver unconscious and caused damage to his larynx.[148] In fact, the driver blacked out and when he awoke he was lying face down, gasping for air, spitting up blood, and had urinated and defecated.[149] The driver showed evidence that sixteen people had died following the use of chokeholds and that twelve had been Black.[150] Thus, seventy-five percent of the chokehold deaths in Los Angeles had been Black males, which was disproportionate to the nine

139. *Id.* at 492.
140. *Id.* at 492–93.
141. *Id.* at 493.
142. *Id.* at 493–94.
143. *Id.* at 495–96.
144. *Id.* at 496.
145. *See id.* at 496–97.
146. 461 U.S. 95, 97 (1983).
147. *Id.* at 97–98.
148. *Id.* at 98.
149. *Id.* at 115 (Marshall, J., dissenting).
150. *Id.* at 115–16, 116 n.3.

percent of the general population.[151] Nonetheless, the Court held that the driver could not seek injunctive relief to stop the practice of chokeholds because he lacked standing.[152]

In order to prove he had standing, the Court would require that the driver prove "he would have another encounter with the police," and either that *all* police *always* choke any citizen whom they happen to encounter, or that "the [c]ity ordered or authorized police officers to act" in such a way.[153] The standing requirement here is preposterous and has the effect of preventing any plaintiff from getting injunctive relief to stop practices that violate rights. The driver in *Lyons* would not only have had to prove that he would have a future encounter with police—presumably via clairvoyance—but also that he would be subject to that *exact* treatment by *any* police officer or that the treatment was the policy of the city.

In addition to the standing requirements that make systematic changes difficult, there is also a requirement that the plaintiff show an affirmative policy and pervasive misconduct to change practices. In *Rizzo v. Goode*, the Supreme Court heard a case reviewing the Eastern District of Pennsylvania's program "for improving the handling of citizen complaints" of police misconduct by the City of Philadelphia Police Department.[154] The district court had deemed the handling of misconduct claims "inadequate" and directed the city to adopt a program for handling claims via equitable relief.[155] The district court believed that it would prevent future police misconduct.[156] The Mayor of Philadelphia[157] challenged the district court's ruling claiming it was an "unwarranted intrusion by the federal judiciary into the discretionary authority . . . to perform their official functions."[158] The Supreme Court, ruling in favor of the mayor, first brought up a lack of standing, as none of the named defendants had actually violated the constitutional rights of any plaintiffs.[159] Instead, individual police officers had violated rights and the

151. *Id.* at 116 n.3.
152. *Id.* at 105 (majority opinion).
153. *Id.* at 105–06.
154. 423 U.S. 362, 365 (1976).
155. *Id.* at 366.
156. *Id.*
157. The Mayor of Philadelphia at the time was Frank Rizzo, a noted bigot, who as police commissioner, "rounded up gay people[,]" forced Black Panthers to strip in the streets, and ordered the police attack of the headquarters of a group of black separatists in West Philadelphia. *See* Jon Hurdle & Maria Cramer, *Philadelphia Removes Statue Seen as Symbol of Racism and Police Abuse*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/06/03/us/frank-rizzo-statue-removal.html.
158. *Rizzo*, 423 U.S. at 366.
159. *Id.* at 371–73.

only nexus between the officers and future rights abuses were a lack of new disciplinary measures.[160]

After the Court decided the standing issue, it addressed what it considered an "unprecedented theory of [§] 1983 liability."[161] Citizens of Philadelphia had tried to show that an "unacceptably high" level of constitutional violations required federal court intervention.[162] The citizens argued that the police department was engaged in a pattern of violations.[163] First, the Court stated that the pattern was no different than any other large city and was not a pervasive pattern.[164] Second, the Court stated that the mayor engaged in no active conduct, but rather police had acted and he simply failed to address a statistical pattern.[165] The Court ruled that equitable relief granted by the district court that mandated the disciplinary program was unavailable under § 1983 as a result.[166]

The case law discussed in this section shows that the standing hurdles and difficulty in proving patterns of abuse make systemic relief based on § 1983 unlikely. If novel and important systemic cases even make it past the initial fiscal hurdles, the standing requirements and inability to argue pattern or practice will make winning difficult for plaintiffs seeking long term systemic change.

3. Systemic Relief Under 42 U.S.C. § 14141

Congress attempted to make systemic abuses more addressable by giving the Attorney General the ability to bring pattern or practice cases under § 14141.[167] While the constraints of bringing pattern or practice cases are different than those faced by a private plaintiff, they are still detrimental to bringing systemic relief.

Section 14141 gives the Attorney General the sole authority to bring pattern or practice lawsuits against "any governmental authority" or "person acting on behalf of a governmental authority" that has engaged in a "pattern or practice" of law enforcement conduct "that deprives persons of rights, privileges, or immunities secured or protected by the

160. *Id.* at 373.
161. *Id.*
162. *Id.* at 375.
163. *Id.*
164. *Id.* The rationale of the Court here is shocking and unacceptable. The fact that violations are widespread and prevalent should not prevent remedy. In other words, violation of rights should not be accepted on relative terms.
165. *Id.* at 376–77.
166. *Id.* at 380–81.
167. Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3191 (2014).

Constitution or laws of the United States."[168] In practice, the Civil Rights Division of the DOJ decides when to initiate an investigation against a police department and conducts the actual investigation of the department's patterns or practices.[169] The Civil Rights Division decides based on information provided by other agencies, local United States Attorney's Offices, reports by academics or journalists, by monitoring lawsuits involving law enforcement agencies, by tracking complaints, or consulting with persons or organizations that have relevant information about police abuses.[170]

There are several reasons that this paradigm may limit the number of pattern or practice investigations that are conducted. First, there is a political issue. The Attorney General's independence has long been in question.[171] However, the Trump administration has taken this lack of independence to great heights.[172] While the Biden administration has promised to bring back a sense of independence to the office,[173] the damage done by the Trump administration to the reputation of the office makes it hard to believe that future presidents will not use their power to influence the decisions of the Attorney General. Since the approach to criminal justice reform regarding police misconduct is divided on party lines,[174] there will always be an unevenness to the DOJ's handling of pattern or practice cases.

168. *See* 34 U.S.C. § 12601.

169. CIV. RTS. DIV., U.S. DEP'T OF JUST., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT 3, 5 (2017).

170. *Id.* at 5.

171. *See generally* Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence*, 87 FORDHAM L. REV. 1965 (2019) (conducting a historical review of the Office of Attorney General and showing an erosion of independence in the twentieth century that continues today and suggesting an independent commission model for the entire DOJ). While the argument in this Note is significantly narrower than Professor Handelsman Shugerman's, there should be more serious conversation about redesigning the DOJ as an independent commission.

172. *See* Maggie Jo Buchanan, *Attorney General William Barr is Willing to Destroy the Rule of Law for the Trump Administration*, CTR. FOR AM. PROGRESS (June 2, 2020, 9:05 AM), https://www.americanprogress.org/issues/democracy/news/2020/06/02/485702/attorney-general-william-barr-willing-destroy-rule-law-trump-administration/; CTR. FOR ETHICS AND THE RULE OF L., UNIV. OF PA., REPORT ON THE DEPARTMENT OF JUSTICE AND THE RULE OF LAW UNDER THE TENURE OF ATTORNEY GENERAL WILLIAM BARR *passim* (2020).

173. Ryan Teague Beckwith & Jennifer Jacobs, *Biden, Harris Vow to Keep Their Justice Department Independent*, BLOOMBERG (Dec. 3, 2020, 7:18 PM), https://www.bloomberg.com/news/articles/2020-12-04/biden-harris-vow-to-keep-their-justice-department-independent.

174. *See* Claudia Grisales, *House Approves Police Reform Bill, but Issue Stalled Amid Partisan Standoff*, NPR (June 25, 2020, 8:44 PM), https://www.npr.org/2020/06/25/883263263/house-approves-police-reform-bill-but-issue-stalled-amid-partisan-standoff.

In fact, this has played out in the life of § 14141. The aggressiveness of the DOJ in enforcing § 14141 waned in the second term of the Bush administration due to policy changes and an unwillingness to coordinate with civil rights groups.[175] The DOJ then increased its aggressiveness during the Obama administration.[176] However, once the Trump administration took over, Attorneys General Sessions & Barr publicly portrayed their unwillingness to enforce § 14141.[177] Politics and partisanship play a large role in the enforcement of § 14141, which undermines the ability for the country to engage in long-term sustained systemic changes.[178]

In addition to politics, resource tradeoffs prevent more systemic reforms. The DOJ only has the resources to bring a small number of pattern or practice investigations a year.[179] Of course, in theory, the DOJ could just spend more on bringing pattern or practice cases but, in the absence of a congressional mandate to focus on the problem, the DOJ's focus will always shift from administration to administration. Furthermore, if complex, one case can completely take up the bandwidth of the Special Litigation Section of the DOJ,[180] which is the subdivision within the Civil Rights Division that completes the actual investigation and litigation of § 14141 claims.[181] Besides matters in criminal justice, the Special Litigation Section also handles disability rights cases, access to reproductive health, and religious rights of the confined.[182]

Finally, the scattered nature of data on police misconduct potentially prevents the DOJ from understanding the true breadth of the problem. Currently, the DOJ relies on information compiled from other agencies, local United States Attorney's Offices, reports by academics or journalists, lawsuits involving law enforcement agencies, and

175. *See* Rushin, *supra* note 167, at 3232–33.

176. *Id.* at 3234–35.

177. *See* Bains & Mulhauser, *supra* note 6.

178. In Ville Platte, Louisiana the Obama DOJ began an investigation and produced a report that showed that police unlawfully held close to a tenth of the town's residents in what it called "investigative holds." *See* Ian MacDougall, *How the Trump Administration Went Easy on Small-Town Police Abuses*, PROPUBLICA (Nov. 8, 2018), https://www.propublica.org/article/ville-platte-louisiana-police-consent-decree-trump-justice-department. These holds were used to detain anyone that might know anything about criminal activity. *Id.* The DOJ determined there was a pattern or practice of unconstitutional conduct. *Id.* When the administration changed over, Attorney General Sessions rejected the Civil Rights Division's consent decree. *Id.*

179. Rushin, *supra* note 167, at 3230, 3240.

180. *Id.* at 3230.

181. CIV. RTS. DIV., U.S. DEP'T OF JUST., *supra* note 169, at 3.

182. *Special Litigation Section*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/special-litigation-section (last visited Sept. 27, 2021).

complaints.[183] However, it does not appear to have a single system to track all of the complaints filed alleging police misconduct. The George Floyd Justice in Policing Act does seek to fill this information gap by establishing a national police misconduct registry but still places the responsibility of compiling and maintaining the registry with the Attorney General and DOJ.[184]

As this section demonstrates, there are severe barriers to attaining systemic reform in criminal justice via both the current private and public enforcement paradigms. For private enforcement, plaintiffs face significant financial barriers to bringing suit. While Congress enacted § 1988 to incentivize private attorneys to take cases, the awarding of attorney's fees is not perfect and might stifle the development of novel legal arguments or prevent cases where minimal or nominal damages may result. Once a plaintiff brings a case, standing requirements and the requirement of an affirmative policy or pervasive practice largely prevents injunctive systemic relief.

For public enforcement, § 14141 provides a route to systemic relief through the Attorney General's power to bring pattern or practice cases but politics, resource tradeoffs, and data gaps prevent consistent and uniform enforcement. The lack of a consistent and uniform policy from the DOJ results in cases falling through the cracks or not being fully litigated or enforced to conclusion.

The creation of an independent agency to handle police misconduct cases could mitigate many of the issues plaintiffs—both public and private—face in bringing police misconduct cases. The EEOC can serve as a guide and lesson as to how to structure the agency to have maximum impact on long term reform of police practices.

## IV. A HYPOTHETICAL AGENCY FOR CRIMINAL JUSTICE REFORM

The full protections envisioned during the civil rights movement of the 1960s never came to fruition. As a result, the case law in criminal justice civil rights law has developed significantly high hurdles to bring systemic changes in comparison to other areas of civil rights. Financial and standing issues largely prevent systemic cases under § 1983 and political and selective enforcement issues prevent the full use of § 14141. However, the creation of an independent agency that is empowered to enforce § 14141 and § 1983 may mitigate the problems that block systemic changes in criminal justice reform.

183. CIV. RTS. DIV., U.S. DEP'T OF JUST., *supra* note 169, at 5.
184. Justice in Policing Act of 2020, S. 3912, 116th Cong. § 201 (2020).

Plaintiffs under § 1983 face various financial hurdles as previously discussed.[185] In addition to the issues stemming from § 1988's case law, there is also the fact that many of those that experience rights violations by police are from poorer socioeconomic backgrounds.[186] It is not a surprise to those that follow policing in the United States that police misconduct is disproportionally experienced by the poorest communities.[187] It is likely that those experiencing rights abuses are unable to afford attorneys, do not understand that they may be able to take advantage of fee-shifting statutes like § 1988, or lack access to attorneys in general.[188] The legal community attempts to serve poor communities via pro bono or public interest work[189] but the view from the ground is bleaker when it comes to access to justice.[190]

An independent agency could choose to take on the complex cases of those least likely to bear the financial burdens. The idea of having a Defender General for criminal defendants is not new.[191] This agency would, in a sense, act as a Solicitor General for those that face abuses by the police. Access to justice in the civil arena lags behind access to justice in the criminal justice arena.[192] There is significant value in the idea of civil *Gideon*[193] for *all* civil suits. However, if there is a single area where we absolutely need the federal government to provide counsel it is in civil rights litigation.

185. *See supra* text accompanying Part III.B.

186. *See* Justin M. Feldman et al., *Police-Related Deaths and Neighborhood Economic and Racial/Ethnic Polarization, United States, 2015–2016*, 109 AM. J. PUB. HEALTH 458, 461 (2019) (finding that "economic privilege w[as] associated with lower rates of police-related deaths . . . whereas greater concentrations of deprivation were associated with higher rates").

187. *See* David E. Patton, *Policing the Poor and the Two Faces of the Justice Department*, 44 FORDHAM URB. L.J. 1431, 1431 (2017) [hereinafter *Policing the Poor*].

188. *See* HOWARD LINTZ ET AL., A BASIC HUMAN RIGHT: MEANINGFUL ACCESS TO LEGAL REPRESENTATION 151–52 (2015) (concluding that the U.S. system fails to offer equal access to justice and leaves indigent people unprotected in civil, criminal, and immigration proceedings).

189. *See* MODEL RULES OF PRO. CONDUCT r. 6.1 cmt. 1–2 (AM. BAR ASS'N 2020).

190. *See* LINTZ ET AL., *supra* note 188, at 152 ("[I]ndigent claimants have hollow guarantees of their fundamental liberty interests because they have no effective way to access legal redress.").

191. *See generally* Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1472 (2020) (proposing an Office of the Defender General that would advocate for the "interests of criminal defendants *as a class* before the Supreme Court").

192. *See* Robert J. Derocher, *Access to Justice Is Civil* Gideon *a Piece of the Puzzle?*, 32 BAR LEADER 11, 15 (2008) ("Surveys have shown that many people . . . don't distinguish between civil and criminal matters and believe they already have access to free civil representation.").

193. *Id.* Civil *Gideon* refers to the right to counsel in civil suits.

In addition to the financial and access hurdles, there may be social hurdles as well. First, those experiencing rights violations may have committed a crime, have a previous record, or be a member of a social group with less social standing.[194] As such, they may face significant biases in their quest to vindicate their rights.[195] Additionally, they may fear police reprisals[196] or may be hesitant to approach the DOJ—itself a law enforcement body—to report pattern or practice abuses. After all, the DOJ is not only the department that handles civil rights enforcement currently but also houses most federal law enforcement as well as federal prosecutors.[197] Our current paradigm of enforcement asks those that face misconduct by police and indifference from prosecutors to trust another law enforcement body to enforce their rights.[198]

Empowering an independent agency to handle rights violations in policing would provide an additional route to those that otherwise would not pursue the issue due to fear of reprisal, expectations that they would face biases or poor treatment, funding issues, or the simple fact that they do not know where to turn. An independent agency could function more like a social work agency[199] than the DOJ, assisting people in

194. *See* Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 756 (1993) [hereinafter *The Endless Cycle of Abuse*].

195. *See id.*

196. *Id.* at 793 n.221. "[O]fficers will retaliate against those who dare to report them for brutality or verbal abuse." *Id.* (alteration in original) (quoting Antonio H. Rodriguez, *So, You Have a Complaint?: Police: Citizens Who Want to Report Being Mistreated Must Run a Gauntlet of Obstacles, Hostility and Fear*, L.A. TIMES (Mar. 14, 1991, 3:00 PM ), https://www.latimes.com/archives/la-xpm-1991-03-14-me-54-story.html). "These officers have been known to threaten people, roust people, arrest them for nothing and sometimes even harm them physically." *Id.*

197. *See Policing the Poor*, *supra* note 187, at 1435 ("[F]ederal prosecutors have increasingly come to rely on those same state and local actors—namely, the police and district attorneys' offices—to bring a large number of their cases. For federal prosecutors, criticizing those 'partners' in law enforcement comes at a price."); *Who Monitors or Oversees the FBI?*, FBI, https://www.fbi.gov/about/faqs/who-monitors-or-oversees-the-fbi (last visited Sept. 27, 2021).

198. *See Policing the Poor*, *supra* note 187, at 1445 ("[A]n officer, who in one context is found by the Civil Rights Division to have engaged in serious misconduct, may be defended and protected by federal prosecutors in another."). A similar paradigm has been criticized in the realm of federal clemency. *See generally* Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 5–6 (2015) (discussing the failure of embedding the pardon attorney in the DOJ and recommending a commission outside the DOJ).

199. Public perception of social workers is favorable and respondents to a survey suggested that social workers make a difference in the country and that the country needs more social workers. *See* Craig Winston LeCroy & Erika L. Stinson, *The Public's Perception of Social Work: Is It What We Think It Is?*, 49 SOC. WORK 164, 172–73 (2004).

understanding and enforcing their rights with an open mind and broader mission.

In addition to alleviating financial and social burdens to enforcement, coupling enforcement of § 1983 and § 14141 in one agency[200] would provide the ability of a single agency to gain a birds-eye view of police misconduct.[201] By having a higher-level view of rights abuses by police, the new agency could more quickly see patterns of misconduct and initiate § 14141 investigations faster and with greater efficiency. By having access to all private § 1983 claims, the agency could collect data and leverage it in bringing pattern or practice cases.

With this increased data and birds-eye view, the agency could additionally conduct research on and adopt regulations for police best practices.[202] While issues of federalism prevent the federal government from forcing states to comply with regulations outside of those mandated by constitutional procedure, Congress could leverage the spending power or other novel ways to encourage states to submit to the regulatory regime voluntarily.[203]

The independent agency model also solves the issues of politicization and independence that plague the DOJ. The EEOC's structure is inadequate to solve these issues, as it is an agency that is significantly burdened by political interference,[204] but there are other federal agencies

200. This is not to suggest that we do away with private enforcement, but rather require reporting to an agency to bring a private suit. The EEOC model, providing the EEOC with essentially a right of first refusal, may be too rigid for criminal justice, but there is value in having a single agency with a view of all misconduct present in a sector.

201. The EEOC has a "birds-eye view" of discrimination in the employment sector that allows identification of systemic discrimination. *See* Occhialino & Vail, *supra* note 84, at 707. However, no single entity has a view of police misconduct in this country. While proposed legislation seeks to remedy this lack of data consolidation, it still places it under the control of the DOJ. *See supra* note 184 and accompanying text.

202. The limited routes to proactive and meaningful reform provided by constitutional criminal justice rights, § 14141, and § 1983 enforcement is long documented. *See* Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 791 (1970) ("[The Supreme] Court is obviously deprived of the ability to make any coherent response to, or to develop any organized regulation of, police conduct."); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 36 (2009) ("[Section] 14141 enforcement can generate only a limited incentive for police departments to reform proactively. Current enforcement practices dissipate that incentive, so much so that it is unlikely to influence departments to reform."); *The Endless Cycle of Abuse*, *supra* note 194, at 753–54 ("Years after Congress enacted section 1983, attorneys, legislators and citizens are questioning the statute's effectiveness as a legal tool for deterring police misconduct."). As such, the federal government should seek to adopt a novel approach to, as Professor Harmon phrases it, "induce" and "compel" police departments to reform. Harmon, *supra* note 202, at 22 (emphasis omitted).

203. *See infra* Part III.B.3.

204. *See supra* note 118 and accompanying text.

designed to limit political interference, such as the Federal Reserve.[205] A structure that mirrors the Federal Reserve,[206] with its ability to make long-term sustained policy, is better suited for an agency that is making complex policy judgements affecting the daily lives of citizens,[207] such as policing.

The Federal Reserve has seven members of the Board of Governors.[208] All are appointed by the President and confirmed by the Senate.[209] They serve staggered fourteen-year terms, and they cannot be reappointed after completing a full term.[210] In nominating someone to the Board, the President must consider the "fair representation of the financial, agricultural, industrial, and commercial interests" as well as the "geographical divisions of the country."[211] In selecting members of the Board, the President also cannot name more than one from any one Federal Reserve District and must appoint at least one member with primary experience in working in smaller community banks.[212] The Chairman of the Board of Governors is selected by the President from the members of the Board for a four year term that can be repeated as many times as the President would like until the fourteen year term is up.[213]

An independent agency making regulations and policy regarding police practices should represent the various regions of the country. Congress could design an agency where members on the board of the independent agency represent various districts of the country. The Federal Reserve Districts themselves were designed by considering the overall commercial practices of each region and were largely allowed to operate independent from each other under the direction of the Board.[214] An independent agency should consider the typical crimes prosecuted, the sizes of police forces in the area, the similarity of state procedural and substantive laws, as well as any other values or issues required to

205. *See* Scott A. Wolla, *Independence, Accountability, and the Federal Reserve System*, PAGE ONE ECON. 1, 2 (2020), https://files.stlouisfed.org/files/htdocs/publications/page1-econ/2020/05/01/independence-accountability-and-the-federal-reserve-system_SE.pdf.

206. The Federal Reserve is certainly the "extreme" in independent agency structures, but there are other agencies that function more independently than the EEOC with less "extreme" structures.

207. *See* Wolla, *supra* note 205, at 2.

208. 12 U.S.C. § 241.

209. *Id.*

210. *Id.* §§ 241–42.

211. *Id.* § 241.

212. *Id.*

213. *See id.* §§ 241–42.

214. *Structure of the Federal Reserve System*, BD. GOVERNORS FED. RSRV., https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-system.htm (last visited Sept. 27, 2021).

construct cognizable districts. The agency's board could also require certain expertise by its members such as academic expertise in criminal law, civil rights, criminology, prior community activism, police experience, public defender work, prosecution work, or other values deemed important to upholding rights and making workable policy regarding police practices.

Ultimately, the goal would be to have an independent agency, like the EEOC in the discrimination context, responsible for being the "master of its own case"[215] in regard to individual cases of rights abuses. The agency would then have the authority to bring pattern or practice cases and utilize its unique birds-eye view to research and study police practices that lead to abuses. Additionally, this paradigm should encourage states to buy into a voluntary police regulatory regime to, over time, unify the country's police practices into a single, more just enforcement paradigm. Since the country is so vast and practices differ so widely, it is important that each area is represented in the agency and that a multidisciplinary board creates policy that supports both the rights of citizens while being workable. This balance is hard to achieve via isolated civil suits—where injunctive relief is hard to obtain—and isolated pattern or practice suits—where consistent enforcement is at the whim of one change of administration. In order to achieve equity in police practices, the country must take the longer, more consistent path to achieve any real systemic change. The Civil Rights Movement is not an isolated movement that came to a conclusion and ended in the 1960s.[216] It is a longer movement that must be sustained and grown for generations to come.[217] The current approach to criminal justice reform does not reflect this reality.

## V. CONSTITUTIONALITY OF AN INDEPENDENT AGENCY FOR CRIMINAL JUSTICE REFORM

An independent agency model for criminal justice reform brings up several questions of constitutionality. First, can Congress create an independent agency of this nature? Second, can Congress empower this

215. Just as the EEOC is "master of its own case." EEOC v. Waffle House, Inc., 534 U.S. 279, 291 (2002).

216. Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1234–35 (2005).

217. *Id.* at 1263 ("[The Civil Rights Movement is] a world-defining social movement that has experienced both reversals and victories and whose victories are . . . being partially reversed. Both the victories and the reversals [that] call us to action . . . are part of a long and ongoing civil rights movement . . . [and] can help us imagine . . . a new way of life, a continuing revolution.").

agency to bring suits under § 1983? Finally, can Congress create an independent agency to regulate police behavior without running afoul of federalism and the states' police power?

The independent agency itself must be constitutional. In *Myers v. United States*, the Supreme Court held that Congress cannot reserve the power to remove an executive officer to itself and that Congress cannot limit the power to remove an executive official appointed by the President.[218] However, in *Humphrey's Executor v. United States*, the Court further elaborated that when it comes to "quasi legislative" or "quasi judicial" officers, Congress has the authority to "fix the period during which they shall continue [in office], and to forbid their removal except for cause in the meantime."[219]

Most recently, in *Seila Law LLC v. Consumer Financial Protection Bureau*, the Supreme Court stated that the "for cause" restriction for firing the single director of the Consumer Financial Protection Bureau ("CFPB") violated separation of powers.[220] In doing so, the Court explained its precedent in *Humphrey's Executor*, stating that Congress can "create expert agencies led by a *group* of principal officers removable by the President only for good cause."[221] The CFPB has the power to engage in rulemaking and enforcement.[222] Specifically, the CFPB can conduct administrative proceedings to ensure compliance with its statutes and regulations, conduct investigations, issue subpoenas, prosecute civil actions in federal court, and request injunctive relief among other powers.[223] In distinguishing the CFPB single director structure from the *Humphrey's Executor* decision, the Court pointed to the fact that the director could not "be described as a 'body of experts' [nor] . . . 'non-partisan' in the same sense as a group of officials drawn from both sides of the aisle."[224] Additionally, the Court stated that the lack of staggered terms prevented accrual of expertise among leadership.[225] Importantly, the Court severed the director-based structure from the rest of the CFPB's operations and stated that a multimember agency would potentially be an alternative.[226]

218. 272 U.S. 52, 159–64 (1926).
219. 295 U.S. 602, 628–29 (1935).
220. 140 S. Ct. 2183, 2191–92, 2194 (2020).
221. *Id.* at 2192.
222. *Id.* at 2191.
223. *Id.* at 2193.
224. *Id.* at 2200 (quoting *Humphrey's Ex'r*, 295 U.S. at 624).
225. *Id.*
226. *Id.* at 2211 ("Our severability analysis does not foreclose Congress from pursuing alternative responses to the problem—for example, converting the CFPB into a multimember agency.").

In summation, Congress has the power to create a federal independent agency and insulate the officers of such agency by allowing only for "for cause" removal if the agency is led by a multimember board. In the case of an agency enforcing and regulating police misconduct and civil rights, *Seila Law* is instructive.

The Court in *Seila Law* seemed to believe that an agency with multimember non-partisan expert leadership with staggered terms and protection from removal is constitutional. Additionally, by severing the leadership and allowing the rest of the CFPB's enforcement paradigm to continue, the Court implicitly approves the rest of the CFPB's powers such as conducting administrative proceedings, investigations, issuing subpoenas, prosecuting civil actions, and requesting injunctive relief. As such, it seems that, in theory, precedent allows for an independent agency that would conduct administrative proceedings, investigations, issue subpoenas, prosecute civil actions, and request injunctive relief. Importantly, these are all the tools that would be required if an agency enforced § 1983, conducted pattern or practice investigations and lawsuits under § 14141, and provided criminal justice regulations.

The biggest constitutional issue in the creation of an independent agency for police misconduct and criminal justice civil rights enforcement is federalism. An agency enforcing § 14141 does not appear to pose constitutional issues as it is already enforced by the DOJ.[227] Federal independent agency enforcement of § 1983 is reminiscent of the historical debate explored in Part II regarding congressional consideration of providing the Attorney General with § 1985 enforcement powers.[228] While the idea might have been controversial at the time, the adoption of § 14141 seems to have at least partially abrogated those worries. Additionally, Congress can confer standing on an independent agency by statute.[229] Independent agencies that are given power to file civil suit in the public interest may even seek relief beyond what the private party would seek.[230] While "[t]he ability of the federal government to sue in a parens patriae capacity is . . . uncertain," Congress can give the federal government standing to sue on behalf of citizens by statute.[231] The power of the government to sue can provide an "essential safeguard[] that

227. *See* 34 U.S.C. § 12601.

228. *See supra* Part II.

229. *Cf.* FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 484–85 (1985) ("We do not doubt, nor do any of the parties in these cases challenge, the standing of the FEC, which is specifically identified in § 9011(b)(1).").

230. *See, e.g.*, EEOC v. Outback Steakhouse of Fla., Inc., 75 F. Supp. 2d 756, 760–61 (N.D. Ohio 1999).

231. *See* ERWIN CHEMERINKSY, FEDERAL JURISDICTION 128 (8th ed. 2021).

otherwise might be lacking," especially in a society where the cost of litigation is high and rights are imperative.[232]

The powers of the independent agency laid out in this Note that bring the most constitutional issues to mind is the ability for this agency to make regulations. Each agency discussed previously in comparison[233] arguably rests on Congress' powers.[234] The federal government, and thus Congress, lacks a general police power.[235] As such, it does not have the power to force states to adopt federal police regulations outside of those mandated by the Constitution, as applicable to the states via the Fourteenth Amendment. However, there are ways that the federal government could make it beneficial for states to submit to the federal regulatory regime. Namely, use of the spending power and safe harbor from federal enforcement of § 1983 and § 14141.

Professor Rachel Harmon argues that the DOJ should induce police forces to proactively reform by means of a complete "safe harbor mechanism" if departments adopt a standardized set of remedial measures designed by the DOJ.[236] Harmon suggests that adopting a "worst-first"[237] litigation policy for § 14141 and a "safe harbor" practice[238] would result in police departments submitting to DOJ-designed reforms

232. *Id.*

233. So far, this Note has discussed the EEOC, Federal Reserve, and CFPB.

234. *See* Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 252–62 (1964) (holding that Title II of the Civil Rights Act was within Congress' Commerce Clause power). Debate about whether Congress can create a central bank, like the Federal Reserve System, has existed since the founding of the republic. For a reconstruction of the first debate on this matter see Charles J. Reid, *America's First Great Constitutional Controversy: Alexander Hamilton's Bank of the United States*, 14 U. SAINT THOMAS L.J. 105 (2018). The first central bank was ultimately created in 1791. *See id.* at 107. A Second Bank of the United States was created in 1816, after the First Bank's charter expired. *History of the Federal Reserve*, FED. RSRV. EDUC., https://www.federalreserveeducation.org/about-the-fed/history (last visited Sept. 27, 2021). Finally, its current iteration was founded in 1913. *Id.* As for the CFPB, the Supreme Court in *Seila Law* simply held the agency's leadership structure was unconstitutional but did not question the constitutionality of the agency. *See* Seila Law v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020). In fact, the Court stated "[t]he only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal" and severed that from the rest of the statutes that created the CFPB's powers and responsibilities. *Id.* at 2209–11.

235. Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919) ("That the United States lacks the police power, and that this was reserved to the states by the Tenth Amendment, is true.").

236. *See* Harmon, *supra* note 202, at 36–38.

237. *Id.* at 1 ("[A] 'worst-first' litigation policy . . . prioritizes suits against police departments with the worst indicia of misconduct . . .").

238. *Id.* ("[A] policy that grants a 'safe harbor' from suit for police departments that voluntarily adopt best practice reforms.").

to avoid suit.[239] While the idea proposed here is narrower than a complete safe harbor from both § 14141 and § 1983, it essentially would utilize Harmon's idea but keep the status quo of allowing private § 1983 claims. In other words, if police departments are willing to abide by the independent agency's regulations, then they cannot be sued by the federal agency under § 1983 or § 14141 but could still be sued by private plaintiffs under § 1983. Essentially, states could avoid the new enforcement paradigm by submitting to the agency's regulatory regime.[240] Nonetheless, private parties would retain their ability to bring § 1983 claims.[241]

In addition to the safe harbor provision, Congress could utilize its spending power to persuade states and police departments to submit to a regulatory regime.[242] Currently, police funding provided by the federal government is not contingent on adoption of adequate reforms.[243] The spending power is a relatively powerful federal instrument that can be used to encourage states to act in ways the federal government could not otherwise mandate.[244]

The spending power stems from Article I, Section 8 of the United States Constitution.[245] Congress can tax and spend for the general welfare, which is construed broadly.[246] In *South Dakota v. Dole*, the Supreme Court explored the few limits on the spending power.[247] In order to place a condition on the receipt of federal funds, the condition must serve the general welfare, be unambiguous, relate to the federal program,

239. *Id.* at 36–38 ("By providing an early and dramatic reward for genuine reform efforts, a safe harbor mechanism would make preferred reforms more appealing [than litigation] for departments with serious misconduct.").

240. For the regime to be successful, it would have to be less costly than the threat of lawsuit brought by the agency.

241. However, one would suspect that adherence to the federal regulatory regime would lessen private § 1983 claims.

242. Using the spending power for police reform is not a novel idea either. *See* Simmons, *supra* note 15, at 357 (arguing that "Congress, pursuant to the Spending Clause of the U.S. Constitution, should impose a condition upon states receiving federal grant money for law enforcement initiatives that requires states to enact legislation aimed at promoting police accountability").

243. *Id.* at 382 ("[T]here are no specific measures that condition the funding on increased transparency and accountability.").

244. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (holding that conditioning federal funding for highways on adoption of a minimum drinking age was a valid use of federal power).

245. U.S. CONST. art. I, § 8, cl. 1.

246. *See* United States v. Butler, 297 U.S. 1, 65–66 (1936).

247. 483 U.S. 203, 207–08 (1987).

must not be barred by the Constitution itself, and cannot be overly coercive.[248]

In regard to the constitutional bar, the Court stated that the Tenth Amendment does not "concomitantly limit the range of conditions legitimately placed on federal grants" and "that the 'independent constitutional bar' limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."[249] In other words, Congress is not limited by its enumerated powers in using the spending power, even if it is a power reserved for the states.

Regarding being overly coercive, the Court approved the amount withheld in *Dole*—five percent of funds for highway grant programs.[250] In *National Federation of Independent Business v. Sebelius*, the Court explained that the spending power cannot surprise states with retroactive conditions or coerce states rather than persuade them.[251]

If Congress allocates funds for police spending in the future, it may encourage police forces to adopt its regulatory regime in exchange for future federal police funding. It is unlikely that Congress can retroactively tie existing funding to this new regime. However, Congress can no longer simply provide funding to police forces without conditions that will initiate and sustain real reform. Congress must act because the bleak state of policing in the United States can no longer be ignored. Since Congress lacks the power to act directly, it must exert the "power of the purse" on behalf of the public interest. Ultimately, a two-step approach utilizing both the spending power and a safe harbor provision from a new stronger enforcement paradigm may be successful in persuading the states, and their police forces, to adopt a regulatory regime. If they do not adopt the regime, police forces would lose funding and face the possibility of being sued by the United States—a plaintiff with comparatively huge resources.

## VI. CONCLUSION

The history of criminal justice civil rights enforcement in the United States is a story of mostly racial struggle. Segregationists prevented meaningful reform in the 1960s and we as a society have paid the price since. In other areas of rights enforcement, we have built complex structures of enforcement, but in enforcement of criminal justice civil

248. *Id.*
249. *Id.* at 210.
250. *Id.* at 211–12.
251. 567 U.S. 519, 584–85 (2012).

rights, we have minimal enforcement and large discretion. We punish police misconduct via various methods that place extraordinary burdens on the aggrieved.

Our system of federalism prevents the federal government from acting directly to regulate police conduct. However, the federal government can no longer take a backseat to enforcement. It must take a central role. In order to strengthen criminal justice rights enforcement, Congress could create and empower a federal independent agency. First, Congress can allow citizens to petition for "the intercession of the power and majesty of the United States"[252] through the agency. Congress could empower the agency to be "master of its own case"[253] in criminal justice rights suits, acting in the public interest. Additionally, Congress could allow the *independent* agency to bring pattern or practice lawsuits against police departments. Finally, Congress could persuade police departments to adopt agency regulations by conditioning a safe harbor from agency enforcement and future police funding on compliance. Through this model, the federal government can centralize enforcement and bring long lasting and meaningful changes to the state of policing in this country.

Making the country's justice system fairer, less biased, and more just is not an endeavor that can be accomplished piecemeal. A longer more consistent path needs to be charted because this work is the "struggle of a lifetime"[254] and "democracy cannot thrive where power remains unchecked and justice is reserved for a select few."[255]

252. 110 CONG. REC. 6779 (1964) (statement of Sen. Jacob Javits); *see supra* note 43 and accompanying text.

253. EEOC v. Waffle House, Inc., 534 U.S. 279, 291 (2002); *see supra* note 89 and accompanying text.

254. John Lewis (@repjohnlewis), TWITTER (June 27, 2018, 11:15 AM), https://twitter.com/repjohnlewis/status/1011991303599607808?s=20.

255. 166 CONG. REC. H2487 (2020) (statement of Rep. John Lewis).