Reconstructing the Department of Justice Office for Civil Rights

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Abstract

The United States has never possessed an effective system for addressing constitutional violations by the police, including privacy intrusions and uses of excessive force in violation of the Fourth Amendment. The existing remedies, such as the exclusionary rule, criminal prosecution, and suits for monetary damages under Section 1983, have long been recognized as deeply flawed.

A more effective, complementary approach exists and is already used for addressing civil rights violations in other contexts, such as education, health care, housing, and employment. If an individual believes that a local school has violated her civil rights, for example, she is not required to hire a costly lawyer or find one willing to take her case on contingency. She can simply submit a complaint to the Education Department's Office for Civil Rights (ED OCR) through its web portal. An ED OCR employee will evaluate her claim and, if appropriate, conduct an investigation and negotiate with her local school district to reach a resolution.

When the United States reconstructs the various institutions of governance degraded by the second Trump administration, Congress should pass a Fair Policing Act that authorizes a reconstructed and expanded Office for Civil Rights in the Department of Justice to investigate and resolve individual complaints of federal rights violations by state and local police, modeled on the complaint procedures that already exist in civil rights offices such as ED OCR.

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I. Introduction: Beyond "Pattern or Practice"

A number of federal agencies contain offices dedicated to addressing individual complaints of federal rights violations.[1] But there has always been an extremely consequential gap in the coverage of these offices: state and local policing.[2] If an individual believes she has been a victim of illegal discrimination or various other federal rights violations in many of the core areas of social policy, such as education, housing, health, or employment, she can often submit a complaint to a federal office that will help her to resolve her complaint without requiring her to hire a lawyer.[3] But when it comes to the area of social policy that gives rise to many of the most serious violations of federal rights—policing—no centralized federal office exists for routinely addressing individual complaints.[4]

This article proposes finally filling the gap. Congress should pass a "Fair Policing Act" that authorizes the Department of Justice to address individual complaints of federal rights violations by state and local law enforcement agents.[5] The office would provide assistance to victims of federal rights violations by state and local police, including constitutional rights violations and above all violations of the Fourth Amendment. Victims would finally receive the same type of routine federal assistance that victims of civil rights violations in other contexts have received for decades.[6]

For example, the Office for Civil Rights at the Department of Education (ED OCR) has long worked to resolve individual complaints of discrimination by federally funded educational institutions.[7] Until the Trump administration's radical changes in 2025, discussed below,[8] anyone could file a complaint using OCR's convenient online form, no matter how minor or isolated the allegation of discrimination.[9] An OCR employee would review the complaint and, if appropriate, investigate.[10] If OCR found that an educational institution had likely violated someone's civil rights, such as through illegal discrimination based on race or disability, it would typically attempt to negotiate a resolution agreement in which the educational institution agreed to take

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[1] *See infra* Part III.

[2] *See infra* Part II.E–F.

[3] *See infra* Part III.

[4] *See infra* Part II.

[5] *See infra* Part IV.

[6] *See infra* Part III.

[7] *See About OCR*, U.S. DEP'T OF EDUC., OFF. FOR C.R., https://www.ed.gov/about/ed-offices/ocr/about-ocr; U.S. DEP'T OF EDUC., OFF. FOR C.R., CASE PROCESSING MANUAL 2 (effective Feb. 19, 2025) [hereinafter "CASE PROCESSING MANUAL"], https://www.ed.gov/media/document/ocr-case-processing-manual-us-department-of-education-office-civil-rights-33891.pdf.

[8] *See infra* text accompanying note 41. [*Author's note, 6/30/26:* Since my initial draft in May 2026, the second Trump administration's undermining of civil rights enforcement has continued, alongside various judicial responses. *See, e.g.*, Michael C. Bender & Dana Goldstein, *Trump Breaks Up Education Dept., Prompting Worries Over Civil Rights*, N.Y. TIMES, June 16, 2016. Rather than making piecemeal adjustments, I plan to carry out a comprehensive update of references to these developments later in the editing process.]

[9] *See How to File a Discrimination Complaint with OCR*, U.S. DEP'T OF EDUC., https://www.ed.gov/laws-and-policy/civil-rights-laws/file-complaint/how-file-discrimination-complaint-ocr.

[10] *See How the Office for Civil Rights Handles Complaints*, U.S. DEP'T OF EDUC., https://www.ed.gov/laws-and-policy/civil-rights-laws/file-complaint/how-the-office-for-civil-rights-handles-complaints; CASE PROCESSING MANUAL, *supra* note 7, §§ 110–111, at 12–13.

remedial actions.[11] Or, if the parties were willing, OCR might facilitate a settlement between them.[12] Litigation was only used as a last resort, and OCR almost never invoked its authority to terminate federal funding.[13] Dealing with OCR became a routine part of being an educational institution that receives federal funding.[14]

Similar offices for assisting individuals with civil rights complaints existed in many other agencies—again, at least until the second Trump administration's radical changes in 2025. For complaints about discrimination by federally funded health care providers, there was an Office for Civil Rights within the Department of Health and Human Services (HHS OCR).[15] For complaints related to housing discrimination, the Office of Fair Housing and Equal Opportunity in the Department of Housing and Urban Development (HUD FHEO) performed a similar function.[16] Likewise, the Equal Employment Opportunity Commission (EEOC) addressed individual complaints regarding discrimination in employment.[17]

These offices were primarily dedicated to addressing complaints related to discrimination.[18] But they were also authorized to address various other federal rights violations. For example, HHS OCR addressed individual complaints of privacy violations under HIPAA.[19] The Department of Homeland Security's civil rights complaint office, the Office for Civil Rights and Civil Liberties (DHS CRCL), was authorized to address not only civil rights violations but civil liberties violations by DHS agents as well—including, for example, Fourth Amendment violations.[20]

Compare the institutions described above with what is available to an individual whose Fourth Amendment rights have been violated by state or local police. Some of the greatest harms brought about by state actors in the United States involve state or local police violating the Fourth Amendment. But there is no federal office that is authorized to address individual complaints of such violations.[21] If the victim of an individual act of excessive force by state or local police wishes to file a complaint, to have the complaint investigated by a neutral third party, and to receive some form of recognition or justice for the violation of their rights, there is no federal office to which they can turn.

The Department of Justice does contain an Office for Civil Rights (DOJ OCR), but it is only authorized to address rights violations related to discrimination by law enforcement

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[11] *See* CASE PROCESSING MANUAL, *supra* note 7, § 303(b), at 17.
[12] *See id.* §§ 201–203, at 13–14.
[13] *See id.* art. VI, at 23; James S. Murphy, *The Office for Civil Rights's Volatile Power*, ATLANTIC (Mar. 13, 2017) (quoting Obama's second assistant secretary of Civil Rights for the Department of Education stating that ED OCR "'almost never need[s]'" "to withhold federal funds or to refer a complaint to the Department of Justice for prosecution").
[14] *See* U.S. COMM'N ON CIV. RTS., FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: 2000 AND BEYOND ch. 1 (Feb. 2001), https://www.usccr.gov/files/pubs/archives/crfund01/ch1.htm.
[15] *See Filing a Civil Rights Complaint*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. FOR C.R., https://www.hhs.gov/civil-rights/filing-a-complaint/index.html.
[16] *See Report Housing Discrimination*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/reporthousingdiscrimination.
[17] *See Filing a Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-charge-discrimination.
[18] *See Office for Civil Rights (OCR)*, U.S. DEP'T OF EDUC., https://www.ed.gov/about/ed-offices/ocr; *About Us*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. FOR C.R., https://www.hhs.gov/ocr/about-us/index.html.
[19] *See Filing a Civil Rights Complaint*, *supra* note 15.
[20] *See* 6 U.S.C. § 345(a)(1), (6).
[21] *See infra* Part II.

agencies that have accepted federal funding—not Fourth Amendment violations.[22] In addition, even within its limited authority, DOJ OCR has never received sufficient funding, staffing, or publicity to effectively serve as a central clearinghouse for complaints of discriminatory treatment by state and local police.[23] DOJ also contains the Civil Rights Division (DOJ CRT), which has been authorized since 1994 to investigate the full range of federal rights violations by state and local police departments, whether or not an agency receives federal funding.[24] But DOJ CRT is only authorized to address complaints that law enforcement agencies have engaged in a "pattern or practice" of federal rights violations.[25] Thus, unlike ED OCR and the other civil rights offices noted above, DOJ CRT lacks legal authority to investigate or address federal rights violations by state and local police that do not rise to the level of a "pattern or practice."[26] If an individual is subject to excessive force in an isolated incident, DOJ CRT will not investigate their claim.[27]

Instead, an individual who has been subjected to excessive force by state or local police is expected to rely on other remedies. The primary remedies that exist for addressing federal rights violations by state and local police are the exclusionary rule,[28] monetary damages including under Section 1983,[29] internal police department discipline,[30] civilian review boards,[31] and the criminal prosecution of police.[32] As described in Part II, below, all of these remedies have long been recognized as deeply flawed.[33]

In fact, the remedies for federal rights violations by state and local police have proved so ineffective that many scholars and activists, especially in the surge of abolitionist thought and organizing from the mid-2010s to the mid-2020s, came to the conclusion that preventing police abuses, up to and including illegal police violence, was futile.[34] Calls for the defunding or abolition of police agencies, or at least the shifting of various responsibilities away from the police, were often motivated in part by a sense that "[n]othing works."[35] After so many decades in which police violence, often against minority groups, predictably gave rise to violent protests, which in turn gave rise to well-meaning commissions, whose reforms were then sometimes partially adopted, before the cycle of violence and half-hearted reform began again, it was not

[22] *See infra* Part II.F.
[23] *See infra* Part II.F.
[24] *See infra* Part II.E.
[25] *See infra* Part II.E.
[26] *See infra* Part II.E.
[27] *See infra* Part II.E.
[28] *See infra* Part II.A.
[29] *See infra* Part II.B.
[30] *See infra* Part II.C.
[31] *See infra* Part II.C.
[32] *See infra* Part II.D.
[33] For prominent book-length critiques of the available remedies for constitutional rights violations by police, see JOANNA C. SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (2023); ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS (2021); AZIZ Z. HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES (2021); BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION (2017).
[34] *See, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1782–84 (2020).
[35] *See* Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1712 (2019) (stating, with regard to police reform: "Nothing works.").

surprising that many observers concluded that police reforms were futile, and that something more radical was needed to bring the violence to an end.[36]

But rather than explaining the perennial failures of police reform by concluding that "nothing works," it might be just as accurate to say that reforms have failed because "so little has been tried." To defend federal rights in areas other than policing, federal action has been far more aggressive and effective. As noted above, ED OCR and other, similar offices have for decades demonstrated the feasibility of federal agencies receiving and addressing very large numbers of individual complaints of federal rights violations.[37] It is baffling, or at least disappointing, that a similar approach has not been attempted in the context of policing. Why provide federal assistance for individual complaints regarding the central federal rights violations in education, housing, health care, employment, and numerous other policy areas—but *not* for individual complaints regarding Fourth Amendment violations by state and local police?

If the United States can afford to spend hundreds of millions of federal dollars annually to support state and local law enforcement agencies,[38] and if we can afford offices to handle individual civil rights complaints involving education, health care, housing, and employment,[39] then surely we can also afford to dedicate some fraction of federal law enforcement funds to ensuring that local police departments are not violating the constitutional rights of the public they serve. Given the deep and ongoing history of constitutional violations by state and local police, it also does not seem unreasonable to require such agencies to respond to investigations by a federal agency, such as a reconstructed and expanded DOJ OCR, as an everyday part of their work, just as responding to ED OCR investigations has long been an everyday part of running a federally funded school. If anything, the case for federal assistance with rights violations in the context of policing is even stronger than in the context of education. The harms resulting from police violations of the Fourth Amendment often involve violence that is even more damaging than the already severe harms resulting from educational discrimination.[40]

The article begins in Part II by detailing the failures of existing remedies for federal rights violations by state and local police. Part III describes how civil rights offices such as ED OCR have demonstrated the feasibility of federal agencies receiving and addressing individual complaints of federal rights violations on a large scale. Part IV, which is the core of the article, offers a proposal for reconstructing DOJ OCR. It argues that Congress should pass a "Fair Policing Act" authorizing DOJ OCR to address individual federal rights violations by state and local police.

The term "reconstruction" is invoked deliberately. Since 2025, the second Trump administration has decimated or diverted the operations of many federal civil rights offices.[41] If the United States succeeds in reversing its current slide away from liberal democracy and toward

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[36] *See id.*
[37] *See infra* Part III.
[38] NATHAN JAMES, CONG. RSCH. SERV., THE COMMUNITY ORIENTED POLICING SERVICES (COPS) PROGRAM: HISTORY, FUNDING, AND POTENTIAL ISSUES FOR REAUTHORIZATION 1, 7–9 (Apr. 24, 2025) (describing federal grants to state and local law enforcement through COPS, reporting average annual COPS appropriations from fiscal years 1995 to 1999 as $1.5 billion, and reporting fiscal year 2024 COPS appropriations of $685 million), https://www.congress.gov/crs_external_products/R/PDF/R48151/R48151.7.pdf.
[39] *See infra* Part III.
[40] *See infra* Part II.
[41] *See, e.g.*, Collin Binkley, *Education Department Layoffs Gut Its Civil Rights Office, Leaving Discrimination Cases in Limbo*, ASSOCIATED PRESS (Mar. 12, 2025), https://apnews.com/article/trump-education-department-layoffs-civil-rights-8cbf463cce765f497c10d688ab4d51e1.

competitive authoritarianism,[42] there will be an opportunity not simply to undo the second Trump administration's changes, but to rebuild government institutions in more fundamental ways, informed by known weaknesses in past institutional designs.[43] Given the known weaknesses of the existing remedies for constitutional violations by state and local police, the reconstruction of federal institutions responsible for addressing such violations would be especially appropriate.

II. The Ineffectiveness of Existing Remedies for Constitutional Rights Violations by Police

It is hard to overstate the potential harms that may flow, and often have flowed, from police officers violating individuals' constitutional rights, especially through acts of violence. The physical harm and potentially long-lasting trauma experienced by an individual subjected to unconstitutional police violence are only the most direct effects.[44] Every act of such violence also carries the risk of eroding public trust in the police and in the state's criminal justice institutions more generally.[45]

The police are often referred to as "law enforcement" and are said to be committed to the protection of the public, as in the motto "protect and serve."[46] Unconstitutional police violence risks undermining the legitimacy of the state and its monopoly on violence.[47] The consequences can be, and in American history often have been, disastrous.[48] It is plausible that one of the primary factors driving the decline of criminal homicide over the course of modernity has been the expansion of the state's role in resolving violent or potentially violent disputes.[49] Where individuals cannot or do not turn to the state's criminal justice institutions, such as law

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[42] On the United States' democratic decline, see, for example, VARIETIES OF DEMOCRACY (V-DEM) INST., DEMOCRACY REPORT 2026: UNRAVELING THE DEMOCRATIC ERA? 4, 15 (Mar. 2026), https://www.v-dem.net/publications/democracy-reports/ (downgrading the United States from a liberal democracy to an electoral democracy).

[43] *See* K. Sabeel Rahman, *The Case for a Third Reconstruction*, DISSENT (Fall 2025) (calling for "transformative thinking" to build an "inclusive democracy"); Gregory Brazeal, *Stuck in the 1700s: It's Time to Revisit the Constitution*, NEWSWEEK, May 8, 2026 (arguing for bold federal legislation to reconstruct American democracy, followed eventually by constitutional change).

[44] On the often life-altering effects of violence, see, for example, THOMAS ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS (2019). On the trauma resulting specifically from police violence, see, for example, Jordan E. DeVylder et al., *Association of Exposure to Police Violence with Prevalence of Mental Health Symptoms Among Urban Residents in the United States*, JAMA NETWORK OPEN (Nov. 21, 2018).

[45] U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4, 79–82 (Mar. 4, 2015) [hereinafter "FERGUSON REPORT"]; NAT'L ACADS. OF SCIS., ENG'G, & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 3–4 (2018) [hereinafter "PROACTIVE POLICING"]; TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161–65 (rev. ed. 2006).

[46] *See* Tracey Meares & Gwen Prowse, *Policing as Public Good: Reflecting on the Term "To Protect and Serve" as Dialogues of Abolition*, 73 FLA. L. REV. 1 (2021).

[47] On the state being defined by its monopoly on the legitimate use of force, see Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills trans., 1946).

[48] *See* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS: SUMMARY OF REPORT (1968) [hereinafter "KERNER COMMISSION REPORT"].

[49] *See* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED (2011). I refer here to homicide in "crime" as opposed to homicide in "war," while recognizing the growing difficulty of drawing a clear line between the two. *Cf.* GREGORY BRAZEAL, THE HERO AND THE VICTIM: NARRATIVES OF CRIMINALITY IN IRAQ WAR FICTION 46–59 (2024) (exploring the increasingly blurred conceptual lines between war and crime).

enforcement, prosecutors, and the courts, violent self-help becomes more likely.[50] Feud-like cycles of violent revenge may emerge.[51] The phenomenon is not hypothetical. Many of the geographic areas with the highest rates of lethal violence in the United States in the last several decades have displayed aspects of quasi-statelessness.[52]

Unconstitutional police violence and racial targeting have also provided the kindling and the spark for many of the violent urban protests of the last seventy-five years.[53] In addition to the damage and injuries that have resulted directly from such protests, they may pose an indirect threat to liberal democracy by heightening fears of disorder, leading to increased support for the illiberal politics of punitiveness and intolerance that often goes under the name "law-and-order" or "tough-on-crime."[54]

Given the enormous stakes of illegal police violence for affected individuals, communities, and the nation as a whole, it might seem to be the sort of harm for which the state and its laws should provide effective, even aggressive, remedies. Yet this has not been the case in the United States.[55] The following sections offer a brief summary of the main mechanisms that exist in the United States for deterring constitutional violations by the police, imposing accountability on officers, and providing justice for those harmed by police illegality. Each mechanism has severe limitations.

A. The Exclusionary Rule

The Fourth Amendment exclusionary rule is often described as the most powerful incentive for police to comply with the Constitution.[56] First recognized by the Supreme Court in *Weeks v. United States* (1914),[57] and first imposed on the states in *Mapp v. Ohio* (1961),[58] the exclusionary rule states that evidence obtained in violation of the Fourth Amendment may generally not be used against the criminal defendant whose rights were violated.[59] Before *Mapp*, state and local police departments were already nominally bound by the Fourth Amendment but apparently often felt no need to comply with it because no consequences realistically followed

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[50] *See, e.g.*, Elijah Anderson, *The Code of the Street*, ATLANTIC (May 1994) (describing self-help norms emerging in contexts of perceived absent, ineffective, or illegitimate policing).
[51] *See id*.
[52] *See id.*; PROACTIVE POLICING, *supra* note 45, at 11–13.
[53] *See* KERNER COMMISSION REPORT, *supra* note 48; FERGUSON REPORT, *supra* note 45, at 4–5, 79–82; PROACTIVE POLICING, *supra* note 45, at 3–4, 11–13.
[54] *See* Omar Wasow, *Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion and Voting*, 114 AM. POL. SCI. REV. 638, 651–53 (2020); KAREN STENNER, THE AUTHORITARIAN DYNAMIC 13–36, 239–324 (2005); Gregory Brazeal, *Rural Mass Incarceration and the Politics of Punitiveness*, 85 MD. L. REV. 642, 642, 668–74 (2026).
[55] *See infra* Part II.A–F. Barry Friedman notes a similar disparity between the severity of police harms and the weakness of the law of policing when he notes:

> From matters as mundane as getting a driver's license to more complex ones such as curtailing greenhouse gases, America is governed by rules. . . . Yet ironically, when it comes to policing, we have forsaken this very basic principle. *Ironically*, because policing—the use of force and surveillance to govern society—is the most grave and threatening of all the governmental functions.

FRIEDMAN, *supra* note 33, at 59.
[56] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 648, 655 (1961) (stating that without the exclusionary rule, the Fourth Amendment's protections would be "'a form of words'" (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920))).
[57] Weeks v. United States, 232 U.S. 383 (1914).
[58] *Mapp*, 367 U.S. at 643.
[59] *Id.* at 655.

from violations.[60] *Mapp* made a concrete difference, causing at least some police departments to offer training on the Fourth Amendment for the first time.[61]

But in the decades since the end of the Warren Court's criminal procedure revolution in 1969, the Supreme Court has created an ever-expanding array of exceptions to the exclusionary rule.[62] Today, it cannot be assumed that evidence obtained through a Fourth Amendment violation will be excluded.[63] As a result, the rule likely provides a less effective deterrent against Fourth Amendment violations than it once did.[64]

More importantly, the exclusionary rule cannot serve as a catch-all, general deterrent to constitutional violations by the police. Strictly speaking, "the exclusionary rule" only applies to Fourth Amendment violations.[65] Outside of that context, the Supreme Court has only required the exclusion of evidence obtained in violation of a narrow range of constitutional rights, including the Fifth and Fourteenth Amendment due process clause's prohibition on the use of brutality or coercion to obtain involuntary confessions;[66] the Fifth Amendment privilege against self-incrimination, which requires the reading of *Miranda* rights before custodial interrogations;[67] and the Sixth Amendment right to counsel, which requires the presence of counsel for identification procedures[68] and the deliberate elicitation of incriminating statements.[69] The Supreme Court has never mandated the exclusion of evidence obtained through a wide variety of other forms of unconstitutional and gravely harmful police misconduct, such as the targeting of individuals based on race or other suspect classifications in violation of the equal protection clause,[70] or the targeting of individuals based on their exercise of freedoms guaranteed under the First Amendment, including the right to free speech, the free exercise of religion, and the freedom of assembly.[71] In fact, even with regard to the Fourth Amendment, there are no Supreme Court cases explicitly holding that evidence obtained through the use of excessive force—an unreasonable "seizure" and thus a violation of the Fourth Amendment—must be suppressed.[72]

Moreover, exclusionary rules only have a deterrent effect if criminal charges are filed against the individual whose rights were violated and a prosecutor wishes to use evidence obtained as a result of the violation. If a police officer violates the Fourth Amendment by carrying out a street stop without reasonable suspicion that the stopped person committed a crime, conducts a frisk without reasonable suspicion that the stopped person is armed and dangerous, and treats the stopped person with excessive force during the frisk, but then lets the

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[60] *See* Yale Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5, 10–11 (1979).
[61] *See* Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 121–26 (2003).
[62] *See generally* Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 341 (2013).
[63] *See* Herring v. United States, 555 U.S. 135, 140–45 (2009).
[64] *See id.* at 148, 153–54 (Ginsburg, J., dissenting) (arguing that the Court's narrowing of the exclusionary rule undercuts the rule's deterrent effect).
[65] *See* Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1109–11 (2000).
[66] *See* Brown v. Mississippi, 297 U.S. 278, 285–87 (1936).
[67] *See* Miranda v. Arizona, 384 U.S. 436, 444–45, 478–79 (1966).
[68] *See* United States v. Wade, 388 U.S. 218, 236–37 (1967).
[69] *See* Massiah v. United States, 377 U.S. 201, 205–07 (1964).
[70] *See* Whren v. United States, 517 U.S. 806, 813 (1996).
[71] *See* Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 163 (2007).
[72] *See* United States v. Collins, 714 F.3d 540, 543–44 (7th Cir. 2013).

stopped person go, the exclusionary rule will never be triggered. Indeed, if the officer simply wants to harass or humiliate someone through various illegal acts, and does not care about a successful prosecution, the exclusionary rule will have no deterrent effect.

Finally, it is worth emphasizing that even in the ever-dwindling range of cases where the exclusionary rule applies, the Supreme Court has often substantively narrowed the definition of the constitutional rights at issue so that various forms of arguably objectionable police conduct are not constitutional violations at all. To take an early and still-controversial example, the Supreme Court held in *Terry v. Ohio* (1968) that it is not a violation of the Fourth Amendment when the police seize and frisk someone without probable cause, so long as the officer has reasonable suspicion that criminal activity is afoot and the person is armed and dangerous.[73] In subsequent decades, the Court watered down the definition of "reasonable suspicion" to allow *Terry* stops based on a much lower quantity of evidence than was present in *Terry* itself.[74] Obviously, once the Supreme Court declared stops based on minimal evidence to be constitutional, the exclusionary rule offered no deterrent against the police conducting such stops—even if many observers found and continue to find such stops deeply objectionable.

In sum, although the various exclusionary rules recognized by the Supreme Court may, to some extent, deter certain narrow forms of police misconduct, it cannot be said that the Court's exclusionary rules provide an effective deterrent against police illegality in general, police violations of constitutional rights in particular, or illegal police violence even more specifically. Nor does the exclusion of evidence necessarily provide accountability for the officer who violated the defendant's rights, or justice for the defendant whose rights were violated.

B. Monetary Damages and Section 1983

Critics of the exclusionary rule sometimes suggest that a strong exclusionary rule is unnecessary in part because police illegality will be adequately deterred by the threat of monetary damages.[75] When an individual is harmed by unconstitutional police conduct, there are various legal actions that in theory may allow the individual to sue for compensation or, in some cases, an injunction to prevent future harms. For example, if a state or local law enforcement agent subjects an individual to excessive force in violation of the individual's Fourth Amendment rights, the individual may sue the officer for damages under 42 U.S.C. § 1983.[76] This provision, commonly known as "Section 1983," was enacted during the Reconstruction era as a way to defend freedmen against official abuses.[77] The provision was revived by the Supreme Court in *Monroe v. Pape* (1961).[78] In *Bivens v. Six Unknown Named Agents* (1971), the Supreme Court created a similar constitutional tort action for use against federal employees.[79] In *Monell v. Department of Social Services* (1978), the Supreme Court held that municipalities may also be held liable as persons in Section 1983 suits, although the Court added a rule limiting liability to constitutional rights violations resulting from official municipal policy.[80]

In theory, the risk of being subjected to financial liability for violating an individual's constitutional rights should provide a powerful incentive for law enforcement agents and

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[73] *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968).
[74] *See* Carol S. Steiker, Terry *Unbound*, 82 MISS. L.J. 329, 332–33 (2013).
[75] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 598–99 (2006) (Scalia, J.) (noting that "[a]s far as we know, civil liability is an effective deterrent" to police misconduct such as knock-and-announce violations).
[76] *See* HUQ, *supra* note 33, at 89–135.
[77] *See id.*
[78] Monroe v. Pape, 365 U.S. 167, 172–74 (1961).
[79] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).
[80] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–95 (1978).

municipalities to comply with the Constitution. But in practice, as in the case of the exclusionary rule, decades of Supreme Court decisions have radically narrowed the scope of Section 1983 and *Bivens* liability.[81] In particular, the Court has read into Section 1983 a doctrine of "qualified immunity" that, today, protects an individual police officer from liability unless he violated a "clearly established" right—which means, in practice, that there was a binding precedent in the officer's jurisdiction involving very similar, or perhaps virtually identical, facts.[82] With regard to suits against federal agents, the Supreme Court has all but overruled *Bivens*. The Court has rejected every *Bivens* claim that it has considered for the last forty years, including, in *Egbert v. Boule* (2022), a claim based on facts that even Justice Gorsuch, a critic of *Bivens*, found difficult to distinguish from the facts of *Bivens*.[83] The Court has also interpreted *Monell*'s judge-made "official policy" limitation in expansive ways, making it very difficult to hold municipalities liable for constitutional violations by their employees.[84]

Second, as Joanna Schwartz's extensive research has shown, nearly all police officers in the United States are effectively indemnified against Section 1983 liability.[85] If the deterrent effect of Section 1983 is supposed to arise out of officers' fears that they might be held personally financially liable for violating someone's constitutional rights, then the existence of near-universal indemnification presumably undermines the law's deterrent effect.

Third, and perhaps most importantly, attempts to regulate police misconduct through private suits for monetary damages will reflect the downsides that generally characterize attempts to regulate social problems through private rights of action.[86] Above all, very few people whose constitutional rights are violated by a police officer will be likely to file a lawsuit.[87] The individual must know that their constitutional rights were violated—which often requires a difficult analysis given the technicalities of legal doctrine. The individual must know that a lawsuit can be filed, and must be willing to dedicate time and energy to finding a lawyer. If the individual is unable to pay a lawyer potentially thousands of dollars out of pocket to pursue a Section 1983 claim, the individual must find a lawyer who is willing to pursue the claim based on a contingency agreement. For a wide variety of reasons, including the technical complexity of

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[81] *See* HUQ, *supra* note 33, at 105–35.
[82] *See* SCHWARTZ, *supra* note 33, at 72–91.
[83] *See* Egbert v. Boule, 596 U.S. 482, 486 (2022) (noting "42 years" without decision upholding *Bivens* liability); *id.* at 502, 503 (Gorsuch, J., concurring in the judgment) (noting that "I struggle to see how this set of facts differs meaningfully from those in *Bivens* itself").
[84] *See* Connick v. Thompson, 563 U.S. 51, 61–63 (2011).
[85] *See* SCHWARTZ, *supra* note 33, at 179–94. Based on information from forty-four of the largest law enforcement agencies in the United States, and thirty-seven smaller agencies, Schwartz determined that

> over a six-year period, plaintiffs had received more then $735 million to resolve the police misconduct cases they'd brought. Officers were made to contribute just 0.02 percent of that $735 million. . . . And in the thirty-seven smaller agencies in my study, no officer contributed to any settlement or judgment in a police misconduct case—not one dime. . . . Even in the rare event that an officer was required to contribute to a settlement or judgment, officers were not threatened with bankruptcy . . . . Officers' contributions in my study ranged between $250 and $25,000, with an average payment of $4,194 and a median payment of $2,250.

Id. at 184–85.
[86] "[R]eliance on litigation has longstanding and well-documented costs and challenges. Litigation can be time-consuming, protracted, and inefficient, exacting great financial and emotional costs on litigants." Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1355 (2012).
[87] "Less than 1 percent of people who believe that their rights have been violated by the police ever file a lawsuit." SCHWARTZ, *supra* note 33, at 21.

Section 1983 suits, the barriers to recovery such as qualified immunity, the difficulty of obtaining attorneys' fees, and the frequency of small damages awards even in successful suits, few lawyers, especially outside of large urban areas, are willing to take on Section 1983 suits.[88] In addition, if an individual harmed by police illegality is criminally charged, obtaining monetary damages may be even less likely because the prosecutor may require a waiver of civil claims as a condition of dismissing the charges or offering a generous plea bargain.[89]

The many hurdles to filing and successfully pursuing a Section 1983 suit mean that the vast majority of constitutional rights violations by police—for example, stops based on a lack of reasonable suspicion—are extremely unlikely to result in an individual lawsuit against the officer. If officers are aware of the fact that they are unlikely to face a Section 1983 suit outside of rare cases involving the most extreme harms, Section 1983 will have little deterrent effect on more minor constitutional violations.

It is true that in recent years, cities appear to have been paying out ever-larger settlements in police misconduct cases.[90] Payments have, in fact, become significant enough that insurers for police departments have effectively forced some departments to revise their training and policies involving uses of force, vehicular pursuits, and other practices that pose the greatest risk of resulting in large damages awards.[91]

Thus, suits for monetary damages are not entirely ineffectual as a means for reducing police misconduct. If nothing else, the threat of such suits appears to have the indirect power, through the actions of insurers, to reduce the likelihood of certain extreme harms. But, again, insurers' concerns extend only to those extreme cases that might result in significant financial liability. Monetary damages suits provide no effective remedy for countless, less extreme forms of police conduct that violates federal rights.

C. Internal Police Department Discipline, Civilian Review Boards, and Democratic Checks

As already noted, judges who support limiting the exclusionary rule sometimes point to the availability of monetary damages as an adequate substitute to deter rights violations by the police.[92] But the same justices also often support limiting the availability of monetary damages.[93] What remains to deter rights violations if neither the exclusionary rule nor monetary damages are available?

One response, which the Supreme Court has occasionally invoked, is that police are capable of regulating themselves.[94] They are increasingly professional, the argument goes, and

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[88] *See id.* at 17–32. For the rules governing the award of attorney's fees in Section 1983 suits, see 42 U.S.C. § 1988.

[89] *See* Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851, 852–53, 885–87 (1987).

[90] *See, e.g.*, Amelia Thomson-Devaux, Laura Bronner, & Damini Sharma, *Police Misconduct Costs Cities Millions Every Year. But That's Where the Accountability Ends*, MARSHALL PROJECT, Feb. 22, 2021, https://www.themarshallproject.org/2021/02/22/police-misconduct-costs-cities-millions-every-year-but-that-s-where-the-accountability-ends.

[91] *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1543–45, 1594–1602 (2017). Private insurers are, however, unavailable to impose pressure for reform on large urban police departments that self-insure. *See* Kimberly Kindy, *Insurers Force Change on Police Departments Long Resistant to It*, WASH. POST, Sept. 14, 2022.

[92] *See supra* note 75.

[93] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 640–41 (1987) (Scalia, J.) (limiting availability of monetary damages under *Bivens*); Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (Scalia, J.) (limiting availability of monetary damages under Section 1983).

[94] *See, e.g.*, *Hudson*, 547 U.S. at 598–99 (Scalia, J.) (observing that "[a]nother development" since *Mapp* is "the increasing professionalism of police forces, including a new emphasis on internal police discipline," such that we

thus police misconduct is best addressed today through internal discipline by police departments.[95] Indeed, in theory, the threat of reassignment, demotion, or termination could presumably deter misconduct as effectively as the threat of suppressed evidence or financial liability. In addition, internal discipline could deter any type of misconduct, and not only those forms of misconduct that involve rights violations.

Unfortunately, abundant historical evidence shows that police departments cannot always be relied upon to police their own compliance with the Constitution, or to impose accountability on officers even in response to public demands.[96] In fact, for at least two structural reasons, police departments are often able to defy public demands for accountability. First, police are often represented by powerful unions.[97] These unions have, in many jurisdictions, secured various entitlements—sometimes through a contract, sometimes through legislation containing a "Law Enforcement Bill of Rights" (LEOBOR)—that create numerous obstacles to effective discipline.[98] For example, police officers often have the right to see the evidence against them in an internal investigation before making a statement.[99] LEOBORs often create a brief window for affected individuals to file complaints.[100] Negative records may be quickly destroyed.[101] Even if a complaint against an officer is substantiated, a police union contract might allow officers to appeal the judgment and any discipline to an outside arbitrator.[102]

The power of police unions can also be seen in the general failure of civilian review boards to act as an effective check on police abuses.[103] In theory, an external panel of neutral civilians might seem to be a promising way to provide oversight of a police department. In practice, police representatives have nearly always ensured that civilian review boards are toothless and ineffective—often by denying them access to the evidence they would need to carry out investigations, and denying them the power to impose binding accountability measures.[104]

Second, there is an inherent imbalance in political power between disorganized members of the public and organized police unions.[105] In theory, if enough members of the public became dissatisfied with a police department's responses to officer misconduct, voters could simply demand that the mayor appoint a new police commissioner, and if the mayor failed to do so, voters could elect a new mayor who would. In the case of misconduct by the employees of a sheriff's office, voters could directly elect a new sheriff. Or the public could elect legislators at the city, county, or state level who could pass laws requiring more effective disciplinary procedures. In practice, however, voters have many competing concerns and are rarely focused

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now have "increasing evidence" police departments take constitutional compliance seriously, and citing research by Samuel Walker); *cf.* Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006 ("I have never said or even suggested" that developments in police professionalism "have sufficiently removed the need for an exclusionary rule to act as a judicial-branch watchdog over the police.").

[95] *See supra* note 94.

[96] *See* HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE U.S. (1998); Shane Bauer, *How a Deadly Police Force Ruled a City*, NEW YORKER (Nov. 16, 2020).

[97] *See* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017).

[98] *See id.* at 717 & n.20.

[99] *See id.* at 737, 749–55.

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *See id.*

[104] *See id.*

[105] *See* FRIEDMAN, *supra* note 33, at 61.

primarily on police misconduct and the internal disciplinary procedures of police departments.[106] In particular, voters who do not belong to groups targeted for aggressive enforcement activity may be inclined to give police the benefit of the doubt, or may even enthusiastically support lawbreaking by the police if they perceive it to be part of an effective "tough on crime" strategy.[107]

In contrast to the disorganized, rarely well-informed, and easily distracted public, police unions and other police organizations are highly organized and well-situated to carry out effective long-term strategies to advance the perceived self-interest of police.[108] If an especially egregious instance of police misconduct happens to generate outrage among some parts of the public, it is often possible to publicize a misleading counternarrative, delay accountability until public attention has dissipated, or appease demands for reform through symbolic or minimal concessions that can later be rolled back.[109] If a candidate for mayor supports more substantial police reform, police organizations may be able to undermine the candidate through campaign spending and public criticisms, warning of violence if reforms are enacted.[110] Even if the public succeeds in electing a mayor who attempts to bring about significant police reform, the police may still be able to undermine support for the official through work slowdowns that increase public disorder.[111]

In sum, history shows that police departments cannot always be relied on to take effective measures to prevent and discipline police misconduct, including rights violations. Nor does democracy provide an automatic check on abuses. It is entirely possible for widespread rights violations by the police to persist through multiple state and local elections.

D. Criminal Prosecution

Some instances of police misconduct are not only unconstitutional but are crimes, and thus subject to criminal prosecution. For example, when a police officer uses force that is not legally authorized, the officer may be prosecuted for assault or, if death results, homicide.[112] Federal prosecutions for certain constitutional rights violations by police are authorized under 18 U.S.C. § 242,[113] and states are free to prosecute police under state law.[114] Thus, the risk of

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[106] *See id.*

[107] On public opinion, race, authoritarianism, and the politics of criminal justice in the United States, see MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); PETER K. ENNS, INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD (2016); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); Brazeal, *supra* note 54.

[108] *See* FRIEDMAN, *supra* note 33, at 61.

[109] *See, e.g.*, Radley Balko, *The Retconning of George Floyd: A Coda*, WATCH (Sept. 4, 2024).

[110] *See* William Finnegan, *How Police Unions Fight Reform*, NEW YORKER (July 27, 2020).

[111] *See* Oliver Laughland, *NYPD Work Slowdown Not Official But 'Understandable', Says Union President*, GUARDIAN (Dec. 31, 2014).

[112] *See* 18 U.S.C. § 242; Screws v. United States, 325 U.S. 91, 111 (1945); Matthew R. Nola, *Civil Rights, Criminal Punishments: 18 U.S.C. § 242 and the Failure of Federal Rights Enforcement*, 58 COLUM. J.L. & SOC. PROBS. 732, 737–38, 748–49 (2025). A federal statute criminalizing conspiracies to violate civil rights also exists. *See* 18 U.S.C. § 241.

[113] *See supra* note 112.

[114] *See, e.g.*, Jay Senter & Shaila Dewan, *Killer of George Floyd Sentenced to 21 Years for Violating Civil Rights*, N.Y. TIMES, July 7, 2022. In practice, however, states have tended to criminalize a narrower range of police uses of force than the already narrow range recognized as a violation of the Fourth Amendment by the Supreme Court. *See* Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS PUB. L. REV. 109, 111–12, 124 (2015) (noting that many states still have laws prohibiting prosecution of police for using force that the Supreme Court has held to be unconstitutional).

criminal prosecution could in theory operate as a deterrent against some of the most serious forms of police misconduct.

The risk of criminal prosecution only reaches as far as the substantive criminal law extends. Even when the police engage in acts of violence that might ordinarily place someone at risk of prosecution, a variety of statutes and precedents often insulate them from criminal liability. For example, excessive force in violation of the Fourth Amendment may be criminally prosecuted under federal and state laws.[115] But the Supreme Court's Fourth Amendment jurisprudence requires various forms of deference to the decisions of police officers that sometimes render unjustified uses of force "reasonable" and thus not "excessive" for Fourth Amendment purposes.[116] Many states have passed laws that effectively immunize police from state prosecution for some uses of force that would be unreasonable even under the Supreme Court's deferential interpretation.[117]

Even where a police officer does engage in a use of force that plausibly violates a criminal law, there are a variety of institutional factors that reduce the likelihood of the officer being criminally charged.[118] Prosecutors may be generally hesitant to charge police with crimes for a variety of reasons. Prosecutors work closely with police, which can contribute to social ties and cultural sympathies that make the decision to prosecute a police officer a source of cognitive dissonance and social tension.[119] Beyond any psychological factors, prosecutors have a profound professional and practical interest in maintaining good relations with local police.[120] In order to successfully prosecute crimes, prosecutors need the police to collect evidence and present testimony at trial.[121] In addition, because local prosecutors are elected in the United States, they often face the same political incentives to avoid antagonizing the police that mayors face, as discussed above.[122] A prosecutor who lost the support of the police could face attack ads funded by police unions and other police organizations, as well as public denunciations by police representatives accusing the prosecutor of putting public safety at risk. Because of these potential conflicts of interest, some jurisdictions assign the decision to prosecute a police officer to a special prosecutor, such as an employee of the state attorney general's office who does not work closely with the police under investigation.[123] But this approach remains far from universal.[124]

Finally, even if a prosecutor were inclined to prosecute a police officer despite all of the potential disincentives noted above, the prosecutor might still choose to decline prosecution simply because of the difficulty of obtaining a conviction. Proving that a police officer's use of force was illegal "beyond a reasonable doubt" will often be challenging, especially because

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[115] *See supra* note 112.
[116] *See* Graham v. Connor, 490 U.S. 386, 396 (1989).
[117] *See* Flanders & Welling, *supra* note 114.
[118] *See* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1455–56 (2016).
[119] *See id.*
[120] *See id.*
[121] *See id.*
[122] *See id.*; EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 79 (2020) (noting that the United States is the only country in the world that elects its local prosecutors).
[123] It appears that as of 2024, seven states had a statute or statewide policy assigning a special prosecutor or at least the state attorney general to decide whether to bring criminal charges in at least some police use-of-force cases that result in death: California, Connecticut, Maine, Maryland, New Hampshire, New Jersey, and New York. *See* INST. FOR INNOVATION IN PROSECUTION, JOHN JAY COLL., PROSECUTING POLICE MISCONDUCT: LESSONS FOR STATE ATTORNEYS GENERAL 8 (2024), https://www.prosecution.org/s/Prosecuting-Police-Misconduct.pdf.
[124] *See supra* note 123.

juries tend to sympathize with and trust the police, although this effect may have lessened to some extent in recent years.[125]

In sum, the risk of criminal prosecution is an unreliable deterrent for even the most serious types of illegal police violence, and for many less flagrant but still harmful types of police misconduct it provides no deterrence at all.

E. DOJ Civil Rights Division "Pattern or Practice" Investigations

Another potential tool for responding to constitutional rights violations by state and local police is the DOJ's authority to investigate police departments for a "pattern or practice" of conduct violating federal rights.[126] Such investigations are conducted by DOJ's Civil Rights Division (usually arbitrarily abbreviated "CRT," a convention that this article will follow).[127] The investigations often result in consent decrees that place police departments under a federal monitor and require them to take various remedial steps to reduce the likelihood of specified forms of unlawful conduct in the future.[128]

Scholars continue to debate the costs and benefits of DOJ consent decrees, with critics on the left often describing them as ineffectively selective and cautious, critics on the right describing them as excessively costly and lengthy, and reformist defenders of the decrees pointing to various successes, especially in recent years.[129] In 2025, the second Trump administration suspended the enforcement of existing consent decrees, making the availability of pattern or practice investigations as a deterrent to police constitutional violations a moot point for at least the near future.[130]

Even if pattern or practice investigations and consent decrees can sometimes be effective in reducing unconstitutional conduct by police, they have clear limitations. Above all, by definition, pattern or practice investigations are not a response to isolated constitutional violations.[131] The DOJ CRT website allows individuals to submit complaints of civil rights violations by police and others.[132] But unless the complaint indicates a pattern or practice of constitutional or federal rights violations, DOJ CRT will not pursue it.[133] The statute that authorizes DOJ CRT to investigate and if necessary file suit to resolve "pattern or practice" rights violations by state and local police departments (formerly "Section 14141") simply does not authorize the office to investigate and file suit to resolve isolated rights violations by individual police officers.[134]

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[125] *See* German Lopez, *Police Officers Are Prosecuted for Murder in Less than 2 Percent of Fatal Shootings*, VOX (Apr. 2, 2021).

[126] *See* 34 U.S.C. § 12601 (formerly 42 U.S.C. § 14141); U.S. DEP'T OF JUST., C.R. DIV., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT (2017).

[127] *See supra* note 126.

[128] *See, e.g.*, United States v. City of Los Angeles, No. 00-11769 (C.D. Cal. June 15, 2001) (consent decree).

[129] *See* RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 351–56 (rev. ed. 2021).

[130] *See* Christy Lopez, *Trump Moved to Dismiss Police Consent Decrees—How Can Judges Respond?*, LAWFARE, June 24, 2025.

[131] *See FAQ About Pattern or Practice Investigations*, U.S. DEP'T OF JUST., C.R. DIV., https://www.justice.gov/d9/2023-10/pattern_or_practice_investigation_faqs_english.pdf (noting that "[a] single incident of excessive force or one unlawful stop does not establish a pattern or practice").

[132] *See Contact the Department of Justice to Report a Civil Rights Violation*, U.S. DEP'T OF JUST., https://civilrights.justice.gov/report/.

[133] *See* U.S. COMM. CIV. RTS., ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 31, 45 n.229, 75, 87, 89 (2019).

[134] *See id.*

In addition, it has never been clear why the Civil Rights Division has targeted some police departments and not others.[135] It does not appear to be the case that the Civil Rights Division developed a clear set of criteria for investigating departments and then applied those criteria to the thousands of law enforcement agencies across the United States in order to see which were most urgently in need of investigation.[136] Instead, the selection process appears to have been somewhat arbitrary, with police departments apparently coming under scrutiny as a result of media coverage and public mobilization against scandals[137]—phenomena that may have as much to do with the health of local media, state transparency laws, local organizing efforts, and the often random contingencies that result in abuses coming to light, as with the relative egregiousness of a police department's conduct.

Thus, as with each of the other potential mechanisms noted above, DOJ pattern or practice investigations and consent decrees do not provide a generally available, effective means of responding to constitutional violations by state and local police.

F. DOJ Office for Civil Rights Complaint Process

In Part IV, below, the prescriptive core of this article will propose a reconstruction of the DOJ OCR that will enable the office to address individual complaints of federal rights violations by police. But as the language of "*re*-construction" suggests, the DOJ OCR already exists.[138] In fact, it already receives individual complaints of certain rights violations through its website, and sometimes investigates and reaches settlements to resolve those complaints.[139] Various limitations, however, prevent the currently existing DOJ OCR from effectively serving the role that will be sketched out in Part IV.

First, DOJ OCR has a very limited jurisdiction. Specifically, the office only has jurisdiction to investigate and respond to complaints of certain rights violations by certain state and local law enforcement agencies.[140] Although the legal details are complex, the core of DOJ OCR's existing mission is ensuring that recipients of federal law enforcement funds comply with various anti-discrimination statutes.[141] The most common sources of DOJ funding for state and local enforcement programs and activities are the Office of Justice Programs, the Office on Violence Against Women, and COPS.[142] There are roughly 18,000 law enforcement agencies in the United States.[143] Unfortunately, there is no practical way for an individual member of the

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[135] *See* Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3194 (2014).
[136] *See id.*
[137] *See id.*
[138] *See Office for Civil Rights (OCR)*, DEP'T OF JUSTICE, OFF. FOR C.R., https://www.ojp.gov/program/civil-rights-office/about. The Office for Civil Rights is a support office within the Office of Justice Programs (OJP), "the largest grantmaking component of the Department of Justice." *Organization, Mission and Functions Manual: Office of Justice Programs*, U.S. DEP'T OF JUST., https://www.justice.gov/doj/office-justice-programs.
[139] *See Filing a Civil Rights Complaint*, DEP'T OF JUSTICE, OFF. FOR C.R., https://www.ojp.gov/program/civil-rights-office/filing-civil-rights-complaint.
[140] *See* U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., AUDIT OF THE OFFICE OF JUSTICE PROGRAMS' CIVIL RIGHTS COMPLAINT PROCESS 1–4 (2023) [hereinafter "OIG AUDIT"].
[141] *See id.* at 1, 20–21.
[142] *See DOJ Grants Financial Guide 2024*, DEP'T OF JUSTICE, OFF. FOR C.R., https://www.ojp.gov/funding/financialguidedoj/overview.
[143] *See* DUREN BANKS ET AL., BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 1 (2016).

public to determine whether, for example, her local police department or sheriff's office has accepted federal funds and thus falls under DOJ OCR's jurisdiction.[144]

Even if a local police department happens to fall under DOJ OCR's jurisdiction, DOJ OCR is only authorized to address certain types of rights violations—mostly allegations of illegal discrimination.[145] Significantly, DOJ OCR is not authorized to address complaints of Fourth Amendment violations unless the complainant can establish some connection between the violation and one of the federal rights violations that DOJ OCR is authorized to address.[146] DOJ OCR would apparently be authorized to investigate a complaint that an individual was subjected to excessive force in violation of the Fourth Amendment if and only if the complaint alleged that the police used excessive force because of the individual's race, sex, nationality, or another suspect classification.

Second, and perhaps not surprisingly given the difficulty of determining whether DOJ OCR has jurisdiction over a complaint, another source of the office's ineffectiveness is the fact that the office is not widely known as a place to address complaints against police.[147] Although DOJ OCR has in recent years created a web portal for receiving individual complaints,[148] and now appears to receive over a thousand per year on average,[149] it is unclear how anyone who has been subjected to illegal discrimination by a recipient of federal law enforcement funding would know that he could submit a complaint to DOJ OCR. Regardless of where the thousands of complaints submitted to DOJ OCR are originating, apparently the vast majority fall outside of DOJ OCR's limited jurisdiction.[150]

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[144] "According to the COPS Office, the agency has received more than $20 billion in funding and it has awarded grants to over 13,000 of the 18,000 law enforcement agencies in the United States." CONG. RES. SERV., THE COMMUNITY ORIENTED POLICING SERVICES (COPS) PROGRAM: HISTORY, FUNDING, AND POTENTIAL ISSUES FOR REAUTHORIZATION 19 (2025). DOJ OJP also awards funding to other institutions such as hospitals, nonprofit organizations, and institutions of higher education. *See* U.S. DEP'T OF JUST., OFF. JUST. PROGRAMS, DOJ GRANTS FINANCIAL GUIDE 2024 (2025), https://www.ojp.gov/funding/financialguidedoj/ii-preaward-requirements#1-0.

A fairly recent "empirical analysis of federal funding for local and state police agencies in the United States" found that "federal funding only reaches a minority of local police agencies," and that federal funds account for "a relatively small percentage of [what] the typical U.S. municipality spends on policing each year." Roger Michalski & Stephen Rushin, *Federal (De)Funding of Local Police*, 110 GEO. L.J. ONLINE 54–55 (2021). The authors found that federal funding reached only "around ten percent" of all local police agencies in any given year, and that "around twenty percent of all non-federal law enforcement agencies" received federal funding "during the past eight years." *Id.* at 54–55. The study does not address what percentage of the U.S. population lives within the jurisdiction of the local police agencies that received funding. If the largest urban agencies are likely to have accepted some federal funding, it is possible that a higher percentage of the U.S. population interacts with federally funded local police than the ten and twenty percent figures would suggest. Michalski and Rushin note data suggesting that the median law enforcement agency accepting federal funding is likely quite small. *See id.* at 61. But it could still be the case that many of the largest agencies also accept federal funds in some form.

[145] *See* OIG AUDIT, *supra* note 140, at 20–21.

[146] *See id.*; U.S. GOV'T ACCOUNTABILITY OFF., DOJ CAN IMPROVE PUBLICATION OF USE OF FORCE DATA AND OVERSIGHT OF EXCESSIVE FORCE ALLEGATIONS 64 (2021) [hereinafter "GAO REPORT"]. GAO notes that 247 of the 7,277 allegations DOJ OCR received between fiscal years 2016 and 2020 included allegations of excessive force, but that 242 of these were "closed administratively." GAO REPORT, *supra*, at 64.

[147] *See* OIG AUDIT, *supra* note 140, at i, 6–9.

[148] Until June 2023, DOJ OCR apparently did not have a web portal for submitting complaints. *See id.* at i, 6–7, 22.

[149] "From fiscal year 2016 through fiscal year 2020, the Office for Civil Rights reported that it had reviewed 7,277 allegations." GAO REPORT, *supra* note 146, at 64. A DOJ OIG audit in 2023 found that DOJ OCR received 4,814 complaints between fiscal years 2019 and 2022. OIG AUDIT, *supra* note 140, at 5 n.7.

[150] Although the phrasing in the DOJ OIC report is not entirely clear on this point, it appears that of the 4,814 complaints DOJ OCR received between fiscal years 2019 and 2022, DOJ OCR "closed" 4,330 complaints in the sense of neither investigating nor referring or deferring the complaint. *See* OIG AUDIT, *supra* note 140, at 3, 5 n.7;

Third, even if the public began to submit more valid complaints, DOJ OCR would almost certainly not have the institutional capacity to respond to the increased volume. In an indication of the relatively low priority that the office receives in the DOJ hierarchy, it is led by a Director who reports to the Deputy Assistant Attorney General for Operations and Management within the Office of Justice Programs (OJP), the DOJ office with primary responsibility for grantmaking and technical assistance.[151] As Part III will show, some civil rights offices in other agencies, such as ED OCR, are led by Assistant Secretaries who report directly to a cabinet-level official.[152]

An investigation by the U.S. Commission on Civil Rights (USCCR) in 1996 "found a lack of support from OJP management for civil rights enforcement, as well as flaws in the organizational structure of OJP," with the result that "OCR was unable to carry out its civil rights coordination and enforcement role effectively."[153] At the time, DOJ OCR apparently had a "small staff of three" for "external civil rights enforcement responsibilities," and none of the staff had received training on Title VI, the main anti-discrimination law that DOJ OCR was responsible for enforcing.[154] In a 2002 follow-up report, USCCR found "the same problems" as in 1996, noting that while OJP had administered "$4 billion in grants and programs" in 2000, directed toward thousands of recipients, OCR had a budget under $1 million, and only "10 full-time employees," including five full-time attorneys.[155] OCR stated that it had "received sufficient funding to conduct three or four compliance reviews each year."[156] It is difficult to determine more recent staffing and funding levels for DOJ OCR, but a 2023 DOJ OIG report referred to DOJ OCR as so "short-staffed" that requesting a large sample of closed complaints from the office "would likely inflict undue strain."[157]

As noted above, DOJ OCR is already statutorily authorized to investigate and seek the resolution of complaints submitted by individuals alleging various forms of discrimination by state and local law enforcement agencies that have accepted federal funds.[158] DOJ OCR can also investigate allegations of excessive force where those allegations are tied to allegations of discrimination.[159] Although the most common type of police rights violation alleged in Section 1983 suits appears to be excessive force in violation of the Fourth Amendment, not discrimination in violation of the equal protection clause, Title VI, or another anti-discrimination

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cf. GAO REPORT, *supra* note 146, at 54. In any case, it appears that DOJ OCR only produces written findings in a handful of cases each year. *See* U.S. DEP'T OF JUST., OFFICE FOR CIVIL RIGHTS (OCR): INVESTIGATIVE FINDINGS, https://www.ojp.gov/program/civil-rights-office/investigative-findings (listing three letters of finding in 2024, five in 2023, none in 2022, two in 2021, and one in 2020).

[151] *See Office of Justice Programs Org Chart*, U.S. DEP'T OF JUST., OFF. JUST. PROGRAMS (updated Sept. 22, 2022), https://www.justice.gov/doj/office-justice-programs-org-chart; *About Us*, U.S. DEP'T OF JUST., OFF. JUST. PROGRAMS, https://www.ojp.gov/about.

[152] *See infra* text accompanying note 170.

[153] U.S. COMM. ON CIV. RTS., 2 TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? 8 (2002) (citing U.S. COMM. ON CIV. RTS., FEDERAL TITLE VI ENFORCEMENT TO ENSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS (1996)).

[154] *Id.* at 8–9, 18.

[155] *Id.* at 16–18.

[156] *Id.* at 19.

[157] OIG AUDIT, *supra* note 140, at 18.

[158] *See supra* Part II.F.

[159] *See, e.g.*, U.S. Dep't of Just., Off. of Just. Programs, Off. for C.R., Notice of Findings v. Union City Police Dep't (10-OCR-0688) (Apr. 12, 2011), https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/ga-10-ocr-0688.pdf; U.S. Dep't of Just., Off. of Just. Programs, Off. for C.R., Notice of Findings [Redacted] v. Thomas Cnty. Sheriff's Office (13-OCR-0460) (May 18, 2015), https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/tcso-13-ocr-0460.pdf.

law,[160] various sources of statistical evidence suggest that state and local police carry out millions of discrimination-based rights violations every year.[161] But if it is correct, as recent research suggests, that only around ten percent of local law enforcement agencies accept federal funding in a given year,[162] DOJ OCR's jurisdiction over these violations may be very limited. The fact that only a subset of Fourth Amendment violations are tied to illegal discrimination makes DOJ OCR's jurisdiction over state and local police violations of the Fourth Amendment even more limited. Expanding DOJ OCR's jurisdiction would require federal legislation.[163]

Even if a presidential administration attempted to pursue investigations within DOJ OCR's current jurisdiction more aggressively, the attempt might soon backfire. The relative effectiveness of ED OCR in addressing individual discrimination complaints may have depended in part on schools being unwilling or fiscally unable to forego federal funding. But state and local law enforcement agencies are far less dependent on federal funding. There may be a number of small law enforcement agencies for whom federal funding makes up a significant portion of their budget.[164] But the fact that only roughly ten percent of law enforcement agencies accept federal funding in a given year[165] suggests that it is generally quite feasible to operate without such funding. If DOJ OCR developed a reputation for aggressively pursuing discrimination claims against law enforcement agencies that accepted federal funding, or for demanding costly reforms, many agencies might simply stop accepting federal funding.

III. Federal Complaint Processes for Civil Rights Violations Outside of Policing

We have now seen that when a member of the public is harmed by police illegality, the paths for obtaining a legal remedy are narrow. This is true for the most common forms of constitutional rights violations by the police, including Fourth Amendment and equal protection violations. Remedies sometimes exist in theory, but in practice they are often ineffective. In particular, as noted in the discussions of existing DOJ institutions above, when state or local police violate an individual's Fourth Amendment rights in an ad hoc way, there is no way for the individual to complain to a federal agency that can then plausibly initiate an investigation and seek a resolution.[166]

It may seem unrealistic that the federal government would assist individuals in this way. But this section will describe how the federal government already provides similar assistance to individuals whose rights have been violated in a variety other contexts—including education, housing, employment, and health.

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[160] *See* Kathryn E. Scarborough & Craig Hemmens, *Section 1983 Suits Against Law Enforcement in the Circuit Courts of Appeal*, 21 T. JEFFERSON L. REV. 1, 10–11 (1999).
[161] *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 556–63 (S.D.N.Y. 2013); Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 736 (2020).
[162] *See supra* note 144.
[163] *Cf.* United States v. City of Philadelphia, 482 F. Supp. 1248, 1259–61 (E.D. Pa. 1979) (rejecting federal government's argument that authorization in 18 U.S.C. § 241–242 to bring criminal right of action implicitly authorized federal government to bring civil right of action as well, and concluding that Section 1983 only creates a right of action for the "injured party," not the federal government).
[164] *See* Michalski & Rushin, *supra* note 144, at 61 (noting that among the twenty percent of local law enforcement agencies that received any federal funding in the previous eight years, "the median percentage was forty percent of the agency's budget").
[165] *See id.* at 54.
[166] *See id.*

As already noted briefly in the introduction, if parents discover that a school district has discriminated against their child based on the child's race, sex, or nationality, or has failed to provide legally required accommodations for a disability, the parent can go to the website of the Department of Education's Office for Civil Rights (ED OCR) and submit a complaint using a convenient online form.[167] Until the gutting of ED in 2025 by the second Trump administration,[168] ED OCR had a bureaucracy of over 500 employees dedicated to addressing such complaints, and a budget of over $150 million.[169] The importance of the office was also reflected in its being led by an Assistant Secretary who reported directly to the Secretary of Education.[170] Once one of ED OCR's employees received a complaint, the complaint would be evaluated to see if it articulated a legal violation that fell within ED OCR's jurisdiction.[171] ED OCR was authorized by regulation to address a variety of legal violations by educational institutions that receive federal funding, including violations of the anti-discrimination provisions of Title VI and the ADA.[172] If the ED OCR reviewer determined that ED OCR had jurisdiction over the claim, the reviewer would investigate it—often by reaching out to the complainant and the school district to collect more information.[173]

The ED OCR reviewer would then complete a timely, written statement of findings.[174] If the reviewer determined that a violation had taken place, the reviewer would work with the affected individual and the school district to remedy the violation, often through a settlement in which the school district agreed to take certain steps.[175] In theory, if the district refused to agree to a settlement, ED OCR could threaten the district with the withdrawal of federal funding or a litigation referral to the Department of Justice.[176] But in practice, ED OCR nearly always reached a settlement with the district.[177] It processed over 10,000 claims per year.[178]

If the district did not comply with the settlement, the affected individual could then submit a new complaint to ED OCR.[179] ED OCR also conducted periodic compliance reviews to ensure that school districts were complying with past settlements.[180] In addition, ED OCR collected, analyzed, and published data on compliance with the civil rights laws that it oversaw.[181]

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[167] *See How the Office for Civil Rights Handles Complaints*, U.S. DEP'T OF EDUC., https://www.ed.gov/laws-and-policy/civil-rights-laws/file-complaint/how-the-office-for-civil-rights-handles-complaints [hereinafter "ED OCR COMPLAINT PROCESS"].
[168] *See* Katherine Knott, *OCR Layoffs Estimated to Cost Up to $38M, GAO Says*, INSIDE HIGHER ED., Feb. 3, 2026.
[169] *See* Ben Miller, *What the Department of Education Actually Does*, SLOW BORING (Mar. 17, 2025); U.S. DEP'T OF EDUC., OFF. CIV. RTS., FISCAL YEAR 2024 BUDGET REQUEST 1 (n.d.), https://www.ed.gov/media/document/ocr-fiscal-year-2024-budget-request-39335.pdf.
[170] *See* 20 U.S.C. § 3413(a); *OCR Functional Statement—Mission and Responsibilities*, U.S. DEP'T OF EDUC., https://www.ed.gov/about/ed-organization/functional-statements/ocr-functional-statements/ocr-functional-statement-mission-and-responsibilities.
[171] *See* ED OCR COMPLAINT PROCESS, *supra* note 167.
[172] *See id.*
[173] *See id.*
[174] *See id.*
[175] *See id.*; U.S. DEP'T OF EDUC., OFF. CIV. RTS., COMPLAINT PROCESSING MANUAL (CPM) 16, 19–20 (2025).
[176] *See* Murphy, *supra* note 13.
[177] *See id.*
[178] *See id.* (noting that from 1981 to 2016, ED OCR full-time staff "shrank from 1,099 to 563, even as civil-rights complaints grew from 2,887 to 16,720").
[179] *See* ED OCR COMPLAINT PROCESS, *supra* note 167.
[180] *See id.*
[181] *See id.*

Similar complaint processes exist for individuals who believe their rights have been violated in the context of housing, employment, health, and other policy areas whose importance is reflected in their being overseen by federal agencies.[182] For example, if an individual believes that a real estate agent or landlord has discriminated against them in a way that violates the Fair Housing Act, the individual can fill out the online complaint form on the Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity, an office led by an Assistant Secretary who reports to the Secretary of Housing and Urban Development.[183] Prior to the second Trump administration,[184] HUD's FHEO employed nearly 600 people.[185] It processed 8,320 complaints in 2024, finding likely discrimination in 471 cases.[186] If the parties agree, HUD allows complaints to be adjudicated by an administrative law judge, saving time and money for all involved.[187]

Similarly, individuals who believe that an employer discriminated against them in a way that violates civil rights law could submit a complaint through the online complaint form on the EEOC's website.[188] Prior to the second Trump administration, EEOC employed over 2000 people and had a budget of over $400 million.[189] It processed tens of thousands of charges per year, securing nearly $700 million in compensation for about 21,000 victims of employment discrimination in fiscal year 2024.[190]

The Department of Health and Human Services' Office for Civil Rights, with a staff of over 300 "full-time equivalents" and a budget of nearly $80 million in fiscal year 2024,[191] similarly processed complaints through its online submission form, investigated them, and attempted to reach a resolution.[192] HHS OCR processed approximately 80,000 complaints in fiscal year 2024.[193] Similar but smaller civil rights offices process individual complaints of civil rights violations for the USDA, VA, and a number of other agencies.[194]

Most of the offices discussed above primarily process complaints regarding civil rights violations—that is, complaints of illegal discrimination.[195] The offices were typically created by

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[182] *See supra* Part I.
[183] *See Report Housing Discrimination*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/reporthousingdiscrimination; *Powers of the Secretary*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/aboutus/secretary-power.
[184] *See* Debra Kamin, *Trump Appointees Roll Back Enforcement of Fair Housing Laws*, N.Y. TIMES, Sept. 22, 2025.
[185] *See* Katherine Hapgood, *HUD Shutdown Plan Reveals Extent of Trump Administration's Reductions*, POLITICO PRO, Oct. 1, 2025.
[186] *See* Heather Senison, *U.S. Housing Discrimination Complaints Rise as Support Network Thins*, N.Y. TIMES, Dec. 22, 2025.
[187] *See* Nicholas R. Seabrook, Eric M. Wilk, & Charles M. Lamb, *Administrative Law Judges in Fair Housing Enforcement: Attitudes, Case Facts, and Political Control*, SOC. SCI. Q. (2013).
[188] *See Filing a Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-charge-discrimination.
[189] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, FISCAL YEAR 2024 ANNUAL PERFORMANCE REPORT 5, 33 (2025).
[190] *See id.* at 5–6.
[191] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., FISCAL YEAR 2024 BUDGET IN BRIEF 9, 11, 154 (2023).
[192] *See Filing with OCR*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. FOR C.R., https://www.hhs.gov/ocr/complaints/index.html.
[193] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 191, at 154.
[194] *See, e.g.*, *How to File a Program Discrimination Complaint*, USDA, OFF. OF ASST. SEC'Y FOR C.R., https://www.usda.gov/about-usda/general-information/staff-offices/office-assistant-secretary-civil-rights/how-file-usda-discrimination-complaint/how-file-program-discrimination-complaint; *Filing an EEO Complaint*, U.S. DEP'T OF VETERANS AFFS., OFF. OF RES. MGMT., https://ormportal.va.gov/.
[195] *See supra* text accompanying notes 183–194.

or in response to civil rights statutes, as a way to ensure the enforcement of the new rights created in those statutes.[196] It is also natural that these offices have focused on discrimination claims because, in many cases, the most common and serious forms of federal rights violation taking place in these policy areas tends to involve illegal discrimination.

But it is important to note that the types of offices noted above do not all deal exclusively with discrimination complaints. For example, ED has a Student Privacy Policy Office (SPPO) that accepts, investigates, and attempts to resolve individual complaints regarding violations of the privacy-focused Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Amendment (PPRA).[197] Similarly, a large part of the work of HHS OCR consists of responding to individual complaints of HIPAA violations.[198] Like the Fourth Amendment, HIPAA's primary focus is privacy.[199] HHS OCR addresses HIPAA violations because the HIPAA statute assigned this task to the Secretary of HHS, and the Secretary delegated the task to HHS OCR.[200] HHS OCR also accepts, investigates, and attempts to resolve individual complaints regarding federal religious freedom laws, which in a sense involve discrimination but may also be described as related to First Amendment free exercise concerns.[201]

The Department of Homeland Security's Office for Civil Rights and Civil Liberties (DHS CRCL) possesses one of the broadest authorizations of any federal rights oversight office.[202] As its name suggests, DHS CRCL addresses not only complaints of civil rights violations, in the sense of illegal discrimination, but complaints of civil liberties violations as well.[203] The office accepts, investigates, and attempts to resolve individual complaints alleging "[p]hysical abuse or any other type of abuse" by DHS personnel, including not only claims of discrimination but due process violations such as denial of notice or access to a lawyer and, crucially for the concerns of this article, unreasonable searches and seizures in violation of the Fourth Amendment.[204]

Thus, nothing prevents Congress from assigning oversight responsibilities for non-discrimination-based legal violations to agency civil rights offices. Congress has already done so

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[196] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601–605, 78 Stat. 241, 252–53 (creating Title VI enforcement mechanisms); Fair Housing Act of 1968, Pub. L. No. 90-284, § 810, 82 Stat. 73, 85 (creating HUD's complaint mechanism).

[197] *See File a Complaint*, U.S. DEP'T OF EDUC., STUDENT PRIVACY POL'Y OFF., https://studentprivacy.ed.gov/file-a-complaint (providing complaint forms for FERPA and PPRA violations).

[198] *See* Sharita Gruberg, *HHS Budget Would Fund Discrimination at Expense of Civil Rights Enforcement*, CTR. AM. PROGRESS, Apr. 25, 2019 (noting evidence that the division of HHS OCR responsible for complaints of health information privacy violations received 25,299 complaints on an annual basis, while the divisions of HHS OCR responsible for addressing complaints of civil rights violations received a total of 8,433 complaints).

[199] *See* CDC, PUB. HEALTH L., *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* (Sept. 10, 2024), https://www.cdc.gov/phlp/php/resources/health-insurance-portability-and-accountability-act-of-1996-hipaa.html.

[200] *See* 42 U.S.C. § 1320d-5 (assigning HIPAA enforcement to HHS Secretary); *Statement of Delegation of Authority*, 65 Fed. Reg. 82,381 (Dec. 28, 2000) (delegating HIPAA enforcement in part to HHS OCR); *Delegation of Authority*, 74 Fed. Reg. 38,630 (July 27, 2009) (delegating HIPAA enforcement exclusively to HHS OCR).

[201] *See Conscience and Religious Freedom*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. FOR C.R., https://www.hhs.gov/conscience/index.html.

[202] *See* 6 U.S.C. § 345 (establishing the Officer for Civil Rights and Civil Liberties within DHS); *see also* Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 55–56, 58, 62–65 (2014) (analyzing CRCL's statutory authority and institutional role).

[203] *See* 6 U.S.C. § 345(1); *File a Civil Rights Complaint*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/file-a-civil-rights-complaint (describing the scope of complaints CRCL reviews).

[204] *File a Civil Rights Complaint*, *supra* note 203.

in a variety of policy contexts from health to immigration.[205] DHS CRCL illustrates the feasibility of directing a bureaucracy to investigate Fourth Amendment violations by law enforcement agents.[206] ED OCR, HUD FHEO, HHS OCR, and EEOC illustrate the feasibility of a bureaucracy overseeing thousands of individual complaints of rights violations per year.[207] ED OCR also illustrates the constitutionality of a federal agency overseeing federal rights violations by paradigmatically local government institutions—that is, local public schools.[208] A state or local law enforcement agency is presumably no more inherently beyond the purview of federal oversight than a local public school district.

The preceding precedents, taken together, demonstrate that no practical or legal hurdles stand in the way of Congress assigning to the Department of Justice the responsibility for investigating and responding to individual complaints of federal rights violations by state and local law enforcement agents, including violations of the Fourth Amendment such as illegal searches and excessive force.[209]

IV. A "Fair Policing Act"

As long as an individual whose constitutional rights have been violated by the police must file a lawsuit in order to achieve redress, countless constitutional violations will almost certainly go unaddressed.[210] If affected individuals were instead able to submit a complaint to a centralized federal system, more individuals would be likely to receive justice, and a broader understanding of the scope and nature of constitutional violations by the police could gradually be developed—the first step toward developing more effective systemic remedies.

Congress should pass a statute authorizing the Department of Justice to investigate and address individual complaints of federal rights violations by state and local law enforcement

[205] *See supra* notes 198–204 and accompanying text (describing HIPAA enforcement by HHS OCR, FERPA enforcement by ED SPPO, and civil liberties complaint review by DHS CRCL).
[206] *See supra* note 204 and accompanying text.
[207] *See supra* notes 167–194 and accompanying text.
[208] *See* Grove City Coll. v. Bell, 465 U.S. 555, 575–76 (1984) (upholding ED's authority to enforce Title IX at educational institutions receiving federal funding).
[209] Such an office would merely be enforcing existing, already judicially recognized legal rights and would raise no issues under City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (affirming Congress's enforcement power under Section 5 of the Fourteenth Amendment but requiring "congruence and proportionality"). *See infra* note 253 and accompanying text.
[210] *See* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 648–52 (2023) (describing the shortage of attorneys willing to take civil rights cases and the resulting gap in enforcement).

This article's focus is on creating a new pathway for obtaining remedies for federal rights violation by state and local police. But existing remedies can and should be strengthened as well. Scholars such as Joanna Schwartz have offered a number of valuable proposals. *See, e.g.*, SCHWARTZ, *supra* note 33, at 233–68. Federal legislation could eliminate qualified immunity under Section 1983, remove *Monell*'s barriers to municipal liability, and establish a federal equivalent to Section 1983 to replace the vanishing judge-made liability under *Bivens*. *See id.* at 234–42, 249–52; Amanda Pulido, *Zero to Hero: The Unavailability of* Bivens *and Why Congress Should Intervene*, 16 FIU L. REV. 807, 809–11 (2022) (arguing for congressional action to create an equivalent to § 1983 for federal rights violations). State legislation could follow Colorado in requiring police who violate someone's constitutional rights, at least under some conditions, to pay some portion of successful Section 1983 claims. *See* SCHWARTZ, *supra* note 33, at 231–39 (describing Colorado's approach). State legislation could also follow New Mexico in creating a cause of action for violations of state constitutional rights—without a qualified immunity limitation, and with appropriate awards for attorney's fees. *See* Joanna C. Schwartz, *Constitutional Recalibration: Lessons from New Mexico*, 54 N.M. L. REV. 345, 346–50 (2024).

officers. The statute, which could be titled the Fair Policing Act,[211] would authorize DOJ to investigate and address (1) any violation of a federal right,[212] and not only violations of the discrimination-focused civil rights statutes that DOJ OCR is currently authorized to investigate; (2) by any state or local law enforcement official, and not only by officials working for agencies that have accepted federal funding.

As noted above,[213] DOJ is already authorized to investigate and address any violation of a federal right by any state or local law enforcement officer,[214] regardless of whether the officer's agency accepts federal funding—but only if the violation constitutes a "pattern or practice."[215] Congress authorized DOJ to conduct "pattern or practice" investigations in the Violent Crime Control and Law Enforcement Act of 1994.[216] The provision is brief and worth quoting in full:

> Title XXI—STATE AND LOCAL LAW ENFORCEMENT
> ...
> Subtitle D—Police Pattern or Practice
> ... CAUSE OF ACTION
> (a) Unlawful conduct.—It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.
> (b) Civil action by Attorney General.—Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.[217]

The Fair Policing Act could remove the "pattern or practice" limitation and authorize DOJ to investigate and address complaints regarding isolated, individual rights violations by state and local law enforcement agents as well. Because equitable and declaratory relief may not provide an adequate remedy for an isolated federal right violation by an individual officer, especially from the perspective of the person whose rights were violated, the Fair Policing Act

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[211] The inspiration for the title is the Fair Housing Act (FHA) of 1968, the last of the three most well-known civil rights statutes of the 1960s, following the Civil Rights Act of 1964 and the Voting Rights Act of 1965. *See* Paula A. Franzese & Stephanie J. Beach, *Promises Still to Keep: The Fair Housing Act Fifty Years Later*, 40 CARDOZO L. REV. 1207, 1207–08 (2019) (describing the FHA as "the third in a trilogy of groundbreaking civil rights laws enacted in the 1960s").

[212] The term "federal right" is intended to refer to what is addressed under Section 1983 as "any rights, privileges, or immunities secured by the Constitution and laws," or in other words what the statute authorizing the DOJ CRT's pattern or practice investigations refers to as "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. § 1983; 34 U.S.C. § 12601(a).

[213] *See supra* Part II.E.

[214] The statute itself refers only to "law enforcement officers," without jurisdictional limitation, but appears under the heading "STATE AND LOCAL LAW ENFORCEMENT," making clear that it is not intended to apply to federal law enforcement officers. 34 U.S.C. § 12601(a).

[215] Section 12601 contains no requirement that a police department receive federal financial assistance. It applies to "any governmental authority" engaging in a "pattern or practice" that deprives persons of rights secured by the Constitution or federal law, and it authorizes the Attorney General to seek equitable and declaratory relief. 34 U.S.C. § 12601(a).

[216] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified as amended at 34 U.S.C. § 12601) (originally codified at 42 U.S.C. § 14141).

[217] *Id.*

could also authorize DOJ attorneys to seek monetary damages on behalf of victims, in the manner of a Section 1983 suit, but without the court-made limitations on liability that have recently hindered Section 1983, especially qualified immunity and *Monell*'s refusal to impose vicarious liability on municipalities.[218]

Any of the concerns cited by defenders of *Monell* and qualified immunity in the context of Section 1983 suits would be mitigated by the fact that DOJ, and not private litigants, would have discretion regarding what suits to bring and what relief to seek, and would only pursue relief consistent with the interests of justice. For example, DOJ OCR could agree not to pursue litigation, with its risk of monetary damages, if a police department fired an officer, or agreed to some form of discipline or retraining for the officer. Presumably, the discipline or retraining of a police officer, along with monetary damages, would be one of the most common remedies obtained through a successful DOJ OCR complaint process. In especially severe cases, common remedies might include the dismissal of the officer, possibly accompanied by the officer's agreement not to work in law enforcement in the future.[219]

If affected individuals wished to pursue monetary damages anyway, they could still file their own suit under Section 1983. Unlike in the context of employment discrimination, the Fair Policing Act could make clear that the DOJ OCR complaint process is merely a supplement to already existing private rights of action, and that the Act establishes no requirement for individuals to exhaust the DOJ OCR complaint process before filing a private suit.[220]

In order to achieve these goals, the Fair Policing Act could include something like the following language:

> (a) Unlawful conduct.—It shall be unlawful for any state or local governmental authority, or any agent thereof, or any person acting on behalf of a state or local governmental authority, to engage in conduct by law enforcement officers that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.
>
> (b) Civil action by Attorney General.—Whenever the Attorney General has reasonable cause to believe that a violation of the preceding paragraph has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate relief. Vicarious liability shall apply to local governments for the acts of their agents, and qualified immunity shall not apply. Nothing in this section shall be interpreted to limit other forms of relief, nor does the existence of a criminal proceeding limit the ability of the Attorney General to conduct investigations or obtain relief under this statute.

As noted in Part III, processes for investigating and addressing individual complaints already exist in the context of education, housing, employment, and other areas. There is no reason that similar processes could not exist in the context of law enforcement. Indeed, many countries other than the United States already provide nationally centralized processes for addressing individual complaints regarding law enforcement.[221] The Fair Policing Act would

[218] For criticisms of qualified immunity and *Monell*, see Part II.B above.

[219] On the problem of police officers finding work at another law enforcement agency after being fired for serious misconduct, see Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676 (2020).

[220] *See Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-lawsuit (stating that someone who seeks to file a federal lawsuit alleging employment discrimination must, with some exceptions, first "file a charge with the EEOC").

[221] *See, e.g.*, *Members*, INDEP. POLICE COMPLAINTS AUTHORITIES' NETWORK, https://ipcan.org/members (listing numerous national bodies for receiving policing complaints); *Information on Country Independent Police Complaints Bodies*, POLICE ACCOUNTABILITY PROJ., https://www.police-accountability-

finally provide individuals with a way to remedy federal rights violations by state and local law enforcement officials without having to face the often insurmountable hurdles involved in a Section 1983 suit, as individuals are already able to do in the context of civil rights violations by state and local education officials, as well as civil rights violations by private actors in housing and employment markets.

It is possible to imagine granting DOJ even more expansive forms of jurisdiction. Congress could authorize DOJ to investigate not only law enforcement officers but carceral administrators,[222] or not only state and local law enforcement officers but federal law enforcement officers as well.[223] In addition, a Fair Policing Act could recognize more expansive federal rights than the Supreme Court currently recognizes under the Fourth Amendment and the Fourteenth Amendment equal protection and due process clauses.[224] In the interest of simplicity and political feasibility, the draft statute above does not include these more expansive possibilities.

Any number of institutional arrangements could be effective in achieving the goals of the Fair Policing Act. The approach that would cause the least disruption to the existing organization of DOJ might be for Congress to create a new Assistant Attorney General in DOJ to lead an expanded DOJ OCR, which could be removed from beneath OJP and assigned the task of processing individual complaints *and* the "pattern or practice" investigations that are currently handled by the Special Litigation Section of DOJ CRT.[225] If DOJ OCR took responsibility for "pattern or practice" investigations, the Special Litigation Section could continue to manage its other responsibilities, such as protecting the civil rights of people in state or local institutions.[226]

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project.com/content/resources/complaints/ (providing information on centralized institutions for processing policing complaints in Canada, England and Wales, France, Germany, Japan, Northern Ireland, and Scotland).

[222] Authorizing the investigation of corrections officers would not be unprecedented. The Violent Crime Control and Law Enforcement Act of 1994 authorized DOJ CRT to conduct pattern or practice investigations not only of "law enforcement officers" but also of "officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles." 34 U.S.C. § 12601(a).

[223] An executive order could direct complaint bodies that already exist within federal law enforcement agencies, such as DHS's CRCL, to enter into memorandums of understanding with the reconstructed DOJ OCR in order to avoid duplicative efforts. There would be many advantages to authorizing DOJ OCR to serve as a clearinghouse for federal as well as state and local policing complaints, including improved efficiency, data collection, and monitoring. Above all, authorizing DOJ OCR to process complaints regarding federal law enforcement agents would simplify the process for complainants. They would know where to submit their complaint without first having to determine the precise federal agency for which an agent worked. The second Trump administration's immigration enforcement activities have made clear that it is often difficult to determine what agency a law enforcement agent works for. *See, e.g.*, Nick Turse, *These Patches Are Clues to Identifying Immigration Agents*, INTERCEPT, Jan. 28, 2026.

[224] On the power of Congress to legislate and enforce minimum standards applicable to local and state policing, see Barry Friedman, Rachel Harmon, & Farhang Heydari, *The Federal Government's Role in Local Policing*, 109 VA. L. REV. 1527 (2023). A Fair Policing Act could also include various widely discussed policing reforms that lie outside of this article's primary focus, such as the reforms included in the George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021), reintroduced as the George Floyd Justice in Policing Act of 2025, H.R. 5361, 119th Cong. (2025).

[225] *See* 28 U.S.C. §§ 506–507a (directing the President to appoint "11 Assistant Attorneys General, who shall assist the Attorney General in the performance of his duties," as well as Assistant Attorneys General for Administration and National Security).

[226] *See* Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. §§ 1997–1997j (authorizing DOJ to investigate conditions in state and local institutions); *Cases and Matters*, U.S. DEP'T OF JUST., C.R. DIV., SPECIAL LITIG. SECTION, https://www.justice.gov/crt/special-litigation-section-cases-and-matters (listing current investigations in corrections, juvenile justice, and disability rights).

Regardless, implementation of the Fair Policing Act would of course require increased funding for, among other things, the hiring of a large DOJ OCR staff for processing individual complaints.

Other relatively uncontroversial provisions might be added to the statute proposed above. For example, the statute might direct DOJ OCR to collect, analyze, and share data of state and local law enforcement violations of federal rights.[227] More ambitiously, DOJ OCR could be authorized to investigate certain especially serious law enforcement harms, such as uses of fatal force, using system-focused approaches modeled on National Transportation Safety Board (NTSB) investigations of aviation accidents.[228] Congress could authorize such investigations even in the absence of reasonable cause to believe there was a federal rights violation.[229] The goal would not be determining individual blame and liability, but identifying systems failures and determining how risks of harm could be reduced in the future.

It might also be worthwhile to consider the activities of the civil rights offices discussed in Part III for ideas regarding the institutional design of a reconstructed DOJ OCR. For example, FHEO provides funding to state and local civil rights agencies that enforce fair housing laws that are "substantially equivalent" to the FHA.[230] DOJ OCR could similarly provide support to state and local agencies that already investigate law enforcement misconduct, such as civilian complaint review boards, police officer standards and training commissions, and state attorney general offices that investigate police misconduct. As in the case of FHEO, DOJ OCR could effectively deputize state and local officials to handle some complaints under DOJ OCR oversight. FHEO also offers parties the option of addressing their disputes before administrative law judges, although parties are always free to opt out.[231] Could it make sense for Congress to establish a system of administrative law judges to address complaints of federal rights violations against police on an opt-in basis?

Rather than propose additional possibilities for the design of a reconstructed DOJ OCR, I will close by emphasizing the importance of consulting with stakeholders who possess relevant practical experience and diverse perspectives, including police and victims of federal rights

[227] Partly due to the decentralization of American law enforcement and criminal justice institutions, there has always been an enormous unmet need for comprehensive and accurate data regarding policing and public safety in the United States. *See* PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 7, 19–20 (2015), https://www.govinfo.gov/content/pkg/GOVPUB-J36-PURL-gpo64136/pdf/GOVPUB-J36-PURL-gpo64136.pdf. Perhaps DOJ OCR could even conduct randomized controlled experiments like the ones funded by HUD to detect housing discrimination. *See* Margery Austin Turner, *Catching Housing Discrimination in the Act: The Power of Paired Testing*, URB. INST. (June 17, 2013). For example, assuming appropriate protections could be designed, DOJ OCR could deploy otherwise identical drivers of different races, or pedestrians of different races, to detect bias in traffic or pedestrian stops in an area where complaints of discrimination have arisen.

[228] *See* John F. Hollway & Ben Grunwald, *Applying Sentinel Event Reviews to Policing*, 18 CRIMINOLOGY & PUB. POL'Y 705 (2019); Joanna C. Schwartz, *Systems Failures in Policing*, 51 SUFFOLK U. L. REV. 535 (2018); Gregory Brazeal, *Justice Theater in the Criminal Law Curriculum*, 45 CARDOZO L. REV. 1723, 1777 n.181 (2024).

[229] *Cf.* 49 U.S.C. § 1131(a) (authorizing the NTSB to investigate various aircraft, highway, railroad, and other accidents in the United States).

[230] "HUD oversees two programs that promote fair housing at the state and local level: the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiatives Program (FHIP). FHAP funds state and local fair housing agencies, and FHIP funds eligible entities that largely include private nonprofit organizations." CONG. RSCH. SERV., R44557, THE FAIR HOUSING ACT: HUD OVERSIGHT, PROGRAMS, AND ACTIVITIES 5 (2021).

[231] 42 U.S.C. § 3612(a)–(b) (providing for administrative hearings before HUD administrative law judges, but providing that either party may elect, in lieu of the administrative hearing, to have the claims "decided in a civil action").

violations by police, both during the initial creation of the office and later on as part of a process of continual feedback and performance improvement.[232]

A. Advantages

The primary benefit of authorizing DOJ OCR to address individual complaints of federal rights violations by state and local law enforcement officers has already been noted. A reconstructed DOJ OCR would provide a more effective remedy for, and deterrent to, federal rights violations by state and local police than has ever existed in the United States. Lives could be saved. Victims of police abuses could be heard and their harms recognized and addressed. Public safety could be improved through greater police legitimacy, trust, and cooperation.

Supplementing private Section 1983 suits with a reconstructed DOJ OCR would be far from unprecedented. In fact, it would reflect a general pattern in American governance over its history, according to which perceived social problems that could not be effectively addressed through recognizing private rights and authorizing private litigation have repeatedly been addressed by empowering a state bureaucracy.[233] From environmental pollution, to workplace safety, to food safety, to zoning, the turn to public enforcement by administrative agencies has often achieved socially beneficial goals that had resisted solution through private rights and private litigation.[234] As shown in Part III, we have already realized the benefits of agency enforcement in the context of combating discrimination in education, housing, employment, and a wide variety of other contexts. In addition, as already noted, other countries, including many with far superior public safety than the United States, have created centralized agencies to address policing complaints.[235]

There is another powerful but more indirect argument in favor of a DOJ OCR complaint process, beyond the likelihood that such a process would more effectively prevent and respond to federal rights violations by police than existing legal procedures. For those who believe a strong exclusionary rule is a valuable deterrent to police misconduct, the DOJ OCR complaint process could provide a way to compensate for the Supreme Court's unfortunate watering down of the exclusionary rule. For those who are more skeptical of the value of a strong exclusionary rule, the DOJ OCR complaint process could strengthen the argument that a strong exclusionary rule is not necessary, at least on deterrence grounds.

For decades, an ideologically diverse chorus has criticized the costs of the exclusionary rule applied to the states by the Supreme Court in *Mapp v. Ohio* in 1961.[236] Above all, critics

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[232] Because a reconstructed DOJ OCR would, in some sense, resemble a service-provider with an online portal for filing complaints, it may be worth specifically noting the importance of following best practices in working with software engineers to design the website and related digital infrastructure. On the often neglected importance of policy implementation, and especially digital implementation, see PAHLKA, *supra* note 232; BRUCE SCHNEIER & NATHAN E. SANDERS, REWIRING DEMOCRACY: HOW AI WILL TRANSFORM OUR POLITICS, GOVERNMENT, AND CITIZENSHIP (2025).

[233] *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE (2022); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 1–3, 11–73 (1990).

[234] *See* Daniel P. Kessler, *Introduction*, *in* REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 1–4 (2010); Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 661–71 (2013).

[235] *See supra* note 221.

[236] *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–800 (1994); William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 444, 448–55 (1997); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 365–67.

have emphasized, excluding illegally obtained evidence from criminal prosecutions may result in the inability to convict a factually guilty defendant—which may not only deprive a victim of justice, but may threaten public safety by allowing a dangerous aggressor to harm again.[237] No doubt in large part because of these costs, no other country has followed the Supreme Court's lead in *Mapp*.[238] Other countries with equally or more expansive civil liberties protections, and far more humane policing, have managed to achieve these results without applying *Mapp*'s "absolute," categorical exclusion of illegally obtained evidence from criminal trials.[239]

As already suggested in Part II.A, in the decades since *Mapp*, an increasingly hostile Supreme Court has whittled down the exclusionary rule through an ever-proliferating series of limitations.[240] The Court now treats the exclusion of illegally obtained evidence not as the default norm, but as an exception that is only justified when exclusion would satisfy a highly contestable cost-benefit analysis.[241]

Confronted with the comparative evidence that the United States' previously relatively strict exclusionary rule was an international outlier, defenders of the rule might argue that this is simply a case where the Warren Court got things right and other countries got them wrong. As a matter of principle, they might also argue, no court anywhere should allow the admission of illegally obtained evidence, regardless of the consequences.[242] Or, perhaps, the defenders of a return to a strong *Mapp*-style exclusionary rule might argue that the United States needs an exceptionally strong exclusionary rule because of its exceptionally decentralized law enforcement institutions.[243] Defenders of a *Mapp*-style exclusionary rule might argue that the rule is necessary in the United States, even if it is not necessary elsewhere, because the United States' decentralized approach to law enforcement makes it impossible for the federal government to effectively achieve compliance with federal law through the federal enforcement of training standards or discipline.

But another option for defenders of the rule of law and civil liberties might be to accept that the exclusionary rule was always, in fact, as its critics alleged, a flawed mechanism for ensuring law enforcement compliance with the Fourth Amendment. A weakened exclusionary rule would likely have at least two benefits from a progressive perspective. First, courts might be less tempted to narrow the scope of Fourth Amendment substantive rights in order to avoid

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[237] *See* People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) (objecting that under the exclusionary rule, "[t]he criminal is to go free because the constable has blundered").
[238] *See* Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399–400 (2001) (surveying exclusionary practices in other democracies and finding none that follow the American mandatory approach).
[239] *See id.*; *see, e.g.*, R. v. Grant, [2009] 2 S.C.R. 353 (Can.) (evaluating the need to exclude illegally obtained evidence using Canada's discretionary balancing test under § 24(2) of the Canadian Charter of Rights and Freedoms).
[240] *See supra* notes 62.
[241] *See* Hudson v. Michigan, 547 U.S. 586, 591 (2006) (describing suppression of evidence as "always . . . our last resort, not our first impulse," and "only" required "where its deterrence benefits outweigh its substantial social costs" (cleaned up)); Herring v. United States, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.").
[242] *See* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (warning that "[i]f the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy"); Mapp v. Ohio, 367 U.S. 643, 659 (1961) (declaring that "nothing can destroy a government more quickly than its failure to observe its own laws").
[243] On the decentralized nature of U.S. criminal legal institutions, see Maria Ponomarenko, *Some Realism About Criminal Justice Localism*, 173 U. PA. L. REV. 789, 789–91 (2025).

excluding evidence and potentially letting dangerous defendants go free.[244] Instead, courts might be more inclined to recognize expansive protections under the Fourth Amendment, knowing that illegally obtained evidence could still be used to convict the factually guilty in those cases where a conviction is necessary to protect public safety.

Second, a weakened exclusionary rule could simplify the logistics of criminal procedure and conceivably result in more cases going to trial. Of course, the rise of plea bargains and the decline of trials has been the product of countless factors.[245] The growing complexity of trials as a result of the Warren Court's criminal procedure revolution and its aftermath has only been one of these.[246] But it is not implausible that trials could be simplified and made less costly and more common if suppression practice played a less central role in criminal proceedings.

Even if a progressive is not persuaded by these arguments, however, there would still be good reasons for the progressive to support the creation of a DOJ OCR complaint process. Those who disagree with the Supreme Court's skepticism toward *Mapp*'s strong exclusionary rule could embrace the creation of a DOJ OCR complaint process as a way to compensate for the Supreme Court's unfortunate undermining of *Mapp*. It might be possible to argue, in theory, that creating the DOJ OCR complaint process could backfire by reducing political pressure on the Supreme Court to reverse course and restore *Mapp* to its previous glory. But it would be misguided to oppose the creation of a DOJ OCR based on the extremely unlikely possibility of such perverse indirect effects.

B. Criticisms

A libertarian might object to the creation of a reconstructed DOJ OCR on the basis of a general skepticism toward hiring new bureaucratic overseers and expanding the federal government's regulatory machinery. In response to this article's recurring observation that there is a puzzling asymmetry between the existence of an individual complaint process for rights violations in the context of education (ED OCR), housing (FHEO), employment (EEOC), certain federal law enforcement (DHS CRCL), and so on, but no such process for rights violations by state and local police, a libertarian might argue that the asymmetry should be resolved by abolishing offices such as ED OCR rather than by expanding them to a new context.

It is certainly almost always possible to identify inefficiencies, unintended consequences, and questionable value-judgments in the bureaucratic implementation of any sufficiently complex system of rules.[247] Lawyers in a reconstructed DOJ OCR might conduct investigations of complaints without sufficient concern for the burdens they are imposing on state and local police departments.[248] After all, it imposes little or no cost on the lawyer to request information

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[244] *See* Amar, *supra* note 236, at 799 (suggesting that the exclusionary rule may harm civil liberties by incentivizing judges to limit the scope of Fourth Amendment rights in order to avoid freeing violent criminals).

[245] For a recent account, see CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021).

[246] *See id.*

[247] For a recent attempt, see NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW (2024). *But see* Andrew Koppelman, *The Mystery of Neil Gorsuch*, L.A. REV. BOOKS (Mar. 19, 2025) (noting that the authors sometimes misrepresent the facts of the stories they tell).

[248] Pahlka offers numerous illustrations from her time in government service of legalistic, procedurally fixated officials who have lost sight of a project's practical goals and seem to view adherence to complex processes as an end in itself. For example, she describes meeting a lawyer ("Henry") who created regulations requiring food stamp applicants across the country to answer an absurdly long series of questions, including whether they own a burial plot. *See* PAHLKA, *supra* note 232, at 195–97.

that may require a great deal of effort from the department under investigation. Even a reasonably and efficiently conducted investigation will require a police department to dedicate resources to responding that could in theory be dedicated instead to public safety.

It is not inconceivable that the hassle of complying with investigative demands perceived as tedious, invasive of privacy, or even hostile or insulting, might lead some marginal number of well-meaning, competent police officers to retire or switch careers. We can imagine a model officer who complies with the law, pursues her work with diligence, and provides great benefit to the community. Such an officer might find great satisfaction and meaning in serving the public with a degree of autonomy, but be driven to misery by having to comply with bureaucratic demands imposed by an overzealous DOJ OCR investigator or by rules resulting from a DOJ OCR-initiated settlement. It is not hard to find stories of educators and doctors who were tempted to abandon their careers rather than submit to what seemed to them soul-crushing and nonsensical federal regulations.[249]

Thus, there are real risks to the creation of a reconstructed DOJ OCR with the authority to investigate and litigate. The implementation of DOJ OCR's mission should keep these risks always in mind and make every attempt to avoid them.

But if the libertarian's ultimate concern is in fact with liberty, it becomes harder to object to a reconstructed DOJ OCR on libertarian grounds. The essential problem that such an office would be designed to address is precisely the lengthy history in the United States of massive, illegal, systemic violations of individual liberty by state and local police.[250] Generally speaking, illegal violence constitutes a more severe violation of liberty than unnecessary paperwork. Similarly, it seems hard to deny that a settlement requiring the police to engage in additional training—even a fairly burdensome quantity of training, even if some of the training turned out to be of questionable value—would impose less of a burden on individual liberty than a police department harassing young Black men through millions of illegal and humiliating street stops, sometimes accompanied by the public grasping of their genital areas.[251] If administrative obligations imposed by DOJ OCR risk becoming unreasonable, the best response would presumably be to ensure that those obligations are kept within reasonable limits—not to remain in the status quo situation where vast, profoundly harmful constitutional violations continue indefinitely without any effective response.

> "But why?" I asked. "Congress said to assess their assets," he said. "A burial plot is an asset." . . . [I]n that moment . . . I saw Henry as that kid in class who . . . completed every extra-credit assignment early. Henry's superpower was that he was thorough. Now Congress was the teacher—a distant, harsh teacher. And Henry was determined to get an A. No, an A+.

Id. at 196–97.

[249] *See, e.g.*, *id.* at 3–6, 212 (describing doctors' frustrations with Medicare regulations).

[250] *See* Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261 (2021).

[251] *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 556–61 (S.D.N.Y. 2013); U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATIONS OF THE FERGUSON POLICE DEPARTMENT 1–6 (2015) (documenting pervasive constitutional violations including unreasonable force, unlawful stops, and racial bias); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 81–116 (2017) (describing sexualized intrusions during *Terry* frisks). For a vivid recording of a police encounter that appears to involve a stop and frisk without the reasonable suspicion required by the Fourth Amendment, racial discrimination in violation of the equal protection clause, and excessive force in further violation of the Fourth Amendment, see Ross Tuttle & Quinn Rose Schneider, *Stopped-and-Frisked: 'For Being a F**king Mutt'*, NATION, Oct. 8, 2012.

Another possible ideological basis for objecting to a reconstructed DOJ OCR might be a commitment to "federalism," "localism," or "states' rights."[252] Like the libertarian, the localist might believe that federal oversight offices like ED OCR have been a mistake that should be rolled back rather than expanded to the context of policing.

As a legal objection, the appeal to federalism fails. Congress has expansive power under Section 5 of the Fourteenth Amendment to enforce due process and equal protection rights recognized by the Supreme Court.[253] If necessary and proper to the enforcement of Fourteenth Amendment rights, Congress could even pass "prophylactic legislation" creating restrictions on state and local law enforcement that go beyond the rights that the Supreme Court has recognized as falling under the Fourteenth Amendment.[254] The Fair Policing Act, as described above, would create no such new substantive rights. It only enforces existing federal rights.

But a critic might object to a reconstructed DOJ OCR based on more pragmatic, non-legal federalist or localist principles. The critic might argue, for example, that policing is best regulated at a state or local level, because different communities have different needs, and the federal government is ill-equipped to know what those needs are.

But a reconstructed DOJ OCR would only be concerned with preventing and addressing federal rights violations. Either a police department violates a federal right, or it does not. If a department wishes to experiment with an innovative way of avoiding federal rights violations, DOJ OCR could and should encourage it to do so, rather than imposing a one-size-fits-all set of nationwide practices.

In order to prevent rights violations, for example, it might make sense for rural police to follow different practices than urban police. It would be unfortunate if an unresponsive, unthinking DOJ OCR bureaucracy imposed demands on police departments that do not make sense given their local conditions and constraints. But these are arguments against a poorly run DOJ OCR, not against the creation of a reconstructed DOJ OCR as such.

V. Conclusion

To conclude, I will note a final objection to the proposal for a reconstructed DOJ OCR—not from the libertarian or federalist right, but from the abolitionist left. An abolitionist might argue that even a reconstructed DOJ OCR would be a "reformist reform" that would inevitably be ineffective at reducing police violence, and as a result would only serve, perversely, to distract from the one truly effective policy change: the abolition of police.

It is not surprising that activist and scholarly calls for prison and police abolition entered mainstream policy debates in recent years.[255] In light of the inadequacies of the existing remedies for federal rights violations by state and local police, scandals involving violent misconduct by American police have continued to emerge and reemerge, decade after decade, generating wave after wave of public outrage. The latest wave of outrage seems at the moment to be receding, but reached remarkable heights between the protests in Ferguson, Missouri after the killing of Michael Brown in 2014 and the nationwide #BlackLivesMatter protests after the killing of

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[252] *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–1512 (1987) (praising constitutional arguments for decentralized government).
[253] *See* City of Boerne v. Flores, 521 U.S. 507, 516–20 (1997) (confirming that Congress has authority under Section 5 of the Fourteenth Amendment to enact legislation to enforce the Amendment's substantive provisions against state and local governments, although emphasizing that Congress may not change the scope of substantive constitutional rights through legislation).
[254] *See* Friedman, Harmon, & Heydari, *supra* note 224, at 1567–82.
[255] *See, e.g.*, Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020).

George Floyd in 2020.[256] During this period, criminal justice reform and especially opposition to police violence against Black Americans became one of the central focuses of political attention among progressives.[257]

One of the strongest arguments for abolition was the failure of previous attempts at police reform.[258] After the violent protests in the summer of 1967, President Johnson created the Kerner Commission to investigate the causes of the "civil disorders."[259] The Commission concluded its report with a quote from the psychologist Kenneth Clark describing his review of earlier reports addressing racial tensions in the United States:

> I read that report . . . of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of '35, the report of the investigating committee on the Harlem riot of '43, the report of the McCone Commission on the Watts riot. I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland—with the same moving picture re-shown over and over again, the same analysis, the same recommendations, and the same inaction.[260]

Observers of the mass protests in the summer of 2020 could make similar observations regarding the persistence of police violence, especially against African American and Indigenous men. A century of attempts at police reform had apparently failed to prevent racially unequal police violence. It is understandable that moderate calls for procedurally minded reforms, such as the promotion of legitimacy-based policing in President Obama's 21st Century Task Force on Policing, were often viewed as inadequate.[261] If every past reform has failed to protect Black lives, is it unreasonable to demand something other than reform?

In support of the abolitionist argument that reconstructing DOJ OCR would be futile, it might also be noted that the enforcement of anti-discrimination law by public agencies has long been criticized as ineffective and even as worse than the "private attorney general" model based on private civil rights lawsuits.[262]

The validity of the abolitionist critique would depend in part on why, precisely, the abolitionist believes the reconstructed DOJ OCR would inevitably fail in its mission of preventing and addressing police violations of federal rights. Similarly, the claim that a futile DOJ OCR would delay the abolition of policing is a contestable empirical prediction. A skeptic of the claim might note that attempted reforms, even ineffective ones, could facilitate the acceptance of more radical changes, or even be a practically necessary step on the way to them, rather than interfering with their arrival.

The skeptic of police abolition might also note that other wealthy liberal democracies have far lower rates of lethal police violence than the United States.[263] More generally, many of these countries have far more respectful and professional and far less militaristic policing

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[256] *See, e.g.*, Juliana Menasce Horowitz, Kiana Cox, & Kiley Hurst, *Views of Race, Policing and Black Lives Matter in the 5 Years Since George Floyd's Killing*, PEW RES., May 7, 2025.

[257] *See id*.

[258] *See* Sekhon, *supra* note 35, at 1712.

[259] KERNER COMMISSION REPORT, *supra* note 48.

[260] *Id.*

[261] *See* Kaba, *supra* note 255.

[262] *See* Johnson, *supra* note 86, at 1357–62 (noting that "the structural and practical weaknesses of agencies tasked with enforcing civil rights has limited their public enforcement capacity").

[263] *See, e.g.*, COUNCIL FOREIGN RELS., HOW POLICE COMPARE IN DIFFERENT DEMOCRACIES (2022).

practices.[264] The presence of vastly higher numbers of handguns per capita in the United States than in these countries makes comparisons difficult.[265] But at the very least, as the introduction noted, it seems premature to say that "nothing works" to address police violence short of abolition when many other countries have far lower rates of police violence as well as higher numbers of police per capita, and when the reforms that have been attempted in the United States thus far have generally been so weak.

Only politically viable reforms have been attempted, and only weak reforms have been politically viable.[266] It may be the case that "police reform" is doomed to futility because no sufficiently bold or aggressive police reforms will ever receive sufficient political support to be implemented. But if this is true, then police abolition would seem to be *a fortiori* doomed to failure. Presumably a public and a democratic process that cannot even enact bold police reforms will be even less likely to enact police abolition.

Police abolitionists call for the United States to leap from having an exceptionally regressive and brutal approach to policing to experimenting with an equally exceptional and untested abolition of policing—something that not even the European states with the most humane approaches to public safety and criminal justice have attempted. This article suggests that the focus of opponents of police violence in the near-term should be politically viable reconstructive policies that will plausibly bring the United States closer to the more nonviolent, respectful, and professional police practices that are already often the norm in many European countries today. The Fair Policing Act would be a step toward that goal.

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[264] *See id.*

[265] *See* Paul J. Hirschfield, *Exceptionally Lethal: American Police Killings in a Comparative Perspective*, 6 ANN. REV. CRIMINOLOGY 471, 471 (2023).

[266] *Cf.* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 815 (2012) (noting that "substantial obstacles exist to federal administrative regulation of the police," including "special interest groups, such as police unions," and the fact that "[e]ven limited federal intervention into policing . . . has been politically controversial").