

2017

State Labor Law and Federal Police Reform

Stephen Rushin

Loyola University Chicago School of Law, srushin1@luc.edu

Allison Garnett

Follow this and additional works at: <https://lawcommons.luc.edu/facpubs>

 Part of the [Civil Rights and Discrimination Commons](#), [Labor and Employment Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Stephen Rushin; Allison Garnett, State Labor Law and Federal Police Reform, 51 GA. L. REV. 1209 (2017).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

STATE LABOR LAW AND FEDERAL POLICE REFORM

*Stephen Rushin** and *Allison Garnett***

TABLE OF CONTENTS

I.	INTRODUCTION	1210
II.	FEDERAL CAUSE OF ACTION UNDER 42 U.S.C. § 14141	1212
III.	STATE LABOR LAWS AND INTERNAL DISCIPLINARY PROCEDURES	1217
IV.	HOW STATE LABOR LAW COMPLICATES FEDERAL INTERVENTION.....	1220
	A. INVESTIGATION OF PATTERNS OR PRACTICES OF MISCONDUCT	1221
	B. IMPLEMENTATION OF SETTLEMENTS AND CONSENT DECREES.....	1222
	C. THE NEED FOR ORGANIZATIONAL BUY-IN.....	1224
V.	CONCLUSION.....	1226

* Stephen Rushin is an Assistant Professor of Law at Loyola University Chicago. Professor Rushin holds a Ph.D. in Jurisprudence and Social Policy and a J.D. from the University of California, Berkeley School of Law.

** Allison Garnett holds a J.D. from the University of Alabama School of Law.

I. INTRODUCTION

In April of 1997, the U.S. Department of Justice (DOJ) reached a settlement agreement with the Pittsburgh Bureau of Police (PBP) to correct a pattern of unconstitutional misconduct.¹ It was the first time the DOJ had used 42 U.S.C. § 14141 to intervene into a local police department to correct systemic misconduct.² The statute, passed in response to the Rodney King beating, provides the U.S. Attorney General with the power to seek equitable relief against troubled local police departments.³

As the reform process began to unfold in Pittsburgh, “problems soon emerged.”⁴ The consent decree required Pittsburgh to improve its process for investigating and responding to civilian complaints.⁵ But at times, the PBP found it difficult to comply with this requirement, in part because the city had agreed to a collective bargaining agreement with the police union that limited which complaints were eligible for investigation.⁶ While the consent decree established ambitious goals for improvement, it also included a clause that read: “Nothing in this Decree is intended to alter the collective bargaining agreement between the City and the Fraternal Order of Police.”⁷ This meant that, in attempting to reform the Pittsburgh Police Department via § 14141, the DOJ was effectively limited in its reach because of the terms of the collective bargaining agreement. As Jonathan M. Smith, the former Chief of the Special Litigation Section of the DOJ’s Civil Rights Division has observed, the Pittsburgh

¹ Consent Decree, *United States v. City of Pittsburgh*, PN-PA-003-002 (W.D. Penn. Apr. 16, 1997) [hereinafter Pittsburgh Consent Decree].

² Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, app. B (2014) (showing that Pittsburgh was the first department to reach an agreement with the DOJ).

³ See *infra* Part II.

⁴ Adeshina Emmanuel, *How Union Contracts Shield Police Departments From DOJ Reforms*, IN *THESE TIMES* (June 21, 2016), <http://inthesetimes.com/features/police-killings-union-contracts.html>.

⁵ *Id.*

⁶ *Id.* (describing how the union contract at that point limited investigations of complaints about conduct that happened over ninety days before the filing of the complaint).

⁷ Pittsburgh Consent Decree, *supra* note 1, at 4.

experience is hardly unique.⁸ In the over twenty years since the DOJ has had the power under § 14141 to seek equitable relief against police departments, it has often had to take on “less sufficient reform strategies” because of the barrier of police union contracts.⁹

This Essay explores this phenomenon in more depth. It shows how state labor law can complicate the implementation of police reform efforts by the DOJ via 42 U.S.C. § 14141. Over the last twenty years, the DOJ has used § 14141 to investigate over sixty police departments and to reform over thirty.¹⁰ This reform process often attempts to overhaul internal department policies related to the investigation and oversight of police officers. Internal disciplinary policies, though, are frequently the product of collective bargaining.

Most states permit or require localities to bargain collectively with police unions about the terms of internal disciplinary procedures.¹¹ Previous research has shown that a significant number of police union contracts include potentially problematic disciplinary procedures that shield officers from accountability and oversight.¹² This means that the very policies that federal intervention via § 14141 is designed to reform—internal departmental disciplinary policies—are commonly the product of state labor law. As this Essay shows, this creates a challenging situation for the DOJ as it attempts to implement top-down reforms in a local police department. On one hand, undoing the terms of a collective bargaining agreement can reduce organizational acceptance of federal intervention. On the other hand, failure to alter these policies can hamper reform efforts.

Ultimately, the goal of this Essay is narrow. It seeks to diagnose, rather than remedy, this tension in the federal oversight of local police departments.

⁸ Emmanuel, *supra* note 4 (pointing to a similar problem in other DOJ settlements with police departments in Newark, Albuquerque, Seattle, Portland, U.S. Virgin Islands, and Los Angeles).

⁹ *Id.*

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.

¹² See *infra* Part III.

II. FEDERAL CAUSE OF ACTION UNDER 42 U.S.C. § 14141

Traditionally, the federal government has played a minimal role in regulating local police misconduct.¹³ Around the mid-twentieth century, the federal government began to take a more serious interest in overseeing local police departments.¹⁴ Federal courts enacted the exclusionary rule, which prevents the state from using certain evidence obtained by police officers in violation of the Constitution.¹⁵ And courts opened up avenues for private litigants to more easily file civil suits against police officers and their employers.¹⁶ But despite these gradual steps, until the late twentieth century the federal government remained a mere “backstop” in the fight against local police misconduct.¹⁷

That changed in the early 1990s after the Rodney King incident motivated Congress to reevaluate its approach to police oversight.¹⁸ In 1994, Congress eventually passed 42 U.S.C. § 14141 as part of the omnibus crime bill known as the Violent Crime Control and Law Enforcement Act.¹⁹ This measure gave the U.S. Attorney General the authority to seek equitable relief against local and state police departments engaged in a “pattern or

¹³ STEPHEN RUSHIN, *FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS* 9–13 (2017) (describing this as the “Hands-off Era” of federal police regulation; explaining how, during this hands-off era, the federal government viewed police misconduct as a largely local issue).

¹⁴ *Id.* at 13–19 (describing this era as the “Intervention Era” and explaining how the federal government began to slowly increase its oversight of local policing in the mid-twentieth century).

¹⁵ See generally *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the exclusionary rule to states and localities, and not just misbehavior by federal law enforcement).

¹⁶ *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (establishing that a private litigant could sue a police officer for misconduct under certain situations); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694–701 (1978) (holding that a claimant under § 1983 could recover from a police department based on the actions of an officer if the department was deliberately indifferent in failing to train or supervise the officer).

¹⁷ *Police Brutality: Hearing Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 102d Cong. 3 (1991) (statement of John R. Dunne, Assistant Att’y Gen., Civil Rights Div.).

¹⁸ DARRELL L. ROSS, *CIVIL LIABILITY IN CRIMINAL JUSTICE* 183–85 (6th ed. 2013) (identifying the Rodney King incident as a turning point in the eventual passage of § 14141).

¹⁹ 42 U.S.C. § 14141 (2012) (“It shall be unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution . . .”).

practice” of unconstitutional misconduct.²⁰ For the first time, this measure “pushed the federal government onto the front lines.”²¹

Section 14141 represented, in part, a congressional recognition that private litigants and the DOJ both previously lacked standing in most cases to seek equitable relief against police departments engaged in unconstitutional misconduct.²² While enforcement of the statute has varied by political administration,²³ the DOJ has since used the measure to investigate over sixty agencies and intervene into over thirty.²⁴ In fact, the DOJ has targeted some of the largest cities in the country with this mechanism, including Baltimore, Chicago, Cleveland, Cincinnati, Los Angeles, Newark, New Orleans, New York, Pittsburgh, Seattle, and Washington, D.C.²⁵ It is safe to say that § 14141 has become one of the “most important legal initiatives of the last twenty years in the sphere of police regulation.”²⁶

The best available evidence suggests that § 14141 reforms are effective at combatting patterns of misconduct. Independent studies in numerous cities have found that the DOJ has effectively used the statute to reduce officer uses of force, reduce civil liability for police misconduct, increase citizen satisfaction, and increase apparent compliance with legal norms.²⁷

²⁰ *Id.*

²¹ RUSHIN, *supra* note 13, at 16.

²² *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 110 (1983) (holding that a private litigant who had been victim of a dangerous chokehold did not have standing to enjoin the Los Angeles Police Department from using such a tactic since he could not prove that he would be harmed by the chokehold again in the future); *United States v. City of Philadelphia*, 644 F.2d 187, 189–90 (3d Cir. 1980) (concluding that, absent congressional authorization, the DOJ also lacked the necessary standing to seek equitable relief against a local police department).

²³ *See, e.g.*, Rushin, *supra* note 2, at 3228–34 (showing how enforcement dipped during the second half of the George W. Bush administration, before ticking back up during the Barack Obama administration; attributing this change in enforcement to shifts in internal policies).

²⁴ For a fairly updated list of all police departments subject to DOJ investigation and intervention under § 14141, see Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, app. at 777–79 (2017) (showing in a complete list of all such agencies from 1994 to 2016).

²⁵ *Id.*; *see also* RUSHIN, *supra* note 13, at app. 286–91 (showing a complete list of § 14141 cases).

²⁶ William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 798 (2006).

²⁷ Joshua M. Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of “Pattern or Practice” Police Misconduct Reform* (July 6, 2011) (unpublished Ph.D. dissertation, American University), <https://www.ncjrs.gov/pdffiles1/nij/grants/237957>.

Despite this success, DOJ action under § 14141 has not always proceeded smoothly. Critics have raised concerns about the cost of § 14141 reform,²⁸ the time table for reform efforts,²⁹ the potentially anti-democratic nature of federal intervention,³⁰ the possibility of de-policing,³¹ the need for organizational buy-in,³² and questions

pdf (showing how reform efforts in Washington, D.C., Pittsburgh, Prince George's County Maryland, and Cincinnati all appeared to lead to improvements); CHRISTOPHER STONE, TODD FOGLESONG & CHRISTINE M. COLE, *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD* (2009), <http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf> (walking through various empirical measures like pedestrian stops, traffic stops, use of force, survey data, and participant observation in concluding that the LAPD has made substantial progress during its DOJ oversight period); ROBERT C. DAVIS, NICOLE J. HENDERSON & CHRISTOPHER W. ORTIZ, *CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE* (2005), <http://www.calea.org/content/calea-2010-annual-report> (relying on surveys, focus groups, interviews, monitor reports, and other statistics in finding that Pittsburgh made measurable progress during federal oversight); Joshua Chanin, *Evaluating Section 14141: An Empirical Review of Pattern or Practice Police Misconduct Reform*, 14 OHIO ST. J. CRIM. L. 67 (2016) (drawing on use of force data, citizen complaint data, and civil suit data to suggest that § 14141 reforms appear to have a meaningful effect); Stephen Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, 14 OHIO ST. J. CRIM. L. 113, 136 (2016) (showing how the LAPD made significant progress under federal oversight, while the DOJ failed to bring about reform in Alamance County, North Carolina).

²⁸ Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1408–10 (2015) (describing how the high cost of police reforms via § 14141 may prove highly problematic for poorer municipalities); Richard Rainey, *Mitch Landrieu Requests a Doubling of Tax Rates for New Orleans Police and Fire*, *TIMES-PICAYUNE* (May 1, 2014), http://www.nola.com/politics/index.ssf/2014/05/mitch_landrieus_tax_hike_plan.html (describing how New Orleans had to consider a significant tax hike in order to afford the cost of structural reform litigation in its police department).

²⁹ Rushin, *supra* note 28, at 1392 (showing in Figure 5 that this reform process can take anywhere from five to around twelve years to complete).

³⁰ For example, now Attorney General Jeff Sessions previously authored a position paper in which he described consent decrees as undemocratic: “One of the most dangerous, and rarely discussed, exercises of raw power is the issuance of expansive court decrees. Consent decrees have a profound effect on our legal system as they constitute an end run around the democratic process.” Michael E. DeBow, Gary J. Palmer & John J. Park, Jr., *Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures*, ALABAMA POLICY INSTITUTE 1 (2008), <http://www.alabamapolicy.org/wp-content/uploads/API-Research-Consent-Decrees.pdf> (forward by Jeff Sessions).

³¹ Rushin & Edwards, *supra* note 24 at 764–67 (using a difference-in-difference estimation strategy to show that the introduction of federal oversight is correlated with an apparent uptick in crime rates relative to unaffected municipalities); *see also* Rushin, *supra* note 28, at 1412–14 (describing this critique of structural reform litigation).

³² Rushin, *supra* note 28, at 1416–18 (citing the Alamance County, North Carolina example as a location where the DOJ was unable to stimulate change in a police department, in part because of a lack of local support for the reform measures).

about sustainability.³³ Others have also worried that the current § 14141 process does not adequately consider community viewpoints in crafting policy reforms.³⁴

Only recently, though, have scholars begun to recognize the complex relationship between state labor laws and § 14141 reform efforts.³⁵ The existing literature has found that police unions object to federal reform efforts under § 14141 for several reasons. For one thing, officer unions sometimes view new disciplinary procedures as unnecessarily onerous and time-consuming for officers.³⁶ Additionally, officer unions have argued that the § 14141 reform process fails to adequately consider their feedback. While the DOJ will often listen to police union demands in constructing the terms of consent decrees under § 14141, the DOJ almost always negotiates these agreements behind closed doors with municipal leaders.³⁷

Union resistance to DOJ reform efforts is not particularly surprising. Researchers have previously documented a number of different situations where police unions have opposed internal reform efforts, including internal policy changes, the installation of civilian review boards, and changes to internal disciplinary

³³ *Id.* at 1410–11 (citing Pittsburgh as an example of a location where federal intervention helped bring about reforms, only to see some patterns of misconduct reemerge after the federal government ended oversight); Jeffrey Benzing, *Pittsburgh Police Could Face Second Federal Consent Decree, Peduto Says*, PUBLICSOURCE (July 1, 2014), <http://publicsource.org/from-the-source/pittsburgh-police-could-face-second-federal-consent-decree-peduto-says> (describing how Pittsburgh saw misconduct return after federal intervention ended, which could inspire another federal consent decree).

³⁴ Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793 (2016) (encouraging the DOJ to incorporate the views of more stakeholders in police consent decrees); Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373 (2010) (similarly arguing for more community input in police reforms).

³⁵ Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799 (2012) (arguing that labor and employment protections could act as a “tax” on police reform efforts); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2205–17 (2014) (mentioning the effect of labor laws and collective bargaining on policing).

³⁶ Chanin, *supra* note 27, at 185 (describing how the union in Washington, D.C. objected to the paperwork required by the federal consent decree).

³⁷ Rushin, *supra* note 28, at 1376 (describing how the DOJ prefers to negotiate directly with municipal leaders without involving police union groups); *United States v. City of Los Angeles*, 2:00-cv-11769-GAF-RC (C.D. Cal. Jan. 5, 2001) (order denying the Los Angeles Protective League’s motion to intervene).

procedures.³⁸ This sort of resistance “is understandable” since policies implemented as part of the § 14141 reform process “may affect the day-to-day work of frontline officers,” and an “organized labor unit designed to enhance working conditions for its members should rationally want to block such changes—or at minimum be a party to any negotiations.”³⁹

What is missing from the existing literature, though, is a richer account of how state labor law interacts with the federal police reform process under § 14141. Emerging evidence suggests that police unions, the collective bargaining process, and state labor law generally, may have a more significant effect on the § 14141 reform process than scholars have previously observed. As discussed in the next Part, new research shows that police unions have been able to use the collective bargaining process and the legislative process to obtain unreasonably proactive internal disciplinary procedures in many large American police departments. These problematic internal disciplinary procedures can facilitate systemic misconduct within a police department. This means that state labor laws may contribute to the very problem the DOJ seeks to remedy via § 14141.

Thus, when the DOJ seeks to eradicate a pattern or practice of misconduct within a police department, state labor law may pose an obstacle. The DOJ has been reluctant, thus far, to use the § 14141 process to upend these labor protections afforded by state law—possibly because of a concern that such an action could reduce organizational buy-in. Ultimately, it appears that state labor laws are more intimately linked to the success (or failure) of § 14141 interventions than scholars have previously recognized.

The next Part discusses the existing and emerging literature on the relationship between state labor laws, internal disciplinary procedures, and patterns of misconduct in American police departments.

³⁸ COLLEEN KADLECK & LAWRENCE F. TRAVIS, III, NAT'L INST. OF JUSTICE, POLICE DEPARTMENT AND POLICE OFFICER ASSOCIATION LEADERS' PERCEPTIONS OF COMMUNITY POLICING: DESCRIBING THE NATURE AND EXTENT OF AGREEMENT 3–4 (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/226315.pdf> (describing several examples of union resistance to reform efforts).

³⁹ Rushin, *supra* note 28, at 1376.

III. STATE LABOR LAWS AND INTERNAL DISCIPLINARY PROCEDURES

Until recently, legal scholars have spent little time investigating the ways that collective bargaining shapes the content of internal disciplinary procedures in American police departments. Most scholarship on police reform has focused primarily on how external legal mechanisms—like the exclusionary rule and civil litigation—can create an incentive structure that will lead rational police supervisors to implement reforms.

Recently, though, a number of scholars have problematized this traditional narrative. Even with the presence of external reform pressures, municipal leaders sometime have ulterior motives for acquiescing to police union demands for lax disciplinary procedures. Police unions are powerful political constituencies, capable of swinging local elections with their endorsement (or lack thereof).⁴⁰ Collective bargaining sessions typically happen behind closed doors and with minimal community input.⁴¹ Given the political pressures and the lack of transparency, there have been documented cases of municipal leaders offering significant concessions in disciplinary procedures when communities are unable to meet union demands for increased compensation.⁴²

Recent research has begun to shed light on how frequently collective bargaining agreements result in the establishment of problematic internal disciplinary procedures.⁴³ At least one study

⁴⁰ Jonathan M. Smith, *Police Unions Must Not Block Reform*, N.Y. TIMES (May 29, 2015), <http://www.nytimes.com/2015/05/30/opinion/police-unions-must-not-block-reform.html> (describing the “political clout” of police unions in local elections).

⁴¹ See PRIYA M. ABRAHAM, OPENING THE CURTAIN ON GOVERNMENT UNIONS 5–8 (2015), http://www.commonwealthfoundation.org/docLib/20150609_CBTransparency.pdf (showing that most states provide limited transparency into collective bargaining negotiations).

⁴² John Chase & David Heinzmann, *Cops Traded Away Pay for Protection in Police Contracts*, CHI. TRIB. (May 20, 2016, 8:36 AM), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-contracts-fop-20160520-story.html> (providing details on how the City of Chicago gave the police union lax disciplinary standards when they were unable to provide higher salaries or more benefits).

⁴³ For example, L. Song Richardson and Catherine Fisk have hypothesized on the complex relationship between police union contracts and internal disciplinary procedures. Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017). Outside of the legal academy, a group of activists associated with Campaign Zero have done important work compiling and analyzing union contracts from eighty-one large American cities, demonstrating that many of the contracts contain potentially problematic clauses that impair accountability. Based on their work, the group has made several

has found that around eighty-eight percent of union contracts in municipal police departments serving communities with at least 100,000 residents contained at least some questionable provisions that could shield officers from accountability.⁴⁴ Many contracts delay interviews after suspected misconduct,⁴⁵ provide officers with evidence before interviews,⁴⁶ mandate the destruction of disciplinary records,⁴⁷ ban civilian oversight,⁴⁸ prevent anonymous

recommendations for improving union contracts. DeRay McKesson, Samuel Sinyangwe, Johnetta Elzie & Brittany Packnett, *Police Union Contracts and Police Bill of Rights Analysis*, CAMPAIGN ZERO (June 29, 2016), <https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5773f695f7e0abbdfe28a1f0/1467217560243/Campaign+Zero+Police+Uni+Contract+Report.pdf>.

⁴⁴ Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1224 (2017) (coding and analyzing the content of 178 police union contracts, describing the law surrounding collective bargaining in American police departments, and ultimately making normative recommendations on how to improve the collective bargaining process so as to avoid regulatory capture).

⁴⁵ For example, the City of Minneapolis mandates a two-day waiting period before investigators can interview officers about alleged misconduct. CITY OF MINNEAPOLIS, LABOR AGREEMENT BETWEEN THE CITY OF MINNEAPOLIS AND THE POLICE OFFICERS' FEDERATION OF MINNEAPOLIS 4 (2012) (on file with author). For other examples, see, e.g., CITY OF ALBUQUERQUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN CITY OF ALBUQUERQUE AND ALBUQUERQUE POLICE OFFICERS ASSOCIATION 32 (2014) (on file with author) (permitting officers to have two hours to consult with a lawyer before making statements); MUNICIPALITY OF ANCHORAGE, COLLECTIVE BARGAINING AGREEMENT BETWEEN ANCHORAGE POLICE DEPARTMENT EMPLOYEES ASSOCIATION AND MUNICIPALITY OF ANCHORAGE 8 (2015) (on file with author) (guaranteeing officers at least twenty-four hours of notice before any noncriminal misconduct interview).

⁴⁶ Rushin, *supra* note 44, at 1227 (stating that "A . . . significant . . . number of municipalities . . . mandate that supervisors provide frontline officers with copies of all evidence of wrongdoing against them hours or even days in advance of interrogations.").

⁴⁷ See, e.g., CITY OF BALTIMORE, MEMORANDUM OF UNDERSTANDING BETWEEN THE BALTIMORE CITY POLICE DEPARTMENT AND THE BALTIMORE CITY LODGE NO. 3, FRATERNAL ORDER OF POLICE, INC. UNIT I, at 24 (2015) (on file with author) (agreeing to remove allegations of misconduct from employees' files after three years, if the complaint was found to be unsustainable or unfounded, or if the employee was otherwise found not guilty); CITY OF CINCINNATI, LABOR AGREEMENT BY AND BETWEEN QUEEN CITY LODGE NO. 69 FRATERNAL ORDER OF POLICE AND THE CITY OF CINCINNATI 41–42 (2014) (on file with author) (permitting retention of disciplinary records that resulted in fewer than thirty days of punishment for no more than three years, while allowing their retention for up to five years if the act resulted in thirty days or more of punishment); CITY OF JACKSONVILLE, AGREEMENT BETWEEN THE CITY OF JACKSONVILLE AND THE FRATERNAL ORDER OF POLICE, POLICE OFFICERS THROUGH SERGEANTS 41 (2011) (on file with author) (establishing five-year time frame for deleting records, depending on the severity of the punishment).

⁴⁸ See, e.g., CITY OF ST. LOUIS, AGREEMENT BETWEEN THE CITY OF ST. LOUIS AND THE ST. LOUIS POLICE OFFICER'S ASSOCIATION/FRATERNAL ORDER OF POLICE LODGE 68, at 19–20 (2014) (on file with author) (establishing a commission devoid of citizen participation that makes all final determinations for disciplinary action); CITY OF BALTIMORE, *supra* note 47,

civilian complaints,⁴⁹ indemnify officers in the event of civil suits,⁵⁰ and limit the length of internal investigations.⁵¹ This is not to say that these terms are always irrational. It is understandable that police officers want reasonable procedural protection when faced with internal investigations that threaten their professional livelihood. Nevertheless, the frequency and scope of these potentially problematic limitations on internal disciplinary action suggests that some supervisors may find it unreasonably difficult to investigate, oversee, or punish an officer engaged in misconduct.

To be clear, no scholarship has definitively found that collective bargaining *causes* the development of overly protective internal disciplinary procedures. It could be that even without collective bargaining, politically powerful police groups would use the political process to obtain similarly generous internal disciplinary procedures. In fact, emerging research shows that police unions have been able to obtain unreasonably protective procedures via the normal legislative process, too. In at least sixteen states, police officer groups have successfully secured the passage of so-called Law Enforcement Officers' Bills of Rights, which codify protective internal disciplinary procedures for frontline officers. Nevertheless, most police officers are part of police unions.⁵² And courts and state labor boards frequently interpret collective bargaining statutes to require the bargaining of internal

at 20, 22 ("Any employee suspended from duty with pay shall be given a suspension hearing as soon as reasonable following the suspension from duty, wherein a determination will be made at that time whether or not the employee shall remain suspended with or without pay and/or be placed on administrative duties. . . . No civilians other than an Administrative Law Judge may serve on a Departmental Hearing Board.").

⁴⁹ Rushin, *supra* note 44, at 1235 ("Thirty-two contracts [in one study of 178 contracts] limit management's authority to investigate anonymous civilian complaints.").

⁵⁰ See, e.g., CITY OF ANN ARBOR, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF ANN ARBOR AND ANN ARBOR POLICE OFFICERS' ASSOCIATION FOR POLICE SERVICE SPECIALISTS 51 (2013) (on file with author) ("[T]he Employer will indemnify and defend employees in connection with liability claims arising out of the performance of the employee's police duties.").

⁵¹ See, e.g., CITY OF ALBUQUERQUE, *supra* note 45, at 33 (limiting internal investigations to only ninety days in length); CITY OF CLEVELAND, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF CLEVELAND AND CLEVELAND POLICE PATROLMEN'S ASSOCIATION NON-CIVILIAN PERSONNEL 10–11 (2013) (on file with the author) (similarly providing a six month limitation).

⁵² BRIAN A. REAVES, U.S. DEPT OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 13 (2011), <http://bjs.gov/content/pub/pdf/lpd07.pdf> (showing that around two-thirds of officers are employed by departments that engage in collective bargaining).

disciplinary procedures.⁵³ Thus, in practice, internal disciplinary procedures generally flow from the collective bargaining process.

This has a couple of important consequences. First, it is not always easy for local political leaders to change internal disciplinary procedures in a police department. Given that collective bargaining statutes normally permit or require the negotiation of disciplinary procedures, this means that even a dedicated political leader who wanted to bring about reform must wait until it is time to negotiate a new police union contract. Second, it may be costly for political leaders to tackle questionable language in a police union contract. By taking such a position during bargaining sessions, political leaders are likely to face demands by police officer unions for additional compensation or benefits to offset the changes.

All of this suggests that bringing about constitutional reform in police departments may require not just changes in leadership and enhanced training,⁵⁴ but also a renegotiation of internal disciplinary procedures via the collective bargaining process. Labor law may also complicate § 14141 reforms in other ways that scholars have not yet fully considered. As the next Part explains, this realization has important implications for federal reforms via § 14141.

IV. HOW STATE LABOR LAW COMPLICATES FEDERAL INTERVENTION

Section 14141 has emerged as a powerful weapon in the federal government's arsenal for combatting misconduct in American police departments. Even so, it appears that internal disciplinary procedures, often established through collective bargaining agreements, contribute to the inability of some police departments to control misconduct within their own ranks. This creates a

⁵³ See, e.g., *Union Twp. Bd. of Trs. v. Fraternal Order of Police, Ohio Valley Lodge No. 112*, 766 N.E.2d 1027, 1031–32 (Ohio Ct. App. 2001) (concluding that discipline was a mandatory subject of bargaining); *City of Casselberry v. Orange Cty. Police Benevolent Ass'n*, 482 So. 2d 336, 340 (Fla. 1986) (holding that municipalities are still required to bargain collectively on some internal disciplinary procedures); *City of Reno v. Reno Police Protective Ass'n*, 653 P.2d 156, 158 (Nev. 1982) (holding that Nevada law requires municipalities to negotiate with police departments over disciplinary measures).

⁵⁴ Both of these are reforms common during § 14141 cases. See Rushin, *supra* note 28, at 1384, 1400.

fundamental tension. On one hand, attempts by the DOJ to undo the terms of a collective bargaining agreement would upset frontline officers, thereby reducing organizational acceptance of federal intervention. On the other hand, failure to alter these policies can hamper reform efforts. The first two subparts below describe how the terms of internal disciplinary procedures can frustrate § 14141 reform efforts. The third subpart considers the drawback of using § 14141 reform as a mechanism for overhauling internal disciplinary procedures established via the collective bargaining process.

A. INVESTIGATION OF PATTERNS OR PRACTICES OF MISCONDUCT

One way that labor law can complicate federal intervention is by hampering DOJ investigations. Remember, collective bargaining agreements frequently limit the ability of police supervisors to keep records on officer behavior.⁵⁵ In fact, one recent empirical evaluation found that nearly half of police union contracts mandate the destruction of disciplinary records over time.⁵⁶ This means that, even if an individual officer is engaged in systemic misconduct over many years, it may be difficult for supervisors to uncover such a pattern.

Such a limitation on departmental recordkeeping can prove particularly problematic when the DOJ attempts to investigate a police department suspected of violating § 14141. The federal government only has authority to seek equitable relief against a police department under the statute if it can show the agency is engaged in a “pattern or practice” of unlawful misconduct. Single acts of misconduct, no matter how egregious, are insufficient to demonstrate such a pattern. Instead, the DOJ must generally show a history of misconduct within the agency that rises to the level of a “pattern or practice.”

⁵⁵ See *supra* note 47 and accompanying text (describing how police union contracts often require the destruction of personnel records after a set period of time).

⁵⁶ Rushin, *supra* note 44, at 1230–31 (“In total, eighty-seven of the cities studied have language in their collective bargaining agreements that requires the removal of personnel records at some point in the future.”).

Once the DOJ has selected a police department for federal intervention under § 14141,⁵⁷ it begins a formal investigation. In doing so, the DOJ “takes an ‘inventory of departmental policies and procedures related to training, discipline, routine police activities, and uses of force, and conducts in-depth interviews to determine whether the department’s practices adhere to formal policies.’”⁵⁸ The DOJ also “look[s] into and review[s] investigations, both citizen complaints and use of force investigations.”⁵⁹ This sort of an investigation of departmental records works most effectively when the department maintains adequate records on officer behavior, disciplinary investigations, and use of force incidents.

Ironically, departments that fail to properly document disciplinary histories may both be the agencies most likely to be engaged in a “pattern or practice” of misconduct, and the agencies where the DOJ may face the biggest methodological challenges in persuasively demonstrating a statistical pattern of misconduct.

B. IMPLEMENTATION OF SETTLEMENTS AND CONSENT DECREES

Another way that labor law can complicate federal intervention efforts is by slowing down reform efforts. In Albuquerque, Los Angeles, Newark, Pittsburgh, Portland, Seattle, and the U.S. Virgin Islands, collective bargaining provisions “appear to have weakened or stalled efforts to improve the handling of police misconduct, to create or extend civilian oversight, or to establish early-warning systems for problem cops.”⁶⁰

The case of Portland, Oregon is particularly instructive. The collective bargaining agreement in Portland provides officers with up to a forty-eight-hour waiting period before they can be questioned about potential misconduct.⁶¹ It also requires advance

⁵⁷ For a complete account of how the DOJ targets an agency for preliminary inquiry and formal investigation under § 14141, see Rushin, *supra* note 2, at 3219–26.

⁵⁸ Rushin, *supra* note 28, at 1371 (quoting INT’L ASS’N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 8 (2006), <http://www.cops.usdoj.gov/files/ric/Publications/e06064100.pdf>).

⁵⁹ Rushin, *supra* note 2, at 3227 (quoting an interview participant describing this formal investigation process).

⁶⁰ Emmanuel, *supra* note 4.

⁶¹ CITY OF PORTLAND, LABOR AGREEMENT BETWEEN THE PORTLAND POLICE ASSOCIATION AND THE CITY OF PORTLAND 36 (2013) (on file with author).

notice of the location, date, and time of the alleged incident, as well as the complainant's name and the nature of the allegation.⁶² In its 2012 findings letter, the DOJ found the Portland police officers to be engaged in a pattern of excessive or unnecessary use of force, particularly against people "with actual or perceived mental illness."⁶³ Eventually the DOJ and Portland agreed to a consent decree that established new regulations for the oversight of officer use of force.⁶⁴ While the consent decree included language requiring the City of Portland to ensure that all uses of force were "properly investigated, reviewed, evaluated, and, if necessary, remedied,"⁶⁵ and it required the city to train officers in de-escalation,⁶⁶ it did not address the waiting period provided by the collective bargaining agreement.

This failure proved problematic in the eyes of the external monitors assigned to oversee the Portland Police Bureau. In their Fourth Quarterly Report, filed in January of 2016, the monitors argued that "by agreeing to a contract that requires" a delay before interrogating officers suspected of misconduct, "the City requires the Bureau to forfeit the opportunity to obtain pure contemporaneous statements from the involved officers about what each did and why they did it."⁶⁷ This is not to say that the DOJ and the City of Portland have been unable to implement substantial and necessary reforms. The collective bargaining agreement only establishes a handful of relatively narrow limitations on the DOJ's abilities to reform the Portland Police Bureau.

But the limitations on reform that the collective bargaining agreement does establish are important. The events in Chicago

⁶² *Id.*

⁶³ Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice & Amanda Marshall, U.S. Att'y for the Dist. of Or., U.S. Dep't of Justice, to Sam Adams, Mayor, City of Portland 10 (Sept. 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/09/17/ppb_findings_9-12-12.pdf.

⁶⁴ Consent Decree at 16-28, *United States v. City of Portland*, No. 3:12-cv-02265-SI (D. Or. Dec. 17, 2012).

⁶⁵ *Id.* at 16.

⁶⁶ *Id.* at 17 ("Officers shall use disengagement and de-escalation techniques when, possible. . .").

⁶⁷ MICHAEL GENNACO, ILANA ROSENZWEIG & JULIE RUHLIN, OIR GROUP, REPORT TO THE CITY OF PORTLAND ON PORTLAND POLICE BUREAU OFFICER-INVOLVED SHOOTINGS AND IN-CUSTODY DEATHS, FOURTH REPORT 115 (Jan. 2016), <https://www.portlandoregon.gov/ipr/article/561174>.

are demonstrative of how these sorts of interrogation waiting periods can limit officer accountability. After Officer Jason Van Dyke fatally shot and killed seventeen-year-old Laquan McDonald in October of 2014, Van Dyke and six other officers filed police reports that falsely claimed that McDonald had charged the officers with a knife.⁶⁸ How was it that so many different officers wrote separate reports providing a nearly identical—and demonstrably false—version of events? Chicago, like Portland, has language in its collective bargaining agreement that provides officers with between two and forty-eight hour waiting periods before being subject to interrogations.⁶⁹ This provides officers with the time to coordinate stories after potential misconduct incidents in a way that deflects blame. As the DOJ argued in their investigative report on the Chicago Police Department, this problem is not merely “theoretical.”⁷⁰ There are documented cases where body-worn cameras have caught officers coordinating stories only moments after a shooting occurred.⁷¹ In Chicago, the DOJ ultimately recommended the removal of these waiting periods after officer involved shootings from future collective bargaining agreements.⁷²

C. THE NEED FOR ORGANIZATIONAL BUY-IN

So what should the federal government do when faced with a collective bargaining agreement that impairs their ability to bring about necessary reform via § 14141? Given the obstacles that

⁶⁸ *Laquan McDonald Police Reports Differ Dramatically From Video*, CHI. TRIB. (Dec. 5, 2015), <http://www.chicagotribune.com/news/ct-laquan-mcdonald-chicago-police-reports-met-20151204-story.html> (explaining how video evidence ultimately proved that these officers had provided false accounts).

⁶⁹ CITY OF CHICAGO, AGREEMENT BETWEEN THE CITY OF CHICAGO DEPARTMENT OF POLICE AND THE FRATERNAL ORDER OF POLICE CHICAGO LODGE NO. 7, at 6 (June 2, 2012) (on file with author) (“The interview shall be postponed for a reasonable time, but in no case more than forty-eight (48) hours from the time the Officer is informed of the request for an interview and the general subject matter thereof and his or her counsel or representative can be present.”).

⁷⁰ UNITED STATES DEP’T OF JUSTICE CIVIL RIGHTS DIV. AND UNITED STATES ATTORNEY’S OFFICE FOR THE N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 57 (Jan. 13, 2017), <https://www.justice.gov/opa/file/925846/download>.

⁷¹ *Id.* at 57–58.

⁷² *Id.* at 58–59 (calling for the renegotiation of these waiting periods and stating that “the CBA-imposed 24-hour rule should be eliminated”).

certain police union contracts may pose for § 14141 reform efforts, some may wonder—why doesn't the DOJ simply challenge the terms of collective bargaining agreements as contributing to a pattern of unconstitutional misconduct? Why is it that, generally, the DOJ has been reluctant to try and immediately reform the police union contract?

The answer to this question is at the heart of the complex relationship between state labor law and federal police reform. In order to be successful, federal officials need frontline officers to buy in to the reform process.⁷³ If frontline officers remain resistant to new oversight and disciplinary measures, the reform process may be long and slow. A recent empirical study suggests that, even as currently enforced, § 14141 may cause some officers to engage in less aggressive policing.⁷⁴

There, researchers found that the introduction of federal intervention appeared to contribute to a periodic, but statistically significant uptick in certain crime rates relative to unaffected municipalities.⁷⁵ The authors of that study concluded that this effect was consistent with claims made by police unions that federal intervention came with growing pains, as officers had to adjust to new external policies.⁷⁶ The study did not find that constitutionally sound policing policies are inconsistent with effective crime fighting; quite the contrary, in fact.⁷⁷ After a few years, there was no evidence to suggest that cities targeted for federal intervention were any less effective at fighting crime than the average American city.⁷⁸ Rather, the authors of the study argue that officers may take time to fully buy-in to the reform process. This is consistent with survey data from a number of cities targeted for § 14141 reforms.⁷⁹

⁷³ Rushin, *supra* note 28, at 1416–18 (describing the need for local support in order for § 14141 reforms to be successful).

⁷⁴ Rushin & Edwards, *supra* note 24, at 735.

⁷⁵ *Id.* at 758.

⁷⁶ *Id.* at 759.

⁷⁷ *Id.* at 772.

⁷⁸ *Id.* at 730.

⁷⁹ See, e.g., ROBERT C. DAVIS, NICOLE J. HENDERSON & CHRISTOPHER W. ORTIZ, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE, VERA INST. OF JUSTICE 21 (2005), <https://www.vera.org/publications/can-federal-intervention-bring-lasting-improvement-in-local-policing-the-pittsburgh-consent-decree> (showing how frontline officers complained that accountability “increased to the point that

All of this suggests that unilaterally forcing major revisions to the collective bargaining agreement—a document designed through collaboration—on an unwilling police union may prove unreasonably disruptive and hamper the overall reform process. In many ways, the approach by the DOJ during the Obama Administration made sense. It did not shy away from calling out potentially problematic language in collective bargaining agreements.⁸⁰ Nevertheless, it did not seek to use the federal courts to overturn these collective bargaining agreements. Instead, it pressured municipalities to renegotiate these problematic terms when the collective bargaining agreements expired. This seems to strike a reasonable balance. It implicitly recognizes that overhauling a police department via § 14141 is a marathon. It can often take over ten years for the DOJ to release a police department from federal oversight.⁸¹ Given the lengthy timetable, the DOJ may be wise to prioritize, at least initially, policy and procedural reforms that do not directly overturn collective bargaining provisions—and focus later in the process on altering the collective bargaining agreement through a more collaborative process. This may ensure organizational buy-in by stakeholders involved in the reform process.⁸²

V. CONCLUSION

With the election of Donald J. Trump as the forty-fifth president of the United States, and the elevation of former Alabama Senator Jeff Sessions to U.S. Attorney General, there is reason to believe that § 14141 cases may be less common in the

officers are almost afraid to say anything in fear of punishment”); CHRISTOPHER STONE, TODD FOGLESONG & CHRISTINE M. COLE, *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD* 19 (2009), <http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf> (describing how seventy percent of officers agreed with the statement that “paper work deters officers from making arrests,” and even more—seventy-nine percent—believed that as a result, external regulation impeded the LAPD’s ability to fight crime).

⁸⁰ See *supra* note 70 and accompanying text (describing DOJ criticism of certain portions of the Chicago collective bargaining agreement).

⁸¹ Rushin, *supra* note 28, at 1392 (showing in Figure 5 that structural reform litigation in American police departments can take between five and twelve years to complete).

⁸² See Patel, *supra* note 34, at 416 (arguing for the inclusion of more stakeholders in the development of DOJ consent decrees); Simmons, *supra* note 34, at 408–09 (similarly advocating for a more collaborative and inclusive process).

coming years.⁸³ Neither Trump nor Sessions has shown a penchant for federal intervention into the affairs of local police departments in the name of civil rights. Thus, it may be that the issues identified in this Essay are, for all practical purposes, moot until the election of a new president.

But absent the repeal of § 14141, it seems likely that future administrations will again rely on this measure as a major tool for improving America's most troubled police agencies. When that day comes again, it is important to recognize the complex relationship between federal police reform and state labor law. Collective bargaining agreements often frame the content of internal disciplinary procedures in American police departments. Emerging evidence suggests that a significant number of these collective bargaining agreements in large American cities include language that unreasonably protects frontline officers from accountability and oversight. Thus, when the DOJ elects to use its authority under § 14141 to reform a police department's internal policies and procedures, it will almost invariably face a few challenges in the local collective bargaining agreement.

This raises a larger normative question: what should the DOJ do in such cases? When enforcing § 14141, how should the DOJ respond to terms in collective bargaining agreements that frustrate reform efforts? Ultimately, the narrow focus of this Essay fails to reach these broader normative concerns. Future research might examine how courts and litigants dealt with similar problems in other institutional contexts, like schools or prisons. In any event, this Essay should be the beginning of a broader discussion about the relationship between state labor law and federal police reform efforts.

⁸³ DeBow, Palmer & Park, *supra* note 30, at 1–2 (describing a statement by then-Senator Jeff Sessions criticizing federal intervention into local police departments).

GEORGIA LAW REVIEW

VOLUME 52
FALL 2017 - SUMMER 2018

To subscribe to the *Georgia Law Review*, please complete the form below. Current subscribers will receive renewal invoices automatically.

Subscription Rates

Domestic: \$34.00

Foreign: \$40.00

Check enclosed Bill me later

Name _____

Address _____

City _____ State _____ Zip _____

send this form to:
GEORGIA LAW REVIEW ASSOCIATION
UNIVERSITY OF GEORGIA
SCHOOL OF LAW
225 HERTY DRIVE
ATHENS, GA 30602-6012
(706) 542-7286
georgialawreview@gmail.com

