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Police Reform Through Section 1983

ADAM J. SMITH*

For decades, members of the Chicago Police Department (CPD) engaged in a protracted campaign of corruption, terror, and violence against Black and brown Chicagoans. Intermittent efforts to reform or otherwise rein in the CPD invariably fell short. In late 2014, a CPD officer murdered a 17-year-old Chicagoan, Laquan McDonald. CPD officials and city leaders attempted to whitewash the killing as a justified use of deadly force, but—thanks to the work of local organizers and a national pressure campaign—McDonald’s death instead led to a yearlong investigation by the federal Department of Justice (DOJ). Ordinarily, such an investigation would have resulted in a federal lawsuit to enjoin unconstitutional police practices; after the election of the stridently pro-police candidate Donald Trump to the Presidency, the prospect of federally monitored reform in Chicago seemed extinguished. But Illinois’ attorney general was undaunted—and instead launched a groundbreaking litigation that would bring CPD under federal supervision for years to come.

The largest reformist and abolitionist movement—indeed, the largest protest movement—in American history erupted this past summer in response to police violence against and unwarranted killings of Black and brown people. Given the moral urgency of the participants’ demands and the necessity of protecting Black lives from state violence, this Article urges the states to follow Illinois’ lead. It contends that 42 U.S.C. § 1983, the statute at the heart of the state’s suit, provides a tenable basis upon which states may sue to obtain police reform with federal-court oversight. It posits as well that the states may overcome the limitations on Section 1983 relief imposed by Lyons, the daunting standing requirements instituted by Lujan, and the specter of federal field preemption through the doctrine of parens patriae, which holds that sovereign entities are entitled to special deference in obtaining federal standing on their citizens’ collective behalf. The Article concludes by calling the states to this greater project—that is, repurposing Section 1983 as a mechanism for obtaining for marginalized communities legal

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redress that would be otherwise unavailable—and by framing police reform as a necessary step on a path toward police abolition.

INTRODUCTION: SIXTEEN SHOTS	52
I. POLICING THE POLICE THROUGH FEDERAL CIVIL RIGHTS SUIT	55
A. 42 U.S.C. § 1983	57
B. 34 U.S.C. § 12601	64
II. STATES AS SECTION 1983 PLAINTIFFS	69
A. <i>PARENS PATRIAE</i> STANDING AND SPECIAL SOLICITUDE	69
B. <i>PARENS PATRIAE</i> STANDING AND SECTION 1983 LITIGATION	72
B. “UNNECESSARY AND AVOIDABLE”	78
C. <i>ILLINOIS V. CHICAGO</i>	83
IV. SECTION 1983 PATTERN-OR-PRACTICE LITIGATION: LESSONS FROM <i>ILLINOIS V. CHICAGO</i>	85
A. WHAT CAN THE STATES LEARN FROM <i>ILLINOIS V. CHICAGO</i> ?	86
B. IS SECTION 1983 PATTERN-OR-PRACTICE LITIGATION LAWFUL?	89
C. WHY PATTERN-OR-PRACTICE LITIGATION?	92
V. CONCLUSION: BEYOND REFORM	95

INTRODUCTION: SIXTEEN SHOTS

More than 400 homicides were recorded in Chicago in 2014.¹ By a cruel kind of arithmetic, then, any day on which only a single person was killed would have been unremarkable.

October 20 should have proven to be just that. Over its twenty-four hours—from the former steel mills of Hegewisch, on the far South Side, to Rogers Park, at the city’s northernmost edge, where Orthodox Jews and the Jesuit brothers of Loyola University walk the same streets—Chicago lost only one life to violence.²

At 9:57 p.m. that evening, Officer Jason Van Dyke, a fourteen-year veteran of the Chicago Police Department (CPD), shot and killed seventeen-year-old Laquan McDonald.³ Van Dyke and his partner had just minutes earlier pulled up to a sea of Mars lights at 41st Street and South Pulaski Avenue,

1. Jeremy Gerner, *Chicago ends 2014 with fewer homicides, but shooting victims up 14 percent*, CHI. TRIB. (Jan. 3, 2015, 9:50 AM), <https://www.chicagotribune.com/news/ct-chicago-crime-year-end-met-20150101-story.html> [https://perma.cc/37NC-7QAG].

2. See *Tracking Homicides in Chicago*, REDEYE CHI. (Oct. 31, 2014), <http://homicides.redeyechicago.com/date/2014/10/>.

3. *Timeline: What Prosecutors Say Happened the Night Laquan McDonald Was Fatally Shot*, NBC 5 CHI. (Dec. 17, 2015, 3:42 PM), <https://www.nbcchicago.com/news/local/Timeline-What-Happened-the-Night-Laquan-McDonald-was-Fatally-Shot-353790811.html>. [https://perma.cc/DFL6-9WV6].

along an industrial corridor bordering Midway Airport. At the time, they knew only what they had heard over their cruiser's scanner: that CPD officers had cordoned off a young, armed Black man whom they suspected of committing a series of trailer break-ins.⁴ As Van Dyke exited his cruiser, his own weapon already drawn from its holster, McDonald was slowly pacing up and down Pulaski with a knife in his hand.⁵

What happened next, according to police reports, was something of a frenzied blur. McDonald was said to have made a sudden lunge toward Van Dyke shortly after the officer left his vehicle.⁶ Van Dyke then responded by firing sixteen shots, the maximum chamber capacity of the department's standard-issue Luger semiautomatic,⁷ in McDonald's direction.⁸ As many as fifteen bullets hit their target; as many as nine entered his back.⁹ The entire episode, from the first shot to the sixteenth, took fifteen seconds.¹⁰ McDonald was pronounced dead less than an hour later.¹¹

At nearly any other time in American history, the police killing of a young Black man might have been written off, briskly and permanently, as a justified use of force. But it could not be swept so easily under a rug in 2014. Public attitudes toward the police were amidst an epochal shift. Thanks to the widespread adoption of camera-enabled smartphones and the unceasing work of police-reform activists, even the least-informed American could no longer plead ignorance to the scope and effects of state violence. Federal and state lawmakers could no longer ignore the millions taking to the streets to demand police reform. And the communities long plagued by police brutality and an ever-expanding carceral state—not least Chicago's communities of color—could not accept anything less than fundamental, lasting change.

Indeed, it was Laquan McDonald's murder, and the highly publicized cover-up that followed, that would spur a renewed grassroots movement to change how Chicagoans are policed. It was that movement that precipitated a two-year federal investigation into the CPD. After the Trump

4. Megan Crepeau et. al., *6 takeaways from the ninth day of testimony in the Van Dyke hearing*, CHI. TRIB. (Oct. 2, 2018, 5:55 PM), <https://www.chicagotribune.com/news/breaking/ct-met-laquan-mcdonald-jason-van-dyke-trial-updates-20191002-story.html> [<https://perma.cc/7KLM-9SY4>]. It was revealed at trial that Van Dyke, while still blocks away from the scene, told his partner, "Oh my God, we're going to have to shoot the guy." *Id.* at ¶ 4.

5. *See Timeline*, *supra* note 3.

6. *Id.*

7. *Id.*

8. *See Timeline*, *supra* note 3.

9. *Id.* The Cook County coroner would attribute McDonald's death to bullets deposited into his neck, his chest, his back, his right leg, and both of his arms. *See* Jamie Kalven, *Sixteen Shots*, SLATE (Feb. 10, 2015, 8:07 PM), <https://slate.com/news-and-politics/2015/02/laquan-mcdonald-shooting-a-recently-obtained-autopsy-report-on-the-dead-teen-complicates-the-chicago-police-departments-story.html> [<https://perma.cc/64PB-NZJC>].

10. *See Timeline*, *supra* note 3.

11. *See* Kalven, *supra* note 9.

administration halted all federal efforts to intervene in local policing, it was those activists who continued to push for another solution. And it was at their urging that Illinois' attorney general, Lisa Madigan, picked up where the Obama administration had left off, bringing a federal civil-rights action against the city of Chicago, and ultimately securing lasting reform.

To do so, Madigan had to overcome a legal system seemingly custom-built to protect the police. Decades of state regulatory atrophy had left federal law as the sole mechanism by which sub-federal policing could be regulated. At the same time, Congress had done little to keep federal police-accountability measures in line with on-the-ground realities. And the Supreme Court had done much to weaken what few measures existed—imposing stricter requirements for victims of police abuse seeking to get into court than for abusive police officers seeking to get out of it.¹² Yet it would be this very regime that would make reform in Chicago possible.

In charting a viable path toward litigated police reform, this Article argues, the state of Illinois has also charted a course for similar projects across the country. Its use of 42 U.S.C. § 1983¹³ (Section 1983) to obtain federally monitored police reform suggests that federal police-reform litigation does not require presidential or Congressional sanction. If this outcome is doctrinally sound, as this author contends it is, then Section 1983 implicitly enables proactive intervention by state attorneys general just as federal law¹⁴ expressly empowers their federal counterpart. In other words, the states can—and should—police the police themselves.

This argument proceeds in four parts. Part I surveys the current state of federal governance over local policing, concluding that it has left those seeking an end to police violence with few legal avenues by which to achieve it. Part II considers the growing authority of the states to change and enforce public law through federal litigation, including federal civil-rights suit. Part III provides a descriptive account of the groundbreaking police-reform suit in *Illinois v. Chicago*.¹⁵ Part IV then frames that litigation as a blueprint for regulating police misconduct through proactive federal suit and as a best and highest use of the states' primacy in federal litigation, while also addressing contrary scholarship. Finally, this Article concludes by situating this kind of

12. See generally William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 82 (2018) (observing that “nearly all of the Supreme Court’s qualified immunity cases come out the same way—by finding immunity for the officials”). See also Noah Feldman, *Supreme Court Has Had Enough with Police Suits*, BLOOMBERG VIEW (Jan. 9, 2017, 3:08 PM), <http://www.bloomberg.com/view/articles/2017-01-09/supreme-court-has-had-enough-with-police-suits> [<https://perma.cc/9K5J-YDD5>] (“...The Supreme Court wants fewer lawsuits against police to go forward.”).

13. 42 U.S.C. § 1983 (2018).

14. 34 U.S.C. § 12601 (2018).

15. *State of Illinois v. City of Chicago*, No. 17-cv-6260, 2018 WL 3920816, (N.D. Ill. Aug. 16, 2018).

reform not as a counterweight to more ambitious projects—*i.e.*, efforts to defund or abolish the police—but as a means of achieving them.

I. POLICING THE POLICE THROUGH FEDERAL CIVIL RIGHTS SUIT

When one individual harms another, the law typically provides the injured party with several potential avenues of recourse. The injured party may, for instance, seek monetary compensation for their injury. They may ask a court to find that the action that caused the injury was itself unlawful. If that action may have violated the criminal law, they can ask the state to seek to hold the aggressor criminally liable. But the most powerful medicine available to them is forward, not backward looking. If the injured party can show with some certainty that more harm is yet to come, the party at fault may be required to conform its behavior to the court's requirements, for as long as the court deems necessary.

American police largely are immune from this regime.¹⁶ If an officer harms someone in the course of their duties—say, by giving a handcuffed arrestee a concussion while throwing them in the backseat of a patrol car¹⁷—state law ordinarily would protect them from tort liability.¹⁸ Of course, the

16. This was not always the case. Many of the Supreme Court's early constitutional criminal-law decisions—including *Weeks v. United States*, 232 U.S. 383 (1914), in which the Court first announced the exclusionary rule—were undergirded largely by tort law, and by the law of trespass in particular. *See generally* *People v. Defore*, 242 N.Y. 13, 20–21 (N.Y. 1926) (Cardozo, J.) (summarizing the development of the exclusionary rule). This suggests an alternative (though perhaps less palatable) course of history in which tort law, not the Fourth Amendment, came to govern American policing. *Cf.* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 598 (1983); Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 498 (1955) (rejecting the "trespass remedy" as "completely impotent" in cases of police malfeasance).

17. Then-President Donald Trump used this particular example when, in 2017, he instructed an audience of police officers not to be concerned with arrestees' welfare: "When you guys put somebody in the car and you're protecting their head, you know, the way you put their hand over? . . . Like, don't hit their head, and they just killed somebody—don't hit their head. I said, you can take the hand away, okay?" *See* Mark Berman, *Trump tells police not to worry about injuring suspects during arrests*, WASH. POST (July 28, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuring-suspects-during-arrests/> [<https://perma.cc/8JRR-TLPZ>].

18. Every state insulates, to some degree, its police officers from tort liability by statute. *See* Jamie Rall, *State Sovereign Immunity and Tort Liability*, NAT'L CONF. OF STATE LEGISLATURES (last updated Sept. 8, 2010), <https://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx> [<https://perma.cc/2LPE-2NNC>] (providing a 50-state survey of state tort-claims acts). As Illinois' own Tort Immunity Act illustrates, these laws generally require that an injury have arisen from something more than mere negligence (for instance, from an officer's "willful and wanton conduct") before imposing liability. *See, e.g.*, Local Governmental and Local Governmental Employees Tort Immunity Act, 745 ILL. COMP. STAT. 10/2-202 (2019); *but see generally* Paul Stern, *Hold Police Accountable by Changing Public Tort Law, Not Just Qualified Immunity*, LAWFARE (June 24,

same holds true for other civil servants: One usually cannot sue a state transportation worker for failing to fix a pothole or seek a court order compelling them personally to do so.¹⁹ But a state transportation worker does not bear firearms, the license to use force, or the implicit power to take away life and liberty. In that sense, a system of accountability in which run-of-the-mill police misconduct is treated like a bump in the road seems woefully inadequate.

Yet that is precisely where we find ourselves today. Though the Constitution would seem to require some form of police regulation,²⁰ the question of what shape it should take remains alarmingly unresolved. State and local legislators, wary of offending powerful police unions and their conservative patrons, generally have elected to stay out of the fray.²¹ Police departments of course have little incentive to self-regulate.²² Rather, those seeking to redress or prevent police violence must look to one of two federal statutes.²³

2020, 11:34 AM), <https://www.lawfareblog.com/hold-police-accountable-changing-public-tort-law-not-just-qualified-immunity> [<https://perma.cc/L4L8-4CQ2>] (arguing that because “[l]aw enforcement officials err, sometimes negligently, sometimes intentionally, and sometimes punitively,” state “tort law should reflect this reality”).

19. Federal district courts, at least, cannot issue writs of mandamus—orders to compel official action—to state officers endowed with any degree of discretion. *See, e.g.*, *United States ex rel. Alaska Smokeless Coal Co. v. Lane*, 250 U.S. 549, 555 (1919) (“But where there is discretion . . . even though its conclusion be disputable, it is impregnable to mandamus.”).

20. *See generally* U.S. CONST. amend. IV (enshrining the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable [government] searches and seizures”).

21. *See, e.g.*, Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 757–59 (2017) (arguing that police unions wield “enormous power to influence public policy” in part “because they can donate . . . to politicians viewed as friendly to their interests”). *See generally* Jill McCorkel, *Police Unions are One of the Biggest Obstacles to Transforming Police*, THE CONVERSATION (June 12, 2020, 4:57 PM), <https://theconversation.com/police-unions-are-one-of-the-biggest-obstacles-to-transforming-policing-140227> [<https://perma.cc/M6FW-VD9T>] (“In cities and states across the U.S., the benefits and protections afforded police have been provided by public officials who have catered—and caved—to union demands over many decades.”).

22. One might argue that the reluctance of police to self-regulate is more fairly characterized as a reluctance to *over*-regulate. After all, the touchstone of the Court’s modern criminal-procedure decisions has been its own disinclination to “second-guess” the split-second judgments of line officers, lest they be left inert. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (“The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”).

23. One additional statute deserves brief mention: 18 U.S.C. § 242, the criminal-law counterpart to Section 1983. 18 U.S.C. § 242 (2018). Under Section 242, it is a federal crime to *willfully* deprive an individual’s rights under color of law. *Id.* (emphasis added). Of course, since it does not create a private right of action or target patterns or practices, Section 242 is of little use in effecting systemic police reform. *See id.* Nevertheless, it remains an important, if somewhat underused, component of the federal government’s civil-rights arsenal. *See generally* Brandon Buskey, Opinion, *How to Prosecute Abusive Prosecutors*, N.Y. TIMES, Nov.

Both, however, leave much to be desired. While 42 U.S.C. § 1983²⁴ would seem to entitle victims of police malfeasance to a wide range of remedies, a series of regressive Supreme Court rulings has all but shut the courthouse doors to those seeking more than retrospective, individualized relief. And though 34 U.S.C. § 12601²⁵ enables the federal government to mandate local-police reform, it stops well short of creating an obligation to do so. Instead, by leaving this prerogative entirely to the Executive, Section 12601 also places the possibility of reining in police violence in the hands of a largely unwitting electorate.

A. 42 U.S.C. § 1983

Enacted during Reconstruction to enforce the guarantees of the Thirteenth, Fourteenth, and Fifteenth Amendments, 42 U.S.C. § 1983 (Section 1983) creates a private right of action to redress violations of constitutional and civil rights by state officials.²⁶ It provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress²⁷

Section 1983's passage suggested a particularly momentous shift in the federal-state balance of power.²⁸ In theory, at least, individual Americans could now hold state and local officials accountable to the promise of the Reconstruction Amendments through civil suit. They could do so through

27, 2015, § A, at 31 (suggesting that Section 242 could be used to rein in overzealous or retributive prosecutors).

24. 42 U.S.C. § 1983 (2018).

25. 34 U.S.C. § 12601 (2018). As this Part details, *infra* Part I.B., Section 12601 permits the Attorney General to seek federally monitored local-police reform when a department has engaged in a "pattern or practice" of constitutional or federal-statutory violations.

26. 42 U.S.C. § 1983 (2018). As Section I of the Ku Klux Klan Act of 1871, Section 1983 was initially codified at Ch. 22, 17 Stat. 13.

27. *Id.*

28. *But see Developments, infra* note 30, at 1142; Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955) (characterizing the Reconstruction Amendments and Acts instead as a more moderate concession to Southern intractability).

actions for damages (to redress earlier harms) or through equitable suit (to prevent future ones). But the people—by and through the federal courts—would now serve as the ultimate stewards of their civil rights. This was, as Justice Potter Stewart would write a century later, precisely the point:

Congress clearly conceived [in enacting Section 1983] that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.²⁹

As Section I of the Ku Klux Klan Act, Section 1983 was but one piece of a legislative package designed to destroy the Klan by holding civilly and criminally liable those state officials who protected the group—many of whom were Klan members themselves.³⁰ Naturally, the Act drew no shortage of concerted opposition. The coming years saw substantial efforts on the part of reactionary Southern lawmakers and their Northern appeasers to undermine Section 1983 and its statutory brethren.³¹ The Supreme Court, too, would seek to claw back this perceived impingement on state sovereignty.

Indeed, it was the Court that would ultimately render Section 1983 virtually impotent.³² In the *Slaughterhouse Cases*,³³ and later in *United States v. Cruikshank*,³⁴ the Court so limited the scope of official actions covered by the Fourteenth Amendment (those taken “under color” of law) as to leave its intended targets once again immune.³⁵ Though they seemed to have left

29. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

30. *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1154–55 (1977) [hereinafter *Developments*]; see also Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 974 (1987) (“The refusal of state courts to protect the fundamental human liberties of both Unionists and the newly freed slaves was a major focus of the legislative debates on both sections one and two of the Act.”).

31. See Nichol, *supra* note 30, at 976 (citing the floor speech of one Southern Congressman, in which he “rejected what he considered to be a central premise of the Civil Rights Act, ‘that the courts of the southern States fail and refuse to do their duty’”).

32. See *Developments*, *supra* note 30, at 1161 (“The effect of such a narrow judicial construction of state action . . . on section 1983 was devastating. Despite continuing infringement of the civil liberties of the freedmen and their descendants, virtually no actions were brought under the statute.”).

33. *Slaughterhouse Cases*, 83 U.S. 36, 78–80 (1873).

34. *United States v. Cruikshank*, 92 U.S. 542, 551–52 (1876).

35. See *Developments*, *supra* note 30, at 1161; see also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY

voting rights untouched, these decisions also left the lower courts wholly reluctant to protect them.³⁶ And with the federal government in retreat, the Jim Crow system of *de jure* Black disenfranchisement and segregation spread unhindered across the South.³⁷ It was a vicious irony that a law designed to constrain state sovereignty would be torpedoed for fear of constraining state sovereignty.

The result was nearly a century of functional dormancy.³⁸ It was not until 1951 that the nation's highest court saw fit even to determine which actors were and were not covered under Section 1983; even then, it did so only in finding that state legislators were immune from claims arising out of their legislative activities.³⁹ But the Court would finally upend this paradigm ten years later, in *Monroe v. Pape*.⁴⁰ There, in Justice Douglas' telling, "13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers."⁴¹ One member of the household—presumably the target of the search—was taken into custody on suspicion of murder, detained, interrogated, and then released without the opportunity to consult counsel.⁴² All of this transpired without a warrant.⁴³

The question presented was whether a warrantless search and seizure by municipal police was action "under color of state law," and thus gave rise under Section 1983 to a colorable federal claim.⁴⁴ But at its crux was a "narrower" issue: whether "Congress, in enacting [Section 1983] meant to give a *remedy* to parties deprived of constitutional rights, privileges and immunities

289 (2004); Blackmun, *infra* note 57, at 11 (casting the federal courts' early record in Section 1983 cases as "our Dark Age of Civil Rights").

36. See *Developments, supra* note 30, at 1161 ("The federal courts, notwithstanding the fact that it was a specific purpose of civil rights legislation to secure the vote for freedmen, were reluctant to intervene even in cases where state officials disenfranchised blacks with the obvious approval of the state government, and outrages grimly reminiscent of those perpetrated by the Klan were held to be beyond the scope of section 1983.").

37. See *id.*

38. See Jeffrey Baddeley, *Parens Patriae Suits by a State under 42 U.S.C. 1983*, 33 CASE W. RES. L. REV. 431, 435 (1983) (noting that only twenty-one cases were brought under Section 1983 between 1871 and 1920). In a 1985 law review article, Justice Blackmun tallied only three Section 1983 decisions rendered by the Court before 1940. The statute's postbellum latency is otherwise beyond the scope of this Article; for further reference, see generally KLARMAN, *supra* note 35, and *Developments, supra* note 30.

39. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

40. *Monroe v. Pape*, 365 U.S. 167 (1961).

41. *Id.* at 169.

42. *Id.*

43. *Id.*

44. *Id.* at 169–70. The Fourth Amendment's corollary exclusionary rule had been incorporated implicitly against the states twelve years earlier, in *Wolf v. Colorado*, 338 U.S. 25 (1949).

by an official's abuse of his position."⁴⁵ In other words, the Court presumed that some right existed, and that the Chicago police officers in question had violated it. The truly operative question was whether Section 1983 provided a federal remedy for its violation.

The Court found that it did.⁴⁶ To reach this result, Justice William O. Douglas (in what was at the time a novel move)⁴⁷ relied almost solely upon the statute's legislative history—the sum of which, he concluded, was “abundantly clear.”⁴⁸ The authors of Section 1983 knew well that Black Americans were often terrorized under color of state law. They also knew that state courts were often complicit in, if not outright supportive of, violence committed against former slaves.⁴⁹ Hence, they sought to “afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the . . . rights . . . guaranteed by the Fourteenth Amendment might be denied by the state agencies.”⁵⁰ The existence of a federal right, then, naturally implied the provision of a federal remedy—especially when the remedy was specified in no uncertain terms, and regardless of whether a perfectly adequate substitute was available under state law.⁵¹ Properly understood, Section 1983 guaranteed access to federal court to redress state-official misconduct, including through equitable suit.

In one fell swoop, *Monroe* transferred much of the supervisory and enforcement authority over civil rights directly to the Article III courts.⁵² After the Court dispensed with the longstanding requirement that plaintiffs first exhaust their claims in state court,⁵³ Section 1983 just as quickly became the primary mechanism by which state-level misconduct was regulated and remedied.⁵⁴ Fourth Amendment claims brought under Section 1983 soon

45. *Monroe*, 365 U.S. at 172 (emphasis added).

46. *Id.* at 187.

47. Cf. Leigh Ann McDonald, *Role of Legislative History in Statutory Interpretation: A New Era after the Resignation of Justice William Brennan*, 56 MO. L. REV. 121, 135 (1991).

48. *Monroe*, 365 U.S. at 180.

49. *Id.* at 183 (“If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens.”).

50. *Id.* at 180. See also *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

51. *Monroe*, 365 U.S. at 180.

52. See *Developments, supra* note 30, at 1136; see also Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 766 (2012) (“If the holdings in *Monroe*, *Mapp*, *Katz*, and *Miranda* enabled courts to regulate police conduct, their reasoning established courts, especially federal courts, as the primary institution for performing this task.”).

53. *Damico v. California*, 389 U.S. 416 (1967); *McNeese v. Bd. of Educ.*, 373 U.S. 668 (1963).

54. See cases cited *supra* note 53.

comprised a significant portion of the federal docket, for police officers were the state officials with whom individuals most often came into litigable conflict (as in *Monroe* itself).⁵⁵ If, indeed, the statute's authors had set out to make the federal courts the nation's primary civil-rights arbiters, they hardly could have asked for a better result.

But the explosive growth in Section 1983 litigation (with nearly 8,000 suits filed under the statute in 1972 alone)⁵⁶ also left a number of the Court's members disinclined to continue this trend.⁵⁷ In a law review article published shortly before her confirmation to the Court, Justice Sandra Day O'Connor suggested that "[i]n view of the great caseload increase in the federal courts . . . one would think that congressional action might be taken to limit [the] use of the [S]ection 1983 [remedy]."⁵⁸ Even the normally taciturn Justice Lewis Powell would author a number of sharply worded concurrences in which he bemoaned the use of federal resources to redress state harms.⁵⁹

They soon would get their wish. President Richard M. Nixon would tap Warren Burger, then sitting on the D.C. Circuit, to succeed Earl Warren as Chief Justice, a decision based in large part on a shared antipathy toward criminal defendants and vigorous support for law enforcement.⁶⁰ To the Court's observers, it came as little surprise that, as Professor Michael Graetz and the legal reporter Linda Greenhouse write, the new Chief's primary

55. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 539 (3d ed. 1999); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1487 (1969).

56. See *Developments, supra* note 30, at 1136 ("In the succeeding decade and a half [after *Monroe*], litigation under the statute has burgeoned, but as the volume of 1983 litigation has expanded, so too have the calls for its restriction.").

57. Naturally, this line of thinking extended to the lower courts. Judge Ruggero J. Aldisert, of the U.S. Court of Appeals for the Third Circuit, complained in a 1973 essay of a "federal judiciary [that] on all levels is overworked with cases which do not properly belong there." Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 L. & SOC. ORD. 557, 575 (1973). Yet others, like Justice Blackmun, disagreed virulently. "The least persuasive criticisms for me, or at any rate the least complete," he wrote in a 1985 law review article, "are those that claim that § 1983 actions are burdening the federal courts. Since any such 'burden' presumably is worth bearing when an action is meritorious, the criticisms must assume that the suits generally are without merit." Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away*, 60 N.Y.U. L. REV. 1, 21 (1985).

58. Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 810 (1981).

59. E.g., *Parratt v. Taylor*, 451 U.S. 527, 543–44 (1981) (Powell, J., concurring); *Runyon v. McCrary*, 427 U.S. 160, 186 n.* (1976) (Powell, J., concurring) (arguing that the Court had "drifted almost accidentally into rather extreme interpretations of the post-Civil War Acts").

60. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 6–7 (2005) ("Burger had argued that . . . [d]ecent people felt anger, frustration and bitterness, while the criminal was encouraged to think that his free lawyer would somewhere find a technical loophole that would let him off.").

ambition “was to roll back rights that Earl Warren’s Supreme Court had granted to criminal defendants.”⁶¹

That same spirit animated a desire to limit the liability of police to Fourth Amendment suit. And with two ostensibly jurisdictional decisions—*Rizzo v. Goode*⁶² and *City of Los Angeles v. Lyons*⁶³—the Court’s new conservative majority appeared to spell the demise of Section 1983 as a means of changing police policy. After *Rizzo* and *Lyons*, it was no longer enough to have been subjected to police abuse to be able to prevent it.

First, in *Rizzo*, the Court rejected a class of Philadelphia residents’ attempt to obtain injunctive relief against officials of the city’s police department and its mayor through Section 1983.⁶⁴ Justice William H. Rehnquist, writing for the Court, pointedly discarded *Monroe*’s expansive enforcement mandate in favor of a restrictive case-or-controversy standard.⁶⁵ He concluded that because the *failure* to respond to unconstitutional line policing was not a practice barred by Section 1983, it could not give rise to a justiciable claim.⁶⁶ Even if inaction could serve as a sufficient ground, granting broad injunctive relief was simply too disproportionate a response to the litigants’ injuries.⁶⁷ Section 1983 alone could not freely license a federal court to “inject[] itself by injunctive decree into the internal disciplinary affairs of [a] state agency.”⁶⁸ In other words, impinging on state sovereignty required

61. MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 14 (2016); *see also id.* at 4 (quoting Burger, in a letter to Harry Blackmun, as characterizing decisions of the Warren Court as “idiocy that is put forth as legal and constitutional profundity”).

62. *Rizzo v. Goode*, 423 U.S. 362 (1976).

63. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

64. *Rizzo*, 423 U.S. at 373.

65. *Id.* *See also* Note, *Rizzo v. Goode: Federal Remedies for Police Misconduct*, 62 VA. L. REV. 1259, 1262 (1976).

66. *Rizzo*, 423 U.S. at 377–78. Justice Rehnquist went so far as to dismiss outright the notion that the Philadelphia P.D. was under *any* constitutional obligation to deter police malfeasance. The plaintiffs, he wrote,

... posit a constitutional ‘duty’ on the part of petitioners (and a corresponding “right” of the citizens of Philadelphia) to “eliminate” future police misconduct; a “default” of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners’ stead and take whatever preventive measures are necessary, within its discretion, to secure the ‘right’ at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983.

Id. at 376. Concededly, this observation was made in dicta. But Justice Rehnquist’s barely contained disdain for the plaintiffs’ requests would suggest that the line between dictum and holding was more gossamer thread than hard edge.

67. *Id.* at 377–78.

68. *Id.*

more than mere patterns or practices; it required express Congressional authorization.⁶⁹

A few months after the Court issued its decision in *Rizzo*, four white officers of the Los Angeles Police Department (LAPD) pulled over Adolph Lyons, a 24-year-old Black man, purportedly for a broken taillight.⁷⁰ The officers, as a dissenting Justice Marshall detailed, “greeted [Lyons] with drawn revolvers as he exited from his car.”⁷¹ After a brief struggle, one of the officers placed him in a chokehold and held him there until he was unconscious.⁷² Some moments later, Lyons awoke “lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.”⁷³ Lyons later sued the individual officers and the LAPD under Section 1983.⁷⁴ He sought damages and an injunction barring LAPD officers from using chokeholds against non-threatening subjects.⁷⁵

The Court’s conservative bloc was not moved. Instead, it picked up where *Rizzo* left off, finding that Lyons lacked Article III standing to seek a department-wide injunction.⁷⁶ Writing for the majority, Justice Byron White found that an individual case of police abuse could not warrant the extraordinarily strong medicine of a blanket injunction. In doing so, Justice White drew a clear line between the kinds of individual police-misconduct claims that he believed were sanctioned by Section 1983 and those that had been barred by *Rizzo*.⁷⁷ Damages suits that sought only to redress past injuries, he wrote, fell into the former category.⁷⁸ But when plaintiffs asked for wholesale injunctive relief against future police behavior, the case-or-controversy requirement imposed by Article III obligated them to meet a virtually impossible bar: they needed to prove that the possibility of their *own* future harm from a challenged practice was, absent injunctive relief, “real and immediate.”⁷⁹ In effect, unless the victim of an unjustified police shooting could plausibly show that he would be shot by the police again, prospective relief would be flatly inappropriate.⁸⁰

69. *Id.* at 380.

70. *City of Los Angeles v. Lyons*, 461 U.S. 95, 114 (1983) (Marshall, J., dissenting).

71. *Id.* at 114–15 (Marshall, J., dissenting).

72. *Id.* at 114–15 (Marshall, J., dissenting).

73. *Id.* at 114–15 (Marshall, J., dissenting).

74. *Id.* at 115 (Marshall, J., dissenting).

75. *Lyons*, 461 U.S. at 115 (Marshall, J. dissenting).

76. *Id.* at 113.

77. *Id.* at 108–09.

78. *Id.*

79. *Id.*

80. *Lyons*, 461 U.S. at 108 (“ . . . it is surely no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.”).

After the Court imposed an even more restrictive injury-in-fact requirement in *Lujan v. Defenders of Wildlife*,⁸¹ the possibility of reining in the police through Section 1983 litigation seemed extinguished. Plaintiffs could now obtain Article III standing only if they sought to redress a previous injury or to prevent “imminent” harm to themselves.⁸² Victims of police abuse still could satisfy these requirements with regard to their own injuries, as had been the case under *Rizzo* and *Lyons*.⁸³ But *Lujan* effectively limited the possibility of obtaining prospective relief from narrow to nothing: individual litigants could no longer seek to address the more remote, but no less certain, threat of future police violence against others similarly situated.⁸⁴ After *Lujan*, the applicability of Section 1983 to individual cases of police malfeasance became strictly retrospective.

The erosion of Section 1983 left victims of state and municipal police abuse with wholly inadequate federal protection. It removed one of the few meaningful possible checks on unconstitutional police practices—the potential for federal injunctive relief where practices by line officers rise to the level of department policy, the precise kind of evil Section 1983 was intended to address.⁸⁵ Paired with an ever-expanding and increasingly incoherent qualified-immunity doctrine,⁸⁶ Section 1983 now seemed to guarantee little to those whom it was enacted to protect.

B. 34 U.S.C. § 12601

Eight years after the *Lyons* Court declined to rein in the Los Angeles Police Department, LAPD officers stopped another Black motorist, 25-year-

81. *Lujan v. Def. of Wildlife*, 504 U.S. 555 (1992). Under *Lujan*, plaintiffs are entitled to Article III standing only if their alleged injury is a non-speculative “injury-in-fact” (that is, if it “affect[s] the plaintiff in a personal and individual way,” *id.* at 560 n.1); if there is a causal link between the defendant’s alleged action and the injury-in-fact; and if the injury plausibly could be redressed by “a favorable decision.” *Id.* at 560–61.

82. *Id.* at 560–61.

83. *See Lyons*, 461 U.S. at 109; *Rizzo*, 423 U.S. at 377.

84. *Cf. Lyons*, 461 U.S. at 108.

85. *See, e.g., Mitchum*, 407 U.S. at 242.

86. The doctrine of qualified immunity presents a wholly different series of challenges for police-misconduct litigants—challenges which extend far beyond the scope of this Article. For present purposes, it suffices to say that the rule set out in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), has come to function as a nearly impermeable shield for individual officers accused of unconstitutional conduct. Under the current qualified-immunity standard, “a government official who has acted in a clearly unconstitutional manner can be shielded from liability simply because no prior case has held similar conduct to be unconstitutional.” Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *YALE L. J.* 2, 67 (2017); *see also, e.g., Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante) (“The court is right about Dr. Zadeh’s rights: They were violated. But owing to a legal *deus ex machina*—the ‘clearly established law’ prong of qualified-immunity analysis—the violation eludes vindication.”).

old Rodney King, following a high-speed chase.⁸⁷ As King exited his car, a group of four officers swarmed him, tasered him, and brought him to the ground.⁸⁸

That would not be the end of the encounter. While a dazed King struggled to rise off the pavement, as nearly twenty of their colleagues watched, two patrolmen and their supervising sergeant unleashed a vicious torrent of baton blows and kicks.⁸⁹ The beating went on for nearly a minute.⁹⁰ After the officers had had their fill, King was taken to a nearby hospital, where he was treated for fractures to his face and legs and a series of deep lacerations.⁹¹ The officers' reports noted only scratches and bruises,⁹² and claimed that King was "oblivious to pain."⁹³

Unbeknownst to the LAPD, a nearby resident had captured King's beating on videotape.⁹⁴ That footage, grainy in appearance but unmistakable in substance, would soon bring police misconduct to the forefront of the nation's political dialogue.⁹⁵ But it took the acquittal of King's assailants, and the widespread protest and unrest that followed, to finally make clear that continued inaction was untenable.⁹⁶

In response, Congress enacted 34 U.S.C. § 12601 (Section 12601) as part of its 1994 omnibus crime bill.⁹⁷ Section 12601 makes any "pattern or practice of 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" unlawful.⁹⁸ It empowers the Attorney General to enforce this guarantee by obtaining "appropriate equitable and declaratory relief to eliminate the pattern or practice" in federal court.⁹⁹

87. INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 4 (1991).

88. *Id.* at 6.

89. *Id.* at 7.

90. *Id.*

91. *Id.* at 8.

92. INDEP. COMM'N ON THE L.A. POLICE DEP'T, *supra* note 87, at 9.

93. *Id.*

94. *Id.* at 11.

95. See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3213 (2014).

96. Four LAPD officers were indicted on state excessive-force charges for their role in King's beating. See Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, *N.Y. TIMES*, April 30, 1992, at A1. Their acquittal, in April 1992, by a largely white and suburban jury would give rise to one of the deadliest uprisings in American history. See, e.g., Ryan D. Enos, Aaron R. Kaufman & Melissa L. Sands, *Can Violent Protest Change Local Policy Support? Evidence from the Aftermath of the 1992 Los Angeles Riot*, 113 *AM. POL. SCI. REV.* 1012, 1013 (2019).

97. This provision was formerly codified at 42 U.S.C. § 14141 (2012), and is referred to as Section 14141 throughout much of the literature. In 2018, Section 14141 was re-codified at 34 U.S.C. § 12601. I refer to it in its most current form.

98. 34 U.S.C. § 12601(a) (2018).

99. 34 U.S.C. § 12601(b) (2018).

The Civil Rights Division (CRD) of the Department of Justice (DOJ) has since launched more than forty “pattern-or-practice” investigations into police departments throughout the country.¹⁰⁰ These inquiries seek out, among other indicia of unconstitutionality, excessive use of force, racial profiling and targeting, and corruption.¹⁰¹ If, after an often years-long investigation, CRD finds substantial evidence of such patterns or practices, it will issue a public report summarizing its findings.¹⁰² It will then seek to end those practices through a court-supervised consent decree—a form of equitable settlement in which a defendant police department agrees to modify its behavior and that of its employees.¹⁰³ These agreements are ordinarily negotiated between DOJ and the police department itself, with input from interested parties—police unions and community groups chief among them—and the general public.¹⁰⁴ Once a tentative agreement has been reached, it is submitted to the supervising federal district court for approval.¹⁰⁵ Finally, after the agreement has been formally entered, the court will appoint what is known as a “special monitor,” a third-party neutral who will ensure that the regulated department will fully implement the requirements of the consent decree and remain in compliance.¹⁰⁶ The failure to comply can result in fines or the imposition of even more stringent requirements.¹⁰⁷

Far from prescribing a one-size-fits-all remedy, pattern-or-practice suits seek to remediate specific concerns and to do so with lasting effect. That much is borne out by the complexity and specificity of Section 12601 consent decrees. Members of the Baltimore Police Department, for instance, had displayed a troubling degree of bias against trans and queer residents; the department’s 2017 consent decree obligated it to end that practice and impose new guidelines and training protocols.¹⁰⁸ The consent decree entered against

100. See generally *Civil Rights Investigations of Local Police: Lessons Learned*, POLICE EXECS. RSCH. FORUM (2013), https://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf [https://perma.cc/JJ2U-XMXX].

101. *An Interactive Guide to the Civil Rights Division’s Police Reforms*, U.S. DEP’T OF JUST. CIV. RTS. DIV. [hereinafter *Interactive Guide*], <https://www.justice.gov/crt/page/file/922456/download> [https://perma.cc/5ZJE-J5GL].

102. *Id.*

103. See, e.g., Amended and Restated Consent Decree Regarding the New Orleans Police Department at 1, *United States v. City of New Orleans*, 35 F.Supp.3d 788 (E.D. La. 2012) (No. 12-1924) (“To achieve these goals, NOPD agrees to fundamentally change the way it polices throughout the New Orleans Community.”), <https://nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Consent-Decree.pdf/> [https://perma.cc/6PH6-A8NG].

104. See *Civil Rights Investigations of Local Police: Lessons Learned*, *supra* note 100.

105. *Id.*

106. *Id.*

107. *Id.*

108. Consent Decree at 19–20, *United States v. Police Dep’t of Baltimore City*, 249 F.Supp.3d 816 (D. Md. 2017) (No. 1:17-cv-00099-JKB), <https://www.justice.gov/opa/file/925056/download> [https://perma.cc/2Z74-6MKS].

the Ferguson (Missouri) Police Department—a majority-white department in a majority-Black community—required that it institute an affirmative-action hiring program.¹⁰⁹ Other settlements have mandated the establishment of community mediation programs, restrictions on the use of certain weapons, or the creation of independent civilian-oversight boards.¹¹⁰ The policy changes required of these departments can and will be as extensive as their failings.

Undoubtedly, Section 12601 is an enormously powerful tool. The statute allows the federal government to compel wholesale reform without engaging in overtly adversarial proceedings.¹¹¹ This is largely a product of the vast resources (at least as compared with their state and local counterparts)¹¹² afforded the DOJ, which empower its attorneys and investigators to engage in remarkably thorough fact development before seeking a consent decree. The department’s investigation into the Chicago Police Department illustrates this well. Over the course of nearly a year, DOJ investigators conducted more than a thousand interviews and spent thousands of work-hours on ride-alongs, in police-union meetings, and with community activists.¹¹³

And the end result of a pattern-or-practice inquiry, while imperfect, can reduce significantly the incidence of police violence. For instance, after the Detroit Police Department entered into a consent decree in 2003, that city saw the number of police-involved shootings over the following five years reduced by two-thirds.¹¹⁴ In the eight years following its 2012 settlement with DOJ, the Seattle Police Department achieved a 63% reduction in serious use-of-force incidents.¹¹⁵ These are not mere figures; they are lives saved.

109. Amended and Restated Consent Decree at 65, *United States v. City of Ferguson*, No. 4:16-cv-00180-CDP (E.D. Mo., Mar. 17, 2016), <https://www.fergusoncity.com/DocumentCenter/View/3854/97-1-Amended-and-Restated-Consent-Decree?bidId=> [<https://perma.cc/6TEN-LA8U>].

110. *Interactive Guide*, *supra* note 101.

111. To illustrate, only one Obama-era Section 12601 investigation generated adversarial litigation: that of the Colorado City (AZ) Police Department. *See United States v. Town of Colorado City*, 935 F.3d 804 (9th Cir. 2019). The Ninth Circuit ultimately concluded there that the municipal-liability rule of *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978), was of no force in determining whether a police department violated Section 12601. *See Town of Colorado City*, 935 F.3d at 809.

112. *But see* Mazzone & Rushin, *infra* note 267 (arguing that state attorneys general, “located in every state in the union where they typically oversee a large cadre of attorneys and staffers,” have in the aggregate “more manpower than the DOJ”).

113. *See* DEP’T OF JUST., *2017 Findings Report*, *infra* note 208, at 2.

114. *See* Tresa Baldas, *Detroit police finally rid of federal oversight*, DETROIT FREE PRESS (Mar. 31, 2016, 8:35 PM), <https://www.freep.com/story/news/local/michigan/detroit/2016/03/31/detroit-police-finally-rid-federal-oversight/82491776/> [<https://perma.cc/3BSF-73XK>].

115. *See* Steve Miletich, *Seattle, Department of Justice ask judge to release police from remaining consent decree oversight*, SEATTLE TIMES (Aug. 12, 2020, 11:41 AM), <https://www.seattletimes.com/seattle-news/politics/seattle-department-of-justice-ask-judge-to-release-police-from-remaining-consent-decree-oversight/> [<https://perma.cc/K9AC-HY36>].

Still, the statute suffers a number of significant flaws. First, and most damningly, its enforcement depends entirely on whether a presiding administration is sympathetic to police reform. As the DOJ's own numbers bear out, the partisan affiliation of a particular presidential administration is a strong indication of its willingness to remediate systemic police misconduct.¹¹⁶ During the eight-year-long administration of Barack Obama, under Attorneys General Eric Holder and Loretta Lynch, the Justice Department opened 25 pattern-or-practice investigations.¹¹⁷ Under Attorneys General Jeff Sessions and William Barr, the Justice Department did not open even one.¹¹⁸ In the hands of those concerned more with blue lives than Black lives, Section 12601 can become a paper tiger.

Moreover, even a reform-minded administration cannot account for every instance of unconstitutional policing. In 2016, when the Bureau of Justice Statistics (BJS) last surveyed the landscape of local policing, there were 468,000 sworn municipal and local police officers and 12,300 police departments in the United States.¹¹⁹ Section 12601 does not address the enormity of this system by providing for state or private enforcement in the federal government's stead.¹²⁰ Rather, it reserves an exclusive enforcement right to the Attorney General.¹²¹ Considering that, over more than a quarter-century, only forty of the nation's thousands of police departments have come under Section 12601 investigation,¹²² one might conclude that the statute carries more symbolic value than substance.

In theory, Section 12601 should serve as a bulwark against unconstitutional police practices. But experience shows that the bloated machinery of American policing cannot be regulated by a few dozen DOJ attorneys—especially if four or eight years may pass in which the statute goes purposely

116. See generally RICHARD JEROME, *POLICE REFORM: A JOB HALF DONE* 6 (2006).

117. U.S. DEP'T OF JUST. CIV. RTS. DIV., *Police Reform and Accountability Accomplishments* [hereinafter DEP'T OF JUST., *Police Reform*], <https://www.justice.gov/opa/file/922461/download> [<https://perma.cc/E68G-YHS3>].

118. U.S. DEP'T OF JUST. CIV. RTS. DIV., *Special Litigation Section Cases and Matters* [hereinafter DEP'T OF JUST., *Special Litigation*], <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download#police> [<https://perma.cc/4CZR-KLG4>].

119. U.S. DEP'T. OF JUST. BUREAU JUST. STATS., NCJ No. 252835, *Local Police Departments, 2016: Personnel* (Oct. 2019), <https://bjs.ojp.gov/content/pub/pdf/lpd16p.pdf> [<https://perma.cc/9EKJ-XBXZ>].

120. See Myriam E. Giles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1386 (2000).

121. 34 U.S.C. § 12601(b) (2018) (“Whenever the Attorney General has reasonable cause to believe that a violation . . . 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.”).

122. Cf. DEP'T OF JUST., *Police Reform*, *supra* note 117 (providing an overview of the few dozen Section 12601 investigations brought to date); U.S. DEP'T. OF JUST. BUREAU JUST. STATS., *supra* note 119 (tallying more than 12,000 police departments).

unenforced. For the communities most affected by police violence and coercion, that is time they simply do not have.

II. STATES AS SECTION 1983 PLAINTIFFS

Police-reform advocates are right to be dismayed at the state of the law. The federal courts have been unjustifiably loath to give victims of police violence the ability to effect reform through litigation. Though Section 12601 enables the Executive to act in their stead, political and ideological considerations can—and often do—leave it unwilling to intervene. But there remains another set of institutional actors able to litigate to reform the police: state attorneys general, who may assert and seek redress for injuries to their constituencies as a whole.

Under the common-law doctrine of *parens patriae*, these officials have broad license to vindicate their states’ “quasi-sovereign” interests—in their residents’ health, safety, and welfare—through affirmative litigation. And following the Court’s landmark decision in *Massachusetts v. EPA*,¹²³ the states enjoy a “special solicitude” in the Article III standing analysis when litigating in federal court to protect those interests—especially when the federal government has abdicated its enforcement responsibilities.

These advantages allow the states to surmount many of the procedural constraints operating on ordinary litigants. As this Article contends, they also enable the states to recast Section 1983 as a means of protecting their citizens from police abuse en masse.

A. *PARENS PATRIAE* STANDING AND SPECIAL SOLICITUDE

At common law, the doctrine of *parens patriae*, or “parent of the country,” gave the sovereign the ability to act as legal guardian to the infirm and the orphaned.¹²⁴ It would develop in the United States into a more expansive theory of sovereign authority, one embodying the broader obligations of a modern government to its citizenry—a “prerogative,” the Supreme Court wrote in one 1890 decision, “often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.”¹²⁵

The doctrine would begin to evolve into its current form, as a bespoke form of authority to bring federal suit, at the turn of the twentieth century. In *Louisiana v. Texas*,¹²⁶ the Court first assigned to the states a special form of standing when suing on their citizens’ behalf.¹²⁷ It found that the states

123. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

124. *See parens patriae*, BLACK’S LAW DICTIONARY (11th ed. 2019).

125. *Mormon Church v. United States*, 136 U.S. 1, 57 (1890).

126. *Louisiana v. Texas*, 176 U.S. 1 (1900).

127. *Id.* at 22–23.

required additional leeway when acting on their citizens' behalf, distinguishing between suits brought by states *qua* states and those brought by states as *parens patriae*.¹²⁸ In the former case, a state's proprietary or enforcement powers had to be directly implicated in order to satisfy Article III. In the latter, a state could obtain standing simply by asserting a "quasi-sovereign" interest in redressing an injury to "her citizens at large."¹²⁹

Over the ensuing decades, *parens patriae* litigation would involve disputes over interstate pollution,¹³⁰ natural-resource access,¹³¹ and railroad price-fixing.¹³² In all these cases, *parens patriae* standing seemed merely an unrebutted presumption.¹³³ It was not until 1982, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*,¹³⁴ that the Court would articulate fully how the states could affirmatively assert or defend their standing as *parens patriae*. There, the Court classified as quasi-sovereign two discrete types of interests: one in the "health and well-being—both physical and economic—of [a state's] residents in general," and the other in "not being discriminatorily denied its rightful status within the federal system."¹³⁵ To test whether a quasi-sovereign interest would suffice for the purposes of Article III standing, Justice White suggested that courts look to "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign law-making powers."¹³⁶

Under *Snapp*, then, whenever a state's quasi-sovereign interest in its citizens' general health and welfare is implicated, it may invoke *parens patriae* to sue on behalf of *all* of its citizens.¹³⁷ This allows the states to obtain broad-based injunctive relief where individuals cannot—for example, against other states or sub-federal governmental entities.¹³⁸ And it enables them to receive standing where other litigants would not: for instance, when a state is a less-aggrieved party but is nevertheless "best suited to obtain relief."¹³⁹ As *parens patriae*, state attorneys general may in effect act as plaintiff's-side counsel, with their clients numbering in the millions.

128. *Id.* at 19 ("[The suit's] gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian, or representative of all her citizens.").

129. *Id.*

130. *See, e.g.,* *Missouri v. Illinois*, 180 U.S. 208 (1901).

131. *See, e.g.,* *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

132. *See* *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945).

133. For much of the 20th century, bare assertions of a state's interest in its citizens' "health, comfort and welfare" would suffice. *See, e.g.,* *Pennsylvania v. West Virginia*, 262 U.S. at 592.

134. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592 (1982).

135. *Id.* at 607.

136. *Id.*

137. *See, e.g.,* Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1303 (2019).

138. *Id.* at 1304.

139. *See* *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

In *Massachusetts v. Mellon*,¹⁴⁰ the Supreme Court imposed one of the few substantive limitations on the states' *parens patriae* authority holding that they could not use it to sue the federal government.¹⁴¹ Eight decades later, in *Massachusetts v. EPA*,¹⁴² the Court largely dispensed with that bar. Instead, it found that the states in fact enjoy "special solicitude in [the] standing analysis"—even when the named defendant is the federal government.¹⁴³ In doing so, the Court reaffirmed that the states are afforded broad latitude in using federal litigation to make and shape policy. It recognized as well the unique role the states could play in holding the federal government to its obligations.

Justice Stevens, writing for the Court, grounded the Court's decision in three factors compelling a greater respect for states as *parens patriae*: the well established interest in interstate comity; the states' abdication, at admission, of an unlimited sovereignty; and their inability to challenge federal action or inaction in other areas of policy in which they have been preempted.¹⁴⁴ *Massachusetts*, he noted, could not "invade Rhode Island to force reductions in greenhouse gas emissions."¹⁴⁵ Nor could it "negotiate an emissions treaty with China or India."¹⁴⁶ Indeed, "in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be preempted" by superseding federal law.¹⁴⁷ In this case, a number of provisions in that superseding federal law—the Clean Air Act—were not being even partly enforced.¹⁴⁸ If the federal government refused to act *and* others could not act in its stead, *Massachusetts* argued, the Commonwealth would be left wholly unable to protect its residents' well-being from the impending effects of climate change.¹⁴⁹

The Court agreed. The states, even when federally preempted, were still owed a great deal of implicit respect in "Our Federalism."¹⁵⁰ Unless they were granted some degree of deference in the Article III standing analysis,

140. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

141. *Id.* at 486 (stating that, in a *parens patriae* action involving the federal government, "it is the United States, and not the State, which represents them as *parens patriae*").

142. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

143. *Id.*

144. *Id.* at 519.

145. *Id.*

146. *Id.*

147. *Massachusetts v. EPA*, 549 U.S. at 519.

148. *See id.* at 533 ("EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate.").

149. *Id.* at 526 ("In sum . . . the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real.").

150. *See id.* at 519 (citing *Alden v. Maine*, 527 U.S. 706, 715 (1999)); *see generally* *Younger v. Harris*, 401 U.S. 36, 44 (1971) (referring to "a system in which there is sensitivity to the legitimate interests of both State and National Governments").

they would be unable to meet fully their obligations as *parens patriae*.¹⁵¹ Thus, in a state *parens patriae* action seeking the enforcement of federal law, neither *Mellon* nor *Lujan*'s imminence and particularity requirements would be fatal; in other words, they would no longer need to assert a proprietary interest that would satisfy *Lujan* to sue as *parens patriae*.¹⁵² The possibility that federal inaction might injure a state's residents as a class would now be enough to warrant Article III standing.

It bears noting that the Court's exegesis of "special solicitude" was surface-level—at best. As a number of commentators have noted, the *Massachusetts* Court failed to detail precisely how states could obtain what purported to be a new form of standing.¹⁵³ And for all the fanfare surrounding "special solicitude," the notion that a state could protect its "rightful place in the federal system" through *parens patriae* action had already been recognized by *Snapp*.¹⁵⁴ For the purposes of this Article, however, the Court's reaffirmation of the primacy accorded the states in federal litigation—especially in the face of federal inaction¹⁵⁵—was made more than sufficiently clear. As sovereigns, the states simply must be treated differently than any other kind of litigant.

B. *PARENS PATRIAE* STANDING AND SECTION 1983 LITIGATION

Parens patriae gives the states an exceptionally broad latitude in mounting affirmative litigation. Special solicitude, its most recent derivation, affords them even greater deference in seeking to compel the enforcement of federal law. Even where other litigants might be denied Article III standing for prudential or procedural reasons, these doctrines grant the states largely unimpeded entry into federal court.

Long before *Massachusetts v. EPA*, however, the states made use of their status as *parens patriae* to enforce federal civil-rights law, including in suits against their own constituent agencies. Importantly, the states have, on a number of occasions, used *parens patriae* standing to sue municipal police officers and departments under Section 1983.¹⁵⁶

The paradigmatic example (the first example, in fact) of state-initiated Section 1983 litigation is *Pennsylvania v. Porter*.¹⁵⁷ There, the Third Circuit

151. *Massachusetts v. EPA*, 549 U.S. at 520–21.

152. *Id.*

153. See, e.g., Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L. J. 350, 397–98 (2011); Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1786 (2008).

154. See *Snapp*, 458 U.S. at 607.

155. See Note, *supra* note 137, at 1310.

156. See Baddeley, *supra* note 38, at 447.

157. *Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

considered whether the state of Pennsylvania could use Section 1983 to enjoin a municipal police officer and his supervisors from enabling any further use of excessive force.¹⁵⁸ In granting that request, the *Porter* court recognized for the first time that a state could invoke *parens patriae* standing to bring suit under Section 1983.¹⁵⁹ It held that the state's quasi-sovereign and proprietary interests, along with a state statute enabling it to sue to protect those interests, were sufficient to confer otherwise unavailable Article III standing.¹⁶⁰ Indeed, under *Rizzo*—decided just three years earlier—an individual complainant seeking injunctive relief would have been unable to obtain it.¹⁶¹ But because the state had a distinct interest in its citizens' *future* wellbeing, the *Porter* court concluded that an injunction was an appropriate Section 1983 remedy.¹⁶² “The Commonwealth’s interest in prevention of physical abuse [by police officers],” the court found, was “no different in kind from [its] interest in preventing poisoning by toxic waste,” the paradigmatic example of an interest that would justify *parens patriae* standing.¹⁶³

To be clear, the Section 1983 relief sought in *Porter* was of limited scope and duration. The injunction would apply only to a select group of officers; contouring the terms of such an order did not require long-term negotiation.¹⁶⁴ But in finding that a state could overcome *Rizzo*'s injunctive-relief bar with regard to multiple police officers,¹⁶⁵ *Porter* suggested they could do so with regard to an entire department.

New York soon would put this theory to the test. In 2001, then-Attorney General Eliot Spitzer brought a Section 1983 action against the Wallkill, N.Y. Police Department, seeking the entry of a consent decree.¹⁶⁶ The state alleged that Wallkill police “target[ed] and harass[ed] women, especially on the public highways, because they are women,”¹⁶⁷ and that they engaged in a “pattern of suspicionless stops and other acts of retaliation directed at the Department’s critics and perceived enemies....”¹⁶⁸ New York argued, as Pennsylvania had in *Porter*, that it had sufficient quasi-sovereign interests at stake such that *parens patriae* standing was appropriate.

158. *Id.* at 312.

159. Baddeley, *supra* note 38, at 447.

160. *Porter*, 659 F.2d at 315 (“The Commonwealth is vitally interested in the prevention of lawless exercises of the powers its laws confer upon police officers hired by its subdivisions . . . [and] in safeguarding the health and safety of individuals in the territory.”).

161. See *Rizzo v. Goode*, 423 U.S. 362, 380 (1976).

162. *Porter*, 659 F.2d at 315.

163. *Id.*

164. *Id.* at 312.

165. *Id.*

166. Decision and Order Dismissing Defendant’s Challenge to Subject Matter Jurisdiction, *New York v. Town of Wallkill*, No. 01-CV-0364, 2001 U.S. Dist. LEXIS 13364, *2 (S.D.N.Y. 2001).

167. *Id.* at *8 (emphasis omitted).

168. *Id.*

The district court agreed. Indeed, it found that the logic underlying the Third Circuit's decision in *Porter* was of universal application. That is, if the interests implicated by unconstitutional police practices satisfied the requirements of *Snapp* in one jurisdiction, they surely would do so in another.¹⁶⁹ And because those same interests—"the prevention of a pattern of police lawlessness, under official sanction, and protection of the citizenry from abusive practices"—were at stake, "precisely the same interests support[ed] *parens patriae* standing for the State [t]here."¹⁷⁰

As to the propriety of the consent decree sought by New York, the *Wallkill* court found that such relief was not only appropriate, but necessary. The department's unwillingness to reform itself meant that "*parens patriae* litigation," brought under Section 1983, was "the best and, likely, the only, method for obtaining the sort of systemic, forward-looking relief" necessary to reform a municipal police department.¹⁷¹

If *Porter* merely suggested that Section 1983 could serve as an enabling statute for state-initiated police reform, *Wallkill* would nearly appear to have confirmed it. As with all developments in the law, of course, one successful example would not be enough.

III. ILLINOIS V. CHICAGO

The long march toward litigated police reform in Chicago began in late 2015, when the DOJ and the U.S. Attorney for the Northern District of Illinois jointly opened a Section 12601 investigation into the Chicago Police Department. It seemed to end prematurely when, shortly after his confirmation, then-Attorney General Jeff Sessions announced abruptly that DOJ would halt all active pattern-or-practice matters.

Or so it appeared. Instead, in a nearly unprecedented development, Illinois' attorney general used the fruits of the federal investigation into the CPD as the basis for a pattern-or-practice suit brought under Section 1983, and ultimately obtained a federal consent decree that will govern policing in Chicago for years to come. In doing so, this Article argues, Illinois may well have set out a new path for obtaining police reform through and overseen by the federal courts.

A. THE CODE OF SILENCE

Laquan McDonald's killing would come as a shock to the city,¹⁷² and indeed to the nation.¹⁷³ But to those intimately familiar with the sordid history

169. *Id.* at *16-17.

170. *Id.* at *11.

171. *Id.* at *21.

172. See NBC CHIC., *infra* note 197.

173. See Eilperin, *infra* note 198.

of the Chicago Police Department—most especially Black and brown Chicagoans—the death of a Black teenager at the hands of police came as little surprise. CPD is, after all, a police department that has produced some of the nation’s most notorious emblems of state brutality, from the 1969 murder of the Black Panther leader Fred Hampton,¹⁷⁴ to the former commander Jon Burge’s decades-long campaign of programmatic torture,¹⁷⁵ to the maintenance of a “black site” at its Homan Square station.¹⁷⁶ And while one cannot hope to adequately quantify the harm done by the CPD to Chicagoans of color, the aggregate financial toll of decades of malfeasance boggles the mind. Between 2004 and 2016, the city of Chicago paid out nearly \$600

174. An orator and organizer of remarkable talent, Hampton was made head of the Panthers’ Chicago chapter (and the group’s national deputy chairman) at twenty. “As Panther chief in Chicago, Hampton built a reputation as a uniter, bringing together the ‘Rainbow Coalition’ of Puerto Rican, white and black poor people, and engineering a tenuous peace among several warring ghetto gangs.” Jeff Gottlieb & Jeff Cohen, *Was Fred Hampton Executed?*, THE NATION (Dec. 25, 1976), <https://www.thenation.com/article/society/was-fred-hampton-executed/> [<https://perma.cc/WP8N-D2TG>]. It would come as no surprise that this radical Black prodigy would draw the attention and ire of J. Edgar Hoover’s FBI. Nor would the FBI’s playing a major role in organizing the nighttime police ambush that claimed his life, which saw officers riddle a sleeping Hampton with bullets before staging the scene as a bilateral shootout. *See id.*; *see also The Murder of Fred Hampton*, PEOPLE’S L. OFF., <https://peopleslawoffice.com/about-civil-rights-lawyers/history/the-murder-of-fred-hampton/> [<https://perma.cc/UER2-57R9>].

175. During his two decades commanding a South Side violent-crimes unit, Burge extracted more than 200 coerced confessions—mostly from Black men—through the use of cattle prods, ropes, plastic bags, and other instruments of torture. *See* John Conroy, *Tools of Torture*, CHI. READER (Feb. 3, 2005), <https://www.chicagoreader.com/chicago/tools-of-torture/Content?oid=917876> [<https://perma.cc/VFW5-LGVK>]. The accounts of those who fell victim to Burge are harrowing:

At a 1985 hearing, Leonard Hinton described being taken to the basement at Area Two two years earlier. He said his hands were handcuffed above his head, his pants and shorts were pulled down, his ankles were handcuffed to a pole so his legs were spread, and then

the officer with the mustache and with the glasses with the black hair, he came in with a rod, and one was carrying a box, a black box. . . . There was a cord to the long rod. . . . The handle on it was black and they plugged the wire into the box. . . . Then they put something in my mouth . . . it was cloth . . . and they tied it so I couldn’t holler. . . . Then they took the rod, long part, and they placed it under my genitals. . . . [It was] a pain out of this world. I couldn’t describe it. . . . They said, ‘Are you ready to talk yet?’ The other said, ‘I don’t think he’s ready to talk yet.’ He hit me with it again. . . . Then . . . he touched it in the crack of my rectum. . . . Then he took that [cloth] out of my mouth. I said, ‘I am ready to talk. Tell me what you want me to say, sir. Please stop.’

Id.

176. *See, e.g.,* German Lopez, *Report: Chicago police use excessive force and often treat people “as animals or subhuman”*, VOX (Jan. 13, 2017, 3:27 PM), <https://www.vox.com/identities/2017/1/13/14265666/chicago-police-justice-department-investigation> [<https://perma.cc/EV6A-VZBM>].

million to settle tens of thousands of excessive force complaints.¹⁷⁷ \$115 million would be spent on Burge's victims alone.¹⁷⁸

But it was a less-evident form of malfeasance that nearly sank the prospect of holding McDonald's killer to account: the department's "code of silence," an unspoken but inviolable rule that obligated officers to refrain from snitching on one another.¹⁷⁹ The official response to McDonald's killing thus followed a well-trodden path, with line officers and CPD brass alike quickly closing ranks around Van Dyke. As was and is common practice,¹⁸⁰ the officers on scene filled their "tactical response reports" with suggestively opaque police jargon. McDonald "refused all verbal commands" and "continued to approach the officers while still armed with his knife."¹⁸¹ Van Dyke, by contrast, "discharged his weapon" only because he was "fearing for his life."¹⁸² And the same tactics would be employed in a concurrent public-relations campaign. In one particularly egregious example, a spokesman for the city's police union told reporters that police video showed McDonald with "a strange gaze about him . . . he's got a 100-yard stare . . . he's staring blankly."¹⁸³ The officers, the spokesman said, were "responding to somebody with a knife in a crazed condition, who stabs out tires on a vehicle and tires on a squad car. You obviously aren't going to sit down and have a cup of coffee with them."¹⁸⁴ Van Dyke's actions were—as planned—soon written off as a permissible use of deadly force.¹⁸⁵

It would take a coordinated effort by activists and investigative journalists to keep McDonald from becoming yet another anonymous victim of state

177. *Id.*

178. Editorial Board, *Lean in on that Police Consent Decree*, CHI. TRIB. (July 20, 2018, 7:00 AM), <https://www.chicagotribune.com/opinion/editorials/ct-edit-consent-decree-rahm-police-20180718-story.html> [<https://perma.cc/LHG2-U784>].

179. CPD did not acknowledge the existence of a code of silence within the department until 2020. A.D. Quig, *CPD's Beck: 'Of course' there's a code of silence*, CRAIN'S CHI. BUS. (Jan. 13, 2020, 2:30 PM), <https://www.chicagobusiness.com/government/cpds-beck-course-theres-code-silence> [<https://perma.cc/5NFM-AM7D>]. It should be noted, of course, that such rules are not native or exclusive to Chicago; nearly every Section 12601 litigation has attempted to address deliberate dishonesty or lack of candor in police reporting. *See Interactive Guide*, *supra* note 101.

180. *See generally* Jamie Kalven, *Operation Smoke and Mirrors*, THE INTERCEPT (Oct. 8, 2016, 8:00 AM), <https://theintercept.com/2016/10/06/in-the-chicago-police-department-if-the-bosses-say-it-didnt-happen-it-didnt-happen/> [<https://perma.cc/A8VA-G6SS>].

181. CHI. POLICE DEP'T, MAJOR INCIDENT NOTIFICATION DETAIL, Incident No. 73204 at 2 (Oct. 20, 2014), <https://www.documentcloud.org/documents/2642124-Laquan-McDonald-police-report-Part-1.html> [<https://perma.cc/XR5X-L6JP>] (contributed by Jeff Cerone, the Chicago Tribune, as "Laquan McDonald police report, part 1"; see page 9 of the contribution PDF).

182. *Id.*

183. Kalven, *supra* note 9.

184. *Id.*

185. *Id.*

violence.¹⁸⁶ For nearly a year, city and police officials kept dashcam and bodycam footage of the killing under lock and key; as public outrage over his death grew, they “did everything in their power to keep the homicide from the public as long as possible.”¹⁸⁷ At the time, as a number of commentators would note, Chicago’s most powerful actors simply had too much at stake.¹⁸⁸ Its mayor, former White House Chief of Staff Rahm Emanuel, “was fighting for re-election in a tight race.”¹⁸⁹ So too was Cook County State’s Attorney Anita Alvarez, who “needed the good will of the police union for her coming re-election campaign,” and who “probably wished to shield the police officers who bring her cases and testify in court.”¹⁹⁰

If, in fact, the city’s leaders were concerned solely with remaining employed, they had good reason to be. In November 2015, more than a year after McDonald’s death, a Cook County judge ordered the city to publicly release the video.¹⁹¹ What it showed was damning. There was, as activists had argued for months, virtually no overlap between what CPD had reported and what the dashcam footage showed. Van Dyke never issued a “command” to McDonald before shooting him.¹⁹² McDonald never moved his knife in the officer’s direction.¹⁹³ Perhaps most importantly, the critical “lunge” toward Van Dyke, the legally obligatory precursor to a “justified” use of deadly force,¹⁹⁴ never happened. McDonald was walking *away* from Van Dyke when he was shot.¹⁹⁵ In fact, McDonald took the majority of Van Dyke’s shots while he was already incapacitated and on the ground.¹⁹⁶

Protesters took to the city’s streets just as soon as they had finished watching—if not processing—the video.¹⁹⁷ For weeks, as a chilly Chicago

186. *See id.*

187. Bernard E. Harcourt, Opinion, *Cover-Up in Chicago*, N.Y. TIMES, Nov. 30, 2015, <https://www.nytimes.com/2015/11/30/opinion/cover-up-in-chicago.html> [<https://perma.cc/5KB7-ZL7Y>].

188. *Id.*

189. *Id.*

190. *Id.*

191. Monica Davey & Mitch Smith, *Video of Chicago Police Shooting a Teenager is Ordered Released*, N.Y. TIMES, Nov. 20, 2015, at A18.

192. *See* Kalven, *supra* note 9.

193. *See id.*

194. *See id.* *See generally* *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (“The calculus of reasonableness [of a use of force] must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”).

195. *See* Kalven, *supra* note 9.

196. *Id.*

197. *Protesters March After City Officials Release Laquan McDonald Dash-Cam Video*, NBC CHIC. (Dec. 17, 2015, 3:10 PM), <https://www.nbcchicago.com/news/national-international/chicago-protests-laquan-mcdonald-dash-cam-video-released/1989516/> [<https://perma.cc/Q8AK-GNMQ>].

fall turned to bitter winter, they continued marching and demanding justice for Laquan McDonald. And as McDonald's killing became a story of national interest, much of the nation seemed no less aghast at what appeared to be a murder committed in cold blood. President Barack Obama, Chicago's most beloved son, said that the footage had left him "deeply disturbed."¹⁹⁸ The Reverend Jesse Jackson, long the city's most prominent civil-rights leader, would lead demonstrations for weeks, including one that blocked Black Friday shoppers from the gleaming storefronts on Michigan Avenue.¹⁹⁹

In short, and in short order, the protests produced results. CPD superintendent Garry McCarthy was out of a job not a week after the video was released.²⁰⁰ Not one week after that, Attorney General Loretta Lynch announced that her DOJ would soon open a federal pattern-or-practice investigation into CPD.²⁰¹

B. "UNNECESSARY AND AVOIDABLE"

One thing is clear from an otherwise muddy sequence of events: There would have been no investigation, and thus no reform in Chicago, had Jason Van Dyke not killed Laquan McDonald.²⁰² History makes plain just how impervious the CPD was to even the most necessary and commonsense of changes. A 1972 blue-ribbon commission led by the former Congressman Ralph Metcalfe, which found that it was "the basic law enforcement policy of [CPD] that aggressive police conduct toward citizens is desirable and

198. Juliet Eilperin, *Obama has watched Laquan McDonald video, White House says*, WASH. POST (Dec. 2, 2015, 4:41 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/02/obama-has-watched-laquan-mcdonald-video-white-house-says/> [<https://perma.cc/3GC9-VW4L>].

199. Monica Davey & Mitch Smith, *Anger Over Killing by Police Halts Shopping in Chicago*, N.Y. TIMES, Nov. 28, 2015, at A11.

200. David A. Graham, *The Firing of Chicago Police Chief Garry McCarthy*, THE ATL. (Dec. 1, 2015), <https://www.theatlantic.com/national/archive/2015/12/garry-mccarthy-fired-chicago/418203/> [<https://perma.cc/W8G4-ZZRB>].

201. Bill Ruthhart, Timothy M. Phelps & Hal Dardick, *Emanuel: Chicago Needs Justice Department Help with Police Department*, CHI. TRIB. (Dec. 7, 2015, 9:08 PM), <https://www.chicagotribune.com/news/ct-chicago-police-federal-investigation-20151207-story.html> [<https://perma.cc/NZU7-644Z>].

202. See generally Lisa Madigan, Cara Hendrickson & Karyn L. Bass Ehler, *Stepping into the Shoes of the Department of Justice: The Unusual, Necessary, and Hopeful Path the Illinois Attorney General Took to Require Police Reform in Chicago*, 15 Nw. J. L. & Soc. POL'Y 121, 125–29 (2020) ("The longstanding policing problems in CPD reached a tipping point, on November 19, 2015, when a Cook County Circuit Court Judge ordered the City to release the video of [McDonald's] shooting.").

legitimate,”²⁰³ produced only a toothless “oversight” office.²⁰⁴ A decade later, an investigation into the use of torture by the infamous CPD commander Jon Burge would reach similar conclusions²⁰⁵ and prove similarly fruitless. So too would a 1997 Commission on Police Integrity convened by Mayor Richard M. Daley,²⁰⁶ and a 2014 study commissioned by Mayor Rahm Emanuel.²⁰⁷

It took the police murder of a young Black man, a tragedy so common as to nearly become cliché, to bring the concerted attention of the federal government to Chicago—and to bring the possibility of long-needed reform closer to reality. Indeed, but for that murder, there would have been no cover-up. But for that cover-up, there would have been no public protest. But for that public protest, there would have been no video evidence released. But for that video evidence, and the national outrage it engendered, there would have been no investigation into the CPD. And without what proved to be an enormously comprehensive investigation, there likely would have been no reform in Chicago.²⁰⁸

203. METCALFE BLUE RIBBON PANEL, *THE MISUSE OF POLICE AUTHORITY IN CHICAGO*, 32–34 (1972).

204. See Rachel L. Leven, *What’s Really New About Chicago’s Newest Police Oversight Office?*, BETTER GOV’T ASS’N (Sep. 29, 2017, 12:00 PM), <https://www.bettergov.org/news/whats-really-new-about-chicagos-newest-police-oversight-office/> [<https://perma.cc/ZD3Z-DYBV>].

205. See CHI. POLICE DEP’T OFF. OF PROF. STANDARDS, *SPECIAL PROJECT CONCLUSION REPORT 6* (1990), <https://peopleslawoffice.com/wp-content/uploads/2012/02/Goldston-Report-with-11.2.90-Coversheet.pdf> [<https://perma.cc/ZH3D-BE7J>].

206. See CITY OF CHI. POLICE ACCOUNTABILITY TASK FORCE, *REPORT OF THE COMMISSION ON POLICE INTEGRITY* (1997), <https://chicagopatf.org/2016/02/22/new-report-on-the-commission-on-police-integrity-1997/> [<https://perma.cc/X6BM-D6ZE>].

207. See RON SAFER ET AL., *PREVENTING AND DISCIPLINING POLICE MISCONDUCT: AN INDEPENDENT REVIEW AND RECOMMENDATIONS CONCERNING CHICAGO’S POLICE DISCIPLINARY SYSTEM 1–2* (2014).

208. As the report itself details, the amount of work required of the investigators, paralegals, and attorneys who compiled it was nothing short of astonishing:

First, we reviewed thousands of pages of documents provided to us by CPD, IPRA, and the City, including policies, procedures, training plans, Department orders and memos, internal and external reports, and more. We also obtained access to the City’s entire misconduct complaint database and data from all reports filled out following officers’ use of force. From there, we reviewed a randomized, representative sample of force reports and investigative files for incidents that occurred between January 2011 and April 2016, as well as additional incident reports and investigations. Overall, we reviewed over 170 officer-involved shooting investigations, and documents related to over 425 incidents of less-lethal force.

We also spent extensive time in Chicago—over 300 person-days—meeting with community members and City officials, and interviewing current and former CPD officers and IPRA investigators. In addition to speaking with the

The culmination of this years-long project would come—in what seemed a less than subtle jab at the new administration—just three days before Donald Trump was to take office,²⁰⁹ when the DOJ publicly issued a 161-page report summarizing its investigation into the CPD.²¹⁰ In it, DOJ and the U.S. Attorney for the Northern District of Illinois concluded that CPD had violated the Fourth Amendment by engaging “in a pattern or practice of using force, including deadly force, that is unreasonable.”²¹¹ This determination rested on four principal findings.²¹²

First, investigators found that CPD’s policies, trainings, and internal disciplinary procedures resulted “in unnecessary and avoidable shootings and other uses of force.”²¹³ The department’s use of violence to achieve its

Superintendent and other CPD leadership, we met with the command staff of several specialized units, divisions, and departments. We toured CPD’s training facilities and observed training programs. We also visited each of Chicago’s 22 police districts, where we addressed roll call, spoke with command staff and officers, and conducted over 60 ride-alongs with officers. We met several times with Chicago’s officer union, Lodge No. 7 of the Fraternal Order of Police, as well as the sergeants’, lieutenants’, and captains’ unions. All told, we heard from over 340 individual CPD members, and 23 members of IPRA’s staff.

Our findings were also significantly informed by our conversations with members of the Chicago community. We met with over ninety community organizations, including nonprofits, advocacy and legal organizations, and faith-based groups focused on a wide range of issues. We participated in several community forums in different neighborhoods throughout Chicago where we heard directly from the family members of individuals who were killed by CPD officers and others who shared their insights and experiences. We also met with several local researchers, academics, and lawyers who have studied CPD extensively for decades. Most importantly, however, we heard directly from individuals who live and work throughout the City about their interactions with CPD officers. Overall, we talked to approximately a thousand community members. We received nearly 600 phone calls, emails, and letters from individuals who were eager to provide their experiences and insights.

U.S. DEP’T OF JUST. CIV. RTS. DIV. & U.S. ATTY’S OFF. FOR THE N.D. OF ILL., *Investigation of the Chicago Police Department*, 2–3 (Jan. 13, 2017) [hereinafter DEPT’ OF JUST., *2017 Findings Report*], <https://www.justice.gov/opa/file/925846/download> [<https://perma.cc/F4XC-SJN2>].

209. See Carrie Johnson, *In Inaugural Address, Trump Decries ‘Carnage’ And Promises ‘America First’*, NPR (Jan. 20, 2017, 12:01 PM) <https://www.npr.org/2017/01/20/510746700/donald-trump-sworn-in-as-the-45th-president-of-the-united-states> [<https://perma.cc/ZK5M-8P4E>].

210. See generally DEPT’ OF JUST., *2017 Findings Report*, *supra* note 208.

211. *Id.* at 5.

212. *Id.*

213. *Id.*

objectives was “not aberrational,” nor was it limited to a group of “bad apples.”²¹⁴ Rather, the report noted “numerous incidents where CPD officers chased and shot fleeing persons who posed no immediate threat to officers or the public.”²¹⁵ And this recklessness often directly threatened bystanders. In one chilling example, “three CPD officers fired a total of 45 rounds, including 28 rifle rounds, at a man during a foot pursuit in a residential area,” with the majority of those shots missing their intended target.²¹⁶

Second, DOJ concluded, the Department’s policies and practices “unnecessarily endanger[ed]” CPD officers themselves.²¹⁷ These practices included engaging in unnecessary and ill-advised foot and vehicular pursuits; failing to await backup while in dangerous situations; and deploying both less-lethal (which is to say Tasers, beanbag rounds, and the like) and lethal weapons in an unsound manner.²¹⁸ Such gung-ho, shoot-first-ask-questions-later tactics were plainly endemic to the department—so much so, in fact, that they were often employed by officers even while in plainclothes, working undercover, or off duty.²¹⁹

Third, DOJ placed the blame for the department’s constitutional infirmity on “systemic deficiencies within CPD and the City,” including the failure to provide CPD officers “with adequate guidance to understand how and when they may use force, or how to safely and effectively control and resolve encounters to reduce the need to use force.”²²⁰ The department failed to deploy or even to train its officers in the use of well-established crisis-intervention and de-escalation techniques.²²¹ And it exhibited a disturbing disinterest in cataloguing incidents that may have been better resolved through the use of nonviolent tactics.²²²

Lastly, the report found that the consequences of CPD’s police practices fell “heaviest on the predominantly black and Latino neighborhoods and the South and West Sides of Chicago.”²²³ Indeed, by DOJ’s calculations, CPD officers used force “almost ten times more often against blacks than against whites.”²²⁴ But this racialized abuse extended far beyond the disproportionate use of violence. Many of the young Black Chicagoans interviewed by DOJ reported that they were “*routinely* called ‘nigger,’ ‘animal,’ or ‘pieces of

214. *Id.* at 24–25.

215. *See generally* DEP’T OF JUST., *2017 Findings Report*, *supra* note 208, at 25.

216. *Id.* at 28.

217. *Id.* at 6.

218. *Id.* at 28.

219. *Id.* at 28–29.

220. *See generally* DEP’T OF JUST., *2017 Findings Report*, *supra* note 208, at 5.

221. *Id.* at 37.

222. *See id.*

223. *Id.* at 15.

224. *Id.*

shit” by CPD officers.”²²⁵ The investigation unearthed a photograph of two officers “squatting over a black man posed as a dead deer with antlers as [they held] their rifles.”²²⁶ And CPD personnel routinely shared their prejudices publicly. One officer posted to Facebook “a photo of a dead Muslim soldier laying in a pool of his own blood with the caption: ‘The only good Muslim is a fucking dead one.’”²²⁷ Chicago, the report went on to conclude, [would] not be able to convince residents in these neighborhoods that it cares if it [did] not take a stronger, more effective stance against unnecessarily demeaning and divisive officer conduct.”²²⁸

In no uncertain terms, the report established that CPD had repeatedly—and too often lethally—violated the Constitution.²²⁹ Such a document ordinarily would have served as the foundation of a Section 12601 suit and the basis for an eventual consent decree. And because the facts on which its conclusions rested were not only thoroughly vetted and researched but undeniably compelling, the DOJ reasonably could expect little in the way of pushback.

But after Donald Trump, not Hillary Clinton, ascended to the Presidency, and after Loretta Lynch was replaced by the archconservative Senator Jeff Sessions of Alabama, any hope of federal intervention in Chicago seemed extinguished.²³⁰ Trump had made the preservation of a status quo in policing a central tenet of his white-backlash presidential campaign.²³¹ And Sessions, who had been the new President’s earliest and most fervent supporter in the Senate, spent much of his confirmation hearing critiquing the Obama administration’s use of Section 12601, claiming that it had “undermine[d] the respect for police officers and create[d] an impression that [departments were] not doing their work consistent with fidelity to law and

225. See generally DEPT’ OF JUST., *2017 Findings Report*, *supra* note 208, at 146 (emphasis added).

226. *Id.* One of those officers, Jerome Finnegan, “was later sentenced to 12 years in prison for being part of a corrupt group in the Department’s Special Operations Section that carried out robberies and home invasions in predominantly black neighborhoods.” *Id.*

227. *Id.* at 147.

228. *Id.* at 148.

229. See, e.g., Jason Meisner et al., *Justice Report Rips Chicago Police for Excessive Force, Lax Discipline, Bad Training*, CHI. TRIB. (Jan. 13, 2017, 9:17 PM), <https://www.chicagotribune.com/news/breaking/ct-chicago-police-justice-department-report-20170113-story.html> [<https://perma.cc/V3BG-LTW7>]. (“In perhaps the most damning, sweeping critique ever of the Chicago Police Department, the U.S. Department of Justice concluded Friday that the city’s police officers are poorly trained and quick to turn to excessive and even deadly force, most often against blacks and Latino residents, without facing consequences.”)

230. It is telling that, in a survey of police officers conducted by POLICE magazine shortly before the 2016 election, 84% of the poll’s respondents indicated that they would vote for Donald Trump. David Griffith, *The 2016 POLICE presidential Poll*, POLICE MAG. (Sept. 2, 2016), <https://www.policemag.com/342098/the-2016-police-presidential-poll> [<https://perma.cc/G5TF-XNH9>].

231. See, e.g., Berman, *supra* note 17.

fairness.”²³² He would soon have the chance to turn those views into official federal policy. Just a few weeks into his tenure, he terminated all active pattern-or-practice matters, including the investigation into CPD.²³³

C. *ILLINOIS V. CHICAGO*

Yet the work done by DOJ in laying bare CPD’s constitutional defects would not go to waste. Activists and reformers looked for another means of using the report in a suit against CPD—even though such an action was essentially without precedent, and despite the fact that *Rizzo* and *Lyons* barred the city’s residents from suing the department themselves. After months of lobbying, internal discussion, and preliminary negotiations with city leaders, Illinois Attorney General Lisa Madigan decided to take that challenge head on. “We are stepping,” she announced at an August 2017 press conference, “into the shoes of the Department of Justice, which abandoned this effort.”²³⁴

Those shoes would prove easier to step into than Madigan might have assumed. Step by meticulous step, the DOJ report had outlined where and how the CPD had gone awry and what changes needed to be made to bring it into constitutional compliance. It was, in effect, a premade federal complaint and remedy.²³⁵ After Mayor Rahm Emanuel voiced his own opposition to federal oversight, and after settlement discussions between his office and Madigan’s broke down, Illinois took its largest city to court.

On August 29, 2017, the state of Illinois (“the State”) filed suit against the city of Chicago (“the City”) in the Northern District of Illinois.²³⁶ Adopting the findings made by the DOJ nearly wholesale, the State’s complaint alleged that the CPD had engaged in a pattern or practice of “using excessive force, including deadly force, and other misconduct that disproportionately harms Chicago’s African American and Latino residents.”²³⁷ By allowing these practices to continue, the State contended, the City had violated the Fourth Amendment (under Section 1983), the Illinois Constitution, the Illinois Civil Rights Act of 2003, and the Illinois Human Rights Act.²³⁸

232. See Adam Serwer, *Trump Gave Police Permission to be Brutal*, THE ATL. (June 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/chauvin-did-what-trump-asked-him-do/612574/> [<https://perma.cc/4PV5-2ZBG>].

233. See *id.*

234. Heather Cherone, *Chicago Police Reform Efforts Need Federal Oversight*, *Rahm Says*, DNA INFO (Aug. 29, 2017, 3:18 PM), <https://www.dnainfo.com/chicago/20170829/jeferson-park/chicago-police-reform-efforts-need-federal-oversight-rahm-finally-admits/> [<https://perma.cc/9YJJ-6CJE>].

235. See *supra* Part I.B.

236. Complaint at 1, *Illinois v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. Aug. 29, 2017).

237. *Id.* at 2–4.

238. *Id.*

In asserting Article III standing, the State invoked four sources of authority. First, it argued that because the “health and well-being of Illinois residents—both physical and economic—is implicated in this case,” the State was entitled to litigate on their behalf as *parens patriae*.²³⁹ Second, and relatedly, it asserted that its “quasi-sovereign interest in the prevention of present and future harm to its residents” was implicated by the CPD’s unconstitutional police practices.²⁴⁰ Third, it invoked its statutory “public policy . . . to secure for all its residents the freedom from discrimination” as an enabling act.²⁴¹ Finally, the State argued, because Illinois was frequently compelled to pay for the treatment of police-abuse victims through its Medicaid program, police violence in Chicago imperiled the state fisc.²⁴²

Following more than a year of negotiations between the State, the City, community leaders, and an intransigent police union,²⁴³ the U.S. District Court for the Northern District of Illinois approved and entered a draft consent decree in January 2019.²⁴⁴ Judge Dow commended the parties on obtaining “a resolution that [was] both more satisfactory and more expeditious than would have been obtainable through contested litigation.”²⁴⁵ And while “the decree [was] not perfect,” Judge Dow nevertheless deemed it an “important first step toward” reform.²⁴⁶

Running nearly 250 pages, the CPD consent decree mandates a near-total overhaul of the department’s hiring practices, disciplinary procedures, use-of-force and nondiscrimination policies, and training protocols.²⁴⁷ Importantly, it addresses all of these policy areas—as would an agreement reached under Section 12601—at a high level of specificity. For instance, the decree dedicates three pages to the use of “electronic control weapons” (more commonly known as Tasers), prescribing how,²⁴⁸ when,²⁴⁹ and by whom²⁵⁰ they may be used; it addresses such seemingly granular topics as officers’ field training²⁵¹ and their reporting of the use of force in similar detail.²⁵² Considered as a whole, however, the consent decree is not merely a set of procedures and prescriptions. It portends a constrained—and safer—CPD.

239. *Id.*

240. *Id.* at 4–6.

241. Complaint, *supra* note 236.

242. *Id.*

243. See Madigan, *supra* note 202, at 138–63.

244. Memorandum Opinion and Order Approving Proposed Consent Decree at 1, *Illinois v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. Jan. 31, 2019).

245. *Id.* at 4.

246. *Id.* at 7.

247. *Id.*

248. *Id.* at 58.

249. Consent Decree, *supra* note 244, at 59.

250. *Id.* at 57.

251. *Id.* at 85–88.

252. *Id.* at 61–69.

IV. SECTION 1983 PATTERN-OR-PRACTICE LITIGATION: LESSONS FROM *ILLINOIS V. CHICAGO*

Part I of this Article surveyed the two federal statutes under which American policing is itself policed: Section 1983, whose promise as a regulatory instrument has been undermined by a byzantine, often internally contradictory series of Supreme Court decisions;²⁵³ and Section 12601, which empowers the Executive to reform local police departments of its own initiative, but which creates no obligation or mandate to do so.²⁵⁴ Part II appraised the power of the states to shape and enforce federal law through their status as *parens patriae*,²⁵⁵ focusing in particular on two examples in which they used that authority to remedy systemic police misconduct through the Article III courts.²⁵⁶

Part III then examined the intersection of those doctrines through the lens of *Illinois v. Chicago*, the first large-scale example²⁵⁷ of what could be termed a *Section 1983 pattern-or-practice litigation*: a lawsuit brought by a state, in federal court, against a constituent municipal police department. It sounded both in the state's common-law *parens patriae* authority and in Section 1983. And it sought to obtain a federal consent decree, the type of long-term injunctive relief that would otherwise be available only through Section 12601 and to the federal government.²⁵⁸

A development of this kind—one that would appear to shift in no small way the balance of federal and state power—naturally gives rise to a host of substantive and prudential questions. This Part interrogates three in particular. First, how might other states draw on Illinois' experience in pursuing their own police-reform litigations? Second, are *Illinois v. Chicago* and its predecessors doctrinally sound prototypes for future litigation, or are they unlawful (if well-intentioned) aberrations?²⁵⁹ And finally—and perhaps most importantly—*why* should the states look to Section 1983 to remedy local

253. See *supra* Part I.A.

254. See *supra* Part I.B.

255. See *supra* Part II.A.

256. See *supra* Part II.B.

257. As detailed in Part II, the pattern-or-practice litigations that preceded *Illinois v. Chicago* were of a different order of magnitude entirely. *Porter* targeted only a select group of Philadelphia P.D. officers and officials. See *supra* Part II.B. And while New York sought in *Walkill* to reform an entire police department, see *id.*, it was one that served a population of a little more than 24,000 people. See U.S. CENSUS BUR., 2000 CENSUS OF POPULATION AND HOUSING 77 (2000), <https://www2.census.gov/library/publications/2003/dec/phc-3-34.pdf> [<https://perma.cc/N7PS-6WTQ>]. By contrast, Chicago is the nation's third-largest city and the CPD its second-largest police department. See CHI. POLICE DEP'T 2010 ANNUAL REPORT 52, available at <https://web.archive.org/web/20150622053903/https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Annual%20Reports/10AR.pdf> [<https://perma.cc/TL4T-6ZZD>].

258. See *supra* Part III.C.

259. See Mazzone, *infra* note 267.

police misconduct? In addressing these queries, Part IV seeks both to reconcile the law examined in Parts I and II with the story told in Part III and to make an affirmative case for Section 1983 pattern-or-practice litigation.

A. WHAT CAN THE STATES LEARN FROM *ILLINOIS V. CHICAGO*?

In years past, the termination of a federal pattern-or-practice investigation would have left police reform unobtainable. *Illinois v. Chicago* would seem to have proven this assumption false. Indeed, Illinois has provided its sisters with a blueprint for ending the federal government's virtual monopoly on police regulation—and may have dispelled the notion that Section 1983 cannot be used to make broad-based change.

For one thing, as the State's complaint makes readily evident, police misconduct implicates nearly every interest that might warrant extraordinary federal relief under the doctrine of *parens patriae*. Take each of the State's asserted grounds for Article III standing. Like Pennsylvania in *Porter* and New York in *Wallkill*,²⁶⁰ Illinois principally drew on its general quasi-sovereign interest in its citizens' welfare:

The interest in the health and well-being of Illinois residents—both physical and economic—is implicated in this case, and the Attorney General therefore possesses *parens patriae* authority to commence legal actions for violations of any federal or state laws. . . . The Attorney General brings this action to defend the State of Illinois's quasi-sovereign interest in the prevention of present and future harm to its residents, including individuals who are, have been, or would be victims of the City's unconstitutional law enforcement practices. . . . The City's violations affect a substantial segment of the residents of the State of Illinois, including direct victims as well as other members of the public who suffer the indirect effects of the City's unconstitutional law enforcement practices. . . . The Attorney General enforces the public policy of the State of Illinois to secure for all of its residents the freedom from discrimination against any individual because of his or her race, color, or national origin in connection with law enforcement. . . . It is the declared interest of the State of Illinois that all people in Illinois can maintain personal dignity, realize their full productive

260. See *supra* Part II.B.

capacities, and further their interests . . . The City’s actions substantially affect or threaten the State of Illinois’s public policy and its stated interest in the nondiscriminatory treatment of its residents.²⁶¹

Put another way, the State claimed both a common-law obligation (as *parens patriae*) and a statutory mandate (through its Civil Rights Act) to protect its residents from discriminatory state action. The same can be said of its 49 sister states—all of whom are entitled (when appropriate) to *parens patriae* standing, have on their books similar civil-rights legislation, and have provided for state civil-rights enforcement through litigation.²⁶² Any state seeking grounds for an analogous action need only look to Illinois’ example for precedent.

Next, the State cited its proprietary interest in protecting the state fisc from unnecessary Medicaid obligations:

The State of Illinois, through its Department of Healthcare and Family Services (“DHFS”), spends billions of dollars annually on health care benefits and services for Illinois residents enrolled in Medicaid, a public insurance program for low-income families and individuals that is jointly funded by the State and the federal government. . . . In 2016, nearly 1 million Chicago residents were enrolled to receive full or partial Medicaid benefits from the State of Illinois. . . . Multiple persons injured as a result of excessive force by CPD officers have incurred medical care costs that Illinois has paid for through DHFS in combination with Medicaid. . . . Absent the injunctive relief that the State seeks, Chicago residents will continue to be subjected to unconstitutional policing practices and, as a result, will incur medical expenses that the State will pay.²⁶³

In other words, because the brunt of police violence fell disproportionately on the poorest Chicagoans, the cost of treating their injuries would fall on the State. Every injury caused by the police thus incurred further debt

261. Complaint at ¶¶ 20-24, *Illinois v. City of Chicago*, No. 17-CV-6260, 2019 WL 398703 (N.D. Ill. Jan. 31, 2019).

262. See generally *State Public Accommodation Laws*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<https://perma.cc/DS6Y-AQMN>] (providing a 50-state survey of state civil-rights acts).

263. Complaint, *supra* note 261, at ¶¶ 27–30.

without justification. Again, any state with a constitutionally defective police department—likely *every* state—can make the same claim for themselves. For states seeking to bring their own pattern-or-practice litigations, then, Illinois' complaint ought to serve as a step-by-step guide.

A number of ground-level lessons, too, can be drawn from the State's experience. For instance, state attorneys general seeking to bring this kind of litigation would do well to concentrate much of their efforts in fact development. Madigan would attribute much of her success to her office's considerable work in building upon and supplementing the DOJ's own investigatory fruits. To be sure, and as Rushin and Mazzone argue, no state's budget can rival that of the DOJ.²⁶⁴ State resources are constrained in a manner entirely alien to the functionally unbounded federal government. But—as Illinois' example proves—there are ways around those constraints. For instance, corporate-interest law firms are all too willing to lend their *pro bono* hours (and especially their associates) to prominent civil-rights litigation; Madigan relied heavily on private-interest lawyers as her office prepared to bring one of the largest civil-rights actions in recent memory.²⁶⁵ State attorneys general might also explicitly reorganize their offices around keeping a closer eye on local policing. They need not ask their state legislatures for more money to change how their offices will spend what they already have, or for permission to make a shift in internal policy.

Finally, and perhaps most crucially, state attorneys general must act at the behest of the communities most affected by police violence and misconduct. As Madigan herself has written,

We knew that all our efforts would be in vain if we did not make community engagement and feedback the central focus of our process. We built our work off of the tireless dedication of community activists, leaders, and organizations in Chicago that had long engaged in police reform efforts.²⁶⁶

Community buy-in, then, is non-negotiable. The states cannot address police violence from the top down. The legitimacy of any police-reform effort depends entirely upon community support; its absence renders reform—if it ever comes to fruition at all—short-lived. As Illinois' example demonstrates, however, Section 1983 pattern-or-practice litigation in fact *incentivizes* the states to give affected communities a leading role in shaping police reform. The activists who pushed Madigan's office to take up the cause of reforming the CPD in the first instance remained at the table throughout—

264. See Mazzone & Rushin, *infra* note 267.

265. See Madigan, *supra* note 202, at 141.

266. *Id.* at 142.

from investigation to settlement. The same must hold true for other states and in other cities if similar litigations are to make lasting change.

B. IS SECTION 1983 PATTERN-OR-PRACTICE LITIGATION LAWFUL?

To be sure, *Illinois v. Chicago* may have reopened the door to obtaining systemic police reform through Section 1983. But as with any innovation in the law, it also gave rise to a host of important concerns and left many of them unresolved.

That much is clear from the work of the policing scholars Jason Mazzone and Stephen Rushin, who recently examined the implications of *Illinois v. Chicago* for future pattern-or-practice litigations.²⁶⁷ Their essay contends that—absent express Congressional or state-law authorization—Section 1983 pattern-or-practice litigation “raises a multitude of doctrinal and public policy concerns,” such that it could fairly be characterized in its present state as *ultra vires*.²⁶⁸ “State attorneys general should act to protect state residents from abusive police practices,” they write, “but the common law doctrine of *parens patriae* is not the right tool for them to do so.”²⁶⁹ If this kind of litigation is to serve as a viable means of constraining police violence and misconduct, as this Article argues it should, their work no doubt warrants reformers’ attention. As such, this section will attempt to address a number of their reservations in brief.

First, given the fundamental “issues of federal versus state power [that] loom large” in this debate,²⁷⁰ Mazzone and Rushin caution against merely assuming that Section 1983 makes space for *parens patriae* suits.²⁷¹ Admittedly, authority for the proposition that states are entitled to sue under Section 1983 is nothing if not mixed. And the Court, as one might expect, has yet to provide a definitive answer. It addressed one side of the Section 1983 caption in *Will v. Michigan Dept. of State Police*,²⁷² holding that states were not “persons” under the statute insofar as it would abrogate their sovereign immunity—in other words, that a state cannot be made a named Section 1983 defendant without running afoul of the Eleventh Amendment.²⁷³ But the Court has said nothing about whether it could *sue* under the statute.²⁷⁴

267. Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L. J. 999 (2020).

268. *Id.* at 1009. *See id.* at 1010, 1063.

269. *Id.* at 1072.

270. *Id.* at 1056.

271. Mazzone & Rushin, *supra* note 202, at 1033–34.

272. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

273. *Id.* at 71.

274. *See infra* note 285 and accompanying text.

Adding to this confusion, too, is a series of lower-court decisions which have answered that question both ways.²⁷⁵ It includes an earlier *Illinois v. Chicago*,²⁷⁶ in which the Seventh Circuit found that states were not “persons” who could be aggrieved by a constitutional violation under Section 1983.²⁷⁷ But that did not prevent a district court within the Seventh Circuit from sanctioning the subject of this Article a few decades later, though that may have had less to do with the holding-dictum distinction than with the Seventh Circuit’s plainly infirm reasoning. In support of its proposition that Section 1983 excluded states as plaintiffs, it cited two Supreme Court decisions—*Will* and *Arizonans for Official English*—and nothing else.²⁷⁸ In neither case did the Court reach any such conclusion; instead, it expressly cabined both holdings to the use of Section 1983 suits *against* the states.²⁷⁹

In the absence of a clear directive from the Supreme Court, then, one might reconcile *parens patriae* and Section 1983 by looking to the lower courts that have not misapprehended the Court’s precedents: namely, the Third Circuit in *Porter*, the Southern District of New York in *Wallkill*, and the Northern District of Illinois in *Illinois v. Chicago*. Adopting their reasoning generates a far more elegant solution: Simply put, a state with sufficient grounds to bring suit as *parens patriae* may do so under Section 1983, because nothing in the text of Section 1983 counsels otherwise. If anything, the breadth with which the Court has construed the *parens patriae* authority as of late²⁸⁰ would seem to counsel quite soundly for an expansive reading of “persons.” Using Section 1983 to regulate municipal practices would fit within the expansive enforcement mandate envisioned by its drafters.²⁸¹ And it would conform to the Court’s own rulings on Section 1983 municipal liability.²⁸² Until the Court pronounces a contrary interpretation, neither its Section 1983 jurisprudence nor the statute itself should be interpreted as a bar to state pattern-or-practice litigation.

Indeed, the ultimate success of *Illinois v. Chicago* suggests that the Court’s police-litigation decisions are not an insurmountable barrier to litigating for reform under Section 1983. In both *Rizzo* and *Lyons*, the Court predicated its denial of injunctive relief on the plaintiffs’ inability to

275. See *Mazzone & Rushin*, *supra* note 267, at 1056–57 (citing *United States v. City of Philadelphia*, 644 F.2d 187, 190 (3d Cir. 1980)).

276. *Illinois v. Chicago*, 137 F.3d 474 (7th Cir. 1998).

277. *Id.* at 477 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69–70 (1997); *Will*, 491 U.S. at 71).

278. *Illinois v. Chicago*, 137 F.3d at 477.

279. See *Arizonans for Official English*, 520 U.S. at 69 (citing *Will*, 491 U.S. at 71) (“We have held, however, that § 1983 actions do not lie against a State.”).

280. See *supra* Part II.B.

281. See *supra* notes 30–32 and accompanying text.

282. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) (holding that municipal agencies can be sued under Section 1983).

demonstrate a sufficient likelihood of future harm to themselves.²⁸³ Illinois, however, satisfied that requirement almost implicitly. As *parens patriae*, it effectively represented a class of more than twelve million people. Unless CPD disbanded entirely, one could assume with absolute confidence that at least one of those twelve million would have their rights violated by a Chicago police officer.

One might, as do Rushin and Mazzone,²⁸⁴ find this logic far too neat. But that would speak less to the propriety of Section 1983 pattern-or-practice litigation than to the *Lujan* regime's manifold shortcomings.²⁸⁵ The imminence and certainty standards that gatekeep federal injunctive relief were intended to discern between claims brought by *individuals*, whether actual people or legal fictions. They can adjudge, with some accuracy, the likelihood of a future injury to a corporate fisc or a human body and thus a claim's justiciability. Yet that utility vanishes when an entire state is the plaintiff, and especially when the injury the state is seeking to prevent is as sure a bet as tomorrow's sunrise. Given this functional incompatibility and that *parens patriae* expressly carves out the states from the otherwise prevailing standing analysis, there is no reason to interpret the Court's Section 1983 decisions as barring state pattern-or-practice litigations.

Finally, Rushin and Mazzone contend that the multitude of other interests implicated by police reform—those of the federal government in enforcement and policy creation, and those of state legislatures in setting the bounds of state executive authority—are too interwoven and too compelling to allow for unilateral reform litigations. Until properly authorized, and “unless other actors have failed to do anything and there is widespread belief that somebody should step up,” state attorneys general ought to refrain as a normative matter.²⁸⁶ But the exception they cite was very much the case in Chicago.²⁸⁷ And under the Trump administration it remained the case throughout

283. See *supra* Part I.A.

284. See Mazzone & Rushin, *supra* note 267, at 1007–08.

285. See Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 68 (1984) (“In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical.”). Nichol is quite right: The literature is replete with critiques of standing doctrine, and especially its component injury-in-fact standard, that cast it as an amorphous, pliant, and thoroughly illogical mess. *E.g.*, Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1070–71 (2015) (“[E]xperience has taught that the concept of injury is too vague and malleable for the idea of injury in fact to have much analytical bite in many cases.”); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 301 (“The injury-in-fact requirement is not only a poor proxy for identifying cases involving the violation of private rights but also entirely superfluous in those cases.”); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 318 (2002) (“Is there really a difference between ‘de facto’ injury and injury ‘in fact’? Are some harms English and some Latin? It is fascinating to think of the fun Justice Scalia would have had with that particular distinction had one of his colleagues fathered it.”).

286. See Mazzone & Rushin, *supra* note 267, at 1041.

287. See *supra* Part III.C.

the country.²⁸⁸ In fact, *Illinois v. Chicago* would seem only to bolster a central holding of *Massachusetts v. EPA*—that the federal government’s failure to enforce federal law can entitle the states to otherwise extraordinary forms of relief.²⁸⁹ There, it was the refusal of George W. Bush’s EPA to enforce a mandatory provision of the Clean Air Act that led to the recognition of the states’ “special solicitude” in the Article III standing analysis and allowed the states to sue to compel federal enforcement.²⁹⁰ Similarly, it was the refusal of Donald Trump’s DOJ to enforce Section 12601 that gave rise to a functionally indistinguishable suit brought under Section 1983. In seeking to enjoin CPD from harming its citizens, Illinois had much the same interest as did Massachusetts in seeking to compel the federal government to keep its air safe to breathe.²⁹¹

Of course, it must be conceded that the circumstances surrounding *Illinois v. Chicago* were virtually unprecedented (never before had the federal government cut off a Section 12601 inquiry after issuing formal findings)²⁹² and that special solicitude was never explicitly cited in the court’s grant of *parens patriae* standing. But by giving the State standing to pursue that policy end, *Illinois v. Chicago* implicitly substantiates the conclusion that the states are as entitled to the enforcement of federal law as is the federal government itself. When the Executive is unwilling or unable to act under Section 12601, nothing aside from the ordinary requirements for standing as *parens patriae* (that is, a threat to the common welfare) should prevent the states from acting in its stead. Rather, as co-equal sovereigns, they should be empowered to enforce the substantive thrust of Section 12601 themselves.

C. WHY PATTERN-OR-PRACTICE LITIGATION?

This Part has concentrated on the *how* of Section 1983 pattern-or-practice litigation—how federal law enables the states to follow Illinois’ lead, and how the states can draw on their sister’s experience in bringing similar suits of their own. In closing, this section briefly turns to perhaps a more challenging question: *why* the states should turn to litigation, and to Section 1983 in particular, in seeking to rein in their police.

First, why should the states not wait—as Rushin and Mazzone propose—for the passage of an enabling federal statute, or for Congress to change Sections 1983 or 12601, or merely for clearer guidance from the

288. See *supra* Part I.B.

289. See Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1305 (2019).

290. *Massachusetts v. EPA*, 549 U.S. at 520–21.

291. As Judge McMahon observed in *Town of Wallkill*, “the *parens patriae* remedy [under such circumstances] is more than merely appropriate; it is virtually compelled.” Order, *Town of Wallkill*, No. 01-CV-0364 at *10.

292. See generally *Interactive Guide*, *supra* note 101.

courts of appeals or the Supreme Court before acting? The answer, as it is in so many areas of unaddressed national concern, is political and legislative paralysis. While police reform (in the abstract, at least) seems to enjoy a great deal of public support,²⁹³ there is scant evidence that a national legislative fix to that end is in sight. So long as it remains under Republican control, the House is sure to remain an unsurmountable impediment to federal police-reform legislation. Naturally, the same is likely to hold true under a future Republican presidency.

And national Democrats have done little to suggest that a devolution of express regulatory authority would come if they were to retake the Senate and the White House. What they proposed while *out* of power made as much clear. In June 2020, House Democrats passed the George Floyd Justice in Policing Act of 2020,²⁹⁴ which, among other changes, would have amended Section 1983 to strip police officers of qualified immunity,²⁹⁵ established a “nationwide police-misconduct registry,”²⁹⁶ and prevented municipal and state police departments that engage in certain practices from obtaining federal funding.²⁹⁷ It addressed federal pattern-or-practice litigation only in passing: “[e]nhanc[ing] funding for pattern and practice discrimination investigations and programs managed by the DOJ Community Relations Service,” giving the DOJ subpoena power under Section 12601,²⁹⁸ and creating a “grant program for state attorneys general . . . to conduct independent investigations into problematic police departments.”²⁹⁹ Though these policies would have been long overdue, they countenanced only a reactive approach to police regulation and reform—one that treated police misconduct as the product of bad apples and not bad barrels, and thus as a problem that can be treated discretely and symptomatically.

So, if the states are left to police the police, why should they entrust it to a single executive officeholder? For one thing, the federal government has already made the same decision for itself, and with some success.³⁰⁰ For another, this kind of proactive regulation by litigation would seem squarely in the wheelhouse of state attorneys general. Their offices are continuously

293. A poll conducted by Gallup in July 2020 found that “a majority of Americans (58%) say major changes are needed to make policing better.” Steve Crabtree, *Most Americans Say Policing Needs ‘Major Changes’*, GALLUP (July 22, 2020), <https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx> [<https://perma.cc/JD6P-YRFC>].

294. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 2 (2020).

295. *Fact Sheet: Justice in Policing Act of 2020*, HOUS. JUDICIARY COMM., at 2, https://judiciary.house.gov/uploadedfiles/fact_sheet_justice_in_policing_act_of_2020.pdf [<https://perma.cc/DS3F-T9RF>].

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *See supra* Part I.B.

engaged in this sort of large-scale affirmative litigation: in the name of consumer protection, they regularly negotiate large, sweeping settlements with private-sector bad actors. If a state attorney general can prosecute civilly and criminally a state utility monopoly for burning down thousands of homes,³⁰¹ it can rein in the malpractices of a local police department.

In fact, the states need not limit their use of Section 1983 to police reform. They may use the template set by *Illinois v. Chicago* as a vehicle for vigorous state enforcement of constitutional rights, and thus as a means of reforming *any* constituent entity not under the state's direct control. A municipal agency with discriminatory hiring or enforcement practices, for example, could be made subject to a consent decree through *Illinois v. Chicago*-style litigation.³⁰² State attorneys general could put the expertise of the federal courts to use in cleaning their own houses, from basement to attic.

In sum, there is little counseling against the states' using federal Section 1983 pattern-or-practice litigation. No response to the present state of American policing could be more inadequate than inaction. It is only through this kind of experimentation and public combat, too, that our system of federalism and its component balance of power have taken their shape.³⁰³ It is a balance that remains in constant flux, the product of a give-and-take that follows public sentiment, the zeitgeist, and the needs of the day. And in no arena of public policy is this fluidity clearer than in policing. A century ago, in the era of Jim Crow and states' rights and *Lochner*, the notion of federal police regulation would have been unthinkable. A century before that, policing—at least as we conceive of it today—did not even exist.³⁰⁴ Today, it is the federal government that has been charged (though not entirely by design) with regulating hundreds of thousands of local police officers. If “Our Federalism” can accommodate two such major shifts in two centuries, surely it can account for a comparatively small devolution of regulatory authority.

301. See Robert Walton, *California AG: PG&E Could Be Prosecuted for Murder*, UTILITYDIVE (Jan. 2, 2019), <https://www.utilitydive.com/news/california-ag-pge-could-be-prosecuted-for-murder/545087/> [<https://perma.cc/9XLR-RXVV>].

302. Cf. *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978) (holding that municipalities and municipal agencies can be sued under Section 1983).

303. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256, 1271–72 (2009) (citing DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 107–40 (1995)).

304. See generally SAMUEL WALKER & CHARLES KATZ, *THE POLICE IN AMERICA: AN INTRODUCTION*, 29–30 (8th ed., 2012). The New York Police Department, arguably the nation's first organized police department, was established in 1844. *Id.* In fact, it would not be commonplace for police officers to carry weapons—or even to wear uniforms—until the turn of the 20th century. *Id.*

V. CONCLUSION: BEYOND REFORM

The seemingly fundamental question of who is to be subject to police control, and thus to the threat of state violence, has never been answered by evidence or logic or democratic planning. It has been a question whose terms have been set by a systemically engrained instinct as to which lives are worthy of dignity and respect, and which are not. And in a nation built on Native lands, on the backs of Black slaves and brown migrants, the answer to that question has been nothing short of a profound, nigh-irremediable tragedy.

Our legal institutions' unwillingness to change this trajectory is abundantly clear. The law has simply granted line officers virtually limitless discretion and deference.³⁰⁵ It is a deference that has long been at its apex when an officer engages with—stops, frisks, detains, arrests, beats, injures, tortures, kills—a Black suspect.³⁰⁶ And it is a deference that extends far beyond the use of force. The police decide themselves who will receive their attention, for what reason, and to what end. They may freely ignore the white driver traveling at 60-mph in a 40-mph zone; they may then stop the driver of color a few cars behind him for barely exceeding the speed limit. They can peacefully detain the white 12-year-old who carries a loaded firearm into his seventh-grade classroom,³⁰⁷ but preemptively shoot the Black 12-year-old

305. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (holding that the proper standard by which to evaluate excessive-force claims is Fourth Amendment “objective reasonableness”). *See also* John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 *TEX. J. C.L. & C.R.* 155, 161 (2016) (“The end result [of the Court’s post-Graham cases] is a highly deferential standard by which to determine whether use of force is justified; the decision to use deadly force is left almost entirely up to the individual officer, and judges and juries are encouraged to give the officer the benefit of the doubt when deciding if use of deadly force was reasonable.”); Darrell L. Ross, *An assessment of Graham v. Connor, ten years later*, 25 *POLICING* 294, 313 (2002) (concluding, in a study of post-Graham excessive-force claims brought under 42 U.S.C. § 1983, that police prevailed at summary judgment in 73% of cases).

306. *See, e.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 *CAL. L. REV.* 125, 129 (2017) (“Put another way, African Americans often experience [constitutional criminal law] as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures.”).

307. *Cf.* NAT’L CTR. FOR ED. STAT., *Indicator 13: Students Carrying Weapons on School Property and Anywhere and Students’ Access to Firearms* (last updated May 2020), https://nces.ed.gov/programs/crimeindicators/ind_13.asp [<https://perma.cc/DY98-GT5D>]. (finding that “a higher percentage of White students than of Hispanic students and Black students . . . reported carrying a weapon” on or near school property). *Compare* Katie Shepherd, *An unarmed 23-year-old black man died after police stopped him. The Colorado governor wants a new probe.*, *WASH. POST* (June 25, 2020, 6:35 AM), <https://www.washingtonpost.com/nation/2020/06/25/colorado-elijah-mcclain-death/> [<https://perma.cc/6922-2H69>] (“[Elijah] McClain was walking home wearing a ski mask and dancing to music on Aug. 24, 2019, when someone called 911 to report him as suspicious. Police tried to stop him, but he kept walking, insisting he had done nothing wrong and had a right to continue his walk. Then, officers tackled him, placed him in a chokehold and restrained him. A paramedic who arrived

who, in an open-carry state, dares to play with a BB gun in a public park.³⁰⁸ In each of these cases, the law will not second-guess an officer's "split-second" decision. This is not a defect in the law of policing. It *is* the law of policing.³⁰⁹

So it takes little effort, as Angela Davis observes, to discern "an unbroken line of racist police killings since the era of slavery."³¹⁰ But it takes little more to discern the more banal—but no less insidious— violence that is inextricable from policing as a practice and as an institution. The millions of Black and brown Americans who have been stopped in the street, thrown up against a wall, groped and prodded, simply for being outdoors. The millions more Black and brown children for whom a bad day at school might mean a misdemeanor conviction, because embedding police officers in public schools has proven a quicker fix than properly funding them. The thousands of cities and towns and neighborhoods in which the police are not a lifeline but an unveiled threat: an ever-present occupying force, like an American drone hovering over Yemen, waiting for the right moment at which to rain death from the sky. One might wonder how mere reform could suffice.

Indeed, in 2023, reform still seems far too little for which to ask. A merciless pandemic has decimated countless Black and brown lives and livelihoods. The killings of Ahmaud Arbery, George Floyd, Breonna Taylor, Tony McDade, and countless others led only three years ago to the largest series of protest actions in American history. These protests against police violence were met, in a particularly grotesque bit of irony, with more police violence. Marchers were gassed, beaten, maimed, shot, arrested without cause, and detained extrajudicially by nameless and badge-less federal agents. President

on the scene later injected him with ketamine to subdue him.") with Jason Silverstein, *Cops bought Dylann Roof Burger King after his calm arrest: report*, N.Y. DAILY NEWS (June 23, 2015, 4:03 PM), <https://www.nydailynews.com/news/national/dylann-roof-burger-king-cops-meal-article-1.2267615> [<https://perma.cc/4PXC-5MU7>] ("After about 16 hours on the run, the admitted mass murderer complained to cops arresting him in Shelby, N.C., that he was hungry, so police got him food from the nearby fast food joint . . .").

308. See Shaila Dewan & Richard A. Oppel, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES, Jan. 23, 2015, at A1 ("Within two seconds of the car's arrival, Officer Loehmann shot Tamir [Rice] in the abdomen from point-blank range, raising doubts that he could have warned the boy three times to raise his hands, as the police later claimed.").

309. Cf. Carbado, *supra* note 306, at 129 (arguing that the Court's effective "legalization of racial profiling" under the Fourth Amendment "facilitates the precarious line between stopping black people and killing black people").

310. Montse Reyes & Ramona Parrotta, *'From Ferguson to Palestine' to Santa Cruz*, CITY ON A HILL PRESS (Jan. 2015), <https://www.cityonahillpress.com/2015/02/06/from-ferguson-to-palestine-to-santa-cruz/> [<https://perma.cc/N662-XMQZ>].

Trump and members of his party called for, and endorsed, this kind of brutal suppression of dissent.³¹¹

But in 2015, as Chicago's Black community and its allies sought justice for Laquan McDonald—yet another of their children taken too soon and without reason—reforming the police seemed the only viable, achievable solution. That the Chicago Police Department would continue to exist was beyond question. Instead, the debate concerned how and by whom its officers would be disciplined and regulated. This was true despite the more radically transformative convictions of many of those at the table.³¹²

For a great many other communities, the parameters of similar debates are likely to remain much as they were in Chicago. Even the tens of millions of feet that marched for Black lives in 2020 were unable to overcome Congressional recalcitrance and gridlock. But while public pressure might not lead to a legislative fix, it can—as Chicago's example illustrates so vividly—more than suffice to force a state attorney general's hand. Section 1983 pattern-or-practice litigation thus provides those communities with an alternative, and obtainable, path forward.

Even if it is for now the only possible solution, reform as such should not be conceived of as a permanent one. Reform should be considered instead a temporary but powerful salve, a means of preventing needless death and injury by imposing further constraints on the use of state violence. In that way reform can provide further support for a fundamental abolitionist hypothesis: that a real and lasting public safety requires far less violent coercion, not more. So, as activists continue to press for a reimagined model of public safety, there is much work to be done in reining in the present one. One should hope, then, that the states might heed Illinois' call.

311. See, e.g., Tom Cotton, Opinion, *Send In the Troops*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html> [<https://perma.cc/Q6WN-2J9H>].

312. Indeed, many of the groups involved in negotiating the consent decree were explicitly abolitionist. As Page May, a founder of the radical Black female collective Assata's Daughters, told *The New York Times Magazine* in 2016, "We are fighting for a world in which the police are obsolete." Ben Austen, *Chicago on the Edge*, N.Y. TIMES MAG., Apr. 24, 2016, at 47.