

Vindicating Civil Rights Under 42 U.S.C. § 14141: Guidance From Procedures in Complex Litigation

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I. Introduction

It is no longer possible to be dismissive of police misconduct and brutality, particularly when caused by systemic patterns or practices. Some facts are beyond dispute. Former New York police officer Justin Volpe pleaded guilty to beating and sodomizing Haitian immigrant Abner Louima with the handle of a toilet plunger and was sentenced to thirty years in prison.¹ Amadou Diallo had no prior criminal record and was completely unarmed and in his home when he was killed by nineteen bullets after being shot at forty-one times by police officers; these officers have been acquitted of all charges.² In Los Angeles, tape-recorded interviews of Detective Mark Fuhrman during the O.J. Simpson proceedings revealed that Fuhrman had made derogatory comments about minorities and women, routinely singled out African Americans for arrest, planted evidence to convict people, lied in court to win convictions and used excessive force against sus-

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¹ U.S. COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY ch. 1 (Aug. 2000), <http://www.usccr.gov/pubs/nypolice/ch1.htm> (last visited Feb. 25, 2003). The United States Commission on Civil Rights issued a report following a hearing conducted in New York City to examine current police practices. The Commission is an independent, bipartisan, fact-finding agency of the Executive Branch, established under the Civil Rights Act of 1957. U.S. COMM'N ON CIVIL RIGHTS HOME PAGE, <http://www.usccr.gov/about/main.htm> (last visited Feb 25, 2003).

² U.S. COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY ch. 1 (Aug. 2000), <http://www.usccr.gov/pubs/nypolice/ch1.htm> (last visited Feb. 25, 2003).

pects.³ In Riverside County, a videotape showed two sheriff's deputies beating a man and a woman suspected of being undocumented immigrants. After their failure to understand the deputies' commands, one of the officers remarked, "bunch of wetbacks, huh?"⁴ In another instance of abject racism and depravity, a unit within the Reynoldsburg, Ohio police department called itself the "S.N.A.T." squad, for "Special Nigger Arrest Team."⁵ Instances such as these are not uncommon and often result from a systemic pattern or practice of acts or omissions.

In order to address institutional violation of civil rights, Congress enacted 42 U.S.C. § 14141, which authorizes the Attorney General to seek injunctive relief from unconstitutional patterns or practices by law enforcement officials.⁶ Part II of this note briefly surveys barriers to traditional remedies for civil rights violations and identifies the basic legislative motivation behind 42 U.S.C. § 14141. Part III discusses some complexities in initial cases brought under § 14141. Part IV examines key aspects of the resolution of § 14141 cases: approval and release of jurisdiction over a consent decree and the employment of a monitor to oversee compliance with the decree. This note proposes that courts faced with resolution of § 14141 cases look for guidance to procedures successfully used in complex litigation, with particular focus on provision of notice and opportunity to be heard, appointment and employment of a special master, as well as approval of, and release of jurisdiction over, consent decrees.

³ U.S. COMM'N ON CIVIL RIGHTS, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination, Volume V: The Los Angeles Report* (Feb. 2001), <http://www.usccr.gov/pubs/larpt/chapter1.htm> (last visited Feb. 25, 2003).

⁴ *Id.*

⁵ H.R. REP. NO. 102-242, 102d Cong., 1st Sess., at 406, 1991 WL 206794, at *136 (1991).

⁶ Section 14141 provides:

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

42 U.S.C. § 14141 (1994).

II. Legislative Motivation Behind 42 U.S.C. § 14141: to Provide Formerly Unavailable Relief in Light of Barriers to Remedying Civil Rights Violations by Law Enforcement Officials

It is crucial to recognize that 42 U.S.C. § 14141 was intended to “close [the] gap in the law” created by the modern equitable standing doctrine, which forecloses an individual from obtaining injunctive relief against police misconduct absent a likelihood of future harm to that particular plaintiff.⁷ Congress intended to confer standing upon the United States Attorney General to obtain civil injunctive relief against governmental authorities for unconstitutional patterns or practices.⁸

The House Committee on the Judiciary recognized that federal criminal civil rights laws, 18 U.S.C. §§ 241 and 242, have not afforded the Department of Justice (DOJ) authority to seek civil injunctive relief from systemic patterns or practices of police misconduct.⁹ In *United States v. City of Philadelphia*, the Third Circuit denied the Attorney General standing to pursue civil injunctive relief and dismissed the case, unwilling to read an implied right of civil action into criminal statutes or grant the Executive the power to sue local governments without congressional authorization.¹⁰ The House Committee on the Judiciary stated that this represented “a serious and outdated gap in the federal scheme for protecting constitutional rights.”¹¹ Commentators have observed that, in addition to the inability to seek injunctive relief, the success of criminal actions under §§ 241 and 242 is hindered by the specific-intent requirement.¹² These statutes not only require that a police officer’s actions had the effect of a deprivation of consti-

⁷ *United States v. City of Columbus*, No. 2-99 CV 1097, 2000 WL 1133166, at *3 (S.D. Ohio Aug. 3, 2000) (quoting H.R. REP. NO. 102-242, 102d Cong., 1st Sess., at 406, 1991 WL 206794, at *138 (1991)). The magistrate judge in *City of Columbus* observed that, although § 14141 itself has no direct legislative history, the history of the Omnibus Crime Bill Act, never actually promulgated, is instructive because it contained a provision nearly identical to § 14141. 2000 WL 1133166, at *3.

⁸ *Id.*

⁹ H.R. REP. NO. 102-242, 102d Cong., 1st Sess., at 406, 1991 WL 206794, at *137 (1991) (citing *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980)).

¹⁰ *United States v. City of Philadelphia*, 644 F.2d 187, 190 (3d Cir. 1980). The DOJ had engaged in an extensive investigation of the Philadelphia Police Department that revealed widespread misconduct and institutional problems.

¹¹ H.R. REP. NO. 102-242, 102d Cong., 1st Sess., at 406, 1991 WL 206794, at *137 (1991).

¹² See Marshall Miller, Note, *Police Brutality*, 17 YALE L. & POL’Y REV. 149, 153 (1998). Marshall Miller provides a thorough discussion of the legislative background of § 14141 as well as these traditional barriers to a civil rights remedy, noted here for context and review.

tutional rights, but also that the officer intended the deprivation.¹³ In addition, the Department of Justice's (DOJ's) policy decision to defer to local authorities decreased the number of criminal investigations of complaints against officers.¹⁴

Criminal prosecutions by local authorities theoretically afford remedy for assault, battery, manslaughter or murder, but prosecutions are extremely rare for a number of reasons. Evidentiary factors contribute to the difficulty.¹⁵ Since victims of police misconduct are often felons, criminal suspects, or other marginalized members of society, they lack credibility before a jury.¹⁶ In many cases, the only other witnesses are fellow police officers, who often invoke a "code of silence."¹⁷ Structural barriers also contribute to the difficulty of local authorities' ability to remedy civil rights violations. Prosecutors are hesitant to bring charges against police officers, upon whom they depend.¹⁸ A recent example of this phenomenon is one officer, Andrew Teague, who was accused of perjury in court and fabricating evidence that led to the dismissal of a murder charge.¹⁹ Though the Los Ange-

¹³ See *United States v. Guest*, 383 U.S. 745, 753-54 (1966) (applying specific-intent requirement in § 241 suit); *Screws v. United States*, 325 U.S. 91, 101 (1945) (applying specific-intent requirement in § 242 suit).

¹⁴ H.R. REP. NO. 102-242, 102d Cong., 1st Sess., 1991 WL 206794, at *136 (1991); see also Miller, *supra* note 12, at 153-54. Marshall Miller has noted that the DOJ received more than 8,000 complaints and investigated more than 3,000 complaints of police misconduct per year in the late 1980s and early 1990s, but federal prosecutors annually pursued indictments in only fifty to sixty cases. Between 1981 and 1991 in Los Angeles, the DOJ initiated only three prosecutions against police officers during the ten-year period, although, as later demonstrated by the Los Angeles Ramparts scandal, unconstitutional patterns or practices existed.

¹⁵ Miller, *supra* note 12, at 152.

¹⁶ *Id.* at 152 (citing DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 24 (1994)). Juries often may be wary of sending police officers to prison for lengthy periods of time for mistreating a known criminal.

¹⁷ See, e.g., *Brandon v. Holt*, 469 U.S. 464, 467 n.6 (1985); *Kinney v. Weaver*, 301 F.3d 253, 277 (5th Cir. 2002) (observing police chiefs' and sheriffs' employment of "code of silence" prohibiting persons who work in law enforcement from speaking out about other officers' misconduct); Miller, *supra* note 12, at 152 (citing PAUL CHEVIGNY, EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS 51 (1995)).

¹⁸ See *id.* Local authorities have often refused to recognize the existence of a problem. Even after Abner Louima was taken to the bathroom, beaten severely and tortured with the handle of a plunger, and notwithstanding a recent study by Amnesty International reporting an alarming pattern of excessive force by NYPD officers, local authorities initially refused to recognize that the incident represented anything more than an isolated occurrence. *Id.* at 149.

¹⁹ See Mark Curriden, *When Good Cops Go Bad: The Justice Department Has a New Weapon to Fight Police Brutality. The Question Is, How Will the Government Use It?*, 82 A.B.A. J. 62, 64 (May 1996).

les district attorney's office agreed that Teague did commit the alleged offenses, the office decided not to prosecute.²⁰

Congress also recognized that, due to the U.S. Supreme Court's equitable standing doctrine, private individuals lack standing to seek civil injunctive relief in most instances and that damages are an insufficient remedy.²¹ A private plaintiff has standing to seek injunctive relief against unconstitutional patterns or practices only if she can show to a substantial certainty that she will suffer similar injury in the future.²² In *Rizzo v. Goode*, for example, although the district court had found the number of constitutional violations by police officers "unacceptably high" and too frequent to be dismissed as rare, isolated occurrences, the Supreme Court reversed on the grounds that the plaintiffs lacked the requisite personal stake in the outcome to pursue injunctive relief because past exposure to illegal conduct did not demonstrate a likelihood of future harm.²³ In *City of Los Angeles v. Lyons*, the Court overturned a preliminary injunction enjoining a chokehold that carried high risk of death or serious injury, holding that neither the plaintiff's exposure to the chokehold nor the police department's continued use of the chokehold constituted sufficient threat of future harm to confer standing upon the plaintiff.²⁴ The Court denied standing based on constitutional rather than prudential limitations, thereby safeguarding its doctrine from being overturned by Congress.²⁵ Justice Marshall pointed out in dissent that the decision left the city "free to continue the policy indefinitely," so long as it was willing to pay damage awards for the rare successful suits for injuries and deaths that result.²⁶ Along the same lines, the 1991 House Committee on the Judiciary stated:

Currently, changes in a police departments[sic] policy are prompted by successful criminal cases or damage actions; the cumulative weight of convictions or adverse monetary judgments may lead the

²⁰ *Id.*

²¹ H.R. REP. NO. 102-242, 102d Cong., 1st Sess., 1991 WL 206794, at *137.

²² See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1396 (2000) (citing *Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974)).

²³ 423 U.S. at 372-73.

²⁴ 461 U.S. 95, 105 (1983).

²⁵ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Congress may override the Court's prudential standing limitations, but it may not legislate around Article III standing requirements.

²⁶ *Lyons*, 461 U.S. at 113 (Marshall, J., dissenting).

police leadership to conclude that change is necessary. This is an inefficient way to enforce the Constitution and is not always effective. Some police departments have shown they are willing to absorb millions of damage payments per year without changing their policies.²⁷

Damages awards are also a rare and insufficient remedy because juries are reluctant to impose heavy damage awards against working class officers.²⁸ Even if a § 1983 plaintiff proves commission of the offense, the defendant may still avoid liability if he establishes a good faith belief in the reasonableness of his actions.²⁹ Moreover, state and local laws often indemnify officers, so offending officers have no economic incentive to change their behavior because a civil suit has no economic impact on them.³⁰

The Rodney King incident and ensuing national outcry, particularly by minorities, compelled congressional action.³¹ Subsequent to the Rodney King incident, the Police Accountability Act was incorporated into the House Omnibus Crime Bill as Title XII.³² Title XII authorized the Attorney General to sue for injunctive relief,³³ but the Crime Bill never reached President Bush Senior due to a filibuster by Senate Republicans and the threat of veto.³⁴ The 103d Congress reconsidered the issue and drafted the Violent Crime Control and Law

²⁷ H.R. REP. NO. 102-242, 102d Cong., 1st Sess., 1991 WL 206794, at *138 (1991).

²⁸ *Federal Response to Police Misconduct: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 17 (1992) (statement of Judge John Newman); Miller, *supra* note 12, at 155.

²⁹ Jon O. Newman, *Suing The Lawbreakers: Proposals to Strengthen The Section 1983 Damage Remedy For Law Enforcers' Misconduct*, 87 YALE L.J. 447, 459 (1978); see 42 U.S.C. § 1983.

³⁰ See Miller, *supra* note 12, at 156.

³¹ H.R. REP. NO. 102-242, 102d Cong., 1st Sess., 1991 WL 206794, at *135-36 (1991). In considering the need for legislation that confers standing to pursue injunctive relief on the Attorney General, the House Subcommittee on Civil and Constitutional Rights held two days of hearings and the report of the House Committee on the Judiciary specifically referred to the Rodney King incident and to alleged misconduct in Boston, New York City and Reynoldsburg, Ohio. In the hearings before the subcommittee, Professor James Fyfe, a sixteen-year veteran of the NYPD, stated that the King incident was no aberration and that "there exists in LAPD a culture in which officers who choose to be brutal and abusive are left to do so without fear of interference." *Id.* at *135. The committee report reviewed, among other things, the findings of the Independent Commission on the Los Angeles Police Department, headed by former Deputy Attorney General and Deputy Secretary of State Warren Christopher.

³² H.R. 3371, 102d Cong. (1991); H.R. REP. NO. 102-1085, at 149-50 (1992).

³³ H.R. CONF. REP. NO. 102-405, at 223-24 (1991).

³⁴ Miller, *supra* note 12, at 164.

Enforcement Act of 1993, which included a provision giving the Attorney General authorization to pursue injunctive relief for patterns of police misconduct.³⁵ The final enacted version included this provision, codified at 42 U.S.C. § 14141.³⁶

III. Section 14141 Enforcement

A. Initial Cases

The methodology of the DOJ has been to investigate and try to negotiate consent decrees,³⁷ rather than to pursue litigation. The DOJ's "strategy has been one of negotiation with resort to litigation only when efforts at conciliatory resolution fail."³⁸ As of August 2001, the DOJ was investigating police departments in at least fourteen cities.³⁹ Based on these investigations, the DOJ has initiated lawsuits against at least five state and local governments.⁴⁰

The first case was *United States v. City of Pittsburgh*, brought against the Pittsburgh police force in 1996, in response to the killing of an African American businessman by police officers and a subsequent class action brought by community leaders and the American

³⁵ S.1488, 103d Cong. (1993); Miller, *supra* note 12, at 164.

³⁶ Pub. L. No. 103-322, tit. XXI 108 Stat. 2071 (1994).

³⁷ A consent decree is a negotiated settlement of a case brought in equity, enforceable by contempt. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 518 (1986). It is a hybrid between a contract negotiated at arm's length and a judicial order. *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975). Consent decrees have historically been entered in antitrust cases, and are common to other suits affecting public policy, including environmental cases, institutional reform litigation and school and housing desegregation suits. Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 888 (1984). For instance, as of 1995, an estimated 70% of government antitrust cases were settled by consent decree. Lloyd C. Anderson, *United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 ANTITRUST L.J. 1, 4 (1996) (citing Stephen Squeri, *Government Investigation and Enforcement: Antitrust Division*, in 36TH ANN. ANTITRUST L. INST. 519, 564 (1995)). Consent decrees are common in Title VII class actions as well, because settlements save the parties the time, cost and emotional difficulty of large-scale litigation, and because they complement public law cases. Schwarzschild, *supra*, note at 898-99.

³⁸ *Nat'l Congress for Puerto Rican Rights v. City of New York*, 75 F. Supp. 2d 154, 166 (S.D.N.Y. 1999)

³⁹ *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 12 (D.D.C. 2001). The district court observed that cities under investigation include: Buffalo, New York; Charleston, West Virginia; Eastpointe, Michigan; Los Angeles, California; New Orleans, Louisiana; New York, New York; Orange County, Florida; Prince George's County, Maryland; Riverside, California; and Washington, D.C.

⁴⁰ *Id.*

Civil Liberties Union (ACLU).⁴¹ A consent decree was entered into by the city.⁴² The detailed forty-page decree requires the city, among other things, to institute a computerized “early-warning system” to flag problem officers; mandates that officers write detailed reports each time they use force, perform searches or stops; requires that all complaints filed against officers are investigated and filed; and establishes procedures for reviewing officers’ performance, complaints against them, arrests, and other job functions.⁴³

The consent decree that resulted from the second suit, *United States v. City of Steubenville*, and subsequent consent decrees were modeled after *City of Pittsburgh*.⁴⁴ In New Jersey and in Highland Park, Illinois, parties also negotiated settlements through imposition of a court-authorized consent decree.⁴⁵ The DOJ’s focus has been on implementation of particular policies rather than attainment of statistical goals.⁴⁶ To this end, the DOJ has negotiated consent decrees and memoranda of agreement with the other cities under investigation.⁴⁷

In *United States v. City of Columbus*,⁴⁸ the magistrate rejected the defendant city’s challenge to § 14141’s constitutionality. The magistrate concluded that under the test set forth by the U.S. Supreme Court in *City of Boerne*, § 14141 was a valid exercise of congressional authority under the Fourteenth Amendment.⁴⁹ The United States al-

⁴¹ Gilles, *supra* note 22, at 1405-06.

⁴² See *id.* (citing Press Release, Dep’t of Justice, Justice Department Reaches Agreement with Pittsburgh Police Department, at <http://www.usdoj.gov/opa/pr/1997/February97/083cr.htm> (Feb. 26, 1997)).

⁴³ See Gilles, *supra* note 22, at 1406 (citing *United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa. Apr. 16, 1997)).

⁴⁴ *Id.* (citing *United States v. City of Steubenville*, No. C2-97-966 (S.D. Ohio Sept. 3, 1997)).

⁴⁵ *Grand Lodge*, 185 F. Supp. 2d at 9; see U.S. Dep’t of Justice, Settlements and Court Decisions: Conduct of Law Enforcement Agencies, at <http://www.usdoj.gov/crt/split/findsettle.htm#Settlements> (last visited Feb. 27, 2003).

⁴⁶ Miller, *supra* note 12, at 190. Marshall Miller has observed that in order to terminate the decrees, the defendant municipalities must demonstrate that they have established the required procedures, not that they have reduced the number or frequency of rights violations. This may be just as well, because available statistics are poor indicators of the level of police misconduct, and the institutional nature of the changes indicates that the changes will remain in place even after the decrees have expired.

⁴⁷ See U.S. Dep’t of Justice, Settlements and Court Decisions: Conduct of Law Enforcement Agencies, at <http://www.usdoj.gov/crt/split/findsettle.htm#Settlements> (last visited Feb. 27, 2003).

⁴⁸ No. CIV.A.2:99 CV 1097, 2000 WL 1133166, at *10 (S.D. Ohio Aug. 3, 2000).

⁴⁹ *Id.* at *8-9 (S.D. Ohio Aug. 3, 2000) (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). The magistrate concluded that, in view of the drafters’ intent to close the gap in the law left by the Court’s hostility to injunctive relief in § 1983 actions, § 14141 is suffi-

leged that officers of the Columbus Division of Police have subjected individuals to excessive force, false arrests and charges, and improper searches and seizures and that the defendant city has tolerated the conduct by failing to implement adequate policies, training, supervision, monitoring and incident investigation procedures.⁵⁰ Fourteen United States Representatives and the Grand Lodge of the Fraternal Order of the Police filed motions for leave to participate as *amici curiae*, granted by the district court in November 2000.⁵¹

In Los Angeles, the facts seem to speak for themselves. In 1991, the Independent Commission on the Los Angeles Police Department, formed in the wake of the Rodney King beating, identified forty-four "problem officers" in the police department, all with six or more complaints of excessive force or improper tactics filed against them between 1986 and 1990.⁵² As of late 1995, of those forty-four officers, three had been fired, ten had quit, nine had been promoted, ten were still on patrol duty and two had actually killed suspects while on duty.⁵³ The Independent Commission on the Los Angeles Police Department, cited by the 1991 House Judiciary Committee, concluded that "there is a significant number of officers in the LAPD who repetitively use excessive force against the public."⁵⁴ Moreover, the conduct of these officers was well known to LAPD management, who condoned the behavior through a pattern of lax supervision and inadequate investigation of complaints.⁵⁵ *United States v. City of Los Angeles*⁵⁶ was initiated in November 2000. The DOJ filed a § 14141 action against the City of Los Angeles, the Los Angeles Police Department and the City's Board of Police Commissioners, alleging the police department had engaged in a pattern or practice of using excessive force, falsely arresting persons, and improperly stopping, searching and seizing people in Los Angeles.⁵⁷ The parties have since negotiated a consent decree.⁵⁸

ciently congruent and proportional to the constitutional harm identified in the legislative history.

⁵⁰ *Id.* at *1.

⁵¹ *United States v. City of Columbus*, 2000 WL 1745293, at *1 (S.D. Ohio Nov. 20, 2000).

⁵² Curriden, *supra* note 19, at 64.

⁵³ *See id.*

⁵⁴ H.R. REP. NO. 102-242, 102d Cong., 1st Sess., 1991 WL 206794, at *135 (1991).

⁵⁵ *Id.*

⁵⁶ No. CV 00-11769(GAF)(JWJx), 2001 WL 314976, 2001 U.S. Dist. LEXIS 1747 (C.D. Cal. Feb. 16, 2001).

⁵⁷ *Id.* at *1

⁵⁸ Consent Decree, *United States v. Los Angeles*, No. CV 00-11769(GAF) (C.D. Cal. June

B. Some Obstacles that § 14141 Overcomes

Section 14141 empowers the Attorney General to pursue injunctive relief when he “has reasonable cause to believe that a violation . . . has occurred.”⁵⁹ In addressing similar statutory language, lower courts have held the Attorney General’s determination of reasonable cause to be beyond judicial review.⁶⁰ The Supreme Court has recognized that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”⁶¹ In view of the liberal pleading requirement of Federal Rule of Civil Procedure 8(a), allegations of misconduct need only be accompanied by facts that could support a pattern or practice claim.⁶² As a result, the Attorney General will have ready access to discovery through the filing of a complaint detailing repeated incidents of police abuse.⁶³ Indeed, the magistrate in *City of Columbus* concluded that liberal rather than heightened pleading standards apply and that “the complaint is not inadequate for failure to include factual or evidentiary detail best left to the discovery process.”⁶⁴

When a specific unconstitutional police policy can be identified, federal courts need only enjoin the implementation of the policy. For example, in *City of Los Angeles v. Lyons*, the district court had issued a preliminary injunction prohibiting the use by a police officer of a potentially lethal chokehold except when threatened with death or serious bodily injury.⁶⁵ Similarly, when the incidents of misconduct are the result of inadequate training, courts may fashion equitable relief accordingly.⁶⁶

Negotiation of consent decrees moves the burden of designing remedial relief to litigating parties, and parties may reach accord without judicial intervention.⁶⁷ As a practical matter, consent decrees

15, 2001), <http://www.usdoj.gov/crt/split/documents/laconsent.htm> (last visited May 2, 2003).

⁵⁹ 42 U.S.C. § 14141(b).

⁶⁰ See Miller, *supra* note 12, at 180.

⁶¹ Heckler v. Chaney, 470 U.S. 821, 831 (1985).

⁶² See FED. R. CIV. P. 8(a).

⁶³ See Miller, *supra* note 12, at 181.

⁶⁴ No. CIV.A.2:99 CV 1097, 2000 WL 1133166, at *9 (S.D. Ohio Aug. 3, 2000).

⁶⁵ 461 U.S. 95, 99-100 (1983).

⁶⁶ Davis v. Mason County, 927 F.2d 1473, 1482-83 (9th Cir. 1991) (holding that deprivation of plaintiff’s Fourth Amendment rights was direct consequence of Mason County’s failure to adequately train its deputies).

⁶⁷ Miller, *supra* note 12, at 183.

would conserve the DOJ's resources.⁶⁸ The less the DOJ is tied up in litigation, the more it can further investigate nationally and oversee implementation of decree provisions. Moreover, negotiation as opposed to litigation may provide for more peaceful relations with the defendant municipality. Municipal and police officials have an opportunity not only to provide support for the implemented provisions, but also to foster community confidence rather than antagonism. For example, in *City of Pittsburgh*, both Mayor Murphy and Police Chief Robert W. McNeilly expressed support for the consent decree.⁶⁹

If positive attitudes, humility and statistics are any indication of success, the District of Columbia has demonstrated that it is possible to address potentially unconstitutional patterns and practices without compromising quality law enforcement.⁷⁰ In an unprecedented and noble act of outreach, D.C. Mayor Williams and Police Chief Ramsey on their own initiative contacted the DOJ to request the Civil Rights Division's comprehensive investigation of excessive force.⁷¹ Together, they implemented reforms without the aid of the court and without protracted and expensive litigation, thereby instituting reforms similar to other cities without the transaction costs.⁷² Attorney General Ashcroft observed that "[t]hese reforms have been implemented without impairing the ability of the police department to fight crime. In fact, last year we saw a decline in the number of murders and in the crime indexed in the District of Columbia."⁷³ Mayor Williams noted that "[c]rime in [D.C.] is at its lowest point in three decades, proving that community policing and resident partnerships can and do make a difference."⁷⁴ Officer-involved shootings fell 78% from 1998 to 2000, and citizen complaints of excessive force fell 36% from 1999 to 2000.⁷⁵ Chief Ramsey added that "the memorandum of agreement . . . requires monitors, both internal and external, who will track our progress. This process is an open book. We will be held accountable not

⁶⁸ *Id.* at 187.

⁶⁹ See Marylynn Pitz & John M. R. Bull, *Court Oks City Police Reform Agreement: Settles U.S. Suit Charging Patterns of Abuse*, PITTSBURGH POST-GAZETTE, Apr. 17, 1997, at C1.

⁷⁰ See U.S. Dept. of Justice, Attorney General News Conference with D.C. Mayor Anthony Williams and D.C. Police Chief Charles Ramsey (June 13, 2001), at <http://www.usdoj.gov/crt/split/mpdressconf.htm> (last visited May 2, 2003).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* Ashcroft stated, however, that if, for some reason, compliance is not forthcoming, the memorandum of understanding provides that the DOJ will be able to seek enforcement through the court system.

⁷⁴ *Id.*

⁷⁵ *Id.*

only to the Justice Department, but also to the community for how we perform.”⁷⁶

C. Some Complexities in § 14141 Cases

1. Construction of “pattern or practice” and relation to 42 U.S.C. § 1983

There is little or no explicit legislative guidance in interpretation of “patterns or practices,” but principles may be derived from other contexts and from case studies in the 1991 Judiciary Committee Report. The U.S. Supreme Court has held that in Title VII, the “pattern or practice” language is not a term of art and words reflect their usual meaning.⁷⁷ Courts have emphasized that each “pattern or practice” case must stand on its own facts.⁷⁸ In general, courts have interpreted the term “pattern or practice” broadly.⁷⁹ A plaintiff in a “pattern or practice” case may rely solely on disparate impact, whereas under the Fourteenth Amendment and many civil rights statutes, a plaintiff must prove disparate treatment in order to prove discrimination.⁸⁰ The Supreme Court has held that plaintiffs can make out a prima facie case of “pattern or practice” discrimination simply through the introduction of statistical evidence.⁸¹ Since statistical evidence is sufficient proof of a “pattern or practice” of discrimination, plaintiffs need not prove any overt institutional policy to satisfy the *Teamsters* definition.

Though it may provide guidance in interpretation, § 1983 case law should not be binding on the courts, as supported by the congressional decision to use the term “pattern or practice,” rather than “custom” from § 1983 case law.⁸² In addition, the absence of limiting adjectives such as “continuing,” “widespread,” and “persistent” suggests that proving a “pattern or practice” of police misconduct should be easier under § 14141.⁸³ One district court has addressed the interaction between § 1983 and § 14141 to some extent.⁸⁴ In a class action

⁷⁶ See U.S. Dept. of Justice, Attorney General News Conference with D.C. Mayor Anthony Williams and D.C. Police Chief Charles Ramsey (June 13, 2001), at <http://www.usdoj.gov/crt/split/mpdpressconf.htm> (last visited May 2, 2003).

⁷⁷ *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977).

⁷⁸ See Miller, *supra* note 12, at 171.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308-09 (1977).

⁸² See Miller, *supra* note 12, at 166.

⁸³ See *id.*

⁸⁴ See *Nat'l Cong. for Puerto Rican Rights v. City of New York*, 75 F. Supp. 2d 154

brought pursuant to 42 U.S.C. § 1983 by African American and Latino individuals in New York, the district court held that there was no danger of inconsistent rulings simply because the DOJ commenced investigations simultaneously.⁸⁵ The district court stated that the statutory authority under which the federal investigations were proceeding was distinct from the class action brought under 42 U.S.C. § 1983.⁸⁶ The court further stated that if the DOJ were to initiate an action, principles of *res judicata* and collateral estoppel would ensure against inconsistent rulings.⁸⁷ According to the district court's treatment of federal investigations versus individual actions, no danger of inconsistent adjudication arises from the mere fact of simultaneous proceedings alone.

The 1991 Judiciary Committee Report, which dealt with § 14141's virtually identical predecessor, suggests that a "pattern or practice" need not be based on extensive evidence of systematic repeated violations.⁸⁸ The committee stated that "authority is needed . . . to address patterns or practices such as the lack of training, or the routine use of deadly chokeholds, or the absence of a monitoring and disciplinary system."⁸⁹ The report cited actual cases involving acts or omissions that could constitute patterns or practices in illustrating the potential applicability of § 14141 to situations where relief formerly was unavailable. For instance, *Davis v. Mason County*⁹⁰ involved a § 1983 claim arising from four incidents of excessive force by police officers during routine traffic stops within a nine month period in Mason County, Washington. The Ninth Circuit affirmed the trial court's finding that individual sheriffs had violated the plaintiffs' constitutional rights and held Mason County liable for failure to adequately train its officers.⁹¹ The Judiciary Committee stated that § 14141 would authorize the court to force Mason County to correct deficient training procedures.⁹²

Likewise, in discussing *Swann v. Goldsboro*, where police offi-

(S.D.N.Y. 1999).

⁸⁵ *Id.* at 166 (rejecting defendants' argument that primary jurisdiction should apply to stay plaintiffs' equitable claims pending resolution of pattern or practice investigations commenced by the DOJ).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ H.R. REP. NO. 102-242, 102d Cong., 1st Sess., at 406, 1991 WL 206794, at *138-39 (1991).

⁸⁹ *Id.*

⁹⁰ 927 F.2d 1473 (9th Cir. 1991).

⁹¹ *Davis*, 927 F.2d at 1479-82.

⁹² H.R. REP. NO. 102-242, 102d Cong., 1st Sess., at 406, 1991 WL 206794, at *138-39 (1991).

cers strangled a young black man to death, the Judiciary Committee stated that under § 14141 the court could have acted to “order remedies for the glaring deficiencies the case highlighted.”⁹³ Evidence at trial indicated that the police officers had engaged in previous incidents involving excessive force without incurring disciplinary action and that the City of Goldsboro had an official policy against investigating incidents of excessive force.⁹⁴ District courts therefore are given minimal interpretive guidance and a good deal of discretion in fact finding.

2. *Commitment and resources of the Attorney General*

The Attorney General’s commitment will also affect the usefulness of § 14141. The DOJ has proceeded with caution, perhaps to ensure that “the first cases are sure, solid cases that help establish good law.”⁹⁵ On the other hand, Paul Chevigny has asserted that “the Justice Department doesn’t like and doesn’t want to take on these cases” and that “[t]he only reason they prosecuted the Rodney King cases . . . [was] to make people think the federal government was doing something.”⁹⁶ The political ideology and commitment of the executive may affect the proactive enforcement of § 14141.⁹⁷ For example, the failure of the Reagan administration to actively enforce the Civil Rights of Institutionalized Persons Act (CRIPA), authorizing the Attorney General to pursue injunctive relief to remedy patterns or practices of constitutional deprivations against institutionalized persons, indicates that a grant of statutory authority to the executive branch does not necessarily elicit enforcement.⁹⁸

Even if the DOJ seeks to proactively enforce § 14141, lack of resources is always an overriding concern. Congress may not direct the Attorney General not to enforce a statute.⁹⁹ Congress may, however, use its spending power to limit funding to the DOJ and to the Civil Rights Division in particular.¹⁰⁰ Since 1993, Congress expanded the duties of the Civil Rights Division but did not increase the budget in

⁹³ *Id.* at *139 (citing 137 F.R.D. 230 (E.D.N.C. 1990)).

⁹⁴ *See id.*

⁹⁵ *See* Curriden, *supra* note 19, at 63 (quoting Deval Patrick, Deputy U.S. Attorney in charge of the Civil Rights Division).

⁹⁶ *Id.*

⁹⁷ *See* Miller, *supra* note 12, at 176.

⁹⁸ *See id.*

⁹⁹ *INS v. Chadha*, 462 U.S. 919, 955 (1983).

¹⁰⁰ Miller, *supra* note 12, at 176 (citing Steven A. Holmes, *Federal Anti-Bias Spending is Inadequate, Groups Say*, N.Y. TIMES, Oct. 8, 1998).

proportion.¹⁰¹ As of 1998, the Special Litigation Section — which assumes primary responsibility for § 14141 enforcement and includes essentially the only people empowered to seek injunctive relief for civil rights violations — did not have any full-time investigators¹⁰² and as of 2000, only twenty-six full- or part-time attorneys were assigned to the Special Litigation Section.¹⁰³ Commentators have recently observed that it is still a long shot to actually get relief, in part because the “department is badly understaffed and is under a hiring freeze.”¹⁰⁴

3. *Judicial attitudes toward structural injunctions*

The past century has witnessed the rise and decline of structural injunctions in civil rights litigation.¹⁰⁵ The height of judicial involvement in community organization was after the U.S. Supreme Court authorized federal district courts to retain jurisdiction over desegregation and fashion appropriate equitable remedies.¹⁰⁶ The use of structural injunctions received academic criticism in the late 1970s and early 1980s.¹⁰⁷ Recent doctrine establishes that with regard to district court injunctions, “the nature of the violation determines the scope of the remedy”¹⁰⁸ and that district courts should take into account the interests of state and local authorities in managing their own affairs.¹⁰⁹ The Court also has been skeptical of structural injunctions, stating that although it is the role of courts to provide relief to claimants who have suffered or will imminently suffer actual harm, “it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”¹¹⁰

¹⁰¹ Miller, *supra* note 12, at 200 n.196 (citing *Oversight of the Civil Rights Division: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. (1997), 1997 WL 10571840, at *1 (statement of Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Division)). Congress expanded the Justice Department’s duties to include prosecution of church arson crimes, enforcement of the Freedom of Access to Clinic Entrances Act, as well as enforcement of § 14141.

¹⁰² See Miller *supra* note 12, at 185.

¹⁰³ See Gilles, *supra* note 22, at 1409-10.

¹⁰⁴ See Curriden, *supra* note 19, at 64.

¹⁰⁵ See Miller, *supra* note 12, at 194-96.

¹⁰⁶ See *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-01 (1955).

¹⁰⁷ See Miller, *supra* note 12, at 195.

¹⁰⁸ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

¹⁰⁹ *Milliken v. Bradley*, 433 U.S. 267, 281 (1977).

¹¹⁰ *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (stating that courts may properly remedy past or imminent official interference with inmates’ presentation of claims to the courts, but it is for the political branches of state and federal governments to manage prisons in such a

Negotiation of consent decrees, which requires the cooperation of state and local authorities in crafting equitable relief, does not implicate the same degree of federalism-based hostility toward judicial intermeddling into local affairs. District courts should not hesitate to actively oversee § 14141 reform upon sufficient indicia of constitutional violations, since “[o]nce a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad.”¹¹¹ Much depends upon the district courts’ proactive involvement in fashioning remedial measures. Although, as discussed, consent decrees in institutional reform litigation have their benefits, they also reduce the involvement of the courts. Since the decrees are often filed the same day as the complaint, trial judges have no opportunity to supervise discovery or oversee proceedings, and since decrees are often afforded deference, trial judges have little practical basis for assessing the fairness or efficacy of the decree.¹¹² In view of the barriers to injunctive relief from civil rights violations, the legislative intent to compensate for the gap in the standing doctrine left by *Lyons* and the fact that a few DOJ attorneys must attempt to bargain for the rightful position of a community, courts are well advised to assume an active stance toward case management, regardless whether the parties negotiate consent decrees.

IV. Guidance From Complex Litigation

This note proposes that district courts faced with § 14141 suits look for guidance to procedures used in complex litigation. Specifically, benefits would arise from appointing a special master to monitor or oversee compliance with the decree provisions and to assist the court by engaging in other specialized duties throughout the process. In crafting the decree, parties should bear in mind the type of decree involved and set forth their intent with particularity, for purposes of clarity upon review and modification, if necessary. Before approval of a decree, notice and opportunity for comment would provide a more complete picture to the court and may prevent protracted litigation, such as later challenges to inadequacy of representation. In addition, antitrust and mass tort litigation impart relevant factors for consideration when determining whether to approve a proposed decree that affects multiple parties and nonparties alike. Toward the

way as to preclude official interference with the presentation of claims).

¹¹¹ *Swann*, 402 U.S. at 15 (holding that if school authorities fail in their obligations in desegregation cases, judicial authority may be invoked).

¹¹² *Miller*, *supra* note 12, at 188.

end of a decree's life cycle, particular considerations arise when it becomes time for the court to release jurisdiction and if it becomes necessary to resume jurisdiction.

A. Employment of Special Masters

This part of the note will discuss the authority for appointment of a special master, the different types of masters that federal courts have employed, some of their uses in institutional reform to date and possible uses in § 14141 cases. Special masters may enable a more efficient and informed disposition of § 14141 cases while reducing the strain on judicial resources, particularly with respect to the managerial, investigative and monitoring aspects of litigation. In addition, special masters may help the parties reach accord and allow for the involvement of nonparties with interests in the litigation.

Federal courts have appointed special masters in order to address overlapping problems of limited judicial resources, shortcomings of the traditional adjudicatory system, and shortcomings of parties and counsel.¹¹³ Courts have employed the services of masters particularly in the most resource-threatening complex litigation, including mass torts (such as actions involving Agent Orange or DDT), antitrust, school desegregation, prison and other institutional reform.¹¹⁴ Special masters have assisted judges in pretrial administration and case management, gathering facts, interrogating parties, conferring with experts, making recommendations or rulings on discovery issues, recommending findings of fact and conclusions of law, promoting joint stipulation of facts, facilitating settlement, framing remedial orders and monitoring the implementation of judicial decrees.¹¹⁵

1. Authority for the appointment of masters

The basic sources of authority for the appointment of special masters include Rules 53 and 70 of the Federal Rules of Civil Procedure, the court's inherent authority and the parties' consent.¹¹⁶ The impact of a special master differs according to what authority the

¹¹³ Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 394-95 (1986).

¹¹⁴ *Id.* at 398-99; Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 WIDENER L. SYMP. J. 235, 249 (1997).

¹¹⁵ Farrell, *supra* note 114, at 237-38, 240-42.

¹¹⁶ David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753, 755 (1984).

court relies upon for appointment. The district court in *Armstrong v. O'Connell* discussed one reason why the authority for appointment matters.¹¹⁷ The critical difference, according to the *Armstrong* court, is that findings of fact in the report of a traditional Rule 53 master would be entitled to a presumption of validity under Rule 53(e)(2), whereas the report and recommendations of a remedial master not appointed under the rule would not be entitled to the same presumption of validity.¹¹⁸

Rule 53 provides that the court in which any action is pending may appoint a special master.¹¹⁹ The rule mandates that reference to a master shall be the exception and not the rule.¹²⁰ In *La Buy v. Howes Leather Co.*, the Supreme Court held that calendar congestion, possibility of a lengthy trial and complexity of issues in an antitrust action were not sufficient justifications for the Rule 53 appointment.¹²¹ Since complexity of issues defines most public law litigation, a district court faced with a § 14141 case should therefore set forth rationales for appointment sufficient to set the case apart from the remainder of the class of institutional reform cases, if it relies on Rule 53.¹²²

The applicability of Rule 70 comes with important limitations. Most relevant to § 14141 is the limitation that Rule 70 is not applicable without a judgment.¹²³ The recent history of implementing reform decrees teaches that parties often seek, and judges benefit from, the appointment of masters early in the process of formulating a remedial plan.¹²⁴ If the court faced with a § 14141 case wishes to appoint a special master earlier in the process, it must therefore look to Rule 53 or to its inherent power for authority.

In addition to the Federal Rules of Civil Procedure, courts have relied on their inherent power in appointing special masters.¹²⁵ The primary source of authority for this inherent power is the U.S. Supreme Court's decision in *Ex Parte Peterson*.¹²⁶ Writing for the Court,

¹¹⁷ 416 F. Supp. 1325, 1336-39 (E.D. Wis. 1976).

¹¹⁸ *Id.*

¹¹⁹ FED. R. CIV. P. 53(a).

¹²⁰ FED. R. CIV. P. 53(b).

¹²¹ 352 U.S. 249, 256-59 (1957).

¹²² See Levine, *supra* note 116, at 800-01.

¹²³ FED. R. CIV. P. 70; Levine, *supra* note 116, at 798-99.

¹²⁴ Levine, *supra* note 116, at 799.

¹²⁵ *Id.* at 788; see, e.g., Ruiz v. Estelle, 679 F.2d 1115, 1169-70 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

¹²⁶ 253 U.S. 300 (1920).

Justice Brandeis affirmed that the courts' inherent power to provide themselves with appropriate instruments required for the performance of their duties includes the authority to appoint persons unconnected with the court.¹²⁷ Judge Irving Kaufman has since asserted that "[o]ver and above the authority contained in rule 53 . . . , there has always existed in the federal courts an inherent authority to appoint masters as a natural concomitant of their judicial power."¹²⁸ It is unclear from the Advisory Committee Notes to Rule 53, however, whether the Committee intended the new rule to replace the inherent authority affirmed by *Peterson* or to leave room for inherent power beyond the terms of Rule 53.¹²⁹ In § 14141 cases, courts therefore should consider appointing masters under both Rule 53 and the court's own inherent power as independent sources of authority.

2. *Appointment of a special master in § 14141 cases: special considerations, limitations and the importance of community confidence*

If the federal court in a § 14141 case considers appointing a master, it should pay particular attention to the mandate in Rule 53(b) that reference to a master shall be the exception and not the rule.¹³⁰ Under *La Buy v. Howes Leather Co.*, it is not sufficient to set forth factors that will distinguish an entire class of cases from the rest of the docket.¹³¹ Appointment under Rule 53 would be appropriate, for instance, when expertise in a nonlegal area is essential for complete relief, when individuals must be evaluated on a case-by-case basis or when parties are unable to develop a remedial plan.¹³² These justifications do not violate *La Buy* because they are not common to all institutional litigation.¹³³

If the court refers to a special master to make recommended findings of fact necessary for liability, a greater showing of exceptional conditions may be required than would be required to sustain a

¹²⁷ *Id.* at 312-13.

¹²⁸ Irving Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 462 (1958).

¹²⁹ Levine, *supra* note 116, at 793. Another problem with reliance on the inherent power is that courts lack guidelines to determine the propriety of an appointment. *Id.* at 789. It is unclear whether the limitations of Rule 53 should apply in the context of appointment under the court's inherent power. *Id.* at 790.

¹³⁰ See FED. R. CIV. P. 53(b).

¹³¹ Levine, *supra* note 116, at 801 (citing 352 U.S. 249, 259 (1957)).

¹³² *Id.* at 801-02.

¹³³ *Id.*

Rule 53 appointment for assisting discovery or remedial measures.¹³⁴ This may be a concern, ultimately for efficiency and economy, since appellate courts have invalidated references and withdrawn appointments for want of exceptional circumstances or on their merits for violation of Article III of the Constitution.¹³⁵ Accordingly, although Rule 53(c) provides for broad powers, in order to steer clear of constitutional challenges the district court should try to ensure parties' consent to the order of reference, limit determination of ultimate issues, and provide for *de novo* review of the master's reports.¹³⁶

Since § 14141 is predicated on a finding of an "unconstitutional pattern or practice," courts should exercise caution when delineating the scope of the masters' role with regard to enforcement and oversight of compliance efforts, in order to avoid challenges that the order of reference improperly abdicates judicial responsibilities. A monitor appointed solely by the parties' agreement invites the same challenges, but with even greater force since such an appointment is external to the procedural safeguards of the federal rules. With regard to monitoring compliance, a consent decree is enforceable by the power of contempt, so the order of reference should not leave too much discretion to the special master in determining whether to impose sanctions. For instance, some courts have left it within the institutional reform master's providence to seek contempt orders himself, which may unnecessarily call into question the master's impartiality and cause overreaching.¹³⁷

The order of reference should ensure that the master stay reasonably within the parameters of the lawsuit at issue. Commentators have observed that in some institutional reform cases, the master is given authority to investigate and determine the constitutionality of other actions not challenged by the original lawsuit.¹³⁸ This is problematic, especially when the master's determinations are made without an opportunity for the defendant institution to be heard in an adversarial proceeding and when the master can enforce compliance via contempt proceedings.¹³⁹

In § 14141 litigation, the parties should be encouraged to find

¹³⁴ Farrell, *supra* note 114, at 249-50.

¹³⁵ *See id.* at 250.

¹³⁶ *See* FED. R. CIV. P. 53(c) (providing that the order of reference to a master may specify or limit powers); Farrell, *supra* note 114, at 251.

¹³⁷ *See* Debra Dobray, *The Role of Masters in Court Ordered Institutional Reform*, 34 BAYLOR L. REV. 581, 591-92 (1982).

¹³⁸ *Id.* at 602-03.

¹³⁹ *Id.* at 603.

someone with unbiased expertise in police procedures and accountability, perhaps with prior experience in settlement of § 1983 actions with knowledge of both parties' sensibilities and legitimate interests. Canons of judicial ethics may apply, so the order of reference should provide for recusal upon becoming aware of a conflict of interest; it should require also that the master not serve as an expert witness for either party in the future or take similar measures to preclude ethical concerns.¹⁴⁰

Magistrate Brazil observed that in recent complex litigation involving Michigan fishing rights, the judge thought it especially important that the parties have confidence in the person who would serve as master, in part because of the emotions permeating the case.¹⁴¹ The need for an appointment that carries the trust of the parties involved is no less vital in the § 14141 context. If a special master, or an analogous person or entity, is appointed to gather and analyze facts or make substantive determinations as to potential claims or degree of compliance with a decree, impartiality and the appearance of impartiality is imperative – particularly because when conducting out-of-court investigations, the master functions without the procedural safeguards that check reliability of reasoning and conclusions.¹⁴²

In the consent decrees and memoranda of agreement so far, most often the DOJ and the defendant city select the monitor responsible for overseeing compliance. Most decrees and memoranda of agreement provide that the parties shall select a monitor or, if unable to agree, that the court shall appoint a monitor among the names of candidates submitted by the parties.¹⁴³ Noticeably absent is the input

¹⁴⁰ Farrell, *supra* note 114, at 277-78. The Los Angeles consent decree provides that the monitor shall not have personal involvement in the last five years with a claim or lawsuit against the defendants. Consent Decree, *United States v. Los Angeles*, No. CV 00-11769(GAF), Part XI, ¶ 159 (C.D. Cal. June 15, 2001), <http://www.usdoj.gov/crt/split/documents/laconsent.htm> (last visited May 2, 2003). The New Jersey decree provides that the monitor shall not testify in any other litigation, issue statements or make findings with regard to acts or omissions of the defendants, except as authorized by the decree. Consent Decree, *United States v. New Jersey*, No. 99 CV-5970(MLC), ¶ 116 (D.N.J. Dec. 30, 1999), <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (last visited May 2, 2003).

¹⁴¹ Brazil, *supra* note 113, at 410.

¹⁴² *Id.* at 418.

¹⁴³ See, e.g., Consent Decree, *United States v. New Jersey*, No. 99 CV-5970(MLC), ¶ 115, (D.N.J. Dec. 30, 1999), <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (last visited May 2, 2003); Consent Decree, *United States v. City of Steubenville*, No. 97 CV-966, ¶ 82 (S.D. Ohio Sept. 3, 1997), <http://www.usdoj.gov/crt/split/documents/steubensa.htm> (last visited May 2, 2003); see also Memorandum of Agreement Between the U.S. Dep't of Justice and the City of Buffalo, ¶ 53 (Sept. 19, 2002), available at http://www.usdoj.gov/crt/split/documents/buffalo_police_agreement.htm (last visited May

of the community stakeholders in appointing the monitor or auditor. The Pittsburgh consent decree provides that “the *City* shall appoint an *independent* auditor who shall report on a quarterly basis the City’s compliance with each provision of this Consent Decree.”¹⁴⁴ With all due respect for the auditor’s hard work and integrity, the provision for appointment seems a paradox; it stands to reason how the auditor is truly independent if appointed by the defendant city under investigation.

In Los Angeles, the city and the DOJ select the monitor, who must have experience as a law enforcement officer, expertise in law enforcement practices or experience as a law enforcement practices monitor.¹⁴⁵ Although experience as a law enforcement practices monitor is not as troublesome, the other terms of selection create at least an appearance of bias to uninvolved civilian stakeholders who had no say in the appointment. This is particularly controversial since the monitor is to have primary responsibility in reporting compliance with the decree to the court, as provided by the decree.¹⁴⁶

Courts should allow an opportunity for community input in appointing a special master. In addressing problems of police brutality, excessive force and racial profiling, scholars have emphasized the need for community representation on civilian advisory councils.¹⁴⁷ Reenah Kim has observed that the uncertain success of § 14141 is due in part to the limited ability of the federal government to utilize local knowledge to improve local police departments.¹⁴⁸ Since the DOJ possesses limited resources and limited ability to call upon local knowledge, courts are well advised to allow nonparties who are nonetheless among the primary stakeholders in the litigation an opportunity to voice their opinions on a proposed order of reference to provide for a better-advised appointment that has the community’s approval.

By allowing for the input of the citizen stakeholders when ap-

2, 2003).

¹⁴⁴ Consent Decree, *United States v. City of Pittsburgh*, No. 97 CV-354, ¶ 70 (W.D. Pa. Feb. 26, 1997), <http://www.usdoj.gov/crt/split/documents/pittssa.htm> (last visited May 2, 2003) (emphasis added).

¹⁴⁵ Consent Decree, *United States v. City of Los Angeles*, No. CV 00-11769 (GAF), Part XI, ¶ 158 (C.D. Cal. June 15, 2001), <http://www.usdoj.gov/crt/split/documents/laconsent.htm> (last visited May 2, 2003).

¹⁴⁶ *Id.* at Part XI, ¶ 173.

¹⁴⁷ See, e.g., Reenah L. Kim, Note, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461 (2001).

¹⁴⁸ *Id.* at 475.

pointing a special master, courts may preclude situations such as in Los Angeles, where civil rights groups sought to intervene to be included as monitors of the consent decrees, fearing that the court-appointed monitor would fail to represent their interests.¹⁴⁹ In *United States v. City of Los Angeles*, the Ninth Circuit upheld the district court's denial of the community groups' and individuals' motion to intervene as of right and reversed the district court's denial of permissive intervention.¹⁵⁰ The Ninth Circuit held that although the community interveners had a protectable interest, they were not entitled to intervention as of right because their interests were not sufficiently impaired by the litigation.¹⁵¹ In particular, the Ninth Circuit reasoned that: the litigation did not prevent individual suits against the city or police officers to address unconstitutional patterns and practices; the litigation did not prevent the community organizations from continuing to work on police reform; and the individuals and community members had not overcome the presumption that the U.S. adequately protected their interests.¹⁵²

In contrast, the Highland Park consent decree that resulted from the DOJ's § 14141 investigation was an outgrowth of a class action and provides that the decree and judgment shall constitute a final resolution of all claims arising out of the incidents alleged in the complaint, whether asserted or not, including claims by the plaintiff class.¹⁵³ The consent decree is therefore expressly binding on the named plaintiffs as well as the plaintiff class. The § 14141 agreements in Los Angeles and Highland Park, taken together, stand for the proposition that the more expressly binding the decree is on the class of stakeholders, the greater the need for allowing notice and opportunity to be heard in light of the possibility of motions to intervene and similar claims of insufficient alignment of interests.

The court in *United States v. City of Los Angeles* recognized the potential for involvement of the community groups and individuals,

¹⁴⁹ See Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 104-05 (2001).

¹⁵⁰ 288 F.3d 391 (9th Cir. 2002).

¹⁵¹ *Id.* at 402; see FED. R. CIV. P. 24.

¹⁵² *Id.* at 402-03. The presumption of adequate representation was not overcome by evidence of President Bush's express opposition to consent decrees between the federal government and local law enforcement and express dislike for this kind of lawsuit.

¹⁵³ Consent Decree, *Bedford v. City of Highland Park*, No. 00-CV-4212, ¶¶ 1-4, 10 (N.D. Ill. Oct. 5, 2000), http://www.usdoj.gov/crt/split/documents/Highland_CD.htm (last visited May 2, 2003).

as well as the police league.¹⁵⁴ The Ninth Circuit held that permissive intervention in § 14141 suits must be granted on a case-by-case basis, focusing on analysis of factors in Rule 24(b), and rejected the notion that intervention for enforcement of a government consent decree is never permissible.¹⁵⁵ The Ninth Circuit acknowledged the interests of the community groups, individuals and police league, notwithstanding the parties' arguments that intervention would slow the process, stating that "the idea of 'streamlining' the litigation . . . should not be accomplished at the risk of marginalizing those -- such as the Police League and the Community Interveners -- who have some of the strongest interests in the outcome."¹⁵⁶ Counsel for the community interveners, Mark Rosenbaum, Legal Director of the ACLU/SC, aptly asserted that "[t]he integrity of the historic consent decree cannot be preserved if the ultimate stakeholders -- the communities who have suffered police abuse time and again -- are locked out of the enforcement process. . . . the people of Los Angeles must be involved in monitoring compliance with the decree."¹⁵⁷

3. *Uses of masters in complex litigation and potential benefits in § 14141 cases: efficiency, independence, delegation of responsibility and humanity*

In complex litigation in the toxic tort context and in institutional

¹⁵⁴ 288 F.3d at 404. The court stated, in relevant part:

If the court had allowed permissive intervention, the Community Interveners would have made proposals in connection with the proposed consent decree. The fact that the Community Interveners may also be interested in the enforcement of the consent decree is not fatal to their permissive intervention request. Because the request was filed before the consent decree was approved, the request should have been analyzed on its own merits without anticipatory consideration of the effect of the proposed decree.

Id.

¹⁵⁵ *Id.* at 403.

¹⁵⁶ *Id.* at 404. On remand, the district court granted the community groups' and individuals' renewed motion for permissive intervention. *United States v. Los Angeles*, No. CV 00-11769(GAF)(RCX), 2002 WL 31288087, at *1 (C.D. Cal. Oct. 7, 2002). The court expressed skepticism regarding the promised benefits of intervention, but conceded that if the interveners provided valuable input and assistance to the monitor and the court, they will have served an important function. *Id.* The court stated, however, that if the interveners proved counterproductive, it would not hesitate to vacate its order permitting intervention. *Id.*

¹⁵⁷ Mark Rosenbaum, Press Release, Ninth Circuit Court of Appeals Requires District Court To Reassess Whether Community Groups and Individuals Should Be Part of LAPD Consent Decree Case, ACLU-SC (Apr. 22, 2002), <http://www.aclu-sc.org/news/releases/20020422ninthcircnstdcre.shtml> (last visited May 2, 2003).

reform cases, masters have served as surrogate judges in limited capacity, pretrial managers, mediators, facilitators of negotiation, investigators of compliance and administrators of remedial decrees.¹⁵⁸ Masters appointed to supervise discovery have exercised the authority of judges to rule on nondispositive motions regarding document production, questions of privilege and how parties will proceed to trial.¹⁵⁹ They also have made preliminary findings of fact necessary to support motions.¹⁶⁰ They are not bound to proceed through formal hearings and argument, however, so they arguably have the capacity to promote efficiency and economy.¹⁶¹ For instance, *In re Agent Orange Product Liability Litigation* involved a special master who engaged in a practice of *ex parte* communications with the parties' express agreement, which proved essential to later settlement negotiations.¹⁶² A special master may become involved in the fact gathering process and develop an understanding of the case that a court constrained by docket congestion may not.¹⁶³ Professor Farrell has observed that one special master in *Agent Orange*, Sol Schreiber, believed he was able to "get into the trenches" during discovery in a way that a judge could not.¹⁶⁴

In a discussion of *City of Quincy v. Metropolitan District Commission*, Magistrate Brazil emphasized the importance of a special master in providing for solutions that involve the public.¹⁶⁵ In *City of Quincy*, a special master was given a broad mandate to investigate, conduct hearings, find relevant facts, analyze possible solutions and draft proposed remedies in the form of an injunction.¹⁶⁶ The master, Professor Charles M. Haar, decided that feasible long range solutions would require the support of the public and of the governmental agencies.¹⁶⁷ Professor Haar's efforts to stimulate public opinion and involve interested citizens in the investigation led to improved com-

¹⁵⁸ Farrell, *supra* note 114, at 256.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* (citing 475 F. Supp. 928 (E.D.N.Y. 1979)).

¹⁶³ *Id.* at 259.

¹⁶⁴ *Id.* Professor Farrell's case studies were based on research and personal interviews with masters and judges conducted at the Federal Judicial Center. *Id.* at 255 n.84.

¹⁶⁵ Brazil, *supra* note 113, at 414-15 (citing CV 138,477 (Mass. Dist. Ct., Norfolk County, filed Dec. 17, 1982)); see also *Special Project-The Remedial Phase in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 812-13 (1978).

¹⁶⁶ Brazil, *supra* note 113, at 415.

¹⁶⁷ *Id.* at 415.

munication and cooperation by the agencies involved, rather than alienation of affected parties, and ultimate agreement with his report and recommended remedies.¹⁶⁸ Magistrate Brazil observed that “public law cases, where a master can affect important policies or social institutions . . . demonstrate an acute need to maximize public confidence in the openness and fairness of the decision process.”¹⁶⁹ Otherwise, disagreement over actions taken by such agents of the court may lead to protracted litigation.¹⁷⁰

In § 14141 cases, special masters could be employed to assist the court in assessing facts, encourage agreement among the parties, encourage nonparty stakeholders to participate, help the parties determine the content of a proposed decree and oversee implementation. In terms of encouraging participation, the Columbia Special Project has observed that although increasing party participation might be thought to slow the remedy formulation process, it frequently has the opposite effect.¹⁷¹ “By provoking simultaneously the efforts of several participants a court protects itself against the failure of any one participant to produce an adequate remedy, and may goad one or more of the others to an at least minimally acceptable effort.”¹⁷² The special master could replace the monitor or auditor in consent decrees entered so far, as well as assume additional roles earlier in the process. In consent decrees so far, the monitor or auditor’s primary responsibility is overseeing compliance and reporting implementation of the agreement.¹⁷³

The fact that the monitor’s report is often the last link between oversight of compliance and the court underscores the need for impartiality and independence. Professor Erwin Chemerinsky, upon independent review of the Police Department’s Board of Inquiry report on the Rampart scandal, specifically recommended creation of an independent commission external to the police department to investi-

¹⁶⁸ *Id.* at 416.

¹⁶⁹ *Id.* at 419.

¹⁷⁰ *See id.* at 405; *see, e.g.*, *United States v. Los Angeles*, 288 F.3d 391 (9th Cir. 2002).

¹⁷¹ *Special Project*, *supra* note 1665 at 812-13.

¹⁷² *Id.*

¹⁷³ *See, e.g.*, Consent Decree, *United States v. Los Angeles*, No. CV-00-11769(GAF), Part XI, ¶¶ 158-59, 173 (C.D. Cal. June 15, 2001), <http://www.usdoj.gov/crt/split/documents/laconsent.htm> (last visited May 2, 2003); Consent Decree, *United States v. New Jersey*, No. 99-CV-5970 (MLC), ¶¶ 115-19 (D.N.J. Dec. 30, 1999), <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (last visited May 2, 2003); Consent Decree, *United States v. City of Pittsburgh*, No. 97-CV-354, ¶ 71 (W.D. Pa. Feb. 26, 1997), <http://www.usdoj.gov/crt/split/documents/pittssa.htm> (last visited May 2, 2003).

gate the extent and nature of police corruption and lawlessness.¹⁷⁴ He further recommended that an outside monitor or auditor with enforcement authority oversee implementation of reform and urged substantial strengthening of the independence of the Inspector General, a position created at the behest of the Independent Commission of the Los Angeles Police Department to oversee administration of discipline within the department.¹⁷⁵

Although consent decrees so far have required that information collected be released to the monitor, the court and the DOJ, the decrees usually do not involve the community in overseeing compliance.¹⁷⁶ Even if police departments are hesitant to allow for direct community review boards, special masters can allow for community voices to be heard through delegating the responsibility of reviewing compliance. Courts may appoint special masters with authority to delegate tasks to civilian advisory boards when monitoring compliance.¹⁷⁷ Review of compliance would then be more streamlined and involve nonparty stakeholders in a fact-finding and consulting capacity, giving the district court ultimate decision-making authority in keeping with Article III, but providing for a more thorough and informed review of compliance.

While some may argue that the cost of special masters is high, courts in § 14141 suits should bear in mind long term efficiencies that the use of masters may provide. The same functions performed by masters – which do not necessarily require discretion left to Article III judges – might otherwise be performed by judges ultimately at a greater cost to taxpayers.¹⁷⁸ Masters who have the parties' trust and who develop expertise throughout the process may prove instrumental to the valid pursuit of settlement negotiations and may serve a vital function in promoting the efficient resolution of cases.

Section 14141 cases are often characterized by allegations of abuse of authority or even physical abuse of victim individuals. As such, regardless of the merits, these suits are highly sensitive to the

¹⁷⁴ Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 555, 646 (2001), earlier version available at http://lawweb.usc.edu/faculty/chemerinsky/rampart_finalrep.html (last visited May 2, 2003).

¹⁷⁵ *Id.*

¹⁷⁶ See Garrett, *supra* note 149, at 101-03.

¹⁷⁷ See, e.g., *United States v. Krizek*, 111 F.3d 934, 943 (D.C. Cir. 1997) (affirming award of fees to special master notwithstanding challenge to provision in order of reference that delegated master's functions to legal assistants where efficient and economical).

¹⁷⁸ Farrell, *supra* note 114, at 275.

communities at issue, both the defendant police departments and the individual stakeholders whose interests are essentially represented by the DOJ. A special master who is able to get in the trenches of the litigation may prove beneficial on a human level. Professor Farrell observes that by appointing a special master, “courts provide litigants in large class action suits with a judicial figure who has the time and interest to talk to them, listen to their problems, commiserate where appropriate, and rule with a compassionate understanding of the humanness of the dispute to be resolved.”¹⁷⁹

B. Proposal of Consent Decrees

1. Basic principles and relevance of parties' intent

When negotiating and reviewing consent decrees, parties and courts must consider whose interests are at stake throughout the stages of implementation, since it is an agreement negotiated at arm's length as well as a judicial order.¹⁸⁰ The parties should bear in mind and identify the type of decree involved. The Supreme Court has stated that, regarding the two types of decrees that parties may enter into, “[t]he distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve supervision of changing conduct or conditions and are thus provisional and tentative. . . .”¹⁸¹ Institutional reform decrees – as in prison reform, school desegregation, and § 14141 suits – are examples of the type of decree that involves changing conduct or conditions.¹⁸² The distinction is relevant for the purpose of determining whether the decree should be readily adaptable to change.

As consent decrees are interpreted according to contract principles, a proposal for a consent decree should be made with an eye toward the potential for review or modification, setting forth with particularity the intent of the parties within the four corners of the agreement. One problem that may arise upon appeal of motions to modify decrees is uncertainty as to the parties' purpose. For instance, in *Rufo*, the parties to the jail reform litigation had agreed that single

¹⁷⁹ *Id.* at 286.

¹⁸⁰ *See supra* note 37.

¹⁸¹ *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 379 (1992) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932)).

¹⁸² *See* David Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo, and Freeman*, 20 HASTINGS CONST. L.Q. 579, 639 (1993).

cells were the plaintiffs' rightful position, but the U.S. Supreme Court inexplicably decided that the plaintiff inmates' rightful position was rather the constitutional floor, which left room for double cells.¹⁸³ Parties to a § 14141 consent decree, police departments and the DOJ, as well as any interveners, should therefore clearly set out the purpose within the four corners of the document, so that one party's bargained-for rightful position is not misinterpreted and given short shrift. A reviewing court would then have more basis for deference to the district court's determination of the parties' intent.

For example, the New Jersey consent decree mandates that, except when suspect-specific, state troopers shall be "prohibited from considering *in any fashion* and *to any degree* the race or national or ethnic origin of civilian drivers or passengers in deciding which vehicles to subject to any motor stop"¹⁸⁴ This imposes arguably a more stringent prohibition on New Jersey state troopers than does the Fourth Amendment as interpreted by the Supreme Court in *Whren v. United States*.¹⁸⁵ The Court in *Whren* held that the constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved, which effectively allows pretextual stops.¹⁸⁶ Thus, if an officer stops a motorist in New Jersey ostensibly for a traffic violation, but the actual reason was simply that the motorist was a young black male in a low income neighborhood at night, the stop would violate the New Jersey consent decree, but not the Fourth Amendment. As such, the parties to the New Jersey decree have apparently raised the bar higher than the constitutional floor, which may be relevant for later review or modification.

¹⁸³ 502 U.S. at 387. The district court had determined the parties' purpose was to provide for single cells, but the Supreme Court stated that if the prison provided a "new facility providing double cells that would meet constitutional standards, it is doubtful they would have violated the decree." *Id.* Professor Levine has explained that unless clearly erroneous, the district court's determination should have prevailed, for the Supreme Court reinterpreted the parties' purpose to provide for a lesser rightful position than agreed upon. *See Levine, supra* note 116, at 640-41.

¹⁸⁴ Consent Decree, *United States v. New Jersey*, No. 99-CV-5970 (MLC), ¶ 26, (D.N.J. Dec. 30, 1999), <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (last visited May 2, 2003)(emphasis added).

¹⁸⁵ 517 U.S. 806 (1996).

¹⁸⁶ *Id.* at 813. The Court held that, although the Constitution prohibits selective enforcement of the law based on race, the constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause, not the Fourth Amendment. Subsequent circuit court decisions have allowed pretextual traffic stops despite arguments that the stop was motivated by racial animus. *See, e.g., United States v. Gillyard*, 261 F.3d 506, 509 (5th Cir. 2001).

2. Notice and hearing

In Title VII actions, rather than immediately approve a consent decree, some courts have held fairness hearings on the proposed decree.¹⁸⁷ This allows participants to make suggestions about the settlement or object to its features, while providing the court a more complete view of the consequences and policy implications of the decree provisions.¹⁸⁸ Similarly, when an action is maintained as a class, the court must grant members of the class an opportunity to appear and object before a settlement can be approved.¹⁸⁹ The distinction between class actions and lawsuits by federal agencies is relevant for purposes of notice and holding a hearing. When the federal government sues to enforce Title VII, for instance, the employer and agency may negotiate, and the court may approve, a consent decree without notice or any formal hearing.¹⁹⁰ The rationale for not holding a hearing is that the suit binds only the government and the employer, while other members of the protected group are not precluded from bringing their own suits.¹⁹¹ That reasoning does not apply to § 14141 suits, however, since recent Supreme Court jurisprudence imposes a prohibitively high bar for injunctive relief in civil rights actions brought under 42 U.S.C. § 1983.¹⁹² In § 14141 actions, police officers and lay citizens alike are beneficiaries of the decree, but only the government and the named defendants are parties.

In class actions maintained under Rule 23(b)(3), notice to class members is required as a matter of due process,¹⁹³ whereas in § 14141 actions no such requirement affords those benefits to nonparty citizens who are nonetheless affected by the decree. The lack of individual capacity to sue for injunctive relief and the absence of procedural safeguards such as those expressly provided by the class action mechanism create all the more reason for courts to hold a hearing on the proposed consent decree. The court should require that notice of the proposed consent decree be published in order to encourage participation by *amicus curiae*. Courts have no incentive to deny *amicus curiae* an opportunity to be heard, as they do not possess authority to

¹⁸⁷ Schwarzschild, *supra* note 37, at 911.

¹⁸⁸ *Id.*

¹⁸⁹ FED. R. CIV. P. 23(e).

¹⁹⁰ Schwarzschild, *supra* note 37, at 916.

¹⁹¹ *Id.* at 916-17.

¹⁹² See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

¹⁹³ See FED. R. CIV. P. 23(c)(2); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974).

nullify a settlement by refusing to consent as an intervener would.¹⁹⁴ In the § 14141 action in *City of Columbus*, the district court observed that “[t]he issues presented by this action are matters of great public interest and concern, both to the parties, to the proposed *amici*, and to the public at large.”¹⁹⁵ In the Los Angeles § 14141 litigation, the district court expressly invited the participation of *amicus curiae*.¹⁹⁶

C. Scope of Judicial Review and Factors to Consider When Approving Consent Decrees

1. Guidance from large scale antitrust and mass tort litigation

In large scale antitrust litigation, as shown by the infamous Microsoft case, a good deal of debate has arisen among courts and commentators over the proper scope of judicial review of consent decrees.¹⁹⁷ Antitrust laws expressly provide for heightened attention before approval of a consent decree. The Antitrust Procedures and Penalties Act (the Tunney Act) imposes additional requirements upon proposals for consent judgments submitted by the United States in civil antitrust suits.¹⁹⁸ Under the Tunney Act, before entering any consent judgment proposed by the United States, the district court must determine whether the entry of such a consent judgment would be in the public interest.¹⁹⁹ In setting procedural guidelines for the public interest determination, the court may appoint a special master and outside consultants or expert witnesses, as well as request and ob-

¹⁹⁴ See Miller, *supra* note 12, at 179 n.173 (citing *United States v. Michigan*, 940 F.2d 143, 163-67 (6th Cir. 1991)).

¹⁹⁵ 2000 WL 1745293, at *1 (S.D. Ohio Nov. 20, 2000) (granting United States Representatives’ and the Grand Lodge of the Fraternal Order of Police’s motion for leave to participate *amicus curiae*).

¹⁹⁶ *United States v. City of Los Angeles*, 2001 WL 314976, at *1 (C.D. Cal. Feb. 21, 2001). The court invited the following parties to submit *amicus* memoranda: Los Angeles Police Protective League, American Civil Liberties Union, Yagman plaintiffs, Los Angeles Command Officers Association, Los Angeles County District Attorney, Los Angeles County Public Defender and Warren Christopher, and Chairman of the Independent Commission on the LAPD. *Id.*

¹⁹⁷ See Anderson, *supra* note 37, at 3-4.

¹⁹⁸ 15 U.S.C. § 16 (2001). For instance, the Tunney Act requires that the United States file with the court a competitive impact statement which provides, among other things, the nature and purpose of the proceeding, a description of the practices or events giving rise to the alleged violation of antitrust laws and an explanation of the proposal for a consent judgment. The Act also requires that the United States furnish such information to any person upon request, as well as publish summaries of the proposal’s terms in newspapers of general circulation where the case was filed.

¹⁹⁹ 15 U.S.C. § 16(e) (2001).

tain the views or advice of any individual, group or governmental agency.²⁰⁰ The court may authorize participation by interested persons or agencies, including *amicus curiae*, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which the court deems appropriate.²⁰¹

The legislative history of the Tunney Act reveals that Congress was motivated by antitrust consent decrees that had failed to provide adequate relief, either because of miscalculations by the DOJ or because of the great influence and economic power wielded by antitrust violators.²⁰² In terms of the amount of deference owed the agency, some courts have held that the Tunney Act's provisions impose an independent obligation on the reviewing court, and do not explicitly defer to the executive agency. "Indeed, it is plain from the statute and its legislative history that a court, rather than being a 'rubber stamp' for the DOJ, is required to act as an independent check on the terms of such decrees."²⁰³

Other courts have applied a far less stringent standard for review of antitrust consent decrees. In *United States v. Microsoft*, District Judge Stanley Sporkin surprised the parties to the litigation by refusing to approve a consent decree agreed upon by the DOJ and Microsoft.²⁰⁴ After arousing considerable debate regarding the scope of his discretion, the case was reversed by the D.C. Circuit.²⁰⁵ In an opinion by Judge Laurence Silberman, the D.C. Circuit held that a district court may reject a proposed decree only if it makes a "mockery of judicial power."²⁰⁶

Courts reviewing § 14141 actions should not explicitly defer to determinations of fairness by the government. Courts that grant virtually automatic approval may be operating on the assumption that

²⁰⁰ *Id.* § 16(f).

²⁰¹ *Id.*

²⁰² *United States v. W. Elec. Co.*, 767 F. Supp. 308, 328-29 (D.D.C. 1991) (citing S. REP. NO. 93-298, 93d Cong., 1st Sess., at 5 (1973); 120 CONG. REC. 36341 (1974); 119 CONG. REC. 24598, 3451 (1973)). The court in *Western Electric* explained that in the legislative history of the Tunney Act, Congress was disturbed by past consent decrees and settlements negotiated under questionable conditions.

²⁰³ *Western Electric*, 767 F. Supp at 328; *see also* *United States v. GTE Corp.*, 603 F. Supp. 730, 740 (D.D.C. 1984) (noting that in light of the history and purpose of the Tunney Act, "it is abundantly clear that the courts were not to be mere rubber stamps, accepting whatever the parties might present").

²⁰⁴ *United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C. 1995).

²⁰⁵ *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995).

²⁰⁶ *Id.* at 1462.

the federal government acts in the public interest.²⁰⁷ In reality, political pressures, in addition to the few lawyers at the DOJ empowered to bring § 14141 suits vis-à-vis the entire nation's backlog of potentially investigation-worthy cases, may create an incentive to settle. Moreover, the fact that § 14141 suits are essentially a matter of local concern that affect entire communities, not just parties to the litigation, counsels in favor of a more comprehensive and less deferential review of decrees. The appointment of a special master agreed upon by the parties early in the proceedings may facilitate a neutral review of the terms of the decree.

Professor Lloyd Anderson has proposed that the public interest standard for judicial review of antitrust consent decrees has been workable and that review should be flexible.²⁰⁸ He has proposed that courts take into account factors such as: the extent to which the decree achieves the relief sought in the complaint; the size of the defendant and complexity of the case; the history of abuse; the extent of litigation prior to settlement; evidence of undue political influence; and the impact of the decree on third parties, the economy and the public at large.²⁰⁹ Many of these considerations are relevant to § 14141 cases.

Settlement of mass tort litigation also is instructive in regard to the considerations involved in approval of consent decrees. Judge William Schwarzer has suggested that when ruling on the dismissal or compromise of a class action, the court must consider and make findings with respect to, among other things: whether notice to members of the class is adequate, taking into account the ability of persons to understand the notice and its significance to them; whether the representation of class members is adequate, taking into account possible conflicts of interest in the representation of class members whose claims differ in material respects from those of other claimants; whether the settlement will have significant effects on potential claims of class members for injury or loss arising out of the same or related occurrences but excluded from settlement; whether the settlement will have significant effects on parties in other actions pending in state or federal courts; and whether the settlement is likely to be fair and equitable in its operation.²¹⁰ These considerations, though formulated

²⁰⁷ Schwarzschild, *supra* note 37, at 918.

²⁰⁸ Anderson, *supra* note 37, at 6.

²⁰⁹ *Id.*

²¹⁰ William W. Schwarzer, Symposium, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 843-44 (1995).

in regard to settlement of class actions under the federal rules, are also relevant in § 14141 litigation. The federal government, like a named plaintiff in a class action, is authorized to bring suit on behalf of a class of persons who claim injury and seek equitable relief from unconstitutional patterns and practices by local law enforcement.

2. *Review of proposed § 14141 consent decrees and conditional approval*

A district court should review § 14141 consent decrees with close scrutiny. Too much deference to the parties is problematic for several reasons. Differences in U.S. Attorney Generals' administrations and the DOJ's scarce resources may affect the parties' relative bargaining power.²¹¹ Moreover, what is at stake is the alleged violation of individuals' constitutional rights. The judiciary has traditionally been a counter-majoritarian force in crucial civil rights litigation this past century, when, contrary to Alexander Hamilton's forecast, state and local governments infringed on minority individuals' rights.²¹² To allow few individuals in the DOJ so much latitude in shaping relief that transcends the instant pattern or practice case at hand, without rigorous judicial review, would undermine the impartial resolution of cases affecting communities and minorities in particular. A more active review of consent decrees would serve to counter such imbalance and underrepresentation.

The following is a nonexhaustive list of suggested factors a court should consider in reviewing proposed decrees in § 14141 cases:

- 1) the degree to which the decree achieves the relief sought in the complaint;
- 2) the nature of the case, including size of the defendant, scope and complexity of the proposed terms;

²¹² See THE FEDERALIST NO. 28 (Alexander Hamilton). In conceiving the diffusion of power between the federal and state governments and the need for each to keep the other in check, Hamilton envisioned that "the States governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authorities," *id.*, but as shown by the Reconstruction Congress and the Civil Rights Era, it has often been the federal government which has afforded security against invasions of civil liberties by both legislative and executive offices of state and local governments. In any event, concern for the preservation of states' autonomy should not inhibit federal intervention when civil rights are at stake, because the ultimate purpose is to protect the citizenry.

[T]he general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government . . . If [the people's] rights are invaded by either, they can make use of the other as the instrument of redress.

Id.

- 3) quantity and quality of information available to the court, taking into account the fact-gathering and interpretive aid of special masters, experts or monitors, if any;
- 4) any prior or current history of attempts by the defendant to evade public scrutiny or accountability;
- 5) whether notice of the proposed decree to potential interveners has been adequate;
- 6) whether the representation of nonparties who nonetheless have a stake in the litigation has been adequate, taking into account possible conflicts of interest;
- 7) whether the decree will have significant effects on potential claims of nonparties for injury or loss arising out of the same or related occurrences, taking into account the preclusive effect of the decree, if any;
- 8) whether the decree will have significant effects on parties in other actions pending in state or federal courts; and
- 9) whether implementation of the reform is likely to be fair and equitable in its operation, taking into account whether the terms provide for neutral selection of a monitor, to which nonparty stakeholders have had an opportunity to object.

If the court were to provide for a special master to monitor compliance, as this note has suggested, it could condition approval of the proposed decree on including a provision that leaves it within the court's province to appoint a special master on its terms, in order to guarantee interested nonparties an opportunity for comment or objection. Courts have conditioned approval of consent decrees in other contexts to ensure proper enforcement. For instance, in related cases involving consent decrees between state and federal governments and Microsoft, the court granted conditional approval of the consent decree pending an alteration which makes clear that the court may take appropriate action regarding enforcement of the decree on its own volition and without prompting by the parties.²¹³ Closer review of proposed consent decrees, with an eye toward manageable standards and appropriate factors for consideration, would promote more meaningful relief, reduce the potential for protracted litigation and lessen the difference in treatment of § 14141 cases by the DOJ across different presidential administrations, thereby providing for a more even-handed resolution of similar pattern or practice cases.

²¹³ *United States v. Microsoft*, 231 F. Supp. 2d 144, 201 (D.D.C. 2002); *New York v. Microsoft*, 231 F. Supp. 2d 203, 258-59 (D.D.C. 2002).

D. Release and Resumption of Jurisdiction over Consent Decrees

After a court has approved a consent decree, the court typically retains jurisdiction in order to supervise implementation, enforce compliance with its terms and modify the decree when necessary.²¹⁴ Parties may include in the decree an express provision by which the court retains jurisdiction, but even without such a clause, the court has inherent authority to enforce its decree, which includes the power of contempt.²¹⁵

Parties may include in the consent decree a provision limiting the court's jurisdiction to a specified time.²¹⁶ Such a provision is valid if bargained for in good faith and approved by the court, but the court must then release jurisdiction upon expiration of the specified time.²¹⁷ On the other hand, if the parties do not include such a provision the court retains jurisdiction until, in its discretion, it decides to release it.²¹⁸

Professor Anderson has pointed out relevant underlying considerations when determining whether to release jurisdiction. First, because a consent decree is a contract, parties have an expectation interest and are entitled to the benefit of their bargain.²¹⁹ With respect to § 14141 actions, the parties include only the United States and the defendant local authorities, but the civilians in the community are essentially third party beneficiaries.²²⁰ In § 14141 cases, at a minimum, their interests should be taken into account. Second, courts have incentive to ensure compliance with the decree because a consent decree is an order as well as a contract, and the court's authority is equally at stake.²²¹ Third, the court should be shielded from the burden of renewed litigation that would result from a premature release of jurisdiction.²²² The court should therefore tread with caution when

²¹⁴ Lloyd C. Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation*, 42 U. MIAMI L. REV. 401, 402 (1987).

²¹⁵ *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 917 (6th Cir. 1979); *Stanwood v. Green*, 559 F. Supp. 196, 198-99 (D. Or. 1983), *aff'd*, 744 F.2d 714 (9th Cir. 1984); Anderson, *supra* note 214, at 402-03.

²¹⁶ *See South v. Rowe*, 759 F.2d 610, 613 (7th Cir. 1985); Anderson, *supra* note 214, at 404.

²¹⁷ *Id.*

²¹⁸ *See, e.g., Kendrick v. Bland*, 659 F. Supp. 1188, 1191 (W.D. Ky. 1987).

²¹⁹ Anderson, *supra* note 214, at 405.

²²⁰ *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981); *United States v. City of Los Angeles*, 288 F.3d 391, 404 (9th Cir. 2002) (analogizing community interveners' status to that of third party beneficiaries in § 14141 suit).

²²¹ *See City of Los Angeles*, 288 F.3d at 391.

²²² *Id.* at 405-06.

considering release of jurisdiction.

The test for release of jurisdiction is two-pronged. The defendant must prove substantial compliance with the requirements of the decree; neither good faith efforts nor progress toward achieving the goals are sufficient.²²³ If the defendant has proved substantial compliance, the court must release jurisdiction unless a strong likelihood exists that the defendants will violate the decree in the future.²²⁴

With respect to substantial compliance, compliance with the underlying law is insufficient here; what is determinative is whether the defendant's actions have satisfied the intent of the parties at the time the decree was entered.²²⁵ This is another reason the parties should clearly articulate their intent. With respect to likelihood of future violation, the standard used by courts in determining whether likelihood of future violation exists involves analysis of the defendant's past record of compliance and the defendant's present attitudes toward the reforms mandated.²²⁶ Courts therefore should be mindful of the defendant's attitude toward compliance with the decree from the outset, at the proposal stage. The more hostile the defendant, the more skepticism is warranted regarding the possibility of future violation. For example, Los Angeles Mayor Richard Riordan was initially adamant in stating that he would never sign a consent decree with the DOJ, whereas the mayor and police chief in D.C. welcomed the DOJ's assistance in devising remedial measures even without a court order.²²⁷

Section 14141 consent decrees so far typically provide that the court retains jurisdiction during a finite term and that, if the DOJ objects to the defendant's motion to terminate, the court must hold a hearing at which both parties may present evidence.²²⁸ The decrees

²²³ See Anderson, *supra* note 214, at 406 (citing *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 199-200 (8th Cir. 1974); *Morgan v. McDonough*, 689 F.2d 265, 268-72, 274-75 (1st Cir. 1982)).

²²⁴ Anderson, *supra* note 214, at 406-11.

²²⁵ *Kendrick v. Bland*, 659 F. Supp. 1181, 1192 (W.D. Ky. 1987).

²²⁶ See, e.g., *Morgan*, 689 F.2d at 280; *Inmates of Suffolk County Jail v. Rufo*, 12 F.3d 286, 292 (1st Cir. 1993) (citing Anderson, *supra* note 214, at 411).

²²⁷ *Los Angeles Will Not Accept Consent Decree on Police Reform, Mayor Says*, CNN, June 20, 2000, at <http://www.cnn.com/2000/US/06/07/lapd/index.html> (last visited May 2, 2003). For several months, Mayor Riordan refused to sign a consent decree with the DOJ, stating: "We don't need them to run our department. . . . They're not going to get a consent decree." Compare Attorney General News Conference with DC Mayor Anthony Williams and DC Police Chief Charles Ramsey (June 13, 2001), <http://www.usdoj.gov/crt/split/mpdpressconf.htm> (last visited May 2, 2003).

²²⁸ See, e.g., Consent Decree, *United States v. New Jersey*, No. 99-CV-5970 (MLC), ¶ 131, (D.N.J. Dec. 30, 1999), <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (last visited

fail to provide for notice to the community or opportunity for comment. Providing notice of a motion to terminate and allowing a reasonable time for interested parties to file *amicus* briefs or otherwise voice their opinions would not only promote more meaningful relief, it would also provide for more finality by decreasing the likelihood of motions to intervene at later stages of implementation and efforts to reopen or relitigate issues. Since the determination of whether to release jurisdiction depends on detailed findings of fact, a special master may be employed here to make preliminary factual inquiries, assess information submitted by nonparty stakeholders and submit a report and recommendation to the court. It should be noted that § 14141 consent decrees so far have explicitly incorporated the “substantial compliance” terminology, but they have not mentioned likelihood of future violation.²²⁹ Courts on their own initiative therefore should inquire as to the likelihood of future violation, irrespective of whether the decree only mentions substantial compliance.

After the court’s release of jurisdiction, plaintiffs have two viable alternatives for seeking enforcement of a consent decree: filing a motion for relief from a judgment or order under Rule 60(b) or filing a new suit.²³⁰ Filing a new suit is appropriate when parties seek to raise new claims not addressed in the original decree, in addition to or in lieu of claims that the defendant has violated the decree.²³¹ If faced with the question whether to resume jurisdiction, district courts therefore must consider whether the claims fall within or go beyond the terms of the decree. If the court utilizes procedures that have proven beneficial in complex litigation, it may decrease the likelihood of protracted litigation in the form of Rule 60(b) motions or new lawsuits.

IV. Conclusion

The drafters of 42 U.S.C. § 14141 realized the gap left by the modern Court’s equitable standing doctrine in the civil rights context and deliberately fashioned a measure whereby a court could identify a pattern of abuse and “bring it to an end with a single legal action.”²³²

May 2, 2003); Consent Decree, *United States v. City of Pittsburgh*, No. 97-CV-354, ¶ 79 (W.D. Pa. Feb. 26, 1997), <http://www.usdoj.gov/crt/split/documents/pittssa.htm> (last visited May 2, 2003).

²²⁹ *See id.*; *see also* Consent Decree, *United States v. Los Angeles*, No. CV-00-11769(GAF), Part XII, ¶ 179 (C.D. Cal. June 15, 2001), <http://www.usdoj.gov/crt/split/documents/laconsent.htm> (last visited May 2, 2003).

²³⁰ Anderson, *supra* note 214, at 413.

²³¹ *Id.* at 415.

²³² H.R. REP. NO. 102-242, 102d Cong., 1st Sess., at 406, 1991 WL 206794, at *138 (1991).

When police policies and practices upstream are the source of a problem, suits against individual officers downstream provide little long term benefit. Section 14141 is thus aimed at institutional reform, targeted at patterns or practices, and carries the potential for long term structural benefit to both communities and law enforcement officials.

Neither the text nor the legislative history of § 14141 affords instruction on the implementation of reform measures. This note suggests that courts find guidance from procedures and considerations in complex litigation, particularly where the instant lawsuit is brought on behalf of, or affects, multiple parties and nonparties alike. In order for a consent decree to provide durable relief to the ultimate stakeholders, the stakeholders should be involved in the process through workable procedures. This note has focused on appointment and uses of a special master throughout the process, provision of notice and opportunity for comment prior to approval of the consent decree, factors to take into account when approving the decree and considerations that arise when deciding whether to release jurisdiction. Complex litigation may provide valuable lessons in other aspects, as well. In taking an active stance toward management, utilizing available procedures, courts may provide the relief to underrepresented individuals that 42 U.S.C. § 14141 promises, as well as the long term benefit to law enforcement officials of being rid of systemic constitutional violation and trusted by the citizenry they protect.

