

A Response to When Police Kill

WHEN POLICE KILL. By *Franklin E. Zimring*. Cambridge, Massachusetts: Harvard University Press. 2017. Pp. xii, 299. \$35.00

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In his important new book, Franklin E. Zimring provides a comprehensive evaluation of the how, when, where, and why police resort to deadly force.¹ The book displays the strengths of Professor Zimring's approach to scholarly inquiry. He starts by showing the growing attention given to police killings in the media over the last several years.² He demonstrates the lack of data and scholarship on the topic.³ Then Professor Zimring presents one of the most comprehensive scholarly compilation of data on police killings to date.⁴ His book makes a number of concrete recommendations for how the federal government, state

DOI: <https://doi.org/10.15779/Z38HM52K3R>

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¹ See FRANKLIN E. ZIMRING, *WHEN POLICE KILL* (2017).

² More specifically, Zimring documents the lack of national attention given the topic of police killings in major news outlets like the *New York Times* and *Washington Post* until recently. As he shows, the topics of “police shootings” and “police killings” did not receive sustained national attention from these papers until around November of 2014—a few months after the killing of Michael Brown by Ferguson police officer Darren Wilson. *Id.* at 7.

³ Zimring shows that while topics like the death penalty were the subject of around 60 articles each year in the nation's roughly 470 law journals between 2000 and 2009, police use of lethal force received around 1 article in American law journals over the same period of time. *Id.* at 8-9 (stating that “the astonishing score for legal scholarship on the death penalty as opposed to that on police killings was 589-0!”).

⁴ Zimring begins by discussing the official national statistics on police killings, which he finds to be painfully incomplete. *Id.* at 25-32 (looking at supplemental homicide reports from the Federal Bureau of Investigations Uniform Crime Reports and arrest deaths reported by the Bureau of Justice Statistics). Zimring then walks through some of the most popular crowdsourcing databases on police killings, like the *Guardian's* project (the Counter), the *Washington Post* project on police killings (Fatal Encounters), and the project by Five Thirty Eight. *Id.* at 28-40.

governments, municipalities, and police departments can reduce the frequency of killings by and of police officers.⁵ It will serve as a handbook for legislators and advocates looking to respond to the epidemic of police violence in the United States in the coming years.

The purpose of this short symposium Essay is to build on Professor Zimring's important contributions in *When Police Kill*. It does this by expanding on two points from the book. First, this Essay builds on Zimring's observations about the causes of the seemingly high levels of police killings in some jurisdictions in the United States, and the failure of many jurisdictions to respond to this phenomenon. Zimring persuasively links the high number of police killings to a number of different factors: the decentralized nature of American law enforcement,⁶ the lack of commitment by local police chiefs and communities,⁷ and the minimal financial incentive for reform given the relative impact of § 1983 suits on municipal budgets.⁸ Indeed, each of these is critical. But as I argue in Part I of this Essay, I would add yet another factor to Zimring's lengthy list: local police union contracts, law enforcement officer bills of rights (LEOBRs), and other labor provisions that can prevent local authorities from adequately investigating or responding to police killings.

Emerging evidence suggests that these provisions are common among large American police departments, and that they may impede internal investigations into police killings.⁹ They may also limit the ability of a police chief, mayor, city council, or civilian review board to terminate the employment of an officer accused of using force unjustifiably.¹⁰ While this may be comparatively less problematic than many of the broader institutional and structural factors that Zimring discusses in his book, I argue that this represents another important part of the equation in

⁵ *Id.* at 143-252 (providing details on the prevention and control of police killings in Part II, specifically talking about the ways that we can improve data reporting on police killings, improve the law, utilize oversight methods, and ultimately improve training and governance of police departments).

⁶ *Id.* at 11 (“...the political disaggregation of power over police makes it difficult to associate police killing with larger political entities such as state and national government, and it also discourages the adding up of the multitude of individual killings across the fifty states into a larger aggregate.”).

⁷ *Id.* at 119-139 (describing the lack of commitment from some city officials because of the current arrangement of costs and consequences).

⁸ *Id.* at 131-139 (explaining the minimal effect of police killings on the Los Angeles budget as an example).

⁹ *See infra* Part I.

¹⁰ *Id.*

developing a national strategy for reducing police violence.

Second, this Essay explores Zimring's recommendation at the end of his book that Congress ought to consider "legislation expanding the funding for the civil rights division of the Department of Justice for consent decrees and litigation concerning police departments and municipalities with high rates of lethal force and poor controls of officers who shoot. . ."¹¹ Zimring goes on to argue that the Department of Justice (DOJ) should place a "stronger emphasis on lethal force" in its identification of police departments in need of federal assistance through either voluntary assistance via the Community Oriented Policing Services (COPS) program or full scale intervention under 42 U.S.C. § 14141.¹² As I illustrate, this proposal is both immediately feasible and normatively desirable. By drawing on prior research into the DOJ's use of § 14141, I demonstrate how the DOJ could harness Zimring's proposed federal database on police violence¹³ to improve its enforcement of § 14141 in a manner that directly fights police violence. Combined, these observations merely bolster and supplement Professor Zimring's compelling and timely research in *When Police Kill*.

THE CAUSES OF POLICE VIOLENCE

When Police Kill provides a thorough explanation for the uniquely American rate of police killings, as well as the failure of many police departments to respond sufficiently to these killings. But one additional factor is worthy of some consideration—internal disciplinary procedures that can make it difficult for police chiefs to discipline or terminate police officers suspected of using deadly force without adequate justification. Internal disciplinary procedures are the result of a complex web of local ordinances, state laws, and labor contracts.¹⁴ Recent studies have argued that police union contracts and law enforcement officer bills of rights frequently establish barriers to internal disciplinary action.¹⁵ Multiple

¹¹ ZIMRING, *supra* note 1, at 240.

¹² *Id.* at 241.

¹³ *Id.* at 253-256 (describing recommendations for a national database on police shootings and injuries, including many of the variables that he would recommend such a database include).

¹⁴ Stephen Rushin & Atticus DeProspero, *Interrogating Police Officers*, 87 GEO. WASH. L. REV. __ (forthcoming 2019) (explaining the array of collective bargaining agreements and LEOBRs that regulate internal disciplinary procedures in American police departments).

¹⁵ See, e.g., Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence*:

recent studies have found that a substantial number of police union contracts limit officer interrogations after alleged misconduct, mandate the destruction of disciplinary records, ban civilian oversight, prevent anonymous civilian complaints, permit arbitration on appeal of disciplinary action, and limit the length of internal investigations.¹⁶ While officers deserve adequate procedural protections during internal

How to Challenge the Police Privilege to Delay Interrogations, 2016 U. CHI. LEGAL FORUM 213 (taking issue with union contract provisions that delay interrogations, providing examples, and offering a roadmap for litigants to challenge these provisions); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017) (providing a detailed assessment of common features from a dataset of union contracts); Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B. U. PUB. INT. L.J. 185, 185 (2005) (coding a dataset of 14 law enforcement officer bills of rights and finding that many thwart accountability efforts); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017) (finding that a substantial number of cities in this study's 178 city dataset have internal disciplinary procedures required by police union contracts that could insulate officers from reasonable accountability); DeRay McKesson, Samuel Sinyangwe, Johnetta Elzie, & Brittany Packnett, *Police Union Contracts and Police Bill of Rights Analysis*, CAMPAIGN ZERO (June 29, 2016), <https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5773f695f7e0abbdf e28a1f0/1467217560243/Campaign+Zero+Police+Union+Contract+Report.pdf> (analyzing a dataset of 81 union contracts and making recommendations for how communities could reform union contracts to improve internal oversight of officers); Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017), <http://www.reuters.com/investigates/special-report/usa-police-unions> (examining a dataset of 82 union contracts, and similarly finding that many thwart reasonable efforts to hold officers accountable for misconduct); Samuel Walker, *Police Union Contract "Waiting Periods" for Misconduct Investigations Not Supported by Scientific Evidence* (2015), <http://samuelwalker.net/wp-content/uploads/2015/06/48HourSciencepdf.pdf> (objecting to waiting periods mandated by some union contracts and law enforcement officer bills of rights); Samuel Walker, *The Baltimore Police Union Contract and the Law Enforcement Officers's Bill of Rights: Impediments to Accountability* (2015), <http://samuelwalker.net/wp-content/uploads/2015/06/BALTIMORE-POLICE-UNION-CONTRACTFinal.pdf> (pointing out problematic features with the Baltimore police union contract and the Maryland law enforcement officer bill of rights).

¹⁶ See, e.g., George Joseph, *Leaked Police Files Contain Guarantees Disciplinary Records Will Be Kept Secret*, GUARDIAN (Feb. 7, 2016), <https://www.theguardian.com/us-news/2016/feb/07/leaked-police-files-contain-guarantees-disciplinary-records-will-be-kept-secret> (describing common features of a dataset of union contracts uncovered from a hack of the Fraternal Order of Police); see generally Rushin, *supra* note 15 (finding that around 88% of the contracts analyzed as part of that study contained at least one problematic feature that the existing literature on police accountability suggests may thwart internal investigations).

investigations, many of these procedures seem designed to insulate officers from reasonable oversight.

Additionally, many police union contracts and civil service laws establish disciplinary appeals procedures that can make it difficult to punish or terminate a police officer found responsible for serious misconduct, including unjustified use of deadly force.¹⁷ Often these appellate procedures give officers the opportunity to challenge internal disciplinary actions handed down by police supervisors through multiple levels of appellate review, generally culminating in binding arbitration.¹⁸ In most cases, an officer facing disciplinary action has a substantial role in selecting the identity of the arbitrator that will hear his or her appeal.¹⁹ This arbitrator is given expansive review authority, with no deference given to decisions made by a police chief.²⁰ The result is that arbitrators

¹⁷ See, e.g., Kimbriell Kelly, Wesley Lowery, & Steven Rich, *Fired/Rehired: Police Chiefs Are Often Forced to Put Officers Fired for Misconduct Back on the Streets*, WASH. POST. (Aug. 3, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired> (describing data collection efforts that found that a significant proportion of American law enforcement officers terminated by their police departments are ordered rehired on appeal by arbitrators); see also Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. (forthcoming 2018) (drawing on a dataset of 655 police union contracts to show that the overwhelming majority of these contracts provide officers with the option to appeal disciplinary action to arbitration, and prove officers with other protections on appeal).

¹⁸ See, e.g., CITY OF AUSTIN, AGREEMENT BETWEEN THE CITY OF AUSTIN AND THE AUSTIN POLICE ASSOCIATION 48 (2013), <http://austinpolic.com/contract/2016/FINAL%20AGREEMENT%20AS%20AMEND%20ED.pdf> (allowing appeals to arbitration on appeal of disciplinary action); CITY OF CINCINNATI, LABOR AGREEMENT BY AND BETWEEN QUEEN CITY LODGE NO. 69 FRATERNAL ORDER OF POLICE AND THE CITY OF CINCINNATI, NON-SUPERVISORS 2, 5 (2016), http://www.serb.ohio.gov/sections/research/WEB_CONTRACTS/14-MED-01-0076.pdf (allowing officers to proceed to arbitration on appeal in cases of suspensions of more than 5 days without pay, discharge, demotion, or termination).

¹⁹ See, e.g., CITY OF DETROIT, MASTER AGREEMENT BETWEEN CITY OF DETROIT AND THE DETROIT POLICE OFFICERS ASSOCIATION 11-12 (2014) (permitting an alternative striking procedure by which the union can remove potential arbitrators); CITY OF JACKSONVILLE, AGREEMENT BETWEEN THE CITY OF JACKSONVILLE AND THE FRATERNAL ORDER OF POLICE, POLICE OFFICERS THROUGH SERGEANTS 21 (2011), https://www.lris.com/wp-content/uploads/contracts/jacksonville_fl_police.pdf (using a rotating list of arbitrators agreed to during the collective bargaining negotiations).

²⁰ See, e.g., MUNICIPALITY OF ANCHORAGE, COLLECTIVE BARGAINING AGREEMENT BETWEEN ANCHORAGE POLICE DEPARTMENT EMPLOYEES AND MUNICIPALITY OF ANCHORAGE 10-12, 16 (2015) (on file with author) (stipulating that management may punish officers for just cause, and then providing arbitrator wide latitude to review any

on appeal frequently order police departments to rehire a substantial number of police officers fired for misconduct—including many officers fired for the unjustified use of deadly force.²¹

Two anecdotes—one that Zimring also uses in *When Police Kill*—further emphasize the relationship between labor law and police killings. In Chapter 10, Zimring uses the Laquan McDonald case to illustrate the power of video footage on judgments of police use of deadly force.²² But the Laquan McDonald killing is also a story of the pervasive effects of labor agreements on the ability of a police department to respond effectively to officer misconduct. Under the Chicago union contract at the time of the McDonald killing, officers involved in a civilian shooting were guaranteed delays of anywhere from 2 to 48 hours before facing questions from internal investigators, potentially giving officers an opportunity to coordinate stories.²³ The contract also allows some officers to have access to video and audio evidence before making statements to investigators.²⁴ In some cases, it limits the Independent Police Review Authority from considering an officer's disciplinary or complaint history when examining new allegations against that officer.²⁵ It bars the use of polygraphs during internal investigations.²⁶ And if an officer is terminated, suspended, or otherwise disciplined, the contract gives officers access to an appeals process that includes binding arbitration before an arbitrator that is selected, in part, by the police union.²⁷ These potentially cumbersome procedural limitations may explain why, as Zimring notes, the City of Chicago ruled the previous 208 police killings

apparent violation of the collective bargaining agreement on appeal); CITY OF NEW HAVEN, AGREEMENT BETWEEN THE CITY OF NEW HAVEN AND THE NEW HAVEN POLICE UNION LOCAL 530, AND COUNCIL 15, AFSCME, AFL-CIO 4 (2011) (on file with author) (explicitly establishing a de novo standard of review on appeal to determine whether there was just cause for discharge or discipline).

²¹ Kelly, Lowery & Rich, *supra* note 17 (showing that around 25 percent of fired officers were ordered rehired over a several year period in some of the largest law enforcement agencies in the country).

²² ZIMRING, *supra* note 1, at 203-06.

²³ AGREEMENT BETWEEN THE CITY OF CHICAGO DEPARTMENT OF POLICE AND THE FRATERNAL ORDER OF POLICE CHICAGO LODGE NO. 7 6-7 (2012).

²⁴ *Id.* at 7.

²⁵ *Id.* at 10 (describing the policy on the purging of disciplinary and complaint records against officers after set intervals).

²⁶ *Id.* at 8.

²⁷ *Id.* at 84-85 (laying out the ground rules for arbitration of disciplinary appeals).

leading up to the Laquan McDonald incident to be justified.²⁸ These procedures may also explain why other empirical studies have found that an estimated 85% of the officers that *do* face punishment in Chicago ultimately see their penalties reduced on appeal before an arbitrator.²⁹

Similarly, the case involving an officer in Oakland, California further illustrates how labor law can complicate community attempts to respond to officers that kill. There, media reports document the story of an officer that killed an unarmed 20-year-old man.³⁰ Months later, the same officer shot *another* unarmed man, this time in the back as he ran away.³¹ Oakland paid out \$650,000 to settle a lawsuit in that case and attempted to fire the officer.³² But on appeal, an arbitrator ordered the City of Oakland to reinstate the officer after a mere suspension and awarded the officer back pay.³³

These are just two examples that illustrate a broader reality facing American police chiefs. In fact, one study by the *Washington Post* of police firings between 2006 and 2017 across dozens of the nation's largest police departments found that arbitration and labor provisions require police chiefs to reinstate around 24% of all fired officers each year.³⁴ I tend to agree with Zimring that the support of a police chief is a necessary factor in reducing the frequency of police violence. But, given this complex reality of labor and employment protections on the ground, I

²⁸ ZIMRING, *supra* note 2, at 205.

²⁹ See Jennifer Smith Richards & Jodi S. Cohen, *Cop Disciplinary System Undercut*, CHI. TRIB. 1 (Dec. 14, 2017), http://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=bc73d166-b1f0-4d8b-9ff9-0529bad5bd7a (noting that a study from 2010 to 2017 found that 85% of disciplinary sanctions against police officers in Chicago were reduced or reversed on appeal).

³⁰ Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Streets*, ATLANTIC (Dec. 2, 2014), <https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258>.

³¹ Sean Maher, *Early Report Shows Oakland Police Shot Man in Back*, E. BAY TIMES (July 28, 2008), <http://www.eastbaytimes.com/2008/07/28/early-report-shows-oakland-police-shot-man-in-back>.

³² Henry K. Lee, *Fatal Shooting to Cost Oakland \$650,000*, S.F. GATE (July 8, 2009), <http://www.sfgate.com/bayarea/article/Fatal-police-shooting-to-cost-Oakland-650-000-3224969.php>.

³³ Henry K. Lee, *Oakland Must Rehire Cop Who Shot Suspect in Back*, S.F. GATE (Mar. 5, 2011), <http://www.sfgate.com/crime/article/Oakland-must-rehire-cop-who-shot-suspect-in-back-2528215.php>.

³⁴ Kelly, Lowery & Rich, *supra* note 17.

would argue that even a dedicated police chief—or a civilian review board, mayor, city manager, or city council for that matter—may face serious roadblocks in making the necessary personnel that can protect public safety and reduce police killings. A dedicated police chief is a necessary, but far from a sufficient, condition for reform.

FIGHTING POLICE VIOLENCE THROUGH FEDERAL ACTION

Zimring makes a number of recommendations for how policymakers could reduce the number of killings by and of police officers. He argues that, “the most effective path to motivating reform in police departments is not to select a single type of intervention but rather to combine the effect of a number of differently imperfect methods of influence to create a cumulative impact on the priorities of police administrators.”³⁵ At the state level, he calls for amendments to criminal statutes on voluntary manslaughter and excessive deadly force, as well as improvements to the current incentives for localities to report complete data on police killings.³⁶ At the local level, he emphasizes the importance of localities selecting police chiefs that will prioritize the reduction of police killings, as well as improvements in the budgeting process to motivate departments to better control police killings.³⁷ At the federal level, he makes a slew of recommendations, including a comprehensive national reporting system on police killings, additional federal statutes criminalizing certain types of police killings, funding for research into police killings, and changes to civil statutes to give victims additional avenues to respond to police violence.³⁸

I would like to expand on one of the proposals that Zimring offers at the end of his book. He signals his support for congressional “legislation expanding the funding for the civil rights division of the Department of Justice for consent decrees and litigation concerning police departments and municipalities with high rates of lethal force and poor controls of officers who shoot.”³⁹ But this recommendation happens near the end of his book, leaving little space for further explanation or development. As I argue in this Part, this proposal is both normatively desirable and feasible.

³⁵ ZIMRING, *supra* note 1, at 241.

³⁶ *Id.* at 242-43.

³⁷ *Id.* at 243.

³⁸ *Id.* at 240.

³⁹ *Id.*

As background, under 42 U.S.C. § 14141, the U.S. Attorney General has the statutory authority to seek equitable relief against local police departments engaged in a pattern or practice of unconstitutional or unlawful conduct.⁴⁰ Congress passed § 14141 in 1994, due in part to the national reaction to the release of the George Holliday video showing Los Angeles police beating Rodney King on the side of a southern California highway.⁴¹ The statute represented the first time that the federal government had the power to intervene into local police departments and effectively force municipalities to make substantive changes in policies and procedures.⁴² While many scholars predicted that § 14141 would become one of the most important tools for combatting police misconduct, its limitations soon became apparent.⁴³ Zimring's proposal would go a long way in helping the DOJ improve the weaknesses of this statute, and ultimately respond more proactively to patterns of police killings within American police departments.

A. Historic Limits on DOJ Enforcement

The DOJ's enforcement of § 14141 has suffered from a number

⁴⁰ 42 U.S.C. § 14141(a) provides that, "It shall be unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution . . ."; § 14141(b) provides that, "Whenever the Attorney General has reasonable cause to believe [that there is a pattern or practice of misconduct] . . . the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice." 42 U.S.C. § 14141.

⁴¹ The events surrounding the beating of Rodney King happened on March 3, 1991. By March 20, 1991, the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary called a hearing to discuss the issue of police brutality. *Police Brutality: Hearing Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong. (1991). At this hearing, legislators began the discussion that would eventually lead to the proposal of Police Accountability Act of 1991. Police Accountability Act of 1991, H.R. 2972, 102d Cong. A diluted version of this statute was then included in the omnibus Violent Crime Control and Law Enforcement Act of 1994. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071.

⁴² STEPHEN RUSHIN, *FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS* 16 (2017) (describing the passage of § 14141 as the beginning of the Intervention Era, when Congress pushed the DOJ onto the frontlines of forcefully reforming local police departments).

⁴³ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 538–39 n.134 (2001) (calling § 14141 one of the most important developments in police reform since *Mapp v. Ohio*).

of limitations. For one thing, the DOJ lacks the resources to investigate or intervene into a large number of police departments each year.⁴⁴ In fact, the DOJ has only been able to investigate around 70 departments since the inception of the statute, and these investigations have resulted in only around 30 formal consent decrees or settlement agreements.⁴⁵ While the DOJ has seemingly targeted larger jurisdictions that serve a substantial portion of the American population, they have only been able to target a tiny fraction of the nation's police departments.⁴⁶ Thus, it is understandable that Zimring argues for increased funding to the DOJ's Civil Rights Division to assist in the enforcement of § 14141 as a weapon to fight police violence. Increasing funding would almost certainly help the DOJ investigate and intervene into more agencies. As it currently stands, the DOJ only has historically had the resources to investigate around three departments per year under this statute, and it has only had the resources to intervene into around one department each year.⁴⁷ This means that, even if Congress doubled the amount of funding for these types of investigations and interventions, the DOJ would only have the resources to investigate 0.03% of the country's 18,000 state and local law enforcement agencies each year.⁴⁸

⁴⁴ Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 100–01 (2001) (concluding that, “the DOJ lacks the resources” to engage in the kind of oversight that many would prefer, resulting in “[f]ew consent decrees” under § 14141).

⁴⁵ Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 777–79 (2017) (showing in app. A and app. B a list of all federal interventions and investigations pursuant to § 14141 between 1994 and 2016).

⁴⁶ U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 2 (2011), <http://www.bjs.gov/content/pub/pdf/cs1lea08.pdf> (estimating there to be around 17,985 state and local law enforcement agencies).

⁴⁷ Congress passed this statute in 1994. This means it has been in existence for approximately 24 years. This would mean the DOJ has initiated around 1.25 negotiated settlements per year, and around 2.92 investigations per year since Congress passed § 14141. Rushin & Edwards, *supra* note 45, at 777–79 (showing in app. A and app. B a list of all federal investigations that the DOJ has opened pursuant to this statute).

⁴⁸ Doubling resources would presumably result in only 6 investigations per year, rather than the usual 3. This would result in only 6 out of 18,000 agencies facing investigation, or around 0.03%. This explains why at least one commentator has suggested that Congress permit private parties, with approval of the Attorney General, ought to have standing to pursue similar equitable remedies against police departments for patterns of misconduct. See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (arguing for the deputization strategy to increase the number of pattern and practice suits under § 14141).

But in addition to funding limitations, the DOJ has also historically lacked the data to identify police departments in violation of the statute. We have even less reliable data on other aspects of police behavior, including other potentially coercive officer behaviors like uses of non-deadly force, arrests, and stops.⁴⁹ Given this lack of data, previous research has described how the DOJ has had to use unreliable proxies for misconduct in determining which police departments were most worthy of investigation with the agencies limited resources.⁵⁰

B. DOJ Interest in Police Use of Force

Despite these limitations, the DOJ has made officer use of excessive force, including deadly force, a pillar of its § 14141 investigations and settlements. As shown in Figure 1, the DOJ has targeted jurisdictions for claims of excessive use of force more than any other cause of action. These include some of the earliest DOJ actions under § 14141 like Torrance, Pittsburgh, Los Angeles, Steubenville, and Buffalo, as well as many recent cases like Baltimore, Chicago, Cleveland, Ferguson, and Newark.⁵¹

FIGURE 1, BREAKDOWN OF DOJ ALLEGATIONS AGAINST LOCAL POLICE DEPARTMENTS UNDER § 14141⁵²

Type of Allegation	Cases
Use of Force	48
Discrimination	38
Search, Seizure, Arrest	36
Other Violations	12

⁴⁹ RUSHIN, *supra* note 42, at 19-20 (“We have no data on the number of officer-involved shootings each year. We do not keep track of the number of injuries caused by police annually. Nor do we keep any national statistics on civilian complaints against local police officers.”).

⁵⁰ Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3219-3224 (2014) (describing how the DOJ uses media reports, whistleblowers, existing civil litigation, criminal cases, and other rough proxies to identify police departments that are showing symptoms of systemic misconduct).

⁵¹ Sarah Childress, *Inside 20 Years of Federal Police Probes*, PBS FRONTLINE (Dec. 14, 2015), <https://www.pbs.org/wgbh/frontline/article/inside-20-years-of-federal-police-probes> (navigate to interactive feature for breakdown of the number of cases that fall into each category; note that many cases fall into more than one category).

⁵² *Id.*

This is not to say that the DOJ has exclusively used § 14141 litigation to remedy excessive uses of force. For example, in Missoula, Montana, the DOJ's investigation and later intervention focused almost entirely on allegations of gender bias in the handling of sexual assault cases.⁵³ Nevertheless, a whopping 70% of all DOJ actions under § 14141 have focused, at least in part, on officer use of force.⁵⁴ A quick examination of some of the major § 14141 cases focused on officer use of force, like the intervention in Albuquerque, New Mexico, reveals how Zimring's proposals could have a transformative effect on the ability of the DOJ to identify and respond to police killings more proactively and aggressively.⁵⁵

C. How the DOJ Could Harness Zimring's Proposed Database

The DOJ initiated its investigation into the Albuquerque Police Department after a series of allegations of excessive use of force.⁵⁶ Indeed, as the DOJ quickly discovered, the APD shot and killed at least 20 people.⁵⁷ While we do not have comprehensive data on the number of police killings nationally during these years, a cursory examination of the data from 2014 through 2017 suggests that this likely made Albuquerque one of the few large American police departments that killed such a large number of civilians per capita during this time period.⁵⁸ If the DOJ had a comprehensive national database it may have identified Albuquerque as an outlier in officer use of force even earlier than November of 2012, when it initiated a formal investigation of the department.

Albuquerque is hardly unique in this regard. One of the most fascinating findings from the recent community efforts to collect data on police killings is the realization that the rate of police killings can vary

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See, e.g.*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE ALBUQUERQUE POLICE DEPARTMENT 1 (2014).

⁵⁶ *Id.*

⁵⁷ *Id.* at 2-3 (suggesting that the APD may have been killing around 11 individuals per 1,000,000 residents each year during this time).

⁵⁸ *See generally* MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> (last updated Sep. 25, 2018) (showing that most large police departments are below the roughly 11 individuals per 1,000,000 residents each year).

widely from one police department to another.⁵⁹ Take, for example, the expose done by the *Guardian* on Kern County, California, which it called the “deadliest” police department in the country.⁶⁰ Police in Kern County killed more people per capita than another other county in the United States.⁶¹ And as is the case in many of the most deadly police departments, outsiders would not have predicted, based on Kern County’s crime rate, that it would surpass all other counties in the number of police killings.⁶²

If the DOJ has access to databases in the future, like that proposed by Zimring in *When Police Kill*,⁶³ it could respond more proactively to departments that appear to be engaged in unusually large numbers of deadly encounters with civilians like those in Albuquerque in 2009-2012 and in Kern County in 2015. While police killings represent just one type of police misconduct, reliable national data on this statute could be a first important step in revolutionizing how the DOJ exercises its discretionary authority under § 14141. It could be the first step in implementing some of the more extensive proposals made by previous scholars to reorient the § 14141 case selection process. Previous scholars have argued that, with access to better data, the DOJ could implement a number of different enforcement approaches under this statute. It could utilize a “worst-first” strategy that prioritizes investigations of jurisdiction based on the results of this database, while giving these agencies a set period of time to publicly demonstrate improvement in hopes of receiving safe harbor.⁶⁴ Perhaps more radically, with additional congressional authorization, the DOJ could develop a coverage formula based in part on data from a national database on police violence that could trigger DOJ scrutiny under

⁵⁹ See, e.g., *id* (showing the wide variation in the number of police killings per capita by large American police departments).

⁶⁰ Jon Swaine & Oliver Laughland, *The County: The Story of America’s Deadliest Police*, *GUARDIAN* (Dec. 1, 2015), <https://www.theguardian.com/us-news/2015/dec/01/the-county-kern-county-deadliest-police-killings>.

⁶¹ *Id.*

⁶² Samuel Sinywangwe, *Examining the Role of use of Force Policies in Ending Police Violence* (2016) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841872. (Instead, at least one study has found that the rate at which departments kill civilians is at least partially predicted by whether those departments have installed recognized best practices in training and limiting police use of force).

⁶³ ZIMRING, *supra* note 1, at 240 (“a new and comprehensive reporting program for deaths and serious injuries from attacks for police officers and civilians”).

⁶⁴ See Rachel Harmon, *Promoting Civil Rights Through Proactive Police Reform*, 62 *STAN. L. REV.* 1 (2009).

§ 14141.⁶⁵ Such approaches may increase the general deterrent effect of § 14141 as a tool to drive down police killing rates across the country.

CONCLUSION

I was lucky enough to be a research assistant, graduate student instructor, and graduate student of Zimring's from 2009 through 2015. During this time, I tried to learn as much as possible about his distinctive approach to researching many of the most vexing problems in our criminal justice system.

For those who have not had the chance to work with him over such an extended period of time, *When Police Kill* provides a crash course in many of his most impressive skills as a scholar. The book dives headfirst into one of the most controversial and important criminal justice topics of our time. In doing so, he frames the importance of the topic in a way that few have before him. He helps readers think about the topic of police killings not just from an American perspective, but also from an international perspective by carefully comparing the American experience with police killings to other westernized countries. His efforts to force readers to think about the uniqueness of the American criminal justice system relative to other countries mirrors his approach in many of his prior works, including most recently in *The City That Became Safe*.⁶⁶

Throughout the book, Zimring uses methodologies that are both sufficiently rigorous to satisfy an academic audience, but also straightforward enough to captivate a general audience. Throughout the book, Zimring maintains the language of a neutral researcher, rather than a partisan activist. And ultimately, Zimring offers thoughtful recommendations that attempt to balance a wide range of practical policy considerations. No doubt, just as I have attempted to build off Zimring's important contributions in this brief symposium Essay, many others will come to rely on this book as a vital starting point in addressing police violence in the United States.

⁶⁵ Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CAL. L. REV. 263 (2017) (advocating for Congress to pass a coverage formula to determine which police departments are worthy of DOJ oversight under § 14141).

⁶⁶ See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2013).