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Police Reform Through an Administrative Lens: Revisiting the Justice Department’s Pattern or Practice Initiative

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The U.S. Department of Justice’s “pattern or practice” initiative has been used to address systemic police misconduct in cities like Ferguson, Los Angeles, and Baltimore. Despite its clear relevance to administrative theory building and the practice of organizational change, the subject remains almost entirely unknown to public administration scholars. This article is designed to serve as an introduction to pattern or practice reform and a detailed agenda for future scholastic and practical contribution, with focus on three areas where administrative scholars could be of particular insight: (a) public personnel management, discretion, and accountability; (b) the influence of legal principles on the management of public bureaucracies; and (c) representative democracy and federalism. Engagement with the issue not only gives administrative scholars a voice on an increasingly salient public issue, but also would add depth and a much-needed perspective to management of such an important policy initiative.

On August 9, 2014, Michael Brown was shot and killed by Ferguson, Missouri, police officer Darren Wilson following a brief altercation over allegedly stolen goods (Bosman & Fitzsimmons, 2014). The incident sparked several days of tension and violence in and around the suburban St. Louis city, captivating the country (Barker, 2014). In the wake of these events, the U.S. Department of Justice (DOJ) opened an investigation into the circumstances surrounding Brown’s death and the practices of the Ferguson Police Department (FPD) more broadly. Wilson was cleared of wrongdoing, but the DOJ’s inquiry into the FPD found that officers routinely violated Fourth Amendment protections while “stopping people without reasonable suspicion, arresting them without probable cause, and using unreasonable force against them” (DOJ, Office of Public Affairs, 2015).

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Seventeen months later, on March 17, 2016, Attorney General Loretta Lynch announced a settlement agreement between the DOJ, the city of Ferguson, and the FPD, designed to bring the FPD into compliance with U.S. constitutional law (DOJ, Civil Rights Division, Special Litigation Section, 2016c). The settlement was formalized pursuant to Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994, a little-known provision establishing federal regulatory power over state and local law enforcement (Violent Crime Control and Law Enforcement Act, 1994). The “pattern or practice” initiative, as it is known, empowers the DOJ to take formal remedial action against state or local police departments it finds to have systematically violated the civil rights of individual citizens. This authority has been used to address systemic police misconduct in Los Angeles, Detroit, Seattle, Washington, D.C., and New Orleans, and is at the center of ongoing reform efforts in cities experiencing recent police-involved violence, including Cleveland, Baltimore, and Chicago (DOJ, Civil Rights Division, Special Litigation Section, 2016a).

As police departments and communities across the country struggled to address the problem of police misconduct and the mistrust and loss of legitimacy it breeds, the DOJ used its pattern or practice authority more actively and more expansively under President Obama (Rushin, 2014). Despite a broad and often controversial impact, and the troubled history of efforts to reform local police institutions (Skogan, 2008; Walker, 2012), the initiative remains vastly understudied. More to the point, the subject has yet to draw the attention of public administration scholars, despite the potential value of their contributions to the practical and theoretical understanding of the matter.

The issue not only demands the insights of administrative experts, but also presents a unique opportunity for public administration scholars to engage with many of the field’s longest-standing debates. By way of introducing the initiative and sketching out a roadmap for future contribution, this article is framed around the inherent tensions born out of public administration’s four defining intellectual traditions—the Hamiltonian vision of strong, centralized administrative institutions; the Jeffersonian preference for local control and a weak executive; the Madisonian view of balanced political power; and the Wilsonian notions of hierarchical accountability and administrative competency (Kettl, 2002).

The article begins by discussing Section 14141 in terms of organizational reform, hierarchical accountability, and the use of rules to manage officer discretion. This section references the Progressive value systems embodied by Wilsonian traditions and draws on the language of the Hamiltonian–Jeffersonian debate to underscore the prominence of both hierarchy and centralization for understanding pattern or practice reform. The second section reflects the initiative’s Madisonian implications, with a focus on how the reform process is shaped by the influence of law on the development and management of public policy, the role of judges and government attorneys in the policy process, and the tension between legal and managerial values in promoting efficient, lawful governance. Finally, Section 14141 is framed in terms of broad issues of constitutional governance, with a focus on federal–state relations and democratic representation.

What follows is a primer on the law and brief review of published literature addressing the reform initiative.

PATTERN OR PRACTICE POLICE REFORM

Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 makes unlawful any “pattern or practice of conduct by law enforcement officers ... that deprives persons of rights, privileges, or immunities” protected under federal law (Violent Crime Control and Law Enforcement Act, 1994).

To determine whether a jurisdiction has engaged in a pattern or practice of misconduct, attorneys from the Special Litigation Section of the Justice Department’s Civil Rights Division and consultant policing experts review department administrative data and organizational policies, and conduct interviews with both officers and members of the community. To move forward, the DOJ must uncover unlawful department policy or find evidence that officers have engaged in repeated, systematic illegal behavior over time (DOJ, Civil Rights Division, 2003b); legal action may not be based on “sporadic bad incidents or the actions of the occasional bad officer” (DOJ, Civil Rights Division, 2003a).¹ The case of Ferguson is again illustrative. Though Michael Brown’s death may have motivated the investigation into the FPD, the shooting alone did not substantiate the DOJ’s pattern or practice finding. Instead, investigators relied on evidence of long-standing racial disparities in the FPD’s use of force and enforcement of traffic laws (DOJ, Civil Rights Division, Special Litigation Section, 2015).

Since the law’s inception, the DOJ has completed sixty-eight investigations into allegations of alleged misconduct, ranging from excessive use of force (e.g., Washington, DC; Miami, FL) and discriminatory policing (e.g., New Jersey, Maricopa County, AZ) to improper search and seizure practices (e.g., Steubenville, OH) and unconstitutional holding-cell conditions (e.g., Detroit, MI). Thirty-six investigations (53%) have generated evidence to support a pattern or practice finding (Childress, 2015).

If a pattern or practice is identified, the DOJ is empowered to initiate legal action to bring the department into compliance with federal law. Most affected jurisdictions have avoided litigation by agreeing to the terms of a negotiated settlement. Though the content of each agreement is tailored to address the specific abuse at issue, the DOJ relies on a core set of administrative and policy tools to drive reform. The typical settlement is built on mandated changes to department operational policy and oversight mechanisms, increased officer training requirements, and the development of both internal and external accountability systems. Most settlement agreements use aggressive timelines and a court-appointed independent monitor to oversee the implementation process.

This is the case in Ferguson, where the FPD has agreed to restructure its entire approach to officer recruitment, training, supervision, and performance evaluation; to renew policy on use of force, police–citizen encounters, and misconduct investigation; to develop community policing and engagement strategies; and to institute rules governing the use of body-worn and in-car cameras, among several other mandates. The reform will be overseen by a monitor, who for a minimum of five years will evaluate and report publicly on department progress (see *U.S. v. Ferguson*, 2016).

The depth of these reforms, the aggressive pace at which they are pursued, and the high-profile nature of the malfeasance at issue highlight the practical importance of the initiative. The reform effort has the potential to dramatically alter law enforcement in the affected jurisdiction, and with it relationships between the police and relevant issue networks, including

members of local communities, civil society groups, and the media. The process also may influence jurisdictional, budgetary, and other long-term planning decisions, and certainly has the potential to reshape relationships between the police and the political branches of federal, state, and local governments. Given this, it is somewhat surprising how little published research exists, particularly from those with administrative expertise.

What scholarship does exist has largely come from academic lawyers. Some have described key components of Section 14141-related settlement agreements (Livingston, 1999) while urging further attention to the effects of the reform process on criminal procedure and law enforcement (Rushin, 2014). Others have focused on the policy implications of the DOJ's reform template (McMickle, 2003; Ross & Parke, 2009). In that vein, Walker (2003, p. 6) suggests that when pattern or practice reform is seen in the broader context of police reform efforts, Section 14141 represents a "new paradigm" of police accountability, one that "includes not just a specific set of 'best practices' but also an overarching conceptual framework of accountability." There is also a strong reformist bent to much of this scholarship. For instance, a series of law review articles present ideas for either improving the statute itself (Gillies, 2000; Harmon, 2009) or using it in such a way as to benefit other areas of criminal justice policy (Kupferberg, 2008; Walker & Macdonald, 2009).

Even with the renewed attention brought on by the DOJ's involvement in Ferguson, there remains very little empirical knowledge of the issue. In fact, much of what is known comes from just three case studies. In 2002, the Vera Institute of Justice studied the implementation of Pittsburgh's consent decree (CD), relying on full access to police department staff and citizen surveys to track progress (Davis, Ortiz, Henderson, Miller, & Massie, 2002). Its findings highlight the importance of political support for the process and the salience of capable, motivated leadership in driving reform. In 2005, less than three years after federal oversight was terminated, Vera published a follow-up study evaluating the effects of the consent decree on police behavior and police-community relations (Davis, Henderson, & Ortiz, 2005). In 2009, a research team from Harvard University considered the effects of the LAPD's consent decree on incidents of racial profiling, public opinion, and officer morale (Stone, Foglesong, & Cole, 2009). The reform process was found to have had a largely positive effect on these and other outcomes.

Chanin (2014) used independent monitor reports and stakeholder interviews to compare the implementation of settlement agreements in Pittsburgh, Detroit, Washington, D.C., Cincinnati, and Prince George's County, Maryland. Despite some variance in the time needed to satisfy key mandates, each jurisdiction achieved "substantial compliance" within five to seven years. Findings suggest that several factors helped to promote the successful implementation of settlement terms, including community and political support for the process, adequate labor and capital resources to manage the reform, and support for mandated organizational changes among leadership and front-line staff. Using longitudinal data from many of the same jurisdictions, Chanin (2015) evaluated the sustainability of organizational changes brought on by pattern or practice reform. The data show that the initiative has the potential to bring about positive change during the oversight period, but that such progress is rather difficult to sustain over time and as oversight conditions shift.

As this review suggests, knowledge of the pattern or practice initiative remains relatively limited, with blind spots in several areas critical to understanding—and managing—what remains a cornerstone of the country's police accountability infrastructure. Importantly, the perspective and expertise of trained public administrators aligns neatly with those areas most

in need of such insights. What follows is a detailed discussion of these issues, beginning with an examination of both the substance and the process of pattern or practice reform.

Substance and Process of Institutional Reform

The contents of the DOJ's reform template and the process used to drive organizational change remain vastly understudied, leaving an opportunity for administrative experts to engage with and improve the implementation and management of the pattern or practice initiative while deepening theoretical understanding of the process of change.

Reform in the Hamiltonian–Wilsonian Tradition

The consent decree formally approved by the Ferguson City Council in many ways embodies a traditional command-and-control-style regulatory framework built in the image of Hamiltonian preferences for strong, centralized institutions and Wilsonian skepticism of bureaucratic discretion. In drawing on a “rules-training-oversight” template, the settlement embodies the Wilsonian approach of promoting efficiency and accountability through top-down organizational systems, and matches historical efforts to guide the behavior of police (Epp, 2010) and other street-level actors (Davis, 1969; Lipsky, 1980). The use of rulemaking to “confine,” “structure,” and “check” officer discretion dates to Kenneth Culp Davis's (1975) seminal volume, and has been drawn on to address law enforcement issues ranging from racial profiling and officer use of force to search-and-seizure and suspect arrest (e.g., Epp & Haider-Markel, 2014; Mastroski, 2004; Walker, 1993).

The Ferguson agreement, like most other pattern or practice consent decrees, begins with a mandate to revise department rules governing key police functions like the use of force and the initiation of a traffic stop. Among other things, these rules detail when and how officers may use force (paras. 128–167),² describe the content of officer training (paras. 134, 147),³ and outline incident reporting procedures (paras. 171–179).⁴ On balance, the approach is designed to circumscribe rather than expand officer discretion (*U.S. v. Ferguson*, 2016).

Several additional protocols, like those requiring supervisor presence at the scene of all high-level use of force incidents (para. 183) and increased involvement in day-to-day supervision of officer behavior (e.g., paras. 240–244 on oversight of body-worn camera usage), promote a more active oversight role for front-line supervisors while strengthening chain-of-command accountability (paras. 251–255). Mandated development of an “early warning system” database, which tracks individual officers across several performance metrics, provides supervisors with information to identify and intervene to correct problematic behavior while centralizing agency accountability (paras. 259–269).

Interestingly, the wide use of this approach and the consistent support it has engendered (e.g., (PERF, 2013) have occurred in the absence of robust empirical justification. There is relatively little known about how each of these policies operates individually, and even less about how they function when used in concert. The need for analysis of the extent to which the framework is capable of controlling discretion and holding officers accountable is clear. Do these strategies succeed in limiting excessive use of force, racial profiling, and other unlawful behavior? Are there interaction effects between settlement components or unforeseen

outcomes generated by their use, either positive or negative? Is an agency-wide approach to managing misconduct more appropriate than individualized efforts that focus on deterrence through officer liability and administrative sanctions?

Throughout the process, organizational power is shifted away from street-level officers as decision-making authority is further concentrated among those of higher rank. At least in theory, the patrol officer has much less control over decisions about how to interact with citizens, including when and how to use force, when to report on incidents, and so on. The same is true of mid-level managers, who must operate under pre-established and externally imposed policies regarding supervision, incident reporting, discipline, and training. A necessary byproduct of these changes is to make the day-to-day work of both street- and mid-level officers much more bureaucratic, rule bound, and legalistic. Officers in Pittsburgh, Washington, D.C., Seattle, and other affected jurisdictions have claimed that such reforms complicate their jobs and harm morale (Davis et al., 2005; Kelly, Childress, & Rich, 2015). Does such testimony hold up under more systematic analysis?

This hierarchical model of bureaucratic accountability is, of course, not unique to agencies affected by pattern or practice reform; such a system has for decades characterized police departments and the business of policing. The “orthodox” administrative management techniques of the post–New Deal era, built around the ideas of Wilsonian progressivism, were adopted and expanded by the police professionalization movement of the 1950s (Walker, 1977). In this model, power flows from the top of the organization downward, and discretion is aggressively controlled through chain-of-command hierarchies and administrative rules. Though much has changed in the last sixty years, this Hamiltonian approach continues to be the organizational point of reference for many departments (Weisburd & Eck, 2004).

Compatible with Other Organizational Goals?

Despite its strengths and resultant pervasiveness, critics of the centralized, hierarchical model have drawn on distinctly Jeffersonian ideas to assert that organizational accountability and the associated limits to street-level discretion must come from the bottom up rather than the top down (e.g., Mastrofski, 1998; Skogan & Hartnett, 1997). Does the implementation of pattern or practice reform bring with it many of the problems that have plagued command-and-control hierarchies throughout history, both in policing and elsewhere? Further, can this traditional organizational approach coexist with community-oriented policing and other progressive reform models designed to promote police–community partnerships, often through increased officer discretion and a “flattened command structure” (Adams, Rohe, & Arcury, 2002, p. 402)?

Consideration of pattern or practice reform in the context of compatibility with a community-oriented policing approach raises a series of interesting questions, with broad implications for future reform efforts and the process of police administration. Most broadly, what is the relationship between the pattern or practice reform template (which is “strategy neutral” in the sense that neither the reform process nor the substance of mandated changes requires anything of the affected department in terms of crime-control or order-maintenance efforts) and wider department policy priorities? To what extent does the installation of hierarchical accountability systems affect efforts to control crime and promote stable police–community relations? Is the pursuit of crime control and order maintenance goals less efficient or less

effective in agencies that have implemented pattern or practice accountability mechanisms? These questions are particularly relevant in the context of rising violent crime in cities like New Orleans, where a federal consent decree has been in place for years (Sledge, 2016), and Chicago, where a pattern or practice finding appears imminent (Bosman & Smith, 2016).

Though the reform process is clearly designed to address officer misconduct, the DOJ has recently begun to use the process to promote other outcomes, including “increased [department] transparency,” “community–police partnerships,” and “community confidence in law enforcement” (DOJ, Civil Rights Division, Special Litigation Section, 2016b). Increased trust and confidence in the police is a laudable goal, particularly among minority community residents in cities like Ferguson, where they have been the subject of systematic discrimination and disproportionate use of force. To what extent are these types of non-mission-based goals achievable as part of a reform effort developed to address a different, though tangentially related problem, particularly when mandated by an outside agency from the top down? How does this expanded mission influence the effectiveness and sustainability of those components specifically geared toward remedying misconduct?

As these questions suggest, in addition to its clear relevance to policing, the pattern or practice initiative touches on several long-standing issues of bureaucratic control, organizational design, and personnel management. The process can serve as a vehicle for deeper analysis of regulatory efforts to manage bureaucratic misconduct and may provide insight into the drive to shape individual behavior in the vision of constitutional law. It raises important questions about the interaction between organizational design and agency policy, and has implications for wider debates about the relationship between legal values (e.g., accountability, due process, equal protection) and the mission-based values that typically drive organizational priorities.

MADISONIAN SEPARATION OF POWERS, LEGAL VALUES, AND RIGHTS-DRIVEN REFORM

Public administration scholars have for decades grappled with the challenge of reconciling the field’s managerial imperative with the rule of law and the broader legal constraints that shape the American constitutional democracy (e.g., Christensen, Goerdel, & Nicholson-Crotty, 2011; Newbold, 2010; Rosenbloom, 1983, 2007). A vibrant strain of this scholarship, and a key animation of the Madisonian tradition, is the examination judge-led management of public institutions (Bertelli, 2004; Wise & O’Leary, 2003).

The issue has its roots in the Warren Court’s expansion of constitutional protections against the arbitrary, disparate, or unjust application of government authority (Rosenbloom, O’Leary, & Chanin, 2010). Many of these rights created a cause of action that made them enforceable through private litigation and allowed individuals to challenge public agencies believed to be operating in violation of their civil rights. As was the case in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), a plaintiff’s victory in such cases set up a complex dynamic: how to reshape unlawful administrative practices in organizations that may either be opposed to, uninterested in, or incapable of changing to comply with the law. Rather than sit idle as their decisions were ignored, many courts chose to themselves manage the reform of unlawful government agencies. This process has come to be known as remedial law.

Like the agreements that underpin pattern or practice reform, judicial remedial orders are legally binding documents that typically involve issues of agency organization, strategic orientation, personnel management, and budgeting, and as such operate at the intersection of law, politics, and administration. Over the last fifty years or so, plaintiffs have called upon judges to issue constitutionally driven remedial orders against segregated school districts, such as *Missouri v. Jenkins*, 515 U.S. 70 (1995), abusive prison systems, such as *Brown v. Plata*, 131 S. Ct. 1910 (2011), and mental hospitals shown to house patients in unconstitutional conditions, such as *Youngberg v. Romeo*, 457 U.S. 307 (1982), among others.⁵

A well-developed line of research examines the legitimacy of the process with an eye toward the institutional and managerial competency of the judge. Those critical of remedial law believe that the use of the federal judiciary to oversee the reform of local institutions raises, at the very least, difficult separation of powers and federalism questions (e.g., Diver, 1979; Sandler & Schoenbrod, 2003; Yoo, 1996). Channeling Jefferson, opponents have argued that such a process infringes on the rights of states and the liberties of individual citizens. More acutely, many of these experts assert that remedial cases require judges to take on administrative responsibilities for which they are neither qualified nor accustomed, in the process threatening the judiciary's institutional prestige and generating illegitimate and undesirable outcomes (Horowitz, 1977, 1983; Yoo, 1996).

Others have lauded the remedial law process for its ability to reform public institutions shown to have violated systematically established legal principles. To these scholars, the results, in the form of the articulation of individual rights against powerful and abusive bureaucracies, outweigh any costs associated with the process (e.g., Feeley & Rubin, 2000; Schlanger, 2006). Speaking about remedial law in the context of public school desegregation, constitutional law scholar Chemerinsky (2003, p. 31) summarizes this perspective succinctly: Lack of political power among minority groups renders the courts "indispensable to effective desegregation."

In broad strokes, the parallels between judicially managed remedial law and the DOJ's enforcement of Section 14141 are difficult to deny. Both initiatives embody the drive to bring unlawful public institutions into compliance with constitutional standards. Both rely on external actors to push change. Both engender strident positions of support and opposition among scholars and practitioners alike. Both implicate Hamiltonian–Jeffersonian tensions over the role of federal power. What is more, despite their clear practical and theoretical relevance, both remain relatively understudied by public administration experts.

A closer comparison of the traditional remedial law model and pattern or practice reform would broaden understanding of each process. It would also shed light on what remains a central component of the enduring challenge of "retrofitting" public administration into the American constitutional democracy (Rosenbloom, 2000).

A useful place to begin such an analysis is to consider the extent to which criticism of remedial law is applicable to pattern or practice reform. On one hand, it would seem that the minimal role played by the judge in managing pattern or practice implementation would obviate many of the separation of powers arguments levied against the judge-led model. On the other hand, as reform efforts in Cincinnati and Los Angeles suggest, judicial enforcement is very much a part of the pattern or practice process (City of Cincinnati Independent Monitor, 2008; Rubin, 2013), though more as a mechanism for addressing noncompliance than as an instrument of day-to-day management. Are DOJ attorneys and monitors better equipped than

judges to manage such a process, or are all such (nonpolice) actors equally unqualified to oversee police department reform? On the contrary, would more robust judicial oversight result in a more effective, stronger set of legal protections in place to limit the use of unlawful and unaccountable police practices? In other words, is the traditional remedial process capable of generating a more effective, more durable set of police department reforms?

Beyond their separation of powers arguments, critics of traditional remedial law argue that the process is an ineffective means of balancing the defense of constitutional rights with other policy-related concerns. Specifically, opponents suggest that the rights at the core of remedial law efforts tend to be defined in overly broad terms, which grants judges an unhealthy power over the course of the organizational reform. Rather than overseeing the implementation of a narrow policy solution, judges have allowed the process to stray beyond the original cause of action, instead using it as a platform to address a wide range of institutional problems (e.g., Horowitz, 1977; Sandler & Schoenbrod, 2003; Yoo, 1996). The affected agency is left powerless, subject to an unpredictable and onerous set of legal mandates (e.g., Wise & O'Leary, 2003).

Critics further suggest that an exclusive focus on remedying constitutional violations too often ignores the managerial and organizational complexity of the task, minimizing the influence of other important factors, including resource availability, jurisdictional electoral preferences, and organizational culture, among others (Christensen & Wise, 2015; Fletcher, 1982).

On the surface, pattern or practice agreements appear to be immune to many of these criticisms. Section 14141 settlements are defined by very specific and narrow tasks rather than ambiguous rights. Pattern or practice agreements are the antithesis of the meandering remedial decree, instead characterized by precise deadlines and predetermined end-dates. Of course, a team of executive branch technocrats, including DOJ attorneys and independent monitors, manages the Section 14141 implementation process, rather than the federal judiciary. The absence of private litigants ostensibly reduces the influence of constituent groups and advocacy lawyers during the negotiation and implementation processes. As a result, the goals of the settlement are able to remain fairly narrow, and the means used to achieve them comparatively well-defined.

There is early evidence highlighting the positive effects of clear means and ends, both of which help to make the implementation of pattern or practice reform relatively efficient (Chanin, 2014; Davis et al., 2002; Stone et al., 2009). By contrast, the DOJ's process has proved to be less effective at generating sustainable changes (Chanin, 2015; Davis et al., 2005). Does wider empirical analysis confirm that the pattern or practice reform process too heavily favors efficient implementation over lasting organizational change? Would a private cause of action (instead of the current construction, which gives the DOJ exclusive enforcement authority) yield other benefits, as some suggest (e.g., Gillies, 2000)? To what extent is the pattern or practice implementation "system" susceptible to the kinds of external influences and personal agendas that have in the past derailed traditional remedial efforts?

Bertelli's (2004; Bertelli & Feldmann, 2006) use of principal-agent theory and game theory modeling to analyze the remedial process presents another interesting theoretical lens through which to examine pattern or practice reform. In contrast to the prevailing wisdom, which held that managerial judges drew on institutional power and legal authority to drive organizational compliance (Wise & O'Leary, 2003; Wood, 1990), Bertelli's analysis suggests that the

institution and its staff, not the presiding judge, control the management of reform. The use of game theory to model negotiations between the DOJ and affected jurisdictions may generate similarly unexpected findings, in the process helping to alleviate the types of loggerheads that delayed reform in cities like Seattle (Miletich, Sullivan, & Thompson, 2012). Further, such an approach has the potential to facilitate more effective cooperation between department leadership and patrol officer union representatives, while increasing both the efficiency and durability of change (Kroman, 2017).

Research on remedial law has made meaningful contributions to the discussion of law in public administration and the practice of rights-driven institutional reform. Extending this analysis to pattern or practice police reform presents a meaningful opportunity for public administration scholars to examine further the practical implications of the Madisonian constitutional model.

FEDERAL POWER AND THE TENSION BETWEEN POLITICS AND ADMINISTRATION

Pattern or practice reform can also be framed in terms of political theory; Hamiltonian–Jeffersonian debates over the proper operation of the American federalist system, different means of democratic accountability, and the complex relationship between politics and administration are each important lenses through which to understand and advance the issue.

Arguments over federal intervention against state and local police departments map closely to academic debates that have come to define the federalism literature, echoing centuries-old tensions between the competing visions of the federal–state relationship articulated by Hamilton and Jefferson. Opponents of intervention have co-opted the language of scholars who advocate a less active federal presence, beginning with the contention that federal management of state and local law enforcement represents a dubious interpretation of states’ rights (e.g., *Melendres v. Arpaio*, 2008; Speri, 2017). As the Trump administration takes shape, many of these refrains have been used to signal that the federal government over the next four years will adopt a more laissez-faire attitude toward police accountability and other criminal justice policy issues (Zapotosky, Lowery, & Berman, 2016).

The argument follows that for our federal system to operate properly, mayors and city council members, not career DOJ attorneys, must be free to shape policy to meet the needs and demands of local constituents (e.g., *U.S. v. Johnson*, 2012). Such a process prevents local jurisdictions from becoming “laboratories of democracy” and limits the ability of grassroots communities to make specific choices about public safety and law enforcement. Pattern or practice reform, which emanates from a series of closed-door negotiations between federal officials and a small handful of high-level local officials also restricts the kind of pluralistic community involvement that energizes local democracy (Heisig, 2015). Special-interest representation is absent from this process (*U.S. v. New Orleans*, 2013), as is any transparent public debate (Johnson, 2012). The views of one national police union organization encapsulate these arguments:

A ... battle is now being waged ... pitting the legal weight and limitless financial resources of the U.S. Justice Department against [a municipal government’s] right to control its own police

department. At stake is no less than the fate of local agencies everywhere to control their own destinies versus an emerging pattern by the ... Justice Department aimed at federalizing municipal police departments ... (Hutchinson, n.d.)

Others, echoing the Hamiltonian view of federal power, suggest to the contrary that vigorous enforcement of constitutional principles is fundamental to the American federation (Armocost, 2003; Stuntz, 2006). After all, the prerogatives of local government do not include the adoption or perpetuation of unlawful policy. Regardless of which crime control strategy a jurisdiction prefers or what percentage of the budget a city council allots to public safety, local police behavior must comport with the rights and liberties established under the Constitution. Section 14141 empowers the DOJ to enforce the rule of law; the performance of those duties is consistent with a mainstream understanding of federal authority and a clear representation of divided government in action (Wise, 2001). Undergirding this position is the contention that federal oversight is the most effective mechanism for identifying and remedying systemic police misconduct.

Public administration scholars have much to contribute to this debate, beginning with an examination of how pattern or practice reform affects department leaders' ability to govern. Are police executives fully capable of making strategic decisions and wielding influence over the formal and informal priorities of the agency, both during and after implementation? Do police leaders and members of the rank-and-file see the investigative process as legitimate? Do they support changes mandated by consent decree? Do officers' opinions regarding the legitimacy of the process affect their willingness to comply with the terms of a settlement, as work by Tom Tyler (2006) and others (Terrill & Paoline, 2015) suggests they might?

Recent scholarship has shown that local support for reform among community leaders and individual citizens is critical to implementing and sustaining organizational change (e.g., Chanin, 2015; Skogan, 2008; Walker, 2012), yet there is very little public opinion research on the issue. Do most residents see federal intervention as legitimate? To what extent are pattern or practice systems and structures consistent with actual jurisdictional policy preferences? Would other approaches to reform, particularly those emphasizing participatory, bottom-up efforts, generate more public support? Would it be preferable to structure police accountability reforms around a state-based version of Section 14141 (Walker & Macdonald, 2009)?

As president, Barack Obama led an ambitious federal effort to drive criminal justice reform at the state and local levels; the pattern or practice initiative was a central tool in this effort and the primary means of identifying and enforcing civil rights violations against law enforcement agencies (Obama, 2017). Obama's DOJ framed the contents of pattern or practice reform agreements as "best practices for achieving police accountability" and urged departments across the country to voluntarily adopt its policies (DOJ, 2001). Has this push led to progress? Has the enforcement of Section 14141 had a homogenizing effect on local policing? Are there discernable patterns to the diffusion of this policy framework?

Arguments made in favor of federal intervention find additional support in the work on the social construction of target populations. Criminal suspects, minority community members, and others on the margins of society are less likely to achieve their preferences through the normal political process (Schneider & Ingram, 1993). Traditionally, these groups maintain fewer political connections than others, have less ability to organize and raise money, and represent positions and issues that tend to be less popular in the eyes of the mainstream (Barak, Leighton,

& Cotton, 2015). If this argument holds, and the rights of suspected criminals and police accountability are undervalued by the traditional political process, it would seem to lend credibility to the use of federal power to drive reform.

What is more, proponents of pattern or practice reform suggest that the imprimatur of federal oversight makes possible certain desirable and otherwise unattainable outcomes. External pressure to reform police practices is often credited with helping police chiefs and other public safety proponents force the hand of public officials in control of jurisdictional budgets (PERF, 2013). There is anecdotal evidence to suggest that the reform mandates help police officials acquire funding to make long-desired upgrades to department infrastructure (e.g., an early warning system), hire additional staff, and/or provide additional services, both to officers (e.g., training) and citizens (e.g., community outreach meetings) (PERF, 2013); does this bear up under wider empirical analysis? How do affected jurisdictions manage the costs associated with settlement agreements, which according to recent estimates run in the millions of dollars annually (Deere, 2016; Kelly et al., 2015)? To what extent does this affect local budgeting and programmatic choices over time?

Beyond funding, federal intervention has the ability to restore legitimacy to the affected department, which in many instances had lost the support and the confidence of the community. On this point, former federal monitor Ron Davis (2009) is worth quoting at length:

If you have an organization that has lost public trust and confidence ... it's going to view even your successes with suspicion and doubt. ... And so now to have a court or monitor validate that you've been implementing best practices, that you're in compliance, that your investigations are thorough. ... I think this process restores legality and legitimacy. (R. Davis, personal communication, 2009, December 18)

Davis's argument and others along the same lines demand further attention from scholars. To what extent are issues of police accountability and the protection of civil rights politically viable? Are local jurisdictions capable of making the kinds of changes brought on by Section 14141 in the absence of federal involvement? Is it possible for jurisdictions to maintain consistent and effective attention to these issues, so that they remain a public priority even in the absence of a high-profile police misconduct incident? To what degree does pattern or practice reform contribute to restoring a police department's legitimacy? How, if at all, does leadership transition affect these findings? Is it possible for the same leadership regime in place during the DOJ investigation to manage the implementation process and post-reform period?

There has long been an argument that to be "relevant" as a field of study, public administration researchers must engage with important social problems (Dahl, 1947; Gill & Meier, 2000; Nabatchi, Goerdel, & Peffer, 2011). Today, fewer issues are more salient and more in need of informed contribution than the administration of policy solutions directed toward systemic police misconduct. The DOJ's pattern or practice initiative represents a significant opportunity for public administration scholars to use the language and concepts of the field's foundational theoretical debates to engage with a practically important, yet understudied administrative problem.

The issue serves as a vehicle for public administration scholars to address these questions as they are unfolding on the pages of national newspapers and in congressional hearings. In the context of the ongoing presidential transition and the changes in policy new leadership will

engender, the DOJ's enforcement of Section 14141 brings to bear debates over the proper application of federal power to establish standards of state and local police behavior and broader issues related to the operation of the American system of federalism. Focus on these issues—and others, including the management of officer discretion, and the ongoing challenge of reconciling efficient crime control with the imperative of lawful, democratic policing—is critical, particularly as DOJ priorities shift away from police oversight, as was the case during the last Republican presidential administration (Rushin, 2014).

The lack of scholarly attention to pattern or practice reform hints at certain challenges confronting interested researchers. The first is access. Examining the various stages of reform, from investigation through termination, requires some ability to discuss the process with the DOJ and the police, along with other relevant stakeholders. Access to decision-makers throughout the reform effort would provide rare insight into a largely unknown process. The DOJ was more transparent under President Obama than in previous administrations; still, the Special Litigation Section could go much further to promote third-party research. How the DOJ under President Trump will handle such issues remains to be seen. American police departments have won a reputation for reticence, insularity, and an intense desire to manage the narrative on issues of concern (Mawby, 2002). This impulse is pronounced in cases involving sensitive or controversial matters, of which officer misconduct and externally driven reform certainly qualify (Mawby, 2010).

Even with full access and the corresponding support of department leadership, researchers may confront opposition from those lower down in the chain of command. Other potential challenges include the fickle nature of political support for police reform (Goldsmith, 2005) and the inconsistent and unpredictable quality of administrative data on police behavior (Kane, 2007), each of which may complicate a longitudinal study of organizational change. These potential roadblocks are relatively insignificant next to the possible benefits to a field of knowledge thus far sustained by a very limited empirical and theoretical literature.

In an article many credit with catalyzing the study of public administration in the United States, Woodrow Wilson (1887) wrote, “it is getting to be harder to *run* a constitution than to frame one.” Wilson's statement reflects the tensions that exist between the Hamiltonian, Jeffersonian, Madisonian, and Wilsonian traditions undergirding the study of public administration. Then as now, scholars and practitioners searched for effective ways to manage public organizations efficiently while balancing the legal and cultural imperatives tied to individual constitutional rights. The DOJ's pattern or practice initiative is an embodiment of this challenge. As DOJ-led reform of the Ferguson Police Department continues to remind us, the issue presents a tangible opportunity for public administration scholars to engage with a theoretically interesting and unique process while making a meaningful contribution to one of the country's most urgent domestic policy concerns.

NOTES

1. Note that the language of Section 14141 does not include a private cause of action. Only the DOJ may initiate a Section 14141 investigation, and thus claims made by private individuals, nonfederal state agencies or actors, or non-governmental organizations may trigger the investigative process. A further point of clarification is also worth making: The DOJ's determination of a pattern or practice of unlawful activity is based not on whether certain individual

actions—say an egregious officer use of force incident—were found in compliance with department policy or federal law, but whether the department in question evinces a pattern of action that violates the law.

2. “FPD will ensure that officers do not use less-lethal force unless: (a) a person is displaying aggressive resistance by attacking or attempting to attack the officer or another person, and (b) less intrusive methods to control the person or avoid harm have been tried and proven to be ineffective or would be ineffective” (para. 134).

3. “FPD will ensure that only officers who have successfully completed approved training and are currently certified may be issued, carry, and use firearms. At least once a year, officers must qualify with each firearm they are authorized to carry while on duty. Officers who fail to qualify will immediately relinquish FPD-issued firearms on which they failed to qualify. Those officers who still fail to qualify after remedial training within a reasonable time will be subject to disciplinary action, which may include termination of employment” (para. 140).

4. “FPD officers will not use conclusory statements, boilerplate, or canned language (e.g., “furtive movement” or “fighting stance”) without supporting incident-specific detail” (para. 175).

5. A version of the remedial law model has also been used to articulate and implement statutorily derived rights on a range of issues, including special education, prison management, access to reproductive health clinics, and, of course, through Section 14141, police practices (see Sandler & Schoenbrod, 2003).

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