

# The Civil Side of Criminal Procedure: Back to the Future?

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Securing compliance by law enforcement officers with legal limits on investigation and prosecution poses a formidable challenge. Traditional remedies fall into two categories: nullification of prosecutions and suits for damages. Courts will exclude illegally obtained evidence to denounce and discourage unreasonable searches and coerced confessions. Courts likewise will reverse convictions when prosecutors fail to comply with such doctrines as those laid down in *Batson*<sup>1</sup> and *Brady*.<sup>2</sup>

The nullification sanction cannot be invoked by a deceased person. More generally, it does not deter official misconduct inspired by motives other than the desire to obtain convictions. Excessive use of force by police illustrates both limits. Here, tort suits provide the primary remedy.<sup>3</sup> Both the nullification sanction and tort suits have serious drawbacks.

The defects of the exclusionary rule are well known.<sup>4</sup> The unattractive prospect of freeing the guilty has led to the recognition of multiple exceptions. It is also plausible to suspect that the prospect of exclusion has discouraged expansive understanding of substantive constitutional rights. The logical point that *ex ante* compliance generally would have the same consequences as exclusion *ex post* has failed to overcome the reluctance to witness the price we pay for constitutional rights.

Constitutional standards related to the trial process typically aim, among other things, at preventing factually erroneous convictions. Reversing convictions when prosecutors fall short of constitutional standards, therefore, does not have the same public-relations problem as the exclusionary rule. Only about one in twenty

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<sup>1</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that prosecutorial use of peremptory challenges in a single case may establish an equal protection violation).

<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that due process requires the prosecution to disclose material exculpatory information to the defense before trial).

<sup>3</sup> *See, e.g., Tennessee v. Garner*, 471 U.S. 1 (1985) (holding that police use of deadly force is unreasonable under the Fourth Amendment, and actionable under § 1983, when neither the crime of arrest nor the suspect's behavior threatened the safety of the officer or future victims).

<sup>4</sup> For a review of these drawbacks, see, for example, Donald A. Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 5–23 (2001).

convictions results from trial rather than a guilty plea.<sup>5</sup> Not all of the trial convictions lead to an appeal. The trial doctrines are important both in the cases that go to trial and in those cases where a guilty plea reflects the prosecution's risks at trial. Nonetheless, only a very small minority of cases ever get to the *Brady* stage,<sup>6</sup> let alone the *Batson* stage.

The imperfections of tort actions are as well known as those of the exclusionary rule.<sup>7</sup> Police defendants have a qualified immunity defense, together with a right to interlocutory appeal and a stay of discovery when the trial court rejects a summary judgment motion.<sup>8</sup> These doctrines reflect the concern that the risk of large damages (passed through to the public by indemnification arrangements) might discourage vigorous law enforcement. Individual tort suits, moreover, are quite ill-suited to high-frequency, low-damages violations, such as arbitrary stops for traffic or under *Terry*.<sup>9</sup>

Tort suits play a substantial role. The existence of indemnification agreements suggests that the risk of liability is real enough to motivate officers and their employers.<sup>10</sup> Millions of dollars are paid each year, although a precise estimate is not available.<sup>11</sup> Video recording has provided a compelling counter to police credibility in some cases. Even if tort suits have drawbacks, they offer the only practical deterrent for misconduct that is motivated by racism or sadism rather than by the desire to win a conviction.

Both tort suits and the exclusionary rule could be made more robust by relatively minor reforms. Even if the Supreme Court declines to reconsider the interlocutory review of pro-plaintiff rulings on immunity, the Court might be persuaded to abandon the discovery stay. Similarly, marginal reforms might strengthen the deterrent effect of the exclusionary rule. Examples include target

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<sup>5</sup> See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (stating that ninety-seven percent of federal convictions and ninety-four percent of state convictions are obtained through guilty pleas).

<sup>6</sup> See *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (holding that *Brady* does not require disclosure before entry of a guilty plea). It should be noted that prosecutors' offices often voluntarily disclose *Brady* material before they are required to do so.

<sup>7</sup> See, e.g., *Dripps*, *supra* note 4, at 18–21.

<sup>8</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that executive officers generally are protected by qualified immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 524–30 (1985) (holding that trial court rulings rejecting the defense of qualified immunity as a matter of law are subject to interlocutory review prior to commencement of discovery).

<sup>9</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>10</sup> See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (finding that employers paid 99.98% of the damages awarded against police officers in a large sample of departments).

<sup>11</sup> See Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 759 (2004) (stating that a large sample of “news stories report significant and sometimes immense sums being paid out to settle abuse claims, as well as payment for many smaller claims”).

standing and reconsidering the application of the inevitable discovery doctrine to vehicle searches. These are not huge steps, but they could make a significant difference.

Even a more effective remedial mix featuring a broader exclusionary rule and simpler procedures in tort cases would still have two major holes. The first is illegal detention by the police, by *Terry* stops of pedestrians, pretextual traffic stops, or time spent in jail before a determination that probable cause for the arrest was lacking. The vast majority of these constitutional violations yield no evidence to exclude. Nor do they, individually, accrue the high damages necessary to justify the costs of litigation.

The other hole in the remedial fabric is the prosecution function. Prosecutors have absolute immunity against constitutional tort liability (unless they carry out investigations, when they are treated like police, with only qualified immunity).<sup>12</sup> Theoretically, the nullification sanction—dismissing prosecutions and reversing convictions—ought to provide strong incentives for compliance. The difficulty within the criminal process is how hard constitutional violations are to prove.

In the very high percentage of cases that end in guilty pleas, the defense gives up before trial. When the defense does contest liability, the most obvious candidates for fuller enforcement are claims of selective or vindictive prosecution, and *Brady* violations. The first type of claim is hard to prove because the substantive law turns on the prosecutor's subjective intent.<sup>13</sup> The second type is hard to prove because the defense typically does not know what the prosecution does not share.

Efforts are underway to fill these gaps in the remedial structure. With respect to the police, in 1994, Congress adopted the Rodney King law, 42 U.S.C. § 14141, authorizing the Justice Department to seek structural reform injunctions against local police departments that engage in a pattern or practice of unconstitutional policing. Institutional reform litigation emerged as a distinct phenomenon in the 1970s. As Abram Chayes observed in a classic article, where traditional private litigation was bipolar, retrospective, and episodic:

The characteristic features of the public law model are very different from those of the traditional model. The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with

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<sup>12</sup> See *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding that prosecutors have absolute immunity from suits brought under § 1983); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (holding that prosecutors alleged to have fabricated evidence during the investigation have qualified rather than absolute immunity).

<sup>13</sup> See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“The requirements for a selective-prosecution claim draw on ‘ordinary equal protection standards.’ The claimant must demonstrate that the federal prosecutorial policy ‘had a discriminatory effect and that it was motivated by a discriminatory purpose.’” (citation omitted)).

negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation. School desegregation, employment discrimination, and prisoners' or inmates' rights cases come readily to mind as avatars of this new form of litigation.<sup>14</sup>

During this early period, the Supreme Court effectively precluded institutional reform litigation against municipal police departments by denying standing to plaintiffs who could not prove they would be future, as opposed to past, victims of police abuse.<sup>15</sup>

Section 14141 bypassed the standing requirement by authorizing the Justice Department to bring suits for equitable relief. Institutional reform litigation aggregates individual violations by alleging widespread violations tolerated by an unconstitutional institutional culture. If an injunction is issued, it usually provides detailed regulations enforced by reporting requirements and the oversight of an independent monitor. The independent monitor assumes the active supervisory role that Professor Chayes attributed to the judge in other cases of institutional reform litigation.

Structural reform litigation functions much like a negotiated rule-making in administrative law. Once the Justice Department informs the department that an investigation has found the threshold pattern or practice, the parties negotiate the terms of the consent decree with input from the police and the community. When an agreement is reached, the district court enters the order. In only a few recent cases have defendants elected to try the case rather than agree to an injunction.<sup>16</sup>

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<sup>14</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

<sup>15</sup> See *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that plaintiff who alleged excessive force against the police had standing to seek damages but not injunctive relief).

<sup>16</sup> See *United States v. Johnson*, 122 F. Supp. 3d 272 (M.D.N.C. 2015) (entering verdict for defendant Alamance County Sheriff after bench trial, finding United States failed to prove pattern or practice of constitutional violations); *United States v. Town of Colorado City*, No. 3:12-cv-8132-HRH, 2015 WL 3774315 (D. Ariz. June 17, 2015) (rejecting summary judgment motions and setting trial of claims under, *inter alia*, § 14141, for trial). The United States prevailed in a jury trial. As to the § 14141 claims, the jury verdict is advisory and not binding on the district court. See Press Release, U.S. Dep't of Justice, Justice Department Wins Religious Discrimination Lawsuit Against Colorado City, Arizona, and Hildale, Utah (Mar. 7, 2016), <https://www.justice.gov/opa/pr/justice-department-wins-religious-discrimination-lawsuit-against-colorado-city-arizona-and>.

Some of our largest departments have been subjects of structural reform injunctions. The list includes Los Angeles, Cincinnati, Cleveland, Pittsburgh, and Detroit. Private class actions have overcome the standing hurdle, and led to injunctions against the New York Police Department<sup>17</sup> and the Maricopa, Arizona sheriff's office.<sup>18</sup>

The emergence of institutional reform litigation is the most dramatic development in constitutional criminal procedure since *Mapp v. Ohio*<sup>19</sup> applied the exclusionary rule to the states in 1961. We now have a wealth of data on experience with these court orders. Do they work? What do they cost, in dollars and in public security? Three of our four articles address these issues.

Michael White, Henry Fradella, Weston Morrow, and Doug Mellon review the history of stop-and-frisk law and then take a meticulous look at New York's experience under a consent decree.<sup>20</sup> They find that the number of reported stops fell dramatically after the order (a decrease of 93% from the peak reached in 2011). Stops after the order showed substantially the same racial distribution as before. The quality of stops, as measured by hit rates for weapons seized and arrests made, rose dramatically.

Did the decrease in the number of stops, accounting for the higher quality of those under the decree, lead to an unacceptable increase in crime? Some tradeoff between liberty and security is inevitable. It would not be a surprise if greater respect for constitutional standards reduced the efficiency of law enforcement. There is some evidence that, accounting for other variables, federal court intervention leads to an increase in crime, at least during the initial years of the consent decree.<sup>21</sup>

As the authors note, a vigorous debate continues about whether the aggressive stop-and-frisk policy contributed to the city's drop in crime prior to the order. The authors find that after rising slightly just prior to the order, the city's crime rate declined slightly (and for homicide, the decline was dramatic). Many factors are at work, but the 93% decline in total stops is so catastrophic that we should expect that if there *was* a crime-control effect, we would see some sign of it.

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<sup>17</sup> See *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (entering structural reform injunction against NYPD).

<sup>18</sup> See *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015) (holding that district court did not abuse discretion in entering structural reform litigation but that some terms in the order were overbroad).

<sup>19</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>20</sup> Michael D. White, Henry F. Fradella, Weston J. Morrow & Doug Mellon, *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9 (2016).

<sup>21</sup> See Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. (forthcoming 2017). Using a difference-in-difference methodology, they find increases in crime that are both statistically significant and of substantial effect size. *Id.* They also find that this effect dissipates during the term of the order. *Id.*

The authors close by observing that police reform “is a marathon, not a sprint.”<sup>22</sup> Can progress achieved under federal court supervision be sustained after the order expires? Joshua Chanin takes up this question in a detailed study of five departments (Pittsburgh, Washington, D.C., Cincinnati, Prince George’s County, and Los Angeles) that achieved substantial compliance with consent decrees under the Rodney King law.<sup>23</sup> The impressive range of the study, covering five major departments, gives us a broad view of how federal intervention interacts with local institutional cultures. Chanin’s findings on the impact of reform injunctions are largely consistent with those of White et al. respecting New York. While the decrees were in force, citizen complaints, police use of force, and the costs of defending or settling civil rights suits generally declined. Crime generally did not increase. After the orders expired, experience varies.

Chanin finds that in Cincinnati and Washington D.C., the injunction seems to have contributed to a long-term improvement in compliance and citizen satisfaction. By contrast, in Pittsburgh, post-decree regression was substantial. Both Chanin and White et al. suggest that reform injunctions can secure substantial improvements in constitutional compliance but that long-term success depends on change in institutional culture.

In our third article, Stephen Rushin takes up the question of what explains sustainable progress in some jurisdictions but not in others.<sup>24</sup> In a detailed examination of the experience in Los Angeles, Rushin finds a remarkable success story. Compliance improved, the costs of defending tort suits dropped substantially, and crime did not increase. This across-the-board progress, moreover, appears to have staying power. In Los Angeles, new police leadership took the court order as an opportunity to adopt best practices rather than as ill-conceived meddling. The results so far have been impressive.

Rushin contrasts the Los Angeles case study with that of the Alamance County, North Carolina, sheriff’s office. The office refused to agree with the Justice Department and proceeded to trial. The district court found insufficient evidence of a “pattern or practice” or constitutional violations. An appeal is pending.

The Alamance County case may (or may not) lead to appellate exposition of the “pattern or practice” criterion. It may (or may not) encourage defiance rather than cooperation by other police departments. By attributing success in Los Angeles to police internalization of constitutional values, his study invites the awkward question of just what would have happened if the Justice Department had won the trial. An order would have issued, forcing at least some improvement in

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<sup>22</sup> White et al., *supra* note 20, at 65–66.

<sup>23</sup> Joshua Chanin, *Evaluating Section 14141: An Empirical Review of Pattern or Practice Police Misconduct Reform*, 14 OHIO ST. J. CRIM. L. 67 (2016).

<sup>24</sup> Stephen Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, 14 OHIO ST. J. CRIM. L. 113 (2016).

short-term compliance. After that? It would be no surprise, albeit not a happy ending, if the departments most in need of reform proved most impervious to it.

In our final article, Bruce Green and Sam Levine address the other big gap in criminal procedure's regulatory structure—the prosecution function.<sup>25</sup> They note that prosecutorial charging decisions are regulated very lightly by the constitutional law defendants can invoke. Criminal procedure specialists have looked largely to administrative law for models of how charging discretion might be regulated. Green and Levine explore the possibility that, at least in state courts, the professional ethical obligations of prosecutors might play a constructive role.

They argue that regulating charging decisions by professional disciplinary actions against prosecutors is a genuine possibility. They show that the ethics rules can be read to bar basing charging decisions on improper factors. They also show that the assumption of plenary executive power over charge selection is a feature of federal constitutional law, not necessarily applicable in the state courts that process most criminal cases.

Green and Levine do not claim a global solution to the problem of prosecutorial discretion. For one thing, federal prosecutions would still be subject to the supposed constitutional executive prerogative. For another, they (understandably, given the current state of the law) leave to another day the precise content of the constraints that might be imposed on charging decisions by general obligations of professional responsibility. It bears emphasis that their turn to state bar authorities is in no competition with other efforts to bring about some “decent restraint of prosecutorial power.”<sup>26</sup>

The full promise of the proposed turn to professional ethics can be seen in light of the other articles in the symposium. Lasting improvement in public institutions depends largely on changes in the internal culture of those organizations. The experience with structural reform litigation against police departments, thus far, suggests that external intervention can be expected to secure some immediate improvement in compliance, and that, in some cases at least, progress puts down roots.

The police professionalism movement of the early twentieth century did not lead to a uniform national pattern of constitutional policing. It did drive out some of the worst practices in some of the departments.<sup>27</sup> Were some prosecutorial

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<sup>25</sup> Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016).

<sup>26</sup> I borrow the phrase from James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

<sup>27</sup> See, e.g., Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 12 (2003) (“The professionalism movement achieved many improvements in American policing.”); *id.* (“Compared with the utter lack of professionalism that prevailed through the late nineteenth century, when police

charging decisions to become seen as not just unsavory, but positively unprofessional, we might see a similar effect on the prosecution function.

Institutional reform suits against police departments and bar proceedings against prosecutors reflect a common assumption. In both cases, abuse is seen as the exception rather than the rule. The Justice Department began targeting the worst of the worst departments for investigations. The number of large departments subjected to court orders may shake that assumption, especially if we factor in New York, subject to an order entered in a citizen's class action suit, and Chicago, where the mayor's police accountability task force just issued a report that is tantamount to an admission of liability under § 14141.<sup>28</sup>

So too with prosecutors: occasional glaring excesses, of course, deserve correction. If, however, the heart of the problem is the normal operation of a system in which outcomes are practically determined by executive discretion, larger solutions are in order. But we have to start somewhere.

For roughly the first century under the Constitution, civil litigation based on the common law torts of trespass, false imprisonment, and malicious prosecution provided the primary regulation of American law enforcement.<sup>29</sup> The reliance on private law made sense while criminal law enforcement, prosecution included, was conducted largely by private persons. During the late nineteenth and early twentieth centuries, the criminal justice became administered by full-time public officers, and the regulatory structure evolved. A regime of administrative discretion regulated at the margins by exclusionary rules and the residual threat of tort liability has been in place ever since. The articles in the Symposium invite the speculation that civil proceedings may bring criminal procedure back to the future, and provide some intriguing glimpses of what such a future might look like.

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departments were the 'adjuncts' of political machines, the achievements of the professionalism movement were substantial." (footnote omitted).

<sup>28</sup> See POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE (Apr. 2016), [https://chicagopatf.org/wp-content/uploads/2016/04/PATF\\_Final\\_Report\\_4\\_13\\_16-1.pdf](https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf). The report found that while Chicago's population is about evenly divided among Caucasians, African-Americans and Hispanics, 74% of those shot by police were black and only 8% were white, *id.* at 7; that 76% of those shocked with tasers were black and only 8% were white, *id.*; that 40% of complaints against police were not fully investigated by the Chicago Police Department, *id.* at 10; and that 1500 officers on the force had been the subject of 10 or more citizen complaints during the period 2007-2015, *id.* at 12.

<sup>29</sup> For purposes of illustration, an 1892 treatise on malicious prosecution and false imprisonment compiled thousands of cases. See MARTIN L. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS, AS ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA (Chicago, Callahan & Co. 1892).