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## Power v. Power: Federal Pattern-or-Practice Enforcement Actions Applied to Local Prosecutors

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# POWER V. POWER: FEDERAL PATTERN-OR-PRACTICE ENFORCEMENT ACTIONS APPLIED TO LOCAL PROSECUTORS

Thomas P. Hogan

ABSTRACT

INTRODUCTION

I. STATUTORY INTERPRETATION OF SECTION 12601

*A. The Statute*

*B. Federal Sources of Statutory Interpretation – No Standing for DOJ*

*1. Statutory Definition of “Law Enforcement Officers”*

*2. Legislative History of Pattern-or-Practice Statute*

*3. History of The Legislative History*

*4. Other Federal and Common Definitions of “Law Enforcement Officers”*

*5. Parallel Precedent for Judges*

*6. DOJ’s Interpretation of “Law Enforcement Officers”*

*C. State Sources of Statutory Interpretation – Possible Standing for DOJ*

*1. State Definitions of Local Prosecutors*

*2. Hybrid Office Structure of Local Prosecutors*

*3. Expanding Conduct of Local Prosecutors*

II. PRIOR DOJ ATTEMPTS TO APPLY SECTION 12601 TO LOCAL PROSECUTORS

*A. Orange County District Attorney’s Office*

*B. Missoula County Attorney’s Office*

III. PRACTICAL ISSUES, FEDERALISM, AND THE DOUBLE-EDGED SWORD OF REFORM

IV. AMENDING THE STATUTE AND AN ALTERNATIVE APPROACH

CONCLUSION

# POWER V. POWER: FEDERAL PATTERN-OR-PRACTICE ENFORCEMENT ACTIONS APPLIED TO LOCAL PROSECUTORS

Thomas P. Hogan\*

## ABSTRACT

One of the most powerful tools available to the United States Department of Justice (DOJ) to stop abuses in the criminal justice system is the federal pattern-or-practice statute, which allows DOJ to bring an enforcement action to prevent discriminatory conduct by government agencies. The most powerful actor in the criminal justice system is the district attorney, the local prosecutor who is at the center of the system. Does DOJ's pattern-or-practice enforcement authority extend to local prosecutors?

This crucial question remains unresolved in formal precedent and has not been addressed in the relevant literature. This Article explores the issue in detail, considering the statutory and legislative background from both federal and state sources, the meager and uninformative real-life scenarios where DOJ has attempted to bring an enforcement action against a local prosecutor, parallel precedent addressing DOJ's authority over judges, and DOJ's own conflicted views. Federal resources demonstrate an almost uniformly negative view of DOJ's standing to bring a pattern-or-practice action against a local prosecutor. However, previously unexplored state law and an analysis of the evolving and expanding authority exercised by some district attorneys reveal novel and newly viable avenues to establish DOJ's standing in this area.

This Article finds that DOJ currently lacks uniform standing to bring a pattern-or-practice enforcement action against a district attorney, with such authority existing only in limited circumstances. The benefits and dangers of amending the statute to grant DOJ such power are addressed, including practical issues, normative concerns, and political ramifications.

This Article recommends that the pattern-or-practice statute be amended explicitly to include local prosecutors, providing critical nationwide oversight regarding such potent actors. The Article also explores a potential alternative solution which would provide more transparency regarding the decision-making of district attorneys.

## INTRODUCTION

The United States Department of Justice (DOJ) has a powerful tool to use when law enforcement agencies engage in discriminatory conduct: section 12601, the so-

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called “pattern or practice” statute.<sup>1</sup> Section 12601 permits DOJ to bring an enforcement action and seek equitable relief against government agencies where there is a pattern or practice of conduct that deprives persons of federal rights, privileges, or immunities.<sup>2</sup> For instance, DOJ used this authority to bring enforcement actions against the Ferguson, Missouri, Police Department and city after the shooting of Michael Brown in 2014;<sup>3</sup> against the Chicago Police Department and city after the shooting of Laquan McDonald in 2014;<sup>4</sup> against the Louisville Police Department and city after the shooting of Breonna Taylor in 2020;<sup>5</sup> and against the Minnesota Police Department after the murder of George Floyd in 2020.<sup>6</sup> The Seattle Police Department has been under a DOJ consent decree pursuant to the pattern-or-practice statute since 2012.<sup>7</sup> Such enforcement actions permit DOJ to require agencies to change their practices regarding use of force, traffic stops, arrests, and other critical aspects of law enforcement.<sup>8</sup> Section 12601 confers broad-reaching authority on DOJ to modify and reform the conduct of local law enforcement.<sup>9</sup>

Meanwhile, the most potent agency in the local criminal justice system is the district attorney’s office.<sup>10</sup> A generation of influential legal scholars have described district attorneys as the most powerful actor in the American criminal justice system.<sup>11</sup> There are over 2,000 chief prosecutors at the local level in the United

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1. See 34 U.S.C. § 12601.

2. *Id.*

3. See Complaint at 1, *United States v. City of Ferguson*, No. 4:16-cv-00180-CDP (E.D. Mo. Feb. 10, 2016); Consent Decree at 1–2, *United States v. City of Ferguson*, No. 4:16-cv-00180-CDP (E.D. Mo. Apr. 19, 2016). For any document cited herein which is not publicly available, a copy of the document is retained by and available through the Maine Law Review.

4. See generally U.S. DEP’T OF JUST. C.R. DIV. & U.S. ATT’Y’S OFF. FOR THE N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017).

5. See Darcy Costello, *US Justice Department to Investigate Louisville Metro Police force, stops, discrimination*, LOUISVILLE COURIER J., (Apr. 26, 2021), <https://www.courier-journal.com/story/news/politics/metro-government/2021/04/26/justice-department-to-investigate-louisville-police-department/7385318002/>.

6. See Carrie Johnson, *DOJ to Investigate Minneapolis Police Over Possible Patterns of Excessive Force*, NPR (Apr. 21, 2021), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/21/989446758/doj-to-investigate-minneapolis-police-for-possible-patterns-of-excessive-force>.

7. See Complaint at 1–2, *United States v. City of Seattle*, No. 2:12-cv-01282-JLR (W.D. Wash. July 27, 2012); Settlement Agreement at 8, *United States v. City of Seattle*, No. 2:12-cv-01282-JLR (W.D. Wash. July 27, 2012).

8. See *Addressing Police Misconduct Laws Enforced by the Department of Justice*, DEP’T OF JUST. (Oct. 13, 2020), <https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> [<https://perma.cc/Y5R7-FL2P>] (“The types of conduct covered by this law can include, among other things, excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests.”).

9. 34 U.S.C. § 12601.

10. The nomenclature applied to the chief prosecutor in a local or state jurisdiction varies from state-to-state, including *inter alia* the titles district attorney, attorney general, state’s attorney, commonwealth attorney, county prosecutor, and city attorney. For purposes of this Article, the term “district attorney” will refer to the chief prosecutor in any local jurisdiction, including states, counties, and cities.

11. See, e.g., Angela Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 4 (2019) (“Prosecutors are the most powerful officials in the criminal justice system.”); David A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480 (2016) (“The starting point for virtually every discussion of prosecutors in the

States (all of whom are elected with the exception of Alaska, Connecticut, and New Jersey).<sup>12</sup> These prosecutors have final say over what cases and which defendants are prosecuted, the sentences sought, and myriad other decisions which dictate the fundamental outcomes of the criminal justice system.<sup>13</sup> The vast majority of criminal cases in America are handled by local prosecutors. For instance, in 2021, federal prosecutions by all of DOJ resulted in sentencing in 57,377 cases;<sup>14</sup> pre-pandemic, DOJ handled 76,538 cases in 2019.<sup>15</sup> From 1990–2019, local prosecutors handled between 10 million and up to 16 million cases per year, ranging from drunk driving to homicide.<sup>16</sup> Thus, district attorneys handle over 99% of the criminal cases in the United States every year. In carrying out their duties, local prosecutors have been accused of systemically racist practices by everyone from academics to public interest groups to sitting prosecutors.<sup>17</sup> In the decentralized prosecutorial system of

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United States is their tremendous clout.”); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009) (“No government official in America has as much unreviewable power and discretion as the prosecutor.”); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549, 2569 (2004) (“The law-on-the-street—the law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges . . . . The real law of crimes and sentences is the sum of those prosecutorial choices.”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 U. MICH. L. REV. 505, 506 (2001) (“[P]rosecutors . . . are the criminal justice system’s real lawmakers.”); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 888 (1998) (“[T]he prosecutor possesses enormous official power that is neither subject to meaningful control by any branch of government nor limited by any procedures for extra-governmental challenge.”); Steven A. Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1476–77 (1987) (“It is the enormous power prosecutors wield that likely drives judicial concern over their intentions and motives . . . .”). *But see* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 171 (2019) (challenging claims of prosecutorial pre-eminence). *See generally* WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (Harv. Univ. Press 2013).

12. GEORGE COPPOLO, OFF. OF LEGIS. RSCH., STATES THAT ELECT THEIR CHIEF PROSECUTORS (2003).

13. *See generally* sources cited *supra* note 11.

14. U.S. SENT’G COMM’N, FISCAL YEAR 2021 OVERVIEW OF FEDERAL CRIMINAL CASES 1–2 (2022) (“The United States Sentencing Commission received information on 57,377 federal criminal cases in which the offender was sentenced in fiscal year 2021 . . . . The . . . cases reported to the Commission in fiscal year 2021 represent a decrease of 7,278 cases (11.3%) from fiscal year 2020 and the lowest number of cases since fiscal year 1999.”).

15. U.S. SENT’G COMM’N, ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2019).

16. *See Number of Arrests for All Offenses in the United States from 1990 to 2021*, STATISTA, <https://www.statista.com/statistics/191261/number-of-arrests-for-all-offenses-in-the-us-since-1990/> (June 2, 2023). State court criminal statistics are notoriously difficult to capture, because of the decentralized nature of the courts and systems.

17. *See* Robert Smith & Justin Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE UNIV. L. REV. 795, 797 (2012) (“[I]mplicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways.”); Angela J. Davis, John Chisholm, & David Noble, *Race and Prosecution*, INST. FOR INNOVATION PROSECUTION JOHN JAY COLL., Jan. 2019, at 1 (“Every action that a prosecutor’s office takes is colored by this country’s historical record of oppressing racial minorities.”); VERA INST. OF JUST., *Prosecution Reform*, <https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/prosecution-reform> [<https://perma.cc/6Y8Y-BU5F>] (last visited Dec. 7, 2023) (“Prosecutors have historically perpetuated mass incarceration and racial disparities in our legal system.”).

the United States, district attorneys are the barbarian kings and queens of criminal justice.

This leads to a natural question: does DOJ have standing to bring a pattern-or-practice enforcement action under section 12601 against a local prosecutor? Almost incomprehensibly, this issue remains unsettled and unexplored. This Article attempts to bridge this gap in the research and potential oversight by federal authorities over all-powerful district attorneys. This Article is structured as follows. Part I reviews the text of the pattern-or-practice statute, traditional statutory interpretation under federal law, and supplementary interpretation sources under state law. Part II describes the two times that DOJ has attempted to assert such authority over local prosecutors and the inconclusive results. Part III discusses the practical, normative, and political issues surrounding whether DOJ should have the authority to regulate local prosecutors via pattern-or-practice enforcement actions. Part IV concludes by recommending that section 12601 be amended explicitly to include local prosecutors, and explores a potential novel alternative option.

The question of whether DOJ has authority to bring a pattern-or-practice enforcement action against district attorneys is a classic match-up of power versus power. In one corner of the ring is DOJ, armed with the potent tool of section 12601 to demand changes in fundamental practices by local criminal justice agencies. In the other corner of the ring are the district attorneys, all-powerful and unsupervised rulers of their own criminal justice fiefdoms. The stakes are high, which may explain why this volatile question has remained unanswered. This Article attempts to answer the question comprehensively, by both a traditional analysis and by introducing undeveloped legal and factual considerations.

## I. STATUTORY INTERPRETATION OF SECTION 12601

### A. *The Statute*

The text of the federal pattern-or-practice statute in title 34 of the United States Code reads:

(a) Unlawful conduct

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

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.<sup>18</sup>

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18. 34 U.S.C. § 12601. The reference in section 12601(b) to “paragraph (1)” is an uncorrected error in the original statute and should read “subsection (a) of this section.” *Id.* at n.1.

The plain text of section 12601 is beguilingly simple. The statute gives DOJ standing to bring an action for equitable relief based on a pattern or practice of conduct that deprives persons of federal rights, privileges, or immunities.<sup>19</sup> It covers conduct by (i) “law enforcement officers;” or (ii) “officials . . . with responsibility for the administration of juvenile justice or the incarceration of juveniles . . . .”<sup>20</sup> There is general consensus that the latter clause addresses juvenile incarceration facilities and agencies, and those are the entities which have been subjected to pattern-or-practice actions under that section of the statute.<sup>21</sup> Thus, the straightforward question here is whether local district attorneys are “law enforcement officers” under section 12601. This question should be simple to answer but turns out to be frustratingly complex.

### *B. Federal Sources of Statutory Interpretation – No Standing for DOJ*

#### *1. Statutory Definition of “Law Enforcement Officers”*

As with any federal statute, after reviewing the text, the initial source to consider when looking for the interpretation of a key term is the definitional section of the statute itself. Most federal (and state) statutes, particularly those dealing with a subject as important as the pattern-or-practice statute, include detailed definitional sections. For instance, the criminal statute addressing felons-in-possession of firearms which have been shipped or transported in interstate or foreign commerce includes an extensive section defining a “firearm,” what prior convictions are covered, and what exactly “interstate or foreign commerce” means.<sup>22</sup> The Federal Clean Water Act, covering pollution of waterways in the United States, carefully and explicitly defines such terms as “pollutant,” “discharge,” “navigable waters,” and other relevant words or phrases.<sup>23</sup>

Thus, we should be able to determine if local district attorneys are “law enforcement officers” for purposes of section 12601 by reference to the definitional section of the pattern-or-practice statute. Unfortunately, diligent scholars will be disappointed. Section 12601 contains no definition of “law enforcement officers.” In fact, the statute also fails to define even what constitutes a “pattern or practice”—a crucial term for any conduct covered by the statute.<sup>24</sup> There simply is no definitional section of the statute, thwarting any easy analysis.

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19. *Id.*

20. *Id.*

21. *See, e.g.*, Complaint, United States v. LeFlore County, No. 4:15-cv-059 (N.D. Miss. May 12, 2015), [https://www.justice.gov/sites/default/files/crt/legacy/2015/07/13/lefllore\\_comp\\_5-12-15.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/07/13/lefllore_comp_5-12-15.pdf) (relating to county juvenile detention center); Complaint, United States v. New York, No. 1:10-cv-00858 (N.D.N.Y. July 14, 2010), [https://www.justice.gov/sites/default/files/crt/legacy/2013/08/26/nyjuv\\_complaint\\_7-14-10.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/08/26/nyjuv_complaint_7-14-10.pdf) (relating to juvenile residential centers); Complaint, United States v. Ohio, No. 2:08-cv-00475 (S.D. Ohio May 16, 2008), [https://www.justice.gov/sites/default/files/crt/legacy/2011/04/26/sciot\\_o\\_complaint\\_05-16-08.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/04/26/sciot_o_complaint_05-16-08.pdf) (relating to juvenile correctional facilities).

22. 18 U.S.C. §§ 921(a)(2)–(3), 922(g).

23. 33 U.S.C. § 1362(6)–(7), (16).

24. The phrase “pattern or practice” has an extensive history of judicial interpretation, so the drafters of section 12601 perhaps can be excused for not defining that term. *See, e.g.*, Int’l Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977) (In an action under the Civil Rights Act of 1964,

## 2. Legislative History of Pattern-or-Practice Statute

In the absence of an explicit definition of “law enforcement officers” in section 12601, we are forced to look to the legislative history of the pattern-or-practice statute to determine if local prosecutors are covered. Once again, scholars will be disappointed, and probably somewhat surprised. Section 12601 has no legislative history regarding whether district attorneys are “law enforcement officers” for purposes of the statute. In fact, despite the high-profile nature of the statute, section 12601 has no legislative history at all.<sup>25</sup>

The facts behind this curious legislative black hole require recalling the circumstances under which the pattern-or-practice statute originally was enacted. Section 12601 was part of the Violent Crime Control and Law Enforcement Act of 1994 (the “1994 Crime Bill”).<sup>26</sup> The 1994 Crime Bill, enacted under President William Clinton, was the largest crime bill in the history of the United States, covering over 350 pages of new federal statutes.<sup>27</sup> The bill addressed gang activity, funding for additional police officers, drug use in federal prisons, violence against women, the death penalty, and numerous other issues including the pattern-or-practice statute.<sup>28</sup> With the enormous volume of issues addressed by the 1994 Crime Bill, at first glance it appears to be a case of Congress deciding to pass a bill in order to find out what was in it, to paraphrase a more recent politician.<sup>29</sup> The immediately following section sheds more light on this gap; however, the fact remains that the pattern-or-practice statute has no formal legislative history to address the issue of whether local prosecutors constitute “law enforcement officers” under section 12601. Another dead end.

## 3. History of The Legislative History

In the absence of any direct legislative history to address the definition of “law enforcement officers” under section 12601, it is useful and necessary to consider the history and development of the statute in a broader context—the history of the legislative history. As described below, there is an extensive historical record regarding DOJ’s efforts to gain equitable oversight authority over local criminal justice activities prior to passage of the pattern-or-practice statute in 1994.

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“the Government ultimately had to prove more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company’s standard operating procedure—the regular, rather than the unusual, practice.”)

25. See Eugene Kim, *Vindicating Civil Rights Under 42 U.S.C. § 14141: Guidance From Procedures in Complex Litigation*, 29 HASTINGS CONST. L. Q. 767, 769 n.7 (2002) (The pattern-or-practice statute “itself has no direct legislative history.”).

26. See Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (1994).

27. See *id.*

28. *Id.*

29. See Peter Roff, *Pelosi: Pass Health Reform So You Can Find Out What’s In It*, U.S. NEWS & WORLD REP. (Mar. 9, 2010), <https://www.usnews.com/opinion/blogs/peter-roff/2010/03/09/pelosi-pass-health-reform-so-you-can-find-out-whats-in-it> (Speaker of the House Nancy Pelosi referring to the Affordable Health Care Act, stating that Congress “[has] to pass the bill so you can find out what’s in it, away from the fog of controversy.”).



The initial history of DOJ's attempts to gain authority over local "law enforcement officers" is captured neatly in one case, *United States v. City of Philadelphia*.<sup>30</sup> As discussed in that decision, in a reaction to widespread allegations of police misconduct, DOJ first requested in 1957 that Congress grant DOJ the authority to bring injunctive actions to protect the federal constitutional rights of individual citizens.<sup>31</sup> The proposal died in committee.<sup>32</sup> DOJ made multiple other attempts during the civil rights era to gain such injunctive authority over local police departments, but always failed.<sup>33</sup>

DOJ then decided on a different strategy. In 1979, DOJ brought a complaint seeking broad declaratory and injunctive relief against the Philadelphia Police Department.<sup>34</sup> DOJ alleged that the police department was engaging in a pattern or practice of depriving citizens of their federal rights through stop-and-frisk tactics, coercive confessions, the use of deadly force, and other illegal conduct and procedures.<sup>35</sup> DOJ sought the equitable authority to enjoin those practices, bringing suit against the city itself, the police department, and various officials.<sup>36</sup> DOJ claimed that it had implied authority to seek such injunctive relief based, *inter alia*, on (i) two federal criminal statutes established under the Civil Rights Act of the Reconstruction era and the Fourteenth Amendment in general; or (ii) the fact that the city and police department received federal funding under two separate acts.<sup>37</sup> The district court dismissed the complaint, holding that DOJ had no such implied authority.<sup>38</sup> DOJ appealed the dismissal to the Third Circuit, once again raising the issue of its proposed implied equitable authority under federal criminal statutes, the Fourteenth Amendment, and the funding acts.<sup>39</sup>

The Third Circuit eviscerated DOJ's claim to implied equitable authority over local police departments. The *City of Philadelphia* court first examined whether the federal criminal statutes or the Fourteenth Amendment provided any such implied authority.<sup>40</sup> The court held that the statutes in question were not designed to give such authority to DOJ; the legislative history revealed that Congress had multiple opportunities to grant such authority to DOJ but had declined to do so, and there were other remedies available to address the perceived wrongs (e.g., criminal

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30. *United States v. City of Philadelphia*, 644 F.2d 187, 194–97 (3d Cir. 1980).

31. *Id.* at 195.

32. *Id.* at 196–97.

33. *Id.* ("Congress had three opportunities between 1957 and 1964 to authorize the Attorney General to bring lawsuits of the type that we now consider. It refused on each occasion . . .").

34. *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1252 (E.D. Pa. 1979).

35. *Id.*

36. *Id.*

37. *Id.* at 1258–67. DOJ initially claimed standing to bring an equitable action under 28 U.S.C. § 518(b), which states: "When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so." See 28 U.S.C. § 518(b). DOJ later abandoned this farfetched claim in the subsequent appeal. See *City of Philadelphia*, 644 F.2d at 189–90.

38. *City of Philadelphia*, 482 F. Supp. at 1274.

39. See *City of Philadelphia*, 644 F.2d at 189.

40. *Id.* at 190–91.

prosecutions or private rights of action).<sup>41</sup> Regarding DOJ's claim for such implied authority under the Fourteenth Amendment, the Third Circuit opined that absent an express delegation of this authority to DOJ by Congress, granting DOJ such broad power over local police agencies would violate central concepts of federalism and the separation of powers.<sup>42</sup> The *City of Philadelphia* court approvingly quoted the district court's opinion that "to permit this action to proceed 'would be to vest an excessive and dangerous degree of power in the hands of the Attorney General.'"<sup>43</sup> The court also noted that DOJ itself had repeatedly stated that it did not have such equitable authority over local police agencies.<sup>44</sup> The court summarily dismissed DOJ's claim to have the requested injunctive authority based on federal funding being supplied to the local municipalities or agencies, simply noting that such allegations were insufficiently pled.<sup>45</sup> The *City of Philadelphia* court upheld the dismissal of the complaint, confirming that DOJ lacked the demanded authority to enjoin local police misconduct.<sup>46</sup>

There was a strongly worded opinion from a group of Third Circuit judges dissenting from the circuit court's decision denying an en banc rehearing in the case.<sup>47</sup> That dissent cited the pervasive pattern of "police brutality in Philadelphia" as necessitating federal oversight.<sup>48</sup> However, DOJ did not appeal the decision in *City of Philadelphia*, choosing not to seek certiorari to the Supreme Court; instead, DOJ's goal of obtaining injunctive authority over local police agencies went dormant for over a decade.<sup>49</sup>

In the interim, there were other instances of police misconduct which drew national attention. Following the police beating of Rodney King in Los Angeles in 1991, the issue of giving DOJ injunctive authority over local police agencies arose again.<sup>50</sup> To address such incidents, Congress introduced a bill called the Police Accountability Act, with the stated goal: "[t]o strengthen the Federal response to police misconduct."<sup>51</sup> The House Judiciary Committee discussed in detail specific instances of police misconduct in North Carolina and Washington state, which were justifications for the proposed law.<sup>52</sup> The Police Accountability Act stated that DOJ's authority would be triggered by "a pattern or practice of conduct by law

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41. *Id.* at 190–99.

42. *Id.* at 201.

43. *Id.* at 200 (quoting *City of Philadelphia*, 482 F. Supp. at 1268).

44. *See id.* at 202.

45. *Id.* at 204–05.

46. *Id.* at 205.

47. *Id.* at 207.

48. *Id.*

49. *See* Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 161 (1998) ("Though the Supreme Court never ruled on the issue, subsequent attorneys general apparently viewed the rulings in *City of Philadelphia* as determinative; the Department of Justice never again attempted to enjoin patterns or practices of rights violations by police or institutional officials.")

50. *Id.* at 163 ("But the Rodney King incident and the national outcry that followed rejuvenated congressional interest in new approaches to the problem of police brutality."); *see also* Rachel Wells, *Lessons from the LA Riots: How a Consent Decree Helped a Troubled Police Department Change*, CNN (May 1, 2017), <https://www.cnn.com/2017/04/28/us/lapd-change-since-la-riots/index.html>.

51. H.R. 2972, 102d Cong. (1991) (emphasis added).

52. *See* H.R. REP. NO. 102-242, at 138–39 (1991).

enforcement officers that deprives persons of rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States.”<sup>53</sup> In short, this was the language which later was adopted as today’s section 12601.

After debate over some specific provisions, Congress incorporated the Police Accountability Act into the House Omnibus Crime Bill of 1991 (the “1991 Crime Bill”).<sup>54</sup> The Senate debated the 1991 Crime Bill, and eventually a compromise version of the bill was agreed to with the House.<sup>55</sup> However, under a veto threat, the 1991 Crime Bill never was presented to President George H.W. Bush.<sup>56</sup> Once again, DOJ was denied injunctive authority over local law enforcement agencies.

However, the pattern-or-practice statute was then was resurrected in the 1994 Crime Bill, signed into law by President Clinton.<sup>57</sup> There is no legislative history to section 12601 associated with the 1994 Crime Bill.<sup>58</sup> Instead, as other scholars have noted, and as asserted by DOJ itself, the legislative history of the earlier version of the pattern-or-practice statute from the 1991 Crime Bill effectively serves as the legislative history for section 12601 in the 1994 Crime Bill.<sup>59</sup>

While the historical background on the pattern-or-practice statute is fascinating, the impact on the current debate about whether section 12601 covers prosecutors as “law enforcement officers” is contained in the interstitial silences of the legislative history. During the civil rights period from 1957 to 1964, when DOJ was repeatedly requesting equitable authority over local police agencies, prosecutors were never mentioned. In *United States v. City of Philadelphia*, DOJ attempted to bring an action against seemingly every official they could think of, including the police commissioner, mayor, police commanders, medical examiner, and prison superintendent.<sup>60</sup> But DOJ did not bring the action against the Philadelphia District Attorney’s Office or the District Attorney (who would later become Governor Edward Rendell).<sup>61</sup> The focus was squarely on police conduct and police policies. When Congress began debating legislation to overcome the decision in *City of Philadelphia*, the focus was on providing the authority which was denied in that case: injunctive authority over police departments, not prosecutors.<sup>62</sup> In the later legislative history addressing the failed 1991 Crime Bill, which included the earlier version of the pattern-or-practice statute, there is ample discussion of the need for oversight concerning local police departments, but that same legislative history is silent regarding the inclusion of local district attorneys.<sup>63</sup> Congress had another opportunity to address the issue in passing the pattern-or-practice statute as part of

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53. H.R. 2972, 102d Cong. (1991). The bill also proposed a new crime of “police brutality.” *Id.*

54. H.R. 3371, 102d Cong. § 1201 (1991).

55. See Cong. Rec. H8173 (Nov. 27, 1991).

56. Miller, *supra* note 49, at 163–64.

57. *Id.*

58. See discussion *supra* Section I.B.2.

59. Miller, *supra* note 49, at 164; Kim, *supra* note 25, at 769 n.7, 772–73 (citing *United States v. City of Columbus*, No. CIV.A. 2:99-CV-1097, 2000 WL 1133166, at \*3 (S.D. Ohio Aug. 3, 2000)) (“[A]lthough § 14141 itself has no direct legislative history, the history of the Omnibus Crime Bill Act, never actually promulgated, is instructive because it contained a provision nearly identical to § 14141.”).

60. See *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1252 (E.D. Pa. 1979).

61. *Id.*

62. *Id.*

63. *Id.*

the 1994 Crime Bill, but did not add local prosecutors.<sup>64</sup> As the Third Circuit in *City of Philadelphia* made clear, in refusing to recognize a new equitable authority for DOJ, the “Court now adheres to the ‘elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.’”<sup>65</sup> Congress had multiple opportunities to include local district attorneys within the scope of the federal pattern-or-practice statute; the silence of Congress in an area where they could have spoken is almost certainly fatal to any argument by DOJ to justify including local prosecutors under section 12601 based on federal legislative history.<sup>66</sup>

#### 4. Other Federal and Common Definitions of “Law Enforcement Officers”

Whilst the history of section 12601 cuts against including local district attorneys as “law enforcement officers” for purposes of the pattern-or-practice statute, other federal statutes offer different potential interpretive avenues. Within title 34, the same title which encompasses the pattern-or-practice statute, there is a statute which explicitly defines “law enforcement officers.”<sup>67</sup>

Title 34 includes a statute which created the “Law Enforcement Congressional Badge of Bravery.”<sup>68</sup> That statute expressly includes a definition for a “state or local law enforcement officer”:

The term ‘State or local law enforcement officer’ means an employee of a State or local government—

- (A) who has statutory authority to make arrests or apprehensions;
- (B) who is authorized by the agency of the employee to carry firearms; and
- (C) whose duties are primarily—
  - (i) engagement in or supervision of the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law; or
  - (ii) the protection of Federal, State, local, or foreign government officials against threats to personal safety.<sup>69</sup>

Superimposing this definition of “law enforcement officer” onto the pattern-or-practice statute, local district attorneys would not qualify as law enforcement officers who are subject to DOJ enforcement actions under section 12601. District attorneys do not have the “statutory authority to make arrests or apprehensions” and are not “authorized by the agency of the employee to carry firearms.”<sup>70</sup> Local district

64. Miller, *supra* note 49, at 163–64.

65. United States v. City of Philadelphia, 644 F.2d 187, 192 (3d Cir. 1980) (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979)).

66. It is interesting to consider an alternative historical timeline. If DOJ had included the Philadelphia District Attorney in the laundry list of officials sued in the *City of Philadelphia* case, then perhaps local prosecutors would have been the subject of debate by Congress during the later formulation of the pattern-or-practice statute. Section 12601 eventually included police, municipal entities, and prisons, the named defendants in *City of Philadelphia*.

67. See 34 U.S.C. §§ 50301–50314 (2017).

68. *Id.*

69. *Id.* § 50301(11).

70. *Id.* There is no state statutory authority or precedent providing local prosecutors with the right to make an arrest or carry a firearm as part of their jobs.

attorneys have the same authority to arrest or carry firearms as any average citizen, no more and no less.

The definition of “law enforcement officer” in the Congressional Badge of Bravery statute aligns with the traditional definition of law enforcement, as the term is commonly understood. The Merriam-Webster Dictionary defines “law enforcement” as: “the department of people who enforce laws, investigate crimes, and make arrests; the police.”<sup>71</sup> This definition simply does not include prosecutors, and specifically includes the police. The common understanding of a term is one of the touchstones of any statutory analysis and must be considered here.<sup>72</sup>

Thus, according to another section of title 34, the same federal title which encompasses the pattern-or-practice statute, local prosecutors would not be considered “law enforcement officers.”<sup>73</sup> The common understanding of the term “law enforcement” also excludes local prosecutors. Once again, based on federal authority, it appears that DOJ does not have standing to bring an enforcement action under section 12601 against the most powerful actor in the local criminal justice system.

### 5. *Parallel Precedent for Judges*

While there is no judicial precedent addressing whether section 12601 covers local district attorneys, there is an analogous decision explicitly addressing the issue of whether the pattern-or-practice statute covers local judges. That case, *United States v. Lauderdale County*, is instructive.<sup>74</sup>

In October of 2012, DOJ filed a pattern-or-practice complaint under section 12601 against Lauderdale County, Mississippi, and two of its juvenile court judges, alleging that they had created a “school-to-prison” pipeline infringing on the constitutional rights of juvenile suspects.<sup>75</sup> The local juvenile court judges moved to dismiss the complaint, arguing that they were not covered by section 12601 because they did not qualify as “officials or employees of [a] governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles.”<sup>76</sup> Just as local prosecutors could argue that they are not “law enforcement officers” under the first clause of section 12601, the judges contended that they were not covered by the second prong of the pattern-or-practice statute.<sup>77</sup> The district court agreed with the judges and dismissed them as defendants from the complaint.<sup>78</sup> The Fifth Circuit then heard the argument on appeal.<sup>79</sup>

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71. *Law enforcement*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/law%20enforcement> [<https://perma.cc/6ALK-VXYB>] (last visited Dec. 7, 2023).

72. *See generally* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 476 (1994) (absent a statutory definition, “we construe a statutory term in accordance with its ordinary or natural meaning.”).

73. *See* 34 U.S.C. § 50301(11).

74. *See generally* United States v. Lauderdale County, 914 F.3d 960 (5th Cir. 2019).

75. *Id.* at 962–63.

76. *Id.* at 966.

77. *Id.*

78. *Id.* at 964 (holding that the judges were immune from such a suit and that the language of section 12601 did not cover judges).

79. *Id.*

In *Lauderdale County*, the Fifth Circuit stated that the case turned on the statutory interpretation of section 12601, the simple question of whether local judges qualify as “officials or employees of any governmental agency with responsibility for the administration of juvenile justice.”<sup>80</sup> The *Lauderdale* court noted that no other court had ruled on the issue.<sup>81</sup> The court confirmed that the relevant terms (i.e., “officials or employees of [a] governmental agency”) were not defined in the pattern-or-practice statute.<sup>82</sup> The Fifth Circuit held that judges are not considered a “governmental agency” under the ordinary meaning of the term, and that Congress had decided not to include a definition that encompassed local judges under section 12601.<sup>83</sup> Then, viewing the relevant terms in the context of the entire statute, the court noted that the statute was enacted under the title of “State and Local Law Enforcement,” with the subtitle of “Police Pattern or Practice,” neither of which indicated any intent to include judges within the scope of the statute.<sup>84</sup> The Fifth Circuit considered some other esoteric statutory construction issues, before addressing DOJ’s ultimate claim: that section 12601 was enacted in part to prevent a pattern or practice which denied juveniles their rights under the criminal justice system and that juvenile court judges are part of the criminal justice system, and thus to find that the judges were not covered by the statute would vitiate the entire purpose of section 12601.<sup>85</sup> The *Lauderdale County* court made short work of this argument, holding that the plain text of section 12601 did not include judges and that DOJ still had other agencies clearly covered by the statute that it could pursue to address their concerns under section 12601, including counties, police, juvenile correctional facilities, and youth services.<sup>86</sup> Accordingly, the Fifth Circuit upheld the dismissal of the case against the local juvenile court judges, holding that judges are not covered under section 12601.<sup>87</sup>

The analogies between the position of judges and prosecutors for purposes of section 12601 are striking. Like prosecutors, judges are not explicitly covered by the text of section 12601. Judges and prosecutors are not included within the traditional (or other statutory) definitions of the relevant terms of the pattern-or-practice statute. Similar to prosecutors, Congress had opportunities to include judges within the scope of section 12601 but did not exercise that option. Like prosecutors, judges are not mentioned in the title or subtitle of the pattern-or-practice statute, which focuses explicitly on police. And finally, similar to prosecutors, judges play a major part in the criminal justice system, but absent some textual support for

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 967–68.

84. *Id.* at 965–66.

85. *Id.* at 968.

86. *Id.*

87. *Id.* At the lower court level, the court held that judges were protected from DOJ pattern-or-practice enforcement authority pursuant to absolute judicial immunity. *Id.* at 964. Given that the Fifth Circuit resolved the issue through the text of the statute, the appellate court held that it did not need to reach the immunity issue. (“[B]ecause we hold that the text of 34 U.S.C. § 12601 is not applicable to the judges of the Youth Court, we do not reach the question of judicial immunity as to any of the specific claims raised in this case.”).

including them under the scope of section 12601, DOJ has multiple other entities clearly covered under the statute for the application of an enforcement action, including police, prisons, and municipal entities.<sup>88</sup> Under the strongly analogous arguments addressed for whether section 12601 covers judges, *Lauderdale County* presents compelling precedent that prosecutors, like judges, are not covered by the pattern-or-practice statute. Congress seemingly would have to take explicit action to amend the statute to include judges or prosecutors.

#### 6. DOJ's Interpretation of "Law Enforcement Officers"

In *United States v. City of Philadelphia*, the Third Circuit explicitly looked at policy statements from DOJ to determine if DOJ itself believed that it had equitable authority over local police departments.<sup>89</sup> A similar analysis is worthwhile here as applied to local prosecutors.

Enforcement actions under the pattern-or-practice statute embodied at section 12601 are carried out by DOJ's Civil Rights Division, specifically by the Special Litigation Section.<sup>90</sup> The Special Litigation Section clarifies that it protects "the rights of people who interact with state or local police or sheriffs' departments," people in prisons and jails, and people in various other distinct contexts.<sup>91</sup> Notably, there is no mention of protecting people from local district attorneys.

When the Special Litigation Section specifically discusses its authority over "law enforcement," every statement is directed at traditional police agencies.<sup>92</sup> They discuss the conduct of state or local police and sheriffs' departments; they hire "police practice experts" to review agency policies; they are looking at evidence regarding traditional police activities, such as use of force, unlawful stops, and discriminatory policing.<sup>93</sup> Once again, glaring in its absence is any mention of overseeing prosecutors, the practices of prosecutors, or how to reform prosecutors.<sup>94</sup>

In another strange twist, DOJ previously argued that its own prosecutors should not be considered law enforcement officers, albeit in different contexts.<sup>95</sup> Congress also seems to doubt the authority of DOJ over local prosecutors. When asked to

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88. It is noteworthy that when specifying the government agencies covered by section 12601, the Fifth Circuit did not include prosecutors. *See id.* at 968.

89. *See United States v. City of Philadelphia*, 644 F.2d 187, 201–02 (3d Cir. 1980).

90. *See* U.S. DEP'T OF JUST. CIV. RTS. DIV., SPECIAL LITIG. SECTION, <https://www.justice.gov/crt/special-litigation-section> [<https://perma.cc/TN6T-9YXR>] (last visited Dec. 7, 2023).

91. *Id.*

92. *See* U.S. DEP'T OF JUST. CIV. RTS. DIV., CONDUCT OF L. ENF'T AGENCIES, <https://www.justice.gov/crt/conduct-law-enforcement-agencies> [<https://perma.cc/P6FB-AH8G>] (last visited Dec. 7, 2023).

93. *See id.*

94. *See id.*

95. *See, e.g., Trupej v. United States*, 304 F. App'x. 776, 784 (11th Cir. 2008) (affirming district court's determination that federal prosecutors were not "investigative or law enforcement officer[s]" under the Federal Tort Claims Act, as argued by DOJ, because the prosecutors "were not empowered to execute searches, seize evidence, and make arrests."); *see also United States v. Washington*, 869 F.3d 193, 214 (3d Cir. 2017) ("'Prosecution' refers to the actions of prosecutors (in their capacity as prosecutors) and 'enforcement' to the actions of law enforcement and those affiliated with law-enforcement personnel.").

review section 12601, the Congressional Research Service chose to focus solely on the conduct of police and reforming police agencies.<sup>96</sup>

Thus, according to DOJ's own policy statements and prior legal arguments, they do not appear to believe that section 12601 covers local prosecutors. DOJ's policy statements were used by the Third Circuit in *United States v. City of Philadelphia* as further proof that DOJ lacked equitable authority over police agencies,<sup>97</sup> and would likely be used against DOJ if the specific issue of standing in an enforcement action against local district attorneys was litigated today.

Based on the available federal resources, it appears that section 12601 does not apply to chief prosecutors, no matter how much power they wield in the local criminal justice system. While this issue looks dead in the water under federal authorities, state law actually provides some indications that local prosecutors are covered by the federal pattern-or-practice statute, but under only very specific circumstances. Those state law sources and circumstances are discussed below.

### *C. State Sources of Statutory Interpretation – Possible Standing for DOJ*

There are sources of state law and specific factual circumstances which support the conclusion that local prosecutors are “law enforcement officers” and thus covered by section 12601. Those sources include state definitions of chief prosecutors, the structure of some district attorneys' offices, and the evolving and expanding authority claimed by certain prosecutors. These factual issues and legal theories have never been examined in academic literature or judicial precedent.

#### *1. State Definitions of Local Prosecutors*

State statutory and constitutional laws provide definitions about the role and authority of district attorneys. Some of these definitions directly impact whether a local prosecutor would be considered a “law enforcement officer” under section 12601, determining whether DOJ would have standing to bring a pattern-or-practice action against a district attorney.

For instance, under Pennsylvania law, the district attorney is explicitly identified as the “chief law enforcement officer” for the county where they were elected.<sup>98</sup> District attorneys in Pennsylvania openly advertise that they are the chief law

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96. See APRIL J. ANDERSON, CONG. RSCH. SERV., LSB10494, REFORMING PATTERNS OF UNCONSTITUTIONAL POLICING: ENFORCEMENT OF 34 U.S.C. § 12601 (2020).

97. *United States v. City of Philadelphia*, 644 F.2d 187, 201–02 (3d Cir. 1980).

98. See 71 PA. STAT. & AND CONS. STAT. ANN. § 732-206(a) (West 2023) (“[T]he district attorney shall be the chief law enforcement officer for the county in which he is elected.”). The attorney general is designated as the chief law enforcement officer for the commonwealth. *Id.*



enforcement officers in their jurisdiction.<sup>99</sup> The Denver District Attorney also asserts that she is “the chief law enforcement officer in the City and County of Denver.”<sup>100</sup>

By contrast, under the California Constitution, the prosecutor is only considered the “chief law officer” of the state.<sup>101</sup> In Wisconsin, the district attorney is defined solely by the duties of the office, which consists primarily of the duty to “prosecute all criminal actions before any court within his or her prosecutorial unit.”<sup>102</sup> In Texas, each separate county or judicial district elects a district attorney and defines the authority of that district attorney, which may include the authority to represent the state only in criminal cases, in all criminal cases or civil cases “in which the state is interested,” or other custom-designed powers.<sup>103</sup> There is a tremendous amount of heterogeneity in how states define the role and authority of local district attorneys.

For purposes of the federal pattern-or-practice statute, these definitions prove useful. For instance, with the Pennsylvania district attorneys explicitly defined as the “chief law enforcement officer[s]” for the county, it appears that district attorneys (and the attorney general) in that state would fall squarely within the scope of section 12601 as “law enforcement officers.”<sup>104</sup> On the other hand, for states like California where the prosecutor is defined as the “chief law officer” or Wisconsin where the prosecutor is defined by the power to prosecute criminal cases, such prosecutors would not automatically fall under the authority of section 12601. For prosecutors in a state like Texas, the applicability of section 12601 could literally vary from district-to-district and year-to-year, depending on the legal duties assigned to the district attorney under state law by local authorities. Where the state law definition of a district attorney thrusts the local prosecutor into the category of a law enforcement officer, there exists a sound and previously uncharted legal theory granting DOJ standing to bring a pattern-or-practice enforcement action against local prosecutors.

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99. See, e.g., *District Attorney*, WAYNE CNTY., PA., <https://waynecountypa.gov/441/District-Attorney> [<https://perma.cc/V48X-UMYK>] (last visited Dec. 7, 2023) (“As the Chief Law Enforcement Officers of the County, we are responsible for seeking justice on a daily basis . . .”); *District Attorney’s Office*, FAYETTE CNTY., PA., <https://www.fayettecountypa.org/492/District-Attorneys-Office> [<https://perma.cc/B85B-9WG7>] (last visited Dec. 7, 2023) (“The Fayette County District Attorney’s office is overseen by the District Attorney, Richard E. Bower. He is the chief law enforcement officer in Fayette County.”).

100. See *About the District Attorney*, DENVER DIST. ATT’Y, <https://www.denverda.org/about/> [<https://perma.cc/T8KJ-777C>] (last visited Dec. 7, 2023). The Denver District Attorney’s assertion that she is the “chief law enforcement officer” for the city does not appear to have any statutory basis, unlike the Pennsylvania district attorneys. See COL. REV. STAT. § 20-1-101 (2016) (enumerating authority of district attorney, not including title “chief law enforcement officer”).

101. CAL. CONST. art. V, § 13 (“Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State.”).

102. WIS. STAT. ANN. § 978.05(1) (West 2017).

103. See TEX. GOV’T CODE ANN. § 43.101 *et seq.* (West 2023).

104. Using the state law definition of a chief prosecutor is a bit of a brute force approach to the issue, as it does not actually consider the nuances of the authority of each prosecutor. However, in the absence of definitional clarity in section 12601 itself, it is difficult to avoid the conclusion that a court would not simply adopt the formal definition applied by state law when considering whether a particular prosecutor should be considered a “law enforcement officer” for purposes of the pattern-or-practice statute.

## 2. Hybrid Office Structure of Local Prosecutors

It is not only the title and statutory authority of local district attorneys that may differentiate which are covered by the federal pattern-or-practice statute. The structure of various prosecutors' offices also may prove dispositive on the issue of DOJ's standing under section 12601.

When people envision district attorneys' offices, they usually think of the prosecutors and staff assigned to such offices. However, the larger and mid-sized district attorneys' offices often have fully functional law enforcement agencies as part of the office. For instance, the Cook County State's Attorney's Office serves as the district attorney for Chicago, and includes an "Investigations Bureau" consisting of more than 120 sworn law enforcement officers.<sup>105</sup> This Investigations Bureau has the personnel of a mid-sized police department, and has all applicable law enforcement powers, but is a part of and under the control of the district attorney's office.<sup>106</sup> Illinois law explicitly grants prosecutors the authority to appoint such investigators and provides for the investigators' full police powers.<sup>107</sup>

Similarly, the Harris County District Attorney's Office, covering Houston, has an investigative division with sworn law enforcement officers covering a full range of law enforcement services, including the authority to "conduct formal investigations, conduct investigations directly for the District Attorney, and assist law enforcement officers from other jurisdictions on a case-by-case basis."<sup>108</sup> The investigators employed by the Harris County District Attorney are considered to be peace officers under Texas law who are formally defined as having the same power and authority as police officers, sheriffs, constables, and the Texas Rangers.<sup>109</sup>

The Los Angeles District Attorney's Office follows a similar model. As stated by the office, "[t]he Los Angeles County District Attorney's Office maintains a staff

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105. See *Investigations Bureau*, COOK CNTY. STATE'S ATT'Y, INVESTIGATIONS BUREAU, <https://cookcountystatesattorney.org/investigations-bureau> [https://perma.cc/G6YU-J9QH] (last visited Dec. 7, 2023) ("Comprising over 120 sworn officers, the Investigations Bureau (IB) provides vital investigative and logistical support to Assistant State's Attorneys. They assist in the preparation and presentation of cases, while also lending their expertise and technical resources to local law enforcement efforts. IB plays a crucial role in complementing and supplementing investigations conducted by other law enforcement agencies. Working closely with prosecutors from the Criminal Prosecutions and Special Prosecutions Bureau, the investigators tackle specialized crimes that may not fall within the purview of other law enforcement agencies. These include official misconduct, public integrity, election fraud, child support, and complex financial crimes.").

106. *Id.*

107. See 55 ILL. COMP. STAT. 5/3-9005(b) (2021) ("The State's Attorney of each county shall have authority to appoint one or more special investigators to . . . conduct investigations which assist the State's Attorney in the performance of the State's Attorney duties . . . . Subject to the qualifications set forth in this subsection, special investigators shall be peace officers . . . . No special investigator employed by the State's Attorney shall have peace officer status or exercise police powers unless the special investigator successfully completes the basic police training course mandated and approved by the Illinois Law Enforcement Training Standards Board or such board waives the training requirement by reason of the special investigator's prior law enforcement experience or training or both.").

108. See *Investigations Bureau*, HARRIS CNTY. DA, [https://www.harriscountyda.com/investigations\\_bureau](https://www.harriscountyda.com/investigations_bureau) [https://perma.cc/E2PD-EEKP] (last visited Dec. 7, 2023).

109. See TEX. CODE CRIM. PRO. Art. 2.12 ("The following are peace officers: [] sheriffs . . . ; . . . constables . . . ; police officers . . . ; rangers . . . ; investigators of the district attorneys', criminal district attorneys', and county attorneys' offices . . .").

of nearly 300 sworn peace officers, known as DA investigators, who conduct some of the most unique, sensitive and complex criminal investigations in law enforcement.”<sup>110</sup> The Bureau of Investigations of the Los Angeles District Attorney’s Office “is the county’s fourth largest law enforcement agency.”<sup>111</sup>

Even a mid-sized suburban county district attorney’s office like Montgomery County, Pennsylvania, houses a full “Detective Bureau” which handles homicide investigations, drug cases, and forensic services—all classic law enforcement functions.<sup>112</sup> Within these district attorney law enforcement bureaus, some have limited—but still distinctly law enforcement—duties; the San Francisco District Attorney’s Office has a captive independent investigations bureau, but its duties are limited to criminal investigations of other police officers and police departments.<sup>113</sup>

The hybrid prosecutorial/law enforcement nature of a district attorney’s office may affect whether DOJ has standing to bring a section 12601 enforcement action against the prosecutor. If DOJ opened a pattern-or-practice investigation into the Chicago district attorney’s office *regarding the conduct of its own sworn law enforcement officers*, DOJ should have unchallenged standing under section 12601. An aggressive DOJ might even take the legal position that the simple fact that the district attorney’s office houses a fully qualified and fully empowered law enforcement agency gives DOJ standing to pursue a pattern-or-practice enforcement action against any aspect of the district attorney’s office.

Accordingly, by delving into the actual structure of local prosecutors’ offices, we have uncovered another potential discrete area where DOJ may have standing to bring an action pursuant to section 12601 against a district attorney. Where such an enforcement action addresses the conduct of the law enforcement agency housed inside a district attorney’s office, that function of the local prosecutor would be covered by section 12601; the only open question is whether housing such a law enforcement agency within a district attorney’s office converts the entire office into “law enforcement officers” for purposes of the pattern-or-practice statute.

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110. *Office Overview*, L.A. CNTY. DIST. ATT’Y’S OFF., <https://da.lacounty.gov/about/office-overview> [<https://perma.cc/TPB3-ZCNG>] (last visited Dec. 7, 2023).

111. *Id.*

112. *See Bureau Organization*, MONTGOMERY CNTY. DIST. ATT’Y’S OFF., <https://www.montcopa.org/1819/Bureau-Organization> [<https://perma.cc/MFN2-VQVP>] (last visited Dec. 7, 2023) (“The Forensic Services Unit is primarily responsible for investigating homicide crime scenes . . . . The Homicide Unit assists all local and state police jurisdictions with investigations concerning murder, manslaughter, homicide by vehicle, suspicious death, suicide and police-involved shooting . . . . The Narcotics Enforcement Team (NET) represents the drug enforcement arm of the District Attorney’s Office, and works in coordination with the Narcotics Unit to investigate major narcotics trafficking operations within Montgomery County, and provide extensive assistance to local police departments with the investigations of drug crimes, including the District Attorney’s Municipal Drug Task Force and Pennsylvania State Police . . . . The Special Investigations Unit (S.I.U.) conducts unique and complex investigations throughout Montgomery County, directing its efforts toward violent and multifarious criminal activity.”).

113. *Independent Investigations Bureau*, S.F. DIST. ATT’Y’S OFF., <https://www.sfdistrictattorney.org/policy/independent-investigations-bureau> [<https://perma.cc/EJL6-7XHX>] (last visited Dec. 7, 2023) (stating the Independent Investigations Bureau’s main duties are to: “[i]nvestigate and review all officer-involved shootings and in-custody deaths [and] [i]nvestigate and review all other excessive use of force cases”).

### 3. Expanding Conduct of Local Prosecutors

In addition to the state definition of a district attorney and the presence of a law enforcement agency within a district attorney's office, DOJ's authority to bring a pattern-or-practice enforcement action may be triggered by the specific conduct of a prosecutor's office. While DOJ is often accused of seeking to expand its authority as in the *City of Philadelphia* case, it is no secret that local prosecutors are taking a more expansive view of their roles and authority in the criminal justice system.<sup>114</sup> Some of these arrogated new powers appear to fit within the definition of the conduct of "law enforcement officers" for purposes of section 12601, a novel legal theory which reflects the ever-evolving nature of prosecutorial power.

As an example, one of the classic definitional aspects of a law enforcement officer is the authority to make an arrest.<sup>115</sup> In Philadelphia, the district attorney's office has established a "Charging Unit," which controls whether the Philadelphia Police Department may make arrests.<sup>116</sup> As stated by the district attorney's office, "[t]he Assistant District Attorneys in the Charging Unit promptly review *all sight arrests and arrest warrants* and determine which charges our office will prosecute."<sup>117</sup> An earlier version of the district attorney's website described the Charging Unit's function as "[s]taffed 24-hours a day, 7-days a week, and 365-days a year, the Assistant District Attorneys in our Charging Unit promptly review *every criminal arrest* submitted by the Philadelphia Police Department to determine if sufficient evidence exists to properly charge, and with what crimes, an offender."<sup>118</sup> Simply put, the Philadelphia district attorney is exercising authority over whom the Philadelphia police department arrests, approving or disapproving the arrests in real time. Similar charging units have been established in Los Angeles, Denver, and other jurisdictions.<sup>119</sup>

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114. See Samantha M. Caspar & Artem M. Joukov, *The Case for Abolishing Absolute Prosecutorial Immunity on Equal Protection Grounds*, 49 HOFSTRA L. REV. 315, 316 (2021) ("There is an increasing sense that unrestrained prosecutors in the United States are a problem . . ."); see generally Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 711–16 (2016).

115. See *supra* Section I.B.4.

116. See *Charging Unit*, PHILA. DIST. ATT'Y'S OFF., <https://phillyda.org/safety-and-justice/criminal-justice-process/charging-unit> [<https://perma.cc/22F6-QZ9Z>] (last visited Dec. 7, 2023).

117. *Id.* (emphasis added).

118. Thomas P. Hogan, *De-Prosecution and Death: A Synthetic Control Analysis of the Impact of De-Prosecution on Homicides*, 21 CRIMINOLOGY & PUB. POL. 489, 493 (2022) (emphasis added).

119. See *Office FAQs*, L.A. CNTY. DIST. ATT'Y'S OFF., <https://da.lacounty.gov/about/office-faqs> [<https://perma.cc/KTX6-WBLK>] (last visited Dec. 7, 2023) ("A deputy district attorney reviews cases brought to the District Attorney's Office by local law enforcement agencies. The reports are reviewed in light of current law and whether the case presented by the agency can be proven in court beyond a reasonable doubt."); *District Attorney Gascón Announces Centralized Charge Evaluation System for Equal Justice Countywide*, L.A. CNTY. DIST. ATT'Y'S OFF.: NEWS RELEASES (Nov. 4, 2021), <https://da.lacounty.gov/media/news/district-attorney-gascon-announces-centralized-charge-evaluation-system-for-equal-justice-countywide> [<https://perma.cc/YFF3-L5XM>] ("Roughly 680 cases a day are presented for filing consideration by law enforcement agencies. Most are reviewed and either filed or declined for criminal prosecution by deputy district attorneys . . ."); *Charging Decision*, DENVER DIST. ATT'Y'S OFF., <https://www.denverda.org/charging-decision> [<https://perma.cc/K8SU-TUEP>] (last visited Dec. 7, 2023) ("The District Attorney's Office reviews cases presented to it or initially filed by the police, and evaluates whether there is enough evidence to support the charges to move forward with prosecution . . . . The case may be accepted for the filing of criminal charges [or] may be refused for

In their avaricious pursuit of new authority that encompasses the initial arrest process, district attorneys are exercising a classic law enforcement function. In fact, the authority over arrests was one of the definitional aspects to qualify as a “law enforcement officer” under title 34 of the federal code,<sup>120</sup> and may be the most salient definitional feature of law enforcement. Moreover, the Supreme Court has expressly recognized that when a prosecutor abandons a strict prosecutorial function and starts to engage in traditional law enforcement activities, the prosecutor should then be treated similarly to the police for legal purposes.<sup>121</sup> Thus, where DOJ seeks an enforcement action based on a discriminatory pattern of arrests, and the local district attorney is the agency approving or disapproving arrests *ab initio*, DOJ should have jurisdiction to bring an action under section 12601 against that district attorney’s office. DOJ’s legal position would be simple: if the district attorney is going to appropriate the discretionary arrest powers of law enforcement, then section 12601 will treat the district attorney as a “law enforcement officer[]” subject to a pattern-or-practice enforcement action.

While federal resources provide virtually no support for DOJ standing to bring a pattern-or-practice enforcement action against a local district attorney, state law and specific factual circumstances create multiple opportunities for exercising such authority pursuant to section 12601. Where the state law definition of a district attorney, the structure of a district attorney’s office, or the conduct of a district attorney implicates the duties of a law enforcement officer, such local district attorneys should be considered “law enforcement officers” covered by the pattern-or-practice statute. Previously unexplored resources under state law and the new powers claimed by district attorneys open the door for DOJ’s standing to bring a pattern-or-practice enforcement action against some local prosecutors.

However, this creates another set of problems. The federal pattern-or-practice statute was envisioned to create uniform protections against discriminatory conduct by local law enforcement agencies to safeguard the “rights, privileges, or

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filing.”). The complete control over what cases trigger an arrest and prosecution is a fairly obvious imitation of the federal system, where DOJ prosecutors make the decision whether a case will be pursued at the initiation of the potential criminal process. *See* U.S. Dep’t of Just., *Just. Manual* § 9-27.200 (2018) (stating that if there is probable cause that a federal offense has been committed, a federal prosecutor may commence a prosecution, decline a prosecution, or request further investigation. However, probable cause is “a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution . . .”).

120. *See* 34 U.S.C. § 50301(11). The discussion of when a prosecutor’s conduct in approving or declining arrests begins to fall into a law enforcement function is worthy of a separate article. Prosecutors always have the discretion to decline a case. If the prosecutor stands next to the police officer, leaves it to the police officer to decide whether to arrest a suspect, but then declines the case mere seconds after the arrest, is this a prosecutor exercising a law enforcement function? Is the fiction of allowing the police officer to make the initial decision sufficient to shield the prosecutor from being considered a law enforcement officer? Is it better for criminal justice outcomes to allow the police to freely consult with prosecutors in making the arrest decision, or should a rigid delineation of authority and resulting liability exist? For purposes of this Article, the focus is not on the decision to decline an arrest, but on the prosecutor’s initial decision to approve the arrest, substituting their judgment for the judgement of the law enforcement officer and essentially becoming a law enforcement officer for purposes of section 12601.

121. *See Burns v. Reed*, 500 U.S. 478, 492–96 (1991) (concluding a prosecutor is absolutely immune from suit for damages based on in-court conduct during evidentiary hearings, but only receives same qualified immunity as police for conduct of giving advice to police on appropriate police conduct).

immunities” provided by federal law.<sup>122</sup> Unfortunately, the definition, office structure, and conduct of district attorneys between and within different states appears to create a patchwork of coverage for section 12601, dependent on the idiosyncrasies of state law and unique policies of each prosecutor’s office. DOJ might have authority to bring a pattern-or-practice enforcement action against the Philadelphia or Denver district attorney, but not the Duluth or San Diego district attorney. The anti-discrimination authority created by section 12601 should apply to all or none of the local district attorneys’ offices. Instead, under current law, the application of section 12601 is wildly and unpredictably inconsistent across the nation.

## II. PRIOR DOJ ATTEMPTS TO APPLY SECTION 12601 TO LOCAL PROSECUTORS

The pattern-or-practice statute codified at section 12601 has existed for almost two decades.<sup>123</sup> During that period, DOJ has attempted to apply section 12601 to a local prosecutor’s office on only two occasions.<sup>124</sup> Neither of those examples, both explored below, resulted in any clarity regarding whether section 12601 lawfully applies to district attorneys, but one example is revealing about DOJ’s strategic approach.

### *A. Orange County District Attorney’s Office*

In 2016, DOJ opened a pattern-or-practice investigation regarding the Orange County, California, District Attorney’s Office and the Orange County Sheriff’s Office regarding their use of custodial informants, colloquially known as “jailhouse snitch[es].”<sup>125</sup> The investigation was concluded in 2022 with a report by DOJ recommending specific remedial measures.<sup>126</sup> Although DOJ found that the district attorney’s office and sheriff’s office still were not in compliance with the remedial measures sought by DOJ, no consent decree was entered and no monitor was appointed; DOJ’s report and recommendations were deemed sufficient.<sup>127</sup>

DOJ’s investigation of the Orange County District Attorney’s Office did not shed any light on whether section 12601 covers local prosecutors because the issue was never contested.<sup>128</sup> In fact, the investigation began when then-Orange County District Attorney Tony Rackauckas requested in 2016 that DOJ initiate a pattern-or-practice investigation of his office.<sup>129</sup> Because DOJ was invited by the district

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122. *See supra* Section I.B.3.

123. *See supra* Section I.B.2.

124. *See infra* Sections II.A–B.

125. U.S. DEP’T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE ORANGE COUNTY DISTRICT ATTORNEY’S OFFICE AND THE ORANGE COUNTY SHERIFF’S DEPARTMENT 6–9, 22 (2022), <https://www.justice.gov/crt/case-document/file/1541906/download>.

126. *Id.* at 56–59.

127. *See id.* at 47–60.

128. *Id.* at 1.

129. *Id.* Interestingly, in the Orange County investigation, DOJ relied solely on section 12601 as the basis for its standing to bring a pattern-or-practice enforcement action against a prosecutor. *Id.* at 7 (“The Civil Rights Division opened this investigation pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. § 12601.”). In other instances, where DOJ’s standing was challenged, such as in the case of the *City of Philadelphia*, *see* discussion *supra* Section I.B.3., and the

attorney's office to investigate, there was no litigation regarding the scope of section 12601.<sup>130</sup>

### *B. Missoula County Attorney's Office*

In 2012, DOJ launched an investigation under the pattern-or-practice statute against the Missoula County Attorney's Office (MCAO) in response to how that local prosecutor's office was handling sexual assault investigations.<sup>131</sup> The investigation included the Missoula Police Department and the University of Montana's Office of Public Safety.<sup>132</sup>

Unlike the Orange County District Attorney's Office, the MCAO objected to DOJ's involvement and refused to cooperate with DOJ's investigation.<sup>133</sup> Instead, the MCAO filed a declaratory judgment action, claiming that section 12601 (then section 14141) did not cover local prosecutors.<sup>134</sup> The MCAO explicitly alleged that DOJ lacked authority to investigate the MCAO because local prosecutors were not "law enforcement officers" under section 12601.<sup>135</sup> The MCAO pointed out that DOJ had never previously asserted any authority over a local prosecutor's office pursuant to the pattern-or-practice statute.<sup>136</sup> The MCAO complaint specified that DOJ itself regularly asserted that DOJ prosecutors were not "law enforcement officers" in other contexts and that the relevant section of the statute was intended to address police departments and sheriff's offices, not prosecutors.<sup>137</sup> The MCAO complaint also alleged that DOJ did not have authority to investigate the MCAO under a series of other theories: absolute prosecutorial immunity barred such an enforcement action; the mere fact that the MCAO received some federal funding unrelated to sexual assault investigations did not open the door to an investigation;

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Montana investigation, *see* discussion *infra* Section II.B., DOJ carefully made an argument in the alternative that it might have standing based on federal funding statutes.

130. In 2021, the Orleans Parish District Attorney was placed under a monitor because of a settlement in a private party civil rights lawsuit. Nick Chrastil, *Orleans DA Says He Welcomes Court-Appointed Monitor, a Rarity in Prosecutors' Offices*, THE LENS (Oct. 29, 2021), <https://thelensnola.org/2021/10/29/orleans-da-says-he-welcomes-court-appointed-monitor-a-rarity-in-prosecutors-offices/>. That case did not implicate section 12601 and, like the Orange County matter, involved a district attorney—Jason Williams—who welcomed the federal oversight. *Id.* District Attorney Williams ran a campaign complaining about the practices of the district attorney's office and then found himself under investigation for federal tax evasion, where he was later charged and eventually acquitted. *New Orleans District Attorney Acquitted in Federal Tax Case*, U.S. NEWS & WORLD REP. (July 28, 2022), <https://www.usnews.com/news/best-states/louisiana/articles/2022-07-28/new-orleans-district-attorney-acquitted-in-federal-tax>.

131. Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., Dep't of Just., and Michael W. Cotter, U.S. Att'y, Dist. of Mont., Civ. Rts. Div., to Fred Van Valkenburg, Cnty. Att'y, Missoula Cnty. Att'y's Off., at 1 (Feb. 14, 2014) (on file with the Dep't of Just.).

132. *Id.* at 3–4.

133. *Id.* at 1–2.

134. *See* Complaint for Declaratory Judgment at 2, *Van Valkenburg v. U.S. Dep't of Just.*, No. 9:14-cv-00038 (D. Mont. Feb. 11, 2014), 2014 WL 631036.

135. *Id.* at 13–14.

136. *Id.* at 6.

137. *Id.* at 13.

and federalism concerns under the Tenth Amendment of the United States Constitution precluded DOJ from investigating an elected local prosecutor.<sup>138</sup>

DOJ's response to the MCAO complaint was curious. DOJ did not simply assert that the MCAO prosecutors were "law enforcement officers" under section 12601;<sup>139</sup> instead, DOJ made a vague assertion of jurisdiction:

[T]he Department of Justice has jurisdiction to investigate and to seek injunctive relief to remedy discriminatory conduct. This jurisdiction arises from both the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d ("Safe Streets Act").<sup>140</sup>

DOJ cited no precedent to establish the fact that local prosecutors were "law enforcement officers" for purposes of section 12601; DOJ failed to offer any statutory authority or legislative history in support of that proposition.<sup>141</sup> DOJ made no argument specific to the issue at all; instead, after generally claiming jurisdiction under the pattern-or-practice statute, DOJ maintained that it had the authority in the alternative to investigate the MCAO because the MCAO received federal funding under the Safe Streets Act.<sup>142</sup> The vast majority of DOJ's response was spent

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138. *Id.* at 9–12, 14–18. The absolute immunity claim is a red herring; prosecutorial immunity protects a prosecutor from civil damages for prosecutorial conduct, but not from injunctive relief which is the remedy under section 12601. See *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) ("[A] prosecutor enjoys absolute immunity from . . . suits for damages when he acts within the scope of his prosecutorial duties.") (emphasis added); *Burns v. Reed*, 500 U.S. 478, 486–87 (1991) (stating that prosecutors have absolute immunity from suits for damages related to their prosecutorial conduct, but the courts are "quite sparing" in applying the scope of such immunity) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)); *United States v. Washington*, 869 F.3d 193, 219–220 (2017) (noting distinction between prosecutorial immunity and law enforcement immunity); *FOP Lodge No. 5 v. City of Philadelphia*, 267 A.3d 531, 551 (Pa. Commw. Ct. 2021) (stating that while prosecutors are immune from suits for money damages, such immunity does not extend to suits for injunctive or declaratory relief). Moreover, when a pattern or practice of illegal conduct can be established regarding a prosecutor's actions (the threshold requirement of section 12601), then even the absolute immunity of a prosecutor can be overcome in seeking money damages under 42 U.S.C. § 1983 claims. See *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (stating that a suit for civil damages against a prosecutor requires a showing of "deliberate indifference," which could be established by demonstrating a pattern of constitutional violations). The issue of federal funding providing jurisdiction for DOJ is an interesting angle. It is not the primary source of jurisdiction cited by DOJ in these cases, which rely on section 12601, and not all local district attorneys receive federal funding, leading to the same inconsistency in attempting to apply DOJ oversight authority to different local prosecutors' offices. See discussion *supra* Section I.C. As further evidence that the federal funding issue does not provide any coherence in this area, the MCAO argued that it never received any federal funding related to the conduct in question, among other deficiencies in DOJ's complaint. See Complaint for Declaratory Judgment, *supra* note 134, at 14–16. Moreover, the federal funding angle was summarily dismissed in *City of Philadelphia* and not even raised by the government in *Lauderdale County*, the latter case addressing whether section 12601 covers judges. See discussion *supra* Sections I.B.3, .5. The Tenth Amendment federalism argument is an echo of the federalism issues raised in the *City of Philadelphia* case. See discussion *infra* Part III.

139. See Letter from Jocelyn Samuels & Michael W. Cotter, *supra* note 131, at 1.

140. *Id.*

141. *Id.* at 6 ("When this discrimination amounts to a pattern or practice of unlawful conduct, the United States can sue for equitable and declaratory relief under [section 12601] or the Safe Streets Act or both.").

142. *Id.* at 7.



outlining the various alleged instances of discriminatory conduct against women by the MCAO and general legal standards for gender discrimination.<sup>143</sup> In short, DOJ's response to the MCAO complaint mirrored DOJ's unsuccessful position in the *City of Philadelphia* case: a general assertion of authority, an alternative argument based on federal funding, and a laundry list of factual complaints about underlying discriminatory conduct by a local agency.<sup>144</sup>

It appeared that the district court would be forced to rule on the issue of whether the pattern-or-practice statute encompassed authority over district attorneys as "law enforcement officers." However, the issue was never reached, once again thwarting a dispositive decision. In DOJ's response to the MCAO declaratory judgment action, DOJ outlined the remedies that the federal government was seeking.<sup>145</sup> The MCAO asserted that it already was complying with those remedies, or was in the process of making such changes, and the entire dispute was wrapped into a very loose Memorandum of Understanding (MOU) between DOJ and the MCAO.<sup>146</sup> The MOU provided no further guidance on whether local prosecutors were covered under the pattern-or-practice statute, stating:

The MCAO, the County, and the Montana Attorney General expressly deny that the USDOJ has any authority over locally elected county attorneys . . . . Nothing in this MOU constitutes any admission, concession, or agreement by the MCAO, the County, or the Montana Attorney General that the United States has such jurisdiction or authority to investigate or seek remedy against the MCAO regarding its handling of sexual assault cases, nor a concession by the United States that it does not have such jurisdiction or authority.<sup>147</sup>

The balance of the MOU addressed actions being taken by the Montana Attorney General (or the MCAO under the guidance of the Montana Attorney General) to handle sexual assault cases in Missoula County.<sup>148</sup>

Thus, DOJ's investigation of and litigation with the local prosecutor's office in Missoula County did not lead to any resolution regarding the issue of whether a local

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143. *Id.* at 6–20.

144. *Compare* United States v. City of Philadelphia, 644 F.2d 187, 189 (1980), *with id.* at 6–20. DOJ has an unfortunate history of making unsubstantiated claims about its equitable authority to engage in enforcement actions. In addition to the examples already discussed in the *City of Philadelphia* case and the MCAO litigation, DOJ currently asserts that section 12601 does *not* give DOJ standing to bring an action against federal law enforcement agencies. *See Conduct of Law Enforcement Agencies*, CIV. RTS. DIV., U.S. DEP'T OF JUST. (July 12, 2023) <https://www.justice.gov/crt/conduct-law-enforcement-agencies> [<https://perma.cc/98CS-HBJB>] ("However, we cannot bring a case based on every report we receive. Nor do we have authority to investigate federal law enforcement agencies."). The plain text of section 12601 covers all "law enforcement officers," admitting of no exclusion for the Federal Bureau of Investigation, Drug Enforcement Administration, or other federal law enforcement agencies. *See* 34 U.S.C. § 12601. DOJ appears to be "cherry-picking" where it would like to have standing (telling local agencies what they are doing wrong), while avoiding standing where it might be awkward (telling the FBI or DEA that their practices are discriminatory).

145. *See* Letter from Jocelyn Samuels & Michael W. Cotter, *supra* note 131, at 17–20.

146. *See generally* Memorandum of Understanding Between, the Mont. Att'y Gen., the Missoula Cnty. Att'y's Off., Missoula Cnty., & the U.S. Dep't of Just. (June 10, 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/06/10/missoula\\_settle\\_6-10-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/06/10/missoula_settle_6-10-14.pdf).

147. *Id.* at 1.

148. *Id.* at 2–4.

prosecutor's office is covered by section 12601 as "law enforcement officers." However, the episode did reveal that DOJ does not have any "silver bullet" argument to establish that the pattern-or-practice statute is intended to cover prosecutors, as opposed to the traditional law enforcement agencies of police departments and sheriffs' offices. At best, DOJ's authority is on shaky ground.<sup>149</sup>

To review, the answer to the question of whether local prosecutors are covered under section 12601 as "law enforcement officers" remains elusive. Under federal sources, it appears extremely doubtful that local prosecutors were the intended targets of the pattern-or-practice statute. However, under state law sources, there is occasional support for considering district attorneys to be covered "law enforcement officers," albeit in limited and fact-specific circumstances. In the history of the pattern-or-practice statute, DOJ has asserted authority over local district attorneys only twice, and neither occasion resolved the legal issue of whether local prosecutors were covered by section 12601. In short, this issue is volatile and unresolved.

If the status of the application of the pattern-or-practice statute to local district attorneys remains unresolved and fragmented, then, as a policy preference, should local district attorneys be covered by DOJ enforcement actions under section 12601? That issue is the subject of the next part.

### III. PRACTICAL ISSUES, FEDERALISM, AND THE DOUBLE-EDGED SWORD OF REFORM

At first blush, all of the confusion and complications regarding whether local district attorneys are covered by the pattern-or-practice statute as "law enforcement officers" seems to cry out for reform.<sup>150</sup> Local prosecutors wield enormous power in the criminal justice system, whether you believe that they are the most powerful<sup>151</sup>

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149. DOJ also should consider the logical ultimate implication of the position that section 12601 encompasses prosecutors. The argument is that prosecutors are law enforcement officers covered by the pattern-or-practice statute, especially when prosecutors are engaged in a systemic pattern of discriminatory conduct. DOJ's prosecutors have repeatedly been accused of a pattern of discriminatory conduct, particularly in their prosecution of drug trafficking cases and defendants. See JAMES JOHNSON ET AL., RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 2 (2010) ("The federal criminal justice system is often viewed with great distrust because of the disproportionate numbers of African Americans, Hispanics, American Indians, and other racial or ethnic minorities in our jails and prisons—and especially because of the disproportionate severity in their sentences."). DOJ itself has essentially conceded this issue. See OFF. OF ATT'Y GEN., MEMORANDUM FOR ALL FEDERAL PROSECUTORS: ADDITIONAL DEPARTMENT POLICIES REGARDING CHARGING, PLEAS, AND SENTENCING IN DRUG CASES (2022), <https://www.justice.gov/media/1265321/dl?inline> (ordering reduced use of mandatory minimum sentences in drug trafficking cases, stating: "This policy applies with particular force in drug cases . . . where mandatory minimum sentences based on drug type and quantity have resulted in disproportionately severe sentences for certain defendants and perceived and actual racial disparities in the criminal justice system."); Sadie Gurman, *Merrick Garland Urges Similar Sentences for Crack, Powder Cocaine*, WALL ST. J. (Dec. 16, 2022), <https://www.wsj.com/articles/merrick-garland-urges-similar-sentences-for-crack-powder-cocaine-11671228566> (quoting a memo from the Attorney General which states that federal prosecution of drug crimes "is still responsible for unwarranted racial disparities in sentencing."). The logical conclusion of DOJ's argument may be that DOJ itself should be investigated for pattern-or-practice violations. But by whom? As the Roman poet Juvenal asked, "Quis custodiet ipsos custodes?" See Juvenal, *The Satires of Juvenal*, Persius Sulpicia, and Lucilius, *Satire VI*, lines 347–48.

150. See discussion *supra* Section I.B.

151. See Davis, *supra* note 11, at 4 ("Prosecutors are the most powerful officials in the criminal justice system.")

or merely one of the most powerful.<sup>152</sup> Local prosecutors are subject to no uniform oversight. This produces a huge potential for abuse, discrimination, and the denial of federal rights of citizens in every local jurisdiction. It appears that there is a virtual necessity that section 12601 be amended or interpreted to give DOJ the injunctive authority to impose some oversight regarding the policies and procedures of all local district attorneys across the United States. However, before rushing to make such an enormous change to the application of the pattern-or-practice statute, thereby giving DOJ a vast new authority, there are some practical, normative, and political concerns that should be addressed.

On the practical side, expanding section 12601 to cover local district attorneys would stretch the expertise of DOJ. DOJ lacks much of the practical experience required to establish standards for local prosecutors. As an example, DOJ might be concerned about racial discrimination in the pattern or practice of local district attorneys in prosecuting minor offenses such as shoplifting or major offenses like homicides. However, absent unique circumstances, DOJ lacks jurisdiction over shoplifting and homicide offenses, does not prosecute such cases, and thus has virtually no expertise in making judgments regarding these cases.<sup>153</sup> It would be a little like asking a single neurosurgeon to supervise emergency rooms at 1,000 local hospitals—the skills of the neurosurgeon simply would not meet the vast and varied concerns handled by the emergency rooms. DOJ would be forced to retain experts in local prosecutions both to bring enforcement actions and to provide oversight for consent decrees. Such experts might be experienced local prosecutors, already subject to regulatory capture by traditional prosecutorial regimes; or the experts could be crusaders, more concerned with dismantling the operations of the local prosecutors than achieving even-handed reform. There would be nothing efficient or intuitive about adding this pattern-or-practice authority for DOJ.

On the other hand, based on recent trends in prosecutions, DOJ appears to have the capacity to engage in expanded section 12601 investigations regarding local prosecutors. DOJ statistics show that DOJ prosecutions have been steadily declining

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152. See Bellin, *supra* note 11, at 212 (“Prosecutors are one of the many important actors who populate the criminal justice ecosystem. Police, legislators, judges, governors, and parole boards are important too.”).

153. See 18 U.S.C. § 1111(b) (explaining that federal jurisdiction exists generally over homicide offenses only if an offense is committed within “the special maritime and territorial jurisdiction of the United States.”); PHYLLIS NEWTON ET AL., INVESTIGATION AND PROSECUTION OF HOMICIDE CASES IN THE U.S.: THE PROCESS FOR FEDERAL INVOLVEMENT 6 (2006), <https://www.ojp.gov/pdffiles1/nij/grants/214753.pdf> (summarizing limited circumstances where federal jurisdiction over homicide exists); KRISTIN FINKLEA, CONG. RSCH. SERV., IN11840, ORGANIZED RETAIL CRIME AND THE FEDERAL RESPONSE 2 (2022) (“Federal law does not criminalize [retail] theft itself, but it prohibits related crimes such as transportation of stolen goods across state lines, sale or receipt of stolen goods, money laundering, and conspiracy. While some have advocated for a federal [organized retail crime] law, law enforcement has previously argued that existing tools are sufficient.”). DOJ does hire some experienced local line prosecutors to fill the ranks of Assistant United States Attorneys, but those prosecutors generally are assigned to the actual prosecution of day-to-day federal criminal cases rather than the supervision of civil rights litigation. See *Principles of Federal Prosecution*, U.S. DEP’T JUST. (Feb. 2018), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution> [<https://perma.cc/STT5-V5J4>].

for the last ten years.<sup>154</sup> In 2010, DOJ criminal cases resulted in the sentencing of 83,946 federal offenders; by 2021, the number of new offenders had fallen to 57,287—a decline of over 30% in slightly more than a decade.<sup>155</sup> The number of new criminal cases filed by DOJ also has dropped significantly, from 68,591 new criminal cases in 2010 to only 50,628 new criminal cases in 2022, a drop of over 26% which continued even post-Covid lockdowns.<sup>156</sup> In fact, the 50,628 new criminal cases in 2022 represents the lowest number of criminal cases initiated by DOJ in over 20 twenty years.<sup>157</sup> Thus, when measured by either federal offenders prosecuted or new criminal cases initiated, DOJ currently is handling a much lighter comparative work load than in the recent past.

If DOJ is prosecuting a fraction of the cases it handled ten years ago, it clearly has the capacity to take on new duties, such as enforcement actions directed at district attorneys. Rather than focusing on the prosecution of individual defendants, DOJ may make a conscious decision to effectuate systemic change by allocating more resources to oversight of the local criminal justice system’s most powerful actor—prosecutors—via section 12601, provided DOJ has standing to bring such pattern-or-practice actions.

In addition to these practical issues, which cut in both directions, there are normative issues. As discussed extensively in the *City of Philadelphia* case, the concept of DOJ having oversight authority over local agencies implicates core federalism issues.<sup>158</sup> Quoting the district court below, the Third Circuit stated bluntly:

The point is that the power which the Attorney General claims in this case is simply not compatible with the federal system of government envisioned by the Constitution. This power, in essence, would permit the Justice Department to bring a civil suit against any state or local administrative body merely because the Attorney General and his subordinates have determined that the defendant’s operating policies and procedures violate any one of the civil rights guaranteed to citizens by the Constitution and laws of the United States. The purpose of such a lawsuit would be to obtain an injunction altering the challenged procedures. Quite

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154. See U.S. SENT’G COMM’N, SOURCEBOOK 2010 GUIDELINE OFFENDERS IN EACH CIRCUIT AND DISTRICT COURT: TABLE 2 (2010), <https://www.uscc.gov/research/sourcebook/archive> (measuring new federal offenders); U.S. SENT’G COMM’N, SOURCEBOOK 2021 DOCUMENT SUBMISSION BY EACH CIRCUIT AND DISTRICT COURT: TABLE 2 (2021), <https://www.uscc.gov/research/sourcebook/archive/sourcebook-2021> (showing the decline, when compared against 2010 figures, of new federal offenders).

155. SOURCEBOOK 2010, *supra* note 154; SOURCEBOOK 2021, *supra* note 154.

156. See OFFICES OF THE U.S. ATTORNEYS ANNUAL STATISTICAL REPORTS: TABLE 1 (2022), <https://www.justice.gov/usao/resources/annual-statistical-reports> [<https://perma.cc/2HN6-K4N8>] (measuring new federal criminal cases filed in United States District Court); OFFICES OF THE U.S. ATTORNEYS ANNUAL STATISTICAL REPORTS: TABLE 1 (2010), <https://www.justice.gov/usao/resources/annual-statistical-reports> [<https://perma.cc/D7DM-VT57>] (showing the comparative decline of new federal criminal cases).

157. See OFFICES OF THE U.S. ATTORNEYS ANNUAL STATISTICAL REPORTS: TABLE 1 (1998-2022), <https://www.justice.gov/usao/resources/annual-statistical-reports> [<https://perma.cc/QSC3-V6S6>] (1998 was the last year when fewer cases were filed by DOJ than in 2022. Only 47,277 new federal criminal cases were filed in 1998.).

158. *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980) (“We agree that judicial recognition of the asserted right of action would violate important principles of federalism and separation of powers.”).

literally, there would be no end to the local and state agencies, bureaus, offices, departments, or divisions whose day-to-day operating procedures could be challenged by suit, and changed by injunction.<sup>159</sup>

These federalism concerns were overcome in passing section 12601 to apply to local police departments, but expanding the pattern-or-practice statute to encompass elected prosecutors strikes even more deeply at the concepts of local autonomy and the preferences of citizens because it directly affects an elected official. Who is better qualified to determine how prosecutors in places as diverse as Los Angeles, Fargo, and Yazoo City should use their discretionary powers? The prosecutors in those jurisdictions and the citizens who elected them, or centralized bureaucrats from DOJ? The populations and problems of different jurisdictions across the United States are heterogeneous, and DOJ's one-size-fits-all solutions may not be sensitive to such problems. Or, it may be that such uniformity to combat potential discrimination is exactly what is needed. This is a debate which must be considered.

A second normative concern is that pattern-or-practice investigations may simply be ineffective tools to assure public safety or reform, or may even be harmful. In the context of applying section 12601 to police departments, there is controversial quantitative research arguing that public safety declined where DOJ invoked the pattern-or-practice statute in reforming police practices, making citizens less safe.<sup>160</sup> While this issue is much-debated and still under study, potential negative unintended consequences of expanding the scope of section 12601 to cover prosecutors should be assessed. DOJ's lack of expertise in the area of local prosecutions could exacerbate the possibility of negative outcomes causally associated with pattern-or-practice enforcement actions directed at district attorneys.

Finally, we would be naïve if we did not address the potential political ramifications of giving DOJ injunctive authority over local prosecutors. Both the left and the right in American politics have claimed that the modern-day DOJ has been politicized as a weapon against their respective interests, and there is little doubt that such a potential exists if DOJ is given such authority over local district attorneys.<sup>161</sup> For instance, DOJ under one administration might demand that a local

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159. *Id.* at 200 (quoting *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1268 (E.D. Pa. 1979)).

160. See Tanaya Devi & Roland G. Fryer, *Policing the Police: The Impact of "Pattern-or-Practice" Investigations on Crime* 4-5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27324, 2020), <https://www.nber.org/papers/w27324> ("For [pattern-or-practice] investigations that were preceded by a viral incident of deadly force—Baltimore, Chicago, Cincinnati, Riverside and Ferguson—there is a marked increase in both homicide and total crime . . . . Put plainly, the causal effect of the investigations in these five cities . . . has resulted in 893 more homicides than would have been expected with no [pattern-or-practice] investigation and more than 33,472 additional felony crimes . . .").

161. See Peter Baker, *Trump Claims He's a Victim of Tactics He Once Deployed*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2022/08/10/us/politics/trump-fbi-justice-department.html> ("Throughout his four years in the White House, Mr. Trump tried to turn the nation's law enforcement apparatus into an instrument of political power to carry out his wishes. Now as the F.B.I. under Mr. Wray has executed an unprecedented search warrant at the former president's Florida home, Mr. Trump is accusing the nation's justice system of being exactly what he tried to turn it into: a political weapon for a president, just not for him."); Harris Alic & Kelly Laco, *Republicans Accuse Biden of Weaponizing DOJ after Trump Special Counsel Appointment*, FOX NEWS (Nov. 18, 2022), <https://www.foxnews.com/politics/republicans-accuse-biden-weaponizing-doj-trump-special-counsel-appointment> ("Rep. Andy Biggs . . . said that the DOJ appeared to be more 'politicized and weaponized' than at any point in

prosecutor file fewer drug cases and seek shorter sentences in order to avoid a discriminatory impact on defendants. Under the next administration, DOJ might be demanding that a local prosecutor bring more drug cases and seek longer sentences to avoid a discriminatory impact on victims of violence perpetrated by drug trafficking organizations. It is not difficult to imagine DOJ enforcement actions under section 12601 being used as a political tool against local prosecutors and the communities they serve, whipsawing back and forth depending on the political inclinations of the executive branch. In fact, it is difficult to imagine section 12601 *not* being used in such a fashion in the current political climate. Expanding section 12601 to include local prosecutors is a classic double-edged sword.

Recent statistical research by a court, a district attorney's office, and a scholar highlights both the impact of local prosecutors and how an expanded statute could be weaponized against such prosecutors by the federal government. Reviewing historical statistics, a court in California expressly held that the Contra Costa District Attorney's Office had engaged in a pattern of conduct with the result "that Black defendants charged with gang related murders are . . . disproportionately charged with certain gang related special circumstances that carry enhanced sentences," and accordingly dismissed the special circumstances allegations.<sup>162</sup> The Philadelphia District Attorney's Office published an internal review explicitly stating that:

From 2015 to 2022, Black defendants were charged at disproportionately higher rates relative to other groups in seven of the eight most common criminal charge categories. Black Philadelphians were stopped and arrested at disproportionate rates, charged with more serious offenses, less frequently released pre-trial, and finally, when convicted, were more likely to be incarcerated.<sup>163</sup>

The Philadelphia District Attorney's Office essentially concedes that it had engaged and currently is engaging in "a pattern or practice of conduct" that denies equal treatment under the law based on race.<sup>164</sup> Finally, in a recent article, a compelling statistical study covering a decade of sentences in North Carolina by local prosecutors with differing political beliefs found that, "[w]hile facially similar

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American history."); *see also, e.g.*, Sean McElwee et al., *4 Pieces of Evidence Showing FBI Director James Comey Cost Clinton the Election*, VOX (Jan. 11, 2017), <https://www.vox.com/the-big-idea/2017/1/11/14215930/comey-email-election-clinton-campaign> ("The Clinton campaign, however, has centered its why-we-lost narrative on the 'Comey effect' . . . . The 'Comey effect' refers to the impact of FBI Director James Comey's October 28 letter to the House Judiciary Committee announcing the discovery [of] new emails that appeared pertinent to their closed investigation of Clinton and his subsequent letter on November 6 that absolved Clinton (after millions of votes had already been cast early)."); Nate Cohn, *Did Comey Cost Clinton the Election? Why We'll Never Know*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/upshot/did-comey-cost-clinton-the-election-why-well-never-know.html> ("Mrs. Clinton herself told Fareed Zakaria on CNN last fall that she 'would have won but for Jim Comey's letter on October 28th.'").

162. *See* People of California v. Eric Windom et al., Case No. 01001976380, at 1 and 10 (Cal. Super. Ct., May 19, 2023). California has adopted a statute covering "an attorney in the case" where there are disparities in charging or sentencing "because of the defendant's race, ethnicity, or national origin." *See* CAL. PENAL CODE § 745(a)(1) (West 2020).

163. PHILA. DIST. ATT'YS OFF., RACIAL INJUSTICE REPORT: DISPARITIES IN PHILADELPHIA'S CRIMINAL COURTS FROM 2015-2022 5, 9 (2023), <https://phillyda.org/wp-content/uploads/2023/06/RACIAL-INJUSTICE-REPORT-2023.pdf>.

164. *Id.*

white and Black defendants who do not have felony records are incarcerated at similar rates, white defendants with felony records are incarcerated at significantly higher rates than facially similar Black defendants.”<sup>165</sup> Thus, depending on where a defendant is located in the United States, strong statistical evidence already exists that prosecutors may be treating Black defendants disproportionately worse or better than other defendants, potentially triggering a federal pattern-or-practice investigation *if the statute covers local prosecutors*.

To summarize, amending the pattern-or-practice statute to include DOJ oversight of potential discrimination by local prosecutors appears to be a straightforward and positive reform. However, there are multifaceted practical, normative, and political issues which should be discussed and fully understood before such a radical expansion of federal authority is undertaken.

#### IV. AMENDING THE STATUTE AND AN ALTERNATIVE APPROACH

Balancing all of these complex legal, practical, and normative issues, DOJ should be granted standing to bring a section 12601 enforcement action against local prosecutors, but this authority should be used rarely. There are three primary reasons that the pattern-or-practice statute should be amended explicitly to include district attorneys: (i) a lack of adequate remedies, (ii) variability in district attorney competence, and (iii) the otherwise unconstrained power of prosecutors.

First, there is currently a lack of adequate remedies to act as a check on misconduct of prosecutors. *Connick v. Thompson* is perhaps the most striking example. In *Connick*, a district attorney admitted to an intentional *Brady* violation by an assistant prosecutor hiding an exculpatory blood lab report, resulting ultimately in the defendant serving fourteen years on death row and coming within a month of execution.<sup>166</sup> However, the Supreme Court vacated a \$14 million award against the district attorney following the defendant’s eventual acquittal, holding that the conduct in question was insufficient to meet the requisite standard of “deliberate indifference” to permit a recovery under 42 U.S.C. § 1983.<sup>167</sup> Other scholars recently have catalogued the difficulties associated with bringing a claim for bad faith prosecution or selective prosecution, whether to stop an unjust prosecution or to seek civil damages.<sup>168</sup> Another cohort has recommended that absolute prosecutorial immunity be abolished entirely, arguing that the “lack of civil remedies denies the innocent equal protection of the law simply because they had the misfortune of suffering malicious prosecution due to the misconduct of a prosecuting attorney rather than the misconduct of anyone else.”<sup>169</sup> Absent amending section 12601 to include district attorneys, there are extremely narrow avenues for correcting misconduct by prosecutors.

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165. Hannah Shaffer, *Prosecutors, Race, and the Criminal Pipeline*, 90.7 U. CHI. L. REV. 1889, 1916 (evaluating differing sentencing outcomes by race, utilizing statistics from 2010–2019 and sorting by prosecutorial preferences in sentencing).

166. *Connick v. Thompson*, 563 U.S. 51, 54, 71–72 (2011).

167. *Id.*

168. See Ann Woolhandler et al., *Bad Faith Prosecutions*, 109 VA. L. REV. 835, 848–56 (2023) (collecting cases and describing difficult standards of proof in selective prosecution claims).

169. See Caspar & Joukov, *supra* note 114, at 315–16.

Second, the pattern-or-practice statute should be amended to realistically reflect the vast differences in competence among the over 2,000 local prosecutors across the United States.<sup>170</sup> There are many highly skilled, competent, and experienced chief prosecutors. However, because they are elected officials, there are also district attorneys who have virtually no experience or prior background as prosecutors. This trend which may be expanding in a volatile political climate and where the lack of prosecutorial experience may be viewed as an electoral asset.<sup>171</sup> As a simple example of a fundamental gap in knowledge, there are many district attorneys in America who are simply unaware that they have a constitutional duty pursuant to *Giglio v. United States*<sup>172</sup> to track and disclose credibility issues for police officers who may testify at trial.<sup>173</sup> Amending section 12601 to include district attorneys would allow for some basic oversight to assure even minimal constitutional compliance by otherwise inexperienced prosecutors. To put it into quantitative terms, consider the competency and tendency towards discriminatory conduct by local prosecutors to be a normal distribution. If DOJ's enforcement powers were directed only at those prosecutors who exist at the left tail beyond two (or even three) standard deviations from the mean of prosecutor competency/discrimination, DOJ would be considering roughly 50 out of the 2,000 local prosecutors' offices as potential targets for an enforcement action, with probably only a few of those 50 meriting a formal investigation.

Third and finally, section 12601 should be amended specifically because of the power of prosecutors. The chief prosecutors in local jurisdictions across the United States wield such an enormous amount of discretionary power that there should be a centralized authority such as DOJ to act as a check on that power and assure that the federal "rights, privileges, and immunities" covered by section 12601 are protected in a uniform fashion.<sup>174</sup> Ironically, in the application of this argument, the power of local prosecutors is also their greatest weakness.

While this Article recommends that the pattern-or-practice statute be amended to encompass local prosecutors, DOJ's potential new authority should be used rarely. District attorneys necessarily exercise a large amount of discretion, and they are the

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170. See Coppolo, *supra* note 12.

171. See Davis, *supra* note 11, at 23 ("[P]rosecutors elected in recent years come from a variety of backgrounds . . . Some . . . had no prior prosecutorial experience when they took office."); see, e.g., Kate Winkle, *José Garza Elected To Be Travis County District Attorney*, KXAN (Nov. 9, 2020), <https://www.kxan.com/news/local/travis-county/garza-harry-face-off-in-travis-county-district-attorney-race/> (newly-elected district attorney for Austin, Texas, has background as community organizer, not as prosecutor or criminal defender); Joshua Sharpe, *Civil Rights Attorney Pamela Price Makes History As Alameda County's Next District Attorney*, S.F. CHRON. (Nov. 19, 2022), <https://www.sfchronicle.com/election/article/Civil-rights-attorney-Pamela-Price-makes-history-17596670.php> (newly-elected district attorney for Oakland, California, has experience as civil rights attorney, not as a prosecutor or criminal defender; replacing 37-year prosecutor and defeating veteran prosecutor for position).

172. *Giglio v. United States*, 405 U.S. 150, 153–54 (1972).

173. See Thomas Hogan, *An Unfinished Symphony: Giglio v. United States and Disclosing Impeachment Material About Law Enforcement Officers*, 30 CORNELL J.L. & PUB. POL'y. 715, 718 (2021) ("Even more worrisome, a national survey found that a majority of prosecutors' offices in the United States do not have a formal *Giglio* policy, and some local law enforcement leaders are not even aware that such a constitutional requirement exists.").

174. 34 U.S.C. § 12601(a).



elected representatives of their citizens. Based on the history of DOJ, such enforcement actions would take place infrequently. In the almost two decades since the enactment of section 12601, DOJ has initiated fewer than fifty pattern-or-practice investigations regarding law enforcement agencies, with less than fifteen actual complaints filed.<sup>175</sup>

Ultimately, this argument about granting DOJ standing to bring an enforcement action against local prosecutors parallels the arguments for why DOJ eventually was granted standing to bring section 12601 actions against law enforcement agencies. Despite legitimate federalism concerns, there is a need for oversight and reform, particularly over actors who wield tremendous authority and have varying degrees of competence.<sup>176</sup>

In the morass of complex legal, normative, and political issues, there is one point of simplicity and clarity. Section 12601 can easily be amended to cover local prosecutors. The statute would be amended to read:

(a) Unlawful conduct

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

For the sake of clarifying this vital issue for both DOJ and local prosecutors, Congress should make an explicit choice in this matter, rather than leaving the issue to the vagaries of state law, prosecutorial preferences, and the judiciary.

If Congress is hesitant to expand DOJ's authority so explicitly, it could at least explore a solution which would offer some transparency on the practices of district attorneys without raising the potential negative consequences associated with giving DOJ full-blown enforcement authority over local prosecutors. One of the main complaints raised about district attorneys is that their decision-making and outcome statistics remain opaque,<sup>177</sup> although some prosecutors are attempting to make more

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175. See U.S. DEP'T OF JUST. C.R. DIV., SPECIAL LITIG. SECTION CASES AND MATTERS (L. ENF'T AGENCIES), <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download> [<https://perma.cc/MA8U-SAMX>] (last visited Dec. 7, 2023) (summarizing past and present enforcement investigations and complaints).

176. Professor Rachel Barkow previously has argued that DOJ prosecutors themselves should have their discretion constrained and overseen by using an administrative law model. See Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873 (2009). While there has been no movement to accept such a model, permitting DOJ the authority to oversee local prosecutors via the pattern-or-practice statute may address some of Barkow's concerns, at least at the local level.

177. See ROBIN OLSEN ET AL., COLLECTING AND USING DATA FOR PROSECUTORIAL DECISIONMAKING 1–2 (2018) [https://www.urban.org/sites/default/files/publication/99044/collecting\\_and\\_using\\_data\\_for\\_prosecutorial\\_decisionmaking\\_0.pdf](https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking_0.pdf) (surveying prosecutors about use of data); Matt Ford, *The Missing Statistics of Criminal Justice*, ATLANTIC (May 31, 2015), <https://www.theatlantic.com/politics/archive/2015/05/what-we-don-t-know-about-mass-incarceration/394520/> (“As judges lost flexibility with the growth of mandatory-minimum sentences during the tough-on-crime era, prosecutors became the most pivotal actors within the criminal-justice process. This rise in influence was matched with a decline

data public.<sup>178</sup> Congress could craft a statute to resolve this lack of information where there are reported issues with a district attorney's office. Rather than an enforcement action, Congress could authorize DOJ to engage in a pattern-or-practice investigation of a local prosecutor and permit DOJ to publicize the statistical findings regarding the prosecutorial decisions of the local agency, but not grant DOJ the injunctive power to force changes on the prosecutor's office.<sup>179</sup>

Such authority would allow DOJ to expose to the public detailed information about potentially discriminatory practices by local prosecutors, but only the voting public would retain the ability to approve or disapprove of those exercises of prosecutorial discretion through the vehicle of informed local elections. If a local prosecutor was claiming that they were declining to prosecute low-level misdemeanors and such declinations were having no effect on violent crime while reducing racial disparities in the criminal justice system, then a DOJ investigation could test and disclose such data to the public. If a district attorney was claiming that increasing prosecutions of high-level gang members was reducing violent crime while not having a discriminatory result, a DOJ investigation could test such claims. This proposed solution would respect the balance demanded by federalism concerns, while resolving this match-up between the power of DOJ and the power of district attorneys by re-allocating the power to perhaps a more appropriate source: the American people.

#### CONCLUSION

The pattern-or-practice statute is an overwhelmingly powerful tool for DOJ to ensure uniform and non-discriminatory practices by local law enforcement in America. By acclamation, district attorneys and other chief prosecutors are the most powerful actors in the local criminal justice system in the United States. But the issue of whether DOJ has enforcement authority through section 12601 over local prosecutors has remained an unresolved and unexplored issue.

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in transparency."); Ronald Wright & Marc Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1614–15 (2010) (“Criminal law practitioners have been slower than civil litigators to embrace data management techniques, presumably because of the disparity of resources available for civil and criminal litigation.”).

178. See Colleen Slevin, *Colorado DAs Unveil Facial, Economic Data Dashboards on Prosecutions*, COL. SUN (Sept. 8, 2022), <https://coloradosun.com/2022/09/08/colorado-da-prosecution-dashboard/> (The creation of public data dashboards “is part of a trend among more prosecutors nationally to provide more transparency to the public about how the criminal justice system works and also help them address any racial and economic disparities after first identifying them in the numbers.”). For an example of a prosecutorial dashboard which contains robust statistics (lacking in most district attorneys’ offices in America), the Maricopa County (AZ) District Attorney’s Office data dashboard is worth reviewing. See *Data Dashboard*, MARICOPA CNTY. ATT’Y’S OFF., <https://www.maricopacountyattorney.org/419/Data-Dashboard> [<https://perma.cc/YFL7-TMK6>] (last visited Dec. 7, 2023).

179. This proposed authority for DOJ to investigate and publish findings has historical precedent at the level of local prosecutors. District attorneys in some jurisdictions have the authority to produce grand jury reports on matters of public concern which do not rise to the level of criminal offenses, although this authority has remained a source of controversy. See generally Barry Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 76 (1987) (“There is a consensus among courts and commentators that, historically, common law grand juries performed a public reporting function by identifying official misconduct without initiating prosecution.”).

This Article traces the murky history of the pattern-or-practice statute through the interpretive lens of both federal and state law, considering previously unexplored legal and factual nuances. DOJ currently lacks general and nationwide authority to pursue enforcement actions against local prosecutors pursuant to the pattern-or-practice statute. However, through a detailed look at state law and the actual structure and evolving functions of district attorneys' offices and by delving into previously unconsidered legal theories and factual nuances, the Article reveals certain categories of prosecutors' offices where DOJ would have standing to bring an action under section 12601.

This Article points out the practical and potentially unpredictable results of amending section 12601 to grant DOJ uniform standing to bring an enforcement action against any district attorney's office. Balancing such issues, the Article recommends amending section 12601 explicitly to grant standing to DOJ to bring an enforcement action against local prosecutors, a necessity given the power and otherwise virtually unbridled authority of district attorneys. The Article also proposes an alternative solution which would create more transparency regarding the unfettered discretion of local prosecutors. In this match-up of power versus power, there is no clear winner, only dangerous potentials in all directions.