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ARTICLE: Organizational Culture and Police Misconduct

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SUMMARY:

... It was almost hard to remember the charges of overaggressive policing that had plagued the New York Police Department ("NYPD") during most of the pre-9/11 Giuliani administration. ... In 1990, after nearly twenty years of complaints and suppression motions involving allegations of police brutality by Area Two detectives, the Chicago Police Department's own Office of Professional Standards ("OPS") conducted an internal investigation. ... The Commission concluded that, whatever its official organizational culture and policies, the LASD had adopted a de facto policy of rewarding aggressive policing by ignoring repeated incidents of excessive force and promoting the very officers responsible for those incidents. ... Indeed, it could suggest the opposite: if the vast majority of police officers manage to avoid excessive uses of force and only a relatively small number of officers misbehave, then the small minority look like "rogue cops" whose behavior the department may not condone and whose misconduct is explainable by non-organizational factors such as personal deficiencies. ... Second, it follows that no legal strategy that ignores the power of the police organization will have any lasting success in addressing police brutality. ... If the investigation determines that the officer acted appropriately, the matter is closed; if the investigation indicates that the officer engaged in misconduct, the supervisor recommends discipline. ...

TEXT:

[*453]

Introduction

The events of September 11, 2001 have left us forever changed. We feel more vulnerable, we are more suspicious, and we are torn in new ways about the balance between vigorous law enforcement and cherished, individual rights of privacy and liberty. In the immediate aftermath of 9/11, the law enforcement community got very high marks. New York City Police officers and their brethren who poured in from all over the country were rightly hailed as heroes for their role in rescuing the injured, recovering the dead, protecting property, and helping to restore order. It was almost

hard to remember the charges of overaggressive policing that had plagued the New York Police Department ("NYPD") during most of the pre-9/11 Giuliani administration.

When tightly knit service organizations such as police, firefighters, and rescue workers act courageously as they did following 9/11, we (and they themselves) attribute their sacrificial conduct not only to personal heroism, but also to the values of their service culture. The cultural self-definition of policing is exemplified by such terms of solidarity as the "brotherhood in [*454] blue" and the "thin blue line." As a result of their organizational cohesiveness, officers are quick to ostracize colleagues who let them down, but they (and their departments) view successful or heroic interventions as collective achievements.

When police officers are accused of misbehavior, however, police solidarity has the opposite effect. In the face of outside criticism, cops tend to circle the wagons, adopting a "code of silence," protecting each other, and defending each other's actions. If the misconduct is found to be true, moreover, their departments deem the miscreants "rogue cops" whose conduct does not reflect negatively on the organization from which they came.

The truth, however, is that the same organizational culture that produces extraordinary heroism also facilitates shocking misconduct, sometimes by the very same actors. n1 One need look no further than the popular press to see that, alongside the high marks for heroism on 9/11, the NYPD is continually dogged by allegations of misconduct and brutality. n2 Moreover, the NYPD is not alone. It is hard to think of a big city police department that has not been investigated by multiple commissions and task forces for charges of corruption, brutality, or other serious unlawful acts. n3 And recent history brings to mind many nationally publicized incidents in which police officers employed tactics that, at best, seemed overly aggressive and, at worst, were downright illegal. Recall the 1991 beating of Rodney King by Los Angeles police, the beating and sodomizing of Haitian immigrant, Abner Louima, by New York City police officers, the shooting of unarmed suspect, Amadou Diallo, in the vestibule of his New York City apartment building, the recent Los Angeles Police Department ("LAPD") Rampart Division scandal, the ongoing investigation of allegations of torture by detectives from Chicago's Area Two Violent Crimes Unit, and recent allegations of brutality by officers in Prince Georges County, Maryland, to name a few. These incidents have provoked widespread public criticism and controversy. Many have resulted in significant damages awards or criminal prosecutions against the offending officers.

Despite all of the attention that has been paid to this issue in recent years--the news coverage, lawsuits, task forces, commissions, and congressional hearings--recurring incidents of police brutality have led many citizens to wonder why very little seems to change. Over the years, a number of prominent police departments have made efforts toward reform, often in response to the recommendations of independent commissions convened to investigate incidents of alleged wrongdoing by police. Still, misbehavior by law enforcement officers seems ubiquitous, and serious, lasting reform appears illusory. As one Los Angeles Times reporter observed in a story about the LAPD:

Often, an investigation is undertaken, followed by recommendations for sweeping change, which are ignored or halfheartedly implemented. [*455] The cycle is so habitual that one steadfast aspect of each new report is a section wondering why the recommendations in past reports haven't been carried out. n4

What accounts for this lack of success in achieving lasting police reform? The answer I want to explore is that reform efforts have focused too much on notorious incidents and misbehaving individuals, and too little on an overly aggressive police culture that facilitates and rewards violent conduct. Real reform requires police organizations to accept collective responsibility, not only for heroism, but for police brutality and corruption as well.

Consider the way in which police departments describe and defend controversial actions by individual cops: either as well-intentioned but unfortunate responses to dangerous and ambiguous situations, or as the aberrant behavior of

rogue cops. The first kind of explanation--the kind that police departments offered to justify the Rodney King beating and the more recent shooting of Amadou Diallo--seeks to place the incident in question outside of the category of police wrongdoing. Occasional beatings or shootings of suspects whom police reasonably believed were armed and dangerous are regrettable, but not culpable. They are the unavoidable consequences of the job that we ask police officers to do in a dangerous and unpredictable world. The second explanation, by contrast, accepts certain police actions as unquestionably wrong, but attributes them to a small minority of police officers gone bad. Thus, these incidents tell us little or nothing about the experience or motivation of the well-behaved and well-intentioned majority. n5

These explanations are powerful and important because they frame the way police departments--and ultimately the legal system--respond to police brutality. Every prescription for controlling police violence is based on a theory of why police officers behave the way they do. This article argues that, because the stories police departments tell themselves (and us) about the causes of police violence are flawed, it is not surprising that judicial, administrative, and departmental responses to police violence have been notoriously unsuccessful.

The primary defect in these explanations (and the solutions that go with them) is that they view police misconduct as resulting from factual and moral judgments made by officers functioning merely as individuals, rather than as part of a distinctive and influential organizational culture. n6 The regrettable- [*456] accident explanation asks whether the officer's judgment about whether to shoot, or how much force to apply, was reasonable under the circumstances as known or perceived by the officer at the time of the incident. This explanation deems an officer not morally or legally culpable for a reasonable, though erroneous, decision. n7 Thus, police departments view the regrettable-accident scenario as requiring no corrective intervention, except, perhaps, an official expression of regret for harm caused. n8 What this explanation fails to consider, however, is how the officer came to be in that particular situation in the first place and whether there is anything to be learned by examining the organizational norms and policies that framed his judgment. n9

The officer-gone-bad explanation is flawed in a similar way. It assumes that the misbehaving cop is off on a "frolic and detour" for which he alone is accountable. This explanation allows the department to distance itself from incidents of misconduct by labeling the perpetrators "rogue cops," deviants who are wholly unlike their fellow officers. Moreover, it allows police leadership to declare to the rest of the rank and file, "this incident is not about you," as Los Angeles Mayor Riordan proclaimed to the rest of the police force in the aftermath of the recent Rampart scandal. n10 All of this allows the police organization to absolve itself of any responsibility for the officer's wrong-doing. n11

By contrast, theoretical and empirical scholarship on policing strongly suggests that the police organization bears significant responsibility for police misbehavior. My goal in this Article is to explore the understudied and underappreciated link between organizational culture and police misconduct. Punishing individual cops will not cure the problem of police violence if systemic features of the police organization permit, sanction, or even encourage the officers' violent behavior. Like the individual-specific n12 explanations that police departments offer for the misbehavior of their members, current remedies are inadequate to the extent that they ignore or undervalue institutional and organizational factors.

[*457] In Part I, I demonstrate the limitations of existing legal remedies for addressing police misconduct. The flaw is that these remedies focus almost exclusively on individual culpability for particular, isolated incidents. This individual-specific and incident-specific approach seriously underestimates the power of the police organization in shaping the conduct of street-level cops. Moreover, not only is individual-specific liability ineffective, it is perverse. It creates scapegoats that may satisfy society's moral outrage while deflecting attention away from the institutional structures that lie at the root of the problem of police brutality.

In Part II, I argue that, unlike the courts, police scholars have long recognized the powerful role of the police organization in determining police conduct. Virtually all major police commissions and task forces convened over the last thirty or forty years have concluded that the patterns of repeated, wrongful incidents identified in these troubled police departments were at least partly caused by systemic features of police culture. Moreover, recent organizational

literature provides a compelling theoretical basis for what police scholars have long concluded: police officers are organizationally embedded in a way that virtually redefines their individual decision-making processes. This literature helps to explain the limitations of police reform efforts that focus on the misconduct of individual officers, while ignoring the causal role of the police organization.

In Part III, I consider, in more detail, how particular features of police culture may contribute to police brutality and its imperviousness to legal solutions. In particular, I note the phenomenon of the "double message," which allows police higher-ups to say one thing in formal policies, while perpetuating a very different message through on-the-ground organizational culture.

Finally, in Part IV, I turn to remedial solutions. I review the failures of entity liability, demonstrating how the "double message" makes 1983 suits against the government especially unlikely to be successful in curbing police brutality. On the plus side, perhaps the most promising legal mechanism is the newly created equitable remedy made available through *42 U.S.C. 14141*. In addition, I argue that some form of peer review should be an essential part of any regulatory strategy for reforming police organizations.

I. Police Brutality: Rotten Apples or a Rotten Barrel?

In the aftermath of the brutalization of Abner Louima by New York City police officers, Police Commissioner Safir declared that the officers involved in the affair were "bad apples" who are spoiling the reputation of the New York police. n13 Safir noted that he did not consider the incident "an act of police brutality," but rather a "criminal act committed by people who are criminals." n14 When unarmed immigrant Amadou Diallo was killed by forty-one bullets fired by four members of the NYPD, Mayor Giuliani termed the [*458] shooting an isolated incident. n15 Police Chief Darryl Gates had a similar reaction to the beating of Rodney King, calling it an "aberration." n16 More recently, in response to serious allegations of multiple, unjustified shootings and other incidents of brutality by Prince George's County, Maryland police officers, County Executive Wayne K. Curry opined that this "is a problem we have with a very few individuals who act outside of our laws and codes and who act without proper or professional judgment." n17 These responses illustrate the nearly universal reaction by local politicians and chiefs of police to publicized incidents of police brutality: they view these incidents as isolated, aberrant acts of rogue cops whose criminal conduct does not reflect on either the leadership or the rest of the rank and file.

The rogue cop story has a number of possible implications for explaining and addressing police brutality. One explanatory theory that police scholars have discussed and tested is that these bad cops have attitudes or personality traits--not shared by their nonviolent brethren--that predispose them to becoming involved in violent encounters with suspects. n18 If so, then the solution could be a combination of ex ante measures to screen out potential bad actors at the hiring and training stage, n19 and ex poste civil and criminal penalties to punish repeat offenders and discourage similar conduct in the future.

[*459] Unfortunately, these strategies have had limited success in curbing police brutality. As this Part will explore in more detail, part of the reason for these strategies' lack of success lies in the inadequacy of the remedial tools themselves. Screening has not proved very useful because available personality tests are not good at predicting which potential employees will engage in violent conduct. Indeed, empirical testing of various theories that have sought to identify a violence-related "working-personality" have found very little relationship between attitudes and behavior. Similarly, strategies based on punishment and deterrence--primarily the use of criminal and civil penalties--are limited by procedural, doctrinal, and practical constraints that render them poor tools for controlling police brutality.

There is also another reason why these strategies represent only a partial solution. It is because the individual-specific model of police behavior on which they implicitly rely is woefully incomplete. Every strategy for police reform is based on some theory of why police do what they do. The psychological testing strategy assumes that the causes of police misconduct are traceable to a set of personality traits that make some officers more prone to violence than others. The punishment-deterrence strategies treat police officers as independent moral agents whose

behavior can be changed simply by exposing them to the threat of civil or criminal penalties. While both of these theories contain significant elements of truth, they are missing an important component: the role of the police organization in shaping attitudes and influencing decision making.

A. Bad Attitudes and Bad Behavior

One of the most compelling observations made by the Christopher Commission, a civilian group that investigated the LAPD after the Rodney King beating, is that a relatively small number of repeat offenders perpetrated a large majority of incidents of police violence. A number of different indicators, including allegations of excessive force or improper tactics, personnel complaint allegations of other types, and use of force reports formed the basis for the Commission's conclusion. n20 Other investigative accounts have [*460] identified similar patterns in which a minority of police officers have records involving multiple, prior violent acts. n21

The Christopher Commission assumed that the explanation for the repeat-offender pattern was that these officers had certain outlooks or personalities that predisposed them to violence. For example, the Commission found it significant that its review of Mobile Digital Terminal ("MDT") transmissions n22 among police officers revealed "an appreciable number of disturbing and recurrent racial remarks," n23 evidence that many officers had "unacceptable and improper attitudes regarding the use of force," n24 and remarks suggesting that officers viewed pursuit as "an opportunity for violence against a fleeing suspect." n25 The Commission posited a generalized connection between officer attitudes, such as racial prejudice, and their use of force, concluding that "attitudes of prejudice and intolerance" toward suspects reflected in MDT transmissions were "translated into unacceptable behavior in the field." n26

Although intuitively it seems correct that some connection exists between attitudes and behavior, efforts to use attitudes to predict and explain behavior in the policing context turn out to be quite problematic. For one thing, the personality tests that researchers have employed to make predictions about future police performance have received, at best, mixed reviews. The test that is still most widely used by police psychologists--the Minnesota Multiphasic Personality Test ("MMPI") and its revision the MMPI-2 n27--gained currency in the law enforcement context in 1973, when the President's Commission on Law Enforcement and Administration of Justice recommended its use for psychiatric and psychological screening of all police applicants. n28 [*461] The Commission's suggested strategy of using personality testing to "screen out" undesirable candidates has characterized most efforts to use pre-employment assessments to improve the performance of police. n29 Despite nearly thirty years of police selection efforts and research studies using psychological screening, however, periodic reviews of these strategies uniformly agree on the inadequacy of screening in general and of the MMPI in particular. n30 A 1972 review of twenty-nine articles on police selection concluded that the quality of the research claiming an attitude-behavior connection in police screening was "poor." n31 A decade later, a study that sought to establish the validity of the MMPI in police selection concluded that "there has been no systematic correlation of tests or interviews with an individual's subsequent behavior and success or nonsuccess in law enforcement." n32 Although the use of the MMPI in law enforcement hiring is not without support n33 and many police agencies continue to use the MMPI, n34 police experts [*462] conclude that its effectiveness in predicting police performance is limited at best. n35

What about tests geared specifically toward predicting a tendency to engage in violent or abusive acts? Although there are tests that purport to measure the relationship between mental health and violence, their utility is limited by the facts that, overall, few people actually commit violent acts, only a minority of people with identifiable psychological problems are prone to violence, and violence-prone individuals do not behave violently in all contexts. n36 As one police researcher starkly concluded, "no test for violence potential has been created that has any demonstrated scientific validity." n37 [*463] Violence-prediction studies outside of the policing literature have come to similar pessimistic conclusions. n38

Perhaps the most promising psychological analyses of police violence have constructed topologies of police personalities based on multiple attitudinal dimensions. n39 A review and synthesis of these topologies isolated five composite police personality types, which do appear to differ in their propensity to use force. n40 The synthesis

hypothesizes that the officers who are most likely to use force share certain attitudes and beliefs such as: conceiving of their role in narrow, crime-fighting terms; believing that their role is best carried out when police have broad discretion to use force; and viewing the public as unappreciative, hostile or abusive. n41 The few efforts that have sought systematic testing of these hypothesized topologies, however, suggest that officer attitudes relate, at best, only weakly to their conduct. n42 What these studies do indicate is that conduct is not simply an extension of attitudes; the connection between the two is mediated through social and organizational forces. n43

The results of these studies suggest that efforts to predict violent conduct by looking at attitudes and beliefs are limited at best. While it seems plausible that, if a small number of police officers are responsible for a disproportionate number of violent police-citizen interactions it might be something about their psychological profile that is to blame, it is not at all clear what that something is and how to test for it. n44 Moreover, the very failure of personality prescreening to predict violent behavior suggests that something [*464] more complicated is going on. In particular, the focus on psychological factors begs two very important questions: first, it fails to sort out whether the offending officers entered the police force predisposed to violence, or whether their violent propensities resulted from their exposure to police culture and work. Second, even if the officers who repeatedly commit violent acts have an identifiable psychological profile, the more basic question is: why were these violence-prone officers permitted by their respective police organizations to repeat their violent conduct again and again?

In sum, police scholars have come to believe that personality tests are poor predictors of police violence precisely because they ignore the fact that "behavior is not a simple extension of attitudes, as organizational and other social forces can attenuate the impact of attitudes on behavior." n45 Police violence "is decidedly more complex and multidimensional than the 'few bad apples' theory would imply." n46

B. Individual-Specific Remedies and Systemic Harms

While psychological strategies attempt to address police brutality by screening out potential brutalizers, civil and criminal sanctions--primarily 1983 suits and 242 prosecutions--attack the problem from the other end, by punishing those who misbehave. Behavioral theories of civil and criminal liability posit that individuals who suffer negative consequences for their conduct will think twice before repeating their acts (specific deterrence), and observing others' punishments will discourage potential wrongdoers from engaging in similar acts (general deterrence). Putting aside the question of whether tort and criminal liability actually deter bad conduct, it is clear that civil and criminal sanctions have had only limited effect in curbing police brutality. n47

Section 1983 provides a federal civil cause of action for damages or equitable relief in circumstances where state or local governmental officials have deprived citizens of rights secured by the United States Constitution or federal law. n48 Section 242 authorizes criminal prosecutions against government [*465] officials under similar circumstances. n49 On both the criminal and civil side, the prosecuting or complaining party ordinarily frames civil rights actions as Fourth Amendment claims of excessive (unreasonable) force during a search or arrest. n50

A number of scholars have written extensive analyses explaining why civil and criminal liability under the federal civil rights statutes have had only limited success in curbing governmental misconduct. n51 The conventional arguments fall into two main categories: practical obstacles--difficulties resulting from the characteristics of the typical litigant and the circumstances in which civil rights cases arise--and doctrinal obstacles--immunities and other features of the civil rights laws that make it difficult for plaintiffs to prevail. This article adds a third obstacle, namely the individual-specific and incident-specific nature of civil rights litigation, which limits its ability to address institutional causes.

The primary mechanism for constitutional criminal prosecution of police officers who use excessive force is 42 U.S.C. 242. n52 Criminal prosecutions can also be brought under generally applicable state laws such as laws against assault, aggravated assault, manslaughter, and murder. Some states also have civil rights statutes, which, like 242, make excessive force in violation of the federal or state constitution a distinct crime. n53 Others have extensively catalogued

the arguments for why criminal liability is not a very effective tool against police brutality, and I will review them only briefly.

[*466] First, it bears noting that criminal standards define the absolute minimum of socially-acceptable conduct. Thus, even when criminal laws are enforced effectively, they do not describe sufficiently high norms of behavior to constrain police discretion within professionally acceptable boundaries. n54

Second, and relatedly, the government brings criminal prosecutions against police officers only rarely and only in the most egregious cases. There are a number of reasons for the low prosecution rate. One set of explanations arises from the nature of the American penal system, in which the accused enjoys certain "procedural advantages" n55 that make criminal cases more difficult to investigate and win. Moreover, governmental officials enjoy the benefit of additional immunities from prosecution under state and federal criminal law. n56 These features reduce the number of prosecutions that are likely to be brought and won. n57 In addition, prosecutors may view criminal sanctions as unjustifiably harsh when used against a police officer who is "just trying to do his job." The criminal sanction has an all or nothing quality that exposes the offending officer to the risk of prison, as well as job loss and public humiliation. A second reason for the low prosecution rate is that police and prosecutors have an identity of interest in investigating and prosecuting crime and an accompanying need to maintain good professional relationships, which may create disincentives for filing criminal cases against cops. A third explanation is that some jurisdictions have inadequate systems for tracking, monitoring, and investigating complaints of misconduct. n58 Critics also charge that there are inadequate mechanisms for oversight and accountability outside of the law enforcement community to ensure that prosecutors bring the right cases. n59

Third, even when prosecutors bring excessive force cases, other factors make them difficult to win. In particular, juries are unlikely to be particularly sympathetic to civil rights victims, who are usually criminal suspects. n60 When it comes down to whose story to believe--the criminal suspect or the police officer--in situations unlikely to involve other witnesses, the officer has a distinct advantage. The fact that the victim is viewed as unsympathetic and unreliable contributes to jurors' natural reluctance to brand a police officer a criminal and to send him to prison for doing his job. n61

Finally, federal prosecution under 242 presents two additional impediments that limit its reach in police brutality cases. The first is that courts [*467] have interpreted 242 to require "specific intent" to violate the victim's constitutional rights, n62 which has confused many courts and made prosecution more difficult. n63 In addition, to the extent that 242 (like its civil counterpart) permits prosecution of ordinary torts and crimes--conduct otherwise under state jurisdiction--it raises issues of federalism that may lead prosecutors to err on the side of underenforcement. n64

While there is much more that could be said about criminal prosecution in the law enforcement context, there is virtually unanimous agreement that it cannot serve as a first-line offense against police brutality. As a practical matter, the government will not, and probably should not, employ criminal sanctions except in the clearest and most egregious cases of police brutality.

On the civil side, the practical obstacles to bringing and winning a 1983 case are many. First, many damages suits are simply never brought at all because plaintiffs are ignorant of their substantive legal rights. In addition, they may lack ready access to legal representation, n65 or may fear retaliation from police for bringing suit. n66 Second, even when they are brought, 1983 suits alleging excessive force are particularly difficult to win. This is due both to the nature of the legal standard, and to the kinds of situations that give rise to such suits. Recall that police may use only the level of force that was reasonable under all the circumstances, including, among other things, the seriousness of the crime at issue, whether the suspect's conduct threatened the safety of the officer or others, and whether the suspect was actively resisting or seeking to evade arrest. n67 In addition, the standard is to be construed "from the perspective of a reasonable officer on the scene, rather than with the 20-20 vision of hindsight." n68 In sum, excessive force determinations involve a fact-intensive balancing of the government's interest in crime control against the citizen's interest in safety and bodily integrity, which gives the benefit of the doubt to the governmental actors. Moreover, the

end result often boils down to whose story the judge or jury believes--the suspect's or that of the officers who stopped, arrested, or questioned her.

This puts the civil rights plaintiff at a distinct, practical disadvantage. The typical complainant in an excessive force case is a criminal suspect from a poor, minority neighborhood, often with a criminal record n69--not a very [*468] credible witness in the eyes of the jury. n70 In addition, the plaintiff's witnesses--who are likely to be family, friends, or acquaintances from the same neighborhood--will not be viewed as disinterested witnesses and may suffer from some of the same credibility problems as the plaintiff. The only other witnesses are likely to be other police officers who, perhaps understandably, will give their fellow officers the benefit of any doubt. More troubling, however, a widely documented norm known as the "code of silence" n71 may lead officers to stonewall (or even lie) about the compromising details of the alleged abusive interaction. Thus, even where the plaintiff can prove serious injury, police officers may be able to allege facts--such as that the plaintiff was resisting arrest or appeared to be reaching for a gun--that would support the officers' use of force. n72

Moreover, despite the fact that the code of silence is a well known phenomenon, and despite evidence that police officers sometimes lie about police-citizen encounters, n73 courts tend to give the officers' stories the benefit of the doubt. n74 Judges and juries (and most ordinary citizens) view police officers n75 as public servants who work under difficult, dangerous, and uncertain conditions to maintain the "thin blue line" between order and chaos. Moreover, the tendency by judicial decision makers to favor police officers over alleged victims of excessive force is reinforced by a widely held public view that a little bit of police brutality is simply the price we pay for crime control. n76 All of this puts the injured plaintiff at a practical disadvantage in making out her case.

[*469] In addition to the practical difficulties, there are doctrinal obstacles as well. First, state police agencies are absolutely immune from civil damages liability under the Eleventh Amendment. n77 Moreover, while courts have construed the Eleventh Amendment to permit injunctive relief against state agencies by the fiction of naming state officials in their individual capacities, n78 the Supreme Court has effectively foreclosed this avenue of relief for victims of police violence through the application of standing rules that are virtually impossible to satisfy in the law enforcement context. n79

Second, although state and local police officers, in their individual capacities, have no Eleventh Amendment immunity, n80 they are shielded by qualified immunity, which abrogates liability for unconstitutional conduct if a court finds that the offending officer could "reasonably have believed" his actions were justified under the circumstances. n81 Moreover, recall that courts evaluating the officer's beliefs and action are not to engage in 20-20 hindsight, but to give the benefit of the doubt in close cases to the police. n82 This follows from the very nature of police work, which requires quick thinking in rapidly changing, sometimes dangerous circumstances involving substantial uncertainty. In many cases, the events surrounding police-citizen encounters will be difficult to reconstruct, and the question of whether an officer applied reasonable force under the circumstances as he reasonably believed them to be will not be easy to answer. n83 Thus, while qualified immunity does not protect police officers who engage in the worst sorts of police brutality, n84 some amount of excessive--and unconstitutional--force will escape civil liability. n85

By these observations, I do not mean to suggest that qualified immunity is not justified in many instances. It stands to reason that even the very best police officers will make judgments or take actions that turn out, in hindsight, to have been mistaken. Immunity from damages liability in such cases is necessary and defensible. n86 My point is, rather, that in cases where officers are [*470] immune from liability, there is no legal incentive for police departments to engage in self-criticism and self-review that could lead to insights about how to avoid potentially harmful police-citizen encounters in the future. By definition, however, these are instances in which self-review could be beneficial. Qualified immunity applies where the officer got it wrong but where his mistakes, either factual or legal, were reasonable. Police departments could use review and retraining to help officers identify and avoid some of these mistakes in future interactions. n87 It bears noting, for example, that young recruits are more likely to resort to using force in police-citizen encounters than older, more experienced officers, who are more skilled in avoiding confrontations. n88 Moreover, while uses of force that are immune from liability are not the most egregious cases, there is reason to think

that unnecessary but low-level force is as troubling as outright brutality in creating police-community friction. n89 Yet, this kind of conduct is likely to slip under the radar screen of existing civil and criminal regulation and thus be ignored by police administration. n90

A third limitation on the scope of civil liability for excessive force results from the narrow way in which the excessive force inquiry is ordinarily defined. In making the determination of whether the officer used reasonable force, only the circumstances immediately surrounding the violent encounter enter into the fact-finder's determination of whether the officer acted appropriately. n91 Thus, the inquiry includes no consideration of whether the officer acted unreasonably in creating the confrontation or causing it to escalate to a point that required the application of force. n92 Limiting the temporal definition [*471] of the claim in this way has a profound effect on how police officers will view their responsibility for avoiding excessive force. As long as the focus is on whether the circumstances justified the use of force at the moment it was applied, officers have no legal incentive to step back and ask themselves whether they could have avoided the entire situation without a violent confrontation. Like qualified immunity, limiting the temporal definition of the claim not only narrows liability, but also reduces incentives for constructive review and training to avoid excessive force in future police-citizen interactions. n93

Finally, while municipalities, unlike states, have no Eleventh Amendment immunity, n94 their liability is limited in ways that make it especially unsuited to addressing police misconduct. Municipalities are liable only when the officer's harm-causing actions can be deemed a "custom or policy" of the entity itself. The easiest case for governmental liability is when a statute or regulation actually enshrines a facially unconstitutional policy, n95 or when a very high-ranking official, such as a chief executive, has formally represented a particular approach as the official policy of the government. n96 The easy cases, however, rarely arise precisely because very little misconduct is sanctioned ex ante by high-level officials, at least not formally. The only other way to satisfy the custom or policy requirement is to show a pattern of repeated incidents of similar misconduct. Where there is such a pattern, the locality is deemed to have an official policy of failing to train its employees to act lawfully. n97

[*472] Unfortunately, however, failure to train claims are very difficult to bring, and even more difficult to win. n98 As an initial matter, the evidence necessary to make out a pattern of repeated instances of police brutality involving different victims is all in the hands of the government, and such information is available only through extensive discovery. Moreover, the sheer volume of factual evidence that is necessary to make out such a pattern makes failure to train cases very expensive to litigate. n99 In addition, the doctrinal showing requires that the discrete instances that make up the pattern be similar enough, and distinctive enough, for a fact-finder to conclude that the misconduct resulted from an identifiable defect in the training program, rather than from some other factor such as the individual characteristics of the wrongdoers. n100 The paradigmatic case for failure to train, according to the Supreme Court, is a series of instances of unjustified police shootings by police officers whose departments issued them dangerous firearms without any instruction on how to use them. n101 As usual, however, the easiest cases do not arise. Most failure to train cases involve less concrete kinds of dangers than mishandled firearms, and correspondingly less clear implications for training. If experience is any indication, very few failure to train cases are ultimately successful in obtaining damages recovery against municipalities. n102

In sum, it is fair to say that practical and doctrinal obstacles make it relatively difficult for plaintiffs to win excessive force cases. Still, police brutality suits make up a large proportion of the total number of 1983 suits filed each year, and the worst cases can lead to large damages awards, n103 sometimes combined with criminal sanctions. Indeed, some big city police departments routinely pay out a seemingly enormous amount in liability costs every year. For example, between 1991 and 1995, Los Angeles paid approximately \$ 79.2 million in civil lawsuit judgments and awards, and pretrial settlements against police officers (not including traffic accidents). n104 New York City paid out \$ 70 million in settlements or jury awards for police [*473] misconduct claims between 1994 and 1996. n105 In 1994-1995 alone, New York City paid out \$ 44 million, which amounts to an average of almost \$ 2 million per month for police misconduct lawsuits alone. n106 As of five years ago, the City of Chicago was budgeting \$ 30 million per year to cover police civil liability costs. n107 In light of this pattern of significant liability costs in many major city police departments, the question remains, "why aren't these suits more effective in rooting out police brutality?"

There are at least two answers to this question: one that has received a significant amount of attention in recent scholarship, and one that has received very little. The first answer has to do with how police officers and their departments view the costs and benefits of police brutality. It goes without saying that liability only serves to punish and deter if defendants experience damages liability as a significant loss that outweighs any benefits from their harm-causing actions. Individual officials, however, almost never reap the financial consequences of 1983 suits that are brought against them because the government handles their legal defense and indemnifies them for any damages assessed against them. n108 Thus, although officials testify that lawsuits in which they are defendants cause them fear and anxiety about possible consequences, they virtually always come out of suits financially unscathed. n109

Of course, this only means that the municipality is footing the bill for individual as well as entity suits, which should give the government an incentive to discipline, or even fire, the wrongdoers who drive up their liability costs. It was certainly the Supreme Court's assumption in *Monell* n110 and *Owen*, n111 which laid out the scope of municipal liability, that governmental liability would result in entities monitoring and sanctioning individual misconduct. n112 Unfortunately, at least in the law enforcement context, civil [*474] rights suits that cost the government significant amounts of money do not necessarily, or reliably, result in negative consequences for the individual officers involved. First of all, 1983 suits often involve protracted litigation over many years. By the time a plaintiff wins a judgment in the case, the passage of time has diminished greatly the connection between the events that gave rise to the suit and any sanction against the officials involved. It is a commonplace that the deterrent force of a sanction is heavily dependent on fostering a close link between deed and punishment. Second--and quite surprising--many (perhaps most) police departments do not keep records in a form that encourages or even permits supervisors to review reports of lawsuits, citizen complaints, and use-of-force reports on individual officers whose performance they are evaluating. n113 Relatedly, many departments do not use these materials to track broader patterns and trends that might reveal problem officers or trouble spots in the police force. In some cases, this failure results simply from disorganized or fragmented record keeping or lack of computer capability. n114 In others, it is more deliberate, flowing out of concerns that statistics about misconduct could be used in litigation against the police department. n115 Whatever the cause, one result is that officers who are the subject of lawsuits, and other forms of citizen complaint alleging police brutality, are often the same ones who the department rewards with commendations and promotions. n116 Obviously, when supervisors do not discipline officers, despite lawsuits or complaints involving police brutality, and those officers' personnel files remain exemplary, the officers have no incentive to change their behavior. Indeed, to the extent that police departments promote problem officers, they are actually rewarding their aggressive conduct.

More broadly, many police departments apparently consider the money they pay out in damages and settlements as simply a "cost of doing business." n117 In the words of LAPD Chief Daryl Gates, "The Department's proactive enforcement philosophy is one of the primary reasons it has been [*475] able to accomplish more with less." n118 This coldly calculated cost-benefit analysis is not surprising when one recognizes that even large damages awards amount to only a small part of the budget of a large metropolitan police department. n119 Even if a department could totally eliminate liability costs, this would buy very little additional, conventional law enforcement. n120 "In big police jurisdictions, verdicts and settlements are cheaper than paying for enough new cops to make a real difference in a department's ability to mount a street presence." n121

Moreover, governmental actors, unlike private actors, are much more likely to be motivated by political incentives than by purely financial ones. n122 While police departments get negative publicity for the worst police abuses that become public--and they reportedly fear scandal more than the monetary liability that might accompany it n123--they also score political points for real or perceived success in fighting crime in their jurisdiction. Political accolades also turn into bigger budgets for crime fighting. To the extent that chiefs of police view a little bit of brutality as an effective law enforcement tool, they will balance the costs of liability against the perceived gains of aggressive policing. If police leadership views the use of force in this way, then it is not surprising that departments are lax in record keeping on such incidents, that they sweep evidence of police brutality under the rug, and that they do not sanction--and may even reward--police officers for engaging in aggressive conduct.

The second answer to the puzzle of why large damages awards seem to have so little effect on police brutality is

related to the first. Assuming indemnification, both individual and entity suits depend for their success on the notion that the governmental entity, in the form of the police organization, will put pressure on misbehaving officers to change their behavior. But, if police leadership is tolerating, even sanctioning, a kind of aggressive conduct that leads to abuses and police leaders are willing to absorb the costs of liability, then the organization itself is part of the problem. My thesis, which I lay out in more detail in Part III, is that police departments that have chronic problems with police brutality are implicitly or informally sanctioning police violence through their organizational culture. If I am correct, then the rogue cop story that police departments routinely offer in the face of allegations of [*476] police brutality is, at best, incomplete and, at worst, simply false. Moreover, police departments get off too easy when they claim that incidents of brutality have nothing to say about the police organization of which the offending officers are a part. Perhaps rotten apples are coming from a rotten barrel, which is not to say that all the cops in the barrel are "rotten," but only that the defective barrel is partially responsible for the ones that are! If so, the solution has to go beyond the misbehaving cops in order to address the organization that had a role in producing them.

The above observation suggests that, in addition to the doctrinal and practical limitations on civil rights liability as an answer to police brutality, there is a third, less appreciated limitation: available remedies rely on a remedial model that ignores or undervalues the power of the police organization as a cause of police misconduct. n124 The 1983 remedy, n125 which is the primary legal tool available to victims of police misconduct, is both individual-specific and incident-specific. It is individual-specific in the sense that it views police officers as autonomous moral agents who are expected to adjust their conduct in response to the pressures of external sanctions. It is incident-specific in that cases only resolve single, isolated occurrences of police misconduct. The policing literature, however, paints a very different picture. In the real world, cops are far from independent agents. Rather, they act within the constraints of a very powerful organizational culture that significantly influences and constrains their judgments and conduct. For similar reasons, viewing police brutality as a string of unrelated incidents belies reality. Police officers who misbehave are often part of a larger pattern of misconduct involving multiple incidents and multiple actors. Such patterns cannot be attributed solely to the misbehaving individuals. Individual officers are behaving as their departments have trained them to behave--whether explicitly or implicitly--and the organizational culture that cultivated and sustained them must also bear some responsibility. To the extent that civil rights law is not equipped to capture these institutional realities, its utility in addressing the problem of police brutality is similarly limited. n126

One practical consequence of the individual-specific and incident-specific model is that judges and juries never get the information that would be most helpful in identifying sick police departments. In particular, they do not hear any comparative data on police shootings or brutality complaints more generally, including comparisons with other departments. They do not learn whether the cop standing before them has a long history of similar incidents n127 or how his complaint history compares to that of his colleagues. They do not know whether the officer's complaint record is unusual or if it is [*477] part of a pattern of similar misconduct that includes other officers in the department. And finally, they do not hear any comparative data that would provide insight into how the officer's employing agency compares with other, similarly situated departments.

This leads to two problems. First, judges in 1983 and 242 cases have no organizational context. They have no way of knowing whether the occurrence that they are reviewing is an isolated incident or the natural and predictable product of a diseased organization. This distinction matters because these are two very different problems requiring very different solutions. It is possible to address isolated brutality by weeding out the bad apples, but sick organizations need organization-wide (systemic) solutions. The "custom or policy" doctrine from *Monell* and *City of Canton* was supposed to provide a forum for considering evidence that suggests a pattern of misconduct, but it simply does not.

Second, and perhaps more important, without an organizational context, judges--and juries even more so--have no good way to draw lines separating bad police violence from police violence that is regrettable but justified. Incidents involving the use of force virtually always occur under circumstances that are fast-moving, confusing, and ambiguous. Sometimes suspects incur injuries as a result of their own actions, or because police misread the circumstances. Other times, police officers are also at fault for contributing to the escalation of a potentially violent situation. Unfortunately, there are often no other witnesses, save for the officers involved and the victim, who is usually a criminal suspect. If so,

it may boil down to the cops' word against the suspect's. Comparative data--such as whether an involved officer has a complaint history that differs radically from his fellow officers n128 or whether the entire police agency has a higher-than-average level of violent confrontations--could provide important clues for resolving these kinds of ambiguities. Although pattern evidence does not necessarily resolve the case at bar, it raises the question of why this officer finds it necessary to employ more force, in more situations, than colleagues in his own or other departments. If the officer is out of sync with his colleagues, it may suggest that his uses of force are "excessive." Similarly, if an entire police department is plagued by significantly more charges of excessive force than effective departments in comparable jurisdictions, n129 the comparison could suggest that the level of force police officers are applying in the more violent department is needlessly excessive.

In addition, without the broader context, courts are left to make judgments based on vague rules, such as the application of force that is "reasonable under the circumstances." Such rules provide no real guidance for what cops are supposed to do in the confusing and fast-moving drama of street [*478] patrol. They also invite courts to review, after the fact in the calm of the courtroom, whether the officer made a reasonable judgment. This puts the officer in the very difficult situation of having no clear rules for conduct that a court will later review in isolation, without the broader context of customary police practice.

C. A Real-World Example

In order to appreciate these individual-specific features of the civil rights law, consider the following rather dramatic series of events. n130 In 1982, police arrested and indicted Andrew Wilson for the suspected murder of two police officers in Chicago. Early in his trial, Wilson filed a motion to suppress his confession on the grounds that it was the product of coercion. Wilson's story was dramatic and bizarre. He claimed that Lieutenant Burge and other officers from Chicago's Area Two Violent Crimes Unit pressured him to confess by beating, kicking, burning, and suffocating him by placing a plastic bag over his head. n131 Wilson also alleged that the officers used two different devices to deliver electric shocks to his genitals, nose, ears, and fingers, resulting in excruciating pain. n132 Wilson vividly described how the officers burned him by cuffing his hands to wall rings at opposite ends of a radiator and stretching his body so that his face, chest, and legs were pressed against the hot surface of the radiator. n133 He offered medical testimony and photographic evidence tending to corroborate the claimed injuries. n134 The State's witnesses--all police detectives--uniformly denied all allegations that they had threatened or mistreated Wilson. The trial court denied Wilson's motion to suppress his confession on the ground that the injuries were minor or superficial, and he was convicted and sentenced to death. n135

In 1986, based on the same set of dramatic allegations, Wilson filed a damages suit against the three Area Two police detectives and the City of Chicago under *42 U.S.C. 1983*. n136 The trial ended in a hung jury. n137 Near the end of the trial, however, Wilson's lawyers began to receive anonymous [*479] letters, apparently written by a police insider, which suggested that Wilson's bizarre story of beating, electrocution, and burning might actually be true. n138 The first letter identified Melvin Jones, who told Wilson's lawyers that Lieutenant Burge had subjected him to electroshock just nine days before Wilson's interrogation. n139 Wilson's lawyers located the seven-year-old transcript of the suppression hearing in which Jones had related the electroshock allegations. n140 Jones led Wilson's lawyers to other victims such as Donald White, a suspect in another police killing, who claimed that he was arrested shortly before Wilson and was taken into custody where he was beaten by Burge and other Area Two detectives. n141 During Wilson's second civil rights trial, his lawyers attempted to put Jones and White on the stand, but the district judge disallowed their testimony as irrelevant, prior-acts evidence. n142 The jury ultimately exonerated all of the individual officers as well as the City of Chicago. n143 The appeals court reversed the case and remanded it for a third trial on a number of grounds, including that the court should not have excluded the testimony of other defendants alleging torture by Area Two detectives. n144

Around the same time that Wilson was litigating his suppression motion and his 1983 suit, very similar allegations of police coercion began to appear in a series of suppression motions filed by multiple defendants--all murder suspects--claiming that their confessions had been obtained as a result of threats or physical mistreatment. n145 Their

stories were remarkably similar to Wilson's. They claimed that the officers beat, kicked, suffocated, burned, and subjected them to electric shocks and "games" of Russian roulette. n146 It turns out that beginning in the early 1970s, citizens had already begun to [*480] make very similar allegations in complaints filed with applicable administrative agencies, the mayor, the state's attorney, and the United States attorney, of abuse by Chicago police interrogators. n147 An investigation by the People's Law Office, which represented Wilson in his civil rights lawsuit, ultimately identified over sixty suspects who alleged that officers from the Area Two Violent Crimes Unit on Chicago's south side had physically abused them during police interrogations. n148 A number of these individuals filed civil rights suits against the individual officers and the City of Chicago. n149

The most remarkable aspect of the Area Two story is the repeated pattern of very similar (and very bizarre) allegations of mistreatment by an identified group of police officers. As Susan Bandes has noted, the reports of torture came from a wide variety of unconnected sources who described "alarmingly similar acts of torture." n150 They also repeatedly identified the same perpetrators. n151 While the pattern of repeat offenses by the same officers might tempt one to turn to the familiar "rogue cop" explanation, a deeper look suggests that the Area Two situation cannot be attributed to purely individualistic causes. At the very least, we need to ask the organizational level question: where were the supervisors and other high-level officials when all of this was going on over the course of nearly twenty years?

Although there is no evidence that supervisory officials instructed their officers to torture arrestees to compel confessions, there is reason to think that high-level officials willfully ignored the abusive conduct. It is striking, for example, how long it took for higher-ups even to entertain the possibility that the torture allegations might actually be true. In 1990, after nearly twenty years of complaints and suppression motions involving allegations of police brutality by Area Two detectives, the Chicago Police Department's own Office of Professional Standards ("OPS") conducted an internal investigation. n152 The OPS ultimately issued a report that listed the names of fifty alleged victims of torture and the names of the detectives who had been involved. n153 Despite the OPS's conclusion that Chicago police detectives had engaged in "systematic" and "methodical abuse" that was both physical and psychological, n154 the department dismissed only the unit commander and ringleader, [*481] Jon Burge, in 1993. n155 Only two other officers were ever disciplined in connection with the torture allegations (and they were later reinstated), and a number of Burge's colleagues named in connection with the torture allegations received commendation, promotion, and later retired will full benefits. n156 No criminal proceedings were ever instituted. n157

Police officials and leaders responded to the OPS report and the firing of Detective Burge with denial, outrage, and indignation, even though a federal court would later conclude that "it [was] common knowledge that in the early to mid-1980s Chicago Police Commander Jon Burge and many officers working under him regularly engaged in the physical abuse and torture of prisoners to extract confessions." n158 The immediate reaction by city officials to the two OPS reports filed in 1990 was to have them sealed. n159 They were not released until two years later by order of a federal court in a related case. n160 Upon release of the reports, Police Superintendent Leroy Martin called them "statistically flawed" n161 and declared that "to believe the department has a brutality problem is to smear the sacrifices of officers who have died in the line of duty." n162 Mayor Daley protested that, "These are only allegations ... allegations, rumors, stories, things like that. This is a report by an individual. It is not fully documented." n163 The police union reacted with indignation when Burge was not reinstated: "This we feel is a miscarriage of justice. ... In this entire case, there is not one shred of evidence. It's strictly a political victory and that's what this is, political." n164 In order to demonstrate their opposition to the OPS report and resulting sanctions, the Fraternal Order of Police sought (unsuccessfully) to enter a float in the 1993 Saint Patrick's Day Parade honoring Burge and the other disciplined officers. n165

Of course, the mere failure to acknowledge wrongdoing does not itself indicate a systemic or organizational problem. Police departments, like all organizations, have many incentives to hide wrongdoing after it has occurred in order to protect their reputations and avoid scandal. Still, as the recent events in the American Catholic Church aptly illustrate, n166 a pattern of continued [*482] wrongdoing that is known but unaddressed by those in power leads to the question whether there is culpability at the organizational, as well as the individual, level. Moreover, there is an important sense in which systemic misconduct is more troubling than isolated acts of misconduct: It suggests that the

organization has lost the will and/or the ability to police itself. This failure of self-regulation is especially worrisome when the organization at issue--the police department--is one to which citizens have ceded a huge amount of coercive power that would be illegal if anyone else employed it. It also has significant implications for what kinds of legal remedies are likely to be effective in addressing the misconduct.

This leads, then, to the remedial question: How might available legal sanctions take account of the systemic nature of governmental misconduct, such as the pattern of police brutality in Chicago's Area Two Violent Crimes Unit? I want to suggest three possibilities: (1) using pattern evidence to buttress the victim's story in suppression motions and individual officer suits, (2) using pattern evidence to make out a failure to train claim against the police department itself, or (3) seeking an injunction directing the police department to take specific measures to address the problem. I will discuss each of these in turn.

The first strategy, employed by many of the Area Two victims in suppression motions and civil rights suits, is to use evidence of comparable stories of police brutality by the same or other officers in order to buttress one's own claim. As additional victims with eerily similar accounts of police brutality by Area Two detectives began to be identified, earlier stories--which might have seemed bizarre and unbelievable, especially coming from a criminal suspect who had every incentive to lie--began to look more plausible. Attempts by the Area Two litigants to introduce pattern evidence, however, met with only limited success. n167

For an individual seeking to exclude an allegedly coerced confession or seeking damages against a police officer for injuries incurred during interrogation, the only relevant question is whether the defendant officers brutalized or injured the individual standing before the court. What the officers have done on other occasions to other individuals is only relevant to the extent that it makes the victim's story in the instant case more probable. Litigants who seek to use pattern evidence in these contexts hope to convince the trier of fact that an officer who used excessive force on prior occasions [*483] also did so on the occasion in question. This strategy, however, runs head on into state and federal evidence rules, which preclude the use of bad-act evidence, unless its purpose is other than to show the actor's propensity as a violent or contentious individual. n168 A litigant may use such evidence, for example, to show motive, intent, or identity. n169 The proponent of the prior-acts evidence has the burden of identifying a relevant purpose that does not involve the prohibited inference from character to conduct and, at least under the Federal Rules, the evidence is also subject to exclusion under Rule 403 if it would create a danger of unfair prejudice. n170 The net effect is that trial courts have broad discretion when determining the admissibility of prior-acts evidence, n171 and courts of appeals will not substitute their own judgment absent a clear showing of abuse. n172

Attempts by a number of Area Two victims to introduce prior acts evidence foundered on these limitations. The victims sought to admit evidence of other instances in which the same officer allegedly brutalized other suspects, either by calling live witnesses or by introducing files from the police department's Office of Professional Responsibility. n173 The plaintiffs apparently argued that they were not offering the prior-acts evidence to show propensity but to show identity or mode of operation, as the evidence rules allow. n174 The classic use of this argument is when the actor's prior acts demonstrate a unique method of operation--for example, the bank robber who always robs banks while wearing a Bozo the Clown mask--that is also present in the circumstances of the case at bar. The Area Two victims hoped to convince the jury that the detectives in Area Two had a distinctive modus operandi, including electrocuting suspects with a black box and suffocating them with a typewriter cover, and that the detectives used the same methods on them. In general, however, courts have construed this exception quite narrowly, requiring "a high degree of distinctive similarity in order to show that the charged offense bears the 'trademark' or 'signature' of the accused." n175 Only if the actor is "shown to have committed prior [acts] in a [*484] distinctive way ... and the [offense at issue] is similar in these distinctive ways" can it be argued that the prior acts identify him as he culprit. n176

The trial courts in the Area Two cases followed that trend. Although three decisions were reversed on appeal, the trial judges in the Area Two cases were very strict in requiring that the other instances of police misconduct that defendants sought to introduce were similar in very specific details to the defendant's alleged conduct in the instant case, and also that the various incidents were not too remote in time. n177 At least one defendant, Madison Hobley,

couldn't even obtain access to the relevant police department brutality files on the Area Two detectives that he alleged beat, hit, and kicked him and put a plastic typewriter cover over his head. n178 The trial courts also denied attempts by Hobley and a number of other defendants to introduce evidence of other instances of torture that eventually came to light, and the appeals court upheld their decisions. n179

In several more recent cases, the courts of appeals reversed the trial court's initial refusal to admit prior-acts evidence. For example, Darryl Cannon alleged in his suppression motion that Area Two officers "terrorized" him by putting a gun in his mouth and pulling the trigger, lifting him up by the handcuffs while his hands were cuffed behind his back, and applying electric shock to his exposed genitalia and mouth with a cattle prod. n180 Cannon sought to introduce the testimony of sixteen other arrestees who claimed that [*485] the same Area Two officers similarly tortured them. n181 The witness testimony included beating and kicking, suffocation with a plastic bag, electric shock to the testicles, and Russian roulette with a gun in the mouth. n182 The trial judge disallowed the testimony as improperly offered to demonstrate propensity to commit bad acts. n183 The court of appeals reversed and remanded for a determination of whether the evidence could be admitted for a legitimate purpose such as to prove motive, plan, identity, or course of conduct or to impeach the credibility of the Area Two officers. n184 In noting that it found "no qualitative distinction between shocking one suspect's genitals with a cattle prod and beating another with a flashlight," n185 the appeals court took a decidedly more liberal view of the standard for modus operandi than what appears to be the majority view. n186

The above discussion suggests a number of conclusions. First, evidence that the same officer who allegedly brutalized the victim has a history of similar violent incidents would, if admitted, be very powerful evidence for the victim's case, especially in light of the hurdles that criminals or suspected criminals face in litigating their cases against police officers. And the more bizarre (and therefore unbelievable) the alleged abusive conduct in the case at bar--especially where it leaves no "marks" on the victim--the more necessary and the more powerful the modus operandi argument becomes. n187 Second, however, this insight also suggests that victims' opportunities to introduce prior-acts evidence in suppression motions and individual officer suits will be very limited. Recall that, in order to qualify as identity or modus operandi evidence under Rule 404(b), the prior-acts evidence must be extremely similar to the incident being alleged in the case at bar. One would have expected that the repeated, bizarre instances of police coercion that occurred in the Area Two cases are precisely the kind of circumstances that would support a 404(b) exception. n188 Yet, the Area Two victims faced significant difficulty in the trial courts in their attempts to introduce pattern evidence. [*486] Moreover, if the Area Two cases are any indication, most victims of police brutality would be even less successful in their efforts to introduce pattern evidence. Most instances of excessive force take the form of generic beating, kicking, threats, intimidation, or shooting--actions that are unlikely to be distinctive enough to qualify as a modus operandi under Rule 404(b). It follows that pattern evidence will rarely, if ever, be admissible in suppression motions and individual officer suits alleging police brutality. As a matter of evidence law, this may be the correct result. n189 My point is that the exclusion of pattern evidence means that suppression motions and individual officer suits will not be good tools for taking account of the systemic aspects of police brutality.

At this point, the reader who is familiar with 1983 litigation will want to point out that litigants who employ the second strategy listed above--bringing failure to train claims against police departments--will undoubtedly be able to introduce pattern evidence. If so, then what difference does it make if such evidence cannot be introduced in damages suits or suppression motions against individual officers?

There are at least two responses. First, there is no exclusion remedy for unconstitutional conduct that is attributable to the governmental entity. While many situations involving excessive force in the Fourth Amendment context would not give rise to exclusion, in any event, because no evidence is at stake, Fifth Amendment coercive interrogation cases clearly would. The exclusionary remedy is widely regarded as vastly more effective in regulating police misconduct than is the damages remedy. n190 In the remedial sense, then, entity liability, assuming it is successful, is not a perfect substitute for an action against an individual officer. n191

Second, with or without the admissibility of pattern evidence, failure to train claims are notoriously difficult to

litigate and even more difficult to win. Recall that a municipality is only liable for an unconstitutional act that constitutes an "official policy" of the entity. n192 Of course, no police agency would have a formal policy of permitting or encouraging police brutality. To the contrary, virtually all departments have policies that forbid excessive force, directing officers to use only the level of force that is reasonable under the circumstances. n193 As the Supreme Court has recognized, however, official policy can be created by what people actually and repeatedly do, as well as by what they say. In *City of Canton v. Harris*, n194 which first recognized liability for failure to train, the Court held that, while a municipality cannot [*487] be liable just because "one of its employees happened to apply [a city] policy in an unconstitutional manner," n195 the entity can be liable, under limited circumstances, if the employee's misconduct is traceable to inadequate training by the municipality. n196 In order to make out such a claim, however, the plaintiff must show that the training was so inadequate that it constituted "deliberate indifference" on the part of the entity to the possibility that the lack of training could result in unconstitutional conduct by its employees. n197 As the Court further explained:

It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. n198

In practical terms, there are essentially two contexts that might give rise to a successful failure to train claim. One situation is where there is a clear constitutional duty to act in a certain way and where, despite the fact that the employee will face recurrent situations in which that duty is implicated, the employee has received little or no training on what the Constitution requires. n199 The consummate example of such a situation is the street level cop who is issued a firearm for use on the beat but given no instruction concerning constitutional limitations on the use of deadly force. n200 While it is clear that handing someone a firearm and putting her on the street without training would make out a clear case of municipal liability--even if only one unjustified shooting has occurred--it is equally clear that such situations never arise. Most failure to train cases involve situations where the precise shape of the constitutional obligation to train is less clear and where employees continue to act unlawfully, in derogation of whatever training they have received. In these cases, the only way to make out a claim is to show a pattern of similar incidents of employee misconduct that are so notorious that the municipality's failure to intervene is deemed to constitute "deliberate indifference" on the part of city policymakers. n201

Given the standard described above, the situation in Area Two seems tailor-made for a successful failure to train claim. The constitutional duty is [*488] clear. While some amount of force by police officers is justified under appropriate circumstances, it is impossible to imagine a situation in which electrocution with a black box, suffocation with a typewriter cover, or subjecting an arrestee to Russian roulette would be justified. n202 Moreover, there also appears to have been substantial evidence to support a finding that the city displayed "deliberate indifference" to a continued pattern of unconstitutional conduct. By the time Wilson filed suit against the City of Chicago, numerous, very similar incidents of abuse involving particular Area Two detectives had come to light, and there is good reason to think that city officials knew about them. n203 Recall that in the early 1970s, numerous citizens had filed complaints with various city agencies and offices alleging similar, bizarre complaints of brutalization by Area Two officers. n204 By the early 1980s, the state courts had also litigated a series of suppression motions alleging similar conduct by the same officers. n205 An investigation by the People's Law Office, which represented Wilson in his civil rights suit, identified a total of over sixty individuals who claimed that Area Two officers had abused them in remarkably similar ways during police interrogations between 1972 and 1991. n206 The Chicago Police Department's Office of Professional Standards

identified some fifty victims whom Area Two detectives had subjected to "systematic" abuse during the relevant time period. n207 Moreover, the OPS report concluded that "particular command members were aware of the systematic abuse and perpetuated it either by actively participating in [the abuse] or failing to take any action to bring it to an end." n208 In short, by the time of Wilson's lawsuit there appears to have been ample evidence that policymakers in the Chicago police department knew, or were willfully ignorant, of repeated instances of torture by Area Two detectives. If so, their failure to address the problem would surely constitute "deliberate indifference."

Nonetheless, not one of the plaintiffs who filed civil rights suits in the Area Two torture cases prevailed in their claims against the municipality. In Wilson, the jury found that the City of Chicago had a "de facto policy authorizing its police officers physically to abuse persons suspected of having killed or injured a police officer," but the jury found no liability because the policy "had not been a direct and proximate cause of the physical abuse visited on Wilson." n209 While it is not clear what the jury meant by its verdict, what is more instructive for our purposes is the court of appeals' discussion of Wilson's failure-to-train claim. The government argued on appeal that it was entitled to judgment as a matter of law on the grounds that no rational jury could have found that "the city had a policy of allowing police officers to [*489] torture persons suspected of killing or wounding officers," and the court agreed. n210 In arriving at that conclusion, the court found that Brzeczek, the Superintendent of Police, n211 had received "many complaints" from the black community that the police were abusing suspects in Area Two. n212 Although Brzeczek had referred the complaints to the appropriate investigative office, police investigators apparently took no action, and Brzeczek did not follow-up on their inaction. n213 According to the court, Brzeczek's desire to avoid doing anything that would interfere with Wilson's prosecution, in part, motivated his inaction. n214 The court's assessment of the evidence is striking:

A rational jury could have inferred from the frequency of the abuse, the number of officers involved in the torture of Wilson, and the number of complaints from the black community, that Brzeczek knew that officers in Area 2 were prone to beat up suspected cop killers. n215

Nonetheless, the court concluded that the fact that Brzeczek's efforts were "ineffective" was not enough to show that he had "approved" the officers' conduct: "Failing to eliminate a practice cannot be equated to approving it." n216 As the court went on to write:

Deliberate or reckless indifference to complaints must be proved in order to establish that an abusive practice has actually been condoned and therefore can be said to have been adopted by those responsible for making municipal policy. If Brzeczek had thrown the complaints into his wastepaper basket or had told the office of investigations to pay no attention to them, an inference would arise that he wanted the practice of physically abusing cop killers to continue. There is no evidence in this case from which the requisite inference could be drawn by a rational jury. n217

It goes without saying that this is an astonishingly high standard of fault. If a policymaker who has actual knowledge of a significant pattern of serious misconduct is off the hook by taking--what he knows are--ineffective steps to address the problem, then systemic misconduct is safe from sanctions under current civil rights law.

Moreover, as Part III will more fully explore, this whole way of framing the issue ignores important realities about the mechanisms of systemic harm-causing behavior. To preview the argument briefly, municipal liability under [*490] 1983 is premised on the idea that entities should only be liable for misconduct that results from the official policies enacted or declared by the official policymakers Yet, systemic harms occur precisely because organizations often send

two layers of messages to their employees: an official message--contained in written policies and official declarations--and an unofficial message--contained in street level practices, informal organizational norms, and bottom line expectations about results. One common feature of systemic wrongdoing is that it tends to occur because the norms and practices of informal culture tolerate or even demand the very conduct that official policy declarations prohibit. Maintaining the dichotomy between official and unofficial policy may even be deliberate, as in the case where policymakers send the message that they desire certain results but are not interested in knowing the details of how these results were obtained. n218 Whether deliberate or not, this structure may allow policymakers to accomplish important organizational goals while escaping blame for any wrongdoing that their subordinates perpetrate in pursuit of these goals. n219

The Area Two situation may have embodied precisely this kind of two-tiered message. Area Two higher-ups had much to gain if their detectives could extract confessions from notorious cop-killers and murderers, by whatever means. Indeed, even the name "Area Two Violent Crimes Unit" suggests that this was an elite group of police specialists dedicated to solving the worst crimes and putting their perpetrators away. n220 While there is no evidence that the detectives' superiors formally instructed them to electrocute, suffocate, burn and beat their suspects, it is striking how long it took these superiors even to entertain the possibility that the allegations of torture could be true, let alone to discipline the officers who were involved. The fact that no one took action despite a multiplicity of credible allegations, the fact that higher-ups continued to publicly deny the misconduct and defend the alleged perpetrators, and the fact that the department commended and promoted, rather than sanctioned, the suspected brutalizers suggests a de facto policy of ignoring police brutality in service of the greater goal of prosecuting and convicting murderers. Chicago's department had, in effect, an official policy of having unofficial policies promoting torture, which permitted it to avoid liability under 1983. n221

D. The Unavailability of Injunctive Relief

Injunctive relief might, in theory, address patterns or systemic harms like those in Chicago's Area Two. That is, after all, how the law of civil rights responded to systemic harms in other institutions such as schools and prisons. These so-called "structural injunctions" were designed to virtually restructure entire institutions that the courts viewed as systemically violating the law. n222 [*491] But the Supreme Court largely shut the door on this option in *Los Angeles v. Lyons*. n223

In *Lyons*, the plaintiff brought a 1983 suit to recover for injuries he sustained when police used a chokehold on him during a traffic stop and to enjoin the LAPD from using chokeholds against arrestees in the future. n224 The use of chokeholds had resulted not only in multiple instances of serious injury, but also in a significant number of deaths, which continued to increase during the pendency of the lawsuit. n225 Despite this known history of injury and death, the LAPD authorized the use of chokeholds, and street level cops widely and customarily used them, especially against African-American suspects. n226 The Supreme Court allowed *Lyons's* suit for damages but disallowed *Lyons's* suit for injunctive relief on the grounds that there was no standing, i.e., no case or controversy to be adjudicated by the court. In order to make out a case or controversy, according to the Court, *Lyons* had to show that he was likely to suffer future injury from the use of chokeholds by police officers. n227 As the Court went on to explain:

That *Lyons* may have been illegally choked by the police on October 6, 1976 ... does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. ... In order to establish an actual controversy in this case, *Lyons* would have had not only to allege that he would have another encounter with police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) [*492] that the City ordered or authorized police officers to act in that manner. n228

What should be clear from the Court's description is that, for all practical purposes, no plaintiff in Los Angeles would ever have standing to enjoin the police department's use of chokeholds. This is because all the circumstances that would give rise to a risk of future injury from the use of a chokehold are under the potential plaintiff's own control. The Court took the view that Lyons could avoid being choked in the future by simply refraining from behavior that could lead to a stop or arrest, or, if such a stop or arrest occurred, by cooperating with the arresting officers. Thus, the Court concluded that there was no inevitable risk that Lyons--or by implication any other imaginable plaintiff--would be subjected to future injury. n229

Moreover, the broader implications of the Court's holding in Lyons are even more far reaching: the Court's remedial standing requirement means that, for all practical purposes, structural injunctions will be unavailable in the law enforcement context. While the Supreme Court has permitted broad structural relief in a few contexts--such as schools and prisons--these situations involve ongoing unconstitutional conditions. By contrast, virtually all police misconduct that could give rise to a 1983 suit for injunctive relief would be episodic (like the application of chokeholds), rather than ongoing (like segregated schools or overcrowded prisons). n230 Unlike the school or prison plaintiff, a litigant who suffers a single incident of police misconduct, whether it is an illegal search, excessive force during an arrest, or a coercive interrogation, will never be able to satisfy the Court's remedial standing requirements. n231 By the time the plaintiff brings suit, the injury-causing actions will have ceased and the plaintiff will be unable to show that she will face a risk of injury in the future.

Eliminating the use of structural injunctions removes a very powerful remedial tool for addressing systemic misconduct in the law enforcement context. Recall again the situation at issue in Lyons. Denial of Mr. Lyons's prayer for injunctive relief meant that the mostly African-American plaintiffs who police had injured by chokeholds (or in many cases their decedents) had to litigate their cases against the police department one-by-one and wait for the cumulative effect of damages liability to have its affect on the department's practice. Meanwhile, during the time period in which these cases were being litigated, the chokehold policy remained in place and arrestees continued to be injured or killed by chokeholds.

[*493] Although litigating cases one at a time might be perfectly adequate in circumstances not involving multiple incidents, situations involving ongoing or repeated harms cry out for a systemic remedy. One of the hallmarks of injunctive relief is that it seeks to prevent harm instead of simply compensating for harm that has already occurred. n232 Moreover, structural injunctions have the additional goal of changing the way the government does business by "reforming institutional structures so as to reduce the future threat to constitutional rights." n233 The injunction that the plaintiff sought in Lyons would have required the police department to formulate an adequate training plan for the use of chokeholds, and to provide the court with records of their use in order to remove a court-imposed ban. n234 This would have reduced the risk that chokeholds would be used in ways that violated constitutional limitations on the use of force. It is clear that structural injunctions are especially well adapted to dealing with systemic harms of the sort at issue in Chicago's Area Two.

II. Police Brutality as an Organizational Problem

As the discussion in Part I suggests, it is essential that the police organization be taken seriously, both in fixing blame and in formulating solutions to police misconduct. There are at least three reasons why this is so. n235 First, it is factually inaccurate to focus on individual deeds, and ignore the organization, in analyzing the causes of police conduct. Law enforcement organizations have cultures--commonly held norms, social practices, expectations, and assumptions--that encourage or discourage certain values, goals, and behaviors. Police agencies are culpable if they tolerate cultures that promote conduct that is morally or legally objectionable. n236

Second, it is unfair to lay the moral responsibility for police misconduct solely at the feet of individual officers. The organizational literature provides a theoretical framework for what police scholars have long known: law enforcement

officers cannot be viewed as individual decision makers who function in isolation. They are embedded in an organization that makes them more likely to frame their judgments in terms of role-based obligations and expectations than according to a simple cost-benefit analysis of their potential actions. This explains why legal sanctions that assume an individual rational actor model are less than successful in curbing police misbehavior.

Finally, the impulse to isolate misbehaving officers as "rogue cops" is, essentially, a search for scapegoats. While punishing individual miscreants may satisfy society's thirst for someone to blame, it also causes us to miss important systemic and organizational causes that lie behind individual acts of brutality. This is not to say that individual officers bear no causal or moral responsibility for their own harm-causing deeds. Indeed, the fact that individuals [*494] function within an organizational framework poses special risks of unintended and inadvertent harms, and imposes corresponding obligations to guard against such harms. n237 Focusing only on isolated actors, however, may divert attention away from needed institutional reform. n238

I will take each of these points in turn.

A. Organizational Culture in Policing

First, the factual reality. Perhaps the most obvious indication that police brutality has an organizational component is precisely the evidence that police spokesmen use to exonerate police departments when cops misbehave: the oft-noted phenomenon that police officers who brutalize citizens have often done so multiple times before. In many troubled police departments, it is a relatively small minority of police officers who account for a disproportionate number of citizen complaints and reported incidents of excessive force. Although one possible explanation is that these repeat-brutalizers have personality traits that predispose them to violence, n239 this explanation fails to explain why their departments permitted these problem officers to repeat their violent conduct. Moreover, the identification of violent tendencies does not distinguish whether the negative personality traits were present when the police department hired the officer or resulted from the officer's training and experience on the force or, most likely, some combination of the two. One of the most obvious places to look for a richer explanation of police brutality is in the culture of the policing organization, which includes the formal and informal norms and expectations that create the environment in which the brutal acts were allowed to continue.

At the outset, it is useful to distinguish two ways in which the term "organizational culture" is used in the policing context. On the one hand, police organizations have a unique occupational culture, which is created by the kind of work that law enforcement officers do and is held in common with other officers no matter what police department they are in. n240 This notion of police culture, which will be described in more detail in Part II.B, includes the features of the so-called "working personality" of the street level cop. n241 Occupational culture, as a set of features that characterize all police agencies, can be distinguished from what organizational science scholars call organizational culture, by which they mean the formal and informal values, norms, and ideas that characterize and define a particular institution, for example, a particular police agency such as the LAPD. n242

[*495] The role of organizational culture, in both senses of the term, was one of the major themes reported by the Christopher Commission, which was created in order to investigate the LAPD in the wake of the 1991 Rodney King beating. n243 The Commission's organizational critique focused on two issues: the LAPD's overall style of policing, and the failure of LAPD management to control a relatively small number of officers engaged in repeated incidents of brutality. n244

The Commission described the LAPD's style of policing as "unnecessarily aggressive," n245 emphasizing crime control over crime prevention, rewarding "hard-nosed" tactics, and evaluating officers on largely statistical measures, such as the number of calls handled and number of arrests made. n246 The LAPD's operational strategy was also extremely proactive. n247 Officers were instructed to maintain a "command presence," which required aggressive identification and investigation of potential suspects and generated a high level of confrontations on the street. n248 The combination of aggressive training, coupled with a heavy emphasis on high citation and arrest statistics as a measure of

success, meant that officers were habituated into commanding and confronting, rather than communicating. n249 The Commission explained that this style of policing "works" if success is measured in statistics such as number of violent crime arrests per sworn officer. n250 Indeed, by this measure, the LAPD consistently outperforms other major city police departments. n251 But, in the process, the Commission concluded, it resulted in overly contentious and violent police-citizen confrontations, and created the risk of a "siege ('we/they') mentality" between officers and their communities. n252

The second organizational feature that the Commission identified grew out of the finding that a relative minority of police officers were responsible for a disproportionate number of citizen complaints of excessive force or improper tactics, use of force reports, and reports of officer involved shootings. "Of approximately 1,800 officers against whom an allegation of excessive force or improper tactics was made from 1986 through 1990, over 1,400 had only one or two allegations. But 183 had four or more allegations, 44 had six or more, 16 had eight or more, and one had 16 allegations." n253 Strikingly, the [*496] 44 officers that the Commission identified as "problem officers" had three to six times as many allegations of excessive-force citizen complaints of other types and uses of force as their counterparts. n254 When the search was extended beyond the LAPD computer data to include LAPD personnel files and complaint investigations, the Commission discovered that these officers had similar patterns in earlier years. n255 Moreover, despite a readily identifiable group of repeat offenders who generated inordinate numbers of complaints and disregarded formal policies and guidelines, these offenders apparently escaped discipline and continued to be promoted. n256 The performance evaluations for these problem officers, which serve as the basis for promotion and assignment decisions, were uniformly positive about the officers' progress and prospects on the police force. n257 Correspondingly, the evaluations were grossly inaccurate about the disciplinary history of the officers. n258 Although supervisors had access to personnel complaint information about these officers, n259 their individual performance evaluations rarely contained records of complaints, whether or not sustained. n260 Moreover, [*497] evaluation files that did catalogue complaints generally did not go the next steps of analyzing the substance and significance of sustained complaints and identifying patterns of multiple complaints. n261

Relatedly, the LAPD apparently had no overall system or plan for keeping track of more generalized data involving officer uses of force, excessive or otherwise. Although officers were required to file use of force reports whenever they used force "greater than 'firm grip' compliance" n262 and whenever they discharged a firearm (even if accidental and even if no injuries resulted), n263 there was no procedure for auditing these reports. For example, the LAPD made no effort to identify patterns associated with particular officers or situations that could then become the basis for training or discipline or both. n264 There was also no mechanism for monitoring force-related civil damages suits and settlements for purposes of officer discipline or training, n265 even though the LAPD investigated approximately eighty percent of these incidents, and "a majority of these cases appeared to involve clear and often egregious misconduct resulting in serious injury or death to victims." n266 Finally, there was no plan in place for systematic review of officers with multiple complaint histories involving excessive force. n267 Apparently, many command officers and supervisors were not even aware of the computer database containing information about personnel complaints, use of force reports, and shooting data. n268 In sum, there was a serious disconnect between the positive assessments contained in officers' personnel files, which often led to continued promotions, and more generalized use-of-force data that painted a radically different picture of the officers' performance.

Another indication of the systemic or organizational nature of the problem was evidence of a work environment that tolerated and even encouraged crude, violent, and racist language n269 and attitudes by street-level cops and their immediate supervisors. This evidence came from the Commission's review [*498] of MDT transmissions, n270 generated in the context of pursuing and subduing suspects. n271 Unlike police radio communications, MDT transmissions are not accessible to the public. They are, however, subject to contemporaneous monitoring by supervisors and subsequent auditing by the LAPD Communications Division. n272 The Commission posited a connection--supported by surveys of the officers themselves n273--between the language and attitudes the police revealed in the MDT transmissions and evidence of discriminatory treatment and officer misconduct directed toward members of racial and ethnic minorities and gays. Importantly, although the racist and sexist aspects of the MDT

transmissions probably violated formal departmental policies against discrimination, officers typing the MDT messages apparently had no concern that the LAPD would discipline them. Although supervisors had access to the MDT transmissions, there was no evidence of monitoring or sanctioning by supervisors and, indeed, supervisors were often themselves the source of offensive comments when in the field. n274

Note the difference between this argument and the mostly failed attempts to use personality traits to predict police violence. n275 The Commission's argument is not so much that the officers' bad conduct is traceable to their violent and bigoted attitudes, but that their language and conduct, as revealed in the MDT transmissions, evidenced an organizational culture that--even if by default--led officers to view violence and bigotry as acceptable behavior. Habitual, offensive speech that continued without correction by supervisors and peers, and stories of questionable conduct that circulated without challenge, both reflected and determined the norms and practices that came to define the LAPD as an institution.

In sum, the Commission's investigation revealed an organizational culture characterized by: formal and informal norms that favored a confrontational, hard-nosed style of policing; an evaluation and promotion system that [*499] had the functional effect of rewarding illegal uses of force through nonenforcement of stated management policies; and a work environment that tolerated (even encouraged) violent and discriminatory language and attitudes that may have contributed to violent and discriminatory conduct. All of this leads to a picture of a police department in which, regardless of formal policies, the informal message that the department conveyed was that confrontational, aggressive policing would be rewarded, even if it resulted in repeated incidents of violence that gave rise to citizen complaints and lawsuits.

It bears note that, despite the serious charges that the Christopher Commission lodged against the LAPD, there was apparently so little change that the United States Department of Justice filed a lawsuit against the department in order to mandate the needed changes. n276 In that lawsuit, filed pursuant to *42 U.S.C. 14141*, n277 the DOJ alleged that the LAPD engaged in a "pattern or practice of unconstitutional or otherwise unlawful conduct that has been made possible by the failure of the [LAPD] to adopt and implement proper management practices and procedures." n278 Significantly, a major feature of the consent decree signed by the parties on June 15, 2002, was a requirement that the LAPD create a comprehensive computer information system that would contain all "relevant information about its officers, supervisors, and managers to promote professionalism and best policing practices and to identify and modify at-risk behavior (also known as an early warning system)." n279

Investigations of other police departments with histories of police brutality have come to conclusions similar to that of the Christopher Commission: police brutality in many troubled departments is a system-wide problem. Consider the report of the Kolts Commission, which was created in 1991 to investigate the Los Angeles Sheriff's Department ("LASD") in the wake of four controversial officer-involved shootings in the span of one month. n280 The Commission concluded that, whatever its official organizational culture and policies, the LASD had adopted a de facto policy of rewarding aggressive policing by ignoring repeated incidents of excessive force and promoting the very officers responsible for those incidents. The Commission identified a total of sixty-two deputies who had been the subjects of between five and twenty-seven formal judicial or administrative investigations for shootings or excessive use of force in the previous five years. n281 Despite their troubled [*500] histories, and despite the fact that evaluating supervisors had access to all investigative files, as well as to a log of all positive or negative remarks made by citizens or station supervisors, the evaluations in personnel files of the troubled deputies were "extremely laudatory." n282 Moreover, almost none of the evaluations mentioned investigations for excessive force, none of the files noted the numerous lawsuits against these deputies that had resulted in damages or substantial settlements for excessive force, n283 and almost none included reports of "pending investigations of citizen complaints or fatal shootings." n284 Perhaps not surprisingly, these histories of force-related investigations did not stand in the way of promotion to Field Training Officer (in charge of training new recruits) or assignment to the "highly coveted" Gang Enforcement Team, where the deputies were subject to little or no supervision. n285 More broadly, the LASD had self-consciously adopted a policy of not tracking trends and patterns concerning officers' use of force--apparently due to fears that the information would lead to civil litigation--despite keeping careful statistics on almost everything else of interest. n286 This practice

obviously disabled LASD supervisors from identifying, disciplining, and/or training officers who had developed a pattern of acts of brutality and it "[gave] rise to an inference that the LASD puts a low priority on identifying and rooting out those who resort to excessive force." n287 The Kolts Commission concluded that the continued retention and promotion of deputies with a history of violent encounters with the public and the failure of police leadership to make efforts to track and eradicate violent conduct indicated a "serious ... system-wide failure[]" in the LASD. n288 Whatever the explicit policy [*501] of LASD leadership, the policy that will be followed by supervisors and by the rank and file is the one that they intuit by "trying to read the bosses to figure out what they can and cannot do." n289

The Mollen Commission came to similar conclusions in its investigation of the NYPD. Although the Commission's investigation focused initially on corruption, it concluded that corruption and brutality tend to go hand in hand and that the problem "extends far beyond the corrupt cop." n290

It is a multi-faceted problem that has flourished ... because of a police culture that exalts loyalty over integrity; because of the silence of honest officers who fear the consequences of "ratting" on another cop no matter how grave the crime; because of willfully blind supervisors who fear the consequences of a corruption scandal more than corruption itself; because of the demise of the principle of accountability that makes all commanders responsible for fighting corruption in their commands; because of a hostility and alienation between the police and community ... which breeds an "Us versus Them" mentality; and because for years the New York City Police Department abandoned its responsibility to insure the integrity of its members. n291

The Commission found it significant that even when NYPD officers committed extreme forms of police brutality in an open and notorious manner, they did so with no apparent attempt to hide their actions from the eyes of their peers and supervisors. n292 Moreover, while most police officers were "genuinely sickened" by the worst forms of brutality, many were willing to tolerate a significant level of violence. n293 "An excessive use of fists to face, nightsticks to ribs, and knees to groin [were] seen as the realities of policing." n294 This tolerance of brutality was not limited to street-level cops but extended to supervisors who also tended to "turn a blind eye to evidence of unnecessary violence around them." n295 The Commission reported that, in the years immediately preceding its public hearings, the department suspended or dismissed very few officers in connection with police brutality, and it generally failed to sanction supervisors and commanding officers for brutality by [*502] officers under their supervision. n296 These practices and attitudes, the Commission concluded, "fuel a police culture that ... fosters and protects" corruption and brutality. n297

The systemic aspects of the events surrounding the Chicago Area Two torture cases were extensively chronicled in Part I, and need little elaboration here. Recall that an internal police investigation identified the "systemic" and "methodical" nature of the physical and psychological abuse perpetrated by the Area Two Violent Crimes Unit. The report concluded that:

The number of incidents in which an Area 2 command member is identified as an accused can lead to only one conclusion. Particular command members were aware of the systematic abuse and perpetuated it either by actively participating in the same or failing to take any action to bring it to an end. This conclusion is also supported by the number of incidents in which the Area 2 offices are named as the location of the abuse. n298

Conclusions to the effect that police brutality has an organizational component are not limited to police forces in the

very largest U.S. cities. For example, the St. Clair Commission, created in 1992 to investigate police brutality in Boston, also noted the repeat brutalizer phenomenon and its negative management implications. n299 The St. Clair Commission concluded that:

The failure to monitor and evaluate the performance of police officers--particularly those with established patterns of alleged misconduct--is a major deficiency in the management of the department No police department and no community should tolerate a situation where officers with long records of alleged misconduct, including some with histories of alleged physical abuse of citizens, remain on the street largely unidentified and unsupervised. n300

[*503]

A more recent account linking police brutality with features of the police organization is a just-released report on the troubled Prince George's County Police Department ("PGCPD") by the newly created Office of Police Reform ("OPR"). n301 The events investigated by the OPR were brought to public attention by a series of articles published in the Washington Post. The reporters described a now familiar pattern. The OPR report notes that, during the 1980s, the PGCPD began to experience an increase in the number of allegations of excessive force (including shootings) by police officers. n302 Between 1990 and 2001, the PGCPD shot 122 people, killing 47 of them. n303 The facts surrounding many of these shootings were eerily similar--an officer shot an unarmed suspect, claimed that he believed the suspect had a weapon, and the PGCPD later exonerated him. From 1990 to 2001, the PGCPD found all officer shootings in Prince George's County justified. n304

Complaints of excessive force by the PGCPD canine unit echo the circumstances of the unarmed shootings. A series of complaints and lawsuits filed against the PGCPD--eighteen between 1993 and 1998--led the FBI to open an investigation into the PGCPD canine unit in April of 1999. n305 In over half of these lawsuits, the victims claimed that the dogs attacked them even though they were not resisting arrest, were on the ground, or were handcuffed. n306 Between 1990 and April of 1999, however, no complaint against the PGCPD canine unit was sustained. n307 Moreover, the PGCPD promoted many of the same officers who had been involved in multiple incidents of shootings or uses of excessive force despite their records of questionable police-citizen interactions. n308

The OPR viewed these deficiencies as resulting from a lack of accountability of superior officers for the unlawful or unauthorized actions of their subordinates. n309 "There can be no accountability," the report concluded, "when officers ignore rules and regulations with impunity." n310 Joseph M. Niland, Prince George's County Public Defender, summed it up this way: "If [*504] someone can't see a pattern in these cases, they don't have eyeballs. ... The pattern has existed for a long time--years--where police fire at people and then as an afterthought they realize they have to justify it." n311

A systematic study by Human Rights Watch of fourteen different police departments throughout the United States similarly concluded that the problems it identified in these departments had a significant organizational component. n312 The purpose of the study was to examine police departments in large cities (representing most regions of the country) in order to identify "common obstacles to accountability" n313 for police misconduct. n314 The report came to the now familiar conclusion that "those who claim that each high-profile case of abuse by a 'rogue' officer is an aberration are missing the point: problem officers frequently persist because the accountability systems are so seriously flawed." n315 In addition to more specific improvements such as better tracking of incidents of brutality, more vigorous and consistent investigation by police internal affairs units, and external review the report emphasized the importance of police leadership in "setting a tone" that makes police brutality unacceptable: n316

Police brutality will subside only once superior officers judge their subordinates--and are judged themselves--on their

efforts to provide sufficient and consistent oversight, appropriate administrative discipline and, when necessary, punishment of the perpetrators of the abuse. There is no substitute for police leadership to make clear to new as well as veteran officers that [police brutality is] not acceptable. The highest-ranking commanders must also hold to account superior officers who are found to have ignored or tolerated abuse committed by officers under their command. n317

The report concluded that such leadership was lacking in virtually all of the departments studied by Human Rights Watch. n318 As evidence of what the report called the lack of a "collective official will" to control officers who engaged in police brutality, the report identified the "lack of linkage among various entities responsible for overseeing the police and for criminally prosecuting officers who break the law." n319 The report noted, for example, that, in many departments, civil rights suits did not necessarily trigger an internal [*505] review, even when those suits gave rise to large damages awards. n320 Similarly, evidence of the lawsuit or damages award often did not appear in the offending officer's personnel file. n321 Finally, there was often no method for tracking civil rights suits or for identifying and keeping track of problem officers. n322

There are a number of objections one could raise to the conclusion that police brutality has an organizational component. First, one could argue that a pattern of repeated incidents of police brutality by a small number of police officers does not necessarily suggest that the problem is systemic. Indeed, it could suggest the opposite: if the vast majority of police officers manage to avoid excessive uses of force and only a relatively small number of officers misbehave, then the small minority look like "rogue cops" whose behavior the department may not condone and whose misconduct is explainable by non-organizational factors such as personal deficiencies. A second possible objection is that the pattern of unsanctioned repeat offenders could suggest sloppy or incompetent management, rather than the more serious allegation that the organizational culture actually condones and encourages police brutality.

There are a number of responses to the first objection. First, one need not choose between the systemic or organizational and the individual or psychological explanations for police brutality in departments that display a pattern of repeat offenders. Both are necessary to a satisfactory explanation of police brutality. There is reason to think, however, that the organizational factors may actually be the more important contributor to conduct. As noted earlier, failed efforts to use personality traits, or topologies of traits, to predict violent conduct reveal that violent attitudes do not necessarily or reliably translate into violent actions. n323 Studies by police scholars and sociologists indicate that individual personality traits provide (at best) only a very partial explanation for police conduct in general, n324 and that personality traits "contribute very little" to an explanation of the use of reasonable or improper force by police officers. n325 The most sensible conclusion, according to one prominent police scholar, is that whatever effect officers' personalities and beliefs have on their propensity toward violence, these factors are mediated by the characteristics of the relevant police organization. n326 Thus, so-called rogue cops cannot be explained away by identifying their alleged violent propensities and ignoring organizational pathologies. In one important [*506] sense, this is good news because organizational factors may be more amenable to change than psychological factors. n327

Second, a law enforcement organization that tolerates repeated, notorious instances of the worst kinds of brutality--even by a minority of police officers--effectively signals to its employees that a certain level of violence is acceptable despite formal policies to the contrary. The culture of an organization is made up of "shared meaning" or "shared understanding," which results in "a process of reality construction that allows [members and participants] to see and understand particular events, actions, objects, utterances, or situations in distinctive ways." n328 These shared understandings are created not only by values and norms that are formally expressed but also by the kinds of conduct that are encouraged, rewarded, or tolerated by the organization. Behaviors that are common and accepted become part of the fabric of informal norms and values that then shape future actions. In a police department that winks at overly aggressive policing, the organizational culture will begin to tolerate, even implicitly encourage, the kinds of excesses that go along with aggressive law enforcement methods. Moreover, empirical research suggests that departments with high levels of excessive or unlawful uses of force also tend to have a high incidence of all uses of force by its officers. n329 This correlation strongly suggests that the so-called rogue cops are only a small part of a broader, more systemic

phenomenon. n330

In response to the second objection, that repeated instances of brutality are evidence of a management rather than an organizational problem, again there is no need to choose between the two. Consider the difference between supervisors whose managerial conduct is negligent versus those whose conduct is reckless, knowing, or willful. Managers of virtually every police department have adopted formal rules and policies describing the contexts in [*507] which officers may employ various levels of force. Formal adoption of these rules, without adoption of structures for monitoring and punishing violators, however, would be ineffective in curbing illegal uses of force. We could call the failure to monitor and discipline subordinates a management failure, rather than an organizational failure. But the more numerous, egregious and notorious the incidents of brutality that remain unaddressed, the more we would deem the managers themselves culpable for failing to take action. n331 Moreover, widespread managerial failure in the face of continued, notorious misconduct begins to look like the organization itself is dysfunctional. Repeated instances of misconduct that go unpunished is evidence that "something is rotten in Denmark." Why? Because repeated failure by higher-ups to address patterns of misconduct is viewed as a signal--by subordinates and the outside world--that such conduct is permissible. n332 It creates a cultural climate that appears--even if by default--to actually condone the deviant behavior.

A final response is that organizational behavior scholars and police scholars strongly corroborate the conclusion that police brutality in many departments is a systemic problem. Both agree that organizational culture changes the way individuals make decisions and that prescriptions for reform will ultimately fail unless police departments take these organizational factors into account. I turn to that literature below.

B. The Power of the Organization in Shaping Conduct

Organizational theory literature makes clear that organizations matter in analyzing and shaping the conduct of individual actors. As V. Lee Hamilton and Joseph Sanders have observed, "the harm that humans do to others increasingly takes place in or originates in organizations." n333 In trying to explain and prevent such harms, "social science and law have tended to treat these actors as behaving according to classical models of rational choice." n334 Hamilton and Sanders argue that this approach is a mistake. Building on the work of Kahneman and Tversky, n335 and Oliver Williamson n336 on the limits of [*508] the rational actor model, Hamilton and Sanders argue that institutional authority "frames the situation for subordinates in such a way that they do not engage in individualistic, rational actor calculus; they do not see the situation as one of choice, but as one of role requirements and obligations." n337 In other words, the power of the organization to shape decision making is not only a function of the interplay between individual and organization. Rather, it results from the organization's power to redefine the actor's frame of reference altogether, i.e., to "mold the perceptions and information processing of its participants." n338

Hamilton and Sanders argue that, in order to control the conduct of such "organizationally embedded" n339 actors, one must understand how their institutional role affects their judgments. Decision making in the organizational context is a function of the hierarchical relationships that define authorities and subordinates. Suppose a subordinate is faced with an order or expectation that she engage in a particular course of conduct that she believes would be wrong. The actor faces a decision whether to ignore her own judgment and obey her superior, or to defy authority and follow her own conscience. Either decision could be wrong and could risk punishment. In order to resolve these kinds of conflicts, individuals choose "frames" through which they view their situations and justify their resolution of the conflict. Individuals who disobey tend to focus on the deed. They frame their actions in terms of the harmful consequences of carrying out the ordered actions and their own physical role in bringing them about. n340 By contrast, a subordinate who obeys is likely to justify her actions in terms of the expectations entailed in her subordinate role, emphasizing obligation over actions. n341

While the deed-based frame is consistent with the rational actor model, the role-based frame involves a more complicated decisional calculus. There are two components of the role-based motivation: fear and obligation. n342 Responses [*509] that arise out of fear of consequences result from a rational actor calculus that weighs the costs and

benefits of disobedience vis a vis the subordinate's role. Actors who are motivated by obligation, however, are not responding only to external sanctions. Their response is a matter of "loyalties" and involves some level of "investment in, or sense of identification with, the role." n343 Understanding the function of role-identification as a motivator is essential to understanding how one might deter an individual from following wrongful orders or expectations. n344

The key insight here is that individuals who are embedded in organizations do not make choices solely as individuals. To the extent that they accept the organizational or role-based frame, they will "no longer [be] acting as isolated rational individuals; [they] are part of a team, agents of authority, absorbed in a larger cause. From the standpoint of the distinction between individual rationality and organizational rationality ... the organization's rationality--its goals and means--dominates." n345

Moreover, research has shown that social-control organizations--such as the military and the police--are especially productive of situations involving role-based motivations because they instill in subordinates the sense that obedience to authority is obligatory. n346 These organizations also have an additional feature that predisposes their subordinate members to role-based thinking. Even the most routine aspects of the job--and even when they are carried out lawfully--are very likely to produce harms. And the immediate actors will tend to explain and justify the harms that they cause in role-based terms. It is easy to see how this analysis applies to the job of policing, where such ordinary policing tasks as subduing and arresting criminal suspects, quelling public disturbances, and conducting street stops can result in broken bones, shootings of unarmed suspects, and cases of mistaken identity. The harmful consequences that can result from routine policing tasks will tend to be justified in role-based terms, i.e., as simply "part of the job." n347

The organizational theory literature provides a theoretical framework for what police scholars have long recognized: police officers are enmeshed in a distinctive organizational culture that powerfully influences their judgment and conduct. Cops are much more likely to frame their decisions in terms of role-based obligations and expectations than according to a simple analysis of the costs and benefits of their actions. Indeed, the most superficial read of the policing literature shows that there is a serious disconnect between existing, individual-specific legal remedies and well-accepted organizational [*510] realities of police work. n348 As Michael K. Brown summarized it in his classic study (described in more detail below):

A patrolman is not free to act solely on the basis of his personal beliefs. ... He is both an autonomous official who responds to the needs of a community as he deems necessary ... and a bureaucrat subject to the coercive inclinations of administrators. Though patrolmen have greater latitude in performing their task than most operatives in public bureaucracies, they are nevertheless enmeshed in a system of hierarchical controls and work-group pressures. n349

One of the earliest explorations of the relationship between organizational culture and police behavior is James Q. Wilson's study of policing in eight U.S. communities. n350 Wilson sought to describe the influences that determine the conduct of street-level police officers and to analyze the difficulties faced by administrators in molding the conduct of their subordinates. n351 Wilson noted that, unlike the situation in many (perhaps most) organizations, the amount of discretion that police officers exercise "increases as one moves down the hierarchy." n352 Street-level cops exercise more discretion, are subject to less supervision, and operate under more ambiguous and less precise rules than other low-level employees. n353 Regulation of police behavior requires [*511] finding ways to influence the exercise of discretion so that it complies with applicable legal and moral constraints.

According to Wilson, "the principal limit on managing the discretionary powers of patrolmen arises not from the particular personal qualities or technical skill of these officers but from the organizational and legal definition of the patrolman's task." n354 In the first part of his analysis, Wilson describes how the experience, attitudes, and work habits of the street level cop give the police organization its "special character." n355 According to Wilson, the other

determinant of police culture--in addition to the aspects of police culture that are common to the job of policing n356--is the choice of organizational style or strategy, which varies among departments. Wilson identified three archetypal police styles characterized by certain behavioral similarities among individual officers, which in turn are associated with certain institutional commitments (e.g., order maintenance over law enforcement or formal approaches versus informal ones) and certain distinctive norms, codes, and policies. n357 More specifically, Wilson hypothesizes that the organizational style can be attributed to the orientation of police leadership, which influences the behavior of street-level cops through the medium of organizational structure. n358 Wilson concluded that any strategy of police reform must take into account the causal influence of these distinctive organizational styles. In particular, Wilson argued that because it is impossible for police administrators and other governmental officials to "prescribe in advance the correct course of action" in all of the various situations their officers might face, they [*512] must control the exercise of discretion by "shaping the over-all style or strategy" of the police organization itself. n359

While Wilson's study focuses on the formal organizational structure and the role of police leadership, other scholars have noted the limitations of formal structure and emphasized the power of informal, work group norms. n360 In his study of street-level police behavior, Michael K. Brown agrees that Wilson has focused on the right problem--the "way in which the dynamics of bureaucracy influence the behavior of patrolmen"--but he faults Wilson's analysis for emphasizing the role of formal administrative controls to the exclusion of more informal influences. As Wilson himself acknowledged, the ability of police higher-ups to influence and control the discretion of their subordinates will depend upon what kinds of decisions the subordinates are making. n361 The more straightforward the decision, such as the choice of whether to issue a traffic ticket to a driver who runs a red light, the more likely that higher-ups can lay down in advance the rules for decision making. Yet, as Brown points out, very few policing decisions are of the straightforward kind; most require extremely complex judgments, beginning with whether to intervene at all, and if so, how. n362 As to these judgments, very few formal rules apply because it is difficult or impossible to formulate ex ante rules for the myriad of situations that are likely to arise, and administrative expectations are likely to be vague and uncertain. n363 Decision making under these circumstances will tend to rely on informal, pragmatic criteria, which may conflict with bureaucratic rules and expectations. I will have more to say about this conflict below, but for now the important point is that most day-to-day decisions that police officers make, including the ones that are most likely to involve police-citizen contacts, are determined more by the informal norms of street-level police culture than by formal administrative rules.

The notion that a set of informal, cultural norms that are unique to the occupation of policing largely determine street-level police conduct is virtually a commonplace in police literature. n364 As a number of scholars have framed it, police officers have a distinctive "working personality"--e.g., a set [*513] of "distinctive cognitive and behavioral responses"--that derives from certain characteristics of the police milieu. n365 The foundation for this so-called working personality is the street cop or the cop on the beat, which serves as the common background or training ground for virtually all police officers from patrolmen to police chief. n366 (One cannot become an officer in the police department in the way a West Point graduate joins the officer corps of the Army. Even the highest ranked police supervisor virtually always begins his or her career as a street-level patrol officer.) As police officers on the beat are exposed to certain common variables of police work, they develop distinctive patterns of coping with these variables, which in turn come to define a distinct occupational culture of policing.

According to Jerome Skolnick, the police officer's role contains two variables that are the primary determinants of the working personality of police officers: danger and authority. n367 The danger entailed in police work--and the sense among police officers that they hold the thin blue line between order and disorder--makes police officers "especially attentive" to any indication that violence or law breaking might be imminent. n368 By virtue of their training and experience, police officers are programmed to notice anything that appears abnormal, out of place, disordered, or threatening. n369 Consequently, police officers tend to be unusually suspicious people. n370 Police work also makes an officer "less desirable as a friend since norms of friendship implicate others in his work." n371 Thus, police officers find themselves socially isolated from those in their own non-police peer group, as well as from those they view as potentially dangerous. n372 The other variable of police work, which reinforces this sense of isolation, is the element of

authority. Police are empowered to intervene in a myriad of ways in the lives of ordinary citizens, from giving traffic citations, to maintaining order at public events, to enforcing public morality through enforcing laws pertaining to gambling, prostitution, and drunkenness. n373 Police authority in these areas creates a we/they mentality, not only between the police and the criminal element, but also between the law enforcers and the general public. n374

As John Van Maanen describes it, "when the policeman dons his uniform, he enters a distinct subculture governed by norms and values designed [*514] to manage the strain created by an outsider role in the community." n375 The development of this distinctive police culture occurs on the job, when Field Training Officers advise their new recruits to "forget everything you learned at the police academy." n376 "Rookies are quickly led to believe that their academy experience was merely a rite of passage, that the training they received there was irrelevant to the realities of policing, and that they will learn what they need to know on the street." n377 As a result of this process of intragenerational socialization, "the police culture becomes not only the primary reference group for officers but also the principal mechanism of organizational control ... over the substantive exercise of police discretion." n378

Only when we appreciate the power of the police organization in shaping the moral decision making of individual cops are we ready to consider the questions of relative culpability and behavioral reform. The point is not that individual officers are not to blame for their harm-causing actions. To the contrary, their organizational affiliation might mean that they are, in some sense, more blameworthy. Organizations can cause unintended or inadvertent harms that go beyond the actions of any one individual, for example, when the actions of multiple employees converge. n379 This may create unique obligations for organizationally embedded actors to guard against such harms. Such obligations could include, for example, investigating how one's own projects interact with those of co-workers, communicating troublesome information, taking measures to prevent wrongdoing by subordinates, protecting whistleblowers, or even declining to participate in an organization with a destructive culture. n380

Sanctioning only individual cops may satisfy society's need to find someone to blame, while diverting attention from harmful organizational structures that contributed to the individual actions. Without addressing the institutional component, however, there will be little hope of rooting out the web of causes that led to the harm. The complicated interaction between individuals and their organizations means that both must be held responsible.

III. Police Culture and the Problem of Fragmented Knowledge

As I have suggested above, it is well-established that organizational structures and their distinctive cultures have a significant causative effect on the decisions and behaviors of institutional actors. Moreover, both policing [*515] literature and the vast majority of police investigative reports show that police departments, in particular, have unique organizational cultures that powerfully influence the behavior of individual cops. What has been largely missing is a more systematic analysis of how the realities of police culture--and its effect on the conduct and judgment of individual officers--may contribute to police brutality and its seeming imperviousness to legal solutions. n381 I turn to that task below.

A. Means, Ends, and the "Double Message"

One of the primary organizational features that researchers have associated with wrongdoing by institutional actors is the problem of fragmented knowledge. "Bureaucratic organizations parcel out morally significant knowledge among various individuals along the same lines as organizational tasks. The division of labor is equally a division of knowledge." n382 For example, supervisors may be unaware of the wrongful actions of subordinates who are implementing organizational policies. Conversely, subordinates may not know where their actions fit into the overall institutional program, or the limits of their individual discretion. Under these circumstances, the conduct of multiple actors can converge to create a harm as to which none of these actors had enough information to have known--or in some cases, to have even suspected--that the harm could or would occur. If "individuals within the organization do not know, or perhaps do not want to know, what their actions add up to," it can lead to organizational wrongdoing for which no one in the organization will accept responsibility. n383 Of course, in any particular circumstance the claim that the

actors "did not know" may or may not be believable. The point is that lack of guilty knowledge--if it is believed--can serve to mitigate moral and legal responsibility. n384

To push the point a bit further, information fragmentation can be used by organizational leaders as a way of avoiding responsibility for organizational harm. One significant feature of bureaucratic management is that "details are pushed down and credit is pushed up." n385 Managers specify the ends that they want to accomplish without identifying in any detail the means that their subordinates are to use to accomplish those ends. This allows managers to avoid becoming enmeshed in messy particulars, but it also serves to insulate them from any harms caused by low-level decisions. When subordinates make mistakes in furtherance of a broadly framed agenda, managers may be able to claim that they neither sanctioned, nor knew, of those harm-causing actions. Conversely, the message that managers send by broadly defined [*516] goals--"results without [any] messy complications"--creates pressure on middle-men to protect their bosses, hide their own mistakes, and convey only good news. n386

The phenomenon of the bureaucratic "double message" has been widely recognized as a cultural feature of many police organizations. Like all organizational cultures, police culture is defined not so much by officially-proclaimed goals and rules, but by the sometimes very different messages that circulate at the operational level. Police socialization involves a whole range of complex and conflicting messages. For example, there is the "hard-nosed" organizational message that emphasizes crime-fighting and proactivity, the message that says, "'Let's go get 'em.'" n387 But, there are also all kinds of "non-hard-nosed mandates" such as "'observe due process,'" avoid excessive force, and do not discriminate on the basis of race. n388 In practice, these mandates often conflict. And while police management may purport to keep them in balance, the official organizational messages are selectively affirmed or undermined by informal messages about what kinds of conduct are actually tolerated or rewarded. n389 It is these informal expectations--that officers learn from fellow officers on the street and in the locker rooms--that determine the institutional culture that ultimately governs and shapes the discretionary decisions of street level cops. n390

Although police officers begin their formal training at the police academy, they do most of their important learning outside of the classroom. n391 And whatever official rules a rookie has learned at the academy are quickly undermined by contradictory messages from field training officers and veteran cops. "When sergeants or older officers give young cops those fabled instructions to 'forget what they told you in the police academy ... you'll learn how to do it on the street,' formal training is instantly and irreparably devalued." n392 Formal learning is further undermined when rookie officers observe firsthand that the rigid rules in which they were formally schooled are widely ignored in practice. n393

Police scholars have identified a number of attitudes that are "articles of faith" in police culture and that "predispose" officers to abuse their power. n394 First, police officers consider themselves to be the "thin blue line" between [*517] societal order and disorder. n395 Like the rest of us, they see the negative effects of crime but, unlike the rest of us, they have the authority and power to do something about it. Police self-definition as the last, best defense against public chaos, coupled with the license to use force, creates a constant risk that police officers will over-react. Second and relatedly, police officers regard disrespect and resistance by citizens as a threat, not only to them individually, but to the very social order. As a result, there is a widespread view among law enforcement officers that citizens who behave rudely or aggressively, or who use insolent or foul language, need to be "taught a lesson." n396 It is not hard to see how the belief that individuals with a "'bad attitude' ... constitute a symbolic attack on the law itself" n397 can lead to police officers being overly aggressive in their handling of offending citizens. Third, police officers believe that they have been given the impossible task of keeping society safe while, at the same time, they are constrained by unrealistic legal and constitutional demands. n398 Significantly, their view is shared by large segments of the public, the media, and many politicians who lament that constitutional constraints are hamstringing the police. n399

All of this contributes to a perceived necessity for police to "take matters into their own hands" and to "cut through the 'bullshit' of legal procedures in order to provide the [level of] safety that the public desperately wants." n400 It also gives rise to several additional characteristics of police culture that make it difficult to address police brutality. The call to do a potentially dangerous job involving conflicting demands and uncooperative or ungrateful citizens results in a

sense of us versus them that develops between cops and the outside world. n401 The bond resulting from this siege mentality n402--the so called "brotherhood in blue"--creates a "fierce and unquestioning loyalty to all cops, everywhere." n403 Along with the bond of solidarity is the sense that no one outside the ranks will really understand the realities of policing. n404

Cops are never told to be silent or to keep the agency's secrets. They never see an order upholding the code of silence that guides [*518] their working lives. There is no need to be explicit. The reactions, body language, whispered asides, and other rites of initiation convey what is expected. n405

The code of silence serves to reinforce police bonds of solidarity, both of which make it difficult to investigate, with any accuracy, incidents that may involve mistakes or misbehavior. n406

The conflict in the police bureaucracy between a set of broader values and goals articulated in formal policies and the informal norms of street-level police culture highlights the tension between means and ends, which is "at the heart of police work." n407 When police supervisors specify the ends that they wish to accomplish--zero tolerance policies, hard-nosed policing, aggressive crime control--without specifying the means to these ends, they are implicitly leaving the messy details to their subordinates. This could simply be a way of delegating responsibility for operational details, but it can also come with an implicit message that goals are paramount, even if it means cutting corners on the means employed to reach them.

This is not to say that anyone is ordering police officers to brutalize suspects, or to engage in other unlawful conduct. But, that cannot absolve the organization of responsibility for the harmful acts. In the words of former Minneapolis Police Chief Anthony Bouza:

Organizational auditors will search in vain for directives calling for, or even remotely suggesting, the toleration of corruptive or brutal acts. Yet agencies exist where such responses are woven so deeply into the organizational fabric that they seem to suggest a conscious and deliberate policy of encouraging such abuses. n408

Police officers often view organizational rhetoric, such as "calls for law and order" or directions "to adopt 'no nonsense measures'" as implicit "invitations for the police to do whatever is needed to get the job done," even if it means sacrificing legal and constitutional niceties. n409 In any event, regardless of whether the double message is intentional or unintentional, what is clear is [*519] that actions, rather than formal directives, convey the organizational messages most cogently. n410 Institutional actors watch how other officers do things, and then they conform their own conduct to what they perceive as the norm. Even if police agencies have much the same formal rules, what differs is what agencies actually tolerate, because that is how cops learn what the agency really accepts.

Personnel policies that directly or indirectly reward aggressive conduct reinforce the disconnect between formal directives and informal police culture in many departments. According to police scholar Herman Goldstein, "Police agencies have long been notorious for urging rank-and-file officers to do one thing while rewarding them for doing something else." n411 Police organizations, like most bureaucracies, tend to measure performance in quantitative terms-- such as number of arrests--rather than in qualitative ones n412--such as how well an officer defused a dangerous situation. Thus, while officers' formal training places the "highest priority on preventing crime" and diffusing dangerous situations, the mechanisms for determining promotions "place a high value on crimes solved, arrests made, traffic

tickets issued, and especially heroic actions carried out in the face of personal danger." n413 Many police scholars now believe that reward systems based on incidents, such as high arrest and citation statistics, rather than on some more qualitative measure of good police work, n414 contribute to a message that officers should pursue ends regardless of the means required to attain them. n415 This quantification of police work teaches street level officers "that their supervisors are interested only in the figures on their activity reports, not in what the police may have done to put them there." n416 In police departments that emphasize [*520] hard-nosed crime fighting as the goal, such reward systems can reinforce an overly aggressive style of policing that leads to alienation of the community and to unnecessary and violent police-citizen confrontations. n417

Also contributing to the gap between formal rules and informal expectations is the discontinuity in many departments between the kinds of judgments that appear in a patrol officer's personnel file and the same officer's personal history as contained in citizen complaints, use of force reports, and lawsuits filed against him. As a significant number of police commission reports note, the same officers who had a history of repeated incidents of violent or questionable behavior were precisely the ones that their departments promoted. n418 Part of the explanation for this phenomenon is that the quantitative method of measuring officer performance rewards officers who engage in behaviors that are more likely to be violent: cops get credit for an arrest or citation (even if the charges are eventually dropped), but may not get credit for defusing a situation without having to arrest anyone. n419 The other reason is that, in many departments, there is apparently no systematic effort to bring together performance data that the department uses in the promotion process and data that appears in the context of lawsuits or citizen complaints. n420 Whatever formal messages these departments sought to convey, their personnel and promotion practices spoke louder.

In sum, the double message that these organizational features create allows police departments to emphasize the goal of proactive crime fighting and reward aggressive officers, while holding less aggressive officers in lower esteem until the former "become an embarrassment." n421 Moreover, when proactive policing does cross the line into illegality, managers can point to formal policies that purport to prohibit excessive force, and showcase highly productive officers without brutality complaints to disclaim responsibility for the problem officers. This allows the agency to claim credit for the fruits of [*521] aggressive crime fighting while denying responsibility for any excesses that result.

B. Dealing with Police Culture: Changing the Message

The above discussion leads to three important conclusions. First, while the oft-repeated "bad apple" explanation for police brutality has focused attention on identifying problem officers, the real story is that organizational factors interact with individual propensities to produce police brutality. n422 Cops do not arrive at the police department door as fully formed brutalizers; they are created, in some part, by features of organizational culture that enable (or incite) them to act on their violent propensities. Thus, police departments must supplement strategies that seek to identify violence-prone officers with measures aimed at changing features of police culture that encourage officers to act on their violent propensities.

Second, it follows that no legal strategy that ignores the power of the police organization will have any lasting success in addressing police brutality. Moreover, strategies to change the behavior of individual cops must include some way of controlling the informal, as well as the formal, messages that frame the way they view their world. While the conclusion that changing the police requires a change in police culture is well-established in the policing literature, it has not found its way into the legal regime that seeks to regulate police brutality. Of course, one possibility is that police culture is not amenable to change by legal mechanisms. Perhaps change will require administrative reform, for example, away from the "professional model" emphasizing aggressive crime control, and toward community policing or problem-oriented policing. I will have more to say about some of these informal mechanisms in Part IV. For now, it is enough to say that interventions seeking to change cop behavior must include the organization or they will ultimately fail.

A third and related conclusion is that thoroughgoing organizational change--the kind that is necessary to alter

entrenched patterns of thinking and conduct--will require top-down pressure, including strong police leadership at the highest levels. The only way that individual cops will change is if the organizational culture changes, and the only way that the organization will change is if high-level officials are held accountable for the actions of their subordinates. As long as police administrators can chalk up misconduct to a few rotten apples and absolve themselves of any responsibility for the barrel out of which those rotten apples came, there will be no lasting reform. According to former Police Chief Anthony Bouza, "[a] police department's first order of business is to get its internal house in order through the creation of an organizational climate that fosters integrity and effective performance." n423 The creation of such a climate begins with the "approach and competence" of the chief of police, which sets the "mood and atmosphere for the [*522] agency." n424 Conversely, departmental differences in police behavior on the street, such as rates of shootings or uses of force, can be traced to cultural differences among departments, and, in particular, to the "personal philosophies and policies, written or otherwise of their chiefs." n425

As suggested above, police managers articulate their policies most clearly by the personnel decisions they make, n426 i.e., by ensuring that disciplinary actions actually reinforce spoken and written norms, policies, and values. n427 "If brutality is condoned or corruption is widely practiced, the pressure on the recruit to go along is irresistible." n428 Importantly, while the formal codes of conduct in different departments are remarkably similar, "the variable is the organizational climate created by the actions and reactions of the administration in power as it deals with its problems every day." n429 It follows that police management "must accept responsibility for moulding the organization's occupational culture. When misconduct occurs, blame must not fall exclusively on the rank and file but must be shared by managers for failing to prevent misconduct from occurring." n430

IV. Remedial Implications for the Law of Policing

The question that remains to be answered is how to structure legal remedies to address the organizational causes of police brutality. First, I return to the damages option and describe how the "double message" phenomenon described in Part III allows governmental entities to escape liability for systemic harms. Second, I discuss the option of attacking the dysfunctional features of police culture directly by injunctive relief. While the Supreme Court has eliminated this possibility through ordinary civil rights litigation, n431 Congress has revived it in a limited form under *42 U.S.C. 14141*. In addition to these strategies for top-down reform, I discuss the potential for change from the bottom up by enlisting the expertise of the police agency through professional peer review.

A. Charging the Organization: Entity Liability Revisited

The Supreme Court envisioned that entity liability would force a governmental agency to internalize the costs of misconduct and thereby provide incentives for the agency to monitor and discipline its employees. Part I [*523] outlined in some detail the myriad of legal and practical reasons why entity liability, as it is currently structured, does not have the functional effect that the Supreme Court assumed or intended it would have. n432 Entity liability, in its current form, is also subject to an additional critique, which builds on the organizational literature discussed in Parts II and III.

Recall that entity liability requires the plaintiff to show that the defendant's harm-causing conduct resulted from an "official custom or policy" of the governmental agency. n433 The most obvious way to identify the official policies of the government is to look at its statutes, regulations, or other official writings, or to ascertain what policymaking officials, such as the mayor or city council have declared to be governmental policy. n434 If defined that way, however, no police agency will ever have an official policy that sanctions police brutality. To the contrary, virtually every police department has firm policies prohibiting excessive force. Moreover, as described in Part III, the situation in many police departments is complicated because the official policies that prohibit police brutality are often undermined by unofficial messages that subtly encourage it. Additionally, to the extent that police leaders score political points for aggressive crime control--which then translates into bigger agency budgets--they have strong incentives to encourage the double message. It allows them to indirectly encourage aggressive policing while escaping blame, when officers step over the line, by pointing to formal policies that prohibit the officers' actions. n435

Although the Supreme Court did not frame it as such, the Court implicitly recognized the double message problem in *St. Louis v. Praprotnik*.ⁿ⁴³⁶ In *Praprotnik*, a plurality of the Court held that "official policy" includes not only written laws and other legal materials, but, in certain cases, "policy [can] be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business."ⁿ⁴³⁷ In order for the acts of high-level officials to count as official policy, however, these officials must have "final policymaking authority" in the area in which the challenged action was taken.ⁿ⁴³⁸ Moreover, the question of whether a particular official has "final policymaking authority" is a matter of state law.ⁿ⁴³⁹ The concurring opinion charged that this formulation creates a huge loophole by allowing a municipality to adopt "precatory admonitions" against misconduct, and thereby "effectively insulate [itself] from any liability based on acts inconsistent with that policy."ⁿ⁴⁴⁰ Because state law ultimately defines "official [*524] policy" for purposes of entity liability--either by articulating that policy or by limiting the range of officials who have power to make policy for the entity--governmental agencies could potentially escape liability for the actions of lower-level officials who have de facto authority, but who are not official policymakers. In the language of the double message: there could be one set of rules and practices "on the books" while a different set of rules--embodied in informal norms and operational practices--actually governed the day-to-day conduct of organizational actors. In order to avoid such strategic behavior, the concurring Justices in *Praprotnik* called for a factual inquiry that would begin with state law, but would ultimately ask the fact-finder to determine where policymaking authority "actually resides."ⁿ⁴⁴¹

The plurality in *Praprotnik* disagreed with the claim that the plaintiff could escape liability by having one set of rules on the books and a different set of rules in practice. The plurality countered that a plaintiff could always show that a municipality's "actual policies were different from the ones that had been announced."ⁿ⁴⁴² This would be true, the plurality noted, if a decision by a lower-level official was "cast in the form of a policy statement and expressly approved by the supervising policy maker."ⁿ⁴⁴³ It would also be true if officers committed so many departures from the written policy that upper-level officials had to have been aware of the repeated departures.ⁿ⁴⁴⁴ In that case, the repeated practice would be deemed to trump any conflicting written or spoken policies in defining the scope of entity liability.ⁿ⁴⁴⁵

As it is unlikely that a supervisor would "expressly approve" a policy of police brutality, the only way to attack the double message problem under the *Praprotnik* plurality's formulation is to demonstrate a pattern of violations by lower-level officials.ⁿ⁴⁴⁶ It turns out, however, that the standard for proving a claim based on a pattern of departures from the official rules is quite high, and--in practice--is often unattainable. The plaintiff must show a series of repeated actions by officials that are sufficiently similar, numerous, and notorious that supervisors are culpable for failing to stop them. In the words of the Court, the pattern of constitutional violations has to have been so obvious that officials showed "deliberate indifference" to the risk of unconstitutional conduct.ⁿ⁴⁴⁷ As noted in Part I, the deliberate indifference standard [*525] is very difficult to satisfy, even in the most egregious situations involving repeated illegal acts.ⁿ⁴⁴⁸ Recall that brutality claims against the City of Chicago for actions by the Area Two Violent Crimes Unit failed despite a long history of similar, bizarre incidents against the same officers.ⁿ⁴⁴⁹ In affirming a finding of no liability, the appellate court opined that entity liability under a failure-to-train theory requires a showing that "an abusive practice has actually been condoned."ⁿ⁴⁵⁰ The court explained that the plaintiff might have prevailed against the entity if the police supervisor had "thrown the complaints into his wastepaper basket or had told the office of investigations to pay no attention to them," because then "an inference would [have] arisen that he wanted the practice of physically abusing cops killers to continue."ⁿ⁴⁵¹ This example suggests that deliberate indifference means something akin to actual knowledge or intent.

In sum, entity liability is not a good solution for systemic police brutality. In order to prevail against a police department, the injured plaintiff must prove that the department, itself, was culpable. As police departments never officially sanction the excessive use of force, this requires the plaintiff to demonstrate that high-level officials ignored a pattern of similar, notorious, illegal acts by their subordinates. Unfortunately, as the Area Two cases vividly illustrate, this showing is very, very difficult to make.ⁿ⁴⁵²

B. The Role of Direct Remedies

As I noted in Part I, one reason why damages liability has been ineffective in forcing governmental actors to internalize the costs of harm-causing conduct is that they view the benefits of aggressive policing as outweighing the costs of liability. n453 One way to address the cost internalization problem is to abandon the indirect approach of civil damages liability and adopt strategies that force governmental entities to take particular steps to minimize the risks of liability. This could be done legislatively--by tying agency reform to funding--or judicially--through court ordered relief backed by the threat of contempt sanctions. These strategies would allow the legislature, or the courts, to mandate the reform of particular features of police administration that predispose to police misconduct.

1. Injunctive Relief: Section 14141

The most obvious way to effect direct reform is through court-enforced equitable remedies. One of the benefits of injunctive relief is that it calls for changes in conduct that are narrowly tailored to target particular harmful behaviors. Unlike a general rule mandating a one-size-fits-all solution, an [*526] injunction applies only to the particular governmental agency that is engaged in unconstitutional conduct. Thus, a court may precisely frame its requirements in order to address the unique facts and situation that gave rise to the problem. Conversely, an injunction has no application to agencies that are not in violation of constitutional norms. n454

So what might equitable relief look like in the law enforcement context? While the Supreme Court, in *Los Angeles v. Lyons*, n455 largely foreclosed this avenue of relief in the policing arena, it is worth noting the specific kind of relief plaintiffs sought in that case. In *Lyons*, the plaintiffs brought suit to enjoin the application of "chokeholds," which the LAPD was using to subdue suspects. n456 Chokeholds applied by the LAPD had caused the deaths of at least fifteen suspects in the seven years before the case came before the Supreme Court. n457 The plaintiff argued that injunctive relief was necessary and appropriate because the continued application of chokeholds involved a "persistent pattern of police misconduct" that was sanctioned by police management. n458 The injunction issued by the district court had two key features. First, it ordered the LAPD to limit its use of chokeholds to situations involving the risk of death or serious bodily harm. This order would remain in place until the LAPD adopted a training program, including written materials and practical training sessions for its members. Second, it required the LAPD to keep orderly and accurate records of all situations in which chokeholds were used and to make that information available to the court. n459

Given the nature and causes of police brutality as described in this article, the district court's two-pronged approach in *Lyons* would go a long way toward reversing the dysfunctional patterns associated with police violence. Recall the crucial observation that much police brutality is attributable to repeated incidents involving the same minority of cops whose personnel records and history of promotions often fail to reflect their overall record of violent episodes. n460 In addition, there is general agreement in the policing literature that such patterns of misconduct reflect problems at the top: supervisors who fail to take leadership to combat an entrenched organizational culture that operates in derogation of official policies. n461 Moreover, as a number of police investigative commissions have pointed out, many departments that manifest the repeat-brutalizer phenomenon have no formal strategy for tracking officers with multiple complaint histories, or for making sure that evidence of complaints and civil lawsuits makes its way into personnel [*527] and promotion files. n462 Indeed, in some instances police departments have made conscious decisions to eschew such record keeping in order to avoid liability. n463 The absence of record keeping and tracking makes it impossible for police management to identify problem officers and to provide targeted remedial training and discipline. The solution is to adopt a strategy to identify officers engaged in questionable behavior before a notorious pattern of unlawful conduct emerges. A so-called "early warning system" must be a prominent feature of any serious police reform. n464

All of this suggests that injunctive relief of the sort the district court mandated in *Lyons* is especially suited to addressing the systemic causes of police brutality. Thankfully, 42 U.S.C. 14141 has restored some of the potential for structural reform. Congress enacted 42 U.S.C. 14141 as part of the Violent Crime Control and Law Enforcement Act of 1994. n465 Section 14141 empowers the Attorney General to file a civil action for injunctive or declaratory relief if the Attorney General has "reasonable cause to believe" that law enforcement officers have engaged in "a pattern or practice

of conduct ... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." n466

The legislative history of this provision is significant for two reasons. First, it supports the conclusion that police brutality is a systemic problem involving lax management and institutional dysfunction. Second, it recognizes that other currently available remedies are inadequate to address the systemic roots of the problem.

Section 14141 was, in large part, a response to the Christopher Commission's finding that a significant number of officers in the LAPD "repetitively use excessive force against the public." n467 The legislative history of 14141 also cites the Commission's finding that "the conduct of these officers [was] well known to police department management, who condoned the behavior through a pattern of lax supervision and inadequate investigation." n468 In enacting 14141, Congress concluded that police brutality was not only a problem [*528] in Los Angeles. It was characteristic of many police departments and it often involved systemic causes--"particular policies or practices that [are] reflected in a pattern of misconduct." n469 The legislators concluded that only injunctive relief could address the problem of systemic misconduct, n470 and that neither the Attorney General, nor private parties, had the authority to bring suit for equitable relief. Private parties are foreclosed by the standing limitations imposed by the Supreme Court in *Lyons*, and at least one court of appeals has recently held that the Attorney General has no implied statutory or constitutional authority to bring such a suit. n471 Consequently, Congress viewed 14141 as necessary to ameliorate the lack of any adequate remedy to address misconduct at the institutional level. n472

The Justice Department's current approach to enforcement of 14141 also underlines the systemic nature of the problem and the need to frame injunctive relief accordingly. As of this writing, the Attorney General has brought suit against police departments in six jurisdictions: Pittsburgh, Pennsylvania; Steubenville, Ohio; the State of New Jersey; Los Angeles, California; Columbus, Ohio; and Nassau County, New York. The Pittsburgh, Steubenville, New Jersey, and Los Angeles lawsuits resulted in consent decrees. Each of the consent decrees describes a pattern of unconstitutional conduct facilitated by the failure of police managers to adopt adequate measures for supervising and training their officers, and to investigate and track citizen complaints. n473 The primary features of these consent decrees are worth considering in detail for their potential to address some of the systemic features that have given rise to patterns of police brutality.

[*529] All four consent decrees have the following three features in common. First, each department must put into place a computerized data collection and retrieval system, accessible to all levels of police management. These systems must contain: any reports--such as use of force reports or arrest reports--that police departments are required to collect in the normal course of police work and any additional reports mandated in the decree; reports of investigations and dispositions of citizen complaints against police officers; n474 and reports of civil or criminal suits alleging excessive force or other specified constitutional violations. n475 These systems must be searchable by incident, officer, and unit in order to permit supervisors and managers to identify trends or patterns of misconduct that might require systematic intervention. n476

A second shared feature of the decrees is the requirement of regular, systematic audits that use the data retrieval system to look for such patterns. High-level managers are directed to search for repeated incidents of misconduct involving particular units, supervisors, or individuals. n477 The consent decrees also mandate that supervisors do regular audits for recurrent misconduct attributable to particular officers under their command. n478 These audits are part of what police reformers call an "early warning system," that allows managers to "identify[] police officers who are repeatedly involved in citizen complaints or other problematic behavior," and enable supervisors to take prompt remedial action. n479

The third shared feature of the consent decrees is that police supervisors and managers must consult computer data reporting concerning uses of force, complaint history, and lawsuit history when making decisions about management and promotion of their officers, especially promotion to training positions such as Field Training Officer. n480 Under this requirement, personnel files must include justification for training and promotion decisions in light of [*530]

reported incidents of questionable or unacceptable conduct. Relatedly, performance appraisals of supervisors will require an accounting for incidents of misconduct by their inferior officers and whether appropriate disciplinary or rehabilitative actions were taken.

This combination of features--statistical monitoring to permit timely identification, investigation, and tracking of problem officers and remedial training to keep problem officers from becoming repeat offenders--reflects the widely held view that managerial commitment to early detection and intervention is essential to police reform. n481 Moreover, while these consent decrees are technically applicable only to the named departments, the Justice Department has signaled its view that the decrees reflect minimum professional standards to which all police departments should aspire. n482 As the Chief of the Civil Rights Division's Special Litigation Section has framed it, "departments seeking to avoid federal intervention would be well-advised to undertake changes in their operations consistent with the provisions of the [two existing] consent decrees." n483

Before leaving the subject, it must be noted that one district court has construed 14141 liability against a governmental entity as encompassing only conduct that would satisfy the "custom or policy" requirements for municipal liability under 1983. n484 It goes without saying that, were the courts [*531] to adopt this construction, it would nullify the statute's potential effectiveness in addressing systemic harm. n485

2. An Epidemiological Approach

Section 14141 has two major problems. One is that the Justice Department lacks the resources to monitor all police departments nationwide. The second is that it is difficult to identify "problem" departments because of an absence of required record keeping. This second problem is relatively easy to solve. One way to ensure that prosecutors and courts have the information that they need is simply to require that all police departments engage in record keeping and reporting. The government could enforce this requirement by making it a condition of federal grants for law enforcement. n486

In the recently enacted Prison Rape Elimination Act of 2003, n487 Congress employed something akin to this strategy in order to address the problem of prison rape. A key feature of the Act is that it ties federal funding of prisons to requirements designed to reduce the incidence of prison rape. The Act requires the Bureau of Justice Statistics of the Department of Justice ("Bureau") to conduct an annual comprehensive statistical review of the incidence and effects of prison rape in federal, state, and local prisons. n488 In carrying out this mandate, the Bureau may issue subpoenas to obtain the public testimony of federal, state, and local officials, including prison wardens and directors, "who bear[] responsibility for the prevention, detection, and punishment of prison rape at each entity." n489 If prison officials fail to testify, the Attorney General can obtain, and enforce, a subpoena in federal court. n490 Moreover, as part of its annual report to Congress and the Secretary of Health and Human Services, the Attorney General must publish a list of prisons ranked according to the incidence of prison rape in each institution. The Act also creates a National Prison Rape Reduction Commission charged with conducting a comprehensive study of the impacts of prison rape and making recommendations to the Attorney General for national standards to enhance the detection, prevention, reduction, and punishment of prison rape. n491 The sanction for a state's failure to enact a state version of the national standard [*532] is a five percent reduction in certain federal prison funding. n492 In addition, prison accrediting bodies can obtain no new federal funding if they fail to adopt the national standard as a feature of their accrediting standard. n493

The power of the comparative strategy that the Prison Rape Elimination Act employs derives from the insight that it may be easier to identify a culpable penal institution than it is to identify a culpable prison official. Prisoners are responsible for most prison rape, and they perpetrate it against other inmates. It is probably impossible to eliminate prison rape entirely (at least unless every prisoner is in solitary confinement all of the time), and in individual cases it may be difficult to determine whether prison officials should have known of the risk to a particular prisoner and should have taken steps to prevent it. But, comparing the relative incidence of rape among various penal institutions tells us something about how officials in different prisons "stack up" in their efforts to eliminate inmate-on-inmate sexual violence. If similar prisons--in terms of size, type of inmate, and other characteristics that might affect the incidence of

violence--report rape statistics that are significantly above the norm, it follows that these prisons have done too little to provide a safe environment for prisoners.

It is easy to see the benefits of using the comparative strategy for addressing police brutality. As in the context of prison rape, it may be much easier to identify a violent police department filled with violent cops than to assess the culpability of individuals. Required record keeping of the sort required by the Prison Rape Elimination Act would allow executive officials and courts to shift their focus from analyzing multiple, isolated incidents, to comparing violence levels among police agencies. An unusually high incidence of violent episodes, patterns of misconduct by the same officers, multiple police shootings, or other significant deviations from the norm--as defined by similarly situated police agencies--could indicate an unhealthy organizational culture, triggering further investigation and possible intervention. Moreover, mandatory reporting is the only way to ensure that interventions like 14141 suits are deployed against cases "other than the headline grabbers," n494 by revealing--through trends and comparisons--how departments stack up against each other and how they function over time.

One potential obstruction to the success of both mandatory reporting and 14141 is the difficulty of obtaining accurate information. As both depend in large measure on the possibility of collecting (and acting on) reliable data about the nature and incidence of questionable or unlawful police conduct, they cannot succeed unless it is possible to overcome certain obstacles to data collection. The difficulties in this regard are many. Most of the information about police-citizen contacts must come from reports that line officers generate, but it is not always possible to rely upon such reports for [*533] complete and accurate information. n495 For one thing, record keeping is costly in terms of officer time and effort, and officers will not likely do it consistently unless organizational norms convey the message that it is a vital part of the job. n496 In addition, to the extent that self-reporting of uses of force or citizen complaints of violent encounters can lead to criticism, discipline, or lawsuits, officers have strong incentives to underreport or shade testimony about incidents in which oneself or one's colleagues have been involved. n497 Moreover, efforts by outside agencies to collect and analyze information in a potentially adversarial framework, such as a 14141 lawsuit, may lead police officers to be defensive and uncooperative. n498 The "wall of silence" that characterizes police interactions with the outside world is, by now, a commonplace. n499 Definitional issues constitute an additional category of difficulties. How should uses of force be defined? n500 What kinds of incidents should be tabulated? How should complaints against officers that are not "sustained" be treated? Finally, when comparing statistics across police departments, it is necessary to make adjustments in order to account for differences in population demographics and other factors that may affect the relative likelihood of violent confrontations. n501

Two summary points are worth emphasizing. First, successful and lasting police reform is absolutely dependent upon the possibility of collecting and acting upon reliable data about the nature and incidence of police violence. Second, however, to the extent that agencies collect and analyze use-of-force data in the shadow of possible litigation against the department or the threat of sanctions against individual officers, it may provoke resistance that undermines that very effort. This, in turn, has led many police scholars to conclude that a focus on re-mediation and retraining rather than increasingly punitive sanctions may actually lead to more certain and lasting reform. I turn to this argument below.

C. Harnessing the Power of Peer Review

Modern regulatory approaches to police brutality are almost exclusively judicial and punitive. Police officers who misbehave can be subject to criminal [*534] liability, civil sanctions, and civil rights suits. Their departments can be subject to damages liability. Police misconduct can also result in public scandal--a threat that is highly feared by police bureaucracies. n502 This regulatory landscape has two significant and ultimately counterproductive results. First, if officers know that investigations of violent police-citizen interactions are only, or are primarily, for the purpose of imposing punitive sanctions against officers, their colleagues, and their departments, the most defensive characteristics of police culture are likely to come forth. n503 These defensive moves make it very difficult for outside reviewers to obtain accurate information about potentially inappropriate uses of force. Perhaps more important, they make it virtually impossible to persuade line officers to apply their knowledge and expertise to finding ways to avoid unnecessary uses of force before they rise to the level of legal liability. n504

A second consequence of this exclusively judicial and punitive regime is that what constitutes appropriate force is defined almost entirely in terms of the level of force that would lead to criminal and civil liability. As police are authorized--indeed obligated--to use some level of coercion in carrying out their duties, the first step in addressing police brutality is to find some operational definition of the boundary that separates legitimate from illegitimate uses of force. In this authorized use of coercion, police are "like other professionals (e.g., doctors), to whom we give special rights to do things (cut people open ... examine their private parts, etc.) that we permit no other persons to do." n505 While all such professionals are subject to criminal and civil liability for instances when they exceed their legal authority, they are also subject to professional norms that require more than simply avoiding legal sanctions. n506 Professional norms are necessary because civil and criminal laws are too broad, present too many barriers to enforcement, and set the bar of behavior too low to "serve meaningfully as the parameters for any professional's discretion." n507 The legal standards that the courts in civil and criminal cases employ, however, almost entirely define police norms about the use of force. This is evidenced by police departments' written policies governing uses of force, which virtually track word-for-word the judicial rules that govern legal liability. n508 Indeed, if the nature of the supervision, discipline, [*535] and training is any indication, many departments seem oriented only toward "avoiding scandalous, liability-generating, or grossly substandard uses of force by officers." n509 This observation has led to a call for the development of professional standards to govern the use of force that go beyond the lowest common denominator of illegality. n510 As one police scholar has framed it, "one would hardly feel comfortable selecting a family doctor whose claim to expertise is a history of avoiding malpractice suits and charges of criminally assaulting other patients; one wants evidence of superior talent, attested to by satisfied customers and admiring peers." n511

These two consequences--the defensiveness created by wholly punitive regulation and the lack of independent professional standards for uses of force--have led many police scholars to conclude that some form of peer review--by which I mean collegial review of harmful or questionable actions by one's professional colleagues n512--is an essential part of the solution to police brutality. n513 A key benefit of peer review is that it would enlist the help of those who have a wealth of expertise and practical knowledge to put toward solutions to police brutality: street-level cops themselves. In addition, it would refocus attention on the right thing. If the problem is a sick culture, rather than sick individuals, then we should aim solutions at changing the culture. Professional peer review has the potential to promote change from the inside out, by replacing unhealthy organization norms with healthy ones.

One of the reasons that members of all professions--from medicine to law to policing--resist outside review of their conduct is that they view outsiders as having little insight into the practicalities of their professional practice. n514 In that respect, they are largely correct. While outside reviewers can [*536] enhance accountability by holding up to public scrutiny professional actions that result in harm, they are unlikely to have good insights into whether the relevant actors made culpable errors and what policy changes might reduce harms in the future. By contrast, peer review has the benefit of enlisting the profession's own experts, and it is possible to conduct it in a way that provides incentives for honest, constructive assessment of mistakes and weaknesses. It can also enhance the development of professional norms that go beyond the mere absence of illegality.

While the two most prominent existing forms of police administrative review--internal affairs review and civilian review--contain some features of professional peer review, they differ from peer review in a key respect: they are primarily individual and punitive, with very little focus on forward-looking, systemic reform.

The most common form of police review is purely internal, i.e., completely police-operated with no input from officers external to the immediate employer, and no civilian oversight. n515 "Most large-and mid-sized police departments have 'internal affairs' units, which ... receive, investigate, and adjudicate citizens' complaints." n516 These units ordinarily report directly to the chief of police and are staffed by officers from other units who rotate through the department. n517 An internal review investigation resembles a criminal investigation--officers "interview witnesses, prepare statements, collect booking slips, review arrest reports [and] collect physical evidence." n518 Once completed, the internal affairs investigation is submitted to the supervisors of the officer involved. If the investigation determines that the officer acted appropriately, the matter is closed; if the investigation indicates that the officer engaged in misconduct, the supervisor recommends discipline. n519 The case is also referred up the officer's chain of command

and, ultimately, the chief reviews the case to determine whether to sustain the complaint and enforce the recommended discipline. n520 At the close of the investigation, the complainant usually receives a "close out" letter stating the finding of the investigation. n521 Often this letter is the only information the police department reveals to citizens. n522

[*537] Perhaps the most significant limitation of internal review is the potential for real or perceived conflicts of interest. n523 The universal practice of police organizations of limiting information regarding complaints filed and aspects of the investigation exacerbates this problem. It creates an appearance of favoritism and undermines citizen perceptions of legitimacy. n524 Nonetheless, while its effectiveness in addressing police misconduct varies widely among jurisdictions, there is no doubt that the rise of internal review has contributed to improving police conduct. n525 Indeed, some internal review mechanisms, such as the review process in Oakland, California, enjoy a national reputation for rigor, integrity, and effectiveness. n526 Still, even scholars who are generally positive about internal review admit that its success is almost wholly dependent upon whether--as in Oakland--a "highly motivated, strong-willed, impeccably honest chief is in command." n527

Moreover, for purposes of its potential for effectuating systemic change, internal review has the more serious shortcoming that it is individual-focused and wholly punitive. The purpose of an internal investigation is to determine whether or not the evidence substantiates a complaint against a particular officer and, if so, to recommend appropriate sanctions. n528 It is designed for incident-by-incident review, and very few departments use internal review to identify patterns of similar misconduct. A notable exception is the internal review mechanism in place in Oakland, where the department compiles and distributes monthly summaries of complaint statistics that identify trends in complaints. n529 The department also distributes a training bulletin that "uses examples to illustrate a procedure or discretionary decision that caused an [*538] otherwise preventable complaint." n530 It turns out, however, that Oakland is one of a small number of departments that use the results of internal affairs investigations in a reformatory manner, to "generate knowledge, learning and behavioral change." Only twenty-eight percent of police departments utilize complaint data in this forward-looking way. n531 It follows that internal review, at least as it currently exists, is unlikely to be a very effective vehicle for widespread policy or organizational change.

The primary source of external review of police action is the "civilian review board." While civilian review can take a number of different forms, its distinctive feature as "a procedure for handling citizen complaints" is that, at some point in the process, it "involves people who are not [police] officers." n532 The notion of an impartial "ombudsman" who would investigate complaints against governmental service agencies first gained currency among administrative law scholars. n533 In the 1960s--in light of police-citizen antagonism and the apparent solidarity of police as a subculture--the citizen review board was viewed as a way to reduce police-community tensions by breaking down the police wall of silence and reducing mistrust of internal police investigations. n534

Not surprisingly, civilian oversight of police was controversial from the beginning. The earliest attempts to set up civilian review boards in New York and other major cities across the country met with such stiff resistance from police unions and street level cops that the efforts were ultimately unsuccessful. n535 It was not until the 1980s, when shifting minority populations in cities permitted the election of local officials who were more responsive to the idea [*539] of civilian review, that civilian oversight mechanisms began to appear. n536 By 1990, thirty of the fifty largest U.S. cities had adopted some form of citizen review of civilian complaints. n537 As of 1998, eighty percent of the police departments in the largest U.S. cities had some form of civilian oversight. n538

Despite their increasing numbers and visibility, however, citizen review boards provide only a limited vehicle for the kind of systemic reform that this article prescribes. First, its disciplinary origins have constrained the potential reformatory effects of civilian review: citizens believed that they could not trust the police to police themselves. Indeed, many cities established citizen review boards in the wake of high-profile cases that involved particular instances of police brutality. n539 Arising, as they do, from circumstances in which citizens and police are already at odds with one another--and civilians have judged police internal review to be untrustworthy--police have viewed citizen review boards with defensiveness and suspicion. n540 They often have great difficulty obtaining the trust of the law enforcement community and, as a result, police officers and administrators may deride their findings and recommendations. n541

Second, and relatedly, police officers view as inappropriate and threatening any invitation for nonprofessionals to second-guess their actions. Their primary objection is that oversight personnel who lack experience and training in law enforcement are ill-equipped to judge whether or not a police officer acted appropriately. n542 Officers also worry about the fairness of the process, not only because the reviewers lack expertise, but also because police [*540] fear that members of the board may have a political agenda that is hostile to law enforcement. n543 Moreover, these reactions often extend to the highest levels of police leadership and--whether or not they are true--they undermine the credibility and power of civilian review. n544

A third reason why civilian review has not been an effective tool for systemic reform is that its primary--and sometimes its only--focus is to investigate individual incidents of misconduct and make recommendations for disciplining the offending officers. Partly due to their incident-specific origins, many civilian review boards fail to take the additional steps of analyzing the policies that may have led to the incidents, identifying patterns of similar conduct, and asking what could be done to prevent such incidents in the future. n545 Instead, they have tended to focus on punishing the immediate perpetrators while letting supervisors off the hook when it comes to judging "management's responsibility for and ... influence over--line officers' and deputies' behavior." n546

Although civilian review can be only one part of the effort to bring about systemic change, it is possible to design it in a way that enhances its contributions to forward-looking reform. Most important, citizen review boards must be specifically charged to identify patterns of misconduct and recommend appropriate policy changes. While nonpolice reviewers may be reluctant to propose reforms--and police administrators may be tempted to dismiss them as uninformed--police experts urge that the policy review function is essential to effective civilian review. n547 "Policy review is designed to serve a preventative function by identifying problems and recommending corrective action that will improve policing and reduce citizen complaints in the future." n548 While most civilian review boards are merely advisory, they can hold administrators' "feet to the fire" by tracking repeated incidents of misconduct and identifying troubling patterns in a way that highlights the need for solutions. n549 Moreover, precisely because citizens are not part of the law [*541] enforcement establishment, they may be able to bring a fresh eye to entrenched problems. n550

For the reasons I have cited above, both internal (police) review and external (citizen) review have inherent limitations in their ability to effect change in the organizational culture of policing. One of the primary impediments to their effectiveness is that these mechanisms have a "fundamentally punitive orientation," n551 rather than a reformative one:

Police officers operating within an adversarial system, pushed to prove their "innocence" and to defend themselves at all costs, will rarely see [a] citizen's complaint and its investigation as grounds for changing their behavior. ... For this reason, we need to know a great deal more about police review systems that attempt to teach officers from their mistakes in positive ways. n552

Many police scholars have concluded that the needed changes in organizational culture will only come when police officers become active participants in the process of self-reform. Only then will reform include "not simply adherence to rules in the face of punitive sanctions, but a change in the organizational values and systems to which both managers and line officers adhere." n553 Professional peer review has the potential to promote change from the inside out by formulating and inculcating healthy organizational norms.

While many current police scholars urge the creation of peer review mechanisms as a reformative strategy, there appear to be few current examples. Proponents must reach back in time for exemplars. A number of scholars, for example, cite as an early experiment with police peer review the Berkeley Police Department's "Friday Crab Club," organized by police reformer August Vollmer in the early 1900s. n554 The Club employed "collegial control" to guide

police methods. n555 It consisted of a weekly meeting at which rank-and-file officers would join Chief Vollmer in reviewing "with candor and a spirit of mutual assistance highlights and lowlights of the police work they had done the prior week." n556 The meetings were a combination of "gripe and learning sessions." n557 Colleagues who had anything against one [*542] another were encouraged to make a clean breast of it. n558 Some sessions included guest lectures by experts such as psychiatrists, as well as "articulate criminals" who would share their experiences. n559 Also on the "agenda of the Friday Crab Club" was the issue of controlling the use of deadly force. n560 Any officer who had fired his gun was required to give an account of the circumstances that had required the action, and his colleagues would make a judgment as to whether the deadly force was justified. n561 Advocates of community policing hold up the Friday Crab Club as a paradigm for collegial peer review that will "unleash[] [the] human potential that lies at the core of community policing and problem oriented policing." n562

The Friday Crab Club was an early forerunner of a style of peer review and training that was revived in the 1960s in Oakland, California. n563 Based on research into police violence by psychologist Dr. Hans Toch at the School of Criminal Justice, State University of New York at Albany ("SUNY"), Chief Charles Gain enlisted Toch's help in formulating a plan for dealing with violence-prone officers in the Oakland Police Department. n564 Toch and a colleague at SUNY, Mr. Raymond Galvin, assembled a study group of police officers who had "violence-related experience, [and] were held in high regard by other officers." n565 These officers set their own agenda for addressing police violence by defining the problem of police brutality, identifying its causes, developing a strategy for addressing it, and putting that strategy into action. n566 Their strategy was to form a Violence Prevention Unit, which reviewed the records of officers whose records contained frequent violent uses of force. n567 The panel would: conduct a preliminary investigation (including interviews with the officer's supervisors and coworkers); form a "study group" of panel members to review all the information; formulate hypotheses to explain the officer's history of violence; develop a set of questions to ask at a meeting between the officer and the panel; meet with the officer to try to identify patterns and common denominators among the incidents; and explore approaches that would minimize future violent encounters. n568

[*543] The results of the project were impressive: following participation in the panels, the involvement of violence-prone officers in incidents with citizens decreased by half. n569 In addition, the Oakland Chief of Police reported that the "program ... resulted in a series of significant organizational changes which touched such diverse activities as communications, patrol and training" and stimulated revisions in departmental procedures for handling particular categories of citizen-police interactions. n570 In a later discussion of the Oakland project, Toch and Grant expressed surprise at the candor with which line officers were willing to discuss their colleagues' violent encounters and explore alternative intervention options. n571 Toch and Grant viewed this as a significant and constructive departure from the usual officer response, which was to blame citizens and exonerate fellow officers. n572 In discussing the success of the Violence Prevention Project, Skolnick and Fyfe emphasize the nonpunitive nature of the panels as the explanation of the officers' candor. They conclude that "officers' historic unwillingness to comment critically on their colleagues' work is rooted in the fact that they almost invariably are asked to do so only in interrogation rooms and in other proceedings designed to find and punish culprits." n573

Toch's research suggested--and the Oakland project demonstrated--that real reform requires not only punishing or retraining the individual but changing the organization itself.

The challenge is to find change strategies that are both generalized in their impact and potent as re-socializers. Such strategies should reshape people; they should also extend change-inducing influence beyond their immediate target Problem persons must help us to understand and cope with organizational problems and other problem persons like themselves. n574

Toch's strategy of enlisting "problem people as problem solvers" relies on change literature indicating that participation models produce change more "completely, effectively, and permanently" than other styles of intervention. n575 Peer review relies on the notion that "police officers are good [*544] judges of the performance of their peers, and these judgments can be harnessed to challenge some of the destructive norms and values of police culture and replace them with a healthier ones." n576

Calls for some form of collegial self-regulation by police organizations are ubiquitous in the policing literature. n577 A recent collection of essays on "Police Violence" by a group of prominent police scholars is significant for the large number of references that urge the use of collegial review as a key to police reform and that decry the perverse effects of the current, exclusively punitive system. n578 Advocates of community policing have made similar recommendations for collegial review as a part of community policing's "problem-solving" approach. n579

The growing interest in peer review is an implicit recognition of the reformatory limits of law. While there plainly are things that the legal system can do to foster productive change in police departmental cultures, there are some things that only the police themselves can do. Lawsuits and citizen complaints will be ineffective if police department cultures--through lax personnel policies and informal norms--condone the underlying conduct. Litigation against police agencies will not change behavior as long as the police organization considers a little bit of brutality (and the tax it imposes) a "cost of doing business." Even injunctive relief will have limited effect on the police organization unless compliance is accompanied by a philosophical commitment [*545] to new ways of doing things. These legal mechanisms are necessary, but we must couple them with mechanisms that make police agencies themselves part of the solution. The combination of legal strategies and collegial peer review provides a way for "problem persons" to provide insights for dealing with "other problem persons like themselves" and the organization that produced them. n580

Conclusion

A focus on police culture leads to two conclusions, and the two may seem to be at odds. The first has to do with injunctive relief. The Supreme Court made a serious mistake in *Lyons*, and Congress chose wisely in passing 14141, which may, if we are lucky, undo part of the damage created by the Court's decision. The second conclusion has to do with internal police review. True reform will take place only when police officers apply their own expertise, from the ground up, to the problem of police brutality. The tension is obvious. On the one hand, courts can take important steps toward reforming bad police departments. On the other hand, those same departments need to reform themselves. Yet both conclusions are true.

Injunctive relief is the consummate systemic remedy. Structural reform litigation in the context of school desegregation and prison reform arose precisely because the circumstances that gave rise to the problem of segregated, unequal schools, and filthy, overcrowded prisons were systemic in nature. Entrenched and long-standing patterns of private and public conduct resulted in segregated schools, and it was thus necessary to undo the problem at the institutional level. The solution required something more than litigating a series of discrimination suits against local officials, school boards, and principals. It required prospective interventions designed to reform the structure of educational institutions in order to prevent racial discrimination from occurring, and to reduce the threat of discrimination in the future. n581 Reformers took a similar approach in the context of prisons. Entire prison systems were unhealthy and dangerous in ways that a series of lawsuits resulting in sanctions against particular governmental or prison officials could not address. Instead, the courts took on the task of mandating the conditions necessary for prisons to operate constitutionally. The courts addressed these decrees not only to the elimination of "specific objectionable practices," but often designed them to address "the underlying organization and financial arrangements" that lay behind the overall condition of the prison. n582 In other words, the courts designed these measures in order to "remove the threat posed by the organization to the constitutional values" that the courts sought to protect. n583

It should, by now, be clear that certain features of the police organization also pose a threat to constitutional values, suggesting that law enforcement [*546] is another context that could benefit from structural reform. Ironically, however, the remedies that the Supreme Court has designed to address constitutional violations by police are virtually

all individual-specific in nature. The exclusionary rule addresses unconstitutional searches and seizures by permitting a defendant whose Fourth Amendment rights are violated to suppress unconstitutionally collected evidence at his criminal trial. n584 The Fifth Amendment, as interpreted by the Court in *Miranda v. Arizona*, n585 provides similar rights of exclusion to defendants who fail to receive from police interrogators the now familiar warning of their right to remain silent and to have legal counsel represent them. And finally, this article has recounted at length the individual-specific nature of the 1983 remedy, which was first articulated by the Court in *Monroe v. Pape*. n586 When these cases were being decided by the Supreme Court, broad structural remedies like the ones that became available in schools and prisons were not even on the Court's radar screen. But, by the time *Los Angeles v. Lyons* n587 came along, there was a clear preference for individual remedies in law enforcement and the Court was already cutting back on its experiment with systemic remedies. The Court said "no" to systemic remedies in law enforcement. n588

There is, however, another impediment to the success of injunctive relief in the policing context: the power of police organizational culture to hinder or obstruct top down reform. Courts direct injunctive relief at police leaders, managers, and supervisors. An injunction could order such measures as: creation of a mechanism for receiving and investigating citizen complaints; computerization of records of complaints, uses of force, and lawsuits; structuring ways to identify patterns of police misconduct such as officers with multiple complaint histories; setting up targeted training programs, among others. The first step in operationalizing such mandates is to obtain the support and leadership of police higher-ups. But, given the realities of policing in which informal norms of street-level police culture often contradict and undermine formal policies, the next challenge will be to obtain "buy in" from the ground up.

This is where some form of professional peer review becomes essential. It is necessary to mobilize street-level cops so that their energy, passion, commitment, and expertise become part of the solution rather than part of the problem. Even if courts impose injunctive relief and police chiefs provide values-oriented leadership, top down reform will not be successful unless the rank and file also become part of the process of redefining police culture from the bottom up.

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Separation of Powers Executive Controls Civil Procedure Sanctions General
Overview Governments Local Governments Police Power

FOOTNOTES:

n1. Officer Burge, who was responsible for many of the brutal interrogations uncovered in Chicago's Area Two, see *infra* notes 130-65 and accompanying text, had a "personnel file full of commendations," many for undoubtedly heroic actions. See John Conroy, *Town Without Pity*, *Chi. Reader*, Jan. 12, 1996, at 2.

n2. See *infra* notes 290-97 and accompanying text (discussing Mollen Commission Report).

n3. See *infra* notes 243-322 and accompanying text.

n4. Terry McDermott, *Behind the Bunker Mentality*, *L.A. Times*, June 11, 2000, at A1; see also Michael K.

Brown, *Working the Street: Police Discretion and the Dilemmas of Reform* 11-12, 281 (1981) (chronicling allegations of police brutality through the nineteenth and mid-twentieth centuries, which have continued despite attempts at reform, resulting in mistrust of the police among minority groups and questions regarding police effectiveness and discretion).

n5. See David Bayley, *Getting Serious About Police Brutality*, in *Accountability for Criminal Justice* 93, 94-96 (Phillip C. Stenning ed., 1995).

n6. The term "organizational culture" includes the culture of policing as a unique occupation as well as the cultural distinctives that vary across particular police departments. Police scholars sometimes use the more precise term "occupational culture" to describe the "outlooks and norms that are commonly found among patrol officers in [all] police agencies." Robert W. Worden, *The Causes of Police Brutality*, in *Police Violence: Understanding and Controlling Police Abuse of Force* 29 (William A. Geller & Hans Toch eds., 1996) [hereinafter *Police Violence*]. For examples of various definitions of organizational culture from the organizational science literature, see Joanne Martin, *Organizational Culture: Mapping the Terrain* 57 (2002).

n7. See *Graham v. Connor*, 490 U.S. 386, 396 (1989).

n8. Sometimes it appears that police leadership is hesitant to offer even an apology lest the public see them as having erred in some way. See, e.g., Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States* 77 (1998).

n9. The limited temporal view reflected in this explanation for police violence embodies the legal standard for excessive force: did the officer apply reasonable force given the circumstances that immediately precipitated the use of force? See *infra* notes 67-68 and accompanying text.

n10. Susan Bandes, *Tracing the Pattern of No Pattern: Stories of Police Brutality*, 34 *Loyola L.A. L. Rev.* 665, 673 (2001) (citing Jim Newton & Ann W. O'Neill, *Captain Under Fire as Rampart Probe Expands*, *L.A. Times*, Sept. 21, 1999, at A1); see also Tamara L. Roleff, *Introduction to Police Brutality* 12, 13 (Tamara L. Roleff ed., 1999) (quoting New York Police Chief Safir characterizing the sodomy of Abner Louima as a "horrific," but "rare," event).

n11. It is precisely in these kinds of situations--where there is no evidence that the government sanctioned

the officer's conduct through some "official policy or custom"--that the governmental entity is also likely to escape liability. See *infra* Part IV.A.

n12. I use the somewhat awkward term "individual-specific" in order to underline the point that even entity liability is ultimately focused on the conduct of individual actors.

n13. See Roleff, *supra* note 10, at 13.

n14. Susan Bandes, Patterns of Injustice: Police Brutality in the Courts, 47 *Buff. L. Rev.* 1275, 1284-85 (1999) (citing Bob Herbert, Living in Denial, N.Y. Times, Aug. 21, 1997, at A31).

n15. Elisabeth Bumiller & Ginger Thompson, Giuliani Cancels Trip Amid Protests Over Shooting, N.Y. Times, Feb. 10, 1999, at A24.

n16. See Lou Cannon, Official Negligence: How Rodney King and the Riots Changed Los Angeles and the LAPD 23 (1997); see also Bandes, *supra* note 14, at 1278 (listing the violence that police inflicted on Malice Green, Abner Louima, and Amadou Diallo as further examples of incidents police officials characterized as "the work of a few rotten apples ... rather than routine police conduct").

n17. David S. Fallis & Paul Schwartzman, Curry Wants New Police Procedures, Wash. Post, July 7, 2001, at A1. When NYPD officer Michael Dowd was arrested for corruption in May 1992, the Department claimed that he was "an aberration" and that corruption was limited to a few "rogue cops." Comm'n to Investigate Allegations of Police Corruption & the Anti-Corruption Procedures of the Police Dep't, Anatomy of Failure: A Path for Success 10 (1994) [hereinafter Mollen Commission Report]. Prior to that arrest, which precipitated the appointment of the Mollen Commission, the Department used a narrow "rotten apple" approach to investigating police corruption. *Id.* at 13; see also *id.* at 10 (reporting that the NYPD generally viewed incidents of corruption and brutality as "isolated and sporadic opportunities" rather than as evidence of widespread police corruption); Human Rights Watch, *supra* note 8, at 33 (arguing that attributing incidents of misconduct to "rogue" officers ignores the larger, system-wide problem of failure to hold police leadership accountable for the misbehavior of their subordinates).

n18. See Worden, *supra* note 6, at 25. Theories about the causes of police misbehavior fall into three categories: sociological theories, which focus on situational factors such as the conduct of suspects, the context

of suspect-police encounters, and such factors as gender, race, and socioeconomic status; psychological theories, which emphasize officer attitudes and personality traits; and organizational theories, which explore the role of organizational culture. *Id.* at 28. Psychological theories underlie much of the intervention that police departments have adopted to control police violence. Sociological theories also have some empirical support. These factors, however, explain only about half of the variation among individuals. Moreover, many sociological factors that correlate with police violence are difficult or impossible to change, making them less useful in crafting solutions to police violence. *Id.* at 25. Organizational theories are the least well-tested, but hold the most promise for reform because organizational factors may be more amenable to change than either officer attitudes or the characteristics of police-suspect interactions. *Id.* at 28.

n19. Of course, it may be that the officers did not arrive with these predisposing attitudes, but rather they were created by features of the job. If so, then the solution would have to include ongoing, periodic psychological testing. See generally Ellen M. Scrivner, *The Role of Police Psychology in Controlling Excessive Force* 18 (Nat'l Institute of Justice, Research Paper, 1994) (noting that psychologists are "sharply divided on using psychological tests to routinely evaluate incumbent officers").

n20. Forty-four officers had six or more allegations of excessive force or improper tactics during the relevant four-year time period while two-thirds of their fellow officers had no allegations lodged against them. These forty-four officers "received an average of 7.6 allegations of excessive force or improper tactics, compared to 0.6 for all officers reported to be using force; the top 44 received an average of 6.5 personnel complaint allegations of all other types, compared to an average of 1.9 for all officers reported to be using force; and the top 44 were involved in an average of 13 uses of force compared to 4.2 for all officers reported to be using force." *Indep. Comm'n on the L.A. Police Dep't, Report of the Independent Commission on the Los Angeles Police Department* 40 (1991) [hereinafter *Christopher Commission Report*]. (The Commission purported to have corrected for differing circumstances--such as assignment to high crime areas, specialized duties, or higher arrest rate--which could contribute to a higher number of violent encounters.)

n21. See Craig Whitlock & David S. Fallis, *Police Routinely Clear Their Own: Prince George's Tolerates Officers Accused of Repeated Abuses*, *Wash. Post*, July 2, 2001, at A1 (reporting in a series on police brutality that several officers had a history of excessive force allegations and fatal shootings); *Christopher Commission Report*, *supra* note 20, at 37 (finding several officers with numerous excessive force allegations also had a history of other complaint allegations, use of force reports, and shootings); *L.A. County Sheriff's Dep't, A Report by Special Counsel James G. Kolts & Staff* 158 (1992) [hereinafter *Kolts Commission Report*] (finding that the Los Angeles Sheriff's Department ("LASD") failed to deal with officers with readily identifiable patterns of excessive force).

n22. The LAPD's MDT system is a computerized communications network between patrol cars and headquarters that allows officers to transmit and receive typed messages. *Christopher Commission Report*, *supra* note 20, at 48. The network cannot be accessed by citizens, but LAPD policy and regulations provide that MDT communications are subject to monitoring and auditing by police managers. *Id.*

n23. *Id.* at xii.

n24. *Id.* at x.

n25. *Id.* at xi.

n26. *Id.* at xii. The Christopher Commission's approach is characteristic of the psychological literature on policing, which identifies an attitude-behavior connection without "fleshing out the details." Hans Toch, *The Violence-Prone Police Officer*, in *Police Violence*, *supra* note 6, at 94, 97. It is not clear, for example, whether the officers who routinely used violence were the same ones with the bad attitudes, or whether the uses of force had indicia suggesting that racism or other prejudice was involved. *Id.*

n27. Paul Detrick et al., *Minnesota Multiphasic Personality Inventory-2 in Police Officer Selection: Normative Data and Relation to the Inwald Personality Inventory*, 32 *Prof. Psychol.: Res. & Prac.* 484, 484 (2001).

n28. President's Comm'n on Law Enforcement & the Admin. of Justice, *Task Force Report: The Police* 129 (1967).

n29. J. Douglas Grant & Joan Grant, *Officer Selection and the Prevention of Abuse of Force*, in *Police Violence*, *supra* note 6, at 150, 150.

n30. See generally *id.* at 150-54 (citing numerous studies and commission reports that uniformly found psychological testing and the MMPI unhelpful in screening potential police officers or in determining propensity for future violence). Screening out strategies are intrinsically difficult to validate because applicants that show signs of emotional disturbance will not be hired, which makes it difficult to know whether the applicant would have performed badly as predicted. See Scriver, *supra* note 19, at 14, 16. In addition, because the psychologist cannot know if an applicant was unfairly screened out, it is difficult to determine how a particular test may be flawed and how the defect could be remedied. See *id.*

n31. Scrivner, *supra* note 19, at 150 (citing D.A. Kent & Terry Eisenberg, *The Selection and Promotion of Police Officers: A Selected Review of Recent Literature*, 39 *Police Chief* 20 (1972)); see also *id.* at 151 (citing J.M. Poland, *Police Selection Methods and the Prediction of Police Performance*, 6 *J. Police Sci. & Admin.* 374, 386 (1978) (noting limitations of psychological and psychiatric theory and measurement technology); Andrew Crosby, *The Psychological Examination in Police Selection*, 7 *J. Police Sci. & Admin.* 215, 226-27 (1979) (noting scholarly disagreement over usefulness of pre-employment personality testing)).

n32. *Id.* at 151 (citing M.C. Mills & J. G. Stratton, *The MMPI and the Prediction of Police Job Performance*, 51 *FBI L. Enforcement Bull.* 10, 13-14 (1982)); see also *id.* (citing R. Daley, *Psychological Screening of Police Candidates*, 49 *Police Chief* 53, 53 (1982) (concluding that "neither psychiatric examination nor psychological screening has proven to accurately or systematically predict police performance"); Anthony G. White, *Police Management-Recruit Screening: A Selected Bibliography*, *Pub. Admin. Series* 1, 1 (1987) (concluding that "only time will tell" whether recruit screening will be effective)). There have also been numerous studies exploring the relationship between officers' behavior and background characteristics such as race, gender, length of police service, and education. See, e.g., Peter B. Bloch & Deborah Anderson, *Police Foundation, Policewoman on Patrol: Final Report* 1, 1 (1974) (gender); James J. Fyfe, *Who Shoots? A Look at Officer Race and Police Shooting*, 9 *J. Police Sci. & Admin.* 367, 367 (1981) (race); Lawrence W. Sherman & Mark Blumberg, *Higher Education and Police Use of Deadly Force*, 9 *J. Crim. Just.* 317, 317 (1981) (education); Robert E. Worden, *Situational and Attitudinal Explanations of Police Behavior: A Theoretical Reappraisal and Empirical Assessment*, 23 *L. & Soc'y Rev.* 667, 670 n.3 (1989) (length of service).

n33. See, e.g., Curt R. Bartol, *Predictive Validation of the MMPI for Small-Town Police Officers Who Fail*, 22 *Prof. Psychol.: Res. & Prac.* 127, 130 (1991) (finding that an "immaturity index" defined by a particular pattern of MMPI scores was a significant predictor of job termination in small town police departments); Larry E. Beutler et al., *Parameters in the Prediction of Police Officer Performance*, 16 *Prof. Psychol.: Res. & Prac.* 324, 333 (1985) (finding that certain "in service" behaviors could be predicted by a battery of tests, including the MMPI); Raymond M. Costello et al., *Validation of Preemployment MMPI Index Correlated with Disciplinary Suspension Days of Police Officers*, 2 *Psychol. Crime & L.* 299, 302 (1996); Deirdre Hiatt & George E. Hargrave, *MMPI Profiles of Problem Peace Officers*, 52 *J. Personality Assessment* 722, 727 (1988) (finding that "problem officers"--who had been subject to serious disciplinary actions--scored higher on certain MMPI scales); Bob Neal, *The K Scale (MMPI) and Job Performance*, in *Psychol. Services for L. Enforcement* 83, 86 (James T. Reese & Harvey A. Goldstein eds., 1986) (finding that applicants with elevated "K scores" were more likely to receive positive supervisory ratings); Nathaniel J. Pallone, *The MMPI in Police Officer Selection: Legal Constraints, Case Law, Empirical Data*, 17 *J. Offender Rehabilitation* 171, 182-83 (1992) (finding a modest but statistically significant relationship between MMPI scores and subsequent job performance).

n34. According to a survey conducted by Strawbridge & Strawbridge in 1990, forty-six percent of police departments utilize the MMPI, or some combination of tests including the MMPI, in selecting police recruits. See Theodore H. Blau, *Psychological Services for Law Enforcement* 76 (1994) (citing P. Strawbridge & D. Strawbridge, *A Networking Guide to Recruitment, Selection and Probationary Training of Police Officers in Major Police Departments of the United States of America* (1990)). In addition, ninety-one percent of police psychologists polled by the National Institute of Justice in 1994 who engaged in preemployment screening utilized the MMPI or MMPI-2, a revised version of the original test. Scrivner, *supra* note 19, at 15.

n35. While the MMPI is, by far, the personality test most widely used for police prescreening, police psychologists use a number of other tests and assessment instruments. See Blau, *supra* note 34, at 79-86 (discussing the range of personality tests and assessment tools used in policing). For example, the Inwald Personality Inventory ("IPI"), used by fifteen percent of police psychiatrists polled in a 1994 National Justice Institute Study, was developed specifically for employment prescreening in the law enforcement context. See Scrivner, *supra* note 19, at 15. Based on a series of studies by Inwald and his colleagues, Inwald claims that the IPI is successful in identifying candidates who are unsuitable for work in law enforcement. See, e.g., Forrest Scogin et al., Predictive Validity of Psychological Testing in Law Enforcement Settings, 26 *Prof. Psychol.: Res. & Prac.* 68, 68 (1995); Elizabeth J. Shusman et al., A Cross-Validation Study of Police Recruit Performance as Predicted by the IPI and MMPI, 15 *J. Police Sci. & Admin.* 162, 163 (1987). No one is claiming, however, that the MMPI, the IPI, or any other personality test currently available will be a good predictor of violent conduct. See, e.g., William Barnhill, Early Warnings: Identifying Violence-Prone Police Officers, *Wash. Post*, Aug. 11, 1992, at B5 (interview with Inwald noting that finding any one test that will eradicate the problem of police violence is a "pipe dream," and noting that the IPI can predict poor performance, but not violent behavior specifically).

n36. See generally Grant & Grant, *supra* note 29, at 151, 153.

n37. *Id.* at 151-52 (quoting M.R. Cunningham, The Prediction of Employee Violence, 49 *Police Chief* 53 (1986)) (discussing studies). Efforts to predict violence have also been hampered by the generally low validity of police selection procedures, lack of consensus on what characteristics make a good police officer, diversity of police performance requirements, and the changing nature of policing itself. *Id.* at 153. There have also been a series of studies that have sought to determine whether police officers have an identifiable "police personality" that is distinct from that of members of the general public. These efforts have been largely inconclusive. See Joel Lefkowitz, Psychological Attributes of Policemen: A Review of Research and Opinion, 31 *J. Soc. Issues* 3 (1975); Worden, *supra* note 6, at 26 (citing Robert W. Balch, The Police Personality: Fact or Fiction?, 63 *J. Crim. L. Criminology & Police Sci.* 106 (1972)).

n38. See John Monahan, Mental Disorder and Violent Behavior: Perceptions and Evidence, 47 *Am. Psychologist* 511 (1992) (finding that the relationship between mental health and violence is limited, as only a minority of people with mental health problems are prone to violence and those who are prone to violence may only act violently under certain circumstances); see also John Monahan et al., Rethinking Risk Assessment 7-13 (2001) (advocating an actuarial approach involving multiple, interacting risk factors to assess potential for violence).

n39. See, e.g., John J. Broderick, *Police in a Time of Change* (2d ed. 1977); *Brown, supra* note 4, at 223-38; William Ker Muir, Jr., *Police: Streetcorner Politicians* 26 (1977); Susan O. White, A Perspective on Police Professionalization, 7 *L. & Soc. Rev.* 61, 70 (1972).

n40. Worden, *supra* note 6, at 26.

n41. *Id.*

n42. See *Brown, supra* note 4, at 242-43; Jeffrey B. Snipes & Stephen D. Mastroki, An Empirical Test of Muir's Typology of Police Officers, 14 *Am. J. Crim. Just.* 268, 291 (1990); Worden, *supra* note 6, at 35, 42 (discussing a Police Services Study of twenty-four police departments in three metropolitan areas that examined the impact of institutional arrangements on the delivery of police services and concluding that "overall, ... officer's characteristics contribute very little to an explanation of the use of reasonable or improper force in these data"); Worden, *supra* note 32, at 701.

n43. Empirical testing supports the connection between various sociological factors and officer behavior. In studies examining the use of the arrest power by police officers, sociological factors explained about half of the variation in arrest. Worden, *supra* note 6, at 25. Moreover, many sociological factors that correlate with police violence are difficult or impossible to change, making them less useful in crafting solutions to police violence.

n44. For a list of studies that have attempted to compare violence-involved officers with non-violence-involved officers in comparable settings involving lethal force, see Toch, *supra* note 26, at 107.

n45. Worden, *supra* note 6, at 27.

n46. Scrivner, *supra* note 19, at 20 (noting the importance of "situational" and "organizational" factors in addressing the problem of police brutality); see also *Brown, supra* note 4, at 243 (concluding that the "weight of the evidence" suggests that the role of "occupational socialization" is more important than "deeply rooted psychological attributes" on police behavior).

n47. See generally Mary M. Cheh, Are Lawsuits the Answer to Police Brutality?, in *Police Violence, supra* note 6, at 247 (arguing that criminal sanctions deter individual officers but are not an effective way to cure systemic misbehavior because criminal sanctions cannot "force fundamental change in how a department is run, supervised, led, and made accountable").

n48. Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress

42 U.S.C. 1983 (2000).

n49. Section 242 provides, in pertinent part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States ... shall be fined under this title or imprisoned not more than one year, or both

18 U.S.C. 242 (2000). In situations involving bodily injury or use or attempted use of a dangerous weapon, 242 calls for a fine and imprisonment for not more than ten years. If death occurs, or if the defendant's acts included certain other crimes such as kidnapping or sexual abuse, the defendant may be sentenced to life in prison or to death. A conspiracy charge can also be filed. See 42 U.S.C. 241 (2000).

n50. The Fourth Amendment authorizes police officers to use only that amount of force that is reasonable in light of all the circumstances as they appeared at the time. See *Graham v. Connor*, 490 U.S. 386, 396 (1989). Special rules apply to the use of deadly force. See *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (holding that the use of deadly force is reasonable only if the officer has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others" and the officer reasonably believes that such force is necessary to make the arrest or prevent escape).

n51. See, e.g., Jerome H. Skolnick & James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* 193-216 (1993) (discussing general beliefs and economic motives that lead to ineffective regulation of police); Banes, *supra* note 14, at 1317-40 (discussing unstated assumptions that influence judges); David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 *Harv. C.R.-C.L. L. Rev.* 465, 480-88 (1992) (discussing the courts' failure to respond to internal police policies). See generally Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. Section 1983 Is Ineffective in Deterring Police Brutality*, 44 *Hastings L.J.* 753 (1993)

(discussing reasons why 1983 fails to deter police brutality).

n52. See Cheh, *supra* note 47, at 254-55 (discussing special role of 242 in police brutality prosecutions).

n53. See *id.* at 251.

n54. See Skolnick & Fyfe, *supra* note 51, at 1196-98 (discussing inadequacy of criminal liability to establish professional norms of behavior).

n55. See Cheh, *supra* note 47, at 251-52 (listing such features as government's burden to prove its case beyond a reasonable doubt, the right to trial by jury, the right to remain silent, and the right to counsel).

n56. See *id.* at 262 (noting that in every state it is a complete defense if the officer acted reasonably under the circumstances or the officer reasonably, though mistakenly, believed that the use of force was necessary).

n57. See generally Human Rights Watch, *supra* note 8, at 90-91 (discussing difficulties of litigating cases against police officers).

n58. See Cheh, *supra* note 47, at 252-53.

n59. See *id.* at 253.

n60. See *id.*

n61. See Human Rights Watch, *supra* note 8, at 85.

n62. See Cheh, *supra* note 47, at 259.

n63. See *id.*

n64. See *id.* at 256.

n65. Plaintiffs are unlikely to know that attorney's fee recovery is available in 1983 suits and the assumption that they would have to fund their own legal representation might deter them from bringing suits. Moreover, even with the fee shifting statute, there may not be a ready supply of civil rights attorneys willing to take the risk of nonpayment, especially in cases involving relatively small amounts of damages. See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 *N.Y.U. L. Rev.* 785, 787 (1970); see also Patton, *supra* note 51, at 755-56.

n66. See Cheh, *supra* note 47, at 253. Cf. Kenneth Adams, *Measuring the Prevalence of Police Use of Force*, in *Police Violence*, *supra* note 6, at 52, 68 (arguing that fear of retaliation hinders filing of citizen complaints).

n67. *Graham v. Conner*, 490 *U.S.* 386, 396 (1989).

n68. *Id.*

n69. See Patton, *supra* note 51, at 756.

n70. See *id.* at 757.

n71. See Mollen Commission Report, *supra* note 17, at 53.

n72. It is not unusual for police to charge suspects against whom they have applied force with resisting arrest. Such charges may be legitimate or retaliatory. In either case, however, they become a bargaining chip for obtaining the release of a potential 1983 suit. See *Newton v. Rumery*, 480 U.S. 386, 392-93 (1987) (affirming the constitutionality of release-dismissal agreements in 1983 cases).

n73. In 1994, the Mollen Commission identified three types of perjury: testimonial perjury (when an officer lies during a court proceeding); documentary perjury (when an officer lies in an affidavit or criminal complaint); and falsification of police records. Mollen Commission Report, *supra* note 17, at 36. The Mollen Commission reported that police perjury had become "so common that it had spawned its own word: 'testilying.'" *Id.* Following the Commission's report, the term "testilying" generated its own discussion, and subsequent academic literature suggests that police perjury is common in many police departments across the country. Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 *Washburn L.J.* 211, 221 (2000). One scholar characterizes police perjury as "pervasive." Donald A. Dripps, *Criminal Law: Police, Plus Perjury, Equals Polygraphy*, 86 *J. Crim. L. & Criminology* 693, 693 (1996) (citing Robert P. Burns, *Bright Lines and Hard Edges: Anatomy of a Criminal Evidence Decision*, 85 *J. Crim. L. & Criminology* 843, 863 n.99 (1995)). Another scholar characterizes police perjury as "an integral feature of urban police work." *Id.* (citing Tracy Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 *S. Cal. L. Rev.* 1, 70 (1994)).

n74. See Human Rights Watch, *supra* note 8, at 77; Bandes, *supra* note 14, at 1319-27; Cheh, *supra* note 47, at 253.

n75. Perceptions of police significantly vary by race and socioeconomic class. See, e.g., Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in *Police Violence*, *supra* note 6, at 129, 137-38.

n76. See Bandes, *supra* note 10, at 677, 679; Cheh, *supra* note 47, at 253. See generally Patton, *supra* note 51, at 764-66 (discussing jury bias).

n77. See *Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

n78. See *Ex parte Young*, 209 U.S. 123, 155-56 (1908).

n79. See *Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983). For further discussion of the unavailability and potential importance of injunctive suits against police departments, see *infra* Part I.D.

n80. See *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

n81. See *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

n82. *Graham v. Connor*, 490 U.S. 386, 396 (1989); see also *Saucier v. Katz*, 533 U.S. 194 (2001) (holding that defense of qualified immunity applies in excessive force cases).

n83. But see *infra* Part I.C (discussing *Wilson v. Chicago*, 6 F.3d 1233 (7th Cir. 1993)).

n84. It is obviously untenable that a reasonable officer would think it was constitutional to sodomize a prisoner in the bathroom of the police station. Thus, there would be no qualified immunity for the abusers of Abner Louima.

n85. The defendant also has the advantage of an interlocutory appeal if a court denies his motion for qualified immunity, which, even if unsuccessful, causes delay and raises the costs of the plaintiff's suit.

n86. Indeed, as I argue later in this Article, I am not at all convinced that increasing the scope of civil and criminal sanctions would be productive if, as has been argued, it exacerbates defensive features of police culture that make reform more difficult. See *infra* notes 503-04 and accompanying text; see also John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 *Va. L. Rev.* 47, 73-78 (1998) (arguing that qualified immunity is necessary to avoid deterrence of socially beneficial police conduct). For the classic overdeterrence argument, see Peter H. Schuck, *Suing Government* 59-81 (1983).

n87. See generally James J. Fyfe, Training to Reduce Police-Civilian Violence, in *Police Violence*, *supra* note 6, at 165, 168 (describing how a problem solving approach can be used to develop a set of principles and

protocols for handling particular kinds of police-citizen encounters such as hostage situations and encounters with mentally disturbed people).

n88. See Adams, *supra* note 66, at 60; Worden, *supra* note 6, at 28. One of the reasons is that more experienced officers learn to avoid certain kinds of situations that could escalate into a situation necessitating the use of force. See generally Fyfe, *supra* note 87, at 168, 170-72 (decriing focus on the "final frame" in analyzing citizen-police interactions and urging attention to how the officer behaved in the moments leading up to the confrontation).

n89. See Fyfe, *supra* note 87, at 165-66 (describing the destructive impact of excessive force resulting from unskilled policing); Carl B. Klockars, A Theory of Excessive Force and Its Control, in *Police Violence*, *supra* note 6, at 6 (noting that "police can engage in all kinds of objectionable behavior without transgressing criminal or civil definitions of excessive force").

n90. Klockars, *supra* note 89, at 13 (noting that the "kind of excessive force that results from unskilled policing" and does not give rise to criminal or civil liability is not viewed as a "problem" by police managers).

n91. See 3 Martin A. Schwartz, Section 1983 Litigation: Federal Evidence 13-15 (2d ed. 1995). This doctrinal feature also makes qualified immunity more likely than it would otherwise be and favors police officers in cases that go to trial by limiting the inquiry to whether the officer's conduct was reasonable given the circumstances immediately surrounding the use of force.

n92. See, e.g., *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (holding that the officer's actions "leading up to the [use of force] are irrelevant to the objective reasonableness of his conduct at the moment" he applied the force); *Dickerson v. McClellan*, 101 F.3d 1151, 1161-62 (6th Cir. 1996) (same); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (same); *Diaz v. Salazar*, 924 F. Supp. 1088, 1095-97 (D.N.M. 1996) (rejecting excessive force claim against nonshooting officers based on the argument that their conduct prior to the shooting created a dangerous situation); *Estate of Saldana v. Weitzel*, 912 F. Supp. 413, 416 (E.D. Wis. 1996) (holding that "unless the officer has provoked the suspect, only the events at or just prior to the shooting determine whether the officer acted reasonably"). But see *Abraham v. Raso*, 183 F.3d 279, 291-92 (3d Cir. 1999) (holding that a "rigid rule" that excludes evidence of events preceding the use of force is inconsistent with the Supreme Court's direction to consider the totality of the circumstances in excessive force cases); *Deering v. Reich*, 183 F.3d 645, 652 (7th Cir.), cert. denied, 528 U.S. 1021 (1999) (holding that the totality of the circumstances inquiry is not limited to the precise moment of the shooting); *Allen v. Muskogee*, 119 F.3d 837, 840-41 (10th Cir. 1997) (in excessive force episode lasting only ninety seconds, the court held that events leading up to the application of force are relevant if "immediately connected" to the threat of force). Sometimes broadening the temporal inquiry redounds to the benefit of police officers. See, e.g., *Isquierdo v. Frederick*, 922 F. Supp. 1072, 1079-80 (M.D.N.C. 1996) (refusing to "freeze frame" the precise moment that deadly force was used and

allowing police officers to introduce evidence of their reasonable misperceptions of the events leading up to the shooting).

n93. See Fyfe, *supra* note 87, at 171 (noting that the "final frame" orientation of much police training has been influenced by the legal test, which asks whether force was justified "at the instant" it was applied).

n94. See *Lincoln County v. Luning*, 133 U.S. 529, 520 (1890).

n95. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

n96. See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (holding the municipality liable for actions of its city manager).

n97. Cases alleging injury resulting from a governmental policy of "failing to screen" new employees are plagued by a similar set of problems. See *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 406-11 (1997).

n98. See Bandes, *supra* note 14, at 1279-80; Rudovsky, *supra* note 51, at 486 (demonstrating difficulty of bringing and winning failure to train claims).

n99. See Bandes, *supra* note 14, at 1309-18.

n100. *City of Canton v. Harris*, 489 U.S. 378, 390-92 (1989).

n101. *Id.* at 390 n.10.

n102. See Bandes, *supra* note 14, at 1330.

n103. A dramatic recent example is the cost of liability to the City of Los Angeles for the recent Rampart scandal. In an April 2000 interview, Mayor Richard Riordan estimated that of \$ 150.5 million in new spending for the upcoming fiscal year's budget, \$ 40.9 million, one quarter of the city's budget, would go toward paying for liability costs in connection with the Rampart cases. Jim Newton & Tina Daunt, *Rampart Costs Weigh Heavily in Riordan's Fiscal Plan*, L.A. Times, Apr. 18, 2000, at B1. By February 2003, Los Angeles had already paid out a total of \$ 42 million to settle 96 out of 190 Rampart-related claims. John M. Glionna, *Oakland Pays for Police Abuse*, L.A. Times, Feb. 20, 2003, at 1. In another recent example, a series of six shootings by police officers in Detroit, all of whom the department cleared, resulted in settlements totaling \$ 8.6 million. David G. Grant et al., *Detroit Is Soft On Killer Cops*, Detroit News, May 14, 2000, at A1 (describing a series of forty fatal shootings by police in Detroit in previous five years, in which thirty-five officers were exonerated, four were charged with misdemeanors, and one was convicted and is serving time in prison).

n104. See Human Rights Watch, *supra* note 8, at 229.

n105. This figure includes liability for assaults, false arrests, excessive force, and police shootings. See *id.* at 304.

n106. See *id.* at 304-05.

n107. See Gary Washburn, *\$ 8 Million Settlement Backed for 3 Cop-Related Suits*, Chi. Trib., Apr. 24, 1998, at 1. For information about the costs of liability in fourteen different cities, see generally Human Rights Watch, *supra* note 8, at 123-383; Victor Kappeler, *Critical Issues in Police Civil Liability 10* (2001) (providing a chart of police liability in selected cities).

n108. Indemnification for costs incurred in connection with 1983 liability is a matter of state law. See Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* 16.24, at 338 (3d ed. 1997). State statutes vary widely as to the scope of coverage, extent of local autonomy over terms and conditions of reimbursement, and limits on amounts of reimbursement. See generally Schuck, *supra* note 86, 85-88 (discussing variety of state statutes). Despite these variations, as a general matter, a state or local official who becomes the subject of a lawsuit can ordinarily count on being defended and indemnified by his or her agency. See Jeffries, Jr., *supra* note 86, at 50.

n109. I am not suggesting that indemnification removes all instrumental benefits of liability, but it certainly

dilutes them significantly. See generally Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 *Vand. L. Rev.* 583, 588 *n.17* (1998) (describing the real and perceived uncertainties of state-controlled indemnification).

n110. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

n111. *Owen v. City of Independence*, 445 U.S. 622 (1980).

n112. See *Owen*, 445 U.S. at 652 ("The threat that damages might be levied against the city may encourage those in a policy-making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringement on constitutional rights."); *id.* at 652 *n.27* ("In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates.").

n113. See Human Rights Watch, *supra* note 8, at 66; Christopher Commission Report, *supra* note 20, at 41.

n114. Significantly, many police departments, even in major cities, have not yet computerized their records in a way that makes them available for tracking statistics either globally or in connection with specific individuals. See Adams, *supra* note 66, at 65; see also *infra* notes 268-69, 476-78 and accompanying text.

n115. See Human Rights Watch, *supra* note 8, at 83 (giving examples of two cities, Boston and Atlanta, that do not keep records of liability costs).

n116. See Christopher Commission Report, *supra* note 20, at 41; Kolts Commission Report, *supra* note 21, at 160; see also Skolnick & Fyfe, *supra* note 51.

n117. Skolnick and Fyfe report that officials in the LAPD view civil damages "as a reasonable price for the presumed deterrent effect of the department's most violent responses to lawbreaking." Skolnick & Fyfe, *supra* note 51, at 205. The officials reason that "the cheapest way to deter potential offenders is to encourage cops to be aggressive--or proactive--to tolerate and foot the bill for their excesses, and hope that the sensational headlines and television news stories that follow will encourage criminals to take their business elsewhere." *Id.*

n118. *Id.* at 206 (citing Daryl F. Gates, A Training Analysis of the Los Angeles Police Department, Oct. 21, 1991, at 14).

n119. For example, the Kolts Commission reported that, in the three and a half years between January 1989 and May 1992, the settlements and verdicts in all excessive force cases against the Los Angeles Sheriff's Department--which was the third largest urban police force in the country, ranking behind Chicago and New York City--totaled \$ 15.5 million, out of a total annual police department budget of \$ 500 million. Kolts Commission Report, *supra* note 21, at 7, 26. The Los Angeles Sheriff's Department's budget for the same services was approximately \$ 550 million. *Id.*

n120. Skolnick & Fyfe, *supra* note 51, at 207.

n121. *Id.*

n122. See generally Schuck, *supra* note 86, at 125-46; Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 *U. Chi. L. Rev.* 345, 348 (2000).

n123. See Mollen Commission Report, *supra* note 17, at 2-4; Bandes, *supra* note 14, at 1322.

n124. For a notable exception, see Bandes, *supra* note 10, at 673. See generally Bandes, *supra* note 14. For an early example outside of the policing context, see Christina B. Whitman, Governmental Responsibility for Constitutional Torts, 85 *Mich. L. Rev.* 225 (1986).

n125. This critique also applies to 242 prosecutions and cases involving the exclusionary rule.

n126. While 1983 failure-to-train claims are theoretically about identifying patterns of misconduct, they are largely unsuccessful in addressing systemic problems for reasons that this article will explain. See *infra* Part II; see also *infra* note 472 and accompanying text (discussing Attorney General suits under 42 *U.S.C.* 14141 as a

possible solution).

n127. See *infra* Part I.C (discussing evidence rules that keep this information out).

n128. See *infra* notes 21, 256 and accompanying text (noting that in many departments a small number of officers have many more brutality complaints than most of their colleagues).

n129. Of course the comparison among departments has to be appropriate. See, e.g., Adams, *supra* note 66, at 68-71 (noting that comparing the number of complaints filed or sustained in different departments as an indicator of relative incidence of police violence can be misleading because of definitional differences, differences in relative ease of filing complaints, differences in how complaints are processed, etc.).

n130. See Bandes, *supra* note 14, at 1288-305 (discussing the Area Two Violent Crimes Unit scandal in detail).

n131. See *People v. Wilson*, 506 N.E.2d 571, 572 (Ill. 1987).

n132. See John Conroy, The Shocking Truth, Chi. Reader, Jan. 10, 1997, 1.

n133. *Wilson*, 506 N.E.2d at 573.

n134. A physician who examined Wilson on the evening of the alleged abuse testified that he had some fifteen different injuries, including two cuts on his face and head (one serious enough to require stitches), a black eye, bruises on his chest, several "linear abrasions or burns" on his chest, shoulder, and chin, and a second-degree burn (six inches long and two inches wide) on his right thigh. *Id.* at 573-74. Hospital records also contained photographs of odd, U-shaped scars on Wilson's ears. See Conroy, *supra* note 132, at 2. Wilson contended that police attached alligator clips to his ears and then connected them to a black box that generated electricity, which caused the scars. *Id.* The medical director of the prison facility where Wilson was interrogated, who had also examined Wilson on the same evening and heard Wilson's story of having been beaten, electrically shocked, and held against a radiator, corroborated these observations at the suppression hearing. *Wilson*, 506 N.E.2d at 574.

n135. See *Wilson*, 506 N.E.2d at 572, 574. The trial judge concluded that Wilson suffered a cut near his right eye at the time of his arrest and that he sustained the other facial injuries after the police obtained the confession. *Id.* at 574.

n136. See Bandes, *supra* note 14, at 1298.

n137. *Id.* at 1299 (citing G. Flint Taylor, Two Significant Decisions in Chicago Torture Cases, Police Misconduct & Civil Rts. L. Rep., July-Aug. 1997, at 1).

n138. *Id.*

n139. See *Wilson v. City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993).

n140. John Conroy, House of Screams, Chi. Reader, Jan. 26, 1990, at 27.

n141. *Wilson*, 6 F.3d at 1238.

n142. *Id.* at 1237-38. For a discussion of the use of prior acts evidence, see *infra* notes 168-72 and accompanying text.

n143. *Wilson*, 6 F.3d at 1236.

n144. *Id.* at 1238. The case ultimately settled for more than one million dollars before going to trial for the third time. See Conroy, *supra* note 132, at 1.

n145. See generally Bandes, *supra* note 14, at 1288-305.

n146. Andrew Wilson claimed that, after his arrest in February 1982 for the suspected murder of two police officers in connection with a traffic stop, he was beaten by Lieutenant Jon Burge and officers Patrick O'Hara, Thomas McKenna, and John Yucaitis. See *Wilson v. City of Chicago*, 684 F. Supp. 982, 983 (N.D. Ill. 1988). Gregory Banks alleged that after the police arrested him in October 1983 for armed robbery and murder, Detectives Peter Dignan and Charles Grunhard, Police Sergeant John Byrne, and other Area Two officers beat him and placed a gun in his mouth in order to get him to confess. See *People v. Banks*, 549 N.E.2d 766, 767 (Ill. App. Ct. 1989). Darryl Cannon alleged that, after his arrest for murder in November 1983, Area Two officers Byrne, Dignan, and others coerced him to confess by subjecting him to electroshock and games of Russian roulette. See *People v. Cannon*, 688 N.E.2d 693, 694 (Ill. App. Ct. 1997). Lonza Holmes testified at his suppression hearing that he confessed because Lieutenant Burge, Detective Madigan, and others severely beat him. See *People v. Holmes*, 556 N.E.2d 539, 544 (Ill. App. Ct. 1989), appeal denied, 564 N.E.2d 843 (Ill. 1990). Aaron Patterson, who the police arrested for murder in 1986, claimed that Area Two officers beat and suffocated him with plastic resembling a typewriter cover in order to induce him to confess. See *People v. Patterson*, 610 N.E.2d 16, 28 (Ill. 1992).

n147. See generally Bandes, *supra* note 14, at 1288-305.

n148. Human Rights Watch, *supra* note 8, at 153. It bears noting that in the cases identified by the People's Law Office, all of the victims were black and all of the perpetrators were white. Bandes, *supra* note 14, at 1288.

n149. See, e.g., *Wilson v. City of Chicago*, 707 F. Supp. 379 (N.D. Ill. 1989); John Conroy, *supra* note 1, at 1 (reporting that Chicago agreed to pay \$ 3,000, \$ 25,000 and \$ 92,500 to settle three civil suits alleging torture by Area Two detectives).

n150. See Bandes, *supra* note 14, at 1288 (emphasis added). The repeated, similar allegations included suffocation with a typewriter cover, Russian roulette, burning by attachment to a radiator, and the use of a mysterious black box to administer electric shocks to the victim's heads, genitals and other body parts. See *id.* at 1288-305.

n151. *Id.* at 1288.

n152. *Id.* at 1289.

n153. Office of Prof'l Standards, Special Project (Michael Goldston & Francine J. Sanders, investigators, 1990) [hereinafter Goldston Report].

n154. *Id.* at 3. Despite the OPS findings, none of the defendants were successful in suppressing their confessions on the ground that they had been physically coerced. According to Susan Bandes, the major obstacle to the success of these motions was an inability to introduce pattern evidence--reports of other, similar incidents--that would have supported the defendants' accounts of the bizarre treatment they allegedly received. See Bandes, *supra* note 14, at 1276-77.

n155. Human Rights Watch, *supra* note 8, at 155.

n156. *Id.* at 156.

n157. *Id.* According to Human Rights Watch, OPS investigators did reopen twelve of the torture cases and ultimately recommended discipline for several officers, but the OPS director overruled the recommendations. *Id.* at 155-56.

n158. *United States ex rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078, 1094 (N.D. Ill. 1999).

n159. Bandes, *supra* note 14, at 1301.

n160. See *Wiggins v. Burge*, 173 F.R.D. 226 (N.D. Ill. 1997).

n161. Bandes, *supra* note 14, at 1301.

n162. *Id.* at 1301-02 (citing *Leads the Cops Don't Want to Follow*, Chi. Trib., Feb. 13, 1992, at 20).

n163. *Id.* at 1302.

n164. Andrew Fegelman, *Judge Upholds Firing of Police Commander Involved in Torture Case*, Chi. Trib., Feb. 11, 1994, at 6.

n165. See *Citing Race Angle in a Float, Parade Bars a Police Entry*, N.Y. Times, Mar. 10, 1993, at A17.

n166. Sometime in the early 1980s, multiple victims began to come forward to report that as children or adolescents, they had been molested by Catholic priests. Since then, there has been a virtual explosion of such reports. One source estimates that from 1982 to 1993, "a priest has been accused of abusing a youngster an average of once a week, according to church documents, news reports and many interviews." Jason Berry, *Fathers and Sins: An Uneasy Coalition of Activists and Clerics Is Forcing the Catholic Hierarchy to Confront the Problem of Sexually Abusive Priests*, L.A. Times Mag., June 13, 1993, at 24, 26. Moreover, it has now become clear that many priests whose superiors knew they were abusers were permitted--sometimes after attempts at rehabilitation--to continue in the ministry. Under these circumstances, no one is claiming that the problem involves a few "rogue priests." It is clearly a systemic problem. See, e.g., *id.*; Lisa M. Smith, Note, *Lifting the Veil of Secrecy: Mandatory Child Abuse Reporting Statutes May Encourage Catholic Church to Report Priests Who Molest Children*, 18 L. & Psychol. Rev. 409, 409 (1994).

n167. See *infra* notes 174-80 and accompanying text.

n168. *Fed. R. Evid. 404(b)* states in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident

Although the Federal Rules are not formally applicable in state court, Rule 404(b) is largely a codification of state common law. See generally 3 Schwartz, *supra* note 91, at 71 n.100 (describing use of pattern evidence in Section 1983 suits).

n169. Id.

n170. Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* 221-22 (2d ed. 1999).

n171. Id.

n172. See, e.g., *Berkovich v. Hicks*, 922 F.2d 1018, 1022 (2d Cir. 1991); *People v. Patterson*, 610 N.E.2d 16, 37 (Ill. 1993) (holding that the decision to exclude prior-acts evidence is "within the sound discretion of the trial court" and refusing to "second guess the trial court's determination").

n173. Bandes, *supra* note 14, at 1295.

n174. See, e.g., *People v. Banks*, 549 N.E.2d 766, 771-72 (Ill. App. Ct. 1989).

n175. Mueller & Kirkpatrick, *supra* note 170, at 216; see, e.g., *Hirst v. Gertzen*, 676 F.2d 1252, 1262 (9th Cir. 1982).

n176. Mueller & Kirkpatrick, *supra* note 170, at 232; see, e.g., *United States v. Sappe*, 898 F.2d 878, 879-80 (2d Cir. 1990) (in prosecution for bank robbery using a toy gun wrapped in newspaper, court properly admitted as modus operandi evidence that defendant had robbed other banks this way); *United States v. Woods*, 613 F.2d 629, 635 (6th Cir. 1980) (signature crime involving armed robbery by robbers wearing ski masks, goggles, and jumpsuits and using stolen vehicle for getaway car).

n177. See, e.g., *Hicks*, 922 F.2d at 1022 (quoting *United States v. Benedetto*, 571 F.2d 1246, 1249 (2d Cir. 1978)) (holding that to prove a pattern of conduct, the other acts must share "'unusual characteristics' with the act charged or represent a 'unique scheme'"); *Banks*, 549 N.E.2d at 771-72; see also *United States ex rel. Maxwell v. Gilmore*, 37 F. Supp. 1078, 1094-95 (N.D. Ill. 1999) (faulting Illinois Supreme Court for failure to reconsider admissibility of prior-acts evidence after pattern of brutality in Area Two had become public); *People v. Orange*,

659 N.E.2d 935, 941 (Ill. 1995) (rejecting defendant's claim that his trial counsel was deficient for failing to investigate allegations of similar abuse because the alleged acts were generalized and dissimilar to defendant's claimed abuse); *People v. Hobley*, 556 N.E.2d 992, 1010 (Ill. 1994) (plaintiff's pattern evidence not admitted on the ground that it was merely general evidence of coercive activity in Area Two); *People v. Murray*, 626 N.E.2d 1140, 1150 (Ill. App. Ct. 1993) (plaintiff's pattern evidence not admitted on the ground that it was merely general evidence of coercive activity in Area Two).

n178. See, e.g., *Conroy*, supra note 1, at 17; *Hobley*, 637 N.E.2d 992. *Hobley*'s attorneys were able to find evidence regarding three other defendants who claimed that the same officers pushed, strangled, beat, punched, and kicked them. *Id.* at 998-99, 1009-10. According to the court, the allegations of two of the witnesses were not similar enough to constitute a modus operandi. *Id.* at 1009. The testimony of the third defendant--who claimed that the same officers had beat him around the face, head, ankles, and ribs; punched him six times; and kicked him in the stomach--was sufficiently similar but not close enough in time, having occurred three years prior to the abuse alleged by *Hobley*. *Id.*

n179. See, e.g., *People v. Maxwell*, 670 N.E.2d 679, 687 (Ill. 1996), modified, *People v. Coleman*, 701 N.E.2d 1063, 1072-74 (Ill. 1998); *Orange*, 659 N.E.2d at 940-41; *People v. Patterson*, 610 N.E.2d 16, 37-38 (Ill. 1992); *Murray*, 626 N.E.2d at 1149-50.

n180. *People v. Cannon*, 688 N.E.2d 693, 695 (Ill. App. Ct. 1997).

n181. *Id.*

n182. *Id.* at 695-96.

n183. *Id.* at 695.

n184. *Id.* at 697.

n185. *Id.*

n186. See also *Wilson v. City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993) (holding that evidence of prior, similar abuse by same and other Area Two investigators was "plainly relevant" because it made it more likely that the same tactics were used on plaintiff Wilson); *United States ex rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078, 1094-95 (N.D. Ill. 1999) (granting writ of habeas corpus ordering that defendant be permitted to conduct discovery and receive an evidentiary hearing on his coerced confession claim in light of testimony of others who alleged torture by the same Area Two detectives); *People v. Banks*, 549 N.E.2d 766, 771 (Ill. App. Ct. 1989) (reversing trial court's exclusion of testimony by another defendant of identical mistreatment--beating with a flashlight and suffocation with a plastic bag--by the same Area Two detective who allegedly tortured defendant Banks).

n187. Ironically, to the extent that prior-acts evidence is more similar to the charged act, and thus more probative, it may also be more prejudicial. The "very resemblance to the charged offense also increases the risk that juries may misuse evidence of prior acts by [judging the actor] a bad person or deciding that the prior acts prove the charged offense simply because they support the one inference that Rule 404 forbids: He did it before, so he probably did it this time." Mueller & Kirkpatrick, *supra* note 170, at 224.

n188. Suffocation with a typewriter cover or bag over the victim's head, applying shocks to the victim's genitals or other body parts using a "black box," and subjecting the victim to games of Russian roulette are notable examples.

n189. There are, of course, good reasons for the rule against bad-act evidence.

n190. See, e.g., Chris Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 *U. Ill. L. Rev.* 364.

n191. Cf. Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 *Mich. L. Rev.* 2001, 2008-10 (1999) (making the parallel argument that requiring race cases to be litigated under the Fourteenth Amendment rather than the Fourth Amendment makes the exclusion remedy unavailable).

n192. See *supra* note 96 and accompanying text.

n193. See *infra* note 452 and accompanying text.

n194. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989).

n195. *Id.*

n196. See *id.*

n197. *Id. at* 388-89.

n198. *Id. at* 390 (internal footnotes omitted).

n199. *Id. at* 396 (O'Connor, J., concurring in part and dissenting in part).

n200. *Id. at* 390 *n.10*, 396 (O'Connor, J., concurring in part and dissenting in part).

n201. *Id. at* 390 *n.10*, 397 (O'Connor, J., concurring in part and dissenting in part). As the reader will have surmised, failure to train includes not only the question of whether formal training was adequate, but also whether policymakers failed to monitor and supervise employees.

n202. See *supra* notes 174-82 and accompanying text.

n203. See *supra* notes 180-86 and accompanying text.

n204. *Bandes*, supra note 14, at 1288.

n205. *Id.* at 1294.

n206. Human Rights Watch, supra note 8, at 153.

n207. Goldston Report, supra note 153, at 3. Significantly, while the OPS report questioned the "manner" in which the People's Law Office approached some of the alleged victims, *id.* at 2, the OPS ultimately concluded that there was credible evidence that the abuse claimed by many of the alleged victims did, in fact, occur.

n208. *Id.*

n209. *Wilson v. City of Chicago*, 6 F.3d 1233, 1236 (7th Cir. 1993).

n210. *Id.* at 1240.

n211. The City conceded that Brzeczek was a "policymaker" for purposes of governmental liability under 1983. See *id.* See generally *Auriemma v. Rice*, 957 F.2d 397 (7th Cir. 1992).

n212. *Wilson*, 6 F.3d at 1240.

n213. In the words of the court of appeals, "the office had done nothing except lose a lot of the complaints." *Id.*

n214. Brzeczek wrote a letter to the state's attorney indicating that he would not take action unless the state's attorney could assure him that doing so would not interfere with Wilson's prosecution. Brzeczek did not hear

from the state's attorney and "true to his word" Brzezcek did nothing further. Id.

n215. Id. (emphasis added).

n216. Id.

n217. Id. (emphasis added).

n218. See *infra* notes 385-86 and accompanying text.

n219. As I explain in more detail, see *supra* notes 194-201 and accompanying text, the Supreme Court's official policy jurisprudence explicitly recognizes the danger that organizations might try to hide their misdeeds behind formal policies that are routinely ignored.

n220. See generally John Conroy, *Unspeakable Acts: Ordinary People* (2000).

n221. See *infra* note 298 and accompanying text.

n222. Douglas Laycock, *Modern American Remedies* 257 (1994). Structural remedies were quite controversial when the courts first began to use them to desegregate schools and clean up prisons, inspiring a flood of academic commentary. Although they continue to inspire criticism from some academic quarters, structural injunctions have now become an accepted part of the judicial landscape, at least in these limited contexts. Courts have also used structural reform decrees, to a limited degree, in attempts to reform child protection and social services agencies. For a general discussion of structural reform litigation, see John C. Jeffries, Jr. et al., *Civil Rights Actions: Enforcing the Constitution* 745-897 (2000).

N223. *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

n224. An officer puts an arrestee in a chokehold by placing his or her forearm across the arrestee's neck and applying pressure. The result of the chokehold is dangerous and unpredictable. Depending on the position of the officer's arm and resistance by the arrestee, the hold may crush the larynx, trachea, or hyoid, and result in asphyxiation or cardiac arrest. *Id. at 117 n.7*. Lyons asked the court for an injunction prohibiting the use of chokeholds absent the threat of deadly force. *Id. at 133*.

n225. In his original complaint, Lyons alleged that the use of chokeholds had resulted in two deaths. By the time the Supreme Court heard the case, the number of deaths had risen to fifteen. *Id. at 100*.

n226. Before the Supreme Court heard Lyons's case, the Chief of Police in Los Angeles prohibited the use of bar-arm chokeholds under any circumstances and the Board of Police Commissioners imposed a six-month moratorium on the use of carotid-artery chokeholds except where there was justification for the use of deadly force. *Id.*

n227. *Id. at 105*.

n228. *Id. at 105-06*. The Court went on to write that "the additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties." *Id.*

n229. See *id. at 108*.

n230. Notably, the desegregation cases and prison cases do not address standing. These earlier cases involve ongoing harmful conditions that by definition, create a risk of future injury to plaintiffs who continue to be exposed to those conditions. The Lyons Court appears, therefore, to have created the idea of remedial standing.

n231. An exception might be a situation in which the entity actually had a written policy that was itself unconstitutional, and even this situation would have to involve circumstances outside of the plaintiff's control in order to satisfy the Lyons standing requirements.

n232. Laycock, *supra* note 222, at 231.

n233. Jeffries et al., *supra* note 222, at 746.

n234. See *Lyons*, 461 U.S. at 133 (granting a temporary injunction banning chokeholds absent the threat of deadly force).

n235. See generally David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 *Mich. L. Rev.* 2348 (1992).

n236. See *id.* at 2375.

n237. See *id.* at 2377.

n238. See *id.* at 2373.

n239. See *supra* note 18 and accompanying text.

n240. See, e.g., *Brown*, *supra* note 4; Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (2d ed. 1975); Peter K. Manning, *The Police Occupational Culture in Anglo-American Societies*, in *Encyclopedia of Police Science* (William G. Bailey ed., 1989); Worden, *supra* note 6, at 29 (citing William A. Westley, *Violence and the Police: A Sociological Study of Law, Custom, and Morality* (1970)).

n241. See *infra* notes 364-66 and accompanying text.

n242. Worden, *supra* note 6, at 28-31. While much has been written about police occupational culture as a determinant of police behavior, much less scholarly attention has been devoted to the influence of organizational culture in the agency-specific sense.

n243. Christopher Commission Report, *supra* note 20, at i-ii, vii.

n244. *Id.* at ii, iv, ix, 31-35.

n245. See *id.* at xiv (noting that "witness after witness testified to unnecessarily aggressive confrontations between LAPD officers and citizens, particularly members of minority communities").

n246. *Id.* at xiv, 98.

n247. *Id.* at 98.

n248. *Id.* at 99.

n249. *Id.* at 104.

n250. *Id.* at 98.

n251. *Id.*

n252. *Id.* at xiv, 98.

n253. *Id.* at 36. During those same years, the 10% of officers that had the most excessive force complaints accounted for 27.5% of all such allegations. *Id.* Similarly, of nearly 6,000 officers identified in use of force reports from 1987-1991, more than 4,000 had less than five reports, the top 5% accounted for more than 20% of all reports, and the top 10% accounted for 33% of all reports. *Id.* Moreover, according to a thirty-eight year veteran of the LAPD who served as assistant chief for four years, for every reported complaint, there are probably between three and four instances in which the same thing occurred with no complaint filed. *Id.* at 32, 33.

n254. There were a total of approximately 8,450 sworn police officers in the LAPD at the time of the Christopher Commission report. *Id.* at viii. "The top 44 received an average of 7.6 allegations of excessive force or improper tactics compared to 0.6 for all officers reported to be using force; the top 44 received an average of 6.5 personnel complaint allegations of all other types, compared to an average of 1.9 for all officers reported to be using force; and the top 44 were involved in an average of 13 uses of force compared to 4.2 for all officers reported to be using force." *Id.* at 40. The Commission concluded that the "extreme concentration of these data" could not be explained merely by officer assignments and arrest rates because many officers with comparable assignments and duties had not generated the same level of complaints and uses of force. *Id.* at 38.

n255. *Id.* at 37. In one dramatic example, an officer, whose hiring background check identified a problem with his ability to control his temper, "was the subject of 19 personnel complaints, including at least three shootings and 11 complaints of excessive force, in his first two and one-half years with the LAPD. A City psychiatrist reported at that time that the officer's aggressive and violent tendencies were likely to continue or even increase. This prediction was borne out in the officer's remaining seventeen and one-half years on the force, during which he accumulated an additional 43 complaint allegations, including 16 for excessive force or improper tactics." *Id.*

n256. See *id.* at 40-47 (providing examples of problem officers who were commended or promoted despite repeated instances of questionable conduct).

n257. *Id.* at 41. Following their probationary period, officers were evaluated twice yearly in a series of categories, including "quality of public contacts," "performance under stress," "communication skills," and "judgment and common sense." *Id.* at 40-41. The officers are rated as "Strong," "Competent," or "Needs Improvement." *Id.* at 40-41. The form also invites narrative comments and includes a section that requires the listing of the number of disciplinary actions taken against the officer within the six-month period. *Id.* at 41.

n258. *Id.* at 41.

n259. Evaluating supervisors are required to familiarize themselves with the "quality of public contacts" of officers under their command, any pattern of force-related complaints, and other relevant information. *Id.* at 41. This information is available to supervisors. "A summary card listing all complaints against the officer, whether or not sustained, is maintained in the division files, and the officer's personnel file maintained at LAPD headquarters contains detailed information regarding sustained complaints." *Id.* at 41. The LAPD also maintains a database containing a list of sustained and unsustained complaints, although the existence of the database is apparently not generally known within the LAPD. *Id.*

n260. *Id.* at 41-42.

n261. *Id.*

n262. *Id.* at 36.

n263. *Id.*

n264. *Id.* at 38.

n265. The Commission reviewed the litigation files of the eighty-three excessive force cases between 1986-1990 that had resulted in settlements or judgments of \$ 15,000 or more. *Id.* at 56. Some of these cases, as described by the Commission, involved clear incidents of excessive, if not malicious, uses of force. For a description, see *id.* at 57-61. (During this period, the LAPD paid in excess of \$ 20 million in judgments, settlements, and jury verdicts in over 300 lawsuits filed against LAPD officers alleging excessive force. *Id.* at 56. The LAPD investigated all but fourteen of the incidents leading to the eighty-three lawsuits. *Id.* Only twenty-nine percent of the investigations resulted in one or more allegations sustained against an officer for excessive use of force or improper tactics. *Id.* Sixty-one percent of the officers involved in the incidents leading to the suits received no discipline. *Id.* Of the ones who were disciplined, nearly half received admonishments or training. *Id.* The LAPD suspended another group of officers, most for twenty-two days or less, and terminated only three officers, six percent. *Id.* Of the officers involved in the suits, eighty-four percent still received overall positive performance ratings for the relevant time period. *Id.* at 57.

n266. *Id.* at 55.

n267. See *id.* at 38, 55-63.

n268. *Id.* at 38.

n269. The Commission's review of MDT transmissions also revealed inappropriate references to women and gays. See generally *id.* at 87-91.

n270. For a description of the MDT system, see *supra* note 22.

n271. Although the majority of MDT messages involved routine police communications, there were hundreds of inappropriate messages. Many of the transmissions contained enthusiastic descriptions of police beatings and shootings. Christopher Commission Report, *supra* note 20, at 49, 52 ("Capture him, beat him and treat him like dirt"; "Did U arrest the 85yr old lady or just beat her up"--"We just slapped her around a bit ... she/s getting m/t [medical treatment] right now"; "Looking to end 1990 with a good shotgun killing ruggg"--"A full moon and a full gun makes for a night of fun"). Many of the MDT transmissions contained offensive remarks targeted at racial and ethnic minorities, gays, and women. *Id.* at 72-73, 87, 89 ("Sounds like monkey slapping time."; "I almost got me a Mexican last nite but he dropped the dam gun to quick, lots of wit"; "U won't believe this ... that female call again said susp returned ... I'll check it out then I'm going to stick my baton in her"; "No. 1600 how many homosexuals did you give orals to today"). For additional examples of the offensive nature of MDT transmissions reviewed by the Commission, see *id.* at 49-54, 72-73, 76, 86-87, 89.

n272. *Id.* at 48.

n273. The Commission cited a survey conducted by the LAPD of the attitudes of 650 of its sworn officers in which approximately twenty-five percent of the officers agreed that "racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community." *Id.* at 69. A total of twenty-seven percent agreed that "an officer's prejudice towards the suspect's race may lead to the use of excessive force." *Id.* at 69.

n274. *Id.* at 73.

n275. See *supra* notes 18-19, 29-35 and accompanying text.

n276. See *infra* note 279 and accompanying text.

n277. For a detailed discussion of the role of this statute in addressing police brutality, see *infra* Part IV.B.1.

n278. Consent Decree I.A.2, *United States v. City of Los Angeles*, (C.D. Cal. June 15, 2001) (No. 00-11769), <http://www.usdoj.gov/crt/split/documents/laconsent.htm> (last visited Feb. 9, 2004). For a discussion of the features of the consent decree in that lawsuit, see *infra* note 473 and accompanying text. See also *infra* notes 473-85 and accompanying text (discussing the role of 14141 in addressing police brutality).

n279. Consent Decree II.A.39, *City of Los Angeles* (No. 00-11769).

n280. Kolts Commission Report, *supra* note 21, at 1.

n281. *Id.* at 159. One of these deputies had been the subject of twenty-seven use of force/harassment investigations during the prior five years, and another had been the subject of twenty-five investigations. (The LASD routinely destroys investigative records after five years, with the exception of those pertaining to officer-involved shootings.) *Id.* As a group, the sixty-two deputies were responsible for nearly five hundred separate use of force/harassment investigations. *Id.* at 160.

n282. *Id.* at 160.

n283. The Kolts Commission reviewed suits brought against the LASD alleging excessive force in which verdicts or settlements totaled more than \$ 20,000 and the use of force was alleged to have resulted in personal injury to the plaintiffs. *Id.* at 25, 27. The Commission concluded that "most of the cases represent clear examples of excessive force." *Id.* It also noted that "many involved similar situations and repeat patterns," *id.*, and many cases involved repeat defendants, *id.* at 26. The Commission concluded that "little or no discipline was imposed

on the Department members responsible for the excessive force in many of the cases [which] suggests that the Department is tolerant of excessive force and that the elimination of excessive force is not a high priority of the Department." Id. at 25.

n284. Id. at 160-61.

n285. Id. at 161. Until 1991, the LASD had a policy of not investigating officer-involved shootings unless the District Attorney ("DA") brought an indictment. Id. at 137-38. Out of 382 referrals to the DA of possible prosecutions between approximately 1982 and 1992, the DA prosecuted only one shooting incident. Id. at 146. "Hence, in the vast majority of shootings, there never was an investigation to see if administrative discipline [or training] was warranted." Id. at 138. The LASD altered this policy in the early 1990s and began to impose discipline, including demotion or firing, for nonprosecuted but out-of-policy shootings. Id. at 138.

n286. Id. at 169 (noting that the LASD "keeps careful and abundant statistics about itself," but "keeps surprisingly little information in [usable] form pertaining to the use of force" resulting from a "previous policy of self-imposed ignorance" based on fears that the information would become the basis for litigation). For a similar claim, see Herman Goldstein, *Policing a Free Society* 164-65 (1977) (noting that the investigatory and disciplinary process may actually be halted if there is a threat of a lawsuit).

n287. Kolts Commission Report, *supra* note 21, at 170.

n288. Id. at 157.

n289. Id. at 170.

n290. The Commission's conclusion in this regard was based on both testimonial and empirical evidence. Mollen Commission Report, *supra* note 17, at 46. Individual police officers reported to the Commission that, in their experience, corrupt cops were more likely to be brutal. See *id.* The Commission also conducted an empirical study of 234 officers who, based on corruption allegations and comments of field commanders, were most likely to be corrupt. Id. The study compared these officers to a random sample of similarly situated officers. Id. The Commission found that these officers were more than five times as likely as officers in a random general sample group to have five or more unnecessary force allegations filed against them. Id.

n291. Id. at 1-2.

n292. Id. at 48-49. One officer who testified to the Commission about the corruption and brutality that defined his career had been given the nickname "the Mechanic" by his sergeant because he "so openly and frequently 'tuned people up,'" i.e., beat them. Id. at 48 n.7. The nickname was used throughout the officer's career. Id. at 48.

n293. Id. at 49.

n294. Id.

n295. Id.

N296. Id. at 50.

n297. Id. at 49. The Commission's report included a chapter entitled, "Police Culture and Corruption," id. at 51, and its chapter on recommendations included a section entitled, "Police Culture and Management," id. at 112. Although the Commission did not use these terms, its references to police culture encompass both occupational culture and organizational culture.

n298. Goldston Report, *supra* note 153, at 3.

n299. The St. Clair Commission reviewed a random sample of 257 (30%) of the Internal Administration Division complaints filed against its officers in 1989-1990. Report of the Boston Police Department Management Review Committee 104 (1992) [hereinafter St. Clair Commission Report]. Of the officers named in the complaints whose prior history was available, 74% had previous complaints against them. Id. at 110. The median number of prior complaints was three. Id. at 112. Thirteen (10%) of these officers, however, had more than ten prior complaints. Id. This small group of officers accounted for a whopping 246 complaints during the

two year period. That means that 10% of the officers in the sample were responsible for 45% of all previous complaints. *Id.* The Commission reported that only 5.9% of these complaints were sustained, a statistic which "strains the imagination" because it implicitly assumes that "94% of the citizens alleging police misconduct are mistaken or are lying." *Id.* at 115.

n300. *Id.* at 114. In response to the St. Clair Commission's report, the Boston Police Department instituted various reforms in order to address the repeat-brutalizer phenomenon. See generally Human Rights Watch, *supra* note 8, at 146-50 (describing reforms and giving them mixed reviews).

n301. Office of Police Reform, Preliminary Report on the Prince Georges County Police Department (2003) [hereinafter OPR Report]. Commissioner Patrick V. Murphy currently heads the OPR.

n302. *Id.* at 3.

n303. Whitlock & Fallis, County Officers Kill More Often than Any in US: Officials Ruled Shootings Justified in Every Case--Even of Unarmed Citizens, *Wash. Post*, July 2, 2001, at A1.

n304. *Id.*

n305. Ruben Castaneda, FBI Probing Canine Unit: Lawsuits Recount Attacks by Pr. George's Police Dogs, *Wash. Post*, April 4, 1999, at A1.

n306. *Id.*

n307. *Id.* Ultimately, two officers involved in the canine incidents were indicted, and one was convicted.

n308. Whitlock & Fallis, *supra* note 21, at A1. To cite just one example, the PGCPD investigated Officer Edward Finn for shooting an unarmed man, lying about injuries a suspect suffered while being questioned, and

possibly contributing to the brutal death--ruled by the medical examiner as a homicide--of an arrestee in police custody. *Id.* at A8. During this time he received a promotion and two meritorious raises. *Id.* In April 2001, the PGCPD awarded Finn the Medal of Valor, the highest honor that the PGCPD awards, for a 1999 incident in which Finn reportedly wrestled a gun away from a suspect. *Id.*

n309. OPR Report, *supra* note 301, at 19.

n310. *Id.*

n311. Whitlock & Fallis, *supra* note 303, at A9.

n312. See generally Human Rights Watch, *supra* note 8, at 1, 33, 45. The report was based on research conducted over a period of two and one-half years. The cities examined were: Atlanta, Boston, Chicago, Detroit, Indianapolis, Los Angeles, Minneapolis, New Orleans, New York, Philadelphia, Portland, Providence, San Francisco, and Washington, D.C. *Id.* at 1.

n313. *Id.* at 1.

n314. In conducting the research for the report, Human Rights Watch communicated with attorneys who had represented victims of police brutality, representatives from police department internal affairs offices, police officers, members of citizen review entities, city officials, Justice Department officials, representatives from U.S. attorney's and local prosecutor's offices, experts on police abuse, and victims of police abuse. *Id.* at 1.

n315. *Id.* at 33.

n316. *Id.* at 62.

n317. *Id.* at 5.

n318. Id. at 3.

n319. Id. at 6.

n320. Id. at 7.

n321. Id. at 6-7.

n322. Id. at 7, 66.

n323. See supra notes 27-46 and accompanying text. See generally Worden, supra note 6, at 25-28, 41-42.

n324. A review of this research concluded that "in most cases investigated, attitudes and behaviors are related to an extent that ranges from small to moderate in degree." Worden, supra note 6, at 25 (citing Howard Schuman & Michael P. Johnson, Attitudes and Behavior, 2 Ann. Rev. Soc. 161, 168 (1976)).

n325. Id. at 42.

n326. Id. at 47.

n327. See id. at 28 (arguing that "organizational factors are more readily altered than are the demeanors of suspects or the outlooks of officers").

n328. Gareth Morgan, *Images of Organization* 128 (1986).

n329. See, e.g., Adams, *supra* note 66, at 56 (citing Robert J. Friedrich, *Police Use of Force: Individuals, Situations, and Organizations*, 452 *Annals Am. Acad. Pol. & Soc. Sci.* 82 (1980)). The President's Commission's observational data from three cities indicates that the rank order of cities with respect to incidents of excessive force is the same rank order as that for all incidents of police use of force. Friedrich, *supra*, at 90. Kenneth Adams notes that tracking all instances in which police use force avoids the definitional problem of defining what constitutes "excessive force" while still providing data that bears on excessive force issues. Adams, *supra* note 66, at 56. Adams likens this approach to tracking mortality rates at a hospital. *Id.* Although high mortality rates could be caused by a whole host of factors, a higher-than-average mortality rate is a red flag that can focus attention that leads to improvements in medical care. *Id.* In the law enforcement context, Adams urges the use of multiple indicators--use of force reports, citizen complaints, lawsuits, and incidents involving serious injury to police and citizens--to identify police forces that are at risk for violent police-citizen contacts. *Id.* at 82-83.

n330. See also Klockars, *supra* note 89, at 6 (arguing that "police can engage in all sorts of objectionable behavior without transgressing criminal or civil definitions of excessive force"); Deborah Small, *Symposium Address, Police Violence: Causes and Cures* (Brooklyn Law School, Apr. 15, 1998), in 7 *J.L. & Pol'y* 111, 116 (1998) (arguing that the problem of violence is not just the worst incidents that get into the paper: "The real problem of police violence lies in the everyday encounters that minority people have with the police ... where they are disrespected and where they are abused verbally. ... That is a violent situation and one that leads to violence.").

n331. On that reading, we would conclude that managerial conduct has moved from carelessness (an objective standard) to recklessness or deliberate disregard or even willfulness (a subjective standard). There are a number of contexts in which the law infers subjective intent from objective circumstances. For example, a litigant can establish the intent element of an intentional tort, such as battery, by showing that injury was so likely to occur by the defendant's actions that we can infer intent. See, e.g., *Garratt v. Dailey*, 279 P.2d 1091, 1094 (Wash. 1956).

n332. The Supreme Court has made a similar move in 1983 cases against municipalities. In order to make out a civil rights claim against a municipality, the plaintiff must show that municipal officials were "deliberately indifferent" to the risk of unconstitutional conduct by their officials. See *City of Canton v. Harris*, 489 U.S. 378, 391-92 (1989). This showing can be made out by presenting evidence that the unconstitutional practice was so pervasive, obvious, and likely to occur that city officials had to have known about it. *Id.*

n333. V. Lee Hamilton & Joseph Sanders, *Responsibility and Risk in Organizational Crimes of Obedience*, 14 *Res. Org. Behav.* 49, 49 (1992). See generally Luban et. al, *supra* note 235, at 2356-65 (discussing the role and moral significance of bureaucracy in causing harm).

n334. Hamilton & Sanders, *supra* note 333, at 49.

n335. See generally Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *Econometrica* 263 (1979); Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, 39 *Am. Psychol.* 341 (1984).

n336. See generally Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (1975); Oliver E. Williamson, *The Economic Institutions of Capitalism* (1985); Oliver E. Williamson, *The Economies of Organization: The Transaction Cost Approach*, 87 *Am. J. Soc.* 548 (1981). Hamilton and Sanders compliment Williamson for "inviting us to consider further the interplay between the individual and the organization" but they criticize his model for its "radically individualistic" orientation that fails to "incorporate the power of the organization to mold the perceptions and information processing of its participants." Hamilton & Sanders, *supra* note 333, at 57.

n337. Hamilton & Sanders, *supra* note 333, at 49.

n338. *Id.* at 57. See generally Robert Jackall, *Moral Mazes: The World of Corporate Managers* 17, 20-21 (1988) (discussing role of information flow in shaping moral decision making in bureaucratic settings); Reinhold Niebuhr, *Moral Man and Immoral Society* xi-xii (noting that the organization dilutes the force of moral thinking); Luban et. al., *supra* note 235, at 2363-65 (discussing the inadequacy of traditional moral theories for failing to appreciate the organizational context of many moral choices).

n339. Hamilton & Sanders, *supra* note 333, at 57.

n340. This frame is the way that people ordinarily handle moral questions outside of hierarchical settings. *Id.* at 63.

n341. *Id.* at 63-64 (citing Herbert C. Kelman & V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (1989); V.L. Hamilton & H.C. Kelman, *When Disobedience Becomes a Crime: Individual, Positional and Situational Differences* (paper presented at the Academy of

Management, Washington D.C., Aug. 1989)).

n342. *Id.* at 64.

n343. *Id.*

n344. *Id.*

n345. *Id.* at 66. In an important, recent literature, incidents of wrongdoing by subordinates in response to organizational expectations and pressures have been termed "crimes of obedience." See, e.g., Kelman & Hamilton, *supra* note 341 (describing, as crimes of obedience, among others, the Mai Lai Massacre, Watergate, Nazi war crimes during World War II, Iran-Contra, and the Chrysler odometer case).

n346. Kelman & Hamilton, *supra* note 341, at 314-15; Hamilton & Sanders, *supra* note 333, at 71.

n347. Hamilton & Sanders, *supra* note 333, at 71; see also Kelman & Hamilton, *supra* note 341, at 16-17 (describing moral reasoning of subordinates faced with questionable orders).

n348. See, e.g., Bandes, *supra* note 14, at 1287-305 (chronicling the legal impediments faced by victims of a pattern of repeated incidents of torture during interrogations by Chicago police); Bayley, *supra* note 5, at 94 (arguing that "police misbehavior, whether excessive force or corruption, cannot be prevented by catching and disciplining misbehaving individuals," but rather there must be a transformation of the "organizational climate that facilitates abuses of authority"); Locke, *supra* note 75, at 138-399 (noting that the tendency to blame the failures of police work on "a few 'bad cops'" ignores "the possibility that the barrel is rotten and is spoiling the contents"); Rudovsky, *supra* note 51, at 493 (noting the deficiencies of legal remedies in addressing the "systemic nature of most forms of police abuse").

n349. *Brown*, *supra* note 4, at 8. *Brown's* analysis is based on a study of three police departments in Southern California that serve jurisdictions differing in size and crime rate. *Id.* Although these three departments are not formally representative of American police departments, *Brown* argues that they "do reflect, perhaps more precisely than a more inclusive sampling, all the dilemmas and consequences inherent in police

professionalism." The study was based on data obtained through observations of police work, data obtained from departments, such as arrest statistics, and survey data derived from interviews with patrolmen and their supervisors. *Id.* at 16. For a more detailed description of the research design, see *id.* at 16-18.

n350. See James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* (1978). Wilson chose the cities to be included in his study at random, first collecting reports from his students on police departments in twelve major metropolitan areas, then focusing on departments in New York state, to minimize differences in legal codes and statewide restraints. *Id.* Wilson finally chose eight of the twenty-five communities on which he reported because they were "'interesting'--that is, they seemed to exhibit important differences in police behavior and political culture." *Id.* at 11-12.

n351. *Id.* at 4.

n352. *Id.* at 7. For a definition of administrative discretion, see *Brown, supra* note 4, at 24-25.

n353. Wilson, *supra* note 350, at 8. For further discussion of the extent of police discretion, see generally *Brown, supra* note 4, at 3-7, 221-45 (describing broad discretion exercised by patrolmen and concluding that they, in large measure, redefine the meaning of justice by their discretionary choices); Peter K. Manning, *Police Work: The Social Organization of Policing* 344-45 (1977).

n354. Wilson, *supra* note 350, at 11.

n355. See *id.* at 48.

n356. This aspect of police culture is sometimes called "occupational culture." See *supra* note 240 and accompanying text.

n357. Wilson, *supra* note 350, at 83. Wilson's three-fold typology consists of: the "watchmen style," characterized by an emphasis on order maintenance over law enforcement, see generally *id.* at 140, the "legalistic style," which emphasized law enforcement and employed a policy of aggressive preventative patrol, see generally *id.* at 172-99, and the "service style," which is characterized by a high level of informal

intervention, see generally *id.* at 200-26. Wilson arrived at his typology inductively through a process of empirical observations in which he and his research assistants observed "patterning among places initially picked pretty much at random." *Id.* at 13. The research process consisted of: collecting available statistics and reports; interviewing police chiefs, patrolmen, judges, prosecutors, and city officials, *id.* at 12; sending two different researchers to the various departments for between two and eight weeks at least two different times; and assigning local informants to check the facts and interpretations contained in the resulting reports, *id.* at 14. For a detailed description of how Wilson chose these eight New York communities out of an initial twenty-five that he investigated, see *id.* at 11-13. For a critique of Wilson's topology, see generally *Brown, supra* note 4, at 8-9.

n358. Significantly for our purposes, Wilson suggested that officers in "watchman-style" departments are more likely to use excessive force--usually in response to a challenge to police authority--than officers in departments with other organizational styles. See Wilson, *supra* note 350, at 140-71. For a description of Wilson's three organizational styles, see *supra* note 357. A number of studies have tested hypotheses arising out of Wilson's framework with generally supportive results. See, e.g., Worden, *supra* note 6, at 28-29 (citing John A. Gardiner, *Traffic and the Police: Variations in Law Enforcement Policy* (1969)); Douglas A. Smith, *The Organizational Context of Legal Control*, 22 *Criminology* 19 (1984); James Q. Wilson & Barbara Boland, *The Effect of the Police on Crime*, 12 *L. & Soc'y Rev.* 367 (1978)).

n359. Wilson, *supra* note 350, at 279. Wilson emphasizes the orientation of the police chief as the major determinant in creating and maintaining institutional culture. For a more detailed discussion of the ways in which political influences affect the police organization, see generally *id.* at 227-77.

n360. See Worden, *supra* note 6, at 29-30 (citing *Brown, supra* note 4, at 7-8, 97; Manning, *supra* note 353 at 3; Skolnick, *supra* note 240; Westley, *supra* note 240; John Van Maanen, *Working the Street: A Developmental View of Police Behavior*, in *The Potential for Reform of Criminal Justice* 407 (Herbert Jacob, ed., 1974); Jeffrey Manditch Prottas, *The Power of the Street-Level Bureaucrat in Public Service Bureaucracies*, 13 *Urb. Aff. Q.* 285 (1978)).

n361. Wilson, *supra* note 350, at 4.

n362. *Brown, supra* note 4, at 97.

n363. *Id.* at 102, 111.

n364. See, e.g., Skolnick, *supra* note 240, at 423; Westley, *supra* note 240, at xiv-xv; Wilson, *supra* note 350, at 10; Manning, *supra* note 353, at 139-201; John Van Maanen, *Observations on the Making of Policemen*, 32 *Hum. Org.* 407, 408 (1973). See generally George L. Kelling & Robert B. Kriesmet, *Police Unions, Police Culture and Police Abuse of Force*, in *Police Violence*, *supra* note 6, at 191, 203-05 (summarizing some of the literature on police occupational culture).

n365. Skolnick, *supra* note 240, at 42. It is a common theme in sociological studies of occupations that people's work has an effect on their outlook on the world. See generally *id.* at 42 n.1 (citing early studies of automobile workers, assembly line employees, furriers, military chaplains, and medical students).

n366. *Id.* at 43.

n367. *Id.* at 44.

n368. *Id.*

n369. *Id.* at 45-48 (describing police training to notice and investigate any circumstances that appear unusual).

n370. *Id.* at 44.

n371. *Id.*

n372. *Id.*

n373. *Id.* at 56-57.

n374. *Id.* at 56. Skolnick suggests that enforcement in areas involving public morality is a special source of resentment when the public observes that police behavior does not reflect a commitment to the rules that the officers enforce against others. *Id.* at 54-55.

n375. Van Maanen, *supra* note 364, at 408.

n376. See *id.* at 412; Anthony V. Bouza, *The Police Mystique: An Insider's Look at Cops, Crime and the Criminal Justice System* 76 (1990) ("Forget all the bullshit they gave you at the police academy, kid; I'm gonna show you how things really work here on the street.").

n377. Worden, *supra* note 6, at 29.

n378. *Id.* See generally Elizabeth Reuss-Ianni, *Two Cultures of Policing: Street Cops and Management Cops* 1-16, 121-26 (1983) (noting a dichotomy between the "street cop culture," which governs the everyday conduct of street level officers, and the "management cop culture," which characterizes their leadership).

n379. See generally Whitman, *supra* note 124, at 256.

n380. See Luban et al., *supra* note 235, at 2383-84.

n381. For notable exceptions, see Skolnick & Fyfe, *supra* note 51, at 89-171; Rudovsky, *supra* note 51, at 480-88; Whitman, *supra* note 124, at 257-60.

n382. Luban et al., *supra* note 235, at 2355.

n383. *Id.* (emphasis added). Bureaucratic actors in a multitude of situations, including officials of the Nazi regime implicated in war crimes, United States regulatory officials faced with accusations of lax financial regulation, and private businesses whose employees are found to have engaged in harm-causing conduct, have

used this so-called "epistemological excuse." *Id.* at 2352-53; Kelman & Hamilton, *supra* note 341, at 165.

n384. Luban et al., *supra* note 235, at 2364.

n385. Jackall, *supra* note 338, at 2.

n386. *Id.*

n387. Toch, *supra* note 26, at 99, 203-05.

n388. *Id.*

n389. See, e.g., Bouza, *supra* note 376, at 49 ("The mere existence of explicit rules doesn't ensure that they'll be followed, or enforced by the administration. Written guidelines may not even reflect the administration's true thinking. The employees tend to respond to the value system transmitted in the daily actions of the hierarchy rather than to written policy.").

n390. Fyfe, *supra* note 87, at 167; see also Skolnick & Fyfe, *supra* note 51, at 12-15 (noting how the culture in the LAPD was conveyed by informal messages, police humor, and informal expectations that encouraged aggressive and violent conduct).

n391. Even "the academy can deliver a 'double message'" that despite a formal emphasis on "legality and human relations," violence is unavoidable. Toch, *supra* note 26, at 99.

n392. Fyfe, *supra* note 87, at 166.

n393. *Id.* See generally Bouza, *supra* note 376, at 52-53 ("The internal culture impinges importantly on new entrants. If brutality is condoned or corruption is widely practiced, the pressure on the recruit to go along is irresistible. Quickly the entire body is infected by the virus.").

n394. Skolnick & Fyfe, *supra* note 51, at 89-112 (describing police culture); Bayley, *supra* note 5, at 100-02; see also Skolnick, *supra* note 240, at 42-68 (describing the policeman's "working personality").

n395. See Bandes, *supra* note 14, at 1321; George L. Kelling & Mark H. Moore, From Political To Reform To Community: The Evolving Strategy of Police, in *Community Policing: Rhetoric or Reality* 3, 12 (Jack R. Greene & Stephen D. Matrofski eds., 1991); see also, Jerome H. Skolnick & David H. Bayley, *The New Blue Line* (1986).

n396. Bayley, *supra* note 5, at 101; see also Paul Chevigny, *Police Power: Police Abuses in New York* 51-83 (1969); Skolnick, *supra* note 240, at 58, 249.

n397. Bayley, *supra* note 5, at 101.

n398. Goldstein, *supra* note 286, at 13 (noting that many view statutory and constitutional requirements, such as limitations on the right to search, rights against self incrimination, and the right to counsel, as serious interferences with "effective law enforcement").

n399. Bayley, *supra* note 5, at 101.

n400. *Id.*

n401. Bouza, *supra* note 376, at 74.

n402. See Christopher Commission Report, *supra* note 20, at xvii; see also Skolnick & Fyfe, *supra* note 51,

at 106; Bandes, *supra* note 14, at 1306.

n403. Bouza, *supra* note 376, at 74.

n404. *Id.* at 73.

n405. *Id.*

n406. See Goldstein, *supra* note 286, at 165 (noting that review of incidents of misconduct are hampered by the "blue curtain," a commitment by police officers to protect each other, either by "supporting the [fellow] officer's actions or denying knowledge of the incident"); Rudovsky, *supra* note 51, at 486-88 (describing how the code of silence frustrates investigation and adjudication of excessive force claims). See generally Skolnick & Fyfe, *supra* note 51, at 112 (arguing that the police code of silence is "an extreme version of a phenomenon that exists in all human groups," but "is exaggerated in some police departments and some police units because cops so closely identify with their departments, their units, and their colleagues that they cannot even conceive of doing anything else").

n407. *Brown*, *supra* note 4, at 286; see also Reuss-Ianni, *supra* note 378, at 121 (1983) (identifying two cultures in the NYPD, the "street cop culture," belonging to working class, career cops from the good old days and the "management cop culture," made up of police managers who tend to be middle class and better educated).

n408. Bouza, *supra* note 376, at 51 (emphasis added).

n409. *Id.* at 71. Former Chief Bouza was in policing for thirty-six years: twenty-four years in the NYPD, three years as Deputy Chief of the New York City Transit Police, and nine years as Chief of Police in Minneapolis. *Id.* at ix; see Skolnick & Fyfe, *supra* note 51, at 13 ("The written rule is clear: cops are to use no more force than is necessary to subdue the suspect. Where a departmental subculture condoning brutality prevails, the unwritten rule is "Teach them a lesson."").

n410. Bouza, *supra* note 376, at 48.

n411. Herman Goldstein, *Problem-Oriented Policing* 163 (1990); see also Bouza, *supra* note 376, at 15-18 (criticizing the modern police bureaucracy for its preoccupation with "efficiency over effectiveness in dealing with substantive problems").

n412. Skolnick & Fyfe, *supra* note 51, at 125. The authors call this method of measuring performance the "police numbers game."

Instead of learning whether or not officers solved the problems to which they were summoned, for example, readers of police annual reports learn how many calls were received by 911 and, on average, how many minutes and seconds it took officers to respond to them. ... It is as though doctors measured their performance by counting operations without bothering to determine whether patients were cured; as though lawyers counted their cases without regard to whether they won or lost for their clients.

Id.

n413. Goldstein, *supra* note 411, at 163; see also Wesley G. Skogan, *Disorder and Decline: Crime and the Spiral Decay of American Neighborhoods* 87 (1990) ("Modern administrators use activity measures and impose performance quotas to increase per-officer 'output' and speed the crime-to-arrest process of their organization.").

n414. For discussions about the difficulty of defining "good police work," see Skolnick & Fyfe, *supra* note 51, at 241-50 (arguing that the definition of good police work begins with the "words that appear on the front page of almost every police department's manual: The primary job of the police is to protect life").

n415. Skolnick & Fyfe, *supra* note 51, at 189-90.

n416. *Id.* at 190.

n417. See Christopher Commission Report, *supra* note 20, at 97-100; Goldstein, *supra* note 286, at 16 (noting that measuring performance by measuring operational output can result in a startling contrast between

"the highly controlled and seemingly infallible operations at headquarters and the disorganized, ineffective, and at times even offensive actions of police officers on the streets and in the homes of local residents"); Skolnick & Fyfe, *supra* note 51, at 190 (the message that their supervisors only care about numbers "tells [cops] that the cardinal sin is not to break the rules, but to be caught breaking the rules. This message--do whatever you care to in a secluded parking lot, or in a family's home, or on a deserted street outside a closed restaurant, just don't get caught by outsiders--leads patrol officers in highly specialized departments to act on their worst instincts at any sign of disrespect from their clientele.").

n418. See *supra* note 116 and accompanying text.

n419. See Goldstein, *supra* note 286, at 85-86, 168; Skolnick & Fyfe, *supra* note 51, at 125-28.

n420. Recall the Christopher Commission's finding that the personnel files of the small number of Los Angeles police officers who were responsible for a disproportionately high number of incidents of brutality contained no information about the complaints and lawsuits that community members had filed against these officers. See *supra* notes 253-61 and accompanying text; see also Human Rights Watch, *supra* note 8, at 1 (summarizing results from studies of fourteen cities); *supra* notes 280-300 and accompanying text (describing similar phenomena in the LASD, the NYPD, the Chicago Area Two Violent Crimes Unit, and the Boston Police Department).

n421. Toch, *supra* note 26, at 99.

n422. See Grant & Grant, *supra* note 29, at 159 (arguing that situational factors, such as the climate of the department, interact with psychological factors to cause problems).

n423. Bouza, *supra* note 376, at 49.

n424. *Id.* at 47.

n425. Fyfe, *supra* note 87, at 166 (citing Gerald F. Uelman, *Varieties of Public Policy: A Study of Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 *Loy. L.A. L. Rev.* 1 (1973)) (noting that a study of

fifty-one Los Angeles County police departments found a strong correlation between shooting rates and the philosophy of the respective chiefs of police); see also James F. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 Just. Q. 165 (1988) (reporting that the "law and order" policies of Mayor Frank Rizzo strongly influenced the rate of police shootings in Philadelphia).

n426. Bouza, *supra* note 376, at 53.

n427. See *id.* at 53 (noting that "if a cop is punished for overzealousness, the troops will absorb the meaning").

n428. *Id.* at 52-53.

n429. *Id.* at 53.

n430. Bayley, *supra* note 5, at 102.

n431. See *supra* notes 222-34 and accompanying text.

n432. See *supra* Part I.

n433. See *supra* notes 94-102 and accompanying text.

n434. See *St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988); *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).

n435. See *supra* notes 122-23 and accompanying text. The governmental entity does not entirely escape the

force of monetary sanctions if the entity defends and indemnifies the individual official.

n436. *St. Louis v. Praprotnick*, 485 U.S. 112 (1988).

n437. *Id.* at 123.

n438. *Id.*

n439. *Id.*

n440. *Id.* at 145 n.7. In *Praprotnick*, a plurality of the Court held that identification of the policymaker for purposes of municipal liability is a matter of state law. *Id.* at 124. Justice Brennan urged an analysis that would have gone beyond state law to search for the "de facto" policy maker. *Id.* at 143.

n441. *Id.*

n442. *Id.* at 131.

n443. *Id.* at 130.

n444. *Id.*

n445. See *id.*

n446. The showing required to make out a custom or usage--a "widespread practice that ... is 'so permanent and well-settled'" that it has the force of law, *id. at 127* - is essentially the same showing that the Court later adopted in *Harris* for making out a failure to train: a pattern in which subordinates "so often violate constitutional rights" that the city can be said to have a policy of failing to train its employees. See *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989). Thus, regardless of whether a plaintiff's claim against a municipality is framed as a custom or usage claim, as the Praprotnik plurality proposed, or as a failure to train (per *Harris*), the Court has set the bar for liability so high as to make these theories largely ineffective in addressing the problem of strategic behavior described above.

n447. *Harris*, 489 U.S. at 388 n.8. While the Court has articulated the deliberate indifference standard in the context of failure-to-train claims, it is clear that failure-to-train claims and custom claims are virtually identical. See *id. at 394* (O'Connor, J., concurring); *Praprotnik*, 485 U.S. at 127.

n448. See supra notes 197-201 and accompanying text.

n449. See supra notes 112-221 and accompanying text.

n450. *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993).

n451. *Id.*

n452. See supra notes 130-221 and accompanying text.

n453. See supra notes 122-23 and accompanying text.

n454. Contrast targeted injunctive relief with an across-the-board constitutional rule that applies to all cases and institutions and may be over-and under-inclusive.

n455. *Lyons v. City of Los Angeles*, 615 F.2d 1243, 1244 (9th Cir. 1980).

n456. *Id.*

n457. *City of Los Angeles v. Lyons*, 461 U.S. 95, 100 (1983).

n458. *Lyons*, 615 F.2d at 1247 (internal quotations omitted) (citing *Allee v. Medrano*, 416 U.S. 802 (1974); *Hague v. Comm. Indus. Org.*, 307 U.S. 496 (1939)) (reversing the district court's denial of a preliminary injunction on standing grounds and remanding the case for reconsideration on the merits).

n459. *Lyons*, 461 U.S. at 99-100, 100 n.3.

n460. See supra notes 418-20 and accompanying text.

n461. See supra notes 386-90 and accompanying text.

n462. See supra notes 256-68, 281-84 and accompanying text.

n463. See supra note 115 and accompanying text.

n464. Police reformers agree that some form of an "early warning system" is essential for successful police reform. See, e.g., Goldstein, supra note 286, at 159-60 (arguing that the exclusive focus on punishment to the exclusion of leadership and training is misguided); Debra Livingston, Police Reform and the Department of Justice: An Essay on Accountability, 2 *Buff. Crim. L. Rev.* 815, 818 (1999) (discussing the importance of record keeping in early warning systems mandated by consent decrees against Pittsburgh and Steubenville under 42 U.S.C. 14141).

n465. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, *108 Stat. 1796* (codified at scattered sections of U.S.C.).

n466. *42 U.S.C. 14141* (2000).

n467. H.R. Rep. No. 102-242, at 135 (1991) (quoting Christopher Commission Report, *supra* note 20, at 40). The Christopher Commission was created to investigate the LAPD following the 1991 beating of Rodney King. See *supra* note 20 and accompanying text. House Report 242 discusses a predecessor bill to Pub. L. No. 103-322, which ultimately enacted *42 U.S.C. 14141*. There is no legislative history to this section of Pub. L. No. 103-322.

n468. H.R. Rep. No. 102-242, at 135 (citing Christopher Commission Report, *supra* note 20, at 40). Legislators also cited the testimony of Professor James Fyfe, a sixteen-year veteran of the NYPD, who concluded that the beating of Rodney King "was no aberration There exists in the LAPD a culture in which officers who choose to be brutal and abusive are left to do so without fear of interference." *Id.* (quoting testimony of Professor James Fyfe before the Subcommittee on Civil and Constitutional Rights following the King incident).

n469. *Id.* at 136.

n470. The legislators noted that, although "the cumulative weight of [successive criminal] convictions and [multiple] adverse monetary judgments may lead the police leadership to conclude that change is necessary," this is ultimately "an inefficient way to enforce the Constitution and is not always effective" because "some police departments have shown a willingness to absorb millions of dollars of damages payments per year without changing their policies." *Id.* at 138. "If there is a pattern of abuse," the enactors concluded, "this section can bring it to an end with a single legal action." *Id.*

n471. *Id.* at 137 (citing *United States v. City of Philadelphia*, *644 F.2d 187 (3d Cir. 1980)*). Legislators noted that the Justice Department can only prosecute individual police officers, "whom juries are often reluctant to convict," and at least one court of appeals, see *City of Philadelphia*, *644 F.2d 187*, has held that the Attorney General has no implied statutory or constitutional power to enjoin systemic violations. *Id.*

n472. *Id.* at 138 (noting that 14141 would "close this gap in the law"). As originally drafted, this provision

would have authorized private parties, as well as the Attorney General, to bring suit for injunctive relief. The final version deleted the section that would have granted standing to individuals.

n473. See, e.g., Consent Decree P 2, *United States v. City of Los Angeles* (C.D. Cal. June 15, 2001) (No. 00-11769), <http://www.usdoj.gov/crt/split/documents/laconsent.htm> (last visited Feb. 9, 2004); Consent Decree P 2, *United States v. New Jersey* (D.N.J. Dec. 30, 1999) (No. 99-5970), <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (last visited Feb. 9, 2004); Consent Decree PP 1, 4, *United States v. City of Pittsburgh* (W.D. Pa. Feb. 26, 1997) (No. 97-0354), <http://www.usdoj.gov/crt/split/documents/pittssa.htm> (last visited Feb. 9, 2004); Consent Decree P 1, *United States v. City of Steubenville* (S.D. Ohio Sept. 3, 1997) (No. C2 97-966), <http://www.usdoj.gov/crt/split/documents/steubensa.htm> (last visited Feb. 9, 2004).

n474. The decrees also called for a beefed-up procedure for intake, investigation, and disposition of citizen complaints. See Consent Decree PP 74-96, *City of Los Angeles* (No. 00-11769); Consent Decree PP 57-87, *New Jersey* (No. 99-5970); Consent Decree PP 47-69, *City of Pittsburgh* (No. 97-0354); Consent Decree PP 33-63, *City of Steubenville* (No. C2 97-966).

n475. See Consent Decree P 41, *City of Los Angeles* (No. 00-11769); Consent Decree P 41, *New Jersey* (No. 99-5970); Consent Decree P 12(a), *City of Pittsburgh* (No. 97-0354); Consent Decree PP 71-72, *City of Steubenville* (No. C2 97-966).

n476. See Consent Decree P 43, *City of Los Angeles* (No. 00-11769); Consent Decree P 43, *New Jersey* (No. 99-5970); Consent Decree P 12(b), *City of Pittsburgh* (No. 97-0354); Consent Decree P 71(b), *City of Steubenville* (No. C2 97-966).

n477. See Consent Decree P 47(c), (f), (k), *City of Los Angeles* (No. 00-11769); Consent Decree PP 47-51, *New Jersey* (No. 99-5970); Consent Decree P 18(b), *City of Pittsburgh* (No. 97-0354); Consent Decree PP 73-74, *City of Steubenville* (No. C2 97-966).

n478. See Consent Decree P 47(a), *City of Los Angeles* (No. 00-11769); Consent Decree P 51, *New Jersey* (No. 99-5970); Consent Decree PP 18(b), 19(b), 20(b), *City of Pittsburgh* (No. 97-0354); Consent Decree PP 73-77, *City of Steubenville* (No. C2 97-966).

n479. Livingston, *supra* note 464, at 819 (quoting Samuel Walker, *Achieving Police Accountability: Despite Well-Publicized Failures, Citizen Review Boards Can Be an Effective Tool* 1, 7 (N.Y. Ctr. on Crime, Communities & Culture, Occasional Paper Series, Research Brief No. 3, 1998)); see Consent Decree P 47(b), (e), City of Los Angeles (No. 00-11769); Consent Decree PP 52-53, New Jersey (No. 99-5970); Consent Decree P 12(d), City of Pittsburgh (No. 97-0354); Consent Decree PP 74-77, City of Steubenville (No. C2 97-966).

n480. See Consent Decree P 47(g), City of Los Angeles (No. 00-11769); Consent Decree PP 52-53, New Jersey (No. 99-5970); Consent Decree PP 23-24, City of Pittsburgh (No. 97-0354); Consent Decree P 78, City of Steubenville (No. C2 97-966).

n481. See Livingston, *supra* note 464, at 846, nn.154-55.

n482. *Id.* at 843; see also *id.* at 845 (arguing that the negotiation of these decrees "offers the Justice Department an opportunity to push local police departments in the direction of best practices in the area of police accountability while not relinquishing the benefits of local knowledge and experimentation").

n483. *Id.* at 817-18 (quoting Weekend All Things Considered: Cop Brutality (NPR radio broadcast, Mar. 15, 1998) (featuring Steven Rosenbaum, Chief of Special Litigation, Civil Rights Division, U.S. Department of Justice)). In addition to the above mentioned lawsuits, courts have dismissed suits against Columbus, Ohio, and Nassau County, New York, in light of changes that these police departments have instituted. See U.S. Dep't of Justice Civil Rights Division, Special Litigation Section, Settlements and Court Decisions, <http://www.usdoj.gov/crt/split/findsettle.htm> (last visited Feb. 10, 2004). The Department of Justice has also initiated investigations of four other jurisdictions--Village of Mt. Prospect, Illinois; Buffalo, New York; Cincinnati, Ohio; and the District of Columbia--each of which was resolved by a "Memorandum of Understanding" with the respective police department. See *id.* Like the resolutions in the other 14141 actions, these agreements require enhanced data-collection in order to facilitate tracking and analysis of questionable citizen police encounters, systematic monitoring of these records, and remedial training to address any identified patterns of misconduct. For details of these agreements, see *id.* Investigations of alleged 14141 violations are currently pending against at least nine additional jurisdictions: Portland, Maine; Schenectady, New York; Cleveland, Ohio; Detroit, Michigan; East Point, Michigan; New Orleans, Louisiana; Prince Georges County, Maryland; Riverside, California; and Tulsa, Oklahoma. See Oversight of the Department of Justice Civil Rights Division: Hearing Before the Senate Judiciary Comm., 109th Cong. (2002) (statement of Ralph Boyd, Jr., Assistant Attorney General).

n484. See *United States v. Columbus*, No. 2:99-CV-1097, 2000 U.S. Dist. LEXIS 11327, at 26 (S.D. Ohio Aug. 3, 2000). In this suit, the United States had argued that 14141 should be construed to permit respondeat superior liability against the government. *Id.* at 20. The court rejected that argument, concluding that entity liability under 14141 should mirror the scope of municipal liability under 1983. The court reasoned that

Congress passed 14141 in order to supplement 1983 without imposing any "new standard of conduct on law enforcement." *Id.* at 10. The court further reasoned that this construction avoids any argument that 14141 exceeds Congress's power under the Fourteenth Amendment because it imposes liability only for conduct actually "caused" by the governmental entity. *Id.* at 32. The court expressed no opinion on whether Congress had the power under section 5 of the Fourteenth Amendment to impose liability on a theory of respondeat superior. *Id.* at 26-27 n.4.

n485. See *supra* notes 95-102 and accompanying text.

n486. For a detailed discussion of the requirements for an adequate police reporting system, see Adams, *supra* note 66.

n487. *42 U.S.C. 15601-15609* (2000). This bill was introduced in the House (H.R. 4943) and Senate (S. 2619) during the 107th Congress, and was reintroduced as H.R. 1707 (a bill identical to the earlier House and Senate versions), during the 108th Congress.

n488. *Id.* 15603(a).

n489. *Id.* 15603(b)(3)(B)(I).

n490. *Id.* 15603(b)(3)(C)(ii). An earlier version of the bill provided that state or local officials who failed to testify could subject their institutions to a twenty percent decrease in federal funding. See S. Res. 2619, 107th Cong. 2(b)(3)(C) (2002); H.R. 4943, 107th Cong. 2(b)(3)(C) (2002).

n491. *42 U.S.C. 15606(e)(1)*.

n492. *Id.* 15607(c)(2). An earlier version of the bill had called for a twenty percent reduction. See S. Res. 2619, 107th Cong. 6(c); H.R. 4943, 107th Cong. 6(c).

n493. *42 U.S.C. 15608(a)*. An earlier version had called for a twenty percent reduction. See S. Res. 2619, 107th Cong. 6(c); H.R. 4943, 107th Cong. 6(c).

n494. William A. Geller & Hans Toch, *Understanding and Controlling Police Abuse of Force*, in *Police Violence*, *supra* note 6, at 321.

n495. See David Dixon, *Law in Policing: Legal Regulation and Police Practices 94-95* (1997).

n496. See, e.g., Skolnick & Fyfe, *supra* note 51, at 229 (noting the importance of police leadership in facilitating line-officer cooperation in keeping and disclosing records in connection with external oversight); Livingston, *supra* note 464, at 846-49 (describing the importance of police buying into police reforms such as early warning systems).

n497. See Frank Anechiarico & James B. Jacobs, *The Pursuit of Absolute Integrity* 202 (1996); Dixon, *supra* note 495, at 310; Livingston, *supra* note 464, at 848-49.

n498. See Livingston, *supra* note 464, at 849 (discussing potential resistance to information gathering in the context of early warning systems or in the shadow of 14141 enforcement).

n499. See *supra* notes 71-73 and accompanying text.

n500. See generally Klockars, *supra* note 89, at 1.

n501. For a general discussion of the difficulties and challenges presented by efforts to measure the prevalence of abuse of force, see generally Adams, *supra* note 66 (discussing conceptual and analytic problems in studying the use of force, reviewing the findings of existing empirical studies on the incidence of excessive force, and comparing different ways to research the extent of excessive force, including official records, surveys of police and citizens, and field observation).

n502. Klockars, *supra* note 89, at 7-8.

n503. See, e.g., *id.* at 16 (citing the tacit agreement ("the code of silence") among line officers to protect one another from punishment, the "cover your ass syndrome" that leads police to avoid conduct that will expose them to criticism, and the widely held view among police officers and supervisors that a "good supervisor is ... one who will 'back up' an officer when he or she makes a mistake"); Bayley, *supra* note 5, at 97 (arguing that when "people point fingers at the police, police 'circle the wagons' creating a conspiracy of silence so as not to tarnish the badge any further").

n504. See Klockars, *supra* note 89, at 16; Douglas W. Perez & William Ker Muir, *Administrative Review of Alleged Police Brutality*, in *Police Violence*, *supra* note 495, at 231-32.

n505. Klockars, *supra* note 89, at 2.

n506. See Skolnick & Fyfe, *supra* note 51, at 196-97 (arguing that professional standards of liability for professions such as medicine, law, and accounting are higher than the standards for criminal liability).

n507. *Id.* at 197-98 (discussing the inadequacy of criminal law in defining professional conduct).

n508. See, e.g., *Manual of the Los Angeles Police Department 556.40 (2002)*, [http://www.lapdonline.org/pdf_files/manual/Table of Contents.pdf](http://www.lapdonline.org/pdf_files/manual/Table_of_Contents.pdf) (last visited Feb. 10, 2004) (use of deadly force); Pa. State Police Regulations 3.05 (Jan. 11, 2003), <http://www.pittsburghlive.com/x/s/112228.html> (last visited Feb. 10, 2004) (deadly force); Seattle Police Department Policy and Procedure Manual 1.145 (Aug. 19, 2003), <http://www.cityofseattle.net/police/Publications/SPD%20Manualv1.1.pdf> (last visited Feb. 10, 2004) (use of deadly force); Cincinnati Police Department Regulations 12.545 (July 29, 2003), <http://www.cincinnati-oh.gov/police/pages/-5960-/12545.pdf> (last visited Feb. 10, 2004) (use of force); Minneapolis Police Department Manual 5-307 (Oct. 10, 2003), <http://www.ci.minneapolis.mn.us/mpdpolicy/5-300/5-300.asp> (last visited Feb. 10, 2004) (deadly force). While broadly tracking *Graham v. Garner*, the Minneapolis Police Department's policy on nondeadly force does attempt to define with a bit more specificity the particular circumstances that may call for an application of force. See *id.* 5-303 (justified use of force); *id.* 5-304 (use of nondeadly force).

n509. Geller & Toch, *supra* note 494, at 294-95.

n510. See, e.g., Klockars, *supra* note 89, at x.

n511. Geller & Toch, *supra* note 494, at 295.

n512. In particular, I envision some form of critical examination by a group of one's professional colleagues--either inside or outside of one's own department--of a past event or course of conduct for the purpose, *inter alia*, of judging how officers handled a particular situation and making constructive recommendations for changes in handling similar situations in the future.

n513. See, e.g., George L. Kelling et al., *Police Accountability and Community Policing*, *Persp. on Policing*, Nov. 1988, at 7 (recommending the use of peer review as part of a community policing strategy); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts Communities, and the New Policing*, *97 Colum. L. Rev.* 551, 652 (1997) (advocating that controlling police discretion to avoid misconduct requires "multiple strategies," including "collegial, intradepartmental review" of the actions of individual officers).

n514. Skolnick & Fyfe, *supra* note 51, at 196-97; Klockars, *supra* note 89, at 15-16.

n515. Douglas W. Perez, *Common Sense About Police Review* 82 (1994). The overwhelming majority of police forces have no external review and are subject to review only by internalized, police-operated mechanisms. The original impetus for rigorous internal review was an effort to "stem the tide" of calls for external, civilian review. *Id.* at 88-89.

n516. *Id.* at 88.

n517. *Id.* at 88, 90-91. It is believed that rotating officers through the department prevents officers from losing touch with street work, allows the officers to bring knowledge of internal affairs to other departments in the organization, minimizes alienation of internal affairs officers from colleagues, and fosters acceptance of the internal affairs function through greater employee participation. *Id.* at 91-92; see also Paul West, *Investigation and Review of Complaints Against Police Officers: An Overview of Issues and Philosophies*, in *Police Deviance*

389 (Thomas Barker & David L. Carter eds., 3d ed. 1994).

n518. Perez & Muir, *supra* note 504, at 215.

n519. *Id.*

n520. *Id.* at 215-16.

n521. Perez, *supra* note 515, at 101.

n522. *Id.*

n523. Many citizens feel that police departments are "incapable" of investigating citizen complaints because of the "fraternity" between officers. John L. Burris, *Blue v. Black: Let's End the Conflict Between Cops and Minorities* 63 (1999). As John Burris frames it, internal affairs investigations are like the "fox guarding the henhouse." *Id.* Similarly, Herman Goldstein has argued that it is "unrealistic" to expect officers to fully investigate claims against men and women who may one day become their partners or superiors. Goldstein, *supra* note 286, at 212. According to one national survey, internal affairs units find an officer guilty of misconduct only thirteen percent of the time. Perez & Muir, *supra* note 504, at 216 (citing Anthony M. Pate et al., *1 Police Use of Force: Official Reports, Citizen Complaints, and Legal Consequences* (1993)). Significantly, however, citizen review panels find sustained outcomes less often than police systems of review. *Id.* at 223.

n524. Perez, *supra* note 515, at 100.

n525. See *id.* at 115-23 (providing a measured, but generally positive assessment of the contribution of internal review to improvements in police conduct).

n526. Perez & Muir, *supra* note 504, at 214-15. But see Human Rights Watch, *supra* note 8, at 63-66 (noting

that "no outside review, including our own, has found the operations of internal affairs divisions in any of the major U.S. cities satisfactory" in cataloging inadequacies in various departments).

n527. Perez, *supra* note 515, at 98 (noting that the chief has the power to ignore or undermine reviewers findings and recommendations).

n528. There are generally four different outcomes available to internal adjudicators. A complaint of police misconduct can be adjudged: (1) unfounded (i.e., the act did not happen); (2) exonerated (i.e., the act occurred but the conduct was justified under the circumstances); (3) not sustained (i.e., the complaint is neither proved nor disproved); (4) sustained (i.e., there is sufficient evidence to support the complaint). *Id.* at 96.

n529. *Id.* at 101.

n530. *Id.*

n531. *Id.* at 101-02.

n532. Human Rights Watch, *supra* note 8, at 53 n.87 (citing Samuel Walker, a civilian review expert). A recent National Institute of Justice report describes four types of civilian review: (1) citizens investigate allegations of police misconduct and recommend findings to the chief of police; (2) police officials do the initial investigation and develop findings, which are reviewed by civilians who recommend that the chief accept or reject the findings; (3) the citizen review board hears appeals of the findings of internal reviewers; or (4) an outside auditor is appointed to examine and report on the fairness, thoroughness, and openness of the internal police investigation process. Many police agencies have adopted some hybrid form of review. See Peter Finn, U.S. Dep't of Justice, *Citizen Review of Police: Approaches and Implementation* 6 (2001), <http://www.ncjrs.org/pdffiles1/nij/184430.pdf> (last visited Feb. 13, 2004) (citing Samuel Walker, *Citizen Review Resource Manual* (1995)). Douglas Perez reports that only 6.5% of police review mechanisms (including internal and external review) are completely independent and external to the police department. Perez, *supra* note 515, at 83. Another 9.7% of police review involves citizens as monitors who review the findings of internal investigators. *Id.* at 83. Fully 83.9% of all police review systems are exclusively internal, completely police-operated systems. *Id.* at 82.

n533. The idea was patterned after the "Scandinavian 'ombudsman,' an impartial general inspector" who

investigated complaints against governmental officials. Skolnick & Fyfe, *supra* note 51, at 220.

n534. *Id.* at 220.

n535. See *id.* at 220-22 (describing the successful fight in New York in the 1960s to defeat proposed civilian review, which would have been headed by a leading ACLU liberal, but whose members included three high ranking police officials with law degrees and two minority members).

n536. *Id.* at 222. Despite the fights of the 1960s, New York City established civilian review in 1980 with little resistance. *Id.* But in 1992, when Mayor Dinkins, the first black mayor of New York, proposed staffing the board with civilians, officers protested vigorously, blocking the Brooklyn Bridge with disorderly and threatening behavior and shouting racial epithets aimed at the mayor and passersby. *Id.* at 223; see also Paul Chevigny, *Edge of the Knife: Police Violence in the Americas* 64-65 (1995).

n537. See Skolnick & Fyfe, *supra* note 51, at 222.

n538. See Finn, *supra* note 532, at 4 (citing Walker, *supra* note 479, at 5). Between 1980 and 1994, the number of civilian review entities increased by 400%, an increase many attribute to the advent of community policing. Livingston, *supra* note 513, at 664-65. It should be noted, however, that only a small fraction of the total of all U.S. law enforcement agencies currently have civilian oversight. Finn, *supra* note 532, at 4. Moreover, most civilian review systems that exist have been created in the last ten to fifteen years. Perez, *supra* note 515, at 124.

n539. Finn, *supra* note 532, at 4; Human Rights Watch, *supra* note 8, at 53. Calls for civilian review are often accompanied by charges of racism. Perez, *supra* note 515, at 125.

n540. See Skolnick & Fyfe, *supra* note 51, at 222-23 (noting that "despite the apparent greater acceptance of civilian review among the public, the whole subject provokes an ugly reaction among some police, and apparently stands for them as a visceral symbol of the shifting balance of urban political power").

n541. For example, the Philadelphia Police Advisory Commission, created in 1993, has been opposed by

multiple lawsuits filed by the police union to challenge its legality. Human Rights Watch, *supra* note 8, at 57. Defending these suits has absorbed a huge amount of the Commission's energy and time. *Id.* During a Commission hearing on one high-profile case, members of the union interrupted the proceedings with charges that the hearing was a "Kangaroo" court. *Id.*; see also *id.* at 56-59 (describing police resistance to findings and recommendations of civilian review bodies in various cities).

n542. Finn, *supra* note 532, at 111-12. Although members of civilian review boards are not currently police officers, they may have legal or law enforcement training or experience. *Id.* at 83; see also Perez, *supra* note 515, at 132 (noting that, although members of the Berkeley Police Review Commission have no formal training in investigation, some have substantial legal knowledge).

n543. Finn, *supra* note 532, at 112-13. Counter to police fears of prejudice, however, virtually all comparisons of civilian review and internal police review have found that civilian review boards sustain fewer complaints against the police than police department reviewers. Perez, *supra* note 515, at 138-39.

n544. Finn, *supra* note 532, at 109 ("Most police administrators believe their agencies should have the final--and often only--say in matters of discipline, policies and procedures, and training.").

n545. *Id.* at 13; see also Perez & Muir, *supra* note 504, at 232 ("Police organizations rarely use their review systems to learn about systematic problems that lead to abuse.").

n546. Finn, *supra* note 532, at 113.

n547. *Id.* at 69-70; Human Rights Watch, *supra* note 8, at 54 ("An essential component of the work of any modern review agency should be making concrete policy recommendations to police administrators about how to prevent abuses occurring in the first place.").

n548. Finn, *supra* note 532, at 69 (quoting Eileen Luna & Samuel Walker, *A Report on the Oversight Mechanisms of the Albuquerque Police Department 128-29 (1997)* (prepared for the Albuquerque City Council)).

n549. Human Rights Watch, *supra* note 8, at 55; see also Finn, *supra* note 532, at 80-81 (describing the role of citizen review in facilitating the development of early warning systems).

n550. Finn, *supra* note 532, at 70. Most civilian review boards are permitted--and some are required by their founding charters--to make policy recommendations, however, the frequency with which they tend to do so varies widely. *Id.* at 20. A recent study by the National Institute of Justice suggests that where citizen review boards have made policy recommendations, they have been largely successful. *Id.* at 71-72 (listing examples).

n551. Klockars, *supra* note 89, at 16.

n552. Perez & Muir, *supra* note 504, at 231.

n553. Livingston, *supra* note 464, at 848; see also Dixon, *supra* note 495, at 157, 309 (arguing that "external controls and accountability mechanisms (desirable as they are) cannot be expected to be effective unless police organizations are themselves involved in the process of control," and advocating some form of "self-governance" by police).

n554. Kelling & Kliesmet, *supra* note 364, at 205-06.

n555. *Id.* at 206.

n556. Geller & Toch, *supra* note 494, at 317.

n557. Kelling & Kliesmet, *supra* note 364, at 206 (quoting Gene E. Carte & Elaine H. Carte, *Police Reform in the United States: The Era of August Vollmer, 1905-1932*, at 47 (1975)).

n558. *Id.*

n559. Id.

n560. Id.

n561. This account of the agenda of the Friday Crab Club appears in *Carte & Carte*, supra note 557, at 46-47.

n562. Geller & Toch, supra note 494, at 317.

n563. See generally id. at 321 (tracing lineage of Violence Review Project to Vollmer's Friday Crab Club).

n564. A grant from the Center for Studies in Crime and Delinquency of the National Institute of Mental Health funded the project. It involved a three-year, cooperative effort between the U.S. Departments of Health, Education, and Welfare, the school of Criminal Justice, State University of New York at Albany, and the Oakland Police Department. Hans Toch et al., *Agents of Change: A Study in Police Reform* (1975) (referring to foreword and acknowledgments).

n565. Id. at 17.

n566. Skolnick & Fyfe, supra note 51, at 248. See generally Toch et al., supra note 564, at 12-13 (describing in detail the development and implementation of the Oakland strategy).

n567. Id.

n568. Hans Toch & J. Douglas Grant, *Police as Problem Solvers* 231 (1991).

n569. Prior to participation in the panels, violence-prone officers had four times as many violent encounters as their nonviolent colleagues (.37 conflicts per month versus .10). Following participation in the panel sessions, the violence-prone officers' involvement in such incidents decreased to .16 conflicts per month, while the involvement of their nonviolent, nonparticipating colleagues remained relatively constant at .8. *Id.* at 243.

n570. *Toch et al.*, *supra* note 564 (referring to foreword).

n571. *Toch & Grant*, *supra* note 568, at 246.

n572. *Id.* See generally *Kelling & Kliesmet*, *supra* note 364, at 207 (concluding that the Violence Prevention Project was a success in both process--because officers participated with enthusiasm--and in result--because it reduced the number of violent confrontations). Apparently, a similar project in Kansas City in the early 1970s did not repeat these results. See *id.* at 212 n.9 (citing Anthony M. Pate et al., *Kansas City Peer Review Panel: An Evaluation Report* (1976)).

n573. *Skolnick & Fyfe*, *supra* note 51, at 249. As one veteran officer put it: "if the department was really interested in constructive criticism and in correcting problems, they'd learn a lot from officers. But they don't ask for that reason; they only ask so that they can stick it to some poor cop. So they don't learn anything." *Id.*

n574. *Toch et al.*, *supra* note 564, at 2.

n575. *Id.* at 3 (citing *The Planning of Change* (W. G. Bennis et al. eds., 1969); R. Lippitt et al., *The Dynamics of Planned Change* (Harcourt Brace ed., 1958); K. Lewin, *Forces Behind Food Habits and Methods of Change*, *Nat'l Res. Council Bull. CVIII* (1943); K. Lewin, *Frontiers in Group Dynamics*, 1 *Hum. Rel.* 5-41 (1947); and articles by other scholars who "initiated a tradition in which persons who are the targets of change are converted into agents of change").

n576. See, e.g., *Adams*, *supra* note 66, at 75-76 (citing David H. Bayley & James Garofalo, *The Management of Violence by Police Patrol Officers*, 27 *Criminology* 1, 17 (1990); K.G. Love, *Accurate Evaluation of Police Officer Performance Through the Judgment of Fellow Officers: Fact or Fiction?*, 9 *J. Police*

Sci. 143, 147 (1981)) (noting research that suggests that police officers are willing to make judgments about the skillfulness of their peers and that, in general, officers "respect colleagues who exhibit behavior police departments want to encourage"); Klockars, *supra* note 89, at 16 ("The breakthrough in controlling excessive force by police will come about only when skilled officers are willing to apply their knowledge and expertise to identifying uses of excessive force and specifying alternatives that would minimize its use.").

n577. See, e.g., sources listed *supra* note 575.

n578. See, e.g., Adams, *supra* note 66, at 75-76 (commenting favorably on the use of peer review panels in Oakland and Kansas City); Geller & Toch, *supra* note 494, at 317 (describing the "energizing effects of showing officers respect by inviting them to describe what works and doesn't and to think of ways to improving their policing methods" and calling for the removal of administrative and legal barriers to peer review); Kelling & Kliesmet, *supra* note 364, at 206-10 (describing with approval historical examples of "collegial review" as an important method of police reform and urging that "line personnel are a powerful and important resource" in efforts to improve policing); Klockars, *supra* note 89, at 16 (calling for police self-review in controlling excessive force); Perez & Muir, *supra* note 504, at 231 (arguing that "if we are to take changing police behavior seriously, we must emphasize proactive training, peer review, counseling instead of negative discipline, and informal, non-threatening review mechanisms"); Toch, *supra* note 26, at 108 (advocating the use of peer review panels to assist a problem officer to "gain insight into his or her pattern of violence and help the [officer] discover or invent a different mode of response to situations in which he or she reacts violently," and noting that "police peer influence" is a "potent way of affecting officer behavior").

n579. See Goldstein, *supra* note 411.

n580. See Toch et al., *supra* note 564, at 2.

n581. See Jeffries et al., *supra* note 222, at 745-46.

n582. *Id.* at 848.

n583. Owen M. Fiss, Foreword: The Forms of Justice to The Supreme Court 1978 Term, 93 Harv. L. Rev. 1, 47 (1979) (emphasis added).

n584. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

n585. *Miranda v. Arizona*, 384 U.S. 436 (1966).

n586. *Monroe v. Pape*, 365 U.S. 167 (1961).

n587. *Los Angeles v. Lyons*, 461 U.S. 95 (1983). For further discussion of Lyons, see supra notes 223-34 and accompanying text.

n588. In the failure to train cases, the Court made a bit of a move toward systemic remedies, but not very successfully. See supra notes 98-102, 187-201 and accompanying text.