

## PATTERNS OF INJUSTICE: POLICE BRUTALITY IN THE COURTS

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Legal consequences often hinge on whether events or incidents are categorized as isolated or connected, individual or systemic, anecdotal or part of a larger pattern. Courts tend to portray incidents of police brutality as anecdotal, fragmented, and isolated rather than as part of a systemic, institutional pattern. Though numerous doctrines--including federalism, separation of powers, causation, deference, discretion, and burden of proof--provide partial explanations for the judicial fragmentation of police misconduct, it seems clear that courts cannot, or do not choose to, see systemic patterns for reasons that transcend doctrinal explanations. This article explores those reasons, which, ultimately, are relevant not only to police brutality but to the larger judicial tendency to anecdotalize systemic government misconduct.

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It is inevitable that courts must decide which details, events and persona are relevant to a particular story of police conduct. Every narrative highlights some details, and downplays or discards others that seem to threaten its coherence. However, the particular decisions courts make are neither inevitable nor mechanically made. The question I want to address is why *this* particular story, the story of police brutality, is so often anecdotalized. These decisions are influenced, explicitly and implicitly, by factors that are political, social, psychological, and cultural. There are many such factors that lead courts to mask or discount systemic harm. Sometimes, courts cannot see connections because of conscious or preconscious assumptions and expectations about how the story should be told, what ought to be part of the story, or how the characters will behave. This article will seek to explore some of those assumptions.

Police brutality is different in kind and degree from police misconduct, such as conducting an unlawful search, or using unnecessary force. It is police conduct that is not merely mistaken, but taken in bad faith, with the intent to dehumanize and degrade its target. It is defined as "conscious, venal, usually concealed, directed toward those of marginal credibility and status."<sup>1</sup> Police brutality is longstanding, pervasive and alarmingly resilient. Perhaps the most puzzling aspect of

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<sup>1</sup> Jerome H. Skolnick and James J. Fyfe, *Above the Law: Police and the Excessive Use of Force at 19* (The Free Press NY 1993).

its resilience is the extent to which it depends on the complicity of multiple governmental actors, including the courts.

Consider the example of ongoing police torture in the City of Chicago. During a period of at least thirteen years, more than sixty men, all of them black, have alleged that they were physically abused, and in fact, tortured, by several named officers in the Area Two police station on Chicago's South Side.<sup>2</sup> Certain types of torture, by certain officers, were alleged over and over--suffocation with a typewriter cover, electroshock with a specially constructed black box, hanging by handcuffs for hours, a cattle prod to the testicles, Russian roulette with a gun in the suspect's mouth. The allegations were corroborated not only by defense attorneys and emergency room physicians but by several respected groups, including a broad based Chicago citizens' coalition, an investigative group from the internal police review agency, and Amnesty International. In nearly every case in which a defendant alleged that he confessed because he was tortured by these same Area Two officers, the courts barred past allegations against the particular officer or against other Area Two officers on relevance grounds. This refusal to admit evidence of prior acts allowed the courts, in most of the cases, to discount the individual

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<sup>2</sup> John Conroy, House of Screams, The Chicago Reader p. 1, January 26, 1990; John Conroy, Town Without Pity, The Chicago Reader p. 1, January 12, 1996; John Conroy, The Shocking Truth, The Chicago Reader, p. 1, January 10, 1997; John Conroy, Poison in the System, The Chicago Reader, p. 1, June 25, 1999.

allegations of abuse entirely, and to admit the confessions.<sup>3</sup> Ten of the defendants are on death row today. In civil cases against the officers and the City of Chicago, the failure to introduce prior acts of brutality paved the way for a rejection of a finding of municipal liability.<sup>4</sup> Although one of the officers, Commander John Burge (the creator of the infamous black box), was ultimately expelled from the force, other officers involved continued to progress through the ranks, garnering nothing but commendations and promotions.

It would be comforting to dismiss the story of Area Two as unusual, anecdotal and unrepresentative. Unfortunately, in many significant respects, what happened at Area Two represents business as usual in Chicago and throughout the United States.<sup>5</sup> Official reactions to police brutality fall into a familiar pattern. The violence inflicted on Rodney King, Malice Green, Abner Louima and Amadou Diallo

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<sup>3</sup> See e.g. *People v. Holmes*, 198 Ill. App. 3d. 766, 556 N.E. 2d. 539 (Ist. Dist. 1989); *People v. Hobley*, 159 Ill. 2d. 272, 637 N.E.2d. 992 (S.Ct. 1994); *People v. Howard*, 147 Ill. 2d. 103, 588 N.E.2d. 1044 (S. Ct. 1991); *People v. Patterson*, 154 Ill. 2d. 414, 610 N.E.2d. 16 (S. Ct. 1992). But see *People v. Bates*, 267 Ill App 3d 503, 642 NE 2d 774 (1994) and *People v. Cannon*, 688 N.E.2d 693 (1st Dist 1997).

<sup>4</sup> *Wilson v. City of Chicago*, 6 F.3d. 1233 (7th Cir. 1993).

<sup>5</sup> The existence of a longstanding police torture ring is unusual in the present-day United States. However, many aspects of the brutality and the institutional response to it were not at all unusual. See text accompanying notes 123-139.

(the unarmed West African immigrant in New York City who died in a hail of 41 police bullets) was, predictably, followed by police assurances that it was an aberration, the work of a few rotten apples, a criminal act rather than routine police conduct.<sup>6</sup> In most cases, the view of police brutality as aberrational (or even justified) shapes the conduct of every institution responsible for dealing with the problem, including police command, review boards, administrative agencies, city, state and federal government, and the courts. This view allows police brutality to flourish in a number of ways--including making it easier to discount individual stories of police brutality, and weakening the case for any kind of systemic reform. The fragmentation of systemic police brutality needs to be addressed at many institutional levels. This article is particularly, though not exclusively, concerned with how and why that fragmentation occurs in the courts.

The fragmentation takes several forms, and is accomplished through numerous doctrinal means. Often, police engaged in incidents of brutality have a history of such incidents,<sup>7</sup> departments house several officers engaged in similar types of brutality or corruption, or the brutality is concentrated in a single neighborhood.<sup>8</sup> However,

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<sup>6</sup> See *infra* notes 30-53.

<sup>7</sup> See *infra* Part I Section A.

<sup>8</sup> For example, the Mollen Commission reported on several situations in which virtually an entire police precinct was engaged in patterns of corruption and brutality

there are innumerable hurdles to identifying or documenting such patterns. Complaints are discouraged,<sup>9</sup> confessions are not videotaped,<sup>10</sup> record keeping is lax or nonexistent,<sup>11</sup> records are sealed or expunged,<sup>12</sup> patterns are not tracked,<sup>13</sup> and police files are deemed undiscoverable.<sup>14</sup> If a history of past incidents does exist and, despite these hurdles, becomes known to the brutality victim, he faces additional hurdles introducing it in court, including

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directed at particular neighborhoods. Clifford Krauss, 2 Year Corruption Inquiry Finds 'Willful Blindness' in N.Y.'s Police Department, New York Times p.p. 1, B2 (July 7, 1994).

<sup>9</sup> See infra notes 59-62.

<sup>10</sup> See Let the Cameras Roll, The Chicago Tribune p. 16, April 26, 1999 (calling on Chicago Police Department to begin videotaping confessions) and Lorraine Forte, Cops prepare to videotape confessions, Chicago Sun Times p. 1, October 2, 1998, (detailing plan to institute limited videotaping of confessions in Chicago, in the wake of allegations that two young boys, later exonerated, were coerced into confessing in the absence of parents or attorneys).

<sup>11</sup> See infra notes 69-72.

<sup>12</sup> See id. See also Shielded from Justice: Police Brutality and Accountability in the United States at 46-49 (Human Rights Watch 1998)(discussing barriers to obtaining investigative and personnel records documenting prior incidents of brutality).

<sup>13</sup> See infra note 131.

<sup>14</sup> See Alison L. Patton, the Endless Cycle of Abuse: Why 42 USC 1983 is Ineffective in Deterring Police Brutality, 44 Hastings L.J. 753(1993).

restrictive evidentiary rulings,<sup>15</sup> protective orders,<sup>16</sup> judicial toleration of police perjury or of "the blue wall of silence,"<sup>17</sup> assumptions about credibility that favor police officers,<sup>18</sup> the absolute immunity of testifying officers,<sup>19</sup> substantive constitutional doctrines insulating failures to act<sup>20</sup> or demanding an exceptionally high level of proof of wrongdoing,<sup>21</sup> restrictive municipal liability standards coupled with a lack of receptivity to evidence of systemic wrongdoing,<sup>22</sup> or standing doctrines that make injunctive relief nearly

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<sup>15</sup> See Part I Section A.

<sup>16</sup> See *infra* note 242.

<sup>17</sup> See Morgan Cloud, Judges, 'Testilying' and the Constitution, 69 S. Cal. L. Rev. 1341 (1996); Gabriel J. Chin and Scott C. Wells, The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. Pitt. L. Rev. 232 (1998) and *infra*, notes 221-224.

<sup>18</sup> See *infra* notes 60-62; 206-216.

<sup>19</sup> *Briscoe v. Lahue*, 460 U.S. 325 (1983).

<sup>20</sup> See *DeShaney v. Winnebago County Dept. of Social Services*, 109 S. Ct. 999 (1989).

<sup>21</sup> See Rob Yale, Searching for the Consequences of Police Brutality, 70 S. Cal. L. Rev. 1841, 1846-51 (1997) (discussing the "significant injury" requirement that is sometimes used to supplement the requirement of objectively unreasonable police conduct.)

<sup>22</sup> See *Board of Commissioners of Bryan County v. Brown*, 107 S. Ct. 1382 (1997); See also David Hamilton, The Importance and Overuse of Policy and Custom Claims: A

impossible to obtain.<sup>23</sup>

In police brutality cases, the routine categorizing of incidents as isolated rather than systemic has had terrible consequences. Systematic police brutality has been masked, insulated and implicitly condoned because courts have failed to make connections among incidents, failed to make causal links between police conduct and the injuries and confessions of suspects, denied litigants or juries access to information which would enable linkages to be discovered, and in general persisted in defining encounters as separate from--and irrelevant to--any overarching systemic patterns that need to be addressed.

Part I examines the phenomenon of police brutality, with particular attention to the ways in which patterns are masked. Section A takes a highly detailed look at one "pocket" in which police brutality and even torture have long thrived--Chicago's Area Two Violent Crimes Unit. I offer the detailed description in order to move beyond abstractions about the conditions in which police brutality thrives, and to facilitate an examination of the ways in which multiple institutions, including the courts, permit such conduct to continue and its practitioners to prosper. Section B asks whether

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View from One Trench, 48 DePaul L. Rev 723 (1999).

<sup>23</sup> City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

the story told about Area Two is itself anecdotal, or is representative of a larger pattern. To assist in placing the Area Two story in context, it describes more generally the attributes of police brutality as practiced in the United States.

Part II seeks to understand the pattern of fragmentation that characterizes the judicial reaction to police brutality. Section A suggests that the literary notion of anecdote, with its concerns about irrelevant detail, the linkages among seemingly disparate acts, and the problem of judging representativeness, can help us think about the patterns of police brutality and why they are so often anecdotalized. It suggest that judicial decisions about what details are connected, relevant or representative are not merely mechanical, but are informed by cultural, social and political assumptions. Section B posits several such assumptions that may lead judges to view patterns of police brutality as a series of disconnected events.

**I. POLICE BRUTALITY: THE IRRELEVANT IS THAT WHICH FAILS TO PRESERVE OUR LAWS**

What accounts for the terrible resilience of police brutality? There have been a few success stories, such as the fact that the use of the third degree is no longer acceptable or prevalent, or the steep decline in police shootings of non-dangerous fleeing felons. But they are informative mostly against the backdrop of the much larger failure to control an endemic pattern of police lawlessness and violence, directly largely at the poor, minorities, and in general the least powerful members of our society.<sup>24</sup>

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<sup>24</sup> The Bureau of Justice Statistics, in its first survey of police/citizen interactions pursuant to 1994 crime control legislation (see *infra* note 131) reported that in 1996 Hispanics and African Americans constituted about half the people subjected to police force, though they represented only one fifth of the relevant population. The kinds of force reported included being hit, pushed, choked, threatened by a flashlight, restrained by a dog and threatened by a gun. Robert Suro, *Study Says Cops Used Force v. 500,000*, *Chicago Sun Times*, Nov. 24, 1997. See also Seth Mydans, *Videotape of Beating by Officers Puts Full Glare on Brutality Issue*, *New York Times*, Sec.1, p.1, March 19, 1991 (stating that court documents indicate that nearly all the victims of maulings by Los Angeles police dogs in the last seven years were black or Hispanic, though whites committed nearly a third of the crimes in which dogs are usually deployed); Tracey Maclin, *Race and the Fourth Amendment*, 51 *Vand. L. Rev.* 333, 390 (1998) (citing Amnesty International report's findings that police brutality victims in New York City are largely minority, and that nearly all victims in cases of death in custody were members of racial minorities). See also David Lester, *Officer Attitudes Toward Police Use of Force* at 183, in William A. Geller and Hans Toch, *Police Violence: Understanding and Controlling Police Abuse of Force* (Yale Univ 1996) (the presumed moral inferiority and race of suspects lead the police to see them as less than human, thereby justifying brutality) and Bob

Under what conditions does change occur? The explanations in the cases of the third degree and deadly force are complex and various. They include the dissemination of effective empirical data, the cooperation and leadership of police chiefs and other high ranking officials,<sup>25</sup> judicial acceptance of responsibility, and the evolution of societal norms.<sup>26</sup> Recently we observed, as a nation, how change may

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Herbert, What's Going On?, The New York Times, News of the Week in Review at 13, February 14, 1999 (New York police treat young black and Hispanic residents as lesser beings, without the same rights as whites, while the Mayor, Police Commissioner and other top officials look the other way).

<sup>25</sup> The influence of a police chief on police culture, as in the well known case of the LAPD's Daryl Gates, is obvious. But higher officials also send clear messages about what conduct is acceptable. For example, police brutality flourished in Philadelphia when Frank Rizzo was mayor, and dropped significantly under his successor, who set a different tone for the administration. Skolnick and Fyfe, supra note 2 at 138-142. Similarly, the Giuliani administration in New York is often accused of achieving its drop in crime through an accompanying increase in aggressive police tactics. See Shielded from Justice, supra note 13 at 268. The tone Giuliani sets for the NYPD is being widely blamed for incidents like the killing of Amadou Diallo. See Patrick Cole, NYC shooting renews outcry on police brutality, Chicago Tribune, p.1, February 15, 1999. See also Andre Douglas Pond Cummings, Just Another Gang: When the Cops are Crooks Who Can You Trust,? 41 Howard L. Rev. 383, 408 (1998) (Reagan and Bush administrations' war on drugs sent the message that police brutality was an acceptable cost of the 'war.')

<sup>26</sup> Paul Chevigny, The Edge of the Knife: Police Violence in the Americas at 132 (The New Press New York 1995).

begin through a galvanizing anecdote.<sup>27</sup> The George Holliday videotape of Rodney King's beating set off a national wave of revulsion, which led to an increased consciousness of police brutality. It also led, eventually, to the Christopher and Kolts Commissions' reports, some of whose recommendations have become law.<sup>28</sup>

When King's beating first became public, Police Chief Daryl Gates and others dismissed it as an aberration<sup>29</sup> (or alternatively, as fully deserved, and not an example of brutality at all). What they could not do--this time--was to deny it had happened at all.<sup>30</sup> The video

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<sup>27</sup> Similar widespread outrage has followed the Louima and Diallo incidents in New York City. See e.g. The Police and the Citizens, The New York Times, p.A28, March 17, 1999 (discussing widespread protests in the aftermath of the Diallo shooting). The difficulty is in moving from the initial outrage to lasting reform. See e.g. The Diallo Legacy, The New York Times, p.18, February 28, 1999; Bob Herbert, After the Protests, The New York Times, p. A31, March 25, 1999. See also When Cops Are Killers, The Nation, p.6, March 8, 1999 (discussing problem of the "symbolology of outrage," generating "a thousand headlines and no victory.")

<sup>28</sup> Chevigny, supra note 27 at 32 (discussing reports). See Independent Commission on the Los Angeles Police Department 1991 (Christopher Commission); Report of the Special Counsel on the Los Angeles Sheriff's Department 1992 (Kolts Commission).

<sup>29</sup> See Lou Cannon, Official Negligence: How Rodney King and the Riots Changed Los Angeles and the LAPD at 23 (Random House 1997).

<sup>30</sup> Cannon, id at 23. Cannon's book, however, suggests that even the Halliday videotape was susceptible to the dangers of fragmentation and decontextualizing. He notes

itself suggested that the beating was not an aberration. The officers who beat King repeatedly with clubs and stunned him with tasers did so in full view of more than a dozen officers, some of supervisory rank, and in full view of at least twenty local residents standing barely sixty feet away.<sup>31</sup> These officers conducted themselves as if they expected there would be no price to pay for their conduct. Their subsequent behavior bears out this conclusion--including their jocular boasting over the police radio about their conduct.<sup>32</sup> The behavior of their colleagues at the station, who refused to accept complaints about their misconduct, exemplifies the solidarity they expected and received. Indeed, in their criminal trial, Officers Koon, Powell, Wind and Briseno moved to dismiss the charges on the ground that they were being discriminatorily prosecuted for acts that were common in

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that the videotape that received so much airplay did not include an initial three seconds in which King was shown charging Officer Powell, and a subsequent ten seconds which were initially very blurred, and later enhanced by the FBI. Id at 194, 431. He argues that the additional footage was a double edged sword, in that it confirmed a head blow to King by Powell, but also suggests that it was in response to King's charge. Id at 431.

<sup>31</sup> Mydans, Videotape of Beating, supra note 25.

<sup>32</sup> Which was received in the same spirit. For example, Sergeant Koon sent a message saying "You just had a bigtime use of force." The reply from the police communications desk was "Oh well. I'm sure the lizard didn't deserve it. Ha, ha. I'll let them know, O.K." Seth Mydans, Police Messages Joked After Los Angeles Beating, New York Times, March 19, 1991.

the department.<sup>33</sup> Yet it took a public outcry, the resignation of a powerful police chief, and the appointment of a commission to even begin to unravel the fiction of the solitary rotten apple. And there is a long way to go, in Los Angeles and elsewhere.<sup>34</sup>

The persistence of police brutality is a case study in the dangers of fragmenting systemic problems. There is no lack of anecdotes. And each one, no matter how shocking, no matter how typical, comes accompanied by the official quote that it was merely an aberration (if indeed, it happened at all). In each case, officials hasten to assure us that the conduct was not part of any greater problem that could or should be addressed on an institutional level.<sup>35</sup> A recent comprehensive report by Human Rights Watch found widespread patterns of police brutality nationwide and an equally widespread

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<sup>33</sup> Mydans, Officers in Beating Case File 30 Legal Motions, New York Times (May 6, 1991).

<sup>34</sup> See e.g. transcript of 60 Minutes, October 30, 1994, quoting former New Orleans Police Officer Michael Thames: "I don't know what the big deal is about the Rodney King beating...That was a kiddie-land beating...The only thing bad about those cops is, like, they had a video camera. It goes on every day, especially in New Orleans."

<sup>35</sup> See e.g. the Mollen Commission's finding that the NYPD maintained, in the face of contrary evidence, that police corruption was not a serious problem, and consisted primarily of sporadic, isolated incidents. Quoted in Bob Herbert, The Stone Wall of Silence, The New York Times at A21, July 23, 1998. See also infra text accompanying notes 39-53.

failure to address them. It found that in general police departments have been unwilling to acknowledge shortcomings and instead dismiss any criticisms as anecdotal.<sup>36</sup> In response, the National Association of Chiefs of Police called the study "unfair" and "uninformed," stating: "We're not saying there aren't a few bad cops. What we're saying is that the report presents an inappropriately broad-brushed impression."<sup>37</sup>

When Abner Louima was sodomized by police with a plunger, suffering a torn colon and a ruptured bladder, while being subjected to racial epithets, officials called it aberrant, "not an act of police brutality...[but] a criminal act committed by people who are criminals."<sup>38</sup> Police Commissioner Safir opined: "Although it's a horrific event, it's a rare event."<sup>39</sup> Almost two years later, Officer

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<sup>36</sup> Shielded from Justice, supra note 13.

<sup>37</sup> Quoted in Peoria Journal Star at B5, July 8, 1998. Presciently, the Human Rights Watch report noted that typically police officials criticize reports on police abuse as misinformed or biased instead of considering their findings, and that often the officials who complain about the incompleteness of the data are the same officials who denied the researchers access to the data. Shielded from Justice, id at 46.

<sup>38</sup> See Bob Herbert, Living in Denial, NY Times p. A19, August 21, 1997.

<sup>39</sup> Joseph P. Fried, U.S. Takes Over the Prosecution of New York Officers in Beating, New York Times, pp. A1, A19, February 27, 1998.

Justin Volpe pled guilty in federal district court to sodomizing Louima,<sup>40</sup> and shortly thereafter Officer Charles Schwarz was convicted of holding him down during the attack.<sup>41</sup> Mayor Giuliani hailed the verdict as evidence that the blue wall of silence is a myth and that police officers found the conduct "reprehensible and perverse."<sup>42</sup> Yet several other officers face internal investigations and federal obstruction of justice charges. According to court testimony, several officers watched Volpe brag about the sodomy and brandish an excrement-soiled stick immediately after the incident,<sup>43</sup> turned away as he appeared ready to toss the stick in the garbage,<sup>44</sup> watched Volpe lead Louima from the bathroom to a holding cell with his pants around

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<sup>40</sup> Mark Hamblett, Plea in Louima Trial Alters the Landscape, New York Law Journal, Volume 221, Number 110, May 26, 1999.

<sup>41</sup> Leonard Levitt, The Louima Verdicts, Some Splits, but Blue Wall Stands, Newsday p. A4, June 9, 1999.

<sup>42</sup> See Verdict Shatters Blue Wall, New York Daily News, editorial, p.34, June 9, 1999 and Levitt, The Louima Verdicts, id.

<sup>43</sup> Tom Hays, Louima Trial Reveals Complexities of Police Culture, Associated Press Newswires, May 31, 1999. Officer Kenneth Wernick testified that when told the stick contained human excrement, he laughed. Id.

<sup>44</sup> Hays, id.

his ankles,<sup>45</sup> in one case lied to investigators about the incident,<sup>46</sup> and in all cases failed to come forward until after Volpe's arrest and after learning about a police internal affairs investigation which put them at personal risk.<sup>47</sup> Volpe himself testified that though there had been another officer in the bathroom with him during the attack on Louima, "it was understood ...that that police officer would do nothing to stop me or report it to anyone."<sup>48</sup>

A little less than one year after Louima was brutalized, an unarmed West African immigrant named Amadou Diallo was killed by a hail of forty one bullets fired by four members of the NYPD's

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<sup>45</sup> Karen Hunter, *Louima Case Leaves Some Big Questions*, New York Daily News p. 29, June 21, 1999.

<sup>46</sup> Michael Schoer initially told investigators he hadn't seen anything. Hays, *supra* note 44.

<sup>47</sup> Gregory Kane, *The Newark Star-Ledger*, p. 3, June 6, 1999; Levitt, *The Louima Verdicts*, *supra* note 42. Officer Kenneth Wernick came forward after being told he would be questioned in a hearing in which his failure to testify truthfully would mean dismissal. Officer Mark Schofield came forward after his gun and shield had been taken from him. Levitt, *The Louima Verdicts*, *supra* note 42. Deputy Chief Raymond Powers was forced to testify after authorities found telephone records showing he had engaged in a series of calls with Sgt. Michael Bellamo (who is accused of filing false reports in the case) around the time of the incident. See Hays, *id.*

<sup>48</sup> *Verdict Shatters Blue Wall*, *supra* note 43.

controversial street crimes unit.<sup>49</sup> Mayor Giuliani, in response, denied that the shooting was any indication of a pattern of excessive force by the department.<sup>50</sup> Those who dismissed the Louima and Diallo attacks as aberrational perhaps saw no connection to the Amnesty International report a year prior to the attack on Louima finding a pattern of brutality in the NYPD. Or perhaps they concurred in the police commissioner's dismissal of that report as "anecdotal."<sup>51</sup> The Amnesty International report came only two years after the Mollen Commission's widely reported findings of widespread abuse and "willful blindness" to that abuse among the NYPD.<sup>52</sup>

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<sup>49</sup> The street crimes unit has been described as aggressive, macho, and independent. Its slogan is "We own the night." See "The Mayor's Other Crime Rating," The New York Times, editorial, p. A26, February 12, 1999.

<sup>50</sup> Elisabeth Bumiller and Ginger Thompson, Thousands Gather Again to Protest Police Shooting, The New York Times Sec. A p. A24, February 10, 1999. See also Michael Cooper, Police Fire 41 Shots, and an Unarmed Man is Dead, The New York Times, Sec. A, p. 1, February 5, 1999; Robert D. McFadden and Kit R. Roane, U.S. Examining Killing of Man in Police Volley, The New York Times, Sec. A p. 1, February 6, 1999; Bob Herbert, A Brewing Storm, The New York Times, Sec. A p. A31, February 11, 1999.

<sup>51</sup> See NY Times, August 27, 1997 (letter to the editor from David Marshall, author of the report).

<sup>52</sup> See e.g. Krauss, 2 Year Corruption Inquiry, supra note 9 at p.21; Joseph b. Treaster, Mollen Panel Says Buck Stops with Top Officers, NY Times Sec. 1, p. 21, July 10, 1994. The Mollen Commission report itself covered much of the same ground as the 1972 Knapp Commission report.

Willful blindness is a good term for it. In addition to all the anecdotal data, there is a convincing body of empirical evidence documenting the existence of systemic police brutality in police departments across the nation. There are also many gaps in the data, and the reasons for those gaps are themselves an important part of the story of the resilience of police brutality. An effective, good faith effort to understand and change the patterns of police brutality would make use of both the anecdotal and the empirical evidence. It would welcome the anecdotal reports as a window onto the street and into the interrogation room--a way to learn about police-citizen encounters that usually elude supervision or review. It would be open to finding the patterns among the anecdotal reports, and it would supplement them with broader empirical studies.

Instead, there appears to be a desire to avoid knowledge, marked by a relentless anecdotalizing, a refusal to see patterns and connections, a refusal even to gather or share the information that might buttress and explain the anecdotal.<sup>53</sup> Often the refusal is accompanied by a demand that those alleging brutality provide

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For example the Department of Justice for many years declined the authority to gather statistics on patterns of misconduct. See Peter L. Davis, Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute, 53 Md. L. Rev. 271, 274 n4 (1994). See also infra note 131 (discussing Justice Department role).

supporting evidence, though the type of evidence demanded is largely in the control of the police themselves.<sup>54</sup> Instead of carefully collecting and analyzing data, officials offer the familiar, reassuring story of rotten apples scrupulously picked out of an otherwise pristine barrel. And they generalize from unrepresentative particulars: assumptions about police and citizen behavior based on the world familiar to the largely white, middle class officials themselves--a world that may bear little resemblance to the places in which police brutality flourishes.

The willful blindness afflicts every level and branch of government. The resilience of police brutality thrives on compartmentalization, failures to act, and deflection and denial of responsibility. Police brutality is the product of many institutional failures. Indeed, as many who have studied it believe, it could not thrive without the complicity of the society police serve. And certainly it could not thrive without the complicity of the court system.

#### **A. THE STORY OF CHICAGO'S AREA TWO VIOLENT CRIMES UNIT**

We don't keep separate count for electroshock, because there are

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<sup>54</sup> See e.g. *Shielded from Justice*, supra note 13 at 46 (NYPD denied Amnesty International requested statistics and case information and then criticized its resulting report for not presenting a complete picture).

so few--only three or four since the first of the year.<sup>55</sup>

Consider the story of the Area Two Violent Crimes Unit, located in an overwhelmingly poor, black area of the South Side of Chicago. For years, stories trickled out of Area Two, into the surrounding community, that within that building, police officers were torturing people. The problem was getting anyone outside the community to believe the stories. Beginning in the early 1970's, there were years of complaints filed with the applicable administrative agencies, the mayor, the state's attorney, and the United States Attorney, and there were allegations filed in numerous judicial proceedings. These complaints and allegations came from numerous unconnected sources, described alarmingly similar acts of torture, and named the same men over and over. But the scandal is not only that no action was taken for so long. It is also that men continued to be convicted, imprisoned and--in ten cases--sent to death row (where they remain today), based on confessions they alleged were elicited by torture. And that the alleged torturers and those who supervised them continued to be commended and promoted through the ranks, never eliciting the slightest hint of official disapproval.

It eventually became known that over a period of at least thirteen years in the early 1970's, more than sixty men, all of them

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<sup>55</sup> Spokesman for OPS, quoted in Deborah Nelson, Cop Torture and Shock Allegations Date to '70's, Chicago Sun-Times p. 4, August 2, 1992.

black, had been systematically tortured by members of a group of approximately fifteen Area Two officers, all of them white. The Office of Professional Standards [OPS]<sup>56</sup> did not investigate the complaints until 1990, and the city suppressed its report finding systemic torture in Area Two until 1992. The unit commander and ringleader, John Burge, was not fired until 1993. No criminal proceedings were ever instituted. Only two other officers (both of whom have been reinstated) were disciplined for any of the incidents, and many of them have been promoted, commended and allowed to retire with full benefits. No effort has been made to identify or address systemic problems in Area Two, or higher up the chain of command. The story is presented as closed, and even given a happy ending: the ringleader was ferreted out. As far as we know, there is no more police torture in Chicago.

A close examination of the Area Two story yields insight into the ways in which interlocking institutions, including state and federal courts, enable police brutality to thrive, and do so within the contours of existing law and social policy. The examination will also provide a concrete illustration of the assumptions that help government officials, including judges, accept and in many respects

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<sup>56</sup> An internal agency of the police department which is made up of civilian departmental employees, and which reports to the Superintendent of Police. See *Shielded from Justice*, supra note 13 at 165.

condone official brutality, and the way those assumptions work.<sup>57</sup>

When suspects were tortured in Area Two, many of them sought to file complaints. Some may have attempted to complain at Area Two itself. If so, there is no record of what occurred. The failure of police personnel to log complaints against their colleagues is a common problem, and one cause of the lack of data on police wrongdoing.<sup>58</sup> But most suspects filed complaints with the OPS. In this venue, the complaints were dismissed as "not sustained," a fate that befalls the vast majority of the complaints filed with OPS.<sup>59</sup> "Not sustained" usually means that the only witnesses to the incident were the police and the victims, and that OPS cannot figure out whom to believe. One journalist described "not sustained" as "a shrug

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<sup>57</sup> See Part II Sec. B, *infra*.

<sup>58</sup> See Skolnick and Fyfe, *supra* note 2 at 3 (discussing George Holliday's attempt to file a complaint in the Rodney King case). See also Nightline, transcript of August 22, 1997 (account by Abner Louima's brother and cousin of the refusal of the desk sergeant at the 70th precinct to allow them to file a complaint about Louima's assault by police). See also Yale, *supra* note 22 at 1854 (recommending the institution of a standardized national system of receiving and recording complaints against police).

<sup>59</sup> Eric Zorn, police brutality alleged; bring on the internal review, Chicago Tribune Sec. 2 at 1, October 2, 1997. OPS claims that 90-92% of complaints are classified as "not sustained," and press figures put the percentage even higher. Shielded from Justice, *supra* note 13 at 166.

that says 'who knows?'.<sup>60</sup> A finding of "not sustained" also reflects the presumption, automatically employed as a matter of OPS policy, that in an uncorroborated swearing contest, the officer's word must be believed.<sup>61</sup> When corroboration is available, it often comes from people whose credibility is questioned, such as other suspects, friends or family, people with criminal records or gang members.

Brutality and its culture create many of these conditions. Brutality is, by definition, concealed. The torturer usually attempts to leave no marks. Many of Commander Burge's techniques, including suffocation, placing a revolver in the suspect's mouth, squeezing a suspect's testicles, and playing Russian Roulette, leave no physical trace. When there is visible injury, unless there is corroboration it becomes the officer's word against the suspect's as to how and where it occurred.<sup>62</sup>

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<sup>60</sup> Eric Zorn, Police Terminology Clouds Unresolved Brutality Cases, Chicago Tribune Sec. 2 at 1, October 6, 1997.

<sup>61</sup> Conversation with Flint Taylor, February 13, 1998. See also Editorial, Leads the Cops don't Want to Follow, Chicago Tribune p. 20, February 13, 1992. As one attorney put it: "If the officer denies it, you're out of luck." Shielded from Justice, supra note 13 at 168.

<sup>62</sup> See, e.g., the brief of the State of Illinois in People v. Cannon, No. 94-4409, First District, Illinois Appellate Court, in which the state's attorney sarcastically said, inter alia: "Somehow, defendant did not sustain severe muscle and tissue injuries and was able to make use of his shoulders and arms after being lifted by his handcuffs from behind and twice being five

The swearing contest is stacked by two other essential characteristics of brutality. One characteristic is that it is concealed, not only by the officer inflicting it, but by his colleagues and supervisors.<sup>63</sup> The nationwide code of silence is well documented, pervasive, and crucial to the continuation of official brutality.<sup>64</sup> In Area Two, no officer ever publicly stepped forward to corroborate the existence of torture, or even intervened at the

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feet off the ground. Through divine intervention, defendant did not bite through his tongue or lip while being repeatedly electrocuted and suffering "the most excruciating pain" of his life in various areas of the city. Detective Dignan who apparently possesses some magical ability to torture without leaving any evidence also grabbed defendant by his hair when he saw defendant's siblings in the police parking lot. Again, there was neither balding nor bruising to defendant's scalp." (brief on file with author)

<sup>63</sup> See Myron W. Orfield, Jr., Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 U. Colo. L. Rev. 75, 108-114 (1992).

<sup>64</sup> See e.g. Skolnick and Fyfe, supra note 2 at 119; Chevigny, supra note 27 at 51. See also Stanley Z. Fisher, "Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports, 28 New England Law Review 1, 12 (1983) (calling police deception part of the culture, not aberrational.) Ironically, the decision of several officers of the NYPD to step forward in the Louima case, though the decision was made after much delay and only in the face of impending personal consequences to the officers themselves, was hailed by Mayor Giuliani and Police Commissioner Safir, not only as not aberrational, but as proof that the blue wall of silence is a myth. Levitt, The Louima Verdicts, supra note 42 and supra text accompanying notes 39-49.

stationhouse itself.<sup>65</sup>

The second characteristic is that brutality is practiced against members of marginalized groups living in marginal neighborhoods.<sup>66</sup> In Area Two, for example, all of the 65 known torture victims were black. One Pittsburgh cop describing the widely known rules stated: "The first is, keep it in the ghetto. In the good areas, you don't go

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<sup>65</sup> One individual with intimate knowledge of the torture wrote anonymous letters to civil rights attorneys providing names of victims. This officer cited the case of Michael Laverty to explain his refusal to come forward. Laverty was an Area Two cop who blew the whistle on the longstanding Area Two practice of keeping a secret set of "street files" separate from official case files. The street files contained exculpatory evidence the officers did not wish to turn over to defense attorneys, and other evidence contradicting the official case. Laverty exposed the practice in order to prevent the trial of George Jones, a man whom he knew to be innocent, in a case in which his colleagues had suppressed evidence exculpating Jones and inculcating another man. Although the Seventh Circuit thought Laverty should have been commended for his actions, instead he was charged with a disciplinary infraction, transferred out of the detective division, ostracized by his fellow officers, and assigned to a series of menial tasks culminating in the monitoring of police recruits giving urine samples. None of the defendants has been disciplined for misconduct in the arrest and prosecution of George Jones. *Jones v. City of Chicago*, 856 F.2d 985, 991 (7<sup>th</sup> Cir. 1988). See also Fisher, *id* at 2-4, 36-38, 40-45 (discussing Jones case) and 42 n207 (discussing treatment of Laverty) and Orfield, *supra* note 64 at 101-102 (discussing Jones case).

<sup>66</sup> See e.g. *supra* note 25 and *Shielded from Justice*, *supra* note 13 at 2,39-46. The report noted that despite gains in many areas since the civil rights movement, one area that has been stubbornly resistant to change has been the treatment afforded racial minorities by the police.

stopping people without cause."<sup>67</sup> One byproduct of this rule is that brutality will seem unbelievable or aberrant to decisionmakers, who tend to hail from more privileged backgrounds--it will not correspond to their experience. Another is that those who can corroborate it are too easy to dismiss--they are more likely to have criminal records, to be associated with gangs and to be less articulate, sophisticated and educated. They are less likely to evoke the empathy of decisionmakers with whom they have little in common.

Whether a complaint is found sustained or unsustained, OPS makes no attempt to place it in any larger context. OPS files are not computerized.<sup>68</sup> Union contracts call for complaints to be expunged every five years,<sup>69</sup> thus depriving police, attorneys and the community of another avenue for tracking individual or precinct-wide patterns of brutality. In ruling on a complaint, OPS does not consider [or even ascertain] whether there were past complaints against the officer. No effort is made to discern patterns of complaints regarding particular officers, particular precincts, or certain types of conduct [such as

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<sup>67</sup> Michael Kramer, How Cops Go Bad, Time Magazine, December 15, 1997.

<sup>68</sup> Shielded from Justice, supra note 13 at 169.

<sup>69</sup> Id at 167.

discharging a firearm or searching without a warrant].<sup>70</sup> This is particularly unfortunate since in Chicago, as nationwide, a vastly disproportionate amount of the brutality is committed by a small group of officers, each of whom may have dozens of complaints in his file.<sup>71</sup> Even multiple sustained complaints have no negative effect at all on

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<sup>70</sup> The police union's contract with the city prevents disclosure of the names of officers under investigation in most circumstances. Shielded from Justice, *supra* note 35 at 154 n9. But see *Wiggins v. Burge*, 173 F.R.D. 226 (N.D. Ill 1997), striking the confidential designation of OPS files detailing a pattern of brutality in Area 2 on the ground that the public interest in disclosure of the documents was not outweighed by the privacy interests of the officers. Often police organizations oppose disclosure of statistics about brutality even with names and other personal identifying information deleted.

<sup>71</sup> In 1989, for example, of Chicago's 11,000 member police force, 437 officers had more than one excessive force complaint. Of these, 278 had two complaints; 85 had three; 35 had four; and 39 had more than five. David Jackson, *Police Brutality: How Widespread is it?*, Chicago Tribune, March 24, 1991. See also Patton, *supra* note 15 at 768-77 and Flint Taylor, *Proof on Police Failure to Discipline Cases: A Survey (Part 2)*, 3 *Police Misconduct Civil Rights Law Reporter* 39, 42-47 (1990) (discussing prevalence of repeat offenders nationwide). See also Steve Mills and Todd Lighty, *Brutality Suit Not 1st Against Cop*, Chicago Tribune, Metro Section, pp. 1, 6 (January 21, 1999) (revealing that Chicago Police Officer Rex Hayes, who is currently being civilly sued for attacking and filing false charges against a South Chicago man and his daughter, had settled or lost at least eight other similar suits, in which the city had paid out a total of well over one million dollars in damages.) See also David Kocieniewski, *More Scrutiny for Shootings by Officers*, The New York Times p. A18 (January 1, 1998) (police officer who fatally shot an unarmed man on Christmas day has been involved in more shootings than any other officer on the city's police force.)

the officer's career--they are not even entered in his personnel file.

Even when the rules permit, OPS has not usually been a zealous investigative agency. Since 1985, three internal audits have accused the agency of losing investigative files and failing to interview key witnesses.<sup>72</sup> Even when a former Chief of Police asked the agency to look into allegations against Burge, it took an inordinate amount of time to do a slipshod and incomplete investigation. OPS' performance is consistent with that of many internal police divisions, stemming largely from the unwillingness of police officials to identify corruption in their ranks.<sup>73</sup> As Paul Chevigny observed in the similar context of New York's internal affairs division: "its policy was to make all the corruption investigations look like low level, individual matters, so they wouldn't balloon into generalized scandals."<sup>74</sup> For all these reasons, neither the large numbers of complaints against a small group of officers at Area Two, nor the fact that they alleged the same highly unusual and appalling story, was noticed by the internal agency charged with policing the police until much later.

In the meantime, many of the torture victims confessed, and were

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<sup>72</sup> David Jackson, *Difficult Path to Justice in Cop Brutality Case*, Chicago Tribune, P. 1, May 3, 1992.

<sup>73</sup> See e.g. Chevigny, *supra* note 27 at 80.

<sup>74</sup> Chevigny, *id* at 81-82.

charged with crimes. Thus individual complaints of torture at Area Two were making their way to the Illinois courts in suppression motions during the 1980's and early 1990's. For example, in 1982, Andrew Wilson said that he was repeatedly punched, kicked, smothered with a typewriter cover, electrically shocked, and forced against a hot radiator. In October 1983 Gregory Banks said he confessed to murder after Burge, John Byrne and other Area Two detectives beat him, suffocated him and subjected him to Russian roulette. In November 1983, James Cody said Area Two detectives used an electroshock device on his genitals. That same month, Darryl Cannon said Byrne, Peter Dignan and others subjected him to electroshock with a cattle prod and played Russian roulette with him, placing the gun in his mouth. In 1985, Lonza Holmes said that Burge, Peter Dignan and other detectives severely beat him. In 1986, Aaron Patterson said that Area Two officers Byrne and Dignan placed a typewriter cover over his face, beat him, choked him and threatened him.

In each case, the trial court denied a motion to suppress the confession. In many of the cases, the court denied the defendant access to police department brutality records on the officers involved.<sup>75</sup> If the defendant had such evidence in his possession, and sought to introduce evidence of similar acts of brutality by Area Two officers, or even by the same Area Two officers, the trial court

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<sup>75</sup> See e.g. *People v. Holbey*, 637 NE 2d 992 (Ill S. Ct. 1994) and *Town Without Pity*, supra note 3 at 22.

barred such evidence--granting the state's motion in limine on grounds that the evidence of prior beatings was irrelevant and immaterial.<sup>76</sup> In all but the Banks and Wilson cases, the Illinois appellate courts initially affirmed the trial courts' rulings. The courts ruled that there were no visible bruises,<sup>77</sup> or that the bruises could have been inflicted earlier or by the defendant himself.<sup>78</sup> Contemporaneous written statements by one defendant chronicling his abuse were barred, dismissed as "self serving;"<sup>79</sup> the testimony by another defendant's brother regarding bruises was found insufficiently credible.<sup>80</sup> The trial courts' decisions to suppress evidence of prior acts of brutality were upheld. The courts ruled, in case after case, that they would defer to the trial courts' factual conclusions.<sup>81</sup>

Patterson's motion to introduce prior OPS files regarding

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<sup>76</sup> See e.g. Patterson, 610 N.E. 2d at 37.

<sup>77</sup> See e.g. People v. Holmes, 556 NE 2d 539 (Ill App. Ct. First Dist, First Div 1989); People v. Patterson, 610 NE 2d 16 (Ill S. Ct. 1992).

<sup>78</sup> See e.g. People v. Hobley, 637 NE 2d 992 (Ill. S Ct 1994); People v. Howard, 588 NE 2d 1044 (Ill. S Ct 1992).

<sup>79</sup> Patterson, 610 NE 2d at 16.

<sup>80</sup> People v. Holmes, 556 NE 2d 539.

<sup>81</sup> See e.g. Holmes, 556 NE 2d 539; Hobley, 637 NE 2d 992.

brutality by Area Two detectives met the fate typical of such motions.<sup>82</sup> OPS had found the prior allegations "not sustained" which the Illinois courts transformed to "unfounded." The Illinois Supreme Court declined to second guess the trial court's decision to exclude the OPS evidence, stating:

A mere unfounded accusation that these officers beat someone who was arrested at Area Two one year previously, without more, does not tend to make it more probable that they coerced defendant's confession.<sup>83</sup>

Given that holding, the Supreme Court had little trouble, only one year after rejecting Patterson's claim, in rebuffing Hobley's attempt to introduce testimony of several others who claimed to have been abused by Area Two detectives in similar fashion. The court found that the three years between Hobley's interrogation and the alleged

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<sup>82</sup> See e.g. *People v. Orange*, 168 Ill.2d 138, 659 NE 2d. 935 (1995) (claim of systematic torture at Area 2 from 1982 to 1984 was rejected because defendant offered generalized allegations of coercive activity in Area 2, without other evidence); *People v. Murray*, 254 Ill. App.3d. 538, 626 NE 2d 1140 (1993) (allegations of abuse of other suspects at Area 2 properly excluded as general in nature); *People v. Maxwell*, 173 Ill 2d. 102, 670 NE 2d 679 (1996) (defendant denied post conviction relief despite studies establishing physical abuse and coercion at Area 2, because he failed to make a substantial showing that his constitutional rights were violated).

<sup>83</sup> *Patterson*, 610 NE2d at 38. See Editorial, *Fatal Consequences*, Chicago Sun-Times p. 45 (December 15, 1998) (reporting on petition filed by the MacArthur Justice Center and 65 death penalty opponents seeking to halt Patterson's execution, and calling for courts to review petition carefully). I am one of those who signed the petition.

incidents made the prior allegations too remote to be relevant.<sup>84</sup>

The court did not heed the words of Justice Rizzi of the Illinois Appellate Court, a member of the panel that reversed Gregory Banks' conviction. Banks had alleged that Dignan, Byrne and Charles Grunhard had put a .45 caliber gun in his mouth and threatened to blow his head off, had struck him with a flashlight on his chest, stomach and the back of his legs while he was handcuffed, and had said "we have something for niggers" and put a plastic bag over his head twice while kicking him in the stomach and the side. The trial court barred reference at trial to complaints of coercion by Byrne and Dignan thirteen months earlier, holding them irrelevant. Justice Rizzi wrote in Banks:

When trial judges do not courageously and forthrightly exercise their responsibility to suppress confessions obtained by such means, they pervert our criminal justice system as much as the few misguided law enforcement officers who obtain confessions in utter disregard of the rights guaranteed to every citizen--including criminal suspects--by our constitution.<sup>85</sup>

Despite Justice Rizzi's warning, the Holbey court distinguished the thirteen month gap in Banks from the thirty six month gap between Holbey's beating and those he alleged. It found the latter gap long enough to render the past conduct irrelevant. The fact that Holbey, Banks, Patterson, and numerous other unconnected individuals were

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<sup>84</sup> 637 NE 2d at 1010.

<sup>85</sup> 549 NE 2d at 771.

alleging the same unspeakable course of conduct, by the same officers, over and over, escaped its notice.<sup>86</sup>

The Illinois Supreme Court's peculiar notions of relevance may explain why the state's attorney was comfortable arguing, in the Cannon case, that the testimony of 28 other arrestees who claimed to have been tortured at Area Two was irrelevant to Cannon's claim of torture. The testimony of the prior arrestees included claims that Dignan, Byrne, Grunhard and others had suffocated them with plastic bags, shocked them in the testicles, beaten them with a flashlight, held a gun in their mouths, and hanged them from handcuffs, among other allegations. The State argued that the prior evidence was irrelevant because it differed from that at Cannon's trial. For example, whereas Cannon alleged that officers placed a shotgun in his mouth and pulled the trigger, these arrestees alleged that officers placed a *handgun* in their mouths. And whereas Cannon alleged the use of a cattleprod, other arrestees alleged that they were beaten with a

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<sup>86</sup> Holbey, 673 N.E.2d at 1010. This holding was reaffirmed in the ruling denying Holbey postconviction relief, despite Holbey's contention that the OPS report detailing a prior pattern of brutality constituted newly discovered evidence. Holbey, 696 N.E.2d at 335. The Illinois Appellate Court relied on Holbey in *People v. Hinton*, 1998 WL 909738 (1st Dist 1998), finding the evidence of a pattern of brutality irrelevant to claims that John Burge had tortured Hinton, since the only evidence that Hinton himself was tortured was his own testimony and a bloody jersey that he could not show had been bloodied in custody.

flashlight.<sup>87</sup> The Illinois Appellate Court rejected the argument, finding that the prior evidence was relevant to the intent, motive and course of conduct of the officers, and also could be used to impeach their credibility.<sup>88</sup> It remanded the case to the trial court, directing the judge to permit evidence of the prior brutal acts.<sup>89</sup>

How did Darryl Cannon learn of twenty eight prior incidents? Though he was first interrogated in 1983, and tried in 1984, his conviction was reversed on grounds unrelated to the conduct of his interrogation. By the time he was retried in 1994, information was available that had been nonexistent or inaccessible ten years earlier. It began with the 1982 interrogation of Andrew Wilson and his brother Jackie, who had been arrested for killing two police officers. The

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<sup>87</sup> People v Cannon, 688 N.E.2d 693, 696-98 (Ill App 1st Dist 1st Div 1997).

<sup>88</sup> Cannon, id.

<sup>89</sup> At the time of this writing, the evidentiary hearing is underway. See Steve Mills, Torture Allegations Lead to Case Review for Man Convicted in '84 Based on Confessions, Chicago Tribune, July 23, 1999. Aaron Patterson and others who allege torture by John Burge are scheduled to testify. Lawyers for Cannon, Patterson, and others have requested a joint hearing before the Illinois Supreme Court to establish the pattern and practice of torture by Burge and other Area Two detectives. State's Attorney Richard Devine has asked the Illinois Supreme Court to instead halt proceedings in the Patterson case as well as two other torture cases (those of Derrick King and Ronald Kitchen) until the Cannon case is resolved. See Steve Mills, Devine Asks Delay in Cases of 3 Who Claim Cop Torture, Chicago Tribune, July 29, 1999.

investigation after the police killing was described as "a massive, citywide manhunt that...brought numerous complaints that police were systematically rousing young black men and forcefully and unconstitutionally interrogating them."<sup>90</sup> The Wilson brothers were both convicted of murder and sentenced to life in prison for the killings. In 1982, Andrew Wilson filed a complaint with OPS about his interrogation, which was found not sustained.

In 1986 Wilson, represented by a small, highly committed group of veteran police misconduct litigators, filed a federal civil rights suit against the individual officers and the City of Chicago. Wilson's testimony is described in excruciating detail in three articles by John Conroy, "House of Screams;" "Town Without Pity" and "The Shocking Truth."<sup>91</sup> For example, from Wilson's testimony:

Detective Yucaitis entered the room...carrying a brown paper bag from which he extracted a black box. Yucaitis allegedly pulled two wires out of the box, attached them with clamps to Wilson's right ear and nostril, and then turned a crank on the side of the box..."I kept hollering when he kept cranking," Wilson said, "but he stopped because somebody come up to the door...Burge returned with the black box about an hour later. He said "fun time..." Burge put one clip on each of the suspect's ears and started cranking...I was hollering and screaming. I was calling for help and stuff. My teeth was grinding, flickering in my head, pain and all that stuff...That radiator...it wouldn't have mattered. That box...took over. That's what was happening. The

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<sup>90</sup> Federal Police Brutality Trial Opens, UPI, February 16, 1989.

<sup>91</sup> See supra note 3.

heat radiator didn't even exist then. The box existed.<sup>92</sup>

Photos taken the next day at the request of Wilson's lawyer showed burn marks where Wilson claimed to have been held against a radiator, and a pattern of scabs on his ears that "seemed inexplicable unless one believed that alligator clips had indeed been attached to Wilson's ears."<sup>93</sup> But on cross examination of Wilson, the policemen's attorney suggested that Wilson had found a roach clip between the time he left Area Two and the time he went to Cook County Jail, and that he had placed it on his ears and nose in order to support his story that he had been subjected to electrical shock.<sup>94</sup>

The first trial ended in a hung jury. Toward the end of the first trial, Wilson's lawyers fortuitously began learning of other victims of torture at Area 2.<sup>95</sup> The information came, at the beginning, from the anonymous letter mentioning Melvin Jones, who led

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<sup>92</sup> Conroy, *House of Screams*, supra note 3 at 20.

<sup>93</sup> *House of Screams*, id.

<sup>94</sup> *House of Screams*, id.

<sup>95</sup> In a deposition of John Burge, Wilson's lawyers repeatedly asked him for information on prior allegations of misconduct against him. Burge said he could not recall any, except one by someone named Michael Johnson. In denying a request for sanctions against Burge for failing to cooperate with discovery, Judge Duff stated: "while Burge may have had a beneficially faulty memory, the court cannot say he lied." *Wilson v City of Chicago*, 1989 WL 65189, (N.D. Ill. June 5, 1989.)

the lawyers to other victims, and so on.<sup>96</sup> At Wilson's second trial, District Judge Brian Duff excluded the testimony of Jones, who claimed to have been subjected to electroshock by Burge and other officers nine days before the interrogation of Wilson, and in an investigation of the same crime. He also excluded the testimony of Donald White that he was arrested in the same investigation shortly before Wilson was, and was beaten for several hours by Burge and other Area Two officers. Judge Duff held Jones' and White's testimony irrelevant. In Jones' case, he found his account diverged significantly from Wilson's: Jones claimed he was shocked using tweezers rather than alligator clips. Judge Duff was particularly skeptical of White, finding that his failure to complain to the State's Attorney or to file a complaint with OPS damaged his credibility.

The jury thus heard no evidence of Burge's prior conduct. The resulting highly confusing jury verdict was that Wilson's constitutional rights had been violated, 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 that the policy had not been a direct or proximate cause of the abuse to Wilson.

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<sup>96</sup> The Jones letter arrived near the end of the first civil trial. When Wilson's lawyers moved for a new trial based on this newly discovered evidence, Judge Duff denied their motion, finding that they had not exercised due diligence in their attempts to discover it. *Wilson v City of Chicago*, 1989 WL 65189, (N.D. Ill. June 5, 1989.)

In 1987, the Illinois Supreme Court overturned Wilson's criminal conviction, finding that he had visible injuries, such as burns on his chest and thigh, a black eye, cuts requiring stitches, and bleeding on the eye surface. It found he had been injured in police custody, and that the state had not met its burden of explaining the injuries, and remanded for a new trial.<sup>97</sup>

At the same time, public awareness of Wilson's allegations about Burge was beginning to grow. In 1989--one year after Burge was promoted from lieutenant to commander-- a local watchdog group called Citizens Alert asked OPS to reopen Wilson's 1982 investigation as well as some other files in which Burge was mentioned. Citizens Alert formed a special Task Force to Confront Police Violence, which created a coalition of more than fifty community organizations to lobby the police board.<sup>98</sup> The coalition began an intensive campaign of letter writing, speeches, articles, marches and rallies. They spoke at every police board meeting until the board agreed to have OPS reopen the case.<sup>99</sup> Protests escalated as other men began stepping forward with

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<sup>97</sup> He was again convicted on retrial. *Wilson v. City of Chicago*, 6 F3d 1233, 11236 (7th Cir 1993) (giving background of state criminal case).

<sup>98</sup> *Town Without Pity*, supra note 3 at 25.

<sup>99</sup> Conversation with Mary Powers of Citizens Alert, February 9, 1998.

similar allegations of torture.<sup>100</sup> In 1990 Amnesty International issued a report finding that systematic torture had occurred in Area Two. That same year, OPS began its new investigation.

OPS filed two reports in 1990. The first found that John Burge had applied electroshock to Wilson and had burned his face, chest and thigh by holding them against a radiator. The second found that Burge and others had engaged in systematic abuse, including planned torture, for at least thirteen years, claiming at least fifty victims. It concluded that command members were aware of the systematic abuse and had perpetuated it, either by participating or by failing to take any action. The city immediately had the reports sealed, and they were not released until 1992, by the order of a federal judge in a related case.<sup>101</sup> Upon the report's release, Mayor Daley and Police Superintendent Leroy Martin called it "statistically flawed."<sup>102</sup> Martin said "to believe the department has a brutality problem is to smear the sacrifices of officers who have died in the line of

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<sup>100</sup> Ken Parish Perkins, *The Bane of Brutality: Commander's Firing a Starting Point for Look at How Cops Treat Minorities*, Chicago Tribune, Tempo Section p. 3 (July 4, 1994).

<sup>101</sup> *Wiggins v. Burge*, 173 F.R.D. 226 (N.D. Ill. 1997).

<sup>102</sup> Charles Nicodemus, *Brutality Rap Hits Merit Cop*, Chicago Sun Times p 3 (March 18, 1995).

duty."<sup>103</sup> Mayor Daley said "These are only allegations... allegations, rumors, stories, things like that. This is a report by an individual. It is not fully documented." <sup>104</sup>

Although neither Daley nor Martin took action at the time, public pressure continued. Burge was eventually fired by the Police Board in 1993. Two other men were disciplined for fifteen months each and then reinstated.<sup>105</sup> The president of the police board emphasized that the board's findings were based on the Wilson case alone. "We did not make findings on any other cases. This is not an indictment of the entire police department."<sup>106</sup>

Burge's firing was upheld in state circuit court. The judge's only comment was "Regrettably, I have to affirm the ruling of the

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<sup>103</sup> Leads the Cops Don't Want to Follow, supra note 62.

<sup>104</sup> Id.

<sup>105</sup> The Fraternal Order of Police was unsuccessful in its effort to enter a float in the 1993 Saint Patrick's Day Parade honoring Burge and the other disciplined officers. *Wilson v. City of Chicago*, 6 F.3d at 1236.

<sup>106</sup> Sharman Stein, *Police Board Fires Burge for Brutality*, Chicago Tribune, February 11, 1993.

police board."<sup>107</sup> No criminal charges were brought against Burge<sup>108</sup> or any of the other Area Two officers.<sup>109</sup> No federal investigation was undertaken.<sup>110</sup> The other Area Two officers, like Peter Dignan, continue to be decorated and promoted. In 1995 Dignan was promoted to the rank of lieutenant for meritorious service.<sup>111</sup> Both Mayor Daley and Police Superintendent Matt Rodriguez were quoted as saying they were unaware of the allegations against Dignan when the selection was

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<sup>107</sup> Cop Fired for Torture Won't Get Job Back, UPI, February 11, 1994.

<sup>108</sup> Burge is currently living in Florida, where he works as a security guard and sails his forty foot cabin cruiser, 'Vigilante.' See Charles Nicodemus, Cop Links 10 Capital Cases, Chicago Sun Times, p. 6, February 26, 1999.

<sup>109</sup> It is extremely rare for the Cook County State's Attorney's Office to prosecute a police brutality case. The Chicago Tribune reports that between 1982 and 1992 only six officers have been criminally charged with abuse. Of those, five were acquitted. The sixth--who shot an unarmed man in the back of the head during a 1983 traffic stop--was convicted only of a misdemeanor civil rights violation. David Jackson, Difficult Path to Justice, supra note 73.

<sup>110</sup> See Paul Hoffman, Feds, Lies and Videotape, 66 S. Cal. L. Rev. 1455 (1993) for a discussion of the Justice Department's traditional hands-off attitude toward state level police brutality.

<sup>111</sup> He was named one of the nation's "top cops," leading to a visit to the White House in which he shook President Clinton's hand. Conroy, Poison in the System, supra note at 26.

made.<sup>112</sup> The Mayor's spokesman said "the Police Department obviously had all sorts of information at its fingertips when it made these promotions, and is standing behind the promotion, and so are we."<sup>113</sup>

As it turned out, the police department did have substantial information at its fingertips. In 1998, information that a federal judge ordered released over the strenuous objections of city attorneys<sup>114</sup> revealed for the first time that OPS had, in 1993, reopened nine of the torture cases, reversing earlier rulings and determining that Burge and other Area Two detectives had indeed tortured six of the complainants. And further, that after determining systematic abuse had occurred, OPS failed to act on the information and simply allowed the files to languish. These critically important findings were kept secret from the alleged brutality victims, some of whom are on death row and in the midst of the appellate process. Late last year, the police department's general counsel, Thomas Needham, decided that the files should be closed because they were too old. He stated that "the lengthy delay between the date of the initial

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<sup>112</sup> Nicodemus, Brutality Rap Hits Merit Cop, supra note 103.

<sup>113</sup> Nicodemus, id.

<sup>114</sup> The information was ordered produced by Federal District Court Judge David Coar, on discovery in an unrelated case alleging a municipal policy of police brutality. Santiago v. Marquez, Mercado and the City of Chicago, 97C-2775 (U.S. Dist. Ct. N.D. Ill. 1997). See also Steve Mills, Prober found cop torture was likely, Chicago Tribune, Sec. 2, p. 1, April 21, 1999.

complaint and the present makes it virtually impossible to conduct any kind of meaningful inquiry into the matter in issue." He ordered that the "sustained" findings be changed to "not sustained," clearing the officers,<sup>115</sup> in order to permit the department to "move forward."<sup>116</sup>

As to the Wilson brothers' case, in 1993, the Seventh Circuit ruled in Wilson's civil rights suit. In an opinion by Judge Posner, the court found that the federal district court's rulings on relevance had deprived Wilson of a fair trial. The Seventh Circuit held that the district court had erred in allowing in "a mass of inflammatory evidence having little or no relevance to the issues at trial"<sup>117</sup> meant to recreate the Wilson's actions in killing two police officers. Conversely, the Seventh Circuit found that the District Court had wrongly excluded the testimony of Melvin Jones and Donald White. Judge

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<sup>115</sup> See Steve Mills, Brutality Probe Haunts City, Chicago Tribune, p.7, February 23, 1999 and Conroy, Poison in the System, supra note 3 at 31. Federal Judge David Coar has since ordered Chicago Police Superintendent Terry Hillard to answer questions about the dismissed allegations. Steve Mills, Judge keeps heat on alleged cop torture, Chicago Tribune, p.5, April 17, 1999. Community groups and attorneys for the brutality victims are urging that the cases be reopened. See Ashley Bach, Police urged to reopen alleged torture cases, Chicago Tribune, Sec. 2, p.3, August 3, 1999.

<sup>116</sup> Steve Mills, Judge keeps heat on allged cop torture, id.

<sup>117</sup> The court found that the underlying facts of the crimes were not relevant to Wilson's credibility, and therefore exceeded the scope of cross examination. 6 F.3d at 1237.

Posner wrote:

[The District Court] kept out on grounds of relevance the plainly relevant testimony of Melvin Jones...If Burge had used an electroshock device on another suspect only a few days previously, this made it more likely (the operational meaning of 'relevant') that he had used it on Wilson. Another excluded plaintiff's witness, Donald White, would have testified that he was arrested as a suspect in the murder of the two police officers shortly before Wilson's arrest and was taken to a police station where he was beaten for several hours by Burge and other defendant officers. Although evidence of prior bad acts is inadmissible to prove a propensity to commit such acts, it is admissible for other purposes, including intent, opportunity, preparation, and plan. Fed. R. Evid. 404 (b).<sup>118</sup>

The court remanded for a third trial on the individual allegations.<sup>119</sup>

The court also considered the municipal liability holding. It found that police superintendent Brzeczek, who was the relevant policymaking official, had received many complaints about abuse in Area Two, that he had referred them to OPS which had done nothing "except lose a lot of the complaints," that he had written to the state's attorney, but when he received no answer, did nothing, that he had signed a commendation for Burge, and that a rational jury could have inferred that he knew Area 2 officers were prone to beat up suspected cop killers. But, said the court, "failing to eliminate a practice cannot be equated to approving it...Proof of dereliction of

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<sup>118</sup> Wilson, 6 F.3d at 1238.

<sup>119</sup> The case settled for more than one million dollars before going to trial for a third time. See *The Shocking Truth*, supra note 3 at 1.

duty was not enough. But that was all there was."<sup>120</sup>

#### **B. THE PATTERN OF NO PATTERN**

The system operates to immunize police from internal discipline and gives the appearance of formal justice, but actually helps to institutionalize subterfuge and injustice. (David Fogel, former director of the Chicago Office of Professional Standards).<sup>121</sup>

Perhaps our first instinct is to dismiss the story of Area Two as largely the work of one evil man, an isolated throwback to more primitive times, with no larger significance. A common reaction to unthinkable stories of this nature is to anecdotalize and compartmentalize them--to assume that they could not happen in our community, that they could only happen to others and never to *us* or those we value, that they are not representative. It is also common to rationalize such incidents--to assume that the victims must have brought their punishment on themselves.<sup>122</sup> This, too, is a way of reassuring ourselves that we are exempt from such a fate.<sup>123</sup>

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<sup>120</sup> 6 F.3d at 1240.

<sup>121</sup> From a 1987 internal memorandum to the mayor of Chicago. Quoted in Zorn, Police brutality alleged, *supra* note 60.

<sup>122</sup> See, for example, the testimony apparently accepted by the jurors in the first trial of the officers accused of Rodney King--that he brought the beatings on by his resistance. Cannon, *supra* note 30 at 253-58.

<sup>123</sup> Erwin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* at 79 (Cambridge Univ Press 1989) (describing just world thinking).

This reaction has elements of truth to it. First of all, police brutality is unlikely to be inflicted on non-minority members of the middle class.<sup>124</sup> One of the salient characteristics of police brutality is that it is largely practiced on poor and minority groups--in part as a way of devaluing them and demarcating *them* from *us*.<sup>125</sup> This characteristic helps allow brutality to flourish, by making it easier for *us* to discount and marginalize the victims' credibility, value, even humanity. Second, a longstanding torture ring may be unusual even in the annals of brutality, at least in the United States. Paul Chevigny, in referring to the minimization of the third degree as one of the human rights success stories in the United States, refers to Area Two as one of the "pockets where the third degree has recently been used" and linking the types of torture that occurred there to tactics used in Brazil.<sup>126</sup>

Nevertheless, in most significant respects, what happened at Area Two is highly representative of business as usual both in Chicago and

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<sup>124</sup> Chevigny says it is rare and risky to subordinate those who are not subordinate, who are middle or upper class. Chevigny, *supra* note 27 at 12. See also note 25, *supra*.

<sup>125</sup> Staub, *the Roots of Evil*, *supra* note 124 at 58. Incidents of brutality often include racial epithets hurled by police at their targets. See e.g. Deborah Sontag and Dan Barry, *When Brutality Wears a City Badge*, *New York Times* p. 1 (November 19, 1997) (describing incidents of brutality by NYPD).

<sup>126</sup> Chevigny, *supra* note 27 at 133.

throughout the United States. As the foregoing account makes clear, the torture of more than sixty black men in Area Two over a period of more than thirteen years could not have occurred without the assistance of numerous individuals and institutions, including judicial officers and judicial institutions. And as the work of Chevigny, Jerome Skolnick, James Fyfe and the other scholars of police brutality well illustrates, if the methods of brutality were unusual, the rest of the story was all too familiar.

In Los Angeles, New York, Pittsburgh, New Orleans, Washington D.C., Philadelphia--in every city for which anecdotal or statistical evidence exists, the pattern of no pattern, the relentless anecdotalizing, the refusal to learn, to know, to acknowledge, is the predominant reaction to police brutality. There are some city-based differences in police culture,<sup>127</sup> but much more striking are the similarities--the siege mentality, the us/them attitude, the tendency to abuse poor minorities, the blue wall of silence, the elevation of loyalty over integrity. The administrative structures set up to deal with brutality vary in some of their particulars--for example internal versus external--but few of the applicable administrative agencies are willing to see or act on patterns of brutality. Often, the agencies are bound by, or themselves promulgate, rules designed to impose secrecy, and to prevent knowledge of patterns and linkages. State courts vary

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<sup>127</sup> See e.g. Chevigny, *supra* note 27, chapters 1 and 2; Police Violence: Understanding and Controlling Police Abuse of Force at 30-32 (in Geller and Toch, *supra* note 25).

in their independence and, even in a state like Illinois in which all state judges are elected, one or two courageous judges can make a real difference. And indeed, the story of Area Two includes examples of judges, both state and federal, who challenged the conventional assumptions and attempted to use the courts to reform rather than condone police brutality.<sup>128</sup> But most striking are the acquiescence, the passivity, the overwhelming *credulousness* of the state courts when faced with brutality claims and rote official denials. The federal government has largely been part of the problem--deferring to state law enforcement agencies, and rarely prosecuting either criminally or civilly.<sup>129</sup> The Justice Department, far from looking for patterns, historically opposed legislation that would have required local governments to report data to them, and then claimed that the problem was local since the federal government had no useful knowledge about it.<sup>130</sup> The federal courts have their own ways of disaggregating

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<sup>128</sup> Thus in the story of police brutality told in *this* article, the actions of these judges are viewed as aberrational rather than part of a larger pattern. I believe this is the correct view, but want to draw attention to the fact that this story, like any other, seeks coherence, and chooses, according to the author's notions of significance, which events and actions are representative and which are anecdotal.

<sup>129</sup> Hoffman, *supra* note 111 at 1455, *Shielded from Justice*, *supra* note 13 at 106.

<sup>130</sup> Hoffman, *id* at 1490. The Violent Crime and Law Enforcement Act of 1994, 42 USC Sec. 14141-2, Ch. 136, Subchapter IX, Part B (1994) now authorizes the Justice Department to investigate and litigate pattern and practice allegations against local police departments. See Mark Curriden, *When Good Cops Go Bad*, 82 May ABA J 62 (May 1996) (discussing the scope of the pattern and

patterns of brutality, including an aversion to municipal liability suits.<sup>131</sup> Besides, the federal courts are only as effective as is the law that binds them. Much of the problem stems from Supreme Court decisions like Los Angeles v. Lyons<sup>132</sup> Rizzo v. Goode,<sup>133</sup> Bryan County v.

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practice legislation). However, as of this writing the Justice Department has yet to produce an annual report (Shielded from Justice, supra note 13 at 108). Nevertheless, some progress is being made. For example, in the wake of the new authorization, a consent decree in Pittsburgh requires creation of a computer database that tracks every officer, including detailed descriptions of all citizen complaints and claims filed in civil court, all documented uses of force, and the race of everyone arrested, searched without a warrant or stopped for a traffic violation. An early warning program has been instituted to monitor this data to identify and address unusual patterns of behavior. The information will be kept for as long as each officer is on the force and made available to the Office of Municipal Investigations before officials question an officer in a brutality allegation. See United States of America v. City of Pittsburgh, Pittsburgh Bureau of Police and Department of Public Safety, U.S. District Court for the Western District of Pennsylvania, Civil No. 9700354, April 16, 1997.

<sup>131</sup> See e.g. Douglas Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 *Hasting LJ* 499, 560 (1993). See also Hamilton, *A View from One Trench*, supra note 23.

<sup>132</sup> 461 U.S. 95 (1983). Lyons denies standing for injunctive relief to litigants unable to demonstrate the likelihood that they will again be subject to the same conduct. Since the courts are reluctant to assume that police misconduct will continue, and equally reluctant to recognize that the misconduct often targets particular (poor, minority) neighborhoods, they rarely find the threshold of likelihood of recurrence to be met.

<sup>133</sup> 423 U.S. 362 (1976) in which the Court upheld dismissal of suit alleging patterns of police misconduct and brutality, based on lack of standing, federalism and an unwillingness to hold government responsible for its

Brown,<sup>134</sup> Briscoe v. Lahue,<sup>135</sup> DeShaney v. Winnebago County<sup>136</sup> and United States v. Whren,<sup>137</sup> which represent the High Court's own refusal to acknowledge or act on patterns of police abuse.

The "whole story," the coherent tale, that courts tell about police brutality is a story of dedicated police officers whose sole motivation is to serve the public good. The evidence of brutality is dismissed as anecdotal and irrelevant. The coherent tale remains coherent by rejecting or assimilating alternative stories. It either rejects stories of brutality as irrelevant and incredible or treats them as exceptions that prove the rule--isolated instances of "savage

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failure to supervise. See also O'Shea v. Littleton, 414 U.S. 488 (1974) (denying standing to challenge a pattern of racial discrimination in administration of the city's criminal justice system.)

- <sup>134</sup> 107 S. Ct. 1382 (1997), holding that a Section 1983 municipal liability action for failure to train or supervise will not lie absent evidence that the policymaker knew, in making his decision, that it would deprive the particular victim of his civil rights.
- <sup>135</sup> 460 U.S. 325 (1983), holding that police officers have absolute immunity for their testimony at trial, even if it is perjured.
- <sup>136</sup> 109 S. Ct. 998 (1989), holding that due process does not include any affirmative governmental duties to protect, even for governmental agencies like police or fire departments that are mandated and expected to afford protection to the citizenry.
- <sup>137</sup> 116 S. Ct. 1769 (1996), holding evidence that police actions were based on pretext irrelevant to a fourth amendment analysis, so long as police had actual authority to take the actions they did.

torture" that constitute "an exceedingly marked and unusual deviation"<sup>138</sup> from a squeaky clean norm.

Why do courts continue to adhere to the narrative of the rotten apples in the face of so many challenges to its coherence? Or, put differently, why do judges so often see their role as to perpetuate the status quo rather than to provide a check on lawless state behavior? What notions of relevance do courts use when they so often relegate each act of brutality to the realm of the irrelevant detail? When courts determine whether a suspect's injury was caused by a police officer, or whether several such police-inflicted acts were caused by the department's policies, what notions of causation do they employ, and what assumptions underlie these notions? When they need to fill in the blanks to render a story coherent, what pre-existing notions of human behavior do they use to create verisimilitude? What political and social assumptions guide, however invisibly, the construction of the narrative of police brutality?

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<sup>138</sup> This is how the city's attorneys belatedly began characterizing the acts of John Burge after judgment was entered against him and the city sought to avoid having to indemnify him. Conroy, *The Shocking Truth*, supra note 3 at 34.

## II. THE FRAGMENTATION OF OFFICIAL CONDUCT

### A. THE "MERELY" ANECDOTAL

The idea of anecdote, understood in broader contexts, can illuminate certain pervasive and crucial decisions courts must make: when determining patterns and links among individuals, when determining the scope of events, when determining what individuals and actions constitute a governmental entity, and when crafting an opinion describing the patterns they discern. Anecdote, as I will explain, can act as both a useful description of, and in some respects a corrective to, current understandings of the ways in which courts comprehend patterns. More specifically, for the purposes of this Article, it can help us think about why judges so often view police brutality as anecdotal, non-systemic, a threat to the conventional narrative of a few rotten apples in an otherwise pristine barrel. What is the power of this story, and how should we understand the refusal to make the connections among these incidents that would open the way for change?

Questions of which details to include or highlight in a particular story, which to minimize or exclude, are inescapable. A narrative can never be more than a representation, a selection of details.<sup>139</sup> Shaping

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<sup>139</sup> Patricia Ewick and Susan Silbey point out that until recently, social scientists rejected narrative analysis as "an ambiguous, particularistic, idiosyncratic, and imprecise way of representing the world." Patricia Ewick and Susan Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 *Law & Society Review* 197, 198 (1995). This description is of course often used about anecdotes as well.

a narrative means determining what events and details are relevant, which requires a standard of relevance. It means determining how these events are connected to each other, and to the whole, which requires both a notion of causality and a standard for defining the whole. This standard is most often supplied by the conventionalized norms of the genre: the narrative structure "will not admit events or phenomena that do not belong to it and preserve its laws."<sup>140</sup> Thus the storyteller will suppress any particulars that don't "fit the mold," that make the story appear "ill-formed."<sup>141</sup> He may not recognize that the presence of the anecdotal can signal a need to re-evaluate the existing narrative. As the work unfolds, new linkages are revealed. The significance of the irrelevant detail may become fully apparent only as the total structure of the story emerges.<sup>142</sup>

Anecdote is a literary term that comes weighted with both positive and negative connotations. It is defined as a narrative of a detached incident or of a single event, told as being in itself interesting or

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<sup>140</sup> Seymour Chatman, *Story and Discourse* at 22 (Cornell 1978); Hayden White, *The Value of Narrativity in the Representation of Reality* at 15, in *On Narrative* (WJT Mitchell, ed, University of Chicago Press 1981). See also Martin Price, *The Irrelevant Detail and the Emergence of Form* at 70-71, in *Aspects of Narrative* (J. Hillis Miller ed) (Columbia 1971) and Ewick and Silbey, *id* at 213 (discussing "colonizing consciousness").

<sup>141</sup> Chatman, *id* at 22.

<sup>142</sup> Price, *supra* note 141 at 70-71.

striking.<sup>143</sup> The anecdote is a story with a point, or with "punch."<sup>144</sup> The Romans regarded anecdotes as a miniature art form.<sup>145</sup> The term calls to mind charming and memorable stories like those Boswell told about Samuel Johnson.<sup>146</sup> In Isaac D'Israeli's words: "A well chosen anecdote frequently reveals a character, more happily than an elaborate delineation; as a glance of lightning will sometimes discover what has escaped us in full light."<sup>147</sup>

An effective anecdote is simple--it is a small but polished story that emphasizes and even embellishes salient and evocative details and disregards those that might interfere with the moral or teaching point.<sup>148</sup> Telling an anecdote may have several salutary effects. It may

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<sup>143</sup> The Compact Edition of the Oxford English Dictionary V. 1 at 319 (Oxford University Press 1971).

<sup>144</sup> Joseph Epstein, *Merely Anecdotal* at 167 (citing Langford), *American Scholar* Volume 61 (Spring 1992).

<sup>145</sup> Elizabeth Hazelton Haight, *The Roman Use of Anecdotes* at 1 (Longmans, Green and Co. New York 1940).

<sup>146</sup> James Boswell, *Life of Johnson*, ed. RW Chapman, corrected by JD Fleeman (London, Oxford University Press 1970).

<sup>147</sup> Isaac D'Israeli, *A Dissertation on Anecdotes* at 16 (1793) (reprinted by Garland Publishing Inc, NY 1972).

<sup>148</sup> Thomas Gilovich, *How We Know What Isn't So: The Fallibility of Human Reason in Everyday Life* at 90 (Free Press 1991) Gilovich describes a "good story" as one whose message is emphasized and sharpened, whereas inessential details are de-emphasized or leveled. Such stories become simpler and cleaner, not encumbered by minor inconsistencies or ambiguous details. They are

bring alive an otherwise dry teaching point, through its evocativeness, and perhaps also through its appeal to empathy. It may focus on experiences with which we can connect on an emotional level. As David Simpson observed: "We understand human nature not by its grand appearances, but by the 'minute springs and little wheels' that anecdotes reveal."<sup>149</sup>

However, the dangers of anecdote are also evident. The anecdote may discard the *wrong* details. That is, instead of discarding the irrelevant, it may oversimplify.<sup>150</sup> It may present itself as representative when it is not. Even without an explicit claim of typicality, it may confuse listeners into believing it is representative, because it is so evocative and memorable.<sup>151</sup>

The "Reagan anecdote" epitomizes the danger, and some of the ambiguity. The "Reagan anecdote" is a masterful means of humanizing and

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informative and entertaining, and therefore worthwhile for both speaker and listener.

<sup>149</sup> David Simpson, *The Academic Postmodern and the Rule of Literature: A Report on Half Knowledge*, 55 (U of Chi Press 1995), citing D'Israeli.

<sup>150</sup> It has been described as "an all purpose put down device, which boxes complicated issues and individuals into a single caption." James Wolcott, *Hear Me Purr*, *The New Yorker* at 54, 58 (May 20, 1966).

<sup>151</sup> Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System--and Why Not?*, 140 U. Pa. L. Rev. 1147, 1159 (1992) (discussing the availability heuristic). See also *infra* note 160.

emotionalizing complex issues of policy.<sup>152</sup> It does so by oversimplifying, by choosing unrepresentative stories and portraying them as representative, and, perhaps even by means of fabrication.<sup>153</sup> Dinesh D'Souza called Reagan's anecdotes "morality tales" whose effective "illustration of a broader theme" was not invalidated simply because some of its details might be erroneous.<sup>154</sup> Thus the term suggests both an evocative and effective tool for communicating, and a misleading and untrustworthy means to an end.<sup>155</sup>

The use of anecdotes inevitably raises the problem of representativeness.<sup>156</sup> Suzanna Sherry and Daniel Farber argue that

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- <sup>152</sup> This is not to suggest that President Reagan was either the first or last practitioner of the art. See e.g. Michael Kramer, "The Political Interest: Newt's Believe It or Not," *Time Magazine*, December 19, 1994 at 43 (describing Newt Gingrich as an accomplished practitioner of the Reagan anecdote).
- <sup>153</sup> Joan Didion, *The Lion King*, *The New York Review of Books*, December 18, 1997; reviewing Dinesh D'Souza, *Ronald Reagan: How an Ordinary Man Became an Extraordinary Leader* (Free Press 1997); Herblock, "Onstage With Two Bit Players and a Superstar," *The Washington Post*, Dec 31, 1995 ({Reagan} told anecdotes that had no basis in fact, but they were good lines and he kept using them).
- <sup>154</sup> Didion, *id* at 13. See also Gilovich, *supra* note 149 at 97 (an effective story may stretch the facts in service of a greater truth).
- <sup>155</sup> Paul D. Erickson, *Reagan Speaks* at 32 (NYU Press 1985); *The Anecdote Trap*, *The Washington Post* pg. A16 (March 6, 1995).
- <sup>156</sup> See Kenneth Burke, *A Grammar of Motives*, ch. III (Univ of Calif. Press (1945)); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*,

"even if a story is true, it may be atypical of real world experiences,"<sup>157</sup> and that "to ignore the typicality concern would be to allow an unrepresentative individual to speak for a group, in effect silencing other members."<sup>158</sup> Farber and Sherry raise their concern with representativeness largely as a critique of critical race scholarship and its use of first person narratives. But this critique seriously underestimates the pervasiveness of the representativeness issue.

Sherry and Farber's observation in fact describes an inherent and unavoidable problem with all use of anecdotes and indeed, most efforts at narrative coherence. Every narrative is itself--unavoidably--based on a choice of anecdotal events according to some standard of relevance, and on assumptions about the causal connections among these events. The tendency to make inferences about whether characteristics or events are representative is an integral part of our cognitive apparatus. What psychologists term the "representativeness heuristic" is one of a set of legitimate and absolutely essential cognitive tools, which permit people to think beyond the information given; to form inferences. In particular, the representativeness heuristic permits people to estimate the likelihood that an event or characteristic is

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96 Colum. L. Rev. 1753, 1767 (1996).

<sup>157</sup> Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan. L. Rev. 807,838 (1993).

<sup>158</sup> *Id.* at 839-40. See also David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 Indiana L. J. 797, 801 (1998).

part of a larger category or class.<sup>159</sup> Like all inferences, it brings with it the danger of error, but nevertheless it is a critical means of organizing our experience.<sup>160</sup>

In the legal context, there is a danger that anecdotes, divorced from any larger context and uninformed by empirical data, will unduly influence the development of legal policy. This is a danger which is decried, for example, in the field of tort reform.<sup>161</sup> As one commentator said, statutes written in response to anecdotal reports may yield highly complex codes that anticipate bizarre circumstances while ignoring the commonplace circumstances citizens are likely to encounter.<sup>162</sup> But there is a significant difference between identifying the dangers of anecdote and dismissing anecdote entirely, a difference

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<sup>159</sup> The other common judgmental strategy is the "availability heuristic," which permits people to estimate the relative likelihood that particular events will recur. Richard Nisbett and Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* at 18-28 (Prentice Hall 1980). See also note 152, *supra*.

<sup>160</sup> See Nisbett and Ross, *id.* at 18-23. The authors note that it is almost impossible to imagine how mental life would be managed without such knowledge structures. *Id.* at 38.

<sup>161</sup> See e.g. Saks, *supra* note 152 at 1159; Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 *Iowa L. Rev.* 1, 15, 21 (1992).

<sup>162</sup> Saks, *supra* note 152 at 1159. See also William Glaberson, *When the Verdict is Just a Fantasy*, *The New York Times* Sec. 4 p. 1, June 6, 1999 (discussing \$2.9 million cup of coffee and other legal horror stories).

some critics miss.

For example, one critic of the narrative turn in law stated that because of problems in assessing truthfulness and typicality, "scientists and medical researchers reject anecdotal evidence."<sup>163</sup> But in ways that are crucial for our purposes, this statement is inaccurately broad. In the sciences and social sciences, anecdotal evidence signals an area ripe for further study, but by itself becomes *merely* anecdotal--unscholarly, unreliable and trivial. Unsupplemented by more systematic study, anecdotal evidence allows only the weakest of inferences, because its representativeness cannot be determined.<sup>164</sup> But when accepted for what it is, anecdotal evidence is useful.<sup>165</sup> Indeed, D'Israeli notes that neither the science of human nature *nor* the science of physics progressed very far until vague theory was supplemented by an anecdotal, experimental dimension which did not divorce knowledge from experience.<sup>166</sup>

In law--perhaps especially in law--the danger of the unrepresentative anecdote exists in continual tension with a need for

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<sup>163</sup> Hyman, *supra* note 159 at 801.

<sup>164</sup> Saks, *supra* note 152 at 1159.

<sup>165</sup> See Gilovich, *supra* note 149 at 58 (distinguishing the cognitive processes involved in generating ideas from those involved in testing ideas).

<sup>166</sup> D'Israeli, *supra* note 148 at 27. See also Simpson, *supra* note 150 at 58 (quoting D'Israeli).

anecdotal evidence.<sup>167</sup> Judge Posner observes that the use of anecdote is inevitable in fields, like law, where theory is weak.<sup>168</sup> But could it be otherwise? The common law system proceeds largely by the use of anecdote, analogy and case studies.<sup>169</sup> Unlike, for example, physics, in which results can be laboratory tested, the results in law will ultimately be tested by more experiential--anecdotal--data.<sup>170</sup> Anecdotal evidence is a way of learning about the legal world "out there"<sup>171</sup> --the society the law serves.<sup>172</sup> It is a

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<sup>167</sup> See Albert W. Alschuler, *Explaining the Public Wariness of Juries*, 48 DePaul L. Rev. 407, 414-17 (1998) (arguing that aggregating data and examining central tendencies is useful, but must exist in conjunction with examination of anecdotal evidence and atypical cases).

<sup>168</sup> Richard Posner, *The Jurisprudence of Skepticism*, 86 Mich. L. Rev. 827, 845 (1988).

<sup>169</sup> See e.g. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 Harv. L. Rev. 923 (1996); Posner, *Jurisprudence of Skepticism*, id at 844-45; Saks, *supra* note 152 at 1159. Indeed, the conventional notion of adjudication assigns great value to individualized, case by case decisionmaking. See Susan Bandes, *The Idea of a Case*, 42 Stan. L. Rev. 227, 277-79 (1990).

<sup>170</sup> I recognize that these questions are not considered closed in the "hard" sciences either. See e.g. Simpson, *supra* note 150 at 42; citing Richard Rorty, *Consequences of Pragmatism* at 164-66); Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 Harv. L. Rev. 1, 11-12 (1989); Comment, *Prolegomenon to Myth and Fiction in Legal Reasoning, Common Law Adjudication and Critical Legal Studies*, 35 Wayne L. Rev. 1449, 1454 (1989).

<sup>171</sup> *Beal v. Doe*, 432 U.S. 438, 448 (1977) (Brennan, J., dissenting). See also Teresa A. Sullivan, *Methodological Realities: Social Science Methods and*

way of testing theory to ensure it is grounded in reality, and that it serves the purposes for which it was conceived.

There is a tension in the notion of anecdote. Is it a story told because it is remarkable, or because it is a vivid and essential representation of something broader? To the extent it does seem remarkable, how can we be sure this is not in fact a function of its failure to conform to familiar stories, or accepted storytelling norms? How can we be sure it is not a function of the storyteller's inability to see connections among "anecdotes" which would, if understood, convert the anecdotal to the systemic? For example, Joseph Epstein tells the following anecdote about the Soviet Union: that its defenders were accustomed to dismissing the testimony of dissident writers such as Boris Pasternak and Alexander Solzhenitsyn as "merely anecdotal" and thus not to be taken seriously. The anecdotal was posed against the "documentary," which meant the statistics and accounts given out by the Soviet government.<sup>173</sup> Similarly, one economist recently defined 'anecdotal' as "the customary derisive tag for heterodox economic

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Business Reorganizations, 72 Wash. U. L. Q. 1291, 1293 (1994).

<sup>172</sup> Stephen Gillers, *Against the Wall*, 43 J. Legal Educ. 405, 407 (1993).

<sup>173</sup> Epstein, *Merely Anecdotal*, supra note 145 at 168. See also Stephen Greenblatt, *Marvelous Possessions: The Wonder of the New World* at 2 (University of Chicago Press 1991) (contrasting history told by anecdotes, or 'petite histoires' with history told through 'grand recit.')

ideas."<sup>174</sup> Anecdote, when well deployed, may be an effective tool in challenging the authority or universality of the conventional narrative. The greatest danger of the grand narrative is that it ossifies. Without the pull of the anecdotal, there is no way to assess the accepted story's continuing viability in the face of new understandings and new information. Its structural choices and assumptions become invisible, and its narrative viewpoint masquerades as omniscient.

The notion of anecdote may offer a partial corrective to such false claims of omniscience. The anecdote provides a temporary landing place, while reminding us that there is always more to come.<sup>175</sup> But in law, the continual accumulation of detail, the temporary landing place, is not always possible or desirable. Closure is an essential element of storytelling, and certainly of legal storytelling. Judgment needs to be rendered. The difficulty is distinguishing those events that ought to be part of the story from those that ought to be excluded.<sup>176</sup>

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<sup>174</sup> John Cassidy, *The Force of an Idea*, *The New Yorker* at 32, January 12, 1998.

<sup>175</sup> Simpson, *Academic Postmodernism*, *supra* note 150 at 53. See also *id* at 62: "There can be no whole, no totalized system, as long as we are dealing with real lives, and so the proper ambition is one of continual accumulation without disclosure."

<sup>176</sup> Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 *U. Chi. L. Rev* 361, 382-90 (1996) (discussing normative aspects of choosing particular narratives).

The challenge is to find a way to mediate between instance and theory, between the anecdote and the larger narrative structure.<sup>177</sup> When ought a proposition be submitted for more systematic study,<sup>178</sup> when ought it be perceived as a quirk or oddity, and when as sufficient notice of a more recurrent problem which needs to be explored? Conversely, when ought systematic, empirical evidence stand on its own without the need for individual, anecdotal stories of suffering or subjective intent?<sup>179</sup>

Narrative theory reminds us that these questions are inescapably normative. Jurists and others who shape the narratives of governmental misconduct are not faced with mechanical and inflexible rules for determining the narratives' construction, but with choices and contingencies that are influenced *but not dictated* by cultural,

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<sup>177</sup> See e.g. Joel Fineman, *The Subjectivity Effect in Western Literary Tradition* at 73 (MIT Press 1991).

<sup>178</sup> Frederick Schauer, *The Questions of Authority*, 81 *Georgetown L.J.* 95, 106 (1992).

<sup>179</sup> See e.g. *Board of the County Commissioners of Bryan County v. Brown*, 117 S. Ct. 1382 (1997) (refusing to find municipality liable in absence of proof that sheriff hired deputy with subjective knowledge that he was likely to violate this particular plaintiff's civil rights;); *EEOC v. Sears Roebuck & Co.*, 628 F Supp 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988) (statistical pattern of discrimination held insufficient in absence of stories of individual women); see also Ewick and Silbey, *supra* note 140 at 206.

historical and political assumptions.<sup>180</sup> There is no way to avoid evaluating those assumptions and assessing both whether they are the right assumptions, and whether they lead to the right results.

**B. SOME ASSUMPTIONS THAT HELP SHAPE STORIES OF POLICE BRUTALITY**

My central thesis is that a number of unstated assumptions interfere with the courts' ability or willingness to see patterns, sequences, causal links, and systemic coherence when it views allegations of governmental misconduct. These assumptions sometimes lead courts instead to a narrow view of connection, causality and plot, under which conduct that ought<sup>181</sup> to be viewed as part of a coherent whole is instead rendered irrelevant and fragmented. That which ought to be seen as part of a grand narrative of official misconduct is instead marginalized as anecdotal.

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<sup>180</sup> We share pre-conscious assumptions about causality, coherence, relevance, motive, origin and closure, and these unstated assumptions help define the narrative structures we find followable and meaningful. Narrative scholars disagree on many things, including the extent to which those assumptions belong to reader or author and the nature of the assumptions themselves (e.g. are they historical, moral, cultural, trans-cultural), but they do agree that notions like "event;" "plot;" "ending" and "causal sequence" cannot themselves explain how narrative coherence is achieved. See e.g. White, *supra* note 141 at 14; Price, *supra* note 141; Chatman, *supra* note 141 at 43.

<sup>181</sup> See Bandes, *Empathy, Narrative*, *supra* note 177 at 385 (discussing the unavoidable moral and political elements of decisions on which stories to tell).

There is a deep and basic human need for narrative coherence, which may be threatened by what is perceived as irrelevant detail. We share, as William James said, an "indomitable desire to cast the world into a more rational shape in our minds than the crude order of our experience."<sup>182</sup> Narrative stabilizes, or appears to stabilize, a frighteningly complex world.<sup>183</sup> In law, these tendencies are magnified. The law itself embodies a striving for coherence and order.<sup>184</sup> Legal rules, presumptions and thresholds can easily disguise patterns and dismiss details that threaten the continuity of the existing order. But they can also be used to illuminate such patterns and details. At times judges are open to challenges to existing governmental systems. At times they will refuse to condone--even help subvert--an order that appears unjust. But overwhelmingly, the judicial system acts to turn away systemic challenges to governmental wrongdoing.

When governmental misconduct is fragmented and anecdotalized, it is less threatening and easier to dismiss. When judges treat

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<sup>182</sup> William James, "The Dilemma of Determinism" (1897), reprinted in *The Will to Believe and Other Essays in Popular Philosophy* (Dover NY 1956).

<sup>183</sup> See Gilovich, *supra* note 149 at 9 (discussing the predisposition to see order, pattern and meaning in the world).

<sup>184</sup> The very notion of the social contingency of legal facts and norms may seem to threaten the legal order, by calling into question the objectivity of legal judgments. See W. Lance Bennett and Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* at 178 (Rutgers 1981).

individual actors who challenge the current system as isolated actors and dismiss or vulgarize their motives, or conversely, portray their actions as heroic and special, they act to perpetuate the current system. My goal in this section is to examine the background assumptions and perspectives that shape courts' tendency to anecdotalize government misconduct and thereby avoid systemic reform.

What follows does not purport to be a comprehensive list of such assumptions. It is more in the nature of a provisional list of working hypotheses. I will explain each of them briefly. I will then examine them in detail in the context of police brutality.

#### **THE ASSUMPTIONS**

- \* the assumption that the status quo is essentially coherent and just, and must be maintained.
  
- \* selective empathy: the inability to take certain perspectives seriously.
  
- \* the fear of destabilization and chaos if systems as currently constituted are threatened, or perhaps even challenged.
  
- \* the need for individual stories of motive, fault and blame.

\* the assumption that the common law attributes provide the paradigm for public law cases.

\* the preference for judicial insulation.

**\* THE ASSUMPTION THAT THE STATUS QUO IS ESSENTIALLY COHERENT AND JUST**

This assumption stems from an inability to imagine that things could be very different from what they are--it sees the current governmental order not as based on political and social choices, but rather as neutral, natural and nonpolitical. It reflects a (not necessarily conscious) desire to perpetuate the current structure on the part of those it has served well.<sup>185</sup> But it is not only the power elite that have a stake in viewing the current order as coherent and just. Studies reveal a widely shared need among the citizenry to believe that the world is just--that those who are punished by the state (and even abused by the police) have brought their fates upon themselves. The longstanding phenomenon of police brutality could not have flourished without widespread acquiescence.

**\* SELECTIVE EMPATHY**

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<sup>185</sup> See Derrick A. Bell, Jr., *Brown v. Bd. of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980). See also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status Enforcing State Action*, 49 Stan. L. Rev. 1111, 1119 (1997) (the current regime is unlikely to redistribute power or goods in a way that significantly disadvantages non-subordinated groups).

There is a human tendency to understand and empathize with those most like us. Judges are not exempt from this tendency, which often leads them to best understand and appreciate the motivations of those who share their defining attributes, such as class, gender, race and prestige.<sup>186</sup> Much of this occurs on a subconscious level. When judges need to "fill in the blanks:" for example, make causal connections or assign motivations, they will do so in a way that seems natural and familiar to them. The danger for judges lies in forgetting that their perspectives are necessarily partial, and mistaking the dominant for the universal.<sup>187</sup> Judges' lack of imaginative empathy may blind them to certain motivations, and make them too credulous of others. When they mistake their own perspectives for universal truths, they may feel too comfortable in dismissing, distorting or assimilating alternate perspectives.

**\* THE FEAR OF DESTABILIZATION AND CHAOS**

The fear of chaos is often expressed in the language of societal costs.<sup>188</sup> The Court expresses concern that if it acknowledges the possibility that certain pervasive patterns exist, an entire system may need to be revamped. The cost is seen as simply too great, and becomes itself a value weighing against change. Justice Powell in McCleskey v.

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<sup>186</sup> Bandes, *Empathy, Narrative*, supra note 177 at 375-82.

<sup>187</sup> *id.*

<sup>188</sup> See e.g. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Ross v. United States*, 456 U.S. 798 (1982).

Kemp explicitly invokes the fear of destabilization as a reason not to act, when he rejects the plaintiff's argument that the administration of the death penalty is racially biased.<sup>189</sup> He states: "[P]etitioner's claim, taken to its logical conclusion, throws into serious question the principles that underlie the entire criminal justice system." McCleskey begins from the premise that protecting lives and preserving order is the highest value, and then concludes that therefore it would simply be too destructive of this value to recognize deep flaws in the criminal justice system. Like the state court judge who refused to infer that police are systematically evading the mandate of Mapp v. Ohio by fabricating their testimony, because that would be "a frontal attack on the integrity of our entire law enforcement system,"<sup>190</sup> Justice Powell and four of his brethren in McCleskey virtually plead *not to be told*, because acting on such knowledge would be too destabilizing.<sup>191</sup>

The judge's unrecognized selective empathy is closely connected to both the desire to perpetuate the status quo and the fear that disturbing the status quo will lead to chaos. The judge is far more likely to identify with the police officer and the law enforcement structure than with the victim of police brutality. But he may well

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<sup>189</sup> 481 U.S. 279, 282 (1987)

<sup>190</sup> People. v. Berrios, 270 NE 2d 709, 713 (NY 1971).

<sup>191</sup> See Randall Kennedy, Race, Crime, and the Law at 336-37 (1997): "Powell's McCleskey opinion was haunted by anxiety over the consequences of acknowledging candidly the large influence of racial sentiment in the administration of capital punishment in Georgia."

overlook the fact that he is exercising selective empathy, and believe his perspective is universal. Thus he is able to believe that because the current system is working well for him and those like him, it must be working well in general, and that those who challenge it must be unrepresentative malcontents.<sup>192</sup> He may also believe that to preserve such an effective system is essential, and that to make systemic changes to it would threaten not just the well being of those like him, but of society as a whole.

The police officer's job is, at least in part, to preserve law and order. The police may see themselves as the thin blue line between order and the forces of crime, or as soldiers in the war on crime. They may view themselves as synonymous with "the law" and with the preservation of order; and may view suspects as the enemy,<sup>193</sup> or as "out of order."<sup>194</sup> Unless they have been carefully and progressively trained, they may perceive threats to their authority as threats to order itself-

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<sup>192</sup> See Kim Lane Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 NYLS L. Rev. 123, 161 (1992) (narrative expectations are dependent on visions of normality and aberration, drawn from experience and widely available stock representations).

<sup>193</sup> See Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence of Police Use of Force* at 26 (in Geller and Toch, *supra* note 25). The author reviews psychological literature identifying several types of law enforcement personalities. He concludes that the "tough cop" who believes his role is primarily crime control, as opposed to problem solving, is most likely to use force improperly.

<sup>194</sup> Chevingy, *supra* note 27 at 142.

-and such perceived threats are a major trigger for police brutality.<sup>195</sup> Charges of systemic police brutality are themselves often perceived by police supervisors, internal affairs investigators and even high level officials like the police chief or the mayor, as threats<sup>196</sup> to the maintenance of order--since they may lead to scandals that could "rock the department" and interfere with its effectiveness at combating crime. As the Mollen Commission found, widespread police brutality and corruption was abetted by willfully blind supervisors who fear the consequences of a corruption scandal more than the corruption itself.<sup>197</sup>

To the extent judges see their role as enabling police to do their jobs, and as helping to maintain order, they may view accusations of

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<sup>195</sup> See Sontag and Barry, When Brutality Wears a City Badge, supra note 26 (reporting findings that perceived challenges to police authority are often the predicate to police violence).

<sup>196</sup> Skolnick and Fyfe, supra note 2 at 186.

<sup>197</sup> Krause, Willful Blindness, supra note 9. The prosecution is also closely aligned with the police. They work together, and tend to see many of their interests as in alignment. Skolnick and Fyfe, supra note 2 at 199. See also Davis, supra note 54 at 289-91 (describing the symbiotic relationship between police and prosecutors), and Mike Allen, Charge of Murder Against an Officer Stirs Debate on Risk, New York Times at pp. 1, C23 (February 17, 1999) (local prosecutors who charge police with crimes often rely daily on those same police to make cases against other suspects.) See also Maurice Possley and Ken Armstrong, The flip side of a fair trial, The Chicago Tribune p. 1, January 11, 1999 (discussing how prosecutors sacrifice justice to win, and why winning becomes paramount).

systemic brutality as a threat to that role.<sup>198</sup> Why judges might view their role in that light is a complex question, partly answered by the judicial fear of chaos and destabilization. To ward off chaos, it becomes crucial to preserve the grand narrative of a police force keeping order effectively, and yet without losing its integrity or abusing its discretion. To preserve this narrative, judges must dismiss stories that would threaten its coherence as irrelevant, incredible or unrepresentative. Thus, rather than welcome the chance to learn more about and address problems of brutality, courts (like police and politicians) fend off allegations of systemic brutality, viewing them as simply too dangerous.

Of course judges could buck the system if they chose, but in police brutality cases they are unlikely to do so. First, it takes tremendous courage to buck the system in police brutality cases. For a state judge to "side with" the complainant and against the police is often political suicide. Police superintendent Leroy Martin said that "to believe the department has a brutality problem is to smear the sacrifices of officers who have died in the line of duty."<sup>199</sup> Judges may agree with this sentiment, but even those who don't are well aware of its power and

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<sup>198</sup> Colbert, *supra* note 132 at 570 (most federal judges are white, wealthy, male and conservative and unsympathetic to civil rights claims, particularly municipal liability claims).

<sup>199</sup> Leads the Cops Don't Want to Follow, *supra* note 62.

prevalence.<sup>200</sup> Even a life tenured federal judge may have difficulty withstanding the wrath one incurs by speaking the truth. Recall the reaction to Judge Harold Baer's observation that people in the Washington Heights section of New York City tend to fear and flee from the police, whom they regard as "corrupt, abusive and violent."<sup>201</sup> Judge Baer had worked on the Mollen Commission, which had found rampant lawlessness, corruption and brutality among police in that very neighborhood. Nevertheless, there were calls for his impeachment from, among others, the Senate Majority Leader.<sup>202</sup> Judge Baer retracted his observation.<sup>203</sup>

On a less conscious level, judges are unlikely to buck the system because they see themselves as part of it. Judges, like police officers, may have a strong temperamental disposition toward the preservation of order. Robert Cover said:

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<sup>200</sup> Chevigny reports that in the early part of the century, lower court state judges were beholden to the machine and thus would deliberately accept perjured testimony from police, themselves cogs in the same machine. Chevigny, *supra* note 27 at 47.

<sup>201</sup> *United States v. Bayless*, 913 F. Supp. 232, 242 (SDNY 1996); reversed on reconsideration at 921 F. Supp. 211 (SDNY 1996).

<sup>202</sup> Joan Biskupic, *Hill Republicans Target 'Judicial Activism'; Conservatives Block Nominees, Threaten Impeachment and Term Limits*, *Washington Post* (September 14, 1997).

<sup>203</sup> *United States v. Bayless*, reversed on reconsideration at 921 F. Supp. 211 (SDNY 1996).

The judge is educated to think in terms of the values underlying legality and ordered processes. His education, colleagues, experience, lead him to be extra alert to potential dangers to law. Moreover, because so much of his life integrates those values, he is, himself, threatened by threats to them. He is quite likely to react when they are under attack or when he feels slippage.<sup>204</sup>

In addition, judges often have a strong identification with governmental actors, such as police officers. Their selective empathy is not hard to understand, in many cases. For example, Andrew Wilson was a convicted killer of two cops, whom he evidently attacked without provocation; Commander Burge was a decorated war hero, and a high ranking officer with several commendations for bravery.<sup>205</sup> Empathy in such a situation would tend to flow toward the officer. In other cases, the selective empathy rests on grounds that are harder to admit.<sup>206</sup> For example, although most of Burge's victims were not accused of murder, all were easily marginalized--black, ghetto dwelling, sometimes gang members, often unemployed. And indeed, one of the purposes of police brutality is to dehumanize its victims; to treat them as objects to whom no empathy is due.<sup>207</sup>

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<sup>204</sup> Robert Cover, *Justice Accused* at 226 (Yale University Press 1975).

<sup>205</sup> *House of Screams*, *supra* note 3 at 22.

<sup>206</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 *Stan. L. Rev.* 317, 321 (1987) (discussing difficulties with purposeful discrimination requirement); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 *Cornell L. Rev.* 1016 (1988)(discussing judicial difficulty with acknowledging racist beliefs).

<sup>207</sup> See e.g. David Lester, *Officer Attitudes Toward Police Use of Force* at 183, in Geller and Toch, *supra* note 25.

Commander John Burge told Melvin Jones, one of his torture victims: "No court and no State are going to take your word against a lieutenant's word."<sup>208</sup> Much police brutality takes place in secret--in interrogation rooms and back alleys.<sup>209</sup> Because of brutality's secret nature, the motivation and credibility of those involved becomes paramount in resolving the swearing contests that are an endemic feature of brutality claims. The courts must, literally, fill in the blanks when they decide whether to believe the police officer or the complainant. Who has a motive to lie, and who is more likely to be telling the truth?<sup>210</sup> Courts will often fill in the blanks with what seems familiar and right to them.<sup>211</sup>

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<sup>208</sup> John L. Stainthorp, with the assistance of Flint Taylor, *Litigating Police Torture in Chicago*, at 3-15, 13 *Civil Rights Litigation and Attorney Fees Annual Handbook* (Salzman ed) (West 1998).

<sup>209</sup> See e.g. Bumiller and Thompson, *Thousands Gather Again to Protest Police Shooting*, supra note 51 (The four officers involved in the shooting of Amadou Diallo were the only witnesses to the incident.)

<sup>210</sup> Bill Nolan, president of the Chicago unit of the Fraternal Order of Police, summed it up this way: "These guys are all murderers. They were all guilty, and now they're looking for a way to get out of jail, so they're blaming John Burge." See Martha Irvine, *Torture Claims in Death Row Cases Raise Thorny Issues for Justice System*, A.P. Newswires, July 3, 1999. See also text accompanying infra notes 250-52,

<sup>211</sup> The result (at least as of this writing) in the Louima federal civil rights case is instructive. One officer was convicted, and another pled guilty when conviction seemed certain. As to both defendants, police testimony corroborated the allegations of brutality. Officers

The divide between the upstanding officer, often from the same class and race as the judge,<sup>212</sup> and the marginalized victim, is typical in police brutality cases, and in torture cases in general. It is a divide between those like us and those we may not see as completely human; it is also a divide between those we believe would preserve stability and those we believe would destroy it. Between those fighting the war on crime, and, by clear implication, those who are enemies of the state. John Conroy writes:

...[I]n societies where torture occurs, the tortured class is usually not held in much respect; the victims are rarely the pillars of the community, but rather its agitators, its poor, its heretics, and those viewed as a threat to the society at large. Torturers, on the other hand, often represent popular belief. It is not unusual for them to come from the rank of honored military men who have served their country in time of need... A judge or jury choosing between an erect and courageous torturer and an unpopular victim often has an easier time identifying with the torturer.<sup>213</sup>

What is problematic about judicial selective empathy in these cases is that it is invisible, to the judges themselves, and often to those who read judicial opinions. Thus the alignment with the police and

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indicted for another alleged incident of brutality against Louima, this one in a police car, were acquitted. In that case, no corroborating police testimony was offered. See Justice in New York City, St. Petersburg Times p.16A, June 12, 1999.

<sup>212</sup> See Skolnick and Fyfe, supra note 2 at 239 (discussing white, male institution of police) and note 199, supra.

<sup>213</sup> Conroy, Town Without Pity, supra note 3 at 22.

prosecution is portrayed and viewed as neutral decision making,<sup>214</sup> and deviations from it are viewed as ideological or political. The preservation of the status quo, which perpetuates police methods that almost exclusively harm the underclass,<sup>215</sup> seems both important and just to those who are unharmed.

In the context of police brutality, the status quo may seem just if the bad actors get their just deserts, even if it isn't done "by the book." This is a recurring theme in the study of police brutality. Officers report that the not very subliminal message, beginning at the academy and constantly reinforced thereafter, is to get the collars in any way possible. We are familiar with this ethic, which is so deeply imbedded in popular culture that it is called the "Dirty Harry syndrome."<sup>216</sup> Perjury and brutality are obviously acceptable, even necessary, ways of getting the job done, and those who engage in them are assured protection from the top down.<sup>217</sup> As the Area Two scandal

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<sup>214</sup> William J. Brennan, Jr., Reason, Passion and "The Progress of the Law," 10 *Cardozo L. Rev.* 3, 11 (1988) (discussing the judge's "visceral temptation to help prosecute the criminal"). See also, Bandes, *Empathy, Narrative*, supra note 177 at 368-69.

<sup>215</sup> Lester, *Officer Attitudes Toward Police Use of Force* at 183, supra note 25) (citing studies that consistently find blacks most dissatisfied with the police).

<sup>216</sup> Skolnik and Fyfe, supra note 2 at 7.

<sup>217</sup> Kramer, *How Cops Go Bad*, supra note 68; Skolnick and Fyfe, supra note 2 at 7; Chin and Wells, supra note 18 at 234-35.

illustrates, perjury is an essential handmaiden to police brutality. It takes the "passive" forms of refusal of officers, even supervising officers, to rat on their compatriots or discipline those under their supervision. But it also takes the "active" forms of covering up wrongdoing,<sup>218</sup> and of lying under oath,<sup>219</sup> as occurred over and over in Area Two.

And so judges are implicated. It has often been observed that judges routinely turn a blind eye to "even incredible"<sup>220</sup> police perjury, implicitly condoning it.<sup>221</sup> Judges may view police perjury as a necessary evil that allows them to put away bad actors rather than let them escape on technicalities.<sup>222</sup> They may also see a certain amount of police misconduct as necessary for the maintenance of order. The perjury

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<sup>218</sup> See e.g. *Webster v. City of Houston*, 689 F.2d 1220, 1232 (5th Cir. 1982) (custom of using throw down guns to disguise wrongful use of deadly force).

<sup>219</sup> David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 *Harv Civ Rights Civ Liberties L Rev* 465, 486 (1992). See also David Kocieniewski, *Police Prosecutor Claims Cover-Up in Beating Case*, *New York Times* p. A25, April 9, 1998 (NYC police sergeant assigned to prosecute officers accused of brutality files federal suit charging that commanders ordered him to cover up evidence of wrongdoing, and punished him when he refused to do so).

<sup>220</sup> Rudovsky, *id* at 488.

<sup>221</sup> See eg *Chin and Wells*, *supra* note 18, and *Cloud*, *supra* note 18.

<sup>222</sup> Rudovsky, *supra* note 220 at 467.

shields them from facing the point at which the force crosses the line and becomes brutality. Or perhaps, as Robert Cover describes in his brilliant study of antislavery judges enforcing the fugitive slave laws, they have somehow convinced themselves that the law allows them no choice.<sup>223</sup>

Even if judges convince themselves that brutality is a necessary cost of obtaining convictions, it is not clear what thought processes they use in a case like Andrew Wilson's. Wilson's civil suit had no bearing on his incarceration, but sought damages for police torture.<sup>224</sup> The civil suit raises the even more unpalatable explanation that "just deserts" may include extra-legal punishment, like police beatings. There is ample evidence that police administer brutality as summary punishment, of a particularly dehumanizing and racialized sort (often even after the confession has been obtained).<sup>225</sup> But there is no acceptable answer to the question of why a judge would condone such behavior, particularly on an ongoing basis.

**\* THE NEED FOR INDIVIDUAL STORIES OF MOTIVE, FAULT AND BLAME**

Robert Cover said: "every narrative is insistent in its demand for

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<sup>223</sup> Cover, *Justice Accused*, supra note 205.

<sup>224</sup> Even when Wilson prevailed, he would never see a dime, since his award would go straight to the families of his victims. *The Shocking Truth*, supra note 3 at 1.

<sup>225</sup> Chevigny, supra note 27 at 11.

its prescriptive point, its moral."<sup>226</sup> The demand for a clear moral point often carries with it the demand for uncomplicated villains, who have deliberately done bad things to good people. That is, when harm occurs, but is not set in motion by malevolence, the reader may find the story lacks verisimilitude; she might find the harm was unlikely to have been *caused* in the way described.

These storytelling conventions are highly problematic when governmental misconduct is alleged. For several reasons, the insistence on motive--on deliberate, bad faith wrongdoing--can only serve to disaggregate governmental misconduct. First, complex governmental entities like police departments, unlike people, don't have motives--they act with an impersonal face. Second, even the individuals who constitute government operate from a variety of motivations, not often directed at particular individuals.<sup>227</sup> Finally, much governmental misconduct is inaction, or a web of interlocking actions and inactions, which do not fit comfortably within the standard morality tale's paradigm of

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<sup>226</sup> Robert Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 5 (1983).

<sup>227</sup> See e.g. *Owen v. City of Independence*, 455 U.S. 622, 652 (1980) (discussing "systemic injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several governmental officials, each of whom may be acting in good faith.") See also *Bandes, Monell, Parratt, Daniels and Davidson: Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 Iowa L. Rev. 101, 126-27 (1986); *Bandes, The Negative Constitution*, 88 Mich. L. Rev. 2271, 2317-23 (1990).

malevolent individuals causing harm by singling out innocent victims.<sup>228</sup>

Police brutality can flourish because so many individuals and institutions are willing to delegate, look the other way, fail to act, and make sure they *do not know* what has occurred before, or in some other department.<sup>229</sup> Street level cops make large numbers of small, disconnected decisions, rarely documented, and subject to minimal review. In some cases these decisions are guided, at least in theory, by written policies or legal constraints.<sup>230</sup> More often, they are guided by priorities communicated less overtly. Indeed, the failure to promulgate specific policies protects policymaking officials and keeps

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<sup>228</sup> The innocent victim part of the tale is also important. The fact that so many victims of police brutality are not only part of marginalized groups, but also in many cases charged with serious crimes, members of gangs, persons with prior criminal records, makes them a poor fit for the standard conception of the innocent victim.

<sup>229</sup> In "The Shocking Truth," for example, Conroy writes about Assistant Corporation Counsel Forti, who is now arguing that the actions of the defendants in the Wilson case were outrageous, shocking and unique. "Forti says he doesn't know the facts of the other Area Two cases. He wants to confine all discussion to what the corporation counsel is charged with doing in the Wilson case, and in his mind his arguments are logical, consistent with the law, and the best course for city taxpayers. The fact that the corporation counsel's outrage is expressed in this, the single case of electric shock that threatens the city's wallet, is merely indicative that the office is doing its job in this single case--he is familiar with no others." The Shocking Truth, supra note 3 at 33.

<sup>230</sup> For example, the decrease in the use of deadly force against non-dangerous suspects came about through a combination of Supreme Court precedent and cooperation from police chiefs. Chevigny, supra note 27 at 7.

responsibility and blame at low levels.<sup>231</sup> It perpetuates the appearance that street level officers are making autonomous, disconnected decisions. But in fact, administrative norms are clearly communicated through less traceable channels. Police learn what it means to be a good cop through the behavior of their colleagues and supervisors, through observing how things are done, what is rewarded, what is punished, what is ignored.<sup>232</sup> An occasional expression of official shock at "isolated instances" of brutality can only be viewed cynically when cops known for their brutality receive sterling personnel reports which fail to even mention their infractions,<sup>233</sup> and in fact are promoted, commended, and by all objective indicia, highly valued in the departmental culture.<sup>234</sup>

Section 1983's legislative history reflects that it was meant to

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- <sup>231</sup> City of St. Louis v. Praprotnik, 485 U.S. 112, 171-74 (1988) (Stevens, J., dissenting); Banes, *Monell, Parratt, Daniels and Davidson*, supra note 228 at 120-27. See also Skolnik and Fyfe, supra note 2 at 203-04 (describing decision by some police departments not to adopt specific policies in order to avoid liability); Peter Schuck, *Suing Government* at 104 (1983) (describing skewed incentives toward inaction).
- <sup>232</sup> How Cops Go Bad, supra note 56 (describing the messages transmitted at the police academy and on the street).
- <sup>233</sup> This is so even when the city repeatedly pays out substantial judgments in civil cases to settle claims against officers accused of brutality. See Skolnik and Fyfe, supra note 2 at 205 and supra note 72.
- <sup>234</sup> Bob Herbert, "A Cop's View," *New York Times* Sec. 4 p. 17 (March 15, 1998) (instead of cracking down on...volatile, dangerous young cops, the department frequently goes out of its way to reward them) and supra note 112.

address the justice system's willful blindness to crimes against the powerless.<sup>235</sup> Yet municipal liability law, which theoretically permits systemic challenges to unwritten policies that cause constitutional harm, has become increasingly inhospitable to claims of systemic inaction. Although in City of Canton v. Harris,<sup>236</sup> the Supreme Court held that policies of failure to train or supervise could be actionable, it demanded a showing that the failures were attributable to the deliberate indifference of policymakers. The recent case of Bryan County v. Brown<sup>237</sup> further heightened the requirement, demanding a showing that the policymaker was deliberately indifferent to the risk that "*this* officer was highly likely to inflict the *particular* injury suffered by plaintiff, in deliberate violation of his constitutional rights."<sup>238</sup> Failure to act, in itself, is simply not seen as a possible cause of harm. Yet government can cause widespread misery, and has, by its failures to screen police officers properly, its failures to train them correctly, and its failures to discipline them for their wrongdoing.

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<sup>235</sup> See e.g. Colbert, *supra* note 132 at 504; Monroe v. Pape, 365 U.S. 167 (1961).

<sup>236</sup> 487 U.S. 378 (1989).

<sup>237</sup> 117 S. Ct. 1382 (1997).

<sup>238</sup> 117 S. Ct. at 1392. This demand parallels that in McCleskey, in which a statistical pattern of racially discriminatory decisions in capital cases was dismissed because plaintiffs could not show that *this* particular state system intended to put *this* capital defendant to death *because* of his race. McCleskey v. Kemp, 481 US 277 (1987).

The conventional story of blame and purposeful misconduct dangerously misdescribes the way governmental misconduct works, by disaggregating it into a series of individual, anecdotal acts. Government causes harm not through the misdeeds of a single malevolent person who wants to harm a specific individual, but through the collective decisionmaking of numerous people, many of whom may be acting in good faith.<sup>239</sup> Few have to affirmatively act in bad faith, because all the incentives are skewed in favor of simply not acting at all.<sup>240</sup> In the Burge case, the list of people and entities who "simply" failed to act is staggering, including the other officers and supervisors at Area Two, certain doctors and other personnel at the County Hospital, certain employees at the County Jail, members of the Office of Professional Standards, the State's Attorney's Office, several Chiefs of Police, the mayor of Chicago, and the U.S. Attorney's Office, among others. The courts were particularly complicit in ensuring that all these actors, themselves included, could avoid knowing of the systematic nature of the brutality.<sup>241</sup> The fact that none of these persons or institutions had

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<sup>239</sup> Bandes, *The Negative Constitution*, supra note 228 at 2323; David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 S. Ct. Rev. 271, 308.

<sup>240</sup> Schuck, *Suing Government*, supra note 232 at 104.

<sup>241</sup> For example, through protection of police personnel and disciplinary records from discovery, and through the practice of granting motions in limine and protective orders to prevent dissemination of such records, even once discovered. Conversation with Flint Taylor, February 13, 1998. See also Patton, supra note 15 at 761

singled out any one of the more than sixty torture victims in order to inflict punishment on him does little to assuage their responsibility for allowing the punishment to continue.

The Supreme Court has made motive crucial in certain contexts, such as municipal liability and equal protection. In these contexts, plaintiffs are caught in a bind when courts demand proof of certain motivations, like racial animus, only to erect impossible roadblocks to obtaining the information or to recoil from the proof when offered. Conversely, when victims of police misconduct have sought to prove improper motives on the part of law enforcement agents, as in the case of pretextual arrests, the Court has claimed an unwillingness to inquire into motivation.<sup>242</sup> This is a particularly unfortunate development in the effort to contain police brutality. A significant amount of the brutality on the streets begins with pretextual arrests, and most such activity targets minority citizens.<sup>243</sup> The effect of the Court's Whren ruling was to establish a basically irrebuttable presumption that an officer with probable cause to arrest--even if he arrests for an illegal left turn with the intent to search for drugs--is acting in good faith.

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(discussing restrictions on discovery in police misconduct cases).

<sup>242</sup> Whren v. United States, 116 S. Ct. 1769 (1996).

<sup>243</sup> Jennifer A. Larrabee, "DWB (Driving While Black)" and Equal Protection- the Realities of an Unconstitutional Police Practice, 6 J.L. & Pol'y 291, 296-299 and nn27-39 (1997) (citing statistics).

In several other ways, courts and administrative agencies have adopted presumptions that cast police officers as public servants acting only from pure motives,<sup>244</sup> while casting brutality complainants as untrustworthy, self serving and acting from vulgar motives.<sup>245</sup> The paradigmatic statement of the courts' view is Justice (then Judge) Burger's statement in Bush v. United States, that:

It would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion.<sup>246</sup>

In this view, the police are not individual actors, some of whom may sometimes perjure themselves, not members of a police force that has a

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<sup>244</sup> For example, OPS and other agencies that investigate misconduct complaints habitually "give great deference to police officers and are extremely cynical about complainants." Chevigny, *supra* note 27 at 90.

<sup>245</sup> One prospective juror reported that she and others were excused for cause because they expressed skepticism about police conduct. (Skeptics Kept off Juries, *New York Times*, p. A18 (November 25, 1997.)) Yet at least one federal circuit rejects a *per se* rule that attorneys must be permitted to ask prospective jurors whether they would be biased in favor of the testimony of law enforcement officers when the government's case depends wholly on the testimony of law enforcement agents. See *U.S. v. Lancaster*, 96 F.3d 734 (4th Cir. 1996).

<sup>246</sup> 375 F.2d 602, 604 (D.C. Cir. 1967). As Albert Alschuler observed, the problem is not the courts' failure to adopt a blanket presumption that police testimony should be viewed with suspicion, but their adoption of a blanket presumption that such testimony is trustworthy. Letter from Albert Alschuler to Susan Bandes, March 11, 1999 (on file with author).

particular agenda and a particular job to do,<sup>247</sup> but representative of society as a whole. Admitting that police may act with partiality or with a particular agenda would render them ideological and unrepresentative. Moreover, in this view it would reflect poorly on us all. The message is clear. Police officers act as nonideological civil servants. If one doesn't, he must be a rogue cop, unrepresentative and irrelevant. Occasionally, someone points out that this may not be the case. Justice Rizzi, in overturning the conviction of Gregory Banks, observed:

We bear in mind that in a criminal case the police are considered part of the prosecution team. Thus, when there is a motion to suppress because of alleged police coercion or racial intimidation, the trial judge must maintain a conscious awareness that the testimony of police is not to be viewed in isolation as if they have no interest in the outcome of the case. Rather, the testimony must be examined by the trial judge with the same scrupulous eye that one would expect the trial judge to use to assay the testimony of a party to the lawsuit.<sup>248</sup>

While police officers are viewed as acting without bias, complainants are seen as having an axe to grind. If the police are seen as speaking for all of "us," then complainants can be easily distanced and seen as speaking only from their own narrow self interest. In the words of two of the members of the Area Two torture ring:

Defendants fabricate exotic allegations in a desperate attempt to undo their confessions. The prospect of a life sentence or the death penalty can make a defendant particularly creative...It's a lot of fun to make stuff up...If you look at all the allegations coming down the trail, you find anyone who gives a statement says we

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<sup>247</sup> See Skolnik and Fyfe, *supra* note 2 at 198 (courts treat police as professionals with their own standards and rules).

<sup>248</sup> *People v. Banks*, 549 NE 2d at 769.

did something to them.<sup>249</sup>

Complainants are suspect because they have been charged with a crime<sup>250</sup> and are trying to suppress a confession, or because they have a criminal record, or are affiliated with a gang, or because, for racial, social and economic reasons, judges find it difficult to empathize with their plights. Sometimes they are suspect simply because they have complained. The very act of challenging the police seems to suggest an unhealthy lack of respect for authority and order.<sup>251</sup> Thus, just as challenging the police acts as a trigger for brutality, it also acts as a barrier to the credibility of those who complain about that brutality.

Finally, issues of motivation are important in determining who has standing to challenge policies that encourage brutality--in other words,

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<sup>249</sup> Nelson, Cop Torture and Shock Allegations Date to '70s, supra note 56.

<sup>250</sup> This raises the problem that often police charge brutality suspects with a crime in order to discourage the bringing of charges, or in order to have something to trade for the dropping of charges, or just simply in order to retaliate. See e.g. Mary Cheh, Are Lawsuits an Answer? in Geller and Toch supra note 25. Professor Cheh notes that police and prosecutors often follow the time honored profession of discharging misdemeanants on condition of a release of civil liability (a practice upheld by the Supreme Court in *Town of Newton v. Rumery*, 480 US 386 (1987)) and that often the charges--such as assault or resisting arrest--were brought by police during the brutality incident. See also Chevigny, supra note 27 at 50 (discussing practice of charging brutality complainants).

<sup>251</sup> Sontag and Barry, When Brutality Wears a City Badge, supra note 126. See also Chevigny, supra note 27 at 43, 74 (documenting brutality against those who defy or criticize the police).

who gets to tell the story, and on behalf of which group? We have seen that often the courts will disaggregate police conduct, portraying each brutal cop as an isolated rotten apple. Conversely, the courts may aggregate police as a class (or even as societal representatives), raising the stakes for those who would challenge police credibility or motives. When individuals seek to challenge police conduct, they may be grouped in pernicious or stereotypic ways--as suspects, gang members, or members of other easily marginalized groups. Again conversely, they will be disaggregated when they seek to represent groups larger than themselves.

In City of Los Angeles v. Lyons,<sup>252</sup> for example, the Court was unable to accept that Adolph Lyons, a black male living in Los Angeles who had been subjected to a police chokehold, had a claim of future injury. Despite ample evidence that the chokehold was used primarily on black men in the South Central area of Los Angeles,<sup>253</sup> the Court would not recognize either that Lyons himself had a tangible fear of being choked again, or that he had sufficient connection with other members of the black community in Los Angeles to permit him to litigate an issue that was certain to continue to affect members of that community.<sup>254</sup> In this way,

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<sup>252</sup> 461 U.S. 95 (1983).

<sup>253</sup> See Chevigny, *supra* note 27 at 45.

<sup>254</sup> For a most effective illustration of the extent to which police brutality affects black and other minority communities, see Felicia R. Lee, *From Some Parents, Warnings About Police*, *The New York Times* at A18 (October 23, 1997). Lee reports that "much as all

the Court rejects or vulgarizes motivations based on linked fate,<sup>255</sup> or membership in a community, or transforms them into individualized interests in the plaintiff's own welfare or aggrandizement.

**\* THE ASSUMPTION THAT THE COMMON LAW ATTRIBUTES PROVIDE THE PARADIGM FOR PUBLIC LAW CASES**

The common law paradigm, as I have discussed elsewhere in detail,<sup>256</sup> assumes the attributes possessed by private law cases in the early stages of the common law. The notion of atomistic, equally placed individuals, engaged in a bipolar contest for pecuniary stakes, with linear causation, impelled by traditional motives, and completely redressible by damages, is a notion that has done immeasurable harm when used to describe the harms inflicted by government-condoned brutality.

The common law model misportrays government, thereby thwarting governmental reform. For example it demands simple and direct causal

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parents broach sensitive topics like AIDS and sexuality or drug use, black and Hispanic parents say they talk to their children about dealing with the police. It is just a matter of time, they tell them, before they encounter a police officer who sees dark skin as synonymous with crime. They coach them on how to behave...most said they began the lessons when their children were 9 or 10..."

<sup>255</sup> See Michael C. Dawson, Behind the Mule: Race and Class in African-American Politics at 76-81 (Princeton Univ Press 1994) discussing the use of a "linked fate" construct to measure the degree to which African Americans believe that their own self interests are linked to the interests of the race.

<sup>256</sup> Bandes, The Negative Constitution, supra note 228 at 2317-23.

chains which rarely exist in the complex administrative state,<sup>257</sup> it assumes that the individual plaintiff is on equal footing with the governmental defendant<sup>258</sup> and it calls for stories of motive and fault which fit poorly with the usual governmental choices "more often made by the interaction of several people acting in good faith than by a single malevolent person."<sup>259</sup>

The bipolar model portrays a contest between two adversaries, in which causal links are linear and easy to trace. (A put his fence on B's property, causing B to lose the use of that property). Common law causality bears little resemblance to the complex ways in which governmental entities cause harm. Government caused harm hews more closely to a probabilistic model, in which a complex ongoing entity causes a predictable amount of ongoing harm, but the particular recipients of that harm are not predictable.<sup>260</sup> As long as the LAPD

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<sup>257</sup> See e.g. *Allen v. Wright*, 468 U.S. 737 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>258</sup> See e.g. *United States v. Armstrong*, 116 S. Ct. 1480 (1996) in which the Court elides the question of how plaintiffs are to obtain records of prosecutorial decisionmaking.

<sup>259</sup> Bandes, *The Negative Constitution*, supra note 228 at 2323.

<sup>260</sup> One scientist explained the problem by analogizing to the reasons why the average gambler always loses out to the average casino owner. He said: "The gambler attempts to predict the individual and unpredictable spins of the roulette wheel, while the owner concerns himself with the quite predictable average outcome." Sarah Boxer, "Science Confronts the Unknowable," *The New*

continued to authorize the application of chokeholds as a means of ensuring compliance, it was virtually certain that some percentage of its recipients would die.<sup>261</sup> It was impossible, however, to predict which individuals would be choked and die, just as it was impossible to predict which police officers would inflict the deadly chokeholds.

Nor are plaintiff and defendant on equal footing when one of the litigants is the government. For example, government has monopoly control over vast stores of information--including police reports, personnel and disciplinary files, court records<sup>262</sup>-- and the ability to withhold or seriously delay litigants' access to that information. In the police brutality context, police departments use that ability as an essential tool for fighting off oversight and intervention.<sup>263</sup> Moreover, government possesses virtually unlimited resources. This means, for example, that it can litigate strenuously and at great length. In Andrew Wilson's civil suits, the plaintiff's attorneys, members of a

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York Times at A15, January 24, 1998, quoting Ralph E. Gomory in Scientific American, 1995.

<sup>261</sup> Skolnick and Fyfe, *supra* note 2 at 42. See also Hoffman, *supra* note 111 at 1513, stating that the Christopher Commission report "documented patterns of abuse that would support a reasonable fear by all young African American and Latino males in LA of abuse at the hands of the LAPD or Los Angeles Sheriff's Department in a wide variety of settings."

<sup>262</sup> See e.g. Patton, *supra* note 15 at 761, describing the legal barriers to discovery of police discipline and personnel files, and suggesting that state judges tend to deny discovery motions for fear of offending police departments.

<sup>263</sup> *Shielded from Justice*, *supra* note 13 at 46-49.

small civil rights firm, "labored for nine years without a paycheck while the city steadily paid more than \$850,000 to...private attorneys who defended the police, and spent hundreds of thousands more on its own defense."<sup>264</sup> It is not surprising, especially given the high odds against recovery, that few lawyers are available to bring civil suits in police brutality cases.<sup>265</sup>

Alternatively, if government does not wish to litigate at great length, it can use its unlimited resources to settle case after case. The statistics on settlements in various cities tell similar stories.<sup>266</sup> In New York City, for example, the city paid almost \$20 million annually in settlements in 1995 and 1996, and more than \$27 million in 1997. In 1997, the city settled 503 police misconduct cases, and tried only 24. The city routinely pays tens of thousands of dollars to abuse complainants, but rarely investigates their allegations, and "the officers named in their lawsuits almost always continue working without

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<sup>264</sup> Conroy, *The Shocking Truth*, supra note 3 at 31.

<sup>265</sup> Rudovsky, supra note 220 at 489.

<sup>266</sup> See Andrew Martin, *Daley Backs Officers in Death of Honduran*, *Chicago Tribune*, Sec. 2, p. 1 (February 5, 1998), reporting that since 1992, the City of Chicago has paid more than \$29 million to settle 1,657 lawsuits alleging police misconduct and brutality. The average cost of the settlements was about \$17,500. See also *\$24 Million is Paid in Suit on 36 Arrests in Los Angeles*, *New York Times* at A 20 (October 1, 1998) (award paid to guests, most of them Samoan-American, who were wrongly arrested and in some cases beaten at a bridal shower. The victims' lawyer says he is still waiting for the sheriff's department to discipline the deputies involved in the melee.)

scrutiny or punishment."<sup>267</sup> In other words, the government can operate on a "pay as it goes" basis, making no effort to learn from the settlements, much less to address the systemic flaws that make them necessary.

The focus on money damages is yet another attribute of the common law system. The Supreme Court's unfavorable rulings in suits like Adolph Lyons' injunctive action against the LAPD's chokehold policy, or Rizzo v. Goode,<sup>268</sup> in which plaintiffs were denied standing to seek structural reforms of the Philadelphia Police Department, have forced police brutality plaintiffs to file damage claims instead of seeking the appropriate system-wide declaratory and injunctive relief. When harm is tangible and easily monetized, plaintiffs are motivated solely by the desire to be made whole financially, and defendants are individual wrongdoers, damages are a perfectly satisfactory remedy. Yet when systemic governmental harm exists, damages are generally a highly unsatisfactory way to address it. The settlement pattern illustrates why: it is often far easier to ask the taxpayers to pay and pay than to take the politically risky position that the police department has to

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<sup>267</sup> Deborah Sontag and Dan Barry, Using Settlements to Gauge Police Abuse, *The New York Times* p 1 and A17 (September 17, 1997). According to the article, the Los Angeles Sheriff's Department now uses information from civil claims to help identify troublesome police officers and patterns of misconduct, and the number of lawsuits against the department has dropped substantially. *Id.*

<sup>268</sup> 423 U.S. 362 (1976).

change its wrongful practices.<sup>269</sup>

At bottom, the common law paradigm is based on the notion of each litigant as an autonomous actor, impelled by rugged, even heartless, individualism. The paradigm dictates that a plaintiff charging police brutality will be seen as motivated solely by greed or fear for his own well being, that he can be easily bought off by money, that he has no long term concerns for good government or community,<sup>270</sup> and that his adversary is an individual like him, of equal power, and with motivations like his. Police brutality litigation according to this paradigm can be nothing more than a contest between two individuals, with money as the prize--a story that begins and ends with each isolated incident.

**\* THE PREFERENCE FOR JUDICIAL INSULATION**

This terrain has been brilliantly explored by Robert Cover in Justice Accused.<sup>271</sup> Judges utilize many devices to assure themselves and others that they have no choice but to affirm the status quo, including,

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<sup>269</sup> Hoffman, *supra* note 111 at 1509.

<sup>270</sup> See Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Cal. L. Rev. 1593, 1635 (1987) ("a view of the world that recognizes the essential interconnectedness of people and the importance of intimacy and sharing is foreign to the Court's current atomistic doctrine.")

<sup>271</sup> Cover, *Justice Accused*, *supra* note 205. Cover explored the means by which antislavery judges dealt with the conflict between their moral values and their perceived duty to uphold fugitive slave laws.

in Cover's words, "elevation of the formal stakes," "retreat to a mechanistic formalism," and "ascription of responsibility elsewhere."<sup>272</sup> Cover speaks of the "helplessness" to which judges lay claim when they wish to deflect responsibility for a difficult choice.<sup>273</sup> Though he does not describe these devices as wholly conscious, he certainly suggests that judges have other choices open to them. When a judge refuses to disturb the status quo, he may experience himself as not having acted at all, which seems a good deal safer than affirmatively acting to change the system.<sup>274</sup>

The failure of judges to take a stand against police brutality is, in some ways, the most intractable piece of the puzzle. As Robert Cover said, the "statist, apologist" orientation is not preordained. Judges can, and sometimes do, act in resistance to an unjust social order.<sup>275</sup> In the police brutality context, moreover, there is no federal Fugitive Slave Act to hinder moral action. Instead, moral action is evaded through a good deal of judicial creativity, willful blindness and refusal to accept responsibility.

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<sup>272</sup> Cover, id at 229-38.

<sup>273</sup> Cover, id at 236.

<sup>274</sup> See also Lenore M. Lapidus, *Maintaining the Status Quo: Institutional Obstacles in a Child Custody Dispute*, in *Law Stories* (Gary Bellow and Martha Minow eds) (University of Michigan Press 1996) and Bandes, *The Negative Constitution*, supra note 23 at 2283-85.

<sup>275</sup> Cover, *Justice Accused*, supra note 205 at 224.

The Supreme Court has set the tone particularly in City of Los Angeles v. Lyons. In that opinion, the Court made ample use of two of Cover's responsibility mitigating mechanisms: the retreat to a mechanistic formalism and the ascription of responsibility elsewhere.<sup>276</sup> These mechanisms permitted the Court both to disaggregate systemic conduct and to avoid dealing with its ugly consequences. The Court disaggregated systemic conduct in several ways. As Justice Marshall complained in dissent, it did so by "fragmenting the standing inquiry and imposing a separate standing hurdle with respect to each form of relief sought,"<sup>277</sup> so that the injury sufficient to permit standing for damages was insufficient to permit standing for an injunction. It also did so in its characterization of the injury itself: fragmenting Lyons' own interests into individualized rather than communitarian concerns. Although the imposition of separate standing hurdles for equitable and damage relief was entirely unprecedented,<sup>278</sup> the Court portrayed itself as choiceless, "bowing to crystal clear demands."<sup>279</sup>

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<sup>276</sup> Cover, *Justice Accused*, id at 199.

<sup>277</sup> *Lyons*, 461 US at 127 (Marshall, J., dissenting).

<sup>278</sup> Richard A. Fallon, Jr., *Of Justiciability, Remedies and Public Law Litigation: Notes on The Jurisprudence of Lyons*, 59 N.Y.U. L. Rev 1, 5-6 (1984).

<sup>279</sup> See e.g. *Lyons*, 461 US at 112 ("we decline the invitation to slight the preconditions for equitable relief.") Cover, *Justice Accused*, supra note 205 at 232.461 U.S. at 112.

The retreat to mechanistic formalism is itself a means of denying responsibility, but it was not the only one employed by the Lyons court. The Court went on to invoke federalism, shifting the responsibility to the state courts to fix the problem.<sup>280</sup> But of course the state courts may have their own notions of mechanistic formalism, such as legal reasoning of the sort that finds a legally significant difference between placing a shotgun or a revolver in the mouth of a suspect in a game of Russian Roulette. And they have their own ways of shifting responsibility, including waiver, harmless error, and deference to the trial court's findings.

## CONCLUSION

The courts, like all the other institutions that have allowed police brutality to flourish, seem to believe that inaction is not only an option, but an ethically neutral one--a choice to opt out of the whole unpleasant situation. Or perhaps, on some levels, these institutions have made a choice, and are comfortable with it. The decision to maintain the status quo is unlikely to be made by police, or even judges, in a vacuum. Much of the police brutality literature suggests that many societal forces converge to encourage the existing order. To the extent that low level cops, unhindered or condoned by supervisors, the chief, the local political structure, and the courts, are brutalizing minority residents of poor neighborhoods, it may be that

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<sup>280</sup> It noted that "[t]he individual states may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis" but that it could not. 461 U.S. at 112.

these actions are part of an implicit bargain with society--at least that part of society that has political and economic power. Such brutality is often implicitly approved by majority residents of stratified, segregated societies who value law and order, who want the boundaries between black and white neighborhoods policed, and who will put up with the infliction of a substantial amount of brutality on others as long as it isn't made impossible to ignore.<sup>281</sup> The treatment of police brutality as aberrational and anecdotal is an essential though largely invisible part of the bargain.

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<sup>281</sup> See e.g. Frank Bruni, Behind Police Brutality: Public Assent, The New York Times, Sec. 4, p.1, February 21, 1999 (though most Americans decry flagrant episodes, many have tacitly blessed a more vigorous, belligerent brand of policing, which is often difficult to distinguish from the unduly brutal or abusive).



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**PATTERNS OF INJUSTICE: POLICE BRUTALITY IN THE COURTS**

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