MUNICIPAL LIABILITY FOR FAILURE TO INVESTIGATE CITIZEN COMPLAINTS AGAINST POLICE

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> Formalism is often the last refuge of scoundrels; history teaches us that the most tyrannical regimes, from Pinochet's Chile to Stalin's Soviet Union, are theoretically those with the most developed legal procedures. The point is obviously not to tar the Police Department's good name with disreputable associations, but only to illustrate that we cannot look to the mere existence of superficial grievance procedures as a guarantee that citizens' constitutional liberties are secure. Protection of citizens' rights and liberties depends upon the substance of the [citizen complaint] investigatory procedures.[1]

I. Introduction

In *City of Canton v. Harris*,[2] the United States Supreme Court announced that a municipality could be liable under Chapter 42, Section 1983 of the United States Code[3] for the misconduct of an employee if deficiencies in a municipal training program were the moving force behind plaintiff's injury and the alleged municipal deficiencies were the result of a deliberate indifference to training police officers.[4] In adopting the deliberate indifference standard, the Court explained that "a lesser standard of fault would result in

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1. Beck v. City of Pittsburgh, 89 F.3d 966, 974 (3d Cir. 1996) (reversing summary judgment in favor of city, evidence creates a jury question), *cert. denied*, 117 S. Ct. 1086 (1997).

2. 489 U.S. 378 (1989).

3. 42 U.S.C. § 1983 (1988), originally enacted as section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, provides:

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

42 U.S.C. § 1983.

4. *See Canton*, 489 U.S. at 391.

de facto respondeat superior liability"[5] and would cause federal courts to engage in an endless exercise of second-guessing municipal-employee training programs."[6] The Court warned that the federal courts were "ill suited to undertake" such a review and to do so "would implicate serious questions of federalism."[7] In her concurring and dissenting opinion, Justice O'Connor warned litigants that § 1983 is not intended to serve as a "'federal good government act' for municipalities."[8] Nevertheless, lower courts instantly expanded liability under *Canton* to include, not just the failure-to-train, but also the failure of other municipal programs which cause constitutional injury to citizens.

The Court, in *Board of County Commissioners of Bryan County v. Brown*,[9] recently reaffirmed its willingness to permit federal inquiry into the deficiencies of municipal programs which result in constitutional injuries. The deeply divided Court again warned, however, that the federal courts should not micromanage municipal programs and decisionmaking through the hammer of civil rights liability.[10]

Following *Canton*, the method in which a municipality addresses citizen complaints against police officers has become the frequent focus of civil rights litigation.[11] Federal courts have signaled that a municipality must systematically address citizen complaints as a part of its responsibility to manage and supervise its police officers.[12] A municipality's failure to institute adequate procedures to air citizen complaints may demonstrate deliberate indifference which gives rise to civil rights liability.[13] Federal judicial decisions reveal the type of response to civilian complaints of police misconduct the courts expect from municipalities. Adverse decisions provide municipalities with notice of a judicial willingness to evaluate procedures for reviewing police misconduct complaints. These

5. *Id.* at 392; *see also* Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978) (holding that there is no municipal respondeat superior liability in civil rights claims).

6. *Id.*

7. *Id.*

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

9. 117 S. Ct. 1382 (1997).

10. *See id.* at 1394.

11. One of the first cases was *Fiacco v. Rensselaer*, 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987), cited with approval in *Canton* for employing a deliberate indifference standard. *See Canton*, 489 U.S. at 387 n.6, 389 n.7.

12. *See infra* part IV.

13. Of course, municipal liability first turns on establishing that plaintiff suffered a constitutional injury at the hands of a government official. *See* City of Los Angeles v. Heller, 475 U.S. 796 (1986).

procedures fall within the limits of judicial oversight prescribed by *Canton* and *Brown*.[14]

A claim that the citizen complaint process shows deliberate indifference is different than a claim that the amount of complaints lodged or incidences of misconduct indicate a custom or policy under *Monell v. New York Department of Social Services*.[15] Similar

14. Liability or potential liability found: *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996) (judgment as a matter of law reversed; question of fact whether Pittsburgh's investigatory procedures against officers were adequate), *cert. denied*, 117 S. Ct. 1086 (1997); *Vann v. City of New York*, 72 F.3d 1040 (2d Cir. 1995) (summary judgment reversed; question of fact whether police system showed deliberate indifference in monitoring complaints); *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992) (jury verdict against North Little Rock, Arkansas affirmed); *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991) (verdict against county affirmed); *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989) (verdict affirmed, City of Everett, Massachusetts, liable), *cert. denied*, 493 U.S. 820 (1989); *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986) (verdict against Rensselaer, New York, affirmed), *cert. denied*, 480 U.S. 922 (1987); *Gonsalves v. City of New Bedford*, 939 F. Supp. 915 (D. Mass. 1996) (imposing municipal liability on City Council and Mayor); *Hogan v. Franco*, 896 F. Supp. 1313 (N.D.N.Y. 1995) (summary judgment in favor of Utica, New York, denied); *Illiano v. Clay Township*, 892 F. Supp. 117 (E.D. Pa. 1995) (Clay Township's motion to dismiss denied); *Carney v. White*, 843 F. Supp. 462 (E.D. Wis. 1994) (Village of Darien's summary judgment denied), *aff'd*, 60 F.3d 1273 (7th Cir. 1995); *Cox v. District of Columbia*, 821 F. Supp. 1 (D.D.C. 1993) (verdict against Washington, D.C.), *aff'd*, 40 F.3d 475 (D.C. Cir. 1994); *Brown v. City of Margate*, 842 F. Supp. 515 (S.D. Fla. 1993) (Margate, Florida's summary judgment denied), *aff'd*, 56 F.3d 1390 (11th Cir. 1995); *Bosley v. Foster*, No. Civ. A. 90-2409-L, 1992 WL 40696, at *1 (D. Kan. Feb. 5, 1992) (summary judgment in favor of Kansas City); *Curran v. City of Boston*, 777 F. Supp. 116 (D. Mass. 1991) (Boston's motion to dismiss denied); *Vasquez v. Reid*, No. 90 C. 1585, 1990 WL 207456, at *1 (N.D. Ill. Dec. 6, 1990) (Chicago's motion to dismiss denied); *Sango v. City of New York*, No. 83 CV 5177, 1989 WL 86995, at *1 (E.D.N.Y. July 25, 1989) (New York's summary judgment denied).

No liability or potential for liability: *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996) (summary judgment in favor of North Sioux City, South Dakota affirmed); *Searcy v. City of Dayton*, 38 F.3d 282 (6th Cir. 1994) (affirming summary judgment, no evidence that failure to investigate past misconduct caused injury); *Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993) (no municipal liability for inadequate investigation of misconduct although investigations inadequate, no deliberate indifference); *Vukadinovich v. Zentz*, 995 F.2d 750 (7th Cir. 1993) (affirming jury verdict in favor of City of Valparaiso, no evidence investigation of police misconduct was inadequate); *Brooks v. D.R. Scheib*, 813 F.2d 1191 (11th Cir. 1987) (verdict against Atlanta reversed, lack of citizen participation in review of misconduct does not show deliberate indifference); *Sarus v. Rotundo*, 831 F.2d 397 (2d Cir. 1987); *Evans v. Avery*, No. Civ. A. 94-10194-WGY, 1995 WL 170056, at *1 (D. Mass. Mar. 14, 1995), *aff'd* 100 F.3d 1033 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1693 (1997); *Schuurman v. Town of Nor Reading*, No. Civ. A. 90-10692-MLW, 1995 WL 464915, at *1 (D. Mass. June 15, 1995) (North Reading's motion for summary judgment granted); *Chudzik v. City of Wilmington*, 809 F. Supp. 1142 (D. Del. 1992) (summary judgment granted); *Taylor v. Canton, Ohio Police Dep't*, 544 F. Supp. 783 (N.D. Ohio 1982) (no city liability).

15. 436 U.S. 658 (1978). *Monell* holds that a municipality may be liable for its unconstitutional policies and customs. *Id.* at 690-91.

to an allegation that the number of past complaints evidences a policy or custom of abusive conduct, a deliberate indifference claim also relies upon evidence of past citizen complaints. In a deliberate indifference case, however, plaintiffs allege that the failure to develop a comprehensive system to review citizen complaints amounts to deliberate indifference to a municipality's obligation to supervise employees. This allegation exposes municipalities to civil rights liability without regard to the number of citizen complaints received. With such an allegation, courts do not ask whether the number of complaints evidences a custom or policy of abuse. Instead, courts ask whether the municipality's complaint procedure is so deficient as to amount to deliberate indifference to the need to supervise officers.

Parts II and III briefly describe the emerging professionalism of law enforcement and, within this context, discuss the risks and benefits associated with current models for receiving and reviewing citizen complaints against police officers. Part IV discusses courts'

The claim that the existence of past complaints of police misconduct alone proves a municipal custom or policy of misconduct is difficult to prove based upon the mere numbers of complaints received. *See, e.g.*, Carter v. District of Columbia, 795 F.2d 116, 126, 133 (D.C. Cir. 1986) (holding that the number of complaints alone is insufficient to prove a custom or policy of abuse); Sarus v. Rotundo, 831 F.2d 397, 401-02 (2d Cir. 1987) (holding that past complaints are insufficient to prove custom or policy). Understandably, courts generally recognize that police officers are vulnerable to unfounded claims of abuse. *See* Brooks v. Scheib, 813 F.2d 1191, 1194 (11th Cir. 1987) (holding that officers working in high crime areas are likely subject to higher numbers of complaints). The need to balance competing interests has led the Court to adopt qualified immunity for individual officers. *See* Hunter v. Bryant, 502 U.S. 224, 229 (1991) (holding that qualified immunity "gives ample room for mistaken judgments") (quoting Malley v. Briggs, 475 U.S. 335, 343 (1986)); Anderson v. Creighton, 483 U.S. 635, 638 (1987) (stating that it is undesirable to "inhibit officials in the discharge of their duties" and qualified immunity "accommodate[s] these conflicting concerns"). Police departments are unique para-military organizations and their employees necessarily confront and legitimately employ violence with split-second judgment. *See* THOMAS J. DEAKIN, POLICE PROFESSIONALISM: THE RENAISSANCE OF AMERICAN LAW ENFORCEMENT 214 (1988); DOUGLAS PEREZ, COMMON SENSE ABOUT POLICE REVIEW 43-44 (1994). In this atmosphere, even some well-grounded complaints will be lodged against most police departments. The Supreme Court has cautioned that some misconduct by employees will not tarnish the municipal employer serving an important public function by providing law enforcement. *See* Pembaur v. Cincinnati, 475 U.S. 469, 480 (1986) (finding that a single incident by a decisionmaker with final authority constitutes a policy); Oklahoma City v. Tuttle, 471 U.S. 808, 814 (1985) (plurality opinion) (single incident is not sufficient to impose municipal liability); *see also Brown*, 117 S. Ct. at 1392-93, (questioning but not deciding whether proof of a "single incident" is ever sufficient to establish municipal liability where the constitutional tort is not based upon direct municipal action by a policy maker). A plaintiff asserting municipal liability by alleging a policy or custom based upon the mere numerosity of past complaints without more will likely fail.

application of the deliberate indifference standard to claims that a citizen complaint procedure is inadequate and summarizes litigation in several small and large communities employing the various models for complaint review. Additionally, Part IV examines the issues of proof raised in *Canton* and reinforced in *Brown*. The Article divides the cases by the models employed; however, the potential deficiencies in any model and the issues of proof suggested by the Court in *Brown* find substantial commonality regardless of the model a municipality adopts. Part V summarizes some of the judicially-dictated minimum standards by which towns and cities should assess their own complaint review procedure.

II. Municipal Police Forces Move Toward Professionalism

The modern police force is vastly different than its counterpart of just twenty years ago.[16] Recruits in major municipalities typically undergo substantial assessment and training prior to serving on a police force. This screening and training includes psychological screening prior to selection to ensure suitability and stability,[17] complete full-time basic training in police science,[18] and general education requirements.[19] Experienced officers undertake special-

16. *See* DEAKIN, *supra* note 15, at 255-300.

17. *See* THEODORE BLAU, PSYCHOLOGICAL SERVICES FOR LAW ENFORCEMENT 69-162 (1994). The typical major police department employs psychologists to evaluate both recruits and officers. Psychologists screen and assess recruits, determine fitness for duty, and assess suitability for special unit assignment. *See id.*; Thomas H. Wright, *Pre-Employment Background Investigations*, 60 FBI LAW ENFORCEMENT BULL. 16 (1991) (discussing the evolution to a more complex pre-employment background check including polygraph, education, previous employers, spousal interviews, credit checks, criminal history checks, military history, and driving records among others).

18. While the training time and subjects vary, municipal and state governments invest considerable resources in initial training. "[A] number of states have implemented mandatory state-wide selection standards while others have not; some states mandate an [sic] minimum of three weeks of recruit basic training, while others mandate a 16-week recruit basic training period . . . ." Albert A. Apa & Thomas J. Jurkanin, *Police Officer Standards & Training Commissions: Three Decades of Growth*, 57 THE POLICE CHIEF 27, 30 (1990); DEAKIN, *supra* note 15, at 272.

19. Today, 65% of police officers have some college credit and 25% are college graduates. *See* Larry Armstrong & Clinton Longenecker, *Police Management Training: A National Survey*, 61 FBI LAW ENFORCEMENT BULL. 22, 22, 26 n.2 (1992); David L. Carter & Allen D. Sapp, *College Education and Policing: Coming of Age*, 61 FBI LAW ENFORCEMENT BULL. 8 (1992). In comparison, in 1970, only 14.6 % of American police officers had completed two years of college; by 1994, approximately 44.7% have two or more years of college. Increased education appears to correlate with decreased complaint rates and 95% of police departments now require at least a high school diploma. *See* Alan Vodicka, *Educational Requirements for Police Recruits*, 42 LAW & ORDER 91, 93 (1994). *See generally*, DEAKIN, *supra* note 15, at 272, 283 (stating that in the past 30 years, "a 23% advance in the collegiate educational

ized and/or refresher training periodically,[20] receive substantial training for supervisory positions,[21] and perform under chain of command and supervision models which attempt to ensure order within departments.[22] Furthermore, many major municipal police academies are accredited by the Commission on Accreditation for Law Enforcement Agencies ("CALEA")[23] and must meet minimum national standards in multiple areas of law enforcement.[24] Studies suggest that higher educational levels among police officers result in lower numbers of citizen complaints.[25] Large municipal police departments continuously employ innovative new policing programs in an effort to improve their community responsiveness and community relations while reducing both complaints against officers and crime against citizens. Community policing and diversity training programs are recent examples of efforts by modern police departments to respond to citizen concerns.[26]

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level of America's police" and less than 1% of officers have not completed high school).

20. *See* Apa & Jurkanin, *supra* note 18, at 28; *IACP Addresses Police Brutality Concerns:* "Project Response" Underway, 58 THE POLICE CHIEF 10 (1991) (describing the "Training Keys" series, a model in-service training program in use for over 25 years throughout most police departments); DEAKIN, *supra* note 15, at 197-208, 271-83 (tracing trends in training throughout nation).

21. See Deakin, *supra* note 15, at 271-84; Armstrong & Longenecker, *supra* note 19, at 23-27. Armstrong and Longnecker reported that:

> [t]he results indicated that 97% of the police agencies surveyed [144 police departments including the two largest in each state] provide in-house supervisory training to newly promoted officers and that 78% of these agencies make the training mandatory. . . . Eighty three percent of the department require 25 hours, 37% require at least 40 hours, and 23% require over 65 hours [for officers promoted to first line supervisor]. . . . [S]urvey results showed that 81% of the departments provide an opportunity for managerial training.

Armstrong & Longnecker, *supra* note 19, at 23-27.

22. *Cf.* BLAU, *supra* note 17, at 36.

23. *See* Deakin, *supra* note 15, at 313-15 (describing movement toward accreditation); Raymond E. Arthurs, Jr., *Accreditation: A Small Department's Experience*, 59 FBI LAW ENFORCEMENT BULL. 1, 1, 5 n.1 (1990). CALEA brought together four influential police organizations: International Association of Chiefs of Police (IACP), National Organization of Black Law Enforcement Executives (NOBLE), the National Sheriffs' Association (NSA), and the Police Executive Research Forum (PERF) to formulate standards for administration, operations, and organization among others. *See id.* Over 300 law enforcement agencies have been accredited. *See* BLAU, *supra* note 17, at 2.

24. *See* Apa & Jurkanin, *supra* note 18, at 28. Nearly every state has established commissions empowered to set mandatory minimum requirements of Police Officer Standards and Training (POST commissions). *See id.*

25. *See* Vodicka, *supra* note 19, at 92.

26. *See, e.g.*, John E. Eck, *Alternative Futures for Policing, in* POLICE INNOVATION AND CONTROL OF THE POLICE 59-80 (David Weisburd & Craig Uchida, eds., 1993)

When modern police forces train officers to set standards of competency,[27] screen recruits for suitability,[28] provide additional training for supervisors,[29] develop innovative new police operation programs,[30] and effectively employ either an internal or external review of citizen complaints,[31] local taxpayers should not be liable for the misdeeds of its police officers under *Monell*[32] or *Canton*[33] theories of liability. A municipality is not liable for the misconduct of its employees under section 1983 based upon respondeat superior tort principles, and, without evidence that it failed its municipal duties, mere misconduct by its employees will not be sufficient to establish municipal liability.[34] Failure to develop an effective

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[hereinafter POLICE INNOVATION]; *see also* DENNIS ROSENBAUM, THE CHALLENGE OF COMMUNITY POLICING (1994) (evaluating effectiveness of new community policing programs); Stephen M. Hennessey, *Achieving Cultural Competence*, 60 THE POLICE CHIEF 46 (1993) (discussing recruit training in cultural diversity); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 565-591 (1997); R. Morrison, *Problem-Oriented Policing*, 41 LAW & ORDER 84 (1993) (discussing proactive policing techniques); Max Raterman, *Police Supervision at a Crossroads*, 42 LAW & ORDER 79 (1994) (discusssing modern management styles); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 496 (1992) (community policing model built on premise of "mutual respect" and hope is that it will curb abuse).

27. *See* Signorile v. City of New York, 887 F. Supp. 403, 422-23 (E.D.N.Y. 1995) (stating in a summary judgment in favor of municipality: "sworn affidavit of a NYPD deputy commissioner of training describing the training police officers receive. Moreover, the affidavit indicates that training is supplemented and updated 'on a continual basis'"); Fulwood v. Porter, 639 A.2d 594, 600 (D.C. App. 1994) ("officers trained adequately and receive refresher courses . . . are instructed, on a continuing basis . . . approximately 24 weeks of training received by new officers . . . refresher training . . . consists of 120 hours of instruction and is offered a minimum of 12 times a year").

28. *See* Longin v. Kelly, 875 F. Supp. 196, 200 (S.D.N.Y. 1995) (finding no liability for deliberate indifference in hiring officers with violent propensity when a psychologist screened recruits and certain scored individuals receive heightened scrutiny before recommendations for acceptance as officers were made).

29. *Cf.* Bordanaro v. McLeod, 871 F.2d 1151, 1161 (1st Cir. 1989) (finding municipal liability where officers were affirmatively discouraged from seeking further training).

30. *See Signorile*, 887 F. Supp. at 423 (finding no municipal liability where police and Housing Authority met to plan better coordination and identify areas where training could be improved).

31. *Cf. Bordanaro*, 871 F.2d at 1162 (criticizing a municipality which "chose to take no disciplinary actions against officers until they had been indicted").

32. 436 U.S. 658 (1978).

33. 489 U.S. 378 (1989).

34. *See Monell*, 436 U.S. at 663-64 n.7. The Court stated: "the doctrine of respondeat superior is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees." *Id.* Despite language favorable to municipalities, *Monell* actually marked an expansion of municipal liability, overruling *Monroe v. Pape*, 365 U.S. 167 (1961), which had insulated municipalities from civil

program to handle citizen grievances of police misconduct is, however, a municipal deficiency. Developing a grievance procedure which satisfies *Canton*[35] has proven a difficult challenge to both small and large communities.

III. Complaint Review Procedures

In the wake of shocking police scandals, high profile *ad hoc* commissions are sometimes convened in major cities to review police misconduct.[36] While these commissions often result in calls for major reform and focus attention on problems of misconduct, these after-the-fact inquiries do not satisfy a department's on-going responsibility to receive and address citizen complaints of police misconduct on a regular basis.[37] The typical metropolitan police force no longer awaits the results of *ad hoc* investigations of misconduct to reveal problem officers. Instead, it has procedures to receive and investigate citizen complaints and to discipline misbehaving officers to the extent permissible under union contracts and public employment law.[38]

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rights liability by concluding municipal corporations were not persons within the meaning of the Civil Rights Act. *See generally* Michael Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539 (1989) (tracing Supreme Court decisions following the line of *Monell*); Douglas Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 518-21 (1993) (discussing legislative history of Civil Rights Act, *Monroe* and *Monell* decisions).

35. 489 U.S. 378 (1989).

36. These well-publicized 'blue ribbon' commissions typically form in response to a particular scandal and make recommendations for change; some became permanent bodies. *See* John Dombrink, *The Touchables: Vice and Police Corruption in the 1980s*, *in* POLICE DEVIANCE 61-98 (Thomas Barker & David L. Carter, eds., 1991) [hereinafter DEVIANCE]; PEREZ, *supra* note 15, at 19-34; Samuel Walker, *Historical Roots of the Legal Control of Police Behavior*, *in* POLICE INNOVATION, *supra* note 26, at 32-52; DEAKIN, *supra* note 15, at 105-08.

37. *See* Rudovsky, *supra* note 26, at 497 (recommending that review of citizen complaints is a necessary component of accountability).

38. There is little acknowledgment in case law for the conflict between the need to discipline and the need to afford officers employment rights and protections. *See* Click v. Bd. of Police Comm'rs, 609 F. Supp. 1199, 1205 (W.D. Mo. 1985) (holding that police officer has right to notice and opportunity to be heard before suspension without pay); *see also* Werner E. Petterson, *Police Accountability and Civilian Oversight of Policing: An American Perspective*, *in* COMPLAINTS AGAINST THE POLICE: THE TREND TO EXTERNAL REVIEW 259, 270 (Andrew J. Goldsmith ed., 1991) [hereinafter COMPLAINTS]; Jan TenBruggencate, *Police Rehire Officer Fired In Exotic Dancer Case*, THE HONOLULU ADVERTISER, April 8, 1997, at B-1 (labor arbitrator orders police officer who was dismissed for tampering with evidence and sexual misconduct with arrestee to be rehired); Richard J. Terrill, *Civilian Oversight of the Police Complaints Process in the United States: Concerns, Developments, and More Concerns*, *in* COMPLAINTS 291; Mitchell Tyre & Susan Braunstein, *Building Better Civilian*

The systematic collection, review, and disposition of citizen complaints against police officers follows many models.[39] The simplest model, still employed in small towns, involves informal investigation and discipline of officers by supervisory officers.[40] Large and mid-size police departments ordinarily employ "internal affairs" units to investigate complaints of misconduct independently.[41]

Review Boards, 63 FBI LAW ENFORCEMENT BULL. 10, 14 n.3 (1994), *citing* Judith Secher, *Legal Considerations Involving Civilian Review of Police Conduct*, THE POLICE CHIEF 11 (March 1993) ("Framers [of civilian review boards] need to consider potential legal conflicts with applicable police officer bills of rights and collective bargaining agreements. In addition, jeopardy to criminal cases might arise through granting immunity for subpoenaed testimony."); Paul West, *Investigation and Review of Complaints Against Police Officers: An Overview of Issues and Philosophies*, *in* DEVIANCE, *supra* note 36, at 373-99.

39. D. Carter, *Police Disciplinary Procedures: A Review of Selected Police Departments*, *in* DEVIANCE, *supra* note 36, at 351 (descriptive survey of 20 major United States police departments); PEREZ, *supra* note 15, at 230-49 (comparative evaluation of internal, civilian, and hybrid forms of police review systems); Richard Jones, *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission*, 77 MARQ. L. REV. 505, 508-509 (1994) (citing Samuel Walker & Vic Bumphus, *Civilian Review of The Police: A National Survey of the Fifty Largest Cities* (1991); West, *supra* note 38, at 373-99 (describing external and internal complaint review models). Large cities typically utilize both internal review and civilian, independent complaint review. *See* Lee P. Brown, *The Civilian Review Board: Setting a Goal for Future Obsolescence*, 58 THE POLICE CHIEF 6 (1991) (sixty per cent of fifty largest cities have civilian review in addition to internal complaint review).

Utilizing both internal and external review may be beneficial. On one hand, internal affairs systems may be more effective:

> Numerous studies support the conclusion that civilian review boards are less likely to sustain charges against police officers than chiefs acting on the results of police internal affairs investigations and that, furthermore, civilian boards are more lenient in disciplinary recommendations when officers are found guilty.

Tyre & Braunstein, *supra* note 38, at 10, 14 n.3. Thus, a purely civilian review system without internal review may not achieve desired results. On the other hand, civilian review fulfills two valuable functions, first, it provides an independent receptacle for complaints and second, provides for public participation and confidence in system. *See* Sa'id Wekili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 PAC. L.J. 171, 192-96 (1993) (stating that the purpose of civilian review is to conduct independent investigations and restore public confidence). However, there is skepticism that multiple complaint procedures are necessary or effective. *See id.*; *see also* Edward J. Littlejohn, *The Civilian Police Commission: A Deterrent of Police Misconduct*, 59 U. DET. J. URB. L. 5, 10 (1981); Rudovsky, *supra* note 26, at 497 ("civilian review is a necessary component of a system of accountability").

40. *See* PEREZ, *supra* note 15, at 87.

41. *Id.* at 88. "This model represents the overwhelming majority of review system types; 83.9 percent of all police review systems are exclusively internal, completely police-operated systems." *Id.* at 82 (citation omitted). Typically, internal affairs units address both internally and externally generated complaints. *See id.* at 91.

Internal Affairs units are not uniformly structured. One model operates wholly independently, one shares an investigatory role with the officer's supervisory officers, and one allocates primary investigatory responsibility with supervisors and oversight

Larger municipalities have moved toward external review by citizen boards.[42] Usually, these boards do not replace internal investigation of misconduct. The citizen boards do, however, provide an independent receptacle for, and an independent review of, complaints.[43] Several cities employ an integrated, hybrid system with both civilian and police roles in receiving and disposing of citizen complaints.[44]

Each model of citizen complaint review has potential advantages and disadvantages;[45] no system is ideal.[46] Informal systems vest inordinate discretion in supervisory personnel, and their success de-

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and review to the internal affairs. *See* West, *supra* note 38, at 395, *citing* H. Beral & M. Sisk, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1964).

42. *See generally* COMPLAINTS, *supra* note 38; PEREZ, *supra* note 15, at 88; Brown, *supra* note 39.

43. *See* PEREZ, *supra* note 15, at 82-83; Petterson, *supra* note 38, at 279.

44. *See* PEREZ, *supra* note 15, at 164-95. Perez believes that a hybrid system, which has roles for both civilian and police in the complaint review process, combines the best of internal investigation with the best of civilian review. *See id.*

Other studies describe external review as following one of three models: civilian review, civilian input, and civilian monitor. Citizen involvement is greatest in the civilian review model (civilians investigate, adjudicate, and recommend punishment to chief); less so in civilian input (receive and investigate); and least involvement in the civilian monitor system (internal process with civilian review of procedure for fairness and adequacy). *See* West, *supra* note 38 at 395.

45. Douglas Perez conducted a comparative study of police review systems over seventeen years. Three kinds of systems, internal, external, and hybrid were identified. He tested each for 1) the integrity (thorough, fair, objective) of the system; 2) the legitimacy (public confidence) in the system; and 3) the learning (impact on future conduct) occurring as a result of the system. *See* PEREZ, *supra* note 15, at 72-81. Perez concludes that complaints should be received through multiple receptacles, located both within the department and outside the department. He also prefers a hybrid investigatory system with either internal investigation coupled with a civilian monitor role or a shared investigation system where non-police question complainants. Perez concludes that not all complaints merit hearings, but when hearings are necessary, a multidisciplinary hearing board is preferred. *See id.* at 250-66. He also concludes that the final decision to discipline be retained by the police executive, as is typical. *See id.* at 239, 268; *see also* Goldsmith, *External Review and Self Regulation*, *in* COMPLAINTS, at 33-38 (identifying drawbacks of civilian review: police resistence to a civilian role, procedural deficiencies, nonprofessional investigations); Jones, *supra* note 39, at 517 (explaining that Milwaukee uniquely vests disciplinary authority in Commission); Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757, 798 (1995) (describing and evaluating INS's newest complaint procedures by an independent office within the Department of Justice; noting labor opposition to review); West, *supra* note 38, at 395.

46. *See* West, *supra* note 38, at 399 ("There is obviously not 'one best model' that can be placed within a police organization. Rather, factors such as community attitude and support for the police, the presence of police malpractice problems, allegations of police department cover-ups, and the sociopolitical environment of the community must all be considered in a complaint review program.")

pends upon the integrity and effectiveness of supervisors and the chief of police. An informal system also lacks accountability and oversight.[47] While an informal system may function well under an effective leader, it just as easily permits cover up and neglect to flourish under an ineffective leader.

Internal affairs systems provide safeguards absent in an informal system. In the internal affairs model, formalized policies and procedures are promulgated to guide the initiation and conduct of investigations. Additionally, professional investigators, following standard investigatory procedures, staff the internal affairs unit. Thus, complaints against officers, in theory, are investigated with the same diligence as the department's other criminal investigations. Furthermore, the devotion of full-time manpower to an internal affairs unit demonstrates a municipality's sincere commitment to uncovering abuse, unlike an informal system where such investigations are merely an incidental supervisory task. Most notably, as compared to civilian review, the internal affairs system appears to have a superior record of sustaining complaints and recommending discipline.[48] Police investigators apparently hold officers accountable for their conduct more often than civilians investigating and judging misconduct. Advantages of an internal affairs systems include efficiency, as well as the professionalism of investigators and their ability to understand law enforcement issues.[49] Finally, the location of an internal affairs unit within the department helps to ensure communication between the investigatory unit and those making personnel decisions. Disadvantages of internal affairs systems include, most significantly, profound public distrust and the potential for biased, self-serving and superficial investigations.[50] Public distrust manifests itself as public fear or reluctance to report misconduct to the police or a lack of confidence in the results. Failure to report abuse or a systematic disregard of reported complaints undermines the effectiveness of the whole

47. *See* PEREZ, *supra* note 15, at 104 (informal systems permit cover-ups, regardless of whether abuses occur or not, and discourage complainants from filing complaints).

48. *See supra* note 39 and accompanying text.

49. *See* PEREZ, *supra* note 15, at 104 ("primary strength of the internalized review process is the competence and professionalism of its investigators").

50. *See* Goldsmith, *supra* note 38, at 24-28.

complaint system.[51] In addition, the public's distrust undermines its belief in the legitimacy of the police.[52]

Civilian review boards cure the real or perceived bias and intimidation problems inherent in internal civilian complaint models.[53] Advantages of citizen review boards include increased public access because the process appears less threatening,[54] a public perception of the independence of the investigatory process, and an increased public confidence in the evaluative process.[55] Civilian review is typically, though not always, more open to public scrutiny.[56] A citizen review system, however, also has disadvantages.[57] Chief among those disadvantages is the apparent tendency of civilians to judge police officers less harshly, to recommend lighter discipline, and the lack of professionalism of civilian investigators.[58] Most

51. *See* Goldsmith, *supra* note 38, at 21-24.

52. *See generally* PEREZ, *supra* note 15, at 102-22; Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551, 603 (1997); Rudovsky, *supra* note 26, at 497. Ironically, internal affairs departments noted for their rigor and unrestricted investigatory powers lead police officers to view some internal systems as tyrannical and unfair. *See generally* PEREZ, *supra* note 15, at 102-22; Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551, 603 (1997); Rudovsky, *supra* note 26, at 497..

53. *See* Livingston, *supra* note 26, at 665-66.

54. The United States Civil Rights Commission recommends external locations to file complaints, and surveys of complainants indicate the same. *See* PEREZ, *supra* note 15, at 102-03; Petterson, *supra* note 38, at 277 (commenting that fear of retaliation discourages complaints).

55. PEREZ, supra note 15, at 148-49 (revealing that complainants surveyed "are impressed with the civilian system; they are comfortable talking to civilians about their grievances; and they have more faith in civilian investigators"); Livingston, *supra* note 26, at 663-65 (civilian review increases integrity of process and public confidence).

56. *See* PEREZ, *supra* note 15, at 132.

57. The efficacy of civilian review is not yet known. However, public confidence is a laudable goal in and of itself.

> The actual effectiveness of civilian review in . . . law enforcement is unclear. Some studies show that determinations made by civilians do not differ substantially from those made by the police department; others show that civilian review procedures sustain citizen complaints at rates not significantly higher than those reported by internal affairs units. But the vigor of investigations seems to be greater in cities with civilian review, and citizens seem to have more confidence in civilian versus strictly internal review systems.

Hing, *supra* note 45, at 798 (footnotes omitted).

58. *See* Tyre & Braunstein, *supra* note 38; *see also* PEREZ, *supra* note 15, at 139. In 1991, Berkeley, California's review board logged "the first instance of a higher rate of findings of misconduct from the civilian review process tha[n] this study has found in seventeen years of research. In other words, not at any time in the history of civilian review had a civilian system found the police guilty more often than had an internal system until Berkeley did so in 1991." PEREZ, *supra* note 15, at 139 (emphasis omitted).

problematic, these civilian boards may become weighed down by their own procedures and operate so inefficiently as to fail in their primary purpose.[59] Finally, the externality and independence of the review board, a valued characteristic when receiving and investigating complaints, may result in an institutional failure at the resolution stage of the process. Unless there is a process by which the status and disposition of complaints are reported to and considered by internal departments making personnel decisions, the impact of the process is diminished.[60]

In sum, there is no clearly superior method to receive and resolve police misconduct complaints. Adopting any model poses challenges and pitfalls to municipal policymakers.[61] While identifying the advantages and disadvantages of each model (informal, internal, or civilian) is useful, a municipality is also well-served by considering desirable goals for its complaint process.

A community's evaluation of its procedures for handling civilian complaints should recognize that receiving and resolving citizen complaints is integral to many law enforcement functions, and that the complaint process must serve those multiple purposes.[62] First, the complaint process must deliver a fair and satisfactory result in an individual case. Obviously, this justice requirement is equally important to both the officer and the complainant. Second, receiving, investigating, and adjudicating complaints from citizens against officers are key aspects of departmental supervision of its officers. Often, the public has unique knowledge about the performance of officers in the field away from supervisory officers. Thus, in addition to providing a procedure that is fair to both aggrieved citizens and accused officers, receiving and adjudicating complaints is a component of personnel management and supervision of errant officers. The process provides an important mechanism to identify

59. *See* Cox v. District of Columbia, 821 F. Supp. 1 (D.D.C. 1993), *aff'd* 40 F.3d 475 (D.C. Cir. 1994); *see also* PEREZ, *supra* note 15, at 134 (discussing the delays in hearing and resolving complaints by civilian review board in Berkeley, California, noting the "negative impact on the effectiveness"; often the police chief has meted out punishment before the civilian process is concluded); Petterson, *supra* note 38, at 279-280.

60. *See infra* notes 208, 214-222 and accompanying text.

61. *See supra* note 46.

62. *See* Paul Hoffman, *The Feds, Lies, and Videotape: The Need For an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1481 (1993). The Christopher and Kolt reports, investigating abuses within the Los Angeles Police Department, demonstrated that despite a system to review and receive civilian complaints, the several dozen "bad" officers remained on the force and were even promoted: "the system was stacked against civilian complainants suggest[ing] department-wide indifference". *Id.*

officers who should be disciplined, transferred, retrained, demoted, or dismissed for misconduct. Third, the responsiveness of the department to citizen complaints gives civilians confidence that the department polices itself and does not hold itself above the law. This accountability function is important for the department in order to achieve and preserve the public confidence and legitimacy necessary to operate effectively as a police department. Finally, the receipt of citizen complaints, contextually, serves the department as an indicator of larger problems, such as problem officers, problem areas of training, and problem geographic areas with deficient supervisors. To that extent, complaints may reveal an organizational need for restructuring, reassessing, and changing.

Civil rights decisions against municipalities generally reflect a judicial expectation that civilian complaint procedures serve these important goals.[63] While courts have not weighed in on which model best achieves the important functions of a complaint review procedure, courts have articulated certain expectations regarding complaint procedures. Most importantly, decisions indicate that courts have embraced the basic premise that adequate complaint review is vital to a police department's supervisory responsibilities.

IV. Failure to Investigate Civilian Complaints of Police Misconduct as a Basis for Municipal Liability

A. Deliberate Indifference Claims

In *City of Canton v. Harris*,[64] the United States Supreme Court decided, in a failure-to-train case, that municipal liability could arise for a constitutional tort by an employee when an omission, such as the failure-to-properly-train an employee, amounted to deliberate indifference to the rights of persons with whom the police come in contact.[65] In *Canton*, plaintiff alleged that following her arrest, officers offered her no medical assistance despite severe emotional ailments that later required hospitalization and outpatient treatment.[66] She alleged that the City of Canton was culpable because it vested the discretion to determine the medical needs of detainees in the hands of supervisors who did not receive adequate training to assess those medical needs.[67] The Court was asked to determine both whether an otherwise constitutional policy (the

63. *See generally infra* Parts IV & V.
64. 489 U.S. 378 (1989).
65. *See id.* at 390-92.
66. *See id.* at 381.
67. *See id.* at 381-82.

city's policy of providing medical care for detainees)[68] could give rise to liability where the training to implement that policy was inadequate, and by what standard such inadequacy should be judged.[69]

The *Canton* Court established that, in addition to liability for affirmative customs or policies under *Monell*, municipalities demonstrating deliberate indifference to training police officers could also be liable to citizens for constitutional deprivations caused by an otherwise constitutional policy.[70] The Court acknowledged that the City of Canton's policy that every jailor, with permission of the supervisor, could secure medical treatment for detainees, was undeniably a constitutional policy.[71] Yet, the plaintiff claimed that if that policy was unconstitutionally applied by a municipal employee, the city could be liable.[72] The Court agreed. In explaining the contours of this liability, however, the Court cautioned that "adequately trained officers occasionally make mistakes" and that no municipal liability would be imposed for such occasional mistakes.[73] In fact, the Court noted that such mistakes "say little about the training program or the legal basis for holding the city liable."[74] Therefore, the Court next asked, by what standard should municipal liability be judged to ensure that courts did not impose mere respondeat superior liability.[75]

The first inquiry under *Canton* requires the court to examine the "adequacy of the training program in relation to the tasks the particular officers must perform."[76] The municipality must train its officers to "respond properly to the usual and recurring situations

68. *See id.* at 387; *see also* Cox v. District of Columbia, 821 F. Supp. 1, 12 (D.C. 1993) ("[i]n addition to concluding that a policy of failing to take action could amount to a policy or custom, City of Canton v. Harris held for the first time that constitutional policies as well as unconstitutional policies could result in municipal liability. . . ."), *aff'd*, 40 F.3d 475 (1994).

69. *Canton*, 489 U.S. at 385.

70. *See* Michael T. Burke & Patricia A. Burton, *Defining the Contours of Municipal Liability Under 42 U.S.C. § 1983: Monell Through City of Canton v. Harris*, 18 STETSON L. REV. 511 (1989) (explaining that municipal liability is fault-based); Anthony D. Schroeder, Note, *City of Canton v. Harris: The Deliberate Indifference Standard in 42 U.S.C. § 1983 Municipal Liability Failure to Train Cases*, 22 U. TOL. L. REV. 107, 111 n.31 (1990).

71. *See Canton*, 489 U.S. at 386.

72. *See id.* at 387.

73. *Id.* at 391.

74. *Id.*

75. *See id.* at 391-92.

76. *Id.* at 390.

with which they must deal."[77] The Court made clear that municipalities would not be liable for failing to anticipate extraordinary events requiring special training. The Court also expressed tolerance for some failures in police training: "[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program."[78] In summing up the claimant's burden to prove the inadequacy, the Court explained that a municipality would be liable only where the inadequacy was "likely to result in the violation of constitutional rights."[79]

Second, the claimant must demonstrate the municipality's culpable deliberateness. Determining deliberate indifference demands exploring policymakers' deliberative, decision-making process[80] when developing training programs. The Court explained that policymakers demonstrate "deliberate indifference," a standard which the Court characterized as higher than either negligence or gross negligence, to the civil rights of claimants when they make a "conscious" or "deliberate choice to follow a course of action . . . from among various alternatives."[81] As to the deliberative process, the Court framed the inquiry as whether:

> [I]n light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.[82]

The Court also required proof that the municipality's inadequate training actually caused the injury.[83] The Court explained that "the identified deficiency in a city's training program must be closely related to the ultimate injury."[84] *Canton* calls upon the jury to an-

77. *Id.* at 391.

78. *Id.* at 390.

79. *Id.* at 390.

80. *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 129 (1988) (holding that policy must be furthered by those with final policymaking authority); *see also* Schroeder, *supra* note 70, at 127.

81. *Canton*, 489 U.S. at 389 (quoting Pembaur v. Cincinnati, 475 U.S. 469, 483-84 (1986) (plurality) (Brennan, J., concurring)).

82. *Id.* at 390.

83. *See id.* at 391.

84. *Id.*; *accord* Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992) (holding that plaintiff must prove policymaker "knows to a moral certainty" that officers will confront such a situation and that lack of training will frequently lead officers to make the wrong choice); *see also* Schroeder, *supra* note 70, at 128.

swer the question, "[w]ould the injury have been avoided . . . [if] the program . . . was not deficient in the identified respect."[85] This close causal relationship necessitates proof that adequately trained officers would have responded differently to the situation.

Canton, therefore, requires a precisely drawn accusation of the deliberate indifference of a municipality.[86] It is not enough under *Canton* that the department's training program is inadequate. The plaintiff must demonstrate that the inadequacy actually caused a constitutional violation, that the inadequacy was the result of a deliberate choice by a policymaker, and that the likelihood the choice would lead to injury was obvious in light of the usual and recurring tasks to which an officer is assigned.[87] The narrowly-crafted allegation requirement generally assures municipalities that police forces with recruitment, training, and supervision practices reflecting policy choices consistent with national standards should be fairly insulated from claims except for very specific weaknesses.[88]

Lower courts instantly extended *Canton* beyond failure-to-train claims to claims based upon a municipality's inadequate system of hiring, supervising, or reviewing police misconduct.[89] When challenging the adequacy of citizen complaint procedures, plaintiffs typically allege that the failure to institute an adequate system to receive, investigate, and resolve citizen complaints against police

85. *Canton*, 489 U.S. at 391.

86. *See id.* at 388-89.

87. *See, e.g.*, Kerr v. City of West Palm Beach, 875 F.2d 1546 (11th Cir. 1989) (city's failure to require continual and rigorous canine unit training caused injury to suspects apprehended by canines); Parker v. District of Columbia, 850 F.2d 708 (D.C. Cir. 1988) (deficient extra-jurisdictional arrest procedure training and physical fitness training), *cert. denied*, 489 U.S. 1065 (1989).

88. *See* Bordanaro v. McLeod, 871 F.2d 1151, 1162-63 (1st Cir.) ("The absence of a strictly enforced disciplinary system led the officers . . . to believe they were above the law and would not be sanctioned for their misconduct. A sufficiently supervised, properly recruited, trained and disciplined group of officers would not have acted so far below the level of accepted police behavior."), *cert. denied*, 493 U.S. 820 (1989); *cf.* Rizzo v. Goode, 423 U.S. 362, 378-80 (1975) (denying injunctive relief; federal courts are ill suited to second guess municipalities implementing police programs).

89. *Canton* implied that the deliberate indifference standard presumably applies to failure to act cases besides failure-to-train where inaction is a moving force behind constitutional injury. *Canton*, 489 U.S. at 394-95 (O'Connor, J., concurring) ("[W]here, as here, a claim of municipal liability is predicated upon a failure to act, the requisite degree of fault must be shown by proof of a background of events and circumstances which establish that the 'policy of inaction' is the functional equivalent of a decision by the city itself to violate the Constitution."). *Brown* confirmed the potential by considering deliberate indifference in the context of improper hiring. *See Brown*, 117 S. Ct. at 1390; *see also* Shari S. Weinman, Comment, *Supervisory Liability Under 42 U.S.C. Section 1983: Searching For The Deep Pocket*, 56 MO. L. REV. 1041 (1991).

officers amounts to a policy of deliberate indifference to the need for police supervision. Plaintiffs further assert that the failure to investigate claims of misconduct or to discipline wrongdoers assures that similar misconduct will recur within a climate of lawlessness engendered by non-supervision.[90] Fitting the claim into *Canton's* test, one court has stated:

> [A] city's complete failure to maintain an adequate system of disciplining officers who act unconstitutionally might also "fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury."[91]

Just as *Canton* requires the fact finder ultimately to ask whether a properly trained officer would have acted differently, these cases ask whether a more effective system to address citizen complaints would have prevented the officer from inflicting a constitutional injury upon the plaintiff. The necessary premise at the core of this claim is whether effective citizen complaint review would have led to better performance by the errant police officer. As the decided cases demonstrate, some courts eagerly have embraced that core premise:

> [A]lthough [plaintiff] has not demonstrated that [deficiencies in the complaint process] actually encouraged additional misconduct or excessive force violations, the . . . inadequacies certainly did permit serious misconduct to go unchecked. In that sense, the District's policy "caused" or was a "substantial factor" in [plaintiff's] injuries. Logically, "continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future."[92]

The need to ask that core question in a narrow and case specific manner was reaffirmed in *Board of County Commissioners of Bry-*

90. *See, e.g.*, Fiacco v. City of Rensselaer, 783 F.2d 319, 328 (2d Cir. 1986) ("[P]roof that other claims were met with indifference for their truth may be one way of satisfying the plaintiff's burden [to prove deliberate indifference]."), *cert. denied*, 480 U.S. 922 (1987); Brown v. City of Margate, 842 F. Supp. 515, 516 (S.D. Fla. 1993) ("[Plaintiff] argued that Margate police officers would use force with relative impunity, knowing that the City would not follow up on complaints and would not discipline or penalize officers for their excessive or unwarranted actions, and that this custom led to the incident in which [the plaintiff] was injured"), *aff'd*, 56 F.3d 1390 (11th Cir. 1995); Sango v. City of New York, 1989 WL 86995 (E.D.N.Y. 1989) (recognizing "proof of a policy of deliberate indifference based upon inadequate investigation of citizen complaints against police officers" is basis for § 1983 municipal claim).

91. *Cox*, 821 F. Supp. at 12.

92. *Cox*, 821 F. Supp. at 19 (quoting Bielevicz v. Dubinon, 915 F.2d 845, 851 (3d Cir. 1990) (internal citations omitted)).

ant County v. Brown,[93] decided in 1997. There, plaintiff Brown complained that her excessive force injuries at the hands of Deputy Sheriff Burns were a result of the county's failure to adequately screen Burns prior to appointment as a deputy. Plaintiff pointed to no general inadequacy in hiring officers. Rather, the apparent breakdown was the result of a familial relationship between the sheriff and the deputy. The primary issue for the Court involved whether proof of a "single incident" (the failure to screen a new hire's criminal record) by a policymaker (the Sheriff) was sufficient to establish deliberate indifference. Nevertheless, the Court's general comments about proving deliberate indifference claims are illuminating because they suggest that *Canton* has appropriate application beyond failure-to-train:

> We concluded in *Canton* that an "inadequate training" claim could be the basis for § 1983 liability in "limited circumstances." We spoke, however, of a deficient training "program," necessarily intended to apply over time to multiple employees. Existence of a "program" makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequence of their action—the "deliberate indifference"—necessary to trigger municipal liability.[94]

Thus, the Court agreed that deliberate indifference claims can extend beyond failure-to-train, at least to other "programs" marred by obvious deficiencies which cause constitutional injuries. However, the Court also acknowledged the difficulty of proving, outside of the failure-to-train context, the ultimate question posed by *Canton*: Would this officer have behaved differently if a proper program were in place? The Court expressed skepticism as to whether a plaintiff could prove that adequately screening applicants before hiring could predict a particular officer's future behavior, especially where the plaintiff proved only a single instance of neglectful hiring:

> The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive. In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a

93. 117 S. Ct. 1382 (1997).
94. *Id.* at 1390.

> failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.
>
> . . . .
>
> Where a plaintiff presents a § 1983 claim premised upon the inadequacy of an official's review of a prospective applicant's record, however, there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself. . . . To prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.[95]

Importantly, the Court pointed out that inadequate training more predictably leads to injuries than does a hiring decision and that the causal link is therefore easier to prove in a training case. The decision alerts litigants that, outside of failure-to- train claims, proving causation between a municipal program and a constitutional injury may prove to be a steep hurdle.

> Unlike the risk from a particular glaring omission in a training regimen, the risk from a single instance of inadequate screening of an applicant's background is not "obvious" in the abstract; rather, it depends upon the background of the applicant. A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly. But that risk is only a generalized showing of risk.[96]

The difficulty of linking a failure to adequately screen recruits with their future misconduct is not unlike the challenge before plaintiffs alleging that inadequate complaint review leads to continued misconduct. As the Court pointed out:

> [A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation must be strong.[97]

95. *Id.* at 1391.
96. *Id.*
97. *Id.* at 1392.

Analogously, to establish a claim that the deficient citizen grievance procedures resulted in injury, plaintiffs must prove that the inadequate procedures made it highly likely that the officer would inflict this constitutional harm upon the plaintiff.

Claimants rely upon one of three methods to prove that an officer would have behaved differently if a better system of citizen complaint review was in place. First, a plaintiff may attempt to prove that there is a "climate of lawlessness" within a police department and that misconduct by police officers generally goes unchecked.[98] Along with this method, a plaintiff must also prove that the particular officer-tortfeasor misbehaved because of this atmosphere.[99] Following *Brown*, this method of proof may be dubious.[100] A second method of proof is more direct. A plaintiff may attempt to prove that the particular officer, with a propensity toward misconduct as shown through prior incidents, misbehaved because that officer believed from past experience that nothing would happen.[101] Finally, a plaintiff may attempt to prove that, had previous complaints against the officer been addressed at an earlier opportunity or more thoroughly, the officer likely would have been dismissed or disciplined before this incident.[102]

Despite the rigorous requirements of proof, claims of deliberate indifference are no longer readily decided on the pleadings. In 1993, the Supreme Court rejected a heightened pleading standard for municipal claims in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.[103] Resolving a split among the federal circuits, the Court in *Leatherman* reaffirmed its commitment to *Monell* causes of action by rejecting a heightened pleading standard for such claims. The Court, however, also signaled its expectation that poorly articulated claims should be disposed of at

98. *See infra* notes 108-31 and accompanying text (discussing Fiacco v. Rennselaer, 783 F.2d 319 (2d Cir. 1986)).

99. *See Fiacco*, 783 F.2d at 327.

100. See *infra* notes 130 & 152 and accompanying text for a discussion of pre-*Brown* analysis. As *Brown* explained, the court must "directly test the link between Burns' actual background and the risk that, if hired, he would use excessive force." *Brown*, 117 S. Ct. at 1392. Thus, "testing the link" requires plaintiff to prove that the municipality's indifference to complaints caused this officer to violate plaintiff's rights.

101. *See infra* notes 159-63 and accompanying text (discussing Parrish v. Luckie, 963 F.2d 201 (8th Cir. 1992)).

102. *See infra* notes 186-208 and accompanying text (discussing Cox v. District of Columbia, 821 F. Supp. 1 (D.D.C. 1993), *aff'd*, 40 F.3d 475 (D.C. Cir. 1994)).

103. 507 U.S. 163 (1993).

summary judgment.[104] Following *Leatherman*, municipalities must be prepared to defend their city programs, including complaint review systems, at summary judgment or trial. Early dismissal of these claims at the pleadings stage is now less likely.[105]

B. Judicial Evaluation of the Complaint Review Process

1. Informal Complaint Review

While there are many variations, informal civilian complaint systems are typified by supervisory discretion. For example, citizen complaints initially may be received by the chief or town leader, assigned for investigation to other officers, and then finally referred to the chief for action.[106] The manner in which complaints are received, whether or not to conduct an investigation, the discipline, the reporting, and the monitoring may all be discretionary decisions by the police chief. Informal systems are as effective or ineffective as the person in charge. These systems often lack procedural safeguards for the accused and the accuser. They also fail to assign oversight and accountability roles to administrators. Thus, while an informal method of citizen complaint review may work effectively when a town has a conscientious police chief, the town has no institutional assurance that the system will work effectively.[107]

The judicial message is unmistakeable with regard to informal systems: the town entrusting unfettered discretion to its police chief will be liable for its police chief's failings. *Fiacco v. Rensselaer*[108] was one of the first cases to hold that a failure to investigate prior complaints may evidence deliberate indifference. The case arose in the context of a relatively small town with informal complaint procedures. There, Mary Fiacco alleged that police used excessive force and caused her constitutional injury when she was

104. *See id.* at 168-69 (acknowledging an inundation of lawsuits and suggesting that summary judgment is the appropriate mechanism to "weed out unmeritorious claims sooner rather than later.").

105. *See* Illiano v. Clay Township, 892 F. Supp. 117 (E.D. Pa. 1995) (denying Clay Township's motion to dismiss); Curran v. City of Boston, 777 F. Supp. 116 (D. Mass. 1991) (denying Boston's motion to dismiss); Vasquez v. Reid, No. 90 C 1585, 1990 WL 207456 (N.D. Ill. Dec. 6, 1990) (denying Chicago's motion to dismiss); *see also* Eric Kugler, *A 1983 Hurdle: Filtering Meritless Civil Rights Litigation at the Pleading Stage*, 15 REV. LITIG. 551, 552-58 (1996).

106. *See* PEREZ, *supra* note 15, at 87-88.

107. *See id.*

108. 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987). The case foreshadowed *Canton* and is cited with approval in *Canton* for the deliberate indifference standard. *See Canton*, 489 U.S. at 397.

arrested for disorderly conduct following a night of heavy drinking.[109] After passing out on the lawn of a Rensselaer, New York home she arrested and was brought to the police station.[110] While exiting the patrol vehicle, she claimed she was "shoved," "dragged," "kicked," and "poked" without provocation or justification by Officers Meyer and Harrington.[111] The plaintiff offered evidence that the Chief of Police had ignored prior instances of alleged brutality brought to his attention by civilians. Fiacco advanced the theory that the failure to exercise reasonable care in investigating prior complaints demonstrated deliberate indifference to police brutality and the municipality's responsibility to supervise its officers.[112] She argued that this deliberate indifference allowed officers to injure plaintiff.[113] The Court of Appeals for the Second Circuit affirmed a jury verdict in favor of Fiacco against Rensselaer.[114] The court approved Fiacco's theory of how municipal indifference to complaints demonstrated failure to supervise and resulted in her injury:

> Fiacco's theory is not that the City intended to engage in unintentional conduct. Rather it is that the City was knowingly and deliberately indifferent to the possibility that its police officers were wont to use excessive force and that this indifference was demonstrated by the failure of the City defendants to exercise reasonable care in investigating claims of police brutality in order to supervise the officers in the proper use of force. We see no logical flaw in such a hypothesis. . . .[115]

The court was satisfied that this failure to supervise resulted in unchecked abuse and made Fiacco's injuries likely.

Fiacco also addressed the admissibility of unsustained and unproven complaints as evidence of inadequate supervision. In reviewing the proceedings below, the Second Circuit agreed with the

109. *See Fiacco*, 783 F.2d at 321.

110. *See id.*

111. *Id.*

112. *See id.* at 323.

113. *See id.*

114. *Compare id.* with Andrews v. Fowler, 98 F.3d 1069, 1075 (8th Cir. 1996) (describing situation in which mayor and city council members took immediate action upon learning of misconduct), *and* Sharrar v. Felsing, No. Civ. A. 94-1878,1996 WL 117162, * 18 (D. N.J. March 7, 1996) (holding on summary judgment, town with only twenty police officers not liable for failure to have an internal affairs department or other formal complaint mechanisms in place), *and* York v. City of San Pablo, 626 F. Supp. 34 (N.D. Cal. 1985) (finding no municipal liability in case of six complaints of excessive force insufficient where complaints were all investigated by the city).

115. *Fiacco*, 783 F.2d at 326.

trial judge that the probative value of unproven third party complaints of misconduct outweighed their prejudicial value.[116] As the court explained, evidence that past complaints had not been investigated proved Fiacco's theory of deliberate indifference.[117] "[I]f the City's efforts to evaluate the claims were so superficial as to suggest that its official attitude was one of indifference to the truth of the claim, such an attitude would bespeak an indifference to the rights asserted in those claims."[118] By alleging that a failure to investigate past complaints amounted to deliberate indifference rather than a pattern of widespread abuse, the plaintiff overcame a substantial obstacle. To prove a pattern of abuse, unfounded complaints are not relevant.[119] However, to prove a climate of lawlessness due to a lack of supervision, the response to any complaint is relevant.[120]

Having determined that unproven claims were admissible, the court then examined the town's response to complaints and the sufficiency of the plaintiff's evidence.[121] Although Rensselaer's town charter called for a Public Safety Board to supervise the po-

116. *See id.* at 327-28.

117. *See id.* at 328 ("[w]hether or not the claims had validity, the very assertion of a number of such claims put the City on notice. . ."); *see also Beck*, 89 F.3d at 975 (holding that evidence of unproven complaints is admissible when allegation is that the grievance process is inadequate).

118. *Fiacco*, 783 F. 2d at 328.

119. The mere number of complaints (whether sustained or not), seems dubious proof of a widespread practice, even in a small community. *See* Kerr v. City of West Palm Beach, 875 F.2d 1546, 1555 (11th Cir. 1989) (comparing injury rate within canine units of other municipalities); Sarus v. Rotundo, 831 F.2d 397, 401 (2d Cir. 1987) (holding that no unconstitutional practice was shown by number of complaints); Bryant v. Whalen, 759 F. Supp. 410, 412 (N.D. Ill. 1991) (statistical evidence of complaint/sustained rate in Chicago is not sufficient); Burnette v. Ciolino, 750 F. Supp. 1562, 1564-65 (M.D. Fla. 1990) (plaintiff bears burden of demonstrating a "history of widespread abuse" and summary judgment is appropriate where plaintiff points to five shootings in five years); McKenna v. County of Clayton, 657 F. Supp. 221. 225 (N.D. Ga. 1987) ("The mere existence" of "common occurrences" such as previous false arrest claims does not establish a failure to adequately investigate unless the plaintiff shows they were resolved against the employer on the merits).

120.

> The jury was instructed that there had never been any authoritative finding as to whether or not any claimant's charge was valid and that the jury was neither to assume that the claims were true nor to try to assess their truth; rather, the jury was merely to "focus [its] attention on [whether] the chief of police and/or the city [took] sufficient steps in their supervisory capacity in handling those claims."

Fiacco, 783 F.2d at 328; *see also* Sango v. City of New York, No. 83 CV 5177, 1989 WL 86995, *10 (E.D.N.Y. July 25, 1989) (holding that unadjudicated complaints are relevant to question of adequacy of the proceedings).

121. *See Fiacco*, 783 F.2d at 328.

lice department, and the town had adopted rules to govern the department and discipline officers, Police Chief Stark had never seen those rules.[122] The Board provided no form on which a civilian could file a complaint against an officer.[123] Fiacco offered evidence that seven written complaints had been filed with Chief Stark, that the police chief typically took no written statements from the complainants, that he did not open any formal investigation, and that he did not make any notations in officer files concerning the complaints.[124] No hearings had ever been held.[125] Instead, the chief testified that "he had conducted as much investigation as he thought necessary."[126]

The chief testified that there had been other complaints against officers and, after investigating those complaints he discharged three officers.[127] Rensselaer attempted to show through this evidence that its informal investigation and discipline process was adequate and resulted in appropriate discipline. The court, however, found the informal process completely inadequate. Rensselaer's problems were compounded by the mayor's lack of response. While the mayor was informed of all complaints, he condoned the failure to prepare formal reports or submit the complaints to the Public Safety Board.[128] Thus, rather than a negligently administered program, the policymakers for the town deliberately ignored the town's duly enacted citizen complaint procedure. Rejecting Renneselaer's defense of its informal process, the court concluded that, "the evidence was sufficient as a matter of law to permit a rational juror to find that the City had a policy of nonsupervision of its police officers that amounted to a deliberate indifference to their use of excessive force."[129]

Plaintiff's causation evidence was not particularly well-defined, most likely because the case was decided before the edicts of *Canton* and *Brown* that plaintiffs must establish and test the affirmative link between the misconduct and the municipality's indifference. However, plaintiff did establish that at least one of the misbehaving officers was the subject of previous complaints. In addition, because of the informality of the complaint process, little or no inves-

122. *See id.* at 329.
123. *See id.*
124. *See id.* at 329-30.
125. *See id.* at 330.
126. *Id.*
127. *See id.* at 331.
128. *See id.*
129. *Id.* at 332.

tigation of the officer's past misconduct occurred. The officer was also promoted to sergeant without past claims being fully investigated or adjudicated. It seems likely, therefore, that even after *Canton* and *Brown*, *Fiacco's* evidence "directly tested the link between" the deficiencies in the complaint system and the misconduct of that officer.[130] The court concluded that a jury rationally could have inferred that:

> [w]ith no formal statement being taken from the complainant, no file being created, no notation being made in the officer's file, and no further investigation being made—[the process] would have been viewed by the officers, and should be viewed by an objective observer, as reflecting indifference by the City to the use of excessive force.[131]

Fiacco proved that an inadequate system for responding to citizen grievances promoted a climate of unconstitutional misconduct as well as an inference that this lawless climate was affirmatively linked to the misconduct at issue.

An informal complaint review procedure also failed the citizens of Utica, New York. The court's particular criticisms regarding Utica are noteworthy and instructive.[132] In *Hogan v. Franco*,[133] a claim for excessive force was made against several Utica officers following the plaintiff's arrest when he resisted officers attempting to confiscate his alcohol at a public fireworks display.[134] Arresting officers beat the plaintiff with a baton and refused to grant medical attention until the next day despite pleas from other arrestees on his behalf.[135] As one basis of municipal liability, plaintiff alleged

130. *Brown*, 117 S. Ct. at 1392.

131. *Fiacco*, 783 F.2d at 331.

132. An earlier case against Utica found no liability. In *Sarus v. Rotundo*, 831 F.2d 397 (2d Cir. 1987), the Second Circuit Court of Appeals reversed a jury verdict against Utica. The court noted multiple avenues to complain about police (the mayor, the Public Safety Commission, and the chief) although complaints eventually funneled to the chief. Importantly, Chief Rotundo testified that he routinely disciplined based upon investigations. *Id.* at 401. The court cautioned, "[w]hile a more formal process might be preferred, appellees offered no evidence that the Utica procedures differed in any way from those employed by other municipalities." *Id.* Although decided before *Canton*, the court followed the deliberate indifference standard, relying on *Fiacco*. *Id.* Put in the context of *Canton*, the claim in *Sarus* apparently failed because plaintiff failed to prove that the informal complaint review procedure in Utica was deficient and the need for formality obvious. *Canton*, 489 U.S. at 390.

133. *See Sarus*, 896 F. Supp. 1313 (N.D.N.Y. 1995). The *Sarus* claim arose from events in 1984. 831 F.2d at 398. The *Hogan* injuries occurred in 1992. *See Hogan*, 896 F. Supp. at 1316.

134. *See Hogan*, 896 F. Supp. at 1316.

135. *See id.*

that Utica's general failure to investigate citizen complaints evidenced deliberate indifference amounting to a policy or practice of failing to properly supervise or discipline officers.[136] Equipped with detailed information about supervision in Utica and a cogent theory, the court examined Utica's system for reviewing citizen complaints.[137]

The court agreed with the plaintiff that the failure to institute adequate civilian complaint procedures was evidence of inadequate supervision and could lead to injuries such as the excessive force injuries he suffered.[138] As to the complaint process specifically, the *Hogan* court first faulted the manner in which past complaints were investigated and resolved.[139] In contrast to testimony in an earlier case,[140] where Police Chief Rotundo testified to "previous disciplinary actions and a system of handling complaints that did not give him sole discretion[,]"[141] in *Hogan*, he testified that: "the police department has no formal procedures for handling complaints of police brutality; . . . the police department does not index such complaints; . . . informal investigations are conducted by fellow officers. . . ."[142] at the discretion of the chief.[143] The court found that the investigation of the *Hogan* incident evidenced "purposeful intolerance" from a department which "arrogantly refused to search for answers, accepted without question denials by involved officers, and concluded that the claims were not only un-

136. *See id.* at 1318. In addition to excessive force by beating, Hogan also complained that being jostled in the back of the van while handcuffed and unable to stabilize himself amounted to excessive force, and deliberate indifference to medical needs. He also prevailed on a claim that the failure-to-train drivers to secure prisoners against injury in the vans, that the failure to provide medical attention, and the failure-to-train officers in use of force each constituted deliberate indifference. *See id.* at 1316, 1322, 1323.

137. The court applied *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 961 (1993), requiring conscious indifference of policymakers to the inadequacy of the program. In this failure-to-train case, the court required plaintiff to prove that a policymaker "knows to a moral certainty" officers will confront a given situation and that the failure-to-train will frequently lead officers making the wrong choice and to a deprivation of civil rights. *Hogan*, 896 F. Supp. at 1321 (quoting *Walker*, 974 F.2d at 297).

138. *See Hogan*, 896 F. Supp. at 1323.

139. *Id.* at 1320 ("Trial testimony indicated that the informal investigation procedures consisted of a supervising officer asking the officer who was the subject of the complaint to submit a statement on special report Utica Police Department Form 61.").

140. *See* Sarus v. Rotundo, 831 F.2d 397 (2d Cir. 1987).

141. *See Hogan*, 896 F. Supp. at 1323.

142. *Id.* at 1317.

143. *See id.* at 1323.

resolved, but unsubstantiated."[144] From the court's perspective, the complaint review process had deteriorated from the earlier case: "[c]ontrary to the situation in *Sarus*, there is no longer a Public Safety Commissioner to handle citizen complaints or to introduce new police policy. . . . Chief Rotunda is now responsible for the supervision of the police, and the informal investigation described above is the result."[145]

The court faulted Utica's failure to index the complaints by officers' names or to place them in officers' personnel files even when unsubstantiated.[146] The court noted that indexing complaints is recommended by the New York State Commission on Criminal Justice and the Use of Force and that "lack of indexing may be a factor of inadequate supervision if supported by other evidence."[147] The court criticized Utica's maintenance of complaints in alphabetical order by complainant. While the process protected an officer's personnel file from the "smear" of "unsubstantiated complaints," the court explained that this indicated "silent support and protection," a "lack of supervision," and "deliberate indifference to the truth."[148]

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144. *Id.* at 1320.

145. *Id.* at 1323. No mention was made of whether the other sources investigating complaints in Utica remained intact. *See* Brown v. City of Margate, 842 F. Supp. 515 (S.D. Fl. 1993) (holding that informal resolution of complaints without written documentation is sufficient to establish deliberate indifference).

146. *See Hogan*, 896 F. Supp. at 1320; *infra* note 147. Regardless of the complaint review system employed, record keeping policies may raise issues of inadequacy. *Compare Brown*, 842 F. Supp. at 516 n.2 ("The City must, however, acknowledge that allegations of a police department's failure to maintain thorough and accurate records of citizen complaints—if substantiated—could be considered evidence of deliberate indifference.") *with* Bosley v. Foster, No. Civ. A. 90-2409-L, 1992 WL 40696, at *2 (D. Kan. Feb. 5,1992) (holding that the destruction of records of unfounded complaints after six months, well-founded claims after two year statute of limitations is not an unconstitutional policy, nor can plaintiff establish an affirmative link between destruction and injury suffered).

147. *Hogan*, 896 F. Supp. at 1324. *Hogan* is not alone in criticizing the failure to index pending and even unsustained complaints. Other courts have complained that the failure to place pending or unsustained complaints in an officer's personnel record or to otherwise track and monitor them prevents the municipality from recognizing early patterns of abuse. *See, e.g.*, Beck v. City of Pittsburgh, 89 F.3d 966, 973 (3d Cir. 1996) (reversing judgment in favor of Pittsburgh: "each complaint was insulated from other prior and similar complaints and treated in a vacuum"); Vann v. City of New York, 72 F.3d 1040, 1045 (2d Cir. 1995); Cox v. District of Columbia, 821 F. Supp. 1, 15 (D.D.C. 1993), *aff'd*, 40 F.3d 475 (D.C. Cir. 1994). *But see* Brooks v. Scheib, 813 F.2d 1191, 1194 (11th Cir. 1987) (holding that court will not mandate policy requiring examination of prior complaints).

148. *Hogan*, 896 F. Supp. at 1319-21.

Utica's informal complaint system, evidence of the inadequacy of the investigation in plaintiff's own case, the town's failure to index complaints and anecdotal evidence[149] of alleged past misconduct were sufficient evidence of deliberate indifference to support municipal liability.[150] The systematic failure to investigate prior complaints convinced the court that: "[t]he inference that a policy existed may . . . be drawn from circumstantial proof, such as . . . evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges that police officers had used excessive force in violation of the complainants' civil rights."[151]

This case suggests that courts may be willing to infer that prior complaints, without regard to their validity, coupled with a faulty system of investigation, suffice to prove a municipality's failure to supervise police officers.

Like Fiacco, Hogan also lacked direct evidence by which to answer the question, "would the injury have been avoided . . . [if] the program . . . was not deficient in the identified respect[?]"[152] Instead, the court concluded the jury could infer that the injury was a consequence of failing to supervise:

> Regardless of whether the investigation would find [the police officers] responsible for the assault upon Hogan, its undertaking was necessary to convey a policy strongly discouraging such acts. Yet policymaking personnel accomplished exactly the opposite, conveying a strong statement of support for civil rights violations by their tolerance of these violations. Their refusal to root out the culprits . . . issues a shout of support for such actions without a word spoken.[153]

149. The court credited the testimony of other victims of alleged abuse and an emergency room physician who claimed to have treated victims of past abuse. "The evidence introduced was sufficient to show a problematic number and regularity of complaints. . . ." *Id.* at 1324.

150. *See id.* The court makes no mention of sustained complaints or proven incidents of past misconduct, an element the *Sarus* court found critical. *See Sarus*, 831 F.2d at 397, 402 (finding no evidence of past incidents "viewed as essential in *Fiacco*" and court was "loath to affirm a finding of a policy of indifference when not even a single incident of other misconduct was presented"). However, the *Hogan* court apparently dismissed the need for proof of prior misconduct, implying that because of inferior investigation of citizen complaints one could not infer a lack of prior misconduct. *See Hogan*, 896 F. Supp. at 1325.

151. *Hogan*, 896 F. Supp. at 1320 (quoting Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991) (omission in original)).

152. Canton v. Harris, 489 U.S. 378, 391 (1989).

153. *Hogan*, 896 F. Supp. at 1320.

Like Fiacco, Hogan used proof of a climate of lawlessness to create the inference that the system's failure caused the instant injury.

Other lessons can be drawn from *Fiacco* and *Hogan*. These cases demonstrate a dissatisfaction with informal complaint systems in which the responsibility for receiving and investigating complaints resides with an individual vested with unbridled discretion to pursue complaints or not. These communities pay the price for the judicially perceived shortcomings of their chief of police.[154]

Hogan also foreshadows an emerging judicial expectation: all complaints (not merely sustained complaints) against officers should be indexed and noted in officer personnel files so that repeated complaints yield data about an officer's overall performance. While each misconduct complaint may be judged in the vacuum of impartiality, an officer's overall performance must be judged in the context of his or her past performance.[155] Experts suggest that multiple complaints, regardless of the adjudicatory outcome, may suggest officers require additional supervision, monitoring, or retraining.[156] Thus, courts expect that the system will potentially identify problem officers from patterns of past complaints and act to protect the public.

2. *Internal Affairs*

Police departments employing internal affairs units to investigate civilian complaints are subject to criticisms that the internal investigations are perfunctory or biased, especially when a police chief directly supervises the investigators or affords them little independence.[157] Moreover, lodging complaints against police to the police

154. *See e.g.*, Carney v. White, 843 F. Supp. 462 (E.D. Wis. 1994) (holding that Village of Darien may be liable where police committee did not monitor the internal complaint process), *aff'd*, 60 F.3d 1273 (7th Cir. 1995); Brown v. City of Margate, 842 F. Supp. 515, 518 (S.D. Fla. 1993) ("The City admitted that prior to 1988 citizen complaints were routinely disposed of orally with no record kept of the complaint nor any documentation made of any investigation that was conducted."), *aff'd*, 56 F.3d 1390 (11th Cir. 1995). An informal system may be successfully defended, however, when the policymakers are responsive. *See Andrews v. Fowler*, 98 F.3d 1069, 1074 (8th Cir. 1996) (describing case in which police chief brought misconduct to the attention of the city council promptly and requested immediate termination; three prior incidents were also met with swift termination).

155. *See supra* note 147 and accompanying text.

156. *See infra* note 232 and accompanying text.

157. *See* Alison Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 794 (1993) (discussing internal affairs investigations posing a serious potential for bias, cover-up and unfairness).

department itself may be viewed as intimidating by the public.[158] Without a nondepartmental unit for receiving citizen complaints, internal affairs systems are subject to allegations that they actively discourage complainants from coming forward through threats, intimidation, and reprisals. If a system discourages complaints by fostering fear, the system is patently deficient.

Parrish v. Luckie[159] is notable both for its assessment of the internal affairs complaint system and the direct link plaintiff proved between the municipality's non-supervision *vis-a-vis* its defective complaint procedures and the particular injury suffered. The Eighth Circuit Court of Appeals affirmed a verdict in favor of plaintiff Parrish for false arrest and sexual assault against the City of North Little Rock, Arkansas. Following her arrest, Ms. Parrish was forced to perform oral sex on the arresting officer, Luckie.[160] She complained to Officer Dallas about Luckie. Dallas in turn reported back to Luckie. Luckie told Dallas "not to report the incident to his supervisor because he knew that if a written complaint was not filed, the Department would not investigate."[161] There was evidence of prior incidents of misconduct involving Luckie.[162] The plaintiff did file a written report about the incident and Luckie was eventually charged and convicted of first degree sexual abuse.[163]

As to the deficiencies in the complaint system, the court agreed with the jury's conclusion that the police department under the direction of its police chief "implemented a policy of avoiding, ignoring, and covering up complaints of physical and sexual abuse."[164] The internal affairs division in North Little Rock did not select cases for investigation independently but was solely controlled by the chief:

> Chief Bruce created and maintained a system in which he was the only person who could open an internal affairs investigation. Chief Bruce maintained a policy of opening investigations only when citizens filed written complaints. After Chief Bruce opened an investigation, he controlled its scope and direction. Investigators would report to Chief Bruce as to whether the written complaint was substantiated or unsubstantiated.

158. *See infra* note 166.
159. 963 F.2d 201 (8th Cir. 1992).
160. *See id.* at 203.
161. *Id.*
162. *See id.* at 204.
163. *See id.*
164. *Id.* at 203.

> . . . .
>
> Evidence also showed that the Department required citizens filing written complaints against officers to submit a statement under oath and to sign a statement that they understood Arkansas' felony statute regarding false swearing. Investigators also discouraged citizens from filing complaints by telling persons that if the investigator believed they were not telling the truth, they might be prosecuted and fined or imprisoned.[165]

The court agreed with the plaintiff that this internal affairs procedure intimidated citizens and made them reluctant to file complaints.[166] Therefore, the absence of complaints did not indicate an absence of misconduct within the force. Instead, the court inferred that officers operating under this system could "act with impunity unless a citizen filed a written complaint."[167]

Most importantly, *Parrish* demonstrates an effective method to prove that the municipality's faulty complaint review system directly permitted a particular officer to violate a citizen's constitutional rights. Here, evidence showed that Officer Luckie knew that if he could convince fellow officers not to file written reports, and could intimidate complainants from coming forward, he could escape investigation and discipline. Thus, the inadequacy of the complaint process allowed Luckie repeatedly to violate the constitution, and Luckie was aware of the lack of consequences for misconduct. The affirmative link, required by *Brown* and *Canton*, was quite strong.

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165. *Id.* at 204-205. This is not an uncommon procedure. Regardless of the system, the hope is that sworn complaints curb false complaints, however, the procedure may also discourage valid ones:

> Civilian review boards have varying procedures, some of which are subject to the same criticisms as are police investigatory process. For example, a body calling itself a "civilian review board" in Richmond, California, requires complainants to sign complaints and gives a stern warning about the prosecution of false statements. Not unlike the police officers' bill of rights in Maryland, this procedure can be criticized on the grounds that it is intimidating to citizens. It quashes one of the arguments put forth historically in favor of civilian review.

PEREZ, *supra* note 15, at 130.

166. The fear of complaining is particularly problematic to internal complaint models. *See* Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 565 (1st Cir. 1989) ("The investigations of complaints against officers required witnesses to come to the station house to give sworn written statements. . . . [T]he effect of such a requirement was to 'frighten[ ] most of the average citizen[s] . . . . This hampered the department's ability to discover the truth surrounding alleged incidents of misconduct.") However, as Perez notes, civilian review can apply similarly stifling requirements. PEREZ, *supra* note 15, at 130.

167. *Parrish*, 963 F.2d at 205.

Nonetheless, an internal affairs system is not a necessarily fatal choice leading inevitably to municipal liability. In *Brooks v. Scheib*,[168] the plaintiff alleged a constitutional injury against an Atlanta police officer and also complained that the city failed to supervise its officers adequately, specifically attacking the internal citizen complaint review process.[169] The Eleventh Circuit Court of Appeals reversed a jury verdict against Atlanta, finding plaintiff's evidence insufficient to support the verdict.[170] As to the plaintiff's "complain[t] about the failure to have a citizens' review committee or other outside involvement in the complaint process,"[171] the court explained that the plaintiff lacked evidence that "police officers cannot be fair and objective in judging complaints against other officers."[172] Unlike in *Parrish*, the *Brooks* plaintiff offered no evidence to show that the police actively discouraged complainants from making complaints or that the police chief exercised unilateral control over the investigation.

Brooks also asserted that the large number of complaints against the officer involved demonstrated Atlanta's deliberate indifference, even if some of those complaints were pending or unsustained.[173] The court rejected this contention. It held that it was improper for the jury to infer that the city had knowledge of misconduct from the number of complaints alone.[174] After all, the court explained, the officer worked in a high crime area where arrestees frequently complain "as a means of harassing officers who arrest them."[175] As to the failure to index complaints by officer name, the court commented that while such a practice might be

168. 813 F.2d 1191 (11th Cir. 1987).

169. *See id.* at 1193. Plaintiff pointed to three specific deficiencies with regard to the internal complaint process: 1) the failure to have a written policy requiring that past complaints be brought to the attention of investigators of fresh complaints; 2) failure to administer polygraphs to officers involved in complaints; 3) failure to have a policy giving citizens a role in the complaint review process. *See id.* at 1194.

170. *See id.* at 1195.

171. *Id.* at 1194.

172. *Id.* at 1194; *see also* Perez, *supra* note 15, at 115.

173. *See Brooks*, 813 F.2d at 1194. Perez reports that most police receive one or fewer complaints per year and that a typical officer receives between two and four complaints over their career. *See* PEREZ, *supra* note 15, at 29.

174. *See id.* at 1193 ("City presented testimony that each complaint was fully investigated and found to be lacking in merit"). Perez cautions that errant officers do not necessarily receive the most complaints, "these ideas do not square with the realities of the reports of police misconduct . . . . [i]ndividual patterns and career histories are far more complex than such simple analysis implies." PEREZ, *supra* note 15, at 30.

175. *Id.* at 1193; *see also* Beck v. City of Pittsburgh, 89 F.3d 966, 975 (quoting Straus v. City of Chicago, 760 F.2d 765, 768-69 (7th Cir. 1985) (stating that people file complaints against the police "for many reasons, or for no reason at all")).

helpful, it would not "mandate a policy which would require that prior complaints always be examined."[176] The court recognized that Atlanta might be liable if the plaintiff could prove "that more effective citizens' complaint procedures would have prevented his injuries."[177] However, plaintiff failed to do so.

Proving internal systems lack legitimacy and integrity requires more than vague inferences that the system is necessarily biased merely because it is an internal system.[178] *Canton* requires far more.[179] Over eighty percent of municipal police departments rely on an internal affairs model to review citizen complaints.[180] In *Parrish*, the plaintiff provided a narrowly-crafted allegation that the internal affairs system actively discouraged complainants from coming forward and that complaints received only cursory investigation in a system designed to cover up more than it revealed. Moreover, *Parrish* proved that the faulty system was a likely factor in Officer Luckie's tendency toward misconduct based on a review of Luckie's past record.

The perceived lack of integrity and legitimacy[181] within informal and internal affairs systems may lead judges and juries to infer that misconduct within a department likely goes unchecked. Yet *Brooks* demonstrates that a plaintiff must muster more than a mere inference of bias to prove deliberate indifference.[182]

3. *Civilian Review Procedures*

Participation by civilians in the review of complaints against police may eliminate the perception that investigations are biased and self-serving. Chief among the strengths of civilian review are perceptions of independence and integrity. Although the perception

176. *Brooks*, 813 F.2d at 1194; *see supra* note 147 and accompanying text.

177. *Brooks*, 813 F.2d at 1195. *Brooks* is notable because it is one of few decisions expressing skepticism concerning the "provability" of a narrowly crafted allegation that a defective complaint procedure caused a constitutional injury, recognizing *Harris's* edict not to second-guess communities. *Id.* at 1194.

178. *See* PEREZ, *supra* note 15, at 114-115 (stating that internal affairs can be "extremely effective in influencing police behavior" and "clean[ing] house").

179. *See* Chudzik v. City of Wilmington, 809 F. Supp. 1142, 1149 (D. Del. 1992) (holding that "sweeping" generalizations that internal affairs system is inadequate is insufficient to oppose summary judgment—plaintiff, as a complaining witness at internal affairs hearing, was permitted opportunity to witness hearing but not to confront witnesses or be represented by counsel).

180. *See supra* note 41.

181. *See* PEREZ, *supra* note 15.

182. *See id.* ("The classic internal review model is not at all as sinister as has been asserted by external observers. The deterrent effects of internal investigative mechanisms are significant.").

of integrity and legitimacy of investigations of citizen grievances against officers may be restored by independent civilian review,[183] such a system also raises efficiency problems. Further, if the civilian review process does not interface with other departments and have an impact on personnel decisions, then the review does not yield meaningful results. Communities transitioning to civilian review should find the District of Columbia's disastrous experience instructive.

The District of Columbia enjoyed an early litigation success following implementation of a civilian review board to hear citizen complaints against officers.[184] Its success was short-lived.[185] The failure to investigate citizen complaints and discipline officers as a species of failure to supervise was advanced a second time as a basis of municipal liability in *Cox v. District of Columbia*.[186] In *Cox*, the plaintiff alleged unconstitutional use of force by Officer Goodwin. Officer Goodwin had against him several prior complaints of excessive force. At least one of those incidents had occurred during his probationary service, when, had the complaint been decided against Goodwin, Goodwin could easily have been terminated.[187] However, the plaintiff was able to prove that, because of a woefully inadequate complaint review procedure, Officer Goodwin remained on the force while his conduct went unchecked and his probationary period on the force expired.

In most respects, the plaintiff's deliberate indifference claim was similar to Fiacco's: that the citizen review system was fundamentally flawed and that the resulting failure to discipline officers assured continued constitutional deprivations. *Cox* demonstrates that the case against a municipality can be proven in large cities as well as in small towns. As in *Fiacco*, not only did the plaintiff demonstrate that there were past complaints, but also that the mu-

183. *See id.* at 142-56.

184. Prior to 1982, citizen complaints were handled through an internal process. *See* Cox v. District of Columbia, 821 F. Supp. 1, 3 (D.D.C. 1993) (describing development of the Civilian Complaint Review Board), *aff'd*, 40 F.3d 475 (D.C. Cir. 1994).

185. In *Carter v. District of Columbia*, 795 F.2d 116 (D.C. Cir. 1986), a civil rights plaintiff offered a mixture of evidence to support a claim of a pattern of excessive force against the District of Columbia. The *Carter* plaintiff failed to adequately attack the procedure for reviewing complaints, instead attempting to show that the number of complaints and the sustained complaint rate was circumstantial evidence of a custom or policy of misconduct. A directed verdict was entered in favor of the municipality and the Court of Appeals for the District of Columbia affirmed. The court found that the statistics alone were "wanting in detail" and plaintiff lacked a cogent theory of the District's deficiencies. *Id.* at 122-5.

186. 821 F. Supp. 1 (D.D.C. 1993), *aff'd*, 40 F.3d 475 (D.C. Cir. 1994).

187. *See id.* at 9.

nicipality did not have an effective system to address the complaints. Moreover, the plaintiff in *Cox* also showed that complaints against the police officer in question went unanswered and that he remained on the force while the complaints were languishing in the city's bureaucracy. As *Canton* and *Brown* demand, *Cox* also proved a link between the deficient program and the injury by demonstrating the officer continued in municipal service without discharge or discipline.

In *Cox*, the plaintiff offered evidence[188] that the District of Columbia's complaint review process for its Metropolitan Police Department was inadequate due to an ever-increasing backlog. For example, the plaintiff offered evidence that in 1983 the average time required to dispose of a complaint was eight months, but by 1990 the time had increased to 33.10 months.[189] The plaintiff demonstrated:

> At the end of its first five years of existence, the CCRB [Civilian Complaint Review Board] had received a total of 1,742 complaints and had a backlog of approximately 1,000 cases. Of the 1,742 cases filed, the CCRB had made findings on the merits in only 145 cases, sustaining at least one allegation of misconduct in 65 of those 145 cases.[190]

According to the court, the District of Columbia mandated that all cases be brought before the CCRB prior to disciplining officers; thus, the CCRB's deficiencies assured officers went undisciplined for years.[191] The District of Columbia responded to the backlog by increasing the budget of the CCRB (although not necessarily to the level requested), but the backlog proved intractable.[192] To the municipality's credit, in 1991 CCRB requested permission to increase its capacity to hear complaints by establishing a panel system. In 1992 the District of Columbia Council finally adopted panels, mediators, and an "Early Warning Tracking System" to identify of-

188. *See Cox*, 821 F. Supp. at 3. The case procedure was unusual. Plaintiffs defaulted police officer defendants in 1991. The District of Columbia and Plaintiff agreed to submit the case without trial, filing a joint stipulation of facts, individual statements of evidence, individual proposed findings of fact and conclusions of law and briefs. *See id.*

189. *See id.* at 6.

190. *See id.* at 7 (footnotes omitted). Furthermore, the CCRB processed less than one-third of the complaints received. *See id.*

191. *See id.* at 6.

192. *See id.* at 7.

ficers involved in three or more citizen complaints within two years.[193]

The *Cox* court noted that under *Canton*, "a city's complete failure to maintain an adequate system of disciplining officers who act unconstitutionally might 'fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.'"[194] The court framed the issue:

> Accordingly, the next step is to determine whether the consistent and chronic delays endemic to the District of Columbia's civilian complaint review process constituted a policy or custom and whether maintenance of that policy or custom amounted to deliberate indifference by the District to its residents or to any other individuals who might come in contact with District police officers.[195]

The court distinguished the quality of proof from an earlier case,[196] explaining that "[t]o establish a pattern, policy or custom, a plaintiff must present 'concentrated, fully packed, precisely delineated scenarios' of unconstitutional conduct."[197] Acknowledging that this proof "is not easy to quantify,"[198] the court concluded that "Cox has firmly demonstrated a pattern on the part of the District of maintaining a complaint and disciplinary procedure so ineffective so as to virtually constitute a nullity, and, at the very least, deliberate indifference."[199] Moreover, Cox demonstrated "that the District of Columbia did maintain, and indeed advance, a custom of egregiously delayed investigations."[200] The deleterious effects of the delays were compounded by the CCRB's role as the "exclusive receptacle for citizen complaints."[201] Worse, the delay resulted in failure to eliminate troublesome probationary officers, thus thwarting the purpose of the probationary period.[202] Finally, Cox presented a logical theory of statistical relevance: due to the egre-

193. *See id.* at 9.

194. *See id.* at 12. (quoting Canton v. Harris, 489 U.S. 378, 390 (1989)).

195. *Id.* at 12.

196. *See* Carter v. Disrict of Columbia, 795 F.2d 116, 125 (D.C. Cir. 1986)).

197. *Id.* at 13 (quoting Parker v. District of Columbia, 850 F.2d 708, 712 (D.C. Cir. 1988)); *see also* Beck v. City of Pittsburgh, 89 F.3d 966, 975 (3d Cir. 1996) (explaining that statistical evidence coupled with actual written complaints is sufficient evidence from which to draw inference that procedures are inadequate).

198. *Cox*, 821 F. Supp. at 13.

199. *Id.* at 14.

200. *Id.*

201. *Id.*

202. *See id.* at 15. Moreover, the CCRB failed to comply with its own statutory deadlines (a thirty day requirement). *See id.*

gious delays (and static number of cases resolved) complaints against officers rose, presumably as a result of a failure to discipline and dismiss aberrant officers.[203] Because of the lack of discipline (a consequence of delays), the court concluded that the District of Columbia's deliberate indifference to disciplining officers assured constitutional injuries would continue.[204]

Of some comfort to cash-strapped municipalities, the court noted that it was not implying that the District of Columbia should merely continue to throw increasing amounts of money at its flawed system (nor that merely increasing funding would be sufficient). Rather, the court suggested that "non-monetary alternatives" such as prioritization might suffice to remedy the failing system.[205] *Cox* serves as a warning to large cities that while civilian review boards may serve important public interests, to the extent that their operation creates delays and inefficiencies in the overall disciplinary system, they must be redesigned or supplemented with simultaneous, parallel internal review and discipline. Arguably, the District of Columbia's primary problem arose because the civilian review board was the "sole receptacle for citizen complaints"[206] and that discipline was delayed pending outcome of the board's review.[207] As a result of the system's delays, the District of Columbia failed to take corrective action and officers gained permanent employment status in the department while awaiting hearings on alleged misconduct.[208]

In addition to liability based upon inefficiencies within the citizen board system, the manner in which the civilian review system is designed to investigate complaints may also expose municipalities to liability just as an internal system might. For example, in *Sango v. City of New York*,[209] the plaintiffs successfully claimed that the abuses against them resulted from a faulty disciplinary system, marred by cursory investigations and inadequate cross-examina-

203. *See id.* at 16 nn.15, 17.

204. *See id.* at 16.

205. *Id.* at 17 n.19 (explaining that "the Court does not suggest that a particular sum of money should have been or should now be appropriated to address citizen complaints. . . other non-monetary alternatives could have been implemented").

206. *Id.* at 14.

207. *See id.* at 6.

208. Courts are particularly intolerant of municipalities that permit promotions and other personnel actions to go forward while complaints (especially multiple complaints) are pending. *See* Vann v. City of New York, 72 F.3d 1040, 1050 (2d Cir. 1995); *Cox*, 821 F. Supp. at 15.

209. No. 83 CV 5177, 1989 WL 86995 (E.D.N.Y. July 25, 1989).

tion of police witnesses.[210] A magistrate's report agreed with plaintiff's assessment that the investigations and the proceedings conducted by the review board were inadequate.[211] Thus, like internal review, civilian review does not ensure thorough or rigorous investigations and may be similarly faulted for a lack of investigatory thoroughness. Worse, the civilian investigators may lack the competency of a police investigators.[212]

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210. *Id.* at *13. New York City's system ultimately subjects complaints to an eight member civilian panel. *Id.* at *4. Perez categorizes New York City's system as a hybrid system, with roles for both police and civilian monitors. PEREZ, *supra* note 15, at 166. New York is currently considering creating an Independent Police Investigation and Audit Board with authority to subpoena, investigate, audit and refer cases to the prosecutor. This independent board would compliment, not eliminate, the Civilian Complaint Review Board. *See* Dan Janison, *Cop Watchdog/New Panel is end-run on Rudy*, NEWSDAY, Oct. 1, 1997 at A28.

211. *Sango*, 1989 WL 86995, at *3. Despite a three level complaint review procedure, a Magistrate's Report found that the Civilian Complaint Review Board's investigation of complaints against the officer were "less than adequate." *Id.* The report criticized the investigations and hearings, noting "brief questioning" and lack of vigorous cross examination of the officer, failure to interview witnesses or in some cases, a failure to document how investigations were conducted. Without success, the City attempted to rebut the evidence with proof that the overall system was adequate, citing an overall 10% "substantiated" claims rate. The court rejected its argument stating, "it simply cannot be said that the percentage identified so conclusively demonstrates plaintiffs' inability to establish inadequate investigations amounting to deliberate indifference that summary judgment against plaintiffs is warranted." *Id.* at *12. *See* Dan Morrison, *Brutality Blind/Safir: Couldn't Predict Precinct Torture*, NEWSDAY, Sept. 12, 1997 at A8 (following incident of egregious brutality, Mayor plans to provide additional funds to hire more experienced investigators for the Civilian Complaint Review Board).

212. *See* PEREZ, *supra* note 15, at 143; Jones, *supra* note 39, at 517. *Beck v. City of Pittsburgh*, 89 F.3d 966 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. . 1086 (1997), highlights the fact that civilian systems can experience the same deficiencies as internal systems. There, the Office of Professional Standards ("OPS") investigated complaints against police officers. *Id.* at 968. Perez identifies Pittsburgh as an example of a hybrid system, with roles for police and civilian investigators. *See* PEREZ, *supra* note 15, at 263. In reversing summary judgment in favor of Pittsburgh, the court faulted determinations made in a vacuum, lack of rigorous investigation, and lack of tracking officers.

> The OPS itself was structured to curtail disciplinary action and stifle investigations into the credibility of the City's police officers. Even if complainant's witnesses were credible, their testimony became inert under OPS policy, while at the same time police officers' statements appeared to have been given special, favorable consideration.
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> . . . .
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> Because there is no formalized tracking of complaints for individual officers, a jury could find that officers are guaranteed repeated impunity, so long as they do not put themselves in a position to be observed by someone other than another police officer.

Beck, 89 F.3d at 974.

Even if complaints are adequately and professionally investigated and resolved promptly, determinations under any system must result in discipline when appropriate.[213] Unlike internal or informal systems closely connected to the chief and the department, external, civilian systems must develop a method to communicate with the internal police departments. In order to impact personnel decisions, the actions of a civilian review board must interface with those charged with supervision and discipline of officers. In *Vann v. City of New York*,[214] the Second Circuit Court of Appeals reversed a decision granting summary judgment to New York based in part on a claim that an inadequate complaint review procedure demonstrated deliberate indifference regarding supervision of abusive police officers.[215] The court explained that deliberate indifference could be found "if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or forestall further incidents."[216] In *Vann*, the plaintiff complained that various units of the police department failed to coordinate their independent knowledge of the police misconduct of officer Raul Morrison and this failure to communicate resulted in a failure to discipline the officer.[217] In this instance, the Department's Early Intervention Unit, which monitored problem police officers, knew about certain misconduct by Police Officer Morrison.[218] In addition, Morrison was referred to the Psychological Services Unit ("PSU") for perceived deficiencies. The Civilian Complaint Review Board received complaints about Morrison both before and after his probationary period.[219] Other departments working with problem officers, including the Department of Advocate's Office and the Central Personnel Index also knew of the officer's shortcomings.[220] In reversing summary judgment in favor of New York the court noted that, "[n]one of these units,

213. Typically, decisions to discipline rest finally within the department and that fact alone should not be seen as a flaw unless recommendations are routinely ignored. In order to hold the chief accountable one must give the chief the responsibility. *See* Rudovsky, *supra* 26, at 497 (commenting that Civilian Review Board's recommendation of discipline should be given serious consideration); Jones, *supra* note 39, at 517; West, *supra* note 38, at 395; PEREZ, *supra* note 15, at 268 (stating that a discipline decision should reside with chief who must be held accountable).

214. 72 F.3d 1040 (2d Cir. 1995).

215. *See id.* at 1041.

216. *Id.* at 1049.

217. *See id.* at 1045.

218. *See id.* at 1042-43.

219. *See id.* at 1044.

220. *See id.*

except PSU, attached any significance to the filing of [civilian] complaints; and PSU did not advise those who know of the complaints to pass the information on to the supervisory units."[221]

These cases instruct municipalities that no matter which system is used to address citizen complaints, courts expect independent and thorough investigations within a system which functions efficiently and results in prompt corrective action. Personnel decisions such as promotion from probation and promotions to a higher rank must account for the existence and disposition of civilian complaints.[222] Finally, to cure pockets of abuse or system-wide abuse, departments must chart the location of trouble spots within their communities.[223] As *Cox* demonstrates, courts are willing to infer that delayed discipline means the municipality is deliberately indifferent to the constitutional injuries of its citizens.

C. Negligently Administered Complaint Review Procedures

A negligently administered complaint system alone is insufficient to hold a municipality liable under § 1983. When a plaintiff does not allege that the system of citizen complaint review is systemically flawed or that the policymakers for the city deliberately ignore procedures, the claim will fail. If the municipality adopts an adequate system and policymakers demand its implementation, then mere mismanagement, even if it directly results in constitutional injury, will not suffice to impose municipal liability.

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221. *Id.* at 1045. The court also noted that "commanding officers were not instructed to, and normally did not, report the filing of new civilian complaints. Nor did DAO seek or receive such information from CPI or CCRB. Foppiano testified that DAO was not concerned about the fact that a new civilian complaint had been filed against a DAO-monitored officer unless and until the officer was found guilty." *Id.* at 1046.

222. In *Vann*, a police department psychologist explained the relevance of unsubstantiated complaints:

> [T]he very fact that an unusual number of civilian complaints had been filed, without regard to how they were ultimately resolved, could create concern that the officer was experiencing psychological problems and was suffering from stress that caused him to escalate minor situations into major confrontations.

Vann, 72 F.3d at 1045.

223. *See Rudovsky*, *supra* note 26, at 497 (stating that civilian review boards should have the authority "to gather statistical data relevant to patterns of abuse"); Hecker, *supra* note 52, at 597-604 (recognizing that civilian review boards have the potential to cause institutional reforms); Petterson, *supra* note 38, at 273 (noting civilian review's potential to make institutional changes); *see also Beck*, 89 F.3d at 974-75 (noting that police force does not make adequate use of the statistical evidence of problems it gathers).

Wilson v. City of Chicago[224] exemplifies how *Canton* and *Brown* require more than mere negligence on the part of municipal policymakers. There, the plaintiff proved, at best, a negligently administered system of citizen complaint review. Plaintiff alleged his confession was coerced by torture and that Chicago policymakers tolerated such torture. Evidence revealed numerous complaints that police abused suspects accused of injuring or murdering police officers in a specific geographic area. The Court of Appeals for Seventh Circuit affirmed a grant of summary judgment in favor of Chicago despite strong evidence that widespread abuse took place against these suspects. Of the quality of anecdotal evidence, the court commented:

> A rational jury could have inferred from the frequency of the abuse, the number of officers involved in the torture of Wilson, and the number of complaints from the black community, that [Superintendent of Police] Brzeczek knew that officers . . . were prone to beat up suspected cop killers. Even so, if he took steps to eliminate the practice, the fact that the steps were not effective would not establish that he had acquiesced in it and by doing so adopted it as a policy of the city.[225]

To compound the trouble in this Chicago neighborhood, the court concluded that, while the complaints against officers were properly referred for investigation, they apparently were not thoroughly investigated.[226] The court concluded that a rational jury might have concluded that the policymaker knew of widespread torture by police in this particular neighborhood; however, the court explained that this was insufficient to establish liability.[227] The court noted that Superintendent Brzeczek referred the complaints to an investigatory system that, if doing its job properly, should have ferreted out the abusers:

> It was the plaintiff's responsibility to show that in doing this Brzeczek was not acting in good faith to extirpate the practice. That was not shown. At worst, the evidence suggests that Brzeczek did not respond quickly or effectively . . . that he was careless, maybe even grossly so given the volume of complaints. More was needed to show that he approved the practice. Failing to eliminate a practice cannot be equated to approving it. Otherwise, every inept police chief in the country would be

224. 6 F.3d 1233 (7th Cir. 1993).
225. *Id.* at 1240.
226. *See id.* ("the office had done nothing except lose a lot of complaints").
227. *See id.*

> deemed to approve. . . the misconduct of the officers under his command.
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> . . . .
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> Deliberate or reckless indifference to complaints must be proved in order to establish that an abusive practice has actually been condoned and therefore can be said to have been adopted by those responsible for making municipal policy.[228]

Unlike in *Hogan* and *Cox*, where plaintiff attacked a flawed system of complaint review, in *Wilson* the municipality had developed a procedure to hear and respond to citizen complaints.[229] Plaintiff did not establish that the system, as designed, was inadequate to meet the public needs. Moreover, unlike the cases involving Chief Rotunda in Utica, Chief Bruce in North Little Rock, or Chief Stark in Rensselaer, plaintiff could not convince a court that Chicago policymakers permitted claims of misconduct to fall through the cracks with deliberate indifference to their merits. The failing, according to the court, was not a systemic deficiency but rather the negligent administration of the program.

Monell, *Canton*, and *Brown* make clear that mere negligence is not a basis of municipal civil rights liability. *Canton* specifically cautioned that no municipal liability would attach when "an otherwise sound program has occasionally been negligently administered."[230] Municipal policymakers must ensure that an adequate system of civilian complaint is adopted and must deliver the message to subordinates that the system must be implemented. However, as *Wilson* demonstrates, negligent mismanagement in the follow-through is not alone sufficient to find municipal liability.

V. What Courts Expect From Municipalities

Municipal liability for civil rights violations based upon a faulty citizen complaint system will continue to be imposed even as more municipalities develop elaborate citizen complaint procedures. Lower court decisions reflect a judicial willingness to impose certain standards for reviewing citizen complaints against police. While this might be viewed as the judicial "second-guessing" *Canton* eschewed,[231] a community is nevertheless well-served by reas-

228. *Id.*

229. *See* Sorlucco v. New York City Police Dep't, 971 F.2d 864, 873 (2d Cir. 1992) (holding that expert testimony to establish pattern of failure to investigate complaints).

230. *Canton*, 489 U.S. at 390.

231. *Id.* at 392.

sessment of its complaint procedures in light of the increasing claims.

An examination of the judicial criticism of various civilian complaint models leads to the conclusion that to avoid liability for failure to respond effectively to citizen complaints a community should, at a minimum:

1) adopt a formal review system regardless of the size of the municipality;
2) provide an outside (nondepartmental) unit to receive complaints so that complainants can come forward without fear or intimidation;
3) accord investigators significant independence from the police chief;
4) ensure professionalism in the conduct of investigations and hearings whether conducted by police or civilians;
5) provide an opportunity for witnesses, officers, and complainants each to be heard;
6) set and enforce time requirements to ensure that the review system results in speedy resolution and discipline when appropriate;
7) prioritize cases by the nature of the complaints so that those suggesting public danger are addressed first;
8) index pending, sustained and unsustained complaints by individual officer to ensure early identification of problem officers;[232] and
9) take action based upon the identification of problems and communicate the outcome of citizen complaint review to departmental agencies taking other personnel action.[233]

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232. Even if discipline cannot be meted out for unsustained complaints, judicial opinions suggest that many complaints in an officer's personnel file may suggest nascent problems deserving evaluation and prophylactic intervention short of discipline. In addition, multiple pending complaints may reveal a need for swift intervention. *See Beck*, 89 F.3d at 974 ("[B]ecause there is no formalized tracking of complaints for individual officers, a jury could find that officers are guaranteed repeated impunity"); *Vann*, 72 F.3d at 1050; *Cox*, 821 F. Supp. at 13-15. Placing unsustained complaints in personnel files may conflict with collective bargaining agreements.

233. My recommendations are a result of reviewing litigation trends. However, they are not inconsistent with the recommendations of law enforcement evaluators. For example, the Police Executive Research Forum (PERF) model policy statement, "[w]ith regard to the complaints system itself, . . . stresses that it must be accessible to all persons who wish to file a complaint, must function consistently, and must collect and analyze misconduct complaints on a monthly basis. Additionally, it argues for a 120-day limit on the disposition of all complaints." West, *supra* note 38, at 398 (citing PERF, *Police Agency Handling of Citizen Complaints: A Model Policy Statement* (Washington, D.C. 1983)); Livingston, *supra* note 26, at 664 (recommending broader civilian role in providing information about police performance); *Hecker*, *supra* note

While these suggestions seem to come as much from common sense as from judicial wisdom, surprisingly, the cases suggest that municipalities have had difficulty implementing these standards. So long as the federal courts are engaged in the evaluation of municipal programs, it behooves municipalities to take note of judicial decisions and adapt their citizen complaint procedures accordingly.

VI. Conclusion

While the Supreme Court has expressed a desire to spare federal courts from "the endless exercise of second-guessing" which would "implicate serious questions of federalism,"[234] judicial scrutiny of the adequacy of civilian complaint procedures employed by municipalities is increasing. Police departments of all sizes may be held liable for poorly designed or implemented civilian complaint procedures. When these procedures fail to detect and discipline officers engaging in misconduct, the fault rests with policymakers who act with deliberate indifference. Both internal and external models of complaint review pose problems for police forces. Recent cases instruct municipalities to formally and promptly address citizen complaints. The litigation experience of some municipalities suggests that, to avoid municipal liability, municipalities might consider adopting a system utilizing both internal and external review[235] of police misconduct. At the outset, the municipality is better served by a citizen complaint system which provides multiple units to receive complaints. During the investigatory stage, independence and competence are essential to creating a sense of integrity and legitimacy in the eventual outcome. At the resolution stage, the decision must be rendered promptly and appropriate discipline delivered. Municipalities must also engage in regular evaluation of their complaint procedures, or else mere supervisory negligence will rise to deliberate indifference. Finally, municipalities must systematically track complaints by officer and geographic area, looking for patterns and pockets of misconduct within its

52, at 602 (recommending monitoring through data collection); Jones, *supra* note 39, at 517 (recommending that civilian boards be empowered to make policy changes).

234. *Canton*, 489 U.S. at 392; *see also* Rizzo v. Goode, 423 U.S. 362, 375-76 (1976) (denying injunctive relief for alleged widespread police abuses in Philadelphia and indicating that delicate issues of federal-state relationships would be implicated if such relief were granted).

235. *See* William C. Smith & Geoffrey P. Alpert, *Law Enforcement: Policing the Defective Centurion—Decertification and Beyond*, 29 CRIM. L. BULL. 147, 155-58 (1993) (advancing a decertification model for certain misconduct which should actively solicit citizen complaints as well as those internally generated).

force. Without indexing and tracking complaints, the municipality may be viewed as ignoring its institutional problems. Despite the municipality's freedom from respondeat superior liability for civil rights violations, if a municipality does not take the complaint review process seriously, municipalities will be exposed to civil rights liability for even a few bad apples.