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LAW AND DISORDER: IS EFFECTIVE LAW ENFORCEMENT INCONSISTENT WITH GOOD POLICE-COMMUNITY RELATIONS?

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MR. TABAK: Some of you may be wondering why we called this program *Law and Disorder? Is Effective Law Enforcement Inconsistent with Good Police-Community Relations?* Some may wonder, "How could the answer to that question be yes?" Yet many people in this city and elsewhere in the country have been lead to believe that the answer is yes—that you cannot reduce serious crime without also exacerbating police-community relations.

We want to explore the extent to which that is or is not true. We have six speakers, plus excerpts from a report co-authored by a speaker who could not be here, followed by questions and answers.

Our first speaker is Professor Paul Chevigny of New York University Law School. He has been a professor there since 1981, and previously was involved with police conduct as the director of the Police Practices Project and as a staff attorney with the New York Civil Liberties Union. He was writing on the subject of police abuses in New York City as long ago as 1969 and, more recently, has been working on a comparative analysis of the

problems of police violence in Third World cities. In the 1990s, he prepared a critique of the failure of the United States federal government to deal with police violence in American cities for Human Rights Watch.¹

PROFESSOR CHEVIGNY: At the outset, I want to say a word about tonight's question. Clearly, it can have only one answer. We can not conduct government by violating people's rights. If we believe violations to be inevitable in the law enforcement process, then something is wrong with the organization of policing, or even, society. We must take the view that effective law enforcement can coincide with good police-community relations.

The proposition in question tonight stems from a popular saying that I'm sure everyone is familiar with: "If you have to kick a little butt to keep order and reduce crime, so be it." Millions believe this, including many, many police.

If you are familiar with the Mollen Commission report,² the officers who were interviewed in connection with the commission's investigation mentioned that the abuses in which they had engaged were done for the purpose of showing people who was boss—in other words, to keep order. Their belief was that violence was necessary to establish their authority.

That proposition is unacceptable because it implies that the police must disregard rights to keep order. We discovered after the shooting in the famous Diallo case³ that there were 40,000 stop and frisks by the Street Crime Unit alone in two years, and the State Attorney General's Office has examined many more cases.⁴ Those cases could not have all met the reasonable suspicion standard, as is required by the Supreme Court. Attorney General Spitzer inevitably found discrimination in stop and frisks,⁵ and a case has

1. PAUL CHEVIGNY, HUMAN RIGHTS WATCH, POLICE BRUTALITY IN THE UNITED STATES: A POLICY STATEMENT ON THE NEED FOR FEDERAL OVERSIGHT (1991).

2. CITY OF N.Y. COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, REPORT OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (1994). The Commission is popularly known as the "Mollen Commission," after its chair, the Hon. Milton Mollen.

3. *People v. Boss*, 701 N.Y.S.2d 342 (App. Div. 1999); see generally David Kociensievsky, *Success of Elite Unit Exact a Toll on the Streets*, N.Y. TIMES, Feb. 15, 1999, at A4 (describing the aggressive approach of the street crime unit).

4. OFFICE OF THE ATTORNEY GEN. OF THE STATE OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES (1999) [hereinafter A.G. REPORT].

5. *Id.* at ch. 5.

been brought by the Center for Constitutional Rights concerning this discrimination.⁶

This would be unacceptable even if it were effective law enforcement because it violates rights. It is easy to conceive of systems that would violate rights and probably be very effective. I don't know whether they really would be "law" enforcement. Nevertheless, it is very important to take a position of zero tolerance of unconstitutional action and the violation of people's rights, even if such misconduct effectively decreases crime. Society has to abandon the attitude that kicking a little butt is necessary to keep order.

Fortunately, there are alternatives. These are illustrated by the somewhat similar Boston⁷ and San Diego⁸ models. Basically, these are examples of problem-solving policing that emphasize community participation. The police show respect for the population, and the population comes to value the police much more.

Recently, the polls show that the Boston Police are very highly regarded by the population, across the board.⁹ They are highly thought of by minority as well as other citizens.¹⁰

The programs in Boston are not "namby pamby" programs. Boston has some very tough programs in the effort to control deadly violence by youth.¹¹ There's an Operation Night Light in which probation officers visit youths who are at risk.¹² The Youth Violence Strike Force works with community and other agencies to identify and counsel at-risk youth.¹³ Operation Cease Fire carries this out as well.¹⁴ In all of these programs, the Boston Police target youths based on information received from the community. They get a lot of cooperation from the churches, the schools, and a large number of other public agencies. They use a broad-gauged enforcement method.

6. Nat'l Cong. for Puerto Rican Rights v. City of New York, 194 F.R.D. 105 (S.D.N.Y. 1999).

7. Such policies are commonly referred to as "neighborhood policing." OFFICE OF THE POLICE COMM'R, BOSTON POLICE DEPARTMENT 1999 ANNUAL REPORT (1999).

8. CITY OF SAN DIEGO, POLICE DEPARTMENT MISSION STATEMENT (2000).

9. Jose Martinez, *Crime Fears Down in a Hub*, BOSTON HERALD, April 22, 2000, at 1.

10. *Contra id.*

11. OFFICE OF THE POLICE COMM'R, *supra* note 7 at 30.

12. *Boston's 'Magic' Formula*, BOSTON HERALD, Feb. 20, 1997 at 24.

13. OFFICE OF THE POLICE COMM'R, *supra* note 7 at 30.

14. *Id.* at 33.

The important thing is that the policing programs also include alternatives to getting involved in gang violence: services and jobs for these youths. That is essential.

Problem solving policing improves community relations, and it also involves community participation. I want to emphasize that. So-called community policing that does not mean participation by the people isn't really community policing.

San Diego's program is less formal.¹⁵ The police have been reorganized along neighborhood lines. They also use a system of problem-solving policing and have community groups that identify problems. The police, with the community groups, explore what law enforcement means might be used to solve the identified problems. This might include civil remedies, such as trying to take control of a crack house as a nuisance.¹⁶

Again, participation is the key. In both of these cities, there has been a decrease in arrests and in crime.¹⁷ And also, there are much better police-community relations. San Diego also uses a system that maps the crime in the various districts. This is very similar to the New York City Compstat system,¹⁸ which is quite consistent with a problem-solving policing approach. However, the problem in New York is that there isn't enough community cooperation. For example, after last year's scandal about the number of stop and frisks, there was a full page ad in *The New York Times* in which a long list of mostly private youth services organizations complained that harassment and abuse by police prevented them from doing their work.

Why was it necessary for youth service organizations to take out an ad in *The New York Times* in order to complain about police problems? The police, and city agencies, should reach out to these organizations to try to resolve problems with youths. In New York, the lack of community participation is solvable and would create better community relations.

MR.TABAK: Thank you Professor Chevigny.

15. *Model for a Chief: City Should Continue Community Policing*, SAN DIEGO UNION-TRIB., Jan. 14, 1999, at B14 [hereinafter *San Diego Community Policing*].

16. POLICE DEP'T, CITY OF SAN DIEGO, NEIGHBORHOOD POLICING: BUILDING A PROBLEM SOLVING PARTNERSHIP (Nov. 1, 2000), <http://www.sannet.gov/police/crime-prevention/np.shtml>.

17. Martinez, *supra* note 9; *San Diego Community Policing*, *supra* note 15.

18. MAYOR GIULIANI DELIVERS KEYNOTE ADDRESS AT THE INTERNATIONAL COMPSTAT CONFERENCE: INNOVATIVE COMPUTER MAPPING PROGRAM HAS REDUCED CRIME TO ITS LOWEST LEVELS IN 30 YEARS (May 13, 1997), <http://www.ci.nyc.ny.us/html/97/sp268-97.html>.

Before I call on the next speaker, I want to read excerpts from two pieces. One is a March 4, 2000 *New York Times* front-page article entitled, *Cities Reduce Crime and Conflict Without New York-Style Hardball*.¹⁹ It discusses San Diego and Boston. One of the things it says about Boston is that David Kennedy of the John F. Kennedy School of Government at Harvard advised changing the focus from gangs and drugs to gun violence. A team of Boston police officers and representatives of the District Attorney's Office, the United States Attorney's Office, the FBI, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco, and Firearms began tracing how guns got into the hands of criminals and who the most serious offenders were. They then consulted black ministers to win their cooperation in going after the ring leaders. The team, including the ministers, began inviting known criminals, drug dealers, and young gang members to "call-ins"—meetings at which the invitees were warned that the violence had to stop or there would be federal prosecutions. The few who did not heed the warnings have been arrested and are now facing long federal sentences. The number of arrests and confrontations on the street with the police were minimal. The program has been so successful that in the past two-and-a-half years, only one juvenile has been killed by gunfire in Boston.²⁰ This same program has now been followed in several other cities.²¹

At this point, our next scheduled speaker was Robert C. Davis, one of two authors of a March 1999 report of the Vera Institute of Justice, *Respectful and Effective Policing—Two Examples in the South Bronx*.²² Because Mr. Davis fell ill earlier today, I am going to read a few excerpts so you can get a flavor of what he would have said had he been able to attend. The report reads:

Serious crime in New York City has declined dramatically since 1990, and the decline has accelerated since the introduction of a set of new police strategies beginning in 1994. The number of civilian complaints against the police, however, rose dramatically after 1993, remaining 40 percent above the 1993 level in 1998. These two trends . . . have led many to speculate that the inevitable price of the dramatic drop in crime is an aggressive

19. Fox Butterfield, *Cities Reduce Crime and Conflict Without New York Style Hardball*, N.Y. TIMES, Mar. 4, 2000, at A1.

20. *Id.*

21. *San Diego Community Policing*, *supra* note 15.

22. ROBERT C. DAVIS & PEDRO MATEU-GELABERT, VERA INST. OF JUSTICE, *RESPECTFUL & EFFECTIVE POLICING: TWO EXAMPLES IN THE SOUTH BRONX* (1999) [hereinafter VERA REPORT].

police force that generates more anger and resentment. This study by researchers at the Vera Institute of Justice refutes such speculation, showing that police commanders in at least two neighborhoods have been able to reduce complaints against their officers below the 1993 levels while experiencing the same dramatic decline in crime characteristic of the city as a whole. The study shows that large reductions in crime can be achieved while practicing respectful policing.²³

The Vera researchers found that in these two South Bronx precincts:

[T]he most likely explanation for the decline in civilian complaints against police is the particularly effective manner in which the precinct commanders implemented departmental policies. Other possible explanations . . . cannot account for the substantial decline in complaints, particularly in 1997 and 1998. Although they adopted contrasting styles of management, both commanding officers improved the way the precinct personnel were supervised, and both improved community relations. They ensured that department-wide training was reinforced with training within their precincts. They administered the departmental monitoring programs for recidivist officers [officers who had many complaints against them by civilians] with zeal, attaching real consequences to the receipt of civilian complaints.²⁴

The Vera report discusses the NYPD's citywide attempt, starting in 1994, to pinpoint down to the block level what was going on with crime.²⁵ Precinct commanders were called upon to account for crime and asked to develop detailed strategies in their precincts.²⁶

The report notes that our next speaker, Commissioner William J. Bratton, was a proponent of the "Broken Windows" theory of policing,²⁷ and set out to enforce statutes to curb quality of life offenses such as public drinking, subway farebeating, and vandalism, which had often been overlooked in the past.²⁸ According to the Broken Windows theory, adopting a tough stance against these relatively minor forms of antisocial behavior sends a signal to the community that law-breaking of any kind will not be tolerated.²⁹

23. *Id.*

24. *Id.*

25. *Id.* at 1.

26. *Id.*

27. *Id.*; James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, ATLANTIC MONTHLY, Mar. 1982 (coining the phrase "Broken Windows" and announcing the theory of policing for which it has come to stand).

28. VERA REPORT, *supra* note 22, at 1.

29. *Id.*; Wilson & Kelling, *supra* note 27, at 32.

According to the Vera report, the objective of the Broken Windows strategy—which had been instituted in the previous administration—shifted in 1994 from simply reducing public signs of disorder to concentrating on strategies to improve intelligence gathering and increase arrests.³⁰ The report adds:

[T]here is no question that crime in New York City has plummeted. By 1997, homicides had declined 65 percent from their peak in 1990 [T]otal index crimes also have declined substantially each year starting with 1991 [T]he rate of decrease in crime complaints accelerated in 1994. By 1997, index crimes had fallen to less than half of their 1990 peak.³¹

The report goes on to show that civilian complaints rose at the same time that the new policing strategies were introduced.³² Civilian complaints rose sharply in 1994 and again in 1995, and then declined somewhat from their new plateau in 1997.³³ The report says:

So many forces conspired to drive up civilian complaints between 1993 and 1995 that it is unreasonable to conclude that the more aggressive style of policing adopted in 1994 was the primary cause. However, reasonable people may still wonder whether police misconduct may be the price to be exacted for controlling crime.³⁴

The Vera analysts state that their investigation tested the idea that crime control and police misconduct necessarily move in opposite directions.³⁵ They saw that not all police precincts experienced a significant increase in civilian complaints in 1994, and that some precincts have shown a substantial decline in civilian complaints during the latter part of the 1990s.

These precincts used the same crime-fighting tactics as the rest of the police force and demonstrated the same major decline in crime reports. If these precincts achieved substantial declines in crime without increased civilian complaints, then we have evidence that crime control and police misconduct are not inextricably linked.³⁶

30. VERA REPORT, *supra* note 22, at 1.

31. *Id.* at 2.

32. *Id.* at 4.

33. *Id.*

34. *Id.* at 5.

35. *Id.*

36. *Id.*

The precincts to which the Vera researchers refer are the 42nd and 44th Precincts, two of a handful of precincts in New York City where both crime and civilian complaints declined substantially in 1997 and 1998. Civilian complaints in these two precincts were, respectively, fifty-four percent and sixty-four percent below their 1993 levels, whereas citywide the complaints rose by thirty-nine percent.³⁷ These two precincts include two miles of waterfront and the neighborhoods of Highbridge, Grand Concourse, Mount Eden, Concourse Village, the Bronx Terminal Market, Yankee Stadium; the Bronx House of Detention, Crotona Park, Claremont Village, and Morissania.

The Vera analysts, after interviewing numerous people within these two precincts, found that the following was clear:

The commanding officers in the 42nd and 44th precincts took a strong interest in managing community perceptions of the police. Each had made community relations a priority and was responsive to community needs. Both commanders attend precinct community council meetings regularly and address community concerns and follow up at subsequent meetings.³⁸

A community affairs officer in the 42nd Precinct said that his precinct commander "gets the highest degree of respect from the community because he maintains the same good rapport with community leaders that he has established with his officers" and "tells the truth about what he can and cannot accomplish."³⁹

The Vera analysts said that although the style of the two precinct commanders differed, both made clear to the officers under their command that they considered attention to civilian complaints a high priority.⁴⁰ Both made clear to their supervising officers and those who supervised them that civilian complaints should be reduced to a low level. Both initiated their own training programs to ensure that these points were driven home. Both spoke at training sessions regularly, emphasizing this.⁴¹ Both created pairs of officers in which a younger officer with an attitude problem worked with a more experienced officer who did not have an attitude problem. One commander stressed to officers on special assignments,

37. *Id.* at 5-6.

38. *Id.* at 15.

39. *Id.*

40. *Id.* at 18.

41. *Id.*

such as community policing or narcotics, that they would be “out” if complaints of abuse were lodged against them.⁴²

The commanding officers also had common styles of dealing with officers on the recidivist list for civilian complaints. Both COs talked to officers on the list personally when they received complaints, rather than leaving these matters to their ICO [Integrity Control Officer].⁴³

Both commanding officers acted decisively when recidivist officers repeated their misbehavior. For example, one was reassigned to be the driver for his Sergeant. Several others were reassigned from patrol to desk duty. Some officers in one of these two precincts were passed over for promotions and new assignments because they had received multiple civilian complaints.

The Vera researchers found that:

Data . . . indicate that the attention to recidivists yielded results in the 42nd and 44th precincts. The number of civilian complaints received by officers who had never had any before declined in 1997 and 1998. But the number of complaints received by recidivist officers declined even faster during the same two years. . . . [In these two precincts] the message resonated clearly to officers on the beat that getting civilian complaints would reduce opportunities for advancement.⁴⁴

The Vera analysts, noting that their conclusions could only be “educated guesses,” concluded that:

The reduction in complaints against the police while the crime rate was dropping was the result of the actions by the two precinct commanders, taken within a context that supported a reduction in complaints.⁴⁵

Whereas citywide, there was only an 11% reduction in civilian complaints from 1996 to 1997, and no reduction from 1997 to 1998, the difference in these precincts, the 42nd and 44th, was that the management styles of the precinct commanders was such—and their interest in promoting respectful policing was such—that there was an improvement in the way that precinct personnel and community relations were managed. They ensured that the citywide policies of training were reinforced by ongoing training within their precincts. They administered the departmental monitoring pro-

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 20.

grams for recidivist officers with zeal, attaching real consequences to receiving civilian complaints. In both precincts, officers got the message that abusive behavior could be hazardous to their careers. In effect, these commanding officers took a departmental policy and used it to further their vision of how police ought to interact with the public. They not only managed their officers well, but they also dealt well with community relations, demonstrating that police were responsive to community concerns.⁴⁶

Now, to give you a broader context—not only regarding New York City as a whole, but also Boston and elsewhere, we are honored to have as our next speaker, Commissioner William J. Bratton. Commissioner Bratton is a consultant, public speaker, columnist, and commentator on issues of public safety, security, and criminal justice throughout the United States and abroad. He is now in the private sector after decades of leading and re-engineering five major police agencies, including service as the police commissioner in New York City and Boston. These experiences are described in his acclaimed autobiography, *The Turnaround: How America's Top Cop Reversed the Crime Epidemic*, published by Random House.⁴⁷ He is widely recognized for advocating problem-oriented community policing. He is a research fellow at Harvard University's John F. Kennedy School of Government. He is also on the Board of the Washington, D.C.-based advocacy group, "Fight Crime, Invest in Kids."

COMMISSIONER BRATTON: Thank you. It is a pleasure to be here with you this evening. Thank you all for coming out to talk about this very, very critical and important issue. I am going to have to apologize. I'll be leaving before the program concludes, due to a prior commitment.

In a democratic society, the principal role of the police is to control behavior. That's why police exist. It has been entrusted to the police to control behavior that is regulated by our constitutions, ordinances, and laws. The challenge has been, is, and should be, for the police to do it constitutionally, consistently, and compassionately.

The discussion this evening focuses on the question, "Can the police do both?" where doing both involves (1) controlling behavior to such an extent that we can prevent and reduce crime, and at the same time, (2) winning the respect and trust of the citizens

46. *Id.*

47. WILLIAM BRATTON & PETER KNOBLER, *THE TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC* (1998).

with whom we work. I believe that civil liberties and civil police are not incompatible goals. In fact, one is essential to the other.

You've heard discussion earlier, and I am sure you'll hear more tonight from other panelists, about activities in San Diego and Boston.⁴⁸ I am very, very intimately aware of the activities in the City of Boston, having served as the superintendent, chief and police commissioner in that department; I started my career there in 1970.

The Boston Police Department of the early 1970s was one of the most brutal, racist, and corrupt in the United States—so much so that I almost left that department in 1973 because of the things taking place. But a reformer, Robert DiGrazia, was brought in, in 1972, as the new commissioner and began to change things in that department.

I left that department in the mid 1980s and ran several other Boston-area police departments, and came here to New York in 1990 to serve as chief of the Transit Police Department. The Broken Windows concept that was mentioned earlier was a key part of how we won back the subways of the City of New York. Those of you who use those subways remember what they looked like in 1990, versus the way they are today.

In 1991, I was asked to come back to the City of Boston, whose police department, I am proud to see, read, and hear, is now being celebrated as one of the best in the United States in the area of race relations. As a former member of that department, it's mind boggling to hear that department described as such.

In 1991, when I returned to Boston, I had to deal with the aftermath of the Stuart case, in which a young white man shot and killed his pregnant wife and then claimed that a black man in the Mission Hill Projects had kidnapped them, and murdered his wife.⁴⁹ The then mayor, Ray Flynn, and his police commissioner Mickey Roache had, according to the residents of the Mission Hill development, unleashed the Boston Police on that development, to conduct stop and frisks and illegal searches in a widespread, abusive, and racially insensitive manner.

As a result, the St. Clair Commission was formed to investigate not only the Stuart incident but also the general practices of the Boston Police Department. James St. Clair, one of the attorneys

48. Martinez, *supra* note 9; *San Diego Community Policing*, *supra* note 15.

49. See generally Peter J. Howe & Jerry Thomas, *Reading Woman Dies After Shooting In Car: Husband, Baby Termed Critical*. BOSTON GLOBE, Oct. 25, 1989, at Metro 1; See also Robert L. Kierstead, *A Story Weaved By a World-Class Con Man*, BOSTON GLOBE, Jan. 15, 1990, at OP-ED 19.

who represented President Nixon in the 1970s, headed the commission. When I became the Boston Police commissioner, the Boston Police Department was planning its response to the St. Clair Commission's report.⁵⁰

The Commission's primary recommendation was the removal of the police commissioner.⁵¹ Even after significant changes, by a racially sensitive Commissioner, Mickey Roache, the Boston Police Department was thought to have been very racist in its activities.

The moderator mentioned that David Kennedy from Harvard's Kennedy School came to the Boston Police Department with a proposal to look at the relationship between guns, drugs, and youth violence. I was the police commissioner to whom he made that presentation and who authorized Kennedy's study. I was superintendent and police commissioner during the period from 1991 to 1993 before coming back here to New York as police commissioner in 1994. So, I am very intimately familiar with what's going on in Boston.

I am also very intimately familiar with the work of, and very friendly with, Jerry Sanders, the former chief of police in San Diego, California. He recently retired and is now heading up the United Way in that city.

I've learned, in twenty-five years of policing in Boston and New York City, and now in consulting literally around the world, particularly in emerging democracies in South America, Eastern Europe and South Africa, that there are no two police departments, no two cities, no two countries that are alike. So while you can compare San Diego, Boston, and New York all you want, to learn of good things and bad things and to shape your initiatives, every city is different. Every city's problems are different. Every city's police force is different. And every city's population is different.

The one common denominator that you will find in any successful venture or in any unsuccessful venture, and in the continuing criticism of what's going on in New York, is leadership. Leadership makes all the difference.

While I don't think the Vera Institute prepared a very good report, in that it was too anecdotal and not substantive in much of its analysis, its *findings* were correct, in that it focused on leadership and the difference that leadership can make.⁵² Many of the con-

50. BRATTON & KNOBLER, *supra* note 47, at 183; ST. CLAIR COMM'N, REPORT OF THE BOSTON POLICE DEPARTMENT MANAGEMENT REVIEW COMMITTEE (1992).

51. BRATTON & KNOBLER, *supra* note 47, at 181.

52. See generally VERA REPORT, *supra* note 22.

cerns in this city right now are focused on the leadership of the mayor and the police commissioner, my successor. The mayor and police commissioner are continuing and expanding on policies that I, as police commissioner, authorized by the same mayor, developed with my team in 1994 to deal with the City of New York *as it existed* in 1994.

The New York City of 1994 was very different than the New York City of 1999 and 2000. The city has changed, much as its subway system in 1990—with 250,000 fare evaders every day was very different from its subway system today—with about 20,000 fare evaders a day.

Great changes occurred. But there has not been leadership that understood that the city had changed and that the tactics and the strategies which were necessary in 1990 in the New York City subways, were necessary in Boston in the mid 1990s, and were certainly necessary in New York City in 1994, 1995, and 1996, were not changed thereafter. The tragedy we are discussing is that the strategies designed for the city when it was much different than it is now did not change. And the more forceful and assertive aspects of that strategy—the stop and frisk tactics, specifically—were increased, rather than adjusting for the changed city. Stop and frisk tactics are an essential tool of police in a democratic society as long as they are done constitutionally, compassionately, and consistently. But we must ensure that they are not used in a manner that seemingly allows the thresholds of the Constitution to be lowered, or gives that appearance.

The idea that to get crime down you have to increase arrests is clearly wrong. But unfortunately this mayor and this police commissioner deeply believe in that philosophy. It is not a philosophy in which I have ever believed.

There is a point in time when you need more arrests. There is a point in time when you need more assertive policing. There is a point in time when you need to be much more intrusive in the lives of citizens. This point in time varies from city to city and from state to state. New York's government has not taken into account the fact that if you are going to advertise that New York is the safest large city in America, if not the world, then you have to police it as if it is the safest large city in the world and not one of the most dangerous, as it had been in 1990 and again in 1994.⁵³

53. *Id.*

So, it is not rocket science to find solutions. You have a Constitution. You have laws. What you have to look to is leadership that appreciates that policing needs to adjust to changing circumstances and that in the 1990s, America benefitted from the concept of community policing, which is the fundamental reason, along with leadership in San Diego, Boston, and New York, why crime went down.

Partnership, problem solving, prevention are the keys. There must be partnership between the community and the police. That is what the Vera study found in the two precincts it looked at,⁵⁴ and what you can find in most precincts in New York City: precinct commanders who go out there and work very hard, but who are also pressured from their leadership to keep up the arrests, to keep up the stop and frisks.

That type of pressure in the city that New York is today is no longer appropriate. It is no longer appropriate for the much safer city that we live in.

What we need to focus on is the idea of leadership, tactics, and strategies that have to continually change—but, while changing, must at all times stay constitutional, compassionate, and consistent.

MR. TABAK: Thank you Commissioner Bratton. On May 9, 2000, *The New York Times* carried a story entitled, *Los Angeles to Work With U.S. on Police*.⁵⁵ It reported that Bill Lann Lee, the Acting Assistant Attorney General for Civil Rights, briefed local officials in Los Angeles on the results of the Justice Department's four-year investigation into allegations of abusive behavior and racial discrimination by Los Angeles officers.⁵⁶ Mr. Lee stated that the inquiry had found enough evidence of civil rights violations to file a so-called "pattern and practice" discrimination suit, alleging systemic failings, but that the Justice Department was prepared to defer filing such a lawsuit in order to allow the City of Los Angeles the opportunity to work toward a voluntary settlement.⁵⁷ *The Times* stated that Mr. Lee came to Los Angeles with a letter outlining the Justice Department's findings, which were similar to what the Justice Department has found elsewhere in the country where it has sued and entered into consent judgments.⁵⁸ *The Times* noted that Los Angeles would be the biggest city to come under

54. See generally VERA REPORT, *supra* note 22.

55. Todd S. Purdum, *Los Angeles to Work With U.S. on Police*, N.Y. TIMES, May 9, 2000, at A16.

56. *Id.*

57. *Id.*

58. *Id.*

such direct federal scrutiny, but added that “the United State Attorney’s Office in Brooklyn has amassed what officials call evidence of system-wide problems in the New York Police Department’s handling of brutality complaints and is pressing New York for changes with a threat of a similar suit.”⁵⁹

Our next speaker is the United States Attorney for the Eastern District of New York, Loretta E. Lynch. In that capacity, she oversees an office of more than 150 attorneys who represent the federal government in matters both civil and criminal. From March 1998 until being named the United States attorney, Ms. Lynch served as the chief assistant United States attorney for the district. She previously served as chief of the Long Island Office of that district from 1994-98. Before that, she served as deputy chief of general crimes and chief of intake and arraignments for the Eastern District. A graduate of Harvard Law School, Ms. Lynch initially practiced at the law firm of Cahill, Gordon and Reindel. She has been in the U.S. Attorney’s Office since 1990. She was the lead prosecutor in a series of trials involving allegations of public corruption in Brookhaven, Long Island. While chief assistant, she was a member of the trial team in *United States v. Volpe et al.*, a five week civil rights case involving allegations of police brutality, excessive force, and false statements.⁶⁰ Ms. Lynch has been a frequent instructor for the Department of Justice at its Criminal Trial Advocacy Program. It’s my pleasure to welcome her here tonight.

U.S. ATTORNEY LYNCH: Good evening. I was asked to touch upon the federal government’s role in dealing with the issue of law enforcement as it relates to community relations—the kinds of cases that we do and the powers and the abilities that we have—and then to touch upon the final question of the evening: whether or not effective law enforcement is inconsistent with good police-community relations. And then I was told I had five minutes. So I’ll do a very short tour around those. I think that the questions and answers will probably help us to elucidate and focus on this a little bit better.

As has been mentioned before, the federal government’s role in the area of police misconduct, and particularly police-community relations, has grown tremendously over the last several years, primarily because of the current focus of the Department of Justice. Again, this is a function of leadership, and is very important to the

59. *Id.*

60. *United States v. Volpe*, 78 F. Supp. 2d 76 (E.D.N.Y. 1999), *aff’d in part, dismissed in part*, 224 F.3d 72 (2d Cir. 2000).

current Administration. Also, the federal government's role has expanded because of the climate and certain flash point issues that have arisen.

The federal government can look at a matter from two vantage points: criminal or civil. When we look at a matter criminally, we obviously look at it on a case-by-case basis. Some of the cases that you've heard about tonight fall into that category. The *Volpe* case,⁶¹ also known as the Louima case, is one of the better-known examples from my district. The last trial in that series of cases began today, involving an officer charged with obstructing the investigation by lying during his questioning by federal investigators. That is a larger issue than the actual assault, but a very, very important one nonetheless.

Dealing with these issues criminally is important. Certainly, it's been very gratifying to me, and hopefully very effective for the victims of actual incidents of police misconduct. But there are certain limitations with that. Dealing on a case-by-case basis, you may have issues of proof. Quite frankly, one of the main problems that you often have in police misconduct cases is the reluctance of witnesses—both victims and law enforcement—to come forward. But the real problem, from my perspective and the Justice Department's perspective, is that you are coming into an event after it has already occurred—whereas the real goal here is to effect some sort of systemic change that will prevent such incidents from occurring in the first place.

That is where the Department of Justice works within the civil context. New statutes have been passed that help in this regard. One of the more effective ones, which has been used in the Los Angeles case that's been referred to, as well as in New York, is commonly known as "Section 14141."⁶² It is colloquially referred to as the "pattern or practice" statute. Essentially what it does is to give the federal government the power to review a police department's activities and determine if there is a pattern or practice of behavior that leads to constitutional deprivations. It can be in the area of racial profiling; it can be in the area of excessive force, as is the focus of the investigation that my office is conducting; indeed, it can touch upon a myriad of things.

This is important because this new law that is about six years old has real force and real power for change. We believe that if the Department of Justice can in fact show that such a pattern or prac-

61. *Id.*

62. 42 U.S.C. § 14141 (2000).

tice of Constitutional deprivations exists, court-ordered remedies can be achieved and real change can be effected in police departments.

What's actually happening in this area, in addition to the Los Angeles situation and the ongoing matter in New York? The Department has successfully settled a number of these matters. The police departments in Pittsburgh, Pennsylvania and Steubenville, Ohio, as well as the New Jersey State Police, have all worked with the Department to settle investigations and, in fact, to review their practices. The New Jersey State Police situation involved racial profiling that was very prominently in the news a while ago.⁶³ In Steubenville and Pittsburgh, there were problems of racial profiling and excessive force. Negotiations have effected systemic change within those police departments.

Again, the real problem that all lawyers have is that we get to the scene after the event has occurred and the person has been harmed. Even if we have a successful pattern or practice lawsuit, that means that we have found years of abuses and years of problems.

The goal is to set in place a format for change so that the police departments can operate effectively, protect individuals, and carry out their law enforcement mandate without violating constitutional rights. It's our view that it can be done because it is being done.

You've heard some examples of Boston and San Diego, as well as the two precincts in New York discussed in the Vera Institute report. So you might say, "Well, why isn't that enough? Why do you need the federal government to come in if there are police commanders out there who will maintain and uphold the police department's existing practices, and discipline officers who abuse citizens and gather too many complaints?"

The real problem, as has been touched on by a number of speakers, and I think we'll hear more about later, is that the type of effective management that does reduce crime as well as reduce civilian complaints, should not and cannot be simply a matter of the personality of the individual commander; it must be a function, and a practice, and a procedure of an entire police department. It is wonderful when a commander takes the initiative and sets forth on his own programs like we've heard about. But for there to be departmental change, that must, as Commissioner Bratton said, come from the top down.

63. Iver Peterson, *Whitman Says Troopers Used Racial Profiling*, N.Y. TIMES, April 21, 1999, at A1.

What we've seen in situations where police departments have entered into settlements and have changed their procedures is that they are, in effect, becoming successful at the very goals of law enforcement. They are still reducing crime, and they are reducing citizen complaints and improving their relationship with the community.

What it requires is that the department as a whole adopt this as a goal. It simply cannot be left to the individual commander, because then you will only have pockets of this kind of superb performance that should be, and in our view, can be carried out throughout the entire city.

As I mentioned, the federal government's role has increased in this. Quite frankly, our goal is to try and get ahead of the curve. It is to our advantage to enter into more of a partnership model with the police, so that problems of excessive force—the individual incidents as well as patterns of abuse that affect the entire city—don't occur.

Really, it's an issue of professionalism. It's an issue, as those police commanders that you heard about in the Bronx recognize, of pride in the people who work for you, pride in the people that you protect, and a desire to do your job without violating the Constitution, which can be done. When it's placed in that context, we find departments very responsive and very willing to change.

In answering the question that was put forth tonight, "Is effective law enforcement inconsistent with good police-community relations?" I say no, for two main reasons. First, one of the most effective tools of law enforcement, in this or any city, is the voluntary compliance of citizens with the law. For people to continue to do that, they have to have a level of trust and respect in the law, and feel that it works for them. Second, the community wants a positive relationship with the police. That's one of the reasons that you all are here tonight. That's one of the reasons that when the police department holds borough-wide meetings to talk about the issues, people are turning out. Sometimes, these meetings are loud and people vent. But the police need to hear what people are actually thinking and saying about them.

The reality is that when people, as they have in this city, say that they are afraid of the police, that is on its surface a terrible thing. What they really are expressing is an even deeper fear: that if they ever need help, if a criminal element in our society ever comes into contact with them, they will have no one to call, nobody to protect them. That is the worst feeling in the world. That's why it's a fed-

eral issue, spanning the city and this country. The Justice Department thinks it's uniquely positioned to work with this issue, in conjunction with other offices. You'll hear from the State Attorney General's Office about the excellent work it's doing in this area. From our view, this effort can't succeed without community involvement.

MR. TABAK: Thank you very much. Our next speaker will, indeed, tell you about what the state government can do. He's right at the center of the activity.

Andrew G. Celli Jr., is Chief of the Civil Rights Bureau in the Office of the New York State Attorney General. The Civil Rights Bureau conducts affirmative litigation, investigations, and policy initiatives in various areas including reproductive rights, disability rights, police misconduct, discrimination in employment, mortgage lending, housing, public accommodations, and other sectors. The Bureau does impact litigation. It drafts and proposes civil rights-related legislation. It releases reports such as *New York City Police Department's Stop-and-Frisk Practices: A Report to the People of the State of New York*, issued on December 1, 1999.⁶⁴ It also assists the New York Solicitor General in preparing and submitting amicus briefs in civil rights cases.

Before joining the Attorney General's Office, Mr. Celli was a partner in the firm of Emery, Celli, Brinckerhoff & Abady PC, a firm that handles plaintiffs' civil rights, police misconduct, First Amendment, and related matters. Prior to that, he was at Cravath, Swaine & Moore, and was a law clerk to Judge Sifton in the Eastern District.

I would note that since the esteemed President of The Association of the Bar of the City of New York, Evan Davis, is here, we hope Mr. Celli will not only tell us what the Attorney General's Office found in the study, but also what he views the jurisdiction of the Attorney General's Office to be in the area of civil rights relative to police conduct.

MR. CELLI: The first thing I want to do is thank the Civil Rights Committee for conducting this program; that's partially thanking myself, because I was on the subcommittee that put this panel together. The second thing I'll do is criticize myself. I think the question that we pose tonight, "Is effective law enforcement inconsistent with good police-community relations?" is the wrong question. Everyone knows that the answer to that is "no," or at

64. A.G. REPORT, *supra* note 4.

least we certainly hope so. The better question is, "How do we ensure that effective law enforcement and police-community relations go hand and hand?" The New York City Police Department, which is the subject of our eight-month investigation in the report to which Ron referred,⁶⁵ is an entity that we need and that will be around as long as there is a City of New York. We must coexist with it as civil rights lawyers and civil liberties advocates, and it must coexist with us. So I'm going to direct my remarks a little bit at the "how" as opposed to the "whether."

First, some introductory points about the Attorney General's Office. This is the first attorney general's administration that has taken on the issue of police misconduct. We brought to the issue three different perspectives (as does Ms. Lynch's Eastern District U.S. Attorney's Office). We are the chief civil rights enforcer for the State of New York; we are a prosecutorial and law enforcement agency with police officers who work in our office; and we are also a public interest law firm that is charged with defending police agencies, particularly the State Police and other state police agencies, such as the Park Police, when they are sued for misconduct, whether on a individual level or a systemic level. So, the Attorney General's Office, like the Department of Justice, can bring these different perspectives to bear on issues of police misconduct.

We tried to do that in our eight-month investigation into stop-and-frisk practices in New York City. We took a holistic approach to studying this very narrow subject, because we correctly hypothesized that the tactic of stop and frisk was affecting large numbers of people.

We looked at all seventy-six precincts within the department and all units within the department. We did a major outreach effort in which, for example, we wrote and spoke to most of the organizations that put in *The New York Times* ad to which Professor Chevigny referred. We solicited stories from the public. Very crucially, we attended to the philosophy that underlies policing in New York, and to the strategies and tactics that the New York City Police Department publishes in writing.

Basically, what we found is that during the period of January 1, 1998 to March 31, 1999, the New York City Police Department pretty much did what it said it was going to do. It carried out certain philosophies—community policing is a term you've heard, and

65. *Id.*

the Broken Windows theory is another term that is out there and part of it—and it carried out very specific crime-fighting strategies.

A word about the philosophy. Basically, it boils down to a few core principles: proactive policing; putting officers in close contact with the community; and policing at the lower levels of misconduct on the street, based on the hypothesis that I think has proven true over time, that folks who commit major crimes also commit minor crimes, and that if you enforce with discretion and to an appropriate degree at the minor levels, you will often find people who are major criminals. This is not to say that the Broken Windows theory or the New York City Police Department's version of that in certain years is the same as zero tolerance. That is very important to understand.

This was the philosophy that drove the New York City Police Department during the period we studied. The strategies and tactics were in writing. The two chief policy documents we looked were *Reclaiming the Streets of New York*,⁶⁶ which was aimed at ending disorder on the streets—the low level kinds of graffiti and quality of life violations about which we hear a lot; and *Getting Guns Off the Streets of New York*.⁶⁷ The department could not have been more clear about what its goals were.

So, with this background, we looked at 175,000 UF-250 forms, stop and frisk forms, filled out by members of the New York City Police Department, which basically documented 175,000 street encounters. These forms tell you who got stopped, when he/she got stopped, the person's race, the reason for the stop, what happened, what the suspected charge was, and whether there was an arrest. It's a short form with a great deal of information. Partially due to cooperation under pressure, the New York City Police Department, gave us that information on a disk. We turned it over to, and worked very closely with, the Columbia Center for Violence Research and Prevention, and we began to analyze the data.

During the period we studied, the New York City Police Department had 40,000 uniformed officers.⁶⁸ This department is larger than all but five standing armies in the world. In the fifteen-month period that our data set covered, 20,280 different officers engaged in the stop and frisk tactic and reported it on this form.⁶⁹ Thus, approximately half of the department was involved in this activity

66. *Id.* at 53 n.29.

67. *Id.* at 53 n.29.

68. *Id.* at 68 n.70.

69. *Id.* at 66 n.63.

during that period. On average, during that period, 375 people were stopped and detained by the New York City Police Department per day, of whom 197 were African American, 128 were Latino, and about fifty-plus were white and a variety of other nationalities that did not amount to a sufficient number to be statically measurable or significant.⁷⁰

Were the officers getting it right when they were attempting to determine whether somebody was engaged in criminal activity? One way to measure that is whether an arrest resulted. Internally, we called this the “efficiency rate.” In general, one-in-nine stops during this period led to an arrest. For the Street Crime Unit—a citywide unit focusing on weapons and serious crimes—one-in-9.6 stops of whites led to an arrest, while one-in-16.3 stops of African Americans led to an arrest. This is not interpretation, this is just math and running the data.⁷¹

With regard to getting guns, only one-in-forty weapons-related stops led to an arrest.⁷² Thus, thirty-nine weapons-related stops out of forty did not lead to an arrest.

Our study tested the Department’s publicly stated hypothesis that the reason why African Americans and Latinos were over represented relative to the population in the group of people stopped and frisked was that African-Americans and Latinos were over-represented in the population of people arrested for crimes and in the population of people who lived in so-called high-crime neighborhoods. We tested that through a variety of social science techniques, including multivariate regression analysis, using these 175,000 forms.

We determined that, African Americans are twice as likely as whites to be stopped for violent crimes and weapons crimes, even after you control statistically for their representation in the population in “high crime precincts” and for their representation in the population of persons arrested—which is one indicator of the so-called crime rate. These are the kinds of data and this is the kind of attention to policy, strategy, and tactics that are necessary to begin to answer what I think is the right question: “How do we go about having effective policing and good community relations?” Information, participation, pressure from government, from the private sector, from the private bar, and leadership at the top, are essential.

70. *Id.* at 95 n.10.

71. *Id.* at 117.

72. *Id.* at 117 n.23.

Commissioner Bratton is to be congratulated for changing the culture of the New York City Police Department in so many ways. But not only is leadership at the top essential; so is commitment in the ranks. That's a harder thing to achieve, but it begins with leadership at the top.

MR. TABAK: Thank you. Don't think I haven't noticed that you didn't discuss the jurisdiction of the Attorney General's Office, but we'll get back to that later.

In opening up the new issue of the *National Law Journal* today, I saw that our next speaker, Johnnie L. Cochran Jr., is listed as one of the 100 most influential lawyers in the country. The *National Law Journal* notes that Mr. Cochran has long been a leading trial attorney, winning substantial verdicts and settlements arising out of police misconduct. He keeps breaking his own records for the biggest settlements and the biggest verdicts ever gotten. He has become the attorney of choice for litigants suing with regard to racial profiling, police brutality, and other law enforcement issues. His current cases include a wrongful death action in Providence, Rhode Island over the shooting death of a black off-duty police officer,⁷³ and representing Abner Louima in a lawsuit against this city over Mr. Louima's treatment by police.⁷⁴ Mr. Cochran is also a leading entertainment lawyer and has long been involved in civic affairs. On a pro bono basis, he secured reversal and release for Black Panther Geronimo Pratt, for whom he helped arrange a \$4.5 million settlement.⁷⁵ So, I am pleased to introduce Johnnie Cochran, for his perspectives derived from his extensive experience in this area of the law.

MR. COCHRAN: Thank you, Ron. It's a pleasure for me to be with you this evening to discuss this very, very important topic. I have been asked to speak from the standpoint of my experience regarding what private counsel can do in this area.

After the Civil War, certain civil rights statutes were enacted that gave private counsel the right to be like private attorneys general. So, here we are, logically speaking. We have heard from the U.S. Attorney, we have heard from the State Attorney General, and now you'll hear from private counsel.

73. Jonathan D. Rockoff, *Providence Police: A Department Under Siege*, PROVIDENCE J. BULL., Apr. 27, 2000 at A1.

74. David Rhode, *Cochran T.V. Ad Sells His Firm's Legal Stardom*, N.Y. TIMES, Jan. 28, 2000, at B3 (mentioning Cochran's representation of Louima).

75. George Meyer, *Era's Last Political Prisoner Becomes Positive Force After Release*, TAMPA TRIB., Oct. 8, 2000, at 4.

Private counsel has that right. It was very, very important in those days for lawyers to bring these actions when, very often, attorneys general were reluctant to enforce the rights of newly freed men and women. Those of us who've studied that and understand and appreciate that understand the importance of doing that even today. Here we are in America, at a great time in a new millennium. But too often our nation's greatness is diminished by too many facts and figures on racism and injustice.

For example, we all cherish the right to travel freely within our borders. But how universal is that right when a recent study of police stops on Maryland interstates shows that African Americans accounted for 80% of all police stops and searches although they were really about 20% of the drivers?⁷⁶ Or consider New Jersey, where African Americans are five-to-six times more likely to have been stopped in that state by officers on that turnpike, and that state's reluctance to ever admit that this situation ever existed.⁷⁷

I'm fairly new to New York, having come from Los Angeles where we have similar problems. But I know about that kind of reluctance. So when I arrived on the scene here, I decided to try to use these civil rights laws from a private standpoint, to see how I could cooperate and see about effecting some change.

It has been a real pleasure to work with Loretta Lynch and her predecessor Zachary Carter, and with Eliot Spitzer and Andrew Celli, in trying to effect these things. As a private counsel, you need to work closely with the U.S. Attorney's Office and the State Attorney General's Office, which both have the staff and a commitment to bringing about change.

The best example I can give you is that of Abner Louima. From the standpoint of cooperating with that office and making our client available, and trusting, and moving forward, we've seen some remarkable changes in this area. I think it becomes very important for us to do that.

The same thing is so with regard to the "New Jersey Four."⁷⁸ I represent these four young men who were on their way to try-out for basketball scholarships at North Carolina Central College.

76. *Data Collection: The First Step in Racial Profiling: Hearing on the Constitution, Federalism and Property Rights Before the Senate Judiciary Comm.*, 107th Cong. (2000) (testimony of David A. Harris, Balk Professor of Law and Values, Univ. of Toledo College of Law, and Soros Senior Justice Fellow, Center on Crime, Communities and Culture).

77. *Id.*

78. David Glovin, *Injured Men Seek Speedy Trial*, BERGEN REC., Sept. 9, 1999, at A1 (detailing the story of the "New Jersey Four").

While riding down the interstate in New Jersey, they ended up being shot ten, eleven times by New Jersey State Troopers, who fired willy-nilly into the vehicle, but later pretended that they had been the ones being fired upon.⁷⁹ These kids were stopped because there was a black driver, along with an Hispanic young man in the right front seat.

We worked very closely again with the U.S. Attorney's Office and Chuck Gerout in New Jersey. This resulted in indictments of the police and also, for the first time, ghosting charges,⁸⁰ after we went back to try to find out why these police officers would do this. We looked at the couple of hours before these kids were stopped that particular night. The police were stopping cars with black citizens, and would write on their reports the license number of a car of white people who happened to be going by. After checking, it was learned that the white people weren't even stopped. So, the police were indicted not only for the ghosting but for attempted murder. Our cooperating with the U.S. Attorney's Office brought to light these kind of things.

We also can bring a civil lawsuit to try to bring about the requisite changes.

When we look at the progress we've made in society, how can we say we've legitimately evolved when in the last couple of years our nation's largest city has been rocked by the brutalization of Abner Louima and by the killing of Amadou Diallo—both of whose "crimes" were having a dark skin shade?⁸¹ In California, I represent Tyeisha Miller, gunned down by police officers, shot twenty-seven times in Riverside, California, while sitting in a car.⁸² These offenses are reminiscent of mob lynchings some fifty years ago, except they're being carried out by law enforcement officers.

So, clearly tonight's question is a burning one for all of us. What can we do about it from the standpoint of private attorneys?

When I first started trying these kinds of cases, there was a great reluctance on the part of lawyers to get involved. They never thought you could beat City Hall. They thought it was impossible

79. *Id.*

80. "Ghosting charges" is used to describe the process of police officers using the license plate number of white motorists who were not stopped on reports of black motorists who were stopped for no violation. David Kocieniewski, *Trenton Charges 2 Troopers with Falsifying Drivers' Race*, N.Y. TIMES, Aug. 3, 2000, at B1.

81. Joyce Purnick, *Metro Matters: 2 More Voices in Dissonance Over Police*, N.Y. TIMES, Aug. 3, 2000, at B1.

82. Scott Gold, *Tentative Award OK'd In Slaying of Tyisha Miller*, L.A. TIMES, July 27, 2000, at A1.

to do this. Nobody wanted to do it. But if you really cared about your community, if you really wanted to bring about change, you knew that someone had to do it. You had stand up and try to do it. We've been trying to encourage lawyers all around this country to stand up and do that, because it's the right thing to do.

Our citizens deserve the same kind of law enforcement throughout all these communities, and it has to be equal, it has to be fair. No one is anti-police, but we want the police to be fair in their treatment of the citizens.

So many times in Los Angeles, I get the right results for the wrong reasons. If I saw the choke hold being used and sued the police department to stop the choke hold and got a big verdict, they would stop it because they didn't want to pay the amount of money—not because it was wrong and they were killing people. But the result was still the same. Similarly, I demonstrated in a civil rights lawsuit that Los Angeles officers were not properly trained to use the hog-tying maneuver, and we stopped that and saved lives—again, for the wrong reason.

It's a question of educating the public to bring about these kind of changes. Ron asked me to give you some examples of the kind of things that can really happen. This morning I was looking at *The New York Times*. One of the large cities chosen for an annual honor for exhibiting innovative ways to solve problems like crime and racism was Montgomery County, Maryland. I kind of smiled at myself when I saw that, because last year I had a case in Montgomery County, Maryland involving a police officer who shot a disabled black man.⁸³ The officer tried to pull the man out of the car with his left hand, while holding his gun in the right hand. The officer shot the man in the back. There was no indictment. We went into that community and brought a civil rights action. After we litigated that case, the authorities did step forward, and we resolved the case for the largest sum in the history of Maryland.⁸⁴

But that wasn't enough. I drew up my own consent decree, stating, "What happened here is wrong, and if you really want to change this, let's do something else." So the clients got a certain amount of money, but I got the clients to agree to have the government put up another \$1,000,000 in Montgomery County, which was used for a pilot program for cameras in cars, to hire more minori-

83. *Slain Black's Family Wins Settlement*, WASH. TIMES, Aug. 7, 1999, at A9.

84. Michael James, *Settlement Reached in Fatal Police Shooting; Montgomery Co. Officials to Pay \$2 Million to Family of Man Killed in Traffic Stop*, BALT. SUN, Aug. 10, 1999, at 5B.

ties, and to have sensitivity training. They hired a black police chief from Portland and bought him in there.

This consent decree became something very unique—so much so that Bill Lann Lee of the Justice Department asked to see my consent decree that we used in that case. Now, it turns out that that community now is now one of the all-American cities, maybe because they stood up and did the right thing. This case is an example of the fact that you can fight City Hall: the case of Junius Roberts.

Another case in which we were recently involved was in Bluefield, West Virginia, a very small community. The title of a June 1, 2000 news story on this is something like “Bluefield to Pay Paralyzed Man One Million Dollars.”⁸⁵ This little town is so small that all the insurance it had was a million dollars; anything more would have broken the entire town.

In this case, a young kid was paralyzed after an encounter with a police officer in which his neck was broken. Our settlement wasn’t just about the money and trying to get the youngster some care for the rest of his life. We negotiated not only the monetary settlement, but once again also a consent decree crafted by both sides as part of the settlement.⁸⁶ In this consent decree, we got the city to agree for the first time to a civilian review panel to look into allegations of police misconduct and to find ways to attract more minorities to the police force. Per capita, Bluefield, West Virginia, has the largest minority community of any city in West Virginia, though it has only one African American in its thirty-three member police force.

So, the client will get a million dollars, and we got a consent decree, a civilian review board, and a public apology.⁸⁷ I’ve never secured a public apology before, in any city, anywhere.

This points out what you can do, and what we must do, if we are going to change these police departments. It is, in fact, a new day, and it does require some daring. It’s not just about money. It requires you to go and do these things.

Finally, perhaps the greatest example I can give you is the example of Geronimo Pratt. For twenty-seven plus years, we fought to get this man free who, we said, was wrongfully convicted by not only the LAPD but also the FBI. It’s a very difficult thing to fight

85. *E.g.*, Malia Rulon, *Robert Ellison Meets Famed Civil Rights Attorney Who Represents Him*, ASSOCIATED PRESS NEWSWIREs, June 16, 2000.

86. *Id.*

87. *Id.*

the FBI. Ultimately, we got a hearing and got him out.⁸⁸ The most difficult thing in my career was to get the FBI to admit that it basically framed an innocent man for all these years through a program called Cointelpro.⁸⁹ But within the last two or three months, we were able to do that also. Geronimo Pratt is now a free man, a free wealthy man, but none of us would take \$4.5 million in return for giving up twenty-seven years of our life.

The point we try to make in these cases is that we need the police, and the police need us. We can work together to make this a better society so that people will all be judged equally. So when we go in and deal with these problems, it is incumbent upon us to get police forces to become diverse.

Clearly, Bill Bratton is right. We need leadership, because these are paramilitary organizations. They will lead from the top. The officers will do what they are told, and it's set by the tone of the person at the top. People who go into law enforcement, by and large, want to do the right thing, but they need leadership.

They also need, however, effective controls within the department. You can't have a system where everybody looks the other way when a police officer does something. Yet that's what we found happening in Los Angeles, and that's why there's going to be a consent decree out there. For years, the police there have done exactly what they wanted to do because, make no mistake about it, the single most powerful figure in the justice system is not Chief Justice Rehnquist or any Supreme Court justice or any court; it's the police officer on the beat. He's the one who can take your life or your freedom. And very little will be done about it unless we change things. Thank you.

MR. TABAK: Thank you very much Mr. Cochran. The last panelist is Michael Meyers, who has been, since 1991, the executive director of the New York Civil Rights Coalition, which he co-founded in 1986 to bring people of all colors together to work in a nonpartisan way toward a racially-integrated society and oppose all forms of racial violence and separatism. Mr. Meyers is a long-time civil libertarian, and is vice president of the American Civil Liberties Union, serving on its executive committee and board. He's been on the board of the New York Civil Liberties Union since 1976. He speaks and writes widely.

88. Neal Gabler, *A Political Verdict PRATT A Reminder of the Old FBI*, L.A. TIMES, June 8, 1997, at M1.

89. *Id.*

While on the national staff of the NAACP, Mr. Meyers edited, for the NAACP's *National Study on Police Violence*,⁹⁰ a manual for addressing police-community conflicts. In 1997, Mayor Giuliani appointed Mr. Meyers to a thirty-three-member task force on police-community relations, formed in the aftermath of allegations of police torture of Abner Louima. Mr. Meyers and two other members of the task force issued a minority report asserting systemic patterns of police misconduct and pointing out difficulties they experienced in getting the mayor to acknowledge core problems of race and policing in New York City.⁹¹

Here is Michael Meyers.

MR. MEYERS: Thank you. I don't have time to develop my themes, but I will sketch them for you. One theme is that there is nothing really new to talk about here. In 1968, the "Kerner Commission" stated:

[We] heard complaints of harassment, of police breaking up social street gatherings and the stopping of blacks on foot or in cars without obvious basis. These stops, together with contemptuous and degrading abuse, have great impact in the ghetto. Some conduct, breaking up of street groups, indiscriminate stops and searches, is frequently directed at youths, creating special tensions in areas where youths spend much time on the street.⁹²

The three dissenters on the 1997 Mayor Giuliani's Task Force on Police/Community Relations found essentially the same thing.⁹³ So there is nothing new.

My prediction, *because* there is nothing new—despite what you've heard about the San Diego model and Boston model—there is not going to be a stampede to San Diego and Boston by the powers, makers, and guardians of our law. They know the problems and they already know the solutions.

Another theme is that, if you really look at this, there is a war going on. We have substituted a War on Poverty with a war on the poor. There are many things they can do in the war on the poor that are constitutional, that have been upheld by the United States

90. NAACP'S NATIONAL STUDY ON POLICE VIOLENCE.

91. N.Y. CIVIL LIBERTIES UNION, DEFLECTING BLAME: THE DISSIDENTING REPORT OF MAYOR RUDOLPH W. GIULIANI'S TASK FORCE ON POLICE/COMMUNITY RELATIONS (MARCH 1998), <http://www.nyclu.org/blame1.html>.

92. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). The Commission is popularly known as the "Kerner Commission," named after its Chair, Governor Otto Kerner.

93. N.Y. CIVIL LIBERTIES UNION, *supra* note 93.

Supreme Court. In law enforcement matters, the so-called Broken Windows theory is the linchpin of the war on the poor; the war on the homeless; the war on the vagrants; the war to bring decent citizens back to “our public spaces”; the war to “take back the streets” and subways; the war to make sure that “aggressive panhandlers” are not hanging around the ATM when you withdraw money, whether or not they intend to rob you; the war against truancy by picking up students on their way to school, even if they are just stragglers, rather than truants; and the war on squeegee people.⁹⁴ When you have 38,000 or 40,000 NYPD cops on the problem of squeegees, the cops win.

I have been in other cities, including Montreal, Canada, that still have squeegee people in public places, because there is no policy or law that commands that they get rid of such people. Here, we’ve got 38,000 cops who are enforcing the declared law and policy.⁹⁵

I am not going to go into any detail about all the swirling and vexing civil liberties questions and violations, because I don’t have time. But, if I had the time, we could talk about the phony war on prostitution. We could talk about the phony war on drugs, which pushes these police officers to be aggressive. If night clubs don’t have cabaret licenses, you can’t dance to the music they are playing. Law-abiding people in this city feel they are being surveilled by the police if they sit on their stoops or enter their apartment buildings.

My next theme is that we have minorities at risk: a black child sitting on his stoop; a black man entering his apartment building and being shot by cops; a young black artist on the subway being beaten to death by cops;⁹⁶ young black and Hispanic men being suspiciously stopped and/or beaten and killed by cops;⁹⁷ students on the highways being stopped by cops and shot at;⁹⁸ a man coming from a social club being tortured in the 70th Precinct by cops;⁹⁹ a

94. Suzanne Fields, *New York, New York Really is a Wonderful Town*, TIMES UNION, Feb. 20, 1998, at A11; Evelyn Nieves, *Is a Crackdown the Answer?* SCHOLASTIC UPDATE 11 (Jan. 2000).

95. Jimmy Breslin, *Rudy’s the Champion of . . . Rudy Pounces On Powerless*, NEWSDAY, May 24, 1998, at A3.

96. Anita Gates, *The Volatile Search for Truth and Blame*, N.Y. TIMES, Apr. 14, 1998, at E5.

97. Salim Muwakkil, *Are Blacks Sitting Out on Marche?* CHI. TRIB., Sept. 11, 2000, at 11.

98. John Rifner & David M. Herszenhorn, *Racial ‘Profiling’ at Crux of Inquiry Into Shooting By Troopers*, N.Y. TIMES, May 8, 1998, at B1.

99. Devlin Barrett, *Louima Tells His Tale of Torture—Takes Stand to ID Volpe as Cop With Stick*, N.Y. POST, May 7, 1999, at 5.

man leaving work who “says no to drugs” being shot dead in an altercation with plain-clothes cops, and then being smeared by the mayor, who announced that the dead man had a juvenile arrest record.¹⁰⁰

This same Mayor says there are just a few bad apples in the police department. My next theme is that the few bad apples analysis is not true. There is a police culture—the Blue Wall of Silence—that protects and covers up for bad cops. There is something insidiously wrong when we who point out these problems are called cop-bashers, especially when no one loves law-abiding cops more than I.

My next theme is that we need cops, and that police are at risk as well. Why else would they need and get hollow-point bullets and 9mm weapons? Cops are at risk because they don’t feel they enjoy the support of the community.

Another theme is that we are losing our freedom. In the balancing of law enforcement versus the rights of the individual, there are many people in this society who aren’t certain anymore about the societal fabric of freedom, of individual dignity, the right to be left alone and not bothered by cops without probable cause or reasonable suspicion. This rending of the fabric of freedom should not be happening in our communities.

Every generation needs a report, for posterity. That is why the three dissenters on Mayor Giuliani’s Task Force, of which I was one, prepared the minority report. The dissenting report made findings about NYPD’s “quality of life” crackdowns. I will tell you about our findings, since the paternalistic *New York Times*, the newspaper of record, did not report on the minority report, despite all its space and all its editors who believe in pretending to be objective. Why? One possible explanation is that the cleaning up of Times Square, named because *The New York Times* is in that square, benefited *The Times* real estate.

First, however, I will discuss briefly the way in which the Mayor dealt with the Task Force. He made a mistake putting me on the Task Force. Mayor Giuliani had read my newspaper columns, but he didn’t read between the lines. He didn’t get my longstanding analysis of police abuse problems.

The first day that we went to the task force meeting, I said to the Mayor:

100. Dan Janison, *Mayor Says Shooting a Cause for Concern*, NEWSDAY, Mar. 25, 2000, at A5.

We don't want to reinvent the wheel. Let's get all the reports that have already been done. Let's agree on our mission statement, but also let's do something about the problem. And, we want you to sit with us. Let this be a task force, one that gets his attention and commits his, who has the power and the authority to change things and get them done.

What did he do? After we unanimously adopted the mission statement, he then walked away from the task force. He didn't fund it as he had promised. He didn't regularly meet with us. And, when we decided to have our own meetings to take care of our business, he assailed us, as did Commissioner Safir. Yet, we are people whom the Mayor put on the Task Force as healers.

When we gave our report to the Mayor, did he thank us for it? No. He criticized us for it, and said that most of the new things in the report were silly and unnecessary, and that the rest of the report consisted of things he had opposed in the past and would continue to oppose.¹⁰¹ And all of that he said in response to the majority report, much of which the three dissenters informed and crafted. But since the majority didn't go far enough, we wrote a minority report

What did we state in the dissenting report? We found that the NYPD was routinely violating minorities' civil rights.¹⁰² This was not a new problem. The NYPD was routinely violating minorities' civil rights during Ed Koch's and David Dinkins' administrations also.¹⁰³ The Broken Windows theory is a new slant on an old problem. Our finding of the routine violation of minorities' civil rights prompted Police Commissioner Safir to accuse the three dissenters of having "a racial agenda."

Mayor Giuliani and Commissioner Safir denied that the NYPD routinely violates minorities' rights. Any police commissioner in office would not believe it, because there is a self-interest in not acknowledging the extent of the problem and, apparently, a self-interest in not doing anything about the problem other than engaging in double talk, using cosmetic approaches like CPR ("Courtesy, Professionalism, and Respect"), and invoking Civilian Complaint Review Board's low rate of substantiation of alleged misconduct as a tactic to deny an extensive problem. We—the minority community, the civil liberties and civil rights community—helped to create and to put into place the Civilian Complaint Review Board and

101. N.Y. CIVIL LIBERTIES UNION, *supra* note 93.

102. *Id.*

103. *Id.*

want it to work. But, when it did not work, it was because it was subverted, especially when the administration, hostile to civilian review, put in its own people.

The dissenting report also found that the representation of minorities in the NYPD was inadequate.¹⁰⁴ The supervisory ranks of NYPD were primarily white.¹⁰⁵ Among cops ranked higher than Captain, only 3.5% were Latino, 4.4% were black, 0.9% Asian, and 4.4% were women.¹⁰⁶ These are appalling statistics.

The dissenting report found that minorities, by and large, were disproportionately excluded from the Police Department by questionable psychological tests used to screen candidates.¹⁰⁷ Yet, of nineteen psychologists on the NYPD's staff, sixteen were white, two black, and one Asian. Moreover, notwithstanding these psychological screening tests, all those police officers who have been accused of, charged with, and convicted of abuse and misconduct and maybe more serious crimes, each and everyone of them had passed their entry-level psychological tests.¹⁰⁸ So, the questions are: "What are these tests for? Are they valid? Are they reliable? Is psychological test ongoing?"

The dissenting report also found that the NYPD's cultural diversity training and curriculum manual contained "false information and insidious racial and cultural stereotypes."¹⁰⁹

The dissenting report further found that systemic patterns of police misconduct were a substantial part of the police culture, and that the NYPD's Internal Affairs Bureau did not deal effectively with these patterns of misconduct.¹¹⁰ Although Mayor Giuliani believes that cops can effectively police cops, we've seen no evidence that the Internal Affairs Bureau can police the cops.

Finally, the dissenting report points out that the Mayor turned a deaf ear toward many citizens who wanted to talk with him directly during the task force's public and private meetings.¹¹¹ Especially offensive and unacceptable was the open contempt the Mayor exhibited in 1997 towards the weeping mothers who had lost children to police violence. The three dissenters reported that the Mayor neglected to take the minimum steps required to comfort them in

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at Part 7.

108. *Id.*

109. *Id.* at Part 6.

110. *Id.*

111. *Id.*

their grief, which was possible without jeopardizing any police officer's civil rights or due process rights.¹¹² Particularly unnerving to the minority of three on the task force was the Mayor's skipping a session at City Hall with minority youth who had been told that they would have a chance to talk with the Mayor about their experiences with, and concerns about, the police.¹¹³ But the Mayor didn't meet with them, and made no apologies about it. He didn't even send a note to explain his absence. Where did he go? To Yankee Stadium for a baseball game.

Another of my themes is that all these reports are eventually shelved. The Kerner Commission report was shelved. Our dissenting report was shelved before it was read by Mayor Giuliani.

The Attorney General's report has been shelved. I accuse the Attorney General's Office of shelving its own report. As I told Attorney General Eliot Spitzer, we don't need a sociological study from the Attorney General; we need a legal complaint. He can bring a legal complaint in conjunction with Johnnie Cochran, in conjunction with the Center for Constitutional Rights, in conjunction with the New York Civil Liberties Union, in conjunction with the NAACP, or on his own. But he should bring it! There is no good reason for his delay, if his sociological study which confirms racial profiling is as accurate and valid as he says it is.

The last of my themes that I have time only to mention briefly is that if the systemic patterns of police misconduct that we have seen in New York City were happening in upper-middle-class communities, it would be stopped. Lawsuits would be brought. Attorneys general would lose elections if they failed to stop it. Mayors would be recalled, or, if you didn't have recall provisions, such provisions would be created overnight. The City Council would be held accountable, whereas now it is not held accountable. Here the City Council looks more diverse, but its members play the game. They have become part of the establishment, part of the problem rather than the solution. Delay and inaction is inexcusable in any form, color, or guise.

MR. TABAK: Thank you very much. For those who arrived late, I want you to know that Commissioner Bratton had to leave early. I had hoped that he would be able to react to some of the statements of other speakers, but that became impossible. I would like now to first invite any of the panelists who wish to respond to anything that any other panelist has said.

112. *Id.*

113. *Id.* at Part 6.

MR. CELLI: Since my office has been attacked, I am glad that Johnnie Cochran is here to defend us if needed. But I don't think we need him because I believe that Michael Meyers and Norman Siegel, dissenters always, understand that there's more than one way to bring about change.

For the record, neither the ACLU, the NYCLU, nor the New York Civil Rights Coalition have filed a lawsuit against the NYPD. Why? Because they understand, as we do, that there is more than one way to bring about change.

If the Attorney General wanted to shelve the report, he would not have sent me here to talk about it, to publicize it, and to continue the dialogue—which is difficult at times but continues—with the New York City Police Department. We are talking about changing the behavior—or, even more difficult, the attitudes—of 40,000 uniformed officers. Without ever ruling out any option, I have not found in the statute book a remedy in court for attitude change. It's important that we focus on attitudes, although we can also change behavior and have attitudes follow.

MR. TABAK: What powers do you think the Attorney General of the state has, even if he may not at the moment choose to exercise them, to deal with police conduct?

MR. CELLI: We have the power to do what we have already done and more. We have the power to litigate. We have the power to subpoena. We have the power to investigate and bring about remedial change with the Department of Justice, or on our own, or with private parties. I think that all of those powers fall under the Executive Law § 63, which is our basic jurisdictional hook.¹¹⁴

The issues are how do we use these powers? When do we use them? What is the best way to bring about change?

I largely agree with Mr. Meyers that there's nothing new under the sun here. But I disagree in the following sense: We've brought light and science to an issue that many people understood in their guts. We are trying to change behavior in a very large organization, and you need science for that. We had to get to that point before we could get to anything beyond that.

PROFESSOR CHEVIGNY: The Center for Constitutional Rights brought a case before the Attorney General's report was finished, based upon these very facts.¹¹⁵ The complaint's been upheld, and the case is pending. I don't understand why another

114. *Id.*

115. See case cited *supra* note 6.

complaint should be brought by anybody. The report that the Attorney General could be reshaped so as to be evidence.

Moreover, there *is* something new under the sun: the “pattern and practice” civil jurisdiction of the federal government, which the courts had previously held did not exist and had to be created by Congress. It is potentially an enormously powerful tool for a reform. I don’t know whether it’s going to be used in New York, but it ought to be.

MR. MEYERS: I don’t want to have a back and forth between me and the Attorney General’s Office, and I am not going to tell you what the NYCLU and NYCRC are prepared to do or preparing to do either. But I will say this: Yes, the Center for Constitutional Rights has filed a litigation. But the issue is what will government do? I warned Attorney General Spitzer not to get involved with this subject unless he was serious about it and prepared to bring a lawsuit. He has the power and the resources to do so. Civil rights organizations are not as resourced as government agencies.

In terms of having a constitutional system and a legal framework for justice, we look to the law enforcers to enforce the law. We can’t be doing your work and everybody else’s work, although we often have to do that. As Johnnie Cochran said, sometimes we have to do so.

When Zachary Carter was the U.S. Attorney, I read in *The New York Times* that his office had done a report on this subject. I saw him soon thereafter at a dinner party and said, “Zack, I’ve known you for a long time. How come I didn’t get a copy of your report?” He said, “Michael, there is no report. Don’t believe everything you read in the newspapers.” Maybe there is or isn’t.

But it’s been a long time now, and all I get from reading the newspapers and trying to figure out intelligently what’s going on is that the U.S. Attorney’s Office is negotiating with the Giuliani administration. I suggest that the time for negotiation is over. The Giuliani administration is coming almost to an end and you could be negotiating through the end of his term. Maybe that’s what is expected. That would feed into the political cynicism and the Mayor’s accusation that this is all political.

I hope that’s not the case. So do I accuse the state Attorney General’s Office of inaction? Do I accuse the U.S. Attorney General’s Office? Yes, I accuse them.

MR. TABAK: I will turn it open to audience questions now.

MS. COWAN: I am an associate at Debevoise & Plimpton, and we're co-counsel with the Center for Constitutional Rights. The complaint is just against the Street Crime Unit, not against the entire Police Department.

With regard to Professor Chevigny's point about § 14141: in its motion to dismiss our complaint, the city argued that that section has removed jurisdiction for private suits based on police misconduct. The court rejected that argument, but it's an interesting argument. It may be a future barrier to private suits.

MR. COCHRAN: I'm not surprised they would make that argument. But I think we have to continue to resist.

We should watch very closely over the next couple of months because, both here and in Los Angeles, we may see the federal government move towards these consent decrees. That would be very important. In Los Angeles, there is a great resistance. The police chief, the police and the mayor do not want to have any kind of consent decree, or any court telling them what to do. Their response is, "We can take care of this ourselves." But that's what they've always said.

They cannot take care of it themselves. It is not within them to properly police themselves. The question is a rhetorical one of who polices the police. They cannot police themselves very well. A better job of policing the police must be done.

AUDIENCE: I was just curious, was the New York City Police Department invited to take part in this program?

MR. TABAK: Yes they were. Commissioner Safir and the Police Benevolent Association's leadership were both invited. They claimed on several occasions they never received our invitations. So, we then faxed, re-faxed, and re-re-re-faxed them. Last week, we got a polite letter from Commissioner Safir saying that neither he nor anyone else from the NYPD would be available.

MR. BUSH: I go to a lot of these panels and I hear a lot of these discussions and I still do not understand why in this state we do not have independent prosecutors with their own independent arm of investigators, so that victims' families don't have to rely on the federal government. As victims, we want the people who are prosecuting to be independent of the Police Department. Second, why do we have these paper tigers? The Civilian Complaint Review Board really is a paper tiger in my opinion.

MR. TABAK: Before others answer, I note that this Association has been on record for several years in supporting a permanent Special Prosecutor's Office, not just for police matters, but in gen-

eral. It wasn't the result of action by the Committee on Civil Rights, but it is still the Association's policy. I think Mr. Meyers wants to comment.

MR. MEYERS: We used to have a statewide post of Special Prosecutor in New York State, created by an executive order that placed that authority and power in the Attorney General's Office. Interestingly, the very liberal Governor Cuomo abolished that office.

To answer your question as to why don't we have these things: theoretically, people in power believe that you do have independent checks on police power. They see that as being lodged with the district attorneys' offices. And the district attorneys jealously guard their jurisdiction. They are the first to reject any allegation that they are playing "footsie" with the Police Department, or that they are not serious about checking and curbing police abuse and brutality when the evidence leads them in that direction. They believe that they do credible investigations and prosecutions in cases against police officers.

The general community believes, with a cynical perception, that somehow in the whole theoretical framework in which a district attorney can as they say, "indict a ham sandwich," that nonetheless, it's very difficult for district attorneys to get indictments in the cases of police officers. When they do get indictments, the cynicism level rises even higher, such as during the state prosecution of the Diallo cops.

People in the civil rights community didn't think that was an effective, credible prosecution. This is what drives and empowers the demagogues who rush in with demonstrations and civil disorders. (Of course, demonstrations are constitutionally protected.) It also drives the cynicism and the lack of trust in the Police Department and the DAs when DAs who do bring prosecutions are then accused of ineffective, lackluster, or incompetent prosecution.

So, yes, we need an independent prosecutor at the state level. In addition, the federal government can provide an additional check under its authority to bring about the prosecution of civil rights violations. But I can't say that the federal government, even under President Clinton, has been aggressive and satisfactory in this regard, because I haven't seen evidence of effective prosecution.

I say, "Give me evidence—at the state level, at the federal level, at the local level." But nobody gives me the evidence. They just give me rhetoric.

MR. COCHRAN: Michael, I would say that on the federal level in Brooklyn, the U.S. Attorney's Office has been much more effective than in other jurisdictions. The Louima case is a classic example of what that office has done. It has gone the extra mile. This has sent a message that has a profound deterrent effect upon the police.

One of the issues here, which is a major problem throughout the country, is that it takes another level of government to maintain a special prosecutor. That is clearly difficult. State prosecutors rely upon the police to make their cases. When they try to prosecute the police, it takes them forever. If you or I committed the same acts as police officers, the investigation would be resolved in a week. But when those under investigation are police officers, it takes months. And then nothing happens, and as Mike says, there is no indictment. The state prosecutors say it's very difficult to proceed against police officers, even with a grand jury. If there are twenty witnesses, these prosecutors will put on all twenty witnesses and then say that the case is so confusing that they can't figure out what to do.

It's as though they are talking to a bunch of people who fell off a truck. If they want to indict somebody, they could do it right off the bat, on the state level.

That's why we feel very strongly that the federal government has the expertise and the laws, and should have the resolve, to prosecute these cases. Federal judges serve for life and presumably are not driven by the whims and vagaries of what's going to take place. So that's the closest we have to independence in prosecution, because you're probably not, at this point, going to have another, totally independent level of government put into place.

PROFESSOR CHEVIGNY: I'm not opposed to independent state prosecutors for police violence. But you should realize you can't set police policy by prosecuting people. The level of proof required, the chances of catching someone, the haphazard nature of whether you've got the evidence in a case or not, the standard of proof, and the level of violence ordinarily required to get an indictment do not reach down to the mass of problems in a department. Those problems have to do with so-called street justice, roughing people up, and also with these stop and frisks and the zero-tolerance type of abuses.

Those abuses require good governance. I don't believe that leadership alone is enough. You need an outside body that oversees the department and has the power to suggest and perhaps dic-

tate policy and changes. I don't mean a Civilian Complaint Review Board, because it takes cases on a case-by-case basis. You need an auditing body or an oversight body.

But those bodies can be turned into police buffs. For example, in theory, Los Angeles has civilian control of the police through the Police Commission. It's always been, in my working life, staffed by people a majority of whom love everything the police do.

That brings us back to the point of the original discussion. So long as people believe that you have to kick butt in order to keep order, we can't do anything. We have to adopt the belief in this country that the Constitution is paramount and that the police must comply with it. Most people in the United States don't believe that, and most police don't believe it. The Police Commission in Los Angeles doesn't believe it, and I don't think most of the Los Angeles City Council believes it. Not to say that they believe it in New York City, either.

My point is that, unfortunately, institutions can't do it all. The issue that you raised here is really of paramount importance. We have to enforce these values, and that requires the will of the people, I suppose.

MR. COCHRAN: We also have to change the culture of these police departments, so that the bad officers fear the good officers, and not vice versa. Now, the good officers fear the bad officers.

Professor Chevigny is absolutely right, and Los Angeles is a classic example. For years and years and years and years, we've been talking about the LAPD and what it's gotten away with. But you've got to understand, the LAPD was put out there, first of all, to deal with the labor unions, the Communists, the zoot-suiters, or whatever happened to be viewed as the problem in Los Angeles. Everybody else looked the other way and said, "Take care of this problem."

This same attitude prevails even now, after the exposure of rampant corruption, with close to 100 cases being dismissed.¹¹⁶ It may cost the City of Los Angeles one billion dollars to compensate people who've been framed and maimed and killed. Every day, more cases are dismissed. People in prison are getting out, because cases were created against them. Many of them are Hispanics and African Americans.

116. James Sterngold, *3 of 4 Officers Convicted In Police Corruption Case*, N.Y. TIMES, Nov. 16, 2000, at A20.

But there's no outrage by the body politic, whose only concerns are, "Why do we have to be bothered by this? Why are you bringing this to us? Let's get this over with." That's the general attitude. Meanwhile, the police commissioner says, "We can take care of this. Give us a chance to take care of this." But it all happened on their watch!

People have been trying to tell the body politic there that the problem is that they'd rather not be bothered. That's why we've got to have some outside influence come in. Otherwise, the situation won't ever change.

The City of Los Angeles would like to pay some money and get this over with. But if that's all that happens, the culture will remain the same. The good cops will stand there silently and look the other way while the bad cops do improper things. The supervisors won't do anything about it. The police chief will go on talking about it and will say that crime is down. And the people will say, "Gee, we're safe in our homes." You're right; it's a culture thing.

MR. CELLI: I'm not an unalloyed advocate of leadership as the answer to everything. I think the change has to come from deep within the organization and be brought about by pressure from the outside. But I wish Commissioner Bratton were still here, so he could talk about culture change. For years, one of the complaints in minority communities about the NYPD was that it did not police enough, that the police did not get out of their vehicles and police the streets because they were afraid to do so. Through Commissioner Bratton's leadership and through the leadership of the people under him, it basically became impossible for officers and their commanders at the precinct level to get away with not policing the neighborhoods.

Maybe the police have gone to the other extreme. But if you can convince beat officers to get out of their police cars and put themselves in harm's way, you can change attitudes dramatically from the top. So, we've seen an example of being able to change the police culture in New York.

The question is: Change it for what purpose? We're talking about instilling the values of the Constitution in police officers. That's a tall order, but it can be done.

AUDIENCE: I've been to a number of these types of events, and I am just bewildered by the fact that we can't get a senior representative from the NYPD to participate. The City Bar Association, on April 1, had an invitation-only event, which was probably an attempt to sanitize the environment so that there would be

more of an opportunity for a frank, civilized discussion with the Police Department. Howard Safir was invited, but he didn't show up.

The New York City Council has been holding meetings throughout the city. The senior representatives from the department are there and are questioned by the City Council members. Then they officially walk from the stage before there is any opportunity for people in the audience to actually engage in conversation with someone from the Police Department.

I'm of mixed minds as to whether or not litigation is the right strategy, or open dialogue, or scientific studies are the right strategy. But I'm convinced that no matter what, step one has to be some frank discussions with the senior members of this Police Department. The Association of the Bar of the City of New York is an august institution. If it can't get representatives of the Police Department here for some form of discussion, we are really in a sorry state of affairs.

I totally agree with the notion that we have to have some sense of citizen participation. Without it, we're not going to get much change. One of the things we have to demand is that we have some form of frank discussion with the current members of this Police Department.

Former Commissioner Bratton was very eloquent in making some strong criticisms. He can do that, as a former commissioner. Former Commissioner Ray Kelly, who was here on April 1, did the same thing, but he is also a former commissioner.

We don't have anybody who's currently serving who has the political will to come forward and have a discussion. But without a discussion with the Police Department, litigation isn't going to work; speaking to each other in these forums is not going to work; another report is not going to work. We have to find a way to sit down and talk frankly to each other. Without that, we're not going to solve this problem.

MR. COCHRAN: What's going to work is an agency like the U.S. Attorney's Office bringing an action, getting the Police Department into court.

The point you make is bewildering. If you have occasion to even appear on a program with Mayor Giuliani or Commissioner Safir, he will not appear on the same segment with you. If you are on Larry King and the issue is police abuse, the Mayor or Police Commissioner will negotiate it so he has to be in a special segment.

You can't ask them any questions. You cannot debate with them. They're either above the law, or they're afraid.

MR. MEYERS: I want to second. I thought we had a free press, but these guys get very intimidated by people who are in power. Television reporters feel they need to get the position of City Hall. As a result, the City Hall reporters get compromised, in terms of reporting the real situation, because they need to get a quote from the Giuliani administration.

Johnnie Cochran is absolutely right. They negotiate with these producers to make sure they get a special segment, separate from the activists—they call them the cop-bashers.

And there is something else that they do. If they do go on a show, they pick and choose for the producers which community activists or civil rights leaders are acceptable. For example, they'll tell the producers that certain people are just cop bashers, but that if the producers get Dennis Walcott [of the National Urban League], we'll think about coming on the show.

This is very dangerous for a so-called free society and free press.

Finally, with respect to the previous question about an independent auditing body, the City Council in New York did create an independent audit board regarding police brutality and corruption.¹¹⁷ The mayor vetoed this, but the veto was overridden by the City Council. Guess what? This matter is in litigation.

PROFESSOR CHEVIGNY: The Police Department has used the approach mentioned by Johnnie Cochran all my working life. Its leaders think that if they keep a low profile and keep their mouths shut, the situation will blow over and they will be able to do exactly as they have always done. That's why they do it.

And up to this point, their policy is actually a wise one, from their point of view. Because they are not interested, really, in having any contact with community forces in this city. They want to do everything themselves.

What is the solution? I'm afraid that an oversight body is about the only thing there is, although without leadership, it's not going to work very well. But given the present leadership, which barely amounts to leadership, it seems to me there is no alternative.

117. MAYOR GIULIANI AND DISTRICT ATTORNEY MORGENTHAU ANNOUNCE LAWSUIT AGAINST CITY COUNCIL'S INDEPENDENT POLICE INVESTIGATION AND AUDIT BOARD: CHARGE THAT BOARD VIOLATES CITY CHARTER AND PREVIOUS COURT RULING THAT FOUND BOARD INVALID (Mar. 25, 1998), <http://www.ci.nyc.ny.us/html/om/html/98a/pr137-98.html>.

MR. TABAK: Do any of the panelists have any concluding comments they'd like to make?

MR. MEYERS: Yes. I have one concluding remark.

You have to remember that the Giuliani administration did not even respect its own Task Force on Police/Community Relations. It stopped talking to us once it was clear that it was not going to be a one-way dialogue.

In a free society, we have to start asserting our rights to free speech more. We also must look at the policies that give credence to this so-called crackdown on quality of life offenses—a “crackdown” that disproportionately affects young minority children and minority people. Unless we look at the policy, the solutions will not come. All those reports that have been shelved say the same thing.

MR. TABAK: I will just note that the Mayor didn't like the majority report of the mayoral task force much better than he liked the minority report.

Thank you very much to all the panelists for a very stimulating discussion, and thank you all for coming.

THE NEW POLICING

*Philip B. Heymann**

The purpose of this article is to examine a remarkable development in law enforcement: the exploration of new forms of policing by combinations of police leaders and academics. This examination focuses on three major cities—New York, Chicago, and Boston—that have developed three different combinations of problem-solving and new forms of relationships with neighborhoods that are often called “community policing.” As a result of these immense undertakings, we have seen a change in belief in the efficacy of policing. But the changed attitudes towards police functions are accompanied by certain risks.

I. THE EFFECTIVENESS OF THE NEW POLICING

I will begin by describing the weaknesses and the strengths of the argument that new forms of policing have had a major effect on fear and safety in our cities and, through that, on the quality of life for millions of people. But wholly aside from the amount of evidence for this belief, it exists and that in turn has changed the attitudes toward policing of citizens and political leaders alike.

It is important to look at New York, Chicago, and Boston separately, for they represent somewhat different approaches based on different theories supported by different police leaders and scholars. Their apparent successes explain the change in attitude toward police, but the approaches differ along the two dimensions that many consider most important: reduction of crime and disorder and an increase in trust in the police.

I will describe generally the practices and theories of policing in each of these three cities and provide some evidence as to what each is doing better or worse. But then it is worth departing from the broad models, each of which may hide too much that is important and particular under a single theory that seems almost as copious as an ideology. We should look much harder at the underlying operations of each cities' police department. And, finally, we should consider the values affected by, and the risks associated with, the different forms of policing.

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A. The National Decline in Crime

Before turning to the changes in theory and practice of policing and their consequences, we should note the importance of the new belief that policing can make a big difference in the amount of violent crime, property crime, and troublesome disorder. In focusing on the new belief, I am not trying to raise doubts about the reduction in fear and the increase in safety that have occurred throughout the United States. There may be some questions as to the role of policing in bringing this about—though these questions do not trouble most of our politicians and citizens—but there is little doubt about the fact of these changes, particularly the actual and significant reduction in fear and increase in safety in most places throughout the United States and particularly in two of the cities which we will be examining.

Figures on reported crime and surveys of citizens tell identical stories. After a rapid increase during the 1960s, there was long-term stability in crime rates in the United States during the following quarter century.¹ That stability included a homicide rate in the United States that was three or four times as high as those of other Western democracies.² It was also widely believed that non-lethal violent crime greatly exceeded that of comparably advanced countries.³

Within this long-term trend, something dramatic first happened in the mid-1980s when the amount of youth violence, particularly killing, shot up dramatically, while violence by those over twenty-five was declining. Then, in the early 1990s, the direction of change reversed and for the rest of the twentieth century, crime, including violent crime, declined radically to levels we had not seen since the 1960s.⁴ Arrests of males under age eighteen for violent crimes declined 26% between 1994 and 1999.⁵ The trend has continued into

1. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES § 2 (2000), <http://www.ojp.usdoj.gov/bjs/homicide/hmrt.htm> [hereinafter HOMICIDE TRENDS].

2. OFFICE FOR DRUG CONTROL & CRIME PREVENTION, UNITED NATIONS, GLOBAL REPORT ON CRIME AND JUSTICE 312-14 (Grame Newman ed., 1999) (listing homicide rates for more than three dozen industrial countries as reported in five United Nations surveys between 1974 and 1993).

3. *Id.*

4. HOMICIDE TRENDS, *supra* note 1, at § 3.

5. Keith Bradsher, *Fear of Crime Trumps the Fear of Lost Youth*, N.Y. TIMES, Nov. 21, 1999, at D3.

the current year, although some major cities, including Boston, experienced an ominous spike in the first few months of 2000.⁶

Between 1993 and 1998, property crimes declined in the United States by 32% and violent crimes declined by 27%. The decline has been spectacular with regard to such non-violent crimes as motor vehicle theft or ordinary thefts of less than fifty dollars. Moreover, this decline has been about equally sharp for males and females, black and white, urban, suburban, and rural.⁷

One area of great public concern did not appear to follow this general course. Although the use of illicit drugs had peaked in the late 1970s, and the decline that followed in the mid-1980s was reversed by an epidemic of smokable crack cocaine, there was a great decline in overall use in the 1980s and, except for marijuana use, prevalence of use in the population continued at a relatively low level into the 1990s.⁸ However, there is little, if any, indication that the price of illicit drugs has risen or that their purity has declined, nor is there any reason to think that their availability has lessened.⁹ The crack cocaine epidemic has greatly abated; but that seems to have far more to do with the natural course of a drug epidemic, including the growing desire of young people to avoid the consequences they see in their addicted elders, than with any success in

6. E.g., Tom Farmer, *Violent Crimes Plunge in U.S.*, BOSTON HERALD, Aug. 28, 2000, at 1 (noting that Boston had already surpassed its 1999 murder total, and that police had reported a 13% increase in shootings); Brett Martel, *Murder on Rise in Major Cities*, CHI. SUN-TIMES, June 23, 2000, at 26 (reporting that murders had increased over 1999 murder rates in Baltimore, Boston, Dallas, Los Angeles, New Orleans, New York, and Philadelphia); Don Terry, *In a Turn of the Tide, Bloodshed Rises in Los Angeles*, N.Y. TIMES, July 11, 2000, at A14 (reporting a 7.5% increase in violent crime over 1999 in Los Angeles, including more murders, rapes, and robberies, but noting that "with only a few exceptions, violent crime is down nationwide"). *But see*, e.g., Eric Lipton, *Giuliani Pulls His Charts Out for a Review of New York*, N.Y. TIMES, Sept. 15, 2000, at B9 ("In the first six months of this year, crimes in the seven major categories fell 7.8%" in New York City).

7. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY, CRIMINAL VICTIMIZATION 1998, CHANGES 1997-98 WITH TRENDS 1993-98, at 9 tbl.7, 11 tbl.8, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv98.pdf> (reporting sharp declines in property crimes and declines in violent crimes for specific demographic groups between 1993 and 1998) [hereinafter VICTIMIZATION SURVEY].

8. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1997, at 245 tbl.3.83 (1998).

9. OFFICE OF NAT'L DRUG CONTROL POLICY, DRUG DATA SUMMARY 4 (1999) (explaining the increase in purity and decrease in price for four types of drugs between 1981 and 1998), available at <http://www.whitehousedrugpolicy.gov/pdf/95253.pdf>.

policing, despite mammoth increases since 1980 in expenditure and in rates and duration of imprisonment.¹⁰

Returning to the sudden reduction in violence, particularly in lethal violence, since the early 1990s, a number of consequences should be noted. Evidence ranging from the self-reports of mothers and children in Boston to the immense increase in optimism and tourism in New York documents the change in the quality of life that has been brought about by reduced violence, and perhaps also by reduced property crime and disorder. Leaders in cities as far away as Johannesburg, Moscow, and Buenos Aires want to learn whatever there is to learn about the relationship of new forms of policing to a wonderfully improved quality of life in many American neighborhoods and cities.

If policing really is making the difference, we should acknowledge that fact in terms of a variety of decisions about the expenditure of resources. Resources should be moving toward police from the immense human and dollar costs of the present rush towards ever longer sentences that have made us one of the world's two leaders in percentage of population behind bars.¹¹ At the same time, the general public may be willing to bear new personal costs associated with intrusive policing measures, if the benefits are as great as they seem. In Chicago, for example, tenants of housing projects have voted to authorize apartment searches without the prerequisites of the Fourth Amendment, a move rejected by a federal court.¹²

B. Are the Increase in Safety and the Reduction in Fear Results of the New Forms of Policing in the United States?

The accelerating reduction in violent and other crime beginning in the early 1990s plainly coincided with a series of major changes in policing. The three cities we are examining, New York, Chicago,

10. E.g., Richard Curtis, Symposium, *The Improbable Transformation of Inner-City Neighborhoods: Crime, Violence, Drugs, and Youth in the 1990s*, 88 J. CRIM. L. & CRIMINOLOGY 1233, 1260 (1998) (stating that many African American youth throughout New York City have avoided heroin and crack in the 1990s because of such factors as the AIDS epidemic and the increased death toll from drug dealer turf wars).

11. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1999, at 387 (1998); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, at 528 tbl.6.30 (1997) (noting that the number of prisoners in custody of federal and state authorities was 1,037,686 in 1995).

12. *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994); Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong*, BOSTON REV., Apr./May 1999, at 4 (providing an overview of the incident).

and Boston, all began new programs shortly before 1995. As we shall see, there are common-sense and theoretical reasons to believe that the forms of policing have made a difference; but before awarding the credit to policing, we should recognize the claims of other contenders in explaining reduced crime.

1. *Some Other Explanations for Declining Rates of Crime*

There are reasons to look for alternative explanations. Violent and other crime is decreasing in many cities throughout the United States, including in cities where policing strategies are very different from those of New York, Chicago, or Boston. New York and Boston have enjoyed remarkable rates of decline, but so have several other cities, which are implementing quite different approaches.¹³ Moreover, other factors unrelated to policing, but highly correlated with the conditions we associate with crime, are changing at the same time. Teenage pregnancy has gone down steadily during the last six or seven years.¹⁴ The decline in birth rates between 1991 and 1996 among black teens between the ages of fifteen and nineteen is particularly striking.¹⁵ There seems to be no obvious relationship between policing and teenage pregnancies, although there has always been a close relationship among crime, violence, teen pregnancy, drug use, and other forms of social breakdown.¹⁶ That suggests that an additional factor—other than policing—may be at work.

Several candidates seem obvious. First, the drop in crime could be tied to the sustained economic boom. Not only has poverty been declining since 1993 for juveniles under the age of eighteen, but the proportion of black juveniles (whose involvement in dangerous violence as victim or perpetrator has been much the highest) living in poverty has also been declining sharply during that

13. *Compare* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION AND PERCEPTIONS OF COMMUNITY SAFETY IN 12 CITIES, 1998, at 9 (1999) (reporting that New York's murder rate fell 65.8% between 1990 and 1997) [hereinafter COMMUNITY SAFETY], *with id.* (reporting that San Diego's murder rate fell 53.3% during the same period), *and id.* (reporting that Los Angeles's murder rate fell 42.2% during the same period).

14. Marc Lacey, *Teen-Age Birth Rate in U.S. Falls Again*, N.Y. TIMES, Oct. 27, 1999, at A16.

15. Judith Havemann, *Birthrate Drops for Teens of All Races*, WASH. POST, May 1, 1998, at A1 (reporting a 20.6% drop for black teens during that period).

16. *E.g.*, JAN M. CHAIKEN & MARCIA R. CHAIKEN, VARIETIES OF CRIMINAL BEHAVIOR: SUMMARY AND POLICY IMPLICATIONS 25 (1982) (noting that "[d]rug use is one of the major factors associated with virtually every type of crime [] studied, and specific forms of drug use correlate strongly with crime types and rates").

period.¹⁷ Unemployment is at near-record lows; and by 1996, 86% of black young adults were completing high school.¹⁸

There are a number of other available explanations, besides new forms of policing, which supporters would claim have led to the reduction of crime and the fear of crime. During the last few years, we have seen the end of the crack epidemic in most cities,¹⁹ an epidemic which spawned drug-selling gangs and the varieties of violent crime that we associate with the Prohibition era of the 1920s. Drug markets have stabilized. Dealers in stabilized industries do not kill each other; thus, dealers in illicit drugs may be particularly violent only at the early stages of a rapidly expanding market.²⁰

Just as the use of crack declined when successive generations witnessed the degrading experiences of older brothers and sisters, the same learning—but this time about guns—may have happened as a result of the violence of the late 1980s.²¹ A very high percentage of young people in disadvantaged neighborhoods had friends who had been killed.²²

Efforts of people other than the police to deal with youth violence also played a role. Prevention efforts by committed members of the community, including organizations such as churches and schools, increased immensely in response to the burst of youth violence, and helped make a difference.²³

Another quite provocative explanation, recently advanced in a leading economics journal, is the rise of legalized abortion some

17. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU HISTORICAL POVERTY TABLES—PEOPLE tbl.3, available at <http://www.census.gov/hhes/poverty/histpov/hstpov3.html> (current through Nov. 30, 2000).

18. NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 17 tbl.8 (1998).

19. E.g., Alexandra Marks, *Teens Drive Decline of "Crack" Craze*, CHRISTIAN SCI. MONITOR, Jan. 6, 1999, at 1; Lance Williams, *Crime Drop Mirrors Falling Popularity of Crack Cocaine*, ST. LOUIS POST-DISPATCH, Nov. 29, 1998, at A14.

20. Fox Butterfield, *Drop in Homicide Rate Linked to Crack's Decline*, N.Y. TIMES, Oct. 27, 1997, at A12 (reporting on a Justice Department study finding that the "waning of the crack cocaine epidemic" was the "most important reason" for the drop in homicide rates through the 1990s).

21. E.g., Fox Butterfield, *Scared Straight; The Wisdom of Children Who Have Known Too Much*, N.Y. TIMES, June 8, 1997, at D1 (discussing how inner-city youth are "recoil[ing] from the gun culture" because many have witnessed shootings or seen relatives or friends incarcerated).

22. E.g., *id.*

23. See generally John Buntin, *A Community Responds: Boston Confronts an Up-surge of Youth Violence* (1999) (unpublished manuscript written for John F. Kennedy School of Government Case Program).

twenty years prior to the beginning of the decline in crime rates.²⁴ Indeed, the article attributes roughly half of the decrease in crime to the government's newfound protection of the right to choose.

Finally, there are those who would argue passionately, and persuasively, that the reduction in violent crime was traceable far less to policing and any increase in the numbers of arrests than to legislation and the longer prison sentences it imposed, along with the consequent prolonged incapacitation of violent offenders. A relatively small proportion of the people born in any given year is likely to commit a high percentage of the crimes and a very high percentage of the violent crimes. When we lock up a higher and higher proportion of the population for longer periods of time, a very high proportion of this particularly dangerous group is imprisoned because they offend and risk arrest so often. This reduces the level of violence on our streets, albeit at great cost. And, somewhat less plausibly, believers in increased deterrence resulting from the perceived threat of a very long sentence for those who are successfully caught and prosecuted have argued that the reductions in crime are directly traceable to that deterrent.²⁵

2. *The Case for New Forms of Policing as a Major Cause of Reduced Crime*

With so many other explanations, why is there reason to believe that new forms of policing are playing a significant role in the reduction of violence and fear? For one thing, some of the sharpest reductions in crime have taken place in Boston and New York where the new forms of policing have been the most thoroughly explored and most enthusiastically implemented. For another, some of the connections between the new forms of policing and the reduction in violence are so plausible that it is hard to imagine that they have not had a major effect. Finally, some fairly rigorous evaluations of recent policing tactics support the hypothesis of effectiveness.

We know, for example, that the increase in youth homicide was almost entirely attributable to homicides with guns; there has been

24. John J. Donohue III & Steven D. Levitt, *Legalized Abortion and Crime*, 115 Q.J. ECON. (forthcoming 2000), at <http://www.mitpress.mit.edu/journals/QJEC/forthcoming.html>.

25. See, e.g., Daniel Kessler & Steven D. Levitt, *Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation*, 42 J.L. & ECON. 343, 346 (1999) (employing a novel approach to separating incapacitation effects from deterrence effects, and finding that the latter had a "nontrivial" effect on a series of 1982 sentence enhancements in California).

no significant increase in homicide with other weapons.²⁶ And both trends have worked in reverse. As Professor Alfred Blumstein of Carnegie Mellon University and Professor Richard Rosenfeld of the University of Missouri-St. Louis have pointed out, the reduction in national homicides in the mid-1990s was very close to the reduction in the number of gun homicides, suggesting again that control of guns has been an important tactic.²⁷ We also know that many homicides occur because of quarrels and other events taking place on the streets. Policing strategies like those of New York that greatly increase the risk of arrest for carrying a gun on the street, particularly for gangs or other groups that have more frequently engaged in violence, should therefore lead to reduced homicides with guns. In fact, those are the homicides that have been declining rapidly.

Similarly, we have believed for centuries that certainty and swiftness of punishment are critical to the effectiveness of deterrence. In Boston, the police are using their powers in new ways to ensure that the deterrent threat to particularly dangerous individuals is very certain and prompt, targeted specifically to a particular type of conduct such as violence, and directly communicated to those most likely to use violence. To determine who is most likely to use violence, Boston police have analyzed data from reports or investigations and have used computers to compile information available by observation of associations on the street. Strategies, like those adopted in Boston, to assure that speed and certainty of punishment are known to those likely to engage in violence seem almost certain to reduce violence.

In both New York and Boston, creating social control and, relatedly, reducing fear, have been accomplished by using the powers of the police to take back the street from gangs. The Department of Justice's Office of Juvenile Justice and Delinquency Prevention estimates that, in 1996, almost 3000 homicides in large cities and suburban counties were attributed to gang members.²⁸ Reducing the apparent street power of gangs competing for status, turf, or drug profits seems likely to reduce gang homicides.

26. Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175, 1196 (1998); see also *id.* at 1194 fig.6b, 1195 fig.6c.

27. *Id.* at 1196.

28. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, 1996 NATIONAL YOUTH GANG SURVEY 32 (1999).

3. *A Closer Look at What We Know About Police Tactics and Reduced Crime*

There is another way to look at developments in policing—one that does not rely so exclusively on the theories of a few academics and police commissioners. The broad models of policing in cities like Chicago, New York, and Boston, can be usefully disaggregated by first identifying the critical powers of the police and then analyzing the innovative ways these powers are being used. It is useful to begin with a reminder of the powers, legitimate and borderline legitimate, granted to the police in the United States. It is through the use of those powers in a particular set of tactics that street crime may be reduced, either by creating deterrence, gathering intelligence, or establishing a feeling of police or neighborhood control of the streets. What we know about the use of these powers to reduce crime should be reviewed, before turning to the broader and more complex strategies that have characterized policing in Chicago, New York, and Boston. The present powers of the police are relatively well known:

1. To arrest, search, or engage in electronic surveillance if there is probable cause to conclude that the person has committed a crime.²⁹
2. To seek or give a suspect concessions in exchange for information or evidence useful against others.³⁰
3. To “stop” if there is reasonable suspicion to believe that the person is about to commit a crime or has just committed a crime, and to frisk if there is reason to fear the person may be armed.³¹
4. To “stop” cars on the ground that they are being operated in any way, however minor, in violation of local ordinances or state laws.³²
5. To seek consent to search the stopped car or, alternatively, to search without consent by either arresting the driver for a traffic violation or developing a reasonable suspicion that the driver might be armed.³³
6. To take advantage of even obvious confusion by a suspect about whether he has a right to say “no” to a search of his

29. *Dalia v. United States*, 441 U.S. 238, 256 (1979).

30. *United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir. 1995).

31. *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

32. *Maryland v. Wilson*, 519 U.S. 408, 412 (1997).

33. *Adams v. Williams*, 407 U.S. 143, 147 (1972).

- home, car, or person, or to refuse to answer questions when not formally under compulsion to remain.³⁴
7. To imply, deceitfully, that they intend to exercise powers of arrest or restraint that they in fact do not have, in order to gain leverage to force a recalcitrant witness or suspect to cooperate.³⁵
 8. To suggest a possible use of force even though its use would be illegal.³⁶
 9. To engage in any of these activities in a way that is designed to interfere with the subject's personal or business relations.³⁷
 10. To analyze material obtained in reports or investigations of individual crimes and to gather useful intelligence from these reports.³⁸

Police in the United States have long had a tool kit that includes at least the powers described above. Exceeding these considerable powers by imposing summary punishment, using unnecessary force to arrest, or disregarding someone's privacy and property rights without probable cause is generally a violation of local and federal law. To ignore the limitations on the use of these powers—even by actions that would not be criminal if carried out by ordinary citizens but which misuse the apparent powers and authority of the police—is an occasion for department discipline.

What do we know about the success of various tactics using these powers, reserving for later a discussion of the broad strategies that are a collection of tactics in Chicago, New York, and Boston? There is much guesswork in this. Fairly rigorous recent experiments clarify a good deal about what forms of policing actually reduce crime. A review of evaluations done by a team at the University of Maryland for Congress and the Department of Justice tells us a good deal about what “works.”³⁹

34. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973).

35. *Green v. Scully*, 850 F.2d 894, 903 (2d Cir. 1988).

36. *E.g.*, *Payne v. Arkansas*, 356 U.S. 560 (1958) (excluding a confession coerced with the threat of mob violence). *Contra* *Green v. Scully*, 850 F.2d 894 (2d Cir. 1988) (holding a confession voluntary even though the police officer threatened the suspect with the death penalty, which was not used in New York State at the time).

37. *See, e.g.*, *Dalia v. United States*, 441 U.S. 238, 248 n.8 (1979) (upholding electronic surveillance of all oral communications taking place within a suspect's place of business).

38. *E.g.*, *United States v. McKinnon*, 721 F.2d 19, 22-23 (1st Cir. 1983) (affirming a firearms conviction based on evidence obtained in a drug investigation).

39. Lawrence W. Sherman, *Policing for Crime Prevention*, in LAWRENCE W. SHERMAN ET AL., *PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS* (1997).

In *Policing for Crime Prevention*, Professor Lawrence W. Sherman of the University of Maryland analyzes the evaluations of policing strategy. He concludes first that, although the evidence is inconsistent, the more convincing studies show that an increase in the number of police causes reductions in crime in the following year, especially in larger cities with higher crime rates.⁴⁰ This is supported by the evidence of epidemics of crime when the police are on strike⁴¹ and by the obvious logic that the presence of more police increases the risk that an individual committing a crime will be apprehended, resulting in both a deterrent and an incapacitative effect.

On the other hand, Sherman finds that rapid response to calls from victims does not have a significant effect on crime reduction, when measured against the resources it requires. Too many crimes are discovered after the fact and even a crime that is discovered promptly is not affected by rapid response if the time between the commission of the crime and the initial contact with the police exceeds nine minutes. Indeed, the average reporting time for such crimes was forty-one minutes later.⁴² Nor did random patrol deter crime by creating a sense of police omnipresence. Among a group of studies, none of which Sherman deemed especially rigorous, the stronger studies suggest that there is no such effect.⁴³

What does make a difference, careful evaluations show, is focusing patrol resources on places and times that have the most crime. The idea is supported by epidemiological research that has shown that crime tends to be very localized,⁴⁴ and by careful studies in Minneapolis suggesting that doubling the police presence led to a 50% decrease in crime in the hot spots, even when the police were not present.⁴⁵ It also often led to increased neighborhood calls for service in the "hot spot" areas.⁴⁶ As to curfews, not enough is

40. *Id.* at 8-1.

41. *E.g.*, SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 117 (6th ed. 1995) (noting the looting that followed a police strike in Liverpool in 1919).

42. Sherman, *supra* note 39, at 8-2.

43. *E.g.*, Robert Trojanowicz, *Evaluating a Neighborhood Foot Patrol Program: The Flint, Michigan Project*, in *COMMUNITY CRIME PREVENTION: DOES IT WORK?* (Dennis Rosenbaum ed. 1986), *cited by* Sherman, *supra* note 39, at 8-3.

44. Sherman, *supra* note 39, at 8-3 - 8-4 (citing epidemiological studies showing that crime is localized).

45. *Id.* at 8-15 (citing Lawrence W. Sherman & David A. Weisburd, *General Deterrence Effects of Police Patrol in Crime "Hot Spots": A Randomized, Controlled Trial*, 12 *JUST. Q.* 625 (1995)).

46. Sherman, *supra* note 39 (indicating that crime-related calls for service increased in hot spots as a result of increased police presence).

known yet to determine whether they are an effective way of reducing crime, particularly among juveniles.

In a related way, concentrating limited police resources on an identified band of particularly dangerous individuals or crimes also reduces crime. We know that a small fraction of a total birth cohort commits a very high percentage of crimes perpetrated by members of that cohort. Targeting the more dangerous people had the hoped-for effect of reducing crime in Washington and Phoenix.⁴⁷ The case is less clear with regard to targeting dangerous crimes, with two notable exceptions: seizing guns and drunk driving.⁴⁸ Efforts to detect and seize guns have proven to be immensely effective in Kansas City. When gun seizures in a target area rose by 60%, gun crime dropped by almost 50%.⁴⁹

There are at least some positive short-term effects of focusing policing on activities that create a sense of disorder in a neighborhood—tending to support the “Broken Windows”⁵⁰ theory that is described later.⁵¹ But, as in the case of making additional arrests for misdemeanors and for other crimes for which an individual might not previously have been arrested (even if caught in the act), the deterrent and incapacitative effects may be significantly offset by countervailing long-term effects. Studies show that recidivism of juveniles increases following arrest.⁵² The same is true of some other categories of offenders, such as unemployed men guilty of domestic violence.⁵³ There is a reminder in all these statistics that the long-term effects of invoking the criminal justice system for relatively minor behavior can be to increase rather than reduce crime through its effect on the life prospects or psychology of the arrested individual.

47. *Id.* at 8-20 - 8-21 (citing Susan Martin & Lawrence W. Sherman, *Selective Apprehension: A Police Strategy for Repeat Offenders*, 24 CRIMINOLOGY 55 (1986); Allan F. Abrahamse et al., *An Experimental Evaluation of the Phoenix Repeat Offender Program*, 8 JUST. Q. 141 (1991)).

48. Sherman, *supra* note 39, at 8-24 (citing James W. Shaw, *Community Policing Against Crime: Violence and Firearms* (1994) (unpublished Ph.D. dissertation, University of Maryland (College Park)); Ross Homel, *Random Breath Testing and Random Stopping Programs in Australia*, in DRINKING AND DRIVING: ADVANCES IN RESEARCH AND PREVENTION (R.J. Wilson & R. E. Mann eds., 1990)).

49. Sherman, *supra* note 39, at 8-31 (citing LAWRENCE W. SHERMAN ET AL., NAT'L INST. OF JUSTICE, THE KANSAS CITY GUN EXPERIMENT (1995)).

50. James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29-38.

51. *Infra* Part III.A.2.

52. E.g., Malcolm Klein, *Labeling Theory and Delinquency Policy: An Empirical Test*, 13 CRIM. J. & BEHAV. 47 (1986), cited by Sherman, *supra* note 39, at 8-16, 8-18.

53. Sherman, *supra* note 39, at 8-19 (citing several studies).

As to the specific crime-reduction benefits attributed to conscientious efforts to improve police relations with neighborhoods, Sherman explains: "Neighborhood watch" groups seem to be almost wholly ineffective, perhaps because cooperation is least likely to be found in high crime areas where distrust is widespread, although community meetings can help mobilize citizen participation in reducing crime. Police visits to citizens' homes are also helpful, at least among non-minority groups, because they facilitate intelligence gathering and otherwise elicit support for police. Providing information to the neighborhood rather than eliciting information from the neighborhood showed no sign of affecting or reducing crime when it was tried in Newark and Houston.⁵⁴ Finally, research consistently demonstrates that individuals who believe that the police treated them fairly and respectfully in their previous encounters are more likely to obey the law in the future.⁵⁵

Such specific, fact-based arguments are more persuasive than exclusive reliance on the broader contentions that significant changes in violence *must* be attributable to changed policing simply because there were no parallel changes in social conditions that could explain the drop in violence. In fact, as we have seen, there have been dramatic changes in social and economic factors, from the availability of jobs to an end to the growth of the crack market, which could explain a rapid reduction in violent crime.

Moreover, even small changes in social conditions can result in dramatic differences in crime or other social phenomena when there is a contagion effect.⁵⁶ A small increase in the availability of guns, for example, could readily result in a geometric increase in the number of young people feeling they need guns, and these increases could in turn lead to still further geometric increases. We simply cannot assume that big changes in criminal behavior can only be brought about by dramatic changes of some other sort.

C. Changes in Public and Political Attitudes Toward Policing

However strong one may find the evidence that new forms of policing are far more successful in reducing crime of almost every sort, other than the sale of drugs, the case has been strong enough and made persuasively enough to create a very substantial change in expert, official, and public expectations about the crime-reduc-

54. *Id.* at 8-25 - 8-26.

55. *Id.* at 8-26, 8-29 (citing an unpublished study).

56. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000).

tion and other functions of policing. One way of illustrating that change is to examine the change in notions about the types of actions for which the police should be held accountable.

South Africa is one of many countries that measures the effectiveness of its police by their capacity to solve reported crimes and the speed with which police respond to calls.⁵⁷ South African police claim, unreliably, to have reduced response time to an average of a very few minutes.⁵⁸ They are now concentrating on improving what happens next: detective work relying extensively on questioning of witnesses and suspects and on forensics.⁵⁹ In this framework, it makes sense that, in late 1999, the South African police would only reluctantly take a report from my friend, a driver whose rear window had been smashed with a brick during an attempted carjacking. Enough time had passed to ensure that the perpetrators had fled, and my friend could not herself provide a useful description of the suspects. There was simply no way to solve such a crime, and, because the police in South Africa are considered accountable for solving all crimes that have been reported, the police were not interested in recording information about the crime.

Law enforcement officials in the United States have learned that most victims do not call police promptly enough to enable them to catch the perpetrator at the scene of the crime and that detective work cannot be relied on to solve the great mass of street crimes.⁶⁰ With that awareness, our policing strategies in the last decade have turned heavily towards prevention of crimes, using the help of those in a neighborhood and focusing on general problems rather than individual events.

Faced with a situation like the attempted carjacking in South Africa, a police department with a prevention-focused strategy would

57. See, e.g., COMM'R OF THE S. AFR. POLICE, ANNUAL REPORT OF THE COMMISSIONER OF THE SOUTH AFRICAN POLICE 95 (1993) (employing percentage of crimes solved as the statistical gauge of police success).

58. See, e.g., Averil Millard, *South Africa—Security Industry/CCTV*, NATIONAL TRADE DATA BANK MARKET REPS., Aug. 1, 1999, available in LEXIS, Middle East and Africa Stories (“Many South Africans have said that they feel the police are too slow in their response to calls, or they do not respond at all.”).

59. See, e.g., Marina Bidoli, *Scorpions’ Hi-Tech Sting*, FIN. MAIL (S. Afr.), June 23, 2000, at 43 (reporting on new technology to help police officers streamline their efforts to track down suspects).

60. E.g., WILLIAM SPELMAN & DALE K. BROWN, *CALLING THE POLICE: CITIZEN REPORTING OF SERIOUS CRIME*, at xxiv (1984) (reporting that, of those crimes in which fast response could make a difference, “only 54 percent . . . were likely to be made in time enough, that is within five minutes, to afford police a reasonable opportunity to make on-scene arrests”).

want to record and analyze the information; together with information on recent and similar events at nearby locations, it would suggest a set of ways that the carjacking activity could be stopped. Some of these would be imaginative devices for making arrests and getting convictions, such as sending undercover operatives to the location or using leverage on people arrested for other crimes in that area to gather information. A problem-solving police department would also consider changing traffic patterns, eliminating the stop signs that make it possible to smash the window of a stopped car and immediately reach inside. It might also try to build a community's support for lawfulness, trust in the police, internal coherence, and "social capital"⁶¹ to the point that bystanders in the neighborhood would help deal with the problem.

Problem-solving policing has received a great deal of credit for reduced crime. As this has happened, elected officials and the public have come to hold the police responsible for reducing crime, and particularly violence, by dealing with the problems that create the opportunity or temptation to safely commit crimes that are dangerous and create fear. In terms of accountability, we have come to assume that the work of the police can be measured by the crime rate, not the arrest or conviction rate. Both New York and Boston have met that standard of accountability remarkably.

If the police are indeed coming to be held accountable for reducing crime, there is disagreement with regard to another question: to whom are they accountable? The South African Constitution requires a national police force, accountable to the nation as a whole.⁶² In the United States, city police departments are held accountable for the crime figures of cities as large as Boston, Chicago, and New York. But we also believe that they are accountable *to* local communities and *for* developing ways that local communities can impose social control themselves, assist the police, and focus the efforts of police and neighborhoods on issues that concern the neighborhood most. New York attempts to focus responsibility at the level of each of its seventy-five precincts. Chicago tries to devolve responsibility down to the level of a beat officer within a precinct. In short, we are coming to accept the fact that police are accountable to neighborhoods as well as to cities, and responsible

61. *E.g.*, ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (describing social capital as the collective value of all social networks and the norms of reciprocity that arise from those networks).

62. S. AFR. CONST. ch. 14, § 214.

for providing what the neighborhood wants as well as for assuring reduced danger and fear in the city at large.

II. THE NEW POLICING STRATEGIES

All this is the setting for a more detailed exploration of what is changing in policing, with a particular focus on three major cities at the forefront of change: Chicago, New York, and Boston. Each has developed its own variation of the new strategies of policing. Each has claimed that its variation is best and deserves the most credit either in terms of reduced crime, increased public acceptability of the police, or reduced fear. I will explore each of these strategies and compare their effectiveness with contemporary developments in the United Kingdom.

A. Chicago and New York

Chicago and New York have taken dramatically different directions in policing. It is revealing that both would claim to be operating in the mode of "community policing," a claim that is required for a city is to get funds from the federal government to increase the number of its police.⁶³ Both cities' models of policing grow out of the same historical rejection of three approaches to policing that had taken on primary importance: random car patrol, rapid response to calls for assistance, and skilled investigation of individual crimes.⁶⁴ Both reject what had become the accepted measure of success: arrest rates.

Not everything about the older model of policing is, in fact, wrong. Rapid response is necessary when the danger of violent crime is continuing. Reactive policing and skilled detective work are, in fact, necessary if the same perpetrator is likely to attack the same or related victims again. One of the top priorities of policing is, in the language of Scotland Yard, "preventing repeat victimisation."⁶⁵ Some significant measure of success in solving dramatic crimes is important to maintaining social mores, public morale, and confidence in the police and government. Still, conceding all this, the limits of reactive policing, and particularly the failures of ran-

63. 42 U.S.C. § 3796dd (1994).

64. George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, PERSPS. ON POLICING, Nov. 1988, at 1, 7-9 (identifying these approaches as pillars of the "reform era," and explaining the reasons why they fell into disfavor in the 1960s and 1970s).

65. REPORT OF THE COMMISSIONER OF POLICE OF THE METROPOLIS 6 (1998-1999).

dom patrol, rapid response, and detective work to meet expectations required that new strategies be adopted.

I have traveled with the police rapid response team ("flying squad") in Johannesburg as it rushed from emergency call to emergency call, usually in response to reports of burglaries. There, as in the United States, the perpetrator was always gone by the time the few minutes it took the police to arrive was added to the few minutes it took the householder to call after the departure of the burglar. Just as the South African police could not use detective work to solve the attempted carjacking described *supra* in Part I.C., they could not use it to solve these burglaries, or, in fact, many other crimes. Therefore, a different approach to policing is needed.

In the United States, an understanding of the ineffectiveness of traditional modes of policing, which had been established by careful experiments,⁶⁶ came to be reflected in experiments in neighborhood-based crime control.⁶⁷ These neighborhood-based approaches also addressed the dangers of friction between police and youth in crime-infested areas, dangers that had exploded in riots in the late 1960s. The new movements were conceptualized in 1979 in a seminal article by Professor Herman Goldstein calling for the police to go beyond merely fighting crime and responding to emergency calls for help and assume the responsibility for finding solutions to help prevent and reduce a broad range of problems faced by the community.⁶⁸ Communities across the country began experimenting with various applications of problem-solving policing.

In the 1980s, three other scholarly developments encouraged the problem-solving aspect of what was to become the new policing: the development of clear evidence linking disorder to fear of crime, the concept of "situational prevention," and the notion of "hot spots." The first will be discussed *infra* in connection with New York. The concept of situational prevention, which originated in England, is that implementing measures, tailored to particular

66. *E.g.*, GEORGE L. KELLING ET AL., THE KANSAS CITY PREVENTIVE PATROL EXPERIMENT: A SUMMARY REPORT 1-3 (1974) (recounting an empirical study that demonstrated, contrary to conventional wisdom of the period, that changes in police patrol policy had no effect on crime).

67. This sense that traditional modes of policing were ineffective also coincided with the rise of privately funded security. The causal link between the former and the latter is certainly open to question, however, as privately funded security has grown inexorably for many years now. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1175 (1999).

68. Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME AND DELINQUENCY 236 (1979).

crimes and locations, that make the commission of the particular crime more difficult, risky, or less rewarding, will discourage the commission of that crime.⁶⁹

The theory of hot spots developed from research and observations indicating that a disproportionate percentage of crime is usually concentrated in small geographical areas, even specific addresses or locations.⁷⁰ Identifying hot spots was found to have two benefits. First, identifying hot spots may allow police to apply the concept of situational prevention to increase the stakes for criminal or disorderly behavior in the hot spots, through increasing police presence in a particular area or increasing community efforts to watch an area. Second, identifying hot spots allows policing analysts to use computer technology that can combine the hot spot locations with detailed maps of the surrounding area to attempt identification of location features that may help explain the reason for the high rate of crime.⁷¹

Beginning in 1988, under the leadership and sponsorship of Professor Mark Moore and then-Attorney General Edwin Meese, a distinguished group of police chiefs, mayors, academics, and others met for five years and further developed the “twin poles of modern policing”: (1) encouragement of the participation, at every stage and in almost every way, of the neighborhood being policed; and (2) addressing crime as a problem to be solved prospectively, not as an event to be explained historically by retrospective investigation and, to whatever extent possible, then remedied by trial and punishment.⁷²

1. *Chicago*

The Chicago Alternative Policing Strategy (“CAPS”) started operating in prototype districts in April 1993. Chicago emphasized the first pole—neighborhood involvement—more completely and enthusiastically than almost any other city. The immediate scholarly background for this neighborhood focus has been the work of

69. Ronald V. Clarke, *Situational Crime Prevention: Its Theoretical Basis and Practical Scope*, in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 225 (Michael Tonry & Norval Morris eds., 1983).

70. Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 1 (1989).

71. WESLEY G. SKOGAN ET AL., ON THE BEAT: POLICE AND COMMUNITY PROBLEM-SOLVING 16-18 (1999).

72. George L. Kelling, *Police and Communities: The Quiet Revolution*, PERSPS. ON POLICING, June 1988, at 1, 8 (describing the Executive Session on Policing and its members and noting a “quiet revolution” in American policing rooted, in part, in community involvement and prospective tactics).

Professor Wesley G. Skogan.⁷³ The more remote scholarly support is the Chicago criminological tradition of emphasizing the relation of the demographic and sociological conditions of a neighborhood to its rate of crime.⁷⁴

Current studies by Robert J. Sampson and Felton Earls have added greatly to this tradition.⁷⁵ The studies show convincingly that the disparity in crime rates within areas of Chicago can be largely accounted for by measurable neighborhood differences, including, prominently, differences in those forms of social capital reflected by constructive involvement in the concerns of neighbors—particularly the willingness to assist in the upbringing of children. The development of social capital can be encouraged by working with neighborhood organizations or helping to develop them. It can be discouraged by allowing fear to force individuals to retreat into their own houses, away from groups and public places.

The form of policing in Chicago relies extensively on the neighborhood to define the focus of police activities as the police attempt to support social control. If the neighbors are most concerned about gangs gathering on the street or noise at night, then these should become police priorities. There is, of course, a risk that the concerns expressed by the neighbors are shaped by assumptions about what the police can and cannot do, including doubts about police capacity to reduce many forms of violence. Still, there is a powerful democratic claim that neighborhood concerns should be respected as well as an instrumentalist argument that respecting them empowers the neighborhood, building social capital and, with that, social control.

This has not been just philosophy. One of CAPS' unique characteristics was the extent to which there was actual, sustained police-community involvement in identifying problems of concern to the

73. E.g., WESLEY G. SKOGAN & MICHAEL G. MAXFIELD, *COPING WITH CRIME: INDIVIDUAL AND NEIGHBORHOOD REACTIONS* (1981); WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990).

74. E.g., CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY IN URBAN AREAS* 108 (1942); Robert E. Park, *Human Ecology*, 42 *AM. J. SOC. REV.* 1 (1937); Ernest Burgess, *The Growth of the City: An Introduction to a Research Project*, in *THE CITY* 47 (Robert E. Park et al. eds., 1925).

75. R. J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, *SCIENCE*, Aug. 15, 1997, at 918-24; R. J. Sampson et al., *Beyond Social Capital: Spatial Dynamics of Collective Efficacy For Children*, 64 *AM. SOC. REV.* 633 (1999).

community.⁷⁶ Community involvement took two forms. The most fundamental form of neighborhood involvement was the formal practice of regular meetings between residents and police officers in every police "beat."⁷⁷ The practice of regular neighborhood meetings was taken far more seriously in Chicago than in most cities with community policing, where public meetings were limited mostly to initial, kick-off meetings and occasional, poorly-attended successors.⁷⁸

Beat meetings, designed to identify problems of concern to the particular community and formulate solutions, generally were held once a month in church basements and park buildings.⁷⁹ The CAPS program encouraged participation of neighborhood organizations such as block clubs, community organizations, client-serving organizations, churches, and merchants' associations in the monthly beat meetings, as well as participation by individual residents. Research on the CAPS program indicates that different communities do, in fact, have different priorities and concerns.⁸⁰ Communities also differed significantly in their willingness to become engaged with the CAPS efforts.⁸¹

Another way CAPS attempted to use the community to identify problems, define priorities, identify resources and solutions, and evaluate the effectiveness of local CAPS efforts was through establishment of district advisory committees.⁸² In addition to meeting with district commanders and staff on a monthly basis, committees were intended to establish subcommittees to help with the identification and evaluation roles of the committees, concentrating on

76. In the CAPS model, a "problem" is understood as a recurring situation or series of related incidents (unlikely to be resolved on their own) that affect a significant portion of the community and can possibly be affected by the resources of the community and the police. SKOGAN ET AL., *supra* note 71, at 35.

77. For CAPS purposes, the city's twenty-five police districts were divided into 279 beats, with nine to fifteen beats per district. In 1990, the average beat included 3600 households, or about 9500 residents. *Id.* at 58.

78. WESLEY G. SKOGAN & ELIZABETH M. HARTNETT, *COMMUNITY POLICING, CHICAGO STYLE* 113 (1997).

79. *Id.* at 55.

80. SKOGAN ET AL., *supra* note 71, at 30.

Latinos were distinctly concerned about gangs and poor people about the physical decay of their neighborhoods. Concern about social disorder was highest in the middle of the income distribution—above the neighborhoods that were blighted by drugs and gangs but below the best-off places, which had fewer problems of all kinds to report.

Id.

81. *Id.* at 30-31.

82. *Id.* at 29.

specific needs or areas. In keeping with the flexible, community-tailored focus of the CAPS vision of community policing, the makeup of the committees was not established centrally. Rather, committees were established by district commanders, based on their view of the most appropriate membership for the district. Committee members included those active in neighborhood schools, businesses, churches, and other institutions active in each neighborhood. Procedural guidelines such as those governing selection of officers, term limits, and voting rights, however, were established by the CAPS management team.

There are organizational implications of emphasizing accountability to neighborhoods. The Chicago policing pushes much of the responsibility in the organization down to the beat officer, with an expectation that other department resources and personnel will assist beat officers in their new role.⁸³ One of the first responsibilities of the "beat team"⁸⁴ is to collect beat-specific information, known as a "beat profile," that is compiled as a tool for problem-solving and new officer orientation. A beat profile includes information on community organizations and resources; descriptions of problem areas and abandoned buildings; identification of twenty-four hour businesses, bars, banks, and schools; and other relevant information gathered from specialized units, such as special gang units, with knowledge of the beat.⁸⁵

Another new responsibility shared by a beat team is documenting in a "beat plan" the three or four key problems they will concentrate on in a particular beat. This focuses attention on the issues until they are resolved, as well as the officers' plans for solving the problems.⁸⁶ In formulating the beat plans, officers are expected to consider resident input that the officers gather from attendance at beat meetings (another new responsibility). Although the advantages of the beat focus are obvious, one great disadvantage, when compared to the New York system, is that resources at the beat officer's disposal may be too limited to address a crime problem that may be much larger than a single beat.

At the same time, the Chicago approach invites the police to address non-crime problems as well as crime. The beat officer and his

83. TOGETHER WE CAN: A STRATEGIC PLAN FOR REINVENTING THE CHICAGO POLICE DEPARTMENT 17 (1993); SKOGAN ET AL., *supra* note 71, at 59.

84. Beat teams consist of the officers who work in the same beat covering all three, eight-hour shifts. Each team has roughly nine officers. SKOGAN ET AL., *supra* note 71, at 60.

85. *Id.*

86. *Id.* at 41, 47.

superiors focus on problem-solving, including community problems that are not initially the responsibility of the police, but are within the control of the city government. The police officer is akin to an ambassador from the central government of Chicago, able to call on other parts of the government for a variety of services that can improve the quality of life in the neighborhood and build social capital at the same time.⁸⁷

This notion of problem-solving, which is addressed to a wide range of problems of the neighborhood as defined by those living there, contrasts importantly with a strong emphasis on rates of crime. A broader focus would likely have a less dramatic effect on violent crime rates, but more satisfactory effects in terms of community acceptance and, through that, on rates of fear. However, evidence measuring acceptance by the community and the effectiveness of the CAPS program is mixed. Wesley G. Skogan led a research effort to evaluate the CAPS program, focusing on fifteen of the 279 police beats.⁸⁸ In terms of implementation of problem-solving, the overall assessment by the evaluation team determined that of the fifteen beats, “four were doing an excellent job, five were fielding reasonable programs, two were struggling to make the grade and four failed to implement much problem solving at all.”⁸⁹ The reasons for relative success or failure seem inextricably connected to factors such as the personalities, enthusiasm, and leadership capabilities of the officers.

The variations between the attitudes and efforts of the officers in the “worst” and “best” beats, in terms of implementation of problem-solving, are dramatic. The officers and sergeant in the beat that the evaluation labeled as the “best” actively participated in beat team and community meetings; developed, implemented, and followed through with problem-solving strategies; utilized CAPS procedures and city resources; and responded to community priorities. Interestingly, this beat’s population ranked last of all the beats in terms of being supportive of the police.⁹⁰ In great contrast, the “worst” beat team’s sergeant and officers had negative or apathetic perspectives on their capacity to effect change, the role of community beat meetings (seeing them as a forum for complaining about the police), CAPS paperwork requirements, and community policing in general (viewing it as public relations). Participation

87. *See id.* at 36.

88. *Id.* at 30.

89. *Id.* at 191.

90. *Id.* at 192–94.

and attendance at beat team meetings were sparse and unproductive; and the officers and sergeant did not utilize the resources available to them, and utilized CAPS procedures only nominally, if at all.⁹¹ These patterns are consistent with the other “best” and “worst” beats.⁹² Other evidence of citizen reactions is discussed after describing New York’s new policing strategies.

2. New York

Wesley G. Skogan also had played an important role as an intellectual father of one of the three central characteristics of New York’s policing. It was his argument in the 1990 book *Disorder and Decline*⁹³ that gave credibility to a groundbreaking article by James Q. Wilson and George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, published in the *Atlantic Monthly* almost two decades ago.⁹⁴ The central argument of *Broken Windows* was that disorderly conduct on public streets, something which the police certainly can control, can undermine social control by frightening, or otherwise discouraging, responsible citizens from being in public places and, at the same time, can encourage criminals to believe that crime would be safe because “obviously, no one at the scene of disorder cares.”⁹⁵ The exaggerated perceptions of danger created by disorder were, in themselves, a costly source of fear that disturbed urban living.

As a matter that was secondary in theory but, perhaps, primary in practice, “Broken Windows” policing also justified very large numbers of “frisks” and misdemeanor arrests, which had the twin benefits of making the illegal carrying of guns far more risky and increasing stops of dangerous people who were wanted for other reasons. The case for Broken Windows policing thus relies on *both* the fact that disorder creates fear and fear eliminates social control, inviting activities that may only take place in the absence of social control, *and* the fact that focusing on disorderly offenses allows and invites aggressive street policing.

This model is a form of problem-solving policing, intended to build social control as well as to use the capacities that the police already have to deal with dangerous people. At the same time, it is unlike the Chicago plan in its lack of dependence on any form of

91. *Id.* at 194–95.

92. *See id.* at 195–205.

93. SKOGAN ET AL., *supra* note 71.

94. Wilson & Kelling, *supra* note 50.

95. *Id.*

fact-finding to determine a neighborhood's definition of problems or any major effort to encourage community participation in their solution. The New York style of policing involves far more independent problem-solving by the police than Chicago's policing, although one of its pillars is the belief, deeply embedded in the Broken Windows theory, that disorder is a major concern of most responsible people in any neighborhood.⁹⁶

While the Broken Windows theory that undergirds this strand of New York's strategy has won nearly universal acclaim among scholars,⁹⁷ it has not been without detractors. One especially effective critic has been Professor Bernard E. Harcourt. In a 1998 article in the *Michigan Law Review*, Harcourt replicated Skogan's analysis and took issue with many of his conclusions. Specifically, he found that certain types of crimes, including rape, purse snatching, and pickpocketing, are simply not significantly related to levels of disorder.⁹⁸ Moreover, most other types of crime were not related at a statistically significant level when poverty, stability, and race were held constant.⁹⁹ Harcourt similarly took issue with other empirical evidence cited by proponents of the Broken Windows theory,¹⁰⁰ concluding that the data simply do not support the hypothesis.¹⁰¹

A second major strand in New York's policing strategies is the energetic, imaginative use of the full range of police powers and

96. E.g., Randy Kennedy & Alan Feuer, *Watchful vs. Worried; Crime Evokes City's Bad Old Days, But Not Old Fears*, N.Y. TIMES, May 28, 2000, § 1, at 27 (noting that the Broken Windows theory, which posits a close link between crime and low-level civic disorder, has been a "big influence on the style of policing that evolved under [Mayor Rudolph] Giuliani").

97. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 293 (1998) (stating that "it is today practically impossible to find a single scholarly article that takes issue with the quality-of-life initiative. It stands, in essence, uncontested—even in the legal academy").

98. *Id.* at 327.

99. *Id.* at 327-28 (finding no significant relationship between disorder and both burglary and physical assault). Indeed, robbery was the only crime significantly related to disorder, once poverty, race, and stability were held constant. But, when Harcourt removed a cluster of five Newark neighborhoods from the data, and held poverty, race, and stability constant, he found no relationship between disorder and robbery victimization. *Id.* at 328-29.

100. *Id.* at 329-31 (finding inconclusive a similar study on the relationship between crime and disorder) (citing Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 L. & SOC. REV. 163 (1988)); Harcourt, *supra* note 97, at 331-39 (suggesting a number of factors, as alternatives to the quality of life initiative, that explain the decline in New York City's crime rates).

101. Harcourt, *supra* note 97, at 331.

capacities to deal with crime problems as they arise. Deputy Commissioner Jack Maple described the four crucial steps of an effective police strategy as accurate and timely intelligence, rapid deployment, effective tactics, and relentless follow-up and assessment.¹⁰² A crime problem might be solved by moving more officers into the area, by addressing its causes, by putting pressure on people subject to arrest and conviction to provide evidence, by reducing safe opportunities for crime, or in any of a dozen other ways. The object of this second strand of New York policing is to ensure that every alternative use of every available police capacity is considered in order to promptly address what has been identified as a significant crime problem.

The third notable strand of New York policing is the much admired and, in fact, remarkable system of management by results called Compstat.¹⁰³ To ensure the conditions of the second strand—early identification of the problems, careful and imaginative review of tactics involving all police capacities, and very prompt response—requires assisting precinct commanders with ideas and, in the New York strategy, powerfully motivating them with the risk of embarrassment or, worse, loss of the command of a precinct. Both of these objectives are accomplished by requiring each of the seventy-five precinct commanders to appear at a very large meeting of headquarters staff, other precinct commanders, and prosecutors and be prepared to be examined on any adverse change in crime statistics in the precinct and to discuss what is being done about it.¹⁰⁴ The pressure is substantial, and may be unnecessary.¹⁰⁵ Part of New York's message may be simply that the precinct commander should take steps to release and encourage the natural inclinations of the police officers to go after crime aggressively.

Although close cooperation with neighborhood groups and reliance on neighborhood leadership has not been a focus of the new policing in New York, there occasionally have been experiments in these areas. Even at its most responsive to communities, however,

102. Jack Maple, Editorial, *Brutality Isn't Part of New Tactics*, N.Y. TIMES, Sept. 21, 1997, § 13, at 17.

103. David C. Anderson, *Crime Stoppers*, N.Y. TIMES MAG., Feb. 9, 1997, at 47 (describing how each precinct's crime statistics are electronically inputted into the Compstat system each week, allowing senior officials to analyze police and criminal activity throughout the city in a timely fashion).

104. *Id.*

105. Boston's management system examines what is happening and what could be done in a far less confrontational way.

it has never approached the aims or practices of Chicago's CAPS program.

3. *Results in New York and Chicago*

What do we know about the results in New York and Chicago? The experiences in both cases remind us that results on the street may depart from strategies. Sometimes Chicago could not develop neighborhood policing in one beat, although it was successful in an adjacent beat. New York has experienced a number of very dramatic and inflammatory instances of police abuse, which were certainly not planned as part of its strategy,¹⁰⁶ and its efforts at developing creative community relations in the 75th Precinct also seem exceptional and far from integral to its core strategies.¹⁰⁷ Moreover, in each case, the studies evaluating each city's new policing approach were conducted within a very few years of the initiation of the strategy; that may be too soon to know the long-term consequences. But it is important to look at what we know now about two dimensions: effectiveness in reducing crime and the ability of the police to develop trust within the community being policed.

In 1998, two arms of the Department of Justice (the Office of Community-Oriented Policing Services and the Bureau of Justice Statistics) produced a groundbreaking victimization survey of residents of twelve cities, including Chicago and New York.¹⁰⁸ Questions went both to the level of crime, fear, and disorder and to the attitudes of citizens toward the police.

New York had more serious crime problems than Chicago but was making more progress in dealing with them. In 1998, Chicago

106. E.g., Jeffrey Rosen, *Excessive Force*, THE NEW REPUBLIC, Apr. 10, 2000, at 2427 (suggesting that defenders of the zero tolerance policy against crime believe that it has an inevitable side effect of aggressive policing); George L. Kelling, *Policing Under Fire*, WALL ST. J., Mar. 23, 1999, at 22 (suggesting that "root-cause liberals" feel that police perhaps can reduce crime, but only at a cost of abusing citizens); Jack Newfield, *Rudy, It's Time to Listen to This Voice of Reason*, N.Y. POST, Feb. 16, 1999, at 20 (quoting Urban League President Dennis Walcott as saying that "there needs to be a balance between aggressive police work and respect for civil liberties and dignity of the people who get stopped and searched"); Liza Mundy, *Broken Windows*, WASH. POST MAG., June 11, 2000, at 4 (commenting that ordinary citizens are appalled at how aggressive policing led to the shooting deaths of two unarmed black men).

107. Harvey Simon & John Buntin, *The East New York Urban Youth Corps and Community Policing: A New Initiative in the "Dead Zone"* (1999) (unpublished manuscript written for John F. Kennedy School of Government Case Program); John Buntin, *The Community Security Initiative Gets Underway* (1998) (unpublished manuscript written for John F. Kennedy School of Government Case Program).

108. COMMUNITY SAFETY, *supra* note 13.

had 68 violent victimizations per 1000 residents twelve-years-old or older; in New York, there were far more, with a rate of 85 per 1000.¹⁰⁹ The black violent victimization rate in Chicago in 1998 was 50 per 1000 citizens for violent crime; in New York it was 123 per 1000.¹¹⁰ A violent victimization in New York was almost twice as likely to involve a weapon.¹¹¹ But during the period 1993-97, homicides in Chicago decreased by about 10%.¹¹² In New York, homicides declined by more than 60% from 26.5 per 100,000 to 10.5 per 100,000.¹¹³

In both Chicago and New York in 1998, residents were far more likely to fear crime in their city than in their neighborhood or on their street.¹¹⁴ Obviously, the likelihood fears are exaggerated increases as firsthand evidence declines. Both in respondents' neighborhoods and in their cities, there was slightly more fear in Chicago than in New York.¹¹⁵ Moreover, 25% of the respondents in Chicago said they were more frightened than they had been a few years earlier while only 15% in New York were more frightened.¹¹⁶

As might be expected with Broken Windows policing, a slightly smaller percentage of the population in New York reported public drinking or drug use, public drug sales, vandalism, graffiti, prostitution, and panhandling in their neighborhood.¹¹⁷ In Chicago, 36% of the residents said that conditions of disorder or activities of the sort I have just described made them feel less safe.¹¹⁸ This was true of only 29% in New York.¹¹⁹

Meanwhile, 74% of the residents in Chicago reported themselves either very or somewhat fearful of crime in their city.¹²⁰ Only a somewhat smaller figure, 68%, reported the same in New York.¹²¹ While most people in both cities felt that their fear had not

109. *Id.* at iv.

110. *Id.* at 3 tbl.1.

111. *Id.* at 5 tbl.5.

112. *Id.* at 9.

113. *Id.*

114. *Id.* at 10.

115. *Id.*

116. *Id.* at 12 tbl.10.

117. *Id.* at 15 tbl.16.

118. *Id.* at 16 tbl.17.

119. *Id.*

120. *Id.* at 18 tbl.20.

121. *Id.*

changed much, there was a somewhat greater percentage of those who felt reduced fear in New York.¹²²

Reports on trust-building relations with the police were also revealing, but cut the other way: 67% of residents in Chicago and only 51% of New York residents said the police were doing community policing.¹²³ Perhaps relatedly, 38% of Chicagoans, compared to 23% of New Yorkers, had heard about a meeting concerning crime in their neighborhood in 1998.¹²⁴ Along all the following dimensions, a somewhat higher percentage of those from Chicago, than from New York, had contact with the police: casual conversation, calling the police for service, providing information to the police, reporting a crime to the police, asking for advice from the police, and participating in community activity with the police.¹²⁵ A significantly higher percentage of New York residents felt there was an increased police presence in their neighborhood; it just took a different form.¹²⁶

The Chicago police elicited more satisfied reactions from the victims of violent crimes than New York police and a significantly higher percentage of Chicago residents said that the police were doing a lot of work with the neighborhood residents to prevent crime and safety problems.¹²⁷ This is far more at the heart of the Chicago strategy than the New York strategy. In Chicago, 73% of city residents were familiar with the term "community policing,"¹²⁸ as compared to just 50% of New Yorkers, a revealing fact in itself.¹²⁹

One survey question combined concern about crime and concern about the police. Residents in both cities were very satisfied with local police.¹³⁰ Not surprisingly, blacks in both Chicago and New York were less satisfied with the local police than were whites.¹³¹ But despite several notorious incidents of police brutality in New York, blacks there were more satisfied with the local police than were blacks in Chicago, by a margin of 77% to 69%.¹³²

122. *Id.*

123. *Id.* at 28.

124. *Id.* at 22 tbl.26.

125. *Id.* at 23 tbl.20.

126. *Id.* at 24 tbl.31.

127. *Id.* at 24 tbl.32.

128. *Id.*

129. *Id.*

130. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, at 110 tbl.2.27 (1999).

131. *Id.*

132. COMMUNITY SAFETY, *supra* note 13, at 25 tbl.34.

B. Boston

Boston was not part of the Department of Justice survey of twelve cities. Its strategies are different from those of both New York and Chicago—different not only in attempting to combine parts of the strategies of each other city, but also in making very different use of problem-solving than New York and a very different use of neighborhood cooperation than Chicago. The rate of homicide reduction in Boston in the 1990s was nearly as dramatic as that in New York.¹³³

It is worth reviewing the events that led Boston to embrace the community-policing model. Already widely criticized for overly aggressive street patrols, in the late 1980s the Boston Police Department encountered public outrage when it was revealed that officers, faced with the sudden emergence of crack cocaine, were indiscriminately stopping and searching young black men. The “stop and frisk” scandal came to a head in the fall of 1989, when, based on widespread suspicion that police routinely used unconstitutional searches and seizures, a Dorchester judge suppressed evidence he believed had been obtained improperly.¹³⁴

That same year, Carol Stuart, a pregnant white woman, was murdered near a largely African American part of Boston.¹³⁵ Her husband Charles, a witness to the crime, reported that an African American male committed the murder. Based on this account, the Boston Police Department aggressively pursued suspects from the area, eventually eliciting witness statements that incriminated a local black resident. These charges were shown to be false when Charles Stuart was later implicated as the murderer. Stuart killed himself before the investigation could be completed. The widespread reports of police abuse, coupled with the appearance of racism within the department, exacerbated public hostility towards the police, particularly within the African American community.

133. Fox Butterfield, *Cities Reduce Crime and Conflict Without New York-Style Hardball*, N.Y. TIMES, Mar. 4, 2000, at A1 (noting that, according to Professor Blumstein, New York's homicide rate fell 70.6% from 1991 to 1998, while Boston's rate fell 69.3% during the same period).

134. E.g., Doris Sue Wong, *Search-on-Sight Judged Illegal*, BOSTON GLOBE, Aug. 30, 1989, at B1 (reporting that Suffolk Superior Court Judge Cortland A. Mathers dismissed weapons possession indictments against two suspected gang members, because the evidence seized pursuant to the search-on-sight policy had been illegally obtained).

135. E.g., Michael Rezendes, *Mayor's Reputation as Racial Healer Gets Some Tarnish*, BOSTON GLOBE, Sept. 10, 1991, at 1.

Recognizing that it needed approaches that were more effective and less divisive, the Boston Police Department implemented a variety of problem-solving and community-policing strategies. The most notable problem-solving strategy in Boston is what David Kennedy, of Harvard University's John F. Kennedy School of Government, has called "Pulling Levers."¹³⁶ In contrast to Broken Windows, it has not made misdemeanor arrests or stop and frisks a key to reduced homicides by increasing the risks of carrying guns, the most lethal weapon. Pulling Levers is instead based on a form of deterrence that is new and yet grounded in a very old theory.

For some centuries, it has been accepted that certainty and swiftness of punishment are more likely to be effective in changing conduct than longer penalties imposed without certainty or speed. This may be particularly true for youthful, violent offenders who are likely to discount sharply both the chance of getting caught and the costs of future punishment and who may know little about actual punishments. Working with the Boston police, Kennedy found, from a careful review of homicide files, that violence in Boston was heavily concentrated, on both the perpetrator's and the victim's side, in gang members and among those with long arrest records.¹³⁷ Kennedy also found, not surprisingly, that the identities of youth with these characteristics were well-known to the police.¹³⁸ (In fact, police in many cities believe that the number of dangerous perpetrators is relatively small and that their identities are known.)

The Boston police discovered that youth in the dangerous categories potentially were subject to a large number of sanctions and inconveniences of one sort or another. In Kennedy's words:

The Boston Gun Project Working Group observed that gangs and gang members left themselves open to an enormous range of sanctions, exactly because they were so highly criminal. Gang members committed large numbers of crimes that were open to ready police enforcement: they sold drugs on the street and they committed large numbers of disorder offenses like drinking and using drugs in public, trespassing, and the like. Gangs and gang members were often the subject of longer-term enforcement attention, such as undercover drug investigations. . . . They were frequently on probation, sometimes on parole, and they routinely violated their conditions of probation and parole, which

136. David M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449 (1997).

137. *Id.* at 452.

138. *Id.*

could include curfews, area restrictions, restrictions on how many and which people they could associate with, abstinence from alcohol and other drugs, and the like. They were often out on bail awaiting trial or sentencing, with similar conditions which were similarly frequently violated. Juvenile offenders were often under formal Department of Youth Services (DYS) supervision but still living in the community. And gangs and gang members were often implicated in large numbers of "cold" cases such as unsolved assaults and homicides.¹³⁹

Therefore, the threat of swift and certain sanctions could be conveyed in person to the individuals whose conduct had to be changed. Absent evidence of a serious crime, which could be difficult to find, the police otherwise might not be able to prevent all the anti-social or criminal conduct of an individual specifically warned of the amount of attention and the range of sanctions to which he would be subject. But the sanctions proved adequate to prevent any particular type of conduct, for example, violence. Indeed, violence often may be something that young people would like to avoid if it would be possible to do so without losing face. In any event, violent activity was less important and more easily abandoned than profit-making activities, which would be threatened by police attention.

Thus, the overall strategy is clear and persuasive. If, as was true in Boston, an identifiable group of individuals is known or reasonably believed to be responsible for a large percentage of a particular type of crime, and if they are individually subject to a wide range of sanctions, then it should be possible to prevent them from engaging in any type of criminal behavior that is not of central importance to them by making clear, in face-to-face contact, that all available sanctions will be brought to bear if they engage in the prohibited conduct. Violent youth fall within that category, as do the crimes of violence that Boston was determined to stop. The strategy would work so long as the critical neighborhoods—those that were home to the youth subject to highly specific and threatening orders to give up violence—were supportive and did not regard the policing strategy as unfair or discriminatory. Finding that support, which New York had done much less well, was one of the objectives of the other, neighborhood-based, part of Boston's policing strategy.

Crucial to Boston's efforts to develop community support was the police department's partnership with the Ten Point Coalition

139. *Id.* at 461 (citation omitted).

(the "Coalition"), a prominent group of local black clergy, members of which had made a name for themselves by taking their ministries to Boston's most dangerous streets.¹⁴⁰ Despite historically tense relations, the two groups began to work together once they recognized their mutual need: the ministers' attempts to reach at-risk youth were undermined by committed offenders who continued to run the streets, while the police department's plans to implement community-based strategies depended on the participation and acceptance of community members who did not trust them. Much of Boston's success in lowering crime and developing community support arises from the credibility the department developed by virtue of its association with the Coalition. This credibility has endured in large part because the Coalition, while cooperative, has remained a distinct entity not afraid to criticize police action.¹⁴¹ As a community watchdog, the Coalition has helped keep the police accountable and deterred abuses akin to those that have plagued New York in recent years.

The community-based activities, which are an integral part of Boston's strategy, can be illustrated by practices in the Dorchester neighborhood, a policing precinct of which the Boston police are particularly proud. They take two forms: (1) modes of serious and continuous consultation with citizens; and (2) demonstrations of concern for the well-being of young people getting in trouble, instead of just recrimination.

Serious consultation began with citywide strategic planning with local priorities to be set by teams in each police district that were led by the district commander, but the membership of which was divided between police and concerned, involved citizens. Real power was devolved from headquarters so that the district commander could work in close association with citizen stakeholders. In the Dorchester district, for example, Captain Robert Dunford gives his neighborhood advisory council significant influence, even over budget allocations and patrol plans.¹⁴² Within each district,

140. *E.g.*, Charles A. Radin & Jamal E. Watson, *Activists Revisit Gang Strategy: Some See Complacency As Youth Violence Increases In Boston*, BOSTON GLOBE, Sep. 5, 2000, at A1.

141. *E.g.*, Judy Rakowsky, *Black Leaders Assail Martin, Urge Tougher Hate-Crimes Efforts; DA Defends Office's Record, Rebuts Report*, BOSTON GLOBE, June 14, 2000, at B3 (explaining that Coalition member Rev. Eugene Rivers criticized police for a 1997 change of policy in classifying hate crimes).

142. The two paragraphs that follow draw on Evan S. Reynolds, *Neighborhood Policing in Boston: A Dorchester Case Study* 9-13, 23-36 (Apr. 30, 1999) (unpublished manuscript, on file with author).

“team leaders” are assigned specific responsibility for the unique problems of a particular beat.

The neighborhood orientation in Dorchester is maintained on a daily basis by four community service officers, each of whom is assigned to interact with neighborhood groups in a particular beat—explaining, learning, relaying concerns, and recruiting participation in a shared “Project Safeguard” to provide neighborhood safety. Finally, even prosecution is made subject to community influence in still another program, the Dorchester Safe Neighborhood Initiative, which is counseled in part by an advisory board consisting of local residents as well as police and prosecutors.

The second strand of Boston’s strategy is a demonstrated concern for the well-being of youth already getting into trouble. What the Boston police avoid is a sense that they are the dangerous enemies of all but the well-behaved among youth in struggling neighborhoods. Adopting the mixed concerns of relatives of youth who form much of the community, the police are determined to make the life of salvageable youth better, not harder. Thus, Commissioner Paul Evans uses a federal block grant to pay for clinical social workers, who are attached to police districts such as Dorchester, to advise, support, and introduce to useful programs those youth who have been referred to them by police.¹⁴³ They maintain confidentiality and appear in court for the youth where this seems appropriate to the case. Districts like Dorchester also have juvenile justice “roundtables” that involve the police, district attorney, schools, social services, and others in regular discussions of what is happening in the lives of certain troubled youth in an effort to find help for them and to coordinate governmental responses.¹⁴⁴

The Boston strategy had organizational implications. While some New York precinct commanders found Compstat meetings harsh and threatening, Commissioner Evans expected district commanders in Boston to carry out *their* plans in highly decentralized ways, and that was communicated through meetings that were less confrontational than those in New York.¹⁴⁵ His role was to decide whether to approve a plan and then support and monitor it.

143. *Id.* at 14-15.

144. *Id.* at 20-23.

145. *Id.* at 3 (reporting that Commissioner Evans pursued decentralization as an avenue toward accountability).

In sum, by taking a hard line against those individuals who commit most crime, and working in tandem with critical neighborhoods, Boston was able to achieve dramatic crime reductions.

C. England and Wales

One final strategy, distinct but related to those I have described, deserves attention as well, for it combines central elements of all three strategies discussed thus far. Like Chicago's strategy, the crime legislation introduced by British Prime Minister Tony Blair's Labour Party relies powerfully on the wishes of neighborhood residents and depends upon them to initiate action.¹⁴⁶ Like New York, Britain focuses attention on disorderly and fear-generating actions that are threatening to individuals; but instead of using statutes that broadly prohibit a type of conduct (such as drinking alcoholic beverages on the street), Britain has turned to far more specific requirements that are addressed only to certain named individuals.¹⁴⁷ Like Boston's strategy, the new provisions specifically target troublesome individuals who are not subject to present prosecution because of lack of evidence of an immediate crime.¹⁴⁸ But the British prohibitions include efforts to deter behavior far less serious than the lethal violence that was the target of Boston's strategy.¹⁴⁹

England and Wales' Crime and Disorder Act of 1998¹⁵⁰ creates something called an "anti-social behavior order." Either the police or the local government can apply for such an order from a magistrate's court. The defendant does not have to be present at the proceedings, which are civil rather than criminal and operate under a preponderance of the evidence rule. If the defendant is found to have acted "in a manner that caused, or was likely to cause harassment, or alarm, or distress to one or more persons not of the same household as himself" and if the defendant cannot establish that his or her behavior was reasonable in the circumstances, a court order to protect the people in the local government area for a mini-

146. Andrew Rutherford, *An Elephant on the Doorstep: Criminal Policy Without Crime in New Labour's Britain*, in *CRIMINAL POLICY IN TRANSITION* 36, 64 (P. Green & A. Rutherford eds., forthcoming 2000).

147. *Id.* at 37.

148. *Id.* at 66-67.

149. *E.g.*, Russell Jenkins, *Peeping Tom Jailed Under New Law*, *TIMES* (London), June 23, 2000, at 7 (describing a mandatory jail sentence for subsequent crimes committed by sex offenders, who are required by the Crime and Disorder Act to register with law enforcement).

150. Crime and Disorder Act 1998, Royal Assent 27 (1999).

mum of two years (with no maximum) is to be issued, prohibiting the individual from doing anything or being anywhere described in the order. Violating the order without a reasonable excuse is an indictable offense, which carries as much as a five-year prison term.

There is no requirement that the defendant have intended to harass or to cause alarm and distress. Nor is there any requirement that the alarm or distress be "serious." Moreover, the activities giving rise to the order are intended to be broader than the acts prohibited by the criminal law. In effect, a magistrate's court can deal with people it determines to be engaged in frightening behavior by developing an injunctive law of its own, a violation of which is punishable criminally. The primary explanation for bypassing general requirements of the criminal law in this way is that there are courses of conduct that involve an accumulation of events, none of which is itself criminal but which together warrant severe measures.¹⁵¹ The resulting deterrence is even more specific and focused than Boston's Pulling Levers.

III. THE PROBLEM OF LEGITIMACY

How could anyone complain about such imaginative and apparently successful policing as has taken place, for example, in New York? The answer is that, in exchange for quite remarkable improvements in personal security, we are accepting reductions in democratic control and thus the legitimacy of the purposes for which the powers of the police can be used. We are endorsing significant reductions in control over the discretion of the police in choosing specific targets. We are moving toward a regime of policing where the notions of equal protection have limited force on the ground. We also increasingly are finding that probable cause and reasonable suspicion as predicates for detention and search are being eroded, and that the very determination of what conduct will be permitted and what form of disorder is subject to prompt sanctions is left in far larger part to the police. Therefore, this evaluation must count the costs as well as the considerable benefits of the new policing.

A. The Problem of the Democratic Legitimacy of the Goals for which Police Powers are Used

In describing the successes of the new policing, I have implicitly assumed that its goal was to reduce serious crime on a citywide

151. Rutherford, *supra* note 146, at 63.

basis. It is time to examine whether this is, in fact, accepted as the goal of the new policing and, if not, what is? Indeed, a prior question remains unanswered: who is to set the goals?

1. *The Inevitability of Discretion*

To be clear at the start, the police have many responsibilities beyond reducing crime. They prevent fights, regulate demonstrations, enforce traffic regulations, engage in rescue or other assistance, and much more. I have focused on the crime reduction benefits of the new policing and the neighborhood trust that it can induce because these have been the major subjects of attention in bringing about the changes that have occurred since 1990, not because they are the only significant functions of a modern, urban police department. Second, unavoidably there are critical choices to be made as to goals, even in the more limited area of dealing with the effects of crime on continuing danger, public fear, social control in neighborhoods, and public resentment of disorder.

Governments of civil law countries from Argentina to France and Germany sometimes act as if there is not a serious question as to the purposes for which police powers like those described above can be used, contending that the police officer is obligated to arrest *whenever* he sees a crime and then to take investigative steps at the order of a judge whom the officer, carrying out another legal obligation, must notify immediately of the crime and the suspect.¹⁵² Thus, in 1999, Klaus Hubmann, the senior public prosecutor in Nuremberg, Germany, explained that he had no choice but to investigate a failed attempt fifty-three years earlier by two Jewish survivors of the Holocaust to poison members of Adolf Hitler's SS.¹⁵³ Hubmann explained that political or moral aspects could play no part in the decision. Civil law countries deny that their police have the discretion, so readily accepted in the United States, not only to decline to arrest in very sympathetic situations but also to develop imaginative uses of police powers for such purposes as reducing disorder, preventing violence, building social control, and

152. E.g., Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 337 n.135 (1995) (noting that "German police have no legal discretion to drop or to refrain from investigating arguably criminal cases").

153. Louise Potterton, *Germany Pursues Holocaust Avengers*, SUN. TELEGRAPH (London), Oct. 10, 1999, at 7.

carrying out whatever are the wishes of members of a community.¹⁵⁴

This denial of discretion is surely a fiction in almost every country in the world. The police officer is forced to decide on what occasions he or she should use these powers for two major reasons. First, in *every* country, what crimes an officer will be in a position to act upon depend upon where the officer is and what he or she is looking for, and this involves discretion. Second, if the officer comes upon a minor matter that is criminal, he has to decide whether it is worth his time, and the time of prosecutors and judicial officials, to process the matter. In the United States, we are very frank about such uses of judgment or discretion by individual police officers or, sometimes, by the police department in the form of directives to officers.

In short, it is wholly implausible to assume that the goal in the United States is to enforce all the criminal statutes enacted by state and federal legislatures. The larger part of violations of the law by 270 million Americans must be ignored by the fewer than one million police, who do not have time to investigate matters they consider unimportant.¹⁵⁵ Moreover, these officers know that prosecutors and judges will lack the capacity to try cases if all the small matters are brought to court, and that juries are likely to reject as excessive the use of the criminal law in those cases. We have come to assume that even statutes recently passed by a concerned legislature will be applied with discretion as to their use.¹⁵⁶

2. *Traditional Understandings and New Choices*

It is how this discretion is used—not any novelty or recognition of the need for it—that has taken new shape as policing has

154. E.g., Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542, 555-57 (1990) (noting that France requires “supervisory-level approval” for certain creative uses of police power “which American law generally permits any police officer to undertake on his or her own”).

155. Cf. U.S. CENSUS BUREAU, *Population Clocks*, <http://www.census.gov/population/www> (providing the population of the United States as 276,351,651) (current through Dec. 19, 2000); U.S. CENSUS BUREAU, SURVEY OF PUBLIC EMPLOYMENT AND PAYROLL 1999, U.S. SUMMARY TABLE (providing the total number of police in the United States), <http://www.census.gov/govs/www/apesst/99.html>.

156. E.g., Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law*, 11 FED. SENTENCING REP. 194, 194 (Jan./Feb. 1999) (“[The Task Force] looked systematically at whether new federal criminal laws, which were popular when enacted, are being enforced. It determined, based on obvious data, that in many instances they are not.”).

changed. Until a few decades ago, it was understood that police discretion—use of limited police resources—would be rationed by the seriousness of the conduct that was being investigated. This seriousness was in turn dictated by the people’s representatives in the legislature, who used sentencing levels to express their relative disapproval of criminal conduct. The assumption, in other words, was that there was a direct correlation between the sentence imposed and the citizenry’s view (as expressed through its elected representatives) of the relative seriousness of the conduct. As long as police relied upon sentences as guidelines to seriousness—and, for the most part, they did—there was a strong democratic component to their enforcement decisions. Thus, police ignored minor, regulatory offenses or left them underpoliced and, therefore, underdetected. The measures of police performance we developed, focusing on FBI statistics as to a few serious crimes, also reflected that judgment. In recent decades, the focus has come to include, besides punishing individual crimes, incapacitating dangerous criminal groups ranging from organized crime to terrorists to street gangs. But what qualified a group for attention was still the seriousness of the conduct in which it engaged: political violence, organized street violence, corruption of officials, intimidation, and extortion.

Both traditional assumptions about the goals or ends of policing and assumptions about how the available means or powers will be used to accomplish whatever goals are chosen have been brought into question by the new policing. Leaving changes in assumptions about means until later, we should focus first on the question of legitimacy of goals.

Consider the issues presented by problem-solving policing. What problems should be given priority? The menu of possible “problems” of street crime the police might decide to address includes:

1. Forms of particularly harmful violence such as homicides, rape, or regular intimidation by organized crime, gangs, or individuals;
2. All violence;
3. Activities that create fear in many people or otherwise discourage social control, such as the disorder coming from open-air drug markets;
4. All forms of drug trafficking; or
5. The security of property against even non-violent theft.

Moreover, these and perhaps other categories of crime are more or less important, depending on the place, time, and victims of the crime. So, the choice is among at least five categories of crime with at least three variations of each. In fact, after some discussion, one might well want to increase the number of choices to well beyond these fifteen variations.

3. *Whose Views Should Priorities Reflect?*

With these reasonable contenders for priority in policing, a critical question becomes: whose views of the importance of each category should control? Again, there are a number of alternatives. Whatever category the police leadership considers most important might be critical. To set limits on acceptable goals, we might want to forbid decisions that seem intended to favor or disfavor the interests of an identifiable group or class, such as failing to investigate powerful political figures or concentrating police effort in wealthy neighborhoods and failing to provide adequate policing in poor neighborhoods, or—a contentious issue—projecting the views of the police, without any popular basis for the choice, as to such issues as fear of crime or what suppressing disorder requires.

A second alternative is the prioritization of categories of crime according to whatever the police think that the majority of the citizens of the city want addressed, regardless of the views of the people in the immediate neighborhood where the problem exists and the policing is to occur. A closely related alternative is that priority should go to whatever problems the mayor wants addressed, for he or she is the duly elected supervisor of the police.

Another alternative is to give priority to whatever problems the police believe the people *in the particular neighborhood* want addressed. This could be defined in several different ways: “the respectable leadership of the neighborhood” (where the definition of respectable may amount to police selection of acceptable behavior); those in the neighborhood who volunteer to work with the police; or the majority of residents of the neighborhood, although there is generally no available process for determining majority views in a neighborhood.

Some of these ways of setting priorities are more democratic than others, either in the effort by the police to decide whose concerns are to be valued or in the making of the actual choice by one or another of different groups. But even in the more democratic methods, deep problems lurk. For example, the police may not be

very good at determining the views of the majority of the public, however we define the relevant public.

As always, the size of the constituency also matters. We know from surveys that people generally believe their own neighborhoods to be far safer than they believe the entire city to be.¹⁵⁷ The people outside a neighborhood area are thus more likely to be influenced by fear, even if exaggerated, and by the immense effect of rare but dramatic crimes as described by the media. Neighborhood majorities are likely to have different attitudes than majorities of a far larger, citywide jurisdiction.

Even if the decision is made to focus on the views of local communities that are smaller than entire cities, the result is likely to depend on how one defines a neighborhood. But the hardest problem is deciding whose views matter. The fact is that different groups want different things. The young and the old are likely to have different attitudes toward disorder. Minorities in a city are likely to have different attitudes than majorities. Most dramatically, the problem can be illustrated by the question: what value should be given to the concerns of rebellious minority youth in an urban slum? Some have treated this group as entitled to concern; others have regarded this group as the object, not the beneficiary, of policing.

In sum, problem-solving policing, whether or not it takes its goals from those living in a particular neighborhood, requires choice among a variety of goals. Even assuming that the objective is to choose goals democratically, so that the police are acting in the name of those affected by their policing, there is no agreed-upon definition of whose concerns are to be valued, how they are to be determined, and what is to be done when those affected have inconsistent concerns.

It may not be possible to resolve these questions persuasively in terms of some political philosophy. But it is certainly dangerous, in terms of democratic values, to leave these questions unaddressed. That is a dangerous characteristic of the new policing.

B. The Risk of Misuse of Police Powers

For many people, the police represent not only protection against the predatory conduct of one's neighbor, but also a source of fear themselves. The fear may be of brutality by the only legitimate armed force in the community or of the embarrassment of

157. COMMUNITY SAFETY, *supra* note 13, at 18, 25.

being treated, particularly in public, without dignity or respect by members of an organization that represents the authority and the power of the state. Or the fear may be of intrusiveness into areas of privacy that one prefers to reserve for oneself and intimates. Because of these fears, we have come to expect more from the police than effectiveness in pursuing even carefully chosen goals.

We expect, *first*, a concern about maintaining a healthy relationship between the citizen and the authority and power of the state; in other words, a respect for the liberty and privacy of individuals. *Second*, we demand an absence of bias in the use of the powers I have described, for assertions of police authority and force that are systematically biased against a racial, religious, or ethnic group convey a powerful message of second-class citizenship. Bias against political opponents of the police or their political supervisors is also a terrible threat to a vital democracy. We expect, *third* and most broadly, to be accorded the respect that a citizen deserves in a citizen-ruled democracy—respect displayed in the way individuals are addressed and handled, particularly in front of others. To protect all these expectations, we depend on the visibility and reviewability of significant decisions by police officers.

In some conflict with these three expectations, the new policing, in many of its manifestations, involves tactics and strategies which are likely to: increase the power of the state at the expense of the capacity of citizens to avoid or resist that power; invite the use of discretion in ways that are more likely to reveal bias than the older forms of policing; and increase the likelihood of particular groups of people being subjected to embarrassment, and treated without respect on the streets. At the same time, the new forms of policing almost are designed to be carried out beneath the radar of visibility on which accountability depends. Thus, there is a price to be paid for the great potential of the new forms of policing, but the price can be reduced by carefully addressing issues of accountability.

1. *Citizen and State: Civil Liberties*

Consider the effect of the new policing on the efforts of the last half-century to control the relationship of the state to the individual and, in particular, of a police officer to a citizen. The specific fears during that period focused on police abuse of the powers to search, arrest, and interrogate. In the 1960s, the United States Supreme Court insisted that all of these powers, even when exercised by local police officers, must satisfy specific conditions—probable cause or reasonable suspicion and the *Miranda* rules—or else any

evidence flowing from the action would be excluded from trial.¹⁵⁸ The assumption was that there would be little incentive to violate the Court's rules if the information could not be used at trial. A somewhat more lenient standard was sufficient to justify a stop or frisk of an individual (reasonable and articulable suspicion),¹⁵⁹ and a somewhat stricter standard was applicable to electronic surveillance.¹⁶⁰

Because these standards required the police to show that, before acting, they had evidence of a crime (and since the focus of policing was on very serious crimes), there has been practically no use of the Equal Protection Clause to guarantee that minorities are not treated differently; after all, citizens could not be subject to these police powers at all unless there was an adequate basis to believe they had committed what was generally a serious crime. And there was a final protection of which we were very proud: the police could not arrest or search at all if the basis for that activity—the definition of the criminal conduct of which the police needed evidence—was so general and encompassing in its coverage or so vague in what it forbade that it left the police officer with the widest discretion in deciding whose conduct and what conduct should be made the basis of arrest and, perhaps, trial.¹⁶¹

It is true and important that these efforts to limit the powers of the police and regulate the relations between citizen and state in a way that respects the primacy of the citizen were based on two suppositions that were, at least, shaky. The first was that police conduct on the street would largely be motivated by the desire to gather evidence for trial, and thus could be regulated by excluding evidence obtained in violation of the restrictions on police behav-

158. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The later Burger and Rehnquist Courts hedged the exclusionary rules crafted by the Warren Court in the 1960s. For example, evidence seized in violation of the Fourth Amendment or the *Miranda* rules can be introduced at trial to impeach a defendant's testimony. *E.g.*, *United States v. Havens*, 446 U.S. 620 (1980) (permitting impeachment with evidence seized in violation of the Fourth Amendment); *Harris v. New York*, 401 U.S. 222 (1971) (permitting impeachment with a confession obtained in violation of *Miranda*). Such evidence is also admissible in proceedings outside the context of the criminal trial. *E.g.*, *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury proceedings); *United States v. Janis*, 428 U.S. 433 (1976) (civil tax proceedings). The Court has reasoned that the rule of exclusion is grounded in a policy of deterrence, which is satisfied by the exclusion in the prosecution's case-in-chief, and should not be applied where principles of deterrence will not be furthered. *E.g.*, *United States v. Ceccolini*, 435 U.S. 268, 279-80 (1978); *United States v. Leon*, 468 U.S. 897, 906 (1984).

159. *United States v. Sokolow*, 490 U.S. 1, 6 (1989).

160. *Katz v. United States*, 389 U.S. 347, 354-59 (1967).

161. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

ior. Second, and equally important, the rules did not provide protection against, or regulate in any significant way, some very powerful investigative techniques: informants; grand jury powers to compel testimony prior to trial; offers by police to engage in illegal transactions in order to develop evidence; various types of physical surveillance; a variety of techniques for eliciting “consent” to a form of detention or search; threats to prosecute an individual who has committed a crime in order to get evidence; and, perhaps most dramatically, the constitutional power to arrest some individuals, and not others, for minor offenses in order to take advantage of the power to search, within a limited area, in connection with an arrest.¹⁶² Seeking greater freedom of action, a police officer or department could emphasize these unregulated powers. Even the regulated powers could be violated without much fear of consequences if the purpose was not to suppress evidence.

The new policing is intended, in many instances, to greatly increase the effectiveness of these unregulated powers and to find ways to avoid judicial enforcement by the exclusionary rule of even such regulated powers as stop and frisk. Findings by the attorney general of the State of New York suggest that there has not been an adequate effort by the New York police to restrict frisks or stops to the situations where the Constitution permits them.¹⁶³ The result of many tens of thousands of such stops has undoubtedly been a sizeable reduction in the carrying of guns and thereby of homicides, but there is a price for abandoning this part of the system of accountability for detentions and searches. A rapid increase in misdemeanor arrests or the use of a variety of other formal or informal sanctions in situations where the average citizen would not be subjected to that police power recreates the very capacity to target specific individuals, gangs and other groups—particularly minority youth—that the Supreme Court had tried to forbid by outlawing the use of vague statutes.

In a number of situations in a number of cities, a major component of the new policing strategy is to rely more and more on that set of police powers that are substantially unregulated by law and to take advantage of the inability of courts to hold the police accountable by recourse to the exclusion of evidence—all in order to

162. *United States v. Robinson*, 414 U.S. 218, 226 (1973).

163. CIVIL RIGHTS BUREAU, OFFICE OF THE ATTORNEY GEN. OF THE STATE OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL, 69–72, 160–74 (Dec. 1, 1999) [hereinafter OAG REPORT].

focus unreviewable police discretion on those forms of conduct and those individuals that the police somehow determine are most dangerous. This conscious use of the weaknesses in the control system built up since 1950 has had dramatic and beneficial results in handling crime, but not without significant risks of changing the relationship of the citizen to the state, and of the police to individuals on the street. It may well be that most people in most neighborhoods regard the tradeoff as highly favorable to the new policing.¹⁶⁴ It is nonetheless dangerous to democratic values.

2. *Equal Protection: Civil Rights*

There has been only extremely rare use of the Equal Protection Clause to regulate police conduct, on the theory that important intrusions such as arrest and search are adequately regulated by the requirements of probable cause and that minor intrusions, which have not been regulated by the Constitution or statute, hardly deserve special attention. But the second part of this judgment has proven to be inadequate in a number of ways. Stopping more blacks and Hispanics than non-Hispanic whites either without the justification of reasonable suspicion or with the justification of having observed a violation of the law—albeit one that is generally ignored in the case of others—may have relatively minor immediate effects on an individual, but immense importance in what it says about the place of black or Hispanic Americans in society and in terms of the felt reality of the promise of equal protection of the laws that they have been given by the U.S. Constitution. Moreover, it may be the embarrassment and resentment of being singled out as a suspect, far more than the intrusion on one's privacy, that needs protection, as Chief Justice Earl Warren recognized in writing the opinion in *Terry v. Ohio* sustaining stop and frisk.¹⁶⁵ Finally, what may be a minor intrusion, if it occurs on a single occasion, may be a major problem if it occurs regularly enough to fuel the fears and affect the conduct of members of a suspect class (for example, minority youth in a high-crime area).

Beyond the costs of these largely unreviewable uses of powers against those the police believe, often correctly, to be more likely to be engaged in a particular type of crime, there is the problem of spillover to clear violations of the rules with respect to arrest, search, or interrogation. The brutality and excessive force dis-

164. Tracey L. Meares & Dan M. Kahan, *Laws and (Norms of) Order in the Inner City*, 32 L. & SOC'Y REV. 805, 830 (1998).

165. *Terry v. Ohio*, 392 U.S. 1, 15, 24-26 (1968).

played in the Abner Louima and Amadou Diallo cases in New York City bolster African Americans' sense of insecurity, as well as their reluctance to enjoy the basic civil liberties accorded to all citizens.¹⁶⁶

To the extent that the new policing encourages the police to focus investigative attention on the earliest signs of criminal behavior or even on disorder alone, it invites using even weak evidence as a basis for finding reasonable suspicion and for the invocation of powers that do not ordinarily require any justification or form of accountability. Thus, a review by New York State Attorney General Eliot Spitzer of 175,000 forms detailing stop and frisk activity in New York City showed that even police records reflect about nine stops of blacks and Hispanics and eight stops of whites for each resulting arrest.¹⁶⁷ In its focus on problem-solving, the new policing also emphasizes the steps that can be taken against an individual without *any* individualized basis in fact. A common example is stopping a driver and searching his or her car for drugs under the pretext of concern that the car's taillight is not working or that its speed is excessive and that the car is thus being operated in violation of a local ordinance. Such forms of policing allow and encourage the use of guesses and probabilities that are far less dependent on evidence, compared to what has traditionally been required for a stop, an arrest, or a search to gather information.

Weaker requirements of justification for police action almost invariably invite more bias. The Spitzer study showed that "even when crime is accounted for statistically, minorities still were being 'stopped' at a higher rate than whites;" blacks were 23% more likely and Hispanics 39% more likely than white non-Hispanics to be stopped by police.¹⁶⁸ Generalizations about the greater likelihood that a particular group will be involved in a particular criminal activity, such as dealing crack cocaine, are now more likely to be made the basis for substantial disparities in treatment than they were before strategic emphasis was put on the unregulated areas of police conduct.¹⁶⁹ Then, even if members of a hypothetical group

166. See Joseph P. Fried & Blaine Harden, *The Louima Case: The Overview—Officer is Guilty in Torture of Louima*, N.Y. TIMES, June 9, 1999, at A1; see also Jane Fritsch, *The Diallo Verdict: The Overview—4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1.

167. OAG REPORT, *supra* note 163, at 111.

168. *Id.* at 119, 123.

169. E.g., Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. TIMES, May 21, 1995, at A1 (reporting that evidence in southern California and throughout the U.S. indicates that the vast majority of crack offenders prosecuted in federal court

X were more likely than others to be selling crack cocaine, the likelihood of any particular member of X being engaged in that conduct is generally so small that it could not satisfy probable cause or reasonable suspicion standards.

Questioning someone (for example, a Hispanic youth) on a corner in a way that suggests he is not free to leave, which the Supreme Court has allowed,¹⁷⁰ or searching a car, or making a street stop of a pedestrian are all likely to be based, to some extent, on the racial or ethnic characteristics that the police believe more frequently accompany crimes of concern.¹⁷¹ A focus on types of dangerous or criminal behavior, rather than on the behavior of specific individuals, invites these generalizations. It is also at the heart of much of the new policing. It is in this context that we should understand the debate about racial profiling.

3. *Respect and Civility*

Sara Stoutland argues, on the basis of an ethnographic study of the reactions of youth and their older family members in Boston, that neighborhoods subjected to the new policing in Boston are pleased with the safety it has provided but concerned about the absence of respect shown to the citizens it confronts.¹⁷² One also can detect this disparity in the review of attitudes towards policing in New York and Chicago.

This issue is related to, but different from, concerns about equal protection and legally defined civil liberties. An absence of respect may be the source of much of the offense given by a failure to treat certain stigmatized groups of citizens equally with other groups; but the issue of respect is broader and is applicable to police interactions with any group of citizens. The difference in treatment between groups may be attributable to differences in political clout, as the influence of one group may elicit respectful handling by the police while the absence of such influence may invite less respectful relations for the other. Ethnic or racial bias may not be the

are non-white people), cited by Symposium, *Is Our Drug Policy Effective? Are There Alternatives?*, 28 FORDHAM URB. L.J. 3, 79-83 (2000) (discussing the disproportionate impact on African Americans and Hispanics of the disparity in length of prison terms imposed for crack cocaine offenses versus those imposed for powder cocaine offenses for like amounts of those drugs).

170. *E.g.*, Florida v. Bostick, 501 U.S. 429 (1991); Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980).

171. United States v. Weaver, 966 F.2d 391, 394 (8th Cir. 1992).

172. Sara Stoutland, Trust, Legitimacy, and Efforts to Reduce Youth Violent Crime: Community Perspectives from Boston 26 (March 1, 2000) (unpublished manuscript, on file with author).

issue. An absence of respect also often reflects a sense that the individual is without rights against the state. But here, too, there is a difference. An officer making a stop and then frisking a citizen on a crowded street may be acting well within the parameters of reasonable suspicion that the law imposes, yet the way the stop is made may convey humiliating contempt for the suspect.

It is becoming very clear that the cause of much violence by youth against other youth is a sense of being treated without respect. The resulting attack is a distorted form of insistence on being treated with dignity and as an important person. Distinguished police commissioners, such as Commissioner Evans in Boston, contend that even forcible encounters like a stop or arrest can, in most cases, be handled in a way that reflects respect for the suspect.¹⁷³ Police officers in the housing projects of Chicago report that they can make arrests without danger to themselves or others if they treat the suspect with respect.¹⁷⁴ All these beliefs are practical reasons, from the point of view of law enforcement, for insisting on at least the appearance of a respectful attitude toward those who are confronted with real or apparent powers of the police.

The issue is at least equally important from the point of view of many law-abiding residents in a neighborhood for whom a continuing question is whether the police are there to support them or to protect people in other areas from them or their children. Citizens who feel themselves and their children the object of policing intended to protect others and who feel that the steps taken reflect a lack of respect for them as citizens and individuals are made to feel like second-class citizens, used rather than valued. They are also taught to fear the police rather than to value their services, an attitude that creates sympathy for youth in revolt and frustration for their elders who need protection but insist on respect.

Some significant forms of the new policing involve dealing with individuals through implicit coercion. In New York, signaling that it is the police who control the streets by zero tolerance policing, claiming to decide what is acceptable conduct and what is disorderly behavior, and gathering information by "leaning on" those who are vulnerable to revocation of parole or probation—all these

173. *First Safety, Then Civility: Boston and New York*, *ECONOMIST*, May 1, 1999, at 25 (citing Commissioner Evans' statement that many of the problems associated with the stop and search of suspects disappear when "there is mutual respect" and "the police explain why the search is being done").

174. *E.g.*, Jerry Lawrence, *Officers' Class Focused on Race Relations*, *CHI. TRIB.*, June 19, 2000, at 1 (describing a seminar offered by a former police officer on the need to treat citizens, especially racial and ethnic minorities, with respect).

may be extremely useful steps in creating security but extremely costly in denying respect. In Boston, the gathering of information by relatively coercive questioning on the streets, accompanied by conveying some notion of the power of computerized retrieval of such information, can have the same beneficial and harmful effects.

All these activities are designed to take place beneath the radar of judicial review, another consequence that Chief Justice Warren anticipated when reviewing powers to stop and frisk. The effects on the citizens in the neighborhood and on their attitudes towards the police are captured in the statistical assessments of policing in Chicago and New York.¹⁷⁵

4. *The Task of the Future: Maintaining the Security Advantages of the New Policing while Reducing its Risks to Civil Liberties*

There is every reason to believe that the great majority of people in almost every city and the clear majority of those in the neighborhoods most threatened by both insecurity and the risks to civil liberties would, if forced to choose, prefer the new forms of policing. The advantages of personal security are that great. Indeed, as noted above, a majority of the residents of some Chicago housing projects were prepared to give up their right to refuse to have their apartments searched without probable cause in the interests of greater personal security.¹⁷⁶

But the choice should not be so stark. Uses of discretion that are beneath the level of visibility to courts could be the subject of departmental regulation. The reliance on the exclusionary rule as a primary sanction need not mean that it is the exclusive sanction. What we need, in short, is a regulatory system with other sanctions and new rules. We must find ways to have both civil liberties and security.

Consider some examples of new forms of regulation. The problem of changed relationships between the citizen and the state, between the resident and the police officer, could be addressed, in part, by requiring the police to make clear when they are asserting authority and when they are simply making a request to stop or submit to a search. The Supreme Court has ruled that this is not required by the Constitution.¹⁷⁷ But the practice of taking advantage of a citizen's ignorance of constitutional rights or his un-

175. *Supra* Part II.A.3.

176. See Meares & Kahan, *supra* note 12.

177. Florida v. Bostick, 501 U.S. 429 (1991); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

founded fears remains subject to political review and it is unwise in light of an increasing emphasis on control of the streets and the gathering of information by informal means. Efforts to keep track of the percentage of black, Hispanic, and white, non-Hispanic drivers of cars that are stopped and to make those figures available publicly are regulatory steps that can have major consequences on a sense of discrimination.¹⁷⁸ Keeping track of the number of complaints against any officer for disrespectful behavior can be an important step in encouraging respect, particularly if it is accompanied by appropriate remedial training.

Most rules require some sanctions if they are to be taken seriously. For behavior that is not generally designed to elicit evidence for criminal trials—the situation with regard to much of the new policing—the exclusionary rule is plainly an inadequate sanction. Nor is there much promise in the form of civil lawsuits, which are likely to be much too costly for remedying the risks to civil liberties in the multitude of low visibility occurrences that are at issue. Administrative discipline under rules that are more manageable is one likely solution.

Regulatory schemes require credibility and credibility often requires some form of external oversight, not of individual administrative determinations but of the adequacy of the functioning of the administrative system, as New York's "Mollen Commission" suggested some years ago.¹⁷⁹ In the past decade, independent partnerships like that between the Boston Police Department and the Ten Point Coalition have benefited both the organizations and the city as a whole. By blending criticism with approval, the Coalition has helped cultivate the police programs that are responsible for Boston's remarkable success. Significantly, the fruits of this effort—the drop in youth homicide, drug use, and overall crime—are nowhere more apparent than on the streets of Dorchester and Roxbury, where furor over police abuse first erupted.

Relationships like this one help fill the void left by the erosion of judicial oversight. They are, however, comparatively rare. An unfortunate series of events, coupled with an unprecedented willing-

178. *Police Tactics in Question: 'Stop and Frisk' in New York*, N.Y. TIMES, Dec. 4, 1999, at A16.

179. CITY OF N.Y. COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, REPORT OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (1994). The Commission is popularly known as the "Mollen Commission," after its chair, the Hon. Milton Mollen.

ness by Boston's police chiefs and black ministers to work together, brought about this unlikely partnership. Its enduring nature testifies to their commitment and mutual dependence. As in other cities, there are still tensions between officers and the minority residents whom the Coalition represents. This friction assures each organization's independence. What remains to be seen is whether cities like New York, in the wake of outrage over assaults like those on Abner Louima and Amadou Diallo, will be willing to reach out as Boston did following the Carol Stuart murder and the stop and frisk scandal in the early 1990s.

These suggestions are meant to be illustrative, and they are far from comprehensive. The central idea is that new rules are required to regulate the new policing and that these cannot take the form of judicial review of the admissibility of evidence. They probably cannot depend primarily on any form of judicial sanctions for violations of the rules, both because the rules will be developed administratively and because they will regulate forms of behavior that have long been considered too subtle to justify judicial review. What we need is the acceptance of new forms of responsibility for civil liberties by police agencies involved in the forms of new policing. Credible oversight must involve those outside of the police but it should be of processes and structures, not of individual cases.

STREET STOPS AND BROKEN WINDOWS: TERRY, RACE, AND DISORDER IN NEW YORK CITY

*Jeffrey Fagan and Garth Davies**

Patterns of “stop and frisk” activity by police across New York City neighborhoods reflect competing theories of aggressive policing. “Broken Windows” theory¹ suggest that neighborhoods with greater concentration of physical and social disorder should evidence higher stop and frisk activity, especially for “quality of life” crimes.² However, although disorder theory informs quality of life policing strategies, patterns of stop and frisk activity suggest that neighborhood characteristics such as racial composition, poverty levels, and extent of social disorganization are stronger predictors of race- and crime-specific stops. Accordingly, neighborhood “street stop” activity reflects competing assumptions and meanings of policing strategy. Furthermore, looking at the rate at which street stops meet Terry standards of reasonable suspicion³ in various neighborhoods provides additional perspective on the social and strategic meanings of policing. Our empirical evidence suggests that policing is not about disorderly places, nor about improving the quality of life, but about policing poor people in poor places. This strategy contradicts the policy rationale derived from Broken Windows theory, and deviates from the original emphasis on communities by focusing on people. Racially disparate policing reinforces perceptions by citizens in minority neighborhoods that they are under non-particularized suspicion and are therefore targeted for aggressive stop and frisk policing. Such broad targeting raises concerns about the legitimacy of law, threatens to weaken citizen participation in the co-production of

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1. James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29-38 (using the analogy of a broken window to describe the relationship between disorder and crime).

2. *Id.*

3. *Terry v. Ohio*, 392 U.S. 1 (1968) (establishing *reasonable suspicion*, as opposed to the higher quantum of proof of *probable cause*, as the constitutional standard to govern stop and frisks).

security, and undercuts the broader social norms goals of contemporary policing.

When it comes to debating theories of crime and law, some people pretend that race does not matter at all, while others accord it undue, if not determinative, significance.⁴ Unfortunately, recent events in policing seem to tip the balance of reality toward the latter view. There is now strong empirical evidence that individuals of color are more likely than white Americans to be stopped, questioned, searched, and arrested by police.⁵ This occurs in part because of their race, in part because of heightened law enforcement intensity in minority communities, in part because of the temptation among law enforcement officers to simply “play the base rates” by stopping minority suspects because minorities commit

4. See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997) (exploring the impact of race relations on criminal law and criminal justice); see also Kim Taylor-Thompson, *The Politics of Common Ground*, 111 HARV. L. REV. 1306 (1998) (emphasizing the role of race in criminal justice issues through a critical review of *RACE, CRIME, AND THE LAW*).

5. United States v. New Jersey, No. 99-5970 (MLC) (D. N.J. Dec. 30, 1999) (consent decree) (establishing the state of New Jersey's consent to comply with various procedures and policies to remedy racial profiling by the state police), <http://www.usdoj.gov/crt/split/documents/jerseysa.htm>; U.S. GEN. ACCOUNTING OFFICE, *RACIAL PROFILING LIMITED DATA AVAILABLE ON MOTORIST STOPS*, GAO-GGD-00-41, 7-13 (2000), available at <http://www.gao.gov/AIndexFY00/title/tocR.htm>; CIVIL RIGHTS BUREAU, OFFICE OF THE ATTORNEY GEN. OF THE STATE OF N.Y., *THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES 89* (1999) [hereinafter OAG REPORT]; DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM*, 34-41 (1999) (describing the explicit use of race in criminal profiles by police departments in Maryland, Colorado, Louisiana, and New Jersey); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 551 (1997); Kris Antonelli, *State Police Deny Searches are Race-Based; ACLU Again Challenges I-95 Stops*, BALT. SUN, Nov. 16, 1996, at 18B; David Kocieniewski & Robert Hanley, *Racial Profiling Was The Routine, New Jersey Finds*, N.Y. TIMES, Nov. 28, 2000, at A1; Barbara Whitaker, *San Diego Police Found to Stop Black and Latino Drivers Most*, N.Y. TIMES, Oct. 1, 2000, at A31; Jim Yardley, *Studies Find Race Disparities in Texas Traffic Stops*, N.Y. TIMES, Oct. 7, 2000, at A12. Similar patterns of stops, searches, and arrests of citizens have been observed in London. See generally DAVID SMITH ET AL., *POLICE AND PEOPLE IN LONDON: VOLUME I: A SURVEY OF LONDONERS 89-119*, tbl.IV.3 (1983) (showing racial disparity in police contacts with black citizens in London). The London survey was conducted in 1981-82, with a stratified random sample of 2420 Londoners ages fifteen and older. Minorities were over-sampled to ensure adequate representation in the study. Overall, 16% of Londoners were stopped in the twelve months preceding the survey. West Indians were slightly more likely to be stopped than whites (18% as compared with 14%), and Asians were least likely to be stopped (5%). The average number of stops was twice as high for West Indians (0.56) compared with whites (0.21) or Asians (0.8). The average number of arrests per person stopped was also far greater for West Indians (3.19) than for whites (1.46) or Asians (1.59). *Id.*

more crimes, and in part because of the tacit approval of these practices given by their superiors.⁶

Whether the legal system should consider race in its every day decision-making is a hotly contested and much-litigated issue.⁷ Yet the modern practice of racial policing should surprise no one. Racial profiling is often defended as a useful means to detect criminal behavior.⁸ The legal system has long used race as a signal of increased risk of criminality. Examples include: immigration exclusion and other discrimination against Chinese immigrants in the 19th century;⁹ the racialization of the debate on the passage of the Harrison Narcotics Act;¹⁰ the internment of the Japanese during World War II;¹¹ border interdictions to halt illegal immigration;¹²

6. See generally STATE POLICE REVIEW TEAM, OFFICE OF THE ATTORNEY GEN. OF THE STATE OF N.J., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (1999) (admitting that New Jersey State Police officers engaged in racial profiling, but also that profiling is part of the culture of the State Police), available at http://www.state.nj.us/lps/intm_419.pdf (Apr. 20, 1999); see generally Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAG., June 20, 1999, at 51 (examining various perspectives on racial profiling).

7. Brandon Garrett, *Standing while Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1816 n.5 (2000) (reviewing recent lawsuits and investigations of racial profiling). Consent decrees stemming from racial profiling have been signed in many cases. E.g., *United States v. New Jersey*, No. 99-5970 (MLC) (D. N.J. Dec. 30, 1999) (consent decree entered); Memorandum of Agreement, Between the United States Department of Justice, Montgomery County, Maryland, the Montgomery County Department of Police, and the Fraternal Order of Police, Montgomery County Lodge 35, Inc., Jan. 14, 2000, <http://www.usdoj.gov/crt/cor/Pubs/mcagrmt.htm>; *United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa. Apr. 16, 1997) (consent decree entered); *United States v. City of Steubenville*, C2-97-966 (S.D. Ohio Sept. 3, 1997) (consent decree entered), <http://usdoj.gov/cit/split/documents/steubensa.htm>; *United States v. City of Los Angeles*, No. 00-11769 (C.D. Cal.) (consent decree entered). For reviews of consent decrees involving police departments generally, see Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Right*, 100 COLUM. L. REV. 1384 (2000).

8. KENNEDY, *supra* note 4, at 145-46 (discussing race as a predictor of criminality). For a review of the historical uses of ethnic and racial exclusion in the United States based on attributions of greater danger to ethnic minorities, see generally SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA* (2d ed. 2000).

9. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (inferring intentional discrimination against Chinese citizens from disparate enforcement of an ordinance banning laundries).

10. Harrison Narcotics Act, ch. 1, 38 Stat. 785 (1914); see also DAVID F. MUSTO, *THE AMERICAN DISEASE* 65 (1973) ("Cocaine raised the specter of the Wild Negro, opium the devious Chinese . . .").

11. *Korematsu v. United States*, 323 U.S. 214 (1944) (finding forced internment troubling but ultimately upholding its constitutionality).

racial components of drug courier profiling;¹³ and the so-called Carol Stuart stops in Boston.¹⁴

Generally, courts have refused to disallow the use of race as an indicia of criminality.¹⁵ Most courts have accepted this practice, so long as (1) race alone is not the rationale for the interdiction, and (2) it is not done for purposes of racial harassment.¹⁶ This practice has been reflected in case law as the sound exercise of "professional judgment" by police officers.¹⁷

12. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 (1976) (affirming the U.S. Border Patrol's right to conduct checkpoint stops of vehicles near the Mexican border with or without reasonable suspicion).

13. *United States v. Harvey*, 16 F.3d 109, 115 (6th Cir. 1994) (Keith, J., dissenting) ("African-Americans are more likely to be arrested because drug courier profiles reflect the erroneous assumption that one's race has a direct correlation to drug activity.").

14. MASS. ATTORNEY GEN.'S OFFICE, REPORT OF THE ATTORNEY GENERAL'S CIVIL RIGHTS DIVISION ON BOSTON POLICE DEPARTMENT PRACTICES (Dec. 18, 1990) (reporting results of an investigation into allegations that, in violation of constitutional mandates, the Boston Police Department "rounded up" African American men in the wake of the murder of Carol Stuart, a white woman).

Shortly before this article went to press, a sharply-divided United States Court of Appeals for the Second Circuit declined to reconsider its ruling upholding its dismissal of *Brown v. City of Oneonta*, 221 F.3d 329 (2000). The plaintiffs in *Brown* alleged that police unconstitutionally swept the 10,000-resident town and stopped and inspected the hands of black men after an elderly woman alleged she had been attacked in her home by a young black male who cut his hand during a struggle.

The panel reaches a grave conclusion by holding that the police act constitutionally under the Fourteenth Amendment when, based on a witness's predominantly racial description, they stop every young African American male in town to determine whether he can exclude himself from a vague class of potential suspects that has been defined in overwhelmingly racial terms.

Brown v. City of Oneonta, — F.3d — (2d Cir. 2000), available in 2000 WL 1855047.

15. See *Whren v. United States*, 517 U.S. 806 (1996). In *Whren*, the U.S. Supreme Court ruled that as long as an officer observes a traffic violation, a traffic stop is constitutional, even if the officer has no intention to enforce the law the driver violated. Even if purely pretextual, a racially-motivated stop is constitutional under the Fourth Amendment if also motivated by a second, non-racial factor. The Court did state, however, that a stop motivated by race alone would violate Fourteenth Amendment protections. *Id.* at 813. COLE, *supra* note 5, at 39-40 (citing the extraordinarily high concentration of minority complainants in unsuccessful federal appellate cases involving pretextual traffic stops). See also *Harvey*, 16 F.3d at 115 (Keith, J., dissenting); KENNEDY, *supra* note 4, at 14 ("Racist perceptions of blacks have given energy to policies and practices (such as racial exclusion in housing, impoverished schooling, and stingy social welfare programs) that have facilitated the growth of egregious crime-spawning conditions that millions of Americans face in urban slums and rural backwaters across the nation.") (citation omitted).

16. See *Whren*, 517 U.S. at 813.

17. Although courts may be reluctant explicitly to identify and endorse the use of race as a proxy for criminal behavior, the factual underpinnings of many cases reveal tacit judicial approval of racial profiling. *E.g.*, *Papachristou v. City of Jacksonville*, 405

Contemporary criminal justice theory and practice accord with this view, but substitute sociological language for the more formal legal endorsement of race-based practices. In New York City, law enforcement strategies emphasize the aggressive patrol of areas containing manifestations of physical and social disorder. Thus, police aggressively enforce laws on public drinking and loitering. They also actively patrol neighborhoods with empty lots, abandoned cars, and dilapidated buildings. Collectively, these strategies are based on the "Broken Windows" theory, named after the influential essay on the contagious effects of unchecked signs of disorder.¹⁸

Beginning in 1994, officials altered the police strategies in New York City to address low-level disorder problems that might invite more serious crime problems.¹⁹ These signs of disorder often are more prevalent in urban neighborhoods with elevated rates of pov-

U.S. 156 (1972) (reviewing the enforcement of a vague vagrancy ordinance against two black men accompanied by two white females); *Florida v. J.L.*, 529 U.S. 266 (2000) (reviewing the adequacy of a stop and frisk based on an anonymous informant's description of a "young black male" wearing a plaid shirt and carrying a gun).

The "professional judgment" of Detective McFadden provided the basis for his stop and search of the defendant in *Terry v. Ohio*, 392 U.S. 1, 28 (1968). What has been lost in the *Terry* discourse in the ensuing years is the explicit racial component of the events. Terry was African American, McFadden was white. McFadden's "professional judgment" concerning Terry was based on the racial incongruity of Terry being observed outside a storefront in a commercial district far from the areas of Cleveland where most African Americans lived. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 966 (1999). *But see Terry*, 392 U.S. at 5-7 (detailing the suspicious activity the *Terry* defendants engaged in after Detective McFadden, a thirty-nine year veteran of the police department, first observed them and felt "they didn't look right to [him] at the time").

In *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), the Court noted that although an individual's presence in a "high crime area" does not meet the standard for a particularized suspicion of criminal activity, a location's characteristics are relevant in determining whether an individual's behavior is sufficiently suspicious to warrant further investigation. Since "high crime areas" often are areas with concentrations of minority citizens, this logic places minority neighborhoods at risk for elevating the suspiciousness of its residents. *See e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

18. Wilson & Kelling, *supra* note 1, at 31. *See generally* GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996).

19. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 292 (1998); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 556 n.14 (1997); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1273, 1273 (2000).

erty and social fragmentation.²⁰ Accordingly, the implementation of Broken Windows policies was disproportionately concentrated in minority neighborhoods and conflated with poverty and other signs of socio-economic disadvantage. Thus, what was constructed as “order-maintenance policing” (“OMP”) was widely perceived among minority citizens as racial policing, or racial profiling.²¹ The fact that its principle tactic was an aggressive form of stop and frisk policing involving intrusive *Terry* searches,²² and that at least two deaths of unarmed citizens of African descent were linked to OMP,²³ further intensified perceptions of racial animus.²⁴

20. WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 59 (1990); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOCIOLOGY 603, 622-30 (1999); Stephen W. Raudenbush & Robert J. Sampson, *Ecometrics: Toward a Science of Assessing Ecological Settings, with Application to the Systematic Social Observation of Neighborhoods*, 29 SOCIOLOGICAL METHODOLOGY 1 (1999).

21. OAG REPORT, *supra* note 5, at 74; David Kocieniewski, *Success of Elite Police Unit Exact a Toll on the Streets*, N.Y. TIMES, Feb. 15, 1999, at A1 (discussing reactions of citizens to aggressive policing in New York City); Kit R. Roane, *Minority Private-School Students Claim Police Harassment*, N.Y. TIMES, Mar. 26, 1999, at B5 (citing complaints by minority students of indiscriminate and frequent police harassment).

22. There is an irony here about the use of such citizen detentions and searches as a crime fighting tool. The *Terry* decision itself located the frisk less as an investigative aid than as a protection for the patrolling officer: “The frisk . . . was essential to the proper performance of the officer’s investigatory duties, for without it the answer to the police officer may be a bullet.” *Terry v. Ohio*, 392 U.S. 1, 8 (1968) (citation omitted). That the stop and frisk engenders animosity was made explicit in the original *Terry* decision. The Supreme Court in *Terry* noted that a frisk “is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly.” *Id.* at 17. The Court also noted that *Terry* stops had the potential to inflict psychological harm: “Even a limited search . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.” *Id.* at 24-25.

23. David Jackson, *Winning War on Crime Has a Price Giuliani Alienates Many in New York City’s Black and Hispanic Communities*, DENVER POST, Apr. 20, 2000, at A23 (discussing the shootings by the New York City Police Department (“NYPD”) of Amadou Diallo and Patrick Dorismond); Symposium, *Is Our Drug Policy Effective? Are There Alternatives?*, 28 FORDHAM URB. L.J. 3, 95 (2000) (“[A] team of undercover police approached a man [Patrick Dorismond] . . . even though they had no reason to believe that he was involved in any criminal activity.”).

24. Citizens who are stopped and frisked based on a profiling or racial policing strategy understand that they have been singled out because of their race. These encounters have been termed “race-making situations.” David R. James, *The Racial Ghetto as a Race-Making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 LAW & SOC. INQUIRY 407, 420-29 (1994). The outrage of many minority citizens over the NYPD’s policing of aggressive stop and frisks reflects not only the emotional harm from being targeted because of one’s race, but also the fear that such situations can escalate into dangerously violent encounters. See generally David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving*

Moreover, by explicitly linking disorder to violence, OMP (as informed by Broken Windows theory) further focused police resources and efforts on the neighborhoods with the highest crime and violence rates.²⁵ That these were predominantly minority neighborhoods further reinforced the disproportionate exposure of New York City's minority citizens to policing. Thus, this construction of disorder broadened the concept to include places where violent and other serious crimes were most likely to occur. Those places tended to be ones with the highest concentrations of socially-disadvantaged minority populations.

In this paper, we assess empirical evidence designed to sort out these competing claims about the underlying theoretical basis for New York City's aggressive policing policy. We analyze patterns of stop and frisk activity to assess whether practice reflected the place-based strategies embodied in Broken Windows theory, or if instead, practice was focused on the social markers of race and disadvantage. We ask whether, after controlling for disorder, the city's stop and frisk policy is, in fact, a form of policing that disproportionately targets racial minorities. We begin by reviewing the history and evolution of these policies, showing the links between race, Broken Windows theory, and aggressive policing. In Part II, we review evidence of the racial skew in policing as reported in recent studies. In Part III, we offer the results of empirical tests of data conducted on trends and patterns of policing to resolve these competing claims about the motivating theories for the observed patterns. We find little evidence to support claims that policing targeted places and signs of physical disorder, and show instead that stops of citizens were more often concentrated in minority

While Black" Matters, 84 MINN. L. REV. 265, 273 (1999). The shared danger of profiling encounters reflects the concept of "linked fate" among residents of minority neighborhoods. "Linked fate" refers to the empathy that people have with family and friends. It can also exist among strangers. In the African American community, linked fate has its foundation in the fact that the life chances of African Americans historically have been shaped by race. MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* 77 (1994). Linked fate suggests that when race over-determines an individual's life chances, it is much more efficient for that individual to use the relative and absolute status of the group as a proxy for individual utility. The long history of race-based constraints on life chances among blacks generates a certain efficiency in evaluating policies that affect minority individuals. *Id.*

25. OAG REPORT, *supra* note 5, at 53 (citing N.Y. CITY POLICE DEP'T, POLICE STRATEGY NO. 1: GETTING GUNS OFF THE STREETS OF NEW YORK (1994) (explicitly linking disorder to violence and rationalizing the concentration of order-maintenance policing ("OMP") strategies in the city's neighborhoods with the highest crime rates) [hereinafter POLICE STRATEGY NO.1].

neighborhoods characterized by poverty and social disadvantage. In Part IV, we conclude by returning to the theoretical arguments supporting current police policies. In this last section, we address claims about the positive link between aggressive policing and the prospects for creating social norms changes to restore social regulation of behavior. The counterfactual of crises in legitimacy provides the context for concluding remarks on race and policing in New York.

I. DISORDER AND AGGRESSIVE POLICING IN NEW YORK CITY

A. From Theory to Practice: Broken Windows and Order-Maintenance Policing

As stated, the policy of aggressive stop and frisk practices reflects theoretical and strategic innovations derived from what has become popularly known as Broken Windows theory.²⁶ The originators of the Broken Windows theory, James Q. Wilson and George L. Kelling, argued that police should address minor disorders to strengthen police-citizen interactions, and consequently, informal social control.²⁷ For Wilson and Kelling, signs of physical and social disorder invite criminal activity.²⁸ Disorder indicates to law-abiding citizens that their neighborhoods are dangerous places, leading to their withdrawal from informal social control and regulation.²⁹ The theory suggests that there is a tipping point at which disorder trumps order by defeating the willingness of citizens to interact with the police and with each other to co-produce security. Accordingly, disorder invites more disorder in a contagious process that progressively breaks down community standards and also sug-

26. Wilson & Kelling, *supra* note 1, at 31. For excellent reviews, see Livingston, *supra* note 19, at 578 (discussing the relationship between Broken Windows theory and current policing practices); Harcourt, *supra* note 19, at 301-08 (critiquing Broken Windows theory and empirical research claiming to support the link between disorder and crime); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 *LAW & SOC'Y REV.* 805 (1998) (discussing the link between social norms theory and law enforcement policies).

27. Wilson & Kelling, *supra* note 1, at 31; Livingston, *supra* note 19, at 576; Waldeck, *supra* note 19, at 1255.

28. Wilson & Kelling, *supra* note 1, at 32. They define "minor" disorder to include such problems and crimes as littering, loitering, public drinking, panhandling, teenage fighting on street corners, and prostitution. They also mention signs of physical disorder, including abandoned cars—with broken windows, naturally—and dilapidated buildings, also with broken windows.

29. *Id.* at 33 ("In response to fear, people avoid one another, weakening controls.").

gests to would-be criminals that crime will not be reported. Disorder ultimately invites criminal invasion.

Broken Windows theory comports well with social norms theories. In this framework, individuals form social norms through interactions with others in social spaces, creating norms of either legal or illegal behavior in their communities.³⁰ Wilson and Kelling argue that when police focus on repairing or removing these disorder problems, they combat crime by promoting the types of social interactions among law-abiding citizens that strengthen the dynamics of social regulation and produce security and social control.³¹ To restate this in terms of Broken Windows theory, disorder conveys a social message that there is no effective social regulation of behavior in a neighborhood with such visible and prevalent signs of disorder.³² In turn, disorder communicates the absence of restraints to others who may interpret this as either tolerance of, or an invitation to, criminal behavior. Thus, as both disorder and criminal behavior spread, they communicate a mutually reinforcing social norm regarding crime and social disorder, all the while communicating danger to those who would attempt to reinforce social norms that oppose crime and disorder.

Empirical support for Broken Windows and disorder theories of crime is reported by Wesley Skogan in an analysis of survey data collected in 1977 and 1983 in six cities.³³ Additional empirical support is reported by George L. Kelling and Catherine M. Coles.³⁴ Bernard Harcourt, however, reanalyzed Skogan's data and failed to replicate the results, citing numerous inconsistencies and errors in measurement.³⁵ Dan Kahan attributes New York City's crime decline in the 1990s to the adoption by its police department of a tactical strategy based on Broken Windows theory, although em-

30. Meares & Kahan, *supra* note 26, at 805. For an illustration based on ethnographic research, see ELIJAH ANDERSON, *CODE OF THE STREET* (1999).

31. Wilson & Kelling, *supra* note 1, at 35; ANDERSON, *supra* note 30, at 32; *see also* Harcourt, *supra* note 19, at 302-3. *See generally* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 *YALE L.J.* 1165 (1996).

32. *See generally* Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. CHI. L. REV.* 943 (1995) (discussing the construction of social meaning); Ellickson, *supra* note 31.

33. SKOGAN, *supra* note 20. Surveys were conducted in Atlanta, Chicago, Houston, Newark, Philadelphia, and San Francisco. His basic model was a regression analysis predicting robbery rates from measures of social and physical disorder, controlling for characteristics of the cities derived from social disorganization theory: poverty, residential stability, and racial heterogeneity.

34. *See generally* KELLING & COLES, *supra* note 18.

35. Harcourt, *supra* note 19, at 312-39.

pirical and conceptual assessments of the crime decline contest that view.³⁶ Empirical work by Robert Sampson and Jacqueline Cohen provide indirect support for a Broken Windows model of policing by focusing on factors that influence perceptions of the tolerance of disorder, especially higher arrest ratios (relative to the crime rate).³⁷ Despite the implicit developmental and deontological underpinnings of Broken Windows theory (and corresponding social norms theories), none of the supportive studies included prospective tests of the effects of disorder on changes in crime rates in subsequent periods. In fact, all these studies rely on cross-sectional research that is unable to determine whether the observed relationships are temporally-ordered and therefore causally related, or if they are simply correlations whose causal order is unknown.³⁸

The most comprehensive empirical test of the underlying premise of Broken Windows theory—that disorder gives rise to higher crime rates—was a study of disorder in Chicago neighborhoods by Robert Sampson and Stephen Raudenbush.³⁹ Rather than rely on either official records or self-reports, the researchers constructed highly reliable measures of social disorder from a randomized schedule of videotaping of locations. They combined these disorder measures with reports of social control mechanisms from a random sample of 3864 residents in 343 neighborhoods, and both self-reported and official records of crime. Sampson and Raudenbush re-

36. Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2488 n.63, n.65 (1997). Kahan states that the decline in crime must be attributable to the new policing strategy: order-maintenance policing. *Id.* But see Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277, 1285-86, 1289-91(1998) (claiming that changes in crime rates are actually predictable cyclical changes in violence rates, and that only gun crime rates have changed); ANDREW KARMEN, *NEW YORK MURDER MYSTERY* 13-24 (2000) (discussing competing causal claims for the decline in New York City's homicide rate from 1991-98, but finding insufficient evidence to support any single explanation).

37. Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 LAW & SOC. REV. 163, 175-79 (1988) (reporting that more aggressive stop and frisk enforcement produces higher arrest ratios that, in turn, communicate a high punishment likelihood to would-be law violators).

38. For a general discussion of this type of validity threat in cross-sectional, non-experimental research designs, see generally THOMAS D. COOK & DONALD T. CAMPBELL, *QUASI-EXPERIMENTATION DESIGN AND ANALYSIS ISSUES FOR FIELD SETTINGS* (1979); KENNETH ROTHMAN, *MODERN EPIDEMIOLOGY* (1986); LEON ROBERTSON, *INJURY EPIDEMIOLOGY* (1992).

39. Sampson & Raudenbush, *supra* note 20 (reporting results of an observational survey of physical and social disorder in Chicago neighborhoods and its weak association with crime rates).

ported that social interactions and social controls among neighbors are more closely related to crime than is disorder, while these social processes—which they term “collective efficacy”—are unrelated to disorder. Similar to Harcourt’s re-analysis of the Skogan data, Sampson and Raudenbush also discredit the relationship between crime and disorder.⁴⁰

These empirical doubts about the efficacy of Broken Windows theory have not stopped its influence on American policing. The development of police strategies that operationalize Broken Windows theory proceeded apace in the past two decades.⁴¹ It was widely translated into a police strategy known as “order-maintenance policing,” or OMP.⁴² At the same time, Broken Windows theory stimulated a body of academic writing on the subject of order maintenance.⁴³

Under OMP, police aggressively enforce laws against social disorder with “zero tolerance” that requires arrest for any law infraction.⁴⁴ Widely viewed as an adaptation of an earlier movement

40. *Id.* at 603.

41. For example, Commissioner William Bratton had earlier implemented an OMP strategy while head of the New York City Transit Police, called the Clean Car Program (“CCP”). The strategy focused on ridding New York City’s subway cars of graffiti. Maryalice Sloan-Hewitt & George L. Kelling, *Subway Graffiti in New York City: “Gettin’ up” vs. “Meanin’ it and Cleanin’ it,”* in SITUATIONAL CRIME PREVENTION: SUCCESSFUL CASE STUDIES 242, 244-45 (Ronald V. Clarke, ed., 2d. ed. 1997).

42. Livingston, *supra* note 19, at 632.

43. *E.g.*, George L. Kelling, *Order Maintenance, the Quality of Urban Life, and Police: A Line of Argument*, in POLICE LEADERSHIP IN AMERICA 296 (William A. Geller ed., 1985); Carl B. Klockars, *Order Maintenance, the Quality of Urban Life, and Police: A Different Line of Argument*, in POLICE LEADERSHIP, *supra*, at 309; Carl B. Klockars, *Street Justice: Some Micro-Moral Reservations: Comment on Sykes*, 3 JUST. Q. 513 (1986); Gary W. Sykes, *Street Justice: A Moral Defense of Order Maintenance Policing*, 3 JUST. Q. 497 (1986) [hereinafter *Street Justice*]; Gary W. Sykes, *The Functional Nature of Police Reform: The “Myth” of Controlling the Police*, 2 JUST. Q. 51 (1985). *But see generally* Jack R. Greene & Ralph B. Taylor, *Community-Based Policing and Foot Patrol: Issues of Theory and Evaluation*, in COMMUNITY POLICING: RHETORIC OR REALITY, 195, 201-03 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) [hereinafter COMMUNITY POLICING].

44. Definitions of the crimes that constitute disorder vary, but generally include: unlicensed peddling and vending, public drunkenness and open drinking, vandalism (including graffiti), public urination, loitering, littering, panhandling, prostitution, and menacing misbehavior. The latter often is symbolized by “squeegee” men who solicit money in return for unsolicited cleaning of motorists’ windshields at stop lights. Cracking down on squeegee men represents the type of OMP enforcement that most closely expressed popular conceptions of the policy. KELLING & COLES, *supra* note 18, at 14-15; Livingston, *supra* note 19, at 553-54; Harcourt, *supra* note 19, at 297; Wilson & Kelling, *supra* note 1; WILLIAM BRATTON & PETER KNOBLER, TURN-AROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 214 (1998) (discussing the NYPD’s policy to rid the city of the squeegee people); William J. Brat-

toward "community policing,"⁴⁵ OMP advocates active engagement with and arrest of law violators. In more traditional community policing, police pursued ameliorative measures that also were consistent with Broken Windows theory, but avoided coercive encounters with citizens on the street.⁴⁶ These ameliorative measures were consistent with Broken Windows tenets that police should focus equally on protecting communities as well as protecting individuals.⁴⁷ Although community policing and OMP both derive from a social norms basis, the implementation of OMP in New York moved in a very different direction, exchanging amelioration of physical disorder for interdiction of social disorder.

Sarah Waldeck claims that this exchange resolved a conflict that arose in the occupational subculture of policing with the advent of community policing.⁴⁸ In addressing non-crime problems, police were reluctant to adhere to a new set of markers for performance and competence based on social interactions with law-abiding citizens.⁴⁹ By emphasizing the aggressive pursuit of social disorder, or disorderly persons, police returned to the more comfortable performance indicators of stops and arrests, while restoring to the workplace their traditional cultural dichotomy of "disorderly people and law abiders."⁵⁰ Thus, for example, while New York City police identified only seventy-five "squeegee" people,⁵¹ the expanding definition of disorder meant that more and more people were disorderly and subject to aggressive police attention.

ton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL'Y 447, 447-48 (1995); N.Y. CITY POLICE DEP'T, POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK 10-12 (1994) [hereinafter POLICE STRATEGY No. 5].

45. Livingston, *supra* note 19, at 562-91. While OMP emphasizes arrest, other forms of community policing eschew arrest in favor of building community contacts. *E.g.*, WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE 8, 55-56 (1997).

46. These include, for example, cleaning up trash-strewn lots, painting over graffiti, and assisting housing inspectors to address code violations. *E.g.*, Livingston, *supra* note 19, at 584 (citation omitted); HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING 134 (1990); George L. Kelling & Mark H. Moore, *From Political to Reform to Community: The Evolving Strategy of Police*, in COMMUNITY POLICING, *supra* note 43, at 3 (Jack R. Greene & Stephen D. Mastrofski eds., 1988); Stephen D. Mastrofski, *Community Policing as Reform: A Cautionary Tale*, in COMMUNITY POLICING, *supra* note 43, at 47, 67.

47. See Livingston, *supra* note 19, at 583 n.162.

48. Waldeck, *supra* note 19, at 1267-69.

49. See *id.* at 1267.

50. *Id.* at 1268, 1278.

51. BRATTON & KNOBLER, *supra* note 44, at 214.

It is important to remember that Wilson and Kelling's original social science construction of Broken Windows theory had little to do with social disorder, especially with the aggressive interdiction of disorderly persons. Thus, as we shall see next, the evolution of OMP in New York resulted in a policy and style of policing that violated the subtle connection that Wilson and Kelling drew between crime and disorder, and that deviated in many important ways from its underlying social norms paradigm. As we show below, the exchange of physical disorder for social disorder signified nothing less than a theoretical paradigm shift from the original construction of Broken Windows theory to the more traditional and problematic policing of social disorganization.

B. Violence, Disorder, and Order-Maintenance Policing in New York City

Many observers have noted that OMP in New York City has eschewed (what is for police) the more esoteric dimensions of community policing targeted at physical disorder, for an aggressive policy of arrest and other traditional law enforcement tactics aimed squarely at social disorder. While remaining true to the origins of Broken Windows theory, there were strategic and tactical reasons to reconstruct the Broken Windows theory in this way.

Whereas community policing implies a partnership between police and community, the interpretation of community needs is one of the wild cards of the theory.⁵² The partnership required that the parties respond both to a neighborhood's priorities regarding crime and to the more traditional police functions of detecting and deterring criminal behavior.⁵³ Community policing, then, often appeared to be a Solomonesque split between traditional police goals focusing on major crimes (e.g., murder and armed robbery) and the goals of community residents concerned with chronic low-level crimes and disorder problems.⁵⁴

However, in shifting from community policing to OMP, police strategy in New York City redirected its strategic focus from remedying physical disorder to policing social disorder. The rationale for this shift from physical to social disorder was the theory that low-level crime—social disorder—nurtures and facilitates more serious crime.⁵⁵ George L. Kelling and Catherine M. Cole conceptu-

52. See Skogan & Hartnett, *supra* note 45, at 8.

53. BRATTON & KNOBLER, *supra* note 44, at 94-95.

54. See generally Goldstein, *supra* note 46.

55. Wilson & Kelling, *supra* note 1, at 34.

alized OMP as a cooperative variant on community policing: the enforcement of standards of conduct jointly defined by citizens and police.⁵⁶ Even so, this strategic shift did not necessarily imply a tactical change toward aggressive policing. Moreover, this tactical shift departed sharply from the Wilson and Kelling and the Kelling and Coles models of Broken Windows, as well as most contemporary models of community policing.⁵⁷ As conceptualized by Kelling and Coles, OMP involved the enforcement of these standards “through non-arrest approaches—education, persuasion, counseling, and ordering—so that arrest would only be resorted to when other approaches failed.”⁵⁸

The origins of the tactical shift are revealed in strategy documents issued by the New York City Police Department (“NYPD”) in 1994.⁵⁹ According to the analysis by the Office of the Attorney General of the State of New York (“OAG Report”), these policies remain in effect today.⁶⁰ First, *Police Strategy No. 5, Reclaiming the Public Spaces of New York*,⁶¹ articulates a reconstructed version of Broken Windows theory as the driving force in the development of policing policy. It states that the NYPD would apply its enforcement efforts to “reclaim the streets” by systematically and aggressively enforcing laws against low-level *social* disorder: graffiti, aggressive panhandling, fare beating, public drunkenness, unlicensed vending, public drinking, public urination, and other low-level misdemeanor offenses.⁶²

Second, *Police Strategy No. 1, Getting Guns Off the Streets of New York*,⁶³ formalized the strategic focus on the eradication of gun violence through the tactical measure of intensifying efforts to seize illegal firearms. Homicide trends in New York City since 1985 provided strong empirical support for emphasizing gun violence in enforcement policy.⁶⁴ Nearly all the increases in homi-

56. KELLING & COLES, *supra* note 18, at 22-23.

57. See SKOGAN, *supra* note 20; Goldstein, *supra* note 46.

58. KELLING & COLES, *supra* note 18 at 23.

59. OAG REPORT, *supra* note 5.

60. *Id.* at 56-59.

61. POLICE STRATEGY NO. 5, *supra* note 44.

62. This aggressive approach to low-level disorder was “the linchpin of efforts now being undertaken by the New York City Police Department to reduce crime and fear in the city.” *Id.*

63. POLICE STRATEGY NO. 1, *supra* note 25.

64. See ROBERT C. DAVIS & PEDRO MATEU-GELABERT, VERA INST. OF JUSTICE, RESPECTFUL AND EFFECTIVE POLICING: TWO EXAMPLES IN THE SOUTH BRONX 2, 3 fig.1a (1999) (charting “Homicides (Murder & Non-Negligent Manslaughter), 1978-1997”) [hereinafter VERA REPORT].

cides, robberies, and assaults during this period were attributable to gun violence.⁶⁵ The political fallout of the homicide crisis lasted for several years more. The homicide crisis was a critical theme in the mayoral election campaign of 1993, and focused the attention of the incoming Giuliani administration's crime-control policy on gun violence.⁶⁶

These two policies, articulated within a relatively brief period in the first few months of the new administration, explicitly cemented the marriage of OMP and "gun-oriented policing"⁶⁷ within policy. The logic of this approach was articulated in a series of documents and statements. "By working systematically and assertively to reduce the level of disorder in the city, the NYPD will act to undercut the ground on which more serious crimes seem possible and even permissible."⁶⁸ These tactical shifts were intended to raise the stakes for criminals who carried guns: "Stopping people on minor infractions also made it riskier for criminals to carry guns in public."⁶⁹ The policy assumed, quite explicitly, that would-be offenders would be deterred from carrying guns since they would be more likely to be stopped for minor crimes or infractions.

The net effect of this marriage was that Broken Windows theory was implemented out of context. Not only was Broken Windows theory recast from physical to social disorder, but community policing and disorder policing both were separated from the theory, reinvented, and implemented with very different tactics.⁷⁰

First, the NYPD version of disorder policing rejected the emphasis on alternatives to arrest and prosecution—essential tenets of the original Broken Windows theory.⁷¹ Although correcting disorder was the focus of policing, the tactic to achieve it was arrest, the most traditional of law enforcement tools. People who committed disorder offenses were questioned and checked for outstanding

65. Fagan et al., *supra* note 36, at 1289, 1298, 1304.

66. See ELI SILVERMAN, NYPD BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING 95 (1999); BRATTON & KNOBLER, *supra* note 44, at 219-20. See generally KARMEN, *supra* note 36.

67. Fagan et al., *supra* note 36, at 1322.

68. POLICE STRATEGY NO. 5, *supra* note 44.

69. VERA REPORT, *supra* note 64, at 1.

70. Waldeck, *supra* note 19, at 1274-75 n.89; see also Bratton, *supra* note 44, at 463-64. This version of community policing eschewed social work functions antithetical to the traditional definition of policing. These tactics robbed rank-and-file police of the activities—searches and arrests—that not only were the staple of police productivity, but also the stepladder to status on the force and advancement within the department. Among police administrators, the emerging paradigm of community policing took away their primary method of keeping order.

71. Waldeck, *supra* note 19, at 1274.

warrants. Those without identification were taken to a precinct, and many were held until fingerprint checks were completed.⁷² In other words, disorder policing was used not to disrupt the developmental sequence of disorder and crime, but instead disorder offenses became opportunities to remove weapons and wanted criminals from the streets.

Second, community policing also was reinvented in this marriage. Community standards were no longer identified through structured and systematic interactions between police and community leaders. Instead, the NYPD turned to its sophisticated data-driven management accountability system—Compstat—to identify community needs. The result was that the locus of the standard-setting process shifted from police-community partnerships to precinct commanders.⁷³ Presumably, precinct commanders were still involved in their communities, developing plans and setting priorities for enforcement.⁷⁴ However, the precinct commanders, who continued to meet with community groups, were now accountable to the NYPD's operational hierarchy for both their successes and their failures to produce declining crime rates.⁷⁵ As a result, precinct commanders set the crime-fighting priorities for that precinct and developed overall plans of action, based on meeting NYPD priorities, rather than the standards set in cooperation with communities.⁷⁶

C. Disorganization and Disorder: Competing Theories of Place and Crime

For decades before Broken Windows, criminological theories emphasized the notion of "place."⁷⁷ In the 1920s, Clifford Shaw

72. *Id.* at 1279. These tactics were developed and widely implemented in the transit police under Bratton's leadership in the early 1990s. BRATTON & KNOBLER, *supra* note 44, at 152.

73. BRATTON & KNOBLER, *supra* note 44, at 233.

74. *See id.*

75. *Id.*

76. OAG REPORT, *supra* note 5, at 54-56. According to the Report, accountability was implemented through Compstat meetings. Compstat ("comparison statistics") is a system of electronic computer mapping of weekly crime statistics within precincts and larger police commands. Monthly Compstat sessions focus on analysis of specific crime issues of any of the eight patrol boroughs. Each patrol bureau spans eight to ten precincts. Commanders are asked to explain, often on the spot and in front of an audience of the commissioner and other high ranking department personnel, changes in crime trends in their areas. *Id.*

77. "Place" in the criminological literature is an enduring concept that alternately refers to neighborhoods, larger sections of cities, or other aggregates of areas. *See generally* CLIFFORD R. SHAW & HENRY D. MCKAY, JUVENILE DELINQUENCY AND

and Henry McKay showed that high rates of juvenile crime were persistent in specific neighborhoods over time, despite changes in the racial and ethnic composition of the persons who lived there. Shaw and McKay concluded that place, not the characteristics of the persons who live there, is implicated in crime. Factors such as poverty rates, a downward skewed age distribution, racial and ethnic heterogeneity, and population turnover (residential mobility) explain variations in crime rates across neighborhoods. Shaw and McKay defined the conditions that produced persistently elevated juvenile crime rates as social disorganization.⁷⁸

Recent revisions to this theory emphasize the social organization—the actions of residents within neighborhoods to produce social control and realize their shared values—as protective against high crime rates. Robert Sampson, Stephen Raudenbush, and Felton Earls reported in a study of residents in 343 Chicago neighborhoods that social cohesion among neighbors is linked to lower levels of violence, net of poverty rates, demography, or other socioeconomic factors.⁷⁹ This dynamic conceptualization of neighborhood emphasizes social interactions among neighborhood residents, including:

- (1) the strength and interdependence of social networks; (2) the efficacy of collective supervision that residents exercise; (3) the personal responsibility they assume in addressing neighborhood problems; and (4) the level of resident participation in formal and informal organization such as churches, block clubs, and

URBAN AREAS: A STUDY OF RATES OF DELINQUENCY IN RELATION TO DIFFERENTIAL CHARACTERISTICS OF LOCAL COMMUNITIES IN AMERICAN CITIES (rev. ed. 1969) (presenting data on the stability of delinquency rates in Chicago neighborhoods across generations of residents of changing composition); ROBERT J. BURSIK JR. & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL (1993) (articulating a systemic theory of delinquency that includes elements of the physical attributes of neighborhoods, their social composition and demography, and the institutions that are influential for the people who live there); Robert J. Sampson & Janet Lauritsen, *Violent victimization and offending: Individual-, Situational-, and Community-Level Risk Factors*, in UNDERSTANDING AND PREVENTING VIOLENCE 1 (Albert J. Reiss Jr. & Jeffrey A. Roth, eds. 1994) (reviewing empirical studies that show a relationship between individuals and communities or neighborhoods and delinquency rates).

78. SHAW & MCKAY, *supra* note 77, at 383-87. Recent studies show that these factors are stable explanations over time of variations in crime and violence rates across cities and larger ecological aggregates. Kenneth Land et al., *Structural Covariates of Homicide Rates: Are There any Invariances Across Time and Space?*, 95 AM. J. SOC. 922 (1990).

79. Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, SCIENCE, Aug. 15, 1997, at 918 (examining neighborhoods in a way that ensured diversity by race, ethnicity, and class).

PTAs. The idea is that community-level social processes such as the level of supervision of teenage peer groups, the prevalence of friendship networks, and the level of residential participation in formal organizations, mediate the link often noted between individual-level factors, such as race and socioeconomic status, and crime.⁸⁰

As Tracey Meares and others point out, the conditions that characterize poor, minority, inner-city communities generally conform to a place-based social organization model of crime. In urban areas, many poor people of color live in conditions of residential segregation, concentrated poverty, and unemployment that predict the breakdown of community social processes,⁸¹ which in turn predict elevated crime rates.⁸² For example, many poor African Americans live in the overwhelmingly poor communities marked by unemployment, family dislocation, and high residential turnover.⁸³ The challenges to social control in socially disorganized neighborhoods are greater for blacks and Hispanics than for whites.⁸⁴

Social disorganization also predicts social and physical disorder. Both theoretically and empirically, disorder and disorganization are confounded. In the study of Chicago neighborhoods by Sampson and colleagues, they included in regression models measures traditionally associated with social disorganization theory to predict disorder in census tracts.⁸⁵ Neighborhood characteristics including concentrated disadvantage⁸⁶ and weak social ties (collective efficacy) were significant predictors of the rates of disorder. Disorder, however, did not predict rates of homicide, and only

80. Tracey Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 673 (1998); see also Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in CRIME AND INEQUALITY 37, 45-48 (John Hagan & Ruth D. Peterson eds., 1995); Sampson et al., *supra* note 79.

81. MASSEY & DENTON, *supra* note 17, at 130-31.

82. Sampson & Wilson, *supra* note 80; see also Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, 93 AM. J. SOCIOLOGY 348 (1987) (discussing the effect of family disruption on crime independent of joblessness and welfare receipt).

83. MASSEY & DENTON, *supra* note 17, at 166-67; WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 20-62 (1987); JAMES SHORT, *POVERTY, ETHNICITY AND VIOLENT CRIME* (1997).

84. Meares, *supra* note 80, at 673-74; Sampson & Wilson, *supra* note 80, at 42 (“[R]acial differences in poverty and family disruption are so strong that the ‘worst’ urban contexts in which whites reside are considerably better than the average context of black communities.”). See generally Sampson et al., *supra* note 79.

85. Sampson & Raudenbush, *supra* note 20, at 633-36, and tbl.6.

86. *Id.* This measure included tract-level rates of poverty and unemployment, single parent households, and receipt of public assistance. Racial concentration of blacks was a moderate contributor to the empirical derivation of this construct.

weakly predicted rates of robbery. After controlling for these neighborhood characteristics, the relationship between disorder and crime disappeared for four of their five empirical tests.⁸⁷

Accordingly, social disorganization predicts crime and disorder, but disorder does not predict crime after controlling statistically for the effects of social disorganization. Sampson and colleagues conclude that: "Contrary to the Broken Windows theory . . . the relationship between public disorder and crime is spurious" for most crimes, and is weakly associated only with the crime of robbery.⁸⁸ Disorder is only a moderate predictor of robbery, and it co-varies with other neighborhood characteristics such as concentrated disadvantage. Disorder may have a cascading effect on antecedents of crime—encouraging business migration, for example—but it has very weak indirect effects on crime itself. Sampson and colleagues concluded that disorder takes a back seat to other factors, including structural disadvantage and social ties, in explaining crime rates. Controlling crime through disorder policing is, in their words, "simplistic and largely misplaced."⁸⁹ Disorder policing, or OMP, leaves the causes of crime untouched.

II. AGGRESSIVE POLICING: OMP, STREET STOPS, AND RACE

Under the tactical shift to order-maintenance policing in New York City, patrol was reinvented to include pro-active interdiction of persons suspected of violating both minor and serious crimes.⁹⁰ The importance of stop and frisk interventions to crime fighting was never formally acknowledged in official documents, but has been discussed in detail by the policy's architects and theorists. Kelling and Coles claim that for OMP to be successful, patrol officers should intervene in observed or suspected low-level disorder.⁹¹

Critics claim that OMP tactics increased the opportunity for pretextual stops leading to searches and arrests.⁹² Stops for minor

87. *Id.* at 637.

88. *Id.* at 603, 636-37.

89. *Id.* at 638.

90. OAG REPORT, *supra* note 5, at 56-57.

91. KELLING & COLES, *supra* note 18, at 243-48; OAG REPORT, *supra* note 5, at 57; Waldeck, *supra* note 19, at 1282-83; accord James Q. Wilson, *Just Take Their Guns Away*, N.Y. TIMES MAG., Mar. 20, 1994, at 47 (stating that police should make street stop and frisks in order to find persons carrying illegal weapons, without stating a legal or practical rationale for these stops).

92. Waldeck, *supra* note 19, at 1282 ("Nor is there any doubt that the police use quality-of-life offenses as excuses to fish for drugs, guns, or evidence of a more serious crime.").

crimes or infractions were easier to justify under a lower constitutional standard (i.e., “reasonable suspicion”) than stops for more serious offenses. Accordingly, OMP stops provided opportunities for police to check for warrants, and, again under reasonable suspicion standards, search suspects for contraband or weapons, and make arrests. Many such offenses—such as public drinking or loitering—take place in public, making their observation easier and an encounter with the putatively offending citizen more likely.

The result was a vast increase in misdemeanor arrests, but also a sharp decline in their quality and sustainability in court. OMP has been activated through vast increases in misdemeanor arrests of adults, increasing from 129,404 in 1993 (the year prior to OMP implementation) to 181,736 in 1996, and 215,158 in 1998.⁹³ But the evidentiary quality of arrests suffered as their number rose. As arrests increased under OMP, the rate at which prosecutors declined to pursue these cases rose dramatically. In 1998, prosecutors dismissed 18,000 of the 345,000 misdemeanor and felony arrests, approximately twice the number dismissed in 1993.⁹⁴ Overall, more than 140,000 cases completed in 1998 ended in dismissals, an increase of 60% compared with 1993.⁹⁵ Prosecutors say that refusals to prosecute as well as the high dismissal rate can indicate a decline in the quality of arrest.⁹⁶ Many of the declined cases, known as “declined prosecutions” or “D.P.s” in the court, came from predominantly minority neighborhoods, the focus of OMP efforts.⁹⁷ The punitive component of the D.P.s. and dismissed arrests—being taken into custody, handcuffed, transported, booked, often strip-searched, and jailed overnight—impregnates these events with its own social meaning quite different from the origins of Broken Windows theory.

93. DIV. OF CRIMINAL JUSTICE SERVS., STATE OF N.Y., CRIMINAL JUSTICE INDICATORS: NEW YORK CITY, 1995-1999, at <http://criminaljustice.state.ny.us/crimnet/cjsa/areastat/areastat.htm> (using search parameters: “Region: New York City,” years 1995-1999) [hereinafter CJI: NEW YORK CITY].

94. Ford Fessenden & David Rohde, *Dismissed Before Reaching Court: Flawed Arrests Rise in New York*, N.Y. TIMES, Aug. 23, 1999, at A1 (citing the sharp rise in the number of arrests that prosecutors declined to prosecute in 1998). The number of cases rejected by prosecutors rose by 41% in the Bronx and 23% in Manhattan, even as the crime rate declined sharply in the same year. Approximately fifty persons each day were arrested and booked, but then released—many spending a night in jail before their cases were dismissed. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

Analyses of 1998 police stop and frisk reports—UF-250s—showed that OMP policing had drifted from street stops in quality of life crimes to widespread stops of citizens in search of guns.⁹⁸ Stop and frisk actions became the primary method for removing illegal handguns from the street. The OAG Report showed that from January 1998 through March 1999, weapons possession was suspected in more than one-third of documented stop and frisk encounters.⁹⁹

The OAG Report also showed that the reconstructed OMP policy was implemented in a manner that was not race-neutral. The OAG Report showed that stops were disproportionately concentrated in the city's poorest neighborhoods, neighborhoods with high concentrations of racial minorities. Table 1 below shows the percentage of stops, according to the distribution of minority populations in the precincts. In precincts with the highest concentrations of minorities, stops of black and Hispanic suspects were highest (by percentage), as might be expected. However, in the thirteen precincts with the lowest minority populations,¹⁰⁰ stops of blacks and Hispanics were well above what their population percentage would predict. In those precincts, 30% of the persons "stopped" were black, more than ten times greater than their percentage of the overall population of those precincts.¹⁰¹ Hispanics comprised 23.4% of the persons "stopped," more than three times their population share. Whites make up 80% of the population of those precincts, but only 41.5% of the persons "stopped." Even in precincts where neighborhoods had the lowest minority concentration, whites were stopped less. The pattern invokes an enduring empirical fact in criminological research: police officers are more likely to treat as suspicious persons who seem out of place from their surroundings.¹⁰² To police officers, race serves as a marker of

98. OAG REPORT, *supra* note 5, at tbl.I.B.3.

99. *Id.* The Street Crime Unit was disproportionately responsible for the use of stop and frisk actions to search for guns. During the fifteen month study period in the OAG Report, the Street Crime Unit ("SCU") had a "particular emphasis on recovering illegal firearms." Its 435 officers (out of nearly 40,000 in the NYPD) effected more than 10% of all documented stop and frisk encounters citywide. *Id.* at 58-59.

100. *Id.* at tbl.I.A.2.

101. *Id.* The OAG Report established the population of each precinct, using census data for day and night populations. *Id.* at 96.

102. JONATHAN RUBINSTEIN, CITY POLICE 225 (1973); John van Maanen, *Working the Street: A Developmental View of Police Behavior*, in THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE 83, 118 (Herbert Jacobs, ed. 1974).

where people "belong," and racial incongruity as a marker of suspicion.¹⁰³

TABLE 1. DISTRIBUTION OF STOPS BY RACE OF SUSPECT AND RACIAL COMPOSITION OF PRECINCT (MANDATED REPORT STOPS ONLY)¹⁰⁴

% Hispanic Population in Precinct	% Black Population in the Precinct		
	Over 40%	10% to 40%	Under 10%
Over 40%	57.0	38.0	17.1
	38.8	55.1	67.0
	3.3	4.9	10.1
	(4)	(11)	(3)
20% to 40%	74.6	31.6	29.5
	19.2	52.0	40.8
	2.9	12.7	22.3
	(2)	(6)	(6)
10% to 20%	84.8	56.9	22.9
	11.0	22.2	40.1
	2.9	18.2	26.3
	(8)	(9)	(5)
Less than 10%	91.6	74.7	30.0
	4.6	8.0	23.4
	2.0	15.4	41.5
	(6)	(2)	(13)
	Legend	% Black Suspects	
		% Hispanic Suspects	
		% White Suspects	
		(Number of Precincts)	

Racial incongruity is one of several patterns observed in the OAG Report that depict the racial component of OMP in New York. The ratio of 9.5 stops of black citizens for each arrest made was 20% higher than the 7.9 ratio for whites.¹⁰⁵ Such higher stop-arrest ratios suggest either that stops for blacks were pretextual and largely unfounded, or that police were less discriminating or skillful in assessing "suspicion" for minority citizens.

Stops, alone or in proportion to the population, tell only part of the story. The NYPD points out, for example, that the higher stop

103. Stephen Mastrofski et al., *Race and Every-Day Policing: A Research Perspective*, Presented at the 12th International Congress on Criminology, Seoul, Aug. 24-29, 1998. Anthony C. Thompson reminds us that racial incongruity was one of the markers that aroused the suspicion of Officer McFadden in the original *Terry* case. See generally Thompson, *supra* note 17, at 962-73 (discussing the racial dimensions of the original *Terry* case and the centrality of race to Fourth Amendment jurisprudence).

104. OAG REPORT, *supra* note 5, at tbl.I.A.2.

105. *Id.* at tbl.I.B.2.

rate for minorities reflects higher participation of blacks and Hispanics in crimes, especially in the city's highest crime neighborhoods. Using crime data on race- and crime-specific arrest rates within precincts, the OAG Report estimated the extent to which race- and crime-specific stops were predicted by crime, or whether actual stop rates exceeded the predicted stop rates. The results show that crime rates only partially explain stop rates overall, and fail to explain the rates at which minority citizens are "stopped" by the NYPD. After controlling for race- and crime-specific crime rates and the population composition of the precinct, the results showed that black and Hispanic citizens were significantly more likely to be stopped than were white citizens.¹⁰⁶ The overall differences between races were statistically significant, and were significant specifically for stops where the suspected crime was either violence or weapons possession.¹⁰⁷

Table 2 illustrates the exponentiated coefficients—or comparative odds—from these models, showing the magnitude of the differences for each race- and crime-specific stop rate. This table only includes stops where reports were mandated by NYPD policy. The results are divided into three sections, according to the precinct's black population. This display illustrates the importance of concentration effects. Each coefficient shows the stop-rate adjusted for the crime rate, disaggregated by race of suspect and suspected crime. In other words, each table shows the rate at which blacks, Hispanics, and whites were "stopped" in proportion to the rate at which they were arrested for each crime type. Comparing the coefficient by race illustrates the magnitude of the differences between races.

106. *Id.* at tbl.I.C.1.

107. *Id.*

TABLE 2. LOG ODDS OF RACE- AND CRIME-SPECIFIC STOP RATES, CONTROLLING FOR 1997 RACE- AND CRIME-SPECIFIC ARREST RATES, BY BLACK POPULATION IN PRECINCT (MANDATED REPORT STOPS ONLY)¹⁰⁸

Black Population in Precinct: Less Than 10% Suspected Crime				
Race of Suspect	Violent	Weapon	Property	Drug
Black	0.37	2.17	0.26	0.10
Hispanic	0.32	1.87	0.39	0.11
White	0.11	0.97	0.33	0.10

Black Population in Precinct: From 10% to 40% Suspected Crime				
Race of Suspect	Violent	Weapon	Property	Drug
Black	0.36	2.12	0.25	0.09
Hispanic	0.31	1.83	0.38	0.10
White	0.17	0.95	0.32	0.10

Black Population in Precinct: Greater Than 40% Suspected Crime				
Race of Suspect	Violent	Weapon	Property	Drug
Black	0.30	1.76	0.21	0.08
Hispanic	0.26	1.52	0.31	0.09
White	0.14	0.79	0.27	0.08

For example, Table 2 shows that in precincts where the black population was less than 10%, blacks were 2.17 times more likely to be stopped for weapons offenses compared to the arrest rate for blacks for that crime. Whites were 0.97 times more likely to be stopped compared to the arrest rate for whites for that crime. Comparing the coefficients, blacks were more than twice as likely ($2.17/0.97$) to be stopped as whites for weapons offenses, relative to their race-specific arrest rates for that crime.

The comparisons throughout this table show the elevated rates at which blacks and Hispanics were stopped for suspected violence and weapons offenses as compared to stop rates for whites. In precincts with more than 40% black population, the black-white ratios were still more than twice as high for violent crimes ($0.3/0.14$) and nearly three times higher ($1.76/0.79$) for weapons offenses. The Hispanic-white ratios in these precincts were comparably disproportionate for stops for violent crimes ($0.26/0.14$) and for weapons offenses ($1.52/0.79$). The disparities were confined to these two crime types. The coefficients were either comparable or lower for

108. See *id.* at Appendix tbl.1.C.1.

whites where stops related to alleged drug or property crimes, regardless of precinct demography.

The higher-than-predicted stop rates of minorities suggest that the police had cast suspicion more often—than would be predicted by their crime participation—on the city's minority population.¹⁰⁹ Although race may not be determinative in the decision to stop a suspect, race certainly appeared to be a motivating factor in the patterns of stop and frisk interventions. The prominence of race in the decision to stop citizens may not rise to the threshold of racial profiling, but it does seem to create a racial classification of "suspicion."

To assess whether that suspicion met *Terry* standards of "reasonable suspicion," the OAG Report examined the stop rationales articulated by police officers on the UF-250 stop report form. The researchers examined the reasons that police officers provided for "stopping" civilians, and estimated the rate at which the reasons, as stated, met Fourth Amendment standards of "reasonable suspicion." The narrative rationales for "stops" came from a citywide sample of 10,000 coded and analyzed UF-250 forms from eight precincts plus a supplemental sample of cases across all precincts.¹¹⁰ The narratives were coded into sixty-seven categories, and the OAG staff then determined whether the stated rationale in each category met *Terry* standards of "reasonable suspicion."¹¹¹ These codes were then collapsed into seven categories, or rationales, which were determined as either meeting or failing to meet *Terry* standards.¹¹²

Table 3, adopted from the OAG Report, shows that in nearly two-thirds of the stops, the articulated "reasonable suspicion" for the stop met *Terry* standards, and that racial disparities were small. However, stops of black suspects more often failed to meet *Terry*

109. *Id.* at 126-27.

110. *Id.* at 135-36. The researchers coded rationales for a citywide sample plus a supplemental sample of specifically chosen precincts. For the individual precinct sample, a purposive sample of eight precincts was selected—the 79th, 42nd, 30th, 43rd, 33rd, 107th, 72nd, and the 19th—based on variation in stop rates and population parameters. For each precinct, approximately half of the UF-250 forms were randomly sampled. In all, 4383 UF-250 forms were randomly sampled for the citywide analysis, including 3282 stops where reports were "mandated." *Id.* at 158-60.

111. *Id.* at 145, tbl.II.A.1.

112. *Id.* at 135-60, tbl.II.A.2. Categories where rationales were sufficient to meet *Terry* standards were: (1) crime observed, (2) suspect fit description, (3) weapon observed, (4) suspicious activity plus other criterion behavior. Categories where rationales failed to meet *Terry* standards included: (1) suspicious activity and (2) suspect in wrong place. *Id.* at tbl.II.A.2.

standards (15.4%) than did stops of whites (11.3%). In contrast, there were only minimal differences between stops involving Hispanic and whites suspects.

TABLE 3. ASSESSMENT OF TERRY RATIONALES FOR STOPS BY RACE OF SUSPECT, CITYWIDE SAMPLE (MANDATED REPORT STOPS ONLY)¹¹³

Assessment of Reasonable Suspicion Standard	Race of Person Stopped				Total
	Black	Hispanic	White	Other	
Facts, as stated, articulate reasonable suspicion	1,172	690	192	60	2,114
	64.3%	65.4%	60.4%	69.8%	64.4%
Facts, as stated, do not articulate reasonable suspicion	281	133	36	9	459
	15.4%	12.6%	11.3%	10.5%	14.0%
Insufficient information	370	232	90	17	709
	20.3%	32.7%	28.3%	19.8%	21.6%
Total	1,823	1,055	318	86	3,282

The pattern of evidence in the OAG Report suggests that race evidently became a factor in “everyday policing” in New York City under OMP. Working within a legally permissible but lower standard of “reasonable” racial discrimination, where a second motivating factor (such as “reasonable suspicion”) may be present, police over-stopped black and Hispanic citizens relative to their crime participation, well in excess of their white neighbors, and more often without constitutional justification. Black citizens in particular tend to generalize these experiences, with potentially toxic consequences for their perception of the legitimacy of the law.¹¹⁴ Disproportionate stops of black citizens is an important “race-making” factor,¹¹⁵ generalized through the sense of linked fate that many blacks share.¹¹⁶ It conveys social stigma and under-

113. See *id.* at tbl.II.B.4.

114. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 386 (1998) (“Blacks correctly see pretextual traffic stops as another sign that police officers view blacks, particularly black males, as criminals who deserve singular scrutiny and treatment as second class citizens.”). See generally David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 571 (1997).

115. This term is borrowed from Professor David James, who has written of the ghetto as a “race-making situation.” James, *supra* note 24, at 420-28.

116. DAWSON, *supra* note 24, at 77 (using the “linked fate” concept to explain the way that African Americans perceive what is in their individual self interest). Experiences such as “stop and frisk” encounters could easily undermine the social meaning of the OMP strategy. *Id.* at 80-84; see also JEFFREY FAGAN & TRACEY L. MEARES, PUNISHMENT, DETERRENCE AND SOCIAL CONTROL: THE PARADOX OF PUNISHMENT IN MINORITY COMMUNITIES (2000) (discussing how the perceived illegitimacy of the criminal justice system in the African American and Hispanic communities has kept

mines the perceived and attributed legitimacy of law and legal institutions necessary to promote compliance with the law. The harm to individuals stopped but not arrested cannot be discounted in a social framework where events and experiences are linked in this manner.¹¹⁷

III. RESOLVING COMPETING THEORETICAL CLAIMS ABOUT STOP AND FRISK ACTIVITY: EMPIRICAL RESULTS

Returning to OMP in New York City, then, we can ask whether the emphasis on disorder was, in fact, a strategy focused on policing poor people rather than disordered places. Of course, at the neighborhood level, race interacts with other neighborhood factors, ones that also correlate with social and physical disorder.¹¹⁸ In the reconstructed Broken Windows theory that informed OMP in New York City, social disorder, or person-focused tactics, replaced physical disorder, or place-based tactics. Empirical evidence shows that the epidemiology of stop and frisk actions in turn was concentrated among minority persons in poor neighborhoods.¹¹⁹ Accordingly, it appears that place was switched for race in the reality of OMP. Thus, what began as policing informed by a nuanced Broken Windows theory, in fact reflects criminological theories focused on social disorganization.

This raises two questions for understanding the racial patterns of policing. First, what are the net effects of race on patterns of policing after we control for disorder? If OMP was in fact targeted at disorder, race differences at the neighborhood level should disappear after we introduce measures of disorder. Unlike, for example, race-explicit drug-courier profiles, OMP should be racially and facially neutral once we control for the level of disorder in the neighborhood.

crime rates steady despite harsher sentencing), <http://papers2.ssrn.com/paper.taf?abstract-id=223148>.

117. William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1218 (1998) (summarizing harms from encounters of innocent citizens with police, including violations of privacy, public shame at being singled out and treated like a criminal suspect, the emotional damage of discrimination, and the potential for police violence and physical injury).

118. Sampson & Raudenbush, *supra* note 20. See generally ROBERT J. BURSIK, JR. & HAROLD GRASMICK, NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL (1993).

119. OAG REPORT, *supra* note 5, at 92-94 (citing New York City Police Commissioner Howard Safir's statement that minorities are more likely to be "stopped" because they live in high crime neighborhoods with an increased police presence).

Second, if disorder itself is predicted by neighborhood or ecological characteristics, factors that also are correlated with race, are these other factors significant predictors of stop and frisk patterns after we control for disorder? While some neighborhood characteristics are correlated with disorder, these factors also are part of competing theoretical explanations, explanations that are based on characteristics of persons, rather than places. Accordingly, we question whether OMP produces the dramatic racial disparities reported in the OAG Report because of the characteristics of people who live in the neighborhood, or whether these disparities reflect policing targeted in fact at disorder. Analytically, we can compare these two explanations to estimate the ecological locus of racial policing. The results of this competition follow, where we present findings of empirical tests designed to assess these competing claims about the theoretical meaning of OMP in New York City.

A. Social and Physical Disorder

Data on the social organization and physical characteristics of neighborhoods were obtained from the 1999 New York City Housing and Vacancy Survey (“HVS”).¹²⁰ The HVS is sponsored by the New York City Department of Housing Preservation and Development (“HPD”)¹²¹ to comply with New York State and New York City’s rent regulation laws. It is conducted every three years with respondents in a stratified random sample of New York City housing units. The sample is based on housing units recorded in the decennial census, and updated every three years as part of the enumeration process preceding the HVS. The HVS emulates the population dimensions of the decennial census and generates measures of household and person characteristics for the city.¹²²

120. U.S. CENSUS BUREAU, DEP’T OF COMMERCE, 1999 NEW YORK CITY HOUSING AND VACANCY SURVEY (1999), at <http://www.census.gov/hhes/www/nychvs.html> [hereinafter NYC HOUSING SURVEY].

121. THE GREEN BOOK: OFFICIAL DIRECTORY OF THE CITY OF NEW YORK (2000) (providing names and contact information for HPD). The Department of Housing Preservation and Development is responsible for setting and administering housing policy in the city, including development of urban renewal programs, enforcement of civil codes for housing, management of city-owned properties, rehabilitation of abandoned buildings, and construction of low-income housing.

122. NYC HOUSING SURVEY, *supra* note 120, at Overview, <http://www.census.gov/hhes/www/housing/nychvs/overview.html>. Differences between the 1999 HVS and the 1990 census include interviewing procedures, staff experience and training, processing procedures, sample design, the sampling variability associated with the HVS and the sample data from the census, and the non-sampling errors associated with the HVS and the census.

The sample includes “vacant available for rent” units as well as occupied units. Both public and privately owned housing units, as well as in rem units,¹²³ are included. The public-use data set is made available by the U.S. Census Bureau, and includes weights to generate estimates of households and persons for the city. The response rate in the 1999 survey sample of 18,180 was 94%. Interviews were conducted between January and May, 1999 by “field representatives” hired by HPD.¹²⁴

Measures of physical disorder and social structure were aggregated from individual-level responses in the HVS to sub-boroughs. The residential location of each respondent is coded to the borough (county) and the *community district* (“CD”), or sub-borough. CD’s are administrative units of each borough; there are fifty-five in the city. Members of the councils of each CD meet periodically to assist city agencies in zoning and other regulatory planning functions. Sub-boroughs include one or two police precincts.

Measures of physical disorder in the sub-borough were computed from responses to items regarding the physical condition of the dwelling and the neighborhood. Respondents were asked to report whether there was damage or disrepair in the exterior walls and windows, stairwells and stairways, and floors. Respondents also were asked to report generally on the condition of other dwellings in their neighborhood: the presence of broken or boarded up windows, and whether the building was “deteriorated” or “dilapidated.”¹²⁵ Responses were aggregated to the sub-borough level to measure the percentage of housing units with these characteristics.

To avoid redundancy among the disorder variables, a principle components factor analysis with varimax rotation¹²⁶ was completed to reduce the variables to a single dimension. The model yielded

123. In rem housing units are housing units that are acquired and owned by the City of New York following tax forfeitures or failure to pay other charges such as correcting violations of the housing codes. NYC HOUSING SURVEY, *supra* note 120, at H-2, Definitions of Rent Regulation Status, <http://www.census.gov/hhes/www/housing/nychvs/defin99.html>.

124. NYC HOUSING SURVEY, *supra* note 120, at Overview. Interviews were conducted to elicit information about the demographic characteristics of each household member, and the housing characteristics of the dwelling.

125. NYC HOUSING SURVEY, *supra* note 120, at Glossary, <http://www.census.gov/hhes/www/housing/nychvs/gloss99.html>. For vacant units, responses were recorded by the HPD field representatives.

126. “Varimax rotation” is a statistical procedure that permits the extraction of distinct factors or dimensions from a set of highly correlated variables, and assumes that the factors do not overlap statistically or conceptually. GERHARD ARMINGER ET AL., HANDBOOK OF STATISTICAL MODELING FOR THE SOCIAL AND BEHAVIORAL SCIENCES 205-6 (1995).

one factor explaining 85.9% of the variance. Factor coefficients ranged from 0.865 to 0.959, indicating uniform loading and high multicollinearity. Because of its conceptual clarity and importance to the construction of "physical disorder," we used the "broken windows" variable as the measure of disorder.¹²⁷

Measures of social disorganization were computed using similar procedures. Both household and person characteristics were constructed by aggregating individual responses to sub-boroughs. Means and variances for the measures are shown in Appendix A, *infra*. A principle components factor analysis with varimax rotation was again completed and yielded three factors that explained 74.0% of the variance. The first factor describes neighborhoods characterized by concentrations of persons with low education, persons under- or unemployed, households receiving public assistance, households with Hispanic residents, and female-headed households. These neighborhoods also were characterized by low white population. The second factor describes neighborhoods with high racial fragmentation (racial heterogeneity)¹²⁸ and high concentrations of male population. These neighborhoods also were characterized by low black population. The third factor describes neighborhoods characterized by high concentrations of immigrants and residential mobility.¹²⁹

These three factors reflect the classic dimensions of social disorganization.¹³⁰ The variables within factors were highly correlated, again permitting selection of specific variables to represent each factor. For conceptual clarity and theoretical specificity, we chose specific variables as measures of social disorganization: the percent of households with one or more persons receiving public assistance, racial fragmentation, and residential mobility.¹³¹ Because of the importance of immigration to the social composition of New York City,¹³² we included as a predictor the percentage of house-

127. Analyses available from authors.

128. See CHARLES LEWIS TAYLOR & MICHAEL C. HUDSON, *WORLD HANDBOOK OF POLITICAL AND SOCIAL INDICATORS* 216 (2d ed. 1972). Racial fragmentation is a measure of the racial heterogeneity within an area, and is computed as:

$$1 - ((P)^2)$$

Where P = proportion of each race within the spatial unit.

129. *Id.*

130. SHAW & MCKAY, *supra* note 77, at 183-89; SHORT, *supra* note 83, at 55; see Sampson & Lauritsen, *supra* note 77, at 1, 51-75; Meares, *supra* note 80, at 673.

131. SHAW & MCKAY, *supra* note 77, at 32, 37, 205.

132. I. M. Miyares & K. S. Gowen, *Recreating Boundaries: The Geography of Latin American Immigrants to New York City*, *CLAG YEARBOOK* 2431 (1998); see Arun Peter Lobo et al., *Immigration to the New York Metropolitan Region in the*

hold heads who were born outside the U.S. We also included two additional measures that are predictors of crime rates at the community level: the housing vacancy rate¹³³ and the percentage of housing units in the area that are public housing.¹³⁴

Finally, we included a global measure of crime in the sub-borough: the count of 1997 arrests within each precinct, aggregated to the sub-borough. Arrest counts, published in the OAG Report,¹³⁵ were obtained by the OAG from the New York State Division of Criminal Justice Services. State crime counts include “finger-printable” crimes, or crimes that are punishable by jail or prison sentences.

B. Stops and Arrests

Counts and rates of stops and arrests within precincts were compiled from data published by the OAG.¹³⁶ In addition to stop counts, the ratio of stops to arrests was computed for each precinct and each type of crime. Cases involving stops that occurred from January 1998 - March 1999 were included. The data tables were compiled by the OAG from files created by the NYPD from UF-250 forms.¹³⁷ UF-250 forms are completed by officers following

1990's, in *MIGRATION WORLD*, Volume XXVII, No. 5. (1999); ARUN PETER LOBO ET AL., *THE NEWEST NEW YORKERS 1990-1994: AN ANALYSIS OF IMMIGRATION TO NYC IN THE EARLY 1990s* (1996); I. M. Miyares, *Little Odessa: Brighton Beach, Brooklyn: An Examination of the Former Soviet Refugee Economy in New York City*, 19 *URB. GEOGRAPHY* 518 (1998).

133. See Ralph B. Taylor, *The Impact of Crime on Communities*, 539 *THE ANNALS OF THE AMER. ACAD. POL. & SOC. SCIENCE* 28 (1995).

134. E.g., TAMARA DUMANOVSKY ET AL., *THE NEIGHBORHOOD CONTEXT OF CRIME IN NYC'S PUBLIC HOUSING PROJECTS* (1999) (manuscript on file with author); TERENCE DUNWORTH & AARON SAIGER, *NAT'L INST. OF JUSTICE, SUMMARY: DRUGS AND CRIME IN PUBLIC HOUSING: A THREE-CITY ANALYSIS*, at viii (1994); Harold Holzman, *Criminological Research on Public Housing: Toward a Better Understanding of People, Places and Spaces*, 42 *CRIME & DELINQUENCY* 361 (1996).

135. OAG REPORT, *supra* note 5, at tbl.I.C.3; see also *id.* at 120 n. 25 (explaining that arrest counts for 1997 were used—instead of 1998 arrest data—to avoid autocorrelation between stops and arrests that both occurred in 1998). Arrest counts are preferable to crime complaint data, since many types of crime (such as drug crimes or minor property crimes) are not reported in citizen complaints to the police. *Id.* at 121. In addition, complaints often include crimes with no suspect information, while arrests include information on the demographic characteristics of the suspect. See *id.*

136. *Id.* at tbl.I.C.3. Race-specific rates for the total number of stops were computed from the percentages included in the table. The race-specific ratios of stops to arrests were computed from data in tbl.I.B.1 and I.B.2, and Appendix tbl.I.B.1 and I.B.2. tbl.I.B.2 also included data on weapons stops by race.

137. *Id.* at 88.

each stop event.¹³⁸ Both global stops and arrests were analyzed, as well as stops where the suspect was alleged to have a weapon. Weapons stops were analyzed separately because of the heavy emphasis on the control of gun violence in the formulation and implementation of NYPD policy.¹³⁹

The analyses included only stops where a UF-250 form was mandated. NYPD policy mandates that officers complete a UF-250 under four specific circumstances: when (1) force is used in the course of the stop; (2) the suspect is frisked (i.e., pat down) and/or searched during the course of the stop;¹⁴⁰ (3) the suspect is arrested; or (4) the suspect refuses to identify him or herself.¹⁴¹ Non-mandated reports also were submitted during this time, but compliance with reporting requirements when reports were not mandated was uneven, raising reliability problems in assessing the consistency of these reports across precincts.¹⁴²

138. *Id.* at 63 (describing the UF-250 form and the NYPD policies regulating the filing of these reports). Although initially designed as a tool for investigation, completion of the UF-250 form has been required by the NYPD Patrol Guide since 1986. *Id.* at 65. In 1997, the police commissioner assigned a high priority to filing UF-250s. N.Y. CITY POLICE DEP'T, PATROL GUIDE: PROCEDURE NO. 116-33 (effective Nov. 14, 1986) (detailing policy police officers, in certain circumstances, to document stop and frisk street encounters on the UF-250 form) [hereinafter PATROL GUIDE].

139. For a discussion of the policy, see POLICE STRATEGY NO. 1, *supra* note 25, and OAG REPORT, *supra* note 5, at 53. The memo described the NYPD's plan to reduce gun violence by intensified efforts to find and seize illegal firearms. Guns and violent crime also were a primary focus of the NYPD's Street Crime Unit ("SCU"), an elite unit of plain-clothes officers tasked to "hot spots" of concentrated criminal activity. The SCU's "mission" is to "effect the arrests of violent street criminals, with a particular emphasis on recovering illegal firearms." OAG REPORT, *supra* note 5, at 53 n.32 (citing Police Commissioner Howard Safir, Statement Before the New York City Council Public Safety Committee (Apr. 19, 1999)) [hereinafter Safir Statement].

140. That is, searches inside his or her clothing.

141. PATROL GUIDE, *supra* note 138; OAG REPORT, *supra* note 5, at 63-64.

142. Analyses in the OAG Report show that whites were over-represented in cases involving non-mandated reports. OAG REPORT, *supra* note 5, at 95 n.9. Although whites comprised 12.9% of all cases and 10.4% of cases where reports were required, whites comprised 19.3% of cases where a form was not mandated. However, completion of non-mandated reports varied from precinct to precinct, when compared as a ratio to the number of stops with mandated reports. *See id.* at tbl.I.A.1. The OAG Report constructed two scenarios to explain the racial disparity in non-mandated reports. In one scenario, "the police completed non-mandated UF-250's for 'stops' of minorities and non-minorities at the same rate, but [found] that 'stops' of whites were less likely to rise to the more intrusive level of force, a frisk or an arrest." *Id.* at 95 n.9. In the second scenario, "the police were more likely to . . . complet[e] a UF-250 form . . . in a non-mandated situation when the person 'stopped' was white." *Id.* In either scenario, analyzing only mandated report cases—which by definition are more intrusive—would show greater racial disparity than would an analysis of all cases. *Id.*

C. Results

Two dimensions of police stops of citizens were computed to test the hypothesis that crime rates alone do not explain differences in stop rates by race or type of crime. First, comparisons of stop rates by race and type of crime are shown in Table 4.¹⁴³ Stop rates by race and type of crime are shown, and the overall race-specific crime rate is shown as a basis of comparison. We used the 1997 race-specific crime counts to compute a per capita stop rate over the fifteen month interval. The results show large disparities by race. Stop rates were nearly five times higher for blacks compared to non-Hispanic whites, and four times higher for Hispanics.¹⁴⁴ The citywide stop rate is heavily weighted by the concentration of stops among blacks and Hispanics. The disparities by race are consistent across crime types, and the heaviest disparities between stops of black and white citizens. For violence and weapons, stops of blacks occur at a rate ten times higher than the rate for whites, and more than twice as high as the rate for Hispanics. Disparities remain for other crime types, but are narrower. Comparisons of race-specific stop rates per 1000 population to arrest rates per 1000 population show that blacks and Hispanics were stopped at rates higher than their arrest rates.

143. *Id.* at 120 n.25 (describing types of crimes). Crimes were reported using four generic crime categories. *Violent crimes* included robbery, assault, homicide, kidnapping and sex crimes. *Weapons crimes* included arrests for both gun and other illegal weapons. *Property crimes* included larceny and burglary. *Drug crimes* included both possession and sale offenses. *Id.*

144. The OAG analysis constructed four categories of race from the eight recorded on the NYPD documentation in the UF-250 data: white, black, Hispanic white, Asian, American Indian, other, unknown. OAG REPORT, *supra* note 5. We use four: black, white, Hispanic, and other. The UF-250 form has no category for black Hispanics, so we were unable to determine whether officers classified black Hispanics as black or Hispanic, or whether officers were consistent in their classification decisions. *Id.* The NYPD classification is based on officers' observations, the Census Bureau classification is based on self-report. In constructing race-specific population rates from the HVS for the sub-boroughs, we classified both white and black Hispanics as black, consistent with classifications in the U.S. Census. The construction of the Hispanic classification from census data involves a two-stage process regarding both race and ethnicity. Once race is determined, a secondary question asks whether the individual identifies himself or herself as a person of "Hispanic origin."

TABLE 4. RACE-SPECIFIC AND CRIME-SPECIFIC STOP RATES PER 1,000 PERSONS, CRIME RATES PER 1,000 PERSONS, AND RACE-SPECIFIC POPULATION CITYWIDE¹⁴⁵

Type of Crime	Stop Rate: Citywide	Stop Rate: Black	Stop Rate: Hispanic	Stop Rate: White	Stop Rate: Other
Violent	3.2	7.5	3.5	0.7	1.0
Property	2.0	3.1	2.6	1.1	0.9
Drug	1.4	2.7	1.8	0.6	0.3
Weapon	7.6	18.0	8.7	1.3	1.8
Quality of life offenses	1.3	1.8	1.5	0.1	0.5
All offenses	17.1	22.6	20.0	4.8	5.2
Total arrests	104,847	53,472	31,454	16,776	3,145
Arrest rate per 1,000 persons	14.1	29.0	15.1	6.0	4.4
1999 population	7,428,162	1,845,306	2,089,149	2,775,637	718,070

These differences are consistent with significant differences reported in the OAG Report.¹⁴⁶ Controlling for race- and crime-specific crime rates and population, that report showed that stop rates for blacks and Hispanics were significantly higher than the stop rates for whites.¹⁴⁷ These effects were most acute for stops for weapons and violent crimes.¹⁴⁸

The second measure of police stop activity is the ratio of stops to arrests by race and type of crime. Once police officers decide to stop a citizen, the outcomes of those stops—including whether a frisk or search is conducted, and whether an arrest is made—should not differ by race. Presumably, the “reasonable suspicion” articulated in *Terry v. Ohio* and incorporated into both the formal training and professional judgment of police officers,¹⁴⁹ should lead to stops with race-neutral outcome probabilities. In other words, there is no rationale for police to exercise discretion differently by race that would lead to a higher rate of “false positives” for any racial group. Accordingly, stop rates should reflect a similar efficiency and strategic allocation of police efforts across races.

145. OAG REPORT, *supra* note 5, at tbl.I.A.1, tbl.I.A.5; DEP’T OF CITY PLANNING, CITY OF N.Y., 1990-99 POPULATION CHANGE ESTIMATES, available at <http://www.ci.nyc.ny.us/html/dcp/pdf/9099pop.pdf>.

146. OAG REPORT, *supra* note 5, at 94-95. Citywide, blacks constituted 50% of the total “stops” and 51% of the arrests for the covered period. Hispanics constituted 33% of all “stops” and 30% of all arrests. Whites constituted 13% of all “stops” and 16% of all arrests. However, this evidence of proportionality masks differences by neighborhood. *Id.* at 95 n.9, 123.

147. *Id.* at tbl.I.C.1 and I.C.2.

148. *Id.* at tbl.I.C.1 and I.C.2.

149. See Thompson, *supra* note 17, at 971.

Table 5 shows the ratio of stops to arrests by race of suspect and suspected charge. A higher rate indicates less efficiency in stops, or an excessive rate of stops needed to affect an arrest. A high stop rate may also indicate more indiscriminate stop practices, or simply broadened suspicion of individuals based on race alone.¹⁵⁰ Overall, the total stop-to-arrest ratio of blacks (7.3 stops per arrest) is 58.7% higher than the ratio for non-Hispanic whites (4.6); the ratio for Hispanics (6.4) is 39% higher than the rate for non-Hispanic whites. For weapons stops, the stop-to-arrest ratio for blacks is 18.7% higher than the ratio for whites, but the ratio for Hispanics is less than 23.0% higher.

TABLE 5. RACE- AND CRIME-SPECIFIC STOP-ARREST RATIOS CITYWIDE¹⁵¹

Type of Crime	Citywide	Black	Hispanic	White	Other
Weapon	16.5	16.5	17.1	13.9	17.3
All Stops	6.5	7.3	6.4	4.6	5.5

To test whether stops were proportionate to crime rates, and to assess factors that might explain stop rates higher than would be predicted by crime rates, multivariate analyses were completed incorporating three potential explanations: the crime rate within the sub-borough (or strategic theory), disorder (or place-based theory), or social disorganization (or person-based theory). Trends in both Tables 4 and 5 confirm the emphasis on weapons stops articulated in NYPD strategy memoranda. Accordingly, separate analyses were completed on the overall stop counts, and then on stops where weapons were the suspected charge or rationale for the stop.

Table 6 shows the bivariate correlations—the correlation between two variables—among these predictors and the outcome variables.¹⁵² Correlations were statistically significant and in the predicted directions for stops overall and stops involving non-white

150. One could also argue that a higher stop rate for one group may indicate “under-stops” of other groups, or a reluctance to stop more often persons of one race or another. That is an unlikely explanation, however, since the OAG Report shows that the racial distribution of stops were consistent across precincts and stable over the fifteen months. See OAG REPORT, *supra* note 5, at 92-110. It is unlikely that the pattern of under-documentation or depressed stop rates for whites would remain so consistent across the NYPD’s many precincts and neighborhoods.

151. OAG REPORT, *supra* note 5, at tbl.I.C.1.

152. For example, stop rates for whites were negatively correlated with vacancy rates, concentrations of public assistance recipients, and housing units with broken windows.

TABLE 6. CORRELATION MATRIX (PEARSON R, P)

	Total Arrests	% in Public Housing	Vacancy Rate	% Units with Broken Windows	% Receiving Public Assistance	Racial Fragmentation	Mobility	% Immigrants
ALL STOPS								
Stops - All	.707**	.474**	.397**	.461**	.573**	.082	-.039	.418**
Stops - Blacks	.582**	.361**	.477**	.423**	.474**	-.120	-.154	.259
Stops - Hispanics	.481**	.388**	.147	.337*	.502**	.236	.142	.418**
Stops - Whites	-.107	-.155	-.337*	-.344*	-.435**	.207	.025	-.033
Stops - Other	.098	.024	-.201	-.136	-.219	.371**	.009	-.126
WEAPONS								
Stops - All	.645**	.449**	.460**	.514**	.664**	-.017	-.124	.336*
Stops - Blacks	.509**	.321*	.462**	.425**	.495**	-.157	-.201	.169
Stops - Hispanics	.518**	.447**	.255	.429**	.641**	.185	.069	.451**
Stops - Whites	.052	-.094	-.244	-.204	-.230	.200	-.015	.015
Stops - Other	.223	-.008	-.110	-.065	-.076	.316*	.080	-.092

* p < .05

** p < .01

*** p < .001

suspects. Stops involving whites either were not correlated with the disorder or disorganization variables, or were correlated negatively with disorganization variables.¹⁵³

Results of multivariate tests of the relative contributions of crime, disorder, and disorganization to stop counts are shown in Table 7. A fixed effects Poisson regression analysis was used, with predictors from each of these three domains.¹⁵⁴ The model estimates the expected value of the number of events in relation to the causal factors and other explanatory variables of interest. The question in this analysis is whether the count of events (stops) in an area (sub-borough) is predicted by factors that might influence these events (arrest rates, social disorganization variables, and physical disorder variables). The baseline model tests the hypothesis that the race-specific stop count is proportional to the number of arrests in the area. The full model assesses whether factors beyond the arrest count predict the stop count in the area.

153. Overall, whites in New York City live in neighborhoods that are marked by the absence of social isolation or economic deprivation, as well as neighborhoods with lower crime rates. *See, e.g.*, JOHN MOLLENKOPF & MANUAL CASTELLS, *DUAL CITY: RESTRUCTURING NEW YORK* 29-31, 304-05 (1991). However, the correlation of stops of whites and crime rates in the neighborhood were not statistically significant. This may reflect the fact that whites often were stopped when they were observed in non-white neighborhoods, usually on suspicion of drugs. *Id.* This illustrates the "racial incongruity" source of disparity, where a stop is triggered by a racial "mismatch" of a person of one color moving through a neighborhood with population dominated by persons of another color. In the case of whites in non-white neighborhoods, it is often on suspicion of drug buying or possession. When black or Hispanic suspects are stopped in predominantly minority neighborhoods, it often is on suspicion of violence or weapons crimes. OAG REPORT, *supra* note 5, at 126-28, and tbl.I.C.1.

154. P. McCULLAGH & J. NELDER, *GENERALIZED LINEAR MODELS* 193-08 (1989); WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* (2d ed. 1993); PETER KENNEDY, *A GUIDE TO ECONOMETRICS* (3d ed. 1994). Poisson regression is an ideal method to analyze factors that predict counts of events, and determining the relationship of these counts to a set of explanatory or predictive variables. The loglinear Poisson model is the one utilized for these analyses. Standard errors are corrected for over-dispersion.

TABLE 7. POISSON REGRESSION OF RACE-SPECIFIC STOPS FOR ALL STOPS AND WEAPONS STOPS ONLY [T, P(T)]

	All Stops				Weapons Stops			
	All Suspects	Black Suspects	Hispanic Suspects	White Suspects	All Suspects	Black Suspects	Hispanic Suspects	White Suspects
Intercept	12.71***	7.74***	3.47**	6.36***	8.86***	6.51***	2.18*	4.86***
1997 Arrests	4.61***	3.24**	3.16**	.81	4.20***	3.17**	3.79***	1.41
% in Public Housing	.30	.01	.28	.95	-.80	-.43	-.68	.16
Vacancy Rate	-1.21	.88	-3.73***	-.94	-.80	.80	-3.92***	-1.08
% Broken Windows	.90	-.71	2.09*	-.49	.45	-.83	2.20*	-.26
% Public Assistance	2.54*	1.55	3.50**	-2.09*	3.97***	2.24*	5.67***	-.79
Racial Fragmentation	1.72	-.11	2.92**	1.01	1.14	-.35	3.77***	1.12
Residential Mobility	-.61	-1.44	1.66	-.23	-1.38	-1.80	.96	-.61
% Immigrant	.05	-.56	1.26	.42	-.46	-.99	1.30	.31
- 2 Log Likelihood	117.1	172.5	163.3	166.7	147.4	190.7	165.6	166.1
Model Chi-Square	16431.4	27870.4	12198.4	5281.7	12888.2	18624.2	4698.5	1542.9

* p < .05
 ** p < .01
 *** p < .001

The results confirm the claim that the arrest rate predicts both total stops and weapons stops in the sub-boroughs. Arrests are a significant predictor of the total number of stops, the total number of weapons stops, and both total and weapons stops for black and Hispanic suspects. However, arrests fail to predict stops for whites. In part, this may reflect the low rate of stops of whites, or the heterogeneity of the locations of white stops. That is, stops of whites may include both "racial mismatch" stops of whites in non-white areas where crime rates may be elevated, but other types of stops occur as well, most in neighborhoods of varying crime rates. Some may simply be based on descriptions from complainants, and others based on the reasonable suspicion grounds articulated in *Terry*.

Crime rates *should* predict stop rates, and should take into account any differences by race in the likelihood that a citizen should be stopped relative to his or her propensity for crime commission. However, when factors other than crime rates affect stops, we attribute these additional factors to policy, or to other tacit assumptions about race, neighborhoods, and criminality. Table 7 shows that for stops overall, factors other than crime in the neighborhood predict the stop counts. For all suspects, after controlling for crime, stops within the sub-boroughs were predicted by their poverty rates. Accordingly, policing in the city's neighborhoods appears to reflect the economic status of people rather than the physical condition of its buildings.

When race-specific stop counts are considered, both disorder and disorganization variables predict stop counts for Hispanics, but not for blacks. The concentration of dwellings with broken windows, low vacancy rates, high concentration of persons in public housing, and racial heterogeneity all predict the stop count for Hispanics. The diversity of this pattern of predictors for Hispanics reflects the heterogeneity of residential patterns and socio-economic factors for Hispanics. For whites, stops are not predicted by crime, but instead are predicted by the absence of poverty. Again, this reflects the tendency for whites to live in areas that although not necessarily affluent, are less likely to be poor.

Finally, Table 7 shows a different picture for weapons stops. For weapons stops of all suspects generally and specifically of black suspects, poverty rates predicted stop counts, after controlling for crime. As above, policing weapons is concentrated in poor neighborhoods. Stop and frisk activity targeted at weapons seems focused on the economic status of people in neighborhoods, not the

physical condition of their buildings. For stops of Hispanic suspects, weapons stops were predicted by both disorder and disorganization variables.

These patterns suggest that stop and frisk strategies have departed from their original Broken Windows underpinnings, and more closely resemble policing of poor people in poor places. How the policy in action evolved so far from its complex and nuanced theoretical origins is a potentially important tale. It is important to understand whether and how race became a marker of increased risk of criminality in this hothouse policy context, the ways in which race interacted with the social organization of policing to produce greater intensity of enforcement and over-enforcement against minority citizens, and the cultural and political dynamics that allow the conflation of race, poverty, and disorder in policing policy. These lessons await a different research paradigm, focused on the hot cognitions of police-citizen interactions, and the social contexts in which these events unfold.

IV. SOCIAL NORMS AND AGGRESSIVE POLICING

In New York, the application of Broken Windows theories through OMP strategies and stop and frisk tactics produced a style of racial policing with stigmatizing effects on minority communities. In fact, the implemented strategy departed sharply from the original design of Broken Windows theory, focusing more on the consequences of broken windows than their causes. The strategy as implemented was intensified surveillance and proactive engagement with citizens under a broad standard of “reasonable suspicion.” The emphasis on persons rather than place, and the racial demography of places where OMP was most intense and active, suggest that the cues to which police responded were primarily tied to race as well as places that are defined by race. Not only is this a long way from Broken Windows theory, but it invites constitutional problems that can further distance police from minority citizens.¹⁵⁵ The drift from engagement with community in the co-production of security reflects two different dimensions of social norms, dimensions of both community and organization.

155. See generally OAG REPORT, *supra* note 5, at 15-44 (discussing Fourth and Fourteenth Amendment issues related to stop and frisk activity and racial profiling, respectively); Garrett, *supra* note 7, at 1829-34 (discussing equal protection issues in racial profiling cases).

A. Social Norms and Aggressive Policing Revisited

Although stop and frisk tactics likely contributed to the crime decline in New York, the precise contribution of these tactics is contested.¹⁵⁶ But there also is little doubt that there were social costs from the crackdown on crime that may compromise the original intent to redirect and rebuild social norms.¹⁵⁷ If the mechanism of decline is search, surveillance, and aggressive misdemeanor arrests, there is no causal path to declining crime that runs through order and social norms. As Harcourt observed, these efforts “have little to do with fixing broken windows and much more to do with arresting window breakers—or persons who look like they might break windows, or . . . strangers . . . or outsiders.”¹⁵⁸

The social norms approach underlying Broken Windows theory required that the cues of crime be removed and replaced with alternative cues that signaled order and social regulation. In the causal dynamic hypothesized by the theory, citizens engaged with police to enforce norms of orderliness, conveying a social meaning that influenced behavior of citizens in the orderly milieu.¹⁵⁹

This construction of social control comports well with the dynamics of collective efficacy discussed by Sampson, Raudenbush, and Earls.¹⁶⁰ Citizen participation in the dynamics of informal social control, such as collective supervision of teenagers and citizen interventions in low-level crimes, are manifestations of the neigh-

156. Fagan et al., *supra* note 36, at 1322 (crediting the decline in gun violence in part to “gun-oriented policing” but acknowledging multiple causation by other social factors); Waldeck, *supra* note 19, at 1283-84 (citation omitted) (suggesting that the stop and frisk tactics produced a crackdown that deterred many from carrying weapons or drugs); Harcourt, *supra* note 19, at 339-40 (claiming that the huge increase in misdemeanor arrests under OMP produced a surveillance effect that depressed crime rates). *But see generally* KARMEN, *supra* note 36 (citing interactions among multiple causes for the crime decline that complicated attribution of effects to any single cause).

157. *See generally* Tom R. Tyler, *Public trust and confidence in legal authorities: What do people want from the law and legal institutions?*, in BEHAVIORAL SCIENCE AND THE LAW (forthcoming) (arguing that public views are primarily shaped by evaluating the fairness of police and court procedures). Neighborhood residents in high crime neighborhood often express satisfaction with the lowered crime rate, but greater distrust of police when aggressive stop, search, and arrest tactics are used. OAG REPORT, *supra* note 5, at 74-87.

158. Harcourt, *supra* note 19, at 342.

159. Kahan, *supra* note 36, at 2488; Meares & Kahan, *supra* note 26, at 823.

160. Sampson & Raudenbush, *supra* note 20, at 611-612 (discussing the link between disorder and “collective efficacy”); *see also* Robert J. Sampson et al., *supra* note 79, at 919-21 (showing evidence that crime rates fluctuate according to the neighborhood’s collective efficacy, independent of poverty, racial composition, and other socio-demographic factors).

borhood's "collective efficacy" that reduces crime and disorder.¹⁶¹ Collective behavior of this type may involve citizen-police interactions, but often these are citizen-initiated efforts, such as "phone trees" among residents to call police and report either physical or social disorder, citizen demands to enforce housing codes to rid neighborhoods of crack houses, advocacy in court proceedings for substantive punishment for chronic disorder offenders, and collective political activity on zoning and licensing.¹⁶² However, neither collective efficacy nor social capital is likely to be increased by policing tactics that rely almost exclusively on stopping, searching, and arresting people. Wilson and Kelling, in the original *Broken Windows* essay, did not imagine a scenario where aggressive policing—in the absence of interaction with community groups or social agencies—would create enduring forms of social interaction by citizens to prevent and control crime.¹⁶³

The incentives for people to engage with legal actors in social regulation and the co-production of security may lie in their evaluations of their treatment by the police. Fairness and crackdowns may be inconsistent, but at least citizens know they are tradeoffs. Recent work by Tom Tyler and colleagues in a survey of residents in three Oakland, California neighborhoods suggests that citizens' evaluations of legal actors are not linked to the outcomes of their court cases or interactions with police, or on the crime rate in their neighborhood.¹⁶⁴ They focus instead on the fairness of their treatment from those authorities.¹⁶⁵ Ronald Weitzer reaches the same conclusion in a survey of residents of three neighborhoods in Washington, D.C.¹⁶⁶ He reports contrasting evaluations of police services in two predominantly black neighborhoods. Proactive po-

161. Sampson & Raudenbush, *supra* note 20, at 612.

162. *Id.*

163. The original Broken Windows theory recognized that a disorder-focused policing strategy would "only be effective if applied in conjunction with a wide variety of other police tactics" and "pursued in partnership with . . . other social agencies." Waldeck, *supra* note 19, at 1270 (citation omitted). Waldeck shows that the social norms and tactics suggested by the original Broken Windows theory diverged sharply from the traditional social norms of policing as "crime-fighters" where the officer's "basic business" is arresting offenders. *Id.*; see George L. Kelling, *Toward New Images of Policing: Herman Goldstein's Problem-oriented Policing*, 17 *LAW & SOC. INQUIRY* 539, 540 (1992).

164. TYLER, *supra* note 157. Tyler also notes that some judgments are made on vicarious experiences of neighbors and friends, an illustration of the importance of linked fate. *Id.*

165. *Id.*

166. Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 *LAW & SOC'Y REV.* 129, 150-52 (2000).

licing of residents of a poor, high crime neighborhood elicited less favorable reactions to police than did the more reactive and respectful treatment of citizens in an "orderly" middle-class neighborhood.¹⁶⁷

Such empirical findings suggest the viability and importance of an approach to social regulation based on procedural fairness. Procedural fairness—or better treatment—promotes greater trust and confidence in the law, and higher rates of compliance.¹⁶⁸

These perceptions of law and legal actors have important implications about popular attributions of legitimacy to law. People who view the law as illegitimate are less likely to obey it, and people who view police officers and judges as lacking in legitimacy are less likely to follow their directives.¹⁶⁹ Although the law is based on the implicit or explicit threat of sanctioning for wrongdoing, the legal system depends heavily on voluntary compliance from most citizens to set and enforce norms, and to engage with the police in social control. Hence, lower levels of legitimacy make social regulation more costly and difficult, both materially and politically. The police depend heavily on the voluntary cooperation of citizens to fight crime. Citizens report crime and criminals, informally help to police their neighborhoods, and aid the courts as jurors and witnesses. Without these cooperative acts from the public, the police risk being seen as an intrusive force imposing order. And without these acts, the meaning of order becomes detached from its social basis and loses its moral weight to influence others in the community.

A social norms approach would invite policing of public order laws in the context of corresponding and contemporaneous extra-legal social initiatives aimed at the same or parallel problems. These efforts reflect a more complex view of the interaction of crime and disorder, one that recognizes their spurious relationship to broader underlying social and physical conditions within neighborhoods. The legitimacy of the law benefits from the simultane-

167. *Id.* at 151. Weitzer's findings stand Broken Windows theory on its head by suggesting that the police may be reacting to the visible cues of crime and disorder, not just would-be criminals who might journey to a disorderly neighborhood to take advantage of crime opportunities. Weitzer's findings suggest that in neighborhoods with visible signs of disorder, police react with indiscriminate and widespread patterns of aggressive stops and interdiction of citizens.

168. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 172-73 (1990).

169. *Id.* at 172; Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 777, 793-800 (1998); TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 86 (1997).

ous and aligned actions of citizens and legal actors to promote social norms. While OMP approaches might promote a temporary reduction of crime through suppression, a legitimacy-focused approach promotes construction of social networks that integrate community-level social processes with the regulation of crime and disorder.

B. Organizational Norms

Explanations of the importance of race in police decision making—up and down the hierarchy within police organizations—focus on both the occupational culture and social norms of policing.¹⁷⁰ Although the empirical literature on police “subculture” offers inconsistent evidence of generalizable attitudes and beliefs, several studies show that the dynamics and structure of the police workplace may work to reinforce social (behavioral) norms, perceptions, and beliefs.¹⁷¹ The separation of the policing and non-policing worlds is widely acknowledged, even in the era of reform and innovation.¹⁷² The insularity of the police workplace leads to a closed system of ideas, a reluctance to question the statements or actions of fellow officers, and “matter of fact prejudices” that are reinforced through customs, rituals, and a shared language.¹⁷³ If the workplace is where citizens “acquire ‘social capital’ . . . and develop ties of empathy and solidarity with their fellow citizens,”¹⁷⁴ then the workplace may be the appropriate locus for efforts to change social norms supporting racial policing.

170. See e.g., STATE POLICE REVIEW TEAM, *supra* note 6, at 33-34 (1999). See generally Jeffrey Goldberg, *supra* note 6; OAG REPORT, *supra* note 5, at Ch. III, Part III (discussing “Police Attitudes Toward Stop and Frisk”). “A recent survey of 650 Los Angeles Police Department officers found that 25% felt that racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community.” REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 69 (1991). *But see* Steve Herbert, *Police Subculture Reconsidered*, 36 CRIMINOLOGY 343, 344 (1998) (claiming that norms within police departments are influenced by bureaucratic structures).

171. See generally BITTNER, *supra* note 102; ANTHONY V. BOUZA, *THE POLICE MYSTIQUE: AN INSIDER’S LOOK AT COPS, CRIME AND THE CRIMINAL JUSTICE SYSTEM* 6-7 (1990).

172. BITTNER, *supra* note 102, at 11; see also JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 242 (1993) (citation omitted).

173. *POLICING: A VIEW FROM THE STREET* 267-70 (Peter K. Manning & John Van Maanen, eds., 1978).

174. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEORGETOWN L. REV. 1, 4 (2000) (describing the workplace as performing crucial functions of the civil society including fostering communication, connectedness, and empathy among diverse individuals).

The skewed version of Broken Windows theory implemented by the NYPD reinforced the crime-fighting image of policing rather than the alternative norms about alternative solutions to crime problems developed carefully in other community-policing models.¹⁷⁵ The “crime fighting” image included stereotypes of citizens and criminals, stereotypes pregnant with racial meaning.¹⁷⁶ After all, the emphasis on social manifestations of disorder, with its demographic and neighborhood correlates, confounded race and disorder, giving rise to broad suspicion of criminal activity and intensified enforcement in minority neighborhoods. Despite recognizing that some citizens were law-abiding and welcomed police presence, the broad reach of stop and frisk policing risked placing many law-abiders under suspicion.

Efforts to reform the police workplace to modify social norms that emphasize race as a risk factor for crime will require complicated and sustained efforts to “admi[t] the workplace into the realm of civil society”¹⁷⁷ Policing as a workplace is at once both regulated by the state but also subject to hierarchy, rules, coercion, formal sanctions, and restraint. Is social norms theory applicable to changing the everyday logic and rules of policing? The shift in police function to OMP did not significantly modify core police functions, and in turn it was unlikely to modify the occupational “frame of reference” about crime and race.¹⁷⁸ Accordingly, the older social norms that were reinforced by those police functions and rewards that remained intact. How then, to change those norms?¹⁷⁹

Many efforts to curtail racial profiling have increasingly focused the role of statistics on police stops. Legislators in seven states have passed laws requiring police to keep statistics, and similar legislation is being considered in twenty-one additional states.¹⁸⁰ Rep-

175. Waldeck, *supra* note 19, at 1269-70.

176. Thompson, *supra* note 17 at 987-89 (discussing the processes of racial and other stereotyping that may unconsciously influence stop and arrest decision making).

177. Estlund, *supra* note 174, at 5.

178. POLICING: A VIEW FROM THE STREET, *supra* note 173, at 269.

179. Professor Waldeck suggests that changes in police functions, specifically a return to the original intent of community policing and its emphasis on alternatives, will promote changes in social norms based on a different functional definition of policing. Waldeck, *supra* note 19, at 1300-01. But we propose changes that do not necessarily involve substantive modifications in police functions that are disruptive of the structural relationships within police hierarchies and workplaces.

180. An Act Concerning Traffic Stops Statistics, 1999 Conn. Acts 99-198 (Reg. Sess.); An act concerning criminal procedure; relating to the collection of information on traffic stops, 1999 Kan. Sess. Laws 2683; N.C. GEN. STAT. § 114-10 (1999); 2000 Mo. Legis. Serv. 1053 (West); An Act Relating to Motor and Other Vehicles, 1999

representative John Conyers, Jr. (D-MI) proposed similar legislation, the National Traffic Stops Statistics Study Act of 1998, which passed unanimously in the U.S. House of Representatives but was rejected in committee by the U.S. Senate.¹⁸¹ One rationale for the emphasis on data collection is that statistics can lead to transparency in policing,¹⁸² making decisions visible and publicly accountable. Statistics may enable police departments to evaluate their strategies, or assess whether there are disparity costs that come with successes of particular strategies. Data also make officers' actions transparent, making them more accountable for their decisions. As decisions and everyday actions become more democratic, social norms from community stakeholders will be infused into police norms.

But the dynamics of organizational change following the introduction of data raises several challenges. The organizational and democratic structures within which data are introduced, how data-driven facts are evaluated, and how their meaning is interpreted require experimentation to develop open forums for both internal organizational reflection and open policy debates.¹⁸³ How information is shared with community stakeholders, whether the agenda for analysis is shared with these groups, and how the findings of data analyses are translated into concrete measures for organizational change are part of a process of community participation that can "civilize" the police workplace through transparency, leading to democratic interactions focused on data-driven facts.¹⁸⁴ The ex-

R.I. Pub. Laws 7164; An Act Relating to reporting information on routine traffic enforcement, 1999 Wash. Legis. Serv. S.S.S.B. No. 6683 (SN); see also UNIV. OF MINN. LAW SCH., INSTITUTE OF RACE AND POVERTY'S RACIAL PROFILING DATA COLLECTION STATUS REPORT (indicating that bills have been introduced in Alabama, Arkansas, Florida, Iowa, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Wisconsin, and Virginia), <http://www1.umn.edu/irp/ARB%20.html>; Laura Gunderson, *Bill Aims to Track Racial Profiling*, PORTLAND OREGONIAN, Sept. 12, 2000 at B1 (describing proposed bill in Oregon, which following introduction, was hailed by state police and several major local police departments expressing interest in collecting data on stops).

181. See H.R. Rep. No. 105-435 (1998). The legislation passed unanimously in the House, but was voted down in the Senate Judiciary Committee due to opposition from police organizations. E.g., Robert Cohen, *Racial profiling Allegations Spur Lawmakers to call for U.S. Study*, THE STAR-LEDGER, Apr. 14, 1999 at 7.

182. For illustrations of the uses of data to assess strategies, see Eric Luna, *Transparent Policing*, 85 IOWA L. REV. 1108, 1167-94 (2000).

183. Susan Sturm & Brandon Garrett, *Moving Beyond Racial Profiling in New Jersey*, PHILA. INQUIRER, Dec. 4, 2000, at A15.

184. Constructing these types of relationships is likely to be contested, even when consent decrees set forth a framework for data collection on stops and monitoring of

tent to which opportunities for community interaction with police are routinized and institutionalized can break down the insularity of police social norms at the top and bottom of its hierarchy.

statistical trends. National Public Radio ("NPR") reported that civil rights groups including the American Civil Liberties Union of Southern California, and plaintiffs in prior racial profiling litigation against the Los Angeles Police Department ("LAPD") have filed motions to be included as monitors in the consent decree involving the LAPD. *Morning Edition* (Nat'l Pub. Radio broadcast, Dec. 18, 2000) (discussing the LAPD consent decree described *supra* note 7), *audio clip of report available at* <http://search.npr.org/cf/cmn/cmnp05fm.cfm?SegID=115661>. In the wake of statements by President-elect Bush in the second presidential debate questioning the federal role in the reform of police departments, these groups are concerned that a court-appointed federal monitor will not effectively enforce the city's agreement. The NPR report quotes Mark Rosenbaum, legal director the Southern California ACLU, as stating that "[t]he decree fences out those individuals who have the greatest interest in the most conscientious enforcement" The NPR report quotes attorneys for the City of Los Angeles, who counter that "involving more people will lead to too much legal fighting and not improving policing. A federal judge will do the job on enforcing the court order, so no outside parties are needed." *Id.*

**APPENDIX A. DESCRIPTIVE STATISTICS FOR
NEIGHBORHOOD VARIABLES**

Social Disorganization	Mean	Standard Deviation
% Non-Hispanic White	36.71	28.77
% Hispanic	27.34	20.50
% Black	26.77	27.00
Racial fragmentation	0.51	0.14
% Living in neighborhood < 6 months	25.57	9.32
% Living in residence < 4 years	39.81	4.60
% Immigrants	82.97	10.58
% Households with public assistance	18.88	13.81
% Not in labor force	40.76	8.19
% Worked less than 26 weeks past year	11.54	2.91
% Unemployed since 1997	38.22	8.65
% Education < less than HS graduate	27.69	12.72
Sex ratio: males: females	0.87	0.10
% Female headed households	21.71	10.97
% Population < 15 years old	22.42	6.63
Disorder		
% Dwellings with damaged exterior walls	3.24	17.71
% Dwellings with damaged exterior windows	2.80	19.11
% Dwelling with damaged stairways	5.69	23.17
% Dwellings with broken heat	13.58	34.26
% Dwellings with damaged floors	5.56	22.92
% Reporting any broken windows in neighborhood	8.89	28.46
% Reporting dilapidated buildings in neighborhood	7.78	26.79

**EXTRA! EXTRA! READ ALL ABOUT IT:
WHAT A PLAINTIFF “KNOWS OR SHOULD
KNOW” BASED ON OFFICIALS’ STATEMENTS
AND MEDIA COVERAGE OF POLICE
MISCONDUCT FOR NOTICE OF A § 1983
MUNICIPAL LIABILITY CLAIM**

*Jenny Rivera**

Although the plaintiff's § 1983 claim is a strong one . . . [the plaintiff's] failure to file within the limitations period cannot be excused. The [plaintiff's] cause of action is therefore dismissed as to the municipal defendants.¹

* * * *

[W]hen commencing a [police misconduct suit] neither the plaintiff nor [the plaintiff's] attorney is likely to know much about the relevant internal operations of the police department, nor about the disciplinary history and record of the particular police officers involved. In view of the strong policies favoring suits protecting the constitutional rights of citizens . . . it would be inappropriate to require plaintiffs and their attorneys before commencing suit to obtain the detailed information needed to prove a pattern of supervisory misconduct²

Recent revelations of police misconduct throughout the country have sparked renewed demands for improved police accountability

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1. *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026, at *2 (S.D.N.Y. Mar. 2, 1999).

2. *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986).

and supervision.³ As investigative committees have identified and highlighted the link between police corruption and police brutality, requests for external controls have increased. Indeed, calls for independent federal monitors in cases of police brutality reflect the dissatisfaction with, and intolerance of, police misconduct and abuse, as well as the growing recognition that local police departments do not or cannot police themselves.⁴ As citizens' disaffection from law enforcement personnel and institutions grows, so does the urgent need for change.

Unfortunately, change in the form of increased accountability and reduced police corruption has proved elusive. Litigation, a traditional vehicle for change, has had limited success in transforming law enforcement at an institutional level.⁵ The overall costs to the government and the public coffers have not stemmed police misconduct at a level commensurate with the substantial judgments

3. E.g., Bruce Shapiro, *When Justice Kills; After Years of Decline Police Brutality Is on the Rise, Sparking a Reform Movement*, THE NATION, June 9, 1997, at 21 (stating that the emphasis of reformers is on independent review boards and special prosecutors); Elizabeth Levitan Spaid, *More Civilian Watchdogs Patrol Thin Blue Line*, THE CHRISTIAN SCIENCE MONITOR, Jan. 10, 1996, at 3 (discussing civilian complaint review panels) [hereinafter *More Civilian Watchdogs*].

4. E.g., U.S. GEN. ACCOUNTING OFFICE, GAO REPORT, LAW ENFORCEMENT: INFORMATION ON DRUG-RELATED POLICE CORRUPTION: REPORT TO THE HONORABLE CHARLES B. RANGEL, HOUSE OF REPRESENTATIVES (1998) (noting that various sources have recommended external oversight of police departments) [hereinafter GAO REPORT]; CITY OF NEW YORK COMM'N TO COMBAT POLICE CORRUPTION, THE NEW YORK CITY POLICE DEPARTMENT'S DISCIPLINARY SYSTEM: HOW THE DEPARTMENT DISCIPLINES ITS MEMBERS WHO MAKE FALSE STATEMENTS (1996) [hereinafter COMMISSION TO COMBAT POLICE CORRUPTION]; CITY OF N.Y. COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, COMMISSION REPORT (1994) (calling for independent oversight commission) [hereinafter MOLLEN REPORT]; COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE CITY'S ANTI-CORRUPTION PROCEDURES, THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 14-15 (1972) (calling for independent investigator and prosecutor) [hereinafter KNAPP REPORT]; Neil Graves, *Louima Breaks Down in Tears at Support Rally*, N.Y. POST, Aug. 10, 1998, at 6 (Public Advocate Mark Green calls for federal monitor of police corruption); Bob Herbert, *The Stone Wall of Silence*, N.Y. TIMES, July 23, 1998, at A25 (police oppose independent agency to investigate police misconduct); David Kocieniewski, *Mayor to Raise Pay of Officers on City Beats*, N.Y. TIMES, May 26, 1998, at B1 (discussing the recommendation of certain members of Mayor Giuliani's Task Force on Police/Community Relations to establish special prosecutor to investigate allegations of police wrongdoing); Joseph P. Fried, *U.S. Reviews Police Killing of Unarmed Man*, N.Y. TIMES, Feb. 3, 1998, at B3 (United States Attorney Zachary Carter monitors state investigation of police shooting of unarmed person); *More Civilian Watchdogs*, *supra* note 3.

5. E.g., Comm. on New York City Affairs of the Ass'n of The Bar of the City of New York, *The Failure of Civil Damages Claims to Modify Police Practices, and Recommendations for Change*, 55 THE REC. 533 (2000) (discussing failure of the tort system to increase police accountability for violations of civil rights).

and settlements that have been paid by states and municipalities.⁶ To increase pressure for public accountability and decrease police misconduct, victims of police misconduct must have greater access to the legal system, and the availability of legal recourse through civil rights actions must be improved. This is particularly true for litigation against localities for poor or nonexistent supervision and discipline of officers for police misconduct. While these actions are the most difficult to prove, they are the most likely to bring about change because they challenge institutional actors and problems, rather than concentrating solely upon individual police officers and their bad acts.⁷

More than two decades ago, the Supreme Court concluded in *Monell v. Department of Social Services*⁸ that cities are “persons” subject to suit under 42 U.S.C. § 1983⁹ for violations of rights guaranteed under the United States Constitution and laws.¹⁰ Pursuant

6. *E.g., id.* at 534 (noting that New York City paid \$140 million in damages for alleged police abuses in fiscal years 1994-95 and 1998-99).

7. Martin A. Schwartz, *Section 1983 Claims Against Municipal Officer and Municipality*, N.Y. L.J., June 20, 2000, at 3 (discussing that municipal liability § 1983 claims “can be factually and legally complex, cumbersome, and very time consuming for counsel and the court”) [hereinafter Schwartz, *Section 1983 Claims*].

8. 436 U.S. 658 (1978).

9. The statute reads, in relevant part:

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 (2000).

10. The Supreme Court’s decision in *Monell* overruled its prior holding in *Monroe v. Pape*, 365 U.S. 167 (1961), that local governments were not “persons” subject to suit under 42 U.S.C. § 1983. The *Monell* decision provided a new avenue of relief for plaintiffs, but not without continuing uncertainty and conflict within the Supreme Court and among the circuit courts concerning the parameters of claims against local governments. *See Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 430-31 (1997) (Breyer, J., dissenting, joined by Stevens & Ginsburg, JJ.) (noting that § 1983 municipal liability interpretive law is highly complex and difficult to apply); *City of Canton v. Harris*, 489 U.S. 378, 385-86 (1989) (determining existence of causal link between policy and constitutional deprivation has left the Court “deeply divided in a series of cases” decided after *Monell* . . . and the Court has had difficulty “defining the contours of municipal liability”); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (plurality opinion) (referencing Courts of Appeals’ divergent interpretations of principles set forth in Supreme Court’s § 1983 opinions); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985) (plurality opinion) (noting the murky state of the law of municipal liability under § 1983 post-*Monell*). *See generally* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, ch. 6 (4th ed. West Group 2000) (digesting various cases from circuit courts addressing mu-

to *Monell* and its progeny, a plaintiff can sue a municipality for its direct actions, as well as for municipal policies resulting in a constitutional tort.¹¹ In the years following the watershed decision in

municipal liability); [hereinafter NAHMOD, CIVIL RIGHTS] 1B MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, §§ 7.6-7.11 (3d ed. 1997 & Supp. 2000) (tracing historical development of Supreme Court's analysis of municipal liability) [hereinafter SCHWARTZ, SECTION 1983 LITIGATION].

11. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993) (holding that municipal liability suits are not subject to heightened pleading requirement, and that immunity defense not available to municipal defendant); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 733 (1989) (noting that § 1983 is the exclusive federal remedy for violations by state actors of rights guaranteed under 42 U.S.C. § 1981); *Harris*, 489 U.S. at 388 (holding that local government may be liable where failure reflects "deliberate indifference to the rights of persons with whom the police come into contact") (footnote omitted); *Praprotnik*, 485 U.S. at 112 (holding that actions of municipal employee with decisionmaking authority, as determined by state law, may be basis for municipality's liability); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (plurality opinion) (holding that a single act by a municipal decisionmaker with final authority may constitute a municipal policy subjecting municipality to § 1983 liability); *Owen v. City of Independence*, 445 U.S. 622, 650 (declining to extend the municipality qualified immunity since employee's good faith is no bar to damages against municipality); *Monell*, 436 U.S. at 690-91 (declaring that local governments are subject to suit under § 1983 for damages, and declaratory and injunctive relief).

Plaintiffs do not have a § 1983 remedy against the states, however, because states are not "persons" within the meaning of § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). In addition, the Eleventh Amendment bars suits for damages against the states. *Quern v. Jordan*, 440 U.S. 332 (1979). See generally NAHMOD, CIVIL RIGHTS, *supra* note 10, §§ 6:67-6:69, vol. 2, §§ 9:48-9:50; SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, ch. 8. Plaintiffs initially sought to reach the states' deep pockets by suing state officials in their official capacity—actions known as "official-capacity suits." The Supreme Court put an end to these efforts when it concluded that such suits must be treated as suits against the government entity the officials represent. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). As a consequence, state officials in these suits are not liable for damages. *Will*, 491 U.S. at 71. Plaintiffs' persistence paid off, however, when the Court subsequently held that state officials sued in their personal capacity—"personal capacity suits"—are "persons" under § 1983, and may be personally liable for damages. *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (citing *Will*, 491 U.S. at 371).

To the benefit of plaintiffs, states generally indemnify individual defendants in these suits. *E.g.*, *Bd. of County Comm'rs*, 520 U.S. at 436 (Breyer, J., dissenting) (citing states that indemnify employees for § 1983 liability, for actions within scope of their employment); see also N.Y. GEN. MUN. LAW § 50-K (McKinney 1999) (requiring New York City pay civil damages imposed against employees); Comm. on New York City Affairs of The Ass'n of the Bar of the City of New York, *The Failure of Civil Damages Claims to Modify Police Practices, and Recommendations for Change*, 55 THE RECORD 533, 540 (2000) (discussing the failure of the current New York tort system to "modify the conduct of persons and organizations found liable" in the New York Police Department, despite the millions in settlement and judgment damages paid by New York City in police abuse cases).

Moreover, plaintiffs also may affect state policy, protocols and other actions through a § 1983 suit to the extent that plaintiffs may proceed against state officials in

Monell, the Court has struggled intensely to define the parameters of § 1983 municipal liability.¹² The result has been a series of cases that seemingly provide relief against localities, but based on a theory of direct liability, which requires a plaintiff to show more than that a municipality's employees acted badly. This requirement of direct municipal action has proved to be a tremendous obstacle to plaintiffs. Having eschewed a respondeat superior theory of liability in actions against municipalities, the Court has given with one hand and taken with the other.¹³

an official capacity suit for injunctive relief. In these actions state actors are treated as individuals. *Will*, 491 U.S. at 71, n.10 (quoting *Graham*, 473 U.S. at 167 n.14).

12. *E.g.*, *Bd. of County Comm'rs*, 520 U.S. at 404 (holding that the conduct attributable to municipality was insufficient to establish liability because plaintiff must establish municipal culpability and "a direct causal link between the municipal action and the deprivation of federal rights"); *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) (holding that a municipality is not liable where a jury finds the individual officer did not commit a constitutional injury); *Harris*, 489 U.S. at 388 (imposing a "deliberate indifference" standard in failure to train case); *Praprotnik*, 485 U.S. at 130 (declaring that failure to investigate "subordinate's discretionary decisions" alone does not constitute delegation of municipal policymaking authority); *Pembaur*, 475 U.S. at 483 (declaring that municipal liability requires decision of those with final policymaking authority); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (declaring that municipalities are immune from punitive damages under § 1983); *Tuttle*, 471 U.S. at 823 (holding that the act of one employee without policymaking power is insufficient to establish municipal policy of inadequate training). *But see Tuttle*, 471 U.S. at 830-31 (Brennan, J., concurring) ("A single police officer may grossly, outrageously, and recklessly misbehave in . . . a single incident . . . attributable to various municipal policies or customs . . . [that] were the 'moving force' . . . or cause of the violation.") (internal citation omitted). *See generally* SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, ch. 7 (discussing municipal and supervisory liability under 42 U.S.C. § 1983). For a discussion and critique of the Court's holdings on municipal policies and customs, see Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17 (2000).

13. *Monell*, 436 U.S. at 691 ("[A] municipality cannot be held liable under § 1983 on a respondeat superior theory."). Members of the Court, in particular Justice Stevens, and several commentators, have questioned the wisdom of the Court's rejection of a respondeat superior theory in § 1983 municipal liability actions. *E.g.*, *Bd. of County Comm'rs*, 520 U.S. at 430-37 (Breyer, J., dissenting, joined by Stevens & Ginsburg, JJ.) (arguing for reexamination of § 1983 and questioning soundness of *Monell* principle rejecting vicarious municipal liability); *Praprotnik*, 485 U.S. at 148, n.1 (Stevens, J., dissenting) ("Like many commentators who have confronted the question, I remain convinced that Congress intended the doctrine of respondeat superior to apply in § 1983 litigation.") (citations omitted); *Pembaur*, 475 U.S. at 489-90 (Stevens, J., concurring in part and in the judgment) (advocating for application of respondeat superior to municipal liability claims); *Tuttle*, 471 U.S. at 834-44 (Stevens, J., dissenting) (arguing that respondeat superior was historically a part of the common law doctrine that is incorporated into § 1983); 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, 1518 (1993) (arguing that respondeat superior should apply to police officers); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section*

Although a *Monell*-based municipal liability claim seems to provide tremendous opportunities for redress of injuries caused by municipal government actions, it is no panacea for the neophyte plaintiff who is unskilled in the intricacies of civil practice and civil rights litigation. The plaintiff seeking to assert such a claim faces myriad obstacles in filing, and eventually succeeding, against a municipality. As with all other civil actions, such a claim must satisfy general procedural and substantive requirements. Furthermore, the claimant must meet certain evidentiary requirements unique to § 1983 municipal liability claims, and must also satisfy a direct causation requirement, which is onerous both in theory and practice.

Recognition of the plaintiff's injury and the source of that injury, matters intricately tied to these same evidentiary requirements, can have a significant impact on the viability of a municipal liability claim. Notice of the injury commences the running of the statutory time limit on the claim.¹⁴ As a consequence, a significant initial hurdle is determining the durational limit for the timely filing of the complaint. Should a plaintiff fail to file within the time limit, the plaintiff is generally barred from *ever* seeking § 1983 redress for the claimed injury, regardless of the merits of the underlying claim.¹⁵

Section 1983 does not contain a federal statute of limitations.¹⁶ To fill this statutory lacuna, the courts turn to state law,¹⁷ and

1983's Asymmetry, 140 U. PA. L. REV. 755, 820-38 (1992) (recommending application of a modified theory of respondeat superior against municipalities) [hereinafter *Reshaping Section 1983*].

14. *Infra* notes 21, 42 and accompanying text.

15. A § 1983 claim period, however, may be tolled pursuant to applicable state tolling provisions, allowing a plaintiff to proceed with the action. *Bd. of Regents v. Tomanio*, 446 U.S. 478 (1980) (applying both state statute of limitations and tolling rules to § 1983 claim); *Chardon v. Soto*, 462 U.S. 50 (1983) (applying Puerto Rico's tolling rules to § 1983 claims) (citing *Bd. of Regents v. Tomanio*, 446 U.S. 478 (1980)). Moreover, a § 1983 claim is subject to equitable tolling principles. *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946). Hence, even a plaintiff whose action is barred by the time limitations requirement may be the beneficiary of a toll of that period for various reasons, including the existence of actions by the defendant which effectively undermine plaintiff's ability to file within the time limit. *But see infra* note 264, discussing the circuit courts' reconsideration of the applicability of federal equitable estoppel principles pursuant to *Holmberg* in § 1983 cases in light of the Court's subsequent decision in *Hardin v. Straud*, 490 U.S. 536 (1989).

16. The absence of a federal statute of limitations is "a void which is commonplace in federal statutory law." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (quoting *Bd. of Regents v. Tomanio*, 446 U.S. at 483 (1980)).

17. Title 42 U.S.C. § 1988 permits application of state law to § 1983 actions because,

[the federal civil rights statutes] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry

“borrow” the state’s limitations period.¹⁸ The appropriate limitations period is “the general or residual [state] statute for personal injury actions.”¹⁹

Although state statutory limitation periods apply to § 1983 actions, the accrual of such actions—the point at which the statutory time commences—is governed by federal law.²⁰ As a consequence, a determination of the timeliness of a § 1983 claim may involve consideration of both state and federal decisional and statutory law.

The Supreme Court has calculated the accrual period from that point in time when the plaintiff knew or should have known of the injury that is the basis of the legal claim.²¹ This standard ostensibly

the same into effect; *but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State* wherein the court having jurisdiction of such civil or criminal cause is held, *so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause*

42 U.S.C. § 1988 (1994) (emphasis added).

The Supreme Court has interpreted § 1988 as requiring a “three-step process” in determining the rules of decision applicable to civil rights claims.” *Wilson*, 471 U.S. at 267. This test, as applied to statute of limitations questions under § 1983, requires that,

First, courts are to look to the laws of the United States “so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.” [42 U.S.C. § 1988.] If no suitable federal rule exists, courts undertake the second step by considering application of state “common law, as modified and changed by the constitution and statutes” of the forum state. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not “inconsistent with the Constitution and laws of the United States.”

Burnett v. Grattan, 468 U.S. 42, 47-48 (1984) (second alteration added) (internal citations omitted).

18. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985) (holding that state personal injury statutes of limitations apply to § 1983 actions); *Tomanio*, 446 U.S. at 483-84; *Chardon v. Soto*, 462 U.S. 650, 655 (1983) (applying Puerto Rican law).

19. *Owens v. Okure*, 488 U.S. 235, 249-50 (1989).

20. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) (holding that a § 1983 claim for unlawful conviction and imprisonment accrues when the state declares such conviction or imprisonment invalid); *Pauk v. Bd. of Trs.*, 654 F.2d 856, 859 (2d Cir. 1981) (“Federal law determines when a claim accrues under § 1983.”) (citation omitted); *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980) (“Federal law . . . ‘establishes as the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action.’”) (quoting *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977)); *cf. Del. State Coll. v. Ricks*, 449 U.S. 250 (1980) (discussing accrual under § 1981).

21. *See, e.g., Ricks*, 449 U.S. at 258 (holding that the Title VII action limitations period runs from when tenure decision is made and communicated to plaintiff, since that is the discriminatory act); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (holding

appears plaintiff-friendly because it seems to consider the possibility that a plaintiff's knowledge of events might be delayed, which would impact the plaintiff's ability to recognize and act on a § 1983 claim. As a result, under certain circumstances, the plaintiff may have more time, cumulatively, than would appear to be provided for, chronologically, under the state's limitation statute. Plaintiffs and their representatives may, however, have the impression—often well founded—that the triggers for determining the point of accrual are less salutary than initially suggested by the standard. In practice, plaintiffs lack the necessary legal knowledge, familiarity with the legal system, and facts about the municipality's actions and policies to discern a legally redressable injury.²² In other words, plaintiffs may have insurmountable difficulty in determining that they have a claim against a municipality.²³

A determination of when a plaintiff knew, or should have known, that the defendant's conduct could be the basis of a redressable § 1983 injury can be a complex inquiry. The inquiry is complicated by the factual complexities inherent in a claim based on an institutional "policy and practice" of a government entity, rather than on direct malicious conduct by some individual "bad actor." This article argues that the courts' rulings in two recent

that the limitations period runs from date when plaintiff received notice of termination of job appointment).

22. Cf. *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986). In *Oliveri*, the Second Circuit recognized the access-to-information problem faced by plaintiffs and their attorneys, and held that plaintiffs need not secure detailed information otherwise necessary to establish a pattern of actionable misconduct prior to commencement of an action.

We recognize, however, that when commencing a [police misconduct] suit . . . neither the plaintiff nor his attorney is likely to know much about the relevant internal operations of the police department, nor about the disciplinary history and record of the particular police officers involved. In view of the strong policies favoring suits protecting the constitutional rights of citizens, we think it would be inappropriate to require plaintiffs and their attorneys before commencing suit to obtain the detailed information needed to prove a pattern of supervisory misconduct in the form of inadequate training, improper policies, and toleration of unconstitutional actions by individual police officers.

Id. at 1279.

23. One scholar has commented on the difficulty prospective § 1983 plaintiffs have in recognizing a claim. SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, vol. 1C, § 12.4.

The fact that a person knows (or should have known) of her injury, however, is not the same as knowing that her federally protected rights were violated. A layperson may well know that she has been injured, but it often takes a lawyer with expertise in constitutional law to evaluate whether federally protected rights were violated. *Id.* at 10.

cases,²⁴ decided in the Second Circuit, equating knowledge of individual officers' illegal and corrupt conduct with knowledge of an injury due to a municipality's policy, custom, or practice, are legally and factually unsupportable. The approach taken by the courts, this article argues, serves to diminish the effectiveness of § 1983 against municipalities.

This article further argues that a judge's determination of untimeliness is an inquiry based on objective facts and a judge's perceptions, influenced by the judge's individual experiences, as well as the dominant cultural norms of behavior as to what constitutes reasonable actions and knowledge on the part of a plaintiff. Thus, the limitations period calculation has an element of subjectivity, as seen through the lens of a culturally normative reality.

The standard of accrual that determines the timeliness of a § 1983 claim is extremely malleable and vulnerable to an individual judge's socially constructed cultural values. This standard of accrual essentially renders § 1983 almost useless against municipalities for police misconduct claims based on policies, practices, and/or customs because it adopts a cultural standard at odds with a racialized societal reality.²⁵ Two recent Second Circuit cases²⁶ are analyzed to demonstrate the difficulty potential plaintiffs and their counsel face in determining the point of accrual for *Monell*-based claims alleging police misconduct.²⁷

The City of New York (the "City"), the municipal defendant in these two cases, challenged the plaintiffs' municipal liability claims as untimely, arguing that they were filed after the three-year applicable statutory time period.²⁸ The City argued that plaintiffs had notice of their municipal liability claims from statements made by

24. The two cases are *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), *aff'd*, No. 99-7336 (2d Cir. Oct. 29, 1999), and *Monzon v. City of New York*, No. 98 Civ. 4872 (LMM), 1999 WL 1120527 (S.D.N.Y. Dec. 7, 1999).

25. Two commentators have asserted that § 1983 "is almost entirely a judicial construct." *Reshaping Section 1983*, *supra* note 13, at 760.

26. *Clinton*, 1999 WL 105026, *aff'd*, No. 99-7336 (2d Cir. Oct. 29, 1999); *Monzon*, 1999 WL 1120527.

27. The author participated in the litigation of both cases in the district and circuit courts. The author drafted the plaintiffs' memoranda of law in *Clinton* and *Monzon* and the *Clinton* appellate brief. The author also argued the *Clinton* appeal before the Second Circuit.

28. Section 1983 claims filed in New York are subject to New York State's three-year statute of limitations. *Owens v. Okure*, 488 U.S. 235, 251 (1989); *Murphy v. Lynn*, 53 F.3d at 548 (2d Cir. 1995); *see also* N.Y. C.P.L.R. 214(2), (5) (McKinney 1990) (state's three year limitations period applicable to general personal injury claims); *see also* discussion *infra* Part I.

state actors and the ensuing extensive media coverage underlying the police precinct scandal.²⁹ In addition, the City claimed that the plaintiffs' participation in the investigation and prosecution of the individual police officers involved in the plaintiffs' illegal arrests, prosecutions, and incarcerations belied any claims that they did not have notice of a municipal liability claim.³⁰ The plaintiffs responded that their municipal liability claims based on police misconduct and corruption were timely filed because accrual did not occur upon their initial arrests and prosecutions, but later, when they knew that their injuries resulted from the City's policies rather than from the individual police officers' actions.³¹ The plaintiffs argued that information about the corruption and the City's direct role in sustaining and furthering the corruption, was essential to their notice of the municipal liability claim.³²

This article discusses the impact of the plaintiffs' testimony, officials' statements, and media coverage of the underlying events of the claim and subsequent events on the accrual period of *Monell*-based claims.³³ Part I sets forth the applicable substantive and procedural law in determining the timeliness of a § 1983 municipal liability claim, and the rules governing summary dismissal based on untimeliness. Part II discusses the two cases filed in the Southern

29. *Clinton*, 1999 WL 105026, at *2; *Monzon*, 1999 WL 1120527, at *1.

30. See Municipal Defendants' Memorandum of Law in Support of Their Motion to Dismiss at 4-7 & nn.5-6, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix at 52-55, *Clinton v. City of New York*, No. 99-7336, (2d Cir. Oct. 29, 1999) [hereinafter Appendix]; New York City Memorandum of Law in Support of Its Motion to Dismiss at 7-9, *Monzon v. City of New York*, 98 Civ. 4872 (LMM), 1999 WL 1120527 (S.D.N.Y. Dec. 7, 1999) (on file with author). See discussion *infra* Part II, for a more detailed discussion of the municipal defendant's arguments.

31. It was critical to the plaintiffs' actions that the limitations period be calculated from some point later than their arrests since both actions were filed more than three years after the police arrested them. *Clinton* filed his complaint five years and eight months after his arrest, and four years and eight months after being sentenced to four years to life in prison. Memorandum of Law in Opposition to Defendant's Motion to Dismiss, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix, *supra* note 30, at 82-83. *Monzon* filed his complaint six years after his arrest, and four years and three months after a jury acquitted him of all charges. Memorandum of Law in Opposition to Motion to Dismiss, at 5-6, *Monzon v. City of New York*, 98 Civ. 4872 (LMM), 1999 WL 1120527 (S.D.N.Y. Dec. 7, 1999) (on file with author) [hereinafter *Monzon's Memorandum*].

32. Memorandum of Law in Opposition to Defendant's Motion to Dismiss, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix, *supra* note 30, at 89-91; *Monzon's Memorandum*, *supra* note 31, at 10-17.

33. Portions of the discussions in Part II-IV of this article are adapted from the author's memoranda of law and appellate brief filed in these cases.

District of New York and the subsequent Second Circuit summary order in one of these cases.

Part III considers the propriety of basing accrual of a § 1983 action upon plaintiffs' testimony, the statements of state and local law enforcement officials, and media coverage of municipal and state employee actions. This section argues that the officials' statements are insufficient as a matter of law, and that judicial reliance upon them is in direct contravention of doctrine and precedent and injects a contrarian analysis at odds with reality into § 1983 *Monell*-based cases.

In addition, this section argues that reliance on "mainstream" media coverage should be suspect because of its unreliability and lack of credibility within communities suspicious of law enforcement motives and actions. This section challenges the wisdom of relying on mainstream English-language media coverage of police misconduct in light of the often tortuous and hostile relationship between law enforcement officials and people of color in general, and between police and the specific communities at issue in the litigation. The culturally and linguistically constructed normative frameworks, as applied to *Monell* claims, are similarly discussed and dissected.

Part IV discusses the equitable tolling arguments raised by the plaintiffs and rejected by the courts. Part V recommends a standard for assessing "constructive knowledge" of § 1983 claims based on state officials' statements and newspaper and other media coverage. This part recommends that the courts adhere to a theory of notice of a municipal liability claim built upon information connecting the municipal action to the plaintiff's injury, rather than one based upon inferences about the connection between individual municipal actors and the municipality.

PART I

A. Limitations and Accrual Periods Applicable to 42 U.S.C. § 1983 *Monell* Claims

In *Wilson v. Garcia*,³⁴ the Supreme Court held that, for limitations period purposes, § 1983 claims were analogous to personal injury claims and thus subject to a state's personal injury statute of limitations.³⁵ Then, in *Owens v. Okure*,³⁶ the Court held that when

34. 471 U.S. 261 (1985).

35. *Id.* at 275-76.

36. 488 U.S. 235 (1989).

there are multiple personal injury statutes of limitations, § 1983 claims are subject to the state's *general* personal injury limitations period.³⁷ *Owens* involved New York State's statute of limitations, and the Court concluded that New York's three-year general personal injury statute of limitations applied.³⁸ The Court further held that a § 1983 damages action on the grounds of "an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated."³⁹

Although § 1983 claims are subject to state statutory time limitations they remain creatures of federal law and accrue pursuant to federal law.⁴⁰ The Supreme Court has determined that accrual occurs when the claimant knew or "should have known of his injury."⁴¹ The circuits have uniformly adopted and applied this standard to § 1983 claims.⁴²

37. *Id.* at 249-50. For a table of state limitations periods applicable to § 1983 claims, including case citations, see SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, § 12.9, *Table of Limitations Periods*, & Supp. 2000.

38. 488 U.S. at 249-51; see also *Murphy v. Lynn*, 53 F.3d 547, 548 (2d Cir. 1995) (stating that the § 1983 statute of limitations in New York is three years); N.Y. C.P.L.R. § 214(2), (5) (McKinney 1990). While § 1983 claims are subject to state statutes of limitations, they are not subject to state notice-of-claim requirements. *Felder v. Casey*, 487 U.S. 131, 140-41 (1988). Notice-of-claim requirements typically impose a short time frame within which the prospective claimant must notify the government of a potential lawsuit against public officers and/or public entities. For a discussion of notice-of-claim requirements, see SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, § 12.15.

39. *Heck v. Humphrey*, 512 U.S. 477, 489-90 (1994).

40. See *supra* note 20.

41. *Urie v. Thompson*, 337 U.S. 163, 170 (1949).

42. *Morales v. City of L.A.*, 214 F.3d 1151, 1154 (9th Cir. 2000) (declaring the standard is when plaintiff "knew or had reason to know of the injury which is the basis of his action"); *Harris v. Hegmann*, 198 F.3d 153, 157 (5th Cir. 1999) ("When a plaintiff knows or has reason to know of the injury which is the basis of the action.") (citation and internal quotation marks omitted); *Montgomery v. De Simone*, PTL., 159 F.3d 120, 126 (3d Cir. 1998) ("[When] plaintiff knows or has reason to know of the injury which is the basis of the § 1983 action") (citation and internal quotation marks omitted); *Smith v. City of Enid*, 149 F.3d 1151, 1154 (10th Cir. 1998) ("When the plaintiff knows or has reason to know of the injury which is the basis of the action.") (citation and internal quotation marks omitted); *Carreras-Rosa v. Alves-Cruz*, 127 F.3d 172, 174 (1st Cir. 1997) ("When the plaintiff knows, or has reason to know, of the injury on which the action is based.") (citation and internal quotation marks omitted); *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996) (when "plaintiff knows or has reason to know that the act providing the basis of his or her injury has occurred") (citation omitted); *Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 182 (4th Cir. 1996) ("[When plaintiff] knew or should have known both of the injury . . . and who was responsible for any injury."); *Rozar v. Mullis*, 85 F.3d 556, 561-62 (11th Cir. 1996) ("[When] the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.") (citation and internal quotation marks omitted); *Sellars v. Perry*, 80 F.3d 243, 245 (7th

B. Motions to Dismiss Pursuant to *Federal Rule of Civil Procedure 12(b)* and Summary Judgment Motions Pursuant to *Federal Rule of Civil Procedure 56* for Untimely Actions

Municipalities commonly seek summary, pre-trial dismissal of municipal liability claims. Accordingly, in *Clinton v. City of New York* and *Monzon v. City of New York*, the City moved for dismissal pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*,⁴³ and, in *Clinton*, succeeded in dismissing the actions against it before discovery under Rule 56.⁴⁴

Summary dismissal requires the defendant to satisfy a strict standard. A court may dismiss a complaint pursuant to Rule 12(b)(6) only if “it appears beyond doubt that the plaintiff can prove no set

Cir. 1996) (“[When] plaintiff knows or has reason to know of the injury that is the basis of his action.”) (citation omitted); *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1157 (2d Cir. 1995) (“When it is clear, or should be clear, that the harmful act [underlying the claim] is the consequence of a county ‘policy or custom.’”); *Pauk*, 654 F.2d 856, 859 (2d Cir. 1981) (when the claimant “knows or had reason to know” of the injury) (quoting *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980)).

For a comprehensive discussion of § 1983 claim accrual, and a synopsis of significant recent decisions on this issue, see SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, vol. 1C, § 12.4. As Professor Schwartz indicates, notice of *injury* and notice of a *constitutional violation* are not the same. *Id.* at 10. The Supreme Court and a majority of circuits adopted notice of *injury*, not notice of the violation of a right as the accrual benchmark. *Id.* Yet, parties and attorneys have difficulty distinguishing these two.

Basing accrual on notice of injury is problematic precisely because constitutional issues are complex and difficult to grasp. Whether an individual has been injured in the constitutional sense and the source of that injury are difficult to determine. Some problems include the herculean task of discerning municipal liability when police departments and cities deny the existence of a municipal role in the officers’ “bad acts,” arguing that the individuals involved are “rogue officers.” *Cf.* newspaper articles set forth, *infra* notes 86-87 (referring to “rogue officers” in corruption scandals). Municipalities also withhold documentation and information that goes to the municipality’s role in the individual actions. *E.g.*, *King v. Conde*, 121 F.R.D. 180, 192 (E.D.N.Y. 1988) (police departments refuse disclosure of personnel and investigatory files because it inhibits collection of information from police officers, and refuse disclosure of police procedural guidelines because it compromises effectiveness of law enforcement). Another layer of complexity to the legal and factual inquiry comes from § 1983 itself which, unlike other statutes, “does not create substantive rights.” *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (citing *Baker v. McCollan*, 443 U.S. 137, 140, 144 n.3 (1979)).

43. *Clinton*, 1999 WL 105026, at *1; *Monzon*, 1999 WL 1120527, at *1. In *Monzon*, the municipal liability claim survived a motion to dismiss, pursuant to Rule 12(b)(6), because the court could not determine, as a matter of law, the untimeliness of the plaintiff’s claim. *Monzon*, 1999 WL 1120527 at *1.

44. In *Clinton*, the court summarily dismissed, pursuant to Rule 56, concluding that, on the record and under the law, the plaintiff was on notice beyond the time when he filed his complaint. See *infra* Part II, for a discussion of the procedural history in these cases.

of facts in support of [the plaintiff's] claim which would entitle [the plaintiff] to relief."⁴⁵ In considering the motion, the court must treat all factual allegations as true and construe all reasonable inferences in the plaintiff's favor.⁴⁶

Summary judgment under Rule 56 is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."⁴⁷ A party seeking dismissal based on summary judgment faces a high threshold. The moving party bears the initial burden of establishing "the absence of a genuine issue as to any material fact."⁴⁸ Moreover, the movant's summary judgment materials "must be viewed in the light most favorable to the opposing party."⁴⁹ Satisfaction of the moving party's burden is essential, because summary judgment cannot be granted unless such burden has been adequately satisfied, even when the opposing party does not adequately respond. "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."⁵⁰

The district court's task in considering summary judgment is narrow. The district "judge's function is not . . . to weigh the evidence

45. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For a comprehensive discussion of the Rule 12(b)(6) standard, and for citations to illustrative cases, see 2 JAMES WM MOORE, ET AL., *MOORE'S FEDERAL PRACTICE* § 12.34 (Matthew Bender 3d ed.); 5A CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1355-1358 (West Publishing Co. 1990 & Supp. 2000).

The Second Circuit has stated that this "principle is to be applied with particular strictness when the plaintiff complains of a civil rights violation." *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991).

46. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). See generally MOORE, *supra* note 45, § 12.34; WRIGHT & MILLER, *supra* note 45, § 1357.

47. FED R. CIV. P. 56(c). In the *Clinton* litigation the City initially filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which the district court treated as a motion for summary judgment under Rule 56, based on the appended supporting documents submitted by both parties. *Clinton*, 1999 WL 105026, at *1. The parties' attachments consisted of published and unpublished judicial opinions, New York State and federal court documents in the referenced criminal matters involving the plaintiff and the former police officer defendants, and plaintiff's affidavit in opposition to the motion to dismiss. Appendix, *supra* note 30, 36-185.

48. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-33 (1986) (discussing Rule 56(e)). For a general discussion of summary judgment and standards of review, see WRIGHT & MILLER, *supra* note 45, vol. 10A, §§ 2716, 2728, & vol. 10B, § 2732.2; MOORE, *supra* note 45, § 56.11[5].

49. *Adickes*, 398 U.S. at 157 (footnote omitted).

50. FED. R. CIV. P. 56(e) advisory committee's note on 1963 amendment (quoted in *Adickes*, 398 U.S. at 160).

and determine the truth of the matter but to determine whether there is a genuine issue for trial.”⁵¹ Thus, the inquiry under summary judgment is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”⁵² To that end, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”⁵³

On appeal, the appellate “[c]ourt reviews the district court’s determination de novo . . . and reviews facts in the light most favorable to the losing party.”⁵⁴ The court must be convinced that there is no “evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party.”⁵⁵ Thus, summary judgment is limited to those cases in which there are no disputed factual issues underlying a claim that must be presented to a trier of fact.

C. Municipal Liability Claims

1. Pleading and Evidentiary Burdens

In *Leatherman v. Tarrant*,⁵⁶ the Supreme Court rejected the application of a heightened pleading requirement to § 1983 municipal liability claims.⁵⁷ The Court reiterated⁵⁸ that its reading of Rule

51. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); see also *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994) (“[A] court ‘cannot try issues of fact; it can only determine whether there are issues to be tried.’”) (citations omitted); *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir. 1994) (The court is “carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.”).

For a general discussion of summary judgment and standards of review, see WRIGHT & MILLER, *supra* note 45, vol. 10A, §§ 2716, 2728, & 10B, § 2732.2; MOORE, *supra* note 45, § 56.11[5].

52. *Anderson*, 477 U.S. at 251-52.

53. *Id.* at 255 (citing *Adickes*, 398 U.S. at 158-59).

54. *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 492 (2d Cir. 1999) (citing *D’Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir.), *cert. denied*, 524 U.S. 911 (1998), *Sullivan v. Town of Salem*, 805 F.2d 81, 82-83 (2d Cir. 1986)).

55. *Chambers*, 43 F.3d at 37 (citing *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988)).

56. 507 U.S. 163 (1993).

57. *Id.*

58. The Court’s earlier reading of Rule 8(a)(2) is in *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

8(a)(2) requires "that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"⁵⁹ However, the Court limited its decision in *Leatherman* to municipal liability claims, and specifically left open the question whether heightened pleading applies to claims against individuals.⁶⁰ Section 1983 scholars have noted that following this decision, several lower courts have preserved pleading hurdles that increase the burden on prospective plaintiffs.⁶¹ For example, some lower courts have concluded that heightened pleading requirements are still applicable to qualified immunity claims and conspiracy claims.⁶²

The Supreme Court and the Second Circuit have made clear on numerous occasions that municipal liability claims are independent of individual claims and impose different evidentiary burdens on the claimant.⁶³ The standard for establishing a municipal policy or custom places a significant burden on a claimant to establish that the municipality *itself* has committed some act resulting in injury to the claimant.⁶⁴

59. *Leatherman*, 507 U.S. at 168 (quoting FED. R. CIV. P. 8(a)(2)).

60. *Id.* at 166-67; see SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, § 7.21 (discussing *Leatherman*).

61. For a comprehensive discussion of the pleading issues and court decisions post-*Leatherman*, see NAHMOD, CIVIL RIGHTS, *supra* note 10, §§ 1:44-1.46; SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, vol. 1A, §§ 1.6-1.7.

62. NAHMOD, CIVIL RIGHTS, *supra* note 10, § 1:44 (citing cases); SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, vol. 1A, § 1.6 (citing cases).

63. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991); see also *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995). See generally SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, §§ 7.7, 7.15-7.18.

In order to fully comprehend the Supreme Court's § 1983 case decisions, the Court's construction of § 1983 must be considered in light of its application of common law tort doctrines to the statute. The Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability." *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (quoting *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986)) (internal quotation marks omitted), and as a consequence, common law tort rules, "defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well." *Id.* (quoting *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)). However, the Court has not uniformly applied common law tort rules to § 1983, but rather has looked to such rules for guidance in construing § 1983 in light of the statute's history and legislative goals. The prime example of the Court's unwillingness to adopt whole-heartedly common law principles is its rejection of a respondeat superior theory as applied to municipal liability claims under § 1983. *E.g.*, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

64. Indeed, plaintiff need not sue an individual to proceed on a municipal liability claim. Only the municipality's policy, practice, or custom, which causes the violation of the protected right, is needed to establish a municipal liability claim. *Monell*, 436 U.S. at 690; *City of Canton v. Harris*, 489 U.S. 378, 385-92 (1989); see *Schwartz, Section 1983 Claims*, *supra* note 7, at 4.

First, the plaintiff must assert a deprivation of a right protected by the United States Constitution or a federal statute because § 1983 does not create “substantive rights; it merely provides remedies for deprivations of rights established elsewhere.”⁶⁵ Second, the municipality must have a policy that, as executed or implemented, violates the claimant’s rights.⁶⁶ Such a policy may be based upon either an official pronouncement or an act or series of actions by municipal employees.⁶⁷ It may include a “policy statement, ordinance, regulation or decision officially adopted and promulgated by [the municipality’s] officers,”⁶⁸ those “edicts or acts [that] may fairly be said to represent official policy,”⁶⁹ or a “governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decision making channels.”⁷⁰ In his succinct summary of a plaintiff’s available theo-

65. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816. (1985) (citing *Baker v. McCollan*, 443 U.S. 137, 140, 144, n.3 (1979) (holding that because police officers inflicted no constitutional injury to respondent, they were not liable under § 1983)); see also *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) (holding that because city’s conduct did not violate the Due Process Clause, § 1983 did not provide a remedy to municipal employer); *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam); *Chapman v. Houston Welfare Org.*, 441 U.S. 600, 615-20 (1979); Michael S. Bogren, *Municipal Liability Under § 1983*, in *SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983*, at 215, 227 (Mary Massaron Ross ed., 1998) [hereinafter Bogren, *Municipal Liability Under § 1983*].

While the Court initially held in *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1979), that § 1983 “laws” encompassed all statutory violations of federal law, it later significantly limited that holding. In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981), the Court pronounced the standard for exceptions to § 1983 “laws” claims: when a federal statute does not confer rights, privileges, or immunities enforceable pursuant to § 1983, and when Congress foreclosed a private remedy by virtue of the statute. In *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981), the Court stated that where a federal statute’s remedies “are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude” § 1983 actions. See generally NAHMOD, CIVIL RIGHTS, *supra* note 10, §§ 2:27-2:37; SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, vol. 1A, § 4.2.

66. *Monell*, 436 U.S. at 690-91. A municipality may be liable for an actual policy, its own direct acts or failure to train, or for actions so pervasive that they rise to the level of a custom. See generally, NAHMOD, CIVIL RIGHTS, *supra* note 10, §§ 6:6-6:13, 6:33-6:34, 6:38-6:43.

67. In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Court addressed the issue of which official could be considered a decision-maker whose actions may be the basis for municipal liability. The court concluded in these two cases that only actions attributable to those persons who, under state law, have final policymaking authority could result in municipal liability. *Pembaur*, 475 U.S. at 481-82; *Praprotnik*, 485 U.S. at 124-27. See generally SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, §§ 7.8, 7.16-7.17.

68. *Monell*, 436 U.S. at 690.

69. *Id.* at 694.

70. *Id.* at 691.

ries for the existence of a policy in satisfaction of the Court's pronouncements, Justice Souter has stated that a policy may be demonstrated:

[W]hen the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy

. . . where no rule has been announced as a "policy" but federal law has been violated by an act of the policymaker itself . . . [such that] the choice of policy and its implementation are one

. . . [and] in a third situation, even where the policymaker has failed to act affirmatively at all, so long as the need to take some action to control the agents of the Government "is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymake[r] . . . can reasonably be said to have been deliberately indifferent to the need."⁷¹

Third, the plaintiff must establish causation. There must be "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation."⁷² The plaintiff must show that the municipal policy "caused a constitutional tort."⁷³ A municipality is liable where its deliberate action is the "moving force" behind

71. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 417-18 (1997) (Souter, J., dissenting) (citations omitted) (third alteration in original). As Justice Souter recognized, *Monell* is the classic example of the first theoretical matrix. The *Clinton* and *Monzon* cases are examples of the third.

The number of acts necessary to give rise to a policy or custom continues to challenge courts and plaintiffs. One legal expert has stated, "there must be more than one event to give rise to a custom or practice." Bogren, *Municipal Liability Under § 1983*, *supra* note 65, at 243. Further, "the practice must be 'longstanding' and 'pervasive.'" *Id.* A custom "must be persistent and well settled." NAHMOD, CIVIL RIGHTS, *supra* note 10, § 6:10; see *Singleton v. City of New York*, 632 F.2d 185, 195 (2d Cir. 1980).

72. *City of Canton v. Harris*, 489 U.S. 375, 385 (1989); see also *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 829-30 (1985) (Brennan, J., concurring in part and concurring in the judgment) (finding that the causation element of a § 1983 claims requires the plaintiff to show (1) action by the city, rather than unilateral action by a non-policy making employee, and (2) that "this policy or custom 'subjected' or 'caused [plaintiff] to be subjected' to a deprivation of a constitutional right").

73. *Monell*, 436 U.S. at 691. The plaintiff cannot proceed under a theory of respondeat superior against the municipal defendant. *Id.* See generally NAHMOD, CIVIL RIGHTS, *supra* note 10, §§ 6:12-6:13, 6:35 (summarizing the law on causation, the constitutional violation requirement, and the need for plaintiff to show a causal relationship between the custom and the constitutional deprivation); SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, §§ 7.7, 7.12 (discussing whether plaintiff has to show some level of fault in the municipality's adoption of the policy, and plaintiff's need to show that the policy caused the constitutional deprivation).

the plaintiff's injury.⁷⁴ Lastly, the plaintiff must also establish culpability of the municipality.⁷⁵ Although § 1983 does not contain a state of mind requirement, "[i]n any § 1983 suit . . . the plaintiff must establish the state of mind required to prove the underlying violation."⁷⁶ Section 1983 only requires a plaintiff to establish the intent required for proof of the constitutional violation

In asserting a claim based on inadequate training, this last criteria requires the plaintiff to establish that the municipality acted in a manner that constitutes "deliberate indifference."⁷⁷ This standard is "a judicial gloss, appearing neither in the Constitution nor in a statute,"⁷⁸ and is an objective standard. Consequently, it is one of the most difficult theories under which a plaintiff may proceed. Moreover, the Supreme Court has made clear that municipal liability based on a policy of inadequate training cannot be based on a single incident of police misconduct.⁷⁹ In contrast, § 1983 action against an individual requires that the plaintiff show a violation of a federal constitutional or statutory right, proximately caused by the actions of a person acting under color of law.⁸⁰

2. *Accrual: Question of Law, Fact, or Mixed?*

The Second Circuit has stated that, in certain circumstances, the determination of when a claim accrues involves "factual issues related to statute of limitations [which] should be put before a jury."⁸¹ Several lower courts in the Second Circuit have noted that

74. *Bd. of County Comm'rs*, 520 U.S. at 404; *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (quoting *Monell*, 436 U.S. at 694); see *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 122 (1992).

75. *Bd. of County Comm'rs*, 520 U.S. at 405; see also *Martinez v. California*, 444 U.S. 277, 285 (1980) (finding no § 1983 liability where the harm to plaintiff was "too remote a consequence" of the state action). The Court has stated that a § 1983 municipal liability claim is subject to a two part analysis: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins*, 503 U.S. at 120 (citing *Tuttle*, 471 U.S. at 817).

76. *Bd. of County Comm'rs*, 520 U.S. at 405.

77. *Harris*, 489 U.S. at 388; see also *Bogren, Municipal Liability Under § 1983*, *supra* note 65, at 249-53 (reviewing the deliberate indifference standard).

78. *Farmer v. Brennan*, 511 U.S. 825, 840 (1994).

79. *Tuttle*, 471 U.S. at 821 (finding that a policy or custom of inadequate training cannot be inferred from a single isolated incident of excessive force by a police officer, because such an inference would "allow a § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policy maker").

80. SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, vol. 1A, § 1.4, at 12.

81. *Eagleston v. Guido*, 41 F.3d 865, 871 (2d Cir. 1994) (citation omitted).

the moment of accrual involves some factual determinations.⁸² According to one Connecticut district court, the date when the claim accrues for statutory limitations purposes "is ordinarily a question of fact for a trier; consequently, a court cannot grant summary judgment for a defendant if there is a genuine dispute as to when the limitation period began."⁸³ As stated in a decision from the Northern District of New York, the determination of when there are sufficient facts to give the claimant "reason to know . . . of defendants' actions, is a factual question that must be resolved by a jury."⁸⁴

PART II

A. Police Corruption Within New York City's 30th Precinct⁸⁵

In the early 1990s, police corruption of epic proportion enveloped the 30th Police Precinct in New York City.⁸⁶ This corruption lasted several years and eventually led to the worst and most pervasive police corruption scandal in the history of New York City—an era marked by perjury, drug sales, extortion, and theft committed by numerous police officers.⁸⁷ The officers involved in

82. *E.g.*, *West Haven Sch. Dist. v. Owens-Corning Fiberglas Corp.*, 721 F. Supp. 1547, 1555-56, n.10 (D. Conn. 1988); *see also* *Paige v. Police Dep't*, No. 97-CV-0455, slip op. at 11 (N.D.N.Y. May 7, 1998) (discussing whether certain facts provided a basis for finding plaintiff had "constructive knowledge" of defendants' actions for purposes of determining when action accrued is a factual question for the jury) (citing *Braune v. Abbott Laboratories*, 895 F. Supp. 530, 556 (E.D.N.Y. 1995)); *JWP Inc. Sec. Litig. v. Dwyer*, 928 F. Supp. 1239, 1248 (S.D.N.Y. 1996).

83. *West Haven Sch. Dist.*, 721 F. Supp. at 1556, n.10 (citations omitted); *see also* *Paige*, No. 97-CV-0455, slip op. at 11 (discussing whether certain facts provided a basis for finding plaintiff had "constructive knowledge" of defendants' actions for purposes of determining when action accrued is a factual question for the jury).

84. *Paige*, No. 97-CV-0455, slip op. at 11-12 (citing *Braune*, 895 F. Supp. 530; *JWP Inc. Sec. Litig.*, 928 F. Supp. 1239).

85. Attorneys of record for plaintiff in *Clinton*, Jose A. Muniz, Esq. and Rudy Velez, Esq., provided valuable assistance and feedback in developing the factual description of the 30th Police Precinct corruption scandal included in the plaintiffs' memoranda of law, which the author wrote, and upon which the text herein is based.

86. David Kocieniewski, *Victim of Framing by 2 Police Officers Wins \$5,000 in Payments from Them*, N.Y. TIMES, Feb. 12, 1998, at B3 [hereinafter *Victim of Framing*]; David Kocieniewski, *New York Pays a High Price for Police Lies*, N.Y. TIMES, Jan. 5, 1997, at B1 [hereinafter *New York Pays a High Price*]; Andrew Jacobs, *Bad Cop*, N.Y. TIMES, Nov. 10, 1996, at 1 [hereinafter *Bad Cop*]; Clifford Krauss, *14 More Officers Arrested at a Shaken 30th Precinct*, N.Y. TIMES, Sept. 29, 1994, at A1 [hereinafter *14 More Officers Arrested*]; Peter Pringle, *Police Close in on "Dirty 30,"* THE INDEPENDENT (London), Apr. 25, 1994, at 10 [hereinafter *Police Close in*].

87. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), reprinted in Appendix, *supra* note 30, at 102-03; *see also* *Victim of*

the corruption acted both individually and with other members of the precinct to steal drugs and stolen goods, and then to cover up their actions by perjuring themselves before grand juries and in court.⁸⁸ The victims of this corruption were predominantly African American and Latino.⁸⁹

These actions were not aberrations, but were common occurrences perpetrated by a significant number of officers within the precinct. According to one account, “one-sixth of the precinct’s officers had routinely stolen drug money, guns and cash.”⁹⁰ Indeed, the 30th Precinct gained the unique distinction of being known as “the Dirty Thirty.”⁹¹ The corruption scandal in the 30th Precinct was so pervasive and systemic that ultimately one-third of the precinct officials were implicated in the underlying illegal acts⁹² and thirty-one police officials of the 30th Precinct were charged, convicted, or pleaded guilty.⁹³

Framing, supra note 86; *Bad Cop*, supra note 86; George James, *Officer Convicted of Perjury in a Drug Case*, N.Y. TIMES, Nov. 21, 1995, at B6 [hereinafter *Officer Convicted*]; George James, *Ex-Officer Tells Court of Protection and Pay Offs*, N.Y. TIMES, Feb. 22, 1995, at B3 [hereinafter *Ex-Officer Tells Court*]; *14 More Officers Arrested*, supra note 86; Larry Elliot, *New York Police Corruption Drive Extends its Inquiries*, THE GUARDIAN (London), May 9, 1994, at 12; *Police Close in*, supra note 86.

88. *New York Pays a High Price*, supra note 86; *Victim of Framing*, supra note 86; *Bad Cop*, supra note 86; *Officer Convicted*, supra note 87; *Ex-Officer Tells Court*, supra note 87; *14 More Officers Arrested*, supra note 86; *Police Close in*, supra note 86.

89. See *New York Pays a High Price*, supra note 86; *Victim of Framing*, supra note 86; *Bad Cop*, supra note 86; *Officer Convicted*, supra note 87; *Ex-Officer Tells Court*, supra note 87; *14 More Officers Arrested*, supra note 86; *Police Close in*, supra note 86.

90. *New York Pays a High Price*, supra note 86; *Victim of Framing*, supra note 86; *Bad Cop*, supra note 86; *Officer Convicted*, supra note 87; *Ex-Officer Tells Court*, supra note 87; *14 More Officers Arrested*, supra note 86; *Police Close in*, supra note 86.

91. *New York Pays a High Price*, supra note 86; *Victim of Framing*, supra note 86; *Bad Cop*, supra note 86; *Officer Convicted*, supra note 87; *Ex-Officer Tells Court*, supra note 87; *14 More Officers Arrested*, supra note 86; *Police Close in*, supra note 86.

92. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), reprinted in Appendix, supra note 30, at 103. The 30th Precinct corruption involved “every tour of duty,” and resulted in thirty-one members from the precinct being charged “for involvement in narcotics distribution, thefts of money and property, unlawful searches and seizures, the use of excessive force, extortion, income tax evasion and perjury.” *Id.* See generally *New York Pays a High Price*, supra note 86; *Victim of Framing*, supra note 86; *Bad Cop*, supra note 86; *Officer Convicted*, supra note 87; *Ex-Officer Tells Court*, supra note 87; *14 More Officers Arrested*, supra note 86; *Police Close in*, supra note 86; Clifford Krauss, *More Officers Facing Arrest in Corruption*, N.Y. TIMES, Apr. 15, 1994, at B1 [hereinafter *More Officers Facing Arrest*].

93. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), reprinted in Appendix, supra note 30, at 103.

The corruption was entrenched and covert, necessitating the participation of several law enforcement entities in the investigation and eventual elimination of the corruption. Beginning about May 1993, the Manhattan District Attorney's Office, along with investigators from the New York City Police Department's Internal Affairs Bureau, the Internal Revenue Service's Criminal Investigation Division, the Mollen Commission (a New York City commission established to investigate police corruption),⁹⁴ and the United States Attorney's Office, undertook a collective investigation into allegations of corruption in the 30th Precinct, including charges of rampant false arrests and perjury committed by precinct officials.⁹⁵ Based on the revelations from their investigation, the District Attorney's Office reviewed well over 500 criminal cases.⁹⁶ Many cases were dismissed and vacated due to the perjury and wrongful actions of the 30th Precinct officers.⁹⁷

Hundreds of persons, the majority of which were African American and Latino, were wrongfully incarcerated, prosecuted, and/or convicted as a direct consequence of the officers' unlawful actions.⁹⁸ This compromised the social contract, seriously breached the trust of the communities most affected by the officers' actions, namely the black and Latino communities, and undermined the trust in the New York City Police Department. It also took a heavy

94. Former Mayor David Dinkins appointed the City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department to investigate police corruption allegations in New York City. This commission, popularly known as the "Mollen Commission" after its chair, Judge Milton Mollen, issued a report that concluded there was corruption throughout New York City's Police Department. MOLLEN REPORT, *supra* note 4.

95. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), *reprinted in* Appendix, *supra* note 30, at 103; *More Officers Facing Arrest*, *supra* note 92.

96. Seth Faison, *Case Review Under Way Due to Police In Scandal*, N.Y. TIMES, Apr. 19, 1994, at B2.

97. Letter from New York District Attorney Robert M. Morgenthau, by Assistant District Attorney Emery E. Adoradio to United States District Judge Charles S. Haight, Jr. (Feb. 26, 1997), *reprinted in* Appendix, *supra* note 30, at 118. The case review was an enormous task, which the plaintiff in *Clinton* argued was incomplete. Indeed, the plaintiff argued, upon information and belief, that there were still 1000-2000 cases pending not yet dismissed by the City. Memorandum of Law in Opposition to Defendant's Motion to Dismiss, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), *reprinted in* Appendix, *supra* note 30, at 79.

98. See *New York Pays a High Price*, *supra* note 86; *Victim of Framing*, *supra* note 86; *Bad Cop*, *supra* note 86; *Officer Convicted*, *supra* note 87; *Ex-Officer Tells Court*, *supra* note 87; *14 More Officers Arrested*, *supra* note 86; *Police Close in*, *supra* note 86.

toll on police resources and cost taxpayers millions of dollars in litigation costs, awards, and settlements.⁹⁹

Indeed, several victims sued officers and the City. Some filed § 1983 actions against those officers who were primary participants in the 30th Precinct corruption. Reynaldo Clinton and Robert Monzon were two of these victims.¹⁰⁰ They sued Edward Checke, Kevin Nannery, Joseph Walsh, and James Velez.¹⁰¹ A jury convicted Velez of various criminal counts. Checke, Nannery, and Walsh pleaded guilty in both state and federal court.¹⁰² All four were sentenced for crimes associated with their unlawful and corrupt practices during their tour at the 30th Precinct.¹⁰³ Ironically, because of their extensive participation in the police corruption and conspiracy to violate the law, the cooperation of Checke, Nannery, and Walsh was critical to the investigation and provided them with the leverage to negotiate pleas for relatively short sentences.¹⁰⁴

99. *Victim of Framing*, *supra* note 86 (reporting that the New York City Law Department paid more than two million dollars in settlements with fifteen civil suits still pending); *New York Pays a High Price*, *supra* note 86 (noting that awards and settlements totaled 1.3 million dollars to date, and legal experts estimated such costs could rise to ten million dollars); *see also* Neil MacFarquhar, *Torture Case Puts Officers on Defensive*, N.Y. TIMES, Aug. 27, 1997, at A1 (reporting that police credibility was “on a knife edge in New York” due to police corruption and abuse); Jennifer Maddox, *Corrupt Police Taint Communities*, THE STUART NEWS, Aug. 12, 1996, at C1 (explaining that police corruption “contaminate[s] relationship with communities”); Kevin Johnson, *New Breed of Bad Cop Sells Badge, Public Trust*, USA TODAY, Apr. 16, 1998, at A8 (discussing several police corruption cases nationally and their impact on society); MOLLEN REPORT, *supra* note 4, at 4 (describing that perception of prevalence of police corruption and law enforcement’s unwillingness to address this “poisons relations between the community and the police”).

100. *Clinton*, 1999 WL 105026, at *1; *Monzon*, 1999 WL 1120527, at *1.

101. *Clinton*, 1999 WL 105026, at *1; *Monzon*, 1999 WL 1120527, at *1.

102. Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), *reprinted in* Appendix, *supra* note 30, at 80-81.

103. Checke, Nannery, and Walsh pleaded guilty in federal and state court to various counts of conspiracy to violate civil rights, tax evasion, and first degree perjury. These pleas were entered pursuant to their respective plea agreements with the prosecutors. *Id.* at 80-81.

104. On September 27, 1994, defendant Walsh pleaded guilty in federal court to conspiracy to violate civil rights and to tax evasion. He also pled guilty to first degree perjury in state court. *Id.* at 125. On November 15, 1994, defendant Nannery pled guilty in federal court to conspiracy to violate civil rights and to tax evasion. He also pled guilty in state court to first-degree perjury. *Id.* at 102. On February 2, 1996, defendant Checke pled guilty in state court to first degree perjury. *Id.* at 110. Of these defendants, Checke was the first sentenced, on April 9, 1996, in state court to a conditional discharge. Checke Sentencing Sheet, *reprinted in* Appendix, *supra* note 30, at 137. Defendant Walsh was sentenced in federal court on April 2, 1997, to nine months imprisonment and two years supervised release, and in state court to nine months

For example, as part of the sentencing phase, the federal prosecutor in Nannery's case noted that:

[D]espite serious concerns about Nannery's abuse of his position of trust and leadership within the [New York Police Department], and the devastating consequences of his actions, both [the United States Attorney's Office and the District Attorney's Office] agreed that he was a critical witness who should be signed up as a cooperator.

In sum, the gravity of the crimes committed by Kevin Nannery is clear, and no amount of cooperation can change that. Nevertheless, Kevin Nannery's willingness to cooperate with this investigation assisted in the prosecution of several additional corrupt officers for which he deserves consideration at the time of sentencing.¹⁰⁵

The federal court sentenced Nannery to five months imprisonment and two years supervised release.¹⁰⁶

Similarly, with respect to Walsh, who was secretly arrested and then cooperated by recording other former officers' statements that resulted in their arrests,¹⁰⁷ the prosecutor stated:

At the time, the Government was unaware of most of Walsh's perjuries, and it is unlikely that the Government ever would have learned of them had Walsh failed to divulge them voluntarily. This information was particularly important because it enabled the District Attorney's Office, first, to immediately identify and vacate legally-flawed prosecutions and, second, to bring criminal charges against those officers who participated in the perjuries.

....

imprisonment, to be served concurrently. Walsh Sentencing Sheet, *reprinted in* Appendix, *supra* note 30, at 138-40; *Ex-Officer Sentenced to 9-month Term*, N.Y. L.J., Apr. 4, 1997, at 2. Defendant Nannery also was sentenced in 1997 in federal court to five months imprisonment and two years supervised release, and in state court to one to three years imprisonment, to be served concurrently. Nannery Sentencing Sheet, *reprinted in* Appendix, *supra* note 30, at 141-44. The court sentenced James Velez to several concurrent terms of one to three years incarceration.

In contrast, Reynaldo Clinton, the target and victim of Checke, Nannery, and Walsh's corrupt actions, served almost two years in prison, more than any of the former police officers. Amended Complaint, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), *reprinted in* Appendix, *supra* note 30, at 5. Robert Monzon was wrongfully incarcerated and had to defend himself at trial. Monzon's Memorandum, *supra* note 31, at 1.

105. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), *reprinted in* Appendix, *supra* note 30, at 112.

106. Nannery Sentencing Sheet, *reprinted in* Appendix, *supra* note 30, at 141-44.

107. *Id.* at 109, n.5.

The gravity of the crimes committed by Joseph Walsh is clear, and no amount of cooperation can change that. Nevertheless, Joseph Walsh's willingness to cooperate with this investigation assisted in the prosecution of several additional corrupt officers for which he deserves consideration at the time of sentencing.¹⁰⁸

The federal court sentenced Walsh to nine months imprisonment and two years supervised release.¹⁰⁹

B. *Clinton v. City of New York*: Factual and Procedural Background

1. Reynoldo Clinton's Wrongful Arrest and Incarceration and Participation in the Corruption Investigation

On or about September 29, 1992, former police officer Edward Checke arrested Reynaldo Clinton.¹¹⁰ Later, former police officer Joseph Walsh falsely testified to the grand jury that he and former police officer Kevin Nannery joined Checke in pursuing, apprehending, and recovering drugs from Clinton.¹¹¹ Clinton was subsequently indicted, convicted for possession of drugs, and sentenced, on October 19, 1993, to an indeterminate prison sentence of four years to life.¹¹²

On November 4, 1994, pursuant to a motion for release under New York's Criminal Procedure Law § 440.10,¹¹³ Clinton was released from prison after serving almost two years.¹¹⁴ The Supreme Court of the State of New York vacated Clinton's wrongful conviction and dismissed his unlawful indictment on December 13, 1994.¹¹⁵

108. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Charles S. Haight, Jr. (Feb. 25, 1997), *reprinted in* Appendix, *supra* note 30, at 136.

109. Walsh Sentencing Sheet, *reprinted in* Appendix, *supra* note 30, at 138-40.

110. Brief for Plaintiff-Appellant at 4, *Clinton v. City of New York*, No. 99-7336 (2d Cir. Oct. 29, 1999).

111. Amended Complaint, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), *reprinted in* Appendix, *supra* note 30, at 8; Letter from New York District Attorney Robert M. Morgenthau, by Assistant District Attorney Emery E. Adoradio to United States District Judge Charles S. Haight, Jr. (Feb. 26, 1997), *reprinted in* Appendix, *supra* note 30, at 116; Brief for Plaintiff-Appellant at 4, *Clinton v. City of New York*, No. 99-7336 (2d Cir. Oct. 29, 1999).

112. Brief for Plaintiff-Appellant at 4, *Clinton v. City of New York*, No. 99-7336 (2d Cir. Oct. 29, 1999).

113. N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1994).

114. Amended Complaint, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), *reprinted in* Appendix, *supra* note 30, at 5.

115. *Id.*

In 1994 and 1995, representatives from the District Attorney's Office approached Clinton regarding his arrest and the wrongful acts of the arresting officers.¹¹⁶ Assistant District Attorney Emery E. Adoradio interviewed Clinton in the presence of his attorney and confirmed information that officers involved in Clinton's prosecution had lied to the grand jury.¹¹⁷ Clinton was later approached again by the District Attorney's Office to recount his version of his arrest to a grand jury, which he did in March 1995.¹¹⁸

2. *Plaintiff Clinton's 42 U.S.C. § 1983 Civil Rights Action*

Clinton filed his amended complaint on June 16, 1998.¹¹⁹ He charged defendants the City of New York, the New York City Police Department, and former police officers Walsh, Nannery, and Checke, with federal and state civil rights violations arising from his wrongful arrest, prosecution, and imprisonment.¹²⁰ Clinton's claims were based on the illegal conduct and perjured testimony of the officers, which, he alleged, were pursuant to an official custom and practice permitting and facilitating such conduct.¹²¹ Specifically, Clinton alleged that the City was liable for official customs, policies, and practices, and for failure to adequately select, hire, train, supervise, and discipline the officers, all of which deprived

116. Affirmation in Support of Dismissal of Indictment (Dec. 10, 1994), *reprinted in* Appendix, *supra* note 30, at 173.

117. *Id.*

118. Affidavit in Opposition to Defendant's Motion to Dismiss (Aug. 28, 1998), *reprinted in* Appendix, *supra* note 30, at 146. The record is unclear and undeveloped regarding the exact dates of these events. It appears that Adoradio's interview occurred before December 10, 1994 and the grand jury testimony occurred in March 1995. This information is gathered from the joint appendix as cited *supra* note 30, and from conversations between the author and the attorneys of record in the *Clinton* litigation. Thus, it appears that Adoradio interviewed Clinton just two years after his arrest and incarceration, and he testified before the grand jury on or about four months after his release from jail, and two-and-a-half years after his arrest.

119. Amended Complaint, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), *reprinted in* Appendix, *supra* note 30, at 4.

120. *Id.* at 4-5.

121. *Id.* at 21-31. This article focuses solely on the municipal liability claims asserted against the City of New York and does not address the claims against the New York City Police Department, because, under the laws of the state of New York, no claims can lie directly against municipal departments, which are merely subdivisions of the municipality and have no separate legal existence. *Polite v. Town of Clarkstown*, 60 F. Supp. 2d 214, 216-17 (S.D.N.Y. 1999) (dismissing suit as to the town police department); *Hoisington v. County of Sullivan*, 55 F. Supp. 2d 212, 214-15 (S.D.N.Y. 1999) (dismissing action as to the county department of social services, and citing *FED. R. Civ. P. 17(b)*, which directs that federal courts must look to state law to determine whether a government department may be sued).

him of his rights and liberties, as guaranteed by the United States and New York Constitutions and federal and state laws.¹²²

3. Procedural History

Clinton filed his action in the United States District Court for the Southern District of New York, to redress the deprivation under color of law, statute, ordinance, regulation, custom, and usage of a right, privilege, and immunity secured to plaintiffs by the First and Fourteenth Amendments of the Constitution of the United States.¹²³ The City moved to dismiss the municipal liability claim, pursuant to *Federal Rule of Civil Procedure* 12(b)(6), on the grounds that Clinton's claim was statutorily time barred.¹²⁴

The district court treated the motion as a motion for summary judgment,¹²⁵ which it granted in an unreported memorandum opinion and order, dated March 1, 1999, dismissing Clinton's municipal liability claim as time barred.¹²⁶ Clinton appealed,¹²⁷ and the Second Circuit affirmed the district court's judgment in an unpublished summary order, filed October 29, 1999, for substantially the

122. *Id.*

123. *Id.* at 5.

124. The City and the Police Department jointly filed the motion to dismiss and, in addition to raising the statutory time bar, argued that the entire complaint should be dismissed because the state law claims were barred for failure to file a timely notice of claim, the malicious abuse of process claim was insufficient on its face, and, with respect to the Department, that the Department was not a proper party suable in this action. Municipal Defendants' Memorandum of Law in Support of Their Motion to Dismiss, reprinted in Appendix, *supra* note 30, at 50.

With respect to these arguments, the district court held that the state law claims were barred for failure to file a notice of claim and that the claims against the individual former police defendants were statutorily time barred. *Clinton*, 1999 WL 105026, at *2-3.

125. The district court concluded that both parties had submitted supporting documents to their papers on the motion to dismiss, and therefore accepted and reviewed the documents, and converted the motion to a summary judgment motion under F.R.C.P. 56. *Clinton*, 1999 WL 105026, at *2.

126. *Id.* at *3. The district court entered judgment granting defendants summary judgment and dismissing plaintiff's claims with prejudice, on March 3, 1999.

127. Plaintiff appealed, pursuant to 28 U.S.C. § 1291, as an appeal as of right from a final decision of the United States District Court for the Southern District of New York. Plaintiff raised the following issues: (1) whether the district court improperly granted summary judgment and dismissed the 42 U.S.C. § 1983 action against The City of New York as time barred; and (2) whether the district court improperly determined the date plaintiff's action accrued, based on statements set forth in an affirmation by an assistant district attorney in plaintiff's criminal case, and based on media coverage of various actions of New York Police Department and District Attorney's Office officials. Brief for Plaintiff-Appellant, at 2, *Clinton v. City of New York*, No. 99-7336 (2d Cir. Oct. 29, 1999) (on file with author).

same reasons set forth in the lower court's decision.¹²⁸ Pursuant to the court's local rule and its pronouncement in the order, the Second Circuit's decision has no precedential authority or other effect beyond cases related to *Clinton*.¹²⁹

C. *Monzon v. City of New York: Factual and Procedural Background*

1. *Plaintiff Robert Monzon's Wrongful Arrest and Prosecution and Participation in the Corruption Investigation*

On June 19, 1992, former 30th Precinct police officers James Velez and Joseph Walsh arrested Robert Monzon.¹³⁰ Monzon subsequently was indicted and incarcerated for drug possession based on their testimony.¹³¹ Velez and Walsh falsely testified to the grand jury, and at Monzon's trial, that they went to an apartment

128. *Clinton v. City of New York*, No. 99-7336 (2d Cir. Oct. 29, 1999) (unpublished summary order).

129. The Second Circuit's Local Rule § 0.23 states, in relevant part, that since statements appended to summary orders "do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court." In accordance with this Rule, the Court's *Clinton* order states that it:

will not be published in the Federal Reporter and may not be cited as precedential authority to this or any other court, but may be called to the attention of this or any other court in a subsequent stage of this case, in a related case, or in any case for purposes of collateral estoppel or res judicata.

Clinton v. City of New York, No. 99-7336, slip op. at 1 (2d Cir. Oct. 29, 1999). The Rule has a longstanding history in the Second Circuit, following its adoption in 1973. It survived a collateral attack in *Furman v. United States*, 720 F.2d 263, 265 (2d Cir. 1983), and recently the Court applied this rule approvingly, reasserting the no-precedential value prohibition, in *Franceskin v. Credit Suisse*, 214 F.3d 253, 256 n.1 (2d Cir. 2000).

For the first time, however, another circuit court recently struck down a strikingly similar local rule, declaring it unconstitutional. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000). The Eighth Circuit's local rule provided that:

Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.

8TH CIR. R. 28A(i).

The Eighth Circuit found the rule "unconstitutional under Article III of the United States Constitution, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'" *Anastasoff*, 223 F.3d at 899.

130. Complaint paras. 8-9, 11, 14-15, *Monzon v. City of New York*, No. 98 Civ. 4872 (LMM), 1999 WL 1120527 (S.D.N.Y. Dec. 7, 1999) (on file with author) [hereinafter *Monzon Complaint*].

131. *Id.* paras. 16-18.

in Manhattan in response to a call about a fight in the apartment.¹³² They claimed that they found Monzon, and recovered a bag of cocaine, which they falsely alleged was in plain view.¹³³ The jury acquitted Monzon of all charges on April 19, 1993.¹³⁴

As a consequence of the 30th Precinct's investigation, Walsh was arrested on June 6, 1994, and thereafter implicated several other officers from the precinct in charges of corruption and perjury, including defendant Velez for his involvement in the wrongful arrest and prosecution of Monzon.¹³⁵ Walsh admitted that he and Velez had falsely arrested and lied about Monzon.¹³⁶ Walsh pled guilty as part of an agreement with prosecutors, but defendant Velez went to trial in state court where he was convicted on various counts of perjury.¹³⁷

The New York District Attorney approached Monzon and his trial attorney on April 26, 1996, regarding the need for Monzon to testify at defendant Velez's criminal trial.¹³⁸ Monzon and Walsh both testified against Velez, and a jury convicted him on May 2, 1996, of numerous criminal counts. The court subsequently sentenced Velez to several concurrent terms of one to three years incarceration.¹³⁹

2. Plaintiff Monzon's 42 U.S.C. § 1983 Civil Rights Action

Robert Monzon filed a § 1983 action on July 9, 1998, against the individual officers and the City of New York.¹⁴⁰ He alleged that the defendants were responsible for his wrongful arrest, incarceration, and his prosecution secured as a result of the illegal conduct and perjured testimony of the former police officers, now individual defendants.¹⁴¹ He further alleged that the City of New York was liable for official customs, policies, and practices, and for failure to select, train, supervise, and discipline officers and supervi-

132. *Id.* paras. 13, 18.

133. *Id.* paras. 11-20.

134. *Id.* para. 20.

135. *Id.* paras. 21-26.

136. *Id.* paras. 25-26.

137. *Id.* paras. 22-24, 28-29; Monzon's Memorandum, *supra* note 31, at 6.

138. Monzon Complaint, *supra* note 130 para. 28. This conversation occurred three years and ten months after Monzon's arrest, and just one week short of three years after his acquittal on all charges. Monzon filed his complaint less than three years after the district attorney approached him.

139. *Id.* para. 29.

140. Monzon Complaint, *supra* note 130. The complaint also listed as a defendant the New York City Police Department.

141. *Id.* para. 1.

sors, which deprived him of his rights and liberties as guaranteed by the United States and New York Constitutions and federal and state laws.¹⁴²

3. *Procedural History*

Defendant City of New York moved to dismiss the complaint pursuant to *Federal Rule of Civil Procedure* 12(b)(6) for failure to state a claim, on the grounds that Monzon's § 1983 and pendant state claims were statutorily time barred.¹⁴³ On December 6, 1999, the district court denied the City's request to dismiss Monzon's *Monell* claim.¹⁴⁴

D. **Municipal Defendant's Motions to Dismiss**

As discussed above, the City of New York filed motions to dismiss in both the *Clinton* and *Monzon* lawsuits.¹⁴⁵ Both motions asserted various grounds for dismissals of the complaints.¹⁴⁶ With respect to the municipal liability claims, the City claimed that they were time barred, and raised two primary bases in each case: first, that the plaintiffs knew, or should have known, of their *Monell*-based claims, at the latest, in Clinton's case, upon the vacatur of his conviction,¹⁴⁷ and in Monzon's case, upon his acquittal;¹⁴⁸ and second, that the 30th Precinct corruption scandal was sufficiently publicized so as to give plaintiffs notice of their alleged municipal liability claims more than three years prior to the filing of their respective complaints.¹⁴⁹

142. *Id.* paras. 41-44.

143. New York City Memorandum of Law in Support of Its Motion to Dismiss at 2, *Monzon v. City of New York*, 98 Civ. 4872 (LMM), 1999 WL 1120527 (S.D.N.Y. Dec. 7, 1999) (on file with author) [hereinafter *City's Monzon Memorandum*].

144. *Monzon*, 1999 WL 1120527.

145. *Clinton*, 1999 WL 105026, at *1; *Monzon*, 1999 WL 1120527, at *1.

146. *Clinton*, 1999 WL 105026, at *1; *Monzon*, 1999 WL 1120527, at *1.

147. Municipal Defendants' Memorandum of Law in Support of Their Motion to Dismiss, *reprinted in* Appendix, *supra* note 30, at 52-55; Municipal Defendants' Reply Memorandum of Law in Support of Their Motion to Dismiss, *reprinted in* Appendix, *supra*, note 30, at 190-95. The City filed its motion and supporting papers on behalf of the City of New York and the New York City Police Department. Municipal Defendants' Memorandum of Law in Support of Their Motion to Dismiss, *reprinted in* Appendix, *supra*, note 30, at 50.

148. City's Monzon Memorandum, *supra* note 143 at 7-8.

149. Municipal Defendants' Memorandum of Law in Support of Their Motion to Dismiss, *reprinted in* Appendix, *supra* note 30, at 54, 192-95; *City's Monzon Memorandum*, *supra* note 143 at 8-9.

1. *Clinton Motion to Dismiss/Summary Judgment Motion*

In the *Clinton* case, the City argued specifically that, under the law, Clinton was on notice of his claim when the New York court vacated his conviction. The City argued that in accordance with the Supreme Court's decision in *Heck v. Humphrey*,¹⁵⁰ a § 1983 claim accrues when "the prosecution terminates in [the plaintiff's] favor."¹⁵¹

Clinton responded that because *Heck* determined accrual for § 1983 claims based on an unconstitutional conviction or sentence, it did not apply to his *Monell* claim.¹⁵² The *Monell* claim is based on actions of the municipal defendants, as well as those of the individual officers, *a fortiori*, he could not be aware of an official policy, custom and/or practice, at the time that his conviction was vacated.

Unlike the claims in the cases subject to the decision in *Heck*, the claims against the moving defendants are not based solely on the specific actions directly leading to the unlawful conviction, rather plaintiff has alleged various actions by the moving defendants, apart from the actions of the former police officers involved in his arrest, that support a municipal liability claim. Thus, the accrual of this claim cannot be measured by the date of his release from prison or of the vacatur of his conviction. It must be measured, as [the Second] Circuit has stated, time and time again, when the claimant "knew or had reason to know of his injury," and in the case of a *Monell* claim, this cannot be "inferred from a single incident of illegality, such as a first false arrest or excessive use of force, absent some additional circumstances."¹⁵³

Clinton argued alternatively that, should the court conclude that the three-year limitation period had expired prior to his filing of the complaint, the court should toll the statute of limitations under equitable tolling principles.¹⁵⁴ He maintained that he was entitled to the benefit of equitable tolling because the individual defendant ex-police officers' "unlawful and fraudulent conduct concealed the basis of [his] cause of action, and the municipal defendant's custom

150. *Heck v. Humphrey*, 512 U.S. 477 (1994).

151. Municipal Defendants' Memorandum of Law in Support of Their Motion to Dismiss, *reprinted in* Appendix, *supra* note 30, at 52.

152. Memorandum of Law in Opposition to Defendant's Motion to Dismiss, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), *reprinted in* Appendix, *supra* note 30, at 87-88.

153. *Id.* at 88 (internal citations omitted).

154. *Id.*

and practice and ensuing investigation further obscured information necessary to form the requisite knowledge of the claim."¹⁵⁵

In response, the City argued that Clinton had particular knowledge at the time of the vacatur which put him on notice.¹⁵⁶ Specifically, the City cited to an affirmation of Assistant District Attorney Emory Adoradio, dated two years after Clinton's arrest and filed in support of the vacatur.¹⁵⁷ The affirmation asserted that during the course of Adoradio's investigation into allegations of corruption in the 30th Precinct, he obtained information that Clinton's arrest and evidence in his case were fabricated.¹⁵⁸ The affirmation asserted that Clinton corroborated this information during the Adoradio's interview of Clinton, in the presence of Clinton's defense attorney.¹⁵⁹

The City also argued that Clinton's testimony about his arrest, presented shortly after the vacatur in a grand jury proceeding against defendant Checke, and a March 1995 news article naming Clinton, were further evidence of information which put him on notice of the precinct corruption.¹⁶⁰

The City further cited the "well-publicized nature of the 30th Precinct scandal,"¹⁶¹ as an additional basis in support of its argument that Clinton should have been on notice of his *Monell* claim more than three years prior to the filing of his complaint.

On the equitable estoppel issue, the City argued that it had not concealed "a single relevant fact" from Clinton,¹⁶² and that regardless, he was not entitled to have the statute of limitations tolled, because any fraud by the 30th Precinct officers could not preclude discovery of Clinton's harm.¹⁶³

155. Appendix, *supra* note 30, at 94-96.

156. Municipal Defendants' Reply Memorandum of Law in Support of Their Motion to Dismiss, *reprinted in* Appendix, *supra*, note 30, at 192-93.

157. *Id.* at 192 (citing Affirmation in Support of Dismissal of Indictment (Dec. 10, 1994), *reprinted in* Appendix, *supra*, note 30, at 173-74).

158. Affirmation in Support of Dismissal of Indictment (Dec. 10, 1994), *reprinted in* Appendix, *supra*, note 30, at 173, para. 3.

159. *Id.* at 173, para. 4.

160. Municipal Defendants' Reply Memorandum of Law in Support of Their Motion to Dismiss, *reprinted in* Appendix, *supra*, note 30, at 193.

161. *Id.*

162. Municipal Defendants' Reply Memorandum of Law in Support of Their Motion to Dismiss, *reprinted in* Appendix, *supra*, note 30, at 195.

163. *Id.* at 196 (relying on precedent in *Barrett v. United States*, 689 F.2d 324, 327 (2d Cir. 1982)).

a. *The District Court's Decision*

The district court concluded that the municipal liability claim was untimely because it was filed more than three years after the dismissal of Clinton's indictment.¹⁶⁴ The court agreed with the City that the Assistant District Attorney's affirmation put Clinton on notice of his claim.¹⁶⁵ In support of its conclusion, the court found that the inclusion of the 30th Precinct scandal in the Mollen Commission's Report, as well as the extensive newspaper and cable network coverage of the 30th Precinct scandal, should have put him on notice of his claim.¹⁶⁶ The court was further persuaded on the notice issue by the fact that Clinton testified before the grand jury against arresting officer Checke—"a process that should have made the viability of his claim obvious."¹⁶⁷

The court refused to toll the statute of limitations, concluding that the City was innocent of any wrongful concealment. Instead, the court concluded that any efforts to conceal the nature of the wrongdoing were conducted by the individual officers, not the City.¹⁶⁸ The court noted that the City had not taken any steps to conceal the officers' actions except those necessary to the integrity of an investigation, and had taken "affirmative steps" to inform Clinton "of the circumstances surrounding his arrest" by having him testify to a grand jury.¹⁶⁹

b. *The Second Circuit Decision*

On appeal, Clinton argued that the information about the individual former police officers' actions, advanced by the City and imputed to him, could not, by itself, place him on notice of a *Monell* policy and practice claim as a matter of law.¹⁷⁰ Clinton stressed the lack of factual information in the record presented by the City to support dismissal of the claim.¹⁷¹ In particular, Clinton challenged

164. Clinton v. City of New York, No. Civ. 3810 (JSM), 1999 WL 105026, at *3 (S.D.N.Y. Mar. 2, 1999).

165. *Id.* at *2.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at *2.

170. Brief for Plaintiff-Appellant at 24-25, Clinton v. City of New York, No. 99-7336 (2d Cir. Oct. 29, 1999) (on file with author) [hereinafter Clinton Appellate Brief].

171. *Id.*

the legal and factual significance of the Adoradio affirmation, which had been central to the district court's decision.¹⁷²

In his brief to the court of appeals, Clinton argued that the affirmation did not provide any new information, other than the fact that in December 1994 an assistant district attorney was investigating allegations of police corruption in the 30th Precinct.¹⁷³ Clinton vigorously argued that such information could not be the basis for notice of his *Monell* claim.¹⁷⁴ First, the affirmation was dated two years after his arrest.¹⁷⁵ Second, it did not contain any reference to the dates and timeframes of the allegations nor investigation of corruption in the 30th Precinct.¹⁷⁶ Third, the affirmation did not reveal any new information to put Clinton on notice of his *Monell* claims. Clinton's brief states:

[Plaintiff] was well aware prior to the filing of this Affirmation that the police had fabricated evidence and lied; [Plaintiff] knew he was innocent, so that this information could not alert him to anything more than he already knew. This information was about the culpability of individual officers. Such information cannot be the basis for alerting him to a municipal liability claim.¹⁷⁷

Clinton also challenged the significance of the media coverage of the 30th Precinct scandal and the doctrinal foundation for adopting a *per se* rule on the sufficiency of such coverage as a matter of law.¹⁷⁸ Clinton asserted that if news coverage of the scandal were considered in determining the moment of accrual of his § 1983 municipal liability claim, various thorny factual issues would arise.¹⁷⁹ For example, there were questions about Clinton's awareness of the news, including the content of articles and news announcements, that were beyond the scope of the motion and the district court's authority.¹⁸⁰

The Second Circuit concluded that all of Clinton's claims were without merit.¹⁸¹

172. *Id.*

173. *Id.*

174. *Id.* at 25.

175. *Id.* at 23.

176. *Id.* at 26.

177. *Id.* at 24-25.

178. *Id.* at 27-29.

179. *Id.*

180. *Id.* at 27-28.

181. *Clinton v. City of New York*, No. 99-7336, slip op. at 3 (2d Cir. Oct. 29, 1999) (on file with author).

2. *Monzon Motion to Dismiss*

a. *The Parties' Arguments*

In *Monzon*, the City asserted the same arguments regarding the timeliness of the *Monell* claim that it had raised in the *Clinton* case. In fact, it relied on the district court's decision in *Clinton* to support its argument that the publicity from the 30th Precinct scandal put Monzon on notice.¹⁸²

Monzon asserted the same counter-arguments raised in *Clinton*.¹⁸³ He argued additionally that his limited English language skills left an issue of fact for the jury concerning what he should have known based on media coverage of the scandal.¹⁸⁴

b. *The District Court's Decision*

On December 6, 1999, the district court denied the City's request to dismiss the municipal liability claim.¹⁸⁵ The court concluded that it could not decide as a matter of law on a Rule 12(b)(6) motion, "that plaintiff was, or should have been, aware that he had a *Monell* claim prior to April of 1996 when he was contacted by the District Attorney's Office to testify against one of the individual defendants."¹⁸⁶ The court further concluded that an issue of fact existed as to whether newspaper reports put Monzon on notice of this claim.¹⁸⁷ The parties eventually settled the case.¹⁸⁸

PART III

The premise of the Second Circuit and Southern District of New York decisions in *Clinton* is that Clinton's testimony in an investigation of an individual police officer, statements of an assistant district attorney, and news coverage of the 30th Precinct scandal provided Clinton with sufficient information, at the time that the

182. City's Monzon Memorandum, *supra* note 143, at 7-9.

183. The Plaintiff urged the court to reject Judge Martin's decision and reasoning in *Clinton*. Monzon's Memorandum, *supra* note 31, at 20.

184. *Id.*

185. *Monzon*, 1999 WL 1120527. The district court granted the motion to dismiss on the remaining claims against defendants the City of New York and the New York City Police Department.

186. *Id.*

187. *Id.*

188. The parties settled for \$60,000. Letter from Jose A. Muniz to New York City Corporation Counsel (July 11, 2000) (accepting \$60,000 settlement offer on plaintiff's behalf) (on file with author); Stipulation Discontinuing Action (July 11, 2000), *Monzon v. City of New York*, No. 98 Civ. 4872 (LMM), 1999 WL 1120527 (S.D.N.Y. Dec. 7, 1999) (on file with author).

New York courts vacated his conviction, to put him on notice of his *Monell* claims.¹⁸⁹ The underlying ruling is that notice of the corruption is notice of the injury caused by the City's policy, practice, or custom. A careful review of the case and the judicial analysis adopted by the courts reveals various legal and practical shortcomings to this approach.

While Clinton did indeed testify before a grand jury just over three years before filing his complaint, that testimony in no way implicated the municipal liability claims. As far as the court record shows, Clinton testified solely about the events surrounding his arrest. Clinton merely repeated that he was wrongfully arrested by a police officer. This testimony was used to substantiate the prosecution's charge that the arresting officer, Edward Checke, had perjured himself when he testified against Clinton before a grand jury in Clinton's criminal action, and that he provided a factually inaccurate account of Clinton's arrest.¹⁹⁰

Similarly, the Assistant District Attorney's affirmation is legally insufficient to support summary dismissal of the complaint. The affirmation's contents may be distilled into three essential pieces of information. First, Assistant District Attorney Adoradio was investigating allegations of police corruption in the 30th Precinct.¹⁹¹ Second, during his investigation Adoradio learned through cooperating police officers that fabricated evidence was used in plaintiff's arrest.¹⁹² Third, that Adoradio's interview with plaintiff, in the presence of plaintiff's counsel, corroborated the cooperating police officers' information.¹⁹³ Again, these statements do not implicate the municipality.

The news accounts focused on the individual officers in the precinct. Throughout these accounts, the law enforcement investigation and arrests are mentioned.¹⁹⁴ Some of the news articles were

189. *Clinton v. City of New York*, No. 99-7336, slip op. at 2 (2d Cir. Oct. 29, 1999); *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026, at *2 (S.D.N.Y. Mar. 2, 1999).

190. Affidavit in Opposition to Defendant's Motion to Dismiss (Aug. 28, 1998), reprinted in Appendix, *supra*, note 30, at 146, para. 8; Indictment in *People v. Clinton*, reprinted in Appendix, *supra*, note 30, at 147-54.

191. Affirmation in Support of Dismissal of Indictment (Dec. 10, 1994), reprinted in Appendix, *supra*, note 30, at 173.

192. *Id.*

193. *Id.* at 173-74.

194. See *supra* notes 86-87, for newspaper coverage of the 30th Precinct scandal and investigation.

published prior to the invalidation of Clinton's conviction and subsequent release from prison.¹⁹⁵

While the district court in *Monzon* reached a different conclusion on the notice question, the court's analysis mirrors the analyses in the *Clinton* decisions. The district court in *Monzon* determined that it could not conclude that the plaintiff received notice of his *Monell* claim prior to when the District Attorney's Office contacted him to testify against one of the police officers named as a defendant in *Monzon's* case.¹⁹⁶ The court concluded, *a fortiori*, that once the plaintiff was contacted to testify, he was on notice of his *Monell* claim. The court appears to have applied the same analyses as the district and Second Circuit courts in *Clinton*.¹⁹⁷

Neither the law nor the facts, however, support the analytic approach adopted in these cases. The plaintiffs' testimony before grand juries and at trial, the district attorney's statements, and the news media accounts do not provide specific information about anything other than the respective individual police officers' bad acts. As a consequence, they do not prompt inquiry or raise the specter of concern that would put either plaintiff on notice to consider a possible action against the City of New York, the entity that must have acted directly against the plaintiff. This is particularly relevant in police misconduct cases where target communities, specifically communities of color, are exposed daily to police abuse and intrusion. As a result, these "accounts" are of dubious value as the bases for judging the accrual period for the municipal liability claim. Moreover, in the context of a motion to dismiss or a summary judgment motion, where factual issues are beyond the purview of the trial judge, whether news coverage should have put the plaintiff on notice is solely for the jury to decide.

195. In fact, the City in *Clinton* submitted two such articles. Appendix, *supra* note 30, at 176-81.

196. The court concluded that:

While plaintiff may have had notice that the felony complaint and the grand jury and trial testimony against him were false more than three years prior to the filing of the present complaint, the Court cannot find as a matter of law on a Rule 12(b)(6) motion that plaintiff was, or should have been, aware that he had a *Monell* claim prior to April of 1996 when he was contacted by the District Attorney's Office to testify against one of the individual defendants.

Monzon, 1999 WL 1120527.

197. Compare *Monzon v. City of New York*, No. 98 Civ. 4872 (LMM), 1999 WL 1120527 (S.D.N.Y. Dec. 7, 1999), with *Clinton v. City of New York*, No. 99-7336 (2d Cir. Oct. 29, 1999), and *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999).

The courts' analyses and reasoning in both cases is evaluated *in-fra* from three different legal vistas within the courts' tri-issue framework, dividing the analyses into the plaintiffs' testimony, state officials' statements, and media coverage of the precinct scandal. I address the doctrinal limits of the courts' decisions and methodology. Specifically, I analyze the manner in which the analysis fails to comport with the theoretical engine driving the Supreme Court's decision in *Monell*. I also discuss the decisions' lack of adherence to circuit precedent on the legal standard applicable to accrual questions in municipal liability cases. I dissect the factual basis for the decisions, concluding that the facts in the record fail to support the *Clinton* courts' conclusions that he was on notice more than three years prior to filing his complaint. Lastly, I raise the issue of the courts' silence on the racialized context in which these cases arise.

A. Plaintiff's Testimony and Law Enforcement Officials' Statements

The *Clinton* and *Monzon* courts' consideration of the plaintiffs' testimony against individual police officer defendants, and the courts' reliance in *Clinton* on the Assistant District Attorney's affirmation, does not adhere to the Supreme Court's doctrinal and theoretical interpretation of municipal liability pursuant to § 1983.

1. Doctrinal Deficiencies and Weaknesses

To be on notice of a municipal liability claim, the plaintiff must be on notice of the injury and that the municipality's policy, practice, or custom is the source of that injury in the legal sense.¹⁹⁸ Thus, to be on notice of a municipal liability claim is to be on notice of the municipal actor's direct role in the plaintiff's injury, vis-à-vis a municipal policy, practice, or custom. After all, "*Monell* [was] a case about responsibility."¹⁹⁹ This approach to the notice question is wholly consistent with the Supreme Court's interpretation of local government liability under § 1983. Simple causation based on the municipality's position as employer is insufficient because respondeat superior is not an available liability theory against a municipality.²⁰⁰ For liability to accrue, the municipality

198. *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1157 (2d Cir. 1995).

199. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986).

200. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

must cause the injury through enforcement or implementation of its policies, practices, and/or customs.²⁰¹

Yet the court's decision in *Clinton* circumvents *Monell* by concluding that a plaintiff would be on notice of a legal claim when the plaintiff learns that the state is prosecuting individual officers and investigating police corruption. This analysis assumes that the plaintiff will become aware of a municipal liability claim, which must be based on institutional wrongdoing via enforcement of some policy, simply by learning that officers are being prosecuted for their actions and that the state is investigating claims of police corruption.²⁰²

This analysis fails to consider the requirement of institutional malfeasance, which is direct municipal action that holds a municipality accountable for those policies that are "the moving force of the constitutional violation,"²⁰³ not for the mere bad acts of its employees or representatives. Nevertheless, these decisions have turned what had been a clearly understood doctrine of direct liability on its head. It appears that in the Second Circuit, a municipality is not liable for the actions of its tortfeasor employee under a theory of respondeat superior in accordance with *Monell*, and a municipality may also rely on the principle of respondeat superior²⁰⁴ as a procedural time bar against a § 1983 municipal liability claim. Thus, a municipality has the best of both worlds. First, the doctrine is a substantive shield, because the municipality is protected from liability for police officers' acts absent some policy; second, the doctrine serves as a procedural sword, because the theory is available to the defendant in asserting the proper time for accrual of the claim and notice to the plaintiff.

Clearly, the Supreme Court did not intend, nor expect, that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents."²⁰⁵ Nor did it intend that a plaintiff would be responsible for determining that a municipal policy caused or allowed the employee or agent to inflict injury on

201. *Id.* at 690.

202. This appears counterintuitive since it would be more difficult to establish liability where the municipality is indeed responding to individual officers' illegal actions by investigating and prosecuting these "bad actors."

203. *Monell*, 436 U.S. at 694.

204. "The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 1313 (7th ed. 1999); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 69-70 (5th ed. 1984 & Supp. 1988).

205. *Monell*, 436 U.S. at 694.

the plaintiff, without direct information about a municipal policy and its connection to the employee's acts.

A plaintiff's testimony about an individual police officer's bad acts that caused the plaintiff's injuries is merely an articulation of information the plaintiff had at the time the injury occurred. For example, testimony that the officer lied about the plaintiff does not demonstrate knowledge of an institutional policy, practice, or custom. Therefore, it cannot be sufficient notice to toll the statute. Although both Clinton and Monzon knew that they were innocent and that the officers involved in their arrests had lied, this does not establish that an individual was on notice of a possible claim. In *Pinaud v. County of Suffolk*, the Second Circuit recognized that such information does not necessarily place a plaintiff on notice that a municipal policy was the cause of the injuries.²⁰⁶

Indeed, an opposite approach ignores the reality of police misconduct victims who are disproportionately black and Latino. For these individuals, police misconduct, especially law enforcement intrusion into their daily lives, is so commonplace as to be expected. As such, the actions of the police in *Clinton* and *Monzon*, and within the 30th Precinct where police targeted African Americans and Latinos, for example, are viewed as typical of the institutional racism which pervades society. While society at large may view such actions as aberrations, and appear surprised or shocked by police misconduct, people of color view this as "business as usual" by the police.

The Assistant District Attorney's affirmation in *Clinton* was also legally insufficient to put a plaintiff on notice. Nothing in the affirmation suggests, or otherwise would lead Clinton to inquire about, the existence of a City policy—in the form of an official statement, a policymaker's acts, or some custom—which caused Clinton's injuries.²⁰⁷ The affirmation only states that the Assistant District At-

206. 52 F.3d 1139, 1157 (2d Cir. 1995).

207. This is particularly inappropriate with respect to New York City's Police Department, which has been the target of numerous claims of corruption and police abuse and historically has denied institutional malfeasance and wrongdoing. *E.g.*, MOLLEN REPORT, *supra* note 4, at 1-9, 51-69, 90-101, 107-09 (detailing history of corruption in New York City, police culture which minimizes and conceals corruption, and Police Department's failure to hold police accountable, but also recognizing that the vast majority of officers are honest); City of New York Office of the Mayor, Executive Order No. 42 (July 24, 1992), 1992 N.Y. LEGIS. SERV. 330 (establishing Mollen Commission, in part, so that "the misdeeds of a few must not be allowed to sully or taint the reputations and sacrifices of the vast majority of honest and dedicated men and women who serve on the police force"); Clifford Krauss, *2-Year Corruption Inquiry Finds a 'Willful Blindness' in New York's Police Dept.: Mollen Report Blames*

torney was “presently investigating allegations of police corruption in the 30th Precinct in Manhattan.”²⁰⁸ Indeed, a careful reading of the affirmation suggests that the affirmation could, by its own words, lead the plaintiff to believe that the Assistant District Attorney’s then-current investigation did not encompass events of the past two years. In fact, it suggests that the Assistant District Attorney’s discovery of information about Clinton’s case was an unforeseen and unrelated result of the Assistant District Attorney’s investigation. The affirmation states:

During the course of this investigation, I learned through cooperating police officers formerly assigned to the 30th Precinct who were participants in the arrest of Reynaldo Clinton that the circumstances leading to the arrest of defendant and recovery of narcotics from his car had been fabricated by the police.²⁰⁹

The City’s own historical rejection and dismissal of reports concluding that the Police Department and the City have encouraged and facilitated the very conduct that flourished in the 30th Precinct further support this interpretation,²¹⁰ which is just as likely to be accurate as the claim that this put the plaintiff on notice. On a motion to dismiss, where there is some equipoise in the possible readings of the parties’ arguments, the court should conclude that the movant has failed to satisfy the burden of showing that the plaintiff cannot prove any set of facts in support of the plaintiff’s claim.

Gap in Responsibility for Rogue Officers, N.Y. TIMES, July 7, 1994, at A1; KNAPP REPORT, *supra* note 4, at 1 (finding widespread police corruption). See generally NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS 1894-1994 (Gabriel J. Chin ed., W.S. Hein 1997) (1895).

208. Affirmation in Support of Dismissal of Indictment (Dec. 10, 1994), *reprinted in* Appendix, *supra*, note 30, at 173.

209. *Id.*

210. *E.g.*, David Kocieniewski, *Bratton Challenges Testimony*, N.Y. TIMES, Jan. 12, 1996, at B4 (reporting that Police Commissioner Bratton “rebutted a rogue police officer’s court testimony that the 30th Precinct’s rampant corruption was encouraged and initiated by the precinct’s two top commanders”); *cf.* MOLLEN REPORT, *supra* note 4, at 13 (characterizing New York City Police Department approach to investigations of allegations of corruption as a narrow focus on the single corrupt cop as the “rotten apple,” rather than on patterns of wrongdoing); *id.* at 70-71 (“[T]he New York City Police Department had largely abandoned its responsibility to police itself and had failed to create a culture dedicated to rooting out corruption . . . [due to] a deep-seated institutional reluctance to uncover serious corruption”); COMMISSION TO COMBAT POLICE CORRUPTION, *supra* note 4 (finding, based on a study of disciplinary cases in 1994-96, penalties were in many cases grossly inadequate).

2. *The Legal Standard*

The courts' decisions are also counter to Supreme Court and Second Circuit precedent in police misconduct cases regarding the quantum of information necessary to provide notice of municipal liability. The initial inquiry into notice of an injury caused by a municipal policy is inextricably linked to the inquiry into the level of evidence necessary to establish the necessary proof of such policy. Although the plaintiff's complaint must contain only a properly pleaded claim,²¹¹ the Second Circuit's and the Southern District's courts' decisions appear to impose an additional pre-filing burden similar to truncated discovery.

Consider the typical case of an individual who is physically injured, or whose constitutional rights are otherwise violated, by a single action of a police officer or some other municipal officer. Such a plaintiff would face a tremendous challenge and significant burden of proof in establishing that a single incident can lead to an inference of a municipal policy.²¹²

Supreme Court precedent in this area is convoluted. In *Oklahoma City v. Tuttle*,²¹³ a plurality of the Court stated that "where the policy . . . is not . . . unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality . . . and the causal connection between the 'policy' and the constitutional deprivation."²¹⁴ Yet, in *Pembaur v. City of Cincinnati*,²¹⁵ a plurality of the Court held that a municipality could be liable where an official policy-maker's single decision results in a consti-

211. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

212. For a discussion of municipal liability based on a single bad act of the police, see Adam S. Lurie, *Ganging Up on Police Brutality: Municipal Liability for the Unconstitutional Actions of Multiple Police Officers Under 42 U.S.C. § 1983*, 21 CARDOZO L. REV. 2087 (2000).

213. 471 U.S. 808 (1985).

214. *Id.* at 824 (internal footnotes omitted) (emphasis added). Three other Justices agreed that a single incident of excessive use of force by a police officer would be insufficient to establish a municipal policy. *Id.* at 833 (Brennan, J., concurring in part and concurring in the judgment, joined by Marshall & Blackmun, JJ.). Although a majority of the Court in *Tuttle* could not agree as to the viability of a § 1983 claim based on inadequate training, the Court subsequently unanimously recognized such a claim, *albeit* subject to a higher threshold of proof. In *City of Canton v. Harris*, 489 U.S. 375, 388 (1989), the Court held that municipal liability may be imposed "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."

215. 475 U.S. 469 (1986).

tutional violation.²¹⁶ This is far from recognizing that the actions of a police officer without such policy-making authority could be construed as a municipal policy, however. Only in *City of Canton v. Harris*,²¹⁷ a failure to train case, has the Court suggested that a single incident could permit an inference of a municipal policy. In *City of Canton*, the Court imposed a high threshold of misconduct for municipal liability, requiring that the municipality act with “deliberate indifference” of the rights of the individual.²¹⁸

Based on the Supreme Court’s interpretation of what may constitute a municipal policy for § 1983 purposes, the individual described in the above hypothetical could not proceed on a municipal liability claim against the government. A claim based on a single action invites summary dismissal for legal insufficiency on the face of the complaint, or as factually unsubstantiated. Although a single incident may be sufficient for a failure to train claim, the plaintiff in such a case must establish deliberate indifference, a particularly onerous burden of proof. Where such a claim is against a municipality for the actions of its police, the claim almost takes on an “enhanced deliberate indifference burden” because of the police “code of silence.”²¹⁹ This code makes it extremely difficult for a plaintiff to procure information regarding individual police officials’ actions and how they relate to police policy, customs, and/or practices because officers do not speak out about corruption. However, as one court in the Eastern District of New York has stated, the existence of such code may be the basis for a failure to train or supervise claim since adequate supervision may avoid deprivation of protected rights.²²⁰

Initially, it may appear that the *Clinton* and *Monzon* cases fall within the category of claims which may proceed based on a single incidence because both complaints charged the City with liability for failure to adequately select, hire, train, supervise, and disci-

216. *Id.* at 480.

217. 489 U.S. 378.

218. *Id.* at 388.

219. *Ariza v. City of New York*, No. CV-93-5287, 1996 WL 118535, at *2-3 (E.D.N.Y. Mar. 7, 1996) (citing a report by the Mollen Commission describing a “Code of Silence,” or “Blue Wall of Silence,” that shields corrupt officers by discouraging honest police officers from reporting corruption).

220. *Id.* at *5-6 (finding that, in a police officer’s complaint against the New York City Police Department for a § 1983 violation of his freedom of speech, a code of silence was evidence of deliberate indifference to his constitutional right by failure to adequately train or supervise employees).

pline.²²¹ However, *Clinton* and *Monzon* involved clearly illegal acts by police officers that are not easily or directly connected to the types of municipal actions which are the basis for liability under *Monell*. The police officers' fabrication of evidence and perjury are not executions of an official policy, ordinance, or regulation. Nor are they actions representative of a municipal custom or practice within the "failure to train" category because they are single actions not obviously attributable to a municipality's training protocol. This is not to say that plaintiff could not prove that the actions are attributable to municipal policy, or custom, but for purposes of notice of a municipal liability claim, the individual officers' actions do not resoundingly fall within a category of conduct which should place a plaintiff on notice of a legally cognizable municipal liability claim.²²²

The Second Circuit recently articulated the nuanced difference in this type of case in *Walker v. City of New York*,²²³ which involved a claim against the City of New York for failure to train and supervise officers not to commit perjury or prosecute the innocent.²²⁴ The court concluded that where proper conduct is so obvious, the plaintiff could not support an inference of deliberate indifference unless there is a history of conduct so that the obvious proper response is no longer likely.²²⁵

To be on notice of an injury caused by a municipal policy, the Second Circuit has held that mere knowledge of an illegal arrest is

221. See Amended Complaint, *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026 (S.D.N.Y. Mar. 2, 1999), reprinted in Appendix, *supra* note 30, at 21-30; *Monzon* Complaint, *supra* note 130, paras. 41-44.

222. Cf. *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992) (finding that a § 1983 claim against a police department involving perjury by the police survived summary judgment because, while an officer usually does not have to be trained not to commit perjury, plaintiff might show a pattern of perjury in the face of which the failure to train or supervise would become deliberate indifference).

223. *Id.*

224. *Id.* at 298.

225. The court states:

Where the proper response—to follow one's oath, not to commit the crime of perjury, and to avoid prosecuting the innocent—is obvious to all without training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise . . .

. . . While it is reasonable for city policymakers to assume their employees possess common sense, where there is a history of conduct rendering this assumption untenable, city policymakers may display deliberate indifference by doing so.

Id. at 299-300.

insufficient.²²⁶ A claim based on a municipality's policy or custom, "does not necessarily accrue upon the occurrence of a harmful act, but only later when it is clear, or should be clear, that the harmful act is the consequence of a [City's] 'policy or custom.'"²²⁷ The circuit court has noted that its application of this "delayed accrual theory" is appropriate because "[w]here no single act is sufficiently decisive to enable a person to realize that he has suffered a compensable injury, the cause of action may not accrue until the wrong becomes apparent."²²⁸

Thus, claims against a municipality based on a "policy or custom" accrue when the plaintiff "knew or should have known enough to claim the existence of a 'policy or custom' so that [the plaintiff can] sue the [municipality]."²²⁹

In the *Clinton* and *Monzon* cases, however, the courts' decisions did not sufficiently consider how information about an individual officer's illegal actions could provide information that would put the plaintiff on notice of a municipal policy that caused the injury. Rather, the courts accepted that knowledge of one equates with notice of the other. Yet plaintiffs need more information. In *Clinton* and *Monzon*, for example, the plaintiffs needed information that would connect—in the legal sense—the officers' misconduct with the City's policy on how to deal with this misconduct. Since the City's officials had historically publicly claimed to aggressively discipline corrupt officers, nothing to notify the plaintiffs of the City's role in facilitating the corruption.²³⁰ The plaintiffs needed credible refutations of the City's own denials. In *Clinton* and *Monzon*, however, the courts imposed a significant burden on the plaintiffs because they required that the plaintiffs have more knowledge and insight about the City's actual role in the corruption than is reasonably possible in a municipal liability case, and certainly more than the Supreme Court has required in the past.

226. *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1157 (2d Cir. 1995)

227. *Id.*; see also *Veal v. Geraci*, 23 F.3d 722, 724 (2d Cir. 1994) (holding that a § 1983 "claim accrues when the alleged conduct has caused the claimant harm and the claimant knows or has reason to know of the allegedly impermissible conduct and the resulting harm").

228. *Singleton v. City of New York*, 632 F.2d 185, 192-93 (2d Cir. 1980) (*quoted in Pinaud*, 52 F.3d at 1157).

229. *Pinaud*, 52 F.3d at 1157 n.17. In *Pinaud*, the Second Circuit distinguished between a § 1983 action against an individual and one against a municipality, concluding that accrual in the former does not foreclose delayed accrual in the latter. *Id.* (distinguishing *Eaglestone v. Guido*, 41 F.3d 865 (2d Cir. 1994), which involved claims against individual defendants, and the case before it which involved a county).

230. *Supra* note 210, and citations therein.

In *Clinton* and *Monzon* the courts concluded that information that the plaintiffs testified against individual police officers, and in *Clinton*, the Assistant District Attorney's investigation of a corruption allegation two years after Clinton's unlawful arrest and incarceration, were sufficient to put plaintiffs on notice of municipal liability claims. However, there is no obvious and direct causal connection between individual corrupt officers and a municipal policy. As already noted, the police department regularly denies any pattern of police misconduct, instead characterizing any and all bad police actions as aberrations and individual acts that are neither encouraged nor condoned by the department.²³¹

3. *Statements' Factual Insufficiency*

Assuming individual police officers' bad acts could be the basis for notice of a municipal liability claim, this would still require proof of a *pattern* of conduct. The pattern is the link to the municipality because, absent institutional support or inaction, such repeated action could not continue or flourish. However, the case records in *Clinton* and *Monzon* lack the factual development of such a pattern.

In both cases, the plaintiffs' testimony to juries merely involved describing what the officers did to them. It did not involve the description of a pattern, custom, or policy. Indeed, their testimony could not encompass such allegations because neither was aware of any such policy at the time of his respective testimony. The plaintiffs simply responded to the district attorney's questions regarding their unlawful arrests.²³²

The statements contained in the affirmation in *Clinton* also fail to provide additional suggestive information about a policy of police misconduct. Neither individually nor collectively can the statements therein be considered to place Clinton on notice of a municipal claim because this information was about the culpability of individual officers. These statements do not place him on notice of the City's training, supervisory, and disciplinary policies and customs, and what role they played in the advent of his injuries. Certainly the fact that Assistant District Attorney ("ADA") Adoradio received information that officers lied in Clinton's case, and that Clinton corroborated this information is not "new" information to

231. *Supra* note 210, and citations therein.

232. Affidavit in Opposition to Defendant's Motion to Dismiss (Aug. 28, 1998), reprinted in Appendix, *supra* note 30, at 146; Monzon's Memorandum, *supra* note 31, at 6.

Clinton, for purposes of alerting him to his claims against the City. He was well aware prior to the filing of the affirmation that the police fabricated evidence and lied; he knew he was innocent, so that this information could not alert him to anything more than he already knew.

The only information set forth in the affirmation that could arguably be construed as information which Clinton did not have prior to the vacatur of his sentence is ADA Adoradio's assertion that the ADA was involved in an investigation of allegations of corruption in the 30th Precinct. At the time of Clinton's illegal arrest, prosecution, and sentencing, Clinton knew that the individual ex-police officers involved in his criminal case had lied. Clinton, however, did not have knowledge of the corruption in which these officers were involved, or the City's involvement in facilitating and permitting such illegal actions within the 30th Precinct. In certain situations such a statement might suffice to place a plaintiff on notice of a pattern, thus alerting the plaintiff of a municipal liability claim. However, this statement provides nothing more than information about ADA Adoradio's connection to the 30th Precinct and Clinton's criminal case.

Equally important is the information left out of the ADA's affirmation. The affirmation does not state that ADA Adoradio informed Clinton or his counsel of any substantive information concerning the corruption scandal and/or the ensuing investigation in the 30th Precinct.²³³ It does not say anything about the timing or scope of the investigation, the bases of the corruption allegations, or the period covered by the investigation. These are not inconsequential matters because it could have been possible that the ADA was investigating actions that occurred after Clinton's unlawful arrest and incarceration. Alternatively, and just as likely, it could have been an investigation concerning corruption totally irrelevant to the unlawful actions that were the basis for Clinton's *Monell* claim.²³⁴

233. This is the procedural difficulty with the lower and circuit courts' approach. Since this was a motion to dismiss converted to a summary judgment motion without the benefit of any pretrial discovery, neither plaintiff nor the City deposed ADA Adoradio, or otherwise inquired, about the information which the courts imputed to the plaintiff based on the Affirmation's statements.

234. We can only speculate as to the reasons for this vague statement, but one possible reason is that the success of the investigation depended on maintaining secrecy in order to protect the integrity of the investigation, as well as those involved in ferreting out the corruption; *see also* MOLLEN REPORT (finding New York City Police Department infested with corruption and an institutional reluctance to address cor-

Neither the grand jury testimony nor the affiant's statements can be the basis for alerting plaintiffs to a municipal liability claim since the Second Circuit has recognized that an unlawful arrest and prosecution do not, as a per se matter, put the plaintiff on notice of a possible municipal liability claim.²³⁵

B. Media Coverage

In addition to the plaintiffs' testimony, and the knowledge imputed to Clinton based on Assistant District Attorney Adoradio's affirmation, discussed *supra* Part III.A, the courts also considered the effect of news media coverage of the 30th Precinct corruption scandal. Unlike the court in *Monzon*, which left these questions for the jury, the courts in *Clinton* inappropriately resolved matters

ruption); COMMISSION TO COMBAT POLICE CORRUPTION, *supra* note 4 (finding New York City Police Department failed to adequately address police corruption).

Notably, neither report can be considered, per se, to have placed Clinton on notice of a municipal liability claim. First, Clinton was incarcerated on the date of the Mollen Commission Report, thus at best leaving a factual question as to whether he had access to the report. The MOLLEN REPORT was issued less than three years prior to Clinton's filing his complaint, and thus even if treated as a basis for notice, it places him safely and squarely within the three-year limitations period.

Police corruption is neither unique to nor a recent phenomenon in New York or any other part of the United States of America. *E.g.*, GAO REPORT, *supra* note 4 (noting recent police corruption in several United States cities, including New York, Chicago, and Philadelphia, and specifically their connection to drug-related activities by the police); Michael Perlstein, *Two Convictions Close Corruption Case; Ex-cops Face Prison for Cocaine Trafficking*, TIMES-PICAYUNE, May 6, 1998, at B1; Mark Fazlollah, *Civil Rights Groups Criticize Police Forcible Entries in Philadelphia*, PHILA. INQUIRER, Apr. 2, 1998; Carol Goar, *Breaking the Bond of Trust Philadelphians are Shaken Over Revelations of a Racism and Corruption Scandal, in the Police Department*, TORONTO STAR, Nov. 11, 1995, at B5; Kevin Sack, *Racism of a Rogue Officer Casts Suspicion on Police Nationwide*, N.Y. TIMES, Sept. 4, 1995, at 1; Jennifer Mad-dox, *Corrupt Police Taint Communities*, STUART NEWS, Aug. 12, 1996, at C1 (discussing several corruption cases in Florida, Tennessee, and Louisiana); *Officer Convicted*, *supra* note 87 (discussing heightened concern about police perjury nationally in light of 30th Precinct perjury scandal); *New Breed of Bad Cop*, *supra* note 86; *Officers Held in Probe of Corruption*, L.A. TIMES, May 4, 1995, at A31 (discussing string of corruption cases in New York City); Malcolm Gladwell, *In Drug War, Crime Sometimes Wears a Badge; New York's Latest Police Scandal Reflects Growing Temptations Facing Officers*, WASH. POST, May 19, 1994, at A1 (noting a national wave of police corruption and New York State's scandals); *see also* Martin A. Schwartz, *Admissibility of Investigation Reports in § 1983 Civil Rights Actions—A User's Manual*, in SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983, at 546 (Mary Massaron Ross ed. 1998) (discussing the report by the "Mollen Commission" and other investigative documents on police misconduct in New York and in Los Angeles, California).

235. *See Singleton v. City of New York*, 632 F.2d 185, 195 (2d Cir. 1980) (affirming that a single false arrest ordinarily cannot provide notice of an official policy).

solely within the province of the jury by considering the impact of news coverage on Clinton's knowledge of the source of his injury.

One of the issues that should have been reserved for the trier of fact is whether Clinton was aware of any newspaper articles or other news coverage of the 30th Precinct scandal or the conviction and sentencing of the former officers involved in his arrest. Resolution of this issue cannot be achieved on pretrial motions because these are the very types of factual issues that are within the purview of the trier of fact, and simply cannot be resolved as a matter of law.

Moreover, the reliance on English-language, mainstream media in these cases reveals the pervasive racial and cultural influences that dominate the law. The media sources cited by the courts exhibit their adoption of a standard of knowledge based on newspapers and news programming familiar only to a segment of the New York population. This standard does not reflect the common experience of all New Yorkers,²³⁶ or of society generally. Not everyone reads *The New York Times*, *Newsday*, or *USA Today*, or watches the Cable News Network, the news sources cited by the district court.²³⁷

People of color,²³⁸ who are victims of police abuse in significant and disproportionate numbers,²³⁹ are particularly disadvantaged by this approach because they do not constitute a majority of the

236. LATIN LOOKS: IMAGES OF LATINAS AND LATINOS IN THE U.S. MEDIA 14-16 (Clara E. Rodriguez ed. 1998) (discussing the disproportionately small amount of news coverage about Latinos and the small number of Latino correspondents, as well as the stereotypical portrayal in the news of Latinos as objects and "problem people").

237. *Clinton*, 1999 WL 105026 at *2 (citing LEXIS ALLNEWS file). The district court in *Clinton* specifically referred to the numbers of stories run in each of these publications in support of its conclusion that the 30th Precinct scandal was highly publicized. *Id.* at *2 & n.1.

238. "People of color" and "communities of color," as used in this article, refer to African Americans, Asian Americans, Asian/Pacific Islanders, Latinos, and blacks and Latin Americans of Caribbean ancestry, as well as discrete communities where they make up a majority of the population.

239. The 30th Precinct scandal is a prime example of this fact since the victims of the police corruption were black and Latino; see also HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998), available at <http://www.hrw.org/reports98/police/index.htm> (discussing how racial and ethnic minorities are abused by police); Harvey A. Silvergate, 'Race Profiling' Inflicts Injustice on Individuals, NAT'L L.J., June 22, 1998, at A20 (discussing racial profiling in law enforcement); NEW JERSEY ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, THE USE AND ABUSE OF POLICE POWERS: LAW ENFORCEMENT PRACTICES AND THE MINORITY COMMUNITY IN NEW JERSEY (1994) (describing the use and abuse of police powers against minorities).

readers of these print media. For example, although the *Clinton* court relied on *The New York Times* to prove notice, only 8.7% of daily readers are African American, 4.5% are Asian, and 7.9% are Latinos, compared with 76.2% who are white.²⁴⁰ This low readership is a consequence of complex factors. First, mainstream media, media that is English-language and historically located outside of immigrant communities or communities of color, does not treat people of color as a target audience.²⁴¹ Apparently this is the case because these communities are deemed unattractive to advertisers due to their low purchasing power—an assumption proved inaccurate by the significant buying strength and habits of these communities.²⁴²

Second, people of color are less likely to be interested in and persuaded by the issues as covered by the mainstream media because these news services provide scant coverage of issues of particular importance to people of color, and what little coverage they do provide perpetuates racist stereotypes.²⁴³ Indeed, “[m]inority

240. SCARBOROUGH RESEARCH, 2000 SCARBOROUGH NEW YORK STUDY (RELEASE 1) (2000) (on file with author). The percentages for the Sunday edition are comparable.

241. Gilbert Cranberg, *Trimming the Fringe: How Newspapers Shun Low-income readers*, 35 COLUM. JOURNALISM REV. 52 (1997) (finding that the press does not target inner-city customers, and that “database marketing relies heavily on identifying and targeting look-alikes—non-subscribers who most closely resemble existing readers in terms of residence, demographics, and life-style”). The main reason for ignoring these communities appears to be economic, with newspapers avoiding minorities and low-income readers because it is assumed they are of little interest to advertisers. This calculation has proved inaccurate and costly, since people of color have tremendous consumer buying power, as recognized by the vast number of local advertisers and telephone businesses who target these communities with focused advertisements. See THE 2000 NATIONAL HISPANIC MEDIA DIRECTORY, FACT SHEET (2000) (estimating that in 1999, Hispanic publication advertising sales totaled \$650 million) (on file with author).

These ideas are not limited to those within the media. Advertisement agencies that have direct influence on advertisement rates and trends in ethnic and/or non-English media advise avoiding these media, based on stereotypes of the media’s clients. Terry Pristin, *Ad Agency Urges Avoiding Black and Hispanic Radio*, N.Y. TIMES, May 13, 1990, at B7 (discussing internal company document that instructed sales representatives to warn companies not to place ads with stations with black and Hispanic listeners because “advertisers should want prospects, not suspects”).

242. *Supra* note 241

243. ROD CARVETH & DIANE ALVERIO, NETWORK BROWNOUT 2000: THE PORTRAYAL OF LATINOS IN NETWORK TELEVISION NEWS, 1999 (2000); Sreenath Sreenivasan, *As Mainstream Papers Cut Back, the Ethnic Press Expands*, N.Y. TIMES, July 22, 1996, at D7 (finding that ethnic press fill the gap left by mainstream press by covering “issues of real concern to immigrants”); Phuong Le, *Numbers Double in 7 Years Ethnic Papers Thriving Across U.S.*, S.F. CHRON., Aug. 31, 1993 at A1 (“One reason for the [ethnic] papers’ success is that they help new immigrants adjust to life

journalists and many of their white colleagues and supervisors say the overwhelming majority of press coverage still emphasizes the pathology of minority behavior—drugs, gangs, crime, violence, poverty, illiteracy—almost to the exclusion of normal, everyday life.”²⁴⁴ Understandably, stereotypical characterization of African Americans, Asian Americans, and Latinos as “problem people” and criminals further alienates this population from mainstream media.²⁴⁵

According to one report based on interviews of 175 reporters, editors, and publishers from more than thirty newspapers nationwide, “no complaint about press coverage was voiced as frequently by minorities (or acknowledged as readily by many whites) as the overwhelmingly negative nature of most stories on people of color—especially blacks and Latinos—and the concomitant absence of people of color from the mainstream of daily news coverage.”²⁴⁶ Indeed, this is the general experience within the news industry:

[N]ews is what editors who assign stories and put them in the paper decide is news, and even the most conscientious editors (and reporters) are largely captives of their own experiences, in-

in the United States.”) [hereinafter *Numbers Double in 7 Years*]. Mark H. Willes, the Chief Executive Officer of the Times Mirror Co., stated last year that with respect to the *Los Angeles Times* circulation, “When we ask Latinos why they don’t read the *Times*, they said we were not relevant to them, we didn’t understand them or respect them, we didn’t cover the things they were most interested in, and they didn’t see themselves reflected in our paper.” Mark H. Willes, Remarks at the 1999 Convention of the American Society of Newspaper Editors (Apr. 15, 1999), in American Society of Newspaper Editors, *It’s Your Future: Economic Imperatives of Changing Audiences*, 1999 CONVENTION (1999), at <http://www.asne.org/kiosk/archive/convention/conv99/economicimperatives.htm> (last modified Oct. 27, 1999). He did, however, note that “[t]hose are all things we can change, and we are.” *Id.*

244. David Shaw, *Negative News and Little Else: By Focusing on Crime, Poverty and Aberrant Behavior, Newspapers Fail to Give a Complete Portrait of Ethnic Minorities*, L.A. TIMES, Dec. 11, 1990, at A1 [hereinafter *Negative News and Little Else*].

245. See generally, CARVETH & ALVERIO, *supra* note 243 (listing crime stories as encompassing 14% of the stories about Latinos); LATIN LOOKS: IMAGES OF LATINAS AND LATINOS IN THE U.S. MEDIA, *supra* note 236, at 14-16 (discussing the disproportionately small amount of news coverage about Latinos and the stereotypical portrayal in the news of Latinos as “problem people”); Sreenath Sreenivasan, *Newscasts in Tagalog and Songs in Gaelic*, N.Y. TIMES, Sept., 8, 1997, at D11 (examining tremendous growth in ethnic programming due to audience seeking nontraditional television); William Glaberson, *Minority Journalists Gather to Share Hopes and Concerns*, N.Y. TIMES, July 29, 1994, at A12 (reporting on minority journalists and speakers at journalists convention who “say mainstream news organizations still present a distorted, stereotypical, and sometimes demeaning view of minorities”); *Negative News and Little Else*, *supra* note 244, at A1.

246. *Negative News and Little Else*, *supra* note 244, at A1.

terests and perceptions. In our still largely segregated society, most whites—especially most whites old enough to be high-ranking editors—don't have the daily experience and exposure that would enable them to automatically incorporate a minority sensibility in their own decision-making.

This means, among other things, that certain stories and issues aren't covered (or are undercovered), certain stereotypes are perpetuated, certain errors are made, certain perceptions are missed (or misunderstood).²⁴⁷

Third, English-language media is inaccessible to many immigrants who do not read English. Consequently, this population relies on second language and ethnic media for news.²⁴⁸ This last factor is becoming increasingly important as the number of persons speaking languages other than English in the United States grows.²⁴⁹ The locus of the lawsuits discussed herein is a prime example of the influence and this trend. New York City is a multilingual city, with various enclaves of ethnic and linguistic communities that thrive, in part, due to their ability to maintain the integrity of their language and customs within these enclaves.²⁵⁰ For many New Yorkers, English is not the language in which they obtain information or generally communicate with others in the City or the world. According to the 1990 U.S. Census, 41% of New Yorkers speak a language other than English at home,²⁵¹ a fact that is not lost on news editors who recognize that the ethnic and various non-English language press are attractive to this community.²⁵²

247. David Shaw, *What's the News? White Editors Make the Call; Newspapers: Even the Most Conscientious are Often Captives of Their Own Experiences and Perceptions*, L.A. TIMES, Dec. 13, 1990, at A1. (showing that the percentage of minorities among professionals on newsroom staff did not exceed 21%, and a majority showed less than 13% of supervisors were minorities).

248. *Numbers Double in 7 Years*, *supra* note 243, at A1 (reporting increase in ethnic press and newspapers in languages other than English).

249. For example, as of 1998, more than 10% of the United States population was of Hispanic origin. U.S. CENSUS BUREAU, *THE HISPANIC POPULATION IN THE UNITED STATES 1* (1998), available at <http://www.census.gov/prod/2000pubs/p20-525.pdf>.

250. See U.S. BUREAU OF THE CENSUS, *1990 CENSUS OF POPULATION AND HOUSING SUMMARY TAPE FILE 3* (1992) (showing that 36.8% of those living in New York City were "foreign born," including 953,449 persons who entered the United States between 1980 and 1990; of the 41% who speak a language other than English at home, 20% do not speak English "very well").

251. *Id.*

252. At the April 2000 American Society of Newspaper Editors annual convention, the outgoing president stated in his keynote address that "there is a 'direct correlation' between a person's sense of community and his or her readership of a newspaper. 'Thus, we do well to help readers and potential readers feel that they belong to the community . . .'" Cheryl Arvidson, *ASNE's Anderson: 'Readers Expect Us to Get*

Indeed, in *Monzon*, the plaintiff alleged that he did not speak English.²⁵³

Based on these factors, it is not surprising that these news sources are neither the most prominent nor the most trusted within communities of color. It is, therefore, unlikely that members of these communities would derive information about law enforcement, or perceive as unbiased news about police corruption, from these sources. Yet this is the most ironic aspect of the courts' approach and treatment of ethnic and non-English language media. If people of color do not derive credible information from mainstream media, and ethnic and non-English language media provide coverage of police misconduct *more* expansively than the mainstream media because of the importance of the issue in these communities, then perhaps this type of coverage would, in the courts' opinion, place plaintiffs on notice of a municipal injury. We will not know in *Clinton* or *Monzon*, however, precisely because of the marginalization of these media sources and their coverage of police misconduct.

What the courts have done, then, is fashion a legal doctrine that is completely normative, adopting and privileging a particular view of knowledge and information gathering, a view that is based on racial and ethnic privilege and dominance within media. This approach misinterprets the law, subverts the fact-finding role of the jury, and undermines the goals of § 1983.

The courts in *Clinton* also impermissibly disregarded the City's burden on summary judgment to establish that no factual disputes existed and that the City was entitled to a decision as a matter of law.²⁵⁴ On its motion, the City presented no evidence that Clinton actually read the cited news articles, saw the cable television coverage, or otherwise had information during his incarceration or after, garnered through the media, that would alert him, or any reasonable person, to the injury and municipal policy that would be the basis for a federal civil rights claim against the City of New York.²⁵⁵

Things Right, Reflect Community, Be in Touch, FREEDOM FORUM ONLINE, Apr. 11, 2000, at <http://www.freedomforum.org/news/2000/04/2000-04-12-07.asp>.

253. *Monzon* Complaint, *supra* note 130, para. 6; *Monzon's* Memorandum, *supra* note 31, at 19 (citing *Monzon* Complaint para. 6).

254. *Clinton v. City of New York*, No. 98 Civ. 3810 (JSM), 1999 WL 105026, at *3 (S.D.N.Y. Mar. 2, 1999).

255. It is unlikely that the City could present such evidence since it did not proceed with, or request, discovery to discern the plaintiff's actual knowledge, or information supporting an allegation about what the plaintiff should have reasonably known. See *Clinton* Appellate Brief, *supra* note 170, at 11, n.3.

This approach flies in the face of civil rights jurisprudence, the recognized social and legal significance of § 1983 and its remedial purpose, and the courts' historically broad reading and application of the law in § 1983 actions.²⁵⁶ As the United States Supreme Court stated more than two decades ago, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"²⁵⁷

Similarly, the City's unsuccessful argument in *Monzon*, that discussion of police corruption in the report of the "Mollen Commission" put Monzon on notice, would have recast the pretrial motion practice inquiry, and demanded that plaintiff know about every document and report on police conduct. For example, in *Monzon*, the City cited the Mollen Commission's report as a basis for finding that Monzon was on notice. Such a standard is not only unsupported by the caselaw and § 1983 legislative goals and history, but is unworkable in practice. It raises questions as to access to documents and reports, and fails to resolve the more subjective problem of what type of information in these reports would place a plaintiff on notice of a municipal liability claim.

The difference in the courts' treatment of media coverage in these two cases is revealing. In the *Clinton* case, the lower court concluded that the precinct scandal was "a major news item,"²⁵⁸ further justifying the court's decision that Clinton was on notice more than three years before filing the complaint, and consequently time barred from bringing suit. By contrast, the district court in *Monzon* concluded that the impact of newspaper reports on the plaintiff's constructive knowledge was a question for the jury.²⁵⁹

One explanation for the difference in treatment may be that the media coverage was used as additional justification, rather than the sole or even primary justification, for concluding that the plaintiff

256. See, e.g., *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 (1972) (stating that § 1983 "must be given the meaning and sweep that [its] origins and [its] language dictate") (footnote omitted); *Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 73 (1989) (Brennan, J., dissenting) ("It would be difficult to imagine a statute more clearly designed 'for the public good,' and 'to prevent injury and wrong,' than § 1983.").

257. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

258. *Clinton*, 1999 WL 105026, at *2.

259. *Monzon v. City of New York*, No. 98 Civ. 4872 (LMM), 1999 WL 1120527, at *1 (S.D.N.Y. Dec. 7, 1999).

was on notice in *Clinton*. In the lower and circuit *Clinton* opinions, the primary basis for concluding the plaintiff was on notice was ADA Adoradio's affirmation and the fact that the plaintiff testified before a grand jury about the investigation of one of the named defendant ex-police officers more than three years prior to filing the complaint.²⁶⁰ Thus, both the district and circuit courts were satisfied that he was on notice based on information and events related to him specifically, rather than general news coverage of a police scandal. However, in *Monzon*, the district court determined that there was no basis for concluding, as a matter of law, that Monzon was on notice prior to contact from the District Attorney's Office for purposes of testifying against one of the named ex-police officer defendants, such contact having occurred less than three years before the filing of the complaint.

These cases may be harmonized if they are interpreted to mean that media coverage may support a finding of constructive notice and possible untimeliness where there is another, primary, basis for a court to find that the plaintiff was on notice. As a corollary, the courts may also have been influenced by the extent and timing of plaintiff's personal participation in the investigation and prosecution of the individual police officers. The problem with this analysis, as previously discussed, is that it fails to fully consider and account for the difference between claims against individuals and those against municipalities for policy-driven actions. They are different doctrinally and legally—the former against an individual who may claim immunity from suit for his or her own actions, while the latter is based on a causal connection between a government policy and the implementation of that policy through municipal representatives' actions, which is not protected by § 1983 immunity defenses.²⁶¹

PART IV

Plaintiffs in *Clinton* and *Monzon* invoked the doctrine of equitable tolling as an alternative basis for the survival of their claims.²⁶²

260. See *Clinton v. City of New York*, No. 99-7336, slip op. at 2 (2d Cir. Oct. 29, 1999); *Clinton*, 1999 WL 105026 at *2.

261. For a discussion of the individual immunity defenses available in a § 1983 action, see NAHMOD, CIVIL RIGHTS, *supra* note 10, §§ 7-8; SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, § 9; Robert F. Brown, *Individual Immunity Defenses under § 1983*, in *SWORD AND SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983*, at 510-45 (Mary Massaron Ross ed., 1998).

262. Equitable tolling must be distinguished from equitable estoppel, although the two are often discussed together. Equitable tolling stops the statutory time clock for a

The *Clinton* courts contemplated the plaintiff's argument, while the *Monzon* court would not even consider the argument.²⁶³

In accordance with Supreme Court precedent, the Second Circuit applies equitable tolling to § 1983 cases where the plaintiff "submit[s] non-conclusory evidence of a conspiracy or other fraudulent wrong which precluded his possible discovery of the harms that he suffered."²⁶⁴ In *Keating v. Carey*,²⁶⁵ the Second Circuit explained that a defendant's fraudulent actions may be the basis for delaying the time of accrual until the plaintiff discovers the basis for the cause of action. The district court in *Clinton* rejected, as affirmed on appeal, Clinton's request to apply these principles to his case.²⁶⁶ The former police officer defendants' intentional concealment of their misconduct and the City's official policy and custom, prevented the plaintiff from learning or having reason to

certain period, usually resulting in the party proceeding with the action. BLACK'S LAW DICTIONARY 560 (7th ed. 1999); 28 AM. JUR. 2D *Estoppel and Waiver* §§ 27-32, 46-47 (2000); 31 C.J.S. *Estoppel and Waiver* §§ 58-112 (1996 & Supp. 2000). Equitable estoppel prohibits the opposition from raising the claim of untimeliness based on actions taken by that party in misleading or misrepresenting information to the other party which resulted in some adverse consequences to the plaintiffs. BLACK'S LAW DICTIONARY 571 (7th ed. 1999); 51 AM. JUR. 2D *Limitations of Actions* §§ 146-48, 150 (1970 & Supp. May 2000); 54 C.J.S. *Limitations of Actions* §§ 85-86, 88-91 (1996 & Supp. 2000).

263. *Clinton*, 1999 WL 105026, at *2; *Monzon*, 1999 WL 1120527.

264. *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1157 (2d Cir. 1995) (citing *Dory v. Ryan*, 999 F.2d 679, 681 (2d Cir. 1993), modified on other grounds, 25 F.3d 81 (2d Cir. 1994)) (emphasis in original).

In *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), the Supreme Court stated that equitable tolling principles based on the fraudulent concealment of information by the defendant apply to every federal statute of limitations. In *Hardin v. Straub*, 490 U.S. 536, 539 (1989), however, the Court reemphasized its prior ruling (as set forth in *Board of Regents v. Tomanio*, 446 U.S. 483, 483-86 (1980), and *Chardon v. Soto*, 462 U.S. 50 (1983)) that state tolling provisions should be borrowed along with state statute of limitations in § 1983 cases. There has been some difference of opinions among the circuits as to the effect of *Hardin* on *Holmberg*, as applied to § 1983 matters, with some courts construing these Supreme Court cases to permit only the application of the state's tolling rules, and not federal equitable tolling principles. For a comprehensive discussion of the applicability of equitable tolling to § 1983 cases, including citations to and case discussions of court opinions interpreting *Hardin* and *Holmberg*, see NAHMOD, CIVIL RIGHTS, *supra* note 10, § 9:34; SCHWARTZ, SECTION 1983 LITIGATION, *supra* note 10, § 12.5.

265. 706 F.2d 377 (2d Cir. 1983) ("Under federal law, when the defendant fraudulently conceals the wrong, the time does not begin running until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of action."). Although the Second Circuit in *Keating* referred to equitable estoppel, *id.* at 382, the Second Circuit has subsequently relied on *Keating* in its discussions of equitable tolling in § 1983 cases. *E.g.*, *Pinaud*, 52 F.3d at 1157 (quoting *Keating*). I will rely on the Second Circuit's interpretation of its own precedents on this issue.

266. *Supra* notes 166-169 and accompanying text.

know of the information that was the basis of his municipal liability claims within the three-year statute of limitations. Thus, equitable tolling should have applied given that such a plaintiff is the quintessential litigant entitled to the benefits of equitable tolling principles.

The plaintiff's claims are precisely the type envisioned as beneficiaries of the doctrine of equitable tolling. The unlawfulness of the former police officers' conduct depended directly upon the surreptitious nature of their actions and on the complex web of lies and deceit that concealed their actions from the plaintiff and the other victims of their nefarious actions. Maintaining secrecy from the victims was essential to the success and continued existence of the fraud. The District Attorney and United States Attorney conceded as much by the very fact that the corruption investigation was secret and required cooperation of various police officers in the precinct.²⁶⁷ Concealment is the essence of the fraud in which these ex-officers participated.

The district court refused to apply equitable tolling in this case because the court concluded that the City did not "hide the rogue officers' conduct beyond that time necessary to conduct an effective investigation."²⁶⁸ However, the court failed to elucidate when the necessary time expired, and there is nothing in the record to suggest that the investigation ended more than three years prior to the filing of the plaintiff's lawsuit.

The district court also failed to consider the derivative effect of the individual defendants' fraud upon the municipal liability claim. The City's official custom facilitated, maintained, and ignored the actions of the individual defendants, resulting in the conduct giving rise to the plaintiff's claim. Thus, equitable tolling should have applied. Failing to invoke the doctrine in favor of the plaintiff rewarded the City for the actions of its employees' in successfully concealing their unlawful actions, and denied plaintiff a remedy, despite his having lost two years of his life while unlawfully incarcerated in a state prison.

PART V

A determination of whether a plaintiff has notice of a *Monell*-based claim—when a plaintiff knows or "should have known" that

267. Letter from Mary Jo White, United States Attorney, by Assistant United States Attorney Michael Horowitz to United States District Judge Lawrence M. McKenna (Apr. 2, 1997), *reprinted in* Appendix, *supra* note 30, at 102-103.

268. *Clinton*, 1999 WL 105026, at *2.

she or he has been injured as a consequence of a municipal policy—requires assessing the importance and impact of various facts and events in a case. Yet the plaintiff may not have any actual knowledge of such information. The task of obtaining this information is particularly complex in a municipal liability case because the injury must result from the implementation of the institutional defendant's policy.

One solution to this accrual problem is for the courts to focus solely on the specific information about the municipality and its policy that is the alleged basis for the plaintiff's injury. In the *Clin-ton* and *Monzon* cases, this would have been the point in time when the plaintiffs' arrests, incarcerations, and prosecutions resulted from the 30th Precinct corruption that occurred as a direct consequence of the City's policy, practices, or customs. This approach accurately and fairly imposes upon the plaintiff the burden of diligently filing a complaint, based on what she or he knows or should know about the institutional actor's policies and role as related to the plaintiff's injuries. It is directly connected to the accrual of the claim *against the municipal defendant*. Thus, information about the individual municipal employees, such as the information gathered from the plaintiffs' testimony against individual police officers, as well as information contained in the assistant district attorney's affirmation concerning his participation in an investigation of allegations of corruption, are irrelevant to accrual. Nor would this information serve as the basis for a finding of notice, absent some connection between the policy and the plaintiffs' injuries. Otherwise, notice of the injuries resulting from the individual officer's actions would also provide notice of a municipal liability claim, a theory which the Second Circuit rejected several years ago.²⁶⁹

While it may be possible in rare cases that notice of injury caused by a police officer will place a plaintiff on notice of injury caused by a municipal policy, those cases are more likely to arise where there is an official policy accessible to the general public. In contrast, cases where the City asserts that police corruption and malfeasance are aberrational and individual and where police misconduct has never linked to a City policy or practice, notice of a municipal policy for § 1983 purposes will include less direct and obvious municipal actions. In cases involving municipal practices and customs, those acts which have "not received formal approval

269. See *Pinaud*, 52 F.3d 1139.

through the body's official decisionmaking channels . . . [and] [a]lthough not authorized by written law . . . could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."²⁷⁰

Courts should also consider the plaintiff's pre-discovery position. When a municipality challenges a *Monell* claim in a motion to dismiss or a summary judgment motion, courts should consider the obstacles the plaintiff faces in asserting a claim against a municipal entity for police misconduct. A plaintiff asserting a *Monell* claim may encounter unique difficulties such as defining institutional actions only discernible after the plaintiff gains access to municipal records and files that may be otherwise inaccessible because of confidentiality guarantees.²⁷¹

Determinations as to whether news coverage is sufficient to place a plaintiff on notice of a § 1983 municipal liability claim should be treated as questions of fact for the jury. Courts should not make per se decisions that, as a matter of law, particular media coverage has met the accrual standard. Otherwise, the courts are likely to adopt mainstream media standards that do not take into account or reflect the experiences of § 1983 plaintiffs, or the dynamics of multilingual, multicultural communities.

Whether the news source is one of credibility and dependability within a community on a particular issue should also be a determining factor. Regardless of whether a jury or a judge resolves the question of the impact of news coverage on plaintiff's knowledge of a claim, such determinations must be based on the specifics of the actual coverage, as well as the news providers involved. The court should consider the availability and substance of coverage by highly visible information sources that are well recognized within the plaintiff's community and with a significant distribution and

270. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970) (footnote omitted)).

271. For example, a plaintiff may only discern from a protracted and lengthy record of misconduct by individual officers that there is a practice, custom or policy at the root of this misconduct. However, the individual officers may have certain privacy rights that make access to such records difficult or impossible for a prospective plaintiff prior to filing of a lawsuit with its attendant benefit of discovery. *E.g.*, N.Y. CIV. RIGHTS LAW § 50-a (McKinney 1992 & Supp. 2000); John M. Leventhal, *Do Not Open Unless . . .*, 214 N.Y. L.J. 1 (1995) (discussing the purpose and application of § 50-a); see also Richard N. Winfield, *Decision in Schenectady Case Denies Access To Records of Police Guilty of Misconduct*, 71 N.Y. ST. B. J. 37 (1999) (discussing impact of New York State Court of Appeals decision denying public disclosure of records of police misconduct incident under state's Freedom of Information Law because information is protected under § 50-a).

readership within the community. The court also should consider whether the coverage conflicted or cast doubt on the mainstream news sources' coverage.

Further, the courts should consider the racial and ethnic elements involved in police misconduct cases. For people of color who are victims of police abuse, their perceptions of that abuse differs and is at odds with the dominant norms and perceptions of police misconduct as individualized and unsupported by institutions. The role of prevalence and dominance of race in law enforcement should be a factor militating in favor of a § 1983 plaintiff.

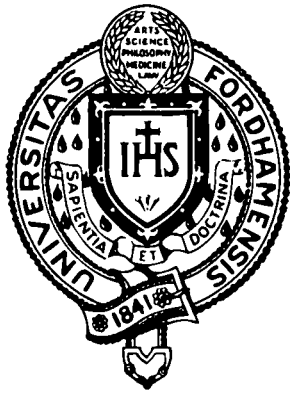
These recommendations would have affected the outcome in the *Clinton* case. The court should have recognized that the plaintiff's testimony and the ADA's statement were insufficient, as a matter of law, to put the plaintiff on notice because they concerned individual officers' bad acts without any direct or obvious causal connection to a municipal policy. Additionally, there was a two-year lapse between the underlying governmental actions and the affirmation, raising unresolvable questions as to the nature and applicability to Clinton of the investigation mentioned in the affirmation.

Alternatively, the court could have determined that the sufficiency of the testimony and the ADA's affirmation were matters for the jury and inappropriate for decision by motion to dismiss or summary judgment motion. In this scenario, the plaintiff and the City could present additional evidence and arguments regarding what information was available to the plaintiff during the years prior to the filing of the lawsuit. Similarly, the evidence and arguments that the news coverage created a "news alert" environment, so as to put Clinton on notice, should have been resolved by the jury and not the judiciary, as the court in *Monzon* concluded.

The legislative intent and public policy behind § 1983 assumes a broad and generous reading of the statute, and is best effectuated by judicial recognition of the importance of civil rights litigation in providing a vehicle for change of state-based misconduct, such as police corruption. Still valid today is the United States Supreme Court's assessment, made a quarter century ago, that, "[Section] 1983 provides 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.' The high purposes of this unique

remedy make it appropriate to accord the statute 'a sweep as broad as its language.'²⁷²

272. *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)). Hopefully, for the sake of New York's citizenry and the individual victims of police corruption, there will be no more plaintiffs similarly situated to Mr. Clinton or Mr. Monzon.



WHY DID PEOPLE STOP COMMITTING CRIMES? AN ESSAY ABOUT CRIMINOLOGY AND IDEOLOGY

*George L. Kelling**

INTRODUCTION

In 1994, to virtually everyone's surprise, a lot of people stopped committing crimes. Although the media first noted sharp declines in crime in New York City, it was not long before it recognized similar reductions in criminal activity in other cities as well. This trend was observed not only in wealthy cities like Boston and San Diego, but also in relatively impoverished cities like Newark and New Orleans—albeit somewhat later.

These declines in crime were so steep and unprecedented that they stunned not just the general public, but criminologists, sociologists, and political scientists throughout the world. Many of these social scientists had predicted that demographic trends—more young people in the population—would drive crime upward to new levels. Today, virtually no one denies that crime has dropped. The question is, “Why?” Obviously, something significant happened to cause so many people to stop committing crime in so short a period—in many cities, crime dropped to 1960s levels in a matter of a few years.

One would like to believe that some objective, “scientific” explanation could account for why people stopped committing crime. Alas, despite the tag “science” in social science, ideology too often shapes the social scientists' responses to such questions: conservatives tend to find their answers in new policing strategies, imprisonment, and changes in culture and values; liberals, their answers in the economy, demographic changes, gun control, and changing patterns of drug use.

In an absolute sense—a scientific sense—neither the question of why crime declined in New York City nor why crime declined nationally, is answerable. Any explanations are strictly post hoc.

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Whatever happened in New York City, or Boston, or San Diego that caused people to stop committing crime has already happened and no scientific measurement system was in place to record it. At best, we can reconstruct the history of events, use whatever data are available, check plausible interpretations, and select what seems to be the most credible explanation.

Though the question, “Why is crime dropping in America,” is unanswerable, some criminologists and economists like to make it appear that they can provide answers.¹ The competing explanations—imprisonment, police practices, the economy, demography, drug markets, gun control, or combinations of these factors—all have their advocates and some fairly reasonable arguments can be developed on behalf of each explanation. The difficulty with these “macro” interpretations, however, is that they assume that such potential causes of crime reduction operate uniformly in communities across the country. This assumption is unfounded.

For example, some crime reductions of the latter half of the past decade appear to be correlated with improved economic conditions. Note the word “correlated.” It may be true that improved economic conditions in some communities resulted in jobs for unemployed youths who would have otherwise committed crimes.² But it also may be true that in other communities, reduced levels of crime have contributed to improved economic conditions. Once citizens, neighborhood institutions, and police regain control over public spaces, local commerce can again develop and thrive. In New York City, areas of Harlem and the Bronx that were once written off as uninhabitable, but today include thriving commercial centers, are prime examples of this phenomenon.

Likewise, anyone who has observed police practices understands that they operate very differently depending upon the neighborhood and community in which they are implemented. For example, practices that were routine in Milwaukee during the 1970s would have been completely unacceptable in New York City during the same period.³ Even imprisonment can affect neighbor-

1. See generally *THE CRIME DROP IN AMERICA* (Alfred Blumstein & Joel Wallman eds., 2000) (containing essays purporting to explain the nationwide reduction in crime).

2. The suggestion put forth by some—that enough New York City drug dealers went to work at, say, McDonald’s to cause the declines in crime—is pretty far-fetched.

3. In Milwaukee during this era, police adamantly refused to meet with citizen or neighborhood groups. To police leaders, their business was just that—police business. While police in many other cities may not have been enthusiastic about meeting with citizens, especially those from minority neighborhoods, few would have been in a po-

hoods differently. Taking five offenders out of a neighborhood and imprisoning them could reduce crime substantially in one neighborhood, have no impact on another, and lead to increases in crime in yet a third.⁴

In other words, social conditions, policies, and practices interact with cities, communities, and neighborhoods in very different ways. Consequently, the only question that can really be asked and answered sincerely is: "Why did people commit fewer crimes in neighborhood X or community Y?"

The problem for social scientists is that there are no easy ways to study such neighborhood interactions and attribute causality. To do so, one first has to spend a lot of time in neighborhoods and cities, often in quite dangerous locations, collecting an assortment of disparate data. Then one must make comparisons to broader economic and demographic statistics—much of it outdated or not broken down by neighborhood. Even when these tasks are completed, however, the findings for New York City may have no relevance for, say, Hoboken, New Jersey, which probably has an entirely different social structure and culture. Few social scientists bother to conduct the necessary fieldwork. How much easier, instead, to download aggregate Uniform Crime Reports from the Federal Bureau of Investigation⁵ and correlate them with widely available economic and labor data. The simple reality is, however, that when inferring about crime, the farther one is from the ground, the less reliable the inference. If criminological research has demonstrated anything over the past forty years, it is that the "crime problem" that drives public concern is a local problem, only understandable within a local context.

"ROOT CAUSES" AND CRIME CONTROL POLICY

In 1967, President Lyndon Johnson's Commission on Law Enforcement and the Administration of Justice put forward the idea that crime is caused by poverty, racism, and social injustice—the

litical climate that would have allowed them to maintain the stance of police in Milwaukee.

4. For example, in some relatively stable neighborhoods, the older criminals keep the younger ones in check.

5. *E.g.*, FED. BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES 1999: UNIFORM CRIME REPORTS* (2000). For each of the annual Uniform Crime Reports since 1995, see <http://www.fbi.gov/ucr.htm>. Searching this web site is an invariably easier and safer exercise than tabulating data in the streets of a high-crime area because it can be completed in the privacy of one's own home.

so-called root causes of crime.⁶ According to this view, crime prevention occurs through amelioration of these social problems. Therefore, the only role of police and criminal justice agencies is to process offenders through the criminal justice system, responding to crime after it occurs. Directly reflecting the underlying assumptions of the 1960s' War on Poverty, these ideas shaped conventional thinking about crime and its control until the early 1990s. Moreover, this model became the foundation for the criminological educational enterprise that developed during the 1970s in universities throughout the country, much of it supported by federal funding. That crime was caused by poverty, racism, and social injustice came close to being the official criminological position about the etiology of crime and, by extension, its solution.

At the time, the police establishment was not terribly enthusiastic about many aspects of the Commission's report. Nevertheless, the report's call for decriminalizing petty offenses such as drunkenness, and its endorsement of the idea that "victimless" crimes such as prostitution should be largely ignored by police, if not decriminalized, were congruent with the reform movement within policing. For a variety of reasons, among them corruption and political entanglements,⁷ police departments by the 1960s had entrenched strategies that sought to limit their attention to the "serious" crimes of murder, rape, robbery, assault, and burglary.

In attempts to further efficiency, increase control of line officers, and heighten the focus on serious crimes, police leaders systematically removed officers from activities such as foot patrol, which exposed them to extensive contact with citizens. All of this was crystallized brilliantly in Sergeant Friday's "Just the facts Ma'am" approach to law enforcement.⁸ It became accepted that the business of police was to respond to serious crime after it occurred and to arrest and process offenders. Furthermore, minor offenses and juvenile offending, unless serious, were to be the province of social

6. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY V* (1967) (making more than 200 recommendations that the Commission believed were "concrete steps" that could lead to a "safer and more just society").

7. E.g., George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing, PERSPECTIVES IN POLICING* (Nat'l Inst. of Just. et al. eds, Nov. 1988). While the political entanglements of police departments is a long story, during much of the nineteenth and early years of the twentieth centuries, the links between police and urban leaders ("ward bosses") were so close that the police in many communities were almost an extension of the political machines. *Id.* at 4-5.

8. The reference is to Jack Webb's portrayal of Sergeant Joe Friday in the television show *Dragnet*, which aired from 1952-59 and 1967-70.

workers, not police. Civil libertarians applauded this view as unintrusive policing, endorsing the police retreat from minor and juvenile offenses, and supporting the idea that police should remain in their cars and respond only to serious crimes. At base, civil libertarians argued for police to use state authority sparingly. Other advocates, promoting and ultimately realizing limitations on institutionalization, also called for similar restraint toward the emotionally disturbed for all but imminently violent individuals.

Meanwhile, crime levels varied considerably during the 1970s and 1980s, with the overall trend moving up and violent crime reaching its highest peak in most communities during the late 1980s and early 1990s. Moreover, fear of crime, with its attendant consequences—citizens avoiding public spaces and facilities, abandoning certain urban neighborhoods or cities altogether, isolating themselves in their homes, and purchasing security hardware such as guns and dogs—remained consistently high following the 1960s. And as noted above, by the late 1980s, many criminologists were predicting a new and even fiercer crime wave looming as a consequence of a large cohort of youth entering their crime-prone teens.⁹

HOW “ROOT CAUSES” REASONING SHAPED EXPLANATIONS FOR CRIME DROPS IN NEW YORK CITY

In 1994, Rudolph Giuliani, a brash center-right Republican who promised to reduce crime and ran against “squeegee men,”¹⁰ was elected mayor of the Democratic city of New York. Within months after Giuliani and his first Police Commissioner, William Bratton, took office, unprecedented declines in crime were recorded, especially for violent crimes such as murder, aggravated assault, and robbery. Criminologists and the liberal media were caught off guard. The question raged: “Why is crime dropping in New York City?” Aside from Giuliani and Bratton’s claim that the police were largely responsible, four general contentions developed to explain the decline in crime: (1) the New York City Police Department (“NYPD”) was “cooking the books”; (2) the economy was improving, causing drug dealers to enter the world of legitimate work; (3) drug use patterns were changing, including a decline in

9. *E.g.*, JAMES ALAN FOX, U.S. DEP’T OF JUSTICE, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL OF CURRENT AND FUTURE RATES OF JUVENILE OFFENDING (1996).

10. “Squeegee men” are intimidating individuals who “wash” windows of cars stopped at traffic lights and demand fees for their services.

the use of crack cocaine; and (4) demographic shifts led to fewer youths in the population.

The first open debate about the issue took place at the 1995 meeting of the American Society of Criminology. Commissioner Bratton addressed the group, putting forth a simple explanation: "Police can control people. In New York City we have. People have changed their behavior."¹¹ For the most part, criminologists responded skeptically. For example, a panel comprised of criminologists and economists from John Jay College of Criminal Justice described their examination of every economic variable that could explain the decline in crime. Their conclusion? None of the factors explained the decline in crime—therefore, hidden economic variables, not yet discovered, must explain them.

One troubling new contention also emerged, that police could indeed reduce crime, but only at the unacceptable cost of harassment and brutality, especially in dealing with minorities. This belief soon became entangled with New York's racial politics, so that the crime reductions were attributed to the police department's "scorched earth policies," "broad sweeps," "zero tolerance," and other draconian police tactics. Two terrible incidents later fueled those charges: the police torture of a Haitian immigrant¹² and the police shooting of an unarmed African man forty-one times.¹³ Undoubtedly, those events contributed to negative explanations for crime reduction. Yet, as tragic as they were, they were tragedies, not trends.

When it became clear that crime was dropping in cities such as Boston and San Diego as well, the question changed from "Why is crime declining in New York City?" to "Why is crime dropping in America?" Even then, however, New York City remained a special case. For example, Fox Butterfield of *The New York Times* annually writes "bad" New York and "good" Boston and San Di-

11. Clifford Krauss, *The Commissioner vs. the Criminologists*, N.Y. TIMES, Nov. 19, 1995, at 43 (chronicling a meeting between Commissioner Bratton and eminent criminologists).

12. *United States v. Volpe*, 78 F. Supp. 2d 76 (E.D.N.Y. 1999); see also David Barstow, *The Louima Case: The Overview; Officer, Seeking Some Leniency, Admits to Louima's Torture*, N.Y. TIMES, May 26, 1999, at A1 (reporting Office Justin A. Volpe's decision to plead guilty to the brutal sodomizing torture of Abner Louima in a New York City police station).

13. E.g., Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1 ("The verdict came down in a tense and racially charged case that led to anti-police demonstrations, arrests, and a reorganization of the department's Street Crime Unit, to which the officers belonged.").

ego stories.¹⁴ According to this scenario, New York got its results by means of “bad cops” harassing citizens, especially minorities, while in Boston and San Diego, “good cops” solved problems and worked closely with citizens to reduce crime. Even social scientists with little knowledge or contact with the NYPD held up the Boston Police Department as a model for the NYPD to emulate.¹⁵ Even the United States Commission on Civil Rights contrasted New York with Boston and San Diego, suggesting that crime reductions in New York “come at a significant cost to the vulnerable communities in greatest need of police protection.”¹⁶ This, despite the fact that in 1999 shootings of civilians in New York were at the lowest recorded levels ever and compared favorably with virtually every city in the United States.¹⁷

One possible explanation for why overall trends in crime reduction were obscured by a focus on a small number of negative events is that both political enemies of Mayor Giuliani and liberal social scientists rejected the underlying ideas that shaped New York’s “theory of action.” Both Giuliani, and later Commissioner Bratton, adopted a strategy whose origins lay in the center-right of academic thought on criminal justice policing. James Q. Wilson and George L. Kelling’s 1982 *Atlantic Monthly* article *The Police and Neighborhood Safety: Broken Windows* was the source.¹⁸ The

14. E.g., Fox Butterfield, *Cities Reduce Crime and Conflict Without New York-Style Hardball*, N.Y. TIMES, Mar. 4, 2000, at A1 (describing successful efforts by cities to reduce crime). *But c.f.*, Heather Mac Donald, *America’s Best Urban Police Force*, CITY J., Summer 2000, at 14-31 (criticizing Butterfield’s attack on New York police as inaccurate).

15. E.g., Orlando Patterson & Christopher Winship, *Boston’s Police Solution*, N.Y. TIMES, March 3, 1999, at A1 (noting that Boston was forced to terminate stop and frisk policies because of outrage among African Americans in the city). Both the Boston and San Diego Police Departments deserve all credit they get. They, like the NYPD, have been national leaders in police innovation—Boston for its work with neighborhoods and communities and San Diego for its problem-solving approach to policing.

16. Heather Mac Donald, *NY Press to NYPD: Drop Dead*, AM. ENTER., Sept. 1, 2000, at 16 (discussing hypocrisy of New York media in berating the police for going soft on crime while simultaneously criticizing harsh effects of more assertive police measures).

17. *Panel Urges Remedies to Abuses by Police*, N.Y. TIMES, Nov. 4, 2000, at A18. It is important to note that comparative data on police shootings are unreliable because police departments have not agreed upon national standards for data collection. Moreover, many departments are reluctant to make data about police shootings public.

18. James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, available at <http://www.theatlantic.com/politics/crime/windows.htm>. This article coined the term “Broken Windows.”

Broken Windows theory argues that disorderly behavior and conditions, such as broken windows left untended, send a message that nobody in a community cares, leading to fear of crime, more serious crime itself, and, eventually, urban decay. Such reasoning is a direct challenge not only to many liberal policy innovations—decriminalization of minor and so-called victimless crimes, deinstitutionalization of the emotionally disturbed, and deregulation of the youthful misconduct in schools and public spaces—but to “root-causes” theory itself. If the logic of Broken Windows is true, restoring and maintaining order will prevent the eruption of more serious crime. As Bratton put it, once people know their obstreperous and minor offenses will be controlled, many will change their behavior.¹⁹

WHAT DID HAPPEN IN NEW YORK CITY?

The story of New York’s reduction in crime could start in a variety of places: with the concern for ending disorder in mid-town Manhattan and the evolution of the Mid-Town Manhattan Community Court;²⁰ with the eradication of graffiti in the subway system;²¹ with the reclaiming of Bryant Park (adjacent to the New York Public Library); with the political decision of former Mayor David Dinkins to add 6000 new police officers to the NYPD during the early 1990s; with the evolution of Business Improvement Districts, especially the Grand Central Partnership that restored control over the neighborhood surrounding Grand Central Station; with Commissioner Raymond Kelly’s decision to devise a plan to reign in “squeegee men” (although Giuliani and Bratton got credit for eliminating squeegee men, the plans to deal with them were developed under Commissioner Kelly); or with neighborhood organizations that demanded throughout the 1970s and 1980s that something be done to address crime and disorder in their communities.

19. James Traub, *New York Story*, NEW REPUBLIC, Jan. 27, 1997, at 12 (discussing anti-drug initiatives in Washington Heights that led to a reduction in violence).

20. E.g., Joseph P. Fried, *Court is Moving Back Into the Neighborhood*, N.Y. TIMES, Oct. 10, 1999, § 1, at 45 (discussing the successes of community courts as well as the opening of a new facility in Red Hook, Brooklyn); Matthew T. Crossnon, *Third Branch of Government Deserves Fair Share of Budget*, N.Y. L.J., Jan. 27, 1993, at S1 (discussing functions and operation of Midtown Manhattan Community Court).

21. George L. Kelling & William J. Bratton, *Declining Crime Rates: Insiders’ View of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217, 1220-21 (1998) (stating that the eradication of subway graffiti “was considered by some to be one of the most successful urban policy ‘wins’ on record”) [hereinafter *Declining Crime Rates*].

All were important moves to reassert control over the city. Many grew out of the same concerns that characterized Broken Windows. In fact, business people in mid-town Manhattan had been clamoring for restoration of order in the Times Square area since the 1970s—articulating the Broken Windows thesis even before *Broken Windows* had been written. At the same time, crime was slowly declining in the years *prior* to the Giuliani administration. This is neither surprising nor inconsistent with evidence that the NYPD played a key role in the dramatic crime reductions of the Giuliani-Bratton era.

The starting point of the New York story of crime reduction most directly linked to the Giuliani administration was the effort to restore order in the subway system. As New Yorkers will recall, by the late 1980s the subway environment was out of control. Despite the virtual elimination of graffiti by 1989,²² conditions were so bad that citizens were abandoning the subway in droves. A quarter of a million passengers a day didn't bother to pay their fare; extortion of money from passengers via aggressive panhandling was the rule of the day; robberies were increasing; and things were worsening fast. The "official" *New York Times* spin on all this was that the problem was homelessness²³—an interpretation supported by homeless advocacy groups and the New York City Civil Liberties Union.²⁴ An initial attempt to restore order was flagging under vitriolic media and legal attacks by advocacy groups, primarily as a result of a lack of police leadership—transit police were simply too busy with "serious crime" to bother with things like disorder and fare evasion. In response, Robert Kiley, then chairman of the board of the Metropolitan Transportation Authority, bypassed the president of the New York Transit Authority and insisted that William Bratton be hired as chief of the Transit Police Department.²⁵

In certain respects, the terms of Bratton's hiring were unusual. Given the root-causes paradigm, chiefs generally were recruited for a variety of reasons: to resolve a scandal; to improve relations with the community, especially with minorities; or to run departments

22. *Id.*

23. *E.g.*, Kirk Johnson, *Officials Debate How to Get Homeless out of Subways*, N.Y. TIMES, Sept. 5, 1988, § 1, at 23 (discussing the sympathetic posture of the Transit Authority toward the necessary removal of homeless people from the subways without violating their civil rights).

24. *Declining Crime Rates*, *supra* note 21, at 1221 (discussing New York Civil Liberties Union's view that the problem "was 'homelessness' and homelessness was not the TPD's [Transit Police Department's] problem").

25. WILLIAM BRATTON & PETER KNOBLER, *TURNAROUND* 140-142 (1998).

more efficiently. Although crime might be mentioned during the search process for a new chief (disorder probably was not), crime reduction was far from the top of the list of expectations. As much as anything, many mayors simply wanted police to stay out of trouble and not rock political or ideological boats. Kiley's expectations of Bratton, however, were different and explicit: regain control over the subway and assure passengers that they were safe. In turn, Bratton had a specific vision of how this could be accomplished. First, he had an idea, a guiding theory of action: Broken Windows. Second, Bratton is an administrative maven. By the time he got to the transit police he had already headed three police departments and viewed himself as a "fixer" of badly run organizations.²⁶

Bratton, however, was out of step with most other police administrators in two ways: first, he believed that police organizations could be turned around very quickly; second, he saw mid-level managers as the key to reforming police departments. Regarding the former, many academics and police chiefs were saying that changing police organizations was a slow and tedious process lasting as long as ten years. For Bratton, this was unacceptable. He wanted and promised results quickly. Regarding mid-level managers, the dominant view in policing was that they, police unions, and civil service rules were the three primary impediments to police improvements. While Bratton may have shared that view of unions and civil service, his view of mid-level managers was exactly the opposite. For him, these managers needed a clear and explicit mandate, measurable objectives, resources to achieve those objectives, and the need to be held strictly accountable for accomplishing them. Within months after Bratton was hired, the transit police restored order. Fare evasion dropped to a fraction of what it had been and robberies steadily declined as well.²⁷ Today, more than 6,000,000 passengers a day ride the subway²⁸ and disorder, fear, and crime are no longer problems.

The reform of policing New York's subway system was the first real test of the Broken Windows hypothesis. It also demonstrated

26. *E.g.*, Clifford Krauss, *Bratton Builds his Image as he Rebuilds the Police*, N.Y. TIMES, Nov. 19, 1994, § 1, at 1 (stating that even Bratton's critics "concede that he has a special ability to innovate and motivate").

27. BRATTON & KNOBLER, *supra* note 25, at 180 (noting that crime statistics since Bratton's two years as commissioner included a 22% decline in felony crime, a 40% decline in robberies, and a 50% reduction in fare evasion).

28. ABOUT NYC TRANSIT, at <http://www.mta.nyc.ny.us/nyct/facts/ffintro.htm> (last visited on Nov. 20, 2000).

that criminal justice organizations could be turned around quickly with proper leadership. By any standard, it was one of the most impressive public policy turnarounds in memory. For good or ill, the turnaround in New York itself eventually overshadowed the changes in the subway.

In many respects, the New York story is a replay of the subway story. Mayor Giuliani inherited a political mandate to reduce crime and, like Kiley, was specific about what he wanted in a police commissioner. An advocate of Broken Windows himself, Giuliani recruited Bratton as commissioner on the basis of his subway success and their shared views: both believed that crime could be reduced, not just a little, but a lot; and swiftly to boot.

What actually happened in the NYPD was far more complicated than what happened in the Transit Police. The size of the NYPD alone was daunting—almost ten times the size of the Transit Police, which, with almost 4000 officers, is among the largest five or six departments in the country. The crime problems were more complex—crime in the subway consists of a relatively narrow set of crimes. Further, the NYPD was a troubled organization. It had been in a muddle for two decades. Preoccupation with corruption had changed how the police department conceived of its business. It came to believe its business was staying out of trouble and responding to crimes after they were committed. Out of fear of corruption, police officers were even forbidden to make arrests for drug deals that went on right under their noses.

Yet Bratton went into the NYPD, as he did the Transit Police Department, with both plans of action and management, and again “called his shots.” He was going to reduce crime; not by the single digits of three or four percent that had characterized recent years, but by double digits.

The plan of action was, of course, more inclusive than just implementation of Broken Windows. Every tactical aspect of policing came under review, from investigations to warrant service. Yet a basic commitment to restoring order in New York remained. As interesting, and ultimately as consequential, was Bratton’s certainty that middle managers were the key to turning around the NYPD. Everything in his Transit experience strengthened this conviction. The question was how to make his approach work in a department with seventy-six precincts. The kind of personal direction that he provided in Transit’s twelve districts was simply impossible in New York’s seventy-six precincts—each of which has a

higher average population²⁹ or more total police officers than most American cities.

The answer that evolved in the NYPD was Compstat, an organizational process in which precinct data and accountability were linked and translated into action.³⁰ The singular achievement of Compstat, one that revolutionized the NYPD, was that it riveted precinct commanders' attention on precinct problems. Prior to Compstat, precinct commanders were preoccupied with two things: what was going on at One Police Plaza (the NYPD's central headquarters), and staying out of trouble. Now their careers rested on knowing their precincts, understanding problems there, and doing something about them. Compstat was the means by which a rigid and highly centralized bureaucracy, in a matter of months, was transformed into a decentralized and highly responsive organization. The speed of organizational change was unprecedented in policing.

The result of these efforts, to use Malcolm Gladwell's phrase, was a "tipping point."³¹ Crime plummeted. Did the economy cause the change? During Bratton's administration, unemployment never went below 8.7%.³² Did the number of youths in the city's population change? No data support this. Did drug use patterns change? Perhaps somewhat, although the evidence is weak.³³ Besides, which came first, changes in drug use patterns or new police activities? One must ignore history and believe in some incredible coincidences to deny police a major portion of the credit for what happened in New York. Kiley first, and then Giuliani and Bratton, called their shots very specifically. Those attributing the

29. New York City's population of 7,430,000 divided by the number of precincts yields an average of approximately 98,000 people per police precinct, just under the threshold of 100,000 that signifies a "large city" in the United States. See DEP'T OF CITY PLANNING, CITY OF N.Y., POPULATION BY RACE AND HISPANIC ORIGIN: NEW YORK CITY AND BOROUGHES 1990 AND 1999 (ESTIMATE), available at <http://www.ci.nyc.ny.us/html/dcp/pdf/9099pop.pdf>; see also Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 637 (1996) (noting that what people call "big city" police departments typically serve 100,000 people or more).

30. See BRATTON & KNOBLER, *supra* note 25, at 233 (explaining the evolution of "the crime meetings" into computer-statistics meetings, or Compstat).

31. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000). Gladwell, a staff writer for *The New Yorker*, examines how major societal changes can often occur without warning and have far-reaching effects.

32. N.Y. CITY POLICE DEP'T, *NEW YORK CITY CRIME CONTROL INDICATORS & STRATEGY ASSESSMENT* 41 (1998) (indicating unemployment statistics for New York City).

33. Clifford Krauss, *Crime Lab: Mystery of New York, The Suddenly Safer City*, N.Y. TIMES, July 23, 1995, at 1.

crime reductions to the economy, etc., simply have no data that support their point of view. Moreover, with the exception of Professor Eli Silverman of John Jay College of Criminal Justice, who studied Compstat in considerable detail,³⁴ no scholars who have written about the crime drops in New York have done research in the police department itself.³⁵

The question remains, however: "Why did crime drop so much in so many locations, virtually simultaneously?"

HOW CAN WE THINK ABOUT WHY PEOPLE STOPPED COMMITTING CRIME IN OTHER CITIES AS WELL?

A broad consensus is emerging among social scientists that three factors drove the outbreak of violence during the 1980s and early 1990s: the post-1985 "crack" epidemic, the proliferation of handguns among youths, and competition among gangs and youths for drug "turf"—competition that was resolved by intimidation and killing.³⁶ At one level, those are entirely plausible explanations: in city after city, the appearance of crack was followed by turf battles, and they were resolved by violence, most often gun-related violence.

But attributing the epidemic of violence to crack, guns, and competition for turf, begs the larger issue. Drugs of one kind or an-

34. ELI B. SILVERMAN, *NYPD BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING* (1999) (attributing much of New York City's crime reduction to those innovations developed by Bratton in 1994).

35. *E.g.*, John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime?*, in *THE CRIME DROP IN AMERICA*, *supra* note 1, at 207-65. Eck and Maguire discuss New York City at great length. They immediately inject ideology into the discussion by presenting New York under the rubric "Zero Tolerance"—a phrase loved by the left as a substitute for Broken Windows because it both smacks of zealotry and suggests blind non-discretionary policing. Never mind that the phrase is absolutely inconsistent with everything that Wilson, Kelling, and Coles ever wrote about Broken Windows. We always have presented order maintenance as a highly discretionary set of activities. Moreover, Bratton has explicitly rejected "Zero Tolerance" as descriptive of his approach (except for dealing with police corruption). Certainly Eck, an accomplished police scholar, is well aware of this. Then, Eck and Maguire proceed by offering critiques of Broken Windows, virtually all of which are non-empirical ideological essays rather than articles that would constitute serious research. (I have no quarrel with ideological essays as long as authors make it clear that they are writing ideological essays—even if they include numbers.) They then move on to Compstat, indicating that while there are plausible reasons to think that Compstat might have had an impact, it probably did not. They draw this conclusion after limiting their analysis to homicides and without ever visiting an NYPD precinct.

36. *E.g.*, Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, in *THE CRIME DROP IN AMERICA*, *supra* note 1, at 1-12 (discussing a myriad of possibilities to explain the reduction of violent crime in America).

other have been around for a long time. An illegal market in drugs has existed during most of the twentieth century.³⁷ Why did illegal marketing turn so violent after 1985? The answer most often given is the proliferation of guns. But guns have been around a long time, too. There have always been ample guns obtainable, whether legally or illegally. If anything, 1980s gun control measures should have made them harder to obtain. True, in prior decades their fire-power may not have been as great, but they were deadly enough. And youths have been with us forever—maybe not as the same share of the population, but still in significant enough numbers to raise havoc if not controlled. What happened to cause parents, neighborhoods, communities, and cities to lose control of their young people? Why, as they had in the past, couldn't communities absorb the guns, drugs, and youth and prevent disorder, crime, and violence? Answering those questions might inform the solution to the riddle of why crime is declining nationally.

Starting during the 1950s and 1960s, three broad trends reduced the capacity of neighborhoods and communities to control themselves and their youth. First, urban renewal, expressway construction, and bussing tore apart neighborhoods, especially inner-city neighborhoods. Second, the institutional controls that traditionally regulated youthful behavior were weakened and undermined in the name of the "rights" of youth, decriminalization, and deinstitutionalization. Finally, criminal justice agencies and police departments abandoned traditional peacekeeping and order maintenance and withdrew into highly centralized facilities and strategies.

Urban renewal and highway construction cut through neighborhoods and communities with little regard for the social consequences. Entire neighborhoods in many areas and fragments of other neighborhoods were bulldozed, either to make room for new "tower block" public housing or expressways. Poor inner-city residents, often African Americans, were displaced into adjacent neighborhoods. Resistance to African Americans moving into white neighborhoods was often fierce, but their advance was inevitable—they had to go someplace. "Blockbusting" and "redlining" followed, reducing property values and opening the way to absentee landlords.

Public housing, rather than providing housing for the working poor—giving them a boost until they could enter the private mar-

37. DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 107 (3d ed. 1999) (discussing the origin of the illegal drug market in New York during the early twentieth century).

ket—became the housing of last resort for the most troubled and troublesome citizens. By the 1980s, such housing became the nurseries in which babies (early-teen mothers) raised babies. Stores and shops abandoned those areas, depriving neighborhoods of the “ownership” that was essential to maintaining control of public spaces. Jane Jacobs predicted all of this as early as 1962 in her classic *The Death and Life of Great American Cities*.³⁸ Gone as well were the convenience and jobs they provided neighborhood residents. And, during the 1960s and 1970s, bussing, whatever the motivations of its advocates, further weakened the bonds of families to neighborhoods. Those who could, moved or sent their children to private schools. As children were withdrawn from the streets on which they once had walked to public schools, their parents’ watchful eyes and presence left as well.

Second, in the name of protecting the “rights” of children and troubled or troublesome populations like the emotionally disturbed against “arbitrary” authority, legislators, courts, and policy-makers weakened the authority of socializing and controlling institutions—not much, but just enough to unsettle things. Whether it was the authority of parents (“You can’t spank me”), teachers (“You can’t make me cover up my ‘school sucks’ slogan on my t-shirt”), the juvenile court (“You can’t stop me from running away”), or psychiatrists (“You can’t make me take medication”), “rights” trumped both responsibility and control. In the past, a teacher’s insistence that a child cover an objectionable slogan was non-negotiable; now, a teacher’s perseverance meant he could be sued. Likewise, incorrigible residents of public housing had their rights: short of committing felonies against their neighbors (and often even this was not enough) these troublesome tenants could not be evicted by housing authorities. Like teachers, housing authorities were so “chilled” by the prospect of long and expensive litigation that they walked away from problems. Like many schools, large public housing projects spun out of control.

The good news was that the vast majority of young persons were relatively unaffected by their “rights revolution”: they obeyed their

38. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 32 (1961).

The first thing to understand is that the public peace—the sidewalk and street peace—of cities is not kept primarily by the police, necessary as police are. It is kept primarily by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves, and enforced by the people themselves. . . . No amount of police can enforce civilization where the normal, casual enforcement of it has broken down.

Id.

parents and were respectful to teachers and authority figures. However, for “wannabes”³⁹ and real predators, newfound rights were made to order. Intimidation, extortion, and “in your face” confrontations were not only to be tolerated, but in the legal lore that was fueled by social “science,” they were elevated to expressions of cultural diversity that should “enrich” their victims. The trouble with this formulation was that although it was a popular notion with intellectual elites and the media, it did not play well in neighborhoods, especially poor and minority neighborhoods. The idea, for example, that prostitution was a “victimless crime” was a cruel joke to inner-city families whose husbands were being hustled in front of their children by scantily clad prostitutes and whose daughters were being propositioned obscenely on their way to high school by cruising “Johns.” To use Norman Podhoretz’s phrase, “tolerating the intolerable” became a civic duty for decent people.⁴⁰

Meanwhile, police and agencies of control such as prosecutors and parole agencies retreated into centralized facilities and strategies. Many in policing, for example, believed that centralizing police and putting them in cars would improve their efficiency and make them more effective. Many accepted the idea that police should intrude into community life as little as possible. They believed: police should deal only with serious crime; youthful offenders should be handled by social workers; drunkenness and other “minor” crimes like prostitution should be decriminalized because they were “victimless.” They believed that because crime is caused by racism, social injustice, and economic inequities, police can do little about crime to begin with except respond to it once it occurs. Regardless, whether driven by the quest for efficiency or adherence to ideology, the outcome was the same: centralizing police and putting them in cars virtually “de-policed” city streets, exacerbating the breakdown of other forms of social control.

In similar fashion, courts and prosecutors moved “downtown” as well. Remote from neighborhoods and communities, they lost any sense of neighborhood priorities. Like police, prosecutors wanted to deal only with “sexy” cases: murder, rape, and robbery. Lost on them and the courts was the reality that entire neighborhoods were the victims of the so-called “victimless” crime. As for probation and parole, offenders became “clients” who reported to officers in

39. Youths who are not really intent on mayhem, but who do enough posturing and “woofing” to intimidate people.

40. Norman Podhoretz, *My New York*, NAT’L REV., June 14, 1999, at 41.

downtown offices. The idea that probation and parole agents should be active in neighborhoods and communities to control their charges both was alien to their operating strategies and obviated by their fear of going into tough neighborhoods. Tom Wolfe caught this pessimistic and jaded attitude just right in his *The Bonfire of the Vanities*.⁴¹

So social scientists have a point when they relate the convergence of crack, guns, and high numbers of youth to the explosion of violence during the late 1980s. They fail to acknowledge, however, that this convergence happened within the context of weakened families, schools, neighborhoods, and other socializing and controlling institutions—most resulting from policies they strongly supported, including urban renewal, decriminalization, deinstitutionalization, bussing, decreased regulation of youth, and the withdrawal of agencies of control—especially police but not limited to them—from neighborhoods and communities. Put concisely, the progressive agenda for cities, so strongly supported and engineered by political and academic liberals during the 1960s and 1970s, overreached itself with a commitment to radical individualism and drained the capacity of neighborhoods and communities to manage youth and those prone to obstreperousness. And by the late 1980s, we lost control of public spaces, especially in poor and immigrant neighborhoods.

Such interpretations are not just coming from the center-right of the political spectrum. Liberals, such as Harold Meyerson, have made very similar observations:

The creation and defense of public space is a distinctly liberal achievement, as is the creation and defense of untrammelled civil liberties. In practice, however, these two values have clashed repeatedly on the sidewalks and streets of America's cities over the past 15 years, as urban poverty and disorder have both grown more virulent. On the whole, urban liberal regimes have tended to defend civil liberties at the expense of public space, just as conservatives have tended to defend market forces at the expense of community stability. (On both the left and right, the individualistic strain in America has been running amok for several decades now.) Liberal urban policy has sent many city dwellers, especially in poorer neighborhoods, scurrying indoors—or to ersatz malls, or the suburbs. It is the center-right

41. TOM WOLFE, *THE BONFIRE OF THE VANITIES* (1988) (presenting a fictional account of how an opportunistic reporter and politician inflame public opinion when the protagonist's vehicle strikes a young African American).

that has risen to the defense of public space in cities, and it is the center-right that is reaping the political reward.⁴²

In many respects, it is not surprising that all of this came to a grinding halt in New York City, especially in the subways. The old saying that “every conservative in New York City was a liberal who had been mugged” may not have been literally true, but it got at the reality that virtually no one could avoid intolerable daily confrontations and intimidation. The result was a growing demand for order that even political loyalty could not suppress. Hence, the election of a center-right politician who was prepared to reject the crime prevention truisms of the past.

But the violence that grew out of the breakdown of community controls affected virtually every city in the United States. And in most, citizens decided: “enough was enough.” Cities moved to restore control over public spaces. In many communities, prosecutors and probation and parole agencies started to create a presence in neighborhoods again. Business Improvement Districts spread nationally. Citizen groups intensified their lobbying and anti-crime efforts. Strong movements developed to find ways to control the aggressive emotionally disturbed, if not with medications, then by institutionalizing them. Housing officials demolished tower-block high rises and built low-density, dispersed public housing, where residents involved in the drug trade were speedily evicted. School officials sought ways to restore order—in some cases reinstating mandatory school uniforms and other signs of discipline and control. Many communities started to return to neighborhood schools. Collaboration among police, criminal justice agencies, other governmental agencies, and the faith community not only formed in city after city, but demonstrated remarkable persistence and effectiveness. Boston was the strongest example⁴³—gang violence was all but eliminated⁴⁴—but examples could be given from cities all

42. Harold Meyerson, *Why Liberalism Fled the City and How it Might Come Back*, AM. PROSPECT, March-April 1998, at 46-52.

43. E.g., David M. Kennedy, *Guns & Violence: Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449, 461 (1997) (discussing the success of the Boston Gun Project Working Group in dramatically reducing gang violence in Boston). The Working Group's strategy focused not only on traditional law enforcement, but also on informing the gang members of the consequences of illegal conduct. *Id.* at 463-64. “The Working Group also hoped that the process of communicating face-to-face with gangs and gang members would undercut any feelings of anonymity and invulnerability they might have, and that a clear demonstration of interagency solidarity would enhance offenders' sense that something new and powerful was happening.” *Id.* at 464.

44. *Id.*

over the country. Courts began to rethink that balance between individual rights and community interests. Police and prosecutors rediscovered the power of city ordinances, zoning, and regulations and applied them to many problems, including drug dealing and crack houses, as well as controlling gangs.⁴⁵ In other words, in every sector, from business to faith institutions, moves were made to undo social policies that had held crime control hostage. Steps were taken to re-strengthen socializing and controlling institutions, increasing their capacity to maintain order and prevent crime. That the configurations of these movements are different in every city should come as no surprise.

So what can I conclude?

CONCLUSION

The criminal justice policies that were derived from “root causes” and its corollaries—decriminalization, deinstitutionalization, and deregulation of youth—have had disastrous consequences. Because crime prevention was equated with solving society’s social problems and reacting to serious crime only after it occurred, the business of criminal justice, criminal justice policy, and practice had no middle ground.⁴⁶ Police, prosecutors, and probation and parole agents ignored minor offenses. Sanctions for minor offenses were limited or non-existent (often, merely fines that went ignored and unpaid). On the other end, however, sanctions for drug dealing and felonies piled up and became more and more extreme—e.g., “three strikes you’re out,” “stiff time,” and “truth in sentencing.” Without the inclination or authority to intervene in minor offenses, police and criminal justice agents (add schools and other socializing institutions as well) sent an alluring but dangerous message to obstreperous youth: “We can’t and won’t control your behavior.” At the margins, a relatively small percentage but a

45. In *City of Chicago v. Morales*, 527 U.S. 41 (1999), the Supreme Court struck down Chicago’s anti-loitering statute on the basis that it was unconstitutionally vague. *Id.* at 64. The Court, however, hinted that a similar provision might be valid “if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members.” *Id.* at 62. In response to the Court’s decision in *Morales*, Chicago enacted a narrower, and specifically anti-gang, statute. CHI., ILL., MUN. CODE § 8-4-015 (rev. 2000).

46. Conservatives as well (especially the far right) were not innocent in this regard—they had their own “macro” approach to explain crime control. For them, crime was caused by the breakdown of family values which, in turn, was linked to welfare. But they did not dominate criminal justice thinking as did liberals. Cf. THE CRIME DROP IN AMERICA, *supra* note 1.

huge number of youth believed this message and blissfully pushed on, inexorably heading towards prolonged incarceration—and in the process terrorizing communities by committing large numbers of both minor and serious offenses. In other words, liberals like to blame conservatives for the disastrously high levels of imprisonment. Yet it was the liberal disinclination to control youth as they explored the boundaries of acceptable behavior that sent the message that anything went, thus sending many youth careening into serious crime and prolonged imprisonment.

To the extent that criminologists and social scientists attribute crime to “macro” causes outside of their control—demography, economics, social injustices—they can comfort themselves about the role they played during the last thirty years. But bad social policies, many of them strongly supported by criminologists and sociologists, got us into the crime mess, and improved policies are getting us out of it.

The issue is not just sorting out responsibility, although it is a first step. Aside from the coming “baby boomerang” now on the horizon,⁴⁷ prisons will be releasing vast numbers of offenders back into neighborhoods and communities. How we think about them and their impact on neighborhoods will influence the crime trajectory in the decades to come. Clearly, they will need the services of the educational, service, and faith communities—many desperately. But controls, as well as services, change and shape behavior. Regardless of whether we are concerned about the arrival of a large cohort of youth or felons returning from prison, we must be willing to make strong statements about the boundaries of behavior, not just at the extremes of felonies, but with minor offenses and obstreperousness as well. To do this we must continue to re-strengthen the ability of families, neighborhoods, schools, and other social institutions to control as well as nourish young people.

47. Fox, *supra* note 9, at 1-5.

WHY CIVIL RIGHTS LAWSUITS DO NOT DETER POLICE MISCONDUCT: THE CONUNDRUM OF INDEMNIFICATION AND A PROPOSED SOLUTION

*Richard Emery and Ilann Margalit Maazel**

In thousands of cases around the country, civil rights plaintiffs successfully sue police officers for violating the Constitution. Yet, day in and day out, police officers make arrests without probable cause, use excessive force, deny arrestees medical treatment, and otherwise violate the Constitution with near impunity. Why don't civil lawsuits deter this reprehensible conduct?

The answer, this essay posits, lies in the conundrum of indemnification.¹

THE CONUNDRUM OF INDEMNIFICATION

New York City represents and indemnifies police officers in the overwhelming majority of civil rights cases.² The city regularly indemnifies police officers regardless of whether they acted intentionally, recklessly, or brutally; whether or not they violated federal or state law; or whether or not they violated the rules and

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1. Although this essay explores the indemnification issue in New York City, many other jurisdictions provide for indemnification of police and other municipal employees. *E.g.*, N.Y. GEN. MUN. LAW § 50-1 (McKinney 1999) (Nassau County indemnification of police officers); *Hennessy v. Robinson*, 985 F. Supp. 283 (N.D.N.Y. 1997) (discussing indemnification in Oneida County); N.Y. PUB. OFF. LAW § 18 (McKinney 1988) (general New York State indemnification statute for public employees).

2. According to Human Rights Watch, "Officers themselves do not have to pay personally in civil lawsuits; the city almost always indemnifies the officer and pays. In the rare case in which the city has not covered the officer, the PBA [Patrolmen's Benevolent Association, a police officers' union] has done so." HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES: NEW YORK: CIVIL LAWSUITS* (1998).

regulations of the New York City Police Department ("NYPD"). Basic political realities explain this practice. Police officers organize in very powerful unions, most notably the Patrolmen's Benevolent Association in New York, which in turn exert pressure on the mayor and the city's lawyer, the "Corporation Counsel,"³ to represent and indemnify the officers. And the mayor, of course, depends on his police force to preserve the low crime rate that remains the perceived crown jewel of this administration.

When the city errs on the side of indemnifying every officer, no one complains. The unions are satisfied—they successfully protect their members. The police officers are satisfied—they avoid personal liability for their wrongdoing. The victims, for the most part, are satisfied—they recover, relatively quickly, from a deep-pocket municipal defendant that, unlike most police officers, can actually pay the judgment or settlement. There is simply no one with a voice in the process with any interest in disturbing the status quo.

Not everyone wins, of course. The taxpayers lose. They pay millions of dollars to fund these judgments and settlements. The community loses, because this system perpetuates and protects police misconduct. And the victims who care more about principle than money lose, because the law gives the city near absolute discretion to defend and pay for police wrongdoing, but little incentive to investigate or discipline officers who violate the law.

COMPENSATION—YES; DETERRENCE—NO

Civil rights plaintiffs bring suit for myriad reasons. Some seek money. Some seek the public vindication of a trial by jury. Some seek punishment for the police officers that assaulted, strip-searched, verbally abused, or falsely arrested them. Still others hope that their cases will deter other officers from future unconstitutional conduct. At the outset of the litigation, most victims of police brutality seek, at different levels, all of the above, with their motives often centering on outrage, punishment, and a desire to effect some systemic change. But, as litigation drags on, their interests often slide toward the unsatisfactory compromise of accepting money from the public for the wrong they suffered. Therefore, the outrage felt by most police abuse victims is best as-

3. "Corporation Counsel" is the popular term used to refer to the New York City Law Department, the agency that acts as the attorney for the mayor, other elected officials, mayoral agencies, and other selected non-mayoral agencies. As used in this essay, it refers always to the Law Department as an institution, and not to its head, Corporation Counsel Michael D. Hess, or any individual staff attorneys.

suaged by criminal prosecution, internal disciplinary action (including termination), better police training and counseling, and civil litigation that actually forces guilty police officers to pay the settlements or judgments against them.

Private lawyers have no power to convene grand juries and indict. For that they rely upon district attorneys, who themselves almost always rely upon law enforcement in their own cases, and who all too often are loathe to take any action against police, except in the most egregious cases.⁴ Nor can private lawyers discipline, dock vacation days, suspend, fire, retrain or counsel police officers. For that they depend on police departments themselves. And police departments—the NYPD included—are notoriously unable or unwilling to discipline, much less fire, police officers.⁵ Finally, training is a palliative and generally inadequate way to prevent future misconduct, and is no match for a police culture of violence.

That leaves civil litigation. Civil litigation is *very* effective at recovering money compensation. The great majority of civil rights suits actively pursued under 42 U.S.C. § 1983 conclude with a settlement for money. When these suits proceed to trial, and plaintiffs win, they receive money—often in substantial amounts.

Civil litigation sometimes—infrequently—achieves the goal of public vindication by jury trial. It is only sometimes effective because most suits settle and never see the inside of the courtroom.⁶ But, plainly, civil litigation is mostly *ineffective* in punishing police officers. No prayer for relief in the civil complaint includes imprisonment, probation, community service, termination, suspension, or discipline of any kind. At worst, civil litigation “punishes” police officers only in the sense that they are forced, under oath, under cross-examination, and in public, to account for their actions. They are forced to confront the victims they falsely arrested, assaulted, or unlawfully strip-searched. Often officers endure grueling depositions by hostile questioners. And if a jury finds for a plaintiff

4. Since 1977, only three City officers have been convicted for on-duty killings. HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES: NEW YORK: CRIMINAL PROSECUTION (1998).

5. In 1996, for example, of 5596 complaints of police misconduct filed with the Civil Complaint Review Board (“CRRB”), 259 were substantiated by the CCRB and only 51 resulted in discipline of any kind for the police officer. N.Y. CIVIL LIBERTIES UNION, SPECIAL REPORT: FIVE YEARS OF CIVILIAN REVIEW: A MANDATE UNFULFILLED JULY 5, 1993-JULY 5, 1998, at tbl.IV (1998).

6. This is because plaintiffs choose to settle, as a result of long delays, or to avoid the inevitable risks of trauma of a trial.

after trial, the officer must face the public humiliation—such as it may be—of knowing that a jury heard his testimony, rejected it, and found that he violated the Constitution.

And if an officer refuses to admit his own wrongdoing, if he lies under oath, he must for all time live with the knowledge that he not only committed the wrong that led to the lawsuit, but that he committed the moral and legal crime of perjury—surely an uncomfortable feeling, at best. However, this punishment is still mild indeed, and of no solace to the victims of police misconduct—especially those who seek to translate their horrible experience into reform of a broken system, and who must helplessly face an officer who lies with impunity to a judge and jury.

As ineffective as civil litigation is in punishing police officers who violate the law, it is even less effective in deterring officers from future unlawful conduct. This is true for one basic reason: police officers *almost never* pay anything out of their own pockets to settle civil lawsuits. Nor do they pay for judgments rendered after jury verdicts for plaintiffs. Police officers are so far removed from the process of settling cases and paying money damages that they often have no idea how much their cases settle for, or even whether they settle at all. We have deposed many officers who had been sued one, two, three times before, yet had no idea how any of those cases were resolved.

Who does pay for police misconduct? The taxpayers do. In the overwhelming majority of civil rights cases of police misconduct in New York State, the taxpayer pays every dollar of the settlement or judgment.⁷ Between 1994 and 1996, for example, New York taxpayers paid approximately seventy million dollars for judgments and settlements arising out of police misconduct, almost two million dollars per month.⁸

THE EXISTING INDEMNIFICATION SCHEME

Taxpayers pay for these judgments because of a series of provisions of the New York General Municipal Law, providing for indemnification and free legal representation of police and other employees of New York City and State. As to New York City employees:

7. *E.g.*, statutes and case cited *supra* note 1.

8. HUMAN RIGHTS WATCH, *supra* note 2. Taxpayers also pay for Corporation Counsel lawyers to defend police officers from civil suits. In 1988, the New York City Law Department established an entire division of lawyers—the Special Federal Litigation Unit—to defend police misconduct cases almost exclusively.

At the request of the employee and upon [the employee's "full cooperation" in the defense of the action and timely notice to the city of the civil action], the city shall provide for the defense of an employee of any agency in any civil action or proceeding in any state or federal court including actions under sections nineteen hundred eighty-one through nineteen hundred eighty-eight of title forty-two of the United States code arising out of any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred.⁹

In addition to free legal representation, the city "shall indemnify and save harmless its employees" from "any judgment" or "any settlement" approved by the city, as long as (1) "the employee was acting within the scope of his public employment and in the discharge of his duties," and (2) the employee "was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained."¹⁰ This is a duty upon the city, not an option. But "the duty to indemnify and save harmless . . . shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee."¹¹

Finally, § 50-k (5) provides that:

In the event that the act or omission upon which the court proceeding against the employee is based was or is also the basis of a disciplinary proceeding by the employee's agency against the employee, representation by the corporation counsel and indemnification by the city *may* be withheld (a) until such disciplinary proceeding has been resolved and (b) unless the resolution of the disciplinary proceeding exonerated the employee as to such act or omission.¹²

Most importantly, nothing in the statute prevents the city from representing and indemnifying police who act intentionally and recklessly to violate a plaintiff's civil rights. Although the city's "duty" to indemnify "shall not arise" in this instance, the city's right or option to indemnify remains. Nor does the statute prevent

9. N.Y. GEN. MUN. LAW § 50-k(2) (McKinney 2000) (emphasis added).

10. *Id.* (emphasis added.) If a New York City police "officer's conduct was in violation of a rule or regulation of the New York City Police Department, the City (through its Corporation Counsel) does not have an obligation to defend the officer under § 50-k(2)." *Schwartz v. City of New York*, 57 F.3d 236, 238 (2d Cir. 1995).

11. N.Y. GEN. MUN. LAW § 50-k(3) (McKinney 2000).

12. *Id.* § 50-k(5) (emphasis added.).

the city from representing and indemnifying officers who violate NYPD rules and regulations, or who are actually disciplined by the NYPD after a disciplinary proceeding.

The indemnification statute "is primarily directed at saving imperfect and, therefore, fallible public employees from the potentially ruinous legal consequences following from unintentional lapses in the daily discharge of their duties."¹³ "[T]he City's obligation to defend its employees from liability for alleged acts or omissions occurring during their work is not limited to those employees who are considered wholly free from fault," and although "negligence is unsatisfactory and worthy of reprimand," no public employee need pay for the consequences of his own negligent conduct.¹⁴ This makes perfect sense. If our society is to encourage public service and attract qualified public servants, public officials cannot face financial ruin for every careless mistake that causes someone damage. Society must bear that cost.

But, as the statute recognizes, reckless and/or intentional wrongdoing is another matter. If a police officer intentionally violates the most basic of civil rights—the right not to be arrested without probable cause, the right not to be subjected to unreasonable or excessive force, the right to some medical treatment if injured while in police custody—why should taxpayers foot the bill? Why shouldn't a police officer pay for his own misconduct, as do lawyers and doctors (through, at a minimum, higher insurance premiums), and, for that matter, criminals?

THE MECHANISMS OF INDEMNIFICATION

The mechanics of representation and indemnification, which are technically distinct acts, are as follows. Under § 50-k, "[t]he Corporation Counsel of the City of New York makes the initial determination as to whether the employee will be indemnified" and represented.¹⁵ These determinations may be reviewed in an Article 78 proceeding in New York State Court.¹⁶ They may also be reviewed by federal courts exercising their supplemental jurisdic-

13. *Blood v. Bd. of Educ.*, 509 N.Y.S.2d 530, 533 (App. Div. 1986) (emphasis added).

14. *Id.* at 533.

15. *Jocks v. Tavernier*, 97 F. Supp. 2d 303, 312 (E.D.N.Y. 2000) (discussing indemnification); *Weitman v. City of New York*, 635 N.Y.S.2d 591, 592 (App. Div. 1995) (discussing representation); *Blood*, 509 N.Y.S.2d at 531 (discussing representation).

16. *Jocks*, 97 F. Supp. 2d at 312; N.Y. C.P.L.R. § 7803(3) (McKinney 1994).

tion¹⁷—the typical (and most sensible) practice where plaintiffs assert § 1983 action against police officers in federal court.¹⁸

The decision by the Corporation Counsel whether to represent the defendant officer “may be set aside only if it lacks a factual basis, i.e., is arbitrary and capricious.”¹⁹ This is not surprising, since the statute provides for free representation where “*the Corporation Counsel* finds [the alleged unlawful act] occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred.”²⁰ Of course, the officer is the only person who ever challenges the Corporation Counsel’s decision, and that is only in the rare instance when the Corporation Counsel withholds representation.

Rather more surprisingly, courts have applied the same arbitrary and capricious standard to the city’s indemnification decision.²¹ This deference finds no support in the statute. In direct contrast to § 50-k(2), § 50-k(3) nowhere refers to decisions by the Corporation Counsel or the city or in any way implies that courts should defer to the city’s indemnification decisions. Nor does the Corporation Counsel have any particular expertise in determining whether officer acted “within the scope” of his employment or whether he acted with “intentional wrongdoing or recklessness.” Even the question as to whether the officer violated an NYPD rule or regu-

17. 28 U.S.C. § 1367 (2000). “[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” *Id.* § 1367(a).

18. *Jocks*, 97 F. Supp. 2d at 312; *Harris v. Rivera*, 921 F. Supp. 1058, 1061 (S.D.N.Y. 1995); *Turk v. McCarthy*, 661 F. Supp. 1526, 1536 (E.D.N.Y. 1987).

19. *Weitman*, 635 N.Y.S.2d at 592 (internal quotation marks omitted); see also *Williams v. City of New York*, 476 N.E.2d 317, 318 (N.Y. 1985) (same); *Blood*, 509 N.Y.S.2d at 531; *Mercurio v. City of New York*, 758 F.2d 862, 864-65 n.1 (2d Cir. 1995) (per curiam).

20. N.Y. GEN. MUN. LAW § 50-k(2) (McKinney 1999) (emphasis added).

21. *Jocks*, 97 F. Supp. 2d at 313 (“Th[e] determination [whether to indemnify], made by Corporation Counsel, may be set aside by this Court if the determination was arbitrary and capricious.”) (internal quotation marks omitted); *Williams*, 476 N.E.2d at 318, (noting that whether the officer acted within the scope of his employment and in the discharge of his duties “and thus was entitled to . . . indemnification by the city [is] to be determined in the first instance by the Corporation Counsel . . . and his determination may be set aside only if it lacks a factual basis, and in that sense, is arbitrary and capricious”). The language in *Williams*, however, is dicta, as *Williams* itself dealt only with the question of whether the officer was entitled to *representation* by the Corporation Counsel.

lation is a purely legal non-technical question, and as easily decided by a court as by the Corporation Counsel. Unlike other “administrative agencies,” which often have expertise in technical fields unfamiliar to judges, the Corporation Counsel has expertise *only* in the law itself—an area in which courts are uniquely qualified. All of the usual rationales for deference to administrative agency decisions are therefore missing here.

As a policy matter, the courts’ deference to the city’s indemnification decisions is unfortunate. The deferential “arbitrary and capricious” standard of review effectively gives the city *carte blanche* to indemnify, or not indemnify, whomever it wants. As a result, indemnification decisions ultimately become a function not of law, but of politics, and except for the rare, highly-publicized, extrajudicial case, or a few cases involving off-duty police not even arguably acting “within the scope” of their employment,²² politics dictate—and very powerful police unions ensure—that the city almost always indemnifies the police.

The first requirement under § 50-k(3), that a police officer be “acting within the scope of his public employment and in the discharge of his duties,” has received unexceptional treatment in the courts. While police officers on-duty almost always act “within the scope,” occasionally, off-duty officers may not.²³

The second requirement—that the officer not be “in violation of any rule or regulation of his agency at the time the alleged damages were sustained,” is somewhat more complicated. At least one court has suggested that the city cannot invoke this clause unless, at a minimum, the city agency pressed departmental charges against the officer.²⁴ In *Blood v. Board of Education*, a schoolteacher who accidentally struck a student in the eye with a bookbag was “reprimand[ed]” and given an “unsatisfactory rating” by the Board of Education.²⁵ The court nevertheless ordered the Corporation Counsel to represent the teacher because, inter alia, “no disciplinary charges were filed” against the teacher “whose teaching career . . . continued uninterrupted,” and therefore no determi-

22. *E.g.*, *Jocks*, 97 F. Supp. 2d 303; *Turk v. McCarthy*, 661 F. Supp. 1526, 1528, 1537 (declaring a shooting by off-duty officer at amusement park not “within the scope”); *Weitman*, 635 N.Y.S.2d at 592 (finding that an off-duty officer on vacation did not act “within the scope”); *Kelly v. City of New York*, 692 F. Supp. 303, 308 (S.D.N.Y. 1988) (asserting that an officer’s misconduct arising from “prior personal dispute” while off-duty was not “within the scope”).

23. *E.g.*, cases cited *infra* note 22.

24. *Blood*, 509 N.Y.S.2d at 533-34.

25. *Id.* at 531.

nation was made that the teacher had violated any Board of Education rule or regulation.²⁶

The First Department repudiated this view just two years ago, when it held that the Corporation Counsel has “authority to make a determination, separate and apart *and in the absence of any determination by . . . the Police Department*, that [an officer] had violated certain Police Department rules and regulations, and is therefore not entitled” to representation by the city.²⁷ The Second Circuit adopted an even broader approach, interpreting § 50-k(2) to permit representation of the officers where the Corporation Counsel “determines that no violation of any rule or regulation of the employing city agency has occurred, *or* if no agency disciplinary proceedings have been commenced against the employee, or if disciplinary proceedings resulted in the exoneration of the employee.”²⁸

Thus, irrespective of whatever disciplinary charges the NYPD may bring, the Corporation Counsel again has effective plenary power to determine whether police officers violated department rules or regulations.

The third requirement, that the officer not act with “intentional wrongdoing or recklessness,” receives next to no discussion in the case law. It is almost never litigated. One principal reason for this may be that, given the Corporation Counsel’s perceived discretion to apply this standard, no police officer could meaningfully challenge the city’s decision not to indemnify on this ground.²⁹

In sum, no law prevents the city from indemnifying police who act intentionally or recklessly, who violate department rules and regulations, or who violate even clearly established constitutional law. The city has effective *carte blanche* to indemnify and represent whomever it wants, given the highly deferential (and highly

26. *Id.* at 531-32.

27. *Bolusi v. City of New York*, 671 N.Y.S.2d 478, 478 (App. Div. 1998) (emphasis added).

28. *Mercurio v. City of New York*, 758 F.2d 862, 864 (2d Cir. 1985) (emphasis added); *Behar v. City of New York*, No. 98 CIV. 2635 (HB), 1999 WL 212685, at *3-4 (S.D.N.Y. Apr. 13, 1999) (discussing that Corporation Counsel’s decision not to represent officers was not “arbitrary and capricious” where there existed pending NYPD disciplinary proceeding against them).

29. In at least one case applying New York State’s largely analogous public officer’s indemnification statute, N.Y. PUB. OFF. LAW § 18 (McKinney 1988), a court held that the city has no obligation to indemnify an officer where the jury awarded punitive damages, “[b]ecause the jury, by awarding punitive damages on each claim, found that [the misconduct] involved intentional wrongdoing or recklessness.” *Coker v. City of Schenectady*, 613 N.Y.S.2d 746, 747 (App. Div. 1994).

suspect) “arbitrary and capricious” standard of review some courts have applied. And given the practical conundrum described in the beginning of this essay, this legal regime ensures indemnification almost all of the time—and hardly deters unconstitutional police misconduct, if at all.

A PROPOSED SOLUTION

What are the solutions here? Given that the city shall not indemnify police who act intentionally or recklessly, or “in violation of any [NYPD] rule or regulation,” and assuming that the city *actually applied* this law, then the city could almost never indemnify any police officer for any § 1983 judgment. Certainly any officer liable for punitive damages, by definition, acts intentionally or recklessly.³⁰ Arguably, any officer liable for assault and battery—by definition intentional acts—acts with “intentional wrongdoing or recklessness.”³¹ And any officer who not only violates the Constitution, but “clearly established” law under the Constitution,³² presumably violates at least some NYPD “rule or regulation.” It is plainly against NYPD rules to arrest someone without probable cause.³³ It plainly violates NYPD rules to use unreasonable or excessive force.³⁴ It plainly violates NYPD rules to exhibit reckless disregard for the life of a prisoner within police custody.³⁵

Applying the law as written, the city therefore could almost never indemnify police officers, and plaintiffs would almost never be compensated. But this result is unsatisfactory. First, given the personal assets of most police officers, plaintiffs would not recover, violating a core purpose of the civil rights laws—to compensate aggrieved plaintiffs. Second, without the prospect of compensation, few victims of unconstitutional conduct would sue in the first in-

30. *Coker*, 613 N.Y.S.2d at 74; *Hartford Accident. & Indem. Co. v. Hempstead*, 397 N.E.2d 737 (N.Y. 1979).

31. *E.g.*, *Masters v. Becker*, 254 N.Y.S.2d 633 (App. Div. 1964); *see generally* RESTATEMENT (SECOND) OF TORTS §§ 21 *et seq.* (1977) (elucidating the elements of assault).

32. “As a general rule, police officers are entitled to qualified immunity,” and therefore are not liable under § 1983, “[i]f (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe that their acts did not violate those rights.” *Oliveira v. Mayer*, 23 F.3d 642, 648 (2d Cir. 1994).

33. NEW YORK CITY POLICE DEPARTMENT PATROL GUIDE § 110-1 (1995).

34. *Id.* § 104-1 (“EXCESSIVE FORCE WILL NOT BE TOLERATED.”) (double emphasis in original).

35. *Id.* § 112-3(2).

stance. And if plaintiffs did not sue, there would be no civil rights judgments or settlements to deter police, indemnification or not.

A better solution compensates *and* deters. That can be achieved by the following: After the jury's verdict as to liability and damages, the judge presiding over the civil rights case should determine what portion of the judgment the city must indemnify. The court's decision should be informed by a number of factors targeted towards deterrence. An officer who is more culpable, who commits intentional wrongdoing, or who acts brutally or with particular disregard for a victim's constitutional rights, or whose behavior could not have been anticipated or controlled by the city, should pay a greater percentage of the judgment. This would provide the greatest deterrent for the most egregious constitutional violations.

The court also should examine the officer's prior disciplinary history. If an officer has a history of misconduct, and received little, no, or inadequate prior discipline from the NYPD, then the city should indemnify a greater part of the judgment. This would put the city on notice that its disciplinary procedures are inadequate, and provide financial incentives to improve them. Conversely, if an officer has a history of police misconduct, and received proper and adequate discipline by the city, then the officer should be required to pay more of the judgment himself. This would reward the city for instituting internal disciplinary measures to deter police misconduct, and deter problem officers from committing misconduct yet again.

Similarly, if the city did not adequately discipline the officer for the misconduct at issue in the instant lawsuit, then the city should be required to indemnify a greater part of the judgment. And if an officer was properly disciplined by the city for the misconduct at issue in the lawsuit, then the officer would be required to pay more of the judgment himself. This again encourages the city to mete out appropriate discipline to officers who violate the law.

Another factor for the court to consider is the defendant officer's ability to pay the judgment. It neither deters police officers, nor benefits plaintiffs, to saddle an officer with a huge judgment that can never be paid. The less of the judgment an officer can afford to pay, the more the city should indemnify the officer, irrespective of the relative culpability of the officer and the city.

Finally, prevailing plaintiffs should always be compensated. Notwithstanding the above factors, it should be the rare case (if any) where the city will not indemnify a police officer at all. To guarantee real compensation, the city must pay at least some portion of

the judgment. Compensation is not only a central purpose of the civil rights laws; it induces plaintiffs to bring the very lawsuits that deter (or should deter) the police from committing unconstitutional conduct in the first instance. If, for example, a plaintiff were the subject of particularly brutal and outrageous misconduct,³⁶ resulting in the NYPD's termination of the perpetrating officer, the above factors (the horrible nature of the misconduct and the NYPD's appropriate disciplinary response) would otherwise counsel against indemnification. This would be unfair and cruelly ironic—since the severe nature of the police misconduct caused the plaintiff unusually severe damage. This final factor—the plaintiff's right to actual compensation—would help prevent such an unfair and unintended result. In addition, a legislative presumption favoring the city's indemnification of at least fifty percent of the judgment would all but ensure that plaintiffs are fairly compensated.

Finally, the indemnification scheme should apply whether or not the police officer acted "within the scope of his public employment," provided that the officer acted "under color of state law." An off-duty officer shoots with an NYPD gun. An off-duty officer is able to arrest someone because he is an NYPD police officer. It would be shocking if the NYPD failed to discipline a police officer for egregious misconduct committed under color of state law, even if the officer did not act "within the scope of his public employment." Since the civil rights laws themselves prohibit unconstitutional conduct committed "under color" of state law, the indemnification statute should be calculated to deter the same.³⁷

This entire indemnification scheme should be written into the municipal law itself. Such a law, passed by the New York State Legislature, would not implicate issues of either comity or federal-

36. *United States v. Volpe*, 78 F. Supp. 2d 76 (E.D.N.Y. 1999), *aff'd in part, dismissed in part*, 224 F.3d 72 (2d Cir. 2000); N.Y. CIVIL LIBERTIES UNION, DEFLECTING BLAME: THE DISSENTING REPORT OF MAYOR RUDOLPH W. GIULIANI'S TASK FORCE ON POLICE/COMMUNITY RELATIONS (March 1998), available at <http://www.nyclu.org/blame1.html>.

37. We propose leaving § 50-k(2), concerning representation of officers by Corporation Counsel, as is. In addition, § 50-k(3), as it applies to settlements, would remain unchanged under this proposal. It is simply too complicated and burdensome for a court to make indemnification decisions where no evidence has been taken, no trial conducted, and no determination of liability made by a jury. In order to apply the above multi-factor test to settled cases, courts would have to hold hearings and hear evidence concerning all of these factors—the officer's level of culpability, his intent, his disciplinary record, etc. This would be costly for all parties and would unnecessarily discourage settlement. In any event, if a police officer is to pay a portion of a settlement, that can be part of the settlement negotiation between the parties.

ism.³⁸ And, as now, this state indemnification statute would apply wherever the civil rights suit were brought—whether in state court, or (pursuant to its supplemental jurisdiction) in federal court.

Such an indemnification scheme has many immediate advantages. It places the indemnification decision in the hands of courts, not the municipality itself, ostensibly removing political pressure from the indemnification decision.³⁹ Most importantly, such a law would say loudly and clearly to every officer: “You are not insured; you have no security that your misconduct will cost you nothing.” With the indemnification decision in the hands of courts, not city lawyers, no officer could be at all sure that the city and the taxpayer will foot the entire bill for violations of clearly established constitutional law. That decision would be made—after the evidence is presented, after trial, and after the jury’s verdict—by a fair and neutral arbiter. Deprived of near absolute impunity from the financial consequences of their unconstitutional acts, police officers will, finally, be and feel accountable for their conduct in some tangible way.

Finally, such an indemnification scheme would provide police officers and the city direct incentives to deter future police misconduct. It would encourage the city to discipline officers when officers should be disciplined. It would punish the city for failing to do so. And it would impose greater penalties for more serious misconduct and for repeat offenders.

We therefore propose that, although § 50-k(3) remain unchanged as to indemnification of settlements, the following paragraphs concerning the city’s indemnification of judgments against police officers be added:⁴⁰

A court will determine to what extent the City must indemnify and save harmless any of its employees employed by the New York City Police Department in the amount of any judgment obtained against such employees in any state or federal court, provided the act or omission from which such judgment arose occurred while the employee was acting under color of state law. The court’s decision shall be determined according to the following eight factors:

38. If a *federal* indemnification statute were enacted instead, the specter of a federal judge making indemnification decisions for municipalities—which are arms of the states—could well pose such problems.

39. To the extent, of course, that judges are not influenced by political considerations.

40. This essay takes no position as to indemnification of other city employees.

- (1) the culpability of the officer and seriousness of the officer's conduct from which the judgment arose;
- (2) whether the officer committed intentional wrongdoing;
- (3) whether the officer has a history of misconduct;
- (4) whether the City imposed inappropriate and/or inadequate discipline for the officer's prior misconduct;
- (5) whether the City imposed inappropriate and/or inadequate discipline for the officer's conduct from which the judgment arose;
- (6) the plaintiff's or plaintiffs' interest in receiving actual and adequate compensation;
- (7) the officer's financial ability to pay the judgment; and
- (8) the interests of justice in the particular case before the court.

The greater the culpability of the officer and seriousness of the conduct, the more intentional the wrongdoing, and the more extensive the officer's history of misconduct, the less shall the City indemnify the officer. Conversely, to the extent the City imposed inappropriate and/or inadequate discipline for the officer's prior misconduct, and to the extent the City imposed inappropriate and/or inadequate discipline for the misconduct that led to the judgment, the more shall the City indemnify the officer. In applying factors six and seven, the court shall also ensure that the plaintiff(s) always receives adequate and actual compensation.

In addition, and notwithstanding the above factors, in order to ensure that the plaintiff(s) receives adequate compensation, there shall be a rebuttable presumption that the City shall indemnify greater than fifty-percent of the judgment.

CONCLUSION

The complex interplay between an indemnification statute that puts the cost of police misconduct on taxpayers, political pressure by powerful police unions, and plaintiffs' (and plaintiffs lawyers') desire for the municipal deep pocket, conspire to strip the civil rights laws of any meaningful deterrent effect. Until the above-proposed or some similar measure is put into place, § 1983 will benefit only the civil rights bar and those few victims of unconstitutional conduct brave enough to sue the NYPD. But if and when such a measure is enacted, the civil rights laws may better serve their core purpose: preventing unconstitutional conduct from occurring at all.

HOW DO WE REDUCE CRIME AND PRESERVE HUMAN DECENCY? THE ROLE OF LEADERSHIP IN POLICING FOR A DEMOCRATIC SOCIETY

*Benjamin B. Tucker**

INTRODUCTION

The issue of crime reduction and prevention has been on the social, political, and economic agenda of modern America for more than a century.¹ During the final quarter of the twentieth century, a new cadre of well-educated and forward-thinking police leaders implemented innovative approaches to crime and other problems affecting the quality of life in communities across the country and sparked a revolution of sorts in policing strategy. We enter the new millennium having witnessed record and sustained reductions in serious crime and significant progress toward reinventing our police departments through a ground swell of innovation in policing centered on community-policing theories.

True progress, however, is in the eye of the beholder. Many in minority communities would question just how far we have come. During the last decade, this country experienced startling and disturbing displays of police brutality and corruption.² These incidents of misconduct have prompted vigorous inquiry into policing

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1. For example, Theodore Roosevelt, faced with slums, a rising crime rate, and a corrupt police force, "brought a reforming zeal to the New York City Police Commission in 1895 and set the standard for the modern NYPD." POLICE DEP'T OF THE CITY OF N.Y., WHO WE ARE, at <http://ci.nyc.ny.us/html/whoweare.html>.

2. Consider, for example, the cases of Abner Louima, Amadou Diallo, and Patrick Dorismond. *E.g.*, Editorial, *New York's Police Commissioner*, N.Y. TIMES, Aug. 10, 2000, at A20 (discussing how the police torture of Abner Louima and the shootings of two unarmed black men, Amadou Diallo and Patrick Dorismond, "raised questions about training, reporting of violations and the expansion of independent street crime units . . .").

practices across the United States. The United States Commission on Civil Rights has investigated whether the New York City Police Department is engaging in “a pattern or practice of conduct . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”³ According to some commentators:

Unquestionably, policing in the United States is under extensive criticism today. Its credibility is under major attack and nearly every month another incident involving excessive force or corruption receives national coverage. The excessive force incidents have been particularly damaging to the image and reputation of law enforcement in this free and democratic society.⁴

Allegations of racial profiling, perjury by police officials, and other patterns and practices suggestive of police misconduct reveal the grim reality that our society remains in crisis with respect to police-community relations. All of this threatens to undermine the “progressive changes that have taken place . . . dealing with [the] structure and function [of police organizations,] . . . technological advances, and those involved with the recent emphasis on integrity and ethics.”⁵ Indeed, strained relations between the police and minority communities have historically been among the most well-documented and difficult urban problems to solve. The problem has been especially acute in the relationship between the police and the African American community, and more recently has manifested itself in similar ways between the police and the Hispanic community.

3. 42 U.S.C. § 14141 (2000). The United States Commission on Civil Rights, originally created under the Civil Rights Act of 1957, is an independent, bipartisan fact-finding agency of the Executive Branch. For information on the Commission, see <http://www.usccr.gov/index.html>. The Civil Rights Act of 1983 established a new Commission. *Id.* In August 2000, the Commission released a report entitled *Police Practices and Civil Rights in New York City* based on a May 26, 1999 hearing on the impact of police practices on civil rights in the community. Letter from Mary Frances Berry, Chairperson, United States Commission on Civil Rights, to The President, The President of the Senate, and the Speaker of the House of Representatives, <http://www.usccr.gov/nypolprc/tran.htm>. The Commission expressed “a strong interest in studying the methods used by the city to balance crime fighting with the exercise of appropriate restraint, particularly following the highly publicized tragedies involving Abner Louima and Amadou Diallo.” *Id.* For a response by the New York City Police Department, see *N.Y.P.D. Response to the Draft Report of the United States Commission on Civil Rights—Police Practices and Civil Rights in New York City*, available at <http://www.ci.nyc.ny.us/html/nypd/pdf/dclm/execsumm.pdf>.

4. CLEMENS BARTOLLAS & LARRY D. HAHN, *POLICING IN AMERICA* 341 (1999).

5. *Id.*

Significant data exist regarding citizens' attitudes toward police. Although the findings have been consistent, they have not been favorable. Analyzing public opinion polls conducted since the 1960s, Tuch and Weitzer found that well publicized incidents of police brutality temporarily lead to lessened support for police on both a local and national level.⁶ Although both blacks' and whites' views are affected, blacks' support of the police is more likely to erode; and "well publicized brutality incidents have greater longevity for blacks and Latinos than for whites."⁷ Others have shown that significant differences exist in the attitudes toward the police of various racial and ethnic groups. For example, Samuel Walker, analyzing Bureau of Justice statistics, notes that while 22% of African Americans had "very little or no confidence in the police," only 9% of whites agreed.⁸ Polls focusing on Hispanics as a distinct group have determined that their views "fall somewhere between those of whites and African Americans."⁹ In September 2000, a survey of city residents, commissioned by the New York City Council, offered further insight into "the city's paradoxical relationship with its police force"¹⁰ The poll revealed:

[T]hat residents unequivocally appreciate the department's role in rolling back crime but are suspicious of its tactics, its attitudes and its commitment to disciplining brutal or corrupt officers. The poll also found that the department had significantly greater support from white residents than from blacks or Hispanics, many of whom reported being afraid or concerned when approached by the police.¹¹

By almost any measure, people of color feel a lack of trust in and respect for, as well as a high level of fear of, the police. One need only recall the string of high-profile cases involving police encounters with blacks and Hispanics resulting in death or serious injury to the citizens.¹² These incidents eroded the general public's confidence in the police, while specifically raising the level of tension in police-minority community contacts. At the same time, the

6. Steven A. Tuch & Ronald Weitzer, *Racial Differences in Attitudes Toward the Police*, 61 PUB. OPINION Q. 642, 647-48 (1997).

7. *Id.*

8. SAMUEL WALKER, *THE POLICE IN AMERICA: AN INTRODUCTION* 215 (3d ed. 1999) (citing BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 1995, at 133 (1996)).

9. *Id.*

10. C. J. Chivers, *Approval and Wariness in Poll on Police*, N.Y. TIMES, Sept. 15, 2000, at B9.

11. *Id.*

12. *See supra* note 2.

police feel that they are often under-appreciated by the community and that any public scrutiny of their actions is undeserved. These conditions do not bode well for the future of police-community relations in our country.

However, without greatly improved police-community relations, the significant reductions in crime we have achieved, especially those gains driven by community-policing strategies, will not be sustained. Continuing to institutionalize police department reforms and successful policing strategies, and strengthening police-community relations, will require innovative and sustained police and political leadership.

WHAT HISTORY HAS TAUGHT US

Little more than thirty years have passed since I joined the ranks of the New York City Police Department. The Knapp Commission was about to begin its investigation into police corruption, sparked by allegations made by police officer Frank Serpico, who broke the "blue wall of silence."¹³ Crime was on the rise and would reach record highs before finally leveling off almost twenty years later.

It was November 1969, and a year before, the Omnibus Crime Control and Safe Streets Act of 1968¹⁴ was passed by Congress to address the rise in crime. Among its formidable contributions, the Act established the Law Enforcement Assistance Administration ("LEAA"). LEAA was charged with implementing a comprehensive program of aid to state and local criminal justice agencies, with a particular emphasis on street crime and riot control. In 1973, a report published by the American Bar Association, *Standards Relating to the Urban Police Function*, offered further insights into the complex role of police in our society.¹⁵ It noted "that police officers were primarily peacekeepers rather than crime fighters: They spent most of their time maintaining order rather than fighting crime."¹⁶ From that point forward, the face of policing in our urban centers, and to a lesser extent in other areas of the country, would change forever.

13. WHITMAN KNAPP, KNAPP COMMISSION REPORT ON POLICE CORRUPTION (1972).

14. Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered section of 18 U.S.C. and 42 U.S.C.).

15. WALKER, *supra* note 8, at 35-36 (citing AM. BAR ASS'N, STANDARDS RELATING TO THE URBAN POLICE FUNCTION (2d ed. 1980)).

16. *Id.*

This transformation was driven by recommendations from appointed bodies such as the President's Commission on Law Enforcement and Administration of Justice, and its report, *The Challenge of Crime in a Free Society*,¹⁷ as well as the National Advisory Commission on Civil Disorders, and its "Kerner Commission" report¹⁸ and the National Commission on the Causes and Prevention of Violence.¹⁹ These reports highlighted problems with the way police departments were run and the manner in which they carried out policing functions. The reports noted, among other things, that the police had "[p]aid too little attention to effective organization[; g]iven inadequate attention to community issues and concerns[; n]ot seriously considered preventive or less coercive strategies to deal with civil disorder and[; n]ot explored alternative strategies to deal with violence."²⁰ Moreover, they suggested that police needed to affect changes in "[t]he quality of police personnel[; t]he quality of officer preparation and training[; t]he management structure within law enforcement agencies[; h]ow the police relate to the community[; h]ow the police deliver services to the community and[; h]ow the police define their responsibilities."²¹

In response to these criticisms, some police administrators and managers began to look for solutions to problems and answers to questions that now challenged their traditional policing practices. Motivated to meet the challenge and further driven by the anti-crime initiatives of the Johnson, Nixon, and Ford administrations—and supported by significant federal funding from LEAA—police

17. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, U.S. DEP'T OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

18. NAT'L. ADVISORY COMM'N ON CIVIL DISORDER, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* (1968). The Commission is popularly known as the "Kerner Commission," named after its Chair, Governor Otto Kerner.

19. DAVID L. CARTER & LOUIS RADELET, *THE POLICE AND THE COMMUNITY* 55 (6th ed. 1999) (citing NAT'L COMM'N ON CAUSES AND PREVENTION OF VIOLENCE, *LAW AND ORDER RECONSIDERED* 292 (1969) [hereinafter CARTER & RADELET],

[There] is an evident inability of the police, as presently organized, manned [sic] financed, equipped, and led, to meet effectively any of the demands and expectations placed on them by the public. These inadequacies are evidenced in their inability to prevent a crime; their declining record in solving crimes known to them; their sluggish response to and indifferent investigation of all but major crimes or those involving important persons, businesses or institutions. Particularly evident is the inability to deal effectively with crime in minority-populated ghettos for reasons, which involve [considering] minority group attitudes and non-cooperation as important as police attitudes, facilities, and efficiency.

Id.

20. CARTER & RADELET, *supra* note 19, at 55.

21. *Id.* at 55.

leaders began to implement changes. Thus, in the 1970s and 1980s, police departments in a number of large²² and small cities²³ began to experiment with new ways of providing police services and fighting crime.

Research flourished and played a critical role in helping law enforcement officers test traditional assumptions about police operations, organization, management, and deployment. Findings from key studies including the *Kansas City Preventive Patrol Experiment* (1974),²⁴ the *Kansas City Response Time Experiment* (1976),²⁵ the *Newark Foot Patrol Experiment*,²⁶ and the *Newport News Problem-Oriented Policing* studies in the 1980s²⁷ were all extremely useful to law enforcement officials.

But perhaps the most important driving force behind effective change and the improvement of management, administration, and operations in policing has been the leadership of more progressive police administrators who understood the importance and value of exploring new crime-prevention and crime-fighting strategies. In addition to funding provided by the federal government, these police chiefs and command staff received financial support for these reform efforts from such professional organizations as the Police

22. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 637 (1996) (noting that what people call "big city" police departments typically serve 100,000 people or more).

23. Lewis D. Solomon, *Local Currency: A Legal And Policy Analysis*, 5 KAN. J.L. & PUB. POL'Y 59, 71 (1996) ("[S]mall cities (in the range of 50,000 - 100,000) typically outperform larger ones in a number of social variables, including crime, health, mental illness, recreation, education, and higher participation in cultural matters.").

24. CARTER & RADELET, *supra* note 19, at 87 (citing GEORGE L. KELLING ET AL., *THE KANSAS CITY PREVENTIVE EXPERIMENT: TECHNICAL REPORT* (1974)).

25. CARTER & RADELET, *supra* note 19, at 87 (citing KANSAS CITY, MISSOURI POLICE DEP'T., *RESPONSE TIME ANALYSIS: EXECUTIVE SUMMARY* (1977)).

26. CARTER & RADALET, *supra* note 19, at 88 (citing GEORGE L. KELLING, POLICE FOUNDATION, *THE NEWARK FOOT PATROL EXPERIMENT* (1981)).

27. CARTER & RADALET, *supra* note 19, at 88 (citing JOHN ECK & WILLIAM SPELMAN ET AL., *PROBLEM SOLVING: PROBLEM ORIENTED POLICING IN NEWPORT NEWS* (1987)).

Foundation,²⁸ the Police Executive Research Forum,²⁹ and the International Association of Chiefs of Police.³⁰

The "reform period" in policing,³¹ which began in the 1930s, had clearly stagnated as we entered the 1970s. However, the 1970s marked a rebirth of reform and a transition to a more community-based mode of operation. Many felt significant excitement and high expectations about the future of policing because of this transition.

CHANGE FOR THE BETTER

Over the next thirty years, law enforcement would undergo great progress and development on several levels within the policing profession. The composition and practices of police departments would begin to change.

A. Racial Diversity of Police Departments Increases

Civil rights advocates, who had long expressed concern over the limited representation of minorities in urban police departments, would witness positive shifts in the racial composition of police departments. By 1993, the majority of officers in Detroit, Washington, D.C., and Atlanta were African American.³² By the same time

28. The Police Foundation was established in 1970 with assistance from the Ford Foundation. From 1970 through 1990, the Police Foundation sponsored what would be some of the most significant police research in the history of policing in this country. *E.g.*, CMTY. POLICING CONSORTIUM, ABOUT THE CONSORTIUM, at <http://www.communitypolicing.org/about1.html> (last visited Nov. 24, 2000).

29. The Police Executive Research Forum ("PERF") is a national organization of police executives representing larger jurisdictions. Its mission is to improve the professional quality of police services through the use of research and development. PERF is based in Washington, D.C. *Id.*

30. The International Association of Chiefs of Police is a professional organization of top law enforcement executives from the United States and abroad. It facilitates "the exchange of information among police administrators [and promotes] the highest standards of performance and conduct within the police profession." *Id.*

31. The "reform period" refers to the period in American policing which marked the efforts of police administrators to move away from police corruption towards the professionalization of policing. It was prompted by the findings and recommendations of the National Commission on Law Observance and Enforcement, also known as the Wickersham Commission. REPORT OF THE NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT RELATIVE TO THE FACTS AS TO THE ENFORCEMENT, THE BENEFITS, AND THE ABUSES UNDER THE PROHIBITION LAWS, BOTH BEFORE AND SINCE THE ADOPTION OF THE EIGHTEENTH AMENDMENT TO THE CONSTITUTION, ENFORCEMENT OF THE PROHIBITION LAWS IN THE UNITED STATES, H.R. Doc No. 722 (3d Sess. 1931) (discussing the abuses arising from the enforcement of Prohibition laws). Police administrators placed strong emphasis on training and focused on making the police more efficient in their crime fighting efforts.

32. WALKER, *supra* note 8, at 37.

in Miami, 47.7% of the police force was Hispanic, while African Americans constituted 17.4% of that force.³³ Furthermore, African Americans moved into important leadership roles as police chiefs in cities such as New York City, Los Angeles, Atlanta, Chicago, and Houston.³⁴

B. Women Rise Through the Ranks

Women, who were historically underrepresented in policing, increased their numbers in police departments due to the passage of the 1964 Civil Rights Act, which prohibited employment discrimination on the basis of sex.³⁵ Today, women represent about 13% of police officers in big city departments.³⁶ Female officers are now assigned the same duties as male officers, including routine patrol duties. Additionally, departments have tried to eliminate many of the barriers to recruiting women,³⁷ and as a result, women have risen to the highest levels of policing. For example, a former student of mine, a recruit in the New York City Police Academy class of 1979, is now an assistant chief and former patrol borough commander in the Bronx. I like to think that, in some small way, she and her fellow recruits were influenced during their careers by my insistence that the police officer's role is not simply to enforce the letter of the law, but to temper application of the law with common sense, respect, and consideration for the people he or she serves.

C. Training Improves

Police training has advanced, with entry-level training growing from 300 hours in the 1960s to more than 1000 hours in many departments by the 1990s.³⁸ At the same time, many departments have instituted field training as an adjunct to their traditional academy training, offering practical, hands-on guidance by experienced officers to new recruits.³⁹

Of critical importance, new policies and procedures were instituted to check police behavior on the street. Police departments developed standard operating procedures to shape and control the exercise of police discretion. This policy shift was prompted by an

33. *Id.*

34. *Id.*

35. Civil Rights Act of 1964, 42 U.S.C. § 20003-2(a) (1999) (enacted July 2, 1964).

36. WALKER, *supra* note 8, at 37 (citing SUSAN E. MARTIN, *THE POLICE FOUND., WOMEN ON THE MOVE: THE STATUS OF WOMEN IN POLICING* (1990)).

37. WALKER, *supra* note 8, at 37.

38. *Id.*

39. *Id.*

increase in lawsuits and driven significantly by Supreme Court decisions on such police practices as search and seizure⁴⁰ and interrogations,⁴¹ but also by protests from the minority community concerning police misconduct, particularly the use of deadly force.⁴² For example, an innovative policy instituted in 1972 by the New York City Police Department reduced firearms discharges by officers by 30%, a significant decrease in the use of deadly force.⁴³ Over the next decade, as police departments in other cities adopted similar policies, the national rate of citizens shot and killed by police decreased by 50%.⁴⁴

D. Overcoming Institutional Resistance to Change

However, police unions made strides as well, and “by the 1970s . . . had established themselves as a powerful force in American policing.”⁴⁵ Many officers felt “angry and alienated over Supreme Court rulings, criticisms by civil rights groups, poor salaries and benefits, and arbitrary disciplinary practices by police chiefs.”⁴⁶ Unions secured salary and benefits increases for officers and won grievance procedures to protect officers’ rights during disciplinary

40. *E.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* confirmed that courts must guard against harassing behavior that violates Fourth Amendment protections against unreasonable search and seizure, and that, whenever practical, police must obtain prior judicial approval of searches and seizures through the warrant procedure. *Id.* at 15-21. However, *Terry* also permits police, when using proper procedure, to conduct limited searches of suspects’ outer clothing as a means of discovering if the suspect has weapons that might be used to assault the officer. *Id.* at 27, 30.

41. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that statements obtained from defendants during incommunicado interrogation in police-dominated atmosphere, without full warning of constitutional rights, were presumptively compelled and therefore inadmissible as having been obtained in violation of Fifth Amendment privilege against self-incrimination). *Miranda* also indicated what law enforcement could do to overcome this presumption of coercion: the giving and conscientious heeding of a set of four warnings. *Id.* at 467-72. Although Congress challenged *Miranda* by establishing voluntariness as the touchstone of the admissibility of confessions in federal court, 18 U.S.C. § 3501 (2000), *Miranda* was recently upheld by *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that *Miranda* announced a constitutional decision of the Court that Congress could not supersede by statute).

42. Former New York City Police Officer James J. Fyfe’s research made particularly noteworthy progress with respect to the use of deadly force. *See, e.g.*, JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993); James J. Fyfe, *Who Shoots?—A Look at Officer, Race and Police Shooting*, 9 J. POLICE SCI. & ADMIN. 367 (1981).

43. WALKER, *supra* note 8, at 38 (citing James J. Fyfe, *Administrative Interventions on Police Shooting Discretion: An Empirical Analysis*, 7 J. CRIM. JUST. 309 (1979)).

44. WALKER, *supra* note 8, at 38.

45. *Id.* (citing HERVEY A. JURIS & PETER FEUILLE, *POLICE UNIONS* (1973)).

46. WALKER, *supra* note 8, at 38.

hearings.⁴⁷ These unions, with their new power within the profession, made police reformers uneasy because unions tended to “resist innovations and [become] particularly hostile to attempts to improve police-community relations.”⁴⁸

Notwithstanding their growing influence and enormous impact on police administration, police unions did not fare well in their battle to avoid the onset of the citizen review process.

E. Citizen Review

Civil rights groups favored citizen review of police actions in order to address concerns “that minority citizens were the victims of systemic police abuse and that police departments did not investigate complaints or discipline officers.”⁴⁹

While serving as assistant director of the New York City Police Department Civilian Complaint Review Board (“CCRB”), I had the opportunity to witness personally the Patrolmen’s Benevolent Association’s (“PBA”) opposition to change. I had been appointed by then Police Commissioner Robert J. McGuire, on the eve of the first in a series of congressional hearings, examining charges of police brutality.⁵⁰ For the next three-and-one-half years, working as principal deputy to Charles J. Adams, the executive director, I helped to revise management practices and policies, and to strengthen the investigations process. We met strong opposition from the PBA even though we kept its leadership informed of prospective changes in board policy that had an impact on their members. On more than one occasion, we prevailed in our efforts to exercise our management prerogative to implement policies, such as making available to precinct commanding officers the CCRB records of certain officers under their command for whom they were accountable. Although the establishment of citizen oversight of police practices was slow, it grew steadily through the 1970s and 1980s, and by the 1990s, a citizen review process existed in many of our big cities.

47. *Id.*

48. WALKER, *supra* note 8, at 38.

49. *Id.* at 39.

50. Representative John Conyers Jr., then chair of the House Subcommittee on Criminal Justice, conducted hearings on police brutality in New York in November 1983. *E.g.*, Sam Roberts, *Koch Defends Police at Hearing on Brutality*, N.Y. TIMES, Nov. 29, 1983, at A1.

A CRITICAL INNOVATION: THE RISE OF COMMUNITY POLICING

The rise of community-policing strategies in the last two decades of the twentieth century is the most important and promising new development in policing for a democratic society. There is little doubt that by the 1980s, the police profession found itself adrift. It was still reeling from the cumulative effects of the 1960s: the civil rights movement; the assassinations of President John F. Kennedy, Dr. Martin Luther King, and Senator Robert F. Kennedy; riots in inner-city communities across the country; protests against the Vietnam War; and landmark Supreme Court decisions redefining police policy and procedures. This period of social upheaval was followed by the 1970s, during which research findings such as the *Kansas City Preventive Patrol Experiment*⁵¹ shattered the long standing assumption that random police patrols deterred crime. Policing had become "an occupation in search of a [new] strategy."⁵²

By the 1980s, that strategy had arrived in the form of community policing. The community-policing philosophy is grounded in the thesis that officers who shed their traditional crime-fighter role, and work more closely with neighborhood citizens to develop programs and strategies to solve problems, can more effectively address crime and related issues affecting the community. Hence, community partnership and problem solving took center stage as the new core strategy.

Solid empirical support for community policing is found in the seminal article, *The Police and Neighborhood Safety: Broken Windows*.⁵³ Authors James Q. Wilson and George L. Kelling explained that foot patrol had only limited deterrent effect on crime.⁵⁴ The research also suggested that police could not fight crime by themselves but were very dependent upon citizens for information.⁵⁵ Furthermore, police could reduce fear by concentrating on less serious quality of life problems.⁵⁶ The nearly universal acceptance of this theory in academia set the stage for police chiefs, elected offi-

51. COMMUNITY POLICING: CLASSICAL READINGS 49 (Willard Oliver, ed. 2000).

52. George L. Kelling, *Forward* to COMMUNITY POLICING: CLASSICAL READINGS, at ix (Willard Oliver, ed. 2000).

53. James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29-38.

54. *Id.* at 29.

55. *Id.* at 34-35 (describing situations in which citizens pass along information about neighborhood crimes to officers engaged in community policing).

56. *Id.* at 32-33 (describing the effect of disorder in the streets on the community's fear of crime).

cials, and community leaders to act, implementing community policing strategies that appeared to offer meaningful solutions to endemic problems and concerns that had previously seemed insurmountable.

From the perspective of police leaders, the "Broken Windows" rationale is clearly rooted in the lessons of the past quarter century. Changes in demographics and strains on limited police budgets in the face of increasing violence and drug use in neighborhoods were a major inducement for government and citizens alike to share the responsibility for keeping communities safe. As a driver of change, community policing shared the spotlight with Herman Goldstein's concept of "Problem Oriented Policing," which asserts that instead of treating crime and disorder as general categories, the police should identify and focus on specific problems such as chronic alcoholics in the neighborhood, or abandoned buildings that served as drug houses.⁵⁷

A number of police departments around the country embraced community policing and set about testing various strategies based on the theory. Each of them adopted the spirit and tenor of the philosophy, yet explored its own way of assessing problems and implementing solutions. By the late 1980s, community-based policing had caught on and was generating a renewed confidence throughout the profession. George Kelling correctly argued that "a quiet revolution is reshaping American policing."⁵⁸ Indeed, a new era had begun. What Kelling termed a "quiet revolution" soon counted among its revolutionaries law enforcement officials from departments in the smallest villages and the largest of big cities. In addition, the five principal professional police organizations—the International Association of Chiefs of Police ("IACP"), the National Organization of Black Law Enforcement Executives ("NOBLE"), the National Sheriffs Association ("NSA"), the Police Executive Research Forum ("PERF"), and the Police Foundation—also saw the potential of community policing.⁵⁹ Even as many in the policing profession found it difficult to move away from what had been the traditional reactive crime fighting role,

57. Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQUENCY 236, 244-47 (1979).

58. George L. Kelling, *Police and Communities: The Quiet Revolution*, in COMMUNITY POLICING 60 (Willard Oliver ed. 1988).

59. The Community Policing Consortium, a partnership of these five organizations, was created and funded in 1993 by the U.S. Department of Justice, Bureau of Justice Assistance ("BJA"). Responsibility for the Consortium was transferred from BJA to the Office of Community Oriented Policing Services ("COPS") in 1995.

other, more visionary police leaders saw the opportunity for police to become more proactive, working in partnership with the community to find solutions to the underlying causes of crime.

The Community Policing Consortium offered the following perspective with respect to the scope of community policing:

Community policing is democracy in action. It requires the active participation of local government, civic and business leaders, public and private agencies, residents, churches, schools, and hospitals. All who share a concern for the welfare of the neighborhood should bear responsibility for safeguarding that welfare . . . [R]esearch reveal[s] that community institutions are the first line of defense against disorder and crime . . . Thus it is essential that the police work closely with all facets of the community to identify concerns and to find the most effective solutions.⁶⁰

Over the past one hundred years, “American police departments changed from inefficient and corrupt political enterprises to enterprises with a nonpartisan professional mission.”⁶¹ There have been significant “improvements in personnel standards and systems of accountability, including the values of due process and equal protection” during the last thirty years.⁶² The experience of the past decades has produced a vast amount of research about policing and has promoted a “new candor about police discretion and about the limits of the police’s ability to control crime.”⁶³ There is now no question that “police [today] are remarkably open to innovation and experimentation.”⁶⁴

While these changes were occurring in police departments, a number of mayors, city managers, and community groups began to recognize the advantages for community-based collaboration offered by community policing. There are myriad instances in which the support from one or more of these three groups has validated the importance of community policing and problem solving in local neighborhoods. Notable examples include Madison, Wisconsin, where Police Chief David C. Couper pioneered the restructuring of his department, placing strong emphasis on organizational change through leadership and training designed, among other things, to

60. CMTY. POLICING CONSORTIUM, *UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION, TRACING THE ROOTS OF COMMUNITY POLICING*, at <http://www.communitypolicing.org/chap2fw.html>.

61. WALKER, *supra* note 8, at 40.

62. *Id.*

63. *Id.*

64. *Id.* (quoting DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 101 (1994)).

emphasize a customer orientation and focus toward citizens;⁶⁵ San Diego, California, where Police Chief Bob Burgreen introduced the problem-oriented approach to policing in the fall of 1989;⁶⁶ Seattle, Washington, where the police chief, supported by the newly elected mayor, became a partner in support of the South Seattle Crime Prevention Committee in its efforts to address public safety and crime related problems;⁶⁷ and Portland, Oregon, where Police Chief Tom Potter and citizen groups prevailed in getting the City Council to pass resolutions adopting community policing as the new approach to address the public safety concerns of neighborhoods and businesses.⁶⁸

By 1992, the climate was right to reinforce the notion that community policing was a viable option in the attack on serious crime in the country. Crime was a prominent issue in the presidential campaign, and if the idea of putting 100,000 additional officers on the streets had strong appeal, then linking this idea to the community-policing philosophy was sure to be a winner among many police executives and academics interested in policing. Community groups seeking opportunities to work in partnership with the police applauded proposed federal legislation to support these ideas.

By the summer of 1994, President Clinton had succeeded in securing the passage of the Violent Crime Control and Law Enforcement Act of 1994,⁶⁹ from which the Office of Community Oriented Policing Services ("COPS") program was born. The COPS program had the following goals: (1) increase the number of officers deployed in American communities, (2) foster problem solving and interaction with communities by police officers, (3) encourage innovation in policing, and (4) develop new technologies for assisting in reducing crime and its consequences.⁷⁰ This was an ambitious undertaking, and the authorizing language creating the program would require the COPS office to accomplish these goals in just six years, with a budget of \$8.8 billion.⁷¹ The police were ready and COPS funding would serve as the catalyst for change.

65. DANIEL E. LUNGREN, CRIME PREVENTION CTR., ATTORNEY GEN'S OFFICE, CALIFORNIA DEP'T OF JUSTICE, COMMUNITY ORIENTED POLICING & PROBLEM SOLVING 67 (1992).

66. *Id.* at 77.

67. *Id.* at 113.

68. *Id.* at 60.

69. 42 U.S.C. § 14141 (1994).

70. Jeffrey A. Roth & Joseph F. Ryan, *The COPS Program After 4 Years—National Evaluation*, RES. IN BRIEF (Nat'l Inst. of Just., Wash., D.C.), Aug. 2000, at 1.

71. "The 1994 Crime Act provided COPS with \$8.8 billion and six years to fund the addition of community oriented policing officers and advance community policing

LESSONS FROM THE PAST CAN HELP US SURVIVE THE FUTURE

Six years have passed since the COPS office began providing resources to state and local police and sheriffs' departments. Crime rates have continued to hold at record lows.⁷² The number of reported index crimes has declined by 16% nationwide since 1995.⁷³ One of the most visible and dramatic reductions in crime occurred in New York City. Mayor Giuliani, citing figures from the *Mayor's Management Report* for fiscal year 2000, noted that despite its status as the nation's largest city, New York ranked 165th in per capita crime among 217 cities with populations exceeding 100,000.⁷⁴ He noted further that crimes in the seven major categories fell 7.8%, continuing a pattern over the last eight years.⁷⁵

However, although the crime data tell a positive story, one need only recall the brutal assault on Abner Louima, and the deaths of Amadou Diallo and Patrick Dorismond, to know that there is much work to be done. Indeed, as a colleague, Jeremy Travis, noted in a recent article, "[i]t is the best of times and worst of times for the New York Police Department."⁷⁶ Travis underscored the tenuous state of police-community relations, particularly police-minority relations, in New York City.⁷⁷ He offered, for the consideration of city leaders, lessons learned from "innovative studies tested" across the country on how they might help in addressing police-community tensions.⁷⁸ These included: (1) soliciting "the public's views of police performance through regular, independent surveys"; (2) "publish[ing] regular independent surveys of police

nationwide." OFFICE OF CMTY. ORIENTED POLICING SERVS., ATTORNEY GENERAL'S REPORT TO CONGRESS 4 (Sept. 2000).

72. See FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITES STATES 1998: UNIFORM CRIME REPORTS 6 (1999) (reporting that crime rates in 1998 were the lowest since 1973), available at http://www.fbi.gov/ucr/Cius_98/98crime/98cius01.pdf.

73. E.g., FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITES STATES 1999: UNIFORM CRIME REPORTS 7 fig.2.2 (2000) (showing a decrease in index crimes between 1995 and 1999 of 16.1%, and a decrease in the rate of index crimes per 100,000 inhabitants of 19.1%), available at http://www.fbi.gov/ucr/Cius_99/99crime/99cius.pdf. "The Crime Index is composed of selected offenses used to gauge fluctuations in the overall volume and rate of crime reported to law enforcement" and includes such offenses as murder, non-negligent manslaughter, forcible rape, robbery and aggravated assault, and the property crimes of burglary, larceny-theft, motor vehicle theft, and arson. *Id.*

74. Eric Lipton, *Giuliani Gives Status Report With Peaks And Few Dips*, N.Y. TIMES, Sept. 15, 2000, at B9.

75. *Id.*

76. Jeremy Travis, *Policing Police Misconduct: The next NYPD commissioner can learn from the best new tactics from across the nation*, N.Y. POST, Aug. 14, 2000, at 2.

77. *Id.*

78. *Id.*

officers to get a firm sense of officer morale and the pressures of the job”; (3) and [conducting] “ongoing, independent audits of critical police functions, including crime reports, enforcement actions and responses to 911 calls.”⁷⁹

Such suggestions, however, are valuable only to the extent that the leaders to whom they are directed are willing to acknowledge that a problem exists, are open to the possibilities for change, and are genuinely committed to resolution. I have worked with police chiefs and mayors alike who recognized that police-community tensions existed in their cities. They were dedicated to finding common ground and seeking lasting solutions with a view towards improving police-community relations.

It may sound like a cliché to state that one must lead by example. However, in my experience, it is absolutely essential that police administrators, mayors, and others in leadership roles do exactly that. It is not enough for leaders to hire more officers, buy better equipment, or improve technology. Our leaders must show that they have strong values, ethics, integrity, and respect for and commitment to all of the people they serve. At the same time, they must ensure that police officers and civilian workers in the agencies they lead are aware of the values the administrators hold, and know that everyone in the organization is expected to live by them.

Those in leadership positions must be sensitive to citizens' concerns as well. They must anticipate potential problems arising from the use of certain law enforcement strategies and police practices that may be viewed by segments of the community as having an adverse impact on them, thus eroding community support for the police. Leaders must be open to engaging in regular communication and candid discussions with the community on a regular basis and, most importantly, during times of crisis.

In his book, *Turnaround: How America's Top Cop Reversed the Crime Epidemic*, former New York City Police Commissioner William Bratton, who served during the early Giuliani administration, observed “[h]ow ironic [it would be] if the police, [who are] perceived in many neighborhoods to be part of the problem, turned out to be in the forefront of a movement toward understanding and resolution.”⁸⁰ There is no irony in this statement at all. The police *must* take the lead in resolving these conflicts. As Bratton explains, “American policing can and must be an essential and signifi-

79. *Id.*

80. WILLIAM BRATTON & PETER KNOBLER, *TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC* 311 (1998).

cant force in addressing the issues of race and police behavior.”⁸¹ But to achieve these goals, “it is essential that police identify and train new leaders.”⁸² Moreover, the training should reinforce the notion that those who take the oath to serve have a duty to conduct themselves as professionals. We need a continuing commitment to changing both the formal and informal processes that influence the conduct of our police. I believe that the social contract between the public and the police requires nothing less.

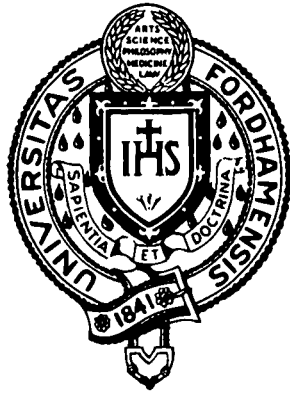
We remain at a crossroads with respect to police-community relations and, in particular, police-minority relations, in New York City and elsewhere in this country. Extraordinary leadership and commitment, especially by police executives and police unions, will be required to improve relations with communities of color. But with the support of mayors, city managers, city councils, and others from the public and private sectors, police departments will be encouraged to seek and find solutions. Although we tend to focus on these issues at times of crisis, the problem is systemic, and it deserves focused and interdisciplinary attention from every sector of our community. We cannot afford to hope that the next crisis or tragedy resulting from a police-community interaction will happen in some other city, on some other leader’s watch. The fact is that, while these incidents have geographic boundaries, the media ensures that reports of their occurrence reach us everywhere in real time. This has the effect of making localized crises national crises. The effect is cumulative, and each new event feeds and reinforces concerns that police conduct is largely motivated by racial and other biases, fueling a suspicion that police overreach in the name of legitimate law enforcement.

In the words of former New York City Police Department chief of personnel, my colleague and good friend Mike Julian, “We tell cops not do the wrong thing; we need to show them how to do the right thing.”⁸³

81. *Id.* at 312.

82. *Id.*

83. *Id.* at 313.



REBELLIOUS OR REGNANT: POLICE BRUTALITY LAWYERING IN NEW YORK CITY

Jessica A. Rose*

*C'mon it's no great news: Means do prefigure ends.*¹

INTRODUCTION

“What might a rebellious law office look like? Turn loose your imagination for just a moment.”² This Comment presents this challenge to lawyers confronting the problem of police brutality in New York City. This Comment suggests that in order to challenge police brutality on a systemic level, while at the same time empowering the client and community, the progressive legal community of New York City must adopt a form of practice that is more “rebellious” in its methodology. It also provides well-deserved recognition for the dedicated work that a growing community of progressive lawyers is doing to combat this problem and for the rebellious spark that drives their work.³

The problem of police brutality is perhaps the most pressing social and political issue in New York City today.⁴ In August 1997, the world looked on with horror as the incident involving Abner

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1. GERALD P. LOPEZ, *REBELLIOUS LAWYERING, ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 377 (1992) [hereinafter LOPEZ].

2. *Id.* at 83.

3. I believe most poverty/social change lawyers are dedicated, intelligent lawyers who are committed to fighting poverty and struggling for justice. See Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 *HASTINGS L.J.* 947 (1992).

4. “Police brutality, the abuse of authority and the use of excessive force by law enforcement officers, is one of the significant and divisive problems currently confronting the United States The net result has been a tremendous decline of public confidence in law enforcement and in the judicial system for failing to adequately deter police misconduct.” Sa'id Wekili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 *PAC. L.J.* 171-73 (1993).

Louima brought to light the frequency and severity of police brutality in New York City. Mr. Louima, a Haitian immigrant, had been arrested and brought to the 70th Precinct house where officers forced him into the bathroom, severely beat him, and sodomized him with the handle of a plunger.⁵ Then on February 4, 1999, plain-clothes officers fired forty-one shots at and killed Amadou Diallo in the vestibule of his Bronx home as he was reaching for his wallet.⁶ On February 25, 2000, an Albany jury acquitted those four police officers and the community expressed outrage.⁷ On March 16, 2000, undercover narcotics officers shot and killed Patrick Dorismond, an unarmed twenty-six year old security guard.⁸ The officers had approached Mr. Dorismond asking to purchase marijuana and a scuffle ensued. The police found no drugs or weapons on him.⁹

Following this string of killings—all of unarmed men of color at the hands of New York City Police Department (“NYPD”) officers—the city erupted in protest and street mobilizations to decry the practices of the police.¹⁰ The city, state, and federal governments were called upon to scrutinize and censure the NYPD’s practices.¹¹ On an international level, human rights organizations

5. David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody*, N.Y. TIMES, Aug. 13, 1997, at B1.

6. David Jackson, *Winning War on Crime Has a Price Giuliani Alienates Many in New York City’s Black and Hispanic Communities*, DENVER POST, Apr. 20, 2000, at A23; see also Amy Waldman, *Diallo Parents Sue City and Officers Over Son’s Death*, N.Y. TIMES, Apr. 19, 2000, at B4.

7. Daniel J. Wakin, *15 Arrested After Protest Against Police*, N.Y. TIMES, Apr. 18, 2000, at B4.

8. Jackson, *supra* note 6, at A23; see also Jayson Blair & Andy Newman, *Draft of U.S. Report Is Said to Fault City’s Policing*, N.Y. TIMES, Apr. 12, 2000, at B1.

9. Randal C. Archibold, *Criticism of Giuliani and Police Mounts After Funeral Violence*, N.Y. TIMES, Mar. 27, 2000, at B1.

10. Wakin, *supra* note 7, at B4.

11. *Id.* (“The Civil Rights Division of the United States Justice Department and federal prosecutors in Manhattan and Brooklyn have been investigating New York City police practices since the 1997 assault on Abner Louima. In addition, Mary Jo White, the United States Attorney in Manhattan, said after the Diallo verdict that her office was examining evidence in the case to see if the officers violated his civil rights.”); see also Archibold, *supra* note 9, at B6 (explaining that H. Carl McCall, the Comptroller of New York State, has requested a state commission to investigate and improve police and community relations, as well as describing a call for federal oversight and action by Mark Green, the city’s Public Advocate, and C. Virginia Fields, the Manhattan Borough President); *Federal Inquiry is Sought into Shooting Response*, N.Y. TIMES, Apr. 7, 2000, at B8 (describing how Congressmen Jerrold Nadler and Charles B. Rangel requested an examination by the Justice Department into the judicial reviews of the police shootings which killed Amadou Diallo, Gidone Busch, and Patrick Dorismond).

published reports on the crisis of police brutality in the United States.¹² As Bill Goodman, the legal director of the Center for Constitutional Rights (“CCR”), explains, “Today it’s not as easy to identify movements. But one movement which is more easily identifiable is the movement against police brutality.”¹³

This Comment examines the legal representation of victims of police brutality in New York City through the lens of Professor Gerald Lopez’s theory of rebellious lawyering.¹⁴ This Comment presents the narratives of four plaintiffs attorneys and two community organizers working to combat police brutality and analyzes whether the legal community is approaching this crisis in a “rebellious” way.¹⁵ Part I discusses the model of rebellious lawyering, its

12. *E.g.*, AMNESTY INT’L, U.S.A., POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT (1996); *see also* HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE U.S. (1998).

13. Interview with Bill Goodman, legal director, Center for Constitutional Rights, in New York, N.Y. (Oct. 22, 1999) (unpublished interview transcript, on file with the FORDHAM URBAN LAW JOURNAL) [hereinafter Goodman Interview].

14. LOPEZ, *supra* note 1, at 429. Professor Gerald P. Lopez is a professor of law, at the University of California, Los Angeles School of Law. For other works by Professor Lopez see Gerald P. Lopez, *A Declaration of War by Other Means*, 98 HARV. L. REV. 1667 (1985) (reviewing RICHARD E. MORGAN, *THE RIGHTS INDUSTRY IN OUR TIME* (1984), which “charges that the ‘rights industry’ has become too ready to ignore or discount the social costs of rights” and primarily discussing Morgan’s lack of analysis of the “elite academic left” and “streetwise” groups); Gerald P. Lopez, *Economic Development in the Murder Capital of the U.S.*, 60 TENN. L. REV. 685 (1993) (discussing the impact of public perception on economic development in East Palo Alto, where a coalition of small businesses and residents brought a lawsuit against the city for mishandling a development project that promised to bring jobs and other benefits to the largely minority population); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (discussing how storytelling is used to facilitate problem-solving by lay lawyers, including how individuals rely on stock stories that reflect their conception of the world, and how storytellers must combine multiple perspectives and create a coherent narrative, and the resulting ethical and political implications); Gerald P. Lopez, *Reconceiving Civil Rights Law Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989) (examining the use of 42 U.S.C. § 1983 litigation to promote social change by assessing the actual legal practice, including the types of firms and clients typically involved, rather than doctrine); Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989) (arguing that “despite some real and unappreciated successes, legal education remains a stubborn underachiever” in training future lawyers to work with politically and socially subordinated people); Gerald P. Lopez, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989) (asserting that legal education must take “seriously a diverse range of scholarship and teaching that focuses rigorous, eclectic, and sustained attention on the ‘Maria Elenas’ [low-income women of color and other socially and politically subordinated people] of our communities) (internal quotations added).

15. Professor Gerald Lopez introduced the term “rebellious” lawyering. LOPEZ, *supra* note 1, at 38.

critique, and related theories, including the model of “regnant” lawyering. Part II describes, through the narratives of the lawyers, the four primary methods of legal representation that are being used by those seeking to challenge police brutality in New York City and, in some cases, to change the system which produces and condones police misconduct: individual representation, class actions, archival of complaints and referral, and community organizing. Part II then explores the narratives of two community organizers who have had extensive experience working with lawyers on the issue of police brutality.¹⁶ Part III examines the rebellious and regnant characteristics in each of the four methods of legal practice. This Comment also addresses the limitations of the current forms of representation in realizing the goal of combating police brutality and achieving social justice for subordinated groups. It concludes that the legal community must develop a more creative and rebellious methodology if it is to accomplish its goals and that it must focus on its potentially transformative impact on society, rather than satisfying itself with small, isolated struggles. Finally, it makes recommendations for how progressive lawyers can reshape their practices to embody a more rebellious model and thereby better assist existing community efforts to combat police brutality.

I. THE MODEL OF REBELLIOUS LAWYERING

A. Gerald Lopez’s Theory of Rebellious and Regnant Lawyering

In his book, *Rebellious Lawyering, One Chicano’s Vision of Progressive Law Practice*, Professor Gerald Lopez proposes a model of lawyering that challenges the traditional approach of many progressive lawyers. Lopez argues that a “rebellious” practice must create a collaboration between lawyer and client that draws on

16. This Comment does not include the accounts of actual survivors of police brutality. The families of victims and survivors of police brutality who have become politicized through their experiences are often consumed with their organizing efforts. For them, this is not the time for an academic analysis of their experiences—it is a time for action. It is also difficult to locate or interview survivors of police brutality who have not been politicized. This is due to several factors. Many non-politicized survivors of police brutality are either unknown by progressive lawyers and organizers, or they are known but choose to limit the nature and duration of their relationship to the lawyers and organizers based on the specific legal needs of their individual cases. Perhaps, for these individuals, reliving their encounters with the police is too painful; the emotional aspect of this issue might therefore discourage participation in the larger political struggle and discussion.

both of their experiences and lawyering skills in order to alleviate the client's subordinated position in society (the client's subordination can result from the marginalized position her economic status, race, gender, sexual preference, age, etc., places her in with respect to the power structure of society).¹⁷ Lopez asserts that both lawyers and lay people possess "lawyering" skills that can be used in the lawyer-client collaboration. Lopez calls for the "professional" lawyer to recognize and encourage the use of the client's "lay" lawyering skills.¹⁸

1. *Theory: The Rebellious Lawyering Model*

Rebellious lawyering seeks to empower subordinated clients. Lopez contrasts this model of lawyering with "regnant" lawyering, which perpetuates the traditional power inequity between lawyer and client and client and society.¹⁹ He draws on theories of and experiences in mobilization, community organizing, and deprofessionalization.²⁰ As Lopez describes it, "[T]hose who would 'lawyer

17. See generally Angelo N. Ancheta, *Community Lawyering*, 81 CAL. L. REV. 1363 (1993) (describing rebellious lawyering in the context of the Asian Pacific American community).

18. The steps used in "professional lawyering" are the same as the steps used in "lay lawyering." LOPEZ, *supra* note 1, at 38-44. Both involve perceiving the difference between the reality we would like and the one we are living in, and trying to take the actions necessary to change our lives to conform with our vision of how we would like the world to be. *Id.* Whether this is complex contract negotiations or filing an application for food stamps, the process is fundamentally the same. *Id.* Lopez sees the law as a "set of stories and storytelling practices that describe and prescribe social reality and a set of conventions for defining and resolving disputes." *Id.* at 43.

19. The term "regnant" lawyering was also introduced by Professor Gerald Lopez. LOPEZ, *supra* note 1, at 23.

20. *Infra* Part I.A.3. Poverty law and social change lawyering literature reflects a long history of concern about the lawyer-client relationship and client empowerment. Examples of this perspective are: Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88) (asserting that "poverty can be soundly attacked only by applying an integrated theory of empowerment") [hereinafter Alfieri, *Antinomies*]; Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) (discussing story-telling as a method of client empowerment in poverty law advocacy) [hereinafter Alfieri, *Reconstructive Poverty Law Practice*]; Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative Lawyering"?*, 1 CLINICAL L. REV. 639 (1995) (suggesting ways to preserve client autonomy); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996) (examining two models of alternative social change lawyering—"client nonprofit" and "the social justice law firm."); Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988) (describing a lawyer whose work with South African villagers consisted of "challenging structures of domination that disabled the community, and creating sources of their own power") [hereinafter

rebelliously' must . . . ground their work in the lives and in the communities of the subordinated themselves."²¹ The elements of rebellious lawyering are: consciousness of the ways the interpersonal relationship between lawyer and client can further disempower the client; continuous reevaluation of the legal and non-legal approaches to problems faced by clients; actively working in coalition and collaboration with other professionals and community members; and analysis of the impact of the lawyer's work on the client's life, as well as the context, interplay, and implications of the lawyer's work on local, regional, national, and international levels.²²

Rebellious lawyering is a theoretical and practical response to "regnant" lawyering. According to Lopez, the elements of regnant lawyering are: focusing on litigation; dichotomizing between service (individual representation) and impact (e.g., class actions or legislative advocacy) litigation; viewing "community education" as diffuse, marginal, and uncritical work; viewing "organizing" as a supplemental, sporadic, and auxiliary activity; viewing the lawyer as the "legal problem-solver" and the client as the "fact-giver"; generally seeing other institutions and groups as only a means of assistance in a certain aspect of a case; and failing to see the larger picture—how different levels and aspects of society respond to challenges of the status quo.²³

Therefore, rebellious lawyering seeks to address the defects of regnant lawyering, namely, "the interpersonal domination of clients by lawyers; the disempowerment that accompanies reliance on litigation-based dispute resolution or its equivalent; and the inefficacy of intrasystemic remedies to achieve meaningful change in the lives of poor clients."²⁴

2. *Criticisms of the Rebellious Model*

Various criticisms have been leveled against the rebellious model. These largely focus on the application of the theory and the

White, *Lessons From Driefontein*]; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990) (explaining how "speech norms and coerced speech practices that accompany race, gender, and class domination—undermine the capacity of many persons in our society to use the procedural rituals that are formally available to them" and concluding that there must be a gradual "relocation of bureaucratized governance in participatory institutions") [hereinafter White, *Sunday Shoes*].

21. LOPEZ, *supra* note 1, at 38.

22. *Id.*

23. *Id.* at 24.

24. Tremblay, *supra* note 3, at 952.

narrowness of its focus. Critics have proposed different techniques of lawyering to achieve the goals of the rebellious model while allowing lawyers a greater flexibility in the nature of their practice.

a. Tremblay: Macroallocation v. Mesoallocation

Professor Paul R. Tremblay argues that rebellious lawyering requires a “justifiable, justice-based allocation of resources away from the clients’ short-term needs and in favor of a community’s long-term needs.”²⁵ Tremblay contends that a response focused on the collective rather than the individual is in tension with the client-centeredness that the rebellious model also advocates.²⁶ This tension raises ethical concerns and issues of the “deferral thesis.”²⁷ The weighing of these different considerations is arguably an exercise of distributive justice.²⁸ In this regard, the lawyer is balancing macroallocation and mesoallocation concerns. Macroallocation takes into account the interests of society at large.²⁹ Mesoallocation considers how to apply the macroallocation to a specific recipient.³⁰ Tremblay concludes that clients cannot be expected, when offered an informed and free choice, to be self-sacrificing unless they are fairly certain of the future benefits in which they, in part, will share.³¹ Accordingly, Tremblay asserts that to a certain extent, rebellious lawyering necessitates the lawyer to impose this long-term view.³² The lawyers interviewed for this Comment all believe they adhere to a client-centered approach to representation; they all reported cohesion between their goals and their clients’ goals. Therefore, it is unclear how a conflict between mesoallocation and macroallocation concerns would be resolved if a conflict did arise. On a hypothetical level, these lawyers all believe that they would follow their clients’ desires.

25. *Id.* at 950. Tremblay terms this idea of deferring present benefits in exchange for promises of long-term benefits the “deferral thesis.” *Id.* at 955.

26. *Id.* at 958.

27. *Id.* at 959-62. Tremblay looks to the field of bioethics to explain the deferral thesis. *Id.* (discussing how in bioethics the client must have informed consent to insure that the client understands the risk analysis involved in the medical treatment, plan, or study. The doctor not only considers the goal of curing the client, but is also influenced by the drive to develop effective treatment for future clients).

28. *Id.* (framing distributive justice in the context of resource allocation within medicine and law).

29. *Id.* at 962.

30. *Id.*

31. *Id.* at 967.

32. *Id.* at 967-68.

b. *Southworth and Sisak: Devaluation of the Lawyer's
(Transactional) Skills*

Professor Ann Southworth asserts that Lopez is "excessively pessimistic" regarding the ranges and importance of the skills that lawyers can, and should, provide to their clients.³³ Southworth maintains that lawyers have skills based on specialized knowledge unique to their profession that should be recognized and utilized in progressive lawyering.³⁴ Southworth acknowledges that as the scope and effectiveness of impact litigation has narrowed, the importance of community organizations and their community mobilization efforts has grown.³⁵ But in contrast to Lopez, she argues that these organizing and community education efforts should be supplemented by a broader range of services from lawyers and that utilizing lawyers' unique abilities would enable the community organizations to expand their work and to take full advantage of lawyers' technical expertise.³⁶

Like Southworth, Janine Sisak proposes an expanded definition of rebellious lawyering that includes transactional representation.³⁷ Sisak analyzes the work of Brooklyn Legal Services Corporation A ("Corp. A") through the lens of rebellious lawyering and suggests a hybrid approach in structuring financing transactions for community organizations and small businesses.³⁸ Sisak describes Corp. A's work as a response to the community's needs and as an effort to effect social change.³⁹ These are two characteristics of rebellious lawyering. However, Corp. A's lawyers see themselves as traditional in that they use transactional skills and do the "legal" end of the work that the clients' request of them.⁴⁰ Also, in Corp. A's

33. Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 STAN. L. REV. 213, 215 (1993).

34. Southworth suggests that lawyers can use their distinctive skills in a variety of ways, such as "general counsel and as providers of transactional representation" to community groups, organizations, and small local businesses. *Id.* Although Lopez recognizes the role of the lawyer as the bridge between lay and professional lawyering, Southworth feels that lawyers can serve perhaps most effectively as technical assistants, performing tasks such as "negotiating on the client's behalf, structuring relationships, drafting agreements, and navigating procedural and political obstacles." *Id.* at 222-23.

35. *Id.* at 228.

36. *Id.* at 227-30; see also Trubek, *supra* note 20, at 419 (discussing the growing number of nonprofit organizations that work with marginalized people).

37. Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORDHAM URB. L.J. 873 (1998).

38. *Id.* at 875.

39. *Id.* at 881.

40. *Id.*

work, the client's empowerment is only part of the "whole process" of community empowerment.⁴¹ Sisak asserts that the definition of rebellious lawyering must be expanded to include alternate models of legal representation that can also seek to empower the client (e.g., transactional representation).⁴² However, she does not think this would undermine rebellious lawyering if the model is viewed as an "evolutionary process."⁴³

c. *Handler, Simon, and Blasi: Too Narrowly Focused and Unhelpful In Effecting Collective Social Change*

Rebellious Lawyering fits into what Professor Joel F. Handler deems the legal camp of "postmodernism for transformative politics."⁴⁴ His critique of this approach to law is that it lacks "meta-narratives" (overarching themes) that create and encourage collective identities and movements.⁴⁵

Similarly, Professor William H. Simon critiques poverty law scholars as not contributing meaningfully to larger collective efforts at institutional and systemic change.⁴⁶ Simon asserts that a source of this ineffectiveness is an excessive concern by these scholars with "professional domination" of clients.⁴⁷ He stresses that "not all lawyer power and influence should be seen as illegitimate domination."⁴⁸ He also finds that the new poverty law scholarship has "tended to sentimentalize poor clients and especially

41. *Id.* at 887. Sisak suggests the possibility that community empowerment may in fact happen outside of the lawyer-client relationship. *Id.* Empowerment may occur, for instance, "in the internal collective action of the community group [client]." *Id.* at 888.

42. *Id.* at 890.

43. *Id.* Fitting transactional work into the rebellious model requires "redirecting the model's theoretical focus away from the attorney-client relationship and toward some other source of empowerment. Although this shift seems drastic, it does not undermine the model if rebellious lawyering is considered an evolutionary process." *Id.*

44. Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 L. & SOC'Y REV. 697 (1992) (stating that the "major theme in postmodernism . . . is subversion, the commitment to undermin[ing] dominant discourse" and positing that, "deconstruction, as a form of politics, is ultimately disabling").

45. *Id.* at 727; see also Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 444 (2000) (reviewing the different critics of collaborative lawyering scholars: Professors Gerald Lopez, Lucie White, and Anthony Alfieri).

46. William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994) (stating that "[t]he Dark Secret of Progressive Lawyering is that effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments"); see also Piomelli, *supra* note 45, at 446.

47. Simon, *supra* note 46, at 1100-01; Piomelli, *supra* note 45, at 446-48.

48. Simon, *supra* note 46, at 1106.

poor 'communities' . . . and to underestimate the difficulties of collective practice."⁴⁹

Professor Gary L. Blasi asserts that lawyering scholars should produce works that can be both practical and useful to practice.⁵⁰ Blasi puts forth four primary critiques of postmodern critical scholarship:⁵¹ (1) "comprehension of the theory . . . is no small contingency";⁵² (2) it is too universally and harshly critical of other practitioners;⁵³ (3) its focus on the "individual lawyer/client microworld" is too narrow;⁵⁴ and (4) it fails to look for structure or explanation above the level of local narrative.⁵⁵

Lopez does not argue for clients' narratives to take precedence over the narrative of lawyers, but rather that the two narratives be given equal treatment, and that the lawyer and client be seen as "co-eminent" practitioners.⁵⁶ Lopez's theory focuses on the local level and individual story. However, he also stresses the importance of connecting with other problem-solvers, such as neighbors, organizers, public employees, and policy makers.⁵⁷ He further encourages professional and lay lawyers to identify and address the correlative impact of their work and the broader society (e.g., national and international interests).⁵⁸

3. *Related Theories*

Lopez's theory of rebellious lawyering draws upon several theories of social change lawyering. A common theme throughout social change legal theory is the notion of client empowerment through the use of client narrative and voice in the development and representation of the client's case.⁵⁹ The relationships between lawyer, client, and community within their respective groups and

49. *Id.* at 1114.

50. Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063 (1994) (critiquing postmodern critical scholarship and encouraging a more collective theory); see also Piomelli, *supra* note 45, at 450-52.

51. Blasi, *supra* note 50, at 1064, cited by Piomelli, *supra* note 45, at 451-52.

52. Blasi, *supra* note 50, at 1074.

53. *Id.* at 1088-89 ("The critical gaze rarely falls on the mirror: it is about the practice of others.").

54. *Id.* at 1087 ("Never has so much theory rested on so little practice.").

55. *Id.*; see also Piomelli, *supra* note 45, at 451-52.

56. Lopez, *supra* note 1, at 55; see also Piomelli, *supra* note 45, at 480.

57. Lopez, *supra* note 1, at 38.

58. *Id.*

59. E.g. White, *Sunday Shoes*, *supra* note 20.

with each other are seen as opportunities for societal and personal transformation.⁶⁰

a. Critical Lawyering

Critical lawyering examines different aspects of social and political stratification and marginalization (e.g., race, gender, and sexual orientation) and analyzes the role of the legal system in the perpetuation of these processes. It also posits that law can be used as an arena for reexamination of the different facets of structural domination.⁶¹ According to Austin Sarat and Stuart Scheingold, “[C]ritical cause lawyering implies a different understanding of the lawyer-client relationship. Attorneys are admonished to relate to clients as listeners and learners rather than as translators.”⁶² The theory of critical lawyering stresses that this redefinition of the lawyer-client relationship is necessary in order to resist and counteract the barriers that have been imposed to restrict access by subordinated groups to the justice system.⁶³ Lucie White explains that bureaucratic institutions and procedures, such as administrative hearings at welfare offices, can impede subordinated groups from “meaningful participation in their own political lives.”⁶⁴ The critical lawyer sees the lawyer-client relationship as collaborative, as opposed to hierarchical.⁶⁵ Lopez draws from this collaborative approach to lawyering. Lopez, like the critical lawyering theorists, stresses the importance of client voice and the use of the client’s knowledge in the legal process.⁶⁶

b. Professionalism and Antiprofessionalism

Both proponents and critics of legal professionalism have advocated for a heightened duty of lawyers to represent people who

60. See generally *id.* (noting that lawyering literature recognizes a long history of this attitude toward client empowerment).

61. Trubek, *supra* note 20, at 416-17. According to Louise G. Trubek, critical lawyering addresses two primary concerns: “[I]mproving lawyer-client relationships in order [sic] more effectively to serve subordinated groups, and rethinking the relationship between legal work and political mobilization.” *Id.*

62. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 9 (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter Sarat & Scheingold, *Cause Lawyering*].

63. White, *Sunday Shoes*, *supra* note 20, at 4-5.

64. *Id.* at 4.

65. Sarat & Scheingold, *Cause Lawyering*, *supra* note 62, at 16.

66. LOPEZ, *supra* note 1, at 377; see also *supra* text accompanying note 22 (discussing the elements of rebellious lawyering according to Lopez).

have been denied access to the legal system. Proponents of professionalism argue that lawyers have a professional duty of public service and political commitment.⁶⁷

Critics of professionalism argue that it is a theory that immunizes lawyers from external critique and regulation. Professionalism is criticized as a means of maintaining control of the market for legal services and preventing other professionals and the lay community from acquiring leverage within the legal system.⁶⁸ Richard Abel advocates for non-lawyers to be encouraged to offer "legal services," and the public at large to perform legal functions themselves with assistance, such as simplified legal forms and handbooks.⁶⁹ This is similar to Lopez's recognition of the role of "lay lawyers" in problem solving.⁷⁰ He explains that "[t]he challenge involved in getting a handle on professional lawyering rests not in what is unique about such lawyering but what it has in common with what everyone practices in getting by from day to day."⁷¹

c. *Popular Education*

Paolo Freire pioneered the theory of popular education in his work on the community education and politicization of the poor and marginalized in Brazil and throughout the Third World.⁷² He asserted that, given the necessary tools, individuals could enter into a dialogue with each other and society at large that had the potential for personal and political transformation. Education is seen as a tool by which the oppressed can transform their situation and achieve political and social transformation.⁷³ Freire states: "Critical and liberating dialogue, which presupposes action, must be carried on with the oppressed at whatever the stage of their struggle

67. Sarat & Scheingold, *Cause Lawyering*, *supra* note 62, at 10; see also Richard L. Abel, *Taking Professionalism Seriously*, 1989 ANN. SURV. AM. L. 41, 51 (1989) (arguing that professionalism could "lobby vigorously for greater public expenditure on federal, state, and local legal aid and public defender programs" and that "the profession should require a significant pro bono contribution by all lawyers") [hereinafter Abel].

68. *E.g.*, Sarat & Scheingold, *supra* note 62, at 10. Sarat and Scheingold explain that, "Professionalism is, in this view, an excuse for excluding those groups Instead of building consensus, enhancing ethical standards, and raising levels of competence, professionalism is seen as part of a top-down project of social control." *Id.*

69. Abel, *supra* note 67, at 48.

70. LOPEZ, *supra* note 1 at 43-44.

71. *Id.* at 43.

72. Richard Shaull, *Foreward* to PAOLO FREIRE, *PEDAGOGY OF THE OPPRESSED* 9-10 (Myra Bergman Ramos trans., 1981).

73. PAOLO FREIRE, *PEDAGOGY OF THE OPPRESSED* 34-35 (Myra Bergman Ramos trans., 1981).

for liberation.”⁷⁴ Through the process of popular education the student and teacher are considered “critical co-investigators in dialogue.”⁷⁵ The popular education model has important implications for rebellious lawyering. The two theories emphasize the importance of student/client voice, the goal of empowerment and societal change, and the student/client serving as co-strategist in problem solving with the teacher/lawyer.⁷⁶

d. Community Organizing

In *Rebellious Lawyering*, Lopez explores the relationship of community organizers and lawyers. In examining methods of community organizing, Lopez draws a parallel between regnant lawyering and what he calls “orthodox organizing.”⁷⁷ The various elements of orthodox organizing are: organizers organize and typically do not develop groups or “movements”; organizers establish connections in the community in order to further their particular goals, and not because they see it as a necessary step to movement building; organizers exercise power, for example by setting meeting agendas and goals; organizers assume that the “oppressed” are willing and capable of sharing their experiences and articulating their grievances; regardless of the local circumstances, organizers follow a standardized organizing formula; organizers assert a willingness to work in coalition with any group (even if this is not a true desire or, alternatively, best for the particular project); organizers view the impact of their efforts as inherently radical; and finally, organizers consider themselves as the preeminent “pragmatists of power.”⁷⁸

Just as Lopez argues that regnant lawyers should become more rebellious, he advocates that organizers should challenge the orthodoxy of organizing and adopt a more rebellious methodology.⁷⁹ A “rebellious” community organizer should: be “life-sized” as op-

74. *Id.* at 52.

75. *Id.* at 68.

76. Seunghee Cha, Still Not Client-Centered—Analyzing “Lawyers as Counselors”: A Client-Centered Approach Through the Lens of Paolo Freire’s Pedagogy for Liberation (1999) (unpublished manuscript, on file with the FORDHAM URBAN LAW JOURNAL) (discussing how the theories of Paolo Friere can inform client-centered lawyering). See generally, Alfieri, *Antinomies*, *supra* note 20, at 666 (discussing Freire’s pioneering theory of popular education and its affects on critical consciousness).

77. LOPEZ, *supra* note 1, at 353.

78. *Id.* at 353-54. Pragmatists of power seem to be those willing to use power from any source necessary to accomplish a goal. *Id.*

79. *Id.* at 357.

posed to the ultimate “pragmatists of power.”⁸⁰ This means that an organizer should not be more or less noticeable than those around her.⁸¹ Lopez asserts that awareness of the work of professional organizers opens the process of mobilization and thus they should also renounce their invisibility despite the advantages of working behind the scenes.⁸² Further, Lopez advocates that organizers should “renounce exaggeration,” thus challenging the myth that professional organizers are necessary to social change,⁸³ and recognize that every person engages in pragmatic problem-solving (as do rebellious lawyers).⁸⁴ Organizers must connect the local, regional, and national dynamics of power to their work and “imagine social and political arrangements responsive to inevitably plural communities.”⁸⁵ Lastly, they should participate in meaningful coalitions that address the realities and tensions at *la frontera*—the boundaries that divide “us” from “them.”⁸⁶

Saul Alinsky, another theoretician and practitioner of community organizing,⁸⁷ established what are known as the Alinsky concepts of mass organization for power.⁸⁸ He organized in poor communities throughout the United States and founded the Industrial Areas Foundation and a training institute for organizers.⁸⁹ Lopez, like Alinsky, stresses communication as the most essential component to organizing.⁹⁰ Similar to Lopez’s theory of rebellious lawyering, Alinsky stressed that the dialogue must be a two-way experience. This is facilitated as messages are conveyed so that

80. *Id.* at 358; *see also id.* at 353 (“Organizers tend to consider themselves the preeminent ‘pragmatists of power’ in any situation and in any relationship.”).

81. *Id.* This contrasts the orthodox organizer who sees himself or herself as inherently radical and necessary for social change to occur. *Id.* at 353-54.

82. *Id.* at 358-61.

83. *Id.* at 361.

84. *Id.* at 366.

85. *Id.* at 368. This requires diverging from a standardized organizing formula and adopting a plan that addresses the realities specific to the situation. *Id.* at 353-54.

86. *Id.* at 373 (“‘Color-blind, radical populism’ never has been what it was made out to be It tries to define out of existence the very differences—gender, ethnic, class, ideological—that define and give life to politics of all sorts. . . . Experience teaches that it serves most often to affirm, not to challenge the status quo.”).

87. *Id.* at 362-63. Lopez is critical of promoting the centrality of professional organizers in fundamental social change. *Id.* According to Lopez, lay social activists, progressive lawyers, and other groups have adopted this notion of the idealized professional organizer. *Id.*

88. SAUL DAVID ALINSKY, *RULES FOR RADICALS: A PRACTICE PRIMER FOR REALISTIC RADICALS*, at *About the Author* (1971) [hereinafter ALINSKY, *RULES FOR RADICALS*].

89. *Id.*

90. *Id.* at 81.

people will be able to relate them to their own experiential knowledge.⁹¹

II. THE PROBLEM OF POLICE BRUTALITY IN NEW YORK CITY

A. Lawyers' Narratives—Different Methods of Legal Representation

The actual accounts of people working in the legal field of social change are not often heard. Mainstream media either downplays or ignores organizing efforts and litigation victories. This is evidenced by sparse media attendance at progressive demonstrations, marches, court case filings, proceedings, and rulings. Academic and professional journals similarly afford scant space for publications by and about progressive lawyering. Lawyers themselves often do not create a space for their clients' voices to be heard in the legal process, and instead translate clients' stories into legal arguments and clients' narratives into under-emphasized "impact statements" or "witness/victim testimonies." As Lopez explains, "our oral traditions rarely report activist work as well as they might. Most such stories seldom circulate outside small, local circles."⁹² The use of narrative, or storytelling, is a central element of rebellious lawyering.⁹³ Accordingly, this Comment frames the analysis of legal representation in cases of police brutality in the context of the stories of the lawyers who are actually doing the lawyering and the community organizers working with them. At the same time, the limits and alterations inherent in every layer of reporting are recognized.⁹⁴

The process of dialogue and narrative can be an empowering tool in the relationship between lawyer and client and among clients. Dialogic empowerment also can occur between lawyers.⁹⁵

91. *Id.*

92. LOPEZ, *supra* note 1, at 8.

93. *See id.* at 39-44. ("We learn to use stories—to understand the world and to solve problems—by living in our cultures."). *Id.* at 40.

94. Lucie E. White recognizes this reality of story-telling in her analysis of the lawyering in a black South African village, Driefontein. White, *Lessons from Driefontein*, *supra* note 20, at 701. She states, "The story I tell sets out just one version of 'what happened.' Like every story, it has an inevitable ambiguity . . . I do not seek to resolve these questions in the way I tell the story or in the way I comment on it. Questions, tensions, gaps will remain in the end; indeed, they constitute the particular richness of the narrative form." *Id.*

95. Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 20, at 2147. Alfieri posits that reconstruction of the poverty law practice requires an integration of client narratives in every aspect of the lawyer-client relationship (e.g., interviewing, counseling, investigation, negotiation, and litigation). *Id.*; *see also* John Kilwein, *Still Trying*:

This Comment endeavors to contribute to dialogic empowerment within the legal community to strengthen the legal community's efforts to combat police brutality.

1. *Individual Representation: Matthew Flamm and Ellen Yaroshefsky*

a. *Matthew Flamm*

Matthew Flamm is private practitioner in Brooklyn, New York. He works with a part-time associate and a receptionist. His work encompasses criminal representation, Civilian Complaint Review Board ("CCRB") advocacy, Police Department employee disciplinary actions (brought in the Department Advocates Office of the Police Department), and civil actions. He started his career in the New York City Law Department. He explains that he learned this area of practice from the defense perspective, which put him in the position of justifying and defending police officers' conduct and trying to avoid judgments against the Police Department. However, he used the "heightened duty" of government lawyers to try to see that justice was done.⁹⁶

Individual justice is the primary goal and motivator for Matthew.⁹⁷ He feels that in police brutality lawyering there are "principles at stake and real issues of public concern to litigate."⁹⁸ However, according to Matthew, the frustrating aspect of his practice is the lack of systemic impact from individual litigation. He says there is a "total disconnect" between individual legal actions and the police officers' subsequent conduct since there is frequently little or no disciplinary action and the city usually indemnifies the officers for damages.⁹⁹

Matthew considers himself a traditional lawyer since his work is limited to the legal system and the avenues of redress provided by the government. He is rebellious, however, in that he sees his work

Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 181, 185 (Austin Sarat & Stuart Scheingold eds., 1998) (discussing Alfieri's theory as "dialogic empowerment . . . attempt[ing] to give her or his clients greater class consciousness, a recognition that they are part of an oppressed group in society with a history").

96. Interview with Matthew Flamm, Esq., in Brooklyn, N.Y. (Oct. 26, 1999) (unpublished interview transcript, on file with the FORDHAM URBAN LAW JOURNAL [hereinafter Flamm Interview]).

97. *Id.*

98. *Id.*

99. *Id.*

and the issue of police misconduct in a political and philosophical framework. He views litigation simply as part of the larger picture of combating police brutality.¹⁰⁰

Matthew prides himself on seeing his clients as individuals who are worthy of respect. In fact, he says, he generally likes his clients.¹⁰¹ He has found that his attitude toward client participation in the legal process sets him apart from most attorneys.¹⁰² He involves his clients in the decision-making process of the case, particularly regarding decisions affecting the outcome of the case (e.g., when to seek settlement; what agency, or individual to sue). However, he clearly delineates between the lawyer's and the client's work. He feels that "the day-to-day stuff—letter writing, demands, etc.—is the lawyer's job."¹⁰³ On occasion, "with the right client," he will have his client assist in different aspects of the investigation for a case. He sees the client's role as, "inherently passive."¹⁰⁴

In terms of non-legal action and collaboration with community groups and other professionals, Matthew voices a certain sense of isolation and frustration.¹⁰⁵ He is a member of the Police Watch Referral Panel and has done some presentations to Bar Associations. He has thought of reaching out to community groups, but feels "pigeon-holed in terms of legal representation."¹⁰⁶ Matthew expresses interest in finding information about community groups working around the issue of police brutality. He recognizes the need for groups that address the emotional injuries that result from police brutality and provide support to victims and their families.¹⁰⁷ He has used the press on occasion. When he has had interactions with the press, he has generally had the clients speak for themselves.¹⁰⁸

Matthew, who is white, lives in Brooklyn, but feels that he is not a part of his clients' communities, which are largely comprised of people of color. He thinks this is partly because he is not a "tre-

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*; see also MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.").

104. Flamm Interview, *supra* note 96.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

mendous self-promoter.”¹⁰⁹ He feels connected to the community through the service he provides for its members. Recognizing that issues of race, class, and gender affect his relationship with his clients, Matthew is conscious of the need to treat people with respect.¹¹⁰

b. Ellen Yaroshefsky

Ellen Yaroshefsky is a Professor at Cardozo Law School in Manhattan, New York. Ellen went to Rutgers Law School (then known as the “People’s Electric Law School”) when it was noted for its radical lawyering and activism.¹¹¹ As a student in the constitutional law clinic, she worked on one of the first “long hairs on the New Jersey Turnpike” cases.¹¹² She then went to Seattle, where she worked with a Native American tribe and started handling police misconduct cases. When she moved back to New York she continued her work at the Center for Constitutional Rights (“CCR”). Currently, she is working on a case involving the shooting and killing by the police of a Hasidic Jew, Gidone Busch, in Borough Park, Brooklyn.¹¹³ She and her co-counsel, the “dream team” of Johnnie Cochran, Barry Scheck, and Peter Neufeld, approach the case with the broad goal of changing the way the NYPD operates.¹¹⁴ This contrasts with Matthew’s individual case approach that focuses on individual justice and compensation.

Ellen maintains a client-centered approach to representation, but finds that her clients have a broader focus than just wanting money damages. She suggests to her clients that if their goal is to change the NYPD and society at large, that then they must work with the community.¹¹⁵ For instance, in the Gidone Busch case she has gone to the Borough Park community several times to meet

109. *Id.*

110. *Id.* (“[Y]ou cannot stop making judgments about someone based on race, what they look like, where you are meeting them and how they are acting and then you get past that superficial stuff.”).

111. Interview with Ellen C. Yaroshefsky, professor of law, Cardozo Law School, in Manhattan, N.Y. (Oct. 21, 1999) (unpublished interview transcript, on file with the FORDHAM URBAN LAW JOURNAL) [hereinafter Yaroshefsky Interview].

112. *Id.* (describing how in *Lewis v. Hyland*, 554 F.2d 93 (3d Cir. 1977), one of the first “long hair” cases, she fought to get an injunction against the police stopping long-haired men who looked like hippies driving along the New Jersey Turnpike).

113. *Id.*; see also Andy Newman, *Disturbed Man Wielding a Hammer is Killed by Police in Brooklyn*, N.Y. TIMES, Aug. 31, 1999, at B1; Kit R. Roane, *Neighbors Ask ‘Why?’ After a Killing*, N.Y. TIMES, Sept. 1, 1999, at B6.

114. Yaroshefsky Interview, *supra* note 111.

115. *Id.*

with different community members and groups.¹¹⁶ She, like Matthew, sees litigation as part of the bigger picture, stressing that, “you can’t see litigation in a vacuum.”¹¹⁷

She sees legal action as one tool for creating social change, and to that extent, she identifies herself as a rebellious lawyer. She aligns herself with the Lawyer’s Guild and explains that she went to law school to prepare herself to facilitate social change. Although she is not currently involved in community activities, she has been in the past and hopes she will be again. She has never had run-ins with the police, explaining that, “It’s not an experience that typically happens to a white woman. That’s precisely the point.”¹¹⁸ Based on her experiences, she thinks that issues of gender, race, and class shape her interaction with clients and their communities. She also feels that, as she has gotten older, her age has affected people’s perceptions of her.¹¹⁹ In her interactions with the Hasidic community she has felt the gender-role distinction; Hasidic men are not accustomed to dealing with women on the level of client-lawyer. This is in contrast to her experiences with African Americans and Latinos. She thinks she is able to sympathize with the experiences of marginalized people, while acknowledging that she is not an “oppressed person.”¹²⁰

2. *Class Actions: Bill Goodman of the Center for Constitutional Rights*

Bill Goodman is the legal director of the Center for Constitutional Rights (“CCR”) in Manhattan, New York. CCR is a non-profit legal organization that fights for human and constitutional rights both domestically and internationally. Bill began his work around police misconduct in 1961, the year he started law school and the year the Supreme Court recognized that the Federal Civil Rights Act provides private citizens the right to sue the government for violations of constitutional rights under 42 U.S.C.

116. *Id.*

117. *Id.* When asked whether she thought legal action is an effective way of combating police misconduct in New York City, she responded that she does not “see things as ‘either-or’s’ anymore. [She] think[s] each little incremental piece adds up to the over-all bigger picture. It’s like a synergistic effect.” *Id.*

118. *Id.*

119. *Id.*

120. *Id.* Alfieri views sympathy as an integral component of the attorney-client dialogue and as a means through which the attorney is able to honor the client’s independent exercise of judgment. Alfieri, *Antinomies*, *supra* note 20, at 699. Alfieri defines sympathy as an “ethic and ideal of shared ends experienced in the relation between self and others.” *Id.*

§ 1983.¹²¹ In 1962, he went to Virginia to intern at a small civil rights firm that, according to Bill, *Jet Magazine* described as “the first integrated law firm in the South.”¹²² That summer, the firm began to consider suits against the police as a possible means of its financial survival. Then in 1964, once out of law school, he joined the firm that his father began in 1950 with Dave Crockett. The firm focused on representing political radicals and explored ways to sue the police for misconduct. They had found that common-law tort actions did not work and were exploring police misconduct cases pursuant to § 1983.¹²³ Since then, he has worked on dozens of cases involving police and corrections officer misconduct.

CCR currently is pursuing a class action against the Street Crime Unit (“SCU”) of the NYPD for its alleged illegal pattern and practice of predominately targeting its stop and searches at African American and Latino men.¹²⁴ The name plaintiffs consist of several African American and Latino men and the National Congress for Puerto Rican Rights.¹²⁵

Bill describes the culture of CCR as focused on litigation. According to Bill, CCR works to eliminate the barriers between judges, lawyers, and clients that are set-up by the traditional model of lawyering.¹²⁶ In that respect, he describes CCR’s work as non-traditional. However, he does not distinguish between rebellious and traditional lawyering.¹²⁷ He, like Matthew and Ellen, recognizes that litigation is not the sole solution to police brutality. How-

121. Goodman Interview, *supra* note 13. Bill sees § 1983 suits as a way of getting private voices heard in court to challenge how the police department should or should not work. *Id.* Thus, these suits allow the community to scrutinize the operations of the police. *Id.*

122. *Id.*

123. *Id.*

124. Nat’l Cong. For Puerto Rican Rights v. City of New York, 194 F.R.D. 105 (S.D.N.Y. 2000).

125. Goodman Interview, *supra* note 13. Several of the initial plaintiffs were referred by Police Watch and Karl Franklin, the former legal director of Police Watch personally. *Id.*; see also Interview with Karl Franklin, legal director of Police Watch, in Manhattan, N.Y. (Oct. 22, 1999) (unpublished interview transcript, on file with the FORDHAM URBAN LAW JOURNAL) [hereinafter Franklin Interview].

126. Goodman Interview, *supra* note 13.

I’ve always thought that the culture of the law and the underlying message is one which seeks to divide lawyers from judges, lawyers from one another, lawyers from legal workers, and most certainly lawyers from clients. It’s also the ways we analyze issues, we separate out issues, we pull them apart and isolate them. If that’s a traditional model of lawyering, then we are not traditional. We work at eliminating these barriers.

Id.

127. *Id.*

ever, he stresses that without legal action police misconduct would be more frequent and more egregious.

Bill acknowledges the effects of race, gender, and class in the staff's interaction with clients and emphasizes that CCR has taken leadership on these issues in the courtroom. However, he is reluctant to give any concrete examples and stresses that he believes people simply want effective legal assistance.¹²⁸

Bill divides his time between Detroit, Michigan and Brooklyn, New York. He and his family have never had problems with the police. He is motivated in his work to challenge police brutality because he feels it is "as stark a demonstration of injustice that we are going to see in our lives."¹²⁹

3. *Archival of Complaints and Referral:* *Karl Franklin, Police Watch*

Karl Franklin was the legal director of Police Watch ("PW") in Manhattan, New York. PW is a non-profit organization that has legal referral, community organizing, and archival components to its work.¹³⁰ PW's twin goals are to provide direct services to people who have been victimized by the police and to organize around the issue of police brutality and misconduct. The legal services are provided through a Legal Advisory Board and a Legal Referral Panel. The Legal Advisory Board, which provides advice and legal direction, is made up of established legal organizations in New York City such as CCR, the Legal Aid Society, the National Lawyers Guild, the NAACP Legal Defense and Education Fund, and the Puerto Rican Legal Defense and Education Fund. The Legal Referral Panel handles individual referrals received through PW's hotline. The attorneys are a combination of politicized practitioners experienced in police brutality work and straight (non-political) practitioners. PW charges the panelists a one hundred dollar annual fee to participate in the panel and requires ten percent of any settlement or judgment collected by the lawyers from cases referred to them through PW.¹³¹ Karl feels that this portion of the project has worked extremely well.

128. *Id.*

129. *Id.*

130. Franklin Interview, *supra* note 125. Shortly after this interview, Karl left Police Watch to start a private practice in Brooklyn, New York.

131. *Id.*

PW also has a Community Advisory Board.¹³² Its collaboration with various community organizations enables PW to take part in the larger movement against police brutality and introduce non-legal approaches into their work.¹³³ The community organizations that are members of the Community Advisory Board were integral in setting-up PW in New York and establishing it in the larger New York movement against police brutality and misconduct.¹³⁴ The community component of PW has been a harder "row to hoe" for PW.¹³⁵

Karl became involved in police brutality work as a community organizer. His first experiences with this kind of work were the demonstrations in reaction to the beating of Rodney King by Los Angeles police officers in 1991.¹³⁶ He identifies himself as a rebellious lawyer and went to law school for the specific purpose of learning a technical skill that would assist him in his organizing efforts. Karl's law school education helps him to do "his part in the movement," particularly in supporting political prisoners in the United States.¹³⁷ He sees law as a tool, yet he recognizes its limits in creating social change.¹³⁸ He thinks individual cases are not going to change the dynamics of police misconduct in communities and that the only way to fundamentally change existing power structures is through community organization.¹³⁹ As a member of

132. The community component of PW consists of the Community Advisory Board. *Id.* The Community Advisory Board is composed of the Malcolm X Grassroots Movement ("MXG"), the National Congress for Puerto Rican Rights ("NCPRR"), the Committee Against Anti-Asian Violence ("CAA AV"), the Audre Lorde Project, and Forever In Struggle Together ("FIST"). *Id.*

133. "[T]he underlying goal of Police Watch is to do a better job at community organizing around the issue of police brutality and misconduct . . . [T]o hook up the individuals with a community organization that is doing work on the issue . . . So, the project has an advocacy arm to its work." *Id.*

134. There is also a Police Watch project in San Francisco, California. *Id.* Both are projects of the Ella Baker Center for Human Rights which is also based in San Francisco. *Id.*

135. Karl feels that some tension resulted from a lack of clearly delineated roles and guidelines in the establishment of the Community Advisory Board. *Id.* There also have been differences in the visions of the organization and some of the board members on how best to approach projects. *Id.*

136. *Id.*; see also Sa'id Wekili & Hyacinth E. Leus, *supra* note 4, at 183-86 (discussing the Rodney King incident and the subsequent "riots" that followed the trial, which resulted in the acquittal of the four Los Angeles Police Department officers).

137. Franklin Interview, *supra* note 125.

138. *Id.* ("It's a tool and if it isn't serving its purpose, then there are other tools to use to get what you need to get done. It's a means to an end.")

139. *Id.* In discussing the role of community organizing in the organization's work, Karl explains, "[I]n essence, the issue isn't going to be solved by litigation. Individual cases are not going to change the dynamics of police misconduct in these communi-

the Malcolm X Grassroots movement, Karl is personally involved in community organizing around police brutality, and other issues such as removing police from the public high schools, and advocating community control of police precincts.¹⁴⁰

Karl grew up and still lives in the public housing projects in Crown Heights, Brooklyn. He thinks that there are issues that he is not qualified to handle based on his personal background. For example, he has to “check [himself]” regarding his preconceptions and reactions when working with the transgender community. He struggles to overcome these limitations and believes that in order to address police brutality he has to see the struggle in a broader context.¹⁴¹ He also sees the issues of race, gender, and class as significant in the outreach and organizing work of PW. For example, when the project had a Latina staff person who spoke Spanish, they received more calls from the Latino community. The current administrative director of the project is a lesbian and has been able to forge ties with the gay, lesbian, bisexual, and transgender communities. One of the main tasks of PW is to reach as many communities as possible. Karl explains, “By no means is [the gay, lesbian, bisexual, and transgender] community saturated with our literature. So, I think there [are] some places where we are quite well known, and then there are others where we have a lot more work to do.”¹⁴²

4. *Community Organizing: Karl Franklin, Police Watch, The Community Advisory Board, and Grassroots Outreach and Education*

Police Watch has a Community Advisory Board and provides community outreach and education.¹⁴³ Of the four case studies, PW has the most in-depth and on-going community involvement in its work. Karl, PW’s former legal director, explains that even though the members of the Community Advisory Board were instrumental in bringing PW to New York and continue to work to-

ties. What’s going to change this dynamic is when the communities are organized. There must be a fundamental change to the power structures.” *Id.*

140. *Id.*

141. Karl sees the issue of police brutality as primarily a problem that the Latino and African American communities have to deal with in New York City. *Id.* He feels that these communities and others have to reach across interest group and racial lines and say, “We may not agree on everything, but we certainly agree that these people we are paying should not beat us up.” *Id.*

142. *Id.*

143. *Id.*

gether and value each other's contribution in the police brutality movement, there have been hurdles to get over in establishing a solid and ongoing collaboration between the different community organizations and PW. Karl is open and candid in this self-critique of the project and accepts the fact that the organization needs to examine this issue further.

B. Through the Lens of the Community Organizer

In examining the "rebelliousness" of lawyers working with the issue of police brutality in New York City, it is critical not only to engage the lawyers in a self-examination of their practices, but also to listen to the experiences of the community organizers and survivors of police brutality who have worked with lawyers on this issue. This is another aspect of the dialogic process that is an integral component to rebellious lawyering.

At the time of this writing, New York City is reeling from a series of police killings of unarmed young men of color and the subsequent legal battles and street-level organizing.¹⁴⁴ The following interviews with two community organizers reflect the intensity of these troubled times. The acquittal of the four police officers who fatally shot Amadou Diallo¹⁴⁵ was announced the day of the interview with Richie Perez of the National Congress for Puerto Rican Rights ("NCPRR").¹⁴⁶ The interview ended when the verdict was announced because Richie had to participate in a live reaction interview with WBAI radio. The office of the Committee Against Anti-Asian Violence ("CAA AV") was empty on the day of the interview with Hyun Lee because the staff was involved with street-organizing efforts and support for those who were arrested in the aftermath of the Diallo verdict. The Louima and Diallo verdicts represent the standard by which other cases of police brutality will be viewed by the courts. Richie Perez asserts that, "They set the standard by which atrocities will be punished. And if these and other atrocities are not punished we are not going to get the others punished."¹⁴⁷

144. *Supra* notes 5-11 and accompanying text.

145. *Supra* Introduction (discussing the police killing of Amadou Diallo).

146. The National Congress For Puerto Rican Rights is often referred to in short-form as "the Congress," but to avoid any confusion with the United States Congress, this Comment will refer to the organization as NCPRR.

147. Interview with Richie Perez, National Congress For Puerto Rican Rights in Manhattan, N.Y. (Feb. 25, 2000) (unpublished interview transcript, on file with the FORDHAM URBAN LAW JOURNAL) [hereinafter Perez Interview].

1. *Richie Perez and the National Congress for Puerto Rican Rights*

Richie Perez has been politically organizing and working with the community to combat police abuse for more than three decades. He is a well-respected and trusted presence in the progressive community, particularly in the community of color and the younger generation of activists.¹⁴⁸ One of Richie's most striking characteristics is his ability to organize from the background and periphery, thus enabling a new generation of organizers to redefine the direction of the police brutality movement while at the same time sharing in the experiences and advice of an seasoned organizer.¹⁴⁹

Richie first worked on the issue of police brutality in the late 1960s and worked on this issue throughout the 1970s as member of the Young Lords Party.¹⁵⁰ The Young Lords was a political organization of Puerto Rican youth that dealt with issues such as police abuse, unlawful imprisonment, and prison abuse.¹⁵¹ In the mid-1970s he was involved in the struggle to save open admissions in the City University of New York system. At the time, he was a teacher at Brooklyn College and had experiences with police surveillance and investigation, and was ultimately imprisoned for his organizing activities.¹⁵² During that period, he was part of a group that founded the Black and Latino Coalition Against Police Brutality.¹⁵³ In 1979, he was a founding member of the Committees Against Fort Apache the Bronx, a group that spearheaded a campaign against the book and film, *Fort Apache the Bronx*.¹⁵⁴ Richie sees parallels between the book and film's portrayal of the South

148. The author of this Comment is aware of Richie's reputation through personal experiences with youth organizers and community organizers working around the issue of police brutality.

149. Perez Interview, *supra* note 147 ("An organization that cannot constantly replenish itself will die. So we made a decision in the early '90s that we wanted to change the nature of our organization and find a vehicle for giving it to young people to run. It didn't mean that we were retiring, just that we wanted to put ourselves as more of a resource, rather than at the center of everything . . . [We are] like these 500-pound elephants. People don't have room to grow."); *see also* Interview with Hyun Lee, the Committee of Anti-Asian Violence, in Manhattan, N.Y. (Feb. 28, 2000) (unpublished interview transcript, on file with the FORDHAM URBAN LAW JOURNAL) [hereinafter Lee Interview].

150. Perez Interview, *supra* note 147.

151. *Id.*

152. Perez was on trial for two years on charges of conspiracy to incite a riot. *Id.*

153. *Id.*

154. *Id.*

Bronx and the defense counsel's depiction of the same area in the Diallo trial.¹⁵⁵

In 1981, the Committees Against Fort Apache the Bronx were merged into the newly formed National Congress for Puerto Rican Rights.¹⁵⁶ Committing police brutality and injustice in the criminal justice system were, and remain, a part of the NCPRR's platform. In the late 1980s, the focus of the NCPRR shifted from racially-motivated violence and police complicity to police brutality itself.¹⁵⁷ The NCPRR Justice Committee specifically focuses on police brutality and related issues.¹⁵⁸ As the Committee began working with families victimized by the police, it saw the political rhetoric it had been advancing being tied to real life examples and becoming more accessible to the community at large.¹⁵⁹ Each individual case highlighted "fault lines in the criminal justice system."¹⁶⁰ Through its work with the families it began to broaden its membership body to people who were not "political" and had been thrust into the anti-police brutality movement by suffering tremendous personal loss.¹⁶¹ Richie stresses that once the NCPRR makes a commitment to a family it is a commitment that must be kept for as long as it takes for the family to gain justice.¹⁶²

The NCPRR has brought together various segments of the Puerto Rican community and the community of color at large. Through the NCPRR's work around police brutality it has forged alliances between the families of survivors and victims of police brutality, veteran and younger community organizers, students,

155. *Id.* Richie states that the depiction of the South Bronx by both the film and the defense counsel was, "a home for savages, social parasites, and only the police represented civilization there. They had a dirty job and a very dangerous job. By dehumanizing the residents of the South Bronx they justified what was called 'street justice' or 'street tactics' being meted out by the police." *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* This reflects Alinsky's position that organizers must be flexible, open to change, "adaptable to shifting political circumstances, and sensitive enough to the process of action and reaction to avoid being trapped by their own tactics." ALINSKY, *RULES FOR RADICALS*, *supra* note 88, at 6.

160. Perez Interview, *supra* note 147.

161. *Id.*

162. *Id.* "[W]e tell the families from the beginning that we cannot guarantee you justice, if we reach a working agreement together, what we can promise you is that you will never struggle alone. As long as you want to struggle, we will struggle with you . . . So like with Altagracia Mayi [whose son, Manuel Mayi, was killed by a racist gang in Queens] and Iris Baez [whose son, Anthony Baez, was killed with an illegal chokehold by the police when his football accidentally hit a police car], we have been together for ten years, we are like [their] family." *Id.*

and street organization members.¹⁶³ The NCPRR assisted the Latin Kings and the Nietas street organizations to broker a truce and create an internal monitoring system.¹⁶⁴ Richie explains that, “These [youths] were our family gone wrong who had been pushed to the underground economy and marginalized and . . . we were prepared to embrace them if they were seriously committed to transformation.”¹⁶⁵ The NCPRR and the Parents Against Police Brutality made a historic alliance with the Latin Kings when the Latin Kings committed themselves to becoming a positive, political force in the community.¹⁶⁶ However, according to Richie, like most individuals and groups that engage in political transformation, some parts of the Latin Kings remained tied to illegal activity.¹⁶⁷ Ultimately, the police jailed the leadership and the organization’s efforts to change its nature were almost entirely halted.¹⁶⁸

The NCPRR employs a three-part approach to its organizing efforts around the individual cases consisting of legal, media, and political/community outreach strategies.¹⁶⁹ The NCPRR offers families its experience and support with the goal of helping families “get [a] voice and punch. So that as they struggle back from their loss they find strength to survive, that they are not just the grieving mother, that after time they become the seeker of justice who has a moral and eventually a political right to speak on the issues.”¹⁷⁰ From this organizing and uniting of families, a group of families formed Parents Against Police Brutality.¹⁷¹ If, however, a family wants to act in a way that the organization feels would be contrary

163. The term “street organizations” here refers to what some call “street gangs.” *Id.*

164. *Id.*

165. *Id.*

166. *Id.* When the Latin Kings were accused of shooting a police officer in the 46th Precinct, the families were approached by the police to denounce the Latin Kings. *Id.* The parents held a press conference and refuted the accusation and stated their support for the Latin Kings. *Id.* Mrs. Baez stated, “I lost my son and I gained a thousand sons.” *Id.*

167. *Id.*

168. *Id.* (“[T]he last thing [the police] want is one thousand organized, militant, young, politicized Puerto Ricans who respond to leadership—they [would] much rather have one thousand disorganized, competing youth, serving as a destabilizing element in our community.”).

169. *Id.*

170. *Id.*

171. *Id.*

to the family's interests, the NCPRR will limit its relationship with the family.¹⁷²

In the NCPRR's experience, one of the most common reasons a family will not work with it or other community organizers is because the family is advised by its attorney not to do so.¹⁷³ This advice usually comes from private practitioners who do not specialize in police brutality work and focus on the possibility of settlement with the city as the goal of the lawsuit.¹⁷⁴ As Richie explains,

Many of the lawyers take the cases because they know there will be a cash settlement down the road. But the families, as they embark on trying to get justice, distinguish that there is a monetary civil suit (that motivates most of the lawyers), but that there is [sic] also criminal and civil rights prosecutions that are available.¹⁷⁵

The NCPRR has found that exacerbating the pressure to settle placed by many private attorneys, those lawyers often do not inform the families about the legal process, deny the families access to their files, charge exorbitant amounts to initiate the representation, and commit potential malpractice.¹⁷⁶ Furthermore, families are often divided as to the desired course of action and have financial hardships that increase the incentive to settle.¹⁷⁷ The NCPRR supported the establishment of Police Watch to address this need for quality and knowledgeable attorneys.¹⁷⁸ On occasion, the NCPRR has assisted families to change counsel due to this type of difficulty.¹⁷⁹

172. *Id.* For example, in approximately 1990, the NCPRR was working with a family that decided to align itself with the Reverend Al Sharpton. *Id.* At the time, Reverend Sharpton's reputation was under attack. Despite the organization's working relationship with him, they felt that the alliance would be detrimental to the family. *Id.* Richie states that, "We felt that this decision was a breach on their part and told them that. We would continue to support the case, but we would not participate in press conferences that we felt were harmful to them, or other [detrimental] activities." *Id.*

173. *Id.*

174. *Id.*

175. *Id.* ("But from the families' point of view settlement does not mean that anyone gets punished. Nor does it mean that the city has agreed to admit to any wrongdoing. Almost invariably the families say that 'this is not what we are in this for, money cannot bring back my kid.'").

176. *Id.* Examples of the potential malpractice that Richie has observed some lawyers commit are filing late and/or incomplete papers with the court. *Id.*

177. *Id.*

178. *Supra* Parts II.A.3-4.

179. Perez Interview, *supra* note 147.

The NCPRR also has extensive experience with progressive legal institutions and individual lawyers.¹⁸⁰ According to Richie, one of the limitations of progressive lawyers and organizations like CCR is that they do not have the capacity to take every case.¹⁸¹ This causes the organizations to engage in a selection process which searches for cases that represent larger issues.¹⁸² Due to the scarcity of resources, these legal organizations prefer class actions to individual actions which “leaves us with the vacuum of who then is going to do the individual cases.”¹⁸³ Richie observed that small law offices do not have the resources necessary to initiate and withstand the long process of a police brutality lawsuit.¹⁸⁴

Over the years of its organizing in the community around the issue of police brutality, the NCPRR has observed that survivors of police brutality and families of survivors and victims now often know how to respond to incidents with the police independently of community organizations.¹⁸⁵ This may be an indication that the movement against police brutality has accomplished a degree of self-empowerment in the community at large.

2. *Hyun Lee and the Committee Against Anti-Asian Violence*

Hyun Lee began her police brutality organizing work when she joined the staff of the Committee Against Anti-Asian Violence (“CAA AV”).¹⁸⁶ On her first day of work in 1994, she met with a Korean woman who, following an argument with a taxi driver over payment of a fare, was arrested and subsequently assaulted both verbally and physically by the police.¹⁸⁷ CAA AV is a grassroots organization that has a small staff and corps of volunteers that work to address various issues confronting the Asian community in New York City.¹⁸⁸ It currently has three main projects: the Youth

180. *Id.* NCPRR was one of the name plaintiffs in the Street Crime Unit class action brought by CCR. *Nat'l Cong. For Puerto Rican Rights*, 194 F.R.D. 105 (S.D.N.Y. 2000).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* (“They don’t need us to tell them to have a press conference, to put up banners, to carry pictures of their children. This is now common-sense knowledge in our broader community.”).

186. Lee Interview, *supra* note 149.

187. *Id.*

188. *Id.*

Leadership Project, the Women Workers Project, and a project that is focused on the effects of gentrification in Chinatown.¹⁸⁹

Issues of police brutality and injustice in the criminal justice system, in general, often arise in the various projects.¹⁹⁰ For example, one of the youths in the Youth Leadership Project in the Bronx and some friends were subjected to an illegal “stop and frisk” and selective enforcement; they were then “put through the system.”¹⁹¹ According to Hyun, the youths’ rights were violated while they were in police custody.¹⁹² CAAAV staff obtained a lawyer for the youths and brought the lawyer to the precinct. CAAAV staff also went to court with them and interviewed witnesses.¹⁹³ Another example of issues pertaining to the police and criminal justice system permeating the various aspects of CAAAV’s work is its organizing efforts with street vendors in Chinatown. For the past several years Mayor Giuliani has been attempting to curb the proliferation of street vendors in certain areas of Manhattan.¹⁹⁴ The police have been enforcing this policy by removing the vendors from the streets, which has often resulted in altercations.¹⁹⁵ Until recently, the CAAAV, like the NCPRR, engaged in advocacy on behalf of claimants in individual police brutality cases.¹⁹⁶ According to Hyun, due to limited resources and a decision that the organization could be more effective doing grassroots organizing, it reduced its individual caseload.¹⁹⁷

When CAAAV does engage in individual case advocacy it accompanies the client to his or her initial appearance in court.¹⁹⁸ CAAAV assists the client in navigating the justice system and explains the procedures and the client’s rights. CAAAV also fre-

189. *Id.*

190. *Id.*

191. *Id.* “Selective enforcement” is the term used to refer to the police’s execution of their duties in a manner that affects marginalized communities in a discriminatory manner, such the disproportionately high rate of stop and frisk of young men of color in New York City. *See, e.g., Nat’l Cong. For Puerto Rican Rights*, 194 F.R.D. 105 (S.D.N.Y. 2000).

192. *Id.*

193. *Id.* Hyun explains that, “By the nature of the community that [CAAAV] works with, we often get cases of young people who are put through the system unfairly.” *Id.* CAAAV bases their involvement on these cases on whether it advances their “organizing work and the struggles of the community.” *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

quently translates for the clients to their attorneys.¹⁹⁹ CAAAV found that working with Legal Aid attorneys was easier than working with the court-appointed 18(B) lawyers [court appointed pursuant to Part 18(B) of N.Y. County Law (Representation of Persons Accused of Crime or Parties Before the Family Court or Surrogate's Court)]²⁰⁰ because they had a relationship with the Legal Aid Society as an organization. CAAAV found that the 18(B) lawyers were often disinterested in the clients' cases and were resentful and hostile toward CAAAV organizers' presence.²⁰¹

Hyun believes it has been easier to work with individual progressive lawyers than 18(B) and non-political lawyers. She asserts, "Legal organizations have their own organizational interests and there is a lot more we have to negotiate with organizations. With individuals it is really based on whether you can work with that personality."²⁰² CAAAV has worked closely with a small pool of lawyers with whom they have established a relationship.²⁰³

CAAAV sits on the Community Advisory Board of Police Watch.²⁰⁴ However, it has not referred any cases to Police Watch.²⁰⁵ It has also worked with the Asian American Legal Defense and Education Fund ("AALDEF"), CCR, and, more recently, through the Women Workers Project, with the National Employment Law Project ("NELP").²⁰⁶ Hyun describes the relationship with the more progressive legal institutions as a relationship "not without contradictions."²⁰⁷ She explains that,

199. CAAAV has had to translate both live communications between the lawyers and their clients and written correspondence. *Id.* Hyun stated, "[T]hat's the part of the work we don't enjoy doing because we feel like we are receptionists for the lawyers." *Id.*

200. N.Y. COUNTY LAW § 722 (McKinney 2000) ("The governing body of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county a plan for providing counsel to persons [before the Family Court or Surrogate's Court] charged with a crime or who are entitled to counsel . . . who are financially unable to obtain counsel.").

201. According to Hyun, "They would just advise people to go plead this or that and their whole attitude was just 'listen to me because I am the lawyer' Sometimes the lawyers will not even bother to call for translators because then you have to wait around for a long time." *Id.*

202. *Id.*

203. *Id.* For example, they have referred cases to John Yong who is in private practice in Chinatown and formerly worked at the Legal Aid Society. *Id.* In the past he was a member of CAAAV. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

You love them because they take up a very important space in the movement—you need lawyers. You need people who are trained and able to defend our community. . . . But at the same time, it's not so clean. I would say [that] maybe this [is] not just a contradiction with legal institutions, but all non-profit groups that have an organizational interest that overtakes our commitment to the movement and to our communities.²⁰⁸

The tensions between organizers and lawyers often emanate from ideological differences. According to Hyun, lawyers, by nature, have to focus on the legal merits and the evidentiary strength of individual cases, while community organizers look at individual cases within the larger historical context of police brutality and the criminal justice system's treatment of people of color.²⁰⁹ These differences in ideology and tactics play out in the collaboration between organizers and legal institutions in deciding whether or not to encourage and/or organize direct actions during the grand jury selection process, and whether or not to call for federal investigation after the failure of local district attorneys to indict police officers for brutality and murder.²¹⁰ The tension between the organizers and lawyers can manifest in every aspect of the working relationship, "all the way down to . . . the tone of language on picket signs."²¹¹ Hyun explains that,

As organizers, we felt that the police murder of [name omitted] was a part of a long history of police brutality against people of color, and a long history of district attorneys' failing to indict cops for murder. We felt that it almost didn't matter what kind of position we took, the DA hadn't indicted a cop for murder in countless other cases before [name omitted] For us it's about movement building among the communities of color and understanding history, it's about taking the anger of the community and doing something with it—building something.²¹²

CAA AV tries to connect victims/survivors of police brutality and their families with other families who have confronted and struggled against police brutality.²¹³ When considering the type of action to take in a specific case, CAA AV focuses on the potential political

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

transformation and empowerment of the individual or family with whom they are working.²¹⁴

According to Hyun, CAAAV's experiences with progressive legal institutions have served as important learning experiences for both the organizers and lawyers about "the possibilities and shortcomings of the relationship between community groups and progressive legal institutions. We undoubtedly need each other for the movement to grow and will continue to learn from our mistakes to forge a stronger relationship that serves to advance the struggles of our community."²¹⁵ Hyun feels that legal action can be an effective way of dealing with police brutality when it supports movement building; however, she also feels that it has the potential of being counter-productive in that it can give people a false sense of security and justice.²¹⁶

In its organizing work, CAAAV also has had experiences with progressive lawyers and legal institutions in which the lawyers made promises that CAAAV relied on, about legal strategies and theories and possible representation, that did not come to fruition. The failure of lawyers to deliver on their promises sometimes meant serious setbacks in their organizing strategies.²¹⁷ She feels that the optimal working relationship between community organizers and lawyers will be reached when there are clearly delineated roles and expectations, coupled with a shared agenda.²¹⁸ According to Hyun, a primary difference between organizers and many progressive lawyers is that "[a]s an organizer you are accountable to a certain community forever. When you have two hats, as a lawyer and an organizer, this double-identity can lead to contradictions."²¹⁹

In analyzing the role of race, ethnicity, class, and gender, Hyun talks about "non-movement" lawyers' inability to empathize with the day-to-day realities of their clients.²²⁰ For example, a lawyer making an inflexible appointment with the client regardless of the implications for the client's work situation.²²¹ She is also critical of some of the lawyers' dehumanizing treatment of their clients who

214. *Id.*

215. *Id.*

216. *Id.* ("It really sometimes dampens the movement building efforts when people are encouraged to just look to the legal channels to fight their battles.")

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

do not speak English.²²² Hyun believes that, on an organizational level, CAAAV has been treated by the courts and the media as a novelty.²²³ For example, people have said, “[O]h, Asian people get beaten up by the police too?’ or ‘Committee Against Anti-Asian Violence—what violence?’”²²⁴ Among other community-based organizations from other communities of color the largest struggle for CAAAV has been to place the experience of immigrants and Asians specifically into the historic view of police brutality.²²⁵ In terms of class, gender, and age dynamics between the lawyers and the CAAAV organizers, Hyun concludes that “non-movement” lawyers would prefer to use CAAAV as an intermediary between them and the clients because the CAAAV organizers tend to be college educated, middle-class, and English speaking.²²⁶ The lawyers also see CAAAV organizers as providers of emotional and informational support to the clients.²²⁷

Her first and only personal experience with the police and the criminal justice system was when she was fifteen years old and her father hit a bicyclist during a family trip in Alabama.²²⁸ She recalls her father being visibly afraid and when she asked him why, he responded by yelling, “Don’t you know what the cops are like in Alabama? They don’t like us.”²²⁹ They waited for the police to arrive and her father was arrested without the police asking any questions.²³⁰ She returned with her father for the court hearing to translate for him and remembers the court treating them rudely.²³¹

III. EXAMINING THE DIFFERENT MODELS OF REPRESENTATION THROUGH THE LENS OF THE REBELLIOUS LAWYERING MODEL

Matthew, Ellen, Bill, and Karl all have aspects of their work that reflect regnant as well as rebellious lawyering characteristics; however, Karl and PW embody the greatest quantity of rebellious qualities. PW is the newest organization and is staffed by young, activist lawyers and organizers. The two New York staff people are

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

an African American male in his late twenties and a white lesbian woman in her early twenties.²³² According to Lopez, the lawyer living in and being a member of the community with which she works facilitates rebellious lawyering.²³³ PW approaches the problem of police brutality through a multi-faceted lens and are open to change.

The narratives of community organizers Richie and Hyun offer both confirmations and contradictions of the lawyers' accounts. Their two organizations, the NCPRR and CAAAV, have had markedly negative experiences with individual private practice lawyers who are not part of the progressive community.²³⁴ Their experiences with progressive legal institutions have been more complex. Richie and Hyun both recognize the important role of progressive lawyers in supporting the grassroots movement against police brutality and in representing individuals who have been subjected to police misconduct.²³⁵ Yet, they both emphasize the organizational/practitioner interests that can conflict with either the client's desires or the objectives of the larger community movement.²³⁶ Hyun suggests that the ideal lawyer would be an individual lawyer who can consistently commit herself to the struggles of a specific community.²³⁷ She also asserts that lawyers should not confuse the boundaries between lawyering and community organizing.²³⁸ This poses a difficult hurdle in the formulation of a rebellious practice: if the client or community articulates a desire for the lawyer to embody regnant characteristics, then is it not disempowering to deny that direction and impose a rebellious model of lawyering? A possible solution would be a hybrid approach in which the lawyer acknowledges and follows the client's directions but also engages the client in using her own "lawyering" skills in collaboration with the lawyer.

232. Franklin Interview, *supra* note 125. Since the date of the Interview with Karl, the staff make-up of PW has changed.

233. LOPEZ, *supra* note 1, at 31.

234. Perez Interview, *supra* note 147; *see also supra* text accompanying notes 170-176 and (discussing Perez Interview).

235. Perez Interview, *supra* note 147; *see also supra* text accompanying note 180 (discussing Perez Interview).

236. Perez Interview, *supra* note 147; *see also supra* text accompanying note 182 (discussing Perez Interview).

237. Lee Interview, *supra* note 149; *see also supra* text accompanying notes 202-203 (discussing Lee Interview).

238. Lee Interview, *supra* note 149; *see also supra* text accompanying note 219 (discussing Lee Interview).

A. Rebellious Characteristics

As previously discussed, the primary characteristics of rebellious lawyering are: being open to change, utilizing the clients' lay lawyering skills, living in the community, making use of the media, using the client's storytelling ability, and seeing the larger picture.²³⁹ Interviews with the lawyers and community organizers present a picture of the reality of lawyering surrounding the issue of police brutality and misconduct in New York City.²⁴⁰ By comparing and contrasting the characteristics of rebellious and regnant lawyering with these realities, this Comment presents questions to legal practitioners striving to be "rebellious" and suggests ways to change their practice to more fully embrace "rebellious lawyering."

1. *Being Open to Change/Engaging in Alternative Problem-Solving*

A fundamental aspect of rebellious lawyering is an openness to change on the part of the lawyer. The lawyer should be able not only to question his or her routinized problem-solving techniques (e.g., litigation), but also should listen to the client and ascertain from the client's story which method of problem solving would be most effective.²⁴¹

The NCPRR engaged in a process of redefining its organizing tactics and political rhetoric to be accessible to and inclusive of the families of the victims of police brutality, youth, and street organizations.²⁴² This openness to change and desire to integrate community voices into their practice is not present in any of the lawyers' narratives. All four of the narratives show a reliance on litigation, and in particular § 1983 suits, as the primary problem-solving technique.

239. *Supra* Part I.A.1.

240. *Supra* Part II.

241. Lopez discusses this concept in his description of the "early brainstorming stage," in which the attorney considers not only how a court will respond to a claim, but also what other audiences may be potentially available to respond to the client's needs and concerns. LOPEZ, *supra* note 1, at 190. Rebellious lawyers should "draw on marginalized experiences, neglected intuitions and dormant imagination to redefine what clients, lawyers, and others can do to change their lives." *Id.* at 29. Lopez asserts that effective lawyering requires an openness to new insights and a willingness to scrutinize one's own solutions, even if they are generally successful. *Id.* Furthermore, the lawyer to be effective must put these new, creative ideas into action with his or her clients. *Id.* at 66.

242. ALINSKY, RULES FOR RADICALS, *supra* note 88, at 197 (1971); see also *supra* note 159 and accompanying text (discussing Alinsky's work and theory).

Bill says that CCR is committed to using the law in different ways to address the concerns and expand the rights of CCR's clients.²⁴³ Matthew, similarly, confines his work to the traditional legal arena; however, he is open to possibilities of collaboration with community groups and sees the need to expand the services provided to victims of police brutality.²⁴⁴

Both Ellen and Karl see litigation as just one possible vehicle to respond to police brutality. Ellen stated that the community arena may have greater potential for effecting change; however, she gave the *caveat* that this would only be the case if the community was "organized."²⁴⁵ Karl sees community organizing as being at the forefront of the work of PW.²⁴⁶ This reflects a tension between the role of rebellious lawyers in social movements. Hyun asserts that lawyers should use their skills and position in the justice system to defend organizers and community members.²⁴⁷ She conceptualizes the role of organizer and lawyer as discrete and separate, yet working in partnership.²⁴⁸ Her position suggests that legal institutions, such as PW, should focus on legal advocacy and leave the organizing to the community organizers.²⁴⁹ Karl readily admits that PW needs to engage in a more in-depth dialogue with the collaborating community organizations and continue to be flexible in its ability to respond to the needs of different communities.²⁵⁰

2. *The Lawyer-Client Relationship: Utilizing Clients' Lay Lawyering Skills*

Lopez insists that a rebellious lawyer must regard "subordinated" clients and other professionals as "co-eminent problem-solvers."²⁵¹ Alfieri also discusses this notion of collaboration, negotiation of shared responsibilities, and use of client-spoken narra-

243. In the context of the Diallo shooting, Bill explains that CCR was in a "position to do what CCR has always done best—which is to find an innovative litigation strategy to meet the needs of the movement." Goodman Interview, *supra* note 13.

244. Flamm Interview, *supra* note 96.

245. Yaroshefsky Interview, *supra* note 111.

246. Franklin Interview, *supra* note 125.

247. Lee Interview, *supra* note 149.

248. *Id.*

249. *Id.*

250. Franklin Interview, *supra* note 125; *see also supra* text accompanying note 142 (discussing PW's outreach to the gay, lesbian, bisexual, and transgender community).

251. LOPEZ, *supra* note 1, at 213. "She must learn to work with, and not just for them, and she must learn to make space, in more than just her thoughts, for what they bring to the collaboration in the way of experience, know-how, and strategic sense." *Id.* Lopez, in his description of an attorney named Sophie, asserts that a rebellious lawyer must not be limited to "imaginative case processing. She [must] keep[] a con-

tives. Alfieri maintains that this is part of the lawyer's responsibility.²⁵² Richie articulated this concept by saying that the goal of the NCPRR is to help the families "get voice and punch."²⁵³ A key element of the NCPRR's work is to empower the families to develop their own voices in the struggle against police brutality.

Matthew, Ellen, Bill, and Karl all maintain that they are client-centered and are primarily directed by the client in their strategic decisions.²⁵⁴ Despite this, the interviews did not reflect efforts on their part to engage in a dialogue with the clients to develop new, creative responses to police brutality. Matthew does, however, engage some clients in investigative work in preparation for the case. He also includes the client in the parts of the litigation that require client input, such as discovery and trial preparation, in a way that encourages the client's full participation rather than passive acquiescence.²⁵⁵ Karl and Ellen state that on occasion (in Ellen's case, more so in the past), in cases where the clients do not have claims that are sufficiently meritorious and/or the cases are ripe for community mobilization, they will refer the clients to community organizations for alternative means of resolution.²⁵⁶ For example, community organizations employ different techniques to garner support and draw attention to the issue of police brutality. These techniques include community mobilization or media campaigns.²⁵⁷ They also collaborate with community organizations and go to their clients' communities and other public forums to do workshops and outreach.

3. *Living in the Community*

In *Rebellious Lawyering*, Lopez describes the danger of a lawyer being seen as a "permanent outsider." Lopez states that, "this community has had more than its share of so-called friends flitting in and out trying to make changes."²⁵⁸ The regnant model does not

stant watch, often spending a lot of time outside of her office, for news of efforts that she can learn from and contribute to." *Id.* at 32.

252. Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 20, at 2141.

253. Perez Interview, *supra* note 147; *see also supra* text accompanying notes 170 and 185 (discussing how the larger community also has been effected by this process of dialogic empowerment in that people on their own prerogative know how to respond to police brutality).

254. Flamm Interview, *supra* note 96; Yaroshefsky Interview, *supra* note 111; Goodman Interview, *supra* note 13; and Franklin Interview, *supra* note 125.

255. Flamm Interview, *supra* note 96.

256. Yaroshefsy Interview, *supra* note 111; Franklin Interview, *supra* note 125.

257. Perez Interview, *supra* note 147; Lee Interview, *supra* note 149.

258. LOPEZ, *supra* note 1, at 31.

require the lawyer to be a part of the community since the lawyer is serving as a technical specialist and liaison to the legal system.²⁵⁹ In response to this regnant tendency in the progressive lawyering community, Lopez asserts that a rebellious lawyer should live in the same community in which he or she works.²⁶⁰

Of the four lawyers interviewed, Karl is the only one who lives within the community he serves. Karl lives in the housing projects of Crown Heights, Brooklyn and has grown-up in an atmosphere of hostility and brutality by the police. Both he, and to a greater extent, his friends, have been victims of police harassment and brutality.²⁶¹

The term "community" can be broadly defined to encompass one's identity (i.e., ethnicity, religion, race, or sexuality). However, even broadly defined, Matthew, Ellen, and Bill live in communities which are separate from their client population. They, and their families, have never had conflict with the police, except in a civil disobedience setting. Yet, they all identify with the issue of police brutality through a common sense of moral and political outrage and through their friends, acquaintances, and the society in general.²⁶²

Both Hyun and Richie organize primarily among their own respective ethnic groups. Additionally, they both participate in coalition efforts that cross racial and ethnic lines to bring together victims of police brutality. CAAAV has worked extensively with AALDEF, which is primarily focused on issues affecting the Asian community. However, it also works extensively with NELP, CCR, and the Legal Aid Society, organizations not serving any one ethnic or racial group. The two community organizations, therefore, work with lawyers and legal organizations that do not specifically serve their racial group. However, Hyun stressed the importance of a lawyer's ability to empathize with the client's background and to engage in a respectful collaboration with both the client and community organizations which support the client.²⁶³

259. *Id.* at 23.

260. *Id.* at 31.

261. Franklin Interview, *supra* note 125.

262. Flamm Interview, *supra* note 96; Yaroshefsky Interview, *supra* note 111; Goodman Interview, *supra* note 13.

263. Lee Interview, *supra* note 149; *see also supra* text accompanying note 222 (discussing Lee Interview).

4. *Making Use of the Media*

Lopez views the use of the media as a tool for creative problem-solving and rebellious lawyering.²⁶⁴ All of the practitioners and organizers have used media as a tool in their work. They have used print news, radio, television, and public hearings.²⁶⁵ Karl believes that two of the challenges PW has confronted are breaking into mainstream media and the cost of advertising. He feels that reaching as many people as possible is crucial to accomplishing the project's goals.²⁶⁶ Matthew cited the use of the press as the most rebellious aspect of his practice.²⁶⁷ CAAAV and the NCPRR, however, have had conflicts in the past with lawyers who discouraged the organizations or their clients from going to the media since they feared that drawing attention to pending cases might lessen the chances of settlement or indictment.²⁶⁸

5. *Using the Client's Storytelling Ability*

Rebellious lawyering stresses the importance of clients' storytelling because the theory recognizes the silence forced upon marginalized communities.²⁶⁹ Rebellious lawyers must collaborate with their clients in a manner that enables clients to express their stories. The client's narrative can be incorporated into every form of legal representation discussed. The class action, individual action, legal referral, archival, and community organizing approaches can increase client narratives in a variety of ways. Forums in which lawyers could incorporate client narratives include: in the courts (e.g., introducing victim impact statements and direct testimony); before the public (e.g., holding public hearings); in the media (e.g., giving interviews and issuing press releases); and by community outreach (e.g., disseminating posters and educational materials). The NCPRR and CAAAV have encouraged the community mem-

264. LOPEZ, *supra* note 1, at 15. The use of media, (for example, a press conference announcing the filing of a law suit) can be used as a means of making contacts with other institutions and groups in the community and as a means of engaging the public at large in the issue. *Id.* The media can also be used as an alternative to litigation as a means of "marshaling support." *Id.* at 206.

265. Flamm Interview, *supra* note 96; Franklin Interview, *supra* note 125; Perez Interview, *supra* note 147; and Lee Interview, *supra* note 149.

266. Franklin Interview, *supra* note 125.

267. Flamm Interview, *supra* note 96.

268. Perez Interview, *supra* note 147; Lee Interview, *supra* note 149. *See also supra* notes 174 and 212 and accompanying text (discussing the Perez and Lee Interviews, respectively).

269. LOPEZ, *supra* note 1 at 191 (explaining the historic silencing of marginalized communities).

bers they have worked with to articulate, in their own terms, their experiences, and have found that this has enabled their organizations to reach a broader audience.²⁷⁰ According to Hyun, lawyers often dwell on the legal minutiae of the cases and scrutinize the organizer's and client's language before they speak to the public.²⁷¹ Lawyers also have a tendency to speak in "legalese" that obscures the message they are trying to communicate to the client and public at large.²⁷² Hyun cites many examples of lawyers approaching clients—particularly non-English speaking clients—in a "dehumanizing" manner.²⁷³

6. *Seeing the Larger Picture*

Another fundamental characteristic of rebellious lawyering is the ability to see the client's issue within the larger societal context. A rebellious lawyer should not only see the impact of the lawyer-client collaboration on the client's individual life, but also the impact it will have and the response it will receive in the local, regional, national, and international socio-political spheres.²⁷⁴ All four lawyers see the issue of police brutality in the larger socio-political context. Matthew spoke of the relationship between the citizenry and the civilian military force in the United States and other countries.²⁷⁵ All four spoke of the political schism between payment of damages and the budget of the NYPD. The lawyers also spoke of the role of politicians like Mayor Giuliani and Comptroller Hevesi in settling or pursuing litigation, and their willingness to accept culpability and responsibility to change. This reflects an understanding of the reciprocal impact between their legal work and the actions of local politicians. Karl put the problem of police brutality in the larger context of the "prison industrial complex" and the criminalization of African Americans in the United States.²⁷⁶ Richie spoke

270. ALINSKY, *RULES FOR RADICALS*, *supra* note 88; *see also supra* text accompanying note 159 (discussing Alinsky's work and theory); Lee Interview, *supra* note 149; *see also supra* text accompanying notes 197-199 (discussing Lee Interview).

271. Lee Interview, *supra* note 149; *see also supra* text accompanying note 211 (discussing Lee Interview).

272. *Id.*

273. Lee Interview, *supra* note 149; *see also supra* text accompanying note 222 (discussing Lee Interview).

274. LOPEZ, *supra* note 1, at 33. In making this connection, the rebellious lawyer will be able to "identify emerging interests, to avoid duplication of efforts, and to help mobilize for increased resources and participation." *Id.*

275. Flamm Interview, *supra* note 96.

276. Franklin Interview, *supra* note 125. By the term "criminalization" of African Americans in the U.S., I not only refer to the mass incarceration of this part of the

of police brutality within the larger context of the criminal justice system and white supremacy.²⁷⁷ Hyun says that CAAAV's Chinatown Justice Project comes into contact with police brutality through its work with youth, street vendors, and low-income residents.²⁷⁸ CAAAV places police misconduct in Chinatown within the larger context of gentrification and the policies of the Giuliani administration. They generally situate police violence within the context of the criminal justice system and white supremacy.²⁷⁹

B. Regnant Characteristics

As previously discussed, the characteristics of regnant lawyering are: focusing on litigation; seeing "community education" as diffuse, marginal, and uncritical work; seeing "organizing" as sporadic, supplemental mobilization; and viewing lawyers as preeminent problem-solvers and clients as fact-givers.²⁸⁰

1. *Focused on Litigation: The Paradigm of Direct Service or Law Reform*

Litigation is appealing because it offers the possibility of forcing the government to alter its current method of functioning and to comply with federal constitutional and statutory guidelines. This can have a tangible impact on people's everyday lives.²⁸¹ However, lawyers working toward the empowerment of subordinated clients and their communities also must recognize the limits of litigation and its possible negative effect on community organizing efforts.²⁸²

population, but also the systematic perception and labeling of the community as either criminal or potentially criminal. See generally ANGELA Y. DAVIS, *Race and Criminalization: Black Americans and the Punishment Industry*, in *THE HOUSE THAT RACE BUILT 264* (Wahneema Lubiano, ed., 1997).

277. Perez Interview, *supra* note 147; see also *supra* text accompanying to note 159 (discussing Perez Interview).

278. Lee Interview, *supra* note 149; see also *supra* text accompanying notes 189-193 (discussing Lee Interview).

279. *Id.* (stating that other CAAAV programs address different forms of police brutality).

280. *Supra* Part I.A.2.

281. LOPEZ, *supra* note 1, at 171.

282. Professor William P. Quigley, in his discussion of the impact of litigation on community organizations, highlights the weaknesses of the judicial system, in general, in regard to social reform. William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 469-70 (1994).

The judiciary is far more disposed to and capable of stopping something from happening than it is to force something positive to occur However, the real work of organizational development is to take the members' rightful share of power and redistribute it Thus, litigation, particularly litigation

This aspect of litigation was not discussed in the interviews with the lawyers. All of the lawyers interviewed saw litigation as just one of the available tools in social change. None of the lawyers shared experiences of litigation causing a negative impact on the client or the community. However, Hyun feels that focusing on legal resources can “dampen” movement-building efforts. She asserted that being focused solely on litigation as a means of redress could be counter-productive to community organizing efforts.²⁸³

Hyun discussed the tension between the desire of legal organizations to bring precedent-setting litigation and the interests of the clients and community organizers.²⁸⁴ According to Richie, progressive legal institutions and individual lawyers lack the necessary resources to accommodate the large number of individual clients needing representation. This lack of resources pressures the larger legal organizations to focus on impact litigation.²⁸⁵

Regnant lawyers narrowly define lawyering as litigation. They judge different potential aspects of the practice, such as community education, street theater, and coalition building, as “variously flawed, utopian, or somehow not really lawyering at all.”²⁸⁶ Critics of traditional litigation-centered lawyering have observed that direct services and law reform litigation can potentially have a negative impact on community organizing efforts. For instance, providing direct service representation may isolate the client because it fails to connect the client with others who have faced similar problems, and fails to develop a collective response.²⁸⁷

as the sole approach to a problem, will not likely be effective in solving the problem.

Id.; Alfieri, *Antinomies*, *supra* note 20, at 664 (“Remedial litigation should not be mounted, even where altruistic relief is possible, without the activation of class consciousness among the poor, nor without the political organization and mobilization of the poor.”).

283. Lee Interview, *supra* note 149; *see also supra* text accompanying note 216 (discussing Lee Interview).

284. Lee Interview, *supra* note 149; *see also supra* text accompanying notes 208-208 (discussing Lee Interview).

285. Perez Interview, *supra* note 147; *see also supra* text accompanying note 182 (discussing Perez Interview).

286. LOPEZ, *supra* note 1, at 26.

287. Alfieri, *Antinomies*, *supra* note 20, at 684-85. In his discussion of direct service, Professor Alfieri confronts the possible negative consequences of examining the client’s problem as an isolated event. *Id.* Alfieri states, “The failure to address legal disputes contextually as individual manifestations of class antagonisms inhibits client politicization and class consciousness . . . and too often improvish[es] [a] community.” *Id.*

Matthew expressed a frustration with the isolation of his practice and the narrow and limited impact the individual cases have on the practice of police officers and the system at large.²⁸⁸ He did not speak of any experiences of bringing clients together to share experiences of police brutality and he probably has not tried this approach. Bill spoke of both a class action (the SCU case) and individual police brutality cases that CCR has undertaken. Although the class action brings together various victims, he too did not share any experiences of bringing clients together from separate cases or the various class actions. Despite the fact that all of the lawyers interviewed feel that law reform and direct services alone cannot accomplish social change, there seems to be a lack of creative and innovative approaches being developed to improve collaboration with clients and community and to better address the problem of police brutality.²⁸⁹

2. *Seeing "Community Education" as Diffuse, Marginal and Uncritical Work and "Organizing" as Sporadic, Supplemental Mobilization*

All of the lawyers interviewed recognize the value of community education and organizing. However, with the exception of Karl, their involvement in these efforts is minimal.²⁹⁰ This recognition of need, coupled with the inaction by the individual lawyers, produces a crisis in the progressive legal community. If the need to reach out to, organize with, and educate the community is viewed as an essential component to social change lawyering, then why are these lawyers not participating in these activities to a larger extent? The answers likely would be the common responses of regnant lawyers: there is not enough time, litigation uses their specialized skills to a greater degree, there are other people who are doing the organizing work, or they reach out to the community when there is the need—when looking for members for a class action or asking for support for a press conference or rally. If a lawyer is going to work for the empowerment of the client and community and embody

288. Flamm Interview, *supra* note 96.

289. Alfieri, *Antinomies*, *supra* note 20, at 688. "Framing an attack on a particular wrong cannot *ipsi dixit* [sic] unmask domination and liberate consciousness. In the same way, pressing for judicial creation or enforcement of a particular rule or doctrine cannot redistribute class power." *Id.*

290. LOPEZ, *supra* note 1, at 153. A characteristic of regnant lawyering is to treat community education and organizing as collateral to the lawyer's "real" work and to be involved in these efforts only on a "sporadic, superficial" level. *Id.*

rebellious lawyering, the lawyer must create space and give priority to these alternative techniques of lawyering.

Richie and Hyun both recognize the importance of legal action in addressing police brutality. One of the three parts of the NCPRR's organizing strategy is legal action.²⁹¹ However, both community organizers stressed that their organizations only will work with lawyers and support legal action if they see it as beneficial to the larger organizing effort.²⁹² This position places the lawyers on the periphery of the organizers' response to police brutality. Therefore, the lawyers and organizers envision the centrality of the legal action and the community organizing differently.

3. *Viewing Lawyers as Preeminent Problem-Solvers and Clients as Fact-Givers*

Matthew captures the regnant belief that clients are essentially fact-givers and lawyers are problem-solvers in his statement that, "Being a client is actually an inherently passive role."²⁹³ Regnant lawyers see their role as filling a need in the fight against subordination and the use of their specialized skills and knowledge places them in a special position in this struggle.²⁹⁴ The legal analysis that is used to determine whether a case is legally meritorious²⁹⁵ or if the legal argument can be broadened to bring about a larger scope of change²⁹⁶ are exercises which exclude the clients from actively participating in the outcome of their cases. These practices must be examined and questioned.

CONCLUSION

The theory of rebellious lawyering has particular salience in the context of the legal representation of victims of police brutality.

291. Perez Interview, *supra* note 147; *see also supra* text accompanying note 169 (discussing Perez Interview).

292. Franklin Interview, *supra* note 125; Lee Interview, *supra* note 149; *see also supra* text accompanying notes 180 and 216 (discussing Franklin and Lee Interviews respectively).

293. Flamm Interview, *supra* note 96; Lee Interview, *supra* note 149; *see also supra* text accompanying notes 104 and 201 (discussing Flamm and Lee Interviews, respectively). Hyun explains that CAAAV has observed 18(B) attorneys in criminal court also not engaging the clients in a dialogue. The lawyers do not explain the criminal court procedures and often do not even request translators so that they and the court can communicate with the client.

294. LOPEZ, *supra* note 1, at 28.

295. Franklin Interview, *supra* note 125; Goodman Interview, *supra* note 13.

296. Yaroshefsky Interview, *supra* note 111.

The clients and their communities are, on “lock-down”²⁹⁷ and they and their loved ones have been subject to and witnesses of continuous, brutal attacks by the NYPD. As the interviewed legal practitioners and community organizers have recognized, their clients are looking for more than just pecuniary damages. They are seeking justice and attempting to prevent similar brutalization from recurring. The importance and impact of these lawyers’ work should not be denigrated or belittled. The judgments and settlements they win for their clients are the closest their clients have gotten to obtaining justice and recognition for their injuries. However, after more than two decades of suits against the NYPD for police brutality and other misconduct, we must attempt to create and encourage alternative approaches to this dilemma that can bring about systemic change on a greater level.

The lawyers envision themselves as client-centered. They voice frustration with the limits of litigation in the context of seeking systemic change in the operations of the police. Despite this frustration, their practices are largely litigation focused and, in this manner, regnant in character. All four attorneys have rebellious characteristics and they all acknowledge the importance of community organizing and education. They also see police brutality in the larger political context of the United States.

Police brutality is a symptom of larger power inequities within the United States. Therefore, the goal of police brutality-related legal representation should be to abolish such brutality, as well as the power dynamic that creates and condones this articulation of inequality. A more rebellious stance on the part of the legal community would respond to the needs of the clients and the community on a more profound level. It is incumbent upon the legal community to take a more rebellious stance in its practice. The transformative process of rebellious lawyering must take place on both an organizational and individual level. Concrete steps can and should be undertaken by the progressive legal community to better assist community mobilization against police brutality. Various grassroots organizations have created networks to assist each other in creating a unified response to police brutality in New York City. Similarly, progressive legal institutions and individual lawyers must come together to discuss their strategies and methodologies. Lawyers would benefit from a network by mobilizing support

297. Franklin Interview, *supra* note 125.

for their cause and by giving and receiving emotional, political, and technical support from their peers.²⁹⁸

The “blue wall of silence” that has been cited as a barrier inhibiting police officers from exposing misconduct within the police force appears to have a parallel within the legal community. The lawyers and community organizers interviewed shared experiences with private lawyers who have further violated the rights of their clients in unprofessional and unethical representation. This wall of silence must be broken as well.

Lawyers, community organizers, survivors of police brutality, families of victims of police brutality, students, members of street organizations, and others must recognize each other as collaborators in a joint struggle and work together to fashion a legal response to the problem of police brutality that will enable the community to become empowered.

298. Kilwein, *supra* note 68, at 195.

