Police Abuse: Can the Violence Be Contained?

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POLICE ABUSE: CAN THE VIOLENCE BE CONTAINED?

David Rudovsky*

I. Introduction

Thirty years ago, in Monroe v. Pape,¹ the United States Supreme Court first addressed the question of whether or not abuses committed by state police officers were subject to suit under the Ku Klux Klan Act of 1871, popularly known as Section 1983.² Monroe presented allegations of police abuse in a quintessential form: several heavily armed police officers broke into the plaintiffs' home without a judicial warrant, ransacked the house and terrorized the occupants, making racial and other derogatory slurs as they proceeded in their search. No contraband was found and no arrests were made.³

The Supreme Court ruled that these allegations stated a cause of action under Section 1983 for the violation of the plaintiffs' Fourth Amendment rights. The Court held that the phrase "under color of state law" in Section 1983 was intended to include actions undertaken by government officials without state approval or authorization.⁴ Most incidents of police abuse involve the actions of officers who act contrary to state law, and, in determining that Section 1983 was intended to counter these violations, the Court held out the promise of an effective federal remedy for police abuse.

Unfortunately, the expectations engendered by Monroe have not been fully realized. After three decades and much constitu-

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³ 365 U.S. at 169.
⁴ Id. at 183–85.

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tional litigation, the abuses continue, in many ways unabated. The beating of Rodney King by Los Angeles police in 1991 and the highly controversial acquittal of the officers involved focused attention once again on the problem of police abuse and demonstrated the continuing existence of the practices and policies that cause it.

Almost everyone who viewed the tape of the King beating was appalled by the display of senseless brutality. While some attempted to explain or defend the police actions, the evidence of brutality and abuse was so strong that a defense was rendered implausible. The incident had the earmarks of classic police abuse: extremely excessive force used by white officers against a black suspect, an event infused with racism, and carried out with an attitude of impunity. For some, the event echoed numerous similar events in the past. Responding to the King incident, New York City Police Commissioner Lee P. Brown declared that “the problem of excessive force in American policing is real.” For many others, it was a first-time eyeopener, a window into a world of official violence that could not be squared with our cultural and political norms.

The bookends of Monroe v. Pape and Rodney King embrace volumes of law and politics. An essential question that emerges

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7 George James, Police Chief’s Call for U.S. to Study Use of Force, N.Y. TIMES, Apr. 17, 1991, at B3.

8 Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit has stated:

[F]or a lot of naive people, including me, [the King case] puts a real doubt on the posture of prosecutors that police are disinterested civil servants just “telling it as it is.”

We should have known all along what this incident points out: that police get involved in what they do and that they are participants in the process just like anyone else. They are subject to bias and they do have a stake in the outcome.

Darlene Ricker, Behind the Silence, 77 A.B.A. J. 45, 48 (1991). This observation was foreshadowed by Justice Jackson’s important insight, made over forty years earlier, that, in considering Fourth Amendment claims, we should be fully aware that the police are involved in the “often competitive enterprise of ferreting out crime.” Johnson v. United States, 333 U.S. 10, 14 (1948).
from this thirty-year period is whether the institutions, programs and principles we have developed to empower the police are also adequate to the task of controlling the police. We must also ask whether in our society, which relies substantially on the courts to regulate and control governmental behavior, the legal response to police abuse is sufficiently sensitive to the institutional nature of the problem.

Enforcing the proper restraints on police power is a difficult problem in any society. In the United States there is both a fear of governmental abuse and a tolerance of repressive measures, the latter reflecting a belief that police excesses are necessary to combat crime.\footnote{While most commentators condemn proven cases of police abuse, excuses are still made. For example, in the aftermath of the highly publicized beating of Rodney King, syndicated columnist Patrick Buchanan wrote:}

In our polarized and violent society, most Americans have come to look upon the cops as "us," and upon King, a convicted felon, as "them." He is the enemy in a war we are losing, badly; and we have come to believe the cops are our last line of defense.


Also writing after the King beating, another commentator wrote: "[T]he tape of some Los Angeles-area cops giving the what-for to an ex-con . . . is not a pleasant sight, of course; neither is cancer surgery. Did they hit him too many times? Sure, but that’s not the issue: it’s safe streets versus urban terror." Llewellyn H. Rockwell, It's Safe Streets Versus Urban Terror, L.A. TIMES, Mar. 10, 1991, at M5.
reinforce patterns of unlawfulness. We know much about the principles of accountability and organizational control, yet we often fail to apply these basic precepts to law enforcement officials.\(^\text{10}\)

In order to explore the sharply differing perceptions of the nature of police abuse and analyze the contemporary legal and political disputes over this profoundly difficult problem, it is helpful to consider an updated version of *Monroe v. Pape*.

II. Metropolis, U.S.A., 1992

Metropolis, a large urban area, like many of its sister cities across the country, has over the past fifteen years experienced an increase in crime and has suffered the pernicious effects of drugs, unemployment and poverty. The police department is structured and operated along the lines of most large city departments. It has devoted an increasing amount of resources to training and supervision, and has recruited and hired additional minority members. The training program is well in line with professional standards, setting forth the appropriate constitutional standards for the use of police powers.\(^\text{11}\)

The police are under substantial pressure to control and deter violent crime and illicit drug transactions. A special narcotics squad with city-wide jurisdiction has been established to combat drug activity. Members of this squad report only to the Unit Commander. The squad is responsible for building intelligence with respect to drug activity, conducting raids of suspected drug locations, recruiting informants and targeting areas that have significant drug and drug-related problems.


\(^{11}\) There are no binding national standards for police officer training. Each jurisdiction sets its own requirements, but all require a course of instruction in constitutional law. Metropolitan police forces typically exceed their state's minimum requirements. For example, the Boston Police Academy, while required to offer 420 training hours to recruits, provides over 800 hours of training, which includes approximately thirty hours of constitutional law. Instruction primarily consists of lectures conducted by the Constitutional Law Instructor, who is both a lawyer and a police officer. Police officers also receive annual updates. Telephone Interview with Lt. James Moore, Constitutional Law Instructor, Boston Police Academy (Apr. 17, 1992).
The nation is involved in a "war on drugs." Congress and state legislatures have given the police and prosecution a powerful array of new law enforcement measures. At the same time, the Supreme Court has drastically limited the substantive protections of the Fourth Amendment and has significantly narrowed the exclusionary rule, thus authorizing increasingly invasive police searches, seizures and other investigative practices.

Enormous sums of money have been expended on the drug war, primarily on the law enforcement side of the equation. Between 1975 and 1990, there has been a three-fold increase in the number of prisoners in the United States; in 1992 we hold well over a million people behind bars, the largest prison population per capita of any industrialized country. The war on drugs is
largely accountable for this development, due to greater numbers of arrests and significantly increased sentences caused by mandatory minimum sentences and guideline sentencing schemes.\footnote{See Marc Mauer, Americans Behind Bars, 6 Criminal Justice 12, 16-17, 38 (1992); Mauer 1992 Update, supra note 16, at 7-9.} Whatever the merits of this heavy-on-enforcement approach (and the results certainly justify acute skepticism),\footnote{See generally Michael Levine, The Drug “War”: Fight It At Home, N.Y. Times, Feb. 16, 1992, at E15; Nadelmann, supra note 16; John Kaplan, Taking Drugs Seriously, The Public Interest, Summer 1988, at 32; Milton Friedman, A War We’re Losing, Wall St. J., Mar. 7, 1991, at A14; Steven Wisotsky, Beyond the War on Drugs (Prometheus Books 1990) (1986). See also Gostin, supra note 16 (arguing that this “penal” approach to controlling drug abuse has greatly contributed to other social ills, such as the needle-borne spread of AIDS).} the directives to police forces around the country have been unambiguous: it is a war, and virtually any means will be tolerated on the battlefield.

The Metropolis narcotics squad has for the past six months investigated drug selling in the Circle Park section, a predominantly African-American, lower-income neighborhood. Complaints by community residents and articles in the city newspaper have led to heightened police concern over the drug problem in this area. Rumors have associated Charles and Linda Raft with known drug sellers. To secure further information about these individuals, the police decide to arrest Robert Castle, a convicted drug abuser, who they believe is a friend of the Rafts. The police arrest Castle on false charges and tell him that things will go much better for him if he cooperates in the investigation of the Rafts. Castle agrees to cooperate and tells the police that cocaine is stored in the Raft residence and that he has seen them sell the drug as recently as two weeks before. Based on these assertions, the police obtain a warrant to search the Rafts’ home.\footnote{The affidavit of probable cause in the search warrant application states:

The undersigned affiant is a member of the Narcotics Unit of the Metropolis Police Department and has been involved in the investigation of drug and drug-related crime for the past three years. On [date] a confidential informant told the affiant that cocaine is stored in the residence of Charles and Linda Raft [address]. The informant has provided reliable information in the past. On three occasions, information provided by the informant resulted in the arrest of drug suspects or in the seizure of controlled substances. The confidential informant saw drugs in the Rafts’ house two weeks ago. The Rafts sell the drug from their home to other persons. Based on the informant’s contacts and sources, he believes that the Rafts will have a large amount of cocaine in their house on this date, in preparation for a large sale tomorrow.}

19 See generally Michael Levine, The Drug “War”: Fight It At Home, N.Y. Times, Feb. 16, 1992, at E15; Nadelmann, supra note 16; John Kaplan, Taking Drugs Seriously, The Public Interest, Summer 1988, at 32; Milton Friedman, A War We’re Losing, Wall St. J., Mar. 7, 1991, at A14; Steven Wisotsky, Beyond the War on Drugs (Prometheus Books 1990) (1986). See also Gostin, supra note 16 (arguing that this “penal” approach to controlling drug abuse has greatly contributed to other social ills, such as the needle-borne spread of AIDS).}
At 7:30 p.m., ten heavily armed officers arrive to execute the warrant. They sledgehammer the front door and gain entry to the living room. To immobilize the occupants of the house, they order the Rafts and their twelve-year-old son to lie on the floor, guns trained at their heads; they are warned that if they move they will be shot. Police fan out through the house searching for drugs. They do not find any cocaine, but in the process of the search they do discover a small amount of marijuana. During the search, the police empty closets, overturn tables, take apart household equipment and tools and dismantle several pieces of furniture. Two of the officers direct racial epithets at the family: Mr. Raft is called a “black-ass drug dealer.”

Frustrated by their lack of success, the police take Mr. Raft into the basement and threaten him with arrest for possession of marijuana unless he supplies them with information about drug dealers in the neighborhood. Raft tells the police that he knows nothing about drug transactions, and that the marijuana is left over from a party they gave several months before. The police inform Raft that their informant had been in the house and had observed narcotics transactions; Raft again states that he has no information and that he does not deal in drugs. Raft does add that he had recently been involved in a dispute with a person in the neighborhood who is known to be involved in drugs, Robert Castle. Raft asks the police if Castle was the informant, but the police decline to answer.

Believing that Raft is lying about his involvement in drug activity, the police decide to arrest him for possession of marijuana, even though they know that the amount involved is below the level established by the District Attorney as a minimum threshold for criminal charges. At the narcotics division, Raft is again questioned about drug activity; upon his denials, he is struck several times by one of the officers. He suffers injuries to the face and arms. He is then charged with assaulting a police officer and resisting arrest.

At the preliminary hearing on the criminal charges, an assistant district attorney offers to drop the criminal charges against Raft if he will agree to waive his right to sue the police. Raft agrees to these conditions, and the criminal charges are dismissed.

This version of *Monroe v. Pape*, updated to the 1990s, provides a point of departure for examining the key elements and
The dynamics of police misconduct. The next section analyzes the hypothetical in terms of the legal response, the institutional causes of the conduct and the culture of police abuse. In the concluding section of this Article, I explore a possible agenda for reform.

III. Judicial and Administrative Remedies for Police Misconduct: The Failure of the Courts and the Political Process

As a matter of public policy and constitutional law, one would expect that the conduct of the police in our hypothetical would be subject to strong condemnation. Indeed, a video portrayal of these events would probably inspire reactions similar to those generated by the Rodney King video. Yet, in the real world of civil rights litigation and police administration, we can expect to find just the opposite: a good deal of the misconduct will not be remediable in the courts and, as an internal administrative matter, little if any evaluative or disciplinary action would be taken against the officers. In fact, as we will see, their actions were a predictable result of police policies and legal doctrine that subordinate individual rights to police power.

The hypothetical raises distinct issues of legal and administrative process, as well as social policy. To elucidate these systemic problems, it is helpful to examine each aspect of the Metropolis police officers' conduct.

A. The Search Warrant

The process by which the police obtained the warrant is highly problematic. The officers used an illegal arrest to put pressure on an informant, withheld this information from the judge who issued the warrant, and submitted an affidavit that arguably fell short of probable cause. In a civil suit, the warrant could be attacked for its failure to provide a sufficient factual basis for believing the informer's tip. However, even if a reviewing court found there was no probable cause to justify the warrant, the doctrine of
qualified immunity would preclude a damage award against the officer who secured it unless no reasonably well-trained officer would have believed that probable cause existed. Thus, even if a constitutional violation could be proven, the officer would be protected from liability in damages.

The facts suggest that the informant acted out of a personal grudge against the Rafts and may have provided false information. However, unless this fact was known to the police, it would not provide an adequate basis for challenging the warrant. Indeed, the warrant could still be upheld even if the police deliberately withheld the fact that they had illegally arrested Castle and pressured him to talk. Suing Castle would not be a real option for the Rafts either, given the informant’s privilege and the difficulty of establishing the level of state action necessary to bring his conduct within the purview of Section 1983.

Finally, the Rafts could not assert a violation of their own Fourth Amendment rights based on Castle’s unlawful pretext arrest. Even if the police deliberately violated Castle’s rights to


24 The doctrine of qualified immunity shields government officials from damage awards in civil rights cases where their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For further discussion of this doctrine, see infra notes 35–37, 42–43 and accompanying text.

25 Where an officer has a reasonable basis to credit the assertions of an informant, the fact that the informant knowingly provided false information is not a basis for attacking the warrant. Franks v. Delaware, 438 U.S. 154 (1978). See also Commonwealth v. Bradshaw, 434 A.2d 181 (Pa. Super. 1981).

26 In Franks, 438 U.S. 154, the Court ruled that a search warrant will be deemed invalid for reasons of an affiant’s misrepresentations only where the false information was given deliberately or in reckless disregard of the truth, and where probable cause would not have existed without that information. See also Leon, 468 U.S. at 923.

27 On the informant’s privilege, see McCray v. Illinois, 386 U.S. 300 (1967) (as a general rule, government need not reveal identity of informant at suppression hearing; disclosure only required where defendant makes a substantial showing that informant may not exist or that affiant has deliberately misstated information received). See also Franks, 438 U.S. at 167. In civil suits, the courts generally have not found informants to be acting “under color of state law” and therefore not subject to suit under § 1983. See, e.g., Ghandi v. Police Dep’t of City of Detroit, 823 F.2d 959 (6th Cir. 1987).
enable them to obtain information to be used against the Rafts, the Rafts would lack standing to challenge such unconstitutional conduct. 28

There is a direct link between the legal standards regarding the search warrant process and the tactics used by the Metropolis police. Warrants can issue on little more than hearsay allegations of informants, 29 and the Court has erected virtually insurmountable barriers to requiring further judicial inquiry into the informant’s credibility, motives or even her very existence. 30 Thus, the police have been told that barring the most unusual circumstances there will be no inquiry into the truthfulness of what the informant alleged or the truthfulness of the officer’s assertions.

If Metropolis is true to contemporary police administration, it will have no standards for informant control. 31 Each detective or officer is relatively free to develop her own network of informants, and there is little overall supervision of individual informants’ credibility, reliability or usefulness. 32 Moreover, in cases where a court actually strikes down a warrant and suppresses evidence in a criminal case, or awards a plaintiff damages in a civil matter, the adjudication is not likely to be reported to the department. 33

The police and prosecutor also know that under the “good faith exception” to the exclusionary rule, even if the warrant does not state probable cause, it will be upheld if a reasonable officer

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28 Wong Sun v. United States, 371 U.S. 471 (1963). Indeed, even where the police commit a criminal act to obtain information about a third-party suspect, the Supreme Court has denied the third party standing to challenge the illegality, ruling that the federal courts should not invoke their supervisory powers to exclude the evidence obtained. See United States v. Payner, 447 U.S. 727 (1980).


30 Absent extraordinary circumstances, the identity of the informant will not be disclosed. See Franks, 438 U.S. 154; McCray, 386 U.S. 300. See also Irving Younger, The Perjury Routine, The Nation, May 8, 1967, at 596.

31 The general practice among police departments is that informants are treated as the "property" of individual investigators; interactions between informants and investigators are most often informal and go undocumented. However, a more centralized and professionalized system has recently been proposed by groups such as the International Association of Chiefs of Police National Law Enforcement Policy Center. See INTERNATIONAL ASSOC. OF CHIEFS OF POLICE NATIONAL LAW ENFORCEMENT POLICY CENTER, MODEL POLICY: CONFIDENTIAL INFORMANTS—CONCEPTS AND ISSUES PAPER (June 1990). These standards have yet to be adopted on a national scale.

32 See Selwyn Raab, Chief Warns of Corruption in Drug Unit, N.Y. Times, Jan. 9, 1992, at B1 (revelations that NYC narcotics investigators lied to strengthen cases and obtain arrest warrants demonstrates need for tighter internal controls and supervision).

would have believed that it did, a standard that has sustained the most questionable of warrants.\textsuperscript{34} The qualified immunity doctrine would then preclude recovery against the Metropolis officers where the conduct, though adjudged unconstitutional, had not been previously clearly proscribed.\textsuperscript{35} The defense would be available even where the officers acted with malice or with an intent to violate the citizen’s rights.\textsuperscript{36} The policy considerations supporting some form of immunity—such as the desire to protect officials from suit where they were not reasonably on notice of the legal standards governing their conduct—could be satisfied with a far narrower defense.\textsuperscript{37}

Whatever the theoretical and policy merits of qualified immunity, we must recognize that broader immunity creates greater incentives to cut constitutional corners. Where more surveillance or investigation might be indicated prior to seeking a warrant, an officer could decide to forego this work, knowing that she only has to approximate probable cause. Furthermore, an officer might be tempted to falsely assert than an informant has a strong record of reliability. Even worse, an officer could entirely fabricate an informant with minimal fear of negative repercussions. In the Rafts’ case, there was a distinct possibility that the informant acted out of personal malice in providing the information, yet the officers had no incentive to examine his truthfulness.

\textbf{B. Execution of the Search Warrant}

Similar incentives to cut constitutional corners exist in executing the warrant. The officers’ entry into the Raft house appears to have been a violation of the Fourth Amendment, as there was no “knock and announce” before the police used a sledgehammer

\textsuperscript{34} See United States v. Leon, 468 U.S. 897, 920 (1984); United States v. Bishop, 890 F.2d 212, 216–18 (10th Cir. 1989).


\textsuperscript{36} Harlow, 457 U.S. at 815–19.

to invade the premises.\textsuperscript{38} Of course, the police might dispute whether or not there was any prior announcement of purpose, presenting a factual issue at trial.

Moreover, it is possible that the officers would testify that they dispensed with the knock and announce procedure based on their belief that violence or destruction of the drugs would have resulted if they had identified themselves. While it seems to be settled law that an announcement of purpose is generally not forgiven in these circumstances, and that permission to dispense with these requirements must be granted by the judge who issues the warrant,\textsuperscript{39} the police could still raise a qualified immunity defense to this claim.\textsuperscript{40}

Several institutional factors also encourage police entry without announcement. The Metropolis police know that if drugs are found during the search, their testimony that they did in fact knock and announce—or that some exigent circumstances justified their entry without identification—would almost always be credited. The police also know that if nothing is found, legal action will be highly unlikely, and therefore the illegality of their entry will be rendered purely academic.

The manner in which the police searched the Raft house raises serious problems under the Fourth and Fourteenth Amendments. The occupants were terrorized; the police pointed guns at them and forced them to lie on the floor during the search. The destruction of personal property during the search may have constituted a Fourth Amendment violation.\textsuperscript{41} The police would likely respond with a potent defense: in narcotics raids they often face violent opposition, and their tactic is to scare and immobilize the occupants to prevent anyone from getting hurt. The destruction of

\textsuperscript{38} State and federal statutes typically require the police to knock and announce their purpose unless there are exigent circumstances that justify immediate entry. See, e.g., \textsc{Cal. Penal Code} § 844 (West 1982); 18 U.S.C. § 3109 (1988). The Fourth Amendment also appears to require the “knock and announce,” absent exigent circumstances. See \textsc{Ker v. California}, 374 U.S. 23 (1963).

\textsuperscript{39} See, e.g., \textsc{Commonwealth v. Grubb}, 595 A.2d 133 (Pa. Super. 1991); \textsc{State v. Cleveland}, 348 N.W.2d 512, 519 (Wis. 1984).

\textsuperscript{40} The issue under the qualified immunity doctrine would be whether it was clearly established that an unannounced entry based on the generalized exigencies inherent in a drug search must be reviewed by the judge or magistrate reviewing the search warrant and not by the police officer. See, e.g., \textsc{Mitchell v. Forsyth}, 472 U.S. 511 (1985).

\textsuperscript{41} See \textsc{Tarpley v. Greene}, 684 F.2d 1, 9 (D.C. Cir. 1982) (“[D]estruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment.”).
property would be justified by asserting that drugs are often hidden in these areas and that a close and intrusive search is permissible under the circumstances.

While a good case could be made that the search techniques were excessive, it is not at all clear that the Rafts would prevail as to all aspects of the search. Again, under the qualified immunity doctrine, there could be no recovery in damages against the officers unless the law was previously clearly established that the challenged conduct was unconstitutional. Moreover, because a court can decide the immunity question without reaching the merits of the issue, it is possible that no clearly established principles would ever be articulated in this area, thus leaving the police free to engage in similar conduct in the future.

It is unlikely that Metropolis police command officials would critically review these search practices. It is also unlikely that the department would take remedial action. The failure to evaluate practices such as the “use of intimidation” during drug raids undermines individual officer accountability by providing implicit departmental approval of these questionable practices.

Even if a court found the officers’ conduct to be unconstitutional, supervising officials would rightly consider it unfair to discipline them since the officers involved were not responsible for the adoption of the search techniques employed at the Raft house. It would be appropriate for the department to reconsider its search policy at this point, but unless the courts seem inclined to suppress evidence or to assess damages, the department’s belief that these practices are essential to drug enforcement would almost certainly preempt any reform.

Municipal liability would be a potential source for relief. Qualified immunity would not be a defense here. However, under the remedial scheme of Section 1983, municipalities are liable for unconstitutional police conduct only where a municipal policy, law

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42 See supra notes 24, 35–37 and accompanying text.
43 See Rudovsky, supra note 37, at 53–55. See also Buricki v. Ryan, 827 F.2d 836 (1st Cir. 1987); Ramirez v. Webb, 835 F.2d 1153 (9th Cir. 1987); Walentas v. Lipper, 862 F.2d 414 (2d Cir. 1988), cert. denied, 490 U.S. 1021 (1989).
44 Even if the unit command had reviewed plans for the search, since no command officials were present during its execution, review would be unlikely unless the Rafts initiated court proceedings. The average metropolitan police department has no device in place to evaluate the performance of specific officers and teams. See Raab, supra note 32.
or custom demonstrably caused it. 46 Because these search practices are unlikely to be “official” departmental policy, the Rafts would have the heavy burden of demonstrating a pattern of such excessive searches sufficient to prove a settled practice or custom. 47 The failure of the department to train or properly supervise its officers in this area is a basis for liability, but only where the plaintiff can show that policy makers were “deliberately indifferent” to the rights of the public. 48

Given the problematic nature of a remedy in damages, the Rafts would probably seek equitable relief. But the Supreme Court has imposed substantial obstacles to such an action. In City of Los Angeles v. Lyons, 49 the Court refused to grant injunctive relief to a plaintiff who had suffered permanent physical injuries when a police officer administered a “chokehold” in effecting an arrest. Relief was denied even though the record demonstrated that this police practice was commonly used in circumstances not justifying such force and had resulted in sixteen deaths in recent years. 50 The Court determined that the past injury had no continuing effects sufficient to provide standing for prospective relief and that the plaintiff was unable to show that he, as opposed to any other citizen, would again be subject to the same unconstitutional conduct. 51 The Court has been disinclined to enjoin most local police procedures, 52 and it is highly unlikely that the Rafts would be granted equitable relief.

46 In Monell v. New York Dep’t of Social Servs., 436 U.S. 658 (1978), the Court ruled that a municipality was liable under § 1983 only where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality]." Id. at 690–91. The Monell doctrine has been further refined in more recent case law. See, e.g., City of Canton v. Harris, 489 U.S. 378, 388–89 (1999) (holding that unsatisfactory training of police officers constitutes insufficient grounds for holding city liable unless city exhibited deliberate indifference); City of St. Louis v. Praprotnik, 485 U.S. 112, 122 (1988) (stating that a municipality is liable only if the challenged action was pursuant to official policy); Pembaur v. City of Cincinnati, 475 U.S. 469, 483–84 (1986) (recovery from a municipality can be based upon acts sanctioned by officials responsible for establishing municipal policy).

47 See cases cited supra note 46. See also City of Oklahoma City v. Tuttle, 471 U.S. 808, 820–22 (1985); Languirand v. Hayden, 717 F.2d 1356, 1358–59 (5th Cir. 1983).

48 City of Canton, 489 U.S. at 389. For application of this standard in the lower federal courts, see, e.g., Davis v. Mason County, 927 F.2d 1473, 1481–82 (9th Cir. 1991); Gentile v. County of Suffolk, 926 F.2d 142, 152–53 (2d Cir. 1991); Kerr v. City of West Palm Beach, 875 F.2d 1546, 1555–57 (11th Cir. 1989).


50 Id. at 100, 110–13.

51 Id. at 101–05.

C. Pretextual Arrests

The Metropolis police executed two pretextual arrests to accomplish their goals. They arrested Castle without probable cause; then they arrested Mr. Raft on charges for which they knew he would not be prosecuted. But Castle's arrest, regardless of its illegality, would not provide the Rafts with a constitutional claim. Mr. Raft's own arrest for drug possession was constitutionally permissible since it was supported by objective probable cause. Accordingly, unless the police department restricts the power of its officers to make pretext arrests or searches, this conduct is likely to be repeated.

The Raft case demonstrates how the Court's jurisprudence on pretext arrests provides incentives to the police to violate or avoid basic constitutional guarantees. The police knew in advance that their illegal arrest of Castle would be a moot legal issue in any resulting investigation or arrest of the Rafts. Castle was unlikely to complain since he was the beneficiary of a deal to drop all charges against him. Raft's arrest on drug charges would never have been made in the normal course of events, but the police used it in this case to gain leverage against Raft. This leverage was used both in the investigation and later to obtain the release of the officers from civil liability in exchange for the dismissal of the criminal charges. Surely, if deterring police misconduct is a principal purpose of the Court's Fourth Amendment doctrine, the pretextual arrests made in Metropolis should be classic candidates for strong remedial action.


Most federal courts have ruled that where a reasonable police officer could have taken the action in question consistent with the Fourth Amendment, the fact that she did it for improper purposes is irrelevant. See, e.g., United States v. Causey, 834 F.2d 1179, 1184-85 (5th Cir. 1987) (en banc); United States v. Hawkins, 811 F.2d 210, 213-15 (3d Cir. 1987). Other courts have ruled that where no reasonable officer would have made the pretextual stop, even though technically allowed under the Fourth Amendment, the evidence should be suppressed. See, e.g., United States v. Guzman, 864 F.2d 1512, 1515-18 (10th Cir. 1988); United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986). The Supreme Court recently denied certiorari, over Justice White's dissent, in three cases that presented this issue: Cummins v. United States, 90-1628, 60 U.S.L.W. 3358 (Nov. 12, 1991); Trigg v. United States, 91-5013, 60 U.S.L.W. 3358 (Nov. 12, 1991); Enriquez-Nevaris v. United States, 91-5087, 60 U.S.L.W. 3358 (Nov. 12, 1991).

There is substantial evidence that police are quite sophisticated in exploiting the many loopholes created by the Court's constitutional remedies jurisprudence. For example, in *Cooper v. Dupnik*, the police deliberately refused to honor the suspect's request for counsel during interrogation. The police knew that any statement given by the defendant would be suppressed at trial, but they also knew that the Supreme Court had ruled that such statements could be used to impeach the defendant if he testified at trial. The defendant was in fact innocent and was exonerated of all charges. In an ensuing lawsuit under Section 1983, the police admitted that they had hoped their illegal questioning would result in a statement that would deter the defendant from testifying. The court nonetheless ruled that *Miranda* is not a constitutionally mandated rule, and that the plaintiff was not harmed by lack of counsel since no fruits of the questioning were introduced against him.* Cooper reveals a troubling judicial complacency and rigidity in the face of a police practice that consciously manipulated and ignored basic constitutional guarantees. If the courts do not address deliberate misconduct, it is unrealistic to believe that other institutions will respond.

In a world where most police officers and administrators continue to believe that ends justify means, few departments will forego pretextual police practices in the absence of judicial pressures to reform. This is particularly true of a narcotics unit operating under few, if any, meaningful constraints with respect to policies involving informants and undercover activity.

**D. Excessive Force**

The Metropolis officers' conduct back at the Narcotics Division probably violated the Fourth and Fourteenth Amendments.*

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* 924 F.2d 1520 (9th Cir. 1991), reh'g granted en banc, 933 F.2d 798 (1991).
* Cooper, 924 F.2d at 1528.
* In *Graham v. Connor*, 490 U.S. 386 (1989), the Court ruled that the use of excessive force by the police during an arrest or other seizure of a person violates the reasonableness standard of the Fourth Amendment. The Court rejected the state's assertion that such claims should be decided under a substantive due process test. Two issues have been contested in the wake of *Graham*. The first is the issue of what standard applies after the suspect has been arrested and taken to the police district. The Court has ruled that the Eighth Amendment applies to post-conviction claims of excessive force. See *Hudson v. McMillian*, 112 S. Ct. 995 (1992) (use of excessive physical force against a prisoner may violate Eighth Amendment although no serious injury resulted); *Whitley v. Albers*, 475
Raft would argue that the police used excessive force by striking him while they were questioning him, and that his arrest for the false cover charges constituted malicious prosecution and false imprisonment. However, proving these allegations would not be easy. The police would undoubtedly testify that Raft became unruly and assaulted an officer, and that reasonable force was used to subdue him. Because of the police code of silence, the officers who witnessed the assault would testify either that they did not observe the incident or, if they did, that the police acted properly in self-defense. The incident, unlike the Rodney King beating, would not have been videotaped.

Excessive force is a product of a police culture that rationalizes physical abuse as appropriate punishment for persons who are viewed as trouble-makers or deviants. Studies of excessive use of force point out that a predictable catalyst to abuse is the officers' perception that their authority is being questioned or defied. Even verbal questioning of authority leads many police officers to believe that their power and position have been threat-
ened. In these situations, the police will demand immediate compliance and acquiescence. If obedience is not forthcoming, the incident escalates and an arrest and use of force is likely to follow.62

Physical abuse is a constant threat and will occur most frequently in departments that do not take this conduct seriously.63 The potential for illegal use of force is so great that the experienced administrator knows that without a meaningful system of accountability, officers will act illegally more frequently. Even those officers who normally would not use illegal force will be more likely to do so if they know it will be tolerated.64

The Rodney King incident is a paradigmatic event demonstrating the serious consequences of the failure to impose accountability. Rodney King underwent a beating that was both protracted and public. The officers involved had to be fully confident of their colleagues’ silence and of their department’s dismissal of any complaints made by the numerous witnesses to this incident. Indeed, so sure were these officers of their immunity from punishment that they bragged about their abuses on the official police computer system and to medical personnel at the hospital where King was belatedly taken for treatment. Only officers assured by prior experience and knowledge of departmental attitudes that the department would not investigate or punish this type of abuse (regardless of the credibility of the witnesses or of their own incriminating statements) could have rationally taken the risk of engaging in this type of behavior.65

64 See supra notes 61 and 63. See also Skolnick & Fyfe, supra note 10.
65 The LAIC described the radio transmissions as follows:

Computer and radio messages transmitted among officers immediately after the beating raised additional concerns that the King beating was part of a larger pattern of police abuse. Shortly before the King beating, Powell’s and Wind’s patrol unit transmitted the computer message that an earlier domestic dispute between an African-American couple was “right out of ‘Gorillas in the Mist’”, a reference to a motion picture about the study of gorillas in Africa.

The initial report of the beating came at 12:56 a.m., when Koon’s unit reported to the Watch Commander’s desk at Foothill Station, “You just had a big time use
Examples from adjudicated cases and from independent investigations provide hard documentation of the systemic flaws in the complaint processes in many police departments. It is not uncommon to find that officers who have been the subject of numerous citizen complaints of brutality are rarely disciplined and continue to serve on the force. In Los Angeles, for example, the Independent Commission investigating the Rodney King incident determined that several officers who had been found responsible for the illegal use of force on civilians had at the same time received performance reviews that made no mention of these findings and which praised the officers' attitude toward civilians.

...tased and beat the suspect of CHP pursuit, Big Time." The station responded at 12:37 a.m., "Oh well...I'm sure the lizard didn't deserve it..."

In response to a request from the scene for assistance for a "victim of a beating," the LAPD dispatcher called the Los Angeles Fire Department for a rescue ambulance:

P.D.:...Foothill & Osborne. In the valley dude (Fire Department dispatcher laughs) and like he got beat up.
F.D.: (laugh) wait (laugh).
P.D.: We are on scene.
F.D.: Hold, hold on, give me the address again.
P.D.: Foothill & Osborne, he pissed us off, so I guess he needs an ambulance now.
F.D.: Oh, Osborne. Little attitude adjustment?
P.D.: Yeah, we had to chase him.
F.D.: OH!
P.D.: CHP and us. I think that kind of irritated us a little.
F.D.: Why would you want to do that for?
P.D.: (laughter) should know better than run, they are going to pay a price when they do that.
F.D.: What type of incident would you say this is?
P.D.: It's a...it's a...battery, he got beat up.

At Pacifica Hospital, where King was taken for initial treatment, nurses reported the officers who accompanied King (who included Wind) openly joked and bragged about the number of times King had been hit.

LAIC, supra note 6, at 14-15. See also Paul L. Hoffman, Legal Director, ACLU Foundation of Southern California, Prepared Remarks Submitted to the House Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Mar. 20, 1991, 3-6 (on file with the author) [hereinafter Hoffman].

See, e.g., Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562-66 (1st Cir. 1989); Spell v. McDaniel, 824 F.2d 1380, 1391-95 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988); Harris v. City of Pagedale, 821 F.2d 499, 508 (8th Cir. 1987). For commentary on this issue, see LAIC, supra note 6, at 151-79; Kansas City Task Force, supra note 63, at 45-49; Boston Police Report, supra note 63, at 99-119 (The Boston Police Department, rather than responding to citizen complaints of abuse, "tries to outlast the [complaining] victim, to continue it and continue it until the victim gets fed up and no longer comes to the hearings.")

See LAIC, supra note 6, at 37-48; Kansas City Task Force, supra note 63, at 45-46; Boston Police Report, supra note 63, at 113-14.
It is quite likely that our hypothetical Metropolis has similar infirmities in its review and adjudication of civilian complaints. Not so hypothetically, assume that a study of the civilian complaints lodged against members of the Metropolis police department discloses that for a two-year period preceding this incident "a total of 756 individual officers were named as subjects of civilian complaints . . . . The names of 29 officers appeared collectively 303 times, each being named nine or more times . . . ."69 If the officer who assaulted Raft was one of the officers with nine or more complaints, his conduct on this occasion should not be surprising.

The department’s failure to investigate allegations of abuse, or to impose appropriate punishment, would lead the reasonable police officer to assume that even repeated violations of citizens’ rights would be condoned within the department.70 The failure to hold these officers accountable for their prior misconduct is a direct link to the abuse of Raft. The deleterious consequences of the department’s failure to monitor and discipline these officers run far wider than the encouragement it might give them to continue to abuse civilians. The message that violence and abusive conduct will be ignored is also sent to every other officer on the force.71

For its part, the Supreme Court either does not grasp the institutional causes of abuse or, as a matter of ideology, is using the doctrines of federalism and judicial restraint to allow these conditions to persist. There is a striking disjunction between the widely recognized causes of abuse and the Court’s response. The Supreme Court’s rulings reflect a belief that abuse occurs in isolated instances and is caused by an occasional aberrant abusive officer. Faced with records that reflect institutional causes, the Court recoils at the argument that the Constitution requires intervention on that level.

In several key cases the Court has deliberately passed up the opportunity to craft an approach that would take into account systemic patterns of abuse. In Rizzo v. Goode,72 a federal district

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69 Kansas City Task Force, supra note 63, at 45.
70 LAIC, supra note 6, at 153–79. See also Boston Police Report, supra note 63, at 113–20.
71 See LAIC, supra note 6, at 153–79; Boston Police Report, supra, note 63, at 113–20; Kansas City Task Force, supra note 63, at 45–49.
court had ruled that there was a pattern of police abuse in Philadelphia. In response, the court ordered the implementation of an internal police department mechanism for the review and adjudication of civilian complaints against officers. The district court made the fairly obvious and well-supported finding that the failure of the police department to investigate these complaints and to discipline officers led to the high level of abuse. The district court's order was focused and limited. It did not, for example, create a civilian review or oversight board. 73

The Supreme Court reversed, stating that principles of federalism and comity prohibited this kind of relief as an impermissible intervention in the affairs of local government. 74 As a matter of local governmental policy and police administration, the fact that the nation's fourth largest city (one with a well-earned reputation for police abuse) did not have a functioning internal review system is a cause for serious concern. The refusal of the Supreme Court to permit such a remedy demonstrates a studied ignorance of the political and social realities of police misconduct. In addressing the tension between the protection of constitutional rights and local governmental prerogatives, the Court adopted a judicial calculus that reinforces the systemic aspects of police abuse by abdicating any judicial responsibility for the proven structural causes of misconduct.

The Court followed a similar doctrinal approach in City of Los Angeles v. Lyons, 75 in which it refused to enjoin the Los Angeles Police Department's use of the deadly "chokehold." The Court found, inter alia, that the improper and illegal application of the chokehold was not a routine City policy, and therefore had been unauthorized. 76 Equitable relief was justified only if "the City ordered or authorized police officers to act [illegally]." 77

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73 423 U.S. at 366-70.
74 Id. at 377-78.
75 461 U.S. 95 (1983). See also supra notes 49-51 and accompanying text.
76 Lyons, 461 U.S. at 107-08.
77 Id. at 106. Lyons has been the subject of severe criticism. See, e.g., David Cole, Obtaining Standing to Seek Equitable Relief: Taming Lyons, in CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 101, 102 (J. Lobel ed., 1980) (arguing that Lyons should be construed narrowly to limit its potentially illegitimate reach); Richard H. Fallon, Jr., Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U. L. Rev. 1 (1984) (arguing that the Court's use of the doctrines of standing and equitable restraint to restrict public law litigation is flawed). The doctrinal flaws discussed in these articles are not the only problems with Lyons; the opinion reflects a startling lack of sensitivity to the fatal consequences of the police practice.
The formalism of *Lyons* is disturbing both as a matter of constitutional adjudication and as a matter of social policy. *Lyons* sent a chilling message to the Los Angeles Police Department: as long as abuses like the chokehold do not become city “policy,” the Court would not interfere. It should come as no surprise that the Rodney King incident occurred in Los Angeles. There is a direct line from *Lyons* to Rodney King, and the Supreme Court bears some responsibility for the pattern of brutality in the Los Angeles Police Department that claimed King as one of its victims.

In a more recent case, the Court did finally understand the link between internal police policies and abuse. In *City of Canton v. Harris*, the Court ruled that in some circumstances the failure of a police department to properly train or discipline its officers may give rise to municipal liability under Section 1983. The causal connection between training and discipline and the incidence of abuse are well established and the Court’s ruling should prompt further moves toward increased accountability. In this regard, *City of Canton* represents a short step towards correcting the ostrich-like approach in *Rizzo v. Goode*. It is only a short step, however, because the Court limited the potential reach of its decision by insisting that the failure to train or discipline be the result of “deliberate indifference” of city officials. This is a level of culpability that approaches intentionality and that poses significant problems of proof. The decision is further limited by the fact that the remedy for the failure to train is simply to extract damages from the municipality. This is significant in ensuring compensation for the victim, but unless the damages are substantial, they will probably have little or no affect on policymakers. Whether the judgment will be considered a cost of doing business or will operate as an incentive to reform is an open question in most jurisdictions.

Investigation and adjudication of claims of excessive force (as well as other forms of police abuse) are often frustrated by the

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79 Id. at 388.
80 See discussion *supra* at notes 72-74 and accompanying text.
81 *City of Canton*, 489 U.S. at 388-92. Decisions in the lower federal courts demonstrate the difficulties involved in satisfying this burden of proof. See, e.g., *Colburn v. Upper Darby Township*, 946 F.2d 1017 (3d Cir. 1991); *Santiago v. Fenton*, 891 F.2d 373 (1st Cir. 1989).
82 See LAIC, *supra* note 6, at 55-61. See also *Skolnick & Fyfe*, *supra* note 10.
police “code of silence.” In our hypothetical, several officers witnessed the attack on Mr. Raft. It is a virtual certainty that none of these officers would provide any evidence in an internal proceeding or court case against the offending officers. A former United States Attorney for the Eastern District of Pennsylvania, in recommending leniency for a police officer who testified in a police corruption trial, stated:

[T]here is a custom that has developed within the Philadelphia Police Department that Philadelphia police officers will acquiesce in the illegal and improper conduct of their fellow officers and that when called to tell the truth, as is the duty of every other citizen in this nation when called before a grand jury or questioned by lawful authorities, that the Philadelphia police officer will remain silent.

The code of silence does more than prevent testimony. It mandates that no officer report another for misconduct, that supervisors not discipline officers for abuse, that wrongdoing be covered up, and that any investigation or legal action into police misconduct be deflected and discouraged. In Boston, for example, experienced investigators will not volunteer for the Internal Affairs Division unless they are promised the ability to choose their next assignment “because they fear retribution once they [go back on the street].” Officers shun temporary promotions to “acting sergeant,” despite higher pay and prestige, because they do not want to have to be in the position of disciplining a fellow officer when they “might be back riding with that officer sometime in the future.”

85 *See supra* notes 60, 83.
87 *Id.* at 59.
Other participants in the criminal justice system abet this policy: prosecutors are highly reluctant to indict police for their illegal acts, judges rarely disbelieve even incredible police testimony, and allegations of police abuse often lead to more severe treatment of the accuser. 88

There are ways in which the pernicious effects of the code of silence can be mitigated. First, the department must make clear that officers who fail to report and provide information regarding unlawful actions of fellow officers will be subject to serious discipline. To be effective, these sanctions should be directed at supervisory officials who abet the code by uncritical acceptance of reports that demonstrate a pattern of silence. Particular attention should be paid to cases in which the allegations of the complainant are sustained either in internal proceedings or in court, and where officers who observed the incident have either not come forward or have supported the false testimony of the offending officer.

Second, the courts should recognize liability both for officers who fail to file truthful police reports or who remain silent concerning abuses that they have witnessed and for municipalities on a theory that a department’s failure to take steps to deal with the code of silence constitutes a municipal policy under Monell. 89

E. Racially Motivated Conduct

The use of racially derogatory language towards the Rafts is strong evidence that at least some of the officers’ misconduct was racially motivated. Such conduct is actionable under Section 1983 (and other civil rights acts), 90 although once again the burden of proof is significant. No independent witnesses could confirm the remarks; the police would maintain that they were firm but polite during the search of the house; and most jurors would be disinclined to believe that the police acted out of racial motivation. 91

89 See supra note 46.
91 Of course, if the police are as openly racist as they were in Los Angeles in the Rodney King incident, police radio transmissions or other recorded statements may provide additional proof of racially motivated abuse.
The racism reflected in the derogatory remarks made to the Raft family is a legacy of our Nation's history of racial discrimination. Racially motivated conduct is hurtful in any form, but where it infects police practices the risks to the victim are particularly great. Historically, police abuse against minorities has been the single most cited cause for the deep distrust and suspicion that inheres in virtually all police-minority community contacts and that have led on several occasions to rebellions and riots.92

Even today, police tactics that would not be countenanced in middle-class suburban communities are the norm in poorer urban areas where minorities make up the majority of the residents. It is not uncommon for the police to conduct sweeps of certain neighborhoods, to stop or arrest persons without individual suspicion, and to conduct searches like the one conducted at the Raft home.93 The LAIC's report of virulent racism in the Los Angeles Police Department should give pause to those who believe that we have eliminated overt racial prejudice from the criminal justice system.94 The police justify their differential treatment of minority communities by exploiting the universally shared fear of crime. But people whose lives are threatened daily by criminal activity should not be subjected to police abuse as a price of police protection.

As long as racial discrimination exists in our culture, it will necessarily impact the criminal justice system.95 However, we

92 See, e.g., NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 157-68 (Government Printing Office 1968) [hereinafter KERNER COMMISSION REPORT].


94 The LAIC reviewed police transmissions and found "an appreciable number of ... racial remarks," including

"Well... I'm back over here in the projects, pissing off the natives."
"I would love to drive down Slauson with a flamethrower... we would have a barbecue."
"Sounds like monkey-slapping time."
"Oh always dear... what's happening... we're hunting wabbits."
"Actually, Muslim wabbits."
"Just over here on this arson/homicide... be careful one of those rabbits don't bite you."
"Yeah I know... Huntin wabbits is dangerous."

LAIC, supra note 6, at 72.

95 See McCleskey v. Kemp, 481 U.S. 279, 286-87 (1987) (discussing racial bias in death penalty prosecutions in Georgia); MAUER, supra note 11, at 10; MAUER 1992 UPDATE,
have the capacity to reduce the incidence of racially motivated misconduct. First, police departments must impose serious disciplinary sanctions for racist conduct. Second, departments must continue to integrate their forces both racially and sexually. Third, significant changes must be made in the training of officers with a view toward broadening their respect for persons of different races, sexual orientations, national origins and cultures. Finally, police departments must address their failure to assure minorities quality assignments and equal opportunities for promotions. It is remarkable that all of the officers involved in the Rodney King beating were white. While no one would suggest that minority officers do not commit abuses, their presence would assuredly provide some deterrence to overt racism.

F. Institutional Obstacles

There are other significant barriers to judicial vindication of the rights of victims of police misconduct. First, victims are not assured access to counsel. There is probably a very small civil rights bar in Metropolis; most lawyers would not be interested in a contingent fee case against the police or the city, even with the possibility of court-awarded attorney’s fees if the suit is successful. Second, many civil rights plaintiffs are burdened by characteristics that may prejudice juries against them. They are often poor, or members of racial minorities, or uneducated or inarticulate; some have criminal records. Jurors tend to dismiss their allegations, often awarding them less than a full measure of compensation.

Third, release agreements can be insidious obstacles to the vindication of civil rights in police abuse cases: if they are validated by the courts, they will add to the arsenal of those interested in
covering up police misconduct. In the Metropolis hypothetical, Raft agreed not to sue the police or the city in return for the dismissal of the criminal charges against him. There is a distinct possibility that this agreement would bar Raft’s claims. In Town of Newton v. Rumery, the Supreme Court ruled that a release agreement is valid if it is “the product of an informed and voluntary decision,” and if “enforcement of [the] agreement would not adversely affect the relevant public interests.” Where a prosecutor played a role in the release negotiations, he must have “an independent and legitimate reason to make this agreement directly related to his prosecutorial responsibilities.” The burden of “establish[ing] that the agreement was neither involuntary nor the product of an abuse of criminal process” rests upon civil defendants. If the prosecutor’s motivation was simply to protect the police from a civil damages action, the public policy prong of Rumery would probably be violated.

Fourth, it is very possible that the individual officers would be judgment proof. If they are, and if there is no provision for

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101 Id. at 393.
102 Id. at 398.
103 Id.
104 Id. at 399 (O'Connor, J., concurring in part and concurring in the judgment of the plurality).
105 See id. at 400. See also Lynch v. City of Alhambra, 880 F.2d 1122, 1127 (9th Cir. 1989); Seth F. Kreimer, Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges, 136 U. Pa. L. Rev. 851, 934 (1988).
106 Local and state governmental units differ significantly in their provisions for the defense and indemnification of officers in civil rights suits. Some municipalities provide counsel, subject to case-by-case determinations regarding possible conflicts of interest with the municipality itself. See, e.g., Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984), vacated in part on other grounds, 748 F.2d 69 (2d Cir. 1984); Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984). In some jurisdictions, insurance carriers will provide counsel, while in others, the department may retain outside counsel to represent the officer or provide funds for the officer to do so.

Practices also differ with respect to payment of settlements or judgments. The municipality may pay such awards or provide indemnification to the officer. Insurance may cover the settlement or judgment. In some jurisdictions, recovery may be limited to the pocket of the individual defendant, who may be judgment proof.

These varying practices serve different interests. Where the municipality pays the costs of litigation (including counsel) and any monetary awards, the plaintiff is assured of payment, but there is virtually no deterrent value with respect to the officer (particularly where the city does not otherwise discipline or retrain the officer). Where the officer is responsible for payment, deterrence is better served, but at the possible cost of depriving the plaintiff of compensation. For extended discussions of these important competing interests, see Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs (1983); Ronald A. Cass, Damage Suits Against Public Officers, 129 U. Pa. L.
indemnification, recovery must be sought directly from the municipality. But under Section 1983, municipal liability can be established only where a city policy, practice or custom has caused the constitutional violation; there is no respondeat superior liability.\textsuperscript{107}

IV. An Agenda for Reform

If the analysis I have made of the judicial and administrative responses to the misconduct involved in the Metropolis hypothetical is correct, the measures necessary for reform are fairly obvious. In the judicial arena, the Supreme Court must make significant doctrinal adjustments with respect to constitutional litigation. These changes should be tailored to the political and administrative realities of policing, and must take explicit account of the systemic nature of most forms of police abuse.

The Court consistently considers operational exigencies of governmental law enforcement in its adjudication of Fourth and Fifth Amendment claims. In those cases, in the balancing of interests, weight has always been given to the “realities” and dangers of policing.\textsuperscript{108} Recognizing the realities only on the governmental side has created a jurisprudence of consistent deference to law enforcement officials and an array of procedural obstacles to the vindication of personal liberties.\textsuperscript{109} It is the politics of the Court, and not immutable legal doctrine, that will foreclose appreciable change in the Court’s approach to police misconduct in the foreseeable future.\textsuperscript{110}

Individual damage suits may continue to generate incremental changes in policy, particularly where the aggregate amounts in any particular locale become so large as to create a political issue concerning the public fisc. Similarly, if the courts develop the doctrinal kernel of \textit{City of Canton} and require municipalities to adequately train, supervise and discipline police, we are likely to

\textsuperscript{109} See supra notes 72-81.
\textsuperscript{110} Cf. Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting: “Power, not reason, is the new currency of this Court’s decisionmaking.”).
see at least some police departmental response to seriously flawed procedures.

However, it is unrealistic to rely on judicial intervention as a source of fundamental change. Regardless of the judiciary’s response, we must focus attention on other alternatives. The most important factor in the control and reduction of abuse is organizational accountability. All other remedies will ultimately fail if not accompanied by a system of training, supervision and discipline that is structured to ensure that departmental policies relative to use of force and other restrictions on the arbitrary use of power are implemented and enforced. The numerous commissions and studies which have examined the problems of police abuse are unanimous in their recommendations: only a dramatic change in the enforcement of new norms of behavior by the police will dislodge the deeply entrenched culture that currently prevails.111

There are several possible ways in which the culture can be modified and in which practices that are more respectful of the normative limitations on police power can be created. The processes of reform involve different institutions in our society; to be successful, they must be mutually reinforcing.

A. Police Administration and the Politics of Change

Despite the formidable obstacles, there is some hope for internally generated police reform. There have been significant advances in recent years in the scope and quality of police training and in the development of official policies and practices. Most departments are managed by professionals who understand the harm to policing that is inflicted when communities are alienated from the police because of patterns of abuse. In part in response to court-imposed sanctions for the violation of rights—including exclusion of evidence from criminal prosecutions and monetary damages against police and municipalities—police departments have developed extensive training programs on the constitutional limits on critical police practices in the arrest, search, interrogation and other investigation areas. However, reliance on judicial inter-

111 See LAIC, supra note 6, at 151-81; Kansas City Task Force, supra note 63, at 45-49; Boston Police Report, supra note 63.
vention as a source of basic change is unrealistic. Of course, as the Supreme Court continues to restrict constitutional rights of suspects, these important incentives for training and supervision will be reduced accordingly.

Further, in some areas the police have taken the responsibility for changing abusive practices. For example, in the 1970s and 1980s public concern over the unjustified use of deadly force led several departments to reconsider their regulations on this practice. Years before the Supreme Court ruled that deadly force could be used to stop a fleeing felon only where the suspect posed an imminent threat of serious physical harm, many police departments had limited deadly force to such situations. As a result, the number of shootings decreased dramatically without any increase in harm to the police.

The reasons for the police initiative on this issue were several, not the least of which was the political pressure of community groups and others concerned with the illegitimate use of such force. Not only did the official rules change, but so did the

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police culture. Violations of the policy resulted in discipline and retraining (and in some cases prosecution).\textsuperscript{117} Police officers soon understood that their departments were serious about the new policies and adjusted their conduct accordingly.\textsuperscript{118} That the new rules were imposed internally on a "voluntary" basis no doubt played a part in their overall acceptance. Indeed, the change in policy was so successful that, when the Court ultimately was faced with the constitutional issue, professional police organizations urged the Court to discard the broad and easily-abused fleeing felon rule.\textsuperscript{119}

Other areas of police duties are equally amenable to significant internal change in norms and conduct. There is no reason why specific practices, for example, the use of police dogs,\textsuperscript{120} non-deadly weapons,\textsuperscript{121} and the control of public demonstrations\textsuperscript{122}...
cannot be subjected to careful study and control in a manner that limits possibilities for the abuse of power. As evidenced by the dramatic results achieved across the country in the difficult field of hostage takings, training of special units that incorporate as a basic tenet the use of all means to save human life can produce remarkable improvements in police work. Over the years, the professionalization of this aspect of policing has substantially reduced the number of persons killed or injured in these volatile situations.

Not all potentially abusive practices are as amenable to administrative efforts at reform. The patterns of harassment, indignities and violence that attend the everyday work of investigation, searches and arrests are far more resistant strains of misconduct, which emanate from a strong police subculture reinforced by political demands such as the "war on crime." If part of the community is seen as a deadly enemy, law enforcement tactics are bound to reflect that conception. If the resulting abuses are to be contained, more fundamental structural change will be required.

One promising development is the practice of community-oriented policing. This model is built on the premise that there are mutual community and police interests and that reciprocal respect for these concerns and interests will provide a more effective and progressive means of policing. Community policing relies less upon the practices of the past three decades which emphasized proactive, aggressive policing aimed at apprehension and prosecution; rather, it stresses the principle of police-community cooperation by increasing foot patrols, supporting community citizen patrols, and developing mutually acceptable goals for particular communities.

Of course, the case for community-oriented policing can be overstated, and there should be no expectation that it alone will generate progressive change. If the police view this concept merely as a matter of labeling, as opposed to one of substantive change in which they have a voice and a stake, the program will not

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Department instituted "sweeping improvements in training, command structure and equipment." Pitt, supra, at B7.


124 SKOLNICK & FYFE, supra note 10.

125 LAIC, supra note 6, at 95–106; Boston Police Report, supra note 63, at 29–53.
succeed. A necessary corollary to police understanding and acceptance of community policing as a new philosophy is the willingness of community leaders to support effective and fair policing, while at the same time condemning excesses and abuses. The community should not be held hostage to a pattern of abuse as a quid pro quo for police protection.

Civilian review of the police is a necessary component of a system of accountability. There has been bitter debate about the concept of civilian review of police, but it is now firmly established in varying forms in thirty of our fifty largest cities. The success of civilian review will depend in large part on the proper allocation of power between police and civilians. It is essential that the civilian oversight include the full power to investigate complaints, conduct hearings, subpoena witnesses, including police officers, and issue reports or findings on the complaints. If the civilian review board does not have authority to impose sanctions, its recommendations for discipline should be given careful consideration by the police commissioner. Civilian review procedures should also include the authority to make policy recommendations and to gather statistical data relevant to patterns of abuse.

The early intervention initiative utilized by an increasing number of police departments provides a related means of breaking the cycle of abuse. Statistical studies within various departments show a disturbingly disproportionate number of complaints regarding excessive force against relatively few officers. The fact that these numbers are as high as they are points to significant deficiencies in the monitoring and disciplining process. But even if internal discipline is effective, many officers reject findings made against them in adversary administrative or judicial proceedings as the illegitimate products of a system that fails to understand the pressures and dangers facing the officer on the street. The officers

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126 Indeed, the Boston Police Department tried to implement a community policing program in March 1991. It has been widely recognized as a failure because the Department merely added community policing onto existing policies, rather than radically rethinking its philosophy of protection as a whole. Boston Police Report, supra note 63, at 39, 44–51.

127 See id. at 128–33.


may moderate their conduct for fear of sanctions, but their own standards and world view remain unchanged.

For some officers who repeatedly engage in abusive conduct, an early intervention program based on principles of non-punitive retraining may be a more effective means of reducing unnecessary violence in police confrontations with citizens. These programs include a mix of retraining on rules governing use of force, role playing, psychological interviews and improving oral communication skills. In an experiment in Oakland, California, a police violence prevention unit used a peer review approach on street officers who, on average, had engaged in physical confrontations with citizens at a rate nearly four times that of non-participating officers. Over time, the officers who participated in this program reduced their violent incident records by more than fifty percent.\textsuperscript{130}

**B. Federal Intervention**

In light of the nationwide scope of the problem, consideration should be given to federal intervention. The power of the federal government in enforcing the constitutional rights of citizens against local police officials has been bitterly disputed.\textsuperscript{131} Historically, the Department of Justice has generally refrained from investigation and prosecution of local police abuse. The limits on federal authority are largely self-imposed, although a narrow statutory authority is also a contributing factor. The magnitude of the abuse problem calls for a substantial change of direction.

The federal government has authority to bring criminal prosecutions against state officers who violate or conspire to violate the civil rights of citizens.\textsuperscript{132} These criminal statutes require the government to prove that the defendant specifically intended to


\textsuperscript{131} The traditional argument against intervention is deeply ingrained. For example, John Dunne, Assistant Attorney General in charge of the Civil Rights Division of the Justice Department, stated during Congressional hearings on police brutality in the wake of the Rodney King incident: “We are not the ‘front-line’ troops in combating instances of police abuse. That role properly lies with the internal affairs bureaus of law enforcement agencies and with state and local prosecutors. The federal enforcement program is more like a ‘backup’ to these other resources.” John Dunne, Statement to the House Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee (March 20, 1991) [hereinafter Dunne Statement], quoted in HUMAN RIGHTS WATCH, POLICE BRUTALITY IN THE UNITED STATES 4–5 (July 1991).

deprive the victim of a constitutional right, a factor that is often cited by the Justice Department as the reason why there are so few police abuse prosecutions. It is unlikely that the failure of the federal government to prosecute police can be so easily explained. It is far more likely that the reasons behind the lack of federal prosecutions are the same as those explaining the paucity of state prosecutions: prosecutors do not like prosecuting fellow law enforcement officers (with whom they work on a day to day basis); evidence of such misconduct is often shielded by the code of silence; victims are more readily subject to impeachment (prior records, life styles, etc.); and juries are inclined to give the benefit of the doubt to the police.

On the civil side, the Justice Department lacks authority to bring injunctive actions even where police abuse is alleged to be widespread. Congress can give the Attorney General the power to bring litigation to protect against widespread violations of constitutional rights. Congress has authorized injunctions in cases of employment discrimination, discrimination in public accommodations, deprivation of voting rights and, for persons in prisons, mental institutions and nursing homes, where “egregious or flagrant conditions which deprive ... persons of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.”

Without the availability of private or public enforcement of constitutional rights in this area, local governments are free simply

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134 The FBI investigates approximately 2500 complaints of police abuse per year. Dunne Statement, supra note 131, at 5. However, very few of these result in prosecution. Mr. Dunne has stated that in the three years preceding the Rodney King incident, there were 98 prosecutions in this area. Id. Yet, in the City of Los Angeles, despite documented cases of serious abuse, no prosecutions had been initiated in several years. Hoffman, supra note 65, at 4-5. The jurisdictional confines of the federal law have provided a rationalization for not doing so.
135 See supra notes 60, 83-85, 88, 91, 99 and accompanying text.
136 In United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980), the Justice Department sought an injunction against the police department of the City of Philadelphia to end the department’s “practice of violating the rights of persons they encounter on the streets and elsewhere in the city,” a departmental policy “implemented with the intent and the effect of inflicting abuse disproportionately on black and Hispanic persons.” Id. at 190. The Court of Appeals for the Third Circuit refused to recognize an implied power in the federal government to bring an action to enjoin violations of constitutional rights. Id. at 192-201.
to pay as they go for the violation of the rights of their people without any possibility of judicial intervention to prevent abuses before they occur. In Los Angeles, even the payment of more than $10 million in police abuse judgments in 1990 alone (more than $1,000 per sworn officer in the LAPD) has had no perceptible impact on these problems.\textsuperscript{141}

Legislation introduced in Congress in the wake of the Rodney King incident would allow greater federal intervention. The Attorney General and aggrieved individuals would be authorized to bring pattern or practice suits.\textsuperscript{142} In recommending these provisions, the House-Senate conference proposed the use of injunctions to meaningfully address patterns of police abuse.\textsuperscript{143}

The bill would also require the Department of Justice to compile and publish data on the use of excessive force by police officers.\textsuperscript{144} The lack of information on the incidence of excessive force and other forms of police abuse is a significant barrier to both political and legal reform.\textsuperscript{145} Without credible information on the scope and pervasiveness of the problem, the public is left with the impression that the abuses are more aberrational than systemic. Significant changes on the national level will not occur unless there is detailed evidence that the abuse is not isolated or local in nature.

The federal government has a large program of assistance to local law enforcement agencies under the Office of Justice Pro-\textsuperscript{141} John L. Mitchell, $11.3 Million Paid in 1990 to Resolve Abuse Cases, L.A. TIMES, Mar. 29, 1991, at A1. In other cities, payment of similarly high figures as compensation for police abuse does not seem to deter such activity. See, e.g., Sean Murphy, City Paid $3.4 Million in Civil Suit Settlements in ‘88, BOSTON GLOBE, May 14, 1989, at 29 (police misconduct cases cost city $1.1 million out of total $3.4 million paid). Part of the reason stems from the fact that, in most cases, the police officer faces no financial risk or other disciplinary sanctions if his conduct leads to a civil suit. See discussion supra note 106. Even being sued repeatedly does not necessarily hinder promotion or assignment to elite training or narcotics units. Bill Wallace, San Francisco Pays in Many Suits Against Cops, S.F. CHRON., May 30, 1990, at A1. Provisions for municipal payment of settlements and judgments may suffice to compensate victims of police abuse, but unless taxpayers are offended by the amounts paid or police departments consider such judgments in disciplining their officers, there will be little deterrence of individual officers' behavior from these payments.


\textsuperscript{143} H.R. CONF. REP. NO. 405, 102d Cong., 1st Sess. at 97.

\textsuperscript{144} Id.

\textsuperscript{145} HUMAN RIGHTS WATCH, supra note 131, at 8.
grams. It is appropriate for the federal government to establish standards for the use of force, including the proper use of weapons, and for internal review of police performance. Further, meaningful and institutionalized respect for constitutional rights should be a condition of the receipt of federal funds for law enforcement.

V. Conclusion

On April 29, 1992, as this Article was about to go to press, a jury without any African-Americans (drawn from a conservative suburban community) returned a verdict of not guilty as to all the officers charged with beating Rodney King. This shocking verdict touched off widespread protests and rioting in Los Angeles and other cities around the country. While the reasons behind the jury’s conclusion are not yet clear, the verdict unfortunately confirms the thesis of this Article: the law and order mentality that has pervaded the consciousness of America, coupled with strong elements of racism, lead many to believe that the police should retain a free hand in order to protect “us” from “them.”

The Rodney King incident demonstrates once again the tragic consequences of our failure as a society to respond to the systemic and institutional aspects of police abuse. Official misconduct endures in large part because we respond to its many manifestations in an episodic manner. As long as the courts and both federal and state government treat police abuse as a series of isolated incidents, or as a regrettable by-product of the war on crime, the Monroes, Rafts and Rodney Kings will continue to pay an unconscionable price for our misguided policies. Police violence will be contained only if we challenge fundamental aspects of police culture and hold the police politically and legally accountable. Experience teaches that structural problems require structural remedies. We ignore that lesson at the peril of individual victims of abuse, the core values and institutions of constitutional government and the very integrity of our society.

146 For example, the Bureau of Justice Assistance Grant Programs can make direct grants to local law enforcement agencies for the acquisition of equipment and other programs dedicated to improving the criminal justice system. 42 U.S.C. § 3751 (1988).

147 It is a common device under federal law to condition a grant upon compliance with some other provision of federal law, and it is already used in the federal law enforcement assistance programs. Under 42 U.S.C. § 3789(d) (1988), for example, a federal grant for local law enforcement may be suspended if it is found that the local body has discriminated in employment on the basis of race, religion, nationality or gender.