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# The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality

by  
ALISON L. PATTON\*

## I. Introduction

When a police officer uses excessive force against an individual, that individual can sue the officer for violating her civil rights under 42 U.S.C. § 1983.<sup>1</sup> Section 1983 actions seek damages or injunctions against abusive police techniques.<sup>2</sup> Years after Congress enacted section 1983,<sup>3</sup> attorneys, legislators and citizens are questioning the statute's effectiveness as a legal tool for deterring police misconduct.

There are three major weaknesses to section 1983 suits. First, these actions are difficult and expensive to pursue.<sup>4</sup> Since most victims of mis-

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1. 42 U.S.C. § 1983 (1988). Section 1983 reads:

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.

2. See generally MICHAEL AVERY & DAVID RUDOVSKY, *POLICE MISCONDUCT: LAW AND LITIGATION* § 2.2 (2d ed. 1992) (detailing scope of federal civil rights acts).

3. Section 1983 originated in the Ku Klux Act of 1871, ch. 22, § 1, 17 Stat. 13 (1873). One purpose of the Act was to "afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the . . . rights . . . guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

4. AVERY & RUDOVSKY, *supra* note 2, § 4.5, at 4-10; Irving Joyner, *Litigating Police Misconduct Claims in North Carolina*, 19 N.C. CENT. L.J. 113, 143-44 (1991); see also *infra* notes 19-20, 26-27 and accompanying text.

conduct are minorities without financial resources, only a small percentage of police brutality incidents become lawsuits.<sup>5</sup> Those victims who are able to get legal representation face a long and arduous litigation process, because police departments rarely settle section 1983 suits.<sup>6</sup> Second, the Supreme Court has severely limited the ability of plaintiffs to enjoin a particular police technique, even one that frequently results in the use of excessive force.<sup>7</sup> Third, juries are more likely to believe the police officer's version of the incident than the plaintiff's. Often there are no witnesses, or each side has an equal number of supporting witnesses.<sup>8</sup> For a variety of sociological and psychological reasons, juries do not want to believe that their police officers are bad people or liars.<sup>9</sup> Thus, plaintiffs rarely win absent help from independent corroborative witnesses or physical evidence.<sup>10</sup>

In spite of numerous impediments, civil rights lawyers continue to bring section 1983 suits because they view such actions as an important tool to address police brutality, and believe that police misconduct would be worse without the law suits.<sup>11</sup>

This Note will explore the effectiveness of section 1983 suits in deterring police officers from overstepping the bounds of their power. Section II presents the preliminary obstacles to bringing and winning a

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5. See AVERY & RUDOVSKY, *supra* note 2, Introduction; see also *infra* notes 12-13, 18 and accompanying text.

6. See *infra* notes 37-44 and accompanying text.

7. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-13 (1983); *Rizzo v. Goode*, 423 U.S. 362, 373-81 (1976); see also *infra* notes 79-89 and accompanying text.

8. See AVERY & RUDOVSKY, *supra* note 2, § 4.5; see also *infra* note 68 and accompanying text.

9. See AVERY & RUDOVSKY, *supra* note 2, § 12.1 (discussing jury selection); see also *infra* notes 69-75 and accompanying text.

10. See AVERY & RUDOVSKY, *supra* note 2, § 11.3(b)(3), at 11-30 ("Most experienced lawyers handling police misconduct cases expect to lose more cases than they win, even though the cases are well prepared and competently presented."); see also *infra* notes 26-27 and accompanying text.

11. See AVERY & RUDOVSKY, *supra* note 2, Introduction; Telephone Interview with Jim Chanin, Attorney in Berkeley, California (Jan. 23, 1992) ("[Police misconduct] would be worse without § 1983."); Interview with John Crew, Staff Attorney, American Civil Liberties Union (ACLU), in San Francisco, Cal. (Jan. 8, 1992) ("Lawsuits are one tool, but alone won't solve the problem of police brutality."); Telephone Interview with Richard "Terry" Koch, Attorney in Berkeley, California (Jan. 10, 1992) ("It is very important to bring these suits even though they are hard to win. We will lose ground if [they are] not brought again and again. We have nothing else now, so we must try to win these suits.") Telephone Interview with Osha Neumann, Attorney in Berkeley, California (Jan. 24, 1992) ("Lawsuits alone do not generally bring about institutional change or control police behavior, but they are one important element."); Telephone Interview with Dan Stormer, Attorney in Los Angeles, California (Jan. 27, 1992) ("[Section 1983 suits are] a great vehicle foremost for poor people and people of color to get justice. We need to keep this available to them."); Telephone Interview with Carol Strickman, Attorney in Oakland, California (Jan. 10, 1992) ("[Section 1983 suits] are one tool. They aren't the total answer, but they are an important tool nonetheless.").

section 1983 suit. Section III examines the deterrent effect of these suits and also looks at the flaws in the institutional components responsible for controlling violence within police departments. Section IV presents proposed solutions to curb the repeated pattern of police brutality.

Based primarily on an examination of section 1983 suits in California, this Note addresses the topic from the perspectives of both law and social science. Case law does not tell much of the story, since deterrence cannot be measured in judicial opinions. Thus, much of the material for this Note was obtained from interviews with attorneys, legislators, city officials, police officers, and journalists who are knowledgeable in the field of police misconduct.

This Note does not claim to be a scientific or statistical study of deterrence. Rather, it addresses the politics and practice of police misconduct suits brought under section 1983, based on the recent experiences of those who are most intimately involved with the problem of police brutality and the litigation of section 1983 suits. The glaring truth, revealed from the interviews and research, is that the cycle of police abuse continues virtually unchecked in many California cities. The numerous legal and administrative checks on police power have failed, and thus, in California, the same attorneys are suing the same officers, repeatedly, with the only change being the plaintiff's name.

## II. The Difficulties of Bringing a Suit Under Section 1983

When bringing a suit under section 1983, a victim of excessive force faces the difficult tasks of first, finding an attorney, and then, winning the case. To be successful, the victim and the attorney must overcome financial, procedural, and evidentiary obstacles.

### A. Obstacle #1: Finding an Attorney

Most victims and witnesses lack both credibility and financial resources. A victim of excessive force will therefore have difficulty finding an attorney to take the case unless there are credible witnesses, tangible evidence, or severe brutality.<sup>12</sup>

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12. See AVERY & RUDOVSKY, *supra* note 2, § 4.5, at 4-9 ("Experience has shown that unless the plaintiff has suffered substantial injuries, recovery, if any, will be very small."); Edward J. Littlejohn, *Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct*, 58 U. DET. J. URB. L. 365, 369 (1981) ("[P]rivate attorneys [represent] only those clients . . . who [experience] severe brutality."); Interview with Sarge Holtzman, Attorney, in San Francisco, Cal. (Jan. 30, 1992) ("[It is] impossible to pursue most cases because there are no witnesses."); Telephone Interview with Osha Neumann, *supra* note 11; Telephone Interview with Tito Torres, Attorney in San Francisco, California (Jan. 23, 1992) ("There is a real lack of lawyers willing to take cases that don't involve serious bodily injury or killing. If more lawyers would take these low level cases, there might be some accountability because it would address the violence before it escalates to a greater degree.").

The typical victim of excessive force is a young African-American or Latino male, from a poor neighborhood, often with a criminal record.<sup>13</sup> Gays and lesbians, transients, drunks, and criminal arrestees are also common targets of abuse.<sup>14</sup> On average, police abuse is not directed at white citizens;<sup>15</sup> when an officer unknowingly beats a person with political influence, the city is likely to settle the suit to minimize the embarrassment.<sup>16</sup>

Unfortunately, these typical victims do not make sympathetic plaintiffs, so their chances of recovery are small, and attorneys have little incentive to take their cases.<sup>17</sup> Since few plaintiffs can afford counsel and most suits are taken on a contingency basis,<sup>18</sup> an attorney undertakes an

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13. Joyner, *supra* note 4, at 113 ("Blacks and other minorities are more apt to be victims of police violence."); Telephone Interview with Oliver Jones, Attorney in Oakland, California (Jan. 8, 1992) ("The persons most likely to be victims are young minorities . . ."); Telephone Interview with Frank Saunders, California-based expert witness and former police officer who has testified at over 500 trials (Jan. 25, 1992) ("A majority of the plaintiffs are minorities."); Telephone Interview with Carol Watson, Attorney in Los Angeles, California (Feb. 9, 1992) ("The plaintiffs are generally young and poor Black or Latino men."); *see also* Mark Carriden, *Police Force*, A.B.A. J., May 1991, at 25 (discussing police misconduct suit by baseball Hall of Famer Joe Morgan, in which jurors "believed Morgan was singled out [by police] because he was black"); Darlene Ricker, *Behind the Silence*, A.B.A. J., July 1991, at 44, 45 ("Minorities, and particularly blacks, have complained for years about police abuse in their communities.").

14. WARREN CHRISTOPHER ET AL., REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 168-71 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT] (stating that gays and lesbians are reported to be common victims of excessive force); Joyner, *supra* note 4, at 113 ("In too many instances, the victim of police misconduct is an individual . . . who is a suspect in illegal or questionable activities."); Telephone Interview with Gordon Greenwood, Deputy Public Defender in San Francisco, California (Mar. 8, 1993) ("Criminal defendants are often targets of police abuse."); Telephone Interview with Osha Neumann, *supra* note 11 ("The homeless and people with criminal records are often targets of abuse.").

15. *See* Joyner, *supra* note 4, at 113; Telephone Interview with Oliver Jones, *supra* note 13. Note, however, that "[w]hites . . . are also victimized particularly if they advocate unpopular causes or political points of view." Joyner, *supra* note 4, at 112-13.

16. *See* Telephone Interview with Dennis Cunningham, Attorney in San Francisco, California (Feb. 13, 1992) ("If your plaintiff is Dolores Huerta, you have a better chance of winning or settling. If the plaintiff has political clout, the city is more likely to pay out.").

17. *See* Joyner, *supra* note 4, at 113 (stating that "victims' character has adverse impact"); Littlejohn, *supra* note 12, at 369 ("When a plaintiff is poor, has minority group status or is a criminal, jurors are likely to resolve doubts in favor of the police officers."); Telephone Interview with Sarge Holtzman, *supra* note 12; Telephone Interview with Osha Neumann, *supra* note 11.

18. *See* Joyner, *supra* note 4, at 143 ("[M]ost victims cannot afford to pay attorney's fees."); Telephone Interview with Dennis Cunningham, *supra* note 16 ("[It is] rare that victims of misconduct have the money to pay a lawyer."); Telephone Interview with Tito Torres, *supra* note 12 ("The economic class who are victims don't have the resources to pay lawyers."); Telephone Interview with Carol Watson, *supra* note 13 ("These [police misconduct] cases are almost exclusively taken on a contingency fee basis."). Note, however, that an attorney can file for both attorney and expert fees in a § 1983 suit. *See* 42 U.S.C. § 1988 (b), (c) (1988 & Supp. III 1991).

enormous financial risk when filing a section 1983 suit.<sup>19</sup> An attorney will therefore be hesitant to accept a weak case or a case without significant damages.<sup>20</sup>

A second common weakness to a case concerns the plaintiff's witnesses.<sup>21</sup> These witnesses often suffer the same credibility problems as does the plaintiff. Many altercations between police and victims of misconduct occur in poor neighborhoods. Witnesses tend to be friends, family, or acquaintances of the plaintiff, and therefore lack the credibility of a disinterested party.<sup>22</sup> Such witnesses often have criminal histories as well.<sup>23</sup> This lack of credible witnesses greatly reduces the chances for success, and is another reason attorneys will be reluctant to accept a case.<sup>24</sup>

## B. Obstacle #2: Winning a Section 1983 Suit for Damages

Even if a victim of police brutality finds an attorney to pursue the claim, winning the suit is a new battle. As the first criminal trial against the four white police officers who beat Rodney King demonstrated, even videotaped evidence may fail to persuade jurors of the officers' guilt.<sup>25</sup> "[Police misconduct] is a very difficult area of law, and attorneys lose a majority of their cases . . . ."<sup>26</sup>

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19. See Joyner, *supra* note 4, at 143 ("The attorney . . . should be prepared to 'front' the litigation costs."); Telephone Interview with Osha Neumann, *supra* note 11 ("It is costly to sue the police, so unless major damages are involved, it is hard to get representation.").

20. See Joyner, *supra* note 4, at 143 ("The inability to 'front' [litigation] costs causes many attorneys to refuse to accept police misconduct cases."); Telephone Interview with Dennis Cunningham, *supra* note 16 ("If [there is] no serious injury, it usually isn't possible to get a lawyer because the lawyer won't get paid."); Telephone Interview with Frank Saunders, *supra* note 13 ("The success of a suit often depends on the seriousness of the injury."); Telephone Interview with Tito Torres, *supra* note 12 ("Not many attorneys will take suits without significant damages. If the payoff is not \$50,000 or more, most attorneys can't afford to take the case, and the police know this.").

21. See AVERY & RUDOVSKY, *supra* note 2, § 4.5, at 4-8 to 4-9 (discussing necessity of independent witnesses).

22. Telephone Interview with Carol Watson, *supra* note 13 ("In many cases the witnesses are neighbors, friends, or acquaintances of the plaintiff. They are not the most credible witnesses.").

23. *Id.* ("Many of [the witnesses] have criminal records since the majority of cases happen in poor neighborhoods.").

24. See AVERY & RUDOVSKY, *supra* note 2, § 4.5.

25. For a general discussion of the trial verdict, see Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted*, L.A. TIMES, Apr. 30, 1992, at A1.

26. Telephone Interview with Karol Heppie, Director of Police Watch, an organization in Los Angeles that provides initial counseling and referrals to victims of police abuse (Feb. 7, 1992); see Telephone Interview with Richard "Terry" Koch, *supra* note 11 ("These suits are very tough to win."); Telephone Interview with Dan Stormer, *supra* note 11 ("Today, it is even more difficult to prevail in section 1983 suits because the courts are cutting back."); see also Joyner, *supra* note 4, at 114 ("[It is] extremely difficult to convince a jury of twelve citizens that police officers have violated the rights of others."). One San Francisco attorney with

Technically, "excessive" or "unreasonable" force gives rise to a cause of action under section 1983.<sup>27</sup> As a practical matter, however, it may be difficult to establish a cause of action based on unconstitutional excessive force because courts tend to protect police officers.<sup>28</sup>

Historically, police officers have been expected to maintain and enforce the prevailing social order. In short, their job is to keep the peace, to arrest suspected wrongdoers and to prevent criminal activities. The judicial protection afforded police officers is based on the presumption that the use of force is necessary to maintain social order and to apprehend persons suspected of committing crimes.<sup>29</sup>

Satisfying the basic elements of a section 1983 suit can therefore entail overcoming a judge's subtle bias.<sup>30</sup>

Unfortunately, this is not the only hurdle an attorney faces. A plaintiff's attorney faces numerous other challenges unique to police misconduct suits.

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almost twenty-five years of experience handling police misconduct suits states: "The violence must be pretty bad to get a jury to rule against the police. These cases are very hard to win." Telephone Interview with Dennis Cunningham, *supra* note 16.

27. AVERY & RUDOVSKY, *supra* note 2, at 2-23. The standard for determining whether a given application of force is unconstitutionally excessive is laid out in *Graham v. Connor*, 490 U.S. 386 (1989). Note that pre-*Graham*, the lower federal courts differed in defining the appropriate constitutional standard. AVERY & RUDOVSKY, *supra* note 2, at 2-26. "Some courts required a showing of some severity to sustain a section 1983 action." *Id.* This led to some "mean spirited decisions." *Id.*; see, e.g., *Owens v. City of Atlanta*, 780 F.2d 1564 (11th Cir. 1985) (holding that arrestee who died from being placed in "stretch" hold position in jail cell was unable to sustain § 1983 claim); *Davis v. Forrest*, 768 F.2d 257 (8th Cir. 1985) (holding that beating with flashlights did not "shock the conscience"); *Raley v. Fraser*, 747 F.2d 287 (5th Cir. 1984) (holding that plaintiff who suffered bruised arms, scraped face, welts on wrists from handcuffs, and sore throat did not meet the severity requirement to state a cause of action); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (holding that recovery under § 1983 requires that injuries be grossly disproportionate to need for action under the circumstances and that the action was malicious); *King v. Blankenship*, 636 F.2d 70, 73 (4th Cir. 1980) (holding that unjustified infliction of bodily harm upon a prisoner that exceeds force needed, is maliciously applied, and inflicts injury that gives rise to § 1983 liability); see also Richard P. Shafer, Annotation, *When Does Police Officer's Use of Force During Arrest Become So Excessive as to Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil Rights Act of 1871*, 60 A.L.R. FED. 204 (1982).

28. Joyner, *supra* note 4, at 114; see, e.g., *Significant Cases and Developments: Civil Rights*, 35 TRIAL LAW. GUIDE 112, 114 (1991) (maintaining that Eleventh Circuit Court of Appeals "went out of its way" in *Samples v. City of Atlanta*, 916 F.2d 1548 (11th Cir. 1990), to affirm verdict for police officer defendants).

29. Joyner, *supra* note 4, at 114.

30. Littlejohn, *supra* note 12, at 415; see also AVERY & RUDOVSKY, *supra* note 2, § 5.7 (discussing federal judges' increasing antagonism toward civil rights actions, leading to requirement of detailed factual pleading); Ricker, *supra* note 13, at 46 (judges give leeway to police officers on trial for brutality).

### (1) *Qualified Immunity Defense*

In excessive force suits, an officer may raise a qualified immunity defense, claiming that her actions were based on good faith.<sup>31</sup> Some in the legal profession argue strongly that qualified immunity simply should not be an issue in excessive force cases.<sup>32</sup> The qualified immunity defense is proper, for example, when an individual's constitutional rights are violated by an officer acting in good faith under a statute reasonably believed to be valid, but later found unconstitutional.<sup>33</sup> By contrast, in cases involving excessive force, the officer actually denies that he violated the victim's constitutional rights. "The question [in excessive force cases] is not whether the force used was justified and necessary; [but] was it reasonable under the circumstances?"<sup>34</sup> The qualified immunity defense is therefore inappropriate.

Unfortunately, the Supreme Court has not clarified whether the qualified immunity defense is applicable to excessive force cases.<sup>35</sup> In the lower federal courts there is confusion: some courts have ruled that qualified immunity is inappropriate, while other courts have allowed this defense.<sup>36</sup> As a result, the first legal battle faced by the plaintiff's attorney in a suit for excessive force may be to overcome the qualified immunity defense.

### (2) *Taking On the Public Entity*

Although the individual officer is the actual defendant in most police misconduct cases, the victim of police brutality is, in reality, taking on the entire municipality. In California, for example, the law mandates that the city provide the defense and pay any settlement or award.<sup>37</sup> The

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31. For a general discussion of the qualified immunity defense, see AVERY & RUDOVSKY, *supra* note 2, §§ 7.2-7.11. For cases discussing the qualified immunity defense, see *Pierson v. Ray*, 386 U.S. 547, 555-57 (1967); *Barker v. Norman*, 651 F.2d 1107, 1120-22 (5th Cir. 1981); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339, 1347-48 (2d Cir. 1972).

32. AVERY & RUDOVSKY, *supra* note 2, at 7-28.

33. *See id.* at § 7.4 ("clearly established" standard).

34. *Id.* at 7-28.

35. *See Graham v. Connor*, 490 U.S. 386, 399 n.12 (1989).

36. For an extensive list of cases going both ways see AVERY & RUDOVSKY, *supra* note 2, at 7-30.

37. *See CAL. GOV'T CODE* § 825(a) (West Supp. 1993). Section 825(a) states, in relevant part:

If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity . . . and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.



city sometimes retains outside counsel in addition to using city attorneys to defend the suit.<sup>38</sup> Occasionally, the police officers' union will hire its own counsel to provide additional defense for the officer.<sup>39</sup>

Civil rights attorneys claim that, in general, cities aggressively defend these suits to discourage litigation.<sup>40</sup> Even in cases in which the evidence in favor of the plaintiff is overwhelming, the city might choose to take the case to trial.<sup>41</sup> The city attorney's office has virtually unlimited resources,<sup>42</sup> and the average suit lasts for many years,<sup>43</sup> costing hundreds of thousands of dollars in fees.<sup>44</sup> The result is an expensive and difficult battle for civil rights attorneys and plaintiffs.

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38. Telephone Interview with Kevin Reed, Western Regional Counsel of the NAACP Legal Defense and Educational Fund, Inc. (Feb. 5, 1992); Telephone Interview with Robin Toma, Staff Attorney at ACLU Foundation of Southern California (Feb. 4, 1992).

39. Telephone Interview with Oliver Jones, *supra* note 13 (noting that in about 10% of the cases he has handled, the police officers' union has hired co-counsel to defend the officer).

40. Telephone Interview with Jim Chanin, *supra* note 11 ("Suits are fought strongly, in general, although now some cases do settle, which is new."); Interview with Sarge Holtzman, *supra* note 12 ("The city tends not to settle often so that there's a disincentive for attorneys to bring these suits."); Telephone Interview with Oliver Jones, *supra* note 13 ("Cities fight suits tooth and nail once the internal affairs department has cleared the officer. . . . Cities are more likely to contest police brutality actions than almost anything else."); Telephone Interview with Kevin Reed, *supra* note 38 ("Suits are defended vigorously and cities don't settle unless they have to."); Telephone Interview with Robin Toma, *supra* note 38 ("These suits are fought very strongly."); Telephone Interview with Tito Torres, *supra* note 12 ("A city backs up officers whether they are right or wrong. I have seen suits where the city attorney spent \$30,000 to \$40,000 defending a suit that could have settled for \$5,000.").

41. For example, the City of Richmond took such an approach in one landmark case with disastrous results for the City. See Carol Benfeil, *\$3 Million Awarded in Richmond Case*, OAKLAND TRIB., June 4, 1983, at A1, A10 (noting that trial resulted in a three-million-dollar verdict); Perry Long, *Richmond Trial Going to Jury*, S.F. CHRON., May 26, 1983 at 3 (stating that in civil rights case against the city of Richmond, the city brought the case to trial in spite of substantial evidence of the police officers' and department's liability); *Richmond Vetoes Pact in Cop Brutality Case*, S.F. CHRON., Jan. 25, 1983, at 5 (discussing the Richmond City Council's rejection of settlement offers in the case).

42. Telephone Interview with Karol Heppe, *supra* note 26 ("The city attorney's office has unlimited resources to fight these suits.").

43. Police misconduct suits may last anywhere from one to five years, depending on whether they are in state or federal court. See Littlejohn, *supra* note 12, at 369 ("[T]he likelihood of long delay before trial has been another impediment for bona fide plaintiffs. In large cities it is not uncommon for civil docket backlogs to extend for two or more years."); Telephone Interview with Oliver Jones, *supra* note 13 (stating that suits in federal court average about two years); Telephone Interview with Kevin Reed, *supra* note 38 (stating that suits usually last anywhere from two to five years); Telephone Interview with John Houston Scott, Attorney in San Francisco, California (Jan. 25, 1992) (stating that suits last two to five years); Telephone Interview with Carol Watson, *supra* note 13 (stating that federal court suits average two and one-half years).

44. Telephone Interview with Robin Toma, *supra* note 38. Robin Toma states that: Suits are long and cost the ACLU a tremendous amount of money to fight—in the hundreds of thousands of dollars. For example, in the suit against the Los Angeles Police Department for illegal spying, dozens of plaintiffs were involved and depositions alone lasted months and costs tens of thousands of dollars in costs and fees.

### (3) *Discovery Battles*

Discovery battles contribute significantly to the length, cost, and difficulty of section 1983 litigation.<sup>45</sup> A police department generally will not turn over disciplinary or personnel records unless a court orders it to do so.<sup>46</sup> Attorneys litigating section 1983 suits in state court face a number of barriers to obtaining these records. Officers' personnel records are confidential and immune from disclosure.<sup>47</sup> To gain access to an officer's personnel record containing information about any history of violence, the plaintiff must show "good cause."<sup>48</sup> Judges also have discretion to deny these motions if "justice requires . . . [protecting] the officer or agency from unnecessary annoyance, embarrassment or oppression."<sup>49</sup>

Showing "good cause" can be difficult; state commissioners, who hear discovery motions, tend to deny motions,<sup>50</sup> especially those that have the purpose of proving an officer's history of violence.<sup>51</sup> Attorneys attribute this to the political component—state commissioners are appointed by judges, who are elected officials, and do not want to offend police departments.<sup>52</sup>

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*Id.*

45. See *id.* ("City attorneys drag their feet on discovery. For example, the Los Angeles Police Department got a contempt order for not turning over discovery files in a case involving the Revolutionary Communist Party."); see also Telephone Interview with Karol Heppe, *supra* note 26 ("Discovery is a battle. Lawyers have a tough time getting records of discipline.").

46. Telephone Interview with Lt. Douglas Seiberling, Director of Internal Affairs Division, Richmond Police Department (Feb. 11, 1992); see also Interview with Sarge Holtzman, *supra* note 12 (stating that in a taxpayer's suit against the city of San Francisco for a pattern and practice of police brutality, the city refused to turn over any personnel records.).

47. CAL. PENAL CODE § 832.7(a) (West Supp. 1993). Section 832.7(a) states, in relevant part: "Peace officer personnel records and records maintained by any state or local agency . . . , or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Section 1043 . . . of the Evidence Code." *Id.*

48. CAL. EVID. CODE § 1043(b)(3) (West Supp. 1993). Section 1043(b)(3) states, in relevant part: "The motion [for discovery] shall include . . . Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." *Id.*

49. CAL. EVID. CODE § 1045(d) (West Supp. 1993). In weighing the evidence, judges evaluate over ten factors derived from *Kelly v. City of San Jose*, 114 F.R.D. 653 (N.D. Cal. 1987). For a discussion of the factors, see *id.* at 663-68.

50. Telephone Interview with Karol Heppe, *supra* note 26 ("State judges often deny discovery motions.").

51. See Telephone Interview with Karol Heppe, *supra* note 26 ("Lawyers [in state court] have a tough time getting records of discipline."); Telephone Interview with John Houston Scott, *supra* note 43 ("Judges keep out evidence of police officers' . . . history of violence."); Telephone Interview with Carol Watson, *supra* note 13 ("State judges are reluctant to grant access to police records. They are more timid to find good cause than federal judges.").

52. See Telephone Interview with Randy Baker, Attorney in Berkeley, California (Feb.

In contrast, "[t]he Federal Rules provide for broad discovery. Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, 'relevance' is very loosely construed . . .,"<sup>53</sup> and thus access to records in federal court is more readily obtainable.<sup>54</sup> Moreover, attorneys claim that federal judges are more receptive to plaintiffs' discovery motions, perhaps because federal judges are appointed for life and are less likely to fear offending police departments.<sup>55</sup> Consequently, gaining access to disciplinary and personnel records in federal court can be easier.

#### (4) *Interlocutory Appeals*

Public entities are allowed to make interlocutory appeals on dispositive motions, such as those that assert a qualified immunity defense.<sup>56</sup> This one-sided privilege gives the city a tactical advantage and extends the length and expense of litigation for the plaintiff's attorney.<sup>57</sup> "Police misconduct actions can simply be 'piece-mealed to death' by repeated appeal through the appellate process before a plaintiff can get to trial."<sup>58</sup> Interlocutory appeals are yet another component that makes section 1983 suits difficult to pursue.

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11, 1992) ("In state court, discovery is more political. The Commissioners do discovery rulings in superior court. They are appointed by judges, who are elected, and they appear to have a very close relationship with the city attorney's office. The state law of discovery is not substantially different from federal law, so the real difference results from the judges' exercise of discretion."); Telephone Interview with Dennis Cunningham, *supra* note 16 ("[State commissioners are] political people."); Telephone Interview with Oliver Jones, *supra* note 13 ("Discovery is completely up to the judge's discretion."); Telephone Interview with Carol Watson, *supra* note 13 ("Discovery depends on how willing the judge is to offend the police department.").

53. AVERY & RUDOVSKY, *supra* note 2, § 6.2.

54. *Id.*

55. Telephone Interview with Randy Baker, *supra* note 52 ("Federal judges are more receptive to discovery motions. State courts often will not grant discovery requests . . . There, it's a more political process."); Telephone Interview with Carol Watson, *supra* note 13 ("In federal court, access is quite forthcoming because judges who are not elected have little or no fear of offending police.").

56. Joyner, *supra* note 4, at 139; *see also* Mitchell v. Forsyth, 472 U.S. 511, 524-30 (1985) (holding that a denial of qualified immunity is an appealable interlocutory decision).

57. *See* Joyner, *supra* note 4, at 139-40 ("The effect of . . . the immediate appealability of the denial of the good faith defense is to allow defendant officers to draw out police misconduct litigation for years.").

58. *Id.* at 140. One Northern California attorney recounts a civil rights case he handled in which the government made three separate appeals before trial, each requiring a hearing in the Ninth Circuit Court of Appeals. Telephone Interview with A.J. Kutchins, Attorney in Berkeley, California (Jan. 28, 1992). He characterizes two of the appeals as frivolous, primarily aimed at running up costs. *Id.* The case was filed as a *Bivens* suit, a judicial cause of action against a government official for violating an individual's constitutional rights under color of law. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* suits have interchangeable standards and procedures with § 1983 suits. *Id.*

*(5) Overcoming the Code of Silence*

Another major barrier plaintiff's attorneys face is the "code of silence," or the "blue curtain."<sup>59</sup>

The code of silence that exists in every profession is even stronger among police officers out of necessity. You depend on each other in life and death situations. This brotherhood/camaraderie is a strong influence. . . . It is naive to think that cops under sworn testimony will not lie if caught in a bind. Cops routinely cover up for each other at trial.<sup>60</sup>

While the code of silence exists, it differs from department to department and is not impenetrable.<sup>61</sup> Indeed, some former officers have observed a decline in the strength of the code of silence throughout the past decade.<sup>62</sup> Nevertheless, an officer generally will not speak up unless

59. Interview with John Crew, *supra* note 11 ("The code of silence is a major problem every attorney faces in these suits."); see also Carol A. Watson, *Complaints Meet a Wall of Silence*, L.A. TIMES, Mar. 10, 1991, at M5 ("The code of silence, adhered to by any officer who intends to remain on the job, provides a virtually impenetrable layer of protection for violence-prone officers. It is clear that the officers who beat Rodney Glenn King felt no threat of exposure from [those] who stood by and watched."). For a general discussion of the code of silence, see CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 168-71, and Flint Taylor, *Abusive Conduct and Torture Tactics of Police*, 3 POLICE MISCONDUCT & CIV. RTS. L. REP. 7 (1990).

60. Telephone Interview with Frank Saunders, *supra* note 13; see also, e.g., Beth Barrett and David Parrish, *Few Fired for Excess Force*, L.A. DAILY NEWS, May 5, 1991, at 1, 8 (discussing code of silence within the Los Angeles Police Department); Victor Merina, *Morgan Awarded \$540,000 by Jurors*, L.A. TIMES, Feb. 15, 1991, at B1 (stating that DEA agent supported account of police officer in his testimony at trial, and that eyewitness's testimony contradicted both the officer's and the agent's account).

61. See Telephone Interview with Donald Casimere, former police officer and investigative officer at Richmond Police Commission, Richmond, California (Feb. 7, 1992) ("Officers are hesitant to talk about other officers. The code of silence exists, but some officers will always come forward."); Interview with Christopher Lefferts, former police officer who worked seventeen years at various departments in Santa Clara County, California, in San Francisco, Cal. (Feb. 4, 1992) ("[Only a] certain percentage of officers do not have the courage to speak up."); Interview with Herbert L. Terreri, former member of California Highway Patrol who served as a patrolman for seven years at various locations throughout Northern and Southern California, in San Francisco, Cal. (Feb. 12, 1992) ("Most officers take lying very seriously and will not risk their jobs for another officer.").

62. See, e.g., Telephone Interview with Donald Casimere, *supra* note 61 ("The code of silence does exist, but there are some officers who will come forward."); Interview with Christopher Lefferts, *supra* note 61 ("When I began as a cop in 1973, the code of silence was strong. I saw it diminish, to some extent, by 1990, when I left law enforcement."); Interview with Herbert L. Terreri, *supra* note 61 ("Today, the code of silence is not as strict a code as it once may have been."); see also Telephone Interview with Frank Saunders, *supra* note 13. Saunders notes that

[s]ome changes in the code of silence have resulted, possibly from the Rodney King episode. For example, in a recent case against [an officer] of the Los Angeles Police Department, [the officer's] partner changed his story at trial; instead of backing up [the officer's] account, the partner said he didn't see the event.

*Id.*

asked;<sup>63</sup> an officer who breaks the code may face ostracism.<sup>64</sup>

As a result, officers often perjure themselves,<sup>65</sup> or, at the very least, say they did not witness the event, rather than speak out against a colleague.<sup>66</sup> When faced with suspected or known perjury, an attorney's only recourse is to try to discredit or impeach the officer's testimony; state law provides that police officers are exempt from submitting to lie detector tests.<sup>67</sup> The existence of the code of silence turns section 1983 suits into credibility contests. As the next section discusses, the police have the distinct advantage because of jury bias.

#### (6) *Overcoming Jury Bias*

Even in the face of seemingly indisputable evidence, such as a videotape, an excessive force suit—civil or criminal—becomes a credibility

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63. See CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 169; see also Interview with Christopher Lefferts, *supra* note 61 ("When it's not a major incident, many [officers] keep quiet if not asked."); Interview with Herbert L. Terreri, *supra* note 61 ("In most of my experience, [an officer doesn't] say anything unless someone asks.").

64. See CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 170; Interview with John Crew, *supra* note 11 ("Cops who speak up are often run out of police departments."). See also Interview with Christopher Lefferts, *supra* note 61 (Lefferts spoke out against an officer when he first began his career. Lefferts claims he almost resigned on the night of the incident. After reporting the incident, it took over a year for many officers in the department to accept him.); Telephone Interview with Tito Torres, *supra* note 12 (noting that officers who are whistleblowers get harassed as a result of speaking out).

65. See Ricker, *supra* note 13, at 46 (maintaining that officers lie or misstate facts on the stand; in their enthusiasm to get a guilty verdict against a criminal defendant, district attorneys often do not challenge the officers, and "judges sigh and turn their heads," creating a court culture that condones dishonesty and creates an "ends justifies the means" mentality); Telephone Interview with Jim Chanin, *supra* note 11 ("While the code of silence makes it very difficult to win cases, they can still be won."); Telephone Interview with Karol Heppe, *supra* note 26 ("Officers who complain against another are often blackballed."); Interview with Sarge Holtzman, *supra* note 12 ("Police testimony always supports each other—it is orchestrated in concert. It is very rare to have an officer testify against another. In cases where one officer's story is too far-fetched, the other officer will just say he didn't see anything."); Telephone Interview with John Houston Scott, *supra* note 43 ("If a cop doesn't stand behind another, who is going to stand behind him next time he, himself, is accused of something?"); Telephone Interview with Dan Stormer, *supra* note 11 ("It is the normal course of events for an officer to bend the truth to fit with the theory of the case [the defense is] trying to come up with."); see also CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 170 (detailing a recent case where a judge admonished officers from the bench for giving false testimony).

66. See CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 169; Interview with Sarge Holtzman, *supra* note 12 ("In cases where one officer's story is too far-fetched, the other officer will just say he didn't see anything.").

67. See CAL. GOV'T CODE § 3307 (West 1980). Section 3307 states in relevant part: "No public safety officer shall be compelled to submit to a polygraph examination against his will. . . . [N]or shall any testimony or evidence be admissible . . . to the effect that the public safety officer refused to take a polygraph examination." *Id.*

contest between the plaintiff and the police.<sup>68</sup> The attorney must overcome jury bias;<sup>69</sup> juries almost always believe the police.<sup>70</sup>

Jurors are often white, middle-class citizens<sup>71</sup> who neither have been victims of police violence nor are likely to have witnessed such violence in their communities.<sup>72</sup> Rather, juries tend to see police as protecting them from criminals.<sup>73</sup> The typical citizen wants to believe that the police are not liars capable of such violence.<sup>74</sup> A plaintiff's attorney must

68. See, e.g., Ricker, *supra* note 13, at 48 (noting that videotape by NBC-TV camera crew of man being pushed through plate-glass window was insufficient to convict two Long Beach, California police officers); Richard A. Serrano, *Officers Claimed Self-Defense in Beating of King*, L.A. TIMES, Mar. 30, 1991, at A1 (discussing substantial inconsistencies between officers' report and videotape of the King beating); Sheryl Stolberg, *Juror Says Panel Felt King Actions Were to Blame*, L.A. TIMES, Apr. 30, 1992, at A1 (noting that videotape of Rodney King beating was insufficient to convict officers); see also Littlejohn, *supra* note 12, at 369 ("Many brutality incidents occur under conditions which result in conflicting testimony about disputed facts, and frequently turn upon a choice between the veracity of police officers and the testimony of plaintiffs.").

69. Littlejohn, *supra* note 12, at 426 ("[J]ury bias is a major factor in police misconduct cases and is partially responsible for the relative infrequency of plaintiffs' verdicts and low damage awards. . . . There is a definite pro-police bias among jurors."); Ricker, *supra* note 13, at 48 ("[J]uries are made up of 'just normal people' who 'have a tendency to be skeptical of people who say they were abused by the police.'" (quoting Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit)).

70. Joyner, *supra* note 4, at 114 ("More often than not, citizens will believe that the actions of police officers were appropriate, lawful and necessary under the circumstances."); Littlejohn, *supra* note 12, at 369, 426 ("Jurors are prejudiced against non-white plaintiffs . . . [W]hen a plaintiff is poor, has minority group status or is a criminal, jurors are likely to resolve doubts in favor of the police officers."); Charles Burrell & J.L. Pimsleur, *Protests in Bay Area—Angry But Mostly Peaceful*, S.F. CHRON., Apr. 30, 1992, at A9 (stating that jurors not inclined to convict police officers); Telephone Interview with Karol Heppe, *supra* note 26 ("It is a big task to overcome jury bias. Attorneys lose a majority of their cases because juries don't want to believe that police lie."); Telephone Interview with Herbert L. Terreri, *supra* note 61 ("Juries generally believe cops.").

71. See Marsha Ginsburg, *Jurors Say King Brought Cops' Assault Upon Himself*, S.F. EXAMINER, Apr. 30, 1992, at A1, A19 (averring that jury of mainly whites in a white suburban community will view blacks differently than will blacks); Stolberg, *supra* note 68, at A1, A23. See also Richard A. Serrano & Carlos V. Lozano, *Jury Picked for King Trial; No Blacks Chosen*, L.A. TIMES, Mar. 3, 1992, at A19 (profiling jurors in first trial of police officers who beat Rodney King).

72. Telephone Interview with Oliver Jones, *supra* note 13 ("Police act differently with different groups. Most middle-class whites perceive the police differently because they have had no experience with police violence.").

73. See Henry Weinstein & Paul Lieberman, *Location of Trial Played Major Role, Legal Experts Say*, L.A. TIMES, Apr. 30, 1992, at A18 (stating that jurors from Simi Valley view police as protectors); *Winning and Losing Tactics in the Case*, S.F. CHRON., Apr. 30, 1992, at A8 (same).

74. Ricker, *supra* note 13, at 45; Telephone Interview with Karol Heppe, *supra* note 26 ("Juries don't want to believe that police lie."); see, e.g., *Verdict Outrages Bradley But He Decries 'Senseless Anger'*, S.F. CHRON., Apr. 30, 1992, at A1, A8 (stating that some people were satisfied with not guilty verdict in first trial of officers who beat Rodney King, and that police officers who beat King did what they were trained to do).

overcome enormous psychological obstacles to convince a typical jury that a police officer used excessive force.

State court juries tend to be more ethnically and culturally diverse and generally have less of a bias in favor of police.<sup>75</sup> In contrast, federal district court juries are drawn from a larger geographic area, which accounts for the more suburban, white, middle-class makeup. Thus, some attorneys bypass section 1983, and instead sue under state tort theories to prevent removal to federal court.<sup>76</sup> Even though an attorney loses the federal court discovery advantage when filing in state court, federal jury bias is so powerful that it can be worth the tradeoff.<sup>77</sup>

Jury bias also affects punitive damage awards. Even if the jury finds for the plaintiff, it is often reluctant to impose punitive damages.<sup>78</sup>

### C. Obstacle #3: Obtaining an Injunction

In addition to or instead of damages, a plaintiff suing under section 1983 may seek to enjoin the particular conduct that caused the injuries. A plaintiff's chances of obtaining an injunction are minimal because the United States Supreme Court has limited the availability of injunctive relief to victims of excessive force.<sup>79</sup> First, the Supreme Court in *Rizzo v. Goode*<sup>80</sup> denied injunctive relief to private groups and individuals who had documented evidence of pervasive abuse by Philadelphia police officers.<sup>81</sup> The Court set a strong precedent in *Rizzo* when it held that federal court intervention in police administration was a violation of federalism and exceeded the injunctive powers afforded by 42 U.S.C. § 1983.<sup>82</sup>

A few years later, in *City of Los Angeles v. Lyons*,<sup>83</sup> the Supreme Court further narrowed the injunctive relief available to plaintiffs suing under section 1983. In *Lyons*, a plaintiff who had been choked into unconsciousness by a Los Angeles officer sought to enjoin police use of a chokehold.<sup>84</sup> At the time *Lyons* was decided, the chokehold had caused

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75. See, e.g., Weinstein & Lieberman, *supra* note 73, at A18 (move of first King trial to white, middle-class neighborhood influenced verdict for defendant police officers).

76. Telephone Interview with Tito Torres, *supra* note 12.

77. Telephone Interview with Randy Baker, *supra* note 52. The jury bias in the Simi Valley trial of the four police officers who beat Rodney King exemplifies the influence of jury bias on the outcome. See Weinstein & Lieberman, *supra* note 73, at A18.

78. Telephone Interview with Richard "Terry" Koch, *supra* note 11 ("The defense counsel usually conveys to the jury that the police officer cannot, on his salary, afford punitive damages. They are sympathetic to the officer and rarely grant punitives.").

79. For a discussion of efforts to obtain injunctive relief through § 1983, see PAUL HOFFMAN ET AL., ON THE LINE: POLICE BRUTALITY AND ITS REMEDIES 12-13 (1991).

80. 423 U.S. 362 (1976).

81. See *id.* at 366-77.

82. See *id.* at 377-81.

83. 461 U.S. 95 (1983).

84. *Id.* at 95.

the deaths of over a dozen persons;<sup>85</sup> by 1991, twenty-seven people had died as a result of this restraint technique.<sup>86</sup> The Court dismissed the suit, holding that in order to have standing to sue for an injunction, the plaintiff must show that he is likely to be a future victim of that same technique.<sup>87</sup>

The NAACP Legal Defense and Educational Fund is trying to narrow the scope of this decision and reopen injunctive relief for victims of excessive force.<sup>88</sup> As it stands today, however, section 1983 suits for injunctive relief remain very difficult to win because of the Supreme Court's decisions in *Rizzo* and *Lyons*.<sup>89</sup>

### III. The Effect of Section 1983 Suits as a Deterrent

Section 1983 suits generally do not deter abusive police behavior,<sup>90</sup> except in rare instances when there is either a large award, media attention, or both.<sup>91</sup> This lack of deterrence comes about because "[m]any officers lose nothing as a result of being sued. It costs them nothing fi-

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85. *Id.* at 100.

86. HOFFMAN ET AL., *supra* note 79, at 13.

87. *Lyons*, 461 U.S. at 105-10.

88. See *Thomas v. County of Los Angeles*, No. CV 90-5217 TJH (Ex) (C.D. Cal. Sept. 23, 1991) (order granting preliminary injunction); Telephone Interview with Kevin Reed, *supra* note 38 ("The NAACP Legal Defense and Educational Fund and fourteen civil rights attorneys have filed *Thomas v. County of Los Angeles* to try to deal with the comity and federalism [issues] established by *Rizzo* and *Lyons*."). The *Thomas* suit challenges the Los Angeles Sheriff's Department's brutality and abuse of the residents of Lynwood, a South-Central Los Angeles community. The Department's actions include: unjustified beatings, killings, shootings, pointing weapons at residents' heads, "trashing" houses during searches, humiliating families by making them stand outside in their underwear during a search, forcing victims to put their hands and faces on hot hoods of police cars during an arrest, racial slurs, and violence during arrest. *Id.*

89. Telephone Interview with Robin Toma, *supra* note 38.

90. See, e.g., Telephone Interview with Randy Baker, *supra* note 52 (no deterrence because lack of economic incentive and because suits have no impact on promotion); Telephone Interview with Oliver Jones, *supra* note 13 (stating that suits generally do not have any effect on officers unless the suit gets publicity); Telephone Interview with Kevin Reed, *supra* note 38 ("The amounts paid year after year by the city for these suits evidences that there is no deterrent."); Telephone Interview with Dan Stormer, *supra* note 11 ("Nickel and dime suits don't have much impact."); Telephone Interview with Tito Torres, *supra* note 12 ("I used to think there would be a deterrent. There isn't any. These suits just compensate the plaintiff."); Telephone Interview with Carol Watson, *supra* note 13 ("The hope that many of us had [that many suits would bring a change in conduct] has not borne fruit."); see also Littlejohn, *supra* note 12, at 426-30 (detailing ineffectiveness of judicial remedies in deterring police misconduct).

91. See Telephone Interview with Osha Neumann, *supra* note 11 ("Big suits that result in change are the exception rather than the rule."); Telephone Interview with Frank Saunders, *supra* note 13 ("Deterrence is only a cumulative result. A department must be hit a lot and hard for it to start changing."); Telephone Interview with Dan Stormer, *supra* note 11 ("Deterrence is determined by the lawlessness of the public entity and the amount of the award."); see also *infra* notes 257-268 and accompanying text.



nancially, it never results in discipline, it has no effect on promotion, and it does not affect the way officers are regarded by their peers and superiors."<sup>92</sup> Moreover, the threat of a lawsuit is minimal; "only a small minority of abuses will ever end up in a lawsuit and the police know that."<sup>93</sup>

In addition, the process of litigation is relatively painless for police officers because the city attorney assumes their defense. For the most part, officers are not involved in the litigation except for depositions and trial testimony.<sup>94</sup> Officers rarely show much concern, even in wrongful death suits, and uniformly approach suits with the attitude that they had a right to do what they did.<sup>95</sup> Some officers even treat the suits as a joke.<sup>96</sup> Thus, the cycle continues: attorneys sue the same officers over and over, and the officers are back on the street the next day while the taxpayers bear the costs.

### A. The Prevalence of Repeat Offenders

Throughout the United States, the police officers who are sued for brutality are often repeat offenders.<sup>97</sup> "Patterns do exist. It is common for attorneys to have cases against officers with histories of violence. These are not isolated incidents of violence. Officers have a pattern of escalation of violence. It starts with a little violence as a rookie, and then

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92. Telephone Interview with Oliver Jones, *supra* note 13; *see also* Bill Wallace, *Jordan to Testify in Lawsuit Accusing 3 S.F. Cops of Beating*, S.F. CHRON., Jan. 27, 1992, at A22 (discussing histories of violence of certain San Francisco police officers who are currently being sued in civil court).

93. Telephone Interview with Osha Neumann, *supra* note 11.

94. *See* Telephone Interview with Lt. Thomas P. Donohoe, Director of San Francisco Police Department Legal Division (Feb. 10, 1992) ("Officers do not usually know they are being sued until the case reaches the city attorney's office and it's time for them to go to a deposition or to meet with the city attorney."); Telephone Interview with John Houston Scott, *supra* note 43 ("The officers are involved in the process only at trial and depositions."); Telephone Interview with Dan Stormer, *supra* note 11 ("The police officers are not much involved in the suits."); Telephone Interview with Tito Torres *supra* note 12 (recalling one case in which officer was not even aware of interrogatory responses filed by city).

95. Telephone Interview with John Houston Scott, *supra* note 43; Telephone Interview with Dan Stormer, *supra* note 11; Telephone Interview with Tito Torres, *supra* note 12; Telephone Interview with Carol Watson, *supra* note 13.

96. Telephone Interview with Jim Chanin, *supra* note 11; Telephone Interview with Oliver Jones, *supra* note 13; Telephone Interview with John Houston Scott, *supra* note 43.

97. *See, e.g.*, Flint Taylor, *Proof on Police Failure to Discipline Cases: A Survey* (pt. 2), 3 POLICE MISCONDUCT & CIV. RTS. L. REP. 39, 42-43, 45, 47 (1990) (discussing repeat offenders in police departments throughout the United States); *Officers Acquitted in Videotaped Rodney King Beating*, S.F. CHRON., Apr. 30, 1992, at A9 (noting that two out of the four officers who beat Rodney King had histories of using excessive force); Wallace, *supra* note 92, at A22 (discussing histories of violence of a few San Francisco police officers currently being sued in civil court); Bill Wallace, *S.F. Pays in Many Suits Against Cops*, S.F. CHRON., May 30, 1990, at A1 (discussing repeat offenders in the San Francisco Police Department who are named defendants in numerous lawsuits).

escalates because no one stops it early on.”<sup>98</sup> Expert witnesses, city personnel, police officers, and attorneys who litigate section 1983 suits observe patterns of recidivism in their own practice and in that of their colleagues.<sup>99</sup> On occasion, an attorney will even have multiple suits against the same officer.<sup>100</sup> Indeed, the prevalence of recidivism is so great that organizations have begun compiling data bases in order to identify repeat offenders.<sup>101</sup>

San Francisco journalist Ruth Keady of the *Daily Journal* noticed the cycle of repeated brutality in San Francisco as she covered police

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98. Telephone Interview with Tito Torres, *supra* note 12.

99. Telephone Interview with Randy Baker, *supra* note 52 (stating that in his three years of practice, he has seen same officers come up in a number of suits); Telephone Interview with Donald Casimere, *supra* note 61 (noting that Richmond Police Commission sees the same officers named in complaints); Telephone Interview with Dennis Cunningham, *supra* note 16 (stating that he observed many repeat offenders in San Francisco and other cities in which he practiced); Telephone Interview with Karol Heppe, *supra* note 26 (stating that many repeat offenders exist in the Los Angeles Police Department); Telephone Interview with Oliver Jones, *supra* note 13 (stating that there are repeat offenders in every department); Telephone Interview with Richard “Terry” Koch, *supra* note 11 (stating that he knows of repeat offenders in the San Francisco Police Department); Telephone Interview with Irene Rapoza, Senior Administrative Analyst, Office of Citizen Complaints, San Francisco, California (Jan. 28, 1992) (noting that the San Francisco Office of Citizen Complaints sees patterns of repeat offenders); Telephone Interview with Kevin Reed, *supra* note 38 (“A number of officers keep turning up.”); Telephone Interview with Frank Saunders, *supra* note 13 (recalling that he served as expert witness in two different cases against same Los Angeles police officer within three-week period); Interview with Herbert L. Terreri, *supra* note 61 (stating that he knew of officers in his department who received numerous complaints for excessive force); Telephone Interview with Robin Toma, *supra* note 38 (“There are problem officers who turn up in suits again and again.”); Telephone Interview with Tito Torres, *supra* note 12 (“For example, one officer had ten lawsuits against him; moreover, he didn’t even know that one suit had settled.”); *see also* CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 39-48 (identifying forty-four officers as serious problems, with patterns of violence). Police departments assert, however, that the numbers should not be oversimplified. Certain officers have more violent beats and make most of the arrests within the department, thereby subjecting them to situations where they are likely to be sued more frequently. Telephone Interview with Lieutenant Richard Ehle, Director of Internal Affairs, Oakland Police Department (Feb. 10, 1992); Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46.

100. Telephone Interview with Carol Watson, *supra* note 13; Interview with Susan Rubenstein, Attorney, in San Francisco, California (Feb. 24, 1992) (recalling when she had two cases against same San Francisco police officer). Kevin Reed of the NAACP Legal Defense and Educational Fund claims that after the NAACP Legal Defense and Educational Fund filed a class action suit against the Los Angeles County Sheriff’s Department, local attorneys started calling to ask questions about specific officers because the attorneys were handling other suits against the same officers. *See* Telephone Interview with Kevin Reed, *supra* note 38.

101. To aid attorneys, the San Francisco branch of the National Lawyers’ Guild, recognizing the patterns of violence among certain officers, is in the process of obtaining funding to assemble a database of officers who are repeat offenders. *See* Telephone Interview with Riva Enteen, National Lawyers Guild, San Francisco, California (Jan. 27, 1992). Similarly, reporter Bill Wallace of the *San Francisco Chronicle* has assembled his own personal database of repeat offenders, accumulated through his years of news coverage of police misconduct. *See* Telephone Interview with Bill Wallace, Journalist, *San Francisco Chronicle* (Jan. 28, 1992).

misconduct litigation.<sup>102</sup> Ms. Keady, frustrated by city agencies' "massive indifference" to police misconduct issues, filed a taxpayers lawsuit<sup>103</sup> in 1989 against the mayor, the City and County of San Francisco, the Chief of Police, and the San Francisco Police Commission.<sup>104</sup> The amended complaint made the following allegations:

Over the course of the past three years, the City has paid over Three Million Dollars in judgments and settlements to individuals who have been injured by unlawful police conduct. In these instances, juries have found that police used excessive force or the City Attorney has determined that the evidence would clearly indicate the excessive use of force. However, no police officer has been terminated for this violent and illegal conduct during the course of duty. In the overwhelming majority of instances, the defendants have instituted no disciplinary action whatsoever. In the rare instances in which some form of disciplinary action was taken, it involved suspension for short period of time, having no deterrent effect upon the police department.<sup>105</sup>

Ms. Keady's suit was an attempt to address the prevalence of repeat offenders and to create a legal deterrent which does not yet exist.<sup>106</sup>

Although an original goal of litigation was to deter police brutality,<sup>107</sup> many attorneys have abandoned deterrence as a goal altogether, realizing that plaintiff compensation is usually the most that can be gained from a section 1983 suit.<sup>108</sup> This lack of deterrence is attributable

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102. Interview with Sarge Holtzman, *supra* note 12. Holtzman is Ruth Keady's attorney. See also Wallace, *supra* note 97, at A6 (discussing the Keady suit).

103. Taxpayers have standing to challenge wasteful spending by a city. CAL. CIV. PROC. CODE § 526(a) (West 1979). Section 526 states:

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof . . . by a citizen resident therein . . . who is assessed for and is liable to pay, or . . . has paid, a tax therein.

104. Interview with Sarge Holtzman, *supra* note 12. See also Complaint, Keady v. Agnos, No. 907394 (S.F. Super. Ct., filed June 14, 1989); First Amended Complaint, Keady v. Agnos, No. 907394 (S.F. Super. Ct., filed Oct. 10, 1991) [hereinafter Keady's First Amended Complaint].

105. Keady's First Amended Complaint, *supra* note 104, at 3. The Superior Court dismissed the suit on demurrer in 1992. The appellate court upheld the trial court's ruling. See Keady v. Agnos, No. A056428, slip op. (Cal. Ct. App. Jan. 14, 1993). The court reasoned that "the complaint fail[ed] to identify any specific expenditure of funds designated for any particular project or function plaintiff [sought] to have enjoined." *Id.* at 5. Thus, "the general Complaint about the conduct of the Police Department [was] not a basis on which [the court of appeal was] going to appoint itself chief of police." *Id.* at 6. Furthermore, the court reasoned that the record lacked specific facts and reasons to support plaintiff's claim. *Id.*

106. Interview with Sarge Holtzman, *supra* note 12.

107. See *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) ("Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.").

108. Telephone Interview with Karol Heppe, *supra* note 26; Telephone Interview with Oliver Jones, *supra* note 13; see also Telephone Interview with Tito Torres, *supra* note 12 ("To

to a variety of factors that, when combined, create an environment in which there is no economic or professional incentive for an officer to change violent habits.

#### B. Problem #1: No Economic Incentive Exists

Officers have no economic incentive to change their behavior since a civil suit has no financial impact on them. As provided by statute, the city pays for the defense and for any settlement or judgment; the officer is only required to cooperate in good faith.<sup>109</sup>

Punitive damages previously were the only way to affect the police officer economically.<sup>110</sup> The law changed in 1985, however, and a city can now pay the punitive damages imposed on the officer.<sup>111</sup> Under the revised statute, city officials are given discretion to determine whether the officer acted in good faith, despite the jury's finding that the officer acted with malice.<sup>112</sup> If city officials decide that, in their opinion, the officer acted "in good faith, without actual malice," then the city can opt to pay the punitive damages.<sup>113</sup> In essence, this law gives the public entity the right to disregard completely a jury finding of malice with its own discretionary evaluation.

As a result, cities will likely choose to pay punitive damages because officers may otherwise sue the city for poor representation or conflict of

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have a deterrent effect, the litigation must hurt something other than this abstract [city] monetary fund."). A lawyer referral service in Los Angeles called Police Watch was originally established with the goal of deterring police misconduct through litigation. Telephone Interview with Karol Heppe, *supra* note 26. According to Director Karol Heppe, this goal has been all but abandoned, since their efforts of ten years have not resulted in a decrease in brutality incidents. *Id.*

109. See CAL. GOV'T CODE § 825 (West Supp. 1993).

110. See *id.* Section 825 previously stated: "Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages." CAL GOV'T CODE § 825 (West 1980), *amended by* CAL GOV'T CODE § 825 (West Supp. 1993). Section 825 was amended in 1985 and has added:

- (b) [A] public entity . . . is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion, finds all of the following:
  - (1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.
  - (2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.
  - (3) Payment of the claim or judgment would be in the best interests of the public entity . . . .

CAL. GOV'T CODE § 825 (West Supp. 1993).

111. CAL. GOV'T CODE § 825 (West Supp. 1993).

112. *Id.*

113. *Id.*

interest.<sup>114</sup> Consequently, police officers have absolutely no economic incentive to stop their violent behavior, since they are fully insulated from the financial effects of a lawsuit. "Instead, the taxpayers keep paying large amounts of money and the brutality continues."<sup>115</sup>

### C. Problem #2: Lack of External Pressure on Police Departments to Regulate Misconduct

While police officers' financial insulation from suits is a contributing factor, the lack of external pressure on police departments to change patterns of violence is primarily responsible for the endless cycle of violence.<sup>116</sup> In general, government, politicians, and the public put very little pressure on police departments to curb misconduct.<sup>117</sup>

#### (1) Lack of Public Pressure

Until recently, there has been little public pressure for police reform.<sup>118</sup> Critics claim that the white, mainstream society has generally been unconcerned with the prevalence of police brutality. "Minorities, and particularly blacks, have complained for years about police abuse in their communities. So long as it remained in those communities, out of the public eye, it was unofficially tolerated as the price we pay for maintaining law and order."<sup>119</sup>

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114. Interview with Sarge Holtzman, *supra* note 12; Telephone Interview with John Houston Scott, *supra* note 43. According to Los Angeles attorney Carol Watson, the change in § 825 to allow the city to pay punitive damages came about because a city in Southern California lobbied to pick up the punitive damages of three officers who were found liable in a civil suit for brutality. Telephone Interview with Carol Watson, *supra* note 13.

115. Interview with John Crew, *supra* note 11; Wallace, *supra* note 97, at A6 ("Losing lawsuits is unlikely to deter errant officers from future misconduct."); *see also* Telephone Interview with Jim Chanin, *supra* note 11; Telephone Interview with Carol Strickman, *supra* note 11; Telephone Interview with Tito Torres, *supra* note 12.

116. Telephone Interview with Jim Chanin, *supra* note 11; Telephone Interview with Dennis Cunningham, *supra* note 16; Telephone Interview with Karol Heppe, *supra* note 26; Telephone Interview with Oliver Jones, *supra* note 13; Telephone Interview with A.J. Kutchins, *supra* note 58; Telephone Interview with John Houston Scott, *supra* note 43; Telephone Interview with Dan Stormer, *supra* note 11; Telephone Interview with Carol Watson, *supra* note 13.

117. *See infra* notes 118-142 and accompanying text.

118. *See, e.g.,* Richard A. Serrano, *Cops in Beating Acquitted on 10 of the 11 Counts*, S.F. CHRON., Apr. 30, 1992, at A1, A16 (stating that the Rodney King beating brought about unprecedented moves to reform police department and forced Los Angeles to finally examine race relations).

119. Ricker, *supra* note 13, at 45; *see also* Vincent Bugliosi, *No Justice, No Peace*, PLAYBOY, Feb. 1993, at 67, 68 ("From rural America to America's big cities, police brutality has been and continues to be pervasive in the Black and Latino Communities." (quoting Steven Hawkings, assistant counsel at NAACP Legal Defense Fund, New York, N.Y.)); Peter Fimrite, *Cop Brutality Called Routine in Flatlands*, S.F. CHRON., Aug. 9, 1991, at A23 ("[C]ases of harassment and excessive use of force [against black residents] are routine and pervasive in the Oakland flatlands . . ."); Pearl Stewart, *Oakland Groups Charge Police Brutality*, S.F. CHRON., July 24, 1991, at A15 (reporting that Oakland community groups accused

The public's resolve to control the police has been further eroded by increases in crime. Effective control of the police requires organized popular pressure.<sup>120</sup> Such popular pressure is unlikely, however, when the public is primarily concerned with being protected from criminals. Instead,

the public's fear of crime has given the police carte blanche to 'control the streets and enforce the status quo.' This has led to an 'institutional toleration of police abuse.' In essence . . . the courts have 'legitimized police misconduct.' . . . 'The few cops who have the proclivity for violence have the license for it as well.'<sup>121</sup>

## (2) Lack of Political Pressure

There is also a lack of political will to do something about excessive force. Politicians do not want to be branded as against law and order and, thus, will rarely speak out against the police.<sup>122</sup> Instead, politicians "tend to respond to police and community concerns about drugs, street violence, and crime. If politicians attack police techniques, the police turn around and blame the crime problem on the politicians."<sup>123</sup>

Politicians who attempt to address police misconduct face strong resistance from other governmental bodies and from police officers' unions.<sup>124</sup> "The police unions have become a deeply entrenched special interest [group], able to bend public policy their way and wear down even the most formidable opponent. . . . 'Nothing gets through, or signed into law, without their stamp of approval.'"<sup>125</sup> The unions feel that civilians should not be involved in scrutinizing the police,<sup>126</sup> and oppose measures

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police department of engaging in brutality against citizens, particularly black males who fit drug-dealer or gang-member profiles); Telephone Interview with Oliver Jones, *supra* note 13.

120. Telephone Interview with Osha Neumann, *supra* note 11.

121. Ricker, *supra* note 13, at 46 (quoting David Rudovsky, *The Criminal Justice System and the Police*, in *THE POLITICS OF LAW* (1982)); see also *Winning and Losing Tactics in the Case*, *supra* note 73, at A8 ("Legal experts said that the jurors [in the Rodney King trial] may have reached their not-guilty verdicts based on their pre-existing attitudes that favor police and fear crime.").

122. Tom Dresslar, *Money Maintains Order in Legislature*, L.A. DAILY J., June 15, 1992, at 7.

123. Telephone Interview with Osha Neumann, *supra* note 11; see also Dresslar, *supra* note 122, at 7; Dan Walters, *Comment: Unions, Officials Have a Deal*, LAKE CO. RECORD BEE, Feb. 14, 1992, at 4.

124. Dresslar, *supra* note 122, at 7.

125. Ralph Frammolino, *Police Organizations Block Reforms at the State Level*, L.A. TIMES, Feb. 15, 1992, at A1 (quoting Margaret Pena, lobbyist for ACLU).

126. Telephone Interview with Donald Casimere, *supra* note 61; Interview with John Crew, *supra* note 11; see also Taylor, *supra* note 97, at 41 ("As in other large cities, the San Francisco Police Officer's Association . . . has repeatedly fought against civilian review, calling for the abolition of the [Office of Citizen Complaints (OCC)] and the return of OCC investigations to the police department."); L.A. Chief to Retire in June After All, S.F. EXAMINER, June 8, 1992 (evening ed.), at A1 (reporting that Los Angeles Police Chief Daryl Gates criticized what he called "meddling by politicians in decisions on police promotions").

such as reform legislation or the establishment of civilian oversight committees.<sup>127</sup> As a result, legislation aimed at reducing police misconduct is usually defeated.<sup>128</sup>

127. Telephone Interview with Donald Casimere, *supra* note 61; Interview with John Crew, *supra* note 11; *see also* Taylor, *supra* note 97, at 41; *L.A. Chief to Retire in June After All*, *supra* note 126, at A13 (reporting that Los Angeles Police Chief Daryl Gates opposes reform legislation).

128. Recent examples of state legislation that tried to address police misconduct but were defeated include the following: (1) California Senator Art Torres, Chair of the now dissolved California Senate Judiciary Subcommittee on Peace Office Conduct, proposed a bill in 1992 to address numerous police misconduct issues. *See* Cal. S. 1335, 1991-92 Reg. Sess. (1992). The bill provided, *inter alia*, that: (a) standardized citizen complaint forms are to be created and used by all law enforcement agencies; (b) each county is to create an office of citizen complaint, headed by an ombudsperson; (c) the ombudsperson is required to send citizen complaints involving felonious acts by peace officers directly to the Attorney General's office; (d) the Attorney General is to investigate these complaints and determine within 180 days whether criminal indictment is warranted; (e) if the Attorney General decides not to file an indictment, she is to file a written finding explaining the decision not to prosecute, which would be a public record and would be sent to the complainant; (f) the Department of Justice is to maintain a central data index of citizen complaints; (g) each law enforcement agency is to adopt a written policy prohibiting the use of excessive force, and to submit a copy of its written policy to the Department of Justice; (h) training courses for law enforcement officers are to include instruction on racial and cultural diversity. *Id.* The bill died in the Senate Appropriations Committee on July 8, 1992. CALIFORNIA LEGISLATURE, SENATE WEEKLY HISTORY, No. 305, 1991-1992 Regular Session, at 365 (Oct. 9, 1992).

(2) California Assembly Member Marguerite Archie-Hudson and Senator Diane Watson proposed bills in 1991 that would have required police officers to report other officers who illegally beat or assaulted individuals. Cal. A. 1114, 1991-92 Reg. Sess. (1991); Cal. S. 513, 1991-92 Reg. Sess. (1991). Failure to report would have been a misdemeanor. *Id.* Governor Pete Wilson vetoed the bills. *See* Letter from Pete Wilson, Governor of California, to members of the California Assembly (Oct. 14, 1991) (on file with author); Letter from Pete Wilson, Governor of California, to Members of California Senate (Oct. 14, 1991) (on file with author). The bill was reintroduced by Assembly Member Archie-Hudson in 1992. Cal. A. 2340, 1991-92 Reg. Sess. (1992). The bill passed in the Senate and the Assembly in August 1992, but was vetoed by Governor Wilson on September 30, 1992. CALIFORNIA LEGISLATURE, ASSEMBLY WEEKLY HISTORY, No. 308, 1991-1992 Regular Session, at 654 (Oct. 9, 1992).

(3) Senator David Roberti proposed two bills, one in 1990 and one in 1991, that would have (a) prohibited peace officers from using "more force than is reasonable, under the circumstances . . . to effect an arrest, prevent escape, or to overcome resistance"; (b) required law enforcement agencies to "adopt a written policy prohibiting the use of excessive force," and to submit a copy to the Department of Justice; (c) required the Department of Justice to maintain copies of these protocols available for public inspection; and (d) required that police officers have racial and cultural awareness training. Cal. S. 2690, 1989-90 Reg. Sess. (1990); Cal. S. 1075, 1991-92 Reg. Sess. (1991). Police associations such as the California Highway Patrol strongly opposed the provisions of the bills. *See* Letter from Lt. A.R. Jones, California Highway Patrol, to California State Senator David Roberti (May 8, 1991) (on file with author). Governor Wilson vetoed both bills. LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE, 1989-1990 Regular Session, 1989-1990 First Extraordinary Session, at 8934; CALIFORNIA LEGISLATURE SENATE RULES COMMITTEE, 1991 DIGEST OF SIGNIFICANT LEGISLATION 161 (Oct. 1991).

(4) California Senator Ed Davis proposed a bill in 1991 that would have (a) required officers to intervene when citizens were being subjected to violence, and (b) required officers to report a

### (3) *Lack of Local Pressure From City Officials*

Police departments are also relatively free from local pressure to stop brutality.<sup>129</sup> For example, the Los Angeles Police Department regularly used excessive force,<sup>130</sup> but the city did nothing to address the problem until forced to by the Rodney King incident.<sup>131</sup> This unwillingness of local officials to confront the issue is not limited to major cities or conservative governments. Even the liberal Berkeley City Council has been reluctant to address misconduct.<sup>132</sup> In general, local government control of the police has been minimal; suits brought by public interest groups are usually the only challenges to repeated police brutality.<sup>133</sup>

Furthermore, city governments approach civil suits against individual officers or the police department defensively, rather than addressing the larger social issues underlying the suits.<sup>134</sup> Local officials are con-

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fellow officer who feloniously beat an individual. Cal. S. 1261, 1991-92 Reg. Sess. (1991). Failure to adhere to the provisions would have resulted in a felony conviction and loss of police officer status. *Id.* The bill was changed in the Senate so that failure to adhere to the provisions would only be a misdemeanor. Frammolino, *supra* note 125, at A1. Even with a watered-down version, the bill was defeated. CALIFORNIA LEGISLATURE, SENATE WEEKLY HISTORY, No. 305, 1991-1992 Regular Session, at 318 (Oct. 9, 1992). Police departments and peace officer associations strongly opposed the bill. Telephone Interview with Charles Fennessey, Legal Consultant, Office of Senator Ed Davis, State Capitol (Jan. 28, 1992); *see also* Ed Davis, Response to Peace Officer Opposition to S. 1261 (statement Davis sent to peace officer associations) (on file with author).

129. *See* Watson, *supra* note 59 ("City Council members approve settlements and pay judgments arising out of lawsuits over police beatings, but they rarely raise a whimper about the huge expenditures of taxpayer money that could have been avoided if they had performed their oversight duties properly. . . . [Furthermore,] there is little or no effort to use [citizen complaints or written lawsuit claims] to monitor police performance."); *see also* Littlejohn, *supra* note 12, at 427. Littlejohn discusses a Connecticut study that found "a disinclination on the part of some municipalities to discipline their police." The study states:

Whether because municipal officials were generally sympathetic toward police officers, or because they were dependent politically on the police department, or simply because the plaintiffs in these suits were not members of a politically significant constituency, the attitude of municipal leaders often appeared to be one of complete support for law enforcement agencies.

*Id.*

130. Ricker, *supra* note 13, at 45.

131. *Id.* at 45-46; *The Rodney G. King Beating*, L.A. TIMES, Apr. 30, 1992, at A20, A23 (describing how videotape rocked the city of Los Angeles and brought a year of sweeping change).

132. Telephone Interview with Osha Neumann, *supra* note 11.

133. Telephone Interview with Kevin Reed, *supra* note 38 (giving example of NAACP Legal Defense Fund suit against the Los Angeles Sheriff for recurrent brutality in the city of Lynwood); Telephone Interview with Robin Toma, *supra* note 38 (giving example of ACLU suit attacking the canine policy of the Los Angeles Police Department which has resulted in over 900 individuals being bitten in the last 3 years).

134. Telephone Interview with John Houston Scott, *supra* note 43; *see, e.g.,* Wallace, *supra* note 97, at A6 (stating that San Francisco City Attorney Louise Renne defended the amount of money paid out by the City of San Francisco for suits against the police, claiming that



strained by social, political and economic factors that militate against any active pursuit of police reform.

From a legal perspective, "a municipality cannot be held liable under section 1983 on a respondeat superior theory."<sup>135</sup> To sue a city under section 1983, a plaintiff must prove that the city's failure to train its officers "amounts to deliberate indifference to the rights of persons with whom the police come into contact."<sup>136</sup> The Supreme Court has adopted extremely stringent standards of "fault and causation" that a plaintiff must satisfy to prove "deliberate indifference."<sup>137</sup> The Court reasoned:

To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. . . . It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism.<sup>138</sup>

Thus, even though city taxpayers bear the costs of individual suits against officers as a practical matter, cities have very little fear of being sued for institutionalized brutality among their police forces. Case law leaves only a scant legal threat to cities, as well as little incentive to curb officers' violent behavior.

There are also practical reasons why cities fail to address the larger social issues underlying the suits. City attorneys have a "potential conflict in representing the officer or the city in [a] damage suit while at the

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"damage awards in misconduct suits are unrelated to the effectiveness of the police department's disciplinary system"); see also *supra* notes 40-41 and accompanying text.

135. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1977).

136. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); see also Flint Taylor, *Proof in Police Failure to Discipline Cases: A Survey* (pt. 1), 3 POLICE MISCONDUCT & CIV. RTS. L. REP. 25 (1990) (discussing relevance of *Canton* to pattern and practice suits).

137. *Canton*, 489 U.S. at 391. City liability under § 1983 "will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible." *Id.* at 389. "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *Id.* at 390-91.

Neither will it suffice to prove that an injury or accident could have been avoided if an officer had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. . . . [A]dequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs.

*Id.* at 391. "[P]ermitt[ing] cases against cities . . . on a lesser standard of fault would result in de facto respondeat superior liability on municipalities . . . ." *Id.* at 392.

138. *Id.* at 391-92.

same time referring the case to the [police] [d]epartment for investigation . . . .”<sup>139</sup> Further, city attorneys claim that any evidence they discover cannot be disclosed because of attorney-client privilege.<sup>140</sup>

City leaders have the power to challenge the police department, but are hindered by their concerns for their political reputation. They may be reluctant to admit to problems within city agencies,<sup>141</sup> and they may be wary of offending the police officers’ unions.<sup>142</sup>

In sum, there is little external pressure on the police by the public, state government officials, or local city officials. This results in minimal accountability for both officers and departments. As discussed in the next Section, the problem continues within police departments, where frequently little or no pressure is put on officers to change their violent behavior.

#### **D. Problem #3: No Professional Incentive Exists for Officers to Change Their Violent Behavior**

The fact that some police departments place little or no pressure on police officers to change patterns of violence is greatly responsible for the cycle of police brutality. As this Section will discuss, internal pressure may be scant or nonexistent for a variety of reasons: the culture within the police department; the lack of correlation between civil suits and internal discipline; the lack of correlation between civil suits and promotion; the flawed internal affairs procedures; and the lack of authority granted to civilian oversight committees.

##### *(1) Lack of Peer and Supervisory Pressure*

The overall environment within a police department often puts little or no pressure on an officer to change violent tendencies. If all three potential sources of pressure—peers, supervisors, and the chief—respond to brutality complaints and suits with a defensive, rather than corrective, attitude, the result is a culture that silently condones violence.

##### **a. Peer Pressure**

In general, police officers’ tight loyalty comes into play when an officer is civilly sued or criminally charged for brutality.<sup>143</sup> “Police, as a

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139. Taylor, *supra* note 97, at 42; Wallace, *supra* note 97, at A6.

140. Taylor, *supra* note 97, at 42; Wallace, *supra* note 97, at A6.

141. See, e.g., Watson, *supra* note 13, at M5 (“[Los Angeles] City Council members approve settlements and pay judgments arising out of lawsuits over police beatings, but they rarely raise a whimper about the huge expenditures of taxpayer money that could have been avoided if they had performed their oversight duties properly.”).

142. See *supra* notes 124–127 and accompanying text.

143. Telephone Interview with Frank Saunders, *supra* note 13 (“The department will usually protect the officer.”); Telephone Interview with Carol Strickman, *supra* note 11 (“The

culture, tend to think of themselves as separate and apart from common citizens. They feel that others don't have a sense of the realities on the street. They develop a strong sense of military camaraderie as a way of coping with the isolation they feel."<sup>144</sup> Within this culture, officers tend to "close the circle and bring the wagons around" when one officer is sued.<sup>145</sup> The mentality within the department becomes "us versus them,"<sup>146</sup> and officers dismiss verdicts as the product of emotional juries.<sup>147</sup>

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reaction of police departments to these suits is very defensive. There is no deterrence because departments are more interested in backing each other up and defending."); *see, e.g.*, Patrick McGreevy, *City Opts to Settle 12 Suits*, L.A. DAILY NEWS, Nov. 7, 1991, at 18 (reporting that Los Angeles Police Chief Gates issued written statement criticizing the city council's decision to settle twelve suits facing the City of Los Angeles for police misconduct; Gates stated: "These kinds of outrageous awards are disheartening to police officers and the entire police department . . ."); Hector Tobar & Leslie Berger, *Verdict Greeted With Relief and Elation Among LAPD Officers*, L.A. TIMES, Apr. 30, 1992, at A18 (reporting that a majority of Los Angeles Police officers support verdict from criminal trial of officers who beat Rodney King, exonerating all four officers of misconduct).

144. Telephone Interview with Osha Neumann, *supra* note 11; *see also* Ricker, *supra* note 13, at 46 (stating that police department culture accepts brutality).

145. *See, e.g.*, Ricker, *supra* note 13, at 46 (stating that a number of the police officers who witnessed the Rodney King beating supported their colleagues' actions); Telephone Interview with Richard "Terry" Koch, *supra* note 11 ("The police have a 'we versus them' mentality; and when one of them is under fire, they tend to 'bring the wagons around' and unite against what they see as the enemy."); Telephone Interview with Osha Neumann, *supra* note 11 ("Police see lawsuits as an occupational hazard and they commiserate on the issue when it happens."). This mentality was exemplified in 1990, when Dan Silva of the San Francisco Office of Citizen Complaints blew the whistle on a few police officers in relation to the Dolores Huerta beating. Francis Achim, the police officer with a history of violence who beat Huerta, had a paper in his personnel file saying he needed counseling because of stress. Achim's supervisors had removed the paper without informing the internal investigators at the department. This cover up demonstrates the lack of peer pressure placed on an officer with a violent history. *See* Taylor, *supra* note 97, at 41; J.L. Pimsleur, *SF Cop Guilty in Document Removal Case*, S.F. CHRON., Feb. 28, 1991, at B6; J.L. Pimsleur, *Huerta Case Hearing Begins Today in S.F.—Police Commission to Probe Missing Memo*, S.F. CHRON., Sept. 26, 1990, at A4.

146. *See, e.g.*, Tobar & Berger, *supra* note 143, at A18 (reporting that most Los Angeles police officers felt vindicated by the not guilty verdict in the trial of the four officers who beat Rodney King; officers had felt under fire from community since King beating in March 1991); *see also* Interview with John Crew, *supra* note 11 ("Cops always back each other up."); Telephone Interview with Osha Neumann, *supra* note 11 ("Cops have a sense of being under siege by lawyers, the city council, the media, etc. . ."); Telephone Interview with Carol Strickman, *supra* note 11 ("Officers usually retain their colleagues' respect in spite of being sued or disciplined. This stems from 'the ends justify the means' philosophy.").

147. Telephone Interview with Lieutenant Richard Ehle, *supra* note 99. Lieutenant Ehle maintains that:

You can't predicate discipline on the outcomes of civil suits because there are not the same standards of proof, juries and judges historically award bigger awards during the holidays . . . Suits are often determined by the capriciousness of juries and judges. . . Juries and judges have never been to a scene where cops were killed, so it is easy for them to judge the situation after the fact.

*Id.*; *see also* Telephone Interview with Oliver Jones, *supra* note 13 ("Jury judgments are attrib-

The code of silence<sup>148</sup> also contributes to a conformist peer environment.<sup>149</sup> Officers are afraid or unwilling to challenge a colleague's misconduct, so the peer group comes to accept the use of excessive force.<sup>150</sup> This acceptance is passed on to the new officers.<sup>151</sup> Through peer pressure, a small number of violent officers can set the tone and ultimately encourage others.<sup>152</sup> "There is no other way to explain the Rodney King episode where so many officers stood there doing nothing. There had developed in Los Angeles a powerful peer group that cheers when you thump on the bad guys."<sup>153</sup> Once a violence-condoning culture develops, it persists and will be unaffected by litigation.<sup>154</sup>

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uted by cops to a misguided jury or a hot plaintiff's attorney."); Telephone Interview with Osha Neumann, *supra* note 11 ("Cops feel that others try to second guess their behavior without realizing that they were putting their lives on the line."); Telephone Interview with Frank Saunders, *supra* note 13 ("The 'siege mentality' within police departments is one reason why cops dismiss suits. Cops approach suits with the attitude: They [the juries] don't understand what our job is and that we have to risk our lives to protect the public. . . . Cops rationalize that they had to do what they did."); Interview with Herbert L. Terreri, *supra* note 61 ("It is not a good idea for juries of laymen to second-guess cops because they [the laymen] have not been there and do not understand what the pressures were at the time of the incident. Moreover, the political tide can influence juries.").

148. See *supra* notes 59-64 and accompanying text.

149. See Karen Nikos, *Man Awarded \$87,000 in '86 LAPD Beating Case*, L.A. DAILY NEWS, Sept. 10, 1991, at 1 (reporting that jurors in U.S. District Court found the Los Angeles Police Department responsible for brutality by its officers because department condoned a "code of silence" that encouraged officers to refrain from reporting misconduct). A California legislative bill that would have imposed reporting requirements on police officers who witness a colleague's brutality was recently defeated. See *supra* note 128.

150. Interview with John Crew *supra* note 11.

151. Telephone Interview with Karol Hepp, *supra* note 26. Attorney Tito Torres has also observed widespread acceptance of the use of excessive force:

In many departments I have seen, a Rambo culture develops. Officers who get the most respect and admiration are those who are able to physically deal with a violent situation. Women officers who talk down violence are often put down for not dealing with the situation with physical force. . . . The field training process is another example of this. The Field Training Officers send in rookies to deal with violent situations and praise them when they physically subdue a criminal.

Telephone Interview with Tito Torres, *supra* note 12.

152. Telephone Interview with Dennis Cunningham, *supra* note 16.

153. Telephone Interview with Tito Torres, *supra* note 12; see, e.g., Watson, *supra* note 59, at M5 ("It is clear that the officers who beat Rodney Glenn King felt no threat of exposure from the aiders and abettors who stood by and watched. And it is highly unlikely that the rookie officer would have engaged in such brutal behavior if his training officer had not implicitly shown approval by his silence.").

154. For example, after the NAACP Legal Defense and Educational Fund filed suit against the Los Angeles Sheriff's Department and individual officers for brutal acts in Lynwood, California, several of the named sheriffs went to Lynwood and harassed certain plaintiffs. The NAACP Legal Defense and Educational Fund was forced to get an injunction to stop the harassment. Telephone Interview with Kevin Reed, *supra* note 38. See also Ricker, *supra* note 13, at 46 (discussing culture in police department that says violence is acceptable).

## b. The Chief and Supervisors

The chief and higher-ranking supervisors establish the tone and culture within a police department.<sup>155</sup> If the upper ranks do not enforce violations of department policy, there will be no curb on officers' misconduct out on the street.<sup>156</sup>

Field Training Officers (FTOs), in particular, have a tremendous influence in defining the "unwritten" department policies.<sup>157</sup> The FTOs work directly with rookies, providing street training. If the FTOs encourage or condone violence, the rookie quickly learns that violent behavior is tolerated.<sup>158</sup> Since opportunities for promotion often are not

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155. See, e.g., CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 61-62 ("[I]n a quasi-military organization [such as the Los Angeles Police Department], the leadership has great power to reduce excessive force and to influence behavior."); Burrell & Pimsleur, *supra* note 70, at A9 (reporting that at time of King verdict, "police chiefs . . . [should] speak out unequivocally that this sort of behavior will not be tolerated in their departments" (quoting ACLU attorney John Crew)); Watson, *supra* note 59, at M5 ("Previous statements by [L.A.P.D. Chief] Gates—racist, violent and militaristic—set the tone for his troops."); Telephone Interview with Oliver Jones, *supra* note 13 ("Sergeants and Lieutenants mostly run the department; they are responsible for maintaining discipline, and they set the tone of the department."); Interview with Christopher Lefferts, *supra* note 61 ("The tone and culture varies from department to department, depending on the supervisors and chief."); Telephone Interview with Kevin Reed, *supra* note 38 ("[When a] black police officer . . . criticized his partner for picking a fight with a crowd, [t]he partner responded, 'The chief told me to take back the streets.'"); Interview with Herbert L. Terreri, *supra* note 61 ("If there's no enforcement of [departmental rules], by superiors, then there's no curb on officers out on the street.").

156. See Ricker, *supra* note 13, at 46 ("There's no encouragement [for brutality] from the police department, but there is a lack of discipline and a culture that says that's acceptable." (quoting Philadelphia attorney David Rudovsky)); see also CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 61-62 (discussing the need for the Los Angeles Police Department leadership to give priority attention to curbing excessive force and to creating accountability systems for command officers); Watson, *supra* note 59, at M5 ("The failure to discipline officers engaged in violence, or who are dishonest about violence . . . allow[s] miscreants to be secure in the knowledge that no penalty will [be] imposed on one who beats a person . . ."); Telephone Interview with Dennis Cunningham, *supra* note 16 ("The older cops teach the younger ones what is OK [behavior]."); Interview with Christopher Lefferts, *supra* note 61 ("If brutality complaints are conscientiously pursued through internal affairs, the likelihood of a recurrence is greatly diminished."); Telephone Interview with Carol Strickman, *supra* note 11 ("You'll always have some officers in a department who are racist or who do not have respect for the people they arrest—drunks, homeless people, minorities. If the chief or training supervisors feel the same way, you have a big problem."); Telephone Interview with Kevin Reed, *supra* note 38 ("The current state of the Los Angeles Police Department and Sheriff's Department are examples of how brutality continues if it is tolerated in a department."); Interview with Herbert L. Terreri, *supra* note 61 ("Departments must make a commitment. . . . The problem is that some older guys [supervisors] had norms that violence was OK."); Telephone Interview with Tito Torres, *supra* note 12 ("The message must come from the chief to be effective.").

157. Telephone Interview with Oliver Jones, *supra* note 13; Telephone Interview with Tito Torres, *supra* note 12.

158. See Watson, *supra* note 59, at M5 ("[I]t is highly unlikely that the rookie officer would have engaged in such brutal behavior [at the King beating] if his training officer had not

significantly affected by an officer's record of complaints, and are never affected by lawsuits against the officer,<sup>159</sup> officers with histories of violence have been promoted to FTO positions.<sup>160</sup> As a result, the next generation of officers comes to accept violent conduct as the norm.

Likewise, if the chief is not committed to enforcing policies against violence, the impact is widespread.<sup>161</sup> Police chiefs typically wield influence in the conduct of litigation against officers as well as significant influence in promotion and discipline. For example, in San Francisco, the chief has to approve all settlements in civil cases against officers.<sup>162</sup> The San Francisco Police Chief also decides what discipline should be imposed on an officer.<sup>163</sup> In other cities like Oakland and Richmond, discipline is decided by the chief and by the officer's supervisors.<sup>164</sup> Additionally, the chief also wields promotional power<sup>165</sup> and can allow an officer to compete in the civil service process despite the officer's rec-

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implicitly shown approval by his silence. Such conduct perpetuates the corruption that undermines public confidence in law enforcement."); *see also* Telephone Interview with Christopher Lefferts, *supra* note 61 ("If an officer's FTO is lousy, there is poor training . . . . The FTO has a lot to do with how a rookie behaves, and can affect the rookie officer's attitudes throughout his or her career."); Interview with Herbert L. Terreri, *supra* note 61 ("Your FTO tells you all the informal rules and has a strong influence on what kinds of values you develop.").

159. *See infra* notes 177-184 and accompanying text.

160. Interview with John Crew, *supra* note 11 ("In the 1980s, the ACLU lobbied the San Francisco Police Department to create a policy that would require that officer complaint records be examined in cases of promotion to FTO. This change was needed because many FTOs in San Francisco had histories of violent behavior."); Telephone Interview with Osha Neumann, *supra* note 11 (stating that as a member of the Berkeley Police Review Commission, he has witnessed at least two officers with complaint records promoted to FTOs); Telephone Interview with Tito Torres, *supra* note 12 ("In the 1980s, I witnessed a lot of officers with histories of violence being made into FTOs.").

161. CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 61-62.

162. Telephone Interview with Lieutenant Thomas P. Donohoe, *supra* note 94.

163. San Francisco Police Department General Order No. P-11, at 2 (July 8, 1986) (on file with author); Telephone Interview with Irene Rapoza, *supra* note 99. When the discipline imposed could be more than ten days of suspension, the San Francisco Police Commission must handle the case. The police chief, however, makes the first decision in the discipline process. He decides if charges will be brought. Telephone Interview with Irene Rapoza, *supra* note 99; *see also* Bill Wallace, *S.F. Police Watchdog Upholds Few Charges*, S.F. CHRON., May 29, 1990, at A1, A4 (discussing complaint and disciplinary procedures).

164. *See* Oakland Police Department General Order 60-60, at 6 (rev. Apr. 23, 1979); Telephone Interview with Lieutenant Richard Ehle, *supra* note 99 (stating that recommendations about discipline are made by the officer's supervisors up the chain of command, and are forwarded to the chief of police for final decision; the city manager must give final approval of the disciplinary actions); Telephone interview with Lieutenant Douglas Seiberling, *supra* note 46 (explaining that in Richmond, discipline is decided by a committee of supervisors, the chief, and Internal Affairs investigating officers).

165. *See, e.g., L.A. Chief to Retire in June After All*, *supra* note 126, at A1 (reporting that Los Angeles Police Chief Daryl Gates, threatened to postpone his retirement unless he got his way with promotions).

ord.<sup>166</sup> If a police chief does not take a violent record into account in making these decisions, the culture of violence will persist.

Those chiefs who severely discipline officers for misconduct or who allow misconduct to affect promotion face low morale and risk losing the support of the ranks.<sup>167</sup> Consequently, a chief may back up an officer who should be disciplined.<sup>168</sup> The result is open approval and encouragement of misconduct.<sup>169</sup>

Thus, the overall environment within a police department plays a significant role in how officers conduct themselves on the street. If all three sources of pressure—peers, supervisors, and the chief—respond to brutality complaints and suits defensively and fail to correct the problem, the department culture evolves into one that condones violence.

## (2) *No Correlation Between Civil Suits and Internal Discipline*

Another reason civil suits do not deter misconduct is that the outcome of civil suits has no effect on the discipline imposed upon an officer.<sup>170</sup> Internal affairs personnel and citizen oversight committee

166. See, e.g., Telephone Interview with Lieutenant Doug Anderson, Oakland Police Department, Personnel Office (Feb. 6, 1992). To compete in the civil service program for promotion, an officer must have a satisfactory service record. Oakland Chief George Hart, however, does not want to bar anyone from participating in the promotion process. Thus, his policy is to allow officers to participate even if they do not have satisfactory service. Chief Hart thinks the best place to consider an officer's service record is at the end of the process, when Chief Hart makes the final selection. *Id.*

167. When San Francisco Police Chief Charles Gain was brought in to clean up the department in the 1970s, his reform efforts made him unpopular with the rank and file; he received a no-confidence vote and was ousted by Mayor Dianne Feinstein in 1980. See Jerry Carroll, *Chief Gain's Bumpy Career as an Outsider*, S.F. CHRON, July 6, 1979, at 4; Robert Popp & George Draper, *Gain Upheld Complaints of Riot Brutality*, S.F. CHRON, March 21, 1980, at 1, 16; Mark A. Stein, *Department Rocked By Scandals; Question Gnaws at S.F.—Are Police Out of Control*, L.A. TIMES, Apr. 15, 1985, at A1.

168. See, e.g., CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 164-65 (discussing examples of the Los Angeles Police Chief reversing complaint findings of "sustained"); Taylor, *supra* note 136, at 41 (detailing the San Francisco Police Chief's failure to discipline officers in the majority of cases during a six-year span); Stewart, *supra* note 119, at A15 (reporting that when faced with community criticism of the way internal affairs handles cases of alleged brutality, Deputy Chief Robert Nichilini responded, "We do not tolerate the use of excessive force any time, anywhere . . . ; [h]owever, . . . police officers are people and sometimes they have difficulties at home or difficulties with the job.").

169. CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 164-65. For example, in the highly publicized case involving Dolores Huerta, San Francisco Police Chief Frank Jordan refused to discipline the officer in spite of an \$8.5 million settlement and in spite of the internal findings of the Office of Citizens Complaints. Taylor, *supra* note 97, at 40-41. The Office of Citizen Complaints (OCC) found that the officer was guilty of unnecessary force, and it passed its findings on to Jordan for discipline. Mike Weiss, *Bedfellows Make Strange Politics*, SACRAMENTO BEE, Dec. 6, 1992, at F1. When Jordan refused to discipline, the OCC had no formal power to take action on its own. As a result, the officer was never disciplined.

170. See, e.g., Littlejohn, *supra* note 12, at 428 (reporting that in the Detroit Police Department, "[t]he civil liability of police officers is not evaluated . . . for disciplinary purposes");

members unabashedly admit that they do not consider suits during their investigations.<sup>171</sup>

Because internal investigations of complaints are usually completed within sixty days to twelve months, long before a suit is decided, the internal affairs and oversight committees can not take lawsuits into account at the time of the investigation.<sup>172</sup> This, however, is merely incidental. Police departments strongly advocate that the outcome of lawsuits should have no bearing on internal discipline.<sup>173</sup> According to one police lieutenant: "Even if an officer was exonerated by the internal affairs investigation and then found liable in a civil suit, this would result in no change in the internal affairs outcome. We have never opened up an old complaint as a result of a civil suit."<sup>174</sup> In accordance with this

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Telephone Interview with Lieutenant Doug Anderson, *supra* note 166 ("Civil suits play no role in either promotion or discipline. A court judgment is not an appropriate way to evaluate officers' behavior."); Telephone Interview with Lieutenant Thomas Donohoe, *supra* note 94 (noting that Legal Division of San Francisco Police Department that handles investigations for civil suits is entirely separate from the internal investigation of complaints and internal discipline); Telephone Interview with Irene Rapoza, *supra* note 99 ("The disciplinary process is entirely separate and unique from the civil suit process. In fact, often I don't even know an officer is being sued until I read about it in the paper."); Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46 (noting that in the Richmond Police Department, while the internal affairs investigators work on both civil suits and complaint investigations, there is no correlation whatsoever between the two). In a Los Angeles suit, the jury found an officer guilty and awarded the plaintiff \$8.75 million in damages. The Los Angeles Police Department's internal affairs department exonerated the officer nonetheless. John Kendall & Amy Louise Kazmin, *Man Shot by Officer Gets \$8.75 Million*, L.A. TIMES, April 27, 1991, at B1, B2; see also, e.g., Taylor, *supra* note 97, at 41, 43 (noting similar situation in Chicago).

171. See, e.g., Telephone Interview with Lieutenant Doug Anderson, *supra* note 166; Telephone Interview with Lieutenant Thomas P. Donohoe, *supra* note 94; Telephone Interview with Irene Rapoza, *supra* note 99; Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46. In a 1991 suit against the city of Hawthorne, California, the plaintiff's family was willing to accept a settlement if the police department would agree to fire the officer who killed their son. The city rejected the offer. *Survivors of Man Killed by Police In Hawthorne Accept \$1 Million*, L.A. DAILY J., Sept. 20, 1991, at 2.

172. Telephone Interview with Lieutenant Richard Ehle, *supra* note 99 (sixty days); Telephone Interview with Irene Rapoza, *supra* note 99 (usually completed within one year); Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46 (thirty days).

173. Telephone Interview with Lieutenant Doug Anderson, *supra* note 166; Telephone Interview with Lieutenant Thomas P. Donohoe, *supra* note 94; Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46; see also Declaration of Robert Mann, at 1 (June 3, 1991) (on file with author) (discussing deposition of Los Angeles Sheriff Sherman Block on December 4, 1990, in *Espinoza v. County of Los Angeles*). In his deposition, Sheriff Block stated that he keeps no record of suits against his deputies because "lawsuits, in and of themselves, do not indicate misconduct. [A lawsuit] can be based on many things and include large numbers of people who are totally uninvolved in an incident in reality." *Id.*

174. Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46; see also, e.g., Taylor, *supra* note 136, at 26 (noting that in context of pattern and practice suits for failure to discipline, disciplinary proceedings are often not reopened even after a civil judgment or settlement in favor of plaintiff); Taylor, *supra* note 97, at 43 (noting that Chicago Police Department does not reopen or reconsider complaints even in light of a civil suit award or settlement).



philosophy, police departments typically do not put information about lawsuits in the officer's personnel file.<sup>175</sup>

*(3) No Correlation Between Civil Suits and Promotion*

There is also no correlation between lawsuits and promotion of officers.<sup>176</sup> Most departments use a civil service system for promotion, based on an examination and a discretionary selection of the top three or five candidates.<sup>177</sup> Some departments, like the Oakland police, consider personnel files at the final selection stage.<sup>178</sup>

Civil suits are never considered in the promotion process since they are not recorded in personnel files.<sup>179</sup> Officers' personnel files only have records of discipline.<sup>180</sup> Thus, the only way an officer's violent tenden-

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175. Telephone Interview with Lieutenant Doug Anderson, *supra* note 166; Telephone Interview with Lieutenant Thomas P. Donohoe, *supra* note 94; Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46.

176. Telephone Interview with Lieutenant Doug Anderson, *supra* note 166 ("Litigation and civil suits play no role in promotion."); Telephone Interview with Jaye Erickson, Senior Personnel Analyst, Consent Decree Division, San Francisco Police Department (Feb. 10, 1992) ("Suits play no formal role in promotion."); Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46; Telephone Interview with unnamed source in Oakland Police Department (Feb. 6, 1992) ("The chief might be aware of a suit, but it is doubtful it plays any role in promotion.").

177. For example, San Francisco Police Department promotes through an exam; the chief or supervisor can then choose one of the top three candidates (unless otherwise affected by court consent decree). Telephone Interview with Jaye Erickson, *supra* note 176. The Oakland Police Department promotes through an exam and the chief selects among the top five candidates. Telephone Interview with Lieutenant Doug Anderson, *supra* note 166. *See also* Interview with John Crew, *supra* note 11 ("Promotion is generally a function of the civil service test and internal politics.").

178. Telephone Interview with Lieutenant Douglas Anderson, *supra* note 166 (stating that the chief of the Oakland Police Department, when making a final selection from the list of top-scorers on the exam, may look over personnel files); *see also* CHRISTOPHER COMMISSION REPORT, *supra* note 14, at xviii (reporting that Los Angeles Police Department uses civil service process for promotion and also looks at performance evaluations, educational and training background, and all sustained complaints); Telephone Interview with Pam Lorton, Associate Governmental Program Analyst of the California Highway Patrol (April 2, 1993) (describing how the California Highway Patrol promotes up to the Lieutenant level using a written test, a writing exam sample, an oral exam, and the candidate's statement of qualifications, annual performance appraisals, disciplinary action data, and sustained citizen complaints).

179. *See, e.g.*, Telephone Interview with Lieutenant Doug Anderson, *supra* note 166 ("Information about a civil suit has no place in [an Oakland Police Department] personnel file because it doesn't mean anything anyway."); Telephone Interview with Lieutenant Thomas P. Donohoe, *supra* note 94 (distinguishing civil suits and personnel records as two separate record systems—no lawsuits go in San Francisco Police Department personnel files); Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46 (noting that Richmond Police Department records of suits are only kept by the Risk Manager, who works in the city's finance department and is responsible for evaluating any claims against the city); *see also* Wallace, *supra* note 97, at A1 ("Being sued repeatedly does not necessarily hinder promotion or assignment to train recruits in the field.").

180. *See, e.g.*, Telephone Interview with Lieutenant Doug Anderson, *supra* note 166 (pol-

cies can be spotted is if discipline was imposed as a result of an internal affairs investigation. As the next Section will discuss, the internal affairs process is often flawed and does not always result in discipline.<sup>181</sup> Consequently, officers can be repeatedly sued and found liable, yet have clean personnel records.<sup>182</sup>

Furthermore, an officer's record of unsustained complaints (i.e., complaints filed but found by internal investigators to be unsubstantiated) is rarely in the personnel file.<sup>183</sup> The cumulative record of complaints, normally kept in the internal affairs department, is generally not examined for promotional purposes.<sup>184</sup>

Police departments and unions openly defend the promotions process, claiming that lawsuits are not indicative of an officer's conduct and that they have no place in the promotion process.<sup>185</sup>

The fact that an officer was sued doesn't mean anything. A settlement doesn't mean an officer did anything wrong. Even if there was a judgment, we would already have investigated it internally. That is all that is relevant. The court judgment is not an appropriate way to evaluate officers' behavior.<sup>186</sup>

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icy at Oakland Police Department); Telephone Interview with Lieutenant Thomas P. Donohoe, *supra* note 94 (policy at San Francisco Police Department); Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46 (policy at Richmond Police Department).

181. See *infra* notes 191-224 and accompanying text for a general discussion of problems underlying internal affairs investigations.

182. See, e.g., Wallace, *supra* note 97, at A1 (reporting that city of San Francisco has paid damages in 54% of all adjudicated suits filed for police misconduct during the last six years, yet during that same period, less than one percent of complaints resulted in disciplinary action).

183. See, e.g., Telephone Interview with Irene Rapoza, *supra* note 99 (stating that at the San Francisco Police Department, "[n]o matter how many complaints an officer receives, unless they are sustained complaints and discipline is meted out, they will not show up in his personnel file.>").

184. *Id.*; see also CHRISTOPHER COMMISSION REPORT, *supra* note 14, at xviii ("The number and nature of any not sustained complaints, however, is not considered [in the promotion process]."); Telephone Interview with John Crew, *supra* note 11 ("Complaints don't generally hurt promotion chances.>").

185. Wallace, *supra* note 97, at A6 ("Just because a police officer is sued and the city pays out a certain amount of money to settle it doesn't mean there should be disciplinary action.") (quoting Paul Chignell, Vice President of the San Francisco Police Officers Association)); Telephone Interview with Lieutenant Doug Anderson, *supra* note 166; Telephone Interview with Lieutenant Richard Ehle, *supra* note 99; Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46; see also Declaration of Robert Mann, *supra* note 173, at 1-2 (discussing deposition of Los Angeles Sheriff Sherman Block on December 4, 1990, in *Espinoza v. County of Los Angeles*). In his deposition, Sheriff Block states: "We do not [keep records of lawsuits against deputies]." *Id.* at 1. When the attorney asked why this is so, Block responded, "Because we are interested in factual allegations of misconduct. And lawsuits, in and of themselves, do not indicate misconduct. . . . [L]awsuits are not determinative of behavior." *Id.* at 1-2. Block further stated that, "without question," he has more faith in the department's investigative procedures than he has in judicial determinations. *Id.* at 2.

186. Telephone Interview with Lieutenant Doug Anderson, *supra* note 166; see also Decla-

Civil rights attorneys challenge the effectiveness of the promotions process, claiming that officers with histories of violence and long complaint records continue to be promoted.<sup>187</sup>

Complaints and suits do not often result in any significant changes out on the street. I have personally seen officers with many complaints made into FTOs—two I can name specifically. I have also witnessed one officer promoted to Sergeant, and another to Captain. In the last case, the promotion to Captain occurred right after the [Berkeley] People's Park demonstrations, in spite of the fact that the officer received several complaints about his conduct during the demonstrations.<sup>188</sup>

While at least one police department has begun taking citizen complaints more seriously,<sup>189</sup> no attempt has been made by police departments to consider civil suits in the promotion process. Police departments defend this practice on the grounds that "internal affairs [investigations] go further than courts do in discovering if misconduct

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ration of Robert Mann, *supra* note 173, at 2 (statement of Los Angeles Sheriff Block) ("[T]he process of lawsuits in itself is not as significant as conduct and behavior which we investigate internally.").

187. Telephone Interview with Jim Chanin, *supra* note 11 ("If promotions were based on the brutality record, there would be more deterrence."); Interview with John Crew, *supra* note 11 ("The ACLU has found that in many departments, there is no real culture created that says that abuse on record hurts promotion."); Telephone Interview with Karol Heppe, *supra* note 26 ("Police Watch has observed the ten-year span of promotions [of certain Los Angeles Police Department officers] even though the officers have five to ten complaints in their file. There is no correlation between promotion and complaints filed."); Telephone Interview with Osha Neumann, *supra* note 11 ("If police administration doesn't look at records of abuse when making decisions about hiring, retention, and promotion, then suits really have little role in deterring officers' conduct."); see, e.g., Taylor, *supra* note 136, at 43 (discussing promotions of Chicago police officers who have histories of violence).

Attorneys also state that records of violence do not generally hurt an officer's chance of laterally transferring to another department. Recently, NBC News Dateline aired a program about police officers who have a history of violence, but who manage to hide their past by moving from police department to police department. See *NBC News Dateline: Gypsy Cops* (NBC television broadcast, Nov. 24, 1992). The program discussed the prevalence of these "gypsy cops" who quit their jobs to avoid being disciplined for brutality, and then go to another city and get hired by a different police department. *Id.* The hiring police department does not learn of the gypsy cops' history of violence because there is no state or federal system to track personal histories of police officers, and because many police departments cover up their officers' brutality when asked for a reference. *Id.*

188. Telephone Interview with Osha Neumann, *supra* note 11. Expert witness and former police officer Frank Saunders, who has testified at trials throughout the United States for the last twelve years, says he has seen defendant cops promoted in spite of their histories of violence. Telephone Interview with Frank Saunders, *supra* note 13.

189. Recognizing the problem, the San Francisco Office of Citizen Complaints (OCC) initiated a procedure in August 1986 under the "Personnel Improvement Program." Telephone Interview with Irene Rapoza, *supra* note 99. Supervisors within the police department have binders of citizen complaints, organized by officer name. *Id.* The OCC sends a weekly report to supervisors, listing recently filed complaints. *Id.* The OCC hopes to call more attention to complaints; previously, the OCC office (a separate office from the police department) had been the only place where records of complaints were on file. *Id.*

occurred.”<sup>190</sup> As discussed in the next Section, the internal affairs process is not always successful in properly investigating and stopping police brutality.

*(4) Internal Affairs Is a Flawed Way to Investigate Excessive Force Claims*

In most police departments throughout the United States, citizen complaints are investigated by the internal affairs division or by a body composed of police and civilians, with ultimate control resting with the police department.<sup>191</sup> This is often the sole method of investigating excessive force complaints.<sup>192</sup> The division is located within the police department—the investigators are police officers, and the entire process is concealed from the public.<sup>193</sup> The only information a complainant receives is the final outcome: whether the complaint was dismissed or sustained.<sup>194</sup>

Details such as the discipline imposed on the officer are completely confidential.<sup>195</sup> Departments claim to be bound by either California Penal Code section 832.7 or the “Peace Officers Bill of Rights”<sup>196</sup> or both to keep this information confidential.<sup>197</sup> According to John Crew, a police practices specialist with the ACLU, no attorney or police officer has ever been able to point out any language in the “Peace Officers Bill of Rights”

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190. Telephone Interview with Lieutenant Doug Anderson, *supra* note 166; *see also* Telephone Interview with Lieutenant Richard Ehle, *supra* note 99 (“The Internal Affairs division is more effective. A higher percentage of complaints is sustained by Internal Affairs than by the citizen complaints board.”).

191. Taylor, *supra* note 97, at 37.

192. HOFFMAN ET AL., *supra* note 79, at 9 (“The lack of independent civilian involvement in the police complaint process also undercuts the credibility of many systems. Internal affairs processes that involve the police policing themselves are viewed by the public with great skepticism.”); Interview with John Crew, *supra* note 11.

193. Beth Barrett & David Parrish, *Department Officials Say All Accusations Investigated*, L.A. DAILY NEWS, May 5, 1991, at 9; Telephone Interview with Tony Boskovich, Chair, Ad Hoc Citizen Review Subcommittee, Bar Association of Santa Clara County, California (Feb. 13, 1992); Telephone Interview with Karol Heppe, *supra* note 26; *see also* Antonio H. Rodriguez, *So, You Have a Complaint?*, L.A. TIMES, Mar. 14, 1991, at B7.

194. *See* HOFFMAN ET AL., *supra* note 79, at 8-9.

195. *Id.* at 8 (“The blanket of secrecy that covers many complaint processes leaves even the complainants in the dark about the results of their own cases.”); Antonio H. Rodriguez, *supra* note 193, at B7. (“You will not be informed of the outcome of the [internal affairs] investigation. It is privileged and confidential information.”).

196. *See* CAL. GOV'T CODE §§ 3300-3311 (West 1980 & Supp. 1993). These sections are commonly referred to as the “Peace Officers Bill of Rights.”

197. Telephone Interview with John Crew, *supra* note 11; *see, e.g.*, Andrea Ford, *Police Privacy Law Comes Under Fire*, L.A. TIMES, Dec. 5, 1991, at B3 (stating that various Southern California Police departments claim they are prevented by the “Police Officers Bill of Rights” from divulging citizen complaint information); Telephone Interview with Irene Rapoza, *supra* note 99 (“We can't release any personnel information to the public because of Penal Code § 832.7.”); *see also* CAL. GOV'T CODE §§ 3300-3311 (West 1980 & Supp. 1993); CAL. PENAL CODE § 832.7 (West Supp. 1993).

that relates to confidentiality of citizen complaints and discipline; rather, the confidentiality requirement is a complete myth that has traveled throughout police departments.<sup>198</sup> Furthermore, it is unclear whether Penal Code section 832.7 requires this confidentiality either. Case law interpreting section 832.7 is split on the issue.<sup>199</sup> The ACLU of Northern California has been working for many years to try to clarify the issue and to open up the complaint process to the public.<sup>200</sup> Some speculate that politics, rather than state law, are the real reason for the secrecy; police unions and chiefs are opposed to releasing disciplinary information to the public.<sup>201</sup> Whatever the case, this lack of public information is disturbing to complainants and the public, who want to know that their complaints were taken seriously and that discipline was meted out where deserved.<sup>202</sup>

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198. Telephone Interview with John Crew, *supra* note 11.

199. See *Bradshaw v. City of Los Angeles*, 270 Cal. Rptr. 711 (Ct. App. 1990). The Bradshaw court held that Penal Code § 832.7 "only precludes disclosure of peace officer records . . . in any criminal or civil proceedings." *Id.* at 718 (quoting CAL. PENAL CODE § 832.7 (West Supp. 1990)). The court found no legislative intent to create a requirement of confidentiality other than in civil and criminal judicial proceedings. *Id.* at 716. In other words, police departments have discretion to disseminate information about a particular officer to the public. *Id.* at 714. But see *San Francisco Police Officers' Ass'n v. Superior Court*, 248 Cal. Rptr. 297 (Ct. App. 1988) (leaving an open question as to whether public participation in citizen complaint investigative hearings would violate § 832.7); 73 OPS. CAL. ATT'Y. GEN. 90 (1990) (Attorney General opinion stating that § 832.7 creates confidentiality requirements for "citizens' complaint records and information obtained therefrom."); 71 OPS. CAL. ATT'Y. GEN. 247, 250 (1988) (opinion interpreting Penal Code § 832.7 as creating general confidentiality privileges); Memorandum from Mara Rosales, Deputy City Attorney, San Francisco, to San Francisco Police Commissioners, Jan. 22, 1992 (stating San Francisco city attorney position that San Francisco Police Officers Ass'n v. Superior Court leaves an open question about Penal Code § 832.7) (memorandum on file with author). See also Hallye Jordan, *Assembly Public Safety Committee Members Try to Balance Officer's Right to Privacy, Public Interest*, SAN JOSE POST REC., Oct. 15, 1990, at 1-2 (discussing conflict in interpretation of Penal Code § 832.7).

200. See Interview with John Crew, *supra* note 11; see also Jordan, *supra* note 199, at 1-2 (discussing ACLU efforts to clarify confidentiality issue and to make complaint information available to the public); Susan Sward, *S.F. Faces Tough Police Issues*, S.F. CHRON., Apr. 15, 1992, at A13, A19 ("[T]he ACLU is pushing to increase the openness of the disciplinary procedures conducted by the independent civilian-run agency that investigates misconduct complaints against officers . . .").

201. Telephone Interview with Tony Boskovich, *supra* note 193; Telephone Interview with John Crew, *supra* note 11; see also *Open Police Records*, S.F. EXAMINER, Oct. 9, 1990, at A18 ("Unfortunately police agencies have used a convenient (and mythical) interpretation of the law to prevent release of all sorts of information adverse to the image of police . . .").

202. Telephone Interview with Tony Boskovich, *supra* note 193; Telephone Interview with John Crew, *supra* note 11; Telephone Interview with Karol Heppe, *supra* note 26; see also *Keeping People in the Dark*, L.A. TIMES, Aug. 5, 1990, at M6 (discussing the importance to the public of open disciplinary hearings of police officers); Rodriguez, *supra* note 193, at B7; *Secret Records Harm the Public*, SAN DIEGO TRIB., July 27, 1990, at B10 ("More disclosure [of disciplinary action] . . . would help restore police credibility. . . . The individual police officer's desire for confidentiality must be balanced against the public's right to know."); Sward, *supra* note 200, at A19 (describing a San Francisco task force pushing city to open up complaint

Notwithstanding complainants' desire for access, police unions have sought to introduce legislation making police records and discipline procedures even more secretive.<sup>203</sup> The efforts have been relatively ineffective.<sup>204</sup> Nevertheless, even after the Rodney King beating, legislation was introduced in Sacramento to dramatically increase the privacy rights of police officers and the secrecy of the investigative process.<sup>205</sup>

This lack of public access has created a procedure prone to abuse. In some cases the sole aim of the internal process is to establish the innocence of the officer.<sup>206</sup> In other cases, the matter is never fully investi-

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process to complainants, claiming it is unfair for an accused officer to have more access to information than the complainant).

203. Interview with John Crew, *supra* note 11; see also Taylor, *supra* note 136, at 30; Taylor, *supra* note 97, at 41 (maintaining that police unions weaken the discipline apparatus and try to close it to outside scrutiny); Paul Gullixson, *Debate on Police Files Still Strong*, PALO ALTO PENINSULA TIMES TRIB., May 13, 1990, at B1, B3 (discussing California Senate Bill 2764 and other California bills introduced in 1990 that sought to limit public access to police files); Bert Robinson, *3 Bills Propose Penalties for Leaks of Personnel Information About Cops*, SAN JOSE MERCURY NEWS, April 26, 1990, at 1E, 3E (discussing the state bills introduced in 1990 that proposed to tighten the secrecy of police personnel information); Pamela Wilson, *Killea Seeks More Secrecy for Police*, SAN DIEGO DAILY TRANSCRIPT, June 25, 1990, at 1 (discussing California Senate Bill 2764 (1990)).

204. Interview with John Crew, *supra* note 11.

205. Cal. A. 2067, 1991-92 Reg. Sess. (1991). Some of the proposed changes in the law under A. 2067 are discussed below.

Under existing law, an officer who refuses to respond to questions or to submit to interrogations during the course of an investigation is subject to punitive action. The bill would provide, instead, that an "officer under investigation shall have the right to refuse to make a statement or to answer questions directly related to the investigation or interrogation" without being subject to punitive action, except with regard to giving involuntary statements to an outside agency investigating a citizen complaint. Cal. A.B. 2067, LEGISLATIVE COUNSEL'S DIGEST, March 8, 1991 (on file with author).

The bill would provide that "investigative material . . . deemed confidential shall not be used in any way against any public safety officer in any past, present, or future proceeding." *Id.*

Under existing law, the head of an agency is not precluded by statute from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. "Existing law also provides that an officer who fails to comply with that order may be officially charged with insubordination . . ." The bill would remove an agency's right to charge an officer with insubordination, prohibit the head of an agency from ordering an officer to give an involuntary statement to any outside agency or department or entity and make the officer immune from punitive action for refusing to give an involuntary statement to an outside agency, department, or entity unless the outside agency is investigating a citizen's complaint. *Id.*

Existing law permits the use of a public safety agency or officer to fulfill mutual aid agreements with other jurisdictions or to provide interagency cooperation. The bill would require that any interrogation of an officer for the purpose of mutual aid must be conducted by the officer's agency or department pursuant to all the statute's provisions. *Id.*

The bill did not pass. CALIFORNIA LEGISLATURE, ASSEMBLY WEEKLY HISTORY, No. 308, 1991-1992 Regular Session, at 550 (Oct. 9, 1992).

206. According to police officer and expert witness Frank Saunders, internal affairs investigations can basically be a cover up. It becomes a process of

gated.<sup>207</sup> As a result, in certain police departments throughout California, the internal affairs process is under fire for its failure to discipline officers and to deter violence.<sup>208</sup> The media and city investigations have revealed that certain officers have long histories of violence that were not addressed by internal affairs or the officers' superiors.<sup>209</sup> Indi-

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whitewashing by internal affairs investigators. The investigators are given the job of "tunnel investigating." That is, there's a predetermined conclusion and their job is to find a way to get this conclusion. Certain departments I have seen or read about are notorious for this.

Telephone Interview with Frank Saunders, *supra* note 13.

207. Attorney Oliver Jones claims that he has had first-hand witnesses testify at trial who were never even contacted by internal affairs investigators. Telephone Interview with Oliver Jones, *supra* note 13; see also AVERY & RUDOVSKY, *supra* note 2, at 4-1 to 4-2 (stating that police may discourage witnesses from becoming involved in the investigations process); Taylor, *supra* note 97, at 38, 41, 43 (citing examples of police department investigations of complaints in which witnesses were disregarded or the investigations were "shoddy," "incomplete," "inefficient," and "biased").

208. For example, in her taxpayer's suit against the City and County of San Francisco, Ruth Keady alleged that the city and the police chief

- (a) Fail[ed] to institute disciplinary action in instances in which clear evidence of substantial misconduct exists.
- (b) Fail[ed] to act upon findings made by the Office of Citizen Complaints.
- (c) Encourag[ed] police officers to disregard the constitutional rights of citizens.
- (d) Condon[ed] acts of violence and other derelictions.
- (e) Fail[ed] to properly train and instruct police officers regarding respect for the rights of citizens.

Keady's First Amended Complaint, *supra* note 104; see also CHRISTOPHER COMMISSION REPORT, *supra* note 14, at xix, xx, 153-71 (conducting detailed study of the Los Angeles Police Department that followed the Rodney King beating and finding the entire internal affairs process to be flawed and in need of "[a] major overhaul"); Bugliosi, *supra* note 119, at 160 (discussing an independent investigation of the Los Angeles Sheriff's Department, which uncovered "deeply disturbing evidence of excessive force and lax discipline"). Outside of California, there also have been recent challenges to internal affairs divisions. See, e.g., Sean P. Murphy & Toni Locy, *Police Defense of Self-Probes Doesn't Tally*, BOSTON GLOBE, Aug. 1, 1991, at 1 (reporting on Boston internal affairs division under fire); Janet Naylor, *PG Council OKs Panel to Review Police Brutality*, WASHINGTON TIMES, July 4, 1990, at B6 (reporting that Prince George County, Maryland approved a civilian board to review police brutality complaints in response to criticism of internal affairs process).

209. See, e.g., Sean P. Murphy, *Researchers to Audit Internal Affairs; Team to Focus on Police Unit's Procedures*, BOSTON GLOBE, Aug. 8, 1991, at 23 ("Internal Affairs [of Boston Police Department] has repeatedly failed to substantiate allegations of misconduct against officers who have long histories of citizen complaints."); Sean P. Murphy, *Officer Remains Despite Charges, Prior Record*, BOSTON GLOBE, Aug. 2, 1991, at 1 (reporting that Boston internal affairs division is under fire for hiring and retaining officers in spite of long record of complaints); Wallace, *supra* note 97, at A1 (reporting that Office of Citizens Complaints, the San Francisco Police Department's substitute for the internal affairs division, is under fire for its failure to discipline officers who have a history of violence). According to the Christopher Commission Report, "183 officers had four or more allegations [of excessive force or improper tactics], 44 had six or more, 16 had eight or more, and one had 16 such allegations." CHRISTOPHER COMMISSION REPORT, *supra* note 14. Performance evaluations of officers failed to record sustained complaints or to discuss their significance, and failed to assess the officers' judgment and contacts with the public in light of disturbing patterns of complaints. Discipline

vidual attorneys, as well, have learned through discovery that many officers have long records of public complaints filed at the police department and that few officers are disciplined.<sup>210</sup>

The failure of internal affairs to properly investigate and discipline officers is attributed to many factors. The loyalty and camaraderie among police officers makes it nearly impossible for internal affairs officers to be unbiased in their approach to complaints.<sup>211</sup> The process of having one officer's misconduct judged by a fellow officer (the internal affairs investigator) often results in a very different conclusion than the public would reach.<sup>212</sup> Officers are generally more sympathetic to one another because of an unavoidable, subconscious bias.<sup>213</sup> Lastly, some

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of officers who were sued for serious brutality was "frequently light and often nonexistent." *Id.*

210. See Telephone Interview with Karol Heppe, *supra* note 26 ("It is rare that discipline was imposed. A cop has hardly ever been fired for his misconduct. In cases where discipline resulted, it was normally a mere oral or written reprimand, or at worst, a one to two day suspension *with pay*."); Interview with Susan Rubenstein, *supra* note 100 (stating that in one of her recent cases, *Wright v. City & County of San Francisco*, No. C89-3390 & No. C89-3724 (N.D. Cal. filed Jan. 13, 1992) (consolidated cases), discovery revealed that one named defendant, Officer James Lassus, had a long history of complaints); Telephone Interview with Dan Stormer, *supra* note 11 ("In most cases where I learned that the officer had a record of complaints, no discipline had been imposed."); Telephone Interview with Carol Watson, *supra* note 13 ("Only the most minor discipline of the officer usually resulted."); see also Bugliosi, *supra* note 119, at 160 (a former Los Angeles District Attorney discussing the failure of internal affairs to discipline in the large majority of cases as a result of the code of silence).

211. See *supra* notes 143-146 and accompanying text.

212. Telephone Interview with Tony Boskovich, *supra* note 193.

213. See, e.g., Tobar & Berger, *supra* note 143, at A18 (reporting that a majority of Los Angeles Police Department officers agreed with verdict in Rodney King trial, acquitting four white officers). Police officers generally feel that an internal investigation by other officers is best because "the investigating officers understand the situation better, having been there themselves at one time." Interview with Christopher Lefferts, *supra* note 61; Interview with Herbert L. Terreri, *supra* note 61. This very "understanding of the situation," however, unavoidably leads to a bias in the way officers approach complaints. Internal affairs officers approach complaints with a preconception that influences their investigation. For example, when asked about patterns of complaints against particular officers, Lieutenant Douglas Seiberling of the Richmond Police Department Internal Affairs division responded:

Yes, a lot of the time we do see the same officer come up again and again. But you must look at the type of work [the officer] does. For example, he may be on the street narcotics unit. Also, some citizens complain a lot about a particular officer even if he's doing his job. [The citizens] will pick on an officer to try to undermine his position on the street. These complaints are taken with a grain of salt. They are still investigated, but all circumstances are considered.

Telephone Interview with Lieutenant Richard Seiberling, *supra* note 46. Lieutenant Richard Ehle of the Oakland Internal Affairs division answered similarly:

Yes, the most aggressive officers show up in complaints over and over. But it is the nature of the beast. That is, the most aggressive officers who handle drug cases are likely to be complained about the most. Often they are just malicious complaints meant to hurt the officer. For example, drug dealers will typically complain to have an impact on their criminal case. Often the public defender encourages criminal



officers view low levels of excessive force, such as excessive shoving, grabbing, or restraining of a suspect, as just "bad style," not worthy of disciplinary attention.<sup>214</sup>

The effectiveness of internal investigations is also greatly influenced by the attitude of the upper ranks. The chief and the superior officers establish the level of violence that a department will tolerate.<sup>215</sup> If there is no pressure from the upper ranks to conform with the rules, then internal affairs investigations become a sham.<sup>216</sup> The very standards by which an officer is evaluated become so lenient that internal affairs divisions sustain very few civilian complaints.<sup>217</sup>

The internal affairs process is further flawed because the imposition of discipline is heavily influenced by the chief of police.<sup>218</sup> Even if the internal affairs division properly investigates a complaint, the final decision regarding discipline rests, in most cases, with the chief.<sup>219</sup> If a chief refuses to impose discipline despite the investigative findings, he sends a clear message to the ranks that brutality is acceptable.<sup>220</sup> In this sense, the chief plays an enormous role in setting the tone for the department, and greatly influences the standards the internal affairs department adopts in its internal investigations.

An additional basic flaw of the internal affairs process is its location within and connection to the police department.

Internal affairs departments are not open to receiving complaints. It is common practice that when a person goes to the department to make a

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defendants to make a complaint for this very reason. We must be careful not to stigmatize an officer just because of complaints. By the nature of the job, they are going to incur complaints.

Telephone Interview with Lieutenant Richard Ehle, *supra* note 99.

214. Interview with Herbert L. Terreri, *supra* note 61; *see also* CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 166 ("[V]iolent behavior, such as the use of batons, is viewed by many members of the [Los Angeles Police Department] as not requiring discipline at all because, as this officer said, 'some thumping' is permissible as a matter of course."); Ricker, *supra* note 13, at 46 (stating that many police officers who witnessed the Rodney King beating felt that the incident was handled properly by the police).

215. *See supra* notes 155-169 and accompanying text.

216. *See* HOFFMAN ET AL., *supra* note 79, at 6.

When incidents of brutality, misconduct or racism occur, the chief's immediate reaction to these incidents will have a great impact on whether the incident will be repeated in the future. A chief that seems more concerned with protecting the department's image than with identifying and disciplining the wrongdoer can send the message that getting caught is a worse sin than the underlying misconduct.

*Id.*; Barrett & Parrish, *supra* note 60, at A8 (reporting that investigation of Los Angeles Police Department revealed marked leniency with regard to handling of police brutality cases).

217. Taylor, *supra* note 136, at 26; Taylor, *supra* note 97, at 46-47; *see also* Barrett & Parrish, *supra* note 60, at A1 (reporting that Los Angeles Police Department sustains very few complaints).

218. *See supra* notes 155-156, 161-169 and accompanying text.

219. *See supra* notes 162-164 and accompanying text.

220. *See supra* notes 155-156, 161-169 and accompanying text.

complaint, the first thing the investigating officer does is bring up the person's name on the computer to see if there are any outstanding warrants. If there are, the officer will arrest the person on the spot. Another common story we hear over and over is that the investigative officer will try to talk the person out of filing the complaint, or, once a complaint is filed, the police will show up at the complainant's house to try to talk him into withdrawing [the complaint]. The cops will say things like, 'You don't want to ruin this officer's career, do you?'<sup>221</sup>

As a result of this practice, citizens lose faith in the internal affairs process and stop filing complaints.<sup>222</sup> This progressive loss of confidence has been evident over the last ten years in Los Angeles.<sup>223</sup>

Cities throughout California have begun to address the problems of internal affairs investigations by setting up independent citizen oversight committees.<sup>224</sup> In Santa Clara County and the City of San Jose, the Bar

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221. Telephone Interview with Karol Heppe, *supra* note 26; *see also supra* note 154. In his article *So, You Have a Complaint?*, Antonio Rodriguez states:

[The knowledge that filing a complaint] is a waste of time [is] solid ghetto and barrio wisdom. It is based on the knowledge that police officers, who are sometimes even friends of the culprit, will investigate the complaint, and that the percentage of sustained complaints is woefully low . . . [O]fficers will retaliate against those who dare to report them for brutality or verbal abuse. These officers have been known to threaten people, roust people, arrest them for nothing and sometimes even harm them physically . . . [When filing a complaint], the officer will interrogate you right there or refer you to a sergeant, who will ask you, usually in an unfriendly manner, why you want to file a complaint. He or she may try to discourage you by telling you that the officer is married, has children, and that your filing will put the officer's job in jeopardy. You may even be told that what the officer did was legal. Or maybe they will tell you that they have no complaint forms . . . The officer will grill you, cross-examine you and try to tear apart your story, often in a hostile manner.

Rodriguez, *supra* note 193, at B7.

222. Telephone Interview with Karol Heppe, *supra* note 26; *see also* Rodriguez, *supra* note 193, at B7 (citing the intimidation and harassment Latinos and African-Americans face when filing complaints against the Los Angeles Police Department as the reason the number of citizen complaints are not representative of the actual number of incidents); Telephone Interview with Oliver Jones, *supra* note 13 ("Statistics about the number of complaints filed each year are misleading because once people have lost faith in the internal affairs process, they just stop filing complaints. I have had several clients express this to me.").

223. Telephone Interview with Karol Heppe, *supra* note 26 ("Many people who call Police Watch say that they didn't file a complaint with the police department because 'nothing ever happens' and 'it is a waste of time.'").

224. Telephone Interview with Donald Casimere, *supra* note 61 ("Civilian oversight committees are fairly common in California. They are generally effective in providing a greater sense of accountability."). In 1980, the city of Oakland established the Citizen Complaint Board, which has the authority to investigate complaints of excessive force and to act as an appellate review board for citizens who want to appeal the findings of an internal affairs complaint investigation. Telephone Interview with Larry Carroll, Senior Complaint Investigator, Oakland Citizen Complaint Board (Feb. 10, 1992); Telephone Interview with Lieutenant Richard Ehle, *supra* note 99. In Richmond, the Police Commission was established to serve as an appellate review board and to investigate complaints dealing with the issues of excessive force and racism. Telephone Interview with Donald Casimere, *supra* note 61; Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46. In 1983, the citizens of San Francisco went

Association has formed an ad hoc citizen review subcommittee to study and to formulate an ideal model for stopping police misconduct.<sup>225</sup> At present, all police departments in the county are using internal affairs systems to investigate complaints.<sup>226</sup> Committee chair Tony Boskovich explains the reason for the Committee's formation:

Internal affairs systems do as thorough a job as they can in investigating. However, they become ineffective because they are hindered by several things. First, a person who has been mistreated by the police is afraid and doesn't want to deal with the police to file a complaint. Second, there is subliminal pressure on internal affairs investigators because they are cops themselves. When someone is investigating his own people, there is potential for subconscious bias and fear. Third, there is a basic problem with the investigations [internal affairs] conduct[s] because [internal affairs officers] go into the community where the event occurred and the residents don't trust cops and won't talk. If a complaint ends up being one person's word versus the cop's word, the complaint is never sustained. Fourth, the complainant often has criminal charges pending against him and, under the advice of counsel, won't talk because internal affairs could use the information against him. Fifth, the complainant is only told the outcome of the complaint and he never learns if discipline was imposed.<sup>227</sup>

Boskovich states that "even if the internal affairs is conscientious, civilian review will only enhance the process."<sup>228</sup> Civilian oversight committees are a step in the right direction. The committees must be given adequate authority if they are to accomplish their goals. The next Section will discuss common drawbacks that have prevented civilian oversight committees from being an active force in internal investigations and discipline.

#### *(5) Civilian Oversight Committees Lack Authority*

Today, more than thirty of the fifty largest cities have Civilian Oversight Committees (COCs).<sup>229</sup> The structure and authority of these bodies varies from city to city.<sup>230</sup> Many do not have binding authority over the police chief or city manager.<sup>231</sup> Nevertheless, COCs without binding au-

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a step further and established the OCC, which completely replaces the internal affairs division and conducts all internal investigations of complaints. See SAN FRANCISCO CITY CHARTER § 3.530.2 (1992) (creating the Office of Citizen Complaints, placed under the direct supervision of the Police Commission through a voter-initiated amendment).

225. Telephone Interview with Tony Boskovich, *supra* note 193.

226. *Id.*

227. *Id.*

228. *Id.*

229. Interview with John Crew, *supra* note 11.

230. *Id.*; see also HOFFMAN ET AL., *supra* note 79, at 9-10; *supra* note 224 and accompanying text.

231. For example, the Berkeley Police Review Commission has no direct disciplinary power, nor can it recommend discipline. The Commission can merely send its findings to the city manager and make policy recommendations to the city council. Telephone Interview with

thority have still been very effective in cities where their recommendations are acted upon,<sup>232</sup> because COCs "generally make a more thorough effort [than internal affairs divisions do] to collect evidence, weigh it, and look into all aspects of the complaint."<sup>233</sup>

The COCs become ineffective, however, if the police chief, city manager and city council ignore their findings and recommendations.<sup>234</sup> While some cities have attempted to give the COC findings more force, such attempts are of limited utility if any discretion is left in the hands of the police department itself.<sup>235</sup>

While COCs are one step in the right direction, the inability of most of them to prescribe discipline keeps them from more effectively solving the problem of recurring police brutality. Furthermore, the failure of COCs to take lawsuits into consideration when examining an officer's

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Osha Neumann, *supra* note 11. The San Francisco OCC can only send its findings to the chief, and has no power to impose discipline. Telephone Interview with Irene Rapoza, *supra* note 99. The Richmond Police Commission does not have binding authority either. It serves as an advisory board with power to pass along recommendations of policy and recommendations based on complaint investigations. Telephone Interview with Lieutenant Douglas Seiberling, *supra* note 46. The Oakland Citizen Complaint Board is also an advisory board without power to impose discipline. Telephone Interview with Larry Carroll, *supra* note 224.

232. Telephone Interview with Donald Casimere, *supra* note 61 (noting that he has personally seen violent officers stop their misconduct after being disciplined, the discipline being a direct result of the COC's findings and recommendation).

233. Interview with John Crew, *supra* note 11; *see also* Telephone Interview with Osha Neumann, *supra* note 11 ("Civilian review can be an important part of the picture of what leads to control of police abuse if they prove to be independent and effective.").

234. Telephone Interview with Osha Neumann, *supra* note 11 ("The Berkeley Police Review Commission has been ineffectual in some ways because the city council ignores it at times."). The OCC in San Francisco is an example of this problem. In 1990, an OCC investigation found an officer guilty of using excessive force on a political figure, Dolores Huerta, yet police Chief Frank Jordan refused to impose discipline. Harriet Chiang & Bill Wallace, *A Frontrunner for S.F. Chief Under Probe*, S.F. CHRON., Nov. 6, 1990, at A3. At the time, the OCC did not have binding authority, so its findings and recommendations were useless in the face of Jordan's refusal. Weiss, *supra* note 169, at F1.

235. The San Francisco Police Commission recently passed Resolution 19-91. Letter from Lieutenant Manuel Barretta, Secretary, San Francisco Police Commission, to Willis A. Casey, Chief of Police, San Francisco Police Department (Jan. 28, 1991) (on file with Office of the Police Commission, City and County of San Francisco, Hall of Justice, and with author). Under the resolution, if the OCC sustains a complaint, forwards its finding to the police chief, and the chief decides not to file a verified complaint against the officer, then the OCC director can pass the finding along to the police commission. *Id.* The police commission can then order the chief to file the complaint. *Id.* However, the OCC disciplinary process does not allow for OCC appeal of officer discipline. If the chief files the complaint and holds a hearing but does not impose adequate discipline on the officer, then neither the OCC nor the police commission has the authority to force the chief to impose any additional discipline. *See* SAN FRANCISCO CITY CHARTER §§ 8.343, 8.344 (1992) (explaining discipline procedure for police officers). Thus, the police chief still retains full power over the extent of discipline meted out to an officer found guilty of using excessive force.

history of violence reinforces the lack of correlation between the civil judicial process and police accountability.

#### E. Problem #4: District Attorneys Rarely Criminally Prosecute Officers

The problem of police accountability is not confined to the internal discipline mechanisms within a police department. The problem extends to criminal liability. For various reasons, district attorneys throughout the country rarely prosecute police officers for misconduct.<sup>236</sup>

Criminal prosecution could be one of the most powerful deterrents to police brutality; its remarkable absence in most cities greatly contributes to the pervasive cycle of abuse.<sup>237</sup> Part of the problem is that city attorneys cannot reveal information about the suit to the district attorneys because of the attorney-client privilege.<sup>238</sup>

The political components, however, are more commonly cited as discouraging district attorneys from criminally prosecuting officers.<sup>239</sup> District attorneys and police departments work together closely as law enforcement agencies, and have a close rapport, creating a built-in conflict of interest for the district attorneys.<sup>240</sup> Furthermore,

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236. Bugliosi, *supra* note 119, at 158; Ricker, *supra* note 13, at 48; *see also* Police Watch, Law Enforcement Data 3-4 (Nov. 8, 1991) (on file with author). The report states:

Since 1980 . . . the [Los Angeles] D.A.'s office declined to prosecute at least 278 police officers and sheriff's deputies accused of assaulting civilians with fists, clubs, flashlights, leather-covered steel saps, pistol barrels, scalding water and electric stun gun. . . . [On] September 5, 1991 the City Attorney's office . . . filed criminal misdemeanor charges accusing an LAPD officer of assaulting a person during an arrest for the first time.

Furthermore, deputies of the Los Angeles County Sheriff's Department were involved in 202 shootings, fifty-six of which "involved seriously questionable circumstances. . . . *In none of the 202 shootings, including the questionable cases, has the D.A.'s office filed criminal charges against the deputy.*" *Id.* (discussing statistics published in the LOS ANGELES DAILY NEWS, October 7, 1990) (emphasis added); *see also* Littlejohn, *supra* note 12, at 366 n.2 ("[C]riminal verdicts against police officers for unlawful behavior are vastly more difficult to obtain than civil judgments."); Watson, *supra* note 59, at M5 ("[T]he refusal of prosecutors to file charges against [officers engaged in violence or who are dishonest about violence] allow[s] miscreants to be secure in the knowledge that no penalty will [be] imposed on one who beats a person . . ."); Telephone Interview with Karol Heppe, *supra* note 26 ("A fundamental problem with the system is that the D.A. never prosecutes cases, regardless if a civil suit is won. There can be millions of dollars in civil awards, but no criminal prosecution results until a man videotapes the cops beating a guy up.").

237. Bugliosi, *supra* note 119, at 158.

238. Interview with Sarge Holtzman, *supra* note 12.

239. *See, e.g.*, Bugliosi, *supra* note 119, at 160 (stating that political concerns of district attorneys affect criminal prosecution of police officers).

240. Ricker, *supra* note 13, at 46, 48; Bugliosi, *supra* note 119, at 160 ("D.A.s and police work together daily in their efforts against crime. Each is dependent on the other. A fraternity develops between the two that weakens the resolve of the D.A. to go after members of that team."); *see also* Telephone Interview with Alan Gordon, Staff Counsel, Office of Senator Art Torres, State Capitol (Jan. 28, 1992) ("One of the premises of California Senate Bill 1335 is

[p]olice are correctly viewed as the "thin blue line" that protects the public from criminals and lawlessness. D.A.s—most of whom, after all, are politicians, not statesmen—fear that the public might perceive them as antipolice and anti-law enforcement, a significant negative at election time.<sup>241</sup>

Thus, civil suits may have criminal elements that warrant investigation by the district attorneys,<sup>242</sup> but criminal prosecution of police officers still rarely occurs. Currently, there is no state mechanism in place to see that criminal charges are brought.<sup>243</sup>

#### F. Problem #5: The Limits on Impact Litigation Aimed at Changing Practices Within a Department

Civil litigation against a police department for a pattern and practice of violence or neglect of discipline is another avenue attorneys pursue to deter police brutality. A municipality can be held liable under section 1983 for failing to correct unconstitutional conditions and for "tolerat[ing] a pattern and practice of misconduct so widespread that it may be considered the unofficial custom or policy of the city."<sup>244</sup>

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that local prosecution of police officers doesn't work because of the close working relationship between D.A.s and police officers."); Telephone Interview with Karol Heppel, *supra* note 26; Telephone Interview with Frank Saunders, *supra* note 13. In January 1992, California State Senator Torres (Chair of the now dissolved California Senate Judiciary Subcommittee on Peace Officer Conduct) released a bill to address this exact issue. See Cal. S. 1335, 1991-92 Reg. Sess. (1992). Among the bill's provisions was a requirement that citizen complaints alleging felonious acts by officers be sent directly to the Attorney General's office. *Id.* The Attorney General, as a more impartial state arbiter than a district attorney, would have the first opportunity to prosecute the officers, and if he should choose not to prosecute, would have to file a written report explaining why. *Id.*

The underlying premise of the bill was that the local prosecution of police officers does not work because: (1) there is a close working relationship between the district attorney and the city attorneys; (2) in big cities, the district attorneys are very popular figures, often elected, vying for public support, and thus the process becomes political; and (3) in smaller cities, city attorneys who would prosecute criminal cases against officers must defend them in a civil suit. Telephone Interview with Alan Gordon, *supra*; see also Dresslar, *supra* note 122, at 7. The bill died in the Senate Appropriations Committee on July 8, 1992. CALIFORNIA LEGISLATURE, SENATE WEEKLY HISTORY, No. 305, 1991-1992 Regular Session, at 365 (Oct. 9, 1992).

241. Bugliosi, *supra* note 119, at 160.

242. For example, attorney Sarge Holtzman had one case in which the officer committed three separate felonies: the officer kicked an unarmed person who was on the ground, filed a false police report, and then perjured himself at his deposition. The district attorney never investigated the matter. The civil suit against the officer was settled by the city. Interview with Sarge Holtzman, *supra* note 12.

243. Telephone Interview with Alan Gordon, *supra* note 240.

244. Joyner, *supra* note 4, at 135-36; see, e.g., *Thomas v. City of New Orleans*, 687 F.2d 80 (5th Cir. 1982) (affirming liability against the defendant municipality in a suit by a police officer who was wrongfully fired for violating an unofficial but standard code of silence). For a general discussion of pattern and practice suits based on failure to discipline, see Taylor, *supra* note 136, at 25-26.

Pattern and practice suits against police departments, unfortunately, are very difficult to win. To establish the city's liability, a plaintiff must prove that a pattern and practice demonstrates "deliberate indifference."<sup>245</sup> As discussed in Part III.C.3, this is a very difficult burden to meet.<sup>246</sup> Overwhelming evidence is needed to show a pattern and practice.<sup>247</sup> Attorneys face the same problems of discovery as in lawsuits against individual officers.<sup>248</sup> The impact of discovery battles is even more severe in these cases since the information needed to establish pattern and practice is usually found only in internal police records and files.<sup>249</sup>

To win these suits, you need to show lots of occurrences, but this proof is hard to get. The City stonewalls on discovery, far past the point of fairness—to the point of borderline ethics. Cities would rather pay big settlements than open up a can of worms by releasing this information. This is not unique to San Francisco. It is a fairly typical situation around the country regarding discovery.<sup>250</sup>

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245. See *supra* notes 136-138 and accompanying text; see also Interview with Sarge Holtzman, *supra* note 12 (stating that in *Keady v. City of San Francisco*, the plaintiff was trying to show that the failure to train and discipline amounts to deliberate indifference).

246. See *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); see also *supra* notes 137-138 and accompanying text.

247. Taylor, *supra* note 136, at 26; Telephone Interview with Randy Baker, *supra* note 52; Telephone Interview with Dennis Cunningham, *supra* note 16; Interview with Sarge Holtzman, *supra* note 12; Telephone Interview with Robin Toma, *supra* note 38 ("[T]o get enough information to prove a pattern and practice, you must get volumes of material, and to get this you have to fight tooth and nail."). In *Silva v. Block*, No. BC039633 (L.A. Super. Ct. filed Oct. 9, 1991) and *Lawson v. Gates*, No. BC031232 (L.A. Super. Ct. filed June 24, 1991), the ACLU is suing the Los Angeles Police Department and Los Angeles Sheriffs Department for canine policies that result in hundreds of unnecessary dog bites each year. Examples of other civil rights pattern and practice suits filed by the ACLU that required long and costly evidence-gathering include: *Coalition Against Police Abuse v. Board of Police Comm'rs*, Nos. C243458, C375660, C399552, C327528, C381339, C413904 (L.A. Super. Ct. filed Sept. 1985) (police spying), and *Orantes-Hernandez v. Meese*, 919 F.2d 549 (9th Cir. 1990) (*Bivens* suit about the right of Salvadoreans to obtain counsel and to apply for political asylum).

248. See *supra* notes 45-52 and accompanying text.

249. Telephone Interview with Randy Baker, *supra* note 52; Telephone Interview with Dennis Cunningham, *supra* note 16; Interview with Sarge Holtzman, *supra* note 12; Telephone Interview with Robin Toma, *supra* note 38. For example, in the case of *Keady v. City and County of San Francisco*, No. 907394 (S.F. Super. Ct. filed June 14, 1989), attorney Sarge Holtzman served interrogatories asking for information from the police about what discipline was imposed on an extensive list of officers who had been sued for misconduct. The city refused to respond. See Notice of Motion and Motion for an Order To Answer Interrogatories Pursuant to Evidence Code Sec. 1043 and 1045, No. 907394 (S.F. Super. Ct. filed July 25, 1991).

250. Telephone Interview with Dennis Cunningham, *supra* note 16.

Furthermore, judges usually require a substantial evidentiary showing before allowing a plaintiff to proceed with a pattern and practice claim.<sup>251</sup> One attorney characterizes this as an "institutional bias":

Courts have huge caseloads, and a pattern and practice suit is an enormous case for the court. A judge will want to scrutinize pattern and practice evidence because [the court] is giving up a lot of time if it allows this case to go forward. . . . Judges adopt the 'smoking gun' theory. In other words, they want hard evidence of the city's and the police department's support [of the brutality or other misconduct]. There is rarely this kind of ['smoking gun'] evidence. So after months and months of discovery battles, the judge will sometimes rule that there's not enough evidence of pattern and practice. [The attorney] can go on with the suit against the individual officer, but the city and the police department [defendants] are dropped.<sup>252</sup>

These realities make pattern and practice suits very long, difficult and costly.<sup>253</sup> While the effect of a pattern and practice suit can be powerful,<sup>254</sup> these problems of length, cost and difficulty limit the number of suits filed and won by private attorneys.

Regrettably, private litigants are the only ones able to bring these suits since the Justice Department lacks standing to bring a pattern and practice suit against a police department, as determined in 1980 by the Third Circuit Court of Appeals in *United States v. City of Philadelphia*.<sup>255</sup> Since 1980, the Justice Department has not been able to play an active role in pursuing pattern and practice suits.<sup>256</sup>

In sum, while successful pattern and practice suits are tremendously effective in deterring repeated police abuse, the impediments to bringing these suits limit their overall effectiveness as a solution.

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251. Telephone Interview with Randy Baker, *supra* note 52; Telephone Interview with Robin Toma, *supra* note 38.

252. Telephone Interview with Randy Baker, *supra* note 52. Note that once the city and police department are dropped from the suit, it is no longer a pattern and practice suit, but merely a suit against an individual officer; and any outcome affects only that single defendant.

253. Telephone Interview with Dennis Cunningham, *supra* note 16 ("[Pattern and Practice] suits can go on for years, what with discovery, appeals and retrials."); Telephone Interview with Robin Toma, *supra* note 38. In its suit against the Los Angeles Police Department for illegal spying, the ACLU spent a large amount of money. Dozens of plaintiffs were involved, and deposing them alone took months and cost thousands of dollars. The city fought the suit intensely but finally settled. Telephone Interview with Robin Toma, *supra* note 38.

254. For example, in one case against the City of Richmond plaintiffs won a three-million-dollar award, and the jury extended liability and responsibility for the wrongful deaths to the individual officers, the police chief, deputy police chief, the city and its city council. See Benfeil, *supra* note 41, at A1, A10.

255. 644 F.2d 187 (3d Cir. 1980); see also HOFFMAN ET AL., *supra* note 79, at 13. The case involved the Justice Department's eight-month investigation of the Philadelphia Police Department that discovered widespread abuses and violence among the officers. *Id.*

256. HOFFMAN ET AL., *supra* note 79, at 12-13.



### G. The Limited Ways in Which Section 1983 Suits Are Effective

Up to this point, this Note has focused its discussion on the limitations of section 1983 suits, and why these suits do not have a deterrent effect in most cases. However, it is vital that the many positive functions of section 1983 suits not be overlooked. Section 1983 suits are important tools and satisfy specific goals that are as important as the goal of deterrence.

First and most obvious, section 1983 suits compensate the victims of police misconduct.<sup>257</sup> Since many victims are poor, the financial compensation can have a tremendous impact on their lives. Thus, section 1983 suits serve a key function of bringing economic justice to those who have suffered financial harm at the hands of police officers.

Second, the lawsuits bring political attention to the issue of police brutality because of the high cost to taxpayers.<sup>258</sup> Conservatives and liberals are united by their outrage over the large monetary awards, and they bring pressure on the city and the police to address the problem.<sup>259</sup>

Third, the suits educate the public and keep the issue of police misconduct in the news.<sup>260</sup> "News coverage . . . galvanizes public support. So the goal of a suit may not be to win, but to get the word out there. Suits turn public attention on the problem and can end up getting a com-

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257. Telephone Interview with Jim Chanin, *supra* note 11; Telephone Interview with Karol Heppie, *supra* note 26 ("Civil suits are the only kind of compensation a victim can receive since the D.A. rarely prosecutes."); Telephone Interview with Carol Strickman, *supra* note 11 ("These suits channel plaintiffs' anger into a legitimate justice system and allow them to get compensation."); Telephone Interview with Tito Torres, *supra* note 12; Telephone Interview with Carol Watson, *supra* note 13.

258. Telephone Interview with Robin Toma, *supra* note 38 ("Sometimes the only thing that draws attention to police brutality suits is the cost. The high cost to taxpayers results because local governments refuse to settle early in the cases and force these cases to trial. If the city government intervened much earlier, costs would be minimal."); *see also*, McGreevy, *supra* note 143, at 1 (city council members questioned Police Chief Gates about a pattern of police misconduct before approving settlements of twelve suits); *\$7 Million to Settle Police Misconduct Cases OK'd*, L.A. DAILY J., Nov. 8, 1991 (payout in suits by L.A. City Council brings issue to attention of city officials).

259. *See, e.g.*, Victor Merina, *Lawsuits Against Deputies Cost \$32 Million Since '88*, L.A. TIMES, Dec. 10, 1991, at A1 (reporting that county board of supervisors considered hiring an outside attorney to investigate the sheriff's department); Sean P. Murphy, *Police Lawsuits Cost City Millions*, BOSTON GLOBE (city ed.), Nov. 28, 1991, at 58 (reporting that Boston city council members consider establishing civilian review board, after more than three million dollars paid in lawsuits); Louis Sahagun, *\$5.5 Million Settlement Offered to Man Paralyzed in Police Shooting*, L.A. TIMES, Oct. 2, 1991, at B8 (reporting that Los Angeles City Council Budget and Finance Committee is examining rising cost of police-related litigation); Wallace, *supra* note 92, at A1 (discussing large damage awards in San Francisco for police misconduct, and the lack of disciplinary action by the police department); Wallace, *supra* note 97, at A4 (reporting that Bar Association of San Francisco proposed eight-point plan for reforming the San Francisco Police Department).

260. *See, e.g.*, Ricker, *supra* note 13, at 48 (discussing the Rodney King case and four other police brutality cases throughout the United States).

munity coalition going.”<sup>261</sup> The suits also educate citizens who sit on the jury, which is an important part of the process since most middle-class citizens are unaware of the prevalence of police brutality.<sup>262</sup> Civil rights attorneys believe that this greater public awareness and scrutiny of police brutality has brought change.<sup>263</sup> “Fifteen years ago, [police officers] would beat people up all the time. Today, there are more limits on police. Police are aware of this and are much more careful not to beat people up in public. People are also more sensitized to the issue and won’t tolerate as much violence.”<sup>264</sup>

The fourth benefit of section 1983 suits is that they result in deterrence and change within the police department if the suits receive media attention or severely affect the city financially.<sup>265</sup> The recent surge of media attention to police misconduct suits may also be subtly encouraging cities to settle more frequently.<sup>266</sup>

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261. Telephone Interview with Robin Toma, *supra* note 38. See, e.g., *Los Angeles Ballot Measure Proposes Tighter Control on Cops*, OAKLAND TRIB., May 31, 1992, at A6 (stating that community reform measures resulted from Rodney King case).

262. See Ricker, *supra* note 13, at 48 (“[The King case] puts a real doubt on the posture of prosecutors that police are disinterested civil servants just ‘telling it as it is.’”)(alterations in original); Louis Sahagun, *supra* note 259, at B1, B8 (“‘The King incident and recent revelations about the Los Angeles County Sheriff’s Department have balanced the playing field in courthouses where police are no longer cloaked in an aura of purity.’” (quoting Southern California attorney R. Samuel Paz)); Telephone Interview with Jim Chanin, *supra* note 11; Telephone Interview with Richard “Terry” Koch, *supra* note 11; Telephone Interview with John Houston Scott, *supra* note 43; Telephone Interview with Robin Toma, *supra* note 38.

263. Telephone Interview with John Crew, *supra* note 11; Telephone Interview with Dan Stormer, *supra* note 11.

264. Telephone Interview with Dan Stormer, *supra* note 11.

265. Telephone Interview with Jim Chanin, *supra* note 11 (“One or two suits have no impact at all, but if it becomes a repeated problem and gets into big bucks, it gets noticed. I know of one Oakland police officer who was sued over and over, and finally was pressured to resign. The City gets upset when it gets too expensive.”); Interview with John Crew, *supra* note 11; Telephone Interview with Richard “Terry” Koch, *supra* note 11; Telephone Interview with Osha Neumann, *supra* note 11 (“The Richmond suit resulted in some changes. A civilian review board was set up and the chief of police resigned.”); Telephone Interview with Frank Saunders, *supra* note 13 (“If suits cost enough money, over a period of time, then the department will probably find a way to remove the officer from public contact or get him to resign.”); Telephone Interview with John Houston Scott, *supra* note 43 (“For example, the Richmond suit in the early 80s resulted in big change because politically and economically the city could not afford to let the brutality continue.”); Telephone Interview with Robin Toma, *supra* note 38; Telephone Interview with Tito Torres, *supra* note 12; Telephone Interview with Carol Watson, *supra* note 13 (“Palmer v. City of Los Angeles was one of those few cases where there was enough publicity to have an effect. It cost the city about \$3.5 million to compensate the victims, and another million to pay back the property owners for the damage done to their apartment houses. Some officers were disciplined and the department was shaken up.”); see also, e.g., Serrano, *supra* note 118, at A1, A16 (reporting that publicity of King beating brought about an unprecedented move for reform in Los Angeles and resulted in federal review of police brutality complaints by the U.S. Attorney General).

266. Telephone Interview with Jim Chanin, *supra* note 11; Telephone Interview with

Finally, the mere threat of a section 1983 lawsuit can have a deterrent effect, albeit minimal.<sup>267</sup> Thus, in spite of the failure of these suits to deter abuse directly in most cases, civil rights lawyers continue to use section 1983 as a legal tool to address police brutality.<sup>268</sup> Unquestionably, police misconduct would be worse without section 1983 litigation.

#### IV. Proposed Solution

Sentiment surrounding the issue of police brutality varies: some hope that the Rodney King incident will start a wave of reform, while others feel that the problem is too widespread, that the courts are too unreceptive to plaintiffs, and that the political arena is too compromising to result in any serious changes.

These sentiments echo those from the days of segregation, when the task of overcoming such institutionalized racism in America was daunting. Yet police brutality must be addressed with the same fervor and political activism that integrated an entire country. When police officers brutalize citizens under the color of law, this is a Constitutional violation that should never be tolerated for any reason, regardless of the political and legal difficulties hindering reform.

The public has a lot to lose if police brutality continues. From an economic perspective, taxpayers bear the costs every time a police officer is found liable. For example, in the City of Los Angeles alone, police brutality has cost taxpayers more than \$34.7 million from 1986 through 1991.<sup>269</sup> Add to this the \$717 million in property damages that resulted from the riots following the verdict in the first trial of the four officers who beat Rodney King,<sup>270</sup> and it becomes obvious that chronic police

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Frank Saunders, *supra* note 13. For example, Los Angeles has recently settled twelve suits. See McGreevy, *supra* note 143, at 1.

267. Telephone Interview with Richard "Terry" Koch, *supra* note 11; Telephone Interview with Carol Strickman, *supra* note 11. Attorney Terry Koch recounts a case in which the threat of future litigation stopped police harassment:

Five or six years ago, a black man who was a transient was repeatedly arrested and put in jail just for passing out red anti-apartheid ribbons in Berkeley. In all cases, he was released from jail after a few hours and all charges were dropped—they [the police] had nothing they could charge him with. I filed a § 1983 suit, even though there were no damages. The suit was dismissed based on governmental immunity, just as I had expected, but now the cops no longer harass this guy. Someone in the upper ranks of the police department must have told the street officers to leave him alone.

Telephone Interview with Richard "Terry" Koch, *supra* note 11.

268. See *supra* note 11.

269. Bugliosi, *supra* note 119, at 159. Note that this figure does not include settlements and verdicts against the Los Angeles Sheriff's Department (\$15.5 million between January 1989 and May 1992). *Id.*

270. Dean E. Murphy & Jim Newton, *Bradley Lifts Curfew Tonight*, L.A. TIMES, May 4, 1992, at A1, A8.

brutality costs the entire society tremendous sums of money, not to speak of the loss of human life.

Although it is not easy to place a numerical cost on the polarization of whites and under-privileged minorities, this by-product of chronic, unaddressed police abuse is equally damaging to our society.<sup>271</sup> Police brutality alienates African-Americans and other minority groups, and it makes them lose their belief in justice in this country. "This [loss of belief in justice] is usually the greatest harm inflicted from police brutality. The bruises and cuts heal, but the disillusionment with society does not go away. The result is generations of very angry and embittered youths."<sup>272</sup> Not surprisingly, this anger manifests itself in the form of riots and crime.<sup>273</sup>

Furthermore, chronic police abuse undermines the effectiveness and safety of all police officers.

For instance, there is no question that the Los Angeles Police Department—along with the L.A. County Sheriff's Department . . .—has suffered immeasurably from the conduct of the officers in the Rodney King case. Following the King beating and verdict, anti-LAPD venom is at an all time high: KILL THE LAPD . . . [is] scrawled on the walls in South Central Los Angeles. So a small percentage of police stain the blue uniform and, by the hostility they create, endanger the lives of thousands of innocent officers.<sup>274</sup>

Clearly, the public and all police officers have a vested interest in stopping the recurring cycle of police brutality.

A long-term, comprehensive approach to the problem of police brutality is necessary.

Police abuse has neither a single cause nor a single cure. It's not 'just' an issue of racism or a lack of training or poor leadership, although all of these can be extremely important factors. If the focus is on one of these issues to the exclusion of the rest, the impact on the overall problem will be minimal. Only a comprehensive approach . . . can bring lasting results.<sup>275</sup>

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271. Bugliosi, *supra* note 119, at 68, 161.

272. Telephone Interview with Gordon Greenwood, Deputy Public Defender at the San Francisco Office of the Public Defender (Mar. 8, 1993).

273. Bugliosi, *supra* note 119, at 68 (discussing five massive race riots, from 1965 to 1992, started by African-Americans in response to police brutality).

274. Bugliosi, *supra* note 119, at 68.

275. HOFFMAN ET AL., *supra* note 79, at 5. For example, the ACLU Police Practices Project has devoted its resources to formulating a comprehensive policy approach to the problem of police misconduct. *See id.* at 6-15. The ACLU targets several political and legal areas where it is necessary to address police misconduct. *Id.* The policy proposal calls for:

(1) Cessation of public and politicians turning over severe societal problems, such as homelessness and widespread criminal activity, to law enforcement, and thus encouraging " 'anything goes' tactics." *Id.* at 5-6.

(2) Improvement at a local level of systems within the police department: leadership,

One obvious solution would be to change state law so that police officers pay for their own defense and damages in a section 1983 suit. This is not an effective solution, however, because it would deprive plaintiffs of a deep pocket. Attorneys and plaintiffs would have a disincentive to pursue section 1983 litigation since a victory would not necessarily result in the payment of attorneys' fees and damage awards.

For example, under a similar cause of action against a government employee for a violation of civil rights, a *Bivens* suit,<sup>276</sup> the individual employee must pay his own defense and damages.<sup>277</sup> According to attorney A.J. Kutchins, one of the attorneys who litigated the well-known Brian Wilson suit,<sup>278</sup> the lack of a deep pocket proved to be financially problematic in Wilson's suit.<sup>279</sup> "There is an assumption that there is a remedy for these government violations because *Bivens* is on the books, but for all practical purposes the defendant is judgment-proof."<sup>280</sup>

Furthermore, the government must be made accountable to give it the incentive to develop policies and procedures to control police officers. Large monetary awards and media attention in section 1983 suits provide incentive for police and city officials to examine police department practices.<sup>281</sup> Large payouts to plaintiffs by cities also help galvanize public and political support for police reform.<sup>282</sup> Therefore, switching economic accountability to the individual officer is not an effective solution.

Similarly, tying the outcome of civil suits to internal discipline of police officers is so politically controversial and foreign to current systems that it is not feasible. Police departments challenge the validity of civil suit outcomes and argue that only police officers can fairly review

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policies, training, tracking the use of force, breaking the code of silence, and community sensitivity training. *Id.* at 6-8.

(3) Establishment of civilian oversight committees that have independence from the police department, investigatory power, mandatory police cooperation, adequate funding, formal hearings, disciplinary impact, public statistical analysis, power to make policy recommendations, diversity of staff, and separate offices from the police department. *Id.* at 8-10.

(4) Increased federal criminal prosecution of police officers by the Justice Department. Congressional legislation to give back to the Justice Department the power to file "pattern and practice" civil lawsuits to enjoin police abuse where it is systematic. *Id.* at 11-15.

(5) Creation and funding of social, economic and education programs that address the root causes of problems that afflict cities and lead to crime. *Id.* at 15.

276. A *Bivens* suit is a judicial cause of action against a government official for violating an individual's constitutional rights under color of law. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

277. Telephone Interview with A.J. Kutchins, *supra* note 58.

278. Brian Wilson lost both his legs at a naval base demonstration in Concord, California, when a government train loaded with weapons ran over him. See Paul Galloway, *Peace Train: A Shocking Injury Adds Steam to Vet's Crusade*, CHI. TRIB., May 6, 1988, at 1.

279. Telephone Interview with A.J. Kutchins, *supra* note 58.

280. *Id.*

281. See *supra* note 265 and accompanying text.

282. See *supra* notes 258-259 and accompanying text.

the actions of other officers.<sup>283</sup> Furthermore, neither police departments nor civilian oversight committees look at civil suits as part of their investigative process.<sup>284</sup>

Therefore, the focus of any reforms should be on the systems that are already established and accepted. If operated properly, these existing systems can succeed in controlling police officers.

#### A. Reinforcement of Internal Mechanisms That Control Police Misconduct

The first internal mechanism to address is leadership within police departments.

Police chiefs and administrators set the tone for their departments in their statements, deeds and attitudes toward the communities they serve.

If a chief of police shows contempt for the legitimate concerns of certain communities, the actions of his or her officers will most likely mirror that contempt. . . . When incidents of brutality, misconduct or racism occur, the chief's immediate reaction to these incidents will have a great impact on whether the incident will be repeated in the future.<sup>285</sup>

As the Rodney King episode in Los Angeles demonstrates, a police chief can silently condone violence for a long time before he is made accountable.<sup>286</sup> Even then, it can be difficult to force a chief to resign. The first proposal is to create a state-level citizen oversight committee that would conduct investigations of police chiefs upon request of attorneys, city officials, or a citizen body. The findings would be a matter of public record and would go back to the mayor and city council of the city in which the chief works.

A second measure that would create internal police accountability is legislation addressing the promotional process within police departments. The legislation would require that police chiefs and supervisors, prior to promoting an officer, review her internal affairs file, personnel file, complaint file, and record of lawsuits. The chief and supervisors would still have discretion in promotion, but would at least be making informed decisions.

The legislation should also directly address the promotion of field training officers (FTOs). As discussed in Section III of this Note, FTOs

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283. HOFFMAN ET AL., *supra* note 79, at 9.

284. See *supra* note 171 and accompanying text. Even the Santa Clara County Bar Association subcommittee that is formulating an ideal model for police review, see *supra* text accompanying note 225, is not considering civil suits as an integrative element. Telephone Interview with Tony Boskovich, *supra* note 193.

285. HOFFMAN ET AL., *supra* note 79, at 6.

286. See Andrea Ford, *Anniversary Noted by Vigils, Rallies, Forums*, L.A. TIMES, Mar. 4, 1992, at B1 (detailing police reform resulting from King beating); L.A. *Chief to Retire in June After All*, *supra* note 126, at A1 (noting that fourteen-year Police Chief Daryl Gates was pressured to step down since the videotaped police beating of Rodney King).

have a tremendous influence on new officers, since FTOs teach rookies the acceptable street policies and ethics. Thus, the legislation would bar officers with two or more sustained excessive force complaints from promotion to FTO. It is not unusual for a police officer to complete his career as an officer without a single sustained complaint of excessive force;<sup>287</sup> thus, two sustained complaints is not an unreasonable limit. By limiting FTO positions to officers with clean records, rookie officers coming out of the police academy will retain the rules they have just learned; this will foster a departmental culture of restraint and professionalism.

A third proposal is to establish mandatory racial and cultural awareness training for officers who have sustained a complaint or have been found liable in a civil suit for brutality or race-related misconduct. California State Senator David Roberti's bills, which were both vetoed by Governor Wilson, would have instituted mandatory training for all officers and are good models.<sup>288</sup>

A fourth proposal addresses the psychological factors underlying police brutality. Counseling should be required for police officers with more than one sustained complaint for excessive force or race-related misconduct, or who have been found liable in civil court for any of these actions. Mandatory counseling would ensure that officers with violent tendencies are treated before the violence begins to escalate.

#### B. Reinforcement of External Accountability Systems

To complete a comprehensive approach to the problem of police misconduct, two additional proposals are necessary to reinforce the external accountability systems. External accountability is essential: "[P]olice have developed an amazing resiliency against pressures to control their own abusive behavior. It seems that police will not alter conduct without outside compulsion; nor is altered conduct guaranteed even when outside compulsion is present."<sup>289</sup>

The first proposal is the mandatory creation of citizen oversight committees in every city in California, adopting the standards set out by the ACLU.<sup>290</sup> The ACLU Police Practices Project states, in its policy report:

The lack of independent civilian involvement in the police complaint process . . . undercuts the credibility of many systems. Internal affairs processes that involve the police policing themselves are viewed by the public with great skepticism. . . . Just as systems of independent

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287. Interview with Christopher Lefferts, *supra* note 61; Telephone Interview with Frank Saunders, *supra* note 13; Interview with Herbert L. Terreri, *supra* note 61.

288. See *supra* note 128.

289. Littlejohn, *supra* note 12, at 366 (footnote omitted).

290. See HOFFMAN, ET AL., *supra* note 79, at 10 (listing ten standards for citizen oversight committees, which will assure the committees' effectiveness as a check on police department actions).

checks and balances serve to curb abuses of power in other government institutions, civilian review serves this same function with local police departments.<sup>291</sup>

If given adequate authority, staff and independence, oversight committees can effectively "check" police power<sup>292</sup> and address the fundamental flaws of the internal affairs process.

The second proposal is to amend either California Penal Code section 832.7<sup>293</sup> or California Evidence Code section 1043<sup>294</sup> or both to ease discovery, in state lawsuits, of officers' personnel records and histories of violence. As discussed in Sections II and III of this Note, suits against individual officers, and pattern and practice suits against police departments, are severely hampered by state judges' reluctance to grant discovery motions.<sup>295</sup> Since federal courts do not provide the same barriers to discovery,<sup>296</sup> requiring the release of this information in state court cannot be characterized as an unwarranted intrusion of officers' privacy.

These proposals would enhance the external systems of police accountability. The ability to hold officers to policy standards is largely dependent on victims being able to file complaints and lawsuits. The current weaknesses in the litigation process and the internal affairs system often prevent the truth from coming out, thereby limiting the effectiveness of each process. Easing discovery standards and creating citizen oversight committees would be a first step in addressing these shortcomings.

## V. Conclusion

Years after Congress enacted section 1983, attorneys, legislators and citizens are questioning the effectiveness of this statute as a legal tool for addressing police misconduct. The weaknesses of section 1983 suits are numerous. At the outset, it is difficult to find an attorney to bring the suit. Once an attorney is finally obtained, both plaintiff and attorney are faced with a long, expensive and harsh battle with the city attorney's office. The suits are complicated by unusual obstacles, ranging from jury bias, to the code of silence, to discovery limitations. Moreover, the ability to obtain an injunction against unacceptable conduct is greatly limited by case law. Most disturbing of all is that even successful section 1983 suits do not seem to deter misconduct. The incidence of repeat offenders is frequent and well-documented, leaving civil rights attorneys frustrated as they must repeatedly sue the same officers.

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291. *Id.* at 9.

292. *Id.* at 10.

293. *See supra* note 47 and accompanying text.

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

295. *See supra* notes 50-52 and accompanying text.

296. *See supra* notes 53-54 and accompanying text.



The lack of deterrent effect is due largely to the fact that both internal and external accountability systems have failed. In many cities and police departments throughout the country, neither preventative measures nor corrective disciplinary actions are being taken. Thus, it is no surprise that civil litigation, as a single accountability system, is ineffective in bringing about any broad change.

If we, as citizens and taxpayers, continue to turn our heads to pervasive police brutality, the brutality will continue along with the millions of dollars in damage awards and settlements paid to brutalized plaintiffs. The more humane option is to set up effective accountability systems to stop this cycle of abuse. There is no shortage of proposed solutions. The ACLU Police Practices Project, California legislators, and other local bodies have a multitude of policy recommendations and bills already formulated. This Note, as well, has suggested solutions that address training, promotion, supervisor accountability, discipline, and citizen oversight. The only component lacking is the political will to effect change. The cost to society and to individuals' civil rights has already been great. Hopefully, the Rodney King beating has sufficiently raised the issue to the public's consciousness and will lead to the public and political attention so badly needed.