From Apples to Orchards: A Vulnerability Approach to Police Misconduct

Jennifer Hickey[†]

[†] Postdoctoral Fellow, Vulnerability and Human Condition Initiative, Emory University School of Law; Georgia Civil Rights Attorney, focusing on Police Misconduct. I would like to thank Professor Martha Fineman and Dr. Atieno Samandari for their thoughtful feedback.

INTRODUCTION

In recent years, high-profile police killings have sparked a national dialogue about police misconduct.[1] In particular, the 2014 police killings of unarmed black men, Michael Brown and Eric Garner, significantly increased public interest in police behavior.[2] The 2020 killings of George Floyd and Breonna Taylor, both unarmed and black, re-ignited national

---

[1] Recent high-profile deaths that have sparked protest include: George Floyd, an unarmed black man, who died after an officer knelt on his neck for eight minutes in Minneapolis, MN on May 25, 2020. *See* Lauren Aratani, *George Floyd killing: what sparked the protests – and what has been the response?*, THE GUARDIAN (May 29, 2020), https://www.theguardian.com/us-news/2020/may/29/george-floyd-killing-protests-police-brutality [https://perma.cc/AX76-KLFU]; Breonna Taylor, an unarmed black woman, shot in her bed during the execution of a no-knock warrant in Louisville, KY on March 13, 2020. *See* Terri Cullen, *Protests erupt around the nation after Breonna Taylor grand jury decision in Kentucky*, CNBC (Sep. 24, 2020); https://www.cnbc.com/2020/09/24/breonna-taylor-case-protests-erupt-after-kentucky-grand-jury-decision.html [https://perma.cc/A6CY-6Y7R]; Eric Garner, an unarmed black man, who died after being placed in a chokehold on July 17, 2014 after NYPD officers stopped him for street vending. *See* James Queally & Alana Semuels, *Eric Garner's Death in NYPD Chokehold Case Ruled a Homicide*, L.A. TIMES (Aug. 1, 2014), https://www.latimes.com/nation/nationnow/la-na-nn-garner-homicide-20140801-story.html [https://perma.cc/CDV4-SZ4T]; Michael Brown, an unarmed black teen, in Ferguson, Missouri in 2014, *The Killing of an Unarmed Teen: What We Know About Brown's Death*, NBCNEWS (Aug. 13, 2014), http://www.nbcnews.com/storyline/ michael-brown-shooting/killing-unarmed-teen-what-we-know-about-browns-death-n178696 [https://perma.cc/9WE5-K477]; Freddie Gray, a black man who died from a spinal cord injury after being left unsecured in a police van in Baltimore in 2015, Ashley Fantz & Greg Botelho, *What We Know, Don't Know About Freddie Gray's Death*, CNN (Apr. 29, 2015), http://www.cnn.com/2015/04/22/us/baltimore-freddie-gray-what-we-know/ [https://perma.cc/4MGG-BEWM]; and Sandra Bland, a black woman found hanged in a jail cell after a Texas traffic stop in 2015, Dana Ford, *DA: Sandra Bland's Death Being Treated Like Murder Investigation*, CNN (July 21, 2015), http://www.cnn.com/2015/07/20/us/texas-sandra-bland-jail-death/ [https://perma.cc/KRA8-DJ3R].

[2] *See* Aurelie Ouss & John Rappaport, *Is Police Behavior Getting Worse? Data Selection and the Measurement of Policing Harms*, 49 J. LEGAL STUD. 153 n.1 (2020) (noting spikes in internet search levels for the phrase "police brutality" in August 2014).

outrage.[3] Amid widespread acknowledgment that the criminal justice system has failed to hold police officers accountable for even the most egregious forms of misconduct, victims are seeking civil remedies as a means of securing justice.[4] Private litigation against the police for brutality, wrongful arrest, and other forms of misconduct is primarily undertaken under 42 U.S.C. § 1983 ("Section 1983"), which grants a right of action against the government for violation of federal rights. While significant scholarly and public attention has been devoted to the inadequacies of the court-developed jurisprudence surrounding Section 1983, particularly the doctrine of qualified immunity, this article suggests that the damages remedy itself may be ill-suited to addressing or deterring government misconduct or achieving social justice in any real sense. Worse yet, this remedy may be partially to blame for the misconduct it attempts to address.

This article examines police misconduct through the lens of Professor Martha Fineman's vulnerability theory, which asks us to imagine a state that is responsive to its citizens' universal vulnerability and seeks to provide the resources needed for resilience.[5] Under this theory, police misconduct can be reframed not as the result of individual actors intruding upon citizens' constitutional rights but as a failure of the state to provide the public safety resources needed for resilience in a just manner. This failure reflects profound neglect of the constituting principles of society and should be perceived as constitutional injury.

Constitutional litigation, focused on individual injury and often directed at individual "bad apples," is inadequate to address this type of social injury; it masks the vulnerability of the state and state institutions and the inadequacy of their responses to social injustice. The American norms and values of individual freedom and responsibility dominate much of the Section 1983 jurisprudence, along with market-based assumptions of governments and citizens as economic actors. The celebration of individual choice and concomitant individual responsibility allows courts and society at large to condone the punishment of individual officials as

---

[3] *See* Aratani, *supra* note 1 (documenting widespread protests following the killings of George Floyd and Breonna Taylor); Cullen, *supra* note 1 (describing national protests following Kentucky grand jury decision not to indict officers involved in Taylor's death for murder).

[4] *See, e.g.*, Rukmini Callimachi, *Breonna Taylor's Family to Receive $12 Million Settlement From City of Louisville*, N.Y. TIMES (Sep. 15, 2020) (discussing the lawsuit by Breonna Taylor's family); J. David Goodman, *Eric Garner Case Is Settled by New York City for $5.9 Million*, N.Y. TIMES (Jul. 13, 2015), https://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html [https://perma.cc/BDX4-A7E5] (discussing the lawsuit by Eric Garner's family); Richard Fausset, *Walter Scott Family Reaches a $6.5 Million Settlement for South Carolina Police Shooting Case*, N.Y. TIMES (Oct. 8, 2015), https://www.nytimes.com/2015/10/09/us/walter-scott-settlement-reached-in-south-carolina-police-shooting-case.html [https://perma.cc/7VRW-KYAH] (discussing the lawsuit by Walter Scott's family; Sheryl Gay Stolberg, *Baltimore Announces $6.4 Million Settlement in the Death of Freddie Gray*, N.Y. TIMES (Sept. 8, 2015), https://www.nytimes.com/2015/09/09/us/freddie-gray-baltimore-police-death.html [https://perma.cc/S393-95JX] (discussing the lawsuit by Freddie Gray's family).

[5] Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133–34 (2017).

an adequate solution to widespread and systemic misconduct. This framing obscures the state's responsibility to address police misconduct as necessitating response and reform to a societal institution, resulting from an inappropriate allocation of privilege and power within that institution. Further, this framing perverts our collective sense of social justice by casting the quest for individual economic retribution as an adequate means of holding the government accountable for its systemic failure to monitor and correct these inequalities.

This article also demonstrates that the very same tropes of individual responsibility and injury foreclosing adequate relief through Section 1983 are responsible for the inequalities in provisioning that constitute police misconduct. Increased focus on individual responsibility, market-oriented efficiency, and privatization have spawned abusive police practices. Because these practices disproportionately target lower-income minorities at the behest of corporate profit, discrimination, rather than general systemic corruption, is the sole discourse of reform. This mutually reinforcing cycle of problem and "solution" prevents us from obtaining generalized relief. Further, litigation focused on addressing individual injury committed by individual officers can never hope to proactively remedy the systemic and pervasive influences, both corporate and political, motivating police misconduct.

Part I of this article provides necessary background information on Section 1983. Part II explores how Section 1983's relentless focus on individual action and individual rights renders it inadequate to address the systemic problem of police misconduct. Part III applies vulnerability theory to provide a detailed analysis of the institutional vulnerabilities that facilitate and sometimes obscure police misconduct. Part IV demonstrates that an anti-discrimination framework alone is inadequate to address these vulnerabilities and discusses how shifting from a relentlessly individual focus on both reason and remedy for police misconduct to a focus on collective and state responsibility moves us toward the achievement of social justice.

I. THE EVOLUTION OF SECTION 1983

"Section 1983," formally codified as 42 U.S.C. § 1983, is a federal statute that grants a right of action to individuals whose federal rights have been violated as a result of state action.[6] This statute became an important

---

[6] 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.

tool for challenging unconstitutional government action in the Civil Rights Era.[7] However, in the 1980s, courts began to limit Section 1983's already-limited reach further.

Under Section 1983, litigants can sue for compensatory and punitive damages and, in limited circumstances, injunctive relief.[8] Litigation for compensatory and punitive damages under Section 1983 closely resembles private tort law, with offenses often referred to as "constitutional torts."[9] The overwhelming majority of Section 1983 cases brought before federal courts are ultimately settled or granted summary judgment; in fact, only about 3% of these cases reach trial.[10]

In the absence of viable alternatives, Section 1983 has become the primary vehicle for legal challenges to police misconduct.[11] There are several alternative avenues of relief, including criminal charges, internal affairs investigations, Blue Ribbon Commissions, and Civilian Oversight committees.[12] However, scholars have questioned the legitimacy and transparency of internal and criminal investigations.[13] Further, rigid focus on individual action has restricted the ability of any of these methods, including Section 1983 litigation, to effectuate systemic change.[14]

Federal statute 42 U.S.C. § 14141, the "Law Enforcement Misconduct Statute," offers a more systemic solution, authorizing the federal government to seek injunctive relief when a police department shows a "pattern or practice" of constitutional violations.[15] In these cases, the Department of Justice ("DOJ") typically seeks settlement via consent

---

42 U.S.C. § 1983.

[7] *See* PETER H. SHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 47 (Yale Univ. Press eds., 1983).

[8] *See* MICHAEL AVERY & DAVIS RUDOVSKY, NAT'L LAWYERS GUILD, POLICE MISCONDUCT: LAW AND LITIGATION § 2.2 (1986 Clark Boardman eds., 2nd ed.).

[9] *See* Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 322–23 (1965) (coining phrase "constitutional tort").

[10] Tracey Kyckelhahn & Thomas H. Cohen, *Civil Rights Complaints in U.S. District Courts*, 1990-2006, BJS SPECIAL REP., Aug. 2008.

[11] *See* AVERY & RUDOVSKY, *supra* note 8 at § 3.7, 3-81; Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 155 (1998).) (acknowledging that a majority of suits against police officers in civil court are brought under Section 1983). Section 1983 suits may be brought in state or federal court. In addition, litigants frequently challenge police misconduct under state tort law, which shares many aspects of Section 1983 jurisprudence, such as the granting of various immunities.

[12] Joanna C. Schwartz, *Who Can Police the Police?*, 2016 CHI. L. F. 437, 439 (2016) (collecting potential influencers of police policy reform).

[13] *See id.* at 460 (2016) (discussing the reluctance of prosecutors to investigate allegations of police misconduct); PAUL HOFFMAN ET AL., ON THE LINE: POLICE BRUTALITY AND ITS REMEDIES 9 (1991) (noting public skepticism regarding "internal affairs processes that involve the police policing themselves").

[14] *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 476 (2003-2004) (noting the insufficiency of the "individual-specific and incident-specific" § 1983 remedy); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 31 (2000) (explaining the advantages of municipal liability rather than individual liability).

[15] *See* 42 U.S.C. § 14141. Although this article is not primarily concerned with offering specific legal solutions to the problems addressed, a reformation of § 14141 may achieve some of the goals herein stated.

decree or Memoranda of Agreement rather than initiating a lawsuit.[16] The federal government has been somewhat successful at effectuating reform through consent decrees. Some scholars and policymakers have even encouraged more aggressive enforcement.[17] However, the DOJ has thus far initiated few consent decrees or lawsuits.[18] Additionally, the enforcement process has been criticized for many reasons, including lack of mandate to include individual officers and community members in reform efforts, failure to encourage information sharing, lack of incentive to promote reform, and failure to continuously monitor compliance.[19] Regardless of problems in implementation, this solution is at least directed at departmental reform rather than focused on the actions of individual officers.

Distrust of, or dissatisfaction with, internal or prosecutorial investigations and the inability to show systemic misconduct that would involve the DOJ forces individuals to turn to the individualistic "remedy" offered by civil courts. Section 1983 cases involving police misconduct, including the use of excessive and deadly force, are typically litigated as violations of the Fourth Amendment's prohibition of "unreasonable search and seizure" and occasionally as violations of the Fourteenth Amendment's Due Process or Equal Protection clauses.[20]

Increased publicity of high-profile police misconduct cases may create the impression that litigation has increased. Indeed, studies suggest that police officers are subject to more lawsuits than any other public employee.[21] However, a 2018 study of insurance claims initiated as a result of police misconduct indicates a slight *decrease* in the number of claims submitted during the past ten and twenty-year periods.[22] This same study also shows that the number of successful claims is climbing and payouts are sharply spiking upwards.[23] Although the number of Section 1983 lawsuits may not have increased in light of growing public awareness of police misconduct, these lawsuits' success rate does appear to have increased. Further, the heightened publicity of successful outcomes may

---

[16] Kami Chavis Simmons, *New Governance and the New Paradigm of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 394 (2010).

[17] *See id.* at 418.

[18] *Id.*

[19] *See id.* at 416–418.

[20] *See generally* Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465, 1486–87 (2018) (analyzing the prevalence of Fourth and Fourteenth Amendment analysis in claims of police brutality).

[21] VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY (4th. ed. 2006).

[22] *See* Ouss & Rappaport, *supra* note 2, at 14. Additionally, prior studies have found that the number of police misconduct lawsuits filed in state and federal courts remained relatively constant from the mid-1990s through mid-2000s. *See* Kyckelhahn & Cohen, supra note 10, at 3 (Number of federal lawsuits coded as "other civil rights," which would include police misconduct, remained constant at about 18,000 cases per year from the mid-1990s through 2006); ISIDORE SILVER, POLICE CIVIL LIABILITY (2010) (approximately 30,000 police misconduct lawsuits filed per year in state and federal court).

[23] *Id.* at 15.

garner an increase in the number of these lawsuits filed in the future.

A. Period of Expansion and Refinement

Section 1983, which began as The Civil Rights Act of 1871, was enacted to protect former slaves from actions of government officials conspiring with the Ku Klux Klan.[24] It was rarely invoked until 1939.[25] From 1939 to 1960, the Supreme Court expanded Section 1983's applicability to a wider range of government misconduct, which included police brutality.[26]

In 1961, the Supreme Court's decision in *Monroe v. Pape* ushered in a wave of Section 1983 litigation[27] by vastly expanding the statute's reach to include *all* government misconduct, not just that which resulted from actions authorized by state law. However, the Court also held that individual government officials were the *only* proper defendants in a Section 1983 action and that local government entities could not be sued.[28] This left no recourse for victims when individual actors were unable to pay and no incentive for department-level change.

Throughout the 1970s, Section 1983 became an increasingly important player in the civil rights arena. The Court continued to narrow Section 1983 immunities.[29] Further, the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, was adopted to encourage attorneys to pursue civil rights claims by allowing the recovery of attorney's fees if the plaintiff prevails on the merits of the case.

Still, the Court stubbornly clung to its refusal to allow lawsuits directly against government entities until 1978, when *Monell* overturned *Monroe* to allow Section 1983 litigation against local government entities.[30] In *Monell*, the Court engaged in oft-questioned historical and statutory interpretation to arrive at the conclusion that sovereign immunity did not apply to local entities under Section 1983.[31] Importantly, however, the Court invoked sovereign immunity in its refusal to apply the private tort principle of respondeat superior to hold municipalities liable for *any*

---

[24] *See* SHUCK, *supra* note 7, at 47.

[25] *Id.*

[26] *See generally* Shapo, *supra* note 9, at 282–94 (coining phrase "constitutional tort").

[27] In the two years immediately following the Court's decision in *Monroe*, civil litigation under Section 1983 increased by 60%. *Id.* at 325–26 n. 249 (citing official court statistics).

[28] *See* SHUCK, *supra* note 7, at 48.

[29] *See id.* at 49.

[30] Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

[31] *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 431 (2016) (noting the Court's reliance on legislative history and interpretation of the Dictionary Act, that passed shortly before the Ku Klux Klan Act of 1871, to find that "person" in § 1983 applied to municipal corporations).

act of their employees.[32] Instead, the challenged misconduct must be undertaken pursuant to an official policy.[33]

B. The Court Pulls Back

However, in the 1980s, the Court began shrinking the reach of Section 1983's remedy, making the individual the dominant focus of reform. In 1981, the Court prohibited the assessment of punitive damages against a municipality in part because it would be unjust to inflict such punishment upon "blameless or unknowing taxpayers."[34] This desire to protect the collective motivated the Court to place the blame for misconduct directly on the individual. The Court also reasoned that individual actors would not be adequately deterred by the possibility that punitive damages would be assessed against the municipality.[35] Rather, the threat of personal financial liability for punitive damages was better suited to accomplishing deterrence goals.[36]

In the context of policing, the Court's decision in the 1989 case of *Graham v. Connor* significantly foreclosed systemic relief by ruling that all claims against police officers for use of excessive force—even deadly force—must be brought under the Fourth Amendment.[37] The Court declared that the Fourth Amendment's prohibition on unreasonable seizure extended to claims of excessive force in the context of arrest, investigatory stop, or other seizure and that the proper test was thus whether an officer's use of force was "objectively reasonable."[38]

This shift from lower courts' analysis of police brutality as a general (and possibly systemic) violation of Fourteenth Amendment substantive due process to a violation of individual privacy rights under the "highly individualizing" Fourth Amendment was likely motivated by the Court's increasingly individualistic ideology.[39] In a recent study, professors at the University of California, Berkeley analyzed trends in federal police brutality litigation pre- and post-*Graham*. They found that 28% of pre-*Graham* cases discussed the Fourth Amendment and 40% discussed the Fourteenth.[40] According to the authors, this data suggests the Court did not choose the Fourth Amendment because it was the most common constitutional understanding at the time, but rather because of an ideological commitment to the notion of individual rights as freedom from

---

[32] *Id.* at 431–32.

[33] *Id.*

[34] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981).

[35] *Id.* at 269.

[36] *Id.*

[37] Graham v. Connor, 490 U.S. 386, 388 (1989).

[38] *Id.*

[39] Obasogie & Newman, *supra* note 20, at 1486–87.

[40] *Id.* at 1485.

government interference.[41]

This commitment to the protection of individual privacy interests against unreasonable government intrusion has undoubtedly shifted the discussion of police misconduct from structural analysis of group or collective injury to individual injury. After *Graham*, 90.4% of police brutality cases analyzed discussed the Fourth Amendment, as opposed to the 28% of cases decided before *Graham*.[42] Any prior willingness of lower courts to analyze police misconduct more broadly through Fourteenth Amendment equal protection or due process clauses[43] has been summarily extinguished.

But the Court did not just narrow systemic relief during this time period; it further shrank the remedy even against individual defendants. Importantly, the Court significantly expanded the defense of qualified immunity, which, in effect, forecloses the availability of relief in many Section 1983 police misconduct cases.[44] Before this expansion, government officials could only gain immunity from suit if they showed that their conduct was objectively reasonable and that they had a "good-faith belief" that such conduct was proper.[45] In 1982, the Court eliminated the subjective good faith component of the analysis and held that a government official is entitled to qualified immunity except where the official's conduct violates "clearly established law."[46] Predictably, the past forty years of qualified immunity jurisprudence have produced a complicated and unpredictable set of rules that vary by jurisdiction as to the granularity of the challenged actions and strength of the precedent that constitutes clearly established law.[47] Qualified immunity has become an almost irrebuttable presumption of government innocence.

The expansion of qualified immunity was unquestioningly motivated by concerns that the threat of personal financial liability would over-deter public officials in their duties and unduly constrain their decision-making.[48] Professor Fred Smith has observed that sovereign immunity

---

[41] *Id.* at 1486–87.

[42] *Id.* at 1485.

[43] As the study's authors point out, Equal Protection and Due Process analyses can still be highly individualized. However, the Fourteenth Amendment at least offered the possibility of structural reform. *See id.* at 1498–99.

[44] *See generally* Shapo, *supra* note 9, at 282–94.

[45] Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).

[46] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[47] *See* Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447–48 (2000) (noting vast disparity among courts regarding how to determine when law is "clearly established"); Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from Saucier to Camreta (and Beyond)*, 80 FORDHAM L. REV. 643, 669–76 (2011) (discussing courts' confusion regarding whether to determine if constitutional rights have been violated before determining if law is clearly established); David Rudovsky, *Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 45 (1989-1990) (noting confusion in lower courts on the proper definition of "clearly established").

[48] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 892–93 (2014) [hereinafter *Police Indemnification*].

principles were central to this over-deterrence rationale as applied to individual *state* actors, but it is unclear why the Court extended these immunities to *local* actors.[49] Nonetheless, the Court has not wavered from its insistence that individual government actors are the proper defendants in Section 1983 cases. Sovereign immunity continues to prevent the state or federal government from being named in a lawsuit for damages.[50] Additionally, this doctrine often bars lawsuits that challenge sheriffs' departments unconstitutional policies because the departments are considered state, not local, actors.[51] Further, in most cases, *Monell's* municipal liability doctrine continues to prohibit the imposition of damages against local government entities because of the high burden of proof required to establish that an actor's conduct was pursuant to an official "policy."[52]

Indeed, Smith has argued that the Court has essentially created a "local sovereign immunity."[53] First, the strict causation requirement of "deliberate indifference" to the likelihood that a specific individual will commit a specific violation forecloses many systemic claims based on failure to screen, train, discipline, or supervise.[54] Second, the circumscription of which officials constitute policy-makers precludes many lawsuits against local governments under the municipal liability doctrine.[55] Third, the qualified and absolute immunity afforded to prosecutors, judges, and legislators significantly limits citizens' ability to sue local government actors, even in their individual capacities.[56]

Further, despite its clear desire to avoid the imposition of financial liability, the Court has severely limited the possibility of injunctive relief as an alternative to damages. In the early 1980s, the Court articulated a separate standard for establishing standing for equitable versus monetary relief under Section 1983; a split that was entirely unprecedented.[57] In *Lyons*, a black man sought to end the Los Angeles Police Department's use of chokeholds.[58] In denying standing to Mr. Lyons, the Court held that

---

[49] Smith, *supra* note 31, at 442–43 ("Very little on the face of the relevant case law explains the Court's choice to extend a doctrine rooted in sovereign immunity to local actors.").

[50] Interestingly, Congress has explicitly abrogated sovereign immunity in the Civil Rights Act through Fourteenth Amendment powers but has yet to attempt the same under Section 1983.

[51] *See, e.g.*, Manders v. Lee, 338 F.3d 1304, 1328 (11th Cir. 2003) (holding that sovereign immunity barred suit against a sheriff because he acted as an "arm of the state" and "not the county" when he implemented use-of-force policies at the jail); Gottfried v. Medical Planning Services, Inc., 280 F.3d 684, 693 (6th Cir. 2002) (holding a sheriff that enforced a state court injunction was entitled to sovereign immunity); Canales v. Gatnuzis, 979 F. Supp.2d 164, 171 (D. Mass. 2013) (holding a sheriff was entitled to sovereign immunity when the state assumed control of the sheriff's office following the abolition of several county governments).

[52] David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. §1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2187–91 (2005).

[53] Smith, *supra* note 31, at 431–32.

[54] *Id.* at 433–40

[55] *Id.*

[56] *Id.* at 440–43.

[57] *See* Richard A. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on The Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 5–6 (1984).

[58] City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

individuals must establish a likelihood that they would again be personally subject to the same conduct at issue to have standing to seek injunctive relief.[59] In so doing, the Court did not consider evidence that the chokehold was disproportionately used against black men residing in the same area as Mr. Lyons.[60] Instead, Mr. Lyons had to establish a likelihood that he would encounter police and be subject to a chokehold on a subsequent occasion.[61] This entirely individualistic standard, which does not account for evidence of widespread injury, is nearly impossible to meet in cases that involve allegations of police misconduct.

As such, Section 1983 litigation has, both practically and rhetorically, become the primary vehicle to address police misconduct. Yet decades of Court decisions have produced a "solution" that is limited to the award of monetary damages in increasingly narrow circumstances.[62] Systemic injunctive relief has become almost entirely foreclosed.[63] The Court has routinely failed to find the government liable, even for compensatory damages, unless an action was undertaken pursuant to a clearly defined and unconstitutional municipal policy. Individual government actors are offered wide immunities for fear that the threat of personal financial liability will negatively impact job performance. Even the most viable "solution" for police misconduct barely affords compensatory relief to individual victims, much less deters future misconduct.

II. THE RELENTLESS INDIVIDUALISM OF SECTION 1983

Section 1983's rigid focus on individual perpetrators causing individual harm forecloses meaningful systemic relief and perverts social justice discourse. The Court has constructed a narrative of police misconduct as individual injury caused by a perceived individual and autonomous bad actor, operating without environmental context or possible constraint. This framing of police misconduct as aberrant intrusions on individual rights has invaded public discourse, misdirecting our focus towards punishment of individual officers and economic retribution rather than on the state's responsibility to address the systemic issues motivating misconduct. The focus on individual rights also furthers

---

[59] *Id.* at 102.

[60] *Id.*

[61] *Id.* at 101–02.

[62] Joanna C. Schwartz, *The Case against Qualified Immunity*, 93 NORTE DAME L. REV. 1797, 1814–15 (2018).

[63] It is worth noting that litigants can and do negotiate for systemic reform in settlement of damages cases. However, these settlements suffer from transparency and accountability issues, as they rely on sporadic and private enforcement and are often not well publicized.

our ideals of a restrained state. Policing is normatively positioned as an exercise of coercive state overreach, not a required provision of public safety. The concomitant view of this autonomous individual rightsholder as a market actor further justifies the adoption of the private tort model with its attendant and incorrect assumptions about the deterrent effect of economic penalties and its normatively problematic vision of government accountability through market correction. This relentless individualism forecloses a necessary examination of the institutional constraints motivating police misconduct and leaves no room to address the social injury caused by police inaction and myriad inequalities in provision of public safety services.

A. Myth of the "Bad Apple"

The Court has undoubtedly fashioned a remedy that places the blame for police misconduct squarely on individual bad apple police officers. This focus on individual responsibility is problematic for multiple reasons. First, centering the analysis on individual officers sidesteps state responsibility by misdirecting attention to individual actions and failing to incentivize structural change. This ensures that police departments and other state institutions will never attempt to find systemic solutions that address the complex personal and structural constraints that lead to misconduct. Second, the Court's fairy-tale ending, in which the villain is aptly punished and properly learns his lesson, does not reflect the reality that individual officers are not suffering any financial consequences from litigation and are not deterred from committing misconduct by litigation or even by threat of litigation.

Section 1983's focus on the behavior of individual actors forecloses any analysis of the systemic factors that lead to officer misconduct. It is simply assumed that officers operate autonomously, independent of context or departmental culture. Professor Susan Bandes has noted courts' tendencies to portray police brutality as isolated incidents rather than to recognize them as part of a systemic, institutional pattern.[64] She observed that courts often construct narratives of police misconduct as the result of individuals with aberrational motives unrepresentative of police officers generally.[65] In so doing, they discard evidence of patterns that point to systemic issues in an effort to meet the narrative's demand for a moral involving "uncomplicated villains."[66] This disaggregation misrepresents the ways in which the government causes harm: through the mixed motives and collective decision-making of numerous individuals

---

[64] Susan A. Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1275 (1999).

[65] *Id.* at 1332.

[66] *Id.* at 1328.

motivated to action or inaction by a variety of incentives.[67]

The Court is almost certainly motivated to analyze police misconduct in this individualized manner by the administrative difficulties inherent in identifying and remedying systemic harm. Indeed, courts have a valid concern that they lack the requisite expertise to analyze the many organizational and cultural factors that contribute to police misconduct and to fashion an appropriate departmental remedy. However, this alone cannot justify the Court's decision to focus only on individual action and injury. A systemic approach to police misconduct must recognize and account for these administrative difficulties in asking courts to fashion an effective remedy.

While Section 1983 jurisprudence is rife with tales of individual accountability for government misconduct, the reality actually seems to be quite different. Despite the Court's insistence that the threat of personal financial liability is necessary to deter police misconduct, empirical data strongly suggests that individual officers are not even held financially responsible for judgments against them due to widespread indemnification, even when punitive damages are imposed. Thus, the government and the "blameless" taxpayers are footing the bill regardless of the Court's intentions to punish or deter individual actors. Further, empirical studies suggest that these lawsuits have not had the desired deterrent effect on police behavior.

The entire premise that individual officers are financially responsible for settlements and judgments is quite possibly a fallacy. A recent study shows that the government almost always fully indemnifies individual actors and provides them with attorneys, even when their misconduct is intentional or malicious.[68] Professor Joanna Schwartz found that officers contributed just .01% of the settlements and judgments paid in civil rights suits alleging police misconduct over the six-year period from 2006 to 2011.[69] Government payouts included punitive damages and occurred even when prohibited by law or policy or when officers were disciplined, terminated, or even prosecuted for the misconduct at issue.[70]

Schwartz pointed out the extent to which her findings undermine much of the Court's reasoning concerning liability in Section 1983 cases, which points to a need for doctrinal adjustment.[71] Qualified immunity would no longer be warranted if there was no need for officers to fear personal financial liability.[72] The Court's municipal liability doctrine was developed specifically to avoid vicarious liability, yet a widespread

---

[67] *Id.*

[68] *Police Indemnification*, *supra* note 48, at 915.

[69] *Id.* at 914–15.

[70] *Id.* at 923.

[71] *Id.* at 937–48.

[72] *See id.* at 938–43.

practice of blanket indemnification essentially functions as such.[73] Further, the Court's prohibition on punitive damages against municipalities at the expense of taxpayers is actively thwarted in practice due to indemnification of even punitive damages assessed against individual officers.[74] In sum, the Court's deterrence and punishment rationales regarding individual bad apples are based on entirely fictionalized conceptions of the orchard.

There is also evidence to suggest that lawsuits do not have a deterrent effect in practice. Several studies have confirmed that the threat of personal litigation does not significantly influence the behavior of police officers.[75] One study even found that officers who had been previously sued subsequently exhibited more aggressive behaviors than those who had not.[76] Certainly, the "moral hazard" posed by blanket indemnification may be somewhat responsible for the lack of deterrent effect,[77] but, as this article strives to demonstrate, simply disallowing indemnification and imposing financial liability on individual officers will not solve the systemic problem of police misconduct.

Thus, the threat or imposition of financial sanctions do not effectively deter individual officers from engaging in misconduct. While it is true that the political pressure generated by high profile lawsuits may affect change in limited circumstances,[78] lawsuits are certainly not the only mechanism for raising public awareness of misconduct. Further, the realities that individual officers are not financially responsible for satisfying judgments and seem not to be suffering any consequences from the imposition of financial penalties, undermine much of the Court's deterrence rationales in Section 1983 jurisprudence. Simply put, even if police misconduct could be analyzed as solely the result of a few bad apples, the current remedy does nothing to deter them or incentivize departments to adopt practices that encourage good behavior, such as education and training.

Thus, Section 1983 jurisprudence functions as a sort of fairy tale involving innocent police departments and simplistically villainous

---

[73] *Id.* at 943–47.

[74] *Id.* at 947–49.

[75] *See* KAPPELER, *supra* note 21, at 7 (citing several studies); Forrest Scogin; & Stanley L. Brodsky, *Fear of Litigation among Law Enforcement Officers*, 10 AM. J. POLICE. 41 (1991); Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 POLICE STUD. INT'L REV. POLICE DEV. 19, 26 (1995); Daniel E. Hall, Lois A. Ventura, Yung H. Lee & Eric Lambert et al., *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 529, 545 (2003); Tom "Tad" Hughes, *Police Officers and Civil Liability: "The Ties that Bind"?*, 24 POLICING: INT'L J. POLICE STRATEGIES STRAT. & MGMT. 240, 253 (2001).

[76] Kenneth J. Novak, Brad W. Smith & James Frank, *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 352, 360, 363 (2003).

[77] *See* Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 199 (2012) (defining the "moral hazard problem" as "the idea that a party who is insured against risk has a suboptimal incentive to reduce it.").

[78] Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1151 (2016) [hereinafter *Governments*].

officers. This narrative of individual responsibility masks the state's neglect of its duty to ensure that coercive power is handled responsibly, by constraining, educating, and supervising officers. It falsely positions the individual officer outside of the institutional context, ignoring the culture and practices that contribute to misconduct and the fact that the individual "street level" officer is not positioned to effectuate systemic reform. Additionally, the Court ignores the empirical reality that the individuals it is attempting to punish and deter are not, in fact, subject to any economic consequences. In sum, the focus on bad apples forecloses a meaningful examination of the orchard.

B. The Punitive Cycle

The rhetoric of individual responsibility embedded in Section 1983 jurisprudence informs public discourse about the remedy for police misconduct by inciting calls for punishment of individual officers or decrying the "punishment" endured by individual taxpayers bearing the cost of police misconduct lawsuits. This discourse, in turn, exacerbates police misconduct by furthering the adversarial relationship between the police and the communities they serve. Further, the misplaced focus of political pressure is another way that systemic reform is foreclosed.

1. Punishing Individual Officers

The Court's fashioning of the Section 1983 misconduct remedy as against individual bad actors has contributed to the popular opinion that justice can be achieved through economic "punishment" when the criminal justice system fails to hold officers accountable. Judges have even explicitly encouraged the public to sue individual police officers for money damages. In 2016, a senior judge on the Second Circuit Court of Appeals wrote an opinion piece in the Washington Post claiming that a federal civil rights suit for damages was "the only realistic way to establish police misconduct and secure at least some vindication for victims and their families" because judges and juries are reluctant to convict police officers of crimes.[79]

---

[79] Jon O. Newman, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASHINGTON POST (Jun. 23, 2016), https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html [https://perma.cc/PE9B-7QAA].

i. Criminal Justice Response

To be sure, individual officers should be held criminally accountable when their conduct violates the law. Unfortunately, there are numerous issues with the criminal justice system that prevent conviction of police officers. Prosecutors are reluctant to pursue cases against police officers because of their close working relationships with the police and because an overwhelming majority of prosecutors are elected and rely on police union endorsement.[80] Judges and juries tend to be overly sympathetic to police and maintain a belief that officers are always acting in the public interest.[81] But, even if the criminal justice system functioned perfectly to punish criminally culpable officers, this piecemeal approach would do little to address systemic factors or prevent future misconduct. Additionally, it would not address the significant amount of police misconduct that is better understood as the product of poor decision-making and mistake, not criminal behavior.

Public cries for criminal accountability, while often well-placed, serve to further divide police and communities. Commentators have pointed out the seemingly contradictory call for extended incarceration of officers who commit misconduct by those who simultaneously decry mass incarceration.[82] For example, political commentator Trevor Noah recently explored the public reaction to the rare criminal conviction of a police officer who shot and killed an unarmed black man in his own home.[83] After Amber Guyger was sentenced to ten years of imprisonment for the murder of Botham Jean, Noah observed that many people of color were outraged at the imposition of such a light sentence. He posited that perhaps, in light of the disproportionate effect of mass incarceration on communities of color, this outrage was not representative of a deep desire to severely punish culpable individuals but was representative of a desire for people of color to be treated with the same level of empathy in sentencing.[84]

Public demands for harsher punishment of police officers automatically position police and the communities they serve as

---

[80] *See* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803–04 (2000); William Lynch III, *Why We Need Independent Prosecutors*, HUFFINGTON POST (Apr. 27, 2015), https://www.huffpost.com/entry/why-we-need-independent-p_b_7153826 [https://perma.cc/T967-VN3Z].

[81] *See* Bandes, *supra* note 64, 1331–32 (discussing judges' view of police misconduct as aberrational); VERA INSTITUTE OF JUSTICE, PROSECUTING POLICE MISCONDUCT: REFLECTIONS ON THE ROLE OF THE U.S. CIVIL RIGHTS DIVISION 8 (1998) (discussing difficulties in federally prosecuting police misconduct due to juries sympathetic to law enforcement).

[82] Victoria Law, *Beyond Incarceration: What Could Accountability Look Like in Police Killings?*, BITCH MEDIA (Jul. 18, 2016), https://www.bitchmedia.org/article/beyond-incarceration-what-might-accountability-look-police-killings [https://perma.cc/U9VX-3B4P]; *The Daily Show with Trevor Noah: The Botham Jean Murder Verdict and its Complex Emotional Aftermath*, COMEDY CENTRAL (Oct. 3, 2019), http://www.cc.com/video-clips/qv3wyh/the-daily-show-with-trevor-noah-the-botham-jean-murder-verdict-and-its-complex-emotional-aftermath [https://perma.cc/8T5V-LHQU].

[83] *The Daily Show with Trevor Noah*, *supra* note 82.

[84] *Id.*

adversaries and foreclose empathetic analysis of the cultural and environmental constraints under which officers operate. Simply put, the solution to widespread police misconduct cannot be found in further vilification and incarceration of individual officers. The desire to solve the problem of police misconduct by severely punishing culpable officers without addressing institutional constraints is motivated by the same notion of individual responsibility that refuses to consider the socioeconomic factors contributing to mass incarceration. There are no simplistic villains on either side of the policy–community line.

ii. Civil Justice Response

Many believe that the civil justice system can step in to "punish" individual officers through the imposition of economic penalties when the criminal justice system fails. The most common types of damages available in constitutional litigation, like in private tort law, are compensatory damages and punitive damages. Compensatory damages are awarded to redress concrete harm caused by wrongful injury. The goal is to place the injured party in essentially the same position they would have been if the tort had not been committed. Punitive damages are assessed to punish individuals for particularly egregious violations of tort law.

The role of punishment in private law, however, has been strongly questioned. At least one scholar has discussed that the imposition of punitive damages in civil lawsuits has the potential to circumvent constitutional protections guaranteed by the criminal justice system.[85] Further, some argue that the concept of punishment has no place in the foundational principles upon which the tort system was built. Private law is meant to be based on the Aristotelian principle of corrective justice, which is simply concerned with returning transactional parties to their initial state after one party realizes a gain and the other a corresponding loss.[86] Such a system, in its purest form, would assign little consequence to individual motives and moral notions of blameworthiness. Thus, the assessment of punitive damages in tort law, including constitutional torts, must be based more upon a distinct retributive form of justice, concerned primarily with sanctioning morally culpable individuals.

Indeed, the Court associates punitive damages with retribution in

---

[85] *See* Benjamin C. Zipursky, *Theory of Punitive Damages*, 84 TEX. L. REV. 105, 107 (2005) (discussing the "criminal aspect" of punitive damages warrants constitutional scrutiny).

[86] Ernest Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2003) ("Corrective justice, in contrast [to distributive justice], features the maintenance and restoration of the notional equality with which the parties enter the transaction. This equality consists in persons' having what lawfully belongs to them. Injustice occurs when, relative to this baseline, one party realizes a gain and the other a corresponding loss.").

some Section 1983 lawsuits.[87] The retributive concept of "just deserts" has long been a justification for criminal punishment, reflecting the idea that a wrongdoer should be punished in proportion to the wrong committed, regardless of consequences.[88] Professor Ronen Perry suggests that retribution also serves a public function by attempting to remedy resulting injuries to society, namely "aggregate outrage, dissatisfaction, and loss of confidence."[89] While the Court may insist that personal liability for even compensatory damages serves to deter misconduct, the retroactive, punitive focus of these lawsuits tends to foreclose any sort of prospective relief.[90] Indeed, empirical evidence suggests that juries in private lawsuits that involve punitive damages view their primary role as exacting punishment rather than achieving optimal deterrence.[91]

In this way, constitutional tort law mirrors criminal punishment: it is primarily concerned with the public sanctioning of a single bad actor to satiate public disapproval and restore a collective faith in justice. This sends a clear signal that economic punishment of individuals is an appropriate remedy for the systemic injustice wrought by widespread police misconduct. Further, by refusing to assess punitive damages against a municipality out of a moral sense of fairness to innocent taxpayers, the Court unequivocally signals that the state is not to blame when police misconduct occurs; the state is an improper target for moral outrage.

2. *Punishing Individual Taxpayers*

Public discourse is also focused on the economic harm police misconduct causes to taxpayers. Articles are regularly written about the amount of money shelled out by larger municipalities as a result of these lawsuits and how this burden trickles down to the taxpayers.[92] Even here,

---

[87] *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981) (suggesting punitive damages can be retributive).

[88] Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV., 177, 177 (2006) ("Retribution, or just desert[s], is usually perceived as one of the most prominent theoretical foundations of criminal liability" that also "focuses on a single person and inflicts upon him a sanction whose severity is determined solely by the gravity of his wrongdoing.").

[89] *Id.* at 181.

[90] An assertion that seems at odds with the notion of corrective justice.

[91] Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2085, 2111 (1998).

[92] *See, e.g.*, Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. cities*, WALL ST. J. (Jul. 15, 2015), https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834 [https://perma.cc/466W-UZZ7] (noting that the 10 U.S. cities with the largest police departments paid out a total of $248.7 million dollars in settlements and judgements); Jonah Newman, *Chicago spent more than $113 million on police misconduct lawsuits in 2018*, CHICAGO SUN TIMES (Mar. 15, 2019), https://chicago.suntimes.com/2019/3/15/18455610/chicago-spent-more-than-113-million-on-police-misconduct-lawsuits-in-2018 [https://perma.cc/BD7U-SP38]; Graham Rayman & Clayton Guse, *NYC Spent $230M on NYPD Settlements Last Year: Report*, NEW YORK DAILY NEWS (Apr. 15, 2019), https://www.nydailynews.com/new-york/ny-stringer-report-nypd-payout-settlement-lawsuits-20190415-2zzm2zkhpna63dtlcr2zks6eoq-story.html [https://perma.cc/8HLW-S39C].

the rhetoric is individualistic. Framing collective cost as the punishment of individual taxpayers is consistent with a focus on punishing individual police officers.

While the Court may refuse to "punish" innocent taxpayers, it is willing to, in limited circumstances where police misconduct is pursuant to municipal "policy," accept that the state, and thereby the taxpayers, has a collective responsibility to *compensate* victims for injuries that are the result of police misconduct. The Court presumably justifies this distinction by rationalizing that the constitutional injury to the individual is greater than the collective injury to the public purse.[93] Nonetheless, while some scholars have argued that morality dictates that the cost of constitutional harm should not be borne entirely by one individual but rather spread across society as a whole,[94] public discourse rarely seems to represent that view. Rather, the tale is usually one of blameless taxpayers outraged at the notion that they should bear the cost of a government actor's willful misconduct or even mistake. The distinctions between compensatory and punitive damages, or societal and individual costs, seem largely irrelevant in the court of public perception.

This rhetoric actually serves multiple divisive roles. Some may respond to this seemingly personal injustice by blaming individual police officers, still others may blame the litigants.[95] This further divides a public already apt to take a position "for" or "against" the police as a whole, while ignoring the complex interplay of personal and institutional constraints at work within police departments.

Thus, the rhetoric of individual punishment in the public arena, whether inflicted upon police officers or "blameless" tax payers, works to further prevent achievement of a systemic solution by placing the focus on individuals and dividing the public on the proper target of its moral outrage and calls for reform. It is not the intention of this article to engage in a form of victim-blaming by highlighting the ways in which public discourse, informed by judicial framing, hampers meaningful solutions and sometimes even contributes to police misconduct. Rather, it is meant to bring awareness to the ways in which a misplaced focus on individual intent and punishment actually contributes to the problem of police misconduct while doing little to solve it.

---

[93] Candace McCoy, *How Civil Rights Lawsuits Improve American Policing*, *in* HOLDING POLICE ACCOUNTABLE 111, 117 (C. McCoy, ed., 2010). Some scholars suggest that deterrence rationales also underlie the Court's decision to impose municipal liability, though this does not seem to square with the Court's subsequent proclamation that municipal officials would not be deterred by the imposition of punitive damages at the taxpayers' expense.

[94] *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1217 (2001) ("[I]t is better to spread the costs of injuries from illegal government actions among the entire citizenry than to make the wronged individual bear the entire loss"); SHUCK, *supra* note 7, at 101.

[95] *See supra* Part II.C (regarding how constitutional litigation pits individual litigants against other members of society).

B. The Problem of Individual Rights

Constitutional litigation, first and foremost, insists on addressing police misconduct as an instance of intrusion on individual Fourth Amendment privacy rights. Failure to begin the analysis with collective social justice concerns regarding the public responsibility of the police prioritizes the position of the individual in both the critique and the solution. This framing is problematic for several reasons. First, it incorrectly places the responsibility on individuals to assert these privacy rights, ignoring that certain rights and the ability to assert them are held disproportionately by the privileged. Second, it not only furthers the adversarial relationship between citizens and police officers, it pits individual rights-holders against one another. Third, this conception of rights as "negative,"[96] allowing the holder to be free from government interference with individual privacy and liberty, imposes no positive obligation on the state to adequately provide public safety. Fourth, the focus on individual vindication of rights dangerously perverts our definition of social justice, restraining us from demanding systemic reform by promoting piecemeal retributive solutions.

1. The Autonomous Citizen Enforcer?

The rhetoric of individual liberty and privacy rights incorrectly places the burden of police misconduct prevention solely on individual citizens. Constitutional litigation presupposes an autonomous liberal subject that is equally possessive of individual rights to privacy and liberty and is able to freely assert and vindicate such rights. However, much scholarly attention has been devoted to the ways in which Fourth Amendment privacy rights are disproportionately held by those with greater wealth and power.[97] The "reasonable expectation of privacy" test employed by courts to determine whether a search or seizure is even protected by the Fourth Amendment affords greater protection from police misconduct to those who have housing, transportation, and employment.[98] Professor Kami Chavis Simmons explored how Fourth Amendment jurisprudence has developed to afford less scrutiny to police activity that

---

[96] In contrast, the term 'positive rights' is used to refer to affirmative obligations placed on the state (and/or others) to provide rights-holders with needed goods or services. *See* Martha Albertson Fineman, *Injury in the Unresponsive State*, *in* INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 50, 51 (A. Bloom, D. Engel, & M. McCann eds., 2018) [hereinafter *Injury*] ("By contrast, the term 'positive rights' is used to refer to affirmative obligations placed on the state (and/or others) to provide rights-holders with needed goods or services.") (footnote omitted).

[97] *See* Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1392–33 (2012).

[98] Kami C. Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. MD. L.J. RACE RELIG. GENDER & CLASS 240, 249—52 (2015).

takes place outside of the "sacred" space of one's home, thus affording significantly less freedom from government interference to those who were homeless or even those who cannot afford to outfit their homes with certain "privacy enhancements," such as fences or soundproof walls.[99] Further, lower-income individuals have a reduced expectation of privacy even within the home because of mandates that require the disclosure of private information to obtain government benefits.[100] The jurisprudence involving the reasonableness of seizures privileges privacy in cars over that afforded to pedestrians or public transit riders.[101]

Even if individuals' "rights" to privacy are equal, there are obvious inequalities in the ability to assert and vindicate these rights. As a starting point, lower-income individuals face financial challenges in obtaining an attorney or initiating litigation. Additionally, many individuals may not even be aware of their rights against police action. This lack of awareness can easily be understood in light of the social, political, and religious factors that operate to disadvantage one's ability to access information. Even if one is aware of such rights, there are a number of factors that constrain the ability to assert them in face of misconduct. Many minorities and residents of lower-income neighborhoods have a legitimate fear of the police that may render them unwilling to question police activity. And again, the coercive nature of these interactions ensures that assertion of such rights might be easily ignored in the moment.

2. *Rights as Trumps?*

The framing of police misconduct as individual injury is part of a larger constitutional scheme that routinely separates individuals from society. Much has been written regarding this problem of "rights as trumps." The concept originated with Professor Ronald Dworkin, who argued that individual rights should never be limited, even in the face of harm to social good.[102] Professor Richard Pildes notes that scholars from other countries have rejected our "rights-oriented constitutionalism."[103] Pildes offered the following quote from a Canadian constitutional theorist: "rights-centred [*sic*] society becomes little more than an aggregate of self-interested individuals who band together to facilitate the pursuit of their own uncoordinated and independent life projects—a relation of strategic

---

[99] *Id.* at 249–50.

[100] *Id.* at 251. *See also* Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 173 (2011) (analyzing the extent to which "[T]he poor barter their privacy rights in exchange for government assistance.").

[101] Simmons, *supra* note 98, at 251–52.

[102] *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 193–94 (1977).

[103] Richard H. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 728 (1998).

convenience and opportunism rather than mutual commitment and support."[104]

Further, the rights-as-trump framing cannot tolerate conflict of rights. This framing often pits individual rights-holders against one another in a battle "between those who are of constitutional concern and those who are not"[105] and forces courts to prioritize constitutional rights. And inasmuch as the government represents majoritarian interests (which this article will demonstrate is often not the case), any consideration of governmental interest in constitutional litigation's balancing or scrutiny tests is really a pitting of the rights of the majority to see its policies enacted against those of the individual plaintiff.[106] Though we may rhetorically view an individual plaintiff in a police misconduct case as representative of a collective interest in freedom from wrongful arrest or brutality, the reality of our political and legal system dictates that society is actually sitting on the other side of the courtroom. Thus, a solution cannot be achieved until we as individuals recognize that we comprise the state; we do not stand outside of it.[107] A fictional posturing of individual versus government will never truly highlight our social responsibility for adequate and equitable public safety.

3. *The Restrained State*

The framing of police misconduct as intrusion by an ideologically restrained state on individual privacy rights imposes no "positive" obligations on the state to provide for public safety. Indeed, the Supreme Court has explicitly rejected the proposition that the Constitution guarantees even "minimal levels of safety and security,"[108] despite its recognition that providing security to the public and its property is "the most basic function of any government."[109]

Importantly, this forecloses our ability to challenge harm caused by police inaction.[110] Courts are simply unwilling to entertain the idea that officials are constitutionally obligated to act. Doubling down on the notion that the Constitution serves only to restrain the state, rather than compel it, the Supreme Court has disturbingly struck down multiple challenges to

---

[104] *Id.* (quoting ALLAN C. HUTCHINSON, WAITING FOR CORAF: A CRITIQUE OF LAW AND RIGHTS 90 (1995)).

[105] Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 34 (2018).

[106] *Id.* at 35 (recognizing that asserted government interests in constitutional litigation can be represented as a majoritarian "right" of political participation).

[107] Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1760 (2012).

[108] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

[109] United States v. United States District Court, 407 U.S. 297, 312 (1972) (quoting Miranda v. Arizona, 384 U.S. 436, 539 (1966) (White, J., dissenting)).

[110] *See Injury*, *supra* note 96, at 50–51 (discussing the underdeveloped idea in American political and legal culture of government inaction causing constitutional injury).

egregious failures of state protection. This includes constitutional challenges against state social workers who failed to protect a young boy from horrific parental abuse resulting in permanent brain damage [111] and police officers who failed to enforce a restraining order against an abusive husband who subsequently murdered his children.[112] In the latter case, the Inter-American Commission on Human Rights later found the United States liable for failure to protect under international law.[113]

We are also left with minimal remedy for police departments' inaction in failing to provide training, supervision, and discipline to police officers. The Court may, in very limited circumstances[114], recognize the harm that results from this failure and impose liability on a governmental entity. However, a very limited set of rules regarding municipal liability for *individual* wrong-doing falls significantly short of recognition that the institution itself failed in its constitutional duty to adequately provide for public safety.

Thus, consideration of police misconduct as state intrusion on individual rights forecloses the imposition of a positive obligation on the state to justly provide protection. The state's failure to meet this obligation reflects a profound neglect of the constituting principles of society and should be perceived as constitutional injury.

4. Putting the "I" in Social Justice

Further, this focus on individual rights has perverted our sense of social justice. Once understood as a positive obligation of the state to provide social and economic protection for all, we now increasingly view the achievement of social justice in individual or group economic terms.[115] Restitution for violation of individual rights has become the progressive rallying cry. Courts have reinforced this narrative of individual justice in a number of ways. They have continuously foreclosed the possibility of collective constitutional injury through a number of limitations to class

---

[111] *Id.*

[112] Town of Castle Rock v. Gonzales, 545 U.S. 748, 753–54 (2005).

[113] LENAHAN (GONZALES) V. UNITED STATES, CASE 12.626, INTER-AM. C.H.R., Report No. 80/11, ¶ 199 (2011).

[114] As discussed in Part I, establishing municipal liability based on failure to train, supervise, or adequately hire requires a showing of deliberate indifference to the likelihood that a specific individual will cause a specific injury, a burden that is often difficult to meet.

[115] Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U. L. REV. 341 (2019) [hereinafter *Social Justice*].

action[116], standing doctrine[117], and lawsuits challenging a "pattern or practice" of governmental misconduct[118] Yet meaningful societal change is unlikely to transpire through piecemeal retributive solutions directed at remedies for only some individuals.

Thus, there is simply no room for the notions of state responsibility and meaningful social justice in a system that exclusively focuses on police misconduct as individual injury committed by an overreaching state.

D. Citizen as Public Safety Consumer?

Section 1983's adoption of the common law tort model to remedy harm caused by the government positions citizens as autonomous consumers of public safety services able to single-handedly prevent police misconduct through market mechanisms. There are numerous flaws and normative concerns with subjecting police misconduct to the same market logic underlying private torts. Many assumptions about the behavior of consumers and corporations in market transactions simply do not apply in the public context. Additionally, by shifting the responsibility to address police misconduct to the individual "consumer," this framing obscures the state's responsibility and dangerously ignores the inherent power imbalances in the relationship between police and citizens.

Section 1983's treatment of constitutional torts as private torts inevitably fosters comparisons of government agencies to private corporations providing services to consumers in the marketplace. This comparison is flawed in at least two ways: government actors are not and should not be motivated by profit and citizens are simply not able to hold government actors accountable through the market correction mechanism of supply and demand. Practically speaking, the court's deterrence goals are unlikely to be met when they are based on such flawed assumptions.

The conclusion that monetary damages will sufficiently deter police misconduct, routinely assumed by courts and commentators alike,[119] rests on market-based assumptions about the motivation of corporate actors, which may (and should) be entirely inapposite to the government. Professor Daryl Levinson made a compelling argument that private tort

---

[116] Richard Thompson Ford, *Discounting Discrimination: Dukes v. Wal-Mart Proves That Yesterday's Civil Rights Laws Can't Keep up with Today's Economy*, 5 HARV. L. & POL'Y REV. 69, 76 (2011) (asserting that class action was one of the most important types of discrimination litigation after passage of the Civil Rights Act but had "petered out" by 1988 due to legal changes making it more difficult to bring).

[117] *See supra.* Part I.

[118] Plaintiffs challenging unconstitutional municipal policies might be viewed as asserting the rights of the collective. *See supra* Part I (regarding the difficulty of establishing municipal liability in Section 1983 lawsuits).

[119] *Governments*, *supra* note 78, 1151–55 (discussing various scholar and commentator views on the deterrent effects of suing government for damages).

law's assumptions regarding the marketplace behavior of rational economic actors do not translate to the public sector because government actors are motivated politically rather than economically.[120] Under the generally accepted law and economics paradigm, a private corporation will internalize the full social costs and benefits of its potentially harmful activity (for example, pollution) and make a self-interested profit-maximizing decision that is assumed to be socially and privately beneficial.[121] However, because government actors respond primarily to political incentives, we cannot assume that the budgetary outlay of litigation costs will cause the government to internalize social cost unless the economic sanction is somehow converted to a political one.[122] Moreover, this economic model may never prevent constitutional violations in a majoritarian government because the benefit of government activity gained by the majority of citizens will almost always outweigh the loss of taxes necessary to compensate victims, particularly where compensable costs do not reflect the true social cost of constitutional violations.[123]

Empirically, it seems that police departments are not, in fact, motivated to reduce misconduct by the threat of costly litigation. Studies confirm that most law enforcement agencies and large cities and counties are not even collecting or analyzing lawsuit data as part of their policy efforts.[124] Most departments ignore lawsuits that do not make headlines or generate significant political pressure.[125] Some departments willfully choose to ignore lawsuits because settlements are viewed as "business decisions" rather than proof of misconduct and because the slow pace of litigation renders them inferior to other potential sources of information such as citizen complaints.[126] In this landscape, there is simply no way that any significant number of police departments are changing their policies to address misconduct as a direct result of litigation.

Even assuming police misconduct could be systemically deterred by the imposition of financial penalty, police departments rarely feel a significant, direct financial impact from these lawsuits. In a groundbreaking 2016 study, Schwartz examined how cities, counties, and states pay settlements and judgements arising from police misconduct

---

[120] Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

[121] *Id.* at 345–46.

[122] *Id.* at 347.

[123] *Id.* at 368.

[124] *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010) (finding that law enforcement agencies rarely collect or analyze information from lawsuits brought against them); *Police Indemnification*, *supra* note 48, at 956 (eighteen of the largest cities and counties keep no records regarding how much they spend in lawsuits involving the police).

[125] Schwartz, *supra* note 124, at 1030.

[126] Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 874–75, n. 184 (2012).

litigation.[127] Approximately half of the surveyed law enforcement agencies contributed in some manner to the satisfaction of these lawsuits.[128] Even then, many did not suffer economic consequences because they received funds specifically marked for litigation costs as part of the city, county, or state budgeting process and any overages, particularly in large cities, were paid from the jurisdiction's general fund.[129]

More importantly, the accountability structure that enables correction of aberrant behavior through the market is entirely missing in the context of police misconduct. The principle of "supply and demand" generates accountability in the private market, as consumers express satisfaction or dissatisfaction with a particular product, process, or idea through the spending or withholding of money.[130] In contrast, government accountability is generated through transparency, electoral sanction, and our system of legislative, judicial, and executive checks and balances.[131] Unlike market transactions, which presuppose a consumer's ability to simply choose another provider if they are unsatisfied with the quality of service (ignoring the very real constraints that social and economic inequality might impose on that "choice"), the transaction of police service itself is often not voluntary, much less the choice of service provider. It is hard to imagine a larger restraint on choice than that imposed by the coercive arm of the state. Thus, police departments are unable to capture the supposed benefits of competition for consumer dollars that might motivate them to deter misconduct. Additionally, citizens are hardly able to hold the police accountable for misconduct by withholding tax dollars in the same way they may boycott a private company.[132]

Despite these obvious incongruities, courts continue to position the remedy for police misconduct as one involving autonomous consumers of public services with freedom of choice.[133] Like the positioning of defendants as individual bad actors, this shifts the burden of correcting police misconduct away from the state, this time to the individual plaintiff

---

[127] *Governments*, *supra* note 78, at 1144.

[128] *Id.* at 1148.

[129] *Id.* at 1149.

[130] Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1263 (2003).

[131] *Id.*

[132] The successful consumer boycott of Chick-Fil-A after its CEO made statements against same-sex marriage is a prominent example. Emily Heil, *Chick-Fil-A Drops Donations that Angered LGBTQ Groups, and Conservative Leaders Cry Betrayal*, WASHINGTON POST (Nov. 18, 2019), https://www.washingtonpost.com/news/voraciously/wp/2019/11/18/chick-fil-a-drops-donations-that-angered-lgbt-groups-and-conservatives-cry-betrayal/ [https://perma.cc/V696-2FN7].

[133] This is part of a seeming trend in constitutional litigation, particularly First Amendment challenges, to frame the individuals involved as consumers and equate the flow of capital with speech. *See* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395 (2011) (discussing the treatment of campaign contributions as speech); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2014) (discussing market concepts in First Amendment commercial speech decisions).

and the private marketplace. The court's positioning also dangerously obscures the gross imbalance of power that naturally exists in any interaction between citizens and police.[134] We are not free to simply take our business elsewhere. We cannot choose to sanction government misconduct by withholding our tax dollars. A proper remedy for police misconduct must reflect these power imbalances and constraints and recognize the state's responsibility for correcting misconduct instead of perpetuating the fiction that marketplace solutions adequately translate to the public sector or even that they should.

Thus, constitutional litigation, particularly for damages, does little to prevent police misconduct. At the same time, it promotes ideals of individual responsibility, free market choice, and restrained state that inhibit meaningful reform and may exacerbate the misconduct in question. It is clear that we must move past the relentless focus on the autonomous individual and embrace a more systemic and inclusive social solution to police misconduct.

III. THE VULNERABLE ORCHARD: FROM INDIVIDUAL TO INSTITUTIONAL

Vulnerability theory provides a better approach to the problem of police misconduct. This theory begins with the recognition that, as embodied beings that are constantly susceptible to changes in our physical and social well-being, we are all universally vulnerable.[135] In contrast to the severely restrained state of current discourse, vulnerability theory requires a responsive state that affirmatively addresses the vulnerability of its subjects.[136] It does so by regulating social roles and establishing and supporting societal institutions.[137] These institutions in turn allocate resources that provide individuals with resilience.[138] Thus, vulnerability theory requires the state to monitor and regulate the ways in which power and privilege may be conferred unequally within social institutions and

---

[134] Additionally, as a practical matter, the citizen versus government litigation battle is inherently unfair. As one scholar has observed, the government has a number of advantages in litigation, including virtually unlimited control over the information complainants need to properly litigate and unlimited resources to control the direction of litigation by, for example, trying to force a settlement. *See* Bandes, *supra* note 64, at 1336–37 ("[G]overnment has monopoly control over vast stores of information including police reports, personnel, and disciplinary files, court records, and the ability to withhold or seriously delay litigants' access to that information" such that "if government does not wish to litigate at great length, it can use its unlimited resources to settle case after case.").

[135] *Social Justice*, *supra* note 115, at 358.

[136] *See id.* at 356 ("Recognition of human vulnerability mandates that the neoliberal legal subject be replaced with the vulnerable legal subject, even as a responsive state is substituted for the restrained state of liberal imagination").

[137] *See Injury*, *supra* note 96, at 58–59.

[138] *See id.* at 63–67.

relationships.[139]

Importantly, vulnerability theory allows us to expand beyond the autonomous individual and closely examine these societal institutions. Institutions are the central way that society provides resources to individuals, allowing them to fulfill social roles and contribute to the healthy reproduction of society.[140] The institutions themselves are vulnerable to internal and external corruption and change, and must be actively monitored and updated by the state because of this vulnerability.[141]

Using a vulnerability approach, police misconduct could be framed not as the result of individual officers intruding on individual privacy rights but as the failure of the responsive state to provide the physical safety resources needed to achieve resilience in a just manner. This framing imposes positive obligations on the government to examine policing practices and assess power imbalances between police and communities. This examination necessarily includes analyzing the socioeconomic and other factors that exacerbate institutional vulnerability and the vulnerability of individual police officers and citizens.

In contrast to the fragmented view of police misconduct as individual morality narratives, a vulnerability approach allows us to take into account the interests of all stakeholders, including the individual officers. Under this approach, one can examine how the state can and should respond to the institutional, physical, social, and economic conditions that constrain the behavior of all decision makers. The following section provides an analysis of some of the institutional vulnerabilities that contribute to systemic police misconduct.

A. The Business of Policing

The same ideals of market competition and efficiency at work in Section 1983 have also contributed to the problem of police misconduct. While individuals are entirely devoid of the informed choice necessary to be effective "consumers" of police services, police departments are increasingly modeling themselves after corporations. Adoption of private business management techniques in the public sector fosters a slavish devotion to performance targets that perverts institutional priorities, causes police to disproportionately target low-income minority neighborhoods, and further dehumanizes citizens in their encounters with the police.

---

[139] *See id.* at 67 ("Because societal institutions are so vitally important, both to individuals and to society, their flaws, barriers, gaps, and potential pitfalls must be monitored, and these institutions must be adjusted when they are functioning in ways harmful to individuals and society.").

[140] *See id.*

[141] *See id.* at 58–59.

1. Policing as Revenue Generation

One of the more troubling moves towards private sector practices was the adoption of performance budgeting. Performance budgeting was part of a larger toolkit of the New Public Management (NPM) movement, which began in the 1990s with the goal of introducing private sector concepts of efficiency and effectiveness into the public sector.[142] The United Kingdom, Australia, and New Zealand were among the first countries to adopt NPM.[143] Performance budgeting was adopted in the U.S. during the Clinton era with the implementation of the National Performance Review (NPR) in 1993.[144] NPR established a direct link between federal agency performance and program funding.[145] Underlying this implementation were the same assumptions employed by former President Reagan: that government was "too big, unwieldy, rule bound, and process driven."[146] NPR reflected the government's goals to operate as a business by "promoting taking chances, focusing on customers, and eliminating cumbersome administrative routines."[147] Performance budgeting was soon adopted by almost all fifty state governments.[148] There is scant data on how many local governments use performance budgeting, but studies undertaken in the early 2000s indicated that approximately 38% of municipalities, with over 25,000 residents, and 34% of counties, had adopted some type of performance measures.[149] It remains unclear how these performance measures influenced the budgeting process.

The top-down implementation of this type of budgeting has "turn[ed] police departments into providers of services in competition with other

---

[142] JANET M. KELLY & WILLIAM C. RIVENBARK, PERFORMANCE BUDGETING FOR STATE AND LOCAL GOVERNMENT 3 (2d ed. Routledge 2015) ("But the current roots of a performance-based approach to allocation decisions go back to the New Public Management (NPM) movement beginning in the 1990s. The movement's foundational assumption was that the public sector was insufficiently accountable to the public for the way its tax dollars were being used and lacked the commitment to efficiency and effectiveness found in the private sector.").. Ed. 2011).

[143] *Id.* ("Noting that the United Kingdom was one of the first countries to adopt the New Public Management reform paradigm, along with Australia and New Zealand, Lapsley concluded that it has been a 'cruel disappointment.'").

[144] Janet M. Kelly, *A Century of Public Budgeting Reform: The "Key" Question*, 37 ADMINISTRATION & SOCIETY 89, 104 (2005) ("His efforts toward reform were predicated on the same set of assumptions that Reagan offered—that government was too big, unwieldy, rule bound, and process driven.").

[145] *Id.* ("The NPR called for a link between agency performance and program funding.").

[146] *Id.* ("His efforts toward reform were predicated on the same set of assumptions that Reagan offered—that government was too big, unwieldy, rule bound, and process driven.").

[147] *Id.* ("Vice President Al Gore's National Performance Review reflected these same themes, asserting that the government needed to act more like a business—taking chances, focusing on customers, and eliminating cumbersome administrative routines (National Performance Review [NPR], 1993).").

[148] KELLY & RIVENBARK, *supra* note 142, at 7.

[149] Theodore H. Poister & Gregory Streib, *Performance Measurement in Municipal Government: Assessing the State of the Practice*, 59 PUB. ADMIN. REV. 325 (1999); Evan M. Berman & XiaoHu Wang, *Performance Measurement in U.S. Counties: Capacity for Reform*, 60 PUBLIC ADMINISTRATION REVIEW 409 (2000).

agencies for resources and customers."[150] This is especially true in the era of backward budgeting, which came into use during the Reagan administration.[151] The government now determines the amount of funding a particular program or agency gets by the amount of overall revenue the government is willing to raise, rather than by examining the revenue needed to provide optimal programs and services.[152] Thus, all government agencies are in competition for the same bucket of money.

Once again, there are normative concerns with subjecting government agencies to market logic. Competition within the public sector is not the type of competition that improves the lives of consumers by allowing for greater freedom of choice or encouraging providers to better conform their services to the demands of the public. In fact, this flies in the face of public demand by ignoring the resource needs of those providing public services. While the public should certainly be entitled to transparency and some measure of accountability in government spending, we should be troubled by the notion of police departments or schools competing with one another for funds at all, much less on the basis of performance. Even if this competition were to spark innovation leading to better services, a cornerstone of the market philosophy, we would expect government entities to share these innovative strategies. Otherwise, we are guaranteeing inequality in the provision of government service on the basis of a number of regional socioeconomic factors.

Additionally, there is evidence that municipal budgeting for income from fines and fees has directly contributed to police misconduct.[153] This focus on revenue generation has caused officers to dehumanize the citizens they should be serving, allowing the aggressive targeting of individuals in much the same manner as the notion of the "criminal" or "enemy soldier." In 2015, the DOJ published the results of its investigation of the police department in Ferguson, Missouri, after the highly-publicized police shooting of Michael Brown, an unarmed black man, which was followed by a militarized police response to peaceful protests.[154] The DOJ concluded "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs," noting that city officials routinely urged the Chief to generate more revenue through enforcement and that this priority was stressed heavily within the

---

[150] Mark Bevir & Ben Krupicka, *Police Reform, Governance, and Democracy in Police Occupational Culture: New Debates and Directions*, 8 SOCIOLOGY OF CRIME, LAW AND DEVIANCE 153, 163 (2007).

[151] Kelly, *supra* note 144, at 103–04.

[152] *Id.*

[153] This is not to suggest that simply providing more money to police departments will prevent misconduct. The movement to "defund" the police by reducing the size of police forces and the number and types of services they provide is gaining traction. Such measures could also reduce pressure to generate profit within police departments. *See* Sam Levin, *What does 'defund the police' mean? The rallying cry sweeping the US – explained*, THE GUARDIAN (Jun. 6, 2020), https://www.theguardian.com/us-news/2020/jun/05/defunding-the-police-us-what-does-it-mean [https://perma.cc/TCJ6-DFTH].

[154] U.S. DEP'T OF JUSTICE, JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015).

department.[155] According to the report, this focus on revenue generation had a "profound effect" on the department's law enforcement practices, causing many officers to view residents, particularly those in black neighborhoods, as "sources of revenue."[156] The report concluded that this culture influenced "all areas of policing" and was directly responsible for police misconduct and failure of supervisors to adequately address civilian complaints.[157]

2. *The Efficient Police Department*

The need to demonstrate efficient performance, whether motivated by competition for necessary resources or a public rhetoric of fiscal accountability, has led to a perverse focus on numeric targets rather than outcomes.[158] This is problematic for two reasons. First, an increased focus on performance metrics in the public sector causes a de-prioritization of community and public values, as government officials focus their efforts on meeting numeric goals instead of serving the community. An extreme example of this comes from Scotland, where an ambulance crew documented an eight-minute response time during which a patient died as a "success" and a nine-minute response time in which the patient was revived as a "failure."[159] Professor Martha Minow has noted that performance metrics generate pressure that may cause some public agencies to "deviate from their ideal purposes."[160] For example, public schools may be hyper-focused on test scores as a performance indicator at the expense of realizing other contributions to learning, such as creating a safe space.[161]

Second, an increased focus on numbers in daily job performance can lead to dehumanization of those members of the public the police are meant to protect and serve and to disproportionate targeting of low-income minorities. Police departments often evaluate officer performance based on efficiency metrics such as number of arrests made, number of citations issued, or number of calls handled.[162] This motivates officers to employ

---

[155] *Id.* at 2.

[156] *Id.*

[157] *Id.*

[158] *See* KELLY & RIVENBARK, *supra* note 142, at 5 (discussing scholars' view that NPM has created an "audit society" with a "tick box mentality").

[159] Lyndsay Moss, *8 Minutes: The Target More Important Than Life or Death*, THE SCOTSMAN (Dec. 17, 2007).

[160] Minow, *supra* note 130, at 1243; *See also* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 7–8 (2008) (suggesting that efficiency may not be the "paramount or only appropriate measure of state success" and that public values such as equality, justice, and fairness should also be measured).

[161] Minow, *supra* note 130, at 1243.

[162] *See, e.g.*, INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMM'N ON THE LOS ANGELES POLICE DEP'T vii-xxiii (1991); German Lopez, *Police Officers Explain How*

more aggressive crime control techniques and disproportionately target minority and poor communities because officers believe that the people there "have no power."[163] At best, responding to community needs is simply a box to be ticked. At worst, citizens are irrelevant or expendable in pursuit of numeric goals.

The widespread adoption of Compstat amongst police departments has exemplified this de-prioritization of the public in the name of efficiency. Compstat, a computer program that tracks and analyzes geographic patterns of crime, was first adopted by the New York Police Department in 1994.[164] It is now used in police departments worldwide and has been adapted for use by other municipal agencies.[165] Compstat ushered in a "business model and managerial philosophy"[166] focused on private sector practices of "benchmarking, assessment, and competition."[167] Under the Compstat system, precinct commanders are expected to analyze crime statistics and geographic mapping from the Compstat software to identify patterns and direct police resources to high-crime areas in the most efficient manner possible.[168] Commanders present their respective precinct's crime rate statistics to high-level officials at regular meetings.[169]

Similar to the competition generated by performance budgeting, the adoption of Compstat led to competition amongst police precincts, as commanders were regularly assessed against one another.[170] Officers and commanders reported feeling alienated by this relentless focus on metrics and efficiency.[171] The pressure created by this internal competition and the valuing of numerical targets over outcome contributed to a "mushroom[ing]" of civilian misconduct complaints against NYPD officers shortly after Compstat's adoption.[172]

High-level officials applauded the fact that Compstat enabled them to measure "success" by the reduction in the number of crime complaints rather than by the number of arrests made.[173] However, this focus on

---

They're Encouraged to Act in Racist Ways, VOX (Jul. 8, 2016), https://www.vox.com/2016/7/8/12128858/police-racism-officers-admit [https://perma.cc/8WMU-TFE4].

[163] Lopez, *supra* note 162.

[164] Katharyne Mitchell, *Ungoverned Space: Global Security and the Geopolitics of Broken Windows*, 29 POL. GEOGRAPHY 289, 291 (2010).

[165] Schwartz, *supra* note 124, at 1072.

[166] David Alan. Sklansky, *The Persistent Pull of Police Professionalism*, HARVARD KENNEDY SCH. EXECUTIVE SESSION ON POLICING AND PUB. SAFETY: NEW PERSPECTIVES IN POLICING, Mar. 2011, at 3.

[167] Mitchell, *supra* note 164, at 291.

[168] *See* Tom Steinert-Threlkeld, *CompStat: From Humble Beginnings*, BASELINE MAG. (Sept. 9, 2002), http://www.baselinemag.com/c/a/Past-News/CompStat-From-Humble-Beginnings [https://perma.cc/5E2N-P6ZC].

[169] *Id.*

[170] Mitchell, *supra* note 164, at 291.

[171] *Id.*

[172] *Id.* (citing W. Rashbaum, *Complaints Against Cops Surge 135%*, NEW YORK DAILY NEWS, April 23, 1996, at 22).

[173] *Id.* (quoting New York Police Commissioner Howard Safir from a 1997 interview: "Here in New

statistics still led to a valuing of market-like efficiency over the needs of the community.[174] In a sense, Compstat redefined police accountability in terms of fiscal responsibility. Instead of working with the community to define priorities and ensure that law enforcement efforts are meeting citizens' needs, police departments are defining "accountability" in terms of ensuring that public resources are used efficiently to combat crime.[175] This rhetoric fails to account for the flagrant abuses of power employed to achieve this crime reduction "target."

In 2013, these problems with Compstat came to light in the case of *Floyd v. City of New York*, in which the Southern District of New York struck down the NYPD's notorious stop-and-frisk program.[176] The practice of "stop and frisk" was used by police officers for decades but accelerated after the 1968 case of *Terry v. Ohio*.[177] In *Terry*, the Supreme Court declared that it was constitutionally permissible for an officer to briefly detain an individual under "reasonable suspicion" of criminal activity and to pat down the outer layer of his clothing upon reasonable suspicion that the individual is "armed and dangerous."[178] In the 1990s, the NYPD implemented a mass stop-and-frisk campaign with the stated purpose of "getting guns off the streets of New York."[179] This campaign was also linked to the crackdown on "low-level street disorder" embodied under the NYPD's order maintenance policing.[180]

Under stop-and-frisk, 4.4 million people were stopped between 2004 and 2012.[181] The *Floyd* court ultimately struck down the NYPD's stop-and- frisk policy as impermissible racial profiling in violation of the Equal Protection Clause, based largely on evidence that officers were

---

York we don't measure success of our commanders by the number of arrests they make. We measure success by the number of crime complaints they reduce. And I think by applying business principles to crime reduction and managing crime, instead of letting crime manage you, you end up with the kind of reductions that we've seen here in New York. Accountability and responsibility is probably the key to making sure that police departments are effective.").

[174] *See* Jeremy Kaplan-Lyman, *A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City*, 15 YALE HUM. RTS. & DEV. L.J. 177, 200 (2012).

[175] *See* Mitchell, *supra* note 164, at 291 (quoting NY Mayor Rudy Giuliani in a 2000 speech: "We have 77 police precincts. Every single night they record all of the index crimes that have occurred in that precinct and a lot of other data. We record the number of civilian complaints. We record the number of arrests that are made for serious crimes, and less serious crimes. It's all part of CompStat, a computer- driven program that helps ensure executive accountability."); Mitchell, *supra* note 164, at 290 (quoting Howard Safir discussing the application of business principles to crime reduction as a means of ensuring police accountability).

[176] Floyd v. City of New York, 959 F. Supp.2d 540, 562 (S.D.N.Y. 2013), *appeal dismissed*, 770 F.3d 1051 (2014).

[177] Kaplan-Lyman, *supra* note 174, at 213–14.

[178] Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

[179] CTR. ON CENTER ON RACE, CRIME AND JUST. AND JUSTICE AT JOHN JAY COLL. OF CRIM. JUST. CITY UNIV. OF N.Y.C., COLLEGE OF CRIMINAL JUSTICE, STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY: A PRIMER, 11–12 (Mar. 2010).

[180] *Id.*

[181] Floyd v. City of New York, 959 F. Supp.2d 540, 558 (S.D.N.Y. 2013), *appeal dismissed*, 770 F.3d 1051 (2014).

specifically instructed to stop Black and Hispanic youths.[182]

The Compstat process and its relentless focus on efficiency played a large role in establishing municipal liability in *Floyd*. The court found the NYPD was "deliberately indifferent" to violations of the plaintiffs' Fourth and Fourteenth Amendment rights.[183] This was largely because the use of Compstat resulted in "significant pressure to increase [officers'] stop numbers, without corresponding pressure to ensure that stops are constitutionally justified."[184] Indeed, the NYPD's use of Compstat was responsible for a 700% increase in the number of stops between 2002 and 2011.[185] The court was specifically concerned with Compstat's focus on efficiency rather than constitutionality as a measure of the quality of stops:

> Chief Esposito and other NYPD officials testified that the *quality* of UF–250s [the form used by officers to document a *Terry* stop] is also reviewed at Compstat meetings. Indeed, there was evidence that attention is paid at Compstat meetings to the quality of enforcement activity in the sense of its *effectiveness*. For example, Chief Esposito often questions commanders at Compstat about whether enforcement activity was responding to crime conditions in specific places and times. There was no evidence, however, that the quality of stops in the sense of their *constitutionality* receives meaningful review or plays a role in the evaluation of commanders' performance during Compstat meetings.
>
> Several NYPD officials conceded in testimony that Compstat focuses on effectiveness, not constitutionality. For example, Chief Esposito was asked to explain an excerpt from the Compstat meeting notes in which he is recorded as stating:
>
> > Quality on 250s[,] forget the number. 5% enforcement rate off 250s, 102 [Precinct] is the worst with enf[orcement] off 250s. A lot of it is probably training. But quality of 250 in [Queens] South has a lot to be desired.
>
> When asked by plaintiffs' lawyers whether "quality" in this passage could refer to whether stops were based on reasonable suspicion, Chief Esposito stated: "No. I think we talk more about where and when. Does it match up with the crime picture? That's what is paramount." None of the excerpts from the Compstat meeting notes regarding UF–250s include a discussion of racial profiling or use the term reasonable

---

[182] *Id.* at 663.
[183] *Id.* at 602.
[184] *See generally id.*
[185] *Id.* at 591–92.

suspicion.

> Similarly, to the extent that Chief of Patrol James Hall and his staff "raise issues or concerns about the UF–250s with COs at the meetings," these relate to the effectiveness of stops and officers' basic compliance with paperwork requirements. There was no credible evidence that Chief Hall or his staff perform regular or meaningful reviews of the *constitutionality* of stops before Compstat meetings.
>
> In sum, Compstat exists to measure the effectiveness of police enforcement activities, not their constitutionality.[186]

Importantly, the *Floyd* court recognized the harm in evaluating the performance of police officers solely on the basis of numerical goals. "[I]mposing numerical performance goals for enforcement activities, without providing effective safeguards to ensure the activities are legally justified, 'could result in an officer taking enforcement action for the purpose of meeting a [performance goal] rather than because a violation of the law has occurred.'"[187]

Thus, police departments respond to imposed scarcity of resources and political and financial threat in a number of harmful ways. It may be hard to square the argument that the government cannot be motivated by the financial impact of lawsuits with the notion of police departments motivated towards misconduct by a focus on revenue generation and efficient usage of resources. It may be that the departments would respond to sanctions if they were not quite so insulated from financial responsibility by municipal budgets or insurance companies.[188] It could be that, as in the private corporate world, the imposition of financial penalty for misconduct is viewed as simply the cost of doing business. Perhaps police officials are simply responding to the political pressure imposed by higher-level decision-makers in the face of public concern with government spending and efficient usage of resources, a rhetoric of "accountability" furthered by the adoption of performance budgeting. Whatever the reason, it is obvious that there are normative concerns with prioritizing private sector efficiency values at the expense of public accountability and transparency.

Top-down accountability structures that condition funding and other incentives on efficiency-based performance metrics are undoubtedly a source of institutional vulnerability. Vulnerability theory demands that the state reexamine its use of these private sector techniques and the ways in which they contribute to unequal and abusive provisioning of police services.

---

[186] *Id.* at 593–94.

[187] *Id.* at 602 (quoting a memo from police Chief Hall).

[188] *See supra* Part II.D., for a discussion on lawsuits' empirical lack of deterrent effect.

B. The Capture of Police Resources

Alongside the shift to private sector business practices, direct corporate influence on policing practices has significantly increased. This private influence has led to abusive deployment of police at the behest of profit generation. The police departments' vulnerability to this form of capture is yet one more component of the complex ecosystem of police misconduct. Not only does constitutional litigation fail to address these complex institutional vulnerabilities, it exacerbates the problem by introducing additional corporate interests aimed at reducing the risk of litigation through insurance. The result is a police force that is accountable primarily to corporations rather than communities and a public that is unable to provide meaningful input into policing priorities or remedy harms caused by misallocation of police resources.

1. The Privatization of Policing

Enduring faith in the private sector's market-oriented efficiency has led to the increased privatization of a number of public institutions such as schools and prisons.[189] Scholars have debated several potential ramifications of this trend, including the eradication of public accountability and identity in favor of private profit and disparities in quality of service based on income.[190] These concerns are valid in the context of policing as well, though it has not yet been subjected to the same level of outsourcing as other government institutions. Nonetheless, private sector principles have changed the structure of municipal government and spaces in ways that disproportionately allow wealthy corporate interests to set the priorities of the police and ensure that police treat some citizens as mere obstacles to profit generation. Police resources are further captured by the for-profit technology companies they patronize. These private influences inhibit the public accountability and transparency that is crucial to democracy and undermine public trust in the police. Elite individuals increasingly turn toward private security firms, depriving the public police of much-needed resources, which in turn motivates aggressive policing tactics focused on revenue generation and gaining political favor.

---

[189] Minow, *supra* note 130, at 1229.

[190] *See, e.g., id.* at 1246–55; Kathy Abrams, *Three Faces of Privatization*, *in* PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY (M. Fineman, U. Andersson and T. Mattsson eds., 2017); Martha McCluskey, *Big Government Against Social Responsibility*, *in* PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY (M. Fineman, U. Andersson and T. Mattsson eds., 2017).

i. The Rise of Order Maintenance Policing

The same trope of individual responsibility motivating Section 1983's laser focus on individual punishment has led to an overall increase in punitive measures and aggressive crime control tactics. Much scholarly attention has been devoted to how this hyper-punitive mindset led to mass incarceration in America.[191] Increasingly harsh punitive measures have been justified against autonomous "criminals" who bear full responsibility for their actions, regardless of socioeconomic "excuses."[192]

A prominent example of this mindset is the order maintenance policing strategy adopted in New York City (NYC) in the early 1990s. This strategy was based on the broken windows theory of policing, which posits that crimes of "disorder" lead to more serious crimes as criminals view law enforcement's inability to deal with disorder, such as vandalism (i.e. broken windows), as evidence of weakness or indifference.[193] The adoption of this theory in NYC shifted police priorities from responding to serious crime to cracking down on disorderly behavior such as panhandling and loitering.[194] This concept of disorder was inextricably linked to poverty.[195] Thus, policing, particularly in urban areas, essentially became focused on punishing the poor under the rhetoric of individual responsibility. Indeed, scholars agree that the only way a restrained state, which lacks the ability to provide social services, can address poverty is by publicly punishing it as a symbolic representation of state power.[196]

In concert with an increased focus on individual responsibility, the rise of order maintenance policing in NYC and other urban areas was a direct result of the privatization of urban governance and spaces. The 1980s ushered in a new mode of governance for urban cities that gave corporations and banks enormous influence over day-to-day operations,

---

[191] *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 263 (2009).

[192] WACQUANT, *supra* note 191, at 3.

[193] *See generally* BERNARD HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001).

[194] Mitchell, *supra* note 164, at 290–91.

[195] *See* Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637 (1999); WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 59 (1990).

[196] *See, e.g.*, Kaplan-Lyman, *supra* note 174, at 177 (arguing that stop-and-frisk techniques act as a form of public punishment to regulate poor communities); Mitchell, *supra* note 164, at 291 (asserting order maintenance policing was "a sovereign form of control over the life and death of marginalized New Yorkers"); Christopher McMichael, *Pacification and Police: A Critique of the Police Militarization Thesis*, 41 CAP. & CLASS 115, 119 (2016) (observing that Marxist and Anarchist thinkers have long viewed police as a "repressive institution" through their general work of "protecting dominant social and economic relations, and preserving the authority of the state and market through a combination of force, administration and mobilizing ideology to garner public consent.").

including policing.[197] Under the Reagan administration, federal funding for urban development and renewal programs was drastically reduced.[198] Cities that previously had extensive control over development and the provision of social services were forced to turn to financial institutions and private investors to handle their mounting debt.[199] In turn, these corporate interests insisted on reforms such as cutting social welfare programs and privatizing government services.[200] These private influences changed the entire focus of urban municipal governance from efforts to meet the needs of the city's communities to entrepreneurial efforts focused on attracting corporations, industries, and developers.[201]

In this way, urban government became a tool not just of specific financial backers, but of all corporate interests. As a result, policing became focused on strategies to ensure the continued flow of capital. Police in NYC, for example, were routinely directed to crack down on crimes of "disorder" rather than targeting more serious crimes. Homelessness, panhandling, public intoxication, and other minor crimes were swiftly dealt with[202] because of their perceived negative impact on area businesses and potential urban development. One of the more prominent examples of corporate influence on policing occurred in 1996, when downtown business interests pressured the mayor of NYC into utilizing the NYPD to crack down on street vendors because of the congestion they created on sidewalks and the competition their products generated.[203] This campaign had nothing to do with public safety and everything to do with profit generation.

In some cases, private entities in these urban cities were explicitly granted governmental powers, including the police power. NYC's quasi-governmental business improvement districts (BID) are one such example. BID are authorized by state statute to make physical improvements to their districts and to provide "additional services required for the enjoyment and protection of the public and the promotion and enhancement of the district . . . ."[204] In 2009, there were sixty-four BID in NYC and many of them hired private security firms to police the streets with a focus on maintaining "cleaner and more orderly neighborhoods."[205] This order maintenance policing strategy matched that of the NYPD and concomitantly included the detention, arrest, and displacement of

---

[197] DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 47 (2005).

[198] JASON HACKWORTH, THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM 24 (2007).

[199] *Id.*

[200] *Id.* at 17–18.

[201] *See id.* at 17–39.

[202] *See* Mitchell, *supra* 164, at 290 ("The strong attack on multiple forms of perceived disorder in the city streets of New York between 1994 and 2001 was reflected in increased policing and anti-homeless laws, and also in higher stop-and-frisk incidents and arrest rates for misdemeanors such as unlicensed vending, panhandling, public drunkenness, and other petty crimes.").

[203] Kaplan-Lyman, *supra* note 174, at 197.

[204] N.Y. GEN. MUN. LAW § 980-c (1998).

[205] Kaplan-Lyman, *supra* note 174, at 196.

homeless people and street vendors at the behest of private profit.[206] Even more problematically, these security firms were answerable *only* to their corporate employers.[207]

Alongside shifts in governance, increased corporate influence in urban cities led to gentrification and privatization of government spaces. Police were once again deployed to support this process and clear neighborhoods and public areas of homeless people, poorer residents, and those suffering from mental illness, who were viewed by corporate real estate developers as impediments to profit.[208] This was a blatant policy shift in which the police were no longer even concerned with "crime," but rather with enabling corporate takeover of urban spaces.

Many police departments in urban areas continue to support these profit-motivated efforts. Even in rural areas, order maintenance policing tactics have been widely adopted.[209] Private profit motivation thus continues to trump public accountability and causes the disproportionate, and often abusive, targeting of low-income individuals.

ii. The Problematic Influence of Technology Companies

A more latent form of capture by private interests is that of surveillance technology companies. Disturbingly, these corporations not only have the ability to use police as a tool for profit generation, but also the ability to foreclose the accountability and transparency that is crucial to public participation in the policing process.[210] Professor Elizabeth Joh provides an example of police departments forced to maintain secrecy about surveillance practices in order to protect the profit interests of a private corporation.[211] The use of stingray technology to intercept cellular transmission could be considered a search under the Fourth Amendment, but courts and commentators are routinely prevented from conducting this analysis because technology companies, fearing market competition, have forced police to sign nondisclosure agreements that prevent them from even revealing the use of the product.[212] Similarly, vendors of software

---

[206] *See* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1199 (1996).

[207] Kaplan-Lyman, *supra* note 174, at 196–97.

[208] NEIL SMITH, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY 223–25 (1996).

[209] *See generally* Anthony A. Braga, et al., *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-analysis*, 52 J. OF RESEARCH IN CRIME & DELINQUENCY 567, 568 (2015) (collecting studies of order maintenance policing and noting that it is now a common crime control strategy).

[210] *See generally* Kaplan-Lyman, *supra* note 174, at 177.

[211] Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 101, 105–12 (2017).

[212] *Id.*

that conduct Compstat-like analysis of geographical crime patterns and other data keep their algorithms and sometimes even their data secret, preventing the public and even the police departments themselves from understanding or contributing to the policies that influence where and how police resources are deployed.[213] Once again, democratic accountability is thwarted by the disproportionate influence of private corporations on police policy.

Technology companies also have the ability to misdirect police priorities by installing and/or operating equipment, most notably red-light and school zone cameras, in exchange for a percentage of revenue from resulting citations.[214] This profit motive could result in companies pressuring officials to issue more citations or even to engage in questionable modification or interpretation of the technology. For example, officials in several municipalities were caught tampering with the yellow light time threshold to catch more offenders with red-light cameras.[215] In an extreme example of this problematic private influence, Chicago's assistant transportation commissioner was sentenced to ten years in federal prison for his role in a corruption scheme involving the city's red-light cameras.[216] The FBI found that the camera company paid over two million in "payments and perks" to bribe the commissioner to use his influence to expand the company's business.[217]

Further, there is disturbing evidence that corporations, such as Amazon, have directly influenced police communications with the public by drafting press releases and social media posts, turning the police into a corporate marketing tool for home surveillance.[218] This not only raises issues of democratic accountability, but serves to erode public trust. It becomes difficult for the public to internalize the dissemination of critical safety information when it is accompanied by a marketing pitch aimed at selling private surveillance technology. Additionally, this ironically

---

[213] *Id.* at 117–20.

[214] *See, e.g.*, Amanda C. Coyne, *Automated speed cameras in Lilburn school zone now operational*, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 23, 2020), https://www.ajc.com/news/local/automated-speed-cameras-lilburn-school-zone-now-operational/xvgbHRfYseE0aG2EDlonoN/ [https://perma.cc/M9M9-FS9Q].

[215] *See* Josh Sanburn, *Cities Have Found a New Way to Take Your Money*, TIME MAGAZINE (Oct. 14, 2014), https://time.com/3505994/red-light-camera-problems-tickets/ [https://perma.cc/A7JC-4XVS]; Eric Ross, *News 5 Investigates: Did the City of Pueblo shorten lights at red light camera intersections to generate revenue?*, KOAA NEWS5 SOUTHERN COLORADO (Aug. 9, 2018), https://koaa.com/news/news5-investigates/2017/06/15/news-5-investigates-did-the-city-of-pueblo-shorten-lights-at-red-light-camera-intersections-to-generate-revenue/ [https://perma.cc/4DXB-3E9E] (listing several cities found to have shortened yellow light time to generate more citations).

[216] 'FBI, Chicago Transportation Official Took Bribes for a Decade, FBI NEWS (Nov. 3, 2016), https://www.fbi.gov/news/stories/transportation-official-sentenced-in-red-light-camera-corruption-case [https://perma.cc/HMN2-WDY9].

[217] *Id.*

[218] Kari Paul, *Amazon's Doorbell Camera Ring is Working with Police – and Controlling What They Say*, THE GUARDIAN (Aug. 30, 2019), https://www.theguardian.com/technology/2019/aug/29/ring-amazon-police-partnership-social-media-neighbor?fbclid=IwAR3i306HVIT3_wEnZo5qSe2LgZ0E27CCEXop7YSpBHTBg6RvokBC0IHOrA [https://perma.cc/GX5W-9JAR].

promotes further privatization of police services by encouraging individuals to take law enforcement into their own hands.

iii. The Private Police

Compounding this increased private incursion, police functions themselves are increasingly privatized. There are now significantly more private security guards than police officers in the United States.[219] In 2017, U.S. Department of Labor statistics showed that there were over 1.1 million private security guards in the U.S. compared to 666,000 police officers.[220] Further research indicates that this is a global phenomenon, with over half of the world's population living in countries where security guards outnumber police.[221] Private security is an extremely lucrative business, with the global market expected to reach at least 240 billion dollars in 2020.[222] Unsurprisingly, the rate of private security employment tracks that of income inequality.[223] A 2014 study found that U.S. cities and states with the highest levels of income inequality employed the most private workers for the purpose of protecting people and property (including private security firms, police, bailiffs, prison officers, transport security, and other related occupations), a trend that is reflected globally.[224]

The proliferation of private security, particularly in residential communities, is part of a broader "secession of the successful" from public services.[225] This creates a vicious cycle in which the wealthy are less likely to fund public police (for example, by voting to increase taxes) because of their reliance on more geographically targeted private policing; the resulting deterioration of public policing then increases the wealthy's reliance on these private firms.[226] This lack of investment in public police

---

[219] Claire Provost, *The Industry of Inequality: Why the World is Obsessed with Private Security*, THE GUARDIAN, (May 12, 2017) https://www.theguardian.com/inequality/2017/may/12/industry-of-inequality-why-world-is-obsessed-with-private-security [https://perma.cc/4VKC-SGHQ].

[220] Niall McCarthy, *Private Security Outnumbers The Police In Most Countries Worldwide*, FORBES (Aug. 31, 2017), https://www.forbes.com/sites/niallmccarthy/2017/08/31/private-security-outnumbers-the-police-in-most-countries-worldwide-infographic/#5b889f93210f [https://perma.cc/QAA4-62BE].

[221] Provost, *supra* note 219.

[222] McCarthy, *supra* note 220.

[223] The income inequality level in the United States has risen steadily, reaching its highest level ever recorded in 2018. The United States' Gini Ratio, an index of income inequality maintained by the Census Bureau, has risen from .40 in 1980 to .49 in 2018, an increase of 20.6 percent. *See* U.S. CENSUS BUREAU, *Gini Ratios for Households, by Race and Hispanic Origin of Householder*, https://www2.census.gov/programs-surveys/cps/tables/time-series/historical-income-households/h04.xls [https://perma.cc/2HPQ-U8DC].

[224] Provost, *supra* note 219.

[225] David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1284 (1999) (quoting Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, §6).

[226] *Id.*

causes the problematic adoption of aggressive police tactics focused on revenue generation, such as those employed in Ferguson.[227] It may also perversely cause police to crack down on the poor in an attempt to satisfy wealthy voters who want to ensure that police are doing enough to control crime.[228] Thus, "[t]he rich will be increasingly policed preventively by commercial security while the poor will be policed reactively by enforcement-oriented public police," and "both the market and the government [will] protect the affluent from the poor—the one by barricading and excluding, the other by repressing and imprisoning."[229] This shift in strategy from crime prevention to after-the-fact enforcement is yet one more example of capture by private profit.

These private police forces present even greater problems of accountability and transparency; in some cases, they operate almost entirely outside of the law. Private security guards carry out frequent stops, searches, and interrogations, and may even have arrest powers.[230] Yet, they are often not required to reveal even statistical information about the number of people they search or detain or the circumstances and the results of such encounters.[231] Further, the United States has been slow to adopt laws regulating the private security industry. States vary widely in their statutory and administrative hiring, licensing, and training requirements. A 2015 study indicated that nine states did not have any statutory requirements for hiring private security guards.[232] Eleven states did not bar the hiring of security guards with prior felony convictions.[233] Research further indicates that in 2017, twelve states had no requirements at all for training unarmed security personnel and fourteen states had none for armed security personnel.[234]

Even Section 1983's remedy is often not available to address misconduct by these private actors due to the application of the complicated "state action" doctrine. This doctrine consists of a number of rules, differing by jurisdiction, that attempt to delimit the boundaries between private and state function. In the context of policing, courts consider indicia of "official function" to determine whether an off-duty policeman was acting under color of law.[235] For example, they consider whether the officer was wearing his uniform or badge, invoked the authority of the police during the encounter, or engaged in secondary

---

[227] *See supra* Part III.A.2, discussing the efficient police department.

[228] *See* Sklanksy, *supra* note 225, at 1284.

[229] *Id.* (quoting David H. Bayley & Clifford D. Shearing, *The Future of Policing*, 30 L. & SOC'Y REV. 585, 594, 602 (1996)).

[230] *Id.* at 1179–80.

[231] *Id.* at 1278–79.

[232] Michael S. Klein and Craig Hemmens, *Public Regulation of Private Security: A Statutory Analysis of State Regulation of Security Guards*, 29 CRIM. JUST. POL'Y REV. 891, 903 (2018).

[233] *Id.* at 897–98.

[234] Robert McCrie, *Private Security Services Regulations in the United States Today*, 41 INT'L J. OF COMPAR. & APPLIED CRIM. JUST., 287–304 (2017).

[235] *See, e.g.*, Chapman v. Higbee Co., 319 F.3d 825, 834 (6th Cir. 2003); Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980); Bouye v. Gwinnett Cnty., 265 F.3d 1063 (11th Cir. 2001).

employment through a contractual arrangement with the police department.[236] It is less clear if a claim would be allowed against a purely private security guard. Courts have allowed these challenges where private guards were granted full police powers through state statute or official deputizing function.[237] However, the Supreme Court has explicitly refused to express an opinion on whether policing is an exclusive function of the state.[238] This relegation of policing to a private unregulated sphere without constitutional recourse is a troubling abdication of state responsibility to the private sector, accountable primarily to wealthy and corporate interests.

The role of police in America, particularly in urban areas, has thus increasingly shifted from protection of public safety to protection and enhancement of private capital. Aggressive policing tactics aimed disproportionately at lower income minorities are directly motivated by the profit interests of private corporations. This further dehumanizes citizens as corporate obstacles, giving rise to unlawful detentions, arrests, searches, and brutality. Celebration of the private sector has also shifted police accountability from public community orientation to private profit motivation. Corporations are increasingly influencing police policies and priorities in non-transparent ways that erode public trust and further the contentious relationship between police and the citizens they are meant to serve. We should hardly be aiming to treat a vital public service like policing as something that can be bought or sold to the highest bidder.

2. Constitutional Litigation as State Capture

Constitutional litigation has, perhaps inadvertently, increased this problematic corporate influence on police conduct and priorities. The threat of individual financial liability for misconduct forces police departments to provide financial indemnification in order to attract and retain officers. The pressure to adopt widespread indemnification is further intensified by the enormous political influence of police unions, which are often perceived as roadblocks to justice because of their powerful advocacy for individual officers in the face of disciplinary threats.[239] Thus, this perceived risk of litigation has motivated virtually every police department in the United States to engage the services of private for-profit companies that offer some form of insurance or risk management

---

[236] *See, e.g.*, Chapman, 319 F.3d at 834; Traver, 627 F.2d at 938; Bouye, 265 F.3d at 1063.

[237] *See* Sklanksy, *supra* note 225, at 1236–39 (discussing Griffin v. Maryland, 378 U.S. 130 (1964)).

[238] *Id.* (citing Flagg Bros. v. Brooks, 436 U.S. 149 (1978)).

[239] *See* Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 US.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 773-74 (1993) (discussing political power of police unions).

strategy.[240] These companies in turn have a dramatic, disproportionate, and often secretive influence on the development and prioritization of police policy. Further, their proposed risk management strategies perversely motivate police misconduct by dehumanizing citizens and officers as sources of "risk" or causing police to avoid interaction with "risky" citizens completely, which is an under-provision of resources for which citizens are currently without remedy.

The concept of constitutional litigation as state capture by corporate interests is not entirely new. Some scholars have explored the ways in which litigation against the government for injunctive relief effectuates this sort of capture by allowing corporations, special interest groups, and elite individuals with counter-majoritarian preferences to shape policy.[241] Those who have the ability to bring these lawsuits can use the courts to shape law in a way that is arguably outside of the customary political process, even constructing the very meaning of the constitution. This constitutional capture is currently happening most frequently in the First Amendment arena, where businesses are increasingly changing the meaning of protected "speech" to include such things as dissemination of purely factual information in advertising and expenditure of money on campaign contributions.[242] This corporate takeover is happening in plain sight as it changes the way the courts, administrators, legislators, and even the public interpret what we consider to be our fundamental First Amendment freedoms. The resulting policy shift exacerbates economic inequality by further entrenching the interests of the wealthy.

In contrast, the capture caused by the imposition of damages in constitutional litigation for police misconduct remains hidden behind mostly sympathetic plaintiffs and stories of individual retributive justice. As opposed to injunctive relief, which even when applied narrowly appears to have farther-reaching social implications, monetary damages are inherently aimed at redressing harm to individuals. This individual focus tends to obscure litigation's role in the ecosystem of police misconduct. Behind the scenes, the resulting threat of fiscal liability has created an avenue for even more corporate influence on police policy, which in turn leads to more misconduct.

In a recent article, Professor John Rappaport took on a novel examination of the role that private insurers play in regulating public police through the provision of law enforcement liability insurance.[243] Municipalities typically insure against litigation arising from police misconduct by either purchasing insurance from a commercial carrier, insuring through an intergovernmental risk pool ("pool"), typically a

---

[240] *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1559 (2017).

[241] *See, e.g.*, ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018); Amanda Shanor, *The New Lochner*, WIS. L. REV. 133 (2016).

[242] Purdy, *supra* note 133, at 195; Kuhner, *supra* note 133, at 398–401 (2011).

[243] Rappaport, *supra* note 240, at 1539.

nonprofit organization formed by a group of local government entities, or self-insuring by allocating a portion of the municipal budget to payout of judgments and settlements.[244] It is estimated that a majority of municipalities purchase some form of commercial police liability insurance.[245] Generally, small municipalities join pools, midsize entities either join pools or use commercial carriers, and larger municipalities self-insure.[246] Rappaport shows that even where municipalities are self-insured or use pools, private parties are inevitably involved through the use of private contractors, supplemental commercial coverage, or reinsurance.[247]

Insurers, motivated by financial incentive to reduce monetary loss, thus seek to minimize risk of liability in two ways: underwriting and loss prevention.[248] Through underwriting, insurers wield influence by charging higher premiums for those deemed riskier, refusing to insure at all, or requiring the adoption of specific policies as a precondition.[249] In some cases, the unavailability of insurance has actually forced entire police departments to shut down.[250] Through loss prevention efforts, insurers also wield enormous influence over the police in a number of ways: reviewing and writing policy, providing model policies, subsidizing subscriptions to policy-writing services, providing education and training, conducting compliance audits, recommending personnel changes, and even mandating structural reforms in extreme cases.[251] Much like the corporations involved in First Amendment litigation, insurers are even constructing the meaning of the Constitution through educational materials interpreting Fourth Amendment jurisprudence.[252] Further, these insurers dramatically shape policy by prioritizing constitutional rights in an attempt to minimize the risk and impact of litigation.[253]

Another player in the litigation avoidance space is Lexipol, a private corporation that provides standardized law enforcement policies and training. More than three thousand agencies in thirty-five states contract with Lexipol to author policies.[254] While Lexipol policies cover a vast spectrum of law enforcement behavior, Lexipol's main focus is not on

---

[244] *Id.* at 1559.

[245] Ouss & Rappaport, *supra* note 2, at 9.

[246] Rappaport, *supra* note 240, at 1159.

[247] *Id.* at 1566–70.

[248] *Id.* at 1554–55.

[249] *Id.*

[250] *See id.* at 1556 ("A number of municipalities shut down their police forces entirely [during the 1980s insurance crisis] rather than operate without insurance."); Liz Farmer, *Police Misconduct Is Increasingly a Financial Issue*, GOVERNING (Jun. 20, 2018), https://www.governing.com/topics/finance/gov-police-misconduct-growing-financial-issue.html [https://perma.cc/X5NX-J42F] ("[C]ities in California, Illinois, Louisiana, Ohio, Pennsylvania and Tennessee have in recent years opted to disband their police departments after losing coverage.").

[251] Rappaport, *supra* note 240, at 1573–88.

[252] *Id.* at 1581.

[253] *Id.* at 1582.

[254] Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891, 894 (2018).

helping to meaningfully guide officer discretion or improve decision-making. Rather, Lexipol's stated goal is to "protect" law enforcement agencies from litigation by providing "legally defensible content."[255]

While the overall effect of policies promoted by insurers and Lexipol could be positive in reducing police misconduct, it is important to note that profit generation undoubtedly motivates policy development. Indeed, Rappaport gives nod to the "perverse" outcomes that could ensue when an insurer's self-interest in minimizing litigation is at odds with social good.[256] And Eagly and Schwartz highlight a disturbing example in which Lexipol's founding partner published an article discouraging law enforcement agencies from adopting a National Consensus Policy on the Use of Force developed by prominent law enforcement groups because the policy's usage of the word "shall" could increase legal liability.[257]

Once again, this outsized corporate influence inhibits democratic accountability. Rappaport acknowledges the argument, made presciently by Professor Peter Schuck in 1983, that constitutional litigation could cause insurers to gain a "politically and morally" objectionable influence over government policy and personnel decisions.[258] He does away with this argument in part by asserting that retention of outside "help" through insurance agencies was a "choice" made by the people through their democratically elected representative.[259] This argument, however, ignores the very real budgetary and other environmental constraints imposed on these "choices." Government actors faced with the threat of legal liability, minimal funding due in part to privatization, and myriad organizational factors contributing to misconduct may have no other option but to purchase insurance or, disturbingly, to contract with third parties to provide policing. Police departments additionally may be forced to use services like Lexipol because they lack the necessary resources to engage in policy writing and revision, a fact that Lexipol also emphasizes in its advertising.[260] The rhetoric of autonomous actors freely choosing to engage the services of private corporations is entirely inapposite here and can hardly justify an assertion that private insurance is the will of the people.

This additional corporate influence on police policymaking also inhibits transparency. It has long been noted that publicly available lawsuit data does not give an accurate picture of police misconduct litigation

---

[255] *Id.* at 895 (quoting About Lexipol, LEXIPOL, http://www.lexipol.com/about/ [https://perma.cc/9SR5-Q8VT]).

[256] Rappaport, *supra* note 240, at 1599 (providing an example of the "blue wall of silence," which is harmful to society as it prevents sanction for misconduct but might be favored by an insurance company because it increases the difficulties in mounting a legal challenge). Additionally, refusal to insure a "bad risk" police department minimizes loss to the insurer but does nothing to help society if the police department continues to operate and engage in misconduct.

[257] Eagly & Schwartz, *supra* note 254, at 926–27.

[258] Rappaport, *supra* note 240, at 1603–04.

[259] *Id.* at 1605.

[260] Eagly & Schwartz, *supra* note 254, at 919–20.

because so many claims are settled privately.[261] Scholars have begun to recognize this and try to mine insurance claim data to fill in the gaps. However, it is distinctly problematic that a private insurance company would have better access to data on police misconduct than the public, particularly where scholars have documented difficulties in obtaining such information from insurance companies.[262] And, as with private surveillance technology companies, concerns about market competition have motivated Lexipol to remain secretive about its process for developing policy and insist that its policies, even when modified by subscribers, not be shared with other non-paying jurisdictions.[263] Thus, the public is denied the opportunity to provide input during the policy-making phase and police departments are denied the crucial opportunity to collaborate and benefit from each other's policy improvements.

Like efficiency-focused business strategies that reposition citizens as sources of revenue to the police institution,[264] the increased emphasis on litigation avoidance repositions citizens as sources of "risk." Rappaport observed that this repositioning might be beneficial insofar as police officers may be more receptive to discussing police misconduct in terms of financial loss rather than any moral or legal prohibition against wrongdoing.[265] Aside from the normative concerns with representing police misconduct in purely economic terms, framing the problem this way could surely give rise to the same abusive behavior caused by dehumanizing citizens as revenue sources or enemies deserving of punishment.

Risk management strategies not only lead to legally actionable police misconduct, they also serve to over-deter, such that citizens deemed "risky" may not receive vital police protection. While empirical evidence suggests that officers are not over-deterred by the threat of personal financial liability,[266] insurers and corporations providing risk management services undoubtedly cause over-deterrence by directly influencing not only how the police perform their jobs, but where they perform their jobs. Police officers may be encouraged to avoid patrolling predominantly minority neighborhoods where the "risk" of misconduct is statistically likely to be higher. Perhaps less police presence in these neighborhoods is socially beneficial because it reduces misconduct, but this circular logic does nothing to address the injury caused when people in these

---

[261] *See, e.g.*, Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 760, 775–76 (2004) (discussing gaps in available data on tort claims against police due to, *inter alia*, discoverable sources not containing details of settlement terms, claims settling before a complaint is filed, and provisions requiring that settlements remain confidential).

[262] *See* Ouss & Rappaport, *supra* note 2, at 9 (noting difficulties in obtaining insurance data).

[263] Eagly & Schwartz, *supra* note 254, at 939–40.

[264] *See supra* Part III.A.2, discussing the efficient police department.

[265] Rappaport, *supra* note 240, at 1547.

[266] *See supra* Part II.A, discussing the myth of the "bad apple."

neighborhoods do not receive the benefit of even minimal police protection or response to crime. The government should not leave a community to fend for itself even if this seems like the only viable alternative to police misconduct. Worse yet, there is no recognized constitutional right to even minimal police protection.[267] This leaves citizens with no legal remedy for harm caused by over-deterrence.

Additionally, risk management strategies may treat officers themselves as sources of risk to the institution. This further serves to alienate officers from their police departments, increasing the likelihood of non-compliant behavior.[268] More importantly, this positioning obscures the vulnerabilities of the police institution and once again abdicates state responsibility to promote resilience by focusing instead on protecting the police from the harmful actions of individuals.

Thus, corporate and wealthy private influences dictate police policy and priorities in a number of ways, including encouraging over-enforcement of minor crimes, in an attempt to clear disorder from commercial and gentrified districts, facilitating potentially illegal surveillance, and causing the use of aggressive political and revenue-generating tactics by underfunding. Section 1983's remedy does little to address this capture, particularly in the area of private policing, and actually contributes to the problem by involving additional corporate influences that exacerbate misconduct and over-deter police from providing services to "risky" communities. In turn, courts' refusal to recognize a constitutional right to even minimal police protection leaves citizens with no remedy for the absence of police protection that was ironically caused in part by constitutional litigation.

A proper remedy must take into account the ways in which the state and its institutions are vulnerable to corporate capture and the effects of such capture. We must recognize the financial constraints, political pressure, and numerous other organizational factors constraining institutional choice regarding the extent of private involvement in policy matters. Further, a solution built on vulnerability theory must address the socioeconomic inequalities in provision of police services arising from an outsized corporate influence bent on criminalizing the poor and avoiding the risk of litigation at the expense of public transparency and accountability. This includes remedying both over-enforcement and over-deterrence that leaves some areas lacking in state protection. We must also recognize the vulnerabilities inherent in private corporations by nature of their dependence upon profit generation.[269] Further, the state cannot be allowed to abdicate responsibility for the resilience of its citizens by refusing to regulate the conduct of private police forces or focusing on minimizing the risk posed by individual officers and citizens.

---

[267] *See* Sklanksy, *supra* note 225, at 1280-87 (discussing law's refusal to recognize a guarantee of "minimally adequate" policing).

[268] *See supra* Part III.C, listing organizational factors that serve to alienate police officers.

[269] *Injury, supra* note 96, at 69.

C. The Vulnerable Apple

In order to address the failure of the police to provide the resources needed to achieve public safety in a just manner, the responsive state must also tend to the needs of the vulnerable police officers. Individual officers face a variety of social, economic, cultural, and organizational constraints that can lead to actions deemed "misconduct."

The foremost concern of police officers is most likely their physical safety. Policing can be dangerous, and each encounter is fraught with the possibility of physical violence or even death. Indeed, the Federal Bureau of Investigation (FBI) reported that in 2018, 106 United States law-enforcement officers were killed and 58,866 officers were assaulted in the line of duty.[270] This legitimate fear of death can cause officers to believe that a measure of violence is warranted in order to protect themselves and properly perform their jobs.

The stress caused by constantly fearing for their physical safety can contribute to a "cognitive strain" that impairs officers' decision-making abilities.[271] Professor Joanna Schwartz highlighted the presence of this type of strain in high-stress encounters such as traffic stops, which require officers to face the possibility of split-second decisions about whether to use force if the vehicle occupant is armed.[272] The presence of this strain "heightens implicit biases and makes error more likely."[273] Thus, reducing the frequency with which officers need to make these split-second judgments, by eliminating traffic stops, for example, should be a high priority of any police reform movement.[274]

Like any other employee, police officers are also concerned with their personal financial stability. As such, they may work long hours at multiple jobs and/or constantly fear the threat of unemployment. Fatigue caused by working overtime or taking a second job to make ends meet can impair an officer's decision-making abilities and lead to misconduct. "Studies have found that fatigued officers 'were significantly more likely to associate African-Americans with weapons,' received more complaints, were more likely to be involved in use of force incidents, and were more likely to commit ethics violations."[275]

---

[270] FBI Uniform Crime Reporting Program, *Law Enforcement Officers Killed and Assaulted, 2018*, https://ucr.fbi.gov/leoka/2018 [https://perma.cc/3KXE-YQNS].

[271] Joanna C. Schwartz, *Systems Failures in Policing*, 51 SUFFOLK U. L. REV. 535, 546-48 (2018).

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *Id.* at 550 (citing Mike Maciag, *The Alarming Consequences of Police Working Overtime*, GOVERNING (Oct. 2017), http://www.governing.com/topics/public-justice-safety/gov-police-officers-overworked-cops.html [https://perma.cc/9VVL-STEX]); *see also* U.S. DEP'T OF JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEP'T 72 (2011) (finding New Orleans Police Department's paid detail system, whereby officers could accept secondary employment, "facilitates a system in which officers are so fatigued that it compromises their own safety, impacts their long term

Further, officers may view every encounter with a citizen as a potential threat of discipline or termination. Public scrutiny in the wake of highly publicized instances of police brutality and police killings further this perception of threat. Officers who have been sued for misconduct have reported heightened stress and lower morale as a result.[276] Ironically, as detailed in Part II.B., this fear of discipline may actually cause more misconduct, as it contributes to the "us versus them" mentality that allows police officers to view themselves as soldiers fighting wars within the community.[277] Further, it has been shown that the threat of discipline and liability causes officers to hide or misrepresent information, which hinders departmental performance improvements.[278]

While adequate supervision and training is likely not the panacea for all police misconduct, it certainly must play a role. For a variety of reasons, supervisors may implicitly or even explicitly condone misconduct by failing to discipline or train officers. Police officers must already exercise an enormous amount of discretion in street-level encounters. Lack of supervision and training only exacerbates the strains of decision-making.

The individual concerns facing officers have contributed to the development of a hyper-aggressive and insulated police culture.[279] This creates a vicious circle, ensuring that new officers actively perceive the threats they face and view the public as the "enemy" from day one. For example, it has been noted that the "dominant narrative" in policing is that "routine traffic stops are fraught with grave and unpredictable danger to the police," despite the fact that officers are very rarely injured or killed following routine traffic stops.[280] Additionally, much has been written about the "Blue Wall of Silence" that pervades police culture. Officers are indoctrinated into this code of unequivocal group loyalty that, at best, prevents them from reporting other officers' misconduct and, at worst,

---

well-being, and impacts the quality of their work").

[276] *See* Willard M. Oliver, *Depolicing: Rhetoric or Reality?*, 28 CRIM. JUST. POL'Y REV. 437, 450 (2015) (one third of officers in depolicing study reported concerns about stress and change in perception by peers as a result of lawsuits); Frank F. Verdik, *Perception is Reality: A Qualitative Approach to Understanding Police Officer Views on Civil Liability* 14-15 (Coginta and DCAF Working Paper Series, Working Paper No. 49, 2013) (officers in civil liability study reported potential stress, mental exhaustion, loss of confidence and passion for job and isolation as ramifications of lawsuit).

[277] The adoption of military rhetoric by the political elite, such as declaring a war on drugs, urban crime and terrorism, and concomitant militarization of the police also reinforces this notion. *See* Daryl Meeks, *Police Militarization in Urban Areas: The Obscure War Against the Underclass*, 35 THE BLACK SCHOLAR 36–37 (2007); *But see* McMichael, *supra* note 196, at 115 (arguing that police have always been militarized in a sense, as they are engaged in social warfare with the public to maintain the dominant order under capitalism).

[278] Schwartz, *supra* note 126, at 886.

[279] Scholars wishing to transcend the narrative of individual responsibility have long focused on the ways in which police organizational culture influences the behavior of individual officers. *See* Armacost, *supra* note 14, at 455 (exploring how reform efforts focus too much on "misbehaving individuals" and too little on "an overly aggressive police culture that facilitates and rewards violent conduct."); Gilles, *supra* note 14, at 31 (advocating for focus on the institution rather than the individual).

[280] Schwartz, *supra* note 271, at 547 (quoting Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 638–39 (2019)).

causes them to be complicit or to engage in misconduct in an attempt to protect other officers from perceived threats or enact vengeance for perceived injuries.[281] Thus, officers wishing to avoid systemic alienation are almost required to adopt an aggressive hyper-masculine attitude that leaves little room for empathy and meaningful engagement with the communities they serve.

Thus, a vulnerability analysis of police misconduct reveals a number of institutional vulnerabilities that must be properly addressed by the state in order to remedy the problem. Unfortunately, there is no room in Section 1983's morality tale for consideration of this non-exhaustive list of socioeconomic and organizational factors affecting police conduct. It is simply not sufficient to continue to position the remedy as one involving individual actors. Police misconduct is a systemic issue affecting all of society and, as such, requires a more comprehensive solution.

IV. BEYOND ANTI-DISCRIMINATION

When structural analysis of police misconduct is undertaken or rhetorically demanded, the primary concern is remedying systemic racism. In the litigation context, this might be accomplished through Fourteenth Amendment equal protection claims. Unfortunately, equal protection doctrine is also highly individualistic and has proven inadequate to address structural causes of misconduct in absence of explicit evidence of racially discriminatory intent. Further, the limitations of formal equality and characterization of injury as state intrusion inherent in our anti-discrimination framework prevent us from recognizing the social injury caused by the state's failure to justly provide public safety to all.

A. Individualized Equal Protection

Like Fourth Amendment claims challenging police misconduct, equal protection claims suffer from a relentlessly individualistic focus. The Supreme Court has made clear that an equal protection claim *requires* a showing of discriminatory purpose and effect.[282] Thus, courts predominantly analyze individual discriminatory intent instead of disparate impact or group injury.[283] This requirement has made it notoriously difficult to challenge racial profiling by law enforcement.[284]

---

[281] Simmons, *supra* note 16, at 382–86.

[282] Washington v. Davis, 426 U.S. 229 (1976).

[283] Obasogie & Newman, *supra* note 20, at 1498–99.

[284] J. Michael McGuinness, *State and Federal Standards Require Proof of Discriminatory Intent in Ethnic Profiling Claims*, 75 N.Y. ST. B.J. 29, 33 (2003) ("Ethnic Profiling claims are generally difficult

Further, limitations in standing doctrine, originally imposed by the *Lyons* court to reject a challenge to the LAPD's use of chokeholds, ensure that individual plaintiffs can rarely obtain injunctive relief for systemic racial profiling because they must prove the likelihood of future *individual,* rather than collective, injury.[285] And even if monetary damages were sufficient to remedy the resulting harm, heightened proof requirements for establishing a municipality's "pattern or practice" of racial profiling also serve to foreclose systemic relief.

Thus, while this article has highlighted a number of ways in which minority individuals and communities are disproportionately impacted by profit-driven policing practices, existing equal protection doctrine is insufficient to adequately remedy the problem in the absence of explicit racially discriminatory intent.[286]

B. From Individual to Social Identity

Advocating for an increased focus on disparate racial impact rather than individual discriminatory intent or injury within the equal protection framework would allow for a more systemic analysis of police misconduct in some situations. However, our anti-discrimination framework, rooted in the concept of "negative rights," concerned primarily with formal equality, and centered on identity characteristics of discrete segments of the population, would still be inadequate to address many of the institutional vulnerabilities described in Part III, which are largely a result of profit-motivated policing.

The notion of equality under the U.S. Constitution is fundamentally an anti-discrimination principle that aims to ensure only sameness of treatment, even where the state is treating all individuals badly.[287] This privileging of formal over substantive inequality ensures that equality will always take a back seat to liberty. Constitutional challenges to unequal treatment completely ignore the socioeconomic constraints on realization of equal opportunity and unequal positioning within society.[288] The application of differing levels of constitutional scrutiny based on social classification also serves to afford even less "equal protection" to those outside the categories of race, ethnicity, or gender[289] (not to mention the

---

to establish because of the ill-defined intent-based discrimination standard.").

[285] *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

[286] The *Floyd* case, *discussed supra.* Part III.A, is the most notorious example of a successful equal protection challenge to racial profiling. There the court inferred racially discriminatory intent in NYPD's stop-and-frisk program from evidence of an unwritten policy that officers should focus their stops on the "right people, the right time, the right location," where officers and the Commissioner himself routinely verbally identified "the right people" as black and Hispanic youths. Floyd v. City of New York, 959 F. Supp. 2d 540, 602–606 (S.D.N.Y. 2013), appeal dismissed, 770 F.3d 1051 (2014).

[287] Albertson Fineman, *supra* note 107, at 1727.

[288] *Id.* at 1728.

[289] *Id.*

inherent problems in categorizing individuals in increasingly fluid classifications). This leaves little room for claims of unequal treatment by the police on the basis of, for example, economic status or disability.

In contrast, a vulnerability analysis examines social identities within institutions and relationships rather than individual characteristics such as sex or race. It places the focus on socially constructed relationships that are inherently unequal, such as those between police officers and citizens, and allows us to examine the structural privilege and disadvantage enveloped in these relationships. This analysis further places the universality of human vulnerability at center stage while still recognizing that people are differently situated, in part, because of these identity characteristics.

Looking beyond individual characteristics allows us to examine social and economic problems that "escape the lines drawn around discrete populations" and address them across categorical differences.[290] Importantly, this allows us to move past the narrative that police misconduct is solely a product of racism (though of course that plays a role) and to adequately consider the many ways in which private corporate influence and other factors addressed here have contributed to the problem.

C. State Responsibility for Social Injury

The structural problems described in Part III are not individual ones. Rather, they are outgrowths of the state's failure to adequately respond to the needs of individuals and society. Vulnerability theory shifts our perspective of police misconduct as overreach of an ideologically restrained state to a perspective of police misconduct as a failure of the responsive state to justly provide the resources needed to achieve resilience. Approaching policing from this positive-rights perspective accurately reflects the government's obligation to the citizenry as a whole and our collective responsibility to ensure public safety. This is not to suggest that we "take the law into our own hands,"[291] but rather that we all recognize our role in actively monitoring and correcting the state when it does not provide public safety resources equitably.

The failure of the state to account for inequalities in policing is thus foremost a social injury rather than an individual one. Recognition of this collective injury does not necessitate minimizing the varying degrees to which this harm is felt by individuals, particularly those of color, but rather

---

[290] *Id.* at 1750.

[291] Sklanksy, *supra* note 225, at 1188 (identifying a rhetorical paradox in the common notion that it is wrong to "take the law into your own hands" through vigilantism but it is socially acceptable to engage in self-defense (i.e. through hiring private police)).

to elevate the consideration of social good in the injury analysis. Nor should the injury caused by inadequate provision of police resources be understood as a financial one resulting from ineffective usage of public funds.[292] Rather, this injury stems from our shared vulnerability by nature of a physical embodiment that renders us dependent upon the state for some degree of physical safety.

Shifting the focus from minimal government interference to positive government obligation also affords us remedies that were previously unavailable. Importantly, we could address the injury resulting from government inaction.[293] Examples of inaction in the policing context include officers engaging in "depolicing" due to fear of litigation, political pressure, financial constraints, or perceived danger, leaving communities without even basic protection against crime, department officials deciding not to enforce a law that they believe to be unconstitutional[294], and officers failing to conduct proper investigations before effectuating an arrest. We could also move beyond the increasingly blurry dividing line of public and private function that enables the almost completely unfettered operation of private security forces.

We will never see a significant reduction in police misconduct if we continue to view the problem as an intrusion on individual or even group rights. The adversarial nature of this framing prevents us from realizing our collective responsibility for public safety and calling on the state to affirmatively address the myriad factors that result in inadequate and unequal provisioning of safety resources. A vulnerability approach places responsibility firmly on the state rather than individual litigants. It further allows us to consider institutional and state vulnerabilities in the development of a proactive systemic solution that truly achieves social justice in the realm of policing.

V. CONCLUSION

Income inequality is at an all-time high in our society, while elite individuals and corporations increasingly exert outsized influence over government response to poverty and protection of capital. As a result, policing as a public responsibility has become focused primarily on punishing the poor as a means of social control while the rich purchase their own safety. Enforcement priorities have shifted from protection of public safety to removal of "obstacles" to profit maximization. Citizens and communities have been dehumanized as sources of income or risk, or

---

[292] Though such an argument might make the concept more palatable to fiscal conservatives.

[293] *See supra* Part II.C.3, discussing the restrained state.

[294] Dominick Mastrangelo, *'Unconstitutional': Virginia sheriff says he won't enforce Democrats' proposed gun laws*, WASHINGTON EXAMINER (Jan. 20, 2020), https://www.washingtonexaminer.com/news/unconstitutional-virginia-sheriff-says-he-wont-enforce-democrats-proposed-gun-laws [https://perma.cc/ZBS8-ZXX8].

efficiency-oriented performance targets.

Rather than addressing this insidious corporate influence, the "remedy" of constitutional litigation under Section 1983 adopts the same motivating rhetoric and concomitantly promotes ideals of individual responsibility and wealth maximization as appropriate "solutions." This litigation paves the way for further misconduct by introducing additional corporate influence focused on litigation avoidance. Public discourse further promotes this narrative of individual economic culpability. Police misconduct is not simply the result of individual officers behaving badly in voluntary market-governed transactions with consumers. Individual punishment and economic retribution are piecemeal "solutions" that foreclose the quest for proactive systemic relief.

Vulnerability theory allows us to move beyond a focus on individual privacy rights and, instead, address police misconduct as a failure of the state to provide public safety resources in a just manner. Recognizing the social injury arising from profit-motivated policing allows us to properly place the burden for addressing police misconduct on the state rather than individual bad actors. In order to achieve true social justice, we must address the complex institutional and personal vulnerabilities and inherent power imbalances giving rise to police misconduct, only some of which have been explored in this article. By examining police misconduct through a vulnerability lens, this article takes the first step towards reimagining a remedy that moves beyond constitutional litigation's relentless focus on the self-interested individual and unites us in our collective responsibility for public safety.