HOW CIVIL RIGHTS LAWSUITS HAVE
IMPROVED AMERICAN POLICING

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(note: This is Chapter 7 of a book manuscript titled To Protect Life: Readings on Police Accountability, currently under review with a university press)

Abstract: When the U.S. Supreme Court decided in Monell v. Department of Social Services (1978) that municipal agencies such as police departments could be sued when a “custom, policy, or practice” violated the Constitution, it created a powerful device for accountability to the law. Analyzing a database of lawsuits brought against police departments prior to Monell and comparing them to records of lawsuits taken from the post-Monell files of the nation’s leading expert witness on police practices, the author concludes that great improvements evident nationwide over the past three decades -- in police use of force, response to domestic violence, and internal discipline -- would not have occurred but for this litigation. But litigation alone did not accomplish this improvement. The operation of the insurance industry in conjunction with “constitutional tort” lawsuits, not any federal administrative agency and not remedies such as the exclusionary rule, is primarily responsible for the standardization of police procedures under the litigation regime.

In 1978, when the U.S. Supreme Court decided Monell v. Department of Social Services, only plaintiffs’ lawyers and in-house counsel for government agencies realized how important it was. Even fewer considered how it might be apply to local police departments specifically. Now, thirty years later, private lawsuits are understood to be a very powerful device for holding police departments and their individual officers accountable to the United States Constitution. In fact, “constitutional torts” have had as much or more influence on police policy and practice – and will continue to have such effect -- than the operation of such well-known but now largely neutralized cases as Mapp v. Ohio or Miranda v. Arizona. This development is good for the public, good for government, good for the Constitution, and especially good for policing.
The goal of this chapter is to describe how constitutionally-based private litigation against the police has developed over the past three decades and to determine its impact, an examination which ultimately leads to the conclusions just stated. The goal is not to provide a doctrinally-based examination of Monell caselaw. (For that, see Collins (1997) or Avery and Rudovsky (1983) or any of the yearly litigation updates from Pratt and Schwartz (1993 – ongoing) and law review articles cited there.) Legal literature is concerned with cases and their doctrinal interpretation, while empirical research determines the actual effects of the cases. Whether those effects are good or bad is a matter of opinion, of course, but at least it is empirically informed opinion – and the conclusion that private lawsuits against the police have improved policing significantly is such an opinion.

This chapter has four parts. The first is a quick overview of Monell caselaw in lawsuits against police departments, describing in very general, non-legal terms the holding in that case and the impact it was expected to have.

The second section describes litigation against the police both before and after Monell was decided, determining what happened when private plaintiffs sued police and their employers for particular types of alleged misconduct. A database drawn from an insurance company’s records describing police litigation prior to Monell is analyzed as an illustration of pre-Monell circumstances. It portrays the earliest days of private litigation against the police, showing the initial impact of Monell and how it changed the legal landscape so as to open the way for the constitutional tort regime that followed.

The third section covers that post-Monell landscape: how police misconduct litigation spread and deepened so as to affect -- and ultimately improve -- local police
practices. The primary conduit for this development was the legal requirement under section 1983 that aggrieved plaintiffs must prove that the police department engaged in an unconstitutional “custom, policy, or practice.” The description of such litigation and how it spread, as well as its effects, is derived from the private files of James J. Fyfe, who, during the period 1982 – 2005, was the nation’s leading expert witness in litigation alleging abuse of force. (New York Times 2005; see also www.towntopics.com/nov1605/obits.html accessed July 2007)

The fourth section explains why this litigation has been so useful and powerful as an accountability device. The most important reason is that insurance companies demanded that police improve their policies and practices so as to adhere to constitutional requirements and thus avoid monetary payouts to injured citizens, and another is that section 1983 court cases were reported in the media – impossible, of course, in the days when police were immune from suit. As a result, police department policies have changed so as to meet constitutional requirements, have become more standardized nationwide, and are more carefully applied throughout police organizations through better training and supervision. This has all been accomplished in a way that should please adherents of free-market, non-regulatory ideology: since private plaintiffs drive the system, their lawyers act as “private attorneys general” from law firms and not government bureaucracies, the movement is completely decentralized and not directed from the federal government, and the market in insurance has provided a natural regulator and spur for increased innovation.

The Monell Case and The Legal Structure It Changed
In 1978, the United States Supreme Court held that local governments were “persons” under section 1983 of the United States Code¹ and therefore open to lawsuits charging violations of the Constitution. Whether the Court contemplated that the private lawsuit, “prosecuted” by plaintiffs’ attorneys, would become a tool of significant governmental reform is speculative.² The case ended the immunity from lawsuits that municipalities had previously enjoyed under the ancient prohibition against suing the government: “the king can do no wrong.” People whose constitutional rights had been violated by municipal employees were now entitled to monetary compensation. But the impact of the case went deeper than merely providing compensation: deterrence of misbehavior was contemplated. When municipal immunity eroded under the weight of the United States Constitution, it did so only in the context of wider public policy. Specifically, liability was grounded in the requirement that plaintiffs prove that their injuries were caused by an unconstitutional municipal “custom, policy, or practice.” A

¹ Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 56 L.Ed. 2d 611, 98 S.Ct. 2018 (1978), interpreting United States Code, Title 42, section 1983, which states: “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…”

²Transcripts of oral arguments before the Supreme Court in the Monell case indicate that the Justices – and, indeed, the lawyers – regarded it primarily as a sex discrimination case that would affect the law of equal protection under the 14th Amendment. Monell involved a pregnant city worker who lost her job with the city of New York because she was pregnant. In holding that the city could not deny constitutional rights under a municipal “custom, policy, or practice,” the Court stated that Ms. Monell could sue the city for lost wages and damages because she was the victim of the city’s policy of such gender discrimination. It is doubtful that the Justices imagined they were opening the way to private lawsuits against all municipal agencies, including police, where it was possible to prove a link to an unconstitutional (often unwritten) policy. However, according to Professor Charles Epp, who has studied the transcripts, Justice Marshall probably understood the revolutionary nature of the holding. (personal discussion with Charles Epp, July 28, 2007)
policy review component was added to the traditional tort lawsuit’s allegations of negligence, and these cases have come to be known as “constitutional torts.”

Monell interpreted an earlier case in which the Supreme Court had refused to hold the Police Department of Chicago liable for a warrantless search and ransacking of a black family’s home and the illegal detention of the father. In Monroe v. Pape, although the Chicago police department and the city were held to be immune from suit, the Court said that individual officers could be held liable. Revolutionary in its time (1961), Monroe held that individual police officers could not claim governmental immunity from suit, but that the municipality itself still retained such protection. Governmental immunity has traditionally protected municipal corporations from being sued because it is reasoned that any judgment paid by a city would be a judgment paid from the pockets of the taxpayers. The ancient dictum that “the king can do no wrong” derived from the idea that, if public coffers could be raided, everyone would suffer. However, in Monroe v. Pape, the Supreme Court began to insert modern constitutionalism into the equation. The fact of being protected from suit can arguably lead to a carte blanche invitation to governments to ignore the law, an untenable situation in a post-Enlightenment age when the Constitution (and its Bill or Rights) supposedly protects citizens from government intrusions.

Prior to Monroe v. Pape, a web of immunity had shielded both the city and its employees. In practice, it operated like a “Nuremberg Defense” situation: a citizen alleging harm at the hands of the police would seek to sue the officers, but patrol officers

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4 The Monroe plaintiffs eventually recovered $11,000 from the thirteen individual officers who had conducted the raid. In 1961, that sum went a lot further than it does today, and the fact that it could be obtained at all was groundbreaking.
could claim a good faith defense because they were acting in their official capacities, passing the blame up the organizational hierarchy to supervisors who had trained them to engage in such acts, or at least permitted them to continue. The supervisors could be held responsible only if they could be proven to have been “deliberately indifferent” or personally involved in the constitutional violation. If they were following the standard policies of police department and city, they were not held liable. In turn, when the plaintiffs claimed that the city’s policies themselves were illegal, the city had absolute governmental immunity from suit. Thus the “Nuremburg” chain of command was complete: “I was just following orders,” but when blame for those orders rose to the level of the employer government, that entity was immune.

The 1961 case (*Monroe*) was an important statement of accountability to the U.S. Constitution, and it was the first blow against the idea that municipalities, like kings, can do no wrong even when they are violating the law of the land. Recognizing the fundamental principle of rule of law, seventeen years later the Supreme Court delivered a second, knock-out blow when it expanded *Monroe*’s reasoning in the *Monell* case. The legal basis for this step was the Supreme Court’s rediscovery of a Civil War-era statute, section 1983 of the U.S. Code, part of the Ku Klux Klan Act which had been written to control vigilantes “acting under color of state law.” That this section of the Code was one of the “Reconstruction Statutes” passed after the Civil War, and that it was rediscovered by the U.S. Supreme Court after the legal revolution of Warren Court pronouncements had applied the Bill of Rights to state action under an interpretation of another post-Civil War statute, the Fourteenth Amendment, was all consistent with the Court’s realization that tools for holding states and municipalities accountable to the
federal Constitution had to be fashioned and used vigorously in the modern, civil rights-aware era.

Monell took the important step of eliminating governmental immunity not only of individual employees, but of the city government itself. The requirement that governments be held accountable to the law overrode the old rationale for immunity as protection of the public purse. Surely the suffering of citizens when municipal employees violated their constitutional rights is greater than their suffering if the public purse were somewhat reduced through lawsuits. And, over time – though the Court did not explicitly say so – the impact of removing immunity would be that risk-averse and money-saving municipalities would demand that their employees learn to follow the Constitution so money would not have to be paid to injured plaintiffs. In the long run, the municipalities would be expected to change the behavior of their employees so as to follow the law, thus protecting citizens, the Constitution, and the public purse.

These two cases arose under the legal structure of tort liability, i.e. private plaintiffs suing for monetary compensation for their injuries. Because the Ku Klux Klan Act permitted plaintiffs to sue for violation of constitutional rights, rather than common-law “civil wrongs,” the “constitutional tort” was born. Tort litigation is intended to achieve monetary compensation for plaintiffs – medical expenses reimbursed, lost wages returned, crashed automobiles replaced, pain and suffering recompensed, etc. – and whether the defendant changes his behavior in the future is left up to the defendant himself (though his insurance company is likely to have something to say about the

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5Monell thus prevented a constitutional tort lawsuit against the police from vanishing if police personnel could make a cognizable claim that their unconstitutional actions were simply conforming to municipal custom. The liability web was completed in Owen v. City of Independence, 445 U.S. 622 (1980), which held that municipalities could not claim good faith defenses to Constitutional violations.
matter.) Constitutional torts follow the same pattern, and the Supreme Court worked under compensatory assumptions in deciding *Monroe* and *Monell*. The possibility of deterrence of future unconstitutional behavior, not merely compensation of victims, was an underlying though only implicit purpose. But deterrence achieved over time cannot be ignored, even though demands for compensation are more immediate and observable.

It is the requirement that plaintiffs prove a violation of “custom, policy, or practice” that would achieve deterrence over time.⁶ *Monell* opened the door to inspection of police department (indeed, *any* municipal department’s) operations, and if those operations produce systematic violations of constitutional rights and thus monetary liability under *Monell*, it would be in the pecuniary self-interest of the municipality to change the offending practices. Matching the observed policies to the requirements of U.S. Constitution is a very useful exercise which would not necessarily be conducted absent the threat of “constitutional tort lawsuits.”

Contrast this device with the more heavily-debated exclusionary rule remedy for violations of the Fourth or Fifth Amendments. *Mapp*⁷ and *Miranda*⁸ are studied by every undergraduate criminal justice major and every American law student, and any viewer of

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⁶ Traditional tort lawsuits against individual police officers in the *Monroe v. Pape* mode, in which plaintiffs allege negligence or even intentional misconduct in taking police action, might exert some deterrent effect. Data about numbers and types of lawsuits filed before 1978 (when *Monell* was decided) indicate that “most of the suits filed in 1967 through 1971 (40.6%) were for false arrest or imprisonment. Another quarter (27.2%) were for brutality.” (Sherman, 1979: 169 citing “Survey of Police Misconduct Litigation 1967-1971” by Americans for Effective Law Enforcement.) These were cases against individual officers alleging common law torts and were brought mostly in state court. These types of cases continued to be filed after *Monell*, of course, but the difference was that plaintiffs would also strive to prove that the wrongful actions were taken as part of the custom, policy or practice of the department and thus its municipality. It is this added dimension of litigation that contributed to significant improvement in police procedures and training, and thus improved American policing over time. Common law tort lawsuits against individual officers occurred both before and after *Monell*, but their deterrent effect would be less because they did not have a policy review component built into the controlling caselaw.


the many popular television police dramas can recite *Miranda* warnings by heart. These exclusionary rules are commonly expected to be deterrents of police misconduct. After all, every case adjudicated in any of the various incarnations of *Law and Order* revolves around developing evidence and getting it admitted at trial – and all the television cases go to trial. By regulating the evidence that gets admitted into all criminal prosecutions, thereby inserting an element of constitutional accountability into every single arrest and prosecution, deterrence of police illegality is assumed. But, in an age in which 95% of felony cases end in guilty pleas (though presumably some do so after a motion to suppress evidence illegal evidence is made,) and in which judges will extremely rarely grant such a motion, we may question the depth of the deterrent effect of the Fourth and Fifth Amendment exclusionary rules. Furthermore, although the reasoning behind the exclusionary rule assumes that police care deeply about the eventual conviction of the people they arrest, some portion of arrests are made not necessarily with an eye towards court-ordered punishment but with an eye towards immediate street-level impact – activities that may be illegal under the Constitution. Furthermore, a rule that may or may not operate to exclude evidence from a case in some remote future cannot be expected to have a fully deterrent effect – especially under the conditions currently prevailing in Supreme Court caselaw, in which police officers who show their illegal actions were taken “in good faith” will not suffer the sanction of having evidence excluded.\(^9\) Over time, the exclusionary rule caselaw has moved accountability back to the standard that

\(^9\textit{United States v. Leon}, 468 U.S. 897 (1984). \textit{Compare this case to Owen v. City of Independence}, cited above, in which the Supreme Court held that there is no good faith defense available to municipal officers who claim their actions, although illegal, were done in good faith. This may be one reason that the constitutional tort lawsuit has had significant impact on police procedures over the past three decades, while that of the exclusionary rule is fading.
prevailed before *Monell*: essentially, a Nuremburg-style structure. By contrast, the constitutional tort caselaw is vigorous in holding police accountable to Constitutional standards – though, as discussed below, it is generally used in different types of situations than the exclusionary rule is.

Neither remedy for unconstitutional police actions – neither the exclusionary rule nor the constitutional tort – can achieve full deterrence of illegal acts. However, when comparing the two, it is possible that a remedy that would directly reform the very rules and procedures governing arrest or interrogation, and enforced within the police department disciplinary system, could arguably achieve more deterrence and accountability than a prosecution-based rule would.\(^\text{10}\) That its impact has been overlooked by police scholars and legal commentators is somewhat surprising. Perhaps all the debate about the exclusionary rule – and how law developed so as to emasculate it under political and legal pressures – diverted attention from a quiet revolution that was occurring in private law offices of civil rights attorneys and federal civil courts (and not criminal courts) throughout the country. By noting the impact of the exclusionary rule and referring to political debates about it, the point here is not that the exclusionary rule is a bad idea or that constitutional torts constitute a perfect accountability device, but simply that the section 1983 lawsuit has been scarcely noticed as the powerful tool for accountability that it is, and that legal and justice scholars should explore its impact much more carefully.\(^\text{11}\)

\(^{10}\)In fact, Chief Justice Warren Burger opposed the exclusionary rule because he thought deterrence of police misbehavior could be achieved better through private lawsuits and an administrative structure in which aggrieved citizens would make monetary claims against officers. See Burger’s dissenting opinion in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

\(^{11}\)Professor Christopher Slobogin reaches a similar conclusion in his hard-hitting article “The Liberal Assault on the Fourth Amendment,” *Ohio State Journal of Criminal Law*, Vol. 4, p. 603 (2007). He states
The impact of section 1983 litigation on deterring police illegality can now be assessed because *Monell* has been law for thirty years. We can describe the load of litigation that ensued after the case was decided, determine what kinds of constitutional violations were alleged and how many such allegations the courts supported, and with what amounts of monetary awards. This does not settle, however, the question of what impact this litigation had, and how. Nor does it address the issue of whether that impact is achieved in cost-effective or policy-preferable ways. Nevertheless, empirical description of what actually happens in constitutional litigation is a good starting point for unpacking the arguments around these questions.

*Monell’s Impact as Shown in an Insurance Company’s Records*

If for no other reason than that *Monell* opened the deep pocket of municipal liability to injured plaintiffs, we would expect a surge of section 1983 lawsuits to be filed in federal courts beginning around 1979 (the year following the *Monell* decision.) It is clear that few cases were filed before, when *Monroe v. Pape* was the controlling law, and this was due to the fact that *Monroe* permitted lawsuits only against individual police officers whose pockets were quite shallow. In the federal district court for the Central District of California (Los Angeles) in the years 1975 and 1976, for instance:

Of the 276 nonprisoner cases, 117 alleged unlawful arrest, assault or battery by the police, and/or unlawful search and seizure . . .

that “the obsession with exclusion as a remedy” has led liberal groups to force the exclusionary rule into the faces of judges “who cannot stomach dismissal of criminal charges against guilty people” and respond with decisions that weaken both the Fourth Amendment and the exclusionary rule as its remedy. Instead, if a different method of deterring Fourth Amendment violations could be found, these judges would be willing to use it. Slobogin proposes a private damages scheme to supplement the exclusionary rule. See pp. 617-619 of that article. Note that such a scheme need not be a full-blown tort lawsuits regime such as that described here.
police misconduct cases generated thirty-three settlements or trials and nineteen dismissals by stipulation. (Eisenstein, 1982: 522)

For this entire federal district, which covers the city and county of Los Angeles over a two-year span, this is hardly a flood of litigation. Under Monroe, which controlled at the time, the cases would have been against individual police officers or supervisory personnel. Juries would be sympathetic to the police officers, officers’ pockets were shallow, and the costs of the litigation outweighed the amount likely to be recovered. This explanation was confirmed in another study from that time. Yale Law Journal student editors examined 149 misconduct cases from 1970-1977 in a different federal district; the students also interviewed many attorneys, judges, and police officials. The research results indicated that plaintiffs won very few cases, mostly because juries were unsympathetic to plaintiffs who, although victims of police abuse, were often nevertheless involved in criminal lifestyles which had drawn the attention of the police in the first place. The Yale authors inferred that there would be little deterrent effect from the litigation, and they bolstered this argument by noting that “both the individual [officer] defendants and the police departments were insulated from the financial burden consequent to a [successful] section 1983 suit.” (Yale Law Journal, 1979: 814) And in those few cases in which plaintiffs won, few of the officers personally paid their adverse judgments; insurance companies or self-insured municipalities indemnified them.

The overall impact of lawsuits against the police both before and after 1978, when Monell was decided, is quite difficult to assess without statistics like these. What these two studies show is that, before Monell was decided, police misconduct litigation was
quite limited in scope and seldom attempted,\textsuperscript{12} and when it was pursued, would likely not have affected police officers’ behavior much. (This is especially so if the departments and their insurers simply reimbursed individual officers for judgments against them, although surely the officers would want to avoid the humiliation of trial.) We would expect this to change after \textit{Monell}, for reasons outlined above and for reasons having to do with the insurance industry’s response to police misconduct.

Note that these statistics about litigation pre-\textit{Monell} were drawn from court records in only two federal district courts, and thus might not have been representative of the country in general, and they did not include lawsuits filed in state courts. (There would be very few cases filed in state courts under section 1983 because it is a federal law designed to punish violation of the U.S. Constitution; however, police officers could be sued in state court for common law torts such as wrongful death or illegal arrest.) Furthermore, these studies of two federal district courts present only a sketchy picture of how many cases were filed, and their final outcomes, but do not capture the full range of allegations threatened and not filed, or filed but dropped, etc. A more comprehensive data source, describing the full range of police litigation in both state and federal courts, and extending through the years both before and after \textit{Monell} was decided, would give a fuller picture and also afford a more accurate assessment of the litigation’s impact. One study (Kappeler, Kappeler, and del Carmen 1993) examined federal cases from official

\textsuperscript{12} The private organization Americans for Effective Law Enforcement conducted an ongoing survey of litigation from 1967 through 1976 and found that police lawsuits had increased over 500% in that time, and this was before \textit{Monell}. A survey by the International Association of Chiefs of Police confirmed this. Although these trade organizations were understandably alarmed at the trend – and it was occurring mostly in state courts nationwide, not in federal courts – the concurrent baby boom growth in population at the time and the civil unrest of the 1960s and 1970s are probable explanations for it, and the rate of lawsuits \textit{per capita} was still quite small compared to later filing volume. These lawsuits were against individual police officers, and in this light it is possible to say that \textit{Monell} in 1978 relieved the pressure on individual officers by shifting monetary liability onto their departments and cities. For an overview of data and surveys about police litigation, see Worrall (2001: 11-13).
opinions published in *Federal Reporter 3d* from 1978 to 1990, concluding that the volume of cases had increased significantly and that *Monell* as a 1978 case might have been responsible. The study covered only cases actually litigated to verdict, however, missing the whole range of settlements that constitute the bulk of litigation.

An obvious source of litigation data covering the entire nation at many points in time, and capturing all complaint behavior whether resulting in trial verdict or not, is records of insurance companies that indemnify police departments. Every case in which a police officer or police department asked for legal help, no matter what actually happened with the case, would be included. Unfortunately, insurance company records are private and seldom released to researchers. However, one small database from an insurance source, covering the years 1974-1984 and thus before/after *Monell*, was compiled and analyzed in 1987. (McCoy 1987a) This insurance company had been the primary insurer\(^\text{13}\) for the National Sheriff’s Association, an organization which has members all over the nation ranging from the most populous jurisdictions (Cook County, Los Angeles County, Dade County) to completely rural counties. The N.S.A. offered this insurance to county sheriffs, deputy sheriffs, and their employer counties. Sheriffs, of course, police county jurisdictions and also have primary responsibility for running local jails, so litigation against them would be expected to cover allegations not only of unconstitutional actions under the 4\(^\text{th}\), 5\(^\text{th}\), and 6\(^\text{th}\) and 14\(^\text{th}\) amendments, but also the 8\(^\text{th}\) amendment (alleging cruel and unusual punishment associated with operation of county jails.)

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\(^\text{13}\) The company, anonymous here, is now defunct. That was the reason I was able to obtain its records. Its former general counsel assured me that the company was in no way atypical, and that the business problems that caused it to dissolve its incorporation in 1984 flowed from areas of insurance unrelated to its police line of coverage. Neither was the advent of *Monell* claims in 1983 the reason the company stopped offering insurance, the lawyer said.
The strengths of the database drawn from this insurer’s records of litigation over the decade 1974-1984 are: 1) all types of county jurisdictions nationwide are covered, 2) all types of lawsuits filed against sheriffs or counties, whether filed in federal or state court or even threatened but not filed, are described here, 3) the statistics describe the types of cases, their dispositions, the amounts of the monetary judgments and costs incurred in providing defenses to the charges. A major weakness of the database is that county governments were immune from suit under the 11th Amendment. *Monell*, which dissolved *municipal* immunity, would not have applied unless the county waived its immunity, so it might be difficult to discern any changes in patterns of litigation before and after *Monell* was decided in 1978. However, somewhat surprisingly, most of the large populous counties insured under this company’s policies had waived their immunities from suit when allegations of municipal employee misbehavior were made, even prior to *Monell* when *Monroe* was the controlling standard. Perhaps this is because municipal union contracts demanded that individual employees should be reimbursed if plaintiffs were to successfully prove they had acted unconstitutionally. By examining the records of this insurance company, the patterns of litigation brought against sheriffs, their deputies, and the county itself could be discerned over time.

There were 998 cases, and in 90% of them the sheriff’s department, not individual sheriff’s personnel alone, was sued. Note at the outset how few the cases were; a mere thousand cases over the course of a decade, covering sheriffs’ departments throughout the entire nation, is miniscule compared to caseloads of the late 1980s up to the present. About 3% of these cases were brought by employees of the department alleging unconstitutional actions in personnel matters (often charges of racial or gender
discrimination in promotion or salary matters.) In 74% of the cases, an individual deputy sheriff (police officer) was sued, usually along with multiple defendants including the sheriff and/or the county. The sheriff of the county (the chief) was sued alone in 255 cases, or 25.6% of the total.

Plaintiffs all demanded compensatory damages, and many asked for punitive damages. Extremely few asked for injunctive relief even though the “policy defendants” such as the sheriff or the county could presumably make changes that would have an impact on future police behavior. The notion that lawsuits could deter police misconduct was scarcely evident in the data describing litigation against sheriffs, either before or after Monell was decided. Individual plaintiffs wanted compensation; but, over time, the logic of Monell was that police executives would change unconstitutional practices and policies that had led to compensatory awards. We have no way of telling from these particular data whether that actually occurred, though other evidence such as that from the Fyfe files, analyzed in the next section, can be used to examine the question.

What were the reasons that plaintiffs sued? The data described about 28 typical legal “causes of action.” They fell into three main categories: lawsuits stemming from normal policing operations, lawsuits by jail inmates, and lawsuits by employees of the sheriff’s department. (The latter category had only 3% of the cases.) In addition, seven other causes of action were occasionally mentioned but did not fit easily into these categories.

Jail complaints were the most common reasons for lawsuits. Most were concerned with conditions of confinement, and of these, the great majority were allegations of constitutional torts that did not also request injunctive relief. Many were of
the type usually described by exasperated federal judges as nuisances: failure to permit an inmate to visit the law library, dietary restrictions, etc. However, 156 of the cases (or 16% of the total) alleged denial of medical care and resulting physical ailments and pain and suffering. Other jail cases, though few, were even more serious. There were eight suicides and five rapes that plaintiffs alleged should have been prevented by good jail management, and 25 jail inmates sued because they had been assaulted by other inmates.

Most interesting for the inquiry of whether lawsuits can enforce the Fourth Amendment’s prohibition against unreasonable searches and seizures, a large number of the cases alleged false arrest or illegal search. The false arrest cases, however, were seldom purely Fourth Amendment situations, since they generally also alleged assaults by sheriffs’ personnel. There were only fifty cases over this ten-year period solely alleging illegal search without any other associated allegations.¹⁴ Fifty cases out of 989 (only 5%) is not a large number, and likely would not exert a significant influence over deputies’ behavior.

There were a few cases that could have affected police policy. Forty alleged poor training and supervision as the underlying cause of alleged misconduct. These are the policy cases aimed at supervisory personnel, and the fact that only 4% of the total number of cases were concerned with organizational dynamics and policies shows how different the legal landscape looked before Monell. Furthermore, very little deterrent impact would be expected if these few plaintiffs did not, in fact, prevail in court.

¹⁴These would be Fourth Amendment cases and are the type of cases that form an alternate model of deterrence of illegal searches and seizures, contrasted to the exclusionary rule. Of course, money losses are alleged here; the search or seizure had to have produced some serious monetary loss to the plaintiff. Moreover, given juries’ reluctance to award money to guilty criminals, these cases probably involved innocent plaintiffs. This is not a strong model for an alternative to the exclusionary rule, but the point is that individual claiming against police actions is possible and its structure – not necessarily this one – should be examined creatively.
10.4% of the cases were not even filed in court. In this group, plaintiffs’ lawyers had contacted the insurance company’s lawyers and told them of the cases, threatened to sue, and invited investigation. In most, the insurer agreed that its insured had been at fault and immediately paid compensation as demanded. These pre-filing settlements were seldom for large amounts of money and would probably have been described by the sheriffs’ lawyers as “nuisances” and the plaintiff’s lawyers as “face-savers.” For the parties involved, they probably reflected claimants’ deeply-felt injustices or perhaps personal animosities directed at individual sheriffs’ officers who had arrested or detained them.

The other 89.6% of the cases were filed in court. This table shows their dispositions:

**TABLE ONE**

*Disposition of Lawsuits Filed Against Sheriffs 1974-1984*

<table>
<thead>
<tr>
<th>Disposition</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissed</td>
<td>159</td>
<td>19.3</td>
</tr>
<tr>
<td>Settled</td>
<td>244</td>
<td>29.6</td>
</tr>
<tr>
<td>Default Judgment (unclear for whom)</td>
<td>92</td>
<td>11.2</td>
</tr>
<tr>
<td>Summary judgment for the defense</td>
<td>231</td>
<td>28.0</td>
</tr>
<tr>
<td>Summary judgment for the plaintiff</td>
<td>2</td>
<td>.2</td>
</tr>
<tr>
<td>Trial verdict for the defense</td>
<td>26</td>
<td>3.2</td>
</tr>
<tr>
<td>Trial verdict for the plaintiff</td>
<td>69</td>
<td>8.4</td>
</tr>
<tr>
<td>Settled during trial</td>
<td>1</td>
<td>.1</td>
</tr>
</tbody>
</table>

N = 824 cases filed in court

Source: Insurer for members of the National Sheriff’s Association, 1974-1984, summaries of claims made and their dispositions. Data on file with the author.
In other words, 38.3% of the lawsuits were decided in favor of plaintiffs who had alleged police misconduct. This means that about $2/3$ of the cases were decided in favor of the defendant police officers or supervisors. There is no expectation that this situation would change much after Monell – the number of cases filed rather than their outcomes would be expected to increase significantly because the case permitted plaintiffs to sue the deep-pocketed cities, thus contemplating more litigation about police practices in general as they existed prior to the Monell decision. If anything, the 1:2 ratio of plaintiffs’ wins to defendant police’s wins indicates that police need not fear litigation as a potential bank-breaker, while the fact that plaintiffs prevailed in a third of the cases indicates that police should take steps to improve their practices.

In order to determine Monell’s impact, it would be important to see what monetary damages were like in police litigation before and after the case was decided. In this database from the sheriffs’ insurer, 23.8% of all cases (both filed and not filed) produced compensatory monetary damages for plaintiffs. This included settlements and also the hotly-debated item of plaintiffs’ attorneys’ fees paid by the losing defendants. 8% resulted in punitive damages, a number that might give us pause when we consider how egregious the misconduct must be for a court to order such damages. Only 1.2% of the cases produced some form of injunctive or declaratory relief ordering changes within the sheriff’s department. These patterns did not vary much when comparing money damages before and after Monell was decided.

How much money did plaintiffs actually receive? The total of compensatory damages and attorneys’ fees and punitive damages paid out to plaintiffs over a decade

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15That is, the combination of settlements, summary judgments for plaintiffs, trial verdicts for plaintiffs, plus perhaps a few more if there had been default judgments for plaintiffs, though if so these would have been insignificant cases in which the police defendants did not bother to show up for a court date.
was $2,221,821. The lowest award was $1; the highest was $165,000. A total sum well over two million (at a time when a dollar was worth a lot more than it is today) might seem sufficiently important that the insurer would have prevailed upon the sheriff departments to take serious steps to prevent litigation. But the sum represents all money paid to plaintiffs from lawsuits in most of the counties all over the nation for an entire decade. Compared to many jury awards in police misconduct cases since 1990, many of which involve multi-million-dollar sums in individual lawsuits alone, this amount seems miniscule. And, contrary to concerns at the time about runaway jury awards, only .3% of these plaintiffs received over $100,000.

In summary, the number of cases, what they alleged, and how much was paid in compensation indicate that litigation against sheriffs was not a major concern to sheriff departments over the decade 1974-1984, even though in very unusual, egregious cases it could have been quite important.

In order to assess the impact of Monell, however, the research question would be whether these patterns changed after that case was decided in 1978. The data indicate that indeed there was a change, though not in numbers of cases brought nor in their outcomes, but in the type of allegations made. Specifically, cases alleging illegal shootings became more frequent. Other types of alleged police misconduct stayed about the same in frequency and outcome. Throughout the pre-Monell period, from 1974-1978 and a lag period from 1979-1980 in which the implications of the case were being absorbed by plaintiffs’ litigators, the number of lawsuits alleging wrongful use of deadly force stayed steady, but after 1980 they climbed.
This was not due to any increase in the raw number of police shootings nationwide, since at the time several states were changing their laws so as to limit police shootings.\textsuperscript{16} Probably, this climb indicates that civil rights attorneys had discovered the potential power of \textit{Monell} and were filing suits with the type of allegations lawyers would say were worth pursuing: situations in which large amounts of money are at issue. Families suing for the wrongful death of breadwinners, or for disabling plaintiffs for life and thus needing hospital or medical care over the course of a lifetime (even worse from the compensatory point of view,) would all go to court – before \textit{Monell}, there would have been little remedy. And even though the new case permitted compensatory lawsuits in cases alleging other types of police misconduct (searches, seizures, racial discrimination, jail conditions, etc.) the potential monetary recoveries would still not favor the benefit of bringing suit compared to its costs. In sum, from these insurance company data, it appears that the first impact of \textit{Monell v. Department of Social Services} was that people who had been shot or beaten by the police were more likely to sue them.

As a quick aside, note that this trend towards more litigation was fostered not necessarily by an increased litigiousness on the part of the population, but by changes in the law itself. At the time (the early 1980s) there was a vehement political debate in the media and in policymaking circles about “the litigation explosion.” Critics associated

\textsuperscript{16}Slowly over that decade, many states were changing their state laws so as to forbid police to shoot fleeing felons, and many municipal police departments had adopted policies that were more restrictive than their state laws allowed. Eventually, when the U.S. Supreme Court was asked to rule on the practice in 1985, a slim majority of states forbid such police shootings. 23 states retained the old “fleeing felon rule,” 22 forbid shooting at fleeing suspects unless the officer was endangered or the runner was suspected of a serious crime of violence, and in five states the standard was unclear. See \textit{Tennessee v. Garner}, 471 U.S. 1 (1985) at p. 12. The Supreme Court noted that shooting and crime rates were uncorrelated with whatever standard a state used.
with the Reagan Administration\textsuperscript{17} claimed that civil litigation had expanded so much that it hurt the economy, unjustly enriched whining gold-digging plaintiffs, and generally encouraged a culture of complaint. This occurred in an atmosphere in which courts had begun to impose strict liability for injuries caused by defective manufactured products, “mass tort class actions” became possible under new rules of civil procedure, and unfettered jury discretion began to produce several spectacularly high awards to plaintiffs. Defenders of these developments (not surprisingly, often plaintiffs’ trial lawyers) claimed that the critics were funded by private big businesses who were vulnerable to these claims and thus had a vested interest in attacking the system that produced them, and that The Great Tort Crisis was not a crisis at all but rather a twisted media campaign mounted by the insurance industry. The lawyers claimed that shortsighted insurance planners had lowered insurance premium rates in the early 1980s to attract new customers, and that they invested the premiums at the high interest rates then prevailing in the market. Later, when interest rates lowered and the companies could not make the profits they had before, the insurance industry suddenly blamed

\textsuperscript{17} Indeed, the Reagan Administration itself had a tort reform working group inside the Justice Department, and in March, 1986 it released its recommendations which aimed to restrict monetary awards in tort cases. Subsequently, various bills were proposed in Congress, but since tort liability is fundamentally a matter for state courts, little could be done. However, in one area, section 1983 constitutional torts, the federal government controlled. Senators Orrin Hatch introduced legislation (Senate Bill 584) that would have limited the types of claims that could be made under section 1983 and also would have instituted a good faith defense similar to that of the exclusionary rule cases. For whatever reasons, the Bill did not gain traction and did not pass. However, agitation for reform of laws governing liability insurance proceeded in the House, and in March, 1986 the Subcommittee on Monopolies and Commercial Law held hearings to consider whether to increase regulation of the insurance industry. One major reform approved was that local governments would be allowed to join together and obtain insurance policies covering the wide pool of governments. Availability of insurance was a major concern for municipalities around the country, especially since they were being hit with rapidly escalating costs for their insurance, and many cities “went bare” because they could no longer afford the premiums. Congress responded by helping restructure the insurance industry through changes in federal regulation so that localities could more easily obtain insurance. Scholars have noted that the insurance industry has “cycles” in which its profitability goes up or down depending on a variety of factors, few of them related to the actual risks insured against. (Baker 2005)
courts for ordering pay-outs that the insurers should have known would be forthcoming from the larger pool of policyholders.

The result was that many states responded to the pressure and passed laws to cap jury awards, limit “pain and suffering” damages, or modify strict liability standards. In the specific area of municipal liability, much of it obtained through “constitutional tort” litigation, insurance coverage was the major issue. The United States Conference of Mayors conducted a survey of 145 cities and found that Monell had caused a huge boom in litigation and jury awards, and this coincided with increasing insurance premiums due to “mismanagement of the insurance industry” and “a prevailing attitude among the citizenry that someone is at fault for all accidents, the ‘sue syndrome.’” (U.S. Conference of Mayors July 1986: 3. See also International City Management Association and the Wyatt Company, 1985, for a similar study regarding personal liability of city managers). Stories of sky-high jury awards against police departments became typical; the awards were higher and the attendant insurance crisis more urgent than when it was first noted in 1978 (Krajick 1978).

In short, by 1986, eight years after Monell had been decided, the legal landscape was shifting significantly. Police use of force cases were pursued because their potential money damages are large enough to pay the considerable costs of preparing a lawsuit. The constitutional tort lawsuit was spreading to other types of police behavior that caused enough damage to merit money awards in court, such as car crashes and “failure to respond” to plaintiffs in danger. A crisis in liability insurance crisis, whether manufactured or real, caused police and city managers to turn their attention to what it would take to insure against this burgeoning litigation threat. Finally, local civil rights
attorneys drove the change in constitutional litigation as much as any public desire for police reform did. The crusading civil rights bar had discovered in the section 1983 lawsuit a mouth-watering combination of motives: doing good and getting well-paid for it. Meanwhile, they would be developing and utilizing a new type of organizational, court-based device for upholding the U.S. Constitution.

Police “Custom, Policy, or Practice” in Court

After Monell, police misconduct litigation spread and deepened so as to affect -- and ultimately significantly improve -- local police practices. The primary spur for this improvement was the legal requirement under section 1983 that aggrieved plaintiffs prove that the police departments engaged in unconstitutional “custom, policy, or practice” in order to win the cases and be compensated for injuries. Lawsuits alleging illegal police use of deadly force constituted the most important type of police litigation under Monell not only because these cases involved deaths and high money damages, but because a method of policy review encouraged by the litigation structure became clear and entrenched as the 1980s progressed. That method was first developed in deadly force cases litigated under Monell in the new litigious atmosphere. The Supreme Court case of Tennessee v. Garner,18 decided in 1985, provided the template.

18More than twenty years later, young police recruits are often surprised to learn that it was only recently, in living memory, that the old medieval rule allowing police to shoot fleeing suspects was abolished. Tactical intelligence and restraint of force are taught today at police academies, and contemporary officers are often surprised to hear about how vehement the opposition to limiting police shooting was at the time. In the 1985 case of Garner, the Supreme Court quoted the arguments of the Memphis Police Department: “Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. ‘Being able to arrest such individuals is a condition precedent to the state's entire system of law enforcement.’ Brief for Petitioners 14.” Garner at p. 10. Imagine how less genteel the words were in
Specifically, after *Monell* opened the door in 1978 to lawsuits alleging police illegality, police chiefs and city managers responded by reviewing their “customs, policies, and practices” so as to bring them into compliance with the Constitution. But at the time, police departments nationwide operated under a patchwork of different policies covering a wide range of police actions, highly dependent on local and state customs and laws. The unstandardized and widely varied police practices were doubly vulnerable to lawsuits under *Monell*’s injunction because liability was possible even if a policy was unwritten but the illegal actions were so common that a court could determine the police were acting under a “custom.” After *Monell* was decided, police chiefs and their legal advisors began to scan the professional literature and reach out to professional and legal organizations to find model policies that they could apply to the practices of their home departments. Seeking to inoculate themselves from lawsuits, they adopted written policies that were more standardized and had been reviewed by attorneys, who in turn also were influenced by professional networks and training seminars offering model policies. (See further discussion of these seminars and their link to insurance in the next section, pp. .)

Of course, existing caselaw at the time said that inadequate supervision or training in otherwise valid policies could trigger liability as surely as a lawsuit over invalid policies could. Police managers and their advisors began to develop a “cognitive model of the legal environment,” in Epp’s words, (Epp 2007) which was that legal liability could be avoided if a department had a good policy, trained officers well to follow it, and

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public policy debates at the time. Many police predicted huge crime waves if police were forbidden to shoot fleeing suspects.
constantly supervised them so as to assure compliance. This developing cognitive model was reinforced when the Supreme Court decided *Garner* in 1985.

*Garner* was the landmark case that overturned the fleeing felon rule, a common law rule that went back as far as medieval England. Under that rule, police were permitted to use deadly force to apprehend a person suspected of having committed a felony. Of course, when the rule had first developed, both the police and force were radically different. Medieval police were “night watch,” not a professional fulltime force, and they were unarmed because guns had not yet been invented. Using deadly force at that time meant catching the person and beating him into submission. Later, in England where the rule developed and in which professional police forces were first constituted, officers did not carry guns even after they had been invented. By contrast, in the United States, by the twentieth century all cities had fulltime police forces and they were all armed with guns. A “Wild West” mentality prevailed; policies as to the circumstances allowing police to shoot, with what training and accuracy and for what results, varied drastically across the country. Legislatures in many states, concerned that police were able to shoot people who later turned out to have been innocent or guilty of minor crimes for which they did not face capital punishment, and concerned that police shootings often sparked civil unrest, forbade police to shoot at suspects running from alleged crime scenes. When *Garner* was argued to the Supreme Court in 1984, a bare majority of states forbade shooting at fleeing felons. By deciding that case on Constitutional grounds (stating that shooting someone without proof of criminality was an illegal seizure under the Fourth Amendment) the Supreme Court declared one uniform policy for the circumstances under which American police would be permitted to shoot:
an officer may shoot to kill a fleeing felon only when that officer reasonably fears for his own life or that of others. Linking this defense-of-life policy to *Monell*’s requirement that police departments would be liable for injuries sustained as the result of an unconstitutional policy, it is clear that *Garner*’s impact would be great -- after all, the policy had been stated by an authority no less than the Supreme Court, so police departments that deviated could expect to be liable in civil lawsuits. The powerful one-two punch of *Monell* followed by *Garner* caused police departments nationwide, in all levels of government, to bring their policy, training and supervision into compliance with the Constitution under a shoot-only-in-defense-of-life policy.

This story shows why the “shared cognitive model” that Epp describes first developed. The approach became evident in the late 1980s.\(^\text{19}\) A technology of policy

\[^{19}\text{Two research organizations conducted surveys in 1986, after } Monell \text{ had had time to sink in and one year after } Garner \text{ was decided. Both surveyed chiefs of cities, not rural jurisdictions. The Police Foundation surveyed 100 chiefs of police of the largest cities in the nation, asking them to rank the types of cases that were of most concern to them, and also to indicate whether they had legal advisors to handle such litigation, what the insurance implications were, and how they perceived the “litigation crisis.” (McCoy 1987b) The Police Executive Research Forum also surveyed police chiefs, adding other supervisory or professional personnel as well. This internal PERF report covered the most common types of litigation and whether there had been significant organizational responses to them. (Nowicki et al.1987)\]

These surveys provided some evidence as to the deterrent effect litigation has on police organizations. Perhaps because they surveyed somewhat different populations, the responses differed slightly. In the Police Foundation survey, all chiefs were well aware of the dangers of litigation and listed use of force, auto pursuits, arrests and searches, and employment-related matters as the areas of greatest concern, in that order. The chiefs’ consensus was that liability, though a bother, was a fact of life. The police chiefs believed their legal liability could be reduced by good training and management practices. They therefore did not perceive a “litigation crisis.” Some mentioned that they believed the crisis mentality emanated from insurance companies, not from the police themselves.

If good management and training were perceived as the appropriate way to prevent lawsuits, this is evidence that deterrence, although diffuse, might be at work. The PERF survey underscored the fact that police personnel in many different job categories were aware of litigation risks and were more concerned about it than the police chiefs surveyed by the Police Foundation apparently were. The PERF survey discerned a notable lack of communication between police chiefs and legal counsel for their departments. Although 71% of the departments reported that they had lost a lawsuit in the past two years, only about half the police chiefs reported that their attorneys even informed them of the issues raised in the civil action or provided them with a statement specifying why the case was won or lost. Most discouraging from a deterrence standpoint, less than half received an assessment of what department procedures could be redesigned to reduce future liability. The authors of the PERF study were sounding the alarm: by 1987, it was time to realize that the legal landscape had changed and chiefs should begin to review the “customs, policies, and practices” of their departments in order to avoid litigation.
review developed inside police departments, and soon this technology spread and was applied to police operations other than deadly force. Eventually, police policies, training, and supervision in a variety of areas became more standardized and transparent. This process occurred nationwide, at all levels of policing, and took about 25 years to develop fully as a technology of policy review and implementation. It was litigation – and also, quite importantly, insurance necessary to lower its risk – that sparked it.

Of course, identifying the exact characteristics of historical trends and their causes is always chancy. Perhaps other factors were at work, and perhaps the causative model described here – i.e., that Supreme court decisions and the structure of tort liability combined to foster significantly improved police policy review and practices, thus reforming the American police in ways that no other accountability regime had been able to do – is somewhat speculative. But data described above, and the experiences of so many people who worked in the field at the time, indicate that this was so. No other person was more deeply involved in these developments than James Fyfe. A look at Fyfe’s papers and records from 1980-2005 provides ample evidence of the argument made here.

Before providing an overview of Fyfe’s papers and records, I must slip into the first person and acknowledge my bias. As Jim’s wife, I observed these legal developments and was involved in supporting the expert witnessing work described here. As an attorney, I had been involved in Monell litigation before I met Jim, and together we

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20 Fyfe’s papers have been donated to the library of his alma mater, the State University of New York - Albany, where he received his Ph.D. from the School of Criminal Justice. References to those papers made in this article can be checked in that archive. The materials of most general interest are the background research and investigation papers from such cases as Garner, Lawson v. Kolender, MOVE, Ruby Ridge, Jeffrey Daumer/Sinthasomphone, Thurman v. Torrington, and of course Diallo, among other cases that were high profile in the news of the day. But there are records of over 600 more typical cases that were news stories only in their local areas, and that is where the real impact of this litigation can be discerned.
were committed to this model of police accountability. Given this situation, it could be said that I am biased towards overestimating the strength of litigation in forcing police departments to adopt better operational policies and improve their training and supervision for them. I will leave it to the reader to determine whether this is so, but urge keeping an open mind when considering “what was in Jim’s basement.”

The big basement was filled to overflowing with research papers, newspaper clippings, files of notes and bibliographies and miscellaneous information organized by police-related subject matter, a collection of procedure manuals from police departments around the USA (and some other nations,) boxes of police department files on such matters as personnel discipline, shooting incidents, dog bites (from police dogs,) consent searches and data on the race of people searched, deaths by positional asphyxia, reports from various commissions and police reform groups, proceedings of the Commission on Accreditation of Law Enforcement Agencies, background material preparing for Congressional hearings on the exclusionary rule, law review articles, and a complete set of Spring 3100 dating back to 1957.\footnote{Spring 3100 is a monthly magazine published internally for the New York City Police Department, basically a newsletter covering personnel actions, program successes, and personalities in that huge department.} There was a scholar’s library covering a 10’ x 20’ wall, heavy on police administration texts, one of which was the update of O.W. Wilson’s classic Police Administration. (Fyfe, Green, Walsh, Wilson and McLaren, 1996) All this covered about a quarter of the basement space. The remainder was filled with boxes containing files and occasionally photos and videotapes and audiotapes, all of it related to individual lawsuits brought against police departments during the years 1980-2003.
Fyfe served as an expert witness in all that litigation. These are case files from over 600 lawsuits. He started this work soon after the Supreme Court decided Monell v. Social Services in 1978, so his career as an expert witness maps the development of section 1983 litigation. This trove of material extends the evidence of litigation trends discerned from the Sheriffs’ Association insurance company files and described in the previous section, and it shows how policy development changed in American policing over those decades.

Of course, it would seem that the best place to start in finding information about constitutional tort lawsuits would be the attorneys who litigated them. The civil rights plaintiffs’ lawyers are “children of Monell,” but the difference between the attorneys and Fyfe was that, as an expert witness, he had a specific and limited role to play in the larger narrative of each case. Individual attorneys can fully litigate a comparatively small number of cases in any given year, and the attorneys who specialize in lawsuits against the police tend to work in small firms (if they are plaintiffs’ attorneys) or regularly handle a few police cases among the broader pool of litigation against the municipality (if they are defense attorneys.) By contrast, Fyfe could specialize in his expert witness work and provide this service in many cases, spread out all over the country. As a person who was a retired police lieutenant from the New York Police Department as well as the holder of a doctoral degree in criminal justice, and a professor and writer, he had credibility as a neutral referee. When he agreed to serve as an expert in a case, he did so because under

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22The names of the attorneys who brought these cases, often in the face of intense political and media pressures and sometimes outright harassment from the police, could produce a roll-call of people whose stories deserve books of their own. Since the point of this chapter is to describe the effects of the litigation and not the people who developed it, no names are mentioned. This should not be regarded in any way as detracting from the hard work -- and in many cases courageous work -- these people did.
Monell he could match the alleged misconduct with a policy, rule, or operating standard of the department that was alleged to have violated the US Constitution (or in some cases, state administrative or common law.) By doing this, he was convinced, eventually he could help improve American policing.

Expert witnesses, like umpires, are required to “call ‘em like you see ‘em,” which inevitably displeases one side in supporting the other. Fyfe’s record as an expert shows that he favored neither side, though that in itself can be criticized as evidence not of neutrality but of sleaze, i.e. being willing to say anything for a fee. The role of the expert witness is rather odd – and in fact Fyfe wrote some articles on the topic. (Fyfe 1998; Anderson and Winfree 1988) He turned down more cases than he took, often telling hopeful lawyers that the other side was in the right and that they should settle the case immediately before spending more money preparing it.23 He stood up in court for police departments and their officers when he determined they had followed the rules, and he savaged them when they didn’t. As an ex-cop, he might have been expected to side with police when they were sued – not from some sort of misguided blind loyalty, but because

23Almost all Fyfe’s cases were civil lawsuits, but there were a few criminal prosecutions, and two of those were some of the most high-profile of his career. He testified against the police in one and for the police in the other. He served as expert on traffic stops on behalf of a group of minority citizens who had filed a “class action” motion to suppress evidence due to illegal racial profiling on the New Jersey Turnpike. The case, New Jersey v. Soto, defended by public defender Fred Last of a small rural county, was the first to spark a high public outcry against racial profiling via the federal program “Operation Pipeline.” By contrast, Fyfe testified on behalf of the police in the criminal case against four NYPD officers who had killed Amadou Diallo. The trial was broadcast live on Court TV. After Fyfe’s testimony on behalf of the officers, Court TV commentators stated that the prosecution’s cross-examination “right after our commercial break” was sure to be scathing. But the prosecutor stood and declared that he had no questions for the witness, stunning the courtroom. The reason was that the prosecution had been the first to engage Fyfe as an expert witness in the case, but Fyfe gave his expert opinion that the four officers were not guilty of manslaughter beyond a reasonable doubt. Obviously the prosecution would not use him as a witness. Subsequently, the defense found him and engaged his services. In the trial, if the prosecutors had questioned him after his direct testimony for the defense, they could not have impeached his credibility because on re-direct examination the defense would have brought out the fact that they themselves had first hired him. Thus, the prosecutors wisely said nothing.
we all tend to see things through the lenses of our own professional experiences. Perhaps it was his professional experience as a scholar that convinced him to see things in a different way, to believe in the possibility of evenhanded (if not blind) justice, and to insist that everyone including the police follow the law. As he testified,\textsuperscript{24} by the end of his career the breakdown of his expert services on behalf of plaintiffs and defendants in the civil cases was about 60/40 (i.e. 60% for plaintiffs, 40% for police.)

The high volume of cases in which Fyfe served as an expert, and the fact that they were well-distributed between police and plaintiffs and drawn from jurisdictions across the country, demonstrates that any conclusions made from reviewing these casefiles are likely to be generalizable to what was happening in police litigation at the time. For the historical question of whether police litigation sparked serious reform of police procedures and, eventually, significant changes in police behavior, a look at the types of cases Fyfe handled over the time period 1982-2003 is useful. This collection of cases picks up the story where the insurance data described in the previous section left off.

In the years 1982 – 1990, almost all the cases involved use of force, usually deadly force. A few were auto pursuit cases, which came to be regarded as a particular type of deadly force and which increased in number through the 1990s. (Alpert and Fridell 1992) Documentation of cases by reviewing electronic materials from that time is

\textsuperscript{24}From a deposition in an Ohio case, 2001: The attorney asked how much time he worked as a university professor, as an expert, and how often as an expert for or against police. Fyfe answered: “I’m allowed to work [on outside contracts] one day a week, and during the summer, I probably work three. So, overall, it’s probably about 30% of my time.” Attorney: “I noticed in your list of cases you have been involved in in the past four years, it looked like probably about 75 percent or 80 percent of those would be plaintiff oriented.” Opposing attorney: “Objection. I don’t think that’s a list of all cases, but a list of cases in which he has actually testified.” Attorney: “Okay. I’ll clarify that, then. The cases that you have actually testified either by trial or deposition?” Fyfe: “That’s correct, yes. That’s probably about 75 or 80 percent for plaintiffs. I do a lot of work for defendants. That is not reflected here because usually it results in summary judgments or nuisance settlements.” Attorney: “Overall, how would your percentage breakdown then be, including all cases that you review and actually issue a report?” Fyfe: “I would say it’s something like 60/40, plaintiffs to defendants.”
difficult because the reports and court pleadings were stored on 5 ¼ inch floppy disks unreadable by contemporary computers; the researcher has to find electronic files that Fyfe transferred to other media or read the voluminous papers in the Fyfe archives. My personal recollection, however, is that Fyfe’s involvement in the *Garner* case, in which the Supreme Court’s majority opinion cited his doctoral dissertation (Fyfe 1977) and in which he had assisted in writing an *amicus curiae* brief for the Police Foundation which was quoted in *Garner*, combined with his professional background as both a retired NYPD lieutenant and an academic who wrote his dissertation on police use of deadly force, rendered him the most desirable expert for cases alleging violations of the “defense of life” standard. Lawyers working on these cases nicknamed him “Dr. Deadly Force” and he did many investigations and wrote many expert reports in cases alleging illegal police shootings.

Only a few of these cases went to trial. Considering that the policy the Supreme Court had enunciated in *Garner* was quite clear, and that obviously it was firmly rooted in the Constitution and states were bound to obey it, the question of whether officers had followed the policy was usually a question of fact and not of expert opinion about what the “custom, policy, or practice” of the police was supposed to be. The issue was whether the law had been violated and if so whether such violation was part of a pattern of ignoring *Garner*’s requirements. Fyfe’s reports usually ended up recounting the facts as brought out in depositions and official reports, restating *Garner*’s policy, investigating whether police officers had been appropriately trained and supervised to follow the

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25 Notes and drafts of the preparation for that case, collaborating with attorneys Steven Winter and Martha Fleetwood, are archived in Fyfe’s files. The National Bar Association, an association of African-American lawyers, filed an *amicus curiae* brief in the case, as did the Police Foundation, which is a research group for which Fyfe worked at the time.
policy, and then leaving the facts to juries as to whose story to believe. He did testify in some trials giving his expert opinion as to what a police officer would be thinking under the conditions proven by the facts of the case, and then he would match that opinion to the Garner defense-of-life policy.

At first, some police attorneys were willing to take these cases to trial on the assumption that local juries would be sympathetic to police actions even if not comporting carefully with Garner’s standard. Fyfe testified in some cases around the nation from 1985-1990 in which local attorneys would try to discredit his testimony by mocking his New York accent and background as out of touch with local conditions. To my recollection (and I leave it to others to go through more boxes of written files,) this tactic never worked. Whether juries disliked New Yorkers or not, plaintiffs’ attorneys had Tennessee v. Garner on their side, and they hammered at the question of whether police had truly and objectively thought their lives were in danger when they shot. This clear standard and the police policy, training and supervision that obviously resulted from it convinced juries around the nation to find for plaintiffs.

By 1990, Fyfe’s expert witness practice was ballooning and cases alleging misuse of force were becoming more varied. He had testified as an expert about the bizarre MOVE bombing in Philadelphia, in which Philadelphia police stormed a house and then bombed a city block from helicopters in order to subdue a troublesome radical political commune.\(^\text{26}\) He gave expert opinions in a series of cases involving brutal beatings, not shootings, in which suspects had died or were maimed. The reasoning of Garner expanded to include such cases: not only deadly force through use of firearms, but the wider continuum of coercive force in general – an example of caselaw development but

\(^{26}\) Theses cases are detailed in Skolnick and Fyfe’s Above the Law: Police and the Use of Force.
also the story of how a new technology of policy development was evolving as a result of Supreme Court cases and litigation based on them.

In the early 1990s, Fyfe began to examine the issue of whether and how police officers should be required to remove themselves from situations in which they would be forced to defend themselves by shooting. When considering a batch of cases sent to him by lawyers for families of mentally disturbed people shot dead, Fyfe began to question whether the “shoot/don’t shoot” mentality of Garner’s defense-of-life policy was too simplistic in addressing the wider circumstances of police shootings. Police who approached what they knew to be possibly dangerous people should know not to exacerbate the potentially violent situation by setting up scenarios in which they would be attacked and thus legally justified in killing the assailant, Fyfe believed. Many such cases were coming to his expert witness practice, and he used the insights he had gained from his research in the Miami Metro-Dade Violence Reduction Project\(^\text{27}\) to show how police policies on dealing with the emotionally disturbed could produce outcomes in which everybody lived.

Here is an example of such a case taken at random from the files in the basement. It was a plaintiff’s case against the Camden, NJ Police Department and seven individual police officers. All the officers were sued personally and the chief and city were sued as “policy defendants.” The facts were these: an emotionally disturbed man was “acting crazy” in the street, yelling and waving a knife at passersby. He was upset about a family matter, and by the time the police were called, he was in the street. Two police officers arrived on the scene and tried to talk to him, but he just became more agitated. Because he had a knife, they determined he was a threat to the people on the street and they called

\(^{27}\) See the chapter by David Klinger in this volume.
for backup. Backup arrived and blocked off the sidewalks so that nobody would be endangered by going too near the “EDP” with the knife. The officers kept trying to talk to him to get him to put the knife down. More backup arrived, so that by this time, seven police personnel were involved – six patrol officers and their sergeant. Rather than calming the man, this agitated him more, and he backed off from them. The officers formed a ring, each officer about fifteen feet away from him (as they had been trained to do) with the man and his knife at the center of the circle.

Notice how these facts would match to a Garner defense-of-life policy. Certainly the man was potentially a threat to the officers and people on the street, but by escalating the situation and provoking him, the officers had set up the situation in which they were all put in danger and thus “permitted” to shoot if the threat became immediate. The officers said the man lunged and swiped at an officer with the knife. (Because all passersby had been blocked away from the scene, there were no non-police witnesses to all this.) When the man attacked, their deposition testimony said, the officers surrounding him shot and killed him.

Stop for a moment right now and recall your first reaction to this. Social worker-types usually think “oh, not another mentally ill person off his meds.” Civil liberties-types usually think “oh, not another person dead at the hands of the police.” Police usually think, “my God! These guys were in a circle all facing the EDP? And the only person shot was the EDP? Whew! Lucky break!” Of course, all those reactions are correct. (The man’s family won the case and was awarded a comparatively small sum of $50,000 because his earning potential was low; the money was for punitive and not compensatory damages.)
Fyfe began to testify in several such cases, and he claimed that the police were under an obligation to think ahead and to plan how to approach the incendiary situation so that nobody would end up dead, including the police themselves. Did cases like this actually work so as to change police policies and procedures and spark training that educated police officers in how to de-escalate potentially violent situations? It is difficult to prove, but multiplying this case by the dozen or so actions filed against the Camden police every year, and multiplying that by the hundreds filed in the state each year, and multiplying that by 50 states – well, the quantitative methodology is not sophisticated here, but it is probable that these lawsuits had more of an impact than monetary compensation for injured claimants alone might indicate, and that impact would be very supportive of the police themselves as policies and training developed so as to help them learn to “police smarter, not harder,” as Fyfe used to say.

Certainly, litigation was not the only reason that police policies changed and improved during those years. It is difficult to disentangle the various threads of causation, and the variables cannot be reduced to quantitative measures amenable to multiple regression. Perhaps it doesn’t matter which cause was most significant, as long as the improvement happened. A prime example of this is litigation about police duty to respond and intervene when a person’s life is in danger. Most of Fyfe’s cases before 1990 had to do with improper use of force, but litigation evolved so as to challenge other police actions – such as the failure to use force when they should. Two high-profile cases on this matter came to Fyfe’s desk, one very early: 1984, the year Tracey Thurman sued the City of Torrington, Connecticut, and 24 of its police officers for failing to arrest her estranged husband after he stabbed her. Thurman had called the Torrington police
before when her husband violated a restraining order; he had previously assaulted and threatened to kill her, and the police knew this. The incident that produced the lawsuit—and eventually a 2 million trial verdict and a made-for-tv movie—occurred when the estranged husband came to her house again and Thurman called the police. He assaulted her, but no police protection arrived. Eventually, half an hour later, an officer came by but did not arrest the ex-husband even after observing him kick Thurman in the head. Eventually he stabbed and maimed her. Her case prompted many police departments all over the nation to review their policies about response to domestic violence, though it could be said that the political environment at the time provided the fertile ground for such “triggering events” to which reformers could refer in arguing for change. At the same time, the Minneapolis Domestic Violence Experiment (Sherman 1992) moved scholarly inquiry on this topic forward, and together these factors produced a definite change in public and police opinion about intervening on behalf of domestic violence victims.28 (Cynics also said that the police were willing to change their policies because they came to see domestic violence not as a family matter in which men could be allowed to dominate but rather as an opportunity for arresting people!)

However, this story of improving police policies is not as seamless as Garner’s. Not all police departments changed their policies, and training about intervention in domestic violence incidents remained conflicted. There was no U.S. Supreme Court case

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28 The other failure-to-intervene case was Sinhasomphone v. City of Milwaukee, the Jeffrey Daumer case. Daumer was a serial killer whose gruesome crimes came to light in 1991. Sinhasomphone was a Laotian immigrant teenager who Daumer had lured to his apartment and was preparing to kill. The boy escaped and ran, nude, out to the street where he found police and asked for help. Daumer convinced the police that this was a “lovers’ quarrel” and that they should not intervene. The police returned the boy to Daumer, who killed and cannibalized him. In all the horror that arose when Daumer was caught and his crimes revealed, the fact that the teenager’s family sued the Milwaukee police was one minor part of the news frenzy. Fyfe’s deposition in the case emphasized that “the primary role of the police is to protect life.” The family won the case, the officers were fired but reinstated years later, and eventually one was elected head of the police union in the city.
setting out the policy here, only a decision from one federal district court that was
adopted in most other federal courts, but not all. The Constitutional basis underlying the
policy was also shaky. Thurman had claimed that the Torrington police department’s
custom of non-intervention violated the Fourteenth Amendment, specifically that the
practice would deprive victims of the right to life, and that it denied them equal
protection of the laws because they were women. Victims of domestic violence, she
argued and the district court agreed, are denied these rights when police refuse to protect
life because domestic fights are a “family matter.” Other courts would not accept this
argument, stating that not all victims of domestic violence are women and it is not clear
that the custom of non-intervention was the result of the police’s department’s intention
to disregard the rights of women. The shaky status of this area of law is illustrated by the
recent U.S. Supreme Court case of Town of Castle Rock v. Gonzales, 545 U.S. 748
(2005), a case in which a frantic mother begged local police to stop her ex-husband from
committing violence against their children, all three of whom he killed. The state of
Colorado had passed a statute requiring all their police to respond immediately to calls
alleging domestic violence, but the officer in this case went to dinner instead. This was
not a case of lack of proper police policy and procedures, but lack of action in following
them. The U.S. Supreme Court said that “even if the statute could be said to have made
enforcement of restraining orders ‘mandatory’ because of the domestic-violence context
of the underlying statute, that would not necessarily mean that state law gave respondent
an entitlement to enforcement of the mandate.” This casuistic “reasoning” stopped the
movement towards improved police protections for victims of domestic violence. There
was no mention of the Fourteenth Amendment equal protection argument.
In sum, by 2005 this area of law had evolved through a period of policy development and police training, but because the U.S. Supreme Court refused to provide a federal Constitutional imperative for it, its status currently rests on state and local law. *Monell* cases (which the *Gonzales* case was) must allege a violation of the federal Constitution, though claimants can still sue under state or local law. Nevertheless, the main point here, i.e. that *Monell* litigation caused reform of police policies and procedures, still stands – the policies were put into place, but now will be supported by local and state law when the federal fails. This occurred because a technology of policy development and application had evolved in other types of cases, and was available to apply to new situations.

As the 1990s wore on, police litigation became more varied as it expanded into those new situations. Civil rights attorneys became more adept at mounting these cases, and the Supreme Court continued to decide cases about section 1983, developing a strong body of law that both limited the scope of lawsuits while supporting the section 1983 device in principle.\(^{29}\) Although the volume of litigation rose, and the type of allegations of misconduct subject to lawsuits expanded somewhat, almost all the cases involved some type of use of deadly force by police. Increasingly, that force was not necessarily exerted at gunpoint.

By the 1990s, a great number of cases involved improper car chases in which police were pursuing people suspected of minor crimes, putting innocent lives of passersby (and, of course the officers themselves as well as the foolish fleeing suspects) in great danger. The logic of *Garner* applied to these cases: why should police engage in

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\(^{29}\)This is not a law review article, so the cases will not be recounted here. However, an excellent overview of cases as they developed and the effect of these cases on police standards is Victor Kappeler’s *Police Civil Liability: Supreme Court Cases and Materials* (Waveland Press 2001).
activity that could kill a suspect simply because he is fleeing, when he is not presenting a
danger to himself or others? Better to call for backup and have him blocked by
responding vehicles, or simply to take his license number and find him later. Several
experts nationwide developed specific expertise in aiding attorneys in bringing lawsuits
resulting from the tragic results of such pursuits, and Fyfe’s basement contains records of
many such cases. This development did not represent a new type of case, but was simply
an extension of the existing Garner defense-of-life paradigm. Moreover, because the
injuries caused in car crashes following these chases were often severe, the monetary
logic of constitutional tort litigation mirrored that of the shooting cases: compensatory
damages would be high enough to justify the costs of litigating.

Almost all the cases involved serious physical injury to plaintiffs, even when guns
were not involved. Fyfe served as an expert witness in a series of cases in which police
dogs, trained to kill and maim, were used instead of firearms for apprehending fleeing
suspects. The federal district court for the Central District of Los Angeles held that
Garner applied because the dogs constituted deadly force. In one of the more egregious
series of cases, a police assassination squad targeted suspected robbers, watched and
waited until they were likely to begin committing a crime, and shot them dead when they
appeared. The Los Angeles Police Department claimed that this operation did not violate
Garner because the suspects were preparing to put lives in danger. L.A. Police Chief
Daryl Gates was held personally liable, along with the city, for several million dollars.30

30In terms of pure volume of paper, files of lawsuits from Los Angeles and Philadelphia took up the most
space in the Fyfe basement. This does not prove that these two cities had the most brutal police
departments, only that plaintiffs’ lawyers from those cities were very active and effective, that the cities
had continuing problems with police misconduct, and that the size of the cities meant that the number of
cases was large, too. Mid-sized New Orleans took the prize for the most appalling though not the highest
number of incidents (cases amounting to premeditated murder by police) and many cities in Texas were
sued by an effective crusading plaintiffs’ lawyer from Nacogdoches. Bunches of cases from small cities
At the end of his career, from 2000-2003, Fyfe was engaged in many cases that challenged police shootings or beatings by off-duty officers. In 1976, he had first noticed the fact that so many shooting incidents occurred when officers were out of uniform off-duty; 20% of the shots fired that he studied for his dissertation were from officers not engaged in police duties, many of them inebriated. (Fyfe 1978) He studied and wrote about the phenomenon (Fyfe 1980) and inspired his students to do so (White 2000) and believed that this was the next type of police behavior that should be changed through 1983 litigation. In 1998, Fyfe wrote a lengthy expose of one case, *Maryanski v. City of Philadelphia*, which involved a terrible beating of two teenagers by off-duty Philadelphia police officers. He showed how the use of force, the fact that the officers claimed to be taking police action while they were drunk and off-duty, and a grossly inadequate disciplinary system that did virtually nothing to punish such actions combined to present a picture of police thuggery that the federal court could not ignore. The article is a step-by-step depiction of how the case developed in which Fyfe warns other departments to learn from the case and examine the agency’s professional standards, disciplinary systems, and actual officer behavior. (Fyfe 1998.31)

A variant of the off-duty problem involved officers who were undercover, in plain clothes, taking police action but not recognized as such by other officers who happened onto the scene and would attempt to arrest the plainclothes officers. (Of course, this was located around the states of Colorado, Maryland, Massachusetts, and Ohio are filed together; again, it would be incorrect to assume these indicated worse problems of police illegality in those states than in others, and instead might be regarded as evidence of more active civil rights bars there. There are no files from New York City, not because the NYPD is perfect, but because Fyfe would not testify against his former employer.

31 Fyfe testified quite successfully in many cases against the Philadelphia police, prompting Philadelphia attorney Alan Yatvin to say in his eulogy at Fyfe’s funeral that “I paid for a wing of that house in Princeton!”
a more common problem when on-duty officers saw what they believed to be criminal activity that would turn out to be covert actions taken by plainclothes officers, but the scenario in which both officers are out-of-uniform is also possible.) As a police academy instructor and developer of procedures for the NYPD in the 1970s, Fyfe and others had initiated a training protocol whereby an arresting officer, whether on- or off-duty, must shout “Police, Don’t Move,” at which time plainclothes officers mistakenly suspected of being criminals were instructed to raise their hands and declare “I’m on the job.” This situation was harder to enforce when the arresting officer was off-duty, because the arrestee plainclothes officer could not be sure of the other’s police status. In the most extreme case, two people in plainclothes could both be claiming to be police officers, and each would be skeptical of the police status of the other. Obviously, a clear police protocol for dealing with this situation is necessary, and officers must be trained carefully to follow it.

This case had returned to the trial court through a campaign of procedural warfare. It had gone to trial years before, and Fyfe had testified at that time when he was still a university professor and not Deputy Commissioner for Training with the NYPD. (When he became Commissioner in 2002, he took on no new work as an expert, but continued to fulfill his contractual obligations in cases that were dragging on from before that time. Thus the data from which this story is constructed ends in 2005, with his death.) The Court of Appeals for the First Circuit returned the case for retrial, and attorney Barry Scheck once more took it to a jury. In a two-day videotaped trial

32The federal appeals court overturned the results of the first trial, citing errors in interpreting the proper standard of liability of supervisors and the municipality. The appellate case details the procedural saga; see Young v. City of Providence, Rhode Island, at http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=04-1374.01A (accessed in August, 2007.)
testimony on behalf of a mother whose on-the-job plainclothes officer son had been shot and killed by a fellow officer off-duty at the time, Fyfe gave the last sworn testimony of his career. The dead officer was black and the shooter was white, and the case had difficult racial overtones. Dying of cancer, and told that testifying would dangerously weaken him, Fyfe said “but that poor bastard is already dead. Somebody’s got to stand up for him.” Fyfe died two weeks later and his testimony was shown posthumously in the trial.33

Police policies about off-duty officers carrying guns, and the actions they may take while off-duty, are still developing. Although the popular press (Boston Globe 2005) and many police department policies and training protocols declare that significant changes are being made in the area, no scholarship or major cases yet demonstrate that this is so. Fyfe and other scholars (Kean 1999) saw the area as ripe for policy development and the next topic for extension of Garner reasoning.34

Outrageous though the police actions in all these types of cases might have been, they did not strain the basic outline of section 1983 litigation: use of force and compensation for wrongful death was still at issue, and the constitutional tort remedy did not spread to other types of police conduct. The fact that section 1983 litigation was almost exclusively concerned with use of force, failure to use force, and the situations in

33Mrs. Young lost her case in the second trial. Jurors later stated that they had discounted Fyfe’s testimony because he was under the influence of chemotherapy and painkillers when he gave it.

34Few people remember how vitriolic the atmosphere in police policy circles was prior to the decision in Garner in 1985. Young officers are often amazed to hear that police were allowed to shoot and, indeed, encouraged to do so as a supposed crime deterrent. 1985 is not so long ago, but a sea-change in understanding of the police role has occurred. Fyfe believed that such a sea-change would also be possible in the off-duty shootings field, especially in relation to off-duty shootings when police officers had been drinking or using drugs off-duty. The policy atmosphere that exists when changes are first proposed can change drastically in only a few decades, as it did in the case of shooting fleeing felons.
which force could be used, could indicate that the main conclusion of this chapter (i.e.,
that litigation is responsible for significantly improving police policies and thus police
practices) is too sweeping. There were comparatively few cases alleging violations of
other Constitutional provisions, and nowhere is this more obvious than in an area of
police activity which has been the focus of reformers’ concerns for decades: searches and
seizures under the Fourth Amendment.

The “files in Fyfe’s basement” contain some cases alleging illegal searches and
seizures, but all involve police actions which resulted in physical harm to plaintiffs.
Even then, police usually won these cases, perhaps because juries regarded the plaintiffs
as whiners (in situations where the plaintiffs were not seriously injured) or lowlifes (in
situations in which plaintiffs, though injured, had indeed been involved in criminal
activity.) The “Fyfe files” also include boxes of materials about the exclusionary rule,
research on how it operates (see Fyfe 1983; see also Davies 1992 and anything Davies
has written on the subject) and legislative materials involving his testimony to Congress
on the issue and news clippings quoting people from all sides in the debates about the
rule’s future. None of these materials mention the private action for compensatory
damages as a possible alternative to the exclusionary rule as a method for enforcing the
Fourth Amendment.

Warren Burger’s pet policy prescription for illegal police activity, which has
come to be known as “the Bivens action,” (see footnote 9) has never gained traction.
Procedurally, section 1983 actions could be used to sue police for illegal searches and
seizures just as surely as it has been to sue for illegal use of force, but it very seldom has
been. The main reason is not difficult to imagine: compensatory structures would only
work for police misbehavior that has ended in somebody dead or injured. How much is a constitutional right worth? Unless the plaintiff can put a provable price on it, nothing. A family who has lost a breadwinner because of unconstitutional shooting can prove it lost money. A person who has been wrongfully beaten, incurring huge hospital bills, can prove he lost money. A person who is the subject of an illegal search can seldom demonstrate monetary loss sufficient to make a lawsuit worthwhile. And even if he has, if he was involved in a crime even though his rights were violated, juries would be reluctant to compensate him.

None of this precludes using the section 1983 lawsuit as a means of affecting search and arrest policies. But plaintiffs would presumably have to do so not primarily for money, but for declaratory and injunctive relief. This is the direct route to policy change through constitutional tort litigation (as opposed to a more mediated, indirect route as described here in changing police agencies through monetary liability) and it has been used often as a reform device for a different criminal justice agency: prisons. There are similarities between prison reform and police reform insofar as 42 U.S.C. section 1983 lawsuits are used in both. But there were many differences. In prison litigation, section 1983 was used primarily as a device to achieve injunctions and consent decrees, not compensation for individual prisoner plaintiffs. The consequences of these injunctions and consent decrees were often not what reformers hoped, and the judicial activism involved in obtaining and implementing them created troublesome constitutional concerns. (Feeley and Rubin 2000) Achieving reform through the compensatory lawsuit creates none of these problems, but it requires that there be a compensable injury in the first instance.
In short, the constitutional tort regime did not get applied so as to uphold the Fourth Amendment because there’s just no money in it. From an accountability standpoint, that might be just as well, because supposedly the exclusionary rule is sufficient to deter misconduct in that area of police activity. However, skeptics have charged that the exclusionary rule’s good faith defense to allegations of illegal searches or seizures “rewards cops for being stupid,” as Fyfe used to say. Transcripts of his testimony before Congress during hearings on the good faith exception are in the basement boxes, and basically they boil down to that observation. Of course, he and all the other people who fought enactment of the good faith exception lost that battle. Most police officers today will tell you that the exclusionary rule does not bother them, that they have learned to work under its threat, and that it isn’t much of a threat in everyday police practice, anyway.

Supporters of the exclusionary rule claim that this is so because it has become so entrenched in law enforcement training that it now exerts considerable control over police behavior. Over time, police managers have been educated about search and seizure, and all officers are trained to comply with Fourth Amendment requirements, and the fact that judges only very rarely throw evidence out of court shows that the exclusionary rule is indeed working to deter unconstitutional actions. This may be an accountability device that has worked, and if there have been very few lawsuits over Fourth Amendment violations, it may be because police are acting well within the law.

Or perhaps not. But resolving the debate about whether the exclusionary rule exerts meaningful deterrent effect on police misconduct is not the issue here. The question here is: has the constitutional tort litigation regime been useful in enforcing the
Fourth Amendment, thus adding more confirming evidence to the assertion that litigation has been a major cause of police reform over the past three decades?\(^{35}\)

Using the cases Fyfe worked on as examples, the answer to this question is “yes and no.” Yes, there were section 1983 cases alleging illegal searches and seizures, and yes, they have been useful; but no, they were not a major cause of police reform in this area. The “Fyfe files” contain records of a few private lawsuits alleging illegal search and seizure, involving people with money who had a lot to lose if they were convicted and the resources to fight back against the police after the criminal proceedings concluded.\(^{36}\) Another such file is from a criminal case, the very unusual situation of a “class action motion to suppress” (see footnote 19) -- not a private civil lawsuit. More powerful are cases of which there were no examples in the Fyfe basement: cases in which a group of people who have been subjected to illegal searches band together to sue the police over a specific arrest policy. These cases can have powerful political effects in

\(^{35}\)If there has been no reform in the Fourth Amendment arena, it would probably not be from lack of litigation, but because the U.S. Supreme Court over the past three decades has systematically weakened Fourth Amendment law. There is no equivalent of a Garner defense-of-life bright line in Fourth Amendment caselaw.

\(^{36}\)A Supreme Court case on this is *Malley v. Briggs*, 475 U.S. 335 (1986) in which State Police arrested a town councilman and his wife for smoking marijuana, though there was very scant evidence linking them personally to any illegal behavior. The State Police had heard on a wiretap that there was a party at their home in which marijuana was smoked. The grand jury refused to indict, and after the criminal case was dropped, the Briggses sued alleging defamation and illegal search and seizure. The US Supreme Court held that the officers who had obtained warrants were not immune from suit. Important as that standard may be, this lawsuit was commenced by people with money who are not the usual victims of illegal police searches and are unlikely to exert much influence on police behavior in search and seizure situations. (McCoy 1986) Fyfe’s files contain a case in which a millionaire sued the local sheriff and county council in a case heavy with political overtones. The plaintiff had inherited a large tract of land that, he claimed, the county wanted for a park. He was a constant user of marijuana, which was common knowledge in the county, and he grew it for his own use on the land. Sheriffs’ deputies came to his house and arrested him for using, producing, and dealing drugs. He claimed there was no probable cause to arrest for producing or dealing, a point which was extremely important because if he were found guilty, the county could seize his land under forfeiture law. The county prosecutor (Ventura County, California) declined to prosecute the case, and forfeiture was prevented. Subsequently, the rich stoner brought a damages action against the police, alleging Fourth Amendment violations. While these cases are somewhat stunning, they are scarcely typical of the types of cases in which searches and seizures usually occur.
forcing police departments to explain their policies in court and in the media (Kappeler 2006, chapter 5), but they are rare and seldom result in large compensatory judgments. They are usually aimed at specific statutes or extensive police programs and their immediate objective is political reform, not compensation. Litigation over the federal drug interdiction program called “Operation Pipeline,” with its specific orders to local police to arrest interstate highway drivers who looked Jamaican, is an example. The racial profiling scandals of the late 1990s, which at base are about unconstitutional stop and arrest procedures, were prompted by defense to criminal charges, not by civil rights lawsuits. (Fyfe was a witness in the Soto case and all the subsequent political fallout over racial profiling on the New Jersey turnpike. For a state-by-state overview of policies in reaction to it, designed to stop racial profiling, see Law Enforcement News 2000.) The fact that the constitutional tort accountability device is available to challenge search-and-seizure policies, even though it is rarely used, is probably a background concern to police officials setting up police operations of search and seizure, but it is not likely to be a pressing consideration. Overall, arrest practices in run-of-the-mill police work not involving a special program are even less often challenged with section 1983 – but of course, they are seldom challenged with the exclusionary rule, either.

Another Constitutional provision that could be vindicated through constitutional tort lawsuits is the Fourteenth Amendment’s equal protection provision. Allegations of racist actions on the part of the police were common in 1978, when Monell was decided, and they are common now. Fyfe wrote a law review article claiming that the “forgotten issue” of Garner was the fact that Garner was black while the police officer was white, and that a racist pattern of shootings was statistically discernible in Memphis but not
necessarily in other cities. (Fyfe 1982 and Fyfe 1986) Why, then, have there been few section 1983 lawsuits claiming denial of equal protection of the laws, compared to lawsuits alleging misuse of force generally? Perhaps the same difficulty in monetizing rights that kept the numbers of Fourth Amendment allegations low is also at work here. Furthermore, courts are often reluctant to venture into the statistical proofs necessary for proving group discrimination, though they do so in employment cases (a type of case that is indeed brought against police departments, but has been declining over the past decade as police agencies have become increasingly gender- and race-diverse.) If groups of citizens aggrieved by police actions could prove that the actions were sparked by racial motives, they could band together in a section 1983 lawsuit demanding both money and policy change – but proving such intent is very difficult.

The fact that there are only a few examples of Fourth and Fourteenth Amendment violations being challenged under section 1983 seems to indicate that the major impact of police litigation has been mostly in cases challenging use of force. If this is so, the major thesis of this article -- “the impact of section 1983 litigation has been that it encourages administrative rulemaking and enforcement within police departments as a means of avoiding lawsuits” – would apply only to police policies on use of force. If so, the conclusion would be that section 1983 litigation has been extremely useful in controlling police use of force, but has not been and will not likely be a powerful accountability device in other areas of police activity. This conclusion would be wrong, because it ignores another important development that occurred in the early 1990s as a response to Monell and Garner: insurance underwriting of law enforcement agencies, model rules
and policies developed alongside it, and a self-replicating oversight technology that could be, was, and is applied to many areas of law enforcement endeavor.

The Final Piece of the Puzzle: Insurance, Model Policies, and Standardization

This chapter has recounted the history of constitutional tort litigation against the police over the period 1978-2005, using records of a defunct insurance company and archives of a leading expert witness on use of force. It looked at numbers and types of cases filed and their results in court, and hypothesized that these results caused police chiefs and city managers to develop a “cognitive model” in response to this litigation which assumed that better policies, supervision, and training would improve police behavior on the street and thus prevent litigation. Charles Epp’s research (Epp 2007) has traced the genesis of that cognitive model to section 1983 litigation, and this chapter adds a piece to that puzzle: the effects of insurance.

Prior to Monell and Garner, few cities insured their police departments. There was no reason to do so if courts would hold them immune from suit. Recall the insurance company data described in the second section of this article: that insurance company was the preferred provider for sheriffs’ departments nationwide, yet so few agencies obtained insurance that there were only 2.2 million dollars worth of claims paid out in the years 1974-1984. Once the courtroom doors opened to plaintiffs alleging constitutional violations for compensatory damages, and cities began to feel the impact, law enforcement officials began to take notice and search for ways to shield their departments from liability. City attorneys could advise them about the state of the law and warn them
of the implications of *Monell* and *Garner*, and in fact Epp’s three-pronged cognitive model maps precisely the state of the law on personal and municipal liability at the time. The new and potentially revolutionary twist that *Monell* added was the chance that the city would be liable if the police department’s “custom, policy, or practice” was unconstitutional.

Where would an alarmed police official turn to find out whether his department’s policies complied with the United States Constitution? Like any other executive, he would rely on his legal counsel to tell him of applicable caselaw, he would scan the professional literature to find model policies that had survived court challenges, and he would turn to his colleagues in professional organizations to compare notes and develop common strategies for preventing problems. Moreover, because the problems involved monetary liability, he would shop for insurance to cover his risks.

In the late 1980s, after *Monell* and *Garner* had time to produce the first multi-million dollar jury verdicts against police departments in many federal district courts, the implications of these cases were beginning to sink into the law enforcement psyche. Police executives began to attend seminars on avoiding liability. Several police organizations offered seminars on vigorously defending against the legal complaints and reviewing and improving police procedures so as to show they are not unconstitutional customs, practices, or policies. (See especially a long series of seminars sponsored by Americans for Effective Law Enforcement of Chicago, or workshops offered by the Legal Officers Section of the International Association of Chiefs of Police at the annual conferences.) A literature emerged “for law enforcement executives in the development of extensive training programs, explicit written directives and the preparation of
supervisors . . . [to control] the personnel assigned to them.” (Di Grazia, 1987: 13
reviewing Silver, 1986 – a book marketed to law enforcement officials with the statement
that it would “show you preventive measures that will minimize your risk of being
charged with police misconduct.)

The obvious questions asked in such seminars was: “what policies will withstand
legal challenge? Where do I find them?” Soon projects analyzing, formulating and
disseminating model policies emerged. Following its widely-distributed publication of
model policy on deadly force (Matulia 1982 and 1985), the IACP instituted an in-house
model policy project and published a detailed set of policy manuals (IACP 1988 et seq.).
The Commission on Accreditation of Law Enforcement Agencies, which was formed in
1979 to foster professionalism in policing through accreditation review, produced a book
of standards and policies which was circulated widely and is well-established as a major
reference work today.37 (CALEA 1982 et seq.) Most important to the argument about
whether section 1983 litigation sparked reform in areas other than police use of force,
these model policies covered a wide range of police operations.

Simultaneously, law enforcement officials sought to reduce their exposure to lawsuits
by obtaining insurance. But insurance companies would not offer attractively-priced
policies if police agencies could not demonstrate they had done everything possible to

37 CALEA’s website reports that its “accreditation program provides law enforcement agencies an
opportunity to voluntarily demonstrate that they meet an established set of professional standards which: 1)
Require an agency to develop a comprehensive, well thought out, uniform set of written directives, 2)
Provide the necessary reports and analyses a CEO needs to make fact-based, informed management
decisions...5) Strengthen an agency's accountability, both within the agency and the community, through a
continuum of standards that clearly define authority, performance, and responsibilities, 6) Can limit an
agency's liability and risk exposure because it demonstrates that internationally recognized standards for
law enforcement have been met, as verified by a team of independent outside CALEA-trained assessors,
and 7) Facilitates an agency's pursuit of professional excellence. (italics added) www.calea.org (accessed
July 2007)
reduce the risk of lawsuits. Stung by the 1985-1986 “liability crisis” and a crisis in their own underwriting and payouts, the insurance industry restructured itself.\textsuperscript{38} Now allowed to offer insurance to groups of municipalities that could pool their risks and resources, insurers moved to organize risk management protocols for police departments. By 1985, two trade organizations had published manuals for police departments to reduce their legal liability through risk management (Wasserman and Phelus 1985; Wennerholm 1985) and by 1990 the first major books and articles prescribing liability avoidance through risk management associated with insurability were published. (Gallegher 1990 a, b, c.) Experts such as Patrick Gallegher and, again, James Fyfe\textsuperscript{39} addressed insurance groups on what to look for and what policy changes require of police agencies seeking insurance against legal liability risks.

Soon it became common knowledge in the law enforcement profession that the way to obtain insurance was to review departmental policies and bring them into line with national standards, and these standards covered a wide range of police operations, not only use of force. Demonstrating compliance with accreditation standards, for instance, could help a police agency get insurance whether the agency actually sought accreditation or not. The CALEA website today offers testimonials from satisfied police executives of agencies that have been accredited by going through an exhaustive process of policy and practice review. Here is one from 1996:\textsuperscript{40}

\textsuperscript{38} See discussion of the “liability crisis” and insurers, above at pp.\textsuperscript{.}

\textsuperscript{39} See Fyfe’s outline for a speech he made in 1992 to a conference of insurers, appendix.

\textsuperscript{40} Excerpt from a letter mailed to CALEA in September 1996 and reprinted with permission from Assistant Chief Kenneth Findley, Tyler (Texas) Police Department.
Thanks for your help in providing me with a list of Law Enforcement Liability Providers who offer discounts for accredited agencies. I presented your list to our Risk Manager. She contacted our insurance broker who subsequently agreed to a reduction in our premiums of $19,000 annually. This equates to a 16.7% decrease.

Charles Epp, in his writings on the effect of litigation on municipal policy improvements, acknowledges the role of insurance. He quotes an article from *Police Chief Magazine* (the magazine of the International Association of Chiefs of Police) reporting that the primary insurer of police agencies stopped offering coverage in 1988. He says that “a North Carolina governmental commission had found that insurance company’s police liability loss record ‘was very good’ but that the high degree of unpredictability of liability suits had contributed to the insurance crisis. Later, the same writer attributed the growing liability threat directly to several key Supreme Court decisions, particularly Monroe v. Pape (1961), Monell v. Department of Social Services (1978), and Owen v. City of Independence (1980), and to growing pressure from plaintiffs attorneys in the wake of those decisions.” (Epp, forthcoming, summarizing Thomas, 1979 and 1982.) Eventually insurers returned to the police market, especially when municipalities themselves developed strategies to obtain insurance, but they did so only if the agencies could demonstrate that they were not vulnerable to lawsuits. Patrick V. Gallegher, who often consulted with insurers and sometimes served as an expert witness on behalf of police agencies, developed a protocol for reviewing police policies, procedures, and practices so as to reduce the risk of liability and marketed it to police agencies. (Gallegher 1990 and 1992) The result of such efforts shared between police departments, their legal advisors, and insurance companies was that police operations improved significantly over the course of the 1990s.
Whether for traditional torts or constitutional torts, legal liability and insurance are inextricably linked. That this link has largely been overlooked in recognizing the depth of policy reform which occurred in law enforcement agencies over the past three decades is perhaps due to the fact that reformers do not think of compensatory lawsuits as a meaningful accountability device. Even scholars who study risk management in police agencies seem to have only dimly perceived the broad effect of linking litigation, accreditation, policy standardization, and insurance, and instead are sidetracked by asking why police departments seldom employ risk managers. (Archbold 2005) The answer is that cities themselves employ risk managers; only police chiefs in huge city departments can afford their own. In most jurisdictions, police chiefs rely on the city’s expertise and the standards available to them through their professional channels such as the IACP and CALEA, and all departments can rely on the advice of risk-avoiding lawyers, whether they can afford to employ in-house counsel, rely on the help of city attorneys, or are part of a city’s contractual arrangement with private general counsel to provide legal advice.

Why has the section 1983 lawsuit, and the broad technology of policy review and implementation that it spawned, been overlooked in debates about police accountability? Two reasons spring to mind, though there are probably many others. First, the effects of this litigation are difficult to discern empirically. No national database about lawsuits exists, and there is no centralized source for information. The data used for this chapter, i.e. insurance company records and an overview of an expert witness’s personal files, are one of the few reports of data on this issue, and the cases described in these data are a compendium of lawsuits from localities all over the nation, not from a centralized reporting system. (Actually, it is this very decentralization that has rendered the section
1983 constitutional tort lawsuit so very effective, as discussed below.) Second, other accountability devices such as consent decrees or the exclusionary rule or citizen review boards are “sexier” because they rely on regulation, and experts such as scholars can have a part in designing the regulations. Lawsuits, although often covered in screaming detail in newspapers and broadcasts, are not usually subjects of scholarly inquiry. Social scientists leave this to the lawyers, and the lawyers do not think empirically.

Other accountability devices have been much more interesting to scholars, but that does not mean they prove to be the most effective in affecting police officer behavior. The exclusionary rule debate, with its intersecting pressures of Congress, the courts, police resistance, and political gamesmanship, has provided fodder for a small industry of criminal justice publishing, but the actual effect of the rule on search and seizure practices is still contested. (McCoy 1996)

Consent decrees, which are detailed injunctive orders to which plaintiffs and police departments agree in order to settle section 1983 lawsuits for injunctive relief (if brought by private plaintiffs) or orders for compliance monitoring (if brought by the federal Justice Department) have received some scholarly attention (Walker 2003) and even more discussion in police professional circles. The public consent decree device is established statutorily by the Violent Crime Control and Law Enforcement Act of 1994 and set into law as 42 U.S.C. § 14141. It permits the U.S. Justice Department to sue local police departments for violations of accepted police “custom, policy, and practice” – a verbatim quotation of the earlier section 1983 language. Walker goes so far as to call the consent decree a “new paradigm,” but he carefully explains that it is made possible because the “specific reforms mandated in those agreements were not developed by the
Justice Department itself but were drawn from recognized "best practices" related to accountability already in place in other more progressive police departments.” (Walker 2003: 6) As this chapter has described, those “best practices” standards came to be developed in the 1980s and 1990s, and it is private litigation rather than consent decrees pursued by the federal Justice Department that first sparked the movement and that continues to do so today.

Walker argues that the section 14141 consent decree offers great hope as an accountability device, and on paper this is surely so. (See a report explaining how it works, published by the Vera Institute 1998, showing that obtaining a “pattern-and-practice consent decree will reform police departments better than criminal prosecution of individual officers will.) Walker said in 2003 that “to date, there have been a total of eight such settlements, with the most highly publicized ones involving the Pittsburgh Police Bureau, the New Jersey State Police, the Los Angeles Police Department, and the Metropolitan Police Department of the District of Columbia.” Examining these eight consent decree cases, it first becomes clear that all were initiated only after the departments in question were involved in scandalous misconduct that attracted national news coverage (in Cincinnati’s case, a race riot.) All of them were initiated prior to 2002, under the Clinton Administration, and no other lawsuits under section 14141 on their scale have produced consent decrees since then. The Bush Administration’s DOJ did prosecute a smaller-scale case under section 14141, against Washington, DC

41 Walker cites as a source of these professional standards the U.S. Dep't of Justice, Principles for Promoting Police Integrity 3 (2001), http://www.ncjrs.org/pdffiles1/ojp/186189.pdf which he says is “the best summary of these best practices. This report was developed through a series of Justice Department sponsored conferences as workshops in the preceding years. See also U. S. Dep't of Justice, Attorney General's Conference: Strengthening Police-Community Relationships, Summary Report (June 1999). Walker served as a consultant to the Justice Department in compiling these standards.
suburban Prince George’s County police department, for its use of dogs as coercive force
(cynically, it can be observed that in Washington, D.C., where many federal civil servants
live in the Maryland suburbs, this story would have been quite a scandal and there would
have been internal pressure on the Justice Department to do something about it.)

Although it can be said that Civil Rights Division of the Department of Justice
under the Bush Administration has simply not regarded section 14141 as a priority, no
political administration is immune from selective prosecution practices. The section
14141 remedy’s success depends on how the Justice Department answers such questions
as:

How difficult a task will the Attorney General face in proving a
pattern or practice of rights deprivations under 14141? Will the Department
of Justice obtain and employ the resources necessary to vigorously enforce
the law? Will federal courts prove willing and able to invest the energy, time,
and ingenuity needed to fashion effective equitable relieve? If
implementation of the law results in extensive intervention into the
administration of local police departments, would Congress accept such a
result? (Miller 1998: 151)

Section 14141 was an important provision of the 1994 Crime Act that was
arguably Clinton’s greatest legislative achievement, and Clinton’s Civil Rights Division
was developing a strategy for using section 14141 aggressively. One of its first consent
decrees was obtained against the police department of Steubenville, Ohio. There is a
Fyfe file on this; Fyfe was engaged as an expert to help prepare the litigation. For
various reasons, including the fact that the DOJ attorneys did not need many of his
services, Fyfe did not do extensive work on the case. Perhaps it was because he had
invested little of his time or energy in it, but he was skeptical of the federal consent
decree device because he worried it would be used only against those agencies that the
federal Justice Department wanted to embarrass. Clinton Administration attorneys sought consent decrees primarily against jurisdictions with Republican executives, and presumably Bush Administration attorneys would seek to embarrass Democratic mayors if its Justice Department were to wield the consent decree device energetically. Since 2002, however, there have been extremely few consent decrees against local police departments prosecuted by the federal Department of Justice.

The consent decree device has been in use since the 1970s, before passage of the 1994 statute, in cases where civil rights organizations brought class actions on behalf of prisoners demanding changes in prison conditions. Fashioned as section 1983 cases demanding monetary compensation, the most important goal for these litigants was to obtain an injunctive decree for court-ordered monitoring of reform. The outcome has not been deep and lasting reform of American prisons. Instead, the lawsuits can be said to have stretched the expertise of judges beyond that which a legal structure can handle, and subject the bench to great criticism for being too activist. (Feeley and Rubin 2000; Cohen 2004; Rosenberg 1994.) The success of various consent decrees against state prisons also was dependent on the personal management styles of the court-appointed monitors (Chilton 1999).

This flaw in the consent decree device perfectly illustrates why the private lawsuit for compensatory damages has, by contrast, been very successful. It simply demands money, and if it gets it, the loser is left on its own to determine how to avoid payouts in the future. By providing high incentives for defendants to change their illegal behavior

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42 In the case of the New Jersey racial profiling scandal, Republican Christine Todd Whitman was governor of the state of New Jersey, and the consent decree covered practices that had been encouraged in the first instance by the federal government itself, in its War on Drugs under the first Bush Administration.
on their own terms, the device fosters the deepest behavioral change. (We are more likely to change more thoroughly if we do it ourselves than if someone tells us how to.)

It does not rely on politically-driven enforcement, and it is not administered by a centralized government bureaucracy. American policing is radically decentralized – local schools and local police are almost completely locally-controlled, and imposing federal Constitutional standards on them is a Sisyphean task when attempted from Washington.

The strength of the private constitutional tort is that local attorneys, pursuing the monetary interest of both themselves and their individual clients, can permeate every location in the nation without relying on an unwieldy and often politically-driven bureaucracy, while applying the same law: that of the U.S. Constitution.

Perhaps paradoxically, accountability to the Constitution may be best accomplished when it is locally-driven. (See generally Dowdle 2007, especially Rubin’s chapter.) The “private attorneys general” (Meltzer 1988), i.e. local attorneys seeking to do good by doing well for themselves and their clients, have fashioned a revolution in police departments all over the nation. Though not unnoticed, section 1983 litigation and the policy development and implementation technology that developed because of it, coupled with the professional risk management skills and oversight of the private insurance industry, has not been given the credit it deserves. This accountability device has probably been the source of the most far-reaching yet deep reforms in American policing over the past three decades. It is through these low-level and constantly challenging events, and the political system’s responses to them, that people learn how to follow the law.
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