

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

2007

Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System

Craig B. Futterman

H. Melissa Mather

Melanie Miles

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Craig B. Futterman, H. Melissa Mather & Melanie Miles, "Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System," 1 DePaul Journal for Social Justice 251 (2007).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

THE USE OF STATISTICAL EVIDENCE TO ADDRESS POLICE SUPERVISORY AND DISCIPLINARY PRACTICES: THE CHICAGO POLICE DEPARTMENT'S BROKEN SYSTEM

CRAIG B. FUTTERMAN, H. MELISSA MATHER
AND MELANIE MILES*

INTRODUCTION

In 2003 and 2004, Diane, a 50-year-old African American school janitor and mother of three, was subjected to multiple acts of abuse by a group of Chicago police officers. These officers were members of an elite tactical team that patrolled public housing on Chicago's South Side. Known to local residents as the "Skullcap Crew," they had a reputation for racist and sadistic behavior. Over the course of a year, they targeted Diane for abuse.

* Craig B. Futterman, Clinical Professor of Law, University of Chicago Law School; B.A., Northwestern University, 1988; J.D., Stanford Law School, 2001. H. Melissa Mather, Former Clinical lecturer at the University of Chicago, 2005-07, The Law Offices of H. Melissa Mather, Austin, Texas; B.A., University of Virginia, 1994; J.D., University of Virginia School of Law, 1997. Melanie Miles, Associate at Schwartz Cooper Chartered, Chicago, Illinois; B.A., Duke University, 2004; J.D., University of Chicago Law School, 2007. The authors worked together with a team of University of Chicago Law students to represent Diane Bond in her constitutional challenge of the City of Chicago's practices for supervising and controlling its rogue police officers. The authors wish to acknowledge Diane for her courage in her efforts to prevent other women from suffering similar abuse at the hands of law enforcement. The authors also wish to thank Jamie Kalven (our partner on the ground), the entire Stateway community (which generously welcomed us and provided the true knowledge and inspiration for this article), Steve Whitman and Jade Dell (our mathematical guides), Emma Rodriguez-Ayala, a dedicated team of University of Chicago Law students (now graduates) (you know who you are) and G. Flint Taylor (who paved the way for *Monell* police reform litigation).

On two separate occasions, they forced her to disrobe and bare the most private parts of her body. They threatened her with a loaded gun, needle-nosed pliers and a screwdriver, leaving her convinced that they planned to rape and kill her. They beat and choked her. They hurled racial and gender-based epithets toward her. They tore up her home. They desecrated religious objects sacred to her. They threatened to plant drugs on her and to falsely arrest her. They beat her teenage son. They brought a middle-aged African American neighbor into her home and forced her son to beat the older man for their amusement. Diane was subjected to these assaults on multiple occasions, despite filing complaints with the Chicago Police Department (CPD). The officers denied any contact whatsoever with Diane, and the CPD failed to sustain any of her complaints.¹

Over the past six years, the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School collaborated with activist and author Jamie Kalven and residents of the Stateway Gardens, the public housing community where Diane lived, on a human rights documentation, advocacy and self-help program focused on issues of police accountability. Together this group documented instances of police misconduct on the ground.

When the group began this initiative, Stateway Gardens with the Robert Taylor Homes to the south, constituted the largest concentration of public housing — and poverty — in the nation.² In the course of our involvement there, community mem-

¹ A full account of Diane's story appears in a series of articles by JAMIE KALVEN, *THE VIEW FROM THE GROUND, KICKING THE PIGEON* (2005), http://www.viewfromtheground.com/wp-content/media/ktp/kicking_the_pigeon.pdf. The lawsuit that arose out of this abuse is *Bond v. Utreras, et al.*, No. 04-cv-2617 (N.D. Ill.) (dismissed with prejudice pursuant to a settlement agreement with the City of Chicago on Mar. 23, 2007).

² Flynn McRoberts and Terry Wilson, *CHA has 9 of 10 Poorest Areas in U.S., Study Says*, CHI. TRIB., Jan. 26, 1995, at 1. See also D. Bradford Hunt, *What Went Wrong with Public Housing in Chicago? A History of the Robert Taylor Homes*, JOURNAL OF THE ILLINOIS STATE HISTORICAL SOCIETY (Spring 2001).

bers were displaced, and the highrises in which they lived were demolished as part of the Chicago Housing Authority's "Plan for Transformation."³ Today the site is being redeveloped into a mixed income community.

In our years working at Stateway Gardens, we witnessed the operation of a different Constitution from that taught in law school classrooms. Aggressive stop and frisks, street interrogations and searches of community members' homes associated with the war on drugs in the inner city created the context that was the prelude to human rights abuses on a grander scale. Groups of officers like the Skullcap Crew committed these acts against people like Diane.⁴ The expected rules were simply different in this community. Whenever police cars pulled into a public housing development, the young Black men outside expected to be searched and treated with the suspicion of being a criminal.⁵ Police misconduct that would generate a public outcry in the university community, and in many of the communities from which we came, was a routine reality at Stateway.

The Skullcap Crew's abuse of Diane occurred in this context.

A team of University of Chicago law students investigated the officers who abused Diane. Our investigation revealed that these five officers were well-known to public housing residents on the South Side of Chicago for their physical brutality, their casual acts of cruelty and their overt racism. We heard multiple first-hand reports of their years-long reign of terror and racial

³ The Chicago Housing Authority approved a \$1.6 billion plan in 2000 to "transform" public housing in Chicago through an aggressive process of demolition, forced relocation and redevelopment. *See e.g.*, Casey Sanchez, *Six More Years*, CHICAGO REPORTER, Sept. 2006.

⁴ *See* Bernard Harcourt, *Unconstitutional Police Searches and Collective Responsibility*, 3 CRIMINOLOGY AND PUB. POL'Y 363 (2004), for a thoughtful essay raising fundamental questions about the implications of aggressive policing strategies associated with the war on drugs.

⁵ *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) (requires that the police must have reasonable and articulable belief that a particular individual is armed and dangerous in order to conduct a stop and frisk).

abuse of African Americans in public housing communities. These stories included the lining up a group of young Black men and kicking them in their testicles, ordering African American men to strike Black women at the threat of arrest, strip-searching African American women and ridiculing their bodies, planting illegal drugs on innocent people and stealing money from and protecting drug dealers.

Above all, residents reported that what made these acts of abuse particularly demeaning and dehumanizing was the officers' racism and the pleasure they took in their racist acts. "They get their jollies humiliating Black folks," a former resident reported. "They get off on it."⁶

How could the Skullcap Crew be so confident they could use their police powers to abuse African Americans in public housing with impunity?

Over the past three years, that question has been at the center of our work — what conditions were in place that allowed this small band of officers to engage in a pattern of abuse of African Americans without fear of consequence? Accordingly, we brought suit not only against the individual officers for their violations of Diane's constitutional rights, but also later filed a *Monell*⁷ claim against the City of Chicago, charging that the City has a policy and practice of failing to adequately supervise, monitor, discipline and otherwise control its police officers.⁸

This article summarizes our statistical analyses and findings about the Chicago Police Department's broken supervisory and disciplinary systems. The purpose of the article is threefold. First, we aim to demonstrate the fundamental and systemic nature of the problems with the Chicago Police Department's disciplinary and supervisory systems. An accurate assessment of these systems is a necessary condition for meaningful reform.

⁶ See Kalven, *supra* note 1, at 14.

⁷ *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978); 42 U.S.C. § 1983 (2007).

⁸ *Bond*, No. 04-cv-2617 (N.D. Ill. Mar. 23, 2007).

Second, we seek to illustrate how statistical analysis, an often underutilized tool in *Monell* claims, can provide powerful evidence of deficiencies in a municipality's practices of supervising and disciplining its police officers. We hope to encourage advocates, reformers and policymakers around the nation to undertake similar analyses to improve police accountability in other law enforcement agencies. Finally, we hope to engage the reader with a series of fundamental questions that stem from our findings about the impunity that has enabled abuse to occur in certain communities.⁹

Part I of the article provides a brief legal background about civil rights litigation against municipalities, through which individuals may act as private attorneys general, by bringing systemic constitutional challenges to widespread but unwritten municipal police practices that operate with the force of law. Part II summarizes our findings from our analysis of Chicago police data about the problems with its practices for supervising and disciplining police officers. Part III seeks to initiate a conversation about the broader implications of those findings.

I. LEGAL BACKDROP

A. *The Promise and Peril of Bringing Monell Claims*

*Monell v. Department of Social Services*¹⁰ is one of the landmark civil rights cases of the past century. On the one hand, it opened up the possibility for true systemic reform by provid-

⁹ This article also emerged from an academic conference that grew out of our collaborative work, titled: *The View From the Ground: Issues and Inquiries Arising from Eight Square Blocks of Chicago's South Side*, held at the University of Chicago Law School spring 2007. A number of questions raised in this article were explored in depth at the conference. We hope that this article encourages others to take on these questions — to take seriously a view from the ground. A webcast of conference highlights and other information about the conference is available at <http://invisibleinstitute.com/conference> (last visited Mar. 18, 2008).

¹⁰ *Monell*, 436 U.S. at 690.

ing an avenue for litigants to hold local municipalities, rather than simply individuals, liable for unconstitutional policies.¹¹ On the other hand, it severely restricted the circumstances under which municipalities could be held liable, foreclosing the possibility of straight-forward *respondeat superior* liability. Instead it set barriers to municipal liability higher than those necessary to recover punitive damages against private individuals.¹² *Monell* claims represent one of the last available remedies for private parties to obtain meaningful reform of unconstitutional local policies through the federal courts, particularly in light of what one commentator has called the “*de facto* prohibition on injunctions in police abuse cases”¹³ enshrined by the Supreme Court in *City of Los Angeles v. Lyons*.¹⁴

In order to recover under *Monell*, however, a plaintiff must show not only that she suffered a deprivation of her rights under the Constitution and that this injury was caused by some policy-level decision of the municipality to act or fail to act, but also that the municipality’s action or failure to act was a result of deliberate indifference to the rights of the plaintiff.¹⁵ Within

¹¹ *Monell*, 436 U.S. 658.

¹² See David Jacks Achtenburg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2191 (2005).

¹³ See G. Flint Taylor, *A Litigator’s View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 772 (1999).

¹⁴ 461 U.S. 95, 105 (1983).

¹⁵ Several different avenues are available to demonstrate municipal liability under *Monell*. See Jessica R. Manley, *A Common Field of Vision: Municipal Liability for State Law Enforcement and Principles of Federalism in Section 1983 Actions*, 100 NW. U. L. REV. 967, 971-78 (describing the history of municipal liability under § 1983). Describing each of these avenues in any detail is beyond the scope of this article. Here, we focus on the basic elements of liability when the policy involved is a “practice or custom,” rather than a straight-forward expression of policy, as for example, when municipal policy appears in writing or is expressed through a final policymaker for the municipality. In those circumstances, the requirements for *Monell* liability are somewhat less restrictive. *Id.* at 974 n. 55 (noting that in *Monell* itself the policy at issue was a “written, formal policy requiring pregnant employees to stop working at a certain time, even if it was not medically necessary”) (quot-

each of these elements – proof of policy or custom, causation and deliberate indifference – lie additional hurdles to liability. A policy or custom, for example, must be a practice or custom so widespread and ingrained as to “have the force of law.”¹⁶ Causation also must be specific to the violation alleged, meaning that merely proving an unconstitutional policy, practice or custom, however loathsome, will not ensure liability unless the specific injury alleged relates to the specific unconstitutional policy proved.¹⁷ Once each of these elements is met, a plaintiff must further prove that the unconstitutional policy that caused her injury was the result of something more than mere negligence on the part of the City. Instead, the policy must be the result of deliberate indifference. This is a state of mind that requires a heightened level of culpability that is even more than mere “indifference.”¹⁸ In fact, the *Monell* standard for municipal liability has been interpreted by scholars as more restrictive than “common law restrict[ions] [on] private employers’ liability for punitive damages.”¹⁹

ing Karen M. Blum, *Municipal Liability Under § 1983*, 15 *TOURO L. REV.* 1535, 1535 (1999)).

¹⁶ See, e.g., *Bd. of County Comm’rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 404 (1997).

¹⁷ *Id.* at 412 (describing how a sheriff’s decision to hire a member of his family onto the police force, despite a background of known criminal convictions, including assault and battery, cannot form a basis for municipal liability because nothing about the convictions suggested that the officer would engage in the precise constitutional violations alleged by the plaintiff).

¹⁸ *Id.* at 411 (“Only where adequate scrutiny of an applicant’s background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party’s federally protected right can the official’s failure to adequately scrutinize the applicant’s background constitute ‘deliberate indifference.’”).

¹⁹ See generally Achtenburg, *supra* note 12, at 2193; see also generally Kevin R. Vodak, *A Plainly Obvious Need for New-Fashioned Municipal Liability: The Deliberate Indifference Standard and Board of County Commissioners of Bryan County v. Brown*, 48 *DEPAUL L. REV.* 785, 800-07 (Spring 1999), for a discussion of the difficulties of showing deliberate indifference.

In addition, merely raising a *Monell* claim typically invites a storm of motions from the City. These motions are designed to whittle away at the plaintiff's right to pursue these claims until such time as they become so old and so divorced from the remainder of the case that they are ultimately dismissed without the City having to substantively respond at all. The City's legal strategy is designed to prevent any public or judicial scrutiny of its practices — to prevent its practices and their implications from ever becoming visible.²⁰

This strategy typically begins with a motion to bifurcate discovery of *Monell* claims from discovery related to the underlying constitutional violation. This is then followed by a motion to bifurcate the trial of these issues, or, in some cases, dismiss the *Monell* claims outright before trial. The City of Chicago has recently augmented this strategy with an additional tool, which it refers to as a "stipulation," but this in reality functions only as an agreement to fulfill its statutory duty to indemnify its employees for damages incurred as a result of actions taken in the course of their employment. Upon filing this stipulation, the City typically moves to block discovery and trial of its practices, ensuring that its policies will remain unexamined.²¹

B. Statistical Analysis as a Useful Tool in Overcoming Barriers to Monell Liability

In the face of such obstacles, how can litigants respond? One method that we found particularly valuable in *Bond* involved using statistical analysis of data obtained from the City itself. Statistics can be used not only to prove that the City had a policy of failing to supervise and discipline its officers, but also to

²⁰ Kalven, *supra* note 1, at 27.

²¹ The propriety of the City's motion has been questioned by a number of federal judges. See, e.g., G. Flint Taylor, *Defending Against Municipal Attempts to Nullify Monell Pattern and Practice Claims: Sample Pleadings*, POLICE MISCONDUCT AND CIVIL RIGHTS LAW REPORT, 754 Thomson/West (Sept./Oct. 2006).

establish the causation and deliberate indifference requirements of a *Monell* claim. With regard to causation, our analysis demonstrated that if the City had an effective system, it would have flagged and disciplined the Skullcap Crew before they had a chance to abuse Diane. However, these officers were encouraged in their belief that they could abuse African Americans with impunity because the City's system of reviewing complaints against officers was so defective. With regard to deliberate indifference, because our analysis was based on the City's own data, the City could hardly argue that it was not or could not have become aware of how ineffective its policies were in deterring abuse.

While we are certainly not the first lawyers to use this type of analysis in proving a *Monell* claim,²² statistical analysis is not as prevalent in police misconduct litigation as it is in other areas of the law, such as employment discrimination, trademark infringement and antitrust.²³ The reasons for the reluctance to use statis-

²² Flint G. Taylor authored an excellent article on the litigation of policy and practice cases. See Taylor, *supra* note 13. Much of the advice given by Taylor reflects discovery strategies that we used in *Bond*. For example, Taylor suggests obtaining sustained rates and comparing them to other jurisdictions, breaking down sustained rates within relevant categories of misconduct, examining ways in which sustained rates may be inflated and obtaining a list of "repeater beaters." *Id.* at 754-55, 760.

²³ See, e.g., *Intl. Bd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) ("[O]ur cases make it unmistakably clear that 'statistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." (quoting *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 620 (1974))); *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 259 (2d Cir. 1987) ("Both Mobil and Pegasus Petroleum offered surveys of consumers and of members of the oil trading industry as evidence relating to the existence of actual confusion between the two marks. The district court properly admitted these surveys into evidence, despite claims of statistical imperfections by both sides, as those criticisms affected the weight accorded to the evidence rather than its admissibility." (citing *Grotirian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331, 1341 (2d Cir. 1975)); *In re Indep. Gasoline Antitrust Litig.*, 79 F.R.D. 552, 561 (D. Md. 1978) (granting class certification because "plaintiffs have produced some documentary evidence supporting their assertions that

tical tools are undoubtedly varied, but it may be rooted in the fact that law schools generally do not stress quantitative skills. Moreover, engaging a statistician or qualified mathematical analyst may seem beyond the reach of an attorney who is independently financing the litigation and hopes to recover a fee at the end of the case. Again, our aim is to persuade practitioners and policymakers alike that accurate analysis of a city's own data is invaluable in assessing the state of its policies and practices.

Before we discuss what we found from our analysis of data from the City of Chicago, however, we should add a few caveats, which are related to the limits of statistics-based evidence in civil rights cases. First, many federal courts have expressed the view that statistics "alone" will not suffice to prove a *Monell* claim.²⁴ This view may be less related to the strength of the con-

proof of impact on all class members is capable of common proof by statistical and economic analyses of the gasoline market").

²⁴ See generally Stephen M. Ryals, *Proof of Municipal Liability in Police Misconduct Cases*, 596 PLI/LIT 7, at *21-22 (1998). See also *Strauss v. City of Chicago*, 760 F.2d 765, 768-69 (7th Cir. 1985) (dismissing *Monell* claim under the now-defunct "heightened pleading" standard for such claims, because the plaintiff's citation of low sustained rates from the Office of Professional Standards [the City agency charged with investigating police abuse] "without more, indicate[d] nothing" because "[p]eople may file a complaint for many reasons, or for no reason at all"); *Woods v. Clay*, 2005 U.S. Dist. LEXIS 343, at *61 (D. Ill. Jan. 10, 2005) (granting summary judgment because "[b]y itself, the fact that the City did not sustain more citizen complaints against its police officers does not establish a widespread custom of ignoring or improperly disposing of complaints, and plaintiffs have not shown that the City should have punished more police officers or that it ignored complaints . . ."); *Glin-ski v. City of Chicago*, 2001 U.S. Dist. LEXIS 20324, at *9 (D. Ill. Dec. 7, 2001) (granting summary judgment despite plaintiff's evidence that the City only sustained 0.011% of civil rights violation claims because plaintiff did not offer any evidence that the not sustained complaints were meritorious); *Brooks v. Scheib*, 813 F.2d 1191, 1193 (11th Cir. 1987) (reversing judgment in favor of plaintiff on *Monell* claim, in part because the "number of complaints [cited by plaintiff] bears no relation to their validity"); but see *Kerr v. West Palm Beach*, 875 F.2d 1546, 1551 (11th Cir. 1989) (citing statistics on dog bites in addition to other policy evidence in determining that the City failed to adequately train canine units). The Second Circuit, in contrast, has at least held statistical evidence probative of notice. See *Fiacco v. Rensselaer*, 783

clusions one can make based on a particular set of data and more related to the general aversion of the legal profession to quantitative analysis.²⁵ The fact remains that this view is entrenched in the case law and is not likely to be shaken. Second, even when courts do consider a statistical analysis on its merits in assessing a *Monell* claim, certain barriers to admission of the evidence must be overcome. Among these barriers are challenges to the relevance of the statistical analysis. These chal-

F.2d 319, 328 (2d Cir. 1986) ("Whether or not the claims had validity, the very assertion of a number of such claims put the City on notice that there was a possibility that its police officers had used excessive force. The City's knowledge of these allegations and the nature and extent of its efforts to investigate and record the claims were pertinent to Fiacco's contention that the City had a policy of nonsupervision of its policemen that reflected a deliberate indifference to their use of excessive force."). On the other hand, courts, when presented with statistical analysis, in addition to other evidence, often respond positively. See *Beck v. City of Pittsburgh*, 89 F. 3d 966, 975 (3d Cir. 1996) (reversing judgment as a matter of law in favor of the city. The court explained that "Bryant, even if it were precedential and/or persuasive, is distinguishable from the instant case. Beck presented considerably more than mere statistics. He also presented evidence of actual written civilian complaints. Further, he presented evidence that the City of Pittsburgh has no formal system in place for tracking complaints against its officers and that the citizen complaints were not isolated incidents"); *Chew v. Gates*, 27 F. 3d 1432, 1445 (9th Cir. 1994) (holding that evidence that dogs bit suspects in 40% of cases, coupled with lack of department policies regarding the use of canine force, could be used to show deliberate indifference); *Watson v. Kansas City*, 857 F. 2d 690, 696 (10th Cir. 1988) (reversing summary judgment in favor of defendant on plaintiff's claim that the city had a custom of failing to protect domestic abuse victims where the arrest rate for nondomestic assault cases was 31% and the arrest rate for domestic assault cases was 16%. The court expressly refused to decide whether statistics are sufficient because "the plaintiff has also presented evidence that . . . the training encourages officers to attempt to 'defuse' the situation and to use arrest as a last resort"); *Webster v. City of Houston*, 689 F.2d 1220, 1222 (5th Cir. 1982) (testimony that 75-80% of officers carried "throw down guns" was used along with other evidence to prove existence of unconstitutional custom), *rev'd after rehearing en banc on other grounds*, 735 F.2d 838 (5th Cir. 1984).

²⁵ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987), in which the statistical evidence of bias in the application of the death penalty was overwhelming, yet a majority of the justices could not bring themselves to rely on this evidence as a basis to find the death penalty unconstitutional.

lenges may be based on how closely the particular analysis tracks the problem raised in the lawsuit,²⁶ how many variables the analysis attempted to account for²⁷ and whether the analysis used is an appropriate baseline or benchmark in assessing the data in question.²⁸

With these caveats in mind, we turn to what we learned about the City of Chicago's policies and practices from a mathematical analysis of its own data.

²⁶ In *Carter v. District of Columbia*, 795 F.2d 116, 124 (D.C. Cir. 1986), the D.C. Circuit upheld a directed verdict in favor of the municipal defendant despite the following evidence: 92% of officers were exonerated in misconduct investigations over a five-year period, the police chief only disciplined one of 26 officers cited by a review board for unjustifiably using their weapons, and the chief only took adverse action against five of 21 officers recommended for discipline by a civilian review board. The court explained that "[t]hese statistics are conspicuously wanting in detail. They do not speak for themselves. The first item, for example, lumps together all investigations of whatever kind; it tells us nothing separately or specifically about excessive force complaints." *Id.* at 124-25.

²⁷ See *Watson*, 857 F.2d at 695-96 (finding statistical evidence persuasive despite a failure to control for the relevant factor of probable cause, noting that while "[g]enerally a failure to account for every variable will affect the weight rather than the admissibility of the statistics . . . in some cases, the statistics may be so defective as to be inadmissible as irrelevant").

²⁸ See, e.g., *People Who Care v. Rockford Bd. Of Educ.*, 246 F.3d 1073, 1076-77 (7th Cir. 2001) ("No effort has been made by the plaintiffs, despite our warnings, to partition, however crudely, the lag in achievement that is due to the school board's past illegalities and the lag that is due to other factors, factors for which the school board bears no federal legal responsibility. The partition could be made by comparing minority academic performance in Rockford with the performance of minority students in other school districts after adjusting for the various factors that are not the school board's legal responsibility yet might be thought to influence the academic performance of Rockford's minority students, such as poverty, family stability, health, class size and quality of teachers. There are statistical methods for holding these factors constant in order to isolate the influence, if any, of the board's illegal conduct on the academic performance of Rockford's minority students. No such scientific comparison has been attempted—nor even anything cruder.").

II. THE CHICAGO POLICE DEPARTMENT'S BROKEN DISCIPLINARY AND SUPERVISORY SYSTEMS – A “PORTRAIT OF IMPUNITY”²⁹

During the late 1970s and 1980s, numerous African Americans complained about brutal techniques used by police from a certain command area of the Chicago Police Department. These techniques involved using a cattle prod, attaching a black box generating electricity to a man's ears or genitalia, handcuffing men to burning-hot radiators, suffocating them with plastic bags, playing sadistic games of Russian Roulette and beating them. These were among the infamous and widely acknowledged torture acts committed by former police Commander Jon Burge and his henchmen.³⁰ Mayor Richard M. Daley and high level police officials have offered repeated statements of reassurance that the days of torture are over. That was then. This is now. That could never happen today, in part due to the Police Department's improved supervisory and monitoring systems.³¹

²⁹ See generally Kalven, *supra* note 1.

³⁰ John Conroy has written a series of important and thoughtful articles on police torture in Chicago, which have been published in the Chicago Reader. His articles can be accessed from Chicago Reader, *available at* <http://www.chicagoreader.com/police/torture> (last visited Mar. 18, 2008). See also *United States ex. rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078, 1094 (N.D. Ill. 1999) (“It is now common knowledge that in the early to mid 1980s Jon Burge and many officers working under him regularly engaged in the physical abuse and torture of prisoners to extract confessions. Both internal police accounts and numerous lawsuits and appeals brought by suspects alleging such abuse substantiate that those beatings and other means of torture occurred as an established practice, not just on an isolated basis.”); see generally *People v. Patterson*, 192 Ill.2d 93, (Ill. 2000); *Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993); *Wilson v. City of Chicago*, 120 F.3d 681 (7th Cir. 1997); *People v. Cannon*, 293 Ill. App. 3d 634, 688 (1st Dist. 1997).

³¹ See, e.g., JAMIE KALVEN, *The View From the Ground Portrait of Impunity— Part II*, (2006), <http://www.viewfromtheground.com/archive/2006/09/portrait-of-impunity-part2.html> (quoting Chicago Mayor Richard Daley and Police Superintendent Phil Cline about the series of safeguards that have been put in place since the Burge era to prevent police torture).

But is that really true? In light of our experiences on the ground and the reports of rampant abuse by the Skullcap Crew, have the underlying conditions that allowed Burge and his henchmen to torture African American men with impunity really been addressed by the City of Chicago? Are the Skullcap Crew and other groups that operate in similar neighborhoods not only present day Burges, but also the inevitable result of persistent fundamental problems that continue to go unaddressed? Below, we analyze the Chicago Police Department's data to shed some light on possible answers to these questions.

A. *The CPD Data Sets*

Our analysis in this article draws primarily from three statistical data sets, each originating from the Chicago Police Department.

First, we studied a series of Chicago disciplinary data. The CPD produced disciplinary data related to *all* civilian abuse complaints over a six-year period (1999 to 2004) in each of the following categories — excessive force/brutality, illegal searches, racial abuse, sexual abuse and false arrests (*e.g.*, planting evidence). We highlight the period surrounding the charged abuse of Diane (2002 to 2004). By organizing the data in this way, we were able to break down the data by type of charged abuse, as well as to aggregate the information to look at the most serious forms of civilian abuse as a whole.

Second, we examined a random sample of the investigative files from the same five categories of civilian abuse complaints and examined every available investigative file relating to misconduct charges brought against the five officers charged with abusing Diane.

Third, we analyzed the distribution of misconduct complaints among Chicago police officers. We paid special attention to the data regarding Chicago police officers who amassed 11 or more official misconduct complaints in a five-year period from 2001 to

2006.³² We call this the “repeater” data set. The repeater data listed the complaints against those officers and noted each officer’s unit of assignment, designating where they worked. For each complaint, we considered the date of the complaint, the results of the City’s internal investigation and the nature of any discipline recommended by the arm of the Department that investigated the charge. We also evaluated data concerning the Chicago Police Department’s early warning programs.

Our analysis below is also informed by years of work with people in the Stateway Gardens public housing community. This ethnographic work — our observations and interviews over years at Stateway — provided additional information which gave fuller meaning to the statistics.

B. CPD Disciplinary Rates

The CPD’s own data clarify that Chicago police officers can perpetrate abuse without fear of consequence. The CPD data reveal that discipline for the abuse of a civilian is rare. The odds are two in 1000 that a Chicago police officer will receive any meaningful discipline as a result of being charged with abusing a civilian.³³ *Two in 1000.*

Between 2002 and 2004, civilians filed 10,149 complaints of excessive force, illegal searches, racial abuse, sexual abuse and false arrests.³⁴ We limited the disciplinary data set to those five

³² While there is no consensus among police practices experts about the number of citizen complaints that ought to trigger intervention or special monitoring by a department, we chose the arbitrarily high number of 11 or more complaints over five years, because there would be little controversy that any Department that is competently monitoring its personnel would have flagged an officer with more than ten official misconduct complaints in that time span.

³³ See Table 1. Craig Futterman, Chicago Police Department Abuse Data (2007) (using Chicago Police Department data on officer misconduct investigations) (unpublished report, on file with the author at the University of Chicago Law School).

³⁴ *Id.*

categories, because they encompass the most serious forms of civilian abuse and correspond to the types of abuse endured by Diane. Only 19 of the 10,149 complaints led to a suspension of a week or more.³⁵ The statistics revealed that:

- The chance of meaningful discipline for a police brutality complaint was less than 3 in 1000.
- Only 1 of 3837 charged illegal searches led to meaningful discipline.
- Not a single charge of false arrest (planting drugs, guns, etc.) over this three-year period led to an incident of meaningful discipline.

Table 1, *Meaningfully Sustained Rates of C.R. Investigations from 2002 to 2004, by Type of Offense*, illustrates the probability of meaningful discipline for each category of civilian abuse.³⁶

³⁵ *Id.*

³⁶ Dr. Steven Whitman worked with us as a mathematical expert in the *Bond* case. He collaborated with us in developing the statistical analyses, tables and graphs in this article. As a part of his consultation, he authored a statistical report, parts of which are subject to a protective order and thus not available to the public. Dr. Steven Whitman, Chicago Police Department Statistical Report (Nov. 2006) (unpublished report, on file with the author at the University of Chicago Law School). Judge Joan Humphrey Lefkow, the federal judge who oversaw the *Bond* case, lifted the protective order over the City of Chicago's objection, because the court found that information about charges of official misconduct against police officers were matters of public concern. The City of Chicago has appealed the court's release of the information. See *Bond v. Utreras*, 2007 WL 2003085 (N.D. Ill. July 2, 2007).

**TABLE 1. MEANINGFULLY SUSTAINED RATES OF C.R.
INVESTIGATIONS FROM 2002 TO 2004,
BY TYPE OF OFFENSE**

2002-2004	Meaningfully Sustained	Total	MS Rate
Brutality	15	5357	0.0028
Illegal Search	1	3837	0.0003
Sexual Harassment, Abuse, Rape	2	111	0.0180
Racial Abuse	1	183	0.0055
Planting Evidence, False Arrest	0	661	0
Total	19	10,149	0.0019

95% CI for Meaningful Sustained Total Rate (0.0019) = (0.001031, 0.002713)

In reality, the odds are much lower than two in 1000. Only a small fraction of people who believe that they have been abused by the police actually file a complaint with the Chicago Police Department. Among the reasons Stateway Garden residents gave for not reporting are fear of reprisal and distrust of the investigatory process. Abuse victims realize that there is only a slim chance their complaint will be sustained and so they are understandably reluctant to risk retaliation. These fears are exacerbated by the vulnerability of victims of police abuse.

A national survey of police contacts conducted by the U.S. Department of Justice found that only one in ten people who believe that they have been abused by the police ever report the abuse.³⁷ The Department of Justice research applied to the Chicago data indicates that meaningful discipline results in only two out of every 10,000 incidents in which civilians believe that they

³⁷ MATHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEPT. OF JUSTICE, NCJ 210296, COMPLAINTS ABOUT POLICE USE OF FORCE 1 (June 2006) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf>.

have been abused. As Dr. Whitman summarized, “This is pretty close to never.”³⁸

C. Sustained Rates

We then examined the 2002 to 2004 “sustained rates,” the percentage of cases where the CPD found that sufficient evidence existed to believe that the charged abuse occurred. We obtained data for each of the five categories of civilian abuse noted in Section A, above.

The overall sustained rate for all categories of civilian abuse charges was only 1% (124 sustained cases out of 10,149 charges of abuse).³⁹

- Brutality cases were also reportedly sustained at the rate of 1%.
- Illegal search charges were sustained at the rate of 0.3%, or 3 in 1000.
- False arrest charges were sustained at the rate of 0.6%, or 6 in 1000.
- Race abuse cases were sustained a little more than 1% of the time.
- Sexual abuse charges were sustained at the rate of nearly 20%.⁴⁰

Chicago’s reported sustained rates are detailed in Table 2: *Sustained Rates of C.R. Investigations from 2002 to 2004, by Type of Offense*.

³⁸ See Whitman, *supra* note 36.

³⁹ See Table 2. Futterman, *supra* note 33.

⁴⁰ While the sex abuse numbers were based on a relatively small sample, the higher rate appears to hold true over time. We did not have the opportunity to test various hypotheses which may explain the higher sustained rate for this category of abuse. This statistic invites further study.

TABLE 2. SUSTAINED RATES OF C.R. INVESTIGATIONS FROM 2002 TO 2004, BY TYPE OF OFFENSE

2002-2004	Sustained	Total	SU Rate
Brutality	82	5357	0.0153
Illegal Search	13	3837	0.0034
Sexual Harassment, Abuse, Rape	22	111	0.1982
Racial Abuse	3	183	0.0164
Planting Evidence, False Arrest	4	661	0.0061
Total	124	10,149	0.0122

95% CI for Sustained Total Rate (0.0122) = (0.0101, 0.0144)

While these rates are certainly low, we wanted to compare them to certain benchmarks in order to better assess whether the City's rates had improved over time, as implied by the City's assurances that the Burge torture chamber could not exist today. We also compared Chicago with other large U.S. cities. When we looked at Chicago's sustained rates over time, we found that, in contrast to the claims of Mayor Daley and Superintendent Phil Cline that the CPD disciplinary systems have been cured since the Burge torture era, sustained rates for brutality and other serious charges of civilian abuse dramatically dropped by 90% from 1999 to 2004.⁴¹ Over that six-year period, the CPD's reported sustained rate in brutality cases declined from about 5% in 1999 to less than 0.5% by 2004, with incremental decreases each year.⁴² The sustained rate for all serious civilian abuse charges dropped by about the same amount. Figures 1 and 2 provide graphic illustrations of this precipitous downward trend.⁴³

⁴¹ See Figure 1. Futterman, *supra* note 33.

⁴² *Id.*

⁴³ A confidential source shared the Chicago disciplinary data for 2006 with the authors. The downward spiral appears to have continued.

FIGURE 1.
PERCENT SUSTAINED COMPLAINTS BY YEAR:
BRUTALITY

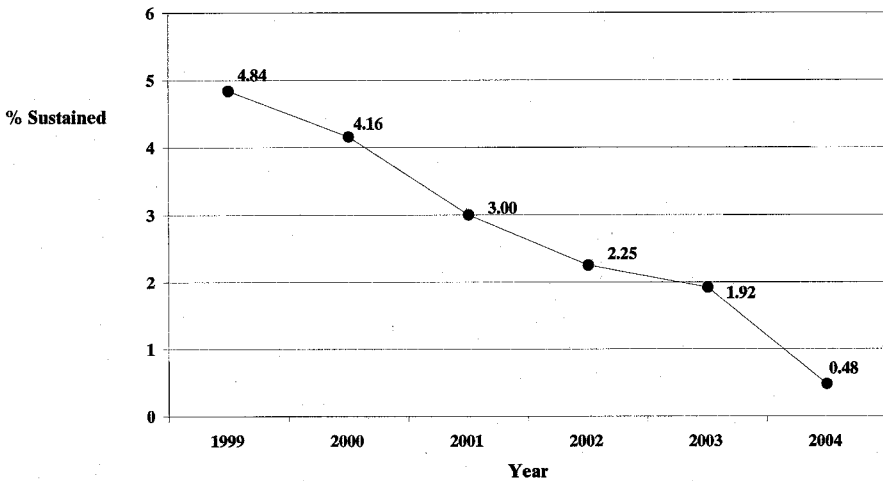
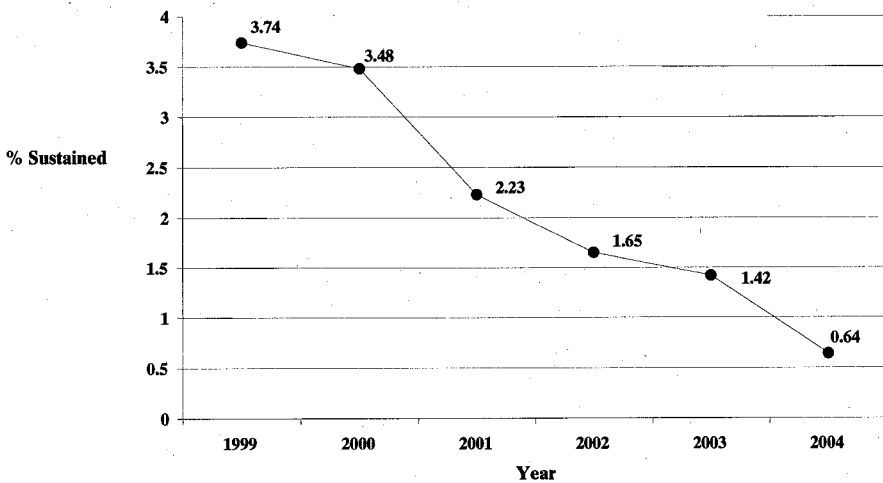


FIGURE 2.
PERCENT SUSTAINED COMPLAINTS BY YEAR:
TOTAL



After examining Chicago data over time, we then compared Chicago to other major metropolitan police departments. The Bureau of Justice Statistics, as a part of the Department of Justice's obligations under the *Violent Crime Control and Law Enforcement Act of 1994*,⁴⁴ collected excessive force complaint numbers and sustained rates from police departments comprised of 100 or more sworn police officers. While few police departments are known for effectively policing themselves, Chicago is, on a number of accountability measures, significantly worse than the norm. As Dr. Whitman observed, "Chicago force complaint data seem out of line with the national profile with sustained rates, being far lower than for the country as a whole."⁴⁵ The average sustained rate for excessive force cases in major metropolitan police departments was 8%, compared to Chicago's 0.48% in 2004, the most recent year in our data set.⁴⁶ A brutality complaint is thus 94% less likely to be sustained in Chicago than in the nation as a whole.⁴⁷ See Figure 3, *Sustained Excessive Force Complaints in U.S. and Chicago*.

FIGURE 3

Sustained Excessive Force Complaints in U.S. and Chicago	
% Sustained in US (2002)*	8%
% Sustained in Chicago (2004)	0.48%
Ratio	16.7

That is, an excessive force complaint is 16.7 times more likely to be sustained in the United States than in Chicago.

*Bureau of Justice Statistics Special Report, June 2006, NCJ 210296, entitled "Citizen Complaints about Police Use of Force" (page 1).

⁴⁴ 42 U.S.C.A. § 14142 (West 1994).

⁴⁵ Whitman, *supra* note 36.

⁴⁶ Hickman, *supra* note 37.

⁴⁷ See Figure 3. Futterman, *supra* note 33.

Comparisons with Department of Justice statistics also showed that the Chicago Police Department received substantially more brutality complaints per officer than the national average. The national average among "large municipal police departments" (1000 or more officers) was 9.5 excessive force complaints per 100 full-time sworn officers.⁴⁸ We would therefore expect 1283 complaints per year against Chicago's 13,500 officers. However, from 1999 to 2004, citizens filed approximately 1774 brutality complaints per year against Chicago police officers.⁴⁹

We then compared CPD excessive force and sustained rate data with that of law enforcement agencies that the U.S. Department of Justice found, pursuant to 42 U.S.C. § 14141, to have engaged in a pattern and practice of excessive force and had deficient disciplinary systems for addressing brutality complaints.⁵⁰ These agencies include Detroit, Los Angeles, Washington, D.C., Miami, Cleveland and Pittsburgh. We obtained the 2002 excessive force and sustained rate data for each of these agencies, as reported to the Bureau of Justice Statistics. Some of the agencies listed above had begun to remediate their systems under federal consent decrees by 2002, complicating our attempts to make good comparisons. Albeit imperfect, our preliminary review showed that Chicago's internal brutality and disciplinary data were substantially worse than cities where the Department of Justice had already concluded there were serious problems.⁵¹

⁴⁸ Hickman, *supra* note 37

⁴⁹ Futterman, *supra* note 33.

⁵⁰ The Department of Justice's findings are available at <http://www.usdoj.gov/crt/split/police.htm> (last visited Mar. 11, 2008).

⁵¹ Gabriel Baird, *Cleveland Police Always Justify Using Force*, THE PLAIN DEALER, Jan. 14, 2007, at A1. The one exception was Cleveland, where not one of nearly 4500 brutality complaints was sustained over a four-year period.

As infinitesimal as the CPD's reported sustained and disciplinary rates are, there are strong reasons to believe that the actual rates are even lower.

First, in our review of random samples of excessive force complaints, we discovered that the City counts complaints that were sustained for administrative violations (but not brutality) as sustained force complaints for statistical purposes. This biased reporting method accounted for about half of the sustained force complaints in the sample, grossly inflating CPD's sustained numbers.⁵² In other words, the CPD failed to sustain excessive force charges in about half of the cases that it reports as sustained.

Second, multiple layers of review occur after the investigative arms of the CPD recommend discipline. Disciplinary findings may be overturned or reduced by police supervisors up the chain of command. In addition, the Chicago Police Board, a group of individuals appointed by Mayor Daley to review sustained complaints of police misconduct, reversed sustained findings or reduced discipline in nearly 50% of the cases that it reviewed.⁵³ Thus, the real sustained and disciplinary rates appear to be far lower than reported in this article.

D. Shoddy Investigations

"If the Chicago Police Department investigated street crime the way that it investigates police abuse, it would never solve a case." – Joseph Stine, former Executive Officer of the Police Training Bureau for the City of Philadelphia.⁵⁴

⁵² Futterman, *supra* note 33.

⁵³ Legal Defense Handbook, Fraternal Order of Police Chicago Lodge No. 7 11-12 (Aug. 2005), *available at* http://www.chicagofop.org/Legal_Defense/LD_Book_090105.pdf.

⁵⁴ Telephone interview with Joseph Stine, consultant (Nov. 2006). Joseph Stine also consulted with us as a police practices and investigations expert in the *Bond* case. He provided invaluable insights around the CPD's practices

We studied a sample of investigative files of Chicago civilian abuse complaints to examine the Department's investigative procedures in practice and to gain a better understanding of why only two in 1000 charges of civilian abuse result in meaningful discipline. Are there systemic problems with the manner in which police misconduct complaints are investigated in Chicago?

We found that standard CPD police abuse investigations violate virtually every canon of professional investigation. For example, professional investigations demand that investigators promptly respond to the scene. When investigators arrive, they protect the scene, seeking to preserve all physical evidence to avoid contamination. They collect and test the evidence. They thoroughly canvass the area and attempt to identify witnesses and potential suspects. They conduct face-to-face interviews with persons who may have pertinent information related to the crime. It is universally accepted that investigators should try to interview witnesses separately, as soon as possible after the incident, to avoid the tainting of memories (innocent or otherwise) and opportunities for collusion. Face-to-face interviews are also essential to observe the subject's demeanor and to ask follow-up questions that arise from witness narratives, as well as from comparisons to the stories of other witnesses/suspects and physical evidence in the case.⁵⁵

Imagine a rape or beating takes place. The victim identifies her attacker. Detectives wait weeks if not months before they even attempt to contact the suspect. When they do, they send the alleged perpetrator a written form informing him of the substance of the allegations, the names of the witnesses, and the

for investigating police abuse in Chicago, which are also reflected in this article. Like Dr. Whitman, Stine drafted an expert report pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure. Aspects of Stine's report are also unavailable due to the protective order, currently being reviewed by the Seventh Circuit Court of Appeals.

⁵⁵ See PAUL B. WESTON AND KENNETH M. WELLS, *CRIMINAL INVESTIGATIONS BASIC PERSPECTIVES*, New Jersey (Prentice-Hall, Inc. 1970).

time, place and circumstances of the crime. The Department then tells the accused to take a week, sometimes two, three or even more weeks, to file a one-paragraph denial of the charges, which is then accepted without question as to whether the accused has talked to any other witnesses or colluded with any other suspects in drafting the denial.

These are not hypothetical or aberrational practices. These are the CPD's standard procedures when it comes to investigating police misconduct. In more than 85% of the CPD police abuse investigations analyzed, the accused officer was never even interviewed.⁵⁶ In many of the remaining 15% of the investigations, the Department determined that the complaint was not sustained without ever requesting any information from any of the officers on the scene.⁵⁷ In the instances in which the charged officer was contacted by an investigator, the contact usually occurred months after the incident. The officer was then provided with the specifics of the charges, including the name of the complainant and victims, and given, on average, an additional seven to ten days to return a brief "To/From" report, generally denying the allegations. In some cases, the charged officer took longer than a month to respond to the charges.⁵⁸ The months-long delay between the incident and required response from the accused creates opportunities for collusion. It was not uncommon to see a group of officers submit nearly verbatim responses, even mimicking the same typographical errors. Following the receipt of these form denials, the complaints were almost invariably not sustained by the Department.

Investigators rarely conducted canvasses or even visited the scene of the incident. Physical evidence was not preserved, much less tested. Recordings of 911 calls of police abuse were routinely destroyed.⁵⁹ Police and civilian witnesses were rarely

⁵⁶ Futterman, *supra* note 33.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

interviewed in person.⁶⁰ While investigators frequently ran background checks on civilian complainants and witnesses who corroborated police abuse, they did not consider the complaint histories of any Chicago police officer involved in the investigation.⁶¹

In view of the CPD's standard practices in official misconduct investigations, it is no wonder that 998 out of 1000 charges of police abuse in Chicago never lead to any real discipline.

E. A Few Bad Apples?

Some tend to describe the problem of police abuse as one of a "few bad apples." Authors of a recent research paper for the National Institute of Justice observed, "[i]t has become a truism among police chiefs that 10% of their officers cause 90% of their problems."⁶² Chicago is no exception.⁶³

Our research supports the proposition that the vast majority of Chicago police officers are not abusive. The research also lends credence to the "truism" that a small percentage of the force commits most of the reported abuse in the City. The data, however, do not support the assertion that the problem is simply attributable to a few bad apples. The data instead paint a picture of an institution with a deeply ingrained culture of denial that enables certain officers to operate with impunity in certain communities within the City. The CPD goes to great lengths *not to*

⁶⁰ *Id.*

⁶¹ We will discuss the Department's failures to address patterns of abuse more fully in Section II.D, *infra*.

⁶² Samuel Walker, Geoffrey Alpert, and Dennis Kenney, *Early Warning Systems: Responding to the Problem Police Officer*, DOJ NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF, July 2001, at 1.

⁶³ See Kalven, *supra* note 1, at 34 (quoting CPD Superintendent Cline: "We'll use all our resources to go after police officers who engage in misconduct. They are giving a black eye to the majority, the 90% of the cops that go out there every day and put their life on the line to keep this city safe.").

know about or address its bad apples or the harm that they inflict on the police, public and justice system.

While the vast majority of the force has not collected an extraordinary number of complaints, this does not mean that the CPD bears no responsibility for the state of police impunity in Chicago. The police code of silence contributes to the Department's machinery of denial. Veteran Chicago police abuse investigators and officers consistently report that they are not aware of a single instance in which a Chicago police officer reported having observed a fellow officer abuse a civilian. While there may be a number of good reasons why good officers fail to report abuse (including the risk to their personal safety and careers), it is an inescapable fact that this type of whistle-blowing is virtually nonexistent in Chicago. The Department acts as a catalyst to this phenomenon by refusing to transfer and protect whistle-blowers as a matter of policy.⁶⁴

1. The CPD Fails to Address Patterns of Abuse

We found that the vast majority of Chicago police officers are not abusive. Approximately 80% of the force received three or fewer complaints in the five-year period examined.⁶⁵ It appears that many officers have zero or one complaint throughout the bulk of their careers.⁶⁶ The expected median is 1.5 complaints.⁶⁷

Less than 5% of the Department account for nearly half of all abuse complaints against the CPD.⁶⁸ Indeed, 662 Chicago police

⁶⁴ An in-depth analysis of the police code of silence is beyond the scope of this article. See Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17 (2000); Jerome H. Skolnick, *Prosecuting Police Brutality Requires Penetrating the Blue Wall of Silence*, AMERICAN PROSPECT, Mar. 27, 2000; *Jeffes v. Barnes*, 208 F.3d 49 (2d Cir. 2000); *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999), for commentary and examples of cases on the subject.

⁶⁵ Futterman, *supra* note 33.

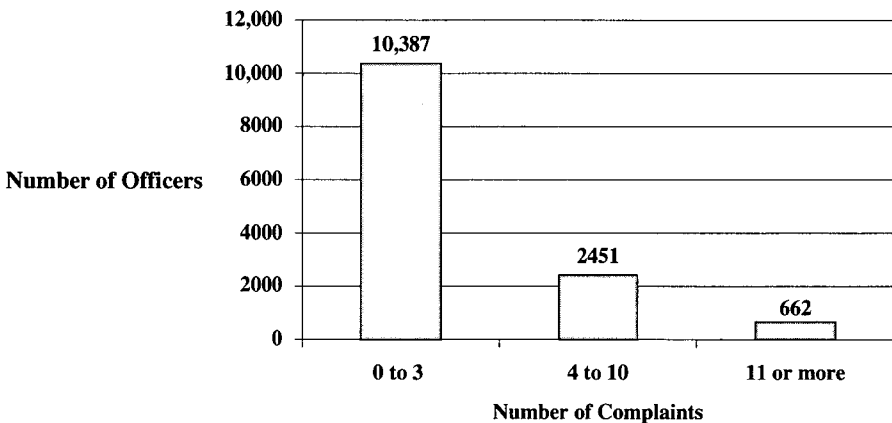
⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

officers, a little less than 5% of the CPD's 13,500 member force, amassed 11 or more official misconduct complaints between 2001 and 2006.⁶⁹ We call these officers "repeaters." Because the vast majority of officers get only a few complaints in their entire careers, it is easy to identify those who may be engaged in a pattern of abusive behavior. They literally jump off the page. Figure 4, *Complaints Against Chicago Police Officers, 2001 to 2006*, illustrates the distribution of complaints among Chicago police officers.⁷⁰

FIGURE 4.
COMPLAINTS AGAINST CHICAGO POLICE OFFICERS,
2001-2006



Yet, the CPD refuses to look at or allow others to look at patterns of abuse complaints.⁷¹ The CPD chooses not to know

⁶⁹ *Id.*

⁷⁰ We believe that many of the officers in the second category (four to ten complaints) should have been flagged for watchful monitoring. Heightened scrutiny, monitoring and intervention ought to occur long before an officer has accumulated 11 or more abuse complaints.

⁷¹ The Department is currently engaged in a court battle to prevent members of the press or public from learning the identities of the officers who have been charged with the most abuse in Chicago. The City is also fighting the release of the complaint histories and redacted investigative files of the

— avoiding critical self-examination and public and judicial scrutiny of its practices.⁷²

Once the veil is lifted, the Department's own data clarify that the CPD lacks any effective system to address patterns of abuse. A complaint against a repeater officer is no more likely to lead to meaningful discipline than a complaint against the 80% of Chicago officers who do not accumulate abuse complaints. A repeater can be 99.8% confident that no meaningful investigation or discipline will result from being charged with the abuse of a civilian. In other words, the probability is just 0.2% that reported abuse will lead to meaningful discipline of an officer who has earned 11 or more abuse complaints in the last five years.⁷³ Seventy-five percent of the repeaters have not received discipline of any kind whatsoever.⁷⁴

The City's early warning programs demonstrate a dismal record of identifying repeat abusers. While the City represents that it has long had in place an early warning system to identify officers who may be engaged in problematic behavior, only 13% of the repeaters have enrolled in its early warning programs.⁷⁵ Nearly 90% have never even been flagged.⁷⁶ There were officers who had amassed more than 50 abuse complaints within five years who had not, as of the time the data was obtained, been

five officers charged with abusing Diane. See *Bond*, *supra* note 36; Frank Main and Abdon M. Pallasch, *What are they hiding? Chicago Police List of Officers with More than 10 Complaints Remains a Secret*, CHICAGO SUN-TIMES, July 17, 2007, at 3.

⁷² The City's primary legal strategy in *Monell* policy cases has been to use any means at its disposal to avoid discovery or litigation of its policies and practices, thereby averting any scrutiny of its practices. See Section I.B. and Taylor, *supra* note 21, for a fuller discussion of the City's legal tactics.

⁷³ There were only 22 incidents of meaningful discipline out of 10,733 abuse charges against these repeaters.

⁷⁴ Futterman, *supra* note 33.

⁷⁵ *Id.*

⁷⁶ *Id.*

flagged by any of the CPD's early warning programs, much less disciplined in any fashion.⁷⁷

There were 33 Chicago police officers with 30 or more complaints between 2001 and 2006.⁷⁸ Only one out of more than 1000 charges of abuse against those 33 officers ever led to meaningful discipline.⁷⁹ Figure 5 illustrates the number of sustained charges against officers with 30 complaints within the recent five-year period. More than half of these officers with more than 30 abuse complaints had never even been flagged for early intervention or monitoring.⁸⁰

FIGURE 5: "REPEATERS"

33 CPD members had 30 or more complaints. Note these pairs containing complaints and sustained complaints:

(30,0)	(33,0)	(30,0)	(31,0)	(36,1)
(33,1)	(50,2)	(30,0)	(52,0)	(30,0)
(31,0)	(32,0)	(53,1)	(31,0)	(34,0)
(31,0)	(30,0)	(30,0)	(30,0)	(36,1)
(34,0)	(55,0)	(33,0)	(30,1)	(31,0)
(40,0)	(38,0)	(35,0)	(30,0)	(35,0)
(33,0)	(31,0)	(33,0)		

Police officials have to work incredibly hard not to know about repeat offenders. While police can generate this repeater data with only a few key strokes from a police computer, the police choose not to analyze the data. Our discovery requests in the *Bond* litigation and court orders to enforce those requests prompted the creation of the repeater data. No one in the CPD ever sought to generate this easily accessible and revealing information. The police officer in charge of the CPD complaint

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

database reported that neither the superintendent nor any other police official had ever asked for or received repeater data that identifies the officers who have been the source of the most abuse charges in Chicago.⁸¹ In contrast to the standard practice of running background checks of individuals in minor traffic stops, the acting Chief Administrator of the CPD's Office of Professional Standards, a man with a quarter century of experience investigating police abuse misconduct in Chicago, reported only five or fewer occasions in which the CPD ever looked up the complaint history of an individual officer as part of an official police misconduct investigation.⁸²

2. The CPD's "Early" Interventions with Repeaters Are Ineffective

CPD early warning interventions appear to have little if any effect on the behavior of officers who have accumulated 11 or more misconduct charges within five years. Drawing on the rare occasions when the City actually flagged a repeater for intervention, we conducted a statistical analysis to assess the efficacy of the CPD's early warning programs. We analyzed the repeaters' complaint patterns before and after the intervention to determine whether the CPD's interventions were making any difference in behavior.

Many of the repeaters collected more abuse complaints *after* having participated in the City's programs. Officers who were flagged by the City as needing intervention averaged 2.6 complaints per year after they completed their program or class.⁸³ If their post-intervention behavior remained consistent, they would average 13 abuse complaints over five years. Fourteen officers averaged more than five complaints per year, four aver-

⁸¹ Daniel Kivel Dep., Aug. 31, 2006, *Bond v. Utreras, et al.*, No. 04-cv-2617 (N.D. Ill. Mar. 23, 2007).

⁸² Michael Duffy Dep., Aug. 29, 2006, *Bond v. Utreras, et al.*, No. 04-cv-2617 (N.D. Ill. Mar. 23, 2007).

⁸³ Futterman, *supra*. note 33.

aged more than seven and one averaged 9.3 complaints per year.⁸⁴ As Dr. Whitman observed, “these programs not only appear ineffective but also appear not to produce results better than having no programs.”⁸⁵

Equally problematic, the Department’s early warning programs are not designed to protect the public. Mary Conley, the police commander who oversaw the CPD programs, explained that the motivation for the placement of officers in these programs is to preserve the Department’s investment in these officers.⁸⁶ While rehabilitation of officers is undoubtedly a worthy goal, the Department should also be concerned with identifying and weeding out officers who routinely abuse the public. None of the CPD’s current or contemplated early warning programs, however, incorporate any investigatory or disciplinary component. Indeed, the CPD has repeatedly emphasized that the Department will not use its early identification system as an investigative or disciplinary tool.⁸⁷ In other words, a pattern of abuse complaints cannot, under CPD procedures, lead to an investigation into an officer’s conduct. Thus, if the CPD were somehow successful in identifying an individual or group of officers who were engaged in a pattern of brutality or corruption, it would not deploy any resources to investigate those patterns, much less anything resembling a sting or undercover operation that has proven effective in federal investigations of police misconduct.⁸⁸ The CPD would simply offer the suspected brutal or

⁸⁴ *Id.*

⁸⁵ Whitman, *supra* note 36.

⁸⁶ Mary Conley Dep., Aug. 25, 2006, *Bond v. Utreras, et al.*, No. 04-cv-2617 (N.D. Ill. Mar. 23, 2007).

⁸⁷ See Andrew Hermann, *Computer System to Track Cops’ Performance*, CHICAGO SUN-TIMES, Apr. 15, 2006, at 5 (quoting police Superintendent Phil Cline that (early) warnings will not trigger disciplinary action but instead counseling and perhaps additional training). As an aside, the long announced computer system to monitor police performance referred to in the title has never been implemented.

⁸⁸ See Jeff Coen and David Heinzmann, *Retrial Bid Pinned on Cops’ Misconduct*, CHI. TRIB., July 17, 2005, at 1; Rudolph Bush, *Officer Pleads Guilty in*

corrupt officer counseling or a class, putting him on notice that he needs to cover his tracks. While such interventions may make sense in response to other problematic behavior (e.g., substance abuse, attendance problems, complaints of verbal abuse, etc.), they are inappropriate to address potential patterns of serious abuse or other criminal conduct. It makes little sense to offer counseling to an officer that the CPD has reason to believe is stealing money, engaging in a drug conspiracy or beating innocent people. These patterns require aggressive, proactive investigations, followed by meaningful action in meritorious cases.

3. The CPD Refuses to Examine Group Patterns

CPD complaint data confirm that police abuse is a highly concentrated and patterned phenomenon. Abuse is not evenly (or randomly) distributed throughout the city. In addition to individual patterns, there are patterns of abuse committed by groups of officers. And these patterns do not just involve particular groups of officers; they focus on particular victims. Abuse is concentrated among certain officers who work together in particular units or teams and who police certain parts of the City — generally lower-income African American and Latino communities.

Chicago police officers usually work as partners and with a team of officers who report to a sergeant. In accordance with the maxim “birds of a feather,” good officers do not generally want to work with officers who abuse their power. Moreover, it is difficult for a repeater to perpetrate abuse without at least the silent complicity of his or her partner and other team members. Yet, the CPD has no system for tracking abuse complaints among groups of officers. Again, the Department and City officials choose not to know.

Fake Raids, CHI. TRIB., Aug. 22, 2006, at 1, for examples of federal investigations of police misconduct in Chicago.

We analyzed the repeater data to see how various CPD units compared.⁸⁹ Two units, in particular, jumped off the page as containing a disproportionate share of repeaters — the Special Operations Section and Public Housing South Unit of the CPD. Both units policed predominantly low-income minority communities in Chicago.

Special Operations is an elite unit of officers deployed in hot spots, or high crime, economically depressed communities, such as Chicago public housing developments. Special Operations contained 64 repeaters who collectively received 1343 abuse complaints over five years.⁹⁰ It should have come as no surprise to the CPD when seven members of the Special Operations Section were recently indicted for a pattern of criminal abuse, and more are currently under investigation.⁹¹ However, the conduct of the special operation officers did not come to light as a result of the analysis or identification of a pattern of abuse complaints against them.⁹² They were instead identified virtually by happenstance when members of the local prosecutor's office noticed that they were failing to come to court as witnesses in criminal drug prosecutions.⁹³ While officers have reported in confidence that the reputations of many of the indicted officers were well known among Chicago police officers and supervisors for years, no one took any action to stop them. The CPD's monitoring and disciplinary systems not only ensured that their crimes would go unaddressed, but actually enabled these crimes and abuses to continue.

⁸⁹ The CPD documents containing the repeater lists and units of assignment (with names redacted) are *available at* <http://www.viewfromtheground.com/wp-content/media/police-docs/sustained-penalty-codes.pdf> and <http://www.viewfromtheground.com/wp-content/media/police-docs/police-officers-more-than-10-crs-unit-175.pdf>.

⁹⁰ Futterman, *supra* note 33.

⁹¹ See David Heinzmann, Anglea Rozas, and Gary Washburn, *Elite Cops Rack Up Complaints*, CHI. TRIB., July 18, 2007, at 1.

⁹² See David Heinzmann, Todd Lightly and Jeff Coen, *Feds Join in Probe of City's Elite Police*, CHI. TRIB., Aug. 16, 2007, at 1.

⁹³ *Memo Sheds New Light on SOS Probe*, CHI. TRIB., March 17, 2008, at 8.

Public Housing South (PHS) officers policed public housing developments on the South Side of Chicago. Even though PHS was one of the smaller units of the CPD, consisting of a little more than half the number of police officers as most districts, it was home to 50 repeaters with 834 abuse complaints within the same five-year period between 2001 to 2006.⁹⁴ Those 50 repeaters made up 18% of the entire PHS unit.⁹⁵

To put this in perspective, we compared the number of PHS repeaters to the number of repeaters assigned to the Second District, a large geographically-based police station that contained a significant portion of the public housing communities that made up Public Housing South. After eliminating the repeaters that transferred to the Second District when the PHS unit was disbanded, there were four repeaters in the unit, making up 0.9% of the Second District.⁹⁶ PHS, therefore, was 20 times more likely to have repeaters than the Second District, even though the units policed many of the same communities. By comparison, most CPD units housed just one to two repeaters in the entire unit. There is virtually no statistical chance that the Public Housing (or Special Operations) repeater distributions were caused by random occurrence.

We then examined the abuse complaints against the group of five PHS officers who were charged with the repeated abuse of Diane, described in the Introduction to this piece. There were obvious patterns among the complaints levied against the team. Moreover, the five officers accumulated together more complaints than repeaters in 33 entire units of the CPD.⁹⁷ The probability that five officers selected at random would each have amassed the number of complaints as the individual members of the Skullcap Crew was less than one in 2 billion. And these five officers worked together. It was essentially impossible

⁹⁴ Futterman, *supra* note 33.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

for such a grouping of multiple complaints per officer to occur by chance. Yet, because the CPD did not perform any pattern analysis by group, Diane's charged tormentors were never identified or stopped. Once again, it required the operation of the machinery of denial for the CPD not to know about the Skull-cap Crew.

The necessity to track potential group patterns of abuse is old news to the CPD. The patterns of abuse have been apparent in every major police scandal over the past few decades. It was apparent in the infamous torture of African Americans in the 1970s and 1980s by Commander Burge and his fellow detectives at Area Two Headquarters when, like now, there were scores of torture complaints without any attempt by the CPD to meaningfully investigate. It was also the subject of Mayor Daley's Commission Report on Police Integrity in Chicago, authored a decade ago, in the wake of the federal indictment and later conviction of ten police officers for having engaged in years of corruption and abuse.⁹⁸ The report observed that the police scandals that animated the study did not involve ten officers from ten different units randomly distributed throughout the City.⁹⁹ These Austin and Gresham scandals involved groups of officers from two gang and drug tactical units on the City's South and West Sides. The Mayor's Commission admonished that the CPD must monitor misconduct complaints by police groups if it hoped to avert similar patterns of abuse in the future.¹⁰⁰ Like Burge and his crew, the Austin and Gresham officers attracted eye-popping numbers of complaints, but CPD's disciplinary or supervisory systems never identified them.¹⁰¹

⁹⁸ Office of International Criminal Justice, University of Illinois, Chicago, *Report of the Commission on Police Integrity*, presented to Chicago Mayor Richard M. Daley 10-11 (Nov. 1997), available at <http://www.viewfromtheground.com/wp-content/media/kirby-letter/police-integrity-report-1997.pdf>.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 21.

¹⁰¹ See David Jackson, *Problems Plague Internal Affairs Division: Forbidden Friendships Between Cops and Criminals*, CHI. TRIB., Oct. 24, 2000, at 13.

Similar patterns hold for the later high profile federal prosecutions of a crime ring led by Chicago police sergeant Joe Miedzenowski, whom the United States Attorney called “the most corrupt cop” in Chicago history.¹⁰² The team of officers led by Miedzenowski was never identified by CPD’s procedures, prior to the federal sting.¹⁰³ Nor was a group of tactical officers from the Englewood district on Chicago’s South Side who are now doing time in federal prison for years of civilian abuse. They had similarly accumulated a shocking number of complaints without any meaningful investigation or repercussions.¹⁰⁴

Despite decades of known patterns of abuse among groups of officers, the CPD lacks any system to address group patterns.¹⁰⁵

4. The Costs of a Few Bad Apples

Make no mistake, a few bad apples can do untold damage to a community. It may also be a gross misnomer. Indeed, as demonstrated by the figures above, there are far more than a few bad apples clustered in certain neighborhoods. Indeed, 50 repeaters made up nearly 20% of the primary unit that policed public

¹⁰² Todd Lightly and Matt O’Connor, *Rogue Cop Gets Life, Drug Ring Leader Called Betrayer of Society, Honest Police*, CHI. TRIB., Jan. 25, 2003, at 1; Carol Marin and Frank Main, *Honored Cop Among 8 Tied to Thefts*, CHICAGO SUN-TIMES, Aug. 31, 2006, at 6.

¹⁰³ Federal law enforcement agents attempted to report Miedzenowski’s abuse. Rather than punish Miedzenowski, the CPD deployed its investigative machinery to retaliate against the agents for reporting the abuse. See Jeff Coen, *\$10 Million Dollar Reward in Cop Case: ATF Agents Sued City, Corrupt Officer Over Retaliation, Harassing*, CHI. TRIB., Feb. 23, 2007, at 3.

¹⁰⁴ Coen and Heinzmann, *supra* note 88; Frank Main, *‘They’re Scum’: 2 Chicago Cops Allegedly Helped Robbers Knock Over Businesses Across the City and Suburbs by Supplying Info About Their Targets and Their Families*, CHICAGO SUN-TIMES, Aug. 23, 2007, at 14.

¹⁰⁵ The CPD has been praised for developing technology to track patterns of civilian crime. See Richard Pastore, *Grand Award Winner Chicago Police Department Using I.T. to Fight Crime*, CIO, Feb. 15, 2004. The irony in CPD’s recognition of the value of tracking patterns in civilian crime, but refusal to look at patterns of police misconduct cannot be ignored.

housing communities on Chicago's South Side.¹⁰⁶ Assuming that any officer, no matter what his or her outlook is on the job, would prefer to work with partners or team members who share that outlook, we can surmise that officers who engage in routine abuse likewise seek out and often work together with like-minded officers. Together these teams of repeaters and their enablers become the cruel and corrupt face of law enforcement for an entire community.¹⁰⁷

Recall that just the first four indicted Special Operations officers alone were responsible for hundreds of arrests. Consider the number of African Americans in prison based on the testimony and abusive practices of these four officers. The social cost of the conduct of these few bad apples is staggering: families made homeless by One Strike evictions from public housing,¹⁰⁸ the human suffering from the brutality at the hands of those four men, the loss of faith in the police and our criminal justice system and the costs of civil lawsuits to taxpayers. The harm caused by these four officers continues to accumulate. The Cook County State's Attorney's Office recently dismissed more than 100 pending felony criminal cases that relied on these officers'

¹⁰⁶ Futterman, *supra* note 33.

¹⁰⁷ Equally important, the abuse of a few undermine the effectiveness and jobs of the thousands of honorable officers in Chicago who want nothing more than to protect and serve the people of Chicago. See Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement*, 79 OR. L. REV. 391 (2000) (the willingness of the public to conform to law depends in large part on public perception of governmental legitimacy, respect, and courtesy vis-à-vis citizens); see also Jeffrey Fagan and Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000) (abusive policing and unfair procedures raise concerns about the legitimacy of the law, weakening public participation in the joint enterprise of public safety).

¹⁰⁸ Congress passed the "One Strike and You're Out" policy as a part of the Anti-Drug Abuse Act of 1988. Under "One Strike," a family living in public housing may be evicted if any member of the family or a guest is arrested for drug-related activity. A conviction is not necessary. See *Dept. of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

testimonies. Additional felony prosecutions may need to be abandoned.¹⁰⁹

III. CONCLUDING QUESTIONS: APARTHEID JUSTICE?

The numbers don't lie. The statistical analysis described in Part II above demonstrates that Chicago has a broken system for monitoring and disciplining its police officers, satisfying each of the elements of *Monell* liability outlined in Part I. This analysis (1) demonstrates the existence of deficient disciplinary and supervisory policies, (2) provides powerful evidence of deliberate indifference — the affirmative efforts that policymakers must make not to know about individual and group patterns of abuse and the egregious harm caused by such abuse and (3) supports several theories of causation, including demonstrating that minimally effective practices would have identified and stopped the Skullcap Crew long before they had the chance to hurt Diane and that the City's practices were so patently deficient that the officers in question were actually encouraged in their patterns of abuse, knowing that they operated with impunity.

Author Jamie Kalven aptly described the CPD's practices for investigating police abuse, the police code of silence and the Department's supervisory and monitoring systems (including its refusal to examine patterns) collectively as a regime of not knowing.¹¹⁰ As the numbers detailed above illustrate plainly, not knowing about police abuse in Chicago requires a great deal of active effort. It requires a deep commitment to the machinery of denial, including denying incidents of brutality, turning a blind eye to patterns of abuse, refusing to look at data that is just a key stroke or two away and passively encouraging a culture of silence in the face of abuse perpetrated by fellow officers.

¹⁰⁹ Maurice Possley, *When Cops Go Bad, Everyone Pays*, CHI. TRIB., Oct. 22, 2006, at 1.

¹¹⁰ Kalven, *supra* note 1, at 27.

Given the lengths to which the City has gone to not know what truths are revealed by its own data, the statistical findings we outline above raise a series of fundamental questions. States of impunity do not exist in every community in Chicago. Most neighborhood districts house few if any repeaters. Just as our students have witnessed a different Constitution on the ground in Stateway, the data show that abuse complaints tend to be concentrated among officers who work in lower income communities of color.

In exploring why this concentration exists, the impact of race is impossible to ignore and hard to discount. These law enforcement policies impact African Americans and other members of minority communities the most. Thus, all the effort invested in not knowing implies a deliberate indifference to the abuse of Black and Brown people who live in the inner city.

Does a different Constitution apply in inner city minority communities? And if so, what are its implications?¹¹¹ Have we really assessed the true impact of this division — the true human cost of abusive police officers operating with impunity within an African American community? How great is the loss of life, liberty and property? The loss of hope and opportunity? The loss of family? Loss of justice? Loss of faith in our political institu-

¹¹¹ See, e.g., David Cole, *Race, Policing, and the Future of the Criminal Law*, 26-SUM HUM. RTS. 2, 3 (Summer 1999) ("Absent race and class disparities, the privileged among us could not enjoy substantial constitutional protection of our liberties as we do; and without those disparities, we could not afford the policy of mass incarceration that we have pursued over the past two decades."); see also Harcourt, *supra* note 4, at 375 (discusses our deliberate decisions *not to know* about the human costs of aggressive, discretionary policing strategies associated with the war on drugs: "The most important thing in the public policy debates, then, is to decide with eyes wide open and brutal honesty, how much unconstitutionality we are prepared to live with—how many sexual batteries of black suspects we are willing to perform. We get to decide.").

tions? Does institutional denial work to disguise the true nature of what we are doing from ourselves?¹¹²

While we do not attempt in this article to answer each of these questions, we do assert that whatever the answer, we cannot afford *not to know*. The Stateway Gardens community in which we performed our work has now been razed. Like the physical structures that once dominated miles of the State Street corridor, Diane and her former neighbors have also disappeared from this place. And as the residents vanished, so did the Skull-cap Crew. Most of its members, like many former Stateway residents, moved their base of operation to public housing communities located elsewhere on the South Side of Chicago. A newly named community (Park Boulevard), with the new eye-catching developments and stores that are popping up, attracting the more well-to-do and completing the erasure of all that came before. But like the vibrant spirit of the Stateway Gardens community, these questions persist and demand our attention to prevent the perpetuation of abuse caused by a willfully blind police department.

¹¹² Richard Wright asked many of these same questions in his classic novel, *Native Son*, set in the South Side of Chicago, more than 60 years ago. RICHARD WRIGHT, *NATIVE SON* (1940).

