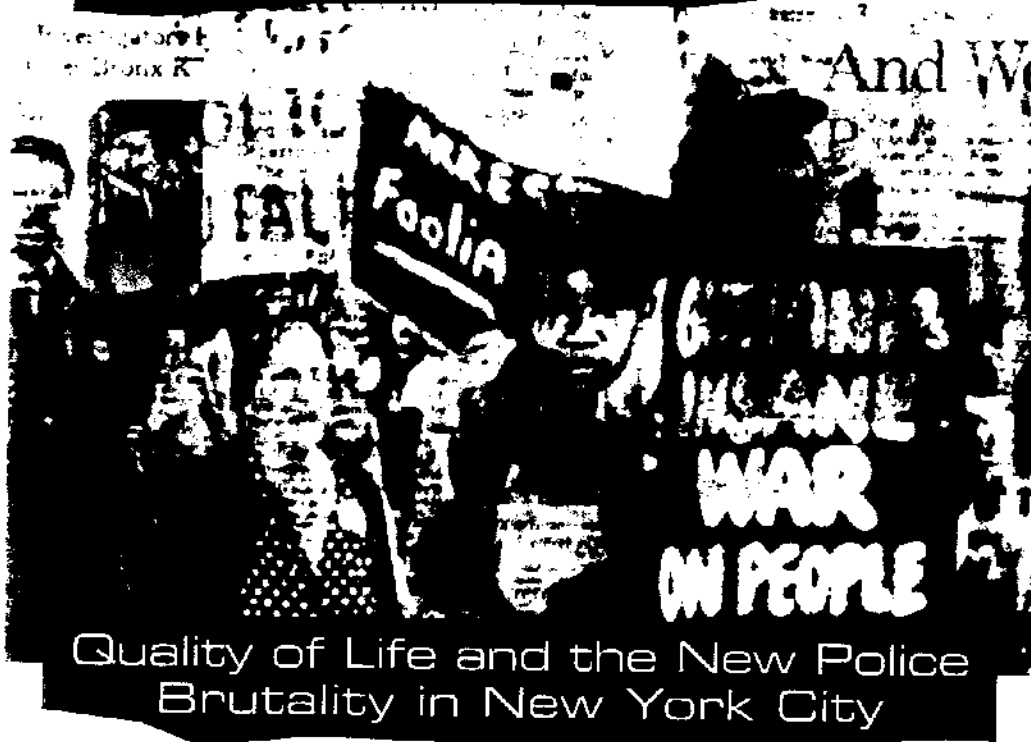


# ZERO TOLERANCE



Quality of Life and the New Police  
Brutality in New York City

Edited by Andrea McArdle and Tanya Erzen

## No Justice, No Peace

Andrea McArdle

### SAFE CITY, MEAN STREETS

While New York City burnishes its reputation as a safe haven for developers, tourists, and affluent residents,<sup>1</sup> the iconic presence of Emma Lazarus's Statue of Liberty offers a more ambivalent welcome to the city's new immigrants.<sup>2</sup> Meanwhile, in the streets of the city, the claims of safety are tested daily. Young pedestrians and bike riders in the poorer neighborhoods are routinely stopped and questioned by police in the Giuliani administration's campaign to reduce drug-related crime. These confrontational investigative tactics have led community members to dread the police rather than welcome their presence.<sup>3</sup> In its declared war on guns and street crime, the NYPD dispatches scores of barely trained recruits into the Street Crime Unit where, in 1997 and 1998, NYPD data indicate that 45,000 people—primarily black and Latino males—were stopped and frisked, often for no reason other than the fact that they were black and Latino. Anecdotal information gathered from NYPD officers suggests that there is extensive underreporting of these encounters—perhaps only one in five stops—according to New York's attorney general, Eliot Spitzer.<sup>4</sup> At the same time, aggressive "quality-of-life" initiatives designed to promote public order and "protect" public spaces have targeted the homeless, sex workers, and gay men.<sup>5</sup>

In this narrative of a new economic order, police use of force is an accepted part of a campaign to pacify the city's more marginalized, less marketable communities. When the circumstances of a violent incident are contested, the mayoral establishment routinely supports

police officers. Mayor Giuliani's remarks following the killing in April 1997 of sixteen-year-old Kevin Cedeno attest to this presumptive crediting of police officers' accounts of events "until and unless there are facts that are established that they acted improperly. That's how a decent, civilized and orderly society operates. You give the benefit of the doubt to the sworn police officers."<sup>6</sup> The mayor's hasty release of Patrick Dorismond's minor police record shortly after the unarmed Dorismond was killed in an altercation with undercover officers on March 16, 2000—as if to mitigate the damage, and deflect attention from the conduct of the officers involved—is another example of the presumptive bolstering of the police and discrediting of civilian casualties of police violence.

When evidence of police violence is more pronounced, police misconduct is framed as isolated and exceptional. Then Police Commissioner Howard Safir's characterization of the vicious assault on Abner Louima as a "criminal act," as distinguished from "police brutality,"<sup>7</sup> suggests that brutality, far from being viewed as criminal, is essentially tolerated and minimized in police culture. The extent to which police brutality is itself criminalized becomes a "measuring stick" for whether or not it is possible for the law to operate evenhandedly, to avoid a disenfranchising double standard.<sup>8</sup> Yet, city officials refuse to acknowledge that brutality, under any definition, is driving current dissatisfaction with the NYPD. Incredibly, Commissioner Safir editorialized that it is a lack of civility rather than the use of force that fuels the criticism.<sup>9</sup> In April 1999, the NYPD inaugurated refresher courses on basic politeness, issuing cheat cards that remind officers to use terms of respect such as "sir" and "ma'am," and to say "thank you."<sup>10</sup>

This continuing failure to acknowledge police criminality in all but the most egregious instances has led disconsolate family and community members to enact their grief and anger publicly. In the wake of the Amadou Diallo shooting, the NYPD is perhaps the most intensely scrutinized police force in the country. The New York State Attorney General's Office completed an investigation into the Street Crime Unit's stop-and-frisk practices late in 1999, and in that same year the NYPD was investigated for civil rights abuse by the United States Attorney's offices for the Eastern and Southern Districts of New York, the New York City Council, the New York City Public Advocate's Office, and the U.S. Civil Rights Commission.<sup>11</sup> In this context, the relative infrequency with which official New York registers the occurrence of police crimi-

nality hardly betokens a “civilized” society, however the mayor has appropriated the term.

### THE GENDER AND RACIAL LIMITS OF ENFRANCHISEMENT

In deciding when and against whom to carry out their assigned campaign of criminalization, police officers exercise an extraordinary amount of discretion.<sup>12</sup> As sociologists of law recognize, those who enforce legal rules apportion and apply power unevenly, in ways that are not admissible when the rules are being formulated.<sup>13</sup> Inevitably, the persons most likely to be marked as criminal not only tend to be among society’s most disempowered but also the most vulnerable to police brutality during the course of law “enforcement.” When the same officers who brutalize civilians are not held accountable for their criminal acts—either by the NYPD or by the legal system that enforces the criminal law—the resulting double standard deepens divisions between the police and people in the community, and disenfranchises these police victims. This lack of effective recourse is one manifestation of a pattern of discrimination against poor persons of color and, increasingly, women, in the application of criminal law—from the point of arrest to sentencing.<sup>14</sup>

I have chosen “enfranchisement” as a framework because, like the closely allied concept of citizenship, it involves a notion of membership, a sense of belonging to, and claiming rights under, a community. With its broader semantic scope, enfranchisement encompasses the claim of any person—whether or not a citizen in the formal legal sense—to the equal benefit of laws for the security of persons and property.<sup>15</sup> Recognizing the rhetorical and conceptual ties between enfranchisement and citizenship, I have drawn on the discourses of citizenship to analyze the way in which the city’s failure to criminalize police brutality invokes inequalities historically inscribed in those discourses.

The idea of enfranchisement implicates what constitutional law scholar Christopher Eisgruber identifies in the context of birthright citizenship as the “responsiveness principle”—the idea that the legitimacy of government derives from its responsiveness to all persons who are subject to its general authority and police power.<sup>16</sup> In practice, the principle of equal responsiveness operates unevenly. The benefits of full

participation and "standing," to use Judith Shklar's term,<sup>17</sup> are not uniformly available. Historically, the idea of citizenship has been bound up with white male political and social prerogative.<sup>18</sup> Even after the formal conception of citizenship was broadened, the identification of full citizenship with the privileged position of white men has been sustained by a web of law and customary practice.<sup>19</sup>

In practice, the formally inclusive discourses of citizenship have excluded from the benefits of social and civic standing those persons whose gender, race, sexuality, or poverty marks them as "other." A society's failure to acknowledge and redress the damage that police violence inflicts places all of us at risk. Yet the impact of tolerating that violence disproportionately affects persons seen as nonnormative and invokes the same patterns of exclusion that are linked with the failed idea of citizenship. Recognizing these gendered and racialized implications is critical to evaluating a legal infrastructure that often relegates the victims of police abuse to a space beyond the law's cognizance.

#### THE LEGAL FRAMEWORK FOR ASSESSING EXCESSIVE-FORCE CLAIMS

In New York City, an array of internal departmental rules, standards of liability in tort law, and penal code provisions circumscribe the use of force by police in effecting arrests, preventing escapes, and defending against imminent use of physical force. These rules generally bar the application of deadly force, coercive methods for eliciting confessions and unnecessary physical force. Only under circumstances in which an officer can show a "reasonable belief" that the use of force was "necessary"<sup>20</sup> do these rules authorize the use of nondeadly and even deadly force. The rules are not identical in scope. In fact, the NYPD's internal regulation on deadly force is stricter than the standard under the state penal law.<sup>21</sup>

The existence of rules restricting police behavior should be distinguished from their enforceability. Egon Bittner has argued that police use of force remains largely unmoderated because the very concept of a "lawful" application of force is "practically meaningless."<sup>22</sup> In general, rules that define the outer limits of permissible force (outlawing use of deadly force against a fleeing, unarmed, nonviolent felon) or that impose a categorical ban on conduct (forbidding use of torture in extract-

ing confessions)<sup>23</sup> are easier to apply than rules based on contextual, fact-bound standards that address the circumstances under which the police may be called upon to make “split-second judgments.”<sup>24</sup> The difficulties of applying these rules aside, rules that are part of a system of noncriminal regulation (the police department’s internal disciplinary provisions, tort remedies that often conclude with a negotiated out-of-court settlement to compensate individual victims)<sup>25</sup> do not allow a public airing of the circumstances of police use of force. Criminal prosecution of the police ensures that the adjudication of liability will be a public process.

#### CRIMINAL LAW AS DISCOURSE

As David Garland has shown, the set of practices and institutions that constitute penalty operate as an authoritative, condemnatory discourse expressing the normative judgment of the community<sup>26</sup>—or at least of the political and economic elites whose values and interests tend to define the “norm.”<sup>27</sup> The seriousness of this discourse is dramatized by the public, ritualized dimensions of imposing sanctions—the formal rendering of judgment in open court, the performative nuances of restraining freedom of movement, the lurid drama surrounding an execution.<sup>28</sup> The power to signify the stigma and opprobrium attached to criminal liability, and to reinforce the rigor of the rule that was breached,<sup>29</sup> offers a powerful explanation for the importance attached to criminal prosecution of police brutality in disempowered urban communities.

Within these communities, and especially among the families who have lost loved ones at the hands of the police, the lack of a consistently functioning model of criminal prosecution communicates the law’s unresponsiveness to the victims of urban police violence. For their family members, a debilitating sense of frustration and disempowerment intensifies the experience of grief. When, for example, Washington Heights resident Kevin Cedeno died after being shot in the back by Officer Anthony Pellegrini, Kevin’s grandmother, Joy Cedeno, said her family would “find no peace until the officer has been arrested, indicted, and convicted.” When Manhattan district attorney Robert Morgenthau announced that a grand jury considering the Cedeno case had determined not to indict Pellegrini, members of Cedeno’s family condemned

the decision and renewed their commitment to seek "justice," hoping (without success) to launch a federal probe of the shooting.<sup>30</sup>

### POLICE BRUTALITY AND THE CRIMINAL PROCESS

Before the 1970s, prosecutions for excessive force were uncommon in New York. Paul Chevigny, longtime commentator on the culture of police abuse in New York City, suggests that the growth of the civil-rights movement and a greater sense of political vulnerability among prosecutors in the 1970s shifted more attention and resources to police brutality cases.<sup>31</sup> At the same time, disclosures of widespread bribe taking among New York City police officers led to the creation of a state-level Special Prosecutor's Office charged with investigating and prosecuting police corruption.<sup>32</sup> In an era in which claims of police corruption and excessive force were treated as conceptually distinct, the limited mandate of the special prosecutor led to a division of labor in which prosecution of excessive-force cases fell to local district attorneys.<sup>33</sup>

In the past twenty-five years, there have been a limited number of successful excessive-force prosecutions against police officers in New York City—typically the more publicized cases of deadly force or torture.<sup>34</sup> However, with a few exceptions, the most prevalent form of physical violence against civilians—the routine, gratuitous use of force that accompanies arrests and street encounters<sup>35</sup>—generally goes unpunished, and often unrecognized. If the level of excessive-force complaints filed with the Civilian Complaint Review Board is any indication—an overall rise of 44 percent between 1993 and 1996, with some decline noted thereafter but a general rise in complaints during the second half of 1998<sup>36</sup>—the incidence of violent encounters has increased markedly under the Giuliani administration. In all probability, the actual level of police brutality is underrepresented in these statistics; the disincentives against officially registering episodes of police violence secure their invisibility. Among those charged with crimes, lack of medical corroboration for an injury, or the concern that asserting an excessive-force claim would complicate the progress of plea negotiations, may discourage victims from raising the issue.<sup>37</sup> Among immigrant groups, fear of disclosing an unregularized status, and procedural misunderstandings fueled by language differences, intensify feelings of vulnerability that can prevent a complaint from surfacing.<sup>38</sup> In much

the same way, targets of the quality-of-life campaign such as homeless people and persons cited under the public lewdness law have been reluctant to come forward, deterred by a process that can be humiliating as well as intimidating. Furthermore, since few complaints result in serious disciplinary measures against the police, filing a complaint can be an exercise in futility.<sup>39</sup>

### BARRIERS TO PROSECUTION

When excessive-force allegations come to the attention of prosecutors, institutional pressures—some structural, others informal—can work against successful prosecution. Most obviously, prosecutors rely on sources of evidence that police officers supply. Prosecutors also provide legal advice and instruction to police officers during criminal investigations.<sup>40</sup> As a practical matter, prosecuting these officers for misconduct jeopardizes that close working relationship.<sup>41</sup> Present and former prosecutors report that lack of cooperation in ongoing cases as well as browbeating of prosecutors by the police “gallery” during trials of other officers are commonplace.<sup>42</sup> Moreover, since the decision to prosecute in any case involves an exercise of discretion,<sup>43</sup> any failure to prosecute police violence will fuel a perception that prosecutorial discretion has been abused. The chief of the New York City Police Department’s Internal Affairs Bureau has suggested that a decision not to prosecute a “minor” occurrence of violence may reflect a judgment that departmental discipline will be more severe than a criminal penalty.<sup>44</sup> Nonetheless, the structural basis of prosecutorial-police cooperation creates an “institutional conflict of interest.”<sup>45</sup>

When local prosecutors do investigate police brutality, it is usually through the mechanism of the grand jury, an investigative body drawn from the local civilian population and controlled by the prosecutor who presents evidence in the case.<sup>46</sup> As the prosecutors I interviewed were quick to point out, all witnesses called to testify before a grand jury in the New York State court system enjoy “transactional” immunity—full immunity from prosecution for any conduct related to the transaction about which they have testified.<sup>47</sup> In excessive-force investigations, summoning police officers to testify about a violent episode in which they may be involved forecloses any possibility of prosecuting them for the incident in a New York State court.

Issues of immunity aside, since 1994 two New York City commissions called into existence to investigate police misconduct have documented that officers who witness violent encounters involving other officers not only are disinclined to incriminate them, but are prepared to lie to avoid doing so.<sup>48</sup> This closing of ranks is especially impenetrable in brutality cases because of the belief, apparently deeply ingrained among most police officers, that force is necessary to survive on the street.<sup>49</sup> The result is that criminally violent behavior is compounded by perjury or other crimes involving false statements.

Sessions of the grand jury are closed to the public; a victim of a crime under grand jury investigation has no right to participate in the proceedings and no access to the evidentiary record. When a grand jury fails to indict, the closed nature of the proceedings forecloses review of the amount and quality of evidence that the prosecutor presented.<sup>50</sup> The terse announcement of “no true bill” typically produces a sense of desolation within communities in which police violence occurs, and, increasingly, trenchant criticism about the prosecutorial process. In response, traditionally reticent prosecutors have begun to engage more directly with these communities, at least to the extent of preparing remarks about the grand jury process for public consumption.<sup>51</sup> For instance, prosecutors prepared reports concerning the grand jury’s failure to indict officers accused in the shooting deaths of sixteen-year-old Yong Xin Huang,<sup>52</sup> twenty-three-year-old Aswan Watson, an unarmed man shot eighteen times by police officers in a precinct-based anticrime unit,<sup>53</sup> and sixteen-year-old Kevin Cedeno.<sup>54</sup> On rare occasions, a grand jury panel may issue a report recommending remedial action other than criminal prosecution, as a Brooklyn grand jury did in the Watson case, urging the NYPD to adopt improved selection criteria and training for anticrime officers.<sup>55</sup> With or without these communications, victims’ families and communities continue to feel under siege by the police—and betrayed by a legal system that they experience as depersonalizing.

#### ADJUDICATING WITHIN THE CREDIBILITY GAP

The limited available data indicate that criminal charges in excessive-force cases are uncommon. There is virtually no empirical work that documents these prosecutions and their dispositions; the most comprehensive data source, based on responses from law enforcement agen-

cies to a national survey conducted by the Police Foundation, noted a low response rate among enforcement agencies for this inquiry, and is confined to the year 1991.<sup>56</sup> No public agency makes data from New York City available in this form,<sup>57</sup> though on occasion local news media have attempted to document the record of prosecutions.<sup>58</sup> These media efforts, and a 1996 report prepared by Amnesty International concerning police brutality in the city, indicate that when a police officer is indicted on excessive-force charges, typically the officer waives the right to a jury trial and proceeds before a judge as trier of fact.<sup>59</sup>

Local prosecutors confirm this practice, noting that, in New York State courts, jury-trial waivers are virtually unmoderated, unlike the federal system in which prosecutorial consent is required.<sup>60</sup> Presumably, the defense preference for "bench" trials in police cases reflects a belief that a jury drawn from an alienated urban community will question the veracity of a police-officer defendant. There is ample evidence that officers frequently falsify reports and lie under oath to conceal the use of force and other abuses of authority.<sup>61</sup> In fact, in the relatively rare instances in which New York City police officers charged with serious felonies in the New York State court system opted for a jury trial, convictions followed.<sup>62</sup>

If urban juries are persuaded that police officers' propensity for truth telling is low, juries drawn from suburban communities may be more accepting of a police officer's version of events. In the Diallo case, the defense persuaded a panel of New York State appellate division judges to transfer the trial venue from Bronx to Albany County, a jurisdiction seen as friendly to law enforcement.<sup>63</sup> Given the demographics of the two counties (Albany's combined black and Latino population is 12 percent compared to the Bronx's 90 percent), and the jury's resounding acquittal of the officers on all counts, comparisons to the suburban Simi Valley, California, siting of the first Rodney King trial seem inevitable.<sup>64</sup> In urban bench trials, judges have shown themselves to have complicated responses to police witnesses that work to the advantage of officers charged with crimes. In 1997, for example, local prosecutors in the Bronx took a series of felony cases to trial involving a range of police misconduct, including deadly and excessive force. Virtually all of the cases resulted in acquittals.<sup>65</sup> In a 1998 Manhattan case, Detective Olga Vasquez and Officer Richard Thompson were acquitted in a bench trial of felony charges in connection with the assault of a narcotics suspect hospitalized for six

days after suffering seven rib fractures. Criminal charges against the victim, Norman Batista, who allegedly had resisted arrest, and the principal prosecution witness, another narcotics suspect, had been dismissed before the start of the officers' trial.<sup>66</sup>

More recently, an off-duty police officer, Michael Meyer, was acquitted after a bench trial of felony assault and reckless endangerment charges in the Bronx shooting of Antoine Reed, an unarmed squeegee man. Reed had committed a quintessential Quality of Life offense: he had started to clean Officer Meyer's windshield while his car was stopped in traffic at a highway exit ramp. Witnesses testified that Meyer exited the car and advanced toward Reed, as he backed up across several lanes of traffic. Meyer fired his service revolver at Reed, who suffered a ruptured spleen, then claimed that he acted in self-defense. Acquitting Meyer, New York State Supreme Court Justice John Collins noted that the prosecution failed to disprove self-defense. The court also ruled inadmissible a half-dozen civilian excessive-force complaints that had been lodged against Meyer since 1984 and that prompted his reassignment to building-repair duty involving limited interaction with the public.<sup>67</sup> Although there are exceptions,<sup>68</sup> the outcomes in these cases suggest that in contests of credibility between a police officer and a civilian (particularly when the latter has a criminal record or is facing criminal charges in connection with the same episode), judges will be inclined to believe police witnesses.

Conversely, judges tend to discredit officers facing criminal charges who testify for the prosecution against other officers, apparently on the theory that any cooperating officer seeks favorable consideration from the prosecution and has an obvious motive to lie.<sup>69</sup> Since it is often assumed that the option to cooperate with prosecutors and negotiate a more favorable plea disposition is always available to officers whose own criminality has come to light, officers who do not cooperate but proceed to trial are more likely to be viewed as truthful.<sup>70</sup> Even when officers who testify on behalf of the prosecution are not cooperators, as in the trial of Francis Livoti for criminally negligent homicide, the credibility of police witnesses can assume central importance. In the state court prosecution of Livoti, a conflict among the prosecution's police witnesses about the circumstances of Livoti's application of a chokehold upon Anthony Baez, moved the trial judge to note that the testimony of the police was a "nest of perjury."<sup>71</sup> Acquitting Livoti, the court ultimately resolved that question of credibility in favor of the four male

officers who corroborated Livoti over the testimony of Latina officer Daisy Boria, whose embattled position in the police department before and after the Livoti case became the subject of her own lawsuit against the NYPD that has since been settled.<sup>72</sup>

In the still relatively rare successful prosecution of on-duty officers for excessive-force charges, issues of credibility either have been more peripheral or otherwise were easier to resolve against the officer based on the evidence.<sup>73</sup> In the first federal civil rights prosecution in the Louima case, police officers corroborated Louima's testimony implicating Justin Volpe and Charles Schwarz in the station-house assault. The manslaughter conviction of transit police officer Paolo Colecchia in 1997 for the shooting of Nathaniel Levi Gaines, a fleeing, unarmed man suspected in a subway stalking, turned on the interpretation of the statute (authorizing a police officer to use deadly force only when the officer "reasonably believes" such force is necessary to prevent an escape of a person suspected of committing a violent felony).<sup>74</sup> In this case, the New York State Supreme Court accepted the Bronx district attorney's argument that the use of deadly force was not reasonable since there was no indication that, at the time of the shooting, the officer or anyone else was in danger.<sup>75</sup> Sentenced to a term of one and a half to four and a half years' imprisonment, Colecchia is one of only a handful of New York City police officers who have received prison sentences for on-duty homicides.<sup>76</sup> After working closely with the Gaines family during the investigation and trial, Norman Siegel of the New York Civil Liberties Union attested to the sense of vindication that the judgment produced among the many persons who contacted him following the verdict. He noted a willingness to imagine—laced with caution—that the legal system is capable of a fair result.<sup>77</sup> At Colecchia's sentencing, Gaines's father acknowledged the prison term as "important."<sup>78</sup>

### THE SEMIOTICS OF SENTENCING

Beyond adjudicating guilt or innocence in nonjury trials, judges also impose sentences. In the state system, the legislature has established a penalty structure for offenses, including minimum and maximum penalties for certain felony-level convictions; within these limits, judges enjoy considerable latitude.<sup>79</sup> In the federal system, judges' discretion has been reined in by the adoption of sentencing guidelines that were

intended, among other things, to remove the variability in sentences between civilians and the police in assault cases and to authorize additional sanctions for civil rights violations.<sup>80</sup> Available data are limited on sentencing patterns in cases in which police officers were criminally convicted. The record of dispositions in a recent series of state and federal prosecutions of officers from the 30th Precinct in Manhattan on charges including drug dealing, theft, and assault, for example, were uneven at best. They often did not seem commensurate with the conduct involved,<sup>81</sup> in part perhaps because a number of officers cooperated with authorities.

Though there are some indications that sentences under the federal guidelines in police brutality cases are more stringent than in the preguidelines era, they are still far more lenient than sentences for assault committed by civilians.<sup>82</sup> Moreover, as the United States Supreme Court noted in its review of the sentences of Lawrence Powell and Stacey Koon, officers convicted of federal civil-rights violations in the assault of Rodney King after an acquittal in a state jury trial, only a limited number of factors are excluded categorically from consideration. A court may either add to or subtract from the penalties prescribed under the guidelines in a number of circumstances, subject to an appellate standard of review of "substantial deference" to the sentencing court.<sup>83</sup> Reviewing the sentencing court's application of the guidelines only for evidence of an abuse of discretion, the Court in the Powell case upheld a reduction from the guidelines based on the sentencing court's determinations that King had provoked the initial phase of the beating, that the officers were susceptible to violence in prison (considering the high visibility of the case), and that Koon and Powell were being subjected to the burden of successive prosecutions.<sup>84</sup> The Court ruled that the sentencing court had abused its discretion in reducing the guidelines-prescribed penalties based on the officers' low likelihood of recidivism and their loss of office following the convictions.<sup>85</sup>

The signifying power of the opinion should not be underestimated. The Court placed its imprimatur on a district court ruling that applied the guidelines in a way that accepts the prevailing justifications for police brutality.<sup>86</sup> The availability of a large number of officers who could have assisted in placing King in custody obviated any imagined need for such an aggressive response.<sup>87</sup> By justifying, on the ground of King's provocation, a reduction in the term of imprisonment prescribed for the officers' conduct, the Court seemed to aban-

don any pretense of reading the facts, even granting the deferential abuse-of-discretion standard. Rather, the opinion reproduced racial and gender stereotypes, invoking a long-familiar narrative within the criminal law that demonizes men of color<sup>88</sup> and recasts victims of state-sanctioned violence as aggressors. Additionally, as Justice David Souter pointed out in his separate opinion, treating successive state and federal prosecutions as a basis for reducing the sentence produced a “normatively obtuse” result: it allowed a defendant to benefit when the federal prosecution was necessary precisely because the trial in the state court failed to produce a just outcome.<sup>89</sup>

#### THE NEED FOR EVENHANDED CRIMINAL PROSECUTION

It would be misguided to suggest that the barriers to enforcing the criminal law against police brutality have been simply a dysfunction of the system of law. Legal institutions and the discourses that accompany them reflect and reinforce economic and political forces in the postindustrial city that produce deep structural inequalities. For this reason, to argue for an invigorated use of a legal process that is itself tied to a larger flawed system is to risk reproducing those very flaws, albeit with a different set of defendants. Yet, if more vigorous criminal prosecution is an imperfect response to the physical and psychic battering and harassment that have become a way of life for many people in the city, it is still an important ingredient in a coordinated antibrutality legal strategy. Prosecution of police criminality can have a deterrent effect and, perhaps more importantly, it enables people to invoke a process for recognizing and resolving public wrongs that for practical purposes has long been unavailable to them. The actual measure of a law, after all, is a citizen’s experience of it—the ways in which it operates when people invoke and use it.<sup>90</sup>

At a minimum, modifications in criminal law and institutional practice are needed to improve the responsiveness of the legal system to victims of police violence. One option that has strong support in the civil-liberties community is a permanent special prosecutor’s office with jurisdiction over both corruption and police brutality cases or the variant proposed by the U.S. Commission on Civil Rights.<sup>91</sup> By focusing only on police misconduct and maintaining its own investigative staff

to develop evidence, a special prosecutor's office would not be in the position of cooperating with the police officers whom it prosecuted or be subject to the subtle (and sometimes none-too-subtle) intimidation tactics that police groups have employed to undermine local efforts to prosecute misconduct.<sup>92</sup>

Predictably, local prosecutors disagree. They argue that the resources available to prosecuting agencies in large cities, and the size of the prosecutors' staffs and the police force in New York City, reduce the likelihood of conflicts of interest and the concern that local district attorneys are unable to enforce the law vigorously against the police.<sup>93</sup> But the thin record of successful prosecutions in New York City does not bear out this optimism. One prosecutor acknowledged that a special prosecutor's office might be marginally better at developing a comprehensive database and at targeting resources but said it is "not inevitable" that a special-prosecutorial model is preferable.<sup>94</sup> (Federal prosecutors are somewhat insulated from the concerns generated by the need to interact with municipal police officers, in that they have less occasion, except in joint investigations, to work with these officers.) Of course, it bears emphasis that a special prosecutor's office will be effective only if police officers are willing to break ranks and testify against other officers, risking retribution and ostracism.<sup>95</sup>

Under either a special- or local-prosecutor model, additional reforms are needed at a minimum to counter institutional biases against conceptualizing police brutality as crime. Identifying improved methods for uncovering and documenting police violence is essential to ensuring that the magnitude of the problem is understood and exposed to critical scrutiny. Developing a comprehensive database that links law enforcement agencies throughout the city and across jurisdictions within the state would facilitate investigation and aggressive prosecution of brutality.<sup>96</sup> As noted, the state penal law's rule on the justified use of deadly force is not as strict as the NYPD's own regulation. Bringing the state rule into conformity with the more stringent departmental guidelines on deadly force is a step that should be taken both to reduce potential confusion concerning the applicable standard and deter unwarranted use of deadly force. Narrowing the scope of the immunity granted to witnesses who testify before state grand juries would facilitate investigation of brutality incidents without foreclosing the possibility of prosecuting the officers who testify. Requiring a grand jury to file reports in all cases in which it declines to indict may help to allay the

frustration of communities in which law-enforcement efforts and police use of force have escalated.

### REMEDIAL MECHANISMS OTHER THAN CRIMINAL PROSECUTION

The view that criminal prosecution should play a central role in efforts to counter police brutality is grounded in the concern that tolerating aggressive police behavior in the name of crime control, the quality of life, or any other "salutary" social policy delegitimizes the rule of law that these programs at least implicitly invoke. The argument for the intensified use of the criminal process advocated here takes a differently nuanced position from other commentators on police brutality, most of whom accord criminal prosecution a more peripheral role in a remedial scheme. The Mollen Commission, for example, favored a comprehensive, preventive approach to the problem of police misconduct rather than a return to a special prosecutor model; it opted for internal anti-corruption structures and an external commission to audit the department's procedures and conduct independent inquiries, as needed.<sup>97</sup> Paul Chevigny has recommended criminal prosecution only for the "clearest" cases.<sup>98</sup> Jerome Skolnick and James Fyfe have argued that in the area of occupational crime, professional peers are better equipped than persons outside the field to address professional derelictions. Moreover, they conclude that to achieve justice for victims of professional wrongdoing, compensatory tort actions are preferable.<sup>99</sup> At a National Emergency Conference on Police Brutality and Misconduct held in New York City in April 1997, lawyers from the Center for Constitutional Rights advocated use of international law standards against excessive force and class actions to contest unreasonably dangerous police practices and technologies.<sup>100</sup> Amnesty International's 1996 report on police brutality in New York City, much maligned by city officials at the time, called for strong disciplinary measures, the creation of an independent oversight body to monitor brutality and corruption, and, where appropriate, criminal prosecution under international standards for abuse of force or firearms.<sup>101</sup>

Another potentially effective remedial mechanism that deserves consideration is the injunction action—a lawsuit seeking prospective and systemic relief by enjoining unlawful conduct and mandating

institutional reform. One such suit brought by the National Congress for Puerto Rican Rights and six individual plaintiffs, pending in a federal district court in Manhattan as this was written, seeks to enjoin the NYPD's Street Crime Unit officers from the ongoing practice of stopping and frisking civilians without "reasonable articulable suspicion," to enjoin officers from basing stops on race and/or national origin, and to require improved training for SCU officers.<sup>102</sup> All of these proposals have merit, and any of them might be used effectively—in conjunction with criminal prosecution.

Since 1994, under Title XXI of the Violent Crime Control and Law Enforcement Act, the U.S. Attorney General has had the authority to bring a civil action against law enforcement agencies to enjoin a "pattern or practice" of conduct violating federal law. The Justice Department has instituted such actions against Steubenville, Ohio; Pittsburgh, Pennsylvania; and the state of New Jersey.<sup>103</sup> In these cases, the United States filed a complaint commencing a lawsuit simultaneously with a consent decree in which the local government defendant agreed to institute new procedures. For example, Pittsburgh, with a force of about 1,100 officers, agreed to the appointment of a federal monitor and to institute a computer tracking program to follow officers who are involved in multiple brutality complaints.<sup>104</sup> Recently, the Justice Department began litigation with Columbus, Ohio, after the city's police union would not agree to changes prescribed under a proposed consent decree.<sup>105</sup>

The "pattern or practice" lawsuit can be a powerful goad to reform the existing structures of police agencies. Presently, Justice Department attorneys are negotiating with officials of the city of New York, and police departments in Los Angeles, New Orleans, and Buffalo are all under investigation.<sup>106</sup> The discussions with the city of New York cap an investigation initiated in 1997 by Zachary Carter, then U.S. attorney for the Eastern District of New York, after the assault on Abner Louima came to light.<sup>107</sup> Leslie Cornfeld, deputy chief of the Civil Rights Division for the U.S. Attorney's Office in the Eastern District, and former deputy chief counsel to the Mollen Commission, has headed the inquiry. In March 1999, Mary Jo White, U.S. attorney for the Southern District of New York, joined the investigation, focusing the attention of her office on the operations of the Street Crime Unit.<sup>108</sup>

News reports have been circulating for months that the federal investigation has uncovered enough evidence of systemic problems (con-

cerning the handling of excessive-force complaints and the failure to track officers who are most often complained about) to justify going forward with a lawsuit.<sup>109</sup> As of this writing, U.S. Attorneys were negotiating with the city over the terms of a consent decree.<sup>110</sup> Mayor Giuliani had gone on record at one point in the discussions as refusing to accept the kind of federal monitor that the cities of Pittsburgh and Steubenville agreed to in their consent decrees with the attorney general.<sup>111</sup> Should the long-anticipated suit against New York City go to trial rather than settle, there is no precedent, and no direct legislative history, to guide a court in determining whether the attorney general could prove a pattern or practice of misconduct under this statute. Case law interpreting similarly worded provisions in cognate civil rights statutes suggests, however, that the Justice Department could meet the “pattern or practice” standard in litigation against the city.<sup>112</sup> Still largely untested, the “pattern or practice” suit could prove a finely calibrated instrument for attacking systemic problems within local police agencies. At the same time, it is not a substitute for the signifying power of criminal law.

## CONCLUSION

In a statement delivered after the officers in the Diallo case were arraigned, Bronx District Attorney Robert Johnson encapsulated the current preoccupation with crime control in New York City: “Troubling questions have been raised . . . regarding police/community relations, civil liberties and the issue of respect. Questions have also been raised about public safety. . . . Certainly we need law and order, but we should not have to sacrifice the freedoms they are designed to protect.”<sup>113</sup>

In the end, it may be that the resistance to criminalizing police brutality is linked to a feared chilling effect on “successful” police work if formal rules and institutional practice governing police use of force are stringently applied. Legal institutions charged with responding to overzealous law enforcement are not insulated from an increasingly strident discourse that legitimates hyperaggressive measures in the name of crime control.<sup>114</sup> If, as Paul Chevigny has argued, the police serve as the “repository” of society’s “illiberal impulses,” there will be little incentive within these institutions to control or deter routine “acts of oppression” undertaken to maintain order and sanitize public space.<sup>115</sup> Additionally, there is a psychic cost to acknowledging that the

guardians of the criminal law are themselves in violation of the law. Yet in disenfranchising persons of color, women, homeless persons, and gays and lesbians, the law's failure to respond consistently and evenhandedly has its own inescapable cost.

For the targets of police brutality, institutions that fail to address police violence reproduce all-too-familiar patterns of exclusion within the legal order. Simply stated, the failure to apply law evenhandedly delegitimizes a presumed society of laws. It deprives victims of police crime of the appropriate expectation that invoking the law will be enough to control and deter criminality. Certainly, criminal prosecution should not be the only response to police brutality. A remedial system that emphasizes individual instances of past misconduct cannot get at the root of systemic racism or gender/sexuality bias. Yet the symbolic and deterrent effects of the criminal law are especially needed to begin to repair the damage done in communities where there has been no sense of justice and no occasion for peace.

#### NOTES

1. David M. Halbfinger, "New York Visitors Set a Record in '96," *New York Times* 3 July 1997: B5.

2. The reference is to Emma Lazarus's 1883 paean to the Statue of Liberty. See Dan Vogel, *Emma Lazarus* (Boston: Twayne Publishers, Div. of G. K. Hall and Co., 1980), 157–159, 202–203. See also "Bill Seeks to Protect Immigrant Workers," *New York Times* 2 July 1997: B4; Steven Greenhouse, "Bill Seeks to Make Sure Immigrants Get Paid," *New York Times* 30 June 1997: B4.

3. Jane H. Iii, "When the Saviors Are Seen as Sinners," *New York Times* 18 May 1997: sec. 13, 1; David Kocieniewski, "Policing Its Own," *New York Times* 11 January 1997: B3.

4. Kit R. Roane, "Spitzer Threatens Subpoena on Frisk Data," *New York Times* 16 May 1999: Metro 39.

5. See, e.g., essays by Erzen, Barr, and by Gore, Kang, and Jones in this collection.

6. David Firestone, "Benefit of the Doubt," *New York Times* 9 April 1997: B3. The mayor's response to the allegations in the Louima case was a departure from his customary stance. David Firestone, "Giuliani Police Quandary," *New York Times* 15 August 1997: A1 ff.

7. "The True Finest Will Come Forward," Editorial, *New York Daily News* 15 August 1997: 41.

8. The quoted language is from Norman Siegel, executive director of the

New York Civil Liberties Union, during the course of a telephone interview on 4 June 1997.

9. Howard Safir, "For Most, Brutality Isn't the Issue," *New York Times* 19 April 1999: A23.

10. See, e.g., Amy Waldman, "Safir Says Police Need to Deal Better with Public," *New York Times* 16 April 1999: B8; Michael Cooper, "Giuliani and Safir Try to Push Politeness Cards at a Roll-Call," *New York Times* 8 April 1999: B3.

11. See, e.g., Kevin Flynn, "Green's Criticism of Police Is Flawed, Giuliani Says," *New York Times* 16 September 1999: B1.

12. Paul Chevigny, *Edge of the Knife: Police Violence in the Americas* (New York: New Press, 1995), 80; Ted Robert Gurr in collaboration with others, *Rogues, Rebels, and Reformers: A Political History of Urban Crime and Conflict* (Beverly Hills and London: Sage Publications, 1976), 135, 164.

13. Roger Cotterrell, *The Sociology of Law: An Introduction*, 2d ed. (London, Dublin, Edinburgh: Butterworths, 1992), 272.

14. See the National Criminal Justice Commission, *The Real War on Crime: The Report of the National Criminal Justice Commission*, ed. Steven R. Donziger (New York: HarperPerennial, 1996), 107–121, 146–158; see also Monte Williams, "Study Shows Rise in Number of Women Jailed for Drugs," *New York Times* 1 December 1999: B18.

15. This principle is reflected in 42 U.S.C. Section 1981(a), which states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other."

16. Christopher L. Eisgruber, "Birthright Citizenship and the Constitution," 72 *N.Y.U.L. Rev.* 54, 72–73, 79 (1997). Eisgruber uses the responsiveness principle to identify a rule for birthright citizenship under the Fourteenth Amendment of the United States Constitution, concluding that all persons born in the United States—including the children of undocumented immigrants—should be treated in law as "subject to the jurisdiction" of the United States with a valid claim to share in its social, political, and economic benefits. *Id.* at 65, 72–85.

17. Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, Mass., and London: Harvard University Press, 1991), 2–3, 14–22.

18. As Shklar argues, citizenship acquired value to the extent that it was unavailable to slaves, women, and some (propertyless) white men. Shklar 49–50. To this list of excluded persons should be added native Americans, infantilized in legal discourse as dependent and lacking agency, and denied citizenship status until 1924, see James H. Kettner, *The Development of American*

*Citizenship, 1608–1870* (Chapel Hill: University of North Carolina Press, 1978), 293–300; Ian F. Haney Lopez, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996), 41; free blacks who, in the antebellum era, generally did not enjoy the right to vote or hold political office, Kettner 311–333; and non-white persons seeking to become naturalized citizens, who remained ineligible for citizenship under the naturalization laws until 1952. Haney Lopez 43. Persons of African ancestry were exempted from the racial bar to naturalization in 1870, however. Haney Lopez 43–44.

19. The conditioning of suffrage on literacy and payment of poll taxes, Eisgruber 57; Donald G. Nieman, *Promises to Keep: African-Americans and the Constitutional Order* (New York and Oxford: Oxford University Press, 1991), 106–108, and the institution of separate but nominally equal access to public services and economic opportunity, Nieman 104–113, 119–120, persisted into the mid-twentieth century, even after a sustained period of law reform offered an invigorated interpretation of the equal protection principle. See, generally, Nieman 169–188.

Neither did the acquisition of voting rights in 1920 constitute women as equal participants in the public order. Until 1934, the consequence of marriage to a man racially ineligible for American citizenship was loss of a woman's own status as a citizen. Linda K. Kerber, "A Constitutional Right to Be Treated Like American Ladies: Women and the Obligations of Citizenship," *U.S. History as Women's History*, ed. Linda K. Kerber, Alice Kessler-Harris, and Kathryn Kish Sklar (Chapel Hill and London: University of North Carolina Press, 1995), 27–28. It was not until the late twentieth century that a woman's right to privacy and bodily self-determination was recognized; Kerber 355. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a woman's right to choose to terminate a pregnancy); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (invalidating statutory requirement that a woman notify her husband before obtaining an abortion).

20. New York Penal Law Section 35.30(1) authorizes use of physical force on a reasonable belief that such force is necessary to effect arrest, prevent escape, or defend against the use of physical force by a person suspected of committing an offense. This section also authorizes a police officer to use deadly force on a showing of a reasonable belief that such force is necessary to effect arrest, prevent escape, or defend against physical force involving a designated felony or a felony entailing use of physical force against another person; to effect arrest or prevent escape of an armed felon; to defend the officer or another person against the use of deadly force. See also Amnesty International, *United States of America: Police Brutality and Excessive Force in the New York City Police Department* (New York: Amnesty International USA, 1996), 37–38 ("Amnesty International Report") (noting that the New York City Police department guidelines, which state that "deadly force shall not be used to subdue a fleeing felon

who presents no threat of imminent death or serious physical injury to themselves or another person," are more stringent than Section 35.30(1) and the constitutional rule in *Tennessee v. Garner*, 471 U.S. 1 (1985), which held that deadly force may not be used against an unarmed fleeing felony suspect. Judge-made rules have rendered inadmissible the fruits of a coerced confession. See Chevigny 132–133.

21. See Amnesty International Report 37–38.

22. Egon Bittner, *Aspects of Police Work* (Boston: Northeastern University Press, 1990), 119, 121–122.

23. See Chevigny 132.

24. *Graham v. Connor*, 490 U.S. 386, 396–397 (1989).

25. Victims of excessive force may institute civil-rights lawsuits to recover money damages against police officers and the municipalities that employ and train them. In fiscal year 1998, 1,686 of the 2,105 police action claims, and \$27.3 of the \$28.3 million disbursed by the city, involved allegations of police misconduct. In comparison to 1998 figures, the cost of all police claims was \$27.5 million and \$20.5 million in 1996. Although the dollar value of judgments and settlements increased, the 2,105 police claims of all types filed in 1998 decreased from 2,266 in fiscal year 1997. From fiscal years 1992 to 1998, police action cases have been the fourth most expensive category of claims. New York City Comptroller's Annual Report Fiscal Year 1998 5, 28 (August 1999). The Commission to Combat Police Corruption, an agency Mayor Giuliani established in 1995 in lieu of the independent monitor recommended by the Mollen Commission, has criticized the departmental disciplinary system—the other non-criminal process for adjudicating police misconduct claims—citing delays and inefficiency. See William K. Rashbaum, "Mayor's Panel Faults Police Dept. on Discipline System for Officers," *New York Times*, 29 June 2000: A1.

In theory, suits that result in a judgment or settlement should deter police misconduct, yet there is much evidence that neither police officers nor the police department is influenced by the outcomes of these actions. New York City, like most municipalities, usually indemnifies officers for damages awards so that officers have no economic incentive to modify their behavior. Alison L. Patton, "The Endless Cycle of Abuse: Why 42 U.S.C. Section 1983 is Ineffective in Deterring Police Brutality," 44 *Hastings L. J.* 753, 768, 771–772 (1993). Police departments do not monitor these suits, and tend to view their results as too variable and unreliable to be used as a basis for evaluating an officer's job performance. Telephone interview with Joel Berger. See also Patton 782–787. Charles Campisi, chief of the Internal Affairs Bureau for the New York City Police Department, acknowledged in an interview on 30 May 1997 that the police department did not consider itself bound by a jury determination of liability against a police officer, adding that it would depend on the "facts" of a case

whether the department would pursue disciplinary measures against an officer found liable for civil-rights violations in a civil suit.

26. David Garland, *Punishment and Modern Society* (Chicago: University of Chicago Press, 1990), 191–193, 199, 251–260, 262, 264–265, 287, 292. See also Peter L. Davis, “Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute,” 53 *Maryland L. Rev.* 271, 288 (1994); Alexa P. Freeman, “Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality,” 47 *Hastings L. J.* 677, 712–716 (1996).

27. Gurr 135, 175–178, 180.

28. Garland 253–254, 257.

29. Cotterrell 144.

30. Merle English, “A Move to Stop Brutal Cops,” *Newsday* 26 April 1997: A07. See also Metro News Briefs: New York, “U.S. Ends Rights Case on Police Killing of Youth,” *New York Times*, 12 December 1997: B6.

31. Chevigny 72, 100.

32. The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, *Anatomy of Failure: A Path for Success* (7 July 1994), 16–17 (“Mollen Commission Report”).

33. Mollen Commission Report 44, 150.

34. Chevigny 73, 99.

35. Chevigny 73, 75–76; Amnesty International 9–10, 14; Davis 285–287. A case in point is the lawlessness of police officers in their effort to enforce a curfew in Tompkins Square Park in August 1988. That effort resulted in many beatings of civilians and over a hundred complaints to the Civilian Complaint Review Board as it was then constituted, though only a handful of arrests. Chevigny 74–77, 81–82.

36. The Civilian Complaint Review Board data indicate that the total number of complaints filed against NYPD officers in 1998 increased by 4.1 percent over the 1997 level. During this same time period, there was a 2.3 percent increase in the number of uniformed officers. *New York City Civilian Complaint Review Board Report* for 1998, 3. Although the peak year for complaints of excessive force was 1995, Lii 1, 12, there has been a general rise in complaints since the middle of 1998. *New York City Civilian Complaint Review Board Report* for 1998, 13.

37. Interview on 22 May 1997, with Steven Zeidman, then associate professor of clinical law, New York University School of Law. Prosecutors from the Brooklyn and Bronx district attorney’s offices indicated that if a person charged with a crime does allege excessive force when arraigned on the criminal charge, prosecutors in a separate unit of their office will investigate the claim, effec-

tively freezing prosecution of the underlying charge in the interim. For the investigation to go forward, the defendant must be prepared to substantiate the allegations and waive provisions of law relating to the timing of a preliminary hearing and trial. If the investigation corroborates the defendant's claim, the district attorney's office will either pursue criminal charges against the officer or refer the matter to the Internal Affairs Bureau within the police department and, where warranted, may dismiss the underlying charge against the defendant-victim. Interview with Charles Guria, chief of Corruption Investigations Bureau, Kings County District Attorney's Office, 8 May 1997; interview with Thomas Leahy, chief of Rackets Bureau, 13 May 1997, and telephone interview, 30 May 1997.

38. See, e.g., Mae M. Cheng, "The New New Yorkers: Dispelling Myths, Educating the Public; Unit Aids Immigrants with Police Services," *Newsday* 3 April 1996: A25; Michele Parente, "Bias Crimes Down in the Bronx," *Newsday* 8 January 1992: 24 (noting that reports of bias underrepresent incidence of bias crimes among new immigrants vulnerable to legal or informal sanctions because of their undocumented status).

39. See Graham Rayman, "Arrested Progress/CCRB's Probes of Police Often Beseet by Delays, Dead Ends," *Newsday* 30 April 2000: A5. See also Dan Barry, "Independent Agency Fails to Police the Police, Critics Charge," *New York Times* 13 July 1997: Metro 19. Although the quantum of proof required in Board cases is the "preponderance of the evidence" standard that applies in civil cases, Paul Chevigny states that the actual standard is more stringent, usually requiring independent corroboration of a complainant's testimony. Chevigny 94; Amnesty International Report 5-6, 55-60. Of the 4,962 complaints filed in 1998, 300 complaints were substantiated, 1,086 were unsubstantiated, 812 were either unfounded or the employee was exonerated, 323 were concluded through conciliation or mediation, 2,384 resulted in "truncated investigations" (e.g., witness/victim unavailable or uncooperative), and 21 were "administratively closed" (e.g., complainant is unavailable or fails to appear for interview). New York City Civilian Complaint Review Board Semiannual Status report January-December 1998, vol. 6, no. 2, pp. 28-30, 74. For years, the NYPD reinvestigated claims substantiated by the CCRB and then failed to bring disciplinary action against the officers under investigation. In a recent move, the NYPD announced that it would not reinvestigate CCRB investigations but instead would refer cases to the CCRB for additional investigation, if thought necessary. Editorial, "A Stronger Civilian Review Board," *New York Times* 13 August 1999: A20.

40. Martin Wallenstein, "Prosecution in New York City," 159, in John Jay Faculty, *Criminal Justice in New York City* (1999).

41. See, e.g., Davis 271, 290-291. Recently, two of New York City's five district attorneys (Charles Hynes in Brooklyn and William Murphy in Staten

Island) acknowledged this functional dependency on the police when they testified before an arbitration panel in support of the Patrolmen's Benevolent Association's effort to secure a larger wage increase than the city had offered the union. Steven Greenhouse, "2 Prosecutors Back Police on Pay Issue," *New York Times* 4 June 1997: B3. Yet practices differ among district attorneys. In Manhattan, for example, prosecution for many police misconduct cases (typically systemic, precinct-wide instances of corruption or excessive force) is handled by a separate unit of prosecutors who have no day-to-day dealings with local police. However, some brutality cases are investigated and prosecuted by trial division attorneys who do interact with the police on an ongoing basis. Interview with Ric Simmons, former assistant district attorney in Manhattan (New York County). July 3 and 5, 2000.

42. Interview with Charles Guria, Kings District Attorney's Office, 8 May 1997; telephone interview with Maryanne Harkins on 13 March 1997, formerly deputy bureau chief, Rackets Bureau, Westchester County District Attorney's Office. See also Robert D. McFadden, "Officer Got No Support from P.B.A., Lawyer Says," *New York Times* 31 May 1997: 23 (reporting general practice of police officers and Patrolmen's Benevolent Association to appear in court during trials of other officers).

43. Davis 292-295.

44. Interview with Charles Campisi, chief of Internal Affairs Bureau, New York City Police Department, 30 May 1997. Chief Campisi acknowledged that the police department does not make public the dispositions in departmental disciplinary proceedings, anticipating that the public would either conclude that the penalties imposed were too lenient or too severe. He also indicated that Police Commissioner Howard Safir had lobbied the state legislature for changes in the current law that would increase the severity of penalties imposed for violations of departmental rules.

45. Telephone interview with Norman Siegel, executive director of the New York Civil Liberties Union, 4 June 1997.

46. Davis 297-298. Davis notes that although currently prosecutors control the grand jury process, historically the grand jury exercised more independence; Davis 299-306. He argues that victims of police brutality should seek direct or judicial access to the grand jury when prosecutors do not prosecute; Davis 308-352. New York law does not authorize direct citizen access, see New York Criminal Procedure Law Article 190, though arguably a court could entertain an application to impanel a grand jury; Davis 352.

47. Interview of Charles Guria and Dennis Hawkins, deputy, Rackets Division, Kings County District Attorney's Office, 8 May 1997; interview of Anthony Girese, counsel to Bronx district attorney and Thomas Leahy, Bronx County District Attorney's Office, 13 May 1997. See New York Criminal Procedure Law sections 50.10(1), 190.40(2). If it can be established that an officer lied

to the grand jury, a prosecution for perjury is authorized. New York Criminal Procedure Law section 50.10(1).

48. Mollen Commission Report 36–43; the City of New York Commission to Combat Police Corruption, *The New York City Police Department's Disciplinary System: How the Department Disciplines Its Members Who Make False Statements* (12 December 1996), 9–30 (“Commission to Combat Police Corruption”).

49. Telephone interview on 13 March 1997, with Maryanne Harkins.

50. New York Criminal Procedure Law section 190.25(3), (4)(a).

51. Interview with Anthony Girese, counsel to Bronx County district attorney, 13 May 1997.

52. The youth, the only son of Cantonese immigrants, had been playing with a pellet gun. Ellis Henican, “No More Games; Many Questions after Teen’s Death,” *Newsday* 26 March 1995: A08. The Brooklyn District Attorney’s Office released a statement prepared independently from the evidence before the grand jury recapitulating the evidentiary facts, including the officer’s claim that the weapon had fired accidentally. Amnesty International Report 46. Referring to this incident, which provoked many expressions of concern in the Asian community, Dennis Hawkins of the Kings County District Attorney’s Office acknowledged that prosecutors had an obligation to try to educate the community about the reasons for a grand jury’s failure to indict. Interview with Dennis Hawkins, 8 May 1997.

53. The same office issued a statement cataloguing its efforts to present the case, which included the testimony of forty witnesses. Joseph P. Fried, “Two Officers Are Cleared in a Killing,” *New York Times* 3 May 1997: 25–26.

54. “Morgenthau Comments on the Fatal Shooting,” B2. In another approach to keeping lines of communication open, the Bronx District Attorney’s Office offers a mentoring program for area youth that is staffed by department employees, including District Attorney Johnson. Telephone interview with Thomas Leahy, Bronx District Attorney’s Office, 10 August 1999.

55. Kit R. Roane, “Training of Some Officers Is Criticized by Grand Jury,” *New York Times* 14 February 1998: B3.

56. Anthony M. Pate and Lorie A. Fridell, *Police Use of Force: Official Reports, Citizen Complaints, and Legal Consequences* (Washington, D.C.: Police Foundation, 1993), 52, 146–149, 157 (vol. 1), table B.41.1 (vol. 2). A federal statute adopted in 1994, Title XXI of the Violent Crime Control and Law Enforcement Act, requires the attorney general to publish a yearly summary of data about excessive use of force by law enforcement officers. 42 U.S.C. Sections 14141–14142. This provision is essentially an unfunded mandate. To date, no report has issued that directly addresses the provisions of the statute. Telephone interview with Robert Moosy, Special Litigation Section, Civil Rights Division, U.S. Department of Justice, 10 August 1999.

57. Neither the New York State Division of Criminal Justice Services, the

state's Office of Court Administration, nor the various district attorney's offices maintain records reflecting the number of excessive-force cases brought against police officers and their outcomes.

58. David Kocieniewski, "Sergeant in 30th Precinct Is Spared Prison Sentence," *New York Times* 18 April 1997: B3; Elaine Rivera, "Minorities Feel Singled Out; They Account for 92.6% of 1990 Killings," *Newsday* 12 March 1991: 8.

59. Amnesty International 60, 62.

60. Under New York law, there is no provision for prosecutorial objection. Assuming that a waiver is voluntarily made, the court must consent to it unless it determines that it is calculated to secure an "otherwise impermissible procedural advantage," e.g., a severance in a joint trial. New York Criminal Procedure Law Section 320.10(2).

61. Commission to Combat Police Corruption 9-11.

62. Indicted on second-degree manslaughter charges, housing officer Jonas Bright was convicted in 1995 of the lesser offense of criminally negligent homicide for fatally shooting 29-year-old Douglas Orfaly, an unarmed Latino man, during an investigative stop. William K. Rashbaum, "Ex-Cop Guilty in Man's Death," *Newsday* 23 April 1995: A30. More recently, Constantine Chronis was convicted by a Suffolk County jury of first-degree assault (with depraved indifference), menacing, and official misconduct, but was acquitted of intentional assault, in an off-duty, racially charged incident. In April 1999, Chronis was sentenced to four-to-eight years in prison. Robert Gearty, "Prison Term for Ex-Cop. 4 Yrs. in Racial Beating near Hamptons Disco," *New York Daily News* 20 April 1999: Suburban 6; John T. McQuiston, "An Ex-Officer Is Convicted in a Beating," *New York Times* 24 February 1999: B5. In October 1999, two off-duty Brooklyn detectives, Lloyd Barnaby and Mark Cooper, were convicted after a jury trial of various misdemeanor charges in connection with the assault of Reginald Bannerman, but acquitted of felony-level assault charges. Bannerman later died after he was hit by a subway train several blocks from the scene of the attack. A judge acquitted two other detectives of attempting to cover up the incident. Joseph P. Fried, "2 Officers Convicted of Assaulting Man Who Was Later Killed by Train," *New York Times* 2 October 1999: B4.

63. See Bob Herbert, "In America: A Whitewash in Albany," *New York Times* 27 December 1999: A23; Richard Perez-Pena, "Albany County Is Friendly Place for Police Officers on Trial," *New York Times* 18 December 1999: B1, B2.

64. See Jane Fritsch, "New Site for Trial Often Factor in Outcome," *New York Times* 17 December 1999: B12; Jane Fritsch, "Four Officers in Diallo Shooting Are Acquitted of All Charges," *New York Times* 26 February 2000: A1.

65. Lizette Alvarez, "Cases Crumble in Prosecution of Officers," *New York Times* 13 April 1997: 31-32.

66. Anonymous, "Two Officers Acquitted on Charges of Brutality," *New York Times* 6 November 1998: B5.

67. Michael Cooper, "Officer Acquitted in Squeegee Man's Shooting," *New York Times* 9 July 1999: B1, B6.

68. Alvarez, "Cases Crumble," 31-32. In an off-duty shooting incident, Bronx Supreme Court justice Steven L. Barrett convicted Officer Richard Molloy of second-degree manslaughter in the death of Irish immigrant Patrick Phelan, and sentenced Molloy to 4-12 years in prison. Amy Waldman, "Officer Sentenced to 4 to 12 Years In '96 Killing of Irish Immigrant," *New York Times* 13 May 1999: B2.

69. Alvarez, "Cases Crumble," 32. Thomas Leahy of the Bronx County District Attorney's Office confirmed the reluctance of local judges to convict on the strength of a cooperating police officer's testimony.

70. Telephone interview with David Dorfman, assistant professor of criminal law, Pace Law School, and former staff attorney with the Legal Aid Society, March 1997 (date approximate).

71. National Congress for Puerto Rican Rights, Trial Report, *Justicia* 4 October 1996; Kocieniewski, "Safir Dismisses Officer," 23.

72. *New York Law Journal* 8 October 1996: 27.

73. Charles Guria of the Kings County District Attorney's Office said that a judge is less likely to credit police testimony that is patently "bizarre," as in a case in which a defendant police officer charged with assaulting an Asian-American store owner testified that the store owner caused his own injuries by banging his head against a store counter.

74. New York Penal Law Section 35.30(1).

75. Nick Ravo, "Officer Guilty of Killing Unarmed Man in the Bronx," *New York Times* 30 May 1997: B3.

76. Randy Kennedy, "Prison Term for Officer Who Killed Unarmed Man," *New York Times* 22 July 1997: B1.

77. Telephone interview of Norman Siegel, 4 June 1997.

78. Kennedy B1.

79. New York Penal Law articles 55-85.

80. Freeman 681-682; Kate Stith and Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago and London: University of Chicago Press, 1998) 3-8.

81. Kocieniewski, "Sergeant in 30th Precinct," B3. Given the reluctance of police officers to testify against their colleagues, prosecutors rely on the cooperation of officers with cases pending against them, in exchange for a more lenient sentence. John Sullivan, "Ex-Sergeant Is Sentenced in Police Corruption Case," *New York Times* 17 June 1997: B3.

82. Freeman 703 n. 104. Data maintained by the United States Department of Justice's Civil Rights Division reveal that for the period of nearly seven years (from 1987 to 1994) following adoption of the federal guidelines, there has been a higher proportion of adjudications of guilt, sentences of imprisonment, and

longer terms of imprisonment among law enforcement defendants than in the two-year period before the guidelines took effect; Freeman 733–738. However, there are also indications that law enforcement defendants receive shorter prison sentences than other persons convicted of civil rights violations; Freeman 739–740.

83. *Powell v. United States*, 518 U.S. 81, 98 (1996).

84. *Id.* at 105, 111–112.

85. *Id.* at 109–111.

86. Freeman 683.

87. Davis 277 n.19.

88. See, e.g., A. Leon Higginbotham, Jr., *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (New York and Oxford: Oxford University Press, 1996), xxv–xxvii.

89. *Powell*, 518 U.S. at 118 (Souter, J., concurring in part and dissenting in part).

90. Cotterrell 270, 284–285.

91. Suggesting as a model the office headed by Charles Hynes in the late 1980s, Norman Siegel argues that a team of prosecutors headed by a highly visible, experienced trial lawyer and staffed by aggressive litigators, investigators, and community organizers could deter police criminality and restore accountability. Telephone conversation with author, 4 June 1997. More recently, Siegel, Margaret Fung, executive director of the Asian-American Legal Defense and Education Fund, and Michael Meyers, executive director of the New York Civil Rights Coalition, each a member of a task force created by Mayor Giuliani after information surfaced about the assault on Louima, filed a dissenting report that specifically called for the establishment of a special prosecutor's office for brutality cases. *Deflecting Blame: The Dissenting Report of the Mayor's Task Force on Police/Community Relations*, March 1998. In June 2000, the U.S. Commission on Civil Rights recommended that an independent agency pursue the most serious charges of brutality. See United States Commission on Civil Rights, *Police Practices and Civil Rights in New York City* 187–190 (June 2000).

92. Siegel recalled that thousands of police officers demonstrated outside the office of Kings County district attorney Elizabeth Holtzman when she created a Law Enforcement Investigations Unit to prosecute police misconduct, which he termed a “step in the right direction.” According to Siegel, the unit was “never aggressive” after that episode. Telephone interview of Norman Siegel, 4 June 1997.

93. Interview with Dennis Hawkins, Kings County District Attorney's Office, 8 May 1997; interview with Anthony Girese, Bronx County District Attorney's Office, 13 May 1997.

94. Interview with Anthony Girese, 13 May 1997.

95. Siegel argues that, to date, police officers have seen only risks to them-

selves in cooperating in a largely unsuccessful process for prosecuting police misconduct. He predicts that officers would be more willing to provide incriminating evidence against other officers if there were a permanently funded office to launch aggressive initiatives against police criminality. Interview with Norman Siegel, 4 June 1997.

96. Interview with Anthony Girese, Bronx County District Attorney's Office, 13 May 1997.

97. Mollen Commission Report 150–154.

98. Paul Chevigny, *Edge of the Knife*, 98, 101.

99. Jerome H. Skolnick and James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* (New York, London, Toronto, Sydney, Tokyo, Singapore: Free Press, 1993) 196–199.

100. Remarks of Michael Deutsch, former legal director of the Center for Constitutional Rights, Plenary Session: Models of Community Struggle and Police Accountability and Legal Workshop. National Emergency Conference on Police Brutality and Misconduct, 26 April 1997.

101. Amnesty International 65.

102. Amended Class Action Complaint for Declaratory and Injunctive Relief and Individual Damages, *National Congress for Puerto Rican Rights v. The City of New York*, 99 Civ. 1695 (SAS), paragraphs 78–88. See also Benjamin Weiser, "U.S. Judge Refuses to Halt Suit Seeking to Disband New York City's Street Crime Unit," *New York Times* 21 October 1999: B5.

103. See Debra Livingston, "Police Reform and the Department of Justice: An Essay on Accountability," 2 *Buff. Crim. L. R.* 815, 816, fn4. See also Jerry Gray, "New Jersey Plans to Forestall Suit on Race Profiling," *New York Times* 30 April 1999: A1.

104. Marshall Miller, "Police Brutality," at 186, 191. Telephone interview with Robert Moosy, Special Litigation Section, Civil Rights Division, U.S. Department of Justice, 10 August 1999.

105. Interview with Robert Moosy, *id.* See also Associated Press, "Ohio City's Police Union Fights U.S. in Brutality Case," *New York Times* 26 November 1999: A41.

106. Benjamin Weiser, "Federal Authorities Grow More Aggressive in Examining Police Nationwide," *New York Times* 28 March 1999: 46.

107. Miller, "Police Brutality," at 150.

108. Robert Polner and Patricia Hurtado, "Rudy Says No: Vows Opposition to Federal Monitoring of NYPD," *Newsday* 24 March 1999: A7.

109. Benjamin Weiser, "Federal Inquiry Criticizes Police in New York City," *New York Times* 10 July 1999: A1, B3; Kevin Flynn, "U.S. Report Expected to Criticize Response by Police to Brutality," *New York Times* 14 June 1999: B1, B6.

110. See, e.g., Kevin Flynn, "Police Consider Plan to Bolster Review Board," *New York Times* 10 August 1999: A1, B7.

111. Polner and Hurtado A7; Weiser, "Federal Inquiry Criticizes Police," A1.

112. See Miller, "Police Brutality," at 169–172 (concluding that attorney general would be able to demonstrate a "pattern or practice" with evidence of a few civil rights violations and an institutional policy sanctioning the violations or from a larger number of related violations and statistical evidence showing disparate impact).

113. "Excerpts from Remarks by the District Attorney," *New York Times* 1 April 1999: B5.

114. See Freeman 704. Opinion polls have suggested that an increasing number of New Yorkers applaud these efforts, especially respondents who are white men or identify themselves as members of the upper middle class. See, e.g., Adam Nagourney, "Poll Finds Optimism in New York, but Race and Class Affect Views," *New York Times* 12 March 1997: A1, B4; Alan Finder and David Kocienewski, "A Safer City Raises Spirits and Questions," *New York Times* 13 April 1997: 1, 34. Of course, these are the groups to which the city's administration has pitched its crime-control rhetoric. More recently, in a poll taken after the Diallo shooting, the *New York Times* found that only 22 percent of the respondents believed that the NYPD treat white and black persons evenhandedly, 51 percent found that most police use excessive force, and 47 percent believed that the crime policy of the Giuliani administration had increased the incidence of police brutality. At the same time, 62 percent of respondents approved of the way Mayor Giuliani has handled crime, and 49 percent agreed that, compared to four years ago, the city is safer today. Dan Barry with Marjorie Connelly, "Poll in New York Finds Many Think Police Are Biased," *New York Times* 16 March 1999: A1, B8.

115. Paul Chevigny, *Police Power: Police Abuses in New York City* (New York: Pantheon Books, 1969), 280.