
In the United States Court of Appeals
for the Tenth Circuit

No. 20-3132

LISA G. FINCH, DOMINICA C. FINCH, AS CO-ADMINISTRATORS OF THE
ESTATE OF ANDREW THOMAS FINCH, DECEASED,
Plaintiffs-Appellants,

v.

JUSTIN RAPP,
BENJAMIN JONKER,
Defendants.

No. 20-3190

LISA G. FINCH, DOMINICA C. FINCH, AS CO-ADMINISTRATORS OF THE
ESTATE OF ANDREW THOMAS FINCH, DECEASED,
Plaintiffs-Appellants,

v.

CITY OF WICHITA, KANSAS,
Defendant-Appellee,

*On Appeal from the United States District Court for the District of Kansas
No. 6:18-cv-01018 (Hon. John W. Broomes)*

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF
PROFESSOR SETH STOUGHTON
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

ANNA K. TSIOTSIAS
CAROLYN M. WESNOUSKY

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Pursuant to Federal Rule of Appellate Procedure 29(a), Professor Seth Stoughton respectfully requests that this Court grant him leave to file the attached amicus curiae brief in support of Plaintiffs-Appellants.

BACKGROUND

Federal Rule of Appellate Procedure 29(a)(2) permits the timely filing of a non-government entity's amicus curiae brief only with leave of the Court or consent of the parties. Obtaining such consent relieves the Court of the need to consider a motion. Pursuant to Rule 29(a)(2), counsel for amicus sought consent of all parties to the submission of this proposed brief. All parties responded, and Defendant-Appellee's counsel did not consent. This proposed amicus curiae brief, which is being submitted concurrently with this motion, is timely as it is being filed and served no later than 7 days after the Plaintiffs-Appellants' brief which it supports.

ARGUMENT

Professor Seth Stoughton is an Associate Professor at the University of South Carolina School of Law and an Associate Professor (Affiliate) in the University's Department of Criminology and Criminal Justice. Prior to joining academia, Professor Stoughton was an officer with the Tallahassee Police Department for five years. In that time, he trained other officers,

helped write policies to govern the use of new technologies, earned multiple instructor and operator certifications, and taught personal safety and self-defense courses in the community. This background has influenced Professor Stoughton's scholarship, which focuses on policing, police culture, and how it is regulated. To that end, Professor Stoughton takes a special interest in rulings that implicate policing, such as training and officer accountability. These include developments in municipal and officer liability.

Professor Stoughton submits his amicus brief is desirable and relevant to the disposition of the case because it explores the causal link between police culture—officer training, supervision, the prioritization of aggressive policing, and the failure to investigate and discipline excessive uses of force—and unconstitutional use of force. The proposed amicus brief does this by explaining how a police department's culture can affect an individual officer's actions, and, therefore, may lead to unconstitutional uses of force against civilians.

Professor Stoughton believes his brief will assist the Court in its review of Plaintiffs-Appellants' municipal liability claim, including in ways not raised by the parties. Police culture, which is manifested in both the official policies and informal customs of police departments, can encourage the

unconstitutional use of force such that these abuses are not just the result of an individual officer's bad acts, but an expected outcome of the working environment.

CONCLUSION

For these reasons, the Court should grant Professor Stoughton leave to file the attached amicus curiae brief in support of Plaintiffs-Appellants.

Respectfully submitted,

s/ Anna K. Tsitsias

Anna K. Tsitsias

Carolyn M. Wesnousky

WILLIAMS & CONNOLLY LLP

725 Twelfth Street, N.W.

Washington, DC 20005

(202) 434-5000

Counsel for Amicus Curiae

Professor Seth Stoughton

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ANNA K. TSIOTSIAS
CAROLYN M. WESNOUSKY

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

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Professor Seth Stoughton (“Professor Stoughton”) submits this brief as amicus curiae pursuant to Rule 29 of the Federal Rules of Appellate Procedure and this Court’s Rule 29.

INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 29(a)(4) of the Federal Rules of Appellate Procedure, amicus curiae states that no party or counsel for any party to this appeal authored this brief in whole or in part, and no person other than amicus curiae or its counsel contributed money toward the preparation or submission of this brief.

Amicus curiae Professor Seth Stoughton served as an officer with the Tallahassee Police Department for five years. In that time, he trained other officers, helped write policies to govern the use of new technologies, earned multiple instructor and operator certifications, and taught personal safety and self-defense courses in the community. Currently, Professor Stoughton is an Associate Professor at the University of South Carolina School of Law and an Associate Professor (Affiliate) in the University’s Department of Criminology and Criminal Justice.¹ Professor Stoughton’s scholarship on policing and how

¹ Professor Stoughton is participating as amicus in his individual capacity and not on behalf of the University of South Carolina.

it is regulated has appeared in the *Emory Law Journal*, *Minnesota Law Review*, the *Virginia Law Review*, and other top law journals. He has written multiple book chapters and is the principal co-author of *Evaluating Police Uses of Force* (2020). He is a frequent lecturer on policing issues, regularly appears on national and international media, and has written about policing for *The New York Times*, *The Atlantic*, *TIME*, and other news publications.

SUMMARY OF ARGUMENT

The Court should reverse the district court’s grant of summary judgment for the City of Wichita (“the City”) on the municipal liability claim. In addition to the arguments set forth in Plaintiffs’ brief, the district court failed to adequately consider the causal link between police culture—officer training, supervision, the prioritization of aggressive policing, and the failure to investigate and discipline excessive uses of force—and unconstitutional use of force.

This brief explores that link and proceeds in three parts.

First, it explains how organizational culture, including that of police agencies, affects individual actions.

Second, it describes several aspects of police culture and explains how each shared attitude can affect an individual police officer's actions, including the decision to use force.

Third, it demonstrates, through empirical research and case studies, that police culture can lead officers to use unconstitutional force against civilians.

ARGUMENT

I. The Role of Culture in Shaping Actions.

For decades, social psychologists have recognized a link between culture and behavior; organizational culture influences individuals' beliefs and decisions. In simple terms, a person's behavior is the product of multiple factors, including their social environment. *See* Geoffrey P. Alpert et al., *Measuring the Impact of Organizational Culture and Climate on Police Officers' Decisions and Behavior* 1 (Centre of Excellence in Policing & Security, Griffith Univ., Aus. Working Paper, Issue 1, July 2012). Personality and individual characteristics, such as belief systems and attitudes "provide[] only a partial explanation of decision-making and behavior." *Id.* (citation omitted). Beyond individual characteristics, people learn behavior norms "by virtue of their associations with others or where they exist within social networks." Thomas Baker et al., *Promoting Ethical Behavior and*

Organizational Citizenship Behaviors: The Influence of Corporate Ethical Values, 59 J. Bus. Res. 849, 853 (2006). Especially in the workplace—where people spend the vast majority of their waking hours with peers, engaged in a common goal—employees develop “a set of shared attitudes . . . in dealing with the strains of the occupation.” Jason R. Ingram et al., *A Multilevel Framework for Understanding Police Culture: The Role of the Workgroup*, 51 Criminology 365, 366 (2013). These shared attitudes play a crucial role in shaping individuals’ thought-processes and behavior. Baker et al., *supra*, at 855.

Extensive empirical, peer-reviewed research has established conclusively that organizational culture alters the actions of individuals who are part of that culture. See Anusorn Singhapakdi & Scott J. Vitell, *Marketing Ethics: Factors Influencing Perceptions of Ethical Problems and Alternatives*, 10 J. Macromarketing 4, 14 (1990) (finding that employees in a company with a code of ethics are less likely to overlook unethical behavior by their peers than those without one). These studies reveal that organizational culture is essentially “a mechanism of social control that can be used to manipulate subordinates into perceiving, thinking, and feeling in certain

ways.” Scott E. Wolfe & Alex R. Piquero, *Organizational Justice and Police Misconduct* 38 *Crim. Just. & Behav.* 332, 338 (2011).

Police culture is no exception. Officers’ unique working environment and similar range of experiences creates a culture built on “shared understandings and collectiveness.” Ingram et al., *supra*, at 367. Numerous studies demonstrate that this shared police culture affects individual police officers’ actions. For example, researchers have found that police culture influences an officer’s decision to wear a seatbelt while on patrol, changes the likelihood that an officer will proactively stop and search vehicles, and even alters an officer’s decision on whether to use force. See Michael Sierra-Arévalo, *American Policing and the Danger Imperative*, __ *L. & Soc’y Rev.* __ (accepted for publication Nov. 20, 2020) (tying police culture’s “shared understanding of police work as dangerous” to officers’ practice of disregarding the written policy to wear seatbelts while driving); Eugene A. Paoline III & William Terrill, *The Impact on Police Culture on Traffic Stop Searches: An Analysis of Attitudes and Behavior*, 28 *Policing: Int’l J. Police Strategies & Mgm’t* 455, 468 (2005) (finding that officers who subscribed to certain cultural norms were more likely to conduct traffic stops and searches); William Terrill et al., *Police Culture & Coercion*, 41 *Criminology* 1003, 1029

(2003) (finding that officers who shared a certain set of cultural values were more likely to use coercive force against civilians than those who did not).

This idea is widely accepted by those who study police reform. President Barack Obama’s Task Force on 21st Century Policing recognized that law enforcement “[b]ehavior is more likely to conform to culture than rules” and cautioned that “[a]ny law enforcement organization can make great rules and policies . . . but if policies conflict with the existing culture, they will not be institutionalized and behavior will not change.” Task Force On 21st Century Policing, *Final Report of the President’s Task Force On 21st Century Policing* 11-12 (2015).

Indeed, police culture contributed to all the major abuse of force scandals to plague police departments in the last thirty years, including the beating of Rodney King, the Los Angeles Police Department (“LAPD”) Rampart scandal, and misconduct with the Ferguson Police Department (“FPD”) as identified by a Department of Justice (“DOJ”) investigation. *See infra* Part III.

Why and how police culture can lead individual officers to use abusive force against civilians is a well-tread research topic. What emerges is a clear portrait of a shared police culture that has the proven potential to contribute

to an officer's unlawful use of force.

II. Police Culture Affects Officers' Actions and Decisions to Use Force.

As a profession, law enforcement is unique in combining a high level of individual discretion with the power to use coercive force against citizens. Researchers who study police culture consistently identify a set of shared attitudes that define and shape officers' behaviors. These cultural attitudes, as described below, are by no means universal across all police departments in the United States. Yet, when adopted and encouraged within a police department, these attitudes can create a culture that promotes the use of unlawful force and shields such abuses from investigation, punishment, and reform.

A. The Danger Imperative.

Policing is undoubtedly dangerous work.² Yet, the emphasis that police culture puts on the risk of danger to individual officers—sometimes called “the danger imperative”—can change officers' risk-calculus and resulting behaviors in predictable, if unintentional ways.

² In 2019 alone, 48 officers were feloniously killed in the line of duty and over 17,000 sustained injuries from assaults. *See* FBI, *2019 Law Enforcement Officers Killed & Assaulted (LEOKA) Report* (2020), <https://ucr.fbi.gov/leoka/2019/topic-pages/officers-feloniously-killed>.

The danger imperative leads officers to be hyper-vigilant against what is communicated as an ever-present specter of violent assault. Officers are taught, “[a]s you approach any situation, you want to be in the habit of looking for cover[] so you can react automatically to reach it should trouble erupt.” Ronald J. Adams et al., *Street Survival: Tactics for Armed Encounters* 155 (1980). Police officers are steeped in this unrelenting rhetoric beginning on their first day at the training academy, during their on-the-job training with a field-training officer, and at their daily briefings before each shift for their entire career. See Sierra-Arévalo, *American Policing, supra*, at 21-30 (describing officers’ formal and informal training that emphasizes “the possibility—even inevitability—of confronting violence while on patrol”); Otwin Marenin, *Cheapening Death: Danger, Police Street Culture, and the Use of Deadly Force*, 19 *Police Q.* 461, 466 (2019) (describing how officers are taught and internalize the idea that police work is “among the most dangerous [jobs] in the country”). Officers are frequently reminded: “their single most important goal every day is simply to make it home at the end of their shift.” Seth Stoughton, *Principled Policing: Warrior Cops & Guardian Officers*, 51 *Wake Forest L. Rev.* 611, 639-40 (2016).

Officer decision-making is predicated on this “culturally constructed understanding of danger.” Sierra-Arévalo, *American Policing*, *supra*, at 12-13. “[P]olice see how problems shared by their fellow officers are addressed” and “come to a common understanding of solutions to problems encountered in the course of their work.” *Id.* at 15. The danger imperative thus affects both how police officers perceive the risk of their jobs, and how they act upon that risk. But it sometimes does so with unintended consequences. For example, many police officers ignore written department policy that requires them to wear their seatbelts while on patrol because they believe it could stop them from reaching their gun in an emergency. *Id.* at 31-37. Yet in 2019, car accidents caused almost fifty percent of all fatal on-duty accidents for police officers. *See* 2019 LEOKA Report, *supra* note 2. The cultural preoccupation with a certain type of danger—violent assault—can lead officers to depreciate an otherwise highly relevant consideration: traffic safety.

At times, it can also lead officers to depreciate other highly relevant considerations, including the civil rights and physical well-being of the community members with whom they interact. “The police are trained to believe that they must always be in control and that they must win in every encounter.” Marcel F. Beausoleil, *Police Abuse, in the Social History of*

Crime and Punishment in America: An Encyclopedia 1372, 1375 (Wilbur R. Miller ed., 2012). This can lead officers to view confusion, requests for clarification, and challenges to police authority as indicative of physical threats. Stoughton, *Principled Policing*, *supra*, at 652.

Additionally, this cultural attitude can lead officers to use excessive force. For example, the now ubiquitous deployment of less-than-lethal force options, like TASERs, can lead fearful officers to use those options in lieu of less serious, but potentially more appropriate options, such as empty-hand control techniques. See Seth W. Stoughton et al., *Evaluating Police Uses of Force* 214 (2020) (discussing what has been referred to as “lazy Tazy”). As one training officer noted of officers who used a TASER to subdue a mentally-ill man: “They’re not thinking in terms of what risk that weapon poses to that person, they’re thinking about self-preservation.” Michael Sierra-Arévalo, *Technological Innovation and Police Officers’ Understanding and Use of Force*, 53 *Law & Soc’y Rev.* 420, 441-42 (2019).

B. “Us Versus Them.”

Police culture often prizes the concept of police officers as an elite, professional force, separated from ordinary citizens. Many officers view themselves as “the thin blue line” between public order and criminal chaos.

See Nan Royce, *Thin Blue Line, A Meaningful Gift to Howard Lake Police Department*, Herald Journal (Jan. 5, 2018) <http://www.herald-journal.com/archives/2018/stories/HL-blue-line-flag.html> (“The simple-looking emblem has multiple meanings, all arising from the same concept: police officers stand as a thin line that protects society from good and evil, chaos and order.” (quoting Major Timothy Roufa, Chief Technology Officer, Florida Department of Highway Safety and Motor Vehicles)). As such, officers may see themselves as members of an elite fraternity (the sheepdogs) that protect the clueless and naïve sheep (innocent citizens) against dangerous wolfdogs (criminals). See Dave Grossman & Loren W. Christensen, *On Combat: The Psychology and Physiology of Deadly Conflict in War and in Peace* 176-77 (2007) (describing the police’s role as “warriors to protect [the sheep] from the predators”).

These pervasive metaphors can significantly influence officers’ behavior. They encourage officers to view themselves as different from and superior to normal citizens, dissociating police from those they are sworn to protect. This often creates a well-remarked on “us versus them” mentality. Such dissociation suggests that only other police officers have the right to evaluate their work, since “police believe that they have special, experience-based and

intuitive knowledge that those outside their occupational circle neither share nor understand.” David A. Harris, *Failed Evidence: Why Law Enforcement Resists Science* 67 (2012).

Too often, this narrative feeds into an adversarial stance between officers and the public. Police officers with this mentality are more likely to be aggressive, adversarial, and rude towards citizens they view as “others” or “sheep.” “This distorted perception reinforces the idea that the police are a separate entity from the public and can result in a pattern of self-justification that can be used to legitimize rudeness, a lack of empathy, and, in some cases, illegal behavior.” Jack L. Colwell & Charles Huth, *Unleashing the Power of Unconditional Respect: Transforming Law Enforcement and Police Training* 45, 80-82 (2010). It can also reduce officers’ respect and patience for citizens. Officers may come to “expect civilians to acknowledge their inferior status and defer accordingly.” Richard E. Sykes & Edward E. Brent, *Policing: A Social Behaviorist Perspective* 101 (1983).

Additionally, dissociation from the public can feed into the danger imperative and make officers suspicious and distrusting of civilians. If every police-citizen encounter has the potential to turn violent, by definition each citizen has the potential to be violent. Officers who anticipate force are thus

likely ready to respond with equal or greater force in every situation, such that, as one commentator advised, officers should “have a plan to kill everyone [they] meet.” John Bennett, *How Command Presence Affects Your Survival*, PoliceOne.com (Oct. 7, 2010), <https://www.policeone.com/Officer-Safety/articles/2748139-How-command-presence-affects-your-survival/>.

C. The Warrior Mentality.

Police culture’s danger imperative and “us versus them” mentality can feed into a third attitude: police officers are warriors in a never-ending campaign against crime. *See, e.g.,* Alexis Artwohl & Loren W. Christensen, *Deadly Force Encounters: What Cops Need to Know to Mentally and Physically Prepare for and Survive a Gunfight* 6 (1997) (“Police officers are on the front line of a war that goes undeclared because of politics and political correctness.”); Diane Cecilia Weber, Cato Inst., Briefing Paper No. 50, *Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments* 10 (1999) (quoting President Clinton’s Attorney General, Janet Reno, speaking to the intelligence community: “So let me welcome you to the kind of war our police fight every day.”). At first blush, this may appear harmless, but the emphasis on a “warrior mentality” in policing may only deepen the divide between police officers and civilians.

First, it promotes the idea that police officers are part of a quasi-military force, which reinforces the danger imperative's demand for hyper-vigilance in every citizen encounter. Stoughton, *Principled Policing*, *supra*, at 640. Second, a war requires an enemy. If police officers are on one side, who is on the other? Anyone who fails to defer to officers, or who fails to comply, immediately and completely. Such individuals are “assholes,” in John Van Maanen's classic terminology, *The Asshole, in Policing: A View From The Street* 221 (Peter K. Manning & John Van Maanen eds., 1978), *reprinted in Police & Society: Touchstone Readings* 346, 347 (Victor E. Kappeler ed., 2d ed. 1999), enemy combatants whom the police must fight and conquer. *See also* U.S. DOJ, *Investigation of the FPD 2* (2015) (“[Officers] are inclined to interpret the exercise of free-speech rights as unlawful disobedience, innocent movements as physical threats, [and] indications of mental or physical illness as belligerence.”); Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loyola L.A. L. Rev. 545, 570 (2001) (describing how paramilitary policing “reinforces the siege mentality that transforms all outsiders into enemies and dehumanizes entire communities”). Likewise, the war-on-crime's paramilitary tone could lead officers to view the public “as symbolic assailants

and the enemy”—which may in turn lead to police policies that dramatically increase citizen complaints. Beausoleil, *supra*, at 1375.

Finally, the warrior mentality emphasizes that police officers are engaged in morally righteous work, and that using force is necessary to achieve the end result—winning. In a police department that has fully adopted this mentality, such an “ends justify the means” perspective can be used to explain, even celebrate, the use of unlawful force “as a means to a noble cause.” *See id.*

D. Command Presence.

Police culture frequently also places a strong emphasis on the idea of “command presence,” which demands that police “must always be in control” and “win in every encounter.” *Id.* Famously, Chief William Parker, who ran the LAPD during the Rodney King scandal, described the department’s philosophy as: “You are a cop, you are in charge, you have to show everyone you are in charge. Be decisive. Have command presence.” Chemerinsky, *supra*, at 563. Police often believe that “command presence” deters criminals from thinking that officers are easy marks because “treating a suspect with respect will cause the suspect to view the officer as weak.” Colwell & Huth, *supra*, at 28. In one popular approach to exerting command presence, officers

are trained to take control by using an “Ask, Tell, Make” approach in interactions with civilians: “Officers first ask a civilian to do something. If the civilian does not do as requested, the officer orders the civilian to comply. If the civilian does not comply with the order, the officer forces the civilian to comply, using violence as it is needed.” Stoughton, *Principled Policing*, *supra*, at 653. In practice, the “Ask, Tell, Make” approach has caused unconstitutional uses of force across police departments, particularly where police officers utilize this technique in the absence of legal authority to act. *Id.*

If adopted, this cultural expectation of control encourage officers to adopt an adversarial and aggressive posture towards civilians. *See Colwell & Huth, supra*, at 45 (“It has become fashionable for officers to adopt an adversarial perspective toward the public, especially when they perceive the public as being unsupportive or overly critical of their actions.”). And an officer who needs to “always be in control” and “win” every encounter cannot tolerate disrespect. *See Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968) (describing the community tensions caused by stop-and-frisks “motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.” (quoting Lawrence P. Tiffany, et al., *Detection*

of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment 18-56 (1967)); Beausoleil, *supra*, at 1375 (“When police officers believe that a citizen has a bad attitude because he/she is openly defiant or disrespectful, they may resort to some form of abuse in order to ‘correct’ the attitude problem.”). A police culture that prioritizes control can prime officers to aggressively react to perceived slights from citizens and escalate the situation, including to the point of using force and/or the arrest power, until the officer has “won.” See Beausoleil, *supra*, at 1375 (“[D]isrespect cannot be tolerated and must be rectified.”).

This sets the stage for needless escalation between police officers and citizens. All too often, we see the results on the news—a routine encounter between police and citizens escalates to violent, even deadly, force. See, e.g., Christina Carrega, *6 Atlanta Police Officers Charged in Forceful Arrests of College Students in Car*, ABC News (June 2, 2020) <https://abcnews.go.com/US/atlanta-police-officers-charged-forceful-arrests-college-students/story?id=71023836> (college students hit numerous times with stun gun and pulled from car); Seth Stoughton, *Cop Expert: Why Sandra Bland’s Arrest Was Legal But Not Good Policing*, Talking Points Memo (July 24, 2015), <http://talkingpointsmemo.com/cafe/sandra-bland-video-legal-but->

not-good-policing (woman dies in jail following her arrest after a traffic stop for not signaling her lane change).

E. The Code of Silence.

Finally, the cultural emphasis on police protecting themselves and each other can extend beyond physical threats; in some departments, police culture demands that officers protect each other from criticism. “In the face of outside criticism, cops tend to circle the wagons, adopting a ‘code of silence,’ protecting each other, and defending each other’s actions.” Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 *Geo. Wash L. Rev.* 453, 454 (2004). The “us versus them” attitude sometimes adopted by police culture reinforces the code of silence by making officers less willing to report abuses of power by their peers. In a national survey of officers, over half agreed that “it is not unusual for police officers to ‘turn a blind eye’ to other officers’ improper conduct” and two-thirds reported that “officers who report incidents of misconduct are likely to be given a ‘cold shoulder.’” David Weisburd et al., Nat’l Inst. of Justice, *Police Attitudes Toward Abuse of Authority: Findings from a National Study 2* (2000), <https://ncjrs.gov/pdffiles1/nij/189105.pdf>. This can create an atmosphere where abuse is not only tolerated, but tacitly encouraged. Without fear of repercussion, officers are more likely to engage

in aggressive policing or even abuse that escalates the use of force against citizens. *See* Beausoleil, *supra*, at 1375. For example, researchers found that after sheriffs' offices in Florida entered into collective bargaining agreements that included procedural protections from administrative discipline, violent incidents of misconduct by officers increased by 40%. *See* Dhammika Dharmapala et al., *Collective Bargaining Rights & Police Misconduct: Evidence from Florida* ___ J.L. Econ. & Org. ___ (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095217. As this study suggests, when law enforcement agencies afford officers greater protection from scrutiny (i.e., unionization), they are more likely to engage in misconduct.

III. When Police Culture Can Lead to a Constitutional Violation.

The use of excessive force by a law enforcement officer violates the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 394 (1989). The constitutionality of an officer's use of force depends on whether the officer's conduct was "objectively reasonable' in light of the facts and circumstances," which must be assessed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396-97. Relevant considerations include "the severity of the crime at issue, whether the suspect

poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.*

But police culture, which is manifested in the both the official policies and the “informal custom[s]” amounting to “widespread practice[s]” of police departments, *Hinkle v. Beckham Cnty. Bd. of Cnty. Comm’rs*, 962 F.3d 1204, 1239-40 (10th Cir. 2020) (quoting *Pyle v. Woods*, 874 F.3d 1257, 1266 (10th Cir. 2017), can encourage the use of force without regard for these factors. Indeed, if found within a police department, the elements of police culture discussed in Part II are indicia of potent, but informal cultural norms that encourage unconstitutional uses of force. *See supra* Part II. Not all of these elements of police culture are necessary to find that a widespread practice of encouraging or tolerating unconstitutional force exists. Just one element, whether it be a pattern of failing to investigate uses of force or an adversarial culture of policing, can contribute to the unconstitutional uses of force against civilians.

The link between a police culture gone wrong and the use of unconstitutional force shows that such abuses are not just the result of an individual officer’s bad acts—they are an expected outcome of the working environment. *See Zuchel v. City & Cnty. of Denver*, 997 F.2d 730 (10th Cir.

1993). When acted upon, this police culture can lead (and has led) to violations of citizens' constitutional rights.

A. Police Priorities and Role in Community.

Cultural norms relating to police priorities and the officer's role in the community can lead to unconstitutional uses of force. For example, a police department may explicitly or implicitly instruct officers to prioritize officer safety over, for example, developing good police-community relations. *See supra* parts II.A & II.E (describing police risk perceptions/code of silence). This creates an environment where officers, who view every civilian as a potential deadly threat, approach every situation as a potential deadly force encounter. *Id.* This "warrior" worldview separates officers from thinking of themselves as members of the public. *See supra* parts II.B & II.C.

Empirical research proves that police officers who ascribe to these elements of police culture are more likely to resort to using force and engaging in coercive police tactics. For example, in one study, researchers found that patrol officers who identified with aspects of an adversarial, warrior-mentality police culture, including distrusting citizens and aggressive policing, were more likely to engage in proactive traffic stops and searches. *See* Paoline & Terrill, *supra*, at 461, 467. And officers did not need to subscribe wholesale to

police culture for it to affect their policing: adversarial policing culture lead to more aggressive enforcement even when an officer only moderately identified with it. *Id.*

In another study, which surveyed the behavior and attitudes of over 600 officers across 12,000 citizen encounters (3,000 of whom were viewed as suspects), researchers found that officers who had positive or mixed views towards the adversarial police cultural attitudes described above were more likely to use coercive force than those who did not. Terrill et al., *supra*, at 1005-07, 1010-11, 1026, 1029 (“These findings suggest that the use of force over citizens is a function of officers’ varying commitments to the traditional culture of policing.”).

And, in practice, the cultural preoccupation with the need to use force creates a tinderbox. Officers that expect to be met with resistance from the civilians with whom they interact are more likely to respond with force, even when such force is not justified. *See supra* parts II.B-D. Examples of how a police department’s culture caused individual officers to exert unlawful force against citizens are littered throughout history. Erwin Chemerinsky described the LAPD’s “Rampart Scandal”—where police in an elite gang unit planted evidence, falsified testimony, stole, and beat and killed civilians all

while covering up their crimes—as “the result of an institutional mind-set first conceived in the 1950s” and “not simply about failure to control a problem group of rogue officers.” Chemerinsky, *supra*, at 562. Chemerinsky pointed explicitly to the LAPD’s culture of aggressive, authoritarian command and control policing, code of silence, and resistance to civilian oversight as the “central problem” that led to officers’ constitutional abuses. *Id.* at 561-63. The LAPD beating of Rodney King a decade before tells a similar story. There, too, an independent commission found that the LAPD’s culture of “we/they” encouraged so-called “street justice” against citizens with a “bad or uncooperative attitude.” *Report of the Independent Commission of the LAPD* 34, 131 (1991).

More recently, the DOJ’s investigation of the Ferguson, Missouri Police Department found a pervasive culture of command presence policing that sanctioned and encouraged officer’s use of force against citizens “as punishment” when they failed to comply with order that lacked legal authority. U.S. DOJ, *Investigation of the FPD*, *supra*, at 34-35. The DOJ explained that “[o]fficers [in the FPD] expect and demand compliance even when they lack legal authority. They are inclined to interpret the exercise of free-speech rights as unlawful disobedience, innocent movements as physical threats,

[and] indications of mental or physical illness as belligerence.” *See id.* at 15.

When met with these perceived “threats,” FPD police officers responded with unjustified force:

- In March 2013, FPD officers responded to the police station to take custody of a person wanted on a state warrant. When they arrived, they encountered a different man (not the subject of the warrant) who was leaving the station. Having nothing to connect the man to the warrant subject, other than his presence at the station, the FPD officers nonetheless stopped him and asked that he identify himself. The man asserted his rights and said “Why do you need to know?” and declined to be frisked. And when the man reached his identification toward the officers, at the officers’ request, the officers interpreted his motion as an attempted assault and took him to the ground. The man was later arrested for Failure to Comply and Resisting Arrest, without justification.
- In January 2013, a patrol sergeant stopped an African-American man after he saw the man talk to an individual in a truck and then walk away. The sergeant detained the man, although he did not articulate any reasonable suspicion that criminal activity was afoot. When the man declined to answer questions or submit to a frisk—despite there being no reason to believe the man was armed—the sergeant grabbed the man by the belt, drew his TASER, and ordered the man to comply. The man crossed his arms and objected that he had not done anything wrong. Evidence showed that the man made no aggressive movement toward the officer, but the officer fired the TASER into the man for over 20 seconds and arrested the man for Failure to Comply and Resisting Arrest.

Id. at 21, 34.

When confronted with innocuous movements—and where there was no reasonable suspicion of criminality—these officers used force against civilians.

In each case, as the DOJ found, the individual officer’s constitutional violation was caused in part by the culture of his or her police department. *See id.* at 34-35. These harrowing examples demonstrate the causal link between an adversarial police culture that encourages officers to anticipate force and preemptive, unconstitutional uses of that force.

B. Training and Messaging.

Police culture surrounding officer training, or the lack thereof, can also lead to unconstitutional uses of force. *See Wright v. City of Euclid*, 962 F.3d 852, 880-81 (6th Cir. 2020) (police department training created “custom of allowing excessive force”). The “command presence” paradigm instructs officers to take control of civilian interactions at all costs—including through the use of force. *See supra* part II.D (describing command presence). By prioritizing control, over communication, for example, police training encourages the use of force in situations where it is not justified.

For example, the DOJ found the FPD engaged in a pattern of excessive force that violated the Fourth Amendment because many officers were quick to escalate encounters with subjects whom they perceived to be challenging officer orders. *See U.S. DOJ, Investigation of the FPD, supra*, at 28. Officers escalated these encounters with force using an abbreviated or perfunctory

“Ask, Tell, Make” approach, in many cases relying on TASERs and canines even when the subject was unarmed or restrained. *Id.*

In one case, an FPD officer asked a handcuffed African-American man to get out of the back seat of his patrol car once it had arrived at the jail (Ask). *Id.* at 30. The man verbally refused and the officer ordered him to comply (Tell). *Id.* The man did not physically resist arrest or attempt to assault the officers. *Id.* The officers drive-stunned and (allegedly) punched the man in the face and head (Make). *Id.*

In another case, a FPD correctional officer asked an African-American woman, who was in custody for drunk driving, to walk toward a cell (Ask). *Id.* at 29. She refused and yelled an insulting remark at the officer, but there was no sign of physical noncompliance or resistance (Tell). *Id.* The correctional officer used a TASER because the woman was “not doing as she was told” (Make). *Id.*

In yet another case, an African-American man was walking down the street after midnight when an officer asked him to stop (Ask). *Id.* at 35. The man kept walking, so the officer grabbed his arm (Tell). *Id.* When the man pulled away, the officer forced him to the ground. *Id.* Then, the officer

handcuffed the man and used his TASER twice because the man allegedly would not provide his hand for cuffing (Make). *Id.*

In all of these examples, the DOJ found that the FPD officers used unconstitutional force. *See id.* at 28-34. Indeed, the civilian victims neither posed an immediate threat to officer or public safety nor resisted arrest. *Graham*, 490 U.S. at 394. The DOJ connected these unconstitutional uses of force to the officers' training: "officers ha[d] not been trained or incentivized to use de-escalation techniques to avoid or minimize force in these situations." U.S. DOJ, *Investigation of the FPD*, *supra*, 34. In these cases, the failure to de-escalate directly lead to the unconstitutional use of force. *See contra* Doc. 191 at 43 (finding that the failure to de-escalate does not mean that the officer violated the constitution).

Likewise, Chemerinsky's analysis of the LAPD found that the LAPD's reliance on "command presence," led to unnecessary aggression by officers. Chemerinsky, *supra*, at 563, 569. And courts across the country have found that similar uses of force by officers in "make" scenarios violated the Constitution. *See, e.g., Brown v. City of Golden Valley*, 574 F.3d 491, 497-99 (8th Cir. 2009) (upholding the denial of qualified immunity for officer who drive-stunned a woman on her arm for two or three seconds when she refused

to hang up her phone despite being ordered to do so twice); *c.f. Hickey v. Reeder*, 12 F.3d 754, 759 (8th Cir. 1993) (using a stun gun against a prisoner for refusing to sweep his cell violated the more deferential Eighth Amendment prohibition against cruel and unusual punishment); *Casey v. City of Federal Heights*, 509 F.3d 1278, 1282-83 (10th Cir. 2007) (using TASER was not objectively reasonable when the subject pulled away from the officer but did not otherwise actively resist arrest, attempt to flee, or pose an immediate threat).

These examples demonstrate a link between “command presence”- type officer training and unconstitutional uses of that force. *See Wright*, 962 F.3d at 880-81. Indeed, when there is a cultural expectation that officers must take control of any civilian encounter, it is entirely predictable that officers will use force even when unjustified.

C. Lack of Supervision and Accountability.

The use of excessive force is likewise promoted by the “code of silence.” *See supra* part II.E. When police departments fail to hold officers accountable for misconduct, including excessive uses of force, it signals the department’s tolerance or tacit approval of an officer’s actions, even in situations where the

action is contrary to law or agency policies. What an agency *does* sends a far stronger message than what an agency *says*.

Officer supervisors play an important role in determining and communicating agency culture: their behaviors demonstrate to other officers what is acceptable and what is not. Maarten Van Craen & Wesley G. Skogan, *Officer Support for Use of Force Policy*, 44 *Crim. Just. & Behav.* 843, 849 (2017). Simply put, officers take cues from their supervisors about how to deal with citizens. *See id.* Where supervisors fail to make critical inquiries into officers' uses of force or fail to discipline officers for unreasonable uses of force, officers learn that such force is acceptable, even desirable.

Both the empirical research and police department investigations bear this causal relationship out. *See e.g.*, Dharmapala et al., *supra* (linking rise in police misconduct to police department's ability to unionize); Chemerinsky, *supra*, at 561-63 (describing the LAPD's culture of code of silence, and resistance to civilian oversight as the "central problem" that led to officers' constitutional abuses); *Report of the Independent Commission of the LAPD*, *supra*, at 34, 131. And, even more, in all of the examples used in Sections A and B, there were no repercussions for the officers. *See* U.S. DOJ, *Investigation of the FPD*, *supra*, at 30, 34-35.

As to the FPD, this failure to discipline contravened the FPD's written policy regarding use of force: "force may not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under a particular set of circumstances." *See id.* at 29 (quoting FPD General Order 410.01). Yet, the DOJ found that FPD officers "routinely engaged in the unreasonable use of [TASERs], and supervisors routinely approve[d] their conduct." *Id.* at 31. Indeed, "[FPD] Supervisors seem[ed] to believe that any level of resistance justifies any level of force." *Id.* at 40 (emphasis added). Given the FPD's complacency with unconstitutional uses of force, in conjunction with FPD's failure to investigate force, failure to follow FPD's use-of-force policy in analyzing officer conduct, failure to correct officer misconduct when they find it, and failure to recognize "patterns of abuse," *id.* at 38, it is no wonder that unconstitutional uses of force were so commonplace among the FPD as to arise to a sanctioned custom.

While the FPD is an extreme case, it is illustrative of the causal relationship between police culture relating to accountability and unconstitutional uses of force. When departments fail to uphold their written policies related to the use of force, it signals to officers that those policies are not worth the paper they are written on. The actual "policy" is what is allowed

by the department. In the case of the FPD and the LAPD, that policy is the unreasonable use of force.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

s/ Anna K. Tsiotsias

Anna K. Tsiotsias

Carolyn M. Wesnousky

WILLIAMS & CONNOLLY LLP

725 Twelfth Street, N.W.

Washington, DC 20005

(202) 434-5000

Counsel for Amicus Curiae

Professor Seth Stoughton

DECEMBER 11, 2020

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1. This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and Fed. R. App. 32(a)(7)(B) because it contains 6,248 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).
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DECEMBER 11, 2020

CERTIFICATE OF SERVICE

I, Anna K. Tsiotsias, counsel for amicus curiae Professor Seth Stoughton, and a member of the Bar of this Court, certify that on, December 11, 2020, a copy of the attached Brief of Amicus Curiae Professor Seth Stoughton was filed electronically through the appellate CM/ECF system with the Clerk of this Court. I further certify that all parties required to be served have been served.

s/ Anna K. Tsiotsias

Anna K. Tsiotsias

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