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BRUTALITY IN BLUE: COMMUNITY, AUTHORITY, AND THE ELUSIVE PROMISE OF POLICE REFORM

Debra Ann Livingston*

ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE. By Jerome H. Skolnick and James J. Fyfe. New York: Free Press. 1993. Pp. xviii, 313. \$24.95.

In January 1994, President Clinton invited Kevin Jett, a thirty-one-year-old New York City police officer who walks a beat in the northwest Bronx, to attend the State of the Union Address. Jett stood for Congress's applause as the President called for the addition of 100,000 new community police officers to walk beats across the nation. The crime problem faced by Officer Jett and community police officers like him, the President said, has its roots "in the loss of values, the disappearance of work, and the breakdown of our families and communities."¹ According to the Clinton administration, however, the police — or at least community police — can still help make a difference. Law enforcement officers, Attorney General Janet Reno has said, can in fact be "heroes and heroines" engaged in the appropriately Herculean task of "rebuilding the fabric of society" in cities, communities, and neighborhoods that are "adrift."²

Concern about crime is once again at center stage. So are the police. Several weeks before the State of the Union Address, the *New York Times* profiled the New York City Police Department's implementation of community policing, a reform-oriented philosophy of policing that, in New York, has involved assigning police officers to foot patrol and expanding their traditional duties to include broader community service.³ Officer Jett, the *Times* reported, walks a beat in a New York neighborhood in which "[s]o many stores have been robbed so often that many, including the Post Office, conduct business from behind thick Plexiglas partitions."⁴ Regular patrol officers responding

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1. *Move Along, Please*, ECONOMIST, Jan. 29, 1994, at 28 (quoting President William J. Clinton, State of the Union Address (Jan. 25, 1994)).

2. Attorney General Janet Reno, Remarks at the Swearing-in Ceremony for FBI Director Louis Freeh, Fed. News Serv., Sept. 1, 1993, available in LEXIS, News library, FNS file.

3. Michael Norman, *One Cop, Eight Square Blocks*, N.Y. TIMES, Dec. 12, 1993, § 6 (Magazine), at 62.

4. *Id.* at 66.

to calls in some areas "are often met with 'air mail,' bricks and chunks of concrete that rain down from above."⁵ The *Times* termed the NYPD's community policing effort perhaps "the largest and most important policing experiment any government has tried to conduct."⁶

There is concern, not only about crime, but also about disorder — the disintegration of norms of civility and mutual respect governing urban life. Here, too, the police share the spotlight. Recent news reports have catalogued the deleterious effects of alleged breakdowns in civic order: the commuter's dread of being harangued by strangers demanding money on the subway; the elderly person's concern about being accosted by obstreperous teenagers in the park.⁷ Citing the work of leading academics who argue that the threat of such encounters breeds fear, which may itself endanger community life by causing the fearful resident to withdraw from public spaces, police reformers in cities like New York are looking to revive an older conception of the function of beat cops. In the view of prominent academics and politicians, these new community police officers, no mere crime fighters, should also "resume a long-abandoned role as guardians of civic order."⁸

Some of the current attention devoted to crime and disorder, bred of public fears that politicians exploit by advocating quick — and ineffective — fixes, will no doubt dissipate over time. No thoughtful person, however, can fail to be concerned about conditions in our cities today, nor can any student of the police help but reflect on how the police might meliorate these conditions. In fact, prominent scholars over the last ten to fifteen years — including Herman Goldstein, George Kelling, James Q. Wilson, and others — *have* propounded new ideas about the police role and about how the police might improve

5. *Id.*

6. *Id.* at 65.

7. *Move Along, Please*, *supra* note 1, at 28. Civic order was a prominent issue in the recent New York mayoral race: both candidates took the time to denounce, as threats to quality of life, squeegee operators who approach automobiles in Manhattan, sometimes menacingly, and intimidate drivers into giving them money in exchange for wiping the drivers' windshields. See Francis X. Clines, *Candidates Attack the Squeegee Men*, N.Y. TIMES, Sept. 26, 1993, at A39. Soon after he took office, Mayor Rudolph W. Giuliani ordered a crackdown on the activities of New York's "squeegee men." See Nicholas Dawidoff, *The Business of Begging*, N.Y. TIMES, Apr. 24, 1994, § 6 (Magazine), at 34, 36. Parenthetically, this crackdown came even as the future direction of the NYPD's community policing program was drawn into some question — as a result, among other things, of the change in leadership in the mayor's office and the corruption scandals that have racked the Department and led to the arrest of over a dozen officers in Harlem's 30th Precinct. See Steve Fainaru, *Bratton, NYC on Extended Honeymoon*, BOSTON GLOBE, Apr. 26, 1994, at 1, 15; Seth Faison, *Can Closer Links Deter Corruption?*, N.Y. TIMES, Apr. 24, 1994, § 4 (Week in Review), at 3.

8. *Move Along, Please*, *supra* note 1, at 29; see also George L. Kelling, *Order Maintenance, the Quality of Urban Life, and Police: A Line of Argument* [hereinafter Kelling, *Order Maintenance*], in POLICE LEADERSHIP IN AMERICA 296 (William A. Geller ed., 1985); George Kelling, *Acquiring a Taste for Order: The Community and Police*, 33 CRIME & DELINQ. 90 (1987); James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

conditions in our communities.⁹ Under the rubric of "community policing," policymakers have taken up many of these ideas and have made them the subject of informal experimentation in police departments across the country. The ideas themselves are varied. Most, however, involve common elements of the "community" strategy: an emphasis on the community, rather than merely on police professionalism and the law, as a source of legitimation for many police tasks; the purposeful decentralization of much police decisionmaking and the reorientation of patrol in the direction of neighborhood-based policing; a redefinition of the police role to include not only response to individual criminal incidents but also matters like promoting the common welfare, solving community-nominated problems that may contribute to crime, and, for some, aggressively maintaining civil order; and, finally, the establishment of close working relationships between police and citizens, community groups, and, sometimes, relevant social service agencies.¹⁰

Above the Law, by Jerome Skolnick¹¹ and James Fyfe,¹² does not, at first glance, fit within this now-burgeoning literature of police reform — a literature aimed at reorienting the police toward the community, the better to address community concerns about crime and

9. See, e.g., HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* (1990); ALBERT J. REISS, JR., U.S. DEPT. OF JUSTICE, *POLICING A CITY'S CENTRAL DISTRICT: THE OAKLAND STORY* (1985); WESLEY G. SKOGAN, *DISORDER AND DECLINE* 14-16, 85-124, 162-68 (1990); JEROME SKOLNICK & DAVID BAYLEY, *THE NEW BLUE LINE* (1986); Herman Goldstein, *Toward Community-Oriented Policing: Potential, Basic Requirements, and Threshold Questions*, 33 *CRIME & DELINQ.* 6 (1987); Kelling, *Order Maintenance*, *supra* note 8; Mark H. Moore, *Problem-solving and Community Policing*, in *MODERN POLICING* 99 (Michael Tonry & Norval Morris eds., 1992); Lawrence W. Sherman, *Policing Communities: What Works?*, in *COMMUNITIES AND CRIME* 343 (Albert J. Reiss, Jr. & Michael Tonry eds., 1986); Wilson & Kelling, *supra* note 8; James Q. Wilson & George L. Kelling, *Making Neighborhoods Safe*, *ATLANTIC MONTHLY*, Feb. 1989, at 46.

10. George L. Kelling & Mark H. Moore, *From Political to Reform to Community: The Evolving Strategy of Police*, in *COMMUNITY POLICING* 3, 18-23 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (discussing elements of a community-oriented strategy). Community policing is a reform strategy that "seek[s] to redefine the overall purposes of policing, to alter the principal operating programs and technologies on which the police have relied, and to found the legitimacy and popularity of policing on new grounds." Moore, *supra* note 9, at 107. It is most often contrasted with the strategy of "police professionalism" or "professional law enforcement" — the organizational strategy that has dominated American policing in recent times and that itself emerged as part of a reform effort directed at combating police corruption and insulating the police from political influence. While community policing is based on the premise that "working partnerships between the police and the community can play an important role in reducing crime and promoting security," *id.* at 123, police professionalism presumes that the police force is professionally remote from the community. Police legitimacy is founded narrowly — in the police mandate to enforce the criminal law and in the police force's specialized competence to carry out this mandate. See Kelling & Moore, *supra*, at 9-17. Community policing, in contrast, opens police departments to "community-nominated problems." It reorients the police away from reactive police tactics that were a hallmark of the professional strategy — like rapid response to calls for service — and toward proactive and preventive involvement in the community. Moore, *supra* note 9, at 112-16.

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12. Professor of Criminal Justice, Temple University.

disorder. Skolnick and Fyfe are primarily concerned, not with making the police more effective guardians of civic order, but rather with holding police officers to the rule of law — specifically, constraining them in the exercise of force. The *Times*'s account of Officer Jett's patrol of Beat 12, Sector George, the 52d Precinct in the Bronx, invokes one image of the police in relationship to the community: the image of Officer Jett, a young African American, trudging alone over eight square blocks that he cannot begin to rid of crime or disorder but that he stubbornly refuses to cede to the "drug dealers, gun merchants, loan sharks, pimps, robbers, burglars and extortionists" with whom he must daily negotiate for a measure of community peace.¹³ *Above the Law* powerfully invokes another image of the police and the community, no less salient, nor less anchored in present realities of American policing: the image of Sergeant Stacey Koon, the Los Angeles Police Department supervisor at the scene of the beating of Rodney Glen King, reporting to headquarters on "a big time use of force" in which King, an African American, was "tased and beat . . . Big Time"; the image of twenty-three other police officers who sped to the scene in high-tech patrol cars or hovered overhead in a police helicopter, but who did nothing to interfere as the beating took place (pp. 2, 13).

On its face, *Above the Law* is about constraining bad cops from misusing their authority, not about empowering good cops to address growing community concerns with the problems of neighborhood deterioration. Yet, *Above the Law* points to a connection between the twin aspirations of police reformers to control police misconduct and to improve police effectiveness in responding to problems of crime and disorder. Perhaps the book's most intriguing aspect is the authors' belief that the very turn to community policing — with its attendant *deemphasis on law* as a basis for police legitimation, *decentralization of decisionmaking*, and *increase in connections* between beat cops and community residents — may itself be a means of limiting the occasions on which police ignore legal restraints. As concerns with both crime and disorder push the police back to center stage and as policymakers indulge in modest hopes that community-oriented policing might help assuage these concerns, the authors' assessment that returning cops to the community will also help keep them from acts of brutality is, indeed, good news. The most frustrating aspect of this thoughtful book, however, may be *Above the Law*'s less-than-full attention to the problems that police face in our communities today and to the possibility that developing better responses to these problems may itself be a precondition to realizing the open, humanistic style of policing that Skolnick and Fyfe believe will help minimize the tragic incidence of police brutality.

13. Norman, *supra* note 3, at 96.

I

In *Above the Law*, Skolnick and Fyfe, themselves prominent police scholars, set out, for the benefit of a general audience, to do three things: to describe the occasions of police brutality, to explain why it persists, and to offer remedies. The King beating sets the stage for this effort, and the authors begin by noting that the public discussion of police violence engendered by the events in Los Angeles has tended to oversimplify a complex set of issues. We cannot explain police brutality, the authors assert, simply by the absence of mechanisms to hold police accountable to elected authority, though such mechanisms are important. Nor can we explain brutality by the supposed authoritarianism of those drawn to policing, when in fact most recruits who join police forces appear to do so out of a "combination of self-interest" — the desire for a well-paid and interesting job — "plus idealism" (p. 93). Finally, the phenomenon of police brutality, the authors assert, cannot be understood simply by invoking the racism of white cops — because occasions of police brutality, though too often tragically bound up in this country's tortured racial history, have not been confined to instances involving the victimization of minorities (p. xvii).

Brutality, the authors contend, is an occupational risk of policing that we cannot absolutely control but that we can minimize. Its incidence has decreased, they believe, in the last fifty years, and even in the last twenty (p. 18). Contemporary police brutality, Skolnick and Fyfe argue, is historically related to vigilantism, and particularly to lynching (p. 24); its roots can also be found in the history of coercive police interrogation practices and in the indiscriminate use of force to repress large civil disorders throughout this nation's history (pp. 23, 87-88).

Police brutality, the authors note, takes many forms. In most instances of police brutality today, however, cops resort to brutality directed at members of a feared outgroup — some population thought to be "undesirable, undeserving, and underpunished by established law" (p. 24). The victim is often, but not always, a member of a racial or ethnic minority; he may also be part of the underclass or merely someone who defies the cop's authority. As with the vigilantism of earlier times, argue Skolnick and Fyfe, the cop who resorts to brutality today commonly invokes legal authority to exonerate his illegal use of force. He administers "curbside justice" to persons "defined as deserving wrongdoers" and acts out of a perception that the legal system is somehow ineffective to deal with a "problem" he encounters on the street (p. 24). In *Cops*, a journalistic account of policing to which Fyfe and Skolnick refer, Mark Baker quotes one officer:

Some guys need a beating. In the street or the back of the precinct, there's a guy who needs a beating. And you got to do it. If you don't do it, the next situation that a cop runs into this character, it's going to be bad.

....

So I have no problem with that. Neither did any cop I've ever known have any problem with that. As long as you don't do it in public, as long as the guy really needs it, and as long as you don't carry it too far. Give him a beating and that's it. Don't break his ribs, you don't knock his teeth out, you don't crack his skull and give him a concussion.¹⁴

Skolnick and Fyfe find a breeding ground for this "vigilante-style" brutality in the bleak conditions police encounter in many American cities. The United States, the authors argue, is a "divided nation" (p. xv) in which urban, multicultural populations "suffer[] disproportionately from crime, gang violence, poverty, and homelessness," while suburban populations are "relatively safe, relatively prosperous, and — most important — unicultural" (p. xi). Cops "are perched perilously on [this] divide," called upon, as they are, to police socially and economically marginalized communities where policing is unquestionably "tough, hazardous, and frustrating" (pp. xv-xvi). Incidents like the King beating, though less frequent today than in the past, may still not be uncommon, say the authors — particularly in communities on the tough side of this divide, where residents and cops may be mutually alienated and distrustful (p. 116). Furthermore, police brutality in such communities may in fact fulfill the "unwritten assignments" of those on the other side of the divide — those with real or personal property to protect (p. 90).

If Skolnick and Fyfe situate police brutality in cruel American realities like racism, poverty, and the social and economic marginalization of many urban populations, they are optimistic about the possibility for the exercise of reasonable restraint on the part of the police, short of the transformation of these background conditions. The persistence of police violence, say the authors, has its origins: first, in the perpetuation of a police culture characterized by the isolation of police from the communities that they serve and by the development of a "siege" mentality among officers vis-à-vis these communities; and second, in the encouragement given to cops to view themselves as soldiers in an unwinnable war against inner-city crime. Most importantly, the authors attribute police violence to insular and autonomous police administrators who encourage these tendencies in the rank and file and fail to root out perpetrators. "[T]he chief is the main architect of police officers' street behavior" (p. 136). The police administrator must signal, persistently and unequivocally, that street justice is not a "tolerable prerogative of the street officer."¹⁵ Police chiefs, too, should be accountable to elected officials — as they are today in all major American cities, now that Milwaukee and Los An-

14. MARK BAKER, *COPS: THEIR LIVES IN THEIR OWN WORDS* 235 (1985).

15. P. 139; *see also* pp. 8, 19.

geles have abandoned the system of lifetime appointments that tenured, respectively, Harold Breier and Daryl Gates (p. 171).

Skolnick and Fyfe propose a variety of reforms to reduce police violence, all premised on the notion that "anything we can do to reduce the insularity of police is a good thing" (p. 266). Thus, the authors applaud administrative changes requiring that police departments be representative of the communities they serve (p. 241). They advocate civilianizing the police force with the addition of "parapolice" — semiprofessionals who perform more routine or peripheral police tasks — as well as police cadets (pp. 255-57). The authors also suggest reforms to ensure that departments are neither balkanized into specialized and isolated units that compete to produce arrest statistics in various "wars" on crime nor compartmentalized in such a way that line supervisors are not involved in reviewing instances of use of force by their officers or held responsible for the street behavior of the cops who report to them (pp. 189-92).

Skolnick and Fyfe would, in addition, further open police departments to outside scrutiny: through civilian review of complaints lodged against the police, for instance (pp. 217-36), and through more vigorous prosecution of brutality cases by the Department of Justice (pp. 209-16). The authors approvingly cite the Supreme Court cases — *Monroe v. Pape*¹⁶ and *Monell v. Department of Social Services*¹⁷ — that together rendered federal courts more inviting forums for plaintiffs seeking money damages in connection with wrongful conduct by police. The authors contend that *Monell*, by exposing police departments to liability when civil rights plaintiffs can demonstrate that the wrongful acts of police officers were the result of departmental custom, has substantially affected police practices and, with *Monroe v. Pape*, "probably has reduced police violence significantly" (p. 200).

Finally, Skolnick and Fyfe note that "[b]oth the public and the police suffer from the absence of a clear, unambiguous, and universally agreed-upon statement of the police mandate in our society" (p. 242; emphasis omitted). They suggest that, as a starting point for the development of such a mandate, the police should take the protection of life as the central purpose of their role. Skolnick and Fyfe invoke the image of a humanistic police department, responsive to the community, yet peopled by officers who "behave predictably and in accordance with their training" (p. 137). The authors acknowledge that on the bad side of the divide — in inner-city slums where "the disadvantaged are virtually certain to view the police as oppressive representatives of the group that is keeping them down" (p. 239) — police can only reduce and not eliminate the tension between the community and the officers who serve in it. The authors nevertheless advocate com-

16. 365 U.S. 167 (1961).

17. 436 U.S. 658 (1978).

munity-oriented policing, among other reforms, as a means of "renewing" the police:

Community-oriented policing has become widespread, prevalent, and fashionable not because it has been proved to work, but because the alternatives to it have been proved to fail. The most glaring recent failure has been the aggressive style of the Los Angeles Police Department, of which the Rodney King beating is just one symptom. [p. 251]

Though primarily promoted as a means to address community concerns with crime and disorder, community-oriented policing and the closely linked philosophy of problem-oriented policing will, the authors believe, also reduce police violence.¹⁸ A "community-oriented" philosophy will make brutality less likely because police officers who adhere to it will abandon "wars on crime" that pit police against the communities they serve and will adopt policing styles that are "more humanistic, [and] more in tune with the underlying needs, problems, and resources of the areas being policed" (p. 258).

II

Above the Law is by no means concerned solely with the turn to community policing, so before taking up that subject, I should first say a few words about other aspects of the book. Skolnick and Fyfe, in their 300-odd page treatment of the subject of police brutality, cover a lot of ground. The authors attempt to offer a general account of police brutality, to situate this account in a historical framework, and to relate the persistence of police brutality to manifestly corrupting aspects of police culture: from the continued employment of police supervisors who "are so indifferent to . . . misconduct as to be grossly negligent in the performance of their duties" (p. 36) to the use of policing strategies like those attributed to the LAPD, whose patrol officers were allegedly rewarded for being "hardnosed," evaluated solely by harsh statistical measures — like the number of arrests made — and placed at risk of developing "a siege ('we/they') mentality that alienates the officer from the community."¹⁹ The authors make a persua-

18. Community-oriented policing has overlapped, in practice, with the concept of problem-oriented policing first articulated by Herman Goldstein and enthusiastically endorsed here by Skolnick and Fyfe. Pp. 257-60; see Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQ. 236 (1979). A problem-solving orientation focuses police not simply on responding to individual criminal incidents but also on the criminogenic situations that may lie behind these incidents — for instance, on the problem of inadequate lighting in a parking lot in which car thefts often occur. Problem-oriented policing "takes seriously the notion that situations might be criminogenic and that crime can be prevented by changing the situations that seem to be producing calls for service." Moore, *supra* note 9, at 120-21. In practice, community and problem-oriented policing are simultaneously the subject of experimentation in police departments today.

19. REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 98 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT]; see also pp. 106, 125-28. The Independent Commission on the Los Angeles Police Department, chaired by Warren Christopher, was created in the aftermath of the Los Angeles tragedy to report on, among other things, the problem of excessive force within the LAPD. The Commission, reporting in 1991,

sive case in favor of an enlightened police administration in which line supervisors "closest to their personnel" and with the "greatest day-to-day effect on their work" participate in the review of complaints and become accountable "for seeing that officers do their jobs in the most humane ways possible" (p. 192). Others have argued that Skolnick and Fyfe fail to make a similar case to support their belief that other proposed reforms will be effective in minimizing police brutality — for instance, civilian review of complaints, the introduction of parapolice and police cadets into police departments, and the move away from specialized units.²⁰ One need not take sides in these particular debates, however, to conclude that, whatever their outcomes, *Above the Law* will emerge as an important comprehensive treatment of the subject of police brutality and of possible mechanisms to control it.

Skolnick and Fyfe are at their best in exploring the street encounters that give rise, sometimes to police brutality, but more often to complaints about police misconduct — an important subject in itself for those who advocate broader police involvement in the community. Drawing on the work of Van Maanen, Chevigny, and others, the authors dramatically portray the most common complaints as arising, not from the "clean" arrest of a known burglar, drug dealer, or other serious offender, but from encounters between patrol officers and people who may not be engaging in criminal activity at all, but whom the police view as potentially threatening or up to no good.²¹ People who loiter about places where children play, who drive dirty cars with clean license plates, who drive clean cars with dirty license plates, or who have previously been identified as "trouble-makers" may be approached by police officers whose suspicions are aroused (p. 97). Skolnick here develops his earlier argument that the police, of necessity, identify certain categories of people in such encounters as "symbolic assailants" — as people who, based upon their gestures, language, or other cues in a police officer's "perceptual shorthand," will be perceived as potentially dangerous.²² Many complaints about police mis-

criticized the LAPD's organizational culture — a culture that, according to the Commission, has historically emphasized "aggressive detection of major crimes . . . and a rapid, seven-minute response time to calls for service" at the expense of crime prevention and with the result that police officers became isolated "from the communities and the people they serve." CHRISTOPHER COMMISSION REPORT, *supra*, at 98. The report, anticipating many of the themes in *Above the Law*, included a recommendation that the Los Angeles Police Department adopt a community-based policing model. *Id.* at 105.

20. Stephen D. Mastrofski & Craig D. Uchida, *Transforming the Police*, 30 J. RES. CRIME & DELINQ. 330, 349-50 (1993) (reviewing *Above the Law*). Skolnick and Fyfe admit that they endorse civilian review of complaints about police misconduct primarily because civilian review will, they say, enhance the *credibility* of the review process — rather than directly constrain police officers in the use of force or improve the actual review of citizen complaints. P. 230.

21. Pp. 97-103, 106, 132; see also PAUL CHEVIGNY, *POLICE POWER: POLICE ABUSES IN NEW YORK CITY* (1969); John Van Maanen, *The Asshole*, in *POLICING: A VIEW FROM THE STREET* 221 (Peter K. Manning & John Van Maanen eds., 1978).

22. P. 97; see also JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 45-48, 217-18 (1966).

conduct have their genesis in street encounters between patrol officers and these "suspicious" persons, whom the officers may mistakenly single out on the basis of "ambiguous cues and stereotypes" — some of which may only thinly mask underlying social preconceptions or prejudices (pp. 98, 114). Mistakes in such encounters may be inevitable. But a confrontational police style that may easily escalate into use of force can make such mistakes very costly and destructive of relations between the police and the broader community:

When officers act upon such signals and roust people who turn out to be guilty of no more than being in what officers view as the wrong place at the wrong time — young black men on inner-city streets late at night, for example — the police may create enemies where none previously existed. [p. 114]

Skolnick and Fyfe define police brutality early on as the "conscious and venal" resort to gratuitous violence by officers who usually attempt to conceal this misconduct (p. 19). Thus, in these street encounters, challenging the personal authority of the officer may well result in a citation or an arrest. More ominously, however, an affront to the officer's authority may provoke a slap or even a beating (p. 102). The authors distinguish this intentionally and maliciously inflicted force — "police brutality" — from force resulting from a failure of training or from an officer's ineptitude — "unnecessary force" (pp. 19-20). They then largely limit their discussion of specific cases to those involving the most blatant and shocking forms of brutality. As Mastrofski and Uchida have ably commented,²³ along lines similar to those here, this limitation is regrettable for several reasons.

First, the distinction between necessary and unnecessary force is itself by no means obvious. "The written rule is clear," Skolnick and Fyfe say. "[C]ops are to use no more force than is necessary to subdue a suspect" (p. 13). The police role, however, extends well beyond the seizure of recognized suspects to include such diverse activities as "driving the mayor to the airport, evicting a drunken person from a bar, directing traffic, crowd control, taking care of lost children, administering medical first aid, and separating fighting relatives."²⁴ All of these activities may — sometimes unexpectedly — require the use or threatened use of force. Bittner's oft-cited observation, invoked by Skolnick and Fyfe (p. 10), that we can most comprehensively see the police role in these diverse activities "*as a mechanism for the distribution of non-negotiably coercive force employed in accordance with the dictates of an intuitive grasp of situational exigencies*,"²⁵ powerfully suggests the play within the formal boundaries separating appropriate and inappropriate uses of force, not to mention threatened uses of

23. Mastrofski & Uchida, *supra* note 20, at 346.

24. EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 44 (National Inst. of Mental Health, 1970).

25. *Id.* at 46.

force. In fact, Skolnick and Fyfe themselves acknowledge that, outside of occasions when the use of force is so unambiguously excessive as to shock the conscience, "questions of how much and when force is justified" are often "matters of judgment, rather than simple dichotomies" (p. 42).

Second, the consequences of resort to unnecessary force — regardless of the officer's good faith — are quite serious. As the authors recognize, cops today often encounter people who, "emboldened by drugs, alcohol, mental illness, or all three, fight back" (p. 37). Good faith mistakes here can be deadly: officers may "find themselves backed into corners and compelled to use more force than they intended, perhaps killing or seriously injuring a suspect who might have been talked into custody" (p. 37). And when cops use more force than is necessary to carry out an assignment — whatever their good intentions — they do not only create enemies of the people against whom force is exercised. "[T]hey undermine [public] confidence in all police and the subsequent capacity of the police to capture criminals and to convict them with police testimony" (p. xvi).

Given the authors' endorsement of community-oriented policing — of putting problem-solving officers back on the beat in presumably close relationship to diverse parts of the community — the authors might well have more fully discussed the potential for reducing both violence and the threat of violence in street encounters between well-meaning cops and community residents. True, police brutality, not resort to unnecessary force, has sparked our most recent, tragic urban riots.²⁶ As Fyfe has noted elsewhere, however, the willful use of wrongful and excessive force by police officers, however appalling, "probably occurs far less frequently — and probably less frequently injures sympathetic and factually innocent victims — than does police violence emanating from simple incompetence."²⁷ If the authors' vision of a more humanistic, less isolated style of policing is to be realized, Skolnick and Fyfe, or others, must next turn their attention, in a work of similar scope to *Above the Law*, to the problem of unnecessary force.²⁸

At any rate, *Above the Law*, by narrowing its focus, does present the subject of contemporary police brutality from the vantage point of an informed historical perspective. The authors treat the history of brutality in police interrogation with particular thoroughness. Here, Skolnick and Fyfe tell a sordid tale about the common use of the fist,

26. James J. Fyfe & Jerome H. Skolnick, *Response to Mastrofski and Uchida*, 30 J. RES. CRIME & DELINQ. 359, 360 (1993).

27. James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, in VIOLENT TRANSACTIONS 207, 210 (Anne Campbell & John J. Gibbs eds., 1986).

28. We can be optimistic that such a work will materialize. Though in *Above the Law* Skolnick and Fyfe decline the opportunity to examine closely the problem of resort to unnecessary force in police work, they have not neglected the topic elsewhere. See, e.g., *id.* at 210-21.

the blackjack, and the rubber hose in interrogations in the 1920s and 1930s. They outline how police reformers, elite lawyers, and law professors took up the cause of reform after the Wickersham Commission reported in 1931 that the practice of the third degree was widespread across the United States.²⁹ The book presents Supreme Court decisions first responding to and, as the authors depict, eventually transforming police conduct in interrogation: from *Brown v. Mississippi*³⁰ — in which the Court held, in 1936, that the use at trial of confessions coerced by repeated whippings, pummelings, and mock hangings was a violation of due process — through *Miranda v. Arizona*.³¹ Skolnick and Fyfe chronicle a success story here, the result, they suggest, of reformist pressure and appellate court rulings excluding coerced confessions: “The fist, the blackjack, and the hose probably will not return to interrogation rooms, except to administer justice outside the law, primarily to punish, not to convict” (p. 65). They ably narrate the turn in police interrogation practices from the use of violence or threatened violence to the psychological techniques in vogue today (pp. 54-64).

Skolnick and Fyfe, however, are on less firm ground in their summary treatment of contemporary interrogation practices. Abruptly turning from the book’s focus — police brutality — the authors pause to take issue with “deceptive” interrogation tactics that police interrogators, they assert, commonly employ today. They suggest that the use of deception by police in questioning suspects may encourage cops to lie to judges when applying for warrants, to violate internal police organization rules against lying, and to perjure themselves in the courtroom (p. 62). “If courts allow police to deceive suspects for the good end of convicting criminals,” they ask, “can we really expect the police to be truthful when offering testimony” (p. 65)? They also posit that police deception in interrogation may further undermine public confidence in the police, as well as cooperation with them, and may even elicit false inculpatory statements (pp. 63-64). These alleged costs, the authors strongly imply, are particularly onerous given that police do not generally need to question suspects at all in order to convict criminals:

Most offenders are caught redhanded in circumstances so rich in incriminating evidence that the police simply do not need to ask them for anything but their names and addresses. When police *buy* narcotics on the street and *bust* the seller, or search a crack house and seize the drugs,

29. Pp. 45, 47. The National Commission of Law Enforcement and Observance, headed by George W. Wickersham, authored the influential Wickersham report. P. 45. The Commission concluded, in 1931, that resort by police to “the inflicting of pain, physical or mental, to extract confessions or statements” was common in police departments across the country. P. 45 (citing NATIONAL COMM. ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931)).

30. 297 U.S. 278 (1936).

31. 384 U.S. 436 (1966).

attempts to obtain confessions serve only to gild the lily of already invulnerable prosecution cases.³²

Some of the authors' concerns here are worth serious consideration — though the more persuasive reasons for curtailing at least some deceptive interrogation practices probably have more to do with ethics and a full-bodied account of the right against compulsory self-incrimination than with policy arguments premised on the supposed bad effects of these practices.³³ At any rate, the authors of *Above the Law* simply assert their concerns — in a pastiche much less successful than Skolnick's earlier, more developed work on the subject.³⁴ The book's abbreviated treatment of the "subtle, complex, and morally vexing issues"³⁵ posed by deception in police interrogation is not helpful. In fact, it detracts from an otherwise powerful tale about effective restraints placed upon one common form of police brutality.

At the outset, deception in the questioning of a *Miranda*-advised suspect who has agreed, voluntarily, to speak with the police can itself take many forms. Interrogators may falsely tell a suspect that an accomplice has identified him; they may merely pretend to be sympathetic or to understand a suspect's reasons for committing a crime.³⁶ Some deceptive practices are clearly unlawful;³⁷ others forcefully bear on whether a suspect has given a statement voluntarily.³⁸ Still others, like an officer's manner in offering a cup of coffee, may do no more than suggest that the officer is befriending the suspect when, in fact, the officer is in an adversarial — and information-seeking — relationship with him. This latter "deception" may simply be inherent in what the authors term *Miranda*'s "awkward compromise": regulating police conduct in interrogation, yet permitting custodial police questioning to continue (p. 57). Given these complexities, it is not enough

32. P. 194; see also p. 58.

33. For a deontological argument, see, for example, R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 40-41 (1981) (arguing that deception regarding crucially relevant facts — like the strength of the prosecution's case — "hardly accord[s] with respect for [the] autonomy and dignity" of the individual being questioned).

34. See Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer-Fall 1982, at 40; Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, CRIM. JUST. ETHICS, Winter-Spring 1992, at 3.

35. Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 54 (1992).

36. See Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 73 (1966); see also JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 109-12 (1993); Leo, *supra* note 35, at 43-47.

37. Police may not, for instance, deceive suspects about the nature of their legal rights — by telling them, for example, that they do not have a right to remain silent or that merely oral statements cannot be used against them in court. See GRANO, *supra* note 36, at 114.

38. Thus, in *Spano v. New York*, 360 U.S. 315, 323 (1959), the Court held that a confession was involuntary because, among other things, the defendant's boyhood friend, a police officer, falsely persuaded the defendant that unless he made a statement his friend, the cop, would be fired — to the sorrow of the officer, his pregnant wife, and his three children. See pp. 50-51.

to say that one's willingness to countenance deception during interrogation will depend on the "balance of one's attachment to due process as against crime-control values" (p. 62). What kinds of deceptive techniques, if any, would the authors prohibit — beyond those already deemed impermissible — and how are we to prohibit them?

Further, in order to assert that police deception in interrogation may relate, along a slippery slope, to police perjury and other forms of police misconduct — and, in addition, that it contributes to the community's mistrust of the police — the authors need to consider more carefully the larger arena in which cops are authorized to use deception: principally in various and widespread forms of covert investigation.³⁹ Do all forms of police deception lead to police misconduct and community mistrust? If they do, much of modern police practice — including Skolnick and Fyfe's "buy-bust" operation in which an undercover police officer, pretending to be a user, buys narcotics and then arrests the seller — should presumably come under fire. If covert investigation does *not* lead inexorably to unacceptable levels of police misconduct and community alienation, then how is deception in interrogation different? Other scholars, invoking societal notions of "white lies, polite lies, excusable lies, and even justifiable lies,"⁴⁰ suggest that, in fact, we in society tolerate many forms of deception, including some forms of police deception in interrogation, and that we distinguish between permissible and impermissible types.⁴¹ This simple capacity to distinguish a permissible from an impermissible lie — and thus potentially to avoid the slippery slope Skolnick and Fyfe pose — certainly extends to the police, whatever one may think about the frequency of perjury by police officers. Skolnick and Fyfe thus suggestively link deceptive interrogation practices to matters like police misconduct in the courtroom but do not make a logical or empirical case for the causal relationship that they hypothesize may exist.

One other point. In considering even salutary changes in interrogation practices, it is easy to assume — and altogether comforting to believe — that whatever the effect of the reform, the police in any event do not need to rely on statements taken from suspects in order to prosecute defendants who have committed serious crimes. The exam-

39. See generally GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* (1988) (describing the history and recent growth of various forms of covert investigation in law enforcement).

40. GRANO, *supra* note 36, at 114.

41. *Id.* (suggesting that American society has taken a "utilitarian approach" to lying and deception, sometimes tolerating it to promote other goals); see also Jan Gorecki, *Miranda and Beyond — The Fifth Amendment Reconsidered*, 1975 U. ILL. L.F. 295, 306 (noting that police tactics such as displaying false sympathy "do not seem to invite general contempt, especially when applied to solve a major crime"); cf. Leo, *supra* note 35, at 54 (noting that "little shared consensus" exists about where to draw the line between permissible and impermissible deceptive police tactics in American society, but suggesting that deceptive interrogation tactics "may be a necessary evil in modern society").

ples that Skolnick and Fyfe invoke, however, are simply not representative of many serious cases. The authors use, as examples, "buy-bust" or drug possession cases in which the police, in effect, either participate in or witness the crime by purchasing drugs from a dealer or by arresting him when he is in possession of the contraband (pp. 58, 194). In fact, even these cases are not "invulnerable" at trial — because, as the authors assert, many potential jurors view police testimony skeptically and may not credit the police officer's account.⁴² At any rate, whether or not a properly elicited and perhaps even videotaped confession would be helpful in these cases, in other cases confessions are "often the only incriminating evidence against a guilty suspect."⁴³ Particularly in the investigation of "historical" crimes — in which the police do not intervene in ongoing criminal activity but arrive after the fact in an attempt to determine who committed a homicide, robbed a bank, or participated in a mugging — the suspect's admissions may well be the most damning, and reliable, evidence against him at trial.⁴⁴ Moreover, jurors will most likely regard admissions in such cases "as the most conclusive form of inculpatory evidence."⁴⁵ Given the centerpiece of *Above the Law* — the beating of Rodney Glen King, when even a videotape of the crime did not persuade one jury to convict — Skolnick and Fyfe give too short shrift to

42. P. 63. Moreover, even if the police officer's account is credited, there is *still* substantial room for reasonable doubt in the possession case that Skolnick and Fyfe posit — a case in which police search a house containing drugs, seize the drugs, and then arrest the occupants. P. 194. Each occupant of the house may contend at trial that the drugs found inside belonged to another. In fact, when those present in a crack house choose not to make statements upon arrest, the relationship of any individual found on the premises — whether dealer, user, or chance visitor — with the house and its contents sometimes simply cannot be established. Although surrounding circumstances — like the location of the drugs, observations made by the officers upon entry into the house, or the results of prior surveillance — may add to the proof in such cases, these cases are hardly "invulnerable" (p. 194) in the context of an adversarial trial in which, as Skolnick and Fyfe recognize, the burden of proof is "rigorous." P. 196.

43. Leo, *supra* note 35, at 54.

44. While noting at one point that custodial interrogation is considered a "practical necessity" in the prosecution of certain serious crimes (p.62), Skolnick and Fyfe suggest elsewhere that the police usually have no need to question a willing suspect, because by the time the investigation has focused on him, the police already have other evidence — such as extrinsic eyewitness testimony — on which to rely at trial. P. 58. Such evidence, however, though it may powerfully corroborate a voluntary confession, may also be wholly inadequate, standing alone, to support a conviction. Moreover — and particularly in the case of eyewitness testimony — this alternative evidence, legally sufficient to be considered by a jury, may itself be so unreliable as to counsel against using it at trial, in the absence of the corroboration that a suspect's voluntary admissions may provide. Here, Skolnick and Fyfe, invoking the "usual" drug possession arrest as their paradigmatic case, simply paint with too broad a brush. As Philip Heymann has put it in discussing proposed restraints on undercover investigation, "striking a sensible balance between civil liberties and effective law enforcement requires understanding the impact that particular investigative restrictions will have on the solution of *particular* types of crime." Philip B. Heymann, *Understanding Criminal Investigations*, 22 HARV. J. ON LEGIS. 315, 333 (1985) (emphasis added).

45. Leo, *supra* note 35, at 54 (citing Saul M. Kassir & Lawrence S. Wrightsman, *Confession Evidence*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67 (Saul M. Kassir & Lawrence S. Wrightsman eds., 1985)).

law enforcement's oft-repeated argument that voluntary statements by suspects are an essential ingredient in the successful prosecution of many cases.

III

So what is one to make of *Above the Law* and, in particular, of its truly ambitious plan for police reform and renewal? Although Skolnick and Fyfe begin by invoking the image of almost two dozen LAPD officers standing by while a drunken, disorderly King is "taught a lesson," they end by endorsing — and affirming the possibility of — a different style of policing: a style in which cops are "open[]," (p. 266), "humanistic" (p. 258), and even "sympathetic listen[ers]" (p. 253). Community policing, the authors assert, though promoted to address concerns about crime and disorder, represents a new orientation in policing that, in partnership with a problem-oriented philosophy, is also "far less likely to generate police violence than traditional patrol policing" (p. 258). This is an intriguing notion. The authors may even be correct. But the devil, as always, is in the details — several of which the authors do not fully explore.

At this juncture, community policing is a philosophy arising, as Skolnick and Fyfe acknowledge, as much from the failures of the past as from affirmative evidence that the police can, in fact, do more to prevent crime or effectively address community concerns with disorder (p. 251). "Wars on crime" have proven intractable precisely because "it is simply not within [the power of the police] to change those things — such as unemployment, the age distribution of the population, moral education, freedom, civil liberties, ambitions, and the social and economic opportunities to realize them — that influence the amount of crime in any society."⁴⁶ Proponents of community policing understand that so-called wars on crime cannot be "won," if for no other reason than that crime is not an enemy that can be vanquished. Once we set the war-on-crime conception of the police mission aside, however, even ardent advocates of community policing admit that the jury is still out on a different, more modest concern: whether community policing can, in fact, augment public safety at all.⁴⁷ Skolnick and Fyfe assert, powerfully, that officers who are placed on the front lines of unwinnable wars on crime become cynical, alienated, and even brutal (pp. 114-15). The authors spend less time assessing the dangers for the beat cop of a reform philosophy that may not be fully realized or

46. Carl B. Klockars, *The Rhetoric of Community Policing*, in COMMUNITY POLICING, *supra* note 10, at 239, 244.

47. David H. Bayley, *Community Policing: A Report from the Devil's Advocate*, in COMMUNITY POLICING, *supra* note 10, at 225, 226-28. Bayley is the coauthor, with Skolnick, of a major work endorsing community policing, *The New Blue Line*. See SKOLNICK & BAYLEY, *supra* note 9.

that does not, as it turns out, address current concerns about crime and disorder.

This inattention would be less noteworthy if the philosophy of community policing did not itself raise legitimate concerns relevant to the problem of police brutality. Community policing, however, both frankly bestows discretion on the beat cop and founds the propriety of his actions in part on community norms — notwithstanding how problematic the notion of *community* really is.⁴⁸ As David Bayley has noted, implications of the theory of community policing provoke concern that this theory, in practice, may “weaken the rule of law in the sense of equal protection and evenhanded enforcement . . . lessen the protection afforded by law to unpopular persons . . . [and] even encourage vigilantism” by mobilizing one part of the community against another.⁴⁹ Community policing implies “that officers are to have much greater freedom and to exercise independence” and that communities are to “have some input into decisions made about the form of police services.”⁵⁰ But encouraging independence in the police and input from the community, as Mastrofski and Uchida note in passing in their review of *Above the Law*, may “place street-level officers at greater risk to be responsive to vigilante values in ‘defended’ neighborhoods.”⁵¹ Moreover, with the decentralized decisionmaking that community policing implies, no one may know “precisely how patrol officers spend their time.”⁵² In first acknowledging and then promoting the beat cop’s street-level discretion, community policing theorists must also be concerned that police officers not employ that discretion for their *own* ends — lest community policing in practice lead to increased slackness and time wasting on the beat⁵³ and to various forms of corruption.

Skolnick and Fyfe recognize the dangers, as well as the promise, of

48. Skolnick and Fyfe recognize that if community “implies a commonality of interests, traditions, identities, values, and expectations,” community may simply not exist in many areas. P. 254; see also Stephen D. Mastrofski, *Community Policing as Reform: A Cautionary Tale*, in COMMUNITY POLICING, *supra* note 10, at 47, 51 (noting that the theoretical literature on community policing “finesses the community problem”).

49. Bayley, *supra* note 47, at 231-32; see also Goldstein, *supra* note 9, at 21 (noting that given the extent to which community policing grants “greater freedom and independence to the officers assigned to specific areas,” in cities “where police corruption or misuse of police authority is [already] common, it may simply not be feasible to experiment with community policing”); Moore, *supra* note 9, at 144 (while advocating a community-oriented philosophy, noting a legitimate concern that “[o]nce policing is cut loose from an obsessive focus with enforcing law and brought back in touch with community concerns, it is entirely possible that the corruption, discrimination, and brutality that once shamed policing will return with new vigor”).

50. Goldstein, *supra* note 9, at 9.

51. Mastrofski & Uchida, *supra* note 20, at 348.

52. Wilson & Kelling, *supra* note 9, at 50.

53. See Bayley, *supra* note 47, at 234 (noting that because community policing “stresses the achievement of objectives over adherence to formal rules,” reform requires “more successful internalization of norms of conduct” to avoid “increased slackness, time-wasting, inattention, and mismanagement”).

purposefully affording discretion to police officers to be responsive to community concerns. They note in particular that "there is considerable support among the public for an aggressive, kick-ass style of policing" (p. 189), that "one of the most vexing problems in controlling police violence is that it is so strongly supported in the most disorderly neighborhoods" (p. 258), and that, as one police commander commented to Fyfe, even "'sweet little old ladies tell [the police] that the cops have forgotten what their nightsticks are for'" (p. 145). *Above the Law*, however, while invoking community policing as a humanistic alternative to past policing styles, does not do enough to address the dilemma posed by these observations: How can cops in diverse, stratified communities "be given sufficient autonomy to do good without also increasing the likelihood of doing ill"?⁵⁴ Community policing advocates have, in fact, developed sophisticated answers to this concern.⁵⁵ Skolnick and Fyfe, however, do not really address the question — surprisingly, because the potential for corruption of beat cops in a community-policing regime is at least as serious as the supposedly corrupting effect of deceptive interrogations, a subject on which Skolnick and Fyfe *do* focus. After all, as the authors acknowledge, the detectives who interrogate are already considerably less likely as a group to engage in acts of brutality than are the patrol officers who will walk neighborhood beats in a community policing regime (p. 132).

There is another aspect of the turn to community policing that Skolnick and Fyfe might have explored more fully — namely, the problems that community police will face in our communities today. *Above the Law* ably focuses on changing the police — on finding better mechanisms to hold cops accountable and on transforming police culture in ways that will make officers and departments more open and presumably more accessible to democratic control. As its proponents recognize, however, the success of community policing — which lies at the heart of the authors' proposal for the "renewal" of police forces — is highly dependent, not only on bettering relations between the police and the community, but on promoting "the development of more effective responses" to the problems that police officers must address.⁵⁶ The authors often allude to, but do not really consider, these problems and the possibility of better responses to them — responses that could be very important to alleviating the hazardous, frustrating conditions that Skolnick and Fyfe portray as the backdrop for contemporary police brutality. What *should* the police officer do to address the numerous conditions with which many communities are concerned: from congregations of drug sellers and buyers in public parks

54. Mastrofski, *supra* note 48, at 65.

55. See, George L. Kelling et al., *Police Accountability and Community Policing*, in PERSPECTIVES ON POLICING 1 (National Inst. of Justice, U.S. Dept. of Justice, Executive Session on Policing Rep. No. 7, Nov. 1988).

56. Goldstein, *supra* note 9, at 15.

to gang members who hang out on street corners? As Yale Kamisar has suggested, the time may have passed when scholars could afford to ignore such questions, linked, as they are, to the substantive ends of policing and to whether these ends — including the authors' desired end of protecting life — can be realized: "What *can* the policeman do? What *should* he be able to do? How can the legislature be of assistance to him?"⁵⁷

So what might a focus on problems entail? Scholars have noted, for example, that the police may lack authority in some situations in which a community seeks action from them — for instance, when panhandlers harass people walking on the streets⁵⁸ or when gang members congregate in a housing project, intimidating residents but breaking laws only sporadically and usually out of the sight of officers, who will be able to obtain sufficient evidence to prosecute in only a small fraction of cases.⁵⁹ As Herman Goldstein has recently noted, "support has been expressed for dealing with some problems through the use of informal authority, candidly referred to as 'kicking ass and taking names.'" ⁶⁰ Skolnick and Fyfe deplore such tactics (p. 258) but do not discuss alternative ways of dealing with the underlying problems of crime and disorder. Goldstein proposes that a problem-solving, community orientation may lead, as it has in several cities, to expanding the *formal* authority of the police in such situations: for instance, through public order legislation based upon an assessment of community conditions that may permit the harassing conduct of panhandlers, gang members, or others to be adequately described and prohibited; or possibly through creative use of civil law as a basis for obtaining injunctions against "public nuisances, offensive behavior, and conditions contributing to crime."⁶¹ To cite another example, Lawrence Sherman has suggested that in some communities police officers who regularly initiate encounters with people on the street may help deter certain types of crime — like robbery or burglary — and, further, that these street contacts with citizens can be conducted, in at least some communities, so as not to alienate those stopped or not to provoke community hostility.⁶² Skolnick and Fyfe discuss at length the recognized potential for such encounters to reflect a patrol officer's

57. YALE KAMISAR, *Fred E. Inbau: "The Importance of Being Guilty" in POLICE INTERROGATION AND CONFESSIONS* 95, 111 (1980).

58. GOLDSTEIN, *supra* note 9, at 135.

59. See Wilson & Kelling, *supra* note 8, at 35.

60. GOLDSTEIN, *supra* note 9, at 134.

61. *Id.* at 139, 134-35, 140-41. Goldstein argues that in the past police officers relied on disorderly conduct, loitering, and vagrancy statutes for the authority to deal with many community problems. When courts declared some such statutes constitutionally infirm, police departments were sometimes left without clear authority to intervene in situations that communities expected them to handle. Goldstein, *supra* note 9, at 23.

62. See Lawrence W. Sherman, *Attacking Crime: Policing and Crime Control, in MODERN POLICING*, *supra* note 9, at 159, 186-89; Sherman, *supra* note 9, at 368-69.

prejudices and to breed community resentment (pp. 95-103). They spend less time considering how a community-oriented department might secure the possible crime reduction benefits of "proactive citizen street contacts"⁶³ without incurring their historical, serious costs.⁶⁴

To be fair, Skolnick and Fyfe do issue forth with a clarion call for "problem-oriented policing," even if they do not discuss the amelioration of the particular policing problems that emerge in their analysis of police brutality (pp. 257-60). The close analysis of local policing problems that is implied by a problem-solving orientation may simply be beyond the scope of *Above the Law*. Focusing on the problems that police face in many communities and on developing better responses to these problems may also, in the end, more likely affect the incidence of *unnecessary force*, rather than police brutality — which has its own genesis and pathology, vividly portrayed by Skolnick and Fyfe, and which is most directly addressed through the efforts of enlightened police administrators who make clear that street justice will not be condoned.

Nevertheless, it remains true that neither the promise of community policing nor the authors' hopes for police renewal will be realized, absent a focus in the near future on policing problems and their amelioration.⁶⁵ Such a focus may be difficult because, in the absence of a "clear, unambiguous, and universally agreed-upon statement of the police mandate" in our society (p. 242), this focus will still require, at times, making explicit choices about the proper scope of police authority and the bounds within which a community may act to address its concerns with crime and disorder. Still, this focus is important and may help further define the police mandate, as Skolnick and Fyfe advocate, in a democratic manner. One LAPD chief who spoke before the Christopher Commission gave testament to the authors' thesis that when overaggressive police administrators charge patrol officers with "war on crime" missions that they are not legally authorized to fulfill, police misconduct is the result:

We expect people to go out and aggressively identify people, and investigate them, and that puts these police officers in the middle between what we evaluate them on and what they are able to do legally. And so

63. Sherman, *supra* note 9, at 369.

64. Sherman suggests that proper training and supervision of officers in a "community relations-conscious police culture" may help reduce these costs — especially if any guidelines that help officers to identify "suspicious" persons are specifically drawn and are "race-neutral in design and effect." Sherman, *supra* note 62, at 188-89. Sherman has outlined strategies for policing communities while sensibly noting that the extent to which the police should focus on communities in targeting enforcement efforts is an empirical question. Sherman, *supra* note 9, at 381. He has elsewhere questioned the effectiveness of community policing, noting that community policing programs have not concentrated enough on locations where crimes are commonly committed. Faison, *supra* note 7, at 3 (quoting Sherman).

65. Goldstein, *supra* note 9, at 15 ("Without a focus on substantive problems, community policing can be an empty shell.").

it results in police officers bluffing their way into situations, and, when they stop people on the street, frequently the guy knows, you don't have anything on me, you don't have any reason, and he knows that very well. And he knows they're bluffing. And that gets us in, time after time, into these conflict situations that end up, frequently with uses of force, frequently with manufacturing or at least puffing of the probable cause.⁶⁶

No less than police administrators, however, communities will make demands on police departments that are open to their concerns. Such departments may often "be pressured to take actions by some groups that abridge the rights of others."⁶⁷ Community police departments, the advocates of community policing assert, can resist these pressures and help educate the public about "what police can and cannot be expected to accomplish" (p. 266). This assertion is, in part, true. But neither the public nor its politicians are likely to remain supportive of a reform effort that does not help address community concerns about crime and disorder. Lest community policing be nothing more than another "concealment and circumlocution,"⁶⁸ police reformers must also assist in developing better responses — lawful, measured responses — to the problems about which the police and communities are concerned. Otherwise, the open, humanistic style of policing that Skolnick and Fyfe so powerfully invoke may remain frustratingly elusive.

* * *

Above the Law is an unsettling account of the worst in abuses of police authority. Skolnick and Fyfe contribute to our understanding of police brutality by arguing for its link to the isolating aspects of police culture and, most importantly, to police administrators who acquiesce in and even promote the patrol officer's alienation from the community. They likewise sketch out an alluring program for reform. The authors do not, and cannot be expected to, fully answer all the questions that now beset police reformers as they struggle to address community concerns about police violence, crime, and disorder. In addressing police brutality, however, Skolnick and Fyfe have brought their usual insight, based on substantial experience, to the entire range of issues.

66. CHRISTOPHER COMMISSION REPORT, *supra* note 19, at 99 (quoting Assistant Chief David Dotson).

67. Moore, *supra* note 9, at 145.

68. Klockars, *supra* note 46, at 240, 257 (arguing that community policing is best understood, not as a substantive policing reform, but "as the latest in a fairly long tradition" of circumlocutions that "conceal, mystify, and legitimate" police distribution of nonnegotiable coercive force).