PAST-ACTS EVIDENCE IN EXCESSIVE FORCE LITIGATION

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ABSTRACT

Myriad obstacles prevent victims of police violence from vindicating civil claims against the officers who have harmed them and the cities which have failed them. Though these plaintiffs face legal hurdles even getting into court, this article explores an unusual evidentiary imbalance that occurs for those few plaintiffs who do make it to trial. A confluence of constitutional law, the Federal Rules of Evidence, and judge discretion allows juries to hear highly prejudicial information about plaintiffs' pasts—including drug use and past criminal behavior—while omitting probative evidence of officers' past misconduct.

This article critiques how courts' interpretations of the "objective reasonableness" standard of Graham v. Connor, *490 U.S. 386 (1989), paired with Rule 404(b) of the Federal Rules of Evidence, cause judges to mistakenly hold certain officer misconduct evidence irrelevant and thus inadmissible at trial. The article then discusses the comparative ease with which many judges admit evidence of a plaintiff-victim's past drug use, criminal activity, encounters with police, and gang affiliation under strained 404(b) arguments. After an analysis—and criticism—of these legal arguments, this article advocates for multiple solutions. First, it discusses how certain officer misconduct records may be relevant notwithstanding obstacles posed by objective reasonableness jurisprudence. Then, it suggests that judges, when applying Federal Rule of Evidence 403's balancing test to determine the admissibility of police misconduct records, take a more nuanced account of the prejudice victims of police violence face from skeptical juries and the inherent trust society places in law enforcement. Third, the article proposes an amendment to Rule 404(b), adopting a stricter balancing test for the admission of certain past-acts evidence about plaintiffs in 42 U.S.C. § 1983 litigation alleging excessive force.*

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Finally, the article discusses how plaintiffs' and officers' pasts surface in the context of impeachment. Extrinsic evidence of plaintiff-witnesses' criminal records is easily admissible under Rule 609 of the Federal Rules of Evidence; contrarily, a finding that a testifying officer has falsified reports or fabricated evidence, reported by an independent civilian complaint review board under a preponderance or clear and convincing evidence standard of proof, is not. This article recommends various changes to the rules of impeachment to level the playing field in the credibility struggle between plaintiffs and defendants. The article suggests either limiting the admissibility of testifying plaintiffs' criminal records in excessive force litigation, or, contrarily, extending Rule 609(a)(1)(B)—which automatically admits evidence of criminal records for crimes that involved dishonesty—to similar findings about a testifying officer by a civilian complaint review board.

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INTRODUCTION

Imagine that a police officer responds to an anonymous call reporting a suspicious vehicle parked on the street. The officer arrives to find a woman and man sleeping in a van. He taps on the window and shines a flashlight inside, startling the occupants awake. In the ensuing haze, the woman turns the ignition and confusedly backs up the car at a snail's pace of three miles per hour. No one lies in the reversing car's path, but the officer shoots thirteen bullets at the driver anyway, killing her. At the officer's trial, should the jury learn that this driver was high at the time; that she had a criminal record; that there was an illegally possessed firearm in the car; or that the car was reported stolen, if the officer knew none of these things when he opened fire?

Imagine another police officer, who, effecting an arrest, chases after a fleeing teenage suspect. The teenager hops a fence and, running with his back to the officer (who now stands and watches him through the fence), clutches at his loose, baggy jeans to keep them from falling off. He is

unarmed. The officer shoots him in the back, killing him. In subsequent civil litigation, the officer claims he thought the boy was reaching for a gun when he grabbed with both hands at his baggy jeans. In determining whether the officer's actions were reasonable, should the jury learn that the officer had recently shot a different fleeing suspect in similar circumstances, making the same dubious (and incorrect) judgment that the suspect was grabbing at a gun and not trying to keep his pants from falling off?

No one should be defined by the worst thing they have done. Indeed, "[i]n a very real sense a defendant starts his life afresh when he stands before a jury."[1] Accordingly, the Federal Rules of Evidence erect certain careful barriers to letting evidence of a party's untoward past creep into trial. Essentially, evidence of a party's past cannot be used to besmirch their character or convince a jury that, because they acted poorly in the past, they likely acted poorly in the present case.[2] Though a past bad act might have *some* bearing on someone's present acts, "[t]he natural and inevitable tendency of the tribunal . . . is to give excessive weight to the vicious record of crime . . . and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."[3]

However, so-called past-acts evidence is not barred altogether. Instead, it comes into trial in two primary ways. The first is that someone's past acts can be admitted to prove something other than their propensity to act a certain bad way. Rule 404(b) of the Federal Rules of Evidence thus allows judges to admit evidence of one's past if it goes toward something other than propensity, including: "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[4] The second way such evidence enters trials is that testifying witnesses may be impeached with past-acts evidence showing that they are untruthful.[5] Judges face the difficult task of balancing this type of evidence's probative value for non-propensity purposes with its obvious potential to prejudice a jury.

But in civil litigation against officers for excessive force, a unique confluence of constitutional law, evidence law, and judicial discretion has created inequities in the admissibility of past-acts evidence. Inquiries into defendant officers' uses of force are increasingly narrowed to split-second decision-making, such that evidence of their pasts is rarely admissible for the purposes described above. Contrarily, highly prejudicial information

1. People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930).
2. FED. R. EVID. 404.
3. *Zackowitz*, 172 N.E. at 468 (quoting 1 JOHN HENRY WIGMORE, EVIDENCE § 194 (1923)).
4. FED. R. EVID. 404(b)(2).
5. *See* FED. R. EVID. 608, 609.

about plaintiffs—including past drug use, criminal records or acts, gang affiliation, and encounters with police—often makes it into trial under Rule 404(b), even when its relevance is attenuated. Accordingly, in the above examples, the evidence of the dead driver's past drug use and criminal possession could be admissible,[6] while the evidence of the second officer's past experiences with baggy jeans likely could not be used to show that a reasonable officer with his experience should have known better than to fire at the teenager's back.

This article explores this imbalance and proposes various reforms of the evidence rules. Part I explains the civil legal landscape for holding law enforcement and cities accountable for an officer's excessive force.[7] Part I continues by detailing the unique latticework of laws insulating law enforcement officers and their city employers from civil liability, including difficulties related to evidentiary discovery, *Graham v. Connor*'s "objective reasonableness" standard, the doctrine of qualified immunity, and the many ways in which the circumstances surrounding excessive force—that the violence often occurs during an arrest, for example—create large credibility hurdles for plaintiffs in subsequent litigation.

Part II discusses how past-acts evidence is treated differently for defendant officers and plaintiffs and how to fix the resulting inequities in what a jury hears.

First, I explain how the objective reasonableness standard of *Graham v. Connor*—namely, its refusal to consider an officer's ill intent—leads some courts to exclude 404(b) evidence of officers' past misconduct as irrelevant when going toward the officer's state of mind. I also show how certain courts assume any misconduct evidence about an officer would be too prejudicial to admit at trial. I critique this assumption, and conclude that judges should be more attuned to the unique prejudices facing plaintiffs in such litigation from the get-go when applying Federal Rule of Evidence 403's balancing test to assess the possibility that the probative value of evidence of an officer's past misconduct might be substantially outweighed by a danger of "unfair prejudice."[8] Furthermore, I suggest ways in which

6. Indeed, this evidence was admitted in a recent case. *See* Opening Argument at 24:00–26:00, State v. Hess, No. F17-00545-V (Tex. 292d Dist. Ct.—Dallas Feb. 3, 2020), https://youtu.be/YLAwT4C2_d8 [https://perma.cc/MW7P-85F30].

7. This article largely focuses on 42 U.S.C. § 1983 litigation, including *Monell* claims against officers, but also discusses state tort claims available in excessive force litigation, including battery and assault. And though this article occasionally discusses criminal cases, its exclusive focus is reforming civil litigation because of the unique evidentiary issues present in those cases, and civil suits' unique capacity to spark reform. *See infra* notes 35–36 and accompanying text.

8. FED. R. EVID. 403.

certain 404(b) theories—especially "absence of mistake" and "knowledge"—can be marshalled in support of admitting such evidence.

Second, I discuss how evidence of a plaintiff's past creeps into these cases under dubious Rule 404(b) theories. Most notably, judges often admit evidence of a plaintiff's past wrongdoing, even if unknown to the officer at the time of the excessive force, on the theory that a plaintiff's drug use, say, or knowledge of past illegal activity and fear of being caught, made it more likely that she acted erratically or violently during the police encounter. I question the validity of this reasoning and propose an amendment adopting a stricter balancing test for past-acts evidence concerning a plaintiff's drug use, criminal past (or present), encounters with police, or gang affiliation that is unknown to the officer at the time of the alleged excessive force.

Third, I discuss the evidentiary rules concerning impeachment of testifying witnesses. A witness's criminal record is often admissible to impeach their testimony. If a past felony involved lying, it is automatically admissible—regardless of prejudicial effect—as a so-called *crimen falsi*.[9] Other criminal records are easily admissible, though subject to certain light restrictions. Because police misconduct litigation stems from encounters with law enforcement, plaintiffs in these cases often have felony records and can be compelled to testify in civil litigation. As a result, evidence of plaintiffs' criminal records is often forced into the open at trial, connoting potentially devastating prejudicial effects beyond just damage to the credibility of their testimony. On the other end, similar evidence casting a pall on a testifying officer's truthfulness—including independent investigations by civilian complaint review boards finding, by preponderance of the evidence or clear and convincing evidence, that the officer fabricated evidence or falsified a police report—is not admissible under the impeachment rules.[10] At best, a lawyer may question the officer about such past misconduct; but if the officer denies it, the lawyer is out of luck because she cannot introduce the proof of the investigation's findings.

To rectify this imbalance, I consider multiple avenues of reform. One involves making a plaintiff's criminal record less easily admissible as impeachment evidence by using a stricter balancing test—a practice the Federal Rules of Evidence already adopt for criminal defendants.[11] I also explore extending the so-called *crimen falsi* rule to reports by civilian complaint review boards finding that an officer engaged in misconduct that

9. FED. R. EVID. 609(a)(2) ("[F]or any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.").

10. FED. R. EVID. 608(b).

11. FED. R. EVID. 609(a)(1)(B).

involved dishonesty, including falsification of police reports, fabricating evidence, and the like. This would make extrinsic evidence of such misconduct automatically admissible to impeach a testifying officer in police misconduct litigation.

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Civil litigation gives people harmed by law enforcement the opportunity to get recompense for their injury. But beyond that, it helps hold cities, police departments, and officers accountable for their actions, ensuring that communities trust those tasked with keeping them safe. This article seeks to identify and chip away at the complex intersections of law and bias that confound attempts to reform law enforcement through litigation.

I. THE POLICE MISCONDUCT LEGAL LANDSCAPE

Though legal remedies exist for addressing police officers' uses of excessive force, obstacles impede holding those officers accountable. This section begins by defining the terms "officer" and "misconduct" for purposes of this article; then, it discusses the civil and criminal routes available to address excessive force incidents, as well as the constitutional and structural difficulties inherent in pursuing such cases. Finally, it addresses the recent shift in public opinion about the police, concluding that, even if opinions have changed, the protections benefitting officers have not likely dissipated substantially.

This article limits its scope to police officers and prison guards who engage in allegedly excessive force while on the job. "Misconduct" thus refers to unjustified physical harms an on-duty officer inflicts on a citizen. Most of the cases discussed in this article involve fatal shootings by officers, but the article's evidentiary conclusions are by no means restricted to cases of deadly force. And though this article focuses on excessive force, its observations and proposed reforms may also apply in part to other types of police misconduct litigation, including that surrounding unlawful detentions, illegal searches, and sexual assault.[12]

Both federal and state remedies exist for plaintiffs injured by an officer's use of excessive force. The federal civil remedy for incidents of excessive force is found in 42 U.S.C. § 1983 ("§ 1983"). The statute gives plaintiffs a cause of action against state officials who, acting "under color of" their

12. For a discussion of the latter, see Fara Gold, *Investigating and Prosecuting Sexual Misconduct Committed by Law Enforcement: Federal Criminal Jurisdiction*, CRIM. JUST. MAG., Winter 2021, at 10–15.

authority, deprive them of any constitutional right.[13] Section 1983 litigation accommodates both compensatory and punitive damages.[14] Successful plaintiffs also collect attorney's fees.[15] Police use of force cases brought under § 1983 revolve around Fourth Amendment violations,[16] but the general nature of the claim hinges on whether the defendant is an individual officer or a municipality.

Section 1983 actions against individual officers are governed by the "objective reasonableness" standard articulated in *Graham v. Connor*.[17] The "reasonableness" of an officer's use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[18] In *Graham*, the Court noted that the "calculus of reasonableness" must not ignore that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[19] Importantly, the Court also stressed that the officer's state of mind is irrelevant—that is, that the "objective" standard means ignoring "underlying intent or motivation," such that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force."[20] Though an officer's intentions are irrelevant to the Fourth Amendment inquiry, they can inform punitive damages.[21]

A city may also be found liable for the constitutional violations of its officers in accordance with *Monell v. Department of Social Services*.[22] So-called *Monell* claims treat "[l]ocal governing bodies" as suable entities under § 1983.[23] However, local governments' liability is limited in multiple ways. First, municipalities are not held vicariously liable for the torts of employees; instead, plaintiffs must allege independently tortious conduct on the part of the local governing body which gave rise to a harmful incident.[24] The two primary avenues for *Monell* liability are: identifying an unconstitutional "police statement, ordinance, regulation, or decision

13. 42 U.S.C. § 1983. The evidentiary issues implicated in § 1983 litigation may also appear in *Bivens* actions in which plaintiffs are able to bring Fourth Amendment claims against federal law enforcement. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

14. *See* Smith v. Wade, 461 U.S. 30, 35 (1983).

15. 42 U.S.C. § 1988.

16. U.S. CONST. amend. IV; *see also* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 239–40 (2017).

17. 490 U.S. 386, 388 (1989).

18. *Id.* at 396.

19. *Id.* at 396–97.

20. *Id.* at 397.

21. *See, e.g.*, Montoya v. Shelden, 898 F. Supp. 2d 1279, 1306 (D.N.M. 2012).

22. 436 U.S. 658 (1978).

23. *Id.* at 690.

24. *Id.*

officially adopted and promulgated" by officials; or any "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking [sic] channels."[25] *Monell* claims thus require: first, a showing that an individual officer violated the plaintiff's constitutional rights; and second, that this violation stemmed from an unconstitutional local governing custom or policy.

State tort law also provides a remedy in excessive force cases. Typical cases allege assault and battery.[26] State assault and battery claims against officers usually require a type of negligence analysis; the inquiry involves looking at the entire encounter between the officer and plaintiff and asking whether the officer acted reasonably.[27] This inquiry can be more expansive than a Fourth Amendment objective reasonableness analysis, allowing for the inclusion of evidence not necessarily relevant in § 1983 litigation.[28] However, state tort law suffers multiple drawbacks when compared to its federal alternative: attorney's fees are not necessarily available for successful plaintiffs, and states often cap tort damages awards.[29] Accordingly, "[w]hile some Section 1983 plaintiffs also assert state tort claims, Section 1983 is the primary vehicle for excessive force claims against the police."[30]

Though criminal penalties exist under both state and federal law for an officer's use of excessive force, actual prosecutions—let alone successful ones—are rare.[31] State laws often outline the standards governing police uses of force, and the language echoes Fourth Amendment reasonableness standards.[32] The federal counterpart, 18 U.S.C. § 242, criminalizes

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25. *Id.*

26. *See, e.g.*, Trahan v. City of Oakland, 960 F.2d 152, 1992 WL 78090 (9th Cir. 1992); Clark v. Martinez, 295 F.3d 809 (8th Cir. 2002); Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005).

27. Garrett & Stoughton, *supra* note 16, at 241 (citing RESTATEMENT (SECOND) OF TORTS § 131 (AM. L. INST. 1965)).

28. *See id.*; *see also infra* notes 108–18 and accompanying text.

29. *See* Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 594 n.26 (2020).

30. *Id.* at 594.

31. Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Sept. 24, 2020, 1:26 PM), https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html%20%5b [https:/perma.cc/6LH7-W7PM].

32. *See, e.g.*, CAL. PENAL CODE § 835a(b) ("Any peace officer . . . may use objectively reasonable force to effect . . . [an] arrest, to prevent escape, or to overcome resistance."); TEX. PENAL CODE § 9.51(a) ("A peace officer . . . is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest."). States adopt slightly higher standards when an officer uses deadly force, often adopting language from *Tennessee v. Garner*, 471 U.S. 1 (1985). *See* CAL. PENAL CODE § 835a(c)(1)(B) (providing that fleeing felons may be killed only if the officer reasonably believes they pose an imminent threat of serious bodily harm to others); VT. STAT. ANN. tit. 20, § 2368(c)(1)(B) (same).

"willfully" depriving someone of their constitutional rights.[33] Fourth Amendment standards involving excessive force are thus subsumed within the criminal statute as well, with the addition of a willfulness *mens rea* element.

This article focuses on civil litigation for three main reasons. First, by holding cities and their officers financially accountable for wrongdoing, civil cases have a capacity to motivate systemic change in ways that criminal cases against individual officers do not.[34] Second, injunctive relief is available in civil litigation, allowing judges to fashion remedies to poor policing practices.[35] Finally, criminal statutes differ from civil ones enough that evidentiary issues (and litigation strategies) may differ between civil and criminal cases. This article thus narrows any proposed reforms to the civil context. However, because some similar evidentiary issues do surface in criminal cases in ways like those in the civil context, I do occasionally discuss criminal cases in this piece.

A. Structural Imbalances Unique to Cases Involving Officer Misconduct

Significant hurdles prevent effective litigation against officers, including substantive legal and constitutional barriers; procedural obstacles; and broader imbalances between how the alleged perpetrators and victims in such cases are viewed and treated. Understanding these barriers is essential to understanding the steep odds facing plaintiffs seeking recompense after officers have harmed them, as well as the evidentiary issues implicated in the lucky cases that make it to trial.

1. Constitutional Barriers

Two constitutional doctrines impact the excessive force cases at issue in this article. One concerns the Fourth Amendment, and the other is the doctrine of qualified immunity.

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33. 18 U.S.C. § 242.

34. It is true that officers usually do not shoulder the financial burden of civil litigation because cities indemnify them. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 885 (2014) ("police officers are virtually always indemnified"). However, the prospect of large damages can motivate cities to pursue change in police departments. To the extent this disincentivizes healthier policing practices, some scholars have also recommended treating police misconduct like medical malpractice and restructuring civilian payouts so that officers are responsible for damages. Rashawn Ray & Clark Neily, *Police Reform*, *in* A BETTER PATH FORWARD FOR CRIMINAL JUSTICE: A REPORT BY THE BROOKINGS-AEI WORKING GROUP ON CRIMINAL JUSTICE REFORM 6, 9–10 (Rashawn Ray & Brent Orrell eds., 2021), https://www.brookings.edu/wp-content/uploads/2021/04/Better-Path-Forward Brookings-AEI-report.pdf [https://perma.cc/V7JD-YE4B].

35. *See* 42 U.S.C. § 1983. For an example of injunctive relief changing policing practices, see Floyd v. City of New York, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013).

The Fourth Amendment's "objective reasonableness" standard narrows significantly the jury's inquiry into an officer's interaction with a plaintiff. This narrowing occurs in two primary elements of police misconduct litigation.

First, *Graham* precludes any analysis of an officer's intentions or state of mind when assessing whether her behavior was objectively reasonable.[36] Some courts have extrapolated from this and refused to consider an individual officer's background or training when determining whether their use of force was objectively reasonable and have instead simply "pretended they were in the officers' shoes and expressed their own views on whether the Fourth Amendment allowed the officers to use deadly force."[37] Accordingly, lower courts typically avoid considering officer training in § 1983 actions, with some exceptions.[38]

Second, the Supreme Court has consistently implied that estimations of Fourth Amendment reasonableness must heavily weigh an officer's "split-second" decisions at the time of the alleged excessive force, perhaps to the exclusion of broader inquiries into the officer's escalatory behavior leading up to the need to use it.[39]

In the context of civil suits, the Supreme Court's qualified immunity jurisprudence further limits officers' liability. Qualified immunity doctrine seeks to prevent "potentially disabling threats of liability" from impeding governmental officials' work.[40] The doctrine offers officers a defense against civil actions, rendering them immune from suit "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[41] The inquiry is comprised of two steps; the official's conduct must violate the plaintiff's constitutional right, and that violation must be of a clearly established law.[42]

In *Pearson v. Callahan*, the Court held that a court need not follow these steps in any particular order.[43] *Pearson* "allow[s] lower courts not to decide the first question—whether the [officer's] conduct was unconstitutional—if they could grant the motion [to dismiss under qualified immunity] on the

36. Graham v. Connor, 490 U.S. 386, 397 (1989).

37. Zamoff, *supra* note 29, at 616 (discussing Plumhoff v. Rickard, 572 U.S. 765 (2014)).

38. *See id.* at 631–33.

39. *Id.* at 619; *see also* Tennessee v. Garner, 471 U.S. 1, 23 (O'Connor, J., dissenting) (highlighting "the difficult, split-second decisions police officers must make"); City & County of San Francisco v. Sheehan, 575 U.S. 600, 612 (2015) ("The Constitution is not blind to 'the fact that police officers are often forced to make split-second judgments.'" (quoting *Plumhoff*, 572 U.S. at 775)).

40. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

41. *Id.* at 818.

42. Pearson v. Callahan, 555 U.S. 223, 232 (2009).

43. *Id.* at 242 (overturning Saucier v. Katz, 533 U.S. 194 (2001), which required these steps be proven sequentially).

ground that the right was not clearly established."[44] To be "clearly established," the right must be clear enough that "every reasonable official would have understood that what he is doing violates that right."[45] In determining whether a right was clearly established, courts must look to whether a past court has found substantially similar conduct to have violated the Constitution.[46]

The Court's qualified immunity jurisprudence presents at least two significant obstacles to excessive force litigation. The first is that, since excessive force cases are often "fact-specific," it is very difficult to find precedent similar enough to convince a court the plaintiff's right was clearly established.[47] Indeed, "nearly all of the Supreme Court's qualified immunity cases come out the same way – by finding immunity for the officials."[48] The second obstacle is the combination of requiring specific precedent to clearly establish rights with giving courts the ability to decide the "clearly established" question *before* "ruling on [plaintiffs'] underlying constitutional violation[s]."[49] This "ha[s] created a vicious cycle" whereby plaintiffs rely on precedent to establish their claims while courts "reduc[e] the frequency with which [they] announce clearly established law."[50] In effect, qualified immunity doctrine prevents the development of Fourth Amendment doctrine and offers officials a strong defense in civil suits.[51]

Qualified immunity doctrine confers a final procedural advantage on law enforcement officers. Even if a court *rejects* an officer's defense of qualified immunity, its decision denying immunity is immediately appealable in the federal circuit courts.[52] This ability "gives the defendant official a significant procedural advantage" because the appeals process can "stay and

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44. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 17 (2017).

45. Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam) (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012).

46. *See, e.g.*, Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8–9 (2021) (per curiam) (comparing facts between two cases involving officers kneeling on the plaintiff and finding no clearly established law); City of Tahlequah v. Bond, 142 S. Ct. 9, 12 (2021) (per curiam) (engaging in a similar detailed factual comparison and finding no clearly established law).

47. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814 (2018); Marcus R. Nemeth, *How Was* That *Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 1011 (2019); Schwartz, *supra* note 44, at 24.

48. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018).

49. Joanna C. Schwartz, *supra* note 47, at 1815.

50. *Id.* at 1815–16.

51. *See* Erwin Chemerinsky, Opinion, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html [https://perma.cc/CPQ6-JU9R].

52. Mitchell v. Forsyth, 472 U.S. 511, 512 (1985).

therefore delay [further] proceedings in the district court."[53] Beyond the delay, the appeals process also adds "significant litigation costs on § 1983 plaintiffs."[54] Plaintiffs may thus be stuck fighting the qualified immunity decision in the courts of appeals, unable to build the rest of their case against the officer and, often, the municipality.

2. *Procedural Barriers and Credibility Contests*

Even absent the constitutional legal protections officers enjoy, plaintiffs face broad statutory impediments to suing them. Most plaintiffs alleging police misconduct in § 1983 claims were injured during an altercation with police—during an arrest, responding to a disturbance call, and so on. This often creates legal impediments to pursuing a claim in the first place, and, once a plaintiff gets to court, can ensure that they face skeptical juries. If a plaintiff can get to trial, the ensuing credibility contest between the parties can be a stacked game.

The impediments to successful excessive force litigation may begin with barriers to plaintiffs suing in the first place. In *Heck v. Humphrey*, the Court held that a plaintiff was barred from suing under § 1983 if their suit revolved around "harm caused by actions whose unlawfulness would render a conviction or sentence invalid."[55] In other words, if someone is arrested for a crime and, during the course of that arrest, is subject to excessive force, they may be unable to sue under § 1983 if they are convicted or plead guilty to the underlying offense for which they were being arrested.[56] Such cases—where the validity of the plaintiff's conviction is impacted by the officer's actions—can appear when people are harmed by officers in an altercation, the officer claims they resisted arrest, and they take a favorable plea bargain, accepting guilt; as a result, they forfeit the ability to bring § 1983 claims based on the incident.[57]

Officers can and do manufacture charges to cover up uses of force that may have been excessive—a strong reason for ensuring that their credibility be impeachable at trial. In some circumstances, after a questionable use of force, an officer will invent so-called "cover charges" and arrest the would-

53. MARTIN A. SCHWARZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES § 9A.16 (Aspen Publishers 4th ed. Supp. 2022).

54. *Id.*

55. 512 U.S. 477, 486 (1994).

56. *Id.* at 486–87.

57. Tamara F. Lawson, Essay, *Powerless Against Police Brutality: A Felon's Story*, 25 ST. THOMAS L. REV. 218, 233–34 (2013).

be plaintiff for an offense like resisting arrest or assaulting an officer.[58] This may bar the injured citizen from suing the officer or department, and will bog them down regardless, making a lawsuit less likely. A recent ProPublica investigation of cover charges in Jefferson Parish, Louisiana, found that African Americans were disproportionately affected.[59] The article found that cover charges are "likely to have an undue impact on Black people, who are most likely to be victims of or witnesses to police abuse," and who "likely won't have the resources to 'defend themselves successfully, even if innocent.'"[60] The United States Department of Justice has uncovered this practice as part of investigations of different cities' police departments.[61] The fact that this practice has been found in multiple cities suggests that many officers are willing to falsify reports to avoid being held responsible for using excessive force. In cover charge-related cases in which a plaintiff makes it to court, success may depend on challenging the officer's truthfulness.

Even if a potential plaintiff's suit is not categorically barred, excessive force litigation is likely an afterthought if a plaintiff faces separate charges stemming from the incident. A plaintiff's top priority may be defending criminal charges, and they may shy away from piling on lengthy civil litigation.[62] These hurdles mean that a large percentage of excessive force incidents are never reported and vindicated via civil litigation.[63]

Once in court, plaintiffs may face skeptical juries because they "have a history of criminal activity, and [are those] whose status in life per se lowers their credibility in the eyes of those that might judge them."[64] As I discuss below, the Federal Rules of Evidence may well cement some of these imbalances by, among other things, allowing plaintiff witnesses' criminal records into trial, admitting evidence of a plaintiff's drug use or gang

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58. Richard A. Webster, *He Was Filming on His Phone. Then a Deputy Attacked Him and Charged Him with Resisting Arrest*, PROPUBLICA (Dec. 22, 2021, 7:00 AM), https://www.propublica.org/article/he-was-filming-on-his-phone-then-a-deputy-attacked-him-and-charged-him-with-resisting-arrest [https://perma.cc/MMY3-642C].

59. *Id.*

60. *Id.*

61. *Id.* (citing U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/W5JE-9VM4].

62. Garrett & Stoughton, *supra* note 16, at 242 n.145.

63. *See* Kenneth Adams, *Measuring the Prevalence of Police Abuse of Force*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 52, 68–70 (William A. Geller & Hans Toch eds., 1996).

64. Gold, *supra* note 12, at 10. Professor Gold's article discusses these credibility issues primarily in the context of victims' allegations of officers sexually abusing them, but the same factors work against plaintiffs' credibility in excessive force cases.

affiliation, and preventing discovery or admission of evidence which might cast doubt on the defendant officers' credibility.

The "desire of jurors to give officers the benefit of the doubt" presents another burden to overcome when alleging excessive force.[65] Furthermore, in fatal police incidents, the victim will go unheard, and "[i]t is all too easy for the officer, in hindsight, to magnify the perceived threat to justify his or her actions. When the officer is white, and the victim is a young man of color, the reality of unconscious racism also matters as events are interpreted."[66]

3. *Cities' Unique Protections*

Finally, there are unique obstacles to successfully suing municipalities for the misconduct of their officers. *Monell* claims require plaintiffs to prove that a municipal policy or custom was the cause of their injury (rather than, say, a single errant officer),[67] and this standard "is rarely met."[68] Because *Monell* claims concern different theories of liability than claims against individual officers, they often implicate different types of evidence and legal theories. This in turn creates procedural hurdles that confound plaintiffs.

Primary among these hurdles is trial bifurcation. Courts often bifurcate trials in which both officers and cities are sued.[69] The Supreme Court has held that, in bifurcated cases, a jury finding that an individual officer did not in fact violate the plaintiff's rights can extinguish the subsequent *Monell* claim on standing grounds.[70] That decision has created a two-step order to

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65. Erwin Chemerinsky, *Police Dodge Accountability for Deaths*, ORANGE CNTY. REG. (Dec. 7, 2014), https://www.ocregister.com/2014/12/07/erwin-chemerinsky-police-dodge-accountability-for-deaths/ [https://perma.cc/RW72-W4WS]. A lack of diversity in jury pools often leads to mainly white juries, who polls show trust police at much higher rates than African Americans. At trial, juries will thus often skew toward supporting an officer's side of a story. *See* Jonathan M. Warren, *Hidden in Plain View: Juries and The Implicit Credibility Given To Police Testimony*, 11 DEPAUL J. FOR SOC. JUST. 1, 5 (2018) (discussing this trend); Ashish S. Joshi & Christine T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, AM. BAR ASS'N (2015), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/ [https://perma.cc/69CB-QE8B].

66. Chemerinsky, *supra* note 65.

67. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (rejecting the application of respondeat superior principles to municipalities in § 1983 litigation and stressing the need to show that the local government's actions actually caused the harm).

68. Chemerinsky, *supra* note 65.

69. Matthew J. Cron, Arash Jahanian, Qusair Mohamedbhai & Siddhartha H. Rathod, *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 DENVER U. L. REV. 583, 605 (2014).

70. City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam) (finding the fact that a city's policy "might have *authorized* the use of constitutionally excessive force is quite beside the point" when no such violation harmed the plaintiff).

bifurcated claims against both officers and municipalities, in which the plaintiff needs to first prove the officer's liability before even having the *Monell* claim available.[71] Beyond the ordering issue, bifurcation's "result . . . is to make the task of proving municipal liability even more onerous" because of "increased costs" associated with multiple trials, "burdensome discovery," and the inability "to place before the jury the circumstances and atmosphere of the entire cause of action."[72] And even if the trial is not bifurcated, claims against the city may be substantially delayed if the individual officer's qualified immunity defense is denied and then appealed.[73] Finally, beyond the difficulties litigating the claims, plaintiffs often "have little economic incentive to bring *Monell* claims" because they "cannot recover punitive damages" in such cases.[74]

Between the lack of incentive to bring *Monell* claims, the difficulty of winning them, and the frequency of splitting up § 1983 litigation against officers and cities such that a municipality's allegedly harmful policies and customs are never discovered or heard of in a court room,[75] "civil rights litigation is presently structured to avoid questions of policy and training if at all possible, and focuses only on the case-by-case facts of a particular encounter."[76] This inability to surface information about and hold cities accountable for their policies means that "municipalities that fail to train, supervise, or discipline their police forces have less incentive to implement reforms, and are likely to continue their illegal practices."[77]

B. Changing Times

The obstacles to successfully pursuing § 1983 claims against officers and municipalities make it exceptionally difficult for plaintiffs to win such suits and thus incentivize meaningful reform. In recent years, an increased public outcry over fatal encounters with police has led to an increase in criminal prosecution of officers. This article does not seek to quantify changes in public opinion or case outcome. But it is important to question whether and

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71. Cron et al., *supra* note 69, at 605.

72. *Id.* (quoting Est. of Owensby v. City of Cincinnati, 385 F. Supp. 2d 626, 666 (S.D. Ohio 2004)).

73. *See supra* notes 53–55 and accompanying text (discussing interlocutory appeals of qualified immunity denials).

74. Cron et al., *supra* note 69, at 605.

75. This assumes the plaintiff's case either fails at the individual officer level or, after a success, fizzles out via settlement with the city or otherwise is dropped due to the lack of incentive to continue with significantly complex litigation.

76. Garrett & Stoughton, *supra* note 16, at 239.

77. Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 509 (1993).

to what extent recent shifts in public opinion or case outcome might impact some of the disadvantages plaintiffs face in such cases. For example, jurors may distrust defendant officers' testimony now in ways they would not have a decade ago. Or jurors may be less likely to give officers the benefit of the doubt.

In the past decade, an increasing number of highly publicized criminal officer prosecutions have been successful.[78] In 2021, Derek Chauvin was found guilty of murdering George Floyd,[79] and Kim Potter was convicted of manslaughter after she allegedly mistook her gun for her taser and killed Daunte Wright.[80] To many, these convictions promise greater accountability for officers who harm people on duty.[81]

However, beyond some high-profile convictions, "accountability for officers who kill remains elusive and that the sheer numbers of people killed in encounters with police have remained steady at an alarming level."[82] There is also some evidence to suggest that there has not been a meaningful change in chances of success in civil litigation.[83] Similarly, though many states have experimented with reforming the law—including making police misconduct records more accessible to the public and defunding the police—few statutory reforms have tackled civil litigation itself.[84] Doing so could herald meaningful reform in police departments.[85]

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78. *See* Aya Elamroussi et al., *Ex-Officer Kim Potter Wouldn't Have Been Convicted in Daunte Wright's Fatal Shooting Years Ago, Legal Experts Say*, CNN (Dec. 24, 2021, 6:33 AM), https://www.cnn.com/2021/12/24/us/kim-potter-conviction-friday/index.html [https://perma.cc/RN4X-W4QA].

79. Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR (April 20, 2021, 5:37 PM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial [https://perma.cc/H9DD-C4ZV].

80. Vanessa Romo, Becky Sullivan & Joe Hernandez, *Kim Potter Is Found Guilty of Manslaughter in the Death of Daunte Wright*, NPR (Dec. 23, 2021, 3:58 PM), https://www.npr.org/2021/12/23/1066012247/kim-potter-trial-daunte-wright [https://perma.cc/39ZK-KQMK].

81. *See, e.g.*, Charles M. Blow, Opinion, *With the Chauvin Verdict, One Battle Is Won. The War Continues*, N.Y. TIMES (Apr. 21, 2021), https://www.nytimes.com/2021/04/21/opinion/derek-chauvin-verdict-guilty.html [https://perma.cc/8QD6-5ACG]. *But see* Alan Dershowitz, Opinion, *The Dangerous Trend Behind Officer Kim Potter's Conviction*, THE HILL (Dec. 24, 2021), https://thehill.com/opinion/judiciary/587236-the-dangerous-trend-behind-officer-kim-potters-conviction [https://perma.cc/WXP8-FRKQ].

82. Tim Arango & Giulia Heyward, *Despite Uproar over Floyd's Death, the Number of Fatal Encounters with Police Hasn't Changed*, N.Y. TIMES (Dec. 24, 2021), https://www.nytimes.com/2021/12/24/us/police-killings-accountability.html [https://perma.cc/XWY2-2U7H].

83. *See, e.g.*, Webster, *supra* note 58.

84. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/3HTT-3U5Q].

85. Cron et al., *supra* note 69, at 606–07.

II. EVIDENTIARY ISSUES AND PROPOSED SOLUTIONS

Once in trial, plaintiffs' and defendant officers' pasts become a hotly-litigated point of contention. Plaintiffs seek information about an officer's past misconduct, while officers seek information about a plaintiff's past run-ins with the law, drug use, and the like. This section discusses such disputes by evidentiary topic—discovery, relevance, past-acts evidence, and impeachment. Within each topic, I discuss the typical arguments for and rulings on admissibility, and then I propose changes to the rules of evidence (or their application) where advisable.

First, plaintiffs are often unable to even find officers' misconduct records via discovery, let alone seek their admission. This results both from the confidentiality of certain records of officer misconduct and from often-successful motions by the municipality to bifurcate a trial against it and an offending officer. This article endorses recent efforts to make misconduct records more easily available to the public—and thus more easily discoverable.

Second, both plaintiffs and defendant officers frequently seek to introduce past acts via FRE 404(b)—including evidence of a plaintiff's drug use or gang affiliation and evidence of a defendant's record of misconduct—with varying success. I recommend that certain types of evidence about a plaintiff in a civil suit—namely, some past-acts evidence and drug-use evidence—be subject to a stricter balancing test than that found in FRE 403. I explore the possibility of rules expanding the ability to introduce past officer misconduct records into trial as well via 404(b), but ultimately conclude that a faithful application of the rule, paired with a reasoned application of 403, arrives at a fair result.

Finally, the impeachment rules often allow the admission of strongly prejudicial information about a plaintiff's criminal record, while keeping out the findings of official investigations into an officer's misconduct, including false police reports. This has the potential to exacerbate already wide credibility differentials between plaintiffs and defendants. I explore two possibilities to rectify this problem: limiting information admissible about a plaintiff's criminal record via Rules 608 and 609, and creating a version of *crimen falsi* in § 1983 suits in which extrinsic evidence of any internal affairs investigations finding reliable evidence of fabricating a police report be automatically admissible as impeachment evidence against a testifying officer.

A. Discovery and Evidentiary Dissonance in Joint Officer-Municipality Litigation

Before plaintiffs and defendants can fight over evidence's admissibility, they need to have discovered evidence to admit. Discovery is essential to both the evolution of a civil case and, often, to public awareness about the issues the case raises. For example, discovery in the civil litigation against tobacco companies in the nineties brought to light "devastating" information about the "companies' many secrets," including widespread fraudulent practices; it is credited with helping shift public opinion about smoking and leading toward the global settlement agreement that concluded the litigation.[86] Discovery can be equally promising in cases involving police misconduct, especially when municipalities are involved.[87] However, the confidentiality of police misconduct records, trial bifurcation, and rapid settlements with cities all impede effective discovery.

1. Police Misconduct Records and Reports

Records of police misconduct come in different forms. Police departments have internal affairs teams that review and investigate civilian complaints of officer misconduct.[88] Police departments also have records of performance evaluations and disciplinary write-ups.[89] Outside police departments, some cities have created independent review boards that conduct their own investigations of officers following civilian complaints.[90] The United States Department of Justice also occasionally conducts investigations of police officers and departments.[91]

These records and investigations can be valuable evidence of jurisdiction-wide unconstitutional police practices and an individual

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86. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 304 (2021); *see also id.* at 360 n.381 (connecting discovery in the opioid litigation with a shift in public opinion from blaming addicts to blaming opioid manufacturers).

87. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

88. *See, e.g.*, *Internal Affairs Division*, S.F. POLICE, https://www.sanfranciscopolice.org/internal-affairs-division [https://perma.cc/3E49-Y27W] (last visited Sept. 4, 2022); *Internal Affairs*, SAN JOSE POLICE DEP'T, https://www.sjpd.org/about-us/organization/office-of-the-chief-of-police/internal-affairs [https://perma.cc/GQY3-RM89] (last visited Sept. 4, 2022).

89. Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745 (2015).

90. *See About CCRB*, NYC CIVILIAN COMPLAINT REVIEW BOARD, https://www1.nyc.gov/site/ccrb/about/about.page [https://perma.cc/JMA5-TBSC] (last visited Sept. 4, 2022).

91. *See, e.g.*, U.S. DEP'T OF JUST., *supra* note 61.

officer's pattern of misconduct.[92] States treat these records with varying levels of confidentiality. Some jurisdictions make them "freely available," while others "make this information so confidential that not even the prosecutor can access the files without a court order."[93]

Cities and police departments might prefer that certain misconduct records stay confidential.[94] Especially in jurisdictions that make the products of internal affairs and civilian review board investigations inaccessible to the public, discovery is an essential tool to uncover patterns of abuse in police departments and records of individual officers' past acts. I echo the work of multiple other scholars who argue that these records ought to be made publicly available, as they can present valuable evidence in trials against officers (as well as valuable impeachment evidence against officers testifying in other trials).[95]

Cities also can and do use settlements to keep damning evidence under wraps. Though this practice is probably not an issue addressable in the rules of evidence, it is essential to understanding the importance of evidence in municipalities' possession in officer misconduct litigation. As an example, the city of Chicago sought to avoid public disclosure of damning dashcam footage of Laquan McDonald's shooting via a settlement whose terms required that the video "remain sealed until investigations are complete."[96] Potential state policies that would make such footage—as well as police misconduct investigations—publicly accessible warrant further study.

2. *Trial Bifurcation*

Trial bifurcation causes serious evidentiary consequences regarding both discovery and admissibility. Cities often successfully move to bifurcate the trial and require plaintiffs to resolve claims against the individual officer before any proceedings on the *Monell* claim.[97] As a result, the discovery process is often limited to the individual officer's case as opposed to larger

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92. For the former, see *Floyd*, 959 F. Supp. 2d at 540; for the latter, see Lewis v. City of Albany Police Dep't, 547 F. Supp. 2d 191 (N.D.N.Y. 2008).

93. Abel, *supra* note 89, at 745–46.

94. Multiple practitioners with whom I spoke suggested that this was a common reason for cities settling claims pre-discovery.

95. *See* Abel, *supra* note 89, at 746; Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339 (2018).

96. *Timeline: The Shootings of Laquan McDonald, Ronald Johnson*, CBS CHICAGO (Dec. 7, 2015, 11:56 AM), https://chicago.cbslocal.com/2015/12/07/timeline-the-shootings-of-laquan-mcdonald-ronald-johnson/ [https://perma.cc/VY72-9S7Y]; Jessica Glenza, *Chicago Officials Delayed Release of Laquan McDonald Shooting Video*, GUARDIAN (Jan. 1, 2016, 1:35 PM), https://www.theguardian.com/us-news/2016/jan/01/chicago-officials-delayed-release-laquan-mcdonald-shooting-video [https://perma.cc/6E9B-WLPE].

97. Cron et al., *supra* note 69, at 605.

trends or practices within the department. And as discussed above, the case is likely to dry up before litigating the *Monell* claim due to lack of incentives to continue the case, even after successfully suing the individual officer. As a result, discovery may never uncover valuable information about city training, policies, and other officers' misconduct.

Floyd v. City of New York presents a telling example of the value of discovery in unearthing misconduct.[98] In *Floyd*, plaintiffs who claimed to have been subject to illegal *Terry* stops by New York City police officers brought a class action against the city under § 1983.[99] The plaintiffs asserted individual claims of illegal stop-and-frisks, which they alleged stemmed from broader policies and customs within the department.[100] After finding most—but not all—of the individual stops unconstitutional, Judge Shira Scheindlin found that the city's policies had violated the plaintiffs' Fourth and Fourteenth Amendment rights.[101] Because the case was consolidated as a class action, and because the claims against individual officers were not siphoned off from the *Monell* claim, the parties were able to uncover through discovery a wealth of damning evidence about city practices.[102] Furthermore, because the plaintiffs sought injunctive relief, the finding of *Monell* liability forced the city to make "immediate changes to the NYPD's policies, a joint-remedial process to consider further reforms, and the appointment of an independent monitor to oversee compliance with the remedies ordered" in the case.[103]

Though *Floyd* took place in a class action context, the case offers compelling evidence in favor of holding a unified trial against officers and municipalities under § 1983 because otherwise, the trial (and discovery) against the city will be unlikely to occur. Judges should accordingly look skeptically at cities' bifurcation motions and weigh countervailing arguments far more heavily than many currently do.[104] But most important for the evidentiary purposes of this paper, eliminating trial bifurcation allows for broader discovery, helping plaintiffs actually uncover the misconduct records that could prove relevant in litigation.

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98. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).
99. *Id.* at 556.
100. *Id.*
101. *Id.* at 558–62.
102. *See generally id.* at 589–607.
103. *Id.* at 667.
104. For strong arguments against bifurcating joint officer-municipality trials, see Colbert, *supra* note 77, at 532.

B. Relevance

The complex nature of excessive force law leads to disputes over the relevance of common past-acts evidence both parties seek to admit. Rule 401 of the Federal Rules of Evidence defines relevant evidence as that which "has any tendency to make a fact more or less probable than it would be without the evidence."[105] Under Rule 402, irrelevant evidence is inadmissible.[106]

In this section, I argue for an expansive view of relevance to accommodate ambiguities in objective reasonableness jurisprudence. I also argue in favor of an altered balancing test in civil litigation when introducing certain evidence against a plaintiff—including drug evidence, felony status, and gang affiliation—when its relevance is attenuated or obscure.

1. Evidence Implying an Officer's State of Mind or Knowledge

Graham v. Connor's objective reasonableness standard rears its head when assessing past-acts evidence related to an officer's state of mind. The intermingling of relevance and objective reasonableness makes for opaque admissibility decisions. Ultimately, I argue that evidence of an officer's past experiences can often be relevant to what they knew at the time of an incident of excessive force, and that courts may be too quick to assume the evidence's irrelevance.

Evidence suggesting an officer's ill intentions or temper is inadmissible to prove liability under the *Graham* standard. *Phillips v. Irvin*, a case from the Southern District of Alabama, presents a telling example.[107] There, a plaintiff sought to introduce evidence of an officer's past bad acts;[108] he made arguments under FRE 404(b) that past misconduct showed the officer's intent to hurt him, and sought to introduce extrinsic evidence of other misconduct to impeach the officer when he claimed he did not "have a temper."[109] The court rejected these attempts, stressing that the *Graham* standard forbids considering an officer's intent.[110] On the impeachment question, the officer's temper was not "material" to the case for the same

105. FED. R. EVID. 401(a).
106. FED. R. EVID. 402.
107. No. 05-0131-WS-M, 2007 WL 2310038 (S.D. Ala. July 27, 2007).
108. Past bad acts evidence often implicates relevance issues; Rule 404(b) of the Federal Rules of Evidence is discussed in greater depth below.
109. 2007 WL 2310038, at *2–3.
110. *Id.*

reason.[111] Courts throughout the country treat this type of evidence similarly.[112]

State tort claims against officers which require proving *mens rea* elements may not pose the same problem for plaintiffs. State assault and battery tort claims, for example, often have intent elements; as a result, in such cases a court is more likely to find evidence going toward an officer's intent to harm a plaintiff as relevant.[113] Plaintiffs often combine § 1983 claims with state tort claims, and in cases where they differ as to intent elements, courts are mixed as to whether to exclude them as failing Rule 403's balancing test. In *Trahan v. City of Oakland*, the Ninth Circuit held that an officer's "prior acts of excessive use of force against minorities in his duties as a police officer" were admissible for the plaintiff's state tort claims but not the § 1983 claim.[114] In doing so, the court criticized (and reversed) the district court's exclusion of the evidence, believing it to have "overestimated the potential for prejudice" and "undervalued the probative value of the evidence."[115] However, other courts to consider this issue often find past misconduct evidence to be unfairly prejudicial.[116] Finally, since evidence of ill intent is relevant for punitive damages, courts may bifurcate the liability portion of a trial from damages as a way of avoiding any prejudice.[117]

Evidence going toward an officer's knowledge of the circumstances is more likely to be relevant and shows how difficult it is to draw a clear line when making admissibility decisions under Rules 401 and 402. A recent Seventh Circuit case, *Burton v. City of Zion*, presents a useful example.[118] In March 2014, the plaintiff, Kasey Burton, was driving with a suspended

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111. *Id.* at *4.

112. *See, e.g.*, Helfrich v. Lakeside Park Police Dep't, 497 F. App'x 500, 508 (6th Cir. 2012) ("[E]vidence tending to reveal Rodriguez's subjective state of mind is irrelevant to Helfrich's federal excessive-force claim and therefore excludable under Rule 402."); Moriconi v. Koester, 659 F. App'x 892, 895 (7th Cir. 2016); Palmer v. Nassan, 454 F. App'x 123, 126 (3d Cir. 2011); Trahan v. City of Oakland, 960 F.2d 152, 1992 WL 78090, at *2 (9th Cir. 1992).

113. *See Trahan*, 1992 WL 78090, at *2; Tanberg v. Sholtis, 401 F.3d 1151, 1168 (10th Cir. 2005) (stating that the subjective element of a state tort claim against an officer might permit admission of intent-related evidence, but excluding evidence of prior acts as prejudicial); *cf.* Clark v. Martinez, 295 F.3d 809, 813–14 (8th Cir. 2002) (analyzing state battery elements and finding that they did not support the type of intent evidence the plaintiff sought to introduce).

114. *Trahan*, 1992 WL 78090, at *1, *3.

115. *Id.* at *3.

116. *Helfrich*, 497 F. App'x at 508–09; *Tanberg*, 401 F.3d at 1168.

117. On the other hand, such bifurcation is not necessary; in cases where liability and the possibility of punitive damages are decided together, such evidence can be admissible along with a limiting instruction. *See* Helena v. City of San Francisco, No. C04-0260 CW, 2006 WL 1140953, at *7 (N.D. Cal. May 1, 2006).

118. 901 F.3d 772 (7th Cir. 2018).

license.[119] An officer drove up behind her and activated his squad car's emergency lights.[120] But Burton did not pull over.[121] Instead, she continued to drive, obeying traffic laws, even when multiple other officers joined in the pursuit.[122] She eventually parked at her home and got out of the car. Officer Joseph Richardt ran up and pulled her to the ground by "incorrectly executing a 'straight-arm take down'" and another officer knelt on Burton's back, injuring her while arresting her.[123] The jury heard these facts, including Burton's refusal to stop the car when first signaled, and found for the defendant officers.[124]

But the jury was *not* told that, six years prior, in 2008, the same Officer Richardt had tased Kasey Burton during an altercation, and the city had subsequently settled a federal lawsuit she brought against it.[125] Burton drove home so there would be witnesses in case the officers did anything to hurt her.[126] Officer Richardt knew who Burton was when he joined in her pursuit in 2014.[127] The district court excluded the evidence of Richardt's having tased Burton in 2008 on relevance grounds, stating that their first encounter had occurred too far in the past and had involved different type of altercation—tasing—and that Kasey Burton's state of mind was irrelevant to the excessive force inquiry.[128]

The Seventh Circuit rejected this analysis, stressing that "[a]lthough neither Burton's state of mind nor Richardt's subjective intent were relevant, Officer Richardt's knowledge at the time certainly was."[129] Because Richardt knew "that Burton had previously been subjected to excessive police force," by himself no less, his "knowledge was . . . critical" in considering why Burton did not stop her car.[130] To the court, "[i]t surely would have been a known fact and circumstance that a reasonable officer would have put in the mix when assessing the level of force required to subdue her."[131] The court noted that officers may "certainly" take a "suspect's history into account in deciding on a reasonable amount of force" to use, and pointed out that "it would create an odd asymmetry to say that a

119. *Id.* at 775.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 775–76.
124. *Id.* at 776.
125. *Id.* at 775.
126. *Id.*
127. *Id.* at 780.
128. *Id.* at 777–78. The district court in part applied a four-part test involving evidence's admissibility under Rule 404(b), but for purposes of this section I focus on the relevance issues.
129. *Id.* at 780.
130. *Id.*
131. *Id.* at 781.

police officer may consider a suspect's prior bad acts when considering the amount of force to use, but need not consider his own prior bad acts."[132]

The court understood that an officer's objectively reasonable act might well be informed by an understanding of why or how a specific person is acting. As an example, the court imagined a hypothetical in which Richardt yelled at a suspect with her back to him to turn around and tased her when she ignored his order, only to find out that she was deaf; would a reasonable officer do the same the second time around if he recognized the same woman?[133] In these situations, the past bad acts evidence is admissible because it is "used only to demonstrate that [the officer] knew about some characteristic of the suspect that he should have considered before using the level of force that he did."[134]

But what if an officer's experiences inform a more generalized knowledge, either of how suspects perceive them or what their behaviors indicate? Though obviously more attenuated than specific facts known about past experiences with *individual* suspects, the Seventh Circuit's reasoning could conceivably support a broader inquiry.

Two examples illustrate the point. First, the *New York Times* recently ran an exposé on a Pennsylvania state trooper named Jay Splain who has, during his tenure in a "largely rural area[]," shot and killed four separate suspects, two of whom were unarmed.[135] This "extraordinary tally" is far from the norm.[136] Imagine an officer in a similar situation, called X. Say Officer X pulled someone over in this rural part of Pennsylvania and, after identifying himself, the suspect grew visibly nervous and started to drive away. Would an objectively reasonable officer in X's position connect the dots—that is, that the suspect only got nervous after hearing his name—and could this in turn alter the types of force that would be reasonably available to him? Would objective reasonableness here require a different amount of force than had there not been such an exposé? It could be impossible to confirm that the suspect had read the article (say, if X shot and killed him as he fled), but does this not have "*any* tendency" to make that fact more probable?[137]

As a second example, imagine Officer Y is chasing a suspect on foot. The suspect climbs a fence, jumps to the ground, collects himself, and continues running while pulling at the waistband of his baggy jeans.

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132. *Id.*

133. *Id.* at 782–83.

134. *Id.* at 783.

135. Kim Barker et al., *After 4 Killings, 'Officer of the Year' Is Still on the Job*, N.Y. TIMES (Dec. 30, 2021), https://www.nytimes.com/2021/12/30/us/pennsylvania-trooper-jay-splain-investigation.html [https://perma.cc/YYW3-UBRX].

136. *Id.*

137. FED. R. EVID. 401 (emphasis added).

Officer Y immediately shoots him in the back, killing him. It turns out that the suspect was unarmed and was trying to hold up his pants as he ran. Imagine next that Officer Y has shot or chased other fleeing suspects in similar situations and mistaken the same hand movement of holding up a waistband for an effort to grab at a weapon. Should Officer Y's accumulated knowledge pass Rule 401's relevance test? An officer in Fresno, California, recently shot and killed a fleeing suspect; a video of the incident shows the unarmed 16-year-old "holding up his baggy pants" as he runs.[138] It does not seem beyond the pale to imagine that, if there were past similar incidents involving this tragic mistake, they could be relevant as informing what was objectively reasonable for an officer with such accumulated experience to do in that situation.

In determining evidence's relevance, courts may too quickly draw the line between specific incidents with the same plaintiff and other incidents which might inform their knowledge of why someone is acting the way they are acting. Courts should instead be open to a broad spectrum of relevance when assessing the particular facts of each excessive force case.[139]

2. *Evidence of Things Unknown to an Officer*

Just as evidence of things known to an officer may be relevant in excessive force cases, things *unknown* to the officer are irrelevant when determining whether they acted reasonably. For example, if an officer encounters a suspect holding a gun and shoots that suspect in a standoff, it would be irrelevant in assessing that officer's actions that, unbeknownst to the officer, the suspect's gun was unloaded and thus harmless.[140] But defendant officers and municipalities often successfully seek to admit prejudicial evidence about a plaintiff—drug use, criminal record, or gang affiliation, for example—that was completely unknown to the officer at the time of a use of force. Though some justifications for admitting such

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138. Liz Gonzalez, *Fresno Leaders Speak Out on Video of Officer-Involved Shooting That Left Teenager Dead*, FOX26NEWS (Oct. 25, 2019), https://kmph.com/news/local/fresno-leaders-speak-out-on-video-of-officer-involved-shooting-that-left-teenager-dead [https://perma.cc/SK6X-KKPN]. For a similar case, see *Oklahoma Police Captain Guilty of Manslaughter in Teen's Death*, CBSNEWS (Nov. 26, 2013, 7:45 PM), https://www.cbsnews.com/news/oklahoma-police-captain-guilty-of-manslaughter-in-teens-death/ [https://perma.cc/QWN7-YUWS].

139. This is not to suggest that all such evidence would be admissible; proper application of Rule 403 may well preclude the evidence's admission as too prejudicial. But acquaintance with the caselaw shows that judges skew too far away from admissibility when determining both relevance and possible prejudice of police misconduct evidence.

140. *See* Jones v. Sandusky Cnty., 96 F. Supp. 3d 711, 716–18 (N.D. Ohio, 2015) (refusing to allow evidence that the decedent's shotgun was unloaded, because the officer did not know it at the time of the alleged excessive force).

evidence may exist in certain circumstances,[141] its admission should be a rare exception and not the norm, as its relevance is often attenuated at best. Because this issue surfaces most commonly in the context of character evidence and impeachment, I reserve a complete discussion for below.

C. Rule 403: Balancing

Federal Rule of Evidence 403 provides the balancing test informing a judge's decision about whether to admit otherwise relevant evidence.[142] The judge may introduce any relevant evidence, but may also exclude it if its probative value is substantially outweighed by, among other things, a danger of unfair prejudice.

Two common evidentiary issues related to Rule 403 surface in the excessive force context. The first involves evidence of an officer's past misconduct; the second, evidence of a plaintiff's past behavior and criminal record. In both situations, courts differ on how they apply Rule 403. Some courts exclude evidence of officer misconduct on the assumption that it would prejudice a jury significantly against the officer.[143] Others brush off such fears on the idea that "[a]ny prejudice the defendant may have faced . . . could have been mitigated by appropriate jury instructions" and on the "presum[ption] that juries follow the court's instructions."[144] Evidence about a plaintiff's gang affiliation or drug use receives similarly varied treatment.[145]

Judges' applications of Rule 403 should consider the possibility that plaintiffs in excessive force cases suffer structural prejudices before entering the courtroom. In other words, the scales are already tipped when the judge is asked to apply the balancing test. As discussed above, officers

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141. *See infra* Section II.D.2 (discussing common ostensible reasons police defendants seek to introduce such evidence, including as a way of explaining why a plaintiff acted erratically during an altercation with the officer).

142. The rule's text reads: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

143. *See, e.g.*, Tanberg v. Sholtis, 401 F.3d 1151, 1167–70 (10th Cir. 2005); Lund v. Henderson, 807 F.3d 6, 11–12 (1st Cir. 2015).

144. Burton v. City of Zion, 901 F.3d 772, 784 (7th Cir. 2018); *see also* Trahan v. City of Oakland, 960 F.2d 152, 1992 WL 78090, at *3 (9th Cir. 1992).

145. *Compare* Casares v. Bernal, 790 F. Supp. 2d 769, 786 (N.D. Ill. 2011) (admitting drug use evidence on the grounds that "although it is true as Plaintiffs say that Day's evidence could 'paint the Plaintiffs in a bad light,' that prejudicial impact is substantially outweighed by its probative value"), *with* Estate of Diaz v. City of Anaheim, 840 F.3d 592, 602–03 (2016) (finding the district court abused its discretion by "refusing to bifurcate the compensatory damages phase (thereby allowing in this unduly prejudicial evidence of drugs and gangs)").

benefit from societal trust, and plaintiffs in these cases often face the opposite problem.

For example, a judge might find evidence of a plaintiff's past drug use somewhat relevant and somewhat prejudicial. But when considering whether that prejudice would be both unfair and outweigh the evidence's probative value, a judge should consider the natural skepticism with which a jury may well view that plaintiff if she was injured during an arrest or other altercation with law enforcement. Similarly, a judge might consider the possibility that a jury might default toward siding with an officer when considering what amount of prejudice is unfair.[146]

D. Rule 404: Past-Acts Evidence

The Federal Rules of Evidence prohibit certain uses of character evidence at trial. Rule 404(a) states that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." The rule is understandable; no defendant would want every nasty thing they had ever done being admitted into the trial to prove that they had done the different, nasty thing of which they were presently accused.

But evidence that could conceivably have the same untoward effect is often introduced for a *different* purpose than showing a party's propensity to act a certain way. If the evidence is introduced for one such different reason, it may be admissible under Rule 404(b).[147] Rule 404(b) discusses the introduction of evidence "of any other crime, wrong, or act" of a party.[148] The rule prohibits such evidence's use "to prove a person's character" for propensity purposes.[149] However, it *permits* the introduction of past acts evidence "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of

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146. As Steve Schleicher, one of the prosecutors in the Derek Chauvin case put it,

> If you take a look at the bystanders in this case, after seeing a man murdered right in front of them, right in front of their eyes, their instinct was to call the police. Now, can you imagine any other group or organization that you could see its members commit this act in front of you, and afterward your first reaction would be to reach out to members of that same group and ask for help? . . . [T]hat's the way we're wired, we trust the police, we believe the police, we want to believe the police.

PBS NewsHour, *Chauvin's Prosecutors Reflect on the Lessons from the Trial*, YOUTUBE (Apr. 29, 2021), https://www.youtube.com/watch?v=xMpMoZLF5vk&ab channel=PBSNewsHour [https://perma.cc/3CX4-WLZK].

147. In cases in which the evidence might still bear the risk that a jury could use it for propensity purposes, courts will issue a limiting instruction.

148. FED. R. EVID. 404(b)(1).

149. *Id.*

accident."[150] In *Burton v. City of Zion*, for example, Officer Richardt's tasing of Ms. Burton six years prior constituted past-acts evidence; it was used to prove his knowledge of why she would act the way she did, rather than the idea that he was prone to hurting people.[151] Finally, if evidence properly fits into 404(b), it still must pass 403's balancing test.

Rule 404 is not without exceptions. Rules 412–15 make exceptions to character evidence rules in cases of sexual assault and child molestation. Rule 412, which pertains in cases alleging sexual misconduct, makes evidence of a victim's "sexual predisposition" or evidence used "to prove that a victim engages in other sexual behavior" inadmissible.[152] In civil cases, the rules make an exception with a kind of reversed Rule 403 balancing test, admitting such evidence "if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[153] Rules 413–15 allow admitting evidence of a defendant's past acts of sexual assault or child molestation—even for propensity purposes—in cases alleging similar behavior. Advocates for these exceptions argued that they helped combat unique issues of both prejudicial imbalances—"victim blaming"—and uniquely strong propensity; a past instance of child molestation, for example, might more strongly imply the propensity to do so again than a past instance of violence for a defendant accused of a present violent crime.[154] But these are the only exceptions in the Federal Rules, and Rule 404(b) governs the introduction of past-acts evidence in all other circumstances.[155]

In § 1983 litigation against officers and municipalities, parties often seek to introduce evidence through Rule 404(b) of an officer's past misconduct or a plaintiff's checkered history, including drug use, gang affiliation, or past felonies. Sometimes, these Rule 404(b) arguments fail on relevance grounds—for instance, adequate Rule 404(b) evidence going to an officer's intent will be irrelevant under the *Graham* standard, as discussed above. This keeps much evidence about an officer's past out of the proceedings, while evidence about plaintiffs' past acts—which can be more easily cabined within Rule 404(b)'s standards—gets in. The most common—and

150. FED. R. EVID. 404(b)(2).

151. 901 F.3d 772, 777–78 (7th Cir. 2018).

152. FED. R. EVID. 412(a).

153. FED. R. EVID. 412(b)(2).

154. Joseph A. Aluise, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J.L. & POL. 153, 163 (1998).

155. California and Alaska each have extended their equivalents of Rules 413, 414, and 415 to cases involving domestic abuse and, in California's case, elder abuse. CAL. EVID. CODE § 1109; ALASKA R. EVID. 404(b)(4); *see also* Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 SANTA CLARA L. REV. 157, 167 (2007).

potentially prejudicial—type of evidence in this regard goes to a plaintiff's motive or behavior during the officer encounter. For example, a plaintiff's knowledge of her felony record or possession of a weapon might make it more likely that she acted a certain way during a police encounter. As I discuss below, these arguments help secure the admission of highly prejudicial information about a plaintiff with somewhat limited probative value.

After a brief discussion of successful Rule 404(b) evidence related to officers and municipalities, I focus on the admissibility of past-acts evidence concerning plaintiffs. I conclude that, for officers in § 1983 litigation, past-acts evidence should face normal Rule 404(b) analysis with two caveats: first, judges should accord greater leeway to "knowledge" and "absence of mistake" justifications to accommodate situations discussed in the "relevance" section above; and second, when § 1983 actions are paired with state tort claims for which an officer's intent is at issue, courts should admit the past-acts evidence with limiting instructions. When trying officers and municipalities together, I advocate a similar use of limiting instructions rather than trial bifurcation. Finally, I advocate that the Federal Rules adopt a narrower balancing test for certain past acts evidence against plaintiffs, including drug use, criminal record or illegal activity, and gang affiliation.

1. Officers and Municipalities

An officer's misconduct records can prove admissible under Rule 404(b) in different ways, depending on the defendant. As discussed above, the confluence of constitutional law and fear of undue prejudice keeps most of such evidence out of trials against individual officers. Any past-acts evidence going to an officer's intent or motive, for example, will likely be irrelevant and inadmissible in § 1983 litigation due to the objective reasonableness standard and Rule 402.[156]

However, other Rule 404(b) arguments can be successful. I focus on two similar ones: knowledge and absence of mistake.[157] As *Burton v. City of Zion* shows, past acts evidence can be admissible when going toward an officer's knowledge.[158] Absence of mistake can constitute an offshoot of that idea. For example, in *Eldridge v. City of Warren*, an officer tased Ralph Eldridge, a diabetic who was going through a hypoglycemic episode.[159] Eldridge sought to introduce video evidence of the same officer tasing

156. *See supra* notes 108–13 and accompanying text.
157. FED. R. EVID. 404(b).
158. Burton v. City of Zion, 901 F.3d 772, 784 (7th Cir. 2018).
159. 655 F. App'x 345, 346 (6th Cir. 2016).

someone in custody who did not comply with the officer's demands under an absence of mistake theory.[160] The court rejected this argument, but in doing so, made a helpful distinction. The court could not see how the evidence went toward an absence of mistake in the officer's using force against Eldridge.[161] The court stressed that the officer had "*intentionally*" tased him, and thus the tasing was not a mistake.[162] However, the court was open to a different absence of mistake theory in other cases. The court noted that the officers relied "on the defense of mistake . . . that they lacked knowledge of Eldridge's medical condition when they used force against him."[163] The court then distinguished the past taser incident as not involving someone with a medical condition.[164]

The definition of the "mistake" can thus test the applicability of Rule 404(b)'s absence of mistake category. In the hypothetical alluded to above involving an officer shooting an unarmed person grabbing at their jeans, the past similar shooting (or other encounter with someone grabbing at the waist of similarly loose jeans) could help disprove an officer's defense that he mistakenly believed the decedent to be armed. This use of past-acts evidence appears frequently in criminal cases, helping disprove defendants' claims that they did not know about, or were mistaken about, some element of their behavior.[165]

An officer's past acts can also help prove identity when the officer denies that he was the person who used force on the plaintiff. In *Lewis v. City of Albany Police Department*, for example, an officer claimed he was not the offender; the court allowed the plaintiff to introduce past misconduct records of him having inflicted "strikingly similar" injuries on other African Americans in past incidents as a way of demonstrating the likelihood that he had been the culprit this time around.[166] Though the opportunities for these Rule 404(b) arguments may be rare, they do provide a potential avenue for such evidence's admissibility.

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160. *Id.* at 347.

161. *Id.* at 348–49.

162. *Id.* at 349.

163. *Id.*

164. *Id.*

165. *See, e.g.*, United States v. Jernigan, 341 F.3d 1273, 1281 (11th Cir. 2003) (upholding admission of defendant's past conviction for possession of firearm to prove that "his possession at the subsequent time [wa]s not mistaken or accidental"); United States v. Harris, 185 F.3d 999, 1004–05 (9th Cir. 1999) (upholding admission of defendant's past, knowing fraud involving partnership funds to disprove notion that he made "unfortunate but innocent mistakes" regarding subsequent financial fraud); United States v. Robles-Vertiz, 155 F.3d 725, 730 (5th Cir. 1998) (upholding admission of past conviction for smuggling aliens to disprove defendant's argument in subsequent smuggling case that he believed the person he smuggled to be a United States citizen).

166. 547 F. Supp. 2d 191, 200 (N.D.N.Y. 2008).

Officers' misconduct records prove more easily relevant and less prejudicial when admitted for *Monell* claims against municipalities. When the theory of *Monell* liability involves a city knowing of officers violating people's rights and turning a blind eye or failing to train them after learning of a pattern of abuse, the evidence of official records of those officers' acts is relevant and often admissible.[167] Because the evidence is admissible against the city but may not fit cleanly into a Rule 404(b) theory against the individual officer involved, courts may face the question of whether to admit the evidence with a limiting instruction, keep it out entirely, or bifurcate the trial.[168] In these cases, for the reasons given earlier (that bifurcating trials impedes discovery, slows—or ends—proceedings, may well prove more costly on the judiciary, and separates out a plaintiff's one harm into individual myopic instances rather than considering the case as a whole), courts should err on the side of limiting instructions.[169]

The Federal Rules of Evidence need not change as to officer misconduct records; to move toward more just results in § 1983 cases against officers, rather, judges should apply broader views of relevance, be more cognizant of the benefits of trying excessive force cases against officers and municipalities together, and weigh the public's default trust of the police—and possible distrust of a plaintiff—when making Rule 403-type judgments about undue prejudice. Such a result could help strike the balance between excluding highly prejudicial evidence while somewhat cutting through the latticework of protections insulating officers and cities from liability for harmful policing practices. In the case of past-acts evidence against plaintiffs, however, I recommend a different approach.

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167. *See, e.g.*, Rauda v. City of Los Angeles, No. CV08-3128-CAS (PJW), 2010 WL 11549632 (C.D. Cal. Feb 22, 2010); Daniels v. Loizzo, 178 F.R.D. 46 (S.D.N.Y. 1998).

168. *See Daniels*, 178 F.R.D. at 48 (holding that, in a bifurcated trial, officer misconduct records could come in against the city but not against the officer); Trahan v. City of Oakland, 960 F.2d 152, 1992 WL 78090, at *3 (9th Cir. 1992) (allowing evidence of past misconduct in against an officer on some claims but not others, and using a limiting instruction); Helena v. City of San Francisco, No. C04-0260 CW, 2006 WL 1140953, at *7 (N.D. Cal. May 1, 2006).

169. Additionally, some courts have simply argued that juries can be trusted to follow their instructions. *See Helena*, 2006 WL 1140953, at *7 (making this argument to allow evidence to be considered against an officer on state tort claims but not § 1983 claims). For cases with multiple defendants—a city and an officer, for example—or multiple separate claims—state and federal torts—this faith may be fair, since jurors deliberating would benefit from distinct situations in which to apply the evidence. When evidence is admissible for some reasons but not others on the same claim, against the same defendant, this argument seems weaker. For example, if evidence of a plaintiff's drug use were admissible to prove they acted erratically that day, but not that they were a drug addict who should not be trusted or was otherwise deserving of punishment, a juror holding the latter biases may struggle to keep them from infiltrating a more limited application of the evidence.

2. *Plaintiffs and Decedents*

Plaintiffs face myriad obstacles to vindicating § 1983 claims against officers and municipalities. Past acts evidence contributes to these obstacles. While the *Graham* standard keeps out much past misconduct by officers—even when seemingly relevant—courts often allow equally or more prejudicial information about plaintiffs on tenuous relevance grounds. This imbalance further tips the scales unfairly against plaintiffs, who often face credibility hurdles to begin with when pitted against established governmental parties.

I begin by discussing common past-acts evidence that officer and city defendants seek to introduce against plaintiffs via Rule 404(b) in excessive force litigation. I focus on two common Rule 404(b) arguments: plan or intent when a "suicide by cop" theory is pursued, and motive when a plaintiff's behavior is unclear or disputed. Then, I use the 2021 case involving the fatal shooting of Genevive Dawes to discuss this evidence's prejudicial effect. Finally, I discuss alternative approaches to treating plaintiffs' past acts, concluding that a version of Rule 412's balancing test constitutes a more just treatment of this evidence.

Plaintiffs face at least four different species of past-acts evidence that threaten undue prejudice: past drug use, felony record or past criminal acts, past encounters with police, and gang affiliation.

Defendant officers often seek to introduce these types of past-acts evidence to demonstrate intent, motive, or plan.[170] Typically, defendants argue that this information helps explain a plaintiff's erratic behavior during the arrest or helps prove that the plaintiff acted during the encounter in the way the police claim.[171] Though evidence of gang affiliation is often excluded on fears of unfair prejudice,[172] evidence of drug use and criminal record more easily finds its way into trial.[173]

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170. FED. R. EVID. 404(b); *see* Boyd v. City & County of San Francisco, 576 F.3d 938, 946–47 (9th Cir. 2009).

171. *See, e.g.*, Rendon v. City of Indio, No. EDCV 13-00667-VAP (OPx), 2014 WL 12965995, at *3 (C.D. Cal. 2014) ("[E]vidence that Decedent had drugs in his system does lend support to Franco's observation that Decedent's behavior 'was impulsive, irrational, and demonstrated poor judgment.'"); *Boyd*, 576 F.3d at 944 (stating that drug evidence was relevant to proving the plaintiff's alleged erratic behavior during arrest); Saladino v. Winkler, 609 F.2d 1211, 1214 (7th Cir. 1979); Casares v. Bernal, 790 F. Supp. 2d 769, 785–86 (N.D. Ill. 2011) (allowing intoxication evidence from the day of the alleged excessive force on the theory that it could help prove the plaintiff's "memory impairment" during testimony, and that it would make it more likely that the plaintiff acted as officers said he did).

172. *See* Valtierra v. City of Los Angeles, 99 F. Supp. 3d 1190, 1195 (C.D. Cal. 2015); Ramos v. Trifone, Civ. No. 11CV00679(SALM), 2015 WL 6509114, at *6–7 (D. Conn. Oct. 28, 2015).

173. *Boyd*, 576 F.3d at 943–44 (upholding the admission of the plaintiff's criminal history, including "kidnapping attempts," testimony regarding prior arrest, and evidence of drugs in his system

These types of evidence are all highly prejudicial. Studies show that people view those addicted to drugs as "more dangerous and fear evoking" than others, and that intoxication is viewed as "a 'causal agent' in 'violence.'"[174] Courts also occasionally recognize that drug use evidence is "highly prejudicial."[175] Evidence of a criminal record or past encounters with the police can create similarly strong stigma: it can keep people from getting jobs,[176] foreclose other societal benefits,[177] and generally cast a pall over a plaintiff's legitimacy in the eyes of a jury. Evidence of gang affiliation "has the potential to be particularly prejudicial" in a courtroom.[178] The introduction of this evidence can also leverage and contribute to ingrained racist prejudices. As Erin Aubry Kaplan writes of the trial of Derek Chauvin:

> Character assassination is fundamental to structural racism; it precedes it. Chauvin's lawyers are going to argue technicalities, that Floyd was killed by cardiac arrest, that he was in bad health and used drugs . . . . Everyone is entitled to a defense. But really, what the defense is arguing is that Floyd died because he didn't deserve to live. He was a big Black man, sporadically employed and, yes, a drug user. He had prior encounters with police (significantly, details of one of those encounters will be allowed into evidence). In short, he was marginal. That he would die young and badly was just a matter of time and circumstances, in any case not a reason to send a white man to prison, especially a police officer.[179]

This evidence can combine to produce the impression in a juror that the plaintiff is somehow lesser because of the circumstances they faced at the time of their encounter with police.

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at the time he was shot and killed by police); *Casares*, 790 F. Supp. 2d at 785–86 (allowing intoxication evidence from the day of the alleged excessive force).

174. Michael Davis, *Addiction, Criminalization, and Character Evidence*, 96 TEX. L. REV. 619, 635 n.94 (2018) (citations omitted).

175. Donastorg v. City of Ontario, No. EDCV 18-992JGB (SPx), 2021 WL 4051170, at *3 (C.D. Cal. June 4, 2021).

176. Amanda Johnson, *Challenging Criminal Records in Hiring Under the Americans with Disabilities Act*, 48 COLUM. HUM. RTS. L. REV. 211, 217 18 (2017).

177. Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 YALE L.J.F. 759, 764 (2019).

178. Est. of Diaz v. City of Anaheim, 840 F.3d 592, 602 (9th Cir. 2016) (first citing Kennedy v. Lockyer, 379 F.3d 1041, 1055 (9th Cir. 2004); and then United States v. Takahashi, 205 F.3d 1161, 1165 (9th Cir. 2000)).

179. Erin Aubry Kaplan, Opinion, *Derek Chauvin Is in the Courtroom, but the Character of Black People Is on Trial in Minneapolis*, L.A. TIMES (April 24, 2021, 3:00 AM), https://www.latimes.com/opinion/story/2021-04-04/derek-chauvin-trial-george-floyd-murder [https://perma.cc/V8VJ-Q5G9].

Evidence of this sort is not only highly prejudicial; it is often of limited relevance in excessive force inquiries. First, under the objective reasonableness standard, evidence of things unknown to an officer is broadly irrelevant; the Ninth Circuit has explained that "[w]e cannot consider evidence of which the officers were unaware—the prohibition against evaluating officers' actions 'with the 20/20 vision of hindsight' cuts both ways."[180] As the Court of Special Appeals of Maryland discussed:

> We fail to understand how information—fully unknown to [officer] Jackson at the time of the incident, and in no way considered by Jackson at any point—is in any way relevant in the instant case. Evidence suggesting that [the decedent] Espina did, in fact, resist arrest is certainly relevant. Indeed, Jackson testified that Espina resisted arrest. Evidence suggesting 'possible' reasons for resistance, however, was not relevant.[181]

Because the objective reasonableness inquiry is focused on the *officer*, evidence of a plaintiff's criminal history "may be relevant" but only "provided that the officers were aware of such information at the time of incident,"[182] or in rare circumstances in which the plaintiff's motive or intent is at issue.[183]

In the latter circumstances, a plaintiff's intoxication or criminal record *might* help support an officer's account that they acted erratically or aggressively. As an example: if an officer claims the plaintiff attacked him and the plaintiff (or his estate) disputes that notion, the officer might be able to argue that the plaintiff was motivated to attack him by fears of being found with an illegal handgun, or made more aggressive—and thus likely to attack the officer—due to the presence of meth in his system, even if these things were unknown to the officer.[184] But this evidence is usually not going to be the only way of proving such things. First, many officers are required

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180. Glenn v. Wash. Cnty., 673 F.3d 864, 873 n.8 (9th Cir. 2011) (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

181. Espina v. Prince George's Cnty., 82 A.3d 1240, 1263 (Md. Ct. Spec. App. 2013), *aff'd sub nom.* Espina v. Jackson, 112 A.3d 442 (Md. 2015) (excluding evidence of the decedent's immigration status and possession of a knife because the officer did not know about either at the time of the excessive force).

182. Valtierra v. City of Los Angeles, 99 F. Supp. 3d 1190, 1193 (C.D. Cal. 2015) (emphasis added).

183. Est. of Tindle v. Mateu, No. 18-cv-05755-YGR, 2020 WL 5760287, at *11 (N.D. Cal. Sept. 28, 2020) (refusing to admit evidence that the decedent possessed and shot a gun before the officer arrived on the scene, since the officer did not know this at the time he used force).

184. *See* Est. of Robinson *ex rel.* Irwin v. City of Madison, No. 15-cv-502-jdp, 2017 WL 564682, at *14 (W.D. Wis. Feb. 13, 2017) (allowing intoxication evidence because it might make more likely the officer's account of how the decedent behaved in a stairwell with no other witnesses).

to wear body cameras.[185] Footage from the incident would thus help show exactly what the plaintiff or decedent did in the encounter.[186] And second, officers usually do not encounter a plaintiff alone; there are other officers and witnesses. In many situations, this highly prejudicial information about a plaintiff will thus be cumulative.

A recent criminal case in Texas presents a useful example of how this type of evidence can be used against plaintiffs in excessive force cases.[187] On January 18, 2017, officers Christopher Hess and Jason Kimpel were called to an apartment complex after an anonymous 911 call reporting a "suspicious person" in a vehicle.[188] Kimpel and Hess, along with other officers, arrived on the scene, approached a black Dodge Journey parked outside, and shined flashlights into the windows.[189] Genevive Dawes and her boyfriend Virgilio Rosales were "clearly asleep."[190] The officers' voices woke Dawes, who turned on her car's ignition and started slowly backing up; after an officer blocked her with his car, she maneuvered the car slightly and began reversing again.[191] No one was in her path,[192] and she reached a speed of between three and five miles per hour.[193] At that moment, Hess and Kimpel fired "at least 13 shots through the passenger window, striking Dawes in the neck, right tricep, left arm, upper left chest, and right forearm."[194] She died at the hospital.[195]

Hess faced aggravated assault charges. During the trial, over the state's objection, past-acts evidence about Dawes made its way into the trial; the judge allowed in evidence that Dawes and Rosales had a stolen gun in the

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185. *See* Mitch Zamoff, *Assessing the Impact of Police Body Camera Evidence on the Litigation of Excessive Force Cases*, 54 GA. L. REV. 1, 12 (2019) (discussing body cameras' prevalence in major cities' police departments).

186. *See Est. of Tindle*, 2020 WL 5760287, at *12 ("Sgt. Mateu's body camera captured the entire incident for purposes relevant to [the dispute about how both parties acted at the scene.]").

187. Though I use a criminal case as an example, the evidence was used to support the officer's defense of objectively reasonable action and does not differ from the inquiry in a § 1983 case. Indeed, § 1983 litigation is currently proceeding against the same officers.

188. Dawes v. City of Dallas, No. 17-CV-1424-X-BK, 2021 WL 1200229, at *1 (N.D. Tex. Mar. 12, 2021).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Genevive Dawes Case: Questions over Dallas Officer's Account of Mother's Shooting Death*, CBS NEWS (June 26, 2017, 6:31 PM), https://www.cbsnews.com/news/genevive-dawes-case-questions-over-dallas-officers-account-of-mothers-shooting-death/ [https://perma.cc/YM2M-Z65B] (around five miles per hour); David Goins, *Jury Finds Former Dallas Officer Not Guilty of Aggravated Assault*, WFAA (Feb. 11, 2020, 12:22 PM), https://www.wfaa.com/article/news/crime/day-5-trial-former-dallas-police-officer-shot-12-times-car-killing-woman/287-57a02ffa-3ec3-40ce-be6b-e9a1a2db636d [https://perma.cc/P2VQ-D38V] (3.1 miles per hour).

194. *Dawes*, 2021 WL 1200229, at *1.

195. *Id.*

car, that they had meth and heroin in their systems, and that the car had been reported stolen.[196] The state's and defendant's motions in limine treaded the ground discussed above. The defendants stressed that the "evidence shows Ms. Dawes's state of mind was, 'I'm not going to jail today,'" which provided "the motive for her decisions to try to flee" by car.[197] They stressed that the evidence went toward "motive."[198] The state stressed that such information was unknown to Officer Hess at the time of the shooting and that there was no "ambiguity about Dawes's conduct . . . [t]he whole thing is on video."[199] The state explained that "[b]ecause there's no dispute about *what* Dawes did, there's no reason to speculate about *why* she did it."[200] The judge sided with the defendant.

In opening arguments, the defense counsel referred to Dawes's drug use three times in under two minutes, calling her decision to turn on the car "drug-induced."[201] In closing statements, the defense discussed Dawes and Rosales's possession of a stolen gun and car, saying, "What does that tell you about the lengths they will go?"[202] Hess was acquitted.[203]

Without cabining judges' discretion in similar situations, evidence like this bearing strained—if any—relevance to the reasonableness of an officer's use of force will find its way into trials. Given plaintiffs' hurdles in even getting to the courtroom in § 1983 litigation and the default credibility afforded officers, this evidence can easily work unfair prejudice if not checked.

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196. Opening Argument at 24:00–26:00, State v. Hess, No. F17-00545-V (Tex. 292d Dist. Ct.—Dallas Feb. 3, 2020), https://www.youtube.com/watch?v=YLAwT4C2_d8 [https://perma.cc/GSR5-MFRC] (last visited Sept. 4, 2022); Closing Argument at 19:30, *Hess*, No. F17-00545-V, https://youtu.be/SJSFoWy0ieg [https://perma.cc/SKT2-C8M3] (last visited Sept. 4, 2022).

197. Defendant's Brief on Admissibility of Certain Evidence at 2, *Hess*, No. F17-00545-V.

198. *Id.* at 4.

199. State's Response to Defendant's Brief on Admissibility of Certain Evidence at 2, *Hess*, No. F17-00545-V.

200. *Id.* at 3 (emphasis in original).

201. Opening Argument at 25:30–:45, 26:30, 27:08, *Hess*, No. F17-00545-V, https://www.youtube.com/watch?v=YLAwT4C2_d8 [https://perma.cc/GSR5-MFRC] (last visited Sept. 4, 2022).

202. Closing Argument at 19:30, *Hess*, No. F17-00545-V, https://youtu.be/SJSFoWy0ieg [https://perma.cc/SKT2-C8M3] (last visited Sept. 4, 2022).

203. By David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Oct. 31, 2021), https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html [https://perma.cc/3NZ2-TE27].

Because of this, I propose a change in the Rules of Evidence similar to the balancing test in Rule 412. That rule allows information about a sexual assault victim's past sexual behavior to come in at trial in civil cases only "if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[204] The reversed balancing test thus precludes most prejudicial bad acts evidence from trial unless it is uniquely relevant. The Advisory Committee Notes on the current version of Rule 412 explain that the rule "aims to safeguard the alleged victim against . . . embarrassment and sexual stereotyping . . . and the infusion of sexual innuendo into the factfinding process."[205]

These concerns are echoed to some extent in excessive force litigation. As discussed, plaintiffs face stereotyping associated with drug use, criminal history, and gang affiliation that surfaces uniquely in police misconduct litigation. Furthermore, evidence of a plaintiff's past acts is usually of cumulative or no probative value in assessing the *officer*'s actions, assuming the evidence was not known to the officer. The strong potential for prejudice, lack of probative value, and already-stacked deck against such plaintiffs justify applying a narrowed balancing test to highly prejudicial bad-acts evidence.

I propose that the Federal Rule of Evidence 404(b) be amended to include a section that adopts a balancing test in between Rules 412 and 403 in civil cases alleging excessive force by a law enforcement officer. The amended rule could state:

> If unknown by the law enforcement officer at the time of alleged excessive force, the court may admit evidence of a plaintiff's past drug use, intoxication at the time of the incident, criminal record or criminal activity, or gang affiliation only if the evidence's probative value outweighs the potential for undue prejudice or needlessly presenting cumulative evidence.

Because such evidence could *potentially* be relevant and useful, a complete bar on its admission would seem unwise. But the rule proposed here could help keep prejudicial evidence out of civil trials unless it was relevant enough to the case that it did not run the risk of further preventing a plaintiff's fair hearing of her claim. It is easy to imagine a civil analogue to Ms. Dawes's case ending differently under such a rule.

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204. FED. R. EVID. 412(b)(2).
205. FED. R. EVID. 412 advisory committee's note to 1994 amendments.

E. Impeachment Evidence

The evidentiary rules governing impeachment present another opportunity to rectify imbalances inherent in civil litigation against officers. After defining the rules and their application in police misconduct litigation, I discuss other scholars' proposals in this area and propose that the rules change in either of two ways: restricting the admissibility of a plaintiff's criminal record as impeachment evidence in civil excessive force cases, or applying a type of *crimen falsi* rule *mandating* the admission of certain, reliable reported findings of a police officer's falsification of records or tampering with evidence.

Federal Rules of Evidence 608 and 609 govern witness impeachment. Rule 608 discusses how a witness's credibility "may be attacked" by testimony about their character for truthfulness or its opposite. Rule 608(b) prohibits the use of extrinsic evidence—"prov[ing] specific instances of a witness's conduct"—in order to attack a witness's truthfulness, but allows counsel to cross-examine a party about specific past acts if they "are probative of the character for truthfulness or untruthfulness" of the witness or another witness. As an example: imagine Officer Z is testifying about what occurred when he used excessive force. Plaintiff's counsel can attack his credibility by asking him: "is it true that, three years ago, you fabricated details when filling out a police report?" If Officer Z says "nope," plaintiff's counsel cannot introduce the factual underpinnings—"extrinsic evidence"—underpinning the question. Officer Z's denial goes uncontested.

Rule 609 gives an exception to 608(b)'s rule: a testifying witness's *criminal* record—including extrinsic evidence thereof—can, and in some cases *must*, be admitted. Evidence of any crime punishable in the jurisdiction by imprisonment for more than one year "*must* be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant."[206] The rule thus removes a judge's discretion in requiring the admission of such evidence if the judge determines it passes Rule 403's balancing test. "Rule 609(a)(1) presumes that all felonies are at least somewhat probative of a witness's propensity to testify truthfully."[207] Accordingly, evidence of a witness's past crimes, including (but not limited to) burglary,[208] bank robbery,[209] drug possession,[210] and murder,[211] can be admissible to impeach a testifying witness.

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206. FED. R. EVID. 609(a)(1)(A) (emphasis added).
207. United States v. Estrada, 430 F.3d 606, 617 (2d Cir. 2005) (Sotomayor, J.).
208. United States v. Cueto, 506 F. Supp. 9, 14–15 (W.D. Okla. 1979).
209. United States v. Oaxaca, 569 F.2d 518, 526–27 (9th Cir. 1978).
210. United States v. Hernandez, 106 F.3d 737 (7th Cir. 1997).
211. *See* Lawson, *supra* note 57, at 240–41.

The rule does not end there. Rule 609(a)(2) states that if a witness has a criminal conviction for "any crime regardless of punishment" that "required proving—or the witness's admitting—a dishonest act or false statement,"[212] the evidence *must* be admitted *regardless* of its prejudicial effect. A jury thus hears evidence of every so-called *crimen falsi* for which a witness—including a testifying plaintiff or defendant—has been convicted.[213] Which offenses count as *crimen falsi* varies by jurisdiction,[214] but the Advisory Committee explained that it primarily "mean[t] crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense," and other offenses involving deceit.[215]

While criminal defendants can avoid the introduction of this impeachment evidence by invoking the Fifth Amendment right against self-incrimination and refusing to testify, civil litigants can be forced to testify; thus, in their typical application to excessive force litigation, Rules 608 and 609 allow for, or mandate, the admission of a plaintiff's criminal record.[216] On the other hand, findings by an officer's police department or an independent city or state investigatory body that he has falsified police reports or manufactured evidence—behaviors that, if criminally sanctioned, would easily constitute *crimen falsi*—are inadmissible.[217]

Rule 609 has garnered broad controversy.[218] There is a "growing chorus of scholars advocating for complete or near-abolition of Rule 609(a) as applied to criminal defendants."[219] But the rule's prejudicial effects also cause harm in civil litigation. Rule 609's application in § 1983 excessive force litigation has led one scholar to recommend prohibiting the admission of a testifying plaintiff's criminal record unless the crimes constituted *crimen falsi*.[220] This response is reasonable. As discussed, a plaintiff's prior convictions can prove highly prejudicial, perhaps especially when pitted

212. FED. R. EVID. 609(a)(2).

213. FED. R. EVID. 609 advisory committee's note to 1972 proposed rules.

214. Judges have held all sorts of crimes to constitute *crimen falsi*. *See, e.g.*, Williams v. United States, 337 A.2d 772 (D.C. 1975) (possessing firearm without a license); Rogers v. State, 558 S.W.3d 833, 841 (Ark. 2018) (all theft); Zukowski v. Dunton, 650 F.2d 30, 34 (4th Cir. 1981) (willful failure to provide information for income tax purposes).

215. FED. R. EVID. 609 advisory committee's note to 1972 proposed rules.

216. *See* Lawson, *supra* note 57, at 220.

217. Though plaintiff's counsel could ask the officer about them, extrinsic proof would be inadmissible under Rule 608.

218. *See, e.g.*, Jeffrey Bellin, *The Evidence Rules That Convict the Innocent*, 106 CORNELL L. REV. 305, 313 n.42 (2021); Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993, 1025 (2018); Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563 (2014); Aviva Orenstein, *Honoring Margaret Berger with a Sensible Idea - Insisting That Judges Employ a Balancing Test Before Admitting the Accused's Convictions Under Federal Rule of Evidence 609(a)(2)*, 75 BROOK. L. REV. 1291 (2010).

219. Moran, *supra* note 95, at 1391.

220. Lawson, *supra* note 57, at 241–42.

against the institution of law enforcement. Furthermore, the impeachment value of such evidence is controversial at best,[221] and for such crimes (i.e., non-*crimen falsi* crimes), judges are again tasked with employing a balancing test; some scholarship has suggested that judges do not properly apply that balancing test when admitting this impeachment evidence.[222]

Another approach, instead of a wholesale exclusion of such evidence, would be to subject plaintiff-witness-specific criminal records to a stricter balancing test before admitting them for impeachment purposes. Rule 609(a)(1)(A) could be amended to state that in civil cases, evidence of a plaintiff-witness's criminal acts that were punishable by more than a year in prison are only admissible if their probative value outweighs the prejudicial effect to that plaintiff.[223] Though I side with the scholars advocating a wholesale rejection of the rule, broader political concerns might dictate adopting this narrower attempt to address the problem.

On the officer-defendant side, similar concerns may support expanding Rule 609(a)(2) to allow evidence of official findings that an officer has committed an act in the course of his duties that involved deceit. This could include findings by an official review board that the officer effected a false arrest, falsified a report, or fabricated or tampered with evidence. If the records were reliable, they would be automatically admissible as *crimen falsi* under this imagined expansion of the rule. Reliable reports could mean those garnered by city review boards whose sustaining of a civilian's complaint must be found by a preponderance of the evidence, or by clear and convincing evidence. Cities' complaint review boards usually use one of those two standards.[224] Any hearsay objections to such evidence would arguably be covered under Rule 803(8)(a)(iii), which exempts the findings of a legally authorized investigation from hearsay exclusion in civil cases.

Any of these proposed approaches would help to alleviate the burdens facing plaintiffs in litigating excessive force cases. If the rules kept out more of a plaintiff's criminal past, it might incentivize more people to bring such suits and hold officers and cities accountable; if the rules allowed admitting of extrinsic impeachment evidence of misconduct records related to an officer's deceitful practices on the job, it would both incentivize better

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221. Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 638 (1991).

222. *See* Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2322–24 (1994).

223. This balancing test is already applied in Rule 609 to criminal defendants. FED. R. EVID. 609(a)(2).

224. *See, e.g.*, CITY OF BERKELEY, CAL., CHARTER art. XVIII, § 125(18)(c) (2021) (preponderance of the evidence); CITY OF TEANECK, N.J., CODE art. XXXII § 2-166(a)(5) (clear and convincing evidence).

behavior on the job and cut against the credibility imbalance between the parties in excessive force litigation.

CONCLUSION

The significant procedural hurdles plaintiffs face to bringing litigation against officers and cities under 18 U.S.C. § 1983, paired with the prejudice they face in trial, works injustices at multiple levels. For the victim of police violence, it forecloses recompense for a harm inflicted by an agent of the state. For the broader society, the lack of an effective mechanism for holding officers and cities accountable impedes the improvement of policing practices by disincentivizing better behavior and training.

Confronting the inequities in how the law and its stewards treat past-acts evidence in excessive force litigation is an important step in achieving justice for victims of police violence.

Accordingly, incorporating a nuanced understanding of the imbalances inherent in § 1983 litigation should be essential to any judge's application of Rule 403's balancing test concerning past-acts evidence against both officers and victims. A narrower balancing test should make it more difficult to admit highly prejudicial evidence of a plaintiff's past at trial. And the impeachment rules should either reduce the use of criminal records information to impeach a plaintiff witness or consider independent review boards' substantiations of citizens' claims that an officer fabricated evidence or falsified a police report as *crimen falsi* equivalents, admissible for impeachment.

The Federal Rules of Evidence constitute a promising, subtle avenue of reform for holding law enforcement accountable. To ensure a better law enforcement future, we should think differently about how we handle evidence of its officers' and victims' pasts.