FEDERAL RESPONSE TO POLICE MISCONDUCT

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

MAY 5, 1992

Serial No. 52

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
59-621 CC WASHINGTON : 1992

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-039431-7

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FEDERAL RESPONSE TO POLICE MISCONDUCT

TUESDAY, MAY 5, 1992

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, John Conyers, Jr., Patricia Schroeder, Craig A. Washington, Michael J. Kopetski, and Howard Coble.

Also present: James X. Dempsey, assistant counsel; and Kathryn Hazeem, minority counsel.

OPENING STATEMENT OF CHAIRMAN EDWARDS

Mr. EDWARDS. The subcommittee will come to order.

A little over 1 year ago, when the Rodney King incident happened in Los Angeles, the subcommittee members and the staff shared the horror of what went on in that incident, and we immediately commenced a series of hearings on the apparent problem of police brutality in the United States. We had as witnesses people from the FBI and from the Department of Justice and people from Los Angeles, the ACLU, and other experts.

And almost immediately, within a few weeks, we were able to write two statutes, one of which would give the Attorney General power to go into a Federal court and ask for an injunction where he has an allegation that there was a pattern or practice of police brutality, and get an injunction so that the particular department would have to stop.

We also brought out a statute that would provide for the Department of Justice to establish a data bank on police brutality, asking the various police departments to send to this data bank at the Department of Justice incidents of police brutality, or alleged incidents, protecting privacy of course, because we really don't know, and we don't know to this day, how many incidents there are. Unless they are videotaped or unless an announcement is made, the people of America have no way of knowing how prevalent police brutality is.

We do know that the FBI testified that, over the past 6 years, they have investigated 15,000 incidents reported to them, because it can be a violation of Federal law. And we said, well, what have you done with it? And they said, well, we will immediately give you a report on the incidents, the 15,000 that we have. Well, it's been

over 1 year and we've been asking the Justice Department what's going on with the 15,000 cases, and they have told us that they have contracted the studies out to reputable research entities and that we should have the results shortly.

[Further information appears in the appendix.]

Mr. EDWARDS. But, in the meantime, these two bills that we approved unanimously in this subcommittee, and overwhelmingly in the full committee, became part of the omnibus crime bill and were passed without hesitation in the House and in the conference. But when the conference report, after passing the House, got to the Senate, there's been a filibuster ever since on the whole crime bill. And so our two statutes on those two items have been held up, which we regret because we think, although they're not substantive totally, they would be useful.

In all of this, we are not being critical of police departments in general. We know they have a difficult job and we honor and respect police departments all over the country. I know I certainly do in my hometown.

But there are still problems insofar as the victims are concerned, and we do want to hear, especially Judge Newman, about what the problems are with regard to victims today, their rights, and that's one of the reasons we're holding this hearing today.

But before I call on our first witness, I yield to the gentleman from Michigan, Mr. Conyers, who right from day one, after the Rodney King incident, has been an ardent, ardent, hard-hitting champion on this issue, as he always has been in his more than a quarter century of service in this House of Representatives. Mr. Conyers.

Mr. CONYERS. Thank you very much, Chairman Edwards.

We together went to the Attorney General, then Dick Thornburgh, to make certain that the Federal investigation commenced instantly when the Rodney King tragedy unfolded. And here again today we're brought back, this country and this Congress, to the whole subject of Rodney King and the aftermath.

In a way, Mr. Chairman, we're caught between two "Kings:" An articulate, beautiful, intelligent King and another King who can hardly pass a sentence from his lips without trembling or stuttering, but both deeply concerned about the future of this country. That's what brings this committee that you've chaired across the years, the Civil Liberties and Constitution Subcommittee of Judiciary, together.

We're also brought together because a suburban jury, as Adriane Washington in the Washington Times said, "passed an unbelievable verdict that created a devastating aftermath that highlighted our shortcomings as a nation and as a people." By acquitting those four officers, that jury confirmed the fears of many African-Americans that the criminal justice system is a failure.

The tragic result of that grossly unjust verdict resulted in a city that went up in flames and two dozen other cities across this country, reflecting anger, pain, outrage of people with nowhere to turn for protection not only against an out-of-control police department, but a negligent Government. You know, one of the things that the President of the United States can't get through his head is that those weren't criminals out in L.A.; those were outraged citizens

that had nothing else that they could do, that were venting the rage of years of political and economic repression. And so when he sent in the Marines, the Army, the National Guard, that had only to do with stopping the unrest, but the underlying causes, he isn't a bit more conscious of those underlying causes than the man in the moon.

So when he sent the Department of Justice in only after the riots had cost 58 lives, thousands of injuries, billions of dollars in property damage, until then the Department of Justice was only a reluctant partner in the prosecution of Rodney King's attackers. Since 1985, the Department of Justice has brought an average of 42 lawsuits per year against police officers, although they investigated more than 15,000 cases—a record that should embarrass everybody in government.

Even South Africa is reversing a long history of tolerating police abuses. Only last week, a police commander was sentenced to death and four other policemen sentenced to jail up to 15 years for killing 11 antiapartheid activists in the Natal Province. Sadly, in the more than two decades of hearings that you and I, Mr. Chairman, have conducted on police brutality in America, all too frequently the police officers have gone unpunished for fatal attacks on African-Americans.

So we must seize this opportunity to get our Congress to enact constructive legislation without further delay. We need to recognize that the visual images of Rodney King's beating, the first police beating in American history witnessed by the world—everybody saw it—illustrates a racial divide that extends far beyond the confines of police departments in this country. We've got to have some healers here. We've got to have some people that can bring this country together.

The same forces that acquitted the police in that case are also the same forces in a way that redline African-Americans that apply for business loans, which maintain housing segregation, which practice job discrimination.

So I just plead that we recognize the larger problem of a society divided by race. The Kerner Commission, that you and I had so much to do with being created, noted 20 years ago—25, as a matter of fact—that if we will fail to address this central issue, it will bring us down. I hope this administration ends its abandonment of the cities, its neglect of the issues of race. We're all adults; we can talk honestly to one another. We know we have problems in this society. But if they can bail out the savings and loan industry, if we can fund programs for rebuilding other cities around the world, surely we can do something to begin to tackle the racial separation and municipal neglect of our cities in America, and it shouldn't have to take death and destruction to make the President or us in Congress understand the dimensions of the problem.

So this committee, I'm going to ask you, Chairman Edwards and all of my colleagues with whom I serve here, to help us set the pace here and report to the full House for its immediate consideration a measure that adds to those measures we previously passed that are in the crime bill.

First, we must give the Attorney General the authority to bring pattern or practice lawsuits against systemic police brutality. Indi-

vidual lawsuits are not going to end the culture of violence that's been created for generations in America and for at least a generation under Daryl Gates in the Los Angeles Police Department, and others like it. We've held hearings in New York, Detroit, Chicago, Miami, Los Angeles, all on this same question over the last 15 years.

The Christopher Commission in Los Angeles found a long history of chokeholds and other illegal practices that were used against African-American citizens of Los Angeles, that they were tolerated officially and promoted within the police department.

The second part of the proposal that I bring to you would make the use, the excessive use, of force a criminal offense punishable by life imprisonment if death results or up to 10 years. Now under the current law, title 18, sections 241 and 242, prosecutors are required to prove that the police officers had the specific intent, as you know, to violate the victim's civil rights. Who can look into a cop's head or anybody else's and tell that they were intending to violate somebody's constitutional rights? It can't be done. And so we eliminate that.

And, third, in this bill we require the Department of Justice to collect statistics on the incidence of police brutality complaints, investigations, and prosecutions. The Department has yet to release the request we made of them more than 1 year ago about the 15,000 complaints that they have investigated over the last 6 years. Under this bill, that information would be made public, save for revealing the names of parties involved, and it would be an important step forward. We can do that; we can do no less than to build on the record of this subcommittee, and I urge, Mr. Chairman, that we commence immediately toward the markup and reporting of the legislation that I've suggested.

Mr. EDWARDS. Thank you, Mr. Conyers.

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. And thank you for conducting this hearing today.

Mr. Chairman, it has been argued by some that Rodney King invited his own problems by having initially resisted arrest, and there may be some truth to that, but I don't believe it can be convincingly argued that Mr. King invited all that was delivered to him. At some point it seems to me—that is, at some point during the arrest process—it seems to me, having viewed the video, as many of you in this room have done, and that's the extent of my examination, but it seems to me at some point that Mr. King became restrained and was no longer a threat to the arresting officers, and it's unfortunate at that point that the beatings did not cease to occur to be delivered.

Some have been reluctant to condemn the riots, the lootings, the killings, on the ground that this postverdict behavior, oh, that was just merely pent-up frustration; that was just merely carried out in the name of civil rights. Such an analogy demeans civil rights. These rioters had no concern for Rodney King. These rioters and looters and murderers had no concern for anyone other than satisfying their own greed.

Some, unfortunately, have seized this moment as an opportunity to fan the fires of discontent, to fan the fires of unhappiness, to fan

the fires of hopelessness, anger, and rage. Oh, they're quick to point accusatory fingers: "Oh, it's the fault of the L.A. police chief; it's the fault of the mayor of Los Angeles; it's the fault of the President." I've heard all three charges expressed.

It seems to me, Mr. Chairman, the time has come for consensus-building. This is the time to ignite the fires of compassion, hope, assistance. This is the time to build, not destroy, and much building awaits completion on the part of all parties to this unfortunate affair. We need to commence a healing process that to succeed will require many people to become less openly and notoriously adversarial and more conciliatory.

I thank the chairman.

Mr. EDWARDS. Well, thank you very much, Mr. Coble.

The gentleman from Texas, Mr. Washington.

Mr. WASHINGTON. Thank you, Mr. Chairman. Thank you for convening this hearing.

I've conferred with counsel and I will endeavor to keep my remarks brief at this time. I have had the opportunity to read the testimony of His Honor, and I think that we are properly focused on one aspect of a much larger problem, and have been given assurances that on Thursday we will get into a more open and free-wheeling opportunity to discuss some of our feelings in general.

But I suppose, feeling as I do, I shouldn't let this opportunity pass without joining my friend at the other end of the table in expressing similar thoughts with respect to the appearance, at least, that many, many people who, for whatever reason, none of which could be justified, have chosen to disregard or disobey the law, hiding behind the thin skirts of outrage that most Americans feel with respect to the particular incident which we have all seen on television regarding Rodney King—I don't think that we should—I think that it's important to look at the past because I've heard it said that those who forget to listen to the lessons of history are doomed to repeat their failures.

It occurs to me that, at least as reported by I believe the Washington Post, giving proper attribution, since 1917, we've had at least 11 incidents that have been labeled as riots in various parts of the country, and following each of those major incidents we have had a study of one sort or another. I read with a good deal of chagrin that some of the people in the community, I'm sure for a worthy purpose, have suggested to the President and others that we have another study. I don't think that, in my very narrow and confined and perhaps overly simplistic judgment, another study is what we need. I think that if you look at least starting with 1965, following the riot in 1965, there was a study, Governor's Commission on the Los Angeles Riots, followed in 1968 by the National Advisory Commission on Civil Disorders, called the Kerner Report; in 1968, the Governor's Select Commission on Civil Disorders; in 1968, the Chicago Riot Study Committee; in 1969, the National Commission on the Causes and Prevention of Violence; in 1970, the National Commission on Campus Unrest; in 1982, following the incident in Miami, the U.S. Civil Rights Commission Report—I think that there is, without question, permeated throughout all of those, Mr. Chairman and members, enough boxcar writing in the sky to

let us know what we've failed to do as a nation and what we must now begin to do.

I believe that if life gives you lemons, that the most appropriate thing to do is to make lemonade. We could spend another 2 years studying the causes of the most recent incidents in Los Angeles, but I think that without more—in our hearts at least, we fairly well know what the problems are.

As a lawyer, it's difficult for me to criticize a particular jury verdict because I've seen verdicts that I like and I've seen verdicts that I dislike, but we must all preach, at least in my judgment, if we are to be faithful to the concept of ordered liberty, we must teach allegiance and preach allegiance to the verdict whether we like it or not. It's sort of like in the military, I'm told—I was never fortunate enough to be able to serve my country in that regard—but you salute the rank, not the individual who wears the uniform.

We must respect the jury verdict in Los Angeles, in my view, or in Simi Valley, although most Americans, it appears, are in a quandary as to attempt to explain it to themselves and to their children. And that is a real quandary because so many people have seen what appears to the unaided eye, at least, to be a rather significant case of police misconduct. I think the judge touched on that. I read over his testimony. There are ways of explaining at least plausible explanations as to how the jury could have somehow reached this decision.

But the main thrust of my point at this time, Mr. Chairman, is that we as a nation, not just the Congress but the President, the judicial branch, as well as the legislative branch, it seems now, while there are others who will have the task certainly and will be about the business of attempting to study in microdetail the events that led up to the very unfortunate series of tragedies that occurred in Los Angeles and environs beginning on last Wednesday, it seems that now more than ever is a time for national leadership to move us forward as a nation. We need leadership from the President. We don't need political posturing from Mr. Clinton or Mr. Bush or Mr. Perot, for that matter.

I think that was amply demonstrated by the people in Los Angeles that I saw on television who were spending a great deal more time across the street in line trying to get some sort of service to which they were entitled than they were over glad-handling with what appeared to be a political opportunist on behalf of at least Mr. Clinton. I'm sure he had the greatest and altruistic purpose in mind.

But we need leadership. We need the Attorney General to make it clear, as ought to have been done Wednesday shortly following the verdict, that that verdict was not the end of the process; that it was the end of one stage of the process, but it's at least a 3-inning ball game because, as Judge Newman remarks in his prepared testimony, in every case of police misconduct there are at least, albeit limited in their resources and approach and result, at least three things that may occur. One is a State court criminal prosecution—well, four, including the administrative remedy, and the judge talked about three of those—the State court criminal proceeding, but at the Federal level the potential for Federal civil rights charges under title 18, United States Code, section 242, as

well as section 1983 of title 42, which is a lot of legal mumbo-jumbo, but it's the civil rights action that one can bring in Federal court when his or her civil rights allegedly have been violated under color of law.

It seems to me that, without looking back in criticism too much, the most appropriate response from the Federal Government on the very day that the verdicts were returned would have been to make it clear that that was not the end of the process. I'm not suggesting, of course, that the people who took advantage of that situation, many of whom were, in my view at least, not acting like they were particularly upset at the verdict because of what they were doing—stealing televisions, it seems to me, has little relationship to righteous indignation with respect to the verdict in Simi Valley.

But it seems to me the Attorney General ought to move swiftly with an investigation, Mr. Chairman, under the although limited resources available without your bill that I hope we can pass out of committee today, and perhaps embody some of the recommendations of Judge Newman either then or in subsequent legislation, none of which will, of course, be applicable to the situation in California because that would be unfair to those, because that would not have been the law at the time. But the Attorney General ought to move forward as the chief law enforcement officer in this Nation.

In addition, we need to talk about education. Education did not directly cause the incidents in California, but I have a feeling deep down inside, and from looking at the reports as far back as 1965, that for every four youngsters that start the first grade, one drops out at least by the eighth grade; and of the three of the four who started the first grade together that graduate, one does not have the functional equivalency of a high school education. And we're spending less money per pupil on education. We're spending more money for persons in prisons than we do on children to educate them. We've cut back on the free breakfast program, and educators tell us that children who cannot afford to eat breakfast at home are three times less likely to learn when they get to school. We still have a modicum of a free lunch program, but not to the extent and degree that we should have, so that children can be in a learning environment where they can learn.

We need leadership from the Federal Government, although we recognize that education is a local concern and ought to be handled and controlled by local school districts and local communities. When a child in one part of the country fails to learn because the system fails him or her, it affects business, it affects industry, it affects citizenship, and it affects government, because someone else has to pick up the pieces one way or another. We either pay now or we pay later. We pay later by paying $40,000 per year to house many of those people who dropped out of the education system, or have been pushed out of the educational system when they become 18 or 19 years old, by housing them in the prisons of America.

We need to do something about health care, to provide meaningful health care for the 37 million Americans who are working. I would deign to hypothesize that most of the people who participated in the violence that followed the violence of the verdict were people who were undereducated, were people without jobs, without hope, without health care, without employment. If we're going to

reform our system and our system of economic conversion, then we ought to make those people first instead of last. We ought to have a Marshall Plan for America. We ought to rebuild our cities.

These things perhaps sound farfetched from the lemonade that some would like to see grow out of the incidents in Los Angeles, but I fear that if we don't do it, then about every 20 years we have a major outbreak like this; that the responsibility will be ours 20 years from now to explain why we didn't do something other than study the problem.

I have had the privilege in my life of representing people who have been the victim of police misconduct. I know that it is very difficult to bring them to justice. As Judge Newman points out in his prepared remarks, we start with the mentality that, all other things being equally, the policeman is going to get the benefit of the doubt. That is a truism in society. I don't think it has anything to do with race or color—because policemen put their lives on the line for us every day. And most, probably better than 90 percent of the police officers in this country, are God-fearing, hardworking, law-abiding citizens whose reputation is soiled and tainted by individuals like those who thought so little of themselves that they needed a badge and a gun and a nightstick to make themselves—and 12 of them—to make themselves the equal of 1 black man, 1 man who happened to be black whose name was Rodney King.

I hope the message from what happened in Los Angeles on that fateful night, and what has happened since, is not the diminution of the view in which we as a society hold one individual or one individual who happens to be black. There's a larger message. Having practiced law since 1970 until the time that I came to Congress, I am certain, if I am certain about nothing else, I'm certain about one thing, there but for the grace of God go any one of us. He didn't have to be black. He didn't even have to be a man. He didn't have to be wearing the clothes that he was wearing. When people think like that, and when society condones conduct like that, it can happen to any of us. It could happen to your child tonight; it could happen to someone else's child tomorrow, because if you're unfortunate enough to run into someone who needs that badge and gun and that nightstick, and the ability to lord over another human being, in order to make himself feel whole, you're in a heap of trouble, as we say down in east Texas, where I'm from, because it can and will happen. And it happens to all kinds of people.

In my judgment, this was not a racial incident. Each person is entitled to his or her view. Whether it was or not, it seems to me that we sell the incident short and we sell our country short even if we project it as a racial incident, because when we do, then for all of those people who are subject to the same conduct, if they think it is racial in nature, and racial only, they're likely to disregard not only the lessons of the past, but what we ought to be doing in the future. We ought not let young people of any color think that what happened to Rodney King couldn't happen to them.

In Houston, TX, where I'm from, we started with incidents happening with people who happened to be black, and when no one heeded the warning, it started to happen to Hispanics and then to white males and finally to women. The message is that we need to strengthen the laws that we have in order to ensure that there's

respect by the people who are hired by us to enforce our laws, first of all, because if they do not, and our society understands that they do not, then there is disrespect for the law. And if there is disrespect for policemen and distrust of policemen and disrespect for the law, then there is violence. And where there is no peace, where there is no justice, there will always be violence.

Thank you.

Mr. EDWARDS. Thank you, Mr. Washington.

The gentleman from Oregon, Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman, I have a statement that I'd like entered fully into the record, and I have some comments that I would like to make.

Mr. EDWARDS. Without objection.

Mr. KOPETSKI. Thank you, Mr. Chairman.

[The prepared statement of Mr. Kopetski follows:]

Statement of the Honorable Mike Kopetski
During Legislative Hearing on
H.R. _____, legislation to strengthen the Federal response to police misconduct
May 5, 1992

Mr. Chairman, I think the we are here today to speak about the need for a federal response to the problem of unreasonable use of force by police officers such as the Rodney King incident in Los Angeles last year. Last week's riots are the most compelling evidence I can offer for the need to reform the federal role in enforcing criminal civil rights statutes. Hopefully, the incidents across the country -- as tragic as they are -- may finally provide the opportunity to bring about meaningful reform that will provide a strong deterrence in preventing this situation from occurring again.

Since 1981, Department of Justice personnel has increased by 55% while the division responsible for investigating and enforcing the criminal civil rights statutes designed to protect the constitutional rights of all Americans has remained at about 40 people.

A look at statistics involving complaints received by the Department of Justice's Criminal Section of its Civil Rights Division is very revealing. For the past five years an average of between 7,500-8,000 complaints were received. The Department of Justice investigated approximately 3,000 annually, and of these only roughly 50 cases a year were presented to the Grand Jury. I am concerned that the Department of Justice's selecting and successfully prosecuting 50 out of 8,000 cases annually is hardly the model of rigorous enforcement.

These numbers reflect the Administration's philosophy on its role in enforcement of the civil rights statutes. That role, as defined by Justice Department officials during last March's testimony, was described as a "backstop," deferring to internal affairs bureaus of local enforcement agencies. In this process, once a complaint is received by a federal agency it is investigated within 21 days. Because of the large number of complaints received this investigation is often cursory, merely reflecting collecting the local police reports. The extent of local response is usually the controlling factor in deciding whether to pursue prosecution.

I am afraid we have all seen the effectiveness and result of the "backstop system". Perhaps more than 55 deaths and half a billion dollars in property damages in Los Angeles will prompt President Bush and the Justice Department to re-evaluate the current approach to criminal civil rights enforcement.

The most basic flaw with this system is clearly evident. The Department of Justice must wait and see the most egregious examples of police conduct and then try and prosecute the individual. So we wait until a amateur video operator catches four officers mercilessly beating a suspect with a number of additional officers looking on. Will there be a federal response, after the beating, after the verdict, after the riots, mayhem and death? I believe it is obvious that the proper federal role in dealing with investigating and prosecuting police misconduct should be preemptive rather than the current wait and see approach.

This can be accomplished in two ways. First, the Justice Department should play a more aggressive role in enforcing federal criminal sanctions against officials who violate civil rights. This role is directly related to the resources devoted to the investigation and prosecution of criminal civil rights violations. If the Justice Department continues to neglect these areas while it doubles its resources in other areas, it cannot seriously expect to diminish the continuing criminal civil rights violations.

Second, Congress should pass, and the President should sign, the Police Accountability Act, authorizing the Attorney General to sue for injunctive relief against abusive police practices. We need the possibility of judicial intervention to prevent abuses before they occur.

Currently, the Justice Department can only prosecute individual police officers. The primary basis for federal civil rights prosecution is 18 U.S.C. sections 241 and 242. These Reconstruction Era civil rights statutes provide for criminal penalties for willful violations of federally protected civil rights and conspiracies to violate these rights. These statutes have been narrowly interpreted by the Supreme Court and are among the most difficult statutes to enforce.

The Police Accountability Act would give the Attorney General and private parties standing to seek and obtain injunctive relief against patterns or practices of police misconduct that violates the U.S. Constitution. If Justice had this authority it could seek federal court relief that would address broader patterns and policies of police abuse instead of focusing exclusively on the narrower range of abuses involving criminal wrongdoing by officers.

The act does not impose any new standards of conduct on police officers, nor does it expose them to further liability. Its intent is to change the department policy when a clear pattern of abusive police practices emerges. Rather than the current scheme in which successive criminal cases must be initiated after the fact by the Justice Department, this Act would offer the Justice Department the power to seek injunctive relief to prohibit certain departmental practices.

The Justice Department has been given this authority in many areas involving constitutional and civil rights, including voting rights, public accommodations, and employment discrimination. But the Justice Department does not have the same authority to protect people from a pattern and practice of police abuse.

We owe the nation's police officers our deepest gratitude for confronting on a daily basis the increasingly violent society in which we live. The vast majority of police officers respect the authority granted them. Their profession is the most dangerous and difficult, and they are confronted and provoked continuously. In Oregon, every police officer, whether state or local, must complete an extensive training course at the Oregon Police Academy in Monmouth, Oregon. Last June, I toured this facility and met with instructors and students alike. Oregon, many other law enforcement departments across the nation, invests heavily in training of its officers and this investment pays off in quality professional law enforcement officers. However, the problem of police misconduct exists and it will not end because of the Rodney King incident. This is a serious problem

and a difficult task which faces the nation. The means to address the problem are clear. Now we must act.

Mr. Chairman, I commend you for holding this hearing and look forward to the testimony of the witnesses today.

Mr. KOPETSKI. I join with my colleague from Texas, Mr. Washington, in stating that this presents some difficult questions and issues for us because of our great belief and confidence in the jury system; that through the years a community of peers has judged the guilt or innocence, judged the tort liability of people where you sue them in a car accident, for example, and we trust a jury to sort through all the facts and to get instructions from a judge and to arrive at justice in our society. So it makes it very difficult for us to criticize the result of that very fundamental part of our judicial system in the United States.

But we know that justice was not served in that decision by that jury in California. So now the question is whether the Attorney General and the Department of Justice are going to do their job, because clearly they have the legal authority, they have the resources to bring action against the police officers and to bring justice in this case, I believe, and I hope that they act forthwith. We don't need another study to see whether they should do this as something that they have the power to do all by themselves in their own decision, nobody else's. The responsibility, therefore, lies with the Attorney General.

I think that Americans believe in this cynical world of ours that the economic system can fail them but the judicial system never will; that there is that constant in American society; that we can go to that branch of government and fairness will always result. And I think that if we try to understand what happened this last week, even by the looters, the lawless looters and rioters, we put this in this context: That our social contract broke down. And it broke down because of the injustice that was meted out by the jury verdict; that people could say, well, yes, I can understand that I want to have a job, but there isn't a job there, but I don't understand why a jury didn't convict these individuals or find them guilty of crime in our society.

When Mr. Coble talks about the healing process in our society, I think that's our greatest challenge, to rebuild that social contract and compact, and that it has to begin with the economic system in our society. And as Mr. Washington was suggesting, it is for all society. It's black and white and Asian. It's for America; that we do have to make a recommitment to our schools and our education system, or people aren't going to understand the processes of American Government; they aren't going to have the ability to get a decent paying, a living wage job; that we are going to have to have a health care network that allows universal access to care; that it takes quality parks and green spaces in our cities so that our children can play, and play safely, in neighborhoods; so that there is a decent quality of life in this country; so that people feel connected to their community; so that they're not going to burn down the stores and businesses in their own neighborhood.

And they need to see, I think, that Government won't tolerate rioting. Yes, they understand that, but also Government won't tolerate white-collar crime; that this Department of Justice will be aggressive in pursuing those, for example, in the savings and loan industry that stole billions and billions of dollars from the American taxpayer, that has added $100 billion to the Federal deficit, and this Department of Justice refuses, for some reason, to go out and

collect the money in judgments that they've already gotten. So there is a credibility problem with the Department of Justice today.

And people say, "Well, why do you come after us, rioters. You come after us aggressively. All we ask is that you go after the savings and loan con artists just as aggressively." So it's a fairness issue, and I think people are willing to sign up for the American society because we have the best system of government, but it's implemented by individuals.

We have talked through this past year, in particular, in closing, Mr. Chairman, about the great changes in this world and the opportunity that the dissolution of the Soviet Union has presented; that the cold war is over and that we've won. And now we're trying to figure out what is the real defense need of America.

We talk about the need to break down those walls, as we tried, and shift dollars from defense to the human factor in America, saying that this is really our greatest and most pressing line of defense. And we failed to do that a few weeks ago.

Well, I'm suggesting today that if we don't take care of this line of defense, that what we saw in Los Angeles was just the beginning; that it's going to be repeated in other major urban areas throughout the United States, and we'd better put moneys into this kind of defense of America, into the education, the health care of the United States, or there will be some other incident that will set the riots off once more.

Thank you, Mr. Chairman.

Mr. EDWARDS. thank you, Mr. Kopetski.

Our first witness is The Honorable John Newman, U.S. Court of Appeals for the Second Circuit. Judge Newman is a former Federal prosecutor and has a long and distinguished record of public service, including experience in all three branches at the Federal level.

Judge Newman, would you please raise your right hand?

[Witness sworn.]

Mr. EDWARDS. Without objection, your full statement will be made a part of the record. We welcome you. We're very pleased to have you as a witness today, and you may proceed.

STATEMENT OF JON O. NEWMAN, JUDGE, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, HARTFORD, CT

Judge NEWMAN. Thank you very much, Mr. Chairman. I appreciate very much your invitation to appear before you and discuss with you a proposal that I made on the pages of the New York Times this past Friday, which is really a renewal of a proposal I had made in the Yale Law Journal many years ago. The proposal is obviously of current interest in the aftermath of the Rodney King episode and the jury's response to it in the context of a criminal case.

But it seems to me the need to focus seriously on the protection of all constitutional rights in this country is an issue that is of concern beyond the specifics of the Rodney King case. That case brings it into sharp focus, but the issues have been with us ever since the 14th amendment was adopted, which guarantees the constitutional rights of Americans against State and local violation. And, regrettably, there has never been a full vindication of the promise of that

amendment, even though significant efforts have been made to achieve that.

Essentially, there are three broad approaches one can take to assure that constitutional rights are enforced. There can be criminal prosecution when there is a violation. There can be civil lawsuits to redress the deprivation. And there can be administrative action taken in the locality concerned.

The Rodney King case focuses our attention on the effort to use the criminal sanction. Many people in this country are distressed that the jury asked to convict those officers of the crime of using excessive forced declined to do so. I'm not here to debate the merits of the verdict, but I do wish to emphasize the fact that the criminal sanction, even if successful on occasion, is never going to be an effective way of enforcing the commands of the Constitution. We did not need the Rodney King case to remind us of that.

A criminal prosecution was used by the U.S. Department of Justice to prosecute the guardsman at Kent State. The case was dismissed by the judge; it never got to the jury. Two years before, in 1968, in an episode that many think is perhaps the most outrageous excessive use of force, the Orangeburg massacre of the students at South Carolina State College, where 3 were murdered, 27 were wounded, the Justice Department endeavored to use a criminal sanction. The grand jury would not even indict. The matter was proceeded by information which does not require an indictment. The jury acquitted in under 2 hours. That episode also was captured on film by a CBS camera, and it is chronicled in the book which many of you know, written by a distinguished reporter. It's entitled "The Orangeburg Massacre."

The reason the criminal sanction won't be effective in most cases is not hard to understand. There are two essential problems. The first is the case requires proof beyond a reasonable doubt. That is a very high standard, quite appropriate for criminal cases, and juries often find it is not met in police misconduct cases.

The second reason is the nature of the defendant. The defendants are police officers, and jurors are reluctant, no matter who they are, to brand a police officer a criminal and risk consigning him to a prison where, for all they know, he will be housed with some of the very people he has been responsible for apprehending. Now I realize prison administrators are alert to that problem, and when there is a conviction, they endeavor to take precautions, but jurors don't know that and they don't want to take the risk.

The people who are saying, "How could the jury fail to see there was excessive force?" I believe are asking themselves the wrong question. Of course, there was excessive force; anyone viewing the tape saw it for himself or herself. The issue for that jury was not simply, "Was excessive force used?" The issue for that jury was, "Should we vote to brand a police officer a criminal and send him to prison?" It is one thing to watch that tape in our living rooms and come to the conclusion that excessive force was used. I think most Americans have come to that conclusion. It is quite another thing for 12 jurors to use their vote and say they are persuaded beyond a reasonable doubt that the officers are criminals who should be placed in prison. This jury, and many other juries across the country, have declined to say that.

Now there are calls for Federal intervention. What can the Federal Government do today? It, too, can bring a criminal case. If it brings a criminal case, and it well may, it will also have to have proof beyond a reasonable doubt and it will have to ask juries to make this same judgment branding police officers criminals. And it will have to have even a further obstacle to overcome; it will have to prove not only that excessive force was used, but that the officers acted with the specific intent to deprive the victim of his constitutional rights. That is a very hard burden to prove. That was the element lacking in Kent State when the judge threw the case out.

There have been some occasional successes in the use of criminal sanctions. Those who shot Schwerner, Chaney, and Goodman, in Mississippi were tried under the Federal civil rights statute criminally, and although some were acquitted, seven were convicted. And there are some successes that the Department of Justice is very proud of, I'm sure, but it is rare to convict a police officer of police brutality. It is rare to convict any public official in this country of denying people constitutional rights. Therefore, I suggest to you that it is more useful to focus on making the civil remedy the effective means of redress.

When rights are denied in America, we tend to rely on the civil law to seek redress. We do not use the criminal law as the first line of redress for denials of rights. We use the civil law. As you know, there is available a civil statute—that's been on the books for over a century—entitling the victim of any denial of constitutional rights to sue those responsible for damages. But that statute has three defects which I want to discuss with you.

It is the wrong plaintiff suing the wrong defendant subject to the wrong defense.

Mr. CONYERS. Which suit or which law are you referring to?

Judge NEWMAN. The 1983 statute, the fundamental civil rights statute in America, section 1983 of title 42.

A suit can be brought only by the victim. Now at first glance that seems very sensible; who else? He's the victim; he's injured; why shouldn't he sue? And I don't suggest he shouldn't sue. What I do suggest is he should not be the only person who sues. There should be authority for the United States of America to walk into a Federal court whenever the constitutional rights of a U.S. citizen have been denied and bring a lawsuit.

Now I know the chairman has proposed a pattern and practice injunction remedy, and there are many situations where that would be a helpful remedy. But I suggest to you, Mr. Chairman, that that, too, is a very difficult lawsuit to bring. And while it would be a useful ingredient, it, too, need not be the only ingredient of procedural remedies for this situation. The United States should be able to sue on behalf of its citizens in any case where the Attorney General thought it was an appropriate situation. It would be useful for several reasons.

It would send a needed message to the citizens of this country that the United States is interested and concerned when civil rights are denied, any civil right, not just police brutality but any civil right, any constitutional right. It would provide the prestige and resources of the United States at counsel table and in the in-

vestigative phase. It would mean the case would be investigated by the FBI. It would mean it would be presented by the U.S. attorney's office, and it would mean that the jury would see the majesty of the United States concerned that constitutional rights not be denied.

So my first proposal is that you authorize, in addition to the civil suit by the citizen, the right of the United States to sue on behalf of the citizen whenever constitutional rights are denied.

The second suggestion is that you permit suit to be brought against the responsible employing agency for which the offender worked. Right now the suit is brought against the police officers. Occasionally, they are successful suits, but frequently they are not. And I've brought some materials that I'll call to your attention that chronicle the outcomes of many of these cases. I happen to have tried some 30 police misconduct cases in Federal court in New Haven back in the seventies when I was a district judge. For 7½ years, I was a district judge. I've been on the court of appeals now for 13. And, incidentally, I should digress simply to point out, what I say today is my own views; I speak for no other judge and do not purport to represent the judiciary or my court. These are my own views. I want to make that quite clear.

I tried these cases and I saw the jury reaction to them. Occasionally, they were successful, but frequently they were not. And one reason they were not is that, just as juries are reluctant to brand a police officer a criminal, they are also reluctant to impose heavy financial obligations on that police officer. Now it may be that the city would have paid the judgment; many times they do, either through indemnification or union contracts, but jurors aren't told that. And the defense attorneys make it very clear in their arguments that you ought not to impose heavy damage remedies on a hard-working police officer. It's a very effective argument. The suit should be brought by the United States, and the defendant should be the city.

Rodney King tomorrow can bring a section 1983 suit which will be called King v. the four police officers. He might win; he might not. I suggest to you the suit will have far better chance of success and will be far more meaningful to the citizens of America, and to the police departments of America, if the suit is called the United States of America v. the city of Los Angeles.

And the third proposal I would make to you is that in those suits you make it possible for the United States and the citizen to prevail against the employing unit of government without the defense of good faith, qualified immunity. Now this a technical matter, and I don't want to take up all your time going into it, but simply to identify the law today in this country is that when a citizen sues for denial of constitutional rights, the jury is told, first determine whether the constitutional right was denied. In this context, that would mean, first determine whether excessive force was used. The jury is then told something else, and it is this. They are told, even if you find the constitutional rights were denied, you must exonerate the police officers from civil liability if you believe they had a good-faith belief in the lawfulness of what they were doing. It is a technical defense; it is hard to explain to a jury. I don't believe they grasp it all, but what they come away with is, well, the judge is

really telling us that even if the violation happened, but the police officer was doing what he thought was his best, we ought not to impose liability. So they use that defense and they exonerate the officers.

If suit is brought against the officer, there's an argument there should be a good-faith defense. Reasonable minds can differ on that. But if suit is brought against the employing city or State, it seems to me there is no justification for a good-faith defense. If the constitutional right has been denied by the employee's conduct, the employer—in this case the city—should pay. Now that's not a startling proposition.

As I've pointed out in some of these materials, if a garbage collector from the city of Los Angeles negligently injures a pedestrian on the streets today, the city will be sued and the city will pay. But if a police officer violates the constitutional rights of a citizen and suit is brought in Federal court, the city is not liable. That is an extraordinary gap in Federal civil rights protection in this country. It is a gap traceable to a ruling of the Supreme Court made many years ago interpreting what it thought was in the minds of the Congress in 1871. I wasn't here in 1871; I don't know if that was in the minds of the Congress or not, but I suggest to you that, whatever was in their minds, it ought not to be in your minds. The time has come to pass a statute that lets the United States sue—doesn't require it, simply authorizes suit by the United States—whenever a constitutional right is denied. It authorizes suit against the employer of the person who perpetrated the deprivation of right, and it permits that suit without the defense of good-faith immunity.

Now those proposals—and I'll end on this note, Mr. Chairman—I don't suggest that they will work profound changes in the law of this country. Indeed, it's almost embarrassing, in view of the dramatic events we have seen and the aftermath of it, to be suggesting to you that attention should be focused on these precise procedural remedies. But it's beyond my ken to deal with the broad social issues that the members of this committee have identified here this morning. My field is law and legal remedies.

There is a concern in this country for law and order, a very proper concern. If there is to be order, there must be law. I have tried to suggest to you some specific steps to strengthen law, to strengthen remedies. You cannot have a Constitution and simply expect it to be abided by because it exists on the books. Rights require remedies, and the remedies we have, both criminal and civil, while they are useful up to a point, are incomplete. I urge this committee to give serious consideration to these proposals or in whatever form you choose to implement them, so that the legal fabric of this country, the set of legal remedies for the protection of all constitutional rights, not just police violations, all constitutional rights will be as effective as we can possibly make them.

I thank you for this opportunity, Mr. Chairman.

Mr. EDWARDS. Well, thank you very much, Judge.

[The prepared statement of Judge Newman follows:]

Statement of Judge Jon O. Newman
Before the Subcommittee on Civil and Constitutional Rights
Committee on the Judiciary
U.S. House of Representatives
May 5, 1992

My name is Jon O. Newman. I am a United States Circuit Judge serving on the United States Court of Appeals for the Second Circuit. Briefly, by way of background, I have been a federal judge for 20 years, serving on the Court of Appeals for 13 years and previously on the District Court for the District of Connecticut for 7½ years. I also served as the United States Attorney for the District of Connecticut for 5 years.

I appear today at the invitation of the distinguished chairman of this subcommittee to discuss a proposal to provide enhanced protection for the civil rights of every person in this nation, a proposal that I made on the op-ed page of The New York Times last Friday. I have submitted with this statement a proposed bill -- "the Civil Rights Protection Act of 1992" -- to implement the proposal.

The proposal has been prompted by the verdicts that occurred in the recent California trial of four police officers charged with brutality in the arrest of Rodney King and by the distressing events that have occurred in Los Angeles and elsewhere in the aftermath of those verdicts. More precisely, I should say that while these events were the immediate impetus for making the proposal, it is actually a renewal of a more elaborate suggestion for legislation that I first made in an article in The Yale Law Journal in 1978. See Jon O. Newman, Suing the Lawbreakers:

Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L. J. 447 (1978). That article grew out of my experience as a U.S. District Judge presiding at an unusually large number of federal trials of police misconduct claims in New Haven, Connecticut, in the 1970's. I tried approximately 30 such cases to a verdict, and assisted in the settlement of more than 100 additional cases. With the Chairman's permission, I would like to have the proposed bill, the Times op-ed piece, and the Yale Law Journal article included at the conclusion of my statement.

I. Remedies for Civil Rights Violations

Ever since the Fourteenth Amendment was adopted in 1866, protecting the constitutional rights of all citizens against deprivations of those rights by state and local governments, this nation has endeavored to make the promise of that Amendment a reality. Many notable achievements have been recorded. One of the first and still today one of the most significant steps was the enactment of the Act of April 20, 1871, now codified as section 1983 of Title 42 of the United States Code. Another major landmark was the Civil Rights Act of 1964. Most recently this Congress enacted the Civil Rights Act of 1991. Despite these important statutes, we still lack effective remedies for violations of constitutional standards.

There are essentially three forms of remedies for civil rights violations -- criminal, civil, and administrative. A criminal prosecution may be brought under federal or state law against the

public officer who caused a denial of constitutional rights; if the officer is convicted, the normal penalties of the criminal law, imprisonment and a fine, may be imposed. A civil suit may be brought under federal or state law against the officer by the person injured by the unconstitutional action; if the suit is successful, the victim may be awarded compensatory damages and sometimes punitive damages. An administrative remedy may be implemented by the city, county, or state that employs the officer; the employing unit of government may discipline the officer and may implement internal reforms to lessen the chances that official misconduct will occur in the future.

Regrettably, we have learned over and over again that existing remedies are inadequate. The videotape of the beating of Rodney King and the jury verdicts in California are only the latest evidence that our response as a nation to civil rights violations is far from complete. I propose to discuss with you, first, the inadequacies of existing criminal remedies; second, the inadequacies of existing civil remedies and how the principal deficiencies of the federal civil remedy could be overcome; and, third, the choices that need to be made in determining how best to strengthen the federal civil remedy.

II. The Inadequacy of Criminal Law as a Remedy for Civil Rights Violations

The Rodney King verdicts illustrate the difficulty of using criminal law as the instrument for vindicating deprivations of

civil rights. There may well be instances where the unconstitutional action of a public official should be regarded as a crime, and some successful criminal prosecutions have been brought under both state and federal law to punish such offenses.

However, a state law criminal prosecution encounters two major obstacles. First, the jury must be persuaded according to the traditional standard of proof that applies in all criminal trials -- proof beyond a reasonable doubt. That is a high standard, as it should be. But in many circumstances, and police brutality cases well illustrate the point, a jury might believe that excessive force was used or other unconstitutional action taken and yet not be persuaded of that fact beyond a reasonable doubt.

Second, when police officers are defendants in criminal civil rights prosecutions, there is inevitably some reluctance on the part of citizen jurors to brand as criminals those on whom they rely for their safety. Some jurors will understandably fear that convicting a police officer of a criminal civil rights offense, even if warranted on the facts of the case, will send to all police officers not only the intended message that civil rights must be respected but the unintended message that perhaps the police should lessen their law enforcement activity and overlook some crimes. Other jurors may understandably fear that the police officer who deserves to be convicted of a civil rights offense does not deserve the hazardous punishment of imprisonment with ordinary criminals, some of whom the officer might have arrested. Even if prison

officials will take every precaution to separate police offenders from the general prison population, jurors do not know that such precautions are available, and many will hesitate to convict in order not to subject the police officer to the risk of prisoner retaliation.

Whether these considerations in fact influenced the verdicts of the Rodney King jurors I do not know, but I believe it likely that these thoughts were on the minds of at least some of them. It is one thing to view the videotape of the Rodney King beating from the serenity of our living rooms, where our reaction is likely to be that, of course, excessive force was used. It is quite another thing to be persuaded beyond a reasonable doubt that one should cast a vote that brands a police officer a criminal and risks his commitment to prison.

There exists a federal statute making it a federal crime to violate civil rights, section 242 of the Criminal Code, and today there are urgent calls for the federal government to bring a section 242 prosecution against the police officers who beat Rodney King. It is not for me to express any view as to the propriety of such a prosecution, but it is fair to point out that a federal prosecution will encounter not only the obstacles faced by the California prosecutors but in addition the extra obstacle that exists in every section 242 case -- the requirement that the accused be shown to have acted with the specific intent to deprive the victim of a constitutional right. See Screws v. United States,

325 U.S. 91, 104 (1945) (plurality opinion). It was the federal prosecutor's inability to present sufficient evidence of this elusive element that led to the dismissal of the federal criminal charges against the National Guardsmen who fired the shots at Kent State University in 1970. See United States v. Shaffer, 384 F. Supp. 496 (N.D. Ohio 1974). If a prosecution is brought, it might well result in one or more convictions. Successful federal prosecutions for civil rights violations have occurred, most notably with seven of the nineteen defendants charged with the 1964 murders of civil rights workers Michael Schwerner, James Chaney, and Andrew Goodman in Mississippi. But successful criminal prosecutions of civil rights violations are infrequent, whether brought under state or federal law.

The essential deficiency of a criminal prosecution for civil rights violations is that it offers the jurors what may often be an unsatisfactory choice between two unattractive alternatives. The jurors can either find the police officers guilty of a crime or they can completely exonerate them by a finding of not guilty. There should be alternative remedies in between these all-or-nothing outcomes.

The difficulties of a successful criminal prosecution for civil rights violations were brought home to me many years ago when, as United States Attorney, I initiated the first federal prosecution in Connecticut for police brutality. The facts were indisputable. A police officer had arrested a teenager for

disorderly conduct and placed him in a police cruiser. As his partner drove the car to the police station at 2 a.m., the officer told his partner to stop on a side street. The officer got out, pulled the handcuffed teenager from the back seat, and punched him flush in the face. Satisfied with this summary punishment, the officer took off the handcuffs and let the teenager go. The details of the episode were testified to by the teenager and, more significantly, by the officer's police partner. Despite the unusually clear proof of police misconduct, it became apparent how difficult it would be to obtain a conviction when the grand jurors expressed reluctance even to return an indictment. At my urging, 12 of the 21 grand jurors, the minimum number required for an indictment, voted a true bill. The trial jury took barely a half-hour to return a verdict of not guilty.

III. The Inadequacy of Existing Federal Civil Remedies for Civil Rights Violations

The inadequacy of criminal sanctions for civil rights violations obviously suggest that civil sanctions be used. Most grievances in this country are remedied by civil lawsuits, and civil remedies are available under both state and federal law for deprivations of civil rights, including acts of police brutality. Section 1983 of Title 42 of the United States Code is the federal law provision most frequently used by those claiming a denial of civil rights. That provision authorizes a civil suit by any person to redress a denial of constitutional or statutory rights caused by

any state or local official. It is a useful remedy, but it suffers from three basic deficiencies.

First, the suit must be brought by the person injured and cannot be brought by the United States suing on his behalf. Second, the defendant, except in one special and extremely limited circumstance, must be the individual police officer who committed the act of misconduct and cannot be the city that employs the officer. Third, even if the jury in the civil case is persuaded that the officer acted to deprive the victim of a constitutionally protected right, the victim loses the suit if the jury finds that the officer had a good faith belief in the lawfulness of his action. Let me explain each of these deficiencies in more detail.

A. Authorizing Suit by the United States. Requiring the plaintiff in a civil rights lawsuit to be the person injured seems at first glance to be a sensible rule. After all, civil lawsuits are always brought by the person injured. But civil rights lawsuits are a special category of lawsuit. Frequently the victim of a civil rights violation is not a typical citizen in good standing in his community, as would usually be the case, for example, when the victim of an automobile accident sues the negligent driver of the car that struck him. A civil rights plaintiff, especially the victim of police brutality, is often a somewhat disreputable person, often a person who has just committed a crime and who may well have a significant criminal record. When such a person comes into court asserting that police officers have

denied him some constitutional right, few jurors start off with a sympathetic disposition toward him.

A civil rights lawsuit pitting the victim against the police officers usually begins with the victim at a considerable disadvantage, often because of the circumstances that brought the victim to the attention of the police. It is a disadvantage from which many victim-plaintiffs with meritorious claims never recover.

An obvious solution is to authorize the United States to initiate the lawsuit on behalf of the injured person. A violation of civil rights means that a United States citizen has been denied a right protected by the United States Constitution. How appropriate it would be for a suit to redress that violation to be brought by the United States!

A civil rights suit brought by the United States on behalf of the person whose rights had been violated would have several advantages. First, it would demonstrate that the federal government was interested in the protection of civil rights. That is an important message for a government to send to all of its citizens. Second, the suit would be presented by the office of the local United States Attorney, usually an office of talented lawyers who are well regarded in the community. Third, the Federal Bureau of Investigation would be available to investigate the episode and gather evidence.

Some might think that the United States may elect to bring a civil suit on behalf of its citizens for a deprivation of

constitutional rights, even without an authorizing statute. Unfortunately, courts have ruled that such a lawsuit requires explicit congressional authorization. One of the major tests of such authority occurred in 1980, when the United States attempted to bring a suit against the City of Philadelphia to obtain an injunction to remedy a widespread pattern of police misconduct. The United States Court of Appeals for the Third Circuit ruled that the suit could not proceed without an act of Congress authorizing such lawsuits. See United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980).

In the past, it has been proposed that Congress should authorize the United States to bring injunction actions to remedy civil rights violations, see H.R. Rep. No. 914, 88th Cong., 1st Sess. 17 (1963); H.R. Rep. No. 956, 86th Cong., 1st Sess. 3 (1959) (proposal of Chairman Celler); H.R. Rep. No. 291, 85th Cong., 1st Sess. 9-11 (1957) (proposal of Attorney General), but these efforts have been largely unsuccessful. See House Report 914 at 22; House Report 956 at 3; 103 Cong. Rec. 12,565, 16,112-13 (1957). A modest remedy, permitting the Attorney General, in limited circumstances, to seek relief against discrimination in the use of public facilities, was enacted into law as part of Title III of the Civil Rights Act of 1964. See 42 U.S.C. sec. 2000b(a) (1988). Authority also exists for the Attorney General to seek injunctive relief for so-called "pattern and practice" denials of civil rights in various areas such as voting, housing, employment, education, and public

accommodations. As far as I am aware, Congress has never authorized a suit by the United States for the specific purpose of obtaining money damages for the victim of a denial of constitutional rights.

It should be emphasized that authorizing suit by the United States on behalf of those denied their constitutional rights would leave the decision to initiate any particular suit entirely in the discretion of the Attorney General. Just as the Department of Justice now decides in which cases it will initiate a criminal prosecution for violations of federal law, it would retain complete discretion whether to initiate a civil lawsuit for a violation of constitutional rights. But at least the legal officers of the United States would have the discretion to bring a civil lawsuit in any case that they determined merited enlisting the prestige and resources of the United States on behalf of any person who suffers a denial of constitutional rights.

B. Imposing liability directly on the wrongdoer's employer. It is a familiar principle of tort law that an employer is responsible for the harms caused by his employee in the course of employment. The legal doctrine imposing such liability is known as respondeat superior. For all sorts of wrongs committed by state and city employees, the unit of government that employs them is liable to the person injured. If a municipal garbage collector drives a truck carelessly and injures a pedestrian, the person injured can sue the city. But the principle of respondeat superior

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does not apply to civil rights suits brought under section 1983. See Monroe v. Pape, 365 U.S. 167 (1961) (municipal liability). The Supreme Court has ruled that when Congress passed the Civil Rights Act of 1871, it intended to create liability only for the individuals who personally caused a deprivation of constitutional rights, and not for the city that employs these individuals.

Whether or not that is what Congress had in mind in 1871, it is now time to make clear that cities are liable for the constitutional torts of their employees, just as they are liable for ordinary acts of negligence. Though the Eleventh Amendment normally insulates the states from damages liability in federal courts, the Supreme Court has made it clear that Congress has authority under the enforcement clause of the Fourteenth Amendment to legislate explicit remedies for unconstitutional action by states and their officers, notwithstanding the Eleventh Amendment. See Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); see also Quern v. Jordan, 440 U.S. 332 (1979) (explicit authorization required).

Some might question the need to create direct governmental liability for constitutional violations of individual officials by pointing out that states and cities frequently indemnify their public officials for liability imposed on them in connection with their public duties, even when they act contrary to legal limitations. In some jurisdictions reimbursement is required, not by state law or city ordinance, but by collective bargaining

agreements negotiated on behalf of state or municipal employees. Thus, it frequently happens that a section 1983 judgment obtained against a police officer for police misconduct is paid by the state or city that employs the officer.

Such reimbursement assures payment to the person injured if he prevails at trial, but the absence of direct governmental liability significantly reduces the chances that the person injured will prevail at trial. When only the individual police officers are defendants in the courtroom, many jurors are understandably reluctant to subject them to civil liability for money damages. The jurors are not told and will often be unaware that state law or local union contracts provide for governmental reimbursement of any sums awarded against the officers. The lawyers defending the police officers will normally find ways to urge the jurors to reject the victim's claim in order to spare the officers the financial burden of an adverse judgment.

There is one limited circumstance under section 1983 in which liability may be imposed upon the governmental employer of public officials who cause a deprivation of constitutional rights. A city may be found liable under section 1983 upon proof that the city maintained an official policy of encouraging or at least tolerating unconstitutional actions by its employees. See Monell v. Department of Social Services, 436 U.S. 658 (1978). But proving such a policy is extremely difficult, and civil rights plaintiffs rarely win on such a claim.

Governmental employers of public officials who deny constitutional rights should be liable not only for compensatory damages but also for punitive damages. The Supreme Court has ruled that section 1983 does not authorize punitive damages against municipalities because liability for such damages did not exist at common law in 1871 and because, in the Court's view, it is not sound policy to impose such liabilty. See City of Newport v. Fact Concerts, 453 U.S. 247 (1981). The common law history of the nineteenth century obviously provides no reason for this Congress not to adopt this remedy, and the policy arguments, I suggest, weigh heavily in favor of punitive damage liability. In creating governmental employer liability for punitive damages, consideration might well be given to establishing dollar limits on allowable awards, perhaps scaled to the population of the city, county, or state. It would also be appropriate, in suits brought by the United States, to permit the jury, or perhaps the court, to allocate the punitive damages award partly to the victim and partly to the United States.

Every person who brings a civil rights suit under section 1983 and the United States, if it is authorized to sue on behalf of the person injured, should be able to sue directly the unit of government that employed the person responsible for a denial of constitutional rights. In the Rodney King case, the suit should be United States v. City of Los Angeles.

C. Governmental liability without a good-faith immunity

defense. A major obstacle to remedying civil rights violations in a federal civil suit under section 1983 is the doctrine of qualified immunity. This doctrine provides that an individual officer who has been found to have acted to deny a citizen some constitutional right nevertheless has a defense to civil liability if the officer had an objectively reasonable good faith belief that his actions were lawful. See Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

The defense of qualified immunity is sometimes difficult to comprehend. Some constitutional violations can be established only by evidence that the officer acted in an unreasonable manner. For example, an unlawful arrest occurs when an officer lacks reasonable grounds for believing that the suspect has committed a crime. Or, a finding of excessive force requires a finding that an officer used more force than was reasonably required under the circumstances. It has never been entirely clear to me why a jury that has first concluded that an officer has acted in a manner that is objectively unreasonable should nevertheless be permitted to relieve the officer of civil liability by finding that it was objectively reasonable for the officer to believe that his actions were reasonable. But some courts have ruled that the good-faith defense is available, even where the constitutional violation requires proof of unreasonable action. See Finnegan v. Fountain, 915 F.2d 817, 822 (2d Cir. 1990) (excessive force); Brown v. Glossip, 878 F.2d 871, 873-74 (5th Cir. 1989) (same); Thorsted v.

Kelly, 858 F.2d 571, 573 (9th Cir. 1988) (same); Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972) (unreasonable search). Other courts disagree. See Holt v. Artis, 843 F.2d 242, 246 (6th Cir. 1988) (excessive force); Bates v. Jean, 745 F.2d 1146, 1152 (7th Cir. 1984) (same). The Supreme Court has specifically left the question open. See Graham v. Connor, 490 U.S. 386, 399 n.12 (1989).

If there is some metaphysical difference between the objective reasonableness that determines whether the officer has acted in violation of the Constitution and the objective reasonableness that determines whether the officer is entitled to the defense of qualified immunity, see Anderson v. Creighton, 483 U.S. at 639, it is safe to say that few jurors understand it, no matter how carefully the trial judge tries to explain it. To most jurors hearing a jury instruction on the defense of qualified immunity, it simply sounds as if the officer should not be found liable if he thought he was behaving lawfully, and many jurors will give him the benefit of the doubt on that issue, even if they think his conduct was improper. The subtleties of the distinction between objective good faith and subjective good faith are not readily grasped by most jurors. The Supreme Court has ruled that only the officer's objective good faith is relevant; his subjective belief in the lawfulness of his actions is not relevant. Anderson v. Creighton, 483 U.S. at 641.

It is not my contention that the defense of qualified immunity

should be abolished for suits against individual officers. When a civil rights plaintiff attempts to sue an individual public officer for money damages, there is some justification for extending to that officer the defense of qualified immunity. My point is that the civil rights plaintiff should be permitted to bring suit directly against the officer's governmental employer, and in such a suit, there is no reason to permit the employer to invoke the defense of qualified immunity. Whenever a public official takes action that deprives a citizen of a constitutional right, the official's employer should be required to pay damages to the victim, regardless of the good faith of the official. If the official's action was unconstitutional, the victim should be compensated. The injury is sustained because the Constitution was violated. The reasonableness of the officer's belief in the lawfulness of his actions may be a reason for not requiring the officer to pay, but it is not a reason for denying the victim fair compensation from the city, county, or state that employs the officer. Cf. Owen v. City of Independence, 445 U.S. 622 (1980) (qualified immunity is not available to municipality for liability that falls within the Monell doctrine). Allowing suits against a governmental employer without the defense of good-faith immunity would further the goals of deterrence, risk-spreading, and compensation.

However, governmental employers should not be liable for those claims that would encounter the defense of absolute immunity that

is normally available to judges, prosecutors, and a few other officials exercising quasi-judicial authority, see Stump v. Sparkman, 435 U.S. 349 (1978). If a city could be sued for damages every time a civil rights plaintiff claimed that a city court judge committed an error of constitutional dimensions in the course of a trial, the city would be sued over numerous matters that are better handled in the normal process of according appellate review to the decisions of trial judges. Similarly, the actions taken by prosecutors to which absolute immunity applies can best be redressed in the course of appellate review of any convictions that result from the prosecutor's unconstitutional actions. Direct governmental liability in such circumstances would create vexatious opportunities to relitigate the validity of criminal convictions in the guise of civil damage suits.

III. The Choices to Be Made in Providing an Effective Federal Civil Remedy for Civil Rights Violations

Framing a statute to implement the three proposals I have presented requires a number of choices to be made concerning important details. I hope it will be useful if I outline some of these choices and indicate the way I have suggested these choices be made in the proposed bill that I have presented.

1. Scope of the statute. Perhaps the most basic choice concerns the scope of the statute. The statute could be narrowly written to cover only unconstitutional actions involving police brutality, or it could be broadened to cover all unconstitutional

actions taken by police officers, such as unconstitutional arrests and unconstitutional searches, or it could be broadened still further to cover all unconstitutional actions taken by any public official under color of law. I think it makes sense to cover all unconstitutional actions. Whenever a constitutional right is denied, the United States should be authorized to sue on behalf of the person injured, and that person and the United States should be entitled to sue directly the employer of the officer responsible for the unconstitutional action.

2. Consent of the victim. The authority of the United States to sue on behalf of the victim could be created either subject to the consent of the victim or without regard to the victim's consent. I suggest conditioning the authority for suit by the United States upon the consent of the victim. Normally, a victim would welcome having the suit brought on his behalf by the United States. But if an unusual situation occurred where the victim preferred to bring his own suit, I would accord him that right.

3. Defendants in suits by the United States. If suit is brought by the United States and if direct liability of the governmental employer is recognized, the suit could be authorized either solely against the employer or against both the employer and the individual officers responsible for the constitutional violation. I have suggested that the suit by the United States be permitted solely against the governmental employer. Suit by the United States against the individual officers is not needed to

vindicate the interests of the victim. He can be fully compensated in a suit against the governmental employer. Moreover, authorizing the United States to sue the individual officers might engender sympathy for the officers by pitting the resources of the federal government against them. The jury might perceive the contest as fairer if the United States is arrayed against a city, county, or state.

4. Consolidation. If the United States is authorized to sue the governmental employer and the victim remains free to sue the individual officers, the possibility of consolidation of the two suits must be considered. I have suggested that such consolidation be permitted.

5. Compensatory damages. In a suit by the United States, I have suggested that the compensatory damages awarded by the jury would be paid to the victim whose civil rights were denied.

6. Punitive damages. Punitive damages are an important aspect of civil rights damage suits because some unconstitutional actions result in minimal compensatory damages. Punitive damages provide the jury with an appropriate way to express the community's sense of outrage. If the United States is authorized to sue on behalf of the victim, the punitive damages could either be paid to the victim, or to the United States, or, in the discretion of the jury or the judge, partly to the victim and partly to the United States. I have suggested the third option, since there may be cases where the jury believes that significant punitive damages

should be assessed against the governmental employer to express condemnation over the action that occurred, yet the jury might not feel that the victim should pocket the entire amount of such an award. Permitting a division of the punitive damages would provide useful flexibility.

Consideration could also be given to placing some limits on the allowable amount of punitive damages. One solution might be to establish three categories of ceilings, scaled to the population of the governmental employer. That would avoid the risk that a small community could be assessed a massive amount of punitive damages.

7. Avoiding double recovery. Some provision should be made to assure that the victim could not receive double recovery as a result of his own suit and the suit by the United States. I suggest that provision be made to offset the victim's recovery in his suit against any damages awarded in the suit by the United States, and similarly to offset any damages awarded to the victim in the suit by the United States against any damages awarded in the victim's own suit.

8. Immunity defense in suit against governmental employer. Consideration should be given to the availability of immunity defenses in suits against the governmental employer. I suggest that in such suits, the defense of qualified immunity should be unavailable, but the defense of absolute immunity, normally extended to judges and prosecutors, should remain available.

9. Statute of limitations. A statute of limitations should

be established both for the direct action against the governmental employer and for the suit by the United States. I suggest that the same limitations periods applicable to suits under section 1983 should be used.

* * * * * * *

IV. Conclusion

A strengthened federal civil remedy for civil rights violations would be an important step for this nation to take in its long effort to secure the full promise of constitutional protections. I do not claim that the proposals I have advanced will work miracles. They will not guarantee that constitutional rights will always be respected, they will not end racism, and they will not eliminate the risk of violent reactions when violations of civil rights are not remedied. But in our nation's quest to strike the appropriate balance between the need for maintaining order and the need to respect citizen rights, the careful crafting of civil remedies can play an important role. There is an understandable public demand for law and order. In the long run, the preservation of order requires an adequate infusion of law. The Civil Rights Protection Act of 1992 can be a significant contribution to the rule of law.

Mr. EDWARDS. Without objection, your article in the New Times and the paper presented to the Yale Law Journal will also be made a part of the record.

Judge NEWMAN. Thank you very much, Mr. Chairman.

Mr. EDWARDS. We appreciate your testimony.

[The information follows:]

(May 1, 1992, New York Times)

How to Protect Other Rodney Kings

By Jon O. Newman

There is a constructive step that this nation can take right now to provide its citizens with a fair remedy for police brutality of the kind we have seen in Los Angeles.

Congress should enact and President Bush should sign a civil rights protection act of 1992 — a new law that would permit the prestige and resources of the Federal Government to be enlisted in support of civil lawsuits for victims of police misconduct.

The acquittals in the Rodney King case tell us many things about the many issues that confront urban America. But one of the most important messages the acquittals send is that criminal law is often an incomplete and inadequate instrument for adjusting the competing demands of law enforcement and the rights of citizens.

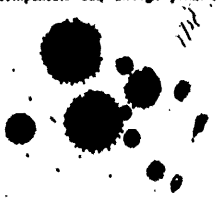
Whatever one's views about whether the four Los Angeles police officers used excessive force in subduing Rodney King, the core problem in their trial was that the jurors had only two extreme choices — either find the officers guilty of a crime or completely exonerate them.

Two major obstacles stood in the way of finding the officers guilty, as they do in every criminal police-misconduct case.

First, the jurors must not merely find that excessive force was used, they must be persuaded of that conclusion beyond a reasonable doubt. Many jurors might have been persuaded by a lesser test that is applicable in ordinary civil trials — proof by a preponderance of the evidence (more than 50-50) — that excessive force was used. Some jurors, obviously the 12 in California, are not persuaded by the high standard that applies in criminal trials.

Second, in all police-misconduct criminal trials, there is an inevitable reluctance on the part of ordinary citizens to brand a law enforcement officer as a criminal. In a few cases, jurors will impose that label, but often they will not, even if they think that the police acted improperly.

For most grievances, society does not rely exclusively on criminal law. A civil remedy that is usually available enables a juror to condemn wrongdoing without being persuaded beyond a reasonable doubt and without branding a defendant a criminal. A jury in a civil case can award money to the victim, not merely to compensate but, through punitive damages, to express its sense of the community's outrage over the crime.



Pass a law to permit civil suits in cases of police misconduct.

At present, there is a Federal civil remedy for police misconduct, but it is woefully inadequate. A victim of police brutality may sue a police officer for using excessive force. This statute, however, has several serious deficiencies.

The victim alone must initiate the suit, the defendant is customarily the police officer rather than the city or state that employs the officer — and the officer is usually exonerated, despite his wrongdoing, if the jury finds that he acted in good faith.

A new Federal remedy should include the following provisions:

- A civil police-misconduct suit would be brought by the United States on behalf of the injured victim.

The case would be investigated by the Federal Bureau of Investigation and presented by the United States Attorney's office.

- The suit would be brought directly against the city or state that employed the police officer.

A city now pays when a garbage collector negligently causes a motor vehicle accident; the city should similarly pay when one of its officers commits an act of police brutality.

- The defense of good faith would be eliminated. The issue for the civil jury should be simply whether the officer used excessive force. The reasonableness of his belief in the lawfulness of his actions should not stand in the way of the city's obligation to pay damage to the victim of his wrongdoing.

The current demands for Federal intervention in cases of police misconduct fail to recognize that existing Federal remedies are inadequate. All the Justice Department can do is bring a *criminal* civil rights action. Such a prosecution might succeed, but it would encounter the same obstacles that were faced by the state prosecutors in Los Angeles.

A new *civil* suit brought by the Federal Government offers the best hope of providing a lawful means of remedying unlawful conduct against citizens. □

Jon O. Newman is a judge on the United States Court of Appeals for the Second Circuit.

The Yale Law Journal

Volume 87
Number 3
January 1978

Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct

by

Jon O. Newman

87 YALE L.J. 447

The Yale Law Journal
Volume 87, Number 3, January 1978

Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct

Jon O. Newman†

In the post-Watergate era, the public has focused an increasingly critical eye on the conduct of public officials. Misconduct in high office has attracted most media attention, yet more serious problems lie at the day-to-day working levels of government, where misconduct is likely to occur more frequently and to affect more people, many of whom have no effective means of remedying its effects or preventing its recurrence. Any misuse of public authority threatens the equilibrium of a system resting so fundamentally on the consent of the governed, but the threat is most acute when the misconduct injures a citizen directly—especially if it denies him a constitutionally protected right.

Nowhere is this threat more dangerous than in the administration of criminal justice, where large numbers of society's least powerful members confront awesome governmental power. The unlawful arrest, the unjustified search, the prosecution based on evidence known to be false, the mistreatment by a jailer—all victimize the most vulnerable of the citizenry. Their individual liberty, privacy, and physical well-being are the initial casualties. Ultimately, such injuries threaten the vitality of a system of ordered liberty.

Holding law enforcers accountable to the commands of the law is an age-old challenge not yet fully met. To be sure, our legal system embodies substantive standards to curb the conduct of law-enforcement officials. But standards are not self-executing, even when endowed with the significance and permanence of explicit constitutional status. There must be effective enforcement devices to ensure the highest degree of realization of two crucial goals: deterring potential wrongdoers from violating constitutional standards and affording remedies

† United States District Judge, District of Connecticut.

that secure adequate compensation for victims of official transgressions. Here our system needs significant improvement, for acts of official misconduct are not isolated occurrences and remain a pervasive source of justified public outrage.

The arsenal for defending constitutional rights in the law enforcement process contains three basic weapons, none of which suffices to ensure compensation and deterrence. The best known, perhaps, is the "exclusionary rule." In 1961 the Supreme Court elevated the exclusionary rule to constitutional status,[1] in the hope that it would deter misconduct by removing a major incentive to overreach—the prospect of using against the accused evidence unlawfully acquired.[2] Undoubtedly the exclusionary rule has deterred some illegal searches and some coercive interrogations, though success in this area is not easily measured. But the available empirical evidence suggests that the rule is not an especially effective deterrent,[3] and many have observed that

1. Mapp v. Ohio, 367 U.S. 643 (1961). The Court in *Mapp* was not in complete agreement. Justice Clark's majority opinion found the exclusionary rule "logically and constitutionally necessary" to the right of privacy protected by the Constitution. *Id.* at 656. Justice Clark was referring to the right to be free of offenses against "ordered liberty"—a right already recognized. But *Mapp* also read the exclusionary rule specifically into the Fourth Amendment, as incorporated against the states: "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . ." *Id.* at 657. Justice Black concurred, but with the reservation that "I am still not persuaded that the Fourth Amendment, *standing alone*, would be enough to bar the introduction against an accused of papers and effects seized from him in violation of its commands." *Id.* at 661 (emphasis added). But by viewing the Fourth Amendment together with the Fifth, Justice Black concluded that "a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Id.* at 662. The dissent by Justice Harlan argued that the exclusionary rule is a remedy not required by the "ordered liberty" embodied in the Fourteenth Amendment. *Id.* at 678-80. Because of his view of the scope of the Fourteenth Amendment's incorporation of the Bill of Rights, however, Justice Harlan did not consider whether the Fourth Amendment, which in his view applied only to the federal government, *required* the particular remedy of exclusion. *Id.* at 678.

2. *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

3. Empirical studies of the effectiveness of the exclusionary rule are inconclusive at best. Yet one can safely assert that they fall far short of establishing that excluding illegally obtained evidence tends systematically to deter misconduct. Several studies indicate that the rule has not significantly affected police behavior and conclude that it has little if any value as a deterrent. The best-known of these studies are Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & AD. 36 (1973). Researchers more favorable to the rule have attacked these studies but concede that their own evidence is no more conclusive. *See, e.g.*, Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974). *See generally* S. SCHLESINGER, EXCLUSIONARY INJUSTICE 30-36 (1977) (surveying major empirical studies and arguing that weight of evidence is that exclusionary rule is ineffective as deterrent); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U.L. REV. 740 (1974) (arguing that it is virtually impossible objectively to measure

whatever deterrence occurs may not be worth the frequent price of freeing a guilty person "because the constable has blundered."[4] An increasingly vocal minority of the Supreme Court has mounted a vigorous attack on the exclusionary rule,[5] and its future as a constitutional requirement is at least in doubt. In any event, even if the rule does deter some future misconduct at justifiable expense, it provides no remedy to the truly innocent victim of past misconduct.[6]

A second available weapon is the criminal prosecution of officials who wilfully deny constitutional rights.[7] The pending prosecution of a former agent of the Federal Bureau of Investigation has refocused attention on the possible uses of this approach, but regardless of the outcome in *United States v. Kearney*,[8] the criminal sanction will never

deterrent effect of exclusionary rule). The Supreme Court recently drew the "clear" conclusion that "[n]o empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied." United States v. Janis, 428 U.S. 433, 452 n.22 (1976). *See id.* at 450 n.22 (canvassing literature).

Empirical research at least raises serious doubts about the deterrent effect of the exclusionary rule, doubts that are reinforced by other considerations. The rule excludes only evidence offered at trial; hence, it directly affects only a small part of the criminal process. It does not even aim squarely at all police misconduct, which encompasses more than illegal searches and interrogations, much less at the broader problem of "official" misconduct. And, of course, as an immediate restriction, the rule affects only the prosecutor. For full discussions of these and other factors, see S. SCHLESINGER, *supra* at 56-60; Oaks, *supra* at 720-36. *See generally* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974). Chief Justice Burger canvasses the rule's drawbacks and limitations in his well-known dissent in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416-20 (1971).

4. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926) (Cardozo, J.). That the exclusionary rule can sometimes operate to free the guilty and more often to impede their prosecution is indisputable. "Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." United States v. Janis, 428 U.S. 433, 448-49 (1976) (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting), and Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 429 (1974)).

5. The first and still most prominent attack is that of Chief Justice Burger in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411 (1971) (dissenting opinion). More recent cases have refused to extend the scope of the rule and display at best a dubious endorsement of the worth of its fundamental rationale. *See* Stone v. Powell, 428 U.S. 465 (1976) (if state has allowed opportunity for full and fair litigation of Fourth Amendment claim, state prisoner cannot obtain habeas corpus relief because of violation of exclusionary rule); United States v. Janis, 428 U.S. 433 (1976) (evidence seized by state law enforcement officials in violation of exclusionary rule is admissible in civil proceedings by federal government); United States v. Calandra, 414 U.S. 338 (1974) (refusing to extend rule to grand jury proceedings).

6. The guilty person whose conviction is precluded by the exclusionary rule has, in a sense, obtained a "remedy" for the violation of his rights, although many would view the remedy as too generous to him and too costly to society to be warranted. Doubtless, he would prefer the avoidance of conviction to a more traditional compensatory remedy, but he is entitled only to an appropriate remedy, not to a preferred one.

7. 18 U.S.C. §§ 241, 242, 245 (1970).

8. Crim. No. 77-245 (S.D.N.Y., filed Apr. 7, 1977).

have significance as a deterrent. Its use is bound to be sporadic at best. Prosecutors, who need to maintain close working relationships with law enforcement agencies, are disinclined to charge police officials with criminal conduct. Moreover, the criminal case requires not only evidence that a constitutional right was denied, but proof beyond a reasonable doubt that the wrongdoer acted with specific intent to deny such a right.[9] This requirement, never easily met, coupled with the understandable reluctance of juries to brand as criminals those who, however misguidedly, are seeking to enforce the law, ensures that even when prosecutions are brought convictions will be rare. And, again, to whatever extent an occasional conviction promotes the public interest in maintaining standards of official observance of the law in the future, the victim of misconduct is not thereby afforded a remedy.

There remains the possibility of the civil damage remedy[10]—the direct claim of the victim of official wrongdoing to secure compensation for the denial of his rights. The suit can be based on common law, as with the traditional tort action for false arrest,[11] or on statute, as with actions specifically authorized by Congress[12] and many of the

9. Screws v. United States, 325 U.S. 91, 104 (1945) (plurality opinion); *cf.* Monroe v. Pape, 365 U.S. 167, 187 (1961) (specific intent not required for civil liability).

10. Suits for civil damages can and often do include a prayer for injunctive relief. The injunction has great potential as a deterrent mechanism, for it can impose sweeping prospective requirements for systemic reform. Nonetheless, I view the civil damage remedy as the primary candidate for immediate and fruitful reform efforts—partly because the injunction generally follows rather than replaces an initial determination of civil liability for damages, partly because the injunction, which is best imposed upon supervisory officials as a remedy for patterns of systemic abuse, has been severely limited by Rizzo v. Goode, 423 U.S. 362 (1976). *Rizzo* not only held that supervisory officials cannot be found liable unless they affirmatively implement unconstitutional policies, *see id.* at 375-77, but also raised the troublesome question of federalism, *id.* at 379-80. The impact of *Rizzo* is graphically illustrated by Lewis v. Hyland, 554 F.2d 93 (3d Cir.), *cert. denied*, 46 U.S.L.W. 3291 (U.S. Oct. 31, 1977), which casts doubt on the availability of injunctions against supervisory officials and individual wrongdoers. *But see* Gerstein v. Pugh, 420 U.S. 103 (1975); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (en banc). The injunction remedy may be more available to deter misconduct by prison officials than by police officials. *See, e.g.*, Todard v. Ward, No. 77-2095 (2d Cir. Oct. 31, 1977). *See generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1227-50 (1977) [hereinafter cited as *Developments*].

The proposed amendments to S. 35, 95th Cong., 1st Sess., 123 CONG. REC. S124 (daily ed. Jan. 10, 1977), now pending in the Senate Committee on the Judiciary, would specifically authorize injunctive relief under 42 U.S.C. § 1983 (1970) against states or governmental units in the form of an order to adopt remedial measures to prevent recurrence of abuse. *See* 123 CONG. REC. S16560-61 (daily ed. Oct. 6, 1977) (amendment proposed by Sen. Mathias). For more on S. 35 and its House counterparts, see note 38 *infra*.

11. *See, e.g.*, Dragna v. White, 45 Cal. 2d 469, 289 P.2d 428 (1955); Johnson v. Jackson, 43 Ill. App. 2d 251, 193 N.E.2d 485 (1963). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 11 (4th ed. 1971).

12. 42 U.S.C. §§ 1983, 1985 (1970).

states,[13] or on provisions of the Constitution itself, as with an action against federal officers for Fourth Amendment violations.[14]

The private suit for civil damages can both compensate and deter. In the battle to restrain official misconduct, it is our most promising weapon, and of its several forms the claim authorized by federal statute can best be shaped to achieve both objectives. Obviously, the common law action could be effectively and uniformly strengthened only through legislation. The action founded directly on the Constitution encounters not only the uncertainty that its scope may be limited to violations of only the Fourth Amendment[15] but also the more fundamental objection that the broad commands of the Constitution are inappropriate sources from which to infer detailed provisions for an effective cause of action. Congress has both the power and the responsibility to legislate protection for constitutional rights, and federal statutes are the logical sources of authority for effective lawsuits to remedy deprivations of federal constitutional rights.

The principal federal statute authorizing a damage suit for deprivation of constitutional rights is 42 U.S.C. § 1983. The statute permits any person injured by official conduct that violates the Constitution or a federal statute to sue the person responsible at law or in equity.[16] Originally enacted as part of the Civil Rights Act of 1871,[17] section 1983 lay virtually dormant for ninety years. Then, in 1961, the Supreme Court ruled that state officials could not avoid its sanctions

13. *See, e.g.*, CAL. CIV. CODE § 52 (West Supp. 1977); ILL. ANN. STAT. ch. 38, § 13-5(b) (Smith-Hurd 1972 & Supp. 1977); MICH. COMP. LAWS ANN. § 750.147 (West 1968 & Supp. 1977-78) (treble damages liability); N.J. STAT. ANN. § 10:1-7 (West 1976) (civil and criminal liability); N.Y. CIV. RIGHTS LAW § 40-d (McKinney 1976) (same).

14. *E.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

15. *See, e.g.*, Archuleta v. Callaway, 385 F. Supp. 384, 388 (D. Colo. 1974) (no implied cause of action against federal officials for damages resulting from denial of due process under Fifth Amendment); Moore v. Schlesinger, 384 F. Supp. 163, 165 (D. Colo. 1974) (same as to First Amendment); Davidson v. Kane, 337 F. Supp. 922, 925 (E.D. Va. 1972) (same as to Fifth Amendment). *But see, e.g.*, States Marine Lines, Inc. v. Schultz, 498 F.2d 1146, 1157 (4th Cir. 1974) (implied cause of action for damages against federal officials allowed for denial of Fifth Amendment rights); Kuczo v. Western Conn. Broadcasting Co., 424 F. Supp. 1325 (D. Conn. 1976), *rev'd on other grounds*, No. 77-7111 (2d Cir. Oct. 27, 1977) (same as to First Amendment); Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1088-89 (C.D. Cal. 1976) (same).

16. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

17. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1873).

by asserting that their actions were also prohibited by state law.[18] The rejection of this defense and the renewed attention to the protection of civil rights during the 1960s spurred an extraordinary increase in the number of lawsuits filed under section 1983 and other civil rights statutes. The nationwide totals were 280 in 1960,[19] 3985 in 1970,[20] and 12,213 in 1977.[21] In the context of misconduct in the law enforcement process, the section 1983 suit is typically brought by a person arrested and later exonerated[22] against state or local police officers for an unlawful arrest, an unlawful search, or the use of excessive force.

For various reasons this increased use of section 1983 has been especially evident in recent years in the Federal District Court for Connecticut, notably at the New Haven seat of court.[23] Since 1970,

18. Monroe v. Pape, 365 U.S. 167 (1961).

19. [1960] AD. OF. OF THE U.S. COURTS ANN. REP. 232, table C 2 (1961). Though there are no statistics on the numbers of suits filed under § 1983 alone, the statute doubtless accounts for a large proportion of the increase. A quick perusal of annotations to § 1983 strongly supports this inference. *See, e.g.*, 42 U.S.C.A. § 1983 (West 1974) (469 pages of annotations); *id.* (West Supp. 1977) (357 additional pages of annotations). *See also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 149 (2d ed. Supp. 1977) (noting that "[t]he 'impressive flood' of § 1983 litigation . . . has, in the past fi e years, reached epic proportions"). It should be noted that the figure in the text does not include habeas corpus or other prisoner actions.

20. [1970] AD. OF. OF THE U.S. COURTS ANN. REP. 232, table C 2 (1971). *See also* note 19 *supra* (discussing published figures).

21. [1977] AD. OF. OF THE U.S. COURTS ANN. REP. A-14, table C 2 (1977). The 1977 *Annual Report* also gives a figure of 13,113. *See id.* at 82, table 11. Unlike those cited in notes 19 & 20 *supra*, the 1977 total for civil rights actions (excluding prisoner petitions) is broken down into categories, as follows: voting, 203; jobs, 5031; accommodations, 442; welfare, 219; other civil rights, 6318. *Id.* at A-14, table C 2. Section 1983 claims against law enforcement officials would fall within the last category.

22. If an unlawful arrest results in a valid conviction, some courts have held a damage suit under § 1983 barred either by expanded notions of collateral estoppel, *see, e.g.*, Covington v. Cole, 528 F.2d 1365 (5th Cir. 1976); Watson v. Devlin, 167 F. Supp. 638 (E.D. Mich. 1958); or by application of common law defenses, *see, e.g.*, Pouncey v. Ryan, 396 F. Supp. 126 (D. Conn. 1975). Neither of these approaches defeats an action for unlawful search or use of excessive force. Other courts have not invoked collateral estoppel even as to unlawful arrest claims, *see* Jackson v. Official Representatives & Employees of the Los Angeles Police Dep't, 487 F.2d 885 (9th Cir. 1973); or at least have indicated in dictum that they would not do so, *see* Guerro v. Mulhearn, 498 F.2d 1249, 1254-55 (1st Cir. 1974); Mulligan v. Schlachter, 389 F.2d 231, 233 (6th Cir. 1968).

23. The impetus to challenge alleged police misconduct in New Haven by means of damage suits under § 1983 appears to have developed in 1970. A seminar conducted by Professor Thomas I. Emerson at the Yale Law School explored various uses of the law to affect social policy, including litigation against the police. A student paper on this topic came to the attention of New Haven attorney John Williams. *See* Harmon, *Cops in the Courts*, 2 YALE REV. L. & SOC. ACT. 334 (1972). Attorney Williams' interest in this subject had been piqued earlier by attendance at the November 1970 National Conference on Police-Community Relations in Los Angeles, California, sponsored by the Law Enforcement Assistance Administration. Attorney Williams and his former partner, Michael Avery, have brought most of the § 1983 suits against police officers in New Haven, materially aided by the availability of Yale law students to assist with research.

There appears to be no reason to believe that actual or alleged misconduct by police officers in New Haven has been more extensive than what might be expected in any other city of comparable size.

approximately 150 lawsuits have been filed alleging denials of constitutional rights by police officers. Though some of these have been withdrawn, dismissed, or settled for nominal sums, many have gone to trial. I have tried twenty-seven of these cases to a conclusion, twenty-four to a jury and three to the court.[24]

Thinking about these cases has left me with a firm conclusion: the section 1983 damage suit has potential as an effective deterrent and compensatory remedy but must be substantially restructured to afford the injured victim a better chance of success. The lawsuit, as currently authorized by statute and limited by prevailing appellate court decisions, suffers from several shortcomings. It is a suit brought by the wrong plaintiff against the wrong defendant, subject to the wrong defenses, litigated under the wrong burden of proof, and rewarded if successful with the wrong measure of damages.

I. The Wrong Plaintiff

The plaintiff in a section 1983 suit is "the party injured," the person who has been unlawfully arrested, against whom excessive force has been used, or whose residence has been unlawfully searched. If the misconduct is a tort, albeit one transgressing constitutional standards, the party injured is an appropriate plaintiff. But he should not be the only plaintiff. Whenever it appears that the Constitution or laws of the United States have been violated, the United States itself should be permitted to sue to redress the wrong. The United States should be authorized to intervene as a plaintiff in the victim's lawsuit and to initiate a suit for the benefit of the victim.

Plainly the United States has an important and legitimate interest in maintaining observance of constitutional standards. At present, it can vindicate that interest only by recourse to criminal prosecution of the wrongdoer.[25] That avenue may be appropriate in extreme cases,[26] but it is both too drastic when successful and too likely to be unsuccessful to be relied on as a deterrent. The government's use of a civil remedy would frequently be more appropriate to the harm inflicted,

24. At least one of the plaintiffs has prevailed in seven of the jury cases and one of the bench trials, indicating more likelihood of success than some might have anticipated. Generalizations about the chances of success, however, should be cautiously drawn. In many of the cases won by plaintiffs, the facts were especially aggravated, and helpful evidence sometimes came from police officers themselves.

25. 18 U.S.C. §§ 241, 242, 245 (1970).

26. *See, e.g.*, United States v. Price, 383 U.S. 787 (1966) (criminal prosecution for deprivation of federal rights based on killing of civil rights workers); United States v. Guest, 383 U.S. 745 (1966) (same, based on denial of equal accommodations to blacks).

less likely to imperil relations with state law enforcement agencies, and more likely to be successful than would a criminal prosecution.

Intervention by the United States as plaintiff when an important national standard has been transgressed is not unusual. The United States or its agencies can bring a civil action to redress violations of statutes protecting voting rights[27] and nondiscrimination in employment[28] and places of public accommodation,[29] and intervention is authorized in numerous similar situations.[30] The government has at least an equally strong interest in enforcing section 1983, a statute that prohibits transgressions of the Constitution itself.

The principal consequence of the United States' appearing as the sole or additional plaintiff in a section 1983 suit would be an increased likelihood of a jury verdict in favor of the victim. Such an increase is needed to correct the current imbalance in the jury appeal of the contending parties in the courtroom. At the defendants' table sit the police officers—well-groomed, in full uniform, and with the American flag figuratively wrapped around them and often literally displayed on their jackets. Except in those rare instances when the party injured is the white, middle-class victim of police mistake, the section 1983 plaintiff is likely to be black or Puerto Rican, poor, disheveled, a felon, and often a drug addict.

Frequently the imbalance of jury appeal is further distorted by the facts of the episode in which the alleged police misconduct occurred. Although some police misconduct is perpetrated against entirely law-abiding citizens, it frequently happens that the plaintiff's grievance arose during police efforts to apprehend him for an offense he had in fact committed. Obviously, the protections of the Constitution safeguard the guilty and innocent alike, yet knowledge of the plaintiff's criminal conduct prior to arrest often undermines a jury's impartial assessment of claims such as police brutality. The jury would view the contest in a totally different light if, instead of a young firebrand

27. *See, e.g.*, 42 U.S.C. § 1973j(d) (1970); *id.* § 1973aa-2 (1970 & Supp. V 1975); *id.* § 1973bb (Supp. V 1975).

28. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

29. *Id.* § 2000a-(5)(a) (1970).

30. *See, e.g.*, 20 U.S.C. § 1709 (Supp. V 1975) (Attorney General may intervene in suits alleging denial of equal educational opportunity); 28 U.S.C. § 2403 (1970) (United States may intervene in any suit that involves constitutionality of federal statute, provided agency of government is not already party to suit); 31 U.S.C.A. § 1244(c) (West Supp. 1977) (Attorney General may intervene in private suits alleging that state or local governments have violated requirements of revenue-sharing laws); 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975) (Attorney General may intervene in suits alleging discrimination in employment); *id.* § 2000h-2 (1970 & Supp. V 1975) (same, for suits alleging violations of equal protection clause of Fourteenth Amendment).

lawyer pleading for money for his disreputable private client, an Assistant United States Attorney were presenting, on behalf of the public, the claim that the police officer had denied the victim a right protected by the United States Constitution.

The increased likelihood of success for the victim would not only strengthen the remedy for deprivations of constitutional rights but would also enhance the deterrent effect of the suit. That suspects pose little threat of becoming attractive plaintiffs in damage actions is precisely the reason why some police officers are unlikely to observe constitutional standards in apprehending them. The prospect of a government lawsuit, with its greater chance of success, would not be lost on law enforcers familiar with courtrooms and juries.

Of course, intervention by the United States need not be obligatory. It should be within the discretion of the Department of Justice, acting through United States Attorneys in each district, to initiate or intervene in a section 1983 lawsuit whenever there is a reasonable basis to believe that public officials have violated any person's constitutional rights.[31]

II. The Wrong Defendant

The defendant in a section 1983 suit is the "person" who "under color of" state law committed the alleged deprivation of constitutional or statutory right. Typically this means a police officer. Despite the similarity of section 1983 suits to tort actions, *respondeat superior* is not available[32] and the employing governmental unit is not considered a "person" within the meaning of the statute.[33] At present, therefore,

31. The "reasonable basis" standard is not intended to be an element of the Government's case, required to be proved before intervention is permitted. Certification by the United States Attorney or an appropriate official of the Department of Justice should suffice. Compare 18 U.S.C. § 6003(b) (1970), under which the United States may apply for an order granting immunity to a witness when, in the judgment of designated Department of Justice officials, the testimony may be necessary to safeguard the public interest. The Justice Department's determination is essentially nonreviewable. *See* United States v. Hathaway, 534 F.2d 386, 402 (1st Cir. 1976); United States v. Leyva, 513 F.2d 774, 776 (5th Cir. 1975); *In re* Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973).

32. *See* Arroyo v. Schaefer, 548 F.2d 47, 51 (2d Cir. 1977); Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir. 1973); Adams v. Pate, 445 F.2d 105, 107 n.2 (7th Cir. 1971); Dunham v. Crosby, 435 F.2d 1177, 1180 (1st Cir. 1970) (dictum). *But see* Carter v. Carlson, 447 F.2d 358, 370 n.39 (D.C. Cir. 1971), *rev'd on other grounds*, 409 U.S. 418 (1973); Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971).

33. Monroe v. Pape, 365 U.S. 167 (1961), held that municipalities are not "persons" within the meaning of § 1983. City of Kenosha v. Bruno, 412 U.S. 507 (1973), made clear that this was true in actions for equitable relief as well as for damages (as in *Monroe*). Both decisions relied heavily upon the legislative history of § 1983. The Court's interpretation

liability can be imposed only upon the individuals who commit or cause the misconduct.[34]

Placing liability on the immediate wrongdoer has strong superficial appeal. But the objectives of compensating the victim and deterring misconduct would be met more frequently if the defendant were the wrongdoer's employer—either the appropriate unit of government or the governmental agency. In addition, the statute should be broadened to include misconduct by federal as well as state officers and hence to impose liability on the federal government or its agencies as well as on the governments or agencies of states and municipalities.[35]

The chances of compensating the victim decrease markedly when the defendant is the individual police officer. A jury understandably succumbs easily to the argument, stated or implied, that recovery should be denied because the damages must come from the paycheck of a hard-working, underpaid police officer. If the officer is judgment proof, neither compensation nor substantial deterrence is likely to result, even when the plaintiff wins. Ironically, those jurisdictions that provide indemnification for the police officer do little to make the lawsuit more effective. Actually, where indemnification is available, the present system of suing only the individual wrongdoer combines the worst of both worlds. The jurors, not informed of indemnification, think the officer will personally have to pay any damages awarded, so

of that history, however, has been termed "highly questionable" the history itself "[a]t best . . . ambiguous." *Developments, supra* note 10, at 1192.

Townships, counties, and most municipal agencies are immune from § 1983 liability under the doctrine established by *Monroe* and *Kenosha*. For a useful collection of cases, see *id.* at 1194-95 nn.51-56. Most pertinent, perhaps, to the present discussion is United States *ex rel.* Lee v. People of the State of Illinois, 343 F.2d 120 (7th Cir. 1965), which held that a city police department was not a "person" for purposes of § 1983.

Several cases have suggested that this immunity for municipalities implies an analogous immunity for the states. *See, e.g.*, United States *ex rel.* Gittlemacher v. County of Philadelphia, 413 F.2d 84, 86 n.2 (3d Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970) (this conclusion termed "inescapable"). The most important consideration with respect to state liability for damages, however, is the Eleventh Amendment, though this barrier too could easily be overcome by congressional action. *See* pp. 457-58 & notes 57-59 *infra*.

34. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 375-76 (1975); Duchesne v. Sugarman, No. 76-7475 (2d Cir. Sept. 28, 1977), slip op. at 6131.

35. The 1975 amendments to the Federal Tort Claims Act, 28 U.S.C. § 2680 (Supp. V 1975), provide a mechanism for private citizens to bring tort actions against the United States for certain acts by federal law enforcement or investigative officials. But the amendments are not tailored to all the problems of police misconduct, even though they do authorize actions for false arrest and assault. Moreover, the context of tort law is an inappropriate one for the adjudication of constitutional claims. *See* pp. 461-62 & note 59 *infra*. It would seem more fitting to restructure § 1983 as the primary vehicle for all such actions, thereby providing a single point of reference for judicial interpretation and development. From the standpoint of increasing the plaintiff's chances of success, though, there may be merit in preserving the remedy offered by the Tort Claims Act for misconduct by federal law enforcement agents, since the statutory claim against the United States is not subject to trial by jury, 28 U.S.C. § 2402 (1970).

they tend to find for defendants and, when damages are awarded, to keep the amount at a modest level. Yet the defendant is not deterred from wrongdoing by the prospect of paying damages, for he knows that any damage award will be covered by municipal indemnification.

Providing for suit directly against the employing department or unit of government would accomplish more than simply informing the jury of a deeper pocket. It would enhance the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence. Police agencies and governments should be forced to assume responsibility for minimizing instances of official misconduct. Placing the burden of damage awards for constitutional wrongs directly upon them would afford a useful incentive to monitor the performance of their employees, to insist on observance of constitutional standards, and to exercise appropriate internal discipline when misconduct occurs.[36]

There are obvious potential obstacles to this reform. Actions against states will face the defense of the Eleventh Amendment. The Supreme Court has ruled, however, that when Congress enforces the commands of the Fourteenth Amendment, it has constitutional authority to impose liability that the Eleventh Amendment would otherwise preclude.[37] That decision was made in the context of racial discrimination, a core concept of the Fourteenth Amendment. Whether it applies to congressional efforts to enforce the Fourteenth Amendment's incorporation of the Bill of Rights remains to be seen. Surely the theory is sufficiently plausible to justify a congressional attempt.[38] Of course,

36. Because the police often feel a sense of professional solidarity and isolation, *see, e.g.*, J. SKOLNICK, JUSTICE WITHOUT TRIAL 52-53, 59 (2d ed. 1975), professional norms may override the effect of legal rules. *See* Oaks, *supra* note 3, at 727. In addition, police may not be familiar with or fully understand some of the esoteric legal rules that supposedly influence their conduct. Enforcement of the exclusionary rule, for instance, which places immediate controls on the prosecutor seeking to introduce evidence rather than on the policeman collecting it, has been hampered because the legal rules that are applied when the prosecutor seeks to introduce evidence generally are not effectively communicated to police officers. *Id.* at 726, 730. See also sources cited in final paragraph of note 3 *supra*.

37. Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976). For further discussion of the Eleventh Amendment problem, see *Developments*, *supra* note 10, at 1195-97.

38. Indeed, Congress now has before it the proposed Civil Rights Improvements Act of 1977, which would amend § 1983 to permit suits against state and local governments under certain limited circumstances. The Senate version of the bill is S. 35, 95th Cong., 1st Sess., 123 CONG. REC. S124 (daily ed. Jan. 10, 1977), now pending in the Committee on the Judiciary. House versions, all identical in substance to S. 35, abound and are likewise pending in the House Judiciary Committee. *See* H.R. 7520, 95th Cong., 1st Sess., 123 CONG. REC. H5257 (daily ed. June 1, 1977); H.R. 6677, 95th Cong., 1st Sess., 123 CONG. REC. H3708 (daily ed. Apr. 27, 1977); H.R. 6151, 95th Cong., 1st Sess., 123 CONG. REC. H3181 (daily ed. Apr. 6, 1977); H.R. 5535, 95th Cong., 1st Sess., 123 CONG. REC. H2347 (daily ed. Mar. 23, 1977); H.R. 4514, 95th Cong., 1st Sess., 123 CONG. REC. H1756 (daily ed. Mar. 4, 1977); H.R. 549, 95th Cong., 1st Sess., 123 CONG. REC. H195 (daily ed. Jan. 6, 1977). The bill, however, would impose liability upon states, local governments, and their

if the United States itself were bringing the action, the problem of sovereign immunity would vanish.[39]

Imposing liability upon the federal government presents no problem of sovereign immunity; Congress clearly can consent to such suits. A different problem emerges, however, if the United States is permitted to initiate or intervene in section 1983 litigation against federal officials. If the wrongdoer were an agent of the Federal Bureau of Investigation, for example, the case caption *United States v. FBI* would suggest an issue as to the requisite adversity of the parties. This problem could readily be solved by creating within the executive branch a special office empowered to bring suit against the federal wrongdoer's employing agency. Analogous are the authority of the Equal Employment Opportunity Commission to sue agencies of the federal government that discriminate in employment[40] and the recently upheld power of the Watergate Special Prosecutor to bring an action against the President.[41]

III. The Wrong Defenses

Two types of defenses are currently available to defendants sued for damages under section 1983. Most defendants, from governors[42] to policemen,[43] are entitled to the defense of good faith. A few de-

agencies for constitutional deprivations by their employees only if (1) a superior officer directed or approved the wrongful action by the employee, or failed to remedy a pattern of wrongful action by the employee, or (2) an unidentified employee denied protected rights by grossly negligent conduct. Arguably, the bill would also impose liability on governments or agencies for their wrongful corporate acts, *i.e.*, those taken by official agency action without regard to wrongdoing by any individual employees. *Cf.* Gentile v. Wallen, No. 77-7093, slip op. at 5952 (2d Cir. Sept. 15, 1977) (claim against board of education "in its corporate capacity" states cause of action under Fourteenth Amendment, despite fact that board of education is not "person" within meaning of § 1983).

Amendments to clarify the substance of S. 35 were introduced in early October. *See* 123 CONG. REC. S16560-61 (daily ed. Oct. 6, 1977). Initial hearings on the bill, originally scheduled for October 28-29, 1977, were postponed; full hearings are now scheduled for February 1978. The hearings will afford an opportunity for the Senate Committee to consider correcting the basic deficiency in the bill as proposed, by eliminating the role of a supervisory official as a prerequisite to the cause of action and imposing liability on governmental agencies whenever any law enforcement official has denied someone a federally protected right.

39. The Eleventh Amendment does not bar suits against a state when the United States is a plaintiff. *See, e.g.*, United States v. Mississippi, 380 U.S. 128, 140 (1965).

40. 42 U.S.C. § 2000e-16 (1970).

41. United States v. Nixon, 418 U.S. 683, 692-97 (1974).

42. Scheuer v. Rhodes, 416 U.S. 232 (1973).

43. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972) (federal law enforcement officials); Fowler v. Alexander, 340 F. Supp. 168, 171 (M.D.N.C. 1972), *aff'd*, 478 F.2d 694 (4th Cir. 1973) ("conditional and partial" immunity for local police officers acting in good faith).

fendants, notably judges[44] and prosecutors,[45] enjoy an absolute immunity from suit. Whatever the merits of either defense—and the case for the good faith defense is the more doubtful—the imposition of liability upon the wrongdoer's employer would make it entirely appropriate to eliminate both defenses.

A. *The Good Faith Defense*[46]

The good faith defense was imported into section 1983 rather casually from the common law, has been extended uncritically, and operates in practice at best to create confusion and at worst to defeat legitimate claims. In 1961, in *Monroe v. Pape*,[47] the Supreme Court, construing section 1983 to impose liability without the element of wilfullness, observed that the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[48] Six years later, in *Pierson v. Ray*,[49] this "background of tort liability," previously invoked to *impose* liability, was held to include as a *defense* to liability the common law defense of good faith and probable cause when damages are sought from a police officer because of an arrest. In *Pierson* the arrest was challenged not for lack of probable cause, but because the statute pursuant to which the arrest occurred had later been declared unconstitutional. Thus "good faith" in the context of *Pierson* meant only reliance on a duly enacted statute.

The leading decision giving further content to the phrase "good faith" in the more typical situation of an arrest challenged for lack of probable cause is the Second Circuit decision in *Bivens v. Six Unknown Federal Narcotics Agents*[50] on remand from the Supreme Court.[51] Though *Bivens* involved a cause of action against federal agents predicated directly on the Fourth Amendment, the Court of Appeals' decision held that the federal agents were entitled to the same

44. Pierson v. Ray, 386 U.S. 547 (1967).
45. Imbler v. Pachtman, 424 U.S. 409 (1976). *But cf.* Briggs v. Goodwin, No. 75-1578 (D.C. Cir. Sept. 21, 1977), *summarized in* 22 CRIM. L. REP. (BNA) 2001 (Oct. 5, 1977) (prosecutor charged with perjury incident to grand jury proceedings not protected by *Imbler*, which limits immunity to prosecutors' exercise of discretion in conducting criminal cases; *Imbler* does not extend to "investigative" or "administrative" action by prosecutors).
46. *See generally Developments*, *supra* note 10, at 1209-17; *id.* (citing sources).
47. 365 U.S. 167 (1961).
48. *Id.* at 187.
49. 386 U.S. 547 (1967).
50. 456 F.2d 1339 (2d Cir. 1972).
51. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

defense available to state police officials under section 1983.[52] Explicitly relying on *Pierson*, the Second Circuit held that the officer has a defense when he establishes both good faith and a reasonable belief in the validity of the arrest. As explained by Judge Medina, the defense has both a subjective and an objective element. The officer must prove "that he believed, in good faith, that his conduct was lawful" and "that his belief was reasonable."[53] Undoubtedly this "objective" component was added to ensure that an officer could not defeat recovery solely by believing in the propriety of his actions, a result that would correlate the success of the defense with the callousness of the wrongdoer.

But however well-intentioned this second ingredient of the good faith defense, it involves nearly circular reasoning that promotes confusion and sometimes defeats meritorious claims. For example, the victim's cause of action for an arrest in violation of his Fourth Amendment rights requires an arrest without probable cause.[54] To make out his case, the plaintiff must establish that a reasonably prudent police officer, under all the circumstances, would not have had probable cause to believe that he had committed a crime.[55] Then, under *Bivens*, the officer still has a defense if he acted in good faith and has a reasonable belief in the validity of his action, that is, if he reasonably believed that he did have probable cause. But if the plaintiff's own case requires him to show an arrest that was not reasonably based on probable cause, what does the defense mean? Surely the officer could not *reasonably* believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause.

The anomaly of the good faith defense is equally apparent when the victim alleges the use of excessive force. To establish his cause of action, the victim must prove the use of more force than was reasonably necessary under the circumstances.[56] Once that is shown, how can the officer have a *reasonable* belief that he used only necessary force?

Judge Lumbard's concurring opinion in *Bivens* endeavors to dispel the apparent circularity of the good faith defense. In the context of unlawful arrest claims, he distinguishes between two aspects of reasonableness. The first, which is presumably part of the plaintiff's case, is

52. 456 F.2d at 1346-47.
53. *Id.* at 1348.
54. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 111-16 (1975).
55. The Supreme Court set out the elements of probable cause in Henry v. United States, 361 U.S. 98, 100-02 (1959).
56. *See, e.g.*, Williams v. Liberty, 461 F.2d 325, 328 (7th Cir. 1972).

"reasonableness for purposes of defining probable cause under the fourth amendment."[57] The second, presumably part of the officer's defense, is "the less stringent reasonable man standard of the tort action against governmental agents."[58]

Even if these aspects of reasonableness are truly different, it is unrealistic to suppose that trial judges will successfully articulate the elusive distinction to the juries who must apply these concepts, much less that juries, hearing even the most learned charge, will possibly grasp the distinction. The jurors are told that, even if the plaintiff proves that an officer lacked probable cause by showing that he could not have had a reasonable belief that the plaintiff had committed a crime, the officer nonetheless has a defense if he acted in good faith and reasonably believed that he did have probable cause. To make sense of such instructions, jurors inevitably focus, I suspect, on the only element of the defense that is comprehensible—the subjective good faith of the officer. Thus the practical vice of the defense in many cases is to leave the victim without a remedy whenever the officer persuades the jury that he thought he had the right to arrest.

Even if the employing department or jurisdiction does not replace the police officer as a defendant, the good faith defense, imported into section 1983 through unwarranted borrowing from the common law, should be abolished. The initial step taken in *Monroe* and extended in *Pierson* and *Bivens* should be reexamined. Why should section 1983 be read against the background of common law tort liability, especially common law tort defenses? This is a statute passed by Congress to provide a remedy for the deprivation of constitutional rights. When such a right is denied, the victim is entitled to compensation and the public is entitled to the deterrent effect of his receiving compensation. Common law notions, heavily influenced by the concept of fault, simply have no place in the attainment of these important results.[59]

57. 456 F.2d at 1348 (concurring opinion).

58. *Id.* at 1348-49 (concurring opinion).

59. This is not a new argument. Justice Harlan, concurring in *Monroe*, objected to the importation of tort law and argued that the deprivation of constitutional rights is more serious than a common law tort committed by a state official and that state remedies based on common law tort concepts are thus not fully appropriate in the context of constitutional claims. 365 U.S. at 196 n.5. Chief Justice Burger, in his *Bivens* dissent, advocated that Congress establish a mechanism for such civil damage suits similar to the Federal Tort Claims Act and suggested specific elements that such a mechanism should incorporate—among them the abolition of sovereign immunity, which I suggest here. 403 U.S. at 422-23.

The argument that the common law of torts should not be applied to constitutional claims against state officials has a strong theoretical basis. State officials are clothed with the state's authority; their ability to invoke that authority makes it more difficult to curb their tortious conduct. In short, the state official has a status quite different from

This is not to suggest that either the Constitution or section 1983 establishes strict liability, in the sense of an entitlement to compensation whenever injury is sustained. The standards of the Constitution, notably those of the Fourth Amendment, already contain a sufficient element of reasonableness to avoid any possibility that law enforcement officers will become guarantors of the liberty or well-being of those they apprehend. But these standards, however flexible, should be enforced on their own terms, without further dilution by common law defenses that evolved under a jurisprudence primarily concerned with adjusting disputes between private individuals. Constitutional standards, designed to limit governmental authority over citizens, serve a more important function. If imposition of personal liability upon the wrongdoer is thought to have consequences adverse to the proper discharge of his public functions, society can either reimburse the wrongdoer or shift liability to his employer, rather than deny a remedy to the victim. His constitutional rights are just as impaired and the injury he suffers just as serious regardless of the good faith of the wrongdoer.

B. *Absolute Immunity*[60]

The absolute immunity of judges and prosecutors finds its rationale in the need to maintain the unfettered performance of duty by these officials. Without immunity, it is argued, a judicial official would be subjected to a barrage of litigation, the defense of which would interfere with his duties.[61] Moreover, the official might hesitate to discharge his responsibilities fearlessly or even to accept the responsibilities of office in the first place if he knew that he would be subjected to personal liability whenever a jury concluded, rightly or wrongly, that his actions had denied someone a protected right.[62]

that of a private citizen. Legal controls more powerful than those of the common law of torts and more appropriate to the official's status should control. If one assumes that rights established by the Constitution are more "important" than other rights protected by the common law, the argument takes on even greater force. *Cf.* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 32-33 (1974) (tort concepts may provide helpful analogies but should not be determinative of liability under § 1983, which serves different purposes and implicates different interests).

60. *See generally Developments, supra* note 10, at 1197-1204 (questioning soundness of rationales for absolute immunity); *id.* (citing sources).

61. *See, e.g.*, Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 349 (1871); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 270-74 (1937); Note, *The Doctrine of Official Immunity under the Civil Rights Acts*, 68 HARV. L. REV. 1229, 1236-38 (1955).

62. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 553-54 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347-48 (1871); Jennings, *supra* note 61, at 271; Note, *supra* note 61, at 1236-38. *Cf. Developments, supra* note 10, at 1202 (pointing out that "this rationale would logically

Shifting defense of the action and liability from the alleged wrongdoer to the employing agency or jurisdiction largely blunts the force of these contentions. Obviously, the fear of personal liability would be totally removed. There would remain some risk of interruption of duty because of litigation, but the official would be at most a witness, and his testimony would not invariably be needed. Those instances, for example, in which a judge's actions have allegedly denied someone a constitutionally protected right are generally a matter of record in the proceedings before the judge.

Abolishing these immunities in conjunction with imposing liability on the appropriate government or agency would further the goal of deterrence as well as eliminate bars to obtaining compensation, for increased visibility would attend the adjudication of a victim's claim. Unconstitutional action by a prosecutor or judge that occurs during a criminal prosecution of the victim is too easily perceived as a trial "error," even as a "technicality." If an independent proceeding were used to force the judicial department or the state to compensate the victim, the significance and legitimacy of a claim based on denial of a constitutional right might well be more widely understood and more fully appreciated, and greater public pressure to discipline wrongdoers and prevent recurrence of abuse might result.

IV. The Wrong Burden of Proof

The burden of proof in an action under section 1983 is on the plaintiff, at least to establish that a denial of his constitutional rights has occurred.[63] The defendant bears the burden of establishing the good faith defense.[64] This traditional allocation of burdens of proof seems unexceptional, but the apparent appropriateness stems from the analogy to tort law and should not be transferred automatically to suits that seek to vindicate denials of constitutional rights. Shifting at least part of the current burden to the defendant would comport with the criminal law standard, which often requires that the government, when proceeding against a person arrested or searched, bear the burden

support an absolute immunity for all governmental decisionmakers vested with discretion —a result which would wholly and impermissibly undermine the section 1983 damage action").

63. Beaumont v. Morgan, 427 F.2d 667, 670-71 (1st Cir. 1970) (placing on plaintiff "burden of showing both that . . . defendants acted under color of state law and that they deprived her of federally protected rights" and holding plaintiff to strict evidentiary standards). *But cf.* Martin v. Duffie, 463 F.2d 464 (10th Cir. 1972) (plaintiff need only establish prima facie case of illegal arrest; burden of justification then shifts to defendant).

64. McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) (en banc).

of justifying interferences with liberty or property. And some shift in the burden might help improve the victim's chances for recovery.

As a claimant for damages, the plaintiff appropriately carries the burden of proving that he was denied his liberty by being arrested or subjected to the use of force. But once that showing has been made, he should not be saddled with the further burden of proving that the intrusion was unwarranted. The defendant has access to the facts that allegedly justify his action and clearly should shoulder at least the burden of going forward with such evidence. Assigning to the defendant the burden of persuasion as well would often obviate the need for the plaintiff to prove a negative—that an arrest was not made with probable cause.

Whether forcing the defendant to justify the challenged governmental action would enhance the plaintiff's chances of winning is far from certain. But it might. The plaintiff's and defendant's versions of the challenged episode typically create a sharp dispute of fact. Rarely does the jury hear any evidence other than the testimony of the principals, for few arrests, searches, or uses of force occur in the presence of disinterested witnesses. With the plaintiff bearing the burden of proving not only that action was taken against him but also that the action was unconstitutional, a jury can too easily resolve its inability to decide who is telling the truth simply by concluding that the case is a 50-50 proposition, in which event the plaintiff loses. In close cases it is understandable, if not inevitable, that the testimony of public officials will frequently be credited over that of the disreputable people who often are plaintiffs in section 1983 suits. Nonetheless, the suggested shift in burden of proof might affect a few outcomes and would at least make the jury take a harder look at issues of credibility in the many cases involving evidence that offers very little from which to choose.

V. The Wrong Measure of Damages

The successful plaintiff in a section 1983 action is entitled to compensatory damages[65] and, in aggravated cases, to punitive damages.[66]

65. *See, e.g.*, Linn v. Garcia, 531 F.2d 855 (8th Cir. 1976); Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975); Palmer v. Hall, 517 F.2d 705 (5th Cir. 1975); Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975).

66. *See, e.g.*, Stengel v. Belcher, 522 F.2d 438, 444 (6th Cir. 1975) (defendant, who had received only minor injuries, shot victims at close range, killing two and maiming third); Palmer v. Hall, 517 F.2d 705, 707 (5th Cir. 1975) (plaintiff shot in back by defendant).

Like any injured plaintiff, the victim of a deprivation of constitutional rights is entitled to damages that fairly and reasonably compensate him for the actual losses he has suffered. In the case of a wrongful arrest, compensatory damages can be awarded for lost wages, bail fees, and attorneys' fees for defense of the criminal charge. And some value should be ascribed to the time wrongfully spent in custody. Wholly apart from actual losses, some courts have approved damage awards that include a sum reflecting the value of having one's constitutional right denied.[67] But except in the rare case in which a successful plaintiff recovers a substantial award for serious injuries inflicted by excessive force, cases of illegal arrests and searches, even when successful, generally result in very modest awards. When jurors learn that a plaintiff has been in prison, as they frequently do when his credibility is attacked by prior convictions, it is not unusual for them to value a few days of his life in jail at a figure as low as $500.[68] A few hours in jail has been priced at $100.[69]

Inadequate awards defeat both the compensatory and deterrent objectives of a section 1983 damage suit. The lack of adequate compensation not only provides paltry monetary incentive to sue but also adds a final indignity to the denial of constitutional rights—the assessment by the judge or jury that the victim's rights were not worth much anyway. And low awards, whether borne by defendants or by their employers, obviously provide scant incentive to refrain from similar abuses in the future.

Both the remedial and the deterrent purposes of official misconduct litigation would be enhanced by providing, in addition to compensatory damages for actual losses, a liquidated damage sum to compensate for the value of the constitutional right denied. The sum could be a constant amount or could vary according to a schedule for different violations and different consequences. Any deprivation of a constitutional right should be valued at not less than $1,000; any time wrongfully spent in jail, no matter how brief, should be valued at not less than $2,500. As with treble damages in an antitrust suit,[70] it would be advisable not to inform the jurors that this liquidated damage element would be added to any sum they might award for actual losses.

67. *See, e.g.*, Basista v. Weir, 340 F.2d 74, 88 (3d Cir. 1965); Manfredonia v. Barry, 401 F. Supp. 762, 772 (E.D.N.Y. 1975).
68. *See, e.g.*, Gray v. DiLieto, Civ. No. 14,640 (D. Conn. Apr. 22, 1976).
69. Tatum v. Morton, 386 F. Supp. 1308, 1313-14 (D.D.C. 1974).
70. Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240 (5th Cir. 1974).

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Conclusion

The combined effect of these proposed changes would make section 1983 a formidable weapon in the continuing battle to promote observance of constitutional rights in the enforcement of criminal law. More victims would become plaintiffs; more plaintiffs would prevail; and instances of misconduct would likely decrease, for the greater number of successful suits and the prospect of governmental liability would combine to form a realistic deterrent to future misconduct.

An effective damage remedy would be more appropriate than the rarely used criminal sanction and far preferable to the all too frequently used "remedy" of the exclusionary rule. Ironically, the exclusionary rule is often a remedy only for the guilty. The criminal can expect to avoid a deserved conviction if he can sufficiently relate the deprivation of his rights to the case against him. Although an occasional innocent victim of a denial of rights might use the exclusionary rule to avoid an unjustified conviction, too often his only remedy is the suit for damages, limited or blocked entirely by currently available defenses. Indeed, the deterrent effect of a revitalized damage action might even become a persuasive reason for modifying the current strictures of the exclusionary rule. Instead of the criminal going free because the constable has blundered, the constable's employer would respond in damages for the wrong done. Some wrongs might still vitiate valid convictions, but a more meaningful damage remedy and a less rigid exclusionary rule might better protect both citizens' rights and public safety.

In 1976 Congress took a modest step toward recognizing the importance of section 1983 damage actions.[71] The provision for an award of attorneys' fees to the prevailing party (if limited to prevailing plaintiffs) may spur increased resort to the damage action as a means of seeking redress for the deprivation of constitutional rights. But more fundamental changes are needed in the structure of the section 1983 lawsuit. It has frequently been observed that the mark of a civilization is the procedure by which it enforces its criminal law. Equally revealing of the depth of a society's commitment to its constitutional principles is the procedure it authorizes when constitutional standards have been violated. Section 1983 can be a significant bulwark in the protection of constitutional rights. More than 100 years after the statute's

71. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1970)).

enactment, the time has come for Congress to give serious consideration to its thorough revision.[72]

72. Whether the changes I recommend would be appropriate in contexts other than the law enforcement process is a question beyond the scope of this article. With this caveat, I offer an illustration of how the statute could be amended (new matter italicized):

The employing department or unit of government of [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of *the United States or* any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. *The United States shall be entitled to intervene in any such action on behalf of the plaintiff or to bring such action on behalf of the party injured. In any suit brought pursuant to this statute, immunities and defenses available at common law, including the defense of good faith, are abolished. To establish liability, the plaintiff need establish by a preponderance of the evidence only that adverse action was taken against the party injured; liability can be defeated when the defendant establishes by a preponderance of the evidence that the adverse action taken against the party injured was lawful. Whenever a verdict is returned in favor of the party injured in a suit under this statute, the Court shall award, in addition to compensatory damages determined by the trier of fact, a sum of $ as liquidated damages for the denial of a federally protected right.*

Mr. EDWARDS. We will be complying with House rules today and operate on a generous 5-minute question period. The gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman. I commend Judge Newman, who has been before me before. You've got me; I'm going to rush to the floor to introduce this, I hope, with all my colleagues that are here. It's important.

I don't think you need to minimize how important it is to get the law to operate correctly. If you read all of the laws that we have protecting citizens against police abuse, in a classroom it sounds perfect, but the police, the lawyers, the judges, the Congressmen know that a police brutality victim doesn't stand a chance. The odds are 100 to 1 that he will ever be able to stay a course because of the simple fact that the whole system is stacked against him, and you make an important change in the civil remedy by adding the Federal Government as the plaintiff, by adding the city employer, along with the offending police officer and the police department, as defendants, and you eliminate the rubric that has gotten most people out of court. So I agree with your analysis.

Now let's talk about the criminal remedy, because you're not suggesting that we forget about the fact there has been a crime committed and there are criminal laws. So I now go back for your opinion about seeking injunctive relief from pattern or practice for the Department of Justice in civil rights case. I would like to know your view in terms of changing title 18, 241 and 242, to eliminate the element of intent to deprive a person of their civil rights, and I'd like your view about the requirement that the Department of Justice begin to compile and evaluate the police cases in terms of how they occur, what areas they occur, under what circumstances they occur, and what suggestions that are led to be used to correct it.

Judge NEWMAN. Well, taking those three matters, the pattern and practice remedy which has been proposed by the chairman and this committee I think is a useful remedy, although I suspect it will have limited success. It will always be difficult to prove a pattern and practice case.

There are, I think, some seven or eight statutes on the books now that authorize the United States to sue, to try to establish a pattern and practice of civil rights violations in various fields—voting, education, public accommodations, and others. I don't have a count, but my impression is very few cases have been brought and very few successes have been achieved.

So while I think it is worth having that remedy available to the United States, frankly, I would not put too much confidence that it will achieve success. And I point out this caution: The legislative process tends to work out compromises, as it should. There is a risk that if you focus on something like pattern and practice, which is very difficult to achieve, some may say, "Well, we did that, so we don't have to do anything else." I think if you ask most State and city and county governments in this country which do they think would be more effective deterrent, which would get their attention, which would cause them to be more concerned about internal discipline, I think they would say a suit by which the United States

sues the city directly in individual cases rather than a pattern and practice case.

Mr. CONYERS. Of course, Judge Newman, but we're——

Judge NEWMAN. I hope you don't have to choose.

Mr. CONYERS. Right.

Judge NEWMAN. I hope you have both.

Mr. CONYERS. Well, since you've said that, then don't compare them that we have to choose.

Judge NEWMAN. I hope you won't.

Mr. CONYERS. We both hope they have both.

Judge NEWMAN. Right.

Mr. CONYERS. But, look——

Judge NEWMAN. It would be helpful.

Mr. CONYERS [continuing]. Let's just remember the pattern and practice scares the heck out of a lot of offending institutions. It's been used in mental institutions; it's been used effectively for prisons; it's been used in the field of education. I don't know whether it will be any less effective here, but, without it, the Director of the Civil Rights Division, John Dunne, said, "I can't do what you want, Mr. Congressman. I don't have that authority."

Judge NEWMAN. I think we're in agreement. I think it is a remedy which this country would be better off having than not having, for sure.

Now your second point dealt with, can you eliminate the specific intent requirement in a criminal civil rights case? The specific intent requirement was enunciated by the Supreme Court in *United States* v. *Screws*. Whether they think they were merely interpreting the statute or were reading into it a requirement necessary to make the statute constitutional, I'm not prepared to say; I can't read their minds. This Congress has broad authority under section 5 of the 14th amendment to enforce the 14th amendment, the so-called enforcement clause.

I would think if it's the will of this committee and the Congress to eliminate the specific intent requirement from 242, you would, I assume, still have a general intent; you'd have a mens rea, a requirement—if that's your view of the sound policy, I would think you ought to enact the statute——

Mr. CONYERS. Well, now I don't—I know that you're advising us, but I want to find out what Judge Newman's view is.

Judge NEWMAN. Well, Mr. Conyers, I really think I ought not to try to offer you a constitutional decision on whether the elimination of specific intent would survive Supreme Court scrutiny. I may have that question.

Mr. CONYERS. Well, no, I didn't ask you that either. I didn't ask you that question, Judge.

Judge NEWMAN. Oh, I'm sorry, I misunderstood.

Mr. CONYERS. What I asked you is whether you think we'd be better off in this country without specific intent in this provision of title 18, 242.

Judge NEWMAN. If it's constitutional to do so, we'd be much better off. There's no question in my mind about that. It would be sound. It would be a sounder, more effective remedy. I have no doubt of that.

And your third point, about gathering the data, of course I'm agreeing with you on that, that the more we know about these cases, document them, we would be better off.

Mr. CONYERS. Thank you very much, sir.

Mr. EDWARDS. The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

Your Honor, it's good to have you with us this morning.

Judge NEWMAN. Thank you, sir.

Mr. COBLE. Judge, on page 14 of your testimony, you indicate that local governments—and you touched on this briefly—that employ public officials who violate the constitutional rights of others should be liable for punitive damages. Now punitive damages—I think I'm correct in this—one of the purposes is to punish past egregious behavior, to deter future misbehavior. I'm going to be very simplistic now and ask you, Do you couch this suggestion or recommendation on the ground that allegations and proof were forthcoming that the government employer, the municipality or the county involved, did mistrain or fail to properly train, or do you just want that, the punitive damages feature, to apply on its face?

Judge NEWMAN. I think my answer is a shade in between those two rather stark alternatives. It surely wouldn't be on its face in the sense of anything automatic, but I am not suggesting that municipal liability for punitive damages would require proof that the municipality failed to train or failed to educate or things of that sort.

Mr. COBLE. Or mistrained?

Judge NEWMAN. Or mistrained. To try to turn a Federal trial of an isolated civil rights case, like Rodney King, into a broad-ranging inquiry into the level of training of an entire city police department I don't think is a useful enterprise. If a civil jury, not a criminal jury, if a civil jury is persuaded by the lesser standard of proof in civil cases, the preponderance of the evidence, more than 50/50, as you know, if they're persuaded that what happened violated the Constitution, the first thing they should do is award compensatory damages. Then if they're also persuaded that that conduct was outrageous, they should be able to express the community's sense of outrage by awarding punitive damages, not because the city has misbehaved but because its officer has misbehaved. Citizens on a jury should have an opportunity, short of the criminal sanction, to express the community's sense of outrage that violence was perpetrated, and punitive damages serve that purpose.

Now they could be limited. I know there's a large concern in many areas of civil law about limiting punitive damages. You could have limits. You could limit it by the size of the community. I don't want to see a community of 30,000 people suffer a $20 million punitive damage award, but you could scale it to the size of the community.

If a city knows all it's liable for is the compensatory damages, that's not a deterrent. I could show you the results of jury verdicts reported in a 1979 piece in the Yale Law Journal, which is reported at 88 Yale Law Journal 781. I won't burden your record with it, but the citation is there.

Judge NEWMAN. Juries in police misconduct cases frequently come in with compensatory verdicts of $500, $800, $1,200. Of the

cases analyzed from New Haven, it's interesting that they usually brought in larger compensatory verdicts for white victims than for black victims.

Mr. CONYERS. Would the gentleman from North Carolina yield to me for a second?

Mr. COBLE. Sure.

Mr. CONYERS. Are you suggesting that if you get half killed by a cop in a small town, that you shouldn't get much, but you'll get a bigger fee if you're in a big city?

Judge NEWMAN. No. Here's what I'm suggesting, Mr. Conyers: I think the compensatory remedy should equal the injury. If you are beaten and you suffer compensatory damages, hospital bills, out of work, a loss of a limb——

Mr. CONYERS. It doesn't matter where it is.

Judge NEWMAN. It doesn't matter. I am suggesting that if you turn to punitive damages, which some people don't want to impose at all——

Mr. CONYERS. Yes, but that's a jury question in the first place.

Judge NEWMAN. Well, again, Mr. Chairman, it's a question of what's feasible.

Mr. CONYERS. But you can't tell a jury that they've got to impose just tiny punitive damages because of the fiscal state of the municipality or the county.

Judge NEWMAN. Oh, we do that. As a matter of fact, we do that now. It's the law all over America that in proving up punitive damages the resources of the defendant are quite relevant, and the police officer would be able to show his resources. And if a company was sued for punitive damages, they would be quite entitled to show their resources.

Now whether you do it by absolute limits——

Mr. CONYERS. What about the Supreme Court case that forced the city to raise taxes because of a punitive damage——

Mr. COBLE. Judge, if the gentleman from Michigan will permit, let me reclaim my time because the clock's ticking and we'll get to this later on.

Judge, that's why I put the question to begin with, and I don't want to cut anybody off. But the practical problems that we would encounter, given your extreme—and perhaps it may not be extreme—of the $20 million verdict, I can see our falling into the trap of people complaining, well, you're using these moneys for this sole individual when we may be having or may be depriving other worthy causes, housing for example.

Judge NEWMAN. Yes, can I respond to that?

Mr. COBLE. Yes, and I think that may be——

Judge NEWMAN. The suggestion I made is that if you authorize punitive damages against the municipal employer, you let the court or the jury allocate the damages part to the victim, part to the United States. I agree with you, some juries will not want to make a large punitive damage award to a victim. They may think the municipality should be made to pay, but they won't want to put all that money in the pocket of the victim.

Mr. COBLE. Of course you and I both know——

Judge NEWMAN. But you can allocate it. You can say let the United States——

Mr. COBLE. Judge, Judge, if I may——

Judge NEWMAN [continuing]. Take that money and rebuild the city.

Mr. COBLE. Judge, you and I both know that municipality money is taxpayers' money.

Judge NEWMAN. Surely. Surely.

Mr. COBLE. Judge——

Judge NEWMAN. And I would hope—I would hope—that if a municipality is hit with a punitive damage award because its police officers beat a person senseless, the taxpayers of that city would be very concerned that their police leadership would take steps to be sure it didn't happen again. That's exactly where the shoe ought to pinch.

Mr. COBLE. Judge, I wanted to get into the good-faith defense, but my time has elapsed. Perhaps we can do that at a later time. Thank you, Mr. Chairman. Thank you, Judge.

Mr. EDWARDS. The gentleman from Texas.

Mr. WASHINGTON. Thank you, Mr. Chairman.

You Honor, if you change, if the Congress—and I agree with what the chairman has put forward and much of what the chairman of another committee, the gentleman from Michigan, has put forward as being ideas worthy of consideration. The problem is that hard cases always make bad law, and we're dealing with the Rodney King situation kind of around us. But, as you mentioned earlier in your remarks and in your prepared testimony, we've known about the fallibility of the present system for a while and it seems now that maybe it's an appropriate time to move forward.

As I recall, *Monroe* v. *Pape,* the Supreme Court turned that case on whether Congress intended a city to be a "person" within the meaning of section 1983. So, without more—in addition to the other things we are doing, we could change the holding of *Monroe* v. *Pape* by amending the statute or some other statute to make it clear that the word "person" as used in section 1983 includes the employer of the person under the usual doctrine of respondeat superior.

Judge NEWMAN. Precisely.

Mr. WASHINGTON. OK. Then kind of bouncing off questions that have been asked both by Mr. Coble and Mr. Conyers, kind of combining those, in a civil action then, when you get to the question—you're not talking about strict liability on the part of the city, the employer?

Judge NEWMAN. I don't consider it strict liability for this reason, Congressman Washington: Strict liability is a concept that has to do with normal tort liability in a case that would usually have a negligence requirement, and it is suggested, for example, when a company distributes a dangerous product they should be strictly liable without regard to their negligence. That's where strict liability comes in. We're not talking about negligence. We're not talking about ordinary torts. We're talking about a special thing which the law tends to sometimes call a constitutional tort: Action by a public officer under color of law that deprives a person of a constitutional right. When that happens, there should be liability.

Mr. WASHINGTON. I agree.

Judge NEWMAN. If you want to think of that as strict, I guess you can, but since strict liability is sort of liability without negligence, it really just doesn't fit; that label doesn't fit here.

The constitutional standards themselves already come with considerable leeway built into them. The excessive force standard we're talking about here, it doesn't say, if you touch a person, you're liable.

Mr. WASHINGTON. If I may——

Judge NEWMAN. It says if you use more force than is reasonably necessary under the circumstances. That's the flexibility.

Mr. WASHINGTON. That's right.

Judge NEWMAN. The fourth amendment is a reasonableness remedy. So it isn't a strict liability. It's a use of the constitutional standards with their built-in flexibility to impose liability.

Mr. WASHINGTON. I'm sorry, I'm not trying to cut you off; I believe we'll get another round in. But I want to press the point, I believe, because perhaps I didn't artfully state my question, in the area of—and I'm agreeing with you. I mean, I think we need to do more. I practiced this kind of law for 22 years before I came to the Congress, so I know about what you speak.

On the question of the liability of the employer, what is the actionable negligence that is usually defined as the thing that the law required to be done that it failed to do or——

Judge NEWMAN. Clearly, perhaps the phrase we need to focus on is not strict liability but vicarious liability.

Mr. WASHINGTON. That's respondeat superior.

Judge NEWMAN. Respondeat superior is the doctrine that says that any employer is liable for the wrongs perpetrated by his employees.

Mr. WASHINGTON. In the course and scope of employment, though, and what employers usually do in a situation like that, what I would do if I were the city defending a suit on one of these is say that the employee was outside the course and scope of employment; that I had not given them the authority. Like there are cases that say if a busdriver beats up a patron getting on the bus, he's hired to drive the bus; he's not hired to beat up people. So then you've got a jury question of whether that's course and scope.

Judge NEWMAN. Well, it's——

Mr. WASHINGTON. What do you do with that? I'm trying to press you. Are you talking about strict liability? In other words, are you talking about every time that the agent who has been on with a nightstick, a gun—are you using the instrumentalities to make the city liable? Since the city issues the badge, issues the uniform, issues the nightstick, and issues the gun, are you trying to hold them liable through the use of instrumentalities which they knew, or should have known, could be the subject of misuse or are you saying that, without respect to that, the city would be liable?

Judge NEWMAN. I am suggesting that if the officer acted under color of law, which is the test for 1983, it should not matter whether he can be said to have enacted within or without the scope of employment. Under a color of law is sufficient. The city gave him the badge.

Mr. WASHINGTON. Right.

Judge NEWMAN. They gave him the authority to say, "Halt. Step outside," and use authority, public authority. That should be sufficient to impose liability on the employing unit of government. Indeed, there's nothing startling about this. This Congress created this very type of liability against the United States of America in 1975 when you amended the Federal Tort Claims Act. A Federal officer who uses excessive force creates liability on the part of the United States of America.

The FBI agent—the United States can't say, "Well, he acted outside his employment." Now if it was perhaps an entirely personal grievance, if he wasn't even under color of law, that would be different. But if it's under color of law, if he's acting as a police officer, the FBI agent today who does that subjects the United States to liability, but the Los Angeles police officer does not subject the city of Los Angeles to Federal civil rights liability.

Mr. WASHINGTON. I thank the judge for his answers to the questions, and I thank the chairman for the time.

Mr. EDWARDS. Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman.

Judge Newman, I want to follow up on this line of questioning that the gentleman from Texas has engaged. I represent the district in Oregon where our Oregon Bureau of Police Standards and Training resides. And Oregon State law requires that all of our State police officers, all local police officers, county sheriffs, deputies, even corrections officers, all have to attend this extensive training program. And so our cities and governments invest a lot of money in this.

And I've toured this facility and their programs, and it's just excellent caliber. I know that Oregon has a high quality of police officers in our State because of this commitment. So if you have the situation where the city—you're saying that the city is going to be exposed to this liability. And they're going to come in, as Mr. Washington has suggested, and says, "Look, here's our magnificent training program and this person went through it and got good grades and met all, exceeded all the standards during training, and then something happened when he or she got out into the field and did violate all accepted rules."

Judge NEWMAN. And so why should they be liable?

Mr. KOPETSKI. And so the question is—and they do that today. And I think what I'm hearing you say is that you're proposing a different legal theory.

Judge NEWMAN. Probably.

Mr. KOPETSKI. Otherwise, the city is not going to be liable under today's law.

Judge NEWMAN. What I believe I'm suggesting is not—and it's certainly different from the civil rights law today, but it is the same liability that the city is exposed to for all of the nonconstitutional torts. I'm sure your cities have adequate programs to train for motor vehicle instruction. I'm sure those who drive their fire engines are given training. But if the fire engine negligently strikes a pedestrian, the city is liable. They can't say, "Well, we sent him to 13 weeks of driver ed course, so don't sue us." They're liable under respondeat superior.

All I'm saying is——

Mr. KOPETSKI. Well, they're not——

Judge NEWMAN [continuing]. Constitutional——

Mr. KOPETSKI. The problem is——

Judge NEWMAN [continuing]. Torts should be on the same footing as all other torts.

Mr. KOPETSKI. Well, let me do it a different way. If you have the welfare caseworker driving the car and they're involved in a motor vehicle accident, and if they're operating within the scope of their employment and they were wrong, they drove through the stop sign, then the city is found liable in that situation, because of respondeat superior. But the issue is, the city comes in and says, "Well, the person was on their lunch break and they weren't supposed to be driving their car over there, and it wasn't in the scope of their employment, and so we're not liable."

Judge NEWMAN. You're going to have that defense here, too. If they say—this officer who was involved, if they could say—not in the Rodney King case, but in some other case—what this officer did had nothing to do with his job; he was in a local bar; he got into a fight; he punched the fellow next to him; they had a disagreement; he wasn't behaving as a police officer. If he wasn't acting under color of law, there is no liability.

Section 1983 requires action under color of law, use of official authority. That's always been the law.

Mr. KOPETSKI. Let me ask another question then. Let's say the training manual says, and all the procedures taught at the BPST say you don't beat anybody in the head, period, under any circumstance.

Judge NEWMAN. All right.

Mr. KOPETSKI. You can hit them in any other part of the body, but not the head. And so the guy hits him in the head. Everybody is hurt and injured, and it's outrageous activity, et cetera. I mean, can the city come in under your standard and say, outside of the training procedures, we're exempt from liability?

Judge NEWMAN. I would say no.

Mr. KOPETSKI. The city is not exempt?

Judge NEWMAN. The city is not exempt.

Mr. KOPETSKI. Now I'm not understanding the theory in that situation. Why?

Judge NEWMAN. Because it is the law of all tort law in America that employers are liable for the wrongs of their employees, and they cannot defend by saying, "We told them not to do it." That's what respondeat superior is. We do it today in America, and the rest of the Western world does it; we're not special. Cities in America are liable for the nonconstitutional torts of their employees. They are liable under much State law for the official torts. It's only 1983, it's only the Federal civil rights remedy that has this gap such that a city is not liable for the constitutional torts of its employees, save only if it's a policy. That's the *Monell* case. But a policy of constitutional deprivation is very hard to prove.

Mr. KOPETSKI. Let me ask you this, Judge——

Judge NEWMAN. So this is just the normal, using for constitutional torts the same standard as for nonconstitutional torts.

Mr. KOPETSKI. Let me ask you this: What is the situation, then, where the city would not be liable?

Judge NEWMAN. Well, the classic situation would be where its officer did not commit a constitutional violation. No constitutional violation, no liability. Constitutional violation, liability. That would be the essential choice that the jury would have.

Mr. KOPETSKI. Is there any situation where the police officer beats an individual and the city would escape liability?

Judge NEWMAN. Well, if he could be said to be acting out of something having nothing to do with his official duties. He wasn't under color of law. He just had a neighborhood fight in a bar with a friend. He was off duty. He didn't have his uniform, his badge, his gun. He was just a bad neighbor that night in the bar and he punched somebody out. But if he's acting under color of law, then he denies a constitutional right.

Mr. KOPETSKI. Is it a question for the jury if he is off duty walking home from work with the uniform on?

Judge NEWMAN. Oh, we've had those cases. Now if he's walking home with the uniform on and he sees something suspicious and he tells that fellow, "Stop," he's using public authority. He's not saying, "Oh, I'm a curious citizen and I wish you would stop." He's saying, "Stop in the name of the law." That's what he's saying. And he's using public authority. He's liable today under 1983. It's just his employer that isn't liable under 1983. That's the omission that existing in existing Federal civil rights law.

Mr. EDWARDS. The time of the gentleman has expired.

Mr. KOPETSKI. Thank you, Mr. Chairman.

Mr. EDWARDS. And I yield for one question to Mr. Conyers.

Mr. CONYERS. Thank you for letting me just raise this question with you, Judge Newman, and I appreciate your testimony and the concern you brought to this subject. If only there were more judges that thought, felt, and acted like you did.

Now our next witness coming up, Johnnie Cochran, a civil rights lawyer who has been practicing almost as long as Craig Washington has practiced, says this. He says that money damages are swell, but they frequently don't stop anything; they don't change anything. He's got all kinds of verdicts against police officers, but they've had no effect of changing the patterns of misconduct because our police departments simply ignore cumulative monetary judgments, frequently don't even pay them. I would like you to respond to that, sir.

Mr. EDWARDS. Well, if the gentleman would yield—you're not asking, Judge Newman, to cancel out the criminal statute. This is an additional statute that you're suggesting.

Judge NEWMAN. Quite correct, Mr. Chairman; nor am I suggesting that equitable remedies be in any way impaired. I agree with the point in the question that damages often don't do enough. That's true. My first answer to that is, but better to have them than not to have them, and my second point is that the suit by the United States that I suggest be authorized against a municipal defendant would include equitable relief. So that if a court said, "Look, not only should there be damages, but there should be an injunction. Perhaps even on this one episode there should be an injunction remedying this to lessen the chances that it occurs again," the court could fashion a remedy. A court has broad equitable power once it finds the law has been violated.

Mr. CONYERS. I agree. I'm glad you put that on the record.

I thank the chairman for yielding.

Mr. EDWARDS. Well, thank you, Mr. Conyers.

The money doesn't all necessarily go to the victim; is that correct?

Judge NEWMAN. Doesn't all what? I'm sorry.

Mr. EDWARDS. Do the money damages necessarily all go to the victim or can the——

Judge NEWMAN. The suggestion I made—and, obviously, you may adapt it any way you see fit—my suggestion was that the compensatory award would go to the victim, because it is compensation for what happened to him. The punitive award could be allocated in either the jury's discretion or the judge's discretion—that's a detail you can work out—so that in some cases it might be appropriate to give part of the punitive award to the victim.

For example, sometimes he's locked up in jail for a day wrongfully and the jury says 1 day in jail isn't worth much. I've seen cases where they priced that at $300. So I think a jury in that case should say, well, for compensation we're not going to give much, but we are going to give some punitive damages to the victim. But other juries say, "We don't want to put vast sums of money in the pocket of the victim, but we do want to express our outrage that something wrong happened." So they should be able to award punitive damages for the benefit of the public, in this case the United States that sues, and I would think the United States would then use that money to deal with the problems in the locality where the incident arose.

Mr. EDWARDS. Well, we would hope so. Judge Newman, you've been really a splendid witness. From where I come from, it's a wonderful proposition you have. Of course, we're going to ask the Department of Justice in a few days to take a look at this and see what they have to say also, but we're grateful that you came today, and thank you a lot.

Judge NEWMAN. Thank you, Mr. Chairman. I know your focus is on police misconduct because that's what has our attention and brings us here today. I simply close by saying I hope you will use this occasion to consider the defects that exist in the remedies for the denial of all constitutional rights. They all need suitable procedural remedies.

Mr. EDWARDS. Thank you for——

Judge NEWMAN. Thank you for the opportunity you've given me.

Mr. EDWARDS [continuing]. Very good advice.

Judge NEWMAN. If I can be of help in the future, I would be delighted to do so.

Mr. EDWARDS. Our next witness is Johnnie Cochran. Mr. Cochran is a former deputy assistant attorney for the city of Los Angeles and former assistant district attorney for Los Angeles County, where he was responsible for prosecution of police misconduct cases. Since returning to private practice in 1981, Mr. Cochran has handled many major police brutality cases.

Mr. Cochran, you will please raise your right hand.

[Witness sworn.]

Mr. EDWARDS. Thank you. Without objection, your full statement, if you have one, will be made part of the record, and you may proceed.

STATEMENT OF JOHNNIE L. COCHRAN, JR., ESQ., LOS ANGELES, CA

Mr. COCHRAN. Thank you very kindly, Mr. Chairman and members of the Subcommittee on Civil and Constitutional Rights. I applaud your efforts. I encourage your seeking passage of H.R. 2972 as a freestanding bill. I believe this legislation is urgently needed.

Over the past 25 years, I have had extensive experience, as you indicate, as a high-ranking criminal prosecutor in the Los Angeles County district attorney's office and as a private civil rights lawyer, with Los Angeles police and sheriff's officers who use excessive force. These years of experience have led me to agree that, at least in the Nation's second largest city, systemic patterns and practices of police misconduct, particularly against minorities, have been and remain persistent and resistant to change.

I have personally been responsible for verdicts against police officers exceeding several scores of millions of dollars, but these have had no effect on changing the patterns of misconduct. Our police departments simply ignore cumulative monetary judgments.

We in Los Angeles thought that the Federal courts would provide us relief from deadly police strangleholds until the Supreme Court decided *Los Angeles* v. *Lyons*. The Los Angeles Police Commission has enforced a temporary restriction on stranglehold use, limiting it to situations where deadly force or serious bodily injury is threatened.

I should note that there have been allegations that the Rodney King incident would not have happened if the Los Angeles Police Department had been allowed to strangle him. This is nonsense. First, if Rodney King was threatening serious bodily injury to a police officer, those officers actually had the authority to choke him. That they did not evidences the officers' perception that he was not threatening such force.

Second, if they had choked him, they might have killed him. We have a history of 17 chokehold deaths in Los Angeles, but not one case of death due to striking with a police or billy club. But now instead of a tragic series of strangulation deaths, we have a long history of shootings and beatings of minorities with guns and clubs. This is unconscionable in a civilized society, but we lack the means for stopping it.

The Constitution purports to grant all persons in Los Angeles the right to be free from unreasonable searches and seizures. In fact, under current law no such freedom exists. All that exists is the right to try to recover money if you are shot or beaten. If you are killed, the only right is for your survivors to seek to recover money. That is cold comfort for the deceased and for his loved ones.

You should assure that not only persons injured, but also persons damaged have standing to seek equitable relief. Otherwise, survivors of persons killed at the hands of the police may be left without such a remedy.

On the issue of standing, I'm appreciative of the subcommittee's efforts to afford persons injured by a pattern of police misconduct

with standing to seek equitable relief, but I'm fearful about whether the structure without more will withstand constitutional scrutiny. Standing is implicated by article III of the Constitution, and I have serious reservations about Congress' ability to create it through this legislation without a clear statement of purpose. Recall that Lyons almost died from strangulation, but was nonetheless denied standing. The case of *Warth* v. *Seldin* offers little solace in this regard.

I suggest that there is a comfortable constitutional basis for granting standing to persons injured or damaged without requiring that further immediate specific threat of injury to that person be shown. That would flow from a congressional finding—and one easily made—that, one, the looming threat of serious injury or death from a pattern of police misconduct causes generalized and continuing mental damage and real fear of police, and, two, the community outrage at such conduct can and does result in enormous damage, physically and otherwise, to the community, with consequent great expense to the Federal Government in seeking to keep the peace. Congress can grant individuals standing to bring an action to be free from the adverse consequences to them of police practices directed at and immediately harmful to others.

I want to point out that your wording "in any civil action under this paragraph, the court may allow the prevailing plaintiff reasonable attorneys' fees..." is also fraught with peril. The private bar is ready, willing, and able—and enthusiastic, I might add—to act as private attorneys general in enforcing rights under the proposed act, but this language practically removes their economic ability to do so. Your language makes the "attorneys' fees" the property of the client, not the attorney. This leaves the client free to waive those fees in order to settle the action. See *Evans* v. *Jeff D.* at 475 U.S. 717, a 1986 case.

Our experience has been that local governments routinely demand and receive from the client a waiver of statutory attorneys' fees. This may cripple attorneys seeking to enforce the act. It would be preferable for the language to read, "In any civil action under this paragraph, the court may allow the attorney for the prevailing plaintiff reasonable attorneys' fees."

On the issue of training, one very important feature of the proposed legislation will be to allow us to seek Federal judicial oversight of what has been in the past an egregious source of injury and death. This is in the area of training. In the trial of the King officers, we were treated to the outrageous spectacle of two Los Angeles Police Department training officers, each viewing the same videotape, and each giving opposite opinions about whether or not the beating was within policy; to wit, in accordance with the training given Los Angeles police officers.

This situation arises because neither police policy nor police training are subject to public review or input and is, accordingly, often vague and ambiguous, if existent at all. No one can point to any definitive manual or policy statement which demonstrates what policy is or what training is given. This policing in a vacuum with secret guidelines, or no guidelines at all, must cease.

Under the proposed legislation, we should be able to flesh out what the policy, the established official practice, is and then be

able to subject it to judicial scrutiny to assure that it measures up to constitutional requirements. We should be able to discover what the real training is, both at the outset of an officer's career and thereafter at rollcall and by peer influence, and hold it up to constitutional scrutiny. And if either policy or training fails to comport to Federal constitutional mandates, we will finally be able to obtain judicial injunctive or declaratory relief on an institutional basis.

In these times, we in the private bar are less than optimistic about the Federal Government's willingness or ability to provide money to fund additional civil rights efforts by the Justice Department. We are hopeful, but cautious. On the other hand, this legislation promises to give the private bar the tools, at the expense of those who violate constitutional mandates, to make the Constitution's written promises become alive and real to those victims of police misconduct throughout this country. It is an important step among many to avoid the recurrence of the disaster that just visited Los Angeles.

Thank you very much, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Mr. Cochran, for very valuable testimony.

Mr. Conyers.

Mr. CONYERS. Thank you and welcome, Attorney Cochran.

Mr. COCHRAN. Thank you.

Mr. CONYERS. We appreciate your continued work with the Judiciary Committee.

Mr. COCHRAN. It's my pleasure, Mr. Conyers.

Mr. CONYERS. First of all, be assured we're going to add the correct language for attorney fee provision. You had an earlier draft and we're going to put that in.

Could you comment, if you feel inclined, about Judge Newman's proposed modifications of title 42, section 1983?

Mr. COCHRAN. I think they're very appropriate. I, for one, however, I feel more strongly than he does about the need for injunctive relief. I think that in the *Lyons* case—and I followed that very closely; an associate of my had that case—I think had we had the ability to have injunctive relief in that case, we could have saved a number of lives in Los Angeles, but the Supreme Court carved out an exception and denied standing to Mr. Lyons, saying that that might not pose a threat. I think that's a real problem.

For instance, in Los Angeles right now in a city, Lenwood, that's patrolled by the sheriff's department, a Federal judge has made a finding, this city and that department is basically out of control, and there's been—we've sought and they are seeking injunctive relief to have them cease and desist from their violent practices vis-a-vis the citizens in that area. I see a great need for this injunctive relief, and so I endorse his ideas.

I need hardly point out to this committee—it's like preaching to the saved—that we're talking here about laws that were enacted in 1871 for a very real purpose, generally to combat the KKK. Sometimes we find they are now wearing different uniforms, but there's a real problem that still exists and these laws need to be updated. So I embrace pretty much what he said.

Mr. CONYERS. Thank you very much. Let me ask you about the departure of Police Chief Daryl Gates. To what extent will that

help heal the divisions in the community that he created and those that followed him? And, also, we have had reports here in Washington that Police Chief Gates was very slow to commit the police to a conflagration that was going on all over television. What happened there, if you have any information?

Mr. COCHRAN. Certainly, I'd share with you my perspective, at any rate. I think, in answer to the first part of the question, I think that Chief Gates has said he's going to leave on June 5th. We have a unique situation in Los Angeles where basically he's chief for life or for as long as he wants to. He has committed to leave on June, I believe June 5. However, he earlier had said he was going to leave in April. I believe it's imperative that he leave. I believe that our new designated police chief, Willie Williams, has demonstrated a sensitivity that will help us in this healing process which we must be about.

And there are certainly positive signs in Los Angeles. This past weekend, numbers of citizens came together to start the cleanup without waiting for government, and it's going to have to be a public-private partnership clearly. That seems to be underway. I think that it's entirely appropriate.

I think, however, that what's happened is that Daryl Gates has served too long. He's outlived his usefulness and needs to leave immediately to start the healing process and get the Los Angeles Police Department back on track, and to regain the reputation which it once occupied and had.

Mr. CONYERS. Well, I'm glad that lawyers like you are around and I'm glad that there are people like that in the city of Los Angeles who are really coming together again, and if anything can be drawn out of this horrible tragedy of police violence and the criminal justice system letting America down, it's that it's brought all out on the table and gives us another opportunity to go forward.

I thank you, Mr. Chairman, and yield back the balance of my time.

Mr. COCHRAN. Thank you, sir.

Mr. EDWARDS. Thank you, Mr. Conyers.

Mr. Washington.

Mr. WASHINGTON. I thank the chairman for the time.

I agree with the gentleman from Los Angeles that it is preaching to the saved or the converted. I thank you for coming and for your testimony. I have no questions.

I would apologize in the unlikely event that I'm not able to stay to the end of your testimony. I have a previous engagement on the other side of the Capitol to address on the matter of civil rights, as a matter of fact, a distinguished group of journalists who write and record for the purpose of religious organizations, and I'm sure you understand.

Mr. COCHRAN. I certainly do.

Mr. WASHINGTON. That message needs to be out——

Mr. COCHRAN. Yes, sir.

Mr. WASHINGTON [continuing]. Because we know the underlying problem is, unless you do something about the conditions that cause people to feel helpless and hopeless, you can put all of the facades on it that you want; you can build back the buildings, but unless you instill some hope in the hearts and the minds of the

people who live there, then it's going to happen again, as my friend from Oregon said. It's going to happen again and again and again. It's not because anybody's prophesizing that we want it to happen.

I felt the same heartache when I saw black people pulling white people out of automobiles in Los Angeles just because they were white as I did the first time, the second time, and the last time that I saw the Rodney King videotape. I think that all good thinking people feel that way.

So I think as many audiences as I have an opportunity to address, the message ought to be the same: That we have to get at the underlying problems. Because you want to get out of the business that you're in; you want civil rights laws to be enforced, and if they are ever enforced, then you'll have to find some other line of work; am I right?

Mr. COCHRAN. I'm a corporate lawyer. I would be pleased to do that.

[Laughter.]

Mr. WASHINGTON. Thank you for your testimony, sir. I thank the chairman for yielding the time.

Mr. EDWARDS. Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman.

Mr. Cochran, welcome. I appreciate your testimony very much.

Mr. COCHRAN. Thank you, sir.

Mr. KOPETSKI. I think, as an aside, that Daryl Gates is—really, if the guy had any class, he'd retire today, don't you think?

Mr. COCHRAN. Yes, well, you'd think so. I think that he's been there so long that he seems to think that "Chief" is his first name, it seems to me, at this point, instead of "Daryl."

[Laughter.]

Mr. COCHRAN. I think that we'd be all well served, and it would be a very statesmanlike act, because I think that he's become really a lightning rod. No matter what he does and says at this point, it's not helpful to the situation. We have a designated chief in the wings. The citizens are quite upset. In fact, he attended a fundraiser at or about the time the conflagration started. In fact, many of the people—it started in south central L.A., but they went immediately to the police department to have a dump Daryl rally, and that's where it spread out from that point. Really he has become a real lightning rod. And I think you're right, as a statesman and someone who loves Los Angeles, it would be entirely appropriate for him to leave at this point. I'm not sure that it will do any good. In fact, it might have just the opposite effect, however.

Mr. KOPETSKI. Well, I guess that goes to his own personal character, but I do know that there's a lot of police officers in my State that wish that—well, people understand, I think, in the Nation that the actions, unfortunately, of every police officer affect every police officer in this Nation and it puts them more at risk. It's a tough enough job and a dangerous enough job to begin with, and you just don't need this kind of representation of leadership, especially in a city that is so noted as Los Angeles.

The question I'd like you to comment upon, though, is the standard—I'm sure you heard the discussion with Judge Newman about the standard of applying liability to the city, the municipality.

Mr. COCHRAN. Yes.

Mr. KOPETSKI. And if you could comment—I mean, it's a pretty broad standard, "under color of law." It just seems that there are very few circumstances in which the city would not be liable.

Mr. COCHRAN. Yes, I think there are a couple of things you need to point out. First of all, on this whole issue of punitive damages, you're aware that you cannot get punitive damages against a municipality under the present law, and there's good reason, obviously, for that. Under the Federal law, generally speaking, we're not talking about the simple negligence action. In most Federal actions, you should understand as a practical matter, the courts will allow you to try both State pending actions along with the Federal action. So you will still have some negligence in there, but we're not really, when we're talking about "under color of law," we're not talking about negligence per se, and therein lies the confusion.

There were some recent cases which came down and talked about it's a higher burden. It's not beyond a reasonable doubt as in a criminal case, but it's higher than simple negligence. What I heard the good justice say was that he thinks, if not strict liability, there should be something that when there is a constitutional tort, that it spells it out, because it is very difficult to demonstrate and to show what's in a police officer's mind, whether he had the specific intent to violate the civil rights of this individual, and that's a very difficult burden. I think I saw a statistic recently where the U.S. Government wins perhaps 90 percent of their jury trials; in this area it's somewhat lower because it is a more difficult burden. And I think that's because there's been a bias in favor of law enforcement, and you can understand that.

So I think that to the extent we can address that, while maintaining fundamental fairness and where it can be constitutional, we need to do that.

Mr. KOPETSKI. Thank you. Thank you. That's been very helpful. Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Kopetski.

The gentlewoman from Colorado, Mrs. Schroeder.

Mrs. SCHROEDER. Thank you, Mr. Chairman, and I apologize for getting here late. We had a hearing going on that I had to Chair, so it was hard to get out.

I must say it's wonderful to have you here. Last weekend I addressed the Head Start convention in San Diego in which there were many families from the area where the rioting was going on because their children were in the Head Start programs up there. Of course, they were very concerned about their homes and their centers and what was going on.

I was amazed at the cynicism about the chief. People really felt, at least many of these people felt, that he had set this all up so that the next police chief would fail; that the tensions would be so high, that there was no way he could come in and ever get Humpty-Dumpty back together again. And I feel that that really does tell you that the local people are just very, very dismayed about what's been going on with the police chief for a long time.

Mr. COCHRAN. That is very true, and Mr. Conyers mentioned this also. There is a body of belief that when this incident first started, I think on Florence Street, a street called Florence in Los Angeles, that the police basically pulled back; that there were some people,

some great, good samaritans who came to the aid of this truck-driver, Mr. Denny, who saw it on television and came down and aided him. Now, obviously, if they could see it on television and still get there, the police obviously knew something about this. They came in, saved this man, got in his truck and drove him to the hospital. And, of course, he's going to recover, it seems, now.

For some reason, the police—and Mr. Gates' explanation was they weren't properly deployed. Well, there had been allegations that they had set aside in Los Angeles $1 million for police overtime in anticipation of a possible verdict of this kind. He had gone on television to the officers of the department and made a 5-minute video encouraging them to be professional.

Now his explanation is that he didn't want to overreact, but certainly, at minimum, it seems to me those streets could have been shut off, so the traffic should have been routed out of there to save problems. But none of that was done. The police stood by for a considerable period of time before they went into action.

Mrs. SCHROEDER. I understand they even over the phone told the National Guard they didn't need to come in for a while.

Mr. COCHRAN. I wasn't aware of that.

Mrs. SCHROEDER. I think I heard that this morning on NPR, that they had a phone conversation in which the National Guard was told they could hold back; they had it under control.

The other thing, though, that we, this committee, did—and I was very proud of it; unfortunately, it went into the crime bill and the crime bill will never see the light of day—but one of the things that we found is among police forces the chief does set a very important tone. And we find among local police officers tremendous amounts of family violence within their own police family. You don't dare get counseling or anything because cool guys don't do that; bad guys don't do that. And then it reflects out on the neighborhood. Now I don't know that anyone ever assessed the Los Angeles Police Department on that, but we did put in the crime bill something for the Justice Department to get counseling on all police forces and to emphasize that if police officers were having personal problems, that it was cool to deal with them rather than push them down and take it out on others.

I think we found that attitude in the military, and we found taking that on in the military made all the difference in the world. I would hope civil rights groups and everyone else could work with us to try to take away some of that old mentality that's still out there. I think you then see it have these kinds of repercussions.

Mr. COCHRAN. I think that's entirely appropriate. The macho kind of siege mentality, us against them, really carries forth in these organizations because, by and large, they're paramilitary organizations, and of course the chief sets the tone. That's why in Los Angeles we've said for years, if you wanted to curtail and do away with racist messages through these MDT's, sending these messages back and forth and joking about beating someone half to death, all the chief has to do is say, "You're going to be fired if you do that," and it's gone.

Mrs. SCHROEDER. That's right.

Mr. COCHRAN. These people follow orders. And that's why it's so important for us to get somebody who understands and is sensitive and wants to make a change.

Mrs. SCHROEDER. Well, that's right. And we had some wonderful police chiefs talk about when they did get psychologists or family counselors onboard, what a difference it could make in even the kind of actions they had against some of their police officers; that they found a tremendous interconnect. So, hopefully, someday we will be enlightened enough to get the Justice Department to do that, and I think it would make a big difference in these kinds of things.

Thank you so much for being here.

Mr. COCHRAN. It's a pleasure being here.

Mr. EDWARDS. Mr. Cochran, as plaintiff's attorney, you have won several million dollar judgments; is that correct?

Mr. COCHRAN. That is correct, sir.

Mr. EDWARDS. And is that just a fraction of the number of complaints that you have had?

Mr. COCHRAN. Yes, we have—and I must say the complaints have continued to go up over the years, and it's a hollow victory. On the one hand, the last case we had was a $3 million verdict against the county of Los Angeles for a man who suffered a broken neck, was put back in a jail cell for about 6 hours after the sheriffs broke his neck, and then he ultimately died. And for that widow and those five or six kids, it was a real hollow victory. Money doesn't really answer. If they had a chance to argue for his life or to make a trade, they would take him, obviously. But that's all the law allows, and that's why I so much applaud these additional efforts.

I mean, what we're really talking about here is a deterrent effect. The real danger of the Rodney King verdict is that the message is that the police can do anything. If Rodney King was not excessive force, what does that say to all police all across the country? And I think that that's why we need to perhaps modify and amend 241 and 242. The police have to feel that there is some accountability. There's always that age-old question of who polices the police. Unless society is willing to come to grips with that, it's not only going to be minority citizens; it applies to everybody. And I think it's all of us who are in this together. Your charge in this committee is so important because it makes a big difference, it seems to me.

Mr. EDWARDS. Briefly tell us a little something about a couple of these cases that you won, these big judgments.

Mr. COCHRAN. Well, certainly I will be pleased to. The last case I mentioned was *Robinson* v. *The County of Los Angeles,* where the jury's verdict was in excess of $3 million, where a man's neck was broken. He had been arrested on a misdemeanor drunk driving charge, turned over by the Los Angeles Police Department to the L.A. sheriff's department. He had a pacemaker, and they had to have him checked by a doctor before he could be booked. In changing his clothes and transferring him from a gurney to a hospital bed, the sheriffs broke his neck. And then the doctor, who was supposedly to examine him, didn't discover the broken neck until he had been taken and booked into jail, and when they discovered his

broken neck, of course it was too late; he had lain for 6 hours in a jail cell. That was the most recent case.

Before that, I tried a case of *Pierson* v. *The City of Los Angeles,* where an elderly couple, a woman 69 years of age and her husband 70 years of age, were on this porch in south central L.A. and some drug dealers had been in this front yard, and that bothered him. So he went into his closet and got a shotgun, unloaded, and pointed it in the air and said, "Get off my property." About the time that he was turning to go back into his house, a Los Angeles Police Department car drove up. He couldn't hear very well. They started yelling, "Drop the gun. Drop the gun." And they alleged that he turned and pointed the gun toward them. They fired 11 shots at this old man, striking him about 4 times.

Meanwhile, his wife was back—it was 7:30 in the evening and there was a program that comes on; she was reciting the rosary. This is really the truth; it wasn't something that I dreamt up. She was reciting the rosary, and she heard all these shots and came out, and they ordered her out, drug her across her husbands body, made her kneel on the front lawn in front of all the neighbors, and took her down to jail. The jury gave $2,300,000 for the two of them. The husband lived for a while; he has since died. And she is a wonderful lady. All she has now is some money. She doesn't have her husband. She has these memories, and it's extremely frightening to her.

We've had a number of cases. I had another case where an off-duty—where a San Fernando police officer was shot by a Los Angeles Police Department officer in a drug undercover bust. He was a Hispanic officer. They had just met and talked 5 minutes before. And when they encountered each other again, the Los Angeles Police Department officer forgot this fellow and shot him in the leg twice. The jury gave him $2.1 million.

So in L.A., you're seeing there's a rising storm of all the money they're paying out on these various verdicts and judgments where people are becoming very upset, but it's only money. You see, you shouldn't change things only because you're paying money; you should change it because it's right. These people shouldn't die or be injured, and it shouldn't be because of that. But we have to do with what we can, and obviously if money judgments are the things that change things, then we have to do that.

Mr. EDWARDS. Well, thanks very much.

Mr. Conyers, you had another question?

Mr. CONYERS. Yes. This testimony by Attorney Cochran triggered in my memory the remembrance of the *Eula Love* case. What was that, about 1980?

Mr. COCHRAN. Yes, it was, in 1979–80. Yes, it was.

Mr. CONYERS. Well, I wanted to get this in. How do we go about breaking this code of silence? Should we have a whistleblower protection bill in here that applies to law enforcement officers? And what about all the cases that come in your door, in any attorney's door, that aren't successfully brought to conclusion? The witness can't hack it; the client can't hack it. The witnesses disappear. The research and investigative portion of putting together a suit of this nature would cost far more than anybody's ever got money for.

And I was just thinking about the real-life impediments that lawyers, many of whom are just not trained for this trial work——

Mr. COCHRAN. It is very difficult. And I don't want to leave the impression by talking about these verdicts, and whatever, that this is easy work. Up until about 1962, no lawyer had ever won a case against the city of Los Angeles in the history of the city in police abuse. This is a new phenomenon where jurors over a period of time have become sensitized. As Mr. Washington I'm sure well knows, these are tough cases clearly, because people don't want to find against the police, even monetary damages. It requires an inordinate amount of effort, keeping abreast of the law, and investment of your personal funds, because the only way you're going to prove these cases is through expert witnesses. You've got to bring people in to talk about how the police fell below a standard of care.

In a recent case, we used all kind of experts. In this case where they broke this man's neck, we used the *Challenger* space expert, a Dr. Kezerian from Ohio, to explain the force applied on this man to sever his neck at C–7 and C–8; he had subluxation, and we had to try to demonstration that for the jury and take the x ray and really do it. So it cost maybe over $100,000. So this is very difficult. This is a real commitment of love that you have to make. So we need all the help we can because we'll never change it if we don't get some other help.

Mr. CONYERS. If the chairman doesn't cut me off, the Washington Times headline today is "Bush Releases $600 Million for L.A.; Liberal Policies Faulted." Now if that doesn't contradict—well, this is the way it usually goes at the White House. But the problem I have is that, how can we possibly underfund the cities, neglect education, housing, health, jobs, and then say liberal policies of a previous generation were to blame and then release $600 million at the same time you're making that assertion?

Mr. COCHRAN. That is astounding.

Mr. WASHINGTON. Will the gentleman yield? Is that sort of like an egregious case of medical malpractice where the doctor blames the patient's body for not having been able to live?

[Laughter.]

Mr. CONYERS. You know, it's incredible, this is a legal problem that brings the civil and constitutional committee here, but it's also a socioeconomic problem, because if we don't get to the underlying causes, if we just treat these people as miscreants, as hoodlums, as criminals that brought that outrage, then we don't get the picture of what's the motivating force behind the pain and the suffering, the humiliation that you've brought out so well in just reciting a few cases that you've had. We've got to somehow bring the American people into focus with this Government. The Government sets the tone. The Attorney General lets these criminal cases go by the board. The courts allow the police lawyers to come in and wipe out a case that they know ought to have received justice.

You know, there's a complicity all along the chain of command in Government, in law, in the courts, in the Congress, in the White House about just letting it slide. If between Martin King and Rodney King we don't get the picture now, this country is hopeless.

Mr. COCHRAN. We're in serious trouble. We've often said in jury argument that they set the standard for our society and for the

laws of our society. And the resulting King verdict at least was the spark. The opposite of law and order is chaos and destruction, and that's exactly what we had, because people would perceive that. Now of course it got totally out of hand when other opportunists got involved in it, but it's a message that should be heard and it starts at the very top, from the President on down. I certainly applaud this committee.

Mr. EDWARDS. Mr. Cochran, in these cases that you described where the multimillion judgments were achieved, were there Federal charges brought at the same time? I presume you're talking about State law.

Mr. COCHRAN. These are State law, and I always file Federal charges in all of my cases. Most of these cases were in State court; some are in Federal court. But there were no Federal criminal charges in any of these cases.

Mr. EDWARDS. There were no criminal charges brought——

Mr. COCHRAN. There were no criminal charges.

Mr. EDWARDS [continuing]. By the Department of Justice.

Mr. COCHRAN. It is extremely—just if I could take 1 minute further, we presently now—there are a couple of other cases, high-profile cases, in L.A. now. There's a case called the *Keith Hamilton* case where a young man was shot nine times while lying prone on the ground in an area called Ladera Heights. It caused a lot of consternation. They went to the grand jury, and the grand jury did not indict. They fired the officers, but they didn't indict. It caused a lot of frustration.

Another case that the district attorney is still investigating: A young man named Stevens in West Covina, the officers, in serving a search warrant at 4 o'clock in the morning, came into his bedroom and he was shot 28 times in the back, 22 times in the upper back, 6 times in the lower back, and they were looking, supposedly, for a weapon that had been involved in some murders. They, of course, never found the weapon. They had been there earlier and he told them, "I don't have a search warrant." "But don't tear my place up. Get a search warrant." They came back at 4 in the morning and he ended up dead. Now that's being—they're again looking at that, but nothing ever happens.

Mr. EDWARDS. Were Federal charges filed?

Mr. COCHRAN. No charges are filed in that case——

Mr. EDWARDS. Federal charges under Federal civil rights laws?

Mr. COCHRAN. None. They're investigating. None has been filed at all. As you saw from——

Mr. EDWARDS. No criminal charges were brought by the U.S. Department of Justice in any of these cases?

Mr. COCHRAN. None at all. In fact, Rodney King is probably the first prosecution we've had out there of any consequence other than the corruption charges involving the sheriff's department out there. You've seen those on the news. We've not had any police abuse charges.

Mr. EDWARDS. Thank you.

Mr. Washington.

Mr. WASHINGTON. Thank you, Mr. Chairman. I haven't been able to get out of here yet; this is such a compelling subject.

Earlier, Mr. Cochran, you touched on the difficulty in just getting one of these cases prepared, in addition to all the other limitations as a private practitioner you face: The fact that you're up against the Government that has unlimited resources.

Mr. COCHRAN. Right.

Mr. WASHINGTON. Most often, suit is filed against an individual officer and the city, and somewhere before it goes to trial a motion for summary judgment is granted, letting the city out, after they've been able to piggyback—if it's anything like it happens in Texas, they piggyback on the discovery from the one with the deep pocket; i.e., the city or the country——

Mr. COCHRAN. Exactly.

Mr. WASHINGTON [continuing]. And use their resources, where you have to match them dollar for dollar on deposition costs and expert witnesses and all of those pretrial matters. Then after the officers have kind of hidden behind the wake of the city, who is a nominal defendant, at least going down the line, somewhere before you actually go to trial, they finally file a motion for summary judgment which is granted on *Monroe* v. *Pape* and that line of cases. They're out of the case, and so the police officers get the benefit of the bargain both ways. They get to ride on the discovery of the deep pockets. You have to match them dollar for dollar. They basically try to buy you out of court; is that about the way it goes?

Mr. COCHRAN. That's exactly what happens, and you're almost broke as you're standing on the courthouse steps. And, lately, they might offer you a token settlement; they go through all of this.

Mr. WASHINGTON. Yes, $1,500 or something like that.

Mr. COCHRAN. Yes, nuisance value, and you've got to stand and stay the course.

Mr. WASHINGTON. Yes.

Mr. COCHRAN. It's a very difficult way to earn a living over a period of time.

Mr. WASHINGTON. Yes. I commend you on what you've done. I must confess that I got tired of crying when I watched—you know, you sit there and the jury nods with you and you kind of read their expressions and they seem to be sympathetic and seem to be hearing the evidence. And they go back in the jury room, and you're sitting there with a paraplegic client who's gotten his neck broken by the police officers, and they come out and look you and God straight in the eye and find that the police officer is not guilty, when you can almost elicit in cross examination testimony, a good lawyer can, can almost elicit a confession knowing that, like all witnesses, they have been fairly well coached.

Mr. CONYERS. Would my colleague yield? How do you assess a suburban jury coming to a conclusion that defies the understanding of the billions of people that saw that case on video?

Mr. COCHRAN. It is absolutely frightening. I think that from the time that jury was moved from an area, Los Angeles County, that's very racially diverse, to Simi Valley, that——

Mr. CONYERS. That was the beginning of the end.

Mr. COCHRAN. That was the beginning of—that case was in trouble. And what that verdict said to me is that we had two standards of justice in this country, one black and one white, both separate and both unequal, and that verdict bespeaks that because those ju-

rors saw things—it was as though they said to us, "Well, don't believe your lying eyes; believe us. We heard this evidence." But we saw the trial. In Los Angeles, the trial was covered gavel to gavel, and I had the privilege of being one of the legal analysts. I sat on the trial many days, and so we saw the evidence and saw it come in. It's just frightening. For the jurors to say afterwards that Rodney King was in control, I mean, you could see this is the mind set—he was in control? I mean, he's rolling around on the ground, and he's in control? Or that the officers didn't use excessive force? Or that he got what he deserved?

And the one thing that his statement perhaps showed, and you saw his statement last week, this was a human being. And I'll tell you, just one other thing I would say, in Los Angeles it's been a bad year from the standpoint of earlier this year a man got 60 days in jail for beating a dog; a Korean grocer shot a little girl in the back of the head, convicted of manslaughter, she got community service. Then Rodney King, people waited 14 months and the officers walked away. So it's a small wonder that people were upset. Now you need to channel your energies and your outrage, but you can see, those kinds of things lead to the chaos and disorder.

So, again, I come back to how I started, that I applaud this committee and your efforts to do something about this at the highest levels, because we need the help out there. I mean, the State court remedies are not satisfactory. It's not getting the job done. We need more help.

Mr. CONYERS. We've got a big job, but we thank you for your testimony. It's been very, very useful.

Mr. COCHRAN. It's my pleasure being here.

Mr. EDWARDS. Mr. Washington.

Mr. WASHINGTON. Let me just proceed just for a moment and then I'll be finished. I think it's important to point out for the American people, because you're a modest man, the difficulties that you face on a regular basis. In addition, except in a few circumstances—and the Rodney King case was one of them—you come down to a person, and I think the judge mentioned this in his prepared statement, who has been arrested for violation of a law against police officers. You don't have the benefit of the videotape. So they come in and they try to scourge his character in every way possible, and that's good defense lawyer work; you know, a lawyer ought to be doing that. But the citizens most often have 4 or 5, 6, 10, 20 of their finest who protect their lives every day and who deserve a good reputation, except when there's a rotten apple in the bunch like this. So you don't have the benefit of a videotape, so you're even straining the credibility even more between the citizen who is arrested for a DWI, or whatever, and it's a Herculean feat. I again applaud you for being able to overcome all of those hurdles that are placed out there that are not there in ordinary civil litigation.

Martin Luther King, if I could paraphrase—you know the quote—said that the measure of a man, and I think the measure of a society, is not what we do in times of comfort and convenience, but what we do in times of confusion and chaos. And these are those times, and you touched upon it. If we don't set an example by this case in the quality and standard of justice for people in

America—we often hear about law and order, but sometimes the word "justice" doesn't permeate that. When we speak of law and order, we're speaking of law and order with justice for all, not just for some; isn't that right?

Mr. COCHRAN. That's exactly correct. That's exactly correct. That says it well.

Mr. CONYERS. Well, let me ask you, Mr. Cochran: Do you believe that there is a way that we can move this country into a greater reconciliation as a result of this tragedy that we've sustained?

Mr. COCHRAN. That's one of the great hopes that we have, that if there's anything that comes out of this, as I said earlier, in Los Angeles, the coming together of people who perhaps have finally gotten the message that there are certain root causes that are endemic that have caused this, and that they are still there, and you just can't gloss over it because another spark will come along and do that.

Unlike, say, in the Watts riots where the rioting was limited pretty much to deep south central Los Angeles, this started to spread out and it caused a lot of fear to a lot of comfortable people, and that's very uncomfortable in a society, when you're guaranteed and you appreciate your domestic tranquillity. So I think that I see a new resolve. The mayor has appointed Peter Ueberroth, as you may be aware——

Mr. CONYERS. Yes.

Mr. COCHRAN [continuing]. To start a process and some real fine citizens in Los Angeles——

Mr. CONYERS. He's a highly reputable leader, and I think that's a very constructive move.

Mr. COCHRAN. I think so.

Mr. CONYERS. We applaud him here in Washington for appointing Ueberroth.

Mr. COCHRAN. I hope that will be the start of something that will help really turn this around. Really, hopefully, what they're talking about is trying to set a model. He says he wants to set a model in rebuilding this area that will be a model for the rest of the country.

Mr. CONYERS. And what about its spreading to these other cities, many unlikely cities that one would have thought would have been susceptible to that? What interpretation do you put on that?

Mr. COCHRAN. The interpretation I put on it—and I think that this is something that I've thought about—if there's any one issue that galvanizes the minority community in this country, there's no issue like police abuse. Every African-American male in America has had that feeling, and it's something that you don't have to talk about or ever discuss with anybody, but you will always understand that feeling for your children, for yourself, or whatever. So that if you see a city like Omaha, NE, or in Montana I understand there was insurrection, you can understand why, because it's a gut issue. It's an issue that strikes the heart of everything that everybody feels and a level of frustration.

Mr. CONYERS. Thank you very much.

Mr. EDWARDS. Thank you very much.

If there are no further questions——

Mr. COCHRAN. Thank you, Mr. Chairman.

Mr. EDWARDS [continuing]. Mr. Cochran, you have been very, very helpful and we appreciate your coming here all the way from the troubled city. We wish you well, as we wish all of the people of Los Angeles well. Thank you.

Mr. COCHRAN. It's my pleasure. Thank you very much.

Mr. EDWARDS. Next week we're going to have—this Thursday—the Department of Justice, Civil Rights Division, on the same subject.

[Whereupon, at 12:20 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING

CIVIL RIGHTS PROSECUTIONS NATIONWIDE BY YEAR (1981-1991)
Compiled from annual Department of Justice statistics

Year	Complaints Received	Investigations	Cases Presented to Grand Juries	Indictments	Informations	Defendants (Police Officers)	Trials	Convictions/ Acquittals	Guilty Pleas
1991	9,835	3,583	62	43	25	129(64)	26	36/13	72
1990	7,960	3,050	46	30	33	97(35)	14	17/3	51
1989	8,053	3,177	40	26	33	84(21)	23	23/10	68
1988	7,603	2,892	44	35	8	71(49)	30	21/26	50
1987	7,348	2,826	57	40	18	105(74)	24	17/17	36
1986	7,546	2,792	49	35	14	112(70)	34	55/20	41
1985	9,044	2,970	56	35	13	106(67)	30	41/21	36
1984	8,617	3,410	48	36	10	93(*)	29	40/*	33
1983	10,457	3,259	54	31	8	85(*)	21	28/*	23
1982	10,327	3,227	81	50	6	98(*)	43	27/*	25
1981	11,064	3,390	62	42	5	80(*)	32	31/*	18

(* indicates data unavailable)

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U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 18 1992

The Honorable Don Edwards
Chairman
Subcommittee on Civil & Constitutional Rights
House of Representatives
Washington, D.C. 20515-6220

Dear Mr. Chairman:

In response to your May 11, 1992, letter, enclosed for the Committee's review please find a copy of the Civil Rights Division's "Police Brutality Study" covering fiscal years 1985 to 1990. As stated in the summary, the Civil Rights Division found that "[a]fter careful analysis, this study does not reveal any statistically significant patterns of police misconduct." This material is raw data comprising the first phase of a broader study by this Department on the issue of police brutality; it has been provided to the National Institute of Justice for their consideration and utilization in the ongoing analysis of the issue.

As you will note from the material provided, there are numerous important limitations to the data, which preclude drawing meaningful conclusions. Two are most significant: In the first place, this material is based on reported complaints, with no refinement made for the validity of the complaint. Second, this material is based only on complaints reported to the Civil Rights Division -- we have no way of knowing how many other instances of alleged police brutality were not so reported. In addition, there are other weaknesses in the data as described in the document.

We are providing this material solely for the Committee's use, and not for public release. Given the limitations in the data we do not think it would be fair to publicly release a document that includes "rankings" of law enforcement agencies when those "rankings" are based on data that are so unreliable.

It our judgment, that would be comparable to the public release of what are essentially unsubstantiated allegations, and we would not publicly release such allegations about individuals.

Moreover, we hope that any use the Committee may make of numbers from this material will note the significant limitations in the data and will not draw conclusions concerning either overall levels of police brutality or the records of individual police departments which simply are not warranted by the data we have.

As mentioned above, the National Institute of Justice is continuing its work in this area. The Department will share with the Committee the results of that review when it is completed. In the meantime, we remain committed to working with the Committee in this important area.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: The Honorable Henry Hyde

POLICE BRUTALITY STUDY

FY 1985 - FY 1990

CRIMINAL SECTION
CIVIL RIGHTS DIVISION
U.S. DEPARTMENT OF JUSTICE

DRAFT--FOR INTERNAL DISCUSSION PURPOSES ONLY

ACKNOWLEDGEMENTS

The Criminal Section of the Civil Rights Division gratefully acknowledges the assistance of its entire staff in the completion of this study. Significant technical support, particularly computer application, data collection and assistance in the interpretation and display of the data, was provided by other Civil Rights Division personnel.

Several organizations provided information which has been included in the study; they are especially thanked for their quick and cooperative response -- the FBI's Uniform Crime Reporting Program, the American Corrections Association, the U.S. Bureau of the Census, and the many state and federal agencies who were contacted for information not otherwise obtainable.

The Criminal Section appreciates the support provided by all who assisted with this study.

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DRAFT--FOR INTERNAL DISCUSSION PURPOSES ONLY

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POLICE BRUTALITY STUDY

I. SUMMARY

At the direction of the Attorney General, the Criminal Section of the Civil Rights Division reviewed and analyzed information, previously collected and maintained for internal management purposes, pertaining to complaints of official misconduct that were investigated by the Federal Bureau of Investigation and which were reported to the Civil Rights Division in a six-year period, fiscal years 1985 - 1990 [October 1984 - September 1990]. The purpose of conducting this review is to determine to what extent, if any, a pattern of police brutality by employees of law enforcement agencies is shown from the data maintained by the Civil Rights Division.

After reviewing the 15,000 reported complaints of official misconduct in order to discern statistical patterns, probably more questions have been generated than answered. We have nonetheless sought to provide some guidance in determining where police brutality occurs and with what frequency and intensity.

Because there is no agency that collects data on police brutality nationwide, the computer data base of official misconduct complaints received by the Civil Rights Division was used for this study. However, the viability of these figures as a full measure of the true incidence of police brutality is severely limited by several factors: 1) the number of complaints reflects only reported complaints and does not purport to capture all instances where official misconduct has occurred; 2) the data base from which these numbers are derived does not indicate the

nature and/or the egregiousness of the official misconduct complained about; 3) the data base information is used predominantly for management purposes and the exactitude of the information entered was not always sufficient for the purposes of this study; 4) one reported complaint may in fact involve multiple incidents, multiple victims and/or multiple law enforcement officers and agencies; and 5) complaints are dated by their time of receipt by the Civil Rights Division, rather than by the date of the underlying incident. It should be further noted that complaints are allegations and no record of the relative merits of complaints is kept.

Over 15,000 complaints of official misconduct were analyzed to assess the frequency with which complaints were made about particular law enforcement agencies. As seen in the chart on page 12, the Justice Department did not receive a single complaint in six years for three-fourths of all agencies that report crime data to the FBI's Uniform Crime Reporting Program; we received only one complaint for an additional 17% of the nation's law enforcement agencies. Fewer than 10% of all law enforcement entities nationwide generated two or more complaints of police abuse from 1985 through 1990. Almost one-half of all the complaints received were against only 187 law enforcement agencies.

In an effort to explain the dispersal of complaints among the nation's law enforcement agencies, certain variables were selected for study that were quantifiable and readily available. Those variables are the number of arrests made by an individual

agency, the number of its sworn officer employees, and the population subject to the authority of each agency. This information was obtained for those 187 agencies having ten or more reported complaints. The agencies were organized into three subgroups so that similar types of agencies would be compared to each other. These subgroups are: 1) state and local law enforcement agencies; 2) correctional systems; and 3) federal agencies.

The statistical analysis of these data does not reveal any strong relationship in explaining why one agency is more likely to have received a greater number of complaints than another agency. A regression analysis was performed upon the variables noted above but it did not show a sufficient nexus between the number of complaints received by an agency and the three variables. The regression analysis was undoubtedly affected by the limited amount of information in the data base.

This study also analyzed the information that was available for each of the 187 law enforcement agencies to see what, if any, patterns or relationships might emerge. Agencies were ranked on the basis of the number of complaints received, number of sworn officers employed, arrests made, and population served for each agency. They were additionally ranked on the ratio of the number of complaints received to the three variables of arrests, employees and population served.

While the rankings may provide a general sense of the frequency and locale of incidents that give rise to complaints of official misconduct, they should be read with caution. They,

too, are limited by the nature of the data base and by other factors discussed in the study.

After careful analysis, this study does not reveal any statistically significant patterns of police misconduct.

A. The Federal Interest

The federal criminal civil rights statute that permits the federal government to investigate and to prosecute incidents of police misconduct is Section 242 of Title 18 of the United States Code, a statute that was enacted during the Reconstruction era after the Civil War. This law applies to anyone who, while acting under color of law conferred by his or her position of authority, willfully interferes with any of the constitutional or federal statutory rights of any U.S. inhabitant. Allegations of "police brutality" are the most common kind of incident prosecuted pursuant to this statutory authority. However, the statute's prohibitions apply to any public official, and even to a civilian acting in concert with that official. Thus, law enforcement officers of local and state police agencies; officers in state prisons, jails and other correctional facilities; state, county and local court employees -- including judges, attorneys, and probation officers; and their federal counterparts; are all subject to prosecution under this statute.

Allegations of brutality are the most common type of conduct investigated and prosecuted under §242, but other types of official misconduct (e.g., extortion of sexual favors and false arrest) can also be investigated and prosecuted pursuant to the statute. The statistical information on the computer system maintained by the Criminal Section, which provided the basis for this study, does not specify the kind of misconduct involved. However, based upon the Division's experience in reviewing the

reports, it can be stated that the vast majority of them involve allegations of police brutality.

B. Methodology

From October 1984 through September 1990, the Criminal Section received over 18,000 complaints in which investigation was conducted by the Federal Bureau of Investigation; 15,279 of these complaints alleged acts of official misconduct.1/ As the following map of the United States and its territories shows, these complaints were widely distributed throughout the country. The states were ranked by the total number of complaints reported during the six years.2/ The states with the greatest number of

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1/ Most of the remaining 2,700 complaints involved allegations related to racial violence incidents while a smaller number related to allegations of involuntary servitude.

2/ Certain caveats about the nature of the computer data base used to generate these statistics must be made at the outset. At present, there is no agency which seeks to collect information about incidents of police brutality on a national level, and the records of the Civil Rights Division should not be seen as an accurate measure of the incidence of police brutality throughout the country. The number of filed complaints that were analyzed in this study reflect only the incidents that were reported to, or otherwise came to the attention of, federal authorities. Complaints can be made to federal authorities through citizen correspondence, phone calls, and personal visits to the Civil Rights Division, local U.S. Attorney's offices, and most frequently, the field offices of the Federal Bureau of Investigation. The Division has learned, however, that public awareness of the federal resources available both to investigate and to prosecute these incidents varies throughout the nation and that in many instances, reports of brutality are not made.

Second, the computer system by which records are kept on these complaints is one that has historically been used primarily for internal management purposes where the uniformity of the information entered was not essential to its utility. However, this current study has required that complaints be aggregated by law enforcement entity, a process which requires that the underlying data be uniform. There is a great variety in the existing computer data base for names used to describe the same

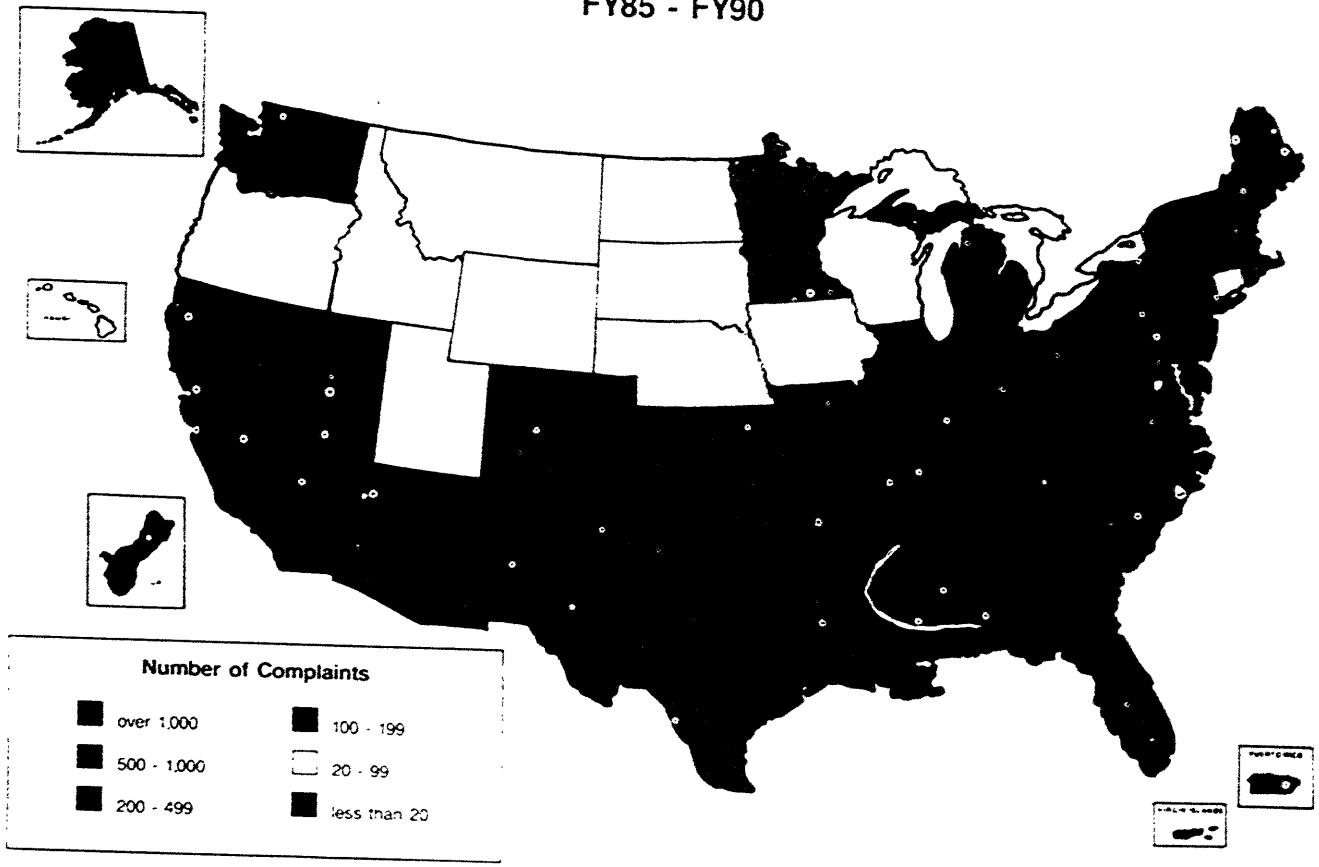
(continued...)

complaints for all law enforcement agencies within its borders were California, Louisiana and Texas, followed by New York, Georgia, Florida, Alabama and Mississippi. Twenty states and territories from the Midwest, Northeast and Northwest had fewer than 100 complaints.

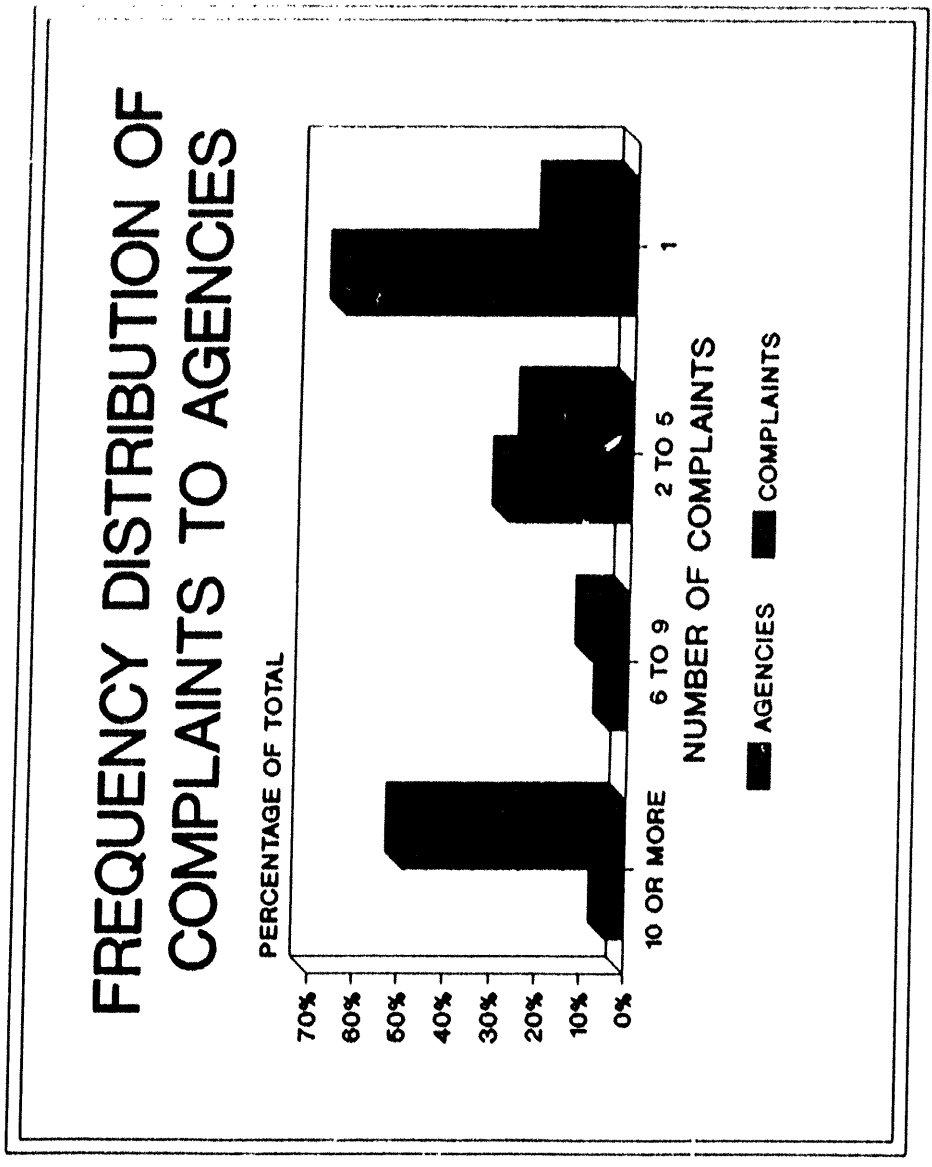
2/(...continued)
agency, especially various state correctional facilities; there are also a number of law enforcement agencies with the same names but which are located in different states. We attempted to correct and to make uniform, to the extent possible, the underlying information on the existing computer data base for purposes of this study.

Third, there is no way of determining the egregiousness of the underlying conduct from the information on the data base. Complaints can range from allegations of the most de minimis kind of force, e.g., a slap or a push, to intentional homicides. Furthermore, one complaint can refer to several incidents.

Number of Complaints by State
FY85 - FY90



Initially, the complaints were organized into a frequency distribution by agency to determine whether there was a readily identifiable demarcation that would lend itself to an appropriate and manageable analysis. As the following chart reflects, almost one-half of all the complaints received during the six years studied were attributable to 4% of all the different agencies, and each one of these agencies generated ten or more allegations of official misconduct that were reported to the Civil Rights Division during the six year period. In contrast, almost two-thirds of all the agencies reviewed had only one complaint reported to the Civil Rights Division during the same six year time period.


FREQUENCY DISTRIBUTION OF COMPLAINTS TO AGENCIES
PERCENTAGE OF TOTAL
70%
60%
50%
40%
30%
20%
10%
0%
10 OR MORE
6 TO 9
2 TO 5
1
NUMBER OF COMPLAINTS
AGENCIES
COMPLAINTS

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It should be further noted that there are approximately [illegible] state and local law enforcement agencies that report statistics to the Uniform Crime Reporting Program of the FBI. In contrast, our review of the 15,000 complaints reported to the Civil Rights Division shows that fewer than 4,400 agencies had even one allegation of misconduct reported to and investigated by the FBI during the six year period. This disparity could indicate that there are a large number of agencies that are operating in an exemplary fashion, or it may be further evidence of the situation noted in footnote two that many citizens fail to report incidents of abuse to federal authorities. The following chart shows the distribution of complaints among all 16,000 law enforcement entities by the number and percent of complaints reported.

PERCENTAGE OF AGENCIES WITH REPORTED COMPLAINTS

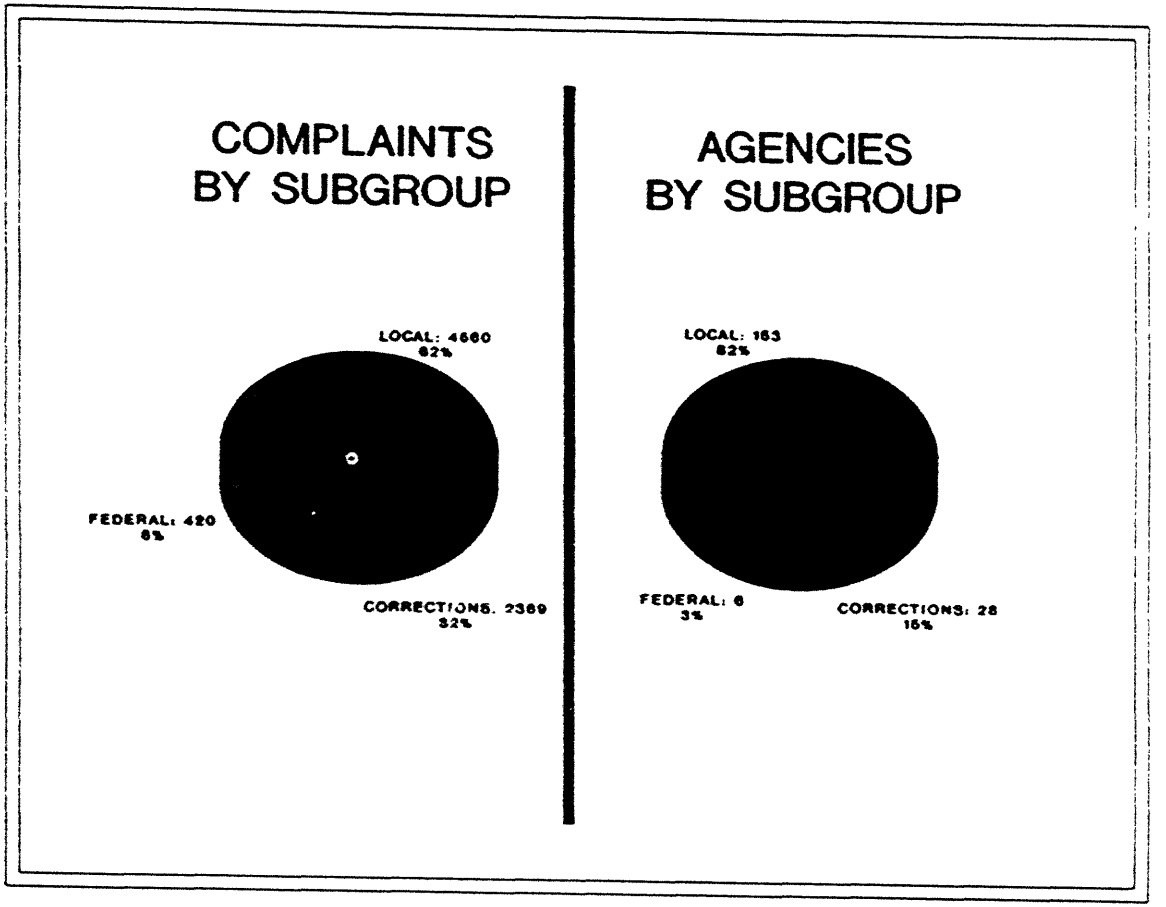
TOTAL AGENCIES = 16,000

A total of 187 agencies received ten or more complaints in the six year time frame. This study concentrates on those agencies since they accounted for a substantial proportion (49%) of all the complaints reported to the Division. In addition, the receipt of less than ten complaints over six years (an average of fewer than two complaints per year) was assumed to be insufficient to support any conclusions regarding the presence of a pattern.

To further facilitate the analysis of all the complaints regarding these 187 agencies, and to aggregate them in a way pertinent to their police functions, three separate subgroups were created:

1) Local and state law enforcement agencies;
2) Correctional systems;
3) Federal agencies.

The distribution of complaints per subgroup and of agencies per subgroup from which the complaints were generated is illustrated in the following chart.


COMPLAINTS
BY SUBGROUP
LOCAL: 4660
62%
FEDERAL: 420
6%
CORRECTIONS: 2389
32%
AGENCIES
BY SUBGROUP
LOCAL: 163
82%
FEDERAL: 6
3%
CORRECTIONS: 28
15%

The first group -- local and state law enforcement agencies -- included the largest number of individual agencies and had the greatest number of complaints. It consists of 153 local police departments, county sheriffs' offices[3/] and state police agencies which received more than 60% of the complaints that were analyzed. The next group in size is correctional systems which includes 28 departments of corrections, both state and federal, and which received one-third of all the complaints. The third and smallest group is comprised of six federal agencies which generated the remaining 6% of the complaints[4/].

In order to assess the complaints of police brutality attributable to individual agencies in a more meaningful context, data for three other factors (or indicators) were also collected:

-- Number of Arrests By the Agency

-- Number of Sworn Officers In the Agency

-- Population Served by the Agency

These three variables were selected to determine whether agencies

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3/ County jails which fall under the aegis of Sheriffs' Offices are included here rather than in the correctional systems subgroup.

4/ The only federal agency not included in this group is the U.S. Bureau of Prisons. It is included among the other correctional systems because its functions are more similar to those systems than to the other federal agencies.

with similar numbers of complaints had shared characteristics.5/

It was determined that, by considering the actual number of complaints made in relation to overall population figures, to the number of employees in a police agency, and to the number of arrests made by that agency, a more sensitive assessment of the incidence of police brutality would be provided than does a simple listing of the number of complaints per agency. Of course, not all allegations of brutality arise from the moment of arrest, but the arrest is the operative event for bringing citizens and law enforcement officers together in confrontations where abuse complaints are subsequently made.

A regression analysis was attempted on the data for the 187 agencies studied to determine what relationships might exist among the four indicators described above that were included for

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5/ Complaints are grouped by fiscal year [October - September] and represent actual complaints reported from October, 1984 through September, 1990, including both open and closed investigations.

Arrest, employee and population data were obtained from the FBI's Uniform Crime Reporting Program, which collects data on a calendar year basis. Because no data were currently available for 1990, 1989 figures were used for that year as well. For those jurisdictions for which there were no UCR data (mostly state agencies), the states were contacted directly and furnished the appropriate arrest and employee figures. Arrest and employee figures for the federal agencies are grouped by fiscal year. Where population numbers were not available from the UCR Program, that information was obtained directly from the U.S. Bureau of the Census, which also provided the national population estimates.

Because correctional officers are not in the business of making arrests, no arrest figures are stated as to them. In addition, the population figure for correctional institutions is the number of inmates incarcerated in the state's institutions for each year rather than the state's overall population.

If no demographic data were available for any agency for any single year, no value was assigned for that factor, in order to minimize the impact of missing data when averages were calculated for ranking purposes.

comparison. The purpose of a regression analysis is to evaluate the extent to which a group of variables can predict a phenomenon. In this particular instance, we attempted to determine whether the numbers of arrests, employees, and population served were any predictor for the number of complaints received by a particular law enforcement agency.

At best, the regression results showed some connection between the number of an agency's employees and the number of its complaints. However, these results were not sufficient to meet professional standards required by the courts for predictive accuracy. When the three factors of employees, arrests, and population were combined, the overall predictive accuracy still was far below that required for acceptance by courts. Thus, the regression analysis did not show sufficient nexus between the number of complaints received by an agency and the three variables.

The study nonetheless attempted to analyze the information that was available for each of the 187 law enforcement agencies to see what, if any, patterns might emerge. Each law enforcement agency within the three subgroups (State and Local Law Enforcement Agencies, Correctional Systems, Federal Agencies) was then analyzed by the number of complaints received for each fiscal year from 1985 - 1990 and for the average of all those years combined. The agencies were ranked by the actual number of their complaints, arrests, sworn employees and population, as well as by the ratio of the number of actual complaints to the

three demographic indicators.[6/] The charts with those rankings, and a summary page for each agency containing all the rankings and the underlying data upon which they were based, are included in the Appendix.

In reviewing these charts, one should regard the rankings with caution. It is crucial to note that the numerical difference between two agencies' rankings may, in fact, vary only a little. For example, an agency ranked 77 among all comparable agencies for its total average number of complaints (San Francisco Police Department) has only one more complaint per year than an agency ranked 131 (Charleston Police Department). In addition, several agencies may "tie" for an equal ranking, giving the appearance that the value differences between ranks are greater. Also, the number of complaints needed to "achieve" a particular rank varies substantially from year to year.

One will also note that the distinctions in rankings are more telling when more agencies are being compared. Thus, the ranking among the subgroup of state and local law enforcement agencies, which has five times the number of agencies that the corrections subgroup has (which in turn is five times the size of the federal agency subgroup), is much more likely to reveal significant differences. Distinctions among the agencies within

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[6/] The smaller the rank number (the closer to a value of 1), the greater is the underlying number of complaints it represents. For example, the San Antonio Police Department has a rank of 4 based on the 21 average number of complaints that it received for the six years. The Los Angeles Police Department, which received an average of 14 complaints, has a "lower" rank of 11. Thus, the smaller the rank number, the "higher" an agency is ranked.

the two smaller subgroups will likely be better explained by the actual numbers rather than by the rankings.

An overview of the data for all the ranked agencies shows that most of the indicators remained fairly stable during the six years. There is, however, a notable, potentially short-term, trend in the number of complaints reported. The number of complaints reported for correctional systems in fiscal year 1990 declined about 50% over 1989. A more detailed discussion of the analysis within each of the three subgroups follows.

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II. STATE AND LOCAL LAW ENFORCEMENT AGENCIES

A. Character of Agencies Included

1. Overall Review

The 153 law enforcement agencies included in this subgroup represent 106 police departments, 37 sheriffs' offices, 1 county jail and 9 state police departments. These agencies do not include any law enforcement agency from the following states or territories, because no single agency in these states or territories had ten or more complaints during the six-year time span:

Alaska
Delaware
Idaho
Iowa
Maine
Montana
Nebraska
New Hampshire
North Dakota
Vermont
Wyoming
Guam
Virgin Islands

The states most frequently represented in this subgroup include four with eleven or more different law enforcement agencies each identified as having 10 or more complaints. The "top ten" states in this group each had five or more individual law enforcement agencies that received ten or more complaints during the six year period. Overall, the "top ten" states accounted for two-thirds of all the agencies that were analyzed in this subgroup. These states are:

State	Number of Agencies Receiving Ten or More Complaints in Six Year Period
Texas	20
California	14
Louisiana	13
Florida	11
Rhode Island	9
Tennessee	8
Illinois	7
Pennsylvania	6
Alabama	5
New York	5
TOTAL [10 states]	98

2. Values of Indicators

Shown below are the average values of the four factors [listed in the Appendix charts as "indicators"] by which the agencies are ranked showing the average for the highest ranking agency, for the lowest ranking agency and for the overall average of all the agencies. For example, New Orleans Police Department had the highest average number of complaints per year (35), while several agencies (including Milwaukee Police Department and Little Rock Police Department) had the lowest annual average (2). But the overall annual average of complaints for agencies in the subgroup is 5.

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	Average No. of Complaints/Yr. Six Yr. Period	Average No. of Employees in Agency Per Yr. for the Six Year Period	Average No. of Arrests Made by Agency Per Year for the Six Year Period	Average Population Served for the Six Yr. Period
HIGH	35	26,577	789,210	28,025,837
LOW	2	11	142	5,522
OVERALL	5	1,158	34,868	936,310

These ranges are extensive and describe law enforcement agencies with clear differences in size and scope of enforcement effort. It appears, thus, that the analysis has captured a substantial cross-section of disparate state and local law enforcement agencies.

As the charts in the Appendix demonstrate, the average annual number of complaints for the group as a whole (approx. 5) remained fairly constant from 1985 through 1990 and ranged from 4.5 to 5.3. With respect to the number of employees and arrests of all the agencies, the average number of employees increased from 1985 through 1990 by almost 5%, while arrests increased by 7%. Simultaneously, the average population increased about 5%.

Almost one-third of the agencies ranked in the subgroup averaged five or more complaints for the entire six years.1/ Of those agencies, 28 also ranked equally high in size or number of sworn officers; 26 equally high in number of arrests while 27 of them were among the largest in population. Overall, only 20 of the top ranked 47 agencies were as highly ranked on all three

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1/ These include 47 agencies. We shall hereafter refer to them as the "top third."

indicators. Several agencies which ranked below the top third because they had an average of fewer than five complaints were also among the largest agencies in terms of employees, arrests, and population. Some of these agencies include several large city police departments such as Atlanta, Boston, Detroit, and Washington, D.C., as well as two state law enforcement agencies, New York State Police and the Oklahoma Highway Patrol, both of which are substantially near the top on all three demographic indicators. Thus, it appears that large values for the size of a police department and the number of arrests it makes, as well as of the general population of the area for which it has enforcement authority, do not necessarily correlate to the number of complaints.

3. Complaints

A look at the chart listing agencies by the number of complaints for each year and for 1985 - 1990 combined, ranked from highest number of complaints to lowest, yields several observations. The top four agencies had more than 20 complaints per year; the top eighteen agencies had 10 or more on average; and, as stated earlier, the top 47 had 5 or more. The widest gap in the number of complaints among the top third lies between the second-ranked Los Angeles County Sheriff (34 complaints) and third-ranked Jefferson Parish, Louisiana Sheriff (23 complaints). Thereafter, the differences from rank to rank vary more gradually, usually by one complaint or less a year. The overall

ranks and corresponding values for those state and local law enforcement agencies with less than five complaints are listed below:

Average No. Complaints	Rank Ranges[8/]
4	48 - 55
3	58 - 82
2	92 - 131

Thus, while the rankings may be useful, they must also be considered in the context of the raw numbers that are the underlying data.

A closer inspection of the complaint-ranking chart for any consistent trends for a particular agency during the six years studied reveals fluctuations and anomalies in the data.

For example, 9th ranked San Diego County Sheriff had ranked lower than forty in 1986 and 1987, ranking as low as 63. Yet, in the next two years, the County Sheriff's Office jumped to third and second place as a result of an increase from the 3 complaints per year earlier to 39 and 30 in 1988 and 1989 respectively. Then, in 1990, the number of complaints dropped to 8, resulting in ranking the San Diego County Sheriff 24th of all the agencies in that single year.

8/ The rankings are based on exact numbers. These numbers were then rounded for listing in the charts in the Appendix, but in fact, one agency will have a higher unrounded number than another agency, and thus a higher ranking. This is why agencies showing the same whole number for average number of complaints received will have a variety of rankings.

Another compelling example of how the number of complaints can fluctuate is shown in the history of the Shelby County Sheriff's Office in Memphis, Tennessee. Ranked overall as 19, in 1985 it was as low as 109, having only 1 reported complaint in that year. That figure varied little until 1988 and 1989 when complaints increased somewhat to 10 and 11 complaints respectively. By 1990, however, that figure jumped to 29, making Shelby first on the list in 1990. The progression in rank from 109 to 1 is startling.

Also in Tennessee, the Chattanooga Police Department experienced a similar single year upsurge. Within three years, Chattanooga's ranking changed from 109 to 12, reflecting an increase from 1 complaint to 13. By 1989, Chattanooga was again ranked below 100 with a single complaint. Though this agency was ranked below 100 in two separate years, it still attained near "top third" status with a rank of 49 for the overall six years' average.

This scenario is repeated among agencies ranked below 20 as well. See Boston, Mass. Police Department (54) and Jersey City, New Jersey Police Department (82).

Some of these fluctuations cited above can be explained by unusual circumstances that are known to the Civil Rights Division. With respect to Chattanooga, for example, in October 196 the Criminal Section received from a citizen's group a letter in which twelve individuals were identified as having been

the victims of police brutality. In response, the Criminal Section requested the initiation of FBI investigations on a number of those complaints, many of which had occurred in prior years. As a result, the Criminal Section's computer system for tracking investigations (which is by the year in which the investigation was requested) indicates a substantial increase for the number of complaints reported for Chattanooga in one year, although the events under investigation occurred over a longer period of time.

In Las Vegas, Nevada, the numbers increase somewhat from year to year due to the response by victims to an advertisement placed in a local newspaper by an activist in the area encouraging them to report any complaints of police brutality to federal authorities. This unusual act alone may be the sole explanation for the tripling in the number of reported complaints for Las Vegas between 1986, in which there were four, and 1990, in which there were thirteen.

As mentioned above, the Shelby County Sheriff's Office in Tennessee is another local law enforcement agency that experienced a substantial change in the number of complaints reported over time, as noted above. One explanation in this particular instance may stem from the efforts of a newly-elected Sheriff with a minimal law enforcement background, who instituted a vigorous anti-drug enforcement campaign. Those efforts utilized techniques, such as large scale reverse sting operations, which required the services of less trained, inexperienced officers, who may have been ill prepared to deal

with fast moving arrest situations in a fully professional manner. As a result of these investigations, the Criminal Section brought charges against three deputy sheriffs in April, 1990 for brutality arising out of those sting operations. Since the indictment in that case, the number of complaints received that involve the Shelby County Sheriff's Office has dropped substantially.

Smaller police departments, too, have also had fluctuations in the numbers of complaints reported from 1985 to 1990. In Darby, Pennsylvania (described infra), the police department had either one or no complaint reported from 1985 to 1989. In January, 1990, the Criminal Section initiated a grand jury investigation that resulted in an indictment of five police officers for conduct during a single incident. As a result of the attention generated by local interest in this investigation, there were 12 complaints reported and investigated involving this agency in 1990.

There are other peculiarities about the agencies included in this subgroup. For example, but for the occurrence of an Operation Rescue demonstration at an abortion clinic in West Hartford, Connecticut in 1989, which resulted in some of the 13 reported allegations of physical abuse by West Hartford police officers that year, West Hartford would not have been included in this analysis as an agency that had received ten or more complaints during a six year period. Indeed, up until 1989, there had been only a single reported complaint against the West Hartford Police Department since and including 1985. Similarly,

but for the 1990 federal investigation that resulted in 12 complaints being reported against the Darby Police Department in that year, that agency would also have been excluded from this group of state and local agencies studied. In Florida, the Largo County Sheriff had four and six complaints reported in 1986 and 1987, but prior and since has had none.

4. Employees

The average number of employees (sworn officers) for each of the state and local law enforcement agencies in the subgroup is 1,158.2/ There are 40 city, county and state law enforcement agencies that averaged more than 1,000 sworn personnel and about 26 agencies that had fewer than 100 employees. Most agencies remained fairly stable in the size of their workforces with a few notable exceptions, especially in California and Florida. San Bernardino, San Diego and Orange Counties Sheriffs' Offices all experienced a 30-40% decrease in the number of sworn officers between 1987 and 1988. In contrast, Broward and Hillsborough Counties in Florida increased the number of sworn personnel by one-third from 1985-86 to 1989. These changes may have some influence on the number of potential complaints reported.

2/ Employee figures refer to those officers in each agency who are sworn and who have the power to arrest. It excludes the number of civilian employees employed by any of the agencies.

5. Arrests

The average number of arrests for each of the state and local law enforcement agencies studied is approximately 35,000 per year. One-fifth of the agencies in the subgroup made more than the average number of arrests, while another 25% had less than one-tenth (3,500) of the group's average number of arrests. The two highest ranked agencies, New York State Police and New York City Police Department, which either had more than, or close to, 750,000 annual arrests, made as many arrests combined as the next twenty highest ranked agencies. The third, fourth, and fifth ranked agencies, which include the Chicago and Los Angeles Police Departments and the Oklahoma Highway Patrol, made from one-third to one-fifth of the New York agencies' total arrests.10/

6. Population

The average population for the geographic area for which the agencies in the subgroup have law enforcement responsibilities is 936,310. There are very large disparities in the proportion of agencies ranked near the top and those ranked at the lower end; about ten percent of all agencies in the subgroup served a population of one million or more residents, while one-third had a population of less than 100,000 within their jurisdiction. Inclusion of large police forces of the three most populated

10/ Responsibilities of sheriffs' offices differ from each other as do those of state police agencies -- some sheriffs have mainly civil functions and not all state police are responsible for patrolling the highways. Thus, arrests for state police agencies and sheriffs' offices may not be comparable across all counties or among states.

states (California, New York, and Texas) may have skewed the population average for the subgroup as a whole.

7. Ratio of Complaints to the Number of Employees, the Number of Arrests Made and the Population

Perhaps the most useful information produced by the study is the comparison of the average number of complaints for each agency to each of the three demographic indicators: number of employees, number of arrests, and population. It is not enough just to know by raw numbers which police department had the greatest number of complaints reported. One should look both at which police department has the most number of actual complaints, and which department has the highest percentage of complaints per arrests, per employees, and per population served.

That assessment can begin by reviewing the individual summaries listing three charts for each state and local law enforcement agency. These summary charts are found in the Appendix. The three separate charts contained within each summary include:

1. the actual figures for the number of complaints reported, the number of sworn employees, the number of arrests, and the size of the population served;
2. the agency's rank based upon the number of complaints, the number of employees, the number of arrests, and population;
3. the agency's rank based upon a ratio of the number

of complaints per employees, arrests, and population.

By comparing the ranked value for each agency in Chart No. 2 (based on raw numbers) to the ranked value in Chart No. 3 (based on ratios for those same indicators), one can see that rankings on the raw numbers, more often than not, do not carry over to an equivalent ranking for the ratios for the same indicators. By illustration, we have cited below a few selected agencies from those agencies ranked in the top third for the greatest number of complaints.

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Agency	Rank Based on Raw Numbers	Rank Based on Ratio[11/] of Complaints to Factor Indicated
New York City PD		
Complaints	10	
Employees	1	148
Arrests	2	142
Population	5	139
Los Angeles PD		
Complaints	11	
Employees	4	136
Arrests	4	133
Population	8	132
Chicago PD		
Complaints	7	
Employees	2	139
Arrests	3	132
Population	10	123
Houston PD		
Complaints	6	
Employees	9	111
Arrests	7	90
Population	12	96

From the opposite perspective, several agencies that ranked lower on raw numbers actually rank very high on the ratio of complaints to the indicators. Some of these agencies that are among those ranked in the top third on the basis of number of complaints received, appear below:

11/ The ratios are complaints/employees; complaints/arrests; and complaints/population.

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Agency	Rank Based on Raw Numbers	Rank Based on Ratio[12/] of Complaints to Factor Indicated
Shelby Co. Sheriff, Tn.		
Complaints	19	
Employees	78	30
Arrests	67	49
Population	106	11
Gretna PD, La.		
Complaints	29	
Employees	132	6
Arrests	112	9
Population	137	2
Laredo PD, Tx.		
Complaints	49	
Employees	101	28
Arrests	107	25
Population	96	43

There are other law enforcement agencies for which the rankings vary substantially on one or more factors, for example, Harris County Sheriff in Texas and Prince George's County Police Department in Maryland.

12/ The ratios are complaints/employees; complaints/arrests; and complaints/population.

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Agency	Rank Based on Raw Numbers	Rank Based on Ratio[13/] of Complaints to Factor Indicated
Harris Co. Sheriff, Tx.		
Complaints	14	
Employees	29	72
Arrests	74	32
Population	26	76
Prince George's Co. PD, Md.		
Complaints	39	
Employees	107	18
Arrests	64	71
Population	31	107

These variations in ranking relationships are not confined to the top third ranked agencies based on the number of complaints reported. For example, the Jennings, Missouri Police Department is not among the top third ranked for overall number of complaints, but it ranks eighth on the ratio of complaints per employees, tenth on the ratio of complaints per arrests, and seventh on the ratio of complaints per population.

Similarly, the Darby, Pennsylvania Police Department ranked 82nd for overall number of complaints, but ranked first on the ratio of complaints per employees, eighth on the ratio of complaints to arrests, and fourth on the ratio of complaints to population. Even an agency that ranked among the very lowest for overall number of complaints, Washington Park, Illinois Police Department, ranked either second or fifth on the ratios of complaints to the three indicators.

13/ The ratios are complaints/employees; complaints/arrests; and complaints/population.

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Agency	Rank Based on Raw Numbers	Rank Based on Ratio[14/] of Complaints to Factor Indicated
Jennings PD, Mo.		
Complaints	62	
Employees	139	8
Arrests	127	10
Population	140	7
Darby PD, Pa.		
Complaints	82	
Employees	147	1
Arrests	134	8
Population	145	4
Washington Park PD, Ill.		
Complaints	131	
Employees	149	2
Arrests	141	5
Population	146	5

There are also examples for those agencies not ranked in the top third that show high rankings for raw numbers but low rankings for the ratios. For instance, San Francisco was ranked 24th or higher on all the actual numbers of the indicators, and yet fell almost to the bottom of the ranking list when the number of complaints was compared to the three indicators. The New York State Police, which ranked first and second for the number of its arrests and population, ranked among the lowest levels, 144 and 148, for the ratios of complaints per arrests and complaints per population respectively.

14/ The ratios are complaints/employees; complaints/arrests; and complaints/population.

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Agency	Rank Based on Raw Numbers	Rank Based on Ratio[15/] of Complaints to Factor Indicated
San Francisco PD, Calif.		
Complaints	77	
Employees	18	138
Arrests	16	138
Population	24	134
New York State Police		
Complaints	105	
Employees	12	149
Arrests	1	144
Population	2	148
Portland PD, Ore.		
Complaints	98	
Employees	50	124
Arrests	45	129
Population	52	124

B. Summary

As noted above in the commentary describing the figures for several agencies, and as further evidenced by the figures for those agencies not discussed in the commentary but for which data can be viewed in the summary charts in the Appendix, the number of complaints reported for state and local law enforcement agencies is so variable across time, place and size that it may not be possible to draw any general conclusions regarding a pattern. Clearly, largely populated areas are ripe for high numbers of complaints. On the other hand, there are many smaller agencies as well that, while not having an equal number of

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15/ The ratios are complaints/employees; complaints/arrests; and complaints/population.

complaints, far exceed the larger state and local agencies in the proportion of the complaints to the number of arrests and to the number of sworn officers during the six years analyzed. In addition, unique occurrences such as advertising to solicit complaints of brutality can increase the number of complaints substantially.

We respectfully submit that no pattern emerges from these figures.

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III. CORRECTIONAL SYSTEMS

A. Character of the Systems

1. Overall Review

During the initial review of all 15,000 official misconduct complaints it was decided to combine all complaints reported involving state correctional facilities and institutions into a second subgroup because of the unique characteristics of penal institutions as law enforcement agencies.16/ In the Division's experience, correctional institutions are more likely to produce a greater number of complaints than are state and local law enforcement agencies. Prisons are closed communities where strong, frequent contacts and associations, both positive and otherwise, are established between the inmates serving sentences for convictions and the correctional officers assigned to maintain order and to preserve the welfare of those under their authority. The population of these institutions consists of many inmates who have been convicted of crimes of violence. Thus, the population is presumptively more prone to violence than the general public encountered by state and local law enforcement officers. The actual number of complaints received involving inmates at correctional institutions within a state is higher

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16/ We used a directory published by the American Corrections Association (Juvenile and Adult Correctional Departments, Institutions, Agencies, and Paroling Authorities) to identify which facilities were in fact state institutions.

that the number of complaints received for many of the individual state and local law enforcement agencies.17/

Complaints reported from correctional facilities were investigated state-wide rather than by each individual facility because the state is the overall employer and, accordingly, training and policies are presumed to be generally consistent. Local and county jails and detention facilities were thus excluded from this subgroup since they are generally under the aegis of the local police chief or sheriff. Complaints reported from these institutions were included in the previous subgroup for state and local law enforcement agencies.

Twenty seven state correctional systems and the federal prison system had ten or more complaints reported to the Civil Rights Division from 1985 - 1990, with a total of almost 2,400 complaints in the six year period studied. Thus, the correctional systems examined in some detail here account for 98% of the complaints received by the Civil Rights Division from this

17/ For example, the average number of annual complaints for this subgroup is 14, while the same figure for state and local law enforcement agencies is five. Indeed, one-half of all the correctional systems studied averaged five or more complaints annually, while less than one-third of state and local law enforcement agencies averaged that many.

subgroup. The states and territories not included are:

Alaska	Maine	Puerto Rico
Colorado	Massachusetts	South Dakota
Connecticut	Michigan	Utah
Delaware	Minnesota	Vermont
Guam	Montana	Virgin Islands
Idaho	Nebraska	Washington
Iowa	New Hampshire	West Virginia
Kansas	North Dakota	Wisconsin
Kentucky	Oregon	Wyoming

All of these states combined generated altogether only about 50 complaints for all six years.18/

The proportion of correctional officers to inmates is much higher than one finds for police officers to the general population, and there is much more frequent and regular contact between inmates and officers. This may, in part, account for the greater number of complaints reported that emanate from correctional institutions.

2. Values of the Indicators

Shown below are the average values of the three19/ factors by which the agencies are ranked showing the average for the highest ranking agency, for the lowest ranking agency and for the overall average of all the agencies.

18/ The accuracy of this combined total may be affected by the lack of sufficient information from the initial data base used in this study. For example, there were some correctional facilities that may have been described in the data base only by the city in which they were located, and thus their complaints reported would not have been aggregated with others from the state correctional system.

19/ Correctional officers do not make arrests, and no data comparison is made on this indicator for this subgroup. The population figure is the overall inmate population in the state's correctional system.

	Average No. of Complaints/Yr. Six Yr. Period	Average No. of Employees in Agency Per Yr. for the Six Year Period	Average Population Served for the Six Yr. Period
HIGH	79	16,218	243,853
LOW	2	668	1,808
OVERALL	14	4,027	24,051

The number of complaints remained fairly constant from year to year until 1990, when there was a substantial decline of almost 50%. Over the six year time period, the correctional systems studied experienced an overall growth of 22% in inmate population, while the number of employees increased over 60%.

Eight state correctional systems exceeded the average number of 14 complaints for the entire subgroup for the six year period. Of those eight, five also had the largest inmate populations and seven the greatest number of employees. The states represented among these eight highest ranked correctional systems include most of the states represented in the first subgroup of state and local law enforcement agencies. These include California, Texas, New York, Louisiana, Alabama, Mississippi, and Arkansas. The U.S. Bureau of Prisons is also in the top eight.

3. Complaints

The annual complaint averages for the eight agencies with the highest averages range steeply from 79 for first-ranked California, to 19 for Arkansas, which ranks eighth. The numerical intervals between each rank gradually decline in size, from 31

between first and second to 15 between second and third to 9 - 11 between the next few. The value difference of 60 between the first and eighth ranks is a large difference. The next highest ranked correctional system, Florida [ranked 9th], had an average of 10 complaints reported annually, an average that was one-half that of eighth-ranked Arkansas. However, the gap between the ranks of the lower half of the subgroup, having five or fewer annual complaints, is only one per year.

The underlying numerical values resulting in the same rank also fluctuated across time. For example, the value of being first rose from 80 complaints in 1985 to 131 in 1989. Also, within a single agency, the same rank could have as many as three different values [see Arkansas which ranked ninth in three different years on the basis of five complaints, ten complaints and twelve complaints].

Because the subgroup of correctional systems represents a smaller number of entities than the subgroup of state and local law enforcement agencies, the changes in rank based on the number of complaints are not quite so startling. However, there are some agencies for which one can note marked changes in ranking during the six years. Arkansas, ranked eighth overall, shifted from its initial third place position with 57 complaints in 1985 to thirteenth place in 1989 with 7 complaints. New York, which dropped in the number of annual complaints reported [80 in 1985 to 15 in 1990] changed from first place to seventh for those respective years.

Among the lower ranking group of correctional systems, North Carolina and Missouri also vacillated in their rankings across the years; the former had been ranked as high as 10 and as low as 22, while the latter varied from a low of 26 to 9, its highest rank.

4. Employees

Almost 30% of the state correctional systems studied employ more than the overall average number of employees, a figure which approaches 4,000. An almost equivalent percentage of state correctional systems has fewer than 2,000, or half the average number of, employees. As mentioned above, the number of correctional officers overall increased by 60% over the six years studied. Because this trend was fairly consistent among all the agencies, there was very little change in the rankings from year to year.

5. Inmate Population

Less than one-fifth of all the correctional systems had inmate populations surpassing the average for the subgroup as a whole, while almost one-half had fewer than half this average. There was a steady increase from 1985 - 1990 for practically all the states in the number of inmates incarcerated in state facilities. Some states experienced almost a 50% increase in their inmate populations, resulting in a change in ranking over time of four to five levels. (See Missouri which changed rank from 15 to 10 between 1985 and 1990 and South Carolina which increased from 14 to 8 in those same two years.)

6. Ratio of Complaints to Employees and Population

As with the state and local law enforcement agencies, there are systems whose rankings on the raw numbers of complaints, employees and population are consistently higher than their rankings on the ratios of the complaints received to those indicators. Perhaps the most startling example of this is the population rank and complaints to population ratio rank for the federal Bureau of Prisons. While the federal correctional system ranked first in size of population, it ranked last in the subgroup on the ratio of complaints to population. As seen below, the three top-ranked systems, in actual number of complaints, had much lower rankings for the ratios of complaints to the number of correctional officers employed and the number of inmates in the institutions.

System	Rank Based on Raw Numbers	Rank Based on Ratio[20/] of Complaints to Factor Indicated
New York State DOC		
Complaints	3	
Employees	1	11
Population	3	11
California DOC		
Complaints	1	
Employees	2	6
Population	2	10

20/ The ratios are complaints/employees and complaints/population.

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System	Rank Based on Raw Numbers	Rank Based on Ratio of Complaints to Factor Indicated
Texas DOC		
Complaints	2	
Employees	3	7
Population	4	6
Federal Prisons (U.S. Bureau of Prisons)		
Complaints	7	
Employees	6	8
Population	1	28

The opposite holds true for other correctional systems which ranked high for the number of complaints received. Note especially the change in ranking for Arkansas.

System	Rank Based on Raw Numbers	Rank Based on Ratio[21/] of Complaints to Factor Indicated
Arkansas DOC		
Complaints	8	
Employees	22	2
Population	23	1
Louisiana DOC		
Complaints	4	
Employees	14	3
Population	15	4
Alabama DOC		
Complaints	5	
Employees	17	4
Population	13	5

21/ The ratios are complaints/employees and complaints/population.

B. Summary

The most notable observation about the correctional systems is not so much how they differ among each other, but how they compare to the state and local law enforcement agencies that were part of the first subgroup. Correctional systems, as a group, generated almost three times the average number of complaints than did the state and local law enforcement agencies. Fifty percent of all the state correctional systems studied averaged as many complaints as did thirty percent of those state and local law enforcement agencies that made the top third of that subgroup.

The disparities between the subgroups in the proportion of employees to population is remarkable -- the average number of employees for the state and local law enforcement agencies was under 1,200 while that same figure for correctional systems was more than three times that size; but the average population under the authority of the correctional officers is less than 3% of the population with which officers in city, county or state law enforcement agencies must interact.

The differences between the subgroups are substantial and reinforce the intuitive determination that these are different kinds of law enforcement agencies. These differences should be considered in evaluating the training programs and personnel policies that may affect the incidence of police abuse complaints. And once again, as with the analysis of the state and local law enforcement agencies, we submit that no pattern emerges from the figures.

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IV. FEDERAL AGENCIES

A. Character of the Agencies

1. Overall Review

Six federal law enforcement agencies were identified for this analysis as having ten or more complaints from 1985 - 1990.[22/] The six agencies were the Bureau of Indian Affairs (BIA), the Drug Enforcement Agency (DEA), the Federal Bureau of Investigation (FBI), the Immigration and Naturalization Service (INS), U.S. Customs, and the U.S. Marshals Service. All of these agencies, with the exception of BIA, which is a Department of Interior agency, and Customs, which is part of the Treasury Department, are entities within the Department of Justice.[23/] We created a

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22/ There were a few other federal agencies for which complaints had been reported to the Civil Rights Division, but none had received the minimum number of ten throughout the six year period studied which was the cutoff for inclusion in the ranking analysis. Some of these other agencies include Treasury's Bureau of Alcohol, Tobacco and Firearms, the Internal Revenue Service, and the U.S. Secret Service. There were also complaints reported in the past six years against the U.S. Park Police (Department of the Interior), the Federal Protective Service (General Services Administration), veterans' hospitals employees (Department of Veteran Affairs) and various military police. In all, they would have accounted for about 35 complaints.

As discussed supra, the U.S. Bureau of Prisons was included among the subgroup of correctional systems because it appeared most similar to those agencies.

23/ There may be a higher incidence of reporting to the Civil Rights Division of allegations of abuse by federal law enforcement officers than by non-federal officers. Aggrieved individuals can be expected to report their abuse complaints to the law enforcement agency employing the offender. If the individual makes no further complaint when a non-federal agency is involved, the Civil Rights Division will never be notified. However, complaints of abuse to federal law enforcement agencies should ultimately reach the Civil Rights Division because the Division has sought to establish comprehensive reporting mechanisms to retrieve all possible complaints involving federal law enforcement

(continued...)

subgroup for federal law enforcement agencies because their law enforcement authority is nationwide in scope and because the functions performed by each agency are unique and frequently disparate from the law enforcement functions of the entities in the other subgroups.

2. Values of the Indicators

Shown below are the average values of the four factors by which the federal agencies are ranked, showing the average for the highest ranking agency, for the lowest ranking agency and for the overall average of all the agencies.

	Average No. of Complaints/Yr. Six Yr. Period	Average No. of Employees in Agency Per Yr. for the Six Year Period	Average No. of Arrests Made by Agency Per Year for the Six Year Period	Average Population Served for the Six Yr. Period
HIGH	37	9,231	1,233,582	243,853,000
LOW	2	412	8,998	243,853,000
OVERALL	12	4,243	263,677	243,853,000

The small number of agencies being compared do not lend themselves to meaningful ranking comparisons.

3. Complaints

Two agencies far surpass the others in the number of complaints reported against them - BIA and INS; they averaged 22 and 37 complaints a year respectively. With respect to INS, the Civil Rights Division and INS have instituted streamlined

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21/(...continued)
officials. We believe that these procedures are most effective with those law enforcement agencies that are part of the Justice Department, most notably INS, as discussed infra.

reporting procedures to ensure that complaints of misconduct are reported promptly to the Civil Rights Division and reviewed immediately for potential criminal investigation. That process was initiated toward the end of calendar year 1987 and explains the dramatic increase in the number of complaints reported from 1988 forward, compared to the prior years.

The Bureau of Indian Affairs has a law enforcement role that can vary from year to year, depending upon the number of tribal police departments that exercise their option to have their own police agencies. BIA is responsible for overseeing the law enforcement activities of over 500 Indian tribes and associations, which have the option annually to contract with BIA to provide law enforcement services. Those tribal police departments which contract and accept federal assistance in providing their own service are independent of BIA. The number of tribal police departments in operation can vary from year to year as they decide to continue their own service or to return to BIA authority. Although federal regulations require that BIA regional offices report to the FBI all allegations of official misconduct on the part of their own officers, as well as those associated with individual tribal police departments, it is not always possible to determine from the data base of official misconduct complaints which agency is responsible for an individual complaint.

A further complication lies in the limited role that tribal police departments have in enforcing the law on Indian lands. Their responsibilities are restricted to misdemeanor offenses, while all felonies must be handled by BIA, creating the

possibility that some complaints would involve officers from both BIA and the specific tribal police agency. Thus, there are some difficulties in assessing whether there is an official misconduct problem within BIA due to the inability to identify clearly the precise law enforcement authority involved in the complaints generated. Also complicating the assessment are fluctuations in the annual number of employees, arrests, and populations, all of which change as the enforcement authority is transferred from year to year.

The remaining four agencies [FBI, DEA, Customs and Marshals Service] all averaged 2 to 4 complaints annually.

4. Employees

The largest number of law enforcement officers is employed by the Federal Bureau of Investigation, with over 9,000 agents, and the fewest by the Bureau of Indian Affairs with 412. Customs ranked second with 6,250 agents and inspectors, while INS averaged about 5,400 border patrol agents and detention officers; DEA and the U.S. Marshals averaged less than half the figure for INS.

5. Arrests

By far, INS has the greatest number of arrests, which the agency refers to as apprehensions -- almost one and a quarter million are made annually. The other federal agencies are at the other end of the scale and were involved in an average number of arrests ranging from approximately 10,000 to 30,000 per year.

6. Population

The population potentially subject to the authority of these various federal agencies is theoretically nationwide in scope,

with the exception of the BIA which is restricted in its jurisdiction to the populations residing on Indian lands. Other factors may, however, limit the actual population served by the federal agencies. The U.S. Marshals Service has a specific function in transferring federal prisoners and working within the federal court system and thus the "population" that it services is generally confined to these two realms. Customs and INS agents probably interact with the largest group of people, those coming across the country's borders, either legally or illegally. Customs has noted that they have the potential to interact with 250 million people annually; the frequency of Customs' arrests, however, is a much lower figure, under 30,000 a year.

7. Ratio of Complaints to the Number of Employees, the Number of Arrests Made and the Population

Even though INS does have the greatest number of complaints reported to the Civil Rights Division during the six years of this study, the ratio of those complaints to the agency's high number of apprehensions is notably low. The INS averaged 228 apprehensions per employee while the FBI averaged almost one arrest per employee. Because the population served can be broad for some agencies and substantially limited for others, and because the arrest figures vary so widely, it may be preferable to compare the federal agencies primarily on the basis of the ratio of the number of complaints received to the number of employees, which appears to be a more constant and stable figure.

That comparison results in INS still ranking first, with less than a 1% (.68%) ratio of complaints received per agent employed. The FBI follows with about a tenth of a percent (.1%) of

complaints received per agent employed. The other agencies, with the exception of BIA for which the data cannot be properly compared, rated even lower, with even smaller fractions of a percent of a complaint per employee.

However, comparing INS to other law enforcement agencies within the state and local subgroup shows that more than fifty percent of all the state and local law enforcement agencies in that subgroup had even higher percentages of complaints per employee than did INS.

B. Summary

Any intra-group comparison among federal law enforcement agencies suffers from the nature of the data to be compared. Formalized reporting procedures, such as those established with INS only a few years ago, may skew the comparison among the agencies, especially as to those agencies that have not reported for as long a time or as routinely. For the subgroup of federal agencies, one must do further investigation on an individual agency basis to determine any pattern in the incidence of official abuse.

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V CONCLUSION

Although no statistically meaningful inferences can be made as to why some law enforcement agencies have more complaints reported than others based on the parameters of this study, it does appear that prisons and large cities are more likely to produce greater numbers of complaints, although large cities also have more people who could be arrested and more officers to make those arrests, and prisons have a substantially higher ratio of correctional officers to its population. On the other hand, some small communities may produce a disproportionately high number of complaints for the size of their police departments.

The number of official misconduct complaints reported for an individual law enforcement agency does not affect the ability of the Civil Rights Division to seek prosecution of unlawful conduct. There is no requirement of a pattern of abuse in order to trigger federal jurisdiction. Though an entire department cannot be prosecuted pursuant to the existing federal criminal civil rights laws, individual subject officers can be. In all investigations brought to the attention of the Criminal Section, the FBI indicates whether an officer has been the subject of prior investigated complaints. That information is taken into account when reviewing a particular incident for prosecutive merit, especially in assessing the potential for proving an officer's specific intent to utilize excessive force.

Federal law requires that each incident be treated as a unique event. The Criminal Section devotes substantial care and thought to each complaint it receives. The opportunity to

investigate and to prosecute incidents of abuse depends upon their being reported to federal authorities. It is hoped that the attention given to this study will encourage anyone who may have been subjected to excessive force, or who has been denied other constitutional protections by law enforcement officers, or who may fall victim in the future, to be aware of the federal resources available to investigate and to prosecute such incidents and to report them to us.

Local Agencies Ranked by All Indicators

(In Order by Complaint Rank)

Average number per year

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
NEW ORLEANS PD	1	26	21	35	35	1,344	45,687	545,009
LOS ANGELES CO SO	2	8	19	16	34	4,608	51,657	1,073,370
JEFFERSON PARISH SO	3	58	60	62	23	709	18,004	355,387
SAN ANTONIO PD	4	24	23	22	21	1,455	44,665	916,256
EL PASO PD	5	57	44	39	18	712	27,476	497,751
HOUSTON PD	6	9	7	12	18	4,312	88,453	1,736,412
CHICAGO PD	7	2	3	10	17	12,044	251,919	2,998,484
ST LOUIS PD	8	23	34	50	15	1,560	33,643	421,690
SAN DIEGO CO SO	9	35	61	29	15	1,077	17,030	657,415
NY CITY PD	10	1	2	5	14	26,577	747,709	7,288,862

COMP = COMPLAINTS EMP = EMPLOYEES ARST = ARRESTS POP = POPULATION

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
LOS ANGELES PD	11	4	4	8	14	7,342	215,510	3,345,714
POLICE OF PUERTO RICO	12	3	22	7	14	11,426	45,650	3,347,452
DALLAS PD	13	14	11	18	12	2,364	81,746	1,005,727
HARRIS CO SO	14	29	74	26	11	1,280	10,872	701,153
OKLAHOMA CITY PD	15	49	46	47	10	775	26,537	438,867
ST BERNARD PARISH SO	15	.	.	112	10	.	.	67,962
MEMPHIS PD	17	30	33	28	10	1,250	33,753	657,616
ORLEANS PARISH SO	17	.	.	.	10	.	.	.
PROVIDENCE PD	19	75	94	92	9	423	6,331	157,583
SHELBY CO SO	19	78	67	106	9	392	13,997	78,977
JACKSON PD	21	79	76	79	9	381	10,762	206,519
LAS VEGAS PD	22	33	18	40	9	1,110	52,026	497,423
PHILADELPHIA PD	23	5	8	13	8	6,520	88,151	1,649,379
TX DPS	24	13	.	3	8	2,653	.	16,774,585
MIAMI PD	25	37	28	54	8	1,064	37,320	386,581

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
SAN DIEGO PD	26	21	12	17	7	1,701	75,624	1,051,876
BUFFALO PD	27	39	71	65	7	1,019	12,414	326,274
PHOENIX PD	28	19	14	20	7	1,811	65,606	931,099
GRETNA PD	29	132	112	137	6	67	2,534	20,445
KANSAS CITY KS PD	29	86	68	87	6	298	13,480	161,972
KANSAS CITY MO PD	29	32	10	46	6	1,118	83,154	444,315
PITTSBURGH PD	29	34	56	53	6	1,109	20,322	388,700
MOBILE PD	33	82	50	78	6	339	23,162	208,279
ST TAMMANY PARISH SO	33	93	106	103	6	230	3,085	91,354
DENVER PD	35	27	15	37	5	1,329	60,776	505,156
MINNEAPOLIS PD	35	55	36	61	5	719	32,914	357,458
HARRISON CO SO	37	109	109	118	5	150	2,697	59,680
METRO-DADE PD	37	15	26	21	5	2,351	40,075	928,405
PRINCE GEORGES CO PD	39	107	64	31	5	154	15,357	594,756
SAN BERNARDINO CO SO	39	43	69	55	5	953	13,443	385,424

Local Agencies All Indicators 3

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
CLEVELAND PD	41	20	30	36	5	1,733	36,348	538,861
NORFOLK PD	41	65	42	70	5	628	28,398	286,139
SACRAMENTO CO SO	41	47	59	32	5	904	18,009	593,312
HONOLULU PD	44	22	25	23	5	1,693	41,159	834,930
INDIANAPOLIS PD	45	41	32	43	5	981	34,511	478,707
KNOXVILLE PD	45	87	78	83	5	289	10,388	175,105
OGLALA SIOUX TRIBAL PD	45	.	.	.	5	.	.	.
TAMPA PD	48	54	57	68	4	723	20,054	289,471
ATLANTA PD	49	25	17	48	4	1,397	55,330	434,957
BEXAR SO	49	70	79	85	4	516	10,312	171,581
CHATTANOOGA PD	49	80	70	86	4	365	12,568	165,278
LAREDO PD	49	101	107	96	4	166	3,075	120,166
DETROIT PD	53	7	9	15	4	4,638	83,442	1,074,161
BOSTON PD	54	17	41	33	4	1,919	28,577	577,205
ALBUQUERQUE PD	55	56	43	56	4	714	28,038	373,464

Local Agencies, All Indicators 4

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
KNOX CO SO	55	105	96	90	4	160	5,691	158,791
LONG BEACH PD	55	63	39	51	4	657	30,457	410,121
AUSTIN PD	58	51	35	45	3	748	32,996	449,245
DALLAS SO	58	74	140	139	3	428	501	17,794
PAWTUCKET PD	58	110	114	111	3	144	2,488	73,852
SANGAMON CO SO	58	126	133	117	3	98	1,014	60,052
CALIF HIGHWAY PATROL	62	6	6	1	3	5,770	160,737	28,025,837
CHARLOTTE PD	62	61	47	60	3	675	25,965	357,962
CRANSTON PD	62	111	113	107	3	142	2,528	74,756
FORT WORTH PD	62	44	31	49	3	915	36,110	430,525
JENNINGS PD	62	139	127	140	3	39	1,324	17,319
LOUISVILLE PD	62	64	49	69	3	655	25,241	286,224
MARICOPA CO SO	62	77	87	75	3	400	8,119	227,520
MARION CO SO	62	72	77	73	3	469	10,472	257,438
GARLAND PD	70	97	90	82	3	194	7,470	175,336

Local Agencies - All Indicators 5

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
METROPOLITAN PD	70	11	20	30	3	3,915	47,590	617,000
MIAMI BEACH PD	70	85	81	99	3	300	9,669	98,424
MONTGOMERY SO	70	96	100	94	3	202	3,779	142,473
VA BEACH PD	70	67	40	63	3	525	30,107	344,316
WARWICK PD	70	102	97	104	3	166	4,110	87,902
WEST VA STATE PD	70	69	82	11	3	521	9,636	1,879,580
SAN FRANCISCO PD	77	18	16	24	3	1,840	57,519	751,298
CINCINNATI PD	78	46	38	57	3	905	31,033	372,435
NASHVILLE METRO PD	78	38	.	41	3	1,019	.	490,807
NEW JERSEY STATE PD	78	10	37	4	3	3,919	31,565	7,675,500
PINELLAS CO SO	78	67	89	74	3	525	7,498	249,983
ALLEGHENY CO JAIL	82	121	144	.	3	117	142	.
BALTIMORE CO PD	82	138	48	27	3	48	25,932	690,714
CLAYTON CO SO	82	112	86	.	3	138	8,280	.
DARBY PD	82	147	134	145	3	14	991	10,983

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
JERSEY CITY PD	82	45	65	76	3	911	15,308	221,008
NEWPORT PD	82	128	122	132	3	81	1,894	29,169
RIVERSIDE CO SO	82	90	62	44	3	272	16,416	461,846
SPRINGFIELD PD	82	98	102	98	3	194	3,577	101,120
WEBB CO SO	82	113	129	148	3	137	1,182	5,522
WEST HARTFORD PD	82	115	108	120	3	131	3,035	58,468
BIRMINGHAM PD	92	62	51	71	2	666	23,007	281,598
FORT LAUDERDALE PD	92	73	53	93	2	461	21,352	153,463
HUNTSVILLE PD	92	88	91	91	2	278	7,009	158,324
SAN JOSE PD	92	39	27	25	2	1,019	37,436	734,442
SEATTLE PD	92	31	.	38	2	1,142	.	504,758
TOLEDO PD	92	53	55	64	2	739	20,565	343,933
BROWARD CO SO	98	52	88	88	2	747	7,564	161,150
HILLSBOROUGH CO SO	98	59	75	42	2	701	10,863	479,290
NEWARK PD	98	36	52	66	2	1,075	22,611	316,247

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
OAKLAND PD	98	66	24	59	2	612	42,266	366,504
PORTLAND PD	98	50	45	52	2	754	27,262	394,348
SALT LAKE CITY PD	98	84	63	89	2	313	16,019	159,327
SUFFOLK CO PD	98	108	29	14	2	152	36,903	1,193,665
EL DORADO CO SO	105	119	115	105	2	123	2,140	83,149
GARY PD	105	89	101	95	2	273	3,774	141,277
GRAND PRAIRIE PD	105	116	84	101	2	128	8,767	94,286
HOMESTEAD PD	105	133	110	136	2	65	2,624	23,348
HUNTINGTON PD	105	123	103	121	2	102	3,570	58,141
KAUFMAN CO SO	105	145	132	134	2	18	1,070	25,357
KENNER PD	105	117	99	109	2	123	3,913	74,337
MUNCIE PD	105	12	117	110	2	119	1,997	73,902
NY STATE PD	105	12	1	2	2	3,894	789,210	17,876,800
ORANGE CO SO	105	42	85	67	2	957	8,334	304,728
ST JOHN THE BAPTIST PARISH SO	105	118	128	126	2	123	1,273	40,706

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
TERREBONNE PARISH SO	105	99	104	115	2	179	3,311	61,681
TULSA PD	105	60	54	58	2	681	21,090	370,553
WOONSOCKET PD	105	124	121	124	2	99	1,900	45,884
AUBURN PD	119	137	124	130	2	54	1,710	31,549
COLUMBIA PD	119	95	83	100	2	209	9,242	97,479
DAYTON PD	119	71	58	81	2	479	18,690	180,322
ESCAMBIA CO SO	119	91	73	77	2	249	10,990	210,805
FORREST CO SO	119	146	137	138	2	18	799	19,329
LITTLE ROCK PD	119	83	80	84	2	328	10,178	175,062
MESA PD	119	81	66	72	2	362	15,183	275,459
MONTGOMERY PD	119	76	72	80	2	410	11,573	192,130
PARKERSBURG PD	119	136	126	127	2	58	1,465	38,064
PLAQUEMINES PARISH SO	119	114	136	133	2	136	840	26,245
SULLIVAN CO SO	119	104	118	102	2	163	1,956	92,939
TANGIPAHOA PARISH SO	119	100	130	122	2	171	1,100	57,886

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
BEAUMONT PD	131	94	95	97	2	220	5,955	119,967
BELLEVILLE PD	131	134	116	125	2	61	2,057	43,105
BERKELEY PD	131	140	125	142	2	39	1,476	16,684
CENTRAL FALLS PD	131	141	131	141	2	36	1,089	17,284
CHARLESTON PD	131	92	93	108	2	240	6,430	74,718
CHICAGO HEIGHTS PD	131	129	135	128	2	77	875	35,709
COVINGTON PD	131	142	142	147	2	22	281	6,750
DOTHAN PD	131				2			
EAST PROVIDENCE PD	131	127	123	123	2	90	1,741	51,929
GALVESTON PD	131	106	92	116	2	155	6,775	61,089
HARRISON TOWNSHIP PD	131	148	143	143	2	13	170	12,198
HARVEY PD	131	131	105	129	2	69	3,122	35,180
HUNT CO SO	131	143	119	131	2	21	1,930	31,274
LARGO SO	131	122	120	113	2	103	1,916	65,497
MILWAUKEE PD	131	16	13	34	2	1,968	70,320	561,005

AGENCY	RANK BASED ON AVERAGE				ACTUAL NUMBER			
	COMP	EMP	ARST	POP	COMP	EMP	ARST	POP
NATIONAL CITY PD	131	130	98	119	2	72	4,002	58,913
OKLAHOMA HP	131	28	5	9	2	1,282	215,040	3,248,598
PORT ARTHUR PD	131	125	111	114	2	99	2,566	62,752
RHODE ISLAND STATE PD	131	103	.	19	2	165	.	987,077
SOUTH CAROLINA HP	131	48	.	6	2	890	.	3,434,284
WASHINGTON PARISH SO	131	135	138	135	2	59	698	25,355
WASHINGTON PARK PD	131	149	141	146	2	11	422	8,638
WESTWEGO PD	131	144	139	144	2	19	511	11,812

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

April 30, 1992

The Honorable William P. Barr
Attorney General of the United States
U.S. Department of Justice
Tenth Street and Constitution Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

The verdict acquitting officers of the Los Angeles Police Department charged with the beating of Mr. Rodney King in Los Angeles, strikes deeply at the moral and social well-being of our Nation. On behalf of the U.S. Commission on Civil Rights, I strongly urge that the U.S. Department of Justice take immediate action to complete its investigation into the possible violation of Federal civil rights laws, and pursue every legal remedy available.

The unfortunate violence in the streets of Los Angeles should not deter swift action by the Department of Justice. The Nation must be assured that every individual's civil rights are preserved. This Nation's commitment to civil rights would be irreparably damaged if every step were not taken to ensure that these invaluable rights are safeguarded.

Sincerely,

ARTHUR A. FLETCHER
Chairperson

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
CHIEF JUDGE
157 MAIN STREET
HARTFORD, CONN. 06106

MAY 29 1992

May 27, 1992

Honorable Henry J. Hyde
United States Representative
2262 Rayburn House Office Building
Washington, D.C. 20515-1306

Dear Congressman Hyde:

Having had a chance today to see the transcript of your comments concerning my proposal to the Subcommittee on Civil and Constitutional Rights, I hasten to try to clarify one matter. Whether municipal and state employers should be vicariously liable under federal law for punitive damages for the constitutional torts of their employees is a fairly debatable issue, and though I favor such liability (perhaps subject to dollar ceilings), such liability is not a significant part of the proposal I presented at the hearing on May 5, 1992. That proposal has three main elements, all of which are aimed at liability for compensatory damages: (1) authorize suit by the United States on behalf of the victim, (2) create liability for the governmental employer of the person who commits a constitutional tort, and (3) eliminate qualified immunity as a defense to the governmental employer's liability.

These three proposals should not be obscured by disagreement concerning punitive damages. All employers, including municipalities, are now vicariously liable for the torts of their employees under state law and are required to pay compensatory damages when an employee commits a tort. My proposal would amend federal law to apply that traditional principle of employer liability, at least for compensatory damages, to constitutional torts, and to authorize suit by the United States on behalf of the victim, a step that seems appropriate in light of the federal interest in observance of constitutional rights.

I would be pleased to pursue these matters with you in more detail if that would be helpful.

Sincerely,

Jon O. Newman
United States Circuit Judge

cc: Hon. Don Edwards, Chairman
Hon. John Conyers, Jr.
Hon. Michael J. Kopetski
Hon. Howard Coble

[LEGISLATIVE PROPOSAL SUBMITTED BY JUDGE NEWMAN]

Sec. 1. Title. This Act shall be known as "the Civil Rights Protection Act of 1992."

Sec. 2. Governmental employer liability. Any state, county, municipality, or other unit of state or local government shall be liable for the acts or omissions of its employee, whether or not occurring in the course of employment, that subject or cause to be subjected, under color of law, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States. The liability created by this section shall exist whether or not the employee is personally liable and whether or not the employee acted with an objectively reasonable good faith belief in the lawfulness of his action, except that liability may not be imposed under this section for any acts or omissions for which the individual causing such acts or omissions is entitled to absolute immunity. An action to establish the liability created by this section may be brought either by the party injured or by the United States.

Sec. 3. Suit by United States. The United States is authorized to bring a civil action at law, suit in equity, or other proper proceeding to redress the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States. The action may be brought only against the unit of state or local government that employed the person whose acts or omissions caused the deprivation. The action may be brought only with the consent of the party injured and may be brought whether or not the party injured has brought an action on his own behalf. An

action brought by the United States pursuant to this section may be consolidated with an action brought by the party injured. In an action authorized by this section, compensatory damages may be awarded to the person injured, and punitive damages may be awarded either to the person injured, or to the United States, or partly to each. There shall be offset against any compensatory damages awarded under this section any compensatory damages previously awarded to the injured party in an action by that party, and there shall be offset against any compensatory damages awarded to the injured party in an action by that party any compensatory damages previously awarded to that party in an action authorized by this section.

Sec. 4. Statute of limitations. The statute of limitations applicable to the liability created by section 2 and to the action authorized by section 3 shall be the same as that applicable to an action under section 1983 of Title 42.

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