

# CIVIL RIGHTS LAWS: THE NEED FOR A NEW LOOK AT AN OLD BAND-AID

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## INTRODUCTION

Police brutality has become a nationwide problem. Recent urban riots have stemmed from incidents of police abuse and the appearance that the judicial system is indifferent to such injustice.<sup>1</sup> In light of the potentially far-reaching repercussions of police brutality, it is not only appropriate but also necessary to analyze this growing national problem.

In most areas, the law has seen fit to fashion remedies to satisfy concepts of fairness and to advance the integrity of the legal system, to which the people must turn lest they resort to civil violence and anarchy. This Article briefly reviews the criminal and civil remedies presently available to a person who has been the victim of police brutality, the obstacles which make difficult the litigation of police abuse cases, and possible changes that could be considered by appropriate legislative bodies.

### A. *Criminal Law Remedies*

Currently, federal prosecutors may bring a criminal action under Federal Criminal Code Section 242.<sup>2</sup> To show a deprivation of rights under Section 242, a plaintiff must prove beyond a reasonable doubt that a defendant acting under color of law "willfully subjected any inhabitant of any State, Territory, or District to a deprivation of civil rights, or to different punishment . . . on account of such inhabitant being an alien, or by reason of his

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1. *See Police Brutality: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 170-75 (1991) [hereafter *Hearings*] (testimony of former Asst. Att'y Gen. for Civil Rights Drew S. Days III).

2. 18 U.S.C. § 242 (1988). State prosecutors, when motivated, can also bring an action under state law. However, in California, local district attorneys have been very reluctant to use existing state statutes. *See* James G. Kolts et al., *The Report on the Los Angeles County Sheriff's Department 146* (July 1992) (finding that district attorney prosecuted only one questionable shooting incident out of 382 referrals for possible prosecution in the last decade)[hereafter *Kolts Report*].

color, or race."<sup>3</sup> In addition, anyone found to have violated Section 242 will be fined up to \$1,000.00 or imprisoned up to one year, or both; in cases where there is bodily injury, Section 242 provides for a maximum felony term of ten years and a maximum fine of \$240,000; in death cases, a convicted defendant may be sentenced up to life imprisonment.<sup>4</sup>

Yet prosecutions of police officers are not only rare, but when officers *are* prosecuted, prosecutions are made more difficult by jurors' reluctance to convict those upon whom they rely for public safety.<sup>5</sup> Over and over again law enforcement leaders, lobbyists, police unions, and police spokespersons have suggested that prosecuting police officers will result in reduced law enforcement, that officers may be less than vigorous in their law enforcement duties and will tend to overlook criminal actions.<sup>6</sup> Some jurors may also fear that a police officer who might deserve to be convicted of a civil rights violation could end up in prison with ordinary criminals, and thus suffer retaliation.

Behind the scenes, police officers who see crimes committed by fellow officers simply adhere to the "code of silence," which consists of a simple rule: An officer does not provide adverse information against fellow officers.<sup>7</sup>

In combination with these practical barriers to a successful criminal prosecution, prosecutors are faced with having to prove that the defendant police officer acted with the specific intent to deprive the victim of a constitutional right.<sup>8</sup> The federal prosecution<sup>9</sup> of the four officers involved the Rodney King beating in 1991, subsequent to the riot provoked by the state court acquittal of the officers,<sup>10</sup> demonstrates the difficulty of relying on existing state or federal court proceedings to prosecute police officers,

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3. 18 U.S.C. § 242 (1988).

4. *Id.*

5. See, e.g., Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 548 (1993).

6. See, e.g., Matthew Kauffman, *Officer Found Not Guilty In Beating Case; Witnesses' Credibility a Factor*, THE HARTFORD COURANT, Nov. 4, 1992, at B1 ("[Police officer's] arrest led to police protests and bouts of 'blue flu' . . .").

7. Warren Christopher et al., *The Report of the Independent Commission on the Los Angeles Police Department* 168 (1991) [hereafter Christopher Commission Report].

8. *Screws v. United States*, 325 U.S. 91, 104 (1945) (holding that a violation of the Civil Rights Act requires a specific intent to deprive a person of a right arising out of the Constitution, the laws of the United States or decisions interpreting those laws). See also *United States v. Shafer*, 384 F. Supp. 496 (N.D. Ohio 1974) (holding that an acquittal is necessary and appropriate when evidence offered by the government is insufficient to support a finding of willfulness beyond a reasonable doubt).

9. *United States v. Koon*, No. CR 92 686 JGD, 1993 WL 387860, 62 U.S.L.W. 2150 (C.D. Cal. Aug. 4, 1993).

10. *Briseno v. People*, No. Civ. B060259 (Cal. Super. Ct. 2d Dist. 1991).

notwithstanding graphic and demonstrative evidence of excessive use of force.

Furthermore, the remote possibility of a criminal prosecution does not inspire fear in the hearts of police officers who use force excessively. One of the most shocking and intriguing aspects of the Rodney King case, besides its videotaping, was the fact that these officers were able to beat King with impunity, almost with arrogance, in an open, well-lit area, in plain view of scores of citizens; they seemed comfortable in the knowledge that the "code of silence" and the power of police institutions would stand as their protectors, ignoring any potential complaints of abuse from the community.

In 1991, after hearing numerous experts on police excessive use of force,<sup>11</sup> the 102nd Congress introduced the Police Accountability Act of 1991.<sup>12</sup> Section 3(a) of that bill would have enacted a criminal penalty for any law enforcement officer who "under color of law subjects any person to force exceeding that which is reasonably necessary to carry out a law enforcement duty . . . ."<sup>13</sup> This section, which would have eliminated the specific intent requirement of *Screws*,<sup>14</sup> was deleted by the Judiciary Committee before the bill was passed out of committee.

While the reasonableness standard proposed in the Police Accountability Act may be inappropriate for imposing a criminal penalty, it would seem that a middle ground, such as a general intent standard, could be fashioned to satisfy the due process concerns of a criminal defendant while making prosecution more possible than it is currently under the stricter standard.

The difference between the *mens rea* of a specific intent and a general intent crime may not seem significant to anyone but a prosecutor. Yet, volumes have been written on the difference as applied in many types of crimes.<sup>15</sup> In Section 242 application, a general intent standard would be similar to that required for the crimes of battery and homicide,<sup>16</sup> where the jury may infer the *mens rea* from the evidence describing the *actus reus*.<sup>17</sup> Moreover, this standard would lessen the prosecution's burden to

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11. Among those testifying were Paul Hoffman, Legal Director of the ACLU of Southern California, Johnnie L. Cochran, Jr., a Los Angeles Civil Rights Attorney, U.S. Circuit Court Judge John O. Newman, and Professor James J. Fyfe of American University. *Hearings*, supra note 1, at III.

12. H.R. 2972, 102d Cong., 1st Sess. (1991).

13. *Id.*

14. 325 U.S. at 104; see *supra* note 8.

15. See, e.g., JOHN H. WIGMORE, EVIDENCE § 103 (Tillers Rev. 1983); WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 27 (1972).

16. See M.C. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 KAN. L. REV. 411, 418 (1972).

17. *Id.*

prove the subjective intent of a police officer—a requirement that is next to impossible to satisfy.

### B. *Civil Remedies*

Given the reluctance of the criminal justice system to initiate criminal prosecutions and the other social and legal barriers discussed above, it is no small wonder that the vast majority of lawsuits filed by individuals complaining of a deprivation of civil rights are litigated as civil violations. Section 1983<sup>18</sup> remains the principal remedy available to those who have been subjected to excessive use of force or other constitutional deprivations at the hands of police officers. It is available as a cause of action in both state and federal courts. In fact, virtually every state in the United States has expressly or implicitly opened its courts to Section 1983 actions, and there are no state court systems that refuse to hear Section 1983 cases.<sup>19</sup>

### C. *Other Obstacles To Litigation of Police Abuse*

There are many reasons why police abuse cases do not get litigated. Some involve practical problems of proof and costs. Yet most can be explained by social and political realities, which in turn contribute to the cost and evidentiary burdens that make litigating these cases very difficult.

#### 1. *Lawyers*

Traditionally there have been very few attorneys interested in taking civil rights cases on behalf of injured victims. Most lawyers are not familiar with the intricacies of Section 1983 and many are intimidated by the notion of fighting city hall. Lawyers may also be fearful that litigation against police officers may harm their chances for judicial appointments or potential for obtaining business from public entities and politicians. Since politicians and public entities base their political fortunes on successful and intimate relationships with local law enforcement, many lawyers will not litigate Section 1983 claims against the police for fear of jeopardizing their relationships with these entities.

Moreover, many civil rights plaintiffs are burdened by the fact that they are racial minorities, often not well-educated or articulate, and in some instances, they may have criminal records. Consequently, attorneys who might consider this area of litigation know that when the client is a member of a racial minority

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18. 42 U.S.C. § 1983 (1979).

19. *Howlett v. Rose* 496 U.S. 356, 378 n.20 (1990); (see also STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS (1992)).

group and of a lower socioeconomic class, judges and/or jurors tend to dismiss their allegations or award less than full compensation to the plaintiff even where the plaintiff can prove liability.

## 2. *Plea Bargains*

Other cases involving excessive use of force are not filed because police officers charge the victim of police abuse with crimes, and then communicate to the prosecuting district attorney that dismissal of the case is conditioned upon a promise not to sue the police or city. Such agreements have been found to be valid.<sup>20</sup>

## 3. *Costs*

In addition, because victims of police abuse and potential civil litigants are not generally from middle- or upper-income brackets, lawyers must often expect to advance the costs of litigation. Even in the simplest of cases such an investment can average between \$4,000.00 and \$5,000.00. Moreover, recent Supreme Court findings have mandated the necessity to utilize expert witnesses in excessive force cases.<sup>21</sup> *Tennessee v. Garner*<sup>22</sup> was a wrongful death case in which an officer shot and killed a 15 year-old burglary suspect found with \$10.00 and a purse taken from the house he had burglarized. The Supreme Court's opinion written by Justice White held that stopping a suspect by the use of deadly force is a "seizure," and thus, subject to the reasonableness requirement of the Fourth Amendment.<sup>23</sup> This laid to rest the defense that the officer's subjective view was the test by which the trier of fact should determine reasonableness. In *Graham v. Connor*,<sup>24</sup> the Court stated further that the reasonableness of the use of force must be judged from the *perspective of a reasonable officer on the scene*, rather than the 20/20 vision of hindsight.<sup>25</sup> Thus, absent the most unusual circumstances, at least one expert witness will be essential to describe the conduct of the officer and to testify as to the reasonableness of the conduct under existing law.<sup>26</sup>

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20. *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (holding that release agreements are not *per se* invalid and that in certain circumstances they are perfectly justified). See also *Lynch v. City of Alhambra*, 880 F.2d 1122, 1127 (9th Cir. 1989) (following *Rumery* and finding a release agreement valid).

21. See R. Samuel Paz, *Police Brutality and Misconduct: Refining Your Case with the Right Expert*, Los Angeles Trial Lawyers, 1992 Summer Travel Program Syllabus 215 (1992).

22. 471 U.S. 1 (1985).

23. *Id.* at 7-10.

24. 490 U.S. 386 (1989).

25. *Id.* at 396.

26. See Paz, *supra* note 21, at 215.

With the expenditures involved in this sort of proof, only those cases in which the plaintiff can prove substantial injuries will work their way through the civil process and possibly result in a verdict. In a vast number of cases where there has been a violation of civil rights, the victim with a meritorious claim simply cannot jump these various hurdles.

#### 4. *Deference to Police Entities*

Two Supreme Court holdings have refused to permit federal courts to provide a remedy to victims of police abuse notwithstanding proof at the trial court level that there was a pattern of police abuse. In *Rizzo v. Goode*,<sup>27</sup> the Court ruled that there was a pattern of police abuse in the Philadelphia Police Department and ordered the implementation of an internal mechanism for the review and adjudication of civilian complaints against officers.<sup>28</sup> The district court found that the failure of the police department to investigate citizens' complaints and discipline officers led to a predictably high level of abuse.<sup>29</sup> However, the Supreme Court reversed, stating that the principle of federal court restraint prohibited relief "against a pattern and practice of abuse as an impermissible intervention on the affairs of local government."<sup>30</sup>

Approximately eight years later, the Supreme Court followed the same approach in *City of Los Angeles v. Lyons*.<sup>31</sup> *Lyons* involved the infamous choke hold, which caused the deaths of seventeen people in Los Angeles, the vast majority of whom were African-Americans. In refusing to enjoin the L.A.P.D.'s use of the choke hold, the Court found that the improper and illegal application of the choke hold was not a routine city policy and because it was not an authorized policy, the Court held that equitable relief was not justified.<sup>32</sup>

The refusal of the Supreme Court to prevent federal district courts from exercising equitable powers demonstrates a deference to local police entities and a refusal to consider continued violations of civil rights within the gambit of the federal district court. As such, *Rizzo* and *Lyons* demonstrate the weakness of the civil system in preventing ongoing and continued patterns of police abuse.

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27. 357 F. Supp. 1289 (E.D. Pa. 1973), *rev'd*, 423 U.S. 362 (1976).

28. *Id.* at 1320-21.

29. *Id.* at 1318-20.

30. 423 U.S. at 377-78.

31. 461 U.S. 95 (1983).

32. *Id.* at 105-06.

### 5. *The Good Faith Defense and Public Entity Immunity*

Another obstacle to the effective prosecution of civil rights violations in civil litigation is the doctrine of qualified immunity. This defense provides that an individual officer found to have denied a person a constitutional right nonetheless has a defense to civil liability, if the officer had an objectively reasonable good faith belief that his actions were lawful.<sup>33</sup> In most cases the good faith defense is difficult to comprehend. Liability in an excessive force case requires a finding that the officer used more force than was reasonably necessary under the circumstances. However, a jury can still relieve the officer of liability by finding that it was objectively reasonable for the officer to believe that his actions were reasonable. This innate confusion renders the defense of little use, except to confuse juries and to allow defense counsel to argue the subjective beliefs of the officers. Combined with the public entity immunity of *Monroe v. Pape*,<sup>34</sup> notwithstanding the finding of a constitutional deprivation, the good faith immunity results in no compensation for the injured plaintiff.

While the most obvious legislative remedy would be to eliminate the good faith defense, it can be argued that under limited circumstances, where there is an actual good faith reliance on a statute or unsettled case law, the good faith defense should be available to the officer. However, even in those limited circumstances, the public entity should not escape liability. The victim has suffered a loss and public entity liability should not be reduced because the officer was justifiably mistaken. The familiar concept in tort law, *respondeat superior*, says that an employer is responsible for the harms caused by its employee in the course of his or her employment. The principle of *respondeat superior* applies to every employer, whether public or private, with the exception of redress for civil rights injuries litigated under Section 1983. In *Monroe*, the Court established that when Congress passed the Civil Rights Act of 1871, it intended to create liability only for the individuals who personally cause the deprivation of constitutional rights and not for the city that employs these individuals.<sup>35</sup> This deficiency in Section 1983 might also be cured by congressional legislation authorizing appropriate remedies for

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33. *Anderson v. Creighton*, 483 U.S. 635 (1987)(stating that a Federal Bureau of Investigation agent is protected on qualified immunity grounds if a reasonable officer could have believed that their search comported with the Fourteenth Amendment even though it actually did not).

34. 365 U.S. 167 (1961)(holding that Congress did not intend to impose liability on municipal corporations, such as the City of Chicago, where police officers act on their own initiative and outside specified police procedures).

35. *Id.* at 172-87.

unconstitutional conduct by police officers and their employing public entities.

There is one limited circumstance under which a public entity can be held liable under Section 1983—where the plaintiff can prove that the city maintained an official policy of encouraging, or at least tolerating, unconstitutional actions by its employees.<sup>36</sup> However, proving such a policy is difficult and civil rights litigants rarely reach litigation on that issue, let alone prevail; in fact, the use of *Monell* liability has had little or no effect on continued patterns of police misconduct.<sup>37</sup>

#### D. *Recently Failed Legislative Efforts*

In 1991, two legislative efforts were proposed in the 102nd Congress to provide a forum for those who would otherwise be unable to proceed with civil litigation. The Police Accountability Act of 1991, introduced by Representative Don Edwards and others, proposed that the Attorney General, in the name of the United States, could file a civil action and obtain appropriate equitable and declaratory relief where he/she believes that a pattern and practice of abuse exists.<sup>38</sup> The Civil Rights Protection Act of 1992, introduced by Representative John Conyers, further allowed for a “pattern-and-practice-damages” action by the United States,<sup>39</sup> and eliminated the public entity immunity created by the holding in *Monroe v. Pape*. These proposed legislations further sought to provide an avenue for the United States to address systematic patterns of abuse. Neither bill passed, since they were incorporated in the Crime Bill, which failed to pass.<sup>40</sup>

The lack of legislative remedies discourages even the most meritorious claims. In fact, the notion that the United States may elect to bring a civil action on behalf of its citizens for a deprivation of civil rights without an authorizing statute has already been tested. In 1980, the United States Attorney attempted to bring a suit against the City of Philadelphia and obtain an injunction to remedy a widespread pattern of police misconduct. The Court of Appeals in *U.S. v. City of Philadel-*

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36. *Monell v. Dep't of Social Serv.*, 436 U.S. 658 (1978)(holding that local governing bodies can be sued directly under § 1983 for monetary, declaratory and injunctive relief when unconstitutional action on their part represents the official policy of the governing entity).

37. See Jonathan Moore, *Establishing Liability under Monell: the Rule 803(8)(c) Alternative*, in 7 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 127 (Steven Saltzman & Barbara M. Woolovitz eds., 1991).

38. H.R. 2972, 102d Cong., 1st Sess. (1991).

39. H.R. 5074, 102d Cong., 2d Sess. (1992).

40. H.R. 3371, 102d Cong., 2d Sess. (1992).



*phia*<sup>41</sup> ruled that the suit could not proceed without an authorizing congressional act.<sup>42</sup> Consequently, it is imperative that Congress recognize this vacuum and provide an adequate legal remedy.

### E. *Civil Verdicts and Social Impact*

Although few cases result in verdicts for police abuse victims, the cumulative effect of civil lawsuits have made elected officials pay attention to the problem of police abuse. For example, a review of the litigation alleging excessive use of force from 1986 through 1990 shows that the city of Los Angeles paid in excess of \$20,000,000.00 in judgments, settlements, and jury verdicts in approximately three hundred lawsuits.<sup>43</sup> This figure does not include the cost of defending these suits.

A similar report involving the Los Angeles County Sheriff's Department showed that from January 1989 to the end of May 1992, settlements and verdicts in excessive use of force cases against the Department reached a total of \$15,492,971.85.<sup>44</sup> The report further found that "[t]he amount paid as settlements and verdicts constitute only a fraction of the actual cost incurred by the County in connection with excessive force litigation . . . ."<sup>45</sup> The report cites the additional cost of in-house counsel, provided by the County Counsel's Office, and also shows that of the cases reviewed, more than half were contracted out to private attorneys.<sup>46</sup> Additionally, in cases with punitive damages, the County bore the cost of separate counsel as well as the payment of expert witnesses, private investigators, and other related litigation costs.<sup>47</sup> While these huge expenditures of money have served as a partial motivator for elected officials to address the issue of police abuse, civil litigation, at best, creates an oblique and somewhat cynical motivation on lawmakers to take action.

### CONCLUSION

If the recommendations for improving Section 1983 were heeded, it would signal an important step for this country in making good on its promise to secure remedies for violations of constitutional protections. However, even if enacted, the tools available to lawyers will not eliminate police abuse. The phenomena of police abuse arises out of a tradition of racism and

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41. 644 F.2d 187 (3d. Cir. 1980).

42. *Id.* at 192.

43. Christopher Commission Report, *supra* note 7, at 56.

44. Kolts Report, *supra* note 2, at 26.

45. *Id.*

46. *Id.*

47. *Id.*

discrimination against hiring racial minorities by law enforcement agencies. It arises from the complex web of interconnected circumstances which besets every city in the United States. Poor educational opportunities, poor housing, fewer jobs, high influx of drugs, and the formation of youth gangs all add together to create a volatile mix that virtually guarantees that constitutional rights will not always be respected, especially if one is identified with any of the circumstances listed. Even new laws will not eliminate the risk of repeated incidents of excessive police violence as long as violations of civil rights are ignored by district attorneys and elected officials.

As we strive to maintain order and reduce criminal violence in our communities, an equally urgent effort must be made to protect and respect the rights of individuals and to create an accessible avenue whereby deprivations of civil rights can be remedied. Moreover, all people should be able to feel that there is a place for justice and that police officers are not above the law.