Prosecuting POLICE MISCONDUCT

Reflections on the Role of the U.S. Civil Rights Division

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INTRODUCTION

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Police in any society are accountable to their commanders, but in a democracy they must be accountable to others as well: to the legislature, to the press, to associations of citizens, and to the law. Citizens of a democracy should expect their police not only to enforce the law, but to respect it. Therefore, at least in theory, when police themselves violate the criminal law, someone must prosecute them.

In practice, prosecutions against the police for misconduct, especially for murder, torture, or the excessive use of force, are extraordinarily difficult to bring. Obtaining convictions is even harder. Few prosecuting agencies have both the resources and the commitment to devote specialized units to these cases on a permanent basis. As a result, in most jurisdictions, prosecutions of police are rare; and, when they are brought, most prosecutors assigned must first learn the special skills that these cases require.

The longest standing exception is the Civil Rights Division of the United States Department of Justice. In addition to its other units, the Division maintains a permanent staff of prosecutors specializing in the prosecution of law enforcement officers. The experiences of those prosecutors have much to say both about the nature of police misconduct and about the strategies that prosecutors anywhere can employ to hold police accountable to the law.

The Civil Rights Division is not the most direct mechanism of police oversight in the nation, nor is it the primary mechanism on which the people of any single jurisdiction rely; but since its birth under President Eisenhower and maturation under Presidents Kennedy and Johnson, the Division has been the most steady and longest lasting instrument of police accountability in the United States.

In order to better understand how its role has evolved since the 1960s, Vera gathered together for a day of discussion five former heads of the Division, two veteran Division attorneys, and its current chief, Bill Lann Lee. We asked them to begin by telling us the stories of prosecutions that captured the difficulties that the Division faced and the lessons that they learned. Starting with those stories and the discussion they spurred, Alexis Agathocleous has created this guide to the Division's experience in the prosecution of police. We hope this booklet proves useful both to students of law and to those who must craft new mechanisms of police accountability in democratic states around the world.

THE federal role IN PROSECUTING POLICE MISCONDUCT: OPPORTUNITIES AND OBSTACLES

Since its inception in 1957, the Civil Rights Division of the U.S. Department of Justice has been responsible for the federal prosecution of police misconduct. Every year, the Division prosecutes local, state, and federal law enforcement officials who abuse their power and violate the civil rights of civilians. Performing this role has proved to be an extraordinarily difficult task. Over the past four decades, federal prosecutors have confronted numerous obstacles in bringing these cases—some of which have endured, and some of which have shifted with the social and political climate. The Civil Rights Division has accordingly modified its tactics, acquired a stronger arsenal against police abuse, and won some significant victories. Based on the reflections of a group of former Assistant Attorneys General and current Division staff, this booklet traces these shifts and pinpoints some of the lessons learned about the strengths as well as the limitations of federal prosecution.

The Division has two chief weapons with which to respond to police misconduct: criminal prosecution and civil litigation. The vast majority of federal action against police abuse of force has consisted of criminal cases, involving individual officers and individual incidents. For over 35 years, this was the only avenue open to federal prosecutors. But the 1994 Violent Crime Control and Law Enforcement Act provided the Civil Rights Division with an important new weapon: the ability to take civil action against governmental authorities who have unlawful policies or engage in a pattern-or-practice of conduct that deprives individuals of their rights.

Federal prosecution can be a very powerful weapon against police misconduct. Successful criminal cases demonstrate that abuse of power is intolerable and vindicate the rights of victims, who are disproportionately from minority groups. Meanwhile, civil cases have resulted in comprehensive reform packages that bear the potential to dismantle institutionalized abuse in police departments or agencies.

But the impediments to achieving convictions are considerable, and even when the Division successfully prosecutes, observers question the significance of the outcome—particularly in criminal cases. Furthermore, federal prosecutions are extremely labor-intensive, and resources are scarce. Observers point out that while law enforcement budgets have consistently grown in the past decades, the number of personnel at the Civil Rights Division—and therefore the number of investigations, indictments, and convictions it pursues—has remained largely static.[1] They also draw attention to the fact that although the Department of Justice employs 9,168 attorneys, there are currently only 20 full-time attorneys who work on misconduct cases in the Criminal Section of the Division.[2]

For this reason, the Division is simply unable to take on all police misconduct cases. Perhaps the greatest dilemma the Division faces, therefore, is deciding how to distribute its limited resources: which cases to prosecute, how to overcome the obstacles it confronts, and whether to pursue criminal or civil options. Focusing on the issues that have emerged over the last four decades, this document brings together the observations, conclusions, and opinions of some of the individuals who have been responsible for making those decisions.

Initial challenges: THE PROBLEMS OF RACISM AND NONCOOPERATION

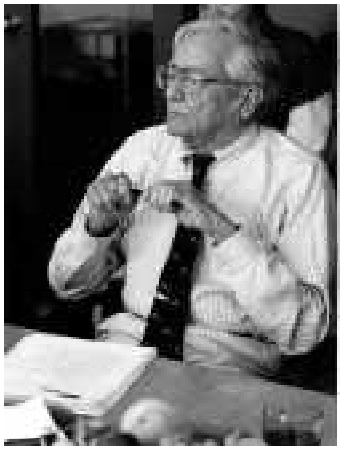
The Civil Rights Division's earliest cases presented federal prosecutors with what seemed to be insurmountable obstacles. Overtly racist violence was widespread, particularly in the South, and often involved law enforcement officials—providing the impetus for the first Civil Rights Division prosecutions. Federal enforcement of civil rights statutes was a relatively new concept, and few local officials or civilians were willing to cooperate with the Division.[3] Furthermore, the Division had precious few resources at its disposal. Burke Marshall, Assistant Attorney General for Civil Rights between 1961 and 1965, recalls that given these restraints, "the problem of police misconduct was totally beyond reach."

The cases that Marshall remembers did not involve small groups of officers, isolated incidents, or misconduct hidden from the public view. Rather, he explains, they involved "lynchings in which law enforcement officers—including deputy sheriffs—participated." That police officers engaged so publicly in civil rights abuses and racially-motivated crimes indicates the extent of the impunity they enjoyed and the likelihood that they would refuse to cooperate with Division investigations.

Police misconduct cases were notoriously difficult to investigate and prosecute, not least because grand juries were almost invariably unwilling to indict police officers. The Division attempted to work within these constraints, sometimes reducing charges in order to circumvent the jurisdiction of grand juries; as Marshall says, "we might have charged some police officer with a misdemeanor, simply in order to put a case on a non-felony basis." Grand and trial juries were extremely difficult to work with, Marshall recalls. "Blacks were totally excluded, no women were put on grand juries, and there was no way for us to control this." Reflecting on observations about the grand jury system made by Division prosecutors today—that despite certain problems, it is extremely helpful to federal prosecutions—Marshall concludes that progress has been made. "The grand jury was not an asset to us," he explains, "it was a hindrance." And even when a case did clear the grand jury, it proved equally difficult to convince trial juries to convict.

The Division's small staff was responsible for enforcing a wide range of new civil rights legislation, from the Civil Rights Acts of 1960, 1964, and 1968 to the Voting Rights Act of 1965. In the midst of this considerable task, police misconduct cases were simply not yet prioritized. Stephen Pollak, who served as Assistant Attorney General in the mid-1960s, recalls that "while there was a tremendous flow of complaints about police misconduct, there were only a handful of people handling them at the Division. It was mainly a paper transaction: They came in and they went out. Nothing happened because they were not a priority." The Division did address some exceptionally serious and high-profile cases of misconduct involving large numbers of victims. However, Pollak remembers, "we had not focused on 'non-egregious' incidents of misconduct as a significant racial issue."

> In the Division's early years, "the problem of police misconduct was totally beyond reach."
>
> **— Burke Marshall**



Burke Marshall

Negotiating relationships WITH THE FBI AND STATE AUTHORITIES

As the Civil Rights Division continued to prosecute police misconduct, new hurdles that impeded its ability to enforce civil rights laws emerged. What later became known as the Orangeburg Massacre illustrates two central problems that federal prosecutors faced. First, relations between the Division and the Federal Bureau of Investigation (FBI)—on which it was dependent for crucial investigative work—were frequently tense. And second, state-level inaction on misconduct cases meant that the Division was forced to prosecute in situations that should have been dealt with by state authorities first.

PARTNERSHIP WITH THE FBI

In 1967, a student chapter of the NAACP at South Carolina State College in Orangeburg unsuccessfully attempted to convince Harry Floyd to desegregate his bowling alley, the All Star Bowling Lanes. On the night of February 6, 1968, a group of students, including members of the Student Nonviolent Coordinating Committee, marched to the alley. When they were confronted with law enforcement officials, disorder erupted and several students were beaten. The following day, a student grievance committee announced a march on city hall and a boycott of local businesses in response to the beatings. South Carolina's Governor Robert E. McNair dispatched 600 National Guard troops onto the scene. That evening, students attempted to start a bonfire on the edge of campus near the command post of the patrolmen. When a fence post was thrown and struck an officer, the police opened fire. Thirty students were shot, three of whom were killed.[4]

Stephen Pollak, the Assistant Attorney General for Civil Rights at the time, recalls the Orangeburg Massacre:

> There was a terrible overreaction on the part of the policing authority, and so the Justice Department immediately dispatched our best people down there. As matters went on, the FBI got involved and carried out an investigation of the South Carolina State Police for criminal conduct. But it turned out that the Special Agent in charge of the local FBI investigation, Charles DeFord, who essentially had on-the-scene control, was bunked up with Chief Strom of the South Carolina State Police, and was interviewing his own staff who were in turn interviewing the Police Chief. I don't think we knew that for some period of time, and I don't suggest that his report was unsound. I'm just saying I was surprised.

Close relationships between the FBI and local police officials inevitably awakened suspicions about the investigative process. Local FBI agents were later discovered to have withheld crucial information from the Division, including the fact that three FBI agents actually witnessed the shootings.[5] This tension between the Division and the FBI was fairly typical

AP/WIDE WORLD PHOTOS

Angry students protest a segregated bowling alley in Orangeburg, South Carolina. Thirty students were shot, three of whom were killed, when highway patrolmen opened fire into the crowd.

at the time. As James Turner, former Deputy Assistant Attorney General for Civil Rights, remembers, "during the days when police abuse cases were most often a by-product of the civil rights revolution, the Bureau's all-white corps of agents seemed unable or reluctant to treat most claims of police misconduct as deserving of investigation." Furthermore, "on the local level, the FBI always had a cooperating, symbiotic relationship with local police. Agents who worked on a daily basis with their local counterparts found it hard to file objective reports about claims of police abuse. And, in an organization in which promotions were determined by the number of successful prosecutions on which an agent worked, even the most diligent and open-minded agents were hard pressed to spend their time on civil rights cases."[6]

Current Acting Assistant Attorney General for Civil Rights Bill Lann Lee describes a considerably contrasting relationship between the two organizations now. "Not only does the FBI do our investigative work," he explains, "but the Division and the Attorney General are constantly talking with them about further work they could do, improving the quality of investigations, and getting more attention for civil rights cases. It's a real sea change from the kind of hostility that we've seen in the past." Much of the challenge in developing a relationship between the Division and the FBI, Lee argues, is fostering effective communication between the two: "A lot of effort is going into matching up cases—which cases we consider important and which cases the FBI considers important. They are an independent outfit, so we have had to develop this coordination." By the 1990s, the Civil Rights Division was requesting several hundred FBI investigations annually—around 400 in 1997. But the FBI initiates the majority of police misconduct investigations itself, passing on its findings to the Division. It conducted approximately 2,900 such investigations in 1997.

STATE INACTION

Orangeburg also exemplified the unwillingness of state officials to take action against officers involved in incidents of misconduct. The Division was keen to encourage state officials to bring such cases themselves. However, no state action followed the report that resulted from the local FBI investigation—no state grand jury was convened and no local prosecution launched. Considering the severity of the shootings, the Division therefore decided to conduct its own investigation and was provided with evidence by the South Carolina State Advisory Committee of the Civil Rights Commission. The investigation was long and difficult, not least because local police officials instructed officers not to cooperate with federal investigators, including those from the FBI. After several months, the Division convened a federal grand jury. After eight days of testimony, the grand jury refused to indict.

Pollak remembers that after this failure to indict, "Ramsey Clark, who was the Attorney General at the time, asked us to bring in further information." The federal grand jury had refused to charge officers in what seemed to be a clear case of abuse—a judgment that Governor McNair described as fair. Rather than dropping the case, as it ordinarily would after a failure to indict, the Division reviewed the grand jury testimony. "The conduct, in Clark's view, the Department's view, and my view, was subject to prosecution," Pollak says. "There had been no action by the State of South Carolina relating to the event, so despite the refusal to indict, we exercised the federal role."

In a highly unusual move, the Division decided to bring the patrolmen involved to trial by filing a criminal information. It alleged that eight patrolmen willfully fired at the students "with the intent of imposing summary punishment upon those persons," thereby violating their Constitutional right "not to be deprived of life or liberty without due process of law."[7] At the time the offense

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— Bill Lann Lee

Bill Lann Lee

The Division's strategy is to intervene once local authorities have failed. "The whole name of the game is to have counties police themselves."

— Stephen Pollak

Stephen Pollak

was a misdemeanor and carried a maximum penalty of a year in prison and a $1,000 fine. The Division also acted to require All Star Bowling Lanes to desegregate in compliance with the 1964 Civil Rights Act. The gravity of the events in Orangeburg meant that the Division felt compelled to intervene and prosecute. But their efforts did not pay off. The trial jury proved as reluctant to condemn the police as the federal grand jury: "In the end," Pollak remembers, "there were 'not guilty' verdicts."

This decision reflects the difficulty of the Division's position. Local authorities are primarily responsible for investigating and prosecuting such violations of civil rights, with federal authorities serving as a backstop in case of inaction. However, the local FBI investigation was suspect at best, and it resulted in no state action whatsoever.

Reflecting on Orangeburg, Stephen Pollak still believes that the Division's strategy should be to wait and intervene once, for whatever reason, local authorities have failed to act. "The whole job is to get local authorities and district attorneys to bring these departments in line and bring prosecutions," he says. "If they don't, the Civil Rights Division is out there to come in and vindicate the rule of law for all to see, without any expectation that it will prosecute all cases. The whole name of the game is to have these counties police themselves." Despite the fact that the Division never obtained a conviction in the case, Orangeburg remains an example of how state inaction on police misconduct forced the federal government to intervene.

Juries: THE DIFFICULTY OF OBTAINING CONVICTIONS

Despite the strength of the cases that the Division prosecutes, juries around the country are frequently unwilling to convict police officers. Prosecutors accustomed to benefitting from the sympathies of jurors for the police and against criminals, here find these sympathies working against them. Thomas Perez, Deputy Assistant Attorney General for Civil Rights, recalls a case in which "the victim was an undocumented Mexican national, who may have been involved in trafficking illegal narcotics. Despite the fact that he was shot in the back and there were other egregious circumstances, we had difficulty obtaining a conviction. There is a war against drugs on the border and you're prosecuting the warriors? There was hostility towards that concept." Perez does not feel that that such attitudes are limited to border states. "We certainly encounter hostilities everywhere. You may take a case in the Midwest where you will encounter jurors who simply have relatives in law enforcement."

Not only do many juries feel sympathy for police officers, they are often suspicious of victims. Drew Days, Assistant Attorney General for Civil Rights between 1977 and 1980, believes that this is because the victims of police brutality are often marginalized:

> We talk about caste systems [in other countries], but we have one in the United States. Police, as an institution, pick their victims very carefully. They pick racial minorities, they pick the poor, they pick the homeless, they pick homosexuals, they pick people who in their estimation are strangely dressed. They pick those who do not make very persuasive witnesses. So what you have is a nice, neat, well-spoken cop who says 'I was doing my duty,' and a victim who is often inarticulate, often with a criminal record, and often without anybody to provide character support.

This dynamic makes police misconduct cases even harder to win.

ASSESSING THE limitations OF INDIVIDUAL CRIMINAL PROSECUTIONS

The 1970s saw the Division's first attempt to prosecute whole departments rather than individual officers. Division prosecutors became aware that even when individual criminal prosecutions were successful, they often failed to eliminate the larger culture of abuse and impunity that framed these cases. Drew Days was Assistant Attorney General for Civil Rights in the late 1970s. He remembers the prosecution of members of the Philadelphia homicide squad as "an object lesson on the limits of this enforcement mechanism." The defendants, he explains,

> were notorious for telling suspects in interviews that they would hit them so hard that their hearts would stop if they didn't cooperate. This was a squad that ultimately got a completely innocent civilian to confess to an arson-related murder of a family in North Philadelphia. It was quite a devastating bunch.

The Division tried this case, and won. But Days recalls that the victory failed to spark any change in the department or prevent further abuse:

> After the officers were convicted, they took appeals. When Frank Rizzo, police chief in Philadelphia at the time, was asked whether he was going to suspend the convicted officers, he said 'no.' He said that these officers were innocent until proven guilty by the U.S. Supreme Court, and that he was not going to do anything to violate that presumption of innocence. So we're talking about one of the most powerful tools the federal government possesses being essentially toothless when dealing with institutional and organic problems within a police department like Philadelphia's. It made no systematic change in the way that the police department functioned. Another group simply came forward, took over the homicide squad, and presumably did many of the same things.

Others agree that individual prosecutions often fail to produce the institutional changes needed to eliminate future abuse. John Dunne, Assistant Attorney General between 1990 and 1993, observes, "I really don't think that those few isolated successful prosecutions have had the trickle-down effect that you would hope on the common denominator of police misconduct."

In Philadelphia, violations of citizens' rights continued to occur and dozens of cases of misconduct remained unaddressed. Staff at the Civil Rights Division realized that the incidents they had prosecuted were not isolated, but rather that the Police Department's management actually fostered misconduct and condoned cover-ups. In April 1979, the Police Project of the Public Interest Law Center of Philadelphia (PILCOP) confirmed the extent of the problem, publishing evidence that between 1970 and 1978, Philadelphia police officers killed 75 people who were not involved in a violent felony, were unarmed, and were running away when shot. They found that, on average, the police shot a civilian every week, and that two-thirds of those killed by police were African-American or Latino. Only nine of these incidents of deadly force resulted in disciplinary hearings.[8]

CIVIL ACTION

Faced with these facts, Drew Days remembers, federal prosecutors "began to think about what course of action might be available that hadn't yet been tried." In an unprecedented move, the Division decided to take civil action against the Philadelphia Police Department and key city officials—including the mayor, the medical examiner, the police commissioner, and 15 other police administrators.

Division prosecutors filed *United States v. City of Philadelphia* in August 1979, alleging systematic police abuse of civilians, and departmental policies and practices that deliberately encouraged such abuses. They introduced evidence of routine brutality; use of force to extract information

and confessions; illegal stops, searches and seizures; and regular use of racial slurs by officers. They asserted that the defendants allowed the use of firearms in situations proscribed by state or federal law, condoned fragmented investigations into incidents of abuse, suppressed incriminating evidence of police wrongdoing, accepted implausible explanations for violent incidents caused by police, harassed complainants and witnesses, and terminated investigations of incidents of misconduct prematurely. They also accused the defendants of refusing to discipline officers for known violations, and ignoring the disproportionate victimization of racial minorities.[9]

Drew Days remembers that the Division "put every resource into that case that we reasonably could. We had a prosecution team of six or seven lawyers, an ancillary support staff, and a special team of FBI agents. We had an amazing group working on the case."

The civil lawsuit significantly expanded the Division's previous action against individuals at the Philadelphia Police Department. Rather than targeting specific officers for specific criminal acts, the Division turned the spotlight onto institution-wide misconduct for the first time. But the defendants vigorously challenged the lawsuit's legality, arguing that the Attorney General had no standing to mount such a prosecution. Congress, they contended, had repeatedly denied the Attorney General the power to "seek to advance the civil rights of third persons," and the United States itself had no legal interests that had been affected by any actions of the Philadelphia Police Department.[10] The defendants prevailed and the case was dismissed.

Despite this setback, federal prosecutors and civil rights advocates continued to argue that federal civil cases should be allowed. If the law did not currently permit the Division to sue, then Congress should change the law. Using *United States v. City of Philadelphia* as a model, they proposed that the Civil Rights Division should be authorized to bring actions against departments that engage in a pattern-or-practice of depriving civilians of their rights.[11] Because pattern-or-practice suits would be aimed at entire law enforcement agencies, proponents pointed out, they would enable the Division to target institutional and organic problems in a way that criminal prosecutions could not. These proposals were rejected by Congress in 1980 and again in 1991. But in 1994 Congress finally awarded the Civil Rights Division authority to bring these civil cases.

THE burden of proof

The sheer difficulty of obtaining a conviction is another hurdle that leads civil rights prosecutors to wonder if criminal prosecution is ultimately their best option. Under current laws—those that it has used to prosecute police misconduct since its establishment—the Division is obligated to prove a defendant's specific intent to deprive a victim of constitutional rights. For example, in a case involving excessive force such as that in Philadelphia, Division prosecutors had to show that the officers not only used excessive force but *intended* to do so—a requirement that critics say poses significant obstacles to civil rights prosecutions. The quantum of proof necessary to expect a conviction is equally daunting, often resting on what some lawyers call "the blood-on-the-floor factor." Drew Days explains, "when you have a death or serious bodily injury involved, you up the chances of getting a conviction. But if the case involves an altercation between a police officer and a citizen, and there is an injury such as a broken bone or missing teeth, it is unlikely that one will get a conviction."

CRIMINAL PROSECUTIONS today

Despite the problems that criminal prosecutions pose, the Civil Rights Division continues to bring these cases. Some of the hurdles that prosecutors faced in the past have become less daunting: The grand jury, for example, is now considered a benefit to the Division despite its inherent dangers. And some people feel that the impact of successful prosecutions has grown in significance, achieving the federal government's central aims in intervention: promoting public confidence in the rule of law, deterring future misconduct by other officers, encouraging vigorous local prosecution, and establishing an appropriate and active role for U.S. Attorneys.

THE BENEFITS AND DANGERS OF THE GRAND JURY

Before federal prosecutors can charge anyone with a felony, they must persuade a federal grand jury to indict. The task of a grand jury is to determine whether sufficient evidence, or "probable cause," exists to charge a police officer with a crime. In police misconduct cases, the Civil Rights Division uses the grand jury more expansively than in routine prosecutions, for the grand jury system provides particular benefits in such cases.

A key feature of the federal grand jury is its subpoena authority. Grand juries can issue subpoenas for the appearance of witnesses and the production of evidence—including personnel files, police reports, and radio transmissions. Thomas Perez, Deputy Assistant Attorney General for Civil Rights, argues that this power benefits prosecutors and police officers and their departments alike. A subpoena for documents, he explains, protects a department's integrity because police have no choice but to hand evidence over to the grand jury. If it was not obligated to do so, the department would be in an untenable position. Handing documents over would damage morale as officers might conclude that the department had prejudged the officer. Not handing them over, on the other hand, would undermine public confidence in the department. "Similarly," Perez continues, "officers are understandably reluctant to provide inculpatory evidence against a fellow officer. A subpoena leaves them little choice but to testify."[12]

A second set of benefits flows from the requirement that federal grand jury proceedings be conducted in strict secrecy. Testimony is not disclosed except by witnesses themselves, unless a case goes to trial. The purpose of this secrecy is both to protect the target of the investigation, in case the allegations are false, and to protect witnesses.

Despite these benefits, Civil Rights Division staff recognize

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— James Turner

James Turner

that lack of public and media access to information about grand jury proceedings does raise problems—particularly in sensitive police brutality cases. Isabelle Katz Pinzler remembers that in her year as Acting Assistant Attorney General, she was confronted with a number of situations in which she was unable to provide families and communities of alleged victims with the information for which they asked:

> This happened where we either couldn't prove the case or, in one instance, knew as a result of the investigation that in fact there hadn't been police abuse. I'm referring to a case of a prisoner who died in federal custody. After a very lengthy investigation, we determined that this man committed suicide. But his family didn't believe that—and there was a great deal of press about it. Because all the information making it clear that there was no misconduct was presented in grand jury, we couldn't talk about it.

Katz Pinzler recognizes that this secrecy results in justifiable frustration:

> You hear the story and think that something is going on, that there's some conspiracy and the Civil Rights Division is part of it. I found myself just saying, 'Trust me. If you knew what I know, you wouldn't be concerned about this—it's really not a prosecutable offense.' But that undermines confidence in the system.

As a result, Drew Days believes that the Civil Rights Division should not take cases to grand jury unless there is a strong chance of indictment. As he puts it, "Never use them unless you are really serious." Others take a different view, arguing that the federal government should be more active in responding to local police abuse by taking more cases to grand jury. They point out that using the grand jury for a large number of cases—even those that are weak—might create an impression that the Division is taking action. Days argues that doing so unfairly and unrealistically raises public expectations: "When these cases come back without an indictment, it reduces the credibility of the Civil Rights Division and the federal government. It makes people very cynical about asking us to come in on subsequent investigations." In other words, pursuing a weak case and losing may well be a worse signal to send to both officers and the community than not pursuing it at all.

DEFINING THE CIVIL RIGHTS DIVISION'S ROLE

The Division still struggles with many of the limitations that have historically framed criminal prosecutions—local unease with federal intervention, jury sympathy for police officers, and the enduring problem of institutionalized misconduct, among others. Despite these limitations, however, individual prosecutions can achieve important long-term goals, as well as vindicate the rights of individual victims of police abuse. The 1990 prosecution of two officers in Ironton, Ohio, illustrates this potential for success.

Thomas Perez, recounts the case of *United States v. Bryant and Ackison* in Ironton, a small town in southeast Ohio:

> As in many such towns, the chief of police wields considerable power, and there are no external

mechanisms of control, such as civilian review boards. The federal government is effectively the only mechanism of control. When the federal investigation began in 1990, William Ackison was chief of police. His department consisted of approximately 20 officers, one of whom was David Bryant, Ackison's son-in-law.

The FBI received complaints from two residents of Ironton alleging that Bryant used unreasonable force against them. In both incidents, the victims sustained multiple lacerations to the head when Bryant struck them with his nightstick. After a brief investigation, an FBI agent discovered that civilian and police witnesses were reluctant to cooperate because they were afraid of Chief Ackison. The situation worsened when Chief Ackison circulated a carefully drafted memorandum informing all employees that they were not required to talk to the FBI agent. Most employees interpreted this memorandum to mean that they were not permitted to talk. Moreover, Ackison explicitly told one officer that if he testified, he would be fired.

At the conclusion of the grand jury investigation, Bryant was charged with five violations of federal law in connection with five separate incidents of alleged brutality, and Ackison was charged with two counts of obstruction of justice. Bryant and Ackison were convicted and sentenced to 63 and 46 months of incarceration, respectively.

In many respects, Ironton had become Chief Ackison's fiefdom. Feeling above the law, he intimidated officers into silence. The investigation and prosecution began to restore the community's belief in the rule of law and respect for their government. The prosecution sent a clear message to the officers that the federal government will vigorously investigate police misconduct. Years later, officers vividly recalled the prosecution and expressed a strong desire to avoid a repeat.

FULFILLING OBJECTIVES

The successful prosecution of Bryant and Ackison fulfilled the Division's central objectives in pursuing police misconduct cases. First, the Division aims to promote public confidence in the government and its respect for human rights. By intervening, prosecuting, and convicting, the Division demonstrated to the citizens of Ironton and other departments that the federal government is serious about civil rights.

Second, the Division aims to deter police from engaging in misconduct. The Ironton prosecution sent a message to the other officers in the small department that abuse is intolerable, a message they remember. Drew Days believes that federal prosecutions and awareness of the Division's work can leave a strong impression on local police leaders and officers: "Writing letters, meeting with governors, meeting with state attorneys general, meeting with police chiefs—that will make headlines. It shows that there is always a chance that your case may be the one in which federal authorities take an interest and prosecute."

Third, the Division aims to encourage local officials to control misconduct themselves. Cases like Ironton can advance this goal if the successful federal prosecution motivates local authorities to pursue these cases themselves. The Civil Rights Division remains committed to the key principle of federalism: retaining states as primary law enforcement actors and intervening when they fail, or are unable, to play this role. As then Assistant Attorney General John Dunne argued before Congress in 1991, federal prosecutors "are not the 'front-line' troops in combating instances of police abuse. That role properly lies with the internal affairs bureaus of law enforcement agencies and with state and local prosecutors. The federal enforcement program is more like a 'backstop' to these other resources."[13]

According to Bill Lann Lee, the Division's role continues very much to serve as a backstop to local and state authority. The Rodney King case is perhaps the best known example of the Division playing this role. This deference to state prosecution is crucial because tensions surface when federal authorities bring criminal cases against local officials. James Turner explains that this has always been a problem for the Division: "The premise that bureaucrats from Washington should second guess the actions of local officers who were serving the public on the front line of law and order was a hard sell everywhere."[14]

Establishing the most effective relationship between U.S. Attorneys and its own prosecutors represents the fourth aim of the Division today. Tension sometimes characterizes the relationship between local U.S. Attorneys and the Civil Rights Division in "Main Justice." As Drew Days recalls, when he was Assistant Attorney General for Civil Rights under the Carter administration, "there were U.S. Attorneys who didn't want anything to do with civil rights enforcement. The best

THE DIVISION'S BACKSTOP ROLE:

THE rodney king CASE

On March 3, 1991, George Holliday secretly videotaped four Los Angeles police officers as they surrounded black motorist Rodney Glen King, shot him with Tasar darts, delivered 56 blows to his body using batons, and kicked his head and body six times. Twenty-three other officers stood by and watched without intervening. As a result of the beating, Rodney King suffered multiple skull fractures; permanent brain damage; a broken ankle, jaw and leg; a shattered eye socket and cheekbone; kidney damage; and neurological damage that resulted in paralysis on the left side of his face. After a prolonged local investigation, the District Attorney brought 11 charges against four officers and took the case to trial. On April 29, 1992, a Simi Valley jury acquitted the officers of 10 of the counts, resulting in massive civil unrest.

AP/WIDE WORLD PHOTOS

Top: **Rodney King, 25, shows a bruise on his chest several days after he was beaten by LAPD officers.** Left: **Stacey Koon, Theodore Briseno and Laurence Powell, three of the officers charged with violating Rodney King's civil rights.**

The perception that a gross injustice had occurred, as well as the public outcry that followed, prompted the Civil Rights Division to commence its own investigation into and review of the case. After examining the evidence, Division prosecutors decided to go ahead. They took the case to grand jury and won an indictment. It then went to trial and resulted in two convictions. In the Rodney King case, the Division waited for the outcome of the local prosecution. When it failed, federal prosecutors intervened. Should the Division have preempted the state prosecution from the start? The backstop policy suggests not, despite the tragedy the failed prosecution caused.

version of that was, 'you are the experts, so you do it.' The worst version was, 'I don't want anything to do with you. I'm never going to become governor or senator if I get involved in those cases'."

On the other hand, Days notes, there are U.S. Attorneys who are highly motivated to take on civil rights cases. The U.S. Attorney's office in Houston, for example, housed a civil rights unit that prosecuted police misconduct. "We need an effective and respectable federal presence in civil rights enforcement," Days concludes. "And particularly with respect to police misconduct, this has to include much more measurable and impressive participation from U.S. Attorneys than has been the case up until now." The norm today is for the Division to prosecute cases jointly with local U.S. Attorney offices, according to Bill Lann Lee.

These four aims continue to guide the Division today as it chooses when and where Washington should intervene and prosecute police misconduct. Individual prosecution can advance all of these aims. But such criminal prosecutions only define part of the federal government's responsibility, particularly in departments where misconduct is widespread. Since the late 1970s, therefore, Division staff have attempted to find additional tools that could provide solutions to the problems unaddressed by criminal prosecutions. The passage of the Violent Crime Control and Law Enforcement Act of 1994 gave the Division such a tool.

CIVIL SUITS AGAINST A pattern-or-practice OF MISCONDUCT

As we have seen, prosecutors and advocates have long argued that civil actions against departments—such as the one that the Division attempted to bring against the Philadelphia Police Department in 1979—should be made part of the federal government's arsenal against police misconduct. The beating of Rodney King focused congressional attention on the problem of police misconduct, and in 1994—15 years after *United States v. City of Philadelphia*—the Violent Crime Control and Law Enforcement Act (the omnibus Crime Bill) included a provision that awarded "pattern-or-practice" authority to the Department of Justice for the first time.[15]

When Civil Rights Division prosecutors gather sufficient evidence of systematic violations of constitutional rights or federal law by a police department, they may seek a judge's statement of the legal standards that govern that department (declaratory relief) and a court order that forces it to abide by those laws (equitable relief). This order can specify reforms that the department must implement in order to avoid further legal action.

Pattern-or-practice suits are pursued by the Division's Special Litigation Section. In order to obtain declaratory and equitable relief, the Section's prosecutors must prove in court that a law enforcement agency either has an illegal policy, or that a set of incidents constitute a pattern of unlawful conduct. The Division need not prove that discriminatory motives prompted the policy or conduct in question; but while in criminal cases evidence of misconduct must establish proof "beyond a reasonable doubt," in civil cases the proof must satisfy a lower standard of a "preponderance of the evidence."[16] Conduct constituting a pattern or practice of misconduct can include excessive force, harassment, false arrests, coercive sexual conduct, and unlawful stops, searches, and arrests.

THE first PATTERN-OR-PRACTICE SUITS

The Civil Rights Division used its new pattern-or-practice authority for the first time in 1996. Special Litigation Section prosecutors alleged that, since 1990, the police department in Pittsburgh, Pennsylvania had engaged in systematic violations of the law in its misconduct investigations and its training, supervision, and discipline procedures.[17] They based these allegations on a long process of interviewing police officials and witnesses to alleged abuse, reviewing police records, and evaluating departmental policies with the help of experts.

The defendants—which included the Pittsburgh Bureau of Police (PBP) and the Department of Public Safety (DPS)—denied all the Division's allegations. However, they agreed that the best way to avoid the risk and costs of the federal suit, as well as future claims of systematic misconduct, was to reform their managerial practices and procedures. They therefore entered into a consent decree with the Division that established comprehensive and specific measures to improve their conduct. The consent decree was approved by the Court on April 26, 1997, and included the following reforms:

- The PBP must keep automated records on the performance of every officer. This includes an early warning system to identify problem officers.
- The PBP must implement a use of force policy that is in compliance with laws and professional standards. It must also develop a use of force reporting system.
- Only specially trained personnel are allowed to conduct strip searches, and only when authorized by a supervisor.
- The City must analyze reports of racial bias and use of racial epithets on a quarterly basis.
- Police officers who are arrested, charged, or accused of untruthfulness, physical force, racial bias, or domestic violence in a civil suit must notify their employers.
- Cultural sensitivity training must be expanded to include training in communications skills and avoiding improper racial, ethnic, and sexual communications.
- An independent auditor must prepare quarterly reports on compliance with all aspects of the order.

The consent decree is an order of the court with a five-year active life. The City of Pittsburgh must be in compliance with its demands within three years—that is, by April 2000—and must maintain these standards for two more. It can then petition to vacate the decree. The judge who approved the decree also determines whether the City is in compliance with its terms.

The Civil Rights Division entered into a similar consent de-

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—John Dunne

John Dunne

cree on August 28, 1997 with the City of Steubenville, Ohio. Earlier that year, the Division had filed a civil suit against the Steubenville Police Department, accusing it of engaging in a pattern-or-practice of subjecting civilians to excessive use of force, false arrests, charges, and reports, and improper stops, searches, and seizures. Police officers in Steubenville reportedly beat witnesses of misconduct, falsified reports, and tampered with official police records in order to cover up misconduct. As in Pittsburgh, the department denied the allegations. But, among other reforms, the city agreed to improve training, implement use-of-force guidelines and reporting procedures, create an internal affairs unit, and develop a system to track civilian complaints and civil lawsuits against officers.[18]

THE POTENTIAL FOR INSTITUTIONAL reform

Because pattern-or-practice authority is a relatively new development, scholars, prosecutors, and other observers are reluctant to draw firm conclusions about these federal civil actions at this point. But they note that these suits give the Division the considerable capability to open up an entire law enforcement organization to scrutiny. As the Pittsburgh and Steubenville consent decrees illustrate, pattern-or-practice suits force departments to reassess and reform entire managerial, training, and disciplinary systems.

Proponents of these suits believe that they can generate meaningful institutional reform in at least three ways beyond the detailed terms of the consent decrees themselves. First, they engage police leadership in the process, and it is they who set the tone on civil rights in their departments. As John Dunne explains,

> In going to speak to the National Police Academy as Assistant Attorney General, I was very troubled by remarks made by middle-level career police officers who were identified as prospective leaders. They showed very little interest in the work of the Civil Rights Division and the standards to which we believe their operations should be held. Like so many other things, this attitude starts at the top. Unless our message gets across to chiefs, mayors, and those who have ultimate responsibility, problems are going to continue.

Consent decrees are therefore particularly powerful, Dunne argues, because they force leaders and top-level officials to commit to reform:

> If you can get a police chief, a mayor, or a governor to be a signatory to a piece of civil litigation, I think you are going to achieve a great deal more in producing a proper standard of conduct throughout the department. It's got to start at the top.

Dunne also believes that pat-

"I want it both ways. I think we still have to do the criminal prosecutions and bring pattern-or-practice suits."

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Drew Days

tern-or-practice suits are less threatening to the public than criminal prosecutions aimed at individual police officers. He explains, "As outrageous as an individual officer's conduct may be, deep down the average citizen may think, 'this cop in blue stands between me and the evil forces in the community.' On the other hand when the public sees a litany of stipulations to which a police department has agreed, it's palatable." Members of the public who are concerned about law and order may ultimately see institutional change as fairer than targeting the behavior of particular police officers. This may result, Dunne argues, in greater public support for efforts to reform the police.

Finally, reform packages that result from pattern-or-practice suits have a wider national impact than sanctions resulting from localized criminal cases. Although the consent decrees reached in Pittsburgh and Steubenville were tailored to problems within those specific departments, they have been used as models of reform by other law enforcement agencies.[19] They offer those interested in remedying misconduct a tangible set of changes that can be effected in departments throughout the country.

As experience with these suits grows, observers are pointing out that they require resources long after the litigation is concluded. As Stephen Pollak asks, "What is the federal government doing to monitor these orders? Are they just another set of orders out there that everyone will forget about in a few years?" Questions like these about the use of Division resources have opened up a debate about the relative merits of criminal and civil cases, and the priority the Division should give to each in future efforts to prosecute police abuse of power.

James Turner argues that pattern-or-practice "rounds out a comprehensive system for the protection of federal rights," suggesting that it is part of a greater whole.[20] Similarly, Isabelle Katz Pinzler concludes, "I want it both ways. I think we still have to do the criminal prosecutions and bring pattern-or-practice suits." However, she acknowledges that "there aren't enough resources in pattern-or-practice right now."

John Dunne reaches a different conclusion. "For many years," he argues, "criminal prosecution was the only act in town. But pattern-or-practice authority casts a whole new light on the matter of Civil Rights Division responsibility." This new option leads him to urge heavy, if not exclusive, emphasis on these civil actions. "I say let's go for pattern-or-practice cases," he says. "I believe today that it is perhaps not the best use of resources to bring criminal prosecutions — because of the blue wall of silence, because of the burden of proof in criminal cases, and because these few isolated convictions have not had the trickle down effect that one would hope for."

Others argue that cost-benefit analysis should never cause the Division to abandon the vindication of individual rights. Drew Days, for one, still believes that federal authorities have a moral obligation to vindicate victims of police abuse, such as Rodney King, using individual criminal prosecutions. As he says,

> If somebody is dead or seriously wounded as a result of police brutality, something has to be done about it. From the standpoint of the federal government, there is no higher responsibility. That really is at the heart of constitutional government. If the federal government is not going to protect people's rights against this type of abuse, then what does federal government exist to do?

The Division, according to Bill Lann Lee, will continue to exercise both its civil and criminal jurisdiction. But this debate about the Division's most appropriate and effective roles in responding to police misconduct promises to continue as prosecutors, advocates, and the public learn more about the actual long-term costs and benefits of this new civil authority.

NOTES

[1] Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. Cal. L. Rev. 1492.

[2] Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States*, New York: Human Rights Watch, 1998, 95. This number excludes managers.

[3] James P. Turner, *Police Accountability in the Federal System*, 20. Unpublished paper, prepared for meeting of Assistant Attorneys General for Civil Rights at the Vera Institute of Justice, June 23, 1998.

[4] Charles Lowery and John F. Marszalek, eds. *Encyclopedia of African American Civil Rights*. Westport, CT: Greenwood Publishing Group, 1992, 414-415.

[5] Jack Bass and Jack Nelson, *The Orangeburg Massacre*, Macon, GA: Mercer University Press, 1984, 146.

[6] James P. Turner, *Police Accountability in the Federal System*, 20.

[7] Bass and Nelson, *The Orangeburg Massacre*, 153-157.

[8] PILCOP, *Deadly Force: Police Use of Firearms 1970-1978*, April 19, 1979. (Introductory Statement of Anthony E. Jackson, Director, Police Project, PILCOP).

[9] *United States v. City of Philadelphia*, 482 F. Supp. 1248 (E.D. Pa. 1979).

[10] *United States v. City of Philadelphia* (1979).

[11] See, for example, Stephanie L. Franklin, United States v. City of Philadelphia: *A Continued Quest for an Effective Remedy for Police Misconduct*, 7 The Black L.J. No. 1 (1981): 180-200.

[12] Thomas Perez, *External Governmental Mechanisms of Police Accountability: Three Investigative Structures*. Unpublished paper, prepared for a Vera Institute of Justice and Ford Foundation conference on Police in Democratic Societies, Arden Conference Center, Harriman, NY, March 23-25, 1998.

[13] Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102nd Cong., 1st Sess. (1991).

[14] James P. Turner, *Police Accountability in the Federal System*, 17.

[15] "Police Pattern-or-practice" 42 U.S.C. § 14141. The statute states:

> It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern-or-practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.
>
> Whenever the Attorney General has reasonable cause to believe that a violation of [the above] has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern-or-practice.

[16] U.S. Department of Justice, *Addressing Police Misconduct: Laws Enforced by the United States Department of Justice*, 1997.

[17] *United States v. City of Pittsburgh*, W.D. Pa., Civil No. 97-0354.

[18] *United States v. City of Steubenville*, S.D. Oh., Civil No. C2 97-966.

[19] United States Department of Justice, *Civil Rights Division Activities and Programs*, February 1998. Online. October 21, 1998. http://www.usdoj.gov/crt/activity.html.

[20] James P. Turner, *Police Accountability in the Federal System*, 29.

POSTSCRIPT

Heather Ward, Planner

The meeting of former and current officials of the Civil Rights Division, held at the Vera Institute of Justice on June 8, 1998, is part of an ongoing effort at Vera to explore ways in which democratic societies hold their police accountable for both public safety and treatment of citizens.

In the last year, we have tested the ideas of democratic policing and accountability laid out in the introduction by Chris Stone through conversations with police, government officials, representatives of nongovernmental organizations, and academics in many countries where democracy is fresh and evolving: Argentina, Brazil, Chile, India, South Africa, Uganda, Hungary, Poland, and Russia. We added to this list New York and Los Angeles, two U.S. cities that have served for years as crucibles of police reform.

Today Vera is working on many fronts to explore these themes more deeply. We are producing original research on several topics: the regulation of various models of private policing, local collaborations between police and community-based organizations to address public safety, and policing practices in New York City that are credited with the City's dramatic drop in crime over the last four years. In addition, we are collecting information from around the world about both the successes and failures of police in democratic societies to address citizens' concerns about crime and to treat civilians fairly.

The products of Vera's work are available to anyone with interest in this topic. A comprehensive bibliography is posted on our website (www.vera.org). It contains more than 500 references on policing and related topics from all regions of the world. In the future, visitors to the website will also find the texts of our research reports and of papers we have commissioned from international criminal justice and human rights experts.

If you would like to share information with Vera about your work on international police accountability and public safety, or if you would like more information about Vera's activities in this area, contact Heather Ward at (212) 334-1300 (hward@vera.org).

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