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## NEW CASES, NEW CHALLENGES: STUDENT COMMENTS

*Editor's Note: Even as we pause to assess the prospects and role of the black lawyer, it is important to remember that the struggle goes on. Black lawyers across the country are called upon to initiate and to respond to litigation having potential ramifications far beyond the boundaries of the particular dispute. Notwithstanding the need to involve other disciplines and to invoke other forums, judicial decrees emanating from litigation will continue to impact upon the rights, interests and common fate of black people. Consequently, the Board is pleased to offer three student comments focusing on ongoing cases of potential significance to the black community.*

*The student commentators deal with new twists on familiar problems. Stephanie Franklin's comment takes yet another look at the continuing search for ways to protect against misconduct and brutality by police who are charged with upholding the law. Nancy Love explores an innovative defense to the "reverse discrimination" allegation which has spawned a whole new genre of litigation. Charles Johnson wrestles with the difficult task of assuring implementation of even limited political concessions.*

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### ***UNITED STATES v. CITY OF PHILADELPHIA: A CONTINUED QUEST FOR AN EFFECTIVE REMEDY FOR POLICE MISCONDUCT***

#### I. INTRODUCTION

*United States v. City of Philadelphia*<sup>1</sup> presents the first real legal attack on institutionalized police misconduct.<sup>2</sup> In this unprecedented civil action,

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

2. *Police misconduct* refers to all police behavior allegedly violating the constitutional rights of citizens. See *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979). Cases of "improper" or "unnecessary" use of force may be determined by the following standards: 1) If a citizen is physically assaulted by a police officer without an arrest (proper use of force requires an arrest); 2) If the arrestee did not verbally or physically resist the policeman (force should only be used if necessary to the arrest); 3) If the force was used to counter resistance to the arrest when the arrestee could easily have been restrained in other ways; 4) If force used in the presence of other policemen who could have assisted in subduing the arrestee, such as in the station, in the lock-up, and in the

the United States government accused the Philadelphia Police Department and key city officials not only of condoning violent individual incidents, but also of maintaining policies that, in effect, encouraged a pattern of abuse and its cover-up.<sup>3</sup> This governmental intervention on behalf of private citizens surpassed the range of traditionally acceptable remedies. The United States classified the problem as institutional and urged relief and reform on an organizational level that available remedies were incapable of providing.<sup>4</sup>

The underlying issue in *United States v. City of Philadelphia* is whether society can exert effective control over an institution such as the police, that possesses so much potential for depriving citizens of constitutional liberties.<sup>5</sup> Traditional responses tailored remedies to the perception that police abuse occurred in sporadic isolated instances. These remedies focused on the individual conduct of the officer and any resulting violations of individual liberties.<sup>6</sup> Although more recent approaches acknowledge the necessary interaction between police and community in a dynamic situation, the remedies themselves remain limited to individual sanctions. In cases of administratively tolerated police misconduct, the traditional remedies lack sufficient scope and impact to protect the victim.<sup>7</sup>

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interrogation room); 5) If an arrestee was handcuffed and did not try to escape or resist with violence; 6) If a citizen resisted arrest but the police use of force continued after the citizen was subdued. See A. REISS, POLICE BRUTALITY—ANSWERS TO KEY QUESTIONS IN THE AMBIVALENT FORCE (1970) 323-324.

3. *Philadelphia Police Sued*, 10 EDITORIALS ON FILE 16 (1979) at 946.

4. Legal mechanisms for controlling police misconduct include 1) the exclusionary rule which bars the use of illegally obtained evidence, 2) actions by the internal affairs component of the police department, 3) criminal sanctions, and 4) civil suits. See 88 YALE L.J. 781 (1979) at 4. These remedies address isolated individual conduct: several will be discussed *infra*.

5. The traditional function of the police, as instruments of the people, is to achieve and maintain order based on principles of public service and ultimate responsibility to the public. See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, POLICE 9 (1973). While discretion is a necessary component of that function, a decision whether to arrest, to make a referral, to seek prosecution, or to use force has a profound effect on the communities which the police are expected to serve, *id*. In minority communities, the police exercise a great deal of discretion that has a negative impact on blacks when allowed to go unchecked. See, e.g., M.W. Meyer, *Police Shooting at Minorities: The Case of Los Angeles*, 452 ANNALS 98 (1980). This unchecked discretion leads to blacks being arrested between three and four times more frequently than whites, *id*. A dual system of law enforcement and protection in black and white communities provokes police-black community tension. See U.S. COMMISSION ON CIVIL RIGHTS, A CONSULTATION ON POLICE PRACTICES AND THE PRESERVATION OF CIVIL RIGHTS 6, (1979); Jones, *The Police in America: a Black Viewpoint*, 9 THE BLACK SCHOLAR 22, 28 (1977) [hereinafter referred to as *A Black Viewpoint*.] See also Katzenbach, *Overwhelmed in Miami*, 3, POLICE MAGAZINE, 6, 8 (1980); *Rage in Miami, A Warning*, 88; U.S. WORLD AND NEWS REPORT 19 (1980). While the police represent the power and the authority of the state and thus must be violent, they are typically violent toward minorities and the poor. Manning, *Violence and the Police Role*, 452 ANNALS 135 (1980).

6. See remarks by Drew S. Days III, Symposium II on Texas Law Enforcement and Community Relations (Nov. 10, 1979). Theories regarding the use of force by police may be categorized into three different approaches: 1) the individual approach which explains police use of force in terms of the characteristics of the officers, see Binder, *THE VIOLENT POLICE-CITIZEN ENCOUNTER* 452 ANNALS 111 (1980); 2) the situational approach which relates police use of force to the specific characteristics of the situation in which police encounter citizens, *id*; and at 3) the organizational approach which views the use of force as a product of the organizational setting. See Reiss, *Controlling Police Use of Deadly Force*, 452 ANNALS 122 (1980). See generally Friedrich, *Police Use of Force: Individuals, Situations, and Organizations*, 452 ANNALS 82 (1980).

7. The Commission on Law Enforcement and Administration of Justice, in 1967, and The National Advisory Commission on Civil Disorders (The Kerner Commission), in 1968, examined the police-community relationship and the potential tension and conflict resulting from police mis-

This comment will explore the inadequacies of these traditional remedies when the root of the problem is systemic, as opposed to individual, and evaluate the need for the type of governmental intervention advocated in *City of Philadelphia*.

## II. *UNITED STATES V. CITY OF PHILADELPHIA*

The Justice Department commenced *United States v. City of Philadelphia*<sup>8</sup> in the United States District Court for the Eastern District of Pennsylvania on August 13, 1979. The United States charged the defendants with "widespread and severe interference with federal constitutional mandates, statutory requirements, and established national policies."<sup>9</sup> The named defendants, in addition to the city itself,<sup>10</sup> included in their official capacities, the Mayor, the Managing Director, the Medical Examiner, the Director of Finance, and the Police Commissioner, along with fifteen other police administrators.

The complaint alleged a pattern of police misconduct consisting of: 1) widespread brutality and violations of federal law by individual employees of the Philadelphia Police Department, and 2) tolerance and encouragement of these violations by the defendants through their policies and procedures.<sup>11</sup> The United States charged individual officers (unnamed) with abusive conduct in the treatment of citizens encountered on the streets or elsewhere, the use of unnecessary deadly force, physical abuse of arrestees and prisoners, the use of physical brutality to extract information and confessions, stopping citizens without probable cause, and illegal searches and seizures.<sup>12</sup>

The internal procedures approved by the defendants were challenged as contributing to the physical abuse and other violations of constitutional liberties. The United States asserted that the defendants permitted the use of firearms in situations proscribed by state or federal law and condoned fragmented investigations which fostered the suppression of inculpatory evidence, the acceptance of implausible explanations, the harassment of complainants and witnesses, and the premature termination of investigations.<sup>13</sup> Moreover, the defendants allegedly refused to discipline police officers for known violations,<sup>14</sup> and ignored the fact that black and Hispanic citizens had been disproportionately victimized by the pattern of police

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conduct. Lawless behavior on the part of the police was identified as "an overwhelmingly important factor in exacerbating racial tensions in urban centers and as sparking incidents which ultimately resulted in the catastrophic riots of 1968."

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

9. Complaint for Plaintiff, *United States v. City of Philadelphia*, No. 79-2937 (E.D. Pa. filed Aug. 13, 1979) at 1.

10. In *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), the Court held that "local governing bodies, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." See Blum, FROM MONROE TO MONELL: DEFINING THE SCOPE OF MUNICIPAL LIABILITY IN FEDERAL COURTS, 51 TEMPLE L.Q. 409 (1978).

11. Complaint, *United States v. City of Philadelphia*, No. 79-2937 (E.D. Pa. filed Aug. 13, 1979).

12. *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1252 (E.D. Pa. 1979).

13. *Id.*

14. Brief for Appellant, *United States v. City of Philadelphia*, No. 80-1348 (3rd Cir., filed April 22, 1980) at 5.

abuse.<sup>15</sup>

The factual allegations of the complaint were substantiated by the United States' replies to interrogatories of the defendants.<sup>16</sup> The information disclosed in these replies was amassed by the Justice Department's investigation of complaints and incidents brought to its attention by several interest groups in Philadelphia. These interest groups and various individuals<sup>17</sup> have repeatedly investigated and studied the Philadelphia Police Department because of its notoriety as the most brutal department in the nation.<sup>18</sup> Consequently, this department serves as a model for evaluating the failure of police accountability throughout the country.<sup>19</sup> It was targeted by the Justice Department as a result of the magnitude of reported police brutality, which apparently went unchecked for an extended period of time.<sup>20</sup>

The Pulitzer prize-winning newspaper, *The Philadelphia Inquirer*, was instrumental in highlighting the issue of police brutality.<sup>21</sup> A four-part series, entitled *The Homicide File*, was published in April, 1977. The investigative reporters noted that "there is a pattern of beatings, threats of violence, intimidation, coercion, and knowing disregard for the constitutional rights in the interrogation of homicide suspects and witnesses."<sup>22</sup> Local judges heard 433 homicide cases from 1974 to April, 1977, eighty of which involved police misconduct in the questioning of suspects.<sup>23</sup> *The Philadelphia In-*

15. *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1252 (E.D. Pa. 1979).

16. In response to interrogatories of the defendants, the United States provided extensive information resulting from its investigation of the incidents underlying the complaint's allegations. First Reply identified 810 prisoners injured by Philadelphia police officers, including photographs of injuries. Also included in this reply was a list of 290 persons shot by police between January 1, 1975 and December 10, 1978. In the Second Reply, the United States outlined the deliberate fragmentation of the investigation procedure. The Philadelphia Internal Affairs Bureau had no established guidelines or directives with respect to what matters would be formally investigated. Prisoner complaints, forwarded to the department with photographs of the injuries, were not followed through with prisoner statements, interviews with witnesses, visits to the scene, background information on the officers, etc. Civil suits alleging police misconduct did not initiate investigations by the Internal Affairs Bureau to ascertain whether the city would defend the offending officer or discipline him. The Third Reply examined the Philadelphia Detective Bureau, Staff Services, Training Bureau, Prisons and Uniformed Forces Division and their contributions to the procedural fragmentation. This included unsubstantiated cover charges, numerous tactics to frustrate investigations by the District Attorney and the United States Attorney, and examples of harassment of critics of the department; Brief of Amici Curiae, *United States v. City of Philadelphia*, No. 80-1348 (3rd Cir., filed Oct. 2, 1980) at 6-9.

17. See, e.g., Schwartz, COMPLAINTS AGAINST THE POLICE EXPERIENCE OF THE COMMUNITY RIGHTS DIVISION OF THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, 118 U. PA. L. REV. 1023 (1970).

18. *Time*, Sept. 19, 1977 at 29-30.

19. C. ALEXANDER, *THE POLITICS OF POLICE BRUTALITY* (Dec. 15, 1979) (unpublished thesis) at 14.

20. *Id.*

21. In its initial story, the *Inquirer* revealed that homicide detectives had beaten, threatened, and coerced Robert Wilkinson, a mildly retarded mechanic, into making statements which led to his conviction for second degree murder in the firebombing death of a Puerto Rican woman and her four children. A month later, another man confessed to the firebombing. The six detectives involved were convicted in federal court of conspiracy to violate the civil rights of Wilkinson. The local authorities had decided not to prosecute.

22. *The Homicide File*, *Philadelphia Inquirer* (booklet reprint of a four-part series published April 24-27, 1977) at 3.

23. *Id.* at 8.

*quirer* charged that "top officials know of and tolerate the coercive measures."<sup>24</sup>

This series of articles prompted an investigation by the Pennsylvania Legislature. The Judiciary Committee's Sub-Committee on Crime and Corrections of the Pennsylvania House of Representatives decided to include the violation of civil rights by and against law enforcement officers in its proposed investigation of organized crime and public corruption.<sup>25</sup> The sub-committee found that a small but significant number of Philadelphia police officers routinely engaged in verbal and physical abuse of citizens to a degree considered lawless. It concluded that the level of abuse had reached that of homicidal violence.<sup>26</sup> The routine denial of the misconduct of certain police officers by the administration resulted in a public perception that the lawlessness was condoned and encouraged.<sup>27</sup>

In 1976, the Police Project of the Public Interest Law Center of Philadelphia (PILCOP) reported its findings on police abuse for that year.<sup>28</sup> The project, funded by a grant from the Law Enforcement Assistance Agency (LEAA), documented a widespread pattern of beatings by police. Statistics compiled by PILCOP indicated 272 reported beatings, resulting in 175 victims requiring medical treatment.<sup>29</sup> PILCOP forwarded sixty-nine cases to the Philadelphia Police Commissioner with the request that the police department investigate them. Of these, only one complainant was known to have been requested to testify against a Philadelphia police officer in a Police Board of Inquiry hearing. This sole complainant heard nothing of the complaint's disposition. None of the officers named in the sixty-nine complaints was ever disciplined by the police department.<sup>30</sup>

More recently, the PILCOP Police Project released a statement in April, 1979, which focuses on recent incidents of the use of deadly force by the Philadelphia police. PILCOP reports "a pattern and practice of alleged

24. *Id.* at 16.

25. A special report was issued on November 15, 1978 concerning the violation of civil rights in Philadelphia, Pa. House of Representatives Judiciary Committee Sub-committee on Crime and Corrections, Special Report on the Violations of Civil Rights by and against Law Enforcement Authorities in the City of Philadelphia Pursuant to House Resolution 109 (1978) at 3 [hereinafter referred to as SPECIAL REPORT].

26. *Id.* at 7.

27. *Id.* The sub-committee determined that Philadelphia lacked effective police leadership in controlling the lawlessness and that the failure of the administration to provide adequate internal discipline resulted in: a) the loss of integrity of its police force in the general community; b) the failure to protect the public from police misconduct; c) the failure to remove those whose transgressions make them unacceptable for further service; d) the failure to retrain and correct employees guilty of misconduct; and 3) the failure to protect innocent police officers, *id.* 7.

28. See *On the Street: Police Violence in Philadelphia*, Philadelphia Inquirer (booklet reprint of series of articles from the late spring and summer of 1977).

29. One hundred and thirteen of those victims which required medical treatment were taken to emergency rooms by police before arraignment. Of those reportedly beaten, 146 were black and thirty-six were women. One hundred and seventy-nine of the victims were thirty years or younger. One hundred and sixty-three of the beatings occurred in the street; forty-three occurred in district station houses. The Police Project of the Public Interest Law Center of Philadelphia (PILCOP) report indicated that forty-nine of the 272 people beaten were not charged with any crime. In 137 of the other cases, the victims were charged only with offenses related to the beating, such as, resisting arrest, assaulting police officers or disorderly conduct. Of those arrested on such charges, only twelve percent were convicted, and the remainder either acquitted, had charges dropped or were enrolled in a non-reporting probation program that left them with no criminal record, *id.*

30. *Id.*

shootings that are condoned by the police and city administration by the lack of disciplinary action against the offending officers."<sup>31</sup> According to the Police Project's director, police in Philadelphia, over a period of nine years, have shot seventy-five persons who were not involved in a violent felony, who were not armed, and who were running away when they were shot dead.<sup>32</sup> The report found that the police shot a person on the average of once a week and two out of every three persons killed in 1978 were black or Hispanic. Only nine disciplinary hearings were held in connection with the deadly force incidents.<sup>33</sup> This report was submitted to the United States Commission on Civil Rights, which was simultaneously conducting public hearings in Philadelphia.

The United States Commission on Civil Rights held public hearings in Philadelphia in February and April, 1979. These hearings, along with hearings conducted in Houston in June, were part of a study by the Commission on what actions the federal government might take in cases of reported systemic civil rights abuses by the police.<sup>34</sup> The commission heard twenty-nine witnesses from both the community and the police department give highly conflicting testimony as to whether or not police misconduct actually existed in Philadelphia.<sup>35</sup>

### III. LEGAL ANALYSIS

The defendants filed answers to the United States' complaint, denying the basic allegations and challenging the Attorney General's standing to maintain the suit. They argued that there was no authority for the United States "to embark upon a lawsuit which seeks to throw into receivership the police department of any municipality."<sup>36</sup> The defendants asserted that: 1) the Attorney General had no express or implied statutory authority to bring this lawsuit; 2) the United States suffered no legal injury sufficient to constitute a case or controversy within the meaning of Article III of the Constitution; and 3) the United States possessed no legal interest which had been affected by any actions of the Philadelphia Police Department.<sup>37</sup>

The United States countered that the Attorney General has authority to bring this lawsuit based on 1) express statutory authority under section 518(b), title 28, of the United States Code; 2) implied statutory authority from federal statutes where additional remedies aid in the enforcement of statutory rights; and 3) inherent authority of the executive branch to remedy

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

32. *Id.* at 2.

33. *Id.* at 6.

34. *Police Practices and Civil Rights: Hearing Before the U.S. Commission on Civil Rights* (1979) (testimony in Philadelphia, Pennsylvania) at 1-2, [hereinafter cited as *Hearing*].

35. Mayor Rizzo testified that there was absolutely no pattern, practice, or problem with police misconduct in Philadelphia and that any perception of such a problem was media-generated for the sake of publicity, *Id.* at 245. Anthony Jackson, on the other hand, testified, as Director of the PILCOP Police Project, that over 2,500 citizen complaints of police misconduct had been handled by PILCOP since its opening in September, 1975.

36. Brief for Defendants, *United States v. City of Philadelphia*, No. 79-2937 (E.D. Pa., filed September 21, 1979 on the issue of standing) at 1.

37. *Id.*

unconstitutional state action.<sup>38</sup>

Judge Ditter dismissed the complaint except to the extent that it charged discrimination on the basis of race, color, or national origin in the administration of federally funded programs.<sup>39</sup> Ditter held that the Attorney General had no standing to seek to advance the civil rights of third persons, absent an express grant of authority by an Act of Congress.<sup>40</sup>

In rejecting the various arguments of the United States, Ditter placed "overwhelming significance" on legislative history and the fact that three separate attempts to grant similar power to the Attorney General, by express statutory authority, had failed in Congress.<sup>41</sup> He reasoned that, in asserting standing in the United States to redress all violations of constitutional rights, the Attorney General was claiming even broader powers than had been expressly and repeatedly denied by Congress.<sup>42</sup>

Moreover, Ditter rejected the United States' interpretation of 28 U.S.C. § 518(b)<sup>43</sup> and held that the Attorney General lacked express statutory authority under this provision. The United States contended that the proper reading of the statute would allow this type of lawsuit since the United States had an "interest" in the enforcement of civil rights. Ditter, however, categorized the statute as "merely a housekeeping provision which pertains to the internal organization of the federal government."<sup>44</sup> He was persuaded by the argument that the United States had statutory authority to sue for the

38. Brief for Plaintiffs, *United States v. City of Philadelphia*, No. 79-2937 (E.D. Pa., filed September 18, 1979 on the issue of standing and mootness) at 4. See also Brief for Plaintiffs, *United States v. City of Philadelphia*, No. 79-2937 (E.D. Pa., filed September 21, 1979 on the sole issue of standing.)

39. *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1259 (E.D. Pa. 1979), 482 F. Supp. at 1270.

40. *Id.*

41. In 1957, 1960, and 1964, Congress refused to enact the proposed amendment title III, to the Civil Rights Acts as an alternative means of enforcing section 1985, which provides relief from conspiracies to interfere with constitutional rights 42 U.S.C. § 1985 (1976). Under the terms of the statute, such conspiracies can be redressed only by a civil suit by the injured individual. The amendment would have permitted the Attorney General to institute a suit for injunctive relief whenever section 1985 was violated, H.R. Rep. No. 2981, 85th Cong., 1st Sess., reprinted in 1957 U.S. CODE CONG. & AD. NEWS 1966. For the unadopted amendment to the Civil Rights Act of 1960 see H.R. Rep. No. 956, 86th Cong., 2d Sess., reprinted in 1960 U.S. CODE CONG. & AD. NEWS 1925, 1953-1954. For the unadopted amendment to the Civil Rights Act of 1964 see H.R. REP. No. 914, 88th Cong., 2d Sess., reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2355, 2392, 2450.

42. 482 F. Supp. at 1257. One commentator has suggested that all of the proposed amendments discussed by the court focused upon giving the Attorney General the authority to sue for constitutional violations on behalf of any individual. In *City of Philadelphia*, however, the Attorney General sought only the more limited power to enjoin widespread deprivations of constitutional rights; comment, *The Authority of the Attorney General to Institute Police Brutality Suits—United States v. City of Philadelphia*, 17 AM. CRIM. L. REV. 255, 263 (1979) [hereinafter cited as *The Authority of the Attorney General*].

43. 28 U.S.C. § 518(b) (1976) provides: "When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so."

44. 482 F. Supp. at 1258. One commentator has concluded that the case law and legislative history of the provision do not support this interpretation. On the contrary, the Attorney General does have standing to sue in this type of case based on the exercise of executive power under Section 518(b), if the United States had demonstrated that it had a sufficient "interest" in protecting victims of police abuse from widespread deprivations of their constitutional rights; comment, *The Authority of the Attorney General*, *supra* note 42, at 265-267.



purpose of preventing discrimination in federally funded programs under 42 U.S.C. § 2000d<sup>45</sup> and retained jurisdiction over that portion of the complaint.<sup>46</sup>

Judge Ditter was convinced by the defendants' allegation that the United States lacked implied statutory authority under 18 U.S.C. §§ 241-242.<sup>47</sup> Although these statutes created criminal penalties for the violation of civil rights, the United States argued that they presented implied authority for a civil action on the ground that Congress did not intend the criminal penalties to be exclusive in cases where they were rendered inadequate.<sup>48</sup> Ditter, however, considered the criminal penalties to be adequate, and held that since Congress had failed to enact the amendment to the Civil Rights Acts of 1957, 1960, and 1964, Congress did not intend to imply civil remedies. He reasoned that Congress "could not intend to do implicitly what it has refused to do expressly."<sup>49</sup>

Moreover, the court rejected the United States' argument that the Attorney General could sue whenever Congress had not adequately provided for the protection of constitutional rights or when the health, welfare, and safety of its citizens are threatened.<sup>50</sup> Ditter found that these interests had been adequately protected by Congress.

On November 20, 1979, the defendants filed a motion to dismiss the remaining claim that the city had discriminated in the application of federal

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45. The United States refers to 42 U.S.C. § 2000(d), 42 U.S.C. § 3766(c)(3), 42 U.S.C. § 6727(b), and 31 U.S.C. § 1242(g). Each of these statutes authorizes the Attorney General to bring suit against state or local government units when he has reason to believe that federally funded programs are being administered by these units in a discriminatory manner.

46. 482 F. Supp. at 1259.

47. 18 U.S.C. § 241 (1976) provides: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having exercised the same . . . they shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life." 18 U.S.C. § 242 (1976) provides: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

48. 482 F. Supp. at 1259-60.

49. *Id.* 1260. See *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979) where the Attorney General brought suit against a state facility for mentally retarded persons, alleging that the institution maintained unsafe and unsanitary conditions, resulting in injuries and death. The complaint charged that these conditions violated the civil rights of the patients. The court held that Congress had not expressly authorized the suit and implied statutory authority did not exist. In *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977), the Attorney General attempted to obtain injunctive relief against a state hospital for the mentally retarded. After refusing to find express authorization for the suit, the court also declined to find implicit authority. In *City of Philadelphia*, Ditter concluded that the courts of appeals for the fourth and ninth circuits relied upon the legislative history of title III in rejecting the Attorney General's claims of standing to sue. He was not persuaded by the United States' contention that this legislative history is irrelevant to the issue before the court and that both *Mattson* and *Solomon* were incorrectly decided. The United States asserted that Congress' failure to enact title III was a narrow and limited action dealing with the provisions of section 1985. Thus, *Mattson* and *Solomon* misconstrued the actions of Congress, *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1256 (1979).

50. *Id.* at 1264-66.

funds.<sup>51</sup> This motion was granted<sup>52</sup> and the final judgment was entered dismissing the entire action. An appeal was taken to the Third Circuit Court of Appeals from the judgment of dismissal.<sup>53</sup>

By the time the case was argued on appeal, the United States had modified its original position in several respects.<sup>54</sup> By this time, only two related claims were now advanced: 1) that the conduct of the defendants violated the due process clause of the fourteenth amendment, as well as 18 U.S.C. §§ 241-242<sup>55</sup> and 2) that the defendants' practices discriminated against blacks and Hispanics, in violation of the equal protection clause and statutory prohibitions against racial discrimination in federally funded programs.<sup>56</sup>

Absent from the litigation of this stage were a number of the United States' earlier claims of authority,<sup>57</sup> the most important of which included causes of action based on implied conditions of federal grants and two statutes authorizing the Attorney General to conduct litigation on behalf of the United States, 28 U.S.C. §§ 516 and 518(b).<sup>58</sup>

In the complaint, the United States argued that the defendants' policies and practices violated the Constitution and laws of the United States which are conditions of the grant and receipt of federal funds by police departments, as distinguished from authority expressly conferred under the funding statutes, the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789(d) or the State and Local Fiscal Assistance Act of 1972 ("the Revenue Sharing Act"), 31 U.S.C. § 1242.<sup>59</sup> On appeal, this argument was

51. This motion was treated as a motion for a judgment on the pleadings. The defendants argued that the complaint did not meet the special pleading requirements for civil rights cases. *See* Brief for Appellant, *United States v. City of Philadelphia*, No. 80-1348 (3d Cir., filed April 22, 1980) at 3.

52. The district court held that the specific-pleading requirement was applicable and that the United States' allegations of discrimination in a federally funded program had failed to set forth the underlying facts and therefore, was not sufficiently specific. The court granted the United States leave to file an amended complaint within 20 days, but the United States did not do so, but moved for entry of final judgment, apparently for tactical reasons; Brief for the Appellant, *United States v. City of Philadelphia*, No. 80-1348 (3rd Cir., filed April 22, 1980) at 3.

53. The two opinions of the district court are reported at 482 F. Supp. 1248 (E.D. Pa. 1979 (October 30, 1979) and 482 F. Supp. 1274 (E.D. Pa. 1979 (December 13, 1979)).

54. No. 80-1348, Brief for Appellant, *United States v. City of Philadelphia* No. 80-1348 (3d Cir., filed April 22, 1980) at 3.

55. *See* note 47, *supra*.

56. *See* note 45, *supra*.

57. In its complaint, the United States advanced several less persuasive causes of action based upon 1) the commerce clause, the interstate travel clause, and the supremacy clause. The United States argued that the defendants' policies and procedures resulted in a burden upon interstate commerce by subjecting persons travelling through Philadelphia to the pattern of denials of constitutional rights. Complaint, *United States v. City of Philadelphia*, No. 79-2937 (E.D. Pa., filed Aug. 13, 1979) at 24; 2) a civil rights statute creating private rights of action, 42 U.S.C. § 1983, *id.*; 3) a criminal statute 245 that the defendants contended had no relevance to this suit *id.* at 23; 4) theories of *parens patriae*; 5) an implied claim under the equal protection clause; and 6) the first, fourth, eighth, thirteenth and fifteenth amendments (i.e., right to be free from the denial of life and liberty, freedom of speech and of rights to peaceably assemble, right to be free from unreasonable searches and seizures, right to be free from being compelled to be witnesses against oneself, and the right to be free from cruel and unusual punishment, respectively, *id.* 23. The district court did not address these claims as extensively, if at all, as those discussed in text accompanying note *infra*.

58. 28 U.S.C. § 516, 518(b).

59. Complaint, *United States v. City of Philadelphia*, No. 79-2937 (E.D. Pa., filed Aug. 13, 1979).

abandoned. Additionally, the United States withdrew the contention that section 518(b) granted express statutory authority to maintain this suit.<sup>60</sup>

These changes are significant to the extent that the primary issue addressed on appeal was whether the United States has implied authority to initiate this suit;<sup>61</sup> any claim of express authority was abandoned.

Judge Aldisert, writing the opinion for the three-judge circuit court panel, rejected the United States' contention that sections 241 and 242 implicitly granted a right of action for injunctive relief. Aldisert was not persuaded by the United States' interpretation of *Wyandotte Transportation Co. v. United States*,<sup>62</sup> and *Cort v. Ash*,<sup>63</sup> as authority for inferring a civil cause of action from the two criminal statutes. Aldisert reasoned that *Wyandotte*, wherein statutory silence was construed as Congressional intent to create a cause of action by implication, does not accurately reflect the current status of the law with respect to implied cause of action. Rather, concluded Judge Aldisert, more recent decisions, including *Transamerica Mortgage Advisors, Inc. v. Lewis*,<sup>64</sup> stand for the proposition that where a statute expressly provides a particular remedy or remedies, a court must refrain from implying a cause of action broader than that expressly provided by Congress.<sup>65</sup>

Moreover, Aldisert rejected the United States' assertion that a cause of action should be implied when no other adequate remedies exist. The court held that Congress had created numerous remedies and mechanisms for the redress of any of the due process violations alleged in the action. But even if no other adequate remedies existed, Aldisert would have declined to find a right of action vested in the United States.<sup>66</sup>

Aldisert also rejected the result urged by the United States in applying the four-part test prescribed in *Cort v. Ash*,<sup>67</sup> to determine whether a statute implicitly creates a private cause of action. The Circuit Court held that 1) the United States is not one of the class for whose especial benefit the statute was created; 2) there was no indication of legislative intent, explicit or implicit, to create such a remedy; 3) it was not consistent with the underlying purposes of the legislative scheme to imply such a right of action in the United States under § 241 and § 242; and 4) it would be inappropriate to infer a cause of action based solely on federal law.<sup>68</sup>

Aldisert found the United States' second theory, i.e. that the fourteenth amendment implicitly granted a right of action, equally unpersuasive and concluded that the fourteenth amendment does not imply authority for this type of suit. In effect, Aldisert found that the United States had misinterpreted the holdings in *Carlson v. Green*,<sup>69</sup> *Davis v. Passman*,<sup>70</sup> and *Bivens v. Six Unknown Federal Narcotics Agents*.<sup>71</sup> These decisions, according to the

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60. See note 43, *supra*.

61. *United States v. City of Philadelphia*, No. 80-1348, slip op. at 3.

62. 389 U.S. 191 (1967).

63. 422 U.S. 66 (1975).

64. 444 U.S. 11 (1979).

65. *Id.* at 8.

66. *Id.* at 9.

67. 422 U.S. at 78.

68. *Id.* at 11-23.

69. 446 U.S. (1980).

70. 442 U.S. 228 (1979).

71. 403 U.S. 388 (1971).

court, hold that only the class of litigants alleging violations of their own constitutional rights, and who have no effective means other than the courts, may seek protection of these rights from the courts.<sup>72</sup> Thus, Aldisert reasoned that these cases did not support the United States' position since the United States sought to vindicate the constitutional rights of citizens and is not a member of the class whose rights have been violated.<sup>73</sup>

Additionally, Aldisert found that there were "special factors counselling hesitation in the absence of affirmative action by Congress."<sup>74</sup> Relying on several decisions, including *National League of Cities v. Usery*,<sup>75</sup> and *Rizzo v. Goode*,<sup>76</sup> the court held that allowing this right of action would violate principles of federalism and separation of powers. Aldisert was persuaded by Judge Ditter's conclusion that "there would be no end to the local and state agencies, bureaus, offices and departments, or divisions whose day-to-day procedures could be challenged by suit, and changed by injunction,"<sup>77</sup> should the United States be allowed to proceed.

The appellate court affirmed the dismissal of the remainder of the complaint since it concluded that the complaint did not allege with sufficient specificity claims under the two federal funding statutes. Recognizing the express statutory authority of the Attorney General to challenge discriminatory administration of federal funds, the court nevertheless found that the United States had not met the pleading requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure. The court held that the allegations of discrimination were vague and conclusory, thus failing to provide the defendants with fair notice of the claims, "[i]t does not in any manner allege facts showing a nexus between acts of racial discrimination and the named individual defendants or between the expenditure of federal funds and incidents of police abuse, nor does it indicate how the city *qua* city practiced discrimination."<sup>78</sup> Aldisert rejected the United States' contention that the requirements of the Federal Rules were satisfied by means of factual information which was supplied in response to defense interrogatories, since civil rights cases require more specific notice in the pleadings, not through discovery. Thus, the appellate court affirmed the district court's opinion in all respects.

#### IV. THE SIGNIFICANCE OF THE CASE: EFFICACY OF REMEDIAL RESPONSES TO POLICE MISCONDUCT

Regardless of the outcome of *United States v. City of Philadelphia*,<sup>79</sup> the suit raised important policy considerations that cannot be ignored. The United States averred that no other effective remedies existed to protect the constitutional rights of citizens from systemic police misconduct.<sup>80</sup> Despite

72. 422 U.S. at 242.

73. *Id.* at 23.

74. *Id.* at 24.

75. 426 U.S. 833 (1976).

76. 423 U.S. 362.

77. 482 F. Supp. at 1268.

78. *Id.* at 36.

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

80. Complaint, *United States v. City of Philadelphia*, No. 79-2937 (E.D. Pa., filed Aug. 13, 1979).

the district and circuit courts' reasoning with respect to the maintainability of the action, this assertion is substantiated by the fact that administrative measures, civil sanctions, and criminal penalties, while technically available, have in practice failed to deter police misconduct and offer little or no protection from abuse.

### A. *Current Remedial Responses*

#### 1. *Administrative Remedies*

The administrative remedies selected for evaluation include those most frequently implemented:<sup>81</sup> 1) internal disciplinary measures; 2) civilian review boards; and, 3) affirmative action programs.

The more traditional disciplinary measures consist of internal control procedures for monitoring the conduct of individual officers, e.g. directives on the use of deadly force, internal review systems, and civilian complaint mechanisms.

According to the President's Task Force on Police, "it is essential that all departments formulate written firearms policies which clearly limit their use to situations of strong and compelling need."<sup>82</sup> Yet, despite the fact that Pennsylvania had enacted a statute in 1973<sup>83</sup> limiting police use of deadly force, the Philadelphia Police Department had never interpreted that statute in terms of guidelines for the 8,000 member force.<sup>84</sup> In effect, the statute had never been implemented in Philadelphia — the department refused to enforce it either by regulation and guidelines, or by punishing and investigating its abuse.<sup>85</sup> The administration allowed each officer the freedom to set his or her own standard without regard to the law.<sup>86</sup>

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81. Federal funds have never been denied to any police department accused of civil rights violations against citizens. See Cory, *A Close Look at the Philadelphia Story: Has Rizzo's Regime Encouraged Brutality*, 2 POLICE MAGAZINE 26, 33 (1979). On September 14, 1980, pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, the Justice Department adopted regulations prohibiting discrimination in acts of police brutality which provide for the loss of federal funds for violations. See Assistance Research and Statistics, Dept. of Justice, Bull. No. 202-724-7782 (1980).

82. President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE POLICE 189 (1967).

83. Section 508 of the Pennsylvania Crimes Code provides that use of deadly force as a preventative measure is restricted to situations where "the actor believes that there is substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm to another." The use of deadly force by a police officer making an arrest or preventing escape, however, is available to a police officer only when he believes "that such force is necessary to prevent death or serious bodily injury to himself (or a person assisting him), or when he believes both that: (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury without delay" See, SPECIAL REPORT, *supra* note 25.

84. *Hearing, supra* note 34 at 82.

85. Police Commissioner, Joseph O'Neill, testifying before the U.S. Commission on Civil Rights, could not say when a policeman should be permitted to shoot. He could offer no guidelines for the patrolman on the streets as to when he was allowed or required to shoot, *Id.* at 217.

86. PILCOP *Police Use of Firearms 1970-78*, April 19, 1979, see text accompanying note 31 *supra*, documented the fact that nearly fifty percent of the shootings by the Philadelphia police actually violated the Pennsylvania law governing the use of deadly force. These victims were not engaged in a forcible felony, nor were they threatening serious bodily harm as the statute requires before deadly force could be used. The study indicated that 469 shootings by the police over a period of nine years resulted in 162 deaths and 297 injuries (sixty juveniles) and found that the administration had never resolved the critical issue when to shoot. The implementation of admin-

The Philadelphia Police Department also has primary responsibility for taking action to punish and prevent misconduct,<sup>87</sup> since as a practical matter, the police are the only ones who can police themselves effectively. However, this responsibility has largely been ignored as well; the internal review system of the Philadelphia Police Department has failed in redressing civilian grievances and has been totally unresponsive to complaints against the police.<sup>88</sup>

The inadequacies of this internal review system were judicially noticed in *Rizzo v. Goode*,<sup>89</sup> a section 1983 class action alleging systemic police abuse against minorities. District Court Judge Fullam cited four principle defects in the operation of the Philadelphia Police Department's citizen complaint system:<sup>90</sup> 1) the rules and regulations are not framed to cover specific violations of legal and constitutional rights of civilians;<sup>91</sup> 2) complaints are handled on a "chain of command" basis, and this results in a

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istrative directives regarding the use of excessive force and the establishment of a Firearms Discharge Review Board in New York in 1972 had a significant impact upon the reduction in firearms discharged by the New York City police officers. Shootings by police officers have reduced by forty percent while the rate of injuries to officers has also declined. See SPECIAL REPORT *supra* note 25 at 8 n.4. In 1980, the new city administration implemented new directives on the use of deadly force. The ensuing controversy, however, brought about some modifications, the effect of which are yet to be seen.

87. Philadelphia, Pennsylvania Home Rule Charter § 5-200 (1951) provides:

The Police Department shall have the power and its duty to perform the following functions. . . . (b) Maintenance of the Philadelphia Police. The Department shall train, equip, maintain, supervise and discipline the Philadelphia Police.

The Pennsylvania Crime Commission reported in March 1974, however, that internal control mechanisms of the Philadelphia Police Department were weak and ineffective and the systemic corruption and misconduct have flourished. See PENNSYLVANIA CRIME COMMISSION, REPORT ON POLICE CORRUPTION AND THE QUALITY OF LAW ENFORCEMENT IN PHILADELPHIA 455 (1974) [hereinafter referred to as REPORT ON POLICE CORRUPTION].

88. *Id.*

89. *Rizzo v. Goode*, 423 U.S. 362 (1976).

90. The district court in *Coppar v. Rizzo*, 357 F. Supp. 1289 (E.D. Pa. 1973), *affirmed sub nom.*, *Goode v. Rizzo*, 506 F.2d 542 (3d Cir. 1974), *rev'd* 423 U.S. 362 (1976) concluded that the evidence showed an unacceptably high number of incidents of police misconduct, and held the defendants (i.e. the Mayor, City Managing Director and other supervisory officials) responsible for their failure to act. Instead of granting simply a prohibitory injunction, (Judge Fullam entered an order requiring the defendants to submit for the courts approval a program for improving the handling of citizen complaints. A proposed program, negotiated between the parties, was incorporated into a final judgment by the district court and the United States Court of Appeals for the Third Circuit affirmed. The district court issued specific guidelines for the formulation of an internal review system: 1) ready availability of forms for use by civilians in lodging complaints against police officers; 2) a screening procedure for eliminating frivolous complaints; 3) adjudication of complaints by an impartial individual or body with a fair opportunity for the complainant to present his complaint and for the officer to present his defense; 4) prompt notification to the concerned parties, informing them of the outcome, *Id.* 1321. See Lenzi, REVIEWING CIVILIAN COMPLAINTS OF POLICE MISCONDUCT—SOME ANSWERS AND MORE QUESTIONS, 48 TEMPLE L.Q. (1974) [hereinafter referred to as *Reviewing Civilian Complaints*]. On certiorari, the United States Supreme Court reversed. The Court held that the district court had exceeded its authority under section 1983 by departing from the principles of federalism which bar federal court interference with state agencies and officials. The Court reasoned that the evidence showed only a few individual violations of constitutional rights by a few individual officers, there was no affirmative link between the incidents and any plan on the part of the defendants, and that a pattern of misconduct had not been established since there were only some twenty or thirty incidents in a twelve month period.

91. The civilian complaint procedure primarily focused on internal infractions of police rules and regulations and was not equipped to handle specific violations of the legal and constitutional rights of citizens. See Lenzi, *Reviewing Civilian Complaints supra* note 90 at 89, 91.

tendency to minimize and discourage civilian complaints;<sup>92</sup> 3) existing procedures do not provide adequate opportunity for the civilian complainant to present his case before a relatively effective tribunal; and 4) the outcome of the proceeding is not disclosed. Civilian complainants received little or no redress given the procedural defects of this type of review system.

Civilian review boards generally are regarded as remedial entities designed to provide a channel for redress of civilian complaints against the police while allowing community participation in the process. The function of the Philadelphia Civilian Review Board was to investigate and determine the validity of civilian complaints of police misconduct.<sup>93</sup> Some cases were settled by an apology by the officer or modification or some other police activity, but most cases were handed without a hearing.<sup>94</sup> This Board, however, did not effectuate police accountability;<sup>95</sup> its weaknesses contributed to its demise in 1968.<sup>96</sup> Minority groups, which at one time lobbied for the Board, began to question its effectiveness.<sup>97</sup> The Board was never given more than advisory authority, and suffered from lack of voluntary support and cooperation from the police.<sup>98</sup> As of 1980, the Civilian Review Board, once a popular alternative in the 1960's, is virtually nonexistent as a remedy on a national scale,<sup>99</sup> apparently due to similar reasons.

Affirmative action programs are designed to increase the number of black policemen on police forces in response to community perceptions and increasing racial tension when one race is visibly absent. As racial composition in urban areas has changed, the relationship between black populations

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92. The Pennsylvania Crime Commission found that responsibility for investigating police misconduct was split between the Internal Affairs Bureau and individual commanding officers, but there were no written guidelines spelling out the relative disciplinary roles. The Commission concluded that there was a lack of independence in the investigative function due to a conflict of interest. See REPORT ON POLICE CORRUPTION, note 87 *supra*.

93. In 1958, Philadelphia Mayor Dilworth, by executive order, established a civilian review board called the Police Advisory Board (PAB) which was possibly the first in America. See I. RUCHELMAN, POLICE POLITICS (1974) at 92-93. Other cities which had civilian review boards were: Washington, D.C. (in 1948); Minneapolis, Minn. and York, Pa. (in 1960); Rochester, N.Y. (in 1963); and New York City (in 1966). *The President's Commission on Law Enforcement and Administration of Justice*, TASK FORCE REPORT: THE POLICE 200 (1967) [hereinafter referred to as TASK FORCE REPORT]. The Philadelphia Board was an advisory board comprised of eight community members, including two former police officers. The Board investigated charges of brutality, false arrest, racial discrimination, or other wrongful conduct of police officers towards citizens. The First Annual Report of the PAB of the City of Philadelphia 1 (1959) (cited in Lenzi, *Reviewing Civilian Complaints supra* note 90 at 118). See also Comment, POLICE-PHILADELPHIA POLICE ADVISORY BOARD—A NEW CONCEPT IN COMMUNITY RELATIONS, 7 VILL. L.R. 656 (1962).

94. TASK FORCE REPORT, *supra* note 82, at 200-201.

95. The Philadelphia Board was the subject of court suits with injunctions against its operations during its life. Throughout its turbulent eleven year history, the Philadelphia Board was opposed by the police as an illegitimate constraint on their authority. The contention was that only another policeman can judge the actions of a fellow officer; see L. RUCHELMAN, POLICE POLITICS, at 82-84.

96. The Board was under-funded, under-staffed and procedurally slow in determining cases. It had to depend on police investigations and reports which were often delayed. Citizens also had difficulty in obtaining complaint forms. The Board's operations were restricted by its lack of subpoena power.

97. See TASK FORCE REPORT, note 82 *supra* at 202.

98. *Id.* at 201.

99. The only board in operation is the seven-year-old Police Review Board in Berkeley, California. See *Police Brutality Issue Reaches Beyond Miami*, 88 U.S. NEWS AND WORLD REPORT 23 (1980).

and virtually all-white police departments has increasingly deteriorated. While these programs may help improve community perceptions, it does not necessarily follow the affirmative action will reduce police misconduct. The effectiveness of affirmative action programs in minimizing police misconduct is difficult to gauge since most programs are relatively new.<sup>100</sup> It is also not clear whether the effectiveness of affirmative action on police/community relations depends on parity between the proportion of minorities on police forces and their proportion in urban populations. Several commentators, however, contend that having more minority policemen on the nation's police force will not better conditions if the overall systemic problems remain the same.<sup>101</sup> According to this school of thought, an affirmative action program, at most, would offer only a temporary solution to the problem of police misconduct. Still, there is no conclusive support for the claim that minority presence on police forces does not or can not affect the degree of police conduct.<sup>102</sup>

## 2. *Civil Remedies*

Individual and class actions brought by victims and police misconduct have questionable remedial or deterrent efficacy. An injured individual may bring federal constitutional claims in state court, as well as common law torts such as false arrest, assault and battery, and trespass.<sup>103</sup> A killing by a policeman may give rise to a wrongful death action at the instance of the

100. See, Jones, *A Black Viewpoint*, *supra* note 5, at 28. Fear of crime coupled with equal fear of lawless police led minorities to call for increasing the number of minority policemen in the country. Some advocates went so far as to suggest that only minority officers should patrol minority communities. *Id.* See e.g., *Commonwealth v. O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972) *aff'd in part*, 473 F.2d 1029 (3d Cir. 1973) (per curiam), a major federal lawsuit alleging racial discrimination on the part of the Philadelphia Police Department in hiring and promoting blacks in which a quota was enforced. See also, *Detroit Police Ass'n v. Young*, 446 F. Supp. 976 (E.D. Mich. 1978), wherein the 6th Circuit has accepted an "operational needs" thesis in upholding an affirmative action program based on the black role model in bettering police/community relations in minority communities. See Comment, *Validity of Public Employer Voluntary Affirmative Action Plans Under Title VII and the Equal Protection Clause of the Fourteenth Amendment: Detroit Police Officers Ass'n v. Young*, 7 BLACK LAW JOURNAL *infra*.

101. See, Jones, *A Black Viewpoint*, *supra* note 5 at 36. One commentator has concluded that "black policemen do not appear to employ force much differently from white policemen, so while recruiting blacks may be desirable in terms of other values, it is unlikely to alter the use of force much." Friedrich, *Police Use of Force: Individuals, Situations and Organizations*, 452 ANNALS 82-96 (1980).

102. Advocates within Philadelphia's Guardian Civic League were consistently at odds with the Mayor and the Police Commissioner on issues ranging from the department's lack of a written firearms policy to a campaign to have police internal affairs court records opened to the public. The Guardian Civic League, an organization of about 800 black and five white officers, calls police misconduct a "major problem in Philadelphia." After Guardian Civic League members (Guardians) began holding "community rap sessions" where citizens complained of police misconduct, the police department threatened them with termination. While the Guardian Civic League may have had little impact on the administrative system, their effect on public perceptions may prove more valuable over time. In October, 1979, the Guardians sued to enjoin the police department from interrogation and surveillance of its members and the city agreed to an out-of-court consent decree banning such harassment. See, Cory, *A Close Look at the Philadelphia Story*, 2 POLICE MAGAZINE 26, 36 (1979). See also, *Open File*, 2 POLICE MAGAZINE 28, 29 (1979).

103. *Project, Suing the Police in Federal Court*, 88 YALE L.J. 781, 782, 4 (1979) [hereinafter referred to as *Project*].



personal representative of the deceased.<sup>104</sup> If such actions are successful, the City is subject to financial liability, assuming there is no governmental immunity. Nevertheless, most police misconduct suits have been brought in federal court under section 1983 of the Civil Rights Act<sup>105</sup> for several reasons: 1) federal judges are more familiar with claims involving civil rights; 2) federal judges are less sensitive to local political pressures; 3) federal discovery rules are more liberal; 4) backlogs of federal court dockets are shorter in some jurisdictions.<sup>106</sup>

Although victims may be awarded nonpunitive damages even without proof of individualized injury,<sup>107</sup> suits brought under section 1983 do not compensate plaintiffs for violations of their constitutional rights or deter police officers from engaging in unlawful conduct, primarily due to jury bias.<sup>108</sup> Moreover, the burden on a victim of police misconduct to establish his case against the offending officer in court is almost insurmountable. The high burden of proof placed on the complainant, the jury's bias against the complainant because of race, ignorance, and poverty, in conjunction with the prevailing attitude favoring law and order at any cost, operate to limit the courts' effectiveness as a forum for obtaining relief.<sup>109</sup> Individual police defendants benefit from a "good faith defense"<sup>110</sup> and are generally indemnified for attorney's fees, damage awards, and settlements by their municipal employers or the municipality's insurance carrier.<sup>111</sup> Moreover, municipali-

104. Harding, *Killings by Chicago Police: 1969-1970: An Empirical Study*, 46 S. CAL. L. REV. 284, 306 (1973).

105. 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, 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."

106. See *Project*, *supra* note 103.

107. *Piphus v. Carey*, 545 F.2d 30 (1976).

108. Lenzi, REVIEWING CIVILIAN COMPLAINTS, *supra* note 90 at 92-93. See also *Project supra* note 103, at 814. According to one commentator, jury bias is a critical factor in assessing the efficacy of a section 1983 suit, given that these verdicts determine individual liability and set the standards against which police misconduct claims are measured. Juries may be prejudiced in the defendant's favor due to the image of his office while biased against the plaintiff as a result of a confrontation with the police and the facts of the episode. Juries are also influenced by the race and lifestyle of the plaintiff (*Project*, *supra* note 103, at 784). This commentator attributes the infrequency of plaintiff verdicts and low damage awards to jury biases and recommends 1) that potential jurors should not be selected from voter registration records alone to allow a more representative selection, i.e. the addition of more black jurors; 2) repeat jurors should be excluded; 3) the good faith defense for defendant police officers should be eliminated; *id.* at 815.

109. Lenzi, REVIEWING CIVILIAN COMPLAINTS *supra* note 90 at 92-93. Only a small number of plaintiffs are successful. Jurors generally favor the police because they are perceived as respectable and perform a necessary service to the community. On the other hand, plaintiffs who are non-white, non-middle class, or who had prior records of some sort are generally disfavored. See *Project*, *supra* note 103, at 814.

110. A police defendant can avoid liability for the violation of a citizen's constitutional rights if he can prove that he believed in good faith that his actions were lawful, and that such belief was reasonable, *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1348 (2d Cir. 1972), *Project supra* note 103 at 803, *rev'd* on other grounds, 403 U.S. 388 (1971). This defense has been criticized because it provides a means by which juror bias is expressed—juries usually rely on the subjective good faith of the officer and ignore the objective standard, *id.*

111. In most cases, individual defendants suffer no financial loss because of section 1983 actions. Generally, municipalities or police departments provide them with free counsel and almost always indemnified, *id.* at 810. Supervisory officers are rarely held liable. The costs of suits are not high and often are hidden, thus providing little incentive to the municipality to discipline the of-

ties and police departments are insulated from the financial burden consequent to a section 1983 suit since most carry liability insurance covering the torts of their officers.<sup>112</sup>

In addition to the above limitations, class actions brought under section 1983<sup>113</sup> face the high cost of litigation and an even higher burden of proof. A class action alleging systemic police misconduct encounters the reluctance of the courts to interfere with the administration of police departments and uncertainty as to how many incidents of misconduct and how active the department must be in authorizing and approving the misconduct before a federal court could grant the requested relief.<sup>114</sup>

ficer. Therefore, "if deterrence depends upon the imposition of financial loss on the individual police officers, or upon the imposition by municipalities of sanctions against the police department, these suits did not deter police misconduct." *Id.* at 815; In the fiscal year 1976-77 and 1977-78, the city of Philadelphia paid out over two million dollars in awards and settlements to victims of police misconduct: *Hearing, supra* note 34, at 40.

112. Section 1983 suits do not pressure municipalities to curtail police abuse since most damage awards are minimal and infrequent. Previously, under *Monroe v. Pape*, 365 U.S. 167 (1961), overruled in part, *Monnell v. Department of Social Services*, 436 U.S. 658 (1978), municipalities were immune from section 1983 suits since they were not "persons". In *Monell*, the Court held that municipalities could be held liable for actions of employees under section 1983, but concluded that municipalities are not strictly liable under the doctrine of *respondeat superior*. The impact of *Monell* is questionable in light of the fact that police employees must have a great deal of discretion in their duties, thus it is difficult to define actions taken pursuant to unconstitutional policies, ordinances, regulations, and customs of the municipality, *Project, supra* note 103, at 785 n.20. See also Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMPLE L.Q. 409 (1978). *Monell* reserved decision on the question whether local governments, although not entitled to an absolute immunity, should be afforded some form of official immunity in § 1983 suits. 436 U.S. at 701. In *Owen v. City of Independence*, 100 U.S. 1398 (1980), the Supreme Court held that a municipality has no "discretion" to violate the Constitution, thus has no immunity from liability under the Civil Rights Act flowing from constitutional violations.

113. In Judge Ditter's opinion in *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1261 (E.D. Pa. 1979), the availability of class actions as an alternative remedy was explored extensively. The court concluded that injunctive relief against pervasive patterns of police abuse could be obtained under section 1983. In *Allee v. Medrano*, 416 U.S. 802 (1974) the court enjoined the activities of law enforcement officials which had interfered with the formation of a labor union. The Court held there was a persistent pattern of police misconduct, consisting of brutality, unlawful arrests, soliciting false complaints and filing criminal charges in bad faith, 416 U.S. at 815. Likewise, in *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), a class of black families obtained an injunction against widespread violations of their fourth amendment rights by Baltimore police. In *Rizzo v. Goode*, 423 U.S. 362 (1976), however, the class action plaintiffs did not succeed in obtaining relief. While *Rizzo* establishes that an injunction will issue against official policies and those who implement such policies when police misconduct denies the rights of citizens, the Court found that no such official policy had been proven by plaintiffs. The findings of the constitutional violations by the Philadelphia police were not challenged. In the absence of "blatant and overwhelming evidence," as in *Lankford*, 364 F.2d 197, where the police had conducted 300 illegal searches of black residences in nineteen days, the burden of establishing a recurring pattern of police misconduct is extremely difficult. Injunctive power against the police is invoked only in cases where there was a "clear, unconstitutional, specific, and extreme course of conduct directed at an identifiable class." Lenzi, *Reviewing Civilian Complaints, supra* note 90 at 94.

114. Judge Ditter attributed any deficiencies in the remedy to the plaintiffs' failure to meet evidentiary standards, as in *Rizzo*. See note 90, *supra*. While this may well be a viable alternative, the fact remains that *Rizzo* was brought "by an alliance of numerous community groups and had the resources at counsel table of one of the five largest law firms in the City". Brief for Amici Curiae, *United States v. City of Philadelphia*, No. 80-1348, (3d Cir., filed Oct. 2, 1980) at 11. The cost of bringing a class action of this magnitude was approximately \$300,000, and still did not satisfy the necessary burden of proof. The experience of the litigants indicates that Philadelphia's administration "has persistently sought to limit discovery of any incidents other than the subject of the suit." *Id.* This may be inferred, as well, from the fact that discovery in *City of Philadelphia* was not reciprocal.

### 3. *Criminal Remedies*

Criminal sanctions have proven ineffective 1) in state courts due to the inherent conflict of interest in the district attorney's office and 2) in both the state and federal systems because of the high burden of proof. Although a particular state may have its own relevant criminal statute, both state and federal criminal provisions are enforced by the district attorney or the United States attorney.<sup>115</sup>

Local prosecutors, who rely on police departments to make arrests and provide evidence for trial, are generally reluctant to prosecute officers.<sup>116</sup> The Philadelphia District Attorney's Police Misconduct Unit<sup>117</sup> is an available avenue for citizen's complaints, but a conflict of interest arises in individual police brutality cases where the civilian is also charged with assault and battery upon a police officer. The district attorney must be an advocate for the victim's charge of police misconduct at the same time that he must prosecute the victim for assault and battery. When faced with these contradictory roles, the district attorney may well be tempted to follow a course that will not jeopardize his close working relationship with the police. A bias in favor of the police may emerge which hinders the prosecutor's advocacy for the victim.<sup>118</sup>

Federal criminal actions are brought pursuant to 18 U.S.C. § 241 and § 242,<sup>119</sup> which impose criminal sanctions for misconduct parallel to that proscribed in 42 U.S.C. § 1983. The complainant must bear the burden of convincing the jury beyond a reasonable doubt that the misconduct occurred and that the defendant specifically intended to deny the victim's constitutional rights.<sup>120</sup>

The chief limitation on the effectiveness of prosecution under sections 241 and 242 as a deterrent, however, is in the nature of the criminal charge itself.<sup>121</sup> A prosecution for police misconduct does not reach the activities of a police department or city administration, but only the actions of one or two officers in isolated circumstances which are limited to the wording of the

115. *Project, supra* note 103, at 782 n.4.

116. *Id.*

117. In January 1978, the Police Misconduct Unit was established in the Philadelphia District Attorney's Office. The function of the unit is to investigate, and prosecute where appropriate, allegations of police brutality, abuse or misconduct. In the past, the district attorney's office did not prosecute unless ordered. PENNSYLVANIA HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE, *Special Report on the Violations of Civil Rights By and Against Law Enforcement Authorities in the City of Philadelphia* 9 n.7. Investigations by District Attorney's office have been inadequate, however, due to a lack of cooperation from the Philadelphia police. There is a uniform policy of not permitting the District Attorney's office to view any statements taken from police officers who are the subject of any investigation. The district attorney is not permitted to interview the police officer who is the subject of the investigation or any witness officers. In every case where police officers have either violated department policy or state law, there has been no disciplinary action taken. These cases involve everything from murder to aggravated assault, simple assault, and reckless endangerment. *Hearing, supra* note 34, at 82-84.

118. See generally Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023 (1970).

119. See note 47, *supra*.

120. *Project, supra* note 103, at 782. See also *Screws v United States*, 325 U.S. 91, 104 (1945) (plurality opinion).

121. U.S. COMMISSION ON CIVIL RIGHTS, *POLICE PRACTICES AND THE PRESERVATION OF CIVIL RIGHTS* 141 (1978) (testimony of Drew S. Days, III, Civil Rights Division, Dept. of Justice).

criminal indictment. This type of prosecution is reactive in that the individuals have already committed the criminal act. "Any conscious effort to anticipate instances of police misconduct and head them off before they occur must arise from some other source than the federal criminal code."<sup>122</sup>

### B. *Significance of United States v. City of Philadelphia*

The dismissal of the United States' complaint on appeal limits the power of the Attorney General to enforce federal civil statutes.<sup>123</sup> If courts maintain a noninterventionist stance with respect to police administration and ultimately decline to allow the Attorney General authority to sue in the absence of express statutory authority, the civil rights of prisoners, institutionalized persons and victims of police brutality will be denied.<sup>124</sup> States and individuals will be left with a burden of enforcement of these rights which has not been met in the past due to excessive reliance on the federal courts.

As one author has expressed, it is conceivable that the significance of *City of Philadelphia* is that it indicates that the role of the federal government in that area is, at best, weak and ineffectual at the present time.<sup>125</sup> The dominant role of the federal government in the 1960's was that of protector of individual constitutional rights against violations by the state and its agents. More recently, however, this role has been circumscribed in *Younger v. Harris*<sup>126</sup> and *Rizzo v. Goode*.<sup>127</sup>

Assuming that the federal forum were open to claims of systemic police misconduct, similar to *Rizzo* and *City of Philadelphia*, there is still the question of the effectiveness of declaratory and injunctive relief against a pattern of abuse as pervasive as that experienced in *United States v. City of Philadelphia*. Is injunctive relief, in and of itself, adequate to curtail and reform illegal administrative practices? One commentator has criticized the prohibitory injunction as ineffective in two respects.<sup>128</sup> First, as against the individual offending officer, this type of remedy is ineffectual since the victim has to satisfy a high burden of proof to establish and enforce the order.<sup>129</sup> The contempt sanction, moreover, is seldom invoked against the police, even if

122. *Id.*

123. Comment, *The Authority of the Attorney General*, *supra* note 42 at 269.

124. *Id.* See, e.g., *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977) (Attorney General denied standing to seek injunction against patient maltreatment at a state hospital); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979) (Attorney General denied standing to seek injunction against unsafe practices at a state facility for the mentally retarded); *United States v. Elrod*, No. 76-4769 (N.D. Ill. March 9, 1979), appeal docketed, No. 79-1394 (7th Cir. March 27, 1979) (Attorney General denied standing to seek injunction against practices in state correctional institution).

125. ALEXANDER, *THE POLITICS OF POLICE BRUTALITY*, *supra* at 19.

126. 401 U.S. 37 (1971). The U.S. Commission on Civil Rights saw *Younger* as limiting the accessibility to a federal forum despite the claim of a federal right violation. In *Younger*, the Supreme Court refused to uphold a district court's injunction against a state proceeding against the plaintiff for violation of the state's Criminal Syndicalism Act. The Supreme Court relied on a strict interpretation of federalism which limited federal intervention significantly. *Id.* 24. In *Rizzo v. Goode*, see text accompanying note 90, *supra*, 113, the Supreme Court refused to uphold the district court's use of its equity power on the ground that it curtailed local administrative discretion within the police department, *id.*

127. 423 U.S. 362 (1976). See 90 HARVARD LAW REV. 36 at 238.

128. Lenzi, *Reviewing Civilian Complaints*, *supra* note 90 at 95.

129. *Id.*

the burden of proof is met.<sup>130</sup> Second, where administrators have failed to take affirmative steps towards disciplining police misconduct, the injunctive remedy also proves ineffective since there is no specific action to enjoin. Therefore, the injunction must prohibit the tolerance of illegal acts.<sup>131</sup>

The mandatory injunction, on the other hand, has proved to be a viable remedy in redressing patterns of constitutional violations in other areas.<sup>132</sup> Courts have ordered mandatory injunctions requiring the implementation of plans to ensure appropriate safeguards for individual rights.<sup>133</sup> In the area of systemic police misconduct, if the injunction is to be adequate as a remedy it will have to order affirmative action on the part of the administration.

The United States in *City of Philadelphia* was seeking a declaratory judgment and broad equitable relief in the form of an injunction both prohibitory and mandatory in scope.<sup>134</sup> Judge Ditter interpreted this prayer for relief as a request for "an injunction substituting the Attorney General's views for those of the defendants as to how the Philadelphia Police Department should be run."<sup>135</sup> The relief sought by the United States may be desirable and effective, but the practical and legal limitations on attaining it include the role the courts are willing to play and are capable of playing. Ditter, apparently, felt restricted in the resolution of this police misconduct problem and failed to recognize that courts do possess power, albeit limited, to supervise the functioning of police departments.<sup>136</sup> Instead, he deferred to the concept of separation of powers between the judicial and executive branches of government and in effect concluded that courts should not intrude into the essential role of the police.<sup>137</sup>

## V. CONCLUSION

The district court in *City of Philadelphia* asserted that the power to maintain this lawsuit does not and should not rest with the Attorney General given the potential abuse of power.<sup>138</sup> Following a strict interpretation of the separation of powers doctrine, Judge Ditter concluded that if civil rights violations could not be redressed effectively with the present remedial alternatives, then it was within the province of Congress to enact legislation granting the Attorney General the authority sought in this action.<sup>139</sup>

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130. *Id.*

131. *Id.*

132. For example, despite the acceptance of the prohibitory injunction as a remedy for tolerated police misconduct, its practical limitations caused the district court in *Goode v. Rizzo*, see text accompanying note 79 *supra*, to deny this type of relief. Instead the court formulated a mandatory injunction which directly ordered the implementation of a comprehensive internal procedure to handle citizen complaints. *Lenzi*, REVIEWING CIVILIAN COMPLAINTS *supra* note 90 at 96.

133. *Id.*

134. Complaint, *United States v. City of Philadelphia*, No. 79-2937 (E.D. Pa., filed Aug. 13, 1979).

135. *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1255 (1979).

136. See *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Hairston v. Hutzler*, 334 F. Supp. 251 (W.D. Pa. 1971), *aff'd*, 468 F.2d 621 (3d Cir. 1972) (*per curiam*).

137. See generally, *Lenzi*, *Reviewing Civilian Complaints* at 99.

138. *United States v. City of Philadelphia*, 482 F. Supp. 1248, 1267 (1979).

139. *Id.* 1270. The United States, on appeal, argues that the district court's approach to this separation-of-powers issue is inconsistent with the views expressed in *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84 (3rd Cir. 1979) (*en banc*), *cert. granted*, 1005 Ct. 2984 (1980), where the court made a distinction, under the separation of powers doctrine, between (1) the execu-

While the federal government should play a significant role in monitoring the use of excessive force by police officers, this role is not limited to the varying interpretations of federalism in the federal courts. The United States Commission on Civil Rights has advocated a legislative solution—the reopening of the federal forum by amending section 1983 with the enactment of a provision which would make liable the governmental entity, the individual supervisory officer, and the individual state official who violated section 1983. The amendment would establish liability against an official who failed to take affirmative steps to prevent the recurrence of known misconduct.<sup>140</sup>

Legislation is also pending in Congress which would increase the penalties for violations of section 242. The proposed changes would relieve the government of the burden of proving specific intent when a person, under color of law, violates constitutional or federal rights.<sup>141</sup> Those modifications of existing law would improve the federal role in enforcing civil rights guarantees. Given that *City of Philadelphia* has been dismissed on appeal and that existing remedies remain ineffectual, a legislative solution seems the most tenable at the present time, but it is not the only alternative. It will remain so, however, as long as communities rely on the government and the courts to intervene and demand that police departments be held accountable.

STEPHANIE L. FRANKLIN

***DETROIT POLICE OFFICERS' ASSOCIATION v.  
YOUNG: THE OPERATIONAL NEEDS  
JUSTIFICATION FOR AFFIRMATIVE  
ACTION IN THE CONTEXT OF PUBLIC  
EMPLOYMENT***

I. INTRODUCTION

When Coleman Young, the City of Detroit's first black mayor, took office in January 1974, he inherited a city that still showed the tension of two major race riots—one in 1943, the other in 1967.<sup>1</sup>

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tive's invoking the jurisdiction of the federal court and (2) direct action. The United States avers that *City of Philadelphia* involves the United States appearing before a federal court seeking relief and that its role as the enforcer of federal law is pertinent to the suit. Brief for Appellant, *United States v. City of Philadelphia* (3rd Cir., filed April 22, 1980) at 5.

140. Alexander *supra* note 125 at 26. In conjunction with *Owen v. City of Independence*, see text accompanying note 101 *supra*, which provides absolute liability for a municipality, individual defendants will be unable to rely on "good faith" defense.

141. *Id.* It is not clear whether this legislation would eliminate the need to establish *mens rea* and whether it would be constitutional.

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1. *Detroit Police Officers' Assn. v. Young*, 446 F. Supp. 979 (E.D. Mich. 1978): vacated and *rev'd*, 608 F.2d 671 (6th Cir. 1979). See Brief for the United States and Equal Employment Oppor-