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Asit S. Panwala

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The Author would like to thank Christine Chen, Anthony Thompson, and Ronald Goldstock for their support and help in this endeavor.
THE FAILURE OF LOCAL AND FEDERAL PROSECUTORS TO CURB POLICE BRUTALITY

Asit S. Panwala*

INTRODUCTION

Excessive use of force by police officers undermines faith in the criminal justice system. Citizens expect those with badges and guns to follow the law as well as enforce it, but these two roles often come into conflict. Reporter Craig Horowitz recounted that one police officer justified his hitting a suspect in the stomach when the suspect tried to run away as being necessary to reestablish authority.\(^1\) Another police officer is quoted as saying, "[i]f someone disses you, you take him in an alley and slap him. If it's known in the street you can be stepped on, you've got a problem."\(^2\)

Police brutality is usually defined as any excessive use of force by a police officer under color of law.\(^3\) Police chiefs from ten major cities have agreed that the "problem of excessive force in American policing is real," rather than a rare occurrence.\(^4\) Not only does police brutality perpetuate the notion that street justice is acceptable, but also victims are unlikely to develop respect for the law when officers abuse their lawful authority. Instead, justice requires that police officers refrain from acting like street thugs, even if they are "dissed."

Although police departments across the country have attempted to ameliorate the hostility between police officers and the community, through careful screening of applicants, minority recruitment,

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* Assistant District Attorney, Felony Cases, Bronx County District Attorney's Office. B.A., University of California Berkeley, 1996; J.D., New York University, 1999. The Author would like to thank Christine Chen, Anthony Thompson, and Ronald Goldstock for their support and help in this endeavor.

2. Id. at 31.
3. See Alexa P. Freeman, Unscheduled Departures: The Circumvention of Just Sentencing For Police Brutality, 47 HASTINGS L.J. 677, 686 (1996) (arguing that the concept of police brutality should be expanded to include physical, psychological, and legal abuse. Psychological abuse occurs when an officer threatens physical harm or an unjustified arrest. Legal abuse may occur even without physical or psychological abuse; it is the violation of a person’s constitutional rights.).
and community policing, police brutality remains a problem within our urban cities. Often the victims of police brutality are minorities stereotyped by the public as criminals in order to justify the reaction of white police officers. As a result, police brutality deepens the racial divide in this country, and sparks riots within major cities. If we revere the principle of equal protection for all, then police officers cannot stand above the law, especially when the racial dynamics of police brutality are considered.

The criminal, a marginalized member of society, is in many ways the perfect victim for police brutality because of her so-called “lack of innocence.” The law, however, is meant to protect every individual. If prosecutors are to uphold their roles as ministers of justice, they must investigate and prosecute all police officers accused of wrongdoing. Policing the police is essential to building public trust in government and legitimating the rules of our society. Otherwise, communities, especially those of color, become fearful of the police and understandably fail to cooperate in stopping crime.

Besides hindering law enforcement, police brutality may also lead to police corruption. The Mollen Commission, for example, found that “[o]nce the line was crossed without consequences, it was easier [for officers] to abuse their authority in other ways, including corruption.”

Currently, there are no guidelines for determining when local or state prosecutors should take police brutality cases and when the federal government should handle them. Often cases are accepted on an ad hoc basis. In the Abner Louima case, Brooklyn District Attorney Charles Hynes and United States Attorney for the Eastern District of New York Zachary Carter, agreed that they would

5. See Freeman, supra note 3, at 706-07.
6. For example, all of the following riots followed a police shooting or beating: Harlem in 1964, Newark in 1967, Atlanta in 1970, Miami in 1980, Los Angeles in 1992, and Cincinnati in 2001. Id. at 707-08.
7. See Robin D. Barnes, Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel, 81 IOWA L. REV. 1079, 1092-94, 1115-17 (1996) (discussing how the power entrusted to public safety officials provides white supremacists with unparalleled opportunities to conduct race warfare through police brutality, and how the harms of police brutality affect the equality of opportunity for African-Americans).
8. See Freeman, supra note 3, at 709.
"sit down and decide where the case will best be prosecuted" after the federal grand jury had completed its investigation. Ultimately, federal prosecutors handled the case, conducted three separate trials, and successfully obtained convictions against two police officers. This Essay will suggest that federal prosecutors will be more successful in deterring police violence if they devote their resources to pattern-of-practice lawsuits against police departments, instead of handling individual cases.

This Essay will first argue that police brutality is largely ignored. Second, it will examine the obstacles facing local and federal prosecutors in obtaining convictions. Then it will compare the advantages and disadvantages of delegating primary responsibility for these cases to the state versus the federal level. Finally, it will argue that, although there are obstacles and advantages for both local and federal prosecutors, ultimately justice is best served when police brutality is primarily pursued by local prosecutors.

I. POLICE BRUTALITY IS LARGELY IGNORED

Abusive police officers are under-prosecuted by state prosecutors. For example, the 1992 Kolts Report criticized the Los Angeles District Attorney's office for prosecuting only one deputy from the Los Angeles Sheriff Department ("LASD") out of the 382 referrals they had received in the preceding ten years. The Kolts investigation also uncovered several cases that deserved prosecu-


tion, but were not pursued. One such case involved a shooting incident where both witnesses and the coroner contradicted the officer's testimony by stating that the victim had been shot in the side and back, and not in the front. Eighty-seven percent of the civilians shot under questionable circumstances by LASD deputies were African-American, Latino, Asian, or Pacific Islander. There is an argument to be made that, given the history of state indifference to crimes against minorities, federal prosecutors should handle these cases. For example, the failure of southern state authorities to curb official lawlessness against African-Americans that provided the motivation for a federal remedy for civil rights in the first place.

Although federal prosecutors have jurisdiction to handle these cases, however, it is not evident that they will exercise it. For example, the Federal Bureau of Investigation ("FBI") investigated 720 criminal civil rights complaints between 1982 and 1991 in the Central District of California, which includes Los Angeles. Approximately 258 officers who were investigated worked for the Los Angeles Police Department or the Los Angeles Sheriff's Department. Out of the 258 officers investigated, federal prosecutors indicted only four officers. Between 1984 and 1990, the FBI investigated approximately 3,000 complaints of criminal civil rights abuse a year, but federal prosecutors presented only about fifty cases, a little under two percent, to a grand jury in each of those years. In the three years preceding the Rodney King incident, there were only ninety-eight federal prosecutions of police brutality in the entire nation. It appears that FBI agents in Los Angeles generally dismissed complaints on the basis of police reports which

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14. Id.
16. See, e.g., Freeman, supra note 3, at 718.
17. Id.
19. Id.
20. Id.
21. Hoffman, supra note 4, at 1532 n.159.
FAILURE TO CURB POLICE BRUTALITY

are often misleading or self-serving. The failure to thoroughly investigate these complaints by interviewing witnesses and examining relevant documents demonstrates that federal authorities have not taken police brutality seriously, thereby creating an environment where police violence is tolerated.

II. OBSTACLES FACING LOCAL AND FEDERAL PROSECUTORS

A. Double Jeopardy Concerns

The federal government ordinarily defers to local authorities in the prosecution of police brutality. In Abbaté v. United States, the Supreme Court held that the double jeopardy provision of the United States Constitution is not violated when both state and federal authorities prosecute a defendant for her actions. In jurisdictions such as New York, however, the state constitution forbids the state prosecution of defendants who have already been tried in the federal system. Thus if the goal is to obtain a conviction, even at the cost of two trials, federal prosecutors in such jurisdictions must wait for the state court verdict before initiating their prosecution. Nevertheless, federal prosecutors pursued charges against the police officers accused of torturing Abner Louima rather than wait for a verdict in state court.

B. Statutory Burdens of Proof and the Difficulty in Obtaining Convictions

When a district attorney prosecutes police officers for brutality, the defendants are usually charged with assault or murder. Admittedly, it is difficult to prove beyond a reasonable doubt that the arresting officer intended to use excessive force. State prosecutors, however, may also charge police officers with criminal negligence.


24. The Justice Department has a “petite policy,” whereby “federal prosecution of civil rights crimes is deferred until after state investigation and prosecution.” Id. at 1532 n.158 (citing 9 U.S. Attorneys Manual 21-25 (1985)).


27. Nothing prevents the federal prosecutor from prosecuting a defendant, who is found guilty under state law, for the corresponding federal offense.


29. Freeman, supra note 3, at 686.
for firing their guns and causing injury or death. 30 These charges only require the prosecutor to show that a reasonable officer would not have feared for her safety and fired her weapon. 31 Jurors often struggle with whether the officer's actions were reasonable because the police officer is frequently the only witness as to how much resistance she encountered. 32 Furthermore, the victim was usually committing a crime at the time of the abuse. 33 Thus, police officers have the "advantage of inherent credibility with juries simply by virtue of their position." 34 Juries sometimes nullify cases because they view police officers as the "thin blue line" between order and anarchy. 35 William Bermeister, head of the New York County District Attorney's Official-Corruption Unit from 1992-2000, stated that these cases are difficult to prosecute because "jurors give officers the benefit of a doubt," and because "if you don't have an 'innocent' victim, jurors don't care." 36 His unit's conviction rate at trial in 1998 was a mere twenty-five percent, far below New York County's general conviction rate of approximately seventy-five percent. 37 His unit, however, lost only two trials in its first seven years. 38


31. See Zarb, supra note 30, at 1984-85; see also Lan Lee, supra note 30, at 120-21.

32. Freeman, supra note 3, at 723-24.

33. See id. at 724-25.

34. Id. at 725 (citing Police Brutality Hearings, supra note 22, at 120 (testimony of James Fyfe, Professor of Criminal Justice, American University)); see Gabriel J. Chin & Scott C. Wells, The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. Pitt. L. Rev. 233, 289-91 (1998) (discussing jury instructions that may remedy misplaced confidence in police officer testimony).

35. The "thin blue line" represents the belief that the police are the last line of defense in a struggle against an unruly and dangerous underclass that is becoming more criminal. See Patrick J. Buchanan, The Police are the Last Line of Defense, L.A. Times, Mar. 10, 1991, at M5; Llewellyn H. Rockwell, It's Safe Streets Versus Urban Terror; In the '50s, Rampant Crime Didn't Exist Because Offenders Feared What the Police Would Do, L.A. Times, Mar. 10, 1991, at M5.


37. Id. Note the these statistics cannot be readily compared with the statistics from the Department of Justice because they do not include convictions by pleas, which would raise the average.

38. Id. Note that Lawrence Stephens, Head of the New York County District Attorney's Official-Corruption Unit from 1990-1992, attributes the early success of the Official-Corruption Unit to its selectivity in pursuing cases. He stated that his unit did not prosecute cases where there may have been an impulsive punch. Interview with
Bermeister claims that these cases are more difficult to prosecute under state law than under federal law because of grand jury immunity.\(^{39}\) Under New York law, a person subpoenaed to a grand jury receives “transactional immunity,” unless she waives it.\(^{40}\) In the federal system, one receives only “use immunity.”\(^{41}\) Under transactional immunity, a witness who testifies to the grand jury and discusses her role in committing the crime cannot be prosecuted.\(^{42}\) Under use immunity, the prosecutor may prosecute the witness, but may not use the compelled testimony or information derived from the compelled testimony against the witness.\(^{43}\) If the prosecutor is able to obtain information from independent source, she may prosecute the witness.\(^ {44}\)

To make matters more difficult for New York City prosecutors, they are not allowed to question police officers who are the subject of an investigation until forty-eight hours after the incident, thereby giving the officers the opportunity to confer with each other and with their attorneys.\(^ {45}\) Although the police department may require an officer to answer questions or face suspension, the department must provide use immunity through what is known as a “G.O.-15” or General Order 15.\(^ {46}\) The immunity regime in New York forces the prosecutor’s hand because she must often decide whether to subpoena an officer who was at the scene based on very little information. The prosecutor must weigh her ability to obtain an indictment at the cost of discovering that the subpoenaed police officer assisted in committing the crime. The immunity regime places local prosecutors at a disadvantage to the extent that guilty officers would rather admit the truth and obtain immunity, than develop cover stories and lie for their colleagues.

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40. N.Y. CRIM. PROC. LAW § 190.40 (McKinney 2002). Transaction immunity is the broadest immunity available.

41. 18 U.S.C. § 6002 (1998); see Kastigar v. United States, 406 U.S. 441, 462 (1972) (holding that transactional immunity is not required by the Constitution).

42. N.Y. CRIM. PROC. LAW § 19.40 cmt. (McKinney 1993).


Under federal law, the prosecutor cannot argue that an officer acted recklessly or with criminal negligence. Instead, the defendant would be charged with violating the civil rights of the victim pursuant to 18 U.S.C. §§ 241 and 242. In Screws v. United States, the Supreme Court held that a conviction under § 242 required proof that the defendant specifically intended to deprive the victim of a constitutional right. Later, in United States v. Guest, the Court read the same requirement into § 241, which prohibits conspiring to violate the civil rights of another. Thus, under federal law, the prosecutor must prove beyond a reasonable doubt that the officer used excessive force and that she intended to do so. The intent requirement is an additional evidentiary burden that the federal prosecutor must meet, whereas local prosecutors may argue that an officer's actions were reckless.

Federal prosecutors face the same problems as local prosecutors in convincing jurors to convict. Drew Days, Assistant U.S. Attorney General for Civil Rights between 1977 and 1980, found that the victims of police brutality are often the marginalized members of the community.

47. See United States v. Shafer, 384 F. Supp. 496, 503 (N.D. Ohio 1974) (Even the ... reckless use of excessive force, without more, does not satisfy the requirements of [18 U.S.C.] § 242 . . . . There must exist an intention to 'punish or to prevent the exercise of constitutionally guaranteed rights . . . .').

48. As compared to § 241, most federal prosecutions are brought under § 242. Section 241 provides in pertinent part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . . or because of his having so exercised the same; . . . they shall be fined under this title or imprisoned not more than ten years, or both; and if death results . . . they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.


Section 242 provides in pertinent part:

Whoever, under the color of law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results . . . shall be fined under this title or imprisoned not more than ten years, or both; and if death results . . . shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Id. § 242.


51. See Guest, 383 U.S. at 761; Screws, 325 U.S. at 101.
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.52

It should not come as a surprise then that the Criminal Section of the Civil Rights Division of the United States Department of Justice reports a higher success rate for all other prosecutions than for official misconduct cases.53 For example, the Criminal Section's overall success rate compared to its rate of success in law enforcement cases for the years 1990 to 1994 were 94.4 percent to 77.8 percent (1990), 89.3 percent to 80.6 percent (1991), 85 percent to 62.2 percent (1992), 73.6 percent to 58.7 percent (1993), and 90.2 percent to 78.7 percent (1994).54

Even when federal prosecutors are able to obtain convictions, it has not effectively changed police practices. John Dunne, U.S. Assistant Attorney General for Civil Rights between 1990 and 1993, observed that "few isolated successful prosecutions have had the trickle-down effect" that one might expect.55 For example, when the Civil Rights Division obtained convictions against members of the Philadelphia homicide squad in 1970s, the chief of police refused to suspend the convicted officers and stated that they were innocent until proven guilty by the United States Supreme Court.56 As a result, the Department of Justice sued the mayor, police commissioner, and police administrators of Philadelphia in a civil suit, alleging a pattern of practice that deliberately encouraged police


53. Police brutality cases are classified under Official Misconduct.

54. Freeman, supra note 3, at 723 n.163 (citing U.S. Dep't of Justice, Summary of Criminal Section Activities (1985-94) (unpublished)). Note that these statistics cannot readily be compared with the statistics provided by William Burmeister, because they include convictions by guilty pleas, thereby raising the average.


56. Id.
The police department, however, successfully challenged the legality of the lawsuit in *United States v. Philadelphia.*

### C. Uncooperative Police Witnesses Pose an Obstacle for Prosecutors

The under-prosecution of police officers may be due in large part to the conflict of having police officers supervise and investigate themselves. Although police officers report approximately fifty percent of the brutality cases investigated by the Manhattan Official-Corruption Unit, police officers are often reluctant to testify against each other. One Manhattan prosecutor stated, “It’s never easy to deal with the police department. They give you what they want to give you.” Justice Lawrence Stephens, head of the Official-Corruption Unit of New York County’s District Attorney’s Office from 1990 to 1992, believes that “ninety percent of officers will lie to cover their colleagues.” Officers who cooperate risk alienation and often become outcasts within the department. As an example, Stephens referred to a police officer that testified for his unit approximately ten years ago and still receives dead rats in his locker as a result of his cooperation. Unfortunately such behavior encourages the “blue wall of silence,” thereby preventing thorough investigations. Officers guilty of using excessive force are fully confident that fellow officers will either remain silent, or verify their cover story. After the beating of Rodney King, the off-

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58. 644 F.2d 187, 206 (3d Cir. 1980) (holding that the federal government did not have the authority to sue a local police department in order to correct its underlying practices).
59. Interview with William Burmeister, *supra* note 36. Approximately fifty percent of the cases that the Official-Corruption Unit reviews come from defense lawyers. *Id.*
61. Interview with Lawrence Stephens, *supra* note 38.
62. *Id.*
63. For example, in 1983, New York City transit police officers arrested Michael Stewart for defacing a subway. Thirty minutes after the arrest, Stewart arrived at Bellevue Hospital comatose. He died thirteen days later. None of the police officers who came in contact with Michael Stewart spoke about what they saw, although several witnesses saw police officers beating Stewart. Isabel Wilkerson, *Jury Acquits All Transit Officers In 1983 Death of Michael Stewart,* *N.Y. Times,* Nov. 25, 1985, at A1.
Officers were so confident of their immunity from prosecution that they bragged about the beating on the official police computer system.\textsuperscript{65} When asked whether citizens should blame rogue cops or a department that permits misbehavior to occur, Burmeister responded that both were culpable.\textsuperscript{66} He stated that even "bad apples" are unlikely to break the law if they are closely supervised.\textsuperscript{67} "It is the combination of bad officers and bad supervision that leads to police abuse."\textsuperscript{68} Unfortunately, supervision is often inadequate, and in many police departments, it is quite common to find officers who have not been disciplined despite a history of complaints. The Christopher Commission, formed in the aftermath of the Rodney King beating, identified forty-four officers with six or more complaints of excessive force.\textsuperscript{69} Since that finding in 1991, nine of the forty-four officers have been promoted, while only three have been fired.\textsuperscript{70} The absence of meaningful discipline and the failure to take citizen complaints seriously creates a culture that tolerates police abuse. The code of silence simply reinforces it.

\textsuperscript{65} The initial report of the beating came at 12:56 a.m., when Sergeant Koon's unit reported to the Watch Commander's desk at Foothill Station:

"You just had a big time use of force . . . tased and beat the suspect of CHP pursuit, Big Time."

The station responded at 12:57 a.m.:

"Oh well. . . I'm sure the lizard didn't deserve it. . . ."

In response to a request from the scene for assistance for a "victim of a beating," the LAPD dispatcher called the Los Angeles Fire Department for a rescue ambulance:

P.D.: . . . Foothill & Osborne. In the valley dude (Fire Department dispatcher laughs) and like he got beat up.
F.D.: (laugh) wait (laugh).
P.D.: We are on scene.
F.D.: Hold, hold on, give me the address again.
P.D.: Foothill & Osborne, he pissed us off, so I guess he needs an ambulance now.
F.D.: Oh, Osborne, Little attitude adjustment?
P.D.: Yeah, we had to chase him.
F.D.: OH!
P.D.: CHP and us. I think that kind of irritated us a little.
F.D.: Why would you want to do that for?
P.D.: (laughter) should know better than run, they are going to pay a price when they do that.
F.D.: What type of incident would you say this is?
P.D.: It's a . . . it's a . . . battery, he got beat up.


\textsuperscript{66} Interview with William Burmeister, supra note 36.

\textsuperscript{67} Id.

\textsuperscript{68} Id.


\textsuperscript{70} Id.
In the case of Abner Louima, who was tortured in the bathroom of a New York City police precinct, investigators found only two police officers willing to provide valuable information.\(^7\) They learned virtually nothing from scores of other officers who were granted limited immunity from prosecution.\(^7\) A senior investigator complained that officers would respond to questioning with “I don’t know,” or “I wasn’t there.”\(^7\) Furthermore, the Internal Affairs Bureau mishandled the case by not reporting a tip they received on the night of the beating.\(^7\) As a result, investigators did not arrive at the precinct until thirty-six hours after the incident.\(^7\)

The delay provided the officers with an opportunity to destroy evidence (the wooden stick allegedly used to sodomize Louima was not found) and develop cover stories.\(^7\) The loss of evidence and the code of silence unquestionably hindered the investigation. The horrendous circumstances of the Louima case, combined with the fact that officers abused him inside a police precinct, suggest that officers have come to expect abuse to be tolerated. Zachary Carter, the U.S. Attorney for the Eastern District of New York, stated that “[t]he boldness of the action suggests a mind-set that they could possibly get away with this extraordinary heinous offense,” and fears that “there might be some reason for them to believe [that] . . . .”\(^7\)

### D. Federal Prosecutors Will Also Encounter Police Resistance

Shifting responsibility to the U.S. Attorney’s office for the prosecution of police brutality, however, may not result in more convictions. FBI agents will encounter the same blue wall of silence that investigators from the district attorney’s office face. Federal agents, as in the Louima case, would similarly suffer from delays caused by the police department’s internal affairs bureau. Unfortunately, police officers are often the only witnesses who can substantiate a claim of police brutality. Thus, their unwillingness to cooperate is often much more significant than which prosecutor, state or federal, handles the case.

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72. Id.
73. Id.
74. John Kifner, Police Say Tip Received Early in Torture Case was Mishandled, N.Y. TIMES, Aug. 23, 1997, at 25.
76. Id.
III. FACTORS FAVORING FEDERAL PROSECUTION OF POLICE BRUTALITY

Many scholars claim that federal prosecutors should have exclusive responsibility for police brutality cases because there is an inherent conflict of interest when local prosecutors handle such cases.\textsuperscript{78} Local prosecutors work closely with police officers and need to maintain a good working relationship with them. Assistant district attorneys rely upon officers to act as their eyes and ears on the streets, and they may fear that those same officers will become uncooperative after they choose to prosecute one of them. Certainly this problem will exist if the prosecutor is investigating an officer who is a witness for her on another case. Thus, it is clear that there must be some level of separation between assistant district attorneys who prosecute police officers, and those who rely upon the same officers as witnesses. As a result, district attorney's offices generally assign these cases to a special unit. In Manhattan, the Official Corruption Unit is responsible for these cases,\textsuperscript{79} while in Los Angeles it is the Special Investigations Division.\textsuperscript{80}

A. State Prosecutors May Decline to Prosecute

Unfortunately, local prosecutors often "fall back on their discretion to decline" rather than pursue a victim's complaint.\textsuperscript{81} From 1980 to 1991, the Los Angeles District Attorney's Office only prosecuted forty-one officers out of 319 cases referred to them, a mere thirteen percent.\textsuperscript{82} Currently, the Manhattan District Attorney's Official-Corruption Unit only presents three or four cases of police brutality to a grand jury each year.\textsuperscript{83} Prosecutors, who tolerate po-


\textsuperscript{81} Freeman, \textit{supra} note 3, at 719.

\textsuperscript{82} David Freed, \textit{Police Brutality Claims Are Rarely Prosecuted}, L.A. TIMES, July 7, 1991, at A1. Note that these statistics are inconsistent with the Kolts Report, that reported that there were a greater number of referrals. \textit{See Kolts Report, supra} note 12, at 99-137.

\textsuperscript{83} Interview with William Burmeister, \textit{supra} note 36.
lice perjury in order to establish a good working relationship with
the police, are likely to overlook the use of excessive force for the
same reason. The tolerance of police perjury or excessive force
sends a message that the legal rules do not apply when the defen-
dant/victim is “guilty.” Stephens found great resistance within his
office to prosecuting officers for perjury. His unit investigated
and determined that a team of narcotics police officers within the
Thirty-Fourth Precinct lied about observing individuals buying
drugs, because the dealers would frustrate them by dealing inside a
building where their deals could not be seen by the police. Despite
these findings, his colleagues within the District Attorney’s
Office argued that the perjury committed by the officers should be
tolerated because it produced the right result—arrests of drug
dealers. After becoming the head of the unit, he felt that he went
from “wearing the white hat in the courtroom, to wearing the
black.” If local prosecutors are pressured into turning a blind eye
to police perjury, an atmosphere is created in which officers may
feel that they have carte blanche to use excessive force.

After leading the Anti-Corruption Unit for two years, Stephens
believed that local prosecutors were unable to resolve this conflict
of interest, even with the creation of a separate unit within the Dis-
trict Attorney’s Office. He stated that Governor Mario Cuomo’s
decision to disband the Office of the Special Prosecutor, which
handled official misconduct cases and was unaffiliated with the
District Attorney’s Office, was a grave mistake. Other prosecu-
tors have found it difficult to recruit assistants for the Official-Cor-
rupption Unit because they feared that, “over the long term,” being
identified with a unit the cops did not like would compromise their
careers.

Prosecuting police officers will inevitably affect the public’s im-
age of police. Jurors and judges may become more skeptical of
police testimony after a high-profile prosecution of a police officer.
In the wake of the Rodney King beating, many police chiefs found
that the community’s perception of police officers suddenly

84. See Christopher Slobogin, Testilying: Police Perjury and What to Do About It,
85. Interview with Lawrence Stephens, supra note 38.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id.
changed from positive to negative. Local prosecutors may justify
dismissing complaints of police brutality because such cases draw
the media's attention to police officers who lie and violate the
law—a significant problem given that local prosecutors routinely
rely upon officers as witnesses.

B. Federal Authorities May Rely on Pattern of Practice Lawsuits

As a result of the Violent Crime Control and Law Enforcement
Act of 1994, federal authorities now have the ability to change how
local police departments operate. The law empowers the Depart-
ment of Justice to force police departments to implement internal
review systems or to enjoin them from allowing officers to use
deadly chokeholds. Since passage of the law, the Civil Rights Di-
vision of the Department of Justice has begun investigating several
departments across the country, including Los Angeles, New Orle-
ans, and Washington, D.C. Furthermore, it has negotiated con-
sent decrees in Steubenville, Ohio and Pittsburgh, Pennsylvania. The Civil Rights Division is currently discussing a consent decree
with the New Jersey State Police, a statewide law enforcement
agency accused of racial profiling. In addition, the U.S. Attor-
ney's Office in the Eastern District of New York is currently inves-
tigating the New York City Police Department's disciplinary
system in response to the Abner Louima incident. Theoretically,


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 pat-
tern or practice of conduct by law enforcement officers . . . that deprives
persons of rights, privileges, or immunities secured or protected by the Con-
stitution or laws of the United States.


95. Id.


97. Weiser, supra note 94, § 1, at 46. Mayor Rudolph W. Giuliani was unenthu-
siastic about the federal investigation. He said, "I thought the era of Federal
micromanaging is over, and of the Federal Government trying to come in and pre-
the power to change police practices complements the federal prosecutor's ability to pursue individual civil rights violations.

Thus, the Justice Department may be better suited to handle police brutality because it has both the power to prosecute individual officers and to force a police department to change its pattern of practice. Although a local prosecutor may argue that an individual officer unreasonably used a chokehold, only the federal prosecutor can enjoin the department from using that particular chokehold. Just the mere threat of a federal lawsuit may provide the needed push for reform within a law enforcement agency. For example, the state troopers of New Jersey have agreed to change some of their practices in order to avoid a federal lawsuit.98 These measures include informing the dispatcher of the exact reason for a stop before the officer leaves the car, refocusing drug enforcement by targeting “impact cases” rather than pursuing passenger vehicles, and publishing reports on the number of minorities and non-minorities stopped.99

The statutory tools available to federal prosecutors suggest that they should have primary responsibility for investigating police brutality. If federal prosecutors were to assume responsibility for handling individual cases of brutality, they would be in a better position to discern patterns of abuse that could support civil lawsuits. Although each state has the ability to pass laws similar to the Violent Crime Control and Law Enforcement Act, none have done so to this point. Furthermore, state legislatures would more likely grant such power to the state attorney general than to the district attorneys, thereby separating the tools available to a single federal prosecutor.

C. Sentencing Favors Federal Prosecution

Although sentencing guidelines provide for stiffer penalties under federal laws, officers, across the jurisdictions, routinely receive fairly light punishment. For example, three of the four officers from Prince George County in Maryland were convicted of beating a burglar into unconsciousness after subduing and hand-

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99. Id. Note that the number of searches conducted by the New Jersey State Troopers dropped from 440 in 1999, to 281 in 2000 when the federal authorities threatened to sue. Nevertheless, a majority of the 281 drivers that were stopped were minorities, including 123 African-American and seventy Latinos. Iver Peterson, Turnpike Data Show Decline in Searches, N.Y. TIMES, Apr. 24, 2001, at B1.
cuffing him, yet received only sixty days in jail. In other similar cases, officers received only fines or community service. Freeman argues that these trivial sentences “dilute the message that the police are not above the law.”

Overall, the federal sentencing guidelines have increased the time served by convicted officers. For example, the federal court sentenced Officer Justin Volpe to thirty years for sodomizing Abner Louima, while his fellow officer, Charles Schwarz, was found guilty of perjury and agreed to serve five years, considerably more time than either would have received in state court. In the Rodney King beating, however, the Supreme Court held that an officer’s status as a law enforcement official might entitle him to a sentencing departure because of his vulnerability in prison. Furthermore, the Court held that officers may receive a downward departure in sentencing if the victim’s conduct provoked the use of force, for example, Rodney King’s attempt to flee. Freeman argues that these departures harm the principles behind the law by giving special considerations to law enforcement officials. Despite these downward departures, officers guilty of police brutality will receive longer sentences if prosecuted by federal rather than local prosecutors.

IV. FACTORS FAVORING LOCAL PROSECUTION OF POLICE BRUTALITY

This Section will argue that the primary responsibility for prosecuting police brutality should be placed in the hands of local prosecutors, despite the advantages detailed above of having federal prosecutors handle such cases. First, the press and the public will be more successful in holding elected district attorneys instead of

100. Freeman, supra note 3, at 680-81 (citing Jon Jeter, 3 P.G. Officers Sentenced to Jail for Beating Suspect; Judge’s Decision Unprecedented in County, WASH. POST, June 14, 1995, at B1).
101. Id. at 679.
102. Id. at 682.
103. Id. at 734. The average prison sentence for the twenty-five offenders who were sentenced to prison between September 30, 1985 and September 30, 1987, was 18.7 months. After the guidelines, the average sentence for the seventy-seven offenders who went to prison was 28.2 months. Id.
104. Joseph P. Fried, Volpe Sentenced to a 30-Year Term in Louima Torture, N.Y. TIMES, Dec. 14, 1999, at B3; Glaberson, Case Closed, Not Resolved, supra note 11, at A1. Under state law, Volpe would have served a minimum of five years and a maximum of twenty-five. Id.
106. Id.
107. Freeman, supra note 3, at 727.
Congressional Representatives accountable for failing to prosecute abusive police officers. Second, Congress has not provided the Department of Justice with sufficient staffing to prosecute all the cases of police brutality. Furthermore, federal prosecutors would not be able to obtain convictions in cases where the officer's actions were simply reckless rather than intentional. Finally, given the resources available to federal prosecutors, they are more likely to influence police practice by focusing upon their unique power to sue local police departments.

A. Local Prosecutors May Be Held Accountable Through Elections

Accountability suggests that the local prosecutor should have the dominant role in prosecuting police violence. Citizens elect the district attorney, whereas the President appoints the Attorney General and the U.S. Attorneys. Thus, the district attorney is beholden to the people of her county to ensure that she upholds the law in all cases, including those involving the police. For a district attorney to suggest that a federal prosecutor should handle a particular case is to suggest that her office is incapable of fulfilling its mission. In the next election, a challenger could highlight this issue in her campaign. Handing a case to the federal prosecutor also sends a mixed message to victims, witnesses, and jurors by suggesting that the district attorney cannot untangle herself from the police and serve as a minister of justice. Lastly, it seems natural to rely upon the district attorney to handle crimes that occur in her jurisdiction, rather than sending them to a federal prosecutor who may be located miles away.

District attorneys have not always been held accountable for failing to prosecute police brutality. The "public's fear of crime has given the police carte blanche to 'control the streets and enforce the status quo.'” Referring to drug-interdiction as the "War on Drugs" sends a message to the police that jurors, local prosecutors, and judges will tolerate whatever needs to be done in order to win. Unfortunately, there may be a large section of the population willing to tolerate these abuses in order to wage a successful

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109. Id.
war on crime, drugs, and gangs in urban America. Community pressure, however, could also serve to force police departments to initiate reforms, while pressing the district attorneys to spend more resources on prosecuting police officers. In the aftermath of the Amadou Diallo shooting, protestors in New York City brought about reforms within the police department. Meanwhile, the Bronx County District Attorney's Office spent considerable resources trying to obtain convictions against the four officers who shot Amadou Diallo.

Federal prosecutors are less likely than their local counterparts to serve as sources of accountability for police brutality. In 1991, United States Representative Don Edwards (D-Cal.) held hearings on the roles of the FBI and the Department of Justice in investigating police brutality. In particular, Edwards sought an explanation for why the office pursued only a small number of indictments given the large volume of complaints received. Edwards was unsatisfied with the explanations that the FBI and the Department of Justice provided. During those hearings, Assistant Attorney General John Dunne testified that "[w]e 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 back-stop to these other resources."


114. Id.

115. Id.

116. Hoffman, supra note 4, at 1492 (citing Police Brutality Hearings, supra note 22 (statements of John Dunne)).
Paul Hoffman has criticized the "back-stop" explanation as an excuse for federal inaction. He pointed out that, in the early 1990s, the first Bush Administration enlarged the federal law enforcement presence on the streets, but made no attempt to persuade Congress that the Department of Justice should have the authority to bring civil lawsuits against police departments.

A national and standardized system of receiving and recording complaints against police officers would draw attention to the issue of police abuse and increase accountability. Currently, the Attorney General's office is required to collect data about the excessive use of force from local police departments and to publish an annual summary. Rob Yale, however, recommends creating a standardized system to receive and record complaints at an agency located away from the local police station. Assigning an independent agency to handle complaints may encourage victims distrustful of the police to come forward and report abuses when they might not otherwise do so. The independent agency would then forward the complaints to the local law enforcement agency or to the local U.S. Attorney's office. In addition, the agency would issue statistical reports, that could include data such as the number of complaints filed against each law enforcement organization, each organization's per capita complaint ratio, and, for those law enforcement agencies that chose to respond, the results of each complaint. The creation of an independent agency would prevent police departments from sanitizing their records and would force prosecutors to acknowledge the existence of police violence.

117. Id. at 1490-93.
118. Id. at 1490.
119. Yale, supra note 9, at 1854-58.
Section 14142 reads:
(a) Attorney General to collect
The Attorney General shall, through appropriate means, acquire data about the use of excessive force by law enforcement officers.
(b) Limitations on the use of data
Data acquired under this section shall be used only for research or statistical purposes and may not contain any information that may reveal the identity of the victim or any law enforcement officer.
(c) Annual Summary
The Attorney General shall publish an annual summary of the data acquired under this section.
Id.
121. Yale, supra note 9, at 1855.
122. Id.
123. Id.
Ultimately, the press may have to be relied upon to force local and federal prosecutors to fulfill their obligation to prosecute police brutality.\textsuperscript{124} The press coverage of the Rodney King incident not only led to a federal conviction, but also encouraged Congress to conduct hearings on police brutality and to grant federal prosecutors the power to sue police departments. The protests in New York City drew attention to the issues of police abuse and may have encouraged local and federal officials to examine the practices of the New York City Police Department.\textsuperscript{125}

B. Obtaining Resources to Prosecute Police Abuse Is a Matter of Political Will

Neither local nor federal prosecutors in metropolitan areas have an advantage in terms of resources. Both, however, could develop the expertise necessary to prosecute police officers by creating a separate section to handle official corruption and abuse. Mary Jo White, former U.S. Attorney for the Southern District of New York, decided not to create such a specialized section in her office because she felt that she did not have sufficient resources to assign attorneys to cases involving only police misconduct.\textsuperscript{126} Unfortunately, both state and federal prosecutors will always suffer from financial constraints. Nevertheless, prosecutors must be willing to shift resources if they truly believe that patterns of police abuse pose a civil rights emergency.

While the federal law enforcement budget has grown in the past decades, the size of the staff at the Civil Rights Division has remained largely static, thereby limiting the number of indictments and convictions.\textsuperscript{127} Currently the Justice Department employs 9,168 attorneys, but the Criminal Section of the Civil Rights Divi-

\textsuperscript{124} The press was referred to by the Founding Fathers as the "fourth branch of government." See Potter Stewart, \textit{Or of the Press}, 26 HASTINGS L.J. 631, 654 (1975).


\textsuperscript{126} Discussion with Mary Jo White, U.S. Attorney for the Southern District of New York, at New York University School of Law, Seminar on Prosecution (Apr. 6, 1999).

\textsuperscript{127} Hoffman, \textit{supra} note 4, at 1492-93.
sion employs only about twenty to thirty full-time attorneys. This staffing shortage will limit the Department of Justice's ability to implement the Violent Crime Control and Law-Enforcement Act. Given these limited resources, it is not surprising that Stephen J. Pollak, Assistant Attorney General for Civil Rights from 1968-1969, believes that the division's strategy should be to wait and intervene only when the 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." This approach may work if local and state officials respond to public pressure. For example, in the aftermath of the Diallo shooting, Governor John G. Rowland of Connecticut responded to a police shooting of an African-American youth by appointing an independent prosecutor and removing control of the investigation from the Hartford police.

The "back-stop" approach relies upon the political will of local prosecutors to allocate resources to prosecute police violence when the victim may be a convicted felon and the conviction will be difficult to obtain. In Manhattan, the Official Corruption Unit has seven assistant district attorneys, six investigators, and a support staff comprised of several paralegals and a receptionist. This is negligible when one considers that over six hundred attorneys work for the New York County District Attorney's Office. Nevertheless, Burmeister believed that his staffing was sufficient and claims that his unit had more resources available to it than similar units in other counties. At any given time, an Assistant District Attorney in the Official Corruption Unit is actively investigating fifteen to twenty-five cases of official misconduct, including cases involving police officers. This unit has generally been successful in obtaining convictions during its twelve years of existence, although there is no indication that it has successfully curbed police violence in New York City.

129. Id. at 8.
130. Id.
132. Interview with William Burmeister, supra note 36; see Skolnick, supra note 79, at 49.
133. Interview with William Burmeister, supra note 36.
134. Id.
135. Skolnick, supra note 79, at 49.
Ultimately, the question of whether a prosecutor has the resources to prosecute police brutality turns on whether the chief prosecutor is willing to prioritize this issue. The local prosecutor is more likely than the federal prosecutor to do so because she will have to run for re-election. Although U.S. Attorneys may call upon the Department of Justice for assistance, the Department of Justice does not have the staffing to effectively cover the entire nation.

**Conclusion**

In the Louima case, U.S. Attorney Zachary Carter and Brooklyn District Attorney Charles Hynes decided that the federal prosecutors were in the best position to handle the case. They ultimately obtained convictions. The federal prosecutors' exclusive ability to sue for unlawful pattern-or-practice, however, suggests that they should devote their limited resources to civil actions, leaving criminal prosecutions to the local prosecutors. Former Assistant U.S. Attorney General Drew Days disagrees:

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?

To answer Days' loaded question, the federal government exists to protect and promote federal norms. That role, however, does not require federal prosecutors to take individual cases away from local prosecutors who are willing to file charges. Federal prosecutors are more likely to curb police violence and fulfill their role in protecting our constitutional rights by focusing upon civil actions.

If Congress passed national legislation requiring local prosecutors to forward complaints to federal authorities, or created an agency to receive such complaints, federal prosecutors would be able to determine which police departments failed to discipline their own. Pattern-of-practice lawsuits are more likely to curb police violence because they target the culture that emboldens officers to believe that they can abuse their power. Furthermore,

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137. *Agathocleous & Ward, supra* note 52, at 18.
prosecution of individual officers has failed to effectively deter other officers from using excessive force.\textsuperscript{138} Despite the federal conviction of the police officers involved in the Rodney King beating, the Los Angeles police department is again plagued with numerous accounts of police violence and corruption.\textsuperscript{139} Less than a decade after the Rodney King beating, officers in the Rampart Division admitted to shooting a gang member and framing him by planting a gun.\textsuperscript{140} Corruption was so widespread within the Rampart Division that nine convictions were reversed and potentially hundreds of cases were tainted.\textsuperscript{141} One must wonder whether we would have read the same headlines if the federal authorities sought to change the police department through civil lawsuits, rather than the prosecution of individual officers.

Although federal prosecutors should continue to investigate cases of police brutality when it results in death or serious injury, they should give local prosecutors the opportunity to pursue these cases. They would then be able to fulfill their “back-stop” role and protect our rights if the local prosecutor declined to file charges. Additionally, the federal authorities do not have the resources to pursue every excessive force case. Thus, it is appropriate that the primary responsibility for prosecuting police violence belongs to the district attorneys, who can be held accountable by the public and the press to ensure that their resources are spent prosecuting police violence.

\textsuperscript{139} See \textit{id}.
\textsuperscript{140} \textit{Id}.
\textsuperscript{141} \textit{Id}.