

The Federal Injunction as a Remedy for Unconstitutional Police Conduct

For a century, the federal Constitution has guaranteed to all persons in the United States the rights to "due process" and "equal protection" at the hands of state and local police.¹ Recent Supreme Court decisions have greatly expanded the content of these constitutional guarantees.² But despite recent efforts by federal courts to define and enforce these rights,³ constitutional violations by the police remain commonplace.⁴

The vast majority of police transgressions are acts of harassment and

1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Actions of state or local police officers within or beyond their local statutory and constitutional authority are sufficiently "state action" to be subject to the prohibitions of the fourteenth amendment. *Monroe v. Pape*, 365 U.S. 167 (1961).

2. See, e.g., *Miranda v. Arizona*, 384 U.S. 486 (1966); *Gilbert v. California*, 388 U.S. 263 (1967); *Katz v. United States*, 389 U.S. 347 (1967).

3. Before 1961, the only significant federal remedy for police violations of constitutional rights was on appeal from a conviction to the United States Supreme Court on the grounds that the conviction (usually because of the use of illegally seized evidence) was so contrary to fundamental principles of "ordered liberty" and so shocking to the conscience as to require reversal. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952). In 1961 the Supreme Court opened the door to much more extensive federal judicial review of state and local police methods by applying to the states the exclusionary rule against the admission of illegally seized evidence. *Mapp v. Ohio*, 367 U.S. 643 (1961). Earlier the same year, the Court in *Monroe v. Pape*, 365 U.S. 167 (1961), held that the general civil remedy section of the Civil Rights Act of 1871 authorized a damage action against police officers for unconstitutional actions. Two years later the Court in *Townsend v. Sain*, 372 U.S. 293 (1963), and *Fay v. Noia*, 372 U.S. 391 (1963), opened the door to federal habeas corpus relief for state prisoners who had been convicted after the admission of evidence obtained by unconstitutional means.

4. Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

Though there are of course no statistics on police violations of constitutional rights, most observers believe that such violations are very numerous, especially in certain areas of large cities. See, e.g., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 299-305 (1968) [hereinafter cited as COMMISSION ON CIVIL DISORDERS]; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: TASK FORCE REPORT: THE POLICE 178-89 (1967) [hereinafter cited as TASK FORCE REPORT]; W. LAFAVE, ARREST 437-82 (1965); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952). Fifteen years ago, unconstitutional arrests in the United States were estimated to number several million per year. Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 152, 154 (1953).

bullying which never lead to prosecutions—unwarranted arrests, illegal searches, unreasonable disruptions of harmless conduct, verbal insults.⁵ Such violations leave no visible scars; the victim usually does not suffer bodily injury or loss of property. Yet to the individual victim these acts constitute serious intrusions upon his privacy, dignity, and security. Where the police violations fall evenly upon residents of a community, everyone's security is threatened.⁶ Where, as is often the case, police misconduct focuses largely on classes of people who are politically powerless to protect themselves, the Constitution's promise of equal protection is mocked, and a community is divided into those whom the police protect and those whom the police victimize. Such police misconduct, unredressed and undeterred, has often been blamed for the frustrations which have recently erupted into violence in many large American cities.⁷

Normally, actual or potential victims of legal wrongs can look to the courts for relief. But where police abuse is the wrong, courts have seemed largely powerless to help.⁸ Neither criminal prosecutions nor civil tort actions for individual acts of police misconduct have been frequent or successful enough to have significant deterrent force.⁹ The

5. For the views of a thoughtful former Police Commissioner (now a judge on the Sixth Circuit) on police misconduct and the difficulties faced by a police official trying to stop such misconduct, see Edwards, *Order and Civil Liberties: a Complex Role for the Police*, 64 MICH. L. REV. 47 (1965).

6. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

7. See, e.g., COMMISSION ON CIVIL DISORDERS 11, 143-44, 299-307.

8. The powerlessness of the courts has caused some observers to favor the creation of civilian review boards to hear citizen complaints of police misconduct. See, e.g., Burger, *Who Will Watch the Watchman?* 14 AM. U.L. REV. 1 (1964). This remedy, defeated in a referendum in New York City in November 1966, N.Y. Times, Nov. 10, 1966, at 32, col. 6, and rejected by the Newark city government in early 1968, N.Y. Times, Mar. 1, 1968, at 1, col. 7, has been applied in only a few cities. One factor to be weighed against civilian review boards is that the boards seem to draw strong and sometimes not very rational opposition from policemen's organizations. This strong opposition raises the possibility that creation of such boards might have a substantial adverse effect on police department morale and initiative. The FBI report on riots in 1964 blamed civilian review boards for making police too passive. N.Y. Times, Sept. 27, 1964, at 82, col. 1. On the general subject of police departments' complaint review machinery, see Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1964); TASK FORCE REPORT 200-02.

9. Criminal prosecutions are infrequent partly because prosecutors work closely and "on the same side" with offending policemen. The many barriers to recovery of worthwhile tort damages from policemen are discussed in Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). A federal tort action under the 1871

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exclusionary rule, applicable to the states since 1961,¹⁰ can work only where the police are developing a case for prosecution and hence has no effect on violations whose only purpose is harassment.¹¹

I.

One potentially effective type of judicial relief, however, has been largely ignored: the federal mandatory injunction.¹² Use of the injunction as a remedy for unconstitutional police conduct has been approved by the Supreme Court in the only case to raise the issue—*Hague v. CIO*,¹³ decided in 1939. In *Hague*, the CIO sought to enjoin the

Civil Rights Act for violations of constitutional rights by illegal arrest and search was approved by the Supreme Court in *Monroe v. Pape*, 365 U.S. 167 (1961), but the possible scope of this remedy has been sensibly limited by the Court's subsequent acceptance of "good faith and probable cause" as a defense to the action. *Pierson v. Ray*, 386 U.S. 547 (1967). On the general inadequacy of possible criminal and tort liabilities as deterrents for police violations of constitutional rights, see TASK FORCE REPORT 31-32; W. LAFAVE, ARREST 411-27 (1965).

10. *Mapp v. Ohio*, 367 U.S. 643 (1961).

11. The inadequacies of the exclusionary rule as a means of enforcing constitutional restraints even on police action directed at obtaining evidence for trial have been almost universally recognized. See, e.g., TASK FORCE REPORT 31; W. LAFAVE, ARREST 427-35, 488 (1965); J. SKOLNICK, JUSTICE WITHOUT TRIAL 211-29 (1966); Burger, *Who Will Watch the Watchman?* 14 AM. U.L. REV. 1 (1964); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965).

12. Such a remedy is authorized by the general civil remedy section of the Civil Rights Act of 1871:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1964).

This section was accepted as authorization for injunctive relief in the reapportionment cases. *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964). The early desegregation decisions authorizing injunctive relief, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), do not cite any statutory basis for such relief. It is possible that the Court felt that no statute was necessary to authorize federal equitable relief against deprivations of federal rights. Cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414 n.13 (1968). But if statutory basis was necessary for the desegregation injunctions, it was ready at hand in Section 1983.

Under 28 U.S.C. § 1343(3), the federal courts have jurisdiction over Section 1983 suits for injunctions without regard to the amount in controversy. *Hague v. CIO*, 307 U.S. 496, 519 (1939) (opinion of Stone, J.).

In view of the facts that police abuses are regarded as an important national problem and that no other remedy seems to be working, the lack of discussion of the injunctive relief authorized by this section is surprising. None of the works cited in notes 4 through 11 *supra* discusses the possibilities of such a remedy. The major opinions in the past twenty years on the wisdom of the exclusionary rule, all of which discuss the adequacy of other remedies for police misconduct, do not mention the injunction. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Irvine v. California*, 347 U.S. 128 (1954); *Wolf v. Colorado*, 338 U.S. 25 (1949); *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

13. 307 U.S. 496, *aff'd with modifications* 101 F.2d 774 (3d Cir. 1939), *aff'g* 25 F. Supp. 127 (D.N.J. 1938). For the findings of fact, conclusions of law, and decree of the district court, see 101 F.2d at 791-96.

Mayor, the Chief of Police, and other officials of Jersey City from continuing an anti-union campaign of harassing arrests, deportations of organizers, and suppression of union circulars and public meetings. The district court issued a permanent injunction prohibiting the defendants and their agents from continuing their "deliberate policy" of constitutional violations. With two dissents from the seven Justices sitting, the Supreme Court affirmed.¹⁴ Of the two dissenters, only Justice McReynolds argued that a federal court should refuse to issue an injunction rather than interfere with "the essential rights of the municipality to control its own parks and streets."¹⁵

Subsequent decisions have not qualified the *Hague* Court's approval of federal injunctions against police misconduct.¹⁶ Yet, despite the apparent willingness of lower federal courts to grant the relief when requested,¹⁷ the lack of reported cases suggests that the victims of misconduct have rarely sought injunctions.

14. The Court's five-Justice majority was represented by three opinions, but the majority Justices disagreed only on the question of how the police conduct complained of amounted to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." and not on the question of the propriety of the injunction remedy under what is now Section 1983.

15. Justice McReynolds added: "Wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts, and essays in that direction should be avoided." 307 U.S. at 532.

16. After 1939, the Court went through a conservative phase on the propriety of granting injunctive relief against state officials. *See, e.g.,* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Comm'n v. Southern Ry Co.*, 341 U.S. 341 (1951); *Harrison v. NAACP*, 360 U.S. 167 (1959). *See generally* Note, *Abstention: An Exercise in Federalism*, 108 U. Pa. L. Rev. 226 (1959). But the closest the Court came to withdrawing approval for injunctions against deliberate police department policies of constitutional violations was with the rule, first clearly announced in 1943, requiring federal court abstention from injunctive interference with state criminal prosecutions. *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Stefanelli v. Minard*, 342 U.S. 117 (1951). *Compare* *Cameron v. Johnson*, 390 U.S. 611 (1968), *with* *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The *Douglas* rule was based on the assumptions that a trial is not itself a wrong to be recognized by the courts and that a presumably fair trial with the possibility of appeal to the Supreme Court gives adequate protection for constitutional rights threatened by a criminal prosecution. As recognized by the *Douglas* Court when it distinguished the earlier *Hague* decision, the *Douglas* assumptions are inapplicable to cases of police constitutional violations. 319 U.S. at 161. In contrast to criminal prosecutions under unconstitutional statutes, police violations of constitutional rights have always been recognized by the courts as wrongs, such violations are rarely followed by trial, and trial and appeal on a criminal charge usually offer no redress for pretrial violations.

17. The reported cases in which injunctive relief against police constitutional violations was granted under Section 1983 are the following: *Refoule v. Ellis*, 74 F. Supp. 336 (N.D. Ga. 1947); *Local 309, United Furniture Workers v. Gates*, 75 F. Supp. 620 (N.D. Ind. 1948); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); *NAACP v. Thompson*, 357 F.2d 831 (5th Cir. 1966), *cert. denied*, 385 U.S. 820 (1967); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966); *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966); *Houser v. Hill*, 278 F. Supp. 920 (M.D. Ala. 1968); *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir. 1968), *petition for cert. filed*, 36 U.S.L.W. 3474 (U.S. May 31, 1968) (No. 1482, 1967 Term; renumbered No. 144, 1968 Term), *aff'g with modifications* 268 F. Supp. 855 (S.D.N.Y. 1967).

In only one case did a district court find clear constitutional violations had taken

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The infrequent invocation of the *Hague* remedy is at least partially explained by the fact that deliberately ordered violations of constitutional rights have not been the primary problem. Most frequently, unconstitutional searches, arrests, or other abuses of police authority cannot be traced as in *Hague* to direct instructions from high police officials. Far more often, recurring violations are passively tolerated by those responsible for supervising the police department.¹⁸

For tolerated constitutional violations, a prohibitory injunction which only ordered high police officials to refrain from unconstitutional conduct would be useless—the problem lies not in what such officials are doing but in what they are *not* doing. Purely prohibitory injunctions would have to be directed against the subordinate policemen who were acting illegally. But courts would be unable to enforce such injunctions unless they were willing to take over the task of disciplining individual policemen. Such an approach would be highly inefficient since the court's only means of enforcing its orders directly against policemen—a contempt proceeding—would be far too cumbersome and heavy-handed to deal effectively with large numbers of alleged violations.

If the injunction is to have any utility as a remedy for tolerated police abuse, it must require affirmative action by the officials responsible for police conduct.¹⁹ The decisions implementing the Supreme Court's

place and yet deny injunctive relief. Even there the court of appeals reversed and granted the injunction. *Lankford v. Schmidt*, 240 F. Supp. 550 (D. Md. 1965), *rev'd sub nom.* *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966). In *Sellers v. Johnson*, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 852 (1948), *rev'g* 69 F. Supp. 778 (S.D. Iowa 1946), the Eighth Circuit Court of Appeals found in reversing the district court that constitutional rights had been violated but declined to order injunctive relief on the grounds that a naked declaration of rights would sufficiently protect the plaintiffs.

18. Professor LaFave has noted that high police officials often acquiesce in patterns of arrests which are not intended to be followed by prosecutions, the victims often being alleged drunks, prostitutes, transvestites, and gambling and liquor law violators. W. LAFAVE, *ARREST* 489 (1965). The very nature of toleration makes evidence of its existence, other than the continuation of on-the-street violations, virtually unobtainable. But occasionally there are other indications of a police head's toleration of unconstitutional conduct. For example, the New York Times recently reported that "[i]n a telephone interview from Ann Arbor Professor Reiss [University of Michigan sociologist who directed a study of police work sponsored by the President's National Crime Commission] said that some police chiefs had been surprised not so much by the reports of beatings but by the fact that observers had been present at the beatings." N.Y. Times, July 4, 1968, at 8, col. 1.

19. There can be no doubt that Section 1983 in terms authorizes the imposition of liability on high police officials. The section imposes liability on "every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected" any person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." A Police Commissioner of course acts "under color of" statute or ordinance in disciplining or failing to discipline his police force. Although a Commissioner's inaction and toleration may not bring him within the sweep of the verb "subjects" in the section, toleration would seem to come within the scope of the phrase "causes to be subjected." In the case of an official responsi-

rulings on school desegregation and legislative reapportionment clearly demonstrate that a federal court has the power to vindicate federal constitutional rights when necessary by issuing mandatory injunctions against state and local officials.²⁰

The only important decision approving injunctive relief for tolerated police misconduct is that of the Fourth Circuit in *Lankford v. Gelston*.²¹ In that case, a "deliberate policy" of unconstitutional searches²² had become no more than toleration of occasional searches by the time the litigation reached the Fourth Circuit.²³ Nonetheless the court reversed a denial of injunctive relief below. Judge Sobeloff hinted that the district court could require the defendant police commissioner to issue orders forbidding any further unconstitutional searches by policemen and promising disciplinary action for violators of the new orders:

It would not have been too much to expect in these circumstances a forthright statement that officers conducting such illegal searches in the future will subject themselves to disciplinary action.²⁴

ble for the discipline of men under his command, inaction may be as causally efficacious as action.

Several recent lower court decisions have (probably wisely) interpreted Section 1983 as not authorizing the imposition of damage liability on a police department head for failure to prevent Section 1983 torts committed by his subordinates. See *Runnels v. Parker*, 263 F. Supp. 271 (C.D. Cal. 1967) (police official immune with respect to rules set for police department subordinates); *Salazar v. Dowd*, 256 F. Supp. 220 (D. Colo. 1966); *Jordan v. Kelley*, 223 F. Supp. 731 (W.D. Mo. 1963). Although prior to a court's order the Police Commissioner's duty in the face of seemingly conflicting obligations may not have been sufficiently clear to charge him with liability in damages for past police violations caused by his "toleration," once the court has spoken the Commissioner's duty is clear and the Commissioner cannot justly complain of its prospective enforcement against him. Even a judge, who enjoys absolute immunity from a Section 1983 damage suit, *Pierson v. Ray*, 386 U.S. 547 (1967), has been held to be a proper defendant in an injunction action. *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967).

20. See, e.g., *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *Chambers v. Hendersonville City Bd. of Educ.*, 364 F.2d 189 (4th Cir. 1966); *Alabama v. United States*, 301 F.2d 583 (5th Cir.) *aff'd mem.*, 371 U.S. 37 (1962); *Reynolds v. State Election Bd.*, 233 F. Supp. 323 (W.D. Okla. 1964).

21. 364 F.2d 197 (4th Cir. 1966) (en banc), *rev'g* *Lankford v. Schmidt*, 240 F. Supp. 550 (D. Md. 1965).

22. In the first few days of a hunt for two Negro murder suspects, a special armed squad conducted more than three hundred searches ("turn-ups") based on nothing more substantial than anonymous telephone tips. There was no showing that the Police Commissioner affirmatively ordered the searches but he authorized the creation of the special "turn-up" squad and undoubtedly knew what it was doing.

23. After the action was brought in the district court, the searches tailed off partly because it became apparent that the suspects had fled Baltimore and perhaps partly in response to the Police Commissioner's generally worded order to his subordinates against entering dwellings without "probable cause." 240 F. Supp. at 555.

24. 364 F.2d at 203. Even in *Lankford*, the Court of Appeals is not clear as to whether the injunction is to be limited to the defendant Police Commissioner—it merely directs the district court to issue an order enjoining "the Police Department" from continuing the searches complained of. 364 F.2d at 206. Of the earlier police injunction cases, only *Local 309, United Furniture Workers v. Gates*, 75 F. Supp. 620 (N.D. Ind. 1948), confined

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A mandatory injunction to stop tolerated police abuses poses special problems for a federal court. The court ought to avoid unnecessarily dampening the vigor of a police department by becoming too deeply involved in the department's daily operations. At the same time, the court should not shrink from making constitutional guarantees effective. The experimental approach taken by some of the more creative federal courts in enforcing the desegregation rulings²⁵ could serve as a rough model for district courts grappling with these conflicting concerns.

Confronted with a pattern of tolerated violations,²⁶ the court should initially declare the existence of the wrong and direct broadly that the Police Commissioner correct it. The court's order should also require the Police Commissioner to report after a short period of time on the steps he has taken and the results these measures have produced. Such an injunction would leave the Police Commissioner free to frame orders to patrolmen and alter enforcement procedures²⁷ to achieve the desired result with a minimum adverse effect on the morale and efficiency of his police department.

In many cases, the court's initial order alone may suffice to call forth effective efforts from the Police Commissioner. But the obvious disadvantage of a broadly phrased order is that its necessary vagueness allows scope for inadequate compliance. A court could rely, however, on several pressures to bring more vigorous corrective action. In an area where emotion and rumor may make it difficult for the Police Commissioner to determine the truth, once a federal court has ruled that some action by the police department is needed, the Police Commissioner might sincerely want to improve his department. Furthermore, a well-intentioned but hard-pressed Police Commissioner could use the court order to justify to superiors, subordinates, and segments of the public

the scope of the injunctive relief to responsible higher officials (in that case the Governor of Indiana and the Superintendent of Indiana State Police).

25. Such a flexible approach was called for in the Supreme Court's second *Brown* opinion, *Brown v. Board of Educ.*, 349 U.S. 294 (1955). For a view of the desegregation cases as prime examples of experimental injunctive relief, see Sedler, *Conditional, Experimental and Substitutional Relief*, 16 *RUTGERS L. REV.* 639 (1962). On the successes and failures of the federal district courts in using the injunction to enforce the desegregation ruling, see J. PELTASON, *FIFTY-EIGHT LONELY MEN* (1961). Cases exemplifying the experimental approach to obtaining desegregation are *School Bd. v. Allen*, 240 F.2d 59 (4th Cir.), *cert. denied*, 353 U.S. 910, 911 (1957); *Bush v. Orleans Parish School Bd.*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569 (1961).

26. See pp. 151-52 & notes 34-36 *infra*.

27. For a description of internal control methods now in use by police departments in various parts of the U.S., see TASK FORCE REPORT 28-30, 193-97. Police department complaint review procedures are described in Note, *The Administration of Complaints by Civilians Against the Police*, 77 *HARV. L. REV.* 499 (1964).

any possibly unpopular corrective measures necessary to protect constitutional rights.²⁸ Finally and most importantly, the threat that unsatisfactory results would call forth greater judicial interference should motivate the Police Chief to devise remedies that work effectively.

In some cases, of course, a Police Commissioner's good faith ineptitude or bad faith inaction would result in insufficient progress after the first injunction. But as long as the Commissioner acted without blatant bad faith, the court could not fairly punish him because his methods did not wholly succeed. It could, however, issue a more specific order.²⁹ At this stage, the court would have the benefit of the Commissioner's periodic reports on measures taken in response to the first order, as well as the plaintiffs' view of these measures and the petition for a more detailed injunction. If the court found further action was necessary, it might direct the Commissioner to issue specific orders to policemen, perhaps even framing the orders itself.³⁰ The court might also require specific changes in the departmental disciplinary machinery to make punishment a more concrete threat to erring policemen. For example, it could order the creation of an undercover squad to gather evidence of police misconduct, or it could order specific changes in the procedures of police disciplinary hearings.³¹ Such orders would seriously interfere with the Police Commissioner's management of his department and a court should make every effort to minimize the dangers inherent in such interference. In dealing with the disciplinary

28. On the present lack of public pressure on police department heads to respect the constitutional rights of minorities and the need to counter public pressure for strict law enforcement at the expense of constitutional guarantees, see A. GERMANN, F. DAY & R. GALLATI, *INTRODUCTION TO LAW ENFORCEMENT* 27 (1962); Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 837-38, 905 (1965); LaFave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEXAS L. REV. 434 (1967).

29. Such was the approach to enforcement employed by the federal courts in desegregating public schools. The court orders contemplated in the second *Brown* opinion, *Brown v. Board of Educ.*, 349 U.S. 294 (1955), left wide scope for experimentation by local school boards in ultimately attaining the objective defined by the Supreme Court in the first *Brown* opinion, *Brown v. Board of Educ.*, 347 U.S. 483 (1954). When more than a decade passed and insufficient compliance was obtained, the federal courts did not put school board members in jail but rather issued much more detailed orders to local school officials. For good examples of how intrusive affirmative court orders can get if necessary, see *Chambers v. Hendersonville City Bd. of Educ.*, 364 F.2d 189 (4th Cir. 1966), and *United States v. Jefferson Co. Bd. of Educ.*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

30. Cf. *United States v. Jefferson Co. Bd. of Educ.*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

31. In a case where violations remained serious and numerous after all other intrusive orders had been tried, a court might consider ordering the appointment of a special master to run the police department's disciplinary machinery. On the advantages and disadvantages of court-appointed monitors, receivers, and masters generally, see Note, *Monitors: A New Equitable Remedy?* 70 YALE L.J. 103 (1960).

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mechanisms of a police department, the court should look carefully to the experience of other police departments with the procedures which the court considers requiring; where possible, the court should rely on practices already used with success elsewhere under similar circumstances. At some point, of course, a court will be justified in concluding that any violations which continue to occur cannot practically be prevented. At that point the court should decline to grant further relief while retaining jurisdiction to modify the permanent injunction if new problems arise.

As the court's orders become increasingly specific, the defendant officials will be compelled to obey the court's specific commands or face the ultimate sanction standing behind a court order—the power to fine or jail for contempt.³² In addition, a recalcitrant official might be ordered to give up his office until he showed himself willing to comply with the court's orders.³³ Since it is important that high police officials not be deterred from vigorous and imaginative law enforcement efforts by the fear of punishment in doubtful cases, the court should make clear at the outset that it will not invoke its contempt power except in cases of unjustified disobedience of a clear and specific order.

II.

Before a federal court can issue any order against a police official, it must conclude that a substantial threat of tolerated constitutional violation exists.³⁴ Proof of such a threat would nearly always require evi-

32. See *United States v. Barnett*, 376 U.S. 681 (1964); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1086-91 (1965); Moskowitz, *Contempt of Injunctions Civil and Criminal*, 43 COLUM. L. REV. 780 (1943).

33. *Lance v. Plummer*, 353 F.2d 585 (3d Cir. 1965), cert. denied, 384 U.S. 929 (1966).

34. When it is a question of prospective injunctive relief for "tolerated" police constitutional violations, any persons threatened with a violation of their rights should have standing to appear as plaintiffs. Normally, in these circumstances, if one person is threatened, at least that person's socio-economic group and probably all members of the community are likewise threatened. Before the 1966 amendments to the Federal Rules of Civil Procedure, such suits could be most conveniently brought as "spurious class actions." See *Lankford v. Schmidt*, 240 F. Supp. 550 (D. Md. 1965), rev'd on other grounds sub nom. *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966); *Bailey v. Patterson*, 323 F.2d 201, 206-07 (5th Cir. 1963), cert. denied, 376 U.S. 910 (1964). The suit should be brought under the present Rule 23 as a Rule 23(b)(2) class action in which "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole" FED. R. CIV. P. 23(b)(2). Though Section 1983 speaks in terms of liability "to the party injured," the federal courts have always taken the sensible view that threat of injury is sufficient to make a person a "party injured" for the purpose of asserting prospective liability against the persons responsible for the threat. See, e.g., *Lankford v. Schmidt*, supra.

If the injunction is to be an effective remedy for police constitutional violations, it is

dence of numerous past violations.³⁵ Since the remedy will focus on alterations in the police disciplinary machinery, the adequacy of existing police procedures should be an important factor in the court's deliberations.³⁶ Where disciplinary procedures are found inadequate on their face, there should be a rebuttable presumption that testimony of violations is reliable—the court should place the burden of proof on the police to disprove plaintiffs' allegations. If, under this standard, the court finds that a substantial risk of future violations exists, it should issue a general injunction as suggested above. In the more difficult cases where the police disciplinary processes do not appear obviously inadequate (perhaps because the Police Commissioner has taken steps in response to an earlier court order), the court must face the task of determining from conflicting testimony and without the presumption whether substantial violations are occurring.

A final question to be faced is whether the remedy's possible dangers to the federal structure of government and to legitimate law enforcement require or permit a federal court to abstain from exercising its equitable powers.³⁷ In the *Hague* case, Justice McReynolds argued in dissent that federal equitable relief should be denied to avoid federal judicial interference with state and local governmental functions.³⁸ It is doubtless a legitimate objective to maintain state and local government free from unnecessary encroachment by the federal judiciary.

very important that, as in other civil rights cases, the district courts liberally permit organizations of "injured parties" to assist individual plaintiffs in the bringing of suits. Without the participation of such organizations, the timorous and impecunious victims and potential victims of police misconduct might be unwilling or unable to petition the court for injunctive relief. Cf. *Smith v. Board of Educ.*, 365 F.2d 770 (8th Cir. 1966) (association of Negro teachers given standing in view of fact that presentation of claims might be discouraged if each member were required to present his claims individually).

35. Although in school desegregation and welfare cases the Supreme Court has held that exhaustion of administrative remedies is not a precondition for federal equitable relief under Section 1983. *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); *Damico v. California*, 389 U.S. 416 (1967), it would probably be wise to require that plaintiffs in police injunction cases exhaust reasonably available administrative remedies before seeking judicial relief. The danger to the vigor and initiative of legitimate law enforcement inherent in the injunctive relief here contemplated is sufficient to justify taking reasonable steps to avoid the issuance of unnecessary court orders. A showing that several complaints have been made to the police department and that misconduct has continued unabated would be sufficient to show exhaustion of remedies. A showing that complaints are discouraged or unofficially punished by the police should be sufficient to show that no administrative remedy is reasonably available. That police discouragement of complaints occasionally takes place is noted in TASK FORCE REPORT 195.

36. An adequate administrative response made only under threat of suit would not preclude the court from issuing an injunction requiring that the adequate administrative measures be continued. Cf. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953) (dictum).

37. On federal equitable abstention to avoid unnecessary interference with state legal and administrative machinery, see note 16 *supra*.

38. See p. 146 & note 15 *supra*.

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But as in the desegregation and reapportionment cases, the fourteenth amendment rights threatened by police misconduct are sufficiently important and the adequacy of state and local relief sufficiently uncertain that any abstention out of respect for state "sovereignty" would be unjustified.³⁹ Plaintiffs' choice of the federal forum should be respected particularly since the case will not usually involve matters in which the state courts have special expertise.⁴⁰

A second possible ground for federal abstention deserves closer scrutiny: the danger that federal injunctive remedies might inhibit constitutional as well as unconstitutional law enforcement practices.⁴¹ To minimize the danger, this Note has suggested that court orders be directed only to high police officials and that these officials initially be left free to choose the means to eliminate violations. Thus the possibility of adverse effects on legitimate law enforcement would not usually justify a complete denial of injunctive relief although it might dictate cau-

39. The argument that state and local governmental officials should be free as a matter of federalism to deprive persons of due process and equal protection without redress in the federal courts would seem to have been answered in the negative a century ago with the adoption of the fourteenth amendment and the early Civil Rights Acts. The implications of that answer have been increasingly recognized in recent years. See, e.g., *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *Orleans Parish School Bd. v. Bush*, 242 F.2d 156 (5th Cir.), cert. denied, 354 U.S. 921 (1957); Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 828-40 (1965); Note, Section 1983: A Civil Remedy for the Protection of Federal Rights, 39 N.Y.U.L. REV. 839 (1964); Comment, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007 (1966). Indeed so completely have the implications of the fourteenth amendment and the Civil Rights Acts been accepted by most federal courts that they have virtually turned on its head the old maxim that equity protects property and not personal rights. Compare *Gee v. Pritchard*, 2 Swan. Ch. 402, 36 Eng. Rep. 670 (1818), with *Henry v. Greenville Airport Comm'n*, 284 F.2d 631 (4th Cir. 1960), and *Clemons v. Board of Educ.*, 228 F.2d 853 (6th Cir.), cert. denied, 350 U.S. 1006 (1956). The latter two cases roundly deny that the federal courts have discretion to refuse injunctive relief for clear violations of federal constitutional rights.

In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court refused to require a Section 1983 plaintiff to exhaust his state legal remedy (a tort action) before seeking damages from police officers in a federal court. In subsequent cases, the Court has refused to allow federal abstention in Section 1983 suits seeking equitable relief even where state and local administrative remedies have not been exhausted. For a discussion of this rule and why it may be wise to require exhaustion of administrative as contrasted with legal remedies in police injunction cases, see note 35 *supra*.

40. Cf. *McNeese v. Board of Educ.*, 373 U.S. 668, 673-74 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961).

41. The danger that injunctive relief for police misconduct might sap the vigor of legitimate law enforcement has frequently been recognized by state courts as a justification for a denial of injunctions against police misconduct. See, e.g., *City of Jacksonville v. Wilson*, 157 Fla. 838, 27 So. 2d 108 (1946); *Harmon v. Commissioner of Police*, 274 Mass. 56, 174 N.E. 198 (1931); *Delaney v. Flood*, 183 N.Y. 323, 76 N.E. 209 (1906). State court decisions allowing injunctive relief include *Berman v. City of Philadelphia*, 425 Pa. 13, 228 A.2d 189 (1967); *City of Ashland v. Heck's Inc.*, 407 S.W.2d 421 (Ky. 1966); *Gurtov v. Williams*, 105 S.W.2d 328 (Tex. Civ. App. 1937); *City of Covington v. Gausepohl*, 250 Ky. 323, 62 S.W.2d 1040 (1933); and *City of Louisville v. Lougher*, 209 Ky. 299, 272 S.W. 748 (1925). For a discussion of state cases involving injunctions and the police, see Note, *Federal Injunctive Relief From Illegal Search*, 1967 WASH. U.L.Q. 104.

tion in the issuance of specific mandatory injunctions when general injunctions have fallen short of their objectives.⁴² Moreover, the possible adverse effects of federal injunctive relief on "law and order" must be weighed against the equally adverse effects on "law and order" of denying aggrieved citizens redress in the courts and allowing police violations of constitutional rights to continue unabated. In view of the recent disorders in American cities, a small reduction in police effectiveness might be more than offset by the benefits which federal injunctive relief would bring. An effective remedy against police misconduct could help engender a new respect for the law among those who now feel that they are only victimized by the law's most visible representatives.⁴³

The initiative of plaintiffs and the effectiveness of police department disciplinary procedures will set the limits to the effectiveness of the federal mandatory injunction. In large cities where the need is probably greatest the remedy will work best since larger cities have the organizations to support injunction suits as well as police departments with well-developed internal disciplinary machinery to carry out a court's directives. The possible values of the proposed remedy to individual rights would seem to justify experimentation to determine just how effective in practice the federal mandatory injunction can be.

Widespread successful use of the federal injunction would mean not only enforcement of hitherto unenforceable rights but also the elimination of perhaps the most important justification for the present exclusionary rule. When the Supreme Court in 1961 first broadly applied to the states the rule excluding evidence obtained by unconstitutional police practices, a primary justification was the lack of any other means to obtain police respect for constitutional rights.⁴⁴ If the mandatory injunction proves effective in preventing police misconduct, the Court might well reconsider a rule that releases the guilty⁴⁵ in an often in-

42. In assessing the weight to be given to the danger of inhibiting legitimate law enforcement, the lower federal courts should weigh the fact that the Supreme Court did not allow the possibility of adverse effects on the initiative of police officers to deter it from approving the imposition under the old civil rights statutes of criminal and civil liability for subordinate police officers' unconstitutional conduct. *Screws v. United States*, 325 U.S. 91 (1945) (approving the application of the criminal statute which is now 18 U.S.C. § 242); *Monroe v. Pape*, 365 U.S. 167 (1961) (holding that Section 1983 authorizes tort damage actions against offending policemen).

43. This was apparently one consideration which led the Fourth Circuit to direct that relief be granted in the *Lankford* case. *Lankford v. Gelston*, 364 F.2d 197, 204 (4th Cir. 1966).

44. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

45. In the well-known words of Cardozo: "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926).

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effectual effort to discipline the police.⁴⁶ In the end, the exclusionary rule might be retained, but its justification would have to rest on fairness to the defendant⁴⁷ and not the need to police the police.

46. On the ineffectiveness of the exclusionary rule see note 11 *supra*.

47. Another possible basis would be a concern that the government not set an evil example of illegality by profiting from the illegal acts of its agents.

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher.

For good or for ill, it teaches the whole people by its example. Crime is contagious.

If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Though this argument has merit, it neglects the contempt for the law that can be bred when the exclusionary rule turns loose upon society the obviously guilty. See Burger, *Who Will Watch the Watchman?* 14 AM. U.L. REV. 1, 21-23 (1964).