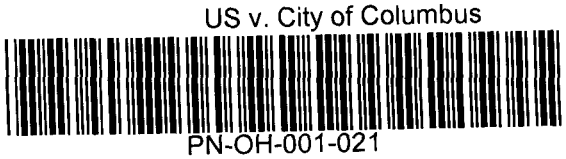

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil No. C2-99-1097
	)	
v.	)	Judge Holschuh
	)	
CITY OF COLUMBUS, OHIO, et al..	)	Magistrate Judge King
	)	
Defendants.	)	
	)	

BRIEF OF AMICI CURIAE IN SUPPORT OF
UNITED STATES'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT

Samuel R. Bagenstos, Trial Attorney
1545 Massachusetts Avenue, A127
Cambridge, MA 02138
(617) 495-9299

Margo Schlanger
1525 Massachusetts Avenue, G301
Cambridge, MA 02138

Counsel for Amici Curiae

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STATEMENT OF INTEREST

Amicus Curiae John Conyers, Jr. is the ranking minority member of the House Judiciary Committee. He was an original cosponsor of the Police Accountability Act of 1991, H.R. 2972, 102d Cong., 1st Sess. – proposed legislation that included the language ultimately enacted in 42 U.S.C. § 14141, the statute at issue in this case. (As discussed below, the legislative history to the Police Accountability Act, as incorporated in the 1991 Crime Bill, represents the most pertinent background to the provision that became Section 14141.) Representatives Howard Berman and Maxine Waters also serve on the House Judiciary Committee and were original cosponsors of the Police Accountability Act of 1991. Representatives William D. Delahunt, Sheila Jackson-Lee, Zoe Lofgren, and Melvin L. Watt are current members of the House Judiciary Committee, and Representatives Danny K. Davis, Harold E. Ford, Jr., Carolyn Cheeks Kilpatrick, Gregory W. Meeks, Juanita Millender-McDonald, Donald M. Payne, and Edolphus Towns are current members of Congress; all share a particular interest in police

accountability. Especially since the Magistrate Judge's Report in this case is the first judicial pronouncement interpreting Section 14141, Amici are concerned that the Report's erroneous restriction of the intended scope of liability of the statute should not become accepted law. Amici leave the facts to the parties and take no position on other issues raised in this case; their interest lies entirely in correcting the Magistrate Judge's determination that Section 14141 incorporates a "policy or custom" limitation on municipal liability, which Amici believe to be a misreading of this important statute.

SUMMARY OF ARGUMENT

Defendants argue, and the Magistrate Judge agreed, that Section 14141 must be construed to incorporate Section 1983's "policy or custom" test for determining municipal liability. Accordingly, defendants contend, an injunction may not issue against a municipality under Section 14141 simply because subordinate employees have engaged in conduct that deprives people of their constitutional rights, even when such misconduct is sufficiently pervasive or systematic to amount to a pattern or practice. Not only must a pattern or practice of misconduct exist within the police department, defendants contend, but the pattern or practice must also be caused by a culpable act, or omission that rises to the level of deliberate indifference, on the part of high-level municipal decisionmakers.

This argument is fundamentally misconceived. The "policy or custom" and "pattern or practice" tests represent *alternative* approaches to the question whether a government entity may be held responsible for the actions of its subordinate employees. The judicially inferred "policy or custom" test, which applies to litigation brought by private parties under Section 1983, is a fault-based regime. It requires the plaintiff to identify some act or omission, attributable to high-level municipal policymakers, that

caused the constitutional violation. The "pattern or practice" test, which Congress has directed to be applied under a number of modern civil rights laws that authorize lawsuits by the federal government, does not rest institutional liability on proven fault by high-level officials; it rests such liability on proof of aggregations of incidents of misconduct by a defendant municipality's agents. The plain language of Section 14141—which authorizes lawsuits by the federal government but not by private parties—reflects Congress's decisive choice for the more modern "pattern or practice" approach.

The Magistrate Judge failed to give effect to this choice for two reasons. First, she apparently did not appreciate the strong pedigree of the "pattern or practice" approach in modern civil rights laws enforced by the federal government or the degree to which the legislative history confirms Congress's decision in Section 14141 to follow that approach rather than the "policy or custom" approach. Second, the Magistrate Judge erroneously believed that reading the statute according to its plain text would raise serious constitutional questions. But a plain-language reading of the statute's "pattern or practice" provision raises no constitutional concern at all, much less a serious one. Regardless of the standard of institutional responsibility, the United States cannot prevail in a Section 14141 case unless it proves multiple acts of unconstitutional conduct taken by state actors who abuse power granted by the municipality. The statute is therefore a quintessential remedy for unconstitutional conduct and comes within even the narrowest conception of Congress's power to enforce the Fourteenth Amendment.

ARGUMENT

A. The Plain Text of Section 14141 Forecloses Application of a "Policy or Custom" Test

Although the Magistrate Judge construed Section 14141 as limiting municipal

responsibility to cases that satisfied the "policy or custom" requirement, she made no attempt to explain how such a requirement could be divined from the text of the statute. Instead, she believed that a restrictive "policy or custom" interpretation was dictated by the legislative history and the canon of avoiding constitutional doubt. Had the Magistrate Judge focused on Section 14141's plain text, however, she could not have reached the conclusion she did. That text, especially when considered "in the light of text of surrounding statutes," *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 120 S. Ct. 1858, 1870 n.17 (2000) (quoted in Report at 14), makes clear that Congress did not incorporate the "policy or custom" test in Section 14141. Rather, Congress expressly adopted the "pattern or practice" approach of modern civil rights laws that authorize suits by the federal government.

In the corpus of federal civil rights law, the "policy or custom" and "pattern or practice" requirements generally represent *alternative* mechanisms for holding a government entity liable for the acts of its subordinate agents. The judicially inferred "policy or custom" standard generally applies only to lawsuits brought by private parties under Section 1983. That standard imposes a requirement of municipal fault. As the doctrine has been elaborated by the Supreme Court, a municipality cannot be held liable under Section 1983 unless the plaintiff can show that the municipality was "itself" at fault. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). To establish such municipal fault, a plaintiff generally must prove the existence of a culpable act or "deliberately indifferent" omission, taken by a municipal policymaker, that either (a) itself violated the Constitution or (b) proximately caused the plaintiff's constitutional injury. See *Board of County Comm'rs v. Brown*, 520 U.S. 397, 403-408 (1997).

In a line of cases prefigured by *Rizzo v. Goode*, 423 U.S. 362 (1976), and

formally commencing with *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), the Supreme Court has found two reasons for concluding that Section 1983 incorporates a "policy or custom" requirement for establishing municipal liability. First, the text of the statute limits liability to a "person" who "subjects, or causes to be subjected," any person to the deprivation of constitutional or federal statutory rights. 42 U.S.C. § 1983.[1] When the defendant is a city, the Court has read this language as imposing liability only where some high-level official "whose acts may fairly be said to be those of the municipality"[2] actually violates the Constitution ("subjects" the plaintiff to a constitutional deprivation) or at least is the "moving force"[3] behind the violation ("causes [the plaintiff] to be subjected" to such a deprivation). See *Board of Comm'rs*, 520 U.S. at 403 (noting that the "policy or custom" requirement "rested partly on the language of § 1983 itself"). Second, the Court has concluded that the Forty-Second Congress, which enacted the statute that became Section 1983, believed that any broader rule of municipal liability would violate rules of state immunity articulated in mid-Nineteenth Century cases like *Collector v. Day*, 11 Wall. 113 (1871), and *Kentucky v. Dennison*, 24 How. 66 (1861). See *Monell*, 436 U.S. at 669-679. Contrary to the suggestion in the Magistrate Judge's report (Report at 15-16), however, it is clear that the principles of state immunity to which the Forty-Second Congress appealed are no longer good law. See *Monell*, 436 U.S. at 676 (observing that the state immunity principles

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[1] The statute reads, in relevant part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 * * *.

[2] *Board of Comm'rs*, 520 U.S. at 403.

[3] *Monell*, 436 U.S. at 694.

relied on by the Forty-Second Congress were "clearly supported by precedent—albeit precedent that has not survived"); see also *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987) ("*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development.").

The "policy or custom" doctrine has required courts adjudicating suits under Section 1983 to undertake a series of elaborate inquiries to determine which municipal officials may be considered "policymakers," see, *e.g.*, *McMillian v. Monroe County*, 520 U.S. 781 (1997); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); which actions taken by those officials actually constitute municipal "policy," *compare Pembaur v. City of Cincinnati*, 475 U.S. 469, 484-485 (1986) (county prosecutor's legal instructions to deputy sheriffs serving a writ constituted county "policy"), *with id.* at 492, 497 (Powell, J., dissenting) ("The action said to have created policy here was nothing more than a brief response to a single question over the telephone."); and under what circumstances an omission can count as "policy," see *City of Canton*, 489 U.S. at 389-390 (requiring a showing of "deliberate indifference"). See generally *Board of Comm'rs*, 520 U.S. at 430, 433 (Breyer, J., dissenting) ("*Monell*'s basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply."); *City of Canton*, 489 U.S. at 385-386 ("The inquiry is a difficult one; one that has left this Court deeply divided in a series of cases that have followed *Monell* * * *.").

This complicated case law is limited to Section 1983 lawsuits, however. Although the Magistrate Judge did not acknowledge the point, modern civil rights statutes have incorporated neither Section 1983's "subjects or causes to be subjected"

language nor its judicially inferred "policy or custom" requirement. Instead, particularly (though not exclusively) when authorizing the Attorney General to bring lawsuits under these statutes, Congress has frequently employed a different method for determining when an entity may be held responsible for civil rights violations undertaken by its agents. Beginning with the Civil Rights Act of 1960, and continuing through the major subsequent civil rights statutes, Congress has authorized the federal government to sue covered entities where their operations exhibit a "pattern or practice" of violations by subordinate officials.[4] Although the existence of a "policy or custom" sufficient for municipal liability under Section 1983, will always suffice for liability under the "pattern or practice" test, see *United States v. Gregory*, 871 F.2d 1239, 1243 (4th Cir. 1989), it is not a necessary prerequisite. Instead, the terms "pattern" and "practice" evince a primary concern with the defendant entity's actual operations rather than its official policies. Taking those terms according to their plain import, an accumulation of violations by municipal employees must also suffice to satisfy the "pattern or practice" test – even if the Attorney General has not proven a link between those violations and any specific act or culpable omission by municipal officials who may be designated "policymakers."[5]

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[4] See, *e.g.*, Civil Rights Act of 1960, 42 U.S.C. § 1971 (voting rights); Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997a; Civil Rights Act of 1964, Title II (public accommodations), 42 U.S.C. § 2000a; Civil Rights Act of 1964, Title VII (employment), 42 U.S.C. § 2000e; Fair Housing Act of 1968, 42 U.S.C. § 3614; Americans with Disabilities Act, Title III (public accommodations), 42 U.S.C. § 12188.

[5] This point also follows directly from the cases finding private institutional defendants liable for patterns of violations by their agents under the Fair Housing Act. See, *e.g.*, *United States v. Balistrieri*, 981 F.2d 916, 929-930 (7th Cir. 1992) (apartment building owner liable for pattern or practice where his rental agent appeared to discriminate between black and white testers on five occasions, notwithstanding the lack of any specific evidence to tie the owner to the agent's discriminatory acts). As the Sixth Circuit has made clear, the Fair Housing Act's "pattern or practice" provision applies equally to cities and private defendants. See *United States v. City of Parma*, 661 F.2d 562, 571-572 (6th Cir. 1981). The "custom" aspect of *Monell*'s "policy or custom" requirement may also permit a determination of municipal liability in the absence of a

The "pattern or practice" standard reflects several commonsense notions: that an entity can almost invariably do *something* to stop a pattern of lawlessness among its subordinates; that it is proper to hold an entity responsible for eliminating such a pattern even when the entity's policymakers have not been "deliberately indifferent" in allowing the pattern to continue, *cf. Board of Comm'rs*, 520 U.S. at 407, 410 (stating that *Canton*'s "deliberate indifference" standard "is a stringent standard of fault" and that a "showing of simple or even heightened negligence will not suffice"); and that it is wasteful to search for a "policymaker" who made a "policy" decision where such a pattern exists. When it vests "pattern or practice" authority in the federal government, moreover, Congress assures that the broad sweep of the remedy will not be invoked indiscriminately or for merely private interests. It will be invoked only in those cases that satisfy the Department of Justice's rigorous standards for approving pattern or practice lawsuits.

When Congress gave the Attorney General authority to bring civil lawsuits targeting constitutional violations by law enforcement officers in Section 14141, it followed the "pattern or practice" model of modern civil rights litigation; it did not incorporate the "policy or custom" requirement that applies to private lawsuits under Section 1983. Section 14141's text makes this point clear. The statute reads, in full:

> (a) Unlawful conduct
> It shall be unlawful for any governmental authority, or any agent thereof,

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direct link with the actions of high-level municipal officials, but Congress could reasonably have concluded that such a determination would be made only in very narrow circumstances. See *Board of Comm'rs*, 520 U.S. at 404 ("[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law."); *Monell*, 436 U.S. at 691 ("Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.") (internal quotation marks omitted; quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970)).

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

Unlike Section 1983, whose "person who . . . subjects, or causes to be subjected" language requires a search for some culpable act or omission by the municipality "itself," Section 14141 provides a remedy for "conduct by [subordinate] law enforcement officers." 42 U.S.C. § 14141. Where those violations, considered together, rise to the level of a "pattern or practice," the federal government may sue for relief against the municipality and any officer involved. See 42 U.S.C. § 14141(a) (violation extends to "any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, * * * engage[d] in [the] pattern or practice"). Moreover, by defining the class of covered entities to include both governmental authorities and their agents and those acting on their behalf, Congress evinced an intent to hold governmental authorities responsible for the acts of their agents—though only when those acts aggregate to the level of a "pattern or practice." *Cf. Meritor Savings Bank F.S.B. v. Vinson*, 477 U.S. 57, 70-72 (by defining "employer" in Title VII to include "any agent" of an employer, Congress evinced an intent to hold employers responsible for the acts of their agents in accordance with agency principles). By its plain text, Section 14141 does not require the Attorney General to make the showing that would be required of a private plaintiff in a 1983 action—that some municipal "policy or custom" was the "moving

force" behind the constitutional violation. Rather, the Attorney General need make only the showing she must make under a wide range of other modern civil rights statutes—that the defendant entity's operations are marked by a "pattern or practice" of violations by subordinate officials whose authority comes from the defendant.

In sum, the Magistrate Judge failed to appreciate that the "pattern or practice" approach of modern, publicly enforced civil rights statutes represents an established alternative to the restrictive "policy or custom" test applied in private litigation under Section 1983. The Magistrate Judge also failed to appreciate the extent to which Section 14141's text adopts that approach. Once these errors are corrected, the Magistrate Judge's interpretation of the statute cannot stand.

B. The Legislative History Confirms That Congress Expressly Rejected the "Policy or Custom" Standard When It Enacted Section 14141

Although the Magistrate Judge made no attempt to explain how a "policy or custom" requirement could be divined from the text of Section 14141, she placed substantial reliance on the statute's legislative history. The legislative history does not support her interpretation of the statute. Examination of the legislative history confirms what the statutory text makes clear: Congress sought to give the Attorney General the broad "pattern or practice" authority she enjoys under other modern civil rights statutes; it did not limit her to bringing cases that would satisfy the "policy or custom" test applied to private suits under Section 1983.

Section 14141 was adopted as part of Title XXI-D of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (the "1994 Crime Bill"). The provision appeared in the version of the 1994 Crime Bill that passed the Senate but not in the version that passed the House. At conference, however, the

House agreed to include the provision that would become Section 14141, and that provision appeared in the law as enacted. See H. Conf. Rep. No. 324, 103d Cong., 2d Sess. 397 (1994). Because no Senate committee prepared a report to accompany the 1994 Crime Bill, the Magistrate Judge was essentially correct that Section 14141 "has no *direct* legislative history." Report at 5 (emphasis added). But cf. 139 Cong. Rec. S15042 (statement of Sen. Moseley-Braun) (noting that the Senate bill "addresses the nationwide problems of police brutality and misconduct and racial bias in the criminal justice system by giving the Attorney General the power to intervene where a police department has shown a pattern or practice of brutality") (full statement attached as Exhibit A).

But the legislative record nonetheless contains significant documentation regarding the provision that became Section 14141. That provision originated as part of a stand-alone bill, the Police Accountability Act of 1991, introduced in the House of Representatives by Representatives Edwards, Berman, Conyers, Dixon, Dymally, Kopetski, Levine, Washington, and Waters. See H.R. 2972, 102d Cong., 1st Sess. The Police Accountability Act, Sections 2(a)(1) and 2(a)(2) of which were virtually identical to Section 14141 as enacted,[6] was incorporated in the version of the Omnibus Crime Control Act of 1991 (the 1991 Crime Bill) that passed the House and in the version that emerged from conference.[7] The legislative history to the Police Accountability Act, as

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[6] The original Police Accountability Act differed in two major respects from the version ultimately enacted. First, the "unlawful conduct" provision in the original bill did not include the phrase "or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles." *Compare* 42 U.S.C. § 14141(a) *with* H.R. 2972, 102d Cong., 1st. Sess. § 2(a)(1). Second, the original bill included a separate private right of action provision. See H.R. 2972, 102d Cong., 1st Sess. § 2(a)(3).

[7] The private right of action provision was dropped in conference, see H. Conf. Rep. No, 405, 102d Cong., 1st Sess. 204 (1991), and that provision never reappeared in the subsequent versions of the bill. Nonetheless, the statements in the legislative history regarding the lack of effective enforcement under Section 1983 remain highly relevant.

incorporated in the 1991 Crime Bill, represents the most pertinent background to the provision that became Section 14141.

Examination of the Police Accountability Act's legislative history confirms that Congress intended what it said–that the statute would incorporate the pattern or practice approach that characterizes public enforcement of many modern civil rights statutes. The House Report to the 1991 Crime Bill could not be clearer on this point: Noting the Attorney General's "pattern or practice authority under eight civil rights statutes, including those governing voting, housing, employment, education, public accommodations and access to public facilities," the Judiciary Committee argued that the "lack[] [of] authority to address systemic patterns or practices of police misconduct" represented "a serious and outdated gap in the federal scheme for protecting constitutional rights." H.R. Rep. No. 242, 102d Cong., 1st Sess. 137 (1991). As should be evident from this passage, Congress considered lawsuits brought by the Attorney General under modern civil rights statutes—and not actions brought by private individuals under Section 1983—to be the relevant model for the litigating authority that Section 14141 would grant.

Indeed, a statute that merely allowed the federal government to sue under Section 1983's standards could not achieve Section 14141's manifest purpose—to "close th[e] gap in the law" that prevented effective enforcement of the constitutional rights of people who come into contact with the police. See *id.* at 138. During two days of hearings that

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The Police Accountability Act was proposed, and Section 14141 was enacted, because Congress believed the existing regime of private lawsuits under Section 1983 to be inadequate. Although Congress ultimately chose to make no change in the remedies available to private parties, its decision to grant new and broad litigating authority to the Attorney General represents a direct response to the inadequacy of those private remedies to achieve full enforcement of constitutional rights in the police context.

formed the legislative record for the Police Accountability Act, see *id.* at 136, witnesses argued that Congress must abrogate the holding in *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980) (absent express statutory authority, federal government may not bring lawsuit against a municipality alleging a pattern or practice of police misconduct), in order to address two basic limitations on private enforcement. First, they observed that the justiciability doctrine of *Los Angeles v. Lyons*, 461 U.S. 95 (1983), made it extremely difficult for individual victims of police misconduct to sue for injunctive relief. See *Police Brutality: Hearings Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary* (1991) ["*Police Brutality Hearings*": Excerpts attached as Exhibit B] at 60 (statement of Paul Hoffman, Esq.) (stating that *Lyons* "makes it almost impossible for private civil rights lawyers to bring pattern-and-practice cases. As was the case in *Lyons*, a person who is choked or beaten or mauled by a police dog, will not be able to show that it's likely to happen again. And so they will not have standing under the *Lyons* case to bring a 1983 action to get protective relief."); *id.* at 174 (statement of Prof. Drew Days) ("Now, one of the things that also creates a need it seems to me for a civil response from the Justice Department is that the Supreme Court has limited very seriously the extent to which private parties can get equitable relief, even where they have been the victims of brutality themselves. A case in point is the *City of Los Angeles* v. *Lyons* * * *."). A statute that gave the Attorney General authority to seek injunctions against police misconduct might address this limitation of existing law even if the statute limited the Attorney General with a "policy or custom" rule; the standing rules of *Lyons* have no application to lawsuits by the federal government to enforce the laws.

But a statute that restricted the federal government to bringing suits under the

Monell doctrine could not possibly address the second then-existing limitation identified by the witnesses: *Monell*'s restrictive "policy or custom" test itself. Representative Washington—one of the original cosponsors of the Police Accountability Act—focused directly on the inadequacy of the "policy or custom" doctrine applied under Section 1983: "The problem down in my area is that there is such a niggardly interpretation of *Monell* and the difficulty in getting the city and the police department held liable." *Police Brutality Hearings* at 125; *see also id.* at 211 (statement of Rep. Washington) ("I think the problem you may have is *Monroe* v. *Pape* and *Monell* leave a lot of room for determining what is the standard that is to be expected."). Civil rights lawyer Paul Hoffman echoed Representative Washington's analysis: "Clearly, the way that *Monell* has been interpreted, particularly recently, makes it difficult for civil rights lawyers to get liability against the city. I think the concern is that it's going to be increasingly restrictively interpreted." *Id.* at 126. And Professor Drew Days, a former Assistant Attorney General for Civil Rights and future Solicitor General of the United States, called the Committee's attention to the "devastating impact that *Rizzo* v. *Goode*" had on private plaintiffs by requiring them to prove a nexus between their injuries and "the types of directives that people at the top gave to line officers." *Id.* at 171. (As the Magistrate Judge appeared to recognize (Report at 14, 16), the official-nexus aspect of *Rizzo* prefigured the Court's adoption of the "policy or custom" test two years later in *Monell*.)

By disregarding the statutory text and reading Section 14141 to incorporate *Monell*'s "policy or custom" test, then, the Magistrate Judge thwarted the purposes apparent from by the statute's legislative history. Those who sought to give the federal government power to obtain injunctive relief against police misconduct saw *Monell*'s "policy or custom" standard as a significant part of the *problem* they intended to address.

It would therefore be surprising if they had drafted a statute that incorporated that same restrictive standard. The legislative history as well as the plain text of Section 14141 makes clear that they did not do so.

In concluding that "such legislative history as exists manifests a congressional intent to conform [Section 14141's] substantive provisions to the standards of Section 1983," Report at 16, the Magistrate Judge relied on two half-sentence snippets culled from the committee report to the 1991 Crime Bill. Neither of these sentence fragments can bear the weight the Magistrate Judge placed on them. First, the Magistrate Judge noted that "the House Committee report contemplates civil actions by the Justice Department 'to change the *policy* of a police department that tolerates officers beating citizens on the street.'" Report at 16 (quoting H.R. Rep. No. 242, *supra*, at 137 (emphasis in Magistrate's Report)). But the quoted passage does not purport to define the extent of liability under Section 14141 at all. Rather, it simply bemoans one of the anomalies of pre-14141 law—that modern legislation gave the Attorney General power to seek changes of municipal policies in many other areas affecting civil rights, but that she had no such authority in the police misconduct area. The full text of the passage makes clear that Congress contemplated that "pattern or practice" authority would extend beyond unlawful "policies" to encompass more informal "practices" and "patterns," including the mere "tolerat[ion]" of low-level lawlessness. H.R. Rep. No. 242, *supra*, at 137.[8] The passage in no way suggests that Congress intended to withhold from the

[8] The passage quoted by the Magistrate Judge reads:
"The Justice Department can sue a city or county over its voter registration practices or its educational policies. It can sue private and public employers, including police departments, over patterns of employment discrimination. The Justice Department can seek injunctive relief under the Civil Rights of Institutionalized Persons Act against a jail or prison that tolerates guards beating inmates. But it cannot sue to

Attorney General the power to attack patterns or practices that are not reflected in official "policy."

Second, the Magistrate Judge pointed to a portion of the report that "commented that the standards of conduct under the act 'are the same as those under the constitution, presently enforced in damage actions under Section 1983.'" Report at 16 (quoting H.R. Rep. No. 242, *supra*, at 138). But as the Magistrate Judge's own report makes clear, that passage plainly refers to the *standards of conduct* applied under the statute, not the *rules governing institutional responsibility* for conduct that violates those standards. The statute uses the word "conduct" only in reference to the activities of law enforcement officers, see 42 U.S.C. § 14141(a). And regardless of whether a "pattern or practice" or "policy or custom" rule applies, it is apparent that Section 14141 of its own accord imposes *no* standards of conduct on such officers. Those standards are supplied entirely by "the Constitution or laws of the United States," *id.*—sources of authority that bound police officers and municipalities long before Congress enacted Section 14141. The statute merely creates a new *remedy* for "conduct by law enforcement officers" that has been proven to violate those standards. *Id.* That remedy, as the text makes clear, is one that permits the Attorney General to bring a lawsuit against a municipality whenever the "pattern or practice" test of modern civil rights law is satisfied.

C. Reading Section 14141 in Accordance With its Plain Terms Raises No Constitutional Question, Much Less a Serious Constitutional Question

The Magistrate Judge's report appears to be driven by the concern that a "pattern or practice" reading of Section 14141 would raise serious constitutional questions. See

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change the policy of a police department that tolerates officers beating citizens on the street."

H.R. Rep. No. 242, *supra*, at 137.

Report at 8-18 (devoting ten pages of a twenty-one-page report to the topic of "Congressional Authority to Promulgate § 14141," and considering the proper interpretation of the statute only in light of the perceived constitutional constraints). The Magistrate Judge's reliance on the canon that statutes should be construed to avoid constitutional doubt was misplaced.

The Supreme Court has recently made clear that the constitutional-doubt canon may not be lightly invoked to alter Congress's handiwork:

> The doctrine seeks in part to minimize disagreement between the Branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made. For similar reasons, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a "fair" one.

Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998). These principles make clear that a court may not, in the name of constitutional doubt, read a "policy or custom" requirement into Section 14141.

First, the statute is not "genuinely susceptible to two constructions." *Id.* As we have argued above, Section 14141's text forecloses a construction that would import Section 1983's "policy or custom" requirement. The Magistrate Judge apparently felt free to invoke the constitutional-doubt canon because "the awkwardness of the language and grammatical structure of [Section 14141] renders it difficult to construe and interpret." Report at 13. But that ignores the Supreme Court's admonition that a finding

of ambiguity can be made only "after, and not before, [the statute's] complexities are unraveled." *Almendarez-Torres*, 523 U.S. at 238. When Section 14141's text is considered in the light of the body of modern civil rights law that vests "pattern or practice" authority in the Attorney General, and when its language is contrasted with that of Section 1983, the incongruity of reading the statute to incorporate a "policy or custom" limitation is apparent. Accordingly, this Court is bound to follow Congress's manifest intent to pursue the "pattern or practice" approach, which requires municipal liability for aggregated incidents of misconduct without further showing of high-level culpability. Cf. *id.* (rejecting application of constitutional-doubt canon: "The statutory language is somewhat complex. But after considering the matter in context, we believe the interpretative circumstances point significantly in one direction.").[9]

Moreover, Congress's decision to forego the "policy or custom" standard raises *no* constitutional question whatsoever, much less the kind of "grave[] doubt" that is necessary to invoke the constitutional doubt canon. Cf. *Almendarez-Torres*, 523 U.S. at 238-239 ("The fact that we, unlike the dissent, do not gravely doubt the statute's constitutionality in this respect is a crucial point. That is because the 'constitutional doubt' doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious. And precedent makes clear

[9] For similar reasons, a "policy or custom" requirement may not be imported into Section 14141 by application of the principle that "if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Vermont Agency of Natural Resources*, 120 S. Ct. at 1870 (quoted in Report at 14). By authorizing the federal government to sue states and municipalities for patterns or practices of police misconduct, Section 14141 plainly effects a change in the federal-state balance. But that change is apparent on the face of the statute—indeed, it is the entire purpose of the statute. The decision to apply an ordinary "pattern or practice" standard such as commonly applies to civil rights lawsuits brought by the Attorney General clearly appears in the text of the statute as well.

that the Court need not apply (for it has not always applied) the doctrine in circumstances similar to those here—where a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt that the statute is constitutional."). True, the Supreme Court has recently cautioned that Congress's authority under Section Five of the Fourteenth Amendment, though broad, is not limitless. The Court has explained that the Amendment's Enforcement Clause must be used for just that – enforcement. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1996) ("Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment."). The danger of congressional overreaching the Court identified in *City of Boerne* and again in *Kimel v. Board of Regents*, 120 S. Ct. 631, 644 (2000), occurs when a congressional enactment does more than "remedy or prevent unconstitutional actions" and instead "make[s] a substantive change in the governing law." *City of Boerne*, 521 U.S. at 519.

But Section 14141, construed according to its plain terms, is a quintessentially remedial statute. A municipality may be liable under that statute only if the Attorney General can prove, to a court's satisfaction, that law enforcement officers clothed with power by the municipality have committed a violation of the Constitution.[10] *If* those officers have committed such constitutional violations, and *if* violations in a given municipality are sufficiently pervasive or systematic to constitute a "pattern or practice," then the federal government may obtain an injunction against the municipality "to eliminate the pattern or practice." 42 U.S.C. § 14141(b). In determining the scope of the

[10] Section 14141 also provides a remedy for violations of federal statutes, see 42 U.S.C. § 14141(a) (creating cause of action where the pattern or practice "deprives persons of rights, privileges, or immunities secured or protected by the Constitution *or laws* of the United States") (emphasis added), but that aspect of the law raises no constitutional questions. So long as the underlying statutes are constitutional as applied to state and local governments, it cannot be unconstitutional to authorize the Attorney General to ask a court to enjoin their violation.

injunction, a district court must heed the statutory mandate that the order constitute "appropriate equitable and declaratory relief." *Id.* In other words, the order may do no more than eliminate the effects of past violations and prevent similar violations in the future. See *United States v. Virginia*, 518 U.S. 515, 547 (1996) (setting forth standards for appropriate relief in constitutional cases).

Section 14141 does not purport to alter the substance of constitutional rights. It simply creates a remedy that is directly targeted at fully proven constitutional violations. The statute thus plainly satisfies the standards for the exercise of Congress' Section Five authority articulated in *City of Boerne*.

Any constitutional challenge to a plain-text reading of Section 14141 must rest on the premise that Congress may not, under Section Five, impose municipal liability that goes beyond *Monell*'s "policy or custom" requirement. But that premise would confuse the Forty-Second Congress's long-rejected interpretation of the Constitution with the requirements of the Constitution itself. *City of Boerne* makes clear that Section Five gives Congress broad authority to prevent or remedy violations of the Constitution. See *Boerne*, 521 U.S. at 536 ("It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference.") (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651(1966)). Where a municipality's employees abuse the official power granted to them and violate the Constitution, the decision to hold the municipality responsible for that conduct plainly serves to remedy the violation and prevent future violations. Indeed, the prevalence of the *respondeat superior* regime throughout private law reflects a widespread judgment that vicarious liability offers a uniquely effective mechanism for deterring lawlessness by subordinate employees and assuring that injured

parties receive compensation. Congress is surely entitled to reach the same judgment and conclude that vicarious liability best prevents and remedies constitutional violations. *A fortiori*, it is entitled to conclude that municipal liability serves such a remedial and preventative function in the narrower context where the municipality's employees have engaged in a "pattern or practice" of violations.

The Magistrate Judge may have believed that *Rizzo v. Goode* imposes a constitutional requirement that municipal liability be limited to instances where the plaintiff challenges an act of official policy. But the relevant holding of *Rizzo* plainly rests on the text of the statute rather than any overriding constitutional requirement. In particular, when the *Rizzo* Court held that the district court could not issue an injunction where "the responsible [policymaking] authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights," *Rizzo*, 423 U.S. at 377, the Court explicitly rested its conclusion on the language of Section 1983. See *id.* at 376 ("[Plaintiffs'] reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983."); see also *id.* at 370-371 ("The plain words of the statute impose liability whether in the form of payment of redressive damages or being placed under an injunction only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws."). The Court did not say that Congress *could* not impose liability for a pattern or practice in the absence of official policymaker involvement. It said only that Congress *had* not done so in Section 1983. Congress plainly has imposed such liability under Section 14141, however, and this Court must give effect to that legislative decision.

CONCLUSION

For the reasons stated, this Court should reject the Report and Recommendation of the Magistrate Judge to the extent that it restricts the scope of municipal liability under 42 U.S.C.§ 14141 to cases that satisfy a "policy or custom" test.

Respectfully submitted,

Samuel R. Bagenstos

Margo Schlanger

1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-9299

Counsel for Amici Curiae

Exhibit A

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PROCEEDINGS AND DEBATES OF THE 103d CONGRESS, FIRST SESSION

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that is when powers conscious of themselves are denied their chance."

That also is the fundamental problem we face today where people, who are conscious of their God-given, innate born powers, are denied their chance because of their sex, because of their race, because of their religion. That has to stop.

So as we are building a more moral society, going back to those virtues that made us the envy of the world, we have to rededicate ourselves also to start judging people upon the merits, upon who they are as individuals, and not upon any stigma that we attach to them due to bias and prejudice.

Mr. President, I yield the floor.

Ms. MOSELEY-BRAUN addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

Ms. MOSELEY-BRAUN. I thank the Chair very much.

Madam President, I would like to make my statement in support of the crime bill.

Before I do, I really would like to engage for a moment in a conversation or colloquy with the Senator from Maine and the President pro tempore, and to say to the President pro tempore I had occasion, as did the other Members of the Senate, to listen to his eloquent lessons on the decline and fall of the Roman Empire, when he talked about it in connection with the line-item veto.

I followed that conversation. I followed the Senator's lesson plan as close I think as anyone. In listening to the Senator's comment in response to the Senator from Maine, if there is one thing I would like to add this evening, it is a voice of optimism, a voice of optimism about the decline in our values and about the direction of the road which we are following.

Every generation of Americans reinvents itself. It is the quintessential American experience that we reinvent how to deal with the problems of our time. It seems to me that there are a lot of young people, there are a lot of people who have not been around for the old days and do not really have any connection to them but who are searching, who are trying to find the moral path, who are trying to find the right way, and who want to build and to continue a society that is strong, that is supportive, that allows for the opportunity the Senator from Maine talks about, who want to fulfill that dream.

I say that to the Senator from West Virginia as a note of optimism. I think our role is to give those young people a chance, to give those young people the foundation or the tools with which to work as they build their new society, as they build what our America will look like in the 21st century. If we have done our job in Government, to provide them with the tools they need in order that those positive values will emerge and beat back the naked values, the declining values, the values that tear us apart, if we do our job, we can make it easier for them to succeed and to triumph.

I believe that will determine the critical difference between whether or not our society will go into a spiral of decline or whether we will be able to take forward from our generation to the next what the dream of this country is all about.

Mr. BYRD. Madam President, will the distinguished Senator from Illinois yield?

Ms. MOSELEY-BRAUN. Absolutely.

Mr. BYRD. She made reference to listening to my speeches on Roman history. I want to take this opportunity to congratulate her on the excellent work she does as a presider over this body. She takes her turn at presiding, and she is one of the best presiding officers we have. I have said this very same thing to my wife and to members of my staff. When the Senator from Illinois sits at that desk to preside, she is not reading a newspaper. She is not signing mail. She is very alert, paying attention to the Senate. She has not forgotten the few suggestions that I made when she first came here in my efforts to give to the new Members a few rudimentary principles by which they might be guided in presiding. She obviously listened and has not forgotten them.

With respect to what we do here, I agree with the Senator. As a father and grandfather, I wish I could say I had some great grandchildren but my grandchildren are fully grown. One is in his fourth year, studying for his doctorate in physics at the University of Virginia; his younger brother is in his first year working on his doctorate in physics at the University of Virginia; one graduated from Princeton about 5½ years ago; and one granddaughter graduated from Roanoke College some years ago.

I have tried to instill in my grandchildren the same thing I have tried to instill into the young people of West Virginia, that you can go as far and as high as you want to in this country if you have the ambition and the drive, the willingness to work and use the opportunities that are yours. I have tried to inspire young people—I do not mean to intrude on the Senator's time, but I have tried to inspire not only the young people but people like myself who are getting along in years with the idea that learning is a continual thing.

We ought never stop learning. Solon, one of the seven wise men of Greece, said, "I grow old in the pursuit of learning." And I try to encourage our young people to read something that is wholesome, to read great pieces of literature; do not fool with the pieces you pick up at the airport in those stands. I never fool with those.

I try to carry with me something by Emerson, his essay, Melton's "Paradise Lost," Dante's "Inferno," "The Divine Comedy," or history. And I try to encourage them to excel in their studies and become the best spellers, the best mathematicians, the best in whatever classes they take. Try to be the best.

I try to encourage them along those lines because I can remember that in my own meager beginnings my foster father did not buy for me a cap buster or a cowboy suit. He did not have much to buy with. He was a coal miner. He bought a set of water colors, or he brought me a drawing book, or a book to read. He encouraged me to try to excel. And so did my teacher.

But I do not hold myself up as a paragon of virtue or anything like that. But people do try to emulate others, and I try to encourage young people to strive for the best. And I tell them when they come to visit my office, do not ever let anyone try to persuade you that there is not a God who created man in his own image and had the destiny of men and nations at heart. And when I use the word "man," I speak generically, and of course I include my wife and granddaughters and the ladies.

This is one individual who still believes that men should look up to women, and I still feel that sometimes I am becoming a little out of place because I was taught to say, "Yes, ma'am," "No ma'am," "Sir."

And I do not intend to ever surrender these old virtues that I was taught. I have missed by far living up to them as I should. We all stray from the straight path. But if we are taught the right things that our mothers—and I lost my mother before I was a year old. But I had a dear aunt who raised me. What we were taught then, if we are taught right, we may stray, but we will come back.

I thank the lady from Illinois. I am speaking as I would in the House of Representatives now, the gentle lady. But I thank the distinguished Senator. She is correct.

We want to do everything we can here. It is our duty. But we have to do more than that. We have to try to provide encouragement to our young people and remember that most of our young people are wholesome young people. We do not hear so much about those who are in the libraries, or in the laboratories, or who are working at their studies. We only hear of a few who do something else, and they serve to give a black eye to the majority of our young people.

I believe we have some fine young people in this country. We ought to do ourselves everything we can to encourage them to grow, to excel, to strive to do what is right and to continue to learn every day of their lives.

I thank the Senator. I want to thank her again for being a good Presiding Officer.

Ms. MOSELEY-BRAUN. Thank you very much. That is a very high compliment coming from the Senator from West Virginia. I am greatly honored by his comments.

Today in Chicago, Madam President, mothers at the Cabrini Green Housing Project will anxiously watch their chil-

dren leave for school, praying that they do not meet the same fate as 7-year-old Dantrell Davis, who was gunned down in a gang crossfire one day last fall as he made his way to class.

Meanwhile, for senior citizens all across the city, the passage of daylight savings time will be more than just a reminder that winter is coming: it will be a signal to them to hurry and finish their shopping an hour earlier so they can be home safely before dark.

Later this afternoon, in cities across the country, parents will keep their children inside after school, afraid to let them play anymore in parks that have been taken over by gangs and drug dealers.

Tonight, Madam President, in a scene which will be repeated at colleges and universities from coast to coast, a female student will leave the Loyola or Stanford or University of Illinois or Grambling Library before she finishes her studies, simply in order to walk back to her dorm room with an escort and be able to move about her environment free of the fear of rape or sexual assault.

And somewhere tonight, in an inner-city neighborhood starved for jobs and economic development, a small businessman will close his doors for the last time, tired of working behind steel bars and bullet-proof plastic and placing his family and future at risk every time he opens for business.

And by the end of the day, thousands of other Americans have acquired a handgun or assault weapon to protect themselves, or for the alternative.

All across this great country, crime is causing Americans to change the ways we live our lives. Crime is destroying the dreams of our young, it is stripping the dignity of our old, and when it strikes fully one, out of every four American households, as it did last year, it is threatening to turn the rest of us into a Nation of victims. Afraid to go to the park or the corner grocery store. Eyeing our fellow citizens with fear. Avoiding entire cities or neighborhoods because of what we fear might happen there.

I have been in public life for 19 years, 4 years as an assistant U.S. attorney and 15 years as a State and local elected official. And for all of those years, crime has been an issue of great public concern. For all of those years, the level of crime in our society has been unacceptably high. But now, there is consensus that crime in this country is out of control.

but we can no longer ignore the truth. We live in a country where 7-year-olds are gunned down on their way to school; where 9-year-olds bring guns to school and when asked why reply, "for protection"; and where—as the Washington Post reported mon—11- and 12-year-olds in some crime plagued neighborhoods are already planning their own funerals.

Eleven-year-olds such as Jessica Bradford, a sixth-grader at Payne Elementary School, who recently told her family that if she should be shot before her sixth-grade prom, she wants to be buried in her prom dress.

"I think my prom dress is going to be the prettiest dress of all," little Jessica said. "When I die, I want to be dressy for my family."

Madam President, when I was 11 years old, my only hope was that one day I would be invited to a prom—not whether my dress would be pretty enough to wear to my funeral!

But then, when I was growing up, Mr. President,, a "club" was something you joined, like the French club or the chess club, not something that millions of Americans attached to their steering wheels to try and make sure their car would still be there in the morning.

What is happening to our children, Mr. President? What is happening to our society? And how long are we going to allow it to continue?

Every day in America, crime brings tragedy to the lives of those like Jessica Bradford, who I hope gets the chance not only to attend her sixth-grade prom, but also to buy a brand-new and even prettier dress for her senior prom 6 years from now.

Perhaps the biggest tragedy of all, however, is that, worn down by the daily barrage of bad news and grim statistics, the latest line of shootings, stabbings, rapes and assaults, we are slowly becoming inured to the slaughter; we are becoming silent accomplices in the slow disintegration of orderly society; we are surrendering our lives to the threat of violence and to the rule of force.

Senator MOYNIHAN was exactly right. We are becoming inured, becoming enamored, we are becoming almost blind and oblivious to the presence of crime around us.

Our victimization is no longer a personal concern, it is a public tragedy, and the very character of our free society is jeopardized by the madness.

More than 50 children under the age of 15 have been killed in the Chicago area this year. That means that more children have been shot in Chicago so far than all people of all ages in England for the entire year of 1991.

We cannot pretend this is only a problem in our inner cities, because violent crime is also spreading across rural Illinois. This epidemic, like all epidemics, is spreading without fear or favor.

How can this be? Where is our outrage?

Perhaps we need to see ourselves as others see us. Like many of my colleagues and millions of other Americans, I saw a "60 Minutes" broadcast last week on the preparations taken by Japanese tourists for a trip to the United States. One group of visitors watched an instructional video entitled "A Little Street Wisdom." Among the tips these tourists picked up were: "Don't let strangers into your room"; "don't walk alone at night"; and "never argue with a criminal—just give him your money."

"Remember to use a little street wisdom and have a wonderful visit to the United States," concluded the video's helpful narrator. Who was the video's producer? Who wanted to take every step possible to prevent foreign tourists from becoming victims on our streets?

The answer, Mr. President, is the U.S. Government.

Allow me to repeat that. As if it does not have enough to do, the United States Government is now producing videos to ensure that the Japanese public is safe on our streets.

But what about the American public, Mr. President?

What about the 23,000 Americans who were victims of homicides last year?

What about the 109,000 American women who were raped and the countless thousands more who were victims of domestic violence?

What about the 1,600,000 Americans who were victims of robberies or aggravated assaults?

I am no xenophobe, Madam President. I do not mind that our Government is taking aggressive steps to protect Japanese tourists in New York and Los Angeles, or German and British tourists in Florida.

But I think the American people have every right to ask what are we—the elected branch of the U.S. Government—going to do to keep them safe on our streets in our own cities and towns?

What we cannot afford to do is to trot out the failed approaches—whether they be liberal or conservative—of the past. In fact, ever since crime and the cry of "law and order" were exploited for political purposes in the 1968 elections, what both parties have billed as the answers to the crime problem have often been more slogans than solutions.

"We have to look at the root causes of crime," said the liberals, calling for increased spending on social programs and an emphasis on rehabilitation as the best way to attack crime. After 30 years of looking, Mr. President, the root causes are still there and crime is worse than ever.

In fact, not only are the root causes still there, they have gotten worse. In many inner-city neighborhoods in this country, unemployment among young males is at levels of 50 percent—and higher. What do people think is going to happen when half of the young men in a community are totally excluded from the system?

Make no mistake, Madam President—all of us know that poverty, unemployment, inadequate housing and education and racial discrimination contribute to crime, and I, for one, always have and always will support an active governmental role in combating these social ills.

I daresay that no one looks forward with more anticipation to the day when we make a serious attack on the

root causes of crime than this Senator and the constituents I represent.

And it is precisely the constituents whom I represent who are saying, "we're tired of being held hostage to crime. We're tired of being terrorized every day of our lives."

Even in the poorest communities in this country, people are saying being criminal is worse than being poor. Poor people—honest people—are the least sympathetic to the vampires who suck the little they have and make them hostages to those who would sacrifice their dignity. It is time that we in Government took action to reinforce that message.

I refer to a conversation earlier. It is the people living in these communities, the citizens, who do not have the chauffeur-driven limousines, and who cannot afford to live in high rises, those in the streets, in the communities, that are victimized the most, and they are the ones who are calling for us to take action.

But in the meantime, while sociologists and psychologists debate the underlying causes, an epidemic of crime is destroying the American people's lives and livelihoods right now.

Liberals were not the only ones with slogans about crime. For conservatives, "lock them up," was the cry of the day, and during the 1980's we built more prisons, imposed more mandatory minimum sentences, and carried out more death penalties than ever before. And lock them up we did, to the point where on a per-capita basis we now incarcerate a greater proportion of our population than any other nation in the world, including South Africa and the former Soviet Union.

During the 1980's, Madam President, our rate of incarceration increased by almost 200 percent, and we spent four times as much on the criminal justice system as we did on education. Yet does one single American really feel safer? I think not.

It is time for a new approach. The ideological debates of the past were nothing more than a false dichotomy that divided and distracted the American people—and those of us who represent them—while all around us, crime skyrocketed out of control.

It is not either/or. And it does not just come down to a choice between funding a social program and funding a prison cell. The truth of the matter is, there is no liberal solution to crime. And there is no conservative solution to crime. There is only a commonsense solution. Common sense tells us that we cannot just focus on alleviating the root causes of crime because even if successful, these measures might not show any effects until 10 or 15 years down the road. We cannot just talk about locking people up, because once you need to lock someone up, you have already failed at what should be the central task of the criminal justice system: preventing crime in the first place. We cannot say that the only solution we have is to warehouse poor people.

I would much rather prevent crime than spend taxpayer dollars—to the tune of $75,000 per cell per year—punishing criminals. Yet we spend hours in this Chamber debating 47 new death penalties or $47 million for a new social program as if either were the panacea to the crime problem.

Ask the people on the street or the police officers and sheriff's deputies on the front lines if they want 47 new death penalties or 47 new social programs. They will tell you, "neither."

They want 47 new cops walking their streets, or 47 new metal detectors at their children's schools, or 47 new jobs. When we talk about crime, and how to reduce the level of fear that the American people are living with every day, we need to stop talking about Head Start on the one hand and habeas corpus on the other. Instead, we need to start talking about what will make people safer in their homes, in their jobs, in their schools, and on the streets of their cities and towns.

Right now. Today.

We can no longer afford false dichotomies and phony choices. Restoration of our domestic tranquility has got to be our priority. We cannot speak of preserving a system of quality education when children cannot go to school. We cannot speak of the economic revitalization of our great urban centers when people are afraid to go to work there.

I have always believed that a successful anticrime strategy must be proactive, rather than reactive. We have to be smart, not just tough. That is why I support this crime bill.

First and foremost, this bill will deploy up to 100,000 police officers on the streets of our cities and towns, exactly where they are needed the most.

However, this bill will not just send out a few more police officers. It also authorizes $1.8 billion in aid to State and local law enforcement to give these agencies the tools they need to aggressively go after crime wherever it occurs. It will help buy DNA labs and squad cars and bullet-proof vests. It will support urban and rural crimefighting initiatives, and provide for new drug treatment and correctional facilities.

S. 1607, the Biden crime bill, builds upon successful local experiments by supporting military style boot camps for nonviolent offenders, and regional drug treatment prisons for violent drug criminals. It authorizes funding for the drug courts that Janet Reno employed so successfully as a prosecutor in Miami courts that require drug testing, drug treatment and alternative punishments for nonviolent young drug offenders.

Let me say that there is no better example of the new thinking embodied in this bill than boot camps and drug courts. Some people say we do not have enough empirical evidence as to whether these ideas will work. But I think they make sense. I believe the people think they make sense. I say very little that we have tried so far has worked. I say we are in a crisis—at least we ought to give it a try.

It provides grants for schools to fund anticrime and safety measures—imagine, Madam President, safe schools—and imposes tough new penalties on the gangs who terrorize adults and lure youngsters to a life of crime.

It addresses the nationwide problems of police brutality and misconduct and racial bias in the criminal justice system by giving the Attorney General the power to intervene where a police department has shown a pattern or practice of brutality, and by making funds available to the States to conduct studies on the effect of race on the administration of criminal justice.

That is no small accomplishment, Madam President.

Because the African-American community in this country wants to be participants in, rather than the object of the crime debate. No community is more devastated by every aspect of crime than the African-American community. If the thousands of black Americans who write me and approach me had one message for this body regarding crime Madam President, I believe it would be this: Provide our community with the economic opportunity we need to allow all Americans to share in this country's promise. Give our neighborhoods a fair share of the law enforcement presence that will stop crime before it happens. But for those who will not respect themselves or their community, who would destroy life rather than uphold it, make the punishment, swift, sure, and certain.

Crime is tearing apart the very fabric of our society. We cannot sit idly by while our constituents and our communities are crying out for help.

I support the crime bill, even though I, for one, oppose the death penalty. I am going to support the bill in any event, and I urge all of my colleagues, from both sides of the aisle, to support it as well.

I also would like to pay special tribute at this time to the Senator from Delaware, Senator BIDEN—he is not here right now—the chairman of the Judiciary Committee on which the Presiding Officer and I serve. For more than a decade now, Senator BIDEN has been on a mission—a mission to get the Federal Government to take a leadership role in the fight against crime. He has battled to find Federal funding for State and local law enforcement agencies. He has been willing to courageously challenge drug wars fought with empty rhetoric instead of real resources and tried to push this nation towards a realistic, comprehensive anti-drug strategy. He has never ignored the toughest issues—such as habeas corpus—and has spent countless hours trying to craft compromises on these issues so that we would not be

blocked from making progress on all of the others.

It is largely due to the efforts and perseverance of the Senator from Delaware in the face of repeated attempts to derail this bill and continue to use the crime issue as a political football that we have a crime bill at all. And I thank him today for his steadfastness and his dedication.

I also would like to take this opportunity to announce that I will be offering a series of amendments to deal with the most disturbing new trend in today's criminal justice system: The rise of violent juvenile crime. Every year, as our streets and cities become more and more dangerous, we find that it is younger and younger criminals who are spreading the fear and the violence.

Once every few generations, we reexamine our treatment of juveniles in the justice system. At the turn of the century, my State of Illinois became the first to create a separate court for juveniles, as recognition spread that it was not appropriate to treat most juveniles in the same way we treat adults. Twenty years ago, as the problem of what we used to call juvenile delinquency intensified, Congress passed the landmark Juvenile Justice Act of 1974, which focused on noninstitutional solutions and on separating status offenders from those convicted of violent offenses. Finally, in the decade which just passed, we witnessed a move to try some of the more violent juvenile offenders as adults.

I submit to my colleagues that once again the time has come for an examination of how we deal with juvenile offenders.

Between 1987 and 1991, the number of juveniles arrested for murder increased by 85 percent. That compares with an increase of only 21 percent for those over the age of 18. During the same period, the number of juveniles convicted of all violent crimes increased by 50 percent, twice the increase for persons over 18.

In 1990, fully one-third of all murders were committed by individuals under 21 years of age, and in 1991, 122,000 juveniles were arrested for committing a violent crime—murder, forcible rape, armed robbery, aggravated assault—the highest number in history.

In fact, in light of who is committing the crimes in our society and the callousness with which the youngest offenders are carrying out their mayhem, it may no longer make sense for us to talk about the juvenile justice system as if it were separate from the criminal justice system. To a very real and a very frightening extent, criminal justice in this country is becoming juvenile justice.

That is why I am proposing a comprehensive package of initiatives to deal with the issue of juvenile crime in our society. To those youngsters and their families who need help, I want to extend a helping hand. To those youngsters who have a brush with the law, I want to provide the education and training to enable them to avoid a life of crime. But to any juvenile who would take up a gun to terrorize society—and to any adult who would provide such a weapon—I want to send a very clear message: You are old enough to know right from wrong and if you use a weapon to commit a crime we will lock you up for a very long time.

In other words, if you are old enough to do the crime—you will most assuredly do the time.

First, because we must always acknowledge that it is better to prevent a crime than to punish a criminal. I am offering an amendment which specifies that at least 20 percent of the juvenile drug trafficking and gang prevention grants must be used to provide parenting classes to high risk families and nonviolent dispute resolution classes to junior high school and high school students in areas of high violence.

We must teach our children that every dispute need not be settled with a gun.

My second amendment expresses the sense of Congress that all incarcerated juveniles receive education at least equivalent to the standards of the local school district. While I realize that, over the past 2 decades, some have said that we should not waste time or money trying to rehabilitate adult offenders, we cannot give up on our youth. According to the Department of Justice, less than half of the 57,000 youth incarcerated every day in public facilities are receiving a satisfactory education. We cannot afford to give up on any juvenile merely because he or she has had a brush with the law. Education probably is, as we all know, the best tool to avoid recidivism. My amendment hopefully will authorize the funding for States to receive grants to ensure that every incarcerated juvenile receives a basic education.

My next two amendments deal with the most dangerous mixture in america today: Kids and guns. I know in the coming months both sides will express themselves passionately on gun control issues—but one thing on which the American people and the Members of this body are in unanimous agreement is that guns do not belong in the hands of children.

As the statistics I cited earlier today indicate, and as the chilling descriptions of some of the killings committed by juveniles signal, juvenile crime is rampant. There are some who think that 13 year olds are not truly capable of distinguishing right from wrong, that a seventh grader does not realize that a gun is not a toy and that he should not bring it to school or carry it on the street.

I am not one of those people.

We as a society cannot turn our streets over to criminals who happen to be children. They must be made to account for their actions when they terrorize the rest of society.

My third amendment would direct U.S. attorneys to try juveniles 13 years and above who murder or use a firearm in the commission of a violent crime as adults, while providing safeguards so that young offenders who truly rehabilitate themselves will not be condemned to a life of incarceration. This amendment I will discuss further in the context of the bill.

Madam President, it is also important that we not spare the adults who are arming our children, cynically using them as mules and lookouts to earn their ill-gotten drug money and push their poison into our children's bodies. A companion measure which I am introducing will make it a new Federal crime to provide a firearm to a juvenile which the provider knows or has reason to believe will be used in a crime or in furtherance of a criminal conspiracy.

Finally, because of the strong evidence that minority youth receive disparate treatment in many Juvenile Justice Systems across the country, I will introduce a measure to allow the Attorney General to intervene where a pattern and practice of such conduct can be demonstrated.

These and other measures offered by many of my colleagues I hope will become additions to perhaps the most important bill we will pass in this session. Then, Madam President, I hope we can turn to the business of enacting some serious gun control measures in this country.

I referred earlier to the epidemic of crime in America. Some people question that characterization. Some feel that it is an exaggeration.

But I use the term epidemic deliberately. When the number of deaths caused by violence, which kills more than 50,000 Americans each year, is greater than the number caused by AIDS—which kills 30,000 or drunk driving, which kills 18,000 crime is an epidemic.

When gunshot wounds are the leading cause of death for both black and white teenage males, crime is an epidemic.

In 1991, for the first time in our Nation's history, the number of homicides alone exceeded 25,000.

So I do not think I exaggerate when we call it an epidemic.

As Dr. David Satcher, the new head of the Centers for Disease Control and Prevention, said, "if violence is not a public health problem, why are all of those people dying from it?"

Violence is perhaps the No. 1 public health problem in this country. And guns are the primary instrumentality of that violence. That is why I support the Brady bill. That is why I support the assault weapons ban. And that is why I will be introducing a measure along with others to require all owners of handguns and assault weapons to purchase liability insurance, just like the owners of a car.

In conclusion, Senator BIDEN is to be commended for taking the leadership in this area, for the vision to recognize

that the something we have to do is not just hearts and flowers or lock 'em up and throw away the key. It is a bit of both. This is crime fighting with common sense. Its is proactive as well as reactive. It is liberal and conservative.

It takes parts of many approaches and crafts a program that can work. We are all in the same boat now even if we came to this point in different ships and by different roads. Crime fighting represents the consensus our Nation has reached. We are bailing out the water in the boat, reclaiming our streets, on our way to rediscovering our domestic tranquility.

We must make sure, Madam President, that the word goes out and that people out in the communities hear us loud and clear. For the criminals who do not watch C-SPAN and are not watching this debate and are not paying much attention, we want to make certain that the word goes out that we are united as a people in this war on crime; that we intend to take our country back; and that violence will no longer be tolerated.

This crime bill, I believe, gives us a first step, gives us a tool to effectively approach this war on crime in a way that makes sense and can work.

I wish to congratulate the ranking minority member, who is on the floor, for all of his work on this bill and Senator BIDEN for all of his work on this bill. I look very much forward to being a part of this continuing debate.

Thank you.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Madam President, I will not take long. I know there are others who want to speak.

Madam President, I really believe that we are quite close to having this basic part of the core package done. I am hopeful that we can before we leave this evening, which would mean we would vote on this, plus Senator DOLE has another amendment, an arson amendment, that we would vote on.

But this particular major amendment, which has been put together by a wide variety of people on the floor—but in particular Senator BYRD—helping us to get this done has $8.9 billion for 100,000 policemen on the beat. I think all of us agree that would be a very good idea. It is a bipartisan issue. Both Republicans and Democrats support it. It is something that is long overdue. If we are going to end criminal activity in this country, or at least diminish it greatly, we need these policemen on the beat.

Second, there will be $3 billion for regional prisons, something we have fought for for years that really is long overdue, that will help to house these prisoners in ways that they need to be housed and will help to take them off the streets so that we end an awful lot of violent crime.

There is $3 billion for boot camps and other State grants, operation grants. I think almost everybody admits that we ought to move toward boot camps, especially with young offenders. It may have some rehabilitation effect. We hope it will. But, most importantly, it will cost about a quarter as much as if we house them in regular prisons at $30,000 to $35,000 a year apiece. It will be a lot less than that if we run the boot camps. But I think it is time to let them know that this is a tough world, that if they are going to act like this, they are going to have to pay the price. So this a good step.

I think both sides can agree that this is a very bipartisan, interesting, and good approach.

We have $500 million in here for hard core juvenile offenders that really ought to be in jail, but we do not have places to put them. These are juvenile detention facilities. It is a step in the right direction. It probably is not enough money right now, but it certainly is a step in the right direction. It is something we have not done before.

And we have the violence against women bill for $1.8 billion. It is about time that we passed that legislation. A great number of Senators have worked on it, particularly Senator BIDEN, Senator DOLE, and myself. There are others that deserve to be mentioned, but let me just mention those three for now, because we feel very deeply about this particular bill. We think it is written well. We believe it will help to solve a lot of problems. We believe that it recognizes the power and the obligation and the duties of the States, and the rights of the States, as well.

One other aspect of this bill that is very, very important is the sentencing aspect. We are adopting truth in sentencing. We are encouraging States to adopt truth in sentencing. That means, if these hard core, violent criminals are put away, they serve at least 85 percent of their sentence. We think it is about time that that take place. And that is a major, major, pivotal part of this.

Now, I want to compliment all who participated in this. In particular, I want to pay tribute to my friend who has spent so many long hours in here, and has since I have been here in the Senate and long before I came, the distinguished Senator from West Virginia, the distinguished chairman of the Appropriations Committee. Because, without him and without the funding that his amendment has provided, none of this really would mean a thing. We could go through and authorize it until Kingdom come, but without that funding, the effort and the ability to be able to really bring down crime in this country would never occur.

He was the one who came up with the funding mechanism. I just want to personally compliment him for it, plus the ability to put this together the way we are putting it together. It is something Senator BIDEN and I have been trying to do for a long time. We know that we have opposition on both sides of the aisle to getting a central core package, but I think this will go a long way toward getting us a bill that both sides can agree to, that both sides will be proud of, that really we can all be proud of, the whole Congress, and that the President will support and literally will help bring down an awful lot of criminal activity in our society that is going on today.

So this is very, very important stuff. I just want to compliment all concerned, especially Senator BIDEN, Senator BYRD, Senator DOLE, Senator MITCHELL, and others who have worked so hard on this particular amendment.

In particular, Senator MACK has worked very hard with me on this regional prisons concept and also the boot camps and the other operations grants. That is $6 billion of this bill. He deserves some credit, as well. I just want to make sure he receives that recognition.

I do not want to take any more time because there are others who would like to speak. But, Madam President, I hope we can put this together tonight, then we can put some other core features in that I think almost everybody will agree to and hopefully get rid of as many amendments as we can and have a bill that will be, for the first time in 8 years, a bill that everyone in this body can be proud of.

Mr. BYRD. Will the Senator yield?

Mr. HATCH. I am happy to yield to the distinguished Senator.

Mr. BYRD. Madam President, I will only take 1 minute to thank the Senator for his very kind remarks. I thank him also for the excellent work that he has done in the committee on this bill, as well as on the floor.

Mr. HATCH. I thank my colleague. We all respect him.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. WELLSTONE. Madam President, I am not going to be long.

I wonder whether I could put a couple of questions to the President pro tempore on this amendment.

I am trying to understand the budget part. I ask the Senator from West Virginia: Altogether, we are going to be talking about spending how much money into this fund?

Mr. BYRD. $22 billion.

Mr. WELLSTONE. This will be $22 billion over the next 5 years?

Mr. BYRD. In the aggregate, over the next 5 years.

Mr. WELLSTONE. I had a conversation with Senator LEVIN from Michigan earlier, and I am trying to understand the way this would work.

As we spend roughly $4.5 billion, or whatever, a year, something like that, do we then reduce the cap by that amount each year?

Mr. BYRD. We do reduce the cap by the amounts specified in the amendment.

Mr. WELLSTONE. I ask the Senator whether or not I would be on the mark oroff the mark with my concern that

Exhibit B

POLICE BRUTALITY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

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ally happens is no one is charged. Out of that 25,000, about 1,300 were charged. So, people are run through the system for the purpose of harassment, but essentially for the police to show that they control the turf. It's hardly surprising that, with that kind of program which has been endorsed by the leadership of the Los Angeles Police Department, and, in fact, trumpeted as good, aggressive police work, that an incident like the Rodney King incident could happen.

Operation Hammer is not the only Los Angeles Police Department program that is based on pretext rather than principle. In Los Angeles, pretext has become principle. Recently Hall of Famer Joe Morgan won a jury award of $540,000 because he was picked up and beaten because he matched the so-called drug courier profile at Los Angeles Airport. Former Los Angeles Laker star Gimelle Wilkes was stopped because he was a black driving a late model car in the wrong part of Los Angeles and, according to the police initially, he had registration tags that were about to expire.

Mr. CONYERS [presiding]. Mr. Hoffman, forgive my interruption, but we do have a recorded vote pending on the floor. So what we propose to do is take a very brief break until Chairman Edwards return and then we'll resume your testimony.

Mr. HOFFMAN. Thank you.

Mr. CONYERS. All right.

[Recess.]

Mr. EDWARDS [presiding]. Mr. Hoffman, we apologize for the delay. You may proceed.

Mr. HOFFMAN. Thank you, Mr. Chairman.

Let me, before moving on to the question of the Federal role in dealing with the patterns of abuse that have been described today, mention one other form of abuse which has recently gotten a great deal of attention in Los Angeles, but which has not received enough attention over the last few years, and it's an area where I think the Justice Department would need to take a look. That is abuses by police canine units in Los Angeles.

Local civil rights attorneys involved in this issue have documented numerous cases of severe, sometimes grotesque, injuries caused by Los Angeles Police Department police dogs in situations where police dogs ought not to have been used and where they have been used in areas that have caused incredible injuries by people who have been bitten and mauled by the dogs. In fact, some of the physical evidence of the injuries that people have sustained are really so gruesome that it's hard to really look at the pictures of people who have suffered these kinds of abuses. At least one person has nearly been killed by a Los Angeles Police Department dog and many have been hospitalized for severe injuries after this has happened.

I think that these—one of the things that's a very serious concern in this issue is the evidence of a racially discriminatory use of the dogs. It's very difficult to document the way that this breaks down, but all the evidence and research that has come to light in the last several years shows that overwhelmingly—in fact, almost all of the cases that we have been able to document in the community have involved African-American and Latino people who have

suffered these dog bite injuries. You don't find many Caucasians suffering dog bite injuries in this context.

The Los Angeles Police Department statistics that we have been able to compile show that in connection with arrests over 50 percent of people arrested by canine units are bitten in Los Angeles. over 50 percent of the cases where arrests are undertaken. So, you're talking about a very severe abuse and also a situation where, like many of the other areas that have been described, there's no adequate training as far as anyone can tell. In fact, it appears that the training and supervision encourages biting rather than restraining it. This is another major area, I think, that needs to be looked at like the other ones that have been mentioned.

One of the things I would want to comment about in terms of the issue of race, in terms of police abuse, it's clear I think from every thing that's been said and from the reality of police abuse in our community, that the African-American and Latino communities bear the brunt of police abuse in Los Angeles. I mean there's just no question about that when one looks at the cases.

On the other hand, I think that it is a problem that does go beyond race in terms of the instances of abuse. For example, the *Vigil* case that I described of the man beaten to death, he was white and it's clear that there are whites who suffer police abuse at the hands of the Los Angeles Police Department.

The other example of the pain compliance holds in the Operation Rescue situation, which is another example where, like Professor Fyfe, our organization has had major differences with Operation Rescue protesters. In fact, we were suing them at the time that they were engaged in these protests. On the other hand, we have also filed the brief on their behalf challenging the pain compliance holds that were used by the Los Angeles Police Department. I think it's just another example of essentially the militarization of police work in Los Angeles, where the Los Angeles Police Department tends to become a military occupying force at war with the community, and the battle zone happens to fall more in the African-American and Latino communities than elsewhere, which is why there is a racial component to the pattern of abuse in the Los Angeles community.

Let me turn, since I know the time is limited, to the question of what the Federal role should be. Much has been made of the question of sections 241 and 242. I think that there are some problems with 241 and 242 that might require legislative reform, but it seems to us that that should not mean that the Justice Department should fail to bring more cases. If the Justice Department can't find cases of police abuse to prosecute in Los Angeles County, there's a big problem. No matter how those laws are interpreted, there are many cases that warrant criminal prosecution of officers, not only of the Los Angeles Police Department, but of other law enforcement agencies.

Mr. CONYERS. Excuse me, Mr. Hoffman. Wouldn't the kind of qualitative investigation systemically that we are now embarking on bring forward those cases?

Mr. HOFFMAN. I would hope so.

Mr. CONYERS. Yes, and especially with other organizations who are now tracking cases—a totally alerted citizenry who are now

going around with video cameras. All of our offices are being besieged across the country. So, it seems to me that that might be an important remedy. One of the things I'm very interested in is how we keep or get an affirmative Federal presence in this area. This may be one of the most important hearings on police brutality that I've ever attended and you two are very important, and we look to you to help supplement the modest attempts we are making in this area.

Mr. HOFFMAN. My concern is the concern, Representative Convers, that you expressed before. It's more a question of will, and not information. I think the information has always been there. One only would have to read the Los Angeles Times to figure out where one had to look for the cases. It has never been a problem of where the information is. The question is, Are those cases going to be brought?

I think the other issue which I want to turn to which I think is of paramount importance, in terms of the legislative role of the Congress, is the question of pattern-and-practice authority for the Justice Department. Mr. Dunne referred to the Philadelphia case which has been a bar to the Justice Department becoming involved in pattern-and-practice cases, of situations like the situation which presents itself in Los Angeles.

In addition to that, there is an additional problem which is the Supreme Court cases, particularly the *Lyons* case, which ironically came in the context of a challenge to the use of chokeholds in Los Angeles, which makes it almost impossible for private civil rights lawyers to bring pattern-and-practice cases. As was the case in *Lyons*, a person who is choked or beaten or mauled by a police dog, will not be able to show that it's likely to happen again. And so they will not have standing under the *Lyons* case to bring a 1983 action to get protective relief. One can only get damages.

Our experience in Los Angeles has not been that damages makes much of a difference. In 1990 there were $10 million in damage awards in the city of Los Angeles, and it hasn't seemed to make a dent at all. It's sort of a pay-as-you-go policy, that one can just pay for civil rights violations because you are a big city and you can tax the taxpayers to pay for it, and the police can conduct their business as usual without restraint.

I think it is important that the Justice Department be given the authority, whether it is to enforce 1983 cases for individuals who can't afford it, or, more importantly, to identify patterns and practices consistently, not just this one time, but all the time, and be given the authority to engage in that kind of litigation. Frankly, when the Justice Department really becomes engaged, when there is a decision to investigate, and when the professional staff of the Justice Department and the lawyers in the Civil Rights Division are engaged on a problem, they are an awesome force to be dealt with.

We just finished a case in the county of Los Angeles involving voting rights where the Justice Department and the ACLU and the Mexican/American Legal Defense and Education Fund were on the same side, and that resulted in the election of the first Latino to the board of supervisors in our history, and it's a case that could not have been brought without Justice Department resources, and

they did a wonderful job and Mr. Dunne argued one of the hearings in that case.

So, if that power can be brought to bear to achieve justice in dealing with patterns and practices of police abuse, it's possible that that could be part of a solution, which involves local issues, I think as Professor Fyfe says, but it doesn't only involve local issues. I think that the issue of a pattern and practice of police abuse in violation of the Constitution of the United States involves issues of national importance, whether they occur in a city like Los Angeles or a small town in Texas or any place.

If there is a pattern or practice of abuse, the Justice Department ought to be able to deal with it, and I think it should be unacceptable to the people of this country and the Congress of this country, that if one could show incidents like Rodney King's occur on a regular basis in any community—if people knew that the Justice Department couldn't do anything about that, preemptive—I think most people in this country would be astounded to know that the Justice Department can't go into Federal court and get an order from a Federal judge getting some protective relief for citizens in their community from a pattern of police abuse. It seems to me that the Congress has to put an end to that, and it's just overdue for that to occur. I was disappointed that Mr. Dunne did not get up here and say not only there had been this history, but that this administration had decided that it was time to ask to be given that authority and that they intended to use it.

In closing, let me just remind the members of the committee and the public, that on the very day of the broadcast of the King beating, President Bush praised Daryl Gates as one the model police chiefs in the Nation, and obviously I don't expect the President of the United States to know a lot about exactly what goes on in communities on police abuse issues. It seems to me that singling out Gates shows, for one thing, that the Justice Department really hadn't briefed the President on the problems of police abuse in our community, because he clearly could not have said that if he had known about the kind of testimony that you are getting.

Mr. EDWARDS. Did he not see the video tape?

Mr. HOFFMAN. But, it also seems to me that there is an issue of the President and the administration setting a tone as well. There has been a lot of criticism of Chief Gates, and proper criticism, that he does not set the tone that will eliminate police abuse in our community. In fact, it is the reverse. His tone, his leadership contributes to police abuse. It seems to me the President, the Attorney General, and the Civil Rights Division have to set a tone also, and that they have to come out and ask for authority to deal with this problem. They have to exercise the authority that they've got more effectively, and they have to speak out more aggressively.

For example, the Justice Department hasn't been going out asking for complaints. No one heard it in our community. You didn't hear the local FBI agents in Los Angeles saying, "Bring us your police abuse complaints." There was silence. I mean that says something to a community when the Federal Government isn't out in the public saying that they are going to deal with a problem and using the powers that they've got and asking for the power that they need.

633 S. SHATTO PLACE #199
LOS ANGELES, CA 90005
(213) 387-3325

DECEMBER INTAKE STATISTICS

BY DEPARTMENT	NUMBER OF COMPLAINTS
LAPD BY DIVISION	5
Div. unknown	0
Wilshire Div	13
Rampart	13
77th Div	0
Devonshire	0
Foothill	0
West Valley	12
Van Nuys	1
North Hollywood	2
West Los Angeles	14
Hollywood	2
Northeast	0
Central	0
Hollenbeck	6
Pacific	5
Southwest	4
Newton	2
Southeast	0
Harbor	1
CECATS	1
Crash Unit	

Mr. EDWARDS. We now recognize Mr. Conyers.

Mr. CONYERS. Thank you.

Mr. Fyfe, Attorney Hoffman, please know that you have our deepest gratitude for not just your testimony here today, but the work you have done across the years. I know ACLU in Los Angeles has been on the case for a long time, and Jim. Fyfe has been in and out of our subcommittees and activities on criminal justice and police abuse across the years, and we are very grateful for your presence here today.

And I want to emphasis how important I think your recommendations and comments are about this very difficult role we have in front of us. I think that it is important for us to recognize that we have made some breakthroughs. Without the Rodney King case, I couldn't have taken an ordinary abuse case, a police abuse case, over there and say we want to study thousands of cases for every case filed for the 6-year limitation period. This case so traumatized the Nation, and as a matter of fact is an international issue now, that there was a necessity for us to get at least the limited cooperation that we have now. So I think we should put that on the record, that were it not for that circumstance, it would be just another case where he was drunk, he was resisting arrest, and we'd say, "Who knows?" Do you not agree with me that we do have an opening here, a window of opportunity that did not exist?

Mr. FYFE. If I may address that—police organizations, I know from firsthand experience, are very conservative and are not prone to change unless they are influenced from the outside. When I look at my own police agency in New York City, it was changed by the revelations of the Knapp Commission, by the pressure of the New York Times and the powerful institutions in New York City. I think about the Metro Dade Police Department; it was changed by pressures from outside. I think about how the FBI was changed. It was changed from pressures from this House by and large, and I think that this is an opportunity for change in Los Angeles as well. It would be a shame to lose it.

Mr. HOFFMAN. I think it is not only Los Angeles. I think it is a glimmer of hope for Los Angeles now that we have this attention, but I think it really is important to focus on the role of the Justice Department and other reforms to be able to deal with this problems on a national basis.

Mr. CONYERS. As citizens and leaders, wouldn't it seem important to you that President Bush take this opportunity to speak for the first time on this very important subject? We could really get the tone set. After all, the Attorney General has made a limited press release. The Director of the FBI made a two-sentence statement after he met with us last week. But, this seems to be an opportunity. Can we frame that so that Governor Sununu and Counsel Boyden Grey over there can say, "We are reviewing the Edwards subcommittee and we think this is a good idea, Chief?"

Mr. HOFFMAN. I think that is absolutely essential, and I think one of the other things that is true of the Los Angeles situation is that much of what has happened, the sort of military approach and some of this Operation Hammer that I described, has been framed in terms of the war on crime and the war on drugs. I mean that is

the rhetoric that comes out. This is necessary, something that must be done. We have to engage in these operations.

I think that the rhetoric has come from the administration over the years and others, and so when the war on crime is mentioned, it's almost as though we can dispense with constitutional rights. It encourages dispensing with constitutional rights, and I think that the logical consequence of taking that attitude and not being careful to cherish constitutional rights when one is dealing with real problems of crime, the logical consequence of that is the video tape that people saw, in my view.

Mr. FYFE. Mr. Conyers, on that subject, I think the whole notion of police as soldiers in a war is something that has to be changed. What we have asked the police to do is very simplistic and unrealistic. We've asked the police to deal with social conditions that are beyond their control. There is no way, no matter how aggressive the Los Angeles police are, or police in any other place, that they can deal with the social conditions that cause the crime and violence that have nothing to do with the police in Los Angeles.

But, what you are doing, in essence, is asking young men and women to go into police agencies and asking them to fight a war that they can't win, and for the best intended people, that's a very frustrating experience. As we learned when we ask soldiers to fight wars they can't win, occasionally you have atrocities, and that's what I think has happened here.

Mr. CONYERS. Why is the Department of Justice so reluctant, so timid, so hesitant? This is a great opportunity. We have just come back from Operation Desert Storm. We've done this great military feat. Here is a great chance for an administration to really come out here and move this country forward. What we feel is that we are pulling them instead of them seizing the moment to be meeting with people like yourselves and the organizations that we know work in this field.

Mr. FYFE. I can try to answer that. As Mr. Hoffman knows, and as Mr. Washington I'm sure knows, most of the people who are on the wrong end of this kind of force have done something to provoke the police. As Mr. Hoffman knows, it is very difficult to win a suit against the police because, unlike a medical malpractice case, you are not representing someone who is totally innocent. You are representing someone who has somehow provoked the police, who are a very sympathetic group, who can come into court and testify that they passed character examinations and that they put their lives on the line for their community, and they have not profited in any way by their actions here. So I think that if you elevate that to the macro level, you find the same kind of phenomenon. Most of the people who are aggrieved by the police have done something to offend the police, have done something that most voters can't identify with, who are among the disenfranchised. It's not a very popular cause.

Mr. EDWARDS. How are we going to win that war, Mr. Hoffman?

Mr. FYFE. I think on the level of myself, I'd make myself available to testify against police in cases that I think are egregious and hit them between the eyes with large verdicts and get police to change.

I think on the level of the Federal Government, folks like yourself have to continue to apply pressure until that view changes. I daresay that if you went in to a jury or asked the public what they thought about people who had committed offenses suing the police, the knee-jerk response is a very negative one. What nerve that person has to sue the police. Chief Gates knows that. When he says Mr. King has a criminal record, that's a very appealing statement.

Mr. CONYERS. The courts' conservatism in civil rights matters, which we are trying to reverse with the Civil Rights Act of 1990 and now 1991, since the President's effective veto of the former, when we look in the area of these kinds of cases, the courts themselves have been very conservative and have read and interpreted these statutes, it seems to me, as narrowly as possible to further make this a difficult terrain. Not only were the statutes inadequate, but it seems that their interpretation didn't help out any, either.

Mr. HOFFMAN. That has been increasingly true. Certainly in the last decade the Supreme Court decisions have, in a general way at least, restricted the ability of victims of police abuse to recover and have restricted the circumstances in which you can recover. That adds to the natural difficulties of bringing these cases.

I think that actually underscores how bad the problem is because people still win. When you take into account how bad the caseload is and the natural difficulties of proving the case, having $10 million worth of judgments against the city of Los Angeles in police cases in 1990 underscores how unbelievably bad the problem is, because we have won that many.

Mr. EDWARDS. How do they get these judgments if there's no pattern-and-practice provision?

Mr. HOFFMAN. What I referred to before was pattern-and-practice cases where you were trying to get prospective relief, to try to eliminate the practices in the future.

Mr. EDWARDS. Oh, I see.

Mr. HOFFMAN. The judgments come in the context of individual damage actions.

Mr. EDWARDS. But, well, these big judgments, we'll say $1 or $2 million, that's against the police department or against an individual officer?

Mr. HOFFMAN. It can be against both. One of the problems in the area, unfortunately, is that city winds up paying for it regardless. The officer never pays even if the judgment is against the officer. So the actual effectiveness of the award to deter individual officers is mitigated by the fact that the city picks up the bill anyway.

In fact, in one of the cases that Professor Fyfe mentioned, the *Lares* v. *Gates* case, where Chief Gates was hit with a very large punitive damage award himself, within days I think the city council said that it was going to pay the award. At that point, what's the point of having a punitive damage award to deter Chief Gates when the city administration turns around the next day and says, "Well, we'll pick up the tab"—regardless of how outrageous your statements were or what your conduct was.

Mr. FYFE. On that point, Mr. Chairman—and I'm not an attorney, but in my experience in these cases I have usually been advised by attorneys not to make any mention of who is likely to pay

the damage. What typically happens is that juries sit on those cases assuming that the verdict will be judgments against the individual police officer and those will knock him out of his home and hearth, when, in fact, they're not.

I testified in a case where a judge wrote that the officers in this case unconstitutionally dragged this man from his house, beat him, and shot him to death—and apparently shot him to death in violation of the State criminal statute on homicides. She awarded $1,000 punitive damage against each of the officers. In all the cases I've testified or consulted in—and there are well over 100—that's the only one where a police officer has ever had to lay out anything out of his own pocket.

Mr. CONYERS. To what extent does the State prosecution of these cases allow the Federals to suggest that they operate as backup?

Mr. FYFE. We were discussing that in your absence. It's very, very difficult for a local prosecutor to bring a case. As you recall, Mr. Conyers, the *Eleanor Bumpers* case—you and I can probably disagree on that one. I don't think that the officer should have been indicted. The fact is that Mr. Merola who was then the district attorney in the Bronx, did indict him. Regardless of the merits of the case, Mr. Merola found himself with 8,000 police officers demonstrating outside his office the next day. So it's a very, very tough thing for a local prosecutor to bring these kinds of actions as well.

In Los Angeles, I was surprised when I went out there to see the relationship between the district attorney, a person who is now gone, and the police. In my experience in the East, the district attorney was the lead law enforcement officials. When he showed up at a crime scene, he was the boss and the police were subservient to him. That was not the case in Los Angeles, however. The Los Angeles officer involved, the shooting team, would keep the district attorney's people at arms' length and would let witnesses go out the back door of police stations while the district attorney's people sat in the front office.

The Rollout Program in Los Angeles was initiated to begin with because the police department was simply not notifying the district attorney that its officers had shot and killed people. He was finding out about these on the radio on his way to work. By the time he found out about them, all the leads in the cases were cold.

Mr. HOFFMAN. The district attorney's office in Los Angeles sends out memoranda about officer-involved shootings. We get them on a regular basis. Many other civil rights groups get them, too. Of course, they're all roughly the same. It's like they were spit out of the same computer; only the names have been changed. It almost always comes out this was a justified shooting. The terms are predictable. It's not viewed as a serious—that whole apparatus is not viewed as a serious attempt to look into those cases.

My understanding, through civil rights lawyers that have really looked into this even more closely than I, is that police commission guidelines that really require the police to cooperate with the district attorney are actually ignored, and that there are informal directives to the police officers that essentially supersede police commission guidelines where Los Angeles Police Department officers are instructed not to talk to the district attorney, so that they can

be coached by the Los Angeles Police Department officer-involved shooting team and not actually give their testimony until it's all figured out what it should be.

That's certainly what the allegations have been among the civil rights community, and no one looks to that system to bring up justified results.

Mr. CONYERS. Finally, what is your conception of the pattern-and-practice authority and how it would operate in this instance, in these police brutality cases?

Mr. HOFFMAN. I think that the city of Philadelphia case is probably a good example of where it should have been applied. I think in the city of Philadelphia case you had a situation where the Justice Department conducted an 8-month investigation of all the complaints in Philadelphia and they identified a whole series of patterns of abuse. They sought to bring an action where there could be equitable relief to deal with those abuses, to remedy them in some effective way. The courts found that the Justice Department didn't have that authority because Congress hadn't given it to them.

I think that if Congress gave the Justice Department the authority to bring those suits and to actually achieve remedies through the courts that would deal with whatever the patterns were that were found, that is what is needed.

Mr. EDWARDS. We could write a bill, which I think would come to this committee as long as it is connected with civil rights, that would be along the lines of the civil rights for institutionalized persons. Mr. Kastenmeier was the author of that.

Mr. CONYERS. Exactly.

Mr. EDWARDS. And we could.

Mr. CONYERS. A great idea.

Thank you so much.

Mr. EDWARDS. Mr. Washington.

Mr. WASHINGTON. I have a two-part unanimous consent request, if I may address it to the Chair first.

The first is that the Chair be empowered to instruct the staff to obtain a copy of the video tape from the Rodney King incident.

Mr. EDWARDS. The Chair will be instructed to ask the staff to do that.

Is there another tape, do you think? Is there in the laws of the city of Los Angeles a law requiring, when an arrest is made, that there is a sound recording made? Is that correct?

Mr. FYFE. As a matter of practice, police department radio transmissions and computer transmissions are recorded on a tape that is reused every 90 days or so. So all the radio transmissions and all the computer transmissions related to this should be readily available.

Mr. EDWARDS. I'm not referring to that. I'm referring to a practice in some police departments where somebody is picked up immediately, the button is pushed, and a recording is made of the event. Does that go on in Los Angeles?

Mr. FYFE. Not as far as I know, sir.

Mr. EDWARDS. It's a good idea, don't you think?

Mr. HOFFMAN. Not as far as I know, either. It would be a good idea.

Mr. EDWARDS. Sorry, Mr. Washington.

Mr. WASHINGTON. That's OK. The chairman was referring to an incident in Brownsville, again in Texas, where the police officers were captured on their surveillance equipment beating a guy in the police station, which resulted in a prosecution. It seems the only time the Justice Department feels constrained to prosecute is when we have a video tape. I understand there are some problems.

The other unanimous consent request, the other part of it, is, Would the Chair be amenable to at least considering broadening the request? The Chair will remember the original request of additional information, I believe put by Chairman Conyers, on additional data over the 6-year period was broadened to encompass, as I understand, for them to take a look at 1983 claims that may have been brought by private litigants.

It occurred to me during the course of that discussion and discussions that followed, Mr. Chairman—I don't know what results we would yield, but at least in my experience a significant portion of the cases that fall below the line, so to speak, in terms of those that end up getting prosecuted as a civil action, and the even smaller number that end up prosecuted as a criminal action, fall within the ambit of a general view of those, and the root basis, I would say, for 95 percent of them would be cases in which there's a charge of assault on the police officer. Would you agree with that?

Mr. HOFFMAN. I think a large number of them involve that charge.

Mr. WASHINGTON. For this reason, Mr. Chairman, I bring a guy in and you're the desk sergeant, and he's battered and bruised. He's going to start complaining. I'm going to have a defense available: I used such force as was necessary to resist him. Ergo, you end up filing a charge against a person to prove the fact that you didn't actually beat him up; you were defending yourself against his unlawful assault.

My question is—and the information is already available in NCIC in some respects—if we could broaden the inquiry, with the permission of the chairman, so that the information we receive back from the FBI will also include at least—not the specifics on each case, but the general category.

I think what you will find, when you look at that, is you will be able to draw a chart with the largest body being cases in which—I mean, I'm not suggesting that all charges of aggravated assault or assault on a police officer are illegitimate, but I'm suggesting that you will find the base there, and most often you will find that the charges that result in either civil charge or criminal charge against the police officer being one in which the original charge was assault, an allegation of assault by the citizen on that very same police officer.

You'll also find, Mr. Chairman, the pattern if the officer has been involved in misconduct in the past, he or she will have cases in which they have prosecuted cases of assault on individuals, which demonstrates, I think, in some respects a propensity toward violence when a face-to-face confrontation results. That is the reason for my request, to just have them bring over the NCIC information. Once you see it, I think you're going to be satisfied that further inquiry may be justified—the same 6-year period of the cases in which—and they already have that as one of the statistical

categories with the NCIC—where a charge of assault on police officers or other strains of that would be filed under various State laws.

Mr. EDWARDS. With Mr. Conyers' consent, we will do that.

Mr. CONYERS. I think it's a good idea.

Mr. WASHINGTON. Thank you, Mr. Chairman.

Just one brief question on the huge verdicts: I don't know what it's like, but I remember when *Monroe* v. *Pape* was the law before *Monell* v. *New York* came along, there was a problem with getting what everyone considers—if a truckdriver runs over me out here crossing the street, Acme Corp. for whom that person is working, in the course and scope of employment, under theory of "let the master answer," or *respondeat superior*, is the means by which you get from the employee to the employer. It seems like you ought to have better experience in California in the cases in which Professor Fyfe has been involved, and Mr. Hoffman has mentioned some, where the city actually responds.

The problem down in my area is that there is such a niggardly interpretation of *Monell* and the difficulty in getting the city and the police department held liable. The jury goes back and they come back with $1 million verdict because they feel, based upon the egregious facts that they have heard, that that is what is justified. Nobody ever pays a dime of it. Nobody ever pays a dime of it.

My point was earlier, would you think about perhaps overcoming the problems? You remember in *Monroe* v. *Pape* the Supreme Court decided that, under 1983, the Congress would not include a city within the definition of a person. I believe there were some ways in which they kind of went around that in *Monell*. But, with the current trend of the Court, we could be back to a situation where only the police officer is liable. No matter what size of verdict is returned, you end up suing the city; you sue the police officer; you sue the police chief; you sue the person who actually perpetrated the egregious conduct. You end up with a judgment, usually a summary judgment for the city and the other officials, unless you can show a cause or connection between them. You end up with a judgment that means absolutely nothing. Then you don't have a deterrent either on the individual officer or on those in higher authority that we all agree are the people who really ought to be sending the message down to these officers. Do you think there is something we could do in that regard?

Mr. FYFE. I would say so. Again, I'm not an attorney. My observation of the interpretations of the liability of employers by judges has sometimes been weird. I remember testifying in a case where a judge bifurcated the case. He, in essence, held one proceeding to determine whether the police officer had violated the individual's civil rights and, if so, whether the violation was a result of the custom and practice of the police department. The judge decided that, while the officer may have acted wrongly, he was following the policy of the department. So, therefore, it would be unfair to come back with a judgment against him, and since there was no judgment against him, the city was off the hook as well.

The interpretation seems very weird. There should be some consistency, to this layperson's view.

Mr. HOFFMAN. Clearly, the way that *Monell* has been interpreted, particularly recently, makes it difficult for civil rights lawyers to get liability against the city. I think the concern is that it's going to be increasingly restrictively interpreted. Unless you really have an egregious set of facts, it's going to be hard to get municipal liability, and the problems that you have described are real.

May I make another suggestion or recommendation that just occurred to me out of the previous discussion? It's not quite related to this, but it relates to the 3,004 other cases. One of the things that struck me in Mr. Dunne's testimony about the backstop role of the Justice Department is that it seems to me that if you are the backstop, one of the things that you're going to have to look at pretty carefully is whether there is an adequate discipline system, whether there is adequate action by local prosecutors, so that you know that things are working out all right.

I think it would be interesting to know what the Justice Department found in those 3,004 cases and in the similar cases in this period about the adequacy——

Mr. EDWARDS. I think we definitely have to ask them that. We can't accept that as an answer unless we find out what percentage of those cases were dropped by the Justice Department because they were adequately taken care of by local authorities.

Mr. HOFFMAN. And it would be interesting to know what efforts they make to determine whether there is adequate discipline. For example, it would be very interesting and important, I think, for the Federal Government, for the Justice Department to keep statistics about the discipline of police officers on an overall basis to see whether there are patterns there, because there are patterns there. The patterns are that police officers don't get serious discipline for these kinds of situations.

If you look at that on a national basis, regional basis, that will assist the Justice Department in knowing when its backstop role is the most needed, when discipline is not meted out. Since the Justice Department keeps statistics about crime and all kinds of other things, this is a perfect thing for the Federal Government and the Justice Department to do to make sure we know whether the local systems need to be backed up by the Federal Government, as I think they'll find they will need to be backed up.

Mr. WASHINGTON. I don't know if we will be able to derive all this information from the information that the chairman has ordered be made available, but at least in Houston, the pattern went from—it basically is pervasive and it deals with any group that may find themselves in disfavor with the police. It starts out with blacks and it goes to Hispanics. In the sixties it went to young whites with long hair, so-called hippies. Finally, it got to women, and that's where it is now. There are a lot of women who are afraid to ride around in cars. One woman was chased 30 miles across Houston, ended up getting shot and killed, because she thought she was running from perpetrators. These were off-duty police officers who had gotten drunk, been out all night at a drinking spree.

I know hard cases make bad law. They ended up, because the officers didn't like something about maybe some gestures or something like this—she didn't know the guys were police officers. They chased her across town, run her across the freeway, and killed her with a gun, off-duty police officers.

The point is, it can happen to anyone. Unless people really understand—I think if the citizens of this country realized that it's not just those other people, it's not just the criminals; we really need to talk about them, too. Even the criminal is entitled to be taken to jail, not beaten on the street like a dog. There's not a person in this room that, if they had seen someone with a stick out beating a dog, like those men were beating Rodney King, if they weren't police officers, who wouldn't have said or done something about it. There's not a person in this room that wouldn't have.

But, we allow police officers to get away with that kind of conduct. If it happens to Rodney King today, it will happen to some person out of their community tomorrow, and it doesn't make any difference what color you are, what socioeconomic group you come from. It's happened to the richest and the poorest people in Houston, and we don't want to be the example. Believe me, it can happen to anybody. We need to get that message across to all the people in this country.

Mr. CONYERS. Mr. Chairman, I'm reminded by the remarks of the gentleman from Texas that one of our witnesses had a portion in their prepared remarks about the video tape itself. Was that in Attorney Hoffman's——

Mr. EDWARDS. It was about——

Mr. CONYERS. In Jim Fyfe's—yes, right, it was Professor Fyfe that had that.

I was struck by later information that revealed that, first of all, there had been cars passing nearby on the highway that were slowing down to witness this. They would actually stop and look at it, and it didn't interfere with the police misconduct at all. In addition, there were people some several hundred yards away who were yelling, "Don't kill him," who realized that those were policemen administering this life-threatening beating. The whole notion of premeditation or this being some rogue cop incident gets totally refuted because there were plenty of witnesses, even without the video tape, many of whom would have probably never thought about coming forward. That, of course, speaks to the arrogance and viciousness and systemic misconduct that that act represented.

Mr. FYFE. I think on that point, Mr. Conyers, I'm not aware that anyone other than the person who took this video tape has come forward.

Mr. CONYERS. Nor am I.

Mr. FYFE. I think that may give some indication as to the real depth of this problem, because it takes an enormous amount of guts to go into a police station and report that you've just seen an officer beating someone up.

Mr. EDWARDS. Mr. Kopetski.

Mr. KOPETSKI. Thank you, Mr. Chairman.

I represent a police training facility for the State of Oregon, and it is one that is used for the State, mainly local police officers as well as correction facility personnel. It's a very fine institution. What happened in Los Angeles was not learned or taught in any police training facility.

Mr. EDWARDS. We will withhold questions while we hear from the next two witnesses. So, if the three of you will serve as a panel.

Our second witness is Drew Days, professor of law at Yale Law School, and former Assistant Attorney General in charge of the Civil Rights Division. Both Mr. Hyde and I had the pleasure of working with Mr. Days when he was the Assistant Attorney General in charge of civil rights, and we are very pleased to have him here again.

And then the third member who will testify before the questions begin is David L. Llewellyn. Mr. Llewellyn is president of the Western Center for Law and Religious Freedom of Sacramento, CA.

Will the two next witnesses please raise your right hand.

[Witnesses sworn.]

Mr. EDWARDS. Thank you. Professor Days, you may proceed. And, without objection, all of the statements, the full statement, will be made a part of the record.

STATEMENT OF DREW S. DAYS III, PROFESSOR OF LAW, YALE LAW SCHOOL

Mr. DAYS. Thank you, Mr. Chairman. It is a pleasure to be back before this subcommittee where I spent a great deal of time when I was in the Justice Department. I am also happy to see the new additions on the subcommittee.

I want to thank you, Mr. Chairman, and the members, for inviting me to testify before you today in connection with your hearings on police brutality in America. I am certain that all of us recognize the important role that law enforcement agencies play in keeping our streets safe and our homes and businesses secure. However, the video-taped beating, on March 3, 1991, of Mr. Rodney King by officers of the Los Angeles Police Department provided undeniable evidence that in some jurisdictions persons who are sworn to uphold the law are among its major violators.

Of course, I experienced, along with millions of others, including President Bush, revulsion upon viewing the video tape, but I must admit to the subcommittee that I was frankly not surprised that a gross violation like the one captured on that video tape could occur in the United States in 1991, for my professional experiences both in private practice as well as my time in the Justice Department have led me to believe that police brutality, although it is not standard practice in the United States, occurs all too frequently in many communities in this country.

What I want to do is talk about two experiences that have brought me to that conclusion. The first was when I was on the staff of the NAACP Legal Defense Fund in New York. In that capacity I brought a number of actions against police departments seeking both equitable and monetary relief for police misconduct. What I found was that even though we brought successful damage actions against police departments for police brutality, although we weren't very successful in that respect, there appeared to be no change in the environment, no change in the context within which police officers worked. There seemed to be no discipline from the top. There seemed to be no criticism by police or city officials of officers who were found to have engaged in police misconduct.

As I think you, Mr. Washington, at the last hearing that was held here talked about the lack of a clear message. There never seemed to be a clear message sent out by those on the top to officers on the line that police misconduct and abuse would not be tolerated.

After we brought a number of suits along these lines we decided that we would seek equitable relief. We would try to get at what we felt were some of the institutional and structural problems in the operation of police departments, and we noted a correlation between incidents of police misconduct in departments and their failure to have any viable procedures for receiving, investigating, and acting upon citizen complaints of police misconduct. So we identified that as an objective that we would seek in our lawsuits.

I am happy to say that we were able to work out consent decrees in several cases and a settlement in one case that revised drastically the procedures that these police departments had for handling complaints, although hearing Mr. Henderson's testimony about Prince Georges County, I am not certain that in the 15 or so years since that agreement that things have really improved. But I do think that in some of the other communities there was leadership at the top and the procedures that were put in place actually did make a difference. But I would invite the subcommittee to look into those cases to find out whether my impression is accurate.

I am happy to say that we were able to work out these cases before the Supreme Court decided *Rizzo* v. *Goode*. I have described *Rizzo* v. *Goode*, and I know members of the subcommittee are familiar with the decision, but let me emphasize the devastating impact that *Rizzo* v. *Goode* had on the ability of private plaintiffs to get at what I regard as important structural and institutional problems in the operation of police departments.

Essentially what the Supreme Court said was, although there was evidence of significant police misconduct in the city of Philadelphia, there was not an adequate nexus between that type of conduct and the operation of the police department overall, the types of directives that people at the top gave to line officers. There was not a nexus between that and the misconduct. It is a very complicated decision, but I think that what it said to private plaintiffs was, "You'll have to go back to damage actions if you want to get any relief," and, as I said earlier, those damage actions tend not to alter the culture or subculture of police departments where there is a condoning or an acceptance of police misconduct.

During my tenure as Assistant Attorney General for Civil Rights in the Department of Justice I was responsible for overseeing our criminal enforcement program, that is, litigation and prosecutions under sections 241 and 242 of 18 U.S. Code. I had come to Washington thinking that if the private damage actions weren't a significant tool for dealing with structural problems perhaps the criminal procedure, the criminal prosecution would make a difference. I found first that although we got a number of complaints of police misconduct it was very hard to make those cases stick. First of all, there was the difficulty of substantiation in many cases. There were cases where, as I indicate in my testimony, reasonable doubt was built into the record; for example, which officer did it, who actually did the beating. And, unfortunately, one can't indict every-

body in a case like that. There has to be some indication of who is doing it. In fact, the Liberty City riots, if you remember, produced a problem exactly like that. There were a number of officers but it was not clear which officer delivered the deadly blow to the black man who was killed in that particular incident.

But, even in those cases where we had strong evidence, and where we had a right to actually obtain prosecution, we ran into jury nullification. Jurors simply would not convict police officers. And we had to deal with the fact that most of the victims of police misconduct are people who come from the wrong side of the tracks, if you will. They are racial minorities. They are members of groups who because of their sexual orientation tend not to have a great deal of credibility. They are poor people. They are people who, with criminal records, are not going to be believed when they get on the stand, even though they have been subjected to quite brutal treatment by police officers.

I thought that education might have some impact, and I really don't know the consequences of the many times that I went down to the National Police Academy at Quantico, VA, to be subjected to pretty hot challenges from, during the year, a thousand police officers from around the country. But what I tried to do was impress upon them their responsibilities to deal with police misconduct within their own departments and the extent to which the Federal Government would come in if they failed to do so.

All of these experiences ultimately brought me to the conclusion in my tenure in the Justice Department that another approach would have to be explored. That there had to be some way in which the Federal Government could fill the gap that was created by the *Rizzo* decision and by other decisions that seemed to interfere with the reform consequences of some of the litigation that was brought that should have produced reform in those departments. So what we did was try to develop an approach that would address this problem.

We first did something like what the Justice Department has committed itself to doing very recently in meetings with Mr. Conyers and other Members of the House; that is, do a survey of police misconduct cases around the country to try to identify communities where there appear to be particular problems. We did that in the late 1970's, and as a result of that investigation we identified the city of Philadelphia as being very high upon the list of those communities where we had complaints of police misconduct. We had private suits brought, we had allegations of racial discrimination in the hiring practices of the police department, and, of course, we had brought a number of criminal prosecutions, some successful, against officers who were members of the Philadelphia Police Department.

One of the things that shocked me, and maybe I was more naive then than I am now, but we were involved in a prosecution of several members of the homicide bureau in Philadelphia. The short story about their activities was that they had a practice of bringing in people who were suspects in murder cases and administering quite brutal punishment to them to get them to confess. There was one fellow, if I remember correctly, on the squad who would say to people, "If you don't talk I'll hit you so hard that your heart will

stop," and this fellow was involved in an investigation of an arson murder in Philadelphia. The police had been told by one person who was an eyewitness, or a supposed eyewitness in the case, that X did the murder, torched the house and that fire resulted in death.

Well, the fellow who was suspected of the arson was brought into the homicide squad office and very brutally beaten. He confessed. And it turned out that he confessed to a murder and an arson that he had no involvement in. He was convicted, and it was only after the conviction and after some further investigation and a confession by the person who actually did the crime that we uncovered the fact that the homicide squad had engaged in these types of practices.

They were convicted by a Federal jury in Philadelphia. Their conviction was upheld on appeal, and when police officials were asked what they were going to do about these officers, my recollection is one of them was actually promoted, and a comment from one of the officials was that these officers still were presumed innocent until the Supreme Court of the United States said so. So we hardly have an indication of a clear message coming cut of that department, and we have people engaged in undeniably brutal practices which are so brutal that they cause an innocent man to confess to a murder that he didn't commit. And, to have police officers say that those officers still enjoy the presumption of innocence is a pretty shocking commentary.

What we did, after we had decided that we would focus on Philadelphia, was to conduct an 8-month investigation. It was a very intense investigation including the use of a special squad of FBI agents, data specialists, computer experts, to look into the allegations that we had uncovered. We concluded after that investigation that there were grounds to bring a lawsuit against the city of Philadelphia alleging a pattern and practice of police misconduct.

We filed the complaint and ran into very heavy going from the start with the district judge who sat on the case. Suffice it to say that the district judge concluded that the lawsuit could not be brought, at least a part of it could not be brought because the Attorney General did not have explicit authority from Congress to bring such a suit, and he saw no basis for concluding that there was an inherent power on the part of the Attorney General to bring such an action.

Let me be more specific about what we alleged in the lawsuit. We sued the city of Philadelphia and 20 of its officials. The suit alleged that the Philadelphia police officers engaged in various patterns of misconduct against civilians and that police and city officials had acted in ways that were designed to shield abusive officers from any serious disciplinary action, either internal or external.

We alleged that, for example, officers who were charged in lethal force incidents were actually put on the investigations of their own offenses. That is, when the department conducted the investigations the subjects of the investigations were involved in those investigations. Trials were lost. Officers were not made available for investigation. Subpoenas from local officials were rejected by police officials, and I can go on and on.

The video tape of Mr. King shocked the American people, I think, but it certainly is not the only video tape that I have seen of a police beating. In fact, in our investigation of the Philadelphia case we had a video tape of a black man being beaten up in the Philadelphia subway station. There are fixed television monitors within the subway station and those monitors picked up a black man being quite seriously roughed up by police officers.

One of the allegations of the complaint was that that video tape had been brought to the attention of the commissioner of police in Philadelphia shortly after it happened and it produced absolutely no reaction. The officers were never disciplined. No action was taken against them.

We also alleged in the complaint that there were acts of discrimination. That there were certain practices that had a discriminatory impact, in effect, upon the black and Hispanic communities in Philadelphia. Suffice it to say that with respect to that part of the complaint the judge held that our complaint was not specific enough; and even though this ruling by the judge came after we had answered interrogatories from the city and provided 800 pages of details with respect to time, place, identification of officer, and nature of the incident, the judge threw out our lawsuit.

That decision was upheld on appeal and a consideration en banc by the third circuit was denied. Whether we would have been successful in proving our case will never be known, but this was a situation where we think that we were not engaged in idle speculation. We had very strong evidence that there were problems in Philadelphia that deserved a response.

Now, one of the things that also creates a need it seems to me for a civil response from the Justice Department is that the Supreme Court has limited very seriously the extent to which private parties can get equitable relief, even where they have been the victims of brutality themselves. A case in point is the *City of Los Angeles* v. *Lyons*, where a man established to a court's satisfaction that he had been the victim of a chokehold without any justification and had been injured at the hands of Los Angeles police officers. He sought not only damages, he sought an injunction against the city of Los Angeles's using chokeholds under circumstances such as the one he was involved in. The Supreme Court's conclusion was that Mr. Lyons did not have standing—he did not have the capacity or the necessary palpable injury to seek that type of remedy.

So I think we face in the United States a situation where we really can't look to private parties to deal with patterns or practices of police misconduct effectively because the procedural barriers have been placed in the way of that by the Supreme Court.

Now, I have taken time this morning to talk about the Philadelphia litigation and I actually mentioned Philadelphia more times than, perhaps, I intended. Not because I have any desire to hold up the City of Brotherly Love for any special criticism. It may well be that successor administrations in Philadelphia, and there have been several, both in the mayor's office and the police department, have dealt with some of these problems. But I do so rather because I really believe, given these various experiences that I have had, that the best hope for dealing with the structural and institutional problems that I have described is not the individual damage action, it is not the individual criminal prosecution, it is the civil pattern or practice lawsuit such as the one we attempted to bring against the city of Philadelphia.

What I think is necessary is Federal legislation that would establish as a matter of Federal law that the Attorney General has explicit authority to bring suit where he or she has reasonable cause to believe that State or local officials are depriving, pursuant to a pattern of police misconduct, persons in their jurisdictions of rights secured or protected by the Constitution or laws of the United States.

Now, as the members of this subcommittee know full well, Congress has seen fit on a number of occasions in the past to give the Attorney General pattern or practice authority where it appeared that that authority was necessary to ensure that individual rights were vindicated. It is certainly the case in title VI of the Civil Rights Act of 1960, having to do with voting and several other titles. But most notable is the Civil Rights of Institutionalized Persons Act of 1980, CRIPA—legislation that I am proud to say I was actively engaged in urging upon the Congress when I was in the Justice Department. It was a very much needed piece of legislation given the problems that we were having dealing with horrendous conditions in institutions where the mentally ill and mentally retarded were confined, as well as brutal and unacceptable treatment of prisoners. That law gives the Attorney General authority to sue on behalf of people in these institutions, and I think that the approach Congress adopted with respect to CRIPA could also be used to very good effect to provide pattern or practice authority to the Attorney General in police misconduct cases.

Now, let me make clear that, although I have devoted much of my testimony to how pattern and practice authority would grant the Attorney General a meaningful tool to deal with the type of problem that we were addressing in Philadelphia, it would also be extremely useful in situations like *Lyons* where, as I just indicated, private parties do not have standing to bring such litigation.

I think that if this new authority were granted to the Attorney General it would, in combination with private damage actions and Federal criminal prosecutions for police misconduct, represent a great step forward in Congress' efforts reaching back to the Reconstruction period to ensure that civilians are given effective Federal protection against official lawlessness like that to which Mr. Rodney King was subjected last month in Los Angeles. I hope very much that Congress will act promptly to provide the Attorney General with that authority.

That concludes my testimony, Mr. Chairman, and I would be happy to respond to any questions that the subcommittee members might have.

Mr. EDWARDS. Well, Thank you very much, Mr. Days, for really very helpful testimony.

[The prepared statement of Mr. Days follows:]

CERTIFICATE OF SERVICE

This is to certify that on this fifth day of September, a copy of the foregoing Brief of Amici Curiae in Support of United States's Objections to the Magistrate Judge's Report was sent by Federal Express, next day delivery, to:

Mark Masling
Special Litigation Section
Civil Rights Division
U.S. Department of Justice
601 D Street, N.W.
Washington, DC 20004
Counsel for the Plaintiff, United States

Timothy J. Mangan
Office of the Columbus City Attorney
90 West Broad Street
Columbus, OH 43215
Counsel for the Defendant, City of Columbus

James E. Phillips
Vorys, Sater, Seymour and Pease
52 East Gay Street
Columbus, OH 43216-1008
Counsel for the Defendant-Intervenor, Fraternal Order of Police, Capital City Lodge No. 9

Margo Schlanger