Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality

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by
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Consider these three cases:

Case One: Four police officers arrest a man who led them on a high-speed car chase after breaking a church window. They place him in a holding cell and begin to beat him. During the beating, he suffers...
a heart attack. They break his nose, ribs and teeth. When they are done, he is in a coma, with irreversible brain damage. Convicted of assault, three officers are sentenced to weekends in jail for between thirty and forty-five weekends. The fourth officer receives a suspended sentence and 180 hours of community service. The lenient sentences cause an outcry from the public, but the judge states they have "already been punished and stigmatized enormously by the unprecedented publicity surrounding this case."2

Case Two: A police officer arrests the driver of a car and his passenger after a high-speed chase. The passenger is pinned to the ground and handcuffed, then the officer stomps on his body, kicks him, jams a shotgun barrel to his forehead and slams his face against the patrol car. The passenger's injuries include a laceration requiring sutures, a broken nose, contusions to the eyes, several chipped teeth and a contusion on the forehead.3 The officer pleads guilty to a misdemeanor civil rights charge of using excessive force and is fined $500.4 The judge concludes that the officer's act was aberrant, that he has suffered enough and that he would lose his job if sentenced to probation.5

Case Three: A police officer orders a group of people to leave a public street corner notorious for illegal activity. When two people refuse to leave, the officer repeatedly assaults them with his baton. He is convicted of felony and misdemeanor use of excessive force and sentenced to three years probation and 500 hours of community service. Although the maximum penalties for these two crimes are three years and eight months in prison respectively, the judge says that he does not think prison is appropriate.6

Since the exposure of reprehensible behavior committed by some police officers in the Los Angeles Police Department through the Rodney King beating and O.J. Simpson trial, media commentators, academicians and politicians across the country are discussing police brutality and other police wrongdoing, bringing to light examples of it

5. Transcript at 21-23, Kachadurian (No. 89-251-Cr-T-10(A)).
in their local jurisdictions. Most of these discussions describe the problem and propose steps to be taken in the future to reform police departments and police misconduct.\textsuperscript{7} Focusing on the prevention of police brutality should be a priority in these reforms, provided that prevention efforts address its many-layered causes.\textsuperscript{8} However, it is equally important to ensure that justice is done when prevention fails.

This Article addresses a critical part of the criminal justice process that bears on police brutality—sentencing. The low sentences in the three descriptions above may seem shocking, but they are not at all unusual in police brutality cases.\textsuperscript{9} In many instances, police officers manage to avoid prison altogether for criminal acts that, if committed by civilians, would lead to many years imprisonment.\textsuperscript{10} When police do go to prison, it is often for a fraction of the sentence that normally results from a particular crime. This is so even when their brutality causes permanent disability or death.\textsuperscript{11}

Now consider this case: Four police officers arrest a man for burglarizing a pizzeria. On the spot, they begin to beat him, continuing even after the man is subdued, handcuffed and knocked unconscious. Three of the officers are convicted of misdemeanor battery and misconduct and sentenced to sixty days in jail. It is considered "unprecedented" for police to receive a jail sentence for brutality in that


\textsuperscript{8} \textit{See} discussion \textit{infra} Part I.C on causes of police brutality.

\textsuperscript{9} I discussed in the first case an example of police brutality in Canada to illustrate that the problem of unjust sentencing for police brutality is not limited to the United States. This Article, however, is concerned with sentencing in the United States.

\textsuperscript{10} \textit{See infra} note 104 for discussion.

\textsuperscript{11} In United States v. Stokes, 506 F.2d 771, 773 (5th Cir. 1975), the court affirmed the conviction of a police officer who was sentenced to six months imprisonment and five years probation after leaving a man in a permanent coma from a fractured skull when he beat him following his arrest. Similarly, in United States v. Nieves-Rivera, 961 F.2d 15 (1st Cir. 1992), the court initially placed a police officer on probation for his role in beating a person who died as a result. \textit{Id.} at 16. After learning that it lacked authority under 18 U.S.C. § 3651 to suspend the sentence, the court resentenced him to a year and a day in prison. \textit{Id.} This crime was punishable by life imprisonment, and the government had asked for 30 years. Brief for the United States at 4, United States v. Nieves-Rivera, 961 F.2d 15 (1st Cir. 1992) (No. 91-1846).
jurisdiction. But the judge reasons that, "'[o]nce a police officer steps across that line . . . he is placing himself in the same kind of posture as the thugs who he is seeking to arrest.'"\(^3\)

The sentence in this fourth case was quite mild, not much harsher than the sentences given in the first three cases. What distinguishes this case from the others is the attitude conveyed by the judge. The judge insisted that we not be blinded by the badge, but rather, that we see such police behavior through the same lens that we view other violent crimes.

When the United States Sentencing Commission promulgated sentencing guidelines for police brutality, it did just what the judge in this fourth case said had to be done.\(^4\) The Commission created a sentencing structure for civil rights offenses that punishes police for their crimes under the same criteria and according to the same calculations used in sentencing civilian criminals.\(^5\) A police officer who assaults someone is subject to the same guidelines as anyone else.\(^6\) In fact, the sentences given to police, as well as to others acting under color of law in civil rights crimes, are enhanced because they have not only violated the law, but have violated the public trust as well.\(^7\)

In theory then, and often in practice, the federal civil rights sentencing guidelines eliminate the sort of gross disparities exemplified in the cases above. Common to these cases is the fact that these sentences were determined in jurisdictions without sentencing guidelines governing police brutality.\(^8\) Without guidelines, judges are often constrained by community attitudes and norms, even when they

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13. Id.
14. The federal sentencing guidelines first went into effect on November 1, 1987. UNITED STATES SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS 1.1 (1987). Although police brutality is not specifically discussed, it is one of the civil rights crimes for which sentencing guidelines were promulgated. Parts III and IV of this Article discuss their history, operation and impact. U.S. SENTENCING COMM'N, FED. SENTENCING GUIDELINES MANUAL 143-44 (1995) [hereinafter 1995 GUIDELINES MANUAL].
15. See discussion infra Part III.A detailing how the federal sentencing guidelines work.
16. Note that the two crimes are different. Police officers legally may use force under a variety of circumstances and thus have defenses that are not available to civilians. But once they are convicted of using excessive force, the guidelines apply equally to their conduct.
18. Case One is from Canada, which does not have sentencing guidelines. Case Two is a United States civil rights case decided prior to the enactment of the federal sentencing guidelines. Case Three is from California which has enacted detailed statutory sentencing
recognize the problem and want to use prison as punishment, as in the fourth case described above. Sentencing guidelines in police brutality cases state a presumption and set a standard against which judges must justify divergences.\textsuperscript{19}

In the federal system, which is the focus of this Article, two factors have contributed to an increase in police sentences: the elimination of sentencing disparities between police and civilian crimes, and the assignment of additional penalties for the civil rights dimension of the crime.\textsuperscript{20} Federal prosecutors generally support this result, contending that the minimal sentences imposed prior to the enactment of guidelines diminished the seriousness of these crimes.\textsuperscript{21} This argument is particularly potent in light of the extraordinary legal and practical difficulties involved in prosecuting police brutality, particularly as a civil rights crime,\textsuperscript{22} in which a racial dimension is commonly present. Although race is not an element of the crime, and no racial or ethnic group has a corner on being either perpetrators or victims of it, police brutality, like lynchings in the past, symbolizes racism to many people. Under these circumstances, it is important not to dilute the message that police are not above the law with a trivial sentence.

The policy of fair punishment for police brutality achieved by the use of civil rights sentencing guidelines may be shortlived, however. In the past year, these guidelines have faced challenges on two fronts. First, in January 1995, the Sentencing Commission staff proposed that the Commission reduce the offense level for civil rights crimes committed under color of law, and correspondingly reduce the sentence to but leaves police brutality untouched. Case Four is from Maryland which has indeterminate sentencing.

\textsuperscript{19} This is not to say that sentencing guidelines are always sound. Removing judicial discretion from sentencing raises serious questions, and the federal system, in particular, imposes very harsh sentences. These and other issues have been the subject of much scholarship but are beyond the scope of this Article. See infra notes 193 & 279 and accompanying text. The claim this Article asserts is that sentencing guidelines are necessary in police brutality cases. See discussion infra Parts III and IV.

\textsuperscript{20} This is sometimes referred to as "the civil rights enhancement." See infra Part III.A.2 for a description of how the civil rights guidelines operate. See discussion infra Parts III and IV. Equivalent sentences between police and civilians could have been achieved by lowering the sentences for civilian crimes to the penalties police used to receive. Partly because of mandatory minimum sentences set by Congress and partly because of its own punishment philosophy, the Sentencing Commission generally increased sentences across the board.

\textsuperscript{21} See discussion infra Part II.B.4.

\textsuperscript{22} See discussion infra Part II.B.3.
be applied. Ultimately, however, the Commission overrode the proposal and slightly increased the guideline levels.

Secondly, and more ominously, on June 13, 1996, the Supreme Court upheld most of the departure grounds applied by the trial court in sentencing the two police officers convicted in the Rodney King beating. The two officers challenged the Ninth Circuit's interpretation of the sentencing guidelines applicable to their crime, reversing the trial court's downward departure from the guidelines. The downward departure adopted by the trial court drastically reduced the officers' sentences. The trial court's justification for departure cut to the quick of the crime. By singling out factors that are inherent in police brutality to support downward departure, the court was, in essence, disparaging the crime itself. In so doing, the trial court essentially excused the officers' behavior. The Supreme Court's reversal of the Ninth Circuit is troubling not only because of the symbolic weight that the "Rodney King case" carries, but also because the decision paves the way for downward departures from the sentencing guidelines in future police brutality cases. The effect of this action is to send a message to police, and the nation, that police are above the law.

Now the Sentencing Commission must act again, this time to ensure that just sentencing for police brutality is not circumvented by the Supreme Court's ruling. It must promptly amend the guidelines to make clear that the departure grounds approved in Koon are not normally applicable in police brutality cases.

This Article argues that police brutality is an egregious crime, the harm of which extends beyond the physical and psychological injuries to victims. Situated in a social reality of acute racial divisions and radically different perceptions of, and experiences in, the criminal justice system, police brutality serves as a lightning rod for widespread

26. For the trial court's justification of the sentences, see Koon, 833 F. Supp. at 785-88.
28. See discussion infra Part IV.B.
29. See infra text accompanying notes 415-18.
public fear and anger. How we deal with it, and particularly how we sentence those who perpetuate it, speak volumes about our commitment to overcoming these deep societal chasms.

Part I of this Article describes police brutality and its causes, placing the conduct in the larger context of race and ethnicity in the United States, especially the African-American relationship to the criminal justice system. Part I then examines the harms of police brutality and argues that the failure to control the police brings with it terrible social consequences and undermines the rule of law. Part II contends that police brutality needs to be treated like the serious crime that it is and sentenced accordingly, but that all too often it is ignored. The states and even the federal government have long neglected the reality of police brutality. Civil rights laws have inadequately enhanced sentences punishing police brutality. Part III examines the federal sentencing guidelines, describing their operation and their effect in strengthening sentencing. Part IV recounts the enactment history of the civil rights guidelines, arguing that after a weak start, the Sentencing Commission intended to send a strong message condemning police brutality. Part IV then analyzes several key conflicting cases that address downward departures from the guidelines in police brutality cases. I examine in detail Koon v. United States, the case that arguably reverses the beneficial effects of the guidelines and reinstates a double standard for police. In failing to reject the use of pretextual grounds for departure, the Supreme Court's decision allows police officers to escape just sentencing for brutality convictions. Accordingly, the Article argues that Koon is not a case presenting narrow questions of technical application and standard of review, but was one raising an enormously important social problem that has far-reaching consequences for the nation's well-being. The Article concludes that it is incumbent upon the Sentencing Commission to reaffirm its intent to maintain strong police brutality sentences by amending the guidelines to reject the Supreme Court's interpretation of the departure rules in these cases.

I. Why Police Brutality is a Problem

A. Definitions

Effective police work often requires, and therefore justifies, the use of reasonable force. However, distinguishing between a legitimate and an excessive use of force is sometimes difficult. Even the "obvi-
ous" cases are not obvious to everyone, as evidenced by the acquittals in the state prosecution of Rodney King's batterers.30

Many criminologists and other academic researchers distinguish between the force that is necessary to get the job done and therefore authorized, and unauthorized force.31 This distinction reflects police policy, but is not helpful in understanding what police brutality is. Also, as a policy matter, much police behavior should be deemed unacceptable and thus censorable even though it might not be actionable.

A useful way of understanding this gradation is to focus on "police abuse of authority," defined as "any action by a police officer without regard to motive, intent, or malice that tends to injure, insult, trespass upon human dignity, manifest feelings of inferiority, and/or violate an inherent legal right of a member of the police constituency in the course of performing 'police work'."32 Police abuse of authority can be physical, psychological or legal. "Physical abuse occurs when a police officer uses more force than is necessary to effect a lawful arrest or search, and/or the wanton use of any degrees [sic] of physical force against another by a police officer under the color of the officer's authority."33 In this circumstance, police abuse of authority and police brutality become synonymous. Psychological abuse occurs when: "a

30. Despite carefully wrought definitions in the caselaw and academic literature delineating the distinction, in the end most juries simply refuse to convict police. CATHarine H. MILTON ET AL., POLICE USE OF DEADLY FORCE 85 (1977). See discussion infra Part II.B.3. The lack of agreement on what constitutes a reasonable use of force reflects a experiential gap, because some communities that see police brutality all the time know perfectly well what it is. See Laurie L. Levenson, Change of Venue and the Role of the Criminal Jury, 66 S. CAL. L. REV. 1533, 1565-66 (1993) (describing how people from different demographic backgrounds have different perceptions of reality; those who have witnessed or frequently heard about police brutality against minorities will evaluate what excessive force is differently than those who have not). This dichotomy may begin to change due to the crash course provided by the O.J. Simpson trial that has made many people previously untouched by, or unaware of, police misconduct more aware of such problems.

31. See Lawrence W. Sherman, Causes of Police Behavior: The Current State of Quantitative Research, 17 J. RES. CRIME & DELINO. 69 (1980) (defining police violence as the justified and unjustified use of any physical force against citizens); Robert J. Friedrich, Police Use of Force: Individuals, Situations, and Organizations, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 82 (1980) (describing police use of force as any legitimate or illegitimate forceful activity which produces physical or emotional injury); Richard E. Kania & Wade C. Mackey, Police Violence as a Function of Community Characteristics, 15 CRIMINOLOGY 27, 29 (1977) (defining excessive force by police as more violence than is "justified to effect a legitimate police function").


33. Id.
police officer verbally assails, ridicules, discriminates, or harasses individuals and/or places a person who is under the actual or constructive dominion of the officer in a situation where the individual's esteem or self-image [sic] are threatened or diminished.34 Under this definition, an officer who threatens physical harm or an unjustified arrest to an individual is engaging in psychological abuse.35 Legal abuse may occur even without physical or psychological abuse. It is the "violation of a person's constitutional, federally protected, or state-protected rights by a police officer."36

The justification for expanding the concept of police brutality to encompass physical, psychological and legal abuse is that the broader concept more accurately captures the wrenching experiences many people have with the police.37 Police departments will benefit from thinking in these terms while trying to improve police/community relations. Also, the term "police brutality" connotes physical injury, which may not always result from excessive use of force or other police abuse.38

Legal definitions correspond imperfectly to the definitions proposed above. There is no statute outlawing "police brutality" per se.39 Under state law, the crimes with which police are typically charged include assault, battery, manslaughter and murder. Under federal law, police are charged with the willful deprivation of a federal or con-

34. Id. at 7-8.
35. Id.
36. Id. at 8.
37. Barker & Carter, supra note 32, at 198. Carter notes that others have run into the same difficulty defining police brutality. For instance, he observes that the President's Commission on Law Enforcement and the Administration of Justice called brutality excessive force, name-calling, sarcasm, ridicule and disrespect, while the U.S. Commission on Civil Rights called it the "violation of due process" as well as "the unnecessary use of violence to enforce mores of segregation, to punish, and to coerce confessions." Id. at 198.
38. United States v. Calhoun emphasized that "the law establishes... that a prosecution for deprivation of rights does not depend upon death or serious physical injury to the victim... [E]ven if... [the victim] had suffered no apparent physical injury, nevertheless, a violation of 18 U.S.C. § 242 might have occurred if the striking were unwarranted and with the intent to deprive... [the victim] of a constitutional right..." 726 F.2d 162, 163 (4th Cir. 1984). Thus, a defendant is not entitled to instruct the jury to consider the severity of the victim's injuries because it is the use of excessive force, rather than the degree of the victim's injury, that determines the crime. United States v. Bigham, 812 F.2d 943, 948 (5th Cir. 1987).
39. Nevertheless, this Article often uses the shorthand "police brutality" in lieu of the unwieldy "law enforcement use of excessive force."
stitutional right under color of law. Nevertheless, in excessive force cases brought under either state or federal law, the initial question is whether the physical force employed by the police was objectively reasonable under the circumstances. Under a broader definition of police brutality that encompasses both psychological and legal abuse, the challenged conduct of the police might be weighed against some other norm. But irrespective of whether the injury results from

40. The federal statutes under which police excessive force crimes are normally prosecuted are 18 U.S.C. §§ 241 and 242 (1994). See infra note 144 and accompanying text of statutes.

41. The Supreme Court has said that reasonableness is measured by an objective standard in which intent or motivation is irrelevant. Graham v. Connor, 490 U.S. 386, 397 (1989). See infra note 298. The confusion between academic and legal definitions of police brutality is exemplified by the work of two prominent scholars, Jerome Skolnick and James Fyfe, who have written extensively and testified as experts on police matters. Skolnick and Fyfe call brutality a “conscious and venal act committed by officers who usually take great pains to conceal their misconduct.” JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW 19 (1993). In contrast, unnecessary force “is usually a training problem, the result of inexperience or insensitivity.” Id. at 20. Accordingly, under Skolnick and Fyfe’s scheme, brutality is intentional, whereas unnecessary force is a mistake made in good faith. Id. Looking at police brutality this way may be helpful for police departments because it suggests a scheme through which they can evaluate and respond to the problem. Skolnick and Fyfe recommend that police departments deal with intentional brutality by firing guilty officers and reforming the particular department’s deviant culture. In contrast, when officers use unnecessary force, a new training program is recommended. Id. at 19-20. But in analyzing police behavior for possible civil or criminal prosecution, Skolnick and Fyfe’s approach is too limited. It would allow a large category of inappropriate or abusive police behavior to go untouched by the law.

In one area of the law, Skolnick and Fyfe’s distinction does apply. Intent is relevant in prisons where the Eighth Amendment is most often invoked. U.S. Const. amend. VIII. Prison officials must exhibit “deliberate indifference” to prisoners, Wilson v. Seiter, 501 U.S. 294, 303 (1991); Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); or in riot situations, the “unnecessary and wanton infliction of pain,” Whitley v. Albers, 475 U.S. 312, 319 (1986), in order to be liable for an Eighth Amendment violation. Both of these standards encompass a subjective component involving intent.

42. It is easier to conceptualize excessive physical force than, for example, excessive psychological abuse. See Stephanie B. Goldberg, FORCE OF LAW, A.B.A. J., July 1992, at 76, 77 (interviewing experts who believe that the Graham standard is easy to understand, common-sensical and “well within the grasp of most jurors.”) If psychological abuse were to be actionable, a more appropriate norm might be drawn from tort law: did the police officer intentionally inflict emotional distress? In the case of legal abuse unaccompanied by psychological abuse, the test might be whether the officer knowingly deprived the victim of a protected right. The point is that the current law treats police brutality as a physical phenomenon and tests its legality against a physical norm.

Some states have enacted laws to reach non-physical police abuse of authority. Most are modeled after the Model Penal Code. Section 243.1, entitled “Official Oppression,” provides:

A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if, knowing that his conduct is illegal, he
physical, psychological, or legal abuse, inappropriate conduct within any of the three categories is always wrong and should be condemned.

B. Incidence

At the outset, two observations concerning the incidence of police brutality are important: First, while police brutality is aberrant in the sense of deviating from acceptable behavior, it is not aberrant in the sense of being unusual. Second, no truly reliable statistics on the occurrence of police brutality exist.

A survey of law enforcement agencies conducted by the Police Foundation and funded by the National Institute of Justice, attempted to compile the number of incidents of excessive use of force committed by police during 1991. The survey used a representative sample of four types of law enforcement agencies: county sheriffs, county police, municipal police and state police. Citizens lodged a total of 15,608 complaints of excessive force in 1991 to agencies in the sample, with the greatest number by far (13,886) attributable to city police departments. In order to standardize the absolute number of complaints, the Foundation calculated the number of complaints of excessive force for every one thousand law enforcement officers within each category of agency. The weighted averages were 15.7 per thousand for state agencies, 20.7 for sheriffs' departments, 33.8 for county

(A) subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights; or

(B) denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity.

police departments and 47.5 for city police departments. With the exception of the state agencies, males and African Americans submitted the most complaints.

A Gallup Poll taken in March 1991 asked a sample of citizens, "Have you ever been physically mistreated or abused by the police?" Five percent of all respondents and nine percent of all non-white respondents answered in the affirmative. Twenty percent of all respondents said they knew of someone who had been a victim. These statistics are more startling in light of the ambiguity of the question posed. Respondents could have easily understood the interviewer to be asking about only incidents of violent attack resulting in serious injury.

Other studies report excessive use of force in police-civilian encounters ranging from one-third of a percent to 13.6 percent. A survey of police officers in a small southern city found incredibly that forty percent thought their fellow officers had at some point used excessive force on a prisoner. These widely varying statistics are not surprising given the lack of uniform definitions and reporting requirements. Nevertheless, taken together, a very serious account of police brutality emerges.

PATE & FRIDELL, supra note 44, at 106-07.

Id. at 155, 159-62. Other studies also report that people of color file more complaints of police brutality than whites do. In one population that was studied, 67 percent of complaints were filed by African Americans (who made up 41 percent of the population). Twenty-five percent of the complainants were unemployed. DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 24-25 (1994). Another study based in New York found that African Americans represented only 24 percent of population yet file 44.8 percent of complaints. Similarly, Hispanics represented 19.9 percent of the population and filed 25.1 percent of complaints. Id. at 28 (citing NEW YORK CIVILIAN COMPLAINT INVESTIGATIVE BUREAU, ANNUAL REPORT 1989). In a survey of people in the Bronx, a largely minority community, a cross section of people said they had seen police harassment or brutality in an arrest. Id. at 24 (citing James R. Davis, A Comparison of Attitudes Toward the New York City Police, 17 J. POLICE SCI. & ADMIN. 238 (1990)).


Thomas Barker, An Empirical Study of Police Deviance Other Than Corruption, in POLICE DEVIANCE, supra note 32.
C. Causes

(1) Police Brutality is a Societal Problem

Competing claims about the causes of police brutality create a false dichotomy of police behavior. Some commentators speculate that police who use excessive force are "rotten apples," while the majority of police officers are honest, forthright and refrain from violence.\(^{56}\) Others reject the "rotten apple" theory, arguing instead that police brutality is an occupational hazard, endemic to police work.\(^{57}\) Although psychological profiling is unable to identify violence-prone officers,\(^{58}\) the "rotten apple" theory clearly has some validity, even if limited. As widespread and culture bound as the problem of police brutality is, it is apparent that most police officers do not beat people up.\(^{59}\) At the same time, the causes of police brutality, including, \textit{inter alia}, police culture, job stress and racism, are social problems that cannot be eliminated merely by firing or incarcerating a few bad cops.\(^{60}\) A complete account of police brutality must reject the false dichotomy and recognize that some, perhaps many but certainly not all, police are violent, \textit{and} that the causes of police violence are not only individually-based, but also stem from our society and culture.

Police brutality is not a new phenomenon—rather, its setting has shifted. Many scholars analogize police brutality today to lynchings in

\(^{56}\) MILTON, \textit{supra} note 30, at 140; PEREZ, \textit{supra} note 50, at 29; William O. Dwyer et al., \textit{Psychological Screening of Law Enforcement Officers: A Case for Job Relatedness}, \textit{17 J. POLICE SCI. \& ADMIN.} 176, 180 (1990) (discussing the "rotten apple theory's" validity); Michelle A. Travis, \textit{Psychological Health Tests for Violence-Prone Police Officers: Objectives, Shortcomings, and Alternatives}, \textit{46 STAN. L. REV.} 1717, 1765 (1994) (describing the "rotten apple theory" as a belief that violent officer behavior stems from personality flaws rather than the law enforcement "subculture"). See also A. Ray McCoy, \textit{Panel Discussion II, Duties Associated with the Right to Self-Determination, Proceedings of the Conference on African-Americans and the Right to Self-Determination, 17 HAMLINE L. REV.} 1, 71 (1993) (stating that the U.S. government's response to a United Nations' petition alleging human rights violations by police against African Americans was that these were "isolated incidents").

\(^{57}\) PEREZ, \textit{supra} note 50, at 47.

\(^{58}\) Travis, \textit{supra} note 56, at 1765.

\(^{59}\) Barker & Carter, \textit{supra} note 32, at v ("[P]roblems of police deviance ... reflect the exception rather than the rule ... .police misconduct represent[s] the minority of officers whose behavior taints their peers."). \textit{But see} PEREZ, \textit{supra} note 50, at 29-30 (observing that complaints are distributed among the majority of officers rather than certain officers receiving large numbers).

\(^{60}\) \textit{See} Paul Hoffman, \textit{The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America, 66 S. CAL. L. REV.} 1453, 1481-82 (1993) (emphasizing that indifference to police brutality was widespread throughout the Los Angeles Police Department and most likely contributed to the development of abusive police officers).
the past. The analogy is apt. For nearly a century following the Emancipation of slaves in the United States, law enforcement officials not only condoned lynchings, but in many instances participated in them. Judge Higginbotham describes Rodney King’s beating as “a


62. Eric Foner, Reconstruction: America’s Unfinished Revolution 1863-1877, at 204, 434 (1988) (stating that law enforcement officials were afraid to prosecute whites); Robert L. Zangrando, The NAACP Crusade Against Lynching, 1909-1950 8 (1980) (stating that “public officials . . . either cooperated with the mob or sought refuge in silence and inaction.”); Report of the Joint Comm. On Reconstruction, 39th Cong., 1st Sess. (1866) (reporting that local officials refused to “prevent or punish” crimes perpetrated against African Americans during Reconstruction). The Civil Rights Act of 1866 and the Enforcement Act of 1871 were passed to protect African Americans from vigilante violence. See infra notes 147-48 and accompanying text. Government complicity in lynching continued well into the 20th century. President’s Committee on Civil Rights, To Secure These Rights 23 (1947) (“Punishment of lynchers is not accepted as the responsibility of state or local governments . . . . Frequently, state officials participate in the crime, actively or passively.”).

63. Foner, supra note 62, at 203 (Confederate soldiers often became policemen after the Civil War and regularly terrorized the African American community). It is clear from the debates on the Enforcement Act of 1871 that Congress knew that law enforcement officials participated in lynchings and mob violence. See generally Cong. Globe, 42d Cong., 1st Sess. (1871). One member described an incident in his district: “Suddenly, without provocation or warning, a policeman, or at least a man in the uniform of a policeman, drew a pistol and deliberately put a bullet through the body of a quiet and inoffensive colored man standing near him. Immediately, an indiscriminate and rapid firing commenced . . . . For at least five minutes a steady fire was poured into the retreating crowd . . . . The panic was increased by the discovery that the police force was in full sympathy with the murderers, and were themselves emptying their revolvers into the terrified and struggling mass of human beings who were frantically striving to get beyond their range.” Id. at 184 (statement of Rep. James Platt). See also Skolnick & Fyfe, supra note 41, at 24 (police participated in at least half of the lynchings in the 1930s); We Charge Genocide 10-12, 59, 59, 81, 82, 120, 225 (William L. Patterson ed., 1951) (describing numerous cases of police participation in, and even instigation of, mob attacks on African Americans up to the 1950s); see also Howard N. Rabinowitz, The Conflict between Blacks and the Police in the Urban South, 1865-1900, Historian, Nov. 1976, at 62, reprinted in Race and Criminal Justice 318, 324-26 (Paul Finkelman ed. 1992) (recounting instances of police brutality against African Americans in post-Civil War urban communities that were rarely punished).

See also Catlette v. United States, 132 F.2d 902, 906-07 (4th Cir. 1943) (holding that a sheriff who refused to protect several Jehovah’s Witnesses who were victims of mob violence and who also participated in the violence violated federal law); Logan v. United States, 144 U.S. 263 (1892) (declaring that persons in the custody of a United States Marshal have a constitutional right to be protected from lawless violence); Downie v. Powers, 193 F.2d 760 (10th Cir. 1951) (finding that a law enforcement officer’s failure to protect Jehovah’s Witnesses was actionable under §1983); Lynch v. United States, 189 F.2d 476,
haunting sequel to the widespread lynching of blacks in the south."  

Brutality during police interrogations, known as the "third degree," also has a sordid history. In 1931, the National Commission of Law Enforcement and Observance, appointed by President Herbert Hoover and headed by George Wickersham, investigated the use of the "third degree," and concluded that it was "widespread throughout the country." In 1930, close to one-quarter of the criminal defendants in New York City alleged that they were beaten by the police. Third degree victims were disproportionately African-American and the severity of treatment was reportedly greater when the victim was African American.

Although lynchings and third degree interrogations are no longer part of police routine, police brutality falls on the same continuum of behavior. First, although it is not always motivated by racism, police brutality cannot be understood apart from race. Throughout the his-

479 (5th Cir. 1951), cert. denied, 342 U.S. 831 (concluding that African-American prisoners have a right to be protected by officers against injuries by third parties under federal law).

64. A. Leon Higginbotham, Jr. & Aderson B. Francois, Looking for God and Racism in all the Wrong Places, 70 DENVER U. L. REV. 191, 192 (1993). According to the Tuskegee Institute archives, between 1882 and 1968 there were 4,743 recorded lynching deaths, of which 3,446 (72.7 percent) were African-American. It is doubtful that these recorded statistics fully capture the true scale and strength of this terrorism. Zangrando, supra note 62, at 4. Although civil rights groups have been collecting and publicizing reports since 1898, no formal reporting mechanisms existed until Congress Passed the Hate Crimes Statistics Act in 1990. Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990). See also Michael Newton & Judy Ann Newton, Racial and Religious Violence in America: A Chronology xi (1991) (listing over 8000 accounts of "atrocities, acts of mayhem, murder, and intimidation" motivated by racial or religious animus but speculating that there were many more victims or their families who were too terrified to report these crimes out of fear of retaliation).

65. The "third degree" is "the employment of methods which inflict suffering, physical or mental, upon a person in order to obtain information about a crime . . . . Those who inflict the third degree are ordinarily law-enforcing officials—police, detectives, sheriffs, or prosecutors." Zechariah Chafee, Jr. et al., The Third Degree: Report to the National Commission on Law Observance and Enforcement 19 (Arno Press 1969) (1931).

66. The Commission was known as the "Wickersham Commission."

67. Chafee et al., supra note 65, at 153. Techniques included solitary confinement in dark, cold cells; near-suffocations in "sweat boxes;" whippings; beatings with rubber hoses, clubs or fists; kickings; threats at gunpoint; intimidation and promises; sleep deprivation; withholding food; and visits to the morgue. Id. at 47-48, 153.

68. Id. at 225. One former district attorney admitted to the Commission that: "'The third degree has now become established and recognized practice in the police department of the city of New York[, and] . . . every police station in the city is equipped with the instruments to administer the torture incident to that process.'" Id. at 90-91.

69. Id. at 101, 158-59.
tory of the United States, police violence against people of color has reinforced white supremacy by discipline and repression.70 Second, the police mentality in the two behaviors is the same: they believe that ordinary legal processes are inadequate to maintain order and that they are justified in using extralegal measures as social custodians.71

(2) Racism

Racist beliefs that people of color, especially African Americans, are more dangerous and prone to criminality than whites, have long fueled white fears and have spurred mob savagery in the past. Today, one way these beliefs destroy African-American lives is by sending disproportionate numbers of African Americans into the criminal justice system. African-American men are arrested, incarcerated and executed at a rate out of proportion to their numbers in the population.72 Even taking into account the higher crime rates among African Americans (itself not a neutral fact), the statistics make it clear that the criminal justice system is not color-blind.73

70. See discussion infra Part I.C.2.
71. See discussion infra Part I.C.3.

Hispanics, too, are overrepresented in the criminal justice system. But because they are harder to identify, data are often inconclusive. MAUER & HULING, supra, at 6. From 1980 to 1993, the number of Hispanic prisoners doubled. Id. Hispanics are frequent victims in drug war sweeps. See infra note 76. In 1992, nearly 90 percent of those sentenced to state prisons for drug possession were African Americans and Hispanics. MAUER & HULING, supra, at 13.

73. Unless one subscribes to the myth that African-American men are inherently predisposed to commit more crime than anyone else, the explanation for such asymmetric involvement in the criminal justice system lies within the complex intersection of racism and poverty. Granted, the overrepresentation of African-American men in the criminal justice system is not necessarily solely the result of racial bias. Current research concludes that in certain areas, such as sentencing and incarceration, racial patterns in crime, rather than bias, are more often the cause of the disparities. MAUER & HULING, supra note 72, at 7. Clearly, conditions such as high unemployment, poor education, the growth of gangs
and the lack of drug treatment programs, as well as alienation, hopelessness and a sense of futility, can push people into criminal acts, and the inability to buy a good defense sends them to prison. These conditions are dominant in the lives of many poor African Americans and other people of color.

But even though it is hard to measure, racial bias must be acknowledged. For example, scholars have tried to compare the influence of discrimination and crime rates on the disparate number of shootings of African Americans by police. See infra note 76. One school argues that “the police have one trigger-finger for whites and another for blacks.” Mark Blumberg, Police Use of Deadly Force: Exploring Some Key Issues, in POLICE DEVIANCE, supra note 32, at 230 (quoting P. Takagi, A Garrison State in a ‘Democratic’ Society, in CRIME AND SOCIAL JUSTICE: A JOURNAL OF RADICAL CRIMINOLOGY, Spring-Summer 1974). Another school reasons that African Americans are shot more because they are disproportionately involved in violent criminal activity. Id. While research does not conclusively validate either explanation, available methodologies are not capable of capturing the full extent of bias. Blumberg concludes that, even though the evidence is mixed, “we must recognize that race discrimination at the societal level is clearly responsible for much of the disproportionate representation of blacks as shooting victims . . . .” Id. at 232-33. See also Kevin P. Jenkins, Police Use of Deadly Force Against Minorities: Ways to Stop the Killings, 9 HARV. BLACKLETTER J. 1, 8-12 (1992) (examining studies concerning whether racial prejudice is a factor in police shootings of African Americans and concluding that racism, even if disguised, often plays a role).

Furthermore, we know that racial bias exists. As long as racist ideologies are vigorously propagated, such as those by Detective Mark Fuhrman of the O.J. Simpson trial, there will be adherents among all sectors of society, including people who work in the criminal justice system. People have a great deal of discretion in the criminal justice system, particularly at the front end. Police do not arrest everyone believed to have committed a crime, nor do prosecutors bring every possible case to trial. Under these circumstances, it is impossible to completely protect against the subtle (or not so subtle) influences of racist beliefs. This reality underscores a main premise of this Article—that limits on judicial discretion in sentencing police brutality are a good idea because pro-police and anti-victim biases bring about unjust results.

Besides the direct influence of racial animus, the criminal justice system itself is infected by racial inequities causing disparate treatment of African Americans and other racial minorities. For instance, few people of color serve as judges. In 1991, only 465 out of 12,000 full-time state judges were African Americans and 150 were Latino. NAACP Legal Defense and Education Fund, The Color of Justice, A.B.A. J., Aug. 1992, at 62, 62. In 1992, of 837 federal judges, only 4.3 percent were African-American and in the preceding eleven years, only sixteen African-American and seventeen Hispanic judges were appointed to the federal bench. Talbot “Sandy” D’Alemberte, Racial Injustice and American Justice, A.B.A. J., Aug. 1992, at 58, 60. Relatively few people of color become lawyers. In 1990, 3.2 percent of United States lawyers were African-American and 2.7 percent were Hispanic. Id. at 59. People of color are frequently struck from juries by prosecutors who are able to find “race-neutral” grounds for circumventing the United States Supreme Court’s holding in Batson v. Kentucky. 476 U.S. 79, 97 (1986) (determining that state’s use of peremptory challenge to exclude all African-American potential jurors because of their race violated defendant’s right to equal protection); NAACP Legal Defense and Education Fund, supra, at 62-63. Similarly, changes of venue often have the effect of excluding people of color from juries. Id. at 63. Several scholars have written persuasively that venue decisions should consider race, ethnicity and other demographics in the interest of justice. See, e.g., M. Shanara Gilbert, An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases, 67 Tul. L. Rev. 1855, 1861-62 (1993) (supporting proposed legislation that would require consideration of demographic similarity-
But instead of prompting calls for reform, the overrepresentation of African-American men in the criminal justice system has simply, and wrongly, confirmed, for many, that African-American men are a menace. The dominant culture that has long dehumanized and imperiled African Americans by racist stereotyping continues to scapegoat them. A principal way this scapegoating takes form is in the adoption of increasingly harsh criminal justice policies peddled to the public by politicians who exploit the fear of crime.


75. One popular measure is the repeat offender law, commonly known as "three strikes" or "three-time loser" laws, in which persons convicted of a third felony are sentenced to life imprisonment without parole. Fourteen states have passed a version of the "three strikes" law by the end of 1994. William M. DiMascio, Seeking Justice: Crime and Punishment in America 20 (Edna McConnell Clark Found. 1995). Many states enacted these laws in the wake of the murder of a young girl, Polly Klaas, in California by a man (ironically Caucasian) with a long criminal record who had been released on parole three months earlier. See Jeffrey Toobin, The Man Who Kept Going Free, THE NEW YORKER, Mar. 7, 1994, at 38. The federal government now has its own "three strikes" law for serious violent crimes. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1982 (1994). Another response has been the federalization of certain state crimes. Congress now allows the federal government to prosecute drug and gun offenses, an area formerly handled primarily by the states. The federal government favors law enforcement and interdiction over drug prevention and treatment, although the latter were increased as well. Office of National Drug Control Policy, National Drug Control Strategy 113 (1995) (representing budgetary spending on enforcement, drug prevention, and treatment). See also Stephen Chippendale, More Harm Than Good: Assessing Federalization of Criminal Law, 79 MINN. L. REV. 455 (1994). A third common strategy in the war on crime is mandatory minimum sentences and the abolition of parole. All 50 states have adopted mandatory sentencing laws for various crimes and 34 states now have "habitual offender" laws, which give enhanced sentences to repeat felony offenders. DiMascio, supra, at 19. These "get tough on crime" measures do not work to reduce crime. For a scathing critique of the war on crime, see Anthony M. Platt, Crime Wave; Politics of Crime in the U.S., MONTHLY REV., June, 1995, at 35. Moreover, they are unaffordable. States are struggling to bear the costs of the war on crime, particularly the im-
Police are the enforcers of these policies, carrying out the wishes of those in power in society. African Americans, and other people of color, are certainly not the only victims of police, but in large cities they bear the brunt of the war on crime. They are disproportionately harassed, beaten and killed by police.76 Scholars of police

mense burden of building and running prisons. California is already spending more on its prison system than on its higher education system. Fox Butterfield, New Prisons Cast Shadow Over Higher Education, N.Y. TIMES, Apr. 12, 1995, at A21. Some states reporting a shift in resources from education to prisons are Connecticut, Florida, Massachusetts, Michigan and Minnesota. Id. Other states are unable to open new prisons recently built because the operating costs are too high. DiMascio, supra, at 9. Mandatory minimums also have led to a dramatic growth in the federal prison population. Id. at 19-20.

The war on crime does not expressly single out people of color, but it has a great impact on them nonetheless. See supra notes 72-74. A vicious cycle has evolved. As more and more people of color are swept into prison as a result of the war on crime (principally the war on drugs), the more the public learns to fear them and is willing to support draconian measures which in turn send even more to prison and keep them there for longer periods of time.


The war on drugs has triggered intense police harassment of minorities. African Americans and Hispanics are ready targets for police in this war. They are stopped and searched solely on the basis of "profiles" rather than for suspicious conduct. Paul Finkelman, The Second Casualty of War: Civil Liberties and the War on Drugs, 66 S. CAL. L. REV. 1389, 1421 (1993); see also john a. powell & Eileen B. Hershonov, Hostage to the
brutality cite racism as a major cause of police violence in many cases.  

The demonization of people of color makes police violence against them politically defensible. Many people do not even see po-

Drug War: The National Purse, the Constitution and the Black Community, 24 U.C. DAVIS L. REV. 557, 609-12 (1991) (stressing that the African-American community has been the target of most drug-related arrests despite the fact that African-American men make up only twelve percent of drug users). Arrests, prosecutions and sentences also reflect the racial disparities of this war. MAUER & HULING, supra note 72, at 9-10. See generally supra notes 72-75.

Accurate statistics on the race of police brutality victims are also unavailable. One scholar argues that the failure of police review systems to keep statistics on the race and sex of complainants stems from political reasons. PEREZ, supra note 50, at 28. But, as noted previously, available research shows that African Americans are disproportionately victimized by the police. See supra notes 72-75 and accompanying text.

See generally supra notes 72-75. See also PEREZ, supra note 50, at 24 (citing Joseph Betz, Police Violence, in MORAL ISSUES IN POLICE WORK (Fredrick Ellison & Michael Feldberg eds., 1985); STEVEN BOX, POWER, CRIME, AND MYSTIFICATION (1983); Ruth Chigwada, The Policing of Black Women, in OUT OF ORDER: POLICING BLACK PEOPLE (Ellis Cashmore & Eugene McLaughlin eds., 1991); Allen E. Wagner, Citizen Complaints Against the Police: The Complainant, 8 J. POLICE SCI. & ADMIN. 247, 247-52 (1980) (documenting that the majority of complainants filing charges of police brutality were young, African-American men). William Geller explains that:

The most common type of incident in which police and civilians shoot one another in urban America is one involving an on-duty, uniformed, white, male officer and an armed, black, male civilian between the ages of 17 and 30 and occurs at night, in a 'public' location within a 'high-crime' precinct, in connection with a suspected armed robbery or a 'man with gun' call. Geller, supra note 76, at 158. See also Josephine Chow, Sticks and Stones Will Break My Bones, but Will Racist Humor?: A Look Around the World at Whether Police Officers Have a Free Speech Right to Engage in Racist Humor, 14 LOY. L.A. INT'L & COMP. L.J. 851, 851-66 (1992); David Rudovsky, Police Abuse: Can the Violence be Contained?, 27 HARV. C.R.-C.L. L. REV. 465, 488-90 (1992) [hereinafter Rudovsky, Police Abuse].

We are all socialized in a racist culture. There is no reason to believe that police are immune from racial stereotyping. For example, although juries are solemnly instructed to set aside their personal feelings and prejudices, they nonetheless view African Americans less favorably than white defendants. See Sheri Lynn Johnson, Black Innocence and the White Jury, 83 Mich. L. REV. 1611, 1616-24 (1985) (finding social science research concludes that race is a factor in jury determinations of guilt or innocence in criminal trials and that African-American defendants are more likely to be convicted than whites).

The reaction of Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit to the Rodney King beating is revealing. He acknowledges that the case forced him to recognize how beliefs and interests can influence police behavior:

By and large the courts are just normal people. They have a tendency to be skep-
tical of people who say they were abused by the police. . . . But for a lot of naive people, including me, [the King case] puts a real doubt on the posture of prosecu-
tors that police are disinterested civil servants just 'telling it as it is.'

We should have known all along what this incident points out: that people get involved in what they do and that they are participants in the process just like anyone else. They are subject to bias and they do have a stake in the outcome. Darlene Ricker, Behind the Silence, A.B.A.J., July 1991, at 45, 48 (quoting Judge Kozinski).
lice beatings as violence; rather, they see it as legitimate protection of self and community. Moreover, they interpret the violence as coming from the victim. This twisted logic explains how the police and later the state jury that acquitted them, the federal judge that sentenced them and the Supreme Court were able to perceive the prostrate Rodney King as a threat.

(3) Above the Law

Police antagonism toward the law is driven by several related conditions. Police are concerned with actual guilt rather than legal guilt, and consequently find the "technicalities" of the legal system irrelevant at best, and more often obstacles. Police culture encourages a "siege mentality" of "us against them," in which "they" are not only criminals but also anyone who seeks to criticize or control the police. Police culture also impresses a vision that police are the

78. Drawing from Franz Fanon, Judith Butler writes of how the black male body is constituted by fear:

In Fanon's recitation of the racist interpellation, the black body is circumscribed as dangerous, prior to any gesture, any raising of the hand, and the infantilized white reader is positioned in the scene as one who is helpless in relation to that black body, as one definitionally in need of protection by his/her mother or, perhaps, the police. The fear is that some physical distance will be crossed, and the virgin sanctity of whiteness will be endangered by that proximity. The police are thus structurally placed to protect whiteness against violence, where violence is the imminent action of that black male body. And because within this imaginary schema, the police protect whiteness, their own violence cannot be read as violence; because the black male body ... is the site and source of danger, a threat, the police effort to subdue this body ... is justified regardless of the circumstances. Or rather, the conviction of that justification rearranges and orders the circumstances to fit that conclusion.


79. The courts obviously agree. The steady chipping away of Fourth Amendment protections is justified on grounds that police should not be hamstrung in their search for the truth. See, e.g., United States v. Leon, 468 U.S. 897, 926 (1984) (allowing introduction of physical evidence obtained pursuant to a search warrant that was subsequently found to be invalid); Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (permitting police officers to search the outer clothing of those who are believed to be "armed and presently dangerous"); Carroll v. United States, 267 U.S. 132, 162 (1925) (holding that police officers' search comported with the Fourth Amendment because they possessed "reasonably trustworthy information" to warrant suspicion of the suspect).

80. See generally Skolnick & Fyfe, supra note 41, at 92, 106 (observing that police departments often display an "organizational culture" of "internal solidarity" that distrusts civilian-outsiders). See also Herman Goldstein, Controlling and Reviewing Police-Citizen Contacts, in Police Deviance, supra note 32, at 327; Perez, supra note 50, at 36-38. This siege mentality is inculcated in rookies as soon as they join the force, thereby self-replicating and sustaining a police culture that is hostile to external restraints. Perez, supra note 50, at 36-38.
"thin blue line" between civilization and chaos. All of these dynamics support the creed that the job must be done no matter what. Such dynamics teach that the end justifies the means.

The war against crime further fuels police who feel entitled to dispense street justice. Afraid of street crime, much of the public appears to accept police brutality as a necessary tradeoff for its own safety. A commentator in the Los Angeles Times wrote matter-of-factly after the Rodney King beating that "the tape of some Los Angeles-area cops giving the what-for to an ex-con . . . is not a pleasant sight, of course; neither is cancer surgery. Did they hit him too many times? Sure, but that's not the issue: it's safe streets versus urban terror." Skolnick and Fyfe put it more bluntly: "[T]here is considerable support among the public for an aggressive, kick-ass style of policing."

Another characteristic of police culture that breeds antagonism to the law and is a predictable cause of police brutality is intolerance

81. The "thin blue line" is an established concept in the academic literature on the police. It is a "sense of mission" by the police who are "pitted against forces of anarchy and disorder, against an unruly and dangerous underclass." SKOLNICK & FYFE, supra note 41, at 93; see infra note 177. In a column after the Rodney King beating, Pat Buchanan wrote:

In our polarized and violent society, most Americans have come to look upon the cops as "us," and upon King, a convicted felon, as "them." He is the enemy in a war we are losing, badly; and we have come to believe the cops are our last line of defense.


82. PEREZ, supra note 50, at 39.

83. See powell & Hershenov, supra note 76, at 614 (documenting complaints alleging that the police routinely physically abused people rounded up in drug sweeps); Rudovsky, Police Abuse, supra note 77, at 468-72 (describing the expansion of police power that accompanied the war on drugs and presenting a hypothetical case of police brutality based on an actual case).


85. See David Rudovsky, The Criminal Justice System and the Role of the Police, in THE POLITICS OF LAW 242, 245 (David Kairys ed., 1st ed., 1982) (stating that citizens "remain silent about police abuse" because of their fear of weakening law enforcement's power to deal with crime); Lance Morrow, Rough Justice, TIME, Apr. 1, 1991, at 16 (citing George Kelling, Professor of Criminal Justice at Northwestern University, for the proposition that the war on crime and drugs encourages a no-holds barred attack by the police upon criminals); NPR Radio Broadcast, supra note 7 (presenting interview with Barbara R. Price, Dean of Graduate Studies, John Jay College of Criminal Justice, stating that civilians accept the police use of "tough methods" against the "bad guys" in the war on crime).


87. SKOLNICK & FYFE, supra note 41, at 189.
of any resistance—real or perceived—to police authority. See PAUL CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY 51-83, 88-98 (1969) (documenting that verbal defiance and antagonizing attitudes toward police officers often trigger police brutality). Chevigny describes three escalating stages in police-citizen encounters that lead to police brutality. They begin with what police perceive to be citizen insolence. If the citizen is identified as a "wise guy" and continues to disdain the officer's authority, an arrest follows. Id. at 60. The citizen who persists in defying the officer will be taught a lesson, usually receiving a beating and then charged with resisting arrest. Id. "The one truly iron and inflexible rule" to be derived from a study of police brutality cases is that "any person who defies the police risks the imposition of legal sanctions, commencing with a summons, on up to the use of firearms." Id. at 136.

89. Whether the citizen has done anything wrong or not is beside the point. Police are not supposed to punish people. See discussion infra text following note 102.

90. High-speed chases, such as in the King case, are notorious for causing police overreaction once the suspect is captured. See infra note 317 and accompanying text. For this reason, most police department regulations require a supervisory officer to personally oversee the arrest at the end of a chase. Ricker, supra note 77, at 47. In a police culture that sees itself as a superior moral force, merely questioning or talking back may threaten many police officers and provoke an overreaction. One study found that in nearly half of the occasions where excessive force was used, the "victim verbally defied" the officer's authority. SKOLNICK & FYFE, supra note 41, at 102. Another perceived affront to police authority is that of repeat offenders whose very return to the street can be experienced as belittling to the officer whose beat the offender returns to. One judge alluded to this characteristic trigger while sentencing an officer for using excessive force during an arrest. The court noted that even "the lowliest of citizens, including recidivistic felons" have constitutional rights. Transcript of Sentencing at 19, United States v. Kachadurian, No. 89-251-Cr-T-10A (M.D. Fla. Dec. 13, 1989).

91. "You never know what's going to happen ... The whole world can come to an end in your last few minutes of duty, right before you leave your watch. Or—right before you retire from the force." SKOLNICK & FYFE, supra note 41, at 94 (quoting from an interview of one police officer). Between 1978 and 1992, 1199 law enforcement officers were killed in the line of duty. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993 401, Table 3.154 (1993) [hereinafter BUREAU OF JUSTICE STATISTICS]. In one year alone, 81,252 officers were assaulted on the job, 36.5% of them receiving injuries. Id. at 406, Table 3.161 (describing 1992); see infra note 415.


93. For a summary of research on police stress, see SAMUEL WALKER, THE POLICE IN AMERICA: AN INTRODUCTION 344-47 (1992). Police experience higher rates of stress-re-
tact, which makes it easier to use violence against them. Stress-management programs have been proven to help change violent behavior among some individuals in some police departments. One expert goes so far as to argue that control of stress is synonymous with control of abuse. Unfortunately, given the many structural causes of police brutality, it is unlikely that control of stress can control abuse entirely, but certainly officers' stress helps explain the individual dimension of the problem.

D. The Harms of Police Brutality

(1) Rule of Law is Violated

Police brutality violates the bedrock principle that we are a government of laws. Justice Douglas wrote that “one measure of liberty is the extent to which the individual can insist that his government live under a Rule of Law.” Our society cannot claim to hold police to this standard as long as police act above the law and we tolerate it. Police brutality offends the rule of law in the following three ways:

(a) Police brutality exceeds positive law

Even if one does not subscribe to a formalist approach rendering the rule of law coextensive with positive law, most people would agree that when police break positive law such as police department regulations and state and federal law forbidding unreasonable force against civilians, they violate the rule of law. Moreover, while cases may raise a variety of defenses, there is no principled basis for challenging the laws themselves. Regulations and laws governing police misconduct cannot be said to offend the core characteristics comprised

related physiological and psychological disorders than the general population, including suicide. Travis, supra note 56, at 1765-66.

94. See Skolnick & Fyfe, supra note 41, at 94 (commenting upon the ways in which police officers dehumanize citizens); Travis, supra note 56, at 1766.

95. Travis, supra note 56, at 1766-67.


ing the rule of law: generality, equality, impartiality, certainty, constitutionality and morality.99

(b) Police brutality perverts the law

It is axiomatic that police brutality is an illegitimate exercise of the power which society gives to police. As such, it is a perversion of the rule of law. Geoffrey Walker proposes twelve principles that define the rule of law, many of which he borrows from Joseph Raz.100 Raz’s eighth principle states that the “discretion of crime-preventing agencies should not be allowed to pervert the law.”101 Walker restates this principle in more general terms in his eleventh principle, which requires “impartial and honest enforcement” of the law.102

Police brutality infringes on these principles in many ways. First, police who employ excessive force against civilians exceed the power given to them. They are employed to enforce the law, not to take it into their own hands. Second, the administration of summary punishment denies victims due process. Victims are determined to be guilty, and punishment is imposed, entirely outside of the normal adjudicative process. Third, police brutality is an arbitrary form of punishment. Even though its causes are largely understood and follow predictable patterns, police violence is random and unpredictable to most individuals who experience it. Fourth, given the extent to which

99. Police brutality laws are general in the sense that they are not intended to target or protect a particular person, and equal in the sense that they are intended to apply the same to all people who are in the same position relative to them. Enforcement by an independent, third branch of government, the judiciary, evidences intent of impartiality. The existence and meaning of police brutality laws are stable and public enough for people to have knowledge of them, producing certainty. The constitutionality of these laws is no longer at issue. Finally, police brutality laws have not been enacted for a bad purpose; they may be over- or underreaching, depending on one’s views, but they were intended for a good or moral purpose. See generally Dicey, supra note 98, at 202-03; F. A. Hayek, The Constitution of Liberty 205-15 (1960); Joseph Raz, The Rule of Law and Its Virtue, in Liberty and the Rule of Law 3, 7-11 (Robert L. Cunningham ed., 1979) (asserting that laws are valid when they conform to the following principles: they are “prospective, open, and clear,” “relatively stable,” general, applied by an independent judiciary that is easily accessible, and not “perverted” by too much prosecutorial or law enforcement discretion).


102. Walker, supra note 100, at 40-41.
poor and minority people are disproportionately victimized, police brutality violates the principle of impartiality. Finally, police brutality is cruel, both physically and psychologically, transgressing the norms of punishment embraced by civilized societies.

(c) Police brutality is treated differently from other crimes

The first two ways in which police brutality offends the rule of law derive from the police officers' behavior. The rule of law is also afflicted by the legal treatment of police brutality. Police crimes are underreported, underinvestigated, underprosecuted and underconvicted.103 If a case clears these hurdles and is successfully prosecuted, the chances are that it will be undersentenced relative to crimes not involving police brutality.104

103. Police crimes are notoriously underreported because victims are often afraid of complaining. See infra Part II.B.3. Also, police departments make reporting difficult by failing to establish and publicize citizen complaint procedures. PATE & FRIDELL, supra note 44, at 35-36, 38-40. Investigations and prosecutions at the state level are infrequent because they present a conflict of interest for local prosecutors who must work regularly with the police on other cases. Ricker, supra note 77, at 48. See infra Part II.B.1. For this reason, the federal government's role in prosecuting these cases as civil rights violations is crucial. See infra Parts II-III. But there are many obstacles to the effective resolution of these cases, including absence of witnesses, lack of victim credibility, the police "code of silence," police perjury and jury nullification, resulting in a low conviction rate. See generally infra Part II.B.3.

104. "Underpunishment" is intended as a relative concept. This Article does not attempt to present an argument on what fair punishment would be in an absolute sense, but rather looks at the sentencing of police brutality in relation to sentences unrelated crimes receive.

Those convicted of police brutality receive less time in prison than those convicted of any other violent crime and many property crimes. BUREAU OF JUSTICE STATISTICS, supra note 91, at 495, 537. The civilian crime that corresponds most closely to police brutality is assault. In the federal system before sentencing guidelines were enacted, the average prison sentence for assault was 44.6 months in 1986 and 48.4 months in 1987. Id. at 495. The average sentence for police brutality during this time was 18.7 months. See infra Part III.B.1. After the enactment of the guidelines, assault sentencing averages ranged from 34.4 to 39.7 months (1988 to 1992) and police brutality sentencing averaged 28.2 months (November 1, 1987 to September 30, 1994). BUREAU OF JUSTICE STATISTICS, supra note 91, at 495; see infra Part III.B.1. The similar state crime of aggravated assault received an average prison sentence of 78 months (1990). BUREAU OF JUSTICE STATISTICS, supra note 91, at 537. In each instance, assault by civilians received far more prison time than police brutality (although the gap was substantially narrowed in the federal system after the guidelines were enacted).

To put these statistics in perspective, a property offense such as burglary before the federal guidelines averaged 58.5 months. Id. at 495. After the guidelines, burglary still averages approximately 49 months, approaching double the average for police brutality. Id. at 495. State burglary averages 80 months. Id. at 537. Even federal motor vehicle theft is punished more severely than police brutality, receiving a pre-guideline average of ap-
Few judges issue written opinions explaining the reasons for their sentences. A sampling of cases in which sentencing opinions were issued indicates that judges are extremely sympathetic to police officers and the demands of their work. Judges are subject to the same social influences as the rest of society. Those influences, such as racism and acceptance of the implicit pact that police have made with much of the public in which brutality is tolerated in exchange for safe streets, enable police brutality to occur in the first place. Sentencing practices perpetuate this double standard when incarceration is imposed unevenly, depending on who the criminals and the victims are. In police brutality cases, police are forgiven and the victims are blamed. Examples of light sentences despite the severity of the harm inflicted and sentencing statistics demonstrate a disregard for the seriousness of this crime.

As these statistics demonstrate, sentencing guidelines alone do not ensure fair sentencing of police brutality. Downward departures from guidelines are one way in which police brutality may be trivialized. While sentencing guidelines are often just that—guidelines—they are supposed to direct the sentence unless an exception applies. Police are not exempt from sentencing guidelines in any system; indeed, in the federal system specific guidelines were enacted to cover crimes by police and other public officials. When they are not applied as intended and there is no appropriate basis for departure, the legal system is not adhering to the values of the rule of law. See discussion infra Parts III-IV. If the Sentencing Commission allows the Supreme Court’s decision in Koon v. United States, 64 U.S.L.W. 4512 (U.S. June 13, 1996), to stand, downward departures in police brutality cases are likely to accelerate, contributing to a further unraveling of the rule of law.

Also, sentencing levels under guideline systems entail value judgments about how crimes are to be treated. The federal sentencing guidelines were a major accomplishment in recognizing the seriousness of police brutality. Even so, police brutality is not considered nearly as serious as drug trafficking, for example. Compare 1995 GUIDELINES MANUAL, supra note 14, at § 2 D.1 (revealing much higher sentences for drug offenses than civil rights violations) with id. at § 2 H 1.1 (showing lower sentences). The point here is not to diminish the harms of drug trafficking, but to show how police brutality rates in comparison.

105. See infra Part III.B.

106. See supra notes 103-04 and accompanying text. Other examples abound. A Los Angeles police officer was sentenced to community service (30 days on a state highway cleanup crew) probation and restitution for battering a suspect during an arrest. Officer Sentenced for Battery in Drug Arrest, L.A. TIMES, Sept. 28, 1991, at B8. A former vice-squad leader convicted of using excessive force and for using interstate commerce to promote prostitution received sixteen months in prison instead of the 70-87 month term recommended by prosecutors. Ex-Vice Officer Gets Lighter Sentence, HOUSTON CHRON., Mar. 15, 1992, at 2. An officer who shot and fatally killed an unarmed woman was convicted of involuntary manslaughter and reckless endangerment and sentenced to one year in prison. The trial judge said that he wanted to hold the officer accountable, but that “[i]there is such a thing as too much deterrence. An officer who fears his own criminal prosecution every time he draws a weapon in the line of duty . . . could very well put the
In this era of the war on crime, judicial failure to punish police brutality in a manner proportionate to similar civilian crimes and citizens' failure to object to this disparity are especially hypocritical. They constitute societal acquiescence to the violent treatment of certain numbers of our citizens by public officials. They suggest that our culture's celebrated values of fairness and equality are not so sturdy. Like all principles, these are given life by our actions, and are meaningless if we do not act in harmony with them.\(^\text{107}\)

(2) Police Brutality Intensifies the Racial Divide

Racism is not only a cause, but also a result of police brutality. Its damage is far-reaching. At the core of this problem lies different belief systems born of different experiences.

In our culture, individualism is the dominant narrative.\(^\text{108}\) This narrative speaks in terms of individual rather than group rights,

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\(^{107}\) Walker's twelfth principle requires an "attitude of legality," in a society organized according to the rule of law. Walker, supra note 100, at 41. One scholar describes the "attitude of legality" as

both substantive—the content of the legal system must somehow "feel" right—and procedural—the legal system's administration is subject to the public's perceptions of its ability to produce justice. The attitude of legality is simultaneously outside the institutional system because it originates and resides in the people subject to the system, and inside the institutional system because it evaluates and guides the system itself. Exercise of the attitude of legality is both cause—shaping the substance and procedure of the legal order—and effect—being shaped by the legal order's substance and procedure. Thomas M. Riordan, Copping an Attitude: Rule of Law Lessons from the Rodney King Incident, 27 Loy. L.A. L. Rev. 675, 694 (1994).

Police brutality represents a failure of this attitude inside the legal system not only by the police who engage in it, but also by police departments and government officials who tolerate it and in some cases even encourage it, as well as by the criminal justice system that inadequately punishes it. Outside the legal system, the public at best ignores police brutality ("not my problem") and at worst tacitly or even overtly approves of it. Public attitudes both cause institutional neglect and are shaped by this neglect. In turn, victims of police brutality and communities which are commonly plagued by it learn not reverence, faith, trust, ownership and respect for the legal system, but scorn, skepticism, distrust, rejection and disrespect for it.

\(^{108}\) This discussion draws heavily on Addis, supra note 76, at 949-53. Addis also includes communitarianism, which recognizes the existence and force of social groups but ultimately seeks to transcend group differences, as part of the dominant narrative. Id. at 951-53. He argues that communitarianism is an assimilationist philosophy. Individualism fails to recognize group differences and communitarianism seeks to eliminate them. Id. at 952. While communitarianism should be categorized as a strain of the dominant narrative, it is not emphasized here because it is a negligible voice in the discourse on police brutality.
agency and responsibility, and individual rather than group injustices. Wrongdoing is the act of an identifiable person against another. Accordingly, as we have seen, the dominant story of police brutality is of individual officers, "bad apples" hurting other individuals who are singled out not because of their race but because they are caught breaking the law or are resisting the officer, i.e., they are victims who put themselves at risk.

The story of the marginalized person is different. For people of color, the reality of racism makes it impossible to consider any aspect of life free from racism's effects: "[I]n this country, for all minorities, especially African-Americans, the almost daily encounter with racism provides the orientation as to how they see and respond to the institutions of this country, even though the encounter might not compel the specific content of that response." In other words, while many acts of police brutality entail police who are not white or victims who are, police brutality cannot be thought about in a way that avoids or moves beyond race.

In a culture such as ours in which the dominant viewpoint denies racism and the marginalized viewpoint finds it inescapable, all acts of police brutality, and official responses to it, heighten the divide. To take the most famous case, when President Bush said that he was sickened watching the King beating videotape, it is likely that he was referring to the individual police officers wielding their clubs against a helpless victim, not that the racism represented in the beating was sickening. When he said that the Justice Department was investigating the case, it is unlikely that he meant that it was targeting institutionalized racism. Yet, for many, the trial against the four officers was a trial against racism and their acquittals in the state case affirmed that the white criminal justice system was not about to dismantle racism.

Of the many manifestations of the contribution of police brutality to a deepening racial divide, including African-American alienation from the criminal justice system, none is so pernicious as the consequent racial stereotyping. Whites internalize the message that racial minorities, and particularly African Americans, are criminals whose own violence has triggered the police reaction. In turn, many of those

109. Because this discussion is about the racial effects of police brutality and because race is probably the greatest predictor of victimization, I have singled it out here. I am not saying that only racial minorities are victims of police brutality.
110. See supra note 78 and accompanying text. See also infra Part IV.B.
111. Addis, supra note 76, at 957 (emphasis in original).
who are tagged with the badge of criminality, particularly youths, take it on as part of their self-definition and identity. Identification with the outlaw is a key element of "urban cool" which entails maintaining a detached and disdainful posture from the mainstream. It is a survival mechanism for validating a self which is rejected under the dominant culture's rules. But clever as this image-flipping is, the strategy is risky in a society that shows no sign of abating its practice of scapegoating people of color. Society fails to realize that "gangster" is merely a role because that role is too often assigned.

(3) Social Costs

Police brutality imposes enormous social costs. In the United States, many of the worst riots were precipitated by a police shooting or other incident between officers and civilians. Often, these flashpoints were imbued with a racial dimension. In the last three decades, at least eight deadly riots have been ignited by the volatile mix of race and police brutality. In 1964, in Harlem, New York City, one person was killed and 140 injured after the shooting of an African-American youth by an off-duty police officer. In 1965, in Watts, Los Angeles, thirty-four people were killed and 864 injured after white police officers mistreated crowd members after an African-American youth was arrested for drunk driving. In 1967, in Newark, New Jersey, twenty-three persons were killed and more than one thousand injured after police officers beat an African-American cab driver who was arrested for tailgating a slow-moving patrol car. In 1967, in Tampa, Florida, rioting followed the fatal shooting in the back of an African-American youth by a white police officer. In 1970, in Atlanta, Georgia, six people were killed and twenty wounded after

113. Obviously, police brutality alone is not the cause of these ideas, but it operates within and reinforces this system of beliefs.
116. Geller, supra note 76, at 1-14 (listing riots that were reactions to police brutality).
117. Liz Donovan, Racially Motivated Violence in the U.S. Since the '60s, Miami Herald, May 1, 1992, at 11A.
119. Kerner Comm'n, supra note 118, at 32-33, 38.
120. Kerner Comm'n, supra note 118.
protesting the killing of an African-American youth in a county jail. In 1980, in Miami, Florida, eighteen persons were killed following the acquittal of white police officers in the beating death of an African-American man; in 1982, one person was killed and twenty-five injured following the shooting of an African-American man by officers; and in 1989, one person was killed and eleven wounded after an African-American motorcyclist was killed by a police officer. Finally, in 1992, in Los Angeles, California, at least fifty-five persons were killed and 2,283 injured following the acquittal of the four police officers—three white and one Hispanic—for the beating of African-American motorist Rodney King.

While other high-profile crimes that affect low-income minority communities often occur and are sometimes prosecuted (i.e., financial fraud, environmental pollution and official corruption), police brutality is like no other crime in its ability to trigger riots and the devastation of deaths, injuries, and ruined lives, homes and businesses which follow.

Besides riots, police brutality costs local governments huge sums in settlements and judgments from lawsuits. Courts are increasingly holding police departments, city officials and municipalities liable for damages under section 1983 of the Civil Rights Act of 1967. De-
spite legal and cultural obstacles to winning these cases, costs associated with political brutality claims have soared, ultimately coming out of taxpayers' pockets. For example, the Police Foundation learned that in 1991, $50 million in awards in civil suits were granted to victims of police brutality occurring in a small number of agencies. Police brutality cost New York City $87 million over a recent five-year period. The costs to cities have skyrocketed in the past couple of decades. In Los Angeles, plaintiffs were paid only $7000 in 1965 but 10 years later the city paid out approximately $10.5 million for police brutality suits. That 1975 figure appears modest compared to the liability that the city is now facing, since the Los Angeles Police Department's recent exposure for its brutality and racism. Unfortunately, Los Angeles is not alone in this problem and ultimately it is the taxpayers who pay for police liability.

Finally, police brutality undermines public confidence in the police. Without the public's trust, effective police work is impossible. People may be less willing to cooperate with police in reporting crimes and giving information as a result of police brutality. Also, citizens might fairly ask themselves why they should follow the law when those who are supposed to enforce it do not. Police brutality can, and already has for many communities, set into motion an unraveling of...
II. Treating Police Brutality as a Crime

The nature of, and harms caused by, police brutality compel a meaningful and dedicated attempt to eradicate it. A broad range of actions should be pursued within police departments and all government branches. But we must remember that above all else, police

130. Scholars and other experts have suggested a variety of measures that might be taken to deter police brutality. Within police departments, training in violence reduction and stress management are two obvious steps to be taken. See Travis, supra note 56, at 1763-67 (advocating for the adoption of these programs by law enforcement agencies). Affirmative action to recruit, hire, and promote African Americans and other people of color in order to integrate police forces reduces racially-motivated police brutality and eases tensions in minority communities. U.S. COMM’N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS? 5-13 (1981) (recommending broader recruitment to achieve more representative police departments) [hereinafter WHO IS GUARDING THE GUARDIANS?]; Rudovsky, Police Abuse, supra note 77, at 490 (supporting efforts to integrate law enforcement and “assure minorities quality assignments and equal opportunities for promotions”). See also Terry M. Neal & Robert E. Pierre, P.G. Man Beaten by Police Wins Little Sympathy, WASH. POST, June 11, 1995, at A1 (describing positive changes in a police department since the number of minority officers increased). Departments must establish clear rules and policies on the use of force, including deadly force: effective procedures for receiving and investigating citizen complaints; and strong and impartial disciplinary systems to hear and punish cases of brutality. WHO IS GUARDING THE GUARDIANS?, supra, at 35-93. See also Rochelle Sharpe, Unions, Service Boards Help Cops Evade Discipline and Brutal Cops Still Police the Streets, Gannett News Service, Mar. 8, 1992, available in LEXIS, News Library, ARCNWS File (describing barriers to internal review and discipline that exist within police departments). Most importantly, police culture must change. “Both the public and the police suffer from the absence of a clear, unambiguous, and universally agreed-upon statement of the police mandate in our society.” SKOLNICK & FYFE, supra note 41, at 242 (emphasis omitted). Skolnick and Fyfe argue that community policing will not only help curb police brutality, but they also assert that it is the key to improving police effectiveness. Id. at 250-55. Travis makes a similar point in urging that the police role be redefined from crime fighting to problem solving. Travis, supra note 56, at 1767-69. Another suggestion for reforming police culture urges departments to enact regulations which would punish racist speech. Chow, supra note 77, at 898.

Federal, state and local governments must make it clear in words and action that police brutality will not be tolerated and resources to oppose it must be increased. Well-staffed and funded prosecutorial units are necessary, as are independent civilian review boards. SKOLNICK & FYFE, supra note 41, at 220-31. See infra Part II.B. The federal government should collect statistics on police brutality, including, inter alia: complaints against the police; types of offenses; characteristics of victims; officers disciplined or prosecuted; convictions; civil actions; internal and external review systems; and judgments. Paul Chevigny, Let’s Make it a Federal Case, THE NATION, Mar. 23, 1993, at 370. The government has been slow to respond to the mandate of § 210402 of the Violent Crime Control
and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). Section 210402 requires the Attorney General to collect and publish data on the use of excessive force by law enforcement officers. Two projects are underway: a victimization study and the creation of a comprehensive database on police use of force. But both are in their preliminary stages only. BUREAU OF JUSTICE STATISTICS & NATIONAL INSTITUTE OF JUSTICE, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE 75-81 (Apr. 1996). The federal government should develop model guidelines for local police forces on the use of force and management of brutality. Also, federal funding to local law enforcement agencies should be conditioned on their compliance with laws against police brutality, terminating funding if a department has a pattern of violations. If federal program money is used to supply departments with equipment or other resources (such as taser guns) and these are used in connection with police brutality, the government should require the money to be returned. Id. Political leaders can use their "bully pulpit" to educate people about the nature and harms of police brutality.

On the legislative front, since the Supreme Court's 1945 decision in Screws v. United States, 325 U.S. 91 (1945), many have argued that Congress should amend section 242 to eliminate the "willfulness" element. Frederick M. Lawrence, Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes, 67 TUL. L. REV. 2113 (1993) (arguing for the elimination of the willfulness requirement in §§ 241 and 242 police brutality cases). The Civil Rights Commission has also made this recommendation to Congress. WHO IS GUARDING THE GUARDIANS?, supra, at 161; see also Hoffman, supra note 60, at 1522; Matthew V. Hess, Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct, 1993 UT A. L. REV. 149, 183; Harry H. Shapiro, Limitations in Prosecuting Civil Rights Actions, 48 COR NELL L. REV. 532 (1961). Subjecting local governments to criminal prosecution for systematically encouraging or allowing criminal violations of civil rights is another remedy Congress could consider. One scholar argues that existing law can be construed to support prosecutions such as these. Stuart P. Green, The Criminal Prosecution of Local Governments, 72 N.C. L. REV. 1197, 1199 (1994).

In one positive development, on September 13, 1994, Congress gave the Attorney General express authority to bring civil cases against localities in which the police deprive people of their federal civil rights pursuant to a pattern or practice. The Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 1796 (1994). It was encouraged to do so by many authorities. See generally Police Brutality Hearings, supra note 44, at 175-76, 185 (testimony of Drew S. Days III). "Pattern or practice" cases are authorized by Congress under other civil rights statutes such as "Title VI of the Civil Rights Act of 1960 . . .; Titles II and VII of the Civil Rights Act of 1964 . . .; Title VII of the Civil Rights Act of 1968 . . .; section 518(c)(3) of the Crime Control Act of 1973; and section 122(c) of the State and Local Fiscal Assistance Act of 1972." Id. at 185-86 n.13. See also id. at 60 (testimony of Paul L. Hoffman); Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 YALE L.J. 447, 450-51, 455-58 (1978) (arguing in favor of civil actions by the Justice Department against localities in order to deter police brutality more effectively). It is now incumbent upon the government to actively pursue these cases.

The judiciary bears heavy responsibility for ensuring that criminal and civil cases are fairly tried. See discussion infra Part II.B.3 on obstacles to prosecuting police brutality. An attitude that the behavior is serious can be conveyed in a myriad of ways, not just through jury instruction. Bifurcation procedures in § 1983 actions that separate claims against municipalities and individual officers are harmful to plaintiffs' cases. Douglas L. Colbert, Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases, 44 HASTINGS L.J. 499, 503-04 (1993). Venue selection must be carefully weighed to produce a jury pool from representative communities. See supra note 73. Because prosecutors, especially at the state and local level, are often resistant to charging police officers...
brutality is a crime, and if we mean to take police brutality seriously, it needs to be treated as seriously as we treat other crimes.

A. Significance of Criminal Prosecutions

Most incidents of police brutality never see the inside of any hearing room, let alone a criminal court. Yet the criminal prosecutions that are brought against police officers for excessive force are critical, even though numerically insignificant.

By conveying a message of intolerance to police brutality, the mere fact that criminal prosecutions are instigated mitigates the culture that currently engenders and sustains police brutality. A diminution in this culture is further bolstered by the sentencing of police officers for their crimes, but only if sentencing is equal to the crime.

with brutality, it has even been suggested that judges afford citizens direct access to grand juries to investigate and indict cases. Peter L. Davis, Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute, 53 Mo. L. Rev. 271, 356-57 (1994). Last, but not least, judges must sentence police brutality commensurate with the serious crime that it is.

131. Because police brutality cases are notoriously among the hardest to prosecute successfully, relatively few offenders are indicted. See discussion infra Part II.B.3. Victims may still have recourse under federal civil rights statutes for damages via section 1983 and 42 U.S.C. § 1985(3) (1994). See discussion supra note 124 and accompanying text. Section 1985(3) provides in pertinent part:

If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. The relief afforded by section 1985(3) is, however, limited. Plaintiffs may recover for proscribed conspiracies among police or between police and civilians only when there is evidence that the conspiracy is motivated by racial or other class-based, invidiously discriminatory animus, or to prevent the exercise of some fundamental right. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

Plaintiffs may also bring civil suits under state tort law alleging assault, battery, excessive use of force, false arrest and false imprisonment. Like criminal prosecutions, all of these civil actions are brought infrequently in relation to the incidence of police brutality. Besides civil suits, victims may seek recourse by filing a complaint with the police department or an independent agency such as a civilian complaint review board.
(1) Collective Condemnation

A criminal prosecution is the most powerful social mechanism we have for expressing the judgment that a wrong has occurred. First, the decision to prosecute elevates and accentuates the seriousness of the behavior and the harms that such behavior causes. Second, unlike all other actions that can be taken against police brutality, a criminal prosecution is brought by the "people." A prosecution signifies a unified sentiment, expressing the conviction of a collective, not an individual. A third reason why criminal prosecution of police brutality is essential is that it evidences a willingness by society to back up its statement of condemnation by its use of collective power when the full coercive power of the government is brought to bear on the wrongdoer. Fourth, a criminal conviction against a person is more grave than a civil judgment. The consequences of a criminal conviction can be severe, including loss of employment; disqualification from a multitude of situations (for instance, public office or professional licenses); ineligibility for adoption, foster care, visitation or custody of children; and disenfranchisement, to name just a few. Moreover, a severe social stigma follows a conviction. And worst of all, in a criminal case that results in a conviction, society may substantiate its judgment by imposing a prison sentence on the wrongdoer.

(2) Sentencing Sends a Message

Many theories seek to enunciate the purposes of sentencing. While some of these purposes conflict, no matter which is accepted, sentencing practices denote a societal judgment about the criminal and the criminal behavior at issue. For example, white-collar

132. The diverse and sometimes contradictory goals of sentencing are: general deterrence (send a message to others); specific deterrence (discourage the individual from committing crime again); retribution ("just desserts"); incapacitation (prevent the individual from committing crime by isolating him from society); and rehabilitation (reform, educate and train). See generally NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974) (supporting prison for specific or general deterrence); JAMES Q. WILSON, THINKING ABOUT CRIME (1975) (advocating selective incapacitation); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976) (arguing for "just deserts" as a ground for punishment); NIGEL WALKER, WHY PUNISH? (1991) (reviewing justifications for criminal punishment, rejecting retribution); National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code (1970) (favoring the rehabilitation model); Herbert Wechsler, Sentencing, Correction, and the Model Penal Code, 109 U. PA. L. Rev. 465 (1961) (advocating utilitarian goals through rehabilitation).

The Sentencing Commission was unable to agree on a philosophy of punishment. Instead it begged the question by concluding that philosophy made little practical difference and it did not need to choose. See 1995 GUIDELINES MANUAL, supra note 14, at 2-4 (discussing the interplay between various goals of sentencing).
criminals are less likely to go to prison than common criminals.\textsuperscript{133} The severe impact on African Americans of the differential treatment under federal sentencing laws for crack and powder cocaine is likewise illuminating.\textsuperscript{134} In both of these instances, a value judgment is

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\item \textsuperscript{133} White-collar criminals benefit from judicial empathy for them, based on the belief that enduring the criminal process is punishment enough for them, the view that they are especially suited for community service and the fact that most of them do not have criminal records, among other rationales. \textit{Stanton Wheeler et al., Sitting in Judgment} 144-65 (1988) (discussing the judicial mind-set in determining sentences); Kenneth Mann et al., \textit{Sentencing the White-Collar Offender}, 17 \textit{Am. Crim. L. Rev.} 479 (1980). Many of these reasons are also used to justify low sentences for police offenders. \textit{See infra} Part IV.B.
\item The United States Sentencing Commission made a deliberate policy decision to deviate from the usual practice of giving white-collar economic criminals probation rather than prison because, it said, these crimes are "serious." Now federal white-collar criminals receive at least a short prison sentence. 1995 \textit{Guidelines Manual}, \textit{supra} note 14, at 7.
\item A possessor or distributor of crack cocaine is sentenced to the same prison time as someone with 100 times that quantity of powder cocaine. 1995 \textit{Guidelines Manual}, \textit{supra} note 14, at \S 201.1(c). At a hearing held by the Sentencing Commission, many witnesses testified that this penalty structure has a discriminatory effect on African Americans. Because the vast majority of crack offenders are African American, they go to prison for much longer periods than the predominantly white powder cocaine offenders for the same drug quantity. \textit{United States Sentencing Commission Hearing on Proposed Guideline Amendments}, Mar. 14, 1995 (statements of Abe Clott, Federal Public and Community Defendants; Angela J. Davis, National Rainbow Coalition; and Nkechi Taifa, American Civil Liberties Union, among others) [hereinafter \textit{Hearing on Proposed Guideline Amendments}]. There is no scientific justification for the different penalties between the two forms of cocaine. United States Sentencing Commission, Amendments to the Sentencing Guidelines, 60 Fed. Reg. 90 (proposed May 10, 1995). Consequently, the Sentencing Commission recommended that Congress amend the drug sentencing laws to equalize sentences for crimes involving the same amount of crack and powder cocaine at the powder cocaine level. \textit{Id.} But Congress rejected the Commission's recommendation, and President Clinton signed a law maintaining the harsh sentences for crack. He did acknowledge the racial disparities that have resulted from the penalty structure, suggesting that one way around the problem was to raise the penalty for powder cocaine. Ann Devroy, \textit{Clinton Retains Tough Law on Crack Cocaine}, \textit{Wash. Post}, Oct. 31, 1995, at A1.
\item Now the Supreme Court has entered the fray with its decision in \textit{United States v. Armstrong}, 116 S. Ct. 1480 (1996), in which it held that statistics alone are insufficient to support a defense allegation that the government has engaged in selective prosecution of crack cocaine defendants because they are African-American. The defendants requested discovery on the government's enforcement of crack and powder cocaine laws. The government resisted, arguing that its enforcement was not racially motivated, but based on neutral criteria. The Supreme Court agreed, overturning the district and appellate court rulings in favor of the defendants. It said that the defendants had not shown that similarly situated "individuals who were not black, could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted." \textit{Armstrong}, 116 S. Ct. at 1489.
\item The \textit{Armstrong} case presents a slightly different factual claim than the one that was before the Sentencing Commission. In \textit{Armstrong}, the defendants sought to show that whites used and dealt crack as much as non-whites, whereas advocates for the change in the sentencing guidelines seemed to accept that there were different racial patterns between crack and powder cocaine crimes. But even if crack is more often the drug of choice
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made about the characteristics of the felons and the public's tolerance for their crimes, which is communicated to them and to society through their sentences. This expressive function of sentencing should be a central consideration in determining how police brutality is to be punished.

H. L. A. Hart asserts that making specific behavior a crime is what communicates social reprobation, not the sentencing of that crime. He distinguishes "between the primary objective of the law in encouraging or discouraging certain kinds of behavior, and its merely ancillary sanction or remedial steps." Hart is correct that analytically the justification for the punishment is usually blurred with the justification for the criminal law.

The problem is that when a crime such as police brutality is nonetheless tolerated socially, there is an effective rejection of the very message that was intended to be conveyed by its criminalization. (Yes, the law says it is illegal, but we'll look the other way.) With police brutality, both the laws and the sentences must communicate that the action is forbidden. If most sentences for this crime are weak, then the goal of criminalization will be eroded. In other words, while it is axiomatic that we need laws which prohibit police brutality, we also need sentences that reinforce our condemnation of the behav-

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for African Americans and other minorities than for whites, the selective prosecution claim ought to have been considered. The defendants alleged that African Americans are prosecuted more often in federal court than other defendants for the same cocaine violations. State courts have more lenient sentences than the federal government and generally do not distinguish between crack and powder cocaine in their penalty schemes. In prosecuting crack crimes in federal court, the government is making a deliberate decision to seek the higher sentences for these offenders. If most of these defendants are African-American, the government's charging practices may well be racially discriminatory.

136. Id. at 7.
137. A good example of this clouded thinking is the current attachment political leaders exhibit to trying and sentencing juvenile offenders as adults. See, e.g., James Dao, Pataki Proposes Legislative Plan to Curb Violent Crime byYouths, N.Y. TIMES, Dec. 10, 1995, at A1 (Governor proposing tougher rules for prosecuting and sentencing juvenile offenders); Fox Butterfield, States Revamping Laws on Juveniles as Felonies Soar, N.Y. TIMES, May 12, 1996, at A1 (44 states have changed or debated changes in their juvenile laws in the past two years). Juvenile crimes can be rigorously denounced without relinquishing the best response for troubled youth which, according to juvenile justice experts, is treatment, not adult-styled punishment. See Jerome G. Miller, LAST ONE OVER THE WALL (1991); Grant R. Grissom & Wm. L. Dubnov, WITHOUT LOCKS AND BARS (1989).
138. Although prosecuting police brutality goes some distance in strengthening the message that it is a crime, there are many obstacles to a successful prosecution. See discussion infra Part II.B.3 and accompanying notes.
ior. General deterrence provides the philosophical justification for sentences intended as censure.139

As a practical matter, the only way to express condemnation of police brutality through sentencing is to sentence it in proportion to other crimes.140 Most of our politicians and other policymakers do not recognize Hart’s distinction between the crime and the sentence. In our system, the sentence’s severity is considered the primary, if not the only, measure of a particular crime’s standing in the lexicon of crimes.141 For example, the importance that the federal government attaches to sentencing is illustrated by its “Petite Policy,” which prohibits dual and successive prosecutions in the absence of a compelling federal interest. One such express interest warranting a second prosecution arises when the sentence in the first trial is not appropriately severe.142

139. This precept maintains Hart’s distinction. Often the purpose of legislating against the behavior and the purpose of sentencing are different. But in police brutality cases the two act in tandem because the purpose of sentencing is general deterrence.

Moreover, with police brutality, other sentencing purposes are either irrelevant or simply less important. Specific deterrence and incapacitation are usually irrelevant because a police officer convicted of a crime committed under color of law is almost always fired and therefore does not have the opportunity to be a repeat offender. Nor is rehabilitation a meaningful ground for sentencing a police officer who has already been afforded education and training to become an officer. Moreover, rehabilitation does not reach police criminality to the extent that the behavior derives from the social context of their work and identity as cops. Retribution is often important to the victim, but it is not a vital basis for sentencing police brutality in a larger social sense. It is not as consequential as sentencing for the purpose of conveying a message that society condemns this behavior. The point here is that the goal of general deterrence justifies the practice of imposing just sentences for police brutality, even if other purposes for sentencing may sometimes be present in a particular case. See discussion infra notes 180-84 and accompanying text.

140. See discussion supra Part I.D.1 on the importance of proportional sentencing from a rule of law standpoint.

141. This conception of sentencing drives the sentencing reformers’ goal to eliminate disparity and achieve proportionality. See discussion of the history of sentencing reform infra notes 189-95 and accompanying text. Moreover, the goal of achieving proportionality in sentencing police brutality is entirely appropriate and not inconsistent with Hart’s theory. If the overall purpose of sentencing police brutality was not general deterrence, but something else (say rehabilitation), arguing for proportionality would be incoherent and indefensible, because each offender’s needs would be different.

142. 7 DEPARTMENT OF JUSTICE MANUAL 9-2.142(I), (IV)(B)(2)(a) (1995) [hereinafter JUSTICE MANUAL]. The “Petite Policy” also considers cases coming within priority areas of the Department to represent substantial federal interests, entailing a second prosecution. Civil rights cases are among the Justice Department’s priority areas. Id. at 9-2.142(IV)(A)(2). Thus, an inadequate sentence in a civil rights case such as policy brutality would certainly be reviewed for a second prosecution.
B. Police Brutality is Not Treated as a Serious Crime

Prosecutions for police brutality may be brought under either federal or state law.\textsuperscript{143} State law criminal charges typically are for assault, battery, manslaughter or murder; whereas, federal criminal charges are brought under civil rights statutes.\textsuperscript{144} It is easier to convict in state prosecutions in one sense: the law does not require proof that the defendant specifically intended to deprive the victim of a constitutional right.\textsuperscript{145} But both state and federal prosecutors must meet the criminal burden of proof beyond a reasonable doubt, making conviction difficult to obtain under any circumstance. The reality is that too often neither prosecutors, judges nor juries are willing to treat police brutality as the serious crime that it is.

\small{(1) State Neglect}

The federal government normally defers to local authorities in the prosecution of police brutality,\textsuperscript{146} but this policy generates

\textsuperscript{143} In some situations, both state and federal actions may be brought. Federal prosecutions may be initiated after either a failed or successful state prosecution ("dual prosecution"). Federal constitutional double jeopardy does not attach to successive prosecutions by two sovereigns. Abbate v. United States, 359 U.S. 187, 194-96 (1959) (upholding federal prosecution following a state conviction for the same act).

\textsuperscript{144} Most federal police brutality prosecutions are brought under 18 U.S.C. § 242 (1994). This statute makes it an offense to interfere with an inhabitant's civil rights under color of law. It reads, in pertinent part, as follows:

\begin{quote}
Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results . . . shall be fined under this title or imprisoned not more than ten years, or both; and if death results . . . shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.
\end{quote}

\textit{Id.} The second federal statute under which police brutality cases are brought is often termed the "Ku Klux Klan Act." This statute outlaws conspiracy to interfere with a citizen's civil rights and comes into play when law enforcement officials act in concert with each other or with private persons. 18 U.S.C. § 241 (1994).

\textsuperscript{145} The Supreme Court read this requirement into section 20 of the Criminal Code, the precursor to section 242, in Screws v. United States, 325 U.S. 91, 104 (1945). See discussion infra note 161 and accompanying text.

\textsuperscript{146} Federal policy dictates that federal prosecutors suspend their civil rights prosecutions if local charges are filed. \textit{Justice Manual, supra} note 142, at 9-2.142(c). The federal government sees itself as playing a "backstop" role. "We are not the front line troops in combating instances of police abuse. That role properly lies with internal affairs bureaus of law enforcement agencies and with State and local prosecutors. The Federal enforcement program is more of a backstop, if you will, to these other resources." \textit{Police Brutality Hearings, supra} note 44, at 3 (recording testimony of John R. Dunne, then-Assistant Attorney General, Civil Rights Division, U.S. Department of Justice).
problems. Indeed, the history of federal civil rights prosecutions of police brutality emanates from the history of state indifference to crimes against African Americans. The failure of state authorities in the South to curb official lawlessness and to protect African Americans from extreme violence perpetrated by white secret societies such as the Ku Klux Klan and the Knights of White Camellia led the post-Civil War Congresses to provide a federal remedy.\textsuperscript{147} The antecedents to current federal criminal civil rights statutes lie in these Reconstruction-era legislative initiatives.\textsuperscript{148}

\textsuperscript{147} See Foner, supra note 62; John H. Franklin & Alfred A. Moss, Jr., From Slavery to Freedom 227 (6th ed. 1988). See also supra notes 62-63 and accompanying text (describing state officials’ acquiescing to, and participating in, terrorism against African Americans). See also Colbert, supra note 130, at 511-17 (reviewing history of post-Civil War official lawlessness); W.E.B. DuBois, Reconstruction in America (1935) (presenting economic and political analysis of Reconstruction).

\textsuperscript{148} Congress first attempted to protect the newly freed slaves from state violence by including a provision in the Freedman’s Bureau Bill of 1866 that made it a misdemeanor to deny, under color of law, a person “on account of race or color, or any previous condition of slavery or involuntary servitude, or for any other cause . . . any civil right secured to white persons . . . [or to subject that person] to any other or different punishment than white persons are subject to for the commission of like acts or offenses.” Freedman’s Bureau Bill of 1866, § 8, reprinted in Edward McPherson, The Political History of the United States of America During the Period of Reconstruction 74 (1871). President Johnson vetoed the bill, objecting on the ground that it subjected southern states to federal military rule. Johnson seemed outraged that under section 8, white people could be fined or imprisoned for denying freed slaves the same rights that they enjoyed. \textit{Id.} at 69 (discussing veto of the Freedmen’s Bureau Bill, Feb. 19, 1866). Johnson specifically objected that the term “civil rights” was undefined. \textit{Id.}

Congress returned to civil rights when it passed the Civil Rights Act of 1866, shortly after the Thirteenth Amendment was ratified. Section 2 of the Act provided that “any person who, under color of any law . . . shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties [because that person was once a slave] . . . or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor.” \textit{Id.} at 79. Federal prosecutors and courts were authorized to enforce the Act. \textit{Id.} Johnson once again vetoed the legislation, protesting that it interfered with states’ rights, threatened state legislative and judicial immunity, discriminated against whites in favor of the former slaves, and was unnecessary. \textit{Id.} at 74-78. This time Congress overrode the President and the bill became law on April 9, 1866. \textit{Id.} at 81. Fearful that the Act might be overturned by the Supreme Court or by a later Congress, Congress passed the 14th Amendment and submitted it for ratification two months later. Milton R. Konvitz, The Constitution and Civil Rights 4-5 (1977).

Pursuant to the power granted it under the Fourteenth Amendment and the subsequently enacted Fifteenth Amendment, Congress passed a series of new civil rights acts known as the Enforcement Acts. These acts were: the Civil Rights Act of 1870 (First Enforcement Act), which largely concerned voting rights but included the first anti-Ku Klux Klan criminal provision and reenacted the color of law provision from the 1866 Act, McPherson, supra, at 547; the Civil Rights Acts of 1871, which included the Second Enforcement Act to protect voting rights, and the Third Enforcement Act known as the Ku Klux Klan Act, the predecessor to section 1983, 2 Fleming, Documentary History of
Today, states are still reluctant to prosecute their own law enforcement officers. Local prosecutors who ordinarily work closely with the police face an impossible conflict of interest between their desire to maintain working relationships and their duty to investigate and prosecute police brutality. District attorneys necessarily rely on the police to provide the evidence needed to initiate and prosecute a case, often as the principal (and most persuasive) witnesses. Inevitably, this symbiotic relationship \(^{149}\) will be destroyed if a fellow officer is charged. \(^{150}\) In many instances, rather than pursue a victim’s complaint, local prosecutors will fall back on their discretion to decline. \(^{151}\) Their unwillingness to prosecute police leaves the federal government

**Reconstruction** 112, 123 (1906); and the Civil Rights Act of 1875, which ensured public accommodations and jury service for African Americans. *Id.* at 295.


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149. This perfectly descriptive term comes from Davis, *supra* note 50, at 289.

150. The problem exists between any district attorney and police officer, but is particularly acute if the two are currently working together on a case. The officer could retaliate and sabotage the case. Also, if the officer is convicted of brutality, other prosecutions on which that officer worked could be jeopardized by the suspicion that brutality or perjury played a role in them. Ricker, *supra* note 77, at 48.

151. James Fyfe, co-author of *Above the Law*, *supra* note 41, and expert criminologist on police brutality, is quoted as saying in a news series on police brutality that “‘[i]t’s a very rare event when police get prosecuted.’” Rochelle Sharpe, *King Verdict Underscores How Few Cops Get Punished*, Gannett News Service, Apr. 29, 1992, available in LEXIS, News library, ARCNWS file. Fyfe also described a study of 1500 police shootings in the western United States in the 1970s which found that only three officers were ever prosecuted (and none were convicted). *Id.* A 1970 study of police brutality complaints filed with the Philadelphia District Attorney’s office concluded that it had not been and could not be “an effective instrument for controlling police violence” because of the “hopeless conflict of interest.” Louis B. Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney’s Office*, 118 U. Pa. L. Rev. 1023, 1023-24 (1970).

The most current—and telling—statistics come from the Police Foundation study on police use of force. *See* supra notes 45-50. In that study, weighted averages were derived from the number of citizen complaints of police excessive force reported by law enforcement agencies. *Id.* at 106. Statistics on the number of criminal charges that were brought are unweighted. To compare the number of complaints to the number of cases charged, both figures are unweighted: for every 1,000 sworn-in officers, state agencies reported 15.7 complaints and 0.14 criminal charges; sheriffs’ departments 20.7 to 0.66; county police 39.4 to 0.49; and big city police 82.5 to 1.24. *Id.* at Table B-13.1 and Table B-38.1.
the chief criminal enforcer of police brutality cases under the civil rights laws.

(2) Inadequate Federal Response

Unfortunately, the federal government, too, encounters difficulties in enforcing the laws against police brutality. In part, the problem stems from its historical legacy of not wanting to trample on states' prerogatives. As a result, it often refrains from actively in-

152. The Criminal Section of the Civil Rights Division of the United States Department of Justice is the federal office primarily responsible for prosecuting criminal civil rights violations, including police brutality. The Civil Rights Division was originally called the Civil Rights Unit when it was first established. Later, it became the Civil Rights Section. Still later, it became a Division with many sections within it, including the Criminal Section.

However, United States Attorneys can, and on occasion do, bring civil rights cases. They are monitored by the Criminal Section and must notify the Criminal Section before proceeding on sections 241 and 242 felonies. Justice Manual, supra note 142, at 8-3.140. Cases are also brought jointly.

153. From its first days, the United States Department of Justice, established shortly after the First Enforcement Act was enacted, found itself with the challenging job of trying to protect the lives and rights of the newly freed slaves. It was not very successful. Despite the network of federal district attorneys, marshals, judges and troops that gave it a presence in every state, the Justice Department was incapable of overcoming enormous southern resistance. First, it simply did not have adequate resources. Even when federal agents were able to investigate complaints and obtain indictments, many of those indicted avoided arrest because marshals were spread too thin. Often only the assistance of federal troops made arrests possible, but the troops were soon withdrawn. Homer Cummings & Carl McFarland, Federal Justice 234, 242, 244, 246 (1937). Judges and lawyers were in short supply in relation to the caseload. Id. at 235, 239, 240. Simply put, expenses exceeded appropriations. Id. at 240. Second, the cases were difficult to win. Witnesses perjured themselves to cover up crimes. Id. at 235. Juries refused to convict because they were either packed or intimidated. Id. at 236, 243, 245. See also Screws v. United States, 325 U.S. 91, 132 (1945) (Rutledge, J., concurring) (commenting on jurors' reluctance to convict bad officers). The lives of people who cooperated were threatened. Cummings & McFarland, supra, at 238. Also, then, as now, proof of the intent required for a criminal conviction was hard to come by. Screws, 325 U.S. at 132. Finally, the Justice Department did not have the support of the Supreme Court and eventually lost political support from the North. See discussion of the Supreme Court's treatment of Reconstruction era laws supra note 148 and Cummings & McFarland, supra, at 246, 248. In the end, the Justice Department retreated, adopting a largely defensive posture of deference to the states. Cummings & McFarland, supra, at 238, 239, 246; Screws, 325 U.S. at 131-32. This policy of self-restraint, coupled with objective limitations, made the civil rights statutes a dead letter.

It was not until the New Deal, when Attorney General Frank Murphy established a "Civil Liberties Unit" within the Justice Department, that federal prosecution of state officials for civil rights crimes, and police brutality in particular, became a priority again. Robert K. Carr, Federal Protection of Civil Rights 1, 29 (1947). Nevertheless, the federal government still clung to its deference policy, as it has to this day. Police Brutality Hearings, supra note 44, at 3 (testimony of John R. Dunne, discussed supra note 146). It is hard to gauge how much of this philosophy comes from a feeling of being under siege on
vestigating a viable case unless the state declines, by which time im-
portant evidence and witnesses may be lost.

A second reason for the reluctance of the federal government is
that from the beginning Congress has not committed adequate re-
sources to the task.\textsuperscript{154} Congressman Don Edwards raised this point in
hearings held on police brutality in 1991.\textsuperscript{155} Since their formation,
government commissions on civil rights have advocated increasing
funding and expanding staff.\textsuperscript{156} Today, the Criminal Section employs
only approximately thirty attorneys whose caseload is divided among
all federal civil rights crimes, including police and other law enforce-

\textsuperscript{154} See Cummings & McFarland, supra note 153, at 240; supra notes 130, 148.
\textsuperscript{155} Congressman Edwards asked then-Assistant Attorney General John Dunne why
overall Department of Justice personnel had increased 55 percent from 1981 to 1990, while
the Criminal Section of the Civil Rights Division, the section that prosecutes police brutal-
ity, had not grown at all. Mr. Dunne could not answer the question, although he denied
that it was due to lack of interest by the government. He tried to bolster this claim by
pointing to greater involvement by U.S. Attorneys in prosecuting these cases, yet did not
provide statistics and could not explain the reduction in one U.S. Attorney's office, from
three lawyers to one in its civil rights division. Police Brutality Hearings, supra note 44, at
31, 321.

\textsuperscript{156} By Executive Order, President Truman established a Committee on Civil Rights
in 1946. The Committee issued a report the following year that recommended, \textit{inter alia},
elevating what was then the Civil Rights Section to a Division and increasing its budget
and staff. Milton R. Konvitz & Theodore Leskes, \textit{A Century of Civil Rights} 70
(1961). The United States Commission on Civil Rights was created by Congress in 1957,
replacing Truman's Committee. In hearings held in 1978 and again in 1981, the Commiss-
ion heard testimony that the Civil Rights Division's resources were too limited. U.S.
\textit{Comm'n on Civil Rights, Police Practices and the Preservation of Civil Rights}
173 (1978); Who is Guarding the Guardians?, supra note 130, at 115. In 1981, the
Commission included among its recommendations that "Congress should approve the hir-
ing of additional personnel for the Criminal Section of the Civil Rights Division . . . to
investigate and prosecute police misconduct cases . . . [and that it] should ensure adequate
staffing for civil rights enforcement in the U.S. Attorneys' offices." \textit{Id.} at 161.
ment brutality, racially-motivated violence, hate crimes, slavery and abortion clinic violence.

A third source of the difficulty is that prosecuting police brutality presents inordinate obstacles. Here, the fault lies not with the federal government, but with the nature of the crime itself.

(3) Obstacles to Prosecution

When Attorney General Murphy created the Civil Liberties Unit in 1939, he determined that after over a half a century of neglect by the federal government, prosecuting police brutality should be one of the unit's priorities. From the beginning, the unit encountered many obstacles in this endeavor. Its first police brutality case was tried twice, ending each time in a hung jury. Hung juries and jury nullifications were not unusual results in these cases. Also, the Supreme Court's decision in Screws, which upheld the constitutionality of section 242 (then section 52), interpreted the statute's "willfulness" element to require proof of a defendant's specific intent to deprive another of a federal right. This requirement created a difficult evidentiary burden to meet.

Non-legal factors impeded the Division's work as well. In a 1945 speech to the Chicago Civil Liberties Committee, Victor W. Rotnem, the head of the Civil Rights Division at the time, described some of these factors:

Police brutality cases offer certain practical as well as legal difficulties. If third degree practices are involved, there are seldom any witnesses save the victim who may be dead or, if alive, certainly is afraid, and the members of the police force who are usually expert

157. Carr, supra note 153, at 151. From the end of Reconstruction through the first World War, lynchings of African Americans reached devastating proportions. Race riots, too, by white mobs against African Americans destroyed lives, homes and businesses. This period of intense intimidation saw little effort on the part of police to protect black citizens; instead, many were involved in the violence. See generally Franklin & Moss, supra note 147; National Ass'n for the Advancement of Colored People (NAACP), Thirty Years of Lynching (1919); C. Vann Woodward, The Strange Career of Jim Crow (1955); Zangrande, supra note 62, at 22-51. Also, the Wickersham Commission had recently issued its report on police third degree practices. See supra notes 65-69.

158. Carr, supra note 153, at 151.

159. The case was United States v. Sutherland. The Department of Justice does not have a citation to this unreported case. Id. at 151-53.

160. Id. at 138.

161. Screws v. United States, 325 U.S. 91, 104 (1945). Justice Douglas, author of the majority opinion, upheld the statute against a charge of vagueness by requiring not only proof of specific intent to violate the law, but also proof of a deprivation of a federal right. This right was "made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." Id.
witnesses for the defense. Presumptions are in favor of a policeman who often must act with some force in arresting a criminal and cannot easily be proved to have voluntarily gone beyond the point of necessary force.\textsuperscript{162}

The problems encountered by the Department of Justice in sustaining police brutality prosecutions early on are still being experienced. The Criminal Section of the Civil Rights Division reports a higher success rate for all its other prosecutions—including racial violence, housing interference and involuntary servitude—than its rate of success in official misconduct cases, which include police brutality.\textsuperscript{163}

There are many reasons for the lower success rate. Victims may be afraid to complain.\textsuperscript{164} Even if a victim does complain, few of the Criminal Section's investigations result in a case being filed.\textsuperscript{165} Frequently there are no witnesses other than the victim, or none who will come forward,\textsuperscript{166} resulting in a "swearing match" between the police

\textsuperscript{162.} CARR, supra note 153, at 162.

\textsuperscript{163.} Department of Justice, Summary of Criminal Section Activities (1985-1994) (unpublished) (on file with author) [hereinafter Summary of Criminal Section Activities]. "Success rate" is defined as an outcome of guilt, whether by plea or conviction. The rate is the percentage of convictions and pleas over the total number of cases filed. For the past five years, the Criminal Section's overall success rate compared to its rate of success in law enforcement cases has been 94.4% v. 77.8% (1990), 89.3% v. 80.6% (1991), 85% v. 62.2% (1992), 73.6% v. 58.7% (1993) and 90.2% v. 78.7% (1994). Note that the statistics for 1994 are current as of October 24, 1994. \textit{Id.}

\textsuperscript{164.} Following the Rodney King beating, the National Association for the Advancement of Colored People ("NAACP") held a series of hearings in cities across the country on police misconduct and published a report on its findings. Among them was the finding that people do not complain to the police because they expect that the police will be unresponsive and that their credibility will be challenged. Many are also afraid of harassment and retaliation. It is not uncommon for victims themselves to be criminally charged (or threatened with a civil suit) to deter them from pursuing complaints against the police. NAACP, \textit{Beyond the Rodney King Story} 52-59 (1995) [hereinafter BEYOND THE RODNEY KING STORY]. Similarly, after its extensive investigation into the Los Angeles Police Department, the Christopher Commission concluded that the LAPD's handling of complaints alleging police excessive force was "skewed" against complainants. \textit{Report of the Independent Commission on the Los Angeles Police Department Report} xix (July 9, 1991) [hereinafter CHRISTOPHER COMM'N]. People told the Commission that they were afraid of coming forward and in some cases were actively discouraged, intimidated and even threatened from doing so. \textit{Id.} at 158-59.

\textsuperscript{165.} For example, in Fiscal Year 1990, the Criminal Section received 7,960 complaints. Of these, 3,050 were investigated, yet only sixty-five cases were filed. Summary of Criminal Section Activities, supra note 163.

\textsuperscript{166.} Witnesses, like victims, are often fearful of reporting police misconduct. \textit{Beyond the Rodney King Story}, supra note 164, at 52 (detailing citizens' fears of police retaliation). Police expert James Fyfe testified before Congress that he was unaware that any eyewitness reported the Rodney King beating other than the man who captured it on videotape. He added that "it takes an enormous amount of guts to go into a police stations and report that you've just seen an officer beating someone up." \textit{Police Brutality Hearings}, supra note 44, at 127 (testimony of James Fyfe, Professor of Criminal Justice, American...
officer and the victim and, consequently, a failure of proof beyond a reasonable doubt.\textsuperscript{167}

Even so, the Criminal Section does pursue police brutality cases whenever it determines that a federal interest requires vindication.\textsuperscript{168} As a result, many of the cases it undertakes are extraordinarily difficult to prove. The traits that make a person vulnerable to a police beating are the same traits that create a lack of credibility with juries (e.g., has a criminal history or was committing a crime when the police brutality occurred;\textsuperscript{169} is the wrong race, age, class, sex or sexual orientation;\textsuperscript{170} was drunk or high on drugs at the time or has a history of

University). In one extreme case, a police officer now faces the death penalty for arranging the murder of a woman who complained to authorities that the officer had beaten her nephew. Michael Perlstein, Guilty: Rogue NOPD Officer, Triggerman May Face Execution for their Roles in ‘Death Squad,’ New Orleans Times-Picayune, Apr. 25, 1996, at A1. Also, victims and witnesses may conclude that reporting to the police about the police is futile. Rodney King’s brother tried to report the beating but was turned away. Christopher Comm’n, supra note 164, at 9-10.

\textsuperscript{167} According to the former Chief of the Criminal Section and the Supervisor of the FBI’s Civil Rights Unit, “prosecutorial decisions are necessarily guided by the evidentiary strength of the case. The extent of independent corroboration significantly influences the victim’s claim. The department does not undertake to prosecute police officers on the strength of the victim’s statement alone.” John Epke & Linda Davis, Civil Rights Cases and Police Misconduct, F.B.I. Law Enforcement Bull., Aug. 1991, at 17.

\textsuperscript{168} Former Assistant Attorney General John Dunne elaborated the Justice Department’s policy as follows: “[W]e are careful in choosing cases for Federal prosecution, but we will not shrink from pursuing a case where the facts require such action. Unquestionably, police misconduct cannot be left unaddressed by police and State officials, and should that occur, it is a proper matter for Federal concern.” Policy Brutality Hearings, supra note 44, at 6 (statement of John R. Dunne, then-Assistant Attorney General, Civil Rights Division, U.S. Department of Justice).

Another description of the policy provides that “the aggressive investigation and prosecution of civil rights matters is absolutely necessary, regardless of cost. Residents of the United States must have access to competent Federal investigative and prosecutive agencies to redress U.S. Constitutional grievances when local mechanisms do not provide adequate relief.” Epke & Davis, supra note 167, at 18.

\textsuperscript{169} [W]e 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 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. Police Brutality Hearings, supra note 44, at 172 (testimony of Drew S. Days III, Professor of Law, Yale Law School). See also id. at 5 (testimony of John Dunne); 120 (testimony of James Fyfe).

\textsuperscript{170} “[M]any victims of police misconduct were people who, because of their race, national origin, poverty, sexual orientation, or criminal records, often lacked credibility in the eyes of predominantly white juries.” Police Brutality Hearings, supra note 44, at 181-82 (prepared statement of Drew Days). See also Skolnick & Fyfe, supra note 41, at 19; and Beyond the Rodney King Story, supra note 164, at 70-72 (noting that minority citizens report more violence at the hand of white officers).
drug addiction or alcoholism; or is mentally ill). In contrast to the victim, police officers have the advantage of inherent credibility with juries simply by virtue of their position. Also, fellow police officers will not come forward due to the "code of silence." Some police are willing to lie and claim necessary use of force to cover up their crimes.

171. SKOLNICK & FYFE, supra note 41, at 36-37.

172. "[C]ops often run into suspects who, emboldened by drugs, alcohol, mental illness, or all three, fight back." Id. at 37.


174. The "code of silence" is well-documented in the literature. Skolnick and Fyfe describe the code and why it is so powerful.

[T]he code . . . typically is enforced by the threat of shunning, by fear that informing will lead to exposure of one's own derelictions, and by fear that colleagues' assistance may be withheld in emergencies . . . . In the closed society of police departments, especially in departments or units that see themselves and the public in terms of 'us and them' and adopt the siege view of the world, the pressure to remain loyal is enormous.

SKOLNICK & FYFE, supra note 41, at 110-11. Another scholar calls it the "blue curtain" and offers a similar analysis as to why it exists. Herman Goldstein, Controlling and Reviewing Police-Citizen Complaints, in POLICING A FREE SOCIETY (1977), reprinted in Barker & Carter, supra note 32, at 326-328. The Christopher Commission detailed its operation in the LAPD. CHRISTOPHER COMM'N, supra note 164, at 168-71. Witnesses testified about it in the NAACP hearings. BEYOND THE RODNEY KING STORY, supra note 164, at 74-76; Barker & Carter, supra note 32; COULSON, supra note 92, at 18. See also Selwyn Raab, The Unwritten Code that Stops Police from Speaking, N.Y. TIMES, June 16, 1985, at E6 (New York City Police Commissioner acknowledges tradition that officers do not testify against each other).

175. The Christopher Commission found that in the LAPD, officers lie but receive lax punishment. CHRISTOPHER COMM'N, supra note 164, at 167. The NAACP report concluded that an impediment to the investigation of police brutality is police perjury, citing both a study done of routine police perjury in suppression hearings in Chicago courts by Myron W. Orfield, Jr., and the testimony of several officers at its hearings. BEYOND THE RODNEY KING STORY, supra note 164, at 57, 79; Myron W. Orfield, Jr., Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 U. COLO. L. REV. 75 (1992). Perjury is difficult to prove, but as the NAACP points out, lawyers and judges who work with police know that it happens. The "code of silence" protects police officers from exposure. Sarah Terry, Experts Try to Pin Down Extent of Police Misconduct, N.Y. TIMES, Nov. 19, 1995, at A33 (describing relationship between police perjury and the "code of silence" in report on Harvard Law School conference on police misconduct). See also supra note 150. In police brutality cases, police perjury can become apparent if, as part of their cover-up of wrongdoing, they bring charges against their victims and testify for the prosecution. See, e.g., United States v. Rorke, 972 F.2d 1334 (3d Cir. 1992); Alison L. Patton, Note, The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality, 44 HASTINGS L.J. 753, 763-64 nn.65-67 (1993) (presenting first-hand accounts by police of how the code of silence can lead to perjury); see also infra Part IV.B.2 (case of United States v. Rorke describes police perjury in their victims' trial).
Finally, juries continue to refuse to convict despite convincing evidence. "Jury nullification" is a common occupational hazard for prosecutors trying these cases.\textsuperscript{176} In part, jury nullification may be the result of the "thin blue line," that is, that the police are all that stand between the citizenry and anarchy.\textsuperscript{177} As a result of all of these factors, it may be said that police comprise the only class of criminal defendants who are universally accorded the legally required presumption of innocence.

Accordingly, convictions of police officers for brutality are relatively infrequent.\textsuperscript{178} Department of Justice statistics on Criminal Section activities from 1985 to 1994 reflect a lower success rate in its civil rights law enforcement cases than in its general civil rights docket.\textsuperscript{179}

\textsuperscript{176} "It appears that judges and juries simply refuse to consider the actions of a law enforcement officer, acting as such, in the same light as those of an ordinary citizen." MILTON ET AL., supra note 30, at 85. "By and large, juries are reluctant to find police officers guilty of criminal misconduct. . . . [P]rosecutors know this." PEREZ, supra note 50, at 51. Drew Days was quite frank in his description of this problem. "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." Police Brutality Hearings, supra note 44, at 172 (testimony of Drew Days); id. at 181 (prepared statement of Drew Days).

\textsuperscript{177} See supra note 81 and accompanying text. "[I]n an era notable for its high fear of crime, juries, who understand that cops routinely undertake risky and protective work, are reluctant to convict police without compelling evidence." SKOLNICK & FYFE, supra note 41, at 19. Racism nourishes this phenomenon. [P]olice may remain the 'thin blue line' between 'them'—the predominantly African-American and Latino populations in the cores of our inner cities—and 'us,' the largely white population migrating away from the central cities and into the affluent suburban belts that surround our major urban centers. . . . The 'thin blue line' theme was used aggressively and successfully by the lawyers representing the officers charged with beating Rodney King in the 1992 state criminal proceedings, and it may explain the verdicts that are otherwise difficult to comprehend. In the urban war between 'them' and 'us,' the police are responsible for preventing urban warfare from spilling out of the inner city.

Hoffman, supra note 60, at 1486. See also Rudovsky, supra note 85, at 245.

\textsuperscript{178} All of these factors apply to state as well as federal police prosecutions. However, convictions for federal civil rights violations are even more difficult to obtain. One reason results from the federal policy ("backstop policy") of deferring to a state's prosecution unless there are compelling reasons to go forward federally. See supra note 146. When federal prosecutors seek a successive prosecution, the Assistant Attorney General for the Civil Rights Division must approve it under the "Petite Policy." JUSTICE MANUAL, supra note 142, at 9-2.142(I)(C)(2). States tend to prosecute the stronger cases and, as a result, federal prosecutors are confronted with the more difficult cases to prove.

\textsuperscript{179} Summary of Criminal Section Activities, supra note 163.
(4) A Slap on the Wrist

In those cases that do result in a finding of guilt, the result is all too often undermined by a token sentence. A judge's inordinately low sentence subverts the message sent by a jury's verdict of guilt.

Federal prosecutors who tried police brutality cases prior to the federal sentencing guidelines clearly regarded the sentencing practices at that time to be too low and therefore problematic. These prosecutors believe that law enforcement excessive-force crimes are trivialized when offenders received low sentences. Their perception was that police and other law enforcement agents received a slap on the wrist—often probation instead of prison—for violent crimes. Conduct that would be rigorously condemned if committed in the context of another type of crime, for example, a civilian assaulting another civilian, often went unpunished if committed by a police officer on the job. The judicial system's failure to adequately punish police brutality frustrated the purpose for enacting laws against it. It sent a message to police and other official wrongdoers that they were above the law and sent a message to their victims that there was no such thing as equal justice under the law.

In sum, while prosecutions are not the answer to police brutality, they are an essential component of the effort to eliminate it. The

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180. Department of Justice policy disallows public statements by prosecutors without advance approval. These conversations do not represent official Department of Justice policy. Nevertheless, the author of this Article spoke with a Justice Department lawyer on October 29, 1993, another on July 7, 1994, another on July 15 and again on November 8, 1994, another on July 18, two others on September 16, 1994 and another on November 4, 1994. All are experienced civil rights prosecutors. Notes of these conversations are on file with the author [hereinafter Prosecutors' Interviews].

181. See supra note 104.

182. Id. This problem is particularly acute when the victim is African-American or Latino because of the long history of police brutality in minority communities. In those comparatively few instances where a conviction is obtained, an inadequate sentence can confirm public perceptions of racism in the criminal justice system.

An example from a context not involving police brutality illustrates this dynamic. In an infamous Los Angeles case that occurred about two weeks after the Rodney King beating, a Korean shopkeeper, Soon Ja Du, shot and killed a 15-year-old African-American girl, Latasha Harlins, after a fight erupted between them over the suspected shoplifting of a container of orange juice. Ja Du was promptly tried and convicted, but given a sentence of five years' probation by the state court. This result enraged African Americans. The name "Latasha Harlins" was invoked as a symbol of racism for many people during the rioting which followed the acquittals of the four police officers in the state trial for the beating of Rodney King. Understanding the Riots, Part I, The Path to Fury, L.A. TIMES, May 11, 1992, at T10; Patt Morrison & Greg Braxton, After the Riots: The Search for Answers, L.A. TIMES, May 7, 1992, at B3; Philip Hager, Justices Uphold Karlin's Ruling in Slaying of Latasha Harlins, L.A. TIMES, July 17, 1992, at B1, B8.
question is who is in the best position to do this work? Unfortunately, state prosecutors often are not, because of the inherent and substantial conflict of interest that exists for them. As a result, even though the federal government has its own internal limitations and external obstacles, it will continue to play a major role in the prosecution of police brutality.

Sentencing is one area in the federal approach to police brutality that has already seen positive reform. When the United States Sentencing Commission promulgated sentencing guidelines for civil rights crimes, it dislodged a crucial stumbling block to the effective prosecution of police and other law enforcement officials. By stiffening the sentences—requiring prison for all but the most minor violations—and limiting judicial discretion to sentence outside the guidelines, the Commission's work has resulted in more of these offenders going to prison, and for longer periods of time, than before the guidelines were in effect. Federal prosecutors by and large support this result, contending that the minimal sentences imposed prior to the enactment of guidelines diminished the perceived seriousness of these crimes. This Article maintains that, because of the grave harms of police brutality and the importance of criminal prosecutions and sentences, these guidelines should be preserved.

III. Federal Sentencing Guidelines and Police Brutality

Federal sentencing practices underwent a revolution a decade ago when Congress replaced indeterminate sentencing with sentencing guidelines. Congress undertook this radical reform because it found that indeterminate sentencing caused great but unjustified variations in the treatment of convicted criminals. It believed that sentencing

183. See discussion supra Part II.B.1.
184. Many of the internal constraints on federal prosecutions are government-imposed and can be remedied if there is a will to do so. See discussion supra Parts II.B.2 & II.B.3. Some of the possible remedies are described supra note 130.
185. The sentencing guidelines first went into effect November 1, 1987. The civil rights guidelines have been amended three times since then, most recently on Nov. 1, 1995. See infra notes 202-06.
186. For a description of the relevant civil rights guidelines and their impact on sentences in police brutality cases, see discussion infra Part IV.
guidelines would eliminate unfair and irrational disparity in sentencing by creating uniform standards for classifying crimes, ranking these crimes in proportion to their seriousness, and imposing set sentences for each crime.\textsuperscript{188}

The federal system was overhauled with the passage of the Sentencing Reform Act of 1984.\textsuperscript{189} The Act established the United States Sentencing Commission whose mission is to promulgate guidelines setting forth sentences for all federal crimes.\textsuperscript{190} To achieve its goal of sentencing uniformity, the Act requires judges to select a sentence from within the narrow guideline range enacted by the Sentencing Commission.\textsuperscript{191} Congress also abolished the United States Parole Commission in order to eliminate uncertainty about the amount of time a sentenced prisoner would actually serve.\textsuperscript{192}

The guidelines have been controversial. Many judges and scholars challenge their effectiveness as well as their justness.\textsuperscript{193} These crit-

explained how he came to view the use of individualized sentencing determinations, although widely employed at the time, as unjust, because they led to grossly disparate sentences for the same crimes. Frankel argued that it was intolerable that our society had given judges "unchecked and sweeping powers" in setting sentences in spite of our lofty claim of being a government of laws, not of men. \textit{Id.} at 5. He further noted that criminal codes were illogical and incongruous, providing "crazy-quilt statutory patterns." \textit{Id.} at 9. This nonsensical system had come about because sentencing laws were not written at the same time, were not coordinated with each other, and were rarely subjected to thoughtful study. \textit{Id.} Rather, they were the random product of politics. \textit{Id.} These qualities, Frankel argued, created a system of "fundamental lawlessness." \textit{Id.} at 49. Other studies also established the substantial disparity and discrimination caused by indeterminate sentencing. \textit{See American Friends Serv. Comm., Struggle for Justice: A Report on Crime and Punishment in America 124-28, 132-44 (1971); Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 11-14 (1976); Andrew Von Hirsch, Doing Justice: The Choice of Punishments 98-99, 101-04 (1976). Various forms of structured sentencing were proposed and enacted in numerous jurisdictions, including the federal system. The general idea was to create rational, uniform and fair sentencing by requiring judges to sentence within prescribed guidelines for each crime. But the limits on judicial discretion varied from system to system; in some, judges were left largely free to depart from the guidelines, while in others, judges were afforded little leeway.

\textsuperscript{190.} Ch. II, 98 Stat. 2017.
\textsuperscript{192.} \textit{See} 18 U.S.C. § 3742(a) (1988) (stating that a defendant may appeal an "otherwise final sentence").
ics argue that the guidelines are too harsh and inflexible. Still, in spite of the judiciary's distaste for guidelines and unhappiness over the loss of its discretion, most courts comply with the guidelines.

A. What The Guidelines Are and How They Work

(1) Generally

The United States Sentencing Guidelines are organized to correspond to most of the major federal crimes. The guidelines establish a "base offense level" for each of these crimes. The base level may, however, be augmented by what the Sentencing Commission calls "specific offense characteristics" that are listed under each guideline. The Sentencing Commission also decided that various factors pertaining to the circumstances of the crime, the offender, and the


194. See Freed, supra note 193, at 1685-86.

195. In 1994, 71.7% of sentences given within the federal court system were within the guideline range. Downward departures accounted for nearly all of the cases sentenced outside of the guidelines (27.1% of all cases were sentenced below the guidelines and only 1.2% were above). Most downward departures were granted on motion by the government due to the defendant's "substantial assistance" to authorities pursuant to 18 U.S.C. § 3553(e) (1996) (a defendant who cooperates with authorities in the investigation or prosecution of another offender). Only 7.6% of all cases sentenced in 1994 were below the guideline range for reasons other than substantial assistance. Thus, judges stepped outside the guidelines on their own in very few cases. In the years prior to 1994, compliance was even greater. U.S. SENTENCING COMMISSION, 1994 ANNUAL REPORT 78-79 (1995) [hereinafter 1994 ANNUAL REPORT].

196. United States Sentencing Guidelines are published annually in the FEDERAL SENTENCING GUIDELINES MANUAL by the Sentencing Commission. References to the guidelines in this Article are to the 1995 edition. See supra note 14.

197. In drafting the guidelines, the Commission referred to past practices as a point of departure. It had two databases: nearly 100,000 dispositions from a two-year period provided by the Federal Probation Sentencing and Supervision Information System (FPSSIS), and a sample of 10,500 convictions between October 1, 1984 and September 30, 1985 for which the Probation Division of the Administrative Office of the United States Courts provided quantitative information along with the presentence investigations. The Probation Division's report on the 10,500 cases was supplemented by information provided by the Bureau of Prisons on actual time (or its best projection of time) that these convicted defendants would serve. Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1, 7-8 & n.50 (1988); U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 21-26 (1987) [hereinafter SUPPLEMENTARY REPORT]. The cases were organized according to the type of crime committed; the idea was to establish a "heartland" or prototypical case and sentence for each crime.

198. For example, aggravated assault carries a base offense level of 15 points. 1995 GUIDELINES MANUAL, supra note 14, § 2A2.2(a). But if a firearm was discharged in the course of the assault, the level is increased by 5 additional points. Id. at § 2A2.2(b)(2)(A).
victim, may be considered in determining the sentence. These are called "adjustments." Another relevant factor in the calculus is the offender's criminal history. To determine the sentence, the court takes the final offense level after the adjustments have been made and the criminal history category identified and selects the appropriate sentence range from the sentencing table. The court may depart upward or downward from the sentence within strict parameters. It has full discretion to select a sentence within the guideline range.

(2) Civil Rights Guidelines

Deeply concerned about the minimal sentences given to police in brutality cases, the Department of Justice advocated two sentencing reforms. First, it asked Congress to amend section 242 to include felony convictions for crimes resulting in bodily injury. The statute at the time deemed only behavior resulting in death to be felonious. Congress finally did so on November 18, 1988. Second, it worked with the Sentencing Commission to ensure that the civil rights guidelines it drafted would communicate the seriousness of those crimes. Eventually, this second reform was also accomplished.

199. A frequently used adjustment considers the offender’s role in the offense. An aggravating role adds points to the offense level while a mitigating role subtracts points. Id. at §§ 3B1.1 & 3B1.2.

200. Id. at §§ 4A1.1-4B1.4.

201. Id. at §§ 5K1.1-5K2.16. The most common ground for departure is "substantial assistance to authorities." Id. at § 5K1.1. See supra note 195. Other specified grounds for both upward and downward departures are: refusal to assist, death, physical injury, extreme psychological injury, abduction or unlawful restraint, property damage or loss, weapons and dangerous instrumentalities, disruption of governmental function, extreme conduct, criminal purpose, victim’s conduct, lesser harms, coercion and duress, diminished capacity, public welfare, terrorism and voluntary disclosure of offense. Id. at §§ 5K1.2, 5K2.1-14, 5K2.16. In addition, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described," then it may sentence outside the guidelines. 18 U.S.C. § 3553(b) (1996). The Commission cautions, however, that “[i]n the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized.” 1995 GUIDELINES MANUAL, supra note 14, at § 5K.2.0 cmt. See infra note 278.


203. The guidelines first went into effect November 1, 1987, a year before the statutory change. Subsequently, the guidelines were amended, effective November 1, 1989, to reflect the increased penalty structure adopted by Congress.

The Sentencing Commission adopted five guidelines to cover civil rights offenses.\textsuperscript{205} A base level offense was assigned to each ranging from 6 to 15. Section 2H1.4 ("Interference with Civil Rights Under Color of Law"), the guideline most often applied to police brutality, had a base level of 10. Under section 2H1.4, an offender was subject to six months in prison at a minimum.\textsuperscript{206}

Even more consequential, the Commission decided to include the underlying criminal behavior in the sentencing calculus. Instead of punishing the civil rights crime in the abstract, distinct from the behavior accompanying the violation, the guidelines focus on the behavior, or "underlying conduct." For example, in a police case involving excessive force, the officer is sentenced for both the civil rights violation and the underlying assault. The sentence is calculated by first referring to the guidelines for the underlying offense of assault and adding on to it the civil rights base offense level.\textsuperscript{207}

This approach dramatizes the gravity of civil rights crimes. Persons convicted of civil rights crimes are punished for the underlying conduct under the same guidelines that apply to this conduct no matter who the offender or what the circumstance is. The sentencing goal

\textsuperscript{205} The five guidelines were: § 2H1.1 ("Going in Disguise to Deprive of Rights"); § 2H1.2 ("Conspiracy to Interfere with Civil Rights"); § 2H1.3 ("Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination"); § 2H1.4 ("Interference with Civil Rights Under Color of Law"); and § 2H1.5 ("Other Deprivations of Rights or Benefits in Furtherance of Discrimination"). Id. Since their initial enactment, the number of guidelines has changed twice. Effective November 1, 1990, guideline section 2H1.2 ("Conspiracy to Interfere with Civil Rights") was consolidated with section 2H1.1 ("Going in Disguise to Deprive of Rights"). 1995 GUIDELINES MANUAL, supra note 14, at 607-08, app. C (discussing amendment 327 to the Sentencing Guidelines). Five years later, effective November 1, 1995, the remaining four guidelines were collapsed into one, section 2H1.1 ("Offenses Involving Individual Rights") and an additional guideline was adopted to sentence hate crimes, section 3A1.1 ("Hate Crime Motivation or Vulnerable Victim"). Id. at § 2H1.1(a). The guidelines adjust for the possibility that no underlying criminal conduct has taken place by adopting relatively high base offense levels. It is hard to imagine such a circumstance, but one possibility might be behavior that causes psychological anguish to the victim. See supra notes 32-42 and accompanying text. Where there is underlying conduct, the base offense level is reduced somewhat. In most cases, the reduced base offense level combined with the underlying offense will exceed the "unadorned" base offense level. The guidelines require that the greater of the two sums shall be applied. 1995 GUIDELINES MANUAL, supra note 14, at § 2H1.1(a).
of achieving proportionality is met through the use of "add-ons."\textsuperscript{208} At the same time, the seriousness of the civil rights deprivation is underscored through the imposition of additional points.

\section{B. Police Brutality Guidelines Result in Higher Sentences}

Empirical research on sentences in police brutality cases is limited, but between the statutory change and the new guidelines, it appears that sentences in police brutality cases (and civil rights cases in general) are longer than they were, supporting prosecutors' episodic observations that the guidelines enacted by the Sentencing Commission result in stiffer sentences.\textsuperscript{209} This development is a positive one. It is a forceful way of sending the message to all people in society that the crime is serious.

\subsection{(I) Department of Justice, Criminal Section Data}

The most useful set of data comes from the Department of Justice's Civil Rights Division. The Criminal Section maintains a database on the status of cases from its own docket and the civil rights dockets of the United States Attorneys. Its database is the only source of information on pre-guideline sentencing practices in law enforcement brutality cases. Unlike other compilations, these case reports break down to include types of law enforcement civil rights violations (brutality, sexual misconduct and false arrest), so that it is possible to isolate and analyze sentences in law enforcement brutality cases as a constant category.

\textsuperscript{208} "Add-ons" is a term used by some Commissioners to refer to additions to the base offense level for underlying conduct.

\textsuperscript{209} There is little reliable statistical evidence on sentences imposed in civil rights cases generally, whether before or after the guidelines. It is especially difficult to gain a picture of pre-guideline sentencing because no agency was responsible for data collection. Pre-guideline studies tended to be conducted for a particular purpose and on a one-time only basis. A consequence of the different purposes of data collection is that the few studies that were done cannot easily be compared; the methods used to gather and organize the data vary too much.

Another problem in investigating sentencing practices in civil rights cases is that their number is low. Relatively few civil rights prosecutions are brought compared to other federal criminal prosecutions, the largest of which are drug offenses. In 1994, the Sentencing Commission determined that 41.8\% of the 39,971 guideline cases that year were drug cases (in 52 of the 39,971 cases the primary offense category could not be determined and thus could not be included in the percentage calculation). 1994 \textit{ANNUAL REPORT}, supra note 195, figure B, at 38 ("Distribution of Sentenced Guideline Defendants by Primary Offense Category"). In contrast, that same year, only 0.3\% of primary offenses were civil rights cases. \textit{Id.} at 39, table 12.
The Criminal Section data\textsuperscript{210} indicate that since the guidelines were enacted, more law enforcement brutality offenders are going to prison and for a longer period of time than before. Of the seventy-six law enforcement defendants indicted\textsuperscript{211} for crimes of brutality committed between September 30, 1985 and September 30, 1987, the guidelines’ effective date, forty-three were found guilty.\textsuperscript{212} Of the forty-three defendants who were sentenced, only twenty-five of them, or 62.5\%, received any prison time, and most of these (68\%) received prison sentences of a year or less.\textsuperscript{213} In contrast, in 103 post-guideline cases, seventy-seven offenders, or 74.8\%, went to prison and less than half (44.1\%) received short sentences of a year or less. These post-guideline statistics are derived from 150 indictments of law enforcement officers for brutality committed between November 1, 1987 and September 30, 1994. During this period, 107 defendants were found guilty by plea or conviction and the Criminal Section has reported sentences for 103 of them.\textsuperscript{214}

Another way of looking at the Criminal Section’s data is to compare average prison sentences. The average prison sentence for the twenty-five offenders who went to prison before the guidelines was 18.7 months. After the guidelines, the average sentence for the seventy-seven offenders who went to prison increased to 28.2 months.\textsuperscript{215}

As in the calculations above, these averages were computed after ex-
cluding the death cases. However, among both pre and post-guideline cases there were a number of extremely high sentences. The impact of these extreme cases becomes clear when looking at the median sentences. The median prison sentence before the guidelines was twelve months. After the guidelines, the median prison sentence was eighteen months.

A striking difference between cases sentenced before and after the guidelines is the rate of judgments of guilt, meaning both pleas and convictions. A judgment of guilt was obtained in slightly more than one-half of the pre-guideline cases (57%), whereas it was obtained in over two-thirds (71.3%) of the reported post-guideline cases. Yet, surprisingly, this increased success in brutality prosecutions cannot be explained by a rise in the number of pleas since the guidelines took effect. Of the pre-guideline convictions, 70% were the result of guilty pleas in contrast to 60.8% of post-guideline cases. Of course, any number of factors unrelated to the sentencing guidelines could account for the greater success rate in these cases in recent years.

A possible explanation linking the guidelines with the greater success rate, however, is that prosecutors are taking the cases more seriously and working harder at prosecuting them than before because there is more at stake. This theory needs to be tested. But the fact that the rate of pleas is lower now than it was before the guidelines were enacted refutes a common perception that the guidelines are used as a bludgeon to frighten defendants into accepting pleas on lesser offenses to avoid longer sentences on the charged offense.

(2) Sentencing Commission Data

The Sentencing Commission did not specifically study sentences for police brutality before it enacted the guidelines. To the extent

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216. For example, prosecutors in the Criminal Section and United States Attorney’s offices may be better trained than they were a decade ago, or they may be prosecuting easier cases. It also could be that the two-year period of pre-guideline cases happened to have a number of non-representative cases, or is not long enough to draw reliable statistical inferences.

217. See infra Part IV.A.1 discussing enactment of the Sentencing Guidelines. The Commission reviewed approximately thirty civil rights cases that predated the guidelines in which sentences were dispensed. See infra note 253. Its presentation of these cases, however, does not shed any meaningful light on pre-guideline sentences in law enforcement excessive force cases. The offenses were organized into generic categories, called “baseline offenses,” that included what were considered to be the salient features of a crime. These categories did not necessarily correspond to the guidelines subsequently drawn up by the Commission. Supplementary Report, supra note 197, at 23. The five civil rights baseline offenses were election laws, arson, victim injury, victim death, and “other.” Id. at 33, table 1(a).
that it has studied this issue since the enactment of the guidelines, no comprehensive findings have been published.218 However, some post-guideline information is available.

The Commission provided unpublished data on guideline section 2H1.4219 covering the 1991 through 1993 reporting periods.220 During this period, fifty-two cases were sentenced under this guideline. When

Any of these baseline offenses could have been committed under color of law. Also, the sentence levels were calculated by averaging the sentences given in the cases. An average sentence is not necessarily descriptive of actual practices because one extreme case can throw the average off. This is of particular concern where, as here, the number of cases is extremely small. Finally, a glaring weakness in the Commission's study is the failure to include probation even though it is commonly perceived that many, if not most, civil rights cases before the guidelines received only probation.

Because the civil rights data were useless for most purposes, the staff may not have provided it to the Commissioners when they were drafting the guidelines. See infra note 253. Nevertheless, the Commission published the results in its Supplementary Report. SUPPLEMENTARY REPORT, supra note 197, at 33, table 1(a).

218. Since the enactment of the guidelines, all sentences imposed in federal criminal cases are required to be reported to the Sentencing Commission. 28 U.S.C. § 994(w) (1994). The Commission, in turn, publishes an annual report that is transmitted to the President, the Congress and the Judicial Conference, presenting and analyzing the data. 28 U.S.C. §§ 995(a)(14)-(16), 997 (1994). In 1994, the submission rates from the courts were 96.2% for Pre-sentence Reports, 99.3% for Judgment of Conviction Orders, and 93.6% for the Report on the Sentencing Hearing (statement of reasons). 1994 ANNUAL REPORT, supra note 195, at 31.

The annual reports did not include civil rights among the primary offenses in its tables until 1991. Since then, as with other offenses, civil rights guidelines are consolidated into one primary offense for reporting purposes, so that it is impossible to determine sentences under each guideline. Moreover, the tables do not report on the nature of the offense or the offender. Thus, in the table providing average length of imprisonment by primary-offense categories, the category of civil rights might include behavior ranging from verbal abuse to first-degree murder, committed by a private citizen or a public official. With this potential range, averages lose much of their meaning. At most, the averages show that at least some civil rights defendants are doing serious time.

The tables show that during the 1991, 1992, 1993 and 1994 reporting periods (October 1 through September 30), 116, 126, 123 and 109 defendants, respectively, received their primary sentences under the civil rights guidelines. In each year, roughly half of these defendants received some imprisonment. The average length of imprisonment, measured in months, was 26.1, 31.0 and 36.7, 40.1 respectively. 1994 ANNUAL REPORT, supra note 195. Because these averages include cases where the victim died, one or two defendants could be serving all of the imprisonment time, thereby skewing the results. These annual reports are simply too superficial to bear close analysis.

219. While police and other law enforcement agents could be sentenced for civil rights crimes under all four civil rights guidelines (before they were collapsed into one, see supra note 205), their primary offense statute, 18 U.S.C. § 242, was sentenced under guideline section 2H1.4. 1995 GUIDELINES MANUAL, supra note 14, at § 2H1.4 cont. (citing 18 U.S.C. § 242 as applicable statutory provision).

the sentence was imprisonment, the average sentence was twenty-four months.\footnote{Id.}

These data support the conclusions of Commission staff who have studied the civil rights guidelines.\footnote{Telephone Interview with Jonathan Wroblewski, Staff Attorney, U.S. Sentencing Commission, Office of General Counsel (July 7, 1994) [hereinafter Wroblewski Interview].} They found that, as of July 7, 1994, sixty-seven defendants had been sentenced under guideline section 2H1.4. Roughly half of them went to prison, averaging 36.4 months imprisonment. This number, however, is skewed by two cases with unusual or extreme facts in which defendants were given severe sentences.\footnote{Id. at 1-9.} If the sentences in these two cases are not counted, the average sentence would be 21.7 months.

(3) Federal Judicial Center Data

The Federal Judicial Center conducted a study in 1984 of pre-Guideline practices, covering persons convicted of violating federal criminal laws who were sentenced between January 1, 1984 and February 28, 1985.\footnote{1 ANTHONY PARTRIDGE ET AL., FEDERAL JUDICIAL CENTER, PUNISHMENTS IMPOSED ON FEDERAL OFFENDERS I-3 (1986) [hereinafter JUDICIAL CENTER DATA].} The database consisted of 39,304 offenders\footnote{Id. at 1-3.} and was prepared specifically to help the Sentencing Commission’s work.\footnote{See supra note 197.} The authors stress that the study cannot support close statistical analysis.\footnote{The authors urge caution in relying on the data for statistical inferences. First, in nearly half of the cases in which offenders were parole eligible, they had to estimate what the decision would have been, based on the probation officer’s prediction. Second, they stress that extreme cases might be the product of faulty record-keeping. Third, while all of the tables they constructed (organized by offense characteristics) show great ranges in punishments, they are unable to conclude one way or the other from the data that a disparity in punishments exists. Fourth, because many of the tables contain few offenders, the statistics may be skewed by chance. Finally, they note that their information about felonies is} Nevertheless, they believe it is valuable for descriptive purposes.
The Judicial Center study shows that, without breaking down the offense according to the different civil rights statutes, out of seventy-two cases, thirty-eight offenders were sentenced to prison and twenty-nine put on probation. Excluding the one case in which more than 10 years of imprisonment was imposed, the average prison sentence was 1 year and 2.2 months. These offenders were not all first timers: twenty-two had prior records, eight of whom had been incarcerated before. The inclusion of persons with prior records means that at least twenty-two of these persons most likely could not have been public officials. Once convicted, a public official usually does not have the opportunity to act under color of law a second time. Also, significantly, it must have raised the average prison sentence because repeat offenders typically receive longer sentences than first-time offenders.

(4) Interpreting the Data

It is hard to draw firm conclusions from the data alone. There are too few cases to obtain truly meaningful statistics. Moreover, and importantly, except for studies run on the Criminal Section's database, reports on pre and post-guideline practices are not comparable. In addition to reliability problems of the earlier studies, none of the studies measures the same event.

The best source of data is the Criminal Section's database. It maintains complete records of all its cases and the data can be manipulated to give information specifically on police brutality. The other sources provide, at best, an impression of trends in civil rights sentencing. In some instances these impressions are consistent with the Criminal Section data, but in others they are not.

With respect to pre-guideline sentencing, the Federal Judicial Center's research can be interpreted to correspond to the Criminal Section's. The Federal Judicial Center found that 52% of all civil rights violators went to prison. Prison sentences averaged 1 year, 2.2

more complete than that about misdemeanors. Judicial Center Data, supra note 224, at 1-4 to 1-10.

228. The seventy-two offenders were convicted of violating 18 U.S.C. sections 241, 242 and 245. Fifteen of these also had secondary offenses, primarily assault. Id. at 8-19. Like the Sentencing Commission's study, the lumping together of civil rights offenses here does not distinguish between official and private misconduct, much less differentiate among kinds of official misconduct, and therefore precludes analysis in brutality cases only.

229. Two were given fines only and three were excluded because the data were known to be unreliable. Id. at 8-21.

230. Id. at 8-19.
months. Nearly one-third (30%) were repeat offenders, making it unlikely that they were law enforcement officers. If their cases had been subtracted from the total, creating more of an overlap with the Criminal Section's pool of law enforcement brutality offenders, it is likely that the average prison time would have gone down, because repeat offenders generally receive more time. This adjustment would bring the Judicial Center's findings close to the Criminal Section's data showing that nearly half of pre-guideline offenders received no prison at all and most of those going to prison went for less than a year.

Post-guideline sentencing studies raise some interesting questions. Two Sentencing Commission sources, one measuring all civil rights offenders and the other measuring section 2H1.4 offenders, indicate that only half go to prison. Yet the Criminal Section's data clearly indicate that since the guidelines were enacted, law enforcement brutality offenders go to prison 74.8% of the time. Are the guidelines causing law enforcement brutality offenders to go to prison at a higher rate than before the enactment of the guidelines but leaving other categories of civil rights offenders unaffected?

If law enforcement officers are going to prison more often under the guidelines than before, they may be serving comparatively less time than other civil rights offenders. Both Criminal Section and Sentencing Commission sources show that civil rights offenders who go to prison are serving more time under the guidelines. Yet the Sentencing Commission's averages for all civil rights cases are higher than its averages for section 2H1.4 cases. This dichotomy suggests that private citizens are raising the civil rights prison average sentence, or are, at least, disproportionately impacted by the guidelines' stringent levels. If this is the case, research needs to be undertaken to determine the source of the disparity. The disparity does not result from

231. RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 87 (Alfred Blumstein et al. eds., 1983) (studies consistently show that prior record affects sentence).
232. See supra notes 211-13 and accompanying text.
233. These are the Commission's annual reports and staff findings. See supra notes 219-23.
234. See supra note 214 and accompanying text.
235. See supra Part III.B.2. Even the average prison sentences computed from the Criminal Section's data shows that law enforcement brutality offenders are serving somewhat less time on average in prison than the Commission's data for civil rights offenders overall. See supra Part III.B.1.
236. Of all the interpretations presented here, this one is the most tentative. There is no way of knowing what cases the Commission included in its computations. The addition or subtraction of one or two cases can shift the results, giving rise to an entirely different
the guidelines. Indeed, law enforcement offenders should be serving more time for the same behavior under the guidelines.\textsuperscript{237} Regarding underlying conduct, Sentencing Commission data show that half of the public-official offenders sentenced under section 2H1.4 go to prison for roughly two years. It is fair to assume that, as previously noted, these were first-time offenders because public officials who are convicted of a civil rights crime are normally fired from their jobs.\textsuperscript{238} Thus, the average offense levels for prison-bound offenders would fall in the range of fifteen to seventeen months.\textsuperscript{239}

Given that the base-offense level under section 2H1.4 is only 10 (6 to 12 months), it is apparent that it is the underlying conduct that boosts the amount of time an offender spends in prison.

Finally, given the strong implication from the data that the average prison sentence of two years for offenders sentenced under section 2H1.4 results from the addition of underlying conduct, it seems clear that this system of computing sentences has had a significant effect in sentencing outcomes. This finding is important because it shows that the application of underlying conduct has rationalized the sentencing process by bringing civil rights sentencing in line with other noncivil rights crimes involving the same behavior. Thus, an important goal of sentencing reform—achieving proportionality—is being met. More importantly, the police and the public are being sent a message: police brutality is an egregious crime and will be punished accordingly.

C. Prosecutors' Views

Prosecutors who specialize in bringing civil rights cases are experts in the operation of the guidelines. Their insights must be seriously considered in evaluating how the guidelines are working. In interviews with a number of current and former prosecutors,\textsuperscript{240} one interpretation. An example of the impact of extreme cases can be seen in the discrepancy between the average and median sentences drawn from the Criminal Section's data. See supra note 215 and accompanying text.  

\textsuperscript{237} The explanation may lie in the courts' use of downward departures. See infra Part IV.  

\textsuperscript{238} Sentencing Commission staff did not specify what the criminal histories were in the sixty-seven official misconduct cases, Wroblewski Interview, supra note 222, but the information provided by the Commission for cases between 1991 and 1993 confirms this assumption that most public officials are first time offenders. Of the fifty-two cases, forty-seven fell in Criminal History Category I and one in Category II (information is missing on four of the cases). See supra note 221.  

\textsuperscript{239} 1995 GUIDELINES MANUAL, supra note 14, at 272; see also id. (Sentencing Table).  

\textsuperscript{240} Prosecutors' Interviews, supra note 180.
phenomenon they all emphasized was the strictness of the guidelines, particularly in police-brutality cases. Their sense is that they are sending more police to prison.

Prosecutors also perceive that these police violators are being given longer sentences. A former employee whose responsibilities included data collection for the Criminal Section of the Civil Rights Division of the Department of Justice said her impression was that police were receiving as much as 50% more time. But, several prosecutors noted, it was impossible to tell whether the change was due to the 1988 amendment to the statute or the guidelines.241

What is clear to prosecutors is that they have been given great leverage due to the increased penalties under the guidelines and the elimination of judicial discretion. The power of sentencing rests largely with the prosecution in deciding what to charge. Also, many think that the guidelines are encouraging more defendants to cooperate and plea to a lesser offense so that the offense level is reduced and points are subtracted for acceptance of responsibility.242 The prosecutor may also ask the court to depart downward on grounds of substantial assistance.

Most prosecutors appear to support the guidelines. They are valued by prosecutors for the message they send. This message is particularly important in the Criminal Section where, because so few police prosecutions are successfully brought, a major goal of its work is general deterrence.243 This deterrent effect is undermined by minimal sentences. Prosecutors believe that these cases are taken more seriously when offenders are subject to lengthy sentences.

Thus, most of the prosecutors interviewed think that the elimination of judicial discretion in these cases is a change for the better because courts tended to sympathize with police and excuse their criminal behavior. Several singled out the role of underlying conduct in the penalty structure as key to lessening sentencing disparity. Police are not considered special under the guidelines, but are to be treated like any other offender who commits the same conduct.

As an empirical matter, several prosecutors mentioned that it was impossible to evaluate the effect of the guidelines. One prosecutor asked whether what was to be measured was a change (presumably a

241. Id.
242. But, interestingly, their own data do not support this belief. See supra note 216 and accompanying text.
243. See discussion supra Part II.B.3 on the difficulty of winning convictions in police brutality cases.
reduction) in the number of complaints about police.\textsuperscript{244} Even such an obvious question as whether stiffer sentences are being given due to the guidelines is difficult to answer because the statutory change occurred within one year of the enactment of the guidelines. Also, with so few cases, it is hard to identify a statistically significant trend. Variations may simply be due to the kinds of cases brought in a given year.

Another prosecutor noted that the guidelines could bring about disparate results among like cases. For example, one prosecutor was troubled by the role of chance in sentencing. In cases in which police behave in a similar fashion, it is often pure fortuity whether the victim is seriously injured or not, yet the presence and degree of injury makes a big difference in the sentence. Similarly, the guidelines do not account for a police officer having a “bad night.” An isolated instance of criminal behavior involving split-second decisions and a carefully premeditated crime might result in similar sentences.

Concerns about anomalous cases aside, several prosecutors were troubled by the severity of the civil rights guidelines. Nevertheless, because police should not be singled out for special consideration, they do not regard the use of downward departures in police brutality cases to be appropriate given their belief that the privileged treatment of police by the criminal justice system is a fundamental obstacle to achieving justice in brutality cases. These comments suggest that liberalizing the grounds for departure will not be a satisfactory means of moderating severe penalties in brutality cases. What is likely to occur with such an approach is a reappearance of the old patterns. Instead, if the sentences are too severe (a point on which prosecutors disagree), they think that the sentencing structure as a whole should be revisited. If done in this manner, the fundamental concept of punishing everyone equally for the same underlying conduct, with add-ons for civil rights crimes, could be preserved.

\textbf{IV. Sentencing Guidelines on Trial}

In police brutality cases, the fundamental purpose to be accomplished by guideline sentencing is recognition and enforcement of the principle that law enforcement agents who violate the law should not be given special consideration by the criminal justice system. This

\textsuperscript{244} She emphasized that the number of complaints is not a measure of how good or bad a police department is. A good police department, she stressed, will make it easy for citizens to make complaints. It would be a disservice to those departments to assume they have a significant problem with brutality when they are doing the right thing by encouraging people to come forward. Prosecutors' Interviews, \textit{supra} note 180.
principle should seem self-evident. But it is precisely this principle that the Supreme Court has rejected in its consideration of *Koon v. United States*.

In *Koon* and *United States v. Rorke*, the trial courts departed downward from the guidelines in sentencing police officers convicted under section 242. In both cases, departure was justified on the grounds that are intrinsic to the crime of police brutality, namely, the victims’ misconduct and the defendants’ status as police officers. In essence, these courts sought to excuse the defendants’ behavior because they were police officers, rather than punish it because they were police officers.

The history of the enactment of the civil rights sentencing guidelines is highly instructive. Twice the Sentencing Commission came close to adopting guidelines that would have effectively rejected the principle of treating police brutality like other serious crimes. But in each instance, the Sentencing Commission instead adopted stringent standards for police and other civil rights violators acting under color of law. The Commission’s actions can be interpreted in two opposing ways. It could be argued that the history casts doubt on the Commission’s long-term commitment to send a convincing message to police departments and other law enforcement agencies that brutality will not be tolerated or that, at the least, its internal struggle reveals an uneasy consensus about the guidelines that were ultimately enacted. The better argument is that the Commission’s view changed in the course of its deliberations. The Commission came to see that police brutality is routinely dismissed as inconsequential and to recognize the connection between that common attitude and the frequent "slap on the wrist" sentences officers received before the guidelines were enacted. The Commission decided that the public deserved bet-

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246. When the Sentencing Commission drafted the guidelines, it employed the concept of a “heartland” case to distinguish among crimes and degrees of criminal culpability. Each crime that is punished under the guidelines has its prototype. The prototypical cases are called “heartland” cases. They are the quintessential crimes of burglary, assault, car theft, police brutality, etc. Each is assigned a base offense level for sentencing. When cases vary from the “heartland,” points are either added to, or subtracted from, the base offense level. In both *Koon* and *Rorke*, the trial judges found that the crimes were not in the “heartland” of police brutality. They did so by denying the very nature of these crimes and the criminals: police brutality is a crime committed by police officers. These cases are discussed fully infra Part IV.B.
247. See discussion infra Part IV.A.
248. See discussion infra Part IV.A.2.
ter. Once set, the Sentencing Commission has not swerved from its decision to maintain strong police brutality guidelines. However, unless the Commission acts decisively again, the result of its steadfast commitment will be undone by the Supreme Court’s failure to recognize the critical role of these guidelines in criminal civil rights enforcement. 249

A. The Sentencing Commission

(1) History of Enactment

Police brutality has had an ambivalent place in the history of sentencing reform. Some, perhaps most, members of the Commission initially resisted increasing civil rights sentences. 250 The enactment history of civil rights guidelines that follows is drawn from extensive interviews and correspondence with the Commissioner most responsible for their adoption, as well as interviews with other key players, a review of the proceedings, including minutes of Commission meetings, hearing testimony, outside submissions and draft proposals, and articles and reports issued since then. It shows that until one Commissioner assumed responsibility for educating the other Commissioners, the Commission was tending towards a position that would cater to the sorts of attitudes about civil rights and police brutality described earlier in this Article that prevail in our society. 251

The relative insignificance of police brutality and other civil rights crimes in the minds of the Sentencing Commission members was demonstrated in the first instance by their failure to follow the procedures used to produce guidelines for all other crimes. 252 There was no


250. The first members of the Sentencing Commission, appointed by President Reagan, consisted of three federal judges, three academics and one criminal justice professional. The three judges were the Chairman, William W. Wilkins, Jr., J., District of South Carolina (now a 4th Circuit Judge); Stephen G. Breyer, J., 1st Circuit (now an Associate Justice on the U.S. Supreme Court); and George E. MacKinnon, a Senior Judge on the D.C. Circuit. The three academics were Michael K. Block, Professor of Law, Policy & Economics, University of Arizona; Ilene H. Nagel, Professor, Indiana University School of Law; and Paul H. Robinson, Professor, Rutgers School of Law. The criminal justice professional was Helen G. Corrothers, a one-time prison warden and U.S. Parole Commissioner. The Commission was generally regarded as a philosophically conservative body. Of the many criticisms of the guidelines, they cannot be said to be the product of a group that was “soft on crime.”

251. The Commissioner who spearheaded the civil rights reform effort was Helen Corrothers.

252. Typically, Commissioners used data sets of existing sentences as a point of departure for developing their new sentencing system. These data are described supra note 197.
useful data set to analyze the adjudication of past civil rights crimes, which may have allowed preconceived notions that police brutality is not a real crime to influence the proposals. Second, other than the Criminal Section at the Justice Department’s Civil Rights Division, there is no evidence of any involvement by a government agency. Finally, civil rights crimes were not on the agenda of Commission advisory or working groups. It was not a topic at any of the hearings held by the Commission. Nor, apparently, was there any citizen comment on the issue. While this empirical vacuum may not have been entirely the Commission’s fault, it nonetheless appears to have had a negative impact on the proposals the Commission initially drafted.

Two main controversies characterized the Commission’s enactment of guidelines for civil rights offenses. First, the Commissioners disagreed about the number of necessary guidelines, both in terms of

Commissioners examined and then accepted, rejected or modified these past sentencing practices and the distinctions upon which they relied. Supplementary Report, supra note 197, at 16. Many other sources also influenced the formation of the guidelines, including, most importantly, Congress’ intent in passing the legislation and its specific instructions to the Commission to consider various factors. Title 28, the Judiciary and Judicial Procedure Code, lists twelve statutory considerations the Commission was to apply in writing the guidelines. 28 U.S.C. § 994(c)-(n) (1996) In addition, the Commission consulted advisory and working groups it had established; solicited information from various federal agencies; held both topical and public hearings; and relied on its own research staff for ideas. Supplementary Report, supra note 197, at 9-11.

Normally, Commissioners submitted guideline proposals to the Staff Director for initial drafting. Staff on the Guideline Production Unit put draft guidelines in the proper format, reviewed proposed guidelines for consistency with previous efforts and then presented them for discussion at Commission meetings. Numerous competing drafts resulted from this process; all proposals were placed on the agenda for Commission consideration. Interview with Helen Corrothers (see supra notes 250-51) and Charles Betsey, former Senior Research Associate for the Commission, Sept. 2, 1994 [hereinafter Corrothers & Betsey Interview].

253. William Rhodes, Research Director for the Commission during the guideline formation, estimates that there were roughly thirty civil rights cases in the entire data base. Telephone interview with William Rhodes, Research Director for the Commission (Oct. 25, 1993). Because of the small number of cases, the empirical study done for other crimes was not conducted for civil rights crimes. Telephone Interview with Phyllis Newton, current Staff Director and former researcher for the Commission (Nov. 1, 1994). Neither Helen Corrothers, nor Charles Betsey, the staff researcher who assisted Corrothers, has any memory of a data set for civil rights crimes. Corrothers & Betsey Interview, supra note 252.

254. Department of Justice officials Roger Pauley and Vicki Portney recall the process as informal and managed through the Criminal Section. Telephone interviews with Roger Pauley, Policy Director, Office of Legislation, Criminal Division, Department of Justice (Sept. 16, 1994) and Vicki Portney, Attorney, Office of Legislation, Criminal Division, Department of Justice (Nov. 2 & 22, 1994).

255. A review of all the files at the Sentencing Commission containing comments on the guidelines uncovered no reference to civil rights crimes.
what kinds of conduct to include and in terms of whether to issue separate guidelines for each offense. Second, Commissioners could not agree on the severity of the sentences to be imposed.

The initial draft section of guidelines for civil rights violations demonstrated clear disregard for the seriousness of civil rights offenses. Issued by the Guideline Production Unit, it consisted of only one guideline, called "Interfering with Civil Rights." All civil rights offenses were to be encompassed under this one guideline, covering behavior ranging from verbal harassment of victims to homicide. This created a lowest common denominator problem—by grouping all the offenses together, the least harmful and the most egregious carried the same punishment. That punishment level was extremely low. The base level first proposed for civil rights offenses was 6, putting it in the lowest ranked range; it brought zero to six months imprisonment.

To correct this flaw, Helen Corrothers, the criminal justice professional on the Sentencing Commission, proposed expanding the guidelines to include a broader range of behavior than that encompassed by the original proposal. Other Commissioners objected on the ground that additional guidelines were unnecessary because so few cases were being brought. They interpreted the relatively small number of civil rights prosecutions to mean that the statutes simply were no longer being violated. A lawyer from the Criminal Section provided examples of recent cases that represented these kinds of behavior, and also attended a Commission meeting to convey that civil rights violations are not a thing of the past, but unfortunately still a paramount concern today. After this meeting, apparently persuaded by his arguments, the Commission voted to adopt Corrothers' proposal. This proposal established five civil rights sentencing guidelines.

256. Telephone interview with Helen Corrothers (Dec. 7, 1993) [hereinafter Corrothers Interview] and Memorandum from Helen Corrothers to Alexa Freeman (Aug. 24, 1994) (on file with author) [hereinafter Corrothers Memorandum].
257. See infra notes 265-66 and accompanying text.
258. Id.
260. Id. at 84, 140.
261. Corrothers Memorandum, supra note 256.
262. Id. The lawyer was Daniel L. Bell II, then Deputy Chief, Criminal Section, Civil Rights Division.
263. Corrothers & Betsey Interview, supra note 252. The Commission meeting was on April 1, 1987, immediately prior to the adoption of the first set of guidelines.
The decision to adopt stricter sentencing parameters than initially proposed underwent a similar process. Commissioners resisted adopting sentences with meaningful prison time, even though they had increased sentences for most other crimes.265 Had the original proposal been adopted, police who used excessive force would have received less time than anyone else for the same behavior but without the civil rights component, i.e. not under color of law. Such a result would have been incongruous.266

265. Commissioners did not acknowledge their hostility to punishing civil rights crimes, but their behavior clearly shows that they did not view civil rights crimes as serious threats like other crimes. Just as in the effort to expand the number of guidelines, the grounds of opposition for increasing the sanctions were veiled. Corrothers cannot recall ever hearing a concise rationale for objecting to these increases. Yet there continued to be consistent resistance to her efforts up until the moment of their adoption. Corrothers & Betsey Interview, supra note 252.

Corrothers' drafts were not presented for discussion by the Guideline Production Unit and the drafts that were offered continued to provide weak and ineffectual sanctions. Unlike the usual identifiable work products from other Commissioners, these drafts were unsigned. The anonymity of the opposition prevented open discussion of the issues. This silence sharply contrasted with the normally hot debates that took place when sanctions for other crimes were discussed. Corrothers Interview, supra note 256.

In discussing this history with Judge Wilkins, former Chairman of the Commission, his first recollection was that there was no resistance to these guidelines simply because they addressed civil rights. He speculated instead that civil rights were given a low priority because there were so few cases and the Commission was buried by its work with high-frequency crimes such as drugs and fraud. This explanation, however, only goes to the scheduling of topics. It does not explain why in this area there was an effort to reverse the usual course that applied for other crimes of giving serious time. Acknowledging that this effort may have taken place, Judge Wilkins then noted that reasonable people can disagree and that these issues were difficult ones. Telephone Interview with William W. Wilkins, Jr., former Chairman, U.S. Sentencing Commission (Nov. 9, 1994).

266. Ultimately, the Sentencing Commission increased the sanctions for the civil rights guidelines. The base offense level for four of the five guidelines was raised from level 6 to 10 (§§ 2H1.3, 2H1.4), 13 (§ 2H1.2) (deleted by consolidation with § 2H1.1 effective Nov. 1, 1990) or 15 (§ 2H1.1). 1995 GUIDELINES MANUAL, supra note 14, at 113-15. For an offender with no criminal history, level 6 would mean zero to six months of imprisonment. Levels 10, 13 and 15 would mean six to twelve, twelve to eighteen and eighteen to twenty-four months, respectively. Id. at 242.

The Commissioners also agreed to a 4-level increase as a “Special Offense Characteristic” when the defendant was a public official at the time of the offense. The number of additional months a four-level increase could bring varies widely depending on the starting point. It could mean as few as nine more months if it raised the offense from level 10 to level 14, or it could mean life imprisonment if it raised the offense from level 39 to 43. Id. This increase did not apply to section 2H1.4 (“Interference with Civil Rights Under Color of Law”), because it was inherent in the offense. The most significant reform, however, was the inclusion of “add-ons” to the base offense level. The idea was the brainchild of Daniel L. Bell II, the lawyer from the Criminal Section who worked with Corrothers. See supra note 262 and accompanying text.
Three factors might explain the Commission's hesitancy to toughen the guidelines. First, civil rights crimes were not a high priority for the Commission. Second, Commissioners had no background in civil rights to give them a special sensitivity to the issues. Finally, some Commissioners resisted stiff penalties for civil rights crimes because they sympathized with the defendants in official misconduct cases. Their initial opposition to the civil rights guidelines, in contrast to their support for often severe penalties for other crimes, must be read against a background of public attitudes towards crime in general. People are terrified by increases in crime and will grasp at any talisman that they believe might reduce it, even if it is irrational. But this attitude towards crime is not applied equally to all crimes. As we have seen, police brutality is an acceptable trade-off for many people in the fight against "real" crime, particularly given the color of many of the police victims. The Commissioners, lacking background in civil rights and not conversant on the issues, probably looked at the small number of cases they were provided in the data set and agreed that the trade-off was reasonable. It is to their credit that they ultimately recognized this inconsistency.

(2) Guidelines Strengthened in Face of Attack

The Sentencing Commission always has the option of reducing the guidelines by amendment, yet it has made only minor technical changes to the civil rights guidelines since their original enactment. Moreover, in 1995, by rejecting its own staff proposal to retreat from its strong stance on police brutality, the Commission reaffirmed its earlier decision to treat these crimes seriously. This action is convincing evidence that the Commission (and Congress, which approves these guidelines) is determined to send a strong message condemning police brutality. This interpretation of the Commission's action is particularly compelling in light of the fact that it not only rejected the staff proposal to dilute these guidelines, but it actually increased the

267. Public support for the death penalty is one such irrational choice when research fails to show any benefit to the crime rate. See, e.g., William C. Bailey & Ruth D. Peterson, Murder, Capital Punishment, and Deterrence: A Review of the Evidence and an Examination of Police Killings, J. SOCIAL ISSUES, Summer 1994, at 53 (reviewing and assessing empirical research on death penalty and finding consistent pattern of nondeterrence); Richard L. Worsnop, Death Penalty Debate: Will Support for Executions Continue to Grow?, CONG. Q. RESEARCHER, Mar. 10, 1995, at 195 (observing that the death penalty growing in popularity as public fears increase in crime, but most law enforcement people admit it does not deter crime); John Horgan, The Death Penalty; Most Americans Favor It, But What Purpose does it Serve?, SCI. AMER., July 1990, at 17 (arguing that the death penalty is popular but does not deter crime).
base level offense for police brutality and other civil rights crimes under color of law from ten to twelve. Also, perhaps significantly, it acted just after the Koon defendants petitioned for certiorari seeking to weaken the guidelines.

On January 9, 1995, the Sentencing Commission published a notice of proposed amendments to the sentencing guidelines that included, inter alia, an alteration to the civil rights guidelines.268 The notice presented a staff proposal to collapse the four guidelines into one.269 While there were several variations proposed, the net effect for crimes committed under color of law was to reduce the offense level. Rather than adding six to the level applicable to the underlying offense, the proposal set an enhancement of two, three or four levels. If the resulting offense level was less than ten, it was to be raised to that level. The problem with the proposal was that it lowered the base offense level for police brutality from the originally enacted guidelines.270

The Commission published several reasons for the proposed changes.271 First, it said that its action was prompted by Congress' mandate to apply at least a three-level enhancement to hate crimes. Second, the consolidation of the four current civil rights guidelines into one would simplify their operation. Third, it reasoned that reducing the enhancement for public officials would bring the civil rights guideline in line with section 3B1.3.272 However, the primary reason for the proposal was not published in the Notice. According to the staff member responsible for its drafting, the proposal to downgrade


269. For the base offense level, the Commission staff proposed applying the greatest of the following: 1) the base offense level for the underlying offense; 2) level 10 for offenses involving the use or threatened use of force or the actual or threatened destruction of property; or 3) level 6. If the crime was a conspiracy, one option set a default level of 12 while the other set it at 10. Id. at 2436.

270. At the time of the proposed amendment, the default level for section 2H1.4 was 10 where there was no underlying offense. With this proposed default level of 10 in place, there appeared to be no change at the low end. However, in police brutality cases, there are no prosecutions without an underlying offense. Thus, under the existing guideline, the default level of 10 was never applied, but under the staff proposal it could have. For example, if the underlying offense was minor assault, the base offense level under section 2A2.3 could be 6 and possibly as low as 3. 1995 GUIDELINES MANUAL, supra note 14, at 34, § 2A2.3 (“Minor Assault”). In that case, even if the Commission opted for the highest enhancement of 4 levels, the base offense level would have ended up being the default level of 10.

271. 60 Fed. Reg. at 2435-36.

272. 1995 GUIDELINES MANUAL, supra note 14, at 207, § 3B1.3 (“Abuse of Position of Special Trust or Use of Special Skill”).
the offense levels for color of law crimes was motivated by a concern that these guidelines were too strict.\textsuperscript{273}

Without knowing the process by which Commission staff and Commissioners arrived at the proposed amendment or, for that matter, the empirical basis for their decision,\textsuperscript{274} it nevertheless appears that the staff member was correct in singling out guideline stringency as the chief issue in contention. The changes behind the first two published reasons for the proposed amendment were accomplished by the amendment that was ultimately adopted.\textsuperscript{275} The latter two reasons, both concerning the minimum length of incarceration to which police officers and others acting under color of law would be subjected, clearly were contested. Between the period of the published notice and the Commission’s submission of the guidelines to Congress, the proposed sentence reduction was eliminated. Not only did the Commission reverse its course, but it added to the base offense level. The Commission has not made its reasoning public, but the statement its action makes is unequivocal: the judicial system must vigorously condemn police brutality.\textsuperscript{276} But the judiciary has not heard the Commission’s message.

\textsuperscript{273} Wroblewski Interview, supra note 222.
\textsuperscript{274} See Hearing on Proposed Guideline Amendments, supra note 134 (statement of Alexa Freeman) (claiming there was insufficient communication of grounds for proposed amendments).
\textsuperscript{275} In accord with Congress’ intent, the amendment provided that if the crime was a hate crime under the Violent Crime Control and Law Enforcement Act of 1994, then a 3 level enhancement would apply to all offenders. 60 Fed. Reg. at 2436. It also consolidated four civil rights guidelines into one.
\textsuperscript{276} Perhaps, too, the Commission realized that altering the civil rights guidelines in isolation from the rest of the guidelines would undermine the purpose of sentencing reform: achieving rationality, uniformity and proportionality. If the offense levels for color-of-law crimes are strict, they are no more so than the guidelines as a whole. Had the proposal been accepted by the Commission, some crimes would have continued to be sentenced harshly while police-brutality offenders would have, once again, received the token “slap on the wrist.”

Many of the criticisms about the guidelines’ overall harshness are valid, the federal prison system is overcrowded and severely overburdened. Perhaps it is time, nearly a decade after the guidelines’ enactment, to reconsider their approach in a comprehensive manner. However, even if the Sentencing Commission should decide to do so, it should exercise great caution in altering the civil rights guidelines. It must be remembered that, in every key respect, all the ordinary advantages and presumptions that flow to the prosecution are reversed, making these cases the inverse of the usual criminal case. Police brutality is unique among crimes.
B. Guidelines Departures by the Courts

Police brutality is a peculiar crime in the sense that society's principal law enforcers become "law-breakers," but the crime itself often follows predictable patterns, as evidenced by the cases discussed below. This distinction is lost in the guidelines departure cases. For courts in guidelines departure cases, the issue is whether they may take into consideration the special nature and circumstances of police work. Focusing on the issue in this manner causes courts to overlook factors generally common to these cases. The real issue is whether these "heartland" factors are already encompassed in the crime of police brutality and the guidelines for sentencing it.

Unfortunately, the Sentencing Commission did not create a clear record of its intent, leaving the door open for the courts to decide this question. Not surprisingly, some courts have taken advantage of this opportunity to enlarge their discretion. That these courts are

277. Its causes, too, are often knowable. See supra Part I.C.

278. Downward departures occur through several mechanisms. The guidelines specifically allow downward departure for offenders who provide "substantial assistance" to government investigators or prosecutors. See supra note 201. The intent of the sentencing guidelines also can be bypassed through mechanisms such as charging decisions and plea bargains. There is no language in the guidelines forbidding these from being used to manipulate sentencing outcomes (although arguably this violates the spirit of the guidelines).

Normally, however, the statute requires that a court sentence within the guidelines unless it finds that the Commission did not take a particular factor into adequate consideration. Id. The Sentencing Commission attempted to guide courts in distinguishing between permissible and impermissible departures by publishing a non-exclusive list of factors that it had not considered adequately for courts to apply in their discretion. Id. These and other unspecified potential factors may only be applied, however, when they are not normally present in the crime. Id. Otherwise, "departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense." 1995 GUIDELINES MANUAL, supra note 14, at 310, § 5K2.0 ("Grounds for Departure").

279. All guideline departures by the courts raise complex questions. At core has been the dichotomy of opinion relative to the propriety of the Sentencing Commission. Numerous courts invalidated the guidelines on separation of powers and excessive delegation grounds before they were upheld by the Supreme Court in United States v. Mistretta, 488 U.S. 361 (1989). See also U.S. SENTENCING COMM'N, ANNUAL REPORT 11 (1989). Despite this decision, there lurks in departure jurisprudence the view that the guidelines threaten federal judicial independence. One of the most outspoken critics is Judge Jack Weinstein who has written articles against them and issued several lengthy opinions in cases rejecting their application. See Jack B. Weinstein, A Trial Judge's First Impression of the Federal Sentencing Guidelines, 52 ALB. L. REV. 1 (1987); Jack B. Weinstein, A Trial Judge's Second Impression of the Federal Sentencing Guidelines, 66 S. CAL. L. REV. 357 (1992); Jack B. Weinstein, A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines, 5 FED. SENT. REP. 6 (1992).

Many courts question the wisdom of sentencing according to guidelines rather than case-by-case determinations. The suggestion is that the Sentencing Commission may be
granting downward departures to police is also not surprising given the bias they usually display in favor of the police—a bias shared by the majority of society to such an extent that is scarcely seen as such. By sanctioning factors common to police brutality cases as proper grounds for downward departure, the Supreme Court encourages more downward departures in these cases.\textsuperscript{280}

motivated by different concerns than those weighed by the courts, caring less about achieving justice than with achieving consistency. Guideline sentencing circumscribes the traditional role of courts in interpreting and applying norms and values. In particular, the guidelines do not expressly allow courts to intervene to prevent grave injustice from being done. Other concerns are institutional. With the advent of guideline sentencing, courts have seen their prerogatives restricted. Thus, the narrowed arena within which courts must operate undoubtedly has generated resentment and resistance. A survey of 270 witnesses on the guidelines by the Federal Courts Study Committee found all 266 judges in opposition for the reasons discussed here. (in favor of the guidelines were three Commissioners and the Attorney General). \textit{Federal Courts Study Committee, Report of the Federal Courts Study Committee} 142 (1990).

These concerns about the role of sentencing guidelines are intricately connected to the debate on the substance of the guidelines. Many judges and scholars believe that the guidelines are inordinately rigid and harsh. See \textit{supra} note 193. But whether the benefits of guideline sentencing as a whole outweigh the disadvantages is beyond the scope of this Article.

It is unclear how many courts have departed downward in police brutality cases. The Criminal Section data do not include notations of departures, and the way statistics are normally compiled by the Sentencing Commission would not reveal a departure unless the average sentences were below the baseline offense of six months for section 2H1.4. They are not. See discussion \textit{supra} notes 221-23 and accompanying text.

However, the Sentencing Commission offered to assist in the research for this Article by specially compiling departure information for section 242 cases. See \textit{supra} notes 210, 220. It reported that between October 1, 1991 and September 30, 1993, there were thirteen downward departures, eight for substantial assistance and five for other reasons, out of fifty-two. \textit{Id.}

But the Commission's data are contradicted by other sources. While constrained from providing case names and citations (by an agreement it has with the Judicial Conference Committee on Criminal Law and Probation Administration and the Administrative Office of the U.S. Courts), the Commission was able to name the five districts in which courts departed downward for reasons other than substantial assistance. Two of these cases were said to be from the Southern District of West Virginia. However, according to Charles Miller, Assistant United States Attorney in Charleston, who has taken the lead in prosecuting all police misconduct cases in that District since his employment there 12 years ago, the only two cases in which the guidelines were not followed were United States v. Adkins, No. 91-5702, 1993 U.S. App. LEXIS 12107 (4th Cir. May 24, 1993) and United States v. Steele, No. 3:91-00233 (S.D.W. Va. 1991). Neither case was, technically speaking, a downward departure. They were both misdemeanors, limited by statute to a sentence of one year's imprisonment. The calculation under the guidelines would have netted the defendants sentences beyond the one year statutory limit. A statutory constraint requiring a sentence below the guidelines is not considered a downward departure. Telephone Interview with Charles Miller, Assistant U.S. Attorney, S.D.W.Va. (Nov. 18, 1994).

Two other cases from the Commission's list remain unidentified, one from the Eastern District of Tennessee and the other from the Northern District of Ohio. The fifth case is Koon v. United States, 833 F. Supp. 769 (C.D. Cal. 1993), \textit{rev'd}, 34 F.3d 1416 (9th Cir.
The Rodney King beating brought for the first time to many in this country an awareness of the problem of police brutality and its role in fomenting enormous racial tension. The massive rebellion in the streets of Los Angeles against the not-guilty verdicts in the state trial court not only forced the Justice Department to try the defendants a second time, but also eradicated once and for all the public's seeming indifference to the outcomes of trials involving police brutality. Perhaps it is not surprising, then, that this case also triggered intense debate on the application of the sentencing guidelines. Even though the Supreme Court has weighed in on the side of the convicted police officers, bringing to an end the sentencing dispute in *Koon*, the issues raised by this case should not be closed, but revisited by the Sentencing Commission as soon as practicable.

(a) Procedural background

On April 17, 1993, the jury returned its verdicts in the federal trial of the four police officers charged with violating Rodney King's civil rights under section 242. Two defendants, Officers Timothy Wind and Theodore Briseno, were acquitted. Sergeant Stacey Koon and Officer Laurence Powell were found guilty. The trial court sentenced Koon and Powell to thirty months in prison, departing downward from the guidelines' sentence range which it calculated to be seventy to eighty-seven months. The court's reasons for departing were fully described in a published sentencing memorandum.

The government appealed, and the defendants cross-appealed, the sentences. A year after the sentencing, on August 19, 1994, a three-judge panel of the Ninth Circuit affirmed in part, vacated in

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One knowledgeable observer believes that most courts are departing—and only downward—in police brutality cases. Wroblewski Interview, *supra* note 222. According to Mr. Wroblewski, these departures often go unnoticed because many, perhaps most, are not appealed. *Id.*


282. Obviously, this awareness was not new for everyone. For many in minority communities, police brutality is a fact of life and the Rodney King beating was nothing more than a reaffirmation of a bitter reality. *See* discussion Part I.


284. *Id.* at 791-92.
part, and remanded the case for resentencing. The defendants asked the full Ninth Circuit to rehear the appeal. A divided court refused to do so. However, nine judges disagreed and issued a dissenting opinion setting forth the reasons why they believed the panel "seriously erred." The defendants then filed a petition for certiorari which the Supreme Court granted. The Supreme Court issued its decision on June 13, 1996, reversing the Ninth Circuit panel on most of the issues, and ordering the Appeals Court to remand the case to the District Court.

(b) Victim's conduct

The trial court began its opinion by referring to the standard for departure under the sentencing statute. It then set forth the reasons why it regarded the case as atypical, and therefore meriting downward departures for the two convicted officers. Foremost among these reasons was King's behavior in attempting to escape from the officers and resisting arrest. The court viewed King as at fault for having caused the incident and prompting the officers to cross the line into illegal conduct. According to the court, King's conduct brought the case outside the "heartland" of an aggravated assault civil rights offense because, unlike an officer's assault on a person already in custody, the officers here were initially "incited to use force." Thus, the court's analysis turned on the distinction between a police officer who intends from the beginning to assault the victim with excessive force and an officer who is provoked and whose use of initial force is reasonable. The court clearly regarded unprovoked custodial assaults as the sort of case contemplated by the guidelines, not arrests of a belligerent, drunk, struggling and potentially dangerous suspects.

286. Defendants' Petition for Rehearing with Suggestion for Rehearing En Banc was filed Sept. 16, 1994. The government's opposition was filed Nov. 7, 1994.
288. Id.
291. Koon, 833 F. Supp. at 785. For the text of the departure standard, see supra note 278.
293. 1995 GUIDELINES MANUAL, supra note 14, at 32-34, § 2A2.2 ("Aggravated Assault").
295. Id. at 787-88.
The Ninth Circuit panel on appeal disagreed and reversed the trial court for departing on the basis of King's behavior.\textsuperscript{296} It began by scrutinizing the lower court's argument that King's wrongdoing brought the case outside the guidelines.\textsuperscript{297} Referring to the analysis in \textit{Graham v. Connor} in which the Supreme Court set forth its test for evaluating excessive force claims,\textsuperscript{298} the Ninth Circuit concluded that the very volatility of the incident that the trial court determined to be a basis for departure is recognized by the Supreme Court to be often present in these situations.\textsuperscript{299} "The incorporation of this consideration into the basic fabric of the law in this area strongly suggests that provocation by the victim in a situation where an officer must act instantly is typical—not unusual."\textsuperscript{300}

The Ninth Circuit then noted that because \textit{Graham} usually applies in civil cases, the proof in \textit{Koon} was much more compelling because it showed beyond a reasonable doubt that the police officers intended to deprive King of his rights.\textsuperscript{301} "Thus the feature which the district court found unusual, and exculpatory, is built into the most fundamental structure of excessive force jurisprudence, and in criminal cases is built in twice."\textsuperscript{302}

The appellate court concluded this portion of its analysis by finding that the difference between the volatile \textit{Graham} type of case, like \textit{Koon} in which the illegal force is used some time after the encounter, and the case in which the force is illegal from the beginning, does not justify applying the guidelines differently.\textsuperscript{303} Instead, it said, the idea

\begin{itemize}
\item \textsuperscript{296} \textit{Koon}, 34 F.3d at 1460-61.
\item \textsuperscript{297} \textit{Id.} at 1457-59.
\item \textsuperscript{298} \textit{Graham v. Connor}, 490 U.S. 386, 393-97 (1989). In \textit{Graham}, the Supreme Court held that in excessive force cases, the prosecutor must identify a specific right that has been infringed, and how the courts define "excessive" will depend on what that right is. Most commonly, police cases are analyzed under a Fourth Amendment standard which inquires into the reasonableness of the police action. "Reasonableness" is judged by an objective rather than subjective standard. "As in other Fourth Amendment contexts... the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." \textit{Id.} at 397 (citations omitted). \textit{See also} discussion supra note 41.
\item \textsuperscript{299} In \textit{Koon}, the Ninth Circuit quoted from \textit{Graham}: "'[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" \textit{Koon}, 34 F.3d at 1459 (quoting \textit{Graham}, 490 U.S. at 396-97).
\item \textsuperscript{300} \textit{Koon}, 34 F.3d at 1459.
\item \textsuperscript{301} \textit{Id.}
\item \textsuperscript{302} \textit{Id.}
\item \textsuperscript{303} \textit{Id.} at 1460.
\end{itemize}
is to protect victims because they are particularly vulnerable in these explosive instances. In other words, the Ninth Circuit panel underscored that it is precisely when a victim angers police officers that officers need to be especially careful not to cross the line.

In dissenting from the denial of the petition for rehearing, Judge Reinhardt focused on the timing of the victim's provocation in relation to the defendants' unlawful conduct, observing that departures under section 5K2.10(e) do not require a tight nexus. He also rejected the panel's finding that volatility is not a ground for departure in these cases, citing the absence of any guideline language that would support the panel's position.

The Supreme Court unanimously rejected the Ninth Circuit's holding regarding victim misconduct but adopted neither the reasoning of the en banc dissenter nor that of the trial court. Instead, it embraced a test developed by then-Chief Judge Breyer of the First Circuit Court of Appeals for determining when departure is appropriate. This test distinguishes among "forbidden," "encouraged" and "discouraged" grounds for departure. According to this scheme, a sentencing court may depart unless an "encouraged" factor was already taken into consideration by the relevant guideline (in which case a court should depart only if the circumstances are exceptional). The Court then went on to find that victim misconduct is an "encouraged" ground because it is listed under section 5K2.10.

304. *Id.*

305. The Ninth Circuit panel determined that the district court justified its departure on an "implicit" basis other than section 5K2.10. *Koon*, 34 F.3d at 1458. Section 5K2.10 states in pertinent part, "if the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense." 1995 GUIDELINES MANUAL, supra note 14, at 285-86. Because the district court found that the illegal conduct occurred after King stopped being provocative, the Ninth Circuit reasoned that it could not have intended to apply section 5K2.10. *Koon*, 34 F.3d at 1458. Instead, according to the Ninth Circuit, the district court viewed King's misconduct as the cause of the escalating incident and in this "but for" sense, King was responsible. The court found that the district court "implicitly recognized" that section 5K2.10 was inapplicable because "but for" causation is a "much less demanding standard" than victim provocation. *Id.*

306. *Koon*, 45 F.3d at 1307. Section 5K2.10(e) states that "relevant conduct by the victim that substantially contributed to the danger presented" may be considered by the court in deciding how much to depart. 1995 GUIDELINES MANUAL, supra note 14, at 285-86, § 5K2.10 ("Victim's Conduct").


308. 64 U.S.L.W. 4512, 4516 (U.S. June 13, 1996) (citing United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)).

309. *Id.* See supra note 278 on the standards for departure.
The Court held that the district court did not abuse its discretion in departing on this basis because the heartland of police brutality is unprovoked aggravated assault, and the defendants' crimes were provoked by King's misconduct. Furthermore, given that the same civil rights guideline punishes unprovoked as well as provoked gov-

310. The Koon case also presented the issue of the standard of review to be applied in departure cases. The Court rejected the Government's argument that de novo review was necessary to preserve the guideline scheme from unjustified disparities, ruling in favor of an abuse-of-discretion standard. It reasoned that trial courts are in a superior position to assess whether the facts of a case bring it outside a guideline's heartland because they can compare it to the many other cases they see. Koon, 64 U.S.L.W. at 4517. "Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases." Id. The Court also cited the statute, legislative history and its own precedent in determining that, even though Congress departed from past practice in allowing appellate review of sentencing decisions, it did not intend to deprive trial courts of their discretion entirely. Id. at 4516-17.

What practical difference this aspect of the decision will make remains to be seen. On one hand, very few police brutality sentences have been appealed. See supra note 270 (most sentencing departures in police brutality cases are not appealed); infra text following note 396. On the other hand, Koon renders the chances of successful sentencing appeals remote. Now that the Supreme Court has approved the use of departures on grounds that are routinely present in police brutality cases, many more trial courts will undoubtedly take advantage of them. Without the effective oversight by appellate courts, it is likely that the cases will begin to diverge.

311. The Court took pains to interpret the district court's decision as basing departure on the provocative conduct of King, in contrast to the Ninth Circuit's opinion, which found that the district court based departure on the volatility of the incident and Kings's "but for" responsibility. By finding that the district court did not depart because the situation was volatile, but because King provoked the officers, the Supreme Court was able to sidestep the application of Graham to police brutality guidelines departure cases. Koon, 64 U.S.L.W. at 4518.

The Ninth Circuit's analysis of the district court's use of section 5K2.10 created a dilemma for the Supreme Court. The Ninth Circuit was clearly wrong to find that the district court did not rely on section 5K2.10 in support of departure. See supra note 305. The district court cited section 5K2.10 when it stated, "[o]f these four factors [warranting departure], only Mr. King's wrongful conduct independently warrants a sentence reduction. See Guideline § 5K2.10." Koon, 833 F. Supp. at 786. The problem for the Supreme Court was that the district court incorporated "but for" causation into section 5K2.10. Throughout its analysis of King's behavior, the district court subtly returned to this "but for" analysis. There is little doubt that the district court blamed King for the fate of the officers in the sense that, if King had not broken the law by speeding, none of the subsequent events would have happened.

The Supreme Court did not want to embrace the district court's interpretation of section 5K2.10. Under the district court's interpretation, departures based on victim misconduct meant that any attenuated "but for" causation by the victim discounts a sentence. Therefore, the Court corrected the district court by finding that in addition to the fact that King's behavior caused the incident to happen in the first place, King's behavior was provocative. In other words, the Court seemed to recognize that the Ninth Circuit was correct in finding the district court's "but for" analysis could not justify departure. In order to
ernment official assault, the district court was correct to differentiate between the two crimes.\textsuperscript{312}

The Court does not adequately explain how it came to define the heartland of police brutality as unprovoked aggravated assault—it simply repeats this claim as though repetition makes it true.\textsuperscript{313} It assumes that civilian aggravated assault is unprovoked and that, by extension, the heartland of police aggravated assault (defined by the simple mechanical annexation of the civil rights guideline to section 2A2.2, the aggravated assault guideline) is unprovoked, too.\textsuperscript{314} For the Court, no meaningful distinction exists between civilian and police aggravated assault: “That petitioners’ aggravated assaults were committed under color of law does not change the analysis.”\textsuperscript{315} But the Court’s reasoning is wrong. The two crimes are critically different. Aggravated assaults under color of law present particular sorts of patterns not shared with civilian aggravated assault. Foremost among the characteristics of police brutality cases is the presence of a victim who is misbehaving in some way. This is logical, when one realizes that the officer approaches the victim because the victim is doing, or perceived as doing, something wrong.

Prosecutors who bring police-brutality cases describe \textit{Koon} as a quintessential heartland case: the police officer has reason to believe the victim has broken the law; the officer confronts the victim; the victim fails to comply promptly—it may be by verbally abusing the officer, physically resisting arrest or fleeing; the officer gets angry and, after subduing the victim, retaliates with a beating.\textsuperscript{316} A common version of this scenario is known as the “post pursuit syndrome,” in which a suspect triggers a chase and when caught, is summarily punished by the very angry and adrenalin-flooded officer.\textsuperscript{317} Often, too, in a po-

\textsuperscript{312} Leaving aside the question of whether provoked or unprovoked aggravated assault constitutes the heartland in police brutality, it is clear that a court should distinguish between the two in sentencing. But it does not follow that the Sentencing Commission intended departure to be a permissible means of doing so. The guidelines provide a punishment range that would allow a court to select relatively more strict or lenient punishments from within that range.

\textsuperscript{313} \textit{Id.} at 4518, 4519.

\textsuperscript{314} \textit{Id.} at 4518.

\textsuperscript{315} \textit{Id.} at 4519.

\textsuperscript{316} Prosecutors’ Interviews, supra note 180.

\textsuperscript{317} \textit{Police Brutality Hearings, supra} note 44, at 26 (testimony of William Baker, Assistant Director, Criminal Division, Federal Bureau of Investigation (FBI)). The connection between the emotion and the adrenaline-charged, high-speed chase and subsequent punishment of the motorist by the police is described in \textit{Geoffrey P. Alpert & Roger G.}
lice-brutality case, the victim is judged to be an undesirable person by the officer, as in *Koon*. Perhaps the victim is intoxicated by drugs or alcohol, is obviously poor, or is a person of color. There are numerous reported police civil rights cases involving similar facts. Thus, the victim's character and misconduct are core elements of "heartland" police-brutality cases. If the King case deviated from the usual, it was not in the basic scenario, but in the serendipitous fact that a videotape provided evidence sufficient to prove the allegations beyond a reasonable doubt.

DUNHAM, POLICE PURSUIT DRIVING 31, 70 (1990); TOM OWENS, LYING EYES 49-50 (1994); PEREZ, supra note 50, at 31; SKOLNICK & FYFE, supra note 41, at 11. Former Los Angeles Police Department Chief Daryl Gates initially tried to explain away the King beating as a result of the post pursuit syndrome.

318. See discussion supra Part II.B.3.

319. See, e.g., United States v. Reese, 2 F.3d 870, 874-80 (9th Cir. 1993) (detailing instances of disproportionate use of police force for offenses such as loitering and minor drug possession); United States v. Boyland, 979 F.2d 851 (6th Cir. 1992) (after leading officers on car chase, victim then ran from officers and resisted arrest when caught); United States v. Myers, 972 F.2d 1566, 1569-71 (11th Cir. 1992), cert. denied, 113 S.Ct. 1813 (1993) (officer subdued initially unruly victims with repeated shots from stun gun); United States v. Messorlian, 832 F.2d 778, 781-84 (3d Cir. 1987), cert. denied, 485 U.S. 988 (1988) (intoxicated victim in minor car accident kicked at window of police car while being detained and subsequently beaten with flashlight); United States v. Patterson, 809 F.2d 244, 245 (5th Cir. 1987) (victim initially refused to obey command to cross intersection; when victim began moving, officer hung onto mirror and fired weapon into truck, causing severe brain damage); United States v. Walker, 785 F.2d 1237, 1238-39 (5th Cir. 1986) (after being stopped for speeding victim and officer had heated exchange and exchanged blows); United States v. DeCoito, 764 F.2d 690, 692 (9th Cir. 1985) (after man who committed hit and run was released, officers beat him); United States v. Fricke, 684 F.2d 1126, 1127-28 (5th Cir. 1982), cert. denied, 460 U.S. 1011 (1983) (officer beat victim after altercation at a dance hall); United States v. Harrison, 671 F.2d 1159, 1161 (8th Cir.), cert. denied, 459 U.S. 847 (1982) (victim leaped at officer); United States v. Stokes, 506 F.2d 771, 773 (5th Cir. 1975) (officer beat obstreperous and verbally abusive drunk); United States v. Delerme, 457 F.2d 156, 157-58 (3rd Cir. 1972) (officer beat victim with nightstick after high-speed chase); United States v. Barnes, CN 8948526 (M.D. Fla., plea 1993) (officer kicked victim who fled on foot after car chase); United States v. White, CR 3-91-175-T (N.D. Tex., filed June 19, 1991) (drunk driver chased and beaten when stopped); Transcript of Sentencing Proceedings, United States v. Kachadurian, No. 89-251-Cr-T-10(A) (M.D. Fla., Dec. 13, 1989) (victim beaten after high-speed chase); United States v. Plaud, CN 88-386 (G.G) (D.P.R., sentenced Feb. 23, 1989) (victim stopped for expired car registration sticker and beaten).

Civil rights prosecutors affirm that *Koon* is a standard, "garden-variety" case, prosecuted far more often than even the reported decisions show. Prosecutors' Interviews, supra note 180.

320. Another case out of Southern California is virtually identical to *Koon* and was also videotaped by a witness. In this case, two deputies from the Riverside County Sheriff's Department chased a pickup truck that evaded a border checkpoint for 80 miles. At the end of the chase, the deputies repeatedly beat two of the passengers, a man and a woman, with batons. Nineteen others ran for cover. Civil rights groups characterized the beatings as charged by anti-immigrant and racist attitudes. The Mexican government issued a statement that "[t]he obvious abuse of authority demonstrated in this case confirms
The Supreme Court completely missed the factual reality of \textit{Koon} and other police brutality cases. As a result, it could not see that the officers' behavior should not be excused or discounted simply because King's behavior was "provocative" to the officers, which obviously it was.\textsuperscript{321} The Court stated that "a finding that King's misconduct provoked lawful force but not the unlawful force that followed without interruption would be a startling interpretation and contrary to ordinary understandings of provocation."\textsuperscript{322} However, just the reverse is true: this "startling" interpretation is the only possible one. Otherwise, there would have been no basis for condemning any of the convicted officers' behavior. Their use of force became illegal because it was no longer justified once King was under control. For the Court to regard a victim under control as still provocative sets a dangerous precedent. It was not external reality, but what was going on inside the police officers' minds that brought their actions over the line from legality to illegality. They were furious at King and wanted to punish him; their adrenaline was pumping after the high-speed chase; their racism fueled their disdain for him; and while they appeared to know that they were breaking the law,\textsuperscript{323} while police culture taught them that they were above the law.

\textsuperscript{321} Of course in \textit{Koon}, the conviction of two of the four officers means that their behavior was not entirely excused. However, in many other police brutality cases the victim's misconduct does contribute to acquittal, as it did in the state criminal trial of the four officers. It should also be acknowledged that a failed defense may nevertheless provide a sound basis for a sentence reduction. The Sentencing Commission was alert to this possibility in allowing departure under the guidelines for coercion, blackmail, duress and diminished capacity. 1995 \textit{Guidelines Manual}, supra note 14, at 314, §§ 5K2.12 ("Coercion and Duress") & 5K2.13 ("Diminished Capacity"). The inclusion of section 5K2.10 ("Victim's Conduct") certainly represents another such circumstance. But this exception must be read against the general requirement that departures be permitted only in atypical cases. 1995 \textit{Guidelines Manual}, supra note 14, at 5 ("Departures"). There is nothing atypical about \textit{Koon} regarding this factor. \textit{See supra} notes 316-20 and accompanying text. If victim misconduct was uncommon in police brutality cases, the Court's endorsement of this departure ground would be understandable, but it is almost always present.

\textsuperscript{322} \textit{Id.} at 4518-19.

\textsuperscript{323} Police radio transmissions immediately after the beating strongly suggest that the officers involved knew that they had crossed the line. Their first report of the beating referred to "a big time use of force . . . ." They subsequently transmitted the word "oops," followed by "I haven't beaten anyone this bad in a long time." \textit{Christopher Comm'n}, \textit{supra} note 164, at 14-15.
(c) A "mix" of departure grounds

In addition to King's misconduct, which reduced the defendants' offense level by 5 points, the sentencing court found further grounds for departure. These other grounds, it said, unlike the victim's conduct, did not independently warrant reductions, but, in combination, they formed unique circumstances that made sentencing outside the guidelines appropriate.\textsuperscript{324}

The Ninth Circuit accepted the district court's approach, cautioning, however, that in the mix of factors that may combine to justify a departure, only factors permitted under the guidelines may be considered.\textsuperscript{325} On appeal, it reviewed each of the grounds the district court employed.

(i) Defendants' vulnerability in prison

The trial court specified the defendants' "extreme vulnerability to abuse in prison" and their exposure to additional adversarial proceedings as two categories of additional punishment that justified downward departure.\textsuperscript{326}

Regarding the first of these, the court found that because of the notoriety of the case, the outrage surrounding it, and the defendants' status as police officers, they were susceptible to abuse in prison, a form of punishment exceeding the guidelines.\textsuperscript{327} The district court recognized that, unlike other cases in which extreme vulnerability to prison abuse may warrant downward departure, in this case the defendants' vulnerability was not due to their physical characteristics. For this reason, it said that in order to support departure, this factor must be considered together with others.\textsuperscript{328}

While open to the possibility of downward departure on this ground in cases where a defendant is vulnerable because of an extraordinary physical impairment, the Ninth Circuit rejected the district court's interpretation of extreme vulnerability to abuse in prison as including police officer status.\textsuperscript{329} It said that departure because of a person's notoriety or occupation would be inconsistent with the guidelines. Such determinations would be subjective and open-ended, inviting great disparities and thus subverting the guidelines' pur-

\textsuperscript{324} Koon, 833 F. Supp. at 786.
\textsuperscript{325} Koon, 34 F.3d at 1452.
\textsuperscript{326} Koon, 833 F. Supp. at 788-89.
\textsuperscript{327} Id. at 788.
\textsuperscript{328} Id.
\textsuperscript{329} Koon, 34 F.3d at 1455.
pose. Also, the appeals court noted that the public outrage was due to the defendants’ criminal acts and that it would be “incongruous and inappropriate to reduce appellants’ sentences specifically because individuals in society have condemned their acts as criminal and an abuse of the trust that society placed in them.”

(ii) Additional adversarial proceedings

The other form of additional punishment to which the district court found the defendants would be unduly subjected was the multiplicity of adversarial proceedings they faced. These proceedings, which would strip them of their jobs and tenure and disqualify them from the field of law enforcement, causing anguish and disgrace, amounted to additional punishment according to the district court. This additional punishment stemmed from that fact that the defendants were police officers.

The Ninth Circuit reversed the district court on this finding as well. It held that these sorts of personal and professional consequences of a conviction are not lawful grounds for departing under the guidelines. In its review of the law, the appeals court found that the factors which constitute aggravating or mitigating circumstances favoring a departure must relate to a “congressionally-authorized legitimate sentencing concern,” such as, for example, the culpability of the defendant or the severity of the offense. The Ninth Circuit also noted that there are “virtually unlimited” consequences stemming from a criminal conviction besides the guideline sentences. Allowing courts to consider these, as the district court suggested, would cause huge disparities, contrary to the guidelines’ purpose.

The Ninth Circuit concluded its discussion of this factor by making two further points. First, it remarked that allowing “additional punishment” to justify departures could easily entail consideration of the defendants’ socio-economic status which is impermissible under the guidelines. It also reiterated that the guidelines intend to punish public officials who have abused their positions of trust more severely than private individuals engaged in the same conduct. In this

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330. Id.
331. Id. at 1456.
333. Id.
334. Koon, 34 F.3d at 1454.
335. Id. at 1453 (citing United States v. Crippen, 961 F.2d 882, 884 (9th Cir. 1992)).
336. Id. at 1454.
337. Id.
case, the very "additional punishments" experienced by the defendants that troubled the district court stemmed from their positions as police officers. The appeals court held that it would be inconsistent with this policy of punishing public officials more harshly than others to allow departure for hardships particular to police officers.338

(iii) Need to protect the public

Another factor that the district court identified as part of the mix supporting departure was the absence of a need to protect the public because the defendants were not violent, dangerous, or likely to be repeat offenders.339 It said that the guidelines did not adequately distinguish between first-time offenders who were dangerous and potential recidivists and those who were not.340 Thus, the court reasoned, while their crimes were serious breaches of the public trust, this factor should be weighed along with the others in fashioning a fair and appropriate sentence.341

Again, the Ninth Circuit disagreed. It found that the Sentencing Commission had already accounted for dangerous offenders in drafting the guidelines and "expressly disapproved" of departures below the range of the lowest risk category.342 What the Ninth Circuit did not point out as additional support for its holding is the fact that this factor will almost always exist in a law enforcement brutality case. Law enforcement officers do not normally have a second chance in their jobs once they have been convicted of a crime. The district court's "absence of need to protect the public" factor would be contrary to the intent of the guidelines not to grant law enforcement officers special treatment but, rather, to deal with their criminal breaches seriously.

(iv) Specter of unfairness

The final factor that the district court found to constitute a mitigating circumstance not adequately considered by the Commission was the "specter of unfairness" in the successive state and federal prosecutions.343 While conceding the constitutionality of repetitive prosecutions under the dual sovereignty doctrine, the district court

338. Id.
340. Id. at 790 n.20.
341. Id. at 789-90.
342. Koon, 34 F.3d at 1456-57.
nevertheless found that the sequence of the federal convictions following state acquittals created "an unusual circumstance" and significantly burdened the defendants.\textsuperscript{344}

The Ninth Circuit reasoned that reducing a sentence on this ground directly conflicted with the guidelines and therefore could not be used as a basis for departure.\textsuperscript{345} Such a reduction does not speak to "the culpability of the defendant, the severity of the offense, [or] to some other legitimate sentencing concern."\textsuperscript{346} The appeals court concluded that the sentencing statute requires sentences to reflect the crime's seriousness and that, in cases such as these where the United States Assistant Attorney General for the Civil Rights Division has authorized a federal prosecution in order to vindicate a citizen's constitutional rights, that criterion is met.\textsuperscript{347}

A majority of the Supreme Court reversed the Ninth Circuit on two of the four "combined" grounds, the defendants' vulnerability in prison and the specter of unfairness in the successive prosecutions.\textsuperscript{348} The Court ruled that unless the Sentencing Commission has already declared that a factor is prohibited, the judiciary exceeds its authority under the sentencing statute if it determines that the factor may never be a departure ground.\textsuperscript{349} When the Sentencing Commission is silent—that is, has not specifically prohibited the factor—the sentencing court must decide if the factor removes the case from the heartland.\textsuperscript{350} Under this test, the Court's majority concluded that vulnerability in prison and successive prosecutions are not within the heartland of police brutality and therefore are permissible grounds for departure.\textsuperscript{351} However, the Court found the other two grounds on which the trial court departed, collateral employment consequences and the low likelihood of recidivism, to be within the heartland.\textsuperscript{352} Accordingly, the Court upheld the Ninth Circuit on these grounds.\textsuperscript{353}

What is remarkable about this part of the opinion is that the Court was just as casual in determining that collateral employment

\begin{itemize}
\item \textsuperscript{344} Id.
\item \textsuperscript{345} Koon, 34 F.3d at 1457.
\item \textsuperscript{346} Id.
\item \textsuperscript{347} Id.
\item \textsuperscript{348} Koon, 64 U.S.L.W. at 4521.
\item \textsuperscript{349} Id. at 4519-20.
\item \textsuperscript{350} Id. at 4520.
\item \textsuperscript{351} Id. at 4521.
\item \textsuperscript{352} The Supreme Court's characterization of these two factors is narrower than the trial court's, which included them under the broader rubric of "additional adversarial proceedings" and "need to protect the public," respectively.
\item \textsuperscript{353} Koon, 64 U.S.L.W. at 4520.
\end{itemize}
consequences are inside of the heartland as it was in concluding that victim misconduct is outside of the heartland. Without any evidence about the Sentencing Commission's deliberations or intentions, the Court made an assessment that loss of employment is to be expected when a public official is convicted of a crime. That the assessment is reasonable is undeniable. But the Court's method was unreasonable in that it imposed its judgment here just as superficially as it did with the victim misconduct factor. The only difference was in the result.

The Court employed the same process when it found that the two other factors, vulnerability in prison and successive prosecutions, brought the case outside of the heartland. It reiterated the trial court's recital of the harms the defendants potentially would suffer in prison and had already suffered in the successive prosecutions. Notably absent from this part of the Court's analysis is any reference whatsoever to the heartland.354

The only factor for which there is any clear evidence of the Sentencing Commission's intention is the recidivism issue. There, the Court properly found that the Commission explicitly rejected downward departure for a first offender with a low risk of recidivism.355 However, with each of the other factors where the Court thought that the Commission's intention was unclear, the Court should have remanded the case, requiring the trial court to make explicit findings as to whether the factors were within the heartland, referencing other police brutality cases.356 A reliable assessment of a factor's relationship to the heartland logically must be based on a cross-section of police brutality cases, yet neither the Supreme Court nor the trial court cited a single police brutality case when determining which Koon facts were inside or outside of the heartland. It is particularly ironic that the Court proceeded in this fashion, given its holding that the standard of review for departures should be abuse of discretion because the trial courts' familiarity with other guidelines cases gives them an "institutional advantage over appellate courts" in deciding whether a case falls within the heartland.357

354. Id. at 4521.
355. Id. at 4520.
356. The Court did remand the case but only for "further proceedings consistent with this opinion," or a recalculation of the sentences.
357. Id. at 4517. See supra note 310.
(2) United States v. Rorke

The Supreme Court's admonition to appeals courts to defer to the superior ability of trial courts to resolve the question of whether or not a case is in the heartland means little if trial courts refuse to educate themselves about what constitutes heartland police brutality. United States v. Rorke is an example of a heartland police brutality case in which the trial court departed downward, with the appeals court summarily affirming. As in Koon, not a single police brutality case was cited to show how the Rorke factors were atypical.

(a) The facts

The defendants, Peter Rorke, Gary Vinnacombe, Dennis Keegan, Richard Smythe and Paul Kelly, were police officers in Upper Darby, Pennsylvania. They were convicted of conspiracy and substantive violations of 18 U.S.C. §§ 241 and 242 on May 28, 1991. In its sentencing opinion, the trial court described the facts of the case as follows. An altercation took place between Diane McArdle, Rorke's pregnant daughter, and a neighbor, Edward Smith, Jr., on September 26, 1990. Smith hit her, splitting her lip. After learning of the assault, Vinnacombe, on duty, and Rorke, off duty, went to the Smith residence in plainclothes equipped with a blackjack. They had no warrant. Upon arriving, Vinnacombe called for back-up officers. Vinnacombe and Rorke pounded on the door until Smith, Jr.'s father, Edward Smith, Sr., half-dressed, opened it. He refused to let them in without a warrant. A struggle ensued and Smith, Sr. was pulled from his house and handcuffed. After he was handcuffed, Rorke struck him in the shoulder with his blackjack. Meanwhile, back-up officers had arrived, including Keegan, Smythe and Kelly. The officers carried Smith, Jr. out of the house, in the course of which he fell on the patio. The officers handcuffed him. After Smith, Jr. was handcuffed, Rorke began beating him with the blackjack, with the other officers joining in kicking and punching him. As Rorke continued to hit him, Smith, Jr. was taken to a police car. Not even alleging any reason, Rorke also ordered the arrest of another son, seventeen-year-old Bobby Smith.

The government's presentation of the facts paints a more lurid scene. Of particular relevance, there were numerous eyewitnesses from the neighborhood who were awakened by the commotion. They

358. 972 F.2d 1334 (3d Cir. 1992).
359. The trial court issued a written sentencing decision, but it is unpublished. Id.
testified that Smith, Jr. did not resist the officers. There was also testi-
mony from an officer, a neighbor and Smith, Sr. that while beating
Smith, Jr., Rorke yelled, "This is what you get when you fuck with my
daughter." None of the officers on the scene tried to protect Smith,
Jr. as he was beaten, with his hands handcuffed behind his back. Wit-
tesses testified that a neighbor from across the street yelled to the
police to "stop beating that boy." In response, one of the officers
shined a light in her face and told her "shut up or you're next." Bobby Smith, the seventeen year old son who was arrested, was taken out in his underwear, his pleas to be allowed to put on pants
rejected.\footnote{361}

Smith, Sr. and Smith, Jr. were falsely prosecuted for assaulting
police officers.\footnote{362} Throughout the six months between the Smiths' ar-
rests and criminal trial the defendants kept silent about what had hap-
pened.\footnote{363} The coverup continued through the trial.\footnote{364} The Smiths
were acquitted despite the false testimony of Rorke, Vinnacombe and
Keegan. Thereafter, the federal investigation started, leading to the
convictions of the officers in this case.\footnote{365}

(b) The sentencing

After making some adjustments, the court determined the guide-
line ranges to be 168-210 months for Rorke, 108-135 months for Vin-
nacombe, 87-108 months for Keegan, 70-87 months for Smythe, and
57-71 months for Kelly.\footnote{366} In sentencing the five defendants, the court
departed dramatically downward from these guideline ranges. Rorke
received sixty months, Vinnacombe thirty months, and Keegan,
Smythe and Kelly twenty-four months each.\footnote{367}

(i) Victim's conduct

The court first expressed its disapproval of the guideline sentence
for Rorke.\footnote{368} It found that the victim, Smith, Jr., significantly contrib-

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361. Brief for the United States at 12-17, United States v. Rorke, 972 F.2d 1334 (3d Cir.
    1994) (No. 91-19960).
363. Brief for the United States at 21, Rorke, 972 F.2d 1334 (3d Cir. 1994) (No. 91-
    19960).
364. Id. at 21-22.
366. Id.
367. Id.
368. "I have to tell you that I can't believe that any federal district court judge sitting
today under the facts of this case would sentence this defendant to jail for 14 years without
the possibility of parole. I just can't believe it. That does not mean that he does not de-
uted to provoking the crime, justifying departure under section 5K2.10. The court rejected the government's argument that, to support departure, the provocative conduct must have been proximate in time to the crime, the conduct must have been directed at the defendant, not his daughter, and the defendant's response must have been proportional to the provocation.\(^\text{369}\)

The court's reasoning was not developed. It simply found that the cases cited by the government did not support this standard.\(^\text{370}\) As for the impact of the provocative conduct, the court was satisfied that an assault of Rorke's daughter was tantamount to an assault on Rorke himself.\(^\text{371}\) Like the trial court's sentencing in \textit{Koon}, the court here embraced a "but-for" analysis, stating that but for the original assault, nothing would have happened that evening.\(^\text{372}\) In adopting this causation theory, the court gave no indication where it would draw the line. Under its reasoning, even the false police reports and perjury at the victims' trials could be defensible responses to the provocation under a "but-for" theory.\(^\text{373}\)

In the end, the court justified its departure on an emotional argument. It said departure was justified because "[i]n this case, Defendant Rorke, though acting under color of law, responded as a father to the news of the beating of his daughter .... As the Sentencing Commission did not adequately take these facts into consideration, the


\(^{369}\) \textit{Id.}

\(^{370}\) It relied on, among other cases, United States v. Yellow Earrings, 891 F.2d 650 (8th Cir. 1989), a case with no relevance to police brutality. In \textit{Yellow Earrings}, the female defendant stabbed the victim immediately after he assaulted, verbally humiliated and confronted her—nude—demanding that she have sex with him. He was six to eight inches taller, and appeared much stronger, than she was; he was drunk and unpredictable, and some of his friends were present from whom he sought support. \textit{Id.} at 651. In the \textit{Rorke} court's discussion of \textit{Yellow Earrings}, in which downward departure was upheld where the provocation to an assault was attempted rape, the court suggested that it was satisfied that Rorke's response to the provocation was proportionate to the defendant's response in that case. Sentencing Opinion at 6, \textit{Rorke} (No. 90-485-01). In applying \textit{Yellow Earrings}, the court did not distinguish between a private citizen's response to provocation and a trained police officer's. \textit{Id.}

\(^{371}\) Sentencing Opinion at 7, \textit{Rorke} (No. 90-485-01). The court's reasoning is reminiscent of antiquated laws rendering women the property of men.

\(^{372}\) \textit{Rorke} Sentencing Transcript, \textit{supra} note 368, at 61. In its opinion, the court again employed a "but for" theory of the case. "There is no question that Smith, Jr.'s conduct precipitated this incident and that absent this, Defendant Rorke, let alone the other defendants, would not have been at the Smith residence that evening." Sentencing Opinion at 7, \textit{Rorke} (No. 90-485-01).

\(^{373}\) Since the Supreme Court's decision in \textit{Koon}, perhaps such attenuated causation would not be allowable. \textit{See supra} note 311.
Court departed below the range as calculated under the guidelines.\(^{374}\)

(ii) Aberrant behavior

The trial court also cited aberrational behavior as a reason for departing for all of the defendants.\(^{375}\) It found that their conduct was out of character, spontaneous and thoughtless,\(^{376}\) and that the guidelines did not account for single acts of aberrant behavior.\(^{377}\)

There are patent flaws with the court’s analysis. First, the court relied on commentary in the guidelines to show that the Commission failed to address single acts of aberrant behavior.\(^{378}\) This commentary refers only to those offense levels where probation may be appropriate.\(^{379}\) Second, first-offender status is expressly prohibited as a basis for downward departure under the guidelines.\(^{380}\) Third, the conduct of the defendants did not consist of a single act but rather of sustained criminal behavior over a period of time encompassing the coverup.\(^{381}\) Finally, the spontaneity of the defendants’ initial actions should not justify departure because this “heat of action” conduct is within the “heartland” of police-brutality cases.\(^{382}\)

What is most troubling about the court’s approach is the underlying attitude it revealed. The character evidence that the officers presented the court was impressive.\(^{383}\) But, like white-collar offenders, police officers usually have good reputations and upstanding lifestyles. They do not have criminal records or they could not be employed in law enforcement. To allow downward departure on this ground would undermine Congress’ goal of uniformity in sentencing.

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375. Id.
376. Id. at 7, 10, 12-13, 15.
377. Id. at 7.
379. Id.
381. See Sentencing Opinion, Rorke (No. 90-495-01).
382. Id.
and the Sentencing Commission's goal of fairness and accountability in the civil rights guidelines.\textsuperscript{384}

A third basis for departure that the court applied illustrates this point. The court cited Smythe and Kelly's youthfulness, lack of sophistication and inexperience to support departures in their cases,\textsuperscript{385} but these factors are almost never allowed consideration in other sentencing contexts.\textsuperscript{386} Smythe and Kelly were middle-class defendants with college educations and police academy training, advantages other drug or blue-collar defendants of a similar age lack.\textsuperscript{387} The routine rejection of similar claims by those far less privileged—for example, many courts have reversed downward departures for young drug defendants\textsuperscript{388}—makes the court's application of them here seem unfairly biased. As in \textit{Koon}, the trial court's sympathies with the defendants unduly influenced its decision-making.

(c) An unexceptional case

It is evident that the court's analysis ignores the concept of the "heartland crime." Obviously the sentencing guidelines cannot predict all the myriad of ways and circumstances in which human beings commit crimes. Their failure to anticipate the precise facts present in a particular case should not, alone, invalidate a sentence. That is why Congress set a generic boundary: only cases which present aggravating or mitigating circumstances of a kind, or to a degree, not adequately considered by the Sentencing Commission, may be sentenced outside the guidelines.\textsuperscript{389}

The \textit{Rorke} case does not fit this exception. Police must often deal with rude, obnoxious, assaultive, even evil, people. They are trained

\textsuperscript{384} Similarly, the Sentencing Commission has criticized pre-guideline sentencing practices of giving probation to an "inappropriately high percentage" of white-collar or "economic" criminals. 1995 \textit{GUIDELINES MANUAL, supra} note 14, at 7.


\textsuperscript{386} The guidelines state that age, education and mental and emotional conditions are not ordinarily relevant to sentencing determinations. 1995 \textit{GUIDELINES MANUAL, supra} note 14, at 275-76 § 5H1.1 ("Age"); § 5H1.2 ("Education and Vocational Skills"); and § 5H1.3. ("Mental and Emotional Conditions").

\textsuperscript{387} Brief for the United States at 88, United States v. Rorke, 972 F.2d 1334 (3d Cir. 1994) (No. 91-19960).

\textsuperscript{388} See, e.g., United States v. White, 945 F.2d 100, 101 (5th Cir. 1991) (reversing departure from 151 to 120 months for 18 year old drug defendant); United States v. Shoupe, 929 F.2d 116, 120-21 (3d Cir. 1991) (reversing departure from 168 to 84 months for 18 year old drug defendant); United States v. Summers, 893 F.2d 63, 69 (4th Cir. 1990) (reversing departure from 352 to 242 months for 23 year old drug defendant).

to withstand provocation.\textsuperscript{390} The fact that the provocation here was personal should not remove the case from the "heartland." Granting the anger that Rorke clearly and understandably felt upon learning of the assault of his daughter, nevertheless as a police officer he should not act outside the law. "The very essence of the civil rights statutes is that trained police officers cannot take the law into their own hands for real or perceived slights and exact summary punishment . . . ."\textsuperscript{391} When police cross this line by summarily punishing people who anger them, they should be penalized under laws enacted to censure exactly this sort of behavior.\textsuperscript{392}

\textsuperscript{390} It is in the nature of their work that police can expect to encounter people who are "unstable, ill-dressed, pugnacious, and threatening." \textsc{Skolnick \& Fyfe, supra} note 41, at 95. Police officers are taught to deal with difficult people and to de-escalate tense and potentially dangerous situations if possible. "[T]he parameters of the police license to use force generally are conceptualized in training and policy as a scale from which officers should pick the least severe degree of force likely to accomplish the job at hand." \textit{Id.} at 38. The court in United States v. Steele, No. 3:91-11233-01 (S.D.W.Va. 1992), spoke to this point when it rejected downward departure on grounds of victim provocation in sentencing a deputy sheriff for beating and striking a drunk and abusive prisoner in his custody: The defendant here was . . . a well-trained police officer. He had been through the State Police Academy, which trains policemen to be state policemen or members of the Department of Public Safety of West Virginia. He had considerable experience thereafter as a police officer . . . . People in law enforcement may not permit passion to control their actions. They must with total disinterest and without bias or passion do what they have to do . . . . I sometimes read in a newspaper of heinous crimes that people have committed and it makes me so indignant that I feel like going out and trying to hunt them up myself and choke them to death . . . but that's not our system of justice. When you get on the bench or when you're a police officer or a United States Attorney or prosecuting attorney or a lawyer, it is your duty to do what the law says, not what your personal feelings tell you to do.

Transcript of Sentencing Hearing at 10-11, \textit{Steele} (No. 3:91-11233-01).

\textsuperscript{391} Sentencing Memorandum of the United States at 15, United States v. Rorke, No. 90-485 (E.D. Pa.) (undated).

\textsuperscript{392} Moreover, the court did not review the circumstances spelled out in section 5K2.10 when victim conduct may support departure. If it had, it could not have justified departing under it. For example, even if Smith, Jr.'s behavior can be said to have contributed significantly to provoking the beating, it cannot be said to have done so in the subsequent false prosecutions. Likewise, the subsequent events were not proximate in time to the victim's conduct. According to a government brief, the beating itself occurred close to two hours after Smith, Jr. assaulted McArdle. Sentencing Memorandum of the United States at 14, United States v. Rorke, No. 90-485 (E.D. Pa.) (undated). This sequence is far less proximate than the victim's conduct was to the police beatings in the \textit{Koon} case. Rorke's repeated beating of Smith, Jr., not to mention the beating of Smith's father and false arrest of his father, brother and him, was not proportional to the provocation of Smith, Jr.'s one punch to his daughter. Finally, the court did not discuss the physical characteristics of the victim, the persistence of his conduct, the danger perceived by the defendant or the danger presented to the defendant as required under section 5K2.10, undoubtedly because they were irrelevant. But their very irrelevance goes to the issue of
The *Rorke* case squarely raises the question of even-handed application of the guidelines. Many of the sentencing court's concerns and grounds for departure are compelling, yet the guidelines normally reject them. Along with *Koon*, this case may be used as precedent for treating police officers and other law enforcement personnel in a privileged way. Such an outcome would vitiate enforcement mechanisms for criminal civil rights violations, send an unwarranted message to the police, and undermine the public's confidence in the justice system.

(3) *United States v. Couch*

A third police brutality case, *United States v. Couch*, comes out of the Sixth Circuit. The defendant sought, but was denied, Supreme Court review of, *inter alia*, the circuit court's affirmance of the trial court's failure to depart downward from the guideline sentence he received. The Sixth Circuit held that as long as the sentence was within the properly calculated guideline range, it would not review a trial court's denial of a downward departure motion. That outcome was not surprising. Even prior to the Supreme Court's holding in *Koon* that abuse of discretion is the standard of review in sentencing departure cases, appeals courts normally upheld sentencing court's refusals to depart. *Couch* is discussed here because, along with *Koon* and *Rorke*, it is one of the few examples of a police brutality sentencing appeal, thus making its facts readily ascertainable.

(a) The facts

On August 12, 1989, Officer Robert Couch, a police officer in Covington, Kentucky, took part in a chase of Larry Overbey, a civilian who was driving at a high speed on Interstate 75. When Overbey finally gave up and pulled over, Officer Donald Andrews was already

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whether section 5K2.10 applies at all. 1995 GUIDELINES MANUAL, *supra* note 14, at 285-86, § 5K2.10 ("Victim's Conduct").


396. *See* discussion *supra* note 310.

397. The district court did not issue a sentencing memorandum. Accordingly, these facts are drawn from both Couch's petition for, and the government's opposition to, the writ of certiorari, as well as the short factual synopsis from the unpublished Sixth Circuit opinion. Where there are differences, the relevant brief is cited. Otherwise, only the Sixth Circuit unpublished opinion is cited. The government's characterization should be given more weight because the jury found Couch guilty beyond a reasonable doubt.
on the scene. By the time Couch arrived, Andrews had his gun drawn.\textsuperscript{398} Couch testified that he saw Overbey make a move toward Andrews and that Andrews shouted at Couch to grab Overbey.\textsuperscript{399} However, the government asserted that Overbey was not attempting to flee, resist or threaten Andrews.\textsuperscript{400}

The two sides also dispute how Overbey ended up on the ground. Couch claims that Overbey and he fell together to the ground when Overbey hit him in the chest.\textsuperscript{401} The government maintains that Overbey was on the ground under Officer Andrew's control from the moment Couch arrived on the scene.\textsuperscript{402} While Overbey was on the ground, Couch struck him with his metal flashlight—one time somewhere on his body according to Couch, several times on the head according to the government.\textsuperscript{403} Other officers on the scene, including Andrews, also beat Overbey.\textsuperscript{404} The incident lasted a few seconds.\textsuperscript{405} When it was over, Overbey was lying in a pool of blood.\textsuperscript{406} One officer who was there said that there was more blood than he had seen in his six and a half years on the force and that it looked like "road kill."\textsuperscript{407} Overbey received over fifty stitches for multiple lacerations to his head. He was also bruised and had welts on his shoulders and back.\textsuperscript{408}

Couch was convicted of two counts of violating section 242.\textsuperscript{409} He was sentenced to prison for sixty-three months (based on an offense level of 26) on the first count, out of a guideline range of sixty-three to seventy-eight months.\textsuperscript{410}

\begin{thebibliography}{99}
\bibitem{398} Couch, 1995 U.S. App. LEXIS 15617, at *3.
\bibitem{399} Id.
\bibitem{401} Petitioner's Petition at 7, Couch (No. 94-3292).
\bibitem{402} Respondent's Opposition at 3, Couch (No. 94-3292).
\bibitem{403} Petitioner's Petition at 7; Respondent's Opposition at 3, Couch (No. 94-3292).
\bibitem{404} Couch, 1995 U.S. App. LEXIS 15617, at *3.
\bibitem{405} Id. at *3-4.
\bibitem{406} Respondent's Opposition at 4, Couch (No. 94-3292).
\bibitem{407} Id.
\bibitem{408} Couch, 1995 U.S. App. LEXIS 15617, at *3; Respondent's Opposition at 4, Couch (No. 94-3292).
\bibitem{409} Count One charged him with using unreasonable force against Overbey during his arrest after a high-speed chase, causing him bodily injury. The second count charged him with falsely arresting Overbey for assault and resisting arrest. Indictment, United States v. Couch, No. CR-1-93-0033 (S.D. Ohio, filed Mar. 3, 1993). A second officer, Michael Kraft, was acquitted of these same charges. Couch, 1995 U.S. App. LEXIS 15617, at *2 n.1. Couch's conviction for the second count was reversed and remanded for a new trial by the 6th Circuit. Id. at *25-*26.
\bibitem{410} Appellant's Brief at 2, Couch (No. 94-3292).
\end{thebibliography}
(b) The sentencing appeal

In his appeal to the Sixth Circuit and petition for a writ of certiorari, Couch made the same arguments for departure that the trial courts in Koon and Rorke found credible and on which the Ninth and Third Circuits split. Although the Supreme Court denied his petition, he would stand a better chance before a sentencing court since the Court's decision in Koon.

Couch claimed that his case was atypical, thus warranting departure. In support of this claim, he referred to the same sort of circumstances that existed in Koon. He argued that the victim's "reckless and criminal behavior" played a substantial role in bringing about the incident; that he lost his job and benefits; that as a police officer he was a more likely target of physical abuse in prison than other prisoners; and that there was a reduced need to protect the public because he was not violent, dangerous, or likely to engage in future criminal conduct. Two of these circumstances, victim misconduct

411. He cited guideline commentary that allows departure in cases where "a particular guideline linguistically applies but where conduct significantly differs from the norm." Appellant's Brief at 41, Couch (No. 94-3292) (citing 1995 GUIDELINES MANUAL, supra note 14, at 5-6, pt. A, § 4(b) ("Departures"); id. at 282-83, § 5K2.0 ("Grounds for Departure"), which reiterates this principle).

412. Id. at 41-42. Couch also argued that the trial court erred in: (1) determining that his underlying offense was an aggravated assault as defined by section 2A2.2 of the guidelines, giving him a base offense level of 17 (15 for aggravated assault plus 2 for the civil rights violation under section 2H1.4); (2) "double-counting" by enhancing his sentence by 4 levels because he used a dangerous weapon; and (3) enhancing his sentence by 3 levels because Overbey sustained serious bodily injury. Appellant's Brief at 35, 38-39, Couch (No. 94-3292). Because many police brutality cases entail this sort of underlying conduct, these claims are commonly raised. There is ample jurisprudence that has developed for aggravated assault, use of a dangerous weapon, and serious bodily injury to which the courts can turn for help in determining whether they apply. See, e.g., United States v. Reese, 2 F.3d 870 (9th Cir. 1993), cert. denied, 114 S.Ct. 928 (1994) (affirming officers' conviction for use of excessive force); United States v. Park, 988 F.2d 107 (11th Cir. 1993), cert. denied, 114 S.Ct. 226 (1993) (affirming aggravated assault conviction of defendant who rushed at I.R.S. agents removing his tractor with an iron pipe); United States v. Newman, 982 F.2d 665 (1st Cir. 1992), cert. denied, 114 S.Ct. 59 (1993) (affirming Newman's conviction for interfering with victim's civil rights under color of law); United States v. Corbin, 972 F.2d 271 (9th Cir. 1992) (affirming defendant's sentencing increase because blows to the head requiring over 25 sutures constituted serious bodily injury); United States v. Williams, 954 F.2d 204 (4th Cir. 1992) (vacating the district court sentence and applying the increased 4-level adjustment for aggravated assault).

Finally, Couch maintained that the district court failed to base his sentence on injuries to Overbey that only he caused. Appellant's Brief at 41, Couch (No. 94-3292). This argument was not developed and more properly pertained to his claims that the aggravated assault guideline was improperly applied.
and vulnerability in prison, were upheld by the Supreme Court as appropriate departure grounds in *Koon*.413

Ironically, the parallels cited by Couch between his case and *Koon* undermine the rationale applied by the Supreme Court in *Koon* that would have bolstered Couch's claim. Both *Couch* and *Rorke* demonstrate that the very factors cited by the Court to be atypical in *Koon* are, to the contrary, quite common. Had the Supreme Court granted certiorari in *Couch*, perhaps the outcome in *Koon* would have been different. At the least, an awareness of the facts in *Couch* might have given the court pause in its “rush to judgment” that *Koon* was outside of the heartland.

**Conclusion**

When a court applies heartland factors to depart downward from a typical police brutality case, it is refusing to apply the guideline sentence on grounds that represent the essence of the crime. The effect of such departures is to diminish the fundamental purposes of the guidelines: to treat police officers like all other people who break the law and punish them for their crimes in proportion to the punishment prescribed for all other crimes. Departures trivialize the principle of fairness and equality for all and send the wrong message to police officers and their victims alike. Such a message is particularly pernicious given the frequent racial dimension to the crime.

*Koon, Rorke* and *Couch* are representative of countless other brutality crimes committed by police. Yet departures have been sought and granted on the basis of findings that the crimes and circumstances surrounding them are not what the Sentencing Commission envisioned when it enacted the guidelines. Given the frequency with which these same factual circumstances appear in police brutality cases (and of which the courts are in the best position to be cognizant), however haphazard the Commission's early process may have been, this challenge to the guidelines seems disingenuous. Furthermore, under any interpretation, the Commission made its intent clear when it reaffirmed and strengthened the police brutality guidelines in 1995.414 Viewed realistically, what is really going on is disagreement between departing courts and the Sentencing Commission on the use and substance of these guidelines. With *Koon*, the Supreme Court has now openly sided with these departing courts, fully sanctioning depa-
ture practice in police brutality cases under the guise of respecting the Commission’s intent.

Admittedly, the Sentencing Commission could have made a better record. The *Koon* decision invites it to do so. The Commission should take this opportunity to thoroughly study police brutality sentencing, both before and after the guidelines. By doing so, it will be able to clearly define the heartland crime. It will need to decide whether the factors that the Supreme Court said are outside of the heartland really are. The issue of victim misconduct is perhaps the most urgent, both because it is so prevalent and because the Court unanimously found that it is not. Specifically, the Commission needs to clarify whether it considers volatile police-citizen encounters of the sort contemplated by the Supreme Court in *Graham v. Connor* to be unusual.\(^{415}\) The Commission should also determine whether it endorses the test for departure that the Court adopted from *Rivera* in which factors are categorized as “encouraged,” “discouraged,” and “forbidden.”\(^{416}\) If it does approve of this test, then the Commission

\(^{415}\) See *supra* note 299 (describing how in *Koon*, the Ninth Circuit cited *Graham v. Connor* to support its holding that because police-citizen encounters are often “tense, uncertain, and rapidly evolving,” the district court should not have found *Koon* to be an unusual case); *see also* *supra* notes 41, 298-99 (discussing *Graham*). In *Couch*, the defendant argued precisely the opposite. In seeking downward departure, he asserted that his conduct should be viewed in light of all the facts and circumstances surrounding the arrest and that police “must respond to rapidly evolving situations and in these exigent circumstances are called upon to make split-second decisions.” *Appellant’s Brief* at 42, *Couch* (No. 94-3292). Without indicating so, *Couch* was quoting directly from *Graham*. 490 U.S. at 397. The Supreme Court did not directly answer this question. It simply rejected the circuit court’s characterization that the district court focused on volatility rather than provocation. See *supra* note 311.

The Sentencing Commission must recognize that *Couch*’s statement is indeed an accurate account of what police work entails. Police officers work under great pressure, often having to make instantaneous decisions. *Coulson*, *supra* note 92, at 15. As in *Couch*, the use of rapid response systems in which police are alerted through their car radios of a situation requiring intervention has intensified this dynamic. Police “must size up the people involved and make raw assumptions about the facts. Snap judgments are the name of the game. Responding officers are under pressure to act quickly. They are expected to be back on patrol as soon as possible and be ready for another assignment. Respond quickly, size up the situation, fix the immediate problem, then exit the scene: This is typical of modern police work.” *Id.* at 110. See *also* *supra* notes 91-92 and accompanying text. One of the things that makes police work so volatile is that it entails subjecting unwilling people to their authority. *Skolnick & Fyfe*, *supra* note 41, at 94. Added to this dynamic is the fact that often the people with whom police must contend are unstable. See *supra* notes 171-72 and accompanying text.

However, the Sentencing Commission should then make clear that the fact that these circumstances arise in police work is exactly the point. It brings cases such as *Koon*, *Rorke* and *Couch* squarely within the heartland.

\(^{416}\) See *supra* notes 308-09 and accompanying text.
will need to designate potential departure grounds accordingly. Finally, the Commission should measure the civil rights guideline's impact on police brutality sentences. As discussed at length in this Article, existing data provide an incomplete picture. The evidence that such a study is likely to produce—that pre-guideline sentences were unconscionably low—will fortify the Commission's commitment to the existing punishment scale. By undertaking this project, the Commission can curb unwarranted departures by setting forth more precisely permissible departure grounds and reinforcing the sentencing courts' resolve to comply.

Even if the Sentencing Commission fails to act, however, courts should resist departures in police brutality cases, despite the Supreme Court's virtual grant of unlimited power to them. As long as police brutality is a crime, to justify downward departure for reasons that are inherent in, and go to the heart of, these crimes is to suggest that the courts are not serious about addressing the problem. While mandated sentencing is surely not the only means of fighting police brutality, any dilution of effort in that aspect of the cause diminishes the trust placed in the judiciary by affected communities. Unless the citizenry believes that the courts can be counted on to try and punish police brutality to the extent willed by Congress, the deep societal chasm that currently exists will not abate.

417. See supra Part III.B.