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## Lawless Law Enforcement

Richard A. Stambul

Jeffrey M. Wilson

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## LAWLESS LAW ENFORCEMENT

If you ever go to Houston, man, you'd better walk right,  
And you'd better not stagger and you'd better not fight,  
'Cause the sheriff will arrest you, he's gonna take you down,  
You can bet your bottom dollar, you're penitentiary bound.<sup>1</sup>

### I. THE PROBLEM

The issue which this comment will consider was of concern to Mr. Justice Brandeis in 1928. He stated: "to declare that in the administration of the criminal law the end justifies the means, to declare that the government may unconstitutionally deprive citizens of any race of their equal rights with others, would be the most pernicious doctrine the Supreme Court could adopt".<sup>2</sup> The Justice was referring to the unfortunate practice of lawless law enforcement.

The legal dilemma posed by police malpractice is too great in dimension to be covered adequately here. The present comment will, then, be limited to the question of whether the legal system can effectively cope with the problem of police discrimination and brutality in the Black community.<sup>3</sup> Specifically, the authors will direct themselves to a discussion of the remedies which are currently employed to redress grievances of alleged police discrimination and brutality. Further, a proposal will be made for the solution of the problem through an effective use of the class action as well as through legislative revisions.

The problem of police misconduct in the minority Black community, although well publicized by the popular media, should be defined. Police misconduct, or lawless law enforcement, is assumed first to include instances of illegal searches, verbal abuse, and physical coercion against residents of the Black community. The problem entails the deprivation of Black citizens' constitutionally guaranteed rights by the police. Finally, the problem includes police intimidation, violence, threats and insults toward the victimized Black community.

It has always been difficult to document specific acts of police malpractice.<sup>4</sup> The reasons for this difficulty become apparent upon an examination of the problem. First, "the vast majority of police transgressions are

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<sup>1</sup> From the Negro folk song *The Midnight Special*, quoted in A. GINGER & L. BELL, *Police Misconduct Litigation—Plaintiff's Remedies*, 15 AM. JUR. TRIALS 555, 711 (1968).

<sup>2</sup> *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

<sup>3</sup> For a corollary discussion on trial conduct and technique see GINGER & BELL, *supra* note 1.

<sup>4</sup> "There [probably] are many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting), quoted in Comment, *The Federal*

acts of harassment and . . . [brutality] which never lead to prosecutions."<sup>5</sup> Consequently, such acts of harassment and intimidation are less likely to reach the courts or the public view. As Justice Jackson noted more than 20 years ago in *Brinegar v. United States*:<sup>6</sup>

Only occasional and more flagrant abuses come to the attention of the courts, and then only those where search and seizure yields incriminating evidence and the defendant is sufficiently compromised to be indicted.<sup>7</sup>

Police harassment has become a fact of daily life for a substantial minority of Americans. In recent years there have been some revealing studies, conducted on the national level, regarding police malpractice.

The import of the police malpractice problem was well emphasized in a statement of the National Advisory Committee on Civil Disorders in 1968:

We have cited deep hostility between police and ghetto communities as a primary cause of the disorders surveyed by the Commission. In Newark, in Detroit, in Watts, in Harlem—in practically every city that has experienced racial disruption since 1964—abrasive relationships between police and Negroes . . . have been a major source of grievance, tension and, ultimately, disorder.

\* \* \* \* \*

In nearly every city surveyed, the Commission heard complaints of harassment of interracial couples, dispersal of social gatherings, and the stopping of Negroes on foot or in cars without obvious basis. These, together with contemptuous and degrading verbal abuse, have great impact in the ghetto.<sup>8</sup>

The Committee concluded that "police misconduct—whether described as brutality, harassment, verbal abuse, or discourtesy—cannot be tolerated even if it is infrequent. It contributes directly to the risk of civil disorder. It is inconsistent with the basic responsibility and function of a police force in a democracy."<sup>9</sup>

The urgency of the need for a viable solution to the problem can be felt in the introductory statement of the National Advisory Committee report: "This is our basic conclusion: Our nation is moving toward two societies, one black, one white—separate and unequal. . . . To pursue our present course will involve the continuing polarization of the American community and, ultimately, the destruction of basic democratic values."<sup>10</sup>

Police misconduct toward the Black community can be viewed as a primary source of many of the political and social problems which today

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*Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 n.4 (1968). See P. JACOBS, *PRELUDE TO RIOT* (Vintage 1967); B. FLECKER, *THE COMMUNITY AND RACIAL CRISES* (1969).

<sup>5</sup> Comment, *supra* note 4, at 143-44.

<sup>6</sup> 338 U.S. 160 (1949).

<sup>7</sup> *Id.* at 181 (dissenting opinion); Comment, *supra* note 4, at 143 n.4.

<sup>8</sup> REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 299-303 (Bantam 1968).

<sup>9</sup> *Id.* at 305.

<sup>10</sup> *Id.* at 1.

hold our society in sustained tension. Nothing less than the future of our governmental system is being jeopardized by part of the public's lack of faith in its police force. If that government is to survive, the legal system on which it rests must provide remedies against police discrimination.

## II. CURRENT LEGAL REMEDIES

### A. *Ineffective Remedies*

#### 1. Police Review Boards

The various metropolitan police review boards, extensively used in nearly every major city to handle complaints of police malpractice from its citizens, differ little from one another in composition and effectiveness. These boards are too often composed of and integrated with those very police forces they were formed to survey.

This latter fact raises several ethical and pragmatic issues. Should the police be allowed in fact to "police" themselves? Can police forces who have a vested interest in their own perpetuation and public image in the white community afford to even recognize, let alone remedy, Black citizens' complaints of police discrimination, brutality and intimidation? How much impartiality can be realistically expected from a police commissioner who is required to mete out "justice" to both a police officer for whom the commissioner is theoretically responsible and to a complainant?

From the standpoint of their effectiveness in easing police-community tensions, the local review boards can be viewed generally as failures. A letter from the McCone Commission to Governor Reagan of California elaborated on part of the difficulties encountered with police review boards:

A large number of policing contacts occur under circumstances which by their nature have few or no independent witnesses, and complaints stemming from such contacts are the most difficult to resolve, as the officer and the complainant offer contradictory stories. When an investigation is unable to secure verifying information, neither the complainant nor the accused police officer is able to obtain the satisfaction desired.<sup>11</sup>

Part of the reason for the failure of police review boards to effectively respond to citizen complaints can be attributed to the self-interest of the policemen serving on the boards. When police "police" themselves, complaints are either ignored or, more often, an impossible burden of proof is placed on the complainant. As Deputy Chief Klug of Cincinnati said, "The thing that bothers me is that police continue to receive huge numbers of complaints but there are only a few instances where the complainant is upheld.

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<sup>11</sup> See Letter from McCone Commission to Governor Ronald Reagan of California, August 18, 1967, at 31 (unpublished).

They can't be wrong that much—and we can't be right that much."<sup>12</sup> When the police "refuse to account to the citizens they serve, when—in the name of *esprit de corps*—they conceal their malpractice from the public review, they compound the difficulties and dangers of their work while weakening respect and support of the citizenry. . . ."<sup>13</sup>

There are other factors which must be considered as causal in the ineffectiveness of police review boards. Two primary reasons for this failure are the lack of finances and adequate personnel to properly administer the boards.<sup>14</sup> With metropolitan populations of several million persons, the budgets allocated for such boards to meaningfully deal with complaints would approach astronomical figures.

It is important to consider whether changes could be made within the present structure of police review boards which would increase their effectiveness. Affording complainants certain basic rights, more specifically, the right of complainant to have an attorney present at a public hearing, the right to cross-examine witnesses, and the right to require publishing of the investigative report and board's decisions, would certainly foster greater confidence in the board's ability to deal with problems.<sup>15</sup> However, the problem of police discrimination would still exist even if review boards could be made more effective. One method of remedying this situation is by the creation of local boards which are made directly responsible to the members of the community by whom they are elected.

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<sup>12</sup> THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 196 (U.S. Government Printing Office, Wash. D.C., 1967), quoting Severo, *Today's Police Cast in the Role of an Enemy of Society*, The Washington Post, June 26, 1966, § A, at 6, cols. 1, 2, 3.

<sup>13</sup> INSTITUTE OF MODERN LEGAL THOUGHT 13 (1969). Therein an analysis of complaint statistics is made. It is declared that the Los Angeles Police Department contends that its investigation and decisions regarding complaints against the police are not unduly prejudiced and are, in fact, evenhanded. The police support their statement with statistics illustrating that the board sustains 40-45% of all complaints. More specifically, in 1966, the Los Angeles Police Department sustained 415 of 953 complaints; in 1967, 391 complaints were sustained out of a total of 1,016. However, a closer analysis of such allegations reveals a more realistic picture. Complaints fall into two categories, namely, civilian complaints for excessive force and complaints from police department heads for neglect of duty. In 1967, there were 369 complaints for excessive force yet only 42 of them were sustained. This equals 11.4% of the total. On the other hand, of 241 complaints for neglect of duty, 79.9% or 192 of these were sustained. Of the total complaints received in 1967, only 10.7% of the complaints sustained were for excessive force as compared to 49.5% sustained for neglect of duty. These discrepancies are, at the least, noteworthy. *Id.* at 53-73. See also INTERNAL AFFAIRS DIVISION, LOS ANGELES POLICE DEPARTMENT, ANNUAL REPORT (1965-1967).

<sup>14</sup> See Letter from McCone Commission to Governor Edmund G. Brown of California, August 17, 1966, at 4 (unpublished).

<sup>15</sup> See TASK FORCE REPORT: THE POLICE, *supra* note 12, at 197.

Thus it is apparent that the inability of police review boards to alleviate racial tensions and to effectively handle complaints suggests that an alternative must be found to which the Black complainant can turn for redress of his grievances.<sup>16</sup> Judicial action, specifically individual suits, has been one such alternative. In dealing with the issue of police discrimination against the entire Black community, how effective or desirable are individual suits? What, if anything, can be changed in the nature of such suits to improve the legal remedy for the problem of lawless law enforcement?

## 2. Individual Suits

Individual suits against police may be brought in state or federal courts.<sup>17</sup> In the past, particularly in the last three years, there have been several cases concerning police misconduct. Often these cases have resulted in substantial awards to complainants.<sup>18</sup> To the extent that a monetary award is sought, the individual suit will serve the party seeking such redress. However, in *Lankford v. Gelston*<sup>19</sup> the court noted that money damages do not suffice to repair the injury of police misconduct. The court stated:

Neither the personal assets of policemen nor the nominal bonds they furnish afford genuine hope of redress. Nor is there any provision for compensation from public funds. In any event the wrongs inflicted are not readily measurable in terms of dollars and cents. Indeed, the Supreme Court itself has already declared that the prospect of pecuniary redress for the harm suffered is 'worthless and futile.' *Moreover the lesson of experience is that the remote possibility of money damages serves as no deterrent to future police invasions.* (emphasis

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<sup>16</sup> See section III *infra*.

<sup>17</sup> 42 U.S.C. § 1988 (1964) adopts state wrongful death provisions as well as any other state remedy necessary to the full vindication of civil rights. *Brazier v. Cherry*, 293 F.2d 401, 405 (5th Cir. 1961). It may be noted that jury rules in some state courts may make use of federal jurisdiction more desirable. This may be true because according to some members of the bar, certain states systematically exclude Black persons from their juries. See A. GINGER, *Minimizing Racism in Jury Trials: The Voir Dire Conducted by Charles R. Garry in People of Cal. v. Huey P. Newton*, in POLICE MATERIALS (Howard University Law School, Reginald Heber Smith Fellowship Program, Summer 1970). Whether these charges are valid or not is not relevant here. It should be noted, at the least, that "where a jury verdict of damages is sought . . . the new Federal Jury Act of 1968 (part of 1968 Civil Rights Act) assures, if not a perfectly representative jury panel, at least a far less racially exclusive one than in the past." *Id.* at 87.

<sup>18</sup> See *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1958) (upholding jury award of \$15,000.00 for beating and coerced confession); *Roberts v. Williams*, 302 F. Supp. 972 (N.D. Miss. 1969) (Negro prisoner blinded by shotgun blast due to sheriff's negligence awarded \$85,000.00); *Rhoades v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967) (jury award for 45 minutes false imprisonment with indignities but no physical abuse reduced to \$7,500.00). See also POLICE MATERIALS, *supra* note 17.

<sup>19</sup> 364 F.2d 197 (4th Cir. 1966).

added)<sup>20</sup>

Thus, individual suits fail to provide viable recourse for broad patterns of police misconduct. Such suits are undesirable simply because they deal only with a small aspect of remedial relief for police discrimination. Individual suits seek answers only to specific instances of police discrimination which have actually occurred. However, the problem is actually a prospective one: individual suits do not alter the status quo; and, as stated by the court in *Lankford*, police discrimination and misconduct against the Black citizenry are not curbed by individual causes of action.

Excluding individual suits, then, are viable legal remedies still available to complainants in the Black minority community?

## B. *The Effectiveness of the Class Action*

### 1. Introduction

There are numerous legal remedies available under the United States Constitution, Federal Civil Rights Act, and state law against police misconduct. Remedies provided are primarily suits for damages and injunctive relief.<sup>21</sup>

<sup>20</sup> *Id.* at 202, citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *Irvine v. California*, 347 U.S. 128 (1954); and *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>21</sup> This outline was prepared by Don B. Kates, Jr., for a conference in Los Angeles on November 21-25, 1970, sponsored by the Western Center on Law and Poverty. Only changes in structure were made for its presentation herein.

- I. Misconduct Prohibited by the Constitution
  - A. Arrest Without Probable Cause
 

*Pierson v. Ray*, 386 U.S. 547 (1967); *Lucero v. Donovan*, 354 F.2d 16 (9th Cir. 1965); *Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963).
  - B. Murder, Beatings, Torture, Coerced Confession
 

*United States v. Price*, 383 U.S. 787 (1966); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961); *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1957).
  - C. Refusal of Medical Care to Persons Beaten by Police
 

*Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963).
  - D. Discriminatory Prosecution
 

*Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *Moss v. Hornig*, 314 F.2d 89 (2d Cir. 1963).
  - E. Illegal Search and Invasion of Privacy
 

*Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966); *Lucero v. Donovan*, 354 F.2d 16 (9th Cir. 1965); *York v. Story*, 324 F.2d 450 (9th Cir. 1963).
  - F. False Imprisonment
 

*Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969).
  - G. Denial of Access to Friends and Counsel
 

*Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965).
  - H. Denial of Police Protection-First Amendment
 

*Wolin v. Port Auth.*, 392 F.2d 83 (2d Cir. 1968); *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966); *Hurwitt v. Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965).
  - I. Denial of Police Protection-Equal Protection
 

*Downie v. Powers*, 193 F.2d 760 (10th Cir. 1951); *Catlette v. United States*, 132 F.2d 902, 907 (4th Cir. 1943); *Huey v. Barloga*, 277 F. Supp. 864 (N.D. Ill. 1967).
- II. Federal Civil Rights Act
  - A. 42 U.S.C. § 1983 (1964) authorizes damages or injunctive relief against vio-

However, the current magnitude of police discrimination against the Black community warrants more drastic action than these available remedies.<sup>22</sup> A feasible legal answer to the problem of police discrimination against the Black community is mandatory injunctive relief through a class action. To date, only one case has been found which joins an entire minority community in a class action to seek such injunctive relief.<sup>23</sup> This case is

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lation by state officials of any conceivable constitutional right. *Georgia v. Rachel*, 384 U.S. 780, 790 n.13 (1966). As Rep. Dawes said in supporting its enactment:

"The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. They are not defined in it, and there is no attempt in it to put limitations upon any of them; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law."

CONG. GLOBE, 42nd Cong., 1st Sess. 475 (1871).

- B. Municipalities and Other Public Entities May Be Sued for Injunctive Relief  
*United States v. Holmes County*, 385 F.2d 145 (5th Cir. 1967); *Adams v. Park Ridge*, 293 F.2d 585, 587 (7th Cir. 1961).
- C. Availability of Damages  
*Caperci v. Huntoon*, 397 F.2d 799 (1st Cir. 1968); *Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967).
- D. Availability Against Federal Officers  
*Jones v. Alfred Mayer Co.*, 392 U.S. 409, 414-15 nn. 13 & 14 (1968); *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964).
- E. Application to Private Persons  
*United States v. Price*, 383 U.S. 787, 794 (1966).

### III. Possible State Remedies for Police Misconduct

#### A. Potential Liability of Government Employer

The following states acknowledge municipal liability in one or another form: Alaska, Arizona, California, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Nevada, New Jersey, Oklahoma, Utah, and Washington. See Van Alstyne, *Governmental Tort Liability: A Decade of Change*, ILL. LAW FORUM 919 (1966).

- B. Negligence Liability of Police Officials for Hiring or Maintaining Officers Whom They Knew, or Should Have Known, to Be Dangerous and Unfit. *Fernelius v. Pierce*, 22 Cal. 2d 226, 138 P.2d 12 (1943). Query: Can a Section 1983 litigation against police be based on this type of theory? See *Roberts v. Williams*, 302 F. Supp. 972 (N.D. Miss. 1969); *Sanberg v. Daley*, 306 F. Supp. 277 (N.D. Ill. 1969). Negligence, in this situation can be based only upon a duty to fire (or not to hire) the officer, and a breach of that duty.
- C. Prosecutor's Policy of Refusal to Prosecute May Constitute Civil or Criminal Nonfeasance  
See, e.g., *State v. Winne*, 12 N.J. 152, 96 A.2d 63 (1953); *State v. Wymore*, 345 Mo. 169, 132 S.W.2d 979 (1939).
- D. Challenging Unconstitutional or Otherwise Unlawful Police Practices by State Taxpayer Suits. All police activity involves expenditure of public funds, whether for the payment of salaries or purchase of new equipment. To the extent that police activities are unconstitutional they involve waste of public funds which a state taxpayer has standing to challenge. *Wirin v. Parker*, 48 Cal. 2d 890, 313 P.2d 844 (1957) ("It is immaterial that the amount of the illegal expenditures . . . actually permit a saving of tax funds." *Id.* at 894, 313 P.2d at 846) and cases there cited. A taxpayer's suit may be maintained even by a plaintiff who has another and more direct interest. *Herr v. Rudolf*, 75 N.D. 91, 25 N.W.2d 916 (1947).

<sup>22</sup> See discussion of the problem and the difficulties of documentation, *supra* section I.

<sup>23</sup> While there have been successful class actions which join large segments of the



*Ennis v. Los Angeles Police Department*.<sup>24</sup> The size and character of the class, as a specific segment of a metropolitan population, makes *Ennis* unique. Moreover, the lack of judicial precedent to guide the bar or the courts emphasizes the importance of the *Ennis* case.

Although the class action for injunctive relief is considered to be the best legal alternative for the Black complainant, problems are seen to arise in such a suit.<sup>25</sup> An analysis of the *Ennis* case will elucidate the legal problems which are entailed in a class action of this type. *Ennis* will be critically examined in order to determine whether the particular form of class action it involves does, in fact, offer the best legal answer to the problem.

The *Ennis* case has two primary objectives: to obtain court recognition that police discrimination does exist, and to force the appropriate agencies to effectively remedy the situation. In the past, the courts have been reluctant to recognize facts of social and political life which were depriving citizens of their civil rights.<sup>26</sup> Although this recognition has been accelerated since the 1950's, any observation as to their position in the future, specifically in regard to actions against police departments, would be mere speculation. The problem then becomes a matter of finding an effective remedy. In order to achieve these objectives, major legal changes are required in the present *Ennis* format if it is to serve as a viable model for future successful class actions.

## 2. *Ennis*: The Class Action—Problems and Proposed Solutions<sup>27</sup>

In a class action as novel and of so large a scale as that involved in the *Ennis* case, several areas are determinative of success. These crucial problem areas involve the decision of who shall be in the class, notice to those members of the class of the pending action and the determination of which parties shall be named as defendants. As the present posture of the case now rests, serious legal issues are raised. The *Ennis* case joined the entire Black community of Los Angeles into one class.<sup>28</sup> Notice was

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population, most notably *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), the entire Black minority of an urban area has not previously been joined into one class action to seek redress of civil rights, let alone to obtain relief from widespread police discrimination. See also *Schnell v. Chicago*, 407 F.2d 1084 (7th Cir. 1969).

<sup>24</sup> No. 68-1763-R (C.D. Cal. filed March 1, 1968).

<sup>25</sup> "Legal alternative" refers solely to remedies available through the judiciary.

<sup>26</sup> See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (legalized discrimination for more than five decades under the slogan "separate but equal"). Use of racial barriers is legendary. See *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Dred Scott v. Sanford*, 16 U.S. 393 (1856).

<sup>27</sup> A preliminary problem to a class action is the question of jurisdiction. 42 U.S.C. § 1983 (1964) and 28 U.S.C. § 1343 (1964) provides such jurisdiction.

<sup>28</sup> The *Ennis* case presented formidable problems since many "militant" organization members were joined seeking injunctive relief to prevent discrimination against the Black community. However, it was successfully argued that such activist organiza-

effected through publication in leading metropolitan newspapers informing Black citizens who desired to be excluded from the suit that they must contact the appropriate agencies. Further, *Ennis* joined the police department and the police chief as party defendants.<sup>29</sup> Modification of the present *Ennis* format is imperative for the attainment of the sought injunctive relief.

a) *Who is in the Class?*

Federal Rule of Civil Procedure 23 provides the jurisdictional basis for a class action. The first question is: who should be joined in the class?<sup>30</sup> The obvious answer is to join all those into the class who are subject to police discrimination and intimidation. In *Ennis*, for example, this meant the entire Black community of Los Angeles.

The problems with so large a class are twofold. First, the practitioner is presented with seemingly insurmountable obstacles. He must find witnesses and collect evidence which demonstrate a "systematic pattern" of discrimination against an entire segment of the urban community. Monetary deficiency hampers the production of an effective work product. Moreover, the problems involved in adequately canvassing a population of several million for evidence are numerous. In order to depose, interrogate, and generally represent the Black population of any urban center, large sums of money, heretofore unavailable, would be necessary. Since the class is composed of hundreds of thousands of persons, adequate legal representation would require a vast armada of experienced attorneys and secretaries. The authors are unaware of the existence of any fund large enough to finance such an action.

The second problem arising is whether the Black community can be properly joined in one class. There was an argument advanced in the early stages of the *Ennis* case that since different plaintiffs claimed violations of different constitutional rights, the Black community could not be joined into a class because the grounds alleged would therefore not be common to all members of the class. This contention ignores the very thrust of the complaint. The plaintiffs are not claiming the violation of several spe-

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tions were not representative of the entire Black community. Those organizations were thus deleted as party plaintiffs in favor of *Ennis*. Still, *Ennis* seeks the same relief for the same broad class.

<sup>29</sup> The trial court dismissed the action against the police commission and city council. This decision is pending on appeal and therefore specific comment regarding such appeal will not be made.

<sup>30</sup> A class action is proper ". . . even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Advisory Committee's Notes, 34 F.R.D. 325, 390 (1964).*

cific rights but rather assert the existence of one wrong against the entire class, a systematic pattern of police malpractice directed against Black citizens.<sup>31</sup> It is important to note that such a class action is really based upon a new specie of wrong (*i.e.* police discrimination) which is further defined in terms of other numerous wrongs. Therefore, the requirements of a class action are met when it is alleged that a series of events or transactions are generated by a systematic pattern of conduct.

b) *Notice to the Class*

There is a substantial problem of notification to a class as large as the entire Black community of Los Angeles.<sup>32</sup> The court, correctly under the circumstances, entered an order in the *Ennis* case "requiring certain publication of notice in the *Los Angeles Times*, the *Los Angeles Herald-Examiner*, the *Los Angeles Sentinel* and the *Los Angeles Herald-Dispatch*."<sup>33</sup> It is recognized that personal in-hand service or even service by certified mail would pose impossible problems. As stated, the members of the class were notified through newspapers that the court would thus exclude anyone from the class upon request. The judgment would include all members who did not request exclusion. The court found that such notice was legally sufficient pursuant to Federal Rule of Civil Procedure 23.<sup>34</sup>

<sup>31</sup> See *United States v. Mississippi*, 380 U.S. 128, 142-43 (1965) where the court stated:

The District Court said that the complaint improperly attempted to hold the six county registrars jointly liable for what amounted to nothing more than individual torts committed by them separately with reference to separate applicants. For this reason apparently it would have held venue improper as to the three registrars who lived outside the Southern District of Mississippi and a fourth who lived in a different division of the Southern District, and it would have ordered that each of the other two registrars be sued alone. But the complaint charged that the registrars *had acted and were continuing to act as part of a state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote solely because of their color* (emphasis added).

See also *Contract Buyer's League v. F & F Investment*, 48 F.R.D. 7, 11 (N.D. Ill. 1969) where the court stated, ". . . the inequity of any particular contract is the result of a greater scheme of exploitation involving, among other factors, the contracts executed by the other plaintiffs."

<sup>32</sup> Approximately 780,000 Blacks populated Los Angeles County in 1967. Commission on Human Relations, *L.A. County Racial and Population Estimates by HRC Areas* (Oct. 1967).

<sup>33</sup> Court order entered by the Honorable Manuel L. Real, Judge, United States District Court, on January 5, 1970 to publish the following notice in certain Los Angeles newspapers, from January 5 through February 5, with 3/4-inch headings:

ATTENTION: ALL NEGRO (BLACK) RESIDENTS OF LOS ANGELES COUNTY—PLEASE TAKE NOTICE OF CIVIL RIGHTS SUIT IN FEDERAL COURT. . . .

(G) If you do not request exclusion, you will be included in the class of plaintiffs represented by the aforesaid attorneys. If you wish, however, you may retain your own attorney to represent your interests.

<sup>34</sup> See *Johnson v. Robinson*, 296 F. Supp. 1165, 1169 (N.D. Ill. 1967) (coverage of the suit by the news media was sufficient notice to the class). See also *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 569 (2d Cir. 1968).

This procedure raises several complex questions in regard to the doctrine of res judicata. Specifically, there are at least three distinct possibilities. First, where a party has actually read the notice; second, where a party has explicitly excluded himself from the class; and third, where a party alleges never to have read the notice yet wishes to take advantage of the court's judgment. In the first instance, where a party has read the notice and is either a named party plaintiff or an absentee member of the class,<sup>35</sup> the judgment is clearly res judicata and bars any subsequent action.<sup>36</sup> In the second example, where a party has actually excluded himself from the class, there may be even more complex problems. Briefly, where the doctrine of mutuality is recognized this party may not use the judgment in a subsequent action.<sup>37</sup> In jurisdictions which do not follow the mutuality doctrine,<sup>38</sup> a party who excluded himself from the original action could theoretically utilize the judgment at a later time.<sup>39</sup> It seems that this party would not be able to use the doctrine of collateral estoppel in a subsequent proceeding since Federal Rule of Civil Procedure 23(b)(3)<sup>40</sup> was never intended to permit such a result. To allow a person to exclude himself today and include himself tomorrow would make a mockery of the 23(b)(3) rule. The third situation is the most difficult to resolve. Here, the absentee alleges never to have read the notice nor known of the action. Theoretically, this individual would still be a member of the class because he never excluded himself. The issue then becomes whether this person should be barred from bringing a subsequent action if the class loses based on the allegation that he already had his "day in court". Any determination of the res judicata effect can be tested only in a subsequent action. The problem seems to be one of balancing this individual's right to due process (denial of "day in court") as opposed to the intent of Rule 23(b)(3), namely, to provide him with due process of law in the original action.<sup>41</sup>

<sup>35</sup> An absentee member of the class is one who is not specifically named in the pleadings, yet is a party to the action.

<sup>36</sup> See F. JAMES, JR., CIVIL PROCEDURE 585 (1965).

<sup>37</sup> The doctrine of mutuality will not permit a party to the second suit to claim that his opponent is bound by an issue litigated in a prior suit unless such party would also be bound had the decision of such issue gone the other way. Note, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment*, 52 MINN. L. REV. 509, 525 n.70 (1967).

<sup>38</sup> Two leading states which have repudiated the mutuality doctrine are New York and California. See *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P.2d 892 (1942); *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

<sup>39</sup> See 47 F.R.D. 169, 180-81 (1969).

<sup>40</sup> This rule requires as prerequisites to maintenance of any class action that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

<sup>41</sup> 47 F.R.D. 169, 180-81 (1969). See Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 652-54 (1965). Note, *Revised Federal Rule 23*, *supra* note 36, at 524-27.

The contentions of the defense on the issue of notice through newspaper publication are worthy of consideration here. The defendants indicated that some members of the class may be illiterate, while those who are literate may never read the "legal notice" section of the newspaper. Thus, the illiterate group must either be contacted through the broadcast media, through personal service, or not at all. As far as the literate members of the class were concerned, defense contended that written notice to every Black person residing in Los Angeles would be the best notice. Furthermore, it was urged that those persons who desire to be bound should give written response by affidavit. It was also contended that because the plaintiffs claimed to be representative of the interests of all Blacks in Los Angeles a positive showing that notice was received was required.

The defense argument continued that in order to insure adequate notification, the plaintiffs should be required to use the broadcast news media of radio as well as newspaper publication. Furthermore, the defendants maintained that prime or near prime time on the broadcast media should be used for such purposes whenever available. Notwithstanding the foregoing arguments, case authority was cited for the proposition that written notice by certified mail should be ordered by the court and given to all members of the class.<sup>42</sup>

It should be noted that while the defense arguments are persuasive, the cost of notification to the entire Black community by certified mail<sup>43</sup> or by television and radio coverage are impracticable at best.

### c) *Proposed Solution*

The problems of dealing with so large a class and of providing adequate notice to such a class present formidable obstacles. The decision of the *Ennis* court to allow newspaper publication of notice may be legally proper under the circumstances, yet it fails to answer relevant criticisms outlined above. The problems inherent in representing such a large class and of *de jure* and *de facto* notice are not satisfactorily answered by the *Ennis* approach.

The approach which should be employed is explained by reference to *Lankford v. Gelston*.<sup>44</sup> The problem in *Lankford* was that of harassment of Black families by illegal searches of their homes conducted by the Baltimore Police Department. Instead of bringing a class action on behalf of the entire Black community of Baltimore, as *Ennis* would suggest, the plaintiffs narrowed their plea for injunctive relief to a spe-

<sup>42</sup> *Norwalk CORE v. Norwalk Bd. of Educ.*, 298 F. Supp. 210 (D. Conn. 1968).

<sup>43</sup> The minimum cost would be \$234,000.00 plus 6¢ per oz. postage (780,000 Blacks multiplied by 30¢ cost of a certified letter).

<sup>44</sup> 364 F.2d 197 (4th Cir. 1966). *Lankford* succeeded in enjoining the police commissioner, thereby enjoining police misconduct and discrimination in Baltimore.

cific segment of the Black population. In *Lankford* the plaintiffs were families of whom 300 had been the subject of alleged police misconduct. Therefore, the *Lankford* case, by narrowing its complaint to 300 families succeeded in providing legal recourse for the entire Black population of Baltimore from such illegal searches by police in the future. The important point here is that by limiting the members of the class to a specific area, for example a relatively small geographic area in the Los Angeles ghetto community, the *Ennis* action or any similar action would resolve the very practical and formidable problems of whom to specifically join in the class and how to effectuate notice to all of the parties concerned. The use of geographic boundaries would sufficiently reduce costs and thereby allow a class to affirmatively show that all members had been notified of the action by certified mail.<sup>45</sup> In addition, the problem of being able to finance and staff the taking of depositions, interrogatories and other necessary pre-trial preparations would become comparatively less difficult. The most important assurance which this solution provides is that although only a small segment of the community would be represented, in a de facto sense the entire Black community would be protected. This is so since non-parties would be able to avail themselves of the court's decision and would, in all likelihood, benefit from the original injunction against the proper agencies.

A word of caution may be necessary here. It is not the intent of the authors to imply that non-parties could use the judgment in a subsequent action. The basis of a solution to the problem lies in ending police harassment of Black citizens. *Lankford v. Gelston*<sup>46</sup> proposed a solution through mandatory injunctive relief. The *Ennis* court could expand the *Lankford*-type injunction by forcing the police department to submit an extensive program which would prevent future violations of the class's rights. Although, in a technical sense, only the members of the class will benefit, in a de facto sense the program will reach every Black citizen in the community. The use of the *Lankford* method in an *Ennis*-type class action would hopefully force the party defendants to provide an effective plan to end police harassment. Simply stated, a program would be required to effectively curb police harassment against the members of the class. Such a program would, of course, be subject to judicial approval and would be submitted within time limits made explicit by the court. Again, as in *Lankford*, the court order would technically protect only those Blacks who were members of the class. However, the vast changes which would occur through the police proposal would not be limited to the class. Instead, all Black citizens would benefit from the original injunction.

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<sup>45</sup> Cf. *Norwalk CORE v. Norwalk Bd. of Educ.*, 298 F. Supp. 210 (D. Conn. 1968).

<sup>46</sup> 364 F.2d 197 (4th Cir. 1966).

d) *Whom to Sue*

The resolution of the question of whom to sue is vital to the success of a class action directed against police discrimination.<sup>47</sup> First, which parties, when enjoined, would have the power and the resources to effectively serve the court order? Second, it must be discovered if some or all of those entities to be enjoined are immune from the injunctive process within the federal court system.

## 1. The Police Department

The most obvious party to join in the suit is the police department. This agency is directly responsible for the harassment and intimidation against the class. Is the police department, however, immune from such a suit?

In general, it is a rule of law that a ". . . public official is immune from civil suit based upon discretionary acts performed within the scope of his authority, regardless of the motives with which he performs his duties . . ." <sup>48</sup> It has been further stated that ". . . this immunity is not abrogated by civil rights statutes"<sup>49</sup>, and that "[e]xcept as otherwise provided by statute, a public employee is not liable for injury resulting from his act or omission where the act or omission was the result of the exercise of discretion vested in him, whether or not such discretion be abused."<sup>50</sup>

It should be noted that federal courts will follow the doctrine of immunity unless it offends the Federal Constitution.<sup>51</sup> This mandate becomes specifically directed to the class action situation under discussion here. It is arguable that pursuant to the Court's decisions in *Egan v. City of*

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<sup>47</sup> An action under 42 U.S.C. § 1983 (1964) must be confined to state officials whereas suit under 18 U.S.C. § 242 (1964) would cover federal officers. *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). *See also* 2 EMERSON, HABER & DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1072-86 (Stud. ed. 1967).

<sup>48</sup> *Selico v. Jackson*, 201 F. Supp. 475, 478 (S.D. Cal. 1962).

<sup>49</sup> *Id.* *See also* CAL. GOV'T CODE § 820.2 (West 1966). *But see* *Scruggs v. Haynes*, 252 Cal. App. 2d 256, 262-68, 60 Cal. Rptr. 355, 359-63 (1967) (section 820.2 does not grant immunity to a police officer even in a suit for damages where unreasonable force was used).

<sup>50</sup> CAL. GOV'T CODE § 820.2 (West 1966).

<sup>51</sup> *Corbean v. Board of Educ.*, 366 F.2d 480 (6th Cir. 1966), *cert. denied*, 385 U.S. 1041 (1967). This principle was firmly established in *Ex parte Young*, 209 U.S. 123 (1908), where the Court held that a plaintiff may sue a state official for injunctive relief where he can show that such official was acting contrary to the Constitution. "The theory is that although the defendant official is not truly a private person, the unconstitutionality of his action removes the extension of sovereign immunity. Thus, it is sometimes said that his unconstitutional act strips him of official character and so of his immunity." *Dibble*, Syllabus for Constitutional Law 47 (unpublished, 1969-70).

*Aurora*<sup>52</sup> and *Monroe v. Pape*,<sup>53</sup> a municipality is not within the ambit of 42 U.S.C. section 1983 and is not a "person" within the meaning of that statute. If this rule were to be applied in a suit to enjoin the police department, a court could, on the basis of *Egan* and *Monroe*, dismiss such an action based upon the doctrine of immunity. However, upon closer examination, these general contentions of immunity have no basis. The Court in both cases was concerned with suits for damages and not with injunctive relief.

In the case of alleged police discrimination against the Black community, there is an entirely different factual problem.<sup>54</sup> Three reasons strongly indicate that the police department should not be immune from suit. First, there should be no doctrine of immunity because such a doctrine is not applicable to suits for injunctive relief. This was the position taken in *United States v. Clark*<sup>55</sup> where the court stated:

This doctrine of "judicial immunity" is a sound one and ingrained in the substantive law of both the Federal and State courts. . . . The Federal courts have applied it to numerous Federal officials. *However, such a doctrine of judicial immunity applies only when those officials are faced with civil suits for damages in connection with the performance of their official duties.* The doctrine has no application where, as here, the relief sought is preventive. . . . The principle that no State official—regardless of his position—is immune from having his conduct challenged—in the form of a preventive action—is well established.<sup>56</sup>

Second, where persons are subjected to a deprivation of their constitutional rights because officials are acting beyond the scope of their authority, the doctrine of immunity is inapplicable.<sup>57</sup> Third, the doctrine of state immunity cannot be permitted to interfere with federally protected rights. Otherwise, protection of section 1983 rights might be easily circumvented in many states.<sup>58</sup> Consequently, the police department may

<sup>52</sup> 365 U.S. 167 (1961).

<sup>53</sup> 365 U.S. 514 (1961).

<sup>54</sup> *Randall v. Newark Housing Auth.*, 266 F. Supp. 171 (D.N.J.), *rev'd* 384 F.2d 151 (3d Cir. 1967), *cert. denied*, 393 U.S. 870 (1968) involved a claim for injunctive relief by tenants, and distinguished *Monroe* on that basis.

<sup>55</sup> 249 F. Supp. 720 (S.D. Ala. 1965).

<sup>56</sup> *Id.* at 727.

<sup>57</sup> The police are sought to be enjoined in the *Ennis* class action not for discretionary acts but for blatantly lawless conduct of a sort which has never been protected. *See Pierson v. Ray*, 386 U.S. 547, 555 (1967), where the court stated "The common law has never granted police officers an absolute and unqualified immunity. . . ."

<sup>58</sup> In *Beauregard v. Wingard*, 230 F. Supp. 167, 173-74 (S.D. Cal. 1964) the court stated

In cases involving civil rights, California cases stating California public policy as to immunity for California law enforcement officers, do not govern; we must turn to federal cases. And likewise, we are not precluded by federal cases based on diversity of citizenship; nor can we regard federal cases concerning federal law enforcement officers as controlling, for such officers, acting as such, are not included within the phrase "under color of" state law, and a suit for violation of civil rights under 42 U.S.C.A. § 1983 may not be brought against them.

And in *Robichaud v. Roman*, 351 F.2d 533, 536 (9th Cir. 1965) the court stated,



be joined as a party defendant to the class action.<sup>59</sup>

## 2. The Police Chief

The police chief is an important party to join in the suit as his power includes the supervision, control, regulation, and management of the department plus the extensive power to make and enforce all rules "necessary and desirable" to the operation of the department.<sup>60</sup> It is thus clear that the police chief is a proper and necessary party in an action pursuant to 42 U.S.C. section 1983. Is he immune from suit? The answer is in the negative. Any party which exerts substantial control over the police department is properly joinable in such a class action. The police chief does not have the benefit of the immunity doctrine for if injunctive relief were aimed at and binding upon individual officers and not upon the chief, the decree would be ineffective.<sup>61</sup>

## 3. The Police Commission

Still another vital party to the suit is the police commission or, where no such commission exists, that governmental agency responsible for the de jure and de facto management and control of the police department. Most city charters, including that of Los Angeles, enumerate the division of powers within the police departmental structure. In Los Angeles, the police commission is explicitly charged with controlling and managing the police department.<sup>62</sup> Moreover, it is obligated by the charter to determine that complaints of police malpractice and misconduct are properly investigated and adjudicated. Therefore, the commission is the sole agency which has the power and the duty to deter or prevent police discrimination against the Black community. Consequently, since the commission is, so to speak, "where the buck stops", it must be joined in the class action.

Nonetheless, it has been maintained that the police commission should

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"[I]f immunities are broadly granted to state officers without consideration of the nature of their alleged misdeeds . . . the statute [42 U.S.C. § 1983] becomes subject to circumvention, if not emasculation."

<sup>59</sup> See *Schnell v. Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Lucero v. Donovan*, 354 F.2d 16 (9th Cir. 1965); *Jordan v. Hutcheson*, 323 F.2d 597 (4th Cir. 1963); *York v. Story*, 324 F.2d 450 (9th Cir. 1963); *Houser v. Hill*, 278 F. Supp. 920 (M.D. Ala. 1968); *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966).

<sup>60</sup> LOS ANGELES CITY CHARTER, art. VI, § 78 and art. XIX, §§ 198-201.

<sup>61</sup> "The test as to whether a superior official can be dispensed with as a party was stated to be whether 'the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court.'" *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 96 (1949), quoting from *Williams v. Fanning*, 332 U.S. 490, 494 (1947).

<sup>62</sup> LOS ANGELES CITY CHARTER, Art. VI, §§ 70, 78, 79. See also *Report by the Governor's Commission on L.A. Riots* 30 (1965).

be immune because of the distant connection between the commission and the alleged acts of discrimination by the police department.<sup>63</sup> This reasoning is weak. The police commission is the agency directly responsible for the police operation.<sup>64</sup> That responsibility implies a clear proximity of the commission to the department and, by itself, provides a legally sufficient basis for a claim against the police commission.<sup>65</sup>

It seems, then, that the police commission cannot avail itself of immunity on the grounds of its "distance" from departmental action. Moreover, any state official or entity is enjoined under the Fourteenth Amendment's proscription of state action contrary to the due process clause.<sup>66</sup> Consequently, if a city or public entity is enjoined under the Fourteenth Amendment, it seems bizarre to contend, as does the defense in *Ennis*, that the police commission is not enjoined under statutes intended to protect persons against deprivation of rights secured by the Fourteenth Amendment.<sup>67</sup> Further, "The concept of federalism: *i.e.*, federal respect for state institutions, will not be permitted to shield an invasion of the citizen's constitutional rights."<sup>68</sup> It has been decided that this principle of federalism will not shield ". . . the activities of the executive and judicial branches of the state from interdiction when constitutional rights are involved."<sup>69</sup> Therefore, it is apparent that there is no obvious legal justification for imposing the doctrine of immunity as a bar to a class action suit against the police commission. *A fortiori*, the authorities cited above indicate that the courts should, in fact, require the inclusion of the police commission in such a class action.

It is now apparent that the class action must include, to be effective, a three-pronged attack aimed at enjoining the agencies charged with the power of management and control of the police force. These three are the police department itself, the police chief and the police commission. It has been shown that none of these entities should or do have immunity from an action involving the constitutional infringement of the class's rights pursuant to 42 U.S.C. section 1983.

### C. Conclusion—*The Modified Ennis Class Action*

The underlying purpose of the *Ennis* case is to stop the unconstitutional deprivation of the rights of Black citizens by the police department.

<sup>63</sup> See Brief for Defendant [City Attorney's Office of Los Angeles], *Ennis v. L.A.P.D.*, No. 68-1763-R (C.D. Cal. filed March 1, 1968).

<sup>64</sup> LOS ANGELES CITY CHARTER, art. VI, §§ 70, 78, 79.

<sup>65</sup> *Lankford v. Gelston*, 364 F.2d 197, 205 n.9 (1966).

<sup>66</sup> See *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

<sup>67</sup> The classic example, as far as this discussion is concerned, is 42 U.S.C. § 1983 (1964).

<sup>68</sup> *Jordan v. Hutcheson*, 323 F.2d 597, 601 (4th Cir. 1963).

<sup>69</sup> *Id.* at 601, referring to *Bell v. Hood*, 327 U.S. 678 (1946).

However, the *Ennis* injunction does not seek to make the courts a super police review board. Rather, it seeks to direct the proper agencies to propose an effective plan to curb police misconduct and discrimination and to offer an effective program of redress for aggrieved Black citizens.

After a careful review of the facts, it is contended that the use of police boards is not effective to combat the problem. Individual suits ignore the central issue and concentrate on redress of individual grievances. It is the class action, when limited, which offers the most viable legal answer for the entire Black community.

However, while the injunctive relief sought may accomplish some of the goals mentioned above, it is reminiscent of the type of injunctive order in *Brown v. Board of Education*.<sup>70</sup> That decision, handed down in 1955 required "all deliberate speed".<sup>71</sup> However, some fifteen years later this well-known case still leaves the problem unsolved. What can be done to avoid a repetition of the unsatisfactory *Brown* results?<sup>72</sup> Since there are numerous complex difficulties inherent in a judicial disposition of the problem of police discrimination, it is important to examine the legislative branch for a possible supplementary solution.

### III. A LEGISLATIVE SOLUTION

The modifications of the *Ennis* model should insure a fair chance of future success in other class actions. However, our system of separation of powers expressly reserves certain powers to other branches of the government. Therefore, it is suggested that a program to effectively deter police discrimination against racial minorities and to provide speedy redress of complaints must emanate from the legislative branches of our cities and states and not from the courts.

It must be noted that the class action injunction will provide desperately needed relief. However, this relief should be only supplementary to major legislative innovations and revisions of the current police structure.

The problem which our city and state legislative agencies must solve is police brutality, harassment, and intimidation aimed at the Black community. The impotence of police review boards serves only to amplify the mood of distrust and tension in our nation's cities. Individual suits brought by Black complainants do not alter this situation. Instead, they

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<sup>70</sup> 349 U.S. 294 (1955).

<sup>71</sup> *Id.* at 301.

<sup>72</sup> The specific manner in which the *Brown* results could be avoided is generally beyond the scope of this comment. However, one method which could be employed was suggested. The court could order the party defendants to submit a program to curb police harassment by a definite date. Failure to observe court imposed deadlines would result in the imposition of penalties. Such penalties could include, for example, the issuance of a contempt order.

ignore the community problem for the sake of individual complainants. Finally, the class action, even when modified to create ultimate effectiveness, may not provide sufficient impetus for change. Any solution must entail the creation in the Black community of a climate of trust and confidence in the police force by effectively deterring police malpractice against racial minorities. The most effective way to attack this problem is by the abolition of the present hierarchical structure of city and county police organizations and the creation of community controlled police departments.

In almost every American metropolis, the police no longer are under civilian control—that is to say, democratic public control. Whether it be constant harassment of black youth in Los Angeles and white youth in Washington, brutal repression of white dissidents in Chicago . . . refusal to obey the orders of a black mayor in Cleveland and those of a white president of the Board of Education in Philadelphia, or failure to answer routine calls for assistance from black neighborhoods of Detroit and white neighborhoods of Baltimore, *it is clear that there are many people in the metropolitan areas who do not believe they can make the police respond to their needs.* (emphasis added)<sup>73</sup>

In order to create a situation where police are safe in our cities, where the inhabitants of those cities have faith in the police, and where citizens are secure in the knowledge that police harassment will be dealt with fairly and firmly, neighborhood police departments must be created. As one Black resident of Watts said:

The police is brainwashed that every colored person is a criminal. In the old days the police were better. They were on the beat and the parents cooperated good with the police. The police would come to the house and talk to the kids if they did something bad. Now they just talk to you on the phone, and the kids hate them and they got no respect for them. The police used to have band groups and boy and girl clubs but they stopped all that. Now they just give out tickets and arrest you. That's one of the reasons we had the trouble here. [referring to the 1965 Watts riot]<sup>74</sup>

Specifically, community departments would be designated by geographic boundaries within each city. These neighborhood police agencies would be financially independent.<sup>75</sup> This would foster a fundamental change of attitude in police-community relations; the police would, out of necessity, become responsive to the needs of the neighbor-

<sup>73</sup> Waskow, *Community Control of the Police*, TRANS-ACTION MAGAZINE, December, 1969, at 4. See also P. JACOBS, PRELUDE TO RIOT, 1-60 (Vintage 1967).

<sup>74</sup> P. JACOBS, *supra* note 4, at 60. A return to the "old days", while seemingly a desirable panacea, is virtually impossible. The fear and racial tension which now are present in every city have progressed too far to allow a proverbial turning back of the clock. Furthermore, the bureaucratic complexities of modern police structure would seem to eliminate any chance of returning to the "good old days".

<sup>75</sup> Existing funds would be apportioned among each community according to population and crime rate statistics. Since massive reorganization would require additional sums of money, new sources would have to be found. The general tax coffers, federal-state-community grants, and novel methods of revenue collection would have to be sought.

hood they served. A strong emphasis would be placed upon recruiting policemen from the very neighborhood with which they were to deal. Consequently, many officers would have an understanding of local needs and conflicts and would be able to resolve these problems with the least amount of friction.

Each community would elect a civilian board of police commissioners to staggered terms of office.<sup>76</sup> This board would be elected by popular vote and would have a two-fold responsibility. First, to oversee and generally direct the neighborhood police chief and second, to form a civilian review board to deal with community complaints.

Each board of commissioners would be responsible for appointing high-level police officers. This function could be done with the approval of the mayor, a metropolitan headquarters, or any legislative agent. The commission would have the power to hire and discipline individual officers. Further, the board would set policy decisions and control the establishment of law enforcement priorities.<sup>77</sup> Therefore, by exerting control over policy and a disciplinary power over officers the community could, by their votes, exert a strong check over police malpractice.

To assure speedy redress of grievances, each board of commissioners would sit as a review board to hear citizen complaints. Unlike present review structures which have no inherent power to deal effectively with such complaints, these review boards would have the power to suspend, fine and expel police officers found to be guilty of proscribed offenses against the community. Each hearing would afford both parties the same rights they would have before any court. Decisions of the board could be appealed to a regional board composed of select commissioners from each community. In this way the review board could effectively deal with citizen complaints.

The concept of community control has raised two primary objections. First, it has been argued that differences in styles of law enforcement might plague the individual as he moved from one area to another. Second, problems of "hot pursuit" from one commission's jurisdiction to another would frequently arise. However, it has been shown that these problems are really illusory. "[A]lready, in a city like Washington where U.S. park police, capitol police, White House police and metropolitan police have major geographically distinct jurisdictions within the District of Columbia, solutions for 'hot pursuit' and similar problems [arising from

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<sup>76</sup> Terms of office would be similar to the system used by the United States Senate. A portion of the board would remain in office while another segment would be newly elected. The purpose of this process would assure the presence of experienced members alongside freshman commissioners. However, unlike the congressional seniority system, each commissioner's power would be no greater than any other.

<sup>77</sup> See also Waskow, *Community Control of the Police*, *supra* note 73, at 4.

different styles in law enforcement] have been worked out."<sup>78</sup>

It should be further noted that neighborhood controls need not destroy city-wide institutions. Criminology, fingerprint, modus operandi files and many "white collar" crimes could still be effectively dealt with by metropolitan agencies. However, community-elected commissioners would be the overseers and not an impersonal police-establishment complex.

It is important to note that these reforms are intended to provide a general foundation for proposed legislation. It is the concept of a law enforcement agency directly controlled by the citizenry that is critical to this discussion. The primary reason for such a radical concept as community-controlled police lies in the belief that only such a program will effectively control police malpractice and will foster an attitude of mutual cooperation and dependence between the police establishment and the Black people.

*Richard A. Stambul*

*Jeffrey M. Wilson*

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<sup>78</sup> *Id.* at 5.