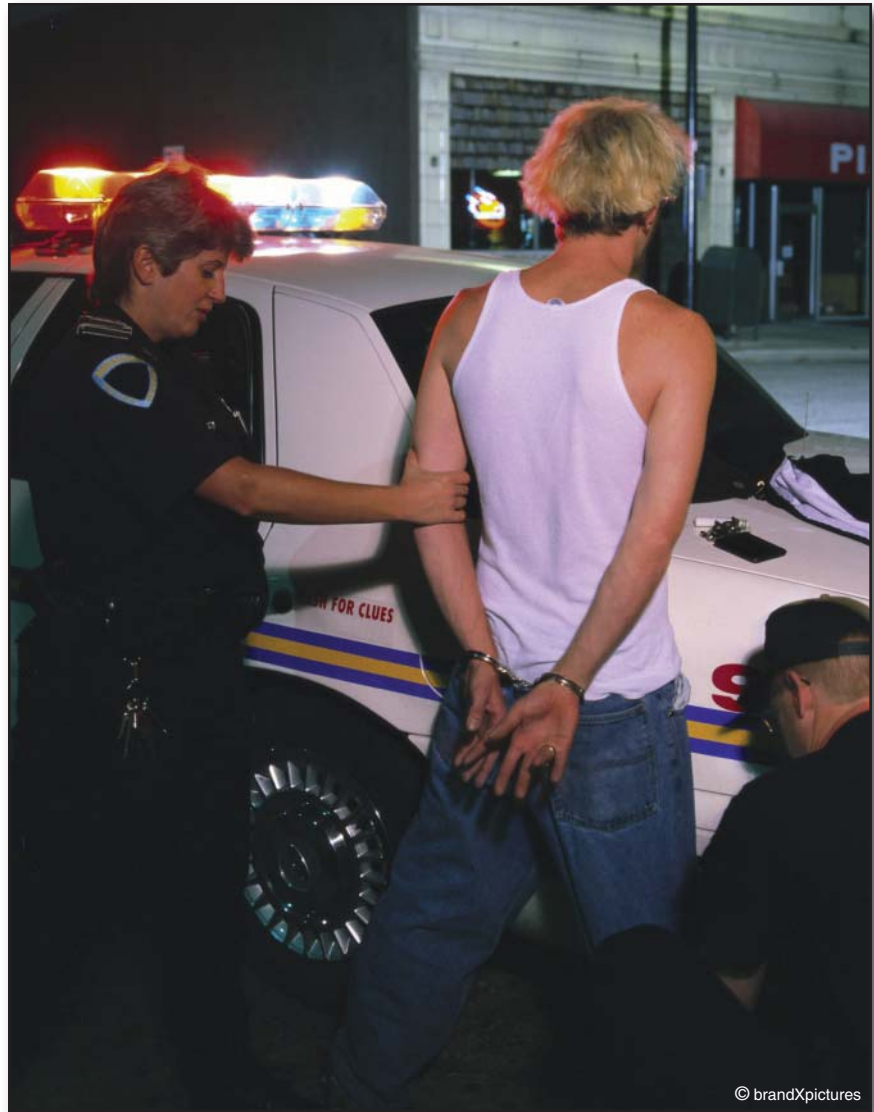


# Double Exposure Civil Liability and Criminal Prosecution in Federal Court for Police Misconduct

By RICHARD G. SCHOTT, J.D.

The law enforcement profession comes with many risks, most of which are knowingly accepted by its members. As in many other occupations, lesser-known, more subtle risks also are inherent in law enforcement. When officers are involved in a physical struggle or violent confrontation, they run the risk of sustaining injury or even death to accomplish their law enforcement mission. They may be called upon to meet force with force, sometimes having to use deadly force. All uses of force by law enforcement are subject to review; none subject to more scrutiny than the use of deadly force. Officers can quickly become familiar with internal review boards, citizen review boards, presentations of cases to



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local grand juries to determine whether state criminal charges are appropriate,<sup>1</sup> and civil lawsuits brought in state courts by alleged victims against individual officers (or their employing agency) that allege wrongdoing on the part of the officer (or entity).<sup>2</sup> Under federal law, there are two additional and

distinct causes of action that officers may find themselves encountering—a *civil* civil rights lawsuit<sup>3</sup> and a *criminal* civil rights prosecution.<sup>4</sup> Familiarity with these federal actions will help officers navigate the potential minefield of consequences that may result from one single action.

This article examines these distinct causes of action under federal law; how the two proceed independent from each other, as well as from state legal proceedings or internal reviews; and why being the subject of both does not place the officer in double jeopardy.<sup>5</sup> It also traces the evolution of the relevant federal statutes and highlights certain nuances of the laws that sometimes leave officers defending themselves against unexpected and otherwise perplexing federal actions.

### **The Federal Civil Cause of Action: Title 42 U.S.C. 1983**

In 1871, the U.S. Congress passed the Ku Klux Klan Act (now known as the Civil Rights Act of 1871) in an attempt to discourage the corrupt influence of the Ku Klux Klan in state government.<sup>6</sup> The passage of the

act meant that certain crimes, such as conspiracies to deprive citizens of the right to vote, hold office, serve on juries, and enjoy the equal protection of the laws, could be prosecuted at the federal level, rather than in state courts, which were often infected with or at least influenced by Klan members.<sup>7</sup> Additionally, those wronged by these actions also could bring an action at law (a civil lawsuit) against those responsible for the wrong if they were acting under color of state law. The efficacy of the statute in achieving its original goal can certainly be questioned. For various reasons, not the least of which was the extent of the Ku Klux Klan's strength in certain southern states, the "statute remained virtually dormant" for the first 90 years after its passage.<sup>8</sup> Beyond challenge, however, is

the influence the statute has had on law enforcement officers in this country during the past half century.

In 1961, Title 42 U.S. Code Section 1983<sup>9</sup> (hereinafter § 1983) was recognized for the first time by the U.S. Supreme Court as the basis for a civil lawsuit against individual law enforcement officers. Based on the language of the statute, which at the time read "[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the territorial jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,"<sup>10</sup> James Monroe sued several individual members of the Chicago Police Department, as well as the city of Chicago in its own capacity. In his federal civil lawsuit, Monroe alleged that 13 Chicago police officers broke into his family's apartment, woke him and his wife, and forced them to stand naked in the living room while they ransacked every room. They then took Monroe to the police station on open charges for 10 hours. Monroe was interrogated about a murder during his confinement but was



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ultimately released without ever being charged with a crime. The officers had neither a search warrant nor an arrest warrant at the time of the alleged behavior.<sup>11</sup> Monroe and other family members claimed that the officers and the city were liable for violating the Fourth Amendment to the Constitution, which prohibits unreasonable searches and seizures,<sup>12</sup> while acting under color of state law. The defendant officers and city sought dismissal of Monroe's lawsuit, in part based on the grounds that the actions alleged violated not only the U.S. Constitution but the constitution and laws of the state of Illinois also.<sup>13</sup> Both the federal district court and the appellate court entertaining the defense ruled that dismissal of the lawsuit was appropriate.<sup>14</sup> The Supreme Court reversed when it discounted the individual officers' position, recognizing that "[i]t was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand"<sup>15</sup> that led to the passage of the law in 1871. The Court further noted that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."<sup>16</sup> As a practical matter, to hold otherwise almost always would preclude a federal suit at the outset because nearly all law enforcement action violative of

the U.S. Constitution (or federal laws) also is a violation of one or more state statutes.

While the primary focus of this article is exposure to individual liability facing law enforcement officers, it should be noted that the portion of Monroe's lawsuit against the city of Chicago was dismissed, as the Supreme Court ruled that the city was not subject to suit under the statute. Relying on the intent of Congress in passing the 1871 act, the Supreme Court



ruled that it "did not intend to bring municipal corporations within the ambit of 1979."<sup>17</sup> This part of the ruling left individual officers as the only defendants liable to victims of their wrongdoing. In 1978, the Supreme Court reversed this portion of its *Monroe* decision.

In *Monell v. Department of Social Services*,<sup>18</sup> the Supreme Court changed course and found that an "analysis of the

legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies."<sup>19</sup> While this decision would seem to have created a lucrative option for a plaintiff to sue the proverbial "deep pocket" defendant in lieu of the individuals who actually deprived the plaintiffs of their rights, individuals have remained the most likely liable defendants. Ironically, this is because of another aspect of the Supreme Court's pronouncement in *Monell*. While recognizing that nonstate government entities could be held liable for constitutional violations where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers,"<sup>20</sup> the notion that the entity should be vicariously liable whenever one of its officers violates a person's constitutional rights was flatly rejected. Thus, for the government entity to be found liable, it must have somehow caused the constitutional violation to occur with an official policy or regulation, not simply because it employed the individual who violated someone's rights.

An example of this causation requirement is illustrated

by the *Bryan County, Oklahoma v. Brown* decision.<sup>21</sup> In that case, Bryan County avoided liability even though the sheriff's decision to hire the reserve deputy who violated the plaintiff's Fourth Amendment right to be free from an unreasonable seizure was deemed a policy of the county.<sup>22</sup> The Supreme Court made clear that "it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights."<sup>23</sup>

Even though it has proven difficult for plaintiffs to reach the deep pockets of the employing entity defendant, § 1983 lawsuits still are often filed at the federal level, as opposed to filing a cause of action in state court, in part due to another feature of federal civil rights legislation. In 1976, Congress passed the Civil Rights Attorney's Fees Award Act, which allows the prevailing parties in § 1983 proceedings to receive a reasonable attorney's fee as part of their costs.<sup>24</sup> This recovery of attorney's fees is a lucrative

aspect of federal suits not typically afforded litigants in state court.

### The *Bivens* Cause of Action

One hundred years after the Civil Rights Act of 1871 and 10 years after its *Monroe v. Pape* decision, the Supreme Court expanded the reach of civil liability for constitutional violations to those who were acting under federal authority when the violation occurred. In its *Bivens v. Six Unknown Named Agents of*

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*Federal Bureau of Narcotics* decision,<sup>25</sup> the Supreme Court created a cause of action that parallels § 1983. Like the plaintiff in *Monroe*, the plaintiff in *Bivens* claimed that he was subjected to both an unreasonable search and an unreasonable seizure. He sued the six unknown Federal Bureau of Narcotics agents who were involved personally for \$15,000 apiece.<sup>26</sup> His suit was

filed in federal court. The district court dismissed for, among other reasons, failing to state a cause of action.<sup>27</sup> The federal court of appeals affirmed the dismissal.<sup>28</sup> The Supreme Court reversed and found that a federal cause of action against the federal agents did exist under the Fourth Amendment. While recognizing that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation,"<sup>29</sup> the Court pointed out "that it is... well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."<sup>30</sup> In creating this federal cause of action against federal officials, the Supreme Court rejected the notion raised by the defendants that because Congress had specifically created the § 1983 remedy against those acting under state authority, it did "not desire to permit such suits against federal officials."<sup>31</sup> As a result of the *Bivens* decision, any law enforcement officer, whether acting under color of local, state, or federal law, can be sued in federal court for violating someone's rights granted to them by virtue of federal law or the Constitution of the United States.

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## The Federal Criminal Violation: Title 18 U.S.C. 242

The criminal companion to Title 42 U.S. Code Section 1983 is Title 18 U.S. Code Section 242 (hereinafter “§ 242”). In wording extremely similar to that found in § 1983, § 242 establishes that

[w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, 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 from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosive, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any

term of years or for life, or both, or may be sentenced to death.<sup>32</sup>

Like any other criminal statute, but unlike the remedy found in § 1983, the punishment imposed upon people who engage in a violation of § 242 includes monetary fines or, depending on the nature of the violation, a term of imprisonment up to life in prison or even a death sentence.



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Noticeably absent from the plain language of § 242 is any reference to authority given by the state.<sup>33</sup> Clearly, Congress intended for all law enforcement officers (whether they be federal, state, or local) to be criminally culpable for willfully depriving people of constitutional rights. Furthermore, even private citizens are viable defendants in a § 242 prosecution if they act in concert with government officials acting under color of law.<sup>34</sup>

A well-documented example of this theory involved a group of 18 defendants who were indicted following the disappearance of Michael Henry Schwerner, James Earl Chaney, and Andrew Goodman, three civil rights workers who disappeared in Philadelphia, Mississippi, on June 21, 1964. As alleged in the federal indictment, Deputy Sheriff Cecil Ray Price of the Neshoba County, Mississippi, Sheriff’s Department detained the three victims in the Neshoba County jail in Philadelphia on June 21. He was then alleged to have released them, intercepted them later on Highway 19, and removed them from their vehicle and placed them in an official Neshoba County Sheriff’s Office vehicle. At this point, he was alleged to have transported the three victims to a remote area where they were turned over to the 18 defendants, “including Deputy Sheriff Price, Sheriff Rainey and Patrolman Willis of the Philadelphia, Mississippi, Police Department.”<sup>35</sup> The defendants then allegedly “‘did willfully assault, shoot, and kill’ each of the three.”<sup>36</sup> The 3 law enforcement officials were indicted, along with 15 nonofficial individuals, for conspiring together and also for committing substantive violations of § 242.<sup>37</sup> The U.S. District Court for the Southern District of Mississippi dismissed the

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substantive § 242 counts against the nonofficial defendants “because the counts d[id] not charge that the latter were officers in fact, or de facto in anything allegedly done by them under color of law.”<sup>38</sup>

The Supreme Court viewed the nonofficial individuals’ conduct differently. The Court ruled that “[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting under color of law for purposes of the statute,”<sup>39</sup> and, therefore, were criminally responsible under § 242.

Compounding the long reach of this criminal statute is the notion that the illegal conduct need not be authorized by governmental authority or occur while the violating officer is on duty. As early as 1879, the notion that the illegal act giving rise to the official’s prosecution needed to be based on actual authority given him by the government was rejected by the Supreme Court.<sup>40</sup> If the criminal violation were to be interpreted otherwise—requiring the illegal action to be something authorized under government authority—the statute would be virtually useless. Consider, for example, the behavior that led to the prosecution of two law enforcement officials in *Catlette v. United States*.<sup>41</sup> The prosecution stemmed from the detention of a group of Jehovah’s Witnesses by Nicholas

County, West Virginia, Deputy Sheriff Martin Catlette and Richwood, West Virginia, Chief of Police Bert Stewart. On June 29, 1941, the group of Jehovah’s Witnesses traveled to the Richwood Town Hall to request police protection while carrying out their work as Jehovah’s Witnesses. Three individuals from the group were ushered into the mayor’s office, which was also utilized by Deputy Sheriff Catlette, and were

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detained there. A short time into the detention, Deputy Sheriff Catlette removed his badge “and stated in substance and effect, ‘What is done from here on will not be done in the name of the law.’”<sup>42</sup> The group was then subjected to blatantly illegal and unconstitutional treatment.<sup>43</sup> After being charged with violating Title 18 U.S. Code Section 52,<sup>44</sup> Catlette urged that the charge was

“fatally defective in that it fails to charge the commission of a federal offense, because it does not state that the alleged acts were within the scope of Catlette’s authority...,”<sup>45</sup> as evidence by the removal of his badge and accompanying statement before his illegal conduct. The U.S. Fourth Circuit Court of Appeals pointed out the fallacy in Catlette’s argument in no uncertain terms. It countered that “it was certainly within the lawful authority of Catlette as a Deputy Sheriff to detain a person in his office.”<sup>46</sup> In more harsh wording, the appellate panel concluded that “Catlette’s argument is, therefore, reduced to nothing more than the notion that an officer can divorce himself from his official capacity merely by removing his badge of office before embarking on a course of illegal conduct, and thereby blithely absolve himself from any liability for his ensuing nefarious acts. We must condemn this insidious suggestion that an officer may thus lightly shuffle off his official role. To accept such a legalistic dualism would gut the constitutional safeguards and render law enforcement a shameful mockery.”<sup>47</sup>

Another expansive view of the color of law notion was recognized by the U.S. Fifth Circuit Court of Appeals in 1991 and involved clearly

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off-duty conduct. In *United States v. Tarpley*,<sup>48</sup> William Tarpley, a deputy of the Collingsworth County, Texas, police force, learned of a past affair involving his wife and Kerry Vestal. Tarpley and his wife devised a plan to lure her former lover to their residence so that Tarpley could beat and threaten Vestal. When Vestal arrived at the house, “Tarpley immediately tackled Vestal and hit him repeatedly in the head. He also inserted his service pistol in Vestal’s mouth. He told Vestal that he was a sergeant on the police department, that he would and should kill Vestal, and that he could get away with it because he was a cop.”<sup>49</sup> The scheme also involved two other officers who, along with the Tarpleys, followed Vestal in their patrol cars until Vestal drove out of their town. Tarpley and one of the other officers were convicted of conspiring to and actually “subjecting Vestal to a deprivation of his constitutional rights, in violation of...§ 242,”<sup>50</sup> which, of course, requires the officers to have been acting under color of law. Tarpley appealed his conviction, arguing that he had not acted under color of law but, rather, that he had acted as a jealous husband.<sup>51</sup> The appellate court affirmed Tarpley’s conviction, reasoning that a “rational juror could conclude that Tarpley was acting under

color of law. Tarpley did more than simply use his service weapon and identify himself as a police officer. At several points during his assault of Vestal, he claimed to have special authority for his actions by virtue of his official status. He claimed that he could kill Vestal because he was an officer of the law. Significantly, Tarpley summoned another police officer from the sheriff’s station and identified him as a fellow



officer and ally. The men then proceeded to run Vestal out of town in their squad car. The presence of police and the air of official authority pervaded the entire incident.”<sup>52</sup> Clearly, without these persuasive factors the outcome would have been different; however, it was no defense for Tarpley to simply argue that his actions were those of a jealous private citizen.

Historically, criminal prosecution for violating § 242 most often stems from arrest

situations where an inappropriate amount of force is used, rather than from unique situations, such as those detailed above.<sup>53</sup> The constitutional deprivation occurring in the context of an arrest is the right to be free from an unreasonable seizure.<sup>54</sup> Probably the most well-known example of this type of prosecution came about as the result of the videotaped arrest and beating of Rodney King in 1991.<sup>55</sup> The individuals involved in the arrest of King who later faced federal prosecution for their actions during the arrest raised several defenses, two of which warrant discussion in the context of this article.

First, Sergeant Stacy Koon argued that he was not guilty of violating § 242 merely by being on the scene and not doing more to prevent the unnecessary use of force.<sup>56</sup> The district court judge considering Koon’s argument disagreed. Relying on U.S. Ninth Circuit Court of Appeals precedent, the trial judge pointed out “that a police sergeant who stands by and watches while officers under his command use excessive force and refuses to order them to stop may, thereby, subject the victim to the loss of his or her right to be kept free from harm while in official custody or detention.”<sup>57</sup> Similar to the absence of vicarious liability in its civil counterpart (§ 1983), to violate § 242, a supervisor’s actions

### Side-by-Side Comparison of the Federal Statutes

Civil (§ 1983)	Criminal (§ 242)
<b>Elements</b>	
Who	Whoever
Color of Law	Color of Law
Deprives	Willfully Deprives
Constitutional Right	Constitutional Right
<b>Remedy</b>	
\$\$ Damages	Prison/Fine

must be more than passive to satisfy the willful component found in the criminal provision. Applying the proper legal analysis to Sergeant Koon's inaction in the King case, the district court did, in fact, find him guilty. The test was set forth as, "[t]he police sergeant must recognize that the force is excessive and that there are reasonable steps within his power that he could take to prevent the use of force" and "[f]inally, the police sergeant must *deliberately* or *willfully* refrain from preventing the excessive force."<sup>58</sup>

#### The Double Jeopardy Argument

The second defense raised in the federal prosecution of the officers involved in the Rodney King altercation that is relevant to the topic of this article was

that, in light of the officers' acquittal in state court, the federal charges should have constituted double jeopardy. This was determined not to be the case. Four officers involved in the apprehension of King were "tried in state court on charges of assault with a deadly weapon and excessive use of force by a police officer. The officers were acquitted of all charges, with the exception of one assault charge...that resulted in a hung jury."<sup>59</sup> Only after the resulting widespread rioting left more than 40 people dead, more than 2,000 injured, and resulted in nearly \$1 billion in property destruction did the United States seek and obtain indictments charging the same officers with violating § 242.<sup>60</sup> The officers argued that the federal prosecution constituted double jeopardy.<sup>61</sup> The Ninth Circuit Court

of Appeals disagreed based on the doctrine of dual sovereignty, which, simply stated, excludes from the double jeopardy prohibition prosecutions brought by separate sovereigns. Clearly, the state of California and the United States government constitute separate sovereigns.<sup>62</sup> The officers argued, however, that their prosecution satisfied a narrow exception to the dual sovereignty doctrine. According to the appellate panel considering their argument, the so-called *Bartkus*<sup>63</sup> exception is satisfied when "the second prosecution, otherwise permissible under the dual sovereignty rule, is not pursued to vindicate the separate interests of the second sovereign, but is merely pursued as a sham on behalf of the sovereign first to prosecute."<sup>64</sup> If that standard is proven, the second prosecution, although brought by the second sovereign, is barred based on double jeopardy. The officers in the instant case did not carry the burden. The fact that the state and federal investigators and prosecutors cooperated with each other did not turn the federal prosecution into a mere sham.<sup>65</sup>

For an even more obvious reason, there is no exposure to double jeopardy if an officer is sued civilly based on § 1983 and prosecuted under § 242 for the same action. Simply put, the Double Jeopardy Clause applies only to criminal cases.<sup>66</sup>

## Conclusion

All actions carry certain consequences. Some are realized immediately, some may take years to materialize. The law enforcement profession is fraught with dangerous consequences. Awareness is always taught—awareness of surroundings and danger signs, for example. Awareness of the potential legal consequences of actions also is useful. This article has discussed federal civil actions against law enforcement officers and federal criminal prosecution of those same law enforcement officers. Having an awareness of the legal bases for these consequences can make being the subject of one, or both, much less stressful for the officers. ♦

## Endnotes

<sup>1</sup> For example, a Prince George's County, Maryland, police officer was indicted for two counts of vehicular manslaughter stemming from an accident he caused while engaged in a pursuit of a motorcyclist during rush-hour traffic. Megan Greenwell, "Md. Officer Indicted in Crash That Killed Two," *The Washington Post*, February 14, 2008, p. B1.

<sup>2</sup> For example, in February 2008, a Prince George's County, Maryland, civil jury found a county police officer liable for assault and battery. The jury awarded the man the officer shot and wounded on January 1, 2006, a total of \$2.4 million. This result followed an internal police investigation reviewed by the U.S. Department of Justice, which found the officer acted appropriately. Ruben Castaneda, "Man Who Was Shot by Officer Wins \$2.4 Million Judgment,"

*The Washington Post*, March 1, 2008, p. B2.

<sup>3</sup> 42 U.S.C. § 1983.

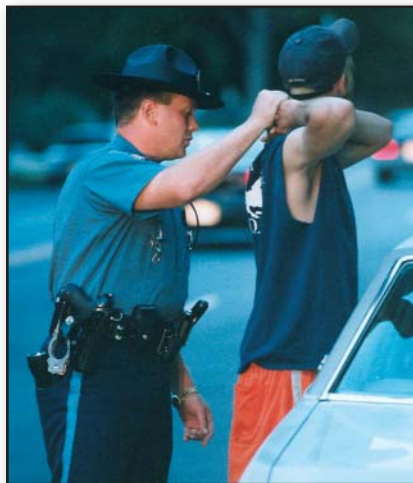
<sup>4</sup> 18 U.S.C. § 242.

<sup>5</sup> U.S. Const. Amend. V, in pertinent part, states "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

<sup>6</sup> Randy Means, "The History and Dynamics of Section 1983," *The Police Chief*, May 2004.

<sup>7</sup> Eric A. Harrington, "Judicial Misuse of History and § 1983: Toward a Purpose-Based Approach," *Texas Law Review*, March 2007.

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<sup>8</sup> *Supra* note 6.

<sup>9</sup> The section of the original Ku Klux Klan Act that allowed for civil lawsuits to redress a constitutional violation later became, and remains, Title 42 U.S.C. § 1983.

<sup>10</sup> *Monroe v. Pape*, 365 U.S. 167 (1961). It should be noted that the statute has remained virtually unchanged, with the notable exception that a person acting under authority derived from the District of Columbia is now included in its reach. The current version of Title 42 U.S.C. Code § 1983 reads, "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person within the territorial jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.*" Emphasis added to changes made after the *Monroe* decision.

<sup>11</sup> *Id.* at 203 (Frankfurter, J., dissenting).

<sup>12</sup> U.S. Const. Amend. IV reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

<sup>13</sup> *Supra* note 10, at 172. Illinois Const., Art. II, sect. 6 at the time was almost identical to U.S. Const. Amend. IV; the actions also constituted a violation of Ill. Rev. Stat., c. 38, sects. 252, 449.1, and Chicago, Illinois, Municipal Code, sect. 11-40.

<sup>14</sup> 272 F.2d 365 (7th Cir. 1959).

<sup>15</sup> *Supra* note 10, at 174.

<sup>16</sup> *Id.* at 183.

<sup>17</sup> *Id.* at 187.

<sup>18</sup> 436 U.S. 658 (1978).

<sup>19</sup> *Id.* at 690 (emphasis in original). In a footnote in its opinion, the Court made clear that, because of the plain language of the Eleventh Amendment, the *Monell* decision was "limited to local government units which are not considered part of the State." FN 54. U.S. Const. Amend. XI reads, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

<sup>20</sup> 436 U.S. at 690.  
<sup>21</sup> 520 U.S. 397 (1997).  
<sup>22</sup> *Id.* at 404.  
<sup>23</sup> *Id.* (emphasis in original).  
<sup>24</sup> 42 U.S.C. § 1988 (b).  
<sup>25</sup> 403 U.S. 388 (1971).  
<sup>26</sup> *Id.* at 389.  
<sup>27</sup> 276 F.Supp. 12 (E.D.N.Y. 1967).  
<sup>28</sup> 409 F.2d 718 (2nd Cir. 1969).  
<sup>29</sup> *Supra* note 25, at 396.  
<sup>30</sup> *Id.*, quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted).  
<sup>31</sup> *Bivens*, 403 U.S. at 429 (Appendix to opinion of Burger, C.J., dissenting).  
<sup>32</sup> 18 U.S.C. § 242.  
<sup>33</sup> Cf. 42 U.S.C. § 1983.  
<sup>34</sup> While this article examines the features of the Color of Law statute found at 18 U.S.C. § 242, it should be noted that there is a separate Conspiracy statute (18 U.S.C. § 241) that makes it a federal crime for two or more persons to conspire to injure, oppress, threaten, or intimidate any person in any state, territory, commonwealth, possession, or district in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having so exercised the same, which does not require the conspirators to have been acting under color of law.  
<sup>35</sup> *United States v. Price, et al.*, 383 U.S. 787, 790 (1966).  
<sup>36</sup> *Id.*  
<sup>37</sup> *Id.* at 792-794.  
<sup>38</sup> *Id.* at 793.  
<sup>39</sup> *Id.* at 794.  
<sup>40</sup> *Ex parte Commonwealth of Virginia*, 100 U.S. 339 (1879).  
<sup>41</sup> 132 F.2d 902 (4th Cir. 1943).  
<sup>42</sup> *Id.* at 904.  
<sup>43</sup> *Id.*, describing the actual treatment and unlawful acts.  
<sup>44</sup> The defendants were charged with violating Title 18 U.S.C. § 52, which later became § 242.  
<sup>45</sup> *Supra* note 41, at 905.  
<sup>46</sup> *Id.* at 906.  
<sup>47</sup> *Id.*

<sup>48</sup> 945 F.2d 806, reh'g. denied (5th Cir. 1991), cert. denied, 504 U.S. 917 (1992).  
<sup>49</sup> *Id.* at 807.  
<sup>50</sup> *Id.* at 808.  
<sup>51</sup> *Id.* at 809.  
<sup>52</sup> *Id.*  
<sup>53</sup> The FBI's Web site points out that most color of law cases fall into five categories: excessive force, sexual assaults, false arrest and fabrication of evidence, deprivation of property, and failure to keep from harm; retrieved from <http://www.fbi.gov/hg/cid/civilrights/color.htm>. From 2001 through 2007, the Criminal Section of the Department of Justice obtained convictions of 391 defendants in color of law cases; 256 defendants were convicted between 1994 through 2000. January 30, 2008 press release; retrieved from <http://www.usdoj.gov>.

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**...any law enforcement officer...can be sued in federal court for violating someone's rights granted to them by virtue of federal law or the Constitution of the United States.**  
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<sup>54</sup> *Supra* note 12.  
<sup>55</sup> Because of the familiarity with the Rodney King incident that most law enforcement officers have, the facts giving rise to the subsequent court proceedings will not be recounted in this article. For a full discussion of the underlying events, see *United States v. Koon*, 833 F.Supp. 769 (C.D. Calif. 1993).

<sup>56</sup> It should be noted that the court opinion referenced in *supra* note 55 recognizes that initially the conduct of the arresting officers and the amount of force used on King in effecting his arrest was reasonable and, therefore, not in violation of King's constitutional rights. The force became excessive at a certain point, and Sergeant Koon was present both before and after the point when it became excessive.

<sup>57</sup> *United States v. Koon*, 833 F.Supp. 769, 779, (C.D. Calif. 1993), aff'd in part, vacated in part, 34 F.3d 1416 (9th Cir. 1994), aff'd in part, rev'd in part and remanded, 518 U.S. 81 (1996), quoting *United States v. Reese*, 2 F.3d 870, 889 (9th Cir. 1993).

<sup>58</sup> *Id.* at 779, quoting *Reese* at 890, (emphasis added).

<sup>59</sup> *Koon v. United States*, 518 U.S. 81, 87 (1996).

<sup>60</sup> *Id.* at 88.

<sup>61</sup> *Supra* note 5.

<sup>62</sup> *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994), aff'd in part, rev'd in part and remanded, 518 U.S. 81 (1996); *Heath v. Alabama*, 474 U.S. 82, 93 (1985).

<sup>63</sup> *Bartkus v. Illinois*, 359 U.S. 121 (1959).

<sup>64</sup> *Supra* note 62, 1439.

<sup>65</sup> *Id.* In footnote 19, the 9th Circuit panel pointed out that the *Bartkus* exception is narrow and seldom successfully pursued.

<sup>66</sup> Kermit L. Hall, James W. Ely, Joel B. Grossman, and William M. Wiecek, eds., *The Oxford Companion to the Supreme Court of the United States* (New York, NY: Oxford University Press, Inc., 1992), 232.

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*Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.*

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