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Police liability for Fourth Amendment violations: An analysis of Section 1983

Chiabi, David Kini, Ph.D.

City University of New York, 1993

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POLICE LIABILITY FOR FOURTH AMENDMENT VIOLATIONS: AN ANALYSIS OF SECTION 1983.

BY

DAVID K. CHIABI

A dissertation submitted to the Graduate Faculty in Criminal Justice in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York.

1993

This manuscript has been read and accepted for the Graduate Faculty in Criminal Justice in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

April 26, 1993
Date

William C. Heffern
Chair of Examining Committee

26 April 1993
Date

Executive Officer

Dr. Richard Lovely

Prof. Isidore Silver

Supervisory Committee

THE CITY UNIVERSITY OF NEW YORK

Abstract

POLICE LIABILITY FOR FOURTH AMENDMENT VIOLATIONS: AN ANALYSIS OF SECTION 1983

BY

DAVID K. CHIABI

Advisor: Professor William Heffernan

This study is aimed at determining a profile of the characteristics and the processing of section 1983/Bivens actions by federal courts in the Eastern and Southern districts of New York. The study also addresses the question of damages, which is the main remedy sought by plaintiffs in these cases.

The data for this study were collected from many sources and can be classified into three categories. They are: (1) case records, (2) interviews, and (3) other records. Elements (independent variables) of Section 1983/Bivens actions were used to measure two dependent variables: (1) the successful prosecution of an action, and (2) the amount of damages awarded.

Frequency analyses, crosstabulation analyses, correlational analyses, and bivariate scatterplot analyses were used to study relationships between the variables. Factor analysis was used as a data reduction technique in

complex data and logistic regression analyses were used to test variables that had an impact on the dependent variables.

The study found that the dollar amounts recovered in these cases are not usually very large except for occasional awards in excessive force cases. Settled cases seem to have resulted in lower amounts of median damages as compared to bench and jury trials. Of all the cases filed pro-se, only one resulted in damages.

The study also found that the many actions filed by pro se plaintiffs are typically not properly presented and consequently do not result in damages. More suits were settled than tried and settled cases consumed about as much time as actions resolved by the other methods of disposition.

The results of the regressions showed that type of representation, violence and the presence of malice predicted successful prosecution of cases. As with success, type of representation and violence were found to predict the amount of damages awarded. Inclusion of a government agency in the data is also a significant predictor of damage award. By focusing on settlements, this study in a new approach showed that there are actually more cases resulting in damages than had previously been supposed.

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Introduction

When slavery was abolished in the United States, many whites and particularly those in the southern states refused to accept abolition as the law of the land (Eisenberg, 1981; Cong. Globe 1871, p. 153). Many expressed their opposition and anger to abolition by openly defying governmental authority. The climate of open defiance enabled the Ku Klux Klan and other hate groups to organize and carry out barbaric acts on the newly freed slaves ("Cong. Globe", 1871). Congress reacted to these abuses by passing the Ku Klux Klan Act of 1871. One of the reasons why Congress acted was because southern states refused to provide lawful protection to blacks (Monroe v. Pape, 1961; Robinson, 1984). Section 1 of the Act in 1874 became the present section 1983 of U.S.C. 42, popularly known as section 1983. After being ignored for almost a century, section 1983 may now be fulfilling more than its original intent.

Presently, the section is the device most used by citizens to challenge conduct by state or local officials which allegedly has deprived them of their civil and constitutional rights (Lee, 1987; Bureau of Justice Statistics, 1987). A Bivens-type action is a judicially-created counterpart to a section 1983 action. It was created by the Supreme Court in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, (1971). The remedy was

created because the Court believed that since section 1983 subjected only state officials to suit, a new remedy was needed. Bivens allows any citizen believing he/she has been wronged to sue a federal official just as he/she would a state official for the violation of his/her civil or constitutional rights. Section 1983 and the Bivens-type action are used to challenge police official misconduct that involves violations of the Fourth and Fourteenth Amendment guarantees against unreasonable searches and seizures, false arrests, false imprisonments, assaults and battery (excessive force), invasion of privacy and malicious prosecution.

Many criminal justice officials - in particular, police officers - have expressed misgivings about the growing significance of section 1983 and Bivens-type actions (Impact, 1980). Especially in the last three decades, the reaction of law enforcement towards section 1983 and Bivens actions has attained unprecedented proportions (Fisher, Kutner & Wheat, 1989). Civil liability has been considered by some observers as one of the most critical concerns to law enforcement officials and their employees today (Reynolds, 1988, p. 1; Sitomer, 1985, p. 21). Federal, state and local government officials are being sued often by victims claiming alleged police abuses. Carmen (1991) states for example, "the number of civil liability cases filed against the police continues to grow" (p. 3). These officers

have to perform their duties under the threat of suffering the consequences of these suits which may include large sums of money in damages, loss of jobs and occasionally their personal assets (Fisher et al., 1989).

By the nature of their activities police officials have more contact with the public than other law enforcement personnel. Police functions, which sometimes require the use of force, often place the police at loggerheads with members of the public. Conflicts with the public occasionally result in suits against police for alleged violations of citizens' constitutional and civil rights. Although there are other remedies (e.g., state tort actions) available to individuals whose constitutional rights have been violated, plaintiffs' lawyers generally consider section 1983 suits and Bivens actions the most effective means of obtaining relief (Yale L.J., 1979; McCoy, 1987).

Other mechanisms for controlling police abuses include: the exclusionary rule; actions by the internal affairs office of the police department; the use of undercover officers (field associates); criminal sanctions and suits at common law. Victims of police violations can also turn to civilian community complaint boards. However, as explained in chapter one, aggrieved individuals who resort to section 1983 suits are generally uninterested in these alternative measures.

The exclusionary rule, one of the mechanisms intended

to control police abuses, has been controversial since its creation. Since the Supreme Court decision in Mapp v. Ohio, (1961), which guaranteed the right of the individual to be free from unreasonable searches, police searches and seizures have become one of the most important subjects of debate in the American criminal justice system. Attorneys, individual police officers, police departments and victims of unconstitutional police activity constantly debate searches and seizures in federal and state courts. In Mapp, the Court held that, as a matter of due process, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in state courts. Federal courts had excluded evidence from illegal searches and seizures since Weeks v. United States, (1914). Mapp extended the exclusionary rule to state cases. The Court hoped that the exclusionary rule would deter police misconduct, particularly violations involving illegal searches and seizures (Schlesinger, 1977, p. 1).

Empirical studies of the exclusionary rule's deterrent effect have not been conclusive (Newman, 1978). As Weintraub & Pollack (1976) note, the Court recognized that the exclusionary rule's ability to deter police misconduct is very limited. In Terry v. Ohio, (1968) the Court stated:

> Street encounters between citizens and police officers are incredibly rich in diversity... Encounters are initiated by the police for a wide

> variety of purposes some of which are wholly unrelated to a desire to prosecute for crime. Doubtless some "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by the Court to condone such activity does not render it responsive to the exclusionary rule... It is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal (Terry v. Ohio, 1968, pp. 13-14).

Because of the uncertainty of the effectiveness of the exclusionary rule as a deterrent to abusive police practices, in the past two decades civil liability has become the current major weapon used in the attempt to deter violations of constitutional rights. Even if the exclusionary rule worked nicely, civil liability suits would still be filed. Civil liability suits are filed not only to deter future violations, but to redress past wrongs. The exclusionary rule may result in dismissal of charges because of the suppression of the evidence; however, it does not directly benefit the innocent victim of official misconduct, who by comparison, can reap financial compensation through a civil suit. Thus many victims of official misconduct may obviously want to turn to the civil suit.

Because the exclusionary rule did not have the full effect envisioned by the Supreme Court, criminal justice personnel started calling for alternatives to the rule to guarantee the protection of Fourth Amendment rights. In the early 1970's Chief Justice Burger made a strong case for use of the civil remedy. He recommended the use of civil actions against the government in place of the exclusionary rule as the principal means of upholding the Fourth Amendment. In Bivens, the judicial counterpart to section 1983, he stated that the exclusionary rule hampers law enforcement, does not deter police misconduct and therefore should be replaced with some other type of control - the tort remedy. In a strongly delivered dissent he wrote:

> I conclude therefore that an entirely different remedy is necessary but it is one that in my view is as much beyond judicial power as the step the court takes today. Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated....Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct - something that the suppression Doctrine, of course, can never accomplish....(Bivens v. Six

Unknown Named Agents, 1971, p. 415)

Even before Burger's stated preference for the tort remedy, section 1983 was being increasingly used by plaintiffs whose Fourth Amendment rights had been violated (e.g., Monroe v. Pape, 1961). Moreover, despite the dissatisfaction with the exclusionary rule as a deterrent to police practices, McCoy (1986) found it appeared that "from the literature neither Congress nor the Supreme Court is likely to abolish the exclusionary rule without instituting some other device to control police activity" (p. 469).

McCoy in her analyses of Malley v. Briggs, (1986), concluded that the Court's ruling showed the civil suit as becoming the primary alternative to the exclusionary rule (p. 463). The favorable view of this civil remedy in the legal circles has encouraged greater use of section 1983/Bivens. Several other factors account for the increase in the use of section 1983 civil suit. For example, according to Barrineau (1987), the Court's continued reinterpretation, renewed awareness of, and concern for individual rights, and current legal doctrines and practices are just some of the factors that have made section 1983 the most utilized and the most lucrative form of liability litigation against law enforcement officers, jail personnel, and other criminal justice practitioners (p. 7).

As a result of the publicity surrounding police civil liability, most police are well aware that they can be sued

for constitutional violations by members of the public (Carmen, 1991). What has alarmed them, in the last few decades, is the rate at which they are being sued and perhaps the ease and what they perceive as the willingness of the courts to award damages against them (Reynolds, 1988, p. 1). Thus, the police, in addition to being faced with the exclusion of evidence in criminal trials, are also faced with civil suits for the same violations.

Because of the increase in the number of suits (Impact 1980), police liability for constitutional violations has increasingly become a source of friction between the police and the courts. Most police officers resent the fact that they are subject to liability for the performance of their official duties. Police administrators are concerned with the potential effects of these suits.

Liability suits against police officers are damaging in many ways. They can result in costly attorney fees, settlement costs or judgments. They can also affect the insurance coverage of police departments and/or municipalities, causing rate increases and even loss of coverage for those municipalities with insurance coverage (Lindsey, 1985). The burden of these suits is also felt by municipalities that do not carry insurance (e.g., New York City) and even more so by smaller municipalities that cannot afford any insurance coverage. In addition to economic costs, civil suits are damaging to the public's confidence

in law enforcement. They can demoralize police departments or individual police officers. They also may lead to additional filings, with or without merit, as others try to "cash in" on encounters with the law enforcement officers (Fisher et al., 1989; Reynolds, 1988; Madden, 1985).

To better understand the extent of litigation against the police, this study examines section 1983 civil damage and the Bivens-type actions - the direct claims of victims of official wrongdoing seeking to obtain compensation for the denial of their Fourth Amendment rights.

Section 1983 suits against the police can compensate individuals for violations of their constitutional rights and also deter further wrongful conduct. To assess these effects, particularly compensation, it is necessary to know the factors that influence the award of damages. Therefore, the study examines the kinds of suits brought against police officers and their departments. It ascertains the nature of damages and measures the amount of damages recovered.

Critical questions of liability, immunity and damages are often decided by the judge or jury in civil liability suits. These questions, particularly those of immunity for federal officials, raise doubts as to whether any reasonable damages are awarded and collected in section 1983 suits. Mindful of these considerations, the study examines the volume of damages obtained from civil cases.

Generally, a plaintiff may recover general damages for

pain and suffering, humiliation and distress, and even loss of reputation in those Fourth Amendment cases that fall within the realm of common law torts such as false arrest, false imprisonment, trespass, assault and battery, and invasion of privacy. The study therefore focuses on plaintiffs' efforts and their difficulties encountered in pursuing civil damages. It further examines the identity of defendants, the individual police officers and the departments, to ascertain the actual bearers of the burden of the damages.

The two main sources of material for this study are the court records of cases filed in the Eastern and Southern Districts of New York under section 1983/Bivens from 1983 to 1987 and personal interviews of some corporation counsels and defense attorneys. An assessment was made of the effects of these suits on the municipality and their relationship to the police department. This assessment is significant since the Supreme Court, Monell v. Department of Social Services, (1978), held that municipalities that employ police may be sued for allowing police departments to foster unconstitutional police "custom, policy, or practice."

Because police department policies may be influenced by court decrees mandating changes in police procedure, some significant police directives, rules and regulations that have had an impact on police affairs are also analyzed. Changes resulting from civil rights decisions are also

analyzed. From the examination of policy changes, a determination is made of the extent to which the costs of defending the individual officers changed the level of police departmental supervision.

Thus the study is directed towards determining: (1) a profile of the characteristics and the processing of section 1983/Bivens actions by federal courts in the Eastern and Southern districts of New York, (2) the range of damages awarded in section 1983 suits in these courts against police and police departments from 1983 to 1987, (3) the ability to compensate the victim for the violation of his or her Fourth Amendment rights, and (4) the liability risk of individual police, police departments and their employing municipalities.

Chapter 1.

The Development of Civil Actions Against Police Misconduct.

This chapter examines the development of the Civil Rights Act. It traces the case law that has developed over the years under title 42, section 1983 and the complementary remedy developed in the Bivens case. The literature that has dealt with the Act is also examined. Consequently, the case law and literature on the current standard of liability, governmental liability, immunity and damages are examined. The increasing volume of litigation resulting from the increased use of the Act is also examined. Finally, the Civil Rights Attorney Fees Act is briefly reviewed.

A. Historical Background: The Enactment of the Civil Rights Act of 1871 and Early Judicial Interpretation.

The freeing of slaves in the mid-nineteenth century was regarded by many whites as posing a threat to their social, economic and political life. Black slaves had been the basis of the southern agricultural economy because the powerful and rich plantation workers relied totally on them for free labor. Their freedom meant the loss of this free labor force and it also meant competition with the poor whites for the few available jobs. The passage of civil rights laws that enabled blacks to protect their rights made many whites

apprehensive. These whites reacted harshly by organizing small groups such as the Ku Klux Klan to terrorize blacks and their supporters. Thousands of blacks were murdered by these groups and many thousands more were brutally terrorized ("Cong. Globe." 1871).

As a result of the Klan activities, Congress enacted the Ku Klux Klan Act of 1871. The present section 1983 is section I of this 1871 Act. The passage of the act was one of the means utilized by Congress to exercise the power vested in it by section 5 of the Fourteenth Amendment to provide a remedy "to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position" ("Cong. Globe." 1871, p. 68). Section 5 of the Fourteenth Amendment gives Congress the power to "enforce, by appropriate legislation, the provisions of this article." And the Fourteenth Amendment forbids states from making or enforcing any laws which have the effect of abridging the privileges or immunities of the citizens of the United States and prevents states from depriving any person of "life, liberty or property, without due process of the law." The amendment further requires that "no state deny any person within its jurisdiction the equal protection of the laws."

Congress used these constitutional powers and passed the Klan Act in reaction to the violence of the Ku Klux Klan, violence which was either condoned by the southern

states or permitted to continue because of the states' inability to control such activities (Monroe v. Pape, 1961, p. 171). Thus, the Klan Act was passed to enable federal courts to grant relief for alleged civil rights violations. As discussed below, the Act reflected congressional hostility to and distrust of state courts. Section I of the Act, which is now codified as 42 U.S.C. Section 1983, added civil remedies to the existing criminal penalties for violations of civil rights.

As stated in Monroe (1961), the title of the Act outlined its broad scope and purposes. This was "an Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes" (p. 171). Because of the broad nature of the Act, the rights guaranteed by section 1983 have, over the course of the years, been expanded to include most rights protected by the first eight amendments to the Constitution. These rights include rights involving freedom of speech, religion, and association, freedom from illegal searches and seizures, excessive force and access to the courts (Hardy & Weeks, 1985, p. 3).

As stated above, the vicious activities of the Klan necessitated passage of the Act. These activities were so appalling that President Grant sent a message to Congress on March 23, 1871 requesting Congressional action to stop the Klan activities. This message laid the foundation for the

Act. President Grant in this message stated that:

> A condition of affairs now exists in some states of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing law, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectively secure life, liberty, and property, and the enforcement of law in all parts of the United States... ("Cong. Globe", 1871, p. 244).

The act, and particularly section I (the present section 1983), was intended to achieve several purposes. These purposes and the rationale of the Act are identified in the congressional debates that led to the passage of the Act, and are summarized nicely by Justice Douglas in Monroe (1961, p. 173). First, the act was meant to override certain state laws that were deemed to violate the spirit of the Fourteenth Amendment. This first section of the bill prohibited the passage of any form of discriminatory

legislation by states against the rights or privileges of citizens of the United States. Second, the act provided a remedy where state law was inadequate. This aspect of the legislation, the inadequacies of the state remedies, was succinctly stated during the congressional debates by Senator Sherman of Ohio.

> ... it is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States Laws by which negroes may testify ("Cong. Globe", 1871, p. 244).

In Monroe Justice Douglas emphasized the third, and most controversial, purpose of the act. The act was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. Several examples of the inability of the states to control the activities of the Klan or the acquiescence of such conduct were presented to the first session of the 42d Congress. This purpose of the Act, reasserted by the majority in Monroe, was and continues to be controversial. For example, Justice Frankfurter asserted in his lengthy Monroe dissent that this particular purpose could not have been intended by the forty-second congress. According to Frankfurter, the

holding of the majority that the act allowed a federal remedy if the state remedy was inadequate was not based on judicial precedent because the issue had never been thoroughly considered by earlier decisions that interpreted the act (Monroe v. Pape, 1961, pp. 230-34). He stated that:

> Of course, if the notion of "unavailability" of remedy is limited to mean an absence of statutory, paper right, this is in large part true. Insofar as the Court undertakes to demonstrate - as the bulk of its opinion seems to do - s.1979 was meant to reach some instances of action not specifically authorized by the avowed, apparent, written law inscribed in the statute books of the States, the argument knocks at an open door (Monroe v. Pape, 1961, p. 235).

The Congressional debates clearly indicate that the 42d Congress had the Klan specifically in mind when this act was passed (Monroe v. Pape, 1961, p. 174). As pointed out in Monroe, the congressional debates are replete with references to the lawless conditions which existed in the South in 1871. Moreover, when President Grant wrote to Congress, Congress was in possession of a 600-page report which detailed Klan activities and the inability of states governments to contend these activities (S. Rep. No. 1, 42d Cong., 1st sess., Monroe v. Pape, 1961).

Many courts have delineated the inability of the states

to deal with offenses perpetrated against black citizens following emancipation. For example, Justice Douglas stated in Monroe (1961) that "it was not the unavailability of State remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this "force bill" as it was called" (pp. 174-75). This echoed Representative Beatty of Ohio during congressional debates over the legislation:

> ...Certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable.... Men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons." ("Cong. Globe", 1871, p. 166).

While the main focus of the act was the Ku Klux Klan, the remedy that the 1871 act created was not a limited one directed solely against the Klan and its members. Rather, the remedy was directed generally against those who, while representing a State in some capacity, were unable or unwilling to enforce the law (Monroe v. Pape, 1961, p. 176). As stated earlier, the problem was not simply a substantive

legislative one (i.e., of states not having passed laws to protect the blacks), but an enforcement problem. Some states had laws to protect blacks from the Klan attacks and other abuses which were not enforced. Representative Burchard of Illinois pointed out that the statutes of a state may show no discrimination and yet be deemed inadequate in that they do not afford the necessary protection required of the state:

> If the State legislature pass a law discriminating against a portion of its citizens or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws ("Cong. Globe", 1871, p. 315).

This legislative history clearly explains why the

Reconstruction Congress was specifically concerned with the refusal of local officials to act when the Ku Klux Klan terrorized blacks.[1] Congress deemed this provision necessary precisely because state and local police would not or could not enforce the law. The speeches by members of the 42d Congress are replete with descriptions of violent and brutal conduct left unpunished by the helpless states or lax law enforcement action by the authorities. There were organized bands of "...lawless men composed mainly of the rebel army working in disguise." These men were violent and terrorized blacks by murdering, whipping and scourging them all over the south ("Cong. Globe", 1871, p. 428).

From its enactment, the precise scope of the Klan Act was not definite and therefore the act has been interpreted by the courts over the years. It is the Supreme Court's interpretation that has guided the use of section 1983. The congressional debates did not indicate whether the act was intended to correct only official actions or whether the intent was to also include the omissions of state governments. An overall reading of the debates reveals a Congressional concern that the federal remedy not be limited to illegal vicious acts committed under the authority of any state law, but rather that the federal law provide a remedy to correct the wrongs overlooked by the local governments.

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[1]. The Reconstruction period, 1865-77, is the period during which most of the significant constitutional changes and Civil Rights legislation were enacted.

The unwillingness of the states and local governments to face the Klan was one of the leading factors which drove federal lawmakers to enact the act. As Representative Lowe noted, the act would have been futile were it limited to overt Klan activity. He stated:

> It is said that the States are not doing the objectionable acts. This argument is more specious than real... What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a State? If a state nevertheless permits the rights of citizens to be systematically trampled upon... of what avail is the Constitution to the citizens. ("Cong. Globe", 1871, p. 375).

This preceding view is supported by the majority opinion in Monroe. The justices in Monroe also believed that the 1871 Congress intended the Act to cover not only intentional but all deprivations of civil rights (Monroe v. Pape, 1961, p. 187). The act was passed not because state and local officials necessarily intended to harm blacks, but rather it was passed because federal lawmakers believed that state and local officials responsible for enforcing the law were unable or were unwilling to do so. The congressional debates indicate that "... some legislators in the Forty-second Congress opposed the bill precisely because it would

impose liability without regard to willfulness..." ("Cong. Globe", 1871, p. 365) or intent on the part of the officials to violate the civil rights of others. But the realization that some state and local officials hid under local laws to violate civil and constitutional rights of others was a serious problem demanding rectification. Federal lawmakers therefore believed that it was critical to hold officials liable even if these officials lacked intent to tolerate these violations.

Thus it appears that the Forty-second Congress was concerned not with whether local authorities contemplated the consequences of their inaction but with whether a federal remedy was appropriate where state or municipal neglect or the inability to act caused unnecessary harm to certain citizens. Recently, Friedman (1988) stated that if the courts were to impose the proof of intent on the local governments for them to be liable, the victim's chances of obtaining relief under section 1983 for police misconduct would be severely limited. The ultimate effect of requiring specific authorization by local governments would jeopardize relief against municipal defendants for the class of plaintiffs for whom the section 1983 remedy was clearly designed (pp. 461-462).

Although this legislation was enacted because of the conditions that existed in the South in 1871, Congressional debates make clear that the act was intended to apply to

every State (Monroe v. Pape, 1961, p. 183). Moreover, as stated by the majority in Monroe, the existence of any state law which is not being enforced does not impede the application of the Act. Though this goal of the act remains controversial,[2] the federal remedy created by this act is generally assumed to be supplementary to the State remedy, and as the majority stated in Monroe v. Pape, (1961), the state remedy need not be first sought and refused before the federal one is invoked (p. 183). The section reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress... (Civil Rights Act, (1871).

The statute was only one of a host of legislative steps taken during the period of Reconstruction to protect

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[2]. See the dissent of Justice Frankfurter in Monroe v. Pape, 1961, pp. 230-243.

southern blacks from the rampant violence.[3] Apart from resistance from state and local governments, Congressional initiatives to counter the attacks on blacks were often subjected to judicial attack. Continuous judicial attack upon these congressional initiatives, state and local resistance to change and growing dissatisfaction with the fight against racial discrimination, resulted in the disuse of the section for a long period (Baumann, 1985, p. 204). Varying opinions of researchers place the number of cases decided under section 1983 between 1871 and 1920 at between 21 and 967 (Robinson, 1984, p. 85). The factors which contributed to the section's long period of disuse include: restrictive application of the state action doctrine, the narrow reading of the Fourteenth Amendment privileges and immunities clause, and the Supreme Court's refusal to completely incorporate the provisions of the bill of rights (Robinson, 1984, p. 85).

Historically, the Court was inactive in promoting individual rights. The behavior that the Reconstruction Congress must have meant to punish (official racially-

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[3]. Other remedies included: the refusal of Congressional seats to delegates elected by the "white-wash" southern electorate, the authorization of the Freedmen's Bureau to take jurisdiction over all cases in which blacks were denied civil rights customarily exercised by whites, or where blacks, because of their race, were assigned different punishments or penalties than whites, the Civil Rights Act of 1866, the Fourteenth Amendment, and the Reconstruction Acts. These remedies preceded the Civil Rights Act of 1871.

motivated physical brutality directed against blacks) was beyond the ability of the state legislature. The ineffectiveness of the civil rights law and the limited holdings within this period cannot be separated from the political developments of the time. Southern Democrats never accepted the radical reconstructionist control of their state governments and often directed their political energy to undoing Republican and black gains within the state political processes. Ultimately, they succeeded.

Racial prejudice (both in the North and South) undermined radical Republican positions and strengthened Southern Democrats. In this political climate, police were left to themselves and often inflicted physical abuses on blacks. It was common knowledge then that the violence often was committed with the connivance of state and local government officials. Cases of Klan abuses of blacks are well documented (Schuck, 1983). Even elections were often very violent. For example, in the 1876 Presidential election Republicans bargained for Rutherford B. Hayes and removed federal troops from the south and were rewarded by the polls. This atmosphere made the mid and late 1870s not conducive to vigorous development of civil rights law. It was not until 1941, when the judiciary began to exhibit a willingness to seriously address civil rights issues, that the section was rejuvenated. It was also during the 1940s that the Court began expanding the interpretation of many

sections of the act, thus expanding its utility.

This act, embodying the current 42 U.S.C. 1983, provides broad civil rights jurisdiction for all claims of deprivations of federally secured rights "under color" of state law. The federal remedy available since 1871 was rarely used until the 1960s. Since then it has been the basis of thousands of lawsuits against criminal justice practitioners. The following discussion details the salient developments of case law relating to this statute.

As stated above, the act of 1871 was Congress's attempt to provide protection to individuals whose civil and constitutional rights were being violated by state officials. With the passage of this act, the federal government intended to remedy the deficiencies of law enforcement practices in the southern states. The intent, however, was not to interfere in the states' political independence. In the congressional debates there is no indication that Congress sought to impair the states' political independence.

This political noninterference was evident in the approach adopted by the Supreme Court in some of its decisions following the civil war. For example, in the Slaughterhouse Cases, (1873) the Supreme Court demonstrated that the primary responsibility in matters of civil rights and civil liberties still belonged to the states. Adopting a narrow interpretation of the privileges and immunities

clause of the Fourteenth Amendment, the Court developed a doctrine which in effect held that the Fourteenth Amendment could only be construed to reach the misconduct of state governments and state officials. Private persons were therefore exempt from the reach of the Amendment (Barrineau, 1987, p. 8). This reading of the Fourteenth Amendment meant that executive and judicial conduct formally sanctioned by the state was deemed to be "state action," while conduct by state officials in violation of their authority was not. As a result, the very activities meant to be checked by the 1871 Act were immunized from federal sanctions just two years following enactment by a Supreme Court decision.

The period from the end of Reconstruction to the Depression was characterized by the inaction of the federal judiciary. According to Barrineau (1987), this was a period when state police were permitted a wide latitude in their activities and little attention was afforded the safeguarding of individual rights by the federal judiciary (p. 8). The result was that Klan-type activity and other forms of abuse which the 1871 act sought to remedy were held by the courts to be beyond the scope of section 1983. For example, Brawner v.Irvin (1909) was a Georgia case involving a section 1983 action against a police officer who whipped and assaulted a female plaintiff in public, detained her, and eventually released her without ever charging her. The Court saw no deprivation of any constitutional or federal

secured privilege or immunity in such conduct and dismissed the action. This decision exemplified the attitude of the courts at the time.

Since the Bill of Rights was designed to deal with relationships between the individual and the federal government, the courts treated it as imposing limitations only on the federal government. The thought by some in the early 1900s that the Fourteenth Amendment had incorporated all the provisions of the first Eight Amendments and thus made them applicable to the states was rejected by the Court (Israel, Kamisar & Lafave, 1990, p. 33). The Court preferred what it termed the "fundamental rights" or "ordered liberty" interpretation of the Fourteenth Amendment due process clause. This approach treated the due process clause as incorporating those principles of justice which are "implicit in the concept of ordered liberty." Under this fundamental fairness principle states were required only to provide criminal defendants with "that fundamental fairness essential to the very concept of justice" (Israel et al., 1990, p.43). The Court maintained this approach until the 1960s.

Beginning in the 1960s the Court started to selectively incorporate certain provisions of the Bill of Rights. Selective incorporation combines both the fundamental rights and total incorporation approaches. It looks at the totality of rights guaranteed by the Bill of Rights provision. If

that right is fundamental, it is included in the Fourteenth Amendment.

It is thus no coincidence that the reinterpretation and the broadening of some of the civil rights acts occurred during the 1960s. For example, beginning in the 1960s the Court has, through a series of decisions, held certain provisions of the First, Fourth, Fifth and Eighth Amendments as applicable to the states.

In two criminal cases in the 1940s the narrow interpretation of acting "under color of state law" in the civil rights acts was reinterpreted. In United States v. Classic, (1941), the Supreme Court reversed the dismissal of charges brought under the criminal provisions of the Civil Rights Act against election officials who had fraudulently counted ballots in a primary in violation of state law. The court rejected the premise that "under color of law" required that the conduct be authorized by a state statute. The Court stated that, "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state, is action taken 'under color of' state law" (United States v. Classic, 1941, p. 326).

Four years after Classic, the Supreme Court, in Screws v. United States, (1945), held that a sheriff's fatal beating of a black prisoner constituted conduct "under color of the law." In this case Justice Douglas, writing for the

majority, defined "under color of law" as meaning "under the pretense of law." From Classic thereon, and particularly in criminal actions under the Civil Rights Acts, conduct "under color of law" included unauthorized and unlawful conduct of a State officer, so long as the "pretense" of authority with which he/she acted furthered, in any way, the constitutional violation.

Although these were not section 1983 cases, the interpretation of basic sections similar to those contained in section 1983 provided the common foundation for most future federal tort actions. In Classic and Screws the Supreme Court interpreted a federal statute (18 U.S.C. section 242), that makes it a crime when someone "wilfully subjects, or causes to be subjected, any inhabitant of any state... to the deprivation of any rights... protected by the constitution..." The interpretation of "color of law" in these cases has been given the same interpretation in section 1983 actions. Moreover, the provision is the same in the two acts apart from the use of the word "wilfully," in section 242.[4] (Call & Slesnick, 1984, p. 63). In Screws the Court indicated that there must be specific intent to deprive a person of a federal right for a violation of the

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[4] Monroe v. Pape, 1961, pp. 184-187. See particularly p. 185 where the Court stated:

> Thus, it is beyond doubt that this phrase (meaning 'under color of law') should be accorded the same construction in both statutes - in § 1979 and in 18 U.S.C. § 242."

statute (s.242) to exist.

Apparently Classic and Screws made section 1983 more available for suits alleging police misconduct. As Barrineau (1987) has observed, within a few years following these decisions, there was a gradual incorporation of the Bill of Rights into the due process clause. This incorporation led to the emergence of the modern equal protection and due process doctrines which greatly enlarged the potential reach of section 1983 (p. 9). The section still remained virtually ignored and few cases seemingly were filed under it. Public acts not authorized by the state law were still considered neither state action nor action under color of law.

Despite the Court's holdings in Classic and Screws, plaintiffs did not step forward under section 1983. There remained hurdles to be overcome. It took fifteen years after Screws, for the Supreme Court in Monroe v. Pape, (1961) to revive not only the intent, but the practical use, of the section. In Monroe, the plaintiff and his family sued thirteen Chicago police officers and the City of Chicago, alleging that law enforcement officers broke into their home without a warrant, forced them out of bed at gunpoint, made them stand naked while the officers ransacked the house, and subjected the family to verbal and physical abuse. The police then allegedly took Monroe to the police station where he was held incommunicado and interrogated for ten hours before being charged. Plaintiffs claimed that the

defendants' actions constituted a deprivation "under color" of law of their constitutional guarantee against unreasonable searches. The federal district court dismissed the complaint and the circuit court affirmed.

The United States Supreme Court concluded that the law enforcement officers' conduct violated the plaintiff's constitutional rights. The Court held that the meaning of "under color of law" for the purposes of section 1983 was the same as that already established in the criminal cases (p. 185). The Court also concluded that since section 1983 provides for a civil action, the plaintiffs need not prove that the defendants acted with a "specific intent to deprive a person of a federal right" (Monroe v. Pape, 1961, p. 187). However, the Court held that municipalities (and in this case, the City of Chicago) were not "persons" under section 1983.

Monroe is important for its expansive interpretation of "under color of law." Also, by its holding that no specific intent to violate a constitutional right was necessary for a civil cause of action, it removed a heavy burden of proof on potential section 1983 plaintiffs. Moreover, it also guaranteed that the existence of a state remedy would no longer bar a section 1983 action, and that an officer who violates state law is, for purposes of this section, still acting under "color of law." (Silver, 1986, sect. 8(10)). Because of this expansive interpretation, Monroe is

considered a landmark case in civil rights law. Following Monroe, the "under color of law" requirement is satisfied when the action in question is committed by a public official appearing to act in his or her official capacity.

It is necessary to place Monroe in a historical perspective in order to understand the holding of the Court. Like other holdings of the Court during this period, it can probably be attributed to the Warren Court's expansive reading of the Constitution. Apart from expanding restricted interpretations of several federal statutes, the Court extended their application to the states. The Warren Court's attempt to extend the benefit of civil rights to all citizens, especially to the poor and to the minorities was unpopular to some, but the Court simply extended to the "poor and ignorant those rights previously effectively enjoyed only by the well-to-do and well educated" (Weintraub & Pollack, 1978, p. 258).

Following Monroe, a plaintiff pursuing a section 1983 claim need only fulfill two basic requirements to satisfy the evidentiary burden. First, the plaintiff needs to prove that he or she has been deprived of a federal statutory or constitutional right. And second, the plaintiff must also prove that the defendant deprived him or her of this right while acting under the color of law. Thus, although the specific actions of the officer may not be authorized by statute, the officer will still be liable, as long as the

officer was clothed with state authority and acted under such authority.

One of the effects of the broadened interpretation of "under color of law" was the difference in the treatment courts accorded defendants under state and local law and federal law. Federal government officers were still immune from section 1983 liability since they do not act under color of state law. And, the absence of municipal liability meant the plaintiff could only sue the individual officer who, in most cases, could not pay any large damages awarded the plaintiff. As a result of Monroe, it became clear that law enforcement officers and other criminal justice practitioners were subject to suit in the state courts under section 1983. It also became clear that plaintiffs usually would not be able to obtain reasonable damages because criminal justice practitioners did not earn much and the municipalities were not liable under this section (Jaffe, 1963).

B. The Complementary Remedy: Bivens.

While section 1983 granted federal courts jurisdiction to deal with constitutional torts committed by state and local officials, there was no equivalent power granted to the federal courts to deal with constitutional torts committed by federal officials. Thus, while federal officials could be sued under section 1983 in the state

courts, they could not be sued under the Act in the federal courts.

As Ikeda (1973) stated, the immunization of federal officials from liability in federal courts produced a double standard in the treatment of federal and state police officers, and consequently, the injured party (the section 1983 plaintiff) suffered because recovery was dependent on whether the defendant was acting under federal or state authority (p. 989). This problem was addressed in the following important decision which substantially altered the law of civil liability.

To bridge this gap, the Court created a remedy based in the bill of rights by its decision in Bivens v. Six Unknown Named Agents of The Federal Bureau of Narcotics, (1971). The inability to obtain relief from federal officials in federal court and the immunity question were among the important background factors of the Bivens decision. The Supreme Court had the opportunity to rule on the damage award question while the Second Circuit had the opportunity to rule on the immunity doctrine as it applied to federal police officers. The allegations advanced by the plaintiffs in this landmark case need to be stated fully here because this case dramatically changed the practice of civil law against federal police officers.

According to Bivens, on the morning of November 26, 1965, six agents of the Federal Bureau of Narcotics forced

their way into his apartment with drawn firearms. The agents forcibly menaced Bivens in the presence of his wife and children and placed him under arrest for alleged violations of the narcotics laws. After a warrantless search of the apartment, they took him to the federal courthouse in Brooklyn to be interrogated, booked and strip-searched. The complaint against Bivens was dismissed by the United States commissioner.

Following the dismissal, Bivens brought a civil suit in federal district court seeking damages for humiliation, embarrassment and mental suffering in the amount of $15,000 from each of the officers based on a right of action under the Fourth Amendment. The district court dismissed the complaint. It held that a claim for damages could not be sustained because there was no express constitutional or statutory provision for such a remedy and, even if there was such a right of action, the defendants, as federal agents, were absolutely immune from civil suit. The Second Circuit affirmed the holding on the ground that there was no constitutional or statutory remedy for such a claim. The Supreme Court reversed, ruling that a valid claim for relief was stated under the Fourth Amendment. The case was remanded to the Second Circuit for a determination of whether the conduct of the defendants was absolutely immune from private suit. The Second Circuit unanimously held that even though the defendants were federal officers, they did not have

absolute immunity and were entitled to the special defense of "good faith and reasonable belief."

Because the Supreme Court held that a money damage action could be derived from the Fourth Amendment, Bivens became a Court-created counterpart to section 1983. The Bivens remedy covered the loophole in section 1983 by adjusting to the situations of those plaintiffs who would have been left with no remedy in federal court (Robinson, 1984, p. 97). As a result of this decision, the Court recognized the injustice suffered by victims whose abusers were federal officers as opposed to those who suffered their fate from state or local officials (Ikeda, 1973, p. 995).

Also, the Second Circuit, on remand, by rejecting the long-standing precedent of granting immunity to federal officials, held that federal officials had only qualified immunity in civil liability lawsuits. Driven by the desire to eliminate the double standard in the treatment of state and federal officials and to provide a deterrent to police misconduct, the Second Circuit held that federal officers performing police duties did not warrant the protection of absolute immunity (Bivens v. Six Unknown Named Agents, 1972, pp. 1346-47). The Court also deemed it necessary not to leave federal officials without protection because of the indispensable functions they perform. Qualified immunity or the defense of "good faith" involved a reasonable belief by the officer that he or she acted consistently with the laws

(Bivens v. Six Unknown Named Agents, 1972, p. 1347).

Because of Bivens, cases against federal officers that would have been dismissed or summarily disposed of by the courts, can now only be dismissed after the officer-defendant has filed an affirmative defense (Bivens v. Six Unknown Named Agents, 1972, p. 1348). Also, many cases that would have not culminated in trial before Bivens, now usually go to trial.

There are, however, differences between Bivens actions and section 1983 actions. Bivens is a judicial creation and can be abrogated by any Congressional enactment that has the effect of providing alternative remedies to similar damage action [Silver, 1986, sect. 8(6)]. It must be noted, however, that some United States government officials are absolutely immune from Bivens suits when acting in official capacity (United States v. Mitchell, 1980).

As Call and Slesnick note (1984), Bivens suits are narrower in scope than section 1983 suits because they require injury to constitutional rights, while section 1983 claims may be based on violations of federal statutes (p. 63). The Court has stated that the phrase, "deprivation of any rights, privileges, or immunities secured by the constitution and laws" in section 1983 means rights created by federal law as well as the constitution (Maine v. Thiboutot, (1980).

C. The Current Standard for Police Liability.

Since section 1983 was rejuvenated in the 1960s, courts have struggled with the question of how to separate meritorious actions from frivolous claims, especially in allegations of violations of the Fourth Amendment (Lobel, 1986, p. 20). According to Lobel, courts are moving toward granting section 1983 remedies only in instances where substantial constitutional rights are violated.

Since police can be held liable for excessive use of force, nondeadly or deadly, the question is which test the courts should use in determining police conduct that amounts to a violation of constitutional rights. Originally, the courts used the "shock the conscience" standard laid down by the Supreme Court in Rochin v. California, (1952) to determine circumstances that warranted the award of damages. This test was based on the Fourteenth Amendment Due Process standard which protects the individual's right to be free from state intrusions into personal "privacy and bodily security through means so brutal, demeaning, and harmful as literally to 'shock the conscience' of the Court."

The police in Rochin attempted to arrest the plaintiff for trafficking in narcotics. Upon approaching the plaintiff, the defendant swallowed a quantity of narcotics and the officers took the defendant to the hospital and forcibly pumped his stomach to remove the illegal drugs. The Court ruled that such actions clearly violated Fourteenth

Amendment Due Process guarantees, and that the officers' intrusion on the defendant's bodily integrity was unquestionably an act which "shocked the conscience." This standard has been abandoned for the "objective reasonableness test" enunciated in Graham v. Connor (1989).

Before deciding Graham, the Supreme Court had decided two earlier cases that set the stage for the outcome of Graham. In Tennessee v. Garner, a statute that allowed the use of deadly force was held unconstitutional. The statute provided that if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, "the officer may use all the necessary means to effect the arrest." Acting under the authority of this statute, a Memphis police officer shot and killed appellee-respondent Garner's son. After being ordered to halt, the son fled over a fence at night in the backyard to a house he was suspected of burglarizing. The officer used deadly force despite being "reasonably sure" the suspect was unarmed and thinking that he was seventeen or eighteen years old and of slight build. The father subsequently brought an action in Federal District Court, seeking damages under 42 U.S.C. 1983 for asserted violations of his son's constitutional rights. The District Court held that the statute and the officer's actions were constitutional. The Court of Appeals reversed. The Supreme Court ruled the Tennessee statute unconstitutional insofar as it authorized

the use of deadly force against apparently unarmed, non-dangerous fleeing suspect.

The Court also stated that "to determine the constitutionality of a seizure we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion" (p. 8). Garner clarifies the extent to which the police can use deadly force. The decision in this case rendered unconstitutional existing laws in many states that imposed no restrictions on the use of deadly force by police officers. This balancing process demonstrates that, notwithstanding probable cause to seize a felony suspect, an officer may not always do so by killing him. As a matter of public policy, human life is more valuable than the apprehension of a suspect. "The Court therefore is of the opinion that the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable" (Tennessee v. Garner, 1985, p. 11).

The Court also said reasonableness depends on not only when a seizure is made, but also on how it is carried out in light of the totality of the circumstances (p. 9). According to Loftus et al. (1989), to determine whether the reasonableness test is a proper standard, one must evaluate how the test will affect police brutality cases. For them,

such a standard ought to facilitate the easy disposition of frivolous cases, allow police officers the exercise of reasonable authority to engage lawful procedures in fighting crime and ensure that victims of unlawful police force are adequately compensated (p. 147).

Consistency is another factor that has been considered in the evaluation of the standard to be used in these suits. The logic in this approach is to synchronize any recommended standard with that used in other Fourth Amendment actions. Therefore, the objective standard adopted in other Fourth Amendment cases, should also be used in civil damage suits. The Supreme Court illustrated the standard to be used in police excessive force cases in the following case.

The Court said the case could not be analyzed in light of the common-law rule allowing the use of whatever force is necessary to effect the arrest of a fleeing felon, because changes in the legal and technological context mean that the rule is distorted almost beyond recognition when literally applied. The Court concluded "that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." The reasonableness of a seizure depends on not only when a seizure is made, but also on how it is carried out. As Silver (1986) has noted, the decision has made the question of the manner of seizure an issue in

civil rights litigation (Silver, sect. 8(6)(2)).

The circumstances surrounding the police violation are considered in every case to determine whether the officer acted reasonably. For example, in determining the reasonableness of an arrest in Brower v. County of Inyo, (1989), the Court stated that a seizure for the purpose of the Fourth Amendment occurs "when there is a governmental termination of freedom of movement through means intentionally applied" (p. 1381). In Brower, a section 1983 action was brought by petitioners' decedent (Brower) alleging that police officers, acting under color of state law, violated the rights of the decedent. Brower was killed when the stolen car he was driving at high speeds to elude pursuing police crashed into a police roadblock. The claim was based on the theory that the roadblock constituted an unreasonable seizure due to excessive force. The United States District Court for the Eastern District of California dismissed the action for failure to state a claim, concluding that the roadblock was reasonable under the circumstances. The Court of Appeals affirmed on the ground that no seizure had occurred.

The Supreme Court held that a seizure occurred. It stated that, consistent with the language, history and judicial construction of the Fourth Amendment, a seizure occurs when governmental termination of a person's movement is affected through any means intentionally applied. Because

the decedent in this case was stopped by the medium activated by the government to stop him, he could make a claim of Fourth Amendment seizure (Brower v. County of Inyo, 1989, pp. 1380-82). The Supreme Court held that the Court of Appeals must, on remand, determine whether the District Court erred in concluding that the roadblock was not unreasonable.

Brower tells police when a seizure takes place in police work. When such a seizure does occur, then the officer can be held liable because the officer would be deemed to have acted unreasonably and to have deprived the individual seized of his or her constitutional rights.

After defining excessive police force and seizure, the court was now ready to define the standard to be used in these cases. In Graham v. Connor (1989), the Supreme Court was asked to decide the constitutional standard which governs citizens' claims against police for excessive force committed in the course of arrests, investigatory stops and/or searches and seizures. The Court clearly stated that cases involving police use of deadly force are to be decided by using the reasonableness standard of the Fourth Amendment. In this case, Graham, a diabetic, brought a section 1983 action seeking to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during the course of an investigatory stop. The District Court granted respondents'

motion for a directed verdict, applying the four-factor test, stipulated by Judge Friendly in Johnson v. Glick, (1973), for determining when excessive use of force gives rise to a section 1983 cause of action. The Court of Appeals affirmed, endorsing this test as generally applicable to all claims of excessive force brought against government officials.

The Johnson test requires consideration by the court of whether the officer acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm." By rejecting this standard used by the lower courts since Johnson v. Glick, the Supreme Court in Graham held that a claim that law enforcement officials have used excessive force in course of an arrest, investigatory stop or other "seizure" of a person are properly analyzed under the Fourth Amendment's objective "reasonableness" standard. The Court stated that:

> Today we make explicit what was implicit in Garner's analysis, and hold that all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness standard, rather than under a "substantive due process" approach (Graham v. Connor, 1989, p. 1971).

Graham now sets the legal standard by which allegations of excessive force by police officers are determined for civil liability purposes. Graham applies to all types of excessive use-of-force cases and is therefore the general rule. Garner, on the other hand, has a specific application - determining liability in escape attempt cases.

D. Governmental Liability.

In Monroe the Supreme Court expressly stated that municipal corporations cannot be sued for damages under section 1983. For many years following Monroe, the Supreme Court and the federal courts continued to grant absolute immunity to municipalities. Classic, one of the 18 U.S.C. section 242 cases that broadened the interpretation of "under color of law," stated that law enforcement officials and other criminal justice practitioners are subject to criminal prosecution under the Civil Rights Act of 1871. It also had become clear to potential plaintiffs of section 1983 that using the section would not be as helpful as they believed; they would not be able to collect large damages because criminal justice practitioners did not earn a great deal of money and municipalities which could afford to pay large damage awards were still immune from liability under section 1983 (Barrineau, 1987, p. 11).

The relief for these plaintiffs occurred in 1978 when that portion of Monroe which granted municipalities and

other local units of government immunity from section 1983 actions was overruled. In Monell v. Department of Social Services (1978), petitioners, a class of female employees of the Department of Social Services and the Board of Education of the City of New York, brought an action under 42 U.S.C. Section 1983. Their complaint alleged that the Board and the Department had, as a matter of official policy, compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The suit sought injunctive relief and back pay for periods of unlawful forced leave. The Department and its Commissioner, the Board and its Chancellor, the City of New York and its Mayor, were named as defendants in the action. In each case the individual defendants were sued solely in their official capacities. The Supreme Court overruled its sixteen year standing decision in Monroe which had continued to grant municipalities absolute immunity. The Monell Court stated:

> Our 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 section 1983 applies. Local governing bodies, therefore, can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief where, as here, 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. Moreover, although the touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for deprivation of rights protected by the constitution, local governments, like every other Section 1983 "person" by the very terms of the Statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels (Monell v. Department of Social Services, 1978, p. 690).

The Supreme Court thus abolished the absolute immunity of municipalities by expanding the definition of "person" as used in section 1983 to include municipal, county, and government entities. Since Monell, police misconduct which can be linked to governmental policy or custom is actionable against the agency responsible for creating the custom or policy.

Monell expanded the application of section 1983 greatly (Barrineau, 1987). The result of the possibility of holding municipalities liable has been the enhancement of the effectiveness of section 1983 and a great increase in the

potential of the section as a means of obtaining relief for violations of the Fourth Amendment. As stated earlier, other factors attributable to the increase include: the development of the modern doctrines of due process and equal protection, the heightened awareness of the individual of his/her civil rights and liberties, and the rapid and continued re-interpretation of the section by the courts, which has continued into the 1980s.

The Monell Court discussed the circumstances under which municipal liability could be imposed. The Court noted that section 1983 only imposed liability for a deprivation caused by a particular defendant, and that a municipality cannot be held liable solely because it employs a violator (i.e., on a respondeat superior theory) (Monell v. Department of Social Services, 1978, pp. 690-91). The Monell Court made it clear that only those police abuses resulting from municipal "custom" or "policy" could lead to municipal liability.

Since Monell, section 1983 plaintiffs have had a deeper pocket on which to draw. However, Monell overruled Monroe just as far as it held that local governments were "persons" under section 1983 and therefore could be sued under the section. The court raised, but did not settle the question of whether local governments were entitled to any form of official immunity. This question was taken up in Owen v. City of Independence (1980). The facts of this case are

stated fully to show how officials can benefit from the qualified immunity exception, but not the municipalities employing them.

In Owen, following the decision of the City Council of Independence to release reports of an investigation of the city police department to the news media and the prosecutor (for presentation to the grand jury), the council also decided that the City Manager take appropriate action against the persons involved in the wrongful activities brought out in an investigation reports. Given this mandate, the City Manager promptly discharged petitioner from his position as Chief of Police. No reason was given for the dismissal and petitioner received only a written notice stating that the dismissal was made pursuant to a specified provision of the City Charter. Subsequently, petitioner brought suit in Federal District Court under 42 U.S.C. section 1983 against the city, the City Manager, and the respondent members of the City Council in their official capacities, alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, and seeking declaratory and injunctive relief. Following a bench trial, the District Court entered judgment for respondents. The Court of Appeals affirmed, holding that although the city had violated petitioner's rights under the Fourteenth Amendment, all the respondents, including the

city, were entitled to qualified immunity from liability based on the good faith of the city officials involved.

The Supreme Court reversed the Court of Appeals and held that the municipal corporation could not assert the "good faith" defense. Barrineau (1987) stated that the Court's holding was based on the grounds that: (a) no such immunity existed at common law; (b) the intent of the Congress was to compensate victims of police violations; (c) maintaining local governmental immunity would render section 1983 as an ineffective deterrent to police violations; and (d) the principle of "equitable loss-spreading" requires no recognition of the immunity (p. 16).

The impact of Monell and Owen is that local governmental agencies cannot raise the good faith defense in section 1983 actions for alleged police violations of civil and constitutional rights. The Court outlined three objectives which it sought to accomplish in Monell and other section 1983 decisions that came before Monell. First, the individual who is harmed by an abuse of governmental authority is assured compensation for his or her injury. Second, the Court believed that the offending public official, if acting in good faith, should be immune from personal liability for damages. But the municipality and consequently the public, whose policy is being enforced by the individual officer, should be liable. And finally, the public, through the municipality, is liable only when the

injury is inflicted by the execution of a government's policy or custom (Owen v. City of Independence, 1980, p. 657; Hardy & Weeks, 1985, p. 11). The Court, therefore, did not find any basis for allowing the city to benefit from the good faith of its employees. The Court stated:

> But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of section 1983 that would justify the qualified immunity accorded the city of Independence by the court of Appeals. We hold, therefore that the municipality may not assert the good faith of its officers or agents as a defense to a liability under section 1983 (Owen v. City of Independence, 1980, p. 638).

Hardy and Weeks (1985) outlined some of the Court's observations of the expected future conduct of local governments and their officials. As the majority stated, section 1983 was meant to serve as a deterrent against future constitutional deprivations, as well as providing compensation for past abuses. The Court intended to make municipalities liable for all injuries (including even those committed in good faith) resulting from the enforcement of its policies and customs. As stated in the decision such a policy provides an incentive for those officials doubting the lawfulness of their conduct to decide in favor of protecting constitutional rights (Owen v. City of

Independence, 1980, pp. 651-52).

The Court made the observation that the possibility of the levy of damages against the city might, in most cases, encourage local policymakers to institute internal rules and programs which have the effect of inhibiting official violations of civil or constitutional rights (Owen v. City of Independence 1980, p. 652; Hardy & Weeks, 1985, p. 11). The introduction of such procedures would indirectly be beneficial in preventing injuries resulting from the activities of police officers who may be acting in good faith.

Since Monroe some courts have sought to limit recovery by imposing on the plaintiff the requirement of showing improper motive or intent of the defendant to cause injury. As the Court stated in Monroe, intent is not necessary for a violation of section 1983. Furthermore, the Court stated that liability under section 1983 should be determined by reference to "the background of tort liability that makes a man responsible for the natural consequences of his actions" (Monroe v. Pape, 1961).

The issue of intent has been discussed in some recent court decisions. The discussion intensified after Monell as the Court grappled with the question of the causal link between the municipal policy or custom and the alleged injury in section 1983 cases. As Friedman noted, some judges, particularly those in the minority in the City of

Los Angeles v. Lyons, 1983, City of Oklahoma v. Tuttle, 1985, and City of Springfield v. Kibbe, 1986, thought a showing of authorization or intent was necessary to find the city liable for violations of constitutional rights in cases involving municipal policy (p. 451). In Lyons and Kibbe the plaintiffs sought redress for the violations of their constitutional rights by individual police officers. They accused the officers of using excessive force and employing municipalities for failure to properly train and supervise the officers. Despite the reaffirmation of Monell that municipalities are not immune from liability under section 1983 suits and that municipalities are considered persons as defined by the 1871 Act, the minority in the above cases seemed to be asking for a requirement that plaintiffs in these police actions prove specific authorization by the municipalities for police to act before municipalities could be held liable.

The dissenters in these two cases, as well as the City of Oklahoma v. Kibbe, 1985 were seeking to establish a link between municipal programs or supervision and the use of excessive force before holding municipalities liable. As it was pointed out in Monell and in some other recent cases, the demand on the plaintiff to submit proof that policymakers deliberately choose an inadequate program or that they were deliberately negligent in their supervision policies, will impose an unnecessary burden on the

plaintiff. Such a demand would not only defeat the purpose of Monell to compensate the victims of police violations but would destroy the effectiveness of the Act. This approach has been thought to be contrary to the modern jurisprudence of the Supreme Court and as Friedman (1988) noted, this characterization "reveals a fundamental misunderstanding of how law enforcement authorities violate citizen's rights" (p. 458). She recently wrote:

> the indifference of supervisors-whether or not deliberate-may give police officers reason to believe that they may act without fear of discipline or control or may lead poorly trained officers into confrontation for which they are ill prepared. Bureaucratic inertia, poorly conceived structural arrangements, or outdated procedures may also produce constitutional violations regardless of the good intention of supervisory personnel. A police department that adopts ineffective disciplinary rules or inadvertently ignores it own regulations may encourage the same unlawful behavior as a department that knowingly implement faulty procedures (p. 458).

The Supreme Court recently addressed the question of intent in the City of Canton v. Harris, 1989. Geraldine Harris, a detainee, brought a civil rights action against the City of Canton. She alleged violation of her right to

receive necessary medical treatment while in police custody. The District Court entered judgment in her favor. The City appealed and the Court of Appeal reversed and remanded and the City petitioned to the Supreme Court for a writ of certiorari. The Court held that inadequacy of police training may serve as a basis for section 1983 municipal liability only where failure to train amounts to deliberate indifference to the rights of the persons with whom police come into contact.

Harris clarified the question of the causal link that the Court had grappled with following Monell. The Court clearly stated in Harris that, to be consistent with Monell the city policy must be the driving force behind the injury. Simply alleging that a city is responsible for a program is not sufficient to hold the city liable (City of Canton v. Harris, 1989, p. 1203). After Harris, if a plaintiff accuses the municipality of failure to train its police force, the plaintiff must prove that the municipality "acted recklessly, intentionally, or with gross negligence, and that the lack of training was so reckless or grossly negligent that the deprivation of the person's constitutional rights was substantially certain to result" (City of Canton v. Harris, 1989, p. 1199).

To be classified as municipal policy, the failure to train must therefore be the result of a deliberate and conscious decision of municipal administrators. The main

question for the courts to answer in these circumstances is whether the training program provided by the municipality was sufficient to enable the officer to perform the function that caused the victim's injury. The victim must be able to establish that the deficiency in the municipal program caused the injury.

There have been other important developments since the Monell and Owen decisions. In 1981, in a suit against the city, its mayor, and six council members for compensatory and punitive damages, municipalities were held to be immune from punitive damages in a section 1983 suit (City of Newport v. Facts Concerts, Inc., 1981). The Court noted that the Owen decision concerned only compensatory damages. The Court also noted that the common law in 1871 did not permit punitive damage awards against municipalities and that neither the retributive nor the deterrence objectives of punitive damages and of section 1983 could be achieved by making municipalities liable in punitive damages for the reckless or malicious conduct of its officials (City of Newport v. Facts Concerts Inc., 1981, pp. 267-71); Silver, 1986, sect. 8-14).

Liability of federal government officials hinges on Bivens and the Federal Tort Claims Act of 1946 and its 1974 amendment. Federal officials can only be sued under Bivens, the federal equivalent of section 1983. The Federal government is, however, immune from liability in all cases

except those in which the suit is brought as a tort action qualifying under the Federal Tort Claims Act. Under this Act, the federal government waives its general tort immunity. An action against a federal official and a tort action against the federal government can be joined in the same suit (Silver, sect. 8(2)).

The Federal Tort Claims Act, after its amendment in 1974, has been held by the Supreme Court to be applicable to acts or omissions of investigative or law enforcement officers of the United States government on claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. Federal officers also benefit from the same qualified immunity as state officials, as stated in Harlow v. Fitzgerald (Posner, 1981, p. 65).

The Court has held that the act is not and was never meant to be an adequate remedy for the protection of constitutional rights (Carson v. Green, 1980). The Court in Green noted that there was no explicit congressional declaration to exclude Bivens or other parallel complimentary causes of action. The Court found that the Federal Tort Claims Act is not adequate because it does not provide for punitive damages, precludes a jury trial and is based on states' created causes of action {Carson v. Green, 1980, pp. 20-23; Silver, 1986, sect. 8(6)}.

Since section 1983 was given new life in the 1960s,

courts have struggled with the question of how to separate meritorious actions from frivolous claims, especially in allegations of violations of the Fourth Amendment (Lobel, 1986, p. 20). According to Lobel, the courts are moving towards granting section 1983 remedies only in instances where substantial constitutional rights are violated.

E. Qualified Immunity.

The Supreme Court has developed the notion of the qualified immunity defense for civil rights violations. Since the 1960s courts have continued to address the question of immunity in section 1983/Bivens actions as law enforcement officials continue to look for avenues to avoid civil liability. Though there are many defenses available to the police officer, the good faith and probable cause defenses (probably more relevant in the enforcement of constitutional statutes) are common to most decisions rendered under section 1983/Bivens.

The qualified immunity or good faith test espoused in Bivens and (now absorbed by the objective reasonableness test stated in Harlow and Creighton) is applicable to executive and administrative officials and serves as an affirmative defense in section 1983 claims. The defendant in these cases need only demonstrate to the satisfaction of the jury/judge that he/she acted in good faith and that his/her conduct was reasonable. Much of police work is discretionary

and the courts realize that it would be impossible for the police to perform their duties without making some mistakes. It is therefore "the over-zealous conduct, not done in good faith, with no regard for individual rights which generally result in large damage awards" (Barrineau, 1987, p. 78).

The present qualified immunity test as enunciated in Harlow v. Fitzgerald, (1982) answers the question whether the official, at the time the act was committed, violates a clearly established statutory or constitutional right of which a reasonable person would have known. Bryce Harlow and Butterfield, senior aides to President Nixon, were accused of violating plaintiff Fitzgerald's constitutional rights by conspiring to have Fitzgerald dismissed as an Air Force official. Fitzgerald claimed that his dismissal was in retaliation for his "blowing the whistle" on the purchasing practices of the Air Force. A district court denied motions by the defendants for a summary judgment holding that they were not entitled to absolute immunity. After the court of appeals denied the appeal the Supreme Court granted certiorari and stated that:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known (Harlow

v. Fitzgerald, 1982, p. 818).

Harlow established new guidelines for the "good faith" defense available to government officials in section 1983 cases. These guidelines are applicable to civil liability cases involving police officers. Therefore, police officers are not liable in section 1983 cases if their actions do not violate clearly established constitutional or statutory rights of which a reasonable person would have known.

According to Carmen (1991), the defense under Harlow has two important implications for police officers and agencies. First, since police are liable if there is a violation of statutory or constitutional right of which a reasonable person would have known, police officers must know the basic constitutional and statutory rights of their constituents. Second, Harlow places an obligation on police agencies to update their officers' knowledge of new cases and developments that have civil liability implications (pp. 54-55).

Qualified immunity is linked to the "good faith defense" of Harlow. Four years after Harlow, the Court decided that a police officer is entitled to only qualified immunity in a section 1983 case (Malley v. Briggs, (1986). In Malley the defendant officer arrested citizens in a dragnet operation against suspected marijuana users on the basis of flimsy evidence gained from phone taps. The Court, in rejecting the officer's claim that he was entitled to

absolute immunity, held that the intervening warrant issued by a judge could not insulate the officer from liability. The officer had acted on the basis of a warrant issued by a judge and claimed that he was either immune from liability on the basis of the warrant and/or that he was immune because he was performing a prosecutorial function, and was thus entitled to prosecutorial immunity.

Malley is significant because the Court refused to be persuaded by the officer's arguments that policy considerations require absolute immunity when a police officer applies for and obtains a warrant. Malley is also important because it sets the standard of review courts will use when determining whether or not an officer may be civilly liable when an unlawful warrant is issued based on an officer's affidavit.

The case therefore makes clear that under no circumstances will the Court extend the "absolute immunity" defense (available to judges, prosecutors, legislatures, and certain members of the executive branch) to police officers. The only exception occurs when the officer is testifying in a criminal trial. This means that officers enjoy only qualified immunity but that they will not be liable if they act in an objectively reasonable manner.

The Supreme Court reiterated the Harlow decision in Anderson v. Creighton, (1987). A federal agent and other law enforcement officers made a search without a warrant of a

home, believing that a bank robber was hiding there. The family that occupied the home then brought a Bivens action for violation of the Fourth Amendment right against unreasonable search and seizure. The Supreme Court held that improper police procedure arising from ignorance of the law of search and seizure amounts to an "abuse of office" whereby a citizen's civil action against the officer and his employer "may offer the only realistic avenue for vindication of constitutional guarantees" (Anderson v. Creighton, 1987).

After restating the rule in Harlow, the Court added that "in order to conclude that the right which the official allegedly violated is clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The Court rejected the "subjective standard of legal reasonableness of the action and used the "objective standard" which focuses on the legal rights that were clearly established at the time the action was taken. The officer is expected to exercise reasonable judgment in determining whether there is probable cause to arrest or search in the circumstances (Holtz, 1988, p. 1).

F. The Increasing Volume of Litigation.

Most of the literature points towards the dramatic increase in the number of lawsuits filed in recent years

alleging misconduct on the part of criminal justice practitioners (Berringer, 1986; Impact, 1980; Lindsey, 1985). Several thousands of these cases are now being filed in the federal and state courts (Reynolds, 1988). This increase in civil liability suits against criminal justice practitioners has profound implications for individual practitioners as well as for their employing agencies. Although most criminal justice practitioners have some vague notion that they can be sued, few have any real understanding of their civil liability. As explained above, recent developments in the federal law have expanded the scope of liability enabling local units of government to be made liable for the conduct of police officers and jail personnel.

Certain related factors indicate that civil liability actions against police officers have been on the rise. A broadening of the interpretation of section 1983, an increased difficulty in maintaining liability insurance by government units and an overall increase in civil suits against public entities and personnel are all indications that such suits are on the rise (Reynolds, 1988, p. 1; Fisher et al., 1989). Also, because of several major decisions by the United States Supreme Court that have broadened the scope as well as reinterpreted certain sections of the Act, the section is readily available as a federal cause of action or remedy in civil liability cases

brought against law enforcement personnel (Ikeda, 1973; Barrineau, 1987; Fisher et al., 1989, p. 47).

A study conducted by Americans for Effective Law Enforcement, Inc. (AELE), shows that 1,723 suits were filed in 1967 and 10,633 in 1977. The study reported that at the time only 4% of the suits resulted in verdicts against the police. In 1983, 27,600 section 1983 cases were filed in federal district courts. According to government statistics, actions under section 1983 since 1977 have accounted for 12% of all civil cases commenced in Federal district courts (Baumann, 1985).

This pattern continued through the 1980s. Increases in civil liability suits were reported nationwide through the last decade (Lee, 1987, p. 163). There was a growth in civil liability suits filed in both federal and state courts. The number of civil rights cases filed in federal courts during the first half of 1980 increased by 56 percent. From 1980 to 1986 the number jumped rose 11,485 to 17,872 (Bureau of Justice Statistics, 1987, p. 4).

Plaintiff's attorneys, pro se plaintiffs, particularly those who are inmates, use section 1983 actions as an "empowerment mechanism." They generally feel alienated by the society due to racism, poverty, class warfare etc., and find themselves trapped in a criminal justice system which offers them very little solace, and very little opportunity. Section 1983 civil suits, at least the frivolous ones or

what the Corporation Counsel terms "nuisance suits," may generally be a simple expression of the overt and covert feelings of disempowerment of these trapped inmates' feelings. Any financial benefit derived from the actions is therefore considered an additional or peripheral benefit. "It may be like playing the lotto for many inmates and also they get to brag about them to other inmates" (Personal Interview, February 7, 1991).

It is also worth remembering that many good section 1983/Bivens cases never reach court, allowing some law enforcement officers to get away with flagrant abuses of certain members of the public, particularly the less powerful. Inasmuch as there are certain pro se plaintiffs who do not know how to frame their causes of action and others who bring frivolous suits, there are some victims of police abuses who do not know that they can sue officers for violations of their rights or are simply too afraid of the police or the system to bring any action. Unfortunately, most of these potential plaintiffs are mainly the poor and the minorities who need protection most and for whom this statute was originally enacted.

In terms of costs, the magnitude of the suits has been described as dramatic. Barrineau (1987) reported that a survey in 1981 by the National Institute of Municipal Law Officers (NIMLO) of its members, revealed that there were civil litigation claims in excess of $4.3 billion pending

against only 215 municipalities. Since there are more than 39,000 local units of government in the United States, if all are being sued at approximately the same rate, there could be as much as $780 billion in section 1983 claims pending (Bates, 1981). This amount did not include the legal fees for defendants, court awarded attorneys' fees, other relief the court deemed just, and the amounts obtained from the suits directly against the individuals. Because of the other fees, even if a very small percentage of the amount of such claims resulted in damage judgments, a large sum of money would have to be used in satisfying section 1983 claims.

The increase in the number of suits is due partly to the expansion of police misconduct litigation and/or partly because aggrieved individuals view section 1983 as the most effective means of obtaining relief. Money damages are usually sought when the plaintiff knows he/she will be able to collect any award if he/she is successful in his/her claim, especially when the city (with a "deep pocket") is a defendant in the suit. Several changes in the civil law, the expansion of other legal grounds and the erosion of the defense of sovereign immunity have also made it easier for the liability of police officers, their superiors and even their employers. The frequent use of the section has not, however, dispelled the doubts raised about its efficacy. The section continues to be plagued by jury bias, inappropriate

defenses and inadequate or lack of clear standards of computing damages("Yale L.J." 1979).

A Connecticut study ("Yale L.J.", 1979), found that suits brought under section 1983 often did not meet the expectations of the plaintiffs or appropriately compensate plaintiffs for violation of their constitutional rights. Plaintiffs seeking a remedy under the section had to overcome substantial impediments in order to receive redress. The study found that jurors were biased against plaintiffs who were non-white or non-middle class, or who had previous problems with the law. They viewed police officers as respectable people performing a difficult and necessary function. In most cases, both the individual defendants and the police departments were insulated from the financial burden consequent to a successful section 1983 suit.

The same study also found that supervisory officials were rarely found liable. Line officers were indemnified for damage awards and settlement costs. The costs of the suits were not high, so that little incentive was given the municipality to discipline the police. Political exigencies also inhibited attempts by the municipality to control its police department's behavior. The study concluded that, if deterrence depends on the imposition of financial loss on the individual police officers, or upon the imposition by municipalities of sanctions against the police department,

then these suits did not deter police misconduct.

Changes were recommended to make the section 1983 remedy workable as a deterrent against police abuses. The study recommended the selection of jurors for such suits from a more representative sample of the community. Municipalities, it said, should be held strictly liable for the unconstitutional acts of their police officers. Moreover, it recommended that individual officers pay without indemnification for any punitive damages awarded against them. This study exposed many of the weaknesses of section 1983 suits as a remedy for police misbehavior.

There are other barriers to plaintiff success under section 1983. Some of the obstacles found in the Yale study were outlined by Foote (1955). In addition to the above obstacles, Foote recognized that most plaintiffs, especially those who are most likely to be victims of police violations, are poor and members of minorities. He also stated that these potential plaintiffs are also the least likely to suffer from humiliation or any other kind of economic loss as a result of the violation of their constitutional rights. Because of their low status and the manner in which they are viewed by society and consequently juries, these plaintiffs chances of recovery are equally limited (Foote, 1955, p. 800).

Aside from the shortcomings Foote identified, other procedural difficulties prevent potential plaintiffs from

damage recovery. Most victims of civil and constitutional violations suffer damage in the form of curtailed freedom of movement, or time spent in illegal custody and interrogation but, in most cases only the most flagrant violations are punished by the award of damages.

G. The Issue of Damages.

The legislative history of section 1983 contains very little information concerning damages (Loftus et al., 1989, p. 151; Carey v. Piphus, 1978, p. 255). Thus, courts have looked to the common law for guidance in determining damages under the section and its Bivens equivalent (Constitutional Torts, 1980). In Carey v. Piphus, (1978), the Court attempted to lay the problem of the nature of damages under section 1983 to rest by holding that ordinary tort principles applied and that nominal damages were appropriate in these cases (pp. 266-67 (1978). In Carey, the Court established three important points. It established that compensation for injuries should be the guiding principle of damage awards, that common law torts are to be the starting point for damage inquiries under section 1983, and that damages should not be presumed to flow from a violation of procedural due process.

Carey overruled a series of cases preceding it that permitted compensation without proof of actual injury for due process violations. It is clear from the cases following

Carey that the case did not settle the problem of the standard of measurement of damages in section 1983 cases. Since Carey the courts have applied the "actual injury" requirement to substantive constitutional violations or have ignored the requirement without distinguishing between the nature of interest protected by procedural due process and other constitutional rights.

Compensation under 42 U.S.C. section 1983 and in Bivens-type actions has usually been limited to the amount of consequential injury to the person or property proven under tort law principles. The common law provides for both the award of punitive and compensatory damages in section 1983 actions (Loftus, et al., 1989). More specifically, as was stated in City of Newport (1981), the jury may award both types of damages in police abuse cases and particularly those involving excessive use of force.

The jury is permitted to award punitive damages under section 1983 "when the defendant's conduct is shown to be motivated by evil intent or when it involves reckless or callous indifference to the federally protected rights of others" (Smith v. Wade, 1983, p. 56). It has been held that plaintiffs can recover compensatory damages for physical and emotional pain (O'Neil v. Krzeminski, 1988, p. 13). Compensatory damages are also recoverable for lost wages suffered as a result of the violation for the plaintiff's rights (Henry v. Gross, 1986, p. 768).

Municipalities are liable only for compensatory damages. This common law tradition of not awarding punitive damages against municipalities is based on public policy. Courts view punitive damages against public agencies as contrary to sound public policy because the burden of such damages will be borne by the taxpayers. An award of punitive damages "... punishes only the taxpayers, who took no part in the commission of the tort...." As the Court stated, in City of Newport (1981), "neither reason nor justice suggests that such retribution be visited upon the shoulders of blameless or unknowing taxpayers" (p. 255). Another justification for not awarding punitive damages against municipalities is that compensation is viewed as an obligation which is shared between the individual officers and the municipality, while punishment is viewed as only applicable to the wrongdoer - the officer.

One major concern with section 1983 lawsuits is the amount of damages that could be recovered. The Supreme Court resolved the problem by holding that substantial damages should be awarded only to compensate actual injury. Punitive damages can be assessed only when a defendant's conduct falls within the standard established by (Smith v. Wade, 1983). But violations of due process rights are actionable for nominal damages without proof of actual injury because of the importance to organized society that such rights be scrupulously observed (Hardy & Weeks, 1985, p. 12; Carey v.

Piphus, 1978). However, under the City of Newport v. Fact Concerts, Inc. (1981), damages for malicious deprivations cannot be recovered from a governmental entity.

Some advocates of the use of section 1983 as a deterrent to police violations argue that the damage action under this section should be based on nothing other than the deprivation of constitutional right (e.g., Smith, 1979; Schuck, 1980). They argue, as Foote (1955) did, that if section 1983 is to serve as a deterrent to police violations of the Fourth Amendment, the claim should be based strictly on the basis that a plaintiff's constitutional right has been violated. These legal scholars (e.g., Schuck, 1980; Smith, 1979; "Harv. L. Rev.", 1980), believe that reliance on the background of tort liability in construing constitutional torts is inappropriate with respect to the nature of injury involved. They also believe the purpose of section 1983 and Bivens-type remedies is not merely compensation for consequential injuries that accompany a constitutional violation, but more fundamentally, redress for the violation of the constitutional right itself.

Many writers (e.g., Nahmod, 1982; Newman, 1978; Posner, 1981) understand that it is difficult to evaluate the impact of tort law as an influence on curbing police misconduct or redressing violations of victim's rights. However, the literature and research on the subject points to the fact that the number of section 1983/Bivens lawsuits is still

steadily rising. Most of the time the officers involved do not pay the damages (chapter 4), although occasionally their careers may suffer.

The average salary of a patrol officer hardly provides a "deep pocket" to satisfy a reasonable judgment for the plaintiff in a section 1983 suit (Eisenberg, 1987; Loftus, et al., 1989, p. 152). Although, plaintiffs in section 1983 or Bivens suits normally sue both the individual officer and his or her employer (municipality or governmental agency), recovery by the plaintiff often turns on indemnity under liability insurance. As a result, most municipalities have comprehensive general liability insurance to cover judgments for compensatory damages. Some state legislators have passed laws requiring cities to insure their officers (Madden, 1985; Blodgett, 1986; Loftus, et al., 1989, p. 152). Consideration of the adequacy of compensation involves determining whether the municipality or the officer was insured. It should be noted, however, that insurance does not indemnify insured officers for injuries because this again is regarded as contrary to public policy. In the interest of deterring tortious conduct, courts do not absorb insureds from liability for their intentional actions.

However, the publicity surrounding such cases (there has been greater press coverage of such actions in recent years) is as disturbing to police administrators as the ammunition they provide to critics. Police and police

administrators do not often accept criticism and negative publicity. These pressures are driving police administrators to greater exertion to prevent repetition of such conduct. These other concerns may be producing the deterrent effect which the damage remedy alone would have not been able to create (Lustgarten, 1986, p. 137; McCoy, 1986).

H. Civil Rights Attorney Fees Act.

As stated before, one of the factors responsible for the increased use of section 1983 to redress violations of individual rights has been the award of attorney's fees. To facilitate the enforcement of federal civil rights acts, the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. section 1988) was enacted. This Act permits a court to award reasonable attorney's fees to the prevailing party in an action for violation of civil rights. The section states that:

> ... In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title... the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs (Civil Rights Attorney's Fees Act, 1976).

Since the late 1970s the act has been widely applied by the federal courts. According to Barrineau (1987), the act

has encouraged litigation that has often resulted in very high attorney's fees (p. 21). Without the right to an award of fees, many factors (for example, the high cost of a lawsuit, especially against a public entity with large resources at its disposal) could discourage the institution of meritorious suits.

The case law indicates that the effect of section 1988 has been mixed. Though aiding the section 1983 plaintiff, courts have awarded attorney's fees which in some instances greatly exceeded the amount of damages awarded to the plaintiff (Coop v. City of South Bend (1981). Courts have also awarded attorneys fees where the suit resulted in a consent decree with no admission of fault and even when the defendant's unilateral or legislative action made the case moot. The Supreme Court, concerned with the awarding of such high fees by the lower courts addressed the problem in Hensley v. Eckerhart (1983). It made clear to the lower courts that the degree of success by the plaintiff should be the most important factor to consider in the award of attorney's fees.

The success of the section 1983 damage remedy can be attributed greatly to Monell (which enabled plaintiffs to reach the "deep pockets" of municipalities) and the Civil Rights Attorney's Fees Awards Act of 1976 (which made the suing of law enforcement officers lucrative). As a result of Monell and the Attorney's Fees Act, an overall increase in

the use of this legal recourse has occurred in the last few decades. The side effects to this increase have been the consequent increases in the number of frivolous lawsuits brought in part by lawyers willing to represent section 1983 plaintiffs on contingency. The following chapters focus on a study of this damage remedy in the Eastern and Southern Districts of New York. They analyze section 1983/Bivens actions filed in these districts from 1983 to 1987.

Chapter 2.

Elements of Section 1983/Bivens Actions.

This chapter discusses the elements of section 1983/Bivens actions. It analyses the types of violations at stake in section 1983 lawsuits and the parties to such suits. It also describes the processing of these actions by the Eastern and the Southern District courts of New York. The processing time of civil actions is also examined as a prelude to the analysis of court time spent on section 1983/Bivens actions. Violations and parties are first examined. After that, attention is given to the examination of the other elements of section 1983/Bivens actions.

Violations

The preceding chapter elaborated the constitutional and federal rights protected by section 1983. It was stated that rights granted by state laws are not protected by this act (Nahmod, 1991). For the purpose of this study "violations" refer to the offenses police officers were alleged to have committed as specified in a section 1983 complaint. The categories used in this study were: assault and battery (including excessive force), false arrest, false imprisonment, illegal search and seizure, invasion of privacy, malicious prosecution, trespass and other

violations. A single complaint can entail multiple violations. The following is a discussion of the requirements of each cause of action.

Assault and battery (sometimes combined in certain complaints) are often linked in civil liability suits whether or not they are each applicable. Assault and battery, false arrest, and false imprisonment can sometimes result from those functions which the public expects police to perform (Reynolds, 1988). For example, the use of force is inherent to police work. While police constitutionally have the legitimate authority to use force in the performance of their functions, such use of force, as stated earlier, must be reasonably necessary to perform specific functions, such as making arrests. One reason for the importance of this study is that often, in practice, police departments and individual officers act under the guise of either officially or unofficially sanctioned boundaries regarding the use of force. Also, officers sometimes use greater force than necessary to perform their functions. As a result, allegations of assault and battery may arise and the potential for such allegations is always present if there is no detection and enforcement of penalties against police, police departments, and their employing municipalities. In fact, victims of police excessive force have a cause of action against police for assault and battery even in instances in which the police may not make

an arrest. Moreover, allegations of police assault and battery are actionable even following an arrest which is legal and even that results in a conviction.

Assault and battery actions are commonly called excessive force suits. Assault and battery or excessive force claims often arise from arrest situations (Blalock, 1974; Silver, 1986). Police have the legitimate authority to use force to effectuate arrests. This force must, however, be equivalent to that necessary to overcome any resistance that may be mounted by the arrestee. Any force that exceeds necessary force is excessive and the officer can be found liable for use of excessive force.

Assault and battery actions also include those charging police with the use of deadly force. As stated in the first chapter, the Supreme Court held in Tennessee v. Garner, (1985) that police officers can use deadly force to prevent the escape of a fleeing felon only if there is probable cause to believe that the suspect poses a threat of serious physical harm to the officer or to others. Indeed, it is worth recalling that Tennessee v. Garner was a section 1983 action.

The majority of civil rights lawsuits against police officers are based on allegations of unlawful arrests (Berringer, 1987; Fisher et al., 1989). It is general police practice to arrest anyone against whom force has been used (Carmen, 1991, p. 77). Another reason why a false arrest may

often turn out to be such a popular cause of action is that in a false arrest case, the defendant has the burden of proving legal justification as an affirmative defense.

False arrests charges can be accompanied by charges of false imprisonment since an arrest is the element that provides the confinement necessary for false imprisonment (Blalock, 1974; Eisenberg 1982). False imprisonment, the unlawful detention of persons, whereby they are deprived of their personal liberty against their will, can occur at any place and not necessarily in jail. The only requirement is that the plaintiff be aware of the confinement or suffer some type of actual harm.

Section 1983/Bivens actions are available to both innocent and guilty persons who have been subjected to illegal searches and seizures. Bivens itself involved an unconstitutional search. The Fourth Amendment right to be free from unreasonable searches and seizures and consequently to have excluded from criminal trials any evidence illegally seized is a right that can be asserted against state officials.

Police actions such as illegal and forced entry into premises also permit the plaintiff to seek damages for trespass. The tort of trespass includes the unauthorized entry on the land of another as well as any offense or transgression that damages another's personal property. Trespasses to property can occur through either a direct or

an indirect entry. A direct entry would occur when one person walks on another person's property without permission. An indirect entry would occur when one person throws an object on another's property. Trespass suits are most often filed along with other suits such as illegal searches and invasions of privacy.

If one person invades the right of another to withhold self and property from public scrutiny, the invading party can be held liable in tort for invasion of the right of privacy. A suit for invasion of privacy may involve unwarranted publicity that places the plaintiff in a false light, or intrudes into the plaintiff's private life, or discloses embarrassing private facts, or uses the plaintiff's name or likeness for the defendant's gain. Generally, the motives of the defendant are unimportant.

A civil suit for the tort of malicious prosecution may result from either a criminal prosecution or a civil suit if the proceeding was instituted maliciously, without probable cause, and with a decision favorable to the defendant. The threat of bringing suit is not enough to result in civil liability on the part of the would-be plaintiff. In a criminal case, the prosecutor is absolutely immune from malicious prosecution suits, even if it is shown that the prosecutor acted in bad faith. Other criminal justice agents, especially the police, are subject to suit under section 1983/Bivens for malicious prosecution.

Punitive damages are generally awarded if the police officer acted with malice. Malice will, therefore, enhance the plaintiffs' chances of obtaining punitive damages. However, the Supreme Court in Smith v. Wade, (1983) held that the plaintiff need not prove actual malice to obtain punitive damages. As stated earlier, it is enough that the police officer acted with reckless or callous indifference to constitutional rights of the defendant (Silver, 1990; Smith v. Wade, (1983).

Other common claims against police are based on violations of the Fifth Amendment regarding confessions and interrogations and the Fourteenth Amendment violations of due process and equal protection rights (Carmen, 1991, p. 35). Research studies have discovered that in most cases plaintiffs of section 1983/Bivens actions allege several causes of action against the same defendant or against several defendants (Fisher et al., 1989; Eisenberg & Schwab, 1987; Carmen, 1989).

The above discussion indicates that the range of possible police violations of the constitution is substantial. The various causes of action derived from these violations can be grouped into the kind of deprivation suffered by the victim of police violation. Victims of police physical abuse in the nature of deadly force and assaults/excessive force can be broadly classified as victims of "violent violations." Those who suffer from

deprivations due to false arrest and false imprisonment suffer from "liberty violations." Finally, victims of violations such as illegal searches and seizures that affect property can be called "property violations." This classification into "violent, liberty and property" violations will be used in the analysis of the causes of action in the present section 1983/Bivens study.

Parties to Section 1983/Bivens Actions.

Plaintiffs

According to section 1983, an action for damages, declaratory judgment and injunctive relief can be brought by anyone who alleges that civil or constitutional rights have been violated by state officials. Plaintiffs include "any citizen of the United States or other person within the jurisdiction thereof" (Carmen, 1991, p. 8). Corporations are not considered persons for the purposes of section 1983 but may qualify as other persons if they are suing in their own right (Nahmod, 1991, p. 8). The clause "other persons within the jurisdiction thereof" in the Act has also been interpreted to include aliens who are legally in the United States (Nahmod, 1991; Carmen, 1991).

Section 1983/Bivens suits are sometimes brought by pro se plaintiffs (representing themselves). Most of these plaintiffs lack the legal knowledge needed to understand or use more complex, formal techniques in filing and following

their cases through the system (Zalman, 1972). For example, some of the complaints may be so vague that they fail to allege constitutional deprivations with specificity. Also, the inexperience of the pro se plaintiffs sometimes leads to long and complicated complaints, which leave the court with the burden of sorting out the facts of the case.

The plight of the pro se plaintiff in the New York courts is outlined in a New York State Bar Association 1987 report of the Subcommittee on Pro se Litigation. The report examined the pro se docket of federal courts in New York state and stated that most pro se actions in the state were filed by inmates (i.e., over 50%). The Southern District was reported to have the highest number of pro se suits in the state, almost 1,400 a year. The study found that of the 1,711 pro se actions pending in the Southern District in 1987, 1,155 were filed by inmates (p. 4).

The appointment of counsel for pro se litigants in the district courts in New York is guided by the Second Circuit decision in Hodge v. Police Officers, (1986) which outlined the standards to be used in determining the need of counsel by pro se litigants. Prior to Hodge, district court judges followed 28 U.S.C. 1915(d), which allowed them virtually unlimited discretion in determining when to grant the request for counsel. Following Hodge, judges have to consider certain factors, which include: probability of success, the complexity of the legal and factual issues, the

ability of the pro se plaintiff to conduct an investigation and to present his or her case and whether credibility is an issue in the case (Hodge v. Police Officers, 1986, pp. 60-61).

Defendants

The official standing of defendants of section 1983/Bivens is necessary for two reasons. First, although it cannot be ascertained directly from the data it is legally understood that the degree of responsibility is often different for different defendants depending on their level of participation in the violation. Secondly, the defendants may benefit from different defenses, particularly the defense of qualified immunity.

Those who are often sued for civil liability for the violation of civil and constitutional rights are: individual police officers, police chiefs, police departments, cities, counties, and the state and federal governments. The alleged wrongdoer (police officer) will usually be a defendant in the suit. Predictably, because he or she is in the field and is the one who has the most contacts with the public, the individual officer should be a defendant in most violations of rights by police. Typically, police departments are also at risk in civil court actions due to the actions of individual police. Most police functions that provoke conflict with the public are performed by individual

officers. They are charged with preventing crime, identifying, and arresting suspects. These functions may often require them to search, seize, interrogate and arrest some members of the public. The performance of these police-citizen functions by officers may sometimes infringe on the civil and constitutional rights of members of the public (Reynolds, 1988).

Most plaintiffs, for the reasons discussed in chapter one, will also name the officer's supervisors and administrators as defendants. Although direct liability for the officer's misconduct may not be assessed against these officials, the expansion of theories based on the superior's responsibilities and obligations to supervise the officer's conduct, provide adequate training, discipline the officers or take appropriate administrative action based on the officer's past behavior or record, has made these superiors defendants in section 1983 actions.

A police chief is likely named as a defendant in those cases in which the plaintiff is seeking to prove that the cause of action is a departmental policy which is being enforced by the field officers who are acting at the command of the police chief. Apart from this connection the administrator of the police organization is rarely subject to suit because he/she is rarely involved in those activities that violate the civil and constitutional rights of the individual. Since Monell, that connection has become

quite significant because the police chief, as the supervisor of individual officers, represents the municipality as well. Consequently, the police chief is usually the defendant in several civil actions.

The governmental entity and the police department will usually be named as the defendant also. Unlike the police chief, the departments and the cities are truly the organs with the "deep pocket" capable of satisfying large monetary awards resulting from section 1983/Bivens actions (Hopper, 1989; Stafford, 1987). Thus the department is often named as a co-defendant.

As discussed in chapter 1, one of the effects of Monell has been to make it possible for the plaintiff to include the local government as a defendant in section 1983 suits if he or she can establish an illegal policy or custom (which led to the violation alleged) of the police that has been condoned by the municipality. In most actions, therefore, local governments are named as co-defendants. Most other cases that do not include the city or county as defendants are probably pro se claims brought by plaintiffs who, because of the reasons stated in chapter 1, (e.g., the inability to properly frame their causes of action) did not clearly define their claims.

The parties who are named as defendants may vary, depending upon whether the suit is filed in state court or federal court. Unlike local governments, state governments

cannot be sued in their own names in either state or federal courts (Nahmod, 1991). States can only be sued in federal court if they expressly waive their Eleventh Amendment immunity. The Eleventh Amendment bars suits in United States courts against the states. State officials similarly cannot be sued in their official capacities for damages under section 1983. State officials do not benefit from Eleventh Amendment immunity if they are sued in their personal capacity (Silver, 1986, sect. 8(08)). In Will v. Michigan Department of State Police, (1989), the Supreme Court ruled that, even apart from the Eleventh Amendment (which is applicable only in federal court), states could not be sued under section 1983.

The New York Public Officers Law section 18(3) which states that a "public entity shall provide for the defense of the employee in any civil action or proceeding, state or federal, arising out of alleged acts or omissions which occurred or allegedly occurred while the employee was acting within the scope of his public employment or duties," has been interpreted to mean the waiver of the Eleventh Amendment immunity by the state. Subsection 4(a) allows for indemnification of employees in the amount of any judgment or settlements and claims obtained against such employees in state or federal courts. In U.S. v. DSC Development Corp., (1984), it was stated that the:

New York statute under which state must provide

> for defense of state employees in civil actions or proceedings and indemnify its officers and employees against judgment is reasonably susceptible to interpretation other than that it waives New York's Eleventh Amendment immunity from suit in federal courts.

By this interpretation, the state of New York is subject to suit under section 1983/Bivens in the federal courts. However, this rarely occurs because the nature of state law enforcement activity does not often subject state officials to the every day one-on-one encounters with the public that municipal or county police experience.

Multiple Defendants

Usually the tendency is for the plaintiff to sue anyone who might have anything to do with the violation. Previous studies (e.g., Eisenberg et al., 1987; Fisher et al., 1989) of section 1983 actions found that most plaintiffs of section 1983 actions allege multiple causes of action in the same complaint and levy charges against multiple defendants.

Although judges have been making efforts to discourage petitioners from including parties who are not clearly linked to the violation (Blalock, 1974), petitioners sometimes include other parties not directly connected to the cause of action as co-defendants in the suits. By including more defendants, petitioners may hope to negotiate

better settlements and to increase their sources of possible damages (Stafford, 1987). These plaintiffs are willing to permit the court to determine those who are not legally at fault during trial (Carmen, 1989; Blalock, 1974).

Studies done after the Monell decision suggest that plaintiffs typically include several defendants in their complaints. Lee (1987), in his study of section 1983 actions, found that since Monell there has been a general increase in lawsuits at the state, county, city and district levels (p. 163). The increase he discovered is most evident in cities and counties. Municipalities are often included as co-defendant in most cases because they have the responsibility to properly train the officers and ability to pay large awards if and when they are granted (Stafford, 1987).

The Processing of Section 1983/Bivens Actions

This section examines how section 1983/Bivens actions are dealt with by the courts. Section 28 USC section 1343(a)(3) provides federal jurisdiction to section 1983 plaintiffs without regard to jurisdictional amount (Nahmod, 1991, p. 3). Plaintiffs of section 1983 have the option of suing in state courts, which are expected by virtue of the Supremacy Clause to exercise concurrent jurisdiction in these type of actions.

To better understand the court processing of section

1983/Bivens actions a conceptual definition of "successful prosecution" will be used. In the study, a case will be considered as successfully prosecuted if all the necessary steps toward prosecution are undertaken by the plaintiff. Such a criterion will be adopted in order to determine the impact of civil lawsuits on law enforcement because damages alone are not the only measure of the burden of these suits. Actions in which reasonable time and resources are spent toward their prosecution are also an important means of measuring the burden of section 1983 cases. This approach takes into consideration the amount of time spent on these cases by the parties and the cost to the parties of prosecuting and defending the suits. The extent to which a court conducts hearings is also important because, as Eisenberg (1982) found, some cases are settled long after the trial has begun and some are settled just before a decision is to be handed down (Eisenberg, 1982).

Cases that do not meet this definition will be considered as failed cases. Thus cases "may" fail as a result of a change of venue, failure to state a cause of action, suit being filed in the wrong jurisdiction or simply because the plaintiff has neglected to proceed with the prosecution. These causes of failure are discussed below.

A case may fail for reasons of venue when the defendant requests a change of venue. The defendant may request a change of venue if he or she believes that he or she will

not receive a fair trial in the jurisdiction in which the suit is filed. The defendant can also request a change if the plaintiff commences the action in a wrong county. At the discretion of the court, motions for change of venue can be made by either party if that party believes that he or she will not receive an impartial trial in the court in which the action is started. Occasionally, the plaintiff asks for a change of venue if crucial witnesses would be inconvenienced. This request is often made if the plaintiff believes he or she will not receive justice due to the prejudice of the judge or jury. The case has not necessarily proved unsuccessful because it is simply being moved to another jurisdiction. But for the purpose of this study, such transfers were considered as failures in the jurisdictions in which they were originally filed by the plaintiff because enough preparations for trial were not made before the change of venue occurred.

Civil cases may also fail because the plaintiff is not able to justify the basis of his or her claim. Failure to state a cause of action means the plaintiff has not been able to state the basis of his/her claim. This is based on the theory that if all the allegations of the complaint are taken as true, there are no grounds for relief for the plaintiff. The focus therefore is on the adequacy of the claim as stated in the complaint.

Another cause of failure is the lack of jurisdiction.

Jurisdiction is the general power of the court to adjudicate a case or a particular claim. This power is granted to federal courts by statutes that implement constitutional guidelines, and the state courts are similarly empowered by state legislatures to grant the relief sought by the plaintiff. Lack of jurisdiction may be raised by the court or any of the parties to the case at any time during the proceedings. Sometimes an action brought to court fails because the court has no power to hear or determine the subject matter in controversy between the parties.

Finally, tort actions can be dismissed if the plaintiff unreasonably neglects to proceed or delays prosecution of his/her claim. Failure to prosecute involved those actions in which the plaintiff, after filing the charge, did not take measures towards the prosecution of the case. Actions constituting failure to prosecute include: not answering interrogatories, refusing to supply discovery materials, and/or not serving process.

Case Dispositions

Though civil cases are supposed to be disposed of in the courts, a considerable amount of activity can take place outside the courtroom (Neubauer, 1991). Cases can be disposed of in the corridors of the courthouse, the offices of the lawyers, the chambers of the judges, or even the offices of insurance companies (Berringer 1987). Like

criminal cases, very few civil cases are tried. According to Marcus and Sherman (1985), some are terminated through a ruling on motions, but most are disposed of by a voluntary settlement reached by the parties in the case. During the steps of a civil case, judges encourage the lawyers to get together and settle the case (Marcus and Sherman, 1985, p. 684; Neubauer, 1991). As a result, trials are relatively rare.

The dynamics of the disposition process vary considerably. In some cases judges are active participants, while in others they are not (Marcus and Sherman, 1985). Some bargains are reached only after long haggling; others are arrived at after short discussions (Lempert & Sanders, 1986). There are also major variations in the types of cases. In many respects, however, litigation is regarded as both a last resort and a worst resort, one that plaintiffs and defendants usually try to avoid (Neubauer, 1991). Yet at the same time, the possibility of litigation affects the ways in which problems are handled outside court (Lempert & Sanders, 1986). Section 1983/Bivens actions are disposed of, by bench or jury trial, settlements, summary judgments, dismissals and uncontested default for the defendant.

Section 1983 plaintiffs have a right to jury trials in claims for damages, but not for injunctive remedies (Carmen 1991; Nahmod, 1991). However, plaintiffs seeking both damages and injunctive relief have access to the jury. The

determination of the number of cases that result in trial is one measure of the non-financial burden of the case. The case workload can be used to determine the approximate cost of handling civil liability suits (Eisenberg, 1982; Fisher et al., 1989). Eisenberg et al., used litigation activity to measure the burden of civil tort actions by estimating the court time of judges taken up by these actions. The adoption of this technique was beyond the scope of this study.

Like other civil actions, section 1983/Bivens actions can be disposed of by settlement. Several factors can account for civil settlements. The willingness of police departments and other governmental agencies to make out-of-court settlements for nominal or limited damages rather than incurring greater expenses in defending groundless or frivolous suits entices some lawyers and defendants to bring civil suits (Roberg & Kuykendall, 1990; Reynolds, 1988). Some cases are also settled to avoid the negative publicity surrounding police activities.

Also, it seems settlements are based on purely business decisions. Settlements are not tantamount to a confession of guilt of the defendant (Neubauer, 1991). Lawyers have to look at the case from their client's perspective. They must evaluate the risk of loss, testimony and the injury suffered by the plaintiff. They must also consider the lawyer on the other side, the court, how well witnesses will come across whenever they take the stand and a host of other factors

before making a business decision as to what the case is worth. And this decision does not "necessarily carry any ideological judgment with it whatsoever as to whether or not everybody has in fact behaved properly." What is important to both parties is the ability to limit the risk of financial loss (Neubauer,1991; Interview, October 19, 1990).

Lawyers for municipalities will settle most cases if it is in the interest of the municipality to settle without going through the expense of a trial. This practice occurs frequently, particularly in the settlement of so called "nuisance suits." These suits, are "claims without merit in which there is an issue of fact to be decided" (Berringer, 1987). Therefore, such cases cannot be dismissed before there is a determination of the issue at trial. They are therefore settled for nominal amounts of damages to avoid the expense of trial. Insurance companies sometimes settle cases just to avoid expenses in defending them. In the same regard, municipalities acting as defendants in section 1983 cases, will settle the "nuisance cases" just as quickly as insurance companies (i.e., make a small payment just to avoid having to go through defending such actions).

Attorneys representing governmental entities are more likely to settle suits out of court, particularly in some of the "nuisance suits," to save money where the cost of defending the suit will be greater than the cost of settlement. In making settlements, attorneys have to

consider what has been paid in similar cases, what juries have brought in as verdicts in similar cases and what the appellate courts have sustained (Berringer, 1987). Settlements also depend on the degree of the injury and the outrageousness of police conduct.

According to Marcus and Sherman (1985), judges want settlements for at least two reasons. The first reason is the increasing recognition of the considerable advantages of settlements over trials for most litigants. A compromise disposition by settlement can often preserve the essential interests of all parties and is usually preferable from the standpoint of both parties. Second, it is necessary to encourage settlements in order to manage ever increasing caseloads of the judges. The burden of the district court caseload, especially in metropolitan areas like New York, has made the theoretical dispute over the propriety of settlements a luxury that can no longer be afforded.

Indeed the Federal Rules of Civil Procedure have promoted settlements since 1983. Two of the objectives of a court's discretionary power to direct attorneys for the parties before it to hold a conference is to expedite the disposition of the actions and facilitate the settlement of the case (FRCP, Rule 16). Rule 16 was first promulgated in 1938 and was not amended until 1983. The 1983 amendment, however, was extensive in that the rule is "now geared to provide for case management from the pretrial stage... to

the trial stage" (Coyne, 1990, p. 202). According to Heileman Brewing Co., Inc. v. Joseph Oat Corp, (1989), the court may order litigants to appear at a pretrial conference for the purpose of discussing a settlement. Therefore, it seems that judicial encouragement of settlements became a formal policy at about the beginning of the current study period (i.e., 1983).

Summary judgments can be granted after a finding by the court that there are no factual issues in dispute and the case is subject to a ruling only upon questions of law. Before arriving at such a conclusion, a court will examine the affidavits, documents, depositions and other proofs submitted by the parties. Either party can ask for summary judgement in his/her favor.

Rudovsky (1989), in his discussion of individual police immunity, notes that individuals are immune from Fourth Amendment claims in situations where the legal principle upon which the claim is based has not been clearly established or if the officer reasonably believes his conduct to be legal (p. 26). The Supreme Court in Harlow v. Fitzgerald (1982) stresses that the determination of the issue of whether the defendant acted with objective reasonableness (the present standard of determining individual police immunity for Fourth Amendment violations) had to be decided prior to discovery. The Court stated:

On summary judgment, the judge appropriately may

> determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonable competent official should know the law governing his conduct (Harlow v. Fitzgerald, 1982, pp. 818-819).

Dismissal involves an order or a judgment disposing of the action or suit; by sending it out of court without a trial of the issues involved. A dismissal with prejudice precludes the plaintiff from subsequently filing another suit based on the same claim. Dismissal without prejudice allows the plaintiff to refile if he/she wishes to reinstitute the claim. In cases in which there are multiple defendants, a motion for dismissal may be granted to one party, but denied to others. Motions for dismissal generally allege that the plaintiff has no legal claim against the defendant.

Time of Disposition.

A major problem of the modern courts is delay in both the civil and criminal process. One of the indicators utilized in civil litigation to measure this delay is the average interval between the filing of an action and its termination (Luskin & Luskin, 1986). The time taken to dispose of the cases is one important measure of determining the burden of section 1983/Bivens actions. Time spent and the attention devoted to the cases means cost to the system.

Like other civil cases, section 1983/Bivens actions usually take many months to process. A pretrial explanation of the long time taken to handle civil actions certainly rests upon the fact that in civil rights cases, much of the evidence can be developed only through discovery (Marcus & Sherman, 1985), and while plaintiffs may be expected to know the injuries they allegedly suffered, it is not reasonable to expect them to be familiar at the complaint stage with the full range of the defendants' practices under challenge.

Several factors affect court processing time. Specific incentives of the parties, type of representation, pretrial procedures and the nature of the case, are just some of the factors that affect court processing time (Luskin & Luskin, 1986; Neubauer, 1988). According to the National Center for State Courts, the median disposition time for civil cases in 32 urban areas ranged from 390 days to 1455 days (Chase, 1988). Data from the Civil Litigation Research Project

suggests that there are variations in processing time among the different courts.

This chapter examined the elements of section 1983/Bivens actions. In the following chapters, these elements of section 1983/Bivens actions are analyzed to better understand the processing of these suits.

CHAPTER 3.

Sources and Methodology.

Research approach

This part of the study looks at section 1983/Bivens actions in two New York districts courts. The study, as stated earlier, is aimed at describing the characteristics of civil suits brought by citizens whose rights have been violated by police and how these cases are processed. The study also addresses the question of damages, which is the main remedy sought by plaintiffs in these cases.

The study assesses the correlation between the nature of the offense and the damages awarded. The assumption tested here is that plaintiffs normally recover larger sums, or that the courts or juries award larger sums for more grievous violations. To make this determination, a classification of both the level of damages and the violations will be made.

Determining those violations that officers are alleged to have committed is important for the evaluation of any modifications of police practices and regulations as a result of these suits. The purpose is to evaluate the degree to which police departments react to certain conduct that results in civil liability suits.

The study compares jury awards of damages with damages

from bench trials and settlements. From the classification of the defendants a determination of the defendants who are often subjected to these actions is made. For this purpose, cases are classified by the method of disposition. This classification also helps in the determination of how these cases are resolved and the size of the awards recovered by bench trials, jury trials and settlements.

This study also examines the parties to section 1983/Bivens cases. As stated in chapter two, defendants were studied because: first, the degree of responsibility is often different for different defendants depending on the level of participation in the violation; second, defendants may benefit from different defenses, particularly the defense of immunity.

Consequences or changes resulting from liability for section 1983 damages suits depend to a large extent on those who pay the damages. The apportioning of responsibility and burden is important for the assessment of the effect of these lawsuits on municipalities and their relationship to the police departments. Moreover, police behavior may be influenced by court decrees mandating changes in police procedure. The analysis of court decisions is thus important to understanding of police conduct. For this purpose a determination was made of the extent to which the burden (financial and otherwise to all parties involved) changed the level of police department supervision and procedures.

Although this admittedly is difficult, if not impossible, to assess directly, it is hoped that after a detailed study of the cases, some observations can be made that will clarify the development of new policy. Thus, administrative directives, rules, and regulations that have evolved over years, and particularly since the Supreme Court decision in Monell v. Department of Social Services, (1978) will be evaluated.

The average time taken to dispose of the cases is also determined. Although it is realized that it will be difficult to determine the exact cost of these suits, the amount of time taken to dispose of the cases provides a basis for projecting the financial burden of the suits. This makes it possible to assess the amount of money spent on these cases by the courts, city, and the police. The analysis of these research questions provides answers to two fundamental questions: (1) What has liability meant to the individual police officer, the police department and the municipality? (2) How will the continuing increase in the number of these suits affect the criminal justice system?

Research questions

In order to develop a profile of section 1983 and Bivens actions, which includes uncovering the range of damages recovered from the actions, this study poses a number of research questions:

1. What types of constitutional violations are police officers alleged to have committed under section 1983/Bivens?
2. Who are the parties involved in section 1983/Bivens suits?
   a) who are the plaintiffs?
   b) who are the defendants?
3. What are the chances that pro-se plaintiffs will successfully prosecute section 1983/Bivens actions?
4. Are there any differences in the elements of section 1983/Bivens actions between the districts?
5. What is the degree of prosecution of section 1983/Bivens actions?
6. What methods are used to dispose of section 1983/Bivens actions?
   a) What percentage of the suits is settled and what percentage goes to trial?
7. How much court time is taken up by section 1983/Bivens actions?
8. What is the nature and volume of money damages gained in section 1983/Bivens actions?
9. How does the amount of damages vary by:
   a) districts?
   b) Nature of violation?
   c) manner of disposition?
   d) the amount of damages asked in the complaint?

e) the presence of malice?

10. What factors predict successful prosecution of section 1983/Bivens action?

11. What factors predict the award of damages?

Description of the districts

Data from the civil cases were collected from the Federal District Courts in two areas - the Southern District of New York (which includes: Bronx County, Duchess County, New York County, Orange County, Putnam County, Rockland County, Sullivan County and Westchester County) and the Eastern District of New York (which includes: Kings County, Queens County, Richmond County, Nassau County and Suffolk County). These two courts were chosen because their jurisdiction covers large police departments in the cities and counties, as well as very small departments in the smaller towns in the suburbs.

Of the 465 cases examined 270 (57.8%) were from the Eastern District and 195 (41.7%) from the Southern District. One of the reasons why more cases came from the Eastern District was because it was easier to identify section 1983 or Bivens-type cases in the Eastern District than the Southern District. As explained in the previous chapter, the Eastern District had a better coding system. Moreover, more cases would be expected from the Eastern District because of its greater population though the arrest rate is higher in

the Southern District. Table 1 shows the features of the districts. For reasons not ascertainable from this study, the crime rate is similar in the two districts, but the number of section 1983/Bivens actions per 100,000 arrests is higher in the Eastern District.

Data Collection

The data for this study were collected from many sources and can be classified into three categories. They are (1) case records, (2) interviews, and (3) other records (police department, New York City Civilian Review Board and the New York City Comptroller's Office).

Case Records.

Data were collected from the Eastern and Southern District Courts of New York. The reason Federal courts were chosen to study rather than state courts was to avoid dealing with issues of state tort law, to limit the number of cases within the sample and to compare two adjacent federal court districts. Because some have questioned the use of federal courts to vindicate the wide array of rights asserted in section 1983 actions (Eisenberg, 1981, p. 74), an additional reason to focus on the federal court experience was to determine the extent to which these actions fill the federal dockets.

However, from the interviews in the current study and

Table 1

Features of the Districts

Characteristics	Eastern District	Southern District
Population	7,240,451	4,551,993
Area (sq. miles)	1436	3514
Arrests rate (1983-87) per 100,000	4559	7522
Crime rate (5 yr. average)	5473	5322
Civil suits (5 years)	24,811	49,704
1983/*Bivens* actions	270	195
1983/*Bivens* actions per 100,000 pop.	3.7	4.3
1983/*Bivens* actions per 100,000 arrests	17.6	10.2

some past studies, most lawyers preferred bringing these suits in state courts. According to the corporation counsel for the New York City Law Department, most of section 1983 actions in the New York area are brought in state court because some practitioners (including the respondent) have the perception that the verdicts obtained in state courts are higher than those obtained in federal courts (Interview, October 19, 1990). Fisher, Kutner and Wheat (1989), found the same result in New Jersey. They found that 61% of section 1983 cases were brought in state courts and only 39% in federal courts between 1985 and 1986 (p. 52).

Data collection focused on lawsuits filed in the two courts against law enforcement personnel. To identify section 1983 and Bivens-type cases filed against police officers and police departments, all section 1983 and Bivens-type cases filed during 1983 and 1987 in the Eastern and Southern District Courts were identified and then searched. In addition, all civil rights cases filed during this period were searched to identify those section 1983 cases that alleged civil rights and constitutional violations by police officers, their departments, the state and/or any federal agency.

Court records contained valuable information, pleadings, motions, briefs, interrogatories, and court orders. Also, available trial transcripts were studied and depositions examined. Information from the court files

provided a profile of the nature of civil and constitutional violations, characteristics of the different parties and the manner of disposition of the suits and the outcomes.

Data were collected on civil cases filed against individual police officers, police chiefs, departments, cities/counties, state and federal agencies in the Eastern and Southern Districts of New York under 42 U.S.C. section 1983 and Bivens. Every identified section 1983/Bivens action case was included in the sample. A computer printout entitled "Police Action Cases Commencing 1982-1987" and a 55 page printout entitled "Pre 1982 Police Action Cases Disposed 1982-1987" that encompassed those cases coded by either the Comptroller's office or the New York City Law Department was obtained from the Law Department of the City of New York. The printouts contained a list of cases alleging violations of the Fourth Amendment: false arrest, false imprisonment, the use of excessive force, or a shooting by a New York police officer.

The printouts were used to search section 1983 and Bivens actions filed against New York City police officers. However, the printouts were incomplete because, as an assistant corporation counsel explained, the Law Department started computerizing its cases only in 1986 and some departments had not entered their cases into the computer. Also, the printouts did not include the court file numbers of many cases and some of the data in the computer were not

accurate and this made it difficult to locate case files for a particular alleged incident. The level of the detailed report for each case varied significantly. This resulted from changes in the information that the attorneys and clerical staff were required to submit or the fact that incomplete forms were submitted for entry into the database. Thus, a search of every case file was conducted to authenticate any available data.

Data were collected during the course of several visits to the two federal courthouses in Brooklyn and Manhattan, New York, and the Federal Military Ocean Terminal in Bayonne, New Jersey. Case numbers were identified from court docket sheets and files. Information contained in disposed cases was obtained from the court depository in Bayonne where files of disposed cases are stored. The cases reviewed covered a five-year period, between January 1983 and December 1987.

To identify other New York cases and those filed from other counties, the civil docket was searched and the code for civil rights cases was identified from the Civil Cover Sheet and a search was made of all the cases filed under that code for the study period. Every plaintiff commencing a civil action in the court must complete this cover sheet. This form requests information about the action, including the nature of the suit. There are five "nature of suit code categories" for civil rights actions and four for prisoner

civil right actions. The five civil rights codes are:

442 - voting
442 - Jobs
443 - Accommodation
444 - Welfare
440 - Other Civil Rights

Prisoner petitions are coded as:

510 - Vacate Sentence
530 - Habeas Corpus
540 - Mandamus and Other
550 - Civil Rights

Cases of civil and constitutional violations are coded as 440. This category was searched to identify those cases filed under section 1983 and Bivens alleging violations against police officers, their departments and cities or counties. Those cases coded as 550 were also searched to identify those section 1983 cases that were filed by prisoners and detainees in which redress was sought for abuses inflicted on them prior to imprisonment or detention. Cases coded as 440 and 550 were easily identifiable in the Eastern District because there was a computer classification for every code category. There was no similar grouping in the Southern District where it was only through the search of the docket sheets that cases coded under 440 and 550 categories could be identified.

Using the docket numbers, files for cases that might have included a police officer or police department were physically checked to determine if a police officer or police department was named in the list of defendants in the original complaint. The complaints were also reviewed for

alleged causes of action to ascertain whether the plaintiff was seeking a section 1983/Bivens remedy.

Cases were not included in the study if the case file failed to state explicitly that it was a section 1983 or a Bivens-type action, or that the violation alleged involved the Fourth Amendment. All cases were also individually checked for police involvement. There was little difficulty in determining whether a defendant was a police officer because complaints must identify the capacity under which the defendant is being named in the suit. For example, the individual officer who committed the act or the department, city or state as the employer of the officer.

Once a case file was located, it was reviewed to collect information on the parties involved, causes of action, police involvement, means of disposition of the case, case identification number and the necessary information needed to track cases to their final disposition. This information was recorded on a data collection form (see Appendix A). In some instances very little information was provided in the docket sheet.

In 95 percent of the cases, the cause of action was clearly provided in the complaint. It was necessary in the remaining cases to infer plaintiffs' claims from the description of events provided in the complaint. This was most common in the pro se complaints. Many pro se complainants often did not clearly state precisely the

violation alleged to have been committed by the police. These plaintiffs described their accusations in general terms and it was the court that deciphered the exact complaint for such plaintiffs. In many of these cases a magistrate was appointed to investigate the merits of the complaint. Unfortunately, due to the random and oftentimes confusing language of the pro-se case files it is not possible to precisely report how many times magistrates were appointed to investigate the merits. Although investigation of merit was not a variable in the study, it is worthy to note. Five hundred cases were originally selected, but 35 were omitted because they contained insufficient information. Thus, the final sample consisted of 465 cases.

Interviews

To complement the case record analyses, interviews were conducted with individuals who had dealt directly with these cases. These included police department personnel, lawyers for the office of corporation counsel and plaintiffs' attorneys (see Appendix B). The interviews were used to identify factors and considerations that affect settlements, the range of damages, and police policy decisions. Certain considerations, such as political and/or public pressure, may affect the results of lawsuits. Police officers and their superiors are often the subjects of more public scrutiny because of the nature of their functions. Because

such considerations could not be derived from the court case data, it was necessary to interview those who are in position to make the decisions that affect settlements of police action cases. The interviews with lawyers for the office corporation counsel were focused on the decisions made in the process of prosecuting section 1983/Bivens actions. Interviews with the New York City assistant police commissioners focused on obtaining information on policy changes adopted as a result of section 1983/Bivens suits.

Interviews with lawyers allow for a contrast of the perspective of plaintiffs' attorneys with that of corporation counsels representing the different police agencies. The interviews with the lawyers for the office of the corporation counsel were intended to determine the reaction of other criminal justice personnel to civil damage awards for constitutional violations. The interviews with plaintiffs' attorneys were particularly useful because many of these attorneys have litigated many section 1983/Bivens cases and are highly regarded experts in the field.

As indicated in Appendix B, two lawyers (assistants) for the office of the corporation counsel, two police assistant commissioners (for Legal Affairs and for Civil Matters) and three plaintiffs attorneys were interviewed from New York City. A little less than half the cases (202) named the New York City Police Department as defendant. Attempts to interview the police commissioners of the New

York City Transit and Housing Police Departments were not successful.

Lawyers for the corporation counsel of Suffolk and Westchester Counties were also interviewed. Suffolk and Westchester were other counties covered in the study that had the most cases apart from New York City. Policies of these counties were also used as a basis for comparison with New York City since they are smaller and are more suburban. Thus lawyers, who had represented the most plaintiffs in their respective counties were selected for the interview. A total of 11 interviews were conducted.

As indicated in Appendix B, the interviews were conducted in person or by telephone over a six month period. The interviews with the two assistant police commissioners and the lawyers for the corporation counsel for New York City were conducted in person. The responses for these interviews were taped. The corporation counsels as well as all the plaintiffs' attorneys were contacted by telephone and the interviews with them were also conducted over the telephone.

Other Records

Other data used for this study were drawn from the following sources: reports of civil trials in the Eastern and Southern Districts from 1983 to 1987, Annual Reports of the Director of the Administrative Office of the United

States Courts, some reports of the New York City Civilian Complaint Review Board, some police records, and some reports of the New York City Comptroller's Office.

The court records and the Annual Reports of the Director of the Administrative Office of the United States Courts provided data on the administering and processing of civil cases and particularly on the time of disposition of other civil cases. Data on the number of police complaints alleged against the New York City police departments and amounts of civil damages paid by New York City, were obtained in the reports from the New York City Comptroller's Office, the police department and the Civilian Review Board. These data were used to gauge the effect of section 1983/Bivens actions on New York City.

Limitations of the data

A number of limitations during data collection were encountered. The following discussion identifies and describes these limitations.

As noted above, an effort was made to identify all suits filed under 42 U.S.C. section 1983 and Bivens between January 1983 and December 1987. This was accomplished by searching court records in the two federal courts. A fundamental source of information was the actual complaint which contained the nature of the violation, the amount asked for by the plaintiffs, the plaintiffs and the

defendants. Most of this information originated mainly from an account of the events of police misconduct as related by the plaintiff in the complaint. Neither the complaint nor most other case information, however, provided the defendant's version of the incident in question. Answers to complaints are most often simply denials of the complaints.

Another problem arose with recording causes of action. These were recorded as they were alleged without consideration for plaintiff's accuracy or whether such causes of action were ever fully proved. Moreover, in many cases defendants were listed only to be later relieved by the court as being ineligible defendants.

Although not a limitation, it was extremely difficult and time-consuming to obtain certain types of information once a case was closed. Because, generally, a good number of cases are settled out of court, documentation of the terms of such settlements, particularly the amount of the awards, was sometimes impossible to obtain or too difficult to attempt.

At the time the data from court files were collected, towards the end of 1988 and the beginning of 1989, a few of the cases were still pending and outcomes of these cases were not determined. Since the number of these pending cases was too small to have any significant impact on the study the cost of tracking down these cases was deemed excessive.

Determining which cases are section 1983/Bivens cases

presented another problem. Most civil suits include multiple claims, of which section 1983 and Bivens claims are but two of the categories. Any case that sought redress under section 1983/Bivens was included in the study. It is possible that some cases filed under other claims might have been omitted if they could not be identified as section 1983/Bivens actions.

There were a number of limitations involving the interviews done for the study. The selection of individuals to interview was based on availability and willingness to participate. It was difficult to get police commissioners, corporation counsels and plaintiff's attorneys to agree to interviews. Attempts to interview police commissioners of the New York Transit and Housing Police authorities, for example, were not successful.

Some officers agreed to be interviewed only by phone and others only for very short periods of time. The goal of the interviews was to obtain specific information on lawsuits that had directly caused changes on police policy from the commissioners and lawyers for the corporation counsels. Both the police departments and lawyers for the corporation counsels, however, were reluctant to supply such information. Only two cases that caused policy changes were supplied by them. As a result specific cases from the study cannot be used to illustrate changes resulting from specific section 1983/Bivens actions. Instead cases which were not

included in the study (see chapter 6) are used.

In summary, although the study had a number of limitations, it is strongly believed that these limitations did not significantly affect the findings. The limitations did not appear to introduce any bias and it is fair to assume that the missing data have only random effects on the findings.

Analysis plan

The current work is an exploratory study which considers the impact of several independent variables on the processing and award of damages under section 1983/Bivens lawsuits. Independent variables in the study were the causes of action, malice, the amount of damages asked, the type of defendant, manner of disposition, type of representation, district and the time of disposition. Two dependent variables were measured - (1) the successful prosecution of an action and (2) the amount of damages awarded.

To obtain descriptive statistics on all the variables in the study, frequency analyses will be run. These analyses will serve to answer research questions one through seven.

To study the relationship between the categorical variables addressed by research question eight, a series of crosstabulation analyses will be done. Correlational analyses and bivariate scatterplot analyses will be used to study the relationship between the variables when the data

are measured on interval scales. In the case of complex data such as causes of action and defendant type, factor analysis will be used as a data reduction technique. Following the classification of the factors derived from these analysis, indices will be constructed that will be used in subsequent analyses involving these variables.

Finally, two logistic regression analyses will be used to test which of the variables in the study have an impact on (1) the successful prosecution of cases in section 1983/Bivens actions and (2) whether damages were awarded in section 1983/Bivens actions.

Chapter 4.

Characteristics of Section 1983/Bivens Actions.

This chapter examines the various characteristics of section 1983 and Bivens actions filed in the Eastern and Southern Federal District courts from New York from 1983 to 1987. The characteristics covered include the nature of the violations alleged by the plaintiffs, the parties to the lawsuits, the manner of disposition, time of disposition and prosecution of the cases.

Violations

Most plaintiffs alleged multiple causes of action. A count of the number of times each type of offense appeared in any of the cases is shown in Table 2. The top three complaints were assault and battery (59%), false arrests (57%), and false imprisonment (47%). This is consistent with findings of other studies (e.g., Eisenberg & Schwab 1987; Coleman, 1990). Fisher et al., (1989) noted that this pattern was so in both federal and state suits. These are expected results, for the section 1983 remedy was created to redress exactly these kinds of deprivation of the individual's rights. Moreover, use of force has been the traditional complaint of plaintiffs in section 1983 suits

Table 2

Civil Liability Suits by Cause of Action

Cause of action	Suits with cause of action alleged[a] Number of suits	Percent
Assault and battery	276	59
False arrest	265	57
False imprisonment	219	47
Malicious prosecution	130	28
Illegal search and seizure	81	17
Invasion of privacy	46	10
Trespass	21	5
Other	133	29

[a] The table is based on 465 cases. Since plaintiffs could list multiple causes of action in the same complaint, the number of suits in the Table is greater than 465 cases in the study.

(Barrineau, 1987, p. 39).

Other charges were made less frequently. Malicious prosecution was alleged in 28% of all actions. Along with invasion of privacy and trespass, illegal searches and seizures allegations were the violations least frequently alleged by plaintiffs. Illegal searches and seizures were alleged in 17% of the cases. Invasion of privacy was alleged in only 10% cases and 5% of the actions alleged trespass. There were numerous other actions including actions for abuse of due process, conspiracy, harassment and false testimony.

Since most cases had multiple violations, Table 3 indicates the combinations of violations that were alleged in the 465 cases and the intercorrelation among each of the causes of action. Eight of the correlations were significant ranging in size from $\underline{r}$ =.117 to $\underline{r}$ =.672. A factor analysis of the cluster of violations suggested a way to classify section 1983/Bivens cases. A principal component analysis using a varimax solution resulted in three factors (see Table 4 which indicates this scheme).

Factor one is comprised of false arrest, false imprisonment and malicious prosecution (titled "liberty violations" for the purpose of this study). Factor two is comprised of trespass, invasion of privacy and search and seizure (titled "property/privacy violations") and factor

Table 3

Cluster of violations

	AB	FA	FI	MA	SS	IP	TP	OV
AB		.050	.009	-.011	-.024	-.019	-.010	.117*
FA	163		.672**	.251**	.010	.055	.022	-.084
FI	131	202		.324**	.021	-.053	.044	-.120*
MA	76	100	95		-.088	.050	.003*	.087
SS	46	47	40	22		133**	.199*	-.065
IP	26	30	18	16	15		.310**	.034
TP	12	13	12	6	8	11		-.046
OV	91	67	50	29	18	11	4	

Note. AB = Assault and battery
FA = False arrest
FI = False imprisonment
MA = Malicious prosecution
SS = Search and seizure
IP = Invasion of privacy
TP = Trespass
OV = Other violations

The lower half of the matrix shows the number of cases for each combination of violations, the upper half shows the correlation.

* p > .05
** p > .01

Table 4

Principal Component Factor Analysis of Causes of Action

	Liberty	Property	Violence
False Arrest	.8577	.0346	.0628
Trespass	.0310	.7554	.0471
False imprisonment	.8843	-.0257	-.0275
Assault/battery	.0938	.0088	.7753
Invasion/privacy	.0026	.7711	.0405
Search/seizure	-.0045	.4700	-.1677
Malicious/pros.	.5722	.0158	-.1018
Other violations	-.1805	-.0907	.6899

Note. Items that are underlined are the variables selected to define the factor based on the loadings after varimax rotation.

three of assault and battery and other violations (called "violent violations"). Table 5 shows the final result of the classification process.

In order to classify cases into groups to use in subsequent analyses, indices were computed following the classification obtained from the factor analysis results. Items on each scale were given an equal weight. Three categories of just "liberty", "property" or "violence" cases were obtained. Cases in the "mixed" category were further subdivided into "liberty and violence", "property and violence" and liberty and property".

Parties to Section 1983 and Bivens Actions

Plaintiffs.

Plaintiffs were classified as either single or multiple and whether they were represented by counsel or filed their cases pro se. Unfortunately limited and inconsistent data in the court files made it impossible to ascertain any other specific characteristics of the plaintiffs.

As shown in Table 6, most cases were brought by single plaintiffs and with counsel. Practically, most encounters with police are with individuals and occasionally with citizens as a group (Avery & Rudovsky, 1982). Consequently, most section 1983/Bivens actions are brought by single

Table 5

Nature of violation

Type of violation	Number of cases	Percent
Just Liberty	74	16
Just Property/privacy	12	2
Just Violence	92	20
Mixed		
Liberty and violence	149	32
Property and violence	20	4
Liberty and property	17	4
All 3 indices	58	12
Unknown	43	9
Total	465	100
Any liberty violation	298	64
Any property violation	107	23
Any violence violation	319	69

Table 6

Number of Plaintiffs and Type of Representation

	Type of Case		
Number of plaintiffs	Counsel	Pro se	Total
Single	72%	92%	77%
Multiple	28	8	23
	100%	100%	100%
	(350)	(115)	(465)

[χ^2_1(N = 465) = 19.88 $_p$<.001].

plaintiffs. The study examined the pro se plaintiff and the importance of legal representation in section 1983/Bivens actions. One hundred and fifteen cases were brought by Pro se plaintiffs. As seen in Table 6, the vast majority (92%) of pro se cases and the majority of counsel cases (72%) had a single plaintiff.

Defendants.

There were two major classifications of defendants; individual defendants (i.e. individual police officers and police chiefs) and governmental defendants (i.e. department, city/county, state and federal government). As indicated in Table 7, the individual police officer was a defendant in 91 percent of the cases.

The police chief was named as defendant in 28 percent of the total suits while the department was a defendant in 44% of the cases. The few cases that did not name individual officers as defendants probably involved those actions alleging the abuse of due process and/or conspiracy by the police chief and department.

Cities and other counties were named as defendants in 61% cases. Also, in those other cases in which the city or the county was not specifically named as a defendant in the complaint, the named individual officers or the department were still represented by municipal corporation counsels.

Table 7

Lawsuits Classified by Type of Defendant

Type of defendant	Cases with Type of Defendant Named	
	Number of suits[a]	Percent
Individual officer	423	91
Police chief	130	28
Department	205	44
City/county	284	61
State	14	3
Federal government	10	2

Note. [a] The Table is based on 465 cases. Since plaintiffs could list multiple defendants in the same complaint, the number of suits in the Table with defendants is greater than 465 cases in the study.

Thus, even when the city or county was not directly named as a co-defendant in the complaint, the municipality was almost always involved in the defense and subsequent payment of damages. There were few cases (3%) in which the state was a defendant. The federal government was named as a defendant in only 2% of the cases.

How is the defendant type related to type of representation? A crosstabulation analysis (see Table 8) indicated that there was a relationship between the type of plaintiff and type of representation. A majority of the cases with counsel have city as the defendant. Pro se plaintiffs were twice as likely to name an individual defendant and almost three times as likely to name the department as defendant as plaintiffs with counsel.

The next analysis considered the original grouping of defendants into individual defendants and government defendants. Table 8 shows the relationship between this type of defendant classification and type of representation. The majority of cases list government as defendant, but this relationship is more marked among those cases in which counsel is present. Again about 39% of the pro se cases listed the individual as defendant.

Multiple Defendants.

In 82% of the cases there were multiple defendants

Table 8

Percent of Cases which included Various Types of Defendants by Type of Representation

Type of defendant	Type of Representation[a] Counsel	Pro se	Total
Officer	15%	30%	15%
Chief	4	10	6
Dept	10	27	14
City	51	21	4
County	18	7	16
State	3	5	3
Fed.	3	1	2
Defendant groups reclassified into individual and government and Representation.[b]			
Individual	19	39	21
Government	81	61	79
	100% (349)	100% (112)	100% (461)

Note. One counsel case does not list a defendant.Three pro se cases do not list a defendant.

Individual includes officer and chief. Remaining defendant types are classified as government.

[a] $[\chi^2_6(N = 461) = 65.48\ p<.001]$

[b] $[\chi^2_1(N = 461) = 29.64\ p<.01]$

named; Table 9 shows different combinations of defendants that were observed. This result was expected given the obvious legal strategy in joining defendants and similar findings reported by previous studies (Eisenberg, 1987; Fisher et al., 1989).

The correlations in Table 9 show the relationship between the different types of defendants. Only three relationships were significant and the correlations were not high: officer and department (r =.16), department and City (r =.15) and City and county (r = -.38).

Table 10 shows the relationship between defendant type and type of representation. While almost 90% of the cases with counsel had multiple defendants, only about two-thirds of the pro se cases had multiple defendants. As noted in chapter 2, the pro se plaintiffs are often not aware of the advantages of including governmental agencies as defendants in their complaints.

Difference in Characteristics between the Eastern and Southern Districts.

What differences exist between districts on such variables as the nature of the violation alleged, the number of plaintiffs and defendants and type of representation? Table 11 shows that there were no significant differences in the causes of action alleged between the Eastern and

Table 9

Cluster of Defendants

	Officer	Chief	Dept	City	County	State	Fed
Officer		.012	-.168**	-.076	.055	-.032	-.005
Chief	119		-.042	-.045	.030	-.082	-.076
Dept	176	53		.152**	-.090	.021	-.042
City	186	54	110		-.383**	-.059	-.047
County	70	23	25	1		-.008	-.065
State	12	1	7	4	2		-.026
Fed	9	2	3	3	0	0	

Note. ** $p \leq .01$

The lower half of the matrix shows the number of cases for each combination of defendants, the upper half shows the correlation.

Table 10

Type of Defendant by Representation

Classification of defendant	Counsel	Pro se	Total
Single	13	30	18
Multiple	86	67	82
Unknown	.3	3	1
	100%	100%	100%
Column total	(350)	(115)	(465)

χ^2 (2, $\underline{N}$ = 465) = 25.59 p<.011

Table 11.
Characteristics of Section 1983/Bivens Actions in Eastern and Southern Districts

		Eastern	Southern	Row total
Nature of Violation[a]				
	Liberty	18%	13%	16%
	Property	3	2	3
	Violent	17	24	20
	Mixed	62	62	62
Number of Plaintiffs[b]				
	Single	80%	72%	77%
	Multiple	20	28	23
Representation[c] by District				
	Counsel	82%	67%	75%
	Pro se	19	33	25
	Total	(270)	(195)	(465)
		58	42	100

Number of Plaintiffs by Representation by District	Eastern District[d]			Southern District[e]		
	Plaintiff	Counsel	Pro se	Plaintiff	Counsel	Pro se	
	Single	77%	96%	80%	Single	64%	89%	72%
	Multiple	23	4	20	Multiple	36	11	28

Defendant Classification by Represent. by District	Eastern District[f]				Southern District[g]			
	Defendant	Counsel	Pro se		Defendant	Counsel	Pro se	
	Single	13%	44%	19%	Single	15%	20	16%
	Multiple	87	52	80	Multiple	85	79	83
	Total	(220)	(49)	(269)		(130)	(64)	(194)
		82	19	100		67	33	100

Defendant Type by Representation by District	Eastern District[h]				Southern District[i]			
	Defendant	Counsel	Pro se		Defendant.	Counsel	Pro se	
	Individual	13%	56%	21	Individual	19%	27%	21
	Government	87	44	79	Government	81	73	7
		(219)	(48)	(267)		(130)	(64)	(194)
		82	18	100		67	33	100

Note. Numbers differ because of missing data

[a] $\chi^2 = 4.84$ p =183 NS df =3

[b] $\chi^2 = 4.5$ p <.05 df = 1

[c] $\chi^2 = 13.55$ p<.001 df = 1

[d] $\chi^2 = 9.50$ p < .05 df=1

[e] $\chi^2 = 13.94$ p < .001 df=1

[f] $\chi^2 = 32.27$ p<.001 df=2

[g] $\chi^2 = 3.01$ NS df=2

[h] $\chi^2 = 43.94$ p < .001 df=1

[i] $\chi^2 = 1.69$ p <.194 df=1

Southern Districts. The percentage of single plaintiffs was slightly higher in the Eastern District. While the majority of cases in Eastern District and Southern Districts were presented by counsel, the Southern District had slightly more pro se actions. In the Eastern District, the majority of pro se and counsel cases had a single plaintiff, but multiple plaintiffs were also likely to be listed in counseled cases. This pattern was also true in the Southern District.

The next analysis controlled for district and examined the relationship between defendant type (i.e single vs. multiple) and representation (counsel vs. pro se). In the Eastern District multiple defendants were more likely than single, but cases with counsel were more likely to have multiple defendants. Though this pattern was similar in the Southern District, it was not statistically significant.

In summary, districts did not differ in terms of the nature of the violations alleged, but cases differed between Districts in the number of plaintiffs listed in the complaint and representation by counsel. The more complex analyses also resulted in some District differences, the most significant one being the relationship between the number of plaintiffs and type of representation when District was controlled for.

Processing of Section 1983/Bivens Actions

As discussed in chapter 2, cases were considered as successfully prosecuted if the plaintiff had undertaken all the necessary steps towards obtaining the remedy sort from the courts. Certain actions were considered failed if the plaintiff did not undertake these requirements. Following this criteria, plaintiffs successfully prosecuted 59% of the cases. Cases were not successfully prosecuted for a variety of reasons including: change of venue, lack of jurisdiction, failure to state a cause of action, failure to prosecute or some unknown reason. Apart from the above, other failures constituting 10% of the cases were: actions that were withdrawn, res judicata, or because they were barred by the statute of limitations (statute of limitations had run) denial of counsel were all coded as other means of failure. Table 12 shows the breakdown of reasons why cases were not successfully prosecuted.

A good number of cases (11%) failed for failure to state a cause of action. Thirty-six (8%) cases failed for lack of prosecution. Only 1% actions failed as result of the change of venue. As a matter of right, defendants can request a change of venue if the plaintiff has violated the venue rules. A small number of actions (1%) failed because the court did not have jurisdiction to decide them. Other reasons for non-prosecution (some of which could not be

Table 12

Reasons for Non-Prosecution

Reason for failure	Percent of cases[a] (N = 465)	Number of cases
Prosecuted cases	59	374
Non prosecuted cases	41	191
Failure/cause of action	11	51
Other	10	48
Not known	9	44
Failure to prosecute	8	36
Jurisdictional	1	6
Venue	1	6

[a] Percentages are calculated based on the total number of cases in the entire sample; i.e., 465 cases. Note that 41% of the overall cases were not prosecuted.

identified) accounted for a good proportion of the actions not prosecuted (44 cases or 9%).

Reasons for non- prosecution were also considered by the type of plaintiff. As can be seen in Table 13, of the 191 cases considered as not properly prosecuted, 102 were counsel cases and 89 were pro-se cases. Overall, there were no major differences in reasons for non-prosecution. However, more pro se cases were not prosecuted because of failure to state a cause of action as compared to counsel cases (31% vs. 22% of the cases). The data however, showed that pro se cases were overwhelmingly not successful. Seventy-seven percent of the 115 pro-se cases were not successfully prosecuted as contrasted with 41% of the 250 counseled cases.

Dispositions

The following section covers the manner of disposition of the cases. It examines disposition by the causes of action and by the defendants. A comparison is made of the manner of disposition of section 1983/Bivens actions and general civil actions.

Manner of Disposition.

Table 14 presents the manner of case dispositions. Cases were primarily disposed of by settlement or dismissal.

Table 13

Reasons for Non-Prosecution By Type of Representation

	Type of representation			
Reason for failure	Counsel	Percent of total (N=102)	Pro-se	Percent of total (N=89)
Failure/cause of action	(23)	22	(28)	31
Failure to prosecute	(17)	17	(19)	21
Jurisdictional	(2)	2	(4)	4
Venue	(3)	3	(3)	3
Other	(27)	26	(21)	24
Not known	(30)	29	(14)	16
Total	(102)	100	(89)	100

$\chi^2 = 6.98$ df = 5 p = .22

Note. Numbers in parentheses represent the sample size.

Table 14

Case Dispositions

Manner of disposition	EDNY	(N)	SDNY	(N)	Total	Cases
Settlement	33	(90)	32	(58)	32	(148)
Dismissal	15	(41)	35	(68)	23	(109)
Summary judgment	11	(30)	14	(28)	12	(58)
Jury trial	6	(15)	8	(15)	6	(30)
Bench trial	4	(12)	5	(9)	4	(21)
Uncontested default/pltiff	.4	(1)	.5	(1)	.4	(2)
Other/unknown[a]	12	(33)	5	(9)	9	(42)
Pending[b]	18	(48)	4	(7)	12	(55)
Total	100%		100%		100%	
	n	(270)		(195)		(465)

Note. Numbers in Table represent percentages. Numbers in parentheses are the sample size.

[a]Dispositions of cases marked other for purposes of the study were cases marked as closed on the court calendar without the manner of disposition stated.

[b]Some cases, mainly those filed in 1986 and 1987, were still pending at the time the data was collected.

Only 11% of Section 1983/Bivens suits went to trial, with 4% tried on the bench and 6% by jury. Table 14 also shows that the manner of disposition varied significantly by district. The relationship between district and manner of disposition was not strong.

However, the most marked difference between the two districts occurs with dismissals - only 15 percent of Eastern District cases were dismissed while 35 percent of Southern District cases were dismissed. In the two districts taken as a whole, more cases were disposed of by settlement than any other disposition (32%), with slightly more settlements made in the Eastern District.

Table 15 shows the percentage of section 1983/Bivens cases reaching bench trial in this study were roughly comparable to the number of other civil cases reaching trial in the two courts during this period. Table 16 indicates the percentage of all other civil cases tried in the Eastern, Southern and on the national level during 1983 through 1987. While there was no difference in the total percentage of cases which went to trial, there was a decline of the percentage of trials in the two Districts after 1985 as seen in Table 16. Interviews with the lawyers for the corporation counsels and defence attorneys failed to reveal any reasons for the decline.

Many cases were dismissed (approximately 23% of the

Table 15

Percentage Actions Resulting in Trial by Judicial District and Type of Action

	1983/Bivens		All other actions[a]	
	Jury	Bench	Jury	Bench
EDNY	7	5	9	9
SDNY	8	5	9	9
NATIONAL	NA	NA	12	12

Note. [a] Data for columns 3 and 4 are from United States District Court. (1989). Annual report of the USDC/SDNY and USDC/EDNY.

Data for jury and bench trials for section 1983/Bivens actions were taken from the present study.

Table 16

Percentage of All Cases and Section 1983/*Bivens* Actions Resulting in Civil Trials in the Eastern and Southern District

YEAR	EDNY		SDNY		NATIONAL	
	All[a]	1983/ *Bivens*	All[a]	1983/ *Bivens*	All[a]	1983/ *Bivens*
1983	4	11	5	23	5	NA
1984	4	19	4	13	5	NA
1985	4	7	3	14	5	NA
1986	4	3	3	5	4	NA
1987	4	3	3	4	5	NA

Note. Data for columns 1, 3 and 5 are from United States District Court. (1989). Annual report of the *USDC/SDNY* and *USDC/EDNY*.

total number of cases studied). Most of the dismissed cases were pro se complaints. Only 2 cases were resolved by an uncontested default for the plaintiff. About 12% of the actions were disposed by summary judgment (see Table 14).

Dispositions listed as other consisted of actions resolved by none of the methods listed above. These included those actions that were withdrawn by the complainant, discontinued or consolidated with other actions in the same court. There were 9% other dispositions. Open cases (those civil suits still pending), mostly actions brought in 1986 and 1987, comprised 21% of the cases. Twenty-one cases with unknown manner of disposition might have been open cases. As was often discovered in the case files, sometimes actions were marked closed without stating any specific method of disposition.

Time of Disposition.

Table 17 shows the time of disposition by type of action. The sample sizes for each of the causes of action (i.e., liberty, property and violence) were too small to use in any further analyses. Cases in which violence was alleged were disposed in a slightly longer time than cases alleging liberty and property violations. Mixed cases were further analyzed to see if any differences could be found. Again, there was a trend for cases which included violence to have

Table 17

Time of Disposition (in months) for Different Causes of Action Alleged

Cause of action	Number of cases	Mean time	(SD)	Median time
Lib.	65	22	14.47	18
Prop.	10	19	12.67	18
Viol.	78	29	17.36	25
Mixed	250	27	16.55	26
Total	403[a]	26	16.45	25
Prop/viol.	14	30	19.62	28
Lib/viol.	128	29	17.31	28
Lib/prop.	11	27	12.35	25
All 3 indices	44	28	16.60	27

Note. [a]62 cases missing time of disposition
Lib = Liberty violations
Prop = Property/privacy violations
Viol = violent Violations
Mixed = mixture of all three violations

a slightly longer time of disposition (property/violence and liberty/violence had similar times of 28 months while liberty/property had 25 months). Table 18 indicates the mean and median time of disposition for the study by the District. The mean time of disposition in the Eastern District and Southern Districts was 27 and 26 months, respectively, while the median time of disposition was 26 and 24 months. The wide variance in the time of disposition indicates that even within districts time varied widely from case to case.

As indicated in Table 18, the median time of disposition for the cases studied is higher than the median time of disposition of civil cases during the same period of the study. For example, in the Eastern District, during the study period, the median time of disposition for a 1983/Bivens action was 26 months, while in the Eastern District for all civil cases from 1983 to 1987 was 9 months.

Table 19 shows the mean and median time of disposition of cases presented by counsel and those presented by pro-se plaintiffs. Both the mean and median time of pro-se actions are lower than that of cases presented by counsel. This is contrary to the 1987 findings (as stated earlier) of the New York State Bar Association report of the Subcommittee on pro-se Litigation which stated that pro-se suits generally took a longer time to dispose of than other civil cases. In

Table 18

Mean and Median Times (in Months) of Disposition by District

District	Number of cases	Mean Time (1983 and Bivens)	(SD)	Median Time (1983 and Bivens)	Median time (all civil[a] (1983-87)
EDNY	215	27	16.03	26	9
SDNY	187	26	16.85	24	8
Total	403	26	16.40	25	

Note. [a] From "Annual Reports of the Director of the Administrative Office of the United States Courts: Detailed Statistical Tables." The national median time for the same period was 7 months.

Table 19

Time of Disposition by Type of Representation

	Number of cases	Mean	(SD)	Median
Counsel	302	28	16.09	26
Pro se	101	23	17.03	21
Total	403	26	16.45	25

a limited survey of dockets of two judges in the Southern District, it was realized that pro se actions comprised almost more than 60% of the cases that were pending for more than five years (see p. 3).

Table 20 indicates the mean and median time of case disposition of cases by the method of disposition. The median time of disposition for all cases studied is 25 months. The median time was reported in the Table as well as the mean time of disposition because the standard deviation for each manner of disposition was quite large indicating that time varied greatly from case to case.

Is the mean time taken to dispose of cases that reached trial longer than the mean time for other methods of disposition? A one-way analysis of variance using time of disposition as a dependent variable and the manner of disposition as the independent variable, shows that there was a significant difference between methods of disposition (see Table 21).

In order to determine where the difference existed, a Neuman-Kuels multiple comparison test was done (see Table 21). The test showed that the time of disposition was different for settlements and dismissals and also that the disposition time was different for jury trials and all other groups with the exception of uncontested default for the defendant.

Table 20

Mean and Median Time (in months) of Disposition by Method of Disposition of Section 1983/*Bivens*

Manner of disposition	Number of cases	Mean time (in months)	(SD)	Median time (in months)
Settlement	140	27	15.4	25
Dismissal	107	22	14.5	19
Summary judgment	50	22	13.1	18
Jury trial	30	43	17.9	39
Bench trial	19	31	22.6	27
Other	38	27	13.7	26

Note. The total is less than 465 because some cases were still pending when the data were collected and some case files did not state the date of filing.

Table 21

One-way Analysis of Variance with Time of Disposition as the Dependent Variable

Source	SS	df	ms	F	P
Manner of disposition	12 327.79	5	2465.56	10.482	.0000
Error	88908.84	378	235.21		
Total	101236.63	383			

Neuman Kuels Multiple Comparison Test

* Denotes pairs of groups significantly different at the 0.050 level

Mean	Group		Grp 4	Grp 5	Grp 6	Grp 3	Grp 1	Grp 2
21.6	Grp 4	(Uncont. default)						
21.9	Grp 5	(summary judgment)						
27.0	Grp 6	(dismissal)						
27.1	Grp 3	(settlements)					*	
31.2	Grp 1	(bench trial)						
43.2	Grp 2	(jury trial)	*	*	*	*	*	

The average time of disposition for trials in this study is 26 months (see Table 18). This average is far greater than the average of trials of other civil cases tried in the two district courts during this period. Table 22 indicates the median time of disposition for general civil trials in the eastern district at this time ranged between 20 to 22 months and 13 to 17 months in the southern district. The national median time for civil trials stayed constant at 14 months.

As can be seen in Table 20, the median time of bench and jury trials for the study was 27 and 39 months respectively. Again these median times are far greater than the median time of bench and jury trials of other civil cases in these courts during this period. There were also differences in time of disposition of jury and bench trials for each district (see Table 22). Jury trials of section 1983/Bivens actions were disposed of in a median time of 30 months in the Eastern District and 41 months in the Southern District. The difference between the national median time of disposition of civil cases and that of the cases in this study was even greater (see Table 18).

Table 22 indicates that the median time of disposition of bench trials in the Eastern District of section 1983/Bivens actions (26 months) was approximately the same as the median time of disposition of other civil actions in

Table 22

Average Median Time for the Five Year Period

	EDNY	SDNY
All civil (1983-1987)[a]		
Bench trials	20	15
Jury trials	23	15
All	22	15
1983/*Bivens* actions		
Bench trials	25	28
Jury trials	30	41
All	28	34

Note. [a] Figures from the "Annual Reports of the Director of the Administrative Office of the United States Courts. The national median times during this same period was 13 months for bench trials, 15 months for jury trials and 14 months across all trials.

A Fisher exact test showed no difference in median time of jury and bench trials between the Eastern and Southern Districts. See Table 14 for number of cases.

this District at the time. But there was a large difference between the time of disposition of section 1983 actions and other civil actions in the Southern District. There was also a large difference in the median time of disposition for jury trials of section 1983 actions and other civil actions in both the Eastern and Southern Districts. The difference is particularly apparent in the Southern District. On the average, the difference in the time of disposition of section 1983/Bivens actions and other civil actions in the Southern District was approximately 14 months. Table 23 shows that even those actions considered as having failed still used up a reasonable amount of the court's time. These failed cases still took longer time to be resolved than the other civil cases. Though the median time of disposition for the failed actions was slightly lower than the average time of disposition for cases in the study, the median for the failed cases was still higher than the average time of disposition of the other civil cases decided during this period.

Discussion

The main findings identified from this chapter are: (1) assault and battery, false arrest and false imprisonment were the causes of action most often alleged by plaintiffs; (2) causes of action tended to occur in three clusters; i.e,

Table 23

Mean and Median Time (in months) of Disposition of Failed Case

Reason for failure	Number of cases	Mean time (months)	(SD)	Min.	Median time (mths)	Max.
Failure cause/Action	53	19	13.94	0	17	53
Failure to Prosecute	40	25	14.84	0	28	54
Venue	7	22	17.25	4	15	49
Jurisdict.	7	27	27.26	3	18	79
Other	57	23	14.30	4	18	64

Note. Failed cases included those which the plaintiff had not undertaken all the necessary steps towards obtaining the remedy sort from the courts.

(a) violations involving individual liberties (false arrest, false imprisonment and malicious prosecution); (b) those involving property rights (trespass, invasion of privacy and search and seizure); and (c) those involving the use of violence (assault and battery and other violations); (3) approximately 91% of the cases had multiple defendants and the individual police officers were named as defendants in more than 90% of the cases; (4) most of the cases were disposed of by settlement; (5) the median time of disposition for all cases was about 25 months; (6) approximately 41% of the actions were not successfully prosecuted; (6) pro se actions were overwhelmingly not successful; (7) the Districts studied did not differ in terms of the violations alleged, but differed in number of plaintiffs and the level of representation by counsel.

The finding that almost 25% of the cases were pro se complaints was significant. It could not be definitely ascertained where the plaintiff resided at the time of filing the action; however, from the inspection of the case records there were indications that most pro se actions were brought by detainees or convicts. The court records indicated that in several pro se filings a petition for representation was made by the plaintiff. Although specific data were not compiled on the number of such petitions, information in these petitions was presented in the case

files in a descriptive manner. These petitions took the form of a letter from the plaintiff to the judge. In some cases the judge appointed a court-magistrate to determine whether the plaintiff deserved a court appointed counsel. On the determination of the court as to whether a pro se complaint has merit and whether the plaintiff deserves counsel, the court asked one of the magistrates to examine the merits of the complaint. Also, there are voluntary organizations and law firms (willing to offer pro bono services) that participate in programs which handle pro se cases. It was not possible to identify pro bono cases in this study.

Pro se cases were mostly not successfully prosecuted. As stated above, some of these plaintiffs were in jail. The chances that potential plaintiffs who are either in jail or in prison will effectively prosecute their actions are slim. For example, several obstacles stand in the way of a plaintiff attempting to prosecute an action from a prison cell. The plaintiff is not only faced with the problem of travelling from the cell to court, but he/she must seek permission to go to court; permission which is not automatically granted in several jurisdictions (Schafer, Personal Interview, October, 1990; Foote, 1955, p. 508). The plaintiff may also be moved from one prison to another, making it difficult to prepare the case or to be present in the jurisdiction in which the case is filed. When forced by

circumstances to wait until they are released to prosecute the suit, pro se plaintiffs are often faced with the reality that the statute of limitations may have expired or that the cause of action may have been dismissed for lack of prosecution.

The impact of Monell of permitting plaintiffs to include municipalities as defendants in section 1983/Bivens suits, was demonstrated by the fact that a majority of plaintiffs during the study period included municipalities as defendants. Some research conducted on civil suits against police (e.g., Fisher et al., 1989; Eisenberg & Schwab, 1987) supports the finding of this study that in most civil liability actions brought against law enforcement officers, the individual officers as well as the cities/counties are usually named as defendants. As discussed in chapter 2, the administrator of the police organization is not often mentioned as defendant because he/she is rarely involved with civilians as the individual officers. But, the departments are often likely to be defendants because they are capable of paying large monetary awards to defendants.

Since most of the violations that trigger these civil liability suits stem from activities of police officers employed by municipalities, federal agencies are rarely included as co-defendants of these suits. Also, the low

number of actions brought against the federal government (ten) was expected because, as discussed in Chapter One, the federal government is immune from liability under section 1983. Though federal officials are subject to Bivens action suits, the federal government is only subject to suit under the Federal Tort Claims Act of 1946. Bivens actions against a federal official and tort actions under this Act can be joined in the same suit.

Also, the manner of disposition reflected the pattern reported in other studies, in particular those disposed by trial. For example, Fisher et al. (1989) found that 57% of the cases in their study were settled while only 14% were tried (p. 76). Moreover, Eisenberg (1982) found that most of the cases in his California study were usually settled before trial. Of the 276 cases filed during the two year period of his study, only 17 went to trial (p. 126). Eisenberg and Schwab confirmed Eisenberg's earlier findings in their 1987 study. The present study also shows that most section 1983/Bivens cases and civil actions do not usually reach trial. The majority of these cases are settled either in court, or settled out-of-court.

The higher percentage of settlements compared to trials can be seen in light of the trend for active judicial roles (see chapter 2). Although it appears that there was encouragement to settle cases as a result of FRCP, Rule 16,

and perhaps some other factors, some case files did not reveal the terms of settlement. One reason why terms of settlements did not appear in some case files was because some of these cases were dismissed on the plaintiff's request or dismissed by stipulation between the parties. Such case settlements were usually not reflected in the court records (Interview, October 19, 1990; Fisher et al., 1989; Eisenberg, 1982). Interviews with New York City corporation counsels, counsels for other counties, and plaintiffs' attorneys, revealed that there are no specific guidelines used when making case settlements. All those interviewed stated that each case is considered based on the facts and circumstances specific to that case. Certain factors, however, were identified as being important in the settlement decision. The factors considered are the time spent on the case, the nature of the injury, the type of crime, the receptiveness of the jury, and the general atmosphere created by the presiding judge. Moreover, and most importantly, the kind of change and policy the plaintiff is attempting to affect must be given due consideration prior to the assessment of a possible settlement (Interviews, October 19, 1990; February 7, 1991).

An assistant corporation counsel for New York City doubted whether the judge/jury will consider a specific factor as crucial. He thought jurors consider many factors

(even factors such as race, sex, class, time of detention, gun, blood etc.) as likely to influence the awards in a case (Interview, February 7, 1991). A suburban county attorney, agreed with the New York City corporation counsel that these factors are "obviously considered only to the extent of the impression they make on the judge or jury." Another suburban county attorney stated that in certain cases, the public perception may be the deciding factor. A settlement may therefore not be made if the public's perception of it would be contrary to the interest of the police and the county (Interview, February 7, 1991). Moreover, settlements in some counties must be approved by legislatures if they exceed certain stated amounts. For example, in Suffolk County, settlements of more than $25,000 must be approved by the legislature (Interview, February 7, 1991).

According to one private attorney, whose practice involves many section 1983 actions, whether or not a case goes to trial or is settled also depends very much on the court in which the action is brought. For example, from his experience with dealing mostly with civil rights actions in the Eastern District of New York, jurors in Brooklyn are more sympathetic to plaintiffs than jurors in Long Island. Therefore, the plaintiff's attorney might be more inclined to take the case all the way to trial in Brooklyn than in Long Island. The more conservative, pro-law enforcement

jurors in Long Island consider crime as the main problem in the county and are much more likely to accept the police version of events than jurors in Brooklyn who understand that police may be abusive. The attorney further believes that black female jurors in the Brooklyn are the most pro-plaintiff because they do not often close ranks behind police. He also added that he has observed that some judges, particularly those in the Eastern District of New York, "frown" at civil rights actions partly because of their beliefs, and sometimes because of their overcrowded dockets. Such attitudes on the part of judges might encourage settlements rather than trials (Interview, February 9, 1991).

The high number of dismissals in the Southern District does not appear to be due primarily to pro se cases. Although the study did not examine dismissal specifically, federal civil cases can be dismissed for a variety of reasons including failure of the plaintiff to prosecute, or to comply with rules or any order of the court.

Because of the holding in Harlow, the corporation counsels and plaintiffs attorneys' were asked what the effect of the holding has been in resolving section 1983/Bivens actions by summary judgments. An assistant corporation counsel for New York City stated that the main change after Harlow and Anderson has been the increase in

the number of motions for summary judgment prior to trials. According to him, though many demands are made to judges for summary judgment before trial, such demands have not been very successful (Interview, February 14, 1991). This view is supported by this study as indicated in Table 14. Only 12% of the cases were disposed of by granting the motion for summary judgment. However, this 12% may represent a large increase in summary judgments because many more motions are now being made after Harlow and Anderson.

One finding of this study which is particularly illustrative of the nature of section 1983/Bivens is the longer time it takes to dispose of these actions than the time of processing other civil cases. It follows that they are more costly to process than other forms of civil actions. Although the study did not measure the cost of processing these actions directly, it can be inferred from the time spent on the processing of these actions by the courts that considerable resources are spent on them.

Three of the four plaintiffs' lawyers interviewed stated that a substantial amount of time was spent on these cases. One estimated that the time usually spent on any specific case by plaintiffs' lawyers ranged from about 10 hours to 1000 hours depending on the type of allegation and the manner of disposition (Interview, February 7, 1991). Other plaintiffs' attorneys indicated in interviews that

they spent anywhere from $1,000 to $25,000 in the preparation of these suits. The cost to defense attorneys and corporation counsels could not be determined.

As Eisenberg (1982) notes, the extent to which courts conduct hearings is an important measure of the burden of section 1983/Bivens actions. This is more evident when the court costs and other costs of civil case management are considered in the disposition of these cases. As indicated by the average (median) time of disposition [25 months for all cases (see Table 18)] the results of the study indicate that these actions require much trial preparation and perhaps much judicial attention, even though most cases did not reach trial (see Table 14). Considering only the actual cases tried (see Table 14) the study found that section 1983 civil suits do not seem to pose any burden on the system. Only 11 percent of the cases were tried. But much judicial time is spent on the other cases that never make it to trial (see Table 20). This accounts for the long time it takes to dispose of the cases. Thus tried cases, by themselves, do not measure the amount of judicial attention and time devoted to these cases as a good portion of them are often settled just before trial (Eisenberg, 1982, p. 126).

CHAPTER 5.

The Award of Damages

There are many ways of measuring the fiscal and other consequences of civil liability suits. One method is to evaluate the level of damages generally won, i.e., the amount gained by settlement or awarded by the courts. This method is used here because one of the aims of the study is to determine the direct impact of damages on those found liable in police civil liability action suits. Thus, this chapter examines (a) the number of cases that produced damages and compares damages awarded in the two districts, (b) the range of recorded damages for the different causes of action, (c) the range of damages for the different methods of disposition, (d) how the amount of damages demanded by the plaintiff related to the amount actually obtained, and (e) how prior elements affect or influence the successful prosecution of section 1983/Bivens actions and the award of damages.

Total Damages

Of the 465 cases analyzed, 90 (19%) resulted in total monetary relief of $4,536,702 to the plaintiffs. The amounts recorded damages ranged from $400 to $950,000. Table 24 shows the range of recorded damages in the cases. The

Table 24

Recorded Damages for Section 1983/*Bivens* Actions

Range	Percentage	Frequency
0 - 4999	15.6	14
5000 - 9999	17.8	16
10,000 - 14,999	13.3	12
15,000 - 19,999	10.0	9
20,000 - 29,999	11.1	10
30,000 - 49,999	14.4	13
50,000 - 99,999	10.0	9
100,000 - 499,999	5.6	5
500,000 and above	2.2	2
	100%	N=90

average amount of recorded damages was $50,408 for suits that produced damages, but the median award was $15,000. This mean was disproportionately increased by three cases which accounted for almost half of the total damages. These three actions involved the use of excessive force; they accounted for $2,070,500 of the total recovery of $4,536,702 for the 90 cases that resulted in damages. For the other 87 cases, the average award was $28,295.

Though the data indicate that approximately 20% of the cases had damages recorded, there are indications that more cases resulted in damages. According to the court records, 148 (32%) were settled and the court records indicated that 70 settled cases resulted in some form of damages. Settlement agreements were written in such language that it was difficult to determine whether damages were awarded. According to the corporation counsel for New York City, however, nearly all settled cases usually resulted in damages even if not recorded (Interview, October 19, 1990). Others interviewed for this study supported this claim. It is therefore probable that damages were awarded in the remaining 78 (17%) cases settled as indicated in Table 25. Thus, damage award cases were probably as high as 40%.

Moreover, when just cases with counsel are considered, the rate of recorded damage recovery rises to about 26 percent. Only one pro se complaint resulted in recorded damages. Table 25 shows that 60% of the cases were settled

Table 25

Percentage of Settlements with Damages Recorded by Judicial District

	District		
	Eastern	Southern	total
Settled (damages)	39%	60%	47%
Settled (No damages)	61	40	53
	100%	100%	100%
Total settled	(89)	(58)	(147)[a]

$\chi^2 = 6.22$ df = 1 $p<.05$

Note. [a] Information on one of the settled cases was missing.

with recorded damages in the Southern District, compared to 39% in the Eastern District. Table 26 shows that a majority of pro se cases were settled without damages recorded. Cases with legal representation were more likely to produce recorded damages from settlements.

Damages by District

As shown in Table 27, the mean award shown for the Southern District is about the same as that of the Eastern District. Three cases in the study accounted for almost half of the total amount of damages and were not included in this mean. These three cases are from the Eastern District and they would have accounted for a large difference in the damage awards in the two jurisdictions. When the three cases are discounted, the mean of the damages recovered in the study falls to $28,295 from 44,260 and that of the Eastern District falls to a comparable $27,435 from $58,776.

Damages by Violation

Table 28 indicates the number of cases by each type of violation (the clusters of causes of action in which the violation was included) that resulted in damages. The percentage of cases that resulted in damages was about equal except that cases with causes of action in all three groups were more likely to have damages recorded. Table 29 shows

Table 26

Percentage of Settlements with Damages Recorded by Representation

	Counsel	Pro se	Total
Settled (Damages recorded)	50	13	48
Settled (No damages recorded)	50	87	52
	100%	100%	100%
	(139)	(8)	(147)

$\chi^2 = 4.18$ df = 1 $p<.05$

Table 27

Damage Recorded by District

	EDNY	SDNY	TOTAL
Total cases	270	195	465
Cases with damages	46	41	87
% with damages(dist)	17	21	NA
Damages[a]	$1,262,000	$1,199,700	$2,461,700
SD	3494	4695	4080
Mean damages	$27,435	$29,261	$28,295
Minimum	$400	$500	$400
Median damages	$15,000	$14,000	$15,000
Maximum	$200,000	$255,000	$255,000

[a] Note. Three cases with the very large damage awards are excluded. The median amount of damages awarded in the three cases was $675,000.

Fisher's exact test showed no difference between the median amount of damages for the Eastern and Southern District.

Table 28

Damages Recorded as a Function of Causes of Action

Causes of action	Nature of action	Suits with damages (N = 87)	Percent category with damages
Lib.	74	10	14
Prop.	12	2	17
Viol.	92	16	17
Mixed	287	59	21
Liberty/Violence	149	30	20
Property/violence	20	1	5
liberty/property	17	3	17
All 3 indices	58	22	38

Note. N = 87, Suits could have multiple causes of action.
Lib = Liberty violations
Prop = Property/privacy violations
Viol = violent Violations

the damage awards for each of the three cause of action groups; the numbers are small and so no distinctive statements can be made.

Damages by Method of Disposition

Table 30 presents the actions resulting in damages by the means of disposition. It also indicates the percentage of damage cases by the method of disposition. The vast majority of actions resulting in recorded damages were settled. This accounted for approximately 47% of the total number (148) cases resolved by settlements. As previously noted, most settled cases produced some form of damages even if not reported. Of the 21 cases that were tried at the bench, only 2 resulted in damages and only 9 of the 30 jury trials resulted in damages.

Table 31 indicates the amount of recorded damages by the different manners of disposition. Again, it is difficult to make definite statements because the number of cases was extremely small except for settled cases. A crosstabulation of damages using cause of action and method of disposition resulted in a small number of cases for all groups with the exception of settlements. Results showed that of the 70 settled cases 64% were mixed, 19% were violence, 13% were liberty and 3% were property. An analysis was done to determine if settled cases alone with damages differed from all other cases with damages. A Fisher exact test showed no

Table 29

Damages Recorded by Cause of Action

Cause of action	Number of suits	Total damages awarded	Mean	(SD)	Median
Lib.	10	$436,000	$43,600	4680	$27,000
Prop.	2	$11,500	$5,750	106.1	$5,750
Viol.	16	$734,000	$45,875	6143	$27,800
Mixed	59	$1,280,200	$21,698	3107	$14,300
Lib/Viol	30	$553,500	$18,450	2468	$11,500
Prop/viol	1	$23,000	$23,000	0000	$23,000
lib/prop	3	$35,000	$11,667	1164	$6,500
3 indices	22	$633,000	$28,773	4136	$15,000

Note. Lib = Liberty violations
Prop = Property/privacy violations
Viol = violent Violations
Mixed = all three groups.
3 cases with extreme awards were excluded.

Table 30

Suits with Damages Recorded by Manner of Disposition

Manner of disposition	Number of suits	Suits with damages Recorded	Percent suits for given manner with damages recorded
Settlement	148	70	47%
Summary/judgmt	58	1	2
Jury trial	30	9	30
Bench trial	21	2	10
Uncontested default/pltiff	2	1	50
Other	42	3	7
Total	301	86	29%

Table 31

Damage Award Suits by Method of Disposition and Recorded Amount

Manner of disposition	Number of suits with damages	Total damage award recorded	Median
Settlement	70	$1,706,100	13,250
Jury trial	9	200,400	21,800
Bench trial	2	33,500	16,750
Uncontested def/pltf	1	13,700	13,700
Summary judgment	1	15,000	15,000
Other	3	235,050	25,000
Settlement	70	$1,706,100	13,250
All other Manners	16	500,600	17,500

difference between the median damage recorded of these two groups (χ = .2031 p = .6522).

Damages Recorded by Damages Asked

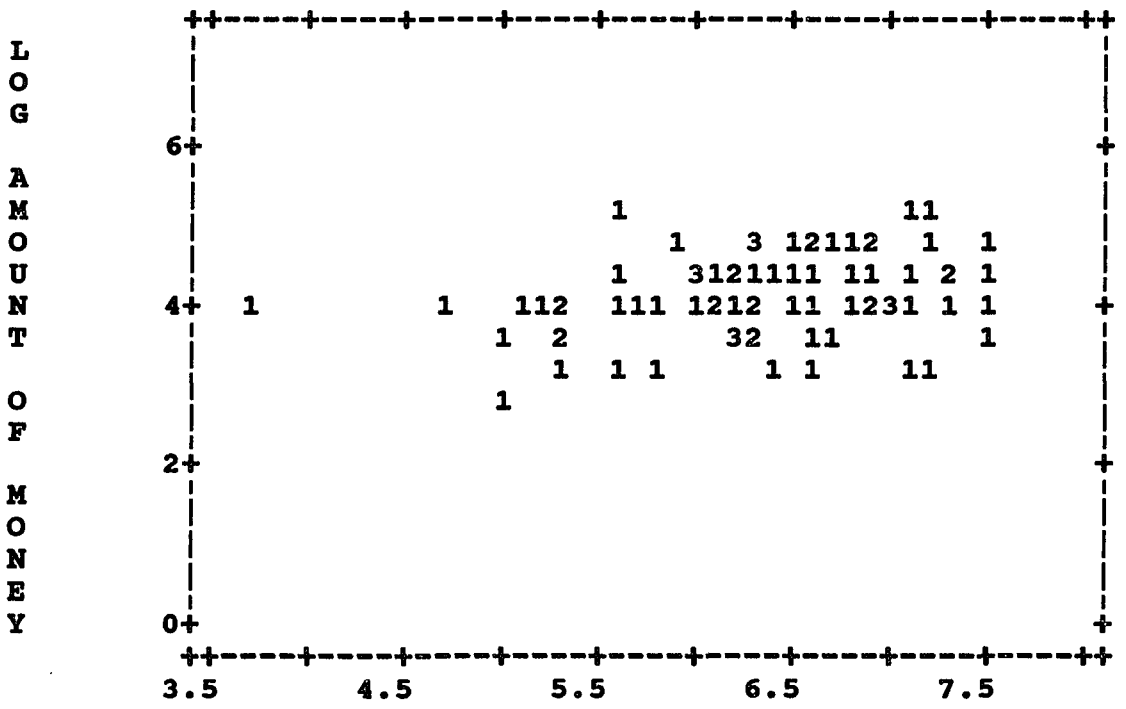
The amount asked for in the complaints ranged from $100,000 to $500,000,000. For all cases, the median amount demanded in the complaints was $2,000,000. The average amount of damages therefore represents approximately 7% of the relief demanded in the complaint while the average award demanded in the actions resulting in damages was $2,000,000. The average damage award was $15,000. A weak relation existed between the amount of damages asked and the amount recorded (r =.29 p<.05), (See figure 1), transformed logarithmically.

Damages by Alleged Malice

Malice was alleged in 26% of the cases (see Table 32). Most of these cases involved allegations of assault and battery and false arrest and false imprisonment. Of the 90 cases resulting in damages, malice was alleged in 29%. Courts specifically stated that damages were punitive in 3% of the cases. These were cases that were tried and thus the jury or courts had an opportunity to rule on the punitive nature of the damages. Settlement agreements were crafted in such language that it was impossible to determine whether damages recorded were punitive or simply compensatory in

Figure 1

Scatterplot of Amount Awarded by Amount Asked*



(r =.29 p<.05).

Note. Amounts on horizontal axis are in hundreds of thousands. Amounts on vertical axis are in the tens of thousands.

* For cases with damages recorded (excluding the three cases with the very large awards.

Table 32

Damages Recorded by Allegations of Malice

	Malice	No malice	Total
Total cases	120	345	465
Cases with damages	26	64	90
% cases with damages	22	18	19
Mean damages	$30,077	$27,536	$28,295[a]
Standard deviation	3539	4316	408.0[a]
Minimum damages	$2000	$400	$400
Median damages	$15,000	$14,300	$15,000
Maximum damages	$150,000	$255,000	$255,000[a]

Note. [a] The three cases with the very large awards are excluded. A total of 90 (including the three awards) cases resulted in damages.

nature.

As indicated in Table 32, the mean award for cases alleging malice is slightly higher than the mean awards for cases not alleging malice. Also, the minimum award for malice cases is $2000 compared to a minimum of $400 for the non malice cases. While only 18% of the non malice cases (61/345) resulted in damages, 22% of the malice cases (26/120) resulted in damages. Malice therefore may have a slight influence on the decision to award damages.

Damages for civil rights are meant to compensate the plaintiff financially for injuries caused by the violation of his civil or constitutional rights. Therefore damages were assumed to be compensatory except in the cases that the courts specified they were punitive. It must be noted that, since many damage awards come from settlements, some negotiated out-of-court, it is difficult to determine the precise number of cases that produced punitive damages. Also, in most settlement agreements, particularly those entered into by the City of New York, there was always a stipulation stating that the settlement was not an admission of guilt by the city or its officials.

As stated above, malice was alleged in 29% of the cases that resulted in damages. Punitive damages may be awarded if the police officer acted with malice (Silver, 1986). Malice will, therefore, enhance the plaintiffs' chances of obtaining punitive damages. However, the Supreme Court in

Smith v. Wade, (1983) held that the plaintiff need not prove actual malice to obtain punitive damages. As stated earlier, it is enough that the police officer acted with reckless or callous indifference to constitutional rights of the defendant (Silver, 1990; Smith v. Wade, (1983).

Factors affecting the award of damages

The mean damages ($28,000) recovered by the plaintiffs in this study are similar to those that have been reported by plaintiffs in other studies of section 1983 actions conducted in other parts of the country. For example, Eisenberg & Schwab (1987) in their California study realized a total recovery of $379,000 for 18 cases and additional attorneys fees of $112,500 for an average of $21,055, without attorneys' fees. Fisher et al. (1989) in a New Jersey study found $2.7 million total damages but with a smaller average amount of $6,000. Their study however, included state court actions. Althea Lloyd's 1983 survey of these kinds of suits listed the average award against police as $565,000 in excessive force cases only (Lloyd, 1983, p. 5). These studies (including the present) confirm that the dollar amounts recovered in these cases are not usually very large. But, occasionally and particularly in assault and battery (excessive force) cases, the courts do grant large damage awards which sometimes amount to hundreds of thousands of dollars such as in the three large awards in

this study.

Though it is difficult to make definite statements about the amount of damages recorded in the trial cases because of the small number of cases, settled cases seem to have resulted in lower amounts of median damages as compared to bench and jury trials (See Table 31). The low average for settlements may result in part from the nominal or low amounts obtained from settlements of "nuisance suits." Chapter 2 stated that these are "cases without merit in which there is an issue of fact so that such cases cannot be dismissed before trial" and are settled for nominal amounts to avoid trial expenses. The lower average of damage awards derived from settlements also suggests that the more serious cases may make it to trial, and/or that jurors grant higher awards than the plaintiffs' attorneys are able to obtain from settlements.

As noted earlier, because of out-of-court settlements, court records often indicated fewer damage awards than were actually accorded. Thus the financial burden of section 1983/Bivens actions is probably greater than the court records indicate. This may also be an indication that the financial burden of section 1983/Bivens presents a problem for those municipalities that have to pay damages, in particular large cities such as New York. Despite the fact that most of the cases did not result in large awards of damages, there were a few cases which resulted in very large

sums.

Of all the cases filed pro-se, only one resulted in damages. This is an indication that representation by counsel played an important factor in plaintiff's success. Although the study did not examine specific characteristics of pro se plaintiffs, a reading of the court files indicated that the cause of action/claim was better stated by counsel, as opposed to the pro se claims which were often so inarticulately presented that they tended to preclude serious consideration. As stated in Chapter Two, the transience of many pro se plaintiffs makes it difficult to successfully follow up their actions. Thus, many of the pro se actions were dismissed as frivolous or for failure to state a cause of action or prosecute.

This manner of processing pro se actions is supported by another study conducted in the Southern District, one of the courts in which data were collected for this study. In an informal study conducted by the pro se Office of the Southern District of New York on the appointment of counsel for pro se plaintiffs, it was found that approximately 25% of all pro se plaintiffs submit applications for appointment of counsel within a year of filing their cases. However, applications were frequently denied by the court or not considered for many months after submission (Annual Report of USDC, 1989, p. 33).

Prediction of successful prosecution and the award of damages.

Above we considered how each of the independent variables related to damage awards singly. In order to obtain a more comprehensive picture of how the characteristics of the complaint impact on the successful prosecution of section 1983/Bivens actions and the award of damages, a logistic regression analyses was used to look at two dependent variables; success and damages.

The first dependent variable "Success", discussed in chapter 2, indicates the successful prosecution of the action (i.e., a case was either successfully prosecuted or not). A case was considered as successfully prosecuted if all the necessary steps toward prosecution were undertaken by the plaintiff no matter the outcome.

The second dependent variable, damages, takes into account whether or not damages were awarded. This variable indicates whether or not a case resulted in damages or was settled (i.e., either a case was settled or damages recorded or neither of the two held). Settled cases were included because from the results of the interviews and from the literature on section 1983/Bivens actions, there is almost unanimous agreement that settled cases produce damages though the amounts may not be indicated in the court files. Thus, this dependent variable included cases that were either settled or had recorded damages.

The independent variables which were used in the logistic regression analyses are elements that are introduced by plaintiffs at the beginning of the process i.e., when the case is filed. These included causes of action (i.e, the liberty, property, and violence indices), defendant type (government or not), presence of malice, type of representation (counsel vs. pro se), district (Eastern vs. Southern) and amount of damages asked.

What are, therefore, the prior elements that predict successful prosecution of section 1983/Bivens actions? Table 33 presents the result of the logistic regression analysis using success as the dependent variable. The classification table of success predictors shows that the prediction rate is a fair one; 73% of the cases were correctly classified according to whether or not they were successfully prosecuted. However, there was a higher success rate for successful prosecution compared to unsuccessful (88% vs. 52%).

Type of representation, violence and the presence of malice were found to predict successful prosecution of cases. Again, the regression reflects what was suggested throughout the earlier analyses of the data i.e., that representation by an attorney made a difference in the outcome while holding other elements constant. As well, the model suggests that violence as a cause of action is a significant predictor of successful prosecution along with a

Table 33

Regression: Successful Prosecution of 1983/*Bivens* Complaints

-2 Log Likelihood 544.6371

	Chi-square	df	Significance
- 2 Log Likelihood	439.311	394	.0571
Model chi-square	105.327	8	.0000
Improvement	105.327	8	.0000
Goodness of fit	397.635	394	.4393

Classification table for Success

	Predicted		
Observed	Unsuccessful	Successful	percent correct
Unsuccessful	86	78	52.44%
Successful	29	210	87.87%
		Overall	73.46%

Significant Predictors[a]

Variable	Wald	df	Sign,
Pro se	42.9200	1	.0000
Violence	9.7768	1	.0018
Malice	3.6974	1	.0545
(Constant	.1440	1	.7044)

Note. [a]Only significant predictors are reported. Others included were: liberty, property, government, district, and amount asked.

less convincing effect of the element of malice in the complaint.

What prior elements predict the award of damages using a multivariate model with the same set of independent variables as above? The results of the second logistic regression analysis are found in Table 34. The classification table indicates that 70% of the cases were correctly classified. Again as with success, type of representation and violence were found to predict the amount of damages awarded holding other elements constant. As well, inclusion of a government agency in the data is a significant predictor of damage award.

The results reflect, as supposed, theoretically and from a legal standpoint, that the nature of the violation affects the volume of damages in civil actions. Thus, violence was found to be the cause of action most often alleged by the plaintiffs (chapter 4) and the most productive. Damages under section 1983/Bivens are usually awarded to compensate the plaintiff for the injuries suffered as a result of the violation.

Two independent variables (representation and violent violations) held as predictors in both regressions. The results indicate that section 1983/Bivens actions caused by police physical abuse are most likely to result in successful prosecution and damages for the plaintiff if they are well prosecuted. In the next chapter, the implications

Table 34

Regression: Damages Awarded.

-2 Log Likelihood 535.07216

	Chi-square	df	Significance
- 2 Log Likelihood	452.612	392	.0185
Model chi-square	82.460	8	.0000
Improvement	82.460	8	.0000
Goodness of fit	421.854	392	.1437

Classification table for Success

Observed	Predicted: No Damages	Predicted: Damages	Percent correct
No Damages	181	65	73.58%
Damages	63	92	59.35%
		Overall	68.08%

Significant Predictors[a]

Variable	Wald	df	Sign.
Pro se	24.5635	1	.0000
Government	6.0021	1	.0143
Violence	5.8981	1	.0152
(Constant	30.7951	1	.0000)

Note. [a] Only significant predictors are reported. Others included were: liberty, property, malice, district and amount asked.

of these findings and those of other studies to police and their employing agencies are examined. Also, suggestions for changes in policy are presented.

CHAPTER 6

Reaction to Section 1983/Bivens Actions and Policy Implications

This chapter examines some of the effects section 1983/Bivens lawsuits have had on police officers, police administrators and employing municipalities. An examination of individual and municipal reaction to section 1983/Bivens suits is also offered to illustrate the impact of the lawsuits. This reaction is reflected in some changes that have resulted partly from section 1983 liability.

Some effects of section 1983/Bivens lawsuits (for example, stress, negative publicity etc.,) cannot be evaluated by using data or are simply immeasurable. This conclusion is arrived at from the evaluation of the case materials, interviews and observations. Besides compensation, the injunction and the impact of the civil suits as determined by the method used in this study (reflected in the costs expended on the suits by the courts, plaintiffs and defendants), there are also invisible effects like stress and negative publicity that may be suffered by individual officers and the police departments (see e.g., Barrineau, 1987, p. 18). Barrineau states that both police departments and the individual police officers are especially concerned about negative publicity surrounding police abuses of the nature examined in this study. Suits

resulting from alleged abuse are stressful and damaging to police and sometimes to plaintiffs in ways that cannot be measured.

Looking at the trend of section 1983 lawsuits, it can be observed that certain advantages which were not foreseen in 1871 have emerged as a result of the increase in the number of suits brought under the Act. With the broadened interpretation of section 1983 by the case law (Monroe v. Pape, 1961; Monell v. Department of Social Services, 1978) in particular, Monroe's generous interpretation of "rights, privileges, or immunities" and "under color of law," the section is now available to many plaintiffs and, as stated above, occasionally provides more and larger damage awards than it previously did before these cases were decided. The broadened interpretation of the section and particularly Monroe and Monell has led to increases in litigation, though not a "flood" of "epic proportions" as had been predicted by critics of the expanded use of section 1983 (see e.g., Blackmun, 1985). Civil claims, most of them section 1983 actions, filed in New York City in the past decade are presented below (New York Law Journal, 1991).

As indicated in Table 35, the number of civil claims in New York City increased from 1980 to 1990. There were drops from 1984 to 1985 and from 1985 to 1986. But, from 1980 to 1990 there was a 91.7% increase. New York Police Department, however claims that the number of police brutality

Table 35

Civil Claims Filed Against New York City Police and New York City from 1980-1990

Year	Civil Claims Filed	Percent Change
1980	125	-
1981	663	+430.0
1982	1,134	+71.0
1983	1,208	+6.5
1984	1,267	+4.8
1985	1,200	-5.2
1986	987	-1.7
1987	1,086	+10.0
1988	1,216	+1.2
1989	1,177	-3.2
1990	1,520	+29.1

Note. From "Brutality Claims, Payments at Record Highs" by E.A. Adams, 1991, New York Law Journal, p. 1. Source: New York City Comptroller's Office. Figures do not include claims against the Housing Authority Police or Metropolitan Transit Authority Police. Settlements and judgments paid in a given year include some paid for claims filed in previous years.

complaints with the Civilian Complaint Review Board has fallen consistently since 1985. According to the department, the decline is due to changes made in 1987 that expanded the number of civilians on the Civilian Complaint Review Board and improved investigations of police brutality cases. The Civilian Complaint Review Board has also attributed the decline to new training programs that began after the Tompkins Square Park riots in 1988. During these riots police were accused of beating protesters (New York Times, 1991). Supposedly, these new measures have made New York City police officers more sensitive to people of other ethnic groups and backgrounds. Table 36 shows the misconduct complaints filed with the Civilian Complaint Review Board since 1984.

Such complaints may be a reflection of the number of police actions that may lead to section 1983 suits. The New York Civil Liberties Union (NYCLU) and many minority leaders claim however, that the declines in civil claims from a specific year to another specific year do not result from the measures implemented by the police department, but from the growing public mistrust of the Civilian Complaint Review Board. Also, the NYCLU attributes periodic declines to the public's loss of confidence in the Board's willingness to bring charges against police (New York Times, 1991).

The figures in Table 35 represent only the claims against the New York City Police Department. There are two

Table 36

Complaints Against the New York Police Department

Year	Unnecessary Use of Force
1984	3,525
1985	3,532
1996	3,295
1987	3,106
1988	2,874
1989	2,410
1990	2,364

Note. From "Debate on New York Police Board Heats Up While Complaints Fall" by J.C. Mckinley, 1991, New York Times, B1. Source: Civilian Complaint Review Board.

other police departments in New York City, the New York Housing Authority and the Metropolitan Transit Authority Police. Considering that the figures in the table represent only filings of the New York Police Department and that those complaints against the Housing Authority and Metropolitan Transit Authority Police are not included in these data, the number of section 1983/Bivens cases filed in New York City during the 1980s was probably much greater than the NYPD figures show.

As the recent troubles in the Los Angeles Police Department illustrate (Rudovsky, 1992), complaints against police for misconduct are not being experienced only in New York. Recently New York City was ranked very high in the nation among the cities with the highest number of excessive force complaints. According to a New York Newsday (1991) report (compiled from confidential police documents), there were 32.3 complaints per 10,000 population and 8.9 complaints per 100 officers in New York City in 1990.

Because of the problems that can be caused by section 1983/Bivens litigation, some police agencies and their employing cities have been attempting to exercise caution in their policies and procedures: planning, management, training, evaluation and education (Carmen, 1991; Interview, October 19, 1991). Some of the attempted changes in the area covered by this study are discussed below.

Reaction to Civil Lawsuits

In this section, an examination of the effects of section 1983/Bivens lawsuits on police and municipalities and corresponding observations made in the jurisdictions covered by this study is presented. These effects are looked at partly from the policies that have been adopted or are being initiated by police agencies and their municipalities. Since the early 1960s when it became clear that section 1983 civil rights and Bivens actions against law enforcement officers could become a problem in law enforcement, some law enforcement and criminal justice agencies have sought to prevent and avoid the consequences of these actions by correcting existing policies and/or introducing new administrative policies.

It is difficult to measure the deterrent effect on individual police officers because they generally know the municipality represents them and indemnifies any damages granted in any suit against them (Roberg and Kuykendall, 1990). An assistant corporation counsel of New York City Law Department states that despite the difficulty of scientifically measuring the deterrent effect of these suits on individual police officers, "police take this stuff quite seriously." The assistant just mentioned has dealt with these types of lawsuits for over ten years, representing police and corrections officers (Interview, October, 1990). Moreover, despite the representation and indemnity by the

employing municipality, the individual officer may be subject to internal disciplinary procedures, and therefore may want to avoid any and all types of allegations against them.

Although not directly related to section 1983/Bivens cases, it may be interesting to note the 1987 Report of the Mayor's Advisory Committee on Police Management and Personnel Policy. According to this report the New York Police Department took disciplinary action against 106 officers during 1983. Since 1983 charges and the number of disciplinary actions have increased. In 1984 the number of charges rose by 50% from 32 to 48 and disciplinary actions rose by 20% from 106 to 125. These numbers increased dramatically in 1985. Charges were brought against 133 officers and 269 officers were disciplined (Mayor's Report, 1987). This increase in police departmental scrutiny of the officer's actions may be resulting from public lawsuits against police departments.

Under the New York Service Law Section 75 and the New York Unconsolidated Laws, incompetency or misconduct may result in dismissal from the Police Department. Forty-one officers of about 26,000 officers in the department were dismissed between 1983 and 1984. Sixty-one officers lost their jobs in 1985 and by September of 1986 when this report was published, 35 additional officers were dismissed from the department.

The assistant corporation counsel mentioned earlier also believes the disciplinary measures that result from such lawsuits are severe. In general, disciplinary measures arising out of police misconduct that do not result in civil lawsuits are suspensions for periods of time without pay. The assistant corporation counsel states that in most disciplinary actions suffered by officers as a consequence of civil lawsuits, officers are likely to lose their jobs and pensions. The reaction of individual police officers, who may now worry about the consequences of their actions, and the reaction of municipalities can be telling factors in determining the degree of seriousness law enforcement takes civil lawsuits. This is manifested by recent policy changes made by municipalities as a result of lawsuits.

Policy Implications

As stated in the introduction of this work, apart from the costs to individual officers and municipalities in terms of attorneys fees, settlements and judgments, section 1983/Bivens civil suits can affect municipal insurance policies, the morale of police performance and the policies of police departments. It is the reaction of the police agencies to section 1983/Bivens suits, reflected in their policy adjustments, that demonstrates much of the impact of the civil liability suits.

Some effects of the suits are not evident. Certain

evident effects offer at least some indications that municipalities, police administrators and supervisors take these suits seriously and they are prepared to use reasonable amount of resources and other legal means to prevent them. The reaction of law enforcement agencies to civil liability lawsuits can be categorized into four police management policies: coping with the increase in liability, maintaining affordable insurance to pay the judgments and settlements, adjusting administrative strategies and education, and training of personnel.

A. Increase in Liability.

As noted in chapter 1, the civil liability of police officers has become the subject of lively public policy debate (Reynolds, 1988; McCoy 1987). This study demonstrates that particular concern focuses on the increased level of civil case filings, the time required for civil case processing, and the impact of increased litigation and higher judgments on municipal insurance and city/county budgets. New York City is a suitable city to use to test the effects of section 1983 suits. It is the largest city in the United States and it has a large multi-ethnic population that at times charge police with abuses. Also, New York City has the largest police agency in the country. Table 37 indicates the amount of damages paid by New York City for police misconduct. Most of the claims were made for section

Table 37

Damages paid by New York City Police Department for Misconduct from 1980 to 1990

Year	Number of Civil Claims	Settlements and Judgments	Damages
1980	125	6	$1,788,000
1981	663	39	3,162,000
1982	1,134	54	1,162,000
1983	1,208	175	3,777,000
1984	1,267	229	8,089,000
1985	1,200	288	7,092,000
1986	987	298	11,476,000
1987	1,086	285	5,761,000
1988	1,216	264	7,414,000
1989	1,177	222	9,327,000
1990	1,520	233	13,348,000

Note. From "Brutality Claims, Payments at Record Highs" by E.A. Adams, 1991, New York Law Journal, p. 1. Source: New York City Comptroller's Office. Figures do not include claims against the Housing Authority Police or Metropolitan Transit Authority Police. Settlements and judgments paid in a given year include some paid for claims filed in previous years.

1983 violations (New York Law Journal, 1991).

As Table 37 shows the number of civil claims and settlements and judgments increased from 1980 to 1983. However, from 1984 through 1990 the picture appears very stable. It may be that following an initial increase during the first three years, claims against police in a given year could not rise above a certain number.

The amount of damages rose dramatically in 1990 when the city paid a record $13 million for police misconduct cases. From 1984 to 1990 New York City paid damages in approximately 312 police action cases per year (See Table 38). The City's projections for the next three years indicate the number of money awards/settlements will continue to increase. These projections are based on the average rate of increase of civil suits and considerations of inflation. The increase in judgments and settlements has been taken to reflect more police brutality, greater media coverage of the incidents, a willingness of the juries to believe that officers can be guilty of misconduct and of course, changes in the law-making municipalities liable (Adams, 1991, p. 2).

Table 37 only indicates claims against the New York Police Department. The figures for the two other police agencies, the Housing Authority Police and the Transit Authority Police are not included in this table. Table 38 indicates the damages paid for all police action cases from

Table 38

Damages Paid by New York City for Police Actions (1984-1990)

Year	Number of Cases	Damages	Average
1984	240	$6,118,779	$25,495
1985	329	10,371,763	31,525
1986	294	8,717,938	29,653
1987	317	6,562,398	20,707
1988	324	10,209,727	31,512
1989	291	9,086,558	31,225
1990	304 (plan)	9,740,929	32,043
1991	305 (plan)	9,940,699	32,592
1992	309 (plan)	10,240,997	33,142
1993	318 (plan)	10,714,156	33,692

Note. From the New York City Comptroller's Office. Judgments and settlements are for amounts that are less than $1,000,000.

1984 to 1990; these payments represent only damages and settlements of amounts of less than a million dollars. The Controller's office would not provide information on the number of cases involving damages and settlements of a million dollars and over.

It is interesting to note the differences in Tables 37 and 38. The figures in table 37 represent only the damages paid by the New York City Police Department (NYPD). Those in Table 38 represent the damages paid by the City for all police violations i.e., including damages of other police agencies in the City. The data in the two Tables are different because Table 38 shows judgments and settlements for amounts that are less than $1,000,000.

Despite the question of the reliability of the data, the amount of damages paid by the city for these years ranged from $6,000,000 to $10,000,000 per year. The projections for future payments is significant only because they indicate that the city is obviously expecting no change, not rising costs. The projections are flat accounting for inflation.

The City of White Plains, also included in this study, settled three section 1983 lawsuits for a total of $20,000 since it became self-insured in 1986 and presently has 22 section 1983 cases pending. White Plains is a significantly smaller municipality compared to New York and both its police department and population are much smaller than those

of New York City.

The Interview data and the literature suggests that municipalities, states and the federal government are deeply concerned over claims that are increasingly producing larger damage awards (Carmen, 1991; Lindsey, 1985; Sitomer, 1985). Most municipalities, like New York City, which are self-insured, have reserved certain portions of their budgets to pay for judgments and settlements of civil liability suits. In New York City settlements and judgments are paid from a special budget of judgments and settlements.

In New York State local governments are expected to represent and indemnify their employees of any judgments or settlements that may be incurred by the employees during the course of their employment. Section 50-K of the General Municipal Law states that such representation shall be provided by the employing agency at the request of the employee involved in "any civil action or proceeding in any state or federal court including actions under sections nineteen hundred and eighty-one through nineteen hundred and eighty-eight of title forty-two of the United States code. Section 50(3) allows for indemnification in the amount of any judgment obtained against such employees or in the amount of any settlement of a claim approved by the corporation counsel and the comptroller of the municipality.

B. Insurance.

Most cities and counties covered in this study are self-insured. Those which were not self-insured (e.g., White Plains) became self-insured in the mid-1980s when insurance rates for the policies they carried against police civil and general liability increased dramatically. Municipalities have to carry insurance because the average police officer does not make sufficient money to satisfy most civil action judgments that may be rendered against him/her and cities would not risk unexpected large settlements rendered against them. The plaintiffs' chances of recovery therefore depend on indemnity under some form of insurance. Municipalities either carry insurance policies or provide budgets to cover judgments for damages resulting from police misconduct suits (Madden, 1985; Blodgett, 1986; Loftus, Porter, Suffoletta & Tomse, 1989). As stated above, some states have passed laws requiring municipalities to insure their police officers (Loftus et al., p. 152). According to New York state General Municipal Law section 52:

> each city, county, fire district, school district, town and village may purchase liability insurance with such limits as it may deem reasonable for the purpose of protecting its officers and employees against liability for claims arising from their acts while exercising or performing or in good faith purporting to exercise or perform their

powers and duties.

While larger municipalities such as New York City can afford, sometimes with difficulty, to pay awards from judgments and settlements (see Table 37) directly instead of buying insurance from private companies (Madden, 1985), large judgments or settlements can potentially bankrupt the smaller municipalities.

In some of the counties within the jurisdictions studied, cities which originally carried insurance policies could not afford to continue their policies especially during the insurance crisis of the mid-1980s. For example, as indicated in Table 39, White Plains carried a policy until 1986 when the policy increased by about 600 percent. As a result of this increase, White Plains had to resort to self-insurance. It can be speculated that the amount of policy coverage increased as a result of the increased number of cases that resulted in damages to plaintiffs.

C. Administrative Policies.

As noted above, it is difficult to determine the deterrent effect of section 1983/Bivens on individual police officers. However, it seems that section 1983/Bivens actions may have had some effect on police officers and law enforcement agencies. Law enforcement agencies that do not have specific policies and those that have policies but have been negligent in following them have been found liable in

Table 39

General Liability Insurance Policy for the City of White Plains

Year	Amount of Policy	Percentage Change
1982/3	$205,146	-
1983/4	$229,310	+11.7
1984/5	$112,915	-50.7
1985/6	$400,000 (*$198,318)	+605.5

Note. From the City of White Plains Law Department. The $198,318 represents the cost of excess policy coverage for 1985/86.

section 1983 lawsuits. Consequently, law enforcement agencies have deemed it prudent to develop and maintain defined policies and procedures. Moreover, police administrators are being forced to justify their management decisions in hiring, training, assignments and supervision. According to Bell v. Wolfish (1979) police administrators must have a rational basis for all administrative decisions.

Administrative policies may be directly or indirectly influenced and in some cases instigated by section 1983/Bivens lawsuits. According to one of the plaintiff's attorneys interviewed for this study, the kind of change or policy the plaintiff is attempting to effect is one of the most important factors considered by the plaintiff and his lawyer in either bringing or settling section 1983 suits (Personal Interview, February 7, 1991). As stated in chapter two, police departments and the corporation counsels declined to supply specific information on causes of action that had directly affected changes in their policies. But, they all stated during the interviews that section 1983/Bivens actions do cause police to effect changes in their policies. The following cases (some of which were supplied by the New York Police Department) illustrating how some changes were effected are, therefore, not from the cases included in this study.

In reaction to civil suits [most of them filed under section 1983 (Carmen, 1991)] the Law Department of New York

City has made it its policy to recommend internal disciplinary actions to the police department, if in its judgment, the officer acted improperly. This disciplinary action can be accomplished before or after a verdict has been rendered against the officer. For example, one senior assistant corporation counsel stated that at one time police officers in New York City believed that they would receive some form of legal representation regardless of the circumstances (even what seemed to be clearly private disputes). The Law Department recommended that the Police Department rewrite the section of the patrol guide regulating this policy to clearly state that off-duty officers who became involved in strictly personal matters would not be represented by the city (Interview, October 19, 1990).

Keeping police officers informed is one important method used by police departments to reduce civil liability. In these matters municipalities in the jurisdictions covered by this study make it a policy to transmit changes in civil liability law into police policy. For example, according to an assistant commissioner for legal affairs for the New York Police Department, judgments of New York courts and the Supreme Court that have a direct impact on section 1983/Bivens lawsuits are usually incorporated into police policy by including the statement or principle of law into training manuals, internal operation orders and/or into

police academy curriculum. It is the obligation of the assistant commissioner, as the general counsel for the police department, to inform the police and other department personnel of changes in law (Interview, October 26, 1990). Generally, the office of the commissioner for legal affairs, even in the process of litigation, examines policies and procedures to determine if there is a need to modify them.

The corporation counsel for Westchester County asserts that these suits constantly alert the county and the police to review their policies and make changes. The corporation counsel of Suffolk County confirmed that recommendations are made frequently to advise police departments and sheriffs, particularly, after rulings by the Supreme Court or the local courts that directly challenge police policies (Interview, February 14, 1991).

Also, where there is litigation that directly challenges police department orders, the policy is changed by internal procedures. The following examples illustrate how litigation of section 1983/Bivens actions is converted into police policy. After settling a recent New York City case, Thomas v. Deighan, SDNY, (1990), the police department revised the strip search practice of Operation Pressure Point to require that an individualized determination be made, rather than requiring that all such arrestees be stripped searched. The case involved a challenge to an Operation Pressure Point arrest. Strip searches resulting

from such arrests following settlement are to be conducted only when the arresting officer reasonably suspects that contraband/evidence may be concealed upon the person in a manner not discoverable by other methods. Moreover, following settlement any strip search now require the approval of the arresting officer's supervisor or that of the supervisor of Operation Pressure Point.

Another example of a court stipulation of settlement of a section 1983 action converted into police departmental policy, was Black v. Cawley, (1971). In this case the plaintiffs brought a class action suit under 42 U.S.C. section 1983 in the Southern District of New York. They sought a declaratory judgment, injunction and money damages for past deprivations and also they sought to prevent the further deprivations of their rights and privileges and immunities secured by the First, Fourth and the Fourteenth Amendments of the constitution. They brought the action on their behalf and on behalf of all others similarly situated. These were persons (members of the press and others) who had in the past witnessed, photographed or commented upon the conduct of members of the New York Police Department in the performance of their duties, or those who may do so in the future. Plaintiffs, represented by the New York Civil Liberties Union, alleged that the defendants, Cawley, the Commissioner, and his officers had been and continued to be engaged in a pattern and practice of arresting and harassing

persons who witness, photograph and/or commented upon or criticized members of the police department in the performance of their duties in public places.

In a stipulation of the above settlement (See Appendix C) the City of New York agreed to notify the police by an order incorporating the terms of the settlement into departmental orders. Consequently, the Police Department issued Interim Order 40. The terms of that agreement are presently incorporated in the New York City Patrol Guide Procedure 110-2 (Appendix D). The order stated in part that:

> A person remaining in the vicinity of a stop or arrest (herein after an "onlooker") shall not be subject to arrest for violation of Penal Law section 195.05 unless the officer has probable cause to believe a violation of section 195.05 exists.

This case is illustrative of how court decisions and court settlements resulting from section 1983 suits can influence police departmental policy. It is also demonstrative of how section 1983 lawsuits have influenced policy changes even in cases where the suit does not result in money damages.

One of plaintiffs' attorneys in Cook Diehe v. City of New York, (1986) stated that these cases do have an impact on police and City policy and that the impact can be great depending on how far the plaintiff is willing to affect the desired change (Interview, February 7, 1991). He recently

prosecuted the Cook Diehe case. According to a plaintiff's attorney this case resulted in the police department changing policy. The case involved a section 1983 suit brought by owners of Oriental Massage Houses against New York police for false arrests, harassment, malicious prosecution etc. The attorney said he spent over a thousand hours on this case, and the case did not result in damages for the plaintiff. The attorney pointed out that, though he is being investigated for overzealous prosecution by the Bar Association, he is satisfied with the outcome of the case because the case produced the result desired by the plaintiff. The plaintiff sought to force the police and the City to change their policy of harassing message parlors.

The Michael Stewart case discussed below also illustrates how policy changed as a result of section 1983 and other civil suits. Although the Stewart case did not involve the New York City Police Department, it is illustrative because the policies of the Transit Police Department are not very different from that of the New York Police Department. Following this case the transit department increased its procedures relating to investigating police misconduct by expanding the personnel and functions of the Inspectional Service Division. Procedural changes to ensure prompt and thorough investigation of serious police incidents included: a 24-hour, 7-day coverage by both internal affairs and civilian

complaint units, immediate response of the Civilian Complaint Unit personnel to all allegations of excessive or unnecessary force and the requirement that Inspectional Service Divisions respond to police incidents where a person in custody dies, sustains serious physical injury, attempts to commit suicide, or becomes seriously ill.

Additionally, the department created the position of legal counsel to investigate serious police misconduct. Shortly thereafter, other policy changes resulting from this case were the establishment of a policy of mutual cooperation with district attorneys and special prosecutors regarding investigations of police misconduct and guidelines for interrogating members of the police department.

D. Education and Training

Police and their supervisors are legally presumed to know the law pertaining to their duties. In this context, law enforcement administrators are expected to guarantee that individual officers know the law required for the performance of their duties. Thus, police departments in the jurisdictions studied, and particularly the New York Police Department, have included law courses in their academy curriculum. Emphasis has been placed on the areas of the law dealing with assault and battery and search and seizure. These are the nature of violations which police are often alleged to have committed as reported in findings of this

study (see Table 1). According to the Westchester County Attorney, these lawsuits bring to the forefront the necessity of instructing the police and personnel of the rights of the members of the public (Interview, February 7, 1991).

Information on police policy is difficult to obtain. However, a confidential report of the New York City Transit Police on the celebrated Michael Stewart case illustrates how changes are made as a result of police liability cases. Although the Michael Stewart case did not involve New York City police officers, but rather transit police, it is analogous to what happens in the New York City Police Department. Moreover, officers of the two agencies are trained in the same academy. Even before the Michael Stewart section 1983 action was settled, a Mass Transit Board created specifically to review the incident that led to the death of Michael Stewart made recommendations for procedural changes regarding the Transit Police Department's future handling of people in similar circumstances.

The Board recommended expanded training for transit police officers dealing with emotionally disturbed persons. This increased training at the New York Police Academy stresses the identification of characteristics that qualify persons as mentally disturbed and how to contain such persons until the arrival of the medical rescue team. Following this recommendation, additional training is given

to transit officers after their initial New York Police Department Academy training to teach them the skills needed to deal with the subway environment.

In-service training is given to transit police and supervisors twice a year to update them on departmental policies. Following these recommendations a training program entitled "Managing Situations Involving Emotionally Disturbed Persons" was developed in conjunction with John Jay College of Criminal Justice in 1988. This program was designed for selected police personnel to train transit police officers and develop training videos "for viewing at command roll calls." These videos are often shown at in-service training sessions to all officers of the department.

In 1986, a sensitivity training program was created in response to the rising number of civilian complaints made against transit police officers. The program is geared toward improving the interpersonal skills of officers who have a history of civilian complaints in their personnel records.

According to the Mayor's Advisory Committee on Police Management and Personnel Policy Report (1987), law courses in the Police Academy stress the training of officers on the legitimate use of force. Accordingly, recruits are instructed that departmental regulations "impose more stringent limits on the legitimate use of police force in New York City than those limits imposed by either state or

federal law" (p. 119).

Blau and McGinley (1989), while recognizing the difficult task of attempting to research the evolution of civil rights litigation, note that a review of the literature of analogical studies can be used to evaluate the impact of such litigation (p. 247). Similarly, apart from the damage remedy, other remedies of section 1983 civil suits, interviews and more importantly the overall reaction of police and municipalities to section 1983/Bivens litigation provide a good measure of the impact of such litigation on all parties involved and the criminal justice system. How effective are section 1983/Bivens actions achieving the plaintiff's goals which as stated are often far more than just damages?

Effectiveness of Section 1983/Bivens Actions

The findings of this study illustrate that section 1983 and the Bivens remedy can be a remedial scheme for victims of police abuses, particularly those for whom the section was originally intended (See p.1). As stated earlier, the study found that damages alone cannot accurately portray the total burden of section 1983/Bivens lawsuits. The impact of these suits may also be measured from the ideological satisfaction derived by plaintiffs. For example, those who bring these actions for the purpose of demonstrating or publicizing religious, political, civil rights or some other

ideological goal. Sight must not be lost of these goals because the success of civil rights litigation cannot be viewed simply in terms of compensation in the form of damages. The religious, political and other forms of satisfaction derived from these lawsuits may actually be more gratifying to these plaintiffs. But, measurement of these outcomes was beyond the scope of this study. Following are some instances of how plaintiffs may derive some form of satisfaction from filing section 1983 suits.

Effects on the Police.

Effecting changes in police policy and practices

This study also confirms that lawsuits filed against governmental entities or their officials are costly regardless of their outcome. As Lee (1987) notes, general relief such as declaratory judgments, injunctions and restraining orders may have long-term financial implications though the immediate financial consequences may be minimal (p. 165). Eisenberg et al. (1987) presented the situation accurately. They stated that these damage awards were only crude estimates:

> They do not include defense costs, insurance costs, or the administrative costs of complying with injunctions. We offer the numerical comparisons merely as points of reference. We cannot say that they establish that constitutional

tort litigation is an insubstantial drain or that it is not providing more than the socially optimal level of deterrence and compensation (p. 687).

Other effects (for example, public confidence in law enforcement and police moral) generated by the lawsuits have led to a great amount of concern for law enforcement officers (Carmen, 1991; Rudovsky, 1992). A conclusion can be drawn that civil suits are one of the effective methods of at least partly controlling police behavior. Moreover, from the examples discussed in this study of the response of police agencies to civil liability, it seems clear that civil actions affect police organization, management and officer behavior.

The most obvious sign of the consequences of section 1983 litigation is that almost all police departments in the area covered by this study, and particularly New York City, are at least adjusting some of their policies and procedures constantly in light of the changing case law by assuring adequate internal enforcement of policies and maintaining training programs to teach and keep their officers updated with regard to constitutional standards.

Exerting pressure on police department and officials

Whatever the studies conclude about the financial burden of section 1983 suits, the results of this study lead to the conclusion that the real or imagined overall effect

of section 1983/Bivens lawsuits on law enforcement is that police administrators and local governments perceive these suits as a serious problem to their efforts at maintaining law and order. This perception is confirmed by the interviews conducted with the corporation counsels for the municipalities, the commissioners for legal matters and the plaintiffs' attorneys within the jurisdictions covered by this study. The interviews show that municipal administrators regard tort actions generally as a serious threat to the financial stability of their cities or counties and also view these actions as having a serious effect on the morales of the individual officers than originally imagined.

Though the study did not examine the issue of police harassment, police have to confront the high number of police suits, many of which are frivolous and without merit (Carmen, 1991, p. 5). Even when a plaintiff's complaints are groundless or absurd, attention must still be given to them because failure to respond leads to a judgment for the plaintiff by default. The hazards of civil liability suits are felt by the police and their departments, whether or not the suits result in damages. The suits leads to concerns about legal representation and even discipline.

"Nuisance suits" were discussed in chapter three. As stated, these are claims which would otherwise be dismissed by the courts but for an issue of fact that must first be

determined. For the Corporation Counsel, "nuisance suits" are annoying and disturbing to police and the departments. Consequently, Corporation Counsels prefer to settle them for token amounts of damages.

Effects on the public.

Obtaining damages

This study examined the question of damages in detail. It was stated in chapter four that 19.4% of the cases resulted in damages for the plaintiff. There were actually more than 19% of the cases resulting in damages. According to the interviews, most settlements result in damages and about 31% of the cases were settled.

Understandably, as was pointed out in the literature, damage awards make municipalities worry about spending their scarce resources on civil lawsuits. As the figures indicate, the median of the damage awards ($15,000) is not very high. While large cities with big police departments such as New York City can afford to pay these damages, the burden of such damages is potentially heavy and draining on small counties and their police departments.

Providing psychological satisfaction

Section 1983/Bivens actions are may also be used by plaintiffs for ideological and political purposes. This is common in cases of police misconduct that provoke

demonstrations by these groups. As was stated in the literature, many minority groups believe that police brutality is racially motivated. These organizations (sometimes through civil libertarians) encourage victims to bring civil suits. Such suits are brought to emphasize more of the political or racist issue than to produce monetary damages for the victim of the police misconduct. Civilian involvement may not change the disposition of the complaint but provide psychological satisfaction to the community that is seeking to publicize its views.

The above discussion illustrates some instances of how plaintiffs of section 1983 may derive satisfaction from section 1983 suits. It is not likely that, in the near future, law enforcement officers in New York will revert to the sort of activities that originally necessitated the enacting of the Act. Though the Ku Klux Klan still exists and seems to have been reorganizing in the last decade, it is improbable that it will in the near future revert to lynching, whipping, scourging and killing of blacks (Monroe v. Pape, 1961; Robinson, 1984). It is also not likely that police or sheriffs can carry out such abuses, in total disregard of the laws, on a scale similar to that of 1891.

But, as recent events in New York, Los Angeles and elsewhere have indicated, there will always be the possibility of police brutality and there will always be overzealous law enforcement officers who in the course of

performing their duties stretch beyond the scope of their authority and violate constitutional rights of others. Some officers may be discriminatory, racist or simply brutal. And unfortunately, those members of the public who are in greatest need of protection from such abuses are mainly the poor and the minorities, the same sort of people who were the original beneficiaries of section 1983.

In the first chapter it was noted how the political atmosphere during reconstruction hampered development of the civil rights law. Likewise, the present state of section 1983 and civil rights law generally cannot be examined without looking at the political realities of the 1980s. Generally speaking and simply stated, it was not a favorable decade for civil rights. The demise of civil rights is epitomized by the conservative agenda of the Reagan government during the 1980s. As Platt (1987) states:

> there have been profound changes in criminal justice in the 1980s. While many aspects of Reagan's programs predate his administration, he was able to put into effect the ideas of the radical right in ways that will endure long into the 1990s. His specific legacy includes: a conservative Supreme Court and federal judiciary; full implementation of the death penalty; introduction of preventive detention; expansion of the prison system; increased participation of the

> private sector in criminal justice; and the definition of the politics of criminal justice in terms of a right-wrong "law and order" consensus (p. 67).

The changes have either reversed some of the civil rights gains or slowed the progress towards the expansion of civil rights to all citizens. Even the Supreme Court, as Justice Thurgood Marshall (1989) remarked, has veered towards a "retrenching of civil rights agenda" (Marshall, 1989, p. 3). Recently, in New York City, plaintiffs who have failed to receive favorable dispositions in criminal trials against police officers for violence have resorted to civil actions.

Like the arrest requirements handed down by the Supreme Court in Miranda v. Arizona, and the exclusionary rule in the 1960s, section 1983/Bivens actions are facing serious opposition from law enforcement. However, law enforcement and criminal justice personnel generally will adjust and learn to perform their duties as a result of section 1983 and Bivens suits.

Section 1983 is a needed tool, which is useful in not only compensating victims but probably deterring some of the most unforgiving abuses sometimes inflicted on members of the public by police. Even if section 1983/Bivens actions were not providing sufficient deterrence by way of damage awards, it does provide injunctive relief and probably other psychological gratification to victims of police abuses

(Interview, February 7, 1991).

Recommendations

From the conclusions drawn from this study, certain proposals and recommendations have been derived which may be useful for future studies and policy implementation by police administrators and municipalities. The following recommendations are proposed as a result of this study:

A. Careful training and internal discipline is still required.

Law enforcement has not really succeeded in avoiding those activities which lead to section 1983 and Bivens lawsuits. The concern for these suits as manifested by law enforcement agencies around the country is ever present. This threat of liability does permeate every police policy and procedure (Reynolds, 1988, p. 7), and it is testing almost every relationship between the government and citizens.

B. Further inquiry into the payment of judgment awards is necessary.

Since this study and several others (Eisenberg, 1982; Eisenberg et al., 1987; Fisher et al., 1989) establish that most municipalities indemnify the officers for almost all liability resulting from

section 1983 and Bivens suits, it is worth informing the public of the details of such payments.

The public deserves to know not only the details of the amounts of damages paid by the officers or the municipalities, but should be informed of the violation and any internal disciplinary measures which the department might have imposed on individual officers after representing the officer and paying the damages. Police awareness of the public's right to know might further promote deterrence.

C. A study of damages of section 1983/Bivens actions against police should be replicated at the state level.

Since more of these actions are brought in the state courts, replicating this study in the state court of the same jurisdiction for comparative analysis will enhance further understanding of section 1983/Bivens civil suits. Moreover, such a study would resolve the doubts surrounding the perceived advantages for the plaintiff of bringing these actions in state courts. Such a study will also examine the conception held by most lawyers who handle these cases in state courts, that higher amounts of damages are recovered in the state courts (Personal Interview, October, 1989).

D. Parties should be required to provide the court with records of all out-of-court settlements.

Since most of the settlements and judgments are paid by the municipalities and consequently the taxpayers, the public deserves to know the terms of out-of-court settlements. Full disclosure of the settlements and the amounts paid out will give the public a feeling of the full impact of civil liability lawsuits.

E. Counsel for municipalities should make the decision to settle early in the process (particularly nuisance suits).

As it was found in this study and others, most of these nuisance suits are settled. An early settlement will save municipalities time and money. To make early settlements the corporation counsel should be able to identify the so called "nuisance suits" early in the process. Also, it would help to identify those plaintiffs for both meritorious and "nuisance suits" who are willing to settle and for low damages as soon as the suit is filed.

F. A study should be done to examine the differences in the amounts obtained from jury trials and those from settlements.

Because of the difference in average amounts

obtained from settlement and those obtained from jury trials, a future study could examine the reasons for the differences. This will help the courts and parties to section 1983 suits adopt convenient and fast methods of disposition.

G. Municipal police departments in conjunction with the corporation counsels should keep ongoing analyses of section 1983/Bivens cases in order to handle them fairly and justly.

H. Frivolous suits should be discouraged.

Frivolous suits are taking up court time and cost money which can be put into other services. Apart from an early determination to end such suits, a way may be found to discourage them.

CONCLUSION

Since the enactment of the Civil Rights Act of 1871, there has been controversy over the role of section 1983 (Nahmod, 1985; Marshall, 1989). The controversy increased in the last few decades because of the increased use of the section. Critics of the section and of the damage remedy against law enforcement officials have constantly expressed concern over the precise role of section 1983. Some of these concerns are as stated by Justice Blackmun (1986): that section 1983 cases are overburdening the courts, that section 1983 cases are frivolous, that they are inconsistent with the theory that federal courts not interfere with state affairs unless absolutely necessary. These various criticisms of section 1983 actions have led to appeals for change in the manner the section is used. For example, proposals have been made for the restriction of the reach of section 1983. There have been proposals for the imposition of an exhaustion requirement to the preclusion of damages awards, and more restrictive interpretations of the section (Rumeld, 1988).

Despite the criticisms, section 1983/Bivens has become a favorite weapon of victims of police abuses seeking redress for injuries suffered as a result of such abuses (Blackmun, 1985; Impact, 1980). The impact of the growth of litigation on the police and law enforcement has been felt

at the federal and state levels (Carmen 1989). As the literature and past studies (see chapter 2) indicate, increased use of the statute has led to pressure on police departments and their employing municipalities to adjust their policies and the general approach to civil rights and constitutional violations. Some of these adjustments do not seem to have been envisioned by the lawmakers in 1871.

The failure of other available remedies to protect the public from police violations of their Fourth Amendment rights means the momentum behind the section and Bivens actions will continue to increase (See pp 3-5). Moreover, the additional incentive of monetary damages in section 1983 actions will likely continue to make the statute appealing to victims of police abuses in the future. As more and more members of the public become aware of their rights, they will react to police abuses by seeking justice and compensation in the courts.

Also, the criticisms leveled against the section - for example, the charge that complaints brought to court under the section are overburdening the courts and that a good number of them are frivolous - are not so substantial that they justify trading civil and constitutional rights for lesser judicial caseloads. As Justice Blackmun stated in 1983, there are no statistics showing the percentage of the cases that are meritless. However, this study found that approximately 40% of the cases studied failed for various

reasons (see chapter 3). Most of these failed cases can be considered as meritless cases. Eisenberg's (1987) findings refuted the claim of a national explosion of civil rights lawsuits (p. 695). And this study (Table 1) found that there were about 4 section 1983/Bivens suits per 100,000 people and .06 suits per 100,000 arrests in the area studied.

The findings of this study reinforce the general findings obtained in other parts of the country; Eisenberg & Schwab (1987), in California, Fisher et al. (1989) in New Jersey, and Lloyd (1983) nationally. The study confirms that there has been an increase in section 1983/Bivens suits, but not an explosion of the nature claimed by law enforcement (Impact, 1980; Carmen, 1991). This study found that section 1983 police action suits were not overburdening the courts, though some judges, particularly in the Eastern District of New York were overburdened with civil cases generally (Personal Interview, February 14, 1991).

The study also found that many actions are filed by pro se plaintiffs. However, these suits are typically not properly presented and consequently do not result in damages. They remain on the court dockets, however, as long as successful section 1983/**Bivens** suits presented by counsel. Pro se actions were not necessarily frivolous, however they usually failed because the actions were poorly framed, improperly prosecuted or because plaintiffs lacked the opportunity to present the action after filing.

More suits were settled than tried. No specific factor accounted for the high percentage of settlements, but for "nuisance suits" which were settled to reduce cost. The settled cases still consumed about the same court time as actions resolved by the other methods of disposition because settlements often occurred just before trial.

This study approached the damage question from a different angle than previous studies of section 1983 have done (Eisenberg, 1982; Eisenberg & Schwab, 1987; Fisher et al. 1989). It looked at damages not just from what the amounts indicated in the court files but included settlements since the interview data indicated that most settlements had damages. By focusing on settlements, this study showed that there are actually more cases resulting in damages than had previously been supposed.

Earlier studies, as well as the conclusions of this study, show that the objective of section 1983 is being fulfilled. The purpose of the Civil Rights Act of 1871 gained additional importance in the last three decades. Blacks and other minorities have been apprehensive given the events in Miami in the 1980s and more recently, in Los Angeles. Also, the Klan has been reorganizing and there have been instances of open confrontation with the Klan in the past few years.

If the public accepts the fact that there are police abuses of civil and constitutional rights which cannot be

fully protected by alternative available remedies, then section 1983 and its federal counterpart Bivens is serving an important function. Therefore, attention should be focused on what section 1983/Bivens is seeking to achieve as well as how to implement the remedy without negatively affecting the police function.

Because police activities are essential and affect so much of the public, and because the public values both the functions of police and their civil and constitutional rights, any threat that affects the relationship between the police functions and the public's cherished rights deserves the kind of examination provided by this study. The issues examined by this study come at an opportune time for both the police and members of the public. An understanding of the relationship between police and the public and the need to respect the public's civil and constitutional rights is beneficial to both parties. Further research is necessary on a number of issues raised in this study. Above all research is needed in order to improve understanding between police and the public.

APPENDIX A.

Kini Court

SECTION 1983 CASE STUDY

Record

1. (Col.

Nos)

1. Court case number

_____

2. Date of complaint----------

3. Name of plaintiff(s)

_____

4. Number of plaintiffs.

5. Defendants

Individual officer----------01

Police chief ----------02

Department ----------03

City ----------04

County ----------05

State ----------06

Federal Government----------07

other ----------08

6. Number of defendants

Single ----------01

Multiple ----------02

7. Nature of violation

False arrest ----------01

Trespass ----------02

False Imprisonment----------03

Assault and battery----------04

Invasion of privacy----------05

Search and Seizure ----------06

Malicious Prosecution ----------07

other (specify) ----------08

Not specified ----------09

8. Was malice involved?

Yes --------

No ---------

9. Amount demanded in the complaint

000 to 5000 ----------01

5001 to 10.000 ----------02

11.000 to 25.000 ----------03

26.000 to 50,000 ----------04

51.000 to 100.000 ----------05

101.000 to 200.000 ----------06

201.000 to 500.000 ----------07

500.000 to 1,000.000 ----------08

1,000.000 to 2,000.000 ----------09

Over 2,000.000 ----------10

Not specified (vague Amount)_____------11

10. Success of complaint.

Readiness for trial ----------1

Dismissal ----------2

11. Reasons for failure

Venue ----------01

Failure to state cause of action----------02

Jurisdictional ----------03

Failure to prosecute ----------04

other (specify) ----------04

12. Manner of Disposition

Bench Trial ----------01

Jury Trial ----------02

Settlement ----------03

Uncontested default for Plaintiff ----------04

Summary judgment ----------05

Dismissal ----------06

other (specify) ----------07

_____

_____

Don,t Know ----------08

13. Date of Disposition _____

14. Amount of damages awarded/ Obtained through settlement.

$_____

15. Nature of damages.

Nominal ----------1

Compensatory ----------2

Punitive ----------3

16. Damages assessed against.

State ----------1

City ----------2

Department ----------3

Individual officer ----------4

Federal Agency ----------5

other (specify) ----------6

17. Damages paid by:

Federal ----------1

State ----------2

City ----------3

Department ----------4

Individual officer ----------5

Insurance ----------6

Not Specified ----------7

18. Information on Insurance

19. Was the action file pro se?

Yes--------

No --------

20. Attorneys for plaintiffs

Name----------

Address----------

Telephone Number----------

21. Attorneys for plaintiffs

Name----------

Address----------

Telephone Number----------

22. Notes:

SGN: KINI

APPENDIX B

INTERVIEWS

	Position	PLACE	MEANS	DATE
1.	Corporation Counsel	Westchester County	Telephone	2/14/91
2.	Corporation Counsel	New York City	Person	10/19/90
3.	Corporation Counsel	Suffolk County	Telephone	2/14/91
4.	Attorney	New York City	Telephone	2/7/91
5.	Corporation Counsel	White Plains	Telephone	3/19/91
6.	Attorney	Suffolk County	Telephone	2/7/91
7.	Attorney	New York City	Telephone	2/7/91
8.	Attorney	New York City	Telephone	2/2/91
9.	Commissioner	New York City	Person	10/26/90
10.	Corporation Counsel	New York City	Person	10/19/90
11.	Commissioner	New York City	Person	10/26/90

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD BLACK; ALAN SALISBURY; WILLIE HAMILTON; EDWARD S. RICHARDS, J.R., and JAMES GANNON; for themselves and all others similarly situated,

Plaintiffs,

-against-

MICHAEL CODD, individually and as Police Commissioner of the City of New York; Patrolman PAUL A. BERT; Patrolman ROBERT CRUZ; Lieutenant DANIEL DILLON; NEW YORK CITY POLICE DEPARTMENT; CITY OF NEW YORK,

Defendants.

73 Civ. 5283 (JMC)

STIPULATION AND ORDER

It is stipulated by and between the attorneys for the parties herein that it is the policy of the New York City Police Department and the defendants that when a person (or persons) is detained, stopped or arrested in public areas, a person or persons not involved in the conduct for which the first person is stopped or arrested may remain in the vicinity of the stop or arrest as an onlooker or onlookers, subject to the safety of the person stopped, the third persons, the general public, and officers of the Police Department, and to provisions of law e.g. P.L. §195.05. The provisions of this order are intended solely as a settlement of the above entitled litigation, and do not constitute an admission that the above policy has been violated by defendants, or any of them. In the following provisions, the term "officer" refers to New York City police officers, agents of the defendants.

1. A person remaining in the vicinity of a stop or arrest (herein after an "onlooker") shall not be subject to arrest for violation of Penal Law §195.05 unless the officer has probable cause to believe a violation of Section 195.05 exists.

2. None of the following constitutes probable cause for arrest or detention of an onlooker unless the safety of officers or other persons is directly endangered or the officer reasonably believes they are endangered or the law is otherwise violated:

   (a) Speech alone, even though crude and vulgar;

   (b) Requesting and making notes of shield numbers or names of officers;

   (c) Taking photographs;

   (d) Remaining in the vicinity of the stop or arrest.

3. Whenever an onlooker is arrested or taken into custody, the arresting officer shall report the action to the supervisor at the station house or other place where the person is taken. Section 110-2 and 110-7 of the Patrol Guide of the New York City Police Department (copies attached), shall be complied with.

4. Defendants shall notify all officers and other employees of the Police Department of the terms of this stipulation by appropriate department order within 60 days of the entry of this order. Such order shall embody the terms of paragraphs 1 through 3 of this order. Area commanders will be informed that the basis for the said departmental order is the settlement of this litigation and that the terms of this order are part of the departmental order. Area commanders shall inform precinct commanders of the existence of this order.

5. Costs, disbursements and attorneys' fees are waived by all parties and their attorneys.

The above provisions of this order shall and the same hereby do constitute the final judgment of this court upon the controversy between defendants, plaintiffs and the plaintiff class. In all other respects, the claims of the plaintiffs are dismissed with prejudice.

Dated: New York, New York
6/1 1977

Paul G. Chevigny

PAUL G. CHEVIGNY
ALAN H. LEVINE
Attorneys for Plaintiffs

W. BERNARD RICHLAND
By /s/ Robert Dietz
ASST. CORPORATION COUNSEL
Attorney for Defendants

SO ORDERED: 6/1/77

/s/ John M Cannella
U.S.D.J.

Appendix D

INTERIM ORDER

NUMBER	REF. P.G.
40	110-2
DATE	
10-4-90	

TO ALL COMMANDS

Subject: OBSERVERS AT THE SCENE OF POLICE INCIDENTS

1. Patrol Guide procedure 110-2, "Arrests-General" is being amended to advise uniformed members of the service that, as a rule, when a police officer stops, detains or arrests a person in a public area, persons who happen to be in or are attached to the area are naturally in position to and are allowed to observe the police officer's actions. This right to observe is, of course, limited by reasons of safety to all concerned and as long as there is no substantive violation of law.

2. Therefore, the following guidelines should be utilized by police officers whenever the above situation exists:

a. A person remaining in the vicinity of a stop or arrest shall not be subject to arrest for Obstructing Governmental Administration (Penal Law, Section 195.05) unless the officer has probable cause to believe the person or persons are obstructing governmental administration.

b. None of the following constitutes probable cause for arrest or detention of an onlooker unless the safety of officers or other persons is directly endangered or the officer reasonably believed they are endangered or the law is otherwise violated:
(1) Speech alone, even though crude and vulgar
(2) Requesting and making notes of shield numbers or names of officers
(3) Taking photographs
(4) Remaining in the vicinity of the stop or arrest.

c. Whenever an onlooker is arrested or taken into custody, the arresting officer shall report the action to the supervisor at the station house or other place where the person is taken. (Patrol Guide procedures 110-2 and 110-7 shall be complied with).

3. This order is not intended in any manner to limit the authority of the police to establish police lines, e.g., crowd control at scenes of fires, demonstrations, etc.

4. Commanding officers are responsible that all members of their command are made aware of, and comply with the contents of this order.

BY DIRECTION OF THE POLICE COMMISSIONER

Distribution
All Commands

ARRESTS - GENERAL

DATE ISSUED	DATE EFFECTIVE	REVISION NUMBER	PAGE
			9 of 9

Misc. 1853-7 (11-80-14)

OBSERVERS AT THE SCENE OF POLICE INCIDENTS

(Continued)

As a rule, when a police officer stops, detains or arrests a person in a public area, persons who happen to be in or are attached to the area are naturally in position to and are allowed to observe the police officer's actions. This right to observe is, of course, limited by reasons of safety to all concerned and as long as there is no substantive violation of law. The following guidelines should be utilized by police officers whenever the above situation exists:

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   (2) Requesting and making notes of shield numbers or names of officers
   (3) Taking photographs
   (4) Remaining in the vicinity of the stop or arrest.

c. Whenever an onlooker is arrested or taken into custody, the arresting officer shall report the action to the supervisor at the station house or other place where the person is taken.

This procedure is not intended in any manner to limit the authority of the police to establish police lines, e.g., crowd control at scenes of fires, demonstrations, etc.

RELATED PROCEDURES

Fingerprintable Offenses (P.G. 110-5)
Photographable Offenses (P.G. 110-6)
Release of Prisoners (P.G. 110-7)
Computerized Investigation Card System (P.G. 110-9)
Notifications in Certain Arrest Situations (P.G. 110-55)
Prisoners - Medical Attention (P.G. 112-3)

Exhibit G

Exhibit 11

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