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COMMENTARY

EQUAL PROTECTION AGAINST UNNECESSARY POLICE VIOLENCE AND THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT: A COMMENT

ALFRED AVINS*

THE recent and widespread allegations of unnecessary police violence at the 1968 Democratic National Convention in Chicago¹ has focused attention on the federal remedies to cure such outbreaks when local authorities are either indifferent or even sympathetic to police excesses. Such local apathy is often found when the object of police violence is an unpopular or minority social, political, or ethnic group.² Federal indictments for police brutality, oppression, or nonfeasance, envisaged in *Screws v. United States*,³ are few and far between.⁴ The difficulties of proving police misconduct beyond a reasonable doubt are formidable.⁵ Even civil damage actions under the authority of *Monroe v. Pape*⁶ are often more of a scarecrow than a real deterrent. Many policemen are judgment-proof.⁷ In addition, evidence is frequently difficult for the unaided would-be litigant to ferret out. A person being beaten by a police officer, whether on the street or in a station house, may be too preoccupied to calmly secure pencil and paper and take the names of witnesses. Those witnesses who are brother officers are unlikely to divulge their identities volun-

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1. D. WALKER, RIGHTS IN CONFLICT: THE VIOLENT CONFRONTATION OF DEMONSTRATORS AND POLICE IN THE PARKS AND STREETS OF CHICAGO DURING THE WEEK OF THE DEMOCRATIC NATIONAL CONVENTION OF 1968 (1968), a report submitted to the National Commission on the Causes and Prevention of Violence. This article is not meant to prejudge the events in Chicago as to whether any unnecessary police violence did in fact exist. See criticism of Daniel Walker by Chief Judge William J. Campbell of the United States District Court for the Northern District of Illinois. N.Y. Times, Dec. 5, 1968, at 1, col. 4; *id.*, Dec. 10, 1968, at 26, col. 1.

2. A good example of this occurred in New Jersey. A federal grand jury indicted eight Paterson policemen for assaulting a Negro, breaking windows in stores operated by Negroes, failing to protect premises occupied by a "civil rights" group, and failing to report these incidents. N.Y. Times, Dec. 19, 1968, at 1, col. 7. Many citizens called police headquarters offering contributions to aid in the defense of the police; policemen themselves were glum or angry about the indictment; and the police chief refused to recommend suspension of the indicted men. N.Y. Times, Dec. 20, 1968, at 42, col. 1. When the mayor voted against suspension of the men, 50 off-duty policemen applauded. It was pointed out that three policemen indicted for burglary had previously been suspended. N.Y. Times, Dec. 21, 1968, at 28, col. 6.

3. 325 U.S. 91 (1945).

4. The indictment against the Paterson police was the first in many years. *Supra*, n.2.

5. See, e.g., N.Y. Times, Jan. 23, 1969, p. 76, col. 1 (patrolman acquitted of beating student).

6. 365 U.S. 167 (1961).

7. When I was an Assistant District Attorney of New York County, policemen uniformly told me that they put all of their property in their wives' names to make any judgments against them uncollectable.

tarily, for the tendency of policemen to close ranks in brutality cases is well known.⁸

PROTECTION AGAINST POLICE VIOLENCE

According to the original understanding of the fourteenth amendment, toleration by state or local authorities of police brutality is a violation of the equal protection clause. Protection against violence was one of the chief aims of the framers. The necessity for federal action was indelibly implanted in the minds of northern anti-slavery men by the notorious Hoar incident. In November, 1844, former Representative Samuel Hoar, a prominent Massachusetts lawyer, was sent by that state's officials to Charleston, South Carolina, to test the constitutionality of a South Carolina law which compelled the imprisonment of free Negro seamen who visited the state as part of the crew of a Massachusetts-owned ship. His visit aroused great public excitement, and he was threatened with mob violence. The state authorities refused or failed to protect him, and he was ultimately expelled from Charleston without bringing the lawsuit.⁹ This incident caused much indignation in the North, and northern members of Congress taxed southerners with it frequently before the Civil War.¹⁰ It remained in the minds of the Republican members of the Thirty-Ninth Congress who proposed the fourteenth amendment. Senator John Sherman of Ohio said: "In the celebrated case of Mr. Hoar, who went to South Carolina, he was driven out, although he went there to exercise a plain constitutional right, and although he was a white man of undisputed character."¹¹ Representative John A. Bingham of Ohio, who drafted the equal protection clause, proposed to introduce this provision because the original Constitution "was utterly disregarded in the past by South Carolina when she drove with indignity and contempt and scorn from her limits the honored representative of Massachusetts who went thither upon the peaceful mission of asserting in the tribunals of South Carolina the rights of American citizens."¹²

Bingham was concerned with the fact that violence was going undeterred because politically unpopular groups, both white and black, were not getting equal and exact justice.¹³ He believed that the privileges and immunities clause of the original Constitution required states to protect citizens in their life, liberty, and property, but that state officials had been remiss in this obligation.¹⁴

8. The Detroit Police Officers Association recently sued the Michigan Civil Rights Commission to enjoin the Commission from ordering the Detroit Police Department to discipline officers for beating and harassing a Negro gasoline station attendant. N.Y. Times, Dec. 15, 1968, at 74, col. 5.

9. See CONG. GLOBE, 34th Cong., 1st Sess. 1598 (1856) (remarks of Rep. Comins); 13 ENCYCLOPEDIA BRITANNICA 542 (11th ed. 1910); BIOGRAPHICAL DICTIONARY OF THE AMERICAN CONGRESS, 1774-1927, at 1103 (1928).

10. See CONG. GLOBE, 33d Cong., 1st Sess. 1154-55, 1556, app. 575, app. 1012-13 (1854).

11. CONG. GLOBE, 39th Cong., 1st Sess. 41 (1866).

12. *Id.* at 158.

13. *Id.* at 157.

14. *Id.* at 2542-43.

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Accordingly, his object was to give federal courts power to make certain that state officials performed their duty of protection.¹⁵ Other Republicans in Congress echoed his desire to see that state officials protected all citizens, including politically unpopular individuals from other states, against violence.¹⁶

From the earliest jurisprudence of this country, every individual was deemed to be entitled to "protection of the laws."¹⁷ The framers of the fourteenth amendment believed that government afforded such protection when it accorded to aggrieved individuals the established criminal and civil remedies for infringements on the rights of life, liberty, personal security, and property. The presence of these remedies served as a deterrent to wrongdoers who would otherwise be free to inflict injury or damage without fear of punishment or a requirement to pay compensation.¹⁸ These rights were deemed in 1866 to be the "civil rights" of citizens.¹⁹

The equal protection clause was designed to make these remedies equally available to all persons. It protected the right to sue²⁰ and to be a witness in civil and criminal proceedings,²¹ because the latter right was necessary to obtain relief in court. The Civil Rights Act of 1866, the forerunner of the first section of the fourteenth amendment, gave all citizens the "full and equal benefit of all laws and proceedings for the security of person and property."²² The Enforcement Act of 1870,²³ the first statute passed by the framers to enforce the equal protection clause, extended this benefit to aliens, a provision made necessary by denial of remedies to Chinese on the West Coast.²⁴ Representative Thaddeus Stevens, Chairman on the part of the House of Representatives of the Joint Committee on Reconstruction and leader of the House Radical Republicans, in his opening speech reporting the fourteenth amendment, explained:

Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall

15. *Id.* at 158.

16. I have collected materials from the debates on this point in Avins, *Fourteenth Amendment Limitations on Banning Racial Discrimination: The Original Understanding*, 8 ARIZ. L. REV. 236, 239-49 (1967).

17. See Marshall, C.J. in *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 163 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." See also *Corfield v. Coryell*, 6 Fed. Cas. 546, 551 (No. 3230) (E.D. Pa. 1823).

18. The relevant debate is collected in Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y. LAW FORUM 385 (1966).

19. See the remarks of Representative James F. Wilson, of Iowa, Chairman of the House Judiciary Committee, in opening the debate on the Civil Rights Bill of 1866. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

20. Avins, *The Right to Bring Suit Under the Fourteenth Amendment: The Original Understanding*, 20 OKLA. L. REV. 284 (1967).

21. Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471 (1966).

22. CONG. GLOBE, 39th Cong., 1st Sess. 209-11 (1866); 14 Stat. 27 (1866).

23. 16 Stat. 140 (1870).

24. CONG. GLOBE, 41st Cong., 2d Sess. 1536, 3658 (1870) (remarks of Senator Stewart). See also Avins, *supra*, n.16, at 249-52.

be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes.²⁵

Nothing in the legislative history of the fourteenth amendment exempts police brutality from the scope of the equal protection clause. Accordingly, if a protection afforded by law against unnecessary police violence exists for one person, it must be made equally available to all.

DISCIPLINARY PROCEDURES AS PROTECTION OF THE LAWS

As previously noted, civil and criminal remedies against police officers who use unnecessary force are equally available to all, but are often of doubtful utility or efficacy. A more potent remedy is disciplinary proceedings which may result in such penalties as forfeiture of pay, demotion, or even dismissal from the police force. Such penalties are most feared by erring police officers because they are, when diligently applied, swift, sure, and substantial. Moreover, police disciplinary boards have the full benefit of police department cooperation, which often enables them to ferret out evidence which would be unavailable to a private litigant or even a prosecuting attorney. Police disciplinary boards are not bound by the technical rules of evidence applicable in court,²⁶ and the courts will sustain the imposition of discipline based on police expertise applied to facts which might be insufficient to warrant a criminal conviction or even possibly a civil judgment for the same misconduct.²⁷ The chances that a policeman guilty of brutality will escape penalty from a conscientious disciplinary board is much less than the chances that he will escape from a criminal or civil court.

25. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

26. *Keith v. Civil Service Bd.*, 57 Ariz. 85, 111 P.2d 57 (1941); *Jenkins v. Curry*, 154 Fla. 617, 18 So. 2d 521 (1944); *Stowers v. City of Atlanta*, 79 Ga. App. 568, 54 S.E.2d 340 (1949); *Doyle v. Kammeraad*, 310 Mich. 233, 17 N.W.2d 165 (1945); *Aller v. Detroit Police Dept. Trial Bd.*, 309 Mich. 382, 15 N.W.2d 676 (1944); *Evans v. Monaghan*, 306 N.Y. 312, 118 N.E.2d 452 (1954); *Roge v. Valentine*, 280 N.Y. 268, 20 N.E.2d 751 (1939); *Slessinger v. Fairley*, 340 Pa. 273, 16 A.2d 710 (1940).

27. See n.26, *supra*. See also *Skaags v. Horrall*, 83 Cal. App. 2d 424, 188 P.2d 774 (1948); *Riley v. Board of Police Comm'rs*, 147 Conn. 113, 157 A.2d 590 (1960); *Davis v. Board of Fire & Police Comm'rs*, 37 Ill. App. 2d 158, 185 N.E.2d 281 (1962); *Taylor v. Civil Service Comm'n*, 33 Ill. App. 2d 48, 178 N.E.2d 200 (1961); *Hammers v. Board of Fire & Police Comm'rs*, 10 Ill. App. 2d 218, 134 N.E.2d 647 (1956); *Oratowski v. Civil Service Comm'n*, 3 Ill. App. 2d 551, 123 N.E.2d 146 (1954); *Zellers v. City of South Bend*, 221 Ind. 452, 48 N.E.2d 816 (1943); *Nuss v. New Orleans Police Dept.*, 149 So. 2d 656 (La. App. 1963); *Bernius v. New Orleans Police Dept.*, 135 So. 2d 124 (La. App. 1961); *Marchese v. New Orleans Police Dept.*, 226 La. 982, 77 So. 2d 742 (1955); *Konen v. New Orleans Police Dept.*, 226 La. 739, 77 So. 2d 24 (1954); *Purdie v. Detroit Police Dept. Trial Bd.*, 318 Mich. 430, 28 N.W.2d 283 (1947); *Hughes v. Department of Public Safety*, 200 Minn. 16, 273 N.W. 618 (1937); *Johnson v. Priest*, 398 S.W.2d 33 (Mo. App. 1965); *O'Shea v. Martin*, 34 Misc. 2d 987, 230 N.Y.S.2d 935 (1962); *Machiano v. Adams*, 286 App. Div. 1007, 145 N.Y.S.2d 32 (1955); *Mack v. Cramer*, 285 App. Div. 925, 137 N.Y.S.2d 435 (1955); *Smith v. Valentine*, 282 N.Y. 351, 26 N.E.2d 288 (1940); *Howland v. Thomas*, 98 R.I. 470, 204 A.2d 640 (1964); *Carlson v. McLyman*, 77 R.I. 177, 74 A.2d 853 (1950); *Erkman v. Civil Service Comm'n*, 114 Utah 228, 198 P.2d 238 (1948); *Petition of Helfernan*, 244 Wis. 104, 11 N.W.2d 680 (1943).

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The uniform rule in the United States is that a policeman who uses unnecessary force against a citizen is guilty of misconduct in his employment and is subject to disciplinary action or dismissal.²⁸ It is interesting to note that the rule is the same in India.²⁹ As early as 1817 the Nizamut Adawlut of Calcutta held that a police supervisor who orders a man of seventy beaten may be dismissed as unfit.³⁰ The Sudder Foudaree Adawlut of Bombay has held that a policeman who procured others to force a person he suspected of using witchcraft to drink stagnant water and undergo an ordeal by fire was guilty of misconduct.³¹ The Chief Court of Lower Burma has decided that slapping a suspect for refusing to answer a question is a violation of duty,³² while the Supreme Court of Ceylon made the same ruling where a policeman handcuffed a prisoner unnecessarily.³³

The rule in Illinois is no different.³⁴ A police officer may be dismissed under police regulations for conduct unbecoming an officer if he maltreats a citizen.³⁵ It has been held that a police officer is subject to disciplinary action if he strikes a person unnecessarily with a club, even if he is making a lawful arrest for disorderly conduct.³⁶ The Illinois Appellate Court has likewise ruled that a Chicago police officer may be dismissed for assaulting a citizen even though the latter addressed insolent language to the officer, since such language did not justify maltreatment of the citizen.³⁷ The Supreme Court of Illinois has decided that Chicago Police Department disciplinary regulations have the force and effect of law,³⁸ and that "the discharge of a police officer for conduct un-

28. *Swars v. Council of City of Vallejo*, 33 Cal. 2d 867, 206 P.2d 355 (1949); *City of Anderson v. Hadley*, 122 Ind. App. 8, 102 N.E.2d 385 (1951); *State ex rel. Boynton v. Jackson*, 139 Kan. 744, 33 P.2d 118 (1934); *Cornett v. Chandler*, 307 S.W.2d 918 (Ky. 1957); *Long v. Daly*, 6 N.J. Misc. 495, 141 Atl. 787 (N.J. Super. 1928), *aff'd* 105 N.J.L. 492, 144 Atl. 588 (E. & A. 1929); *Marran v. Common Council*, 61 Atl. 13 (N.J. Sup. 1905); *People v. Partridge*, 88 App. Div. 60, 84 N.Y.S. 779 (1903); *People v. McLean*, 60 Hun. 584, 15 N.Y.S. 219 (1891); *People v. Bell*, 57 Hun. 590, 10 N.Y.S. 829 (1890); *People v. French*, 15 N.Y. St. Rep. 108 (1888); *People v. Carroll*, 42 Hun. 438 (N.Y. 1886); *Appeal of Bettero*, 65 Pa. D. & C. 363 (1948); *Harless v. Bichsel*, 327 S.W.2d 791 (Tex. Civ. App. 1959); *Allen v. Herrera*, 257 S.W.2d 753 (Tex. Civ. App. 1953). *See also* *People v. Jourdan*, 90 N.Y. 53 (1882). *See generally*, Annot., 100 A.L.R. 1394 (1936); Note, 33 MICH. L. REV. 450 (1935).

29. *See A. AVINS, EMPLOYEES' MISCONDUCT AS CAUSE FOR DISCIPLINE AND DISMISSAL IN INDIA AND THE COMMONWEALTH* 44, 605-6 (1968), where I have collected a large number of Indian cases on this point.

30. *Ram Bux Hujam v. Mahtab Rai*, 1 MacNaughton 341 (1817).

31. *Cowusjee Muncherjee's Case*, 9 Morris 458 (1858).

32. *Queen-Empress v. Nga Shwe O* (1881), 1 Moyle's Lower Burma Criminal Circulars 533, [1872-1891], Lower Burma Rul. 150, Selected Judgments, Lower Burma 150 (2d Ed. 1907).

33. *Police Ct. Case, Kurunegala*, No. 12,936, Vanderstraaten 51 (Ceylon Sup. Ct. 1870).

34. *See Coane v. Geary*, 298 Ill. App. 199, 18 N.E.2d 719 (1939).

35. *Olsen v. Civil Service Comm'n*, 28 Ill. App. 2d 146, 171 N.E.2d 80 (1960) (drawing pistol without provocation).

36. *Kulczyk v. Board of Fire & Police Comm'rs*, 344 Ill. App. 555, 101 N.E.2d 626 (1951).

37. *Oratowski v. Civil Service Comm'n*, 3 Ill. App. 2d 551, 123 N.E.2d 146 (1955). *Accord*, *Edwards v. Civil Service Comm'n*, 227 Iowa 74, 287 N.W. 285 (1939).

38. *Harrison v. Civil Service Comm'n*, 1 Ill. 2d 137, 115 N.E.2d 521 (1953).

becoming a member of the department is not only for the purpose of punishing the officer, but for the protection of the public."³⁹

Moreover, an Illinois statute which requires that a police officer who is guilty of oppression, malconduct, or misfeasance in the discharge of his duties must be removed from office⁴⁰ has been held to be designed for the protection of the public.⁴¹ As the Illinois Appellate Court observed: "Discipline . . . is vital or this force of armed men can become a haven for bullies officially armed with guns. . . ."⁴²

It appears from the foregoing analysis that statutes and police department disciplinary regulations which are the equivalent of laws for the department are designed to protect the public against police violence. They are a protection afforded by the law for the security of citizens against police misconduct and therefore constitute the "protection of the laws" which must be accorded equally to all persons who come within the jurisdiction of the state. The fact that such tribunals are relatively new innovations in most jurisdictions, does not remove them from the scope of the fourteenth amendment. The Constitution covers every protection afforded by law, whether in existence in 1866 or newly devised. The principles of the equal protection clause cannot vary, and as long as the police disciplinary tribunal comes within the legal theory of the fourteenth amendment as originally understood, the amendment covers it just as if specifically named by the framers. Any superior police official or city official whose duty or function it is to invoke disciplinary procedures where policemen commit misconduct, and who unjustifiably refuses or fails to invoke such procedures when a case of police brutality is brought to his attention, has denied the equal protection of the laws to the person who was the victim of the brutality.

OFFICIAL INACTION AS A DENIAL OF PROTECTION

It may be argued that superior city officials and police superiors who fail to invoke disciplinary procedures in police brutality cases cannot themselves be amenable to federal penalties because they have done nothing personally. It may be said that they are guilty only of inaction, and that under the reasoning of *The Civil Rights Cases*⁴³ the "state action" requirement has not been satisfied. This reasoning will not withstand close analysis. The *Civil Rights Cases* held that where a state passes no law for the protection of any person, Congress cannot step in and affirmatively impose duties on private businesses as an enforcement of the equal protection clause. This author has no doubt

39. *Id.* at 145, 115 N.E.2d at 529. *Accord*, DeGrazio v. Civil Service Comm'n, 31 Ill. 2d 482, 488, 202 N.E.2d 522, 526 (1964).

40. ILL. REV. STAT. 1953, c. 38, § 449 (1963); ILL. ANN. STAT. ch. 24, § 9-92 (Smith-Hurd 1969).

41. *People v. Niewinski*, 13 Ill. App. 2d 307, 142 N.E.2d 151 (1957).

42. *Nolting v. Civil Service Comm'n*, 7 Ill. App. 2d 147, 162, 129 N.E.2d 236, 244 (1955).

43. 109 U.S. 3 (1883).

of the correctness of this interpretation of the fourteenth amendment,⁴⁴ but giving this principle of law its widest scope, it has no application to police discipline.

The Supreme Court decided in *The Civil Rights Cases* that where a state had no statute or law affording protection to anyone, its constitutional duty of protecting everybody equally had been satisfied. This is unquestionably correct. Where nobody gets any protection, the amount of protection afforded to all by law is exactly equal, since everybody gets nothing.⁴⁵ Applying this to police discipline, if a policeman of the City of Chicago had a legal right to beat the mayor over the head with a club, and still remain on the police force, without being disciplined, he has the same right in the case of any other citizen. But it is questionable whether such a police officer would remain on the force very long after such an incident. As previously noted, Illinois has passed laws and regulations protecting the mayor against police brutality by imposing disciplinary penalties for such actions. Doubtless they would be invoked in a case of brutality against the mayor; hence, all other citizens are constitutionally entitled to the same degree of legal protection. In other words, a state may withhold its protection from all, but once its laws afford protection, the "state action" requirement is satisfied and that protection must be made equally available to all.

This proposition is clearly supported by the original understanding and intent of the Republican framers of the fourteenth amendment. For example, Representative James A. Garfield, the Ohio lawyer who later became President of the United States, observed:

44. I have previously discussed the legislative history of the Civil Rights Act of 1875 which was involved in the Civil Rights Cases and have concluded that the Supreme Court came to the right result, although some parts of the majority opinion are not an accurate reflection of the intent of the framers of the statute. See Akins, *The Civil Rights Act of 1875; Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966); Akins, *What is a Place of "Public" Accommodation?* 52 MARQ. L. REV. 1 (1968); Akins, *The Civil Rights Act of 1875 and The Civil Rights Cases Revisited: State Action, the Fourteenth Amendment, and Housing*, 14 U.C.L.A. L. REV. 5 (1966).

45. A good example of this point are the statutes abolishing "heart-balm," such as the tort of alienation of a spouse's affections. Under common law, every married person was protected by law against third persons who alienated the affection of his or her spouse. The protection which the law gave was a remedy in tort for damages, which tended to deter third persons from breaking up the marriage. If the law of a state had given this remedy only to white persons, or only to Christians, or only to citizens, it would have denied to all persons within the state's jurisdiction the equal protection of the laws against alienation of a spouse's affections. But since all married persons had a right to sue in tort, all were equally protected, and still are in states which retain the common law. However, some states have abolished the tort of alienation of affections. In such states, a third person is now legally privileged to break up a marriage without fear of deterrence by law, and no spouse is protected against this conduct. Nevertheless, from a constitutional point of view, every spouse has equal protection of the laws even though no one is protected. Accordingly, abolition of "heart-balm" is constitutional. See *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815 (1936); Annot., 158 A.L.R. 617 (1945). *Contra*, *Heck v. Schupp*, 394 Ill. 296, 68 N.E.2d 464 (1946), decided on other grounds. See generally, Feinsinger, *Legislative Attack on "Heart-Balm,"* 33 MICH. L. REV. 979 (1935).

It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions, like the air of heaven, covering all and resting upon all with equal weight. The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State.

It may be pushing the meaning of the words beyond their natural limits, but I think the provision that the States shall not 'deny the equal protection of the laws' implies that they shall afford equal protection.⁴⁶

Garfield's scholarly colleague, Representative William Lawrence, a former state judge, took the same position.⁴⁷ Senator George F. Edmunds of Vermont, Chairman of the Senate Judiciary Committee, declared:

[It] does not say that no State shall pass any law which shall deny to its citizens and those of the United States the equal protection of its equal laws, but it says that no State shall deny it, by which I understand, as English jurists and English history have understood for a thousand years when the very same language was used in Magna Carta, that we will not deny to our subjects, the equal protection and redress of the laws, that it imports an affirmative duty to see to it that an equal and a real protection to every citizen within these borders is accorded and vindicated.⁴⁸

Finally, Senator James F. Wilson of Iowa, who had been Chairman of the House Judiciary Committee in 1866, stated that "neglect to enforce laws enacted to assure such equal protection is a denial of it."⁴⁹

The intent of the framers of the fourteenth amendment was that if a private person inflicted personal injury or property damage on another private person and the state had laws redressing such injury, a state official who refused or failed to afford such redress was himself liable to federal jurisdiction for denying the equal protection of the laws to the victim. In such a case the state official was liable, not for the initial injury on any theory of vicarious liability, but for his own dereliction in failing to afford the constitutional right of equal protection.⁵⁰ Under section five of the fourteenth amendment, Con-

46. CONG. GLOBE, 42d Cong., 1st Sess. app. 153 (1871).

47. He said: "The word 'deny' must include an omission by any State to enforce or secure the equal rights designed to be protected. There are sins of omission as well as commission. A State which omits to secure the rights denies them." 2 CONG. REC. 412 (1874). See also *id.* at 341.

48. 8 CONG. REC. 960 (1879). He also said: "[I]t was the belief . . . of those who framed and passed these amendments . . . that every citizen within the borders of that State should have equal and fair security under the law, not only as a written proposition but as a real fact." *Id.*

49. 15 CONG. REC. 135 (1883).

50. Avins, *Federal Power to Punish Individual Crime Under the Fourteenth Amendment: the Original Understanding*, 43 NOTRE DAME LAW. 317 (1968); Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331 (1967).

gress has enforced the equal protection clause by providing a remedy in federal court for persons who have been denied protection by state officials.⁵¹

In the case of police brutality, the equal protection clause requires that superior police officials and superior city officials make available to the aggrieved party the same disciplinary procedures that would be available to them if they were the victims. If they fail to do so, they are amenable to federal remedies, not for the brutality on any theory of respondeat superior, but for their own fault in refusing to accord equal protection of the police disciplinary laws to the injured person. Of course, if it appears that the evidence is insufficient, or there was justification for police action, or other good reason for not invoking disciplinary procedures, then the superior officials have performed their duty and no federal cause of action lies against them. But a uniform standard must be applied to all. A superior official who justifies plainly indefensible police conduct because he does not like the victims cannot absolve himself of his personal responsibility by invoking a discretionary power. His discretion is circumscribed by the constitutional mandate.

Moreover, each superior official in the chain of police command is responsible to the victim. If one layer of officialdom will not move, the aggrieved person may appeal to the next higher layer, and so on along the line until the police superintendent and the mayor are informed of the facts. Each official up the ladder who unjustifiably refuses to set appropriate disciplinary machinery in motion makes himself liable to a federal remedy for refusing the same protection against police violence he would normally give in other cases.

The foregoing rule, far from being either novel or extraordinary, is exactly what the framer of the equal protection clause contemplated. On March 9, 1866, Representative Bingham stated his purpose as follows:

[The] care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution. . . . I may borrow the words . . . as truly descriptive of the American system: 'centralized government, decentralized administration.' That, sir, coupled with your declared purpose of equal justice, is the secret of your strength and power.⁵²

Every police official and every city official, from the lowest to the highest, takes a personal oath to support the Constitution of the United States. Every such official has a personal obligation to keep that promise. Any official who

51. The Ku Klux Klan Act of 1871, ch. 22, sec. 1, 17 Stat. 13, now 42 U.S.C. sec. 1983. See CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871) (remarks of Rep. Shellabarger).

52. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).

refuses to enforce the constitutional mandate of equal protection has broken his oath and made himself amenable to federal jurisdiction on account of his own personal dereliction. There is nothing unjust about making him respond for his own fault. The higher the official, the graver is his breach of his official oath and the more necessary is the remedy. Importance of position is not a shield against dereliction of federally-imposed duty.

CONCLUSION

The vast majority of police officers are able, conscientious, and law-abiding as well as law-enforcing. This is equally true of superior police and city officials. A few bad apples, however, tend to crop up in every barrel. These must be cast out lest they contaminate the rest and brutalize the police force. For police officers and superior officials to close ranks in brutality cases and shield the offender must ultimately drive a wedge between the citizenry and the police, as well as corroding the police itself. The fourteenth amendment, equally with sound public policy, forbids any such concession to unnecessary police violence.