The Authority of the New York Attorney General When Police Abuse Their Authority.

The Committee on Civil Rights[1]

ISSUES PRESENTED

1. Whether the New York State Attorney General has the authority to initiate civil actions in cases of police abuse of authority?

2. Whether the New York State Attorney General has the authority to initiate criminal proceedings in cases of police abuse of authority?

BRIEF CONCLUSIONS

1. The Attorney General may initiate civil actions pursuant to the *parens patriae* doctrine.

2. The Attorney General has limited authority to prosecute police officers where misconduct constitutes a crime in violation of anti-discrimination laws and the district attorney with jurisdiction cannot or will not prosecute.

DISCUSSION

I. Introduction

The statutory powers and duties of the Attorney General are set forth in Section 63 of the Executive Law. *See* N.Y. Exec. Law § 63 (McKinney 1993 & supp. 2001). While the Executive Law does not specifically mention the Attorney General's authority to address police misconduct, it does provide expressly that the

[1]Andrew Celli took no part in this report.

Attorney General shall "[p]rosecute … all actions and proceedings in which the state is interested." N.Y. Exec. Law § 63(1) (McKinney 1993 & supp. 2001). Thus, where a quasi-sovereign interest of the State in the well-being of its citizens is involved, the Attorney General may initiate civil actions pursuant to the common law doctrine of *parens patriae*. *See generally Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Baretz*, 458 U.S. 592, 600 (1982). Because police misconduct threatens a quasi-sovereign interest, the Attorney General may seek legal relief on behalf of State citizens. Indeed, the New York Attorney General recently invoked this authority to address an out-of-control town police force. *See Spitzer v. Town of Walkill*, No. 01-Civ-0364 (S.D.N.Y. March 16, 2001) (order denying motion to dismiss).

In addition, the Executive Law authorizes the Attorney General to prosecute criminal actions that violate State anti-discrimination laws when the local district attorney cannot or will not prosecute the offenders. *See* N.Y. Exec. Law § 63(10) (McKinney 1993 & supp. 2001). Although this section of the Executive Law has never been litigated, it appears to authorize the Attorney General to prosecute unchecked police misconduct that is motivated by bias.

Recently, the Attorney General has investigated incidents of "racial profiling" by the New York City Police Department. To render its findings more concrete, this memorandum will pose the hypothetical of an Attorney General initiated suit to address racial profiling. This memorandum does not address non-jurisdictional defenses, immunities, or conflicts of interest.

II. The Attorney General May Initiate Civil Suits to Redress Police Misconduct

A. The Concept of *Parens Patriae*

In the absence of explicit statutory authority, the Attorney General may initiate civil actions pursuant to the common law *parens patriae* standing doctrine. "*Parens patriae*," literally "parent of the country," originally referred to the common law concept under which the role of the State as the sovereign was to act as guardian of persons under disability. *See Snapp*, 458 U.S. at 600. However, this original common law concept has very little to do with the *parens patriae* standing concept that has developed in American law. *Id.* The American concept of *parens patriae* does not involve the State's stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. *Id.* In fact, if nothing more than this is involved - i.e., if the State is only a nominal party without a real interest of its own - then it will not have standing under the *parens patriae* doctrine. *Id.* at 601. *See also Cliff v. Vacco*, 267 A.D.2d 731, 699 N.Y.S.2d 791 (3d Dept. 1999) (Attorney General's authority under N.Y. Exec. Law § 63 does not extend to the representation of private individuals in matters involving the enforcement of private rights).

B. Elements of *Parens Patriae* Standing

Cases have established three criteria for *parens patriae* standing:

> The test for *parens patriae* standing … has three prongs; *First*, the State must articulate "a quasi-sovereign interest" - that is, an interest that is distinguishable from the interests of private parties. [*Abrams v.*] *11 Cornwell Co.*, [695 F.2d 34,] 38-39 [(2d Circuit 1982)], citing *Snapp*, *supra*. *Second*, the state must "allege [] injury to a …substantial segment of the population." *Id.* at 39, quoting *Snapp*, 461 U.S. at 607. And, *third,* the reviewing court must find that "individuals could not obtain complete relief through a private suit." *Id.* at 40.

Spitzer, slip op. at 5. *See also People v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 811-12 (N.D.N.Y. 1996).

"While not admitting of a precise definition, a 'quasi-sovereign interest' has been held to consist of a set of interests which the state has in the well-being of its populace." *State by Abrams v. New York City Conciliation & Appeals Board*, 123 Misc.2d 47, 49, 472 N.Y.S.2d 839, 841 (Sup Ct. New York County 1984) (citing *Snapp.* 458 U.S. at 602). Moreover, while *parens patriae* standing requires that a substantial segment of the population be injured or threatened with injury by the defendant's conduct, indirect injuries may be considered, *Snapp*, 458 U.S. at 607, and there is "no numerical talisman." *John's Pump House*, 914 F. Supp. at 812.

Although the doctrine of *parens patriae* is judicially recognized as vague, courts have routinely permitted States to use *parens patriae* litigation to seek remedies for (1) civil rights violations alleged under a variety of federal laws and (2) to protect different groups, including minorities, women and persons with disabilities. Where acts of discrimination and constitutional malfeasance are perpetrated by police officers, *parens patriae* actions have been deemed even more appropriate. *See Spitzer*, slip op. at 4 (citing *Pennsylvania v. Porter*, 659 F.2d 306, 316 (3d Cir. 1981) (en banc)).

C. The New York Attorney General's *Parens Patriae* Standing

Police misconduct threatens significant community interests and frequently poses barriers to individual suit. Thus, it is appropriate for the Attorney General to bring suit in his *parens patriae* capacity to address this problem. Additionally, where a significant pattern of police misconduct goes unredressed substantial numbers of

citizens are affected.

Police misconduct threatens all citizens, indeed the very credibility of the state *qua* state. For that reason, the Third Circuit found, in a suit alleging police misconduct, that the Commonwealth of Pennsylvania had *parens patriae* standing "both in its own behalf as sovereign and as a representative" plaintiff "vitally interested in safeguarding the health and safety of individuals in its territory," stating in relevant part that:

> Misconduct of local government officials both interferes with the proper discharge of those functions which the Commonwealth has delegated, and risks undermining public confidence in the instrumentalities to which it made the delegation. Additionally, patterns or practices of misconduct by local officials in violation of constitutional rights interferes with the performance of the obligation of executive officers of the Commonwealth to uphold and enforce those rights."

Pennsylvania v. Porter, 659 F.2d 306, 314-15 (3d Cir. 1981) (en banc).

In *Porter*, the Commonwealth alleged that a police officer had engaged in an "extended pattern" of "harassment, illegal detentions, illegal arrests and illegal searches and seizures." *Porter*, 659 F.2d at 309 (cited in *Spitzer*, slip op. at 6). Like "invidious discrimination," police misconduct causes "political, social, and moral damage" and the State "has a substantial interest in assuring its residents" protection "from these evils." *Snapp*, 458 U.S. at 609 (holding that the Commonwealth of Puerto Rico had *paren patriae* standing to protect its workers from national origin discrimination). Thus, police misconduct threatens a quasi-governmental interest.

Finally, there are significant barriers to private suit for redress of police misconduct. In particular, individual victims are largely unable to secure injunctive

relief. *See*, *e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95 (1983). Moreover, individual victims may be deterred by fear of retribution. *See Porter*, 659 F.2d at 316. In pattern and practice cases, individuals may lack the financial wherewithal to be adequate class representatives. *Id.* at 315. Moreover, class certification could well be denied in State court under the Government Operations Rule.[2] For these reasons, *parens patriae* standing is appropriate in cases of police misconduct.

A New York federal district court recently held that the New York Attorney General had *parens patriae* standing in a suit alleging that the Walkill police department was, literally, out of control. *See Spitzer*, slip op. at 1. In *Spitzer*, male police officers routinely pulled over women to ask them for dates and harassed citizens who criticized the police department. Despite the obvious police misconduct, local officials were either unwilling or unable to regain control of the department. The court found that the Attorney General had standing to seek to remedy these violations under the doctrine of *parens patriae*. The court emphasized the local government's long-standing acquiescence, the police department's suspicionless and retaliatory traffic stops, and the State's constitutional obligation to combat illicit discrimination like "gender profiling." *Spitzer*, slip op. at 5. More specifically, the court found that the State has a strong quasi-sovereign interest in protecting law-abiding New Yorkers (especially women) from systemic, unlawful discriminatory and retaliatory police tactics carried out with official knowledge and

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[2]The Government Operations rule holds that where governmental operations are involved, and where subsequent petitioners will be adequately protected under the principles of stare decisiswe class relief is uneccessary. See e.g. Jones v. Berman, 37 N.Y.2d 42, 57 (1975); New York City Coalition to End Lead Poisoning v. Giuliani, 245 A.D. 2d 49, 51 (1st Dept. 1997). Unless the Government has already "demonstrated reluctance" to extend relief beyond individual plaintiffs, the class device is unavailable. Legal Aid Society v. New York Police Dept, 274 A.D.2d 207) (1st Dept. 2000).

sanction. *Id.* at 3.

While an out of control police department represents perhaps the best justification for *parens patriae* standing, the court's analysis in *Spitzer* supports the conclusion that, where there is a significant pattern of police misconduct, the interests of the citizens of New York are sufficiently affected to support a *parens patriae* action by the Attorney General.

D Racial Profiling Proper Subject of Attorney General Suit.

The next logical extension of the *parens patriae* doctrine in cases of police misconduct would be to attack the use of "racial profiling" in stop-and-frisk and other police actions. The Attorney General has already investigated New York City's "stop and frisk" practices and uncovered disturbing evidence of widespread racial bias. *The New York City Police Department's "Stop & Frisk Practices": A Report to the People of the State of New York from the Office of the Attorney General* (Attorney General Elliot Spitzer, Civil Rights Bureau, 1999) (available online at: www.oag.state.ny.us/press/reports/stop_frisk.html). (Hereafter "AG's Report.) Last August, the United States Commission on Civil Rights also found substantial evidence of racial profiling by the New York City Police Department. *Police Practices and Civil Rights in New York City*, Chapter 5. (United States Commission on Civil Rights, August 2000) (available online at: www.uscrr.gov/pubs/nypolice). (Hereafter "USCCR Report.") New York City's Police Commissioner has recently ordered a ban on racial profiling. *Commissioner Bans Profiling Using Race by the Police*, Al Baker (New York Times, March 14, 2002, Pg. 3, Col.) Yet, the commissioner has not announced any plans to root out this apparently entrenched

practice. The Attorney General, having uncovered and publicized the facts of racial profiling, and the local authorities having failed to address the problem, should now act.

1. The Extent of Racial Profiling

Both the Attorney General and Civil Rights Commission found gross disparties in the rates at which minorities and whites were subjected to stops by the New York City Police Department. The Attorney General's report was based on a statistical analysis of the Department's UF-250 reports for the period from January, 1998 through March, 1999. Police officers are required to complete UF-250 reports whenever a suspect refuses to identify themself, whenever a suspect is frisked or searched, and whenever a stop results in the use of force or an arrest.[3] The Attorney General found that African Americans, 25.6% of the City's population accounted for 50.6% of all stops citywide. (AG's Report, at 94.) Hispanics, 23.7% of the City's population, accounted for 33% of all stops. Id. Whites, 43.4% of the city's population, accounted for only 12.9% of all stops. Id. at 94-95. African Americans were more than six times, and Hispanics more than four times, more likely than whites to be stopped by the police. Id.

Breaking the data down by police precinct, the Attorney General found not only that majority - minority precincts were subjected to heightened surveillance by stop and frisk, but also that minorities venturing into majority white neighborhoods were subjected to special scrutiny. Of the ten precincts reflecting the highest stop and frisk rates, African Americans and Hispanics constituted the majority of the population in seven. Id. at viii. One was

[3] But See USCCR Report, Chapter 5. (Requirement regularly disregarded by police officers.)

majority white, and the other two were business districts. Id. Meanwhile, in precincts where blacks and Hispanics were each less than 10% of the population, more than 50% of people stopped by the police were black or Hispanic. Id. at 106.

Nor can these disparities be explained by differing crime rates. After controlling for crime rates, citywide, the Attorney General found African Americans were stopped 23% more often than whites, and Hispanics were stopped 39% more often than whites. Id. at 123. Similarly, the crime rates per precinct do not explain the amount of scrutiny received. The precincts with the highest stop rates - mostly majority-minority - had stop rates greater than would be predicted based on their crime rates. Id. at xii. Conversely, the precincts with the lowest stop rates - mostly majority white - had stop rates lower than would be predicted based on their crime rates. Id.

The U.S. Commission on Civil Rights, after analyzing UF-250 data for 1998, holding hearings, and reviewing documentation from the Civilian Complaints Review Board, the Police Academy, and other sources, also concluded that the New York City Police Department engaged in racial profiling. The Commission recommended:

> the immediate adoption and implementation of a written department policy that carefully defines, expressly prohibits, and stiffly penalizes racial profiling as the sole motivation in the stopping and searching of individuals. There should also be a departmental system of records established to permit the consistent collection and evaluation of data to determine whether racial profiling is occurring, and if so, when and why.

USCCR Report, Chapter 5. The commission also noted that 78% of complaints to the Civilian Complaint Review Board are brought by African Americans or Latinos. Id., Chapter 1. The Commission further recommended an independent monitor for the police department, and the appointment of an independent prosecutor for high

profile misconduct cases. Id.

2 Parens Patriae Standing to Address Racial Profiling.

The State's quasi-sovereign interest in preventing racial and national origin discrimination, as the court in *Spitzer* emphasized, is particularly strong. *Spitzer*, slip op. at 5. Racial profiling puts substantial numbers of individuals - indeed entire communities - directly at risk of unfair discrimination. We have seen that minorities in New York City are subject to grossly disproportionate levels of police scrutiny. Substantial numbers of New Yorkers are being subjected to discriminatory stops and frisks daily. Racial profiling corrodes public confidence in the integrity of the justice system, and undermines police-community relations. The facts have been available for some time, and the City has proven unable to take the necessary steps.

Individual suits are unlikely to address the problem. Likely as minorities are to be stopped by the police in New York City; individuals would still have a difficult time obtaining injunctive relief. Class certification would likely be denied under the Government operations rule. Even if a class could be certified, the cost of developing the case could well be prohibitive for likely class representatives. Accordingly, the Attorney General is the appropriate authority to take action on the problem of racial profiling.

III. The Attorney General May Prosecute Police Misconduct Where Such Misconduct Violates State Anti-discrimination Laws

By law, the Attorney General of New York has no general prosecutorial authority and, except where specifically permitted by statute, has no power to prosecute criminal actions. *See Della Pietra v. State of New York*, 71 N.Y.2d 792,

796-797 (1988). However, where police misconduct occurs due to unlawful discrimination, and the local authorities cannot or will not prosecute, the Attorney General has jurisdiction to prosecute the offending officers. *See* N.Y. Exec. Law § 63(l0) (McKinney 1993 & supp. 2001). The duties of the Attorney General include the prosecution of

> every person charged with the commission of a criminal offense in violation of any of the laws of this state against discrimination because of race, creed, color, or national origin, in any case where in his judgment, because of the extent of the offense, such prosecution cannot be effectively carried on by the district attorney of the county wherein the offense… is alleged to have been committed, or where in his judgment the district attorney has erroneously failed or refused to prosecute.

Id.

This directive dates from the 1940s, when criminal sanction was the predominant method of enforcing anti-discrimination laws. *See generally* Report of the New York State Temporary Commission Against Discrimination, 6 Leg. Doc. 15-20 (1945). Since the enactment of Executive Law § 63(10), anti-discrimination enforcement has taken on a predominantly civil focus. Thus, there are no reported cases where § 63(10) has been invoked.

A. Laws Against Discrimination.

Criminal sanctions, however, are also available to redress unlawful discrimination. The Civil Rights Law, for instance provides:

> No person shall, because of race, creed, color, national origin, sex, marital status or disability … be subjected to any discrimination in his civil rights, or to any harassment … in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.

N.Y. Civ. Rights Law § 40-c (2001) (McKinney 1992 & supp. 2001).

Violation of § 40-c constitutes a Class A misdemeanor. *See* N.Y. Civ. Rights Law § 40-d (McKinney 1992 & supp. 2001). Likewise, a person is guilty of Class A misdemeanor who:

> Strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation.

N.Y. Penal Law § 240.30 (McKinney 1999 & supp. 2001).

Moreover, the Hate Crimes Act of 2000 arguably places a wide spectrum of criminal conduct within Attorney General's § 63(10) jurisdiction . 2000 N.Y. Laws ch. 107, § 2, codified at N.Y. Penal Law § 485.05 (McKinney supp. 2001). It might be asserted that Penal Law § 485.05 is essentially a sentence modifier rather than a discrete crime, and the underlying crimes are not, in themselves, anti-discrimination laws. However, the broad language of § 63(10) empowers the Attorney General to prosecute "any of the laws of this state against discrimination." The Hate Crimes Act of 2000 seeks to deter and punish discriminatory crimes, and is within the plain meaning of "laws against discrimination." Prosecution of bias crimes, then, falls within the Attorney General's § 63(10) jurisdiction. Where police misconduct occurs in the form of a covered offense, the Attorney General has authority to proceed against the offending officer(s).

B. Local Authority Fails to Act.

The Attorney General's jurisdiction in anti-discrimination prosecutions is limited to those situations where the local district attorney either (1) cannot prosecute effectively due to the extent of the offense, or (2) in the Attorney

General's judgment erroneously fails to prosecute. N.Y. Exec. Law § 63(10) (McKinney 1993 & supp. 2001). These preliminary requirements of § 63(10) have not been litigated. However, a plain reading of the statutory language supports its applicability to police misconduct.

First, the Attorney General may proceed where the extent of the offense renders local district attorneys ineffective. Where there is a significant pattern of police misconduct, for instance, the local district attorney might not have the resources to prosecute. The Executive Law seems to authorize action due to the scope, rather than the nature of the offense. The New Heritage Dictionary defines "extent" as "scope or comprehensiveness." The American Heritage Dictionary (William Morris ed., 1978). However, a balance of the extent of the offense against the resources of the local district attorney is called for. Moreover, cases of police misconduct may threaten non-fiscal resources as well. For instance, local district attorneys, in the performance of the their duties, are necessarily reliant on the cooperation of police officers. Local district attorneys may be naturally prone to identify with, and reluctant to prosecute police officers. Indeed, such prosecutions might endanger important relationships. Thus, the Attorney General's jurisdiction should be broadly construed.

Second, where the Attorney General concludes the local district attorney has "erroneously failed or refused to prosecute," action under Executive Law § 63(10) is called for. Although the statute does not define "erroneous," the legislature intended to create a system of review akin to the federal Attorney General's review of local United States Attorneys' decisions. Report of the New York State Temporary

Commission Against Discrimination, 6 Leg. Doc. 37 (1945). Due to the "incalculable evils" wrought by discrimination, both the State and the victim are afforded "this second chance for redress through the criminal courts." *Id*. at 38. In other words, the term "erroneous" does not seem to set forth a standard, but rather contemplates that the New York Attorney General should exercise independent judgment in deciding whether to prosecute under § 63(10). New York's Attorney General should pay particular attention to cases of police misconduct because local officials may not have the perspective, distance, or institutional incentive to evaluate a situation neutrally.

C. Limitations

By its terms, Executive Law § 63(10) is limited to cases of discrimination based on race, creed, ethnicity or national origin. It does not afford protection on the basis of gender, disability or other classifications which have been afforded protection since its enactment. Moreover, it does not reach police abuse where a discriminatory motive cannot be shown. For these reasons, § 63(10) offers limited utility for redress of police misconduct. The provision would have greater effect if it were extended to either specifically grant the Attorney General standing in cases of police abuse of authority or cases of crimes which violate a citizen's civil or constitutional rights.

D. Racial Profiling

Stops, frisks, searches, and other police actions taken on account of a person's race or national origin, implicate the right to the equal protection of the law, the right to be free of unreasonable searches and seizures, and other civil rights.

Thus, racially motivated police action appears to be actionable under Section 40-c of New York's Civil Rights Law, and thus the Attorney General has the authority to prosecute racially motivated police action. To the extent that racial profiling is systemic, indeed a matter of policy, suit for injunctive relief under the *parens patriae* doctrine would be more appropriate since it would secure relief for the entire community.

CONCLUSION AND RECOMMENDATIONS

For the aforementioned reasons, the Attorney General has *parens patriae* standing to commence civil actions for redress of police misconduct. For instance, the documented use of racial profiling by the New York City Police Department would be an appropriate subject for suit by the Attorney General. Likewise, where police misconduct is motivated by unlawful discrimination, and local authorities are unable or unwilling to prosecute, the Attorney General has criminal jurisdiction. Legislation to clarify and broaden the Attorney General's criminal jurisdiction in cases of police misconduct would be desirable.