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Saving the World: How Municipal Lawyers Can Help in the Fight Against Climate Change



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Conflicts of Interest in Police Misconduct Litigation and What to do About Them

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Civil actions for damages are arguably the leading vehicle for legal accountability in policing. Damages actions enable victims of police misconduct to act as private attorneys general with a financial incentive to unearth evidence of police misconduct.[1] Particularly important are actions brought pursuant to Title 42, § 1983 of the United States Code against those who deprive individuals of their rights under federal law.[2] Section 1983 imposes civil liability when public officials abuse their authority and thereby deprive individuals of their constitutional rights.[3] For example, the use of excessive force to effect an arrest by a police officer amounts to a violation of the Fourth Amendment's prohibition on unreasonable search and seizure and is actionable under Section 1983.[4]

Nevertheless, there is wide agreement that damages remedies have done little to curb police misconduct.[5] A variety of explanations have been offered, such as the strength of the qualified immunity defense available in actions brought under Section 1983 against state and local officials.[6] Yet the leading empirical study of qualified immunity found this defense is usually unavailing or unsuccessful, and plaintiffs obtain favorable judgments or settlements in a majority of Section 1983 cases brought against law enforcement officials.[7]

A perhaps more plausible explanation for the relative inefficacy of civil rights litigation for curbing police misconduct is suggested by Joanna Schwartz's study of twenty-six police departments that had been subject to external review; she found: "[L]aw enforcement officials only rarely have information about suits brought against their departments and officers . . . . Even less frequently do law enforcement agencies investigate claims made in lawsuits, review closed litigation files, or consider the dispositions of cases."[8] This article focuses on what may be the most important reason that public employers rarely learn about evidence of official misconduct unearthed in Section 1983 litigation—the ethical obligations of attorneys who represent police officers named as defendants in Section 1983 actions.

I. Ethical Obligations of the Officer's Attorney as a Roadblock to Accountability.

The general rule in tort law is that of *respondeat superior*—an employer is liable for the torts of an employee while acting within the scope of employment.[9] Section 1983 jurisprudence, however, does not permit plaintiffs to hold a public employer vicariously liable for the constitutional torts of its employees acting within the scope of their employment. In *Monell v. Department of Social Services of New York*,[10] the Supreme Court held that municipalities "may not be sued under § 1983 for an injury inflicted solely by its employees or agents," but, rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible for under § 1983."[11] The defense of qualified immunity, however, is not available to public employers sued under Section 1983 for customs or policies that cause deprivations of constitutional rights.[12] One might, therefore, suspect that civil rights plaintiffs might be willing to shoulder the burden of proving a custom-or-policy claim against an employer in order to avoid facing the

qualified immunity defense available only to individual defendants. The available data, however, is inconsistent with this supposition.

The most comprehensive examination of this issue is a study by Professor Joanna Schwartz, who reviewed the dockets of Section 1983 cases filed against police officers and other law enforcement officials in five judicial districts—the Eastern District of Pennsylvania, the Middle District of Florida, the Northern District of California, the Northern District of Ohio, and the Southern District of Texas, in 2011 and 2012. In her "docket dataset of 1,183 cases, ninety-nine cases (8.4%) were brought solely against municipalities and/or sought only injunctive or declaratory relief."[13] Thus, in more than nine of ten Section 1983 cases, individual public employees, entitled to assert the defense of qualified immunity, were named as defendants.

There seems to be good reason for plaintiffs to sue individual officers despite qualified immunity; that defense is usually unavailing or unsuccessful. Professor Schwartz found qualified immunity was raised in only 37.6% of all Section 1983 cases in which the defense was available,[14] and in those cases, qualified immunity was granted in full in only 12% of cases, and granted in part in only 5.9% of cases.[15]

Critically, the financial burden of liability is usually not experienced by individual public officials, but instead, by their employers. That is because police officers and other public employees frequently have the right to be indemnified for their legal costs arising from their conduct undertaken within the scope of employment. In their survey of state laws governing indemnification of public employees, Aaron Nielson and Christopher Walker found that nearly every state either requires or authorizes the indemnification of public employees for their legal costs arising from civil litigation based on acts within their scope of employment: twenty-three states require indemnification for state and local public employees, another thirteen require indemnification of state employees and, of these, eleven also authorize indemnification of local employees, five require indemnification of local employees only, and seven states authorize state and local governments to indemnify.[16] Indemnification of police officers and other public employees is also often required by collective bargaining agreements.[17] The ubiquity of indemnification has also been demonstrated by Professor Schwartz, who found: "[L]aw enforcement officers employed by the eighty-one jurisdictions in my study almost never contributed to settlements and judgments in police misconduct lawsuits during the study period."[18]

As part of their obligation to indemnify their employees for their legal costs arising from civil litigation, state and local governments are usually required or authorized to provide legal representation for their employees sued for acts within the scope of employment.[19] In her study, for example, Professor Schwartz found that "law enforcement officers are also almost always provided with defense counsel free of charge when they are sued," adding, "several government employees and plaintiffs› attorneys noted in their responses that officers are almost always represented by the city's or county's attorneys, or by attorneys hired by union representatives."[20]

The appointment of a lawyer to represent a police officer named as a defendant in civil litigation triggers the fiduciary duties owed by the lawyer to the officer. A lawyer's fundamental duty, of course, is to "zealously assert[] the client's position under the rules of the adversary system."[21] Thus, the officer's attorney must guard the interests of the client, not the client's employer. An attorney also has an obligation, by virtue of the attorney-client privilege, not to disclose confidential communications with the client made for the purpose of obtaining or providing legal representation.[22] Beyond that, a lawyer may not use any information obtained during the course of representing a client to the disadvantage of the client without that client's informed consent.[23] This obligation extends to information that is not provided by a client, nonconfidential, or otherwise protected by the attorney-client privilege: as the Modern Rules of Professional Conduct state, "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.[24] Nor may a lawyer paid by a public employer to represent an individual

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Lawrence Rosenthal, after graduating from Harvard Law School, where he won the Fay Diploma and was an editor of the Harvard Law Review, clerked for Judge Prentice Marshall of the United States District Court for the Northern District of Illinois and Justice John Paul Stevens of the United States Supreme Court. Professor Rosenthal entered the practice of law as an Assistant United States Attorney for the Northern District of Illinois, specializing in organized crime and public corruption prosecutions. Among other things, he brought the first racketeering case involving insider trading, and secured the longest sentence in the history of the district in an organized crime case (200 years). He subsequently joined the City of Chicago's Department of Law, where he was Deputy Corporation Counsel for Counseling, Appeals, and Legal Policy. In that capacity, he argued three cases in the United States Supreme Court, and supervised a large volume of complex litigation as well as legislative as policy matters. To his great embarrassment, Professor Rosenthal was named by Chicago Magazine as one of "Chicago's 25 Toughest Lawyers." Since then, he tries to be nicer. Professor Rosenthal joined the Chapman faculty in the fall of 2005. He also continues to engage in litigation in the United States Supreme Court and other appellate courts, usually on a pro bono basis.

public employee take direction from the public employer or otherwise act to the detriment of the individual employee who is, after all, the lawyer's client; the Model Rules provide that "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[25]

The possibility that the interests of a police officer named as a defendant in Section 1983 litigation will diverge from the interests of the officer's employer is not remote. Section 1983 litigation involving allegations that a police officer has used excessive force, for example, may reveal information relevant to the question of whether the individual defendant has violated the excessive-force policies of the police department that employs the officer. Officers who use force in a manner that violates departmental policy, in turn, are likely to be exposed to a risk of internal discipline up to and including termination.[26] That reality gives rise to a potential conflict of interest between a police officer sued for misconduct and the department that employs the officer. In the course of representing an officer named as a defendant in a civil action alleging police misconduct, for example, the officer's lawyer may learn of information that, if disclosed to the officer's employer, might expose the officer to discipline for violating the department's policies.

Consider, then, the position of the attorney representing an officer in Section 1983 police misconduct litigation who learns of information, as a result of interviewing the client, conducting an investigation to defend the litigation, reviewing materials generated in discovery, or reviewing the evidence, that the plaintiff intends to present (or actually presents) at trial, which suggests that the police officer client has violated the excessive-force policy of the law-enforcement agency that employs the officer. In light of the attorney's obligation to protect the interests of the client, and the prohibition on disclosing even nonprivileged information adverse to the client, the attorney would be likely to conclude that the best course of action is to settle the lawsuit and avoid disclosing adverse information to the department that employs the officer. After all, given the ubiquity of indemnification, the client's financial interests are unlikely to be harmed by a settlement, but if the matter proceeds, there is a risk that information will come to the attention of the client's employer and could lead to discipline.[27]

Even if the case fails to settle and instead goes to trial, the attorney would retain an obligation not to disclose information to the officer's employer that is adverse to the client's interests. Indeed, the ethical obligations of plaintiffs' and officers' counsel may well align; as Professor Schwartz observed, "ultimately, plaintiffs' attorneys and officer-defendants often want the same thing—for the government to pay."[28]

The available empirical evidence, though limited, suggests that an information-flow problem exists. Professor Schwartz's finding that police departments rarely use information generated in litigation to assess policy and personnel, for example, suggests an information-flow problem.[29] Similarly suggestive is Marc Miller and Ronald Wright's conclusion, after surveying public records and published accounts, that there is a greater volume of settlements and judgments against officers in cases alleging police misconduct than can be explained by publicly available records, indicating that a substantial number of claims are likely resolved by settlements that the plaintiffs agree to treat as confidential:

> [M]any civil claims against police are resolved either before a case is filed, or through secret settlements and judgments sealed by courts. Police departments, cities and counties are settling strong cases, and perhaps even less strong cases, but they are requiring (and probably paying for) sealed agreements. In some places, it has become standard litigation strategy for cities to negotiate an agreement that binds the parties not to discuss the judgment and asks the judge to seal the discovery documents and the settlement agreement.[30]

It is hard to ignore the difference in information flow created by the absence of vicarious liability under Section 1983, as compared to areas of the law that apply the rule of *respondeat superior*. Under *respondeat superior*, tort plaintiffs can directly sue the deep-pocketed employer; indeed, there is little reason for a plaintiff to bother naming as a separate defendant the individual employee who allegedly engaged in tortious conduct. Attorneys representing entities vicariously liable for the torts of their employees, moreover, can advise their clients to undertake cost-effective reforms that reduce their exposure to liability, even if they involve disciplining individual employees. Attorneys for police officer defendants, in contrast, are obligated not to disclose this type of information to public employers, at least when it could lead to discipline, a denial of indemnification, or other adverse consequences for the attorney's client. It is therefore small wonder that civil litigation has been less than fully effective in inducing public employers to identify problem officers, and to undertake reform and discipline as warranted in order to address police misconduct.

II. Converting the Attorney for the Officer into the Attorney for the Employer.

Insurance law points the way toward reform. An insurer

ordinarily has a contractual right to control the defense of litigation against the insured; given that the insurer is the party with a financial stake in the litigation, it is eminently reasonable that the insurer reserves a right to control that litigation.[31]

An interesting variation on an insurer's right to control litigation against the insured is found in section 2-302 of the Illinois Local Governmental and Local Governmental Employees Tort Immunity Act:

> If any claim or action is instituted against an employee of a local public entity based on an injury allegedly arising out of an act or omission occurring within the scope of his employment as such employee, the entity may elect to do any one or more of the following:
>
> (a) appear and defend against the claim or action;
> (b) indemnify the employee or former employee for his court costs or reasonable attorney's fees, or both, incurred in the defense of such claim or action;
> (c) pay, or indemnify the employee or former employee for, a judgment based on such claim or action;
> (d) pay, or indemnify the employee or former employee for, a compromise or settlement of such a claim or action.[32]

Thus, the Illinois statute, taken literally, authorizes a local government to elect to appear in its own name and defend a civil action against its employee, through its own attorney. In that event, the local government's attorney has an attorney-client relationship with the local government, not the employee named as defendant.

Nothing in either Section 1983 or the professional obligations of lawyers forbids such an arrangement; there is, after all, nothing in Section 1983 jurisprudence or the professional obligations of an attorney that requires the attorney to establish an attorney-client relationship with the individual named as the party in the case for which that individual will be indemnified. For example, a lawyer is obligated to refrain from taking actions that will harm the interests of a "client." As long as the lawyer makes it clear that he or she is representing the officer's employer, not the officer, and that the communications between the officer and the lawyer are not privileged, no attorney-client relationship is created between an officer and the lawyer for a public employer that has been tasked with defending the lawsuit against a public employee.[33] Consider the approach suggested for the initial interview conducted by a lawyer for a municipality with a police officer named as a defendant in a civil case in order to avoid creating an attorney-client relationship between the attorney and the officer:

> Good afternoon, Mr. Police Officer. My name is Ms. Lawyer, and I am counsel for the Town of Reddirt. Before we begin, it is very important that you understand my role here today. I have been retained by the Town; I am the Town's attorney. I am not your lawyer. I arranged this meeting so I could find out what you know about the Traveler matter that might help me in giving the Town legal advice. Our conversation is not protected by an attorney-client privilege as between us, so anything you tell me I may convey to the Town. You are not required to answer any of my questions, and you have the right to retain your own lawyer before talking with me. Do you understand what I have just told you? Do you have any questions?[34]

In the regime authorized by the Illinois statute, the same admonition would be appropriate, except that the sixth sentence above would be slightly revised: "I arranged this meeting so I could find out what you know about the Traveler matter that might help me in representing the Town, which will conduct and pay for the defense of the lawsuit against you, and also pay the cost of any settlement or judgment against you in that lawsuit, as long as you cooperate with the Town as it defends the case against you."[35]

Although the Illinois formulation appears to be unique, and the decided cases supply no indication that police departments in Illinois have employed the statute along the lines discussed above (perhaps because applicable collective bargaining agreements may require police departments to supply officers with lawyers who represent them in actions arising from actions within the scope of employment), there is no reason why the duties of police departments to their employers could not be crafted along these lines. Moreover, although the Illinois statute is unique, it is far from the only jurisdiction that permits a public employer to take over the defense of an action against its employee. A California statute, for example, provides: "[U]pon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought . . . on account of an act or omission in the scope of his employment as an employee of the public entity."[36] The duty imposed by this statute would be discharged if a public employer directed its own attorney to defend to defend the action brought against the employee and thereby "provide for the defense" of the Section 1983 lawsuit.

To the extent that applicable statutes, ordinances, or collective bargaining agreements are not as broad as those in Illinois and California, other jurisdictions could amend applicable statutes, ordinances, or collective bargaining agreements to make clear that the duty to indemnify police officers is conditioned on the ability of the police department or other public employer to control the defense of the officer through its own attorney, holding a fiduciary duty to the employer.

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Police Misconduct *cont'd from page 13*

III. Conclusion.

In this fashion, the professional obligations of attorneys that prevent departments from making full use of the information unearthed in civil litigation can be overcome. A municipality could direct the attorneys that it retains to defend litigation brought against the police officers it employs to be alert to any evidence that might warrant discipline against the officer named as a defendant or suggest a need for systemic reform. The information unearthed by private attorneys bringing civil actions against police officers could therefore be leveraged to improve police training, supervision, and discipline, much as the doctrine of *respondeat superior* enables private employers to use civil litigation in this fashion. Indeed, municipal attorneys could enhance that process by performing their own investigation to assess the conduct of the officer named as a defendant.

To be sure, there is no substitute for the political will to pursue reform. If elected officials and police executives have no wish to pursue reform, it is doubtful that any program of civil liability can alter that state of affairs—officials dedicated to the status quo are likely to view litigation expenses as the political cost they must pay to pursue their vision of effective policing. But even departments desirous of pursuing reform and identifying misconduct are hampered by a system in which the plaintiff's incentive to settle a case in a manner that produces compensation for attorney and client alike aligns with the incentive of a police-officer defendant, and the officer's attorney, to resolve the matter in a fashion that minimizes the chances that the officer will face internal discipline. As long as this state of affairs persists, civil litigation's potential to address police misconduct will remain unfulfilled. If the defense of civil litigation is conducted by an attorney with a duty to the public, not the officer, an important obstacle to police reform can be removed.

Editor's Note: This article is adapted from Professor Rosenthal's note titled *Legal Ethics as Roadblock To Police Accountability*, 92 Miss. L.J. 1 (2022).

Notes

1. *See, e.g.*, Joanna C. Schwartz, *What Police Learn from Lawsuits,* 33 Cardozo L. Rev. 841, 846, 872 (2012) ("Whether motivated by their ethical obligations or the promise of a percentage of any recovery, plaintiffs' civil rights attorneys have strong incentives to uncover all evidence that might support their client's claims.").
2. *See* 42 U.S.C. § 1983 (2018) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").
3. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 184 (1961) (citation omitted) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)), overruled in part on other grounds by Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978) (holding, in an action against police officers for an allegedly wrongful search, that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.")
4. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 395 (1989) ("[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . .").
5. *See, e.g.*, Nat'l Res. Council, *Fairness and Effectiveness in Policing: The Evidence* 278-80 (Wesley Skogan & Kathleen Frydl eds., 2004); Samuel Walker, *The New World of Police Accountability* 32-33 (2005); Barry Friedman & Mario Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827, 1867-70 (2015); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 954-59 (2014).
6. For arguments along these lines, *see, for example*, Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs,* 29 Touro L. Rev. 633 (2013); and Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1244-50 (2015).
7. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 19-47 (2017).
8. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking,* 57 U.C.L.A. L. Rev. 1023, 1028 (2010) (footnotes omitted). Professor Schwartz focused on jurisdictions that have been subject to external review because those jurisdictions had made more information available about their policies and practices than most police departments, and she supplemented the information disclosed by the departments with interviews and correspondence with knowledgeable practitioners and experts. *Id.* at 1042-43.
9. *See, e.g.*, Restatement (Third) of Agency § 7.07(1) (2006) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment").

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