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**CRIME
AND CIVIL
JUSTICE**

When Torts and Crimes Overlap
Fighting to Improve Prison Conditions
Representing Victims of Police Misconduct

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Cases of police abuse are numerous, but officers are rarely disciplined for their misconduct. A civil suit may be the best option

3'.6"

for victims who want to hold offenders accountable. However, be aware that taking on the thin blue line is no easy task.

TO PROTECT AND SERVE?

By || HOWARD FRIEDMAN

Thousands of people are victims of police misconduct each year, yet it often goes undisciplined or is even covered up. Officers, unprovoked, will beat, Taser, and pepper-spray victims. Victims are also falsely arrested, illegally strip-searched, and improperly investigated, leading to wrongful convictions. But an unwritten rule known as the "code of silence" keeps officers from reporting misconduct or testifying against their fellow officers.

Victims of police abuse may suffer physical and emotional injuries along with lost income, medical expenses, legal bills, and other costs. They deserve justice, and the officers who hurt them deserve to be reprimanded or convicted for their crimes. After all, if anyone other than a police officer hurt them, the offender would be charged with a crime.

Options for redress are varied. Victims can file an internal complaint, seek criminal charges, file a civil suit, or contact the press. For several reasons, a civil suit may be their best option for ensuring that the police misconduct is brought to light even if the officer isn't disciplined.

It's typical for a victim to be arrested and charged with a crime in connection with the event in which they were allegedly abused. Police officers know that criminal charges reduce the victim's credibility, so these charges can help cover for an officer's misconduct. They also may keep victims from filing a complaint for fear of further retaliation.

If criminal charges are pending when a client first contacts you, successfully resolving them is the first step. Before bringing a civil lawsuit, you should consult with your client's criminal defense attorney; interfering with the criminal case can have adverse consequences.

When a client files an internal complaint or threatens to sue a police officer, the prosecutor may be disinclined to offer a favorable plea and more likely to fully prepare the criminal case. Prosecutors work so closely with police officers that they may view them as clients and need to protect the credibility of their police officer witnesses.¹

It is almost always in your client's best interest to wait until the criminal case is resolved before filing a claim,



unless a statute of limitations requires you to file suit or notice of suit.

Internal Complaints

Along with a criminal conviction, a successful internal complaint is one of the two primary means of disciplining a police officer. But pursuing an internal complaint is difficult because the police department controls the process. Your client cannot direct the department to interview witnesses and, unless a civilian review board is involved, only the officer can appeal the decision. Furthermore, police departments rarely find an officer at fault, especially for using improper force.

A Department of Justice study found that in 2002, investigators sustained just 8 percent of complaints involving use of force, while 34 percent were not

sustained, 25 percent were deemed unfounded, and 23 percent resulted in exoneration of the officer.²

Still, filing an internal complaint may be helpful even if it is not sustained. The investigation can uncover evidence, such as a witness who is willing to speak to a police officer but reluctant to speak to your private investigator. Of course, this will help only if your state allows access to completed investigations; public records laws vary widely on this point. Also, filing a complaint puts the department on notice of a problem, which could result in the city being held liable if left unaddressed.

The department also may be interested in screening out overly aggressive officers. If the officer has already been the subject of internal and civil complaints, the department may be

more willing to take action to prevent further complaints.

If your client wishes to file an internal complaint, you can draft it for your client. Although police departments have a form, they accept letter complaints. Arrange for your client to be interviewed in a neutral location—victims of police misconduct often feel unsafe going into a police station to complain about an officer from that department. Also, your involvement likely will lead to a more thorough investigation by the department.

However, filing a complaint might adversely affect your client's ability to obtain compensation in a civil suit. Some police departments will refuse to indemnify police officers who are fired for misconduct. Self-insured departments may not provide counsel for an officer if

they wish to reserve their right to refuse indemnification.

Criminal Complaints

Pursuing criminal charges is difficult. Local prosecutors take very few cases³ and criminal cases against police officers are extremely hard to win.⁴

Initiating criminal charges against a police officer is especially problematic when your client also faces criminal charges. Prosecutors may interpret your client's pursuit of criminal charges as an effort to gain an advantage in his or her own criminal case. Also, because prosecutors rely on police officers, they risk losing their cooperation if they are thought to believe the word of your client over that of an officer.

In some states, a civilian can file an application for a criminal complaint against a police officer. They are rarely granted because the clerks who make this decision work closely with police officers. Even if the application is granted, the prosecutor is unlikely to vigorously pursue the charge.

Most successful prosecutions are brought by federal prosecutors, who take cases only if they feel they will be able to get a conviction. Obtaining a criminal conviction against a police officer requires a high degree of proof. Factors that make a case more attractive to a federal prosecutor include objective evidence like videotape or photographs; a victim who is credible; good, impartial witnesses; a significant physical injury; a police officer who is out of control; or a department that is poorly managed.

Your client's civil suit will probably be stayed if a criminal prosecution against the offending officer is pending. This means the criminal investigative materials are likely to be available for the civil suit. Also, witnesses are more inclined to cooperate with a prosecutor, resulting in better evidence for the civil case. Of course, a stay will delay your client's

Civil suits sometimes end up changing police department policy, but they rarely cause the police officer to be disciplined for the conduct alleged in the lawsuit.

ability to obtain compensation, which could be a hardship for him or her.

Although a successful criminal prosecution will make it easier to prove the officer's liability, it could make it more difficult for your client to collect damages in his or her civil suit. State laws differ, but many police departments refuse to indemnify officers for criminal conduct, even if it was in the line of duty. Also, the officer may be in prison and out of a job, or financially strapped after having to pay for his or her criminal defense.

Even if the officer is found not guilty in his or her criminal case, a civil jury could find that the officer violated your client's civil rights based on a preponderance of the evidence. State laws, insurance contracts, union contracts, and pressure from fellow officers and the public all push police departments toward indemnification in civil cases. The lack of a criminal conviction could be beneficial to securing compensation for the client.

Pursuing an internal complaint or criminal charge against a police officer may wear out your client. As time drags on, witnesses also may no longer be willing to participate. Clients who have testified many times may not be effective as witnesses. Plus, the need for compensation may make your client more willing to settle on less favorable terms.

Civil Suits

Civil suits sometimes change police department policy because the de-

partment wants to avoid similar problems in the future and clarify the law for its officers, or because a civil settlement demands a policy change or further officer training. Sometimes, other police departments see publicity about a suit and change their policies to avoid a similar problem. Civil cases "are far more likely" to bring about changes in training, tactics, and policy than criminal prosecutions.⁵

Civil suits, however, rarely cause the police officer to be disciplined, even when there is a large verdict. In my experience, the only times civil suits resulted in discipline were two cases where the police officers were caught lying in their depositions. In one case, the officer was indicted and convicted of perjury. In the other, the department took disciplinary action. If the client wants to see the police officer punished, filing an internal complaint and cooperating in the investigation are essential—even with the potential adverse effects on your client's civil case.

There is no respondeat superior liability in civil rights cases under 42 U.S.C. §1983. Police departments can indemnify an officer, but this is unlikely in cases where the officer was found guilty of criminal conduct against a plaintiff. Many insurance policies and state statutes prohibit indemnification of a police officer for criminal conduct. Similarly, if a department terminates an officer for his or her actions toward a plaintiff, the department may refuse indemnification.

Some states restrict indemnification

if the officer acted in a malicious manner.⁶ Other states require indemnification in most circumstances.⁷ Some police unions have negotiated for indemnification. You need to know both the state law and the police department's policy concerning indemnification of officers.

While there is no respondeat superior liability in §1983 cases, a local governmental agency is liable for actions of an employee if the plaintiff can prevail under *Monell v. Department of Social Services*.⁸ A *Monell* claim requires the plaintiff to prove that a policy or custom of the agency caused officers to violate the law; claims typically involve a failure to act on the part of the police department that led officers to feel they could violate the law with impunity.

Winning a *Monell* claim establishes the entity's liability and ensures payment of compensatory damages, but it does not increase the amount of damages. Proving a claim requires extensive discovery and will complicate your client's trial. Judges may view these claims as a waste of time and be hostile toward them. But the resulting public exposure can cause the police department to reform its procedures. Bringing a *Monell* claim may also be important when there is a risk of non-payment by the individual defendants.

Police misconduct cases are hard to win because of prejudice in favor of officers and because the law in this area is so complicated. To maximize your client's odds of success, carefully investigate the claim before filing suit. In addition to obtaining your client's records under state public records statutes, obtain police policies, reports, logs, and the like. These are hard-fought cases. Time spent at the start will save time later on. You do not want to be surprised by facts that hurt your case after you have filed suit.

The Press

Press coverage brings public attention to police misconduct, which thrives


in secrecy. Some clients will want to alert the public to their abuse by speaking to members of the press. A well-drafted complaint that tells your client's story with facts is likely to attract press attention. Witnesses or other victims of the same officer or police department may come forward after reading or hearing about your client's case, and attorneys may contact you with information about the police officer or the police department.

Public officials respond to press coverage. After an article in the newspaper about the incident, the police chief may have to explain to the mayor or city manager what happened. Public outrage over police misconduct can lead to changes in policies or practices to prevent further misconduct.


Although bringing public attention to the case may ultimately benefit your client, he or she should refrain from contacting the press while criminal charges are pending. Press attention may cause the prosecutor to work harder to secure a conviction.

Reporters will investigate your client's statements, but there is no guarantee a story will be favorable. Anything your client says can be introduced at trial as an admission or to contradict the client's testimony. The press can be a powerful weapon; it must be used carefully.

Civil cases can result in changes to police policies, but they are not likely to result in discipline of a police officer. Your client should be advised of the avenues available to redress the harm done to him or her.

Even if the police department does not discipline the officer and the prosecutor does not bring criminal charges, your client may be comforted by knowing he or she did everything possible to hold the officer accountable. In many cases, a civil suit will be the best way to learn the truth about the incident and the only recourse likely to achieve at least some of the client's goals. 

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NOTES

1. See Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 Fordham Urb. L.J. 639 (2003).
2. Matthew J. Hickman, Bureau Just. Statistics, *Citizen Complaints about Police Use of Force* 3 (June 2006), bjs.ojp.usdoj.gov/content/pub/pdf/ccpuf.pdf. The remaining 10 percent of complaints had an "other disposition" (for example, the complaint was withdrawn).
3. *Id.*
4. David A. Harris, *The Interaction and Relationship between Prosecutors and Police Officers in the U.S., and How this Affects Police Reform Efforts*, in *The Prosecutor in Transnational Perspective*, Erik Luna and Marianne Wade, eds. (Oxford U. Press, 2011).
5. William K. Rashbaum, *Decision Not to Indict Officer May Seem Surprising, but Follows Pattern*, N.Y. Times (Feb. 19, 2004), www.nytimes.com/2004/02/19/nyregion/decision-not-to-indict-officer-may-seem-surprising-but-follows-pattern.html.
6. See e.g. Mass. Gen. Laws ch. 258 §9 (2004) (Proposed legislation would change "grossly negligent" to "wanton" under 2011 Mass. H.B. 2156 (NS), 187th Gen. Ct. (introduced Jan. 20, 2011)); *Pinshaw v. Metro. Dist. Commn.*, 524 N.E.2d 1351, 1357-58 (Mass. 1988) (prohibiting indemnification for compensatory damages when an officer's conduct merits an award of punitive damages, even if no punitive damages were awarded).
7. For example, California and Illinois provide broad indemnification if the officer is acting in the scope of his or her employment. Cal. Govt. Code Ann. §825 (West 2011); 745 Ill. Comp. Stat. Ann. 10/9-102 (West 2011).
8. 436 U.S. 658 (1978).