LEGAL ETHICS AS A ROADBLOCK TO POLICE ACCOUNTABILITY

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INTRODUCTION

Perhaps the leading vehicle for legal accountability in policing is civil actions for damages. Criminal remedies can only be accessed

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by prosecutors, who are often reluctant to charge officers.[1] When criminal charges are filed, juries are often reluctant to convict.[2] Civil actions for injunctive relief are difficult to pursue,[3] and even if injunctive relief is issued, its effect on the conduct of officers in the field, as well as the sustainability of reforms implemented by injunction, are uncertain.[4] Public employers can discipline officers

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[1] For representative discussions of the reluctance of prosecutors to charge police officers, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 466-67 (2004); Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines To Prosecute*, 53 MD. L. REV. 271, 289-91 (1994); Alexandra Hodson, *The American Injustice System: The Inherent Conflict of Interest in Police-Prosecutor Relationships & How Immunity Lets Them 'Get Away With* Murder', 54 IDAHO L. REV. 563, 586-89 (2018); John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 802-06; Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1465-72 (2016); Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 911-25 (2020).

[2] For representative discussions of the reluctance of juries to convict police officers of crimes, see DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 51 (1994); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 19 (1993); ALBERT J. REISS, JR., THE POLICE AND THE PUBLIC 191-92 (1971); Armacost, *supra* note 1, at 466; Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 247, 253 (William A. Geller & Hans Toch eds., 1996); Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 724-26 (1996); Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L.J. 363, 366-67 (2016); Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 644 (2003); Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. LAW. 675, 682-84 (2016).

[3] For discussions of the difficulties of suing for injunctive relief, see, for example, Armacost, *supra* note 1, at 491-93; Avidan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375, 395-98 (2018); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1396-99 (2000). *See also* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding the plaintiff lacked standing to seek injunctive relief against police policy and practice of using chokeholds because he could not establish a likelihood that he would again be subjected to a chokehold in the future).

[4] For helpful discussions of the mixed record of federal decrees providing for injunctive relief against police practices, see Joshua Chanin, *Evaluating Section 14141: An Empirical Review of Pattern or Practice Police Misconduct Reform*, 14 OHIO ST. J. CRIM. L. 67, 108-10 (2016) (finding mixed results in a study of five police departments subject to injunctive decrees); Brianna Hathaway, *A Necessary Expansion of State Power: A "Pattern or Practice" of Failed Accountability*, 44 N.Y.U. REV. L. & SOC. CHANGE 61, 80-83 (2019) (finding limited empirical evidence regarding the effects of injunctive decrees on policing); Zachary A. Powell, Michele Bisaccia Meitl & John L. Worrall, *Public Consent Decrees and Section 1983 Civil Rights Litigation*, 16 CRIMINOLOGY & PUB. POL'Y

when they obtain evidence of misconduct, but their investigations are often hobbled by a variety of limitations imposed by statute[5] or collective bargaining agreement.[6] Perhaps more important, it is

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575, 594 (2017) (citation omitted) (In a study of jurisdictions subject to consent decrees obtained by the U.S. Department of Justice "our main conclusion is that the DOJ consent decree process *may* contribute to a modest reduction in the probability of Section 1983 filings occurring. This effect, however, may differ across the history of the DOJ consent process. The protective effects of the consent decree experience may not last in the long term. However, as more and more agencies complete the consent decree process, the DOJ may adapt and refine their methods of oversight."); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1408-18 (2015) (discussing limitations on the efficacy of injunctive relief); Stephen Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, 14 OHIO ST. J. CRIM. L. 113 (2016) (discussing contrasting case studies and concluding that reform litigation is likely to be effective in agencies that are supportive of external intervention); Samuel Walker, *"Not Dead Yet": The National Police Crisis, A New Conversation about Policing, and the Prospects for Accountability-Related Police Reform*, 2018 U. ILL. L. REV. 1777, 1801-07 (discussing mixed evidence developed in evaluations of injunctive reforms of police departments). *Cf.* Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 45 (2012) (footnote omitted) ("Just as expanding the deterrence effect of other federal remedies requires increasing their expected costs for departments, exploiting the deterrence potential of Section 14141 [authorizing the Department of Justice to seek injunctive relief] requires increasing the expected costs of permitting a pattern or practice of constitutional violations for police departments. However, this goal cannot be achieved by raising the costs of Section 14141 for each department that is investigated or sued since the statute authorizes only remedial measures and monitoring necessary to eliminate the illegality—not damages or other non-remedial punishments. As a result, Section 14141 cannot incentivize additional police departments by raising the costs of each investigation or suit under the statute. If Department of Justice suits for equitable relief are to deter misconduct more than they do now, they must do so by some other mechanism.").

[5] *See, e.g.*, Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 796-98 (2012) (describing how civil service laws make it costly to discipline officers); Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEG. F. 213, 222-24 (describing statutory protections for officers in internal investigations); Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 203-22 (2005) (same); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1220-27 (2016) (same); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1208-13 (2017) (same).

[6] *See, e.g.*, Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 749-55 (2017) (describing how police union contracts impede investigations and discipline of officers); Harmon, *supra* note 5, at 799 (describing how collective bargaining makes it costly to impose managerial reforms in police departments); Rushin, *supra* note 5, at 1222-39 (describing how collective bargaining agreements make it more difficult to investigate and discipline officers); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2210-14 (2014) (same).

often difficult for police departments to effectively monitor the conduct of officers in the field; scholars have long questioned the efficacy of supervisory control over police officers on patrol in light of the substantial discretion and necessarily limited scrutiny that officers experience in the field.[7] Even when complaints of abuse are brought to the attention of police departments, they often fail to aggressively pursue internal investigations of their own officers, perhaps fearing that it may harm incumbent managers if proof emerges that their subordinates have engaged in misconduct.[8] Perhaps for this reason, lawyers for victims of police misconduct often advise their clients not to initiate or cooperate with internal police investigations.[9]

Damages actions enable victims of police misconduct to act as private attorneys general with a financial incentive to unearth evidence of police misconduct.[10] Indeed, it is the financial incentives of plaintiffs and their attorneys that likely explain why civil litigation is generally thought preferable to internal police

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[7] *See, e.g.*, JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 131-71 (John E. Jackson & Christopher H. Achen eds., 1997); MICHAEL K. BROWN, WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM 96-131 (1981); HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 101-27 (1977); MALCOLM D. HOLMES & BRAD W. SMITH, RACE AND POLICE BRUTALITY: ROOTS OF AN URBAN DILEMMA 131-32 (2008); REISS, *supra* note 2, at 200-02; SKOLNICK & FYFE, *supra* note 2, at 123-24; SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 8-16 (2001); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 64-69 (1968); David N. Allen, *Police Supervision on the Street: An Analysis of Supervisor/Officer Interaction During the Shift*, 10 J. CRIM. JUST. 91, 104-06 (1982); Jeffrey Manditch Prottas, *The Power of the Street-Level Bureaucrat in Public Service Bureaucracies*, 13 URB. AFFS. Q. 285, 306-10 (1978).

[8] For an argument along these lines, see Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 856-68 (2016).

[9] *See, e.g.*, Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1066 (2010) ("[P]laintiffs' attorneys sometimes make it difficult for investigations to occur. Anecdotal evidence suggests that plaintiffs' attorneys may not want their clients to participate in internal investigations for fear that the clients' statements to investigators might be used against them during the lawsuit.").

[10] *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.").

investigations as a means of unearthing evidence of misconduct.[11] Moreover, the threat of liability for damages creates a financial incentive for potential defendants to embrace measures that will reduce their exposure to liability.[12] Particularly important are actions brought against those who deprive individuals of their rights under federal law pursuant to Title 42, § 1983 of the United States Code.[13] Section 1983 is interpreted to impose civil liability when police officers abuse their authority and thereby deprive individuals of their constitutional rights.[14] Accordingly, "[s]ection 1983 creates a species of tort liability for the deprivation of any rights, privileges, or immunities secured by the Constitution."[15] Moreover, the use of excessive force to effect an arrest by a police officer, to take one example, amounts to a violation of the Fourth

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[11] *See, e.g.*, *id.* at 872-73 (footnotes omitted) (second ellipsis in original) ("Those who have examined evidence developed during litigation and internal investigations have found litigation files to be far more comprehensive. . . . [T]hose representing government defendants have little reason to identify or explore evidence of policy and personnel failures, particularly given that such evidence would likely be discoverable. In contrast, plaintiffs have a 'strong incentive . . . to dig deeply and generate more detailed and critical information' supporting their cases. 'If information exists, litigation is the likeliest vehicle to ferret it out.'").

[12] For discussions of the financial incentives created by exposure to tort liability, see, for example, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 135-73 (1970); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.1 (4th ed. 1992); and STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 5-32 (1987). For discussions of how exposure to civil liability can incentivize the government to better supervise public employees, see, for example, PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 100-21 (1984); and Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 829-38 (1992).

[13] *See* 42 U.S.C. § 1983 (1996) ("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 . . . .").

[14] *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.'").

[15] Manuel v. City of Joliet, 137 S. Ct. 911, 916 (2017) (citations and internal quotations omitted).

Amendment's prohibition on unreasonable search and seizure and is for that reason actionable under § 1983.[16]

Nevertheless, there is wide agreement that damages remedies have done little to curb police misconduct.[17] A variety of explanations have been offered, such as the governmental defendants' relative indifference to damages liability,[18] and the strength of the qualified immunity defense available in actions brought under § 1983 against state and local officials.[19] These explanations, however, are less than satisfying. Municipalities and other units of government with limited resources available to fund constituent services have ample reason to be concerned about the budgetary consequences of damages liability.[20] Nor does the availability of insurance insulate public employers from the budgetary consequences of liability; the leading study of the matter found the price of insurance rises when public employers do not undertake measures to reduce their exposure to liability.[21] As for

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[16] *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 . . . .").

[17] *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 & Maria 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).

[18] For a discussion of this possibility, see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348-57 (2000).

[19] 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).

[20] For arguments along these lines, see, for example, John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1461-74 (1989); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 276-87 (1987); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 253-78 (1988); and Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 831-41 (2007).

[21] *See, e.g.*, John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1587-91 (2017) (finding that through denials of coverage, differentiated premiums, deductibles and self-insured retentions, and limits on coverage, insurers

qualified immunity, 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 § 1983 cases brought against law enforcement officials.[22] Moreover, especially in the aftermath of widely-publicized incidents of police misconduct, public concern about police violence may well create substantial political momentum behind efforts to enhance police accountability.[23]

A more puzzling, but 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."[24]

As Professor Schwartz observed: "If policymakers do not gather and analyze information from lawsuits, they cannot possibly

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impose costs on governments that are not taking what the insurers regard as adequate efforts to limit liabilities). Moreover, "most of these policies provide what amounts to excess coverage, because they are subject [to] a sizable deductible, usually called a self-insured retention, or 'SIR.' Aggregate data on the amount of coverage, or 'policy limits,' provided by the policies, and the amount of SIRs, does not appear to be available, but anecdotally the retentions at present are almost always six (in the hundreds of thousands) or seven (in millions) figures." Kenneth S. Abraham, *Police Liability Insurance After Repeal of Qualified Immunity, and Before*, 56 TORT TRIAL & INS. PRAC. L.J. 31, 34-35 (2021).

[22] *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 19-47 (2017) (reviewing the dockets in five districts in different circuits involving § 1983 cases brought against law enforcement defendants over two years and finding qualified immunity was raised in only 37.6% of cases in which the defense was available, was granted in full in only 12.0% of cases, and granted in part in only 5.9% of cases, while also finding plaintiffs obtained favorable judgments or settlements in 57.7% of cases).

[23] For a helpful discussion of the political momentum for reform in the wake of the 2020 killing of George Floyd at the hands of Minneapolis police officers, see Christopher W. Adams, *From the President: A Moment for Change*, THE CHAMPION, Sept./Oct. 2020, at 5.

[24] Schwartz, *supra* note 9, at 1028 (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.

make informed decisions intended to avoid future misconduct."[25] Still, she added, there is reason for optimism if information derived from lawsuits comes to be utilized by officials: "When officials actually consider information from lawsuits, they use that information to reduce the likelihood of future misbehavior."[26] Similarly, in his study of the effect of insurance on police policy and practices, John Rappaport found: "To the extent that researchers have identified successful strategies for combating police misconduct, insurers have been reasonably effective at inducing police agencies to use them."[27]

This Article focuses on what may be a critically important, but entirely overlooked, explanation for the relative inefficacy of damages liability—the ethical obligations of attorneys who represent police officers named as defendants in § 1983 actions. As Part I explains, damages actions are usually brought against individual officers, who are then represented by attorneys whose fiduciary obligations run to the officer, not the municipality or other governmental entity that employs the officer. Officers' attorneys, moreover, have an ethical obligation to keep evidence of their clients' misconduct from their clients' employers. To assess the extent of the problem, Part I presents the results of a survey of a representative sample of § 1983 litigation alleging police misconduct, and finds that, in the vast majority of cases, there is no attorney with a fiduciary obligation running exclusively to the officer-defendant's employer; indeed, in some 80% of cases, the same attorney represents both the individual officer and the officer's employer. Small wonder, then, that litigation rarely surfaces evidence of police misconduct that departments can use to impose discipline or undertake reform.

The anomaly created when officers are represented by attorneys loyal to them, even though their legal costs and judgments against them are paid by the officer's employer, cries out

[25] *Id.* at 1028-29 (footnote omitted).

[26] *Id.* at 1029 (footnote omitted). In a subsequent study of five large police departments that analyzed information generated from litigation, Professor Schwartz found that while "it is difficult to pinpoint the role of lawsuits in department decisions," and equally "difficult to measure the effect of department decisions on line officer behavior," nevertheless, "lawsuit data has helped identify problems and craft interventions in these instances." Schwartz, *supra* note 10, at 860-61 (footnotes omitted).

[27] Rappaport, *supra* note 21, at 1596.

for reform. Part II proposes a simple one—by statute, ordinance, or collective bargaining agreement, in exchange for granting employees indemnification, public employers could acquire the right to appear for and defend their employees through their own attorneys, who would owe a fiduciary obligation not to the officer, but to the employer. Evidence suggesting misconduct unearthed in civil litigation could then be conveyed to police executives and elected officials consistent with the defense lawyer's professional obligations, and could thereby become available as a basis for discipline or policy reform. Accordingly, at least when municipalities and other units of government that employ police officers have the political will to curb misconduct, information derived from civil litigation can be used to combat abuse.

I. THE ETHICAL OBLIGATIONS OF THE POLICE OFFICER'S ATTORNEY AS A ROADBLOCK TO ACCOUNTABILITY

There is good reason to focus on § 1983 as the best vehicle for imposing civil liability for police misconduct; state law is replete with a variety of tort immunities and liability limitations that circumscribe its reach when it comes to imposing liability on units of government and their employees.[28] State-law defenses and immunities, however, are inapplicable to § 1983 litigation.[29] Three aspects of § 1983 litigation, however, undermine its ability to put public employers on notice of evidence of misconduct by their employees: First, § 1983 jurisprudence holds public employers are not vicariously liable for the conduct of their employees acting within the scope of their employment; second, officers sued under §

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[28] For a survey of applicable state-law governmental immunities and limitations on liability, see Rosenthal, *supra* note 20, at 804-13.

[29] *See, e.g.*, Howlett v. Rose, 496 U.S. 356, 377-78 (1990) ("To the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law."); Felder v. Casey, 487 U.S. 131, 139 (1988) ("[A] state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy."); Martinez v. California, 444 U.S. 277, 284 n.8 (1980) ("A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.").

1983 are usually entitled to be indemnified for their legal costs by their employer; and, third, the lawyer that public employers are obligated to provide to their employees owes a fiduciary duty to their individual clients, not the municipality or other unit of government that employs the officer.

A. No Vicarious Liability

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.[30] Vicarious liability is justified because it incentivizes employers to supervise their employees in a manner that will encourage them to exercise due care to avoid harming others, and reduces the risk that employees with insufficient assets to satisfy judgments will have inadequate incentives to exercise due care.[31]

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*,[32] the Supreme Court held 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 under § 1983."[33]

The standards for imposing liability on a municipal defendant based on a custom or policy are demanding. For example, the Court has cautioned that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts

[30] *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 7.07(1) (AM. L. INST. 2006) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.").

[31] For helpful discussions of these points, see, for example, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 120-21 (1987); SHAVELL, *supra* note 12, at 172-74; and Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988).

[32] 436 U.S. 658 (1978).

[33] *Id.* at 694.

to deliberate indifference to the rights of persons with whom the police come into contact," and that "the identified deficiency in a city's training program must be closely related to the ultimate injury."[34] The Court reasoned that "permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell*."[35] The Court subsequently added that "'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."[36] Accordingly, commentators have frequently observed plaintiffs face onerous barriers in seeking to impose § 1983 liability on public employers.[37]

Despite the stringency of the test for employer liability, there is one reason § 1983 plaintiffs might choose to sue a public employer rather than an employee. In actions under § 1983 against individual public officials, as well as actions against federal officials brought directly under the Constitution under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[38] the defense of qualified immunity bars an award of damages unless the defendant "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."[39] The

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[34] City of Canton v. Harris, 489 U.S. 378, 388, 391 (1989).

[35] *Id.* at 392 (citation omitted).

[36] Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997).

[37] For helpful discussions of the point, see, for example, David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2186-95 (2005); Cover, *supra* note 3, at 398-401; Matthew J. Cron et al., *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 DENV. U. L. REV. 583, 604-09 (2014); and Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 430-40 (2016).

[38] 403 U.S. 388 (1971). In *Bivens*, the Court recognized a right to sue federal narcotics agents directly under the Constitution "to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment." *Id.* at 397. For the Court's account of the subsequent development of its *Bivens* jurisprudence, see Ziglar v. Abbasi, 137 S. Ct. 1843, 1856-58 (2017).

[39] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Although actions against officials acting under color of state law are brought under § 1983 and *Bivens* actions are brought directly under the Constitution, the Court has "deem[ed] it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S. 478, 504

defense of qualified immunity, however, is not available to public employers sued under § 1983 for customs or policies that cause deprivations of constitutional rights.[40] One might, therefore, suspect civil rights plaintiffs might be willing to shoulder the burden of proving a custom-or-policy claim 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 Schwartz, who reviewed the dockets of § 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.[41] 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."[42] Thus, in more than

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(1978). *Accord* Wilson v. Layne, 526 U.S. 603, 609 (1999); Malley v. Briggs, 475 U.S. 335, 340 n.2 (1986); *Harlow*, 457 U.S. at 818 n.30.

[40] *See* Owen v. City of Independence, 445 U.S. 622 (1980) (rejecting the defense of qualified immunity for governmental defendants facing custom, practice, or policy claims under § 1983).

[41] For a description of the study's methodology, see Schwartz, *supra* note 22, at 19-25. Professor Schwartz set out her rationale for selecting these five districts:

> I chose to look at decisions from district courts in the Third, Fifth, Sixth, Ninth, and Eleventh Circuits because I expected that judges from these circuits might differ in their approach to qualified immunity and to Section 1983 litigation more generally. This expectation was based on my review of district court qualified immunity decisions from each of the circuits, as well as a view, shared by others, that judges in these circuits range from conservative to more liberal. Moreover, commentators believe that courts in these circuits vary in their approach to qualified immunity, with judges in the Third and Ninth Circuits favoring plaintiffs, and judges in the Eleventh Circuit so hostile to Section 1983 cases that they are described as applying "*un* qualified immunity."
>
> I chose these five districts within these five circuits for two reasons. First, I expected that these five districts would have a large number of cases to review: from 2011 to 2012, these districts were among the busiest in the country, as measured by case filings. Second, these five districts have a range of small, medium, and large law enforcement agencies and agencies of comparable sizes.

Id. at 19-20 (footnotes omitted).

[42] *Id.* at 27. Even this likely overstates the prevalence of claims against governmental defendants. Professor Schwartz noted of the cases in which only governmental defendants were sued: "In some of these instances, plaintiffs apparently intended to sue individual officers (indicated by the fact that they named Doe defendants) but were ultimately unable to identify the officers." *Id.* at 27 n.82.

nine of ten § 1983 cases, individual public employees, entitled to assert the defense of qualified immunity, were named as defendants. Accordingly, the dataset indicates plaintiffs' attorneys are evidently willing to take on the burden of overcoming qualified immunity in the vast majority of cases they file, rather than bringing cases against public employers based on their customs, policies, or practices in which the defense of qualified immunity is unavailable, but which encounter stringent standards of proof.

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 § 1983 cases in which the defense was available,[43] 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.[44] Similarly, in his study of the trial of civil rights cases over a three-year period,[45] Alexander Reinert found there was no jury instruction or interrogatory on qualified immunity that was proposed or adopted in 70.3% of cases,[46] and in the cases that went to trial, qualified immunity instructions or interrogatories were proposed or adopted in approximately 15% of cases.[47] He concluded: "The overall picture this paints is one in which qualified immunity rarely, if ever, plays a role in jury trials of civil rights claims."[48]

There is good reason why qualified immunity is not likely to be a powerful defense in most § 1983 cases—plaintiffs' attorneys have little incentive to bring cases likely to be barred by that defense.

In § 1983 litigation, a "prevailing party" may recover its attorney's fees as part of the recoverable costs of litigation.[49] The

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[43] *Id.* at 29 tbl.2. There was considerable variation among the five districts studied, with qualified immunity raised in 54.7% of cases in the Southern District of Texas but only 23.9% of cases in the Eastern District of Pennsylvania. *Id.*

[44] *Id.* at 36 tbl.6.

[45] For a description of his methodology, see Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2080-81 (2018).

[46] *Id.* at 2083 tbl.1.

[47] *Id.* at 2083-84 tbl. 2.

[48] *Id.* at 2088.

[49] 42 U.S.C. § 1988(b) (2000) ("In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .").

Supreme Court interpreted the statute to mean a prevailing plaintiff "'should ordinarily recover an attorney's fee' from the defendant," but only "authorizes a district court to award attorney's fees to a defendant 'upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation.'"[50] Accordingly, plaintiff's attorneys, who recover their fees only if they prevail, have an incentive to bring only cases likely to have sufficient merit to generate revenue.[51] After all, if we reasonably assume most potential plaintiffs cannot afford to front both the costs of litigation and attorney's fees, plaintiffs' attorneys assume the risk their work will go uncompensated when they file a case—only if the plaintiff is a prevailing party able to recover attorney's fees through a judgment or settlement will the plaintiff's attorney obtain compensation.[52]

The risks assumed by plaintiffs' attorneys in civil rights litigation are therefore likely to drive decisions about whether to file a case. It follows that plaintiffs' attorneys should screen out cases likely to be barred by qualified immunity or some other defense, and instead, bring cases that involve the kind of egregious facts likely to overcome qualified immunity and other potential defenses.[53]

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[50] Fox v. Vice, 563 U.S. 826, 833 (2011) (citations omitted) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416, 421 (1978)).

[51] *Cf.* William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 707 (2016) ("[I]f the decisionmaker is the plaintiffs' attorney working on a contingency basis, the attorney must weigh the expected fees earned through litigation against the costs of bringing the suit. Indeed, given a limited budget of time and credit (for litigation expenses) that he can extend to his clients, an attorney working on contingency must concentrate his efforts on cases with the highest settlement value.").

[52] *Cf.* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 35 (2002) (observing that in environmental litigation, "[a]lthough attorneys' and expert witnesses' fees potentially are available to successful citizen suit plaintiffs, paying the up-front costs can be so prohibitive that only well-funded groups can afford to bring citizen suits.").

[53] This discussion has limited application to pro se plaintiffs, although the empirical evidence available suggests that pro se plaintiffs may have limited ability to select cases likely to have merit. *See, e.g.*, Scott Dodson, *A New Look at Dismissal Rates in Federal Civil Cases*, 96 JUDICATURE 127, 130-34 (2012) (documenting higher rates of dismissal of complaints in pro se cases and suggesting that the selection effects of legal rules favoring defendants are more pronounced in cases brought by counsel); Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 205-09 (2014) (documenting higher rates of pretrial adjudication in pro se cases and suggesting that the selection effects of legal rules favoring defendants are more pronounced in cases brought by counsel); Patricia Hatamayar Moore, *An Updated*

Indeed, the available empirical evidence indicates that plaintiffs' attorneys select cases that they think will be likely to overcome potential defenses such as qualified immunity. Professor Reinert, for example, interviewed attorneys representing plaintiffs in *Bivens* litigation and found: "Nearly every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage."[54] Julie Davies, in her interviews of plaintiffs' attorneys conducting civil rights litigation in the San Francisco area, noted: "Several attorneys conducting police misconduct litigation focused on qualified immunity as a substantial obstacle, although those practicing in the Ninth Circuit acknowledged the issue was easier to win there than elsewhere."[55] Professor Schwartz, in contrast, interviewed thirty-five plaintiffs' attorneys handling police misconduct cases in the five judicial districts that she studied,[56] and found that "[t]hirteen lawyers . . . report that they do not take qualified immunity into account when selecting cases, and another eleven report rarely declining cases because of qualified immunity,"[57] but added that attorneys who reported that they rarely or never considered qualified immunity at the screening stage identified "other concerns [that] duplicate and thereby minimize qualified immunity concerns," such as "select[ing] cases with facts so egregious and evidence so strong that the cases are not vulnerable to dismissal on qualified immunity grounds."[58] It seems

Quantitative Study of Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 609-22 (2012) (documenting higher rates of dismissal of complaints in pro se cases); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2143-51 (2015) (same); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1130 nn.121 & 123 (2020) (finding that in the five jurisdictions studied 16.1% of cases brought by pro se plaintiffs resulted in settlement, voluntary dismissal, or a plaintiff verdict, while 71% of counseled plaintiffs obtained one of these outcomes, even though only 3.5% of counseled cases and 1.5% of pro se cases were dismissed on qualified immunity).

[54] Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492 (2011).

[55] Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 244 (1997).

[56] For a description of her methodology in selecting attorneys to interview, see Schwartz, *supra* note 53, at 1113-19.

[57] *Id.* at 1131.

[58] *Id.* at 1138. (footnotes omitted). She also reported that some lawyers screened out claims rather than cases when they can "bring[] federal claims that cannot be dismissed

that whether plaintiffs' attorneys are selecting cases with qualified immunity in mind, or only the strength of the evidence, they will likely choose cases not barred by qualified immunity.

Accordingly, plaintiffs' attorneys are likely to avoid filing cases likely to encounter a successful qualified immunity defense. Given the difficulty of establishing a custom or policy claim against a public employer, moreover, those claims may well prove similarly unattractive to plaintiffs' attorneys. This is the most likely explanation for the data demonstrating that, despite the availability of a qualified immunity defense in cases against individual public officials, the vast majority of § 1983 cases alleging police misconduct name individual public officials as defendants.

B. The Prevalence of Indemnification

As we have seen, vicarious employer liability is justified because it gives an employer an incentive to ensure that its employees exercise due care.[59] With no *respondeat superior* liability under § 1983, there is reason to be concerned that employers' incentives are skewed by the absence of vicarious liability. The picture becomes more complicated, however, by the ubiquity of indemnification.

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 the scope of employment.[60] Indemnification of police

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on qualified immunity grounds—including claims for injunctive relief and claims against municipalities—when they think qualified immunity could be an issue." *Id.* at 1140.

[59] *See supra* text accompanying note 31.

[60] *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 269-72 (2020) (finding that 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). *See also* Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587,

officers and other public employees is also often required by collective bargaining agreements.[61] 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."[62]

The prevalence of indemnification should be unsurprising. Indemnification is an efficient vehicle for minimizing the risk that their employees' exposure to liability will reduce their productivity by deterring conduct that may provoke litigation and inhibit the willingness of highly-qualified individuals to take these positions.[63] If public employees were not indemnified for their legal costs, accordingly, that could produce a substantial chilling effect on their willingness to undertake activities that might expose them to

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590-96 (2000); Rosenthal, *supra* note 20, at 812-13 n.51, 819-20; Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1216-23 (2001); Dina Mishra, Note, *When the Interests of Municipalities and Their Officials Diverge: Municipal Dual Representation and Conflicts of Interest in § 1983 Litigation*, 119 YALE L.J. 86, 101-02 (2009).

[61] *See, e.g.*, Teressa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 865-67 (2017) (describing contractual indemnification obligations); Rushin, *supra* note 5, at 1221 (same).

[62] Schwartz, *supra* note 17, at 912. Another study involving *Bivens* litigation against employees of the United States Bureau of Prisons (BOP), coauthored by Professor Schwartz, involved "a dataset of 171 cases in which the plaintiffs presented a *Bivens* claim at some point during the course of litigation and secured a settlement or payment after judgment. In only 8 of the 171 cases (less than 5%), BOP employees and their insurers paid a share of the settlement amount. . . . [W]e found no case in which the BOP itself appears to have contributed agency funds to plaintiffs' settlements in successful *Bivens* claims. Instead, government attorneys arranged to have these matters resolved with payments from the Judgment Fund, which is funded by the Treasury of the United States." James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 579 (2020).

[63] For a helpful explication of the economics of public employee indemnification, see Kramer & Sykes, supra note 20, at 272-76. Indeed, there is a long history of indemnification of public officials in the United States, dating to the earliest years of the nation. For a helpful discussion, see generally James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010).

liability.[64] What is more, we should expect that § 1983 litigation will usually be brought against public employees who are entitled to indemnification; absent indemnification, plaintiffs would likely fear that an individual public employee might lack sufficient assets to satisfy a judgment.[65]

Accordingly, although § 1983 litigation is brought against individual public employees, their legal costs are generally paid by their employers.

Given that the costs of § 1983 litigation against police officers are generally passed along to their employers through indemnification, one might conclude that despite the absence of vicarious employer liability under § 1983, municipal employers ultimately bear the same financial burden as those who face vicarious liability, and therefore retain an incentive to supervise their employees in a manner that ensures that they exercise due

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[64] Indeed, the Supreme Court has sought to justify the defense of qualified immunity because of "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987)). *Accord,* Filarsky v. Delia, 566 U.S. 377, 388-90 (2012); Richardson v. McKnight, 521 U.S. 399, 409-12 (1997). Qualified immunity, however, is at best an incomplete answer to this threat of overdeterrence, since it does not protect public employees against the often substantial costs of defending litigation, even if it encounters a successful qualified immunity defense.

[65] *See* Schwartz, *supra* note 17, at 952 ("Widespread indemnification facilitates § 1983's goal of compensating plaintiffs after a settlement or judgment in their favor. If officers were not indemnified, they would be personally responsible for satisfying six- and seven-figure settlements and judgments from their relatively modest annual salaries. Because many law enforcement officers could not pay the settlements and judgments entered against them, many plaintiffs would go uncompensated even after a fact finder concluded that their rights were violated. Indemnification ensures that judgments and settlements will be satisfied from governments' deep pockets."). *Cf.* Alphonse A. Gerhardstein, *Making a Buck While Making a Difference*, 21 MICH. J. RACE & L. 251, 261 (2016) ("When you select defendants, make sure you are suing defendants that are either insured or have resources to pay a judgment. If the individual defendants were discharged and will not be indemnified or covered by the entity, then take care to ensure that you will be able to collect any award from them. Obtaining a judgment against a defendant who cannot pay will not solve the client's goal of receiving fair compensation."); Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1565 (2020) ("The City of East Cleveland . . . does not have the resources to pay settlements and judgments entered against it and its officers. East Cleveland is self-insured, so lawsuit payments come from its general funds. And the city is reportedly on the verge of bankruptcy. As a result, attorneys who regularly bring civil rights cases against Cleveland are unwilling to sue the East Cleveland Police Department and its officers." (footnotes omitted)).

care not to violate the rights of others. Indeed, a number of scholars have advanced arguments along these lines.[66] This conclusion, however, is complicated by the fact that in § 1983 litigation, by virtue of the absence of *respondeat superior*, in the vast majority of cases, as we have seen, despite the availability of a potential qualified immunity defense, plaintiffs name an individual officer as a defendant.[67] That brings into play the ethical obligations of the lawyer for the officer.

C. The Fiduciary Duties of the Officer's Counsel

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.[68] In her study, Professor Schwartz found that "law

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[66] *See, e.g.*, SCHUCK, *supra* note 12, at 100-21 (proposing that public employers' financial responsibility for constitutional violations committed by their employees within the scope of employment will deter constitutional violations); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 829-38 (1992) (same).

[67] *See supra* text accompanying notes 41-42.

[68] For examples of legislation authorizing the government to defend its officers, see CAL. GOV'T CODE § 995 (West 2020) (requiring a "public entity" to "provide for the defense" of civil actions against its employees); FLA. STAT. ANN. § 111.07 (West 2020) (authorizing state and local agencies to provide defense of employees); IDAHO CODE ANN. § 6-903(2)(i) (West 2020) (requiring defense of public employees); IOWA CODE ANN. § 670.8 (West 2020) (same); KY. REV. STAT. ANN. § 65.2005(1) (West 2020) (requiring defense of local employees); ME. REV. STAT. ANN. tit. 14, § 8112 (West 2020) (requiring governmental entities to assume defense of employees); MD. CODE ANN., CTS. & JUD. PROC. § 5-302 (West 2020) (requiring local governments to assume defense of employees); MASS. GEN. LAWS ANN. ch. 258, § 2 (West 2020) (requiring public attorneys to defend public employees); MISS. CODE ANN. § 25-1-47 (West 2020) (authorizing defense of local employees); MICH. COMP. LAWS ANN. § 691.1408 (West 2020) (same); MINN. STAT. ANN. § 466.07 (West 2020) (requiring municipalities to defend employees); MONT. CODE ANN. § 2-9-305 (West 2020) (requiring defense of state employees); NEV. REV. STAT. ANN. § 41.0339 (West 2020) (requiring defense of public employees); N.D. CENT. CODE ANN. § 32-12.2-03 (West 2020) (requiring defense of state employees); N.J. STAT. ANN. 40A:14-155 (West 2020) (requiring defense of police officers); N.M. STAT. ANN. § 41-4-4 (West 2020) (requiring defense of public employees); N.C. GEN. STAT. ANN. § 143-300.3 (West 2020) (requiring defense of state employees); OHIO REV. CODE ANN. § 2744.07(A)(1) (West 2020) (requiring defense of local public employees); OR. REV. STAT. ANN. §§ 30.285(3), 30.287(1) (West 2020) (requiring defense of state employees); 42 PA. STAT. AND CONS. STAT. ANN. § 8547(a) (West 2020) (requiring defense of local employees); 9 R.I. GEN. LAWS ANN. § 9-31-8 (West 2020) (same); S.C. CODE ANN. § 1-7-50 (2020) (requiring

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."[69]

The appointment of a lawyer to represent a police officer named as a defendant in civil litigation creates 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."[70] 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.[71] 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.[72] This obligation extends to information that is not provided by a client, nonconfidential, or

Attorney General to defend state and local employees); VT. STAT. ANN. tit. 3, § 1101(a) (West 2020) (requiring defense of state employees); WASH. REV. CODE ANN. § 4.92.070 (West 2020) (requiring payment of costs of defending state employees); W. VA. CODE ANN. § 29-12A-11(a)(1) (West 2020) (requiring defense of local employees).

[69] Schwartz, *supra* note 17, at 915-16.

[70] MODEL RULES OF PRO. CONDUCT Preamble and Scope (AM. BAR ASS'N 2002). To similar effect, see RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 16 (AM. LAW INST. 2000) ("[A] lawyer must, in matters within the scope of the representation: (1) proceed in a matter reasonably calculated to advance the client's lawful objectives, as defined by the client after consultation.").

[71] *See, e.g.*, RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (AM. L. INST. 2000) ("[T]he attorney-client privilege may be invoked . . . with respect to: (1) a communication (2) made between [attorney and client] (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.").

[72] *See* MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2012) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."); *id.* r. 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent . . . ."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 60(1)(a) (AM. L. INST. 2000) ("[D]uring and after representation of a client . . . [a] lawyer may not use or disclose confidential client information as defined in [section] 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client . . . . "); *id.* § 59 ("Confidential client information consists of information relating to representation of a client, other than information that is generally known.").

otherwise protected by the attorney-client privilege.[73] Nor may a lawyer paid by a public employer to represent an individual 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.[74]

A useful analogy for ascertaining the obligations an attorney employed or paid by a public employer has can be found by considering the obligations of an attorney hired and paid by an insurance company to represent an insured, pursuant to the terms of an insurance policy that provides the insured with a contractual right of indemnification. Nothing in the professional obligations of an attorney prohibit arrangements in which the attorney is hired

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[73] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.6, cmt. 3 (AM. BAR ASS'N 2012) ("The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."); *id.* r. 1.8, cmt. 5 ("Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client . . . . Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 59, cmt. b (AM. L. INST. 2000) ("This definition [of confidential client information that may not be disclosed by an attorney] covers all information relating to representation of a client, whether in oral, documentary, electronic, photographic, or other forms. It covers information gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege. It includes work product that the lawyer develops in representing the client, such as the lawyer's notes to a personal file, whether or not the information is immune from discovery as lawyer work product . . . . The definition includes information that becomes known by others, so long as the information does not become generally known." (citations omitted)).

[74] *See* MODEL RULES OF PRO. CONDUCT r. 5.4(c) (AM. BAR ASS'N 2002) ("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."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 134(2) (AM. L. INST. 2000) ("A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if: (a) the direction does not interfere with the lawyer's independence of judgment; (b) the direction is reasonable in scope and character, such as by reflecting the obligation borne by the person directing the lawyer; and (c) the client consents to the direction under the limitations and conditions provided in [section] 122."); *id.* § 122(2) ("[A] lawyer may not represent a client if . . . in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.").

and paid by a third party, such as an insurer, as long as the client consents to the arrangement.[75] If a conflict subsequently arises between the interests of the insurer and insured, however, counsel is ethically obligated to protect the interests of the client, the insured, and not the insurance company that originally engaged the attorney to represent the insured.[76]

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[75] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.8(f) (AM. BAR ASS'N 2012) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 134, cmt. c (AM. L. INST. 2000) ("This Section accommodates two values implicated by third-person payment of legal fees. First, it requires that a lawyer's loyalty to the client not be compromised by the third-person source of payment . . . . Second, however, the Section acknowledges that it is often in the client's interest to have legal representation paid for by another. Most liability-insurance contracts, for example, provide that the insurer will provide legal representation for an insured who is charged with responsibility for harm to another." (parenthetical omitted)).

[76] *See, e.g.*, ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 751 (6th ed. 2018) ("When the defense attorney undertakes to represent the insured, a fiduciary relationship enters the picture; the attorney's fiduciary obligation to the insured, which exists independently of the liability insurance contract between insurer and insured, requires competent and diligent representation of the insured's interests."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 134, cmt. f (AM. L. INST. 2000) ("With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud and, if applicable, consistent with the lawyer's duties to the insurer as co-client." (citation omitted)); James M. Fischer, *Insurer-Policyholder Interests, Defense Counsel's Professional Duties, and the Allocation of Power to Control the Defense*, 14 CONN. INS. L.J. 21, 28-29 (2007) ("When the rights of the policyholder and insurer are in conflict, the courts consistently hold that counsel's duties to the policyholder trump counsel's obligations or desire to accommodate the insurer."). For judicial statements of this view, see, for example, Prevratil v. Mohr, 678 A.2d 243, 250 (N.J. 1996) ("Plainly stated, in any litigation, counsel for an insurer must put the insured's interests ahead of the insurer's." (citing Lieberman v. Employers Ins., 419 A.2d 417 (N.J. 1980)); Purdy v. Pacific Auto Ins. Co., 203 Cal. Rptr. 524, 533 (Cal. Ct. App. 1984) ("[W]here an insurance carrier is called upon to defend its insured, the attorney retained by the carrier for this purpose owes the same fiduciary duty to the insured as he or she would had the insured made the selection of counsel. The attorney's primary duty has been said to be to further the best interests of the insured."); Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133, 1137 (Wash. 1986) ("[D]efense counsel retained by insurers to defend insureds . . . owe a duty of loyalty to their clients. Rules of Professional Conduct 5.4(c) prohibits a lawyer, employed by a party to represent a third party, from allowing the employer to influence his or her professional judgment . . . [and the Rules] demand[] that counsel understands that he or she represents only the *insured*, not the company.").

The possibility that the interests of a police officer named as a defendant in § 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.

Police departments frequently have policies that address the use of force. In a 2007 survey, the Bureau of Justice Statistics found: "Nearly all local police departments had written policies pertaining to the use of lethal (97%) and less-than-lethal (96%) force by their officers."[77] A 2011 survey of more than 1,000 law enforcement agencies found that over 80% of responding agencies employed a use-of-force continuum in which officers were directed to utilize force proportionate to the situation confronting them.[78] In their survey of the fifty largest policing agencies in the United States, Brandon Garrett and Seth Stoughton found that these agencies "have widely varying force policies," but most have policies that require officers to assess what force is justified along a continuum or matrix: "Of the forty-nine responding largest agencies, thirty-one included some form of a force continuum or matrix and six included a graphic representation of it."[79] And, in their review of a repository of use-of-force policies of the seventy-

[77] BRIAN A. REAVES, BUR. OF JUST. STATS., U.S. DEP'T OF JUST., LOCAL POLICE DEPARTMENTS, 2007, at 18 (2010) (citation omitted).

[78] *See* WILLIAM TERRILL, EUGENE A. PAOLINE III & JASON INGRAM, FINAL TECHNICAL REPORT DRAFT: ASSESSING POLICE USE OF FORCE POLICY AND OUTCOMES 15-16 (2011) ("[W]e asked respondents if they relied upon a force continuum approach as part of their less lethal force policy. We offered explicit direction so as to clarify our intent stating, '[b]y force continuum, we mean a guideline (sometimes depicted graphically) that officers can use to determine the type of force that may be used in generic situations. Such guidelines are sometimes (but not always) linked with varying forms of citizen resistance in an attempt to assist officers in matching the level of force to the level of resistance/threat encountered. . . . Over [eighty] percent of the respondents indicated that they did rely on some form of a force continuum.").

[79] Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 280 (2017). They added: "Just under half, or twenty-four, of these large agencies counseled minimizing the need to use force, or that officers use the minimum force necessary." *Id.* at 281. Moreover, "[m]ost of the largest departments did require or encourage verbal warnings before using lethal force," while "[f]ewer agencies—only about half—encourage or require verbal warnings before using *non*-lethal (less-lethal or less-than-lethal) force." *Id.* at 282-83.

five largest cities, Osagie Obasogie and Zachary Newman found that all of these policies require that officers employ "reasonable" force, often stated at a high level of generality that endeavors to track constitutional standards, while 92% of policies address the level of force officers may use, and 79% also regulate the permissible use of force in terms of the level of resistance faced by officers.[80]

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.[81] 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. This is especially true for § 1983 cases that are not barred by qualified immunity. In such cases, the plaintiff has alleged, or, at the summary judgment stage, has adduced evidence of a

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[80] *See* Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1303-13 (2019) (reviewing policies on use-of-force, level-of-force, and resistance).

[81] *See, e.g.*, BUR. OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., POLICE CHIEFS DESK REFERENCE: A GUIDE FOR NEWLY APPOINTED POLICE LEADERS 185 (2d ed. 2008) [hereinafter POLICE CHIEFS DESK REFERENCE] ("Rules and regulations usually proscribe specific behavior that will result in employees being disciplined for failing to follow the guidelines provided." (footnote omitted)); OFF. OF COMM. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: RECOMMENDATIONS FROM A COMMUNITY OF PRACTICE 53 (2012) [hereinafter STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS] ("A matrix specifies the nature of offenses or policy violations and associates them with specific penalty options or ranges of discipline. Within such a system, a policy violation falls within a certain class or category of violation that, in turn, corresponds to a particular range or set of discipline options that a decision-maker can consider according to the totality of the circumstances present in a given case."); LOU REITER, LAW ENFORCEMENT ADMINISTRATIVE INVESTIGATIONS: A MANUAL GUIDE § 1.2 (4th ed. 2019) ("Misconduct is an act or omission by an employee that if proven true would normally result in some form of discipline, sanction or remediation. This would include: 1. Commission of a criminal act, 2. Neglect of duty, 3. Violation of an agency policy, procedure, rule or regulation, core value, training standard, or 4. Conduct that may tend to reflect unfavorably upon the employee and/or agency.").

violation of clearly established law.[82] Violations of well-settled rules, of course, present a strong case for internal discipline under use-of-force policies that track or exceed the settled constitutional standards governing the use of force. Moreover, as we have seen, plaintiffs' attorneys have strong incentives to file those cases that they expect will overcome qualified immunity and other potential defenses.[83] Thus, we should expect a substantial volume of § 1983 litigation in which the plaintiff adduces evidence that a police officer has violated clearly established constitutional standards. Indeed, as we have also seen, the available empirical evidence indicates that § 1983 plaintiffs secure favorable judgments or settlements in the clear majority of § 1983 cases involving alleged police misconduct.[84]

Consider, then, the position of the attorney representing an officer in § 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

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[82] *See, e.g.*, Behrens v. Pelletier, 516 U.S. 299, 308 (1996) ("[T]he legally relevant factors bearing upon the *Harlow* question [whether the action is barred by qualified immunity] will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry." (emphasis in original) (citation omitted)).

[83] *See supra* text accompanying notes 49-58.

[84] *See supra* text accompanying note 22.

attention of the client's employer and could lead to discipline.[85] 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.

It is not only the threat of employer discipline that may cause an officer's attorney to be cautious about what type of information should be disclosed to the officer's employer. There is also the risk that the officer might be denied indemnification. The obligation of public employers to indemnify their employees for acts undertaken within the scope of employment is not universal; in their survey of state indemnity statutes, for example, Professors Nielson and Walker found that eighteen states do not indemnify for acts done with malice, eighteen states exclude from the obligation to indemnify misconduct that is willful, wanton, or intentional, five states deny indemnification for reckless conduct and six for gross negligence, seven states deny indemnification for criminal conduct or conduct undertaken with criminal intent, eleven states exclude indemnification for fraud, three states exclude conduct reflecting bad faith, and eight states exclude malfeasance or misconduct in office.[86] Accordingly, at least absent the client's consent, if the attorney permits information to come to the attention of the officer's employer that suggests a basis on which the employer could deny indemnification, the attorney has breached the duty to zealously protect the client's interests.[87]

In this connection, it is also worth remembering that in most jurisdictions, officers are represented by unions with considerable political heft, and which advocate vigorously for their members.[88] Police unions would be likely to complain vigorously if they believed

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[85] *Cf.* Keenan & Walker, *supra* note 5, at 199 ("On matters of discipline, the interests of police managers diverge from those of rank-and-file police officers. Police managers have a formal responsibility to direct their organizations and to maintain high standards of professionalism and integrity. This includes the responsibility to investigate alleged misconduct and appropriately discipline any employee found guilty of misconduct." (footnote omitted)).

[86] *See* Nielson & Walker, *supra* note 60, at 275-77.

[87] *Cf.* Schwartz, *supra* note 9, at 1065 n.244 ("The Portland auditor posited that a lawyer representing an individual officer may believe that turning over information about her client to the police department would violate her ethical obligation to represent her client's interests.").

[88] For a helpful discussion of this point, see Fisk & Richardson, *supra* note 6, at 744-47.

that their members' interests were not being protected by their attorneys during the course of civil litigation. Unions could also monitor the performance of lawyers provided to their members to ensure that they take no actions prejudicial to members' interests. And, as we have seen, police unions themselves frequently select the attorneys that represent their members, albeit at the expense of their employers.[89] To the extent that a lawyer for an officer breaches the obligation not to disclose information adverse to the client, the lawyer would even be exposed to professional discipline by those who enforce the ethical obligations of lawyers.[90]

Although no scholarship to date has addressed the manner in which § 1983 litigation can create a conflict of interest between the officer and the police department that employs the officer by unearthing evidence that could expose the employee to discipline, a handful of student notes have recognized that because police departments and officers may present incompatible defenses in § 1983 litigation, counsel must be wary of the a potential for conflicts of interest before undertaking to represent both an officer and the entity that employs the officer in § 1983 litigation.[91] There are also

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[89] *See supra* text accompanying note 69.

[90] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2016) ("It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . . ."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 5(1) (AM. L. INST. 2000) ("A lawyer is subject to professional discipline for violating any provision of an applicable lawyer code.").

[91] *See, e.g.*, Mishra, *supra* note 60, at 97-127 (discussing potential conflicts and arguing that joint representation should be prohibited absent a fully informed waiver); Ann M. Scarlett, Note, *Representing Government Officials in Both Their Individual and Official Capacities in Section 1983 Actions After* Johnson v. Board of County Commissioners, 45 U. KAN. L. REV. 1327, 1337-44 (1997) (advising against joint representation); Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825, 2837-55, 2859-62 (1997) (discussing potential conflicts and concluding that attorneys cannot represent both public employers and police officers in § 1983 litigation). *Cf.* Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 61 (2003) ("A special and rather unique series of concurrent conflicts issues come up in the situation where government attorneys may be called upon to represent both government entities and individual employees of those entities in the same case. A classic example might be where a city attorney's office is called on to represent both the city and its police department, as well as one or more individual police officers, in a civil suit alleging police brutality. The potential for conflict in such a situation is inherent, as the city may escape liability by proving that the individual

a handful of judicial opinions cautioning that an attorney may not represent both a police officer and the department that employs the officer in § 1983 litigation when there is a serious risk of inconsistent defenses.[92] Thus, there are considerable ethical perils when a lawyer represents both a police officer and the governmental entity that employs the officer in a case alleging that the officer is guilty of misconduct. Lawyers must either refrain from joint representation, or else take care not to compromise the interests of either client.

D. The Effects of the Defense Lawyer's Ethical Obligations on the Flow of Information to Public Employers

Although lawyers for individual police officers are under an obligation to take care not to divulge information adverse to their clients to their employers, one might question whether this observation has practical significance. After all, employers might have other ways to learn whether litigation has unearthed

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officers acted outside the scope of their employment, but the individual officers may escape liability by proving that their actions fell within the scope of their employment." (footnote omitted)); Debra Bassett Perschbacher & Rex R. Perschbacher, *Enter at Your Own Risk: The Initial Consultation and Conflicts of Interest*, 3 GEO. J. LEGAL ETHICS 689, 706 (1990) ("The reason that a conflict of interest is created in municipality-employee situations is because the municipality may avoid liability if the employee was acting outside the scope of his or her employment.").

[92] *See, e.g.*, Johnson v. Bd. of Cnty. Comm'rs, 85 F.3d 489, 493-94 (10th Cir. 1996) (concluding counsel must advise individual public employee of need for separate representation); Ross v. United States, 910 F.2d 1422, 1432 (7th Cir. 1990) (discussing "serious potential for conflict" between interests of county and its employee); Gordon v. Norman, 788 F.2d 1194, 1196-99 (6th Cir. 1986) (discussing need for counsel to be cautious about representing both public employer and employees); Dunton v. Cnty. of Suffolk, 729 F.2d 903, 907-10 (2d Cir. 1984) (attorney could not represent both public employer and employee in light of availability of defense that employee did not act within the scope of employment); Van Ooteghem v. Gray, 628 F.2d 488, 495 n.7 (5th Cir. 1980) ("[A] serious problem of conflict of interest could exist in future § 1983 actions in which one attorney represents both a county and a county official individually."). *Cf.* 28 C.F.R. § 50.15(a)(2) (2020) ("Upon receipt of the individual's request for counsel, the litigating division [of the U.S. Department of Justice] shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expense.").

information that warrants discipline of individual officers, as well as reforms to policy, supervision, or training. Perhaps they obtain such information by monitoring pending proceedings against individual officers; or, in cases in both employer and employee are named as defendants, perhaps they secure separate counsel who monitors the litigation and forwards all pertinent information to the employer. Indeed, the available empirical evidence indicates that in most § 1983 cases involving alleged police misconduct, both individual officers and the municipality that employs them are named as defendants.[93] Or, perhaps plaintiffs or their lawyers provide such information to those who employ officers accused of misconduct.

The question whether the ethical obligations of lawyers for individual officers inhibit employers from learning about information unearthed in civil litigation that could be useful to improve training, supervision of police, or to impose discipline on officers guilty of misconduct, is ultimately an empirical one. It is not easy, however, to identify pertinent empirical evidence. After all, there are no readily available metrics for what kinds of information about pending litigation are conveyed to police or municipal executives. Still, there is good reason to be skeptical about whether municipalities are able to monitor civil litigation against police officers to identify evidence of police misconduct that might warrant discipline or policy reform.

At the outset, the cost of monitoring civil litigation may inhibit its utility as a source of information for public employers. In cases in which only individual defendants are named, a public employer must bear the cost of assigning legal or other staff with relevant expertise to monitor the proceedings. Even then, it may not be easy to glean useful information when a nonparty to litigation attempts to act as a monitor; information disclosed in discovery is not ordinarily placed in public records available for a nonparty's review,[94] and disclosure of such information to nonparties is often

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[93] For example, one survey of municipal attorneys found that seventy-five percent of the respondents reported that the city was named as a defendant in § 1983 cases alleging police misconduct. *See* Lisa D. Hawke, Note, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK U. L. REV. 831, 847-48, 848 n.130 (2005).

[94] *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) ("[P]retrial depositions and interrogatories are not public components of a civil trial. Such

prohibited by protective order.[95] A public employer obligated to secure counsel for a police officer sued for acts within the scope of employment might instruct the officer's lawyer to provide it with information about the officer's conduct developed in the litigation, but as we have seen, the attorney would be obligated to refuse to follow the instructions of the client's employer to the extent they could prejudice the interests of the attorney's client.[96]

In cases in which both an individual police officer and the officer's employer are named as defendants, absent the officer's informed consent to representation by conflict-ridden counsel, the same attorney may not represent both employer and employee if

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proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice." (citation and footnote omitted)); FED. R. CIV. P. 5(d)(1)(A) ("[D]iscovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission."). Theoretically, a public employer or even a nongovernmental litigant concerned with police misconduct might seek to intervene as a party in litigation involving police misconduct, but the right to intervene is limited to those with a statutory right to intervene or a claim or defense in common with those at issue in the litigation. *See* FED. R. CIV. P. 24(a)-(b) ("[T]he court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute . . . . [T]he court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact.").

[95] *See* FED. R. CIV. P. 26(c)(1)(A) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . forbidding the disclosure or discovery."). *Cf.* Bond v. Utreras, 585 F.3d 1061 (7th Cir. 2009) (journalist could not challenge protective order barring disclosure of information produced in discovery in civil litigation involving allegations of police misconduct when the information was not filed with the court, and the case had been subsequently been settled). *See also* Jon Loevy, *Truth or Consequences: Police "Testilying"*, 36 LITIG. 13, 20 ("If someone makes a complaint that a police officer whacked her on the head with a baton or shot her with a taser without justification, the department's investigators will undertake an investigation, but no one will ever see it. If someone is savvy enough to make a Freedom of Information Act request, towns will either refuse to turn documents over or redact them beyond recognition. Many state statutes exempt these documents expressly. And if a civil lawsuit is filed, municipal lawyers will consume substantial legal resources fighting in court to keep the documents under a strict protective order, sharply limiting who can review them."). For an exploration of the prevalence of protective orders, often following an agreement of the parties, see Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1275-85 (2020).

[96] *See supra* text accompanying notes 70-74.

their interests come into conflict or are likely to do so.[97] Thus, a public employer must bear the cost of securing separate counsel if it wishes the litigation to be handled by an attorney free to report evidence of an officer's misconduct to the officer's employer. If the public employer does not bear the cost of separate counsel, no attorney is available that is ethically permitted to relate information adverse to the interests of the officer to the officer's employer.

Prior to the current study, there was no data available indicating how often municipalities choose to be represented by separate counsel, and how often they waive potential conflicts and permit the attorney for the officer to represent the municipality as well, save for one student-authored note suggesting, based on an examination of a handful of cases and interviews, that the use of separate counsel is rare as a consequence of its cost.[98]

Because the extent to which municipal defendants utilize separate counsel when both individual employees and their employer are sued is an empirical question, for the present inquiry, the dockets in the cases that Professor Schwartz reviewed in her

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[97] *See* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2002) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client . . . and (4) each affected client gives informed consent, confirmed in writing."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 121 (AM. L. INST. 2000) ("Unless all affected clients and other necessary persons consent . . . a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."); *id.* § 128 ("Unless all affected clients consent . . . a lawyer in civil litigation may not: (1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter . . . .").

[98] *See* Mishra, *supra* note 60, at 88 ("Because many of the same facts and elements relate to § 1983 claims against municipalities as to § 1983 claims against municipal officials in their individual capacity, the same legal team frequently will defend both a municipality and its official in a § 1983 case.") (citing cases and interviews with municipal attorneys).

study of § 1983 cases filed against police officers and other law enforcement officials in 2011 and 2012 were reviewed and coded to examine a variable not considered in her study—whether, in cases in which both officers and their employer were named as defendants, they were represented by separate counsel.

Professor Schwartz found that of the 1,183 § 1983 cases alleging misconduct by a law enforcement officer in her study, in 99 of those cases, or 8.4%, were brought solely against municipalities, and/or sought solely injunctive or declaratory relief.[99] The remaining cases accordingly involved damages claims made against individual officers. The current study involves an additional analysis of the latter cases, which not only constitute some 91.6% of § 1983 cases alleging police misconduct, but are also are the cases most likely to involve allegations of serious misconduct by an individual officer. Moreover, because officers can assert a defense of qualified immunity in these cases and not others, the likelihood of a conflict of interest between an officer and the officer's employer is greatest.

The table below summarizes the results of coding the dockets in the five judicial districts in Professor Schwartz's dataset in which claims seeking damages against individual defendants were made.[100] Cases were coded into one of four categories: cases in

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[99] Schwartz, *supra* note 22, at 27 tbl.1.

[100] The strategy for identifying and searching case dockets was described by Professor Schwartz:

> I reviewed the dockets of cases filed in 2011 and 2012 in the five districts in my study. I searched case filings in the five districts in my study through Bloomberg Law, an online service that has dockets otherwise available through PACER and additionally provides access to documents submitted to the court—complaints, motions, orders, and other papers. Within Bloomberg Law, I limited my search to those cases that plaintiffs had designated under the broad term "Other Civil Rights," nature-of-suit code 440. . . . I reviewed the complaints associated with these 3,748 dockets and included in my dataset those cases, brought by civilians, alleging constitutional violations by state and local law enforcement agencies and their employees.

Schwartz, *supra* note 22, at 21-22 (footnotes omitted). Identification of the dockets made possible by the availability of Professor Schwarz's database. Joanna C. Schwartz, *Data from: How Qualified Immunity Fails*, DRYDAD (July 6, 2020), https://datadryad.org/stash/dataset/doi:10.5061/dryad.sbcc2fr3w [https://perma.cc/AC9W-T232]. Of the ten datasets made available by Professor Schwartz, five datasets collected cases where qualified immunity can be raised. The current study reviewed those five datasets, one from each district. Each dataset was

which the same counsel represented the employer and the officer (Joint Representation), cases in which separate counsel represented the municipal and individual defendants (Separate Representation), cases in which a code for separate or joint representation was not applicable because only municipal or individual defendants were named (N/A), and cases in which it was impossible to assign a code because the docket did not contain sufficient information to ascertain whether municipal and individual defendants were represented jointly or separately (Unknown):[101]

further filtered to those identified by Professor Schwartz as having a claim against one or more individual officers and an official capacity claim against municipality. This represented approximately 944 dockets of cases from the five judicial districts as follows: E.D. Pa., 357 cases; M.D. Fla., 149 cases; N.D. Cal., 209 cases; N.D. Ohio, 129 cases; and S.D. Tex., 100 cases. For the current study, each case docket was retrieved on Westlaw and the "Participant Information" section was reviewed. As needed, complaints and other filings were reviewed to identify the relevant defendants. When more information was necessary dockets and other filings were cross-checked or retrieved on Bloomberg Law. These datasets are on file with the author and Professor Sherry Leysen, the Director of the Rinker Law Library at Chapman University, Fowler School of Law.

[101] Cases in which separate counsel represented at least one of the individual law enforcement defendants were coded as involving separate representation. In some cases, defendants were named that were neither units of government nor law enforcement officials. The representation of those additional parties was ignored for purposes of coding. Finally, in what may be an overly conservative assumption, cases in which different attorneys from the same firm or government law department separately appeared for governmental and individual defendants, were coded as cases of separate representation (this occurred in a small number of cases), even though the prohibition on using information relating to the representation of a client applies not only to the individual lawyer representing that client, but also to all other lawyers in the same firm. *See* MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR ASS'N 2020) ("(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. . . . (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 123 (AM. L. INST. 2000) ("Unless all affected clients consent to the representation . . . the restrictions upon a lawyer imposed by §§ 125-135 also restrict other affiliated lawyers who: (1) are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association; (2) are employed with that lawyer by an organization to render legal services either to that organization or to others to advance the interests or objectives of the organization; or (3) share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office.").

District	Joint Representation	Separate Representation	N/A	Unknown
E.D. Pa.	294 (82%)	7 (2%)	38 (11%)	18 (5%)
M.D. Fla.	97 (65%)	25 (17%)	20 (13%)	7 (5%)
N.D. Cal.	183 (88%)	5 (2%)	8 (4%)	13 (6%)
N.D. Ohio	106 (82%)	15 (12%)	6 (5%)	2 (1%)
S.D. Texas	72 (72%)	18 (18%)	7 (7%)	4 (4%)
Total	**752 (80%)**	**70 (7%)**	**79 (8%)**	**44 (5%)**

Two key points emerge. First, the vast majority of § 1983 cases alleging police misconduct name both municipal and individual defendants. In at least 87% of cases, both were named (and in another 8% of cases the docket was incomplete). Second, in the vast majority of cases, defense counsel jointly represents both individual officers and their governmental employer. Joint representation occurred in 80% of all cases; and in more than 91% of cases in which both individual and governmental defendants are named, and their representation can be determined from the docket (752 out of 822 cases). Although there is some variation between the five judicial districts, separate representation of municipal defendants and their employees seems to be very much the exception and not the rule. The rate of separate representation was highest in the Middle District of Florida, but even there, the separate representation of individual and municipal defendants occurred in less than one-fifth of cases. The lowest rate of separate representation was quite low—only 2%—in the Eastern District of Pennsylvania and the Northern District of California.

In cases of joint representation, the impact of the potential conflict between the interests of a public employer and its employee is likely to be greatest. In such cases, the attorney retained to represent the employee is, of course, obligated the treat that

employee as a client. [102] In turn, as we have seen, a lawyer is under an obligation to take no action that may harm the interests of a client.[103] Thus, absent the client's informed waiver, a lawyer who takes action that may prove prejudicial to the client—such as conveying information to the client's employer that may lead to professional discipline against the client—would breach the lawyer's professional obligations. Moreover, as we have seen, powerful police unions will likely monitor the manner in which their members are represented to ensure that officers' interests are protected.[104]

To be sure, in cases of joint representation, an attorney also has a fiduciary obligation to the governmental defendant that employs the officer, but, when the client is a unit of government, although the "client" is generally defined as the officials authorized to act on behalf of that unit of government,[105] as a practical matter, it is frequently difficult for an attorney to identify precisely who is authorized to speak on behalf of the government or what interests the attorney is obligated to protect.[106] Thus, it is far easier for a

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[102] *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 97 cmt. c (AM. L. INST. 2000) ("When a lawyer is retained to represent a specific individual . . . the person (in the appropriate capacity) is the client, unless the use of the individual's name is merely nominal and the government is the interested party.").

[103] *See supra* text accompanying notes 70-74.

[104] *See supra* text accompanying note 88.

[105] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.13(a) (AM. BAR ASS'N 2003) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 96(1)(a) (AM. L. INST. 2000) ("When a lawyer is employed or retained to represent an organization . . . the lawyer represents the interests of the organization as defined by its responsible agents pursuant to the organization's decision-making procedures . . . .").

[106] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 9 (AM. BAR ASS'N 2003) ("Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole." (citation omitted)); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 97 cmt. c (AM. L. INST. 2000) ("No universal definition of the client of a governmental lawyer is possible. For example, it has been asserted that government lawyers represent the public, or the public interest. However, determining what individual or individuals personify the government requires reference to the need to sustain political and organizational responsibility of governmental officials, as well as the organizational arrangements structured by law within which governmental lawyers work. Those who speak for the governmental client may differ from one representation

lawyer to assess the interests of the lawyer's individual client than that of a governmental entity. In any event, a public employer may be willing to waive its right to object to potential conflicts of interest in order to avoid the cost of securing separate representation for it and its employees,[107] or otherwise discount the potential for a conflict of interest in order to avoid the expense of securing separate representation.[108] Thus, the prevalence of joint representation, coupled with the ethical obligation that an attorney has not to take actions prejudicial to the interests of the attorney's individual client, is likely to prevent the attorney from informing a public employer that litigation has unearthed evidence of the employee's misconduct.

Even in cases in which both employee and employer are represented by separate counsel, there are additional obstacles to utilizing litigation in a manner that can bring evidence of an officer's misconduct to light. In particular, there are the strategic considerations that counsel for a joint defense even when separate attorneys represent multiple defendants; counsel is likely to conclude that it is better to reach an agreement to defend the case jointly rather than risk friction in the defense camp.[109]

There are a number of considerations that argue for coordination between defense lawyers. An initial threat to deny

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to another. The identity of the client may also vary depending on the purpose for which the question of identity is posed.").

[107] A client may consent to representation by an attorney under a potentially conflicting obligation to another client if it gives informed consent to such representation. *See* MODEL RULES OF PRO. CONDUCT, r. 1.7(b) (AM. BAR ASS'N 2002) ("Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client . . . and (4) each affected client gives informed consent, confirmed in writing."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 121 (AM. L. INST. 2000) ("Unless all affected clients and other necessary persons consent to the representation . . . a lawyer may not represent a client if the representation would involve a conflict of interest.").

[108] For example, as we have seen, the same attorney may not represent both employer and employee if their interests come into conflict or are likely to do so. *See supra* text accompanying note 97. If a public employer presumed, at least at the outset of § 1983 litigation, that no evidence of misconduct was likely to emerge that could warrant discipline or other action adverse to the individual officer, it could conclude that joint representation is permitted.

[109] For a helpful discussion of the benefits of a joint defense in civil litigation, see Bradley C. Nahrstadt & W. Brandon Rogers, *In Unity There Is Strength: The Advantages (and Disadvantages) of Joint Defense Groups*, 80 DEF. COUNS. J. 29 (2013).

indemnification as part of settlement negotiations may be in the interests of both employer and employee but will often prove hollow; Professor Schwartz found "some government attorneys affirmatively use the possibility that they will deny officers indemnification to gain settlement leverage, limit punitive damages verdicts, and reduce punitive damages verdicts after trial—only to indemnify their officers once the cases are ultimately resolved."[110] As we have seen, threats to deny indemnification are almost always bluffs; indemnification is nearly universal.[111] This should be unsurprising given the downside risks of antagonistic defenses; especially in the face of a threat to deny indemnification.

Absent an agreement to act in concert, the potential exists for the individual employee to defect; if counsel for the officer comes to fear that counsel for the municipal defendant may pursue evidence of misconduct that could provide a basis to deny indemnification, much less produce evidence that might warrant discipline of the officer, the officer's lawyer could easily conclude that the client would be best advised to defend by insisting that he was obeying his employer's orders or policies, thereby strengthening the plaintiff's case against the public employer under *Monell*, while potentially shifting damages to the employer or strengthening a qualified immunity defense.[112] The individual officer could also settle with the plaintiff and provide testimony that bolsters the plaintiff's custom or policy claim against the municipal defendant.[113] Counsel for the plaintiff would have ample reason to

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[110] Schwartz, *supra* note 17, at 931. She added: "the threat that a city will deny indemnification may discourage plaintiffs from proceeding with claims against individual officers." *Id.* at 932.

[111] *See supra* text accompanying notes 60-62.

[112] *See* Teressa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL. L. REV. 153, 186-92 (2011) (explaining how an officer's claim of following supervisory directives can strengthen the officer's qualified immunity defense); Mishra, *supra* note 60, at 99-100 (explaining how an officer can defend a § 1983 case by claiming that he was following orders). *Cf.* Atchinson v. District of Columbia, 73 F.3d 418, 427 (D.C. Cir. 1996) ("[O]fficials sued individually may find it advantageous to agree with a plaintiff that training was inadequate, for a jury might conclude that officials without proper training should not be liable for any harm caused. In view of these potential conflicts, it is possible that had the officials known all along of the potential for personal liability, they would never have agreed to joint representation at the outset.").

[113] *Cf.* Dunton v. Cnty. of Suffolk, 729 F.2d 903, 907 (2d Cir.), *amended by* 748 F.2d 69 (2d Cir. 1984) ("A municipality may avoid liability by showing that the employee was

agree to such a settlement, rather than run the risk that the officer will not be indemnified, making any judgment against the officer difficult to collect.[114] The same dynamic could appear if the attorney for the municipal defendant conditioned any settlement on the disclosure of evidence of misconduct to the municipality. Moreover, a judge or arbitrator could well conclude that a municipality's insistence on such a conditional settlement is inconsistent with its obligation to defend and indemnify the officer.

Accordingly, even when a police officer and the unit of government that employs the officer are represented by separate counsel, defense counsel are likely to agree to a coordinated defense to avoid the problems that inhere in potentially antagonistic defenses. Such an agreement would likely preclude counsel for the municipality from taking any action adverse to the officer, such as disclosing information to the employer that might lead to either a denial of indemnification or internal discipline.

My own experience in municipal government is consistent with this account. In my years in a senior position in the City of Chicago's Officer of Corporation Counsel, I found that the attorneys representing individual police-officer defendants consistently refused to supply even unprivileged information derived from their representation of the officers whenever they feared that it could prove helpful in the course of disciplinary investigations or failed to otherwise advance the interests of their clients. Even though our office provided separate counsel for officers and the city when both were named as defendants, rarely did this policy result in the production of evidence useful in disciplining individual officers.

As for the plaintiffs and their attorneys, there is equal reason to question whether they are likely to disclose the evidence they have obtained reflecting an officer's misconduct to the department that employs the officer. When litigation is anticipated or pending, plaintiffs' lawyers often advise their clients not to provide

not acting within the scope of his official duties, because his unofficial actions would not be pursuant to municipal policy. The employee, by contrast, may partially or completely avoid liability by showing that he was acting within the scope of his official duties. If he can show that his actions were pursuant to an official policy, he can at least shift part of his liability to the municipality.").

[114] *Cf.* Schwartz, *supra* note 17, at 929-30 ("In the private law context, scholars have observed that plaintiffs and uninsured or underinsured defendants may work together to target the defendants with the deepest pockets.").

information to police departments for fear that such disclosures might adversely affect the pending or anticipated litigation.[115] Subsequently, when it comes time to settle or take a case to trial, the problem of indemnification emerges. As we have seen, it is often the case that there is an exception to the obligation of police departments to indemnify their officers when the officer has acted maliciously, in bad faith, or exhibited willful and wanton misconduct.[116] Plaintiffs and their attorneys, in contrast, have an incentive to preserve indemnification, so that they can reach the deep pockets of a public employer, rather than only the limited assets of an individual officer.[117] For this reason, plaintiffs, like the attorneys for police-officer defendants, are unlikely to highlight evidence of misconduct that might induce a public employer to deny indemnification.

Thus, as Professor Schwartz observed, "ultimately, plaintiffs' attorneys and officer-defendants often want the same thing—for the government to pay."[118] Given the effective alignment between the interest of the attorney for a police officer in preventing evidence of the client's misconduct from reaching the officer's employer, and the interest of the plaintiff's lawyer in obtaining quick and certain compensation for the plaintiff from the deep pockets of the officer's employer, plaintiffs' lawyers may well be no more likely to alert police departments to evidence of an officer's misconduct than are the lawyers for the officer.

Moreover, 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.[119] Similarly suggestive is

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[115] *See, e.g.*, Schwartz, *supra* note 9, at 1066 ("Anecdotal evidence suggests that plaintiffs' attorneys may not want their clients to participate in internal investigations for fear that the clients' statements to investigators might be used against them during the lawsuit.").

[116] *See supra* text accompanying notes 86-87.

[117] *See, e.g.*, Ravenell & Brigandi, *supra* note 61, at 863 ("[M]ost savvy plaintiff's attorneys will not enter into a settlement with a defendant without some guarantee that the defendant will be able to pay the agreed upon amount, either through his employer or insurer.").

[118] Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 1101 GEO. L.J. 305, 335 (2020).

[119] *See supra* text accompanying note 24.

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.[120] This suggests that attorneys for police officers, concerned about protecting their clients from discipline, frequently are able to negotiate confidentiality agreements that prevent the use of information unearthed in civil litigation in subsequent disciplinary proceedings.

There is one additional empirical clue. As we have seen, the obligation to indemnify frequently does not exist with respect to misconduct that is in malicious, willful and wanton.[121] This is roughly the standard for an award of punitive damages, which under § 1983, is appropriate "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[122] Moreover, sixteen states expressly refuse to indemnify an officer for an award of punitive damages.[123] Yet, in her study of police indemnification, Professor Schwartz found:

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[120] *See* Marc L. Miller & Ronald F. Wright, Essay, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 775 (2004) ("[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." (footnote omitted)).

[121] *See supra* text accompanying note 86.

[122] Smith v. Wade, 461 U.S. 30, 56 (1983).

[123] Nielson & Walker, *supra* note 60, at 236.

> Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases. Officers did not pay a dime of the over $3.9 million awarded in punitive damages. And officers in the thirty-seven small and mid-sized jurisdictions in my study never contributed to settlements or judgments in lawsuits brought against them. [124]

If police departments or municipalities were scouring pleadings and materials produced in discovery in an effort to find a basis to identify evidence of police misconduct, we would not expect this result; especially in cases in which a judgment for punitive damages against an officer is issued. Indeed, on that score, Professor Schwartz found that "[s]ome jurisdictions appear to have indemnified officers in violation of governing law," and that "[j]urisdictions may sidestep prohibitions against indemnification of punitive damages by vacating the punitive damages verdict as part of a post-trial settlement."[125] The fact that the officers in these cases were represented by attorneys with an ethical duty to minimize their exposure to either punitive damages or discipline surely helps to explain this finding.

Accordingly, as long as police-officer defendants face no realistic financial exposure in § 1983 litigation, and are represented by attorneys with an incentive to protect their clients from discipline, there is ample reason to believe that § 1983 litigation will not produce a flow of information to police departments adequate to ensure that they are able to make necessary policy and personnel decisions in light of evidence of misconduct unearthed in civil litigation.

To be sure, the ethical obligation of officers' lawyers not to disclose information adverse to their clients is likely not the only reason that civil litigation fails frequently fails to produce necessary reforms or discipline. Daryl Levinson, for example,

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[124] Schwartz, *supra* note 17, at 890. There was in fact, a single case in which the Los Angeles Police Department refused to indemnify an officer for a $300 award of punitive damages, although the officer was not ultimately forced to pay the award. *Id.* at 928-29.

[125] *Id.* at 921.

observed that because "government responds to political, not market incentives [and] . . . cares not about dollars, only about votes,"[126] it follows that "government cannot be expected to respond to forced financial outflows in any socially desirable, or even predictable, way,"[127] and the likelihood that the government will undertake reforms to reduce potential liability is particularly low when it comes to activities likely to pay political dividends in the eyes of voters.[128] Thus, at least when aggressive policing pays political dividends, public employers might hesitate to undertake reforms or disciplinary actions that might over-deter officers in ways that could prove politically undesirable.[129] There may also be municipal attorneys who reflexively defend police conduct. Professor Schwartz, for example, found that some municipal attorneys are wary of identifying information that might reflect poorly on their governmental clients and even generate additional litigation.[130] Yet, she did not find municipalities invariably ignored information about police misconduct generated in litigation; she also found examples of police departments that used information generated in civil litigation to spur reform.[131]

Given that government policymakers respond to political and not market incentives, when there is no political pressure for police reform, and political pressure exerted in the opposite direction by,

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[126] Levinson, *supra* note 18, at 420.

[127] *Id.* at 348.

[128] *See id.* at 370 ("So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will *never* deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims." (emphasis in original)).

[129] For a more elaborate discussion of the problem of overdeterrence, see Rosenthal, *supra* note 2, at 714-25.

[130] *See* Schwartz, *supra* note 9, at 1065 n.244 ("The Kolts Commission [which investigated the Los Angeles County Sheriff's Department] posited that an attorney may not want to 'strongly advocate terminating an officer for misconduct knowing at the same time that the fact of termination may increase the exposure of the [city or county] in litigation arising from that misconduct.' And the [Los Angeles County Sheriff's Department] auditor posited that lawyers might avoid disclosing damaging information about an officer if they are 'concerned about their individual track record in litigation and their perceived effectiveness at minimizing judgments and settlements.'" (second brackets in original) (citation omitted)).

[131] *See, e.g.*, Schwartz, *supra* note 10, at 852-61 (discussing jurisdictions that have used information generated in lawsuits); Schwartz, *supra* note 9, at 1052-56 (same).

for example, powerful police unions, it is doubtful that any regime of damages liability can induce officials to undertake reform. Still, damages liability imposes political as well as financial costs that can produce reform; as we have seen, elected officials have ample reason to be concerned with the adverse budgetary consequences of damages liability.[132] Beyond that, public concern over police misconduct may generate political pressure for reform. But, even when there is political will to reform, the professional obligations of attorneys for police officers stand as a serious obstacle. Given the seeming obligation of defense counsel to endeavor to conceal evidence of their clients' misconduct, even police departments pursuing reform—as a result of political pressure or otherwise—have limited ability to utilize information derived from civil litigation to undertake discipline or reform.

It is hard to ignore the difference in information flow created by the absence of vicarious liability under § 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 the individual employee who allegedly engaged in tortious conduct as a separate defendant, and thereby run the risk of some sort of compromise verdict against only the individual defendant, enforceable only against that defendant's limited assets, at least when a private-sector employer refuses to indemnify its employees.[133] 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 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

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[132] *See supra* text accompanying note 20.

[133] Although comprehensive statistics are not available, it appears that indemnification of employees is far from universal in the private sector, and when it exists, it is often subject to important limitations. For a helpful discussion of the limits on private-sector employee indemnification, see Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1506-09 (2009).

inducing public employers to identify problem officers and 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

As long as § 1983 jurisprudence rejects vicarious liability of public employers based on the misconduct of their employees, individual officers will be named as defendants in the vast majority of lawsuits alleging police misconduct, and represented by attorneys whose fiduciary duties run to their clients, and not to the police departments that employ them. For this reason, the professional obligations of the attorneys for individual officers represent a potent barrier to the use of information unearthed in civil litigation to enhance police accountability.

Of course, the Supreme Court might change course; for decades, critics inside and outside of the Court have argued that *Monell*'s rejection of vicarious liability should be repudiated.[134] Yet, Congress has not altered § 1983 to impose vicarious liability, and the Supreme Court has made no move away from *Monell*.[135] A course correction seems unlikely.[136]

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[134] *See, e.g.*, Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 430-37 (1997) (Breyer, J., dissenting); Robert J. Kaczorowski, *Reflections on* Monell*'s Analysis of the Legislative History of § 1983*, 31 URB. LAW. 407, 430-35 (1999); Kramer & Sykes, *supra* note 63, at 300-01.

[135] *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 60 (2011) ("[U]nder § 1983, local governments are responsible only for their *own* illegal acts. They are not vicariously liable under § 1983 for their employees' actions." (emphasis in original) (citations and internal quotations omitted)); Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.").

[136] A municipality could presumably waive its right to defend a *Monell* claim and accept vicarious liability for the constitutional torts of its employees. *See, e.g.*, Evans v. City of Chicago, 513 F.3d 735, 741 (7th Cir. 2008) ("[T]he City waived its right under *Monell* . . . not to be held liable in damages without proof that the City by its 'policy or custom' caused the alleged constitutional violation."). In the subset of cases in which the *Monell* claim is weak and the individual officer's qualified immunity defense is strong, however, this course of action would likely not be in the interest of the client. In any event, as long as the individual officer remains a party to the case and entitled to be represented by the officer's own attorney, that attorney would retain the ethical obligation to resolve the case in a way that minimizes risks to the attorney's client, such as the risk that evidence unearthed in the litigation could be used to impose discipline.

Even if § 1983 jurisprudence continues to reject *respondeat superior* liability, there is a vehicle by which public employers can obtain control over litigation against their employees. A police officer's right to be indemnified could be conditioned on the ability of the municipality that employs the officer to defend litigation against the officer through its own attorney.

A. Affording Public Employers Control Over the Police Officer's Defense

Indemnification need not be a one-way street. In return for indemnity, the indemnified party can be expected to shoulder some obligations as well, including surrendering control over the litigation.

Insurance law again is instructive. An insured ordinarily has a contractual duty to cooperate with the insurer's defense of the litigation as a condition on the promise that the insured will be indemnified against any judgment that may emerge from the litigation:

> The primary obligation that the insured owes the insurer in liability insurance (apart from paying premiums when due) is the duty to cooperate. The duty to cooperate is essentially the flip side of the insurer's duty to defend. The insurer promises in the policy to provide the insured with a defense, and the insured reciprocally commits to cooperate with the insurer in making settlements, providing evidence, enforcing subrogation rights, and attending hearings, trials, and depositions.[137]

There is nothing extraordinary about the insurer's right to control the litigation; given that the insurer is the party with a financial stake in the litigation, it is eminently reasonable that the insurer reserve a contractual right to control that litigation.[138] To

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[137] JERRY & RICHMOND, *supra* note 76, at 681 (footnote omitted). *Cf.* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 134 cmt. F, reporter's note (AM. L. INST. 2000) ("[C]ourts have found policyholder consent to the role of the insurer in designating counsel and controlling the defense through execution of an insurance contract containing a duty-of-cooperation clause.").

[138] *See, e.g.*, Fischer, *supra* note 76, at 54 ("Permitting the insurer to exercise exclusive control over the defense of the claim is a reasonable accommodation of the interests of both insurer and policyholder. These interests include the duties and obligations that both assume under the standard liability insurance policy, the express

be sure, as we have seen, insurers are usually obligated to provide an attorney to represent the insured, and to the extent that a conflict of interest arises, the attorney is obligated to protect the interests of the client.[139] Still, insurance law provides an example of when an agreement to indemnify can vest control over the litigation in the indemnitor, rather than the party named as a defendant in the litigation.

Although the obligations that run between insured and insurer are ordinarily a creature of contract, the obligations of indemnitor and indemnitee can be embodied in a statute as well. For example, statutes that grant public employees a right to be indemnified frequently provide that the indemnified employees are under an obligation to cooperate with the defense of the litigation.[140] This approach is eminently reasonable; an employee

tender by the policyholder of the defense of the claim to the insurer, and the fact that the claim will be resolved within policy limits."); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 284-85 (1995) ("[A]n insured who demands a defense thereby consents both to representation by company-selected counsel and to joint representation because of the context in which the demand is presented. The company is entitled to control the defense. The company expects to take the helm and can defend the liability suit effectively only if it is a co-client. In contrast, the insured has no right of control, and, in a full coverage case, has no reasonable expectation of asserting control (and perhaps no actual expectation as well). In these circumstances, it is proper to conclude that the insured, by demanding a defense, impliedly agrees to allow the company to become a co-client. To conclude otherwise would hold that an action not contemplated by the liability contract—that is, some further act conveying the insured's permission to allow the company to become a co-client—is a precondition for the company's exercise of the powers the liability contract conveys." (footnotes omitted)). *Cf.* Hurvitz v. St. Paul Fire & Marine Ins. Co., 135 Cal. Rptr. 2d 703, 713 (Cal. Ct. App. 2003) (holding that an insurer did not breach a duty to insureds by settling defamation and other claims within policy limits over the insureds' objections: "A party purchasing a liability insurance policy containing the duty to defend language at issue here agrees to accept the insurer's view concerning the point at which the benefits of settlement exceed the risk of continuing litigation. The alternative is to negotiate—and pay for—a policy with a consent provision. Liability insurance exists primarily to protect the insured's finances. The covenant of good faith and fair dealing requires the insurer to minimize the possibility of an award that exceeds the policy's limits—it does not require the insurer to fight a legal action until the bitter end when the costs of defense exceed the benefit to be achieved.").

[139] *See supra* text accompanying note 76.

[140] *See, e.g.*, ALASKA STAT. ANN. § 09.50.253(b) (West 2020) ("The state employee shall deliver these documents within the time period established by the attorney general in a regulation adopted under this section. The initial delivery of these documents to the attorney general constitutes an agreement by the employee to cooperate with the attorney general in the state employee's defense of the action or proceeding and a consent

that the attorney general conduct the defense as the attorney general considers advisable and in the best interests of the employee, including settlement in the attorney general's discretion."); IOWA CODE ANN. § 670.8 (West 2020) ("The governing body shall defend its officers and employees, whether elected or appointed and shall save harmless and indemnify the officers and employees against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of their employment or duties . . . . In the event the officer or employee fails to cooperate in the defense against the claim or demand, the municipality shall have a right of indemnification against that officer or employee."); KAN. STAT. ANN. § 75-6116(b) (West 2020) ("The governmental entity . . . shall pay or cause to be paid any judgment or settlement of the claim or suit, including any award of attorney fees, and all costs and fees incurred by the employee in defense thereof if: (1) The governmental entity finds that the employee reasonably cooperated in good faith in the defense of the action or proceeding . . . ."); KY. REV. STAT. ANN. § 65.2005(3) (West 2020) ("A local government may refuse to pay a judgment or settlement in any action against an employee . . . if: . . . (c) The employee willfully failed or refused to assist the defense of the cause of action . . . ."); LA. STAT. ANN. § 13:5108.1(B)(5) (2020) ("If, during the pendency of the action, the covered individual fails or refuses to cooperate with the attorney general in defending the action, then the attorney general may terminate the representation and withdraw from defense of the covered individual."); MD. CODE ANN. CTS. & JUD. PROC. § 5-302(d)(1) (West 2020) ("The rights and immunities granted to an employee are contingent on the employee's cooperation in the defense of any action."); MASS. GEN. LAWS ANN. ch. 258, § 2 (West 2020) ("The public attorney shall defend the public employee . . . provided, however, that the public attorney determines that the public employee was acting within the scope of his office or employment at the time of the alleged loss, injury, or death, and, further, that said public employee provides reasonable cooperation to the public employer and public attorney in the defense of any action . . . ."); MO. ANN. STAT. § 105.716(2) (West 2020) ("All persons and entities protected by the state legal expense fund shall cooperate with the attorneys conducting any investigation and preparing any defense . . . by assisting such attorneys in all respects, including the making of settlements, the securing and giving of evidence, and the attending and obtaining witness to attend hearings and trials."); N.H. REV. STAT. ANN. § 99-D:2 (2020) ("As a condition to the continued representation by the attorney general and to the obligation of the state to indemnify and hold harmless, such officer, trustee, official, or employee shall cooperate with the attorney general in the defense of such claim or civil action."); N.Y. PUB. OFF. LAW § 17(4) (McKinney 2020) ("The duty to defend or indemnify and save harmless prescribed by this section shall be conditioned upon . . . the full cooperation of the employee in the defense of such action or proceeding and in defense of any action or proceeding against the state based upon the same act or omission, and in the prosecution of any appeal. Such delivery shall be deemed a request by the employee that the state provide for his defense pursuant to this section."); N.D. CENT. CODE ANN. § 32-12.2-03(6) (West 2020) ("The state shall defend any state employee in connection with any civil claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of the employee's employment if the employee provides complete disclosure and cooperation in the defense of the claim or demand . . . ."); OR. REV. STAT. ANN. § 30.285(4) (West 2020) ("Any officer, employee or agent of the state against whom a claim within the scope of this section is made shall cooperate fully with the Attorney General and the department in the defense of such claim. If the Attorney General after consulting with the department determines that such

with no financial stake in the litigation as a result of a promise of indemnification might refuse to cooperate with its defense, resulting in a large judgment for which only the indemnitor is liable. In return for indemnification, public employees are frequently required to cooperate with efforts to defend the financial interests of the party that has promised them indemnification.

Pennsylvania and Rhode Island have statutes go a step further, expressly granting control over the litigation against a public employee to the attorney selected by the government.[141] By their terms, these statutes entitle attorneys for individual officers to supply information to public employers that would be useful in assessing whether the officers have engaged in misconduct. But, of course, as long as the individual officers remain the clients of those attorneys, the professional obligation of the officers' attorneys not to take any action that might harm their interests would prevent the disclosure of even nonprivileged information to officers' employers that could harm the officers' careers.[142]

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officer, employee or agent has not so cooperated or has otherwise acted to prejudice defense of the claim, the Attorney General may at any time reject the defense of the claim."); UTAH CODE ANN. § 63G-7-902(2)(b) (West 2020) ("If the employee fails to make a request, or fails to reasonably cooperate in the defense . . . the governmental entity need not defend or continue to defend the employee, nor pay any judgment, compromise, or settlement against the employee in respect to the claim."); WYO. STAT. ANN. § 1-41-103(e)(iv) (West 2020) ("Any public employee of the state against whom a claim within the scope of this subsection is made shall cooperate fully with the state in the defense of the claim. If the state determines that the public employee has not cooperated or has otherwise acted to prejudice defense of the claim, the state may at any time reject the defense of the claim.").

[141] *See, e.g.*, 42 PA. STAT. AND CONS. STAT. ANN. § 8547(c) (West 2020) ("When . . . the local agency defends an action against an employee thereof at the request of the employee, it may assume exclusive control of the defense of the employee, keeping him advised with respect thereto, and the employee shall cooperate fully with the defense, except that in situations where the legal counsel provided by the local agency determines that the interests of the employee and the local agency conflict, the local agency shall obtain the express written consent of the employee for such interested representation or shall supply independent representation."); 9 R.I. GEN. LAWS ANN. § 9-31-10 (West 2020) ("Whenever the attorney general defends a state employee or former state employee . . . the attorney general shall assume exclusive control over the representation of the employee or former state employee, and the employee or former state employee shall cooperate fully with the attorney general's defense.").

[142] *See supra* text accompanying notes 71-74.

> A somewhat different, and apparently unique formulation is found in section 2-302 of the Illinois Local Governmental and Local Governmental Employees Tort Immunity Act:
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> 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.[143]

Note the phraseology in subsection (a)—the "local public entity" itself can "appear and defend" a claim against its employee.[144] This formulation, taken literally, entitles a public employer *itself* to elect to appear and take over the defense of the suit against its employee, through its own lawyer, rather than having the employee defend the claim utilizing the employee's own attorney. Defending litigation by having the employee appear and defend through the employee's own attorney, with the employer then indemnifying the employee for legal costs, attorney's fees, and the amount of any settlement of judgment, is an entirely separate option made available to the "local public entity" is subsection (b).

Thus, the Illinois statute, taken literally, authorizes a local government to elect to appear in its own name and defend a civil

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[143] 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2020).

[144] Under the Act, "'[l]ocal public entity' includes a county, township, municipality, municipal corporation, school district, school board, educational service region, regional board of school trustees, trustees of schools of townships, treasurers of schools of townships, community college district, community college board, forest preserve district, park district, fire protection district, sanitary district, museum district, emergency telephone system board, and all other local governmental bodies." 745 ILL. COMP. STAT. ANN. 10/1-206 (West 2020).

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 § 1983 or the professional obligations of lawyers forbids such an arrangement; there is, after all, nothing in § 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."[145] As long as the lawyer makes it clear that he 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.[146]

[145] Note that the rules and authorities discussed in Part I.C above refer only to a lawyer's obligation to a "client."

[146] *See, e.g.*, MODEL RULES OF PRO. CONDUCT Preamble and Scope (AM. BAR ASS'N 2002) ("Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS § 14 (AM. L. INST. 2000) ("A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide services; or (2) a tribunal with power to do so appoints the lawyer to provide the services."). 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?

Perschbacher & Perschbacher, *supra* note 91, at 704-05 (footnote omitted). 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

Accordingly, if a lawyer representing a public employer takes care to make clear to the police officer named in a suit that although the employee will be indemnified, the lawyer is not representing the officer, and will treat the officer as a witness, not a client, no attorney-client relationship is created between lawyer and officer. Indeed, this is precisely how lawyers for entities are generally required to treat employees of the entity.[147] As long as no attorney-client relationship with the individual police officer is created, a lawyer for a public employer remains free to communicate any information learned during the course of the civil litigation that might be useful in assessing police use-of-force policy and practice—or training or disciplining the officer.

One might object that this approach offers an employee indemnity only if the employee agrees to representation by a conflict-ridden attorney, but that view is deeply flawed. On the view advanced above, the public employer's attorney never establishes an attorney-client relationship with the employee, and therefore breaches no duty owed to a client, including the duty to avoid conflicts of interest. After all, an attorney has a duty to refrain from representing one with an interest in conflict with the interests of the lawyer's "client."[148] Thus, if a lawyer establishes no attorney-

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." *See* 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2020).

[147] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.13(f) (AM. BAR ASS'N 2003) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 14, cmt. f, reporter's note (AM. L. INST. 2000) ("The general rule is that confidential communications between a lawyer for an organization and an employee or agent of the organization about a matter of interest to the organization does not thereby make the lawyer counsel for the associated person with respect to that person's own interests in the same matter.").

[148] *E.g.*, MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 2012) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 121 (AM. L. INST. 2000) ("[A] lawyer

client relationship with a police officer, then, the lawyer has no duty to the officer to refrain from representing a client with a conflicting interest.

To be sure, on this approach, the public employer offers its employee indemnification, but no attorney with a fiduciary duty to that employee. The Illinois statute, however, imposes on police departments no duty to provide attorneys to represent their employees. Although the statute permits a public employer to elect to pay an employee's attorney's fees; it nowhere requires it; the statute leaves the public employer free to "appear and defend against the claim or action" against its employee itself, or, in the alternative, permits the employer to "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."[149] These are separate statutory options, and only the latter involves employees retaining their own attorneys.[150]

Nor does anything in the professional obligations of an attorney afford an officer an entitlement to legal representation beyond what is stated in applicable statutory and contractual provisions. As we have seen, it is common and regarded as eminently reasonable that indemnitors, who have a direct financial

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may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."); *id.* § 128 ("Unless all affected clients consent . . . a lawyer in civil litigation may not: (1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter . . . .").

[149] 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2020).

[150] Moreover, a separate Illinois statute imposes on public employers a duty to pay no more than judgments for compensatory damages against their employees arising from acts within the scope of their employment. *See* 745 ILL. COMP. STAT. ANN. 10/9-102 (West 2020) ("A local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages (and may pay any associated attorney's fees and costs) for which it or an employee while acting within the scope of his employment is liable in the manner provided in this Article."). Judgments under § 1983 are considered "tort judgments" within the meaning of these statutes. *See, e.g.*, Kolar v. Cnty. of Sangamon, 756 F.2d 564, 566-67 (7th Cir. 1985) (applying this statute). This duty to indemnify is discharged as long as the public employer pays the judgment; the employer has no obligation to supply its employees with a lawyer owing a fiduciary duty to those employees.

stake in litigation, have the right to control the litigation.[151] If the officer has accepted a promise of indemnification understanding that claims against that employee will be defended—free of charge—by a lawyer employed by, and owing a fiduciary duty to, the employer, then the officer is deprived of nothing to which that employee is entitled. To be sure, a lawyer is ordinarily under a professional obligation to take direction from the client, but if a public employee, by contract or otherwise, has agreed that the client's employer will appear for him and have have control over the litigation, nothing in the Rules of Professional Responsibility requires a lawyer to take direction from a public employee who is not only a client, and who has in any event agreed not to provide such direction.

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 precise Illinois formulation is unique, it is far from the only formulation 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."[152] The duty imposed by this statute would be discharged if a public employer directed its own attorney to undertake to defend the action brought against the employee and thereby "provide for the defense" of the § 1983 lawsuit. Like the Illinois statute, the California formulation nowhere requires that a public employer's attorney establish an attorney-client relationship with the employee who has been sued.

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[151] *See supra* text accompanying notes 137-39.

[152] CAL. GOV'T CODE § 995 (West 2020) (emphasis added). The phrase "public entity" is defined to "include[] the state . . . a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." *Id.* § 811.2.

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.

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.[153] This approach offers the additional benefit of obviating the need to secure separate counsel for governmental and individual defendants in order to avoid the potential for a conflict of interest between these clients.

B. Meeting the Objections to Converting Police Officers From Clients to Witnesses

The proposal advanced above is unconventional, to say the least. It contemplates that a lawsuit against an individual police

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[153] For more general explications of the view that attorneys for the government have a duty to pursue the public interest, see, for example, Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000); Allan C. Hutchinson, *'In the Public Interest': The Responsibilities and Rights of Government Lawyers*, 46 OSGOODE HALL L.J. 105 (2008). Relatedly, some have criticized internal disciplinary investigations conducted by police departments on the ground that police departments tend to resist disciplining their own officers. *See supra* text accompanying note 8. The proposal advanced above effectively involves municipal lawyers defending civil cases in the investigative process, and to that extent may lend it greater objectivity.

officer will be defended by an attorney having no attorney-client relationship or other fiduciary duty to that officer. A number of objections can be lodged to this approach.

The premise of the proposal advanced above is that public employers condition their offer of indemnity on their employees' agreement to permit the case to be defended by an attorney selected by and owing a fiduciary duty to the employer. As we have seen, however, many jurisdictions decline to indemnify public employees for conduct that is undertaken in bad faith, willful and wanton, or for awards of punitive damages.[154] One might object to the proposal advanced above by observing that, for claims on which no indemnity is available, the officer does not receive the protection of indemnity in exchange for the officer's agreement to be represented by an attorney for the officer's employer. Instead, on non-indemnifiable claims, the officer is at financial risk, but is not represented by an attorney with a fiduciary duty to that officer.

One answer to this objection is to indemnify officers for all judgments against them arising from conduct within the scope of employment. As we have seen, the limitations on indemnification are more symbolic than real; in fact, officers are almost always indemnified, even on claims for which indemnity is seemingly unavailable.[155] Accordingly, statutory and contractual limitations on indemnification of public employees are more form than substance. Beyond that, there is a downside to limiting indemnification. As we have seen, limitations on indemnification create the possibility that the officer may decide to defect rather than risk losing indemnification.[156] The best course of action may well be for public employers to acknowledge reality, and offer their employees blanket indemnification.

If, however, a public employer wishes to maintain limitations on indemnification, it need only offer the officer separate counsel, having a fiduciary duty to the officer and not subject to the direction of the public employer, charged with representing the employee only on non-indemnifiable claims.

A more fundamental objection involves what is probably the most novel feature of the proposal advanced above—that the

[154] *See supra* text accompanying notes 86, 123.
[155] *See supra* text accompanying notes 124-25.
[156] *See supra* text accompanying notes 112-14.

attorney defending the claim against an individual officer is not an attorney having a fiduciary obligation to the officer. Among the classic justifications for creating a fiduciary relationship between attorney and client is that the client's ability to engage in privileged conversations with an attorney promotes candid communication between the two.[157] One might therefore object to the proposal advanced above on the ground that officers will be less likely to communicate candidly with attorneys defending civil litigation who have no attorney-client relationship with the officers, and who therefore cannot engage in privileged communications with the officers, but instead must effectively treat the officer as a witness.

At the outset, there is reason to question whether there is support for the claim that the assurance of confidentiality provided by the attorney-client relationship promotes the client's candor. There is, in fact, little in the way of empirical evidence for this claim.[158] Proof that the attorney-client relationship promotes candor on the part of the client is scant, mostly consisting of a handful of surveys in which respondents opine that they believe attorney-client confidentiality promotes candor, although even the survey evidence is equivocal on this point.[159] Notably, criminal

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[157] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.6, cmt. 2 (AM. BAR ASS'N 2012) ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.").

[158] *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 409 n.4 (1998) ("Empirical evidence on the privilege is limited. Three studies do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication."); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 162 (1993) ("This assumption—that clients need the privilege to encourage them to communicate—purports to be an empirical one. The modest amount of empirical data available, however, it equivocal at best and casts doubt on the truth of this assertion.").

[159] *See, e.g.*, Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 241-47 (1989) (survey in-house counsel, outside counsel, and senior managers concerning corporate attorney-client privilege); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1262 (1962) (survey of laypeople). *But cf.* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 384-86 & tbl.2 (1989) (finding only half of lay respondents believed that an obligation of confidentiality would make them more likely to give information to

defense attorneys often doubt that their clients are willing to be candid with them, at least when candor requires an admission of wrongdoing.[160] As for their clients, the limited data available suggests that criminal defendants frequently mistrust their lawyers.[161] There is little more reason for a police officer to trust a civil defense lawyer with whom the officer has no prior relationship, and who has been appointed to represent the officer in civil litigation in which only the officer's employer has a real financial stake.

In any event, whatever the value of the attorney-client relationship and its ability to promote candid communication in general, there is reason to believe that it plays a particularly limited role when it comes to the relationship between a police officer and an attorney defending a civil action alleging misconduct

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attorneys and finding that most attorneys and layperson respondents believed that the same information would be provided absent an assurance of confidentiality); Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 186-92 (2007) (interviews with attorneys for governmental entities disclosed limited concern that assurances of confidentiality promoted candor).

[160] *See, e.g.*, Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 9 (2010) ("[T]hose charged with very serious offenses do not readily admit guilt to their attorney, despite assurances of confidentiality. . . . [C]lients believe that defense attorneys will give better representation to clients whom they believe are innocent, and that assumption by clients helps explain why most clients assert their innocence to their attorneys."); Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 460 (2001) ("[C]lients try very hard to convince their lawyers they are innocent. For some clients, this may be a calculated decision; because they are aware of the ethical constraints on their lawyers offering perjured testimony, they want to preserve their options. But at least in some cases the desire to convince your lawyer you are innocent is not about calculated risks: it is about getting the lawyer to commit wholeheartedly to your defense." (footnote omitted)). *See also* Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 394-95 (2014) ("Clients often lie to their own lawyers, usually in the form of exaggerating favorable facts and understating the unfavorable ones, and that clients routinely omit critical facts or share half-truths with their lawyers. This is not surprising, given that doctors experience the same problem: patients lie, leave out embarrassing facts, and so on, despite the severe consequences that result from tampering the diagnosis or treatment suggestions of one's physician. Empirical studies also indicate that therapist-patient privilege is insignificant to patients in deciding what to disclose to psychotherapists." (footnote omitted)).

[161] *See, e.g.*, Matthew Clair, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in Attorney-Client Interactions*, 100 SOC. FORCES 194, 203-06 (2021) (finding indigent criminal defendants in Boston frequently mistrusted their court-appointed lawyers).

by the officer. That is because the civil defense attorney generally meets the officer only after an initial investigation has been performed, and the officer has already given his version of the pertinent events to investigators in an unprivileged context.

Police departments usually have policies by which they receive and investigate complaints alleging police misconduct.[162] Moreover, as we have seen, in internal investigations, police are frequently given special procedural protections by statute or collective bargaining agreements.[163] In particular, officers frequently are afforded a right to notice that they are under investigation and a right to delay interrogation until they have had an opportunity to consult with union representatives or counsel.[164] This right to prepare for interrogation gives officers an opportunity to consult with their own counsel, or union representatives, prior to an interview, and to square their account with the available evidence.[165] More important for present purposes, the account that they provide to investigators with whom they have no attorney-client relationship is, of course, unprivileged.

Accordingly, at least in cases in which there has been an internal investigation, an officer has likely already made an

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[162] *See, e.g.*, JAMES J. FYFE ET AL., POLICE ADMINISTRATION 467-75 (5th ed. 1997) (describing general practice of receiving complaints and initiating investigations); POLICE CHIEFS DESK REFERENCE, *supra* note 81, at 158 (same); STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS, *supra* note 81, at 13-57 (same); REITER, *supra* note 81, chs. 1-3 (same). Although national data is not comprehensively recorded, one study found: "During 2002 a total of 26,556 citizen complaints about police use of force were received by large law enforcement agencies. This corresponds to overall rates of 6.6 per 100 full-time sworn officers and 10.9 per 100 full-time sworn officers responding to calls for service." MATHEW J. HICKMAN, BUR. OF JUST. STATS., CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 2 (2006).

[163] *See supra* text accompanying notes 5-6.

[164] *See* Huq & McAdams, *supra* note 5, at 223-26 (describing statutes, contractual provisions, and administrative regulations that require delay in interrogation and granting officers an opportunity to obtain counsel); Keenan & Walker, *supra* note 5, at 212 (describing statutory rights to delay interrogation and have a representative present); Rushin, *supra* note 5, at 1224-27 (describing contractual provisions that delay interrogations and entitle officers to confer with counsel); Stephen Rushin & Atticus DeProspo, *Interrogating Police Officers*, 87 GEO. WASH. L. REV. 646, 672-77 (2019) (same).

[165] For helpful discussions of the extent to which the privilege to delay interrogation impedes investigations by assisting the officer in crafting an account that can be reconciled with other evidence, see Huq & McAdams, *supra* note 5, at 234-40; Rushin & DeProspo, *supra* note 164, at 677-80.

unprivileged statement, after consulting with counsel or a union representative, and after having had ample opportunity to craft an exculpatory version of events.[166] Having already committed to an account of the pertinent events in a nonprivileged context, it is scarcely likely that an officer, given the opportunity to have a privileged conversation with an attorney newly appointed to represent the officer in a civil action, will be moved to admit that the officer's prior account was false, much less confess to conduct that could expose the officer to internal discipline, civil and even potential criminal liability.

In any event, even if one indulges the perhaps heroic assumption that officers will become more candid if given the opportunity to have a privileged conversation with an attorney defending a civil action, from the standpoint of a police department concerned about rooting out misconduct, one wonders what is to be gained by encouraging officers to make candid admissions of misconduct to their civil defense attorneys that will never see the light of day. There seems to be little reason to permit an officer to confess to misconduct only if the confession is protected by attorney-client privilege. Similarly, there is no obvious benefit to either the public or a police department to promote candor as long as the officer's admissions never see the light of day. At least from the standpoint of those interested in rooting out police misconduct, there are few benefits in affording officers accused of misconduct the benefits of attorney-client confidentiality in the course of civil litigation for which they wish to be indemnified by the taxpayers.

[166] Although an officer cannot be compelled to make potentially incriminating statements in the course of an internal investigation under the Fifth Amendment, if the officer receives binding assurances that his statements will not be used in a criminal proceeding, the officer can be compelled to provide a statement relating to allegations of official misconduct in the course of an internal investigation. *See, e.g.*, Gardner v. Broderick, 392 U.S. 273, 278 (1968) ("If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself . . . the privilege against self-incrimination would not have been a bar to his dismissal." (footnote omitted)). For helpful summaries of this aspect of Fifth Amendment jurisprudence, see Steven D. Clymer, *Compelled Statements from Police Officers and* Garrity *Immunity*, 76 N.Y.U. L. REV. 1309, 1314-21 (2001); Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452, 453-59 (1987).

A related objection is that an officer who is treated as a witness rather than as a client, and who has no financial stake in the litigation by virtue of a contractual right to indemnification, may decline to cooperate with the defense of civil litigation. As we have seen, however, the duty to cooperate with the defense of the civil case can be made condition of the right to indemnification, just as a duty to cooperate is part of most contracts of insurance or statutory promises of indemnification.[167] Indeed, even when the officer asserts the Fifth Amendment right not to be compelled to make incriminating statements, the officer can nevertheless be compelled to cooperate with an investigation of alleged misconduct as long as the officer's compelled statements may not be used as evidence against the officer in a subsequent criminal prosecution.[168]

One might also object that a regime that does not grant an officer named as a defendant in civil litigation the status of a client unfairly slights the officer's interest in avoiding a disposition of the case that may tarnish his reputation. As we have seen, however, insurance law has long rejected this view; insurance contracts routinely grant the insurer control over the litigation in return for the valuable promise of indemnification.[169] There is nothing unlawful or unconscionable about such an exchange; indeed, insurance law has long rejected the view that an insured defendant can reject a settlement that the insurer concludes is prudent and consistent with its contractual right to control the litigation because of its potential reputational consequences for the insured.[170]

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[167] *See supra* text accompanying note 137.

[168] *See, e.g.*, *Gardner*, 392 U.S. at 278 ("If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal." (citation and footnote omitted)).

[169] *See supra* text accompanying notes 138-40.

[170] *See, e.g.*, Fischer, *supra* note 76, at 40 n.51 ("The policyholder's interest in avoiding reputation stigma is consistently subordinated to the insurer's financial interest."); Anthony J. Sebok, *What Do We Talk About When We Talk About Control?*, 82 FORDHAM L. REV. 2939, 2956-57 (2014) ("[I]n full coverage cases, common law courts uphold the insurance contract as written. The clearest example of this comes from cases involving doctors who object to their insurer settling medical malpractice claims within policy limits. Doctors resent being sued in medical malpractice and probably believe that settlements injure their reputations. Even if they can be confident that settlements will be sealed or protected from public access, doctors may still feel, with some reason, that

Moreover, as we have also seen, to the extent that the contract of insurance limits the scope of the attorney's representation of the insured, such limitations do not run afoul of the professional obligations of an attorney.[171]

A final objection, at least from the standpoint of the public employer, is that under this proposal, a jury in a civil action might learn that any judgment against a police-officer defendant will be paid by the officer's employer if the defense attorney is identified as representing the employer rather than the individual officer named as a defendant. Such knowledge might encourage juries to return larger judgments, knowing that they will be paid by the deep pockets of the employer.

Ordinarily, a jury cannot be told that a defendant's potential liability will be paid by a third party obligated to indemnify the defendant. Rule 411 of the Federal Rules of Evidence provides: "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully."[172] The rationale for this rule is that "knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds."[173] Accordingly, Rule 411 prevents the admission of evidence that a defendant is insured because of the risk that a jury might be more inclined to return a large verdict for the plaintiff if it knew that the judgment would be paid by an insurance company.[174]

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they have a right to a public judgment by a court where allegations against them impugn their professional (and perhaps personal) character. The short answer to these insureds is: 'Tough luck.' . . . [T]he standard liability insurance contract does not require an insurer to take into account the insured's litigation preferences if it settles within policy limits." (footnote omitted)).

[171] *See* MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2002) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 19(1) (AM. L. INST. 2000) ("[A] client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable under the circumstances.").

[172] FED. R. EVID. 411.

[173] *Id.* advisory committee's note to 1972 proposed rules.

[174] *See, e.g.*, Ventura v. Kyle, 825 F.3d 876, 885 (8th Cir. 2016) ("Given Ventura's repeated efforts to introduce evidence of HarperCollins's and Kyle's insurance at trial, it is difficult to see how Ventura's counsel's comments were anything other than 'a

It is unclear, however, whether this exclusionary rule applies to evidence of a promise of indemnification by a public employer, rather than evidence that an entity in the business of providing contracts of insurance will indemnify the defendant.[175] Martin Schwartz, for example, has argued that governmental indemnification of police-officer defendants and insurance should not be equated, and that juries should be informed that an individual governmental defendant will be indemnified for an award of damages to avoid the risk that a jury will find against the plaintiff or reduce its damages award because it is concerned about an officer's ability to pay a large judgment.[176] The proposal advanced above could strengthen the argument that Rule 411 does not exclude evidence of indemnification, since it would means that a public employer would not only provide counsel to represent an insured and indemnify the insured against an adverse judgment, as in the case of private insurance, but would also appear and defend the lawsuit through its own lawyer.

It is doubtful, however, that a tenable distinction can be drawn between indemnification, even when a public employer appears and defends its employee through its own lawyer as a condition on its offer of indemnity, and evidence that a person was "insured against liability" within the meaning of Rule 411 and its state-law analogs. After all, an employer's offer of indemnification, along with the employer's pledge to appear and defend a civil action against the employee, is one means by which an employee can become "insured against liability." Moreover, the rationale underlying Rule 411's exclusionary rule remains applicable; whenever the jury learns that a deep-pocketed entity will pay a judgment, there is the very risk that it will make the jury more prone to return a larger verdict for

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deliberate strategic choice' to try to influence and enhance damages by referencing an impersonal deep-pocket insurer." (footnote omitted)).

[175] *See* Larez v. Holcomb, 16 F.3d 1513, 1524 (9th Cir. 1994) (Pregerson, J., concurring in part) ("The City of Los Angeles and other California municipalities are not insurance companies; they have not been paid to assume risks; they are unable to spread such risks among 'policy holders.' Jurors would be aware of such distinctions and would realize that city funds are derived from taxes. In sum, the *protection to insurance companies* rationale for excluding evidence under [Rule] 411 does not justify restricting admission of evidence regarding the city's obligation to indemnify its officers for compensatory damage awards." (emphasis in original)).

[176] *See* Schwartz, *supra* note 60, at 1243-49.

the plaintiff that Rule 411 guards against.[177] Moreover, even aside from Rule 411, Rule 403 bars the admission of evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[178] Evidence that a public employer will pay a judgment against an individual officer creates considerable risks of confusion or unfair prejudice. If a jury is told that the officer will be indemnified, there is a risk that the jury will inflate the verdict for that reason.[179] Yet, if the jury is not told of indemnification, there is a risk that the jury might inappropriately reduce its award, or find for the defendant, to spare the officer the burden of paying a judgment that it might regard as beyond the officer's means. Or, if the jury learns of indemnification, it may become concerned that its verdict will place an inappropriate burden on the taxpayers.[180]

Under § 1983 jurisprudence, a jury's task is to award fair compensation, rather than focusing on the defendant's ability to pay a judgment.[181] Rather than indulging the risk that a jury's knowledge of indemnification, or lack thereof, will skew its judgment, surely the best practice is simply to instruct the jury that it should rely solely on the evidence in reaching its verdict without reference to any question of ability to pay.[182] Indeed, given the

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[177] *Cf.* Berry v. City of Detroit, 25 F.3d 1342, 1348 (6th Cir. 1994) ("The jury determined that plaintiff's damages were six million dollars. The liability of the police officer and the City was joint and several. . . . Jurors would be less than human if they did not factor in a plaintiff's chances of ever directly collecting six million dollars from a police officer. In short, there is tremendous pressure to find a deep pocket if the jury believes the wrong committed was egregious, as they justifiably could have concluded here.").

[178] FED. R. EVID. 403.

[179] *See, e.g.*, *Larez*, 16 F.3d at 1519 ("[H]aving been told that Holcomb would not bear the burden of a damages award, the jury might have been tempted . . . to inflate the award beyond the amount necessary to compensate her.").

[180] *See id.* at 1525 (Pregerson, J., concurring in part) ("[J]urors as taxpayers arguably might lower a punitive damage award where they know that the city, not the defendant, will bear the costs.").

[181] *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 257 (1978) ("[A] person should be compensated fairly for injuries caused by the violation of his legal rights.").

[182] *See, e.g.*, Larez v. Holcomb, 16 F.3d 1513, 1519 (9th Cir. 1994) ("Although the district court was right to be concerned that juror sympathies might district the jury from dispassionate determination of an appropriate damages award, its instruction on indemnification was not a proper response. The district court should have addressed its

potential for confusion or unfair prejudice, it should come as little surprise that the great weight of authority holds that a jury should not be informed that the § 1983 defendant will be indemnified by a public employer, whether because of Rule 411 or a more general concern that the issue of indemnification is likely to confuse, distract, or prejudice the jury.[183] Thus, there is little likelihood that a regime in which counsel for public employers appear and defend civil cases against police officers sued for acts within the scope of their employment should provide a basis to inform juries that the officer will be indemnified.[184]

concern with a firm admonition to the jury. The court, for example, might have emphasized that if the jury determined that Larez's constitutional rights had been violated, the jury should calculate damages based solely on the injuries actually suffered by Larez, without regard for Holcomb's finances or the jury's personal likes and dislikes.").

[183] *See, e.g.*, King v. Kramer, 763 F.3d 635, 650 (7th Cir. 2014) (upholding exclusion of indemnity agreement between county and a contractor in a section 1983 action under Rule 411); Kemezy v. Peters, 79 F.3d 33, 37 (7th Cir. 1996) ("When the defendant is to be fully indemnified, such evidence, far from being required, is inadmissible." (dictum)); *Larez*, 16 F.3d at 1518-21 (holding that it is reversible error to inform jury about an officer's right to indemnification for compensatory damages and municipality's authority to indemnify for punitive damages to prevent "potentially distracting considerations" affecting its verdict); Lewis v. Parish of Terrebonne, 894 F.2d 142, 146 (5th Cir. 1990) ("We also fail to find an abuse of discretion when the trial judge refused to admit into evidence a liability insurance policy providing coverage to certain defendants. The plaintiff credits the paltry punitive damage award by the jury to the judge's failure to admit evidence of insurance. We find no authority that evidence of insurance must be admitted when a claim for punitive damages has been made."); Green v. Baron, 879 F.2d 305, 310 (8th Cir. 1989) (finding that an instruction that the State will indemnify the defendant should not be given because it "is extremely prejudicial"); Griffin v. Hilke, 804 F.2d 1052, 1056-57 (8th Cir. 1986) (holding that the argument of plaintiff's counsel that the government would pay damages was impermissibly prejudicial). *See also* Lawson v. Trowbridge, 153 F.3d 368, 378-80 (7th Cir. 1998) (finding that although reference to insurance is ordinarily impermissible, when officers were permitted to adduce evidence of their limited means, the plaintiff should have been permitted to respond with evidence of indemnification).

[184] Additional considerations come into play when punitive damages are sought against a police officer. Under § 1983, an award punitive damages against an individual defendant must be proportioned in light of the defendant's assets. *See, e.g.*, City of Newport v. Fact Concerts, Inc. 453 U.S. 247, 269 (1981) ("By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations."). Thus, to the extent that a police-officer defendant contends that a punitive damages award should be assessed in light of the officer's limited assets, evidence that the officer will be indemnified is appropriate, and is not offered for a purpose forbidden by Rule 411. *See, e.g.*, Mathie v.

Finally, even if juries learn or guess of an officer's right to indemnification, that would likely be of little moment. Whenever a police officer arrives in court represented by a well-dressed attorney or two, juries likely infer that the officer's legal costs are not coming out of the officer's pocket, but, instead, are probably being footed by some sort of deep pocket.[185] Thus, in all likelihood, very little turns on the debate about whether to inform juries that an officer will be indemnified for judgments against them; juries most likely are aware of indemnification whether or not they are told about it. This consideration therefore supplies little reason to reject a proposal that enables police department to make effective use of information unearthed in civil litigation.

CONCLUSION

Civil litigation is a powerful vehicle to root out police misconduct. Plaintiffs' attorneys have strong financial incentives to unearth evidence of misconduct, and are not subject to the wide variety of constraints and infirmities that often plague internal investigations conducted by police departments.

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

Fries, 121 F.3d 808, 816 (2d Cir. 1997) ("[A] fact-finder can properly consider the existence of such an [indemnity] agreement as obviating the need to determine whether a defendant's limited financial resources justifies some *reduction* in the amount that would otherwise be awarded. It would be entirely inappropriate for a defendant to raise the issue of his limited financial resources if there existed an indemnity agreement placing the burden of paying the award on someone else's shoulders." (emphasis in original)); Perrin v. Anderson, 784 F.2d 1040, 1047-48 (10th Cir. 1986) ("[P]unitive damages were requested; the ultimate source of payment therefore is relevant. The jury must know the impact an award on the defendant to properly assess punitive damages." (citation omitted)). Of course, this represents the proper course regardless of whether a public employer's counsel appears for and defends the action against the officer.

[185] *See Larez*, 16 F.3d at 1525 (Pregerson, J., concurring in part) ("[J]urors very likely already know that a government employee defendant in a civil rights case personally will not pay any damage award against him or her.").

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.