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WHY CIVIL RIGHTS LAWSUITS DO NOT DETER POLICE MISCONDUCT: THE CONUNDRUM OF INDEMNIFICATION AND A PROPOSED SOLUTION

*Richard Emery and Ilann Margalit Maazel**

In thousands of cases around the country, civil rights plaintiffs successfully sue police officers for violating the Constitution. Yet, day in and day out, police officers make arrests without probable cause, use excessive force, deny arrestees medical treatment, and otherwise violate the Constitution with near impunity. Why don't civil lawsuits deter this reprehensible conduct?

The answer, this essay posits, lies in the conundrum of indemnification.¹

THE CONUNDRUM OF INDEMNIFICATION

New York City represents and indemnifies police officers in the overwhelming majority of civil rights cases.² The city regularly indemnifies police officers regardless of whether they acted intentionally, recklessly, or brutally; whether or not they violated federal or state law; or whether or not they violated the rules and

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1. Although this essay explores the indemnification issue in New York City, many other jurisdictions provide for indemnification of police and other municipal employees. *E.g.*, N.Y. GEN. MUN. LAW § 50-1 (McKinney 1999) (Nassau County indemnification of police officers); *Hennessy v. Robinson*, 985 F. Supp. 283 (N.D.N.Y. 1997) (discussing indemnification in Oneida County); N.Y. PUB. OFF. LAW § 18 (McKinney 1988) (general New York State indemnification statute for public employees).

2. According to Human Rights Watch, "Officers themselves do not have to pay personally in civil lawsuits; the city almost always indemnifies the officer and pays. In the rare case in which the city has not covered the officer, the PBA [Patrolmen's Benevolent Association, a police officers' union] has done so." HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES: NEW YORK: CIVIL LAWSUITS* (1998).

regulations of the New York City Police Department ("NYPD"). Basic political realities explain this practice. Police officers organize in very powerful unions, most notably the Patrolmen's Benevolent Association in New York, which in turn exert pressure on the mayor and the city's lawyer, the "Corporation Counsel,"³ to represent and indemnify the officers. And the mayor, of course, depends on his police force to preserve the low crime rate that remains the perceived crown jewel of this administration.

When the city errs on the side of indemnifying every officer, no one complains. The unions are satisfied—they successfully protect their members. The police officers are satisfied—they avoid personal liability for their wrongdoing. The victims, for the most part, are satisfied—they recover, relatively quickly, from a deep-pocket municipal defendant that, unlike most police officers, can actually pay the judgment or settlement. There is simply no one with a voice in the process with any interest in disturbing the status quo.

Not everyone wins, of course. The taxpayers lose. They pay millions of dollars to fund these judgments and settlements. The community loses, because this system perpetuates and protects police misconduct. And the victims who care more about principle than money lose, because the law gives the city near absolute discretion to defend and pay for police wrongdoing, but little incentive to investigate or discipline officers who violate the law.

COMPENSATION—YES; DETERRENCE—NO

Civil rights plaintiffs bring suit for myriad reasons. Some seek money. Some seek the public vindication of a trial by jury. Some seek punishment for the police officers that assaulted, strip-searched, verbally abused, or falsely arrested them. Still others hope that their cases will deter other officers from future unconstitutional conduct. At the outset of the litigation, most victims of police brutality seek, at different levels, all of the above, with their motives often centering on outrage, punishment, and a desire to effect some systemic change. But, as litigation drags on, their interests often slide toward the unsatisfactory compromise of accepting money from the public for the wrong they suffered. Therefore, the outrage felt by most police abuse victims is best as-

3. "Corporation Counsel" is the popular term used to refer to the New York City Law Department, the agency that acts as the attorney for the mayor, other elected officials, mayoral agencies, and other selected non-mayoral agencies. As used in this essay, it refers always to the Law Department as an institution, and not to its head, Corporation Counsel Michael D. Hess, or any individual staff attorneys.

suaged by criminal prosecution, internal disciplinary action (including termination), better police training and counseling, and civil litigation that actually forces guilty police officers to pay the settlements or judgments against them.

Private lawyers have no power to convene grand juries and indict. For that they rely upon district attorneys, who themselves almost always rely upon law enforcement in their own cases, and who all too often are loathe to take any action against police, except in the most egregious cases.⁴ Nor can private lawyers discipline, dock vacation days, suspend, fire, retrain or counsel police officers. For that they depend on police departments themselves. And police departments—the NYPD included—are notoriously unable or unwilling to discipline, much less fire, police officers.⁵ Finally, training is a palliative and generally inadequate way to prevent future misconduct, and is no match for a police culture of violence.

That leaves civil litigation. Civil litigation is *very* effective at recovering money compensation. The great majority of civil rights suits actively pursued under 42 U.S.C. § 1983 conclude with a settlement for money. When these suits proceed to trial, and plaintiffs win, they receive money—often in substantial amounts.

Civil litigation sometimes—infrequently—achieves the goal of public vindication by jury trial. It is only sometimes effective because most suits settle and never see the inside of the courtroom.⁶ But, plainly, civil litigation is mostly *ineffective* in punishing police officers. No prayer for relief in the civil complaint includes imprisonment, probation, community service, termination, suspension, or discipline of any kind. At worst, civil litigation “punishes” police officers only in the sense that they are forced, under oath, under cross-examination, and in public, to account for their actions. They are forced to confront the victims they falsely arrested, assaulted, or unlawfully strip-searched. Often officers endure grueling depositions by hostile questioners. And if a jury finds for a plaintiff

4. Since 1977, only three City officers have been convicted for on-duty killings. HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES: NEW YORK: CRIMINAL PROSECUTION (1998).

5. In 1996, for example, of 5596 complaints of police misconduct filed with the Civil Complaint Review Board (“CRRB”), 259 were substantiated by the CCRB and only 51 resulted in discipline of any kind for the police officer. N.Y. CIVIL LIBERTIES UNION, SPECIAL REPORT: FIVE YEARS OF CIVILIAN REVIEW: A MANDATE UNFULFILLED JULY 5, 1993-JULY 5, 1998, at tbl.IV (1998).

6. This is because plaintiffs choose to settle, as a result of long delays, or to avoid the inevitable risks of trauma of a trial.

after trial, the officer must face the public humiliation—such as it may be—of knowing that a jury heard his testimony, rejected it, and found that he violated the Constitution.

And if an officer refuses to admit his own wrongdoing, if he lies under oath, he must for all time live with the knowledge that he not only committed the wrong that led to the lawsuit, but that he committed the moral and legal crime of perjury—surely an uncomfortable feeling, at best. However, this punishment is still mild indeed, and of no solace to the victims of police misconduct—especially those who seek to translate their horrible experience into reform of a broken system, and who must helplessly face an officer who lies with impunity to a judge and jury.

As ineffective as civil litigation is in punishing police officers who violate the law, it is even less effective in deterring officers from future unlawful conduct. This is true for one basic reason: police officers *almost never* pay anything out of their own pockets to settle civil lawsuits. Nor do they pay for judgments rendered after jury verdicts for plaintiffs. Police officers are so far removed from the process of settling cases and paying money damages that they often have no idea how much their cases settle for, or even whether they settle at all. We have deposed many officers who had been sued one, two, three times before, yet had no idea how any of those cases were resolved.

Who does pay for police misconduct? The taxpayers do. In the overwhelming majority of civil rights cases of police misconduct in New York State, the taxpayer pays every dollar of the settlement or judgment.⁷ Between 1994 and 1996, for example, New York taxpayers paid approximately seventy million dollars for judgments and settlements arising out of police misconduct, almost two million dollars per month.⁸

THE EXISTING INDEMNIFICATION SCHEME

Taxpayers pay for these judgments because of a series of provisions of the New York General Municipal Law, providing for indemnification and free legal representation of police and other employees of New York City and State. As to New York City employees:

7. *E.g.*, statutes and case cited *supra* note 1.

8. HUMAN RIGHTS WATCH, *supra* note 2. Taxpayers also pay for Corporation Counsel lawyers to defend police officers from civil suits. In 1988, the New York City Law Department established an entire division of lawyers—the Special Federal Litigation Unit—to defend police misconduct cases almost exclusively.

At the request of the employee and upon [the employee's "full cooperation" in the defense of the action and timely notice to the city of the civil action], the city shall provide for the defense of an employee of any agency in any civil action or proceeding in any state or federal court including actions under sections nineteen hundred eighty-one through nineteen hundred eighty-eight of title forty-two of the United States code arising out of any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred.⁹

In addition to free legal representation, the city "shall indemnify and save harmless its employees" from "any judgment" or "any settlement" approved by the city, as long as (1) "the employee was acting within the scope of his public employment and in the discharge of his duties," and (2) the employee "was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained."¹⁰ This is a duty upon the city, not an option. But "the duty to indemnify and save harmless . . . shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee."¹¹

Finally, § 50-k (5) provides that:

In the event that the act or omission upon which the court proceeding against the employee is based was or is also the basis of a disciplinary proceeding by the employee's agency against the employee, representation by the corporation counsel and indemnification by the city *may* be withheld (a) until such disciplinary proceeding has been resolved and (b) unless the resolution of the disciplinary proceeding exonerated the employee as to such act or omission.¹²

Most importantly, nothing in the statute prevents the city from representing and indemnifying police who act intentionally and recklessly to violate a plaintiff's civil rights. Although the city's "duty" to indemnify "shall not arise" in this instance, the city's right or option to indemnify remains. Nor does the statute prevent

9. N.Y. GEN. MUN. LAW § 50-k(2) (McKinney 2000) (emphasis added).

10. *Id.* (emphasis added.) If a New York City police "officer's conduct was in violation of a rule or regulation of the New York City Police Department, the City (through its Corporation Counsel) does not have an obligation to defend the officer under § 50-k(2)." *Schwartz v. City of New York*, 57 F.3d 236, 238 (2d Cir. 1995).

11. N.Y. GEN. MUN. LAW § 50-k(3) (McKinney 2000).

12. *Id.* § 50-k(5) (emphasis added.).

the city from representing and indemnifying officers who violate NYPD rules and regulations, or who are actually disciplined by the NYPD after a disciplinary proceeding.

The indemnification statute "is primarily directed at saving imperfect and, therefore, fallible public employees from the potentially ruinous legal consequences following from unintentional lapses in the daily discharge of their duties."¹³ "[T]he City's obligation to defend its employees from liability for alleged acts or omissions occurring during their work is not limited to those employees who are considered wholly free from fault," and although "negligence is unsatisfactory and worthy of reprimand," no public employee need pay for the consequences of his own negligent conduct.¹⁴ This makes perfect sense. If our society is to encourage public service and attract qualified public servants, public officials cannot face financial ruin for every careless mistake that causes someone damage. Society must bear that cost.

But, as the statute recognizes, reckless and/or intentional wrongdoing is another matter. If a police officer intentionally violates the most basic of civil rights—the right not to be arrested without probable cause, the right not to be subjected to unreasonable or excessive force, the right to some medical treatment if injured while in police custody—why should taxpayers foot the bill? Why shouldn't a police officer pay for his own misconduct, as do lawyers and doctors (through, at a minimum, higher insurance premiums), and, for that matter, criminals?

THE MECHANISMS OF INDEMNIFICATION

The mechanics of representation and indemnification, which are technically distinct acts, are as follows. Under § 50-k, "[t]he Corporation Counsel of the City of New York makes the initial determination as to whether the employee will be indemnified" and represented.¹⁵ These determinations may be reviewed in an Article 78 proceeding in New York State Court.¹⁶ They may also be reviewed by federal courts exercising their supplemental jurisdic-

13. *Blood v. Bd. of Educ.*, 509 N.Y.S.2d 530, 533 (App. Div. 1986) (emphasis added).

14. *Id.* at 533.

15. *Jocks v. Tavernier*, 97 F. Supp. 2d 303, 312 (E.D.N.Y. 2000) (discussing indemnification); *Weitman v. City of New York*, 635 N.Y.S.2d 591, 592 (App. Div. 1995) (discussing representation); *Blood*, 509 N.Y.S.2d at 531 (discussing representation).

16. *Jocks*, 97 F. Supp. 2d at 312; N.Y. C.P.L.R. § 7803(3) (McKinney 1994).

tion¹⁷—the typical (and most sensible) practice where plaintiffs assert § 1983 action against police officers in federal court.¹⁸

The decision by the Corporation Counsel whether to represent the defendant officer “may be set aside only if it lacks a factual basis, i.e., is arbitrary and capricious.”¹⁹ This is not surprising, since the statute provides for free representation where “*the Corporation Counsel* finds [the alleged unlawful act] occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred.”²⁰ Of course, the officer is the only person who ever challenges the Corporation Counsel’s decision, and that is only in the rare instance when the Corporation Counsel withholds representation.

Rather more surprisingly, courts have applied the same arbitrary and capricious standard to the city’s indemnification decision.²¹ This deference finds no support in the statute. In direct contrast to § 50-k(2), § 50-k(3) nowhere refers to decisions by the Corporation Counsel or the city or in any way implies that courts should defer to the city’s indemnification decisions. Nor does the Corporation Counsel have any particular expertise in determining whether officer acted “within the scope” of his employment or whether he acted with “intentional wrongdoing or recklessness.” Even the question as to whether the officer violated an NYPD rule or regu-

17. 28 U.S.C. § 1367 (2000). “[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” *Id.* § 1367(a).

18. *Jocks*, 97 F. Supp. 2d at 312; *Harris v. Rivera*, 921 F. Supp. 1058, 1061 (S.D.N.Y. 1995); *Turk v. McCarthy*, 661 F. Supp. 1526, 1536 (E.D.N.Y. 1987).

19. *Weitman*, 635 N.Y.S.2d at 592 (internal quotation marks omitted); see also *Williams v. City of New York*, 476 N.E.2d 317, 318 (N.Y. 1985) (same); *Blood*, 509 N.Y.S.2d at 531; *Mercurio v. City of New York*, 758 F.2d 862, 864-65 n.1 (2d Cir. 1995) (per curiam).

20. N.Y. GEN. MUN. LAW § 50-k(2) (McKinney 1999) (emphasis added).

21. *Jocks*, 97 F. Supp. 2d at 313 (“Th[e] determination [whether to indemnify], made by Corporation Counsel, may be set aside by this Court if the determination was arbitrary and capricious.”) (internal quotation marks omitted); *Williams*, 476 N.E.2d at 318, (noting that whether the officer acted within the scope of his employment and in the discharge of his duties “and thus was entitled to . . . indemnification by the city [is] to be determined in the first instance by the Corporation Counsel . . . and his determination may be set aside only if it lacks a factual basis, and in that sense, is arbitrary and capricious”). The language in *Williams*, however, is dicta, as *Williams* itself dealt only with the question of whether the officer was entitled to *representation* by the Corporation Counsel.

lation is a purely legal non-technical question, and as easily decided by a court as by the Corporation Counsel. Unlike other “administrative agencies,” which often have expertise in technical fields unfamiliar to judges, the Corporation Counsel has expertise *only* in the law itself—an area in which courts are uniquely qualified. All of the usual rationales for deference to administrative agency decisions are therefore missing here.

As a policy matter, the courts’ deference to the city’s indemnification decisions is unfortunate. The deferential “arbitrary and capricious” standard of review effectively gives the city *carte blanche* to indemnify, or not indemnify, whomever it wants. As a result, indemnification decisions ultimately become a function not of law, but of politics, and except for the rare, highly-publicized, extrajudicial case, or a few cases involving off-duty police not even arguably acting “within the scope” of their employment,²² politics dictate—and very powerful police unions ensure—that the city almost always indemnifies the police.

The first requirement under § 50-k(3), that a police officer be “acting within the scope of his public employment and in the discharge of his duties,” has received unexceptional treatment in the courts. While police officers on-duty almost always act “within the scope,” occasionally, off-duty officers may not.²³

The second requirement—that the officer not be “in violation of any rule or regulation of his agency at the time the alleged damages were sustained,” is somewhat more complicated. At least one court has suggested that the city cannot invoke this clause unless, at a minimum, the city agency pressed departmental charges against the officer.²⁴ In *Blood v. Board of Education*, a schoolteacher who accidentally struck a student in the eye with a bookbag was “reprimand[ed]” and given an “unsatisfactory rating” by the Board of Education.²⁵ The court nevertheless ordered the Corporation Counsel to represent the teacher because, inter alia, “no disciplinary charges were filed” against the teacher “whose teaching career . . . continued uninterrupted,” and therefore no determi-

22. *E.g.*, *Jocks*, 97 F. Supp. 2d 303; *Turk v. McCarthy*, 661 F. Supp. 1526, 1528, 1537 (declaring a shooting by off-duty officer at amusement park not “within the scope”); *Weitman*, 635 N.Y.S.2d at 592 (finding that an off-duty officer on vacation did not act “within the scope”); *Kelly v. City of New York*, 692 F. Supp. 303, 308 (S.D.N.Y. 1988) (asserting that an officer’s misconduct arising from “prior personal dispute” while off-duty was not “within the scope”).

23. *E.g.*, cases cited *infra* note 22.

24. *Blood*, 509 N.Y.S.2d at 533-34.

25. *Id.* at 531.

nation was made that the teacher had violated any Board of Education rule or regulation.²⁶

The First Department repudiated this view just two years ago, when it held that the Corporation Counsel has “authority to make a determination, separate and apart *and in the absence of any determination by . . . the Police Department*, that [an officer] had violated certain Police Department rules and regulations, and is therefore not entitled” to representation by the city.²⁷ The Second Circuit adopted an even broader approach, interpreting § 50-k(2) to permit representation of the officers where the Corporation Counsel “determines that no violation of any rule or regulation of the employing city agency has occurred, *or* if no agency disciplinary proceedings have been commenced against the employee, or if disciplinary proceedings resulted in the exoneration of the employee.”²⁸

Thus, irrespective of whatever disciplinary charges the NYPD may bring, the Corporation Counsel again has effective plenary power to determine whether police officers violated department rules or regulations.

The third requirement, that the officer not act with “intentional wrongdoing or recklessness,” receives next to no discussion in the case law. It is almost never litigated. One principal reason for this may be that, given the Corporation Counsel’s perceived discretion to apply this standard, no police officer could meaningfully challenge the city’s decision not to indemnify on this ground.²⁹

In sum, no law prevents the city from indemnifying police who act intentionally or recklessly, who violate department rules and regulations, or who violate even clearly established constitutional law. The city has effective *carte blanche* to indemnify and represent whomever it wants, given the highly deferential (and highly

26. *Id.* at 531-32.

27. *Bolusi v. City of New York*, 671 N.Y.S.2d 478, 478 (App. Div. 1998) (emphasis added).

28. *Mercurio v. City of New York*, 758 F.2d 862, 864 (2d Cir. 1985) (emphasis added); *Behar v. City of New York*, No. 98 CIV. 2635 (HB), 1999 WL 212685, at *3-4 (S.D.N.Y. Apr. 13, 1999) (discussing that Corporation Counsel’s decision not to represent officers was not “arbitrary and capricious” where there existed pending NYPD disciplinary proceeding against them).

29. In at least one case applying New York State’s largely analogous public officer’s indemnification statute, N.Y. PUB. OFF. LAW § 18 (McKinney 1988), a court held that the city has no obligation to indemnify an officer where the jury awarded punitive damages, “[b]ecause the jury, by awarding punitive damages on each claim, found that [the misconduct] involved intentional wrongdoing or recklessness.” *Coker v. City of Schenectady*, 613 N.Y.S.2d 746, 747 (App. Div. 1994).

suspect) “arbitrary and capricious” standard of review some courts have applied. And given the practical conundrum described in the beginning of this essay, this legal regime ensures indemnification almost all of the time—and hardly deters unconstitutional police misconduct, if at all.

A PROPOSED SOLUTION

What are the solutions here? Given that the city shall not indemnify police who act intentionally or recklessly, or “in violation of any [NYPD] rule or regulation,” and assuming that the city *actually applied* this law, then the city could almost never indemnify any police officer for any § 1983 judgment. Certainly any officer liable for punitive damages, by definition, acts intentionally or recklessly.³⁰ Arguably, any officer liable for assault and battery—by definition intentional acts—acts with “intentional wrongdoing or recklessness.”³¹ And any officer who not only violates the Constitution, but “clearly established” law under the Constitution,³² presumably violates at least some NYPD “rule or regulation.” It is plainly against NYPD rules to arrest someone without probable cause.³³ It plainly violates NYPD rules to use unreasonable or excessive force.³⁴ It plainly violates NYPD rules to exhibit reckless disregard for the life of a prisoner within police custody.³⁵

Applying the law as written, the city therefore could almost never indemnify police officers, and plaintiffs would almost never be compensated. But this result is unsatisfactory. First, given the personal assets of most police officers, plaintiffs would not recover, violating a core purpose of the civil rights laws—to compensate aggrieved plaintiffs. Second, without the prospect of compensation, few victims of unconstitutional conduct would sue in the first in-

30. *Coker*, 613 N.Y.S.2d at 74; *Hartford Accident. & Indem. Co. v. Hempstead*, 397 N.E.2d 737 (N.Y. 1979).

31. *E.g.*, *Masters v. Becker*, 254 N.Y.S.2d 633 (App. Div. 1964); *see generally* RESTATEMENT (SECOND) OF TORTS §§ 21 *et seq.* (1977) (elucidating the elements of assault).

32. “As a general rule, police officers are entitled to qualified immunity,” and therefore are not liable under § 1983, “[i]f (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe that their acts did not violate those rights.” *Oliveira v. Mayer*, 23 F.3d 642, 648 (2d Cir. 1994).

33. NEW YORK CITY POLICE DEPARTMENT PATROL GUIDE § 110-1 (1995).

34. *Id.* § 104-1 (“EXCESSIVE FORCE WILL NOT BE TOLERATED.”) (double emphasis in original).

35. *Id.* § 112-3(2).

stance. And if plaintiffs did not sue, there would be no civil rights judgments or settlements to deter police, indemnification or not.

A better solution compensates *and* deters. That can be achieved by the following: After the jury's verdict as to liability and damages, the judge presiding over the civil rights case should determine what portion of the judgment the city must indemnify. The court's decision should be informed by a number of factors targeted towards deterrence. An officer who is more culpable, who commits intentional wrongdoing, or who acts brutally or with particular disregard for a victim's constitutional rights, or whose behavior could not have been anticipated or controlled by the city, should pay a greater percentage of the judgment. This would provide the greatest deterrent for the most egregious constitutional violations.

The court also should examine the officer's prior disciplinary history. If an officer has a history of misconduct, and received little, no, or inadequate prior discipline from the NYPD, then the city should indemnify a greater part of the judgment. This would put the city on notice that its disciplinary procedures are inadequate, and provide financial incentives to improve them. Conversely, if an officer has a history of police misconduct, and received proper and adequate discipline by the city, then the officer should be required to pay more of the judgment himself. This would reward the city for instituting internal disciplinary measures to deter police misconduct, and deter problem officers from committing misconduct yet again.

Similarly, if the city did not adequately discipline the officer for the misconduct at issue in the instant lawsuit, then the city should be required to indemnify a greater part of the judgment. And if an officer was properly disciplined by the city for the misconduct at issue in the lawsuit, then the officer would be required to pay more of the judgment himself. This again encourages the city to mete out appropriate discipline to officers who violate the law.

Another factor for the court to consider is the defendant officer's ability to pay the judgment. It neither deters police officers, nor benefits plaintiffs, to saddle an officer with a huge judgment that can never be paid. The less of the judgment an officer can afford to pay, the more the city should indemnify the officer, irrespective of the relative culpability of the officer and the city.

Finally, prevailing plaintiffs should always be compensated. Notwithstanding the above factors, it should be the rare case (if any) where the city will not indemnify a police officer at all. To guarantee real compensation, the city must pay at least some portion of

the judgment. Compensation is not only a central purpose of the civil rights laws; it induces plaintiffs to bring the very lawsuits that deter (or should deter) the police from committing unconstitutional conduct in the first instance. If, for example, a plaintiff were the subject of particularly brutal and outrageous misconduct,³⁶ resulting in the NYPD's termination of the perpetrating officer, the above factors (the horrible nature of the misconduct and the NYPD's appropriate disciplinary response) would otherwise counsel against indemnification. This would be unfair and cruelly ironic—since the severe nature of the police misconduct caused the plaintiff unusually severe damage. This final factor—the plaintiff's right to actual compensation—would help prevent such an unfair and unintended result. In addition, a legislative presumption favoring the city's indemnification of at least fifty percent of the judgment would all but ensure that plaintiffs are fairly compensated.

Finally, the indemnification scheme should apply whether or not the police officer acted "within the scope of his public employment," provided that the officer acted "under color of state law." An off-duty officer shoots with an NYPD gun. An off-duty officer is able to arrest someone because he is an NYPD police officer. It would be shocking if the NYPD failed to discipline a police officer for egregious misconduct committed under color of state law, even if the officer did not act "within the scope of his public employment." Since the civil rights laws themselves prohibit unconstitutional conduct committed "under color" of state law, the indemnification statute should be calculated to deter the same.³⁷

This entire indemnification scheme should be written into the municipal law itself. Such a law, passed by the New York State Legislature, would not implicate issues of either comity or federal-

36. *United States v. Volpe*, 78 F. Supp. 2d 76 (E.D.N.Y. 1999), *aff'd in part, dismissed in part*, 224 F.3d 72 (2d Cir. 2000); N.Y. CIVIL LIBERTIES UNION, DEFLECTING BLAME: THE DISSENTING REPORT OF MAYOR RUDOLPH W. GIULIANI'S TASK FORCE ON POLICE/COMMUNITY RELATIONS (March 1998), available at <http://www.nyclu.org/blame1.html>.

37. We propose leaving § 50-k(2), concerning representation of officers by Corporation Counsel, as is. In addition, § 50-k(3), as it applies to settlements, would remain unchanged under this proposal. It is simply too complicated and burdensome for a court to make indemnification decisions where no evidence has been taken, no trial conducted, and no determination of liability made by a jury. In order to apply the above multi-factor test to settled cases, courts would have to hold hearings and hear evidence concerning all of these factors—the officer's level of culpability, his intent, his disciplinary record, etc. This would be costly for all parties and would unnecessarily discourage settlement. In any event, if a police officer is to pay a portion of a settlement, that can be part of the settlement negotiation between the parties.

ism.³⁸ And, as now, this state indemnification statute would apply wherever the civil rights suit were brought—whether in state court, or (pursuant to its supplemental jurisdiction) in federal court.

Such an indemnification scheme has many immediate advantages. It places the indemnification decision in the hands of courts, not the municipality itself, ostensibly removing political pressure from the indemnification decision.³⁹ Most importantly, such a law would say loudly and clearly to every officer: “You are not insured; you have no security that your misconduct will cost you nothing.” With the indemnification decision in the hands of courts, not city lawyers, no officer could be at all sure that the city and the taxpayer will foot the entire bill for violations of clearly established constitutional law. That decision would be made—after the evidence is presented, after trial, and after the jury’s verdict—by a fair and neutral arbiter. Deprived of near absolute impunity from the financial consequences of their unconstitutional acts, police officers will, finally, be and feel accountable for their conduct in some tangible way.

Finally, such an indemnification scheme would provide police officers and the city direct incentives to deter future police misconduct. It would encourage the city to discipline officers when officers should be disciplined. It would punish the city for failing to do so. And it would impose greater penalties for more serious misconduct and for repeat offenders.

We therefore propose that, although § 50-k(3) remain unchanged as to indemnification of settlements, the following paragraphs concerning the city’s indemnification of judgments against police officers be added:⁴⁰

A court will determine to what extent the City must indemnify and save harmless any of its employees employed by the New York City Police Department in the amount of any judgment obtained against such employees in any state or federal court, provided the act or omission from which such judgment arose occurred while the employee was acting under color of state law. The court’s decision shall be determined according to the following eight factors:

38. If a *federal* indemnification statute were enacted instead, the specter of a federal judge making indemnification decisions for municipalities—which are arms of the states—could well pose such problems.

39. To the extent, of course, that judges are not influenced by political considerations.

40. This essay takes no position as to indemnification of other city employees.

- (1) the culpability of the officer and seriousness of the officer's conduct from which the judgment arose;
- (2) whether the officer committed intentional wrongdoing;
- (3) whether the officer has a history of misconduct;
- (4) whether the City imposed inappropriate and/or inadequate discipline for the officer's prior misconduct;
- (5) whether the City imposed inappropriate and/or inadequate discipline for the officer's conduct from which the judgment arose;
- (6) the plaintiff's or plaintiffs' interest in receiving actual and adequate compensation;
- (7) the officer's financial ability to pay the judgment; and
- (8) the interests of justice in the particular case before the court.

The greater the culpability of the officer and seriousness of the conduct, the more intentional the wrongdoing, and the more extensive the officer's history of misconduct, the less shall the City indemnify the officer. Conversely, to the extent the City imposed inappropriate and/or inadequate discipline for the officer's prior misconduct, and to the extent the City imposed inappropriate and/or inadequate discipline for the misconduct that led to the judgment, the more shall the City indemnify the officer. In applying factors six and seven, the court shall also ensure that the plaintiff(s) always receives adequate and actual compensation.

In addition, and notwithstanding the above factors, in order to ensure that the plaintiff(s) receives adequate compensation, there shall be a rebuttable presumption that the City shall indemnify greater than fifty-percent of the judgment.

CONCLUSION

The complex interplay between an indemnification statute that puts the cost of police misconduct on taxpayers, political pressure by powerful police unions, and plaintiffs' (and plaintiffs lawyers') desire for the municipal deep pocket, conspire to strip the civil rights laws of any meaningful deterrent effect. Until the above-proposed or some similar measure is put into place, § 1983 will benefit only the civil rights bar and those few victims of unconstitutional conduct brave enough to sue the NYPD. But if and when such a measure is enacted, the civil rights laws may better serve their core purpose: preventing unconstitutional conduct from occurring at all.