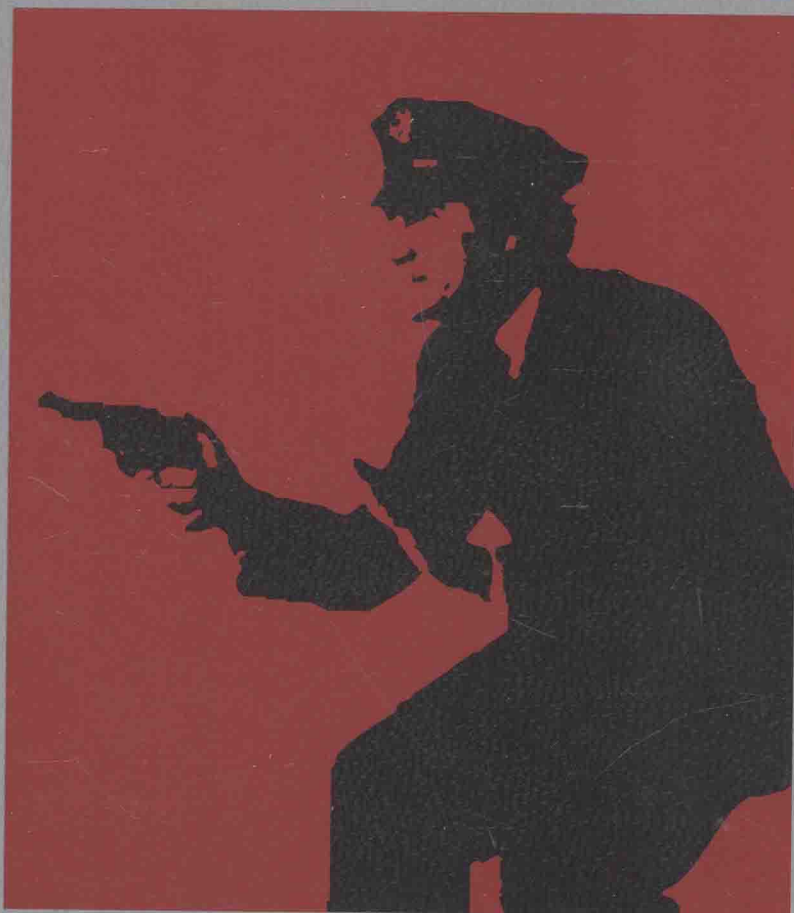


# ***Police Misconduct***

**Law and Litigation**

**Third Edition**

**MICHAEL AVERY • DAVID RUDOVSKY • KAREN BLUM**

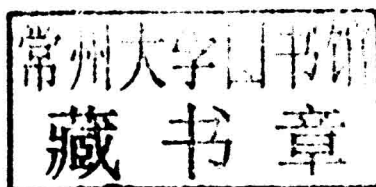


# Police Misconduct

## Law and Litigation

*Third Edition*

By Michael Avery, David Rudovsky and  
Karen M. Blum



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## About the Authors

Michael Avery is a graduate of Yale College and Yale Law School who has been practicing law and has been a member of the National Lawyers guild since 1970. After one year as a staff attorney for the American Civil Liberties Union, he entered private practice, specializing in civil rights litigation. Mr. Avery is a Professor of Law at Suffolk University Law School in Boston, Massachusetts and has taught law on the adjunct faculty of Northeastern University School of Law and Boston College Law School. He also lectures frequently on the subject of police misconduct litigation at law schools across the country, and at conferences held by the National Lawyers Guild, the International Association of Chiefs of Police, and other organizations. Before joining the Suffolk faculty in 1998, Mr. Avery was a partner in the firm Perkins, Smith & Cohen in Boston, Massachusetts.

David Rudovsky is a graduate of Queens College and New York University Law School. He has been practicing law in the civil rights and civil liberties fields since 1967. He has been First Assistant Defender at the defender Association of Philadelphia, and is a founding partner of the law firm of Kairys, Rudovsky, Messing & Feinberg, LLP. Mr. Rudovsky is a Senior Fellow at the University of Pennsylvania Law School and lectures frequently on civil rights matters. In 1986, he was awarded a MacArthur Fellowship for his work in criminal justice and civil rights.

Mr. Rudovsky and Mr. Avery have jointly briefed and argued a number of important civil rights cases, including *Gomez v. Toledo*, 446 U.S. 635 (1980), *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *City of Canton v. Harris*, 489 U.S. 378 (1989).

Karen M. Blum is a Professor of Law at Suffolk University Law School in Boston Massachusetts, where she taught since 1976 in the areas of civil procedure, civil rights and police misconduct litigation. She is a graduate of Wells College, Suffolk University Law School (J.D.) and Harvard Law School (L.L.M.). Professor Blum has been a regular faculty participant in § 1983 Civil Rights Programs and Institutes throughout the United States. In addition, she has served as a faculty member for workshops for federal judges and magistrate judges sponsored by the Federal Judicial Center. Her numerous law review articles in the § 1983 area have been cited by the Supreme Court of the United States and lower federal courts throughout the country.

The authors would encourage attorneys representing plaintiffs to take advantage of the information services provided by the National Police Accountability Project of the National Lawyers Guild. NPAP is a membership organization open to plaintiffs' attorneys, paralegals and community activists who seek remedies for police misconduct. NPAP operates a listserv for the exchange of information and conducts frequent CLE programs. NPAP is located at 14 Beacon Street, Boston, MA 02108, tel. 617-227-6015 and may be found on the Internet at [www.nlg.org/npap](http://www.nlg.org/npap).

## Preface

Thirty-five years ago, two of the current authors, Michael Avery and David Rudovsky, published the first edition of *Police Misconduct: Law & Litigation*. At that time, very few lawyers would even consider representation of persons who had civil rights claims against the police. Moreover, the legal landscape of § 1983 as it pertained to actions against police officers and government units was quite undeveloped. We believed then—as we do now—that these cases were particular legal and political importance and that properly prepared cases could achieve significant results.

Thirty-five years later much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct. The most commonly faced issues in police misconduct litigation have been the subject of repeated review by the lower federal courts and the Supreme Court. But the development of the law has not been linear. In certain respects it is now easier to challenge police misconduct in court than it was two decades ago. In other respects, it is far more difficult.<sup>1</sup>

Disclosures of patterns of police abuse as a result of litigation, governmental investigating commissions, press reports, and citizen action, have focused much needed attention on the scope and causes of police misconduct, leading to significant reforms. Nonetheless, as recent scandals in New Orleans, Philadelphia and New York make clear, systemic abuse is still all too prevalent on too many areas.

The problem posed by the illegal exercise of police power are of particular concern for individuals of a disfavored race, class, alienage, or sexual orientation, and for those who have the temerity to challenge authority. The social divisions caused by racial discrimination are often reflected in relations between citizens and police officers. Although a principal purpose of the Civil War Amendments and the accompanying Civil Rights Acts was to combat racially motivated abuses, those laws were almost immediately gutted by a conservative judiciary and ignored by law enforcement and other officials. One hundred years after their passage the Kerner Commission found:

To some Negroes, the police have come to symbolize white power, white racism, white repression. And the fact is that many police do reflect and express white supremacist attitudes. The atmosphere of hostility and cynicism is reinforced by a widespread belief among Negroes in the existence of police brutality and in a "double standard" of justice and protection—one for Negroes and one for whites. Report of the National Advisory Commission on Civil Disorders.

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<sup>1</sup> 1. In a highly misleading citation, Justice Scalia quoted this paragraph in *Hudson v. Michigan*, 126 S.Ct. 2159, 2167 (2006), as support for the proposition that the availability of civil remedies against police supports limitations on the application of the exclusionary rule in criminal cases. We invite the reader to judge the honesty of this assertion based on a full review of this book.

Historically the police frequently have sided with powerful economic interests against strikers and working class movements. The Haymarket protesters, the Molly Maquires, the “Bread and Roses” strikers, farm workers, and innumerable less publicized workers’ actions and movements have suffered from police repression. Many other forces, including the civil rights movement, the women’s movement, gays and lesbians, and war protesters have felt at one time or another, the heavy hand of police abuse.

Other police abuse problems result from the fact that our society lacks the elementary social cohesiveness, sense of shared purpose, and fundamental social and economic fairness to make possible a solution to the problem of crime. In effect, the police are asked to perform an impossible task. Attempts to prevent crime inevitably lead to excesses which violate legal and constitutional norms. Law enforcement and obedience to law are often mutually exclusive goals for the police. Pressure to protect society’s short-run interests by emphasizing law and order results in the sacrifice of more fundamental interests of constitutional order.

Changes in this situation are very difficult to make. The public’s understandable fear of crime has been used to support a “free hand” for the police. Many people have been persuaded that protection from crime requires subordination of individual rights. Even people who would otherwise be strongly opposed to police abuse remain silent for fear of weakening law enforcement’s hand in dealing with crime. Other people, of course, support the illegal tactics of the police to enhance and preserve their own social and political privileges.

In the last two decades the “War on Drugs” has re-ordered law enforcement priorities and has had a serious impact on civil liberties. Unfortunately, the Bill of Rights has often been ignored by both police officers and judges preoccupied with a perceived need to enforce the narcotics laws at any price. The scope of substantive privacy rights under the Fourth Amendment has been dramatically narrowed. The procedural mechanisms for challenging police misconduct have been affected as well, both by doctrines which come into play in the litigation of motions to suppress evidence in criminal cases, and by the expansion of qualified immunity and other defenses to civil liability.

The need for comprehensive and sophisticated study of the legal principles relevant to the litigation of police misconduct problems is greater than ever before. Thus, in this Third Edition of *Police Misconduct: Law and Litigation*, we are extremely pleased to welcome Karen Blum, Professor of Law at Suffolk University Law School, as a co-author. With her valuable work this edition significantly expands the scope of our earlier texts.

Police misconduct suits can do more than compensate those persons or groups that are the direct victims of illegal police conduct. Such litigation exposes both individual acts of brutality and unconstitutional institutionalized police practices of which

people (both jurors and the public at large) would otherwise never hear. As a result, these cases can help to illuminate police insensitivity to the problems of the community and to the democratic rights of citizens.

Without overemphasizing the importance of litigation, and recognizing that the resolution of police abuse problems is tied to changes well beyond those that can be effected through the legal system, we believe that this kind of work has significant political and legal benefits.

The potential of litigation under the Civil Rights Act to challenge abuse of state power was suggested by the Supreme Court in *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980):

The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "[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." *Monroe v. Pape*, 365 U.S. 167, 184(1961) (quoting *U.S. v. Classic*, 313 U.S. 299, 326 (1941). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, supra, 365 U.S. at 172.

How "uniquely amiss" it would be, therefore, if the government itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals conduct"—were permitted to disavow liability for the injury it has begotten. . . A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guaranties, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. . .

More recent decisions of the Supreme Court and lower federal courts, however, have cast doubt upon the resolve of the federal judiciary to enforce constitutional guarantees. In this context, the Third Edition of *Police Misconduct* presents a comprehensive and detailed examination of the legal aspects of this litigation.

We have attempted to present the subject matter in the format most useful to practitioners. Each aspect of the case from initial evaluation of the court's charge to the jury, is analyzed from a legal litigation perspective. There is a complete discussion of each important litigation step, and a thorough review of the relevant case law and statutes is provided. In addition, this volume provides a detailed litigation checklist and a set of comprehensive sample pleadings, discovery motions, and related litigation papers. We thank Jonathan Feinberg, David Rudovsky's law partner, for assembling and editing these Appendices to provide up to date pleadings for civil rights litigation.

Chapter One presents the basic theoretical underpinnings upon which police misconduct litigation is based.

Chapter Two discusses the types of misconduct by police officers which may give to liability under the civil rights acts.

Chapter Three covers the increasingly important absolute and qualified immunity defenses which are available to government agents in § 1983 actions.

Chapter Four canvasses the various theories of liability against individual, supervisory, and governmental defendants.

Chapter Five discusses the principles that govern cases involving federal officers and the United States.

Chapter Six should be read prior to the first interview with the potential plaintiff. It contains practical information about evaluating cases and obtaining and preserving evidence of police wrongdoing. This chapter also has a section on counterclaims and retaliatory actions by police.

Chapter Seven and Eight contain instructional and descriptive material concerning the basic pleadings in a police abuse case, as well as discussion of the applicable law. The Appendix contains sample forms which should be consulted together with these chapters.

Chapter Nine discusses the effect on a civil rights action of earlier court proceedings. If a client has been charged with criminal offenses, this material should be consulted before you resolve the criminal case, so that civil remedies will not be foreclosed or compromised by what happens in criminal court.

Chapters Ten, Eleven and Twelve are trial-oriented. They contain voir dire questions, which should be put to potential jurors at the outset of the case, and suggested instructions to the jury, which should be requested at the conclusion of the case. The requested instructions should be read in conjunction with the corresponding substantive discussions in Chapters Two and Four.

Chapter Eleven discusses the actual litigation of a civil rights damage action. The trial skills necessary to successfully litigate a civil rights damage action cannot be taught in this volume and the analysis and material presented are not intended to serve as a general primer for civil trial litigation. Realistically, these skills are mastered through experience and repeated trial work. There are, however, certain problems, issues, and tactical decisions that are unique—and often decisive—in the trial of a civil rights damage action. This chapter identifies those special areas of litigation and discusses from a trial advocacy standpoint the range of approaches that should be considered by counsel. Appendix G contains an actual cross-examination of a police officer which exemplifies some of the tactics that can be used in such a case.

Chapter Thirteen covers the important aspect of damages. Early attention to this aspect of a case is crucial and counsel should begin preserving evidence of damages as soon as a case is accepted.

Chapter Fourteen covers the topic of attorneys' fees.

Chapter Fifteen discusses equitable relief. In many cases money damages are not adequate to remedy the constitutional violation; an injunction or declaratory relief is necessary to ensure full protection of constitutional rights. The Supreme Court has placed substantial restrictions on equitable relief in civil rights cases, but with careful preparation, systemic violations of rights can be remedied.

The continued publication of this work has been immeasurably easier by the assistance and encouragement of our many friends and colleagues.



POLICE MISCONDUCT

Michael Avery  
Karen Blum  
David Rudovsky

December, 2012

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