

MALICIOUS PROSECUTION COUNTERCLAIMS AND
THE RIGHT OF PETITION IN POLICE MISCONDUCT SUITS

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INTRODUCTION

Police misconduct plaintiffs increasingly find themselves on the defensive against individual officer defendants who have filed suits and counterclaims against them. Police unions now routinely advise their members to assert defamation or malicious prosecution counterclaims against false arrest and excessive force claimants and organized groups exist to help advance them. These retaliatory strategies have now become so organized that a group called "Americans for Effective Law Enforcement" monitors the success of police officers in court and prints the results of their suits in a quarterly publication entitled "The Police Plaintiff." One training primer on "how to sue" boasts that defendant officers are successfully pursuing these counterclaims in at least half of the cases in which they are filed.

A variation of the "SLAPP" ("strategic lawsuits against public participation"), such suits and counterclaims are more than merely a litigation nuisance: They violate a misconduct

plaintiff's right to petition the government for redress of grievances found in the federal as well as in many state constitutions. Defendant officers use these counterclaims to target and to punish citizens who exercise their basic right to seek legal redress in the courts as a way to complain about police behavior as well as to obtain compensation for their injuries. Behind this trend is a conscious and organized effort by law enforcement personnel and unions to stifle any form of criticism of their behavior.

The filing of malicious prosecution counterclaims as well as defamation suits by individual police officer defendants appears to be an expanding, and disturbing, trend in police misconduct litigation. This article will address the recent case law in this area, state and federal, that is developing around such efforts. It will specifically address the various state and federal court views on the threat such suits pose for the right of petition, particularly the current trend towards placing significant restrictions on these counterclaims based on either an absolute or a qualified privilege.

VARIATIONS OF COUNTERCLAIMS AND COUNTERSUITS AGAINST MISCONDUCT PLAINTIFFS

Typically, law enforcement officers will file defamation

countersuits against citizens who, rather than filing a lawsuit, complain about a particular officer's behavior to a superior officer or who file an internal disciplinary complaint. These defamation claims usually involve allegations that the citizen has made "false statements" about the officer. They constitute a substantial percentage of suits currently being filed by law enforcement personnel.

When a citizen has filed either a civil rights or common law false arrest or excessive force lawsuit, individual officers (with the encouragement and help of their unions) are more likely to use the tort of malicious prosecution as the basis for the action. Theoretically, such claims can be asserted against the complaining party in a disciplinary action against the officer, provided the additional elements for the tort are present.

Malicious prosecution claims are more complicated than defamation claims since they involve additional considerations of individual harm. In addition to the considerations of truth and falsity involved in a defamation action, malicious prosecution claims also require proof that: (1) the proceedings were initiated without probable cause to believe that the claim asserted might be valid; (2) the proceedings were initiated for a purpose other than that of securing the proper adjudication of the

claim; and (3) the proceedings have terminated in the complaining party's favor. Restatement (Second) of Torts ? 674 Wrongful Use of Civil Proceedings, Comment (g).

According to a Training Bulletin published by the International Association of Chiefs of Police [IACP] entitled "The Police Officer as Plaintiff," a particular officer's choice among four different goals or objectives will determine what type of action is chosen as well as what type of litigation tactics are employed. According to the IACP bulletin, those four goals are:

- (1) Compensation for physical and other injuries suffered (not available if benefits are available under state workmen's compensation laws). The Bulletin recommends claiming injuries for compensation such as infliction of mental distress, invasion of privacy, false arrest or imprisonment, property theft or damage, and interference with the officer's employment relationship.
- (2) Vindication and restoration of the officer's and the department's "good reputation," usually the individual police officer's primary goal in bringing such a suit.
- (3) Deterrence of future "physical or verbal attacks on the officer or the department," which is, according to the IACP Bulletin usually a police union's primary objective in encouraging officer suits. The IACP Bulletin goes on to encourage the use of

injunction suits to prohibit alleged "misconduct by a specific defendant ... [or] where individuals or groups are engaged in a campaign of verbal harassment or planned violence against the police."

(4) Defense when an officer has been sued; the filing of a counterclaim by the officer, according to the IACP Bulletin, "virtually doubles the officer's chances of successfully defending the suit."

The IACP Bulletin also encourages officers to bring actions against not only the "person who committed the act that resulted in the injury" but also "groups that have incited the attack upon the officer," the person's employer and the person's parents if he or she was a minor. Also encouraged are defamation and malicious prosecution actions against any "attorney who knowingly brings a spurious criminal charge, civil suit, or disciplinary complaint against an officer."

With this kind of encouragement, police officer "SLAPPs" are on the rise nationally: A 1986 study conducted by the Libel Defense Resource Center revealed not only a national rise in tort suits brought by public officials but also showed that law enforcement personnel comprised more than one third of the plaintiffs in such cases. See Libel Resources Defense Center

[LRDC] Study #7, Public Official Libel Actions: A Comparison of Reported Cases 1976-1979 and 1979-1984 (1986). As stated in the

LRDC study:

It appears that police and their unions and representatives have for some time been consciously invoking libel as a remedy for perceived abuses in media coverage of law enforcement, as well as a means of challenging civilian oversight of police activities and more individualized arrest and complaint situations. Indeed, in some non-media cases, police unions apparently advise their members to assert libel counterclaims as a matter of course against false arrest or police brutality claimants and organized groups exist to help foster or advance such claims. LRDC Study #7, at pp. 5-6.

In 1984, Washington state police unions organized to convince the state legislature to pass a statute giving them the ability to assert malicious prosecution counterclaims as a matter of course in any legal action brought against an individual police officer. The Washington legislature passed the statute, relieving defendant law enforcement officers of the need to prove a number of the usual common law requirements for a malicious prosecution tort claim. Wash.Rev.Code 4.24.350.

The Washington statute gives a police officer defendant the automatic right to file a malicious prosecution counterclaim "arising out of the performance or purported performance of the public duty of such officer." Such a counterclaim can be filed

even though the original proceeding has not terminated in the officer's favor, normally an essential element of the common law tort of malicious prosecution.

The stated purpose of the Washington statute is to provide a remedy against the "growing number of unfounded lawsuits, claims and liens ... filed against law enforcement officers, prosecuting authorities, and judges" A legislative staff memorandum submitted prior to its passage further states the motives behind the law, passed at the insistence of police unions in the state:

Law enforcement officers, prosecutors and judges are occasionally the target of lawsuits brought by individuals whom they have arrested, prosecuted, or sentenced. Such lawsuits have no legitimate or rational basis and are simply brought for malicious reasons and without probable cause. Often the only purpose of such lawsuits is to embarrass or impugn the reputation of the public officers or to cause the officers or the municipal corporation to incur substantial legal fees to defend the lawsuit. [Emphasis supplied.]

The staff memorandum goes on:

Such lawsuits were having the effect of deterring public officers from properly exercising discretion in their jobs and inhibiting the performance of their public

duties. The Legislature determined that the elements required for a malicious prosecution claim should be modified for public officers.

In at least one state then, by the authority of a specially enacted state law, police officer defendants can as a matter of course file a malicious prosecution counterclaim in any civil rights or common law action brought against them. The real world impact of this statute is demonstrated in Gerald Anderson v. City of Black Diamond, et al, a case that is currently on appeal to a Washington State Court of Appeals. Anderson v. Black Diamond, Wash. Court of Appeals Division One Case No. 33788-2.

Mr. Anderson's original civil rights lawsuit against two narcotics detectives and the City of Black Diamond was dismissed on an order of summary judgment. He is now appealing a \$222,000 jury verdict entered against him in November 1993 based solely on the two detectives' malicious prosecution counterclaims. Most of the judgment was for "lost promotional opportunities" based on expert testimony that simply because the officers had been sued, both would be "virtually disqualified" from promotional opportunities. Further expert testimony established (and persuaded the jury) that "employers can't take the risk of hiring a policeman who has been sued because of the risk of a claim against them for negligent hiring" and "accusing [an officer] of

committing a civil rights violation ... is the equivalent of accusing a teacher of engaging in sexual abuse of a child or a doctor of murdering his patients." [Excerpts are taken from the trial briefs and trial transcript.] At the appellate level, an organization of police unions has filed a motion for leave to file an amicus brief to address "issues pertaining to the effect of vexatious litigation and the filing of false lawsuits against law enforcement officers, on both the victimized officer and his family and on the criminal justice system."

It is questionable whether an individual defendant police officer could assert such a malicious prosecution counterclaim (as opposed to a separate lawsuit) in an action brought in federal court: Federal courts do require the common law proof that a prior proceeding terminated in favor of the claimant. Therefore, a malicious prosecution claim "cannot be asserted as a counterclaim in the very action it challenges as malicious." Kalso Systemet, Inc. v. Jacobs, 474 F.Supp. 666, 670 (S.D.N.Y. 1979).

In addition, if an officer files a separate malicious prosecution action against a citizen who previously filed an unsuccessful civil rights suit, the defendant citizen can attempt to remove the state claim to federal court pursuant to the federal

question statute, 28 U.S.C. ?1441(b). The basis for doing so is that the federal court has original jurisdiction because the suit arose under the laws of the United States, 42 U.S.C. ?1983. One court sustained such a removal, stating that the question of whether there was probable cause to believe that a valid cause of action under ?1983 existed at the time the civil rights complaint was filed is a "pivotal question of federal law." Sweeney v. Abramovitz, 449 F.Supp. 213, 216 (D.Conn. 1978).

As the Sweeney court stated:

[T]he potential for using state malicious prosecution suits to deter legitimate ?1983 actions implicates important federal concerns.... If the question of what constitutes probable cause to bring a ?1983 action is determined according to state law, there is a possibility that the [probable cause] standard will be set so high in some state courts as to permit malicious prosecution suits to be brought in response to legitimate ?1983 actions. Sweeney, 449 F.Supp. at 216.

The Sweeney court went on to touch upon what is certainly a key question in assessing the legitimacy of police officer retaliatory lawsuits:

It is of course possible that ?1983 actions, like any other judicial process, may be abused. But determining the standards for malicious prosecution action requires the delicate balancing of the legitimate interests of public officials to be free from unfounded ?1983 suits against the necessity of preserving plaintiffs' ability to vindicate their federal rights undeterred by fear of being subjected to unfounded malicious prosecution suits. Such a balancing may itself be a federal question

sufficient to invoke 28 U.S.C. § 1331 jurisdiction.

In Sweeney, the police officer plaintiff filed his malicious prosecution countersuit in state court alleging that the defendants' civil rights action filed in federal court had been "commenced and prosecuted ... without probable cause, and with malicious intent." Sweeney, 449 F.Supp. at 214. Sweeney may thus be limited to the procedural scenario where the original unsuccessful action was filed in federal court and the officer's countersuit filed in state court is removed back to the federal court with original jurisdiction.

On the other hand, as addressed more fully below, any suit or claim filed against an unsuccessful complaining citizen raises important questions involving the citizen's First Amendment right to petition the courts for redress of grievances. These issues must be addressed even where the malicious prosecution or defamation counterclaim or suit remains in harsher, more police-friendly state courts. [For additional information on these procedural questions, see generally Police Misconduct, Section 4.6, "Counterclaims and Retaliatory Actions by the Police."]

THE FEDERAL AND STATE RIGHT TO PETITION FOR REDRESS
IN COURT OR ADMINISTRATIVE AGENCIES

A citizen's right to complain in whatever form he or she

chooses about government official conduct lies at the core of First Amendment freedoms. Because officers are public officials, their actions and those of their departments are subject to public criticism and debate. Those involved in the debate must not be subjected to the constant threat of retaliatory defamation or malicious prosecution suits. See, e.g., New York Times v. Sullivan, 376 U.S. 254 (1964) (libel suit brought by police chief concerning alleged false statements published about police treatment of Dr. Martin Luther King). Some courts have held that even if a public officer suffers inconvenience, embarrassment, or damage to reputation as a result of public criticism, that is simply a burden which "unfortunately all civil servants may be called occasionally to shoulder as part of the obligation of the job." Greenberg v. City of N.Y. Mun. Bldg, 382 N.Y.S.2d 547, 550 (1977) (malicious prosecution action involving administrative proceeding).

If courts continue to uphold an individual officer's right to sue a citizen for complaining about his or her behavior, then each potential plaintiff must accept the possible expense of defending against the officer's suit should the evidence prove inconclusive. If the trend is not stopped or curtailed, eventually only those plaintiffs who have nothing to lose (i.e., are incarcerated) or

who are affluent enough to hire a defense attorney at hourly rates (i.e., with home owners insurance) will complain. What if, for example, the citizen who saw the Rodney King beating did not have the video camera and simply complained to the Los Angeles Police Department? Would he have done so had he known that the officers involved would sue and put him through the expense of a full blown trial if the Department made a determination in the officers' favor?

Few courts, federal or state, have ruled on the constitutional issues involved, either because officer defendants are successful in using such counterclaims for settlement purposes and the issues are seldom appealed or the questions usually take a back seat to other issues. The one federal court that has addressed the First Amendment dimensions of malicious prosecution claims against an unsuccessful civil rights plaintiff ruled that such claims raise substantial First Amendment issues, and enjoined the state and state officers from proceeding with their state court suit. Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983).

In Oldham, an attorney and his lawfirm had unsuccessfully litigated a wrongful death "failure to protect" suit on behalf of the estate of a woman who had been beaten to death by her husband against the State of Florida and the State Attorney. The state

trial court granted summary judgment to the defendants and that judgment was upheld on appeal along with a ruling that the action was not frivolous. The State of Florida and the State Attorney then filed a malicious prosecution action naming as defendants the plaintiff's attorney and his law firm. Oldham, 707 F.2d at 1180.

On a motion to dismiss, the attorney argued that the State and state officials sued in their official capacities could not, consistent with the First Amendment, file malicious prosecution actions against persons exercising their First Amendment right to petition the government "by bringing legal actions against the State and state officials." Id. The motion to dismiss was denied.

The attorney then filed a ?1983 action in federal court asking the court to enjoin the malicious prosecution action in the state court. He simultaneously filed a petition for writ of certiorari to the Supreme Court of Florida. The district court dismissed the State of Florida as a defendant, holding that it was not a "person" for purposes of ?1983. It also denied injunctive relief, finding that "Cate had shown neither a substantial likelihood of success on the merits nor the presence of irreparable injury." Id.

The Eleventh Circuit upheld the dismissal of the State on the

grounds of Eleventh Amendment immunity rather than a direct interpretation of the language in ?1983. Id. at 1182-1183. It further stated that it was reluctant to apply the doctrine of Pullman abstention in light of unresolved state law questions, including whether a state official sued individually for his or her official acts could maintain a countersuit in his or her individual capacity. In discussing the Eleventh Amendment, the court stated that so long as the damages sought by the plaintiff would come from "the public treasury and not from the named individual defendant, it is impossible to maintain the fiction that the suit is not against the [government]." Id. at 1181.

With respect to the individual state official as a malicious prosecution plaintiff, the Eleventh Circuit held that because his function as plaintiff was "no different from that of private plaintiffs in purely private proceedings," abstention under Younger v. Harris was not applicable. Id. at 1183. However, the court held that Pullman abstention was appropriate pending response to certified questions to the Supreme Court of Florida concerning the First Amendment rights involved.

The plaintiff attorney in Oldham had argued that "the First Amendment protection of the right to petition the government for redress of grievances absolutely bars states and state officials

from bringing malicious prosecution actions against citizens who have sued the state and state officials in their official capacities for negligence." Id. at 1184. In ruling on this question, the Eleventh Circuit stated: "The facts of this case thus pose an important constitutional issue on the scope of the First Amendment right to petition." Id. It stated further that the First Amendment right to petition could be chilled not only by pre-filing actions but also by "subsequent punishments" such as retaliatory lawsuits brought by government officials. Id. at 1186. It concluded that the district court erred as a matter of law and abused its discretion by failing to strike the balance between the governmental interests involved and the First Amendment in favor of "First Amendment freedoms and absolute immunity from suit by governmental entities or officials." Id. at 1187.

As to the particular facts before it, the Eleventh Circuit held that the malicious prosecution action was filed in direct response to the attorney's attempt to petition the government and that its only purpose was to penalize that activity and to deter it in the future. Id. at 1189 [compare the list of objectives and goals for police officer countersuits listed in the IACP Training Bulletin above]. It further concluded that the source of the

chill was the "direct penalization of citizens who have petitioned the government in the form of litigation by requiring them to defend a malicious prosecution action" and that this "critical irreparable injury" was a sufficient injury for purposes of enjoining the state court action. Id.

The Eleventh Circuit in Oldham posed the following questions to the Supreme Court of Florida: (1) Whether a state official who has been sued in his official capacity for negligence in the exercise of his official duties may maintain a malicious prosecution action against the plaintiffs in the negligence action; and (2) If the answer to (1) is yes, what is the standard of malice that the state official must prove in order to prevail on the merits of the malicious prosecution action and how does it compare with the level of malice that must be proved in malicious prosecution actions where private parties are the plaintiffs. Id. at 1185.

In answering the state law questions on certified to it, the Supreme Court of Florida ruled that state common law prohibited a state official sued in his or her official capacity from maintaining an action for malicious prosecution. Cate v. Oldham, 450 So.2d 224 (Fla.1984). In so ruling, the Florida court stated:

There simply is no historical basis for a state officer to

retaliate with a malicious prosecution action when he was sued in his official capacity. Malicious prosecution is considered a personal tort.... The gravamen of the action is injury to character.... [citations omitted]. Oldham, 450 So.2d at 227.

The Florida Supreme Court stated further that at common law, a successful defendant could either tax costs and fees in the original action or he or she could sue for malicious prosecution, but the defendant could not attempt a double recovery by proceeding with both. Id. Finally, it concluded that:

A government official sued only in his or her official capacity, and from whom no relief is sought which would run against his or her personal, as opposed to governmental behavior or finances, can claim no greater right to seek greater sanctions. Oldham, 450 So.2d at 227.

In Oldham, the Florida court based its holding in part on the English history of the citizen's right to petition his or her government for redress of grievances. This right was nearly an absolute one, being separately and expressly protected by Parliament through statute by which no form of action or criminal sanction "could ever be imposed or brought because of a previous petition to the government for redress of a grievance against any part of government." Oldham, 450 So.2d at 226; 1 W. Blackstone, Commentaries 138-39.

So important was this right considered that it was

incorporated into the constitutional scheme in American Bill of Rights, i.e., the First Amendment, which provides that "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." The right was also guaranteed in the early colonial charters and subsequently in nearly all of the individual state constitutions. Oldham, 450 S.2d at 226. See, e.g., California Art.I ?3 ("The people have the right to instruct their representatives, petition the government for redress of grievances..."); Connecticut Art.I ?14 ("Citizens have a right ... to apply to those invested with the power of government for redress of grievances, or other proper purposes ..."); Georgia Art. 1 ?1 ("The people have the right ... to apply by petition or remonstrance to those vested with the powers of government for redress of grievances"); New York Art. 1 ?9 (Right of People to Petition for Redress of Grievances).

One aspect of the right of petition, now incorporated into the First Amendment and the state constitutions, is the right of access to the courts, particularly when the litigation being labeled malicious "can be characterized as a form of political expression," as surely a complaint about police misconduct can. United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 221 (1967) (J. Black). The presentation of a complaint

concerning a government's conduct "is now expressly held central to the right to petition that government for the redress of grievances against it." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.")

ABSOLUTE PRIVILEGE AND THE ANTI-TRUST ANALOGY

Besides Florida, a number of other state courts have held that the right of free speech and/or the right to petition for redress absolutely prevents a government body from suing its citizens for defamation, basically holding that criticism of the government is absolutely privileged. Regarding the absolute privilege to be free from defamation suits, see, e.g., Johnson City v. Cowles Communication, Inc., 477 S.W.2d 750, 753 (Tenn.1972); State v. Time, Inc., 249 So.2d 328, 329-33 (La.App.1971); City of Chicago v. Tribune Co., 307 Ill. 595, 139 N.E. 86 (1923) (quoted with approval in New York Times v. Sullivan, 376 U.S. 254, 292, 299 (1964)).

Sometimes the absolute privilege in defamation actions is not based on the right to petition but is rather based on the absolute privilege granted to witnesses giving testimony. Many states, for

example, specifically bar officer defamation suits against a citizen complaining about police misconduct in an internal department proceeding. This bar is based on either statutory or common law absolute witness privilege in administrative proceedings. See, e.g, Miner v. Novotny, 498 A.2d 269 (Md. 1985) (citizen's brutality complaint filed against county deputy sheriff was protected by same common law absolute privilege as statements made by witnesses in judicial proceedings); Putter v. Anderson, 601 S.W.2d 73 (Tex.Civ.App. 1980) (statutory witness privilege applied); Campo v. Rega, 79 A.2d 626, 433 N.Y.S.2d 630 (N.Y.App.Div. 1980) (same holding); Pena v. Municipal Court, 96 Cal.App.3d 77, 157 Cal.Rptr. 584 (Cal.Ct.App. 1979) (citizen's complaint of police misconduct was protected by absolute statutory privilege); Imig v. Ferrar, 70 Cal.App.3d 48, 138 Cal.Rptr. 540 (Cal.Ct.App. 1977) (same holding).

This witness privilege applies even if the complaints prove to be false. As stated by the California court in Imig: "We agree with plaintiff that it is distressing and demoralizing for police officers to be subjected to false accusations of brutality, but that may be one of the crosses that a police officer must bear, in light of the power and deadly force the state places in his hands". Imig, 138 Cal.Rptr. at 544. Whatever the basis, "the

policy supporting an absolute privilege for criticism of the government is to allow the free communication of ideas, a concept at the core of First Amendment liberties." City of Long Beach v. Bozek, 645 P.2d 137, 141 (1982) (J. Mosk).

Although the case law is not as developed as that for defamation, state courts have similarly found an absolute privilege from suits brought by governmental bodies for malicious prosecution. See., e.g., City of Long Beach v. Bozek, 31 Cal.3d 527, 645 P.2d 137, 183 Cal.Rptr. 86 (1982), vacated, 459 U.S. 1095 (1983), on remand, 33 Cal.3d 727, 661 P.2d 1072, 190 Cal.Rptr. 918 (1983) (discussed below); Board of Education of Miami Trace Local School District v. Marting, 7 Ohio Misc. 64, 217 N.E.2d 712 (Ct.C.P. Madison County 1966) (Board of Education lacked authority to sue citizens for malicious prosecution; stating that any statutory provision restricting the right to criticize official conduct through a lawsuit because of the potential expense of a retaliatory action would contravene the First Amendment).

In Bozek, the California Supreme Court ruled that a governmental entity could not maintain an action for malicious prosecution against someone who had previously sued the entity without success. Bozek, 645 P.2d 137, 143 (1982). The defendant, Richard Bozek, had originally filed suit against the City of Long

Beach and two police officers for false imprisonment, false arrest, negligent hiring, assault and battery. A jury found in favor of the City of Long Beach as well as the police officers, who then instituted a separate action against Bozek for malicious prosecution, alleging that he had filed his complaint without probable cause and with knowledge that the allegations were false. On Bozek's motion, the trial court dismissed the City on the ground that municipalities should not be permitted to sue for malicious prosecution. Bozek, 645 P.2d at 138.

In upholding the trial court's ruling that the City could not sue, the California Supreme Court pointed out that the City's sole purpose seemed to be obtaining reimbursement for litigation and trial expenses in the previous suit which it could not recover. Although the gist of a malicious prosecution action is individual injury, such as injury to reputation or emotional distress, the Court declined to draw a bright line between individual and government entity plaintiffs who could not, for example, suffer emotional distress. Id.

Instead, the Court stated that the most significant factor militating against allowing a governmental entity to sue for malicious prosecution is the "constitutionally guaranteed right to petition the government for redress of legitimate grievances"

found in both the First Amendment and the California Declaration of Rights. The Court emphasized that this right is accorded "a paramount and preferred place in our democratic system" and that, being intimately connected with the rights of free speech and free press, it is "among the most precious of the liberties safeguarded by the Bill of Rights." Id. at 139, citing American Civil Liberties Union v. Board of Education, 55 Cal.2d 167, 178, 10 Cal.Rptr. 647, 359 P.2d 45, cert.den. 368 U.S. 819 (1961) and Mine Workers v. Illinois Bar Assn. 389 U.S. 217, 222 (1967).

In construing the limits of the right of petition in Bozek, the California court analogized to a line of cases interpreting federal antitrust laws such as Eastern R. Conf. v. Noerr Motors, 365 U.S. 127 (1961), Mine Workers v. Pennington, 381 U.S. 657 (1965) and California Transport v. Trucking Unlimited, 404 U.S. 508 (1972). In Noerr, the U.S. Supreme Court first declared that the Sherman Act could not be used to impose civil sanctions for a publicity campaign aimed at influencing the Legislature, even if it was designed to stifle competition.

In Pennington, the Court expanded this absolute privilege to concerted efforts to influence the executive branch regardless of whether or not they were undertaken with an improper purpose. In California Transport, the Court similarly ruled that the right of

petition encompasses attempts to obtain redress through the institution of administrative and judicial proceedings, since "the right to petition extends to all departments of the Government." California Transport, 404 U.S. 508, 510 (1972). See also Mid-Texas Communications v. American Tel. & Tel. Co., 615 F.2d 1372, 1382 (5th Cir. 1980) ("The crux of Noerr-Pennington immunity is the need to protect efforts directed to governmental officials for the purpose of seeking redress").

By analogizing to the Noerr-Pennington doctrine, a number of courts have held that various actions constituting the exercise of the right of petition are absolutely privileged from civil liability. The Seventh Circuit, for example, dismissed an IRS agent's 42 U.S.C. §1985(1) conspiracy action against a corporation that had complained about the performance of his duties. Stern v. United States Gypsum, Inc., 547 F.2d 1329 (1977) (privilege applied even where professional injury to the official about whom complaints are made). Other federal courts have similarly ruled in favor of an absolute privilege, most notably in the context of "SLAPP" suits against environmental groups. See, e.g., Sierra Club v. Butz, 345 F.Supp. 934 at 939 (N.D.Cal.1972) (dismissing a lumber company's tortious interference counterclaim against the Sierra Club, "even if it is shown that plaintiffs were motivated

by malice"). See also Oregon Natural Resources Council v. Mohla, 944 F.2d 531 (9th Cir. 1991) (allegations of misrepresentation are insufficient to overcome Noerr-Pennington protection).

In Bozek, the California Supreme Court applied the anti-trust analogy to dismiss a City's malicious prosecution lawsuit against a citizen who lost a police misconduct case before a jury. Based in part on the holdings in Stern and in Butz, the Bozek court stated:

Allowing cities to sue for malicious prosecution against unsuccessful former plaintiffs would provide the municipalities with a sharp tool for retaliation against those who pursue legal actions against them. Indeed, it is not unlikely that even good faith claimants would forego suit in order to avoid the possibility of having to defend against a subsequent malicious prosecution action should their action against the city prove unsuccessful. Bozek, 645 P.2d at 141.

In so ruling, the Court recognized that cities might be entitled to compensation for expenses incurred in defending baseless suits and in order to deter "the proliferation of such suits." Id. at 143. However, the Court said that the preferable remedy was not a separate malicious prosecution action by which an unsuccessful plaintiff originally represented by counsel on a contingent fee basis would be required to hire new counsel at considerable expense. Rather, the city's concerns could be addressed by attorney fee and cost sanctions imposed under Civil

Rule 11 and its statutory counterparts. Id.

Finally, in a footnote, the Bozek court refused to address the question of whether an individual police officer, rather than a municipality, might bring a malicious prosecution action against an unsuccessful police misconduct plaintiff. It did, however, imply that it would be in favor of such suits. The Court held that, unlike cities, individual police officers "have an interest in recovering damages for harm to their reputations and for emotional distress caused by lawsuits alleging improper conduct on their part." Id. at 143, n. 9. Further, it held that suits by individual officers "do not necessarily raise the specter of a retaliatory policy designed to discourage legitimate exercise of the right of petition through the courts." Id. [But see IACP Bulletin discussion of "deterrence" as a primary goal to be achieved in such suits.]

The Bozek court noted that "suits by individual police officers might require that a different balance be struck between the right of petition and the tort policies underlying the malicious prosecution cause of action." Id. Those common law tort policies are "to protect the individual from unjustifiable litigation in the protection of the interests of (1) damage to reputation, (2) putting in jeopardy life, limb or property, and

(3) damage to property, as for example expenditure of money to defend oneself." Board of Education v. Marting, 217 N.E. 2d 712 at 717 (Ohio 1966) (emphasis in original).

Police misconduct civil rights suits are, however, necessarily based on state action, and the vast majority of tort misconduct suits also allege torts based on official, not private, acts. In most cases, individual police officer defendants are represented by counsel paid for by insurance required by union contract or by their employer. In most cases, any potential judgment is paid for out of insurance proceeds or out of government funds. In most cases, the defendant officer has no personal or property interests that need protecting. Two circumstances might weight the balance discussed in the Bozek footnote in favor of allowing an officer's malicious prosecution claim: (1) when a plaintiff has asked for punitive damages against an individual officer, subjecting the officer's personal property to a temporary lien, and (2) when, as implied by the facts at issue in the Anderson v. Black Diamond case discussed above, the officer can show that he or she has actually suffered some damage to his or her professional reputation as a result of the filing of an unsuccessful complaint or civil rights suit.

CURRENT TREND TOWARD QUALIFIED PRIVILEGE

AND AN ACTUAL MALICE REQUIREMENT

In ruling that a police misconduct plaintiff was absolutely privileged from a countersuit, the Bozek court also addressed the question of whether the actual malice standard found in free speech and free press cases should also be the level of constitutional protection for the right of petition. Bozek, 645 P.2d at 140, citing to New York Times v. Sullivan, 376 U.S. 254 (1964). The Bozek court ruled in favor of an absolute privilege because of the "severe chilling effect" such a standard would have on those expressing beliefs derogatory of governing authorities even if the statements were made with actual malice. On remand after a writ of certiorari to the U.S. Supreme Court, the Bozek court further stated that its decision was independently based on Art. 1, §3 of the California Constitution, thus precluding a Supreme Court opinion on the First Amendment question of whether the "actual malice" standard applied. City of Long Beach v. Bozek, 103 S.Ct.712, on remand, 33 Cal.3d 727, 661 P.2d 1072 (1983).

In Cate v. Oldham, discussed above, the respondent State of Florida conceded that the "First Amendment, at a minimum, requires that state officials must maintain a higher burden of proof than other plaintiffs in malicious prosecution actions, i.e., must

prove at least actual malice [cite to New York Times v. Sullivan] as opposed to legal malice [cite to Florida case law]. Cate v. Oldham, 707 F.2d 1176, 1184 (11th Cir. 1983). Although it did not decide the issue directly, the Eleventh Circuit implied that because the First Amendment rights involved required "jealous safeguarding" and "stringent protection," only with proof of actual malice could such a malicious prosecution action meet constitutional standards. Id. at 1189. On remand, the Florida Supreme Court stated that because it had determined that a state official who has been sued in his official capacity could not maintain an action for malicious prosecution, it was not necessary for it to decide the question of what standard of malice would apply to such a suit. Cate v. Oldham, 450 So.2d 224, 227 (Fla. 1984).

Recent cases at the state and federal level now make it clear that a qualified, rather than an absolute privilege, is the appropriate level of protection for a defendant in a countersuit based on complaints about police misconduct. In 1985, for example, the Court of Appeals of Maryland expressly overruled a line of "absolute privilege" cases. Miner v. Novotny, 304 Md. 164, 498 A.2d 269 (1985), overruling Bass v. Rohr, 57 Md.App. 609, 471 A.2d 752 (Md.App.1984) (citizen was absolutely privileged from

defamation action based on First Amendment right of petition after filing complaint to executive agency).

In Novotny, deputy sheriff Miner sued a citizen, Mr. Novotny, who had filed a brutality complaint against him after being arrested by the officer and charged with driving while intoxicated and with battery. Miner, subsequently exonerated by his department of the brutality charges, sued for defamation, intentional infliction of emotional distress, and abuse of administrative proceedings. The trial court dismissed all of his claims, holding that a complaint of brutality against a law enforcement officer "is absolutely privileged as a petition for redress of grievances under the First Amendment." Novotny, 481 A.2d at 510.

In upholding the dismissal, the Court of Special Appeals held that Mr. Novotny's brutality complaint was absolutely privileged. The court stated that "[i]t matters not that Novotny's complaint may have been made without substantial justification [citation omitted], or that it was unfair or malicious [citation omitted], or that it was motivated by self-interest, or that it was likely to cause professional injury to Miner, or even that Novotny was pleased by the prospect of causing such injury to Miner." Novotny, 481 A.2d at 511. It further stated that:

If one wants to be a public servant in a free society, he must develop a thick skin. If the First Amendment means anything, it means that a citizen has a right to criticize, even unjustifiably, the conduct of those operating the government. If the government itself can decide which criticisms it will tolerate and which it will not, by its courts freely allowing government officials to bring defamation actions against citizens expressing grievances, then an essential aspect of our freedom is impaired. Id. at 513.

The lower appellate court in Novotny concluded by saying that the federal constitutional right of petition for redress of grievances "is superior to the common law right to bring an action of defamation." Id.

In an interesting decision, the Court of Appeals of Maryland reversed the lower appellate court on the question of First Amendment absolute privilege, but upheld the dismissal of the officer's defamation action based on an absolute statutory witness privilege. Miner v. Novotny, 498 A.2d 269 (Md. 1985). With regard to the absolute witness privilege, the Novotny court pointed out that a legislatively enacted "Law Enforcement Officers' Bill of Rights" was designed to provide the officer with "substantial procedural safeguards during any inquiry into his conduct which could lead to the imposition of a disciplinary sanction." Novotny, 498 A.2d at 273. Because of these procedural safeguards, the absolute immunity granted witnesses in

administrative proceedings would apply to prohibit the filing of a defamation suit against a citizen complaining about police misconduct. Id. at 274, 275 (possible harm to officer from false complaint is outweighed by the public's interest in encouraging the filing and investigation of valid complaints).

In ruling that a qualified rather than an absolute privilege applied to a citizen's complaints about police misconduct, the Novotny court noted that since the lower appellate court's decision, the United States Supreme Court had decided the issue of what level of privilege applies to the right of petition. Novotny, 498 A.2d at 271, citing McDonald v. Smith, 472 U.S. 479 (1985). McDonald was a libel action brought by an unsuccessful candidate for U.S. Attorney against a citizen who had written defamatory letters to the President and to other federal officials complaining about the candidates conduct as a Superior Court judge.

The McDonald Court concluded that the framers of the Petition Clause never intended it to provide absolute immunity from defamation liability. McDonald, 472 U.S. at 486 ("there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions"). Based on McDonald, the Novotny Court

held that "the qualified privilege recognized in New York Times v. Sullivan and its progeny constitutes the extent of the constitutionally-mandated protection of the First Amendment right to petition the government for redress of grievances." Novotny, 498 A.2d at 272.

Recent cases in other states have followed the decision in Novotny that in light of the Supreme Court's unanimous decision in McDonald, the New York Times v. Sullivan actual malice standard rather than an absolute privilege is the level of protection for the right of petition. At least one state supreme court has held that this standard applies even where the right of petition being asserted is derived from the state constitution rather than the First Amendment. Harris v. Adkins, 189 W.Va. 465, 432 S.E.2d 549 (W.Va. 1993), overruling Webb v. Fury, 282 S.E.2d 28 (W.Va. 1981) (absolute privilege based on W.Va. Const. Art. 3 ?16 and Noerr-Pennington line of cases). See also Doe v. Alaska Superior Court, Third Judicial District, 721 P.2d 617 (Alaska 1986); Kemp v. State Board of Agriculture, 803 P.2d 498 (Colo. 1990).

Because of the U.S. Supreme Court's ruling in McDonald, police officer malicious prosecution countersuits can be evaluated by the First Amendment "actual malice" standard used for public officials suing for defamation or libel. This malice standard is

more stringent than the expansive definition of malice usually required for common law malicious prosecution actions. Compare Albertson v. Raboff, 295 P.2d 405 (Cal.1956) (malicious prosecution action allowed to proceed even though absolute witness privilege prohibited defamation action, based on "malice" distinction) with Brodie v. Hawaii Auto Ret. Gas Dealers Assoc., 631 P.2d 600 (Hawaii App. 1981) (malicious prosecution action dismissed on a summary judgment motion for lack of extrinsic evidence of "malice").

In contrast to the looser "malice" required for common law malicious prosecution, the First Amendment's "actual malice" standard is a difficult one to meet: The public official must prove that an allegedly defamatory statement [or malicious prosecution] was made [or filed] with knowledge of its falsity or with reckless disregard for its truthfulness. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). In addition, the malice question can almost always be addressed on a defendant's motion for summary judgment. On summary judgment, the usual standard required of defamation [and malicious prosecution] plaintiffs is that the public official must produce specific evidence of "actual malice" sufficient to "establish a prima facie case by evidence of convincing clarity." Rye v. Seattle Times, 678 P.2d 1282, 1289

(Wn.App. 1984) (dismissing action on summary judgment on lack of showing of actual malice). See also St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (ordering defamation action dismissed on summary judgment based on lack of defendant's awareness of probable falsity of statements accusing public official of criminal conduct).

CONCLUSION

Malicious prosecution and defamation countersuits pose a serious threat to police misconduct plaintiffs. Courts already have numerous tools such as Civil Rule 11 available to deal with false police brutality claims should such a claim be filed. In the absence of any showing that a particular officer's reputation has been actually damaged or the officer's personal finances or property are at stake in some way, retaliatory countersuits brought by individual officers are unjustified. In the absence of a clear showing of actual malice, forcing a misconduct plaintiff to proceed to trial on a countersuit simply because he or she was unsuccessful violates that person's right to petition the government for redress of grievances about police misbehavior. If the trend is not stopped, it will ultimately result in many plaintiffs injured by police behavior as well as their attorneys simply succumbing to silence.