

For immediate release
Dec. 9, 2014

Follow-up to Ferguson: How a Former Homicide Detective's Federal Lawsuit Attempts to Apply a Civil War-era Law to Today's Civil Rights Violations

As President Obama called this week for \$260 million in federal funds to provide better training and technology for law enforcement across the country and Attorney General Eric Holder pledged to develop guidelines to help police departments avoid racial profiling, it must have sounded vaguely familiar to police departments across the country. That's because there has been a federal program in place to do exactly that for two decades, and it's called, appropriately, the ["COPs" program](#). So why aren't extra resources alone enough to address the racial divide in community policing in many urban communities and what will it take to really change behavior? [One former Boston area homicide detective](#) thinks the solution may be to apply a Civil War-era law to civil rights abuses.

Funding Both Punishment & Prevention - The largest crime bill in U.S. history, the [1994 Violent Crime Control & Law Enforcement Act](#) was passed following the 1991 beating of African American Rodney King by four Los Angeles police officers and the city's riots the following year. The law not only strengthened punishments, but also put in place several deterrents and preventive measures. On the punishment side, it expanded the federal death penalty, defined new types of offenses such as hate crimes and provided federal funding for new prison capacity. On the deterrent side, it banned assault weapons, restricted access to other types of weapons for certain individuals and mandated states to set up sex offender registries. As a preventive measure, the law provided funding for adding 100,000 officers around the country and for encouraging a community-based approach to law enforcement. The [Office of Community Oriented Policing Services \(COPS\)](#) is the agency within the Department of Justice (DOJ) that was established to manage the distribution of these funds, which are currently issued under the [American Recovery and Reinvestment Act of 2009](#).

Focus on Community Policing - Congress intended for COPS funds to be used to encourage law enforcement agencies to build trust and cooperation within their communities. The program provides grants to law enforcement agencies for hiring officers, training them in community policing, deploying new crime-fighting technologies and developing innovative policing strategies that integrate police officers into the community at large. So, for example, the funds can be used to hire additional officers to broaden a department's diversity profile, to improve transparency by installing body or dashboard video recorders or to train officers in community policing techniques.

\$15 Billion Over Two Decades With Mixed Results - Thus far, over \$15 billion – or, on average, an annual amount nearly three times that proposed earlier this week by the President - has been spent on the COPS program, which has provided funding

to more than 13,000 law enforcement agencies and added over 100,000 community policing officers nationwide.

Many towns and cities across the country have made significant progress in using COPS funding to establish greater trust and cooperation between law enforcement and the community they serve. The program provides ample guidance in how to address problematic racially biased and discriminatory practices as well as how to involve the community in developing policing strategies that are tailored to the individual community.

Unfortunately, other police departments continue to struggle with civil conflicts stemming from a continued mismatch between the community's ethnic diversity and the diversity of its police force, as well as from the continued use of racial or cultural profiling. These are two of the key challenges the COPS program sought to address by allowing a police department to add additional officers and by training them in better community policing. What is now clear, after two decades of experience with the program, is that it is not sufficient to just provide a law enforcement agency with more money, manpower and guidelines – some form of significant enforcement must be available to ensure that change actually happens.

Getting DOJ's Attention Requires Critical Mass - The Violent Crime Control Act contained a provision that made it unlawful for law enforcement to engage in a pattern of conduct that deprived citizens of their Constitutional rights and gave the Attorney General [the authority to sue police agencies](#) anywhere in the country if they exhibited a “pattern and practice” of using excessive force and/or violating people’s civil rights—and compel them, under what’s known as a “consent decree,” to change those practices. This is the legal basis behind the federal investigations such as the one in Ferguson and now in Staten Island. Currently about 20 cities, including New York City, have entered into consent decrees or “memos of understanding” with the Department of Justice (DOJ), usually under threat of civil rights lawsuits filed by the DOJ if they refused.

If a law enforcement agency receives federal funding, DOJ can also use the anti-discrimination provisions of the **Omnibus Crime Control and Safe Streets Act of 1968**, and **Title VI of the Civil Rights Act of 1964**, which forbid discrimination on the basis of race, color, sex or national origin by agencies receiving federal funds.

So with all of these potential punishments available, why do we still have systemic civil rights abuses in some law enforcement agencies? As individuals, neither a victim whose rights were violated nor an officer who witnesses the abuse has much recourse to effect change in a systemic pattern of police abuse. Proving a pattern requires a critical mass of complaints on file, but pursuing legal action is costly, so victims of civil rights abuses are frequently left to represent themselves or find public legal assistance. Even if they do secure legal counsel, their advocate will likely find law enforcement to be highly uncooperative unless DOJ itself intervenes, but again, DOJ isn't likely to take notice until either the number of complaints becomes

significant, a particular incident raises the public's attention or political pressure is exerted.

Police officers themselves are in a unique position to observe discrimination and other civil rights violations on the job, but they must typically report their observations through an internal body such as Internal Affairs. In a department where civil rights abuses are systemic, it's unlikely that internal culture will be receptive to self-policing; and, in the law enforcement fraternity, where solidarity trumps everything else, an individual officer's risk for retaliation is high.

Applying a Civil War-era Law to Civil Rights Violations – So what if there were a way for law enforcement insiders who have either experienced personally or have direct knowledge of civil rights violations in their police departments to disclose these abuses or "blow the whistle" directly to the Justice Department without exposing their identity to their immediate superiors? What if they could secure professional representation and enough potential reward to offset risking their career in law enforcement? Most importantly, what if the violating police department faced not just a significant penalty for past offenses, but could also potentially lose out on future federal funding if it failed to comply with federal civil rights laws? Such a tool does exist. It's called the federal [False Claims Act](#). All DOJ needs to do is to simply apply it to grantees of the COPS program who continue to have civil rights violations.

Enacted during the Civil War, the federal False Claims Act was intended to encourage citizens to inform the government about companies who were providing shoddy or faulty munitions, equipment and supplies to the Union Army. It wasn't widely used, however, until the 1980s when defense contractor abuses led Senator Chuck Grassley and other legislators to propose enhancing the statute with provisions that would provide greater incentives for whistleblowers.

These ["qui tam" provisions](#) allow a citizen or citizens – including police officers - with evidence of fraud involving government contracts and programs to sue, on behalf of the government, to recover the fraudulently used funds. In compensation for the risk and effort of filing a qui tam case, the whistleblower or "relator" may be awarded a portion of the funds recovered, typically between 15 and 25 percent, an amount which, depending on the recoverable damages, will at least fund legal representation. A qui tam suit initially remains under seal for at least 60 days during which time the U.S. Department of Justice can investigate and decide whether to join the action. Most seals are extended at least once, and it is not uncommon for a case to remain under seal for several years while DOJ investigates the case. A settling defendant may not only have to pay back a portion or all of the funds they received fraudulently as well as the plaintiff's legal costs, but they may also be required to sign a "corporate integrity agreement" in order to receive any federal grants or funding in the future. Unlike an individual civil rights lawsuit that typically focuses on one or two officers, a corporate integrity agreement holds the entire police department as well as the municipal authority accountable for future compliance.

If you want federal funds, you must comply with federal laws. Congress often requires recipients of federally financed assistance programs to certify their compliance with applicable federal civil rights statutes and regulations. Because the 1994 federal law that created the COPS program was, at least in part, a response to the public outcry over the police beating of LA motorist Rodney King, all police departments receiving COPS funds are specifically mandated to comply with laws prohibiting any form of discrimination. The program requires that *both* municipalities and police departments periodically certify their compliance with anti-discrimination laws as a condition of funding. Specifically, the applicable forms that both municipal and law enforcement executives must sign requires the grantee police departments to assure that they "will not, on the ground of race, color, religion, national origin, gender, disability or age, unlawfully exclude any person from participation in, deny the benefits of or employment to any person, or subject any person to discrimination in connection with any programs or activities funded in whole or in part with Federal funds."

Failure to adhere to these requirements can result in the suspension or termination of COPS funding and the imposition of sanctions. But, in addition, because the funds for the COPS program are from the federal government, a grantee that *knowingly* falsifies a compliance certification is subject to civil penalties for committing fraud under the False Claims Act. The COPS forms and manuals specifically warn recipients that falsification of the certification may subject the grantee to suit under the FCA. So DOJ has always had both a carrot (being able to continue receiving COPS funds) and a stick (having to repay past grants) to punish law enforcement agencies that knowingly accept COPS funds using a false certification.

Money Talks - So how can a complaint filed under the False Claims Act succeed in changing law enforcement behavior when other types of civil and criminal proceedings have failed? Put simply – money talks to those who simply don't listen to either regulatory guidance or future threat of litigation. Over the past three decades, whistleblowers in sectors like pharmaceuticals, banking and government contracting have used the FCA to assist DOJ in not only recovering taxpayer funds that were fraudulently obtained, but also in successfully changing illegal behavior where regulatory enforcement proved largely ineffective. Companies and organizations caught violating the FCA frequently find the repayment of federal funds and/or the potential loss of future federal funding to be a greater disincentive than punitive actions for regulatory, civil or criminal infractions.

Ken Williams, a former Brockton, Massachusetts, homicide detective, has brought such a lawsuit against the Brockton Police Department. The case is currently pending in Boston Federal Court. Civil rights experts believe Williams' case may be the first ever attempt by a whistleblower to use the repayment of federal funds as leverage to change a police department's discriminatory behavior. Between 1994 and 2011, the Brockton Police Department received well over \$5 million in COPS grants to fund the salaries of 41 officers. Williams' lawsuit contends that, during

much of this time, neither the city nor the department were in compliance with the COPS grant pre-conditions to receiving the federal funds. In addition to the multiple civil actions filed against the department, the city's police chief admitted in a 2007 news article that, in the history of the department, only two positions of rank were held by a minority and it was the same individual promoted twice.

Will it work? – One potential hurdle is that, unlike FCA complaints where the DOJ is asked to recover federal funds managed by other federal agencies, the COPS program is managed by DOJ itself and the investigative resources it uses, such as the FBI, are themselves a part of the law enforcement community. Under the False Claims Act, DOJ has the discretion to "intervene" or prosecute a case. They declined to intervene in William's lawsuit in August, just as events in Ferguson unfolded, and the complaint was unsealed in September. Statistics show that cases in which DOJ intervenes are more likely to succeed. Williams says he intends to pursue his lawsuit, even if DOJ chooses to remain on the sidelines.

The approval of Attorney General nominee Loretta Lynch would potentially mark a sea-change in DOJ's stance on supporting lawsuits to remedy police conduct such as the one being brought by Ken Williams. As a federal prosecutor, Lynch was not only a part of one of the most significant civil rights cases against police brutality in the past two decades, but she has also successfully brought False Claims Act cases. In addition, the Senate's new Judiciary Committee chair is none other than the False Claims Act's strongest advocate, Iowa Republican Chuck Grassley. It certainly seems worth a try for DOJ to simply use more effectively the laws, legal remedies and financial incentives it already has before asking for new ones.

Ken Williams is represented in the federal qui tam action by [Thomas Poulin](#) of the [Simmer Law Group](#) in Washington, DC. Williams has also filed a second civil action against Brockton PD alleging the department's retaliation for his reporting of a false arrest and police corruption. Attorney [John Hightower](#) represents him in that matter.

Civil Action # 12 CV12193 (FCA claim attached here)

Contact: Peg Schoen, Media Relations, Simmer Law Group
peggy.schoen@simmerlaw.com 202-441-1531